IMMUTABLE OR MOVEABLE INTERSTATE RIVER BOUNDARIES: *OHIO v. KENTUCKY*

Natural monuments, such as rivers and mountains, often constitute state lines, providing logical and easily perceived borders.[1] Despite their practicality, such boundaries engender interstate disputes that predate even the Constitution.[2] The Supreme Court, sitting in its original jurisdiction,[3] has long cited convenience and avoidance of

1. The practice dates back to ancient international law whereby countries separated by rivers were "presumed to use this natural division as their boundary. Handly's Lessee v. Anthony, 18 U.S. (5 Wheat.) 374, 379-80 (1820). *See generally* E. VATTEL, 1 THE LAW OF NATIONS ch. 22 (Philadelphia, 1869) (1st ed. London 1758).

Municipal boundaries of cities and towns established along such interstate rivers often extend to the state line provided by such rivers. Vermont v. New Hampshire, 189 U.S. 593, 599 (1933).

2. Disputes involving eleven states raged when the Constitution was adopted in 1787. Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 723-24 (1838). At least one of these controversies, that between Rhode Island and Massachusetts, involved a river boundary. *Id.* at 663. The Supreme Court has dealt with the problem since New York v. Connecticut, 4 U.S. (4 Dall.) 1 (1799). *See generally* Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 701 (1959).

3. The Supreme Court's original jurisdiction emanates from the Constitution. U.S. CONST. art. III, § 2. Moreover, 28 U.S.C. 1251(a)(1) provides the Court with original and exclusive jurisdiction over "controversies between two or more states," such as the principal case. In fact, the first case in which a state sued another state under the Supreme Court's original jurisdiction involved an interstate boundary dispute. New York v. Connecticut, 4 U.S. (4 Dall.) 1 (1799). Such original jurisdiction arose from the need for some neutral tribunal to resolve interstate conflicts; otherwise, states acting independently could only resolve such controversies through either diplomatic negotiation or force. *See* C. WRIGHT, LAW OF FEDERAL COURTS, § 109 (3rd ed. 1976). Cases heard under the Court's original jurisdiction constitute a statistically small part of the Court's workload. Monaghan, *The Supreme Court 1974 Term*, 89 HARV. L. REV. 1, 278 (1975).

The Court exercises its original jurisdiction even though boundary disputes involve political questions. United States v. Texas, 143 U.S. 621, 639 (1892). Language in some early cases suggest that one state suing another must allege serious injury or the imminent threat thereof to successfully invoke even the Court's exclusive original jurisdiction. Alabama v. Arizona, 291 U.S. 286, 291 (1934); Louisiana v. Texas, 176 U.S. 1, 15 (1900). Other cases state, however, that most of the interstate cases taken under the Court's exclusive jurisdiction involve boundary disputes. Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 288 (1888). The language requiring serious injury allegations in suits between states most likely constituted a warning against bootstrapping a

future litigation as the guiding principles in settling such interstate controversies.[4] The fluctuating character of interstate rivers, however, makes compliance with these guidelines difficult. In *Ohio v. Kentucky*,[5] the Supreme Court fulfilled neither of these goals as it set the Ohio-Kentucky boundary immutably at the 1792 low-water level on the Ohio River's north shore.

Until the late eighteenth century, Virginia and four other states claimed rights to portions of an area now comprising the states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and part of Minnesota.[6] Following a request by Congress,[7] the claimant states ceded their rights in this land to the federal government.[8] Virginia's cession included land now constituting the southern halves of Indiana, Ohio, and Illinois; the Ohio River marked the boundary between these three states and what later became Kentucky.[9] The Supreme Court

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controversy into the Court's original jurisdiction by joining a state in a case involving injury only to certain individual citizens. 176 U.S. at 16. At any rate, the opinions stemming from interstate boundary disputes typically make no reference to the degree of harm at stake. In the principal case, the record contained no evidence of the degree, if any, of change in the river caused by the dams which gave rise to the litigation (See note 11 *infra*). Exceptions of the Commonwealth of Kentucky to the Report of the Special Master at 25, Ohio v. Kentucky, 444 U.S. 335 (1980).

4. These principles originated in Handly's Lessee v. Anthony, 18 U.S. (5 Wheat.) 374 (1820), which also stated that such principles should not be overcome by the type of "technical perplexities" that often influence private contract relations. *Id.* at 383-84. *See also* New Jersey v. Delaware, 291 U.S. 361, 378 (1934) (the precepts to be obeyed in the division of waters dividing states were those of international law); Vermont v. New Hampshire, 289 U.S. 593, 606 (1933) (construe documents fixing interstate boundaries with a view toward possible convenience and avoidance of controversy); Howard v. Ingersoll, 54 U.S. (13 How.) 381, 424 (1851) (commending the selection of a line as fixed and certain as practicable and representing the boundary states would naturally have in mind); Purvine v. Hathaway, 393 P. 2d 181, 183 (1964) (thalweg boundary, changing with thread of the stream, serves convenience in ascertaining border location and discouragement of boundary disputes).

5. 444 U.S. 335 (1980).

6. C. MOORE, THE NORTHWEST UNDER THREE FLAGS 65-66 (1900).

7. Handly's Lessee v. Anthony, 18 U.S. (5 Wheat.) 374, 377 (1820).

8. *Id.*

9. The language in the acts of cession indicated that Virginia ceded all her land "northwest of the Ohio River." 11 LAWS OF VA. 326, 327 (Hening 1822); 1 LAWS OF THE UNITED STATES 472, 474 (1815). This language meant that Virginia retained the river bed of the Ohio River, according to the ancient law of nations which holds that when one state possesses land divided by a river and cedes to another land on one side, she retains the river bed. 18 U.S. at 379. *See* R. TYLER, A TREATISE ON THE LAW OF BOUNDARIES AND FENCES 78 (1874). Kentucky came into being as a district of Virginia, attaining statehood in 1792. Indiana v. Kentucky, 136 U.S. 479, 480, 503

held in *Indiana v. Kentucky*[10] that the actual line forming the border between those two states followed the low-water mark of 1792, the year of Kentucky's statehood.[11]

In 1955, the federal government began construction of new high-lift dams along the full stretch of the Ohio River.[12] These dams gradually moved the shoreline inland.[13] Ohio claimed its border with Kentucky remained at the river's north shore low-water level as it existed in 1792.[14] Kentucky, however, contended that the current low-water level on the north shore comprised the boundary, subject to gradual modifications in the river's course.[15] Consequently, Ohio sought a boundary determination from the Supreme Court.[16] The Court, relying primarily on *Indiana v. Kentucky*, approved Ohio's claim.[17]

(1890). In so doing, Kentucky succeeded to the "ancient right and possession" of the river bed of the Ohio River. *Id.* at 479, 508.

10. *Id.* at 479.

11. *Id.* at 508.

12. The federal government erected dams along the Ohio to replace those built between 1910-1929. Ohio v. Kentucky, 410 U.S. 641, 643 (1973). Two of these high lift dams, the Captain Meldahl Dam about 34 miles upstream of Cincinnati and the Greenup Dam, lie between Ohio and Kentucky. Dams located between Ohio and other states, however, also affect the Ohio River water level between Kentucky and Ohio. The Markland Dam pool originating in the Ohio River between Indiana and Kentucky affects the Ohio-Kentucky boundary, including the Cincinnati area. Telephone interview with William E. Dreisle, Chief of the Survey Branch for the Louisville, Kentucky branch of the U.S. Army Corps of Engineers in Louisville, Kentucky (Jan. 8, 1981).

13. Ohio v. Kentucky, 410 U.S. 641, 643 (1973).

14. *Id.* at 642.

15. Exceptions of the Commonwealth of Kentucky to the Report of the Special Master at 2, 444 U.S. 335 (1980).

16. Ohio v. Kentucky, 384 U.S. 982 (1966). Ohio moved for leave to file an amended complaint in 1971, Ohio v. Kentucky, 404 U.S. 933 (1971). It sought a new determination that the boundary line was the center of the Ohio River, or alternatively, the 1792 low-water line on the northshore. The Court, however, denied this motion on recommendation, primarily on the basis of Ohio's long acquiescence to *some* north shoreline border. Ohio v. Kentucky, 410 U.S. 641 (1973). The only unresolved issue was whether the current low-water mark or that of 1792 fixes the actual border.

17. While the actual location of the 1792 boundary has yet to be completely discerned, officials working on the project speculate that it does not lie inland of the modern day shoreline. Telephone interview with Michael Szollosi, Special Counsel to the Attorney General of Ohio, in Columbus, Ohio (Jan. 8, 1981). Cincinnati officials followed the litigation with great interest as that city lies along the Ohio-Kentucky border. *Id.* So also have officials in Huntington, W. Va., since that city

Normally courts construe a river boundary to be the middle of the river's main navigable or most used channel.[18] The Court selects this line, called the thalweg,[19] to ensure the states' concurrent jurisdiction

currently seeks to annex all land between its current city limits and the state line on the river. *Id.* The principal case affects that action since the Virginia Cession also established the Ohio boundary with West Virginia.

18. Iowa v. Illinois, 147 U.S. 1, 1 (1893). It may be closer to one border than to another. C. BROWN, BOUNDARY CONTROL AND LEGAL PRINCIPLES, § 225 (1957). In contrast, the middle of the river refers to the middle of the river bed, as defined by the banks of the river. 147 U.S. at 1.

19. 18 U.S. at 379; C. BROWN, *supra* note 18, at § 236.

The thalweg rule and all the doctrine in this section comprise the federal common law developed by the Court to govern interstate boundary disputes. *See* notes 26, 27 *infra*; State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 375 (1977). This federal common law only applies to the narrow issue of interstate boundary *location*. *Id.* It should not be confused with the notion of a federal common law rejected in Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). The latter concept refers to the once supposed existence of a "transcendental body of law outside of any particular state but obligatory within it" until changed by statute. *Id.* at 79. *Erie* went on to hold that in the absence of state statutes, state common law applied. *Id.* The interstate river boundary common law falls under the express exception to *Erie* of "matters governed by the Federal Constitution or by Acts of Congress." *Id.* The Constitution puts under Congress' power the admission of states to the Union, U.S. CONST. art. IV, § 3, and the approval of all interstate agreements, including those referring to interstate boundaries, U.S. CONST. art. I, § 10.

Once the boundary becomes established, ownership of the lands abutting the river comes under the jurisdiction of the property of the law of the state involved. Barney v. Keokuk, 94 U.S. 324 (1877). State law also governs whether an original patent reached to a river, Joy v. St. Louis, 201 U.S. 332, 342 (1906). Furthermore, it determines how land on either side of the interstate boundary is disposed of as between public and private ownership. Arkansas v. Tennessee, 246 U.S. 158, 175-76 (1918). Such dispositions, however, cannot alter the federally designated line. *Id.*

This arrangement reflects the "cardinal rule" of equality between states that no state shall individually impose legislation on any other. Kansas v. Colorado, 206 U.S. 46, 97 (1907). One commentator suggests that the alternative would consist of a set of choice of law rules whereby the Court would choose the law of one state having a particular relation to the transaction and impose the law of one "quasi-sovereign" on another. Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 683 (1959). Interstate boundary disputes thus involve the necessary "overriding" federal interest in having a uniform rule of decision necessary to justify the use of federal common law. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421-27 (1964); Hinderlider v. La Plata & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938); Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 682-83 (1959).

Nothing precludes the Court from moulding this common law from principles originating in federal law, state law, or international law; the Court has no limit in doing so other than the requirements of reaching a sensible solution for the controversy at hand. Connecticut v. Massachusetts, 282 U.S. 660, 670-71 (1931); Kansas v.

over the riverbed.[20] The thalweg rule became the general rule for interstate river boundaries in *Iowa v. Illinois*,[21] wherein the Court set the line between those states at the middle of the Mississippi's main channel.[22]

The thalweg rule does not apply, however, when language used in historical documents establishing state boundaries indicates a border set on some other line.[23] State acts of cession, historic treaties, and

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Colorado,185 U.S. 125, 146-47 (1902). *See also* Note, *What Rule of Decision Should Control Interstate Controversies*, 21 HARV. L. REV. 132 (1907).

The federal common law applies when a question of interstate boundary location arises in a case not heard under the Court's original jurisdiction. Rust Land & Lumber Co. v. Jackson, 250 U.S. 71 (1919); Howard v. Ingersoll, 54 U.S. (13 How.) 381 (1851).

20. In so construing this thalweg boundary, the law presumes that the right of navigation is common to the states thus separated. Arkansas v. Tennessee, 246 U.S. 158, 169 (1918); H. WHEATON, ELEMENTS OF INTERNATIONAL LAW § 192 (8th ed. 1866).

When a line other than the thalweg is chosen, as in the principal case, supplementary acts may be passed to ensure this equal right. *E.g.*, An Act Concerning the Erection of the District of Kentucky into an Independent State, ch. 14, § 11, Virginia Acts (1789). Earlier cases discuss the equal right under an "equal footing" doctrine. Pollard v. Hagan, 44 U.S. (3 How.) 212, 223 (1845). This doctrine originates from the theory that the original states succeeded to all rights of the English Crown. Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842).

21. 147 U.S. 1 (1893). *See also* New Jersey v. Delaware, 291 U.S. 361, 379-80 (1934); Minnesota v. Wisconsin, 252 U.S. 273, 281-82 (1920).

22. Iowa v. Illinois, 147 U.S. 1, 13 (1893).

23. *See* Washington v. Oregon, 211 U.S. 127 (1908) (Courts have no power to change the boundary thus prescribed and establish it at the middle of some other channel). Such explicit language precludes the application of both the thalweg rule and the equal footing doctrine. *See* Texas v. Louisiana, 410 U.S. 702, 710 (1973). Sometimes the specific language of the historic documents establishes the boundaries in the middle of the main channel anyway. Arkansas v. Tennessee, 246 U.S. 158, 161 (1918) (Court held boundary between the two states follows the middle of the Mississippi's main channel of navigation based on the act admitting Arkansas to the Union in 1836).

The meaning of the language in such a document, however, often resides in the historical data surrounding the boundary's establishment, as well as the physical characteristics of the landmark itself. In Oklahoma v. Texas, 260 U.S. 606 (1923), treaty provisions used three rivers as part of the Oklahoma-Texas boundary. The provisions expressly locate the boundary along the western bank of the Sabine River, and the southern bank of the Arkansas River. When the Arkansas River border segment met the Red River, however, the treaty instructed that the boundary "follow" the course of the Red westward and then "cross" the Red and run due north on the Arkansas River. *Id.*, at 625.

The Court recognized that the failure to expressly designate a bank boundary on the Red River might indicate a different purpose from that of the shoreline borders on

congressional acts of state admission have accordingly indicated non-thalweg borders, often following shorelines. In *Oklahoma v. Texas*,[24] for example, the three different rivers dividing those states all constituted shoreline borders by the terms of a treaty between the United States and Spain.[25]

Both thalweg boundaries and boundaries set by historical language change with the gradual, insensible movements of accretion.[26] The accretion rule arises from fairness considerations and a realization that natural changes in rivers are unintentional and expected.[27]

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the other rivers. Three factors overcame this suggestion: 1) the instruction to cross the Red River and run north, implying that the preceding course had been on the south side of the river; 2) the declaration in the treaty that use of the waters and navigation of the three rivers should be common; and, 3) the historical data of the negotiations culminating in the treaty, which indicated that the framers and signers had intended a river bank boundary for each river. *Id.*, at 625-26.

24. 260 U.S. 606 (1923).

25. *Id.* at 625.

26. The Court applied the accretion doctrine to a thalweg boundary in Mississippi v. Arkansas, 415 U.S. 289 (1974).

The accretion doctrine comprises part of the federal common law the Court developed to govern interstate boundary disputes. *See* note 19 *supra*. This common law categorizes change in a river as either accretive (gradual and imperceptible), J. GOULD, A TREATISE ON THE LAW OF WATERS, § 155 (1883), or avulsive (sudden and dramatic), Nebraska v. Iowa, 143 U.S. 359, 360-61 (1892). In the typical case where two states each hold to the thalweg, the borderline will shift with the gradual, insensible changes of accretion. The rule comes from the common law governing private riparian landowners and is "in like manner recognized where the boundaries between States or nations are, by prescription or treaty, found in running water." *Id.* at 361; I. HYDE, INTERNATIONAL LAW, § 138 (2d rev. ed. 1945). The principle also applies to inundation of land by water, such as allegedly occurred in the principal case (*see* note 13 *supra*), because of the gradual, non-violent character of the change. Shively v. Bowley, 152 U.S. 1, 35 (1894). *See also* United States v. Claridge, 416 F.2d 933 (9th Cir. 1969) *cert. denied*, 397 U.S. 961 (1970) (changes in the Colorado River's course caused by construction of Hoover Dam are accretive); C. BROWN, *supra* note 18, at § 230, 203-04.

27. Nebraska v. Iowa, 143 U.S. 359, 362 (1892). The rule also serves the principle of boundary convenience, which in such instances outweighs the inconvenience that the minor, imperceptible decrease of soil due to accretion causes the landowner. *Id.*

A different result follows an avulsive change, wherein a river suddenly abandons its old channel and cuts a new course. In such case, the borderline remains the center of the old channel as it existed just prior to the avulsion. *Id.* The rule, again, serves the convenience criteria since the river's new path may cause a state to suffer a loss or large portions of land greater than the benefit of keeping the river in its new course as the boundary. *Id.*

Note that so long as the old channel remains a running stream, though it may no longer be the main channel, the boundary after the avulsion is still subject to changes from erosion and accretion. Arkansas v. Tennessee, 246 U.S. 158, 174-75 (1918). The

Thus, in *Missouri v. Nebraska*,[28] a case involving a river border set by the acts admitting those states to the Union, the Court bluntly rejected Missouri's argument that the boundary line remained permanently fixed. The Court reasoned that Congress did not mean to preclude established rules governing changes in interstate rivers, even in the presence of historical documents.[29]

The thalweg and historical documents rules may also be precluded when litigating states have over long periods of time implicitly recognized a particular line as the boundary, evidenced by their acts and statements.[30] This acquiescence doctrine controls border disputes when the facts provide a basis for its application, establishing the boundary at the line thus recognized.[31] Thus, the Court dismissed the complaint in *Rhode Island v. Massachusetts*,[32] stating that even if the border selected by a joint-state commission constituted error, the occupation of the disputed property by Massachusetts for two centuries and the lack of protest by Rhode Island for 40 years precluded a

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boundary becomes fixed when the water becomes stagnant, all accretion having ended. The Court construes the gradual filling up of the bed not as an accretion, but as an ultimate effect of the avulsion.

The Court makes no distinction in applying both the accretion and avulsion doctrines as to whether the changes in the river result from entirely natural processes or artificial, man-made causes. St. Clair County v. Lovingston, 90 U.S. (23 Wall.) 46, 68 (1874).

28. 196 U.S. 23 (1904). The historic language in *Missouri* came from the Act of Congress admitting Missouri to the Union, 3 Stat. 545, ch. 22, a subsequent act extending the western boundary of Missouri to the Missouri River, 5 Stat. 34, ch. 86, and the 1867 Act of Congress admitting Nebraska in the Union, 14 Stat. 391, ch. 36; 196 U.S. at 25-27.

29. *Id.* at 36-37. The Court clearly stated that shoreline boundaries also remain subject to accretion in Oklahoma v. Texas, 260 U.S. 606, 626 (1923).

30. Such a line becomes conclusive even if it varies from the line established in the original grant. The Court regards such border not to be the result of an alienation, but rather as the definition of the "true and ancient boundary." Virginia v. Tennessee, 148 U.S. 503, 522-23 (1893). The rule reflects the desire to maintain "the tranquility of the people, the safety of the states," and the "happiness of the human race" by allowing the conventions of practice to settle matters that would otherwise remain uncertain. E. VATTEL, 2 THE LAW OF NATIONS, ch. 11, § 149 (Philadelphia, 1869) (1st ed. London 1758). Evidence used to establish acquiescence includes the state's service of process within the land involved, evidence of citizens' voting locations, evidence of land records to the controverted property being stored in a particular state, or records of taxes assessed by a particular state on the land, Indiana v. Kentucky, 136 U.S. 479, 510 (1890).

31. *Id.*

32. 45 U.S. (4 How.) 591 (1846).

change at the time of this case.[33]

While the Supreme Court has not directly considered the effect of accretion on an acquiescence boundary, it held in *Arkansas v. Tennessee*[34] that accretion to land which became part of Tennessee, after an avulsion thrust it across the Mississippi thalweg boundary, by its joint acquiescence with Arkansas belonged to Tennessee.[35] The Court suggested no basis for denying this result when accretion affects an acquiescence boundary rather than acquiescence to land within and not actually part of a state boundary.

In *Indiana v. Kentucky*, the Supreme Court again applied the acquiescence doctrine in a dispute involving the Ohio River interstate boundary established by the original Virginia cession.[36] The *Indiana* controversy involved a question of ownership of Green River Island just east of Evansville, Indiana.[37] When Kentucky attained statehood, the island came clearly within its jurisdiction. Intervening years, however, saw the low-water line recede to a point where a mere bayou separated the island from Indiana.[38] The Court recognized that convenience might have been better served by granting jurisdiction to the more proximate state, Indiana.[39] Instead, it properly applied the acquiescence doctrine which put the land under Kentucky's control, based on the exclusive and previously unchallenged jurisdiction she had exercised over the island.[40]

The Court in *Indiana* also announced that the border established would remain immutable at the same position it occupied when Kentucky became a state in 1792.[41] While this language contradicted the accretion rule generally applied to boundaries,[42] the Court did no apparent harm due to the fact that the boundary established correctly resulted from acquiescence.[43]

33. *Id.* at 638-39.

34. 310 U.S. 563 (1940).

35. *Id.* at 572.

36. 136 U.S. 479, 483 (1890).

37. *Id.* at 509.

38. *Id.* at 508.

39. *Id.* at 518.

40. *Id.*

41. *Id.* at 508.

42. *See* notes 26-27 and accompanying text *supra*.

43. The evidence indicated that in the 70 years of Indiana's statehood preceding this suit, she had never asserted legal claim to the tract in question, nor any right of

The Court in *Ohio v. Kentucky* relied heavily on the *Indiana* holding that the Ohio River boundary remained immutable from its inception,[44] since the southern border of both Indiana and Ohio originated in the same Virginia cession.[45] The Court thus deemed as controlling the *Indiana* interpretation of the northern Kentucky border as an unchanging line, without considering that the two cases are clearly distinguishable. The *Ohio* case lacks the dispositive factor of acquiescence present in the earlier case.[46] Neither Ohio nor Kentucky could point to a preponderance of evidence indicating that the

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sovereignty or ownership. Conversely, evidence readily showed Kentucky's history of jurisdiction, including the passage of laws declaring the land within her boundaries, federal and state court suits involving parties claiming under Kentucky grants, and Kentucky taxes assessed on the land. Indiana v. Kentucky, 136 U.S. 479, 515-17 (1890).

The opaque quality of the Court's *Indiana* opinion makes its reliance on acquiescence less than clear. One can argue, as did counsel for Indiana, that such a foundation clearly violates the common law doctrine *nullum tempus occurrit regi* (the passage of time does not abrogate claims of sovereignties). *Id.* at 500. The Court ignored this objection; perhaps it used the language stating that the Virginia Cession boundary remained immutable since 1792 to camouflage the problem. This suggestion loses credibility in view of the Court's long-established precedent that acquiescence applies to states as well as private landowners. California v. Nevada, 447 U.S. 125, 131 (1980); Arkansas v. Tennessee, 310 U.S. 563, 569 (1940); Rhode Island v. Massachusetts, 45 U.S. (4 How.) 591, 639 (1845); *Property: The Fixed Law of Changing Boundaries*, 41 MISS. L. J. 444, 448-49 (1970). In fact, a mere three years after *Indiana*, its author cited its acquiescence language as precedent for the statement that interstate acquiescence conclusively establishes interstate boundary rights, Virginia v. Tennessee, 148 U.S. 503, 523 (1893). Another fact disserving the *nullum tempus occurrit regi* objection is that the doctrine does not apply to the bringing of suits between states. Commissioners of the Sinking Fund of Louisville v. Buckner, 48 Fed. 533, 536 (1891).

Despite the ambiguity of *Indiana*'s opinion, the wording of the acquiescence discussion strongly points to its dispositive character in the case ("The long acquiescence of Indiana in the claim of Kentucky . . . forbid . . . any disturbance of Kentucky in her possession of the island and jurisdiction over it."), 136 U.S. at 518.

44. Ohio v. Kentucky, 444 U.S. 335, 339 (1980).

45. *See* notes 6-9 and accompanying text *supra*.

46. In the principal case, Justice Powell, writing for the Court's three dissenting members, questioned the precedential value of *Indiana* on its own merits, since it completely contradicted Handly's Lessee v. Anthony. Ohio v. Kentucky, 444 U.S. 335, 344 (1980). Handly's Lessee v. Anthony involved a small peninsula separated from the northern shore only by a bayou, 18 U.S. (5 Wheat.) 374, 375 (1820). In declaring the peninsula part of Indiana, the Court pointed to the inconvenience that would arise if the land came under Kentucky's jurisdiction since the Ohio River separated the two. *Id.* at 381. In *Indiana*, the Court cited the language in Handly's Lessee v. Anthony establishing Kentucky's jurisdiction over the river, but then abruptly

other side had acquiesced to the borderline it promoted.[47] Although the southern boundary for Ohio, like Indiana, differs from other boundaries in its location on the north bank rather than the thalweg, cases like *Missouri v. Nebraska* and *Oklahoma v. Texas* clearly reject the notion that such a distinction justifies abandoning common law rules of boundary change.[48]

Since neither state in *Ohio v. Kentucky* acquiesced to the border advocated by the other, the acquiescence doctrine did not apply as it did in *Indiana v. Kentucky*. Thus, the *Ohio* Court mistakenly relied on *Indiana*. Neither did the thalweg doctrine apply in *Ohio* due to the presence of historical documents in this case establishing a shoreline boundary. The only applicable doctrine in this case, accordingly, was the historical documents doctrine.

Applying the doctrine to the present case, the river boundary should have been located at the present-day low-water line, which represents the 1792 low-water mark as modified by subsequent accretion and erosion. Instead of applying this doctrine, the Court errone-

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states that the boundary should nevertheless be set at the low-water mark existing when Kentucky became a state, Indiana v. Kentucky, 136 U.S. 479, 508 (1890).

In so doing, the Court created the exact inconvenience prohibited in Handly's Lessee v. Anthony by granting jurisdiction of an island on the north side of the Ohio to the more distant state of Kentucky. Powell conjectured that Justice Field in *Indiana* had effectively overruled the case on which he claimed to rely, 444 U.S. at 344. *Indiana* may still be reconciled with Handly's Lessee v. Anthony, however, in that both cases granted jurisdiction to that state which had historically exercised its sovereignty over the disputed territory, 136 U.S. at 515-17; 18 U.S. (5 Wheat.) at 384.

47. The Special Master appointed by the Court to gather facts in *Ohio* suggested that some elements of acquiescence existed. He declined, however, to take evidence from the states on this specific point. Report of the Special Master at 13-14, 444 U.S. 335 (1980). Nevertheless, the litigants proffered such evidence in their briefs. Ohio cited Kentucky legislative documents referring to the 1792 low-water marks as the boundary; Kentucky countered this with three bridge agreements Ohio engaged in which stated that the location of the Ohio's north shore low-water mark as determined by the Corps of Engineers should define the boundary between Ohio and Kentucky. The Special Master discounted these contracts, however, surmising that this admission occurred to expedite the bridge construction. He also pointed out that the contracts arose concurrently with the Kentucky opinions citing the 1792 boundary. *Id.* The Special Master subsequently recommended that the Court not decide the case on acquiescence grounds, but merely follow the holding of *Indiana*, *Id.* at 12. The Majority opinion still gave lip-service to the acquiescence evidence against Kentucky, designating it as of "no little interest," Ohio v. Kentucky, 444 U.S. 335, 340 (1980).

48. *See* notes 26-29 and accompanying text *supra*.

ously held that the boundary between Ohio and Kentucky remained immutably at the 1792 mark, without regard for accretion.

The Court's *Ohio* decision demonstrates indifference to the guiding principles it previously expounded for boundary disputes. The Court disserves convenience by selecting the more inconvenient line available.[49] The dams which led to the controversy having moved the shoreline inland, the 1792 boundary now lies probably entirely underwater.[50] The current-day low-water mark, by contrast, can be seen through much of the year.[51]

The Court, moreover, disserves the goal of avoiding controversy by mechanically repeating the eccentric and unnecessary declaration of an immutable boundary from *Indiana v. Kentucky*, again without articulating a rationale for determining when a border remains unchanged. States contesting a common river boundary can determine which way the Court will rule in their situation only by bringing suit before the Court.

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49. And, as in Indiana v. Kentucky (*see* note 40 and accompanying text *supra*), the Court expressly admitted doing so. 444 U.S. at 340.

50. *See* note 17 *supra*.

51. Telephone interview with William E. Kreisle, Chief of the Survey Branch for the Louisville, Kentucky branch of the U.S. Army Corps of Engineers in Louisville, Kentucky (Jan. 8, 1981).