Does the Georgia plan to redraw the Tennessee-Georgia border pass legal muster?

Georgia and Tennessee are fighting a war of words. Recently, the Georgia Legislature passed a resolution reciting that “the northern border of the State of Georgia and the southern border of the States of North Carolina and Tennessee lies at the 35th parallel, north of the southernmost bank of the Tennessee River.”¹ In so reciting, Georgia declares that its northern border with Tennessee is incorrectly drawn. The resolution goes on to create Georgia-North Carolina and Georgia-Tennessee boundary-line commissions designed to “meet with similar commissions of the States of North Carolina and Tennessee to establish, survey and proclaim the true boundary lines between Georgia and North Carolina and between Georgia and Tennessee.”²Were the Georgia-Tennessee state line moved to precisely follow the 35th parallel, the line would be shifted northward to points over a mile north of its present location.

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The current controversy, which continues to receive detailed scrutiny by regional news media and which has led to considerable political posturing, ostensibly hinges on the proper location of the Georgia-Tennessee border. But everyone knows that the ultimate issue is water. To support its burgeoning Atlanta metro population, particularly during a time of drought, Georgia needs more water. The Tennessee River runs tantalizingly close to the Georgia line, but it turns northward just before sweeping through Georgia territory — or does it? Georgia seeks to move the state line to a point that would bring the Tennessee River within its reach.

This controversy is not a new one. Georgia’s resolution has merely reopened a border disagreement between Tennessee and Georgia that dates back at least to 1818. The dispute is also an escalation of a water dispute that arose between the states a decade ago when the Atlanta Regional Commission set its sights on an inter-basin transfer of water from the Tennessee River to Atlanta as a solution to Metro-Atlanta’s growing water needs.

The posturing and debates surrounding this controversy are well publicized in regional media. Less well known, however, are the legal principles pursuant to which the dispute would be decided in court, were the dispute to come to that. Had this conflict arisen in earlier times or between independent nations, it is the kind of conflict that “might lead to war.” Today, the war of words could well lead to litigation. The purpose of this article is to explain the legal principles that would likely control the outcome of such a lawsuit.

Creation and History of the Georgia-Tennessee Border: Is It or Isn’t It the 35th Parallel?

Georgia was admitted to the Union in 1788, and Congress fixed the 35th parallel as its northern border. As the result of various royal charters and grants, the southwestern border of North Carolina (presently dividing that state from Georgia and South Carolina) was recognized as following the 35th parallel westward to the Mississippi River. In 1790, North Carolina ceded its western lands to the United States in exchange for the forgiveness of certain debts. The former North Carolina lands, bounded on the south by the 35th parallel, became the State of Tennessee on June 1, 1796. Congress thus created Tennessee and specified the 35th parallel as its southern boundary.

In 1818, Georgia commissioned James Carmack and Tennessee appointed James S. Gaines to locate the 35th parallel and to fix the boundary between the two states. The surveying parties met at the town of Nickajack on the Tennessee River in present-day Marion County, which was believed to be on the boundary line between Georgia and Alabama. The surveyors decided that the 35th parallel lay “one mile and twenty-eight poles from the south bank of the Tennessee.” The surveying party marked the line of latitude with a large stone, on which was inscribed “Geo. lat. 35 north. J. Carmack,” thus setting the present state line. We now know this survey to be inaccurate, and reasons for the incorrect survey abound in southeast Tennessee lore, ranging from bad weather to fear of Indian attack.

Legally, Tennessee recognizes its southern boundary as the 35th parallel as found by Carmack and Gaines. The Tennessee Code states, “The boundary line between this state and the state of Georgia begins at a point of the true parallel of the thirty-fifth degree, as found by James Carmack, mathematician on the part of the state of Georgia, and James S. Gaines, mathematician on the part of this state.”

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Georgia, however, argues that it has never accepted the Carmack-Gaines state line, and the Georgia Code still places the state’s northern border at the actual 35th parallel.

The boundary between Georgia and North Carolina and Georgia and Tennessee shall be the line described as the thirty-fifth parallel of North latitude, from the point of its intersection by the River Chattahoochee, west to the place called Nickajack. 14

Tennessee and Georgia thus disagree over the legal effect of the Carmack and Gaines boundary line.

Disputes over the propriety of the border have arisen over the years. Georgia made efforts in the 1890s, 1905, 1915, 1922, 1941, 1947 and 1971 to “resolve” the dispute, but each time Tennessee did little or nothing to achieve any change.15 Georgia even formed a borderline committee in 1947 and authorized the committee to look into the matter and the Attorney General of Georgia to bring suit to the Supreme Court if the committee could not resolve the dispute.16 Yet the border remained the same.

Georgia’s View That the Border Is Misdrawn and Why That Matters

Georgia’s argument is simple and is well outlined in its resolution. In 1788, Congress fixed the 35th parallel as Georgia’s northern border, and when Congress created Tennessee in 1796, it specified the 35th parallel as Tennessee’s southern boundary. After Carmack and Gaines completed their surveying work, Tennessee passed legislation setting its southern boundary with Georgia as the 35th parallel as found by Carmack and Gaines.

Georgia, on the other hand, has never officially accepted the Carmack-Gaines line. Without a doubt, Georgia will be able to prove that the 35th parallel sits approximately 1.1 miles north of the Carmack-Gaines state line along the entire Tennessee-Georgia border.

The question now is whether Georgia could, at this late date, force the border to be moved. The stakes are ostensibly land but, more fundamentally, are access to Tennessee’s water. According to Georgia, its northern border with Tennessee, correctly placed along the 35th parallel, would leave a portion of Nickajack Lake, presently sitting entirely within Tennessee, in northwest Georgia. In Georgia’s view, capturing a portion of the Tennessee River should entitle Atlanta to at least a portion of the river’s water. The seriousness of this view, and of Georgia’s intent regarding moving the border, is reflected by a position paper titled “Tapping the Tennessee River at Georgia’s Northwest Corner: A Solution to North Georgia’s Water Supply Crises,” dated February 2008. This memorandum presumes that, legally speaking, Georgia’s true northern border is the actual 35th parallel, as opposed to the current placement of the line. The 35th parallel runs through the Tennessee River at Nickajack.17 Water issues are thus bound up with the state line issue, even though resolution of the state line issue would not necessarily resolve all water issues.18

Prescription and Acquiescence: The Law Governing the Border Dispute

Article III, Section 12 of the Constitution extends the judicial power to controversies between two or more states and to controversies between a state and citizens of another state. It specifies that the Supreme Court has original jurisdiction over cases in which a state shall be a party.19

Were the current border dispute to escalate from a war of words to legal action, Georgia would begin by filing a motion with the United States Supreme Court for leave to file a complaint against Tennessee to resolve the
boundary dispute. Although the Supreme Court could conduct a full evidentiary trial, the court would more likely appoint a special master to hear evidence and to make a report to the court containing recommendations. The court would then likely receive briefs and permit oral argument in opposition to and in favor of the recommendations. Ultimately, the court would accept, reject or modify, in whole or in part, the special master’s recommendations. In Georgia v. South Carolina, a border dispute that involved the location of the state line in the Savannah River, the process from original petition to final decision by the Supreme Court took 13 years. That dispute merely affected uninhabited islands in the Savannah River.

Boundary disputes between states are not new to the Supreme Court. In fact, as contemplated by the framers of the Constitution, the Supreme Court has employed its original jurisdiction to resolve disputes between states involving not only boundary disputes, but also disputes over transboundary pollution and water rights. From these disputes, there has developed federal common law that, in pollution cases, is similar to state common law of nuisance and in boundary disputes draws primarily from the doctrines of adverse possession, waiver, estoppel and laches. On several occasions, the court has issued injunctions restricting interstate pollution or requiring that states construct waste disposal facilities.

In an action by Georgia against Tennessee, the federally created doctrine of prescription and acquiescence would most likely determine the outcome. The state asserting “prescription” must show that it exercised possession and dominion over the disputed territory. In addition, the state asserting the claim must also show “acquiescence” by the neighboring state. The court has defined these doctrines through a series of boundary-line disputes, although the presence of significant population and development in the disputed territory is typically missing from these cases. Consequently, were a border lawsuit between Georgia and Tennessee to be accepted by the Supreme Court, it would become one of the most significant border cases in our nation’s history.

As the Supreme Court has explained, decision as to whether prescription and acquiescence have occurred involves a broad, fact-intensive inquiry. Merely symbolic acts such as the planting of a flag do not qualify as adverse possession by a state. Rather, what counts is, on the one hand, meaningful conduct evincing the actual exercise of sovereignty and control over an area and, on the other hand, a concomitant failure to do so.

The Supreme Court has identified various indicia relevant to the determination of prescription and acquiescence. Of signal importance for prescription is actual entry upon or occupation of the land in question. Closely corresponding with this indicator are such factors as the establishment of towns in the disputed area, the creation of county government there and the building and maintenance of public roads and structures.

In addition to such real development, the Supreme Court looks to activities and transactions within the disputed area that presuppose rightful possession. Continued on page 18
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to disputed territory. Acquiescence, it must be remembered, does not hinge on the validity of a boundary line, for the doctrine of prescription and acquiescence involves a kind of adverse possession among sovereign states. Just as the presence of the factors described above is indicative of prescription, their absence goes to show acquiescence.

Moreover, the nature and timing of a state’s protest are considered probative of acquiescence. Particularly representative of acquiescence is a pattern of “silence in the face of circumstances that warrant a response.” A sovereign state, having had notice of another’s exercise of dominion and control over disputed territory, is expected to take affirmative action to oppose the encroachment and to preserve its right to control the area.

The Supreme Court takes into account such evidence of formal protest as judicial pronouncements, legislative enactments and other official statements. Attention is paid to a state’s prior attempts, if any, to bring the dispute before the judiciary, including the

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The Supreme Court, for resolution. Notwithstanding, inaction and the passage of time itself may constitute acquiescence where the duration is sufficiently long. No particular amount of time is required for prescription and acquiescence to occur, although under the circumstances the time must be deemed to be substantial and uninterrupted. Regarding length of alleged prescription and acquiescence, cases run the gamut from 24 years to more than 200.

To prevail against the argument of prescription and acquiescence, Georgia would have to focus on the acts of the Georgia legislature itself and the various times through history that Georgia has raised the state line issue. The position statement it published demonstrates this focus. Georgia would need to substantiate the various times its legislature objected to the state lines’ location and emphasize the recalcitrant nature of Tennessee’s response as voiced through its legislature and governor. Georgia would want to portray all of Tennessee’s actions over the past 190 years as protecting the benefit it gained from a mistake.

Tennessee, on the other hand, would likely focus its argument on the inhabitants and development of the disputed region by persons considering themselves to be Tennessee residents. Tennessee would emphasize that it has
No Boundary Talks with Georgia, Legislators Say

In April the Tennessee General Assembly made it clear that it does not want to participate in a boundary commission proposed by Georgia legislators to consider moving the states’ border. Members of the Senate State and Local Government Committee voted unanimously for a resolution that formally rejects any participation in such a commission. The full Senate later agreed. The measure had already unanimously passed the House earlier.

Governed the people located on this land for nearly 200 years. The following two examples of Lookout Mountain and the Copper Hill dispute illustrate the stakes for Tennessee residents and show that this border dispute is no ordinary one.

Lookout Mountain

The histories of Lookout Mountain, Ga., and Lookout Mountain, Tenn., show how people have adjusted to the state lines’ present location over time. These towns are separated by the Carmack-Gaines state line. The legislatures of Georgia and Tennessee created the two towns, and both the charter for Lookout Mountain, Ga., and the charter for Lookout Mountain, Tenn., rely on the Carmack-Gaines state line as a boundary.²¹

When examining the actions of these two towns, it is important to recognize that municipalities may exercise only those powers expressly delegated to them by the legislature, in statutes or the municipalities’ charters, or those powers necessarily implied.²² When a municipality fails to act within its charter or under applicable statutory authority, the action is ultra vires and void.²³ Consequently, in creating the towns of Lookout Mountain, the legislatures of both states have governed in reliance upon the Carmack-Gaines state line. Each time these towns have used their legislatively derived power, they have acted in reliance upon the present state line. Over time, these two towns have created police forces, built roads, placed utilities along their right of ways, built parks, enacted zoning ordinances, built sewers and all other acts that local governments typically do.

The Carmack-Gaines line runs down Robin Hood Trail, the street itself being in Lookout Mountain, Ga. The Carmack-Gaines state line, however, divides the properties on the northern side of this street. It even runs through some houses. These homeowners pay property taxes to both Tennessee and Georgia after the tax assessors for Walker County, Ga., and Hamilton County, Tenn., have accessed and apportioned their property. Negotiations over the state line and the residence of the inhabitants have occurred on and off for 75 years concerning the Robin Hood properties and other properties in these towns.

These property owners receive four annual property tax bills respectively from Walker County, Ga., Lookout Mountain, Ga., Hamilton County, Tenn., and Lookout Mountain, Tenn. Their children attend either a Tennessee or Georgia public school based upon the location of the state line on their property, which often must be determined by a survey. Residents on the south side of Robin Hood Trail are Georgia residents. They pay Georgia property taxes, Georgia income tax, and vote in Georgia’s elections. Some of the residents on the north side of Robin Hood are Georgia residents, but most are Tennessee residents based on where the Carmack-Gaines lines run on their properties. They pay property taxes to both states based on an apportionment that the tax assessors for Walker County,

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Ga., and Hamilton County, Tenn., jointly perform. Thus, the Carmack-Gaines state line has become enmeshed with the daily lives of these people.

If Georgia were to prevail and move the state line, Lookout Mountain, Tenn., would, in a legal sense, basically cease to exist. The moved border would encompass most of its residents, its City Hall and school. Since the town has acted over the years through power granted to it by the Tennessee legislature, which would not have possessed the police power it conveyed to it, all of its actions according to Tennessee and Georgia law could be deemed ultra vires. That would also be true of the actions through history of East Ridge and Copper Hill, and some of those of Chattanooga. How the court would untangle such a mess is unclear.

Georgia’s Litigation over Copper Hill

Interestingly, the disputed area has already given rise to a famous Supreme Court case that could be determinative as to whether Georgia acquiesced in Tennessee’s governance of the area. In Georgia v. Tennessee Copper Co., 237 U.S. 424 (1915), Georgia invoked the Supreme Court’s original jurisdiction in an attempt to stop transboundary air pollution from two copper smelters. The works of the Tennessee Copper Company, much the larger of the two, we’re situated within one-half mile of the Carmack-Gaines state line, but south of the 35th parallel, placing it squarely within the area Georgia claims.

In a prior lawsuit by landowners that surrounded the smelting operations, the Tennessee Supreme Court described the operations as follows:

The method used by the defendants in reducing their copper ores is to place the green ore, broken up, on layers of wood, making large open-air piles, called “roast piles,” and these roast piles are ignited for the purpose of expelling from the ore certain foreign matters called “sulphurets.” In burning, these roast piles emit large volumes of smoke. This smoke, rising in the air, is carried off by air currents around and over adjoining land. 14

A Georgia commission created by Georgia Governor J. M. Terrell concluded, in a report issued on November 20, 1903, that within a radius of ten miles “the copper reduction works at present conducted at Ducktown constitute not only a nuisance, but have been, and are hourly and daily damaging and destroying vegetable life … for miles within the boundaries of this state.” 15

Litigation over the nature and extent of the injunction lasted until the late 1930s. 16 Never in this litigation did Georgia argue that it was the quasi-sovereign with jurisdiction over the Tennessee Copper Company because the company operated within Georgia’s boundaries. Rather, it acted at all times as if it had no authority to govern the Tennessee Coal Company except through litigation by one neighbor against another. The smelting operation of the Tennessee Copper Company no longer exists. The 35th parallel and the Carmack-Gaines state line still border its ruins. If Georgia were to sue Tennessee today over the boundary line, the history of the Tennessee Copper Company might again become important to illustrate how Tennessee and Georgia have governed or not governed the disputed area.

Moving the Tennessee Border One Mile to the North Would Affect Thousands of People and Billions of Dollars of Property

The political and economic effect of moving the Tennessee-Georgia border to the north — even just a mile — would be massive. In Hamilton County, this geographic shift would move nearly 15,000 acres having a collective property value of over $2 billion into Georgia. 17 Much of the “disputed” area in Hamilton County is currently occupied by the city of Chattanooga and is heavily populated. Some of Chattanooga’s largest manufacturers are located in the narrow strip of land claimed by Georgia. If successful, as stated above Georgia’s effort would also claim virtually all of the cities of Lookout Mountain and East Ridge. All five public schools in East Ridge, a city with over 20,000 residents, would become part of the Georgia school system. Beyond Hamilton County, over sixty square miles of Marion, Bradley, and Polk Counties (including the entire town of Copperhill) would be annexed into Georgia. Tens of thousands of Tennessee residents — who have voted for the state’s governors and legislators, paid city, county, and state taxes in Tennessee, and sent their children to Tennessee schools — would be disenfranchised as Tennesseans.

Conclusion

We’re Georgia to file suit against Tennessee in the effort to move the border, and were the United States Supreme Court to accept the case, the controlling legal principles would likely be the well-established doctrine of prescription and acquiescence. So far, media coverage of the current war of words has displayed little awareness of this doctrine. Yet given the duration of
the disagreement and the fact that much of the territory at issue is inhabited and developed, the lawsuit would quickly become one of the most significant border-dispute cases in our nation’s history.

To give effect to the doctrine of prescription and acquiescence, the history of how the disputed area has been governed from 1818 to the present will likely be determinative. The dispute implicates much more than water and water rights. The border dispute does not involve uninhabited islands in a river; it involves an area with a history and inhabitants with allegiances. If litigation were to take place, the actions of the two states to govern people who live on places like Robin Hood Trail and businesses that have developed along the state line like the Tennessee Copper Company would be examined in detail. The lawsuit would engender an emotional conflict that would be fascinating, rowdy and intense and that would once again test and undoubtedly reaffirm the integrity of these United States.

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Notes

2. Id.
3. Missouri v Illinois, 200 U.S. 496, 518 (explaining the court’s jurisdiction to hear an interstate pollution dispute).
4. Tennessee Valley Authority has the ultimate authority to resolve all issues involving water rights in the Tennessee River’s watershed pursuant to 16 U.S.C. § 831 et seq.
7. Id. at 84-85 (Report of the Secretary of State to the President), 424-25 (An Act for the Admission of the State of Tennessee).
8. Goodspeed’s History of Tennessee, supra n.8 at 181; Haywood, supra n.8 at 26-27.
9. Goodspeed’s History of Tennessee, supra n.8 at 181; Haywood, supra n.8 at 26-27.
10. Goodspeed’s History of Tennessee, supra n.8 at 181; Haywood, supra n.8 at 27. A “pole” is approximately 16.5 feet.
11. Goodspeed’s History of Tennessee, supra

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n.8 at 181; Haywood, supra n.8 at 27.
12. Goodspeed’s History of Tennessee, supra n.8 at 181; Haywood, supra n.8 at 26-27
15. Jack Brian Hood, supra n.3, at 200-01.
16. Id.
17. Additionally, the legislatures of Georgia and Tennessee each have passed resolutions concerning the border dispute. Georgia’s resolution creates a Georgia-Tennessee boundary-line commission with the intention of surveying and establishing the “line” boundary between Georgia and Tennessee. Georgia Senate Resolution 822 (2008). Tennessee’s resolution cites the law of adverse possession and acquiescence, notes that the U.S. Supreme Court has jurisdiction over the boundary dispute, and resolves that the boundary has been properly established and that Tennessee will not participate in the Boundary Line Commission established by the Georgia General Assembly. Tenn. House Joint Resolution 919 (2008).
18. Under the common-law doctrine of riparian rights, owners of property riparian to a river have the right to the undiminished use of the river without any impairment or burden on it. See Connecticut v. Massachusetts, 282 U.S. 660, 669 (1931). Consequently, Georgia argues that as the state line is redrawn so that Georgia becomes riparian to the Tennessee River, it will have an equal right to use water from the river.
20. Sup. Ct. R. 17 (requiring motion for leave to file and supporting brief to precede initial pleading in original action).
23. Id.
29. See New Jersey v. New York, 523 U.S. at 792.

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479, 510 (1890).
36. See Arkansas v. Tennessee, 310 U.S. at 567.
38. See Arkansas v. Mississippi, 250 U.S. 39, 45 (1919).

42. Georgia v. South Carolina, 497 U.S. at 389.
43. See New Jersey v. New York, 523 U.S. at 787.
44. See Indiana v. Kentucky, 136 U.S. at 515.
47. See Georgia v. South Carolina, 497 U.S. at 393.
50. See Rhode Island v. Massachusetts, 45 U.S. 591, 638 (1846).
56. Id. at pp. 15-39.