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**Note**


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I. INTRODUCTION

*Hope v. Perales*¹ is one of the latest abortion decisions in a line of cases in which state courts have expansively interpreted their state constitutions to broaden their citizens’ right of privacy beyond what is

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federally mandated. The Supreme Court of New York County declared invalid the Prenatal Care Assistance Program (PCAP) which provided prenatal medical assistance but did not fund abortions, medically necessary or otherwise, to pregnant women who had incomes below 185 percent of the federal poverty line. The court decided that the program discriminated against the fundamental right of those women who needed an abortion but could not obtain one, and thus, violated due process and was unconstitutional.

This Note analyzes the significance of the Hope court's holding and the possible value of its reasoning if applied in a Nebraska court faced with the question of the constitutionality of the current Medicaid program that only funds abortions when the life of the mother is endangered. First, the Hope decision will be outlined. Second, the federal law in this area and its impact on the states will be discussed. Next, the Hope decision will be compared with the analysis in previous cases construing the due process clause of the New York Constitution. The New York and Nebraska histories in construing their state constitutions will also be examined. Finally, the Hope analysis will be applied to the Nebraska due process clause. This Note then concludes that the Hope reasoning and analysis provide Nebraska courts a prime opportunity to enlarge Nebraska citizens' privacy rights, especially those of indigent pregnant women.

II. **HOPE v. PERALES**

A. Facts and Issues

The Prenatal Care Assistance Program (PCAP) is a medical assistance program in New York that offers services to pregnant women with incomes between 100 percent and 185 percent of the federal poverty line to assure them a healthy pregnancy, delivery, and recovery. Initially a federal program, PCAP presently only provides reimbursement for procedures authorized by statute. Chapter 584 of the Laws of New York was adopted to enumerate the guidelines for New York's program and allows funding to the extent of federal reimbursement. Excluded are funds for medically necessary abortions performed by health care providers. However, PCAP cannot refuse other services available through the program to women who have had an abortion, such as transportation to covered services or medical services following an abortion to ensure a healthy recovery.

Jane Hope and Jane Moe, two pregnant women with incomes between 100 percent and 185 percent of the federal poverty line, were denied medically necessary abortions under this statute. These two

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2. *Id.* at 975.
women, along with four physicians, one nurse-midwife, seven health care clinics providing services for women in the PCAP income bracket, four advocacy organizations, and two members of the clergy sought injunctive relief from Chapter 584 and a declaration that the plaintiffs and women of their class were entitled to have PCAP-funded medically necessary abortions. Plaintiffs were denied a temporary restraining order enjoining enforcement of Chapter 584.5

Plaintiffs challenged Chapter 584 on the theory that the statute violated the New York State Constitution's due process clause6 by not reimbursing health care providers who performed medically necessary abortions to women in the PCAP income bracket. Plaintiffs argued that the funding system frustrated the reproductive choices of these women and that the system pressured women toward one of two choices, childbirth.

Plaintiffs made it very clear that they did not wish to stop the services provided but only that they wished to broaden the scope of services funded by PCAP.7 The court focused on the issue of whether the PCAP funding system prevents an eligible woman from exercising her constitutional right to an abortion without governmental interference.8

B. Opinion

The court held that PCAP violated the due process rights of program eligible pregnant women in need of a medically necessary abortion by leaving no real choice in whether to abort a pregnancy or to give birth to a child.9 In reaching its decision, the court emphasized New York’s long and liberal history in construing its state constitution.

First, the court argued that New York recognized a woman’s right to an abortion three years before the United States Supreme Court’s similar decision in Roe v. Wade.10 The court emphasized that even though the Supreme Court held that the federal constitution does not require states to pay an indigent woman’s pregnancy related expenses, it has decided that when such an obligation to provide medical care to

5. Id.
6. Plaintiffs also challenged the validity of Chapter 584 on the basis that it violated other provisions of the New York State Constitution. Specifically, they alleged violations of the State Constitution’s free exercise of religion clause, the equal protection clause, the clause pledging aid, care and support of the needy, and the clause pledging protection and promotion of the health of the inhabitants of the State. Id. Two of these causes of action were withdrawn. Id. at 975. This note will not discuss the court’s decision concerning these clauses.
7. Id. at 975.
8. Id. at 976.
9. Id. at 980.
10. Id. at 976.
indigents has been assumed by a state, the state cannot avoid constitutional limitations on the way in which it dispenses benefits.\textsuperscript{11} The court concluded that since PCAP's funding scheme provided funding for childbirth, only one of two possible alternatives, the scheme violated the constitutional right to privacy derived from the due process clause of the New York Constitution.\textsuperscript{12}

The court relied on the fact that the state constitution's due process clause had been construed to give greater rights than the due process clause of the federal constitution to those it was meant to protect.\textsuperscript{13} In addition, New York decided to fund abortions in the Medicaid program even though the United States Supreme Court held that such funding was not mandated by the federal constitution and was not reimbursed by the federal government.\textsuperscript{14} The court also recognized that New York City had authorized the New York City Health and Hospitals Corporation to provide medically necessary abortions, at the city's expense, to those women eligible for PCAP.\textsuperscript{15}

The court then supported its assertion that the right to privacy includes the right of an individual to make decisions according to one's own conscience, free from governmental interference.\textsuperscript{16} In support of its decision, the court cited numerous decisions of the United States Supreme Court that gave citizens the right to decide issues such as procreation, contraception, and abortion free from governmental restraint in the name of privacy.\textsuperscript{17}

The New York court made it clear that there are many New York cases construing the state constitution as expanding the rights of its citizens beyond that conferred by the federal constitution.\textsuperscript{18} Even though the language of the New York and federal due process clauses are identical, the court claimed that the state clause grants more rights to its citizens than the federal clause.\textsuperscript{19}

The court next reasoned that the proper question when a statute is challenged on non-procedural due process grounds is "whether there is some 'fair, just and reasonable connection' between it [the challenged statute] and the promotion of the health, comfort, safety and

\textsuperscript{11}. Id. (citing Maher v. Roe, 432 U.S. 464, 469-70 (1977)).
\textsuperscript{13}. Id. at 977.
\textsuperscript{14}. Id.
\textsuperscript{15}. Id.
\textsuperscript{16}. Id.
\textsuperscript{17}. Id. (citing Roe v. Wade, 410 U.S. 113 (1973); Eisenstedt v. Baird, 405 U.S. 438 (1972); Skinner v. Oklahoma, 316 U.S. 535 (1942)).
\textsuperscript{18}. Id. at 978. These cases will be explored in the analysis of this Note. See infra text accompanying notes 53-80.
welfare of society." The court restated that a previous case had held that a pregnant woman has a right to choose an abortion when medically indicated. Because the purpose of PCAP is to decrease infant mortality and to increase the likelihood of healthy babies, the court decided that there was no way to reach these objectives by excluding funds for abortions. For example, Hope, a carrier of sickle cell anemia, was denied an abortion. She had no way to obtain an abortion even though her income was above the poverty line because she could not afford insurance coverage. Since the abortion could not be funded, Hope was required to carry the child even though doing so endangered her health and she was likely to give birth to a sick child. The court concluded that this type of result was "not 'fairly,' 'justly,' 'rationally' or 'reasonably' related" to the state's objectives of decreasing infant mortality and low birth weight.

According to the court, the legislature is allowed to prefer carrying a child to term over abortion, but the legislature is not allowed to trample constitutional rights in order to obtain the result. PCAP pressured indigent women into the state's chosen result and prevented them from exercising their constitutional rights. The court refused to allow the legislature to deny a woman a real decision in whether to give birth. The court held that an assistance program that conditions funding on the choice of the state's preferred result, as in this case, is basing its qualifications on conduct and not need, therefore coercing the loss of a constitutional right that could harm the woman.

Even though the court recognized that a state has no obligation to treat childbirth and abortion the same, the court found it inconsistent to assert that a program providing prenatal services furthers even an important, let alone compelling, state interest when eligible women are denied assistance despite their medical need. The court held that "[a]s PCAP presently stands it violates the due process rights of a pregnant eligible woman for whom an abortion is medically necessary by leaving her with no real choice in the decision of whether to 'bear or beget a child.'"

21. Id.
22. Id.
23. Id. at 979.
24. Id.
25. Id.
26. Id.
27. Id. at 979-80.
28. Id. at 980.
29. Id.
III. ANALYSIS

The New York court's reasoning is convincing because it properly applied the required strict scrutiny due process analysis to protect the fundamental rights—a woman's right to have an abortion and to make choices concerning her health—at stake. This decision furthers a tradition of protecting New York citizens' constitutional rights whenever a New York court deems the United States Supreme Court will not or has not read the U.S. Constitution as broadly as it should. It can be argued that the Hope reasoning can be applied to the Nebraska State Constitution due process clause and offers the Nebraska courts a way to ensure the rights, health, and safety of their pregnant citizens. Although the two states' respective histories in construing their state constitutions and due process clauses have heretofore been dissimilar, there is no reason that Nebraska courts could not conclude that medically necessary abortions must be funded (at state expense) for women who otherwise would be eligible to obtain prenatal care under Medicaid, using the reasoning in Hope.

A. Federal Law and its Impact on Funding Medically Necessary Abortions in the States

It is first necessary to understand that no federal funding can be used for abortions unless the "continuation of the pregnancy would endanger the mother's life." Federal financial participation (FFP) will only be given when a physician has found, and certified in writing, that the above condition is met. No FFP is available if the Medicaid agency has paid prior to receiving the certification of the physician. The primary difference between the PCAP funding in Hope and Medicaid funding in Nebraska is that federal funding under PCAP is explicitly delineated in statutes while Medicaid funding generally reimburses for "all medically necessary care rendered to qualified individuals," with an exception for abortions when the life of the mother is endangered. Despite this difference, however, the programs are similar in two ways. First, both programs fund pregnancy-related expenses but do not fund medically necessary abortions. Sec-

34. It is necessary to note that "medically necessary" procedures do not include only those procedures necessary to save the mother's life although a procedure to save life is included within this category. "Medically necessary" procedures usually include those necessary to prevent, diagnose, or prevent the worsening of a condition that causes pain, deformity, or illness and no other effective course of treatment is available for the patient that is more conservative or less expensive. See, e.g., Moe v. Secretary of Admin. and Fin., 417 N.E.2d 387, 391 (Mass. 1981).
ond, both programs, if found to violate their respective state due process clauses, must be funded by the states themselves and not federal funds.

The Supreme Court has upheld the constitutionality of a participating Medicaid state's decision to refuse to pay for abortions even though it provides funding for childbirth expenses under the federal constitution. In *Maher v. Roe*, the United States Supreme Court decided that the U.S. Constitution does not require a state participating in the Medicaid program to pay for non-therapeutic abortions when the state also pays for childbirth. At issue in the case were the Connecticut Welfare Department's limits on Medicaid funding. In Connecticut funding could only be used for "medically necessary" abortions. The Court's reasoning, however, was arguably based only on the equal protection clause of the Fourteenth Amendment and not the due process clause. The Court decided that indigent women are not considered a suspect class for equal protection purposes and easily found that the state's regulation was rationally related to its purpose because subsidizing the costs of pregnancy are rationally related to encouraging childbirth. Dissenting in *Maher*, Justice Brennan recognized that the regulations interfered with the enjoyment of fundamental rights. Therefore, he criticized the majority for not recognizing these fundamental rights were present and a meritorious due process claim was presented by the case. Brennan proclaimed that withholding benefits in a manner that discourages the exercise of fundamental rights violated the due process clause.

As can be seen, the *Hope* court used the same reasoning as Justice Brennan and relies on Justice Brennan's dissenting opinion in its decision. Brennan's reasoning is particularly applicable to this Note because his due process argument would be essentially the same argument a lawyer in Nebraska would use under the state constitution's due process clause. The one crucial difference is that the statute in *Maher* concerned non-therapeutic, or elective, abortions, while Nebraska will not even fund those abortions necessary for the health of the mother. Therefore, the argument should be even more persuasive.

36. Id. at 466.
37. Id. at 470.
38. Id. Because of this determination, the state needed not find a compelling state interest to justify its regulation. The court also noted that since the regulation did not prevent the woman from getting an abortion, it did not impinge on a woman's right to an abortion. Id. at 474.
39. Id. at 478-79. A similar conclusion was reached in *Beal v. Doe*, 432 U.S. 438 (1977).
41. Brennan argued that the Court had decided that the right to privacy was fundamental. Id. at 486 (Brennan, J., dissenting).
42. Id. at 489 (Brennan, J., dissenting).
The Supreme Court later struck another blow against pregnant women requiring medically necessary abortions. The Court held in *Harris v. McRae* that a state participating in the Medicaid program was not required to fund medically necessary abortions when no federal reimbursement was allowed. Relying on its decision in *Maher*, the Court argued that the lack of federal funding placed no burden on a woman's right to have an abortion and reasoned that merely because a woman has a right does not give her an entitlement to have that right reimbursed at state expense. Again, Brennan strongly dissented, arguing that the state has no right to use its power to burden a woman's fundamental right to choose an abortion.

These cases obviously show the Supreme Court's reluctance to fund abortions, even when the mother's life could be adversely affected. These decisions have a great impact on people's lives and health and may lead to feelings of helplessness and hopelessness. However, a solution has been found. The federal constitutional rights construed by the Supreme Court represent the minimum guaranteed rights of a United States citizen. The fifty states are independent sovereigns that can grant more, but not less, rights under their state constitutions than the minimum mandated by the United States Constitution. Therefore, a few state courts have been encouraged by their citizens to interpret their state constitutional due process clauses more broadly than the federal due process clause to assure that medically necessary abortions for indigent women are funded. Additionally, commentators have encouraged more states to take advantage of the "richness state constitutions afford litigators seeking to lessen the impact of federal decisions narrowly interpreting Constitutional rights." Since each of the fifty states have their own constitution which can be interpreted independently from the United States Con-

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43. 448 U.S. 297 (1980).
44. Id. at 326. The "Hyde Amendment," which was in dispute in this case and currently in effect, is a restriction enacted by Congress prohibiting the use of federal funds to reimburse any abortions unless carrying the fetus to term would endanger the mother's life or in cases when the mother had been a victim of rape or incest, if the crime had been reported promptly. Id. at 302.
45. Id. at 316. The Court also decided that the Hyde Amendment did not violate the establishment clause, id. at 319-20, or the equal protection clause, id. at 326.
46. Id. at 330 (Brennan, J., dissenting). Justice Marshall further argued in a separate dissent that denial of the funding of an abortion is tantamount to denying a woman the right to an abortion altogether. Id. at 338 (Marshall, J., dissenting). Justice Stevens also wrote a separate dissent. Id. at 349.
stitution, the state courts can interpret their constitutions as granting greater due process rights than the due process clause of the U.S. Constitution. This broad interpretation is possible even if identical language is used in both provisions because the interpretation, not the language, controls. Most courts that have been faced with the issue of whether their state constitutions mandate funding of abortions for indigent women have decided that the state government must fund abortions.

*Hope v. Perales* follows the logic of these decisions. However, the New York Supreme Court has taken this reasoning beyond simply mandating that the state fund medically necessary abortions for those below the poverty line. The court's decision guarantees women *over* the poverty line reimbursement for their medically necessary abortions. It is necessary to inquire whether this mandatory funding scheme is consistent with earlier cases construing the due process clause of the New York Constitution. If this reasoning is found to be consistent, it gives great support to the idea that Nebraska courts should find that the funding of *at least* medically necessary abortions for indigent women is mandated under the due process clause of the Nebraska Constitution.

**B. Hope's Consistency with Prior Cases in Construing the State Due Process Clause**

The New York Constitution's due process clause and the U.S. Constitution's due process clause are virtually identical. Both use the same operative language. Therefore, one might be tempted to think that both should be interpreted to protect the same rights. However, New York's constitutional due process clause has not been immune from the expansive interpretation that has been applied to other provisions of the New York State Constitution.

One overriding theme will be explored in cases construing the due process clause of the New York State Constitution. The theme that will be analyzed is the New York courts' increased willingness to use its own interpretation to protect its citizens whenever it feels that the federal due process clause provides insufficient protection. In order to

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50. Chaput, supra note 48, at 606.
51. Id. at 608.
52. Id. at 616.
53. "No person shall be deprived of life, liberty or property without due process of law." N.Y. CONST. art. I, § 6.
55. These constitutional decisions will be discussed in the discussion detailing the differences between New York and Nebraska case law. See infra notes 81-99 and accompanying text.
understand the significance of the New York analysis and the difference between the New York and Nebraska approaches to their constitutions, one must understand that there are three modes of state constitutional analysis used by courts in interpreting their own state constitutions.56 First, there is the "lock-step approach," where the state looks to the United States Constitution in order to use an identical analysis for the state provision. This is only used when there are parallel provisions in the state and United States Constitution.57 Second, a state may take a "reactive posture," where the state court usually follows federal precedent, but will occasionally grant more rights under its own constitution.58 Third, the state can take the "beyond-the-reactive" approach in which the state analyzes its own constitutional provision before looking at federal precedent.59 As will be seen, New York has shown evidence of applying both the "reactive posture" and the "beyond-the-reactive" approaches, and in doing so, has increasingly interpreted its due process clause to ensure more rights to its citizens.

In the criminal context, the New York state due process clause has been construed expansively to afford those accused of crimes with greater rights than has been bestowed upon them by the federal constitution. For example, in People v. Isaacson,60 the police brutalized a third party and led him to believe that he was facing a prison sentence even though the substances found on his person after his arrest were comprised of caffeine and not amphetamines. As a result of this police conduct, the third party became an informant and lured the defendant to New York to conduct a drug transaction so that New York police could arrest and prosecute the defendant in the state.

The court seemed to be unsure about the outcome under the federal constitution, and therefore the Isaacson majority explicitly decided the case on the basis of the state constitution.61 The court laid out the analysis for determining whether the due process rights of a citizen are violated under the state due process clause. First, the court recognized that the purpose of the clause is to protect fundamental rights of the citizen by a "shield of inherent and fundamental principles of justice."62 The court further argued that due process of law mandates the courts to foster respect for personal immunities that are fundamental.63 Factors to be considered in deciding whether police

56. Chaput, supra note 48, at 607.
57. Id.
58. Id.
59. Id.
60. 378 N.E.2d 78 (N.Y. 1978).
61. Id. at 82.
62. Id.
63. Id.
conduct lives up to the aforestated principles were then enumerated. After weighing the factors, the court found that the defendant's due process rights under the New York Constitution were violated.

The court used an advanced "reactive posture" to protect its citizens in this case. Because the New York court feared that the Supreme Court would not agree that the due process rights of the defendant were violated, it granted more rights under its constitution. The fact that the court analyzed the federal case law in the area demonstrated that the court was willing to employ such an analysis. However, after determining that the Supreme Court might not find a right existing under the federal due process clause, the New York court had no alternative but to turn to its own due process clause to ensure protection of New York citizens in such a case.

The same concerns pervade the Isaacson analysis as those that pervade the Hope analysis. The Isaacson court emphasized the amount of respect that must be accorded to fundamental rights given to citizens as did the Hope court. Since abortion is a fundamental right, it follows that a program that interferes with the exercise of the fundamental right and does not, by its terms, promote the health, comfort, safety, and welfare of society does not comport with due process. Just as the government interfered with the defendant in Isaacson, the state interfered in Hope by denying money for all abortions. The government threatened not only to interfere with the exercise of a fundamental right, but also threatened the health of pregnant women in need of an abortion. By doing so, the health, comfort, safety, and welfare of society were not promoted. In this regard, the Hope decision complies with previous case law.

Cooper v. Morin was another state constitutional decision upon which the Hope decision depended. Cooper also addressed the state due process clause. In Cooper, female pretrial detainees brought a class action suit seeking declaratory and injunctive relief from restrictions placed on them at the county jail. The detainees were limited to noncontact visits with both family and friends while the inmates in the jail were afforded direct contact visits. A limit of ten minutes was placed on the detainees while the inmates often took visits in excess of fifteen minutes.

Once again, the New York court took an advanced "reactive posture." The court first analyzed federal case law and decided that the due process clause of the Fourteenth Amendment of the United States Constitution would not mandate that the detainees receive longer con-

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64. Id. at 83.
65. Id. at 84.
tact visits. This analysis again demonstrates the court's willingness to adopt federal analysis if agreeable to the state court's view of due process. Anticipating that the United States Supreme Court would not protect the detainees' rights under the federal due process clause, the *Cooper* court progressed to a state constitutional analysis and decided that the applicable test was "a balancing of the harm to the individual resulting from the condition imposed against the benefit sought by the government through its enforcement."

Using this test, the court in *Cooper* recognized that the fundamental right of marriage and procreation weighed heavily on the detainees' side of the balance. Since noncontact visits could seriously impair family relationships, the court required the state to have a measure that was both reasonable and necessary if the state were to abridge the right of family life. The state's purpose in maintaining the presence of the detainee for trial was held to be an insufficient state interest to justify abridging the right of the detainees. Although the state would be required to add more personnel and rearrange the facility, measures that would obviously cost money, the court concluded that the citizens' rights are of utmost importance and financial concerns could not justify impinging on those rights. Therefore, the court instructed that a system of contact visitation be instituted in the jail and that visitations should be allowed for a reasonable duration, at least more than ten minutes.

The balancing test explained in *Cooper*, although not outlined directly, was applied in the reasoning in *Hope*. As was previously discussed, a fundamental right was at issue in *Hope*. PCAP, by funding only birth-related expenses even when a woman's health is threatened, prevents a woman from exercising the fundamental right of choice. The state's side of the balancing test was purportedly characterized by the promotion of a healthy pregnancy and birth. However, this is not sensible if a woman needs an abortion for her health. In fact, in order to carry out the objective of the statute, it would indeed be necessary to fund abortions. Abortions would be performed to ensure that an unhealthy pregnancy does not occur and to ensure the good health of children carried to term. The state should not interfere with a woman's fundamental right to abortion if such laws defeat the objectives of the program.

Finally, *Hope* also properly and convincingly relies on *Rivers v. Katz*, a case demonstrating a "beyond-the-reactive" approach. *Riv-

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68. *Id.* at 1192-93.
69. *Id.* at 1194.
70. *Id.* at 1195.
71. *Id.*
72. *Id.* at 1196.
73. 495 N.E.2d 337 (N.Y. 1986).
ers was based solely on the New York state due process clause, without any discussion of the federal constitution at all. In Rivers, patients who had been found to need involuntary care and treatment due to mental illness brought a declaratory judgment action to declare that forced treatment was unlawful and that they had a right to refuse medication. One of the patients appealed the forced medication through an administrative review process provided by the patients’ psychiatric center but failed.

The court’s analysis, based solely on its own state constitution, suggests that the court has lost a willingness to explore federal law before interpreting its constitution. This is characterized in the “beyond-the-reactive” approach.

The court maintained that “due process requires that a court balance the individual’s liberty interest against the State’s asserted compelling need on the facts of each case” in deciding whether to forcibly administer medication. Rivers recognized that citizens of New York have a right to decide what will be done with their body and to control medical treatment. The right to reject treatment is not absolute and may be overridden by compelling state interests. The court held that if a patient has the capacity to reason and come to a decision, then the state may not forcibly medicate. Further, the fact of mental illness or institutionalization alone cannot satisfy the “lack of capacity to reason” standard in order to infringe the patient’s constitutional right. In addition, the court found the administrative review proceedings were inadequate to protect the patient’s due process rights. No standards were listed and no criteria were available articulating what factors were to be considered during the proceedings.

Hope follows the reasoning in the Rivers case. Hope cannot be criticized for not considering the reasoning used by the United States Supreme Court in interpreting the federal constitution because Rivers also took the “beyond-the-reactive” approach. The Rivers court has demonstrated the willingness of New York courts to analyze their own constitution independently, without being limited to the extent of protection under the federal constitution.

As in Rivers, the Hope court showed respect for a broad range of rights retained by its citizens that may or may not be found within the United States Constitution. Just as the patients in Rivers had a funda-

74. Id. at 344.
75. Id. at 341.
76. Id. at 343.
77. Id. The court determined that if the patient is found to lack the capability to make a reasoned decision, the court must make the further determination that the treatment is in the patient’s best interests and the side effects suffered from the medication are the least intrusive of any possible treatments. Id. at 344.
78. Id. at 341-42.
79. Id. at 344.
mental right to determine their treatment, a woman has a fundamental right to an abortion. It is undisputed that the state has a compelling need to promote healthy pregnancies and a healthy childbirth. However, the PCAP rules did not serve these compelling needs, and thus, cannot be used to abridge a constitutional right.⁸⁰

These cases convincingly demonstrate that the New York Supreme Court has consistently upheld the state constitutional rights of its citizens when the United States Supreme Court has failed to protect these rights. In the earlier due process cases, the court was more willing to rely on federal analysis, but recently the court has become more willing to base its decision on the state constitutional due process clause.

C. Comparison of New York and Nebraska Historical Interpretations of Their Own State Constitutions

Nebraska and New York have different histories in construing their state constitutions. The histories are not contradictory, just different in the approach each has taken in construing their respective state constitutions in light of the federal constitution. The *Hope* majority properly based its decision in *Hope* upon the fact that New York courts have traditionally construed the state constitution more broadly than the United States Constitution when necessary to protect its citizens' rights.⁸¹ The New York courts have construed their constitution broadly both when the state's constitutional language is identical to its federal counterpart and when its language is substantially different. These decisions provide additional support for the idea that New York has assumed a "reactive posture" and the "beyond-the-reactive" approach. On the other hand, Nebraska has a tradition of deciding issues raised under its constitution utilizing an identical analysis used to construe the same provision in the United States Constitution. In other words, the Nebraska court uses the "lock-step" approach in state constitutional analysis.

New York has given a broader reading to its constitution when the provisions in question are different from the federal counterpart. For example, the language of Article I, Section 6 of the New York Constitution is different from the First Amendment of the United States

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⁸⁰ *Rivers* supports the decision in *Hope* in yet another way that was not used by the court. An individual's constitutional rights do not depend on the current whims of the state. If it is a constitutional right of New York citizens to determine their medical treatment even if it promotes an undesirable outcome for the state, surely the state may not refuse to fund the women's right to choose her medical treatment in *Hope*.

Constitution. In *Immuno, A.G. v. Moor-Jankowski*, the New York Court of Appeals had no trouble finding that greater rights are granted to the speech of its citizens than that mandated by the differently-worded first amendment. On appeal to the United States Supreme Court, the Court remanded the case to the New York Court of Appeals after deciding that First Amendment rights were not implicated. The New York Court of Appeals decided that its state constitution required the court to read the letter involved in the dispute under a broader standard that the Supreme Court had found was not required under the First Amendment. Again, an attempt to read liberal rights into the United States Constitution was made and thwarted. The court did find a way to protect its citizens through the state constitution, but only after a time-consuming and costly remand. This is a great example of the "reactive posture" seen previously in the due process cases.

Nebraska's parallel provision to the First Amendment is also differently worded than the federal counterpart. When a statute prohibiting obscene telephone calls was challenged as being overbroad and, therefore, violative of both the state and United States constitutional free speech provisions, the Nebraska court decided that neither provision was violated. The court, consistent with the "lock-step" approach, claimed that Nebraska had already decided that the state free speech provision would not provide greater protection in this area than the First Amendment of the United States Constitution.

Moreover, New York courts have also been willing to expand their citizens' rights when the state and federal constitutional language is identical. The due process cases described above are one good illustration. The New York state constitutional counterpart to the Fourth Amendment of the United States Constitution, Section 12 of Article I, has also been construed as giving New York citizens greater rights, even though the language of this section is identical to the Fourth Amendment. When the New York Court of Appeals first considered the case, it held, on Fourth Amendment grounds, that the search in

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83. *Id.* at 1277. In *Immuno*, the defendant, an editor of a scientific journal, published a letter to the editor. The letter asserted that the plaintiff planned to establish a facility which would manufacture biological products from chimpanzees. Further, the letter alleged that there was a possibility that the products would spread hepatitis.
87. *Id.* at 237, 450 N.W.2d at 406.
88. *People v. Harris*, 570 N.E.2d 1051 (N.Y. 1991). The court recognized that it is desirable to interpret the provisions in the same way to facilitate the implementation of the rules but that the federalist system of government allows states to confer greater rights through the interpretation of their state constitution. *Id.* at
dispute was illegal,\textsuperscript{89} a decision reminiscent of the "reactive posture." The United States Supreme Court reversed and remanded the case to the New York court.\textsuperscript{90} On remand, the evidence was rendered inadmissible under the New York State Constitution.\textsuperscript{91}

The Nebraska Constitution’s due process clause\textsuperscript{92} is identical in its operative language to the due process clause of the United States Constitution\textsuperscript{93} as is the New York Constitution’s due process clause. Yet, the Nebraska Supreme Court has clung to the "lock-step" approach, which is unlike New York’s approach. For example, in \textit{State ex rel. Spire v. Northwestern Bell Telephone Co.},\textsuperscript{94} an act limiting the Public Service Commission’s telephone rate-making authority was held to be nonviolative of both the Nebraska and United States Constitutions using the same analysis under both constitutions. Additionally, in \textit{State


\textsuperscript{90} New York v. Harris, 495 U.S. 14 (1990).

\textsuperscript{91} People v. Harris, 570 N.E.2d 1051, 1055 (N.Y. 1991). The court used a noninterpretive analysis as opposed to an interpretive analysis in coming to its decision. In other words, the court did not examine the language of the provision but "proceed[ed] from a judicial perception of sound policy, justice and fundamental fairness." \textit{Id.} at 1053 (quoting People v. P.J. Video, 501 N.E.2d 556, 550 (N.Y. 1986), \textit{cert. denied}, 479 U.S. 1091 (1987)). In doing so the court reiterated that the state constitution, through constitutional interpretation, has given greater protection to rights concerning due process, self-incrimination, and the right to counsel than the federal counterparts have given. \textit{Id.} at 1054.

\textsuperscript{92} "No person shall be deprived of life, liberty, or property, without due process of law." NEB. CONST. art. I, § 3.

\textsuperscript{93} "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

\textsuperscript{94} 233 Neb. 262, 279-88, 445 N.W.2d 284, 297-300 (1989). Even though the case involved a procedural due process analysis, it nonetheless illustrates the Nebraska court’s tendency to evaluate the Nebraska and U.S Constitutions under the same analysis.
v. Hankins,95 the Supreme Court held that the Nebraska statute requiring a defendant to prove insanity as an affirmative defense did not violate the Nebraska and federal constitutional due process clauses. Again, consistent with the "lock-step" approach, the court uses one analysis for both constitutions. The method by which the court dismisses a separate state constitutional claim suggests that the court has perhaps not thought of using its state constitution to broaden the rights of Nebraska citizens.

There are exceptions to this trend, however. One case suggests that when the Nebraska court is faced with a constitutional provision newly amended and different from the federal counterpart, the court will use its own analysis. For example, the court was faced with a challenge that a state statute violated the Nebraska "Right to Bear Arms" amendment to Article I, Section 1 of the Nebraska Constitution.96 The statute in question made it illegal to possess a machine gun, short rifle, or a short shotgun. The Nebraska Supreme Court upheld the statute as a valid exercise of police power under the Nebraska Constitution with no discussion of the United States Constitution.97 The separate analysis was necessary in this situation, however, since the Nebraska Constitution had been amended the year before. Yet, this decision may demonstrate a willingness of the court to view challenges to citizens' constitutional rights brought solely under the Nebraska Constitution more broadly.

The Nebraska Supreme Court has also recognized, when it was faced with a Nebraska law decision of which it disapproved made by a federal district court judge, that it (the Nebraska Supreme Court) is the final arbiter in Nebraska law and that the court must follow its own analysis and reach a conclusion based on that analysis.98 Undisputedly, the court recognizes its responsibility to make Nebraska law for its citizens. If a challenge were clearly presented to a Nebraska court, under the Nebraska State Constitution and not under its federal counterpart, with a case where Nebraska citizens are clearly not afforded the rights they deserve under the United States Constitution, the court might accept the challenge and guarantee the suggested rights under the Nebraska State Constitution.

The "lock-step" approach used by the Nebraska Supreme Court does not suggest hostility to the idea of broadening the interpretation of the state constitution. Perhaps the court has not been actively encouraged to do so by attorneys. Perhaps the court has not been faced with a situation compelling enough to so construe the Nebraska Constitution.

97. Id. at 462-63, 451 N.W.2d at 690-91.
The same argument that was raised in *Hope* could be brought before the Nebraska courts, and the lawyer raising the argument could encourage a decision based, not on the United States Constitution, but on the Nebraska due process clause. There arguably would be no reason for the court not to consider the claim, and the court could quite easily decide that the funding of medically necessary abortions is mandated under the Nebraska Constitution. This action by the court would not be inconsistent with Nebraska precedent. It would simply be a step forward from a regressive "lock-step" approach to a more progressive "beyond-the-reactive" approach advocated by many commentators. New York has taken this step, and many other state courts have realized the great potential for individual rights under their state constitutions. Nebraska has only to join their ranks.

D. Applicable Medicaid Provisions Under Nebraska Law

The Nebraska Medical Assistance Program (NMAP) covers abortions only in those situations where federal funding is available. In other words, abortions are covered only "when the life of the mother would be endangered if the fetus were carried to term." Certification of the physician is also required as mandated by the Code of Federal Regulations.

While funds covering abortion are severely restricted, the NMAP does cover a wide range of physicians' expenses related to pregnancy. Such expenses include prenatal care, delivery, and postpartum care. For those women who do not meet eligibility requirements for Medicaid themselves, NMAP does provide services to the women on the theory that the unborn child is eligible. These services include pregnancy-related, delivery, postpartum services, and unrelated services that must directly benefit the unborn or newborn child.

If closely read, the regulations provide one of the purposes that the state of Nebraska has for funding prenatal services under the Medicaid program. Listed as covered services are those "[s]ervices to a woman during pregnancy which are directed to protecting and ensur-
ing the health of the woman and the fetus."\textsuperscript{108} This purpose is reiterated at least once more in the Code where "[m]edically necessary services to ensure a healthy outcome for the current pregnancy" are listed as covered services.\textsuperscript{109}

Thus, the stage is set for a due process argument based on the Nebraska state constitution. As in \textit{Hope}, pregnant women who are eligible for medical assistance because of their income or because of their status as pregnant women, are denied funding for their medically necessary abortions. The situation in Nebraska is even more tragic than the situation existing in \textit{Hope} because abortion has been singled out in Nebraska as one medically necessary procedure that will not be covered by Medicaid, in spite of the fact that the Medicaid program is to be used to fund other medically necessary procedures. PCAP simply eliminated abortion from its coverage because it was not specifically enumerated by statute as required by all procedures covered by PCAP.

E. Due Process Analysis in Nebraska Courts

The Nebraska Supreme Court has used the following substantive due process analysis when faced with a claim that an individual is being deprived of due process of law. First, the court must ascertain "the degree of judicial scrutiny to be focused on the statute."\textsuperscript{110} If the court decides that a fundamental right is involved, the court will invoke the standard of strict scrutiny; that is, a compelling state interest will have to be found in order to justify the statute.\textsuperscript{111} If, however, no fundamental right is present, a statute rationally related to a legitimate governmental purpose will suffice, and if satisfied, the act will be declared constitutional and not violative of the due process clause.\textsuperscript{112}

The Nebraska Supreme Court has never been faced with the question of whether the Nebraska due process clause requires the state to fund medically necessary abortions for indigent women when no federal reimbursement is available but when the state does pay for pregnancy-related expenses. If the court agrees to consider the question under the Nebraska State Constitution, as previously discussed, the court's decision must be in the affirmative if it were to use the reasoning of the \textit{Hope} court.

\begin{itemize}
\item \textsuperscript{108} \textit{Id.} § 2-006.06B (emphasis added).
\item \textsuperscript{109} \textit{Id.} § 2-006.06B1.
\item \textsuperscript{111} \textit{Id.}
\item \textsuperscript{112} \textit{Id.; State ex rel. Spire v. Northwestern Bell Tel. Co.}, 233 Neb. 262, 269, 445 N.W.2d 284, 300 (1989).
\end{itemize}
1. Fundamental Right?

The first hurdle that a lawyer must overcome in presenting a *Hope* argument to the Nebraska Supreme Court is to convince the court that a woman's right to a medically necessary abortion is a fundamental right. In fact, this is the most important hurdle. The court has recognized that when a statute is "subject to strict scrutiny, the statute always, or nearly always . . . is struck down[,] the only critical decision is whether strict scrutiny should be invoked at all."\(^{113}\)

The *Hope* court had the benefit of a previous New York case that implicitly held that a woman has a fundamental right to an abortion free from governmental interference under the New York Constitution.\(^{114}\) The Nebraska Supreme Court has not recognized an explicit fundamental right to an abortion without governmental interference under its state constitution. However, the Nebraska Supreme Court has recognized that privacy is a fundamental right.\(^{115}\) Even though the court claims it has recognized no right to privacy under the state constitution broader than the federal constitutional right,\(^{116}\) the court does not reveal that the case on which it relies for this proposition had nothing to do with the constitutional right of privacy. Rather, the case concerned the Nebraska statute prohibiting the invasion of privacy as a tort.\(^{117}\) Therefore, an argument that such a right does exist as part of the Nebraska state due process clause would not be precluded in Nebraska courts.

Even if the court insists that the right to privacy is no broader than that recognized by the United States Supreme Court, the Court has decided many cases that would suggest that abortion is indeed a fundamental right and that a portion of that right is the freedom to make decisions concerning procreation without governmental restraint or interference.\(^{118}\) In fact, the Nebraska Supreme Court has admitted that the right to privacy pertains to "'matters relating to marriage, procreation, contraception, family relationships, and child rearing and education.'"\(^{119}\) Indeed, this fundamental right to privacy is what spurred the United States Supreme Court to recognize a woman's right to an abortion in *Roe v. Wade*.\(^{120}\) In fact, the *Roe* Court recog-

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116. Id. at 384, 488 N.W.2d at 539.


120. 410 U.S. 113 (1973).
recognized: first, that only fundamental rights are embraced by the concept of privacy;\textsuperscript{121} second, that the right of privacy includes the abortion decision;\textsuperscript{122} and finally, that "[w]here certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these rights may be justified only by a ‘compelling state interest.’"\textsuperscript{123} Perhaps these decisions have come under scrutiny by the present Court, but this does not prevent Nebraska courts from embracing this reasoning. The Nebraska Supreme Court has admitted that matters relating to procreation are protected by a right to privacy and that this right to privacy is a fundamental right. Therefore, Nebraska should decide that a woman's right to an abortion is a fundamental right and should allow only a compelling state interest to justify the statute; further, the statute should be narrowly tailored to effectuate its purpose. This is the same analysis found in \textit{Hope}.

2. \textit{Hope} Analysis Applied in Nebraska

Once the court accepts the responsibility to its citizens to expand rights under the state constitution and decides that the right to an abortion without state interference is fundamental, the \textit{Hope} analysis can be freely applied to the due process clause of the Nebraska State Constitution. As in New York, the Nebraska lawmakers may prefer one result of pregnancy over another, but they cannot interfere with a fundamental constitutional right. By funding only childbirth with one narrow exception, the Nebraska Medicaid program has funded a preferred conduct and denied treatment of the medical necessity as a result of the pregnancy. The purposes of the Nebraska Medicaid program are to provide services to promote healthy mothers and babies. The means used to carry out the program cannot be found to be narrowly tailored to its objectives. The policy of funding only childbirth cannot promote healthy mothers and babies when it denies necessary treatment to people with a bona fide medical need. This program may force an indigent woman to forego her health in order to carry a child, and as in \textit{Hope}, force the birth of unhealthy children. Admittedly, funding abortions when no federal funding is available would place a financial burden on the state, but in no way should financial considerations be the basis for denying a citizen a fundamental right. Therefore, the Nebraska Supreme Court should decide that the Medicaid system as it exists now—denying pregnant indigent women medically necessary abortions—violates the due process clause of the Nebraska State Constitution.

\textsuperscript{121} Id. at 152.
\textsuperscript{122} Id. at 155.
\textsuperscript{123} Id.
IV. CONCLUSION

Hope v. Perales provides a prime example of a state court defending the rights of its citizens by interpreting its state constitution more broadly than the parallel provision in the United States Constitution. The Hope analysis clearly follows the previous decisions of the New York Court of Appeals and demonstrates the powerful use of the “beyond-the-reactive” approach in state constitutional analysis.

This trend in the law has great promise for citizens in states like Nebraska who wish to protect their rights from being abridged by a capricious United States Supreme Court. One obvious area in which many citizens have this desire is in the area of abortion. The Hope decision provides a possible blueprint for an argument for attorneys confronted with this issue and could be used to successfully challenge the present Nebraska Medicaid system. The Hope decision also provides support for future constitutional cases and should be used to ensure Nebraska citizens more rights under their state constitution than provided to them under the United States Constitution.

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