REFLECTIONS ON TAKINGS: THE WATUPPA PONDS CASES

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INTRODUCTION

Regulations with important public purposes sometimes take away the value of a citizen’s property no less completely than if the government had physically confiscated it. The United States Supreme Court has often wrestled with, but never subdued, the question of how far a regulation has to go before it becomes a taking of property sufficient enough to require just compensation under the Fifth Amendment of the United States Constitution.¹

¹. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.


For a sampling of the extensive literature on takings law, see, e.g., RICHARD E-
The Court most recently addressed the problem in *Lucas v. South Carolina Coastal Council*, and the case has generated a mass of controversy and scholarly attention. Whether a regulation is construed as a taking or as a legitimate exercise of police power determines the critical issues of whether compensation is awarded, for what amount, and for what period of time. Considerations include whether the taking was total or partial, its purpose, and to what extent, if at all, the owner's use of his property infringed upon the health or rights of others. The judicial test is notoriously, if understandably, obscure.

As recently as 1922, it was generally assumed that "the Takings Clause reached only a 'direct appropriation' of property or the functional equivalent of a 'practical ouster of [the owner's] possession.'" In *Pennsylvania Coal v. Mahon*, the state had enacted a

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A LEXIS search in the spring of 1994 turned up 117 law review articles on the *Lucas* case. Most of the commentary concentrates on the legal issues. I am presently researching the case from its (more interesting) factual perspective.

4. See *First English*, 482 U.S. 304. On remand from the Supreme Court, the plaintiffs in *Lucas* did not receive damages because the temporary taking of the use of their property was not considered total. Telephone Interview with Bachman Smith III, Esq., Counsel for South Carolina Coastal Commission (April 4, 1994).

5. The legal definition of "public purpose" is not clear. See, e.g., Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 459 (Mich. 1981) (determining public purpose is a legislative function).

6. One work has labelled this elusive distinction "the most haunting jurisprudential problem in the field of contemporary land-use law . . . one that may be the lawyer's equivalent of the physicist's hunt for the quark." Charles M. Haar & Michael A. Wolf, Land-Use Planning: A Casebook on the Use, Misuse, and Re-use of Urban Land 875 (4th ed. 1989). See also Nollan v. California Coastal Comm'n, 483 U.S. 825, 853, 866 (1987) (Stevens, J., dissenting) ("Even the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence.").

Daniel R. Mandelker & Michael M. Berger, A Plea to Allow the Federal Courts to Clarify the Law of Regulatory Takings, 42 Land Use Law & Zoning Dig. 3 (1990) ("It is something of an open secret that the Supreme Court has yet to firmly define the boundaries of regulatory taking jurisprudence.").


8. 260 U.S. 393 (1922).
statute, the Kohler Act, that prohibited coal mining when the mining caused land which the mining company did not own to collapse, even when it had purchased the right to undermine the property.\textsuperscript{9} The plaintiff's house was in danger because of the mining company's activities, but the plaintiff had purchased the property with knowledge of a prior deed that had granted the company the right to undermine the property. To give the plaintiff the benefit of the statute would force the coal company to leave coal in the ground it could otherwise have mined. Justice Oliver Wendell Holmes, Jr., found for the coal company, stating that,

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while property may be regulated to a certain extent, \textit{if regulation goes too far it will be recognized as a taking} . . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.\textsuperscript{10}
\end{quote}

Holmes would not grant the plaintiff, through the operation of a statute, greater rights than he had bargained for and purchased.\textsuperscript{11}

Justice Louis D. Brandeis was the only dissenter in \textit{Mahon}.

\textsuperscript{9} See the Brief for Defendants in Error at 6-8, Mahon Co. v. Mahon, 260 U.S. 393 (1922) (No. 549) and the Brief \textit{ex rel} City of Scranton at 2-5, \textit{Mahon}, 260 U.S. 393, for descriptions of the effects of subsidence.

\textsuperscript{10} \textit{Mahon}, 260 U.S. at 415-16 (emphasis added). The decision was not popular with Holmes' colleagues. G. \textsc{Edward White}, \textsc{Justice Oliver Wendell Holmes: Law and the Inner Self} 401-03 (1993).

In \textit{Mugler v. Kansas}, the Court had held that a restriction on the use of property that the legislature deemed detrimental to the public health, morals, or safety could not be considered a taking of property necessitating compensation to the owner. 123 U.S. 623, 669 (1887). Holmes called the reasoning in such cases "pretty fishy." 1 \textsc{Holmes-Laski Letters} 473 (M. Howe ed. 1953) (cited in E.F. Roberts, \textit{Mining with Mr. Justice Holmes}, 39 \textsc{Vand. L. Rev.} 287, 292 n.27 (1987)).

As the Court said in \textit{Lucas}, compensable cases will now be found where a regulation denies "all economically productive or beneficial uses of land," but the point at which to draw the line remains a problem. \textit{Lucas}, 112 S. Ct. at 2901. As Justice Scalia admits:

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It is true that in at least some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing).
\end{quote}

\textit{Id.} at 2895 n.8. \textit{But see} Epstein, supra note 3, at 1376 (calling the second example "merely a form of competition against which no landowner is ever entitled to compensation"). Professor Epstein goes on to ask, now that the Court has announced that a 100% deprivation of value requires compensation, "what legislature will be foolish enough to take an entire plot of land?" \textit{Id.} at 1377.

\textsuperscript{11} \textit{Mahon}, 260 U.S. at 416.
While he acknowledged that any exercise of the police power regarding the use of property inevitably restricts its owners without compensating them, he believed that "restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. . . . The State merely prevents the owner from making a use which interferes with paramount rights of the public."12

Takings jurisprudence has recently been in an even greater than usual flux. In 1987, the Court decided Keystone Bituminous Coal Ass'n v. DeBenedictis,13 in which, although the facts were similar to those of Mahon, the Court held that the earlier case did not control.14 In Keystone, the Bituminous Mine Subsidence and Land Conservation Act, and regulations promulgated under it, required that fifty percent of the coal beneath certain protected structures be left in the ground to support the surface.15 Coal companies sued to enjoin the Department of Environmental Resources from enforcing the Act and its regulations on the grounds that they effected a taking of property (twenty-seven million tons of coal, or about two percent of their total reserves) and interfered with the contractual waivers of liability that the companies had negotiated with surface owners.16 The Court ignored Pennsylvania's distinction between surface, mineral, and support estates, upheld the statute, and found no taking.17 The Court, reminiscent of Brandeis' dissent in Mahon, deferred to the legislative judgment that any interference with the "investment-backed expectations" of the petitioners was necessary to achieve the public purpose of the statute,18 which was to prevent a "significant threat to the common welfare."19

The juxtaposition of these two cases shows the changing expectations and different regulatory atmospheres of the periods in which they were decided. Dissenting in Keystone, Chief Justice Rehnquist

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12. Id. at 417 (Brandeis, J., dissenting). Brandeis also said the opinion was the result of Holmes' "class bias." White, supra note 10, at 555 n.124 (quoting Melvin I. Urofsky, The Brandeis-Frankfurter Conversations, 1985 SUP. CT. REV. 299, 321).
14. Id.
15. Id. at 477.
16. Id. at 478-79.
17. Id. at 480-81.
18. Id. at 505-06.
19. Id. at 485. Holmes had found the Kohler Act to be a "private benefit" statute, partly because it usually did not apply when the surface and the coal were owned by the same party; thus its "public purpose" did not justify the destruction of constitutionally protected rights: Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413-14 (1922). No such limitation was found in the Bituminous Mine Subsidence and Land Conservation Act.
pointed out that the statutes at issue in each case were “strikingly similar”; he would have followed Mahon and found a taking. He considered the value of the fraction of petitioner’s coal deposits which had been destroyed by the statutory requirement, whereas the majority compared the value of the petitioner’s entire holdings to the relatively small percentage at issue. The Chief Justice believed that petitioners had been deprived of all use of a segment of their property as effectively as if it had been physically appropriated. It is perhaps no coincidence that Keystone and two other leading United States Supreme Court takings cases occurred during the recession of the late 1980s, when public desire for regulation collided with public reluctance to finance such regulation with tax dollars.

In Mahon, two old friends, Holmes and Brandeis, uncharacteristically disagreed. Thirty years earlier, however, they had ultimately agreed with each other on a conceptually similar issue. The Watuppa Ponds cases had presented such a problem, eventually known as a “regulatory taking,” in the context of water power, which immediately preceded coal as the primary power source in the East. Brandeis and his first law partner, Samuel D. Warren, Jr., had joined forces to fight a proposed state statute that would have extended the holding of the second Watuppa case. They believed the statute would take the property of mill owners on the river that exited the ponds by decreasing its volume. Their efforts may have persuaded Holmes, then of the Massachusetts Supreme Judicial Court, to hold in the final case that the mills should be compensated for their losses. The pivotal evidence was a deed, as it would be later in Mahon. Although ancient and previously unknown to the plaintiffs, it proved sufficient to support their claims. Legal sta-
bility eventually prevailed, despite the economic turmoil of the region and period.

The tale of the Watuppa Pond cases and related events is worth narrating, not only because it is a good yarn, but also for the insight it sheds on Holmes and Brandeis and on the development of doctrine that remains in dispute to this day. This Article is its first full telling.

I. THE WATUPPA PONDS CASES

The Quequechan (pronounced “quick-e-shan”), or Fall River, originated in North and South Watuppa Ponds, which were connected by a narrow passageway and covered about 3300 acres.26 After two miles, the river emptied into tide waters; during its last half mile it fell 130 feet, and it was there the original mills were located.27 In 1889, the city of Fall River depended entirely on the prosperity of its 57 cotton mills, which operated 43,875 looms and 2,000,000 spindles (one-seventh of the total in the entire country), produced about 500,000,000 yards of cloth a year, and employed a total of 20,000 people with a weekly payroll of about $125,000; their invested capital amounted to $20,000,000.28 Fall River had many advantages as an industrial city, and had become the leading textile manufacturing center in the country by 1875.29

In 1871, the Massachusetts legislature authorized Fall River to appropriate water from North Watuppa Pond for domestic purposes and explicitly made the city liable if a resulting diminution in water power affected the mills adversely.30 Prior to 1886, 222 acts

27. Id. at 196; see also 1 Louis C. Hunter, A History of Industrial Power in the United States, 1780-1930, at 533 (1979).

The 1888 dollar was worth approximately $42.65 in 1989 dollars. The figure is derived from The Value of a Dollar: Prices and Incomes in the United States 1860-1989, at 2 (Scott Derks ed., 1994). The weekly payroll would thus be equivalent to $5,331,250 in 1989, and the invested capital an impressive $853,000,000.
30. The statute read:
[T]he city of Fall River shall be liable to pay all damages that shall be sustained by any person or persons in their property by the taking respectively of the entire waters of said North Watuppa Pond, or by the taking of any less
of this kind similarly provided for compensation to mill owners in Massachusetts, consistent with the common law's treatment of riparian owners' rights to a flow of water. In 1873, the city accordingly passed a bill taking 1,500,000 gallons of water per day from the Watuppa Ponds.

The Watuppa Ponds, however, were not ordinary ponds. They were "great ponds," as were many bodies of water affected by the appropriation acts.

II. WHAT IS A "GREAT POND?"

The colonists of Massachusetts Bay Colony considered its many, large, freshwater ponds and lakes too vital to the community's survival to permit them to be privately owned. Horace Gray, Jr., in Commonwealth v. City of Roxbury, noted that while the colonists were eager to enact a body of laws, they did not want to be perceived as overstepping the command in their charter to "make no laws repugnant to the laws of England." Their first proportion of said waters, as authorized by the second and third sections of this act, or by the taking of any land, rights of way, water rights or easements. St. of 1871, c. 133, § 10, cited in Watuppa Reservoir Co. v. Fall River ("Watuppa I"), 134 Mass. 267, 268 (1883).

31. Warren & Brandeis, supra note 26, at 195, 199. The common law of watercourses evolved prior to the nineteenth century industrial expansion, and was founded upon the maxim, aqua currit et debet currere, ut currere solebat; that is, water flows, and should flow, as it is accustomed to flow. Every owner of property through which water passed was entitled to its use. Similar to the concept of prescription, this rule was modified to avoid an inevitable anti-development effect as the demand for water power increased. Theodore Steinberg, Nature Incorporated: Industrialization and the Waters of New England 140-48 (1991).

32. Watuppa I, 134 Mass. at 268.


35. 75 Mass. (9 Gray) 451, 503-28 (1857) (editor Horace Gray, Jr., reporting in a note following the decision).


36. Roxbury, 75 Mass. (9 Gray) at 513; see also Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 71 (1851) (Shaw, C.J.): It might seem to them less arrogant to set forth and declare their 'liberties' and rights in this form, than to enact in terms a body of laws, which might seem to
code, the “Body of Liberties,” (“colony ordinance” or “ordinance”) was published in manuscript form in 1641 and amended annually until 1648.37

Section two of the colony ordinance read as follows:

“Every inhabitant who is a householder, shall have free fishing and fowling in any great ponds, bays, coves[,] and rivers, so far as the sea ebbs and flows within the precincts of the town where they dwell, unless the freemen of the same town or the general court have otherwise appropriated them.

Provided, that no town shall appropriate to any particular person or persons, any great pond, containing more than ten acres of land, and that no man shall come upon another’s propriety without their [sic] leave, otherwise than as hereafter expressed.

...,

And for great ponds lying in common, though within the bounds of some town, it shall be free for any man to fish and fowle there, and may pass and repass on foot through any man’s propriety for that end, so they [sic] trespass not upon any man’s corn or meadow.”38

indicate a disregard of the authority of the mother country. This use of the term ‘liberty,’ as synonymous with right, franchise, and privilege, is strictly conformable to the sense of the term as used in Magna Charta .... Id. See also Stoddard, 89 Mass. (7 Allen) at 166 (discussing the colonists’ desire to make a code of written laws without “express legislation, in order to avoid any direct antagonism with the government in England”).


According to Storer v. Freeman, 6 Mass. 435, 438 (1810), the ordinance was “annulled with the charter by the authority of which it was made” in 1684, id., but Gray says that the judgment against the charter was denied by the House of Commons, and was never admitted here. Roxbury, 75 Mass. (9 Gray) at 517.

38. Warren & Brandeis, supra note 26, at 197 (quoting Colonial Laws of Massachusetts 90). Gray suggested that the colony ordinance really only defined what was at the time common usage, as a result of the exigencies of colonial life. Roxbury, 75 Mass. (9 Gray) at 514-17. The contemporary version of the ordinance is codified at Mass. Gen. L. ch. 131, § 45 (1992).

Note that the ordinance operated prospectively only and explicitly excluded ponds that had been granted into private hands prior to its enactment. Apparently, however, few such conveyances were made. The second Watuppa Pond opinion said only one was known and that it had been upheld as creating good title in the grantee. This conveyance was made in 1635 to John Humfry, and consisted of “500 acres of land & a freshe pond, with a little ileland conteyneing aboute two acres.” Watuppa Reservoir Co. v. City of Fall River (“Watuppa II”), 18 N.E. 465, 470 (Mass. 1888); see also Stoddard, 89 Mass. (7 Allen) at 165 (citation omitted). Wiswell’s Pond in “Newtown” was the only other example I found. See Stoneham v. Commonwealth, 144 N.E. 83, 84 (Mass. 1924).
This provision concerning public ownership of, access to, and use of ponds over a certain size secured an important right, as shown by its inclusion in the same chapter that dealt with freedom of speech in courts and town meetings and the freedom of emigration. Its broad purpose, dear to the hearts of the colonists, was to "declare a great principle of public right, to abolish the forest laws, the game laws, and the laws designed to secure several and exclusive fisheries, and to make them all free."  

On its face, the ordinance appeared to authorize a trespass to the land surrounding a great pond if the property were not actually damaged. This limitation on property ownership was understandable given the primitive conditions under which the ordinance was enacted. Inevitably, however, as the Commonwealth became more densely populated, the ostensible easement that this created was severely narrowed by the courts. In 1863, the question arose for the first time whether the uses specified in the ordinance (fishing and fowling) were exclusive; the court interpreted the public reservation to be flexible enough to include additional uses. Later cases, however, held that the ordinance was only "intended to limit the passing and repassing to unimproved and uninclosed [sic] lands lying on the ponds, and [was] to be construed with reference to the condition of things existing when the ordinance was adopted." The distribution of competing rights among individuals, state and local governments, and businesses, some of which had rights granted by the legislature, became increasingly more complex. As cities and towns proliferated in Massachusetts, the public's need for fresh water and the mills' need for power came into direct conflict.

III. *Watuppa I*

The Watuppa Reservoir Company was incorporated in 1826 to construct a dam that would raise the water in the ponds to a certain height and to maintain a reservoir for the benefit of the company's

41. *Stoddard*, 89 Mass. (7 Allen) at 167. The court stated:
With the growth of the community, and its progress in the arts, these public reservations, at first set apart with reference to certain special uses only, become capable of many others which are within the design and intent of the original appropriation. The devotion to public use is sufficiently broad to include them all, as they arose.

Id.; see also Warren & Brandeis, *supra* note 26, at 205-06.
42. Slater v. Gunn, 49 N.E. 1017, 1019-20 (Mass. 1898).
stockholders, the mill-owners on the river.\textsuperscript{43} In 1883, the company and eight mills sued for damages from Fall River’s 1873 appropriation of water and the resulting diminution in their water power.\textsuperscript{44} The city argued that the state owned the great ponds and the land under them and that riparian owners on the Quequechan had no right to the flow of water, contrary to their rights at common law.\textsuperscript{45} The superior court disagreed and the supreme judicial court affirmed; the 1871 statute had explicitly provided damages for injury to water rights and the city was required to compensate the mills. Furthermore, even the lowest mill on the stream, the American Print Works, which used the water only for bleaching and cleansing processes and not for power, was also entitled to damages.\textsuperscript{46}

Various local papers reflected the anger which the decision aroused. The \textit{Fall River Daily Herald} stated, "[t]his decision is contrary to reason, though it may be quite in harmony with the law, and it only shows how widely separated these two things sometimes become."\textsuperscript{47} The \textit{Fall River Daily Evening News} announced that damages would amount to $76,780.95.\textsuperscript{48} The next day it claimed

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Ten years may seem like a long time between the city's order and the suit, but the controversy had been brewing for some time. See WILLIAM ROTCH, REPORT ON THE CASE OF THE WATUPPA RESERVOIR CO. VS. THE CITY OF FALL RIVER (1880) (civil engineering report on the computation of damages sustained by the city's taking of water).
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Massachusetts in general, and Fall River in particular, led the country in production of printed cloth, so possibly this mill was essential to the others. See SMITH, supra note 29, at 86.
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In 1881, Thomas Stetson, counsel for the city, argued forcefully that manufacturing establishments which did not use water for power should not be able to recover any damages. He reasoned that in 1825, when the reservoir company was incorporated, none of the mills on the river had any other use for the water, as there was no steam power in Fall River until 1838. Argument of Mr. Stetson 23-24 (Apr. 16, 1881). The legislation that had protected Massachusetts mills since colonial days, see infra note 96, had not contemplated using the water for steam, dyeing, bleaching or cleansing, but only for driving a mill by a head of water. Id. at 23-25. In this peripheral issue, only mentioned in passing in the dissent to the second opinion, Watuppa Reservoir v. City of Fall River, 18 N.E. 465, 475, 478 (Mass. 1888) (Knowlton, J., dissenting), we see the tension between ancient law and contemporary reality.

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Another article says that an additional annual charge of up to $25,000 was possible. \textit{The Water Suits Decision}, supra note 44. In the briefs preceding the second suit, Stetson claimed the amount paid was actually about $70,000. Hearings on Petition for an Act Granting the City of Fall River Water from a Great Pond, Legis. Comm. upon Water Supply, 3, 5
\end{quote
that the 1871 statute, the basis for the award to the mills, had been
drafted by a Judge Thomas, "learned counsel" for the company. 49
Further, "shrewdness on one side [the city's lawyers], and public
spirit on the other [the mills] were wanting, and the city will be
under the galling necessity of paying in perpetuity for that as a priv­
ilege which they ought to enjoy as a right." 50 The article noted that
water power, as a source of energy, "was growing less valuable as
compared with steam year by year." 51

In fact, Fall River had not become the major textile producer
in the country by remaining as it had begun, dependant upon the
falls of the Quequechan. The first mill had been built on the river
in 1813, 52 but by 1850 the water power had been developed to the
fullest possible extent. Conveniently, at about the same time,
George Corliss' improvements in steam-powered engines made
them adaptable to textile mills. 53 By 1860, Fall River's first three
steam powered mills had almost one quarter of the total number of
spindles in the city; by 1875, the city's eleven water wheels pro­
duced only a fraction of the horsepower of its eighty-one steam en­
gines. 54 Mills constructed in the last half of the century were no
longer tied to the falls for power, but could obtain sufficient water
from wells or canals and could be located anywhere. 55 By 1883, all
the water-powered mills were provided with auxiliary steam power,
because the river was an unreliable source of power in the sum­
mer. 56 By the late 1880s, steam was the primary source of power. 57

(May 18, 1886) (argument of Thomas M. Stetson, petitioner) [hereinafter Argument of
Thomas M. Stetson]. The company asserted that the sum paid was considerably less,
$50,792.25. See Brief for Watuppa Reservoir Company at 24, Petition of the City of Fall
River for an Amendment to its Water Act 1871 Ch. 133, (1886) [hereinafter Petition].
In contemporary dollars, damages would have ranged between $2,166,278 and

49. The Water Suits, supra note 44.
50. Id.
51. Id.
52. Nuisances in Quequechan River. Hearing by the Committee on Health, FALL
RIVER WKLY. NEWS, Mar. 1, 1883, at 1.
53. SMITH, supra note 29, at 45. The last two water-powered mills were built in
1846 and 1848. Id. at 46.
54. Id. at 47.
55. Id. at 71-79 and map at 73, showing the pattern of mill construction.
56. ROTH, supra note 44, at 5; Nuisances in Quequechan River. Hearing by the
Committee on Health, supra note 52.

As early as 1836, several Fall River mills had steam power available for use during
droughts. 1 HUNTER, supra note 27, at 514. By 1880, "auxiliary steam power was
widely adopted in the principal river basins east of the Mississippi." Id. at 515.
57. SMITH, supra note 29, at 40.
IV. THE "WATUPPA NUISANCE" CASE

At the time of the first water suit, the Watuppa Reservoir Company was embroiled in another controversy. When the water in the ponds was low, the shore (or "flats") of the half-mile long channel between the ponds and the company's dam became a "'wet, rotten [and] spongy'" swamp. The resulting stench from sewage dumped there by the mills and the city was offensive half a mile away. It was considered at least detrimental to the public health, if not the actual source of scarlet fever, typhoid fever, and diphtheria, and the cause of several deaths. The Board of Health believed that the only way to abate the nuisance was to fill in the flats. The company relied on its right to flood the flats and vehemently disagreed, since filling would narrow the channel and deplete the flow of water to the mills. It claimed that the abutting property owners were merely trying to confiscate its property, and that it was entitled to compensation. After all, the company asserted, it had not created the nuisance; the mills and the city had.

In 1877, Colin Mackenzie, an owner of property on the flats, began filling the swamp and continued after the company ordered him to stop. Two years later, the company sought an injunction, but the Board of Health ordered Mackenzie, twice, to continue. The company sued to restrain him, and won, despite the admission of its lawyer, James M. Morton, that the land was not necessary to it. The opinion ignored the legislature's right to condemn property under its police power; it construed the company's charter in its favor and the Board of Health's orders to be "simply void." The

58. Nuisances in Quequechan River. Hearing by the Committee on Health, supra note 52 (citation omitted).
59. Id.; see also The Watuppa Pond Nuisance, FALL RIVER WkLY. NEWS, Mar. 15, 1883, at 2. For twenty years, ending in 1876, the Hargraves soap works had boiled dead cows and horses and poured its refuse into the stream and the ponds. The Watuppa Flats. Hearing for the Abatement of the Nuisance, FALL RIVER DAILY EVENING NEWS, Mar. 8, 1883, at 1. The sewer system had not extended to the part of the city affected. Nuisances in Quequechan River. Hearing by the Committee on Health, supra note 52.
60. Nuisances in Quequechan River. Hearing by the Committee on Health, supra note 52. The company suggested $500,000 as appropriate compensation. The Watuppa Nuisance, FALL RIVER DAILY HERALD, Mar. 8, 1883, at 4.
62. Watuppa Reservoir Co. v. Mackenzie, 132 Mass. 71 (1882). See also Nuisances in Quequechan River. Hearing by the Committee on Health, supra note 52. Morton also argued for the company in Watuppa I, see supra part III, which he cited as supportive of the company's rights here. The Watuppa Flats. Hearing for the Abatement of the Nuisance, supra note 59.
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case was then referred to a Master to determine damages from the filling done before the injunction.64

The Board of Health, "thus thwarted in their efforts, found themselves helpless in an emergency demanding instant action" and applied to the legislature.65 Hearings followed, debating: (1) what, if anything, should be done, (2) how the financial burden should be allocated for both compensation to the company (if granted) and the cost of filling, and (3) the language of a proposed bill to ensure the abatement of the nuisance.66 All parties agreed that the nuisance existed, but the city, after Watuppa I, was loath to pay compensation to the company again.67 Although the company claimed that its rights of flowage were equivalent to ownership of the land, it denied either responsibility or liability.68 Each party accused the others of personal interest in the outcome and hotly contested which group—commissioners appointed by the State Board of Health, the City Council,69 or the Board of Aldermen—was best qualified to abate the nuisance.70 Although the members of the legislative committee who participated in the hearings were sympa-

64. The Watuppa Nuisance, FALL RIVER WkLY. NEWS, Mar. 15, 1883, at 2.

65. Id. The papers were furious at the whole affair. An irate article, published after the court's decision in Watuppa I, said:

Taking the establishment of this claim [in the water case] in connection with the monstrous assumption of the Watuppa Reservoir Company to levy blackmail on the owners of the land along the river, and to prevent the filling in of the land to the great inconvenience and danger of the whole population of the city, it becomes a question whether the people of Fall River have any rights which these corporate tyrants are bound to respect.

The Water Suits Decision, supra note 47.


67. The Watuppa Flats Nuisance. Hearing on the Proposed Legislative Act, supra note 66. Mayor Braley stated:

We are mulcted first for damages to pay for water in the ponds and then for damages in this nuisance case and if we cannot get relief without paying for it, we prefer to let it go. . . . Do they [the company] not hold this right of flowage subject to the police power of the Commonwealth and the demands of public good?

Id.

68. Id.

69. Id.

70. The Watuppa Flats Bill, FALL RIVER WkLY. NEWS, Apr. 5, 1883 at 2. See also The Claims of the Reservoir Co., FALL RIVER WkLY. NEWS, Apr. 12, 1883, at 2.
thetic to the city, the bill, as finally passed, was "framed in the
interest of the Watuppa Reservoir Company rather than in that of
the city, and grant[ed] more to the company than they [had] asked
for." The right conveyed in the company's charter to flood the flats
did not include the option to ignore a public nuisance. The state,
possibly subjected to pressure from powerful mill interests, ap­
peared to have eluded its responsibility to protect the public health.
As the company claimed the prerogatives of ownership, it should
have been held responsible, as any private owner traditionally
would have been, to abate a nuisance on its property. Possibly this
controversy contributed to the firm stance the court took against
the mills five years later.

V. Watuppa II

In March 1883, shortly after Watuppa I was decided, the Fall
River Daily Herald reported that the Board of Aldermen had au­
thorized the mayor to "petition the legislature for such an act or
acts as may be necessary to secure the rights of the city under all
future condemnations of water in the Watuppa ponds for city and
public purposes." Three years later, the city successfully proposed
that the legislature amend the 1871 act to allow the city to draw an
additional 1,500,000 gallons daily. The amendment, in response to
Watuppa I, included a provision specifically denying the city's liabil­
ity for damages other than those "the state itself would be legally

71. The Watuppa Flats Bill, supra note 70.
72. The Watuppa Flats, FALL RIVER WkLY. NEWS, Apr. 19, 1883, at 1. The bill, as
reported on the same page and approved the following June 16, provided that expenses
and damages would be paid out of the city treasury, with reimbursement through collection
of taxes. The city, however, had never been able to collect any taxes from the
reservoir company. The Watuppa Flats Nuisance. Hearing in Boston Yesterday, FALL
RIVER WkLY. NEWS, Apr. 12, 1883, at 2. As an article on April 19 stated, "[w]e see in
this bill a certain and extravagant expenditure of the public money with a very uncer­
tain return of any portion of it." The Watuppa Flats, supra.
73. City Government. An Additional Appropriation of $25,000 Made to Meet the
Judgment in the Water Suits, FALL RIVER DAILY HERALD, Mar. 6, 1883, at 1.
74. Argument of Thomas M. Stetson, Before the Legislative Committee upon
Water Supply. In Behalf of the City of Fall River, Petitioner for an Act Granting it
Water From a Great Pond (May 18, 1886). Stetson alleged that thirty-two million gal­
lons of water flowed from the ponds every day. Id. at 5. Not surprisingly, counsel for
the mills estimated the flow somewhat lower, at twenty-five million gallons. Brief for
Watuppa Reservoir Company and the Mills Constituting It at 10, Petition, supra note 48.
liable to pay." The amendment continued: "Parties holding, in respect of said pond, any privileges or grants heretofore made, and liable to revocation or alteration by the state, shall have no claim against said city in respect of water drawn under this grant." The amendment annulled "any privileges heretofore enjoyed in respect of said pond," if inconsistent with the amended act. Governor Robinson refused to sign the bill, on the grounds that the amendment authorized the taking of private property without providing compensation, but it was passed over his veto.

Again, the Watuppa Reservoir Company and the Troy Cotton and Woolen Manufactory sued for an injunction to prevent the city from diminishing their water power. The question presented was whether the legislature could constitutionally authorize a city to appropriate the waters of a great pond for public purposes without compensating owners of land or privileges on a stream flowing from it.

In the arguments before the Legislative Committee on Water Supply, the exchange of briefs that preceded the second case, and the opinion itself, the defendant city relied upon the colony ordinance and case law which supported its devotion of the ponds to public use and argued that the legislature's power to regulate public rights was unlimited. Its counsel, Thomas Stetson, distinguished...
between a direct invasion or appropriation of private property, which would constitute a taking, and a consequential injury to private property that might result from legislative control of public rights, which would not. 82 Stetson emphasized that water was then of secondary importance to steam. 83 He claimed that every one of the mills had "long since outgrown its waterpower, and ha[d] to maintain two separate power plants. In fact about all the value left it is to use it for a claim of damages whenever the public needs the State's water." 84 The mills and reservoir company had taken their grants subject to the public rights in great ponds, and compensation to them was not required. 85

The plaintiff company claimed that no case had ever held that the waters of a great pond could be diverted by the state or anyone to the detriment of a riparian proprietor on an outlet stream. 86 Its lawyers sought to show that the ponds were part of a natural, constantly flowing watercourse, and therefore not governed by the ordinance, but by the common law; 87 thus, the state could not be

that cause entitles him. Do you know, gentlemen, he wrote it himself . . . A man may not disclaim his debts, nor will we allow Judge Hoar to disclaim the fame and honor of such a decision . . . Nobody ever could drive a horse-cart through one of Mr. Justice Hoar's decisions.

Argument of Thomas M. Stetson, supra note 48, at 7-8. At least in this opinion, nobody did.

82. Argument of Thomas M. Stetson, supra note 48, at 7-8. This argument clearly anticipated the modern regulatory takings dilemma.

83. Id.

84. Id. at 28. See supra notes 55-57 and accompanying text.

85. Argument of Thomas M. Stetson, supra note 48, at 27-29; see also Watuppa II, 18 N.E. at 466-67.

86. Brief for Watuppa Reservoir Co. at 11-12, Petition, supra note 48. The company also accused the city of attempting to try questions that, in 1883, had already "been tried before commissioners, the [s]uperior court and the [s]upreme court and decided adversely to the city, but which the city fancies it finds some encouragement [sic] in the opinion of the court in 134 Mass. [sic] 267 to try over again if it can secure this Legislation." Id. at 23. The "encouragement" referred to may be found in the first Watuppa ponds case, "[i]f there may be contingencies in which it might divert the waters to the injury of persons owning water rights on the outlet without making compensation, it is clear that the Legislature has not claimed or asserted any such right in this case." Watuppa Reservoir Co. v. Fall River ("Watuppa I"), 134 Mass. 267, 269 (1883); see also Watuppa II, 18 N.E. at 468 (plaintiffs' counsel's argument).

87. Watuppa II, 18 N.E. at 468 (plaintiffs' counsel's argument). The company admitted: There may be great ponds with neither inlet [n]or outlet whose waters have not been granted by the Legislature from which the Legislature might authorize water to be taken without compensation to any one. But in such a case the waters of the pond form no part of a watercourse.

Brief for Watuppa Reservoir Co. at 12, Petition, supra note 48.
allowed to divert the water to the detriment of a lower proprietor.\textsuperscript{88} The company's charter was a contract between it and the state that had vested water rights in the mills which the later legislative amendment could not injure.\textsuperscript{89} Further, although the company did not deny that public needs must be satisfied when they arose, it asserted that the act of 1886 was unconstitutional because it made no provision for compensation.\textsuperscript{90}

In a four to three decision, the court dismissed the suit.\textsuperscript{91} The common law would indeed have required compensation for a diminution in the flow of an ordinary stream, but the legislature was entitled to grant these waters without paying riparian users because the colony ordinance had devoted great ponds to public purposes.\textsuperscript{92} The ordinance was "universally accepted" and in force throughout the entire state, even in regions that had originally not been within the boundary of Massachusetts Bay Colony when it was enacted.\textsuperscript{93} No legal liability would be incurred for the deprivation because the company's right to the waters of the ponds, although granted to it by the state, was "a qualified right, subject to the superior right of the state to use the pond and its waters for other public uses."\textsuperscript{94} The legislature could also authorize cities or towns to exercise these powers.\textsuperscript{95} The opinion never mentioned the increasing importance of steam power.

A dissent reiterated the argument that the ponds were part of a natural watercourse, and saw no reason to treat streams flowing from great ponds any differently from other streams. It maintained that the ordinance should not be interpreted to limit riparian proprietors' right to a flow of water:

\textsuperscript{88} Brief for Watuppa Reservoir Co. at 11, Petition, supra note 48. To this point the city claimed that at common law, riparian proprietors had the right only to "ordinary" use of water. \textit{Watuppa II}, 18 N.E. at 468-69; see infra part V-B. Thus, even if the ponds were a part of a watercourse, the city claimed the outcome should be in its favor.

\textsuperscript{89} Brief for Watuppa Reservoir Co. at 15-17, 20-22, Petition, supra note 48; see also \textit{Watuppa II}, 18 N.E. at 469.

\textsuperscript{90} Brief for Watuppa Reservoir Co. at 21-22, 28, Petition, supra note 48; see \textit{also Watuppa II}, 18 N.E. at 469.

\textsuperscript{91} \textit{Watuppa II}, 18 N.E. at 474. One of the majority who voted against compensation to the mills was Oliver Wendell Holmes, Jr. He had been an associate justice of the supreme judicial court since 1882, but was absent from the court when \textit{Watuppa I} was decided.

\textsuperscript{92} Warren & Brandeis, supra note 26, at 196-98; \textit{Watuppa II}, 18 N.E. at 472.

\textsuperscript{93} \textit{Watuppa II}, 18 N.E. at 471 (listing Plymouth, Nantucket, Dukes County, and Maine).

\textsuperscript{94} \textit{Id}. at 472.

\textsuperscript{95} \textit{Id}. \textit{See infra} parts V-A, V-B.
Can it be supposed that our forefathers, zealous as they were in the encouragement of the erection of mills, intended by these provisions to take from individuals, without compensation, rights which they had acquired under previous grants to have water flow through their lands forever?96

Furthermore, the dissent continued, the Commonwealth had entered into a contract with the company through its corporate charter, and the rights it had granted in that document vested rights in the company that could not be taken away without compensation unless the charter was repealed.97

As a result of Watuppa II, "a hue and cry has been raised that the supreme court had struck a terrible blow at the manufacturing interests of the state."98 The day of the decision, the Boston Daily Globe reported, "[i]t was claimed at the argument by plaintiff's counsel that if the statute was constitutional it might result in Fall River alone in the destruction of $340,000 worth of property without the payment of $1."99 The Fall River Daily Evening News and the Fall River Daily Herald applauded the decision.100

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97. Watuppa II, 18 N.E. at 479. As noted, the majority summarily dismissed the plaintiff's argument on this point, saying that the state had not granted away the public's rights in the ponds by granting the corporate charter. Id. at 473.

98. Free Water for Towns, FALL RIVER DAILY HERALD, Mar. 13, 1889, at 1. Interestingly, the article went on to discuss the mills' inclination to try the case again:

There is talk of some one-sided trade between a king of the colonies and the Piutes whereby a title was passed, which has been overlooked. If enough importance can be attached to the antique transaction, it is possible that the city may be put to considerable expense in the future.

Id. See infra § VI.


100. The Water Suits, supra note 78. The newspaper reported:

Citizens of Fall River will receive the judgment of the supreme judicial court... with a grateful sense of relief and abiding confidence in its equity and
The Fall River Daily Evening News stated that Fall River was not the only city in the state that required water and had been discouraged from taking it by manufacturing interests. In fact, after the 1886 act was passed, similar powers had been granted to other towns, and soon legislation was proposed to codify and give general application to the holding of the case.

A. The Proposed Water Bill

Shortly after Watuppa II, Representative Pratt of Abington introduced a bill into the legislature to extend the effects of the ruling by general legislation. The Committee on Water Supply granted hearings to “consider the expediency of giving to towns that now or may hereafter take water from Great Ponds for domestic, fire and other purposes the same rights in the waters of said ponds as the Commonwealth now has.” A few days later, on March 7, a Boston Daily Globe editorial entitled Danger to Manufactures expressed its disgust for the opinion, the proposal, and its potential effect on industry.

wisdom . . . [T]he Legislature . . . ha[s] only exercised the natural rights which belong by the supreme law of public necessity, to every government which has a right to protect its people. Any other decision would have been based upon narrow technical grounds, and could not have stood the sifting test of public thought and criticism.

Id. See also Another Victory. The Wautuppa [sic] Reservoir Company Beaten in Court, FALL RIVER DAILY HERALD, Oct. 30, 1888, at 1.

101. The Water Suits, supra note 78. The article stated:

Fall River is not alone in meeting the exorbitant claims of people who resist public improvements and the general welfare of the community in a spirit which challenges the entire body of citizenship to rebel against it. All over the commonwealth there are places situated as Fall River is in relation to our great ponds, heavily taxed as we are to maintain public improvements, who will hail this decision as a signal and righteous interpretation of law in the interest of public health and public justice.

Id.

102. The City. Hearing on Water Supply, FALL RIVER DAILY EVENING NEWS, Mar. 21, 1889, at 2 (naming Ashburnham, Maynard, Millbury, and New Bedford); see also Warren & Brandeis, supra note 26, at 198 n.2 (adding Ayer and Malden); see infra part V-B and text accompanying note 123.

103. Legislative Hearings, BOSTON DAILY GLOBE, Mar. 1, 1889, at 6.

104. Danger to Manufactures, BOSTON DAILY GLOBE, Mar. 7, 1889, at 4 (evening ed.). The editorial read:

The manufacturing interests of Massachusetts are in great danger of being crushed between an upper and a nether millstone. Already they are compelled to pay heavy taxes on all their raw materials and machinery. Already they are forced to buy coal in Pennsylvania instead of drawing from the cheaper supply of Nova Scotia and Cape Breton. And now it is proposed to deal them a still heavier blow, and allow the water power by which New Eng-
An editorial in the *Fall River Daily Evening News* related Pratt's arguments and those of several opposing participants at the March 12 hearing. The damages section of the draft under dis-

land has attained her present position to be destroyed without making compen-
sation to the ruined owners of the mills and factories dependent on it.

This is the true meaning of the insidious order introduced in the Legislature some time since and referred to the water supply committee. Its language is well calculated to conceal the true effect aimed at. Under the guise of giving to towns that take or may hereafter take the water of large ponds the same rights that the State now has in the waters of these ponds, it is really designed to enable towns to drain every mill stream in the Commonwealth supplied by such ponds, and to pay no damages for thus confiscating valuable property. This is the true effect of the proposed bill, and no doubt its promoters are well aware of it. Whether the intended victims are equally well informed will be seen at the hearing next Tuesday.

It was generally supposed, until a few months ago, that the Constitution of Massachusetts afforded protection against an injustice of this character. In November [sic, the case was decided October 29], however, the Supreme Court ruled [in Watuppa II] that because our forefathers had decreed that the great ponds should be open to the public for fishing and fowling, therefore the State was at liberty to do as it pleased with them regardless of any rights in streams flowing from them. However sound this position may be in law, it cannot affect the question of legislative action. This Commonwealth cannot afford to exact from its manufacturers all that it may be entitled to take. If the ordinance of our ancestors is in favor of the proposed law, their practice at any rate is against it; for prior to 1886 there was no instance of allowing a town to take water without compelling it to pay damages. We think the rule laid down by the court is more honored in the breach than in the observance, and depre-
cate any legislation which unjustly encroaches upon private rights.

105. The Legislature. *Great Ponds*, FALL RIVER DAILY EVENING NEWS, Mar. 13, 1889, at 3. The paper reported:

The legislative committee on water supply yesterday gave a hearing on the question of giving to towns the rights now held by the State in great ponds. . . .

...[Representative Pratt] wanted legislation on general principles to em-
body the decision of the majority of the supreme court in the Fall River Watuppa reservoir case. He argued that towns should be allowed to take water from great ponds for domestic and fire purposes without compensation for damages any more than the State itself would be liable. He did not believe in private water companies, but, he would have cities and towns furnish them-

selves with water. He had not included cities in the bills because their water supply might necessitate so extensive a taking of water privileges as to be a public calamity for which damages should be paid. But as the court has de-

cided that the mill owners have no vested rights in the waters of great ponds, he would have that principle clearly laid down in statue [sic] law, so that towns would not be liable for vexatious suits for damages.

Judge E.C. Bumpus, of Quincy, said that the supreme court recently de-
cided that when the towns take water they must pay damages to cover all time, but these cases have gone back for retrial. He denied now that any retroactive legislation could be passed, and claimed that the State could not give away rights and then take them back. The policy of the State has been, as shown by
cussion provided that:

[N]o action for the recovery of damages arising out of the taking or using by any town of the waters of a great pond shall be com­menced or sustained by any littoral owner or riparian proprietor on the shores of such pond or the bank of any stream flowing or fed therefrom against a town so taking or using such waters. 106

This preclusive language no doubt inflamed the mill owners and the company still further.

Another hearing on the same bill was announced for March 20. An editorial in the Boston Daily Globe that morning, Save the Ponds and Streams!, alleged that without the mills, thousands of workers would be unemployed. 107 The evening editorial, Towns'

over 200 water acts, to have compensation made for water so taken. He said he would submit a brief communication to the committee showing the reasons why any retroactive legislation would be unconstitutional. From 1712 to the present, legislation has been favorable to the mill owners.

H. G. Barker, of Cambridge, representing the Revere Copper Company, said litigation was but just begun and urged that the Legislature should be cautious and conservative in this matter. He claimed that when the State granted ponds to towns, the grant included the land under the water. He believed the State would not take away from the mill owners the rights already given them. He further claimed that the mill owners have acquired now their rights by undisturbed occupation and possession for a long term of years.

Id. Barker ultimately prevailed with his prescription theory in Attorney Gen. v. Revere Copper Co., 25 N.E. 605 (Mass. 1890). This argument was not offered in Watuppa I, presumably because the company's charter was too recent to establish prescription. In Revere Copper, the company showed that the mill and its predecessors in title had lowered the height of the pond since 1770, a period of 120 years. Id. at 606. The reservoir company had only been incorporated half as long. Watuppa Reservoir Co. v. Fall River ("Watuppa I"), 134 Mass. 267, 269-70 (1883)

106. Free Water for Towns, supra note 98.
107. Save the Ponds and Streams!, BOSTON DAILY GLOBE, Mar. 20, 1889, at 4 (morning ed.). The editorial stated:

There is another hearing at the State House today, beginning at 10 a.m., on the proposed cession of the State's rights in the ponds and water-ways to the towns within whose borders they are situated.

We have already called attention to the dangerous character of this proposition. The water-ways belong to the people of the State, and the people would very soon lose all control over them if the State rights were given to the towns; because many towns would sell or give away the exclusive right to the ponds and streams. It would be most obnoxious to ordinary people to see a pond or stream where the public from time immemorial had the right to row or fish, turned into the private property of some wealthy person. Besides, many ponds would be dried up by those who covet the land they occupy; and that would destroy the source of water supply for many a mill stream, which would ruin many a valuable plant and throw large numbers of working people out of employment.

The Legislature must not be allowed to give away the State's right to the water bodies—that is, the people's rights—without a vigorous protest.
Water Supply-Mill Owners Who Want To Get Power Cheap, described what transpired at the hearing, where Louis D. Brandeis presented the case for the company and its witnesses.108 The Fall River Daily Evening News reported the company's position to be that the proposal "would do irreparable injury to mill privileges on streams flowing out of great ponds, that private property would be most unjustly confiscated, and the Watuppa decision was against justice and still of doubtful authority."109

The committee agreed on a general water supply bill to report to the legislature on April 2. Its powers to take water were very broad, and its provisions for paying compensation quite narrow, although by no means as stringent as originally proposed.110 This bill only prohibited a suit until water had actually been diverted. It

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The hearing on the order as to giving to towns taking their water from great ponds the same rights as the State now has, brought out a large number of mill owners and others at the morning's session of the committee on water supply. Louis D. Brandeis had the conduct of the case for the remonstrants.

The speakers . . . [a]ll spoke in remonstrance. . . Mr. Herschel spoke of the narrowness of the margin by reason of which the great paper milling interest of the Western part of the State is kept alive and of the danger of interfering with the present status of affairs. In the course of his evidence he spoke favorably of the English system of compensating reservoirs, and said it could only benefit communities and mill-owners, while no one could be harmed by it.

James B. Francis of Lowell, an engineer and water-power expert, said that the proposed legislation would bear hardly upon the smaller class of mill owners. Mr. Brandus [sic] then introduced the following as representing the lesser mill interests: B.S. Binney of Shirley spoke of the fact that insecurity in the matter of water powers within the State rendered it impossible to raise money on many of them and thought that inasmuch as Massachusetts has no coal supply, the State should exercise extreme caution in regard to interfering with vested water rights.

F.W. Wood of Woodville was strenuously opposed to the proposed measure, as was also A.S. Morrison of Braintree. Mr. Brandus [sic] followed with some remarks, in which he defended the remonstrants from the charge made by Mr. Pratt [who proposed the bill] in his speech at the former hearing, that they were "squatters." He went on to show the magnitude of the interests involved by stating that there were over 1200 great ponds in the State with a water acreage of 93,000 acres. The rights were the result of the confidence of mill owners for over 200 years that the State would protect them in the outcome of their labor and foresight. What was proposed would be striking blindly at many interests, and for reasons of a trivial nature.


110. General Water Supply. Comprehensive Bill from the Committee, BOSTON DAILY GLOBE, Apr. 2, 1889, at 3 (morning ed.).
did not pass, and on May 7 the House adopted the report of Brandeis' committee. \(^{111}\) Despite an "energetic" defense by the defeated

An act to define the powers and duties of cities and towns authorized to supply their inhabitants with pure water.

Section 1. Any city or town hereafter authorized by the Legislature to supply its inhabitants with pure water may, by such agency as the city or town may determine, besides taking and holding the waters it is authorized to take, also take and hold any water rights connected with such waters; may prevent the pollution of said waters; may collect, store and convey said waters into said city or town, and use and distribute and sell said waters to the inhabitants thereof; may construct and maintain dams, reservoirs, storage basins, drains, conduits, pipes and aqueducts and erect buildings and machinery; may change the course of any streams within the water-shed of its source of supply; may carry any pipes, drains, conduits or aqueducts over or under any river, water-course, tide water, railroad, highway or other way; may enter upon and dig up such road or way for the purpose of laying down, maintaining or repairing any pipe, drain, conduit or aqueduct, and may from time to time take, by purchase or otherwise, and hold any lands, rights or easements that said agency may deem necessary for carrying out the purposes aforesaid.

Section 4. The city or town shall pay all damages that shall be sustained by any person in property by such taking of any waters, lands, rights or easements; and if any person sustaining such damage fails to agree with the city or town as to the amount of damages sustained, such damage shall be assessed and determined by a jury in the Superior Court for the county in which such property is situated ... within three years of such taking ... .

Section 5. No application shall be made to the court for the assessment of damages for the taking of any water or water rights, or for any injury thereto until the water is actually withdrawn or diverted by the city or town; and any person or corporation whose water rights may be thus taken or affected, may make his application aforesaid at any time within three years from the time when the waters shall be first actually withdrawn or diverted.

\(_{Id.}\)

Compare with the damages provision of the original bill, \textit{supra} text accompanying note 106.

\(^{111}\) \textit{House Debates the Elevator Bill and Great Pond Rights, \textit{Boston Daily Globe},} May 7, 1889, at 8. The \textit{Boston Daily Globe} reported an opposition speech by "Johnson of Haverhill":

For 250 years . . . the citizens of Massachusetts have, under encouragement from the General Court, built up by their own enterprise, unaided by the State, the flourishing mills, villages and towns on the streams in this Commonwealth. A large proportion, if not all, of these streams have their source or are fed by great ponds.

Yet the gentlemen in the sixth division presents [sic] a bill here today which would take from the mills that support of nature which enables them to hold their position.

Now, Mr. Speaker, let us for a few minutes consider what the effect would be if this bill were passed. You see the bill gives to towns the right to take the waters of a great pond to be used for any purpose (not alone for domestic or fire purpose), without giving any compensation to the riparian proprietor or littoral owner on the shores of such pond or along the lines of streams flowing therefrom, or, in other words, to the manufacturer [sic], who use and own the
bill's sponsor, it was "characterized a revolutionary bill, and was rejected by a decisive vote."  

Additional factors that influenced this vote will be discussed in the following sections, but even on its face it seems a correct resolution. The balancing of interests necessary to resolve controversial issues of this kind is usually more successful in a state legislature where all sides have an opportunity to debate, than when delegated to less diverse and potentially even more self-interested governmental units.  

B. *The Exchange of Articles in* Harvard Law Review  

Meanwhile, shortly after the second case was decided in October 1888, and at the same time as the debate on the water bill proposal, three consecutive law review articles elaborated upon *Watuppa II* 's majority and dissenting arguments in response to the bill. Louis D. Brandeis and Samuel Dennis Warren, Jr., wrote the first and third, and Thomas Stetson, a lawyer for Fall River in *Watuppa I* and *II*, the second.  

Warren was a close friend and former classmate of Brandeis' at Harvard Law School and a member of a prominent New England family with extensive paper mill holdings. After graduating, he had practiced with a Boston firm, Shattuck, Holmes & Munroe, in which Oliver Wendell Holmes, Jr. was a partner. Warren persuaded Brandeis to return east from St. Louis, suggesting that they take advantage of his business and social contacts and form a partnership. They formed Warren & Brandeis in 1879, and in that

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water power of the streams. You see, Mr. Speaker, that it is no "picayunish" interest that would be affected by the passage of this bill. On the contrary, it would be detrimental, if not ruinous, to all the manufacturing interests of the Commonwealth that are in any way dependent on water for power, and it is a fact, Mr. Speaker, that one-half of the power used in Massachusetts today is water power.  

You will find that it is not the mill owners alone that will be affected. It is not the mill owner who is proprietor of the stores and houses in most instances in the community where the mill is established, but the value of these stores and houses is dependent upon the prosperity of the mill and when you strike a blow at the mills you strike a blow at all the industries in the town.  

In the language of one of the remonstrants at the hearing before the committee, and by the way, the gentleman was not a mill owner, "such action would seem to be an extreme case of State robbery such, as if done by an individual, the State would consider a penitentiary offence."

*Id.*

113. *See infra* notes 186-87 and accompanying text.
114. ALPHEUS T. MASON, BRANDEIS: A FREE MAN'S LIFE 54-55 (1946) (citing a
year Warren introduced Brandeis to his old boss, Holmes. The three often met socially, before Holmes was appointed to the supreme judicial court, and became close friends. 115 In 1888, Warren's father died and he left the practice to assume control of the family business. 116 After that, the firms shared offices in the same building so the former partners could still see each other on a regular basis. 117

It was Warren's idea that they should share the editorship of a law review to be started at Harvard. 118 Brandeis eventually became a trustee and the law review's first treasurer. 119 They contributed money, advice, and three jointly written articles. At Warren's suggestion, the first two concerned the Watuppa Pond cases, 120 to which Brandeis referred in a letter of March 20, 1889:

We are having a Water fight now which is quite as warm as the rag fight was a few years ago, with the advantage however of the Community being with us, instead of prima facie against us. I have been making public opinion by wholesale. The press is full of our editorials, the law reviews of our articles, & before the legislative committee on Water Supply we have had two hearings & another comes Monday. 121

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See also Mason, supra note 114, at 571, for the influence Brandeis later wielded over Holmes when the two were justices of the United States Supreme Court.

116. 1 Letters of Louis D. Brandeis, supra note 115, at 77 n.1.

117. Allon Gal, Brandeis of Boston 12 (1980); Brandeis, supra note 115, at 77-78 (citing a letter from Brandeis to his brother Alfred, March 20, 1889, after Warren had left the firm).

118. Mason, supra note 114, at 54; "Half Brother, Half Son," The Letters of Louis D. Brandeis to Felix Frankfurter 569 (Melvin I. Urofsky & David W. Levy eds. 1991). Warren had written to Brandeis, "I regard [Holmes] as the greatest American thinker in law . . . I think we will make our discussions triangular with some benefit all around." Id.

119. Mason, supra note 114, at 67-68; Baskerville, supra note 114, at 78.

120. See Alfred Lief, Brandeis: The Personal History of an American Ideal 50-51 (1936).

The last and vastly more famous article was The Right to Privacy, 4 Harv. L. Rev. 193 (1890), inspired by the socially prominent Warren's resentment at having his private life discussed in newspaper society columns after he married the daughter of the ambassador to Britain. Lief, supra at 51. See also Philippa Strum, Brandeis: Beyond Progressivism 135 & n.65 (1993); Baskerville, supra note 114, at 82-88.

121. 1 Letters of Louis D. Brandeis, supra note 115, at 78.
Sounding the theme of settled expectations, their first law review article, dated December 15, 1888, was incensed over the dangers to mill owners in a "great manufacturing community," who had expended capital in reliance upon the uninterrupted flow of water and built factories "upon nearly every stream in Maine and Massachusetts, which [was] favorably situated and capable of furnishing water-power." As previously mentioned, Fall River's 1886 water act was immediately followed by statutes granting to cities and towns the same right that the state had, to appropriate water from great ponds without paying compensation. As a result of the passage of these statutes, Brandeis and Warren envisioned a widespread curtailment of waterpower. They strongly asserted that compensation should be paid to mill owners and examined state cases in detail for support.

John Henry Wigmore, author of *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, told the following story:

"A few months after I was admitted to the bar, I was going along Washington Street, Boston (I remember almost the very place), one Monday, when I met Louis Brandeis. (He was then known as the 'young Choate' of the Boston Bar). He said to me, 'Do you want to earn $100? Supposing a near-faint, I answered, 'Most hungrily I do.' He said, 'I am counsel for some mills and must argue next week before a legislative Committee against a bill to condemn all public lakes in Massachusetts for municipal water supplies. Before Saturday night, I must know what is the total potential water power available from Massachusetts lakes.' 'But,' I said, 'where does it tell what the total is?' He answered, 'Nobody knows; that is just the point.' 'Well,' I asked, 'tell me how to figure it out, at least.' He answered, 'I don't know how. And I haven't got time to find out. That is why I employ you.' 'Well,' I said, 'I would do blinder things than that for $100. Next Saturday night, you said?' 'Yes,' he ended, 'results by next Saturday.' You can imagine what I went through, that week. But * hadn't* to find out, and *did* find out."

WILLIAM R. ROALFE, JOHN HENRY WIGMORE: SCHOLAR AND REFORMER 15 (1977) (quoting Wigmore, “Independent Research Work,” 2. Remarks to the Northwestern University Law School Class of 1915 (Wigmore Collection)). Brandeis actually paid Wigmore $50 more than he had offered, and said it was for "your very valuable services in the great pond question." *Id.* (citing letter from Louis D. Brandeis to Wigmore, April 2, 1889 (Wigmore Collection)). In a letter to Oliver Wendell Holmes, Jr., on Feb. 6, 1916 (the year Brandeis was appointed associate justice of the Supreme Court), Wigmore wrote that he considered this his first genuine retainer. *Id.*

In contemporary dollars, $150 was approximately equivalent to $6400, a considerable sum for a week's work, even today. *See supra* note 28.

For the "rag fight," *see Strum, supra* note 120, at 17.


123. *See Warren & Brandeis, supra* note 26, at 198 n.2; *see also* Watuppa Reservoir Co. v. Fall River ("Watuppa II"), 18 N.E. 465, 473 (Mass. 1888). Other towns were said to have been holding off until *Watuppa II* was decided before proposing such legislation. Warren & Brandeis, *supra* note 26, at 198 n.2. *See supra* notes 101-03 and accompanying text.

124. Warren & Brandeis, *supra* note 26, at 202-11. Two Maine cases were in-
They argued that riparian owners on a stream ("whatever its source") were traditionally entitled to the natural flow of water without diminution, subject to the reasonable use of the proprietors above. Thus, mills on rivers flowing from great ponds deserved no different treatment. The rights of riparian owners were property within the meaning of the Constitution, and not even for a public purpose could the legislature deprive mills of the flow of water without paying compensation. They asserted, as the Watuppa II dissent had, that the state had no exceptional rights to great ponds under the ordinance, which only reserved them to towns for public use.

A private land owner whose property completely surrounded a small pond, with no outlet stream, owned it completely and could do what he liked with the water. But if the pond had an outlet, if it was "a link in a chain through which water made its course from the mountains to the sea," he would only have the reasonable use of the water and could not divert or destroy it. The state's rights in great ponds with outlet streams could be no better. The public right to such ponds only extended to its use of the water as a pond, not to ownership of the water itself.

Brandeis and Warren concluded:

It is a wide departure from the spirit which has in the past led the Commonwealth of Massachusetts to foster its manufacturing industries by every means in its power, and the decision is to be regretted especially, because it comes at a time when all the restraints imposed by the Constitution and the courts are needed to protect private property from the encroachments of the Legislature.

In almost immediate response, Stetson's article of February 15,
1889, took issue with the claim that the ponds were part of a water-course. He did not contest the common law rights of riparian owners, but denied that title to running water could be extended to these ponds’ assertedly still waters. The law of lakes and not the law of watercourses had to apply to water that did not flow, even if the lake had an outlet stream; and no rule prohibited the diversion of still water. To apply the common law to great ponds “would be a hypothecation forever of these glorious free public reservoirs, to pay claims of mill-sites and bank-owners.” For the majority in Watuppa II and this author, the “colonial wisdom” of the ordinance made it unnecessary for the public to “pay for its water to the miller”; principles of “loftier utility” controlled in the Commonwealth.

Brandeis and Warren’s April 15 rebuttal alleged that there was a “slight current” near the channel into the south pond and the point at which the city took water was a short distance away; only the body of the pond was still. The ponds’ perceptible current entitled them to be classified as a watercourse. Distinguishing the degree of flow required might be “unpractical and unscientific,” but they asserted that the Watuppa ponds met the requirements.

The “private ownership of water-power” had been unquestioned in Massachusetts until these cases; no “paramount right of the public” to water power had been recognized until the 1886 act. True, the ordinance had predated the Constitution, and, despite its limitation on private property, admittedly could have been transformed into a settled rule of property through long compliance. However, the common law had prevailed instead, and it now defied both common law and constitutional principles to “extend by forced interpretation an ancient ordinance to a new application subversive of a well established and long undisputed rule of property.”

134. Id. at 320.
135. Id. at 324-25.
136. Id. at 320.
137. Id. at 330-31.
139. Id. at 3.
140. Id. at 18.
141. Id. at 9 n.1. This argument reiterates that of the Watuppa II dissent, Watuppa Reservoir Co. v. Fall River (“Watuppa II”), 18 N.E. 465, 478 (Mass. 1888) (Knowlton, J., dissenting).
142. The Law of Ponds, supra note 138, at 9 n.1, 22.
Brandeis and Warren ultimately won this debate when the general water bill was defeated on May 7, but perhaps not entirely for the reasons they expressed. A strict application of the colony ordinance, such as their opponents Stetson, Representative Pratt, and the Watuppa II majority advocated, would never account for water once it flowed from a great pond, as it did in many instances. But the mill acts, whose pro-industry spirit Brandeis and Warren and the Watuppa II dissent invoked, simply immunized mills somewhat against suits by proprietors whose land was flooded and did not by themselves grant rights to the flow of water or guarantee compensation to mills in the event of a diminution. The common law would have provided damages for the mills, but there was no apparent way to apply it. Given these choices, the problem seemed insoluble. The proper balance among these competing interests was by no means clear, and whether the ponds had a current was too debatable a point upon which to rest a resolution; it had, after all, lost in Watuppa II.

Chief Justice Lemuel Shaw, whom Brandeis and Warren credited with resurrecting the ordinance in this context, had addressed a similar situation almost forty years earlier in dicta. In Cummings v. Barrett, mill tenants on a stream that originated in a great pond claimed the exclusive right to control all of its water; they sought to enjoin the cutting and taking of ice from the pond, which might deplete the amount of water they needed to power their mills. Shaw wrote:

We are not aware that [the colony ordinance] has ever been altered. What the rights are of adjacent or riparian owners of land bordering on such ponds, has, we believe, never been the subject of adjudication or discussion. . . . But in the advanced state of agriculture, manufactures, and commerce, and with the increased value of land and all its incidents, there will probably be hereafter increased importance to the question, whether and to what extent such riparian proprietors have a right to the use of the waters, for irrigating land, for steam-engines, for manufactories which require a large consumption of water, and for the supply of their own icehouses, for delivery to neighbors, and for more distant traffic.

In a case between the owners of a mill with the privilege of a

143. See supra § I.
144. See supra note 96 and sources cited therein.
145. Warren & Brandeis, supra note 26, at 202-03.
146. 64 Mass. (10 Cush.) 186, 187 (1852).
mill stream, and the riparian owner of land, on a large pond, supplying such mill stream, the nearest analogy perhaps, and that is apparently a strong one, is to that of riparian proprietors, on a running stream.\textsuperscript{147} Apparently this celebrated justice would have agreed with Brandeis and Warren and allowed the common law rule to regain its vitality once water left a great pond.

At the same time as the debate on the water bill, a strike in Fall River highlighted the mills' importance to an increasingly industrialized and complex community.

C. \textit{The Fall River Weavers' Strike}

In 1884, the Fall River mills cut the wages of all laborers by twenty percent on the ground that the Democratic administration, led by Grover Cleveland, might reduce the tariff. After he tried to do so and failed, the mills rescinded the pay cuts for all classes of labor except one. Five years later the weavers, the poorest paid and least skilled workers in the mills, were still ten percent short of their 1884 salaries, despite the election of Benjamin Harrison, a Republican who advocated a high tariff.\textsuperscript{148} The weavers requested several times that the Manufacturers' Board of Trade restore their wages, to no avail.\textsuperscript{149} The manufacturers claimed that the weavers had not recouped their 1884 salaries because they had been better paid than other mill workers\textsuperscript{150} and, at salaries averaging eight dollars a week, the weavers were as well paid in Fall River as anywhere.\textsuperscript{151} Attempts to negotiate failed, and on March 12, 1889, a front page headline in the \textit{Boston Daily Globe} read: Silent Looms. Fall River

\begin{footnotes}
\item[147] Id. at 188.
\end{footnotes}
Weavers Begin the Battle. General Surprise at the Number Enlisted. Seven Thousand Already Engaged in the Struggle. Determination the Watchword of Leaders. Manufacturers Sanguine of Ultimate Victory.152 Never in all of Fall River's many mill strikes had so many workers left at one time,153 but the manufacturers were unconcerned because of an oversupply of weavers.154

The spinners' union was one of the strongest labor organizations in the country; it was well organized and recognized by the manufacturers. The weavers, however, had failed to establish a union until this strike, primarily because their large number (almost ten thousand) included men, women, and children. They were not as easy to control or mobilize as the spinners, whose union had only about eight hundred adult male members.155 The weavers also tended to be indifferent to trade unionism, a problem that plagued them for years.156

When the new union ordered the strikers to avoid trouble and stay away from the mills, however, its orders were obeyed.157 The spring weather was good and the strike was almost a vacation to workers accustomed to "the stuffy, noisy weave rooms inside the grim looking mills."158 Between four and five thousand strikers attended a meeting in the park.159 Spirits were high, and the weavers'
only terms were “unconditional surrender.”  

But the strike had been ordered with an almost empty treasury and no means to support thousands of weavers; the lack of sound leadership was apparent within the first few days.

A connection was swiftly made between the strike and the proposed general water bill. A Boston Daily Globe editorial entitled The Title to Ponds and Streams appeared the next morning—the day of the hearing before the water supply committee—predicting the demise of the mills and the jobs they provided and pleading with people of all political beliefs to protect the rights of the mill owners. The strike also got somber treatment in the local papers. The Fall River Daily Evening News pleaded that “appeals to prejudice and passion should be avoided” given the seriousness of the massive unemployment to the community, whether voluntary or in-

160. Few Knobsticks. More Weavers Desert Their Looms, supra note 158.


162. The Title to Ponds and Streams, BOSTON DAILY GLOBE, Mar. 12, 1889, at 4 (morning ed.). The editorial read:

Many valuable mills in this State and many thousands of working people are dependent upon water power. All who are interested in any way in maintaining the water supply in the mill streams or elsewhere should attend the hearing at the State House beginning at 10:30 today, to show cause why the pending resolve relating to the ponds and streams of the State should not be adopted.

All rights in the lakes and rivers of Massachusetts are now vested in the State. But it is proposed to give to the towns all the rights which the State possesses in the lakes, ponds and streams within those towns. The effect would be to enable any town to dry up any pond within its borders, and with it any mill stream that may take its rise in these waters, without any compensation to the owners of mills, whose plant would be ruined, or to the working people who would be thrown out of employment.

The just and proper title to the water ways and water bodies rests in the Commonwealth. So it has always been, and so it should remain. The State will make the gravest mistake if it lets its ancient rights — which are merely the ancient rights of the people — go out of its hands or divide them with towns or individuals. If that is done it will not be long before the people at large will have lost all control of the water of their State, as they have of the land: for many towns will sell or give away the exclusive right to sources of water supply.

This is a matter of so much importance, both to the large milling interests of the present time and to future generations, that the people, without regard to party, should make themselves heard and felt in relation to it. No legislator who values popular rights, as handed down from the colonial days, or who regards the great manufacturing interests, ought to vote for such a measure.

Id. See supra part V-A. Despite the claim Brandeis made in his March 20 letter, see supra text accompanying note 121, this editorial and the others cited in part V-A were all anonymous.
voluntary, and the importance of an expeditious solution.\textsuperscript{163}

The strikers received support from weavers in other towns,\textsuperscript{164} but other departments within the Fall River mills operated as usual. The spinners, for example, knew that the yarn they spun was being sold at a profit to other businesses in New England. As long as they worked, the weavers had no hope of causing the manufacturers any economic distress.\textsuperscript{165} Indeed, "manufacturers, so far from being alarmed at the prospect of a loss of earnings . . . regard[ed] the strike with philosopical [sic] serenity as an unavoidable incident, like the break-down of the machinery of a mill."\textsuperscript{166}

The mills refused an attempt by the state board of arbitration to arrange a meeting between the parties,\textsuperscript{167} because to recognize the new union would perpetuate an ongoing threat.\textsuperscript{168} They swore they would not raise salaries no matter how long the strike lasted\textsuperscript{169} and continued to assert that they paid higher wages for weaving than other manufacturing centers.\textsuperscript{170} The board and the manufacturers' committee, however, did agree that if the weavers went back to work first they might negotiate.\textsuperscript{171} The arbitrators requested that the weavers do so for three months at their old wages while the state studied the situation. The Weavers' Association Committee reported the proposal to the executive committee and it was quickly

\begin{itemize}
\item \textsuperscript{163} The Strike, \textit{FALL RIVER DAILY EVENING NEWS}, Mar. 13, 1889, at 2.
\item \textsuperscript{164} Way Not Paved Toward an Amicable Settlement of the Fall River Strike. \textit{State Arbitrators a Little Premature in Believing Progress Had Been Made}, \textit{BOSTON DAILY GLOBE}, Mar. 16, 1889, at 1 (evening ed.).
\item \textsuperscript{165} All Out. Weavers Very Generally Obey the Order to Strike, supra note 153; The Third Day of the Strike, supra note 161; Silvia, supra note 149, at 467-68.
\item \textsuperscript{166} A Word to the Weavers, \textit{FALL RIVER DAILY EVENING NEWS}, Mar. 16, 1889, at 2.
\item \textsuperscript{167} The Fourth Day. Weavers Hold a Variety Show on the Park, \textit{FALL RIVER DAILY EVENING NEWS}, Mar. 14, 1889, at 2.
\item \textsuperscript{169} The Fourth Day. Weavers Hold a Variety Show on the Park, supra note 167.
\item \textsuperscript{170} The Strike, supra note 163. The \textit{FALL RIVER DAILY EVENING NEWS} reported:
It is said that Lowell pays 20 cents for a cut of 50 yards, which would be at the rate of 18 cents for 45 yards, for which Fall River pays 19 cents, or a cent in favor of the Fall River weaver over the Lowell weaver. It is held also that in Lowell a weaver is not allowed as many looms as in Fall River, and that the average wages of weavers there will not exceed $7 per week.
\textit{Id.}
\item \textsuperscript{171} \textit{Id.}
\end{itemize}
rejected. On this, the fifth day of the strike, nine thousand weavers were out of work.

The following week, the weavers' committee suggested that the strikers might return to work if the manufacturers gave a token raise of five percent in the meantime, pending a settlement by the board of arbitration. The mill owners refused and only repeated their earlier offer. The Thursday evening *Boston Daily Globe* reported:

> The manufacturers have shown their teeth, and by refusing to arbitrate have practically paralyzed all the industries of the city. The complaints uttered against the corporations this morning are loud and long. All the traders, and every person who depends upon the prosperity of the city at large for his living, are making bitter complaints. They say that the mill owners are pigheaded, and that their refusal to submit to the terms offered by the State board of arbitration has put machinery in motion that will cost the city a million of money before it can be stopped.

Seventy thousand people lived in Fall River, all of them dependent in one way or another on the mills; between twelve and twenty thousand workers had been put out of work by the strike. The manufacturers were adamant:

> The agreement which the weavers had condescended to make would not receive the slightest notice from the board of trade. We will make no concession of anything, and if the weavers are willing to return to work on the old basis, we may then consider the advisability of leaving the question of wages to the Board of Arbitration for investigation. . . . We are now paying the highest wages, and we will pay no more. We will fight this strike to the end, even if it lasts six months.

*Another Proposition to Arbitrate, supra* note 175.


174. *No Signs of Weakening, supra* note 148. According to this article, the strike now included 15,000 people, about 10,000 of whom were weavers. *The Strike. The Situation But Little Changed from Last Week, Fall River Daily Evening News, Mar. 19, 1889, at 2; A Question of Endurance. No Arbitration, No Compromise, Fall River Daily Evening News, Mar. 21, 1889, at 2.*


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*Another Proposition to Arbitrate, supra* note 175.

177. *To Count the Cost of the Cotton Kings' Obstinacy Reveals Some Ugly Facts, Boston Daily Globe, Mar. 21, 1889, at 5* (evening ed.).

178. *A Word to the Weavers, supra* note 166 (estimating the number of people out of work at 20,000); *The Eleventh Day. Convincing Proof that Wages Could Be Raised,*
fledgling weavers’ union had managed to keep all but two thousand of the forty-five thousand looms idle for over two weeks, with little or no violence, despite “all the might of capital, and all the dread of poverty combined. . . . It was a wonderful achievement.” But more and more weavers were returning to work every day, and the Fall River Daily Evening News begged them to admit defeat. On March 27, partly due to the efforts of a local minister, the front page headlines read, Battle Over. The Fall River Weavers Yield To Starvation’s Gaunt Spectre. They Vote to Return Tomorrow. Decision of the Executive Committee. Causes a Murmur at the Park, Until Good Parson Brown Appears. He Persuades the Strikers to Acquiesce. The state board of arbitration would continue its investigation and the union would attempt to gain strength, but the weavers went back at their old wages. “All was lost but honor,” the Boston Daily Globe claimed. The Fall River Daily Evening News took a more qualified view. Each weaver lost $20 to $25, for a total gain to the mills of over $300,000 in wages not paid for fifteen days. The market for cloth actually improved from the lack of production, which further benefitted the manufacturers.

Mayor Jackson of Fall River spoke at several of the legislative hearings on the proposed general water bill. The mayor, predictably, defended the principle of the 1886 act that had benefitted his city with free water. He also expressed the belief that individual cases should be evaluated as they arose, and opposed the general

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179. But Just Begun. Half a Million Sunk in the Weavers’ Strike, BOSTON DAILY GLOBE, Mar. 26, 1889, at 1 (morning ed.). The relatively few mills in operation were operated mostly by unskilled children, who took “advantage” of the strike to learn the trade. Id.


181. Set the Looms in Motion, FALL RIVER DAILY EVENING NEWS, Mar. 22, 1889, at 2.

182. BOSTON DAILY GLOBE, Mar. 27, 1889, at 1 (evening ed.).


185. The Strike and Its Results, FALL RIVER DAILY EVENING NEWS, Mar. 28, 1889, at 2. In 1989 dollars, the weavers lost between $853 and $1066.25; the total wages lost would be approximately $12,795,000. See supra note 28.

186. See supra part V-A.
His lack of support may have been crucial to the bill's defeat and may seem perplexing without the perspective that the weavers' strike, which ended March 27, gives to his point of view. The manufacturers' expectations, that the common law and their corporate charters gave them rights to the flow of streams, encouraged them to invest in their factories with confidence and provide jobs for the many thousands of workers unemployed in Fall River at the same time as the bill was debated.

VI. WATUPPA III

Watuppa II remained a problem for the mills. In 1891, the Fall River Evening News reported complaints about the high rates that were being charged for the city water. Some citizens solved the problem by drilling artesian wells. One company altered a natural ravine through which a stream flowed so that it would function as a reservoir from which the company could lay pipes to its mills.188

187. Water Supply of Cities. Legislative Hearing, FALL RIVER WKLY. NEWS, Apr. 25, 1889, at 1. The newspaper reported:

The bill before the committee, Thursday, is one prepared in the interest of manufacturing corporations and of the city of Boston; it was a general bill regulating the water supply of cities and towns, and had in it the old provisions relating to the payment of damages, against which the city has successfully fought in the Legislature and the courts within the last few years.

The mayor, in his argument before the committee Thursday, presented the same line of argument adopted by him at the other hearings as to general legislation—that cases should always be treated individually—the circumstances surrounding them, the diversity of rights was such that no general bill that was just and equitable could be passed at the present day; that the splendid property of the State in its ponds was a wealth that the Legislature should protect with the greatest prudence; that whenever interested parties presented their claims before the Legislature on the one side, and the people their claims on the other, full opportunity should be given both sides to be heard, and no surrender made prematurely by general legislation to anybody; that the wisdom which had characterized the legislation, and which had reserved the ponds for uses not known, should be alike displayed by this Legislature in preserving, without gift to anybody, this great public property for whatever uses the future might bring forth. Replying to strictures made by the attorney of manufacturing interests against the legislation which Fall River had obtained, the mayor spoke strongly and forcibly in defense of its justice and equity.

Id. See also The City. Hearing on Water Supply, supra note 102; Water From Great Ponds, FALL RIVER DAILY EVENING NEWS, Mar. 26, 1889, at 3; Water Supplies for Cities and Towns, FALL RIVER WKLY. NEWS, Apr. 4, 1889, at 2.

That year the reservoir company brought the case back to court. To employ the common law to protect the rights of the mill owners, the ponds had to be excluded from the scope of the ordinance, which, as interpreted in Watuppa II, enabled Fall River to take the ponds' water without compensation. Watuppa II had stated confidently that the ordinance was in force throughout the entire state, despite its not having been "extend[ed] to those places by any positive enactment now known." In Watuppa III, Oliver Wendell Holmes, Jr., who had agreed with the majority in the second case that no compensation was due, now found for the mills based on an interpretation of new evidence that finely distinguished the state-wide application of the ordinance.

The modern state of Massachusetts was formed by the union of two colonies, Plymouth and Massachusetts Bay, in 1692. Fall River was in the part of the state which had been Plymouth, but Massachusetts Bay had enacted the ordinance. In 1656 and 1680, while still independent, Plymouth had conveyed to private individuals, plaintiffs' predecessors in title, two large tracts of land; these "time-stained deed[s]" had apparently been forgotten. The first grant, the "Freemen's Purchase," included land on the Quequechan River and about half of the north pond; the second, the "Focasset Grant" or "Purchase," included all of the south pond and the rest of the north. Holmes initially held that the latter deed conveyed "the ponds and the water-power embraced within its boundaries to the grantees as private owners," despite their having been mentioned only in the habendum, not in the granting clause.

If these conveyances had been made before the ordinance was

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190. See supra note 93 and accompanying text.
194. Real Estate. Wage Reduction Has a Depressing Effect, Fall River Daily Globe, Sept. 4, 1891, at 8; see also City Defeated. Water Suits Decided by the Supreme Court, Fall River Daily Globe, Sept. 3, 1891, at 7.
195. Watuppa III, 28 N.E. at 257. The grants were also referred to collectively as "The Grand Deed." City Defeated. Water Suits Decided by the Supreme Court, supra note 194.
196. Watuppa III, 28 N.E. at 257. The habendum clause read, "all the above mentioned and bounded lands, with all and singular the woods, waters, coves, creeks, ponds, brooks, benefits, profits, privileges, and hereditaments whatsoever in before arising, ac-
enacted, the plaintiffs' rights would be safely established under the common law, as the ordinance explicitly exempted prior grants from its terms, "unless the freemen of the same town or the general court have otherwise appropriated them." If the conveyances had been made after 1692, plaintiffs would clearly come under the ordinance's jurisdiction and Watuppa II would apply. But as they were made during the interim, the issue for the court was whether the ordinance was law in Plymouth Colony before its union with Massachusetts pursuant to the Province Charter of 1692.

Justice Holmes held that only "usage and . . . judicial decision" showed that the ordinance extended to Plymouth before 1692, and that these were insufficient to alter private rights. He cited an earlier case, Litchfield v. Scituate, for the proposition that "the time when the province charter passed the seals is indicated as the moment when . . . the ordinance became applicable to that part of the state." Thus, the Watuppa ponds were exempt from the ordinance's terms before it had legal effect in Plymouth by having been granted into private hands. The ponds were not reserved for public use. The common law applied, and the mill owners on the Quequechan could not be deprived of their water without due compensation from the city. Although Watuppa II was still good law in

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197. The ordinance was first published in 1641 and amended every year until 1648. See supra note 37 and accompanying text.
198. Colony Ordinance, Section 2 (1647).
199. See Chief Justice Shaw's opinion in Barker v. Bates, 30 Mass. (13 Pick.) 255, 258 (1832) (stating that the ordinance was "a settled rule of property in every part of the State").
201. Id. (citing Litchfield v. Scituate, 136 Mass. 39, 47 (1883)).
202. Watuppa III, 28 N.E. at 258. The rights of the Troy Cotton & Woolen Manufactory were not difficult to establish under this rationale, but the court had to strain a bit for the reservoir company. The reservoir company owned neither land nor water-rights. It had, however, built a dam and controlled the water power for the benefit of the mills. These activities "show[ed] a sufficient possession, under the title of the owners, to warrant the issuing of an injunction." Id.

A headline the day of the decision read: Great Pond Law. Supreme Court Reverses Its Opinion. Decision That Affects a Vast Deal of Property. The State's Power over Big Waters Limited. Fall River Must Pay for Its Drinking Supply. The article referred to the case as "highly important," involving "millions of dollars' worth of property." BOSTON DAILY GLOBE, Sept. 3, 1891, at 5 (evening ed.). An editorial comment
the portion of the state that had been Massachusetts Bay Colony, "the principles of State ownership there announced [did] not apply to these particular ponds, on account of the Pocasset deed."203

The company had prevailed over the city by utilizing previously unknown and ancient grants. It was an impressive piece of research and legal reasoning performed by "a New Bedford man, well known to lawyers"204 of the time, but whose identity remains unknown to this researcher.

The Fall River Daily Evening News referred to a compromise offer which the company had made before Watuppa III was decided. The offer included an annual tax exemption of about $5000 and the provision of some city water for the American Printing Company if the company were unable to satisfy its needs. The city had refused the offer, expecting that the judgment would be in its favor.205 An article in the Fall River Daily Herald suggested that if the city had accepted the offer, it would have been in a better position.206 The company's lawyer, however, seemed reasonable when he stated on the day of the decision:

If we asked for it the judge might issue an injunction restraining the city from taking water under the act of 1886, but the reservoir company will probably not do anything to interfere with the comfort of citizens.

the next day said, "[t]he Massachusetts Supreme Court has decided that riparian owners have rights by no means to be ignored." Editorial Points, Boston Daily Globe, Sept. 4, 1891, at 4.

204. Real Estate. Wage Reduction Has a Depressing Effect, supra note 194.

For the response to the case in the Fall River papers, see, e.g., Against the City. Black Eye Given Fall River Today by the Supreme Court, Fall River Daily Herald, Sept. 3, 1891, at 1; That Opinion. Text of the Ruling Against the Municipality, Fall River Daily Herald, Sept. 4, 1891, at 1 ("It is declared that the decision of the [Massachusetts] [S]upreme [J]udicial [C]ourt, that by the Pocasset grant the Watawpa [sic] company has a prior claim to the ponds, may be law, but it is not justice.").

James Madison Morton, who had been counsel to the mills in the "Watuppa Nuisance Case" and in Watuppa I and II, was appointed to the Supreme Court bench in 1890. James Madison Morton: A Memorial, 248 Mass. 593, 594 (1924) (supp.). This was the same year that a relative (perhaps his father, Marcus Morton, Jr., who wrote the opinions in those cases) retired as Chief Justice, having served twenty-one years on the bench. Id. Many of the articles on Watuppa III made the point that James Madison Morton took no part in the decision, and denied that his appointment had anything to do with the city losing the case. See, e.g., Against the City. Black Eye Given Fall River Today by the Supreme Court, supra.

206. That Opinion. Text of the Ruling Against the Municipality, supra note 204.
The only thing for the Reservoir Company now to do is to prove what its damages have been and sue the city for the taking of water during the past five or six years. The company can stop the city from taking water in the future under the act of 1886. The city can take water under the old act, which requires the payment of damages, the amount of which will be assessed, as formerly, by three commissioners.207

VII. Afterwards

Neither these opinions nor the law reviews portray the actual necessity for water power at the time.208 Even the contemporary newspapers give only a hint. In fact, steam had been gaining in importance for decades, as Stetson argued in Watuppa II.209 By 1860, Fall River had obtained about twenty-five percent of its power from steam,210 and by the early 1890s it had actually displaced water in New England as the primary power source of the textile industry.211 Fall River's location on the shore enabled it to import coal cheaply, which gave it such an advantage over its major competitor, Lowell, that it superseded that city as the country's largest cotton mill center.212 That is not to say, of course, that water did not retain sufficient value for other purposes to justify the mills' considerable interest in it.

In the same way that some of our modern environmental rulemakings drag on for years only to become moot before they are ever resolved,213 the company and the city finally reached a permanent compromise agreement the year after Watuppa III. Under it, the city was released from any past or future claims for damages arising from its appropriation of the ponds' water for public purposes, provided it would supply the mills with water when the pond level fell too low.214 This was not an unreasonable burden on the

208. See supra notes 51-57 and accompanying text.
209. See supra text accompanying notes 83-84.
210. 1 Hunter, supra note 27, at 486.
211. Smith, supra note 29, at 40.
212. Id. at 54. In 1871, Representatives of Lowell corporations complained to the Massachusetts Railroad Commissioners about the high rates and inadequate service that made the transportation of coal to Lowell so expensive that it could not compete with Fall River. Id. at 54-55.
214. Agreement Between the City of Fall River and the Watuppa Reservoir Company and Others, June 6, 1892, Reservoir Commission Reports, Dec. 6, 1897.
city by any means. By this time, water power, and the textile industry itself, were nearly at an end all over New England. The success of Fall River as an industrial city

had been based on the supremacy of steam as the source of power for new textile mills. . . . Fall River had definite locational advantages in comparison with most other New England textile centers. These continued to operate in some degree as long as this industry expanded in New England. But after 1890 their significance was hidden by the rapid rise of print cloth mills in the South.215

By the end of the century, the use of water power from the ponds was negligible. The ponds were polluted and stagnant, and served only to cool coal-powered mill engines.216

The very fact that the water was superfluous is significant. The court did not bend over backwards to protect the company in Watuppa III because the water was vital to the mills and because the mills were vital to the community. Watuppa III was decided (correctly, in my view) because the seventeenth century deeds, regardless of whether these immediate plaintiffs were aware of them, had been relied upon by their predecessors in interest to build an immense manufacturing enterprise. These expectations were not to be upset, even at this later date. The case was decided in favor of the mills because preserving their settled expectations was simply the right thing to do.

As noted, the author of Watuppa III was Warren and Brandeis' good friend, Oliver Wendell Holmes, Jr. The three socialized frequently and it was Brandeis who arranged a teaching position at Harvard Law School for Holmes in January of 1882, just before Holmes' appointment to the Supreme Judicial Court of Massachusetts.217 Given Brandeis' keen interest and participation in the controversy that followed the second opinion, it is tempting to spec-

215. SMITH, supra note 29, at 79 & ch. III. The advantages of being close to the cotton fields, advancing technology, and more lenient labor laws made the South a serious competitor; eventually it won out, leaving Northern mill cities ruined. "In 1909, southern production of print cloth constituted 36 percent of the national total. Fall River's dominance of the market was gone . . . ." Id. at 121.

216. 1 HUNTER, supra note 27, at 534. Fall River had symbolized the triumph of steam power over water power. Id. In 1895, the Borden family opened "Cotton Mill Number 4," vastly increasing the city's textile capacity; it put almost six acres of machinery in production. Id. at 535. But, only four years after Watuppa III, this waterpowered engine and its millworks were "virtually obsolete when installed." Id.

217. MASON, supra note 114, at 64-65; BASKERVILLE, supra note 114, at 78 (1994); WHITE, supra note 10, at 196-208.
ulate that he or Warren influenced Holmes to adopt their point of view in *Watuppa III*. Although it seems extremely likely that Holmes was aware of their efforts, I could find no evidence to support this hypothesis.218

Later in his state court career, Holmes demonstrated his pro-labor stance in his famous dissent in *Vegelahn v. Guntner*.

It is possible that in *Watuppa III* he was influenced by the Fall River strike (as Mayor Jackson may have been) and hoped that the weavers would benefit vicariously by a decision in the company's favor. But if that were so, he would have been disheartened by a headline in the *Boston Daily Globe* the same day the *Watuppa III* decision was reported, *Down They Go. Wages To Be Reduced in Fall River Mills. Cut of 10 Per Cent. Expected To Go into Effect Oct. 5. Low Prices for Prints the Cause Assigned. Operators' Course Causes Big Surprise. Spinners Postpone Action. Strike Probable.*219 There never was any peace between the mills and the city until the mills were gone.220

In 1994, there are neither mills nor waterfalls in Fall River. Bridges cross an empty gorge, the Quequechan having been relocated to a culvert underneath Interstate 195 in 1960.222 Former mill buildings serve as outlet stores. North Watuppa Pond is the city's main water source, and the South Pond fulfills its recreational needs.223 Thomas Stetson would be pleased.

**Conclusion**

Legal historians William Nelson and Morton Horwitz theorize that nineteenth century legal reasoning can be divided into two

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218. Professor Melvin I. Urofsky, who has edited many volumes of Brandeis' correspondence, wrote me: "I know of no direct letters from Brandeis and Warren to Holmes . . . ." Letter from Melvin I. Urofsky to Deborah Paulus (Mar. 30, 1993) (on file with author).

219. 44 N.E. 1077, 1081-82 (Mass. 1896) (Holmes, J. dissenting) (stating that the conflict between labor and management was as much competition as the more traditional kind, between businesses).


221. World War I gave Fall River a ten-year period of additional prosperity, but the South resumed its industrial advance after the war ended. *Smith*, supra note 29, at 121. See also *Silvia*, supra note 149, at 716 ("Fall River was an unfortunate forerunner of the national depression by five years.").


223. As a public park ultimately resulted, it seems much more reasonable that the city should have been required to compensate the mills.
broad periods. In the early part of the century, before a court followed a precedent, it considered whether the precedent furthered a desirable policy, such as the encouragement of economic growth. If not, the precedent was rejected on the grounds that society's needs had changed. But in the middle 1800s, when slavery became a major issue in national politics, "instrumentalism" gave way and was followed by a greater respect for precedent and a return to settled principles that derived from religion, American transcendentalism, and Enlightenment ideas about human rights. The formalism and the "scientific" jurisprudence of the last half of the century "flatter[ed] that longing for certainty and for repose that arose out of the fratricidal strife of the middle and the seeming social chaos of the end of the century." One aspect of this shift in focus was a reinvigorated interest in individual property rights.

The Watuppa Ponds cases reflect the struggle to reconcile two pairs of conflicts. First, there were conflicting contemporary expectations, those of the mills that the river would continue to flow and those of the city that the ponds would supply its steadily increasing need for water. Second, there were conflicting ancient legal principles, the common law of water rights and the seventeenth century ordinance. In Holmes' Watuppa III decision, stable legal principles, and the mills, triumphed through his interpretation of the deeds to trump the ordinance. Thus, the decision, in its effect on at least part of the state echoed Shaw's 1852 dicta in Cummings v. Barrett and was consistent with the spirit of the times. Yet the legitimate needs of the public were in no way thwarted by the decision, as the settlement a year later provided for them. Consequently, the correct conclusion, from the perspective of both public and private interests, was ultimately reached without any judicial undermining of settled principles.

As discussed, Justice Holmes would hold, thirty-one years after


226. Impact of the Antislavery Movement, supra note 225, at 566 (citing Oliver W. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 466 (1897)).


228. 64 Mass. (10 Cush.) 186 (1852). See supra text accompanying notes 146-47.
Watuppa III, that the statute at issue in Pennsylvania Coal Co. v. Mahon was a taking of the mining company's property without compensation and an interference with previously existing rights of contract, and thus formally open the regulatory takings question. He wrote:

When this seemingly absolute protection [of private property in the Fifth Amendment] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

The plaintiff in Mahon purchased his property under a deed that gave him only surface rights. Although the holding appears harsh, he and his predecessors in interest may have actually benefited from their bargain and their risk by negotiating a lower purchase price without the subsurface rights. In any case, his knowledge of his rights makes the case intuitively fair; his expectations were established in his deed. Although Holmes was forced to decide a "debatable and . . . burning question[,]" and created in that case an enigma for future generations of lawyers to grapple with, still the deed as a representation of settled expectations was paramount and dispositive for him. Furthermore, his Mahon decision was compatible with takings opinions he wrote on the Massachusetts Supreme Judicial Court at approximately the same time the Watuppa Ponds cases were before it.

Brandeis' positions are more complicated. It is clear that his legal philosophy underwent a significant change over time. His early career was dominated by a conservative belief in laissez-faire capitalism, perhaps unsurprising in the son of an entrepreneur. This belief is apparent in his partnership with Warren, where most of his clients were small factory owners, and in his advocacy for the mills. Stephen Baskerville writes that at the time of the Watuppa

230. Id. at 415.
231. Id. at 416.
234. STRUM, supra note 120, at 16.
235. BASKERVILLE, supra note 114, at 135.
Ponds cases, Brandeis was still heavily influenced by his education in the common law and that he was convinced that those concepts would continue to hold their primary position in American jurisprudence, despite growing evidence to the contrary after the Civil War.\textsuperscript{236} Brandeis' view of the pond controversy could be explained as exemplifying his belief that judicial evaluations of the common law were preferable to statutes, given the susceptibility of legislators to special interests.\textsuperscript{237}

His ideas gradually evolved into what Philippa Strum called an "egalitarian economic definition of democracy," which the justice had adopted by 1913 and would retain.\textsuperscript{238} Brandeis wrote, "rights of property and the liberty of the individual must be remoulded, from time to time, to meet the changing needs of society."\textsuperscript{239} A year later, dissenting in \textit{Mahon}, he wrote that an exercise of the police power that deprived an owner of the use of his property still provided that owner with "the advantage of living and doing business in a civilized community."\textsuperscript{240} It is thus logical to hypothesize that he would have agreed with the majority opinion in \textit{Keystone Bituminous Coal Ass'n v. DeBenedictis}, despite his early distrust of legislatures.\textsuperscript{241}

I believe that \textit{Keystone} was incorrectly decided because of its tendency to undermine principles necessary to a stable society. As William O. Douglas wrote:

The law is not properly susceptible to whim or caprice. It must have the sturdy qualities required of every framework that is designed for substantial structures. Moreover, it must have uniformity when applied to the daily affairs of men.

Uniformity and continuity in law are necessary to many activities. If they are not present, the integrity of contracts, wills, conveyances and securities is impaired. And there will be no equal justice under law if a negligence rule is applied in the morning but not in the afternoon.\textsuperscript{242}

I do not deny the usefulness of regulatory statutes to environmental interests. However, it is important to note the potential for abuse that \textit{Keystone} created. While the statute at issue in that case

\textsuperscript{236} \textit{Id.} at 78-79.
\textsuperscript{237} \textit{Id.} at 99-100, 112. See \textit{supra} part IV on the Watuppa Nuisance.
\textsuperscript{238} \textit{Strum}, \textit{supra} note 120, at 12, 20-23.
\textsuperscript{239} \textit{Truax v. Corrigan}, 257 U.S. 312, 376 (1921) (Brandeis, J., dissenting).
\textsuperscript{240} \textit{Pennsylvania Coal Co. v. Mahon}, 260 U.S. 393, 422 (1922).
was no doubt enacted to benefit the public.\textsuperscript{243} \textit{Keystone} gave legislatures the idea that many exercises of the police power would not result in compensable takings.\textsuperscript{244} The case made it easier for states to enact laws and regulations that are not justified and that interrupt private expectations unfairly.

Perhaps the course of legal reasoning in the nineteenth century conceals a lesson for the twentieth. A return to settled principles of law, such as the respect for property that recurred at the end of the last century, might be in order.\textsuperscript{245} Arguably, such respect was subrogated to the public enthusiasm for environmental regulation that began in the 1960s, just as it was subrogated to the desire for economic expansion and industrial development in the early nineteenth century.

While regulation is necessary in a crowded and complex world, government is simply not constitutionally authorized to regulate away the value of property any more than it can appropriate or invade it, without good public reason and just compensation. As Justice Rehnquist stated in \textit{Keystone}, in language reminiscent of Justice Holmes in \textit{Mahon},\textsuperscript{246} a broad exception to the just compensation requirement of the Fifth Amendment based upon the police power "would surely allow government much greater authority than we have recognized to impose societal burdens on individual landowners, for nearly every action the government takes is intended to secure for the public an extra measure of 'health, safety, and welfare.'"\textsuperscript{247}

The Supreme Court has not provided the guidance expected of it in this problematic area for some time. In \textit{Keystone}, four justices dissented.\textsuperscript{248} In \textit{Nollan}, five justices joined a total of three dissents.\textsuperscript{249} In \textit{First English}, the most cohesive of these decisions, one

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\textsuperscript{243} \textit{Keystone}, 480 U.S. at 492.
\textsuperscript{245} Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2901-02 (1992) ("[A]s it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends . . . .")
\textsuperscript{246} \textit{Keystone}, 480 U.S. at 512-13 (Rehnquist, C.J., dissenting).
\textsuperscript{247} \textit{Keystone}, 480 U.S. at 506 (Rehnquist, C.J., dissenting, joined by Powell, O'Connor, and Scalia, J.).
\textsuperscript{248} \textit{Id.} at 506 (Rehnquist, C.J., dissenting, joined by Powell, O'Connor, and Scalia, J.).
\textsuperscript{249} Nollan v. California Coastal Comm'n, 483 U.S. 825, 842 (1987) (Brennan, J., dissenting, joined by Marshall, J.); \textit{id.} at 865 (Blackmun, J., dissenting); \textit{id.} at 866 (Stevens, J., dissenting, joined by Blackmun, J.).
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dissent was joined in part by two other justices.\textsuperscript{250} In *Lucas*, one justice concurred,\textsuperscript{251} two dissented separately,\textsuperscript{252} and one filed a separate statement asserting that the writ of certiorari should have been dismissed in the first place.\textsuperscript{253} By returning to stabilizing principles such as those illustrated by the Watuppa Ponds cases, the Court could clarify its ambiguous message in takings jurisprudence.

\textsuperscript{250} First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 322 (1987) (Stevens, J., dissenting, joined in Parts I and III by Blackmun and O'Connor, JJ.).


\textsuperscript{252} Id. at 2904 (Blackmun, J., dissenting); and id. at 2917 (Stevens, J., dissenting).

\textsuperscript{253} Id. at 2925 (Souter, J., filing a separate statement).