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Judicial Lawmaking and its Threat to Freedom

By Sarah McIntosh

Over the last decade politicians and commentators have debated the proper scope of judicial review at the federal level. This debate is every bit as relevant within the states. The Kansas Supreme Court pushed this issue to the fore with its decision in *Montoy v. State of Kansas*. In *Montoy*, the Court held that the legislature was violating the Kansas Constitution by failing to provide suitable funding for Kansas public schools. The **Flint Hills Center** for Public Policy anticipated the problems and detrimental effects generated by *Montoy* in its Policy Brief, "Undermining the Judicial Power of the State." In the brief, Gerrit Wormhoudt warned that a decision by the Court to usurp legislative power could cost the Court the "trust, confidence and respect to which that office is entitled." On Oct. 19, Dr. Richard Epstein, the James Parker Hall Distinguished Service Professor of Law at the University of Chicago Law School, spoke to an audience at the Wichita Art Museum. In his speech, which focused on analysis of judicial activism at the federal and state levels, he cited *Montoy* as an example of judicial usurpation of legislative power. He criticized the Kansas Supreme Court for its reliance on a clause in the Kansas Constitution requiring the legislature to "make suitable provision for finance" of education. The Court in *Montoy* usurped the legislature's power by making a fundamentally legislative determination as to how to allocate the state's budget. The Kansas Constitution provides that the legislature "shall provide for intellectual, educational, vocational, and scientific improvement by establishing and maintaining public schools, educational institutions and related activities which may be organized and changed in such matter as may be provided by law." Section 6b grants the legislature the power to make suitable provisions for finance of education. It should be the legislature's job to determine the meaning of "suitable" and to use its decision-making power to balance the interests of different spending programs. The Court did not invoke a long-standing legal doctrine in *Montoy*, but rather re-cast the word "suitable" as a legal term for the Court to interpret rather than the legislature. In determining what suitable means, the Court relied on one study commissioned by a legislative committee. Allowing the Court to use one legislative study as a tool to usurp legislative decision-making sets a dangerous precedent. It could deter future legislative committees from commissioning studies for fear that the conclusions may be critical of any current policies. The legislature must work within restraints. It has to decide what programs to put in place and how much to spend on these programs. If the courts attempt to determine how much the legislature should spend on any one program in isolation, then the power to legislate shifts away from the branch in which it was vested. As a result of the Court's demand for increased spending, the legislature has to decide either to cut other programs or to increase taxes. Taxing and spending are legislative powers, however, and the courts should not interfere in this process. Courts look at these issues in isolation. They make their decisions based on restricted facts. The design of the legislature, in contrast, assumes that legislators look at a variety of factors and competing programs. When the legislature makes funding decisions it has to consider them within this broader framework. Unfortunately the legislature gave in to the Supreme Court's demands, allowing the usurpation

of its power—a dangerous precedent. The founding fathers found it important to separate power into many hands in order to maintain a balance that would prevent a concentration of authority. The framers of our Constitution warned against the concentration of power and its potential for abuse. The Kansas Supreme Court disrupted that balance and took over the lawmaking duties of the legislature in the State of Kansas. If the courts continue to take upon themselves the power to read specific requirements into general terms in laws, the people will lose the ability to control spending through their elected representatives. Decision-making over funds at a further level of removal from accountability distorts the proper course of governance. Kansans should be wary of this disregard for our historical foundations and the implications it holds for future law-making and work to prevent a furthering of this concentration of power.

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