

# The Burger Court Opinion Writing Database

*Texas v. Louisiana*

410 U.S. 702 (1973)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



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

CHAMBERS OF  
THE CHIEF JUSTICE

March 2, 1973

Re: No. 36 Orig. - Texas v. Louisiana

Dear Byron:

Please join me.

Regards,



Mr. Justice White

Copies to the Conference

3 —  
NY  
You joined Blu

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

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 36, Orig.

Circuit of Appeal

2/24/73

Recorded in the Clerk's Office

State of Texas, Plaintiff,  
v.  
State of Louisiana. } On Bill of Complaint.

[February —, 1973]

MR. JUSTICE DOUGLAS, dissenting.

Louisiana was admitted into the Union in 1812. 2 Stat. 701. The constitution of Louisiana of 1812 described her western boundary as "beginning at the mouth of the river Sabine, thence by a line to be drawn along the middle of said river, including all its islands, to the thirty-second degree of latitude." That was the description that was recited in the 1812 Act in which Congress approved the constitution of Louisiana. 2 Stat. 701, 702-703. There remained a controversy between this Nation and Spain over this western boundary and the Treaty of 1819 settled the question by the only authority that could establish a boundary with a foreign government. *Rhode Island v. Massachusetts*, 12 Peters 657, 725.

That treaty provided that the boundary should start "at the mouth of the river Sabine in the sea, continuing north along the western bank of that river, to the 32d degree of latitude." 8 Stat. 252. The Treaty of 1828 recognized that as the boundary line between Louisiana and Texas. 8 Stat. 372. Texas did not come into the Union until 1845. The Treaty of 1819 read literally that Louisiana's western border was the western bank of the Sabine. Louisiana does not claim as much. She claims only the "middle" of the Sabine, which according to the thalweg doctrine, when describing boundaries on navigable waters, means the middle of the channel, which is not necessarily the geographical "middle" as held by the

1/14

## 4th DRAFT

1. The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

## SUPREME COURT OF THE UNITED STATES

No. 36, Orig.

Mr. Justice Douglas, J.

Circulated:

State of Texas, Plaintiff,

v.

State of Louisiana.

On Bill of Complaint

Circulated:

2-27-73

[February —, 1973]

MR. JUSTICE DOUGLAS, dissenting.

Louisiana was admitted into the Union in 1812. 2 Stat. 701. The constitution of Louisiana of 1812 described her western boundary as "beginning at the mouth of the river Sabine, thence by a line to be drawn along the middle of said river, including all its islands, to the thirty-second degree of latitude." That was the description<sup>1</sup> that was recited in the 1812 Act in which Congress approved the constitution of Louisiana. 2 Stat. 701, 702-703. There remained a controversy between this Nation and Spain over this western boundary and the Treaty of 1819 settled the question by the only authority that could establish a boundary with a foreign government. *Rhode Island v. Massachusetts*, 12 Peters 657, 725.

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<sup>1</sup> It was also in the Enabling Act giving Louisiana authority to form a constitution and state government and gain admission to the Union. 2 Stat. 641.

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

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 36, Orig.

From: Douglas, J.

Circulated:

State of Texas. Plaintiff,

v.

State of Louisiana.

On Bill of Complaint.

Recirculated:

3-1-73

[February —, 1973]

MR. JUSTICE DOUGLAS, dissenting.

Louisiana was admitted into the Union in 1812. 2 Stat. 701. The constitution of Louisiana of 1812 described her western boundary as "beginning at the mouth of the river Sabine, thence by a line to be drawn along the middle of said river, including all its islands, to the thirty-second degree of latitude." That was the description<sup>1</sup> that was recited in the 1812 Act in which Congress approved the constitution of Louisiana. 2 Stat. 701, 702-703. There remained a controversy between this Nation and Spain over this western boundary and the Treaty of 1819 settled the question by the only authority that could establish a boundary with a foreign government. *Rhode Island v. Massachusetts*, 12 Peters 657, 725.

That treaty provided that the boundary should start "at the mouth of the river Sabine in the sea, continuing north along the western bank of that river, to the 32d degree of latitude." 8 Stat. 252. When Texas was admitted to the Union in 1845, 9 Stat. 108, that same boundary was used to describe her eastern line. 8 Stat. 372, 374. The Treaty of 1828 recognized that as the boundary line between Louisiana and Texas. 8 Stat. 372. Texas did not come into the Union until

<sup>1</sup> It was also in the Enabling Act giving Louisiana authority to form a constitution and state government and gain admission to the Union. 2 Stat. 641.

182

6th DRAFT

to: the Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

SUPREME COURT OF THE UNITED STATES  
From: Douglas, J.

No. 36, Orig.

Circulated:

State of Texas, Plaintiff,  
v.  
State of Louisiana. } On Bill of Complaint.

Recirculated: 3-4-73

[March —, 1973]

MR. JUSTICE DOUGLAS, dissenting.

Louisiana was admitted into the Union in 1812. 2 Stat. 701. The constitution of Louisiana of 1812 described her western boundary as "beginning at the mouth of the river Sabine, thence by a line to be drawn along the middle of said river, including all its islands, to the thirty-second degree of latitude." That was the description<sup>1</sup> that was recited in the 1812 Act in which Congress approved the constitution of Louisiana. 2 Stat. 701, 702-703. There remained a controversy between this Nation and Spain over this western boundary and the Treaty of 1819 settled the question by the only authority that could establish a boundary with a foreign government. *Rhode Island v. Massachusetts*, 12 Peters 657, 725.

That treaty provided that the boundary should start "at the mouth of the river Sabine in the sea, continuing north along the western bank of that river, to the 32d degree of latitude." 8 Stat. 252, 254, 256. When Texas was admitted to the Union in 1845, 9 Stat. 108, that same boundary was used to describe her eastern line. 8 Stat. 372, 374. The Treaty of 1828 recognized that as the boundary line between Louisiana and Texas for it was the boundary between the United States and Mexico,

<sup>1</sup> It was also in the Enabling Act giving Louisiana authority to form a constitution and state government and gain admission to the Union. 2 Stat. 641.

*T 2/27*  
*Opn. joined 2/7*

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

7th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 36, Orig.

From: Douglas, J.

State of Texas, Plaintiff,  
v.  
State of Louisiana.

Circulated: \_\_\_\_\_  
On Bill of Complaint.

Recirculated: 3-16-73

[March —, 1973]

MR. JUSTICE DOUGLAS, dissenting.

*115-10*  
Louisiana was admitted into the Union in 1812. 2 Stat. 701. The constitution of Louisiana of 1812 described her western boundary as "beginning at the mouth of the river Sabine, thence by a line to be drawn along the middle of said river, including all its islands, to the thirty-second degree of latitude." That was the description<sup>1</sup> that was recited in the 1812 Act in which Congress approved the constitution of Louisiana. 2 Stat. 701, 702-703. There remained a controversy between this Nation and Spain over this western boundary and the Treaty of 1819 settled the question by the only authority that could establish a boundary with a foreign government. *Rhode Island v. Massachusetts*, 12 Peters 657, 725.

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<sup>1</sup> It was also in the Enabling Act giving Louisiana authority to form a constitution and state government and gain admission to the Union. 2 Stat. 641.

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

February 6, 1973

RE: No. 36 Orig. - Texas v. Louisiana

Dear Byron:

I agree.

Sincerely,



Mr. Justice White

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

February 5, 1973

No. 36 ORIG. - Texas v. Louisiana

Dear Byron,

I am glad to join your opinion  
for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

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

Please give me  
JW

From: White, J.

1st DRAFT

Circulated: 2-1-73

**SUPREME COURT OF THE UNITED STATES**

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

No. 36, Orig.

State of Texas, Plaintiff,  
v. } On Bill of Complaint.  
State of Louisiana.

[February —, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

Texas brought this original action against Louisiana to establish its rights to the jurisdiction and ownership of the western half of Sabine Pass, Sabine Lake, and Sabine River (Sabine) from the mouth of the Sabine in the Gulf of Mexico to the thirty-second degree of north latitude, and to obtain a decree confirming the boundary of the two States as the geographic middle of the Sabine. After the motion to file was granted, 397 U. S. 931 (1970), Louisiana filed motions, answer and counter-claim asserting that its boundary was on the west bank of the Sabine; and the case was referred to a Special Master, 398 U. S. 934 (1970).

The Report of the Special Master and the parties' exceptions are now before us. The Special Master's recommended conclusions are that the geographic middle, not the west bank or the middle of the main channel, is the boundary between the two States; that all islands in the Sabine when Louisiana was admitted as a State in 1812 should be awarded to Louisiana subject to prescriptive claims, if any, by Texas to such islands; that all islands formed in the east half of the Sabine after 1812 belong to Louisiana, and those in the west half to Texas.

8  
2/1  
pp 3, 3, 8, 11  
Opin  
To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
 Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: White, J.

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

Recirculated: 2-27-73

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 36, Orig.

State of Texas, Plaintiff, |  
v. | On Bill of Complaint.  
State of Louisiana. |

[February —, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

Texas brought this original action against Louisiana to establish its rights to the jurisdiction and ownership of the western half of Sabine Pass, Sabine Lake, and Sabine River (Sabine) from the mouth of the Sabine in the Gulf of Mexico to the thirty-second degree of north latitude, and to obtain a decree confirming the boundary of the two States as the geographic middle of the Sabine. After the motion to file was granted, 397 U. S. 931 (1970), Louisiana filed motions, answer and counter-claim asserting that its boundary was on the west bank of the Sabine; and the case was referred to a Special Master, 398 U. S. 934 (1970).

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B  
JOURNAL 2/1

STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 2, 3, 4, 8, 9

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

From: White, J.

3rd DRAFT

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

**SUPREME COURT OF THE UNITED STATES**

Circulated: 3-6-73

No. 36, Orig.

State of Texas, Plaintiff,  
v.  
State of Louisiana. } On Bill of Complaint.

[February —, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

Texas brought this original action against Louisiana to establish its rights to the jurisdiction and ownership of the western half of Sabine Pass, Sabine Lake, and Sabine River (Sabine) from the mouth of the Sabine in the Gulf of Mexico to the thirty-second degree of north latitude, and to obtain a decree confirming the boundary of the two States as the geographic middle of the Sabine. After the motion to file was granted, 397 U. S. 931 (1970), Louisiana filed motions, answer and counter-claim asserting that its boundary was on the west bank of the Sabine; and the case was referred to a Special Master, 398 U. S. 934 (1970).

The Report of the Special Master and the parties' exceptions are now before us. The Special Master's recommendations are that the geographic middle, not the west bank or the middle of the main channel, is the boundary between the two States; that all islands in the Sabine when Louisiana was admitted as a State in 1812 should be awarded to Louisiana subject to prescriptive claims, if any, by Texas to such islands; that all islands formed in the east half of the Sabine after 1812 belong to Louisiana, and those in the west half to Texas.

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

February 7, 1973

Re: No. 36, Orig. - Texas v. Louisiana

Dear Byron:

Please join me.

Sincerely,



T.M.

Mr. Justice White

cc: Conference

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

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

February 5, 1973

Re: No. 36 Orig. - Texas v. Louisiana

Dear Byron:

Please join me.

Sincerely,

H. A. B.

Mr. Justice White

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

February 6, 1973

Re: No. 36 - Texas v. Louisiana

Dear Byron:

Please join me.

Sincerely,

*Lewis*

Mr. Justice White

cc: The Conference



February 2, 1973

Re: No. 36, Orig. - Texas v. Louisiana

Dear Byron:

I will join your opinion for the Court in this case regardless of whether or not you accede to the following rather picayune request for a change in the sentence on page 11 which now reads as follows:

"The homesteader prevailed in this Court because title to the land had not passed to Idaho;"

Scott v. Lattig is an old friend of mine from my days in private practice when I litigated land titles along the Colorado River. For that reason only I went back and read it, and it seems to me that the most accurate way to summarize the holding of the Court, which you do in the sentence above quoted, is to say in substance that "the homesteader prevailed in this Court because title to the island remained in the United States".

The quotation from Scott which immediately follows this sentence on page 11 contains this language:

"But the island . . . did not pass to the State or come within the disposing influence of its laws."

Had Idaho been a state, like Nebraska, which gave title to the bed of the stream adjoining riparian land to the

riparian property, Idaho law might have awarded the part of the island in question to Lattig without the necessity of Idaho ever having owned the island. I think the Court in Scott recognized this when it said that the ownership of the island neither passed to the state nor came within the "disposing influence of its laws". Idaho law could have awarded title to Lattig either on the basis that he had acquired that part of the island from the state as proprietor, or because under state law he as riparian proprietor owned it from the time of Idaho's admission to the union. The answer to both these alternative grounds for the state court holding is not that Idaho didn't have title to the land, but that the United States did.

This is a real nit-pick -- forgive me.

Sincerely,

Mr. Justice White

HOOVER INSTITUTION  
ON WAR, REVOLUTION AND PEACE  
Sanford, California 94305-6010



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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

March 16, 1973

Re: No. 36 Orig. - Texas v. Louisiana

Dear Byron:

Please join me.

Sincerely,

Mr. Justice White

Copies to the Conference