Testing Legislative Deferral

ABORTION POLICY MAKING IN NEW YORK, 1970–2010

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ABSTRACT

The legislative deferral hypothesis posits that elected policy makers, anxious to avoid the political repercussions of taking clear positions on controversial issues, will actively seek to involve the judiciary in resolving these disputes. This study seeks to further test the legislative deferral theory by considering its applicability to the state level. What is revealed from an examination of the development of abortion policy in New York is that, despite the controversial nature of the issue, lawmakers did not seem to attempt to involve the courts in its resolution, and virtually no policy was created by the state's judicial branch. I propose an alternative explanation for judicial noninvolvement, borrowing from path-dependence theory, that emphasizes the importance of the initial location of policy change and the issue frames that first took hold around this issue.

In 1970, New York State passed a sweeping abortion reform law that legalized the procedure essentially at the discretion of the woman up to the twenty-fourth week of pregnancy, representing one of the most liberal measures passed by any state in the pre–*Roe v. Wade* era. What is perhaps more remarkable than the scope of the legislation, however, is that it came at a time when neither the Democrats nor the Republicans in the state assembly and senate were unified in their position on abortion. By the same token, public opinion on the issue was bitterly divided, and lobbying efforts on both sides of the question were intense. As the roll call of the vote was being announced in the state's lower house, conservative Democrat George Michaels interrupted the count to announce that "I fully appreciate that this is the termination of my political career, but Mr. Speaker, I must have some peace in my family. And I therefore request you, Mr. Speaker, to change my negative vote to an affirmative vote" (Saxon 1992). All the while, a case challenging the constitutionality of New York's abortion ban, *Hall v. Lefkowitz* (305 F. Supp. 1030 [S.D.N.Y. 1969]), was making its way through federal court, with the potential to render the entire liberalization effort a moot point. Why, then, when facing so many political obstacles, did lawmakers choose to act on such a highly controversial piece of legislation?

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Indeed, abortion policy as it exists today in New York is almost entirely the result of policy choices made by elected officials in the legislative and executive branches, with the courts never meaningfully altering these decisions. This is in contrast to the treatment of this same issue at the federal level, where landmark decisions such as *Roe*, *Planned Parenthood v. Casey*, *Stenberg v. Carhart*, and a host of other rulings variously struck down or upheld restrictions on abortion. While legislation treating abortion has been passed by Congress, most notably in the form of the Hyde Amendment, which bans most federal funding for the procedure, and the Partial-Birth Abortion Ban Act signed by President Bush in 2003, it seems fair to say that most federal policy making treating reproductive rights has been located in the judicial branch.

A robust role for the courts fits well with the predictions of the legislative deferral model. This hypothesis was first developed by Mark Graber in his seminal 1993 piece addressing the countermajoritarian difficulty, and it has been subsequently developed by Lovell (2003) and Whittington (2007), although all of them share several key assumptions. Perhaps the most important of these is that lawmakers seeking to avoid the political consequences of legislating on controversial issues will seek the intervention of courts, owing to the electoral unaccountability of the latter. Indeed, Lovell (2003, xx) writes that "deferrals occur in some very important and highly contested policy areas . . . [and that] legislators are quite likely to have both motive and opportunity to defer to the courts." Graber (1993, 58), quoting one member of the Ohio House of Representatives, observes that that body comprised "ten strong pro-choice people, ten strong pro-life, and 79 legislators who would rather the issue would go away." These versions of the legislative deferral theory all suggest a normative component as well, arguing that the countermajoritarian difficulty is in fact something of an illusion, as elected lawmakers themselves are the source of much judicial authority.

What the case study presented in this article reveals is that, despite the presence of virtually all of the conditions Graber, Lovell, and Whittington lay out as most likely to result in legislative deferrals, this behavior is entirely absent from the development of abortion policy in New York. Specifically, Graber identifies three circumstances that are likely to produce this phenomenon: (1) when a stalemate has been reached within the other branches of government over an issue, (2) when issues divide parties or dominant national coalitions internally, and (3) when no clear public consensus is present around a specific controversy. Briefly stated, Graber (1993, 36) argues that "the justices have most often exercised their power to declare state and federal practices unconstitutional only when the dominant national coalition is unable or unwilling to settle some public dispute. The justices in these circumstances do not merely fill a void created by the legislative failure to choose between competing political proposals. On the contrary, prominent elected officials consciously invite the judiciary to resolve those political controversies that they cannot or would rather not address."

To understand this disconnect between the theoretical predictions of the legislative deferral hypothesis and the observed process of abortion policy making in New York, I pro-

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pose an alternative framework to address why deferral behavior on the part of lawmakers was absent in this case and, related to this, why the courts were seemingly so reluctant to engage meaningfully in the abortion debate. Briefly stated, I argue that, particularly in cases in which policy change is novel or has been dormant for a considerable length of time, the institutional location of decision making will be significantly influenced by the branch of government that first initiates that change. Furthermore, that institution will tend to persist as the primary venue for further development of policy in a given issue area. The theory on offer here emphasizes that the mechanism driving this institutional persistence is something akin to a path-dependent process, although instead of being driven by a pattern of increasing returns, it is the rhetorical framing of issues that becomes entrenched, resulting in the predominance of either a "legal" or a "political" institution. Finally, the framework proposed here, drawing primarily on the work of Mahoney (2000) and Pierson (2000, 2004) in the path-dependence tradition and Brandwein (2011) and Novkov (2011) in the area of law and American political development, assumes that certain institutions will tend to use frames that are inherent to their mandates—either policy oriented or legally oriented—unless they are influenced by the previous involvement of another institution in a particular issue area.

I begin with an overview of the relevant literature, focusing particular attention on past work treating interbranch relations and the separation of powers, as well as situating the present study within previous scholarship. I then offer a considerably more detailed description of the theoretical framework proposed here, in addition to a discussion of some of the major works from which it draws and the methodology used in the main case study. The final two sections provide an overview of the development of abortion policy in New York, with a particular focus on the roles played by the courts and lawmakers, as well as a discussion of the implications of this case study for the theoretical approach on offer here.

SITUATING THE PRESENT STUDY

The legislative deferral hypothesis, although speaking to a number to areas within the law and courts subfield and, to a lesser extent, legislative decision making, is perhaps best understood as a theory situated in the wider literature treating interbranch relations. Approaches seeking to account for and explain the behavior of judges through this lens loosely fall into two main categories. The first group of scholars working in this area posit that many of the decisions reached by the US Supreme Court are best understood as strategic choices by the justices who seek to advance their policy preferences but are constrained by those of the elected branches (see, among others, Murphy 1962; Clinton 1994; Ignagni and Meernik 1994; Knight and Epstein 1998; Hansford and Damore 2000; Vanberg 2001). Other proponents of the separation of powers model tend to conceptualize the Court/Congress relationship as one in which the policy preferences of the members of each body are aligned on a left-right spectrum that defines the range of possible choices available to the Court (Rosenberg 1992; Epstein, Knight, and Martin

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2001; Bergara, Richman, and Spiller 2003; Harvey and Friedman 2006). Finally, some researchers (Murphy 1964; Rosenberg 1992; Segal and Westerland 2005; Chutkow 2008) have focused on the institutional features Congress can use to dissuade the Supreme Court from challenging its enactments.

A second account of the separation of powers model can be found in the legislative deferral hypothesis. Rather than focusing on the ability of Supreme Court justices to ignore the policy preferences of Congress or the president, proponents of this approach argue that the tension between the legislative and judicial branches is often overstated and that, at least in some cases, the two institutions will act in cooperation. Indeed, Lovell, Graber, and Whittington largely reject the assumption shared by both the advocates of the separation of powers and attitudinal approaches that courts and elected officials rarely share the same policy goals. Instead, the legislative deferral theory posits that lawmakers will often empower judges in order to serve either their own electoral interests or to avoid internal discord among political parties or governing coalitions.

The theory proposed in this work shares with the legislative deferral approach a skeptical view of the separation of powers idea that the relationship between courts and elected officials is best understood as conflictual. Indeed, as with this model, the approach described here sees courts and lawmakers as often acting cooperatively, although the mechanism driving this cooperation differs from that described by Graber, Lovell, and Whittington. Rather than simply responding to invitations from the elected branches to create or clarify policy, I propose that courts will become more or less engaged in policy formulation depending to a large extent both on their own actions and on those of the legislature. At the same time, lawmakers will tend to be more or less involved in policy development depending on the order of institutional involvement and the terms of debate surrounding an issue. In other words, the timing of a particular institution's involvement in the policy-making process, coupled with the framing choices made by actors within each branch, seems to offer a better account of the abortion case in New York described below. In this regard, the theory proposed here is perhaps best understood as a refinement of the legislative deferral model in that it accepts the core element of this approach—that courts and legislatures tend to act cooperatively rather than competitively—although conceptualizing this relationship as an ongoing dialogue between these branches rather than simply one of courts responding to invitations from lawmakers to create policy in areas that may be politically inconvenient.

THEORY AND METHODS

The case study presented here indicates that several factors relevant to the institutional location of decision making are neglected by the proponents of the deferral model. Specifically, the timing of institutional involvement and the framing of the abortion question by the relevant decision makers in the state as a political rather than legal issue resulted in a diminished role for the courts and the predominance of the elected branches. The theo-

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retical framework presented here, therefore, draws on two main traditions. The first borrows from some of the predictions and assumptions of path dependence, while the second integrates ideas and understandings found in recent work in law and American political development, particularly that of Brandwein (2011) and Novkov (2011).

In terms of the former, policy development took place during two distinct phases; the first represented the initiation of one path among several choices, while the second was characterized by a series of subsequent decisions that further reinforced that institutional path. This series is similar in many respects to what Mahoney (2000, 509) calls a *reactive sequence* that seeks to identify "chains of temporally ordered and causally connected events." The theoretical framework proposed here is not, however, purely path dependent in the traditional sense. Unlike this approach as described by North (1990), Pierson (2000, 2004), Hathaway (2001), and Smith (2008), the focus is not primarily on the phenomenon of increasing returns but rather on the establishment and entrenchment of frames and patterns of discourse surrounding how an issue, in this case abortion, is understood.[1]

The second aspect of the theory described here is developed from Brandwein's (2011) argument regarding the inseparability of ideas and institutions and Novkov's (2011) concept of "legal archaeology." As Brandwein (2011, 190) puts it, "Stable sets of ideas are inherent to mandates and hence to institutions." Related to this is legal archeology's focus on "the flow of discursive framings of ideological commitments from legal language to political and cultural discourse and vice versa" (Novkov 2011, 356). The synthesis of these concepts yields an approach in which institutional first movement—in this case, the legislature's preemption of the abortion question from the courts—resulted in that issue being framed by both judges as well as elected officials as something best resolved by the latter. In other words, the rhetorical norms and ideas that constitute the mandate of legislatures came to dominate the abortion debate in New York, leading to the maintenance of that institution as the predominant location of decision making.

In terms of the methodological approach of the foregoing case study, I employ a form of process tracing that identifies an initial important event, followed by a consideration of how subsequent events were shaped by the qualities of this antecedent development. More formally, process tracing as it is understood here is defined as "an analytic tool for drawing descriptive and causal inferences from diagnostic pieces of evidence—often understood as part of a temporal sequence of events or phenomena" (Collier 2011, 824). Within the

1. The idea that norms may be responsive to path-dependent pressures is not entirely new (see Greif 1994; Acharya 2004; Paul 2008), although the focus here has tended to be on culture rather than ideas or issue frames. Similarly, Barnes and Burke's (2015) recent book posits that path-dependent features can be found to operate across and between branches of government, a phenomenon similar to that observed in this study.

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broad umbrella of process tracing is also found what Collier (2011) refers to as "recurring empirical regularities." Borrowing from Waltz, Collier describes this approach as concerned "not simply [with identifying] . . . a relationship that has been found, but . . . one that has been found repeatedly" (824). The proceeding analysis reveals that there is indeed a clearly identifiable relationship between both the language employed by the courts and the elected branches when treating the abortion question as well as the institution primarily responsible for policy change.

Identifying how and when a particular issue frame becomes adopted by institutional actors is therefore critical to the argument offered here. Brandwein (2006, 235) proposes several guidelines for making such a determination, including "isolat[ing] the underlying interpretive framework . . . explain[ing] how it enables and constrains meaning . . . [and] link[ing] the underlying framework to its sponsoring interpretive community." In addition, a knowledge claim is said to "win" when subsequent adherents refer to it in reduced form, while a "losing" claim is likely to be defended with more zeal (234, 235). Interpretive communities here are defined as the separate branches of government, and their particular view of the abortion question can be found in their written opinions or public statements.

The material from which the information included in this study was identified comes from three primary sources. The first consisted of a keyword search of archived articles from the *New York Times* between 1970 and 2010 through the ProQuest Historical Newspapers database using the terms "abortion" and "New York." Additionally, a search of the same terms was conducted among all published opinions from the New York State Court of Appeals, the Second Circuit Court of Appeals, and the US Supreme Court over the same 40-year period using the LexisNexis Legal database. Where an instance was found of a gubernatorial veto of bills passed by the state senate and assembly, the full accompanying message was also included. Finally, assembly floor debates concerning important pieces of abortion legislation were obtained from the New York State Assembly Public Information Office.

With these parameters in mind, the theory I propose here can be summarized by two major points: (1) the behavior of courts and lawmakers in a given issue area will be influenced by the ideas and understandings of the institution that first developed policy in that area, and (2) subsequent decisions will tend to reinforce the initial issue conceptualizations established early in the process of policy development. Some elaboration on the level of analysis of the proceeding study is warranted here as well in order to better explain the theory on offer. While the legislative deferral hypothesis, particularly as described by Lovell, focuses on the behavior of lawmakers, this study considers the relevant policy-making community to be all three branches of government acting in combination with one another. What this study examines, then, is why one institution was predominant in this issue area rather than another. The answer I propose goes beyond the issue of whether deferral existed and instead focuses on how the timing of institutional involvement, as well as the frames used to debate abortion, made both the legislature less likely to pass

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the issue to the courts and the judiciary more inclined to leave this policy to the elected branches.

TRACING ABORTION POLICY IN NEW YORK

The impetus for the liberalization law that passed the legislature and was signed by Governor Rockefeller in 1970 came largely from the recommendations of the Froessel Committee, which had been appointed by the governor in 1968 to study and offer recommendations regarding the then 140-year-old abortion statute passed in 1830 (Greenhouse and Siegel 2012). Prior to this, reform bills had been introduced in 1967, 1968, and 1969 that would similarly have replaced the antiquated law, although none were ever brought to a floor vote in either chamber. In 1970, though, senate majority leader Earl Brydges, a conservative Republican who opposed the measure, finally did allow a vote to come to the floor on a considerably more liberal version of the legislation that had failed in the late 1960s and that allowed for abortion essentially with no restrictions up to the twenty-fourth week of pregnancy, sponsored by Republican senator D. Clinton Dominick. The final 31–26 vote came as a surprise to many and sent the measure to the assembly, where relatively easy passage was expected (Kovach 1970a). In fact, the vote in the lower house was considerably closer, as well as more dramatic, with conservative Democrat George Michaels changing his vote during the roll call and providing the bill with the necessary majority to be sent to Governor Rockefeller for approval (Kovach 1970b).

Prior to the vote in both chambers, a memo had been circulated by Republican assembly member Constance E. Cook outlining a number of arguments in favor of repeal. Among other things, Cook pointed to the fact that "illegal abortions are the single largest cause of maternal death in the United States. This tragedy is compounded by the fact that virtually no deaths result when an abortion is conducted in accordance with proper medical procedures" (Greenhouse and Siegel 2012, 160). The memo went on to emphasize that African American and Puerto Rican women were disproportionately harmed by the 1830 law and were 5 and 25 times less likely to have the procedure performed in a medical setting than white women, respectively. Finally, much of Cook's argument was devoted to a discussion of the support the abortion liberalization law had among clergy members. The only reference the memo made to a constitutional basis for repeal was a brief mention of the California Supreme Court's ruling in *People v. Belous* (1969), striking down that state's abortion law the previous year.

It is worth noting that prior to the introduction of the bill that would eventually be passed in 1970, a case, *Hall v. Lefkowitz*, had begun working its way through the federal courts in 1969 that challenged New York's abortion law on equal protection grounds and would eventually culminate in the dismissal of a similar case, *Abramowicz v. Lefkowitz*, in 1972 following passage of the liberalization law. Specifically, the brief for plaintiffs argued that such statutes "are both a result and symbol of the unequal treatment of women that exists in this society" (Siegel 2010, 1885). What is perhaps most noteworthy about these

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cases is that they had clearly presented lawmakers in New York with an opportunity to allow the issue to continue working its way through the courts and avoid the abortion issue entirely. Instead, they preempted this process and reformed the state's law themselves, a move that appears clearly at odds with what the legislative deferral model would predict.

Two years after the 1970 bill became law, and following the defeat of several assembly members and senators in the 1972 elections, including George Michaels, the legislature passed a repeal law that was subsequently vetoed by Governor Rockefeller. Just as assembly member Cook's memo had relied on explicitly policy-centered language, the governor's veto message emphasized that "the truth is that a safe abortion would remain the optional choice of the well-to-do woman, while the poor would again be seeking abortions at a grave risk to life in back-room abortion mills" (Greenhouse and Siegel 2012, 160). Rockefeller also expressed doubts about the support the bill enjoyed among New York residents and suggested that passage had been the result of a vocal pro-life minority rather than the larger electorate. Again, virtually no reference was made to the possible constitutional deficiencies of recriminalizing abortion or the right to privacy that would become the rhetorical mainstay of pro-choice advocates following *Roe*.

That same year, pro-life interest groups and political action committees, led by the New York State Right to Life Committee, challenged the state's abortion law in court as a violation of the US and New York Constitutions. The case that eventually made its way to the New York State Court of Appeals began in December 1971 when Robert Byrn, a law professor at Fordham University School of Law, petitioned the Queens County Supreme Court for custody of "Infant Roe," referring to all of the fetuses awaiting an abortion procedure in New York City hospitals. The trial court found in favor of Byrn and ordered a preliminary injunction against all city hospitals from performing abortion procedures, a ruling that was quickly vacated by the intermediate court before being reviewed by the Court of Appeals (Farrell 1972). Ultimately, in *Byrn v. New York City Health & Hospitals Corporation* the state high court ruled 5–2 against the plaintiff, finding that the question of "fetal personhood" was not a legal one but instead belonged in the political arena.

The majority opinion would largely set the tone for subsequent decisions by the Court of Appeals. In it, Judge Breitel wrote that "whether the law should accord legal personality is a policy question which in most instances devolves on the Legislature" (31 N.Y.2d 194 [1972] at 201) and that "there are, then, real issues in this litigation, but they are not legal or justiciable" (203). Judge Jasen's concurring opinion echoes this view in claiming that legal personhood "is a value judgment not committed to the discretion of judges, but reposing instead in the representative branch of government" (205). That same year, the Court of Appeals handed down its decision in *Robin v. Inc. Vil. of Hempstead*, a case challenging an ordinance the village had passed requiring that all abortions be performed in the county's hospital. In ruling against the respondent the court echoed many of the same sentiments it had expressed in *Byrn*, with Judge Fuld writing that "there can be no doubt that the State has reserved to itself reg-

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ulation of the practice of medicine in general and of the performance of abortions in particular. . . . [This] legislative scheme demonstrates the State's purpose and design to pre-empt the subject of abortion legislation and occupy the entire field" (30 N.Y.2d 347 [1972] at 350).[2]

New York legislators did not revisit the issue again until 1976, when a parental consent law was passed by the senate and assembly, although like the repeal bill of 1972, it too was vetoed by the governor (Dullea 1976). Interestingly, the bill was considerably more restrictive than similar legislation passed in other states, as it required not only notification of a minor's parents but also their consent and contained no provisions for a judicial bypass (Dullea 1976). In his veto message, Governor Carey (1976, 456) wrote that the bill was "illusory [and would] not accomplish its stated purpose. On the contrary, it is an attempt to substitute symbolism for a substantial and legally sound treatment of a serious issue." As with Governor Rockefeller's veto 4 years earlier, scant attention was paid to potential legal deficiencies in the law, despite the fact that a similar statute was at that time under review by the US Supreme Court in what would be the *Planned Parenthood v. Danforth* decision, striking down the Missouri law the following month. Perhaps more importantly, Carey's message also devoted considerably less attention to offering a rhetorical defense of the concerns articulated by Rockefeller and Cook, suggesting that the "policy" frame established earlier in the decade was becoming more entrenched.

Floor debates from the assembly leading up to passage of the parental consent requirement similarly demonstrated that lawmakers continued to think in highly political terms. Assembly member Koppell, for example, argued that "when that child is born there is little likelihood in many cases that it will be given a decent education, a decent home and a decent upbringing" (A8836, New York State Assembly, *Record of Proceedings* [June 30, 1976], 8866). In support of the measure, assembly member Schmidt, the bill's main sponsor, followed a policy line of argument common to parental involvement laws, claiming that "it makes no sense under the previous law to require a parent to give his or her consent to a doctor to give a penicillin injection, but yet at the same time require no consent whatsoever for a surgical abortion which could have grave physical and mental consequences" (8881). Echoing many of the policy-centered arguments that had been put forward in 1970, assembly member Siegel expressed concern that "we are going to send them back to the pre-'71 situation, we are going to send them back into the back alley, or they are just going to get on a bus and go to Connecticut, or Pennsylvania, or Vermont, or Massachusetts and obtain these abortions away from the families. . . . [Those] victim-

2. While no court up to that point had ever found a fetal right to life, such a finding was not entirely fanciful. Indeed, the trial court that initially heard Byrn's case did issue an injunction against the liberalization law, and the ultimate Court of Appeals decision was not unanimous, with two of the seven judges authoring dissenting opinions. For a thorough discussion of the possibility of a legal declaration of fetal personhood and the Byrn case in particular, see Price and Keck (2015).

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ized by the bill are the same people who were victims of the State's restrictive attitude prior to 1971, those who were economically unable to travel" (8885, 8886).

Following Brandwein and identifying the use of a previously established frame in reduced form, we also see assembly member Koppell arguing that "Mr. Hevesi pointed out the dangers inherent in forcing those young women to go to a parent. They won't do it. All the things that we all worry about, at least those of us who voted for a liberalized abortion law, will be reality again for those young women" (A8836, New York State Assembly, *Record of Proceedings* [June 30, 1976], 8860). What is notably absent from the 1976 floor debate is a consistent use of any legal frames by members of the assembly. Indeed, during the length of the 118-page record, potential constitutional deficiencies in the parental consent law are mentioned only three times.[3] This is particularly striking given that *Planned Parenthood v. Danforth* (1976) was before the US Supreme Court at the time of the floor debate, concerning a law very similar to that being proposed in New York. This suggests that, even after *Roe* had arguably begun the process of constitutionalizing the debate around abortion, lawmakers in New York continued to frame the issue almost exclusively in policy terms.

The debate over abortion restriction was again revived several years later and became a crucial part of the 1978 and 1979 budget battles in Albany, with lawmakers finding themselves in a stalemate over the issue of Medicaid financing for the procedure. A year earlier, both the Republican and Democratic leadership in the assembly and senate, as well as the governor, had all pledged their support for government funding of abortion before an audience of family planning advocates in the wake of the Hyde Amendment and the ending of federal money for abortion services (Rule 1978). This commitment among the leadership, however, was not able to prevent a deadlock over passage of the 1978 budget as senate Republicans refused to accept the governor's bill without the inclusion of their own amendment banning state aid for abortion. While they were able to delay passage of the budget for several days, the GOP eventually relented and allowed the question to be presented as a separate bill that passed the senate but was defeated by a 78–66 vote in the assembly (Meislin 1978).

As with the parental consent bill, the floor debate regarding the 1978 amendment banning Medicaid financing for abortions is illustrative. Lawmakers here focused almost entirely on fiscal concerns, including a protracted debate regarding residency requirements for the collection of Medicaid. Assembly member Hevesi, for example, stressed the illusory nature of savings from the amendment, stating that "the fact is whatever the savings are, $8 million or $16 million for abortions, if there is a success to the policy underlying this bill, and that is to eliminate abortions and encourage live births, the cost to the State of

3. Assembly member Siegel, for example, referring to *Roe*, argued that this "is very clear law, and I think that on that ground, this legislation is clearly unconstitutional" (8883)—the only reference to the 1973 decision made during the debate.

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New York and locality will double, and triple, and quadruple because of the existing mandates in law" (A12296, New York State Assembly, *Record of Proceedings* [May 9, 1978], 3299). Supporters of the bill also highlighted what can fairly be considered political concerns, with assembly member Bersani arguing that "what we are asked to vote on here tonight is that in view of Congress again and again turning down and saying that 'we will not contribute to Medicaid to pay for abortions,' whether or not the State of New York should take upon itself to fully fund abortions, remembering, of course, the very emotional feeling among many taxpayers in the State as regards to abortions, and whether or not the State of New York should force their local governments to pay" (3294). The potential constitutionality of the Medicaid funding ban was never mentioned during the 1978 floor debate, despite the fact that the US Supreme Court had already issued two rulings related to state funding of abortion by that point in *Beal v. Doe* (1977) and *Maher v. Roe* (1977).

In 1986, Congress passed the Prenatal Care Assistance Program (PCAP), which provided funding for infant care to women at twice the poverty level, on the condition that states pass laws matching the federal requirements. This led to another tumultuous fight in Albany, with the Democratic-controlled assembly refusing to pass a PCAP bill without the inclusion of funding for abortion services, while the Republican-controlled senate similarly blocked any such legislation that did include these funds. The impasse continued for three consecutive legislative sessions, during which PCAP assistance was denied to New York women, until the senate version of the bill was eventually passed in July of 1989 (Hays 1990). Contemporaneous accounts of the eventual resolution of the dispute between the two chambers suggest that the assembly finally agreed to the senate's demand that abortions be excluded from PCAP funding, as it had become clear that the continued denial of these funds was beginning to take a heavy toll on New York women. By the time the bill was passed, the state's infant mortality rate was among the highest in the nation, and child welfare advocates were increasingly pressuring lawmakers to break the impasse and begin allowing eligible women to participate in the program (Gutis 1989). Indeed, Speaker Mel Miller told reporters that "although most of my conference would favor that abortions be paid for under this program, they feel the program is so important that it be approved" (Gutis 1989). It is entirely possible that these Democrats, much as Graber, Lovell, and Whittington might predict, ultimately voted to remove abortion funding from PCAP with the expectation that the denial would be overturned by the courts; however, these hopes would not be realized.

The debate in the assembly on PCAP funding was relatively brief, although it nonetheless reveals that lawmakers in 1989 continued to frame questions related to abortion in policy terms. Assembly member Mayersohn, for instance, expressed concern over the impact of PCAP's lack of abortion funding on the lives of eligible women, stating that "I would like to vote for this bill, it expands medical care; but there is nothing in it for women who desperately need to limit the size of their families so that they can continue their education or they can continue to work to feed their children. . . . I don't want them consigned to a life of poverty and no hope, and I can't vote for a bill that denied these

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women the full range of medical services they so desperately need" (A8836, New York State Assembly, *Record of Proceedings* [June 30, 1989], 395). Assembly member Marshall expressed a similar concern, saying that "I hope this is only the beginning and that we will see here in this Legislature that women in this category receive the full range of benefits, they desperately need them. If we don't, many of them will not be able to survive and sink back on welfare" (393). What is perhaps most relevant about these comments for the theory on offer here is that legislators again seemed to be referring to earlier framing choices in reduced form, stating simply that the absence of abortion financing in PCAP would result in increased poverty.

The program was quickly challenged in court with the petitioner, the New York Civil Liberties Union, carefully basing its argument on the idea that denial of PCAP funds for eligible women violated the Equal Protection Clause of the New York State Constitution in order to forestall any federal involvement. While the law was indeed found to violate the state constitution by the trial and intermediate appellate courts, the New York State Court of Appeals, in an uncharacteristically antiabortion rights decision announced in 1994, vacated the lower court holdings and found the law to be constitutional (*Hope v. Perales*). In handing down its decision, the court held that, because state Medicaid funding was still available for indigent women, the provisions barring PCAP reimbursement for abortion were not discriminatory and, perhaps more interestingly, that it was ultimately up to the legislature to determine where its funds were to go. The appeals court ruling was the final word on the matter, as a federal claim would almost certainly have been futile in the wake of the US Supreme Court's 1977 decision in *Maher v. Roe*, which upheld a similar provision banning Medicaid funding for abortion in Connecticut.

Chief Judge Kaye's opinion for the court in *Hope* is notable in two respects. Perhaps most importantly, it reveals a similar focus on what might be considered "policy" concerns to that described by Judge Breitel in *Byrn*, further reinforcing that issue conceptualization. Specifically, Kaye writes that "the available benefits [under PCAP] are tailored to the statutory objective of combatting the State's 'unacceptably high rate of low birthweight and infant mortality'—reportedly higher than the national average—and increasing healthy births by ensuring adequate prenatal care to pregnant women" (*Hope v. Perales*, 83 N.Y.2d 563 [1994] at 573). The chief judge also evinces adherence to the previously established norm of deference to the choices of the legislature in a reduced form, tersely claiming that "we cannot say beyond a reasonable doubt that, by not including abortion funding in PCAP, the Legislature has transgressed its powers" (578). Suggesting what may be seen as her own reservations about the wisdom of the policy choice itself, Kaye also writes that "it is not the role of the courts to pass upon the wisdom of the Legislature's policy choice, even though there may be differences of views about the decision to exclude a medically necessary service from an otherwise comprehensive prenatal care program" (575).

The court's decision in *Hope* is somewhat unique in the national context inasmuch as it upheld an abortion funding ban that went beyond Medicaid, which has been the focus of

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the vast majority of litigation in state courts in this area.[4] Some comparisons may be made, though, with the Oregon Supreme Court's decision in *Planned Parenthood v. Department of Human Resources* (1984), a case that involved a challenge to an Adult and Family Services Division rule limiting the number of abortions eligible for state funding to one for women older than 18 and two for those 17 and under. As with the PCAP legislation, it seems that this directive was the result of a compromise between pro- and antiabortion rights advocates within the state government, with the court writing that "[the policy] was motivated by pressure from persons concerned solely with opposition to abortion itself, and not any other state interests. The compromise that ultimately was struck and which evolved into the rule challenged in this case is a direct result of the anti-abortion sentiments of several members of the Emergency Board" (*Planned Parenthood v. Department of Human Resources*, 687 P.2d 785 [1984] at 789). Nevertheless, the court struck the rule down as inconsistent with the enabling legislation, suggesting that, at least in this case, state courts were not always willing to defer to the other branches in the case of abortion restrictions, even when public funds were not directly threatened.

In any event, the arguments put forward by both sides in *Hope* were quite similar to those used by supporters and opponents of Medicaid abortion funding bans in a number of other states. The majority, for instance, points out that "[plaintiffs] urge, however, that by failing to include abortions among PCAP entitlements, the statute creates an impermissible inducement for women to carry their pregnancies to term and relinquish their fundamental right of choice" (*Hope*, 83 N.Y.2d 563 [1994] at 575). In considering a challenge to Arizona's ban on Medicaid financing for abortions, the court there echoed a similar sentiment in striking the limit down, writing that "the state is not simply influencing a woman's choice but actually conferring the privilege of treatment on one class and withholding it from another" (*Simat Corp. v. Healthcare Cost Containment System*, No. CV-01-0324-PR [2002] at 34). The Supreme Court of Texas also considered this argument, rejecting the claim that "by paying medical expenses for childbirth but not for medically necessary abortions, [plaintiffs] argue, the State effectively coerces a woman's decision whether to terminate or continue a pregnancy" (*Bell v. Low Income Women of Texas*, 95 S.W.3d 253 [2001] at 264). The point here is that the New York Court of Appeals would have been well within the mainstream of other state high courts whether it had chosen to strike down or uphold the PCAP restriction.

Despite his sometimes unpredictable views on abortion, Governor Pataki did in 1998 support legislation that would mirror federal laws banning the harassment of abortion doctors and women attempting to enter abortion clinics, providing for up to 4 years in prison

4. See, e.g., *State of Alaska v. Planned Parenthood of Alaska* (2001), *Women of the State of Minnesota v. Gomez* (1995), *Jeannette v. Ellery* (1995), *N.M. Right to Choose v. Johnson* (1998), and *Women's Health Center v. Panepinto* (1994), inter alia, all of which struck down state bans on Medicaid financing for abortion.

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if convicted (Nagourney 1998). The push came in response to the killing of abortion doctor Barnett Slepian in Buffalo earlier that year by an antiabortion extremist, although the proposal still met with resistance from some quarters, most notably the staunchly pro-life Conservative Party of New York and the Catholic Conference (Nagourney 1998). Despite this opposition, a Freedom of Access to Clinic Entrance (FACE) law was passed by the legislature in 1999, and the law was upheld in 2001 when it was first applied to a Utica family who had been arrested for aggressively protesting an abortion clinic in the city (McKinley 2001).

There was a limited floor debate preceding passage of the 1999 FACE law that followed similar lines of argument surrounding other clinic access restrictions, typically focused on the potential restriction of free speech and expression rights. Assembly member Seaman, who opposed the bill, argued that "it's a safety measure, I understand that, but it also has the effect of making it difficult for certain people who have very strong beliefs about the sanctity of life to express their opinions and it has a dampening effect on their ability" (A01753, New York State Assembly, *Record of Proceedings* [January 25, 1999], 230, 231). Supporters of the legislation, like assembly member John, focused on safety concerns and the Slepian murder, saying that "we come tonight with a bill that has evolved to provide protections for people seeking access to health care. At least one violent death has happened in our state because the victim provided abortion services to women. Let us hope that this legislation will provide a measure of protection and safety for those providers and their families" (233). In this sense, supporters of the clinic access measure framed their arguments again in policy terms, while opponents were more likely to use rights-based rhetoric. This particular issue, however, is perhaps unique in that it addresses abortion somewhat more indirectly and almost definitionally evokes concerns related to First Amendment speech and expression claims.

By 2000, the abortion issue in New York seemed again to be in an almost dormant state. While legislation was still being perennially introduced by a handful of assembly members and senators that would provide for various assorted limits on abortion access, these bills never left committee and were likely intended only as symbolic acts by the few remaining pro-life legislators left in Albany. Legislation was introduced to allow over-the-counter access to the so-called morning-after pill, which had been approved for sale with a prescription by the FDA in 2000 (Cunningham 2001), precipitating another confrontation between Democrats and Republicans over reproductive rights. After passing in the assembly several times, the senate finally allowed the legislation to come to the floor in 2005; it was passed in a bipartisan vote, although the bill was vetoed by Governor Pataki, who expressed reservations about the fact that the law included no age restrictions (Baker and Hernandez 2005). The issue eventually became moot in 2009, when the FDA finally allowed sale of the drug without a prescription to all women over the age of 17 (Harris 2009); however, as of the end of the legislative session in 2011, legislation was still being proposed to allow access to Plan B for all minors.

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ALTERNATIVE EXPLANATIONS FOR THE LOCATION OF DECISION MAKING

Having presented the case study above and suggested a theoretical explanation for the lack of legislative deferral there, a discussion of why other potential accounts of judicial noninvolvement and the active role of the legislature in the case of abortion policy development in New York are insufficient explanations for this observed behavior is warranted. Indeed, scholars have proposed a number of instances when courts might be expected to act in a deferential manner toward legislatures, including issues related to public opinion (Barnum 1985; Mishler and Sheehan 1993), the relationship between the judiciary and the dominant political coalition (Dahl 1957), or the constraints imposed by the other branches themselves, as discussed in the previous section. Why, then, should we not accept that the courts in New York were simply deferring to the elected branches, as is the case, after all, any time a judge votes to uphold a challenged statute or provision?

The apparent reluctance of the New York Court of Appeals to engage in abortion policy making is perhaps most notable, as this body has often been responsible for very significant changes in public policy, particularly when dealing with controversial social issues. Some notable examples include *People v. LaValle* (2004), which struck down New York's capital punishment statute; *People v. Ferber* (1981), which found the state's child obscenity law unconstitutionally vague; and *People v. Onofre* (1980), which invalidated New York's 1965 sodomy law. Many of these cases involved relatively antiquated laws that had been more or less ignored by the legislature at the time the decisions were rendered, such as *Onofre* or *People v. Acme Markets, Inc.* (1975), which struck down an 1881 Sunday closing law. Other landmark cases in the court's jurisprudence involved state departmental policy, as with *Matter of Griffin v. Coughlin* (1996), which invalidated the Department of Corrections' policy mandating participation in a religiously based substance-abuse program as a condition of visitation rights. Still others simply required agencies or other government bodies to do something, as was the case in *Campaign for Fiscal Equality v. State* (1994), which required a specified level of funding for public schools. All of these decisions came during the same period of time considered in the present study, suggesting that there was nothing unique about the Court of Appeals in this period that might imply a greater inclination against an activist agenda. The point here is that New York's high court has rarely shied away from involving itself in the policy-making process or challenging the legislature's preferences and actions, making its remarkable deference to the elected branches in the abortion issue particularly noteworthy.

There is also little reason to believe that the courts in New York would be unlikely to behave in a manner similar to their federal counterparts in the development of abortion policy under the terms that the legislative deferral model would suggest. Court of Appeals judges in the state are appointed in the same manner as members of the US Supreme Court, with the governor nominating candidates who are subsequently confirmed by

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the senate. Unlike in a number of other states, there are no judicial retention elections in New York, removing any incentive judges may have to appeal to popular opinion for the maintenance of their positions. In other words, the structural conditions in the state government are sufficiently similar to those in the federal system that deferrals would have the same appeal to both lawmakers and judges in New York as they would to members of Congress and the US Supreme Court, making their absence all the more notable.

One common explanatory approach employed by law and court scholars when accounting for differences in the behavior of courts, whether across time (Spriggs and Hansford 2001; Segal and Spaeth 2002; Kaheny, Haire, and Benesh 2008), across levels within the judicial hierarchy (Zorn and Bowie 2010), or between jurisdictions (Flemming, Holian, and Mezey 1998; Weiden 2011), has been the policy preferences and ideologies of judges. While there exists surprisingly little systematic research on the ideological makeup of state supreme courts, the New York Court of Appeals (see Bonventre 1992; Bonventre and Powell 1994; Brace, Langer, and Hall 2000) has traditionally been seen as among the most progressive in the country. Nevertheless, of the three major decisions dealing with abortion discussed in this study, two were supportive of abortion access while another upheld a restriction on the practice. To the extent that partisan affiliation can be used as a meaningful guide to policy preferences for state judges, it is worth noting that the Court of Appeals' decision in *Hope* in 1994 was staffed by three Democrats, two Republicans, and an independent. The two earlier cases—which were supportive of abortion rights—were decided by a court consisting of three Republicans, two Democrats, one independent, and one judge who had been previously endorsed by both parties (Historical Society of the New York Courts 2016). As the New York case study presented here demonstrates, these decisions are much more consistently understood as deferential to the legislature than as ideologically motivated on either side of the abortion issue.

Some scholars (Cameron, Segal, and Songer 2000; Epstein, Segal, and Victor 2002) have argued that the structures of governments can have an important influence on the likelihood that a given institution will address important policy questions. A brief comparison between the experiences of New York and New Jersey in the development of abortion policy, however, suggests that these structures were not determinative of the court's role. Politically, the two states are very similar, both located in the northeast and generally understood as Democratic Party strongholds. The academic literature has also borne out the view of New York and New Jersey as highly ideologically comparable, with Erikson, Wright, and McIver (2007) placing both at virtually the same position on the left-right axis, while Wright, Erikson, and McIver (1985) categorize the two firmly in the "liberal" third of the ideological spectrum. The two states also maintain strong governors by national standards (see Salmore and Salmore 2008; Schneier, Murtaugh, and Pole 2010) and maintain highly professionalized legislatures (see Maestas 2000; Squire 2008). Despite these similarities, the courts in New Jersey have been highly engaged in abortion policy development, striking down a parental notification requirement (*Planned Parenthood of Central New Jersey v. Farmer* [2000]), ruling that a conscience law passed by the state did not apply to non-

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profit or nonsectarian hospitals (*Doe v. Bridgeton Hospital Association* [1976]), and permanently enjoining certain types of protests at abortion clinics (*Horizon Health Center v. Felicissimo* [1994]). While a much more detailed comparison of the development of abortion policy in New York and New Jersey would undoubtedly offer a better account of the highly divergent role of the courts in the two states, it seems unlikely that the political structures in New York sufficiently account for the lack of judicial involvement in this issue.

Finally, on the legislative side of the equation, Kingdon (2003) famously argues that particular policy issues come to the attention of policy makers through three main processes: problems, policies, and politics. The first of these refers to problems that for one reason or another become salient in the public or policy-making sphere and that must therefore be dealt with by government or other policy-making institutions. Problems themselves become visible either through a focusing event, indicators—meaning scientific, social scientific, simply statistical, and so forth—or feedback from existing programs or policies. Kingdon's second process refers to the "gradual accumulation of knowledge and perspectives among the specialists in a given policy area, and the generation of policy proposals by such specialists" (17). Finally, politics, in the author's terms, refers to changes in the "national mood," the administration, election results, public opinion, and so on, that spur policy makers to address an area that had not previously been on the policy agenda.

Leading up to the legislature's passage of the liberalization law, there does not seem to have been a specific focusing event that drew lawmakers' attention to the abortion issue or feedback from previous policy decisions. Similarly, there was no vast change in the partisan makeup of the senate or assembly in the late 1960s or early 1970s, with Republicans controlling both houses and the governorship for most of the mid-20th century and no major shift following the 1970 election (Schneier et al. 2010). There was, of course, the Froessel Committee report in 1968 that had recommended reform of the state's abortion law; however, an almost identical report had been issued that same year in New Jersey, termed the Crane Commission (Waggoner 1970), although it did not lead to any legislative action in that state. The point here again is that there does not seem to have been any particular feature of the New York political scene that did not exist in other states leading the legislature to take up the abortion issue when it did. Reform of abortion laws had indeed begun nationwide in the late 1960s, and it was likely that New York's statute would have fallen, as almost all such laws did following *Roe*. The relevant question remains, however, why it was the legislature rather than the courts that led this change.

DISCUSSION

As described earlier, one of the most striking aspects of the development of abortion policy in New York is the degree to which it did not follow the pattern that would be expected from the legislative deferral model. Lovell (2003, 3) summarizes the theory well, writing that "caught between powerful constituencies with incompatible demands, legislators preferred to avoid the political costs of making clear decisions. Legislators thus decided that

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their political interests were best served by passing statutes that appeared to make decisive choices but that covertly empowered the courts." Recall that Lovell, Graber, and Whittington offer four conditions under which this type of behavior should be present: specifically, when (1) a stalemate exists among lawmakers over a particular issue, (2) parties are internally divided, (3) there is no public consensus surrounding the policy, and (4) legislators expect their preferences to be validated by the courts. The fact that a reform bill had been introduced in each of the three legislative sessions prior to 1970 without receiving a floor vote suggests that something of a stalemate over abortion seems to have existed at the time, as does the attempted repeal of the liberalization law a mere 2 years after its passage. The budget battles of the late 1970s and early 1980s over Medicaid coverage for the procedure, as well as the 3-year delay in the approval of PCAP funding over the same issue, certainly demonstrate that even after legalization, abortion continued to be a source of stalemates in the legislature. Nevertheless, the courts were never given an opportunity to rule on the constitutionality of Medicaid bans as such and only affirmed lawmakers' choices in the relatively narrow *Hope* decision.

An examination of the partisan breakdown of the major votes on abortion discussed in the previous section also reveals clear internal division within both the Republican and Democratic parties. The 1970 liberalization bill, for example, saw 46 Democratic votes in the assembly favoring repeal with 24 opposed, while 30 Republicans voted in support of the measure compared to 49 in opposition. The senate was similarly divided over the issue, passing with the support of 18 Democrats and 13 Republicans, while 4 Democrats and 20 members of the GOP opposed the bill. Similarly, the 1976 parental consent law saw an evenly divided Democratic assembly, with 39 members each voting for and against the measure, as well as receiving the support of 8 senators with 16 opposed. The Republicans, for their part, were more united on the issue, voting 54 to 5 in support of the parental consent requirement in the assembly and 26 to 6 in the senate. This partisan division continued into the Medicaid funding battles of the late 1970s, and it was not until the 1989 vote on PCAP funding, which ultimately received the support of most members from both parties, that these internal struggles seem to have abated.[5]

If consensus about abortion policy was elusive for elected lawmakers during much of the 40-year period considered here, the larger public was perhaps even more divided. According to the General Social Survey, 52% of New Yorkers in 1972—the first year for

5. Partisan vote totals for the 1978 Medicaid funding ban in the assembly were as follows: 43 Republican yeas and 18 nays, 23 Democratic yeas and 63 nays. The senate bill received the support of 32 Republicans and 5 Democrats, and the opposition of 5 Republicans and 18 Democrats. The 1979 version of the same bill received 43 Republican votes and 22 Democratic votes in the assembly and the opposition of 15 Republicans and 60 Democrats. The senate saw 28 Republican and 5 Democratic votes in favor versus 7 Republicans and 19 Democrats opposed. Finally, the 1989 PCAP bill was opposed by only 3 Democrats in the senate and 2 in the assembly, with the remainder of both parties voting in favor of the legislation or abstaining. (All data are from the *Journal of the Assembly of the State of New York* and the *Journal of the Senate of the State of New York*, 1970, 1972, 1976, 1978, 1979, 1989.)

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which data are available—agreed that a woman ought to be able to access abortion services for any reason, while 46% disagreed. In 1976, the numbers remained almost identical, with 51% of respondents supporting the pro-choice position and 46% expressing a pro-life sentiment. Indeed, by 1994, the percentage of New York residents expressing support for liberal abortion access had risen to only 59%, with 40% opposing the procedure in most cases.[6] In terms of the conditions under which legislative deferral ought to be expected, in this case in which there is a lack of public consensus surrounding an issue, it is again clear that such behavior would be predicted in the New York case yet is virtually absent.

The final circumstance that proponents of the deferral model describe as likely to precipitate this type of activity is an expectation among lawmakers that their policy preferences are likely to be vindicated by the courts, although only Lovell expressly makes this claim. At the time of the 1970 liberalization bill, very little case law existed at either the state or federal levels dealing with abortion, making it difficult to speculate about any expectations legislators may have had about the possible outcome of litigation. Interestingly, lawmakers passed the parental consent measure in 1976 on June 10, a mere 3 weeks before the US Supreme Court would issue its decision in *Planned Parenthood v. Danforth*, striking down a similar provision in Missouri. Had members of the assembly and senate in Albany been interested in deferring policy-making authority to the courts in this instance, they had only to wait a short time before learning how the judiciary was likely to respond. Instead, they passed a highly controversial piece of legislation that was ultimately vetoed by the governor, who himself was under tremendous pressure from advocates on both sides of the issue (Dullea 1976). The Medicaid funding debate, for its part, suggests little about lawmakers' expectations of the courts, as the ban was defeated after being separated from the larger budget bill. Finally, by the time the legislature passed the PCAP abortion ban in 1989, some members may have harbored expectations that the courts would overturn the restriction given the more or less pro-choice positions the Court of Appeals had taken in the *Byrn* and *Robin* decisions. Of course, such expectations proved unfounded, as the *Hope* case upheld the ban on PCAP funding for abortion.

To reiterate, the theoretical framework on offer here is that the initial location of policy change within the elected branches initiated a developmental path that saw a highly deferential court largely accepting the choices of the assembly and senate. Furthermore, the mechanism driving this behavior was one of issue framing whereby the terms of the debate, situated as they were at a time when a number of discursive approaches might have been adopted, were set by the elected branches and reflected the norms and understandings inherent to the mandates of those institutions. In terms of the former, the *Byrn* decision demonstrates well how the language and understanding inherent in a given institution's mandate can influence how other branches view a certain policy question. The

6. The General Social Survey, or GSS, is a project of NORC of the University of Chicago. For more, see http://www.norc.org/Research/Projects/Pages/general-social-survey.aspx.

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court's majority opinion can be broken up into two main sections; the first of these consists of a cursory overview of historical views of abortion, which Judge Breitel concludes is of little importance to the present case, while the second considers Byrn's claim regarding the legal personhood of unborn fetuses. Much like Justice Blackmun's majority opinion in *Roe*, Breitel stresses the difficulty of resolving the question of when life begins, although the resolution of this issue is based on considerably different reasoning in *Byrn*. While Blackmun stresses that the constitutional understanding of personhood under the Due Process Clause has never included the unborn, Breitel writes that "whether the law should accord legal personality is a policy question which in most instances devolves on the Legislature" (*Byrn v. New York City Health and Hospitals Corp.*, 31 N.Y.2d 194 at 201) and that "there are, then, real issues in this litigation, but they are not legal or justiciable" (203). It is abundantly clear from the above quotations that the judges of the Court of Appeals were not basing their ruling in *Byrn* on a "legal" understanding of the question in the sense of rights, precedent, or common law but rather on what might better be termed "judicial restraint" in the tradition of legal scholars such as Felix Frankfurter and Oliver Wendell Holmes.

Examining the specific portions of the Court of Appeals decisions in *Hope* in greater detail also reveals some interesting themes about how the court saw its role in relation to the legislature, as well as choices that lawmakers had made when developing policy. When Judge Kaye writes in *Hope* that "it is not the role of the courts to pass upon the wisdom of the Legislature's policy choice, even though there may be differences of views about the decision to exclude a medically necessary service from an otherwise comprehensive prenatal care program" (*Hope*, 83 N.Y.2d 563 [1994] at 575), two main points seem particularly apparent. The first is the chief judge's explicit claim once again that she does not see the role of the court as one of "second-guessing" the choices of the elected branches. In addition, Kaye invokes rather explicit political language when she writes that "PCAP may even make abortion more affordable for these women as—irrespective of pregnancy outcome—the statute offers free testing for fetal abnormalities that may early in pregnancy indicate the need for (and thereby reduce the cost of) an abortion, mental health and social services, family planning and 60-day postpartum care" (575). The second is that Kaye seems to suggest that she herself does not appear to support that choice when she describes the procedure at issue as "medically necessary" and the PCAP program as "an otherwise comprehensive prenatal care program" (575). Nevertheless, the chief judge chose to uphold the law, a decision that would seem important both as a simple refusal to alter the policy decisions of the legislature, as well as a signal to lawmakers that the court was likely to continue this norm of accepting the policy outputs of the elected branches.

Finally, *Hope* is instructive inasmuch as the opinion of the court in many ways reflected adherence to the interpretive framework established in *Byrn* and *Robin* in a somewhat reduced form. In addition to her statement regarding the court's reluctance to second-guess the choices of the legislature discussed above, the chief judge writes that "we are bound to accept the legislative determination that PCAP-eligible women are not indigent or in need of public assistance to meet their medical needs" (*Hope*, 83 N.Y.2d 563 [1994]

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at 577). While Judge Breitel had spent considerable time articulating the reasoning behind his claim that the legislature was the proper venue for the resolution of abortion policy questions, the *Hope* court seems largely to take this understanding for granted. Indeed, the thrust of the opinion in that case focused more on explaining the history and legislative intent behind the PCAP law than offering a justification, constitutional or otherwise, for why the elected branches ought to enjoy wide latitude in creating policy in this area. In this sense, an important component of the identification of accepted frames described earlier in this work is well supported by the court's opinion in *Hope*.

Why, though, were the courts in New York so much more likely to both defer to the choices of the legislature and frame their decisions in much more political terms than their federal counterparts? The answer, I suggest, is that the issue conceptualization of abortion as a political question can be traced to the early involvement of the elected branches that, as suggested by their particular mandate, relied on these frames when abortion first appeared on the agenda of policy makers in the state. While there is no record of the floor debate in the assembly that preceded the vote on the liberalization bill in 1970, a memorandum distributed by Assemblywoman Constance E. Cook may be illustrative of the rationale that informed the legislature's decision making. In particular, the document makes mention of three main arguments in favor of legalized abortion: that the procedure was already common and available to women who could afford them, that the law interfered with the ability of doctors to make necessary medical decisions, and that "the state [ought to be kept] out of the business of decreeing who is to be born" (Nossiff 2001, 66). Governor Rockefeller's veto message rejecting the repeal of the liberalization law in 1972 also relies almost exclusively on what might be termed "nonlegal" reasoning when he wrote that "I can see no justification now for repealing this reform and thus condemning hundreds of thousands of women to the dark age once again. . . . The truth is that a safe abortion would remain the optional choice of the well-to-do woman, while the poor would again be seeking abortions at a grave risk to life in back-room abortion mills" (Greenhouse and Siegel 2012, 159, 160). These themes continued to form the basis of how lawmakers conceptualized abortion going forward as well, with policy-centered arguments being prominent during floor debates throughout the rest of the 1970s, 1980s, and into the 1990s.

While it may seem intuitive that elected lawmakers would rely largely on this type of political rhetoric, such is not always the case. Returning to the New Jersey example touched on earlier, Governor Christine Todd Whitman's 1997 veto of that state's late-term abortion ban made reference to no fewer than five state and federal cases in arguing that the deficiencies in that law were to be found in constitutional concerns of equal protection and overbroad language. Indeed, among other legal issues cited by Whitman, the governor wrote that the law was "unconstitutional under United States Supreme Court precedent narrowly circumscribing the authority of the State to 'place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability'" (Veto Message of Assembly Bill no. 2409, 2).

Moreover, as Greenhouse and Siegel (2012) point out, the universe of potential issue frames before the US Supreme Court's landmark ruling was considerably broader than it

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was after 1973, when the conceptualization of abortion as a rights question came to prominence, particularly among proponents of the pro-choice position. In this sense, it may seem obvious that lawmakers would consider abortion from a policy-oriented standpoint prior to *Roe*, as this was arguably how the issue had been framed nationally before 1973. The point here, though, is not that legislators were choosing a discursive frame from a set of competing possibilities but that they were, by virtue of their positions as elected officials, institutionally inclined toward this type of rhetoric in the first place. Had the courts been the first movers in altering abortion policy in New York, I argue, it is likely that the dominant frame would have become a legal one, as seems to have been the case in New Jersey and indeed nationally.

A final advantage of the theory presented in this work is that it clearly lends itself well to further testing and falsifiability. The vast majority of states have at least some record of litigation and legislative policy making treating the abortion question, providing ample opportunity to further examine this theoretical framework. Considering the order of institutional involvement in this or indeed other issue areas, as well as the frames adopted by lawmakers and judges and the location of subsequent decision making, would reveal the extent to which the predictions offered by the approach proposed here hold across cases. An initial policy change located in the courts, followed by extensive legislation on the same topic, for instance, would suggest that important pieces of the model presented above are missing. Such further testing would not be particularly onerous and would provide an excellent avenue for future research.

None of this, of course, is to suggest that the legislative deferral hypothesis does not retain considerable explanatory power. Nevertheless, the New York case clearly defies this theory's predictions, indicating that some refinement of this model may be warranted. An excellent starting point for future research would seem to be further examination of deferral behavior at the state level. As the preceding study reveals, many of the same institutional incentives that exist for lawmakers and judges at the federal level are present in the states, although there are also important differences that may change the calculus of the relevant actors. Would states with elected judiciaries, for instance, be less likely to accept deferrals from their state legislatures? What role does federalism play in determining the behavior of judges and legislators? The abortion issue in New York, for example, suggests that there was something of a parallel track of lawmakers interacting with judges at the federal and state levels. Virtually all of the Court of Appeals decisions relied on interpretations of the state constitution, rendering many of the federal court decisions inapplicable and allowing for the development of a completely independent set of constitutional interpretations.[7] Additionally, taking the timing of institutional involvement in decision making

7. Further to this point, an examination of state court decisions across the country reveals that issues such as Medicaid financing for abortion, parental involvement laws, informed consent requirements, and a host of other issues on which the US Supreme Court had spoken were litigated at the state level as well with vastly different outcomes between jurisdictions.

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into account may also yield a more robust theory. Given the profound implications of the legislative deferral hypothesis for our understanding of judicial behavior and its relative lack of scholarly attention, further refinement of this theory ought to benefit not just its proponents but also the wider community of researchers interested in the field of interbranch relations.

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