Restraining Agency Action: Administrative Discretion and Adoption of Statutes by Reference in *Clemens v. Harvey*, 247 Neb. 77, 525 N.W.2d 185 (1994)

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I. INTRODUCTION

In the administration of law, two of the murkiest areas are the amount of administrative discretion allowed in carrying out legislative mandates and the interpretation of statutes adopted by reference. The Nebraska Supreme Court has given considerable attention to both areas in the last fifteen years and *Clemens v. Harvey* presents a clear illustration of the court's consistently conservative approach. With "New Federalism" and the resulting transfer of funding and

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1. 247 Neb. 77, 525 N.W.2d 185 (1994).
2. "New Federalism" refers to the movement aimed at deregulating many of the federal programs and transforming them into block grants. Medicaid, which is the program at issue in *Clemens*, is a prime example of a program which Congres-
program control from the federal to the state level, how state courts interpret federal statutes adopted by reference, and the amount of discretion state agencies are allowed in carrying out legislative policy, becomes increasingly important.

In *Clemens*, the court continued its practice of applying the "Lazarus Rule"\(^3\) to statutes adopted by specific reference. This rule holds that statutes which adopt other statutes by specific reference are not amended when the original statute is repealed or amended.\(^4\) In *Clemens*, the court also reiterated that the legislature cannot adopt by reference acts of Congress which will be passed in the future because that would constitute an unconstitutional attempt by the legislature to delegate its legislative authority to Congress.\(^5\)

In *Clemens*, the court also maintained a watchful eye on agency discretion. The court held that when the Department of Social Services (DSS) eliminated eligibility for medical assistance for an entire class of citizens, it exceeded its administrative discretion, because DSS lacked the specific statutory authority to issue such a regulation.\(^6\) The regulation was therefore found to be invalid.\(^7\)

It is the function of the legislature to establish public policy in Nebraska through the enactment of statutes.\(^8\) *Clemens* held that excluding an entire class of citizens from medical assistance was a legislative act because of the extent that it reflected the public policy of the state.\(^9\) Under the state separation of powers doctrine, even if the legislature wanted to delegate such a power to DSS, it could not do so because that would have been an improper delegation of its own power and prerogatives.\(^10\)

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7. Id.

8. Id. at 82, 525 N.W.2d at 189. See Nebraska Pub. Power Dist. v. City of York, 212 Neb. 747, 326 N.W.2d 22 (1982).


10. Id. at 82-83, 525 N.W.2d at 189. See also State ex rel. Spire v. Conway, 238 Neb 766, 472 N.W.2d 403 (1991).
This Note first presents the factual background of the caretaker relative medical assistance program in Nebraska and the factual background and procedural history of Clemens. Next, this Note analyzes the Nebraska Supreme Court's holding that statutes adopted by reference are not altered when the original statutes are changed. It examines whether changes are needed in Nebraska's approach to adopting legislation by reference and concludes that the clarity of the court's approach eliminates a need for change. Then, this Note examines what the court's refusal in Clemens to uphold a DSS regulation reveals of the law on: 1) whether the legislature can adopt by reference future acts of Congress; 2) how much discretion the legislature can delegate to administrative agencies; 3) the strict limits on administrative discretion in the policy-making area; and 4) the application of Nebraska's Separation of Powers Doctrine. This Note concludes that despite the legislature's passivity in protecting its power, Clemens resulted in a significant victory for the legislature's right to establish the state's policy. Finally, this Note points out that Clemens v. Harvey illustrates the continuing possibility of abuses of agency discretion, especially when lower income Nebraskans are concerned.

II. BACKGROUND

Clemens v. Harvey was a class action suit brought by Legal Services agencies to prevent the Nebraska Department of Social Services (DSS) from eliminating the class of "caretaker relatives" from eligibility for Medical Assistance (Medicaid) benefits. Caretaker relatives are Nebraskans responsible for the care of children whose income and resources are low enough to be eligible for Medicaid, but not low

11. There was not a strong reaction in the Legislature to DSS's usurpation of this legislative decision. Prior to DSS's action to cut the caretaker relative class, one senator, Appropriations Chairman Scott Moore, told a legislative committee, "[I]t is my understanding [that cutting the caretaker relative class from Medicaid eligibility] could be administratively done if the department so chose to do so." Exclude Certain Persons from Eligibility for Medical Assistance, 1992: Hearing on LB 1080 before the Committee on Health and Human Services, Nebraska Legislature, 92nd Legis., 2d Sess. (1992) (statement of Senator Scott Moore, February 20, 1992).

12. The Clemens class action was brought and successfully pursued by Nebraska's three Legal Services agencies, Legal Services of Southeast Nebraska, Legal Aid Society, Inc., and Western Nebraska Legal Services, working in cooperation with the Nebraska Center for Legal Services. These agencies are now prohibited by Congress from participating in such class action suits against government agencies. Omnibus Rescissions and Appropriations Act, § 504(a)(7), 110 Stat. This change leaves lower income Nebraskans bereft of legal aid to oppose abuses of agency discretion that affect them.


enough to qualify for a cash Aid to Dependent Children (ADC) grant. Typically, these caretakers work full or part-time. Medicaid provides an incentive for them to remain in the workplace. If they did not receive Medicaid as caretaker relatives, the expense of meeting their medical needs might lead them to quit their jobs in order to lower their incomes and qualify for Medicaid and ADC cash grants. Since many people in this class have serious mental and physical health problems, the importance of adequate health coverage in their lives cannot be overstated.\textsuperscript{16}

When the Medicaid program was established by federal statute in 1965, the caretaker relative class was one of the classes for whom coverage was mandatory.\textsuperscript{17} If a state wished to receive federal matching funds for its Medicaid program, the state was required to provide medical benefits to non-grant ADC caretaker relatives.\textsuperscript{18} When the Nebraska Legislature established Nebraska's Medicaid program, it adopted by reference "all applicable provisions"\textsuperscript{19} of Title XIX of the Social Security Act of 1965,\textsuperscript{20} thereby incorporating mandatory Medicaid coverage for caretaker relatives into state law.

The federal government changed coverage for caretaker relatives from mandatory to optional for states in 1981 when Title XIX of the Social Security Act\textsuperscript{21} was amended by the Omnibus Budget Reconciliation Act (OBRA).\textsuperscript{22} This change allowed states to drop Medicaid for the caretaker relative class without losing eligibility for federal Medicaid matching funds. States that continued to cover the caretaker relative class received federal matching funds for that coverage.

The presence and level of federal matching funds is a crucial element in the level of Medicaid services that a state can afford. In 1991, the match rate for Medicaid from the federal government to cooperating states was 64%.\textsuperscript{23} In 1992, the level of federal matching funds was cut to 61% and put on a sliding scale, linked to the comparative condition of the state's economy.\textsuperscript{24} Given the dramatic growth in Medicaid expenditures, which went from 4.2% of Nebraska's state budget in 1980 to 10% of the state budget in 1993,\textsuperscript{25} the cuts in federal matching

\textsuperscript{16} Brief of Appellants at 6, Clemens v. Harvey, 247 Neb. 77, 525 N.W.2d 185 (1994) (named appellants suffered from liver disease, hyperthyroidism, and severe mental depression).

\textsuperscript{17} Title XIX of an Act of Congress identified as H.R. 6675, 89th Cong., 1st Sess.


\textsuperscript{19} NEB. REV. STAT. § 68-1021 (Supp. 1994).

\textsuperscript{20} Title XIX of an Act of Congress identified as H.R. 6675, 89th Cong., 1st Sess.

\textsuperscript{21} Id.


\textsuperscript{23} Moore, \textit{supra} note 11.

\textsuperscript{24} Id.

\textsuperscript{25} Id.
rates for Medicaid had a serious budgetary impact. Nebraska had to appropriate an additional $18 million in fiscal year (FY) 1992-93 over FY 91-92 in order to maintain a consistent level of Medicaid coverage. One solution to this growing budgetary problem was to cut back or eliminate all optional Medicaid programs.

A number of bills were introduced in the Nebraska Legislature to cut these optional programs, including coverage of the caretaker relative class. However, none of the bills were even advanced out of committee. In January 1993, the Nebraska Department of Social Services responded to a projected budget deficit in the Medicaid program by changing the Nebraska Administrative Code to eliminate caretaker relatives from eligibility for Medicaid. This regulatory change became effective on February 1, 1993, and was made independent of any state legislative action. Prior to taking this administrative action, DSS estimated this change would affect only about 345 adults and their families. After the administrative cut was made, DSS discovered that at least 5,700 people had their Medicaid coverage cut off.

A year before the cut was made DSS Director Mary Dean Harvey testified before the legislature about the effects of cutting people off Medicaid. She said:

Now we know what . . . [the cuts are] going to translate into. If they don't have this kind of coverage where they can access the preventive health care that they're going to need, chances are they are more likely to end up in the emergency rooms which is the worst place to try and get primary health care, and/or the crisis will set upon them leading to longer hospitalizations.

In January 1993, just one year later, Director Harvey ordered caretaker relative Medicaid coverage taken away.

26. Id.
29. Legislative Bill 1080, which was introduced by Senator Scott Moore during the 1992 legislative session, would have ended Medicaid coverage for caretaker relatives, but it was indefinitely postponed in committee and was not voted on by the legislature.
30. Moore, supra note 11.
31. After the Supreme Court ruled that coverage for the caretaker relative class should be reinstated, the class had grown to 8,900. Hearings on L.B. 203 and L.B. 204 Before the Health and Human Services Committee, 94th Legis., 1st Sess. (1995)(statement of Milo Mumgaard, Director, Nebraska Center for Legal Services).
32. Exclude Certain Persons from Eligibility for Medical Assistance, 1992: Hearing on LB 1080 before the Committee on Health and Human Services, Nebraska Legislature, 92nd Legis., 2d Sess. (1992)(statement of Mary Dean Harvey, Director, Nebraska Department of Social Services).
Affected parents filed a class action lawsuit. The named plaintiffs in this class action suit were working parents of children who had received Medicaid benefits as non-grant ADC caretaker relatives. Each of the named plaintiffs had chronic medical needs such as liver disease and severe mental depression. Due to the plaintiffs' low income, they could not afford either the needed medical care or private medical insurance.

The action was submitted to the Nebraska District Court upon the parties' stipulation of facts. The trial was held on April 8, 1993. On September 8, 1993, Judge Bernard J. McGinn certified the case as a class action but held that the regulatory action had violated neither state statutory provisions nor the Nebraska Constitution. The parties appealed directly to the Nebraska Supreme Court. The supreme court reversed on both state statutory and Nebraska Constitutional grounds.

III. ANALYSIS OF CLEMENS

In Clemens, the Nebraska Supreme Court strongly defended the legislature's right and ability to set policy from two different encroachments on their policy-making prerogative—federal statutory changes and state agency regulatory actions. Clemens also illustrates, as previously noted by the court, the problem of confusion that can be caused when the legislature adopts by reference statutes that the
originating body later amends or repeals. Clemens did not break any new ground in the area of federal-state relationships. However, in an era of swift and dramatic changes in cooperative state-federal programs such as social services, it further clarified Nebraska law.


In Anderson v. Tiemann and Smithberger v. Banning, the Nebraska Supreme Court dealt with whether the state legislature could adopt an act that would be passed by Congress in the future. Smithberger held that such an act would be an unconstitutional delegation of state legislative authority to Congress. Smithberger invalidated a bill the legislature passed to spend federal relief funds which it anticipated Congress would soon appropriate. Since the Nebraska statute adopted federal language that Congress had not yet passed, the court held it unconstitutionally delegated state legislative authority to Congress. However, in Anderson, the court upheld a constitutional amendment allowing Nebraska to tie its state income tax rate to the federal rate, noting that the amendment did not mandate such delegation; it only allowed it. Because the legislature retained the power to make all state income tax decisions, a state law tying federal and state rates together was not "an abdication of its functions." The key factor was whether the state legislature retained full policy-making authority rather than abdicating its authority to another law-making body.

In the Medicaid program adopted by Nebraska in 1965, the Nebraska Legislature made the independent policy decision to adopt the same guidelines set out in the 1965 Social Security Act. Nebraska's adoption of parts of that statute by reference can be viewed as an exercise in efficiency. It saved time and statute printing expense but did not turn the legislature's authority over to Congress.

40. The court does not directly discuss this problem in Clemens, but a dispute over a statute adopted by reference lies at the heart of this case.
41. 182 Neb. 393, 155 N.W.2d 322 (1967).
42. 129 Neb. 651, 262 N.W. 492 (1935).
43. Id. at 666, 262 N.W. at 500.
47. Id. at 400, 155 N.W.2d at 327.
48. Title XIX of the 1965 Social Security Act.
49. "When the legislature subsequently enacts legislation which makes related pre-existing law applicable thereto, it is presumed that it did so with full knowledge of such preexisting legislation." School Dist. No. 17, Douglas County v. State, 210 Neb. 762, 765, 316 N.W.2d 787, 770 (1982).
B. Statutes Adopted by Specific Reference Are Not Amended When the Original Statute Is Amended.

As Anderson and other cases make clear,50 the legislature may incorporate specific federal statutes into state law. The Nebraska Supreme Court’s view of the consequences when the state adopts a federal statute and the federal statute is later amended or repealed is also clear. In 1982, the supreme court held: “Where one statute refers to another and the latter is subsequently repealed, the statute repealed, absent a contrary legislative intent, becomes a part of the one making the reference and remains in force so far as the adopting statute is concerned.”51 In so ruling, the court held this rule, first used by the court in 1899 in Shull v. Barton,52 should still be given effect. However, the court did not act unanimously.

Justice White, joined by Justice Krivosha, called Shull a “procedural trap, which has no basis for logic.”53 Pointing out that Shull often requires an “exhaustive search”54 of the statutes, “many long since repealed and replaced,”55 White unsuccessfully urged that Shull be overruled.56 The debate of the court over this statutory rule of construction was still raging a decade later when a dissent in Fisher v. City of Grand Island57 led to it being renamed the “Lazarus Rule.”58 Justice Shanahan, joined by Justice Grant, was as sharply critical of the “Lazarus Rule” as Justice White had earlier been in School Dist. No. 17.59 Justice Shanahan accused the majority of acting, “as a mag-

52. 58 Neb. 741, 79 N.W. 732 (1899).
54. Id.
55. Id.
56. Id. See also Shelby County Comm’n v. Smith, 372 So. 2d 1092, 1094 (Ala. 1979). (“This rule, however, leads only to confusion by requiring analysis of the general law at some point in the past.”).
58. Justice Shanahan in his Fisher dissent wrote, “Not since ‘Lazarus, come forth’ has there been such a summons for the dead to associate with the living, for this court raises from Nebraska’s dead statutes a procedure, killed by repeal in 1972 . . . .” Id. at 933-34, 479 N.W.2d at 774-75 (Shanahan, J., dissenting).
isterial mortician, caring for a body of law long since demised," and described the repealed statutes in question as "exist[ing] only in dust-covered books in a dark, musty backroom of a law library, conducive to raising mushrooms, or which have been placed beneath an uneven table leg to stop wobbling."

Justice Shanahan also noted that the Lazarus Rule "arguably amounts to a denial of due process required by the Constitutions of the United States and Nebraska." Due process requires the government to give notice to individuals of governmental actions which affect fundamental interests. When such interests are affected by legislative action, there is generally no notice question "because publication of a statute is normally considered to put all individuals on notice of a change in the law of the jurisdiction." Arguably, when a statute adopts by reference statutes that are later repealed, citizens are not given complete notice since the entire statute is not contained in a current book of statutes and the due process requirement of notice has not been met.

Justice Shanahan met with no more success than Justice White had ten years earlier. With the Nebraska Supreme Court firmly supporting the Lazarus Rule, the coverage of the caretaker relative class, mandated by the legislature in 1965 when it adopted "all applicable provisions" of Title XIX would seem to have remained in effect until repealed or amended by the Nebraska Legislature, regardless of any action taken on the federal level. However, the Lazarus Rule only applies to statutes adopted by specific reference, not those adopted by general reference. A general statutory reference is made to a general body of law, such as a reference that reads "[in] compliance with accepted tort principles."

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61. Id. (Shanahan, J., dissenting).
62. Id. at 937, 479 N.W.2d at 777.
63. Id. at 937-38, 479 N.W.2d at 777.
64. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 13.8 at 552 (5th ed. 1995).
67. "[T]he [specific] reference is . . . one which refers to one or more named provisions of another act . . . ." Horace Emerson Read, Is Referential Legislation Worth While?, 25 Minn. L. Rev. 261, 266 (1941).
69. Robson, supra note 3, at 226.
or repealed. If the adopting reference to another statute refers to it by specific statutory section numbers, it is adopted by specific reference, the Lazarus Rule then applies, and state law does not change when the referenced statute is altered.

In Clemens, DSS argued that the law creating Medicaid referred to a general body of federal law and, therefore, was not specific reference legislation. DSS cited Leach v. State Department of Motor Vehicles, where the court stated: "We believe that when a statute adopts the general law on a particular subject rather than a specific statute, it adopts not only the existing law but later legislation on the subject." However, a close reading of the Nebraska Medicaid statute does not support a general reference determination. The Nebraska Medicaid statute adopted "all applicable provisions of Title XIX of an Act of Congress identified as H.R. 6675, 89th Congress, approved July 30, 1965."

When the court ruled a statute had been adopted by general reference in Leach, it pointed out, "no specific statute had been incorporated" into relevant law. Such was not the case in the Nebraska statute dealing with caretaker relatives. It incorporated all applicable provisions of a specific statute, Title XIX of the Social Security Act, on the specific subject of Medicaid. Title XIX of the Social Security Act is clearly a specific statute, so DSS was left with the much weaker proposition that by "accepting ... all applicable provisions" of a statute, the legislature was adopting a general, rather than a specific, body of law.

The Nebraska Legislature was clear about the specific statute it adopted. The adopted federal statute clearly defined both the class of caretaker relatives and the eligibility of this class for Medicaid.
cause the Nebraska Legislature has not amended this statute, the eligibility of the caretaker class for Medicaid has not changed. Furthermore, there was no showing of legislative intent to change the status of the caretaker relative class. The legislature had 11 years since the 1981 passage of OBRA to exercise the state option to end coverage of the caretaker class. A number of bills to do so were introduced, but none passed.

The defeat of these bills cannot be used to define the legislature's full intent. However, they clearly indicate legislative support for continued caretaker relative coverage. As the court noted in State ex rel. Spire v. Stodola, if the legislature had wanted the rule later adopted by the affected state agency, "[i]t clearly could have included [that] provision . . . ."

The legislature has responded to other Medicaid eligibility changes in federal law. For example, Nebraska statutes have been amended to include coverage of low-income newborns born after October 1, 1984 (Ribicoff children). The legislature's addition of this new class for Medicaid coverage demonstrates its retention of control over which classes of Nebraskans are eligible for Medicaid. Following DSS' logic, it would have been unnecessary for the legislature to pass a law adding the Ribicoff class for coverage since the federal addition of a new class would automatically mandate state coverage.

In Clemens, DSS also argued that because Title XIX is amended "literally every year," to read the caretaker relative statute as a specific reference statute would "irrationally[ly]" require the state statute to be amended every year. However, the Nebraska Legislature would not be under such an obligation. It would only be required to adopt legislation necessary to maintain Nebraska's eligibility in the

82. Both Legislative Bill 1080 in the 92nd Legislature, 2nd Session and Legislative Bill 792 in the 93rd Legislature, 1st Session would have eliminated Medicaid coverage for the caretaker relative class. Both were indefinitely postponed in committee.
83. 228 Neb. 107, 421 N.W.2d 436 (1988).
84. In Stodola, the Department of Public Institutions was the state agency.
86. L.B. 1127, § 4, 88th Legis., 2nd Sess. (1984). This class was added by specific reference: "all individuals less than twenty-one years of age who are eligible under section 1905(a) of the Social Security Act as amended."
87. The name "Ribicoff children" comes from its chief sponsor, Senator Abraham Ribicoff, (D-Conn.). The class includes children from families earning between 100% and 133% of the ADC income standard.
89. NEB. REV. STAT. § 68-1021.
Medicaid program, and optional changes which the legislature deemed fit Nebraska's policy goals. Other statutory changes made by Congress to the Medicaid program would be no more important to Nebraska than the changes Iowa and Utah make in their Medicaid programs "literally every year."91

DSS characterized as "absurd" a reading of the law that included in the caretaker relative statute, Nebraska Revised Statute 68-1021, all applicable guidelines from the 1965 version of Title XIX, but none of the changes Congress later made that the Nebraska legislature did not adopt.92 DSS based this conclusion on the presumption that the legislature intended a rational result from the statutes.93 However, DSS' argument suffered from a lack of specificity. What part of that reading of 68-1021 was irrational?

*That the Nebraska Legislature would want to debate and pass specific changes in the Medicaid program rather than have Nebraska automatically accede to program changes passed by Congress?94

*That the guidelines adopted thirty years ago and never repealed by the legislature are still valid law?

*That when the legislature adopted all "applicable" Medicaid provisions of Title XIX of the 1965 Act95 it meant to adopt those provisions and nothing more?

The value of the contribution made by Clemens v. Harvey96 in clearing up the areas of Nebraska law covering federal-state cooperative programs is made clear by the Supremacy Clause argument that DSS raised in its Clemens brief.97 DSS correctly pointed out that the caretaker relative class of Medicaid, which had been mandatory for participating states since 1965, was made optional by the 1981 Budget Reconciliation Act. But DSS went on to argue that "to force"98 the state of Nebraska to cover this optional Medicaid class would violate the Supremacy Clause of the U.S. Constitution.99 DSS' reasoning was that if Congress made a program optional for states, it would be unconstitutional for a state to continue to offer that formerly mandatory, but newly optional, program. Not only did this reasoning reveal a

91. Id.
92. Id.
95. NEB. REV. STAT. § 68-1021 (Supp. 1994).
96. 247 Neb. 77, 525 N.W.2d 185 (1994).
98. Id.
99. U.S. CONST. art. IV, § 3, cl. 2.
unique view of the U.S. Constitution and federalism, but it also failed to deal with appellants' argument. Appellants were not arguing that federal law required the State of Nebraska to provide this Medicaid program. On the contrary, appellants agreed that the change in federal law made this program optional. Their position was that state law, adopted in 1965 and unchanged since then, included caretaker relatives as a statutorily eligible Medicaid class. In such a situation, the Supremacy Clause was irrelevant. Federal law made the class optional for state coverage. State law still mandated the class's coverage.

C. Only Limited Administrative Discretion Can Be Delegated by the Legislature

A common question concerning the separation of powers is: how much power can the legislature delegate to administrative agencies to fill in the details of the larger policy decisions that the legislature makes? In a practical sense, it is impractical and undesirable for the legislative branch to concern itself with regulatory minutia. As Davis and Pierce noted in their Administrative Law Treatise, "Discretion is inevitable in all agencies at all levels of government." But there is an extensive gray area within this grant of discretionary area concerning what is an administrative issue and what is within the realm of policy questions that must be left to the legislature. It is an important battleground for power between the executive and legislative branches, and the courts serve as referees. The Nebraska Supreme Court has not been an intrusive referee. On the


101. An additional DSS argument reflects the same unique view of the principles of federalism. Their brief complains, "One can be certain that if, . . . , coverage for medically needy caretaker relatives had been optional and not covered in Nebraska prior to 1981, and then became mandatory due to the 1981 federal OBRA amendments, the Appellants would have argued early and often that federal law is supreme and that such coverage became mandatory." Brief of Appellees at 15, Clemens v. Harvey, 247 Neb. 77, 525 N.W.2d 185 (1994) (No. A-93-0898). This statement significantly mischaracterizes federal-state cooperative programs. What appellants would have answered in that hypothetical situation was that the State of Nebraska had a choice between funding coverage of the caretaker class or losing all Federal Medicaid matching funds. Even in that "mandatory" situation, the Supremacy Clause would not force the State of Nebraska to cover a specific Medicaid class.

102. 3 Kenneth C. Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 17.1 (3d ed. 1994).

question of how far the legislature should be able to go in filling in administrative details, the court holds, "[T]he legislature has a wide discretion, and the court should be reluctant to interfere with such discretion." This is an eminently reasonable approach given the practical limitations on a part-time legislature in dealing, in any detail, with any of the thousands of issues that come before it.

Courts have also generally given agencies a large amount of discretion as to how they may operate within statutory limits. For example, the U.S. Supreme Court has held:

If . . . Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

However, the Supreme Court also noted in INS v. Cardoza-Fonseca that it was necessary to defer to an agency only if tools of statutory construction failed.

In Nebraska, the court has also recognized the need for agency discretion. In State ex rel. Douglas v. Nebraska Mortgage Finance Fund, the court noted that the modern tendency is toward more liberal grants of discretion given the increasing "complexity of economic and governmental conditions." As early as 1964, the court also expressed skepticism about whether a legislature could "prescribe all the rules and regulations necessary for a specialized agency to accomplish the legislative purpose."

However, the Nebraska Supreme Court has arguably been more restrictive than the U.S. Supreme Court. Nebraska's highest court has consistently held that "an administrative agency may not employ its rulemaking power to modify, alter, or enlarge provisions of a statute which it is charged with administering." Given this holding, DSS was faced with limited discretion in deciding whether Medicaid covered a specific class of people. Under Nebraska's Medicaid statute, an administrative action eliminating an entire class from eligibility would seem to "modify, alter, or enlarge" statutory provisions. Once the court found Nebraska's statute to be a specific reference stat-

ute that expressly mandated that caretaker relatives was an eligible class, it had to hold that DSS action altered statutory provisions in an unacceptable manner.

However, even if the court had agreed with DSS' argument that federal Medicaid provisions were adopted by general reference, the court should have found in favor of the plaintiffs. The 1981 changes in the Social Security Act made coverage of caretaker relatives optional by states. This federal statutory change did not move the decision on whether to cover this class into the area of agency discretion. A change in the federal legislation making a program optional left the decision of whether coverage should have been withdrawn to the legislative branch.

DSS does have considerable discretion in writing rules and regulations for social services. DSS argued that eliminating a class from eligibility for Medicaid was "clearly within the bounds delineated by the Nebraska Supreme Court as proper . . . for the exercise of discretion." In making this argument, DSS argued caretaker relatives were not specified along with other classes in Nebraska's statute creating Medicaid, nor were they included in the referenced Social Security Act provision. Therefore, DSS argued that it had the discretion to eliminate coverage of this class because it was not statutorily mandated.

However, the federal statute did not use general language such as states shall provide medical assistance for all persons it deems necessary. It specifically defined the class covered as caretaker relatives as "individuals who are— (ii) relatives specified in § 406(b)(1) with whom a child is living if such child, except for § 406(a)(2), is (or would, if needy, be) a dependent child under Title IV." 111


112. DSS argued that the federal government had dictated to Nebraska that the eligibility for benefits of an entire class of citizens (a legislative decision) should be left to agency discretion. Giving either the federal government or state executive branch agencies such legislative power has been found unconstitutional by the Nebraska Supreme Court. See generally State ex rel. Spire v. Stodola, 228 Neb. 107, 421 N.W.2d 436 (1988); County of Dodge v. Department of Health, 218 Neb. 346, 355 N.W.2d 775 (1984); Smithberger v. Banning, 129 Neb. 651, 262 N.W. 492 (1935).


115. This argument rests on the proposition that the 1981 federal OBRA amended Nebraska's statutory law dealing with Medicaid.


112. DSS argued that the federal government had dictated to Nebraska that the eligibility for benefits of an entire class of citizens (a legislative decision) should be left to agency discretion. Giving either the federal government or state executive branch agencies such legislative power has been found unconstitutional by the Nebraska Supreme Court. See generally State ex rel. Spire v. Stodola, 228 Neb. 107, 421 N.W.2d 436 (1988); County of Dodge v. Department of Health, 218 Neb. 346, 355 N.W.2d 775 (1984); Smithberger v. Banning, 129 Neb. 651, 262 N.W. 492 (1935).


115. This argument rests on the proposition that the 1981 federal OBRA amended Nebraska's statutory law dealing with Medicaid.

D. Agency Discretion Cannot Intrude on Legislative Powers.

There is no doubt that the legislature can delegate to an administrative agency the power to make rules and regulations to implement state policy.\(^{117}\) However, the agency's rule-making authority is limited to the powers delegated to it by the statute it is administering.\(^{118}\) While DSS had been given the statutory authority to promulgate rules and regulations "as to medical services and benefits,"\(^{119}\) there was no applicable statutory language which alluded to DSS' authority to eliminate entire classes from Medicaid coverage.\(^{120}\) A change in federal law could not insert such agency discretion without first being adopted by the state.

In addition, the Nebraska Supreme Court has held: "In order to be valid, a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated."\(^{121}\) Given the legislature's adoption of caretaker relatives as a Medicaid class in 1965, and its failure to modify or repeal such coverage, it is difficult to see how DSS' denial of coverage to caretaker relatives was anything but a direct contradiction of the applicable statute. _Clemens_, therefore, closely followed the reasoning in _Dodge_ and _Stodola_, in which the supreme court ruled invalid agency regulations which directly "contravene[d] the statute which the agency is obliged to administer."\(^{122}\)

In _Dodge_, the Nebraska Health Care Certificate of Need Appeal Panel granted a certificate of need based on criteria that was not required under the Certificate of Need Panel's enabling statute. _Dodge_ did differ from _Clemens_ because in _Dodge_ the administrative action also differed from regulations created by the Nebraska Department of Health, the overseeing executive department. The court pointed to differences with both legislative and executive guidelines in _Dodge_ to hold that the panel exceeded its discretion.\(^{123}\)

_Clemens_ is closer to _Stodola_ than _Dodge_ because it involved only a difference with legislative guidelines, not executive guidelines as well. In _Stodola_, the legislature authorized the Department of Public Institutions (DPI) to adopt appropriate regulations for making determinations about ability to pay for services. The state statute specifically stated the factor of "taxable income reportable under Nebraska

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118. Id.
DPI promulgated a regulation that required the furnishing of financial information "including but not necessarily limited to a copy of their state tax return and a completed financial questionnaire." The court found the rule to be invalid because it "has promulgated a rule . . . which enables that agency to exercise powers beyond those actually delegated to it by the Legislature." DSS' actions in Clemens were arguably even more flagrant than the DPI regulations which the court held to be improper in Stodola. Stodola involved only the amount of documentation affected parties had to supply. DSS in Clemens summarily eliminated an entire class of people from Medicaid coverage. Given this precedent, the court's holding in Clemens was no surprise, "[W]e do not find that DSS has been given the specific authority to unilaterally eliminate coverage to the class in question." 

E. Separation of Powers Doctrine

The court in Clemens also held that DSS, a part of the executive branch, had violated the Separation of Powers Doctrine of the Nebraska Constitution because excluding an entire class from Medicaid was a legislative act. The Nebraska Constitution states:

The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.

The Nebraska Supreme Court has strictly guarded against "one branch of government . . . encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives." It has called this division "the beam from which our system of checks and balances is suspended."

The power to make public policy and set the standards for carrying out that policy is a legislative power. As the court held in Ralston v. Turner: "Within constitutional limits, the Legislature is the sole judge as to what laws should be enacted for the protection and welfare

126. Id. at 110, 421 N.W.2d 436, 438 (1988).
128. Id. at 83, 525 N.W.2d 185, 189 (1994).
of the people." In Clemens, the court held that not only had the legislature "not attempted" to delegate to DSS the power to eliminate a class of persons from Medicaid coverage, it also held that "the Legislature cannot delegate such powers." While the Nebraska Court approaches the area of constitutional separation of powers on a case by case basis, it has attempted to maintain a rigid division between the branches. In State ex rel. Spire v. Conway, the court held a state senator could not serve in the legislature while retaining a state college teaching job in the executive branch. In State ex rel. Meyer, the court found that the legislature has total authority over appropriations, but once the appropriations are made, the authority shifts to the executive branch. Both decisions illustrate the court's determination to maintain a division between the branches even when, as in Conway, the affected party arguably had a policy-making role in only one branch and held a non-supervisory position in the other branch.

In comparison to Conway, Clemens was a simple separation of powers question. DSS' action had the effect of altering or repealing a legislative act. The legislature had worked within its constitutional power to determine which classes of low-income Nebraskans were eligible for Medicaid. DSS then vetoed the legislature's decision as it affected the caretaker relative class. The court's ruling in Clemens is consistent with Hagemeister when it ruled: "It is beyond the power

133. State ex rel. Ralston v. Turner, 141 Neb. 556, 559, 4 N.W.2d 302, 305 (1942). See also 16 C.J.S. Constitutional Law § 113 (1984) ("Legislative power is the power to enact laws or to declare what the law shall be. . . ."); Nebraska Pub. Power Dist. v. City of York, 212 Neb. 747, 757, 326 N.W.2d 22, 28 (1982) ("In general, . . . it is the function of the Legislature by the enactment of statutes to declare what the law is.").


135. Id., 525 N.W.2d at 189 (emphasis added).


139. DSS argued in Clemens that State ex rel. Meyer supports the proposition that, once the legislature has appropriated state funds, the executive branch can spend that money as it sees fit. Under this logic, DSS could have eliminated the caretaker relative class from coverage under its executive powers. The court dismissed this claim without comment since the logical extension of this proposition would reduce the legislature's appropriations power to control over only the aggregate amount of appropriations since the executive branch could then make whatever changes it wanted. It should be noted that this interpretation would, if accepted by the court, have signaled a tremendous shift in power from the legislative to the executive branch.

RESTRAINING AGENCY ACTION

of the executive or administrative bodies to . . . interfere, with or limit powers conferred on the Legislature by the Constitution.\textsuperscript{141}

F. Who Will Check Administrative Discretion?

\textit{Clemens} is an apt illustration of why executive agencies should not be given the discretion DSS argued for in this case. If an executive agency were free to eliminate programs without legislative approval, it would be impossible to either depend on legislatively created programs or to consistently enforce legislative standards. But \textit{Clemens} raises an important question of who is responsible for holding administrative agencies accountable for not exceeding their discretion. Courts can act as referees, but only if a party with standing brings a case before them.

The \textit{Clemens} decision was the result of a class action suit brought by four Legal Services agencies, Legal Services of Southeast Nebraska, Legal Aid Society, Inc., Western Nebraska Legal Services, and the Nebraska Center for Legal Services.\textsuperscript{142} Legislation recently passed by Congress combines a significant cut in the Legal Services budget\textsuperscript{143} with a prohibition on class action suits filed against any governmental entity.\textsuperscript{144} The passage of this legislation insures that Legal Services agencies will be unable to take on a case like \textit{Clemens} in the future.

When governmental agencies exercise improper discretion, there are often private parties with the resources to defend their own rights, and to restore the proper balance among branches of government. However, when governmental actions affect the economically disadvantaged, the ability of the affected people to defend their rights, even if their legal position is unassailable, is limited. Congressional action to gag or destroy Legal Services will eliminate one of the few legal allies of the economically downtrodden.

VI. CONCLUSION

Prior to the \textit{Clemens} decision, there were probably few people who expected the conservative Nebraska Supreme Court to reverse the district court's decision and support a class action suit brought by impoverished parents against the Nebraska Department of Social Services. However, a careful reading of the court's decisions indicates it was probably an easy case for them to decide. In \textit{Clemens}, the court con-

\begin{itemize}
  \item \textsuperscript{141} \textit{Id.}
  \item \textsuperscript{142} The Nebraska Center for Legal Services was terminated on December 31, 1995.
  \item \textsuperscript{143} In FY 1996, the national Legal Services budget was slashed. Jon Newberry, \textit{Temporary Reprieve for the LSC After a Tough Fight, Legal Agency Gets 1996 Funds, But Future is Unclear}, ABA J. Dec 1995 at 18.
  \item \textsuperscript{144} Omnibus Rescissions and Appropriations Act, § 504(a)(7), 110 Stat.
\end{itemize}
continued its conservative approach to interpreting statutes adopted by reference, its close watch over the use of administrative discretion, and its vigilant protection of the separation of powers. The importance of *Clemens* was not that it broke new ground or pointed the court in a new direction, but that it clarified and strengthened the court’s approach to some important questions of statutory interpretation and separation of powers.

In *Leach*, the court clearly differentiated between statutes adopted by general reference and those adopted by specific reference, and held that specific reference statutes were not altered when the original statute was changed. But the court’s stance blurred in *Fisher*. As Justice Shanahan pointed out in his dissent, the reference statute in question did not contain a specific statutory reference to the justice of peace statute so, if it followed *Leach*, the court in *Fisher* should have held the repeal of the justice of peace statute (the reference statute) also repealed its effect on the adopting statute. The court did not do so. *Clemens* gave the court an opportunity to reiterate its holding that specific reference statutes are not amended when the original statute changes.

However, *Clemens* also demonstrates the confusion that can result when statutes are adopted by reference, then amended or repealed over time. As the dissent in *School Dist. No. 17* illustrates, this is not a new or unique problem. It is a problem which can be easily solved. Statutes that are adopted by reference can be reprinted in their entirety, thereby eliminating “exhaustive search[es]” and clarifying legislative intent. But as a Wisconsin decision pointed out, incorporating statutes by reference has its merits:

> [The] greatest advantage gained by incorporating terms by reference is that the new bill may be shortened with two practical benefits, reduction in the volume of the statute books, and application of established precepts of proven worth to a new situation with a minimum of legislative tinkering. Thus, with [few words]... it incorporate[s] a multitude of descriptions of... conduct.

The trade-off is simple. Nebraska can opt for efficiency and avoid re-printing voluminous statutes adopted by reference or it can opt for clarity and adopt statutes word for word, instead of by reference.

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147. *Id.* at 935-36, 479 N.W.2d at 775-76.
150. *Id.* at 770, 316 N.W.2d at 772.
How much confusion is caused by statutes adopted by reference? Situations similar to Fisher\textsuperscript{152} will occasionally recur, where the legislature fails to amend every affected section of the statutes, and the courts are left to wrestle with determining actual legislative intent. But in other situations, Clemens will prove helpful in clarifying the situation. When the legislature refers to a specific statute, that statute becomes part of the state law and remains state law until the legislature makes a change. This clarification reduces the need to foreswear the useful legislative device of adopting legislation by reference.

Clemens was not an important case in the area of how much discretion an administrative agency can assume in executing legislative acts. DSS did not present a colorable claim that the legislature intended to allow DSS the discretion to eliminate entire classes of Nebraskans from coverage by specific social services programs. Dodge County,\textsuperscript{153} Stodola,\textsuperscript{154} and Beatrice Manor\textsuperscript{155} are much more important in charting the boundaries of agency discretion in Nebraska.

However, Clemens is important in helping to set the parameters for what the Legislature cannot delegate to agency discretion. Inasmuch as establishing the policies and eligibility for specific government programs is clearly a legislative role, the court has been clear and consistent. "The Nebraska Constitution . . . prohibits one branch of government . . . from improperly delegating its own duties and prerogatives."\textsuperscript{156} There will always be gray areas of agency discretion, but eliminating an entire program, or an entire class of citizens from program participation is not in a gray area. The court was clear in Clemens: "The Legislature cannot delegate to DSS the authority to eliminate caretaker relatives from eligibility for medical assistance."\textsuperscript{157}

This is an important ruling given the times in which we live. As the federal government cuts back its state aid, there will be increasing pressures on state legislatures to cut social programs, many of them with significant constituent support. The politically easy way out for the legislature would be to give executive agencies the authority to make those unpopular cuts. The court held in Clemens that the Nebraska legislature does not have that option. It was not only the right decision on constitutional grounds, it was the right decision to make for democratic reasons. The legislature, not agency bureaucrats, is

\textsuperscript{154} State ex rel. Spire v. Stodola, 228 Neb. 107, 421 N.W.2d 436 (1988).
\textsuperscript{157} Clemens v. Harvey, 247 Neb. 77, 83, 525 N.W.2d 185, 189 (1994).
elected to set our state's policy. In *Clemens*, the court rightly refused to let it shirk that duty.

The court's reliance on the Separation of Powers Doctrine of the state constitution in *Clemens* was also important. If the court had limited its decision to holding that the legislature had not delegated the power to DSS to eliminate caretaker relatives from eligibility, the legislature could have attempted to give DSS or other agencies the power to eliminate programs. The court's reliance on constitutional grounds clearly forecloses this option.

Despite *Clemens'* clear restraint on administrative discretion, in its aftermath we are left with a disturbing question. Who will make sure that questionable exercises of administrative discretion are challenged in the courts? It is clear that the action taken by DSS was improper under Nebraska law. The consequences of allowing such an action to stand were serious. On an individual level, it is not an exaggeration to call it a matter of life and death. When thousands of Nebraskans were eliminated from Medicaid, many of them could no longer afford prescribed medication for conditions such as heart and kidney disease and psychiatric problems. Death or permanent disability were possible results. On a governmental level, DSS altered the separation of powers by usurping a legislative power. The stakes are high. In the wake of *Clemens*, we need to ask, now that Congress has tied Legal Services' hands, who will act to see that justice is done?

*Jeffery R. Kirkpatrick '97*

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