



10-1978

## Montana v. United States

Lewis F. Powell Jr.

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SUPPLEMENTAL MEMORANDUM

TO: Mr. Justice Powell

FROM: Nancy

May 9, 1978

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

Motion to Affirm

The SG has filed a 13-page ~~response~~, which is a tip in itself that there may be something here. The response addresses the England/collateral estoppel point and the Supremacy Clause issue on the merits.

1. England/collateral estoppel. The SG argues first that England is inapplicable because the conditions for imposition of that doctrine are inapplicable. According to the SG, those conditions are: (1) the federal court has abstained, (2) the parties asserting the federal claim "freely

and without reservation" submit their federal claims to the state courts, (3) the parties in both actions are identical, and (4) the state court has jurisdiction over the parties. The SG submits that these conditions were not met because the federal court technically did not abstain, but held its proceedings in abeyance pending completion of the state court proceedings in Kiewit; the United States never agreed to submit its federal claims to the state courts; the state court never acquired jurisdiction over the United States; and the United States was not a party to Kiewit. On the collateral estoppel point, the SG argues that the decision in Kiewit did not decide the issue here. According to the SG, ~~xxxxxx~~ it was not clear that Kiewit would have to pay any gross receipts tax because the tax might have been cancelled out by the other tax credits (personal property and corporate income).

So no 9 I think the SG probably is right about England, but I have doubts about the collateral estoppel point. It is true that the Montana S. Ct. in Kiewit I said that the ~~xxxx~~ gross receipts tax might end up in a "washout", but in Kiewit II it seems that the contractor argued that it might indeed ~~f~~ have to pay a net tax and that therefore the tax was invalid, because it amounted to a revenue-raising, rather than a revenue-enforcing, measure. (As noted in the preliminary memo, the state court rejected this argument in Kiewit II.) In addition, even if the identical issue was not litigated in Kiewit I as in the federal proceedings below, the United States would seem to be bound by the state court determination



that the distinction in the Montana tax between public and private contractors is not violative of the equal protection clause. Whether or not this equal protection determination is determinative of the discrimination issue under the Supremacy Clause is an open question, as far as I can tell, but the/collateral estoppel issue is not clear to me.

2. The Supremacy Clause issue. The SG's argument, in essence, is that the gross receipts tax is discriminatory against the federal government because: (1) The tax applies only to public contractors, and therefore it is not like the neutral, across-the-board taxes imposed in cases like Alabama v. King & Boozer or James v. Dravo Contracting (both cited in the preliminary memo). The taxes imposed in those cases "are imposed equally on all similarly situated constituents--private as well as governmental--in the state. The tax involved here is not." Motion to Affirm 10. According to the SG, the omission of private contractors is critical because if the tax were imposed on private contractors, there would be constituents in the state who could protest to the legislature if the tax became too high. Here, on the other hand, the tax applies only to those who deal with federal the/government and state and local governments. That brings me to the SG's second point: (2) Although the tax appears to be neutral because it applies to/state and local entities as well as the federal government, this is only superficially the case. The state can reimburse its contractors for the



taxes (as can the federal government), but with the state, the money goes from one pocket (the contracting office) to the other (the tax collector). The same is not true of the federal government.

While the SG is correct that the ~~issue~~ tax here is not like the ones upheld, ~~where~~ which applied ~~across~~ across-the-board to ~~public~~ contractors or lessees dealing with public and private entities alike, neither is the tax as clearly discriminatory as the SG makes it out to be. The tax applies not only to contractors who deal with the federal government, but also contractors who deal with local governments. These latter governments do not get back their money the same way the state does, and in that respect are situated just like the federal government. ~~In addition~~ Unless they are reimbursed by the state, which does not appear to be the case, they provide the political check on the state's taxing power required to sustain the tax. The SG does not provide an adequate answer to this point. He merely says, in a footnote:

"The fact that the tax is imposed on receipts from local governments, school districts and other governmental entities makes no difference, even assuming that those entities, like the federal government, cannot recoup those payments occasioned by the tax. Once it is shown that the State is discriminating against the federal government, the tax must fall; its constitutionality cannot be restored by showing that the state is also discriminating against other governmental entities."

Motion to Affirm 10. This statement begs the question whether the tax does discriminate against the federal government; and

the state maintains that the fact that other governmental entities also are subject to the tax proves non-discrimination.

The question, then, is whether the added protection that would be afforded the federal government if the tax also were imposed on contractors dealing with private entities is constitutionally required if the tax is not to violate the Supremacy Clause. I still think this is a substantial federal question. Certainly, for basic equal protection purposes involving state taxation, the distinction between private and public contractors would pass constitutional muster. The question here is whether a higher standard is applicable when the ~~gov~~ federal government contends that the failure to include private contractors in the tax ~~demonstrates~~ discrimination against the federal government. See preliminary memo at ~~10x~~ 9-10.

One final word: the SG relies heavily on United States v. County of Fresno, 429 U.S. 452 (1977), for the proposition that the tax is invalid because it is not applied across-the-board to private as well as public contractors. In County of Fresno, California imposed a tax on lessees of tax-exempt public property, and this applied to persons who rented ~~tax-exempt~~ tax-exempt houses from the National Forest Service. The Court sustained the tax. But the SG argues that the reason the Court sustained the tax was because it corresponded to the tax imposed on the owners of private property (which was not tax-exempt), which presumably was reflected in the rent paid by these private lessees. See 429 U.S. at 465. The SG therefore reasons that this other tax provided the "political check against abuse"



required by the Supremacy Clause. (In addition, I note that Tyler recommended to you in his bench memo that the tax was okay in part because it represented an attempt to even up the relative positions of those renting from owners of tax-exempt property and those renting from owners of taxed property.) Here, on the other ~~ah~~ hand, private contractors are totally excluded from the tax.

While County of Fresno thus is instructive, I do not think it is dispositive of this case for several reasons. you For what it's worth, that case involved taxing federal employees' possessory interest in federal property, ~~h~~ whereas this involves a direct tax on the gross receipts of the contractor himself. But because the tax is on the work the contractor does for the federal government, and because in many instances the government will reimburse the taxpayer, I doubt that that makes a constitutional difference. The more important distinction between the cases is that here at least the tax is imposed on ~~xxxx~~ contractors who do business with local governments as well as those who do business with the state and the federal government. That may be sufficient to make the tax nondiscriminatory, but I am not sure. Contrary to appellants' contentions and the opinion of the dissenting judge below, however, it seems to me likely that if the tax were imposed only on those who do business with the state and the federal governments, the tax probably would violate the Supremacy Clause.

Nancy

*Note  
front*

*(Issue is substantial - see dissent.)*

*3 8/41 invalidated Mont. state tax on contractors doing jobs for public bodies - including the U.S.*

*A motion to affirm has now been filed. See my supplemental memo, attached. H.*

*The tax - in a suit instituted and financed ~~by~~ by U.S. ~~the~~ in state ct. (but in name of a contractor - was sustained.*

PRELIMINARY MEMORANDUM

May 11, 1978 Conference  
List 3, Sheet 1

No. 77-1134

MONTANA

v.

UNITED STATES

*State relies on collateral estoppel & other grounds.*  
Appeal from D. Montana  
(East, Smith; Kilkenny, dissenting)

Federal/Civil

Timely

*3 8/41  
SG claims Supremacy Clause exemption*

1. SUMMARY: The main question presented by this appeal is whether a state-imposed gross receipts tax on contractors who perform work for public bodies, including the federal government, is unconstitutional under the Supremacy Clause. Subordinate issues are whether imposition of a tax on public contractors but not private contractors violates the equal protection clause, and



whether the federal three-judge court was precluded from considering these issues because of a prior state court adjudication.

2. FACTS: Appellants are the State of Montana, the Montana Dep't of Revenue, and the Department's Director (all hereinafter referred to as Montana or appellants). Montana imposes a tax of 1% on gross receipts of public contractors, which are defined to be construction contractors performing work for any public body, including the State, any of its political subdivisions or special purpose districts, and the federal government. It appears that the tax originally was conceived as a "revenue enforcing", rather than as a "revenue raising" measure. The gross receipts tax would be collected from public contractors and held, sort of as security, for the contractor's personal property and corporate income taxes that eventually would become due. The contractor receives a refund or credit toward the personal property and corporate income taxes. The State apparently keeps whatever is left over, however, and so the tax acts in part as a revenue raising measure.

This litigation began in state court when the federal government, on behalf of the Army Corps of Engineers, directed one of its contractors (Kiewit) to challenge the Montana tax on equal protection and supremacy clause grounds. Kiewit brought suit in state court. The suit was controlled and financed by the federal

government. Kiewit lost in state court. Kiewit Sons, Inc. v. State Board of Equalization, 161 Mont. 140 (1973)

(Kiewit I) (contained in the J.S. App. 105-123). The Montana S. Ct. rejected all the challenges to the tax law. The following holdings are relevant to this case: (1) The distinction between private contractors, who are not subject to the tax, and public contractors, who are, is not irrational under the equal protection clause in view of the wide latitude given the states in enacting taxing statutes. (The reasons given by the state court for the distinction did not seem to have anything to do with taxation; they seemed to be related more to the need for licensing and regulation of contractors who perform work for public bodies.) (2) The tax is not an unconstitutional discrimination against the federal government because contractors who deal with the federal government are not treated less favorably than contractors who deal with the State. (3) The impact of the tax on the federal government is not direct or substantial. All of these rulings added up to the conclusion that the tax is not unconstitutional under this Court's precedents.

In Kiewit Sons, Inc. v. Department of Revenue, 531 P.2d 1327 (1975) (Kiewit II) (contained in J.S. App. 124-30), the Montana S. Ct. rejected Kiewit's contention that the statute was invalid when used as a revenue-producing measure instead of a revenue-enforcing measure.



During the pendency of these state court proceedings, an action that had been filed by the federal government to challenge the tax was continued pursuant to the parties' agreement. After Kiewit I and Kiewit II, the majority of the three-judge court below ruled that the tax is invalid under the Supremacy Clause. First, it rejected Montana's contention that relitigation of the constitutionality of the tax was barred by res judicata, collateral estoppel, or the rule of England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (holding that a party that submits its federal claims for decisions by a state court, without reservation, forgoes the right to return to district even if it did not seek review of the state court decision in this Court).

*Fed Ct  
action  
stayed*

On the merits, and in a fairly confusing opinion, the majority held that the tax violates the Supremacy Clause by discriminating against the federal government and in favor of the state. The supposed discrimination occurs because although contractors who work for both the State and the federal government have to pay the tax, and thereby the cost to the contracting government is made higher, the State gets its money back in the form of general revenues while the federal government does not.

While first stating that its resolution of the Supremacy Clause issue made it unnecessary to pass upon the question whether the equal protection clause prohibits the State's discrimination between public and private

contractors, the court went on to state its views on the issue anyway. First it stated that it was not barred by collateral estoppel from reaching the issue, despite the prior resolution of the question by the Montana S. Ct. The majority explained: "[N]othing in the issues presented, nor did the contractor Kiewit have standing to raise on behalf of the Government in Kiewit, the Government's current issue of the discriminatory effect upon it as an owner-builder by the imposition of [the tax] upon its [c]ontractors in violation of the Supremacy Clause." J.S. App. 15. On the merits of this issue the court concluded that "as between [public contractors] and large structure private contractors, there is no reasonable or rational factual basis for the demonstrated unequal treatment under the Act." Id. 16. Apparently by reading the equal protection clause together with the Supremacy Clause, the majority concluded that "the imposition of the [gross receipts] tax upon [public contractors] discriminates against the Government in favor of private contractors, all in violation of the Supremacy Clause." Id. 17.

Judge Kilkenny dissented on every point. He believed these issues to have been determined conclusively by the prior state court adjudication. The United States admitted the following facts indicating that it had control over the lawsuit: the federal government required Kiewit to file the lawsuit; reviewed and approved the complaint; paid the attorneys fees; directed the appeal to the Montana



6.  
S. Ct.; participated as amicus curiae before that court; was the real party in interest; directed the filing of a notice of appeal to this Court; and, through the SG, abandoned its appeal here. In view of these facts, Judge Kilkenney believed that the federal government had the "laboring oar" in the state court proceeding and therefore should be bound by it. Drummond v. United States, 324 U.S. 316, 318.

On the merits, he suggested that the majority's decision sub silentio overruled a whole line of this Court's cases allowing States to impose gross receipts taxes on contractors even when they worked for the federal government. See, e.g., Alabama v. King & Boozer, 314 U.S. 1; James v. Dravo Contracting, 302 U.S. 134. The majority's reasoning--that this was discrimination against the federal government and in favor of the State, simply because the State got back its contracting money in the form of general revenues--would apply to every tax on contractors' gross receipts because the same work performed for the federal government would not be as expensive when performed for the State. The majority's reasoning distorts the proper test, as set out in Phillips Chemical Co. v. Dumas School Dist., 361 U.S. 376, that the State must treat those who deal with the federal government as well as it treats those with whom it deals itself. Id., at 385. Here that test was met because the tax itself is identical as applied to contractors working for the federal government

and contractors working for the State. The only difference is in the impact on the sovereign, and at that point there is no Supremacy Clause violation because the tax itself is the same regardless of whether the sovereign is the State or the federal government, and any economic effect on the federal government is neither direct nor substantial.

On the issue concerning the difference in treatment of public and private contractors, Judge Kilkenny concluded that the issue had been decided in the State's favor in Kiewit I and that, in any event, the majority's resolution of the question was wrong. The States have wide latitude in drawing distinctions for purposes of taxation; the fact that the Supremacy Clause is implicated does not change that standard of review. Rather, the federal government's interest "must be weighed in the balance to ascertain whether the state treats similarly-situated constituents in a similar fashion. . . . [T]his condition is satisfied here in that all contractors are subject to the same exact tax." J.S. App. 33.

3. CONTENTIONS: Appellants attack the reasoning of the majority on each of the above points, including whether the district was precluded from considering these questions. On the merits, appellants contend that the lower court majority has completely misinterpreted Phillips Chemical. In concluding that the tax is discriminatory because the State gets its payment back in the form of general revenue, the lower court implicitly overruled many



of this Court's cases upholding state taxes on contractors working for the federal government. See cases cited at J.S. 15. (Appellants also note that while the State itself will get its money back, the same will not be true of political subdivisions and other units that hire public contractors.) According to appellants, Phillips Chemical simply requires that the tax applied to contractors dealing with the federal government be the same as the tax applied to contractors dealing with the State. (In Phillips the tax itself was different as applied to property leased by the federal government or the State.) The fact that the tax here distinguishes between public and private contractors only is relevant to the equal protection question.

Appellants' position, in sum, is:

"A tax must pass two separate 'discrimination' tests. As with any tax the classification between those who actually pay the tax and those who are excluded must be non-discriminatory under equal protection standards. And where a tax also has some inter-sovereign overtones, the tax must also be non-discriminatory in that it treats those taxpayers who deal with the Federal Government as well as it treats those who deal with the State."

J.S. 18. The lower court majority has "greatly confused the law . . . by holding that a Supremacy test must be made not only of the relationship created by the taxing act between the two sovereigns but also that a Supremacy test (rather than an Equal Protection test) is also made of the actual classification for tax purposes between those taxed and those exempt." J.S. 20.

Appellants' arguments are echoed in two amicus briefs--one from California and one filed jointly by Virginia, Arizona, North Dakota, Alaska, Nebraska, Maryland, Hawaii, Nevada, Oregon, Alabama, Wyoming, Guam, Washington, Arkansas, Florida, West Virginia, Iowa, Idaho, New Mexico, Indiana, Puerto Rico, and Colorado. They are all very upset with the decision below.

4. DISCUSSION: In view of the reaction of the States who are amici, the opinion of the dissenting judge, the lack of coherence in the decision below, and the apparent departure from this Court's precedents, it would be hard to say that there is not a substantial federal question here. This clearly is not a case like Phillips Chemical, where the tax itself differed depending on whether the federal government or the State was involved. The only way to say that there is discrimination here is to focus on the fact that when the State pays a contractor a higher price because of the contractor's tax liability, it gets back the extra funds through the tax, while the federal government does not. But appellants, the amici, and the dissenting judge seem to be right that this would be true with any tax levied on all contractors (public and private).

This latter point may be what impelled the court below to examine the exemption of private contractors from the tax; for the exemption makes this tax look like more like the tax in Phillips Chemical, which applied only to those who dealt with the federal government and the State,



yet the State got its money back. The court below may have been attempting to see whether the tax structure really is a facade for discriminating against contractors who deal with the federal government. But there is much to what appellants say about the confusion in the decision below of the equal protection and Supremacy Clause tests. In addition, political subdivisions of the State receive the same tax treatment as the federal government.

I would call for a response from the SG. There is no response.

Bregstein

Opns in petn

## MONTANA

vs.

UNITED STATES

Relisted for the Chief Justice. Also motion to affirm.

Relisted for the Chief Justice. Also mot

Bill Relinquish  
would reverse.  
on see Judicial  
- to Bryan denies he  
is probably right.

Noted

[illegible]



BENCH MEMORANDUM

To: Mr. Justice Powell

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

Summary

This case arises out of a challenge to the constitutionality of the Montana Contractors' Gross Receipts Tax Act (the Act). The Act levies a 1% tax on the gross receipts from "public contracts," defined to include all contracts for public construction work in the State with the State of Montana, its subdivisions, and the United States. The Act imposes no tax on gross receipts from "private contracts," i.e., contracts with private purchasers of construction work.

The Act provides for refunds and credits of the gross receipts tax, based on the payment of Montana personal property tax, personal income tax, and corporate license tax. These refunds and credits reduce the effective rate of the gross receipts tax to one half of 1%.

The Act also establishes a system for licensing and regulation of contractors who enter into public contracts.

Though in the following discussion I will use the terms "public contractor" and "private contractor" for facility of expression, it should be borne in mind that a contractor may perform both public and private contracts. The gross receipts tax is levied on the receipts from all public contracts.

The first question presented by this case is whether the United States is precluded from litigating its claim that the Act is unconstitutional. The answer to this question turns on the effect to be given to a prior judgment of the Montana Supreme Court. This question is discussed in Part I.

If the United States is not precluded from bringing this action, then the Court must reach the merits of its claim that the Act is unconstitutional. This claim, as presented by the SG, rests on the Supremacy Clause alone, though an equal protection challenge to the Act has been mentioned at various stages of this litigation and the prior state court litigation. The constitutionality of the Act is discussed in Part II.



I. The Res Judicata Issue

*In a prior case, in which the U.S. raised the same issue as here (invalidity of gross receipts tax), U.S. lost. State claims res judicata*

By stipulation of the parties, the proceedings in the DC were continued pending the decision of another case raising similar issues in the Montana Supreme Court, Kewit Sons v. St. Bd. of Equalization, 505 P.2d 102 (1973) ("Kewit I, reprinted at pp. 105-23 of the Appendix to the Jurisdictional Statement). The complaint in the DC was filed less than a month after the filing of the complaint in Kewit I. The State maintains that the two complaints raised the same constitutional issues, that the United States controlled the litigation in Kewit I, and that the United States submitted its constitutional claims unreservedly in that case and had them determined. Accordingly, the State contends, the United States was barred from relitigating its constitutional claims in the DC, under the rule laid down in England v. Louisiana Medical Examiners, 375 U.S. 411 (1964). *collateral estoppel*

The State also contends that even if England does not apply, the doctrine of collateral estoppel precludes the United States from relitigating in the present action those specific issues that were decided in Kewit I. Unfortunately, the State does not define with any precision what it thinks those issues were. From its citations to the Kewit I decision, I would judge that the State claims that the Montana court ruled on the claim that the Act discriminates unlawfully between the United States and private purchasers of contractors' services. (See

discussion of Equal Protection claim, infra.) Referring to the same passage in the opinion of the Montana court, the State also contends that the court ruled on the claim that the distinction drawn between public and private contractors is unlawful. (See discussion of Equal Protection claim, infra.) Finally, without referring to any part of the State court decision, the State maintains that the Supremacy Clause claim was also determined adversely to the United States.

The SG contends that the England doctrine is inapplicable to this case. He argues that England governs only where

"(1) the federal court abstains and sends the parties to state court for a resolution of state law grounds, (2) those parties 'freely and without reservation' litigate all their claims in the state courts, (3) the parties in the federal and state courts are identical, and (4) the state court has competent jurisdiction over the parties."

According to the SG, these conditions were not met in the present case.

First, the DC did not invoke the doctrine of abstention; rather, the parties stipulated to a continuance. And the stipulation merely recites that the action is continued pending the resolution of Kewit I. Second, the SG insists that the United States was not a party to the Kewit I action, and therefore is not bound by the judgment in that case.



U.S. not a  
party to  
Keweenaw \* SG

The SG responds to the State's collateral estoppel <sup>also</sup> claim by contending that the facts in this case and Keweenaw I <sup>contend</sup> are significantly different. There a particular contract <sup>facts</sup> between the United States and a contractor was considered; a <sup>different</sup> provision of that contract forbade the contractor to claim the credits and refunds available against the gross receipts tax. That provision is no longer included in public contracts let by the United States, according to the SG. The SG also claims that the facts in Keweenaw I were significantly different because the contractor's large inventory of equipment in Montana led the Montana court to assume that all of the gross receipts tax would be refunded or credited to the contractor on account of other taxes paid. In contrast, according to the SG, the record in the present case establishes that taken overall, the effective rate of taxation on contracts let by the United States will be one-half of 1 % of the gross receipts of the contractor.

The England doctrine is nothing more than the application of standard res judicata rules in the context of abstention. If a party is sent to state court by an abstaining federal court, and once there elects to litigate all of his claims and have them determined by the State court, then that party may not avoid an adverse determination of his federal claims. In particular, he cannot relitigate those claims in the federal court. England, 375 U.S. at 418-19. In the

\* But see next page.

*formally a party  
in Koweit, the  
U.S. controlled*

present case, since there was no abstention, it would only be confusing to invoke the England rule; simple application of the rules of res judicata will fit the situation more precisely.

The United States controlled the litigation in Koweit I, and was the real party in interest in that litigation. In response to the State's request for admissions in the DC, the United States admitted that it required Koweit to file the suit in state court, that it reviewed and approved the complaint, that it paid the attorneys' fees and costs, that it directed the appeal to the Montana Supreme Court, that it was the real party in interest, that it directed the filing of a notice of appeal to this Court, and that the appeal to this Court was aborted at the instance of the SG.

It is next necessary to consider whether the United States should be considered to have pursued the same cause of action in Koweit I as it now pursues in the present action. The complaint in Koweit I sought a declaration that the Act is unconstitutional, and a refund of taxes paid by Koweit under the Act. In particular, it alleged that the Act discriminates illegally against the United States and those with whom it does business, in violation of the rights to due process and equal protection; that the Act discriminates against public contractors because no tax is imposed on private contractors; and that the Act "illegally violate[s] the immunity of the Federal Government and its instruments (including [Koweit])



U.S. is asserting  
same cause of action  
as in ~~Keweit~~ Keweit  
— a declaration of  
invalidity of state tax.

from state control in the performance of their functions".

In the DC, the amended complaint sought a declaration that the Act is unconstitutional, an injunction against its enforcement, and a refund of all net proceeds of the gross receipts tax received by the State from contractors doing business with the United States. The complaint alleged that the Act is unconstitutional because it discriminates against the United States in violation of the Supremacy Clause and the Fourteenth Amendment; because it discriminates between public and private contractors; and because it discriminates between the United States and private purchasers of contracting services.

The gravamen of both the state court suit and the suit in the DC was the prayer that the Act be declared unconstitutional, and that appropriate refunds be paid. It is true that in the DC action, the United States sought refund of all net proceeds of the gross receipts taxes paid by its contractors, while in the state court action it sought only the taxes paid by Keweit. And in the state court action, the United States did not seek an injunction against enforcement of the Act.

Despite these differences, it seems to me that it would be sensible to conclude that the United States is asserting the same cause of action here that it asserted in Keweit I. The claim asserted by the United States in both

actions was its right to be free of the Act because of the Act's repugnance to the Constitution. A holding in Kewit I that the Act is unconstitutional as applied to public contracts of the United States would have resulted in refunds of all taxes paid by contractors on business done with the United States, and not just refunds of Kewit's taxes. Further, it is up to a plaintiff to claim all damages due under a given cause of action in a single lawsuit.

Nor do I think that there are any differences in the facts in the two cases that would support the conclusion that the United States is asserting a separate cause of action.

*Not  
are  
facts  
different*

Contrary to the SG's assertion, the State court did not conclude that Kewit's other tax payments would fully offset its gross receipts tax. This seems clear from the court's opinion, and was stated explicitly in the court's decision in Kewit II.<sup>1</sup> It is true,

.....  
1. Some six months after the decision in Kewit I, Kewit filed another complaint. It alleged that in Kewit I, the court had decided that the gross receipts tax is constitutional only if it results in no net revenue for the State. Kewit claimed that since it had become obvious that the gross receipts tax did produce net revenue for the State, the Act should be declared unconstitutional.

In Kewit II, the court rejected this suggestion, commenting that Kewit had read its first opinion "much too narrowly." The court agreed with the trial court that the second action was barred by "doctrines of res judicata, collateral estoppel or stare decisis." The opinion in Kewit II is reprinted at pp. 124-30 of the App. to the Juris. Statement.



as the SG states, that the Montana court noticed the clause in Kewit's contract with the United States that barred Kewit from taking advantage of the refunds and credits available against the gross receipts tax. The United States has since begun to allow its contractors to use the available offsets. This difference in the facts, however, seems to me to cut against the SG's claim that Kewit I should not be controlling here. Since Kewit's contractual incapacity to take advantage of these offsets increased the effective net rate of taxation to the full one percent, it further exacerbated the unequal treatment of which the United States complains. Therefore, any differences in the facts in Kewit I would seem to have made it a stronger case for the United States than the present one.

One additional aspect of the doctrine of res judicata (and collateral estoppel) should be noticed. An action for a declaration of the unconstitutionality of a state statute that fails at one time may well succeed at a later time if there are intervening changes in this Court's construction of the relevant constitutional provisions. This possibility should be taken into account in fashioning the rule of res judicata to govern the government's prosecution of successive actions aimed at voiding the same state statute. An analogous problem was presented in Comm'r v. Sunnen, 333 U.S. 591 (1948).

In that case, T had entered into several contracts to license the use of patents that he held. Under each contract

the licensee agreed to pay royalties. One of the contracts was entered into in 1928; others, identical in all important respects, were entered into later. T assigned the contracts to his wife as a gift. The Comm'r brought an action before the Board of Tax Appeals claiming that the income from the 1928 contract for 1929-1931 was taxable to T; the BTA decided against the Comm'r in 1935. In a subsequent proceeding, the Comm'r made the same claim with respect to the income from all of the contracts for the years 1937-1941. Except with respect to the 1928 contract, the Court refused to hold that the Comm's was bound by the prior decision of the BTA. The Court stated that the principle of collateral estoppel "is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally." Id., at 599. Changes in the applicable legal rules made by decisions of the Court in the years between the Comm'r's two suits, the Court held, precluded barring the Comm'r from pursuing his claim in the second suit.

The SG does not suggest, however, that there were any significant changes in the law of immunity under the Supremacy Clause, or in the relevant Equal Protection doctrines, between the the decisions of the Montana court in the Kewit cases and the decision of the DC in the present case. The only basis for such a claim would be the decision of this court in United States v. County of Fresno, 429 U.S. 452 (1977). I discuss the



Fresno case infra, in reviewing the merits of the claim that the Act is unconstitutional; as you will see from that discussion, I do not regard Fresno as working any significant change in the law of immunity under the Supremacy Clause.

Under traditional notions of res judicata, the assertion by the United States of the same cause of action in the state court that it now asserts in this case would bar its relitigation of that cause of action. This would be true even if the United States supported its claim in the DC with theories of the unconstitutionality of the Act that it did not present to the Montana court in Kewitt I. It also appears, however, that the United States presented not only the same cause of action but also the same theories of unconstitutionality in the Montana court.

The Montana court first treated the Kewitt I case as raising equal protection claims under the Fourteenth Amendment. The court concluded that there was no constitutional impediment to imposing a tax on the gross receipts of public contracts but not on the gross receipts of private contracts. App. to J.S., at 117-18. Its reasoning appears to have been that since the State has good reason to license and regulate contractors in their dealings with public bodies, it is fair to tax those dealings differently than purely private dealings. As to "the second half of the discrimination question raised by [Kewitt]," the court concluded that the tax does not discriminate against

the United States in favor of private customers of construction contractors. The Court reasoned that the United States was subjected to the same treatment in this regard as the State and its political subdivisions, and that this satisfied the constitutional requirement of equal treatment.

It appears that Kewit and the United States also raised two Supremacy Clause issues. The first one is quite different from that raised in the present case. They argued that the sections of the Act providing for the licensing of public contractors interfered with the functions of the Federal government by giving the State a power of review over whether or not a contractor is eligible to do business with the United States. But they also argued, according to the Montana court, that "this Act violates the immunity of the federal government from taxation or the economic impact of taxation." The court rejected that claim, relying on the authority of James v. Dravo Construction Co., 302 U.S. 134 (1937), for the proposition that a state may tax an independent contractor for the privilege of doing work within the state, even if that work is done under contract to the United States. App. to J.S., pp. 122-23. The court concluded that the gross receipts tax "was not aimed at nor does it impede the federal government in performing its functions. If there is any burden on the federal government, it is indirect and not substantial."

On the basis of the foregoing, I conclude that a



strong argument can be made for the position that the United States is precluded at this time from relitigating the constitutionality of the Act in federal court. In the following discussion, I assume that the United States is not barred, and consider the merits of its claim that the Act is unconstitutional.

## II. The Constitutionality of the Act

*Assuming U.S. is  
not barred by res  
judicata*

By a 2-to-1 vote, the three-judge district court held that the Act violates the Supremacy Clause of the Constitution. The DC based this holding on the conclusion that the Act discriminates against the United States in two ways. First, though contractors dealing with the State and the Federal Government are subject to the tax, and accordingly incorporate the amount of the tax into their bids, the State recoups the net tax paid as general revenue. Thus, the State pays an effective price lower than that paid by the Federal Government for the same work. This discrimination against the Federal Government in favor of the State the DC held to violate the Supremacy Clause. Second, the DC concluded that that Act discriminates against the Federal Government in favor of private purchasers of construction services, because contractors working for the latter are exempted from the gross receipts tax.

Because it held that the Act violates the Supremacy

Clause, the DC declined to consider the additional argument that it violates the Equal Protection Clause. For the same reason, it did not consider the related claim that the Equal Protection issue is foreclosed by the decision of the Montana Supreme Court in the Kewelt cases.

A. Supremacy Clause Issue.

The SG argues that the exemption of private contractors from the payment of the gross receipts tax is the crucial factor in rendering the tax unconstitutional under the Supremacy Clause. His argument in this respect has two distinct themes.

The first is that the tax puts contractors who deal with the Federal Government in a worse position than private contractors. This constitutes, according to the SG, "discrimination in favor of private parties at the expense of the United States and those with whom it deals." The SG contends that the Supremacy Clause requires that the tax be imposed "evenhandedly" on all contractors in the State.

The SG's second theme rests on what he perceives to be the policy underlying the Supremacy Clause law on tax immunities of the Federal Government. The Federal Government and those with whom it deals can be protected from the abuse of oppressive taxation only if the taxes to which they are subjected are also imposed upon some additional group of persons and entities that will provide a political check on the



rate of taxation. In the present case, the SG contends, there is no political check on the gross receipts tax. To the extent that public contractors dealing with the State charge the State a higher price because of higher gross receipts taxes, the State recovers the increment in receipt of the tax. Thus, it is a matter of indifference to the State and its contractors at what level the gross receipts tax is set. Private contractors and their customers are likewise indifferent to the level of the tax. The only real transfer of wealth under the gross receipts tax is from the Federal Government to the State.

The SG acknowledges that one of the difficulties with his second argument is the finding of the DC that the subdivisions of the State are placed in precisely the same position as is the Federal Government. They do not recover any of the gross receipts tax paid by their contractors, so that the level of the gross receipts tax is of considerable concern to them. Presumably, it therefore becomes a concern to the taxpayers of those subdivisions, or at least of those subdivisions that do not receive contributions from the State in excess of any transfer to the State occurring through the operation of the gross receipts tax. The SG's treatment of this point begs the question entirely:

"Once it is shown that the tax discriminates against the federal government by favoring similarly situated constituents within the state, the tax must fail; its constitutionality cannot be restored by

*tax is same  
for contracts with state  
as with fed govts.*

showing that the state also  
discriminates against other  
governmental entities."

The State, in contrast to the SG, addresses both of  
the aspects of "discrimination" found by the DC. With respect  
to the discrimination between the State and Federal Governments  
attributable to the receipt of the tax by the State but not the  
Federal Government, the State argues that the DC's decision has  
sweeping and untoward effects. Any tax levied by the State and  
paid both by persons doing business with the State and by  
persons doing business with the Federal Government will have  
the effect that the DC found objectionable. Despite this  
effect, the State points out, this Court has approved such  
State taxes repeatedly. E.g., James v. Dravo Construction Co.,  
302 U.S. 134 (1937) (tax on gross receipts of construction  
contractors); Alabama v. King & Boozer, 314 U.S. 1 (1941)  
(sales tax); United States v. Boyd, 378 U.S. 39 (1964) (use tax  
on property owned by state or federal government but used by  
independent contractors). The State argues that the relevant  
test regarding discrimination between the State and the Federal  
Government is not whether the net economic effect of a state  
tax is the same for the State and the Federal Government -- it  
can never be the same -- but rather whether those dealing with  
the State government are treated in the same way as those  
dealing with the Federal Government. Phillips Chemical Co. v.  
Dumas School District, 361 U.S. 376 (1960). Here, as the State

*Same*



points out, all public contractors are subject to the same tax.

It is this first aspect of the DC's holding -- discrimination in favor of the State based on receipt of the tax by the State -- that has so alarmed the numerous States that have filed briefs as amici curiae.

With respect to the exemption of private contractors from the gross receipts tax and the consequent exposure of the federal government to oppressive taxation, the State points out the exposure of political subdivisions and their taxpayers to the same treatment. See p. 15 supra. The State also rejects as simplistic the SG's "two-pocket" conception of State taxing and expenditures. The State insists that its taxing and purchasing decisions are separated one from the other, so that it is misleading to imagine that it makes no difference to the State that a high gross receipts tax is reflected in the price it pays for the services of contractors.

I think that the State is correct with regard to the discrimination that the DC perceived in the receipt of the tax by the State. All State taxes have the effect that the DC found objectionable, and it is at least clear that this Court since James v. Dravo Construction Co., supra, has not invalidated State taxes just because the Federal Government may bear the ultimate burden of the tax.

The effect of the exemption of private contractors on the constitutionality of the Act is a more difficult question, | *yes*

perhaps best put into perspective by a brief historical note. For many years the Court read the decision in M'Culloch v. Maryland to forbid state taxes on those with contractual relationships with the Federal Government if the effect of the tax was or might be to increase the cost to the Federal Government of performing its functions. Beginning around 1937, however, with the decision in James v. Dravo Construction Co., the Court moved away from this broad Supremacy Clause immunity for the Federal Government and those dealing with it. There is much in the subsequent decisions that reflects the confusion and uncertainty of the Court in developing some new principle to delineate the authority of the States to lay taxes that affect the United States. The decision in United States v. County of Fresno, 429 U.S. 452 (1977), appears to me to have been an attempt to synthesize and state with precision the new standard as it had been developed in the forty years since James v. Dravo Construction Co.

At issue in Fresno was the constitutionality of a California statute levying a tax on the possessory interest of individuals in improvements on tax-exempt land. Under this statute, the County of Fresno imposed a tax on the use by United States Forest Service employees of houses supplied to them by the United States. The Court began its consideration of the constitutionality of the statute by reviewing the Supremacy Clause basis for the Federal Government's immunity



from State taxation, as set forth in M'Culloch v. Maryland.

In M'Culloch, the Court noted that the power to tax the national bank could be use to destroy the bank, effectively repealing the federal law creating the bank. Since the federal law is the "supreme law of the land," the Court reasoned, such a de facto repeal would be unconstitutional. The State suggested that even so, the tax that it had levied would not destroy the bank, but the Court rejected that suggestion.

"If the State's poweer to tax the bank were recognized in principle, the Court doubted the ability of federal courts to review each exercise of such power to determine whether the tax would or would not destroy a federal function."

Fresno, 429 U.S. at 458. The Court also rejected the argument that just as the State will not abuse its power to tax its own citizens, it will not impose oppressive taxes on a federal function.

"A State's constituents can be relied on to vote out of office any legislature that imposes an abusively high tax on them. They cannot be relied upon to be similarly motivated when the tax is instead solely on a federal function."

Id., at 458-59. Because the Court thought this distinction between the political checks on the two types of taxes so significant, it limited its holding by stating that it did not extend to a tax "imposed on the interest which the citizens of Maryland may hold in this institution [the bank], in common with other property of the same description throughout the

State." 4 Wheat., at 436.

The Court in Fresno noted that M'Culloch has been and continues to be understood to preclude State taxes levied directly on the Federal Government, or with a legal incidence on the Federal Government. But it also noted that "decisions of this Court since M'Culloch have been less uniform on the question whether taxes, the economic but not the legal incidence of which falls in part or in full on the Federal Government, are invalid."

After reviewing the decisions since James v. Dravo Construction Co., the Court formulated the following rule.

"The rule to be derived from the Court's more recent decisions, then, is that the economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is imposed equally on the other similarly situated constituents of the State. This rule returns to the original intent of M'Culloch v. Maryland. The political check against abuse of the taxing power found lacking in M'Culloch, where the tax was imposed solely on the Bank of the United States, is present where the State imposes a nondiscriminatory tax only on its constituents or their artificially owned entities;<sup>11</sup> ....

11. A tax on the income of federal employees, or a tax on the possessory interest of federal employees in Government houses, if imposed only on them, could be escalated by a State so as to destroy the federal function performed by them either by making the Federal Government unable to hire anyone or by causing the Federal Government to pay prohibitively high



salaries. This danger would never arise, however, if the tax is also imposed on the income and property interests of all other residents and voters of the State."

Fresno, 429 U.S., at 462-63.

The Court applied its analysis to the California tax by first concluding that the legal incidence of the tax was not on the Federal Government or its property. The only remaining question then was whether the tax was discriminatory with respect to the federal function, that is, whether its incidence was so limited as to destroy the political checking function first noticed in M'Culloch. The Court concluded that the tax was not discriminatory because it was equivalent to the property tax imposed on owners of non-exempt property and passed on to them by their lessees. "Consequently, the appellants who rent from the Forest Service are no worse off under California tax laws than those who work for private employers and rent houses in the private sector." Id. at 465. In reaching this conclusion, the Court relied on a similar analysis of the economic incidence of a tax on the use of tax-exempt property owned by the United States in United States v. City of Detroit, 355 U.S. 466 (1958).

Defining the "discrimination" proscribed by the Supremacy Clause in terms of the political check on oppressive taxation by a State seems sensible to me. It establishes a rather generous constitutional limitation on State taxation

affecting the Federal Government, and one that does not depend on a weighing by the Court in each case of whether the tax in question is so high that it actually burdens the functions of the Federal Government. At the same time, it is a limitation that should prevent State tax burdens so heavy as to impair the operation of federal law, and that, in the most general terms, is the purpose of the Supremacy Clause. Within the limitation so established, it continues to be open to Congress to further immunize the Federal Government and those dealing with it from State taxation. City of Detroit v. Murray Corp., 355 U.S. 489, 495 (1958).

I also think that the Court misapplied its standard of discrimination in the Fresno case. Instead of sticking with the idea of "discrimination" defined in terms of the political check on oppressive taxation, the Court slipped over into a kind of equal protection analysis of discriminatory effect. It established that all persons who rented homes in California were subject (directly or indirectly) to roughly the same tax burden. That was probably true. But the fact that those who rent from the federal government and those who rent from private landlords end up with (roughly) the same rent bill because of two different taxes does not show that there is any effective political check on the tax levied on those renting from the federal government. Presumably, the private renters would prefer to see that tax raised, while their own (indirect)



tax remained the same or was lowered, so long as the overall revenue needs of the county were satisfied.

What the Court should have examined in Fresno was the incidence of the use tax that the federal employees paid. In fact, the California statute authorized the imposition of the use tax on all possessory interests in improvements on tax-exempt land; accordingly, all persons with such interests, and not just those with such interests related to Federal land, were subject to the tax. If this larger group proved large enough to provide a significant check on oppressive imposition of the use tax on federal employees, then the discrimination test of the Supremacy Clause should have been held to be satisfied. Thus, in United States v. City of Detroit, *supra*, the Court noted not only the equivalent economic burden on owners of private property and users of federally owned property. It also noted that "the [use] tax applies to every private party who uses exempt property in Michigan in connection with a business conducted for private gain. Under Michigan law this means persons who use property owned by the Federal Government, the State, its political subdivisions, churches, charitable organizations, and a great host of other entities." Id., 355 U.S. at 473.

In the present case the political subdivisions of the State, and their taxpayer-voters, would seem to me to provide a strong and effective check on oppressive use of the gross

receipts tax against the Federal Government and those contractors who do business with it. But there is no doubt that if gross receipts from private contracts were also subject to the tax, another group of taxpayer-voters, private purchasers of contractors' services, would also be concerned with the rate at which the gross receipts tax is levied. As I see it, the only question is whether the Act is unconstitutional because it fails to include as strong a political check on abusive taxation as it might have done. The Court was willing to say in Fresno that a group of taxpayers subject (indirectly) to a different tax (private tenants subject to (passed on) property taxes on their landlords) would guard adequately against abuse of the use tax imposed on renters of federally owned homes. I think that the interests of the State's subdivisions and their taxpayer-voters in this case will provide at least as strong a check on the use of the gross receipts tax.

B. The Equal Protection Issue

The DC did not consider the Equal Protection claim, as noted above. In his Brief, the SG concentrates his attention on the decisions of this Court dealing with the Supremacy Clause immunity of the Federal Government. Since the issue was not considered below, and is not pressed in this Court, I see no need for the Court to consider it now.

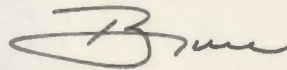
It is difficult even to find a clear formulation of



the equal protection claim. The appellant treats the issue in its Brief, pp. 18-22, and formulates the question as the acceptability of the distinction drawn between public contractors and private contractors, as if all contractors were permanently classified as one or the other. But as I have noted at the head of this memorandum, the tax is levied on the receipts from public contracts. Contractors are free to engage in both public and private contracts, or to engage in only private contracts if they wish not to pay the tax. Further, the tax is a potential cost for every bidder on any public contract, so all potential public contractors are subject to the same tax cost. In addition, since the SG's Supremacy Clause argument rests on the assumption that the tax is shifted from the contractor to the purchaser, I do not see how he could argue that contractors who pay the gross receipts tax are disadvantaged.

The only perceptible differential impact of the tax is between public and private purchasers of contractors' services. Any conclusion that there is a significant difference in this regard would have to rest on the assumption that the gross receipts tax is shifted from the contractor to the purchaser of his services. There is no support in the record for such an assumption. Further, I think it would be a bad idea to entertain equal protection claims based on the actual rather than legal incidence of a tax. Finally, I think that even if

the actual incidence of the tax is on the public bodies paying for the construction, and even if equal protection claims can be based on actual economic incidence rather than legal incidence, the discrimination can be justified in this case. The gross receipts tax is levied as part of a general statutory plan for the licensing and regulation of contractors performing public contracts. This system is maintained for the benefit of all public bodies making use of construction contracting services within the State. It seems reasonable to me to impose a tax that is paid (indirectly) by those benefitting from the maintenance of this licensing and regulatory system.

A handwritten signature in dark ink, appearing to be "B. J. ...", is centered below the text.



77-1134 MONTANA v. U.S.

Argued 12/4/78

The DC seemed to confuse E/P & Supremacy Clause analysis. Under either approach, the tax seems to meet a standard of our prior cases. SG, relying on McCulloch, argues tax discriminates against U.S.

77-1134 Mont. v U.S. (Pre-conference notes).

~~At~~ issue in Mont's tax of 10% on gross receipts from "public contractors" - defined to include cts with fed. govt as well as with ~~the~~ state & local govt. But no such tax on contracts with private parties.

1. Res judicata or estopped. U.S. - in Kewit Sour v St. Board - had been real party in interest. It ~~approved~~ <sup>was at the</sup> suit in state court attacking validity of tax on Supremacy Clause + E/P grounds. U.S. approved complaint, paid attys fee, + directed appeal to Mont. S/ct. It sustained the tax.

I am inclined to think U.S. - as ~~to~~ real party in interest (despite S.G.'s attempt to distinguish) is at least equitably estopped.

2. Tax is valid. If not <sup>estopped,</sup> tax seems valid. No distinction is drawn bet. state, city + fed cts. The 39/ct misapplied Fresno,

~~and~~ cases that tend to support validity include: James v Dravo Const. Co 302 U.S. 134; U.S. v. Bond 378 U.S. 34



Poore (for State of Mont.)

Most of larger const. projects are public.

The gross receipts tax was "hostage" to payment of personal prop. tax

Fresno supports ~~the~~ validity of Mont. tax.

No direct tax - only indirect through the ~~passing~~ contractor who pay the  $\frac{1}{2}\%$  and pass it on to U.S.

Tax on all local govt entities - including cts. with water districts, flood districts, <sup>irrigation districts,</sup> school dists - are subject to this tax. Taxpayers ultimately bear burden. There is a safeguard ~~to~~ against discrimination vs. Fed Govt. There is a realistic political check.

Smith (S.G.)

Governmental immunity & analysis starts with McCulloch v. Md's interpretation of Supremacy Clause.

Emphasizes Fresno.

Doesn't rely on part of J. East's op.

Not an E/P case. This <sup>case involves</sup> ~~is~~ privilege & immunity of Fed Gov under Sup. Clause.

Smith (SG - Cont).

No estoppel or res judicata (See my notes)  
S/ct of Mont. decided state case  
on factual assumption that no longer  
exists.

U.S. is asking for refund.

John Stevens expressed interest  
in eq. estoppel issue.



Revere 8-1

(Probably on estoppel)

77-1134 Montana v. U.S.

Conf. 12/6/78

---

The Chief Justice Revere

Could find collateral estoppel  
on merits.

---

Mr. Justice Brennan Revere

State tax is valid.

Can't go alone on estoppel - would  
reach merits.

---

Mr. Justice Stewart Revere

Merits present close Q; though  
leaning towards Reversal.

Also could reverse on  
collateral estoppel.

Best for us to decide on merits

Mr. Justice White Affirm

Collateral estoppel issue is close.

On merits, exclusion of private  
contractors - impacts too ~~to~~ directly  
on Fed Govt - discriminatorily.

---

Mr. Justice Marshall ~~Affirm~~ Reverse

Agrees with Chief on both  
issues

---

Mr. Justice Blackmun Reverse

On collateral estoppel.  
If we reach merits, would  
affirm.



On either grounds.

I'd prefer to decide merits

---

Mr. Justice Rehnquist Reverie

On either - but prefer  
to reach merits.

There is less private  
construction than public.

Water districts, irrigation  
districts, & similar entities  
provide the political protection.

---

Mr. Justice Stevens Reverie

Political check is stronger  
here than in Fresno

Would prefer Estoppel.

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,

Yes  
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.  
/

BENCH MEMORANDUM

To: Mr. Justice Powell

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

Justice Marshall's opinion contains a thorough discussion of this case and the issues presented. My only reservations concern Part III.C, beginning at p. 20.

The discussion of Moser at pp. 20-21 sets forth the principle that in "successive actions involving unrelated subject matter," decisions of law in earlier cases may not be preclusive on a party to the earlier action. By stressing the distinction between related and unrelated demands in the successive actions, the opinion appears to be concerned with situations in which a broad holding on some question of law in one action might be urged as precluding the losing party from securing reexamination of that holding in a subsequent action involving different facts. Such preclusion might be unwarranted, the opinion seems to imply, if the new factual



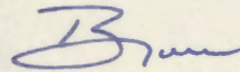
situation raises considerations that could not have been foreseen at the time of the first action.

This part of the opinion is oblique, at best. But the result it argues for is familiar -- limiting previous rulings of law narrowly to the facts of the prior case, even though in the prior opinion those rules may have been announced in broad terms. This "overruling without overruling" is an accepted feature of constitutional adjudication. I am not sure that it makes much sense to discuss it in terms of the Moser case, which did not involve constitutional litigation, but I think the underlying principle and practice are clear enough to survive this bit of confusion.

Justice Stewart's letter of January 17, 1979, to Justice Marshall raises several good points. The first and second sentences of the paragraph beginning on p. 21 of the opinion, and the footnotes to those sentences, are overstatements of the law of collateral estoppel on the points mentioned. I think it would be well to wait and see how Justice Marshall responds to Justice Stewart's suggestions.

I disagree with Justice Stewart about the England case. The doctrine of that case is simply an application of the general doctrine of preclusion in the context of federal court abstention. A party should not be precluded by a state court judgment unless he has submitted freely to the state court the issue determined by it. This rule of England should

apply equally whether the preclusion suggested is res judicata (same parties) or collateral estoppel (as in this case, a party in federal court that controlled one side of the litigation in the state court). Since the parties argued extensively about the effect of England in this case, I think Justice Marshall properly refers to the case in his opinion.





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

1/19/79

With this change in TM's opinion,  
I recommend that you join.

Bum

W. J. you

- 2 -

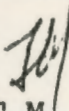
justified on the theory that a party has had a full and fair opportunity to litigate his claims in a prior proceeding, and I think its important to note in text that the Government does not dispute the fairness of its previous opportunity in this case.

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



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

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

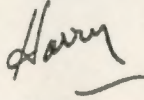
January 18, 1979

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,

A handwritten signature in dark ink, appearing to read "Harry", with a horizontal line underneath.

Mr. Justice Marshall

cc: The Conference



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,



Mr. Justice Marshall

Copies to the Conference

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

Join

Stewart  
Blackmun  
Stevens

For: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Marshall

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

Recirculated: 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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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.

## I

In 1971, Peter Kiewit Sons' Co., the contractor on a federal dam project in Montana, brought suit in state court contending that the Montana gross receipts tax unconstitutionally discriminated against the United States and the companies with which it dealt. The litigation was directed and financed by the United States. Less than a month after the state suit was filed, the Government initiated this challenge to the constitutionality of the tax in the United States District Court for the District of Montana. On stipulation by the parties, the instant case was continued pending resolution of the state-court litigation.

That litigation concluded in a unanimous decision by the Montana Supreme Court sustaining the tax. *Peter Kiewit Sons' Co. v. State Board of Equalization*, 161 Mont. 140, 505 P. 2d 102 (1973) (*Kiewit I*). The court found the distinction between public and private contractors consistent with the mandates of the Supremacy and Equal Protection Clauses.

receipts' shall not include cash discounts allowed and taken on sales and sales refunds, either in cash or by credit, uncollectible accounts written off from time to time, or payments received in final liquidation of accounts included in the gross receipts of any previous return made by the person." *Id.*, § 84-3501 (3).

<sup>2</sup> See Montana Rev. Codes Ann., §§ 84-3513 and 84-3514. (Supp. 1977).

<sup>3</sup> See App. 98-108; 112-117, 164.



*Id.*, at 149-154, 505 P. 2d, at 108-110. The contractor subsequently filed a Notice of Appeal to this Court, but abandoned its request for review at the direction of the Solicitor General. App. to Juris. Statement 86-87. It then instituted a second action in state court seeking a refund for certain tax payments different from those involved in *Kiewit I*. On determining that the contractor's second legal claim was, in all material respects, identical to its first, the Montana Supreme Court invoked the doctrines of collateral estoppel and res judicata to affirm the dismissal of the complaint. *Peter Kiewit Sons' Co. v. Department of Revenue*, 166 Mont. 260, 531 P. 2d 1327 (1975) (*Kiewit II*).

After the decision in *Kiewit II*, a three-judge District Court heard the instant case on the merits. In a divided opinion, the court concluded that the United States was not bound by the *Kiewit I* decision, and struck down the tax as violative of the Supremacy Clause. 437 F. Supp. 354 (Mont. 1977). The majority began with the premise that the Supremacy Clause immunizes the Federal Government not only from direct taxation by the States, but also from indirect taxation that operates to discriminate against the Government or those with whom it transacts business. *Id.*, at 359. See *United States v. City of Detroit*, 355 U. S. 466, 473 (1958); *Phillips Chemical Co. v. Dumas Independent School Dist.*, 361 U. S. 376, 387 (1960). Because no private contractors were subject to the Montana gross receipts tax, the court reasoned that the statute impermissibly singled out the Federal Government and those with whom it dealt for disparate treatment. That the tax applied to state and municipal as well as federal contractors did not, in the majority's view, negate the statute's discriminatory character. For although contractors on state projects might pass on the amount of their tax liability to the State in the form of higher construction costs, Montana would recoup its additional expenditure through the revenue that the tax generated. By contrast,



when federal contractors shifted the burden of their increased costs to the United States, it would receive no such offsetting revenues. Accordingly, the court concluded that the statute encroached upon the immunity from discriminatory taxation enjoyed by the Federal Government under the Supremacy Clause. 437 F. Supp., at 358-359. One judge argued in dissent both that the United States was estopped from challenging the constitutionality of the tax and that the statutory scheme, because it encompassed receipts of municipal and state as well as federal contractors, was not discriminatory within the meaning of *Phillips Chemical Co. v. Dumas Independent School Dist.*, *supra*. 437 F. Supp., at 365-366 (Kilkenny, J., dissenting).

We noted probable jurisdiction. 436 U. S. 916 (1977). Because we find that the constitutional question presented by this appeal was determined adversely to the United States in a prior state proceeding, we reverse on grounds of collateral estoppel without reaching the merits.

## II

A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies. . . ." *Southern Pacific R. Co. v. United States*, 168 U. S. 1, 48-49 (1897). Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. *Cromwell v. County of Sac*, 94 U. S. 351, 352 (1877); *Lawlor v. National Screen Service Corp.*, 349 U. S. 322, 326 (1955); 1B J. Moore, *Federal Practice* ¶ 0.405 [1], at 621-624 (2d ed. 1974); *Restatement (Second) of Judgments* § 47 (Tent. Draft No. 1, March 28, 1973) (merger); *id.*, § 48 (bar). Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that deter-



mination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. *Parklane Hosiery v. Shore*, — U. S. —, — n. 5; Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1, 2-3 (1942); Restatement (Second) of Judgments § 68 (Tent. Draft No. 4, Apr. 15, 1977) (issue preclusion). Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. *Southern Pacific Railroad, supra*, at 49; *Hart Steel Co. v. Railroad Supply Co.*, 244 U. S. 294, 299 (1917). To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.<sup>4</sup>

These interests are similarly implicated when nonparties assume control over litigation in which they have a direct financial or proprietary interest and then seek to redetermine issues previously resolved.<sup>5</sup> As this Court observed in *Souffront v. Compagnie des Sucreries*, 217 U. S. 475, 486-487 (1910), the persons for whose benefit and at whose direction a cause of action is litigated cannot be said to be "strangers to the cause. . . . [O]ne who prosecutes or defends a suit in

<sup>4</sup> See Hazard, Res Nova in Res Judicata, 44 S. Calif. L. Rev. 1036, 1042-1043 (1971); Vestal, Preclusion/Res Judicata Variables: Adjudicating Bodies, 54 Georgetown L. J. 857, 858 (1966); Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818, 820 (1952).

<sup>5</sup> Although the term "privies" has been used on occasion to denominate nonparties who control litigation, see, e. g., *Merriam v. Saalfeld*, 241 U. S. 22, 27 (1916); Restatement of Judgments § 83, comment a (1942), this usage has been criticized as conclusory and analytically unsound. 1B Moore, Federal Practice ¶ 0.411, pp. 1553 (2d ed. 1974); cf. Developments, *supra*, 65 Harv. L. Rev., at 856. The nomenclature has been abandoned in the applicable section of the Second Edition of the Restatement. See, Restatement (Second) of Judgments § 83 (Tent. Draft No. 2, Apr. 15, 1975).



the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own . . . is as much bound . . . as he would be if he had been a party to the record." See *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U. S. 260, 262 n. 4 (1961); cf. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U. S. 100, 111 (1969). Preclusion of such nonparties falls under the rubric of collateral estoppel rather than res judicata because the latter doctrine presupposes identity between causes of action. And the cause of action which a nonparty has vicariously asserted differs by definition from that which he subsequently seeks to litigate in his own right. See *Merriam v. Saalfeld*, 241 U. S. 22, 29 (1916); Restatement (Second) of Judgments, § 83, Comment b, p. 51 (Tent. Draft No. 2, Apr. 15, 1975); 1B Moore, *supra*, ¶ 0.411 [6], at 1553-1554; Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818, 862 (1952).

That the United States exercised control over the *Kiewit I* litigation is not in dispute. "The Government has stipulated that it:

- "(1) required the *Kiewit I* lawsuit to be filed;
- "(2) reviewed and approved the complaint;
- "(3) paid the attorneys' fees and costs;
- "(4) directed the appeal from state district court to the Montana Supreme Court;
- "(5) appeared and submitted a brief as amicus in the Montana Supreme Court;
- "(6) directed the filing of a Notice of Appeal to this Court; and
- "(7) effectuated Kiewit's abandonment of that appeal on advice of the Solicitor General." App. to Juris. Statement, 86-87.

Thus, although not a party, the United States plainly had a sufficient "laboring oar" in the conduct of the state-court litigation to actuate principles of estoppel. *Drummond v.*



*United States*, 324 U. S. 316, 318 (1945). See *Schnell v. Peter Eckrich & Sons*, *supra*, at 262 n. 4; *Souffront v. Compagnie des Suceries*, *supra*, at 486-487; *Watts v. Swiss Bank Corp.*, 27 N. Y. 2d 270, 277-278, 265 N. E. 2d 739, 743-744 (1970).

## III

To determine the appropriate application of collateral estoppel in the instant case necessitates three further inquiries: first, whether the issues presented by this litigation are in substance the same as those resolved against the United States in *Kiewit I*; second, whether controlling facts or legal principles have changed significantly since the state-court judgment; and finally, whether other special circumstances warrant an exception to the normal rules of preclusion.

## A

A review of the record in *Kiewit I* dispels any doubt that the plaintiff there raised and the Montana Supreme Court there decided the precise constitutional claim that the United States advances here. In its complaint in *Kiewit I*, the contractor alleged that the gross receipts tax and regulations promulgated thereunder were unconstitutional because they, *inter alia*:

"(a) illegally discriminate against the Plaintiff, the United States, and its agencies and instrumentalities, and those with whom the United States does business, and deny them due process of law and the equal protection of the laws;

"(b) illegally impose a tax on Plaintiff which is not uniform upon the same class of subjects;

"(c) illegally and improperly interfere with the Federal Government's power to select contractors and schedule construction and . . . conflict with Federal law and policy regulating Federal procurement;

"(d) illegally violate the immunity of the Federal Gov-



ernment and its instruments (including Plaintiff) from state control in the performance of their functions; [and]

“(f) illegally frustrate the Federal policy of selecting the lowest possible bidder. . . .” App. 37.

The Montana Court rejected those contentions on the theory that:

“The federal government is being treated in the same manner as the state of Montana treats itself and its subdivisions or municipalities. The only discrimination the federal government can claim is that private contractors are not paying the same tax as public contractors. However, according to [*Phillips Chemical Co. v. Dumas School Dist.*, 361 U. S. 376 (1960) and *Moses Lake Homes v. Grant County*, 365 U. S. 744 (1961)] . . . all [that is] required is that the state does not give itself special treatment over that received by the federal government. The Act involved here treats the federal government in the same manner as it treats those who deal with any part of the state government.” *Kiewit I*, 161 Mont., at 152, 505 P. 2d, at 109.

No different constitutional challenge is at issue in this litigation. Indeed, the United States' amended complaint tracks almost verbatim the language of the plaintiff's in *Kiewit I* in alleging that the Montana tax provisions:

“(1) illegally discriminate against the plaintiff, United States, and its agencies and instrumentalities, and those with whom the United States does business in violation of the Supremacy Clause, Article VI, Clause 2, and the Fourteenth Amendment;

“(2) illegally impose a tax on plaintiff's contractors and subcontractors which is not uniform upon the same class of subjects in violation of the Fourteenth Amendment;

“(3) illegally force the United States of America to pay



more for its construction than does a private party or corporation in violation of the Supremacy Clause, Art. VI, Cl. 2; [and]

“(5) . . . illegally interferes with the Federal Government’s free choice to choose its contractors and frustrates the policy of choosing the lowest bidder in violation of federal procurement law and the Supremacy Clause, Art. IV, Cl. 2.” App. 67.

Thus, the “question expressly and definitely presented in this suit is the same as that definitely and actually litigated and adjudged” adversely to the Government in state court. *United States v. Moser*, 266 U. S. 236, 242 (1924). Absent significant changes in controlling facts or legal principles since *Kiewit I*, or other special circumstances, the Montana Supreme Court’s resolution of these issues is conclusive here.

### B

Relying on *Commissioner v. Sunnen*, 333 U. S. 591 (1948), the United States argues that collateral estoppel extends only to contexts in which “the controlling facts and applicable legal rules remain unchanged.” *Id.*, at 600. In the Government’s view, factual stasis is missing here because the contract at issue in *Kiewit I* contained a critical provision which the contracts involved in the instant litigation do not.

Under its contract with the Army Corps of Engineers, Kiewit was unable to take advantage of the credit provisions of the gross receipts tax.<sup>6</sup> In 1971, however, the United

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<sup>6</sup> Clause 58 of the contract enumerated the credit provisions of the Montana statute and provided that: “[t]he Contractor, and, in turn, the subcontractors will not take advantage of these credits.” *Peter Kiewit and Sons’ Co. v. State Board of Equalization (Kiewit I)*, 161 Mont. 140, 145-146, 505 P. 2d 102, 106 (1973).

The record does not reflect the reason for the Government’s policy. See Tr. of Oral Arg. 35.



States altered its policy and has since required Montana contractors to seek all available refunds and credits. See *United States v. Montana*, 437 F. Supp., at 354; App. 91. As the Government reads the *Kiewit I* decision, the Montana Supreme Court proceeded on the assumption that if Kiewit had been able to avail itself of the offsetting income and property tax credits, there might have been a "total washout" of its gross receipts tax liability. 161 Mont., at 145, 505 P. 2d, at 106. Thus, according to the Government, the holding of *Kiewit I* was that the Montana statute did not discriminate against the United States under circumstances where, but for the Federal Government's own contractual arrangement, the tax might have had no financial impact. Brief of the United States, 35-36. Because the uncontroverted evidence in this case establishes that after taking all credits available, federal contractors are still subject to a gross revenue tax of one-half of one percent, App. to Juris. Statement 90, the Government submits that the factual premise of the *Kiewit I* holding is absent here.

We disagree.<sup>7</sup> It is, of course, true that changes in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues. See, e. g., *United States v. Certain Land at Irving Place & 16th Street*, 415 F. 2d 265, 269 (CA2 1969); *Metcalf v. Commis-*

<sup>7</sup> A threshold difficulty with the Government's argument is that the record does not support its assertion that contractual provisions barring contractors from taking credits are "no longer applicable in the contracts involved in this litigation." Brief for United States 16. See also Tr. of Oral Arg. 37. The Montana gross receipts statute was enacted in 1967, and the Government has not limited its request for relief to gross receipts taxes paid after 1971 when the contractual provisions involved in *Kiewit I* were discontinued. See pp. ~~18-19~~, *supra*. To the contrary, the Government's amended complaint in the instant case seeks a refund of all tax payments, less credits, made under the Montana statute. App. 68-69. Thus, the Government's contention concerning factual changes does not justify the District Court's refusal to invoke estoppel with respect to the pre-1971 claims.

9-10



sioner, 343 F. 2d 66, 67-68 (CA1 1965); *Alexander v. Commissioner*, 224 F. 2d 788, 792-793 (CA5 1955); 1B Moore, *supra*, ¶ 0.448, at 4232-4233, ¶ 0.422 [4], at 3412-3413. But we do not construe the opinion in *Kiewit I* as predicated on the factual assumption that the gross receipts tax would cancel out if public contractors took all available refunds and credits.

The Montana Supreme Court adverted to the washout possibility when discussing the origin of the gross receipts tax as a revenue-enforcing rather than revenue-generating measure. Prior to the enactment of the statute, certain public contractors had evaded assessment of local property taxes by shifting equipment from one construction site to another, and by filing corporate or personal income tax returns that did not fairly reflect the amount of profit attributable to construction projects within the State. 161 Mont., at 143-145, 505 P. 2d, at 104-105.<sup>8</sup> In establishing a flat percentage tax on gross receipts, with credits available for income and property tax payments, the Montana Legislature sought to remove any incentive for contractors to dissemble about the location of taxable equipment and the source of taxable revenues. Under the statutory scheme, a contractor who paid a substantial amount of property or income taxes might, by claiming those payments as credits, effectively cancel out his gross receipts tax liability. *Id.*, at 145, 505 P. 2d, at 105. In practice, the court noted in *Kiewit I*, the statute had not resulted in a total offset of the 1% gross receipts payments in part because of provisions such as those in federal contracts. *Ibid.*, 505 P. 2d, at 106. Significantly, however, the court did not rely on the potential absence of tax liability in its analysis of *Kiewit's* constitutional challenge. Indeed, it did not even allude to the washout potential in the course of that discussion. *Id.*, at 147-154, 505 P. 2d, at 106-110. It focused rather on the

<sup>8</sup> Apparently the problem had not arisen to any appreciable extent with private contractors. Tr. of Oral Arg. 5-6.



rationality of the classification between public and private contractors, and on the parity of treatment between the United States and other public contractors. *Ibid.*

Our conclusion that the washout potential of the tax was not of controlling significance in *Kiewit I* is further reinforced by the Montana Supreme Court's holding in *Kiewit II*. There, the contractor alleged that its gross receipts tax liability had exceeded its property and income tax credits, and argued that "the only basis" for the decision in *Kiewit I* was that "if the Act were properly enforced it would result in a 'washout.'" *Kiewit II*, 166 Mont., at 262, 531 P. 2d, at 1328. The Montana Supreme Court rejected that reading of *Kiewit I* as "much too narro[w]." *Id.*, at 263, 531 P. 2d, at 1329. That the offset possibility had not materialized for *Kiewit* was, in the court's view, a fact too "inconsequential" to warrant relitigation of the statute's constitutionality. *Id.*, at 264, 531 P. 2d, at 1329. So too here, we cannot view the absence of a total washout as altering facts essential to the judgment in *Kiewit I*.

Thus, unless there have been major changes in the law governing intergovernmental tax immunity since *Kiewit I*, the Government's reliance on *Commissioner v. Sunnen*, 333 U. S. 591, is misplaced. *Sunnen* involved the tax status of certain income generated by a license agreement during a particular tax period. Although previous litigation had settled the status of income from the same agreement during earlier tax years, the Court declined to give collateral estoppel effect to the prior judgment because there had been a significant "change in the legal climate." *Id.*, at 606. Underlying the *Sunnen* decision was a concern that modifications in "controlling legal principles," *id.*, at 599, could render a previous determination inconsistent with prevailing doctrine, and that

"[i]f such a determination is then perpetuated each succeeding year as to the taxpayer involved in the original litigation, he is accorded a tax treatment different from



that given to other taxpayers of the same class. As a result, there are inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and a fertile basis for litigious confusion. [Collateral estoppel] is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers." *Ibid.* (citations omitted).

No such considerations obtain here. The Government does not contend and the District Court did not find that a change in controlling legal principles had occurred between *Kiewit I* and the instant suit. That the Government's amended complaint in this action replicates in substance the legal argument advanced by the contractor's complaint in *Kiewit I* further suggests the absence of any major doctrinal shifts since the Montana Supreme Court's decision.<sup>9</sup>

Because the factual and legal context in which the issues of this case arise has not materially altered since *Kiewit I*, normal rules of preclusion should operate to relieve the parties of "redundant litigation [over] the identical question of the statute's application to the taxpayer's status." *Tait v. Western Maryland R. Co.*, 289 U. S. 620, 624 (1933). See *United States v. Russel Manufacturing Co.*, 349 F. 2d 13, 18-19 (CA2 1965).

C

The sole remaining question is whether the particular circumstances of this case justify an exception to general principles of estoppel. Of possible relevance is the exception which obtains for "unmixed questions of law" in successive actions involving substantially unrelated claims. *United States v. Moser*, 266 U. S. 236, 242 (1924). As we recognized in *Moser*:

"Where, for example, a court in deciding a case has

7-9 <sup>9</sup> See pp. 11-12, *supra*.



enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. But a *fact, question or right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law." *Ibid.* (emphasis added).

Thus, when issues of law arise in successive actions involving unrelated subject matter, preclusion may be inappropriate. See Restatement (Second) of Judgments § 68.1, Reporter's Note, at 43-44 (Tent. Draft No. 4, Apr. 15, 1973); 1B Moore, *supra*, ¶ 0.448, at 4235; Scott, 56 Harv. L. Rev., *supra*, at 10. This exception is of particular importance in constitutional adjudication. Unreflective invocation of collateral estoppel against parties with an ongoing interest in constitutional issues could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical. To be sure, the scope of the *Moser* exception may be difficult to delineate, particularly where there is partial congruence in the subject matter of successive disputes. But the instant case poses no such conceptual difficulties. Rather, as the preceeding discussion indicates, the legal "demands" of this litigation are closely aligned in time and subject matter to those in *Kiewit I*.

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). As we held in *England*, abstention doctrine may not serve as a vehicle for depriving individuals of an otherwise cognizable right to have federal courts make factual determinations es-



essential to the resolution of federal questions. *Id.*, at 417. See *NAACP v. Button*, 371 U. S. 415, 427 (1963). However here, as in *England*, a party has "freely and without reservation submitte[d] his federal claims for decision by the state courts . . . and ha[d] them decided there. . . ." *England v. Medical Examiners*, *supra*, at 419.<sup>10</sup> Considerations of comity as well as repose militate against redetermination of issues in a federal forum at the behest of a plaintiff who has chosen to litigate them in state court.

Finally, the Government has not alleged unfairness or inadequacy in the state procedures to which it voluntarily submitted.<sup>11</sup> We must conclude therefore that it had a full and fair opportunity to press its constitutional challenges in *Kiewit I*.

<sup>10</sup> The Government seeks to distinguish *England* on the ground that the ~~the Government seeks to distinguish *England* on the ground that the~~ court below did not technically abstain, but rather, at the parties' request, continued the action "pending resolution in the state Courts of Montana." App. to Juris. Statement 49-50. Further, in the Government's view, the rule of *England* arises only when a party freely submits his federal claims to adjudication in state courts. Because the United States was not a party in *Kiewit I*, the Government submits that it is not bound by the judgment in that case. Brief of United States 34.

(5-6) We agree that the District Court's action is properly characterized as a continuance and that res judicata, the doctrine involved in *England*, is inapplicable to nonparties. See pp. 3-8, *supra*. But neither point is availing here since we dispose of the case on grounds of collateral estoppel, which does apply to nonparties, see *ibid.*, and invoke *England* simply to dispel any inference that the same result would obtain if the Federal Government had been forced into state court and had reserved its federal claim.

<sup>11</sup> Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation. See Restatement (Second) of Judgments § 68.1 (c) (Tent. Draft No. 4, Apr. 15, 1977); Note, The Preclusive Effect of State Judgements on Subsequent 1983 Actions, 78 Col. L. Rev. 610, 640-653 (1978). Cf. *Gibson v. Berryhill*, 411 U. S. 564 (1973); *Trainor v. Hernandez*, 431 U. S. 434, 469-470, and n. 15 (1977) (STEVENS, J., dissenting).



Accordingly, the Government is estopped from seeking a contrary resolution of those issues here. The judgment of the District Court is

*Reversed.*

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

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 WILLIAM H. REHNQUIST

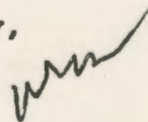
January 22, 1979

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

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,

Mr. Justice Marshall

lfp/ss

cc: The Conference



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.

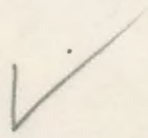
Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF  
THE CHIEF JUSTICE

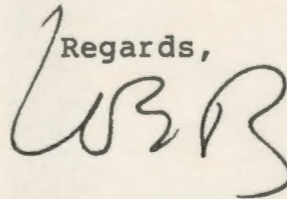
February 1, 1979



Re: 77-1134 - Montana v. United States

Dear Thurgood:

I join.

Regards,  


Mr. Justice Marshall

Copies to the Conference



[illegible]