

# The Burger Court Opinion Writing Database

## *Montana v. United States*

440 U.S. 147 (1979)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

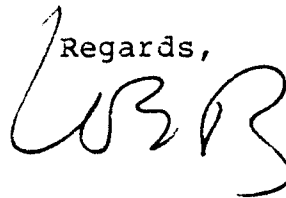
February 1, 1979

Re: 77-1134 - Montana v. United States

Dear Thurgood:

I join.

Regards,



Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

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CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

January 19, 1979

RE: No. 77-1134 Montana v. United States

Dear Thurgood:

I agree.

Sincerely,

*Bill*

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

January 17, 1979

Re: No. 77-1134, Montana v. United States

Dear Thurgood,

My only problem with this opinion is the long paragraph beginning on page 21 discussing other "recognized exceptions to collateral estoppel." First, it strikes me that this paragraph is gratuitous. More importantly, there is substantial doubt whether the situations discussed are really "recognized exceptions." For example, the first situation -- when a defendant is forced to litigate an issue of exclusive federal jurisdiction in state court -- is not a recognized exception as far as I am aware. At best, it is an open question. The only citation in support is a student Note in the Harv. L. Rev. arguing for a change in current doctrine. Other commentators have argued to the contrary. E.g. Currie, Res Judicata: The Neglected Defense, 45 U. Chi. L. Rev. 317 (1978).

Similarly, the second situation discussed -- a statutory right that presupposes determination of factual questions in a federal forum -- is also unsettled. The authority cited in footnote 11, the Gardner-Denver case, deals only with arbitral awards which pose a far different question. Also cited is another student piece in the Geo. Wash. L. Rev. Finally, the footnote states that this Court has left open the question of "the scope of preclusion with respect to § 1983 claims that could have been asserted in prior state court proceedings." Two dissenting opinions are cited. In Preiser v. Rodriguez, 411 U.S. at 497, however, the Court stated that "[R]es judicata has been held to be fully applicable to a civil rights action brought under § 1983." While this statement is not a holding, the question might not really be so open, and at the very least, this discussion should not be in a paragraph labeled "recognized exceptions" to the doctrine of collateral estoppel.

The rest of the paragraph deals with England. In the briefs, Montana argued that the government was barred from relitigating by the doctrine of collateral estoppel and England abstention. By deciding to preclude relitigation of the dispute because of collateral estoppel, there is no need to reach the England question. Placing the discussion of England under "recognized exceptions" to collateral estoppel seems to me to confuse two distinct issues. England simply does not involve collateral estoppel.

In short, I would hope that you might give favorable consideration to the possibility of deleting this entire paragraph and its accompanying footnotes. If the paragraph is deleted, I shall gladly join the opinion.

Sincerely yours,

Mr. Justice Marshall

Copies to the Conference

P.S.  
/

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

January 18, 1979

Re: No. 77-1134 - Montana v. United States

Dear Thurgood:

Thanks for your letter of today, and for your willingness to accommodate my views. The changes you propose are entirely satisfactory, and I am glad to join your opinion for the Court as so modified.

Sincerely yours,

P.S.  
/

Mr. Justice Marshall

Copies to the Conference

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
✓Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 23 JAN 1973

Recirculated: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 77-1134

State of Montana et al.,	} On Appeal from the United States
Appellants,	
v.	
United States.	
	District Court for the District of Montana.

[February —, 1979]

MR. JUSTICE WHITE, dissenting.

I disagree that the Government was estopped from litigating its claim in federal court by virtue of the earlier action in the courts of Montana. And on the merits I think the Montana gross receipts tax is constitutionally infirm. Thus, I would affirm the decision below.

### I

It is basic that the principle of collateral estoppel "must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts . . . remain unchanged." *Commissioner v. Sunnen*, 333 U. S. 591, 599-600 (1948). The Court does not dispute this, but maintains that discrepancies in the facts underlying the state and federal actions were of no moment. It is clear, however, that the Montana Supreme Court assumed in *Kiewit I* that the tax under scrutiny was a tax enforcing, rather than a revenue collecting, measure. The significance of that supposition, in my view is refuted neither by the opinion in *Kiewit I* nor by the state court's subsequent pronouncements in *Kiewit II*. That the assumption lost its force by the time of the federal litigation is undisputed. By then the Federal Government had abandoned its policy of requiring contractors with whom it dealt to forego credits available under the gross receipts law. Though federal contractors accordingly availed them-

17 JAN 1979

No. 77-1134

Montana v. United States

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The State of Montana imposes a one percent gross receipts tax upon contractors of public, but not private, construction projects. Montana Rev. Codes Ann. § 84-3505 (Supp. 1975).<sup>1</sup>/ A public contractor may credit against the gross receipts tax its payments of personal property, corporate income, and individual income taxes. <sup>2</sup>/ Any remaining gross receipts liability is customarily passed on in the form of increased construction costs to the governmental unit financing the project. <sup>3</sup>/ At issue in this appeal is whether a prior judgment by the Montana Supreme Court upholding the tax precludes the United States from contesting its constitutionality and if not, whether the tax discriminates against the Federal Government in violation of the Supremacy Clause.



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

January 18, 1979

Re: No. 77-1134 - Montana v. United States

Dear Potter:

I am willing to delete the first two sentences and accompanying footnotes of the first full paragraph on p. 21 of United States v. Montana, beginning "We note also...." Although as a review of the law journal articles cited in fns. 10 and 11 will reflect, there is certainly case law authority for the propositions advanced in text, I agree that it is unnecessary to address the points in this opinion.

I am, however, reluctant to dispense with a discussion of England v. Medical Examiners. Since both the state and Government strenuously argued England, and the dissent below partially relied on it, our reference is scarcely gratuitous. And while it is true that England involved res judicata, I see nothing in the reasoning of the opinion to suggest that a different result would obtain where collateral estoppel was applicable. If a party forced into state court could not be precluded under res judicata from litigating the federal claims that he reserved, a fortiori, a controlling non-party could not be foreclosed under the same circumstances. At the very least, we should be careful to dispel any inference to the contrary, which is how fn. 12 is presently phrased.

As to the discussion on the top of p. 23, I think it beyond argument that unfairness or inadequacy of prior procedures constitutes a recognized exception to collateral estoppel. Application of that doctrine has always been

justified on the theory that a party has had a full and fair opportunity to litigate his claims in a prior proceeding, and I think its important to note in text that the Government does not dispute the fairness of its previous opportunity in this case.

Accordingly, I will rewrite the first full paragraph beginning on p. 21 to read:

"Nor does this case implicate the right of a litigant who has 'properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims,' and who is then 'compelled, without his consent. . . to accept a state court's determination of those claims,' England v. Medical Examiners, 375 U.S. 411, 415 (1964) (footnote omitted)."

The text of the remainder of pages 22-23 will follow. Footnotes 10 and 11 of the first draft will be deleted, and fns. 12 and 13 renumbered to reflect the deletion.

Sincerely,

  
T.M.

Mr. Justice Stewart

cc: The Conference

4, 10<sup>11</sup>, 13, 15

19 JAN 1979

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1134

State of Montana et al.,  
Appellants,  
v.  
United States.

On Appeal from the United States  
District Court for the District of  
Montana.

[February —, 1979]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The State of Montana imposes a one percent gross receipts tax upon contractors of public, but not private, construction projects. Montana Rev. Codes Ann. § 84-3505 (Supp. 1975).<sup>1</sup>

<sup>1</sup> Section 84-3505 (5), Montana Rev. Codes Ann. (Supp. 1977) provides in part:

"Each public contractor shall pay to the state an additional license fee in a sum equal to one per cent (1%) of the gross receipts from public contracts during the income year for which the license is issued. . . ."

The Act defines public contractors to include:

"(1) . . . any person who submits a proposal to or enters into a contract for performing all public construction work in the state with the federal government, State of Montana, or with any board, commission, or department thereof or with any board of county commissioners or with any city or town council . . . or with any other public board, body, commission, or agency authorized to let or award contracts for any public work when the contract cost, value, or price thereof exceeds the sum of \$1,000.

"(2) . . . subcontractors undertaking to perform the work covered by the original contract or any part thereof, the contract cost, value, or price of which exceeds the sum of \$1,000." *Id.* § 84-3501.

Gross receipts encompass:

"all receipts from sources within the state, whether in the form of money, credits, or other valuable consideration, received from engaging in, or conducting a business, without deduction on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, taxes, losses, or any other expense whatsoever. However, 'gross

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

January 23, 1979

Re: No. 77-1134-Montana v. United States

Dear Bill:

I have considered carefully your letters of January 22. I think it self-evident that citations to the Restatement or scholarly articles are not intended to bind us on issues not presented on this appeal. It seems to me unnecessary to state the obvious.

Sincerely,

*T.M.*

T.M.

Mr. Justice Rehnquist

cc: The Conference

28 JAN 1979

3rd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 77-1134

<p>State of Montana et al., Appellants. v. United States.</p>	}	<p>On Appeal from the United States District Court for the District of Montana.</p>
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[February —, 1979]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The State of Montana imposes a one percent gross receipts tax upon contractors of public, but not private, construction projects. Montana Rev. Codes Ann. § 84-3505 (Supp. 1975).<sup>1</sup>

<sup>1</sup>Section 84-3505 (5), Montana Rev. Codes Ann. (Supp. 1977) provides in part

"Each public contractor shall pay to the state an additional license fee in a sum equal to one per cent (1%) of the gross receipts from public contracts during the income year for which the license is issued. . . ."

The Act defines public contractors to include:

"(1) . . . any person who submits a proposal to or enters into a contract for performing all public construction work in the state with the federal government, State of Montana, or with any board, commission, or department thereof or with any board of county commissioners or with any city or town council . . . or with any other public board, body, commission, or agency authorized to let or award contracts for any public work when the contract cost, value, or price thereof exceeds the sum of \$1,000.

"(2) . . . subcontractors undertaking to perform the work covered by the original contract or any part thereof, the contract cost, value, or price of which exceeds the sum of \$1,000." *Id.*, § 84-3501.

Gross receipts encompass:

"all receipts from sources within the state, whether in the form of money, credits, or other valuable consideration, received from engaging in, or conducting a business, without deduction on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, taxes, losses, or any other expense whatsoever. However, 'gross

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

January 18, 1979

Re: No. 77-1134 - Montana v. United States

Dear Thurgood:

Please join me in your circulation of January 17 as  
modified by your letter of today to Potter.

Sincerely,



Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

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CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

January 22, 1979

No. 77-1134 Montana v. United States

Dear Thurgood:

Please join me in your second draft of an opinion  
for the Court in this case, circulated January 19.

Sincerely,

*Lewis*

Mr. Justice Marshall

lfp/ss

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

January 22, 1979

Re: No. 77-1134 Montana v. United States

Dear Thurgood:

I have had second thoughts about writing separately in this case, since I do agree with your conclusion and disagree with virtually nothing which you say in the opinion; my problem is that I don't know enough about the law, and the briefs don't shed enough light on it, to make me sufficiently confident to join an opinion which is expansively written and may be thought to bind us later as to issues not presented in this case. My concerns could be accommodated by some bit of explanation to the effect that the citations to the Restatement of Judgments, the reporter's notes, and the law review articles referred to in Part II and its footnotes are not intended to bind us to those treatises as to issues not presented by the facts of this case.

As an example of my reservations, the first sentence of your footnote 11 on page 15 of the second draft states:

"Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation . . .".

There are then cited the tentative draft of the Restatement (Second) of Judgments, a note in Volume 78 of the Columbia Law



Review entitled "The Preclusive Effect of State Judgments on Subsequent 1983 Actions", with page citations to 640-653, a "Cf." citation to Byron's opinion in Gibson v. Berryhill, and to John's dissent in Trainor v. Hernandez. I have reservations about the content of the first sentence insofar as it uses the words "quality" and "extensiveness", although I agree that Gibson certainly supports its use of "fairness" as one of the criteria.

I realize that it is often difficult to avoid stepping over the line from substance to style, and if you prefer to leave the opinion as written, I will simply go ahead with my separate concurrence.

Sincerely,



Mr. Justice Marshall

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

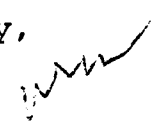
January 22, 1979

Re: No. 77-1134 Montana v. United States

Dear Thurgood:

At Conference in this case I voted to reverse on the merits of the constitutional issue, rather than collateral estoppel; I realize that a majority preferred to decide the issue of collateral estoppel, and you now have a Court for your opinion. Within a couple of days I anticipate circulating a short concurrence, not reaching the merits of the tax immunity claim, but expressing the idea that if we are to reverse on the basis of collateral estoppel (and I agree with the result you reach), we ought to do so without as much reliance on non-judicial materials as your opinion presently contains. I hope to have the concurrence in your hands by the latter part of this week.

Sincerely,



Mr. Justice Marshall

Copies to the Conference

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: 25 JAN 1979

Recirculated: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 77-1134

State of Montana et al.,	}	On Appeal from the United States District Court for the District of Montana.
Appellants,		
v.		
United States.		

[February —, 1979]

MR. JUSTICE REHNQUIST, concurring.

I join the Court's opinion on the customary understanding that its references to law review articles and drafts or finally adopted versions of the Restatement of Judgments are not intended to bind the Court to the views expressed therein on issues not presented by the facts of this case.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

January 18, 1979

Re: 77-1134 - Montana v. United States

Dear Thurgood:

Please join me.

Respectfully,

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Mr. Justice Marshall

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