

PUBLIC OPINION AND THE UNITED STATES SUPREME COURT'S PERCEIVED LEGITIMACY AFTER *DOBBS*

Amy Semet

Associate Professor of Law



Trends in Supreme Court Opinion

- Trends in Confidence/Approval Among All Institutions
- Trends in Confidence/Approval for U.S. Supreme Court
- Election Impact of *Bush v. Gore*
- Factors Impacting Confidence
- Reforms



Legitimacy and Supreme Court

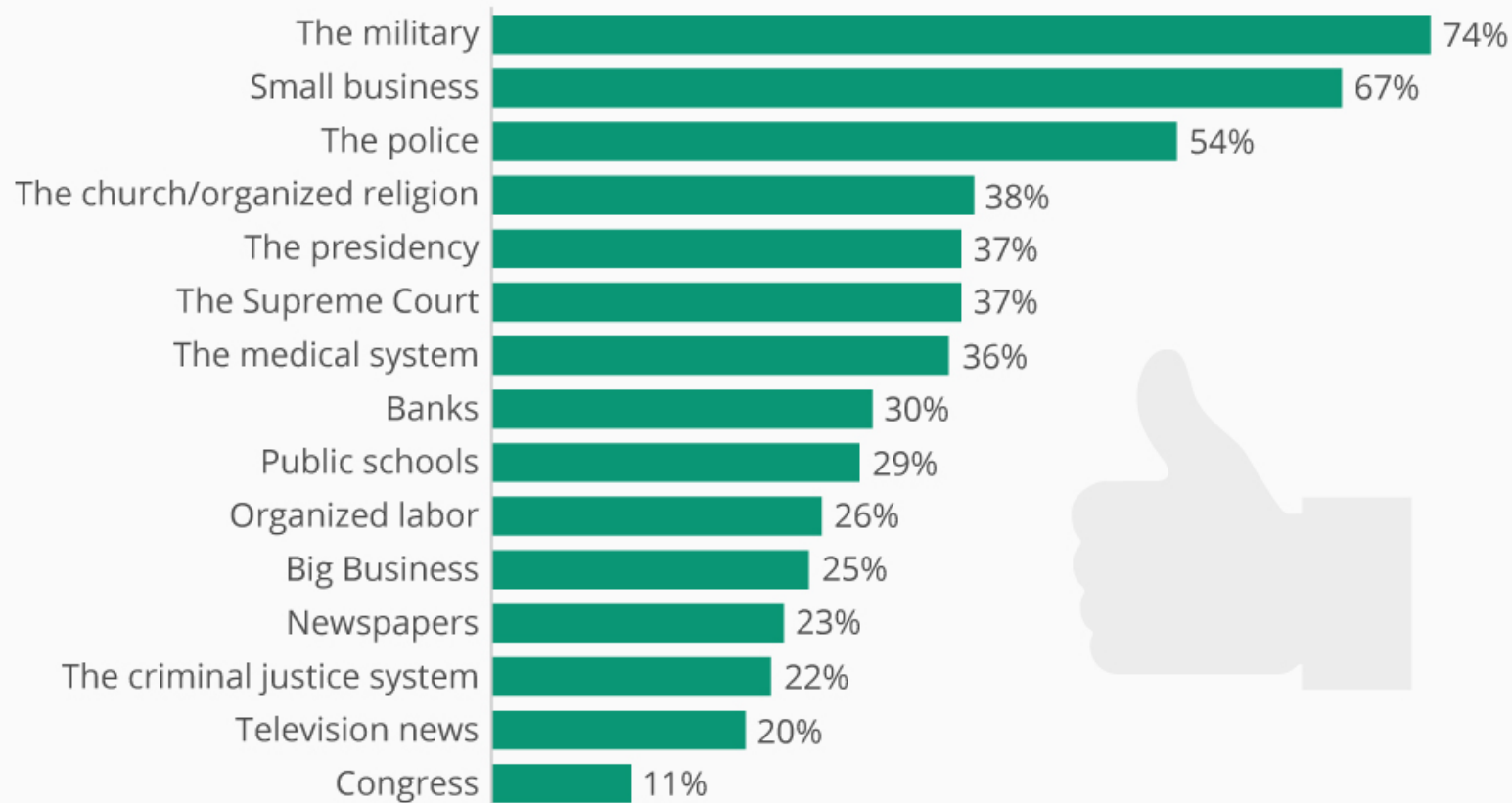
- Power depends on legitimacy; have to leave it to public and political branches to enforce the Court's decisions
- Federalist Papers: Judiciary “may truly be said to have neither FORCE nor WILL, but merely judgment”
- Legitimacy stems from belief that the Court is not a political body

Legitimacy and Supreme Court

- In 1950s and 1960s, could not readily infer a Justice's political background from their votes (Lee & Epstein 2018); Justice White, appointed by a Democrat, had a more conservative record than Justices Scalia and Rehnquist in the 1990s; Justice Stevens, appointed by a Republican, often ruled with the liberal wing
- Now justices rarely vote against ideology of the President who appointed them
- Increasingly, the Supreme Court is not viewed as an apolitical institution, public does not accept the notion that Justices are just “umpires” calling “balls and strikes”
- Two-thirds of Americans think politics drive Supreme Court decisions (Grinnell College/Selzer poll)

The Institutions Americans Trust Most And Least

Share of U.S. adults trusting the following a great deal/quite a lot (June 2018)



Confidence in the U.S. Supreme Court

Now I am going to read you a list of institutions in American society. Please tell me how much confidence you, yourself, have in each one -- a great deal, quite a lot, some or very little. The U.S. Supreme Court

— % Great deal/Quite a lot



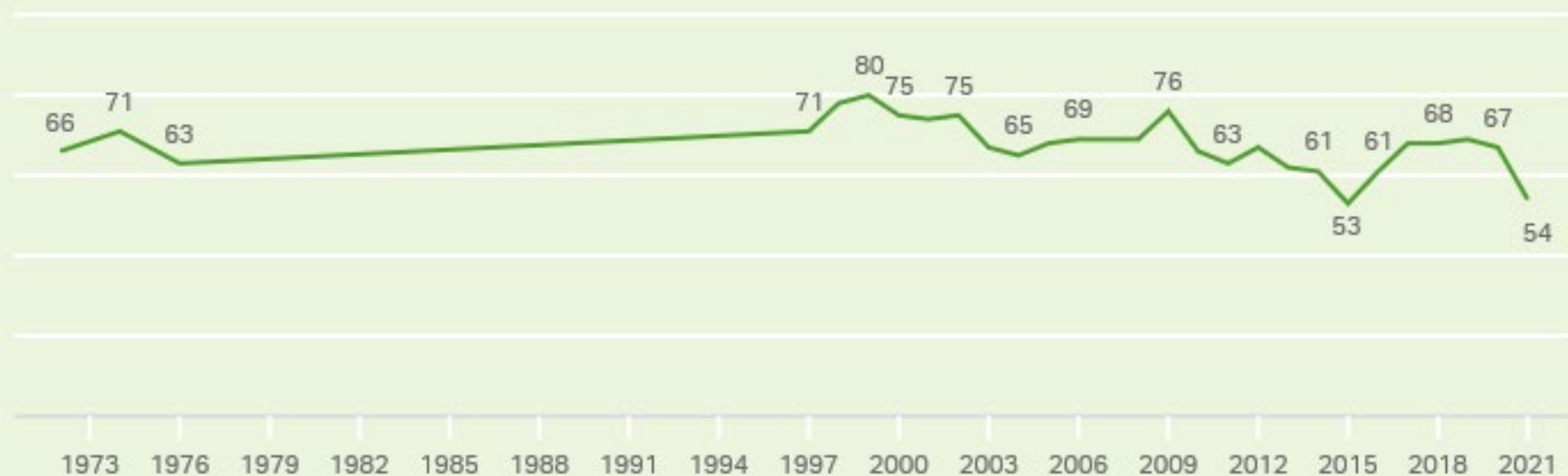
[Get the data](#)

GALLUP

Trust and Confidence in the Judicial Branch of the Federal Government/U.S. Supreme Court, Full Trend

How much trust and confidence you have at this time in the judicial branch headed by the U.S. Supreme Court -- a great deal, a fair amount, not very much or none at all?

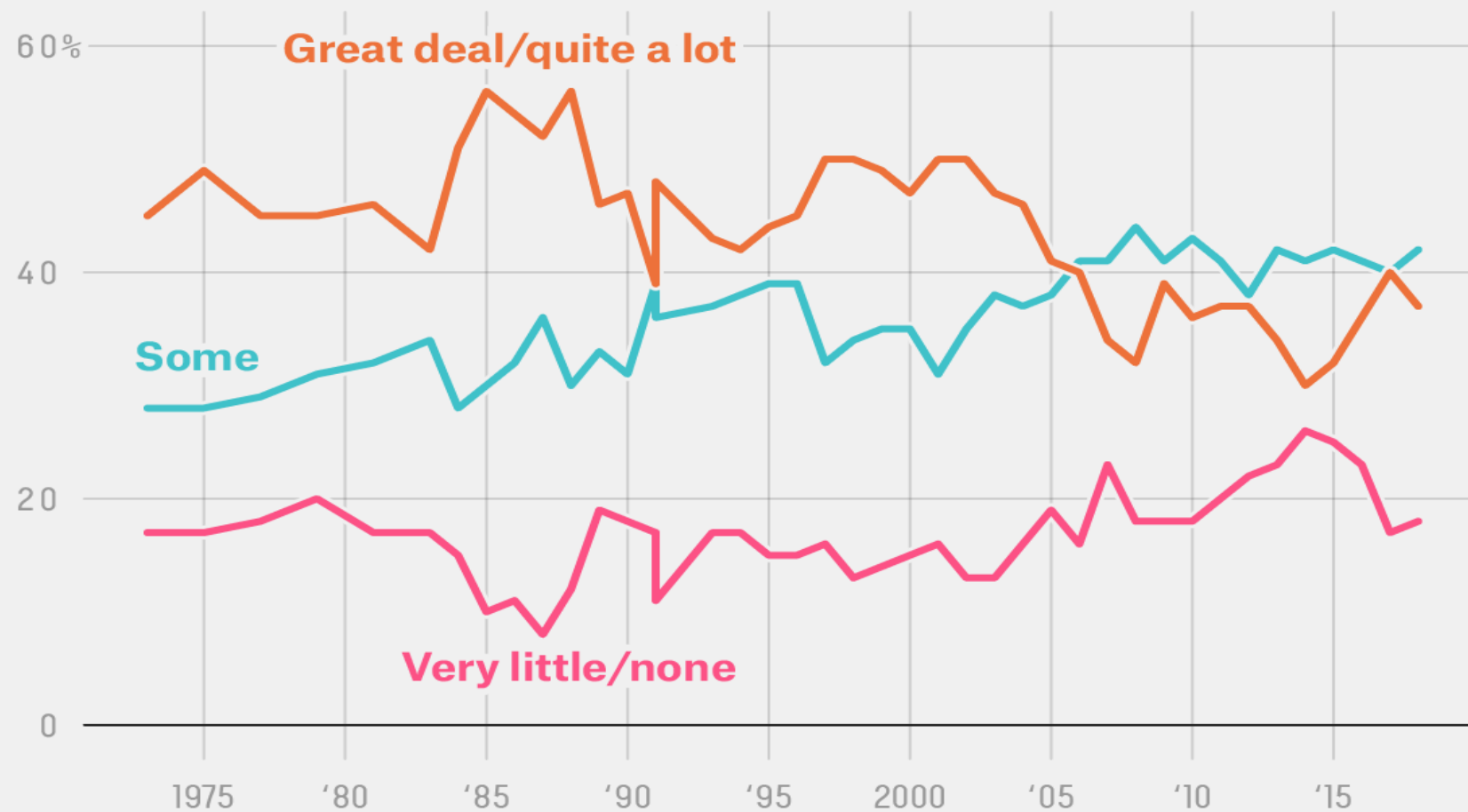
— % Great deal/Fair amount



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Faith in the Supreme Court has eroded

Share of respondents by confidence in the Supreme Court



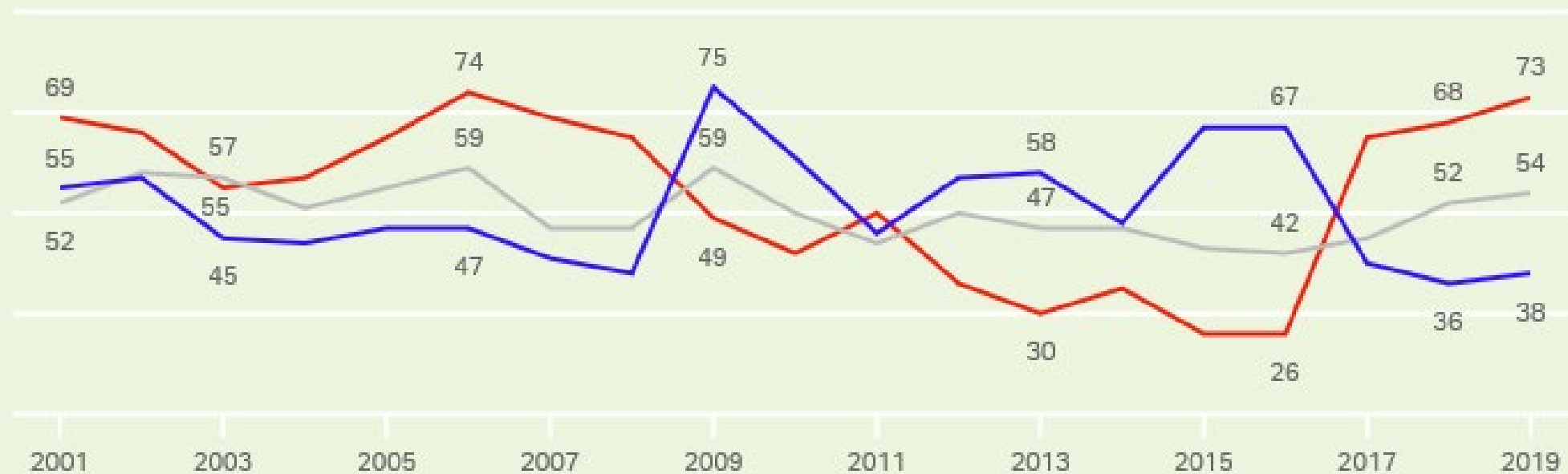
June 2022 Gallup Poll: Confidence in All Institutions Hits Record Low from 2011-2021

- Poll taken June 1-June 20 when leak of opinion known
- Small business, military, police, medical system, church and public schools have most confidence
- Newspapers, criminal justice system, big business, TV news, Congress have least confidence
- Supreme Court confidence down 11% (36% to 25%), Presidency down 15% (38% to 23%)
- Supreme Court confidence down 5% from previous low in 2014, decline in confidence double that of other institutions
- By contrast, between 1973-2006, 47% confident in Supreme Court
- Confidence down among Democrats (30% to 13% from 2011), Independents (40% to 25%), but unchanged among Republicans (37% to 39%)
- Republican confidence both lower (26% in 2010) and higher (53% in 2020) in past

U.S. Supreme Court Job Approval, by Party ID

% Approve

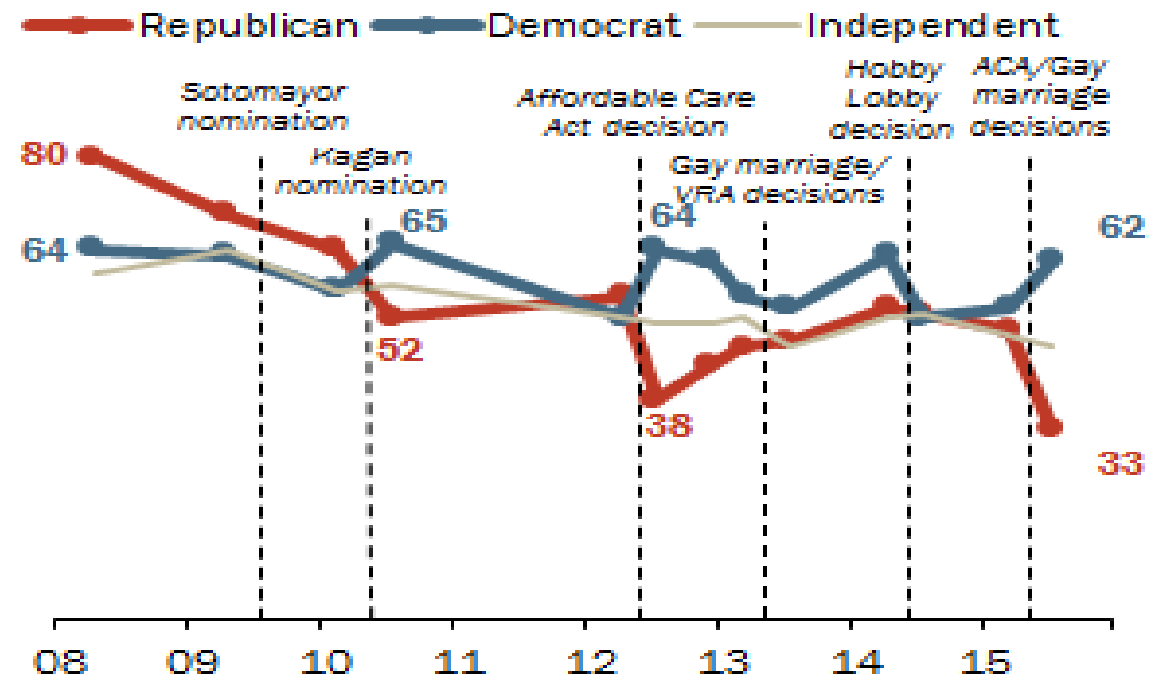
■ Republican ■ Independent ■ Democratic



GALLUP

After Momentous Term, Widening Partisan Gap in Views of the Court

% viewing Supreme Court favorably ...



Survey conducted July 14-20, 2015.

PEW RESEARCH CENTER

Bush v. Gore

- Recognizable case to American public, heavily covered in news media giving unique test of the Court's legitimacy in the public mind
- Some argued that decisions like *Bush v. Gore* did not alter long-term perceptions of judicial legitimacy because people remained loyal to the Court as an institution; commitment to rule of law was most important predictor of support (Gibson 2007)
- Some scholarly studies indicate that the Court recovered to pre-*Bush v. Gore* levels of confidence within one year (Gibson 2007)
- 10 years later public opinion remained polarized on party and race lines and one's attitude on *Bush v. Gore* was a predictor of one's approval and confidence in the Supreme Court (Semet, Persily and Ansolabehere 2014).

Erosion of Confidence

- Public opinion about abortion has remained steady. A clear majority oppose overturning *Roe*.
What changed was the political landscape and increased polarization
- Electoral changes since 2010 and rise of Tea Party
- Senator McConnell and death of Justice Scalia
- Close majorities on votes of Trump justices; Kavanaugh hearings
- Five of six Republican appointed justices appointed by a President who lost popular vote
- Rush to fill Justice Ginsburg's seat decreased Democratic confidence, while not improving GOP confidence (Armaly & Lane 2021)
- Policy disagreement with Supreme Court increasingly leads to lessened feelings of legitimacy (Strother & Gadarian 2021)
- *Dobbs* is part of trend of Supreme Court decisions (guns, administrative state, school prayer, voting rights, immunity)
- Shadow docket and Supreme Court decisions made on merits without full briefing
- Changes re: stare decisis and precedent, use of history and "tradition"

Dobbs Effect on Legitimacy/Confidence

ANTI-DOBBS

Ignoring precedent (*Dobbs* dissent)

Judicial restraint/reliance (Roberts concurrence)

Disconnect between what some Justices told Senators during confirmation process

Take away constitutional rights

Out of line with public opinion

Use of history and tradition

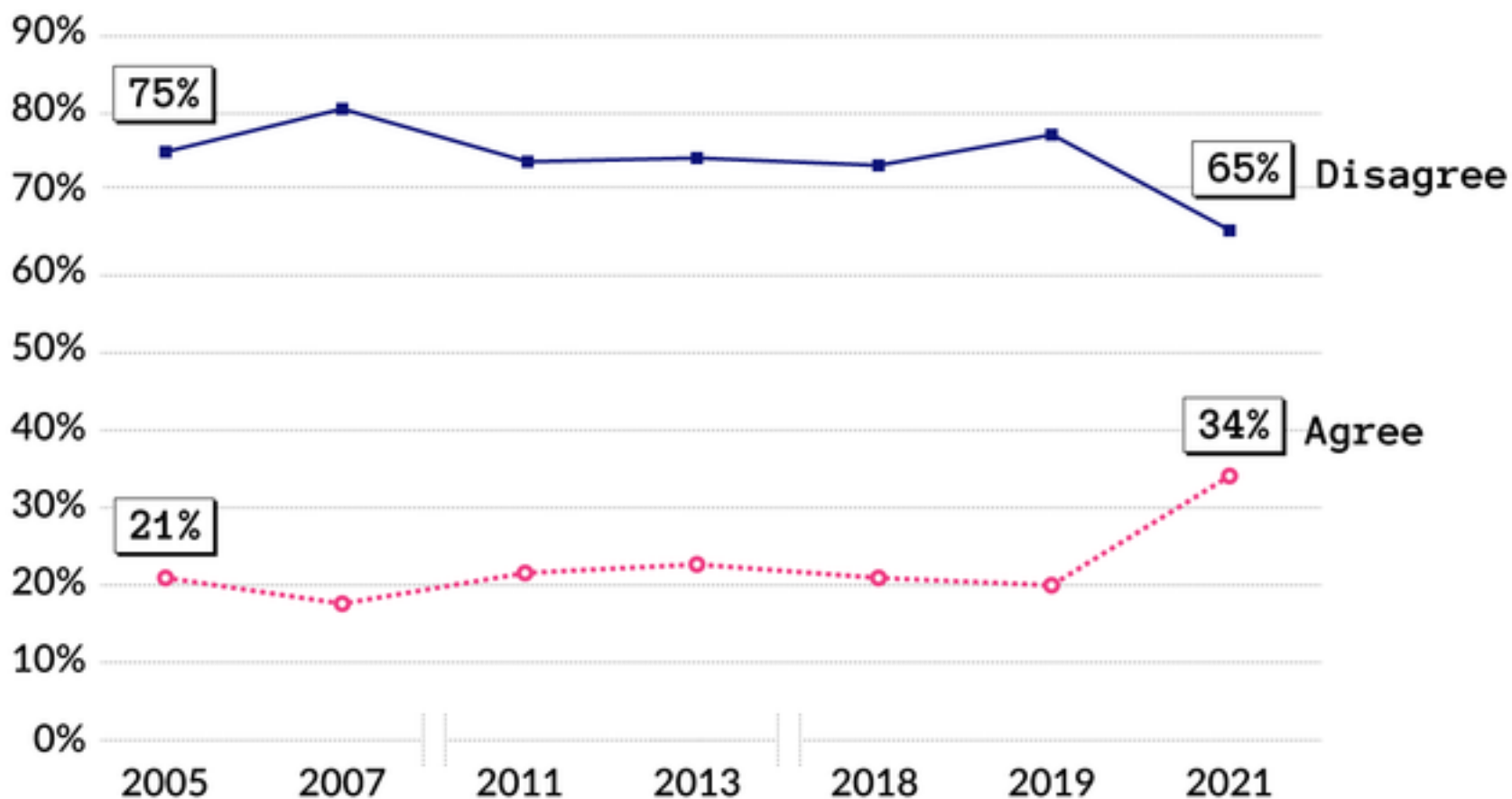
PRO-DOBBS

Dobbs protects Court's legitimacy ("tearing off the band-aid" of politically popular but erroneous precedent) (Franck & George, *National Review*)

Public opinion should play little role

Decisions based on principle, Court should correct mistakes

If the Supreme Court started making a lot of rulings that most Americans disagreed with, it might be better to do away with the Court altogether



Source: Annenberg Civics Knowledge Survey, September 7-12, 2021, and prior years. The question was not asked in years not shown.

Looking Ahead

- Impact on other rights (birth control, gay marriage, etc.)
- How will future opinions be structured?
- Lessened legitimacy can also lead to reforms
- Limit tenure? Expand the Court? Repeal filibuster? Judicial code of ethics? Limit jxn? Give political branches power to reject Court rulings like in Canada, New Zealand, England?
- But as a practical matter, reform unlikely
- 2024 election could be defining moment (potential ruling on independent state legislature doctrine)