I suppose most of you, like me, have never heard of the Watuppa Ponds. But in 1888, a battle broke out over the legality of their use to supply drinking water for a nearby city. The issue closely divided Massachusetts's highest court, and led to a heated debate in the recently launched *Harvard Law Review* featuring future-Justice Louis Brandeis. He and co-author Samuel Warren would team up again two years later with one of the most influential law review articles of all time, which created our modern legal concept of privacy. Their earlier work on the Great Pond issue was of far lesser import. In fact, I found out about this dispute from a sarcastic post by a colleague contrasting the Great Ponds article with Brandeis's famous privacy article. Naturally I wanted to know more. It's true that these article deal with a much narrower problem. But although the specifics of the disputes have changed, it's remarkable how many of the fundamental issues continue to vex us today.

First, a little background on the case, *Watuppa Reservoir Co. v. City of Fall River*. The North and South Watuppa Ponds are adjacent to Rhode Island. The ponds are nearly eight miles long and a mile across, making them one of the largest water bodies in the state. They feed the Fall River, which flows out to the nearby Atlantic. The dispute arose when the state legislature authorized the city of Fall River to take additional water from the ponds without compensating downstream owners. The Fall River, as you might guess from its name, has a large drop down to sea level, and mills that utilized the river were impacted by the decrease in water flow from the city's diversion. The mill owners sued, claiming that they had been unconstitutionally deprived of their water rights as owners of land along the river. Like other eastern states, Massachusetts follows what's called the riparian approach to water law, which prohibits uses of water that unreasonable interfere with downstream users.

The state's highest court, the Supreme Judicial Council, ruled against the mills. The four-judge majority on the court included another future U.S. Supreme Court Justice, Oliver Wendell Holmes, who was on the court from 1882 to 1902. Holmes didn't write separately, but he didn't join the dissent, so apparently he agreed with the majority opinion. In fact, he may even have been swing voter, given the 4-3 split.

The majority ruled that the great ponds of the state (those over 20 acres) were covered by the public trust doctrine under legislation dated back to the 1600s. The public trust doctrine vests title to the waters in the state in trust for the public, and the state legislature was entitled to decide that supplying drinking water was a use consistent with the public trust. The dissenters argued that the state had only the same rights in the land as a private owner would have in a small pond that fed a stream and was therefore subject to the rights of downstream landowners to make reasonable use of the waters. Historically, previous diversions from great ponds had all been accompanied by compensation, up to the passage of the legislation involved in the case itself. A pond that fed a stream was as much a part of

the stream as a pond that received water from one stream and ultimately fed the water to another, being only "one link in the chain" of the water system.

In their initial article, Brandeis and Warren were sharply critical of the majority opinion. They painstakingly review prior decisions dealing with the great ponds, concluding that none of them support the majority's public trust holding. Instead, they agreed with the dissent that the state has only the rights of a private landowner regarding the pond, requiring it to respect the rights of downstream owners like the mill. They conclude by accusing the court of changing a long-established rule of property without real justification. They also argue that the decision is "a wide departure from the spirit which has in the past led the Commonwealth of Massachusetts to foster its manufacturing industries." They add that the decision comes at an especially bad time "when all the restraints imposed by the Constitution and the courts are needed to protect private property from the encroachments of the Legislature." This skepticism about legislation is rather at adds from the positions he would espouse several decades later on the Supreme Court. Apparently, his views evolved in the meantime.

The questions raised by this article continue to vex us. To this day, courts struggle to determine when a government has "taken" property. The public trust doctrine involves one way of avoiding a claim of taking. But the boundaries of that doctrine remain contested. And in specific area of water, courts in California and elsewhere have recognized the public trust doctrine as a limit on the private water rights, but have had trouble striking a balance.

A different view of the case appeared in the Harvard Law Review four months later. The author's name does not appear in the end, although a Thomas Stetson is named in the copyright notice. Perhaps it was a student note. This article argues that if a pond lacks a perceptible current, it is not part of the river system itself, and hence landowners along the river have no right to complain about overuse. There is no duty, according to the author, to allow water to flow into a stream, as opposed to the duty not to interfere with the river after it leaves its source.

Brandeis and Warren fired back a much longer reply, arguing vigorous that the pond had to be considered part of the river system. The issue, they conclude is "one of facts": whether the pond "as the source, or as the connecting link" is "necessary to and structurally a part of the stream."

We continue to debate where to draw the line in defining a water system. The points of contention have changed. Brandeis and Warren though it obvious that a swamp would not be included, whereas now environmentalists and the Trump Administration are locked into a

battle over which wetlands count as part of the “waters of the United States,” to use the statutory term. But the battle continues to be between those favoring a formalist test and those who (like Brandeis and Warren), think that ultimately the issue is one of hydrology. The courts will have to hash out these conflicting perspectives.

At least for those of us in the business, it’s striking how much preferences have changed regarding types of legal scholarship. Anything published by the Harvard Law Review today would be twenty times as long, much less about legal doctrine, and far more lofty in its theoretical ambitions. There’s something charming about the much more mundane aspirations of the journal in its early days.

This whole episode is intriguing in several ways. First of all, it shows how some of the problems that trouble us today were faced in a different guise by an earlier era. And second, it seems to show that Brandeis’s thought about regulations of private property had shifted over time. It’s possible that Holmes’s views also shifted. In the 1920s, they would again find themselves on opposite sides, but with Holmes favoring the property owner and Brandeis the government. Did they change their views, or did the Great Ponds issue seem different to them than the later dispute over coal mining rights?

Postscript for legal history nerds: I haven’t found public access versions of the documents, though they may well be out there somewhere. The citations are 18 N.E. 465 (1888) for the court’s decision; 2 Harv. L. Rev. 195 (1888) and 3 Harv. L. Rev. 1 (1889) for the Brandeis and Warren articles; and 2 Harv. L. Rev. 316 (1889), for the defense of the court’s decision.