

# **Sources and Consequences of Polarization on the U.S. Supreme Court**

**Brandon Bartels**

George Washington University

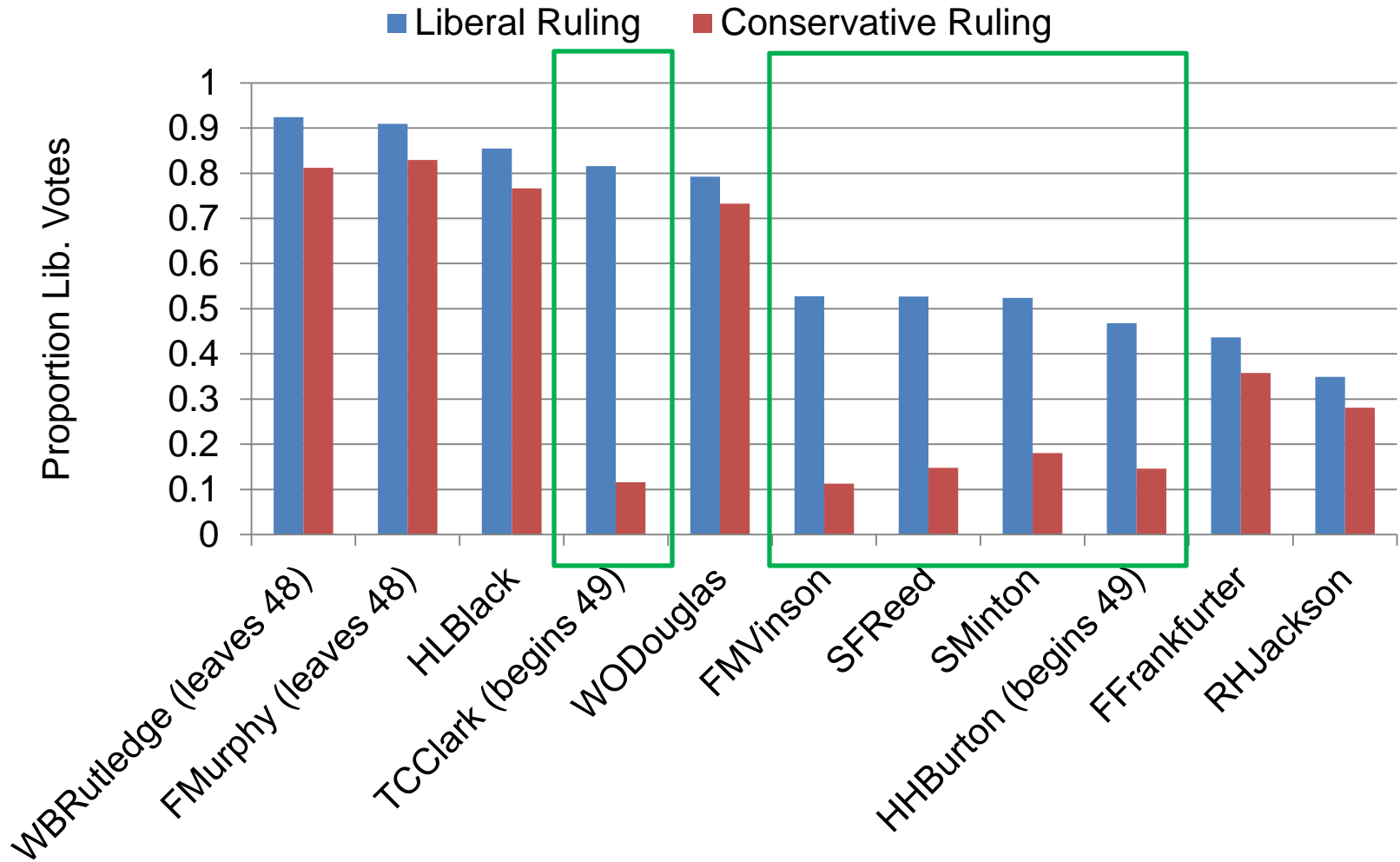
# Sources of Polarization

- Changing criteria for judicial appointments
- Demise of patronage and political/electoral considerations
- Recent phenomenon: near-exclusive emphasis on *ideological reliability*
  - No more liberal Republicans (Souter, Stevens, Blackmun) and conservative Democrats
  - No more “swing justices” (Kennedy and O’Connor)
- Partisan polarization among political elites more generally
- Strategic retirements
- Result: Disappearing center....contrast from past.

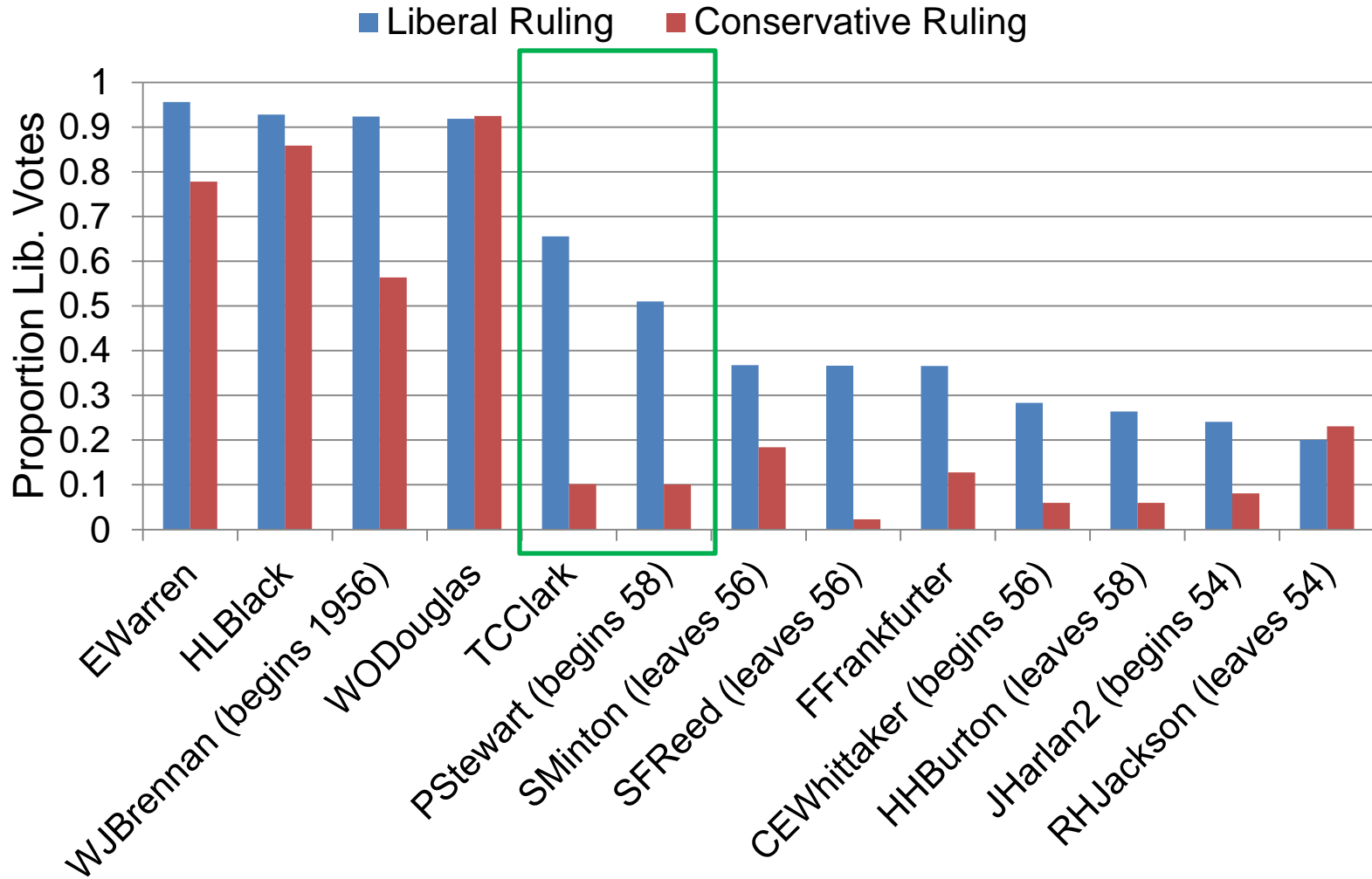
# The Shrinking Center Over Time

- “The center was in control.”
  - Woodward and Armstrong (1979, 528)
- Today’s Supreme Court
  - Low “swing” or crossover potential among nearly every justice
  - Justice Kennedy....
- “Swing capacity”: In close votes, a justice is likely to be in the majority for both liberal and conservative case outcomes.

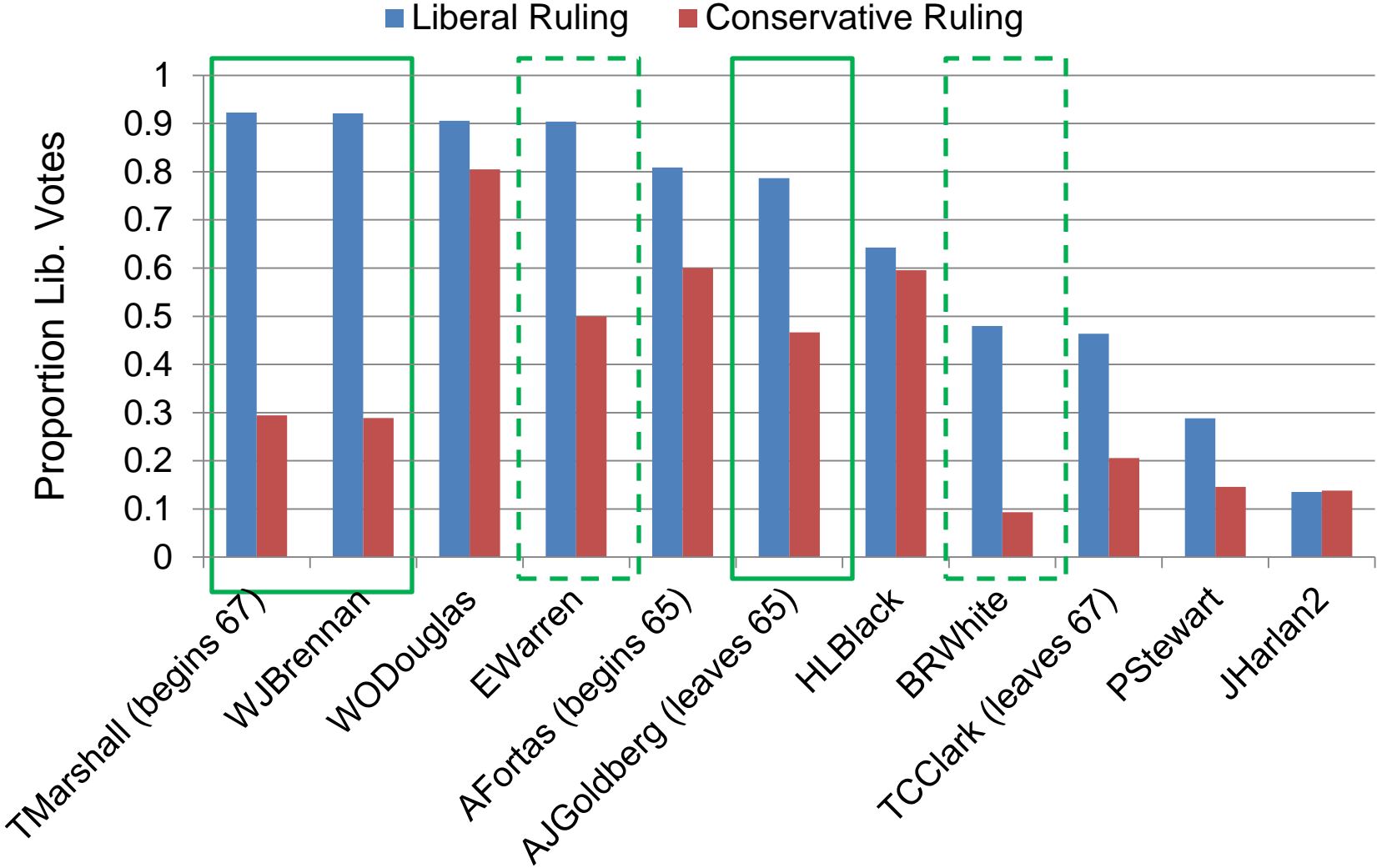
# Vinson Court, 1946-52 Terms



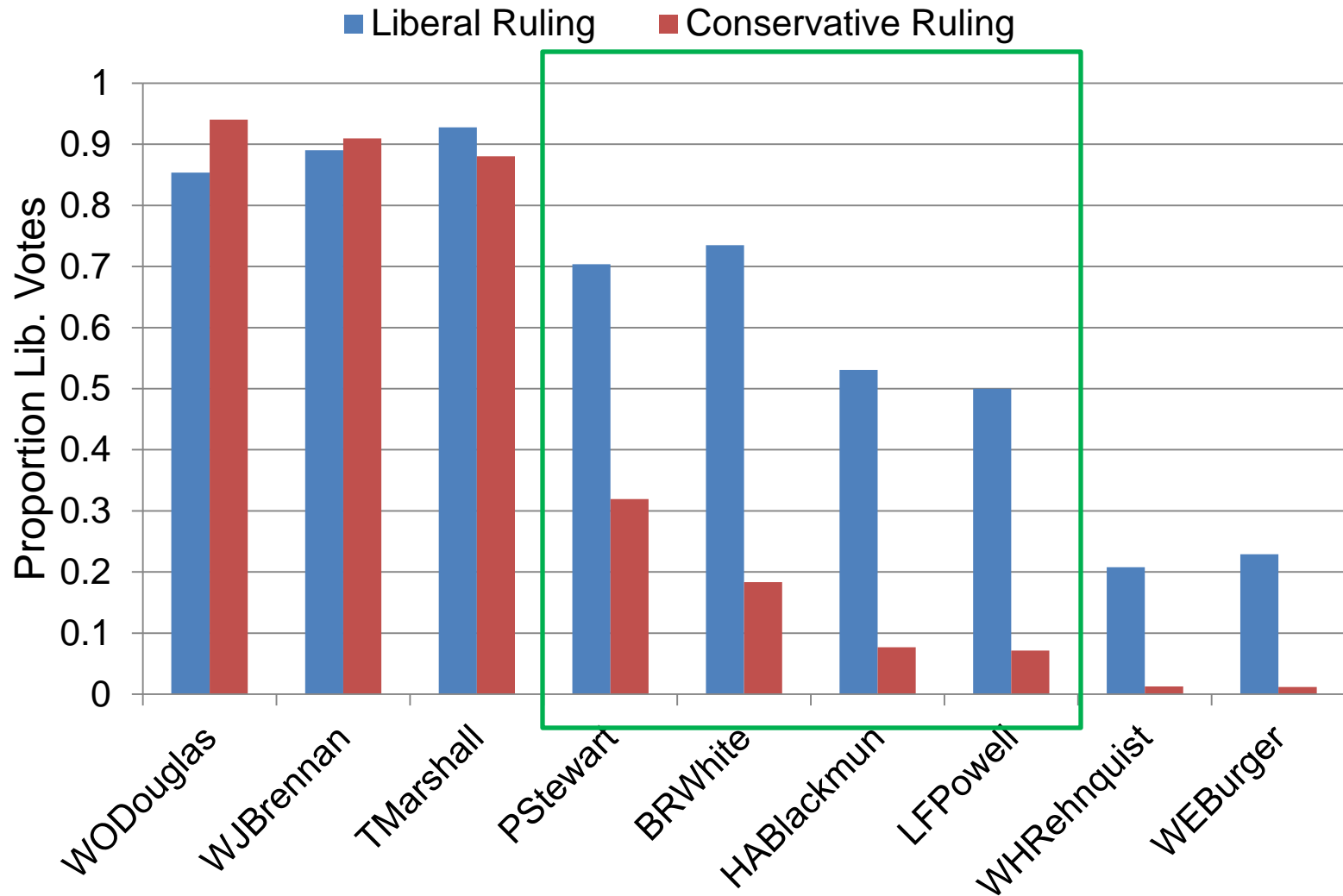
# Warren Court, 1953-61 Terms



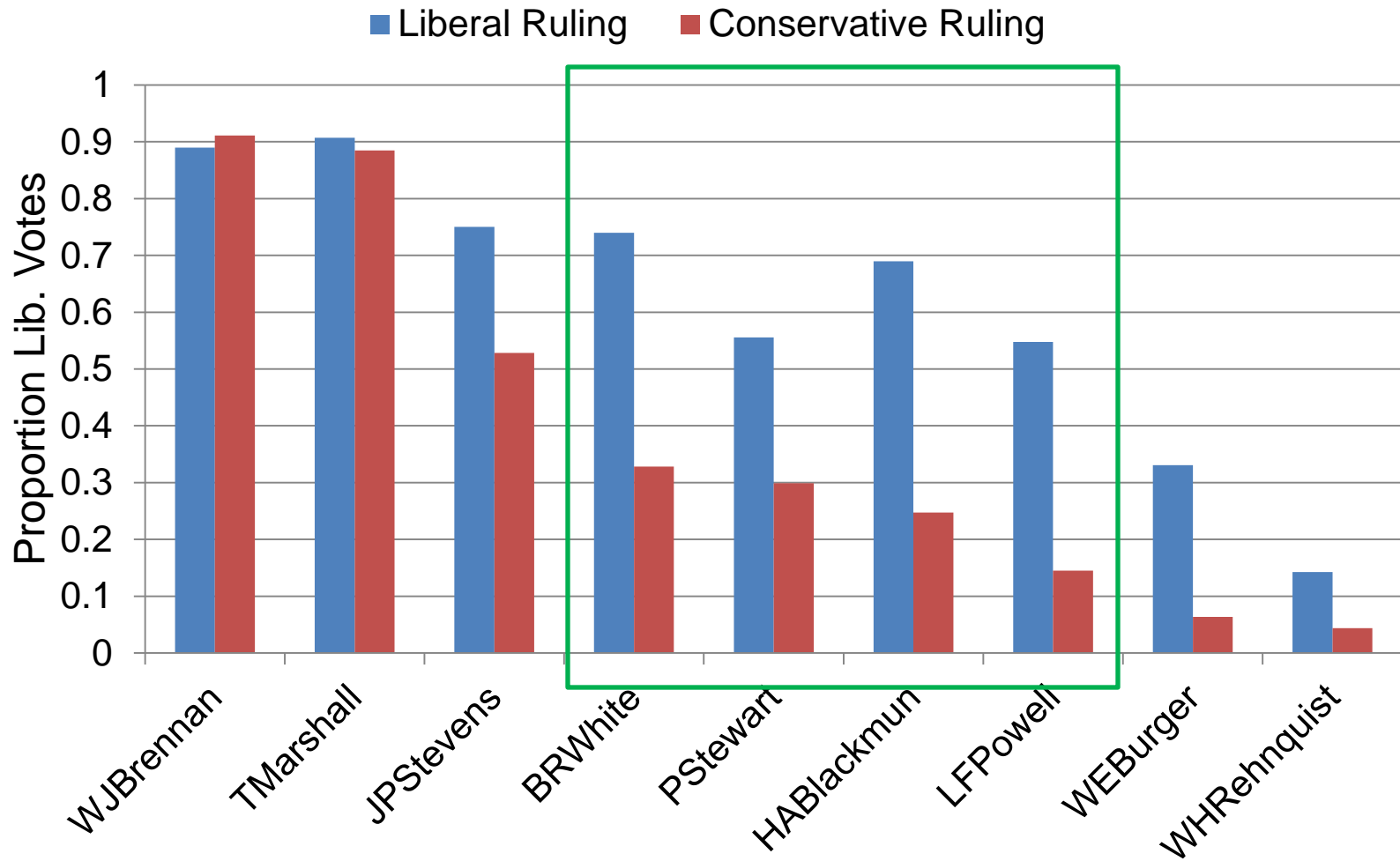
# Warren Court, 1962-68 Terms



# Burger Court, 1971-74 Terms

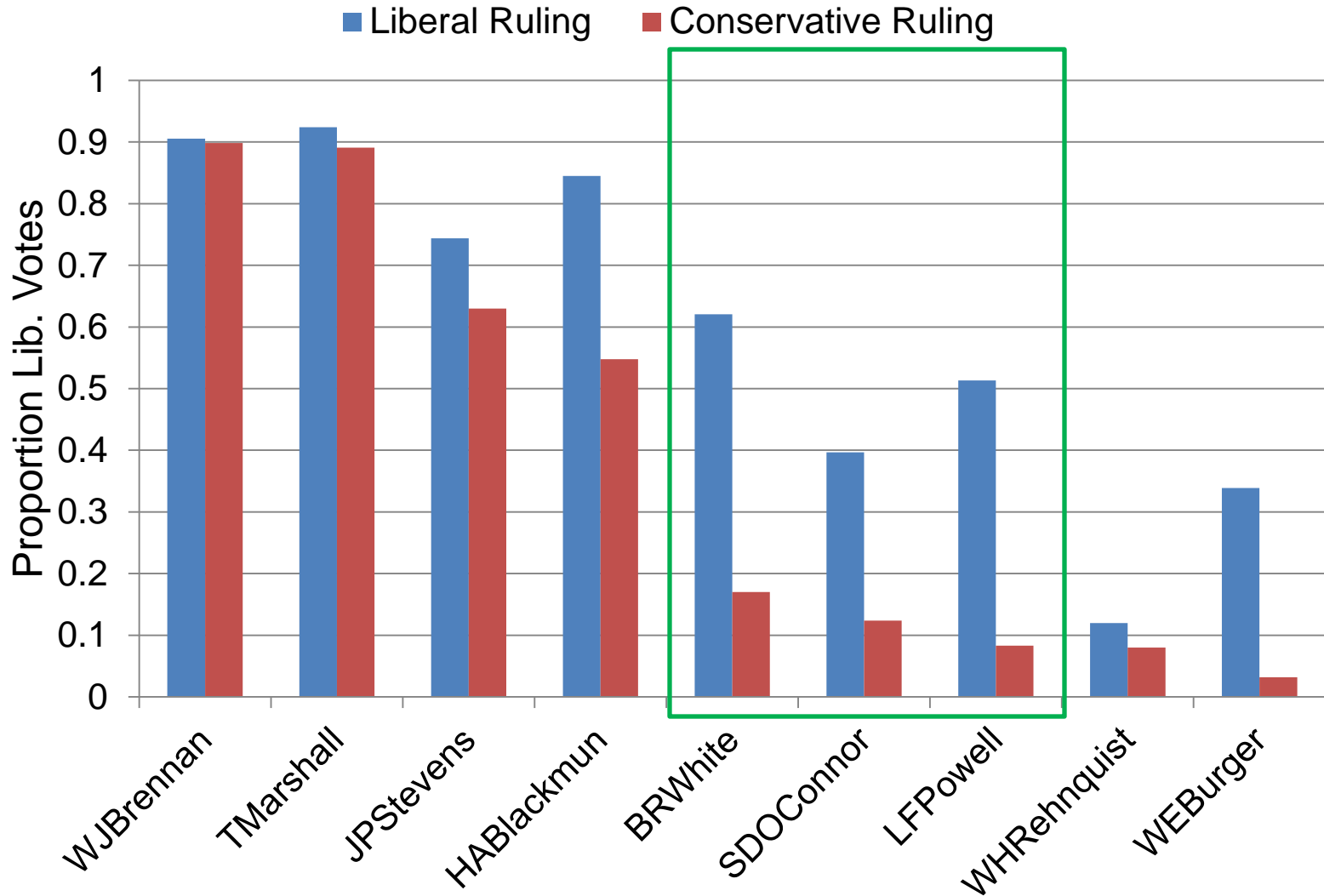


# Burger Court, 1975-80 Terms

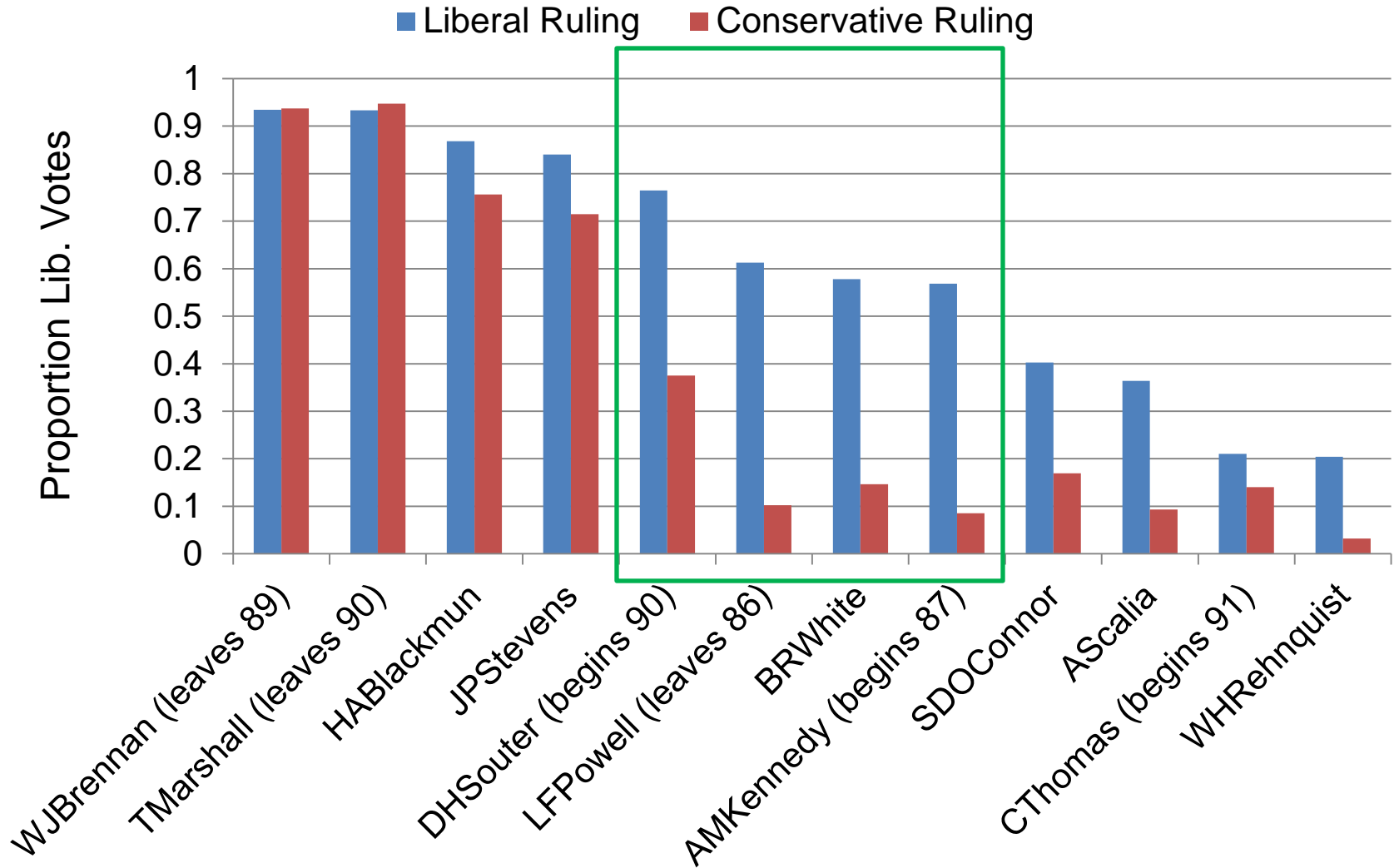




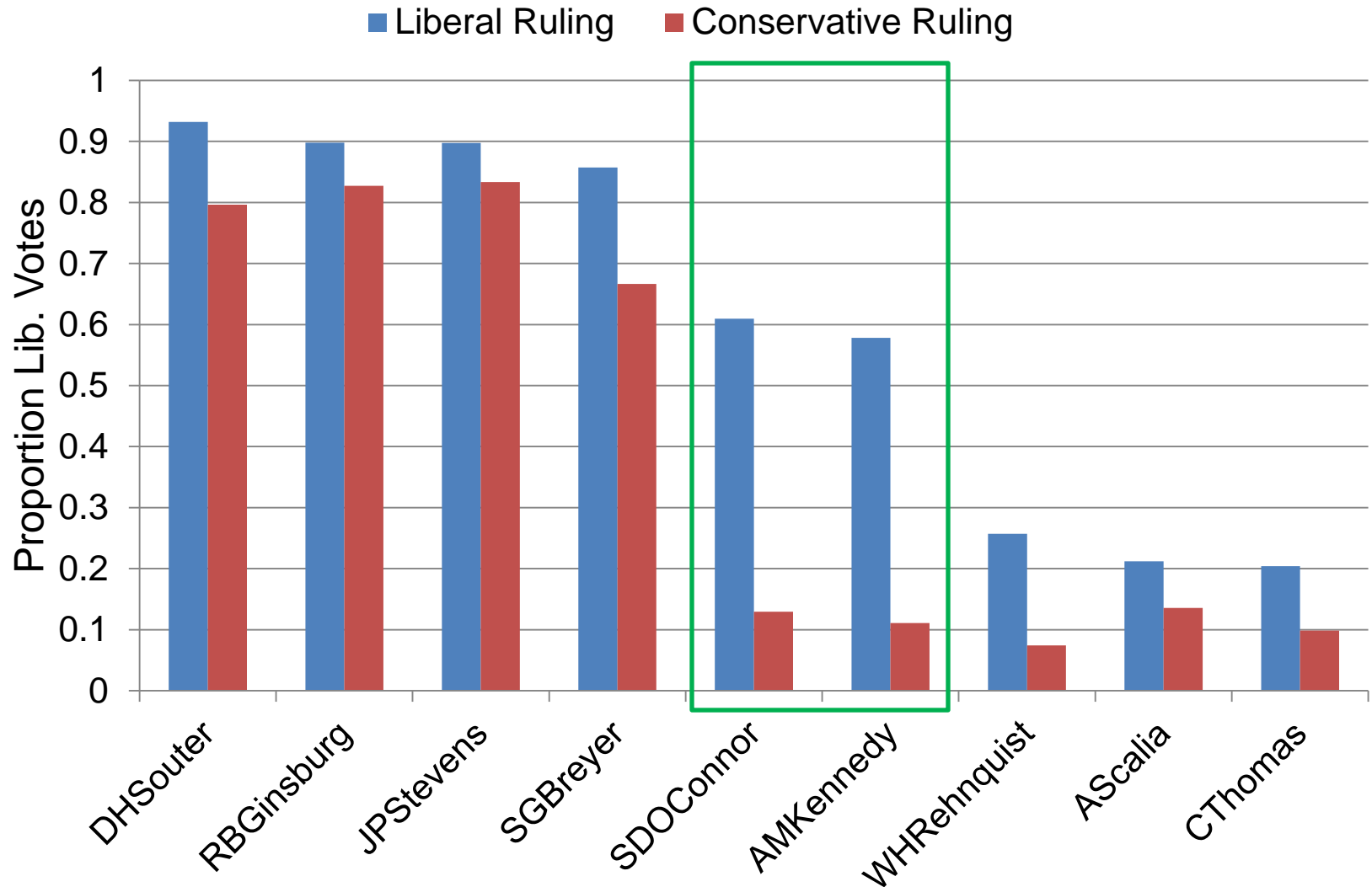
# Burger Court, 1981-85 Terms



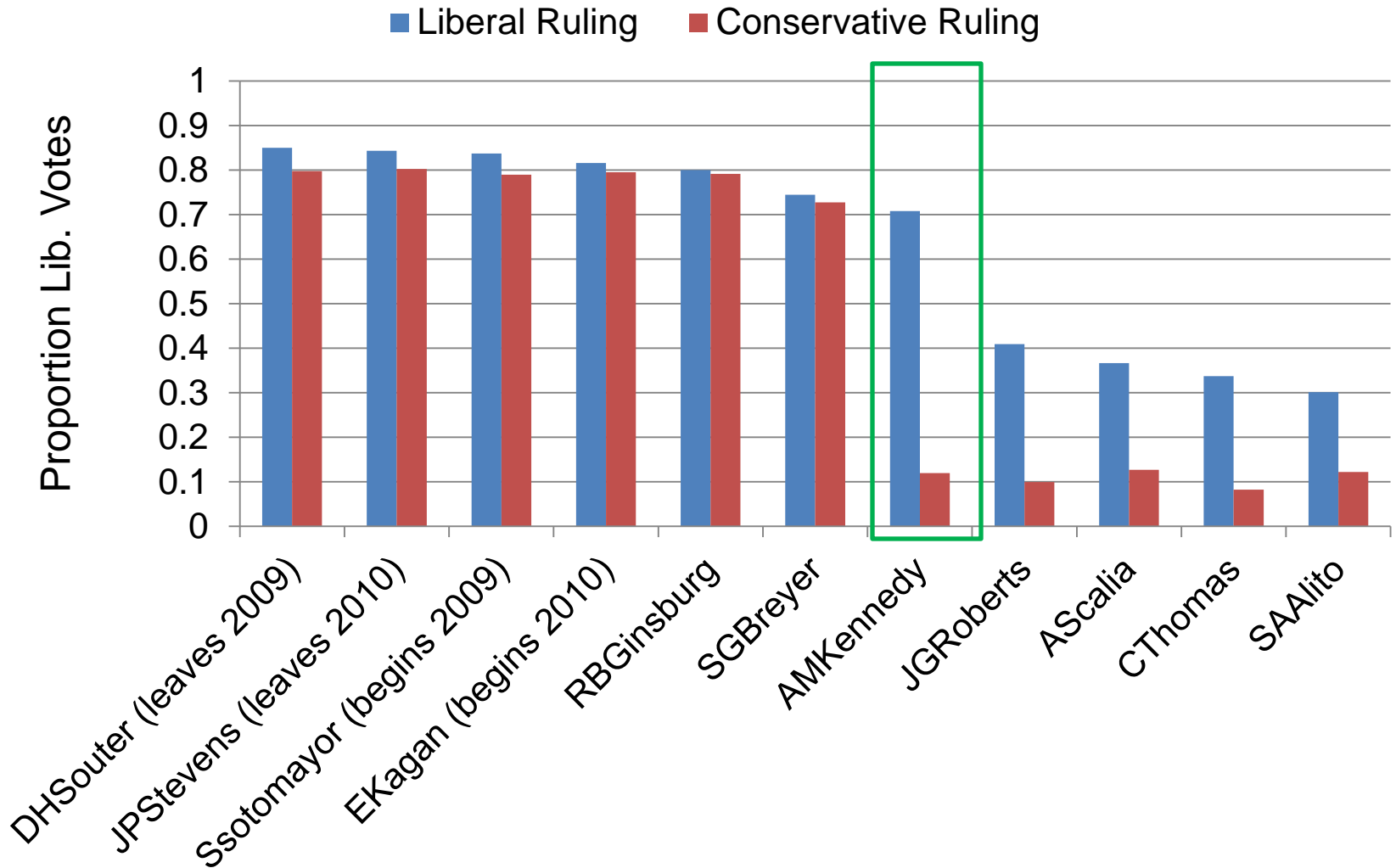
# Rehnquist Court, 1986-93 Terms



# Rehnquist Court, 1994-2004 Terms



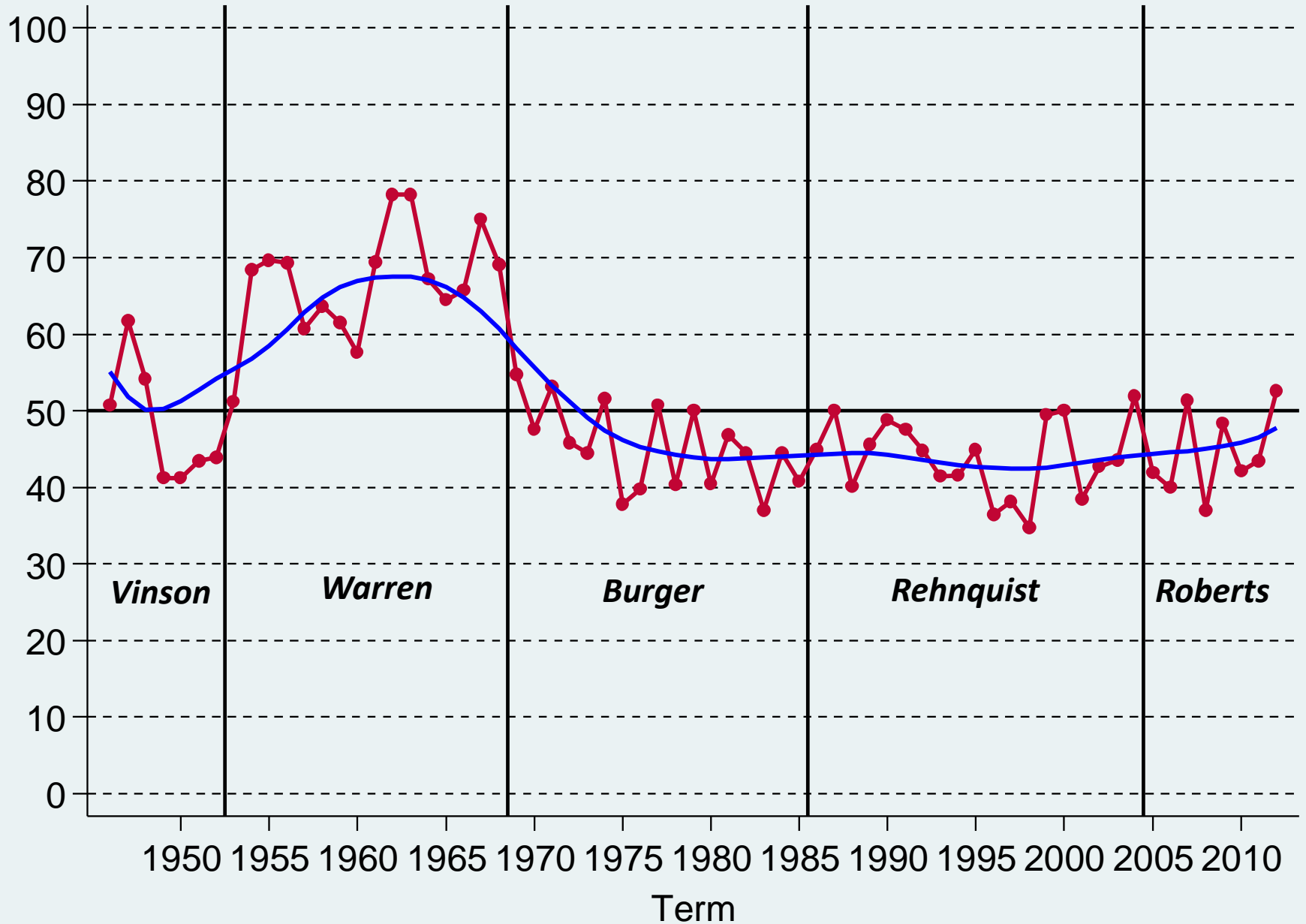
# Roberts Court, 2005-2012 Terms



# Policy Outputs Over Time

- On the whole, long period of low to moderate polarization, but it's increasing...and will likely continue to increase.
- Direction of policy outputs largely independent of presidential appointments (based on expectations from “ideological reliability” model)

A. Percent Liberal Supreme Court Rulings, 1946-2012 Terms



# Policy Outputs Over Time

- On the whole, long period of low to moderate polarization, but it's increasing...and will likely continue to increase.
- Direction of policy outputs independent of presidential appointments (based on expectations from ideological reliability appointment model)
- Vinson Court moderation
  - Division among FDR appointees: Douglas, Black, Rutledge v. Frankfurter, Jackson
  - Truman's moderate to conservative appointees (Vinson, Burton (R), Minton, Clark)

# Policy Outputs Over Time

- Warren Court liberalism
  - Brought to you by *Eisenhower* (Warren and Brennan), but also FDR appointees (Black, Douglas); not Truman
  - Kennedy: Mixed (Goldberg v. White)
  - Johnson emphasized ideological reliability: Fortas, Marshall
- Burger Court “center right”
  - Strong center, appointed by in large by Republican presidents (Stewart, Powell, Blackmun, Stevens); also White (Kennedy appointee)
  - Leftward drift: Stevens and Blackmun



# Policy Outputs Over Time

- Rehnquist Court: center-right...why not more conservative?
  - Stevens and Souter, liberal drift
  - O'Connor and Kennedy, swing justices
- Roberts Court: center-right
  - Kennedy, the only remaining swing vote

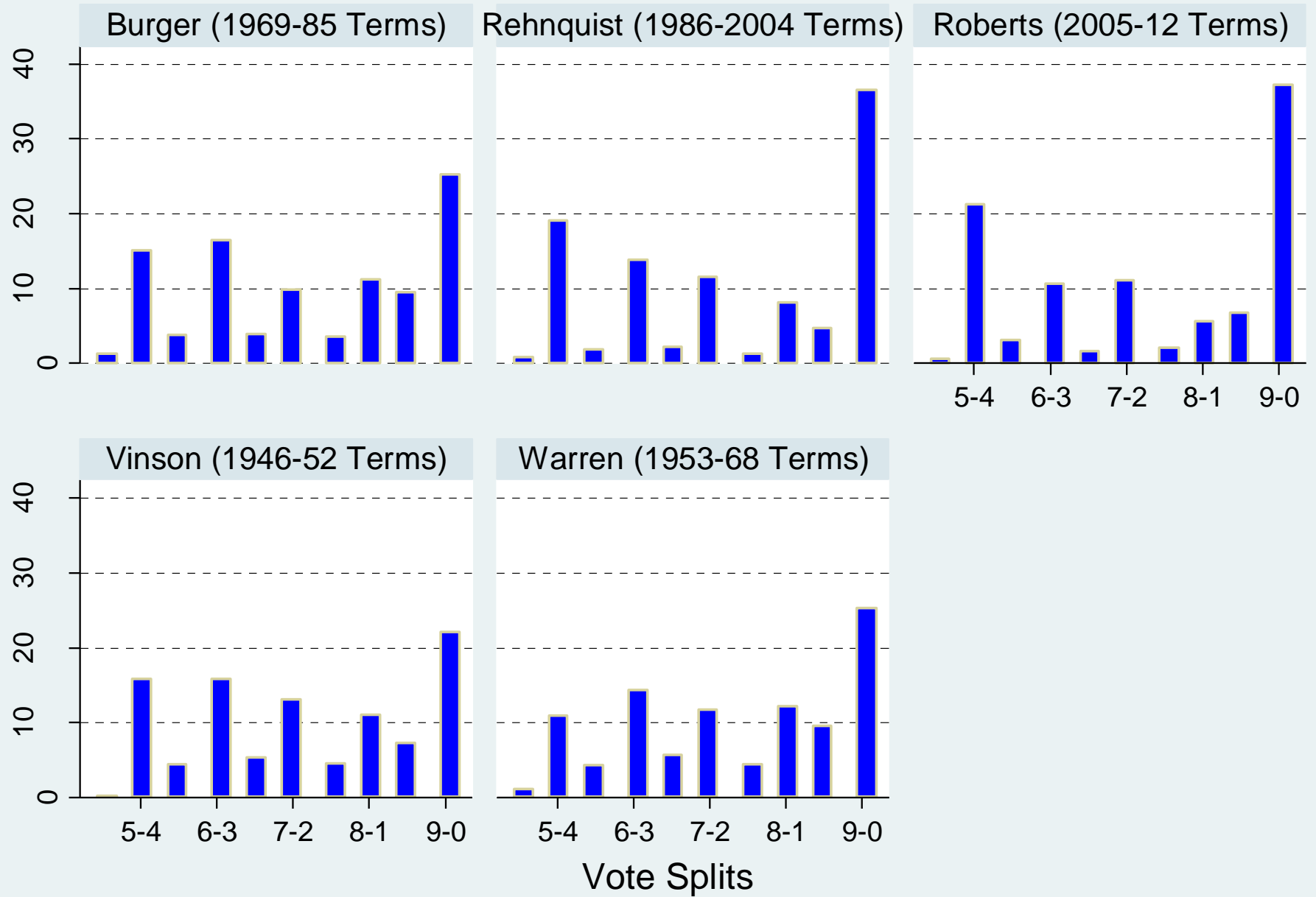
# Consequences of Polarization

- Today: One person in middle who's pivotal on most issues
- Kennedy: the last “swing justice?”
- “Ideological reliability” model of presidential appointment makes presidential elections even more consequential for Supreme Court policy outputs.
  - SC outputs will more closely track presidential ideology (Dahl).
- Will someone evolve into a swing justice for institutional maintenance concerns?
  - E.g., Justice O'Connor
- Benefits of polarization?
  - Legal clarity

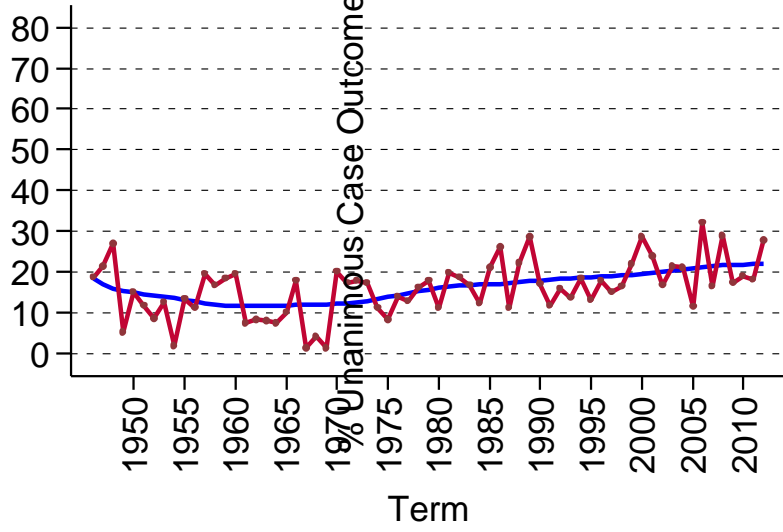
# Consequences of Polarization

- Polarization paradox?
  - Increase in 5-4 decisions, but an *increase* in unanimous cases as well.

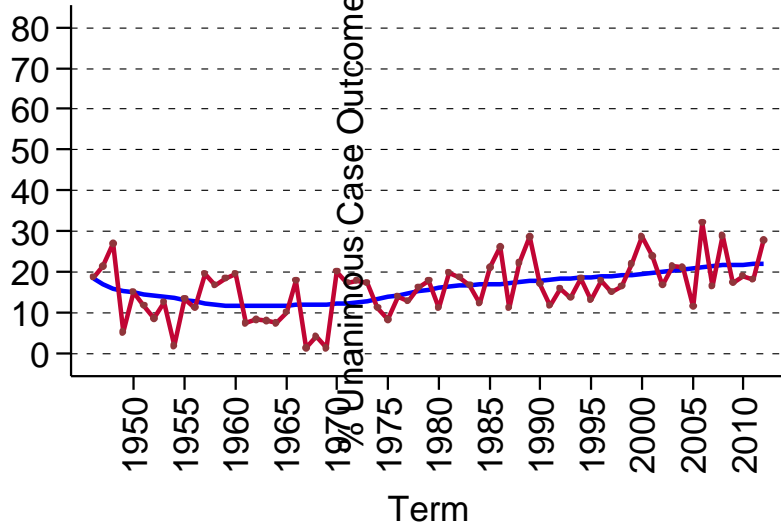
# Frequency Distributions (Histograms) of Vote Splits by Chief Justice Era



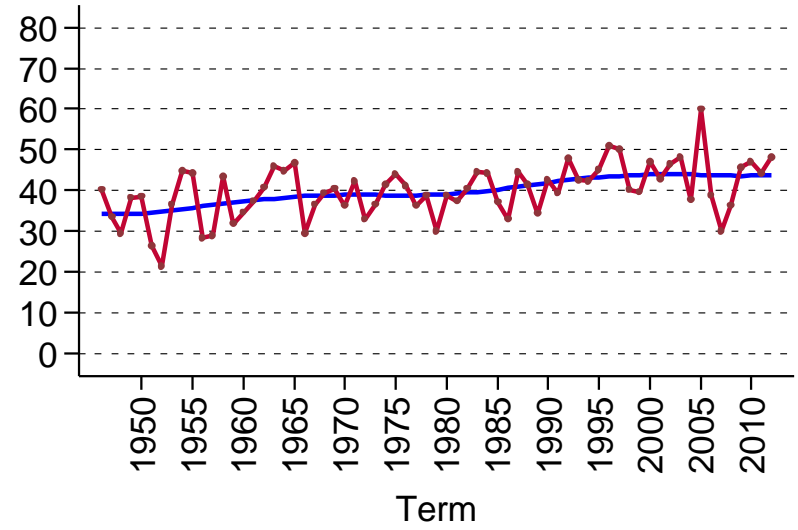
### A. Closely Divided Case Outcomes



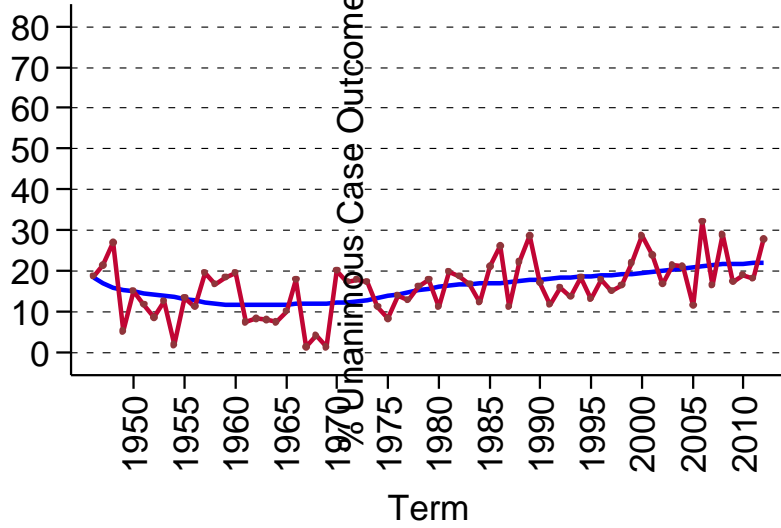
A. Closely Divided Case Outcomes



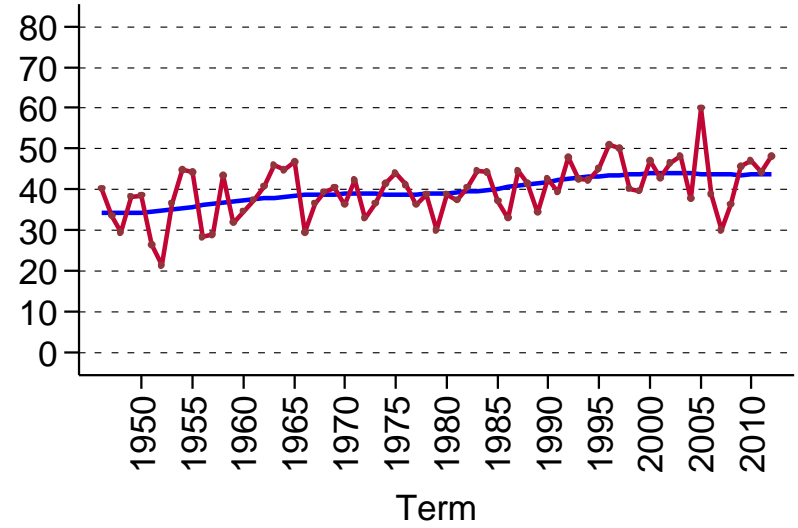
B. Unanimous Case Outcomes



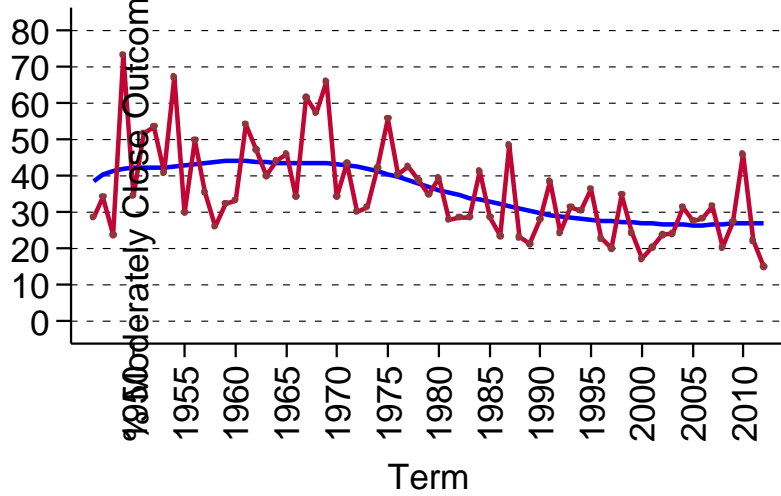
A. Closely Divided Case Outcomes



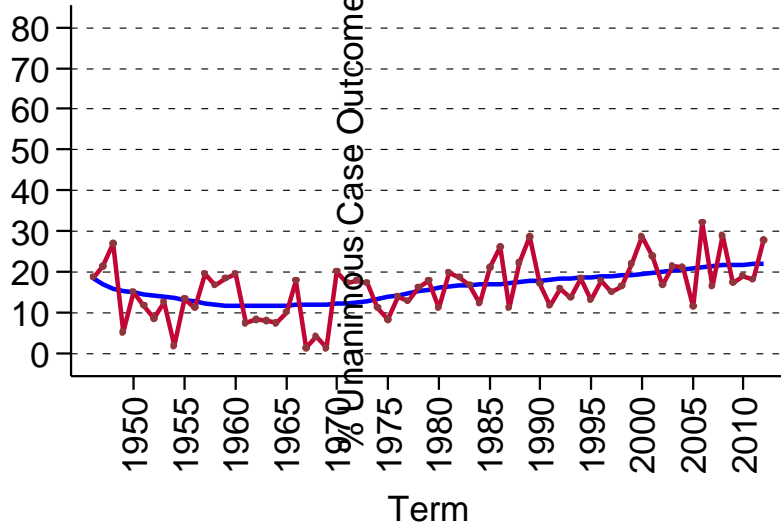
B. Unanimous Case Outcomes



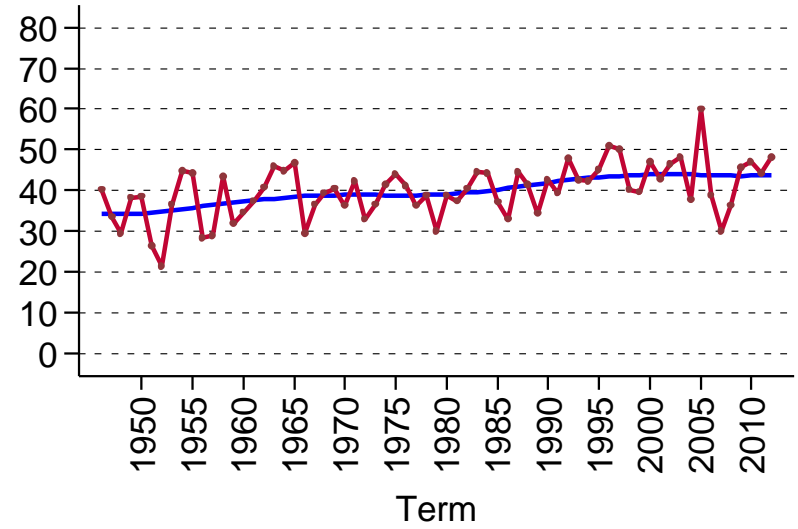
C. "Not Close" Case Outcomes (6-3)



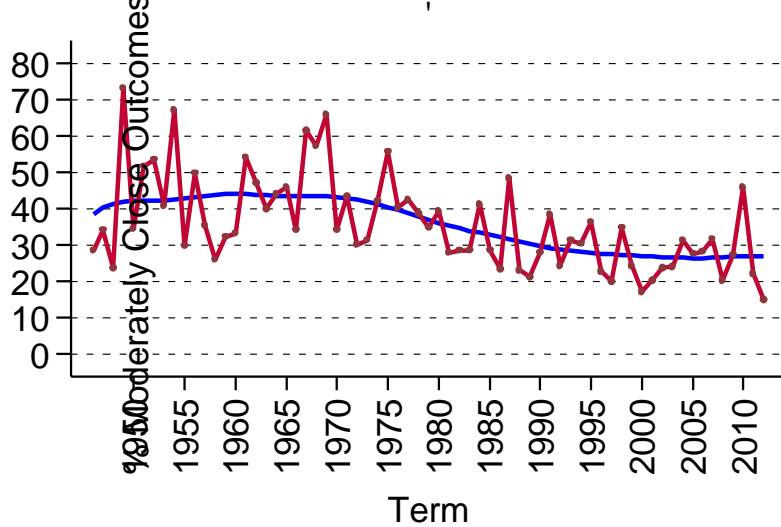
A. Closely Divided Case Outcomes



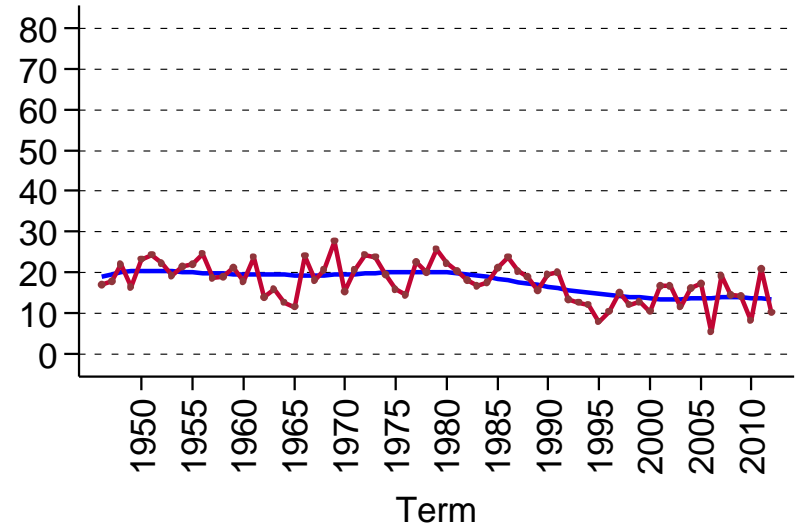
B. Unanimous Case Outcomes



C. "Not Close" Case Outcomes



D. Moderately Close Case Outcomes





# Consequences of Polarization

- Polarization paradox?
  - Increase in 5-4 decisions, but an *increase* in unanimous cases as well.
- Volitional v. exigent agenda (Pacelle)
- Strategic voting to the extreme at cert stage; risk aversion
- Increase unanimity for legitimacy purposes; offset to closely divided cases?
- Back to legal clarity...bifurcated.