

The University of Kansas Law Review

Written Testimony of Richard E. Levy*
Before the House Agriculture Committee, State of
Kansas**

I. INTRODUCTION

In *Hellebust v. Brownback*,¹ the Federal District Court for the District of Kansas invalidated two statutory sections that provided for the election of the State Board of Agriculture.² The provisions authorized various county and statewide agricultural groups to send representatives to an annual convention at which members of the Board of Agriculture were elected.³ Because the Board of Agriculture exercised substantial regulatory authority over matters such as pesti-

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** This testimony was presented on October 27, 1993.

1. 824 F. Supp. 1506, *modified*, 824 F. Supp. 1511 (D. Kan. 1993).

2. 824 F. Supp. at 1513-20, 1524 (invalidating KAN. STAT. ANN. §§ 74-502 to -503 (1992)).

3. KAN. STAT. ANN. §§ 74-502 to -503 (1992). Specifically, section 74-502 identifies thirteen categories of groups that may send representatives to the annual meetings including: county or district agricultural societies, granges, farmers' unions, statewide wheat and livestock associations and similar organizations. *Id.* § 74-502(a). In counties where the signatures of 100 persons engaged in agricultural production who are not members of such groups can be obtained, an independent delegate may also be sent. *Id.* § 74-502(b). Under section 74-503, each of the six state districts elects two members to the Board of Agriculture to serve three-year terms; generally, a minority of the twelve-member Board are elected at each meeting. *Id.* § 74-503.

cides,⁴ water use⁵ and meat inspections,⁶ the district court found the Board to be a general governmental agency and held that this arrangement violated the "one person, one vote" principle of *Reynolds v. Sims*.⁷ Based on this conclusion, the court placed the Board's functions in receivership and appointed the Governor (in her official capacity) as receiver pending legislative action to correct the defects in the selection process for the Board of Agriculture.⁸

The Kansas House Agriculture Committee requested that I comment on the constitutional issues raised by this case.⁹ Because of the public interest in these matters, *The University of Kansas Law Review* agreed to publish the written testimony I submitted to the Committee.¹⁰ This testimony is reproduced below in the form it was submitted, with the inevitable addition of footnotes and technical alterations. It is followed by a brief postscript in which I describe some of the distinct concerns that developed in the oral exchange that accompanied my presentation of this testimony to the Committee.

4. See *Hellebust*, 824 F. Supp. at 1514 (citing KAN. STAT. ANN. §§ 2-2205, -2438a(m)-(n), -2439, -2478 (1991)).

5. See *id.* (citing KAN. STAT. ANN. §§ 82a-701(e)-(g), -702, -703a, -706, -726 (1989)).

6. See *id.* (citing KAN. STAT. ANN. §§ 65-6a20, -6a27(b)(2), -6a31 (1992)).

7. See *id.* at 1515-20 (relying on *Reynolds v. Sims*, 377 U.S. 533 (1964)).

8. *Hellebust v. Brownback*, 824 F. Supp. 1524, 1527-29, 1532 (D. Kan. 1993).

9. Specifically, I was requested to comment on the following matters:

1) Highlight the constitutional issues which are outlined in *Hellebust v. Brownback*, 824 F. Supp. 1511 (D. Kan. 1993).

2) What constitutional principles should the Committee keep in mind when it deliberates the options for the organizational structure of the former Board of Agriculture? Are the former State Board of Agriculture's functions executive in nature and therefore should be placed under an agency secretary appointed by the Governor?

3) Is this a case of judicial intervention similar to the dissenting argument in *Reynolds v. Sims*, 377 U.S. 533, 589 (1964) (Harlan, J., dissenting), and further, is this a valid argument?

Letter from Raney Gilliland, Principal Analyst, Legislative Research Dept., Kansas Legislature, to Richard Levy, Professor of Law, University of Kansas School of Law (Oct. 11, 1993) (on file with author).

10. Cf. Fred N. Six, *A Request for Thoughtful Criticism*, 41 KAN. L. REV. 655 (1993) (arguing that state court judges would benefit from scholarly analysis of their work). Because this testimony was prepared for legislative deliberations, it is not based upon exhaustive research and does not purport to engage in thorough doctrinal analyses of the issues raised. Instead, my goal was to highlight the constitutional issues and suggest some of the basic concerns that the legislature should bear in mind when it considers possible responses to the *Hellebust* decision.

II. TESTIMONY BEFORE THE KANSAS HOUSE AGRICULTURE COMMITTEE

A. Introduction

Members of the Committee:

I am honored by your request that I comment on some of the constitutional issues raised in the aftermath of *Hellebust v. Brownback*,¹¹ in which the federal district court invalidated the process used to select the State Board and Secretary of Agriculture. The court named the Governor as receiver of the Board's functions and left it to the legislature to devise a permanent solution to the defects in the Board's structure.¹² This task is a sensitive one from both the constitutional and political perspectives, and it is my pleasure to provide whatever assistance my constitutional law expertise might afford.

After discussing the "one person, one vote" principle as it applied in *Hellebust*¹³ in order to highlight the issues presented in that case, I will outline some of the constitutional concerns that the legislature must bear in mind when it deliberates the options for restructuring the Board of Agriculture.¹⁴ In the process, I will also address the suggestion that it is incumbent upon the legislature to resist the federal court decision as an instance of improper judicial intervention.¹⁵

B. The "One Person, One Vote" Principle

1. Origins of the Principle

It is well established that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution not only specifically prohibits racial discrimination but also incorporates a general principle of equal treatment under the law.¹⁶ In a long line of cases, the United States Supreme Court has held that the principle of equal treatment applies with particular force when fundamental rights are involved.¹⁷

11. 824 F. Supp. 1506, *modified*, 824 F. Supp. 1511 (D. Kan. 1993).

12. *Hellebust v. Brownback*, 824 F. Supp. 1524, 1527-29, 1532 (D. Kan. 1993).

13. *Hellebust v. Brownback*, 824 F. Supp. at 1515-20; *see infra* part II.B.2.

14. *See infra* part II.B.

15. *See infra* part II.C.

16. U.S. CONST. amend. XIV, § 1; *see generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-1 (2d ed. 1988) (discussing the meaning of equality).

17. *See, e.g.*, *Dunn v. Blumstein*, 405 U.S. 330 (1972) (fundamental rights of voting and travel invoked to invalidate durational residency requirements as prerequisites to voter registration); *Griffin v. Illinois*, 351 U.S. 12 (1956) (fundamental right of access to criminal appeal invoked to

Among those rights deemed “fundamental” for equal protection principles is the right to vote. In *Reynolds v. Sims*,¹⁸ the Supreme Court held that equal protection requires the votes of all persons to carry equal weight.¹⁹ In other words, the Court adopted the “one person, one vote” principle.²⁰ Legislative districts with widely disparate populations and other arrangements that dilute or exclude the votes of some citizens thus violate the Equal Protection Clause.²¹ The Supreme Court has repeatedly reaffirmed this principle, most recently in *Board of Estimate v. Morris*,²² where it invalidated the longstanding election process for New York City’s Board of Estimate (which has significant legislative functions) because the voting power of residents of the city’s larger boroughs was substantially diluted.²³

The “one person, one vote” requirement reflects both our general conception of democracy and basic constitutional principles. The essence of democratic institutions is their political accountability to citizens over whom they have governmental authority. *Reynolds v. Sims* recognized that political institutions are not truly democratic if some votes count more than others.²⁴ It violates our basic sense of governmental legitimacy to subject individuals to regulatory authority without giving them a fair say in the selection of those who exercise that authority. This common-sense understanding of democratic institutions is reinforced in two ways by constitutional jurisprudence. First, constitutional doctrine treats the right to vote as fundamental because it preserves other rights.²⁵ Those whose voices are heard can protect their interests in the political system; those whose voices are muted

invalidate denial of appeal of indigent defendants unable to afford trial transcript); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (fundamental right of procreation invoked to invalidate compulsory sterilization of some repeat offenders).

18. 377 U.S. 533 (1964).

19. *Id.* at 568.

20. Justice Douglas first coined the phrase “one person, one vote” in his majority opinion in *Gray v. Sanders*, 372 U.S. 368, 381 (1963); see also *id.* at 382 (Stewart, J., concurring) (“one voter, one vote”). The *Gray* Court applied the doctrine to a state statute’s county unit system of counting votes in a political party’s primary election, 372 U.S. at 370-72, and *Reynolds* extended it to state legislative districting. 377 U.S. at 540.

21. *Reynolds*, 377 U.S. at 561-68.

22. 489 U.S. 688 (1989).

23. *Id.* at 692-703.

24. See 377 U.S. at 561-68.

25. *Id.* at 562 (“the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights”); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“Other rights, even the most basic, are illusory if the right to vote is undermined.”); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (“the political franchise of voting . . . is regarded as a fundamental political right, because preservative of all rights”).

cannot.²⁶ Thus, unequal treatment with respect to voting rights is properly the subject of heightened concern under the Equal Protection Clause. Second, judicial action to correct distortions in the political process is generally regarded as consistent with the proper constitutional role of the courts.²⁷ Judicial restraint requires respect for the decisions of politically accountable institutions,²⁸ but not when their accountability is compromised by flaws in the political process.²⁹

2. The "One Person, One Vote" Principle Applied in *Hellebust*

In light of Supreme Court decisions developing these basic considerations, the law applied in *Hellebust* was clear: To survive the strict constitutional scrutiny accorded to measures affecting fundamental rights, significant departures from the "one person, one vote" principle must be necessary to serve a compelling governmental interest.³⁰ A narrow exception to this constitutional requirement exists for governmental bodies with a special limited purpose and whose activities have a disproportionate effect on those who may vote.³¹ Under this doctrine, the constitutional deficiency of the selection process for the Board of Agriculture, and by extension the Secretary of Agriculture, was reasonably plain. In particular, the application of this law to the Board raised four issues.

26. See *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626-28 (1969); *Reynolds*, 377 U.S. at 565.

27. *Davis v. Bandemer*, 478 U.S. 109, 121-27 (1986) (political gerrymandering allegedly causing vote dilution found justiciable under Equal Protection Clause challenge); *Baker v. Carr*, 369 U.S. 186, 226-29 (1962) (Equal Protection Clause challenge to legislative malapportionment not a nonjusticiable political question).

28. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (1962); Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 348-54 (1989).

29. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938) (suggesting that "more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment" might apply to statutes "directed at particular religious or national or racial minorities" because "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities") (citations omitted); see generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

30. *Hellebust v. Brownback*, 824 F. Supp. 1511, 1518-20 (D. Kan. 1993) (citing *Hadley v. Junior College Dist.*, 397 U.S. 50, 51-54, 56 (1970); *Kramer*, 395 U.S. at 626, 632-33 (1969); *Reynolds*, 377 U.S. at 561-62).

31. *Id.* at 1515-16 (citing *Ball v. James*, 451 U.S. 355, 370-71 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 728 (1973)).

a. Issue 1: Is Section 74-502 Consistent with the "One Person, One Vote" Principle?

The district court correctly concluded that it is not.³² Although under section 74-502 a wide array of agricultural groups and interests are represented in the selection process, nonagricultural interests are not.³³ Thus, a large percentage of the population is totally excluded from the process of selecting the Board of Agriculture. Those entirely excluded clearly do not have an equal say in the selection of the Board. This problem is particularly acute given the potential for sharply divergent policy perspectives among agricultural and nonagricultural interests.

b. Issue 2: Can the Departure from the "One Person, One Vote" Principle Be Justified Under the Narrow Exception for a Body with Special Purposes and a Disproportional Effect on Its Constituents?

This issue is more difficult, but on balance I believe that the district court's conclusion on this point was also correct.³⁴ Historically, it seems clear that the Board of Agriculture was intended to promote agricultural markets and as such might have functioned as a limited purpose body selected by those whose interests it affected.³⁵ As the regulatory functions of the Board expanded, however, this ceased to be true.³⁶ The Board's authority to regulate water and pesticide usage throughout the state, for example, applies to residential and commercial activity in nonagricultural settings.³⁷ Even if the Board's direct regulatory authority were confined to agricultural activity, its decisions would have a significant impact on all residents of the state. The regulation of agricultural uses of water and pesticides has a significant environmental impact on the entire population of the state, and the regulation of agricultural markets affects not only those directly involved but also consumers throughout the state.³⁸ Thus, given the breadth of agricultural activity, even a more limited Board of Agriculture would probably fall outside the exception. In light of the Board's current functions, the exception is clearly inapplicable.

32. *See id.* at 1515-20.

33. *See* KAN. STAT. ANN. § 74-502 (1992).

34. *See Hellebust*, 824 F. Supp. at 1515-20.

35. *See id.* at 1512-13.

36. *Id.* at 1513-15.

37. *Id.* at 1514 (citing KAN. STAT. ANN. §§ 2-2205, -2438a(m)-(n), -2439, -2478 (1991); *id.* §§ 82a-701(e)-(g), -702, -703a, -706, -726 (1989)).

38. *Id.* at 1513-15.

c. Issue 3: Is Section 74-502 Necessary to Further a Compelling Governmental Interest?

Even though the statute violates the “one person, one vote” principle, it might be sustained if it passed the compelling governmental interest test.³⁹ But no purpose for section 74-502 was offered at all in *Hellebust*, much less a “compelling one.”⁴⁰ Even if a compelling purpose could be offered, the requirement that the process be “necessary” to serve that purpose is exceedingly difficult to meet.⁴¹ The state must show that the process is “narrowly tailored”; namely, that it neither includes those who logically should be excluded under the stated purpose nor excludes those who should be included.⁴² In addition, the state must show that the same purpose could not be accomplished through some other, less discriminatory means.⁴³

d. Issue 4: What is the Appropriate Judicial Remedy?

Having analyzed the statute under settled doctrine and concluded that it was unconstitutional,⁴⁴ the final issue before the district court was how to remedy the constitutional defects without crippling state government or unduly interfering with the restructuring of the Board.⁴⁵ As you know, the district court appointed the Governor, in her official capacity, as receiver to exercise the functions of the Board and left it to the legislature to construct a long term solution.⁴⁶ This strikes me as an appropriate response to a difficult situation, intended to preserve the prerogatives of the state to the extent possible in light of the unconstitutionality of section 74-502.

In sum, then, the “one person, one vote” principle is well established and accords with both our basic understanding of democracy and fundamental constitutional doctrine. The application of established doctrine in *Hellebust* was reasonably straightforward and required the invalidation of section 74-502. The remedy ordered was minimally intrusive given the constitutional violation and put the ball back in the legislature’s court. The question then becomes, what is the appropriate legislative response?

39. See *supra* note 30 and accompanying text.

40. *Hellebust*, 824 F. Supp. at 1520.

41. See *id.* at 1515 (citing *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1963)).

42. *Id.* at 1520 (citing *Hadley v. Junior College Dist.*, 397 U.S. 50, 56 (1970)); see also *id.* at 1518 (citing *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 632-33 (1969)).

43. *Kramer*, 395 U.S. at 632.

44. *Hellebust*, 824 F. Supp. at 1515-20, 1524.

45. *Hellebust v. Brownback*, 824 F. Supp. 1524, 1525-27 (D. Kan. 1993).

46. *Id.* at 1527-29, 1532.

C. *The Legislative Response*

While my comments to this point should make clear that I do not believe the *Hellebust* decision is an example of improper judicial interference with political prerogatives, I recognize that there are those who disagree. The debate over when it is proper for courts to intervene is the central problem of constitutional law; it is as old as the power of judicial review itself. When the courts' duty to "say what the law is"⁴⁷ requires that they interpret and apply the Constitution to invalidate government action, they stand in the way of political decisions made elsewhere.⁴⁸ Because the broad language of the Constitution does not lend itself to a single, unassailable interpretation in the complex reality of modern government, disagreements about the propriety of judicial decisions invalidating government action are inevitable.⁴⁹

But even if *Hellebust* and *Reynolds v. Sims* are "wrong" in this sense, that is irrelevant for the legislature as it goes about the task of responding to the decision. The Supremacy Clause expressly states that the United States Constitution is the "supreme Law of the Land," binding on state government officials, including the legislature.⁵⁰ United States Supreme Court decisions interpreting the Constitution are authoritative until they are overturned by that body or by constitutional amendment,⁵¹ and the district court decision in *Hellebust* applied well settled doctrine in a reasonably straightforward manner.⁵² Thus, whether or not we agree with *Hellebust*, we are bound to respect it unless and until it is overturned on appeal.

If the legislature disagrees with the way the doctrine was applied or believes that *Reynolds v. Sims* should be overruled, the only appropriate recourse would be to press the state to appeal the district court decision, all the way to the Supreme Court if necessary. But such an effort is likely to be unavailing. There are no apparent errors in the *Hellebust* court's application of *Reynolds v. Sims*, and the Supreme Court is unlikely to overturn *Reynolds* in light of its recent reaffirmation of the "one person, one vote" principle in *Board of Estimate v. Morris*.⁵³ Unless there is a successful appeal, the legislature is duty-bound to act in good faith to implement the constitutional principles underlying the *Hellebust* decision.

47. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

48. See BICKEL, *supra* note 28, at 16-23.

49. See *id.* at 1-33.

50. See U.S. CONST. art. VI, cl. 2.

51. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (per curiam).

52. See *supra* notes 16-43 and accompanying text.

53. 489 U.S. 688 (1989).

D. Suggestions for the Reorganization of the Board of Agriculture

This brings us at long last to the task at hand: the reorganization of the Board of Agriculture. In addressing this problem, the legislature must be concerned not only with the equal protection problems that led to the invalidation of section 74-502 but also with state separation of powers principles that constrain the structure of administrative bodies. With respect to the equal protection concerns, the possible remedies grow out of the doctrine described above. It is important to bear in mind that the basic defect of the previous system is that it vested significant governmental authority in a Board that was accountable only to a limited segment of the voting population. Any effort to preserve this arrangement in some other form is likely to be unconstitutional. Instead, the regulatory authority previously exercised by the Board must be vested in a body (or bodies) that are politically accountable. Before discussing the possible alternatives, I will provide some background into the separation of powers issues that might be raised by those alternatives.

1. Separation of Powers

The separation of powers issues that might arise from potential solutions to the problem are distinct and present only questions of state, rather than federal, constitutional law.⁵⁴ Put simply, separation of powers requires that legislative, executive and judicial power be divided among distinct branches of government whose structure is appropriate to their powers.⁵⁵ This principle is reflected in the Kansas Constitution, which vests legislative power in a numerous and geographically representative legislature;⁵⁶ executive power in an elected and “unitary” governor;⁵⁷ and judicial power in an independent judiciary with

54. While the federal constitution incorporates separation of powers principles, these principles apply only to federal institutions. See U.S. CONST. arts. I-III. Any separation of powers constraints on state institutions arise from the state constitution, although federal decisions may be persuasive by analogy as the considered application of basic principles by respected courts. See *State ex rel. Stephan v. Kansas House of Reps.*, 236 Kan. 45, 59-64, 687 P.2d 622, 634-38 (1984); see also Francis H. Heller, *Separation of Powers*, in *POLITICS AND GOVERNMENT IN KANSAS: SELECTED ESSAYS* 21, 30-33 (Marvin A. Harder ed., 1989). Because the separation of powers issues arise from the state constitution, any problems identified in my testimony could be cured by a state constitutional amendment designed to implement the new process for selecting the Board or its successor(s). The equal protection violation that underlies the *Hellebust* decision, however, cannot be cured by a state constitutional amendment.

55. THE FEDERALIST NO. 47 (James Madison); see also *State ex rel. Anderson v. State Office Bldg. Comm'n*, 185 Kan. 563, 345 P.2d 674 (1959); *State ex rel. Anderson v. Fadely*, 180 Kan. 652, 308 P.2d 537 (1957); *Coleman v. Newby*, 7 Kan. 55 (1871).

56. KAN. CONST. art. II, §§ 1, 2 (amended 1974).

57. KAN. CONST. art. I, §§ 1, 3 (amended 1972).

jurisdiction to resolve cases and controversies.⁵⁸ Separation of powers issues are present when one branch exercises powers not within its sphere or limits the essential powers of another.⁵⁹ In the case of the Board of Agriculture, two main issues might arise.

First, the statute vesting regulatory authority in the Board of Agriculture (or any other body) must comply with the nondelegation doctrine, which protects the allocation of legislative power by prohibiting its delegation to administrative agencies or other bodies.⁶⁰ To pass muster under the nondelegation doctrine, the legislature must provide an "intelligible principle" or standard to guide and control the administrative exercise of regulatory authority.⁶¹ In the absence of such a standard, the exercise of this authority would be a "legislative" function that cannot be delegated rather than the "executive" function of implementing a statutory mandate.⁶² The intelligible principle requirement is very generous, however, and does not pose a significant problem for the legislature,⁶³ especially insofar as satisfactory substantive standards are likely already written into the statutes administered by the Board of Agriculture or its successor.

Second, the legislature may not improperly interfere with the Governor's role as the "supreme executive power of this state . . . who shall be responsible for the enforcement of the laws of this state."⁶⁴ This provision reflects the general separation of powers principle of the "unitary executive," which is necessary to secure prompt, effective and uniform enforcement of the laws.⁶⁵ Gubernatorial control over executive officers is implicit in both the language of Article 1, Section 3 of the Kansas Constitution and in the general principle of the unitary

58. KAN. CONST. art. III (amended 1972).

59. See THE FEDERALIST NOS. 47-51 (James Madison); *State Office Bldg. Comm'n*, 185 Kan. at 567-572, 345 P.2d at 678-681.

60. See generally *State ex rel. Schneider v. Bennett*, 222 Kan. 11, 564 P.2d 1281 (1977) (discussing the nondelegation doctrine as it relates to statutory functions delegated to the state finance council).

61. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406-11 (1928); *State ex rel. Donaldson v. Hines*, 163 Kan. 300, 302-03, 309, 182 P.2d 865, 868, 872 (1947).

62. See *J.W. Hampton, Jr. & Co.*, 276 U.S. at 406-11; *Hines*, 163 Kan. at 302-03, 309, 182 P.2d at 868, 872.

63. See *Yakus v. United States*, 321 U.S. 414, 420, 424-25 (1944); *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D.D.C. 1971).

64. KAN. CONST. art. I, § 3 (amended 1972).

65. See THE FEDERALIST NO. 70 (Alexander Hamilton); Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 72-74 (1990); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 599-602 (1984).

executive.⁶⁶ This control ordinarily includes the power to appoint executive officers, or at least a significant role in their appointment.⁶⁷ Measures that place the power to appoint executive officers in another branch, or otherwise limit the Governor's appointment power, therefore raise separation of powers concerns.

Neither the unitary executive principle nor the Governor's appointment power is absolute, however. Indeed, Article 15, Section 1 of the Kansas Constitution vests the power to provide for appointments in the legislature: "All officers whose election or appointment is not otherwise provided for, shall be chosen or appointed as may be prescribed by law."⁶⁸ But this power must be exercised in accordance with separation of powers principles. In *State ex rel. Anderson v. State Office Building Commission*,⁶⁹ the Kansas Supreme Court held that a statute requiring the Governor to appoint members of the legislature to the State Office Building Commission, which exercised executive functions, was invalid because it violated separation of powers principles.⁷⁰

The most authoritative treatment of these issues by the Kansas Supreme Court came in *State ex rel. Schneider v. Bennett (Schneider I)*⁷¹ and *State ex rel. Schneider v. Bennett (Schneider II)*.⁷² In *Schneider I*, the court invalidated, on separation of powers grounds, a statute that vested control of the state department of administration in the state finance council,⁷³ a body on which individual legislators served.⁷⁴ In *Schneider II*, however, the court upheld the state finance council after it was stripped of its significant executive functions, ruling that legislative membership on the council was not invalid just because it exercised the limited and statutorily constrained executive function to transfer items of appropriation from the Kansas educational building fund.⁷⁵ Under these decisions, the selection process for the Board of

66. See KAN. CONST. art. I, § 3; Krent, *supra* note 65, at 72-74.

67. See Krent, *supra* note 65, at 72-74.

68. KAN. CONST. art. XV, § 1. Moreover, the top executive officials in Kansas, the "constitutional officers" (Governor, lieutenant governor, secretary of state and attorney general), are elected, KAN. CONST. art. I, § 1 (amended 1972), although the Governor appoints the secretary of state and the attorney general if those offices are vacant. KAN. CONST. art. I, § 11 (amended 1972). The independent mandate of high-level executive officers further compromises the unitary executive principle, although its implications for election of other officers is unclear. See *infra* note 87.

69. 185 Kan. 563, 345 P.2d 674 (1959).

70. *Id.* at 564, 572-75, 345 P.2d at 675-76, 681-83.

71. 219 Kan. 285, 547 P.2d 786 (1976).

72. 222 Kan. 11, 564 P.2d 1281 (1977).

73. *Schneider I*, 219 Kan. at 297-98, 547 P.2d at 796-98.

74. *Id.* at 292, 547 P.2d at 794.

75. *Schneider II*, 222 Kan. at 22-25, 564 P.2d at 1290-92.

Agriculture may be constrained in light of its significant executive functions.

Although neither *Schneider* decision is directly controlling, they do illustrate that the Kansas courts take a pragmatic approach to separation of powers. Strict separation of powers is not required,⁷⁶ but measures that interfere in significant ways with the powers of other branches are likely to be overturned.⁷⁷ This approach is reflected in the controlling test for evaluating such issues, which was articulated in *Schneider I*.⁷⁸ To determine whether a measure usurps, or unduly interferes with, the powers of another branch, the Kansas courts consider: (1) the essential nature of the power being exercised; (2) the degree of control by one department over another; (3) the objective sought to be attained by the legislature; and (4) the practical result of the blending of powers as shown by actual experience over a period of time.⁷⁹

2. Application

The application of this test to the State Board of Agriculture obviously varies depending upon the particular mode of selection eventually chosen by the legislature. I will therefore discuss the unitary executive and equal protection issues together in the context of specific options available to the legislature. These options include limiting the Board's powers, providing for direct elections, or providing for the appointment of the Board.

a. Limiting the Board's Powers

In response to the equal protection defects that rendered the Board of Agriculture invalid in *Hellebust*,⁸⁰ the legislature might attempt to bring the current selection process under the narrow exception for special purpose bodies⁸¹ by stripping the Board of its regulatory functions. For example, if the Board's function was limited to promotion of Kansas agricultural products, it might pass constitutional muster.⁸² As a general matter, the greater the Board's regulatory authority, the less likely the prior selection process is to survive constitutional scrutiny under the Equal Protection Clause.⁸³ To be

76. *Schneider I*, 219 Kan. at 288-89, 547 P.2d at 791.

77. *See id.* at 297-98, 547 P.2d at 796-98.

78. *See id.* at 289-91, 547 P.2d at 791-93.

79. *Id.* at 290-91, 547 P.2d at 792.

80. *Hellebust v. Brownback*, 824 F. Supp. 1511, 1515-20 (D. Kan. 1993).

81. *See supra* notes 31, 35 and accompanying text.

82. *Hellebust*, 824 F. Supp. at 1513, 1516.

83. *See supra* notes 30-38 and accompanying text.

successful, this approach would require that the Board be stripped of its significant regulatory functions. If the Board's powers were limited in this fashion, that would also appear to preclude any separation of powers problems, as *Schneider II* illustrates.⁸⁴ Note, however, that if this approach is taken, it would still be necessary to vest in some other body (or bodies) the powers taken from the Board. To the extent that these bodies already exist and present no constitutional issues of their own, this might be an effective solution, but many of the issues that arise in connection with the Board of Agriculture might simply be replayed in other contexts.

b. Direct Elections

The Board could be directly elected either by statewide elections or as representatives of districts with approximately equal populations. This approach is responsive to the *Hellebust* decision and would satisfy the Equal Protection Clause provided that the districts are properly drawn. Although this approach would probably also survive a separation of powers challenge, there is at least a potential argument that it would compromise the unitary executive in violation of Article 1, Section 3.⁸⁵ Direct elections eliminate any gubernatorial role in the selection of the Board, and its independent mandate would limit the Governor's ability to control the Board's exercise of executive powers.

Nonetheless, direct elections would probably survive the *Schneider* test.⁸⁶ First, although the Board's functions are executive, they are also "quasi-legislative" insofar as they involve discretion to determine regulatory policy, which would give the legislature greater leeway in limiting the Governor's control over the Board. Second, direct elections do not give the legislature any control over the executive branch. Indeed, the Kansas Constitution does not treat direct elections as fundamentally inconsistent with the unitary executive; it expressly provides for the direct election of some executive officers, such as the attorney general.⁸⁷ Third, to the extent that the legislature's action is

84. See *supra* notes 75-79 and accompanying text. See also *Marks v. Frantz*, 179 Kan. 638, 647-51, 298 P.2d 316, 322-25 (1956) (pre-*Reynolds v. Sims* case upholding in part delegation of regulatory authority to board of examiners in optometry appointed by Governor from list of four names selected by Kansas Optometric Association).

85. KAN. CONST. art. 1, § 3 (amended 1972); see *supra* notes 64-67 and accompanying text.

86. See *supra* notes 78-79 and accompanying text.

87. KAN. CONST. art. 1, § 1 (amended 1972). This provision might be interpreted to exclude implicitly election of other executive officers, but such an inference is unlikely given the legislative authority to provide for selection of officers and the broad language of Article 15, Section 1. KAN. CONST. art. XV, § 1. Although Article 15, Section 1 uses the term "election" in reference to officers whose "election or appointment" is constitutionally mandated and

intended to remedy a constitutional defect in the Board's selection, that objective would support the action. Finally, the historical precedent for direct election of other executive officials, such as the Insurance Commissioner,⁸⁸ suggests that practical experience would support this approach.

While this analysis does tend to support the validity of direct elections in separation of powers terms, a cautionary note is in order. Recent state supreme court decisions may reflect a stricter view of separation of powers. You are all probably familiar with *State ex rel. Stephan v. Finney*,⁸⁹ in which the court invoked separation of powers to rule that the Governor lacked authority to enter a binding agreement with Indian tribes concerning gambling on reservations.⁹⁰ Another decision, *State v. Williamson*,⁹¹ invoked separation of powers to overturn a trial judge's dismissal of criminal charges (on the ground that civil commitment was more appropriate) because the dismissal interfered with the county attorney's executive power to exercise prosecutorial discretion.⁹² These decisions may signal the emergence of a stricter view of separation of powers which could make the Kansas Supreme Court more sympathetic to any eventual separation of powers challenge.

On balance, I suspect that the Kansas courts would uphold direct elections, but the issue is not entirely free from doubt. Before adopting the direct election alternative, the legislature should consider the possibility that litigation could further delay resolution of the Board of Agriculture issue and, if successful, could draw into question other longstanding selection methods.

c. Appointment

Whether the appointment of the Board of Agriculture would be constitutional depends upon who does the appointing. It seems there are three basic possibilities: (1) the Governor might appoint the Board or Secretary or both; (2) the legislature might appoint the Board or Secretary or both; or (3) the appointment of the Board or Secretary or both might be vested in some private group or groups.

conspicuously omits the term in stating that other officers "shall be chosen or appointed," the word "chosen" is broad enough to encompass elections. *See id.*

88. KAN. STAT. ANN. § 40-106 (1993).

89. 251 Kan. 559, 836 P.2d 1169 (1992) (per curiam).

90. *Id.* at 577-83, 836 P.2d at 1181-85.

91. 253 Kan. 163, 853 P.2d 56 (1993).

92. *Id.* at 165-68, 853 P.2d at 58-60.

Let me discuss the last option first. Since the “one person, one vote” requirement was crafted in the context of “elections,”⁹³ supporters of the previous system might wish to avoid the *Hellebust* decision by cosmetic changes designed to recast the process as the “appointment” of government officials. This expedient is unlikely to be successful. Although the “one person, one vote” principle does not apply to appointments,⁹⁴ this seems to be because the power of appointment is vested in politically accountable officials who ultimately trace their power to elections that do comply with that principle.⁹⁵ Most states reject, under various doctrines, the vesting of significant governmental authority in private parties without ultimate control by elected officials.⁹⁶ In any event, such a course of action would almost certainly result in a renewed challenge to the Board of Agriculture in which the federal district judge is unlikely to be sympathetic to the state’s position. Even if the state were eventually successful, this would mean further disruption and delay in the important regulatory functions previously exercised by the Board.

The gubernatorial appointment option is the one most certain to pass constitutional muster. It is clearly permissible in equal protection terms for high-level executive branch officials to be appointed by the Governor, who is popularly elected in compliance with the “one person, one vote” principle.⁹⁷ Nor do there appear to be any apparent separation of powers problems, so long as there is no violation of the nondelegation doctrine, because the executive function remains in the executive branch.⁹⁸ If the legislature is reluctant to vest unfettered discretion

93. See generally *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963).

94. *Hadley v. Junior College Dist.*, 397 U.S. 50, 58 (1970); *Sailors v. Board of Educ.*, 387 U.S. 105, 111 (1967).

95. See Krent, *supra* note 65, at 72, 74.

96. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (nondelegation doctrine); *Gumbhir v. Kansas State Bd. of Pharmacy*, 228 Kan. 579, 618 P.2d 837 (1980) (unlawful delegation of legislative authority to a nongovernmental association); *State v. Crawford*, 104 Kan. 141, 177 P. 360 (1919) (same). See also *Coffman v. State Bd. of Examiners in Optometry*, 50 N.W.2d 322 (Mich. 1951) (same); *Murtha v. Monaghan*, 169 N.Y.S.2d 137 (N.Y. Sup. Ct.), *aff’d*, 169 N.Y.S.2d 1010 (N.Y. App. Div. 1957), *aff’d*, 151 N.E.2d 83 (N.Y. 1958) (same); *Gold v. South Carolina Bd. of Chiropractic Examiners*, 245 S.E.2d 117 (S.C. 1978) (unconstitutional delegation of executive appointive power to private organization).

97. Cf. *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 614 (1974) (refusing to consider charges of racial bias in mayoral appointments because the mayor was accountable to voters); *Barrett v. Duff*, 114 Kan. 220, 217 P. 918 (1923).

98. See *supra* notes 64-75 and accompanying text. Cf. *Buckley v. Valeo*, 424 U.S. 1, 124-43 (1976) (per curiam); *Myers v. United States*, 272 U.S. 52, 117 (1926) (“The vesting of the executive power in the President was essentially a grant of the power to execute the laws. . . . [T]he reasonable implication . . . was that as part of his executive power he should select those

over the appointment in the Governor, his or her power to appoint might be limited. Most clearly, legislative consent to any appointment can be required.⁹⁹

A more difficult question is whether the same groups that currently elect the Board of Agriculture might be given power to select a list of nominees from which the Governor must choose. A number of statutes provide for this method of selecting administrative officials, particularly those involving regulation of professional activities.¹⁰⁰ This practice was upheld in *Marks v. Frantz*,¹⁰¹ which validated the requirement that the Governor appoint the board of examiners in optometry from a list of four names selected by the Kansas Optometric Association.¹⁰² Although *Marks v. Frantz* seems to dispose of the separation of powers issues raised by such a selection process, the case is potentially distinguishable. The Board of Agriculture's executive functions are broader than the regulation of a single profession.¹⁰³ In addition, a professional role in the selection of those who regulate professional activity is easily justifiable in terms of expertise.¹⁰⁴

Moreover, this kind of limited access to the nominating process might be problematic under the Equal Protection Clause.¹⁰⁵ It is arguably little better than vesting the appointment power directly in the agricultural interests who previously elected the Board. Although gubernatorial selection provides some popular accountability, the Governor's choice

who were to act for him under his direction in the execution of the laws.") (citations omitted).

99. See *Leek v. Theis*, 217 Kan. 784, 802-04, 539 P.2d 304, 320-21 (1975).

100. E.g., KAN. STAT. ANN. § 44-709(f) (1993) (employment security review board); *id.* § 74-4001 (1992) (Kansas animal health board); *id.* § 74-9001(a) (travel and tourism commission); *id.* § 74-9402(a) (commission on the future of health care). Most statutes, however, provide that the Governor must *consider* a list of nominees selected by other entities, usually professional organizations; these statutes do not mandate that the Governor choose from such nomination lists. E.g., *id.* § 65-2812 (board of healing arts); *id.* § 74-1106(a) (board of nursing); *id.* § 74-1404 (Kansas dental board); *id.* §§ 74-1603 to -1605 (board of pharmacy). This is true even respecting the Board of Examiners in Optometry, whose selection from a list of nominees was mandatory at the time of *Marks v. Frantz*. Act of March 20, 1923, ch. 220, § 4, 1923 Kan. Sess. Laws 306, 307 ("[T]he governor shall appoint a board of examiners in optometry . . . to be selected from a list of four names for each appointment, submitted by the Kansas optometric association, or its successor."). See *Marks v. Frantz*, 179 Kan. 638, 644, 298 P.2d 316, 320 (1956); see also *infra* notes 101-02 and accompanying text. Under current law, three members must be selected "after consideration" of a list submitted by the state optometric association, and a fourth member represents the general public. Act of April 18, 1975, ch. 318, § 9, 1975 Kan. Sess. Laws 924, 929 (codified as amended at KAN. STAT. ANN. § 74-1501 (1992)).

101. 179 Kan. 638, 298 P.2d 316 (1956).

102. *Id.* at 647-51, 298 P.2d at 322-25.

103. See *Hellebust v. Brownback*, 824 F. Supp. 1511, 1513-15 (D. Kan. 1993).

104. See, e.g., *Cooper v. Delaware Valley Medical Ctr.*, 630 A.2d 1 (Pa. Super. Ct. 1993).

105. See *Board of Estimate v. Morris*, 489 U.S. 688, 692-703 (1989); *Reynolds v. Sims*, 377 U.S. 533, 561-68 (1964).

would be controlled by a nonrepresentational nomination process. And although *Marks v. Frantz* upholds such a process, it is not controlling on the equal protection issue because it was decided before *Reynolds v. Sims*. Indeed, the legislature might wish to be cautious in adopting this method because a constitutional challenge is almost certain to follow and, if successful, would throw a number of regulatory bodies into constitutional jeopardy.

The final option, legislative appointment, satisfies equal protection, but it would present serious separation of powers problems. Legislative appointment is particularly problematic under the second prong of the *Schneider* test¹⁰⁶ because the legislature is not only limiting the Governor's power but also taking that power unto itself. In contrast, direct elections or appointment of executive officers from a list of nominees limits executive power, but does not involve the legislative exercise of that power. Although *Schneider I* can be distinguished because legislators would not actually serve on the Board,¹⁰⁷ the case is analogous because both situations involve attempted legislative control over an executive function.¹⁰⁸ Opponents of legislative appointment might also rely on *Buckley v. Valeo*,¹⁰⁹ where the United States Supreme Court held that appointment of Federal Election Commission members by designated legislators violated the Appointments Clause.¹¹⁰ Although *Buckley* rests on the specific language of the United States Constitution for which there is no counterpart in Article 15, Section 1 of the Kansas Constitution,¹¹¹ the decision also reflects general separation of powers principles.¹¹²

E. Conclusion

In deliberating the options for restructuring the Board of Agriculture, the legislature should respond in good faith to the holding in *Hellebust* and the underlying equal protection principles it implements.¹¹³ In addition, there are potential separation of powers difficulties with many

106. See *supra* note 79 and accompanying text.

107. See 219 Kan. 285, 292, 547 P.2d 786, 794 (1976).

108. See *id.* at 297-98, 547 P.2d at 796-98.

109. 424 U.S. 1 (1976) (per curiam).

110. *Id.* at 124-35, 143 (citing U.S. CONST. art. II, § 2, cl. 2).

111. Compare U.S. CONST. art. II, § 2, cl. 2 with KAN. CONST. arts. I (amended 1972), XV, § 1.

112. Cf. *Morrison v. Olson*, 487 U.S. 654, 670-77, 685-96 (1988) (interbranch appointments permissible under Article II, Section 2, Clause 2 of the United States Constitution, but must be otherwise consistent with separation of powers).

113. *Hellebust v. Brownback*, 824 F. Supp. 1511, 1515-20, 1524 (D. Kan. 1993).

of the alternatives open to the legislature.¹¹⁴ Appointment by the Governor is most likely to withstand any constitutional challenge under either provision. Mechanisms designed to retain an enhanced voice for agricultural interests or limit the Governor's authority to appoint members (except for requiring legislative approval) present some constitutional difficulties. While such mechanisms may ultimately survive judicial scrutiny, there would be costs in terms of delay and uncertainty concerning the functions of the Board.

Thank you for your attention.

III. POSTSCRIPT

Before the Agriculture Committee, many questions and much attention were focused on the possibility that agricultural groups might be given the power to provide the Governor a list of nominees from which the Board must be selected.¹¹⁵ Such an option appeared attractive to many legislators as a means of preserving the essence of the former system. A similar method of selection is used for various professional organizations¹¹⁶ and, most prominently, the Kansas Supreme Court.¹¹⁷

While this approach might pass equal protection scrutiny on the grounds that "appointment" rather than "election" is involved,¹¹⁸ it is problematic for several reasons. Most obviously, it may be seen as a

114. See *supra* notes 52-79, 84-92, 98-104, 106-12 and accompanying text.

115. Such a selection process should be carefully distinguished from one in which private groups provide a nomination list but the Governor is not required to appoint members from the list of nominees. So long as the Governor's appointment is not legally constrained by private nominations, there can be no conflict between their consideration and the "one person, one vote" principle. For this reason, the State Board of Examiners in Optometry, which was discussed at the legislative hearing, would be on safe ground. Although the state optometric association submits a list of names for consideration, the Governor is not required to select from among them. KAN. STAT. ANN. § 74-1501 (1992); see also *supra* notes 100-02 and accompanying text. Other professional boards whose members are selected in a similar manner would likewise present no equal protection problems. See *supra* note 100.

116. See *supra* note 100; see also KAN. STAT. ANN. § 44-555b(a), (e)-(f) (1993) (establishing workers compensation nominating commission consisting of one member appointed by designated labor union and another member appointed by the chamber of commerce, with power to make binding nominations for workers compensation review board).

117. KAN. CONST. art. III, § 5.

118. Many cases suggest that the "one person, one vote" principle does not apply to appointments, but these cases involve appointments by elected officials who themselves are chosen in compliance with that principle. See, e.g., *Sailors v. Board of Educ.*, 387 U.S. 105, 111 (1967); *City of Atlanta v. Metropolitan Atlanta Rapid Transit Auth.*, 636 F.2d 1084 (5th Cir. 1981); *Burton v. Whittier Regional Vo. Tech. Sch. Dist.*, 587 F.2d 66, 67-70 (1st Cir. 1978); see also *supra* notes 94-95 and accompanying text. The example of private nominations that severely limit gubernatorial appointments is not necessarily controlled by those cases.

blatant attempt to circumvent the earlier ruling in *Hellebust* and struck down on that ground. Second, it may be unconstitutional under other principles, such as the nondelegation doctrine, which has often been said to apply with particular force when governmental authority is delegated to private parties.¹¹⁹

If this measure were struck down, moreover, it might draw into question those other bodies, including the Kansas Supreme Court, that currently employ a similar means of selection.¹²⁰ Although the current case law favors these bodies, the use of a similar mechanism to circumvent the ruling in *Hellebust* would likely be struck down. Litigants could then use this adverse precedent to challenge the process for selecting government officials whenever the Governor is required to appoint public officials from among those nominated by private groups.¹²¹ There are potential grounds for distinguishing these bodies from the Board of Agriculture; there would be considerable uncertainty pending final resolution of the issues.¹²²

Ultimately, however, the best reason to avoid this method of selection is that it is inconsistent with the basic principle of democracy; it is still a case of “the fox guarding the chicken coop.” The interests of those engaged in the business of agriculture and the interests of the rest of the

119. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). The Court in *Carter* attacked a delegation “in its most obnoxious form,” because it did not delegate to an official or public body but rather to a private person. *Id.* In my view, this difference, standing alone, should not be dispositive. Although separation of powers challenges to professional licensing organizations, which are often selected through a similar process, have generally been rejected, these cases are distinguishable. See *supra* notes 100-02 and accompanying text.

120. See *supra* notes 100, 116-17. The Kansas cases typically address only the separation of powers issues, see, e.g., *Marks v. Frantz*, 179 Kan. 638, 298 P.2d 316 (1956) discussed *supra* notes 100-02 and accompanying text, and, in any event, the cases would not be controlling as to the “one person, one vote” principle, which is a federal requirement derived from equal protection. See *supra* notes 16-29 and accompanying text.

121. These potential consequences are probably less widespread than assumed at the legislative hearings because most statutes creating professional oversight and licensing boards only require that the Governor consider nominations by professional associations leaving the Governor free (from a legal, if not a political, perspective) to appoint members not on the list of nominees. See *supra* note 100.

122. Some legislators bristled at my suggestion that these other bodies might be distinguished on the basis of the need for professional expertise and the longstanding culture of professional ethics. The legislators quite correctly pointed out that considerable expertise is also involved in agricultural activity and that agriculture is not devoid of ethics. Nonetheless, no advanced degree or professional license is necessary to engage in agricultural activity, and there is no individual relationship between the practitioner of agriculture and a “client” that underlies the ethical norms of most professions. For those reasons, it would be easier to defend this selection process for professional regulation than for the Board of Agriculture. Cf. *Vakas v. Kansas Bd. of Healing Arts*, 248 Kan. 589, 596-602, 808 P.2d 1355, 1361-65 (1991) (discussing legislative desire to uphold professional and ethical norms in rejecting nondelegation challenge to reinstatement provisions governing the state board of healing arts).

state's population do not always coincide. Indeed, these interests are often opposed on such matters as pesticide regulation and water use. The governmental authority to regulate such matters should be vested in a body that is politically accountable to all Kansans. This would not prevent agricultural interests from having an important say in the business of the Board, brought to bear through the usual political channels.¹²³ These groups do not need and should not have an exclusive say as to who decides matters of importance to the entire state.

123. Indeed, even absent a statutorily enhanced role in the appointment of the Board, one would expect agricultural groups throughout the state to wield considerable influence over its membership.