Issue Resuscitation at Oral Argument on the US Supreme Court *

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Abstract

The U.S. Supreme Court is not a self-starting institution; it must wait for issues to come to it before deciding them. The Court’s certiorari process is, however, a powerful device that provides justices with full discretion over cases they hear and which individual questions within those cases they will decide. Thus, while the justices often grant cert. on the questions presented by the litigants, they sometimes limit the questions they will consider and, in rare cases, order the parties to brief completely separate issues. When this happens, there may be justices who would rather decide the case on issues that were suppressed. Here we seek to determine the factors that may lead justices to resuscitate such issues and how they go about doing so. In particular, we posit oral arguments provide justices with a unique forum to take this tack. To test this assertion we examine all cases from the 2002 to 2010 terms that contain issues suppressed during the cert. stage. We then analyze whether justices attempt to resuscitate these “dead” issues at oral argument and offer several explanations for why they engage in “issue resuscitation.”

*We thank Ryan Krog and Kevin T. McGuire for providing data. We also thank Amanda Bryan and Charles Gregory, members of The Research Club, for helpful comments.
On February 19th, 2008, Kari Kennedy had reason to celebrate. Despite the minuscule odds of having a case heard before the US Supreme Court (odds are about 1 in 80), Kennedy’s petition was granted review in one concise sentence: “The petition for a writ of certiorari is granted limited to Question 3 presented by the petition” (emphasis added).1 Nothing, however, puts a damper on a cert.-grant party like the realization that nearly all substantive issues have been stripped from the case. This, however, is what happened to Kennedy’s attorneys; of the four questions originally presented, the Court allowed them to brief only question 3, which focused on the Fifth Circuit’s holding about an obscure aspect of the Employee Retirement Income Security Act. This question was so slight it took up fewer than two of the 31 pages Kennedy’s attorneys devoted to “reasons for granting the petition,” leaving Kennedy’s attorneys little with which to work. While such a limited grant supposedly killed the three remaining substantive issues, it was not the last the Court would hear of them. In fact, these “suppressed” issues took center stage early in the decision making process.

Specifically, as oral arguments got under way, the petitioner’s attorney, David Furlow, did not even complete his opening statement before he was interrupted by Justice Ginsburg: “you did, in your reply brief, address the plan question?” Ginsburg’s reference was to one of the suppressed questions and was, in our estimation, resuscitated for the Court. Justice Breyer picked up on this, admitting his “state of mind is I’m sorry we limited it,” additionally asking Furlow to address the “plan question” at the end of his arguments. Breyer next commented, “I’m tempted to try to decide it...could you possibly say why shouldn’t we just go ahead and decide the substance, not as a technical matter?” Ginsburg and Breyer’s initial comments set the tone for oral arguments; indeed, 8 of the first 10 utterances from the bench concerned one of the previously suppressed issues. The arguments continued and, in the process, several new alternatives were placed back into the record. This, in turn, meant

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1Kennedy v. Plan Administrator for DuPont Savings and Investment Plan (2009), 552 U.S. 1178.
these issues were also available for the Court to decide as they became part of the record.

After discussing the suppressed issues at length, the justices considered – and even questioned – whether they could or should reach the merits on these resuscitated issues. Justice Scalia admitted the suppressed questions had been “explicitly put under our nose” and asked Leondra Kruger, Assistant to the Solicitor General arguing for the U.S. as amicus curiae, “Do you know any other case in which we have explicitly declined to accept a question and then have used one of these other back doorways of – of answering it anyway?” Kruger responded in the negative, prompting Breyer to ask, “Well, could we do this...what’s your suggestion as to how we proceed?”

*Kennedy v. DuPont Savings* makes three points clear to us – first, not all justices are happy when the Court grants *cert.iorari* on limited review. Although we do not have the conference memos to know who voted to grant, it is Ginsburg and Breyer who were most agitated with the suppression – Breyer even directly asked the Assistant SG how the Court should proceed. Second, the Court is cert.ainly reluctant to allow suppressed questions to be discussed at length during oral arguments. Third, and despite the Court’s reluctance, *DuPont Savings* demonstrates the justices’ willingness (despite their outward reticence) to use oral arguments as a forum to raise and address suppressed issues. Despite the fact that these issues had been previously suppressed at the *cert.* stage, discussion was dominated by their policies. In total, these issues were raised 30 times by the Court and discussed by 6 of the 7 justices who spoke during the proceedings. Most interesting are the questions concerning whether or not the Court could decide the suppressed issues at the *cert.* stage—after all, who would stop it from doing so? Perhaps the answer to this question lies with Scalia’s comment suggesting justices view oral proceedings as a “back doorway” to get issues before the Court.

This notion of a “back doorway” might confuse casual and ardent Court-watchers alike because the accepted idea of a case’s journey to the Supreme Court goes something like this: from the hundreds of thousands of cases heard in the district courts each year, several
thousand are heard on appeals at the Circuit Court level. Unsatisfied with results at the circuit level, roughly 8,000 file for *cert. iovari* with the Supreme Court. The justices carefully and deliberately cull through these appeals, grant *cert.* to fewer than 100 petitions, read the submitted briefs, hear the pursuant oral arguments, and then issue opinions that satisfy the presented legal questions – and hopefully at least one party (Baum 2007). This story, told in undergraduate classrooms across the country, is both simple and misleading in its simplicity. The story we present in its stead is far more complex because not every issue presented is decided on by the justices and not every issue decided on is presented by the parties.

While the very presence of a Court questioning its own ability to address issues not originally granted might indicate this is a rare event for the justices, a close analysis suggests otherwise. In what follows we seek to illuminate case-level and justice-level features that prompt issue-resuscitating behavior. To do so, the next sections develop our theoretical argument based on issue-fluidity scholarship, Riker’s theory of heresthetics, and literature that indicates Supreme Court oral arguments may be the best place for resuscitation to occur. From this theoretical foundation we derive several hypotheses. We next outline the data and method we use to test these hypotheses. Finally, we discuss our empirical results and consider the implications of our study.

**Issue Supresssion on the U.S. Supreme Court**

Issue fluidity, broadly defined, is the process by which legal issues presented in litigant briefs are transformed by the U.S. Supreme Court throughout its decision-making process. The justices may discover or suppress issues to broaden or narrow the scope of their final opinions at the agenda-setting stage or at the merits stage. To expand available policy space, the Court may either order the parties to brief answers to additional questions or simply extend policy in the majority opinion beyond the questions presented. Alternatively, the justices may diminish policy space by suppressing issues granted on *cert.* or by failing to answer questions presented by the parties in their opinions (Ulmer 1982; McGuire and

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Palmer 1995; Palmer 1999; Krog and McGuire 2011). We are particularly interested in the suppression of issues at the agenda setting stage and, in turn, how justices react to this phenomenon later in their decision making process.

Recent work on issue fluidity addresses the first phenomenon of interest to us. Krog and McGuire (2011) reveal the Court’s motivation for such behavior at the certiorari stage. In their analysis of cases docketed between 2005 and 2009 they find in 15 percent of cases, the Court suppressed one or more issues raised in the cert. petition. More specifically, they find several case level factors (including the number of questions presented by the litigants and whether the case emanated from a state court) affect whether justices will suppress one or more issues presented by the parties. Even though this phenomenon does not happen often, it can be an important strategy for justices. Indeed, for a justice facing a lesser (or even least) preferred alternative based on the issues presented, this tactic can dramatically decrease the bounds of the policy space in which the the Court may decide.

We pick up where Krog and McGuire (2011) leave off in an attempt to analyze our second phenomenon of interest – namely how justices react to issue suppression. That is, we focus on how justices respond when an issue raised in a petition for certiorari is suppressed. Our contention is that when the Court issues a limited cert.-grant, but a justice prefers a suppressed issue to those available in the current policy space she may attempt to resuscitate an issue. By this we mean a justice may re-raise a suppressed issue in order to place it back in the legal record before the Court reaches the merits of the case. In so doing, the justice

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2Key within the fluidity literature is the centrality of issues as opposed to cases because it is issues the Court resolves (McGuire and Palmer 1995, 694). Justices and clerks attest to this notion by seeking cases that best present issues (Perry 1991, 220). The catch, according to McGuire and Palmer (1995), is cases rarely present issues in a way most palatable to the justice so some level of tinkering is often required – in the form of issue discovery or suppression.
attempts to alter policy space.\textsuperscript{3} The question, however, is what can explain such behavior. We seek an answer in the next section.

**Issue Resuscitation as Heresthetical Maneuvering**

To determine how a justice responds when the Court suppresses issues she may find important, we turn to Riker’s theory of heresthetics, or what he calls the art of manipulating the rules of a game in order to increase the odds of winning (Riker 1984). Most generally, this theory posits collective decision-making via voting on proposals necessitates a dynamic, rather than static, model. In his words, policy space “...is not fixed, and the alternatives themselves change over time” (Riker 1984, 14). Due to this elasticity, a rational actor who is forward-thinking may use heresthetical maneuvering if she fears losing, or in this case if she believes a least-preferred outcome will prevail. Such behavior can take three forms: controlling the agenda, voting in a sophisticated fashion, or adding alternatives to the policy space (Riker 1984; Epstein and Shvetsova 2002; Johnson, Spriggs and Wahlbeck 2005; Black, Schutte and Johnson 2013).

Our focus is on the last of the three possible maneuvers: adding alternatives. Although much of Riker’s work focuses on actors with agenda-setting or leadership power, Riker notes there is still heresthetical opportunity for any ‘creative’ actor. As he argues, “Those who expect their preferred alternative to lose initially may introduce new alternatives, even as mere participants and not leaders” (1983, 64). The intuition behind this strategy is twofold: 1. the new issue splits the current majority, moving the current minority to majority status, or 2. the new alternative offered is potentially better for the player who offered it than is the most popular alternative currently on the agenda. Thus, Riker notes that if at least some of those who support the most popular choice are willing to switch to the

\textsuperscript{3}Note, however, that because these issues were previously briefed and because a justice places it in the legal record, such resuscitation does not violate the norm that keeps the Court from deciding issues *sua sponte* (see e.g., Epstein, Segal and Johnson (1996)).
new alternative then there is a better chance of defeating the outcome the proposing player least prefers. In his own non-empirical work, Riker draws from the annals of history to provide several examples of heresthetical issue addition. He finds the addition of “dimensions of judgment” in the debate over the Seventeenth Amendment as well as in the Lincoln-Douglas debates (Riker 1986). In the latter example, Lincoln’s tactic, when he posed his famous question to Douglas about slavery in new territories, added a new dimension to their debate. Douglas’ answer, in turn (to the delight of Lincoln), drove away some of Douglas’ supporters.

While a handful of studies systematically test other components of Riker’s theory, such as manipulating voting order (Johnson, Spriggs and Wahlbeck 2005) and casting strategic votes (Calvert and Fenno 1994), only one study systematically tests whether political actors heresthetically add issues to the agenda. Black, Schutte and Johnson (2013) find that by raising threshold issues during oral arguments minority coalition justices raise the probability of a case being dismissed as improvidently granted (DIG). In turn, a DIG effectively preserves the status quo, thereby avoiding a less-preferred majority outcome. The difference between our work compared to Black, Schutte, and Johnson’s analysis is that they focus on how adding an issue can be used to stop the Court from reaching the merits of a case while we argue issues may be added in an attempt to change the focus of debate. That said, their work is instructive for ours as we turn next to examining how justices might engage in heresthetical issue resuscitation at a key point during the Court’s decision making process: the oral arguments heard in each case.

**Issue Resuscitation, Heresthetics, and Oral Arguments**

Oral arguments are the only recurring and formalized opportunity justices have to directly interact with litigants’ attorneys. These sessions take place after the parties have submitted their written briefs but before the Court meets to cast initial votes on the merits at conference. As such, the oral arguments provide a unique opportunity for justices to resuscitate issues that have been suppressed from the case record. Three extant findings support this claim.
First, research provides systematic evidence that oral arguments generally play an informational role in the Supreme Court’s decision-making process (Wasby, D’Amato and Metrailer 1976; Johnson 2001, 2004). Other scholars substantiate these findings through detailed analyses of specific cases or issue areas (see, e.g., Wasby, D’Amato and Metrailer 1976; Cohen 1978; Benoit 1989). Systematically, Johnson (2001, 2004) shows the types of information justices garner during oral arguments help them set policy as close as possible to their preferred outcomes. Second, these proceedings provide an excellent venue for justices to raise issues that may have been suppressed at the cert. stage. Indeed, Johnson (2001, 2004) finds a high percentage of issues discussed during oral arguments do not originate in the litigant briefs but rather are placed on the record during these proceedings. For our purposes, this means that if an issue has been suppressed at the agenda setting stage, justices have a clear opportunity to resuscitate it during the conversation with the attorneys.

Finally, scholars have known for some time that justices use oral arguments as a strategic tool (Wasby, D’Amato and Metrailer 1976; Johnson 2001, 2004). Specifically, during these proceedings justices signal one another about issues important to them, take note of their colleagues’ questions and comments, and use the information they garner when building coalitions (Johnson 2004; Black, Johnson and Wedeking 2012). Our point is that if justices listen to one another and often act on what they hear during the coalition formation process, then oral arguments provide an excellent venue for justices to engage in heresthetical issue resuscitation.

Hypotheses

Combined, the previous sections indicate that, because issues may be fluid between the cert. and merits stages, justices have an opportunity to heresthetically place issues back on the agenda during oral arguments in an attempt to change the policy focus of a case. But when are justices most likely to take this tack? Here, we posit three main hypotheses to explain when this phenomenon will occur. First, a justice will base her decision to resuscitate an issue by considering the number of issues already available to her. When policy space is
ample because the Court was generous in its cert.-order, a justice can strategically maneuver without needing to heresthetically add alternatives to the agenda. If, however, the Court uses its cert.iorari process to limit questions presented – and therefore reduce the policy space available – a justice is more likely to engage in issue resuscitation as she has less room to strategically maneuver. This idea flows from McGuire and Palmer (1995) as they propose the Court is more likely to engage in issue discovery when fewer questions are granted. Similarly, we propose:

**H₁ Policy Space Hypothesis:** A justice is more (less) likely to resuscitate suppressed issues as the available policy space, i.e. number of questions granted at the cert. stage, decreases (increases).

Second, a justice will base her decision to resuscitate on whether the outcome is likely to receive majority support on the merits. If she anticipates her preferred outcome will prevail in the end then she has no need to resuscitate an issue. Alternatively, if her preferred outcome is likely to lose by a large margin this strategy may not be an intuitive one for her to follow. More specifically, if a justice is ideologically close to her colleagues she knows the legal outcome of the case will likely resemble her preferred outcome, especially as the ideological distance between her and the Court’s median justice decreases.⁴ We expect a justice in this position to simply focus on the issues before the Court and to not resuscitate a suppressed issue during oral arguments. On the other hand, when a justice is ideologically distant from the Court’s median, no matter the issue on which the Court will decide, her position will most likely not be the majority view. In this instance she may be less likely to waste her time with heresthetical maneuvers during oral arguments. Rather, she will move beyond these maneuvers as her time is probably best spent raising questions that will poke holes in the issues currently before the Court.⁵

⁴Following Spriggs and Hansford (2001) we assume policy will be set at the Court’s median.

⁵These questions, in turn, may be used as the basis for dissent. While this is certainly speculative, it is an intuitive argument.
However, when a justice is neither too close nor too far from the median justice, she may see an opening that will allow her to capture a majority coalition. Indeed, she may be able to pull the median towards her by resuscitating an issue that had been suppressed on *cert.*. In particular, she will use this strategy in an effort to change the focus of the case to a more preferable (and likely) outcome. This leads us to predict that a justice’s ideological distance from the median justice acts in a curvilinear fashion:

\[ \text{H}_2 \text{ Distance From the Median Hypothesis: Moderate justices are more likely to resuscitate suppressed issues than justices who are ideologically closest or farthest from the median justice.} \]

Finally, we posit the ideological makeup of the Court may affect a justice’s decision to heresthetically resuscitate an issue. Specifically, if a justice predicts she is *de facto* a usual member of the minority coalition she may use issue resuscitation to help reach more desirable outcomes. Due to the ideological make-up of the Court in our sample of cases, a liberal justice faces a potential conservative majority in every case. Given this default minority status, liberal justices are also more apt to heresthetically resuscitate suppressed issues.\(^6\) Thus, we hypothesize:

\[ \text{H}_3 \text{ Liberal Justice Hypothesis: Due to a conservative majority during the Rehnquist and Roberts Court eras, liberal justices will be more likely to resuscitate issues during oral arguments.} \]

**Data and Method**

We test our hypotheses on all cases decided from 2002-2010 where the Court suppressed at least one issue at the *cert.* stage.\(^7\) To make this determination we searched

\(^6\)Of course this hypothesis is contingent on the make-up of the current Court. For example, we would expect more conservative justices to use this strategy during the Warren Court Era.

\(^7\)We used 2005-2009 to ensure compatibility with (Krog and McGuire 2011) and then added the additional terms to expand the number of observations.
Lexis/Nexis for cases granted *cert.* on a limited review. We then used Lexis/Nexis or Westlaw to obtain the petitioner’s *cert.* briefs and the oral argument transcripts for each case.

With *cert.* petitions and *cert.* orders in hand, we content analyzed each oral argument transcript to assess whether an issue suppressed by a *cert.* order was resuscitated during oral arguments. Because transcripts for our sample period are voice-identified, the unit of analysis is each individual justice’s behavior. This means that for each case in our sample there are nine observations (or eight in cases heard without a full Court). In particular, we coded our dependent variable, *Issue Resuscitation* as 1 when a justice asks a question about a suppressed issue and 0 otherwise.

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8For example, even though the brief for Tennessee raised two questions in *Tennessee v. George Lane et al.* (2004) the Court granted review for only the first. Its order granting *cert.* read, “Petition for writ of cert.iorari to the United States Court of Appeals for the Sixth Circuit granted limited to Question 1 presented by the petition.”

9We excluded three classes of cases: capital cases not presenting a statutory or constitutional issue, cases where the Court’s *cert.* order functioned to clarify (rather than to limit) the questions presented, and cases where no oral argument transcript was available.

10For example, in *Scheidler v. NOW* (2002), the Court’s *cert.* order suppressed Question 3, the only question dealing with First Amendment rights. We therefore content analyzed the oral argument transcript for any mention of such rights. In so doing we found discussion by three justices, including this comment from Justice Souter, “Well, maybe it is, but I think, among other things, I think we are and should be concerned about the First Amendment issues which arise when you cross the line into liberty...”

11Note that we also kept a count of the number of times each justice raises a suppressed issue. For now, however, we utilize the more blunt instrument of simply whether a justice raises the issue at all. In future iterations we may analyze the amount of time a justice spends on these issues.
logistic regression model.

**Independent Variables**

To test our first hypothesis, we include one variable, *Questions Granted*. This variable is calculated by subtracting the number of questions suppressed from the number of questions presented by the parties. Coding in this fashion – rather than by simply counting the number of questions granted on the Court’s *cert.* order – also allows us to capture the occurrence of mandated questions. Specifically, in 12% of our sample, the Court grants none of the questions presented by the parties and instead orders the parties to brief a question manufactured by the justices (or presumably by the subset of justices who voted to grant *cert.*).

To test our ideological distance hypothesis we include two variables, *Distance from Median* and *Distance from Median Squared*. That is, we calculate *distance* as the absolute value of the distance between each justice’s dynamic ideal-point estimate and the median justice’s ideal-point using Martin and Quinn (2002) scores. We also include a squared term to test for the non-linear effect of distance. As our hypothesis suggests, we expect a positive relationship between *Distance from Median* and issue resuscitation. The squared term, then, allows us to test the hypothesis that some justices may be far enough from the median that heresthetic maneuvers may be less appealing to them than would be writing a dissent based on the arguments presently before the Court. This is consistent with existing literature (see e.g., Johnson, Spriggs and Wahlbeck (2005); Black, Schutte and Johnson (2013)). We therefore expect the coefficient for *Distance from Median Squared* to be negative.

To test our ideology-based hypothesis, namely whether liberal justices on a conservative court are more likely to resuscitate issues, we also include *Ideology* which is each justice’s

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12*Such an instance is therefore coded as 0 for two reasons: 1. technically none of the issues presented were granted; and 2. we believe this coding scheme best represents this situation as the least appealing for a justice in the *de facto* minority.*
Martin-Quinn score. Note that although both this variable and the distance-based variables rely on Martin-Quinn scores, they are theoretically and methodologically distinct. The ideological distance variables are meant to determine a justice’s distance from the median while this variable simply measures a justice’s liberalism relative to her colleagues.

We also account for case level factors that may affect whether a justice engages in issue resuscitation. First, justices clearly have more opportunity to resuscitate if they speak more during oral arguments. As such we include a measure of Verbosity by taking the natural log of the number of questions asked by each justice in each case.\textsuperscript{13} To determine whether justices are more likely to resuscitate in specific issue areas, we also include a dummy variable to distinguish Civil Liberties cases from other issue types. We code civil liberties cases 1 and all others 0.

Because justices may not want to add issues to an already complex case, we include a measure of Complexity which is a count of all amicus briefs filed in a case Collins (2008). The intuition is that as the number of filed briefs increases the Court has more issues to consider. This, in turn, makes may make the case more complex and justices may not want to consider more than the issues before them. Finally, we include a measure of Case Salience by creating a dummy variable that equals 1 if a case appeared in the New York Times between the date the Court granted cert. and when the justices heard oral arguments.\textsuperscript{14}

\textsuperscript{13}We use the natural log to account for the fact that the difference between asking 2 and 3 questions is more consequential than the difference between asking 24 and 25 questions.

\textsuperscript{14}We derive this measure in the same way as Epstein and Segal (2000) did, with two differences. First, we constrain our search to post cert.-grant and pre-oral argument articles so that we have a measure contemporaneous to our phenomenon of interest – namely issue resuscitation during oral arguments. Second, in contrast to Epstein and Segal, who only count front-page stories, we count any story with the exception of Court term previews. This is consistent with more recent manifestations of the Epstein/Segal measure (see e.g., Collins and Cooper (2011).
Results

Table 1 depicts the parameter estimates of our analysis. Overall, the model performs well and provides solid support for all of our hypotheses. Simply put, there are clear relationships between heresthetical behavior and our case-level and justice-level hypotheses. However, because it is difficult to interpret the exact nature of the effects with the coefficients in a logistic regression, we turn to a visual depiction of our substantive results.

As we predicted, when justices are more constrained due to a lack of available policy space, they are also more likely to attempt heresthetical maneuvers. Indeed, note the clear negative slope in Figure 1, indicating such a relationship. We plot Questions Presented on the x-axis and the probability a justice resuscitates a suppressed issue on the y-axis. The solid line represents the probability a justice will engage in heresthetical behavior and the dashed lines represent the 95 percent confidence intervals. When the sample maximum questions are granted at certiorari – 3 – the probability a justice will try to resuscitate a suppressed issue is a mere 0.04 [-0.01, 0.1]. This probability increases sevenfold to 0.28 [0.16, 0.4] in the most constrained condition of zero petitioner questions granted. The take away from this point is that justices who believe the policy space has been too constrained to help them reach their most preferred outcome in a case will simply expand the space by reintroducing issues during the oral arguments. In turn, because these issues become part of the case record, the justices may rule on them without violating the norm against deciding sua sponte.

Recall that we code number of petitioner questions granted, so cases coded as 0 are ones in which the Court stipulated the specific issues to be argued.
Next, recall our prediction of a curvilinear effect for *Distance from the Median*. Figure 2 provides support for the idea that justices who are neither too close to, nor too far from, the Court median have the highest probability of resuscitating a suppressed issue during oral arguments. Moving from a justice closest to the median (lowest ideological distance) to a justice farthest from the median (highest ideological distance) yields an 87% relative decrease in the probability of resuscitation (i.e., 0.08 to 0.01). More importantly, a moderate justice (the apex of the curve) represents a 100% relative increase over a justice closest to the median (i.e., 0.08 v 0.16), and a 16 fold relative increase over justices who are ideologically extreme (i.e., 0.01 v 0.16).

[Figure 2 about here]

Turning to our *Liberal Justice* hypothesis, we find liberal justices during the Rehnquist and Roberts Court eras are significantly more likely to invoke the heresthetical tactic of issue resuscitation than are their conservative colleagues. Specifically, Figure 2 provides evidence of this substantive effect. Recall that we use Martin and Quinn (2002) scores to estimate ideology; liberal justices have negative values and conservative justices have assigned positive values. Moving from the most liberal to the most conservative justice yields a 64% decrease in the likelihood that resuscitation will occur (i.e. 0.25 v 0.09). In short, the most liberal justices are 2.7 times more likely to resuscitate issues than are the most conservative justices.

[Figure 3 about here]

Beyond our expected findings, several of our control variables affect whether a justice engages in issue resuscitation. First, justices who ask more questions have a higher probability of resuscitating suppressed issues.\(^\text{16}\) This is unsurprising as justices who speak more

\(^{16}\)Note that because we coded our dependent variable at the question-level (and not the word-level), we control for *Verbosity* at the question-level. This variable therefore only accounts for the number of times a justice speaks, not how much she speaks during each turn.
simply have more chances to resuscitate a suppressed issue. In addition, justices are clearly less likely to resuscitate issues in *Civil Liberties* cases. Holding all else equal, a justice has only a 0.10 [0.05, 0.14] probability of resuscitating issues in a civil liberties case. Released from the heightened scrutiny that often surrounds civil liberties cases, this probability increases to a 0.17 [0.15, 0.19] probability in non-civil rights cases. Note, finally, that we fail to find any effect for *Complexity*, or *Case Salience*.

Discussion

There are clearly conditions under which justices seek to place issues back on the legal record that have been quashed earlier in the decision making process. That said, despite the justices’ best efforts, heresthetically resuscitating suppressed issues during oral arguments is almost never successful. In our sample there are only 3 cases where resuscitated issues eventually make it to the merits stage: *Kennedy v. DuPont Savings, Dada v. Mukasey*, and *Global Crossing Telecommunications v. Metrophones Telecommunications*. In the first two cases, the Court ordered additional briefing on the suppressed questions and ultimately made decisions on them. The latter case ‘made it’ only in so much as the issues resuscitated during oral arguments were actually refuted by the majority opinion. Although this poor track record does not necessarily negate the rationality of resuscitating issues during oral argument it does uncover a rather unsavory aspect of the Court’s behavior: the one way to really bury an issue is to kill it at the *cert.* stage. Indeed, even giving the issue CPR during oral arguments is not enough to save it.

The question, then, is whether understanding the strategy of issue resuscitation is important if it is almost never successful as a practical matter. We argue it is. Indeed, this phenomenon is a story of judicial behavior and strategy that stands independent of the maneuver’s success. As we note in the introduction, resuscitation is far more common than indicated by the justices’ reactions during *Kennedy v. DuPont Savings*, and more important than its commonality, are the specific justice-level features that affect the probability of this heresthetical maneuvering. When a justice is constrained by a lack of policy space within
which to work, when she is in an ideological sweet-spot where she is neither too close to
nor too far from the median, and when she predicts losing based on being in a de facto
minority, a justice is more likely to raise additional alternatives by attempting to resuscitate
dead issues. Taken together, these findings demonstrate justices will try to change the policy
space available to them even if exerting such an effort is largely unsuccessful. This speaks
to the idea that justices will act strategically in many ways to try to secure an outcome
favorable to them.

Beyond the substantive implications of our findings, we also add to several bod-
ies of literature. To begin, we situate issue resuscitation within traditional issue fluidity
scholarship, adding to the extant “discovery” and “suppression” categories. As issues are
transformed between the cert. and merits stages we demonstrate that once suppressed does
not mean always suppressed. This, in turn, suggests fluidity may be more complex than
originally conceptualized. We also provide further evidence that justices are strategic ac-
tors who work within institutional constraints to pursue policy outcomes. In particular, a
strategic justice may add alternatives to the record in order to avoid a suboptimal outcome;
doing so via issue resuscitation avoids violating the Court’s norm against deciding issues
sua sponte. At the same time we add to existing oral argument literature by demonstrating
justices use these proceedings to help them pursue outcomes they desire. While Kennedy v.
DuPont Savings provides fitting anecdotal evidence, our work systematically accounts for
such behavior.

Most generally, our empirical analysis supports Riker’s theory of heresthetics. Be-
cause Riker’s work was largely anecdotal our systematic approach lends evidence to Epstein
and Shvetsova’s (2002) claim that the Supreme Court is a body ripe for heresthetical ma-
neuvering. Indeed, we show that, by resuscitating suppressed issues during oral arguments,
justices do behave as herestheticians when there is a good probability they will lose. This
comports with Riker’s theory that political actors’ behavior is not stochastic – it is instead
conditioned on specific circumstances, including when an actor believes he will not achieve
his preferred policy and when he believes issue resuscitation will be beneficial for him where he seeks to place policy.
References


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<td>Verbosity</td>
<td>0.701**</td>
<td>0.138</td>
</tr>
<tr>
<td>Civil Liberties Case</td>
<td>-0.180**</td>
<td>0.193</td>
</tr>
<tr>
<td>Case Complexity</td>
<td>0.003</td>
<td>0.017</td>
</tr>
<tr>
<td>Case Salience</td>
<td>-0.036</td>
<td>0.255</td>
</tr>
<tr>
<td>Intercept</td>
<td>-3.469**</td>
<td>0.249</td>
</tr>
</tbody>
</table>

N: 574
Log-likelihood: -207.252
$\chi^2_{(8)}$: 322.44

Table 1: Logistic regression of a justice’s decision to resuscitate a suppressed issue during oral arguments. Robust standard errors clustered on justice. Significance levels (two-tailed test): †: 10% *: 5% **: 1%
Figure 1: Predicted probability a justice resuscitates a suppressed issue conditional on number of questions granted at *certiorari*. All other variables are held at modal or median values. The dashed lines represent the 95 percent confidence intervals for the predicted value.
Figure 2: Predicted probability a justice resuscitates a suppressed issue conditional on ideological distance from the median justice. All other variables are held at modal or median values. The dashed lines represent the 95 percent confidence intervals for the predicted value.
Figure 3: Predicted probability a justice resuscitates a suppressed issue conditional on ideology. We use Martin and Quinn (2002) ideal-point estimates, where liberal justices take on negative values, and conservative justices take on positive values. All other variables are held at modal or median values. The dashed lines represent the 95 percent confidence intervals for the predicted value.