SOMETHING THERE IS THAT DOESN'T LOVE A WALL

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INTRODUCTION

Administrative law was on the ballot in Kansas last year. As one glossy mailer declared, "[u]nelected bureaucrats *make whatever regulations* they want" and Kansans ought to vote yes on a proposed constitutional amendment in order to "give every Kansan a voice in state government."[1] The so-called "legislative veto" amendment—which was narrowly defeated—would have given the Kansas Legislature the ability to override executive branch rules and regulations by a simple majority vote.[2] I highlight the mailer and its message not to agree or disagree with it, but simply because it clarifies the core question of administrative law—who decides?

The mailer also offers a typical framing of the debate—either unelected bureaucrats decide, or ordinary Kansans do through their elected representatives. As Philip Hamburger recently put it, administrative law may become an "extralegal regime" if it "evades not only the law but also its institutions, processes, and rights. The central evasion is the end run around acts of [the legislature] and

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1. The mailer was paid for by Americans for Prosperity.

2. H.R. 5014, 89th Gen. Assemb., Reg. Sess. (Kan. 2022). The proposed language provided: "Whenever the legislature by law has authorized any officer or agency within the executive branch of government to adopt rules and regulations that have the force and effect of law, the legislature may provide by law for the revocation or suspension of any such rule and regulation, or any portion thereof, upon a vote of a majority of the members then elected or appointed and qualified in each house."

the judgments of the courts by substituting executive edicts."[3] Professor Hamburger suggests that administrative law is a threat to "popular political power" devised by a "rulemaking class" which has "a dim view of popularly elected legislatures and a high view of its own rationality and specialized knowledge."[4]

Striking the same chord, Kansas Attorney General and recent candidate for Governor, Derek Schmidt, campaigned on the idea that—as he put it—"the people's elected representatives in Congress, not unelected bureaucrats, make the law. Reestablishing democratic control over the sprawling federal bureaucracy is, in my view, one of the most important steps we must take to preserve liberty for future generations."[5] For similar reasons, he urged voters to adopt the amendment because it "would return lawmaking authority to the lawmaking branch of government, the branch closest to the people."[6]

But as the defeat in Kansas of this particular amendment shows, not everyone is worried about "unelected bureaucrats" running wild. Many Kansans likely agreed with the *Wichita Eagle* when it opined that talk about unelected bureaucrats was a "cheap scare [tactic]" designed to hide the fact that state employees in the executive branch—presumably hard-working and disinterested professionals—are "selected for their expertise in specialized fields such as public health and safety, utilities, the environment, pharmacy, nursing, optometry, dentistry and embalming, just to name a few."[7]

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3. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 29 (2014).

4. *Id.*

5. News Release, Kan. Att'y Gen., Derek Schmidt, U.S. Supreme Court Term Good for Liberty, The Rule of Law (July 7, 2022), https://ag.ks.gov/media-center/news-releases/2022/07/07/u.s.-supreme-court-term-good-for-liberty-the-rule-of-law [https://perma.cc/479S-ZEUF].

6. Tim Carpenter, *Kansas Constitutional Amendment on Rules and Regulations: Voters to Decide Legislature Power*, KAN. REFLECTOR (Nov. 3, 2022, 8:30 AM), https://kansasreflector.com/2022/11/03/kansas-constitutional-amendment-on-rules-and-regulations-voters-to-decide-legislature-power/ [https://perma.cc/R6CR-7D6C].

7. The Editorial Board, *Vote 'No' on Kansas Ballot Questions 1 and 2 and Protect our Constitution*, WICHITA EAGLE (Oct. 23, 2022); *see also* ADRIAN VERMEULE, COMMON

A former chair of the Kansas Democratic Party put it more bluntly: "It's open season on the administration's ability to run the government."[8] Whatever view one takes, the proposed amendment and the arguments surrounding it are ample evidence that administrative law remains a controversial and dynamic area of law—in Kansas and around the nation.

I. A BRIEF HISTORY OF SEPARATION OF POWERS IN KANSAS

Answering the question "who decides?" in matters of law and government is inextricably tied to deeper questions about the structure of government and its divisions of power between and among separate governing departments. Any discussion of administrative law—even a brief survey such as this—must begin with a history of the doctrines of separation of powers as they have developed within a particular jurisdiction. In Kansas, that history reveals evolving standards that remain dynamic and in flux.

In the decades following statehood, the Kansas Supreme Court routinely adhered to a principle of strict separation of powers as illustrated by our turn-of-the-century decision in *State v. Johnson*.[9] In *Johnson*, we struck down a legislative conferral upon the judiciary of the power to set railroad rates, holding that "the functions of the three departments should be kept as distinct and separate as possible, except so far as the action of one is made to constitute a restraint upon the action of the other."[10]

GOOD CONSTITUTIONALISM 135 (2022) ("[T]he administrative state is today the main locus and vehicle for the provision of the goods of peace, justice, and abundance central to the classical theory. The administrative state is where those goods are translated and adapted into modem forms such as health, safety, a clean environment under intelligent stewardship, and economic security.").

8. John Hanna, *After Abortion Vote, Kansas Lawmakers' Power Back on Ballot*, ASSOCIATED PRESS (Oct. 27, 2022), https://apnews.com/article/2022-midterm-elections-health-legislature-state-governments-constitutions-60f6103f666d886be18917bdd32bba82 [https://perma.cc/3D7Q-NV39].

9. 61 Kan. 803 (1900).

10. *Id.* at 814.

The *Johnson* rule is one forerunner to the federal non-delegation doctrine. Keith Whittington and Jason Iuliano have explained that doctrine by noting that while "[t]here is no explicit textual prohibition on the delegation of legislative power to other actors, . . . such a rule has long been thought implicit in the U.S. Constitution," as the "very idea of a separation of powers might suggest that executive officials should refrain from, or be barred from, exercising legislative powers."[11] These scholars write that "[c]onsolidating the legislative and executive functions in the same hands has long been seen as a serious threat to liberty, and a core principle of liberal constitutional theory was to separate those distinct governmental functions in distinct governmental organs."[12] Yet federal courts have typically upheld such delegations of legislative power by Congress so long as Congress also provides an "intelligible principle" to guide executive or judicial actors.[13]

In Kansas, the strict *Johnson* principle of non-delegation did not carry the day. Instead, in decisions both before and after *Johnson*,

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11. Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 389 (2017).

12. *Id.*

13. Touby v. United States, 500 U.S. 160, 165 (1991) (citing J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)). Justices Gorsuch and Alito recently expressed willingness to utilize the major questions doctrine—whereby "administrative agencies must be able to point to 'clear congressional authorization' when they claim the power to make decisions of vast 'economic and political significance'"—as a path to reasserting strict non-delegation. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring); *see also* Brown v. U.S. Dep't of Educ., No. 4:22-CV-0908-P, 2022 WL 16858525, at *13 (N.D. Tex. Nov. 10, 2022) (holding that the federal student loan forgiveness under the HEROES Act fell under a "major-question" exception to *Chevron* deference, thereby requiring that an agency show "clear congressional authorization" for the exercise of any authority); *id.* ("Still, no one can plausibly deny that it is either one of the largest delegations of legislative power to the executive branch, or one of the largest exercises of legislative power without congressional authority in the history of the United States. In this country, we are not ruled by an all-powerful executive with a pen and a phone. Instead, we are ruled by a Constitution that provides for three distinct and independent branches of government. As President James Madison warned, '[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.'").

Kansas courts have genuflected to the principle that "the legislature possess[es] all the legislative power of the state [and] cannot delegate any portion of that power" but have nevertheless reasoned that given the variegated and complex society we live in, "it is generally found impracticable for [the legislature] to exercise this power in detail."[14] Thus, in *Coleman v. Newby*,[15] the court held that the legislature "may mark out the great outlines, and leave those who are to act within these outlines to use their discretion in carrying out the minor regulations."[16] This paint-by-numbers approach allowing executive agents to fill in the blank spaces left in broadly written statutes has been the governing rule in Kansas for all of our history.[17]

Administrators have, however, repeatedly been told that they must color within the lines. Which is to say that our delegation doctrine is not without limits. Kansas law does recognize that "some direction must be given in order for a legislative delegation to be constitutional" and typically when challenges arise, they focus on the adequacy of that legislative standard.[18] The legislature must—at minimum—guide agencies by "conditions, restrictions, limitations, yardsticks, guides, [or] broad outlines" which function as "adequate . . . guide rules" for agency action.[19]

The flexible and cooperative approach taken by Kansas courts to legislative delegations of power has—since the mid-twentieth

14. Coleman v. Newby, 7 Kan. 82, 88 (1871).

15. 7 Kan. 82 (1871)

16. *Id.* at 88.

17. Blue Cross & Blue Shield of Kan., Inc. v. Praeger, 276 P.3d 232, 277–78 (Kan. 2003) ("Where flexibility in fashioning administrative regulations to carry out statutory purpose is desirable in light of complexities in the area sought to be regulated, the legislature may enact statutes in a broad outline and authorize the administrative agency to fill in the details. . . . In testing a statute for adequacy of standards, the character of the administrative agency is important.").

18. State *ex rel.* Morrison v. Sebelius, 285 Kan. 875, 916 (2008).

19. *See* Wesley Med. Ctr. v. McCain, 226 Kan. 263, 271 (1979) (delegation to administrative agency requires "adequate standards and guide rules"); State *ex rel.* Donaldson v. Hines, 163 Kan. 300, 309 (1947) (delegation to administrative agency must be guided by "conditions, restrictions, limitations, yardsticks, guides, rules, [or] broad outlines").

century—come to define the separation of powers more broadly in Kansas. By the 1950s, the Kansas Supreme Court had completely abandoned the *Johnson* rule of strict separation. The court regularly refused to strike down governmental combinations of power in one place, often in the name of what was "practicable."[20] By 1976, in *State ex rel. Schneider v. Bennett*,[21] Kansas courts settled on a four-factor "balancing" test—still applied today[22]—intended to permit cooperative sharing of power among the branches of government so long as no specific combination created a "significant interference" with the independent functioning of any department of government.[23]

Soon after, in *State v. Mitchell*,[24] the cooperative nature of power sharing among the branches of government in Kansas was clarified

20. *See, e.g.*, State *ex rel.* Hawks v. City of Topeka, 176 Kan. 240, 245 (1954) (upholding an act granting power to cities to acquire real estate for off-street parking by eminent domain on the grounds that "'the absolute independence of the departments and the complete separation of the powers is impracticable, and was not intended'") (quoting *In re* Sims, 54 Kan. 1, 11 (1894) (Johnston, J., concurring)); State *ex rel.* Anderson v. Fadely, 180 Kan. 652, 695–96 (1957) (upholding an act creating the State Finance Council, holding "it cannot be overlooked as a practical matter that as between the legislative and the executive departments of our government the enactment contemplates comity and cooperation and not a blending of powers").

21. 547 P.2d 786 (Kan. 1976).

22. Solomon v. State, 303 Kan. 512, 526 (2015) (describing the four factors as "(1) the essential nature of the power being exercised; (2) the degree of control by one branch over another; (3) the objective sought to be attained; and (4) the practical result of blending powers as shown by actual experience over a period of time").

23. *Bennett*, 547 P.2d at 792 ("First is the essential nature of the power being exercised. Is the power exclusively executive or legislative or is it a blend of the two? A second factor is the degree of control by the legislative department in the exercise of the power. Is there a coercive influence or a mere cooperative venture? A third consideration of importance is the nature of the objective sought to be attained by the legislature. Is the intent of the legislature to cooperate with the executive by furnishing some special expertise of one or more of its members or is the objective of the legislature obviously one of establishing its superiority over the executive department in an area essentially executive in nature? A fourth consideration could be the practical result of the blending of powers as shown by actual experience over a period of time where such evidence is available.").

24. 672 P.2d 1 (Kan. 1983)

when the Kansas Supreme Court adopted a rule of acquiescence.[25] In *Mitchell*, the court was required to determine "whether the Supreme Court has exclusive constitutional power to make rules pertaining to court administration . . . ."[26] In deciding whether a legislative enactment dictating a rule of court procedure violated the separation of powers, the *Mitchell* court held that "[a]lthough the Supreme Court has the constitutional power to determine court procedure, it may cooperate with the legislature in the exercise of that power. The Supreme Court's acquiescence [to the statute in question] is an example of cooperation."[27] The court followed the logic of this holding through to its inevitable conclusion, reasoning that because "the judiciary can acquiesce in legislative action" which dictates aspects of "the judicial function," a problem only emerges "when court rules and a statute conflict"; and in "such circumstances," the court's rule "must prevail" and the statute must give way.[28]

Recent history, however, suggests the Kansas Supreme Court may be backtracking from the blurred lines of separation embodied in the rules of practicability, cooperation, and acquiescence. In a 2015 case, for example, I criticized our court's separation of powers jurisprudence, arguing that "in the name of balance, cooperation, and harmony, we have permitted breaches of the walls of separation between the departments so long as no single breach is determined to be 'significant.'"[29] I would instead have adhered "to the basic principle . . . that 'the functions of the three departments should be kept as distinct and separate as possible,'"[30] and would have held that when "the Government is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform

25. *Id.* at 18–19.
26. *Id.* at 19.
27. *Id.* at 3.
28. *Id.* at 23.
29. Solomon v. State, 364 P.3d 536, 553 (Kan. 2015).
30. *Id.* at 556 (Stegall, J., concurring).

it."[31] In so doing, the court could return to its "obligation to guard and protect a clear and strong wall of separation between each of the three great departments of government—keeping each within its proper province and protecting those provinces from colonization by the other two departments."[32]

And in 2022, a majority of the Kansas Supreme Court relied on separation of powers principles to evaluate the justiciability of legislative redistricting maps which considered political affiliations.[33] In that case, when evaluating whether "partisan gerrymandering" was a "political question" outside the scope of judicial review we took a "modest approach to questions that touch the core constitutional principle of separation of powers and the ongoing dictate that the coordinate departments of government accord one another the due and proper respect expected and owed under our unique constitutional arrangements."[34] Thus, if "resolving a controversy is outside the scope of the competence of the judiciary, it is said to be 'nonjusticiable'—that is, it is a matter committed by the structure of our Constitution to the legislative or executive branches of government."[35] The court went on to note that "these branches are ultimately accountable . . . to the voters . . . [who] will—undoubtedly—have [their] say in the matter."[36] Finally, the court observed that this "is not an unfortunate accident or a mistake in our constitutional structure, but rather 'a consequence of the separation of powers among the legislative, executive, and judicial branches . . . .'"[37]

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31. *Id.* (Stegall, J., concurring) (quoting Association of American Railroads, 575 U.S. 43, 68 (2015) (Thomas, J., concurring)).

32. *Id.* at 545 (Stegall, J., concurring).

33. *E.g.*, Rivera v. Schwab, 512 P.3d 168, 185 (Kan. 2022); *In re* Validity of Senate Bill 563, 512 P.3d 220, 229 (Kan. 2022)

34. *Rivera*, 512 P.3d at 184–85.

35. *Id.* at 181.

36. *Id.*

37. *Id.* (quoting Gannon v. State, 319 P.3d 1196, 1218 (Kan. 2014)).

II. THREE RECENT DEVELOPMENTS IN KANSAS ADMINISTRATIVE LAW

In light of this history, I conclude this brief article by discussing three recent developments in Kansas administrative law concerning: (1) judicial deference; (2) prosecutorial discretion; and (3) emergency powers. Each of these areas of the law confronts—in important and unique ways—the core administrative law question of "who decides?"

A. Judicial Deference

When executive agencies make decisions, how do those decisions get reviewed? Kansas, like most states, has a judicial review act by which an aggrieved person can appeal an agency decision they don't like.[38] And embedded in the process of judicial review is the question of deference. That is, when an agency action is based on its own interpretation of a statute or a regulation, should a court defer to that agency interpretation? Under federal law, the answer—at the moment—appears to still be yes.[39] But in Kansas, recent developments have moved our state courts to afford far less deference to state agency decisions than that given by federal courts to similar federal agencies.

Prior to 2009, Kansas courts applied a version of *Chevron* deference we called the doctrine of operative construction—under which the interpretation of a statute by an administrative agency charged with the responsibility of enforcing the statute was entitled to judicial deference.[40] As such, we afforded "great" deference to an

38. KAN. STAT. ANN. §§ 77-601–31 (2022).

39. *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) (deferring to agency interpretations of the agency's own regulations, unless that interpretation is "plainly erroneous or inconsistent with the regulations"); Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843–44 (1984) (deferring to agency interpretations if a statute is unclear, so long as they are a "permissible construction," meaning one that is not "arbitrary, capricious, or manifestly contrary to the statute").

40. Matjasich v. State Dep't of Hum. Res., 21 P.3d 985, 988 (Kan. 2001).

agency's interpretation of its statutes.[41] But by 2009, our court abandoned this doctrine, declaring that "[n]o significant deference is due" to an agency's construction of a statute.[42] This change was codified in the 2009 amendments to the Kansas Judicial Review Act.[43] Yet in subsequent years, parties still argued—and lower courts still applied—the doctrine of operative construction.[44] In response, the Kansas Supreme Court "attempted to set the record straight with all the subtlety of a foghorn."[45] In *Douglas*, the court made it "crystal clear" that "we unequivocally declare here that the doctrine of operative construction . . . has been abandoned, abrogated, disallowed, disapproved, ousted, overruled, and permanently relegated to the history books where it will never again affect the outcome of an appeal."[46] Kansas courts now review a claim that an agency "erroneously interpreted or applied the law" under K.S.A. 77-621(c)(4), "without deference" to the agency's interpretation.[47]

The same trend in Kansas administrative law has rejected giving any deference to an agency's interpretation of its own rules and regulations.[48] But this has not always been the case. For example, in our 2002 *Winston* decision, we recited the rule that "courts shall give deference to an agency's interpretation of its own

41. *See, e.g.*, Mitchell v. Liberty Mut. Ins. Co., 271 Kan. 684, 700 (2001) ("Usually, the legal interpretation of a statute by an administrative agency that is charged by the legislature with the authority to enforce the statute is entitled to great judicial deference . . . .").

42. Higgins v. Abilene Mach., Inc., 204 P.3d 1158 (Kan. 2009).

43. *See* Mary Feighny, *2009 Amendments to the Kansas Administrative Procedure Act and the Kansas Judicial Review Act*, 78-OCT. J. KAN. B. ASS'N 21, 23 (2009).

44. *See, e.g.*, Douglas v. Ad Astra Info. Sys., L.L.C., 213 P.3d 764, 769 (Kan. Ct. App. 2009), *rev'd*, 296 Kan. 552, 293 P.3d 723 (2013), *and abrogated by* Redd v. Kan. Truck Ctr., 239 P.3d 66 (Kan. 2010) ("Under the doctrine of operative construction, the Board's interpretation of the law is entitled to judicial deference. If there is a rational basis for the Board's interpretation of a statute, it should be upheld upon judicial review.").

45. Michael S. Obermeier, *The Kansas Judicial Review Act: A Road Map*, 86-MAY J. KAN. B. ASS'N 24, 31 (2017).

46. Douglas v. Ad Astra Info. Sys., L.L.C., 293 P.3d 723, 728 (Kan. 2013).

47. Landrum v. Goering, 397 P.3d 1181, 1187 (Kan. 2017).

48. May v. Cline, 372 P.3d 1242, 1245 (Kan. 2016).

regulation. . . . An agency's interpretation of its own regulation will not be disturbed unless the interpretation is clearly erroneous or inconsistent with the regulation."[49] In 2016, however, we once again announced an end to judicial deference to executive agencies on questions of law. Relying on the reasoning of *Douglas*, we held that the "interpretation of a regulation is a question of law. . . . We therefore owe no deference to an agency's interpretation of its own regulations and exercise unlimited review over such questions."[50]

B. Prosecutorial Discretion

A second area of administrative law undergoing possible change in Kansas concerns prosecutorial discretion. While prosecutors are not traditionally viewed as "bureaucrats" in an executive agency, they are some of the most important actors in the arena of administrative law. That is, the day-to-day decisions of prosecutors fill in the blanks left by the legislature when it crafts necessarily broad and general criminal statutes. This "prosecutorial discretion" is an immensely powerful tool of the administrative state.[51]

Two recent cases at the Kansas Supreme Court have used the doctrines of separation of powers to limit the level of discretion the legislature may give to prosecutors.[52] The basic principle is clear: when

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49. Winston v. State Dep't of Soc. & Rehab. Servs., 49 P.3d 1274, 1281 (Kan. 2002).

50. *May*, 372 P.2d at 1245.

51. *See* Peter L. Markowitz, *Prosecutorial Discretion Power at its Zenith: The Power to Protect Liberty*, 97 BOSTON L. REV. 489, 490–91 (2017) ("Modern presidents have asserted increasingly robust visions of the scope of their own prosecutorial discretion power—at times using prosecutorial discretion policies to achieve goals that they could not otherwise realize through the legislative process.").

52. *See* State v. Harris, 467 P.3d 504, 507–09 (Kan. 2020) (holding residual clause of statute prohibiting possession of weapon by convicted felon, which defined "weapon" to include dagger, dirk, switchblade, stiletto, straight-edged razor "or any other dangerous or deadly cutting instrument of like character" was unconstitutionally vague on its face); State v. Ingham, 430 P.3d 931, 943–44 (Kan. 2018) (Stegall, J., concurring) (questioning whether a statute criminalizing "[p]ossessing, manufacturing or transporting a commercial explosive" and defining "commercial explosive" as "chemical compounds that form an explosive; a combination of chemicals, compounds or materials, including, but not limited to, the presence of an acid, a base, dry ice or aluminum foil, that are

crafting a statute, the legislature must not delegate the ability to decide what the law says on an *ad hoc* basis to the executive or judicial branches.[53] Laws that delegate too much discretionary authority to non-legislative actors to define criminal conduct are necessarily void for vagueness. A vague law "invite[s] arbitrary power" and "threaten[s] to transfer legislative power to police and prosecutors, leaving them the job of shaping a vague statute's contours through . . . enforcement decisions."[54]

Just as a criminal statute must put the public on notice of what conduct is prohibited in order to satisfy due process, so too must a statute provide "explicit standards" (i.e. an intelligible principle) for enforcement.[55] Impermissible delegations of the legislative power in the criminal context leave open the possibility of arbitrary law enforcement at the whims of potentially unaccountable police, prosecutors, and judges.[56] Within constitutional boundaries, publicly accountable legislators have the liberty to define criminal conduct, while prosecutors, judges, law enforcement officers, and juries are deliberately constrained by those legislative definitions. Put another way, the separation of powers requires that a criminal

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placed in a container for the purpose of generating a gas or gases to cause a mechanical failure, rupture or bursting of the container; incendiary or explosive material, liquid or solid; detonator; blasting cap; military explosive fuse assembly; squib; electric match or functional improvised fuse assembly; or any completed explosive device commonly known as a pipe bomb or a molotov cocktail" was unconstitutionally vague, though the issue was not briefed before the court).

53. *Harris*, 467 P.3d at 507–09.

54. *Ingham*, 430 P.3d at 943 (Stegall, J., concurring) (quoting Sessions v. Dimaya, 138 S.Ct. 1204, 1223 (2018) (Gorsuch, J., concurring)).

55. *Harris*, 467 P.3d at 508.

56. Kolender v. Lawson, 461 U.S. 352, 358 (1983); *see also* United States v. Davis, 139 S. Ct. 2319, 2325 (2019) ("Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide."); United States v. Reese, 92 U.S. 214, 221 (1875) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.").

statute must "convey sufficient clarity to those who apply the ordinance standards to protect against arbitrary and discriminatory enforcement."[57]

C. Emergency Powers

A final example of Kansas administrative law in flux is the executive branch's use of emergency powers. Nearly all government actors became reacquainted with this critical executive function—and its limits and controversies—during the global COVID-19 pandemic.[58] Early on during the pandemic, we heard a case that put those questions squarely before us.[59] In the spring of 2020, Kansas Governor Laura Kelly issued a COVID-19 emergency proclamation.[60] According to Kansas law, that proclamation could not last longer than 15 days unless ratified by a concurrent resolution of the Legislature. The Legislature did adopt House Concurrent Resolution 5025 which extended the Governor's emergency declaration—but it also purported to delegate the legislative power to revoke executive orders issued under the emergency declaration to a smaller body consisting of legislative leaders called the Legislative Coordinating Council.[61]

Governor Kelly then issued a controversial executive order that, among other things, temporarily prohibited "mass gatherings."[62] The Legislative Coordinating Council immediately convened and voted to revoke this order, and Governor Kelly then brought an original action in our court asking us to determine whether the LCC overstepped its authority.[63] Our ultimate holding—that the LCC

57. City of Lincoln Ctr. v. Farmway Co-Op, Inc., 316 P.3d 707, 714 (Kan. 2013) (quoting City of Wichita v. Hackett, 69 P.3d 621, 627 (Kan. 2003)).

58. Magnus Lundgren et al., *Emergency Powers in Response to COVID-19: Policy Diffusion, Democracy, and Preparedness*, 38 NORDIC J. OF HUMAN RIGHTS 305, 306 (2020) (noting the number of governments that declared states of emergencies in response to the pandemic was "equivalent to all SOEs declared globally since the 1980s.").

59. Kelly v. Legislative Coordinating Council, 460 P.3d 832 (Kan. 2020).

60. *Id.* at 834.

61. *Id.* at 836–37.

62. *Id.* at 837.

63. KAN. STAT. ANN. § 48-904 et seq.

exceeded its lawful authority in revoking the executive order because the "plain text" of House Concurrent Resolution 5025 did not authorize the LCC to revoke the executive order—did not resolve the administrative law questions at the heart of the case.[64] As such, we declined to decide "whether a concurrent resolution passed by the Legislature can delegate its oversight authority under KEMA [the Kansas Emergency Management Act] to the LLC [Legislative Coordinating Council] . . . or whether Executive Order 20-18 was a legally valid or constitutional exercise of the Governor's authority [under the Kansas Emergency Management Act]."[65]

I wrote separately to address a part of the LCC's argument—that absent some legislative oversight, emergency powers exercised by the executive may at some point entail an unconstitutional delegation of legislative authority. I found the argument that the legislature contemplated fixing this oversight authority with the LCC to be "at least colorable in light of the vexing separation of powers problems created when one branch of government delegates its power to another branch as the Legislature has done (in part) in [the Kansas Emergency Management Act]."[66] I noted that "[a]bsent a liberal interpretation of the Legislature's ability to continually oversee the Governor's exercise of delegated Legislative authority, the structure of KEMA itself risks violating the constitutional demand of separate powers."[67]

CONCLUSION

"'Something there is that doesn't love a wall/That wants it down,' observed Robert Frost, blaming nature's assault—winter's 'frozen

64. *Kelly*, 460 P.3d at 834.

65. *Id.*

66. *Id.* at 841 (Stegall, J., concurring).

67. *Id.* (Stegall, J., concurring) (citing Solomon v. State, 364 P.3d 536, 552 (Kan. 2015) (Stegall, J., concurring) ("The separation of powers contains no opt-out clause. The departments are not free to ignore the strictures of separate powers upon a mutual declaration of cooperation in furtherance of some jointly agreed upon governmental objective.")).

ground swell.' As with nature, so too with governments."[68] I wrote those words in 2014 hoping to spark a more robust judicial focus on those vexing separation of powers problems.

I went on to observe that there is something about power that doesn't love a wall; that wants it down. It is in the centripetal nature of governmental power—if dispersed like so many iron filings across a surface—to be restless until it is united in one place, as though drawn by an unseen magnet beneath. Knowing this—and having a healthy fear of consolidated power—the drafters of both our national and Kansas constitutions structured our government to be crisscrossed by numerous "walls of separation." The most important of these walls of separation are those that both hem in and protect the exercise of the three distinct forms of governmental power in our constitutional system—the executive, the legislative, and the judicial powers.[69]

As the ground of Robert Frost's poetic pastures heaved and fell under the pressures of time and season change, so too does power ebb and flow within the governments of men—and under similar pressures. And "who decides?" remains a perennial question of equal importance to the ultimate questions concerning the actual decision being made. What is to prevent administrative law from becoming that "extralegal regime" feared by those suspicious of the rulemaking class of "unelected bureaucrats"? Ultimately, we must rely on those very walls of separation—if kept in good repair—to do the job.

68. Solomon v. State, 364 P.3d 536, 550 (Kan. 2015) (Stegall, J., concurring) (quoting Robert Frost, *Mending Wall*, in NORTH OF BOSTON 11–13 (1917)).

69. *Id.* at 550 (Stegall, J., concurring) (quotations omitted).