

## ANALYZING THE RELIABILITY OF SUPREME COURT JUSTICES' AGENDA-SETTING RECORDS\*

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*Nearly all aspects of the Supreme Court's decision-making process occur outside the public eye. To study how the Court makes law and policy, scholars largely must rely upon archival materials harvested from the private papers of retired Supreme Court justices. Previous efforts to validate the reliability of these materials focus solely on the votes justices cast at the merits stage and were unable to assess the reliability of recently released papers. We examine the agenda-setting records for several justices' papers, including those of Justice Harry A. Blackmun, the justice whose papers were most recently made public. Our results suggest that Blackmun's papers are reliable and accurately archive his colleagues' agenda votes.*

In March 2004, the Library of Congress publicly released the private papers of former Justice Harry A. Blackmun. Consisting of 1,585 boxes of material, the Blackmun papers contain a treasure trove of data for Court scholars. From the role of oral arguments (Johnson, Wahlbeck, and Spriggs, 2006) to the opinion-assignment process (Wahlbeck and Maltzman, 2005), data from the Blackmun papers significantly improve our understanding of the Court.

Perhaps most important, the Blackmun papers offer an unprecedented view of the Supreme Court's agenda-setting decisions. Justice Blackmun maintained copious notes that recorded how every justice voted at the agenda stage (his docket sheets), as well as marked up copies of every memorandum that summarized a certiorari petition or appeal brought before the Court during his twenty-four-year tenure (1970-94). In 2007, supported by funding from the National Science Foundation, Epstein, Segal, and Spaeth (2007) digitally photographed and made freely available online all of Blackmun's papers throughout his years of service during the Rehnquist Court (1986-94). Accordingly, scholars now have critical archival data on the Supreme Court just a mouse click away.

To be sure, Blackmun's papers may unlock many of the mysteries that surround the Supreme Court's agenda-setting process (and later stages as well). Indeed, existing studies have examined the Blackmun papers to analyze what happens when policy and legal considerations collide at the agenda-setting stage (Black and Owens, 2009a) and whether the separation of powers influences justices' agenda-setting votes (Owens, 2010). Yet, to date, no one has analyzed the accuracy of Blackmun's data. Do Blackmun's papers reliably record how his colleagues voted on the thousands of petitions and appeals before the Court? How do Blackmun's records compare to his colleagues' archives? Scholars must answer these questions before further relying on the Blackmun papers. Simply put, reliability cannot be assumed but must be tested.

\*We gratefully acknowledge financial support from the Center for Empirical Research in the Law and the Center for the Study of Human Ethics and Values, both located at Washington University in St. Louis, as well as the Center for American Political Studies at Harvard University. We thank Emily Baehl for her able research assistance. We also appreciate the tireless assistance of the reference librarians in the Manuscript Reading Room at the Library of Congress.

In what follows, we empirically examine the reliability of Justice Blackmun's agenda-setting records and compare them with his colleagues' materials. Though Blackmun's records are not perfect, we find that they are highly reliable. Our results should assure scholars that they may freely use Blackmun's papers to study Supreme Court agenda setting.

We proceed as follows. We begin with a thumbnail sketch of the Court's agenda-setting process and why it is crucial for scholars to understand it to appreciate more fully how the Court makes law and policy. We then describe the data and methods we use to analyze the reliability of Blackmun's papers. After reporting our results, we discuss how scholars can make effective use of the Blackmun papers to examine Supreme Court decision making more fully.

## SUPREME COURT AGENDA SETTING

In this section, we describe, first, how the Supreme Court sets its agenda and, second, how justices may act strategically during this important stage of the decision-making process.

The process by which the Court treats petitions for review typically takes the following form: When a party in a lower court loses a case and wants the Supreme Court to review the lower court's decision, the party files a petition for a writ of certiorari (hereafter, "cert") with the Supreme Court. The petition is a statement of reasons to the Court explaining why it should review the lower court's decision (Stern et al., 2002:54-55).<sup>1</sup> This petition is initially examined by the clerk of the Supreme Court, who ensures that it conforms to the Court's strict formatting guidelines. The petition and any additional materials (such as the respondent's brief in opposition) are then distributed to each of the justices' chambers (Stern et al., 2002).

The petition is then randomly assigned to one of the law clerks in the "cert pool." Initially created in 1972, the cert pool is a labor-sharing agreement whereby each appeal or petition for certiorari is randomly assigned to one of the participating justices' law clerks. This law clerk (the pool memo writer) drafts a memorandum about the petition, which summarizes the facts of the case, the arguments made by the parties (and amici), and concludes with a discussion that recommends how the Court should treat the petition. Currently, all the justices save Justices Stevens and Alito participate in the cert pool.<sup>2</sup> The pool memo is distributed to all justices who participate in the cert pool.<sup>3</sup>

<sup>1</sup> If the Court grants the petition for a writ of certiorari, it requests the lower court to certify to it the record in the case (Stern et al., 2002:55).

<sup>2</sup> At the time of the pool's creation, four justices—Brennan, Douglas, Marshall, and Stewart—did not participate. With the exceptions of Justices Stevens and Alito, every new justice to join the Court has opted to participate in the pool. Clerks in Justice Stevens's chamber screen all petitions and write a memo for Stevens only when a case is worthy of consideration. One former Stevens clerk estimated that this occurred in 20 or 25 percent of all cases (Ward and Weiden, 2006:126-27). Justice Alito, who joined the Court in 2006, was initially a member of the cert pool. His subsequent decision to opt out was announced in September 2008. It is unknown what internal procedures are currently used in his chamber. Justice Sotomayor, the Court's newest member (as of this writing in October 2009), has opted initially to participate in the pool, but suggested during her confirmation hearings that she might follow Justice Alito's path and eventually leave it (Mauro, 2009).

The chief justice then prepares and circulates the “discuss list,” a list of all petitions he thinks the Court should formally consider at its next conference. As Stern et al. state: “[The discuss list] is a list of cases. . . . that are considered worthy enough to take the time of the Justices at the conference for discussion and voting. Only those certiorari cases considered *prima facie* to be of possible merit make the list” (2002:13). Associate justices are free to add to the list petitions that they think the Court should consider, but a petition cannot be removed except by the justice who originally put it on the list.<sup>4</sup> A petition that makes the discuss list receives at least some form of discussion by the Court during conference and a recorded vote, regardless of whether it is eventually granted or denied. A petition that fails to make the discuss list, however, receives no recorded vote and is summarily denied.

The Court meets approximately once a week on Fridays during its term to consider cert petitions. At these conferences, the justice who placed the petition on the discuss list leads off discussion of the petition, stating why he thinks the Court should or should not grant review to it. He then casts his agenda vote. In order of seniority, the remaining justices do the same. If four or more justices vote to grant review, the case proceeds to the merits stage.<sup>5</sup>

The only publicly observed part of the agenda-setting process is the ultimate outcome of the vote—whether the petition or appeal is granted or denied review. The public never observes how many justices voted to grant or deny review. Nor does the public learn why the justices decided accordingly. Except in the relatively rare instance of a dissent from the denial of certiorari, each justice’s specific vote on a petition and the reasons are unknown.<sup>6</sup>

In addition to the secrecy that occurs at the agenda stage, there are very few formal rules directing the Court to hear particular cases. With little restriction, the Supreme Court since 1925 has possessed the power to set its own agenda. Supreme Court Rule 10 states simply that the Court is likely to hear cases that involve conflicts among the lower courts, or cases that involve important issues. While there are strong norms compelling justices to grant review to cases with these legal factors present, justices need not always follow them.

Combined, these two features of secrecy and discretion provide the perfect opportunity for justices to act strategically. Justices can search for cases they wish to hear and avoid those that may be problematic (Black and Owens, 2009a; Caldeira, Wright, and Zorn, 1999). Justices can choose from a smorgasbord of cases in their pur-

<sup>3</sup> Justices in the cert pool generally have their clerks engage in some level of supplementary review of the pool memo (Peppers, 2006). For example, when the clerk preparing the pool memo was not one of his, Justice Blackmun assigned a clerk to review the memo.

<sup>4</sup> Of course, in response, the justice’s colleagues are free to put the case on the list.

<sup>5</sup> If three justices vote to grant review and a third justice casts a “Join-3” vote, the case will be granted review. For more on this, see discussion below and Black and Owens (n.d.) and O’Brien (1997).

<sup>6</sup> Of course, the Court sometimes calls for the views of the solicitor general (CVSG), a public act. Justices often CVSG when they require more information in a case (Pacelle, 2003) or when they seek to influence their colleagues at the agenda stage (Black and Owens, 2009b).

suit to make policy and may frequently reach out to decide issues. Indeed, quotes from law clerks over the years suggest that justices use their discretion to ferret out particular issues they wish to address. Stated one clerk:

[W]hen you talk to your justice individually, you might want to point out personal views, either yours or his. . . . Something like, "you seem particularly interested in this [issue], and I wanted to bring [this petition] to your attention" (Perry, 1991:61).

Of course, justices have been nearly as forthcoming in their statements as well:

The opinion of \_\_ v. \_\_, which I wrote . . . I had spent several terms looking for a case that presented this issue pretty well. I think \_\_ was one of the most important cases we have done in the \_\_ years I've been on the Court. I mean it set in team [sic] the whole progeny of \_\_ cases. . . . That's the sort of thing I do sometimes. I look for cases (Perry, 1991:208).

At the same time, discretionary agenda control allows justices to avoid cases that serve as poor policy-making vehicles or that might impugn the Court's integrity. For example, in *Demosthenes v. Neuschafer* (no. 89-259:12),<sup>7</sup> Justice Blackmun's clerk stated: "The exhaustion/abuse of writ issue may be certworthy, but I agree that this capital case is not the proper context in which to address it." Justices themselves agree that cases are "fungible" due to the size and nature of the Court's agenda; even petitions with minor problems can be denied review, since so many cases with similar issues return to the Court (Perry, 1991:221).

The power to reach out for issues or deny review to certain cases creates a process in which the justices strategically set the Court's agenda. Indeed, a host of studies over the last few decades have argued precisely that. For example, Krol and Brenner (1990) and Brenner (1997) argue that agenda setting is driven in large part by justices' desire to reverse lower-court decisions. Caldeira and Wright (1988) show that when more groups file amicus curiae briefs either supporting or opposing review, the Court perceives the case to be more important and worthy of justices' attention. Benesh, Brenner, and Spaeth (2002), Boucher and Segal (1995), and Brenner (1979) argue that affirm-minded justices anticipate the Court's likely merits ruling and vote to review cases only when they believe they will prevail on the merits. Caldeira, Wright, and Zorn (1999) argue that justices are more likely to vote to grant review to a case as they increasingly favor the merits outcome. And Black and Owens (2009a) find that justices are more likely to grant review to a case when they prefer the expected merits decision to the existing status quo, and when certain legal factors are present.<sup>8</sup>

Justices strategically set the Court's agenda, these authors argue, because, ultimately, the policy the Court makes is a direct function of the cases on its docket. If justices accumulate cases in one particular issue area, the Court is likely to clarify and expand the law in that area. Moreover, by selecting particular cases the Court signals to the legal community the issues it deems most salient. As Justice Brennan once stated:

<sup>7</sup> This memo—and several thousand more like it—can be accessed through the Digital Archive of the Papers of Harry A. Blackmun (Epstein, Segal, and Spaeth, 2007).

<sup>8</sup> Of course, other studies—both old and new—addressing various forms of agenda setting are equally important (Provine, 1980; Collins, 2008; Baird, 2006).

The choice of issues for decision largely determines the image that the American people have of their Supreme Court. The Court's calendar mirrors the everchanging [sic] concerns of this society (Brennan, 1973:483).

Given, then, that the agenda-setting process makes some outcomes more likely than others, and that justices strategically anticipate and react to these outcomes, it is substantively important to understand the mechanics of the agenda-setting process, the conditions under which justices set the Court's agenda, and, most important for this article, the reliability of the data used to examine these questions.

## DATA, METHODS, AND RESULTS

Scholars studying the choices justices make during the agenda-setting process must have confidence in the data on which they rely. Maltzman and Wahlbeck (1996) tell us that justices' records on merits decisions are reliable. That study, however, is limited in two respects. First, it does not examine the reliability of justices' *agenda-setting* records. While one might think that cert records are the same as merits records, the volume of petitions processed and the speed with which they are processed suggest that justices' accuracy at the merits stage may not carry over to the agenda stage. Justices dispose of nearly 8,000 petitions for certiorari each term but fewer than 100 full decisions on the merits.<sup>9</sup> Second, Maltzman and Wahlbeck (1996) were not able to examine the reliability of Justice Blackmun's papers. Given that Blackmun's papers are the most current available to scholars, these analyses must be extended to ensure reliability.

We analyze a random sample of agenda-setting votes from the Court's 1971, 1986, and 1990 terms. The 1971 term offers the largest number of papers with which to compare results, providing docket sheets from Justices Blackmun, Brennan, and Douglas.<sup>10</sup> Only two sets of papers are available during the Rehnquist Court—those of Justices Blackmun and Marshall.<sup>11</sup> Accordingly, we examined their docket sheets during the 1986 term (the first term of the Rehnquist Court) and the 1990 term, which marks the last term of Justice Marshall's service.

We randomly sampled a total of 552 dockets that made the Court's discuss list across these three terms.<sup>12</sup> In particular, we examined 270 dockets from the 1971 term, 187 dockets from the 1986 term, and 95 dockets from the 1990 term. We collected all data for the 1971 term (i.e., the docket sheets of Justices Blackmun, Brennan, and

<sup>9</sup> Data on merits decisions comes from Spaeth (2006), with the decision type limited to all orally argued signed and per curiam opinions, and judgments of the Court, and the unit of analysis equal to the case or docket.

<sup>10</sup> Though Justice Marshall served during the Court's 1971 term, his papers do not contain docket sheets during that term. His papers only contain docket sheets for the 1967 and 1968 terms and the 1985-90 terms.

<sup>11</sup> As of this writing, the Brennan estate does not entertain requests to access any of Justice Brennan's case files from the 1986 term until his retirement. (E-mail to authors from Library of Congress Manuscript Reading Room, on file with authors.)

<sup>12</sup> Recall that we are interested in petitions that actually received some sort of a recorded vote. Because cases that failed to make the discuss list have no recorded vote—they are unanimously and summarily denied—we cannot use them in our analysis.

Douglas), as well as all the docket sheets from Justice Marshall during the 1986 and 1990 terms at the Library of Congress in Washington, D.C. Docket sheets for Justice Blackmun for the 1986 and 1990 terms come from Epstein, Segal, and Spaeth (2007).

To quantify the level of agreement among the justices' docket sheets, we rely on the Kappa statistic (Cohen, 1960). In formal terms, Kappa ( $\kappa$ ) is equal to

$$\frac{p_a - p_e}{1 - p_e}$$

where  $p_a$  is the observed proportion of agreement and  $p_e$  is the expected level of agreement due to random assignment to values by coders. Scholars across-the-board rely on this measure to assess intercoder reliability (e.g., Howard and Segal, 2004; Maltzman and Wahlbeck, 1996; Spriggs, 1997; Spriggs and Hansford, 2000; Spriggs and Wahlbeck, 1997). The Kappa statistic essentially allows us to examine whether observed agreement between or among coders—or, here, justices—exceeds levels that one would expect due to chance alone. The measure is more sophisticated than simply calculating agreement percentages.

Table 1 presents the ability of a recording justice to document other justices' votes accurately. It compares, for example, Justice Blackmun's impression of Brennan's vote with Brennan's recording of his own vote.<sup>13</sup> During the 1971 term, Justice Blackmun correctly recorded Justice Brennan's vote in 89.6 percent of the docket sheets we examined. That is, Blackmun's record of Brennan's vote agreed with how Brennan recorded his own vote in nearly 90 percent of the dockets under study. This level of agreement is systematically higher than what we would expect if Blackmun randomly coded Brennan's vote and is, by a frequently used metric, evidence of "almost perfect" agreement between the two justices (Landis and Koch, 1977).

Indeed, every possible justice-to-justice combination in our data observes high levels of agreement. Justice Blackmun recorded the votes of Justice Douglas with 82.2 percent accuracy, which is to say that Blackmun coded Douglas's vote the same way Douglas coded his own vote 82.2 percent of the time for substantial agreement that is, again, systematically higher than what we would expect if Blackmun randomly coded Douglas's votes. Justice Brennan also performed ably. He accurately recorded the votes of Justices Blackmun and Douglas 91.9 percent and 85.9 percent of the time, respectively. Finally, Justice Douglas accurately recorded the votes of Justices Blackmun and Brennan almost perfectly.

While all justices in our sample have significant agreement, some justices seem to have been less clear with their voting intentions. For example, Justices Blackmun and Brennan had some difficulty discerning Justice Douglas's votes during the 1971 term, though the rate of agreement was still substantial. Blackmun accurately recorded Douglas's vote in roughly 83 percent of the dockets we examined. Brennan fared

<sup>13</sup> Following Maltzman and Wahlbeck (1996), we make the necessary and reasonable assumption that a justice accurately transcribes his or her own vote.

**Table 1**  
**Accuracy of Justices' Agenda-Setting Votes, 1971, 1986, and 1990 Terms**

Recording Justice	Voting Justice	Percent Agreement	Kappa Statistic	Agreement Level
<i>1971 Term (N = 270)</i>				
Blackmun	Brennan	89.6	0.847	Almost Perfect
	Douglas	82.2	0.753	Substantial
Brennan	Blackmun	91.9	0.873	Almost Perfect
	Douglas	85.9	0.797	Substantial
Douglas	Blackmun	89.3	0.831	Almost Perfect
	Brennan	91.1	0.865	Almost Perfect
<i>1986 and 1990 Terms (N = 282)</i>				
Blackmun	Marshall	95.0	0.921*	Almost Perfect
Marshall	Blackmun	94.7	0.920*	Almost Perfect

**Notes:** Treating 1986 and 1990 separately does not effect these results. \*Denotes  $p < 0.01$ . Agreement levels come from Landis and Koch (1977:165).

slightly better, with an agreement of 86 percent. That *both* Blackmun and Brennan struggled to record Douglas's vote correctly but had no difficulty recording each others' votes suggests that Douglas sometimes sent mixed signals to his colleagues.

The bottom portion of Table 1 examines reliability during the Court's 1986 and 1990 terms. Reassuringly, we find that even fifteen years later, Justice Blackmun's assiduous recordkeeping persisted. Justice Blackmun correctly identified Justice Marshall's vote 95 percent of the time, for an agreement level of "almost perfect." Justice Marshall's records are equally accurate, as he correctly coded Justice Blackmun's position in 92 percent of the docket sheets we examined.

If we treat the 1986 and 1990 terms separately, we still find extraordinary high levels of agreement but note a slight decrease in the value of Kappa for both Blackmun and Marshall as we move from 1986 to 1990. In particular, Blackmun's agreement decreases from 0.9291 in 1986 to 0.8959 in 1990. Marshall's decline is steeper—perhaps due to advanced age—dropping from 0.9391 in 1986 to 0.8705 in 1990. Of course, based on the agreement-level metric, both are still firmly situated in the category of "almost perfect."

We next analyze how well justices recorded the votes of their other colleagues. That is, to what extent is there agreement among the justices' docket sheets for recording the votes of all their colleagues? Table 2 reports the results from the 1971 term. The first column reports the type of vote cast by a justice, the second column presents the Kappa statistic for this vote type, and the third column presents the same agreement-level categorization used in Table 1.

We note that the table is missing an indicator of statistical significance for the Kappa statistics. Unfortunately, since some justices had missing values for some of

Table 2  
Reliability of Justices' Agenda-Setting Votes, 1971 Term

Outcome	Kappa	Agreement Level
Deny	0.944	Almost Perfect
Grant	0.907	Almost Perfect
Grant, Vacate, and Remand	0.825	Almost Perfect
Out (Discretionary Recusal or Absence)	0.970	Almost Perfect
Grant and Reverse (Summary Reversal)	0.515	Moderate
Note Probable Jurisdiction	0.984	Almost Perfect
Dismiss Appeal	0.651	Substantial
Affirm Appeal	0.836	Almost Perfect
Postpone Jurisdiction	0.893	Almost Perfect
Join-3	0.079	Slight
Hold	0.837	Almost Perfect
Call for Views of the Solicitor General	0.634	Substantial
Vacate as Moot	1.000	Perfect
Overall (all outcomes)	0.906	Almost Perfect

**Notes:** As we have variation in the number of coders for each observation, we cannot examine the statistical significance of Kappa. Agreement levels come from Landis and Koch (1977:165).

their colleagues' votes, we have a variable number of coders for some dockets. Accordingly, we are unable to test the null hypothesis of random agreement. We follow Maltzman and Wahlbeck's approach here and note that it is ultimately the size of the Kappa statistic that we care about—how much different it is from zero—as opposed to just the binary determination of whether it is different from zero (Maltzman and Wahlbeck, 1996:n. 12; Cohen, 1968:217).<sup>14</sup>

The results suggest, first, that if scholars are interested simply in using the docket sheets to ascertain justices' grant or deny votes (e.g., Owens, 2010; Black and Owens, 2009a; Caldeira, Wright, and Zorn, 1999), they can have a high degree of confidence in their data's reliability. Votes that typically are coded as votes to grant review (i.e., Grant, Note Probable Jurisdiction, Postpone Jurisdiction) all have Kappa scores of at least 0.89. Similarly, votes that are generally coded as deny votes (i.e., Deny, Affirm Appeal, Dismiss Appeal) have substantial or almost perfect levels of agreement. In other words, all the justices we examined nearly always agreed that a particular justice cast a grant or deny vote. As these six vote types collectively account for the significant majority of all votes cast by the justices during the agenda-setting process, scholars can rest assured that the justices' data are, by and large, quite reliable.

The data also tell us when justices' recordings are less reliable. That is, we find evidence to suggest that "Join-3" votes are the least reliably recorded. The Join-3 vote

<sup>14</sup> If we exclude observations with fewer than three justices' codings, we are able to recover the statistical significance of Kappa. If we do this for the items reported in Table 2, we find that all items save "Pass" and "Join-3" are statistically significant ( $p < 0.01$ ).

is a conditional vote to grant review. If fewer than three other justices vote to grant review, the Join-3 votes lies dormant as a vote to deny review. In the event that three other justices vote to grant review, however, the Join-3 vote transforms into a grant vote, which provides the petition with the requisite four votes required to receive full plenary review (Black and Owens, n.d.; O'Brien, 1997). The low level of Join-3 reliability could be a function of justices simply recording the *final* disposition of a Join-3 vote. That is, upon hearing that Justice Blackmun cast a Join-3 vote, Justice Brennan may have simply waited until the final tally to determine whether the Join-3 transformed into a grant vote or could be treated as a deny vote. In reviewing the (relatively infrequent) use of Join-3 votes in our data, this generally seems to be the case.

Finally, we performed the same type of reliability analysis for agreement between Justice Blackmun's and Justice Marshall's recollections of their colleagues' votes in 1986 and 1990.<sup>15</sup> Combining the 1986 and 1990 terms, we find that Blackmun and Marshall's coding of the 1,827 votes cast by their colleagues agreed 95.8 percent of the time, which corresponds to a statistically significant Kappa statistic of 0.9389. Treating each term as separate, we find 97.9 percent and 91.5 percent overall agreement for 1986 and 1990, respectively.<sup>16</sup> Both of the corresponding Kappa statistics—0.9708 and 0.8626—are statistically significant.<sup>17</sup>

## CONCLUSION

The public unveiling and subsequent online publication of Justice Blackmun's private agenda-setting materials arguably represent the two most important developments for Supreme Court scholars in recent memory. It is necessary, however, to ask whether their content provides both an accurate and reliable portal into the private agenda-setting decisions made by the Court.

We are pleased to report that Justice Blackmun's assiduity in recordkeeping stands up when subjected to the systematic analyses we performed here. Our results suggest that scholars wishing to analyze the agenda-setting process using Justice Blackmun's papers may do so with the knowledge that these data are both accurate and reliable. **jsj**

<sup>15</sup> Unfortunately, since data come from only two coders (i.e., justices) we cannot recover a Kappa statistic at the level of vote type.

<sup>16</sup> The number of observations for the 1986 and 1990 terms is 1,238 and 589, respectively.

<sup>17</sup> Maltzman and Wahlbeck (1996) provide a third type of analysis where they statistically model errors in accuracy as a function of a half dozen covariates in a binary response model. We do not replicate this final step for several reasons. First, their general goal was to establish the reliability of using archival materials in a more general sense. We take that result as a given and simply seek to extend it to a specific justice's papers—those of Justice Blackmun. Second, as a practical matter, because we are interested in assessing reliability during the Rehnquist Court years—and have records for only two justices—there is perfect collinearity among variables that we would want to include in our model. For example, Blackmun's age, with which we expect to observe a positive relationship, is perfectly correlated with the amount of time he served with the justice whose vote he is recording (Justice Marshall). Moreover, to the extent that we find a *higher* degree of accuracy in the agenda-setting votes than Maltzman and Wahlbeck found at the merits stage, the importance of modeling errors—and the variation we would seek to explain—are of less importance.

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