

# The Burger Court Opinion Writing Database

*Commonwealth Edison Co. v. Montana*

453 U.S. 609 (1981)

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



(V)

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

CHAMBERS OF  
THE CHIEF JUSTICE

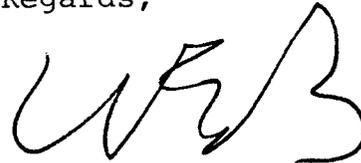
June 17, 1981

RE: No. 80-581 - Commonwealth Edison Co. v.  
Montana

Dear Thurgood:

I join.

Regards,



Justice Marshall

Copies to the Conference

3

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 2, 1981

RE: No. 80-581 Commonwealth Edison Co. v. Montana

Dear Thurgood:

I agree.

Sincerely,

*Bul*

Justice Marshall

cc: The Conference



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

CHAMBERS OF  
JUSTICE POTTER STEWART

May 27, 1981

Re: No. 80-581, Commonwealth  
Edison Co. v. Montana

Dear Thurgood,

I am glad to join your opinion for  
the Court.

Sincerely yours,

Justice Marshall

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 28, 1981

Re: 80-581 - Commonwealth Edison Co.  
v. Montana

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Dear Thurgood,

I shall await the dissent in this  
case.

Sincerely yours,



Justice Marshall

Copies to the Conference

cpm

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

From: Justice White

Circulated: 18 JUN 1981

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

No. 80-581 - Commonwealth Edison Co., et al.  
 v. Montana, et al

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Justice White, concurring.

This is a very troublesome case for me, and I join the Court's opinion with considerable doubt and with the realization that Montana's levy on consumers in other states may in the long run prove to be an intolerable and unacceptable burden on commerce. Indeed, there is particular force in Justice Blackmun's argument that the tax is here and now unconstitutional because Montana collects most of its tax from coal lands owned by the federal government and hence by all of the people of this country, while at the same time sharing equally and directly with the federal government all of the royalties reserved under the leases the United States has negotiated on its land in the State of Montana. This share is intended to compensate the State for the burdens that coal mining may impose upon it. Also, as Justice Blackmun cogently points out, post at \_\_\_\_

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

1st PRINTED DRAFT

Circulated: \_\_\_\_\_

SUPREME COURT OF THE UNITED STATES

Recirculated: 24 JUN 1981

No. 80-581

Commonwealth Edison Company et al., Appellants, v. State of Montana et al.	}	On Appeal from the Supreme Court of Montana.
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[June —, 1981]

JUSTICE WHITE, concurring,

This is a very troublesome case for me, and I join the Court's opinion with considerable doubt and with the realization that Montana's levy on consumers in other States may in the long run prove to be an intolerable and unacceptable burden on commerce. Indeed, there is particular force in the argument that the tax is here and now unconstitutional. Montana collects most of its tax from coal lands owned by the Federal Government and hence by all of the people of this country, while at the same time sharing equally and directly with the Federal Government all of the royalties reserved under the leases the United States has negotiated on its land in the State of Montana. This share is intended to compensate the State for the burdens that coal mining may impose upon it. Also, as JUSTICE BLACKMUN cogently points out, *post*, at —, n. 9, another 40% of the federal revenue from mineral leases is indirectly returned to the States through a reclamation fund. In addition, there is statutory provision for federal grants to areas affected by increased coal production.

But this very fact gives me pause and counsels withholding our hand, at least for now. Congress has the power to protect interstate commerce from intolerable or even undesirable burdens. It is also very much aware of the Nation's energy needs, of the Montana tax and of the trend in the energy-rich

No. 80-~~88~~1

26 MAY 1981

Commonwealth Edison Co. v. Montana

On Appeal from the Supreme Court of Montana

JUSTICE MARSHALL delivered the opinion of the Court.

Montana, like many other States, imposes a severance tax on mineral production in the State. In this appeal, we consider whether the tax Montana levies on each ton of coal mined in the State, Mont. Code § 15-35-101 et seq. (1979), violates the Commerce and Supremacy Clauses of the United States Constitution.

I

Buried beneath Montana are large deposits of low sulphur coal, most of it on federal land. Since 1921, Montana has imposed a severance tax on the output of Montana coal mines, including coal mined on federal land. After commissioning a study of coal production taxes in 1974, see House Resolution Nos. 45 & 63, Senate Resolution No. 83, Laws of Montana, 1619-1620, 1653-1654, 1683-1684 (March 14 & 16, 1974); Montana Legislative Council, Fossil Fuel Taxation (1974), in 1975, the Montana legislature enacted the tax schedule at issue in this case. Mont. Code § 15-35-103 (1979). The tax is levied at varying rates depending on the value, energy content, and method of extraction of the coal, and may equal at a maximum, 30% of the "contract sales price."<sup>1</sup> Under the terms of a 1976 amendment to

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Footnote(s) 1 appear on following page(s).

12 JUN 1981

5, 13, 20, 22, 25

1st PRINTED DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 80-581

Commonwealth Edison Company et al., Appellants, v. State of Montana et al.	}	On Appeal from the Supreme Court of Montana.
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[June —, 1981]

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## I

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<sup>1</sup> Under Mont. Code § 15-35-103 (1979), the value of the coal is deter-

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 22, 1981

Re: No. 80-581 - Commonwealth Edison Co. v.  
Montana

Dear Harry:

Pursuant to your request, I will not bring  
Commonwealth Edison down Friday.

Sincerely,

*J.M.*  
T.M.

Justice Blackmun

cc: The Conference

STYLISTIC CHANGES THROUGHOUT.

26 JUN 1981

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-581

<p>Commonwealth Edison Company et al., Appellants, v. State of Montana et al.</p>	}	<p>On Appeal from the Su- preme Court of Mon- tana.</p>
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[June —, 1981]

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I

Buried beneath Montana are large deposits of low sulphur coal, most of it on federal land. Since 1921, Montana has imposed a severance tax on the output of Montana coal mines, including coal mined on federal land. After commissioning a study of coal production taxes in 1974, see House Resolution Nos. 45 and 63, Senate Resolution No. 83, Laws of Montana, 1619-1620, 1653-1654, 1683-1684 (March 14 & 16, 1974); Montana Legislative Council, Fossil Fuel Taxation (1974), in 1975, the Montana Legislature enacted the tax schedule at issue in this case. Mont. Code § 15-35-103 (1979). The tax is levied at varying rates depending on the value, energy content, and method of extraction of the coal, and may equal at a maximum, 30% of the "contract sales price."<sup>1</sup> Under the terms of a 1976 amendment to the Mon-

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

April 6, 1981

Re: No. 80-581 - Commonwealth Edison Co. v. Montana

Dear Lewis and John:

If it is all right with each of you, I shall attempt the dissent in this case. Please let me know if you feel the dissent assignment should be otherwise.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a long horizontal flourish extending to the right.

Mr. Justice Powell

Mr. Justice Stevens

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

April 9, 1981



Re: No. 80-581 - Commonwealth Edison Co. v. Montana

Dear Lewis:

Thank you for your note of today. I shall definitely bear this in mind in connection with the writing in this case.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", is written below the word "Sincerely,". A horizontal line is drawn underneath the signature.

Mr. Justice Powell

✓

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 26, 1981

Re: No. 80-581 - Commonwealth Edison Co. v. Montana

Dear Thurgood:

In due course, I shall attempt a dissent in this one.

Sincerely,

A handwritten signature in black ink, appearing to read 'H.A.B.', with a horizontal line underneath.

Mr. Justice Marshall

cc: The Conference

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

From: Mr. Justice Blackmun

Circulated: JUN 17 1981

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

No. 80-581, Commonwealth Edison Co., et al. v. Montana, et al.

JUSTICE BLACKMUN, dissenting.

In Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), a unanimous Court observed: "A tailored tax, however accomplished, must receive the careful scrutiny of the courts to determine whether it produces a forbidden effect upon interstate commerce." Id., at 288-289, n. 15. In this case, appellants have alleged that Montana's severance tax on coal is tailored to single out interstate commerce, and that it produces a forbidden effect on that commerce because the tax bears no "relationship to the services provided by the State." Ibid. The Court today concludes that appellants are not entitled to a trial on this claim. Because I believe that the "careful scrutiny" due a tailored tax makes a trial here necessary, I respectfully dissent.

I

The State of Montana has approximately 25% of all known United States coal reserves, and more than 50% of the Nation's

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 22, 1981

Re: No. 80-581 - Commonwealth Edison Co. v. Montana

Dear Thurgood:

I was confused this morning when I spoke of the citing of Jicarilla in your opinion for this case. I misread my "warning note." Jicarilla is cited more than once in my dissent, not in your opinion for the Court.

If at all possible, I would like to retain those cites. This would mean that Commonwealth Edison would come down the same day as Jicarilla. This is all right only if you approve and only if we can get them down on or before July 3. Potter has joined you in Commonwealth Edison but is "out" in Jicarilla.

For the moment, it may be well not to try to bring Commonwealth Edison down this Friday. Do you mind?

Sincerely,

*Harry*

HAB

Mr. Justice Marshall

cc: The Conference

~~Pursuant to your  
request I will not  
bring Commonwealth Edison  
down Friday -~~

cc The Conference

*JMA*

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

From: Mr. Justice Blackmun

Circulated: \_\_\_\_\_

Recirculated: JUN 23 1981

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-581

Commonwealth Edison Company  
 et al., Appellants,  
 v.  
 State of Montana et al. } On Appeal from the Supreme Court of Montana.

[June —, 1981]

JUSTICE BLACKMUN,

dissenting.

with whom Justice Powell and Justice Stevens join,

In *Complete Auto Transit, Inc. v. Brady*, 430 U. S. 274 (1977), a unanimous Court observed: "A tailored tax, however accomplished, must receive the careful scrutiny of the courts to determine whether it produces a forbidden effect upon interstate commerce." *Id.*, at 288-289, n. 15. In this case, appellants have alleged that Montana's severance tax on coal is tailored to single out interstate commerce, and that it produces a forbidden effect on that commerce because the tax bears no "relationship to the services provided by the State." *Ibid.* The Court today concludes that appellants are not entitled to a *trial* on this claim. Because I believe that the "careful scrutiny" due a tailored tax makes a trial here necessary, I respectfully dissent.

I

The State of Montana has approximately 25% of all known United States coal reserves, and more than 50% of the Nation's low-sulfur coal reserves.<sup>1</sup> Department of Energy, Demonstrated Reserve Base of Coal in the United States on January 1, 1979, p. 8 (1981); National Coal Assn., Coal Data 1978. Approximately 70-75% of Montana's coal lies under

<sup>1</sup> Montana and Wyoming together contain 40% of all United States coal reserves and 68% of all reserves of low-sulfur coal. H. R. Rep. No. 96-1527, pt. 1, p. 3 (1980).

April 9, 1981

80-581 Commonwealth Edison v. Montana

Dear Harry:

Although I am out of Maryland v. Louisiana, No. 83 Orig., I have read Byron's opinion rather hurriedly.

No doubt you will find some of it helpful in your dissent in the above case. Byron relies on your Complete Auto Transit in his discussion on page 27.

As you will recall, at Conference Byron said that he could be "had" to our point of view in this case.

Sincerely,

Mr. Justice Blackmun

lfp/ss

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

May 27, 1981

80-581 Commonwealth Edison Co. v. Montana

Dear Thurgood:

In accord with my vote at Conference, I will await  
Harry's dissent.

Sincerely,



Mr. Justice Marshall

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 18, 1981

No. 80-581 Commonwealth Edison Co. v. Montana

Dear Harry:

Your dissenting opinion is excellent in every respect, and I am happy to join it.

Sincerely,

*Lewis*

Mr. Justice Blackmun

LFP/lab

Copies to the Conference

(W)

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

May 28, 1981

Re: No. 80-581 Commonwealth Edison Co. v. Montana

Dear Thurgood:

Please join me.

Sincerely,



Justice Marshall

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 27, 1981

Re: 80-581 - Commonwealth Edison v. Montana

Dear Thurgood:

Like Lewis, I shall await Harry's dissent.

Respectfully,



Justice Marshall

Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

June 22, 1981

Re: 80-581 - Commonwealth Edison v. Montana

Dear Harry:

After restudying this case, I have decided to join your dissent. I think you are correct in your demonstration that the Majority's position emasculates the fourth prong of the Complete Auto Transit test. As the author of Complete Auto Transit, your views are especially persuasive to me.

I remain troubled by Byron's point that Congress really should draw the constitutional line on excessive severance taxes. Nevertheless, the Majority's holding will mean that there is no constitutional line on such taxes unless Congress acts--even a tax of one thousand percent of value and a total repeal of all other taxes will be permissible if Congress continues to evade its responsibilities. On the other hand, your view would presumably result in upholding most severance taxes that have been historically regarded as acceptable and would merely protect the interstate market from the kind of exportation that is akin to "taxation without representation." Another virtue of your position is that it would postpone the time when it would be necessary to delineate the constitutional standard in even more concrete form until after a factual record has been fully developed. In sum, please join me.

Respectfully,



Justice Blackmun

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