

Chapter One

Introduction

This report investigates the power of the government of the City of Boston to frame and implement a vision for the city's future. The City of Boston has emerged from the difficult years of the 1950s to become a diverse, vital, and economically powerful urban center. In the words of a Boston Foundation report, published in 2000, "Boston is America's urban success story. It is also a city at a crossroads, never stronger economically but facing new challenges bred from that success."¹ The focus in this report, however, is not on the city as a successful urban environment where people live and work. It is on the city as a government. What can Boston's city government do, given the limits of state law, to address the new challenges the city faces? What are the city's legal powers? What state-imposed limits constrain its ability to improve the lives of city residents, workers and visitors?

In considering these questions, it is useful to have some idea about the kind of future the city might want to pursue. This report makes no attempt to prescribe a future for Boston, but it does offer four different visions of Boston's possible futures over the next 20 years and explore the ways in which the state-defined legal structure affects the city's ability to pursue these possibilities. The four possibilities offered here are: a global city, a regional city, a tourist city, and a middle class city. A global city concentrates on developing Boston's connections to the global economy – through high-technology, finance, health care and research – as the city's primary strategy for growth. A regional city focuses on Boston's surrounding cities and towns and is more concerned with the city's relationship to development around Route 495 than to its relationship with Shanghai. A tourist city seeks to attract visitors from around the world as its major emphasis – concentrating on hotels and restaurants rather than, as a regional city might, metropolitan-wide public transportation and parking. A middle class city's attention is centered on city residents rather than on visitors or the city's relationship to its region or the world. For a middle class city, services for residents, especially public education, are the most important. While these four visions are not mutually exclusive, they are not mutually reinforcing either. By using these four visions as a filter through which the issue of home rule can be viewed, it is possible to explore more clearly the kinds of powers Boston needs to develop itself in the next few decades –and to identify the gaps between its needs and its current legal status.

The conclusion of this report can be simply stated: Boston's power to pursue any, let alone all, of these goals is severely constrained by state-imposed legal limits. The city is subject to a multitude of state statutes that apply only to Boston, and these Boston-specific rules establish the framework for deciding matters as critical as controlling its revenues and expenditures and engaging in zoning and land-use planning. At the same time, the city is subject to many generally applicable state laws that restrict all cities and towns across the state. This legal regime is significantly out-of-date. The structure of state control over Boston's decision making essentially has not been changed for more than a century. Indeed, the key development in the last century has not been Boston's gaining more power but its transference of key parts of its infrastructure to the state in the 1950s. At the moment of its greatest vulnerability, the city made deals with the state – and with developers – that have affected its power ever since.

The other noteworthy event in the mid-twentieth century was an amendment of the state constitution in the 1960s that gave all cities and towns in the state, including Boston, home rule. But the Home Rule Amendment, as it is called, did not alter Boston's essential subservience to state power, as this report will demonstrate. As Boston enters the 21st century, the important questions are: Will the state continue to have the upper hand in determining Boston's future? Or will Boston itself be given more control – either alone or together with other cities and towns in its metropolitan region – to set its goals and work to fulfill them? This report seeks to not only to describe the present state of the law, but to answer questions related to the future. Notwithstanding the state's recognition of home rule and the city's impressive recovery from its

dark days of the 1950s, Boston remains a city bound – a city subject to important limits on its powers that the state has never seen fit to remove and that do not apply to other major cities in the country.

To better understand the limits on Boston's legal powers, this study compares Boston with six other major American cities: New York, Chicago, San Francisco, Seattle, Denver and Atlanta. These six cities were not chosen because they possess a great deal of legal power nor because they notoriously lack such authority. Instead, the cities were selected because they are similar enough to Boston in size, demography, and economic power to provide a useful comparison. These are major, successful cities from different parts of the country that are comparable to Boston but also vary in the size of their populations, their diversity (some have a "majority minority" population and some do not), the level of education their populations possess, and the size of their economies. All of them are large, economically influential actors within their regions and states. Each has an ethnically and racially diverse population, one that is substantially more diverse than the other communities that comprise its metropolitan region. Each is doing fairly well, as compared to other major cities in the United States. And each of them faces substantial but related challenges, occasioned by increasing suburban growth, significant immigration, and the persistence of concentrated poverty. Of course, the six cities are also different from Boston in a number of ways. Some are much bigger; all are growing more rapidly (some far more rapidly); some are facing problems that Boston does not have. And all of them are located in distinct regions of the country, each with its own political culture and attitudes about urbanism and local self-government.

What is most important for the purposes of this report is a particular kind of difference among the seven cities: they all have been organized by their states in very different ways, with different governmental structures and different legal limitations on their ability to guide their future. The variety of ways in which these cities are constrained and empowered is instructive in thinking about Boston's future. The numerous other studies that have compared major American cities too often have paid little attention to the role of the state-defined legal structure in urban policymaking. When inter-city comparisons have engaged in legal analysis, they have tended to focus on a particular power – such as the sales tax – without examining the broader legal structures within which this power is exercised. The most comprehensive studies of local legal power have usually been conducted on a state-by-state basis, while this report represents a comparative study of the legal powers of seven major American cities. The conclusion from this comparison is clear: Boston is saddled with a legal structure that is significantly more constraining than the one that applies to most of the other cities examined. This is most strikingly the case when it comes to fiscal control. But it is true as a general matter as well. The current limits on Boston's power do not derive simply from the fact that it is the state's largest and most important city. Other major cities in the country enjoy a degree of legal control and flexibility that Boston simply does not have.

To carry out this study, reports issued by city and state agencies, nonprofit organizations and scholars were reviewed, offering an important context for evaluating a broad range of legal materials that affect Boston. The legal materials include the constitutional provision that confers home rule on the state's 351 towns and cities, the state-wide initiatives, such as Proposition 2½, that powerfully affect the decision making discretion of these cities and towns, and the many state statutes that, as a whole, touch on virtually every aspect of local power. Additional focus has been placed on the narrowly targeted legislative enactments that uniquely constrain (and, on occasion, empower) the City of Boston, including the state laws that have shaped the city's own charter. In addition, state laws that authorize public authorities were examined, such as the Massachusetts Turnpike Authority and the Massachusetts Port Authority, which exercise important regulatory and land use control within the city limits. All of these legal materials were examined in light of the state judicial opinions that have interpreted them, often in ways that further confine the choices that Boston can make.

The non-legal aspects of Boston's power are also explored here, through interviews with people who are knowledgeable about city politics, some of whom have worked for the city or state government. As these experts recognize, the formal legal structure significantly affects Boston's political relationships with the state and its neighboring cities and towns. State law determines Boston's relationship with the state through the way in which it establishes Boston's political representation in the state legislature. And Boston's ability to cooperate with nearby towns and cities is a function of the legal powers that the state has given to (and withheld from) these localities. Throughout this report, aspects of the legal structure that affects the ability of Boston to work with – or struggle against – other cities and towns and the state itself are examined.

To obtain a comparable understanding of the legal power of the other six cities, six prominent local government law scholars from across the country were consulted. On the basis of a mutually agreed upon research design, each of these scholars performed a detailed investigation of the legal powers of one of the six comparison cities. The substantial reports they submitted have provided an indispensable resource; it would have been impossible to fairly assess Boston's comparative legal power without them. These colleagues investigated the legal powers of these other cities for a parochial reason: to shed light on Boston's current legal status. Boston is not the only city limited in its legal power to control its own destiny. Quite the contrary. All of the cities examined in this report operate under constraints. Indeed, some of the constraints imposed on other cities are even more problematic than those that apply to Boston. But, Boston can learn from the problems these other cities face as well as from their advantages.

The next chapter of this report offers a snapshot of Boston and the six other cities with respect to a number of different criteria, ranging from their physical size to the percentage of jobs they supply for their regions. This snapshot shows that Boston is right in the middle of the selected cities with respect to a number of important economic and demographic measures. The comparison with the other six cities also reveals the importance of Boston, with its significant economic clout, to both its metropolitan area and the state as a whole. And it demonstrates that there is nothing unique about Boston, compared to these other cities, that requires it to operate under a dramatically distinct legal structure.

The succeeding chapters examine the legal powers of all seven cities, with a uniform focus on Boston. Chapter Three sets forth the overall legal structure for the exercise of local power. It analyzes the Massachusetts Constitution's Home Rule Amendment and the state laws that affect the organization of the city's governmental structure. By comparing this legal structure with those of the six other cities, this report demonstrates that the state constitutional grant of home rule to Boston is weaker than that conferred on most of the other cities. The next four chapters look beyond the general legal structure to assess the authority of the seven cities to use their power to tackle significant areas of local concern: raising revenue, allocating expenditures, land use, and education.

Chapter Two

An Overview of Boston and the Six Cities

The six cities with which Boston is compared in this report can be described in a number of different ways. In terms of land area, Boston is the second smallest of the seven cities (San Francisco is a fraction smaller). In terms of population, three are larger and three are smaller than Boston. Boston is also in the middle when the size of the population of the metropolitan areas in which these cities are located is considered: Boston is third in the list of seven. Boston is last on the list, however, in one important respect. The population of all of the other cities – and all of the other metropolitan areas – grew faster in the 1990s than Boston's, some at dramatically faster rates.

CITY	LAND AREA SQ MILES	CITY POPULATION 2000 CENSUS	PERCENT POPULATION CHANGE 1990-2000	METROPOLITAN STATISTICAL AREA POPULATION 2000 CENSUS	PERCENT METROPOLITAN POPULATION CHANGE 1990-2000
New York	303	8,008,278	9.4	18,323,002	8.8
Chicago	227	2,896,016	4.0	9,098,316	11.2
San Francisco	47	776,733	7.3	4,123,740	11.9
Boston	48	589,141	2.6	4,391,344	6.2
Seattle	84	563,374	9.1	3,043,878	18.9
Denver	153	554,636	18.6	2,179,240	30.7
Atlanta	132	416,474	5.8	4,247,981	38.4 ²

The size indicated in the preceding chart of Boston's metropolitan population, like that of every other city, is only one of many ways of looking at population: the size depends on how one defines the area. The Census Bureau's population figures for the Boston area, for example, range from 5,819,100 (the consolidated statistical metropolitan area) to 3,406,829 (the primary metropolitan statistical area).³ Because of the controversy over the definition of the region, it is difficult to compare the seven cities in terms of their percentage of the regional population. Nevertheless, the chart offers one version of this comparison. As the next chart indicates, Boston is sixth of the seven cities in its percentage of its metropolitan area's population. But no city has a majority of its metropolitan population (like Boston, five of the seven cities have a quarter of the population or less). The following chart also shows the city's share of the state's population. Boston is fifth of the seven cities in this regard. As this report demonstrates at length, this figure is important because of the critical role the state plays in determining the power of the seven cities. It is important to note, however, that, like Seattle, Denver, and Atlanta, the Boston region – as distinguished from the city itself – contains roughly half (for the Boston region, more than half) of the state population. (The New York and Chicago regions cover areas in three states, but their in-state regional population alone is considerably more than half of their state's population.)

CITY	CITY POPULATION	REGIONAL (MSA) POPULATION	STATE POPULATION	CITY PER CENT OF REGION	CITY PER CENT OF STATE
New York	8,008,278	18,323,002	18,976,457	43.7	42.2
Chicago	2,896,016	9,098,316	12,419,293	31.8	23.3
San Francisco	776,733	4,123,740	33,871,648	18.8	2.3

Boston	589,141	4,391,344	6,349,097	13.4	9.3
Seattle	563,374	3,043,878	5,894,121	18.5	9.6
Denver	554,636	2,179,240	4,301,261	25.5	12.9
Atlanta	416,474	4,247,981	8,186,453	9.8	5.1 ⁴

Another way to compare the seven cities is to consider their racial and ethnic diversity. The percentage figures for the cities in the year 2000 are shown in the following chart.⁵ Like all but Seattle and Denver (the two cities with populations closest to that of Boston), Boston is a “majority-minority” city. As the chart reveals, Boston is right in the middle – fourth out of the seven cities – in its percentage of Black, Asian/Pacific Islander, and Hispanic (of any race) residents. As a result, its minority population is more diverse than that of Atlanta (predominantly Black), San Francisco (predominantly Asian), or Denver (predominantly Hispanic); it is also more diverse than Seattle (which has the largest non-Hispanic white population of all seven cities).

CITY	WHITE	BLACK	ASIAN/ PAC ISLAND	NATIVE AMER	OTHER RACE	TWO OR MORE RACES	HISPAN OF ANY RACE	NON- HISP WHITE ONLY
NYC	44.7	26.6	9.9	0.5	13.4	4.9	27.0	35.0
CHI	42.0	36.8	4.4	0.4	13.6	2.9	26.0	31.3
SFO	49.7	7.8	31.3	0.4	6.5	4.3	14.1	43.6
BOS	54.5	25.3	7.6	0.4	7.8	4.4	14.4	49.5
SEA	70.1	8.4	13.6	1.0	2.4	4.5	5.3	67.9
DEN	65.3	11.1	2.9	1.3	15.6	3.7	31.7	51.9
ATL	33.2	61.4	1.9	0.2	2.0	1.2	4.5	31.3

Boston is a diverse city in many other ways as well. It is third out of seven in the percentage of foreign born residents, fourth out of seven in the percentage of individuals living in poverty, and third out of seven in the percentage of residents over 25 with a bachelor’s degree or higher.⁶ Notably, both San Francisco and Seattle have less poverty and more residents with higher education than does Boston (and San Francisco also has the highest percentage of foreign born of the seven cities.). Boston is quite distinctive in one way: it is first out of the seven cities in the percentage of the population currently enrolled in college or graduate school, with a percentage that is twice that of two of the other cities.

CITY	PERCENT COLLEGE/ GRAD STUDENT	PERCENT FOREIGN BORN	PERCENT INDIVIDUALS BELOW POVERTY	PERCENT AGE 25+ BACHELOR DEGREE OR HIGHER
New York	7.4	35.9	21.2	27.4
Chicago	7.2	21.7	19.6	25.5
San Francisco	11.0	36.8	11.3	45.0
Boston	14.6	25.8	19.5	35.6
Seattle	11.6	16.9	11.8	47.2
Denver	6.9	17.4	14.3	34.5
Atlanta	8.5	6.6	24.4	34.6
US as Whole	6.2	11.1	12.4	24.4

Another important lens through which to compare the seven cities is to look at their economies. Economic life is too complex to portray in two or three tables. But examining a few figures is still instructive. The Boston metropolitan area has the third largest economy of the seven cities – indeed (after New York, Los Angeles, and Chicago) it has the fourth largest gross metropolitan product in the nation.⁷ The difference between the Boston metropolitan area and the metropolitan areas that surround some of the other cities is dramatic: the Boston metropolitan

economy is more than twice as large as that of three of the other cities. (If the Boston metropolitan area were a separate country, its economy would rank twenty-second in the world – a fraction smaller than Switzerland but larger than Belgium, Sweden, or Austria.) The Boston area is also third out of seven in its total employment (behind only the much larger metropolitan areas of New York and Chicago), and, as the chart below indicates, third in the list of seven in the percentage of employment within three miles of the central business district and fourth out of seven within ten miles of the central business district.⁸ (Employment in New York and San Francisco is much more concentrated than in Boston, while in Chicago and Atlanta it is much more dispersed.) It is important for the reader to note that all of the figures in the following chart disregard city lines: studies of economic life focus on metropolitan areas, not individual cities. The reason for this focus is simple yet important: the economy, unlike government institutions, disregards city boundaries.

CITY	2002 GROSS METROPOLITAN PRODUCT (BILLIONS US \$)	TOTAL EMPLOYMENT WITHIN 35 MILES OF CBD	3 MILE SHARE	10 MILE SHARE
New York	448.9	3,078,507	45.3	77.4
Chicago	349.5	2,814,162	18.7	36.4
San Francisco	110.6	828,775	44.5	61.0
Boston	266.9	1,536,970	25.7	55.0
Seattle	120.9	1,006,815	22.5	50.5
Denver	100.9	852,018	18.3	67.1
Atlanta	177.9	1,457,958	11.3	38.1

Notwithstanding the metropolitan nature of economic life, it is helpful to get a sense of Boston's prosperity as compared to that of the region as a whole. One way to do so is to compare income levels – median family incomes and median household incomes – of the city and the region over time. Given the complexities and changing nature of the definition of the metropolitan regions, the figures in the following table should be read with caution.⁹ Nevertheless, some general points seem clear enough. For all cities except Seattle, the median family incomes as a percentage of their metropolitan areas' median family incomes fell sharply from the 1950s to 2000 (in Seattle the decline was minor). As a group, they had 97.5% of metropolitan median family income in 1950 but had dropped to 76.5% in 2000. This decline demonstrates the impact of the suburbanization of child-rearing, middle-class families. The cities' decline was somewhat less severe when comparing their median household income with that of the metropolitan area. The reason is that single person households are counted for this figure but not for family income. (Households include Yuppies as well as retirees.) The decline for all cities combined was from 93% in 1950 to 77.5% in 2000. Here again, the median household income declined in all seven cities, and Boston's overall decline, as a percentage of the region, was comparable to most of the other cities. But both Seattle and San Francisco did much better. As is true elsewhere, gentrification has reversed Boston's decline to some extent – but Boston still remains well below the region's median figures.

CITY	CITY PERCENT OF METRO 1950	CITY PERCENT OF METRO 1980	CITY PERCENT OF METRO 1990	CITY PERCENT OF METRO 2000
New York				
Family Inc	95	na	75	70
Household Inc	95	na	78	75
Chicago				
Family Inc	97	77	74	70

Household Inc	96	74	75	75
San Francisco				
Family Inc	100	85	82	84
Household Inc	93	79	83	87
Boston				
Family Inc	92	70	70	65
Household Inc	87	67	72	72
Seattle				
Family Inc	103	na	92	98
Household Inc	96	na	81	87
Denver				
Family Inc	102	83	80	79
Household Inc	99	78	76	77
Atlanta				
Family Inc	91	64	60	63
Household Inc	88	62	62	67

Another way to get a feel of the nature of the local economy is to explore information about the city's employment. As is the case in four of the other six regions, there are more people commuting suburb-to-suburb in the Boston metropolitan area than suburb-to-city or city-to-city. But Boston still attracts a substantial commuter workforce. Boston's workforce is not as dominated by residents as New York nor is its metropolitan economy as suburbanized as Atlanta. Instead, like Seattle and Denver, Boston has a relatively balanced mixture of residents and commuters. In fact, more commuters than residents work in Boston. Moreover, in 2002, Boston's unemployment rate was the lowest of the seven cities.¹⁰

CITY	PERCENT OF REGION'S WORKERS COMMUTING WITHIN CITY	PERCENT OF REGION'S WORKERS COMMUTING SUBURB TO CITY	PERCENT OF REGION'S WORKERS COMMUTING SUBURB TO SUBURB	2002 CITY UNEMPLOYMENT RATE
New York	77.5	4.7	8.9	7.9
Chicago	25.8	13.9	47.6	8.4
San Francisco	35.8	11.4	32.1	7.4
Boston	17.0	20.3	47.0	5.7
Seattle	25.0	23.6	40.3	7.7
Denver	16.1	20.8	49.1	7.1
Atlanta	5.2	15.2	73.4 ¹¹	8.8

Boston's continued strength as a job center and its ability to retain a diverse mix of residents, rich and poor, black and white, Hispanic and Anglo – along with its role as a center for domestic and international tourism – enable it to retain its position as the "hub" of the metropolitan region. A report by the Boston Redevelopment Authority provides a helpful summary of Boston's role in the regional economy:

Today, Boston is the center of New England's economy, its importance to the region shown by its role as a generator of jobs and tax revenues. Although Boston accounts for only 9.5% of the state's population, Boston accounts for 17% of the state's jobs, 22% of total goods and services in the state, and nearly 18% of the state's tax revenues. Similarly, the city's economic impact is felt throughout the region as nearly one out of every 13 jobs in New England is in Boston. As home to so many of the region's important public and private institutions and agencies, Boston also serves as the educational, medical,

cultural, and governmental center of the region. Clearly, Boston is a sizable portion of the regional economy and contributes substantially to that of the nation's.¹²

One final comparison concerns a matter determined by the legal system: the cities' influence in the state legislature. Political influence is an elusive concept to measure, but some basic numbers demonstrate that there are differences among the cities examined. In Massachusetts, 17 state representatives represent at least a portion of Boston – 11% of the House. Ten of these 17 House districts (59%) are wholly within the city limits, while the city shares with neighboring communities the other seven districts, casting a majority of the votes in all of them. In the Senate, six current senators represent at least a portion of Boston (15% of the Senate), but only two of Boston's six Senate seats are entirely within the city. The city casts a majority of the votes in only one of the shared districts; it casts a plurality of votes in the other three. Even when Boston residents hold these seats, therefore, their constituents are often not themselves Bostonians.

Except for San Francisco (3%), these figures give Boston the lowest percentage of representatives in the state House of any of the cities, although Denver (16%), Atlanta (12%) and Seattle (12%) are roughly comparable. (New York has 42% of the state's representatives and Chicago 30%.) The figures also place Boston in the middle of the seven cities for the Senate, although far short of New York (42%) and Chicago (31%). Chicago, San Francisco, and Seattle share similar representation patterns in their House, with about half of their districts entirely within the city and the rest shared. The vast majority of New York and Denver House districts, on the other hand, are entirely within the city. What is unusual in Massachusetts is the shift of pattern of representation when one turns to the Senate. Boston's shift in the Senate away from the House pattern of having seats largely in the city is unique among the seven cities. The other six largely maintained the pattern of representation they displayed in House seats. For example, half of Seattle's Senate seats are entirely within the city, the same ratio as in their House districts.

A related way to look at the cities' political influence is to examine their production of legislative leaders. Boston presently fares very well in this regard; both the Speaker of the House and President of the Senate represent portions of Boston. New York, Chicago, San Francisco, and Seattle have each produced the current head of one of their state's legislative bodies. Denver and Atlanta have not fared as well: their delegations are in the legislature's minority, depriving them of much effective power. A glance at the past suggests that Boston may have been in a position similar to Denver and Atlanta for much of its history. Until the middle of the twentieth century, the leader of both Massachusetts houses was a Republican. Except for the current Speaker and his immediate predecessor, the leader of the House has represented Boston for only 10 years in the past century. Similarly, from 1900-1978, the Senate President represented Suffolk County for only 15 years. On the one hand, because the state legislature meets in Boston – as it does in Denver and Atlanta – it could be argued that representatives and senators who hail from outside of Boston have a better understanding of the city and more stake in its success than if the legislature met elsewhere. But on the other hand, the legacy of the legislature's leadership deriving mainly from outside of Boston suggests that the city may have been weakly represented in the state house during the period when many of the laws defining Boston's legal powers were passed.

There are many other ways to compare Boston and the other six cities. Some of these – particularly information on land use and education – will be provided in the sections dealing with these specific subjects. One final point seems worth emphasizing: the seven cities have demographic and economic similarities. Each of the cities is the dominant economic force in its region. Each is also the leading city within a region that makes up a substantial portion – sometimes even a majority – of the state's overall population. Each is also home to a growing immigrant population and an increasingly diverse one. At the same time, each of the cities is on something of an upswing. Although others are growing faster than Boston, Boston too is growing enough to be experiencing the pains, and reaping the rewards, of gentrification. These

similarities call into question the substantial differences among the legal structures that the states have created for the cities examined in this report. The critical question this report poses is whether Boston, as a legal matter, is as well positioned as these other cities to build upon its position as a leading national, even international, urban center. This issue is explored in the next chapter.

Chapter Three

The Legal Structure of Home Rule in Massachusetts

Every major American city operates within a legal framework that is not of its own making. These frameworks vary substantially. One key difference is whether a state defines city powers and administrative structures through specific statutes or through general delegations of authority. Until the late nineteenth century, all states chose the first path. They treated their cities as state entities and defined their legal powers and established their charters through specific legislative enactments. As cities grew in size and complexity, most states shifted course. Rather than requiring cities to seek special permission from the state legislature each time they wanted to act, states granted cities what is known as ‘home rule’: the more general authority to act without state permission and even, for some, act in a way that supersedes conflicting state laws.

There is significant variation among the states that shifted to home rule. No state permits its cities to do whatever they wish. All of them place limitations on cities’ independence, but some place much more significant limitations than others. The details of each state’s legal definition of home rule matter a great deal. They establish the basic rules of the game for exercising local power. By doing so, they powerfully affect not only the particular policies that cities can pursue but the confidence each city has in its ability to chart its own future free of state legislative influence.

Certainly the legal definition of home rule in Massachusetts matters for Boston. That definition is set forth in Article 89 of the state constitution (known as the Home Rule Amendment)¹³ and spelled out further in the Home Rule Procedures Act.¹⁴ It helps to explain why Boston is so much more reliant on the property tax than any of the other six cities. It is the reason why so many of its innovative regulatory initiatives, unlike those of other cities, emanate from grants of authority specially conferred by the state legislature rather than from the more general grant of home rule. And, most fundamentally, it helps to understand why so many present and former Boston city officials share a feeling of constraint that is not common for officials from other cities.

Before comparing the state law definitions of home rule that govern each of the seven cities, this report focuses on Boston alone, including the state legislature’s role in structuring Boston’s legal powers prior to the Home Rule Amendment in 1967. That history of state legislative oversight is critical to understanding the scope of the city’s legal powers in the post-home rule period. With that background in place, a comparative perspective can be developed. There are two important powers that state home rule provisions typically confer. The first is the charter power, which enables cities to establish a charter of government for themselves. The second is the general home rule power, which gives cities the power to act without specific statutory authorization and, sometimes, provides them a degree of protection from state legislative control. Boston fares no better, and often much worse, than the other cities on each of these key dimensions of home rule. As a result, officials’ attitudes toward home rule in Boston – their ethos of home rule – is decidedly more passive than it is in the other cities.

The Legal Powers of Boston Before Home Rule

All of the states in which the seven cities are located shifted to home rule at some point, but they did not make the move at the same time. Some adopted a home rule system in the late nineteenth century. Others, like Massachusetts, waited almost another century to do so. By the time Boston finally received home rule, more than two-thirds of the states had already given home rule to their cities.¹⁵ Among the cities examined for this report, only Chicago received home rule later than Boston, and even Chicago enjoyed at least some protection from state interference well before Boston did.¹⁶

Boston's failure to win home rule earlier was not for lack of effort. Boston officials, including Mayor James Michael Curley, submitted some of the first home rule proposals to the state legislature.¹⁷ One such proposal sought home rule for Boston alone.¹⁸ Clearly, Boston was eager to get out from under state control. And with good reason. The state legislature had aggressively asserted its power over Boston's affairs – and never with greater consequence than during the Irish-Yankee battles in the late nineteenth and early twentieth centuries or during the fiscal crises that squeezed the city in the 1950s and 1960s.

The City as a Creature of the Commonwealth

For nearly two centuries – from 1630 to 1822 – Boston, like the other towns in Massachusetts, was run by the town meeting.¹⁹ In many respects, the town meeting had considerable local power:

The freemen of every township shall have the power to make such by-laws and constitutions as may concern the welfare of their town, provided they be not of a criminal, but only of a prudential nature, and that their penalties exceed not 20s. for one offense, and that they be not repugnant to the public laws and order of the country.²⁰

But, as early as 1635, the General Court enacted a statute asserting central control over the colony's local governments.²¹ That statute carefully circumscribed the powers of towns – fewer than 30 at the time – to those matters “which concerne[d] only themselves.”²² It also made clear that even within that sphere, local governments would have no authority to make laws “repugnant to the lawes & orders here established by the General Court. . . .”²³

With the exception of a brief interlude during the Revolutionary War (which one state legislative commission termed “the ‘golden age’ of municipal home rule in Massachusetts”²⁴), the General Court “increased its control over the towns, especially the capital Town of Boston”²⁵ Halting its brief practice of treating local governments as if they were “independent city-states,”²⁶ the state began to treat them as if they were mere creatures of the legislature. By the end of the nineteenth century, “there could be no ‘violation’ of municipal home rule by the Legislature because there was no home rule left to ‘violate.’”²⁷

A series of Supreme Judicial Court decisions emphatically made this point. In the early nineteenth century case of *Stetson v. Kempton*,²⁸ the Court set forth the general proposition that towns were creatures of the General Court and enjoyed only those powers expressly granted them through legislation.²⁹ Other decisions soon followed that explained just what this proposition meant: towns could spend money or enter into contracts only for those purposes that had been expressly authorized by state statute. Even when faced with seemingly general authorizing language in state statutes, the Supreme Judicial Court was quick to construe the legislation narrowly to limit local power.³⁰

By the midway point of the nineteenth century, the Supreme Judicial Court had made clear that if local governments like Boston wanted to assert additional authority, they would have to petition the state legislature for it. There also were few limits on the state's ability to intervene in local affairs without local consent. The court specifically upheld the state's right to abolish local government units.³¹ Although the complete abolition of all municipal governments might raise state constitutional concerns,³² it seemed that there was little, short of that limitation, which the state could not do to a city such as Boston.

The First Wave of State Legislative Interference in Boston's Affairs

What the court announced in principle by the mid-nineteenth century, the legislature implemented in practice by the century's end. No local government in the state bore the brunt of this legislative activity more directly than Boston. The state legislature interfered in Boston's

affairs throughout the latter part of the nineteenth and early part of the twentieth centuries, and the extent of the state's intervention during this time is striking.

An examination of the state legislature's role in shaping Boston's charter provides one way to see the state's assertion of power over local matters during this period. By 1820, Boston's population had reached 43,000, and its voting population was almost 8,000.³³ This growth produced considerable debate about whether the town meeting form, or that of an incorporated city, could best manage local affairs. The issue was not whether to increase Boston's power – that would remain the same. The issue was whether to adopt a representative form of government to replace the town meeting.³⁴ The proposal to do so was very controversial (Josiah Quincy, later to become Mayor, was one among many who was opposed³⁵). But in 1820 a state constitutional amendment was adopted giving the state legislature the power to offer city charters to towns that had more than 12,000 inhabitants.³⁶ In 1822, the Boston town meeting applied for, and was granted, a city charter. Boston was the first city to be incorporated in Massachusetts.³⁷

Boston's 1822 charter, its first, was enacted as special legislation – that is, it was adopted by the state legislature and could therefore only be changed at the legislature's discretion. This established a pattern of state control of the city charter that remains unbroken. Like all subsequent amendments, the 1822 charter was not written by the city of Boston. Admittedly, the state legislature permitted Boston to vote on the charter in 1822. But, it has not always been willing to make a local referendum part of the process of formulating Boston's governing structure. In many cases, the state legislature has made changes in the charter without ensuring that Boston residents wanted them.

The 1822 city charter – and consequently Boston's administrative structure – has undergone a series of revisions and reenactments over the last two centuries. These revisions have progressively worked to “strengthen” the executive power of the mayor.³⁸ At the same time, beginning particularly with the charter amendment of 1885, greater state oversight had been introduced into Boston's political structure. The 1822 charter divided the city government into three political bodies: the Mayor, a Board of Aldermen, and a City Council.³⁹ The charter also divided the city into twelve wards.⁴⁰ The Mayor and the eight-member Board of Aldermen were elected by the residents of the city as a whole.⁴¹ The City Council was elected by the twelve wards, with each ward sending four representatives.⁴² The executive and administrative functions of the government were given to the Mayor and the Board of Aldermen collectively.⁴³ The Mayor's role in early Boston was thus quite restricted: it was largely limited to a seat on the Board of Aldermen. The city's legislative power was exercised – as is typical of bicameral legislatures – concurrently by the City Council and the Mayor and Board of Aldermen, with each “having a negative upon the other.”⁴⁴ The 1822 charter also provided for the establishment and election of a School Committee, independent of the newly created municipal government. The School Committee consisted of one individual elected from each ward, along with the Mayor and Aldermen.⁴⁵

The first major charter amendment, of 1854, essentially kept the structure of the 1822 provisions, but marked the beginning of the independence of the Mayor.⁴⁶ The amendment took away the powers that the Mayor shared with the Aldermen and gave him powers distinct and separate from those that the Aldermen exercised. One of the most important of these was the veto power – a veto that could be overridden by a two-thirds vote of the legislative bodies.⁴⁷ Other changes made in 1854 included increasing the number of Aldermen from eight to twelve,⁴⁸ and the number of School Committee members more dramatically to 72.⁴⁹

Immense growth, engendered in part through annexation, occurred in Boston in the decades after the 1854 amendments. The city expanded from twelve wards to twenty-five by 1875. Massive waves of immigration dramatically changed the nature of the city's population. In 1882, Boston elected its first Irish-born, Roman Catholic mayor, Hugh O'Brien.⁵⁰ These developments led to a major revision of the Boston charter in 1885, one that its proponents, no doubt euphemistically, characterized as responding to an “increasing demand for efficiency in

government and for a strong mayor.”⁵¹ The 1885 charter revision allocated essentially all of the executive powers of the government to the Mayor.⁵² It also placed the growing administrative arm of Boston’s municipal government directly under the Mayor’s control. The officers and boards that had been selected by the City Council or the Board of Aldermen were now to be appointed solely by the Mayor, although confirmation powers were still allocated to the Board of Aldermen.⁵³ The Mayor’s veto power was also enhanced. Whenever the City Council or Board of Alderman appropriated funds for expenditures, the Mayor was empowered to exercise a line-item veto, selecting what he approved or disapproved.⁵⁴ Like any other veto, this veto remained subject to an override by the City Council and Board of Aldermen. These charter amendments substantially changed the power structure of the Boston city government. But they were passed solely by the state legislature without any referendum approval by Boston voters. Indeed, at the same time, the legislature also passed another important piece of special legislation without referendum approval,⁵⁵ one that “divest[ed] the city of all control and authority over the board of police and place[d] it in the hands of the Governor.”⁵⁶

Discontent with Boston’s governmental structure — especially among members of the state legislature — continued past the turn of the century, eventually resulting in another charter revision in 1909.⁵⁷ Once again, the city’s residents were not given an opportunity to approve the changes, although the charter proposals themselves grew out of proposals authored by a commission the Mayor had appointed. The 1909 revision was fueled by the spirit of progressive reform popular at the time.⁵⁸ The charter amendment, reformers thought, would be “likely to secure good government when good men are elected, and to minimize the power of bad men, if elected, to provide bad government.”⁵⁹ (As it turned out, John Francis Fitzgerald, known as “Honey Fitz,” was re-elected in 1910, and he was succeeded, in 1914, by James Michael Curley.⁶⁰) The most radical change made in 1909 was to abolish the Board of Aldermen. The power of the Mayor also continued to increase. “All heads of departments and members of municipal boards” were to be appointed entirely by the Mayor without confirmation by the Council.⁶¹ These appointees would serve for four years, after which they would “hold office [at] the pleasure of the mayor.”⁶² Mayoral vetoes were also given conclusive weight: instead of permitting a Council override, vetoes rendered the item entirely void.⁶³ Any ordinance proposed by the Mayor was presumed to be in force unless specifically rejected by the City Council within sixty days.⁶⁴ All appropriations — except those for school purposes under the control of the School Committee — were required to originate with the Mayor.⁶⁵ The City Council could reduce or reject any of these items, but it could not increase or originate the budget in any way.⁶⁶

New layers of state supervision added by the 1909 revision were as important as the increases in the Mayor’s power. A Finance Commission was established to “investigate any and all matters relating to appropriations, loans, expenditures, accounts, and methods of administration affecting the city of Boston or the county of Suffolk . . . and to report thereon . . . to the mayor, the city council, the governor, or the general court.”⁶⁷ The Commission consisted of five members appointed by the Governor.⁶⁸ Even though the Governor appointed the commission, Boston was charged with paying its expenses. (The FinCom, as it is known, continues in operation to this day.) The state Civil Service Commission was also given the power to approve Mayoral appointees.⁶⁹

There were other state interventions during this period as well — all of which were enacted without the city’s consent. These included targeted limits on the city’s power to borrow funds and caps on the amount the city could spend on its public schools. Boston was barred from raising tax rates, or increasing assessments, without receiving express permission from the state legislature. And a state-controlled licensing board was established for the City of Boston alone — a licensing board that establishes its own budget which the city is legally bound to fund.⁷⁰ (The Boston Licensing Board also remains in place today.) As if to make the state’s assumption of local powers crystal clear, the state legislature went so far, during the end of this period, as to play a direct role in selecting the city’s mayor. Shortly before Mayor Curley was elected to a second term in 1922, a new statute made it impossible for a Mayor to succeed himself in 1926.⁷¹

The state's interest in Boston matters – and its charter in particular – remained intensive well into the 1940s. According to some, the next major charter revision, which occurred in 1948, resulted from the continuing political struggle between the Yankees and the Irish in Boston. With the Irish taking control of municipal government, and the Yankees retreating into the state house, “the charter gave the mayor strong formal powers, [but] it sharply limited the areas in which they could be exercised.”⁷² On this view, the revision was an attempt to separate politics from the Boston government, “[a]imed primarily at James Michael Curley and his personal style of politics”⁷³

Others contend that the revision was simply the “upshot” of the 1947 charter commission's recommendation proposing to offer Boston voters a council-manager structure of government, while also continuing to offer the option of the traditional mayor-council form.⁷⁴ Rather than imposing a specific form of government,⁷⁵ the 1948 amendments established a structure through which the citizens of Boston could choose between three plans of government.⁷⁶ Plan A essentially preserved the mayor-council governmental structure, although the Mayor's veto powers were curtailed: the City Council could again override vetoes unless the legislation required the expenditure of money or taking out a loan.⁷⁷ Plan D and Plan E, the other two options, were council-manager structures, with Plan E providing for proportional representation.⁷⁸ Plan A was adopted by the voters.

Whatever the reasons for this charter revision, the state legislature played an important role in structuring Boston's choice as to which plan to select, reflecting the state's continued interest in the details of the city's internal organization. Though “anxious to avoid taking a public stand on the issue . . . ,” the state legislature established procedural rules that helped to ensure that Plan A would get to the voters first.⁷⁹ Moreover, not long after Plan A was adopted, the legislature stepped in and “clarified” the kind of government the voters had selected. Amendments adopted in 1951 struck out sections 10 to 20 of the 1948 amendments – the sections that described what a Plan A government is – and inserted new sections in their place.⁸⁰ To be sure, the 1951 amendments did not radically restructure the Plan A form of government; in many ways the revision simply rectified the inadequate drafting of the 1948 amendment. But the state legislature's role was reflective of prior practice,⁸¹ a practice that did not end in 1951.⁸²

The Second Wave of State Legislative Interference in Boston's Affairs

The story of state intervention in Boston affairs is often told as an inter-ethnic feud between the Irish and the Yankees, with the latter trying to save “their” city from the former, who were newly ascendant. That way of telling the story makes the state's assertion of control a relic of the history just described. The state's penchant for limiting Boston's ability to make decisions for itself, however, cannot be so easily confined. A second wave of state interference in Boston's affairs occurred during the 1950s and 1960s, when urban renewal efforts dramatically transformed the city. This new phase was different. During the first wave, the state often stripped the city of important powers or imposed new administrative structures on it. During the second, the city asked the state to assume control. The state's increased authority over Boston's affairs during this second period cannot be understood as a continuation of an Irish-Yankee power struggle. It was a consequence of the severe financial difficulties that the city faced and of the city's inability (and lack of legal authority) to address them on its own.

The decades immediately following World War II were difficult ones for Boston. Boston's population dropped by over 100,000 residents in the 1950's – its worst decade.⁸³ It then dropped by over 50,000 in the 1960s and over 70,000 in the 1970s before rising slightly in the 1980s.⁸⁴ (The worst decade for all the other cities in our study was the 1970s, except for Denver, which had the hardest time in the 1980s.⁸⁵) There was little reason in those years, as Ed Glaeser has put it, “to suspect that Boston would be any more successful than Rochester or Pittsburgh or St. Louis over the next few decades.”⁸⁶

Though dramatic action was necessary, Boston was constrained in its ability to respond. Caught up in structural shifts in the economy, and with a fiscal record of notoriously high property taxes on some commercial properties as well as irregular assessment practices, retail sales were dwindling and new commercial construction was “all but nonexistent.”⁸⁷ The results were dramatic. “[T]he city’s tax base in 1959 was 25% smaller than it had been back on the eve of the Great Depression”⁸⁸ And the city had little in the way of revenue to draw upon other than the property tax.

A mayor eager to relieve the tax burden might have tried to even out assessments or to take aim at unfair abatements. But doing so would have increased the residential tax burden and made it difficult to attract new developers. Borrowing was an alternative, but it too was not without its problems. The city tried to raise much needed capital by issuing new bonds in 1959, but “Moody’s Investor’s service lowered the city’s bond rating from A to Baa, making Boston, among cities in the United States with over half a million people, the only one assigned this poor rating.”⁸⁹

The strategy that the city adopted was to try to obtain new powers from the state to gain control over the situation. The last wave of state interference in local matters had left the new mayor “utterly dependent on the state government for anything of consequence, especially anything involving the expenditure of public funds.”⁹⁰ Efforts to wring new revenue authority out of the state, however, were unavailing.⁹¹ So, too, were the city’s attempts to gain more control over the parking shortage and to build a new municipal auditorium.⁹² Similarly ineffective were efforts to reduce the costs that Boston had to bear for services that benefited other communities. For example, efforts to eliminate asserted inequities in the assessments charged by the Metropolitan Transit Authority went down to defeat in the state legislature. And efforts to shift some of the costs for Suffolk County expenses onto the other cities in the county – so that Boston would not be responsible for bearing them alone – met a similar fate.⁹³

When a coalition of business and civic groups came together to push for a legislative package to help Boston in 1956, they were careful to ensure that the measures did not carry Boston’s name or the name of its mayor. Even then, the legislative push achieved only mild success.⁹⁴ In such a climate, talk of getting local authority to levy a sales or payroll tax seemed wildly unrealistic.⁹⁵ One estimate suggests that Mayor Hynes, during his 10 years in office, managed to have less than one quarter of his petitions enacted by the state legislature.⁹⁶

Lacking the power to find new sources of revenue, and unable to get the state to have other actors assume burdens that hit Boston particularly hard, the city found it attractive to have the state assume responsibility for important pieces of its infrastructure. Repeatedly during this period, the city ceded important authority to the state in return for additional access to funds or relief from burdensome costs. Whether the bargains made during this time were wise ones is open to debate. Boston became a national leader in redevelopment during these years, and it was aided in that effort by state measures that gave Boston additional powers in return for giving up some old ones. But in important respects, Boston emerged from the era of urban renewal with less legal control over key parts of its city than it had decades before. State-created public authorities – and sometimes the state itself – took over important city assets.

For example, in the early 1950s, the city began an effort to build a garage underneath Boston Common in order to address its parking crisis. After finally winning state legislative approval to pursue the project, the city ran into difficulties. In the end, the Mayor agreed to a state proposal to place the project under the control over a state-established Massachusetts Parking Authority run by a three-person board, two of whom would be appointed by the Governor.⁹⁷ The final version of the legislation, the Supreme Judicial Court ruled, denied the city any veto rights in the event that the Authority chose to use its power of eminent domain to take land necessary for the garage’s construction.⁹⁸ (The legislation provided that the garage would revert to the city’s control upon the garage’s completion. But Boston would eventually lose control of the garage to the Massachusetts Convention Center Authority.)⁹⁹

Similarly, with the support of Mayor Hynes, the state in 1956 established a public authority – the Massachusetts Port Authority (Massport) – to take control over the city's port, the Tobin Bridge, and Logan Airport. Massport was placed under the control of a seven-member board appointed to seven-year terms by the Governor.¹⁰⁰ Massport now owns nearly 10% of the land within the city's limits.¹⁰¹ Massport's assumption of control over the Tobin Bridge was only one indication of the degree to which the state was becoming the key player with respect to the city's thoroughfares. The state established the Massachusetts Turnpike Authority in 1952 and built (and kept control over) the Massachusetts Turnpike extension into the city. And, in 1959, a cash-strapped Boston sold the Sumner Tunnel, which the city itself had built in the 1930s, to the state. The state then transferred control of the tunnel to the Turnpike Authority.¹⁰²

To round out the state's assertion of authority over the city's transportation infrastructure during these years, the state completed the central artery – which initially had been proposed by the city planning board as a Boston project.¹⁰³ The state's chosen route for the roadway generated significant local opposition. In the end, although Mayor Hynes "was distressed by the way the expressway was cutting off the North End and the entire waterfront from the rest of the city," he supported its construction because "he could find no other practical alternative to the transportation problem."¹⁰⁴

Another dramatic example of the state's role in structuring the city's redevelopment was the state's approval of the city's request in 1957 for a \$45 million loan to address a significant budget shortfall. Having refused Boston's request for a sales tax, and rejected its efforts to unburden itself of costs it considered unfair, the state granted the funding in return for Boston's promise to cut its workforce substantially and to conduct a property equalization survey.¹⁰⁵ This pattern would repeat itself in later decades. Faced with a fiscal crisis, the state would come to Boston's aid in return for Boston selling off property or transferring control over important parts of the city.¹⁰⁶ During the 1980s, the city would sell off numerous municipally-owned parking garages to the private sector and the state. And yet another state-controlled authority, the Massachusetts Convention Center Authority, would be established to run a major public facility in the city.¹⁰⁷

There were exceptions to the pattern. Although the state was exercising ever more control over the city's transportation network in the 1950s, the state legislature during this period allowed Boston to veto proposed state highway projects – including the famed inner-belt – that would have had a dramatic impact on the city.¹⁰⁸ Similarly, at the city's request, the state established the Boston Redevelopment Authority, thereby enhancing Boston's overall ability to coordinate redevelopment even as it injected a measure of state control into the process.¹⁰⁹ Alone among the state's municipalities, Boston had previously been denied the power to establish such an agency, thereby hindering its ability to receive redevelopment funding from the federal government.¹¹⁰ During this period Boston also received the power to confer tax abatements on new development, as allowed for in Chapter 121A, after having encountered obstacles to doing so under the prior legal regime.¹¹¹

A 1962 statute also returned control over the appointment of the Boston police commissioner to the Mayor of Boston.¹¹² For more than 75 years, fears about the potential performance of a Mayor-appointed police commissioner had led the state to delegate the power to appoint Boston's police commissioner to the Governor. This allocation of authority produced a strange balance of power in Boston in those years. The police commissioner was loyal to the Governor, and he possessed almost total control over how the police were run and what their priorities were. So independent was the commissioner that, at one point, the city was ordered by the Supreme Judicial Court to accede to his request to make city land available for the establishment of a new police headquarters.¹¹³ At the same time, the Mayor, along with the City Council, retained control over the police department's budget, even though city officials could not dictate what it should be spent on. Criticism of the police department often blamed poor funding by the city, while successes were often attributed to the Governor. Controversy regarding police

performance finally induced the state to change the law to allow the Mayor to appoint the police commissioner.¹¹⁴

Important as the new grants of power were, they had their limits. The state established the Boston Redevelopment Authority in such a way as to keep a hand in its decisions: the state retained the power to appoint one of its board members. Chapter 121A empowered the city to give up tax revenues, but it did not authorize it to find new funding streams. And the statute transferring the appointment of the police commissioner to the Mayor made sure that he did not have too much control over the police department through the appointment process. The state statute provided that the police commissioner was to be appointed for a term.

The State Grant of Home Rule Power

Given Boston's history of state legislative control, Massachusetts' 1967 grant of "home rule" promised to mark a new phase of the legal relationship between the city and the state. The preamble to the Home Rule Amendment explains that its purpose is to "grant and confirm to the people of every city and town the right of self-governance in local matters."¹¹⁵ That sweeping language turns out to be quite misleading. Boston remains to this day highly dependent on, and beholden to, the state legislature in exercising legal power – more dependent than most other cities in our study. A key reason is that the Home Rule Amendment turned out to be relatively weak as to both of its key features: the charter power and the general home rule power.

The Charter Power

The city charter is best understood as a mini-constitution for the city. It sets forth the administrative structure of the city's government, the procedures that city agencies and officers must follow, and, often, many of the city's regulatory powers. Consistent with its status as higher law, the charter governs when it conflicts with a local ordinance or regulation. The charter also cannot easily be changed. The charter's significance makes it matter whether the city or the state writes it. One of the key powers that home rule usually confers on cities is the power to write their own charter independent of the state legislature.

The Massachusetts Home Rule Amendment gives Boston the right to establish a charter for itself.¹¹⁶ But that power has not proved consequential. Of the seven cities studied for this report, only Boston, Chicago and Atlanta, have not written a home rule charter. And only Boston and Atlanta have a charter that was specially written for it by the state legislature.¹¹⁷

The fact that the state legislature has written Boston's charter does not mean that the charter is a single state law. The city's "charter" is, in fact, a "patchwork of special laws enacted over the years by the Legislature."¹¹⁸ The Office of the City Clerk has printed a pamphlet that is the closest approximation of Boston's charter. It contains a five-paragraph preface that reveals just how complete the state legislature's role has been in writing the charter. As if to underscore the point, the preface concludes: "Two useful works containing . . . many of the various statutes which are part of Boston's charter are 'Special Laws Relating to the City of Boston Enacted Prior to January 1, 1938,' and, 'City of Boston Code (1975),' both of which are out of print and available in libraries."¹¹⁹

Boston's situation can be explained in part because it did not obtain the home rule charter power until relatively late in its history. By the time Massachusetts granted the home rule charter power, three cities – Denver, San Francisco, and Seattle – had possessed it for nearly a century. A fourth – New York City – had possessed it for more than 40 years. Unlike these other cities, Boston was already a fully developed, modern urban center when it received the power to draw up a governmental structure on its own.

By contrast, San Francisco adopted its own charter in the decades following California's 1879 state constitutional grant of home rule.¹²⁰ Seattle voters in 1890 made the city one of 10

first-class cities¹²¹ to adopt a Freeholder charter under the state constitution.¹²² Denver followed a similar course in 1904, establishing a mayor-council form of government and spelling out the basic functions and structure of the Denver city government.¹²³ New York City wrote its own charter in the 1930s after the state constitution was revised in 1923 to permit a city to create a charter commission authorized to draft a charter that would take effect when approved by city voters in a referendum.¹²⁴

The way Massachusetts structured the home rule charter power also helps to explain why Boston, like so many municipalities in the Boston metropolitan area and so many of the state's largest cities,¹²⁵ has not used it. Under the Home Rule Amendment, the city can bring order on its own to the current jumble of statutes that constitute its charter only by placing the whole of its governmental structure in the hands of a separately elected charter commission.¹²⁶ By law, that commission can pursue an unlimited reform agenda once established; it then submits its proposal for an up-or-down vote by city residents.¹²⁷ As one former city official told us, this process "puts everything on the table" without any means by which city officials can structure it. Such a process gives city officials little incentive to push for charter reform. Other state constitutional home rule provisions are not nearly so rigid. Colorado permits Denver's city council to initiate substantial charter reform efforts without establishing an independent charter commission;¹²⁸ and California similarly permits its cities to propose charters without resorting to a commission.¹²⁹ Under Washington's state constitution, cities like Seattle may present voters with an alternative to the elected charter commission's proposal.¹³⁰

The charter amendment process under the Home Rule Amendment provides an alternative means by which Boston may reform its charter. It permits two-thirds of the city council to propose a change that voters can approve by referendum.¹³¹ If they do, the amendment becomes law.¹³² This procedure can be followed for limited changes to the charter; more substantial changes require use of the revision or adoption process.¹³³ The requirement that amendments receive super-majority support on the city council makes the process relatively restrictive. The Colorado and Washington constitutions permit a simple majority of the city council to place a charter amendment on the ballot.¹³⁴ The Georgia home rule statute permits the city council to make charter amendments on its own without resort to a referendum.¹³⁵

Still, the charter amendment process has its advantages. It enables Boston officials to exert significant control over charter reform efforts. Indeed, the Home Rule Amendment and implementing legislation make clear that cities may use the charter amendment power to change requirements that are contained in special state legislative acts.¹³⁶ It is not entirely clear whether this power permits the city to use the charter amendment process to dispense with certain pre-home rule special laws, such as the state-imposed requirement that there be a Governor-appointed, city-funded Boston Finance Commission.¹³⁷ In any event, the city has not attempted to use the charter to free itself of these kinds of restrictions that pre-date home rule.

Boston is not alone in being subjected to state control of its charter. A major charter reform occurred in the 1970s in New York City at the behest of a commission that was created and partially controlled by Governor Nelson Rockefeller. The Colorado constitution specifically defines aspects of Denver's administrative structure.¹³⁸ And, as noted in this report, the Georgia state legislature had a major hand in writing Atlanta's current charter. But Boston is far less in control of, and less engaged with, its charter than the other six cities.

In New York City, the charter is a major focal point of local civic debate and discussion in a way that it has never been in Boston. In recent years, New York City has considered charter amendments and referenda concerning the creation and modification of the city's campaign finance system, the adoption of and proposed modifications to term limits for city officials, the proposed (though not acted on) relocation of Yankee Stadium from the Bronx to the West Side of Manhattan, and, most recently, the adoption of nonpartisan elections for municipal office.¹³⁹

Similarly, Denver has reformed its city charter on an almost annual basis since 1904. In the last four election cycles, voters have amended the charter to establish the Department of Community Planning and Development, modernize revenue procedures, modify initiative and referendum procedures, alter the powers of its water commission to issue bonds, change civil service rules, require the city council to create a Board of Ethics, and increase the mayor's and the city council's ability to set pay and benefits for city employees.¹⁴⁰ The most recent reforms occurred in 2002 and 2003 and were led by Denver's mayor and supported by those who, as one councilwoman put it, believed that "our [charter] should be a contemporary document. It's shameful to have so much outdated stuff in it."¹⁴¹ In the lead-up to the election, the *Denver Post* and other local publications featured articles and editorials addressing the topics and ramifications of the proposed amendments, as well as local reactions.¹⁴²

In San Francisco, at least six charter reform committees have been established in the last 40 years. Most recently, the voters in 1993 approved a measure "directing the Mayor, the Board of Supervisors and the former Chief Administrative Officer, with the help of a citizens advisory committee, to recommend charter reforms."¹⁴³ The Board of Supervisors subsequently worked with the public to update the 1980 draft charter.¹⁴⁴ After the proposed update failed to appear on the ballot, Supervisor Barbara Kaufman devoted significant time to revising the charter.¹⁴⁵ Finally, in 1996, a revised charter was passed, which "reduce[d] the document from over 300 pages to less than 100; it put the mayor, assisted by a professional city administrator, in charge of day-to-day management of all city departments; it allow[ed] elected officials to set policy through the budget process; it ma[de] elected officials accountable to the public, rather than relying on appointed commissions; and it remove[d] many restrictions to modern management."¹⁴⁶

Soon after the Massachusetts Home Rule Amendment became law, Mayor Kevin White convened a commission to rethink home rule in Boston.¹⁴⁷ That initiative did not result in a home rule charter reform proposal, and no other significant charter reform effort has been pursued in Boston since home rule was granted. Of course, there may be advantages to Boston's more passive approach. Charter reform can be a distraction from more substantive concerns. Boston need not engage in charter reform to pursue any of the four visions of the city's future described in this report. Nonetheless, Boston's lack of homegrown charter activity is striking and unfortunate. The city appears to have given up on a way of focusing civic attention on the future that many cities have used.

The General Home Rule Power

Denver, San Francisco and Seattle had to adopt home rule charters in order to obtain general home rule powers under their state constitutions. This is not the case in Massachusetts. Even though Boston has not written a home rule charter, it still benefits from the state constitution's general grant of home rule power. Section 6 of the Home Rule Amendment vests home rule power in all municipalities whether or not they have written a charter for themselves.¹⁴⁸

Section 6 appears, at first glance, to be very broad. It authorizes any city or town to exercise "any power or function which the general court has the power to confer. . . ."¹⁴⁹ This language is important. It provides the basis for the Supreme Judicial Court's conclusion that municipalities have significant powers to regulate land use even in the absence of state authorizing legislation.¹⁵⁰ In recent years, Boston has relied on this language to ban smoking in restaurants and city workplaces.¹⁵¹ Indeed, standing alone, this language would make Massachusetts' Home Rule Amendment as broad as any of the state home rule grants examined for this report. But the sweeping introductory language of Section Six is qualified in two important ways. In combination, they make Boston's home rule grant among the weakest of the seven cities.

1. Specific Exemptions

The first limitation, detailed in Section 7, lists six areas in which cities and towns are expressly denied home rule power. The categories excepted from the home rule grant of Section 6 are the powers: (1) to regulate elections; (2) to levy, assess and collect taxes; (3) to borrow money or pledge the credit of the city or town; (4) to dispose of park land; (5) to enact private or civil law governing civil relationships except as incident to an exercise of independent municipal power; or (6) to define and provide for the punishment of a felony or to impose imprisonment.¹⁵² For these categories, Boston is in the same position as it was before home rule. It may act only if it has been specifically authorized to do so by a state statute.

Because the exceptions for regulating city elections, taxing, borrowing, and regulating most private or civil affairs cover such a wide range of issues that are of concern to cities, Section 7 makes home rule in Massachusetts something of an illusion. Perhaps this explains why so many local officials in the state complain that they can do little without the permission of the state legislature.¹⁵³ Or why a Boston city official told us that the Home Rule Amendment was viewed less as a source of power than a reason for concluding that local action would require state authorizing legislation.¹⁵⁴ Or why the state legislature still spends almost as much time on local legislation as it did in the years leading up to the passage of the Home Rule Amendment.¹⁵⁵

The import of these exceptions is magnified by the way state courts have interpreted them. The Supreme Judicial Court has held that the list of excepted areas is not exhaustive. Towns and cities also lack home rule over some matters not mentioned by Section 7, such as those that have significant extra-local impact.¹⁵⁶ In addition, the Supreme Judicial Court has construed the private or civil affairs exception to invalidate local ordinances that arguably fall outside its scope. For example, it invoked this limitation to invalidate local rent control ordinances absent statutory authorization¹⁵⁷ and to uphold local anti-discrimination ordinances only if they lack strong enforcement mechanisms.¹⁵⁸ Similarly, state courts have construed the tax exception to strike down local revenue measures that one might think are not taxes, including, most recently, impact fees imposed on new development.¹⁵⁹

No other city in this study operates under a grant of home rule that exempts taxing, borrowing, the regulation of private or civil affairs, *and* the regulation of municipal elections from its coverage. The Illinois constitution's home rule provision is a case in point. It is a mirror image of the Massachusetts Home Rule Amendment. Rather than broadly conferring governmental authority to localities and then expressly denying them a range of important powers, it grants municipalities only those home rule powers that pertain to local matters but then expressly defines them in an expansive fashion.¹⁶⁰ The list of home rule powers Chicago enjoys includes the power to tax, the power to borrow, and the power to "regulate for the protection of the public health, safety, morals, and welfare"¹⁶¹ Moreover, the Illinois constitution provides – as the Massachusetts Constitution does not – that the "[p]owers and functions of home rule units shall be construed liberally."¹⁶² Consistent with that instruction, the state supreme court has construed the grant of home rule to include the power to regulate municipal elections, including the authority to require them to be nonpartisan.¹⁶³

Denver enjoys a similarly generous home rule grant. The Colorado constitution specifically establishes Denver as a home rule entity with the power to issue bonds, to construct, own and operate public utilities, and to exercise the power of eminent domain "within or without" the city's territorial limits.¹⁶⁴ It grants municipalities "control" over local and municipal matters, as well as the power to regulate municipal elections, consolidate park and water districts, and assess, levy and collect property taxes for municipal purposes and improvements.¹⁶⁵ Colorado's constitution instructs the courts to construe the home rule grant liberally,¹⁶⁶ and the courts have held that the state constitution's recognition of cities' right to control local or municipal matters includes the right to impose taxes – including the sales tax – for local purposes.¹⁶⁷ As the state supreme court explained, when the people adopted home rule in the state constitution "they conferred every power theretofore possessed by the legislature to authorize municipalities to function in local and municipal affairs."¹⁶⁸

Like Chicago and Denver, San Francisco possesses the home rule power to tax,¹⁶⁹ borrow,¹⁷⁰ and regulate municipal elections.¹⁷¹ These powers flow from the California constitution, which states that municipalities that adopt their own charters (as San Francisco has done), have home rule over municipal affairs.¹⁷² The state's supreme court has construed this term liberally. San Francisco has used its authority to adopt a public campaign financing system and to levy taxes – such as a business license tax – that its state legislature has not expressly sanctioned. California's home rule amendment contains no prohibition against the regulation of private or civil affairs like the one that the Massachusetts Supreme Judicial Court relied upon to invalidate local rent control ordinances.

New York City's home rule grant is like Boston's in that taxation is expressly exempted from its scope.¹⁷³ But it still contains a number of powers that Boston does not have. A recent charter amendment considered whether the city should move to a system of non-partisan elections and a prior one authorized municipal financing of local elections. Each of these measures is likely beyond the scope of Boston's home rule authority. New York City has also barred discrimination by private clubs,¹⁷⁴ cigarette vending in public places,¹⁷⁵ smoking from nearly all places of employment,¹⁷⁶ and discrimination according to place of residence by rental car companies.¹⁷⁷ And it has regulated aspects of the conversion of rental housing to co-ops and condominiums¹⁷⁸ as well as residential rents.¹⁷⁹ Boston's power to adopt these measures is seriously constrained by the exceptions for either private or civil affairs or elections set forth in Section 7.

Only the home rule grants for Seattle and Atlanta are limited in ways comparable to Boston's. The Washington Constitution authorizes cities, like Seattle, that have adopted home rule charters to "make and enforce within [their] limits all such local police, sanitary and other regulations as are not in conflict with general laws."¹⁸⁰ This delegation of authority has been read quite narrowly in a series of state court decisions stretching back nearly a century.¹⁸¹ The result is that Seattle, like Boston, must actively seek out state legislative authorization to obtain the power to tax or regulate in a wide variety of areas. In a similar vein, Georgia's grant of home rule expressly exempts the regulation of private or civil affairs, just as the Massachusetts Home Rule Amendment does.¹⁸² Moreover, the Georgia Supreme Court has held that "powers of cities must be strictly construed, and any doubt concerning the existence of a particular power must be resolved against the municipality."¹⁸³

Yet Seattle and Atlanta still appear to enjoy more independence from their state legislatures than Boston. Washington's constitution does not expressly deny the broad range of home rule powers that Massachusetts' Home Rule Amendment does, and there is thus more room for state judges to construe its terms in a manner favorable to home rule. This has begun to happen. In recent years, the Washington Supreme Court has relied on the home rule grant to uphold Seattle's power to run its own electrical utility¹⁸⁴ and to provide domestic partnership benefits to city employees.¹⁸⁵ Seattle has also adopted local campaign finance measures, as well as a private cause of action for unfair real estate practices, pursuant to its assertion of home rule powers – assertions that the express exceptions to the Massachusetts Home Rule Amendment would appear to preclude Boston from making. As for Atlanta, its home rule statute, although narrow, does not expressly exempt the power to borrow nor wholly exempt the power to tax,¹⁸⁶ as does Boston's. In fact, the city's state-drafted charter expressly confers a general power to tax, which Atlanta has exercised frequently, as well as a general power to borrow.¹⁸⁷

2. Preemption

The Massachusetts Home Rule Amendment's other important limitation appears in Section 6. It concerns what lawyers refer to as preemption: the power of the state legislature to override conflicting local laws. The Massachusetts Home Rule Amendment makes clear that the state's power of preemption is virtually unlimited. It provides that cities and towns may exercise their home rule powers only to the extent their actions are not "inconsistent with the [state] constitution or [the] laws enacted by the general court"¹⁸⁸ There is no area of local concern,

therefore, that is immune from state interference. Even when the city is not taxing, borrowing, regulating elections, or regulating private or civil affairs, its laws must conform to those established by the state legislature. At most, then, the home rule grant permits Boston to act when the state legislature has not said it may not. Indeed, the state courts have gone so far as to hold that “[the state legislature’s] authority includes the power to choose to provide an appointive rather than elective, form of municipal government.”¹⁸⁹

Preemption works in two ways. Some state laws preempt local ordinances expressly. This was the case, according to the Supreme Judicial Court, when Boston attempted to provide health benefits to domestic partners of city employees.¹⁹⁰ But Section 6 does not say that the state legislature must have “denied” a local power in order for it to be overridden. It says only that a local law may not be “inconsistent with” the state law. Soon after the Home Rule Amendment’s adoption, serious consideration was given to changing this language to make it more favorable to assertions of home rule authority.¹⁹¹ Those efforts did not succeed. Section 6 thus permits state statutes to preempt local laws even in the absence of a clear conflict. It is enough if the state is found to have dealt with the general subject matter in a manner that, by implication, renders the local action inconsistent with state policy.

The problem of preemption in Massachusetts is compounded by the fact that the areas in which the state has legislated are so diverse and comprehensive that any local regulation can be understood to trench on *some* state policy. The Supreme Judicial Court, for example, held that the city of Boston was prohibited from expending its own funds to inform voters about a local referendum. Because the legislature enacted “comprehensive legislation” regulating election financing after the Home Rule Amendment – legislation that did not specifically address whether a city could spend money to educate voters – the court ruled that Boston’s desire to conduct the voter-education campaign was “inconsistent with . . . laws enacted by the general court.”¹⁹² Decisions like this one have a chilling effect on municipal initiative. Local officials in and out of Boston interviewed for this report repeatedly invoked the shadow of preemption – and the litigation that a claim of preemption would trigger – as a prime constraint on independent local assertions of authority in Massachusetts.¹⁹³

The Home Rule Amendment does impose one important constraint on the state’s power to preempt: the state cannot pass a “special law” targeted at a particular city. Section 8 of the Home Rule Amendment provides that the state can preempt only by enacting a general law – unless it obtains two-thirds majorities in each branch of the legislature following a recommendation from the Governor.¹⁹⁴ This is not to say that a preemptive state statute cannot impact Boston more significantly than other Massachusetts cities. The statewide referendum that banned rent control¹⁹⁵ affected only three cities (Boston among them), and the initiative failed to earn a majority among voters in those three cities.¹⁹⁶ It nevertheless has not been struck down by the Supreme Judicial Court as constituting special legislation.¹⁹⁷ Still, the ban on special legislation does protect Boston from targeted restrictions on its authority to some extent. Section 8 makes it difficult for such measures to be adopted as a matter of course.

The ban on special legislation, however, contains a serious limitation. It is not retroactive.¹⁹⁸ It has no application to state laws enacted prior to the recognition of home rule. Given that home rule came so late to Boston, and given that Boston has been such a peculiar object of state legislative attention, there are many such special laws. A search of the state code turns up scores of statutes with phrases such as “except for the city of Boston.” Many of these special acts are trivial but burdensome, such as the law (recently changed) that severely limited the fee that Boston (and Boston alone) could charge to tow a car¹⁹⁹ or the one that restricts the late fees that the city school committee may impose on evening students to a level below that allowed for other municipalities.²⁰⁰ But others are not trivial. Perhaps the most tangible legacy of these laws are those found in the city charter itself – such as the ones establishing the Finance Commission and the Licensing Board.

Section 8 of the Home Rule Amendment also contains another exception to its ban on special legislation: special legislation is permissible if the city files a home rule petition requesting it. A petition may be filed by the city council and mayor acting jointly, or by referendum of the city's voters acting on their own.²⁰¹ But reliance on the home rule petition mechanism is no substitute for the exercise of home rule power. A home rule system that relies on localities requesting state legislative permission in many ways resembles the system that was in place prior to home rule. The state legislature is under no legal obligation to approve a petition it receives. In practice, the state tends to be reluctant to grant approval when the matter in question is controversial (as was the case with a recent petition concerning the provision of domestic partnership benefits) or related to a matter thought to be of state concern (such as taxation). A successful petition usually requires a substantial investment of legislative effort by the city, effort that would not be required if the city were empowered to act on its own. And, of course, whenever a city must ask the state for permission, it opens up the possibility for logrolling or approval conditioned on agreement to state demands. Concerns of just this kind led the Massachusetts legislature to place the Home Rule Amendment on the ballot in the first place. All of these concerns are especially heightened for Boston – the state's largest urban center and the home of the statehouse – given the interest that so many non-residents have in its actions.

More fundamentally, state laws passed in response to home rule petitions remain state laws. Unless they are deemed subject to the charter amendment process, they can only be changed or repealed with the consent of the state legislature. Thus, while the state allowed Boston to reconstitute the school committee in response to a home rule petition, the state legislation specified (among other things) that the new school committee have seven members, that the members have staggered terms of office, and that there be a 13-member nominating panel (organized in detail by the legislation) empowered to present a list of candidates from which the Mayor selects committee members.²⁰² None of these provisions can be changed without returning to the legislature. The concern about state control is even more serious when the city relies on the petition process to obtain power arguably within the scope of the home rule power. The result may be that the special state law will preempt future exercises of the home rule power. The city's reliance on the petition process to adopt many of its most innovative affordable housing initiatives may have had just this consequence – which is explained more fully in the chapter on land use.

Just as many states have defined the home rule power broadly to include many areas – including taxation – that Massachusetts exempts, there is also nothing natural about the way that the Massachusetts Home Rule Amendment defines the power of preemption. To be sure, Seattle, Atlanta, and New York – like Boston – are bound to follow general state laws. But several other cities in our study enjoy substantially more protection from them. Denver's state grant of home rule provides: "the statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters."²⁰³ In addition, the state constitution specifically identifies Denver as a home rule city and invests it with powers, including borrowing powers, that the state courts have held are beyond state control.²⁰⁴ As a result of these protections, Denver has successfully challenged directly conflicting state statutes that attempted to regulate municipal employment practices²⁰⁵ and to limit the city's ability to impose sales taxes for local purposes.²⁰⁶

California's state constitution provides that a city, or city and county, may adopt a charter giving it the power to "make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters"²⁰⁷ The state supreme court has interpreted this to confer the "constitutional authority of a home rule city or county to enact and enforce its own regulations to the exclusion of general laws if the subject is held by the courts to be a municipal affair rather than of statewide concern"²⁰⁸ California municipalities have relied on this immunity to overturn state laws regulating local bidding procedures,²⁰⁹ municipal employment rules,²¹⁰ local elections,²¹¹ and even some city taxing powers.²¹²

Chicago's home rule grant flatly prohibits legislative preemption in several circumstances. Under the state constitution: (1) the legislature cannot limit the borrowing power of a home rule unit with a population greater than 500,000 below an amount equal to 3% of the unit's total estimated assessed value;²¹³ (2) the legislature cannot deny or limit a home rule unit's power to levy special assessments for local improvements;²¹⁴ and (3) the legislature cannot deprive home rule units of the power to impose "additional taxes" for the provision of "special services."²¹⁵ As to other areas, including local exercises of the home rule taxing power, the constitution requires preemptive state legislation to be passed by super-majorities.²¹⁶ Finally, the Illinois constitution specifically instructs courts to construe the home rule grant liberally and to recognize the power of home rule municipalities to legislate in areas of "concurrent" state and local concern.²¹⁷ In practice, the Illinois Supreme Court has held that these interpretive instructions were designed "to eliminate or at least reduce to a bare minimum the circumstances under which local home rule powers are preempted by judicial interpretation of unexpressed legislative intention."²¹⁸

The City Charter as a Limit on Local Power

As the previous sections have demonstrated, express exceptions and the shadow of preemption substantially limit Boston's home rule power. But there is another limit on its power as well: its own city charter. Once again, other states take the opposite tack. A Washington appellate court has held that cities' home rule charters should be construed to uphold local ordinances and regulations even if they arguably conflict with the charter's terms.²¹⁹ To do otherwise, the court suggested, would undermine the purpose of the grant of home rule – to enable local governments to exercise powers necessary to address local concerns.²²⁰ Similarly, in California, the case law indicates that conflicts between ordinances and the city charter should not be "implied."²²¹ That logic has less force when the state legislation defines the charter's terms. Courts can then view the conflict between the charter and a local ordinance as one that pits the state against the city. The Massachusetts Supreme Judicial Court has adopted this stance. The court has defined Boston's charter to limit municipal operations. Its decisions reflect a judicial inclination to treat the city's charter more as a state-imposed limitation on local action than as an expression of local self-governance.

The best example of this dynamic comes from a pre-home rule case, *McCaffrey v. Mayor of Boston*.²²² There, 10 taxpayers filed suit to enjoin Boston from appropriating \$2,500 to an "executive committee," composed entirely of City Council members, to investigate the advisability of establishing a hospital for chronic disease.²²³ The funds were mostly designed to cover the costs of the committee's visit to hospitals for chronic disease in other parts of the country. As the taxpayers pointed out, the 1909 charter amendment specifically stated that "no other sum shall be paid . . . for or on account of any personal expenses directly or indirectly incurred by or in behalf of any member of [the City] Council."²²⁴ The city attempted to justify the legality of the payments by citing a subsequently enacted general law which permitted appropriations of "all other necessary charges" of a municipality.²²⁵ The Supreme Judicial Court, in a brief opinion, held that "scarcely any expenses more strictly personal can be imagined than those arising from travel." The charter, the court said, was applicable to Boston alone and addressed Boston's "particular needs." Consequently, "[n]o words of general permission can stand against such particular and positive prohibition."²²⁶

Although the Supreme Judicial Court interpreted provisions of Boston's charter to limit city power despite the existence of permissive general state statutes, it has not interpreted the charter to expand city power in the face of seemingly more restrictive general state laws. In *Edwards v. City of Boston*,²²⁷ 10 taxpayers successfully challenged Boston's one-year extension of a school transportation service contract for its failure to comply with the Uniform Procurement Act. Similarly, in *Boston Teacher's Union, Local 66 v. City of Boston*,²²⁸ the Supreme Judicial Court upheld a state law requiring the Mayor to submit a supplemental appropriations request by the School Committee to the City Council. In both cases, the court held that the subsequent general state laws controlled notwithstanding the powers conferred on the city by its charter.

The Ethos of Home Rule

There is, of course, more to a city's legal power than the protections contained in state grants of home rule. Other aspects of state law can expand or contract city powers in ways that the terms of a home rule amendment might conceal. These other state laws are extremely important in their own right. This is certainly the case with respect to the legal powers of Boston. A discussion of home rule in Boston that overlooked Proposition 2½ would be very misleading.

The same point holds true for the other cities in this study. Denver has significantly broader home rule taxing powers than Boston, but it also labors under a separate state law, known as the Taxpayer Bill of Rights, that imposes very restrictive limits on its fiscal authority (Colorado's Taxpayer Bill of Rights is discussed later in this report). Moreover, while Denver has greater power to regulate affordable housing than Boston, it is subject to a statewide prohibition against rent control just like Boston is. San Francisco's home rule taxing powers are also significantly constrained by preemptive state laws. The next four chapters – on revenues, expenditures, land use, and education – highlight the role that these kinds of state laws play in shaping home rule for each of the cities in our study.

Still, state home rule provisions *are* important in and of themselves. They define the fundamental legal relationship between city and state and set the basic parameters for the exercise of city power. They indicate whether city officials should think of taxation as something within their purview or something for the state alone. They determine whether municipal elections should be conceived of as a city matter or as an issue on which the state legislature has ultimate responsibility. And they instruct city officials to believe that there are areas of authority reserved to them or to assume that there are no such areas. Home rule, in practice, is a state of mind as much as it is a legal rule system. It only works if the officials vested with home rule power have the confidence to assert the powers arguably entrusted to them. The legal definitions set forth in provisions such as the Home Rule Amendment of the Massachusetts Constitution play an important role in creating an ethos of home rule that either presumes city power or city powerlessness.

This study did not endeavor to compare, in any scientific sense, the ethos of home rule that prevails among officials in the seven cities. But a number of people in each city were interviewed for this report, and their impressions certainly match up with what an investigation of the legal materials indicates. Those cities that have been invested with very strong home rule measures seem to have a confidence in their lawmaking powers that other cities lack. Consider this summary from the researcher of the home rule ethos among officials in Chicago: "The City of Chicago is confident in the exercise of its home rule powers and is generally able to work well with the limits it perceives, be they statutory, constitutional, or judicially imposed."²²⁹ Or this one from Denver: "Because of its centrality to the state population and economy, Denver exercises state-wide power. And because of the relative weakness of state government, Denver tends to exercise significant autonomy in its sphere."²³⁰

No officials in Boston, past or present, have voiced similar sentiments. Indeed, only officials from Seattle expressed the sense of constraint that seems so prevalent in Boston – and Seattle is the only city with a home rule grant that appears to be as weak as Boston's. The relatively weak nature of the Home Rule Amendment, when compared to the home rule grants that have been given to Chicago and Denver, has a lot to do with the pervasive sense of constraint discerned among Boston officials. If so, an expansion of the home rule powers contained in the Home Rule Amendment could alter the basic assumptions about city power that now predominate in Boston.

Both as a matter of perspective and as a matter of legal constraint, one lesson from this chapter should be unmistakable: the city of Boston cannot have a major influence in its own development – whether as a global city, a regional city, a tourist city, or a middle-class city –

without adequate power to decide important matters on its own. But Boston's ability to influence its future development is not simply a matter of its powers under home rule. It also depends on its specific legal powers in important areas of local concern. The next four chapters examine more intensively Boston's power – under not only the Home Rule Amendment but also under other provisions of Massachusetts law – in four key areas: revenues, expenditures, land use, and education. As this report suggests, what is true of Boston's authority under home rule is true in these more specific areas as well: Boston is a city bound to an extent that many comparable major American cities are not.

Chapter Four

Revenue

The most important powers cities possess involve their authority to raise revenue and to spend it. If the state legislature can impose severe constraints on raising local revenues and, at the same time, require a city to make significant local expenditures, the city can become unable – for reasons beyond its control – to meet its basic obligation to avoid a fiscal meltdown. To be sure, local fiscal power is no guarantee that a city will manage its budget well. Cities, like private businesses, might spend more money than they have even if no one orders them to do so. Cities might also handle their finances well even though the state puts them in a seemingly impossible situation. Boston has managed to keep expenditures roughly in line with revenues even though it lacks independent legal control over either. Nevertheless, revenue restrictions and mandated expenditures are critical impediments to a city's ability to manage its finances.

Local fiscal power is important, however, for reasons other than its impact on fiscal discipline. Interest in local fiscal power is based, above all, on the way it affects a city's ability to shape its own future. State-imposed limits on a city's revenue-raising authority affect a city's ideas about the kinds of economic development that it should promote. A city is likely to be more eager to promote the kind of development that it can tax than the kind that provides no revenue. State-imposed limits on a city's revenue also make the city vulnerable to economic shifts and thus to the influence of outsiders. When shifts in the economy in the 1950s left Boston's property tax base insufficient, the city had little choice but to acquiesce in development proposals from the state and private actors. Finally, the amount of funds that a city controls determines its ability to invest in projects that go beyond the provision of basic services such as public safety. These are the projects that enable a city to transform itself into a catalyst for regional cooperation, a mecca for tourism, an affordable home to middle class residents, or a worldwide leader in innovation.

Cities receive their revenues from three main sources: taxes, non-tax revenue such as fees, and cash grants from the state and federal governments. Because the concern of this study is with the way that state law shapes city power – and the effect that state rules have on a city's ability to use its authority to define its future – the role that the federal government plays in shaping the revenues of Boston or the other six cities is not examined here. Rather, the focus is solely on the role of the state, beginning with a description of Boston's key sources of income and how they compare to those relied on by the six other cities. Following a description of the sources of income is a comparison of the way Massachusetts and the other states structure cities' taxing powers, their non-tax revenues, and, finally, the manner in which they receive state aid.

Basic Sources of Income

As the following table shows, Boston relies primarily on just two sources of income: property taxes, which in Fiscal Year 2005 constituted 58.1% of its revenues, and state aid, which that year constituted 23.3%.

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Revenues millions)	(in	Fiscal Year 2004 Actual	Fiscal Year 2005 Actual	Fiscal Year 2006 Budget
Property Tax Levy		1,094.15	1,150.59	1,207.62
Overlay Reserve		(42.08)	(44.25)	(40.84)
Excises		59.57	82.51	70.95
Fines		66.66	65.61	64.78
Interest	on			

Investments	7.79	17.79	16.00
Payment in Lieu of Taxes	22.27	23.45	23.28
Chapter 121A	54.81	54.91	53.53
Misc. Dept of Revenue	40.81	43.06	32.53
Licenses, Permits	34.82	33.82	27.18
Penalties, Interest	9.83	9.75	8.29
Available Funds	2.93	5.53	12.11
State Aid	459.84	461.13	469.64
Teacher Pension Reimbursement	61.39	76.52	76.52
TOTAL RECURRING	1,872.79	1980.43	2021.59
Non-Recurring Revenue	0.00	0.00	9.23
Budgetary Fund Balance	20.00	0.00	20.00
TOTAL REVENUES	1,892.79	1,980.43	2,050.81

All other sources of income in Fiscal Year 2005 – excise taxes, parking fines, fees, and the like – constituted only 18.6% of the city's revenues.²³¹

This picture of the city's revenues is skewed, however, by the fact that Boston includes funding for education – the single largest local expense – in its general budget. Other cities in this study do not follow a similar accounting practice. Since all cities rely heavily on property taxes and state aid to pay for schools – even if they rely on a much wider array of revenue sources for other local services – this accounting difference is potentially significant. Boston's inclusion of schools in its budget may unduly magnify its reliance on property taxes and state aid. It is useful therefore to examine the percentage of the non-education budget that the city can support with revenues other than property taxes and state aid. If Boston can generate a considerable amount of own-source, non-property tax revenue to spend on expenses other than education, it would suggest that the city is not overly dependent on property taxes and state aid.

School-related expenses cost Boston about \$680 million in 2004.²³² The city therefore had a non-schools budget of about \$1.3 billion (out of a total budget of \$1.98 billion). After subtracting state aid and property taxes from the city's revenues, Boston had about \$369 million of own-source non-property tax revenue – that is, enough own-source non-property tax funds to cover 28% of the non-schools portion of its budget. This figure is very low when measured against the comparable figure for the other cities. In Chicago, non-property tax, own-source revenues paid for about 60% of the city's non-schools budget in 2003.²³³ And that's not counting some additional non-property tax revenue – such as the sales and income taxes – that the state collects and then remits automatically to the city. In San Francisco²³⁴ and Seattle²³⁵ the percentage was about 65 and 70 percent, respectively. In Atlanta²³⁶ and Denver²³⁷ the figure was even higher: about 80 and 85 percent, respectively. Even New York City's non-property tax, own-source revenues made up approximately 60% of its non-school budget in 2003.²³⁸

Thus, while all of the cities in this study are strapped for cash, Boston is in a unique position. It is limited not only in the amount of funds it has available but in the sources on which it can rely to generate revenue. Boston has the least diversified revenue portfolio of any of the cities in our study. And it is unusually dependent on discretionary state aid for a substantial portion of its daily operating budget. These two ingredients have important effects on the city's ability to plan for its own future.

Taxes

Boston's limited ability to generate revenue by taxing is a direct consequence of state law. Boston did not choose the property tax over other taxes. Nor did it choose to take state aid over generating more own-source revenue through additional taxes. Boston operates within a set of state-defined constraints that restrict the types of taxes it may impose and that place significant limits even on the taxes that it is authorized to levy.

The General Legal Structure of Taxation

Boston received home rule in 1967. But the Home Rule Amendment did not empower Boston to levy taxes. Boston's entire taxing structure – what is taxed, how it is assessed, and who collects it – is essentially determined at the state level. As one commentator explained in regard to Boston's most important source of revenue, "[s]ince only the [state] [l]egislature has the constitutional authority to levy taxes, the role of municipal officials in property taxation, even in authorizing the classification of property, is purely administrative."²³⁹

This legal structure is rejected in other states. Taxation need not be understood as a delegation of power from the state withheld from municipal home rule powers. Chicago, Denver, and San Francisco all operate within home rule frameworks that adopt the opposite presumption. In these states, taxation is presumptively within the cities' home rule powers.²⁴⁰ As early as 1906, just 10 years after the passage of what can be called the Home Rule Amendment in California, the California Supreme Court adopted the language of the United States Supreme Court in explaining the importance of municipal taxing authority:

That the power of taxation is a power appropriate for a municipality to possess is too obvious to merit discussion. As was said by Mr. Justice Field . . . , "[a] municipality without the power of taxation would be a body without life, incapable of acting, and serving no useful purpose."²⁴¹

With this background presumption, the legal structure of California has developed in importantly different ways from that of Massachusetts. This is not to say that cities like San Francisco are without restrictions on taxation. On the contrary, as will be explored in more detail below, California voters have passed an extensive initiative that severely limits California cities' ability to assess property taxes. Nevertheless, given the underlying presumption in favor of local taxing authority, the reaction was to rely on other forms of taxes rather than on state aid to fill the gap.

A similar pattern can be found in Colorado. There, too, taxation is considered a local power under the state constitution.²⁴² Indeed, some state efforts to preempt local taxation have been held unconstitutional.²⁴³ To be sure, as in California, the recognition of a home rule power to tax has not meant that the state lacks the power to impose limits on the city's taxing power. Among the limits Colorado places on Denver is a state constitutional amendment that regulates local property taxes by limiting residential tax assessments.²⁴⁴ Nevertheless, because Colorado's grant of home rule confers the local power to adopt a broad range of taxes, Denver has been able to respond to these state restrictions by relying on additional taxes. Boston cannot adopt a similar strategy without express state statutory authorization.

The home rule framework in Illinois offers perhaps the most dramatic contrast to Boston's. A 1970 amendment to the Illinois Constitution gave Chicago broad home rule fiscal powers.²⁴⁵ As one of the drafters of this provision explained, the purpose of the measure was "to give home rule units some additional power to raise revenues as they see fit for their needs, without easy invasion or limitation by the state legislature. We agreed that home rule without money is meaningless."²⁴⁶ Localities in Illinois thus have discretion to rely on many sources for tax revenue, and Chicago has used that discretion. Even if one excludes the sales tax revenue that the state collects and automatically remits to Chicago, the city's home rule taxes make up

26% of its budget.²⁴⁷ That's nearly twice the percentage of the budget funded by all of Boston's own-source, non-property tax revenues. Moreover, in recent years, Chicago has increasingly turned to user fees and other non-tax revenue sources to augment its income. Boston is constrained in its ability to follow suit because, as this report will show, the state courts have construed the taxation exception to the Home Rule Amendment to preclude the imposition of many local fees.

The fact that Boston's taxing power requires delegated authority from the state – given the state legislature's historic and continuing reluctance to relinquish control of that power – goes a long way towards explaining Boston's imbalanced reliance on the property tax and state aid. But state control over taxation is important in Massachusetts not only because it has helped make Boston uniquely dependent on a single local revenue source and on discretionary state assistance. It is also important because it has implications for the amount of taxing authority the state may lawfully delegate to the city. The Massachusetts Supreme Judicial Court has made clear that delegations of taxing authority are subject to state constitutional limits. Admittedly, the court has recognized that, once the power to levy property taxes has been delegated, municipalities can set their own tax rates and can have some discretion over how they adjust these rates for the different classifications of property established by the state. Nevertheless, when the Supreme Judicial Court struck down a fee as an improper tax in *Emerson College v. City of Boston*, it found that the state statute had run afoul of the limits of legislative delegation. The scheme constituted an impermissible delegation to an administrative official of the power to tax, the court said, because the assessment decisions were to be determined only by the fire commissioner. The distinction between the delegation of power to local governments that the state allows for property taxation and the delegation struck down in *Emerson* is by no means clear; it may simply be the longstanding nature of the former and the novelty of the latter. If so, any new delegation of taxing authority to Boston has to be tailored carefully to prevent its being considered beyond the state's authority to delegate.

The fact that the City of Boston's taxing authority is a delegation of state power has another implication as well: the limitations of the Massachusetts Constitution regarding state taxation also affect Boston. The constitution determines the extent to which the state itself can tax and, as a result, the extent to which it can delegate taxing authority to the city. For example, the constitution requires that the state "levy proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the . . . Commonwealth."²⁴⁸ This amendment might be read as requiring proportionality of taxes across the whole state, thereby prohibiting local tax variance. Instead, the Supreme Judicial Court has interpreted this language to mean that all taxes must be proportionate within each class and within each municipality.²⁴⁹

The significant role that the Supreme Judicial Court has played in defining local taxing powers – through cases like *Emerson* and the rulings on the meaning of phrases like "proportional and reasonable assessments" – highlights a critical feature of the legal structure of taxation in Massachusetts, one that provides an important background for our discussion of revenues in Boston. To the extent that one wishes to change Boston's taxing powers, that change will be molded by judicial interpretation of Massachusetts's constitutional limitations.

The Property Tax

We have already noted that the City of Boston is heavily dependent on property taxes. Year after year, Boston relies on the property tax for more than half of its total revenues and for roughly three-quarters of its own-source revenue. No other city in our study has this kind of reliance on the property tax. In 2003, revenue from property taxes made up 10% of the city budget in Denver,²⁵⁰ about 12% in Chicago,²⁵¹ and 15% for San Francisco.²⁵² Atlanta relied on property taxes for 20% of its revenues,²⁵³ and Seattle for 27 percent.²⁵⁴ Even New York City depends on property taxes for only about 25% of its total revenues.²⁵⁵ Although these percentages change once the schools budget is factored in, the increase is not significant.

Boston's reliance on the property tax is still about 30% higher than Chicago's even if schools are included.²⁵⁶ (Property taxes make up only roughly one-third of Chicago's school budget.)²⁵⁷

The unusual importance of the property tax in Boston increases the significance of the limitations, both legal and prudential, that the state places on the city's ability to raise money from the property tax – as well as on its ability to determine the best way to adjust tax rates to compensate for budgetary shortfalls from other sources. The following considers these limitations and how they compare to those that apply to the other cities in this study.

1. Impact of Proposition 2½

Although statistics demonstrate that the Commonwealth is no longer in the top half of the states in terms of its high levels of taxation of its citizens,²⁵⁸ the fears of uncontrolled property taxation in Boston have long historical roots. In the late 1800s, Boston's Mayor Nathan Matthews criticized Boston for being "the most heavily taxed in the nation, possibly 'in the entire world.'"²⁵⁹ As early as before the Civil War, "suburbanization of the elite" was already underway in Boston . . . as many middle- and upper-middle class families of property frequently transferred their domiciles . . . to avoid paying high property taxes."²⁶⁰ In 1885, a state statute was passed that limited municipalities' property tax rate, excluding debt service, to 12% of the assessed valuation in the previous three years.²⁶¹ The same statute placed Boston's cap at 10.5% – a whole percent and a half lower than the statewide limit for other cities.²⁶²

The 1885 limitation on property taxation was repealed for much of the twentieth century,²⁶³ but Massachusetts's voters approved an even more stringent statewide restriction on property taxation in 1980.²⁶⁴ Aptly named, Proposition 2½²⁶⁵ places two restrictions on the property tax. First, the total property tax levy for any municipality cannot exceed 2.5% of its total taxable value – this is often referred to as the "levy ceiling."²⁶⁶ Second, annual increases in the property tax levy cannot exceed a 2.5% increase over the previous year's levy limit – this is often referred to as the "levy limit."²⁶⁷ There is, to be sure, some wiggle room within these limits. The value of new construction is added to the property tax levy on top of the 2.5% limit.²⁶⁸ Moreover, the levy limit pertains only to absolute increases in the dollar amount of property tax collection; depreciation of property values for one class of property can allow tax increases for another while still staying under the limit.²⁶⁹ Most importantly, exceptions to Proposition 2½'s limitations may be adopted by a referendum vote by the constituents of a municipality. These exceptions can take the form of overrides or debt exclusions. An override allows a municipality to increase the tax levy for a given year over the 2.5% limit.²⁷⁰ This increase is considered permanent and becomes the baseline for the following year's calculation of the levy limit.²⁷¹ An exclusion, on the other hand, is targeted to a specific capital project or debt and exists only for the life of the project or debt; it is not added to the baseline for future calculations.²⁷²

The immediate effects of Proposition 2½ after its passage in 1980 were swift and groundbreaking. Municipalities laid off teachers, police officers, and other civil service personnel. Given this financial crisis, the state stepped in and provided state aid to assist municipalities in maintaining basic services.²⁷³ State aid thus became an integral part of economic politics for Boston and every other city and town in the state. But state aid has not fully eased the fiscal squeeze. Boston has come close to the Proposition 2½ levy ceiling on a number of occasions. In 1985, Boston's property tax rate was right on the levy ceiling of 2.5% before falling back down to 1.4% in 1989 after four years of substantial property value growth.²⁷⁴ Five years later, in 1994, another wave of depreciation brought the tax rate dangerously close to the tax ceiling, this time to 2.47%.²⁷⁵

Property values have increased in subsequent years, but this history illustrates how vulnerable Boston is to economic shifts and how much of an impact the 2.5% levy ceiling has on Boston's finances during times of recession. The levy ceiling makes it difficult for Boston to respond to downturns in property assessments. And it prevents it from reaping the benefits of economic upswings, even to save or prepare for the next stage of the cycle.²⁷⁶ Proposition 2½

also prevents Boston from growing its property tax base to keep up with inflation rates. As one article explains, “[i]nflation has risen 93% in Greater Boston from 20 years ago, . . . [b]ut two decades' worth of Proposition 2½ has allowed communities to increase cumulative spending by just 64 percent” if, as in Boston, there have been no overrides.²⁷⁷

One response of many municipalities in Massachusetts to Proposition 2½ has been to obtain referendum approval for an override of Proposition 2½'s limits.²⁷⁸ Boston has not asked its voters for an override. Its not doing so has turned into a political sore point in recent years. In response to attempts to acquire authority from the state to levy other taxes to supplement the property tax, state officials have been vocal in demanding that Boston resort to property tax overrides first before asking for other taxing authority. House Republican Leader Bradley Jones, Jr., has said that Boston “shouldn't be arguing for local-option taxes before it's gone to the voters to override the state's property tax limit.”²⁷⁹

Such an argument does not explain, however, why Boston must put a single-issue referendum on the ballot to raise property taxes before it can obtain the additional taxing authority other cities in our study already have by virtue of state constitutional grants of home rule or broad statutory delegations. Illinois, for example, has established a tax structure that proceeds from very different assumptions than those embraced in Massachusetts. Under Illinois's home rule system, cities have taxing powers unless those who oppose their exercise succeed in passing a referendum requiring the city to give them up.²⁸⁰ Massachusetts makes the referendum a prerequisite to the exercise of additional taxing authority; Illinois makes it a prerequisite to the relinquishment of taxing authority. Significantly, a large majority of municipalities in Illinois that have exercised home rule taxing powers have overwhelmingly defeated referenda that asked voters to relinquish them.

2. The Impact of Exempt Property.

The limits of Proposition 2½ are not the only constraints on Boston's ability to generate revenue from the property tax. For a city that relies so heavily on the property tax, Boston has a significant proportion of property that is exempt from property taxation. This, by and large, has not been the city's choice. State law mandates that much of Boston's land be excluded from the tax rolls.

According to a study conducted in 2002, more than 50% of Boston's land area is exempt from property taxes.²⁸¹ This percentage is striking compared to the figures for other cities. Only 25.4% of Denver's properties were tax exempt and less than 20% of Atlanta's total acreage is tax exempt. The disparity between Boston and the other cities is clear even if one considers tax-exempt value as opposed to tax-exempt acreage. In the year 2001, 24.9% of all assessed value in Boston was exempt from property taxation.²⁸² By contrast, only 3.2% of total assessed value in San Francisco is exempt,²⁸³ and less than 20% of the assessed value in Denver²⁸⁴ and Seattle²⁸⁵ is exempt. Only New York, among cities in our study, exceeds Boston: almost 40% of its total assessed value is tax-exempt, while another 20% is classified as partially taxable.²⁸⁶

The breakdown of exempt properties in Boston is also significant. The largest percentage of exempt land, encompassing more than 26% of the total landmass of Boston, is exempt because the property is owned by the state.²⁸⁷ Massport and the Urban Parks and Recreation Division of the state's Department of Conservation and Recreation (formerly the Metropolitan District Commission) control more than half of the state's holdings in Boston. The second largest owner of tax-exempt property is the city itself (14% of all the property in Boston), almost half of which is parkland and other open space.²⁸⁸ Popular conceptions to the contrary notwithstanding, colleges and hospitals account for only 2% of total tax-exempt land in Boston.²⁸⁹ Other tax-exempt institutions, such as cemeteries, museums and charitable organizations, account for 8%.²⁹⁰ In terms of assessed value, as opposed to acreage, however, privately owned land makes up a more significant percentage. State and municipal property account for only

14.2% of total assessed value in the city even though these governments own more than 40% of the acreage; private institutions account for 10% of both acreage and assessed value.²⁹¹

Boston can compensate to some extent for its significant amount of tax-exempt properties because it receives Payment In Lieu of Tax (PILOT) contributions. The state made a contribution of almost \$1 million in the year 2002.²⁹² But this payment was voluntary. No payment was made in 2001 or 2000. Massport, the owner of 9% of city land, contributed more than \$11 million to the city in 2005,²⁹³ and in 2006 announced plans to increase this amount. But, as Boston officials explain, “these payments are voluntary and do not come close to the amount that the city would receive in property taxes if the properties were privately owned.”²⁹⁴ Overall, PILOT contributions account only for roughly 1% of Boston’s total budget.²⁹⁵

3. The Allocation of Property Tax Burden

Another way in which the state constrains Boston’s control of the property tax is the limit it places on the city’s ability to allocate the tax burden among types of property within its boundaries. Along with other cities in the state, Boston was empowered by a constitutional amendment adopted in 1978 to set different rates for residential, commercial, industrial, and personal property.²⁹⁶ The constitutional provision permitting variation among classes is particularly important to cities like Boston because the Supreme Judicial Court has held that, in accord with the constitution and state legislation, assessments should be for “full and fair cash value,” a requirement designed to bring to an end a longstanding practice (notorious in Boston) of disproportionate assessments for similar properties.²⁹⁷ Without classification, or the ability to tailor assessments, Boston would have no means of allocating the tax burden between residential and commercial property owners.

Boston’s power to classify property is limited by state law. State legislation passed the same year as the constitutional provision permitting classification enabled the city, with approval from the state Department of Revenue, to raise the property tax levy on commercial, industrial, and personal property up to 1.75 times that of residential property owners.²⁹⁸ The idea was to lessen the strain on municipal residents, while putting the property tax burden on properties used to generate income. The classification of real property also cannot exceed four classes, and the assessment of the tax rate must be proportionate within each class.²⁹⁹

In 2003, Boston sought to increase the 1978 limit so that it could shield residents from an increasing tax burden spurred in part by a sharp upward trend in housing values. The state’s acquiescence to this change came with conditions: it would allow Boston to tax commercial properties at higher rates for one year but, for the subsequent five years, the discrepancy would have to be reduced until commercial properties were taxed at a lower rate.³⁰⁰ Like so many of Boston’s requests to the state, Boston’s short-term needs were met at its long-term expense.

4. The Opposition to the Property Tax

For the reasons just canvassed, Boston faces significant state-imposed limits on its ability to control its primary source of income. Boston is not alone in being restricted in its ability to tax property for revenue. The sensitivity of taxpayers to property taxes has generated similar restrictions across the nation.³⁰¹ All of the cities in our study operate under some legal limits on property taxes. Some of them operate under limits that are even more severe than those that apply to Boston. The two cities that operate under the most significant constraints are San Francisco and Denver – constraints imposed by Proposition 13 in California and by the Taxpayer Bill of Rights (TABOR) in Colorado. Each of these is more restrictive than Proposition 2½. Indeed, unlike the Massachusetts approach, which adopted its tax limitations as a statute, both Proposition 13 and TABOR were enshrined in the state constitutions.

In California, property taxes have been taken out of San Francisco’s hands entirely. Proposition 13³⁰² grants the state, as opposed to the locality, control over the property tax base

and rates. It caps the total property tax rate at 1% of assessed value.³⁰³ It defines assessed value as the full cash value of the property as of 1976 (two years before the amendment was passed), or at the time that the property is “newly constructed” or ownership changes hands.³⁰⁴ Finally, it requires that a two-thirds supermajority of qualified voters approve any special taxes, prohibits any additional taxes related to property, and requires any increase in tax revenue on the state level to garner a two-thirds supermajority of the state legislature.³⁰⁵

Given the state’s control over property tax receipts in California, the state can redistribute the property tax collected to suit its needs. With the creation of the Educational Revenue Augmentation Fund in 1992, the state did just that – shifting \$3 billion of cities’ and counties’ share of the property tax to local school districts in order to satisfy statutorily mandated funding floors for education and to meet a budget shortfall.³⁰⁶ Property tax receipts in San Francisco thus operate functionally as simply another element of state aid. Precisely because the state is seen to be “taking” local property taxes, however, the political effects of legislative control are different than they would be if the state were thought not to be generous with its own funds. There have been significant moves in recent years – including by a commission charged with proposing a reform of the fiscal provisions of the state constitution – to restore local control over revenues derived from local property taxes.³⁰⁷

Like San Francisco, Denver is hampered by legislation and initiatives that limit its control over property tax revenues. Denver’s property tax levy was first limited by the “Gallagher Amendment,” passed by the state legislature and adopted as a statewide referendum in 1982.³⁰⁸ Responding to the alarm over residential property tax increases, the Gallagher Amendment fixed residential property tax receipts at 47% of total receipts (the level when the Amendment was passed).³⁰⁹ Then, in 1993, the Taxpayer Bill of Rights was adopted by Colorado voters. TABOR establishes a formula that severely limits annual revenue growth and provides that any revenue raised in excess of that limit be refunded back to the taxpayers.³¹⁰ TABOR also requires that any new taxes, tax rate increases, levies above the prior year, extensions of expiring taxes, or changes in tax policy that produce net tax revenues be submitted to the voters for approval.³¹¹

TABOR’s limitations are much more extreme than Proposition 2½. But that’s only the beginning of the story. The intersection of TABOR and the Gallagher Amendment has produced serious complications. Since the ratio between property taxes on commercial and residential properties is locked in, changes in valuations may require that the rate on one classification be raised to preserve the Gallagher balance. But any increase in property taxes requires voter approval under TABOR. If the increase is rejected, or if the municipality decides that it is not worthwhile to put it before the voters, its only option is to lower the tax rate to preserve the ratio. The intersection of TABOR and the Gallagher Amendment thus produces a ratchet-down effect. Indeed, since the TABOR refund limit is calculated on the basis of the previous year’s collection, any decline in revenue collection in one year has a lasting impact on a city’s budget limit for all subsequent years.

The limits imposed on the property tax in San Francisco and Denver cause very serious financial problems for these two cities. But it must be remembered that neither city relies on the property tax the way Boston does. Moreover, even cities like Chicago, which do not face state-imposed caps on the property tax, have generally shied away from raising property taxes in recent years. Chicago is exempt from the state property tax cap that applies to other municipalities in Illinois.³¹² But the city has voluntarily adopted a cap that mimics the one adopted by the state.³¹³ The decision to do so reflects Chicago’s conscious pursuit of a fiscal policy not to increase property taxes. City officials have concluded that tapping into other revenue streams – both through reliance on other taxes and through other, non-tax means – makes more sense given the burdens on residents that the property tax uniquely imposes. Boston’s limited alternative fiscal options, however, do not afford it the same opportunities to respond to concerns about high property taxes.

5. Structural Limits on Increasing Property Tax Revenue

We have thus far focused on the direct limits that the state has placed on Boston's power to levy property taxes. There are also practical limits to the use Boston could make of the property tax even if the city succeeded in removing current state law limits on its own power to levy it. In the world of property taxes, Boston is only one player among many well-situated communities. Any increase in Boston's property tax generates concern about a flight to the suburbs and thus a decline in the city's property tax base. A delicate balance has to be struck on a yearly basis. Boston needs to raise enough money to provide good services and improve its infrastructure in order to entice businesses to locate or remain in town. At the same time, it must prudently keep the tax rate as low as possible to achieve the same end. Boston's recent attempt to balance its budget through an increase in the property tax on city residents demonstrates the prudential limits on the property tax that would remain whether or not Proposition 2½ was in place. As the *Globe* notes, "[w]hen Boston homeowners got letters last month alerting them to a big potential tax increase, some felt it was finally time to flee to the suburbs."³¹⁴

Indeed, Boston's recognition of this dynamic led the city to fight to secure the power to *exempt* some commercial property from local property taxes in the decades immediately following World War II. The resulting legislation – known as Chapter 121A – was passed by the state legislature to deal with blighted, open, decadent, or substandard areas in a city.³¹⁵ Under Chapter 121A, private developments, known as urban redevelopment corporations, are exempt from property taxation and special assessments for a period of 15 years.³¹⁶ This limit of fifteen years is extendable to forty years if the development provides certain amenities, such as affordable housing. Instead of property taxes, the organization is required to compensate the state and local governments through three different forms of payments: a specified minimum excise to the state Department of Revenue, a direct payment to the city which is negotiated between the city and the corporation, and a percentage of any return on investment that exceeds 8%.

Chapter 121A underwent a major amendment in 1960. Prior to 1960, Chapter 121A could only be used for developments that were primarily residential. In an attempt to entice the Prudential Insurance Company to construct what is now the Prudential Center, Chapter 121A was amended to include commercial developments. Although Boston voluntarily, and eagerly, forsook property taxes for a lesser amount of revenue in order to attract this development, the construction of the Prudential Center is thought to have served Boston's economy well at the time that it was built. The Boston Redevelopment Authority has contended that the "[t]he Prudential Center and other office buildings that followed enabled the city to attract and capture the professional service and finance jobs that were to become the staples of Boston's economy."³¹⁷ Although such a causal claim should be met with skepticism, the construction of the Prudential Center did signal Boston's intention to benefit from a changing economy. Indeed, although professional service and finance jobs only accounted for a quarter of Boston's employment in the 1940s, their share jumped to 35% after the construction of the Prudential Center, and to 60% in the last couple of years.³¹⁸

Other Local Taxes

Limited as Boston's power to levy the property tax is, the city's power is even more constricted when it comes to the imposition of other taxes. A comparison between Boston and the other cities demonstrates this disparity. In Seattle, the property tax accounted for only 27% of the city's general fund in 2003, while the retail sales tax made up 20%, the business and occupation tax provided 18%, and the utility tax contributed 17%.³¹⁹ San Francisco raises more revenue from a combination of other local taxes than from the property tax.³²⁰ Atlanta and Chicago both receive, in total, twice the revenue from a combination of other local taxes than they get from the property tax.³²¹ Even Denver, which relies on the sales tax for more than half of its general fund revenues, has a more diverse tax base than Boston. Denver relies on numerous non-sales taxes, including the property tax, to raise another 20% of its revenue.³²² That's more than Boston gets from all of its non-property tax, own-source revenue sources – including those derived from means other than taxation.

The key reason for Boston's lack of tax diversity is that the state denies its local governments the power to impose any of the available meaningful substitutes for, or supplements to, the property tax, such as the sales tax, the occupation tax, or the income tax. That is not the case in other states. Every city within our study, other than Boston, receives a portion of its revenue from sales taxes. And every city, other than Boston and Atlanta, receives a portion of its revenue from an income or an occupation tax. Atlanta is the exception that proves the rule. It has the legal power to impose an income tax and an occupation tax, although it has not chosen to exercise it.

1. The Sales Tax.

With a 5% state sales tax, Boston shoppers pay a relatively low sales tax rate compared to the other cities in our study (which range from 7% in Atlanta to 8.8% in Seattle). The local portion of the sales tax in these cities is usually small. In Atlanta,³²³ Chicago,³²⁴ and San Francisco,³²⁵ the local sales tax is 1%; in Seattle it is less than 1%.³²⁶ Denver, on the other hand, has a local sales tax of 3.5%, larger than the 2.9% state sales tax, with other sales taxes bringing the total rate to 7.2%.³²⁷ New York City has the highest local sales tax, currently 4.375%.³²⁸ Combined with the 4.25% state sales tax, New York's overall sales tax is 8.625%.³²⁹

Locally-imposed sales taxes burden city residents. But they also enable cities to capture wealth from commuters and tourists who use the city's infrastructure, take advantage of its concentration of economic wealth, and enjoy its cultural, historical, and natural beauties. Boston captures some revenue from commuters and tourists, at least indirectly, through the commercial property tax, business permit and licensing fees, and excise taxes and fees. The jet fuel tax and the hotel excise, discussed in more detail below, also target the tourist population. Still, tourist cities that rely on sales taxes, more extensive user fees, and similar revenue collecting mechanisms are much more successful in capturing revenue from tourists and commuters than Boston is. San Francisco – like Boston, a popular tourist destination – estimates that it collects \$350 million in tax revenues from tourism, or over 7% of the city's \$4.8 billion budget.³³⁰ In Massachusetts, on the other hand, the sales tax is strictly a state tax; all proceeds are kept by the state.

No one should underestimate the political difficulty of changing the structure of the sales tax in Massachusetts. The state did not even have a sales tax until 1966, and the initial tax was enacted, at a rate of 3%, as a temporary measure to deal with an annual budgetary deficit of \$150 million.³³¹ A later referendum approved its continued use; the sales tax was made permanent by the legislature in 1967. (It was increased to its current rate of 5% in 1975.)³³² Considering this recent history and the fact that the sales tax was initially passed as a temporary measure, Massachusetts could be thought to have a general aversion to the sales tax as a source of revenue. The state's proximity to New Hampshire, which has no sales tax and no income tax, may also contribute to the policy considerations against raising the sales tax, especially for municipal benefits.³³³ The state sales tax itself, established by a referendum, is subject to repeal through referendum or initiative. Such a repeal is certainly possible. In 2002, an initiative sought to repeal the state income tax at a time when the state was making major budgetary cuts in its own programs and in state aid to municipalities; the initiative was narrowly defeated by a vote of 55% to 45%.³³⁴ The eagerness with which many Massachusetts residents were willing to eliminate 40% of the state's revenue suggests why the state might be cautious about bestowing sales tax authority on its municipalities.

But Massachusetts's aversion to the local sales tax is not simply a function of its general hostility to taxation. It is also related to the legal structure of local power. Precisely because Massachusetts denies home rule taxing power to its municipalities, Boston has had no power to impose a sales tax in the absence of state legislative approval. In states with a tradition of local home rule taxing power, by contrast, cities have often taken the lead in initiating the sales tax. That was the case in Denver, where the state supreme court held that "the power to levy sales . . .

. taxes for the support of local home rule government is 'essential to the full exercise' of the right of self-government"³³⁵ To be sure, in some places, states have stepped in to preempt local sales taxes and replace them with state sales taxes to provide greater uniformity and a more convenient means of administration. In doing so, however, the state has usually ensured that cities were not deprived of their revenue stream. San Francisco and Chicago were able to maintain a claim on the sales tax even after the states asserted control over them.

2. The Income or Occupation Taxes.

The other major alternatives to the property tax are the income tax and the occupation tax. Again, Boston has no legal power to get revenue from either one, and, again, this makes Boston uniquely constrained. Seattle lacks home rule taxing power, but a state statute enabled Seattle in 2003 to collect more than \$100 million from business and occupation taxes levied on gross receipts for most business activity.³³⁶ The New York state constitution specifically reserves taxation to the state,³³⁷ but New York City has been empowered by statute to impose a personal income tax at a rate set by the state.³³⁸ (Until 1999, the city's personal income tax also applied to commuters; since then, the state legislature has effectively precluded its imposition on non-residents.³³⁹) New York City's personal and corporate income taxes represent nearly one-third of its tax receipts.³⁴⁰ The Illinois state constitution expressly denies Chicago the power to levy its own income tax,³⁴¹ but a state statute guarantees it a percentage of the state income tax.³⁴² Chicago received nearly \$200 million from the tax in 2003.³⁴³ Denver lost in its bid to assert home rule authority to impose an income tax in 1958.³⁴⁴ But it has used its otherwise expansive home rule powers to impose an occupational privilege tax, and this tax nets roughly \$20 million annually, or about one-third of what Denver receives in property taxes.³⁴⁵ Atlanta also lacks home rule taxing power but it has been authorized by statute to impose a local income tax of 1% if voters approve such a tax by referendum.³⁴⁶ San Francisco imposes a payroll tax pursuant to its home rule authority. It has generated nearly \$300 million – more than its sales and hotel room tax combined.³⁴⁷

It is somewhat ironic that Boston is the one city without the power to tax personal or business income. Boston is the only city in our study other than San Francisco that is home to more jobs than residents.³⁴⁸ In fact, only one other city in the nation – Washington, D.C. – provides a similar proportion of jobs for its area. And Washington, D.C., like San Francisco, receives revenue from an income tax.³⁴⁹ Of course, there are substantial policy reasons for not imposing a local income tax, the most notable being the concern that doing so would encourage people and businesses to move outside the city limits. Yet it should be of some concern that the current revenue structure reduces Boston's incentives to continue to serve as a regional job machine. Although local job growth helps expand the local property tax base, the relationship is not nearly as direct as the one between rising employment and the income tax base. Moreover, even though it is denied the local power to tax income, Boston could be given – as Chicago is – a percentage of the state income tax. A statewide tax would not drive employers or residents from the city or be evaded by exiting the municipal boundaries. But it would take account of the unique role that Boston plays in regional and state employment.

Were Boston to benefit from an income tax, it would not be an unprecedented occurrence. While the income tax in Massachusetts is now strictly a state tax, Massachusetts had a form of local income taxation until 1915, when a constitutional amendment exempted all taxation on intangible property from local taxation.³⁵⁰ Prior to this amendment, local income taxation as such was not permitted. Instead, cities like Boston assessed taxes on "personal property" – such as income derived from stocks and bonds – before these taxes were carved out of the property tax and re-categorized as relating to "income."³⁵¹ The categories of "income tax" and "personal property tax," after all, are artificial categories adopted by the state legislature. Although they are now treated as standard categories, they have a recent history not only in Massachusetts but in other states as well.³⁵²

3. Targeted Local Taxes

In addition to the property tax, sales tax, and income or occupancy tax, the other cities in our study have been empowered to impose a wide array of targeted taxes. Denver imposes a lodgers tax, a telecommunications tax, a franchise tax, a car rental tax, a food and beverage and liquor stores tax, a facilities development admissions tax, and an aviation fuel tax, among others, in addition to its sales tax, property tax, and occupation tax.³⁵³ San Francisco imposes a business license tax, a real property transfer tax, a utility users tax, a parking tax, and a transient occupancy tax, along with a sales tax and an income tax (not to mention a state-collected property tax that benefits the city).³⁵⁴ Chicago imposes more than a dozen taxes.³⁵⁵ Even the three cities without home rule taxing power impose a wide range of additional taxes. New York City lists twelve separate taxes in its budget plus an additional line for “other taxes.” In addition to a property tax, a sales tax, and an occupation tax, Seattle levies an admissions tax and a utility tax on seven different types of services; it also lists a separate line in its budget for “other taxes.”³⁵⁶ Atlanta imposes a hotel/motel tax, an alcohol tax, a public utility tax, a car tax, and an insurance premium tax in addition to its property tax and sales tax.³⁵⁷ Atlanta also has the statutory authority to impose a host of additional taxes – not just an income tax and an occupation tax – that it has not exercised.³⁵⁸

By contrast, Boston is highly constrained in its ability to impose these kinds of targeted taxes. The only excise taxes authorized by the state are local taxes on motor vehicles, hotels and motels, and jet fuel. That means Boston has the power to impose only four types of taxes (including the property tax). Other cities impose from three to seven times the number of taxes that Boston imposes. And they possess the legal power to impose even more. The result is that Boston’s excise taxes account for only approximately \$83 million,³⁵⁹ or roughly 4%, of Boston’s total budget. Boston’s revenue from the motor vehicle excise tax makes up the majority of this amount (approximately \$44.7 million), with hotels and motels coming in second (\$21.9 million), and jet fuel third (\$15 million).³⁶⁰ All of these taxes are regulated, collected, and monitored by the state: after the state has collected the taxes, it remits the funds back to the locality where they were collected.

The motor vehicle excise tax can be understood as a substitute for the property tax.³⁶¹ As noted earlier, the legal system has permitted the taxing of personal property unless specifically exempted.³⁶² The difficulty and administrative costs of valuing personal property, combined with the differing rates between communities, led to the state’s enactment of the uniform excise now imposed on motor vehicles in lieu of personal property taxes. The tax is assessed by the state Registry of Motor Vehicles at a rate of \$25 per \$1,000 of valuation, which is determined by a percentage of the retail price (which decreases with its age).³⁶³

The Massachusetts excise taxes on hotels and motels and on jet fuel were authorized by the state legislature in 1985. Both of these statutes were passed as local options, that is, they allowed a municipality to opt into their exercise with the approval of the municipal government. Boston has opted into both forms of taxes. The hotel/motel excise gives Boston the option to assess up to a 4% surcharge for room charges as a complement to the already existing state excise of 5.7%.³⁶⁴ Since hotel development returns property taxes on top of this surcharge, this legal structure gives Boston an incentive to attract hotel development into the city.³⁶⁵ Indeed, since Boston hosts major national and international events, the hotel excise is a key way in which Boston can capture revenue from tourism. Other revenue from tourism goes directly to the state through its own excise tax and the state sales tax.

Boston officials have complained that the hotel/motel excise tax does not provide enough revenue to the city even to cover additional costs associated with tourism. Reacting to what some called the Sail Boston “fiasco” in 1992, when the city spent an extra \$2.4 million for safety and public works but received only \$400,000 from the hotel excise while the state made millions more than it spent on the event,³⁶⁶ Mayor Menino asked for all of the excise proceeds, including the state portion, during the soccer World Cup championships held in Boston in 1994.³⁶⁷ Similar concerns were expressed regarding the Democratic National Convention held in Boston in July,

2004. As early as 2002, tensions were developing between the city and the state over the fact that the city would be responsible for picking up most of the bill for the convention even though the state would reap significantly more revenue from it.³⁶⁸ After the state refused to help cover its costs, the Mayor asked for just half of the state's receipts during the convention.³⁶⁹ This request was rejected.

The jet fuel excise allows Boston to impose a 5% excise on the average price per gallon of jet fuel.³⁷⁰ But the state has attached a mandate for any community that adopts this tax. The statute requires adopting localities to establish a reserve fund "to provide for extraordinary and unseen expenditures."³⁷¹ The town or city must deposit between one and five percent of its total revenue per year into a segregated fund and cannot withdraw from that fund without "written documentation detailing the amount of such draft or transfer and an explanation of the reason for the draft or transfer."³⁷² For the purposes of this section, towns and cities are defined as communities with more than 150,000 residents – a category that includes only Boston, Springfield, and Worcester.³⁷³

Recently, Boston has lobbied the state legislature to allow it, along with other Massachusetts cities, to adopt more local option excise taxes to supplement property tax revenues. The focus has been on a restaurant meals excise tax that would be added to the state's 5% meals tax, a parking excise tax, and a 50-cent surcharge on movie and entertainment tickets.³⁷⁴ The restaurant tax made its way through the legislature before being vetoed by the Governor.³⁷⁵ With state aid declining, the state Senate tried again in 2003, albeit with some important alterations. Although it had originally passed the measure as a local option tax, which would require only that the municipal government adopt the tax, the bill was amended to require referendum approval before it took effect.³⁷⁶ That change accords with the approach the state has taken with respect to other revenue raising measures, like the Community Preservation Act of 2000 and the Proposition 2½ override. They, too, require the city to win approval by constituents, and not just by the elected local government, in order to add new revenues. Even with the inclusion of this constraint on the city's power, the bill never became law.

Advantages of, and Cautions About, Increased Powers to Diversify the Tax Base

In thinking about local taxation, the focus of discussion has often been on the limits imposed on the property tax by the current state-defined revenue structure. Boston should consider instead the role that the overall tax structure plays in influencing the policy decisions that affect city life. From this broader perspective, Boston's revenue problem has less to do with the limits that the state has placed on the property tax than with the fact the state forces the city to be so reliant on a single kind of tax that highlights the importance of the city's territorial boundaries.

One consequence of the city's state-mandated reliance on the property tax is the territorial emphasis of the city's overall development policy. Because property taxes are the principal revenue source over which Boston has any semblance of control, Boston's politics is heavily focused on land use development, and its educational funding is similarly focused on promoting and preserving this element of the city's prosperity. A territorial emphasis – inherent in a tax that targets land-based resources – seems natural for a small New England town that is relatively self-contained. For a metropolitan center like Boston, this emphasis is more controversial. It potentially ignores the city's far more expansive role in the regional, state, and national economies.

The dependence on the property tax ensures that the funding of Boston's city budget falls disproportionately upon the shoulders of Boston's residents and businesses. Yet Boston serves as the economic center of the region and an important player in the global marketplace. Commuters – defined locally and globally – descend upon Boston daily, and they depend on the infrastructure and services Boston provides to accomplish their goals. Boston also serves as an important tourist destination, with thousands of visitors enjoying the city's cultural, historical, and natural resources. Studies conducted in the 1990s by the Boston Redevelopment Authority show

that although Boston's residential population was only 574,000 according to the 1990 census, the number of people in Boston surged to approximately 1.2 million on any given work day, and to almost 2 million when there was a special event.³⁷⁷ Similar studies found that Boston was one of only three cities (along with San Francisco and Washington, D.C.) that created more jobs than it had residents, with more than 61% of its jobs held by commuters.³⁷⁸

The recent push for taxes other than the property tax has often been aimed at "allow[ing] Boston to get at commuters who are otherwise paying nothing" – those who "benefit from the services without really paying for them."³⁷⁹ The point, however, is not just that the city's dependence on the property tax prevents it from collecting revenue from others who arguably should be contributing. So long as the state constrains Boston's ability to tax activity within its boundaries by non-residents, the city has less of an incentive to embrace fully its larger role in the life and economy of the region, state and nation. To mention but one example, it seems problematic for a city eager to be a center of the region's civic and recreational life to be reliant on parking fines for its second largest stream of own-source income. Such a situation hardly induces Boston to be as welcoming a place to nearby visitors as it might otherwise be. Yet parking fines are one of the few means by which Boston may currently recoup costs attributable to visitors.

Boston's lack of tax diversity also encourages the city to overlook the advantages that may come from keeping property taxes low. Chicago on its own has decided to refrain from relying too much on the property tax in recent years. Boston has benefited from pursuing a similar course. Boston's ability to manage its budget responsibly without substantially raising property taxes has no doubt played a role in the city's overall economic success as well as in the appreciation of local property values in recent years. Insofar as state-imposed limits protect the city from the temptation to rely on property tax increases to solve a fiscal squeeze, they therefore serve a potentially useful role. Similarly, state-mandated exemptions of city land from the tax rolls deprive Boston of needed revenue, but they encourage the private institutions that benefit from these protections to invest in the city. By all accounts, the future of the city's economic health depends on the willingness of universities and hospitals ("eds and meds" in the current vernacular) to maintain a strong presence in Boston. But without the power to tap other revenue streams to compensate for a reduced reliance on the property tax, it is harder for Boston than it is for cities like Chicago to see beyond the limits imposed on the property tax and focus instead on maximizing the advantages to the city of its property-tax-exempt enterprises.

Diversity of revenue sources would provide Boston with the flexibility in terms of its budgetary needs that other cities in our study enjoy. It also would enable Boston to approach its overall development strategy differently, because the city would no longer be locked into a particular revenue source that new development would be required to produce. There are, however, risks associated with Boston's obtaining increased power to diversify its revenue sources beyond the property tax. The property tax has, for the most part, been a stable and consistent source of revenue for Boston. Unlike the Commonwealth itself, which has been hit hard by economic downturns as a result of its dependence on income taxes, property values in Boston have continued to grow. As the 2006 budget for the City of Boston explains, "[t]he increases in the gross property taxes have been steady and consistent" from 1985 to 2004.³⁸⁰ From 1995 to 2002, gross property tax receipts in Boston grew 42.6%.³⁸¹ In 2003, there was a \$62.6 million increase from the previous year. Boston has generally been able to adjust its property tax levy in relation to property values within its boundaries to compensate for budgetary needs.³⁸²

By contrast, cities that have relied on the sales tax as their primary source of revenue have seen dramatic decreases in that portion of their budget.³⁸³ The same volatility has affected cities that rely on income taxes.³⁸⁴ Moreover, while Boston may be envious of San Francisco's and Denver's ability to capture a broader base of regional wealth through their use of the sales tax, these cities are threatened by neighboring cities that attempt to maximize their own intake through competition for shopping malls outside of the central city's borders. This competition

over retail dollars has done much to scar their regional landscape. Research indicates that per capita retail consumption in California has not increased.³⁸⁵ Cities like San Francisco are thus locked into a fight with their surrounding cities over a fixed pie of retail dollars. It is not likely that the region as a whole, or the public interests served by municipal entities, benefits from this conflict.

Any plan to diversify the city's tax base, therefore, must be based on a thorough and detailed study of how best to do so. While it is important to keep in mind the possible benefits of local sales and income taxes, as well as the potential benefits of interlocal competition, it is also important to promote a regional atmosphere that discourages inefficient and frustrating inter-municipal relations. Sales and income taxes can generate the same fixation with boundaries as the property tax. The place of taxation for sales and income is determined by municipal boundaries, and their allocation can be just as arbitrary as they are for property taxes.³⁸⁶ Boston might benefit more than other cities in the state if a sales tax were levied at the point of sale and an income tax levied at the place of employment. But these taxes often capitalize on regional trends rather than on local amenities. Regional thinking about sales and income taxes is, therefore, indispensable.

Despite the legitimate concerns about tax diversity, it seems wrong to conclude that Boston should be grateful that the state has forced it to rely on the property tax or that it has been required to forego so much of the revenue that a less restricted power to tax might make available. One doubts that the other cities in our study would be willing to trade their more expansive revenue powers for Boston's limits. A fundamental question thus arises from a comparison of Boston's taxing power to that of the other cities in our study: Why should the City of Boston not be able to decide for itself whether to levy the same kind of taxes that, as a matter of law, these other cities are empowered to impose?

Fees

Taxes are not the only way that cities derive revenue. Another key way to obtain cash is through the fees that cities charge for the use of city services. These fees, which include payments for obtaining licenses and permits, account for a very small amount of Boston's overall budget. But they represent an important form of local power. As noted before, the Home Rule Amendment limits the power of Boston to "levy, assess and collect taxes" without state authorization.³⁸⁷ State aid, by its nature, is also within the discretion of the state to impart or to withhold. Unlike these tightly controlled areas of revenue collection, Boston is empowered to assess and collect fees without state intervention. This empowerment is confirmed by a state statute.³⁸⁸ The authorizing legislation is quite broad, and the procedure for obtaining fees tracks the general procedure for passing any ordinance in Boston (approval by the city council and Mayor). Still, even here, Boston operates within a legal structure that imposes unusual constraints.

The Legal Structure of Fees in Massachusetts

Considering the different legal treatment of fees and taxes in Massachusetts, it is not surprising that much of the legal battle waged in this area has been over whether a specific assessment is a fee or a tax. If it is interpreted as a fee, the assessment is typically upheld as within the municipality's power. If it is read as a tax, it is struck down because the Home Rule Amendment requires a delegation of power from the state legislature. The test for determining whether an assessment is a fee or a tax is laid out in the seminal case on this issue, *Emerson College v. City of Boston*.³⁸⁹ As the Supreme Judicial Court explains, fees differ from taxes in three ways:

[(1) a fee is] charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society, [(2) a fee is] paid by choice, in that the party paying the fee has the

option of not utilizing the governmental service and thereby avoiding the charge, and [(3)] the charges are collected not to raise revenues but to compensate the governmental entity providing the service for its expense.³⁹⁰

The *Emerson* decision addressed an “augmented fire services availability”³⁹¹ fee assessed upon certain buildings in Boston after the city determined that fire protection for those buildings required significantly more personnel and resources than more conventional buildings. The ordinance imposing this fee was established pursuant to specific state authorizing legislation, which recognized that certain structures drain fire protection resources more than others and provided Boston with the ability to impose a “fee for augmented fire services availability pursuant to the [state statute] or pursuant to an ordinance enacted by the city of Boston”³⁹² Even though the city’s actions were authorized by the state, the court struck down the fee as a tax.³⁹³ The court noted that the benefits arising from the payment were not sufficiently particular to the payee: the benefits affected neighboring buildings as well as the individuals within the buildings being charged. The court found that the fees were compelled, despite the fact that they could be reduced through voluntary actions of the building owners to install fire safety mechanisms. Finally, the court found that the proceeds of the fee were not targeted to support the augmented fire services but supported fire and police services generally, a fact that was consistent with the revenue-generating purpose of a tax rather than the compensatory purpose of a fee.³⁹⁴

Two points of interest arise from the *Emerson* decision. It is noteworthy how narrowly the court construed what qualifies as a fee. Even if a fee can be said to compensate the city for providing a particular service to a specific party, it is to be considered a tax if it is not for a unique benefit but for a service traditionally provided by the local government.³⁹⁵ Thus, a school impact fee imposed by the Town of Franklin on the owners of newly developed property was struck down as a tax because it was designed to compensate for the general provision of education and not for a particular benefit to the payee.³⁹⁶ Impact fees relating to charges for new utility hookups have similarly been upheld or struck down depending on the particular situation of the city charging the fee.³⁹⁷ It is also noteworthy that the *Emerson* court was willing to look independently into a state authorizing statute to strike down a locally enacted fee. Although the Court focused primarily on the ordinance enacted by Boston, it nullified the authorizing legislation as well.³⁹⁸ Considering the limitations on delegation of taxing authority in Massachusetts, and the requirements that taxes be reasonable and proportional among classes of property, it held that the state could not delegate the power, even as a tax, at least in the manner that it did.

Even if an assessment fits the definition of a fee laid out by Massachusetts courts, there is still another legal impediment to imposing a fee: it might be deemed impermissible because it is preempted by state law. As covered in Chapter Three, the doctrine of state preemption requires that locally enacted ordinances, such as one imposing a fee, not conflict with state statutes.³⁹⁹ Preemption of local fees can be express or implied. For many decades, the paradigmatic example of a state law operating uniquely to constrain Boston’s ability to manage its own finances was one that expressly capped the amount of fees that Boston could charge owners of cars towed from city streets. The state legislature capped Boston’s towing fee at \$12, a figure that was substantially less than what it cost the city to tow a car. Because the law was specific to Boston, neighboring municipalities were permitted to charge higher rates for towing. Recently, the legislature approved a Boston home rule petition that allows Boston to charge up to \$75, the maximum allowable rate within the state.⁴⁰⁰ But the fact that this phenomenon existed for a number of years—in addition to the fact that state law still determines how much Boston may permissibly charge drivers whose cars are towed—illustrates the profound extent to which Boston cannot control its own fiscal destiny, as well as the mundane form that such restrictions often take.

Implied limitations on fees are potentially even more significant. The Supreme Judicial Court recently struck down an inspection fee on public utilities imposed by the City of Newton. The fee was designed to pay for conducting inspections before or after the excavation of a public way.⁴⁰¹ The Court found that the fee conflicted with a state statute that was so comprehensive

that it prohibited other restraints on the utility. This theory of preemption is very expansive – and it is not accepted in other states.⁴⁰²

Fees in Other Cities

Boston's use of fees is quite limited compared to most of the other cities in our study.⁴⁰³ Usually, there were two reasons why other cities collected substantially more from fees. The presence of a unique fee – one often related directly to a city's ownership of a key piece of its infrastructure – enabled them to obtain more revenue. In addition, the legal structure established in other states, and its subsequent interpretation by the courts, differs in important ways from that of Massachusetts. As a result, other cities have more authority to raise revenue through this non-tax device than Boston does.

1. Unique Fees

As referenced earlier, Boston sold off or otherwise lost control over many key pieces of its infrastructure over the last seventy years and thereby diminished its ability to count on fee income from infrastructure. In San Francisco, by contrast, user fees account for approximately \$1.58 billion in revenues, almost 33% of the city's total operating budget.⁴⁰⁴ Approximately \$500 million of this amount came directly from its airport and another \$500 million from its hospital.⁴⁰⁵ These receipts are generally used to run the enterprises where the money comes from; only a small percentage of the proceeds go into the city's general operating fund.⁴⁰⁶ Nevertheless, to place these figures in perspective, property taxes in San Francisco generated only about \$718 million in 2003.⁴⁰⁷ A similar situation exists in Chicago.⁴⁰⁸ There, user fees make up approximately 15% of the city's total budget (including their school budget and state and federal grants). Almost a third of that amount – approximately half a billion dollars – came from the O'Hare Revenue Fund, a user fee collected from the Chicago airport.⁴⁰⁹ As with San Francisco's airport revenues, these fees do not constitute money that the city can use as it wishes. They serve to cover the operating costs of the airports, although the city benefits in other ways from retaining ownership of these assets, whether through the letting of contracts or maintaining control over planning decisions that relate to them.

Other unique fees, however, are of much more use. Chicago used to receive a substantial portion of its fees from tolls collected for use of the Chicago Skyway, a formerly municipally-owned highway that nets the city \$44 million.⁴¹⁰ While these fees were partially used to cover operating and maintenance costs, they also have helped to secure a bond issue that raised an additional \$52 million for other city transportation improvement projects.⁴¹¹ Litigation to preclude the city from making use of these "extra" funds failed, in part because the state courts concluded that the imposition of the tolls was within the city's home rule powers.

2. The Legal Structure

In Massachusetts, as noted above, the strong distinction between fees and taxes reveals an aversion to fees being used as a substitute for taxes.⁴¹² This attitude is not unique to Boston. In Chicago, similar fears that municipalities might use fees to get around prohibitions against municipal income and occupation taxation prompted the Illinois General Assembly, by a 3/5 vote, to pass a statute prohibiting home rule units from imposing taxes or fees on insurance companies.⁴¹³ There is also a state constitutional prohibition against cities using licensing powers for raising revenue.⁴¹⁴ Yet these limitations on Chicago highlight just how much more onerous the restrictions that apply to Boston are. While Chicago cannot tax insurance companies without state approval, Boston cannot tax any business without state approval. And while Chicago cannot license for revenue, its expansive home rule power to tax effectively renders that limitation meaningless. By contrast, in Massachusetts, the judgment that a license "fee" is a tax is fatal to the exercise of municipal power.

Chicago has recently relied on substantially increased fees for water and sewer services, rather than on new taxes, for new revenue. In other cities, differences in legal language and judicial interpretations have similarly facilitated an increased reliance on fees. This is particularly the case in California, where there has been an explosion in fees in recent decades.⁴¹⁵ In California, on average, fees constituted 25% of city budgets in the late 1970s and 41% in the mid-1990s.⁴¹⁶ California cities turned to user fees primarily because of the legal constraints on taxation imposed by Proposition 13. And judicial decisions facilitated the transition.

The legal issue in California courts is different from the tax/fee controversy in Massachusetts. Proposition 13 in California, in addition to imposing strict limits on property taxes, required that any “special taxes” passed by a local government receive a two-thirds majority. California courts have read this restriction on “special taxes” narrowly, leading many assessments to fall outside the special taxes category and retain their status as fees. As the California Supreme Court explained, the special tax provision “must be strictly construed and ambiguities therein resolved so as to limit the measures to which the two-thirds requirement applies.”⁴¹⁷ The Court justified its narrow reading criticizing the initiative procedure that led to this restriction in the first place, calling the restriction “inherently undemocratic” and questioning the legitimacy of a “requirement . . . imposed by a simple majority of the voters throughout the state upon a local entity to prohibit a majority (but less than two-thirds) of the voters of that entity from taxing themselves for programs or services which would benefit largely local residents”⁴¹⁸

Given this restrictive reading of special taxes, it is not surprising that many charges that would fall squarely in the tax category in Massachusetts are considered fees in California. While Boston has been granted statutory authority to impose a linkage ordinance,⁴¹⁹ which generates affordable housing fees from some office development, the city’s power to assess impact fees is limited outside of that context. By contrast, San Francisco passed a transit fee that imposed a \$5 per square foot charge on new developments downtown to “provide revenue for the San Francisco Municipal Railway system (Muni) to offset the anticipated increased costs to accommodate the new riders during peak commute hours generated by the construction of new office space in the downtown area.”⁴²⁰ The benefit of this fee was not exclusive to the owner of the building (in fact very little benefit can be said to be attributable to the developer). It ultimately benefited the commuters of San Francisco. Nevertheless, a California appellate court looked directly to the “impact” that the payee was causing to justify the fee. The court explained that the fee imposed was a good estimate of the increased costs caused by the construction.⁴²¹ Furthermore, the court noted, “[d]evelopers have been required to pay for streets, sewers, parks and lights as a condition for the privilege of developing a particular parcel” even though they ultimately benefited the public as a whole.⁴²² Massachusetts’ insistence on there being a particularized benefit to the payee is strikingly absent here. California’s leniency towards impact fees appears to stem from its willingness to interpret fees as a negative imposition (like a “fine” for imposing a cost) as opposed to a purchase of special benefits.

San Francisco is not unique in being empowered by this more receptive judicial approach to fees. While a provision of the Colorado constitution regulates the local property tax,⁴²³ the Colorado Supreme Court has construed this section not to apply to fees or special assessments. The Court held that a local transportation utility fee, imposed on owners of developed lots for maintenance of local roads, was not an invalid property tax but a reasonable special fee.⁴²⁴ Thus, even though Denver does not now rely on fees for much of its budget, the legal structure provides flexibility should it choose to follow other cities in responding to state limits on taxing power by turning more to fees.

Cities that have made extensive use of user fees have generated a comfortable source of income for their operations. User fees, however, like the sales tax, play their own role in influencing local or regional politics. In California, where user fees have played a larger and larger role for years, the increased emphasis on user charges has fueled the emergence of a consumer-oriented city.⁴²⁵ In the place of a general service government providing public goods to all residents, there has emerged a local government that functions as a retailer of services

purchased and consumed by individual users. While the benefits to Boston in moving to this structure may be apparent, such a move would transform the very foundation of what a city government is – what it provides, and whom it exists to serve. It should therefore be made with care.

State Aid

As mentioned earlier, Boston's dominant reliance on the property tax is accompanied by its reliance on state aid. For the past decade, state aid has remained the city's second-highest form of revenue, ranging from 20 to 30 percent of total revenue. State aid is given in substantial amounts to each of the cities in our study. Normally this aid is for schools, not for the funding of general municipal services. Boston receives state money for education too, which will be discussed below. What is unusual about Boston is that it also receives large amounts of discretionary state aid for the financing of its day-to-day activities. Among the cities in our study, only New York is like Boston in this regard.

The history of state aid to Boston can be divided into three phases.⁴²⁶ The first phase, spanning the years between 1982 and 1989, was characterized by a substantial increase in state aid to compensate for the devastating effects of Proposition 2½. Boston's state aid grew by \$215 million, a 111% increase.⁴²⁷ The second phase began when the state budgetary crisis from 1989 to 1992 led to a decrease in the state aid portion of municipal revenue. The 1992 disbursement of state aid throughout the state fell by \$639 million, or 21.5%, from the 1989 level (while state spending in other areas increased by 15%).⁴²⁸ The third phase began in 1993, when state aid increased again after the Education Reform Act amended the formula for calculating educational assistance.⁴²⁹ This increase was limited in part due to Boston's comparatively strong commercial property tax base: Boston's receipts increased by \$121 million, just under 37%, from 1992 to 2003, compared to the 111% increase in the 1980s.⁴³⁰ Recently, the state endured another period of economic crisis, and Boston's state aid was once again threatened. Assistance for fiscal year 2004 was \$80 million lower than that of fiscal year 2002, a decrease of 18.5%. This up-and-down history demonstrates how Boston's struggle with its budgetary allocation is affected by having to rely on a revenue source that is, under state law, significantly (although not entirely) in the discretion of the state on a yearly basis. Welcomed though it is by the City of Boston, state aid can be seen as the Trojan horse in the fight for local control.

Types of State Aid Boston Receives

1. Educational Assistance

One of Boston's largest sources of state aid is allocated to the city's general fund for educational assistance, generally referred to as Chapter 70 aid. Boston received approximately \$200 million from the state pursuant to Chapter 70 in fiscal year 2004, accounting for 43.5% of its total state aid receipts.⁴³¹ Passed in the 1970s before Proposition 2½ came into effect, Chapter 70 was an early effort to maintain equitable and adequate funding of schools in Massachusetts and to reduce municipal dependence on property taxation to support education. The Education Reform Act of 1993⁴³² ushered in a new age of Chapter 70 funding by altering the formula that determines what municipalities receive. Prior to 1993, Chapter 70 funding was essentially an ad hoc process. The 1993 act amended the disbursement process to establish a relatively strict formula to better equalize and stabilize educational funding within the state.

The new Chapter 70 formula is complex, but it can be distilled into three basic parts. First, a minimum spending level, based on expenditures per student, is determined for a given school district. This is called the foundation budget.⁴³³ A second calculation then assesses what the local community is capable of contributing.⁴³⁴ Finally, to make up the difference between the first figure and the second, the state fills in the gap with state aid distributed directly to the municipality. The state's contribution to this program has been significant.⁴³⁵ To ensure that per pupil spending each year was raised at least \$175 higher than the previous year, the

Commonwealth's commitment to Chapter 70 funding more than doubled from \$1.3 billion in 1993 to \$2.8 billion in 2000.⁴³⁶ The result is that the gap between per capita spending in property-rich and property-poor school districts has been reduced. Still, this state program is less popular than one might expect. Differences in foundation budget calculations between similarly situated communities create inter-municipal tension. And some criticize the foundation budget as too low an approximation of how much is required to provide an adequate education.⁴³⁷

Chapter 70 grants, like some other kinds of state aid, are determined by formula. But there are no guarantees that the formula will remain constant. The legislature can, and indeed does, adjust the formula in response to the state's fiscal situation and the legislature's own policy decisions. Thus, although the Education Reform Act was intended to stabilize municipal education funding, significant cuts have been made when there is an economic crisis.⁴³⁸ No doubt, the state was facing severe economic downturns. Compromises had to be made on a statewide level, even if they affected local governments like Boston. Nevertheless, the fact that state aid, unlike many other state expenditures, is seen as readily adjustable makes Boston more vulnerable than other cities in the country because state aid makes up such a large proportion of Boston's overall budget.

2. Additional Assistance

The second major source of state aid is "additional assistance." Additional assistance is given to less than half of Massachusetts municipalities,⁴³⁹ and Boston receives a substantial portion of it. These funds have been distributed for the last 20 years and, unlike many other forms of state aid, Boston can use the money for any purpose.⁴⁴⁰ Additional assistance, however, does not rely on a formula; its dispersal lies entirely within the discretion of the state.⁴⁴¹ From 1994 to 2002, the allocation of additional assistance was frozen at approximately \$200 million.⁴⁴² In recent years, gubernatorial vetoes have reduced the amount that Boston and other cities have received: \$31 million in statewide additional assistance was vetoed during the 2003 state budget process, and, later, working on the same budget, the Governor slashed additional assistance again, increasing the overall veto to \$73 million.⁴⁴³ Since Boston receives 40% of statewide additional assistance distributions, the veto had a considerable impact on Boston's receipts – leading to a more than \$30 million decrease after almost a decade of relatively level assistance.⁴⁴⁴ An additional \$48 million statewide was subsequently vetoed for the 2004 budget, and Boston's receipts remained the same in 2005.

3. Lottery Aid

Lottery aid is the third largest source of state aid, although it accounts for only about 12% of total state aid receipts.⁴⁴⁵ The Massachusetts Lottery was established by the state legislature in 1971 to respond to the need for more municipal revenue.⁴⁴⁶ Its distribution to the state's 351 municipalities relies on a formula that takes into account population and property valuation, but the state has control over its disbursement.⁴⁴⁷ Indeed, the state has placed caps on the amount municipalities can receive in times of economic trouble, with any receipts above the cap transferred to the state. In 1989, a cap was imposed that remained in place until 1995, when it began to be phased out.⁴⁴⁸ In the recent economic downturn, a cap was reinstituted. Since 2001, Boston has lost substantial amounts of aid from this source: lottery aid fell from approximately \$70 million in 2001 to \$54 million in 2004 and 2005.⁴⁴⁹ Thus, even though lottery aid is often touted as a form of local revenue, Boston cannot depend on it as it can on its own-source income.

There are also problems with how the lottery distribution formula works. Although revenue is distributed according to the number of residents within a community, more money is distributed to localities that have lower property values. Boston therefore receives less aid per capita than other cities in Massachusetts. The lottery aid formula also does not take into account where lottery tickets are sold. A substantial percentage of tickets are sold in Boston indicating that Boston is providing the infrastructure for their sale and that Boston residents contribute a disproportionate share of the proceeds to the lottery fund – but this is not taken into account in

the disbursement. Boston “receives a smaller percentage share of lottery aid than its share of the state population, and dramatically less than the share of lottery proceeds derived from sales in Boston.”⁴⁵⁰

State Aid in Other Cities

After the passage of Proposition 2½, some solution was clearly necessary to keep traditional municipal services running in Massachusetts. Denver and San Francisco faced similar, if not greater, budgetary constraints. But they relied on their authorization from the state to impose sales and use taxes rather than receiving state aid. Massachusetts’ decision to resort to state aid to resolve the financial crisis of Proposition 2½ was thus only one option among many.

Boston is by no means unique in terms of its reliance on state aid. New York City also relies on state aid to support its overall budget, with approximately 30% of its revenue coming in the form of state grants.⁴⁵¹ Other cities, however, are far less dependent. State aid in Denver accounts for less than 3% of the city’s general operating budget, although it accounts for almost 35% of the school budget. The percentage of San Francisco’s budget from state grants, even including its school district, is less than 10%.⁴⁵² In Atlanta and Seattle, almost no aid is transferred from the state to the municipality for general purposes; virtually all revenues for non-school purposes come from the cities’ own revenue sources.⁴⁵³ The state aid contribution to Atlanta’s non-schools budget amounts to no more than a few hundred thousand dollars – a payment from Fulton County for debt service for the Atlanta zoo.⁴⁵⁴

When other cities do receive significant funding from the state for general services, they often maintain far more independence from state legislative control than does Boston. That is the case in Chicago. Only 5% of Chicago’s general operating budget comes from state grants, while 50% of its school budget is supported by state and federal programs.⁴⁵⁵ Another 7% of Chicago’s overall revenue comes from mandatory transfers of portions of the state income and sales tax.⁴⁵⁶ Pursuant to a strict formula set forth in state legislation, Chicago (along with other Illinois municipalities) receives 10% of the income taxes collected by the state on a per capita basis.⁴⁵⁷ And it receives one percent of the state sales tax, in addition to the revenue from its own sales tax, if the sale occurs in Chicago.⁴⁵⁸ Like many other sources of income now available to the other cities in our study, these taxes provide an alternative to the Massachusetts requirement that Boston rely overwhelmingly on the property tax and on discretionary state aid. Chicago receives much of its state money as of right, not as a consequence of the state legislature’s annual judgment about what the city “needs” and what the legislature can afford to transfer to it.

Chicago also receives revenue from the state in the form of state-local revenue sharing. The personal property replacement tax, which includes “an additional state income tax on corporations and partnerships, a tax on businesses that sell gas or water, a 0.5% fee on all gross charges for telecommunications services excluding wireless services, and a per-kilowatt tax on electricity distributors,” is returned to Chicago through a formula.⁴⁵⁹ These funds make up approximately \$450 million out of Chicago’s operating budget of \$6.1 billion.⁴⁶⁰ Denver benefits from a similar scheme. In Colorado, a rebate on the state tax on cigarettes goes to cities and counties based on the proportion of states sales tax revenue collected in each jurisdiction. More than one-quarter of the state-collected tax is disbursed to localities in this way, with Denver receiving more than \$2 million annually.⁴⁶¹

The structure of state assistance in Boston is very different than the formula-driven re-allocation used elsewhere. Every year, the Division of Local Services of the state Department of Revenue informs municipalities about the amount that they can anticipate receiving from the state in the following year. This notification, usually referred to as the “cherry sheet,”⁴⁶² gives local governments a year to plan for the following year’s budget. But state aid estimates provided by the “cherry sheet” can change as the next fiscal year approaches. Not until the state legislature and the Governor approve the state budget is the estimated state aid guaranteed to the

municipality. As a result, one of the major criticisms against state aid is its unpredictability. With a large portion of their budget coming from the state, Massachusetts cities are vulnerable to year-to-year decisions whether to increase or decrease the state contribution.

This criticism has not fallen on deaf ears. The change in the educational aid formula, mentioned above, was an attempt to reduce state aid's unpredictable nature. As far back as the 1980s, there were other attempts to insert uniformity into the state aid program as well. Governor Dukakis promised in his 1982 election campaign that he would ensure that "40% of the state's sales, income, and corporate taxes would be dedicated for local aid each year," a pledge that never materialized.⁴⁶³ A report issued by a panel composed by the Governor in the late 1980s to assess possible changes in Proposition 2½ recommended that a stable 26% of state revenues be turned over to the localities every year.⁴⁶⁴ This recommendation (never adopted) promised a legal stability that Boston does not now possess. State aid has in fact bounced around the 20% mark for many years.

Concerns with Relying on State Aid

That Boston receives disproportionately more state aid than other cities in our study might be thought to reflect its power in the statehouse. On this view, the state's willingness to assume annual responsibility for a portion of Boston's financial condition is not an indication of the state's hostility to the exercise of city power. Quite the contrary. The Boston Home Rule Commission, writing in 1971, argued that it would be a mistake to increase Boston's independent revenue authority, saying that it would make more sense to increase the state's share of local financing.

We are sympathetic to the commission's concern that local control over fiscal matters can contribute to inter-local inequality. The state *should* play an important equalizing role given the economic and social disparities between cities and towns in the Boston metropolitan area. Nevertheless, as the recent history of state aid demonstrates, a system that makes Boston dependent on discretionary distributions does not place the city on a strong footing to plan for its future. The current structure ensures that Boston's fiscal health is entwined with state legislative budget battles. State aid can change without any input from the city, and it is always uncertain what the final figure will be. The current structure of state aid in Massachusetts is thus consistent with our central finding in this chapter: Boston suffers from a greater lack of local control over revenues than the other major cities studied.

There is nothing that Boston can do on its own to increase or promote state aid other than lobby the state for more funds to support its own, as well as state mandated, programs. If instead of state aid, Boston, like Denver and San Francisco, were given new taxing power to overcome the state-created limitations on its power to tax property, it would have more local control over its own finances. Moreover, if a sales or income tax, rather than state aid, accounted for 30% of Boston's budget, Boston could promote jobs and retail sales within its boundaries and benefit from this promotion. The current system of state aid, by contrast, creates an accountability issue. The state can cut taxes (or refuse to increase them) by reducing state aid to make up for its own budgetary shortfall. But the city cannot pass its shortfall onto another entity. The city has to increase taxes or reduce services. Thus, the state benefits from the tax reductions or a balanced budget while the city's reduction in services or increase in taxes hurts it politically. The state gets the benefit, even though it is responsible for the situation for which the city takes the blame. This lack of accountability is magnified by the state-created structure that determines the city's control over its own expenditures – the next topic explored in this report.

Chapter Five

Expenditures

The constraints states place on the local power to generate revenue take on added significance when one considers the substantial costs that cities incur simply to fund basic services. These costs do not arise because cities choose to assume them. They are a byproduct of a state decision that certain services will be provided locally. States choose to take on some services that are thought of as “basic” themselves. Others they deem to be primarily local. The state’s choice about how to allocate the responsibility for a basic service has a powerful impact on local spending decisions. Once state policy has determined that paying for police and fire protection is largely a local responsibility, it becomes obvious that this is where much of the city’s available revenue must go. As a result, many cities – including Boston – have relatively little money left over to promote other projects that might help realize their vision of the city’s future.

The primary determinants of local spending power, then, are state decisions designating basic services as local governmental functions and state rules limiting the revenues needed to pay for them. But states control city expenditures through more direct means as well. States enact laws that prohibit some kinds of local spending and other laws that mandate local spending. These targeted interventions affect not only what cities can do but their costs. It is not just that the state charges local governments with the responsibility for ensuring public safety. It also determines the benefits that must be paid to the workers they hire to carry out this responsibility.

To get a sense of how Boston’s control of its expenditures compares to that of other cities, it is important to know the percentage of the different municipal budgets that basic services consume. After examining this comparison, this report turns to the role that the general legal structure plays in local spending choices made by Boston and the six other cities. This chapter concludes by focusing on two types of spending that have important effects on municipal budgets – spending funded by bond issues and the provision of municipal employee benefits – to see specific ways in which Boston’s spending discretion is constrained more than that of other cities.

Expenditures for Basic Services

There is nothing obvious about the allocation of responsibility for different functions among different levels of government. Noticeable variations exist among the cities in our study. Of course, there are also similarities — public safety constitutes a very significant line item in every city’s budget. But many cities do not fund education, as Boston does, through general fund revenue (albeit with significant state aid contributions). And, unlike New York City, Boston is not responsible under state law for a share of its residents’ Medicaid expenses.⁴⁶⁵ Indeed, the Massachusetts state government, unlike the New York state government, assigns to itself almost all public welfare expenditures and a large fraction of health and hospital spending.⁴⁶⁶ As a result, “local government activities in Massachusetts tend to be limited to the core functions of local governments—elementary and secondary education, police and fire protection, and transportation.”⁴⁶⁷ To get a sense of just how much of Boston’s spending discretion is determined by the need to fund these services, it is helpful to examine how Boston spends its general fund budget. Here’s a summary (in thousands of dollars) of Boston’s general fund expenditures for Fiscal Years 2005 and 2004.⁴⁶⁸

Expenditure	2005	2004
General Government	57,471	30,061
Human Services	23,821	22,642
Public Safety	457,541	390,854
Public Works	106,749	87,045
Property & Development	29,836	31,088
Parks and Recreation	15,708	11,260

Libraries	27,594	24,089
Schools	673,009	656,291
Public Health	60,586	58,762
County	--	--
Judgments & Claims	6,620	(3,544)
Retirement Costs	59,419	87,934
Other Employee Benefits	142,721	129,937
State, District Assessments	115,894	111,061
Capital Outlays	2,683	393
Debt Service	115,769	120,938
TOTAL	1,895,421	1,758,811

As the table makes clear, the costs of education and public safety (police and fire)⁴⁶⁹ are Boston's two largest expenses. In fiscal year 2004, the city's spending in these areas represented 59.6% of its total general fund expenditures. The city also has a number of mandatory expenses that must be financed from its general fund. Debt service and state assessments take up roughly 13.2% of the city budget, while employee benefits (largely retirement and health benefits) consume another 12.4%. The seven categories just named (schools, police, fire, debt service, state assessments, retirement expenses, health insurance) account for approximately 85% of the city's expenditures. Indeed, overall, in fiscal year 2002, only 11 city departments were appropriated more than 1% of the city's budget.⁴⁷⁰ In addition to the seven already mentioned, these were public works/snow removal, public health, transportation, and the library.⁴⁷¹ These four additional expenses represent a combined 10% of the budget.⁴⁷² All other city expenses, in total, represent only 10% as well.⁴⁷³

Another way to look at the city's expenditures is to focus not on program areas but on what the city buys with its money. Boston's expenditures are heavily weighted toward human resources. The city's fiscal year 2004 budget allocates nearly 75.8% of its total funding to the costs of personnel (largely salaries, overtime, and health insurance for city employees).⁴⁷⁴ For this reason, any decrease in the city's operating budget must fall primarily on municipal employees. The Mayor estimated that the \$73 million reduction in his proposed fiscal year 2004 budget would lead to a workforce reduction of around 1700 employees, mostly within the school department.⁴⁷⁵

The fiscal demands placed on the other cities in our study are similar, if not worse, than Boston's. They, too, have little in the way of truly discretionary revenues to put towards new programs. Seattle, like Boston, spends roughly 80% of its budget – if the costs of utilities are included – on core services.⁴⁷⁶ By some estimates, San Francisco has \$2 million available for discretionary spending out of a budget of more than \$1 billion.⁴⁷⁷ Other cities are also like Boston in that they allocate the overwhelming bulk of spending to human resources. Denver and Chicago spend between 70% and 80% of their general fund revenues on personnel costs.⁴⁷⁸ Thus, as in Boston, when revenues are flat or turning downward, budgetary flexibility is created chiefly by shrinking the municipal workforce.

Given these spending obligations, and the limits on available revenue, providing funds for new local programs tends to be something of an afterthought in the municipal budgeting process for all of the cities examined. Rather than beginning the budgeting process by developing a list of spending priorities, and then determining the amount of revenue needed in order to achieve them, a city must usually start with the constrained structure created by its allowable revenues. A premium is then placed on ensuring that the basic city services assigned by the state will be paid for. The Mayor's statement accompanying his transmittal of Boston's \$1.75 billion fiscal year 2004 budget to the City Council makes this point explicitly. It says that the budget "does not include optimum funding for even the City's core priorities"⁴⁷⁹ This statement, introducing a

budget that calls for a \$73 million reduction in funding compared to the prior fiscal year, unsurprisingly blames this inability on declining revenues, specifically “the State’s control over the City’s second largest source of revenue [state aid].”⁴⁸⁰

Of course, Boston does make discretionary decisions that, in marginal ways, tilt local spending to push a particular vision of the city’s future. In recent years, the city has substantially increased outlays for the Elderly Commission, which arguably helps Boston become a more affordable home for long time residents. Similarly, Boston has increased spending on cultural affairs, which demonstrates an effort to enhance its attractiveness as a tourist city. Each of the cities in our study promotes visions of its future in this way. A review of their municipal budgets reveals, however, that, in light of the core services they must fund, it is difficult to use discretionary spending as a primary means of defining a future path for the city’s development.

The Legal Structure of Local Spending

The Legal Structure in Boston

Prior to the Home Rule Amendment, the Massachusetts Supreme Judicial Court ruled in *Whiting v. Mayor of Holyoke*⁴⁸¹ that cities had “only a delegated power to . . . expend money. Their rights in this particular regard rest upon legislative grant; if the authority is not found in express terms or by necessary implication in some act of the General Court, it does not exist.”⁴⁸² The Home Rule Amendment effectively reversed the constitutional presumption articulated in *Whiting*. It permitted municipalities to “exercise any power or function which the General Court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the General Court in conformity with powers reserved to the General Court”⁴⁸³ This change makes the background legal structure for local spending in Boston quite expansive. Although Boston has no power to tax without prior state legislative approval, it is presumptively entitled to spend for whatever purposes it chooses.

The Massachusetts Home Rule Amendment, however, still allows the state to exercise ultimate control over local spending. Boston remains subject to the general laws of the state. Under Section 6 of the Home Rule Amendment, state decision-making continues to displace local decisions – including local decisions to spend.⁴⁸⁴ Notwithstanding the Home Rule Amendment, therefore, state statutes still matter. Massachusetts General Law, Chapter 40, section 5, for example, permits towns and cities to spend money for the exercise of any of their “corporate powers.”⁴⁸⁵ While this language is quite broad, subsequent sections go on to enumerate very specific purposes for which municipalities are authorized to spend funds and to limit other types of expenditures.⁴⁸⁶ Section 6A allows a city to spend money “for the purpose of advertising its resources, advantages and attractions,” but only upon “local acceptance” by the Mayor and City Council.⁴⁸⁷ Various other provisions cap the amount that a city may spend on specific items.⁴⁸⁸ As will become clear, other state (and federal) laws also limit Boston’s power through project-specific funding, required state assessments, mandated budget procedures, and various forms of unfunded mandates.

One noteworthy example of this kind of state control of local spending occurred in 1978 when, in *Anderson v. City of Boston*,⁴⁸⁹ Boston’s ability to spend money on a voter education campaign in an initiative election was challenged as contrary to state law.⁴⁹⁰ The plaintiffs argued that, because the legislature had amended Chapter 40’s specification of permissible expenditures on a number of occasions after the passage of the Home Rule Amendment, the legislature intended the specifically enumerated provisions to be an exhaustive list.⁴⁹¹ The Supreme Judicial Court rejected this argument, stating that “[n]either as a matter of statutory construction nor in practice are municipal appropriations limited to those purposes enumerated in [Chapter 40].”⁴⁹² The Court made clear, however, that the legislature did have the power to prohibit cities from spending money in particular areas – as well as implying that the state has the power to establish special procedures before money can be spent.⁴⁹³ Ultimately, the Court ruled against the city in *Anderson* on the grounds that state legislation had prohibited municipalities from spending funds

on voter education.⁴⁹⁴ Because the state legislature had enacted “comprehensive legislation” regulating election financing after the Home Rule Amendment—albeit legislation that did not specifically address whether a city could spend money to educate voters—Boston’s desire to conduct the voter-education campaign, the Court said, was “inconsistent with . . . laws enacted by the general court.”⁴⁹⁵

Another example of state control of Boston’s spending decisions occurred in *Connors v. City of Boston*.⁴⁹⁶ In that case, the Supreme Judicial Court ruled that Boston’s executive order extending group health insurance benefits to domestic partners of city employees was inconsistent with state law and thus invalid.⁴⁹⁷ Since the general ability of cities to provide health insurance benefits was governed by a state statute, the court reasoned, the state did not allow localities to provide a greater level of benefits than the state.⁴⁹⁸ The state statute, in other words, implicitly precluded Boston’s attempt to cover domestic partners.

In addition to directly prohibiting certain types of expenditures, state statutes place a number of procedural constraints on Boston’s budgeting process. Some are general, such as the requirement that the city budget be balanced. Others apply only to Boston, not to all cities in Massachusetts. Boston, for example, is required to set up a segregated reserve fund for “extraordinary and unforeseen expenditures” amounting to 2.5% of the preceding year’s expenditure for county and city departments, not including the school department. (The same legislation required the creation and maintenance of a similar reserve fund for the school department.⁴⁹⁹) This fund is subject to many additional detailed requirements. The Mayor, with approval of the City Council, is authorized to draw funds from the reserve, but only in the final month of each fiscal year.⁵⁰⁰ Should the reserve fund be depleted in a year in which the city incurs a deficit, the amount required to be appropriated in the next year for the reserve fund increases by 50%.⁵⁰¹ Other restrictions include a provision that the Mayor can reallocate no more than \$3 million before April 15 of each fiscal year, a provision that money cannot be transferred between departments after an appropriation has been made except with approval of the Mayor and a 2/3 vote of the City Council, and a provision holding city officials who intentionally spend “in excess of the appropriations duly made in accordance with law” personally liable for the amounts expended.⁵⁰² The act also requires that appropriations for hospitalization and insurance expenses be no less than the average of the three preceding years’ expenses for this category.⁵⁰³

One aspect of the state legal structure works to protect Boston rather than to limit its discretion. This provision bars the state, from 1981 onward, from “imposing any direct service or cost obligation upon any city or town . . .” without local approval or full funding by the state.⁵⁰⁴ This limitation on the state’s capacity to impose unfunded mandates on local governments appears to have been intended to offset Proposition 2½’s constraint on local taxing. But, while Proposition 2½’s limits on local taxing have proved significant, its limit on state unfunded mandates has not. The principal reason for this is that the prohibition was expressly made prospective and many significant state mandates pre-date 1981. Another reason is that the courts have interpreted the prohibition in ways that enable the state to continue to impose new costs without providing new money. One way of doing so is for the state to condition the receipt of other kinds of state aid on acceptance of the unfunded “mandate.”⁵⁰⁵

The Legal Structure in the Other Cities

Like Boston, other cities in our study are subject to balanced budget requirements and state statutes structuring their budgeting process. New York City is under the fiscal oversight of the state-created Municipal Assistance Corporation established during New York’s fiscal crisis of the 1970s (although its influence has diminished in recent years).⁵⁰⁶ Atlanta, like Boston, is prohibited by special legislation from spending money for specified purposes, is required to pay for mandated services, and has to fund state-created governmental authorities that are outside of its control.⁵⁰⁷

But this kind of constraining special legislation is not a universal feature of the legal structure of city spending power. Denver seems to be relatively free of the kind of specially targeted impositions that apply to Boston. This freedom stems, in part, from Colorado's ban on special legislation.⁵⁰⁸ Like those that affect most of the other six cities, Colorado's ban dates back nearly 100 years. Although Boston also benefits from a ban on special legislation, its protection was established by the Home Rule Amendment less than 50 years ago, and it was expressly made prospective.⁵⁰⁹ In addition, cities that, unlike Boston, enjoy some degree of home rule protection from state legislation have more local power to control their own spending for another reason: their decisions cannot be as easily preempted by state statute.

A striking contrast to the Massachusetts Supreme Judicial Court's holding in *Anderson* – which barred Boston from spending funds on voter education – is the California Supreme Court's decision in *Johnson v. Bradley*.⁵¹⁰ In that case, the court upheld a Los Angeles ordinance providing public financing for local candidates who agreed to campaign spending limitations despite a state law that expressly prohibited cities from spending local funds to finance local elections.⁵¹¹ The state law, the court found (in agreeing with its court of appeals), was unconstitutional because it infringed on municipal home rule. “We can think of nothing that is of greater municipal concern,” the court said, “than how a city's tax dollars will be spent; nor anything which could be of less interest to taxpayers of other jurisdictions.”⁵¹²

A similar contrast exists on the issue of domestic partner benefits. Although the Massachusetts Supreme Judicial Court ruled in *Connors* that Boston's provision of domestic partnership benefits was preempted, the legal structure of home rule in all the other cities led to the opposite result. The state courts that govern Atlanta,⁵¹³ Chicago,⁵¹⁴ Denver,⁵¹⁵ New York City,⁵¹⁶ and Seattle⁵¹⁷ have all ruled that their state laws do not preempt those cities' domestic partner benefits ordinances. (San Francisco has long provided these benefits without objection from the California courts.) Indeed, in reaching the conclusion that Denver had this power, an appellate court in Colorado held that municipal employee benefits are a matter of “local concern” for home rule purposes.⁵¹⁸ This means that Colorado cities need not rely on a state statute for the authority to offer group health insurance plans to their employees; they can make the decision on their own. Since the issue was understood as being a local one, it is not surprising that the Colorado court found little state legislation regulating the provision of health insurance benefits to municipal employees. Without the thicket of state legislation that exists in Massachusetts, the court could more easily uphold city power.⁵¹⁹ It is ironic that Boston is the only city in our study without the power to spend city funds to provide health insurance benefits to domestic partners of city workers. After all, it is also the only city in our study that must confer marriage licenses as matter of state constitutional law to same-sex couples.⁵²⁰

Those cities that (unlike Boston) possess some measure of protection from state preemption have sometimes even freed themselves from state laws that mandate spending. Denver successfully challenged costly, state-mandated training and certification requirements for local police officers on home rule grounds.⁵²¹ Overall, however, efforts to limit the state's power to compel local spending have proven no more significant elsewhere than they have in Boston. San Francisco benefits, as do Denver, Seattle, and Boston, from a limitation on unfunded mandates.⁵²² But the California state courts have upheld several state laws that impose significant local costs. These laws range from one that increased local worker's compensation benefits to one that compelled local governments to extend unemployment insurance to their employees.⁵²³

Local Spending Power: Specific Examples

Given differences in accounting practices and the sheer volume of state laws that bear on local spending decisions, it is not possible to evaluate the relative spending power of the seven cities in the comprehensive fashion that was used for revenues. To provide a comparative sense of the constraints that the state has placed on Boston, instead this report focuses on two areas in which state law significantly affects city spending discretion. The two areas are city spending

through bond issues and city spending on municipal employee benefits. In the first example the state limits local spending, while in the second the state mandates local spending. After discussing these two examples in some detail, this section concludes by briefly listing – only for Boston – additional instances of state control to illustrate their breadth and diversity.

State Limits on Spending Through Bond Issues

The cost of providing basic municipal services is so high – and the funds available from taxes, fees, and state aid are so limited – that cities often cannot pay for large projects and programs by spending discretionary funds. These initiatives are carried out instead by taking on debt. City borrowing can be understood as a way of raising revenue rather than spending it. But borrowing is normally undertaken to support a particular project, and the funds raised have to be secured either by general revenues or, in the case of revenue bonds, by fees generated by the service or capital improvement. For this reason, this report considers the process of issuing bonds as an exercise of the spending power and treats state borrowing limitations as restrictions of city control over its expenditures. After all, in fiscal year 2005, Boston spent over \$115 million on debt service – over 6.1% of its revenue and one of the largest single line items in the city's budget.⁵²⁴

Under Massachusetts law, Boston can authorize bonds only up to 5% of the valuation of the city's taxable property.⁵²⁵ The substantial portion of city land that state law exempts from property taxes makes this limit even lower than it might first appear. There are, however, ways that Boston can increase its total amount of debt. With the approval of a state board composed of the State Treasurer and Receiver General, the State Auditor, the Attorney General, and the Director of Accounts, or their designees, Massachusetts municipalities are allowed to borrow up to double the statutory amount.⁵²⁶ In addition, under a 1966 act, the state allows Boston to issue debt outside of the debt limit for specific purposes, such as construction and renovation.⁵²⁷ (Other special legislation, such as the Convention Center Act, authorizes borrowing outside of the debt limit as well.⁵²⁸) In total, within its current debt limit of \$3.81 billion, Boston has authorized approximately \$1 billion in debt and has the capacity to authorize roughly another \$2.81 billion.⁵²⁹ But state law also imposes other constraints on Boston's borrowing power. It sets the maximum maturity period for the different types of bonds and details the permissible purposes for which bonds may be issued.⁵³⁰ The combined effect of these state regulations is that state approval—whether from the legislature or the state board — is normally required for the city's long-term capital projects.⁵³¹

Other cities are subject to fewer requirements of state approval (minimal though the approval requirements for Boston may be in practice) and to fewer limits on the purposes for which local debt may be issued. While the Home Rule Amendment that governs Boston specifically states that "borrowing" is not a local power, Denver is a home rule city, free from all state constitutional or statutory debt limitations.⁵³² The only limits on Denver's ability to issue debt are imposed by the city itself, although Denver's city charter limits the debt to 3% of the city's property values.⁵³³

Chicago's power to issue debt is even more extensive. The 1870 Illinois constitution prohibited municipal indebtedness in an amount greater than 5% of the value of the city's taxable property.⁵³⁴ But the current Illinois constitution imposes no such limit. Instead, the current constitution authorizes the legislature to impose a limitation if the limit does not go below an amount equal to 3% of the local government's total equalized assessed value.⁵³⁵ The Illinois legislature, however, has not exercised this power. Consequently, Chicago has no borrowing limit in place. Perhaps not surprisingly, under these circumstances, Chicago's bonded debt is approximately 10% of its estimated assessed value,⁵³⁶ which is significantly more than the legal limit permitted in Boston. Indeed, in the recent past, Chicago's indebtedness has increased enormously. Between 1998 and 2002, its long term direct debt per capita doubled, rising from \$750 in fiscal year 1998 to \$1470 in 2002.⁵³⁷ When revenue bond debt is added to this total, the figure doubles again – in fiscal year 2000 Chicago had \$8,411,633,000 in total debt (a 36%

increase between 1997 and 2000), which averages out to \$2,905 per capita.⁵³⁸ This broad power to issue debt has helped Chicago avoid – at least temporarily – a disastrous fiscal crisis. And it has simultaneously enabled the city to support an ambitious neighborhood development initiative, funded by bonded debt, which cost between \$200 and \$250 million per year over its four year lifetime.⁵³⁹

Chicago's debt service payments currently consume 42% of its property tax revenues.⁵⁴⁰ Thus it seems unlikely that the current trajectory can continue. Chicago's Deputy Budget Director made the interesting observation, however, that the debt rating agencies, such as Standard & Poor's, Moody's, and Fitch, have been "enablers" of Chicago's increase in debt.⁵⁴¹ Although the rating agencies have noted that the city's debt burden is rising, they have taken no action to slow it down, concluding instead that the borrowing is within an acceptable range.⁵⁴² This attitude may be based in part on the fact that Chicago has the power to tax and could use that power if the debt burden became too high.⁵⁴³ In some perverse way, the uncapped debt limit may work to Chicago's disadvantage: it has allowed the state legislature to ignore the city's fiscal crises more than it could have if the city were subject to debt limitations. On the other hand, because Chicago has relied on debt rather than state aid, it has made itself less vulnerable to state dictates about its budget priorities.

The broad borrowing powers of Denver and Chicago seem readily understandable given their generally extensive home rule powers. Yet the situation in Atlanta shows that there is no necessary connection between limited home rule and limited authority to assume debt. Atlanta finances many of its projects and services through bond issues, including general obligation bonds, tax allocation bonds, Solid Waste Management Authority revenue refunding bonds, limited obligation bonds, and so-called Section 108 bonds.⁵⁴⁴ The Georgia constitution authorizes Atlanta to issue general obligation bonds⁵⁴⁵ with the consent of the majority of the city's voters.⁵⁴⁶ Although the Georgia constitution also limits the amount of general obligation debt that Atlanta can incur,⁵⁴⁷ that limit is high. The city may not incur general obligation debt beyond 10% of the assessed value of all taxable property.⁵⁴⁸ Even that limit has been raised because Georgia allows the enactment of local constitutional amendments and, under such an amendment, Atlanta has established a limitation of 12%. This 12% limit is itself divided into two categories: an 8% limitation on general government debt and a four percent limitation on school debt.⁵⁴⁹

Our point here is not to suggest that Boston should be assuming the vast amount of debt that these other cities are incurring. As stated in the discussion of the state's limits on the city's property taxes, there may be long term benefits for Boston to limit its borrowing to the relatively modest amount required by Massachusetts law. On the other hand, given the costs of basic services, and the scarcity of revenue sources other than the property tax and state aid, Boston's comparatively restricted borrowing power constrains one possible means of undertaking the kind of investments for its future that other cities now have the legal power to make. One need think only of the role that borrowing might play in confronting the city's affordable housing problem. Or its possible role in enabling Boston to promote itself as a tourist venue. This issue is considered further in the next chapter when discussing the power of the seven cities to engage in tax increment financing, a form of debt financing designed to promote economic development. As will be clear, Boston also has less power than other cities to use this tool as well.

State Mandates for Municipal Employee Benefits.

The provision of core services and payments for municipal employees eats up a large portion of the budget for most of the cities in our study. But Boston's authority to determine one important element of these costs – the level of employee retirement and health care benefits – is more constrained by a web of state laws and regulations than are other cities.

1. Retirement Benefits

Employee retirement benefits are a large expense for Boston – \$147 million in fiscal year 2005.⁵⁵⁰ These benefits are pervasively regulated by the state. Nearly all of Boston's city employees receive their retirement benefits through the State-Boston Retirement System, one of 106 mandatory contributory retirement systems run throughout the state for governmental employees.⁵⁵¹ The Boston system has over 14,000 retirees and over 20,000 active members, with a total fund value of approximately \$3.1 billion.⁵⁵² Under state law, the authority to establish and amend the benefit provisions is vested solely in the state legislature.⁵⁵³ The five-member State-Boston Retirement Board administers the plan.⁵⁵⁴

The Boston retirement fund derives from employee payroll withholdings, investment income, and annual contributions from the City of Boston. Under state law, employees contribute from 5% to 9% of their salaries to the fund each year;⁵⁵⁵ these contributions represent approximately 10% of total benefits.⁵⁵⁶ The remainder is made up by investment income and direct contributions from the city.⁵⁵⁷ Under state law, the Retirement Board conducts a full valuation of the system every three years,⁵⁵⁸ and this valuation determines the contribution required by the city.⁵⁵⁹ Benefits, based on an employee's age, years of service, and job classification, are paid under formulas established by state law. The state also regulates the type and amount of pre- and post-retirement death benefits, sets the eligibility and funding requirements for disability retirement, mandates a number of benefit preferences and options for certain types of employees—most notably public safety officials and veterans – and establishes procedures for benefit determinations and appeal rights.⁵⁶⁰

An important change in the way that the retirement system is funded occurred in 1997. The state decided to discontinue its practice – which began after Proposition 2½ was enacted—of funding cost of living increases for retired workers.⁵⁶¹ After announcing its intention to shift future cost of living adjustments back to the state's municipalities, the state legislature passed a local option statute enabling local pension boards to authorize cost of living increases.⁵⁶² Boston accepted this option. At the time, the legislation was criticized because it only enabled local elected officials to choose whether to make the initial commitment to award cost of living adjustments; all subsequent decisions would be made by the Retirement Board.⁵⁶³ The Retirement Board has, in fact, granted a number of increases. Under this legislative scheme, in other words, Boston's elected officials, who are responsible for balancing Boston's budget, have no say over whether a cost of living adjustment will be granted to its employees in any given year.

The state has offered a number of other local options to deal with retirement benefits, the most important of which is one that allows municipalities to switch from pay-as-you-go funding to a fully-funded system.⁵⁶⁴ In 1988, the Boston City Council exercised this option – a decision that, once again, was irrevocable. (The move toward fully-funded pensions is widely considered to be an important aspect of sound financial management and was expected, among other things, to increase the city's bond rating.⁵⁶⁵) Boston's decision required the city to amortize its unfunded pension liability through a schedule of payments over a 40 year period.⁵⁶⁶ As a condition of accepting this option, the state statute required Boston to accept a number of other changes, including an increase in allowances for dependents and a reduction in the vesting period for disability leave.⁵⁶⁷

In sum, Boston is obligated to fund the entire cost of municipal pensions – no questions asked – but it has virtually no control over the cost of these pensions. The discretion left to local officials – such as the decision not to fund cost of living adjustments due to financial hardship or to change fund managers – rest not in the hands of local elected officials but the Retirement Board. “Local options,” such as the move to full funding, carry with them obligations to accept state policy determinations with regard to benefit levels and plan administration. And basic moves – such as setting up early retirement incentive plans to reduce payroll cost (the sort of thing private companies do with some regularity)—require state legislative approval.⁵⁶⁸

These kinds of multiple state controls over retirement benefits are only one option among many. The structure for paying retirement benefits in Denver is very different. Denver's pension

plan is controlled by the City Council. Denver's current ordinance exempts city employees from the Colorado state pension plan,⁵⁶⁹ establishes a trust fund to manage contributions and payments,⁵⁷⁰ and creates a retirement board to administer the plan. The board consists of five members appointed to six-year terms by the Mayor (the membership also elects three non-voting board members to the board). The board defines the plan's contents (subject to the provisions of the municipal code),⁵⁷¹ hears complaints of employees who are denied benefits under the plan, and maintains an investment manual to guide the trustee managing the fund.⁵⁷²

This is not to suggest that the City of Denver has complete control over its pension costs. Unlike other employees, Denver's police and firefighters participate in the Statewide Defined Benefit Plan. The Colorado legislature created this plan, by passing the Policemen's and Firemen's Pension Reform Law, after a study found that Colorado's local police and fire pension plans had an unfunded liability of approximately \$500 million.⁵⁷³ Under the state plan, the fund supporting pensions for Denver's police and firefighters is supported by state, local, and employee contributions, with the amount of the local contributions set by the state.⁵⁷⁴ As initially passed, the statute allowed cities to choose to participate, but a change in the statute prohibited withdrawal after January 1, 1988.⁵⁷⁵ Thus it is no longer possible for Denver to withdraw from the plan.

Chicago's flexibility in controlling pension costs is more like Boston's than Denver's. More than 100 years ago, Illinois assumed control of Chicago's pension system.⁵⁷⁶ All benefit entitlements, including prescribed cost of living increases, are specified by state law.⁵⁷⁷ Because pension expenses, now 6-8% of the city's budget,⁵⁷⁸ constitute the city's fastest growing budget item, this statutory scheme imposes on Chicago significant mandated costs that it cannot control. Instead, four different pension boards – for municipal employees, laborers, police, and fire department employees – administer pension funds, make investment and qualification decisions, and determine the amount of money needed to fund payouts. Local officials describe the city as resigned to its fate of paying whatever the pension boards require.

Despite this substantial amount of state control, Chicago has more influence over pension matters than does Boston. In 2003, the Illinois General Assembly authorized an early retirement package for Chicago that the city had drafted and pressed it to enact. Approximately 2500 employees have signed up for the program, which allows them to purchase years of service or make additional pension payments in exchange for early retirement. Only 1700 of the 2500 vacancies created by the early retirement plan will be replaced; as a result, there will be an overall reduction of 800 employees in the city work force. Illinois law also has provided Chicago with some influence over state pension decisions by requiring that at least two city officials (the Treasurer and the Comptroller) be ex officio members of all pension boards.⁵⁷⁹ Finally, the Illinois Supreme Court upheld a municipal ordinance imposing a mandatory retirement age, rejecting the argument that the ordinance was preempted by the state Pension Code.⁵⁸⁰

2. Health Benefits

In 1968, the Massachusetts state legislature adopted a statute that authorized municipalities to provide health care coverage for their employees.⁵⁸¹ Although the legislation was a local option statute, it was like the other option statutes described above: a municipality that decided to opt in could not subsequently opt out.⁵⁸² Moreover, since the state statute established the exclusive means by which municipalities could provide health insurance coverage, it essentially required participation. Unsurprisingly, Boston chose to participate. The statute extensively details the contours of the program, including the permissible contribution levels for various employees and the types and levels of benefits. These requirements are binding once a city opts in, thereby decreasing Boston's flexibility to control health care costs – costs that represent a substantial portion of its budget.

One important aspect of the state legislation is its requirement that a municipality pay at least 50% of its employees' health care costs. The statute also authorizes municipalities to elect

to pay a greater percentage (up to 90%)⁵⁸³ – an election that Boston made.⁵⁸⁴ After Boston did so, the state amended the law to provide that municipalities must provide the same percentage level of contribution for all employees.⁵⁸⁵ Based upon this amendment, a number of municipal unions sued, alleging that the city was required to increase its contribution to their health insurance so as to equalize it with the contribution to the most generously funded municipal unions.⁵⁸⁶ Despite the fact that the equalization provision was passed after Boston elected to be covered, the Supreme Judicial Court held that the city was bound by its terms.⁵⁸⁷ This provision, still in effect, thus gives any local union the power to veto a reduction in the city's percentage contribution to health insurance. The generous health care provisions received by Boston employees and retirees – a 90% reimbursement for HMO participants and a 75% reimbursement for traditional insurance plan participants – is therefore not easily put on the table by the city when looking for ways to cut costs. To be sure, Boston might choose to provide highly subsidized health care to its employees on its own. Nevertheless, state law makes it difficult for the city – in managing its various commitments to municipal employees and to city residents generally – even to consider reducing its level of contribution to employee health insurance.

The relevant legal structure is different in other cities. They are freer to provide greater benefits to employees and also freer to reduce or limit them as a cost-saving device. Denver and Chicago, again, will be our comparison cities. Denver's considerable power over its employees' benefits derives from the state constitution. The city's home rule authority gives it power over benefits, since employee benefits are considered matters of local concern.⁵⁸⁸ The only restraint on Denver's authority to determine employee benefits is the language of the city charter; the state has no influence over the benefits received by most regular municipal employees. Indeed, in November 2003, voters approved "Referred Question 1A" to remove the guidelines for employee benefits from the city charter and to allow them to be set by ordinance.⁵⁸⁹ The change in the charter was designed to "express the policy of the City to provide generally prevailing compensation," and to "permit the Mayor and Council to accept, reject or modify pay and benefit recommendations."⁵⁹⁰ Benefits are now determined by the Career Service Board, which makes recommendations to the City Council on pay, recruiting, hiring, and "fringe benefits."⁵⁹¹ The "fringe benefits" include sick pay, disability pay, vacation time, health insurance, life insurance, and dependents' benefits.⁵⁹² Once again, pay and benefits for the police and fire departments are different – they are set by collective bargaining processes. The Denver city charter makes this collective bargaining process mandatory.⁵⁹³ It also prohibits city workers from striking regardless of the progress of negotiations,⁵⁹⁴ and it requires that the collective bargaining be conducted in good faith.⁵⁹⁵ No substantive requirements for benefits for police or firefighters are contained in city ordinances.⁵⁹⁶

Chicago, like Boston, spends a considerable amount on employee benefits.⁵⁹⁷ While it does not possess the same degree of control over employee benefits as Denver, it is also not subject to the degree of constraint on its power that Boston is. Illinois law does not mandate city or employee contribution or benefit levels. Occasionally, state laws will have an impact on city health insurance (such as recent state legislation requiring contraception to be covered by insurance plans). But Chicago can and does actively negotiate the terms of its health insurance plans. Moreover, although the city agreed, in a settlement of a recent lawsuit, not to alter the terms of health care coverage for its retirees, the settlement does not include current employees. With its health care costs rising about 20% each year, city officials stress that cost sharing changes are required and that municipal employees will have to assume a greater proportion of the cost in the future.⁵⁹⁸

Additional State Controls on Boston

The additional examples of state controls described below illustrate the detailed nature of state intervention in Boston's decisions concerning the expenditure of its funds.

1. State Assessments

In fiscal year 2005, Boston spent almost \$112 million to pay for specific state assessments.⁵⁹⁹ The most important of these is its required payments to the Massachusetts Bay Transportation Authority.⁶⁰⁰ Of course, these payments are in return for an important benefit that the city receives. Nevertheless, they are entirely outside of the city's control. Not only are the formulas that determine the amount the city must pay set by the state legislature, but the city contends these formulas disproportionately burden Boston.⁶⁰¹

This method of determining state assessments suggests a more general problem. Formulas that determine the local share of state expenses threaten to become a political weapon that can be deployed against the city. The method that the Massachusetts Water Resources Authority (MWRA) uses to set its rates illustrates this danger. The MWRA is the public authority responsible for the region's water and sewer systems.⁶⁰² It sets overall rates for sewage and water services and then sends a bill to a municipality, which decide for themselves how to set sewer and water rates within their jurisdiction.⁶⁰³ In 1993, a number of suburban lawmakers proposed changing the assessment formula from one based on population to one based primarily on the amount of sewage produced.⁶⁰⁴ This change was widely viewed both by Boston and its suburban neighbors as a way to shift costs to the city.⁶⁰⁵ Ultimately, the state legislature passed a version of the new formula largely along the lines proposed.⁶⁰⁶ Surprisingly, the change did not result in a relative increase in Boston's assessment.⁶⁰⁷ Nevertheless, this history suggests how an arcane assessment formula set at the state level has the potential to have a profound effect on Boston's budget.

2. Suffolk County

Despite being the largest municipality in Suffolk County, Boston still has historically been responsible for a disproportionate share of county expenses, the largest being the Sheriff's office, which includes county corrections. The city recently obtained from the state a major reduction in its share of county correctional costs; the state now pays 96% of these required costs.⁶⁰⁸ Even now, one thing is clear: the city must pay whatever portion of these expenses the state chooses. The state could thus return to its earlier policy of requiring a much greater contribution from the city any time it decided to do so.

3. Charter Schools

The state has established a number of charter schools for Boston students.⁶⁰⁹ The most common form of these schools – Commonwealth charter schools – are established by the state alone, without any required approval by the Boston school department.⁶¹⁰ Once established, the charter schools are monitored directly by the state.⁶¹¹ Yet, because the children who attend Boston's charter schools are local residents, the city is required to pay tuition costs for the more than 4000 students who attend them.⁶¹² Admittedly, the state recently agreed to reimburse municipalities for 100% of the first year tuition, as well as a portion of the second and third year tuition.⁶¹³ Even so, Boston remains obligated to pay a portion of the tuition, despite its lack of oversight over the schools. While many education practitioners and observers point to the positive performance of charter schools and their role in helping to catalyze overall improvement in the Boston public schools, there remain concerns about whether the state will fully fund its commitment going forward. The Governor's fiscal year 2003 budget included no funding for this line item, which left the city responsible for the entire bill.⁶¹⁴ And the Governor's fiscal year 2004 and 2005 budgets provided only partial funding for the program.⁶¹⁵

4. External Funding.

In addition to its general fund budget, Boston receives almost \$321 million in "off-budget" external funds.⁶¹⁶ These funds, which largely take the form of federal and state grants, are targeted to specific purposes.⁶¹⁷ These purposes may or may not reflect the city's own priorities. The vast majority of dedicated funding goes toward education expenses (largely from federal Title I funding), neighborhood development programs (largely from various HUD grants), public health

(largely from federal sources for AIDS and homelessness-related services), and Suffolk County expenses (most of which the state pays in the form of direct aid).⁶¹⁸ This kind of dedicated funding for specific purposes helps support a number of important programs. But it also means that Boston's ability to control its expenditures is not just a function of the revenues it has on hand. Its spending power is limited by the purposes for which the state (or the federal government) permits the funds to be spent.

5. Licensing Board and Finance Commission

Two relatively small examples of Boston's expenses mandated by the state are the Finance Commission and the Boston Licensing Board. Both of these entities were established by the state as a way to limit the power of the City of Boston. The Finance Commission, whose members are appointed by the Governor, reviews any aspect of the city's spending and contracting activities that it chooses.⁶¹⁹ The Licensing Board, whose members are also appointed by the Governor, grants alcohol and food licenses for bars, restaurants, and similar establishments in the city.⁶²⁰ Despite the fact that these entities are not created or controlled by the city, Boston is responsible under state law for financing their operations.⁶²¹ In a 1983 case, the Licensing Board successfully sued the city, arguing that the Mayor is obligated under the statute creating the board to request an amount from the City Council no less than that included in the board's "budget requisition."⁶²² The city, in other words, must pay for the Licensing Board even though it cannot play a role in determining its budget.

Conclusion

A review of the legal structure in Massachusetts demonstrates the extent to which Boston's expenditures do not reflect the city's own decision making about what is essential to promote Boston's vitality or prosperity or competitiveness or mix of residents and commercial life. That kind of decision making is a luxury Boston cannot afford because city budget decisions are shaped by state limits on revenue raising, state rules that curb the city's ability to incur expenses for programs it wants, and state mandates that require it to incur expenses that it might prefer to avoid.

The degree to which Boston's fiscal powers are controlled becomes particularly clear when they are compared to the other cities in our study. Our review of expenditures, like our chapter on revenues, does, however, reveal an irony. Even though most of the other cities have greater fiscal power than does Boston, their financial situation is usually no better and often much worse. This fact reveals a basic truth about the relationship between legal power and the structural situation of cities. Cities are but single actors in a much larger political and economic system, and they cannot control their destinies no matter how much legal power they have. It is a mistake, however, to conclude that, since Boston has been able to handle its finances relatively well, it benefits from being controlled by state law. Another conclusion – the one favored in this study – is that Boston *currently* benefits from a variety of structural factors that some other cities do not. Some of the statewide limitations may reinforce those structural advantages. But many do not. The city is operating within a legal structure over fiscal matters that discourages it from planning in a broadly inclusive way. That the city has done well is a tribute to city officials and, no doubt, to a good deal of luck with macro-economic and demographic trends. But there is no reason that state law should be working against city efforts to continue along that path, as many constraints on local expenditures now seem to do.

Chapter Six

Land Use and Development

This chapter examines Boston's power to control its built environment – the physical aspects of the ways in which the city develops and grows. Although the city's land use powers are among its most visible, Boston does not exercise them in a transparent way. Instead, its land use authority, like that of every city in our study, is embedded in a maddeningly complex array of state laws, regulations, judicial decisions, ownership structures, and public authorities. This complexity makes the city's development policy obscure even to the most interested of observers. Yet Boston's land use powers directly affect the look of the city in a way that no other city powers can. As late as the 1950s, a prominent Bostonian, approaching the city for the first time by plane, looked out to see not a single "identifiable structure except the old Customs House tower . . . [and] exclaimed in a startled voice: 'Where's Boston?'"⁶²³ Now, of course, the city's skyline is far different. Economic decisions by private developers had much to do with this change. So, too, have changes in the legal rules that affect Boston's power over land use development.

Boston's ability to control its physical environment has increased over the last 50 years. But a variety of state laws continue to shape city land use decisions. Some of these state-imposed limits on Boston's power are embedded in the state grants that give the city its authority over the built environment, while others stem from the Home Rule Amendment's narrow definition of home rule power. Still others arise from state regulatory requirements for specific parcels within the city or from the fact that state governmental entities hold title to them. The absence of state legislation itself has an impact. After all, Boston's powers are affected by the actions of other cities and towns in the region. The state's failure to promote effective interlocal cooperation thus also constrains Boston's land use power.

In describing the state-city relationship on land use issues, the focus is on two major ingredients: decision making power over major changes in the city's physical development and control of the supply of affordable housing. These two aspects of the city's land use power are inextricably related to the broader visions of Boston's future described in Chapter One. Boston's legal authority to promote new development and provide affordable housing inevitably affects its ability to become a world leader in innovation. Development and affordable housing attract the knowledge-based industries on which global cities depend. They also affect the city's attractiveness as a tourist destination, because lively, affordable neighborhoods promote an urban feel that facilitates tourism. Revenue generated by development, along with the city's power to provide low- and moderate-income housing, determines whether Boston will remain a place where the middle class can afford to live. And the city's legal power to promote development and affordable housing inevitably affects its relationship with its suburbs and, as a result, the kind of regional city Boston is and will become.

The first part of this chapter describes the legal structure that controls the city's physical development. Every state law that has an impact on Boston's power over land use is not described here. Instead, the key state grants of local power to zone and to plan and the limits that the state places on them is examined as well as the state's direct control over parts of the city (particularly its airports and roads) and its restrictions on the city's development powers (specifically, tax increment financing and the creation of business improvement districts). Once these basic ingredients of the city's land use authority are described, the issue of affordable housing is explored. On that crucial topic, both the city's ability to provide housing for low- and moderate-income city residents and its power to affect the exceptionally high cost of the city's housing more generally – a problem that affects everyone in the city – is examined.

In considering the multiple limits on Boston's power in this chapter, Boston is contrasted with the other cities. Every city faces state-imposed constraints. But Boston is subject to a number of limits that appear to be unique. Boston's zoning and planning powers are derived from statutes applicable only to Boston. This kind of specially-targeted legislation does not affect

either other Massachusetts cities or other major cities in the country. Equally important, Boston's lack of control over much of its territory – including its airport and development projects as significant as the Big Dig – stands in sharp contrast to projects that other cities are now developing under their own control. Unusual too are the restrictions on Boston's legal power to use modern innovative development tools, such as tax increment financing and business improvement districts. Most important, perhaps, is Boston's comparative inability – in contrast to other cities – to promote housing affordable to people with moderate means. Boston's future development, in short, is significantly – although certainly not entirely – outside of its control.

Zoning and Planning in Boston

It is important to note at the outset that the legal limits on Boston's land use powers have not prevented it from becoming an economically powerful city. Although the city (like the state and nation) has had its ups and downs, the last 25 years have made Boston a considerable economic success. The Boston Foundation summarized Boston's economic status in 2002:

Today, Boston drives the Massachusetts economy and is the financial and cultural capital of New England. With little more than nine percent of the Bay State's population, it accounts for more than twice that percentage in jobs, goods and services, and state tax revenues. Boston also anchors Metro Boston – currently identified as one of only 42 major high-tech centers around the globe.⁶²⁴

We address the relationship between local land use policy and the city's development, however, not to examine the present but out of concern for the future. Does Boston have enough legal flexibility to promote its continued economic success? To investigate this question, the state-established legal structure for zoning and planning that governs Boston and the six other cities is explored below.

Zoning Powers

Over the last several decades, Boston has taken considerable advantage of its power to use zoning as a tool for economic development.⁶²⁵ It began a thorough rezoning process in the 1980s with the express purpose of reshaping the city's land use policy in light of the city's changing role in the broader economy. That process is now substantially complete, and it has produced major alterations in the city's initial zoning code adopted in the 1960s. Among the goals of the changes have been the promotion of downtown physical development, helping major institutional actors – such as universities and hospitals – fulfill their growth plans, enhancing street life, and ensuring vibrancy within longstanding neighborhoods.⁶²⁶

Boston has been able to engage in this revision of its zoning policy because the Home Rule Amendment enables all of the state's municipalities, including Boston, to exercise the zoning power.⁶²⁷ At the same time, the Home Rule Amendment allows the state legislature to preempt a municipality's exercise of this power.⁶²⁸ The state legislature has in fact passed a special act dealing with Boston's zoning power. That act, known as the Enabling Act,⁶²⁹ applies only to Boston, and it largely determines the way in which Boston exercises its zoning authority. Since the Enabling Act defines the scope of the local zoning power more narrowly than the Home Rule Amendment, it limits the city's power.

1. The Enabling Act

The Enabling Act was passed in 1956 before the adoption of the Home Rule Amendment. It does not simply limit Boston's land use power. On the contrary, its initial effect was to give Boston important land use powers it otherwise lacked. Other municipalities in the state had been granted the zoning power pursuant to a general law passed in 1920.⁶³⁰ Boston, by contrast, received state authorization to zone only in 1924, and the 1924 state statute gave the city little zoning discretion.⁶³¹ Instead, it “contained detailed use and dimensional regulations,

effectively serving as [the city's] zoning ordinance⁶³² The Enabling Act, which took effect in 1958 after being accepted by the City Council and signed by the Mayor,⁶³³ empowered local officials to divide the city into zoning districts and, for the first time, enabled the city, rather than the state legislature, to regulate the height and size of buildings, the amount of open space, and population density.⁶³⁴

Although the Enabling Act finally gave Boston meaningful zoning power, it did not end the state's practice of singling out the city on land use matters. The nineteenth century practice of passing special acts targeting specific land uses continues to the present day. In 1990, for example, the legislature passed "An Act Protecting Certain Public Commons,"⁶³⁵ that, most significantly, inserted a provision into the Boston Zoning Code prohibiting Boston officials from granting permits for new buildings that would cast a "new shadow" on any portion of the Boston Common at any time of day.⁶³⁶ The legislature passed a similar law with respect to the Boston Public Garden in 1992.⁶³⁷

The most important example of the state's special treatment of Boston's land use power, however, is the Enabling Act itself. The zoning powers of all cities and towns in Massachusetts, other than Boston, are defined by the state's general Zoning Act, Chapter 40A of the Massachusetts General Laws.⁶³⁸ Chapter 40A does not affect zoning in Boston.⁶³⁹ Not long after Chapter 40A was enacted, the Boston City Council adopted an ordinance – over the veto of Mayor White – that attempted to accept it as the city's zoning law and thus dispense with the Enabling Act.⁶⁴⁰ But the Supreme Judicial Court rejected that effort and held that that the Enabling Act, and not Chapter 40A, governs zoning in Boston.⁶⁴¹

2. Differences Between the Enabling Act and Chapter 40A

The Enabling Act and Chapter 40A are substantively similar in most respects. The courts regularly consult cases interpreting one of the statutes in order to decide issues under the other.⁶⁴² Nevertheless, there are important differences between them. One difference is that the state statute governing Boston is styled an "Enabling Act," while Chapter 40A is entitled the "Zoning Act." This difference in name reflects a potentially important substantive difference. Chapter 40A, unlike the Enabling Act, is not intended to serve as a source of local zoning power. It was enacted after the Home Rule Amendment with the intent to "facilitate, encourage, and foster the adoption and modernization of zoning ordinances . . . in accordance with the [Home Rule Amendment]"⁶⁴³ In other words, Chapter 40A was not intended to preempt those local land use powers that are traceable to the home rule power unless there is a clear conflict.⁶⁴⁴ Boston, however, is subject to a state zoning *enabling* act, and it therefore may not benefit from a similarly narrow view of its preemptive effect.

Another key difference between the two statutes concerns their treatment of local zoning authorities. The Enabling Act establishes two such authorities for Boston – the Zoning Commission and the Zoning Board of Appeal.⁶⁴⁵ The act makes the Zoning Commission responsible for adopting and amending Boston's zoning code and maps; it assigns to the Board of Appeal the task of hearing zoning appeals and granting variances from the zoning code's requirements.⁶⁴⁶ The Enabling Act also identifies various constituency groups whose members must be included on these two zoning boards. For example, the Mayor must select members of the Zoning Commission from among candidates nominated by the AFL-CIO, the Greater Boston Real Estate Board, the Greater Boston Chamber of Commerce, the Contractor's Association, and Boston architecture societies; three members have to represent neighborhood associations.⁶⁴⁷ The act requires that the Board of Appeal have a similar structure.⁶⁴⁸

Chapter 40A, by contrast, does not require the creation of a separate zoning commission. Instead, it vests zoning authority in the city council or its equivalent.⁶⁴⁹ Elsewhere in Massachusetts, in other words, zoning authority is in the hands of politically accountable actors rather than appointees who explicitly represent particular interests. To be sure, city councils often delegate their power, granted by Chapter 40A, to grant exceptions from existing zoning rules.⁶⁵⁰

But Chapter 40A ensures that city councils have a powerful role in shaping large-scale development projects.⁶⁵¹ The Enabling Act gives the Boston City Council no equivalent role in the review of exceptional projects.⁶⁵² Distinctions of this kind no doubt help explain the City Council's attempt to "accept" Chapter 40A as the city's zoning statute in 1982.⁶⁵³ Had that effort been successful, the Boston City Council – like the state's other city councils – would have assumed the role in zoning that it now lacks.

The procedures for approving zoning amendments in the Enabling Act and Chapter 40A are also importantly different. Again, they have the effect of giving the Boston City Council only a very limited role in setting land use policy for the city. In other Massachusetts cities, Chapter 40A requires a two-thirds vote of the city council (or its equivalent) to approve a zoning amendment.⁶⁵⁴ Under the Enabling Act, the Boston City Council plays no role in the approval of zoning amendments. Instead, a vote of seven of the eleven zoning commissioners is required to pass an amendment.⁶⁵⁵ The amendment must also obtain mayoral approval.⁶⁵⁶ But the Mayor's veto can be overridden by a vote of nine zoning commissioners.⁶⁵⁷ Even though an override is not a frequent occurrence, the Zoning Commission has exercised this power.⁶⁵⁸

The Enabling Act structures Boston's zoning amendment process differently in another way as well. In 1993, the state legislature amended the Enabling Act to facilitate increased community participation in Zoning Commission and Board of Appeal decisions.⁶⁵⁹ One effect of the 1993 legislation was to lower the requirements for standing with respect to zoning amendments, permitting any Boston property owner or resident to petition the Zoning Commission for an amendment. Previously, state law allowed petitions to be brought only by property owners who would be affected by the proposed change.⁶⁶⁰ Although, under Chapter 40A, other cities and towns can choose to adopt the zoning amendment process now in effect in Boston, only Boston is required to adopt it.⁶⁶¹

Why should Boston be subject to a zoning law that applies to no other city in the state? In rejecting a challenge that the Enabling Act arbitrarily singled out Boston for distinct treatment, the Supreme Judicial Court offered one possible answer. The state legislature, it said, could reasonably conclude that the largest city "in the heart of a great metropolitan area, may be subject to problems and conditions not found in comparable degree in other communities."⁶⁶² Nearly a half-century later, it is not easy to discern exactly what these special problems and conditions are. Perhaps the Enabling Act was intended to foster greater development in Boston than would occur under the administrative structure provided in Chapter 40A. That might explain why it all but excludes the City Council from zoning decisions and vests so much authority in a separate zoning commission with a membership that seems to promote the interests of builders. Yet if the Enabling Act was aimed at tilting Boston's zoning in favor of development, it is debatable whether this framework should continue. After all, with its current impressive skyline, Boston is not the city it was fifty years ago. Yet only the state, and not the City of Boston, can decide to change the administrative structure adopted by the Enabling Act.

Even if Boston were thought to need a zoning framework tilted toward development, it is not clear that the Enabling Act serves that goal. Several of its provisions give Boston greater powers to limit development than other municipalities have under Chapter 40A. For example, the so-called Dover Amendments to Chapter 40A – which limit the ability of zoning authorities to regulate religious and educational uses – do not apply to Boston.⁶⁶³ Unlike Chapter 40A, the Enabling Act also does not explicitly authorize the Board of Appeal to take financial hardship into account when determining whether to grant a variance.⁶⁶⁴ (In fact, the Supreme Judicial Court has held that for Boston, financial hardship alone is not sufficient to meet the threshold requirement of a "substantial hardship," which is necessary to receive a variance.⁶⁶⁵) Finally, the Massachusetts subdivision law does not apply to Boston. This gives Boston a much freer hand in regulating subdivisions (few though they may be) than other municipalities in Massachusetts.⁶⁶⁶

3. Zoning in Other Cities

The question raised above about the reasons for assigning Boston its own unique zoning framework becomes even more pressing when one compares the Enabling Act to the zoning laws that govern the other cities in our study. These cities are also major urban centers in important metropolitan areas. Yet their states have chosen to set up their zoning powers in a way that makes them more like those found in other Massachusetts cities rather than like Boston's.

The other cities in our study trace their zoning power to a combination of home rule authority and general zoning enabling statutes that are akin to Chapter 40A. Only Boston traces its zoning authority to a special legislative act. The other cities are also not subject, as is Boston, to a state statutory framework that virtually excludes the city council from the zoning process. While Boston's City Council plays no role in the approval of zoning amendments, all of the other cities require city council (or, in the case of San Francisco, Board of Supervisors) approval before an amendment takes effect. New York City requires a two-thirds approval by the city council if the relevant planning council has not approved the plan but the mayor has – a standard somewhat similar to the one that Chapter 40A requires Massachusetts municipalities other than Boston to use. (The other cities require only a simple majority, and, interestingly, Chicago just shifted from a supermajority requirement to the majority council approval approach in November of 2004.) Moreover, none of the other cities follow the Enabling Act's requirement that appointees to zoning boards be drawn from a list of specific state-identified groups. Some permit their mayor to appoint board members with complete discretion (Chicago, Denver). Others permit appointments to be made without membership qualifications but with significant input from local legislative bodies (San Francisco).⁶⁶⁷

The closest that other cities come to the practices that state law requires Boston to follow is that some of them are required to identify certain professions from which at least a few board members must be selected. Yet even the two cities that impose these professional qualification requirements – Atlanta and New York City – have not opted to follow the course set for Boston by the state legislature. Boston's board members must represent groups (ranging from the real estate trade to the construction trade) that would have an interest in overriding zoning restrictions to promote development. By contrast, Atlanta's charter provides that two of the five members of the Board of Zoning Adjustment must be "actively engaged in the professions of planning, architecture, or related professions," and that the remaining members be "lay" persons. New York City's charter provides that, of the five members of the zoning board that hears petitions for zoning variances, one must be a registered architect, one a professional engineer, and one a planner.⁶⁶⁸ In other words, the cities that set forth qualifications for appointees give much greater weight to backgrounds in planning and design than does the requirement imposed on Boston by state law.

Two additional differences in state land use laws are also noteworthy. One relates to a point made in Chapter Four – the fact that Boston has no home rule taxing power while other cities do. Comparing Boston and Chicago suggests why this difference matters for land use authority. The Illinois Constitution has been construed to prohibit land use exactions for the recovery of costs not "specifically and uniquely attributable" to the property charged.⁶⁶⁹ This is the most restrictive standard in the country. One might imagine, then, that Boston would have greater powers to impose land use exactions on developers than Chicago does. But that's not the case. Chicago is entitled to enact land use exactions, in particular, impact fees,⁶⁷⁰ that Boston cannot impose because Boston's home rule powers are more limited than Chicago's. Even if Boston could show that an impact fee was based on costs uniquely attributable to the property charged, it might still lack the authority to impose the fee if it were thought to constitute an unauthorized "tax." Chicago does not face that limitation because it possesses home rule taxing authority.

The final difference may seem very technical, but it illustrates the detailed ways in which the Enabling Act affects Boston's ability to make zoning decisions. It concerns what lawyers call the "vested rights" doctrine. This legal rule freezes current zoning regulations so that owners who have taken certain steps towards development under existing legal rules are not subject to new, more onerous rules that are adopted later.⁶⁷¹ This doctrine can have very adverse consequences

for urban planning. The situation in Seattle illustrates how. Washington law provides that development rights vest on the date of the development's permit application regardless of when development actually takes place.⁶⁷² As a result, developers in the Seattle area search for old subdivision applications, so that they can build new housing under the old standards rather than more restrictive modern land-use and environmental laws.⁶⁷³ Boston enjoys much greater flexibility from vested rights claims than Seattle. Nevertheless, the vested rights protection in the Enabling Act is significant. It provides that, unless the city has given the developer notice that a hearing on the new zoning rule is pending, a developer's right to freeze zoning vests when a permit has been issued to build or when construction has "lawfully begun."⁶⁷⁴ California, by contrast, provides that property owners acquire vested rights in prior zoning regulations only when permits have issued *and* when they have made substantial financial and material investments in reliance on prior approval under the old regulations.⁶⁷⁵ Moreover, California requires that the money be spent on actual physical work on the site, not just the creation of detailed plans and blueprints.⁶⁷⁶ Unlike the situation in Boston, then, California cities have flexibility to change zoning rules much later in the process – not only after the permit has been issued but after money has been spent on plans. Whatever the merits of these alternative rule systems for zoning changes, the choice between them is made by state law – not by the City of Boston.

Planning Powers

The state of Massachusetts has established an administrative structure for planning in Boston that, like its structure for Boston's zoning, is very different both from that of other municipalities in Massachusetts and from the other cities in our study. The planning law for other cities in Massachusetts requires that municipalities with more than 10,000 people establish a planning board with members appointed by the mayor and confirmed by the city council⁶⁷⁷ (the mayor may also remove members for cause with city council approval⁶⁷⁸). These planning boards are charged with making a master plan, which the state law defines as "a statement, through text, maps, illustrations or other forms of communication . . . designed to provide a basis for decision making regarding the long-term physical development of the municipality."⁶⁷⁹ Because state law does not make the master plan enforceable, a zoning amendment cannot be deemed unlawful for failing to be consistent with it. Nevertheless, the plan can be relied on to assess the lawfulness of a zoning decision.⁶⁸⁰ Moreover, planning boards have functions other than crafting a master plan. They draft zoning amendments, preclude reconsideration of rejected amendments, and serve as a special permit granting authority.⁶⁸¹ They also play a significant role in site plan review and establish rules for subdivisions.⁶⁸²

This statewide legal structure has no application to Boston. (The first subsection of the state's general law concerning local planning begins with the words: "Any city except Boston . . ."⁶⁸³) Boston is subject to a separate, state-established framework that bars Boston from having the kind of planning board elsewhere.⁶⁸⁴ Instead, it vests the planning power in a separate governmental entity, the Boston Redevelopment Authority (BRA), which is simultaneously charged with promoting and implementing redevelopment in the city. This administrative structure is very unusual. Like the other cities in our study (with the possible exception of Seattle), Massachusetts municipalities have a city-controlled planning body that is not responsible for (indeed, is often not permitted to exercise) the promotion of particular redevelopment projects. By virtue of state law, Boston alone relies on a single, quasi-independent public agency – the BRA – to oversee both planning and economic development.

1. The Structure and Powers of the BRA

The BRA is run by a five-person board of directors, four of whom are appointed by the Mayor and one by the state.⁶⁸⁵ All board members are appointed for terms of five years and can be removed only for cause.⁶⁸⁶ Even though other redevelopment authorities in the state have a similar organizational set up, this structure injects a degree of state control into Boston's planning agency (the BRA) that is not present in any other municipal planning board in Massachusetts. All

other planning board members in the state are entirely locally selected. No doubt one can overstate the importance of this difference: the BRA has increasingly come to be seen as a city agency. Nevertheless, city control over the BRA is a consequence of informal relations between city officials and the directors of the BRA. As a formal matter, the BRA remains legally independent of the city's elected officials in a way that the state's other municipal planning agencies are not. This is not only a reference to the way the board is appointed. City councils elsewhere in the state can adopt zoning amendments to constrain planning board actions. The Boston City Council has no equivalent authority. In Boston, the power to adopt and amend the zoning code is vested wholly in the Zoning Commission.⁶⁸⁷ As a result, the Boston City Council has far less power to control its planning agency than other cities in the state, a deficit magnified by the fact that the BRA has the authority to develop and not just plan.

The merger of planning and redevelopment functions makes the BRA a very powerful agency. A partial list of the BRA's responsibilities reveals the breadth of its powers, which range from the authority to set a broad vision for future city land use policy to the ability to implement specific building projects in conjunction with private developers. More specifically, the powers include:

- reviewing proposed development projects that require zoning relief, are subject to development review, are proposed to be located on publicly-owned land or in Urban Renewal areas, or that receive public subsidy.
- making recommendations on major construction and redevelopment activity to the city's Zoning Commission and Zoning Board of Appeal.
- drafting and recommending new zoning measures and serving as staff to the city's Zoning Commission.
- drafting master plans that address the city's needs for infrastructure, downtown and community economic development, and that include design guidelines and development controls
- acquiring, selling and leasing real estate to achieve economic redevelopment and promoting public policy objectives, such as encouraging growth industries and appropriate land use policies.⁶⁸⁸

Consolidating planning and development in Boston clearly has benefits. Fragmenting these tasks across different agencies can stifle development, while permitting a single entity to make tradeoffs between adherence to a plan and compliance with requests from developers can make the kind of development the plan envisions more likely to occur. After all, cities are in competition with other cities and their own suburban surroundings for development. A streamlined process for making zoning concessions provides Boston with the power to act when developers express interest in building in the city. According to the BRA, overcoming zoning restrictions through the extensive and flexible use of "Planned Development Areas" and "urban renewal district plans" allows it to adapt to changing needs and accommodate community interests, especially when it comes to mixed-use developments.⁶⁸⁹ The BRA's dramatic remaking of the central part of the city in the decade immediately following its creation is a testament to the capacity of a single entity to make major changes in the city's physical appearance.

The risks of combining the role of planner and developer, however, are also substantial.⁶⁹⁰ One concern is the flip side of the ability of a consolidated planning/development agency to move quickly and efficiently. The agency can move too quickly to remake the city's physical landscape without sufficient consultation with those who will be affected. The BRA is no stranger to such complaints. The unease about its push for urban renewal – and the recent amendments to increase public participation in the zoning process – reflect these concerns. Yet recent amendments promoting public participation are not the only way to achieve public accountability. Another option would be to make Boston's planning structure more subject to City Council control, as it is in other municipalities in the state.

Another downside of consolidating planning and development is the potential for the development power to overwhelm the planning power, effectively leaving the city with no real planning. Critics contend that BRA's plans too often do not serve as a guide for development decisions when specific projects are being considered. Indeed, some feel that the merger of roles produces an inherent conflict of interest.⁶⁹¹ Having the power to plan is important, critics argue, but having the power to alter, amend, and vary plans in developmental negotiations can compromise the plans – or even render them irrelevant.⁶⁹² One target of this criticism is the BRA's most recent major planning effort for the city: *Boston 400: Connecting the City and its People*,⁶⁹³ a comprehensive planning process initiated by the Mayor's office in 1997.

Boston 400 was the first city-wide planning effort of its kind since 1965.⁶⁹⁴ As the name implied, the purpose of Boston 400 was to guide the development of the city into its 400th anniversary in 2030.⁶⁹⁵ The initial process for Boston 400 involved public forums and meetings with residents in Boston's eighteen neighborhoods.⁶⁹⁶ From these public engagements, four themes arose as the major concerns of Boston residents and became the backbone for the Boston 400 plan: Boston as a city of neighborhoods, Boston as a vital natural environment, Boston as a cultural and learning center, and Boston as the economic and transportation hub of New England.⁶⁹⁷ Organized around the four themes, the plan carefully documents the state of Boston and raises concerns that needed to be addressed. The overarching aim of the plan was to make Boston more "livable," with a special focus on open space, public space, and city-wide transportation.⁶⁹⁸

Boston 400, however, is not the kind of physical plan that specifically documents what the layout of the city should look like. For better or for worse, Boston 400 is not a master plan.⁶⁹⁹ It describes important considerations for future developments and, in general terms, indicates where more efforts should be placed.⁷⁰⁰ As Boston 400 Project Manager Charles Euchner explained, the report is a "tool kit as well as a vision for the city."⁷⁰¹ Not surprisingly, then, plans are being proposed and important decisions being made with little reference to the goals of this citywide plan.

2. A Brief History of the BRA's Creation

In assessing the wisdom of consolidating planning and development in Boston, it is important to remember that the merger is a relatively recent occurrence. Prior to the state's creation of the BRA in 1957, the city had its own separate planning board.⁷⁰² Established in 1914 by city ordinance (pursuant to a state enabling act), the board was one of only 14 city planning boards in the United States at the time.⁷⁰³ It consisted of five mayoral appointees, subject to confirmation by the City Council.⁷⁰⁴ By design, the board was not very powerful: its members were unpaid, given a very limited budget and, at first, provided with only one staff member.⁷⁰⁵ Moreover, its plans were, as a matter of law, only advisory in nature.⁷⁰⁶ Nonetheless, it did important – if, in hindsight, controversial – work, including providing the initial plans for the Central Artery.⁷⁰⁷

Although Boston was a pioneer in establishing an administrative entity charged with responsibility for planning, it was quite late in receiving power to create a redevelopment authority. In 1946, a Massachusetts statute permitted every city in the state except Boston to create a redevelopment authority (under state law, urban renewal in Boston originally was the responsibility of the Boston Housing Authority).⁷⁰⁸ This changed only with the city's successful request to the state to create the BRA in 1957, and in large part the request was successful because it had become clear that the city's failure to have such an entity contributed to its relative lack of success in attracting then-ample federal urban renewal funding.⁷⁰⁹ Initially, the BRA was only a redevelopment authority. It assumed the additional responsibility for city planning in 1960. In that year, the state legislature dramatically expanded the BRA's power at the request of Boston officials, including the Mayor. The 1960 act established the BRA as the city's planning board, thereby creating for the first time in a major American city a single entity responsible for functions previously understood to be distinct. The act also gave the BRA powers previously held by the

State Housing Board, which included the power to approve the taking of land by eminent domain, the power to approve urban renewal projects,⁷¹⁰ and the power to grant zoning, health, building, and fire code variances in accordance with state law.⁷¹¹

To understand the reasons for giving the BRA these expansive powers, the 1960 act must be placed in context, one that reflects the subtle ways in which early constraints on Boston's legal powers helped shape the distinctive legal structures that continue to the present day. The 1960 act was the third attempt on the part of the legislature to provide binding tax concessions to the Prudential Insurance Company for its proposed building on a large plot of abandoned railway land in Boston's Back Bay. While Prudential was interested in opening a large regional headquarters in Boston, and by 1960 had begun some work on the land in question, Boston's history of tax assessments was a major stumbling block. In 1954, Mayor Hynes tried to find a mechanism through which the city could credibly offer Prudential the tax concessions it wanted before taking on the project.⁷¹² By the end of Hynes' final term in 1959, the Supreme Judicial Court had twice offered advisory opinions declaring the proposed arrangements unconstitutional (or at least not clearly constitutional), and Prudential was threatening to walk away from the deal.⁷¹³ In 1960, John Collins became Mayor and brought in Edward Logue, an urban renewal expert who had worked in New Haven. Logue proposed that the legislature use the urban renewal power of the BRA "to declare the abandoned railroad site a 'blighted area' and then proceed with the appropriate clearance and development plans as part of a necessary public undertaking"⁷¹⁴ Satisfied that these "slum clearance" efforts were a "public purpose," and by the more general nature of the latest proposal, the Supreme Judicial Court pronounced the proposed legislation constitutional in August, 1960.⁷¹⁵

After the Supreme Judicial Court issued its opinion, Logue immediately set to work lobbying for tax concession legislation and for expanded BRA powers.⁷¹⁶ Although tax concessions and the increased powers given to the BRA were in principle two separate issues, the necessity of running projects through the BRA made a "larger and more powerful BRA" almost an inevitability.⁷¹⁷ In the fall of 1960, a uniquely powerful BRA was born. The tax concession legislation (known as "121A") – discussed above – provided a mechanism that allowed the BRA to transfer its interest in project land to urban redevelopment corporations (limited dividend companies set up for the purpose of developing the property), banks, and—not coincidentally—insurance companies.⁷¹⁸ Out of the fiscal crisis of the 1950s, then, Boston went from having a planning board with little power and no redevelopment authority to having a unique kind of super-agency in charge of planning and development.

3. City Planning in Other Cities

There may be good reasons to structure Boston's planning differently from that of other municipalities in Massachusetts. After all, Boston is not like other cities and towns in the state. Yet the other major cities in our study generally maintain the separation between planning and development that Massachusetts requires for its other local governments. Chicago has a separate Planning Commission and Community Development Commission.⁷¹⁹ New York City has a separate Department of City Planning⁷²⁰ and Department of Housing Preservation and Development.⁷²¹ Seattle has a separate Planning Commission⁷²² and Office of Economic Development.⁷²³ In each city, the two agencies have their own members and their own purposes.

The redevelopment and planning structure in Denver is typical. The Denver Urban Renewal Authority's mission statement describes it as a "full-service redevelopment agency engaged in neighborhood and downtown revitalization, economic development, home ownership and housing rehabilitation throughout the City and County of Denver."⁷²⁴ The authority's board is made up of 11 members, who are appointed by the Mayor (and confirmed by the City Council) for staggered 5-year terms.⁷²⁵ Authorized by state enabling legislation,⁷²⁶ it administers local, state, and federal programs for slum removal, construction, and tax benefits for redevelopment.⁷²⁷ It also plays a role in selecting the leadership for major redevelopment corporations and has been influential in developing new redevelopment plans to house a growing urban population.⁷²⁸ The

Denver Planning Board, on the other hand, is established by the city charter and is comprised of 11 members appointed by the Mayor.⁷²⁹ It is responsible for the supervision of the city's planning office and for recommending amendments to the city's comprehensive plan to promote "the orderly growth and harmonious development of the City and the metropolitan area."⁷³⁰

The fact that a city planning board does not have power over development does not mean that it lacks influence on city land use policy. Just over a year ago, Denver's planning commission initiated the first major revision of its planning process since the 1950s.⁷³¹ This revision, entitled Blueprint Denver, was undertaken in recognition of the fact that, in the next 20 years, 132,000 new residents are projected to move into Denver and 760,000 into its metropolitan area.⁷³² Blueprint Denver is a supplement to the city's ongoing planning initiative, Comprehensive Plan 2000,⁷³³ and it was formally adopted by the City Council as the "city's first integrated land-use and transportation plan"⁷³⁴ It called for a massive overhaul of Denver's labyrinthine zoning code and for greater intergovernmental cooperation, and it viewed the city as having 'areas of stability' and 'areas of change.'⁷³⁵ Spurred in part by Blueprint Denver, the Denver zoning code was subjected to a massive simplification and update in May, 2003. What had been 400 land uses was reduced to a more manageable 100, and inconsistencies and outright contradictions within the code were resolved.⁷³⁶

Boston is not required to formulate a comparable master plan for the city – and has not done so. Other cities have master plans comparable to Denver's. In fact, Atlanta's city charter requires the city to prepare a comprehensive development plan every 15 years,⁷³⁷ and Washington's Growth Management Act requires Seattle to update its comprehensive development plan every 10 years.⁷³⁸ Moreover, master plans are not the only form that the exercise of planning authority can take. In some cities – New York City, San Francisco, and Seattle – the planning commission must approve proposed zoning amendments before they are sent to the city council for final approval. In San Francisco, state law requires the city to exercise land use regulation in accordance with a long term, comprehensive general plan that must contain seven distinct elements: general land use, traffic, housing, conservation, open space, noise and safety.⁷³⁹ Although Boston's Enabling Act requires proposed zoning amendments to be reviewed by the BRA, it does not require that the BRA approve them.

Recently, efforts have been made to alter Boston's planning structure. The City Council has taken up a proposal to separate planning and development once again. But any city council action would have to take the form of a home rule petition. That is because the state legislation creating the BRA was established by a pre-Home Rule Amendment special act. The decision on whether or not the BRA should be maintained in its current form, in other words, is not one that the city can make for itself. The decision has been made for the city by the state in a way that no other city examined has chosen for itself.

State Exemptions of Property from Local Land Use Control

State control over the legal structure of zoning and planning is not the only way that the state affects Boston's decision making about its physical development. Even when Boston exercises the zoning and planning powers that it does have, it can affect only a portion of its territory. One might think, looking at a map of the city, that the city government – or the BRA – can control the development of all of it by exercising its power to zone, plan, and develop. But this is not the case. Through regulatory requirements and outright assumptions of title, state law excludes significant portions of city land from normal city land use control.

State Permitting and Planning Control in Designated Areas of Boston

One way the state asserts control over the physical development of Boston is through the exercise of planning or permitting authority over specific designated areas. One well-known example is the Charles River Basin, which constitutes an important part of Boston's recreational and natural landscape. The Department of Conservation and Recreation, formerly known as the

Metropolitan District Commission,⁷⁴⁰ maintains detailed master plans for this portion of the city.⁷⁴¹ Another important example is the state's regulation of "designated port areas" and "tidelands," which together comprise much of Boston Harbor. The state has designated three areas along the Boston Harbor as "designated port area[s]" in order "to promote the use of waterfront land for water-dependent purposes, and to preserve portions of the waterfront for maritime industry and commerce."⁷⁴² Development in these areas is subject to state regulation regarding permissible uses and structures.⁷⁴³ The state's regulation of tidelands covers a larger geographic area but is less pervasive.⁷⁴⁴ All projects on tidelands require state licenses and must meet statewide requirements regarding the types of uses and structures that are permissible.⁷⁴⁵

The state's tideland regulations do permit municipalities to submit "municipal harbor plans" that set forth detailed alternative regulations for tidelands.⁷⁴⁶ To the extent the plans are approved by the state, they—rather than the state regulations—apply.⁷⁴⁷ Boston has submitted a number of plans to the state, and the city has succeeded in getting its proposed plans approved. Sometimes, however, the state has rejected aspects of the city's plans or imposed "very detailed, location-specific conditions," including building heights, open space requirements, and setback requirements.⁷⁴⁸ The state-approval requirement for tidelands, for example, has had a direct impact on the city's efforts to shape the much-discussed development of the Seaport area.

In 1999, the BRA released the South Boston Waterfront Public Realm Plan, which envisioned the entire seaport area as a mixed-use, walkable community.⁷⁴⁹ In response to the state tidelands requirement, it also formulated the South Boston Waterfront Municipal Harbor Plan.⁷⁵⁰ A controversy has emerged over whether the Municipal Harbor Plan deviates from the Public Realm Plan. During a Council hearing on the subject, "most of the dozen who testified . . . said the [Municipal Harbor] plan . . . even fails to uphold the city's own design of its waterfront, as laid out in [the] 1999 'Public Realm Plan.'"⁷⁵¹ According to critics, the Municipal Harbor Plan lacks civic and cultural uses at the waterfront, focusing instead on density, hotels, and office development.⁷⁵² And, they contend, it allows for the construction of buildings taller than allowed under previous plans, thereby furthering developer interests over the public interest.⁷⁵³ Yet it is the Municipal Harbor Plan, not the Public Realm Plan, that has received state approval, and for the most part, it is that plan that is going forward.⁷⁵⁴ What ultimately will be constructed in the Seaport area, however, still remains open to debate.

State Ownership of Land within Municipal Limits

A second way the state exercises land use control within Boston's territorial limits is more direct: it holds title to key parcels. To be sure, the City of Boston itself has significant land holdings: the city owns 14% of its territory,⁷⁵⁵ twice the percentage of land held by Denver or Atlanta.⁷⁵⁶ Still, the state (or entities under its control) owns nearly twice as much land in the city as the city itself does.⁷⁵⁷ (By comparison, New York City owns roughly eight times the number of parcels owned by the state, with an assessed value 26 times greater than the state-owned land.⁷⁵⁸) Rather than attempting to map all the state-owned parts of Boston, or to describe all of the development projects involving them in which the city plays a subordinate role, attention is focused here on two examples. Unlike the other cities in our study, Boston lacks control over two key aspects of its infrastructure: the airport and major roads.

1. Logan Airport

Almost nine percent of the total land in Boston is owned and operated by an independent state authority, the Massachusetts Port Authority (Massport).⁷⁵⁹ The vast majority of this land – over 2300 acres, representing 16 – of the total tax exempt land in Boston – is occupied by Boston's Logan International Airport.⁷⁶⁰ Logan Airport – Boston Airport until 1956 – was built by the U.S. government in East Boston in the 1920s and was originally operated largely as a military facility.⁷⁶¹ In 1928, the U.S. Army transferred ownership of the airport to the Massachusetts legislature, which for a time leased it to the City of Boston.⁷⁶² In 1956, the legislature created Massport and transferred ownership of the facility to it, where it remains today.⁷⁶³ Logan Airport

is now New England's premier airport, as well as the nation's 18th and the world's 34th most active airport, with approximately 26.7 million passengers in 2004.⁷⁶⁴

Boston exercises virtually no control over this part of the city, which is entirely exempt from Boston property taxes.⁷⁶⁵ Indeed, with the exception of its receipts from the fuel excise tax, Boston does not directly share in any of the revenues generated by the airport. Yet, in fiscal year 2003, Logan Airport generated approximately \$296 million in operating revenue, largely from landing fees, parking fees, rentals and concessions on the airport properties (representing 88% of Massport's net revenues) and incurred only approximately \$164 million in operating expenses.⁷⁶⁶ Massport does make a relatively small payment in lieu of taxes to Boston each year,⁷⁶⁷ and it loses money operating its port properties in Boston.⁷⁶⁸ Nevertheless, "net revenue" from its Boston properties generates substantial surpluses for Massport each year.

If Boston (rather than Massport) owned its airport, it would have substantially more ability to take advantage of the revenues that the airport generates. This legal structure would not be unusual: Denver, Chicago,⁷⁶⁹ and San Francisco⁷⁷⁰ all own their own airports. Indeed, they own their airports even though (unlike in Boston) the airports are not located within the conventional understanding of the city limits but have been built on annexed land located some distance from the core city. Even in New York City, where both LaGuardia and Kennedy airports are operated by the Port Authority of New York and New Jersey, the city owns the land on which the airports are built and leases it to the Port Authority.⁷⁷¹ This arrangement represents a guaranteed source of airport-related income and gives the city some leverage over long-term planning decisions at the two airports.

Denver provides a good example of this alternative ownership structure. During the early 1980s, the city realized that its existing Stapleton airport – built in 1929 and itself owned and run directly by the city – was no longer able to meet the region's needs.⁷⁷² As a result, the city began planning to build a new airport. From the inception of the project, city officials insisted that the new airport be owned and operated by the city.⁷⁷³ Denver's most significant hurdle was that finding sufficient land available within the city for an airport. The city therefore needed to convince neighboring Adams County to allow it to annex 53 square miles of land to be used for the new airport.⁷⁷⁴ After Denver granted a number of concessions to the county, the county voted in 1988 to accept the annexation through a constitutionally-required referendum.⁷⁷⁵ This city-county deal was strongly supported by state legislators and the Governor. The airport opened in 1995 and is already a source of revenue for the city, although the cost of debt service on bonds issued to fund the construction of the airport limits its profitability in the near term. In the long term, it seems likely that the city's ownership of the new airport will be a significant source of nontax revenue.

Denver's ownership of the airport land has also had an impact on the city's redevelopment efforts. With the construction of the new airport completed, the old city-owned Stapleton airport ceased operation in 1995.⁷⁷⁶ Close to the Denver urban core, it offered the potential for future growth that could help reduce the threat of skyrocketing urban housing prices resulting from the increasing Denver population. Because the city owned the site, it was able to move to redevelop it without having to annex new territory. Indeed, the site, with 4,700 acres, offered the largest urban development area in the nation.⁷⁷⁷ Currently, the property is being developed by a quasi-public nonprofit entity known as the Stapleton Development Corporation, an entity created by the city's redevelopment authority and controlled by mayoral appointees.⁷⁷⁸ The city itself has a key role in the project. In 1991, the Denver City Council approved a conceptual plan written by the Stapleton Tomorrow Committee with the assistance of the Stapleton Redevelopment Foundation.⁷⁷⁹ The Stapleton Development Plan maps out more than 12,000 homes, 3 million square feet of retail space, 10 million square feet of office/industrial space, and over 1,100 acres of regional parks and open space.⁷⁸⁰ The comprehensive plan for the development of the area embraces a "New Urbanism" approach that stresses parks, sidewalks, houses with porches, and "traditional neighborhood design."⁷⁸¹ The project also features environmentally friendly construction by reusing the concrete from the old airport to build

sidewalks.⁷⁸² The project has won the international Stockholm Partnerships for Sustainable Cities Award because of its focus on sustainability and green construction techniques.⁷⁸³ And the Colorado Sprawl Action Center, an environmental lobby group, has added the project to its hall of fame for its commitment to mixed development, low-income housing, and environmental planning.⁷⁸⁴

Boston's lack of control over Logan also stands in marked contrast to the situation in Chicago, where decisions regarding plans to expand O'Hare airport are made in the first instance by the city itself. Of course, the city needs Federal Aviation Administration approval for its airport plans. And, in light of a 2003 court decision, it needs state approval as well. Nevertheless, after the court decision was issued, the state passed the "O'Hare Modernization Act," which granted broad authority to the city and exempted the project from a number of normally required regulatory approvals.⁷⁸⁵

The most dramatic example of Boston's comparative lack of control over airport issues is the 30 year battle between city officials and Massport over the construction of a controversial fifth runway at Logan. Massport began the planning and construction of the runway in 1972. At the time, Massport asserted that it was not required to file an environmental impact report with the state and began construction prior to receiving state approval.⁷⁸⁶ The City of Boston – joined by various state officials – filed suit in Massachusetts Superior Court, seeking to enjoin the construction of the runway permanently.⁷⁸⁷ In August 1974, a permanent injunction against further construction was issued, based upon the court's finding that state environmental laws applied to the project and that the required state approval had not been granted.⁷⁸⁸ While Massport's appeal was pending, the Secretary of Environmental Affairs rejected Massport's environmental impact statement because the project failed to meet state environmental standards.⁷⁸⁹ In 1976, Massport and city and state officials opposing the runway reached a tentative settlement under which only very limited construction would be completed and the new runway would not be built.⁷⁹⁰

In the late 1990s, Massport began a new push to construct the runway. In contrast to its position in the previous litigation, Massport accepted the need for state environmental approval in order to proceed with the project. In 1999 it began the process of gaining the required state approvals.⁷⁹¹ This time, in June 2001, the state approved the project, and, in August 2002, the Federal Aviation Administration gave its approval as required under federal law.⁷⁹² With these approvals in hand, Massport went to court, seeking relief from the 1974 injunction. The city, which continued vigorously to oppose the project, intervened along with a number of citizens groups from the East Boston neighborhood, opposing Massport's motion for relief. Rather than lifting the injunction, in late 2003 the court removed the absolute prohibition on construction and ordered the parties to negotiate a settlement consistent with the judgment.⁷⁹³ The city still continued to oppose the project, with Mayor Menino earning a reputation as "the strongest critic of the runway."⁷⁹⁴ But the city's legal options ran out when in January 2004 the U.S. Court of Appeals for the District of Columbia rejected its challenge to the Federal Aviation Administration's approval of the project.⁷⁹⁵ In April 2004, the parties, including the city, submitted a proposed order to the Massachusetts court. Under the proposed order, which clears the way for construction of the runway to commence, Massport is obligated to take a number of measures designed to mitigate the air and noise pollution concerns of East Boston residents.⁷⁹⁶ Regardless of the legal merits of Boston's case, if the city itself were in control of the airport – as Denver and Chicago are – it seems clear that the debate over Logan's expansion would have proceeded differently.

2. Roads

When it comes to toll roads and bridges – a number of which run through Boston – the key decision maker again is not the City of Boston. The Tobin Memorial Bridge, which connects Charlestown (Boston) and Chelsea, is owned and operated by Massport. The bridge charges a \$3 round trip toll.⁷⁹⁷ The three harbor tunnels in Boston—including the Ted Williams Tunnel

constructed as part of the Big Dig – are owned and operated by the Massachusetts Turnpike Authority.⁷⁹⁸ The round trip toll for each of these tunnels, used by millions of vehicles each year, is \$3.⁷⁹⁹ Although one of the tunnels – the Sumner Tunnel – was built by the City of Boston in 1934, it was purchased by the state and placed under the control of the Turnpike Authority in 1958.⁸⁰⁰

Impact of State Ownership. One consequence of this ownership structure concerns fiscal control. The Turnpike Authority charges a flat one-way fee of \$1 for passenger cars using the turnpike east of Newton. A passenger car traveling the roughly fifteen miles from the beginning of the Boston Extension in Newton to its terminus in Boston at the Ted Williams Tunnel thus pays \$1, while the approximately 125 mile journey from the New York State border to the beginning of the Boston extension costs the same car \$3.60.⁸⁰¹ While the costs of the Big Dig – for which the Turnpike Authority is responsible – unquestionably justify the need to raise substantial toll revenues in the Boston area, it is by no means necessary that the toll roads within Boston be in the hands of a state authority. In 1958 the City of Chicago constructed a six lane toll road, called “Skyway,” that runs through a 7.8 mile stretch of the city.⁸⁰² The highway, which costs \$2 for a one-way trip, is entirely funded through user charges.⁸⁰³ In 2004, the city was projected to generate \$44 million in net revenue from the highway.⁸⁰⁴ The city’s ability to use Skyway revenue to finance other transportation expenses was challenged in court in 2001. But an Illinois appeals court held that the city’s home rule powers encompassed the ability to operate the road and that it was entitled to receive a reasonable rate of return on the project.⁸⁰⁵ In fact, in 2005, the City sold the Skyway for nearly \$2 billion to an international transportation conglomerate and is leasing it back over the next 99 years.

An even more important consequence of the state’s ownership of Boston’s transportation infrastructure relates to land use control. The Turnpike Authority owns much more than roads and tunnels in Boston – over 200 acres of city land. As a result, the Turnpike Authority is a major player when it comes to important development proposals affecting Boston. A good example concerns Harvard University’s plan for a major expansion into Boston’s Allston neighborhood. One ingredient in this expansion involved the Turnpike Authority’s sale of 91 acres of land in Allston to Harvard – a deal valued at \$75 million. Harvard’s purchase “gives it a wide range of options, including blocking views of the nearby Charles River or even moving the state’s major east-west highway.”⁸⁰⁶ City and state officials opposed the deal for a number of reasons.⁸⁰⁷ Indeed, at one point, the Massachusetts Bay Transportation Authority threatened to take 47 acres of the land by eminent domain.⁸⁰⁸ The city’s concern is based, at least in part, on the fact that the land was conveyed to a tax-exempt nonprofit educational institution. The Turnpike Authority’s decision – made without consultation with the city – will have a significant impact upon Boston’s tax revenues for an indefinite period of time. Boston has negotiated for more payments in lieu of taxes with Harvard.⁸⁰⁹

The Big Dig. The most dramatic example of the connection between the ownership of roadways and land use planning is the Central Artery/Tunnel Project or the “Big Dig.” In the 1980s, Massachusetts officials began the planning process for what would become the largest public works project in the history of the United States.⁸¹⁰ The project had two major components: a third tunnel underneath Boston Harbor, connecting downtown Boston with East Boston where Logan Airport is located (the tunnel was also connected with the Massachusetts Turnpike Extension) and an underground highway culminating in a new Charles River crossing.⁸¹¹ Scheduled for completion in 2005, the 7.8 mile project⁸¹² will have cost almost \$15 billion.⁸¹³ The Central Artery/Tunnel Project is owned and managed by the Turnpike Authority.⁸¹⁴

From the beginning of the project, the city has searched for ways to exert control over its development. In 1984, Frederick Salvucci, the state’s Secretary of Transportation, rejected the city’s efforts to run the project’s required citizen participation through neighborhood councils. As Salvucci explained: “The city was pushing us to go with committees where they would pick the people, and [Mayor] Flynn was in control of every neighborhood in the city. I didn’t want that. . . . I certainly didn’t want to give control of the project to the city.”⁸¹⁵ In 1989, the city sought state

approval of a memorandum of understanding that would have legally obligated the state to compensate the city for expenses associated with the Big Dig.⁸¹⁶ The city's proposals were modeled after contemporaneous agreements in Seattle and Chicago. Under the Seattle agreement, the state gave the city funds to subsidize its review of a state construction project in the city.⁸¹⁷ Under the Chicago agreement, the state gave the city funds to improve local roads in conjunction with a state highway project.⁸¹⁸ Boston sought financial assistance from the state for Big Dig-related expenses and lost city income.⁸¹⁹ This effort failed.

The state did make a number of concessions to the city regarding the placement of on and off ramps on the depressed central artery – although it did not grant the city everything it wanted.⁸²⁰ The state also agreed to fund the city's efforts to combat the large number of rodents expected to be unearthed by the project.⁸²¹ And the state and city reached an agreement on a job training program designed to increase the number of Boston residents – as well as women and minorities – who would work on the project, with the state agreeing to fund a portion of the program.⁸²² Nevertheless, as a formal matter, there is little doubt that the Turnpike Authority is in charge of the project. As the Memorandum of Understanding between the Turnpike Authority and the City of Boston (discussed below) reaffirms, the Turnpike Authority, in accordance with state legislation, “owns and is responsible for the construction, maintenance, repair, reconstruction, improvement, rehabilitation, financing, use, policing, administering, control and operation” of the entire metropolitan highway system, including the Big Dig.⁸²³

Although the city has had very little formal control over the fate of the project,⁸²⁴ the political process of gaining approval from federal regulators, as well as Mayor Flynn's ability to influence Boston residents' perception of the project, gave the Mayor considerable political power in its formative early period. In 1988, after months of increasingly vocal complaints about the planning process, Governor Dukakis sent Flynn a letter asking him to appreciate “the state's ‘continued sensitivity to the city's agenda.’”⁸²⁵ As one insider involved in the planning of aspects of the Big Dig put it: “[T]hey'd have to listen to the city, because the city always had that unspoken saying that if you don't agree with us Mayor Flynn will oppose the project. So [the city] would get listened to”⁸²⁶ Ultimately, the city managed to exert some influence over the process because of the political problems that would have been created if the Mayor began a campaign of concerted opposition against it.

The Lease of Air Rights. Under the terms of the 1997 legislation that put the Turnpike Authority in charge of the Big Dig, the lease of air rights over the Turnpike property is exempted from Boston's building, fire, garage, health and zoning laws.⁸²⁷ This provision applies only to Boston; neighboring communities retain full zoning control over Turnpike air rights in their communities.⁸²⁸ The 1997 legislation also gives the Turnpike Authority control over the development of the relevant parcels, while requiring that the construction and proposed uses of the land “preserve and increase the amenities of the community.”⁸²⁹ These parcels, which comprise over 44 acres of potential real estate,⁸³⁰ are estimated to be worth more than \$500 million.⁸³¹

The 1997 legislation required the Turnpike Authority and the City of Boston to enter into a Memorandum of Understanding regarding the development of the parcels, which they did on June 1, 1997. Under the terms of the Memorandum, the Central Artery portion of the turnpike is to be subject to Boston's zoning requirements, while the Turnpike Extension is not.⁸³² The Memorandum also sets up a citizens advisory commission and contains other provisions for community involvement.⁸³³ Finally, the Memorandum calls for BRA review and certification of large projects, while exempting the development from other provisions of the zoning code.⁸³⁴ If the BRA has any objections to the proposed development, the proposal goes to binding arbitration.⁸³⁵

Perhaps most strikingly, the Memorandum contains a provision that appears to define exempted air rights in such a way as to include parcels adjacent to the Turnpike Extension that are owned by the Turnpike Authority.⁸³⁶ This is in conflict with the terms of the state statute itself,

which explicitly provides that Turnpike Authority-owned parcels located in Boston, other than the air rights parcels, are subject to Boston zoning and other regulations, as well as to BRA large project review, without the arbitration provision contained in the Memorandum.⁸³⁷ Although this issue has not been litigated, a great deal of legal uncertainty has been created by the interaction of the Memorandum and the state legislation. For its part, the Turnpike Authority has insisted that the entirety of projects over Turnpike land – which almost inevitably require the use of adjacent parcels in order to be economically viable – are subject to the terms of the Memorandum. A number of neighborhood and other groups have advanced the argument that those portions of the developments that are on adjacent parcels are subject to BRA review – without the possibility of binding arbitration – and require zoning variances under the city's normal licensing procedures. This argument is based primarily on the proposition that, regardless of the terms of the Memorandum, the BRA and the Turnpike Authority cannot contract out of the provision of state law that requires Boston's zoning code to apply to the projects.⁸³⁸

This legal uncertainty has framed the controversy between the city and the Turnpike Authority over Turnpike Extension development issues. For example, in the late 1990s, the Turnpike Authority began negotiations with Millennium Partners, a developer that proposed a massive, 49-story tower over the Turnpike at the corner of Boylston Street and Massachusetts Avenue. Area residents, as well as the Mayor and BRA officials, strongly objected to the scale of the proposed development, insisting that the main tower be reduced from 49 to 15 stories.⁸³⁹ While normally this opposition would have been more than enough to stop the proposed development, the Turnpike Authority's control over the project – if it was as comprehensive as the Turnpike Authority itself asserted – could have allowed it to go forward despite strong opposition on the city's part.

At least one reason for the city's opposition to the Turnpike Authority's projects—beyond its lack of control over them—is the tax structure set out by the 1997 law regulating the Turnpike parcels. The legislation calls for developers to pay property taxes on the full value of any buildings erected on the property as if it were the owner of the property, but exempts from taxation the value of the land—including the air rights themselves.⁸⁴⁰ This provision is in contrast with the general rule regarding the taxation of land owned by the Turnpike Authority but leased to a business, under which the lessee is taxed as if it were the owner of the entire parcel, including the land. While it is difficult to estimate the extent to which this provision affects the tax revenues that the city will receive from a development on Turnpike land, it is clear that Boston will receive less than it would for a comparable development located elsewhere in the city.

The Rose Kennedy Greenway. A related source of continuing conflict between the city and the Turnpike Authority is over control of the series of parks – the Rose Kennedy Greenway – on the land that will cover the Central Artery in downtown Boston. Even before construction on the Big Dig began in 1987, city and state officials, as well as neighborhood and downtown business groups, had begun to make plans for the nearly 30 acres of land that would be freed up by the sinking of the Central Artery, with a particular emphasis on the area in downtown Boston.⁸⁴¹ As the Boston Society of Architects put it, the Central Artery project would provide a “rare second chance to correct the brutal urban renewal and highway mistakes of the past.”⁸⁴²

Early in the planning process, both the city and the state Department of Public Works – which was in charge of the project until 1997 – assumed that much of the land freed up in the downtown corridor would be used for development.⁸⁴³ In the late 1980s, however, then BRA director Stephen Coyle came to believe that the new land opened up should be used primarily for parks.⁸⁴⁴ While the Boston Society of Architects called for 4.3 million square feet of development, the BRA plan called for only 1.1 million square feet, with the vast majority of it devoted to affordable housing.⁸⁴⁵ Ultimately, the state Secretary of Environmental Affairs supported Coyle's planned usage of the land over greater development.⁸⁴⁶ The required environmental certificate issued by the state mandated that 75% of the land be set aside for use as “open space”—a figure roughly in line with the BRA's desires.⁸⁴⁷ While the city largely got its way in this contest, it was through the result of state decision making, not because of the city's legal powers. Had the state

environmental officials who had power to hold up the project not agreed with the city's plan for the corridor, it is likely that the arrangement would not have followed the city's preferred plans so closely. At no stage in the planning process for this land did the federal or state laws governing the procedure give the city a veto.

Although it is now largely envisioned as park land, the actual development of the Rose Kennedy Greenway still remains in the Turnpike Authority's hands.⁸⁴⁸ And the controversy over both the governance and the financing of the new park land has continued.⁸⁴⁹ In 2002, the Mayor and Governor reached an accord under which a new trust would be created to oversee the development and management of the land.⁸⁵⁰ Under this plan, the Mayor would appoint two members and the Governor five members to a board of directors that would control the trust. In addition to being given control over the development parcels inside the corridor, the trust was also to be financed through a tax on adjacent property within the corridor.⁸⁵¹ This plan met with widespread opposition – from the Turnpike Authority (which would have lost control over the land), from neighborhood interests (who feared giving the same entity control over both development and parkland), and from the business community (which would largely have to finance the parks operations through the special assessments).⁸⁵² In the face of such widespread opposition, the plan died in the state legislature.⁸⁵³

Meanwhile, the property has remained under Turnpike Authority control, and the Authority has awarded contracts for the basic design of three major sections of the Greenway.⁸⁵⁴ In 2004, the city and the Turnpike Authority reached an agreement over the future of the land. Under this agreement, a non-profit organization would be created to manage the land.⁸⁵⁵ Because the agreement does not involve the state legislature, it – unlike the old plan – cannot rely on tax revenues for support. It will rely instead on private donations and contributions from the Turnpike Authority.⁸⁵⁶ Half of the 10-member non-profit board of directors will be appointed by the Turnpike Authority, with two each appointed by the state and city and one by the Kennedy family.⁸⁵⁷ Thus both the city and the state will continue to assert some control over the area's development, but the major voice (including the appointment of the executive director) will be that of the Turnpike Authority.

The role of the private sector in this proposed resolution of the status of the Rose Kennedy Greenway highlights a point that should not be overlooked in this discussion of the role of the state, state authorities, and the city in development policy. The private sector has an important role in development decisions in Boston. Major office projects have recently been completed and are underway in parts of the city, as are large-scale retail and industrial projects.⁸⁵⁸ Moreover, private decision making is not the only source of influence on Boston's development other than the government. The city's Empowerment Zone – 5.8 square miles in the center of the city, containing roughly 10% of Boston's population – is governed by a board of directors consisting of 12 mayoral appointees and 12 local residents.⁸⁵⁹ Our discussion of the state's limits on city power, in short, should not be understood to suggest that there are no other limits on the city's ability to control its future development.

3. Consequences of State Ownership of Land

The consequences of the state's ownership of important parts of Boston are substantial. On the positive side, the state's broad land holdings ensure that significant capital improvements occur in Boston that the city need not pay for with its own funds. For example, the Massachusetts Bay Transportation Authority (MBTA), created by the state in 1964 (replacing the Metropolitan Transit Authority, established by the state in 1947), owns and operates all subway, bus, light rail, and commuter rail service in Boston.⁸⁶⁰ Although the city is assessed for a contribution to the MBTA to make up for the shortfall between its revenues and its expenses, that assessment is offset by the capital spending in Boston that the authority plans to undertake. Between 2003 and 2008, the MBTA plans to spend \$3.2 billion on capital investments throughout eastern Massachusetts, two-thirds of which will be dedicated to reinvestment in infrastructure.⁸⁶¹ In Boston, major projects include improvements in the North Station Transportation Center, the

development of the Silver Line along Washington Street and on the South Boston waterfront, and an extension of the tunnel connecting South Station with the pier area.⁸⁶²

Other state-created entities are similarly engaged in spending that accrues to the city's benefit in many ways, including promoting neighboring developments over which the city can exercise control. In the Seaport area discussed above, Massport is developing "Waterside Place," a mixed-use project near the Boston Convention Center that includes 600,000 square feet of retail along with housing, a hotel, and a grocery store.⁸⁶³ The Convention Center is itself another example. In 1982, the state legislature established the Massachusetts Convention Center Authority; it is responsible for the design, construction, and operation of the Boston Convention and Exposition Center on a 60-acre site in South Boston.⁸⁶⁴ The Authority is now governed by a 13-member board, nine of whom are appointed by the Governor (some upon recommendation of others), with two members appointed by the Mayor.⁸⁶⁵ In addition to constructing and operating the Convention Center, the Massachusetts Convention Center Authority is developing a large hotel on the South Boston site.⁸⁶⁶

The fact that so much capital spending on physical development within Boston occurs at the behest of state-controlled entities, however, also has negative consequences for the city. It means that the state, not the city, is often the lead planning decision maker for Boston. After all, the members of the MBTA's seven-person board of directors are appointed by the Governor (the state Secretary of Transportation is the chairman of the board),⁸⁶⁷ and thus state decision makers are in charge of its massive capital projects. Similarly, both Massport and the Convention Center Authority are governed by state rather than city appointees. As a result, significant land use decisions are made without city officials being responsible for them. One final important example deserves mention here: the site of the former Boston State Hospital – with 175 acres, the largest developable piece of land within the city.⁸⁶⁸ The state has sold off a portion of the site and, with community consultation, developed others; only in 1997, however, seventeen years after the hospital closed, did it give the BRA a role in planning development of the remaining land.⁸⁶⁹ Throughout, the state remained – and remains – in charge of the development.

This kind of state control over city land use is not unique to Boston. In all the other cities in our study, a variety of state governmental entities assert some planning authority over critical parcels. In Denver, new sports stadiums have been built under the control of state-created public authorities much like the Massachusetts Convention Center Authority.⁸⁷⁰ In Chicago, a state-controlled public authority runs both McCormick Place and the Navy Pier, two of the most important tourist sites in the city.⁸⁷¹ In New York City, the Port Authority of New York and New Jersey is the lead actor in the redevelopment of the Ground Zero site.⁸⁷² Indeed, the Empire State Development Corporation – formerly the Urban Development Corporation and governed entirely by gubernatorial appointees – assumed a critical role in such major New York City projects as the Times Square redevelopment project, the 125th Street corporation, the Apollo Theater, the Audubon ballroom, a 74.5 acre mixed-use development along the East River in Queens, the redevelopment of the main U.S. Postal Facility on 34th Street, and, most importantly, the coordination of the rebuilding and revitalization of lower Manhattan, south of Houston Street, in the aftermath of the September 11th attack.⁸⁷³

Nevertheless, the extent of state influence on land use policy in Boston is more pervasive than it is in other cities. In many of the other cities, it is possible to identify transformative development projects that have taken place recently on city-owned land and with minimal state involvement. New York City has developed an ambitious housing program with city-owned housing stock (discussed below), and Denver ran the major redevelopment project related to its city-owned airport (discussed above). There are no comparable projects in Boston. Moreover, other cities hold title to assets (such as airports and roads) that Boston lacks. And they benefit from the fact that state-created public authorities give them greater power to influence development. To mention but one example, the Chicago Transit Authority is governed by an eight member board (seven directors and a chairman), with four members and the chairman appointed by the Mayor of Chicago, albeit with the approval of the City Council and the

Governor.⁸⁷⁴ (The Governor's three appointees similarly require approval of the Mayor and the Illinois Senate.⁸⁷⁵) The City of Chicago thus has substantially more say in dealing with transportation issues than Boston does. In Boston, state-created authorities, with governing boards dominated by appointees of the Governor, are playing a leading role in the major projects that are now transforming – or will soon transform – the city. Major decisions about the future development of Boston are thus more in the hands of the state and state authorities than those of the city itself.

Limits on Fiscal Tools Used in Urban Redevelopment

In addition to exercising direct control of land use power by structuring planning and zoning law and owning land within the city limits, the state shapes Boston's power to promote physical development through its definition of local fiscal power. The most basic way that state-imposed fiscal limits affect Boston's land use policy is, as determined in Chapter Four, that they make the city dependent on property tax revenue. Given that state law also helps make over 50% of the land in Boston tax exempt,⁸⁷⁶ taxes on a relatively small percentage of land must be used to meet a large share of the city's total budget. This structure all but requires Boston to make land use decisions in a way that maximizes property tax revenues, even if that means de-emphasizing other worthy aims of a forward-looking land use policy.

The state also uses its control of local fiscal power, however, to impose specific restrictions on Boston's use of the kind of innovative fiscal tools that cities use to promote the very kind of development that a reliance on the property tax necessitates. Two of these fiscal tools are discussed here: tax increment financing districts and business improvement districts. Boston is not denied the power to use either tool, but state legislation limits their use in ways that do not exist in other cities. As a result, Boston uses these tools less than other cities do.

Tax Increment Financing

Until recently, Massachusetts was one of very few states that did not permit tax increment financing as the concept is generally understood. Tax increment financing is a dedicated use of property taxes to pay off bonds issued to promote development.⁸⁷⁷ Under tax increment financing, municipalities issue bonds to fund land acquisition, planning, and infrastructure improvements for designated districts.⁸⁷⁸ The revenue generated by the increase in the property tax valuation of properties within these districts is then pledged to pay off the bonds.⁸⁷⁹ Tax increment financing is much more than a revenue-generating device. It is a useful tool for a city seeking to promote new physical development and, therefore, an important ingredient in its land use policy. By permitting a city to lay claim to the future economic benefits of a physical development even before construction takes place, tax increment financing helps a city generate the revenue needed to fund the public planning and infrastructure that can entice a developer to build in the first place. This is particularly important given the fiscal limitations that generally constrain the ability of major cities to encourage private investment.

For a number of years, Massachusetts municipalities have been permitted to engage in another kind of financing mechanism: negotiating tax abatements for individual parcels in order to facilitate development.⁸⁸⁰ Because this financing method is referred to in Massachusetts as tax increment financing, the newly enacted legislation permitting "traditional" tax increment financing is known in Massachusetts as "district improvement financing (DIF)."⁸⁸¹ Massachusetts law authorized municipalities, including Boston, to employ DIF only in July 2003.⁸⁸² Mayor Menino strongly supported the state legislation authorizing DIF financing.⁸⁸³ Although it is too early to judge its effects on Boston, tax increment financing has been used extensively in a number of other cities. The point here is not to endorse tax increment financing as a development tool – it certainly has its critics. The point instead is to point out its distinctive features in Massachusetts.

Perhaps the most significant aspect of Massachusetts's authorizing legislation—beyond the obvious fact that municipalities are powerless to employ this method of financing without state

approval—is how long it took the state to allow it. Pioneered in Minnesota in 1947, tax increment financing was available in approximately 40 states – including every state that has a city in this study – prior to its adoption in Massachusetts.⁸⁸⁴ That Boston had to wait for a state statute is a direct consequence of the limited terms of the Home Rule Amendment, which expressly excludes the power to tax from the powers it gives cities. There is no possibility here, as there was in Chicago, for Boston to develop its own framework for using this fiscal tool. Boston's power is wholly defined by the terms of the authorizing statute, known as Chapter 40Q.

In some respects Chapter 40Q is quite broad. It does not narrowly prescribe necessary conditions for creating tax increment financing districts as is the case in Atlanta, where a designated area must be underdeveloped or blighted.⁸⁸⁵ Nor does it vest the power to establish districts in a separate redevelopment authority, rather than the city, as is the case in Denver⁸⁸⁶ and San Francisco.⁸⁸⁷ Instead, the Massachusetts statute vests the power in the city itself, with the city's elected leaders drawing the districts unless they choose to delegate the power to an agency.⁸⁸⁸

But Chapter 40Q does contain important restrictions that are not uniformly features of tax increment financing elsewhere. Chapter 40Q sets a maximum of 25% of the municipality's geographic area that may be designated as an improvement district.⁸⁸⁹ Although caps on the extent to which a city may rely on tax increment financing are not unusual (Georgia limits districts to 10 per cent of the city's taxable property),⁸⁹⁰ the geographic nature of Massachusetts's cap is a potentially significant constraint. Chicago has no limit on the number, location, or size of tax increment financing districts, and, currently, approximately 25-30% of its geographic area is within one of the districts.⁸⁹¹

Chapter 40Q also requires that a municipality's development plan—required in order to employ a DIF—be approved by the state Economic Assistance Coordinating Council before it can take effect.⁸⁹² This state approval requirement is not part of other state laws authorizing tax increment financing. Georgia leaves it up to local legislative bodies, like the Atlanta City Council, to approve the plan.⁸⁹³ The same is true in San Francisco. Illinois requires other taxing jurisdictions within the designated district to give their approval before it can be formed (the effect of a district will be to limit their taxing ability).⁸⁹⁴ But the Chicago City Council can approve the district by a supermajority vote even if these other jurisdictions object.⁸⁹⁵ No state agency is required to consent.

A last-minute change in Chapter 40Q further constrains tax increment financing in Massachusetts. That change requires that the bonds issued under the DIF legislation be counted against the overall municipal bond limit.⁸⁹⁶ An extensive use of tax increment financing will thus require cities approaching their overall borrowing cap either to seek additional borrowing authority from the state or to forego other priorities. This restriction does not exist in San Francisco or Denver, cities that rely on redevelopment authorities to create these taxing districts. There, funds borrowed by the local redevelopment agency under the statutorily-approved method for tax increment financing do not count against the city's debt ceiling.⁸⁹⁷ Moreover, in cities with more generous debt ceilings (or, as is the case in Chicago, no debt ceiling), a requirement to count DIF debt as city debt has less meaning than it does in Boston – or no meaning at all.

Of the cities examined for this project, only Seattle has a tax increment financing system with constraints that are equivalent to Boston's. In fact, the limits on Seattle are even more severe, in part because there is a separate tax system for funding the schools, which significantly complicates the reservation of property taxes for dedicated purposes.⁸⁹⁸ Not surprisingly, Seattle, like Boston, has not used tax increment financing in any significant way.

Business Improvement Districts

Business Improvement Districts (BIDs) have been employed with increasing frequency throughout the United States as a means of revitalizing urban neighborhoods. Unlike tax

increment financing, BID s do not dedicate portions of tax revenue to secure bonds aimed at financing development. Instead, although the precise governance structures and functions of BID s vary from jurisdiction to jurisdiction, they are territorial subdivisions of municipalities that raise additional tax revenues from property owners to fund services beyond those provided by the municipality.⁸⁹⁹ Their creation almost always requires approval by the municipality's government, and, although a formal approval vote by the owners of property is not always required, as a practical matter it is unlikely that a BID will be created without substantial support from property owners within the proposed district.⁹⁰⁰ BID s are usually governed by boards of directors elected by property owners within the district – that is, not by the district's residents or by the tenants who occupy the commercial premises but by property owners, even if they live outside the city.⁹⁰¹

As their name indicates, BID s are most often employed in downtown business districts. BID s have been particularly targeted toward “the effort of urban downtowns to meet the challenge posed by their great nemesis--the suburban shopping mall.”⁹⁰² In their most common form, they provide a “diverse array of programs and services, including sanitation, policing, social services, infrastructure improvements and business recruitment and retention.”⁹⁰³ Although by no means uncontroversial,⁹⁰⁴ BID s “are credited with playing an important role in restoring urban morale and making older downtowns more attractive places to shop, visit, do business, and seek entertainment,” with even critics conceding “that BID programs have improved safety and sanitation within the districts.”⁹⁰⁵ As was the case with tax increment financing, BID s are best understood as a component of city land use policy. The BID structure permits a city to delegate a measure of its regulatory power over land to property owners who have invested in its jurisdiction. The property owners can then work together to exercise control over the area in which they have invested. The very existence of the BID structure can thus play a role in making parts of the city attractive to further investment. They give potential investors an added measure of confidence that they will be able to maintain or improve the area in which they plan to build.

There are currently over 1000 BID s in operation nationwide, including within every city discussed in this report except Boston. New York City alone has over 130 BID s in operation.⁹⁰⁶ Chicago has 25, most of which tend to cover a single neighborhood, although one includes property representing 34% of the city's total assessed value.⁹⁰⁷ (Most of Chicago's BID s are in exclusively commercial or exclusively industrial neighborhoods, where “[st]reetscape improvements, additional street cleaning and snow removal services are the main services provided,” but Chicago also has one area that consists exclusively of residential property, which funds private security services.⁹⁰⁸) There are a number of BID s in Denver, the most significant being the 120-block Downtown Denver Business Improvement District which funds cleaning and maintenance services, safety initiatives, consumer marketing campaigns, and economic development efforts.⁹⁰⁹ Seattle also has a number of BID s,⁹¹⁰ and San Francisco has one major BID.⁹¹¹ Atlanta has the Atlanta Downtown Improvement District, the Buckhead Community Improvement District, and a BID in the Midtown district, which overlaps with the downtown district and funds a private police force.⁹¹²

Given the popularity of BID s nationwide, it is unsurprising that property owners in Boston's downtown shopping district—Downtown Crossing—have been actively seeking the approval of a BID since 1996.⁹¹³ The revenues raised from the BID would primarily be used to hire “neighborhood ambassadors,” who would be responsible for greeting visitors, keeping the area clean, and communicating with the police to improve public safety.⁹¹⁴ As one shop owner in the area put it, “I'm willing to pay extra because it will bring people back to downtown.”⁹¹⁵ Despite strong support from the Downtown Crossing Association, the Boston City Council, and Mayor Menino, the proposal has failed to win approval by the state legislature.⁹¹⁶ A number of legislators and lobbyists have expressed strong opposition to the proposal, in part because of its governance structure and in part out of opposition to privatization generally.⁹¹⁷

In light of the concerted effort on the part of city officials and business leaders to win legislative support for a home rule petition to create Boston's first BID, one might be surprised to learn that Massachusetts passed enabling legislation in 1994 allowing municipalities, including

Boston, to create BIDs on their own.⁹¹⁸ Under the terms of the 1994 act, a BID may be created in order to retain and recruit business, promote economic development, and supplement security and sanitation services for the area.⁹¹⁹ If a petition outlining the purposes, governance structure, and assessment schedule for the proposed BID is filed with the municipality by those representing 51% of the assessed valuation of property as well as 60% of the property owners within the proposed district, the city may establish the BID after a public hearing.⁹²⁰

Despite the existence of this legislation, Boston has not established a BID. The reason is that the enabling legislation gives every landowner within the district the ability to opt out of the assessment fees required to operate the BID.⁹²¹ Massachusetts is the only state in the nation that enables property owners in a BID to opt out of the duty to pay assessments—a provision that has “proven a significant obstacle to the creation of BIDs in the state.”⁹²² This provision is contrary to the normal operation of BIDs—which often require a great deal of support within the district in order to be created, but, once created, function coercively to tax all property within the district according to an established schedule.⁹²³ That is the case in each of the other cities. Although all the other cities, like Boston, are subject to state statutes (or provisions in the state constitution) that define the scope of their authority to establish BIDs, each of them, unlike Boston, has the statutory authority to impose additional taxes – and, in some instances, to issue bonds – on the property in these districts once a BID is established. In 2003, Georgia even proposed an amendment that would allow a business improvement district to levy an additional one percent sales tax within its boundaries.⁹²⁴

Given the problems created by a scheme permitting individual property owners to opt out – when they of necessity share the benefits of the BID’s efforts – it is unsurprising that Boston’s property owners have not shown any interest in pursuing this device. Even those geographically compact business communities that have demonstrated a great deal of interest in establishing a BID – such as Downtown Crossing merchants – are understandably wary of an arrangement in which district assessments are not compulsory. The combined effect of the enabling legislation’s opt-out provision and the legislature’s lack of support for Boston’s home rule petition is to deprive Boston of the opportunity to experiment with a development strategy that has been employed throughout the nation. This is not to deny that BIDs present real problems relating to their democratic accountability and the privatization of traditional municipal services. It is simply to note that – despite the determination of both Boston’s political and business leaders that it is an experiment worth trying – state legislators have effectively blocked Boston from establishing BIDs within the city. Like the limits on tax increment financing – and like the unique state legislation governing zoning and planning and the unusual amount of state control over large parts of the city – the state restrictions on BIDs are part of an overall pattern of state-imposed constraints on Boston’s ability to control its physical development.

Providing Affordable Housing

As noted at the outset of this chapter, limits on Boston’s authority over land use have not prevented Boston from becoming economically successful. As a result, the concern raised was whether current rules impede Boston’s ability to guide its development toward continued economic success. When the city’s role in providing opportunities for affordable housing within the city is considered, a very different kind of issue arises. The lack of affordable housing in Boston is not a problem on the future horizon. It is one that already threatens Boston’s economic success. Consider the language used by Neal Peirce and Curtis Johnson in their recent report, *Greater Boston in the 21st Century*:

There’s already a single crisis glaringly poised to have devastating impact on the region: stratospheric housing prices that drive away young professionals and seasoned workers alike, including some individuals at highly professional or M.D. levels – people critical to building and maintaining a strong economy.⁹²⁵

The key question for Boston when it comes to housing, therefore, is whether the current legal structure permits it to act in a way that might alleviate this present crisis.

In answering that question, this report does not suggest that the city's housing crisis is simply a consequence of limits on Boston's legal power. Extensive local regulation of real estate development could itself be a cause of the high cost of housing. Moreover, as Peirce and Johnson note, the Boston metropolitan region as a whole faces a serious and growing affordable housing problem.⁹²⁶ The region's housing prices doubled from 1997-2003, making it one of the least affordable metropolitan area in the country.⁹²⁷ Construction costs are among the highest in the nation, while new housing starts per capita were among the lowest. Median home prices topped \$400,000 in 2003 – more than double the national average.⁹²⁸ Over 43% of the region's renter households are “cost-burdened” – that is, they pay more than 30% of their income in rent.⁹²⁹ One in five households pay more than half of their salary for housing.⁹³⁰ According to one study, Massachusetts was the most expensive state in the nation when the states are ranked according to the hourly income needed to rent a modest two-bedroom apartment.⁹³¹

Given the regional nature of the affordable housing problem, the operation of Massachusetts state law on the ability and desire of other cities and towns in the Boston metropolitan area to encourage affordable housing within their borders has a significant influence on the city's housing market. Insofar as state incentives to increase affordable housing – in particular, Chapter 40B, the “Anti-Snob Zoning Act”⁹³² – are insufficient to motivate other cities and towns to increase their supply of affordable housing, Boston ends up with a disproportionate share of housing for the poor. In 2000, Boston provided over 40% of the region's overall supply of affordable housing.⁹³³ Only seven of the 129 communities in the Boston metropolitan area, other than Boston, have at least 10% affordable housing in Chapter 40B's sense of the term, with many of Boston's nearest neighbors having the least amount of affordable housing in the region.⁹³⁴ Many critics of the state's housing policy maintain that, while Chapter 40B imposes an obligation on all of the state's municipalities, the state's zoning law⁹³⁵ does not give municipalities sufficiently flexible tools to encourage affordable housing effectively.⁹³⁶ In June 2004, the state legislature – following the recommendations the Commonwealth Housing Task Force – passed the Smart Growth Zoning and Housing Production Act, or Chapter 40R, which is primarily aimed at addressing this issue, and in 2005 passed the Smart Growth School Cost Reimbursement Act, or Chapter 40S, designed to reimburse cities and towns for education costs absorbed in the creation of such housing.⁹³⁷ Moreover, insofar as municipalities outside of Boston that want to address their level of affordable housing are prevented from doing so by the operation of state law—whether through the statewide prohibition on rent control⁹³⁸ or the state Subdivision Control Law (which protects from local review subdivisions that front existing roads)⁹³⁹ – Boston's ability to address its own housing issues is affected as well.

This report, however, is not focused on the regional housing issue – important as it is, even for the city of Boston. It is focused on the city's own ability to provide affordable housing. The extent of the city's problem is starkly described by a report issued by the City of Boston in May 2004:

Five years ago, a single-family house in Boston sold for almost 40% less than one in a typical suburban community. By 2003, that difference had shrunk to 19%. . . . [H]ouse values in the city . . . [are] up by 112% over the past five years – almost double the regional average price increase of 60%. In most of Boston's historically affordable neighborhoods, the price increases have been even larger: values grew by 185% in Roxbury and 152% in East Boston. Lower-priced neighborhoods where market-rate prices were affordable are quickly disappearing, leaving renters and homebuyers with dwindling options other than publicly assisted housing, or leaving Boston. . . . In 2003, only a third of listed apartments cost what the average Bostonian could afford. For home buyers, the situation is even more difficult. . . . [I]t now requires an income of more than \$105,000 to afford the average single-family home, as compared to \$55,500 five

years ago. Only about one in four Bostonians has the income necessary to buy the average-priced home.⁹⁴⁰

As this excerpt makes clear, the “affordable housing” problem does not refer to a single issue. One concern is the lack of housing for people with low and moderate incomes, usually defined as households at or below 80% of the region’s median household income (that is, households with incomes of less than roughly \$50,000 a year).⁹⁴¹ Much of the state’s housing policy – and much of the city’s as well – is directed toward this population. The city’s linkage program⁹⁴² and a substantial part of its inclusionary zoning policy⁹⁴³ targets this population. (These programs are discussed below.) Chapter 40B defines affordable housing with a similar population in mind: it defines it as housing entitled to government subsidy.⁹⁴⁴ There is, however, another affordable housing problem in Boston: the unavailability of housing affordable by the middle class – that is for people with even substantially more than the median household income. These are the people primarily referred to in the excerpt quoted above. Most of the population finds Boston’s housing unaffordable. Only 351 of the 5,726 single-family houses or condominiums sold in Boston in 2003 – 6% of the sales – were sold at a price a family with a median household income could afford.⁹⁴⁵ And only 9% of the apartments were listed at prices affordable to the average Bostonian.⁹⁴⁶

Each of these affordable housing problems are considered separately, beginning with housing policies for the low and moderate income population: subsidized housing, the linkage program, and inclusionary zoning. Next, the problems generated by the high price of Boston housing are considered – both rental and owned – for all Boston residents, as well as for potential Boston residents. Throughout, Boston’s power to address its housing problems is compared to that of the other cities in this study.

Housing the Low and Moderate Income Population

Although, as mentioned above, Boston already has 40 per cent of the region’s affordable housing stock, the city has made significant efforts to maintain or even increase its housing for low and moderate income city residents. But every device it has available to do so – from direct spending through rent control through linkage and inclusionary zoning – is limited by state law.

1. Subsidizing Housing Through Direct Spending or Use of City Assets

The single largest source of housing affordable by low-income families in Boston is public housing. Two-thirds of subsidized housing in Boston,⁹⁴⁷ housing approximately 27,000 people,⁹⁴⁸ is publicly owned. The demand for this housing has never been greater: there are 22,000 people on the waiting list for the city’s 14,000 units.⁹⁴⁹ In addition to this public housing – owned by the Boston Housing Authority – other housing units are subsidized through a variety of federal, state, and city programs. Overall, almost 20% of Boston’s housing stock, in some neighborhoods, over 40%, was subsidized in 2000.⁹⁵⁰ Even with this amount of subsidization, over 32,000 Boston residents are spending more than half their income on rent and the number of homeless in Boston is at an all-time high.⁹⁵¹

Subsidized housing requires money, and constraints on the city’s revenues, discussed earlier, significantly limit its availability. Federal and state support for housing has declined substantially over the last twenty years. The federal Department of Housing and Urban Development’s budget was 7.5% of federal spending in 1978, but it was 1.5% in 2000.⁹⁵² Direct federal support for housing creation has virtually disappeared. In 2000, the Department increased support for a major form of subsidized housing – Section 8 vouchers – but in its own estimate it addressed only 1.4% of Boston’s needs.⁹⁵³ More recently, cutbacks in Section 8, and other federal programs, have made reliance on even this amount of federal support unreliable.⁹⁵⁴ Meanwhile, state spending on housing has declined from 3% of its total budget in the early 1990s to under 1% in 2003, and the state’s share of the state/federal commitment to housing has

dropped from 45% to 35% in just two years.⁹⁵⁵ The state's commitment to nearly all of its housing programs has decreased in the last fifteen years.⁹⁵⁶

In the face of these cutbacks, the City of Boston embarked in 1999 on its own program to stimulate the building of more affordable housing and to preserve existing affordable units.⁹⁵⁷ By 2004, more than 2200 units had been authorized, and the city successfully preserved most of the targeted federal and state subsidized housing.⁹⁵⁸ In a 2004 report, the city committed \$56 million for housing initiatives over the next three years and set a fundraising target of an additional \$25 million.⁹⁵⁹ Ninety percent of the total amount would be aimed at low and moderate income households.⁹⁶⁰ But the city's source of funds for these goals is limited. As noted in Chapter Five, Boston, like all the cities in our study, has little in the way of discretionary funds to pursue a particular policy. The city recently made available \$30 million in new city funds for housing, but the sale of city assets and the city's surplus property fund made this appropriation possible.⁹⁶¹ The Mayor's announcement, in April 2003, of a moratorium on city financing for new affordable housing projects until July 2005, citing cuts in state aid,⁹⁶² is indicative of the difficulty of addressing this problem over the long term through direct city spending.⁹⁶³

Another way to increase the existing affordable housing stock is for the city to assume title to properties that were previously privately owned. Cities do this by foreclosing on properties that are delinquent in paying city taxes. Boston has pursued this policy to some extent although the numbers are small: 795 units in 1997, dropping to 264 in 2003.⁹⁶⁴ Chicago has a program at a similar scale. Under Chicago's Troubled Buildings Initiative, enforcement officials offer the owners of derelict or tax-delinquent properties a choice: either repair the building in order to bring it up to code or to deed the building to the city.⁹⁶⁵ Once the city acquires ownership, it works with a developer to renovate the building as an affordable unit.⁹⁶⁶ Consequently, as of January 2004, 3 buildings, with a total of 48 units had been completely recovered, another 24 buildings (650 units) are currently undergoing rehabilitation, and another 38 buildings (732 units) are either under receivership or in court.⁹⁶⁷

New York City, by contrast, has used this mechanism as a key tool in making affordable housing available to its residents. Its program began in the late 1970s when many landlords were in default on taxes.⁹⁶⁸ In order to spur their payment of back taxes, the city used a local procedure in order to foreclose on properties in default.⁹⁶⁹ Surprisingly, many property owners were happy to have the city take the buildings off their hands. As a result, the city became title holder to tens of thousands of residential units, and it began to see these units as a potential means of increasing the affordable housing stock.⁹⁷⁰ Through a variety of programs, the city promoted the development of these properties, known as "in rem" properties.⁹⁷¹ In a fifteen year period, more than 200,000 new or rehabilitated units were created across the city, some filling entire blocks and others as in-fill of two to eight houses.⁹⁷²

In 2002 Mayor Bloomberg put forward a plan, called "The New Housing Marketplace," to invest \$3 billion over five years to preserve and create 65,000 units of housing for low, moderate and middle income New Yorkers, in part by providing city-owned land for the construction of 7,000 units of housing.⁹⁷³ A key component of the plan is the disposition of the remainder of the city's stock of "in rem" housing.⁹⁷⁴ As part of this strategy, New York City plans to redirect federal and city resources, along with \$2 billion from the city's housing budget, for the rehabilitation of in rem housing.⁹⁷⁵ In addition, the city will accelerate environmental review of city-owned property to make sure more of it is available for residential development,⁹⁷⁶ and it will streamline the disposition of city-owned property by centralizing this function in the Office of the Deputy Mayor for Economic Development and Rebuilding.⁹⁷⁷ One objective of these initiatives is greater collaboration among the many landholding public agencies in New York City.

Boston is currently not in a position to follow New York City's model because it has relatively few formerly privately-owned properties under its control.

2. Linkage and Inclusionary Zoning

Given that Boston lacks independent assets to dramatically increase its supply of affordable housing on its own, it must, like other cities, rely heavily on efforts by private actors to increase the supply of affordable housing above what state and federal assistance would support. A critical issue, therefore, concerns the city's regulatory power to require or encourage private efforts. On this front, Boston has been a pioneer in asserting its regulatory authority, despite having a state-defined grant of home rule that is much narrower than that of other cities. Boston's innovative strategies in this field, however, have often been subject to successful litigation challenges. As a result, its success has ultimately depended on its ability to secure special authorizing legislation. Other cities have been able to act more independently.

Linkage. One of the most significant of Boston's efforts is its "linkage program." In 1983, the city established the program--officially known as Development Impact Project Exactions—in order "to mitigate the impact of large-scale development on the supply of housing and jobs available to low- and moderate-income people. . . [It did so] by requiring the payment of a development exaction, or an equivalent in-kind contribution, for the creation of affordable housing and project-related job training programs."⁹⁷⁸ The requirement is imposed on developers of large-scale commercial, retail, hotel or similar buildings.⁹⁷⁹ The housing portion of the exaction is currently \$7.18 for each square foot above a 100,000 square foot floor.⁹⁸⁰ From the inception of linkage through June 2000, almost \$60 million had been awarded by the trust that manages the linkage funds to assist with the development of affordable housing.⁹⁸¹ This has generated the construction of almost 6000 housing units, most of which are allocated to those with incomes at or below 80% of the region's median household income.⁹⁸²

The Zoning Commission's authority to enact the linkage program was challenged in 1986, and the trial court sided with the challenger, holding that the linkage fees amounted to the imposition of an unauthorized tax.⁹⁸³ The Supreme Judicial Court, in *Bonan v. City of Boston*, eventually reversed, but it did so on the ground that the plaintiff in that case did not have standing to bring the suit.⁹⁸⁴ The court did not discuss the merits of the plaintiff's legal argument. But it pointedly noted that the "[a]sserted omissions in the statutory authority of the city's zoning commission . . . may be cured by legislation"⁹⁸⁵ In 1987, the legal uncertainty surrounding Boston's ability to adopt its novel linkage program was eliminated when the state passed a law explicitly authorizing the program.⁹⁸⁶ The authorizing legislation was quite specific, however, detailing (among other things) the amount of permissible exactions and the length of repayment periods.⁹⁸⁷ State legislation allows Boston to increase the exaction amount periodically within prescribed limits; other changes require state approval.⁹⁸⁸

Inclusionary Zoning. Another important Boston initiative to encourage the development of affordable housing is the city's inclusionary zoning policy. In February 2000, Mayor Menino signed an executive order requiring certain housing developers to contribute either financially or in-kind to the city's affordable housing stock. Half of this housing is to be reserved for those at or below 80% of the area's median income; the other half is available to those between 80% and 120% of the area's median income, as long as the average is affordable to those at the median income.⁹⁸⁹ The executive in its current revised form, requires housing developers either to set aside 15% of the units within a new development for affordable housing or, at the discretion of the BRA, may create a 50% greater number of affordable housing units off-site or contribute \$97,000 per unit to the city's affordable housing fund.⁹⁹⁰ The executive order applies only to projects of 10 or more units that require zoning relief and to projects financed by or developed on land owned by the city (or the BRA).⁹⁹¹ By its terms, the affordable housing requirement does not apply to "as of right" developments—which means that developers not requiring zoning relief (or financial assistance from the city) have no obligation to provide affordable housing.⁹⁹² Thus far, the city's policy has been widely celebrated as a success. For the three year period ending in June, 2003—including a period before the executive order took effect—the city credits its inclusionary development program with the permitting of 539 affordable housing units and \$8.7 million in contributions to the affordable housing fund.⁹⁹³

Because this policy has taken the form of an executive order, critics fear that the policy could be set aside by a new Mayor or, indeed, by the current Mayor in order to lure attractive developments.⁹⁹⁴ For this reason, they have argued that the policy ought to be written into the zoning code.⁹⁹⁵ Mayor Menino has resisted this line of argument, claiming that the flexibility of the current arrangement allows for the policy to respond to the housing market and the economy.⁹⁹⁶ Even if the requirement were to be written into the zoning code, however, it is not certain that the inclusionary zoning policy would withstand court scrutiny under the Enabling Act. As noted above, in *Bonan v. City of Boston*, a number of developers challenged the Zoning Commission's authority to enact Boston's linkage program, arguing "that the exaction requirement is both an unlawful condition of zoning approval and an unauthorized tax beyond the authority of the zoning commission of Boston to adopt."⁹⁹⁷ At least with respect to its application to cases in which city-owned land or city financing are not involved, Boston's inclusionary zoning policy can be considered as much a condition on zoning approval as the linkage program.

As the court noted in *Bonan*, Chapter 40A—the general state zoning act—includes a provision that specifically authorizes inclusionary zoning measures.⁹⁹⁸ The legislature amended Chapter 40A in 1986 to add this provision in response to the Supreme Judicial Court's ruling in *Middlesex & Boston Railway Co. v. Board of Alderman*.⁹⁹⁹ In that case, the court held that the City of Newton exceeded its authority when it attempted to impose a requirement that developers seeking zoning relief sell 10% of the housing created by the development at below-market rates.¹⁰⁰⁰ Chapter 40A now expressly allows zoning ordinances and by-laws that authorize the granting of special permits designed to increase the permissible density of the population or the intensity of a particular use in a proposed development and that condition the municipality's approval on the applicant's provision of a stated public benefit, including "housing for persons of low or moderate income."¹⁰⁰¹

This amendment does not apply to Boston. As discussed above, it is well established that Boston's Zoning Enabling Act and Chapter 40A are distinct.¹⁰⁰² Thus, the *Bonan* court concluded, Boston could not—and indeed, did not even attempt to—rely on this provision of Chapter 40A to support its linkage program. Unlike Chapter 40A, Boston's Enabling Act contains no explicit grant of authority for inclusionary zoning. It merely states that exceptions to normal zoning regulations in approved districts may be granted and that such exceptions may be subject to "appropriate conditions and safeguards."¹⁰⁰³ Moreover, the legislation adopted after the *Bonan* decision that explicitly authorized Boston's linkage terms is not identical to the amendment to Chapter 40A authorizing inclusionary zoning. As noted above, it authorized the payment of development impact fees under certain prescribed circumstances. Thus, although Boston's authority to impose an inclusionary zoning requirement may well be defensible, it does not have the definitive kind of authorization available to other Massachusetts cities or other cities across the country.

Linkage and Inclusionary Zoning in Other Cities. The lack of clarity with respect to Boston's authority to enact an inclusionary zoning policy stands in sharp contrast to that of Denver. In 2002, the Denver City Council adopted an inclusionary zoning ordinance with the creation of the "Moderately Priced Dwelling Unit" program (MPDU).¹⁰⁰⁴ The ordinance applies to all new residential developments of 30 or more units and requires that 10% of the units be affordable.¹⁰⁰⁵ It commits the city to expedite the zoning permitting process for these developments, to provide a density bonus, and to pay developers a subsidy of \$5000 to \$10,000 for each unit of affordable housing constructed.¹⁰⁰⁶ Given Denver's status as a home rule city under the Colorado constitution, Denver clearly had the authority to enact this ordinance.

It is important to recall that the structure of home rule in Colorado reverses the presumption under Massachusetts law. In Massachusetts, due to the exemption of the power to tax and the power to regulate private or civil affairs from the scope of the home rule grant, Boston's ability to enact programs such as linkage or inclusionary zoning is in doubt absent relatively clear authorizing legislation. In Colorado, neither of these limitations on the home rule grant exists, and thus Denver's ability to act in the first instance is unquestioned. Indeed, shortly

after Denver enacted the ordinance, a Colorado legislator introduced legislation that would have prohibited local legislation requiring developers to sell property at below fair market value.¹⁰⁰⁷ The legislation was not enacted, and it is not certain that it would have been effective. State legislation preempts local legislation in Colorado only if a court finds that the state legislation deals with matters of state concern. Given Colorado precedent,¹⁰⁰⁸ it is not clear whether the state legislation, if passed, would meet this standard.

Other cities benefit from a broad home rule grant similar to the one that Denver enjoys. This greater power has shaped their approach to policies concerning linkage and inclusionary zoning. San Francisco has had a linkage ordinance in place for roughly as long as Boston has, although for much of that period it raised considerably less money for housing. San Francisco has been able, on its own, to amend its ordinance several times since its inception to require higher contributions and broaden its coverage. The process for doing so simply requires a proposed amendment to the local zoning code by the Planning Commission, followed by Board of Supervisors approval.¹⁰⁰⁹ Due to its broad home rule grant, San Francisco is not as dependent on state legislation as Boston is for its authority to implement its program. In Boston, similarly substantial amendments would likely require new state authorizing legislation.

Cities in California can also generate support for linkage ordinances by relying on their greater local taxing power. In Sacramento, California's capital, the possibility that the municipality might adopt a local real estate transfer tax induced local realtors to support a proposed linkage ordinance.¹⁰¹⁰ Given the exemption of taxation from the home rule grant in Massachusetts – an exemption that does not exist in California – Boston would not have the power to adopt such a transfer tax on its own. It could therefore not use the possibility of such a tax to generate political support for an alternative such as a linkage ordinance. The advisory group that initially helped formulate Boston's linkage policy proposed a "neighborhood impact excise tax" on new development as the second step in the long term plan that the linkage ordinance was intended to initiate.¹⁰¹¹ That tax has not been imposed. And it could not be imposed without state legislation authorizing its adoption.

Seattle is like Boston – and unlike Denver and San Francisco – in needing specific state legislative authority to impose impact fees on housing developers. Like Boston, it has received the necessary authority from the state.¹⁰¹² But Seattle's approach is different from Boston's linkage and inclusionary zoning programs. In 1980, Seattle tried to preserve existing low-income housing with ordinances restricting the ability of landlords to convert low-income housing to non-residential uses.¹⁰¹³ One ordinance charged landowners a fee to convert low-income housing, but a trial court struck down the fee as an invalid tax.¹⁰¹⁴ The city responded with a slightly different ordinance, requiring an owner to obtain a license to demolish low-income housing and use the property for non-residential purposes.¹⁰¹⁵ The ordinance required landlords to give tenants notice and help in relocation in order to get the license; it also required them to provide new low-income housing or contribute to the city's low-income housing replacement fund.¹⁰¹⁶ A developer sued over the new ordinance, arguing it imposed an invalid tax.¹⁰¹⁷ Seattle countered that the ordinance was not a tax but merely a development regulation within the city's police powers.¹⁰¹⁸ The Washington Supreme Court agreed with the developer, stating: "[q]uite simply, the municipal body cannot shift the social costs of development on to a developer under the guise of a regulation."¹⁰¹⁹ The ordinance's requirements amounted to a tax, the court reasoned, and the city could not impose it without express legislative permission.¹⁰²⁰ With this litigation in the background, the Washington legislature provided Seattle with the necessary authority in 1990, passing legislation enabling cities to force developers who demolish low-income housing to help tenants with relocation costs.¹⁰²¹ The resulting Tenant Relocation Assistance Ordinance¹⁰²² required landlords to pay \$2,000 to any low-income tenant displaced by gentrification, demolition, or conversion of housing to non-residential use.¹⁰²³ Seattle has also adopted a form of inclusionary zoning through its zoning code by providing a density bonus to developers in return for their contribution to solving the city's affordable housing problem.¹⁰²⁴

Not every city possessing the power to adopt ordinances aimed at inducing or requiring

private developers to share the burden of providing affordable housing has exercised that power. Chicago seems to have the power to adopt an inclusionary ordinance under its expansive home rule grant,¹⁰²⁵ but it has not adopted one and has no plans to do so. "The city recently tabled a mandatory 25% affordability set aside ordinance that would have applied to the construction of all housing units within the city. As a compromise, the city's Affordability Housing Ordinance, passed in late 2003, imposes set aside requirements . . ." if a developer purchases city land at a discount or if the land is part of a tax increment financing district.¹⁰²⁶ Density bonuses are also given in exchange for construction of affordable units. According to Chicago officials, the major reservation about the proposed inclusionary zoning ordinance was the city's unwillingness to jeopardize the construction boom currently underway in the city.¹⁰²⁷ Chicago appears to be unwilling to take measures (either regulation or taxation) that might trigger the loss of business and development to the suburbs. (Wholly aside from its merits, the mandatory set-aside ordinance debated in Chicago would likely exceed Boston's legal authority.¹⁰²⁸)

3. Rent Control

Two-thirds of Boston's housing units are rental units.¹⁰²⁹ The price Boston residents have to pay for rent is thus an essential aspect of whether housing in Boston is affordable. For more than twenty years, the measure employed by Boston (along with Brookline and Cambridge) to control the cost of housing was rent control. In 1970, the Massachusetts legislature passed a rent control enabling act, which gave municipalities of 50,000 or more the option to enact local rent control ordinances.¹⁰³⁰ This enabling legislation was needed because, absent state approval, the Supreme Judicial Court had held that Massachusetts municipalities lacked home rule authority to regulate the landlord-tenant relationship.¹⁰³¹ When this legislation expired, three municipalities in the Boston region—including Boston—continued to enforce rent control ordinances pursuant to special authorizing legislation.¹⁰³² The goal of the enabling legislation (and the rent control ordinances) was to ensure the availability of affordable rental housing for low income, elderly, and handicapped individuals in communities where market forces would otherwise increase rental costs beyond their means while at the same time providing landlords with a reasonable return.

The question whether rent control is an effective means of promoting housing affordability has, of course, been a subject of intensive academic and policy debate. But there is another question as well: what level of government should be empowered to make the policy judgment that resolves this debate? At present, the citizens of Massachusetts have resolved the debate themselves, denying Boston the power to do so. In 1994, a statewide referendum prohibited rent control ordinances throughout the state.¹⁰³³ Although the ballot measure narrowly succeeded in statewide voting, a majority of those voting in each of the communities where rent control ordinances were then in place voted against the measure.¹⁰³⁴ At that time, approximately 22,000 units in Boston were under a form of rent control under which rents could not legally be raised until the unit changed hands; another 63,000 units were subject to a less stringent form of rent control under which rents could be raised annually up to a ceiling, usually 10%, set by city officials.¹⁰³⁵ Rents within the city increased by almost 50% from 1995-1999, after the state-wide referendum repealed rent control.¹⁰³⁶ Between 1993 and 1998, the number of renters who paid more than 50% of their income in rent increased by almost 7000 households, even while the total number of renters in the city declined.¹⁰³⁷ More recently, rents have stabilized, even moderately declined, in most Boston neighborhoods.¹⁰³⁸ Still, with the median renter income in Boston only approximately \$33,000, 54% of renter income is needed just to pay the rent.¹⁰³⁹ This figure, along with that in Chelsea, is the highest in the region.¹⁰⁴⁰

Subsequent attempts on the part of Boston and other affected communities to obtain permission from the state legislature to reintroduce some form of rent control have been unsuccessful. It is by no means clear that Boston would choose to impose rent control if it could. In December 2004, the Boston City Council itself defeated a proposed rent control ordinance.¹⁰⁴¹ One of the reasons for this defeat was the fear of its impact on the city's finances, given Boston's disproportionate reliance on the property tax. As the *Boston Globe* reported, some City Council

members said that rent control “would choke property taxes at a time when the city desperately needs revenue.”¹⁰⁴²

The Supreme Judicial Court has broadly interpreted the state legislation that was passed to implement the statewide referendum banning rent control.¹⁰⁴³ Although the legislation expressly repealed a number of laws relating to the operation of rent control in Massachusetts, it did not repeal legislation authorizing ordinances designed to protect tenants in buildings undergoing condominium conversion.¹⁰⁴⁴ After the 1994 referendum prohibited rent control, Boston’s City Council passed condominium conversion regulations designed specifically “to preserve a reasonable balance in the city’s housing stock and a reasonable supply of rental housing, particularly for those who are elderly, handicapped, or of low or moderate income”¹⁰⁴⁵ The ordinance provided rent increase and eviction protections to tenants occupying units that had been converted to condominiums.¹⁰⁴⁶ The Supreme Judicial Court struck down the Boston ordinance as contrary to the underlying purpose of the referendum and the authorizing legislation.¹⁰⁴⁷ The court held that Boston’s attempt to protect prospective tenants of units converted to condominiums (as opposed merely to tenants occupying units being converted) was an impermissible end-run around the legislation prohibiting rent control.¹⁰⁴⁸ No doubt in part because of this decision, over 2500 rental units within Boston were lost to condominium development during the 1990s.¹⁰⁴⁹

The rent control experience of other cities has been mixed. San Francisco and New York City continue to have rent control laws. In San Francisco, the rent control law limits the annual allowable increase according to a schedule based upon inflation, and it covers the vast majority of rental units within the city.¹⁰⁵⁰ San Francisco’s rent control laws have even become stricter in recent years, due in large part to citywide ballot initiatives. Landlords used to be able to increase rents each year based upon capital improvements, but a November 2000 ballot initiative prospectively limited the availability of this increase.¹⁰⁵¹ In New York City, recent state legislation has cut back on what at one time were the nation’s most stringent rent control laws. Today, most units are no longer under strict “rent control” but under a less stringent form of rent regulation known as rent stabilization.¹⁰⁵² In 1993, the state legislature passed a law that removed luxury units or high-earning tenants from rent stabilization.¹⁰⁵³ In 1997, with the statute authorizing rent control about to expire, the legislature further scaled back the rent protections available in New York State, including New York City.¹⁰⁵⁴ In 2003, again facing expiration of rent control authorization, the legislature again weakened rent protections. The 2003 legislation specifically targeted rent control in New York City, limiting the city’s ability to regulate rent control.¹⁰⁵⁵

Seattle and Denver are like Boston: they too lack the power to impose rent control. (Chicago has never attempted to adopt rent control.¹⁰⁵⁶) Seattle had a local rent control ordinance in place for a number of years, but, in the 1980s, the state legislature passed a law outlawing any local ordinance that regulates rent in any manner.¹⁰⁵⁷ Denver has no power to pass a rent control ordinance because Colorado courts have interpreted the normally broad grant of home rule authority not to trump conflicting state anti-rent control legislation. Because rent control measures address a “mixed” issue of local and statewide concern, the Colorado Supreme Court ruled, home rule municipalities could not enact rent control in the face of conflicting state law.¹⁰⁵⁸

4. Conclusion

The programs listed above by no means exhaust Boston’s efforts to address its housing needs. Over the next three years, Boston is committed, among other things, to renovating 2,000 buildings, producing 10,000 new units of housing (20% of which would be for low and moderate income residents), and preserving 3,000 rental units.¹⁰⁵⁹ But even these ambitious goals target only a small part of Boston’s housing problem – as do linkage (nearly 6000 units over more than fifteen years from 1984 to 1999)¹⁰⁶⁰ and inclusionary zoning (539 units over the last 3 years).¹⁰⁶¹ In 2000, there were roughly 250,000 housing units in Boston, of which 160,000 were rental units.¹⁰⁶² Rent control (now gone) and subsidized housing (continually in jeopardy) have affected

a substantial part of this housing stock. The City of Boston, in sum, does not currently have the ability to engage in a major expansion of the city's housing for the low and moderate income population.

Middle Class Housing

Most of Boston's efforts are now directed at low and moderate income residents, not at Boston's housing problem more generally. But the high cost of Boston's housing affects every city resident – and potential future residents as well. One way to confront this problem is to build considerably more housing for the middle class within the city.¹⁰⁶³ Indeed, unless Boston substantially expands its residential housing capacity, it is hard to see how it can begin to make a major dent in the significant increases in housing prices – and high rents – that characterize the city today.

Is there something that Boston could do to address the high price of housing within the city? The answer is yes and no. The negative part of the answer derives from the kinds of state limitations and revenue constraints just discussed: key ways that might increase the housing supply or limit price increases, ranging from subsidized housing to rent control, are not within Boston's capacity to implement. These constraints are more severe than those in other cities. San Francisco, like Boston, has an affordability problem; indeed, San Francisco's and the Bay Area's affordable housing crisis is probably the worst in the nation. Despite the recent recession, the median housing price in San Francisco recently topped \$650,000,¹⁰⁶⁴ and the median price for the Bay Area is \$545,000 – 18% higher than one year ago.¹⁰⁶⁵ But San Francisco has tools to respond to this problem that Boston lacks. As noted, unlike Boston,¹⁰⁶⁶ the city has the power to impose rent control.¹⁰⁶⁷ San Francisco also strictly controls condominium conversions.¹⁰⁶⁸ Chicago too is an expensive city, but it uses tax increment financing funds to help subsidize affordable housing construction. And Cook County, of which Chicago is a part, "decreases property taxes when multifamily buildings are rehabilitated and at least 35% of the apartments are leased to low and moderate income households."¹⁰⁶⁹ Either strategy would be difficult for Boston to adopt given its lack of power over tax administration, although the recently enacted state statutes that govern its authority to use tax increment financing now provide it with some room to follow Chicago's lead.

The affirmative part of the answer derives from the contradictions that bedevil Boston's development policy even under the current legal regime. On the one hand, Boston's gentrification – and the attendant rise of property values and, therefore, housing prices – is one of the city's goals. The economic development ideas discussed in this chapter – such as the efforts to attract commercial office space, hotels, the Convention Center, and Harvard University – fuel gentrification. So does the understandable desire to improve the quality of housing in neighborhoods across the city. At the same time, the city is committed – as this chapter has demonstrated – to preserving and even increasing its amount of affordable housing. These policies conflict with each other. And the gentrification policy now has the upper hand.

This is not to say that gentrification and the availability of housing affordable to the middle class, as well as to the poor, are necessarily in conflict. A class diverse city is a possible goal. Diverse cities have existed throughout history. These days, however, it would appear that income diversity requires an extensive legal regime – one that ensures that existing and new housing remain affordable to the overwhelming majority of Boston residents while the city is upgraded from one end to the other. Such a legal regime might include rent control and subsidized housing: European cities have traditionally provided rent subsidies to a large spectrum of society and offered two to three times the amount of public housing as American cities.¹⁰⁷⁰ It might also include a wide variety of innovative property regimes, such as the promotion of limited equity ownership.¹⁰⁷¹ Some of these kinds of initiatives may not be within the city's power to implement.

Although Boston is using the powers that it does have to promote affordable housing for the middle class, the actions of other cities in our study offer examples of additional possibilities. In Chicago, under the Chicago Partnership for Affordable Neighborhoods, “the city provides incentives to developers who agree to include affordable units within their market rate developments. The affordable units must be targeted at buyers who fall within the range of 60 to 120% of area median income (currently, \$45,000 to \$90,000 for a family of four).”¹⁰⁷² The sale price of affordable units cannot exceed \$155,000.¹⁰⁷³ The city offers a variety of incentives to developers: permit fee waivers of up to \$10,000 per affordable unit, marketing assistance, perimeter site improvements and landscaping, density bonuses, and streamlining the permitting process, cutting the time-line by as much as half. The program also provides incentives for home buyers. It grants a deferred interest-free loan at a level determined by the buyer’s income (although buyers are required to obtain a first mortgage from a private lender). As of December, 2003, 214 affordable units had been constructed with an average of 20% affordable units in each project.

Under New York City’s HomeWorks Program, “small, vacant city-owned buildings are rehabilitated by experienced builders to create one- to four- family homes for sale to individual homebuyers at market prices.”¹⁰⁷⁴ Further, it is the case that “[t]here are no income limits for the buyers (in a majority of the cases), nor are there any income or price limits for any rental apartments.”¹⁰⁷⁵ Homebuyers are chosen through lotteries, with a preference for 50% of the homes given to current residents of the communities where the homes are located.¹⁰⁷⁶ (A preference for 5% of the homes is given to New York City police officers.¹⁰⁷⁷) Another condition is that “[h]omebuyers are required to occupy at least one unit in their homes as their primary residence.”¹⁰⁷⁸ Builders usually work with lenders to offer mortgages with low down payments, and, since the lenders take income from the rental apartments into account when qualifying homebuyers for loans, many of the homes are affordable to moderate- and middle-income buyers.¹⁰⁷⁹ To help make the program workable, the city also “conveys the buildings to the builders at nominal prices,” and it provides a partial tax abatement or a subsidy to homebuyers, as well as imposing a resale restriction.¹⁰⁸⁰ As noted above, Boston does not have the city-owned housing that would enable it simply to adopt New York City’s program. But, working with developers, elements of the program could help stimulate new housing initiatives.

Although state-imposed legal constraints play an important role in Boston’s affordability crisis, it is important not to lose sight of the point made at the beginning of this section: the affordable housing crisis in the Boston metropolitan area is region-wide. No real solution is likely until the regional context in which Boston’s housing problems are located becomes a focus of government policy. Some of the cities in our study have been able to recognize this point. In Chicago, a proposal is now underway to establish a linkage program akin to Boston’s, but one that would operate on a regional scale.¹⁰⁸¹ Such a regional approach seems to offer the most potential for Boston in the long term, while highlighting the extent to which Boston does not presently have the power to address some of its most pressing issues on its own.

Chapter Seven

Education

Introduction

Many cities in our study spend as much on education as on all other functions combined. Boston itself spends more than a third of its funds on schools. But the role that public schools play in city life is even more fundamental. A strong school system attracts people – in particular families with children – to the city. And it keeps those people in the city. In the absence of a good public school system, families with the means to do so may conclude that the cost of living in the city – given the added costs of private schooling – is too high and therefore decide to move elsewhere. The strength of a city's public schools thus helps determine who lives within the city and, as a result, the city's politics. A city with many families with children – Boston currently has a smaller percentage of children than any major city in the country except for San Francisco – is likely to pursue different goals than one with a different population. A strong public school system can affect the city's image for others as well. As the schools improve, companies considering where to locate – and state officials who determine the scope of local powers – gain confidence in the city's ability to govern itself.

At the same time, the strength of a city's public school system is affected by the nature of the population that lives in the city. A school system that disproportionately serves children from poor families faces pressures – fiscal and otherwise – that many suburban school systems do not. Those pressures may lead fewer new families to move to the city and cause current residents to move out. The same pressures may also contribute to a sense that a city is not capable of governing itself well. And that perception, in turn, may hinder a city's ability to attract investment and obtain the greater powers of self-government necessary to respond to the needs of the city's school system.

Clearly, Boston's ability to sustain itself as a middle-class city – one of the four futures set forth at the outset – depends on its capacity to provide quality public education to the children of city residents. But insofar as a strong public school system becomes emblematic of the city's general health, it is also relevant to each of the other futures considered in this report. Below, the population that the Boston public schools currently serves – and how it compares to the public school population in other cities – is discussed, as well as the role that state law plays in empowering and restricting the city's ability to maintain and improve the quality of the public schools. Unlike other areas considered, such as taxation, Boston enjoys an unusual measure of authority when it comes to education. The city obtained the power to appoint a school board relatively recently, but it is already using it to pursue a number of innovative reforms. Nevertheless, the legal structure that the state has established for the local provision of education limits Boston in ways large and small. Admittedly, many aspects of the state legal structure also contribute to the success of the city's school system. Some expressly empower the city to make educational policy. Whatever its impact, however, the state's legal structure affects local educational policy in ways that Boston cannot control.

State law establishes the parameters for local educational policymaking in two important respects. The first concerns the role that state law plays in directly regulating the organizational structure of the city's school system, the amount of funding available to it, and the content of the instruction that it provides. The second concerns the role of state law in defining the variety of educational alternatives – ranging from private schools to suburban schools – that are available to families whose children might otherwise attend Boston public schools. The state plays similar roles in structuring educational policy in each of the cities in our study. Boston has been given greater authority over its schools than many of these cities. Yet some of them operate within a state law structure that permits them to exercise powers that Boston appears to lack. A key question, therefore, is whether the legal structure that the state of Massachusetts has established

for Boston's public schools should be altered to permit the city to exercise even greater local control.

Who Goes to the City's Schools

Founded in 1647, almost 200 years earlier than the other school systems examined, Boston's public school system is the oldest in the country,¹⁰⁸² and it has a very distinguished history. Boston's Public Latin School (1635) is the nation's oldest public school,¹⁰⁸³ the Mather School (1639)¹⁰⁸⁴ is the nation's oldest elementary school, and English High (1821) is the nation's oldest public high school.¹⁰⁸⁵ The Boston public school system continues to have many strengths. But it also has problems similar to those of the other school districts in our study. The dilemmas of education affecting urban schoolchildren across the nation are remarkably consistent.

Some of these dilemmas stem from the sheer size of public school systems in major cities. There are 135 public schools in Boston, providing education to roughly 60,000 students.¹⁰⁸⁶ This places Boston's school system right in the middle of the cities in our study. Both New York City and Chicago have a substantially larger student enrollment: New York City educates more than one million students in approximately 1,400 schools, while Chicago has almost 440,000 students in more than 600 schools. The other cities are comparable to Boston's in terms of their school population: San Francisco manages 114 schools with nearly 60,000 students, Denver 144 schools with nearly 72,000 students, Seattle about 130 schools with around 47,000 students, and Atlanta 102 schools with about 55,000 students.¹⁰⁸⁷ All of these school districts are coterminous with the city boundaries in which they are located. And all of them are significantly larger than any of the other municipal school districts within their regions.

If size poses a challenge that is unique to urban school systems, so, too, does the demographic makeup of the students they serve. In all seven cities, the composition of the student body in the public schools is significantly different from the composition of the population of the city as a whole. There are more poor students than poor city residents. Like the other cities, Boston must therefore educate a school population substantially different not just from its neighboring suburbs but also from city residents themselves. This fact, along with other characteristics of the student population, significantly affects the education system in all the cities examined.

Although socioeconomic disadvantages are hard to measure, one indicator is the percentage of schoolchildren who qualify for free or reduced-cost meals. Seventy-two percent of Boston's students qualify.¹⁰⁸⁸ (The percentage of the city's population below the poverty line is 19.5%.¹⁰⁸⁹) The other cities range from approximately 75% in Atlanta to 70% in New York City, 61% in Denver, and less than 40% in Seattle.¹⁰⁹⁰ Boston's schools are also significantly more populated by African Americans, Hispanics, and Asians than the city as a whole. Boston was 49.5% non-Hispanic white in 2000, but only 14.6% of Boston's public school students were non-Hispanic white.¹⁰⁹¹ Every other racial and ethnic category is over-represented in the Boston schools: African Americans constitute 48.8% of the school population and 25.3% of the city population, Hispanics constitute 26.9% of the school population and 14.4% of the city population, and Asians 8.9% of the school population and 7.6% of the city population.¹⁰⁹² (The Boston teaching staff is 61% non-Hispanic white and 26% African American.¹⁰⁹³) This majority-minority nature of the school population characterizes the other school districts as well. The distribution among the minority groups differs – San Francisco's school population is more than 40% Asian and 20% Hispanic, while Atlanta's is approximately 90% African-American – but the non-Hispanic white population is low in every city. Seattle has the largest non-Hispanic white population at 40%; no other city had a non-Hispanic white population in excess of 20%.

Other characteristics of the student population also influence the education offered by the seven cities. Boston's student population has significantly been affected by immigration: children learning English as a second language make up roughly 21% of the student population.¹⁰⁹⁴ Boston has fewer English learners than some cities: in San Francisco the figure exceeds 30%

and in Denver it is just over 25%.¹⁰⁹⁵ But Boston's percentage is higher than found in others: New York City (13.5%), Chicago (14%), and Seattle (11.7%) have smaller proportions of students with limited English proficiency, and Atlanta has the lowest percentage (2.5%).¹⁰⁹⁶ Another important statistic is the number of students considered to need special education. The comparison between cities on this point is difficult because different school districts have different criteria for defining who qualifies as a special education student. Using one widely relied upon federal measurement,¹⁰⁹⁷ special education students (as of 2001-02) make up 20.4% of the students enrolled in Boston's public schools.¹⁰⁹⁸ (An even greater percentage of Boston's teachers are designated special education teachers.) Boston's figure for students needing special education is unusually high. The percentage of students receiving special education in New York City public schools is 14.0%, in Chicago 12.3%, Denver 11.0%, San Francisco 11.9%, Atlanta 7.4%, and Seattle 12.6%.¹⁰⁹⁹ Assuming that there is not significant overlap between students for whom English is a second language and students in special education programs, more than 40% of the children in the Boston public schools students fall into one of these categories. No other city in our study must educate a comparable population. Students in these categories, for example, make up less than 30% of the population of the public schools in New York City.

The Governing Structure of Education in Boston

The demographics of the school population are important to consider when thinking about what a city like Boston must do to improve the quality of its schools. But in responding to the challenges and opportunities presented by the socioeconomic circumstances of the children who attend public schools, cities like Boston are not free to do as they please. The state powerfully influences the kinds of educational policies cities can pursue and the kinds of students who attend city schools.

First of all, the state establishes the basic governing structure for urban school systems. Massachusetts' role in defining the governing structure stems in large part from the fact that education, like the power to tax, is a responsibility placed upon the state by the state constitution. As the Supreme Judicial Court has said, "[i]t is clear that ... [the state constitution] obligates the Commonwealth to educate *all* its children."¹¹⁰⁰ Strictly speaking, then, education is not within the home rule powers of the city of Boston or any other municipality in Massachusetts. Other states take a similar approach. Even though local governments play a major role in running public schools in virtually every state, education is generally not considered a home rule power. In New York, state courts have upheld a law ordering New York City to appropriate a specified amount of its budget to education because the state constitution specifically exempted education from the scope of the legal grant of home rule.¹¹⁰¹ Some states do place limits on the scope of state intervention into local educational matters. A Colorado court has interpreted its state constitution to give local school districts responsibility for education that precludes some state efforts to compel local educational spending.¹¹⁰² Nevertheless, in the main, education is a state function as a matter of law in every state, even though it is widely understood to be a quintessentially local power.

Massachusetts exercises its authority not only by enacting general statutes that apply to school districts throughout the state but also by passing special laws that directly affect the legal power of the City of Boston to govern the public schools. A few of these special laws are petty but burdensome, disadvantaging Boston relative to other municipalities in the state. (Boston's school committee can only charge an advance fee of \$5 for evening schools, while all other municipalities can charge at least \$20.¹¹⁰³) But the more substantial way in which the state singles Boston out is through special acts – often passed in response to home rule petitions filed by the city itself – that establish the basic organizational structure of the city's school system. These special state laws are very important: they determine the extent to which the city government – rather than an independent governmental entity such as a school committee – controls the public schools. This amount of state control did not always exist. The founding of the first public school in the country, the Public Latin School, occurred in Boston almost one

hundred fifty years before the adoption of the Massachusetts constitution, and, until 1789, the selectmen of Boston conducted all school affairs – there was no formal school committee. Since that time, however, the state has repeatedly intervened through special acts, almost always in ways that have limited the authority of the city's legislative body over the public schools. In recent years, yet another shift has occurred, this time moving control of the schools from the school committee to the Mayor.

From an Elected Committee to Mayoral Appointment

In 1789 – before the incorporation of Boston as a city – the state legislature delegated to Boston the power to elect its first school committee “for the control of the schools.” The committee included the town's selectmen (after incorporation, it included the Mayor and the aldermen), along with members elected from the city's wards. The aldermen were eliminated from the school committee in 1835, but the Mayor and, for a time, the President of the Common Council, were members until 1885. In 1885, the school committee became an independent branch of government, consisting only of its own elected members. A separate institution, it was thought, could free education from the political give-and-take that dominated other areas of municipal governance. As one commentator explained, “[i]n most cities, education has been seen by the general public as an area off limits to politicians.”¹¹⁰⁴ At the same time, it was thought, an elected school committee would allow citizens to maintain a direct link to those who run the schools.

Over the course of its lifetime, the elected school committee experienced a number of major structural changes, always in the name of reform – growing to as many as 116 members and shrinking to as few as five.¹¹⁰⁵ These reforms were routinely made in the name of improving the education offered the children who attend Boston's public schools, but minority residents often criticized them for failing to ensure adequate representation.¹¹⁰⁶ In 1905, for example, the school committee was changed from a 24-member board to one that had five members. Like the 116-member committee in the late 1800s, the 24-member board was criticized for being inefficient. But the change itself was criticized as an effort to dilute Irish political power.¹¹⁰⁷

Whatever the intended purpose of the reforms, accusations of corruption and patronage continued to haunt the school committee. But the voting strength of the Irish continued to increase over Yankee incumbents, allowing them to control the school system to the exclusion of almost all other minority groups.¹¹⁰⁸ Many years later, another minority was at issue: the school committee's resistance to desegregation undermined its credibility, eventually leading to court ordered busing in the 1970s.¹¹⁰⁹ In 1981, a state special law permitted a local referendum, which approved replacing the five-member committee, elected at large, with a 13-member committee, nine of whom would be elected by district. This change, however, did not stem the tide of criticism of the elected school committee from the Mayor's office as well as from Boston residents.

The criticisms had several components. Establishing an independent school committee was originally conceived as a way of isolating the schools from politics. But the school committee had its own politics. Although the creation in 1905 of a five-member committee was touted as an effort to increase efficiency, it eventually came to be described as “little more than a political clubhouse, whose members exacted contributions to political ‘times’ from school staff, got jobs for friends and supporters and mucked about in the daily business of contracts and curriculum.”¹¹¹⁰ Aspiring politicians used the elected school committee to establish themselves before pursuing higher office.¹¹¹¹ School committee members channeled their efforts into generating a constituent base for reelection for higher office, and this focus made them concentrate more on short-term issues in order to appease their constituents than on pursuing broader educational policy issues.¹¹¹² The lack of focus on educational issues led to indecisiveness on important questions – notably, the failure to consolidate the system by closing schools. At the same time, political involvement in the schools was limited: in 1989, four of the nine district representatives ran unopposed, and voter turnout was low.¹¹¹³

There was also a serious problem of accountability. In a survey of twenty-five large urban school boards, the Boston Municipal Research Bureau found that budgetary accountability was ensured in other cities “by either giving the board the authority to tax or authorizing the mayor to appoint the board.”¹¹¹⁴ School boards with taxing authority were held directly accountable for their expenditures since they had to raise their own money; the fallout of increased expenditures fell directly on the taxing decisions of the board. Those boards appointed directly by the mayor ensured accountability since the mayor was responsible for the city’s overall budgetary revenue. Boston’s School Committee included neither one of these features. “The result,” the report concluded, “is the blurring of accountability with no one official or board in charge.”¹¹¹⁵

The elected school committee’s overspending was also well documented. From 1978 to 1991, the elected committee¹¹¹⁶ overspent its allocation eleven out of fourteen times, sometimes in excess of \$30 million dollars.¹¹¹⁷ The school committee’s independence as an appropriating body was limited by its need to negotiate the school budget with the Mayor and the City Council on a yearly basis. But if the Mayor did not approve the budget, the school committee could question the Mayor’s dedication to education until he did.¹¹¹⁸ As one commentator observed, the budget process lead to “fingerpointing and absolute paralysis. The Mayor can say that he had nothing to do with electing these characters, and the School Committee can say that they have no power to raise money on their own.”¹¹¹⁹ Given the importance of education in the contemporary political and social environment, one of the goals of moving to an appointed board was to give the Mayor the incentive and the opportunity to become involved in education.

In 1989, in a non-binding referendum, Boston residents narrowly voted in favor of an appointed committee. In 1991 the state legislature approved Boston’s home rule petition authorizing the establishment of the current, seven-member, Mayoral-appointed school committee.¹¹²⁰ The home rule petition required another referendum in 1996.¹¹²¹ The Secretary of State was obligated to place a binding referendum on the ballot asking whether the appointed board should be retained or whether the committee should revert back to the 13-member elected format. Other than these two choices, no other plan could be considered without another home rule petition.¹¹²² Since the non-binding referendum had produced such divisive results, it is not surprising that, at first, some polls reported that the viability of the appointed structure was in jeopardy.¹¹²³ Some of the strongest objections to the appointed board came from minority leaders who argued that it deprived minority voters of a “direct say in the selection of policy makers” for a system with a majority-minority enrollment.¹¹²⁴ Another line of attack focused on the fear that the appointed Committee would further concentrate power in the Mayor.¹¹²⁵ Ultimately, notwithstanding these criticisms, the referendum favored preserving the appointed committee.

The Current Governing Structure in Boston

The current form of the school committee is defined by the charter amendment passed in 1991.¹¹²⁶ This is the structure that the city sought and that city residents approved. Still, it should be remembered that the charter amendment was authorized by a special state legislative act. The city probably cannot alter its terms, therefore, without returning to the state legislature for permission to do so.

The school committee consists of seven members appointed by the Mayor to four-year terms. The Mayor selects the seven members from a list of nominees given him by a 13-member nominating panel. Between three to five individuals are nominated for every committee position; the number of nominations for a given years depends on the number of terms that are set to expire.¹¹²⁷ The composition of the nominating panel is defined by an elaborate scheme, which aims to include parents, teachers, administrators, the business community, and higher education – all selected by a related organization.¹¹²⁸ The panel is charged to “strive to nominate individuals who reflect the ethnic, racial and socioeconomic diversity of the city of Boston and its

public school population.”¹¹²⁹ Despite the complexity of this nominating system for school committee members, the Mayor has more influence on the operations of Boston’s schools than at any time in history.

The day-to-day operations of Boston’s public schools are in the hands not of the school committee but the superintendent of schools, whom the school committee appoints. The first superintendent was appointed in Boston as early as 1851, but for more than a century he held little executive power.¹¹³⁰ In 1978, legislation established the superintendent as the chief executive officer of the School Department.¹¹³¹ In 1986, the superintendent was given responsibility for submitting an annual budget to the school committee.¹¹³² The most recent definition of the superintendent’s powers was initiated by a home rule petition “endorsed by the School Committee . . . passed by the City Council . . . and signed by the Mayor.”¹¹³³ The resulting legislation – Chapter 613 of the Acts of 1987 – reinforced the superintendent’s role and added more executive responsibilities to his position.

Chapter 613 allocates to the superintendent many powers that once belonged to the school committee. According to Chapter 613, “[t]he superintendent of schools shall be the executive officer of the school committee in all matters pertaining to powers and duties of the school committee.”¹¹³⁴ The superintendent has “the exclusive authority to make appointments and promotions for all school department positions.”¹¹³⁵ He has the power to “assign, reassign, suspend, lay-off, demote, remove and dismiss any school department employees” without school committee control.¹¹³⁶ He possesses the sole power to enter into, and amend, contracts on behalf of the school committee.¹¹³⁷ In fact, the school committee cannot take any action unless it first receives a recommendation from the superintendent, one that includes an estimate of the costs and, where possible, the revenue sources that can cover the costs.¹¹³⁸ The allocation of power away from the school committee, as a multi-member body, to the superintendent mirrors the institutional developments that strengthened the power of the Mayor of Boston over that of the City Council. Indeed, the superintendent serves in the Mayor’s cabinet. Nevertheless, the school committee continues to appoint the superintendent and to set his or her salary, and it retains the power to remove its appointee for cause.¹¹³⁹ The school committee also remains empowered to make broad policy decisions regarding the programs and operations of the Boston schools.¹¹⁴⁰

The 1987 amendments were, in part, a reaction to corruption and patronage problems that consistently plagued the school committee. In that respect, they were successful. As the *Boston Globe* noted, “[s]ince the committee ceded its personnel powers . . . the patronage problems have abated. And no School Committee member has been accused of corruption in a decade.”¹¹⁴¹ Another major impetus centered on the school committee’s perceived budgetary irresponsibility. As noted above, the superintendent is responsible for submitting the school budget to the school committee for approval.¹¹⁴² For the most part, this is just a recommendation. The school committee continues to hold the authority to approve or reject the budget and to reduce or increase any item in it.¹¹⁴³ Commentators on this process have charged that the committee routinely ignores the budgetary recommendations of the superintendent – quickly adding back programs, leading to overspending.¹¹⁴⁴ But the budget allocation process does not end with the school committee. After acquiring its approval, the superintendent also has to get the approval of the Mayor. This division of budgetary powers between the Mayor and the school committee has led to tensions. But it is also one of the primary reasons why the school committee was moved from an elected body to an appointed body in the first place – to create a convergence of interests between the Mayor and the school committee that he appoints.

The Governing Structure in Other Cities

The extent of integration of Boston’s school committee with the city government is unusual. With the exception of New York City, no city in our study comes close to Boston’s degree of consolidation. Boston’s school committee is not only appointed by the Mayor but is fiscally dependent on the city for budgetary appropriations. This structure makes Boston more responsible for the funding and educational decisions taken by its school committee than is true

for other cities. In Boston, the school system is inseparable from the city government, and in particular the city's chief executive.

According to a survey conducted by the Boston Municipal Research Bureau, only 13% of the 30 urban school districts it examined were controlled by the mayor. Sixty percent used the opposite system: an elected committee that retained full fiscal control without any substantial connection to the city.¹¹⁴⁵ Four of the seven cities in this study elect their school board members¹¹⁴⁶; only New York City, Chicago, and Boston select them through mayoral appointments.¹¹⁴⁷ And only Boston and New York City have school boards that are fiscally dependent on the city.¹¹⁴⁸ The others have an elected school committee that runs the schools – with the assistance of a superintendent it appoints – and that is authorized to levy taxes to fund them.

In San Francisco, the San Francisco Unified School District “is legally and politically independent of the city's municipal government.”¹¹⁴⁹ State law requires this separation. The school board is elected by local constituents and operates separately from the municipal government altogether.¹¹⁵⁰ Independence from city government, however, does not amount to autonomy from state government. A permissive state education code – adopted by constitutional amendment in 1972 – seems to grant local school districts the authority to adopt any policy not prohibited by state law.¹¹⁵¹ But, like other school districts in the state, the San Francisco Unified School District is dependent on the state. The Governor proposes the school budget for the entire state, and the state legislature approves it.¹¹⁵² The state legislature also earmarks education funding for specific programs.¹¹⁵³ And, along with the department of education, the state legislature controls the ways in which all California schools are run.

Since the budget is so tightly controlled at the state level, localities in California have little ability to advance some programs at the expense of others, or even to allocate more money into or out of educational funding depending on the priorities of the city. San Francisco's city government has tried to influence the school district by giving it money from its own general fund. This is one of the city government's limited ways of influencing the schools, but it is hardly significant: the amount of money transferred by the city government makes up less than 1% of school district's total budget.¹¹⁵⁴ City voters adopted Proposition J, a 1991 local referendum that amended the city charter to create a budget floor for, and earmark revenues to, children's services.¹¹⁵⁵ Only a portion of the funds earmarked by Proposition J go directly to education. The rest of the revenue goes to services that assist children more generally.¹¹⁵⁶

Seattle's school district, like San Francisco's, is independent of the city government and is similarly controlled by the state. By state law, a school board, comprised of seven members elected from different parts of the city, runs the district and appoints the system's superintendent.¹¹⁵⁷ Most school funds come from the state or federal government; less than one third comes from local property taxes.¹¹⁵⁸ Equally significantly, the local property tax levy for schools is established by the school district rather than the city, and must be approved by the local voters.¹¹⁵⁹ This structure ensures the separation of control between the city government and the school committee. As one school district employee put it, “The city has very little to do with us. . . .Funding usually means control.”¹¹⁶⁰ As in California, however, the school district's independence from the city does not mean that it is autonomous. The state exercises extensive control, leaving the school committee with a reduced policymaking function.¹¹⁶¹

Concern about the limited role this educational structure gives to Seattle's city government led to the city's adoption of the Families and Education Levy in 1990.¹¹⁶² That ordinance authorizes a special city property tax “grounded in the notion that school success for all students does not lie solely with the Seattle Public Schools – it is the responsibility of all of Seattle's citizens.”¹¹⁶³ The city has used this authority to raise nearly \$140 million over the last 15 years.¹¹⁶⁴ Funds raised may be used for specific projects – not all of which go to services administered by the public schools system.¹¹⁶⁵ A seven-member oversight committee (comprised of three citizens, the mayor, the city council president, the district superintendent, and a school

board member) controls the distribution of the funds.¹¹⁶⁶ The mayor proposes the amount of the levy at seven-year intervals, but voters must approve the tax by referendum.¹¹⁶⁷

Chicago exercises more control over education than Seattle but not as much as Boston. After going through several rounds of reforms in the 1980s and 1990s,¹¹⁶⁸ the state legislature determined that the Chicago public school system was to be run by a seven member board appointed by the Mayor without the consent or approval of the City Council.¹¹⁶⁹ Indeed, a nominating panel, similar to the one that exists in Boston, was abolished in order to give the Mayor unfettered control over his appointments.¹¹⁷⁰ Once appointed, however, state legislation makes the school board autonomous within its sphere of governance, especially regarding budgetary matters. The school budget is separate from the city's budget, and the board itself decides upon the collection and allocation of its funds.¹¹⁷¹ Final approval for the school's budget, like in California, comes not from the city but from the state – in this case, the Illinois Board of Education. Moreover, although Chicago established local school councils to promote local involvement in education, their powers were reduced in 1995 when the state consolidated the powers of the school committee¹¹⁷² and provided for mayoral control over appointments.¹¹⁷³ The school board, not the mayor, chooses the superintendent.

Only the city government of New York plays a role in running the public schools akin to Boston's. State law contains a number of provisions regarding the organization of the New York City public school system, many of which appear to be responsive to the requests of the city. The most recent significant amendments gave the Mayor the power to displace the board of education and effectively run New York City's public schools. Until the mid-1990s, state law promoted decentralization to community school boards within New York City.¹¹⁷⁴ But Mayors Giuliani and Bloomberg have succeeded in pushing the legislature to shift power from the community school districts to the city's Schools Chancellor.¹¹⁷⁵ Legislative changes have reduced the role of the city board of education and made the Chancellor essentially an employee of the Mayor.¹¹⁷⁶ With greater power, Mayor Bloomberg and the new Chancellor have made a number of controversial changes. These include adopting a uniform reading and math curriculum for all but the top 200 high performing schools, announcing the end of "social promotions" for third graders who perform poorly on standardized tests, breaking up a number of large, struggling high schools into smaller ones, revamping the high school admissions process, and shaking up the city schools' bureaucracy.¹¹⁷⁷ The Mayor's ability to exercise this kind of control is bolstered by the fact that New York City, like Boston, funds its school through its general local property tax. The city contributes almost half of the school system's funding, with the rest of coming from the state and federal government.¹¹⁷⁸ Thus the city government controls essentially all local funding of the New York City schools.

The State's Role in School Finance and Classroom Instruction

Even though states vary in the power they permit city governments to exercise over their public school systems, all of them retain extensive supervisory authority. There is nothing inevitable about this extensive state authority. California has considered recent initiatives – both statutory and constitutional – that would establish "home rule" school districts. Were this legislation to pass, school districts like San Francisco's would remain independent of the city government but would enjoy a degree of freedom from state control that Boston's school district does not have. They would be empowered to raise property taxes outside the strictures of state tax caps like Proposition 13 and would be exempt from a host of state education mandates. As of yet, no state has moved toward a system that would both enhance city governmental power over the public schools *and* reduce state control. For that reason, none of the cities in our study – whether they have independent school boards or a more consolidated system like Boston's – have anything like complete control over their schools.

In Massachusetts, the first, and perhaps most important, of the state's roles derives from its control over school finance. By virtue of state law, Boston is dependent on state aid (and on its limited property tax revenues) to fund its school system. The other major limit derives from the

Education Reform Act of 1993: the state Department of Education and the state Board of Education establish curriculum and testing requirements for the Boston public schools.¹¹⁷⁹

School Finance

The traditional funding source for American public schools has been the local property tax. That is particularly true in Boston, where state law makes the city unusually dependent on the property tax for all city services, including education.¹¹⁸⁰ Even in cities with greater power to diversify their tax base, such as Chicago,¹¹⁸¹ the property tax is still the dominant local revenue source when it comes to education.¹¹⁸² That is because the taxing power for schools is conferred on an independent school board that lacks the broader home rule taxing power that the state has given the city itself. Property taxes are thus often the primary revenue source available to school districts.

1. School Finance Litigation: An Introduction

This reliance on the property tax to fund education has been problematic. Across the country, there has long been a mismatch between the local property tax base and the needs of local schools. As a result, a wave of school finance litigation has swept the nation in the last thirty years. This litigation has directly affected local school funding in Boston, New York City, San Francisco, and Seattle. Successful state constitutional challenges in Massachusetts, New York,¹¹⁸³ California,¹¹⁸⁴ and Washington¹¹⁸⁵ have resulted in legislation that has significantly altered the financing system in each state. Even in states where similar litigation has not been brought or did not succeed, the influence of the lawsuits in other states can be seen. In Georgia¹¹⁸⁶ and Illinois,¹¹⁸⁷ the state legislatures reformed school financing partly in reaction to the success of litigation in other states. As a result, Atlanta and Chicago operate within fiscal structures for school funding similar to those that apply in the other cities in our study. Only Denver, among our cities, operates in a state legal structure that does not seek to address the inequalities that reliance on a local tax base tends to promote.¹¹⁸⁸

The first round of school finance legal challenges relied on state and federal constitutional guarantees of equal protection of the laws: the state, it was argued, could not fund schools in a way that created fundamentally unequal educational opportunities. This was the theory embraced by the California Supreme Court in *Serrano v. Priest*,¹¹⁸⁹ often considered the first modern-day educational finance challenge. This theory is still embraced in some states, but its rejection by the Supreme Court of the United States in 1973 in *San Antonio Independent School District v. Rodriguez*¹¹⁹⁰ spawned a second wave of litigation. This time, the argument was that state courts should invalidate existing school finance systems because they violated specific educational mandates found in state constitutions, mandates that do not always refer to concepts like equalization.

For example, the battle over educational funding in New York, which has centered on the definition of what constitutes a “sound basic education,” has struggled to define what that phrase requires. Recently, an intermediate appellate court decided that a “sound basic education” required nothing more than an eighth grade education – concluding that the skills acquired by that level of schooling were sufficient for a resident to operate as a citizen of the state.¹¹⁹¹ The state’s highest court, the New York Court of Appeals, rejected this interpretation, ruling that the state had to make a determination regarding the amount of spending necessary to provide a sound and basic education.¹¹⁹² As the New York litigation illustrates, courts can use specific state mandates to require a basic minimum floor for educational quality without defining what that floor is.

This kind of judicial decision making comports well with the historic use of foundational budgets as the marker of state responsibility. For years states have set general guidelines about how much a school should spend at a minimum, providing aid to supplement local school budgets. The determination of what that foundation budget should be is often a reflection of political power and the extent to which the state is willing to allocate funds to cities rather than a

statement of what a basic education requires. Some foundation budgets have a very tenuous connection to educational realities. In New York state, the average expenditure for students is approximately \$11,000 per student, with the bottom 10% spending almost \$9,000 per student. Yet the foundation amount set by the state is \$4,000 per student.¹¹⁹³ In Seattle, which relies on the state for a substantial portion of its educational funding, the city must lobby the state for alterations in the way it determines what is necessary for a “basic education” to get funding for teaching tools such as computers.¹¹⁹⁴ In principle, Seattle could fund these kinds of expenses with local receipts. But since the state has taken over most of the funding responsibility without giving the city more revenue-raising power, appealing to the state to redefine its responsibilities is likely to be more productive than trying to raise funds locally.¹¹⁹⁵ In Atlanta, state funding is governed by the 1985 Quality Basic Education Act,¹¹⁹⁶ which establishes a foundational funding formula. The system, however, has never been fully funded.¹¹⁹⁷

This emphasis on state constitutional minimum requirements has resulted in remedies that have increased state control over education, although it has also increased external funding for urban school systems. The state might have restructured the financing scheme for public education while preserving local independence. But the rhetoric of the new line of cases emphasizes the role of the state. Almost all the cases have increased state supervision over educational funding, with local revenues being replaced by state-determined aid.

2. Massachusetts School Finance Reform

This is what happened in Massachusetts. The origins of school finance reform in Massachusetts can be traced back to 1978 when the first case challenging the constitutionality of the state’s funding scheme, *Webby v. Dukakis*, was filed.¹¹⁹⁸ In reaction to the lawsuit, as well as pressure from a variety of constituents including important components of the business community, the state legislature enacted a measure that provided school aid to municipalities, and the lawsuit was temporarily suspended.¹¹⁹⁹ But the inequities continued to persist, and the same lawsuit was again put into motion in 1983, only to be withdrawn once again when the legislature passed another statute designed to improve schools in the Commonwealth.¹²⁰⁰ By 1990, still dissatisfied with educational deficiencies in Massachusetts, *Webby* was filed yet again, this time to be consolidated with several other cases into *McDuffy v. Robertson*.¹²⁰¹

McDuffy, decided in 1993 by the Supreme Judicial Court, is the seminal decision dealing with education in Massachusetts. It held, among other things, that the Commonwealth had a duty imposed by the state constitution to ensure that every student receive an “adequate” education.¹²⁰² Noting the deficiencies in urban districts in particular, and the glaring discrepancies between districts, the court held that children in less affluent communities “are not receiving their constitutional entitlement of education as intended and mandated by the framers of the Constitution.”¹²⁰³ The court did not prescribe a remedy for this constitutional violation. Rather, it deferred to the legislature to fashion a solution that would meet the state’s constitutional burden.¹²⁰⁴ (No Boston student was a plaintiff in this litigation, nor was the Boston educational system a focus of the parties or the court.)

The same month that *McDuffy* was decided, and in response to the mandate that the court imposed, the state legislature passed the Education Reform Act of 1993. Its scope was significantly more sweeping and comprehensive than previous educational reform efforts – affecting virtually every aspect of education from school hours to graduation requirements. One of its most fundamental elements was its change in state aid for educational funding (discussed above) provided by Chapter 70. State aid had been provided before the Education Reform Act, but it was mostly discretionary, and efforts to balance the state budget in the late 1980s resulted in significant reductions in educational funding to Boston and other communities.¹²⁰⁵ The Education Reform Act established a foundation budget in an attempt to equalize spending across Massachusetts school districts regardless of the wealth of the community.¹²⁰⁶ Through a complex formula,¹²⁰⁷ the foundation budget set a minimum funding level for every city and town. The state also committed itself to a seven-year increase in educational funding, an increase that raised total

state educational aid from \$1.3 billion in 1993 to nearly \$2.8 billion in 2000.¹²⁰⁸ This mandated increase expired in 2000, and contributions after that time have been more subject to state discretion.

State aid has been very important to school committees in Massachusetts, including Boston's. All localities now fund schools at the foundation budget, primarily because of the increased state aid. Although state aid to Boston increased substantially over the years because of the Education Reform Act, overall state aid has more recently grown at a substantially lower rate. When the 7-year increase period expired, Chapter 70 funding, like additional assistance, began to plateau. Other grants affecting education have also been cut. The city received \$197 million in state aid in 2001, \$205.6 million in 2002 and 2003, \$200.5 million in 2004 and 2005, and is due to receive \$203.6 million in 2006.¹²⁰⁹ The state's budget in 2004 showed an increase in Boston's Chapter 70 receipts, but overall educational aid reflected "the elimination of several major State education grants, including funds for class size reduction, full-day kindergarten, student transportation, and early literacy education," and changes in reimbursement of charter school tuitions.¹²¹⁰

The current reliance on a state-supported foundation budget has thus not saved Boston from major cuts in its education programs in recent years – undermining much of the reform initiated in the 1990s. The Boston school committee asserted that it faced a severe budgetary shortfall in the 2003-2004 school year, with a gap of more than \$114 million between revenues and expenditures in a total budget of approximately \$620 million.¹²¹¹ Although Mayor Menino allocated an additional \$33.5 million from Boston's reserve fund for one-time expenses, the school district was still forced to cut \$81 million.¹²¹² Doing so involved "the closing of five schools, increased class size, a 10% reduction for all schools, a more than 20% reduction for all central offices, and a salary freeze for all employees,"¹²¹³ including eliminating "more than 780 positions, including 400 jobs held by teachers."¹²¹⁴ Although the 2004-2005 budget showed a 1% increase from the previous year and required no drastic cuts,¹²¹⁵ teachers still needed to be eliminated in Boston's schools. One school committee member attempted to place the budget realities into a specific, understandable context: "[t]he bottom line is that at Madison Park [High School], there are 100 more students and two less teachers."¹²¹⁶

The controversy over educational funding thus continues. Even though discrepancies between funding in different communities have shrunk, there remain substantial differences in funding levels. Some school districts lag far behind in terms of teachers, class sizes, and facilities. As a result, the plaintiffs of the original *McDuffy* decision filed another lawsuit in 1999, challenging the state for failure to comply with its constitutional mandate. In April 2004, in *Hancock v. Driscoll*,¹²¹⁷ Superior Court Judge Margot Botsford issued a sweeping opinion holding that the state's education finance system was still unconstitutional notwithstanding the improvements made by the Education Reform Act.¹²¹⁸ The Supreme Judicial Court, however, reversed that decision, concluding that the state legislature was making sufficient progress to be in compliance with *McDuffy*.¹²¹⁹ (Again, it must be noted that no student from Boston is a plaintiff in the litigation, and the focus of the litigation is not on Boston's educational system.)

The litigation has ended, at least for the moment, but it is instructive to note that Judge Botsford's *Hancock* opinion found that, even though the focus districts – Brockton, Lowell, Springfield, and Winchendon – were at the state-mandated foundation budget, their education level was constitutionally inadequate. The state-wide average, the court found, is 117% of the foundation budget, while districts performing well are at 130%, and districts like Brookline and Wellesley are at 161%, of the foundation budget.¹²²⁰ Boston is just about at the state-wide average of 117% of its foundation budget – above the level of the districts at issue in the case but well below the best performing districts.¹²²¹

Curriculum Frameworks and MCAS requirements.

Educational funding was not the only issue that the legislature addressed in the Education Reform Act. The act also carved out a more prominent role for the state in the field of education. Under the act, the Department and Board of Education are required to establish curriculum frameworks in the core subjects of mathematics, science and technology, history and social sciences, English, foreign languages, health, and the arts.¹²²² They are authorized to provide standards for subjects ranging from nutrition to the Federalist Papers and from computer skills to AIDS.¹²²³ (The legislature itself has mandated education on subjects ranging from the Bill of Rights to physical education.¹²²⁴) They set teacher certification standards, provide for the length of the school day and school year, and have the power to declare a school district “under-performing” and, if so, intervene in its operation.¹²²⁵ (In 2002, the No Child Left Behind Act¹²²⁶ increased federal intervention into school policy as well.)

Intense debate has surrounded the drafting of the mandated curriculum frameworks. The first set of curriculum frameworks, which accounted for about three-fourths of the subject areas, were not adopted until 1996, almost three years after the statute was passed; the most recent framework was adopted in August, 2003.¹²²⁷ All of the frameworks have been revised, some several times. In their current form, they establish a detailed conception of the substance of education in schools throughout Massachusetts, including in Boston. The English language framework, for example, is composed of four strands: language (consisting of six standards), reading and literature (twelve standards), composition (seven standards), and media (two standards).¹²²⁸ Everyone who testified in the *Hancock* litigation praised the quality of the curriculum frameworks. The problem, Judge Botsford found, was that the foundation formula did not take into account the kind of quality education required to use the frameworks effectively:

[T]he current curriculum frameworks are recognized as defining truly comprehensive educational programs in each of the subject areas, and they call for a wide variety of resources—materials, supplies, equipment—in order effectively to implement the experiential, problem-solving type of learning that they seek to provide. It took the department and the board many years and many tries to develop these curriculum frameworks It is not reasonable to assume that the foundation budget formula, developed between 1991 and 1993, did or could have contemplated the costs associated with implementing these frameworks [T]he original foundation budget formula . . . was made in a context where no set of educational goals existed. . . . [I]t is necessary to review the foundation budget formula to make sure it is aligned and constructed in a way that will allow school districts to implement the goals the Commonwealth has set.¹²²⁹

The Department of Education spent appreciably less time deciding on the kind of testing mechanism to use to assess whether students have learned what they were supposed to learn. The Education Reform Act provided that “the system shall employ a variety of assessment instruments” in order to test students on their knowledge of basic skills.¹²³⁰ The act identified the tests as a tool to compare municipal education quality, help formulate better educational programs, and “inform teachers, parents, administrators and the students themselves as to individual academic performance.”¹²³¹ Even though the curriculum frameworks were still in flux, the Department of Education adopted one method of assessment in 1998: a standardized test called the Massachusetts Comprehensive Assessment System (MCAS). The test was to be taken at 4th, 8th, and 10th grades, and would focus on English and math.¹²³² The aim was not only to assess the capabilities of the students but to provide useful feedback to the schools and the state so that remedial measures could be taken to bring all schools up to par. The Department also formally requested that local school districts adopt the MCAS as an official and uniform graduation requirement.

The MCAS initially was very controversial. As a Boston Foundation report put it:

MCAS results have been highly correlated with family income: low-income communities tend to fare worse, high income communities tend to fare better – prompting controversy over the fairness and accuracy of the test. An August 2002 study . . . ranked schools by MCAS scores and demographic characteristics, including property values and the number of children receiving free or reduced price lunch. The study shows that Boston . . . is outperforming predicted test scores given the socioeconomic composition and past performance of its public school students.¹²³³

The performance by Boston students referred to was that 57.6% of those who earned Competence Determination passed both English and math (compared to 81% statewide), while 27.7% passed neither test.¹²³⁴ 50-60% of Boston students with disabilities or lacking English proficiency failed the test.¹²³⁵ (In Massachusetts as a whole, almost one-fifth of seniors had not passed MCAS in December 2002.)¹²³⁶

These kinds of results have led to changes in the testing scheme. The test has been reconfigured in many ways. The state changed the fourth-grade MCAS exam from 13 hours in 1998, to eight hours in 1999, to six hours in 2000. When the test was finally administered to sophomores in 2001, the year it would become a graduation requirement for the class of 2003, the test had been changed and so had score cut-offs. The pass rate was substantially higher. Increased school awareness of the requirement, along with changes in teaching strategy to focus on the test, no doubt played a part in the increased scores. Indeed, Massachusetts recently ranked first in the nation in 4th and 8th grade student achievement across most reading, math, and science categories.

Massachusetts's interventions concerning testing and curricular design are by no means unusual. Other cities in our study must comply with state established testing regimes that, although they differ in detail from Massachusetts, reflect a basic assumption of state supervisory authority. Necessarily, these testing regimes influence local school curricular choices; indeed, they are often expressly designed to ensure compliance. The Georgia Department of Education explains, for example, that its extensive statewide testing program is designed to "measure the level of student achievement of the Quality Core Curriculum (QCC) standards . . . [and] to identify students failing to achieve mastery of content"¹²³⁷ Still, states often describe these interventions as efforts to assist school systems, as the Georgia Department of Education puts it, "in identifying strengths and weaknesses in order to establish priorities in planning educational programs."¹²³⁸ It is important, therefore, not to assume that state intervention is necessarily antagonistic to the interests of the local school system. The Chicago Board of Education has incorporated the state testing scheme into its own performance based management regime. For high schools, results on the statewide tests are combined with dropout rates and estimates of the percentage of ninth graders expected to graduate on schedule to evaluate each school in the system.¹²³⁹ Schools in need are then classified as "Probation" or "Challenge" schools.¹²⁴⁰

The State's Role in Establishing Educational Alternatives

State directives regarding organizational structure, fiscal matters, and instructional content are not the only outside forces that affect Boston's management of its school system. A second category of state constraints requires Boston to take into account – and compete with – a number of alternatives to its own public school system. Four alternatives will be considered here: private schools, charter schools, suburban schools, and the Metropolitan Council for Educational Opportunity program (METCO).

It may seem odd to think of the state as playing a key role in making such alternatives available. But the state's influence is significant. Sometimes the state directly creates these alternatives, such as when it enacts state legislation authorizing the creation of charter schools

and establishing mechanisms for certifying them independent of local authorities. At other times, the state plays a less visible but no less important role. Consider the suburban school districts that provide an alternative educational option for potential city residents. The distinct populations served by urban and suburban school districts within the Boston metropolitan area constrain Boston's ability to become a regional city – one of the four futures set forth at the outset of this study. It is important to recognize that the way that school district lines are drawn to track municipal boundary lines – thereby ensuring urban/suburban distinctions in schooling – is an artifact of state law rather than local choice.

As is the case with the state's educational standards, it would be a mistake to assume that the state's facilitation of alternative schooling options necessarily operates to disadvantage Boston. Alternatives available to Boston residents – such as charter schools, private schools, and METCO – can play a positive role in inducing families with children to stay in Boston. In addition, these alternatives – whether they are within the city or in nearby suburbs – can generate useful competitive pressure on the city schools to improve. Nevertheless, they can also generate costs for Boston's public schools: they can drain resources away from the traditional public school system. The way that the state establishes alternatives, therefore, is of direct relevance to a city's ability to ensure that its residents receive quality education.

In considering the educational alternatives that the state promotes, it is also important to keep in mind how the state's school finance structure shapes the city's reaction to them. The restrictions placed on local revenue collection determine the nature of the school budgeting process. Indeed, they produce a push/pull effect that leads school officials both to support and reject educational alternatives. State aid for education is dependent on enrollment, and this dependence makes it hard for the city to deal with significant, even if predictable, fluctuations in its public school population. Widespread withdrawal creates a hole in the budget that is difficult to patch, while sudden growth overburdens facilities more than the extra money generated can accommodate. One example of this push/pull effect is the impact on the Boston public school system of charter schools and parochial schools. Boston officials have been vocal in their disapproval of charter schools not only because they have no control of how many charter schools are created but also because every student who enrolls in a charter school takes money away from the district schools. Yet, at the same time, the financial troubles of Boston's Archdiocese have generated fears over the closing of parochial schools in the city. Closing parochial schools would have a significant impact on Boston's school system if it produced a large influx of students.

This push/pull dynamic ultimately undermines the city's ability to consider the issue of education from a broader perspective. Of course everyone has the interest of the students in mind. Yet, of necessity, the debates revolve around budgeting and appropriations. A change in enrollment does not change Boston's tax base but it affects the educational aid on which the operation of the school system depends. Moreover, charter schools and private schools can limit their enrollment, or even close down, but the Boston public school system can do neither. School officials are understandably concerned that they will lose money every time a student leaves for a charter school. City residents are understandably concerned their children are left in an inadequately funded public school system.

Private Schools

Approximately 21,000 of Boston's 80,000 school age children do not attend Boston's public schools. Of these, almost 13,500 are in private schools, 4,000 in charter schools, and 3,000 in METCO schools.¹²⁴¹ Parochial schools make up the vast majority of students in private schools, with approximately 11,000 attending.¹²⁴² That puts Boston at the high end among our cities. Only Seattle has a greater proportion – 31% – of its students in private schools.¹²⁴³ New York,¹²⁴⁴ Denver,¹²⁴⁵ and Chicago¹²⁴⁶ have less than 20% of their children in private schools, and the figure in San Francisco is less than one-quarter.¹²⁴⁷

The demographics of Boston's private school students are different from those of the private schools in the other cities in our study. More than half of the non-Hispanic white students who live in Boston attend private schools – a higher percentage than almost anywhere in the country.¹²⁴⁸ Whereas Boston's public schools are 14% non-Hispanic white, the private school population is approximately 45% non-Hispanic white, much closer to the citywide average (the city itself is 49.5% non-Hispanic white¹²⁴⁹). The percentage of African American students in private schools, at approximately 28%, is also closer to the citywide population – considerably smaller than the public school figure of 48.5%. Finally, the private school population is less than 10% Hispanic (Boston's public schools are almost 28% Hispanic) and Asians make up 3% of private schools (and 9% of public school students).

These figures reflect a growing trend towards diversity in Boston's private schools. During the past two decades, the African American, Hispanic, and Asian private school population has more than tripled.¹²⁵⁰ Moreover, Boston's private schools – especially its parochial schools – serve a large number of disadvantaged children through scholarships and money raised through local parishes. Even so, for the most part, the minorities that enroll in private schools are from middle-class families, leaving most poor schoolchildren and the “the large wave of immigrants who have settled here in recent years” to attend the public schools.¹²⁵¹

The surge of non-Hispanic white students into private schools is often attributed to the federal court decision to order the desegregation of the Boston public schools.¹²⁵² Whether because of racial bias or parental frustration over sending their children to schools outside their neighborhoods, the non-Hispanic white population of Boston's public schools dropped from 64% in 1970 before the desegregation order to the current 14% figure.¹²⁵³ Many African American parents also began sending their children to local private schools to avoid having them bused across the city. Whatever the cause of the current demographics, private schools are controversial in Boston because they are often perceived as offering a better education and offering it only to the select few who can afford it. In other cities, comparisons between private schools and public schools do not always conform to this standard belief. In New York City, recent studies have shown that public schools offer more advanced placement courses than private schools generally (88% of public schools compared to 58% of private schools).¹²⁵⁴

Boston has made significant efforts to induce parents to enroll their children in public rather than private schools. But it is worth noting that private schools save cities a substantial amount of money. As one article pointed out: “[w]ith a per pupil cost of \$7,428, private schools in New York City save the city \$2.2 billion; in Chicago \$924 million (1990 data) . . . and in Boston nearly \$80 million.”¹²⁵⁵ Whether or not this savings is worth the cost of losing students, it should be noted that parochial schools in Boston are themselves losing students while parochial schools in the suburbs are growing.¹²⁵⁶ Moreover, it's not just suburban parochial schools that are putting pressure on enrollment in Boston's parochial schools: urban parochial schools, like traditional public schools, are in competition with charter schools which offer free, publicly supported education.

In Massachusetts, private schools are not under the supervision of local school committees. But they must receive school committee approval to operate.¹²⁵⁷ (As stated below, the approval process for charter schools is quite different: while the state has delegated approval of private schools to local school committees, it grants charters to charter schools itself.) This school committee approval requirement for private schools is designed to ensure that they provide instruction at least equivalent to the public schools and that they are in full compliance with Massachusetts' compulsory education laws. This legal structure has withstood court challenges. One challenge was that it was an improper delegation by the state legislature;¹²⁵⁸ another was that it infringed upon the religious freedom of parents who wanted to educate their children in a parochial school.¹²⁵⁹ In upholding the ability of the legislature to delegate this approval power to local school committees, the Supreme Judicial Court took a considerably more relaxed approach than it did when considering the delegation of taxing authority.

Notwithstanding this local government approval process, the court has made clear that no public money can be spent to support private schools in Massachusetts.¹²⁶⁰ Massachusetts has therefore not attempted – and, given current interpretations of the state constitution, apparently could not attempt – direct subsidization of private schools. Illinois, by contrast, offers a tax break for private education expenditures of up to \$500.¹²⁶¹ The legislation authorizing this benefit has been subjected to judicial challenge, but the challenge has been unsuccessful.¹²⁶² In Colorado, state support for private schools lies at the center of a struggle that directly involves the city of Denver. In 2004, the Colorado Supreme Court struck down a statewide voucher program.¹²⁶³ The measure required school districts to participate if they had at least eight low performing public schools, a standard that covered Denver.¹²⁶⁴ Under the law, Denver would have been required to pay a portion of the private school tuition (including that of religious schools) of children living in the school district. The Colorado Supreme Court concluded that the measure violated a state constitutional requirement of local control over education because it directed the expenditure of local school funds for other than local school purposes.¹²⁶⁵

Charter Schools

1. Charter Schools in Boston

The Massachusetts Education Reform Act of 1993 introduced charter schools into the state's education system in order to foster innovation in the provision of education. Charter schools, it was thought, could serve as a model for imitation, provide more opportunities for students and parents to select schools with different characteristics, and, through competition, make local school districts more accountable.¹²⁶⁶ At the same time that the Education Reform Act instituted more standardization for Massachusetts public schools with the introduction of curriculum frameworks, in other words, it also carved out, for a limited number of alternative schools, a space for non-standardization. The limit derives from a cap on the number of charter schools that can be approved, as well as on the maximum amount that charter schools can draw from local school districts' general funds. (The monetary limit is 9% of a locality's funds.¹²⁶⁷) These limits on charter schools are controversial. The concern is that they stifle a promising innovation in public education. Governor Romney recently vetoed a legislatively enacted, one-year moratorium on the creation of new charter schools, a veto that the legislature did not override.¹²⁶⁸

There are two types of charter schools in Massachusetts. The original charter school format established in 1993 was the commonwealth charter school – a public school operated by a board of trustees independent of the local school committee.¹²⁶⁹ Any nonprofit business or corporate entity, combination of 10 or more parents, or two or more teachers can apply to the state board of education for a charter to become a commonwealth charter school.¹²⁷⁰ (Private schools and parochial schools are explicitly denied the ability to apply.¹²⁷¹) The construction and start-up costs of commonwealth charter schools are not provided by the state.¹²⁷² An application for a commonwealth charter school does not require approval from the locality's mayor or school committee; all that is required is approval by the state.¹²⁷³

A Horace Mann charter school, authorized by the state several years after the commonwealth charter school, is an attempt to allow public school committees and teachers to take advantage of this form of experimentation without having to break free from the school district altogether. Horace Mann charter schools are initiated by the public school system itself; they require school committee support before an application can be filed with the state.¹²⁷⁴ Once the required approvals are obtained, both commonwealth and Horace Mann charter schools are managed independently. Their operation is explicitly placed outside of the supervision of local school committees.

Although both forms of charter schools are permitted, only the commonwealth charter school has truly taken off. In the 2004-2005 school year, there are forty-nine commonwealth charter schools and only eight Horace Mann charter schools in Massachusetts.¹²⁷⁵ There are

sixteen commonwealth charter schools and only two Horace Mann charter schools in Boston.¹²⁷⁶ With the expansion of current charter schools and proposals for new ones, Boston's charter school enrollment is expected to increase well beyond 4,000.¹²⁷⁷

Charter schools are controversial – not only in Boston but also in the other cities examined. The reason is that charter schools straddle the public/private divide. On the one hand, charter schools are clearly public schools. Their employees and boards of trustees are public employees, and their financing is drawn directly from public funds. Moreover, although they operate independently, they are not exempt from state regulations. Their students must comply with testing and graduation requirements set by the state. Their teachers, unlike those in private or parochial schools, must have the proper certification to teach. Their teachers are also part of the state retirement system, with years at the charter school counted towards their service. (To induce public school teachers to teach at charter schools, local school districts are required by law to grant a leave of absence for up to two years for any public school teacher who requests it to teach at a charter school.¹²⁷⁸) Unlike a magnet school or a private school, charter schools are not permitted to establish criteria for enrollment; they must select students at random if there is more demand than there is space.¹²⁷⁹ Charter schools are allowed to tailor their curriculum to focus on certain goals, but they are not permitted to administer any other requirements – including screening for special needs or proficiency in the English language.¹²⁸⁰ Charter schools must also give preference for admission to students living in the district in which they are located.¹²⁸¹

Despite their public school status, charter schools do not operate like ordinary public schools – and thus they share some characteristics with private schools. For example, they cannot ordinarily rely on public funds to pay for initial start up costs.¹²⁸² Private capital must be raised to get the school going. On the other hand, the “private” aspects of charter schools also give them certain advantages. Boston's public schools have to contend with unexpected enrollment fluctuations and unexpected needs. Charter schools can control their enrollment in terms of absolute numbers,¹²⁸³ and this ability allows them to structure their curriculum and class sizes in ways that are not available to public schools. The importance of this stability should not be understated: charter schools can budget more carefully without having to deal with the kinds of fluctuations that are outside of public schools' control. Most charter schools have therefore been successful in implementing smaller class sizes¹²⁸⁴ (closer to 20 per classroom) than have public schools.

Charter schools are also free to structure their curriculum and their programs.¹²⁸⁵ Although they are required by law to take English learners and children in need of special education, there is no requirement that they structure their program to accommodate them. If a charter school fails to educate these children, they can always go to the public school system, which must provide education to everyone. Moreover, charter schools can set aside reserve funds to plan for future expansions or improve their facilities and equipment. Although public schools can receive grants from the state, the extra funds that charter schools can put aside make it possible for them to invest on their own terms. Finally, like private schools, charter schools can go out of business. For public schools, the situation is different. As one commentator explained: “[h]ere are the poor public schools. They're supposed to do everything, serve everybody. The charter schools are touted, but they don't seem to be taking all the problem kids.”¹²⁸⁶

There is debate over whether charter schools are succeeding. Many point to higher MCAS test scores and student demand as evidence that they are. There is also great controversy over whether, if they are, it is because they serve a different population of students from regular public schools or because they offer a better quality of education.

Whatever the explanation, the demographics of Boston's charter schools are in fact different from those of the Boston public school system as a whole. Special education students in Boston account for almost 20% of the student population, but in the charter schools they account

for around 10%.¹²⁸⁷ 73.6% of all Boston students are eligible for free or reduced lunch programs, but only 53.6% of charter school students are.¹²⁸⁸ The most striking fact is that, according to one report, although nearly 25% of students in Boston's public schools are learning English, there is not a single student in Boston's charter schools that is similarly categorized.¹²⁸⁹ There are many possible reasons why charter schools enroll fewer special education students and no English learners. There are rumors of discrimination. But much of this discrepancy can be explained through self-selection. Since charter schools in Boston have generally not elected to focus on English acquisition or special education, students who need these programs may not enroll in them simply because their educational structures do not accommodate them. To be sure, although this may explain why students with certain needs are absent from the charter schools, it does not explain why fewer students eligible for free and reduced lunches are enrolled – unless a connection between socioeconomic status and children with special needs can be established.

The ethnic demographics of the charter schools are also different from those of the general public schools. African American students predominate in charter schools – more than 70% of charter school students are African American¹²⁹⁰ (compared to 48% of public school students and 28% of private school students), while only 13.7% are Hispanic and Asian¹²⁹¹ (more than one-third of public school students are Hispanic and Asian). Non-Hispanic white students enroll in charter schools at about the same rate as they do in public schools, but they are concentrated in very few schools.¹²⁹² As the Massachusetts Teachers Association questioned: “[why] do we have charter schools that are virtually all white or all black, when the foundation of public education is to bring together children of differing cultures and backgrounds?”¹²⁹³ One possible answer derives from the fact that charter schools have not enrolled English learners in their programs. Another explanation is that, because parents submit bids for particular charter schools, they are inclined to select charter schools within their neighborhood. Residential segregation is thus replicated in the selection process. “The fact that South Boston Harbor Academy is 81% white and the Edward Brooke Charter School is 93% African-American merely reflects the demographics of each school's neighborhood.”¹²⁹⁴ This relationship between neighborhood and ethnic identity may also help explain the low Hispanic and Asian enrollment in charter schools; there are no charter schools populated largely by either group.

The funding of charter schools is another source of controversy. In accord with the state charter school law, students who leave a public school for a charter school take the average cost per student spent by the school district with them. The state gives these funds directly to the charter school and deducts the amount from state aid to the school district. In 2002, the amount per child that the Boston school district lost to charter schools was \$9,300 plus the cost of transportation. The criticism against this use of the average expense per student is that it fails to account for the variation among students. The figure of \$9,300 includes the cost of students in expensive special education programs, English-acquisition programs, and other special programs. Yet charter schools, as stated earlier, take a disproportionate number of students who require only a regular education. They therefore receive, and can spend, more per student than a public school. A recent amendment to the charter school legislation sought to reduce the impact that charter school enrollment has on public schools. The amendment provided for 100% reimbursement for the first year that a student leaves, followed by a 60% and 40% reimbursement for the following two years. The intent behind this legislation was not to offset the impact indefinitely but to allow public schools to make a gradual transition away from needing the funds that a particular student provides. Boston did not receive funding from the state under this program in 2003 and 2004. In 2005, Boston received a \$10.2 million reimbursement to offset a total loss of \$31.6 million.

Given these kinds of issues, hostility has arisen between some of those associated with charter schools – their students, their boards of trustees, and their teachers – and some residents of the communities within which they are embedded.

School officials are often involved in one aspect of this divide. State officials, such as Governor Romney,¹²⁹⁵ support the expansion of charter school programs, and many local officials see them as another battleground between local and state control.

The controversy over charter schools is likely to continue. To their critics, charter schools invoke the elitism and escapism of private schools, while simultaneously withdrawing funds from the public school system. Officially open to everyone, charter schools, they claim, are tailored to certain types of students – those who have fewer needs – while leaving the majority of schoolchildren behind. Supporters, by contrast, can point to recent studies that show that charter schools produce educational gains. On average, Boston's charter schools had higher pass rates on the MCAS and higher scores on other standardized tests than other public schools.¹²⁹⁶ The evidence also suggests that the unique styles of charter schools have helped some children succeed. The South Boston Harbor Academy had a 100% pass rate on the MCAS for its 10th graders; only the magnet schools in the public school system can compete with this rate.¹²⁹⁷ For reasons such as these, charter schools are much in demand: in Boston, the waiting lists for the 2006-2007 school year (about 6,500 students) exceeds their enrollment (5,200 students). But an increase in the number of charter schools will require additional state legislation and additional state approvals – a process bound to generate continued political opposition.

2. Charter Schools in Other Cities

In considering the role of charter schools in Boston, it is important to note that the same controversies exist in almost every metropolitan area in the country. There are charter schools in all of the cities within the scope of our study except Seattle, and the debate in those cities echoes many of the arguments made about Boston's charter schools. There are, however, important distinctions between charter school programs in the other states and the Massachusetts structure.

In Atlanta, the charter school system is almost the opposite of Boston's. That is largely because state law gives local officials much more say over charter school approval. Like Boston, there are two types of charter schools – conversions and start-ups – which correlate with the Horace Mann schools and commonwealth charter schools.¹²⁹⁸ Unlike Boston, however, the conversion charter schools, which are “traditional public schools that [were] converted by, and run by, local school districts,”¹²⁹⁹ were adopted first, while the start-ups were added later. Moreover, all charter schools are subject to approval by local school boards, and funding for charter schools is allocated by the locality. As a result, there are only 6 charter schools in Atlanta, even though legislation authorizing charter schools was passed almost six years before Massachusetts enacted its statute.¹³⁰⁰

In evaluating the criticism of the state approval process in Massachusetts, one might interpret the Atlanta experience to suggest that few charter schools would be approved if Massachusetts changed its legal structure to allow more local control. Yet a local approval process exists in Denver and charter schools have been relatively plentiful there. The Colorado program was established at roughly the same time as Massachusetts', and charter schools have been relatively successful in getting into Denver's educational “market.” Charter schools educate 3% of Denver's schoolchildren, albeit in fewer schools than Boston has (Denver has 10 charter schools). This is not to say that there has been no opposition to charter schools in Denver. In the early years the Denver public school district was adamant in rejecting charter school applications,¹³⁰¹ and amendments were proposed to create a state institution to approve charter schools so that localities could not ban them wholesale.¹³⁰² Recently, the city has become more accepting about the prospect of more charter school applications – including many operated by high profile national organizations that manage schools around the country. One of the reasons for this change seems to be the limitations that are imposed on charter schools. Although Boston's charter schools receive more per pupil than Boston spends on a standard public school education, the legal structure in Colorado limits the amount that charter schools can receive to 80% of what a public school spends per pupil. Charter schools are thus asked to save money per

student over the cost of educating the same student in the public school system. A recent state law also makes it easier for charter schools to pay for their startup and administrative costs. Moreover, Colorado's charter schools are allowed to seek budgetary increases directly from the voters through an initiative.¹³⁰³ Indeed, whenever a public school district goes to the voters to seek approval for a bond issue, charter schools can include their own proposals with the school district's proposals.

Assigning the local school system an important role in approving charter schools has also not stymied their growth in Chicago. Chicago has been the most aggressive sponsor of charter schools in Illinois.¹³⁰⁴ Both start-up and conversion schools are permitted, although home schools cannot be converted to charter schools.¹³⁰⁵ Illinois' Charter School Law¹³⁰⁶ originally authorized the establishment of 15 non-sectarian charter schools in the city beginning in 1997.¹³⁰⁷ Statutory amendments in 2003 increased the allowed number to 30 (out of a total of 600 public schools within the city).¹³⁰⁸ The 9,000 students educated in Chicago's 20¹³⁰⁹ currently operating charter schools make up 2% of the total number of children in the Chicago public schools.¹³¹⁰ Although not run directly by the school district, Chicago's charter schools are accountable to Chicago's Board of Education as well as to the state.¹³¹¹ Indeed, under Illinois law, charter schools must be sponsored by local education authorities.¹³¹² Once a charter is granted, however, charter schools in Chicago have legal autonomy from Chicago's school system.

California law has an unusual structure for involving the local school district in charter school applications. A request for charter approval must be submitted first to the school district, but if it is rejected, it may then be presented to the state Board of Education.¹³¹³ The local school district retains supervisory power over the charter schools it approves but not over the ones that it rejects and the state approves.¹³¹⁴ For those charter schools, the state is the supervisory entity. Of the 11 charter schools in operation in San Francisco as of 2002, nine were approved by the city.¹³¹⁵

A minority of states – including one in our study – has been reluctant to permit charter schools. Washington voters rejected statewide initiatives that would have authorized charter schools in 1996 and 2000, and legislative proposals failed in 1998, 1999, 2000 and 2003.¹³¹⁶ It was not until 2004 that the legislature approved the use of charter schools even on an experimental basis.¹³¹⁷ But the legislation required a statewide referendum to take effect and the referendum failed soundly.¹³¹⁸ Much of the delay is attributable to widespread community opposition to charter school programs.

Suburban Schools and METCO

Private schools and charter schools provide alternatives to the city's public schools by offering something different from a public school. Charter schools may even be understood as a private school alternative within the public school system. Suburban school systems offer an entirely different type of alternative. For families who might otherwise locate in Boston, the most important educational alternatives to Boston public schools seem to be the public schools in the cities and towns elsewhere in the Boston metropolitan region. Parents can – and do – move out of Boston to enroll their children in a school located in another school district. And, of course, there are many families who choose not to move to Boston either out of concerns about city schools or the perceived advantages of suburban public schools.

1. Suburbanization

One way to see the potential importance of the suburban school option is to examine the decline in the number of school-age children in Boston. Since the 1960s, there has been a 35% drop in this population,¹³¹⁹ a figure that dwarfs the number of children living in Boston who attend private or charter schools. And, as noted at the outset of this report, the population of the metropolitan region as a whole is growing faster than that of Boston.

Most of the cities in our study have experienced a similar dynamic. They too are losing families to the suburbs through migration and failing to attract new families who are moving to their metropolitan area. The result is that urban public school enrollments have declined dramatically as suburbanization has increased. In San Francisco, public school enrollment is 60% of what it was in the 1960s.¹³²⁰ In 2004, Atlanta had nearly 10,000 fewer students in its public schools than it had a decade before,¹³²¹ and fewer than half the students it had in 1969.¹³²² Seattle's public school enrollment peaked at 99,326 in 1962, but plummeted to 47,400 by the end of the 20th century; current enrollment thus represents less than half the enrollment the system had at its height.¹³²³ In 2002, Chicago's public school system had about 440,000 students,¹³²⁴ down from a total of 580,292 students in 1969, due to "white flight" to the suburbs and an exodus of black middle-class families.¹³²⁵

In two of the cities in our study, however, public school enrollment is on the rise, if only slightly. By 2002, New York City public schools had about 100,000 more students than they had a decade earlier.¹³²⁶ This increase brought enrollment almost to the level reached in the early 1970s, when a sharp decline began. A substantial part of this growth is due to an influx of immigrant children,¹³²⁷ which has (perhaps temporarily) mitigated the effects of suburbanization. In Denver, as of 2003, public school enrollment increased by about 10,000 over the previous decade.¹³²⁸ Even with this recent enrollment increase, Denver's public schools have only 75% of the students they had 40 years ago.¹³²⁹

Fundamental changes in the overall relationship between the central city and its region are needed to reverse these trends. The factors that affect a family's decision about where to live within a metropolitan area go well beyond the quality of the public schools in the central city. Housing, transportation, job opportunities, and ideas about urbanism are relevant as well. Addressing concerns about these matters cannot be met simply by improving the city schools. Nor can city schools easily be improved without middle-class families being attracted to the city in the first place. The next subsection explores the ways in which Boston has experimented with measures that seek to bridge the suburban/urban school divide without fundamentally changing the demographics of either the central city or its suburbs.

2. METCO

One approach that Boston has pursued – one that stands out for its innovation – is the Metropolitan Council for Educational Opportunity ("METCO") program. METCO was not originally conceived as a permanent alternative to Boston's public school system. African American activists established it in the mid-1960s for about 200 students, before desegregation was fully implemented in Boston, as an "interim program."¹³³⁰ Parents in Boston would have access to suburban schools, its supporters thought, and the participating suburbs would benefit from some diversity in their schools.¹³³¹ After almost 40 years, the program is still operating. Now, approximately 3,000 students are bused across city lines every morning to attend suburban schools.¹³³² This is close to the number of students that stay in Boston and attend private, secular schools.

Since METCO was established as part of the civil rights movement, it is perhaps not surprising that it has largely served African American students. When the state Department of Education requested that the program start taking Hispanic and Asian students about a decade ago, it was met with strong resistance. The METCO program now serves a small percentage of Hispanic and Asian students.¹³³³ But the waiting list for METCO is over 15,000 students.¹³³⁴ Compared to the public school enrollment of approximately 60,000, this demand for METCO is extraordinary. To be sure, many of the students on the METCO waiting list have not even begun school. Some parents place their children on the waiting list just a few weeks after they are born.¹³³⁵ Nevertheless, the intensity of parents' desire to place their children in a suburban school remains strong. Critics point out that METCO siphons off good students that would benefit the public school system if they remained in it.¹³³⁶ Efforts have even been made to abolish the program altogether. But the prospect of parents participating in the METCO program moving out

of Boston slows abolition efforts. According to one study of METCO parents conducted in the mid-1990s, “20% of the METCO parents said that they would probably move out of Boston if METCO were not available . . . ,” while “[h]alf said they would send their children to parochial or private schools.”¹³³⁷

METCO students do well when compared to Boston public schoolchildren. As some critics point out, METCO students sometimes feel ostracized in both their suburban school and in their own neighborhood.¹³³⁸ And they endure long hours of commuting.¹³³⁹ Nevertheless, as one reporter explained, comparing Boston's public schools to that of Weston, a participant in the METCO program:

[C]an't help but see the images of Weston and Boston public schools as alter egos rolling by the schoolbus window: [c]hildren weighted down with book-laden backpacks vs. those flitting about with hard-to-read Xerox copies. State-of-the-art libraries vs. some teachers paying out of their own pockets for supplies. Not just money . . . but a mindset. A voluntary city-suburb compact that challenges every child to learn vs. vestiges of a court-ordered busing system to desegregate the Boston schools that ... still writes off certain students.¹³⁴⁰

Only a few other cities in the country have anything like METCO.¹³⁴¹ No other city in our study does. Nor does any city in our study have another kind of “inter-district” solution: a school district consolidated with the districts in nearby suburbs. That option has been tried elsewhere, including recently in Tennessee and North Carolina.¹³⁴² As David Rusk notes, while consolidation was very popular from 1942 through 1972, “legislatures have rarely exercised such powers since.”¹³⁴³ Consolidation is not usually considered to be “voluntary” in the way that METCO is.

Most of the cities in our study that have experimented with public school choice programs have restricted themselves to “intra-district” alternatives. This is hardly surprising. The current legal structure in most states permits cities to implement inter-district options only with suburban consent or with the assistance of direct state intervention. Even in Massachusetts, despite the support for it, the METCO program is unlikely to expand. It has not expanded to new suburbs – or within existing suburban schools – since 1978.¹³⁴⁴ Hence, the long waiting list.

Educational Reform in the Boston Public Schools

As explained earlier, the Boston city government now controls its public schools far more than it has for much of its history, but it remains subject to a wide range of state-established constraints. Within these constraints, Boston can – and does – affect the quality of the education it offers its students. This is not the place to canvass the literature on the problems involved in reforming the nation's public schools. But six basic kinds of strategies occur to us, and Boston's power to implement these six strategies differs. The strategies suggested here are: enriching the public schools; modifying the system of instruction; organizing the community to support education; creating different levels of education for different kinds of students; expanding school choice within the school district; and transforming the kind of student body that attends the public schools. These strategies overlap – and many, perhaps all, can be pursued simultaneously. Nevertheless, the categories suggest a useful way to organize thinking about the issue, and each are briefly examined below, noting the distinct ways in which other cities pursue them and how state law provides the framework for their efforts.

Enriching the Public Schools

Boston has adopted two reform plans to improve its public school system: Focus on Children, which took place from 1996 to 2001, and Focus on Children II, which runs from 2001 to 2006.¹³⁴⁵ Many of the items on the city's agenda under both plans are designed to enrich the public school system. Examples include:

- \$370 million of capital funds for school buildings
- \$143 million (in public and private funds) for 11,000 new computers
- \$25 million to establish a 12-month school year for extra support in reading and math in pivotal grades
- \$4 million for mandatory summer school for students needing intensive help in reading and math
- Guaranteeing full-day kindergarten for every five-year old
- Expanding 2-6pm after school programs¹³⁴⁶

These kinds of efforts (and they are only illustrative) are more dependent than the other strategies examined on Boston's ability to generate revenue for its school system.

But there are other complexities as well. One example is considered here: reducing class size. Reducing class size is, of course, expensive: it requires hiring more teachers (the average teacher salary in Boston is \$64,000¹³⁴⁷) and providing them with adequate classrooms and materials. From 1996-2002 Boston invested \$15 million to reduce class size in every grade level.¹³⁴⁸ But cities and towns in Massachusetts, including Boston, are dealing with their economic crisis by reducing teacher staffing, and hence increasing class sizes.¹³⁴⁹ In Massachusetts, the Education Reform Act provides funds that can be used for class size reduction, but the act does not require that they be used for that purpose.

Because of the rising concern over the ineffectiveness of large classes, several states have put into place initiatives to reduce class size. The California legislature enacted a major class size reduction initiative in 1996 to reduce the average class size from 30 to 20 in grades K-3.¹³⁵⁰ Funding was allocated for teaching facilities and per-student expenditures.¹³⁵¹ Commentators have described the initiative as the largest infusion of state funds into local schools since the emergency funds designed to compensate for the effects of Proposition 13.¹³⁵² In just a few years, the sought-after reduction was successfully implemented.¹³⁵³ A less targeted effort was undertaken in Seattle with the passage of Initiative 728, which dedicated certain state funds to local schools for (among other purposes) reducing class size, especially in lower grades.¹³⁵⁴ New York state has also passed legislation to reduce class sizes for early elementary school grades.¹³⁵⁵

Reducing class size is more complicated than simply spending more money. Consider the relationship between the teacher-student ratio and class size. One can calculate a teacher-student ratio by dividing the number of students by the number of teachers. Boston's student-teacher ratio is quite low: 13 students to one teacher.¹³⁵⁶ San Francisco's is 17 to 1.¹³⁵⁷ Class size, however, is a different number: Boston's average class size is 22 for grades K-2, 25 for grades 3-5, 28 for grades 6-8, and 31 for grades 9-12.¹³⁵⁸ Even though San Francisco has a higher teacher-student ratio than Boston, its average class sizes in some – though not all – grades are about the same as Boston's.¹³⁵⁹ Atlanta, on the other hand, has a student-teacher ratio close to Boston's,¹³⁶⁰ but its average class size is significantly lower – in the low twenties, or dipping under twenty, across the board.¹³⁶¹ What, then, explains Boston's combination of low teacher-student ratio and (comparatively) high class size?

A report written in 1993 addressed this issue.¹³⁶² The study noted that a substantial number of teachers in Boston are hired for special and bilingual education. Seventy percent of Boston's school children are classified as requiring "regular" education, yet only about 50% of the teachers teach these children. The rest of the teachers concentrate in special education or in assisting students with limited English proficiency. Since most of these programs involve taking children out of classes for more individualized instruction, a heavier burden is placed on the remaining

teachers to accommodate the bulk of the student population. The report questions whether the best way to accommodate students with special needs is the “pull-out” method adopted in Boston schools. The report also notes that giving teachers time off for planning and staff development – along with the method of allocating teachers according to subject and grade – are additional reasons why the number of teachers available and class sizes do not match.

Even if these (no doubt controversial) explanations for class size in the Boston schools are accepted, it still remains unclear why Boston deviates so much from the other cities in our study. Other cities have special needs students too. One possible reason is that Boston classifies more of its students – approximately one quarter of the student population – as needing special education.¹³⁶³ For 2006, special education funding is expected to account for \$146 million, almost 35% of the school budget dedicated to instruction.¹³⁶⁴ A significant number of teachers are hired for special education purposes when compared with “regular” education teachers. Combined with bilingual students, they make up more than half of the public school enrollment, and nearly 60% of the system’s educational budget. Seattle, which classifies only about one-quarter of its students as needing either special education or bilingual education,¹³⁶⁵ spends less than a quarter of its educational budget on these two categories.¹³⁶⁶

Provision of special education, it should be emphasized, is a state mandate. Yet state funding falls short of the needed expenditures, which explains why special education is often described as the prototypical “unfunded mandate.” To relieve the burden that special education places on school districts, the state legislature created a “circuit breaker”¹³⁶⁷ program promising state reimbursement of 75% of special education costs when a student’s cost exceeds four times the state average foundation budget (\$29,320 in 2004).¹³⁶⁸ But due to state budget cuts and an unexpected number of claims from individual schools, reimbursement for school districts like Boston fell well below the promised 75% to around 35%.¹³⁶⁹

Yet the impact of special education on the average class size is not just a question of state mandates and state funding gaps. The line between students who need special education and those who do not is unclear. Reporting and identification appear to be key components of the high special education percentage in Boston. Although not dealing with Boston specifically, statewide reports demonstrate that the percentage of special education students has steadily dropped in the last decade – from 17% in 1993 to 15% in 2003.¹³⁷⁰ Since this decreasing trend runs counter to the national trend of increasing special education identification, the state Department of Education attributed the change largely to “a combination of changes in data collection, changes in reporting requirements, and changes in the enrollment calculation, . . . [indicating] efforts to decrease inappropriate identification of students with disabilities.”¹³⁷¹ Other discrepancies between Massachusetts statistics and national statistics also raise questions about the identification process. In Massachusetts, special education correlates strongly with gender: 66% of males are identified as needing special education compared to 34% of females.¹³⁷² National special education enrollment shows almost perfect gender parity, with 51% males and 49% females in special education programs.¹³⁷³

Class size, then, stems not just from the school system’s overall resources but also from the way those resources are allocated. And that allocation process for Boston’s public schools – such as for students needing special education – is a complex combination of detailed state mandates and local discretion. Boston’s ability to shift resources to regular education from special education is constrained by the general issue of its home rule authority discussed earlier in this report. The same point can be made with regard to students with limited English proficiency. In November 2002, Massachusetts voters adopted an initiative eliminating bilingual education for those with limited English proficiency, replacing it with English language immersion.¹³⁷⁴ The impact of this change on the Boston schools will be considerable, and the process of working out the details will require the school committee to work within the mandate imposed by the state-wide initiative. Class size for regular education – and not just for English learners – will be affected by this decision making process. Funding aside, the kind of issues that

determine class size in Boston are, in sum, amenable to a limited – but important – amount of local control.

Modifying the System of Instruction

The previous discussion of class size demonstrates the overlap between the strategy of enriching the public schools and efforts to modify the system of instruction. Overcrowded classrooms and overburdened teachers significantly affect the quality of education in urban schools. Smaller classes increase the ability of teachers to provide more personalized attention to students, develop more innovative teaching techniques, and maintain control of the classroom. Although this kind of improvement usually requires additional revenue, it sometimes can be accomplished by reallocating existing resources. Many of the elements of the Boston school committee's reforms designed to improve instruction in the public schools do require additional resources. But others can be accomplished through re-allocation of existing resources – a re-allocation that, like class size, operates under the shadow of the state's ultimate control of the educational system but is not wholly dictated by it.

1. Boston's Program

Elements of Boston's reform efforts that attempt to modify the classroom experience include:

- Citywide learning standards in major subjects in all grade levels
- Whole school improvement plans, on a school-by-school basis, developed by a wide range of people interested in the school
- A concentration on literacy and mathematics as the essentials of education
- Use of student work and data to identify problems and monitor progress

The Boston school committee has considerable latitude to undertake these kinds of initiatives – to the extent, that is, of the limits provided by its current budget. The focus here is on one important example of its initiatives: pilot schools.¹³⁷⁵

Since 1994, Boston has established 20 pilot schools, from grades K-12, with approximately 5,700 students¹³⁷⁶ (more students, one should recognize, than are in charter schools, non-parochial private schools, or METCO). Pilot schools are established to be models for innovation, and they have considerable autonomy over their budget, staffing, governance, calendar, and curriculum.¹³⁷⁷ This freedom, it should be emphasized, is from Boston School Committee's rules – and the requirements of union contracts – not from state law. Nevertheless, the pilot schools – which operate with the average per-student budget of the public schools – have been innovative and effective. The pilot schools are small (fewer than 500 students), have smaller class sizes, require more hours of school, and devote significantly more time to collaborative planning and improved teaching.¹³⁷⁸ In a recent report, the Center for Collaborate Education gave high marks to the innovations in the thirteen pilot schools that have operated for more than a year. As they summarize their findings:

"Pilot Schools:

- Have among the highest daily student attendance of all BPS schools
- Have among the highest total number of students on waiting lists to enroll in the school

- Have among the fewest transfers out of school
- Have among the lowest percentage of students suspended
- Are among the top performing schools in Boston on the MCAS
- Graduate a high percentage of their students
- Send a high percentage of their graduates to college¹³⁷⁹

The demographics of the pilot schools, according to the Center for Collaborative Education, are close to those of the public schools – closer than are private schools or charter schools. Overall there are more non-Hispanic whites (18% vs. 14%) and somewhat greater African Americans (51% vs. 47%), about the same Asians (essentially 9% in both) and fewer Hispanics (21% vs. 30%) than the public school system as a whole.¹³⁸⁰ (The statistics vary substantially by school.¹³⁸¹) Pilot schools are also much like the public school system as a whole in terms of special education students, although not in terms of English language learners (only 3.8%).¹³⁸² Students in pilot schools are somewhat less poor than those in the system as a whole (61%, instead of 78%, receive free or reduced-price lunch).¹³⁸³ The Center for Collaborate Education evaluation indicates that a more personalized learning environment, greater flexibility, and more teacher collaboration can have a significant effect on education.

Some contend that the pilot schools “were created, in part, as a direct response to the competition posed by charter schools.”¹³⁸⁴ But unlike charter schools, the pilot schools were not a product of state legislation.¹³⁸⁵ It appears that the city’s authority to create these schools stems from its state-conferred power to engage in collective bargaining,¹³⁸⁶ and the principal way in which these pilot schools are different from ordinary public schools is that they are “free of the union contract and school-committee rules and regulations . . . ,” thereby allowing the schools a substantial degree of freedom to innovate and experiment.¹³⁸⁷ Given this basis for the program, Boston’s authority to establish pilot schools is dependent on the agreement of the teachers’ union.

2. Efforts in Other Cities

While “Boston’s in-district charters are unique in this country,”¹³⁸⁸ they are part of a national trend towards smaller and somewhat more autonomous schools within larger, urban school systems. By 1997 there were more than 150 “small schools” in New York City, and an attempt by the Chancellor to limit their growth and influence was a dramatic failure.¹³⁸⁹ Just recently, Mayor Bloomberg announced the opening of 52 more small, themed schools at the middle and high school level, with the freedom to have their own individual “learning philosophies.”¹³⁹⁰ The schools have been funded by almost \$60 million in grants from the Bill & Melinda Gates Foundation.¹³⁹¹

As with Boston’s pilot schools, the small schools movement in New York City was not initiated at the state level. Instead, New York City itself decided that its high schools, which often had up to 5,000 students, had become “aging behemoths” or “dinosaurs,” not able to match the educational demands of the public school population.¹³⁹² The city’s growing squadron of small schools was “started by an unlikely alliance of neighborhood advocates seeking control of their schools, conservatives promoting school choice, educational pioneers eager to test theories, and a teachers’ union striving to give its members more say in their work lives.”¹³⁹³ Moreover, “[a]lthough all of the schools fall under the auspices of the city’s central Board of Education, most of these new schools have been given crucial support from several local nonprofit groups”¹³⁹⁴

Chicago’s story is similar. Prior to the 1990s, Chicago had small schools (defined as under 350 students), but they tended to be in the more affluent portions of the city.¹³⁹⁵ During the

1990s, Chicago created about 150 additional small elementary and high schools, focused in the impoverished areas of the city.¹³⁹⁶ By enhancing mayoral control, state legislation played some role in this shift, albeit indirectly, as in both Boston and New York City. The 1995 Chicago School Reform Act placed increased power in the Mayor's office regarding academic performance.¹³⁹⁷ With his enhanced control, Mayor Daley created a School Reform Board of Trustees, which subsequently released a resolution supporting small schools. The trustees called for proposals and soon approved the creation of 24 of these schools and provided grants.¹³⁹⁸ Some of Chicago's small schools are "freestanding," with "their own space, budget, and principal."¹³⁹⁹ Others "are housed in a *multiplex*, where schools share a building and a principal but have their own unit numbers and operate independently from the other schools in the building."¹⁴⁰⁰ The second category creates a "School-within-School, in which the small school is located within a larger school"¹⁴⁰¹ As in New York City and Boston, Chicago's new small schools emphasize experimental and innovative teaching strategies.¹⁴⁰² And, as in Boston, attendance rates and dropout rates have improved significantly in these schools.¹⁴⁰³

San Francisco is just beginning to pursue small schools reform. It was not until 2003 that San Francisco began "looking to small schools in hopes of boosting the academic performance of African American and Latino students and those learning English."¹⁴⁰⁴ The program first began with three "guinea pigs," but the "district hopes to add a few small schools to its roster each year so that within five years, 15,000 students will attend 10 small schools and 10 redesigned schools"¹⁴⁰⁵ The Gates Foundation has given money to help these schools be financially stable, but their long-term stability is unclear.¹⁴⁰⁶ In 2004, the San Francisco Unified School District solicited more proposals for small schools.¹⁴⁰⁷ Again, the process appears to be locally driven and controlled, although California provides grants for creating small high schools.¹⁴⁰⁸

Atlanta does not have a history of fostering small schools. One writer has said the Atlanta metropolitan region has an affinity for all things "big," including 1,500-plus student middle schools.¹⁴⁰⁹ Even Atlanta, however, is now making its first foray into small schools with its current \$40 million project to turn Carver High School into "four smaller schools, each with its own academic focus –science and technology, health sciences, performing arts, and early college. Each school will have a college preparatory curriculum."¹⁴¹⁰ The district's deputy superintendent cited the systems adopted in New York City and Boston as reasons for redesigning Carver.¹⁴¹¹

Denver has not made any real attempt to create smaller schools. Exceptional cases exist, but there is no general system to foster the creation of small schools. The Denver Commission on Secondary School Reform recently decided not to offer "a recommendation to create new small schools of no more than 400 students."¹⁴¹² The same approach appears to be followed in Seattle. While there are rare examples of efforts to establish small schools, they seem to have little to do with school district policy.¹⁴¹³

As the varied efforts of these cities demonstrate – and as Boston's Pilot School program exemplifies – giving the city authority over its school system can enable innovative and effective school reform. Revenue limits, to be sure, are always a constraint. But even within these constraints, Boston can be – and has been – a leader in this kind of innovation on its own.

Organizing the Community

Another ingredient within Boston's capacity to implement – one that has limited financial implications – is the involvement of both parents and the community at large in the support and operation of schools. Pilot schools – like the Boston public school system as a whole – have recognized the importance of these efforts. "Families," one of the principles of the pilot schools suggests, "are critical partners in creating high performance Pilot schools."¹⁴¹⁴ Boston's Focus on Education II similarly cites engaging "families and community partners" in "supporting the growth and education of students in and out of the classroom" as one of the key ingredients in improving the school system.¹⁴¹⁵

There are two different ingredients in this reform idea – family and community. It has become commonplace to recognize that a successful educational system cannot rely on the schools alone. The attitudes and efforts of the student's family and peers, even before the child is old enough to go to school, have important effects on the prospect for learning and achievement. High expectations communicated to students by teachers and parents alike tend to produce better results once school begins. A recent report on higher performing urban schools in Massachusetts lists parent relationships as a key factor in their success:

All of the [higher performing] schools place a high premium on communication with parents, going to great lengths to build bridges and to develop trusting relationships. Administrators and teachers make frequent calls to parents to talk about their children's achievements, upcoming projects, and events. Disciplinary or academic problems are also consistently communicated through dialogue with parents.¹⁴¹⁶

This effort is particularly important in schools, like Boston's, with a substantial majority of students from poor families. Another report found that some "demographically challenged districts" (their term) do better than others, but none do as well as schools located in communities with high education and income levels.¹⁴¹⁷

The second ingredient in this effort is community engagement – organizing support and involvement for the school system from the community at large. This kind of civic engagement, according to some scholars, is the key overlooked ingredient in improving urban education.

[O]ur central concern is at the citywide level . . . Civic capacity . . . calls for more than bringing short-term pressure to bear on an existing arrangement; it calls for altering relationships. In a important sense, the old subsystem has to be replaced by a new or remade one. . . . Because urban communities are diverse and because urban school children are a highly vulnerable group, urban education is an important testing ground for politics and whether it can be made to serve worthy aims.¹⁴¹⁸

In Boston, the divergence between the demographics of the public school system and of the city as a whole complicates this political effort. But it also makes it more important. Of course, it is not entirely clear how community organization fits in with the more significant trend in the reorganization of Boston's public schools – the shift from an elected and independent school committee to an appointed one and the increased authority conferred on a single actor, the superintendent. One might think that this trend reflects a preference for centralization and a choice to insulate educational policy from community influence. Others might contend, however, that the increased mayoral accountability ensures popular oversight. There certainly is no necessary contradiction between mayoral control and community organizing designed to improve the public school system. Still, Boston's efforts in this regard appear to trail some of the comparison cities – even though the city appears to be empowered to adopt a least some of the innovations embraced by these other cities.

Chicago has gone the furthest of any of the cities in our study in terms of institutionalizing community organization, even though it too has reorganized its school system in a way that enhances mayoral control. In 1988, the "state approved an extensive plan for school decentralization that shifted decision-making from the city school bureaucracy to local school councils (LSCs) in each school."¹⁴¹⁹ The legislation provided all 560 of Chicago's elementary (K-8) and high schools (9-12) with a local school council.¹⁴²⁰ These councils have an elected board of 11 members (6 parents, 2 teachers, 2 community members, and the principal).¹⁴²¹ They generated an impressive amount of interest at their first elections, with 9,733 parent candidates, 4,944 community members, and 2,579 teachers running for about 5,400 positions in 1989.¹⁴²²

The key consequence of the LSCs is to shift power away from the superintendent. The school superintendent tried to retain some form of his previous control by “seeking tight control over the allocation of funds.”¹⁴²³ Such efforts proved fruitless.¹⁴²⁴ LSCs were given the power to “hire and fire the principal, allocate the school’s discretionary monies, and help determine the allocation of staff resources.”¹⁴²⁵ The LSC also had the responsibility of developing a School Improvement Plan, a three-year plan created for the purpose of improving the quality of their school’s education.¹⁴²⁶ Thus, each LSC had decision-making power over its school’s curriculum.¹⁴²⁷ This is not to say that LSCs are left completely on their own devices without supervision. Due to a perception that many LSCs were in fact failing to meet their duties, the state legislature passed a law in 1995 that required new LSC members to receive training in “basic areas of school governance: principal selection and contract terms; school budgeting; LSC member responsibilities; teamwork; and school improvement planning.”¹⁴²⁸ The 1995 legislation also “required a number of changes in district governance, including granting authority over the district to the mayor. And the act gave the school board power to hold LSCs accountable to districtwide standards, essentially diminishing LSCs’ ability to operate independently of school board policy.”¹⁴²⁹

In Seattle, a push towards some decentralization came from the top of the school system. In 1995, a new district superintendent was appointed – a retired army general who had “no experience in education” when he took over Seattle’s school system.¹⁴³⁰ One might not expect such an individual to herald an era of educational decentralization. Yet he “decentralized school operations, making principals the chief executive officers of their buildings, with the responsibility for raising academic achievement.”¹⁴³¹ He also helped decentralize the school funding system.¹⁴³² While he was superintendent, “[i]ndividual schools . . . [came to] control about one-half of all district spending.”¹⁴³³ As a result, Seattle is now “known as a decentralized district that gives schools discretion over budget and educational approaches (and more money for students with the greatest needs)”¹⁴³⁴

The decentralization efforts in Chicago and Seattle contrast with the school reform trend exemplified by New York City. New York City has conceived of greater mayoral control, and enhanced power for the superintendent, as an antidote to the problems of decentralized governance structures. New York City tried decentralization of educational policy in the late 1960s by creating thirty-three elected community school boards “having only the power to select a community superintendent.”¹⁴³⁵ All powers related to personnel (other than the community superintendent), along with the curriculum, were still centrally controlled.¹⁴³⁶ Only “[l]imited budget discretion” was given to the community boards.¹⁴³⁷ The community board elections were to be organized “by a complicated system of proportional representation designed, it seemed, to discourage participation.”¹⁴³⁸ Ultimately in 1995, the city “reverted to a strong chancellor who was selected to recentralize the city school system,” which included attempts to take away power from the community boards and to remove board members.¹⁴³⁹ In 1996, the decentralization movement in New York City came to an end. A “law passed by the New York state legislature vested broad new powers in the city’s top school executives and relegated school boards primarily to helping schools achieve standards set by central headquarters.”¹⁴⁴⁰

San Francisco does not have a significant school decentralization program, and its most recent comprehensive education plan makes no mention of one.¹⁴⁴¹ Instead, San Francisco “[s]pearheaded” the use of reconstitution,¹⁴⁴² which “permits a superintendent or other authorized official to completely overhaul underachieving schools by terminating all administrators, faculty, and staff and hiring new personnel who are committed to the objectives of education reform set out for that particular district.”¹⁴⁴³ Atlanta’s superintendent appears to exert equivalent authority as San Francisco’s. There, a new superintendent, appointed in 1999, has replaced 85% of the district’s principals,¹⁴⁴⁴ and “[e]arly in her tenure, . . . [she] launched an accountability program that sets annual performance targets for each school, giving monetary awards to employees at schools that meet their goals.”¹⁴⁴⁵ Even in Atlanta, however, a recent state statute requires each school board to establish local school councils, which are comprised in part of teachers. These

councils are primarily advisory in nature, although local school boards may give them greater authority if they choose to do so.

In Denver, the picture of decentralization within the city school district is mixed. On the one hand, in the early 1990s, Denver became “perhaps the only district in the United States to institutionalize school-based decision making and parent-community involvement as district policy.”¹⁴⁴⁶ The key innovation was the creation of collaborative decision-making teams for each school in the district.¹⁴⁴⁷ These teams are comprised of the school principal, four teachers, one classified employee, four parents, and a representative of the business community.¹⁴⁴⁸ They develop improvement plans for their school and are empowered, among other things, to schedule teachers’ time, determine school budgets, and select new faculty.¹⁴⁴⁹ Because they were established pursuant to state mandate, however, “[t]here is a lingering sense of disbelief that a big institution such as Denver Public Schools could really commit itself to decentralization, especially since the idea was originally imposed upon it.”¹⁴⁵⁰ Indeed, in 2003, the Denver’s school system imposed a district-wide literacy program as a response to statistics showing a growing problem with literacy in its schools.¹⁴⁵¹ To some teachers, this plan was seen as “a shift in how decisions are made, from decentralized to centralized.”¹⁴⁵² Moreover, in Denver, “principals control only a tiny fraction of their budgets,” which appears largely limited to being able to “convert” one staff position into another¹⁴⁵³ One Colorado legislator is drafting legislation that would “make principals ‘entrepreneurs’ with complete control over school budgets beginning in the fall of 2006 with a gradual implementation.”¹⁴⁵⁴ Thus, while it may be true (as Denver’s superintendent states) that the Denver public school system “is more decentralized than many urban school districts,”¹⁴⁵⁵ the future direction of Denver’s school system regarding decentralization seems to be very much an open question.

As the experiences of these comparison cities demonstrate, decentralization of authority within the public school system is a controversial topic. It will no doubt remain controversial in Boston as well as elsewhere. Boston seems empowered either to increase or to decrease its current level of community participation in educational decision making.

Creating Different Levels of Education

1. The Boston Strategy

The educational system is locked in a conflict between group benefits and individual benefits. Educators generally want to improve the educational quality for the system as a whole. They are dedicated to the entire student body and tend to consider overall improvement to the school district necessary to convince parents and students that Boston public schools can compete with the available alternatives. This is the philosophy behind the reform efforts considered so far: enriching the schools, modifying methods of instruction, and organizing the community. Parents, however, are provided with alternatives to the public school system, and they are often primarily interested in maximizing the benefits for their own children. As determined earlier, the METCO program and charter schools boast long waitlists, and many families with resources already send their children to private schools¹⁴⁵⁶ or have moved to the suburbs to give their children better educational opportunities. Internal fragmentation may be one of the few ways that Boston public schools can attract these kinds of children.

The virtues and defects of separating out different kinds of students within the school system are widely debated by educational commentators and concerned citizens. The creation of separate systems stands in considerable tension with efforts to improve the overall quality of the schools. Over and over again, people argue that good students are being “siphoned off” from the public school system. On the other hand, in a world where differentiation sells and differences in abilities among students are significant, magnet schools and tracking may be one of the few reasons keeping some families in Boston. Similarly, METCO and charter schools are important reasons why many students still enroll in the public school system, and the existence of private

and parochial schools is a primary motivator for other families to stay in Boston.¹⁴⁵⁷ The recent introduction of the MCAS has added another layer of “objectivity” for parents to compare the public schools of Boston with other schools available to their children.

Like many other large metropolitan school systems around this country, Boston has chosen to maintain a series of educational tiers tailored to provide different educational opportunities for students of different ability levels. Boston has three elite public “examination” schools, and it also has a series of formal and informal internal tracking systems that group schoolchildren into classifications based on projected learning ability. The three examination schools are the Boston Latin Academy in Dorchester, Boston Latin School in the Longwood hospital area, and the John D. O’Bryant School of Mathematics & Science in Roxbury. These schools recruit students based on examination scores on the Independent School Entrance Exam taken before the 7th grade.¹⁴⁵⁸ The examination score is weighted equally with the student’s grade point average in English and math,¹⁴⁵⁹ and preference for each individual school is then considered in determining enrollment. Students are admitted as either 7th or 9th graders, although the O’Bryant School takes some students in the tenth grade as well.¹⁴⁶⁰

The application process for examination schools is open to all students, whether they are in public, charter, or private school. Indeed, even though the vast majority of students in Boston are enrolled in the public school system, only about 50% of the examination schools’ students are admitted from the public schools.¹⁴⁶¹ Indeed, approximately 20% of the student body at Boston Latin School comes from just five of the roughly seventy elementary schools – schools with reputably strong “advanced work” programs.¹⁴⁶² More than 30% of all examination school students, and more than 60% of all admitted students from public schools, arrive from an “advanced work” program.¹⁴⁶³

The three examination schools educate more than 5,000 students. The schools’ racial composition varies. In the Boston Latin School and Boston Latin Academy, non-Hispanic whites and Asians are disproportionately represented compared to the public schools as a whole – and compared to Hispanics and African Americans.¹⁴⁶⁴ At the O’Bryant School, about 50% of the student body is African American, and about 10% is non-Hispanic white.¹⁴⁶⁵ In considering these racial demographics, it is worth noting that the examination schools have been subject to judicial challenges for both segregation and racial preference. For many years a judicial mandate required racial set-asides in the selection process to desegregate Boston’s examination schools.¹⁴⁶⁶ When this court order was lifted, the school committee and examination schools sought ways to maintain some form of affirmative action lest the diversity gains be quickly lost. That effort was struck down as unconstitutional under the Equal Protection Clause by a federal court in 1998.¹⁴⁶⁷ As commentators have noted, there are hints in the court decision that it was premised, in part, on the fact that racial affirmative action was used to help minority students from private schools, for whom there is no clear evidence of a history of discrimination.¹⁴⁶⁸ The high percentage of private school admittance, in fact, might help explain the overall demographic discrepancy between the examination schools and the rest of the school system. Proposals for granting a public school preference for admission to Boston’s examination schools have been considered but not adopted.¹⁴⁶⁹

The examination schools are some of the best schools in Boston. The achievements of the Boston Latin School illustrate their differences from Boston’s other public schools.¹⁴⁷⁰ The Boston Latin School provides an unprecedented level of qualified teachers and advanced classes. Twenty-six advanced placement classes are offered along with the regular education courses.¹⁴⁷¹ Students are required to take the advanced placement exam upon their completion.¹⁴⁷² A myriad of programs with outside organizations provide social, psychological, and moral support for Boston Latin students.¹⁴⁷³ Because of the small special education percentage (0.7%) and the absence of English-learners,¹⁴⁷⁴ the 115 teachers are able to maintain a smaller class size not only in the earlier grades but in high school as well. The academic achievements of the students reflect their abilities and the resources that have cultivated them. All students at Boston Latin School pass the MCAS exam in 10th grade, and 98% of its students are accepted to a 4-year

college upon graduation.¹⁴⁷⁵ Although the Boston Latin School is the most well-known of the examination schools, the profiles of the other examination schools are similar. These schools demonstrate that Boston is more than capable of managing an elite school. (Reversing the usual pattern of city students transferring to suburban schools, a controversy exists over the extent to which nonresident suburban students enroll in Boston's examination schools through temporary and false addresses.¹⁴⁷⁶ Although prone to exaggeration, critics estimate that 15 to 25% of examination students may live primarily in suburban communities, while listing Boston addresses to attend these prestigious schools.¹⁴⁷⁷)

These magnet schools, along with the considerations that prompted their creation in the first place, have led school officials to institute divisions among public school students very early in their educational career. Children are grouped into classrooms and programs that determine their educational trajectory. This kind of tracking was much more prominent and widespread before the Educational Reform Act was passed in 1993. As a report published in 1990 by the Massachusetts Advocacy Center noted, almost every school had several levels of class grouping that would start at a very early age.¹⁴⁷⁸ Since it was difficult to move from one track to another, tracking was criticized as a caste system that predetermined the fate of many students early in their education. The report detailed the educational, social, and psychological harms that tracking and student placement produced. The growing consensus was that the use of tracking neglected many children and helped leave them behind.

Mandates by the state Board of Education, along with changing sentiments about tracking, have altered the tracking practices of the Boston public school system since the early 1990s. The Education Reform Act called for an end to "remedial" or "general" education – in other words, the tracking of students into lower, less rigorous tracks. School districts, including Boston's, were asked to submit reports detailing how they were going to eliminate this practice.¹⁴⁷⁹ Boston was quick to adopt a method of eliminating remedial education in its schools.¹⁴⁸⁰ Although remedial tracking has now been largely dismantled, advanced tracks have been retained in part because of the public schools' need to compete for positions in examination schools.¹⁴⁸¹ Advanced work programs continue for children in the 4th, 5th, and 6th grades (before the start of the examination schools), with a focus on providing more depth and breadth for talented students at an accelerated pace.¹⁴⁸² Students tracked into "A" groups are provided more innovative teaching styles and more resources as they prepare for the entrance exams. The selected students are thus permitted to pursue their academic potential to an extent that might not otherwise be possible.

There is concern about the extent to which these programs construct, as opposed to just recognize, "good" students while simultaneously erecting a mental barrier to children who have been tracked into lower groups on the pedagogical hierarchy. Students in the higher tracks are well aware of their placement, and possess a confidence and encouragement other students lack, while those tracked into lower groups are pegged early on with a badge of inferiority that they recognize and often embrace. Many commentators question whether success and achievement for a few is worth denying, even slightly, opportunity and resources for others. Nevertheless, with the success of the examination schools relative to external educational opportunities, and the discrepancies between these schools and other public schools in the city, it is clear that examination and tracking can produce superior schools and noteworthy results.

Meanwhile, special education programs offer tracking at the other end of the spectrum. Many of the children in these programs require, and benefit from, special attention. Still, the result is that a large number of schoolchildren with acute learning problems are placed in highly delineated programs that separate them from other schoolchildren for portions of the day. Children posing problems to classrooms – often overcrowded, with teachers who are overworked – can also be placed in special education programs because regular education teachers lack the time and resources to dedicate themselves to giving the kind of attention needed while attending to other children. Increasing the number of special education teachers exacerbates the burden

on regular teachers. More teachers are hired to serve a small number of special education students, leaving fewer teachers to handle the rest of the school's population.

2. The Experience in Other Cities

Boston is not alone in opting to organize its public school system to provide different kinds of education for different groups of students. Other school districts also have examination schools. Lowell High School in San Francisco has the same level of prestige and competitiveness as the Boston Latin School. Lowell High School has also undergone similar battles over its racial demographics, although the struggle in San Francisco is between the large Chinese population, which claims to be hurt under the current desegregation consent decree, and African Americans, who feel that the system must be maintained to avoid segregation. As one article notes, the reason why Chinese residents are the most vocal group against race conscious admissions is because "white parents who opposed it tended to leave the city" instead.¹⁴⁸³ Reacting to a settlement that provided that race could no longer be taken into account for admission, the school board altered the admissions criteria towards a more holistic and subjective process. Seventy percent of the new students would be chosen by tests.¹⁴⁸⁴ The remaining 30% would be selected using broader measures, such as artistic talent, athletics, recommendations, and family income.¹⁴⁸⁵ This policy has prompted complaints that San Francisco's elite schools are dropping their merit standards.¹⁴⁸⁶ On the other hand, this more holistic process appears to be one way in which San Francisco provides for something akin to a public school preference to applicants to the Lowell School. Half of the students chosen through this process must be taken from "public and private schools that were underrepresented in the students admitted to Lowell the preceding year(s)"¹⁴⁸⁷ No other city in our study with a competitive admission public school seems to have anything like a public school preference of the kind that Boston has contemplated.

Stuyvesant High School in New York City is a competitive admission public school, but "although bitterly criticized by minorities for a test they say benefits students from districts with white majorities, [Stuyvesant] remains a nonnegotiable meritocracy."¹⁴⁸⁸ All students are required to take an entry test, which is regarded as being harder than the SAT, in order to be eligible for the school.¹⁴⁸⁹ The stakes for being admitted to the school are high. In 1997, over 11,000 students competed for 850 spots at Stuyvesant. A recent graduating class of 700 had 21 students admitted "to Harvard, 20 to Yale, 47 to Columbia and 103 to Cornell."¹⁴⁹⁰ At the same time, the school has "neither racial preferences nor many African-American or Hispanic students."¹⁴⁹¹ At the moment, Stuyvesant's website describing its admissions process describes its admissions test, which, it claims, is based on state law.¹⁴⁹²

Chicago's elite magnet schools pursue a somewhat different approach. They currently take race into account when selecting students, although many suspect the school district might eliminate racial preferences in 2006 if the city is released from its voluntary 25-year desegregation plan.¹⁴⁹³ A committee has been named to "explore whether other factors, such as economic status and ZIP code, should be included in magnet admissions criteria in an effort to promote diversity."¹⁴⁹⁴ Currently, "[g]rades, attendance and standardized test scores and, to a smaller extent, race and ethnicity factor into who gets into these premier high schools."¹⁴⁹⁵ The panel recently recommended that the public school system "should set aside up to 20% of slots at each of the city's eight selective-enrollment high schools for students with abilities not measured by standardized tests or grades"¹⁴⁹⁶ The panel also stated that "[s]triving for racial and ethnic diversity in the schools should remain a goal [if the desegregation decree ends in 2006], . . . [b]ut other factors such as a student's leadership qualities, athletic ability or community service also should be considered during the application process."¹⁴⁹⁷ Nothing will be decided, it seems, until the future of the city's desegregation decree is decided in 2006.

As the experience both in Boston and these cities demonstrate, decisions about the creation of elite schools and about special education are in the hands of the local school system only to a limited extent. Decisions by the state regarding educational policy and, equally importantly, judicial decisions concerning the constitutional limits of policies that favor diversity,

constrain city discretion. Equally importantly, as explored earlier, the city is constrained by the intense debate about the wisdom and nature of differential levels of education for public school students.

Expanding School Choice

Even though each of the cities in our study comprises a single school district, spatial segregation along socioeconomic lines within the city manifests itself in the makeup of individual schools. That is because school assignments are often based on where one lives within the city. One way to overcome this form of class and race segregation within city schools is to permit students within a school district to choose a school that is not in their immediate neighborhood.

Boston, like many cities in our study, allows for some – albeit limited – opportunities for intra-district school choice. It used to be that 100% of spots at each individual school in Boston were reserved for students within that school's "walk zone."¹⁴⁹⁸ This proportion has been changed so that "the percentage of available seats allocated for students within a school's walk zone [was reduced] from 100% to 50%"¹⁴⁹⁹ This revised plan treats "students who did not actually live within the walk zone of any school as though they had a walk-zone preference for their first or second choice school."¹⁵⁰⁰ This system has withstood a recent constitutional attack based on the contention that the plan was "was adopted for racially discriminatory reasons,"¹⁵⁰¹ because it sought to increase racial balance within schools while preventing some white students from attending schools within their "walk zone."¹⁵⁰²

New York City has had an intra-district school choice program since 1993.¹⁵⁰³ Nevertheless, because priority is given to neighborhood children, "cross-community district transfers" are only allowed if there is space, which is rare.¹⁵⁰⁴ Thus, although this program, at least in theory, attempts to counteract segregation,¹⁵⁰⁵ its practical value is quite limited. Atlanta had allowed students to transfer within the district based on a first-come first-served basis; in 2001-02, about 1100 of the 2000 requests were granted.¹⁵⁰⁶ This system was "credited with keeping some families from fleeing to the suburbs or private schools," but it had to be changed after the passage of the No Child Left Behind Act in order to give preference to children attending failing schools.¹⁵⁰⁷

Seattle has a school choice program, which allows students and their parents to rank where they want to attend school.¹⁵⁰⁸ For example, Seattle has 10 public high schools, which students rank. The school system then places students according to criteria established in a 1998 plan.¹⁵⁰⁹ There are 3 tiebreakers and the second one is: "if but only if the school deviates from the District's proportion of white and minority students by more than a specified percentage, students who bring that school closer to the ratio are assigned."¹⁵¹⁰ A panel of the federal Ninth Circuit Court of Appeal invalidated this plan as an impermissible racial classification under the Equal Protection Clause.¹⁵¹¹ However, the Ninth Circuit has very recently granted a rehearing *en banc*.¹⁵¹² It seems that much of the impetus for the litigation is that 5 of the 10 public high schools are considered to be significantly superior to the others.¹⁵¹³

San Francisco, in response to the end of its "rigid racial formula" for desegregation,¹⁵¹⁴ adopted a five-year plan in 2001 creating a system of intra-district school choice for its students.¹⁵¹⁵ For the first two years of the program, students were able to rank five schools that they wanted to attend, a number later increased to seven.¹⁵¹⁶ In deciding where to place their students, the school district considers factors such as parental preference, where a child's sibling attends school, the particular needs of individual students, enrollment near a child's home, and "diversity."¹⁵¹⁷

These experiences in other cities suggest that Boston could, if it were so disposed, adopt alternative versions to its current intra-district choice structure. But they equally suggest the limits that this kind of policy promises for fundamental school reform.

Transforming the Student Body

The internal differentiation of Boston's public schools is designed to retain the best-performing students in the public school system, while maintaining a broad-based education system open to any child living in the city. As studies of urban school districts have demonstrated, however, there are fundamental questions posed by school districts like Boston's that current policies do not address. Can the public school system, populated overwhelmingly by students from poor families, remain competitive for middle-class students against the appeal of private schools, charter schools, and suburban schools? Is there a way to attract the kind of students who now attend suburban schools, private schools, and charter schools into the public school system as a whole, not just to its elite schools? No matter how much enrichment or classroom innovation or community organizing is implemented, is the dramatic divergence between the nature of the student body and of the city population as a whole an impediment threatening the popular support for, and the quality of, the city's public education system?

Questions of this kind are not – properly are not – on the school committee's agenda. The school committee is obligated to educate the student body it is given, however it is constituted. But the city itself is in a different position. It needs to decide the extent to which its future – not only of its educational system but of the city itself – will ensure that middle class residents, including middle-class families with school age children, live in the city. If it adopts this objective, it must establish a housing and development policy aimed toward ensuring that this constituency can live in town. It must obtain revenues and make expenditures to achieve the same end. And, of course, it must improve the quality of education – in ways such as those canvassed above – so it can entice residents not just to live in the city but to send their children to the public schools rather than to the alternatives. Every one of these kinds of policy initiatives, as demonstrated throughout this study, is constrained by state law. At the same time, Boston has some room to maneuver in establishing these kinds of policies. In exercising its current discretion – and any additional discretion it might be given in the future -- it needs to decide what kind of city it wants to become in the twenty-first century.

Chapter Eight

The Future of Boston

Throughout this report, we have referred to four alternative futures for the City of Boston. We have called these alternatives the global city, the regional city, the tourist city, and the middle class city. This final chapter draws together these earlier references, indicating the kinds of re-thinking of the legal powers of the city government that might promote these four possible futures. Of necessity, this chapter will be both speculative and incomplete: there is no sure way to promote any of these conceptions of Boston's future, let alone others that we do not specifically consider. Besides, legal changes are only part of any strategy designed to further different conceptions of the city's development. As we stated at the outset, these four futures are also not necessarily inconsistent with each other; decisions have to be made about which aspect of each of them is most important. Despite these complexities, it seems to us helpful to take a closer look at each of these ways in which Boston might develop in the twenty-first century and at the kind of legal structure that might help it do so.

Boston's legal position should be the subject of a much richer conversation than has historically taken place. The fact that Boston has limited legal authority has long been recognized. The city government itself has often complained about its lack of power -- and especially its restricted revenue-raising capacity. Long ago Mayor Curley pushed for greater home rule for Boston. But the city's complaints have largely been to no avail. One reason for this, we believe, is that the issue has so often been framed in terms of the city's need to avert fiscal crises. As long as requests for greater home rule are made in terms of Boston's immediate financial problems, its complaints are likely to reinforce the popular view that city officials are simply trying to avoid hard budgetary choices by complaining about their need for more revenue. People outside of Boston's city government can easily dismiss concerns about limited city power because they do not appear to be connected to broader structural issues that concern the state as a whole.

The real issue concerning home rule for Boston has little to do with the city's short-term budgetary needs, important as they are. The issue instead is that Boston—even more than other municipalities in the state—has to function within a legal structure that is essentially the same as Massachusetts put in place nearly a century ago. To the extent it has been updated, the key changes were made in response to the unique challenges that Boston faced following World War II, when the city suffered dramatic population losses in connection with nationwide economic restructuring. Many of these changes, as we explained in Chapter Three, resulted in the city's ceding control over key parts of its infrastructure to entities run by the state. Although there may have been good reasons for that transfer of power at the time, Boston is no longer a city in decline. Its legal structure should reflect this new status. To be sure, the state conferred "home rule" as a nominal matter on Boston and the state's other municipalities in the 1960s. But Boston's version of home rule, as we have explained above, is an unusually constricted grant of power.

The need for reform becomes particularly clear when Boston's legal powers are compared with those of other major metropolitan centers. Their greater legal flexibility suggests another reason that more is at stake, when considering Boston's legal powers, than the city's perennial need for additional cash. As a global city and a tourist city, Boston is in competition with other cities both in the United States and abroad. New York, Chicago, San Francisco, Seattle, Denver, and Atlanta -- the cities we have examined in this report -- are examples of these competitors. These cities, like Boston, must make decisions about their future. But they are in a better legal position to choose among possibilities and to implement their choice than Boston is. None of the other cities in our study, however, is particularly well positioned to work cooperatively with its surrounding suburbs. But it is ironic that Boston is also no better off in this regard. Since Massachusetts has not given Boston the kind of home rule that its competitor cities enjoy, it

should at least have obtained the benefits that greater state control is traditionally thought to provide – that is, less parochialism. But Boston cannot claim even that advantage.

In suggesting in this report that Boston is a city bound, we are not arguing that the state should have no role to play in crafting Boston's future. The state is obviously and properly interested in the development of its largest city. Its own future is bound up with Boston's. The point we are making is more limited: the City of Boston should be as free as other major cities in the country to organize itself to implement a plan for its future. The current legal structure in Massachusetts provides Boston more disincentives than incentives for undertaking this crucial task. These limitations should be of concern not only to city officials but to the residents of the other cities and towns in the Boston metropolitan region and of the state as a whole. Boston may be home to less than one-fifth of the region's population, but its welfare and that of the state itself is deeply connected with the fortunes of the Commonwealth's largest city. Boston can be a major contributor to the social and economic health of the region and the state if it is able to maintain and build on its attractiveness and to ensure its affordability. On the other hand, if Boston is less able than other comparable cities in the country to respond to the economic and demographic shifts that inevitably affect major urban areas, it will be hampered in its ability to play that role. Boston has made enormous gains over the last several decades, and it should now be able to strategize about its future from a position of strength. State law should be revised to facilitate this city effort.

To examine how Boston might be empowered to accomplish this task, we begin by describing more fully each of the four future conceptions of the city's future that we have regularly referred to in this report. We then turn to a consideration of how the limits on the power of the City of Boston, as described in each of the preceding chapters, affect the city's ability to embrace any of them.

Four Futures for Boston

Just as it is unhelpful to think about Boston's legal power solely in fiscal terms, so too is it wrong to consider the concept of home rule abstractly as a question of the city's general right to engage in local self-government. The issue is not whether to empower Boston as a matter of principle. The issue instead is how to empower Boston so that it can take control of its future. To answer that question, it is necessary to consider the purposes for which local power could be used. Only then can one properly evaluate the limitations imposed by the city's current legal powers. One way to undertake such an evaluation is to think about the kinds of futures that Boston might pursue and to consider whether the city's current legal structure facilitates efforts to implement them. The current literature on urban governance suggests four prominent paths for future development. Collectively, they frame our discussion of why enhancing the legal powers of the City of Boston matters.

The Global City

Saskia Sassen's important book, *The Global City*,¹⁵¹⁸ argues that a new kind of city has emerged since the 1980s, one with an economy that is integrated into other city economies around the world. Major cities, she says,

now function in four new ways: first, as highly concentrated command points in the organization of the world economy; second, as key locations for finance and for specialized service firms, which have replaced manufacturing as the leading economic sectors; third, as sites of production, including the production of innovations, in these leading industries; and fourth, as markets for the products and innovations produced.¹⁵¹⁹

Boston is an example of the kind of city that Sassen describes. It is a key location for

financial and other specialized service firms as well as for the production and consumption of innovations in the global economy. In 2004, the Boston Redevelopment Authority examined the economic make-up of Boston and 34 other major American cities, focusing particularly on what it called “knowledge based” industries. By “knowledge based” the BRA meant industries like publishing, communications, computer-related services, finance, insurance, real estate, legal services, health services, education, engineering and management – the kind of specialized services that, Sassen argues, characterize global cities. “Boston’s share of employees in knowledge based industries (58%),” the BRA found, “is exactly double the US average. Of the nearly 3 out of every 5 Boston workers working at knowledge based jobs, 18% are employed in the finance, insurance, and real estate sector – more than double the national average.”¹⁵²⁰

Boston cannot simply count on its continuing to be a global city. Global cities are in competition with each other. Boston must nurture its global status in order to retain it. This requires more than simply ensuring that the city has the ability to retrain its current knowledge-based industries and to attract more of them. It also requires the city to be a place where those who work in these industries – and, equally importantly, those who work in the vast array of service jobs that support the lives of knowledge-based workers (nannies, dry-cleaners, restaurant workers, and the like) – want to live. One critical ingredient in this effort, mentioned earlier in this report, is dealing with Boston’s lack of affordable housing. But, as Richard Florida has emphasized, the task is broader than that. It requires Boston to continue to develop its urban vitality, ensuring that it is the kind of place that people from across the country, and around the world, want to live.¹⁵²¹

The Regional City

“Most Americans today,” Peter Calthorpe and William Fulton declare in their book *The Regional City*, “do not live in towns—or even cities—in the traditional sense of these terms. Instead, most of us are citizens of a region—a large and multifaceted metropolitan area encompassing hundreds of places that we would traditionally think of as distinct and separate ‘communities.’”¹⁵²² Most people, they hasten to add, do not think of themselves in these terms. They think of themselves as living in a specific city or town, even a specific neighborhood.

But the patterns of our daily existence belie a different reality. Most of us commute from one metropolitan town to another for work, for shopping, and for many other daily activities. The businesses for which we work are typically bound up in a series of economic relationships with vendors and customers on a regional or metropolitan scale. And, even if we do live and work in one small town . . . , the ecological fallout of our day-to-day patterns will be felt upstream or downstream throughout the region.

Boston is a regional city in Calthorpe and Fulton’s sense of the term. The Boston Metropolitan Planning Organization defines the region as 101 cities and towns. (Other definitions make the region even bigger.) Boston’s relationship to its neighbors is one of both connection and disconnection. On the one hand, as this report has described, the city attracts an usually large commuter workforce and its cultural and sports facilities regularly bring residents of the region who live outside of Boston to town. At the same time, Boston is in competition with its neighbors for residents and commercial development. Boston and the inner suburbs have had relatively stable populations for many years while growth has exploded on Cape Cod and along Interstate 495.¹⁵²³ Boston’s future depends on whether this growth contributes to, or detracts from, Boston’s continued success. Boston’s environmental quality and its security against threats of terrorism, like its economic future, are also powerfully affected by the decisions made by the other cities and towns in the region. Yet there is little regional coordination on these (or other) kinds of issues. Boston’s status in its region and the region’s own future are in a continual state of transition. The city’s effectiveness in engaging with its neighbors is likely to have a critical affect on its own prosperity and vitality – and on that of its neighbors as well.

That the Boston metropolitan area has a stake in Boston's future should be beyond dispute. The economy in metropolitan Boston is the third largest of the seven metro areas considered in this study. The Boston area ranks third among the seven in terms of having the largest number of businesses located within three miles of the central business district. In addition, while suburb-to-suburb commuters outnumber suburb-to-city commuters in the region, more commuters than city residents work in Boston. These facts – combined with the city's unmatched array of cultural and health care institutions, not to mention its airport – support the notion that, suburbanization notwithstanding, Boston remains the region's hub.

The Tourist City

In their influential book *The Tourist City*, Dennis Judd and Susan Fainstein describe the transition of major cities into vehicles for attracting tourists.¹⁵²⁴ Tourist cities shift their focus from the needs of city residents to the desires of out-of-towners who might want to visit. In doing so, they sell themselves to people across the country and around the world in a manner similar to businesses that market any other consumer product. They advertise, highlight the value of their heritage, culture, and architecture, and construct their infrastructure and amenities to ensure that the tourists come. If tourists do come, the city – and many of its residents -- devote themselves to pleasing these outsiders regardless of whether they will ever return.

There can be little doubt that Boston is a tourist city, or that the Commonwealth as a whole benefits from this fact.

Boston is among America's premier tourist cities, placed by surveys among the top five U.S. cities to visit. Each year, the city attracts millions of people. They come for business, academic conferences, and special events like the Boston Marathon. They come to see colonial-era sites such as the Paul Revere house and to wander its well-preserved historic neighborhoods. They come for graduation ceremonies at one of the area's many colleges and universities and to tour the New England countryside. They come to shop in one of the city's notable retail areas, such as Faneuil Hall Marketplace, to enjoy one of several nationally ranked museums, or to attend the theater or symphony.¹⁵²⁵

Tourist cities, like global cities, are in competition with each other. A city's failure to focus on changing tastes and fashions will lead tourists to journey elsewhere. A city's failure to support its cultural attractions – and to generate new ones – will suffer the same fate. Boston cannot simply assume that tourists will continue to want to travel here. It must organize itself to ensure that they do.

The Middle Class City

For most city residents, the most familiar conception of Boston – and thus of its future – is that of being a middle-class city. This is a city focused on its residents not on outsiders, on its city services not on its marketing ability, and on its ability to be the home not simply of the rich and poor but of those in between. Sam Bass Warner describes this vision of Boston in the late nineteenth century:

Perhaps 60% of Boston's population was middle class by living habits and aspirations. . . . As one might expect, more people held middle class aspirations than enjoyed the income necessary to live out these ideals. A reasonable guess would be that 40 to 50% of the families of Boston were middle class by income. Such people were sufficiently well off to live by the income of one member of the family. This income was secure enough not to be drastically curtailed in times of panic; it provided the family with a safe, sanitary environment; it allowed the family to dispense with children's work at least long enough for them to finish grammar school.¹⁵²⁶

Of course, both this picture of Boston and the definition of the “middle class” have dramatically changed in the last hundred years. Barry Bluestone and Mary Huff Stevenson describe the nature of these changes as a “triple revolution”: a demographic change caused by new immigration and the doubling of the minority population; an industrial revolution that led to the loss of traditional blue-collar jobs and the rise of an information-based economy; and the spatial revolution caused by suburbanization.¹⁵²⁷

Despite these changes -- or because of them -- Boston’s responsibility for providing basic services to its residents remains unchanged. And so does the widely held desire to ensure that it remains a city populated by the middle class. All of Boston’s major services, from police and fire to health services and sanitation, are important to being a middle class city. But none is more important than the quality of its public schools. Boston cannot keep its middle class residents -- or attract new ones -- unless the services it provides are of a high quality and are provided at a tax rate middle-class residents can afford. The three revolutions that Bluestone and Stevenson describe -- above all the industrial and spatial revolutions -- jeopardize Boston’s ability to do. Without an effective city policy, Boston could become simply a home for the rich -- or, perhaps, for the rich and very poor.

City Power, State Constraints, and the Future of Boston

Boston does not wholly lack the power to become a city that engages with the global marketplace or that contributes to the economic vitality of its own region. Nor is it without the ability to attract tourism or to provide an appealing home for middle-class residents or for those aspiring to join their ranks. Boston has already made progress in pursuing all of these goals. Each chapter of this report discusses an aspect of the state-imposed limitations on Boston’s ability to pursue the objectives of a Twenty-First Century City outlined above

Our study emphasizes three major deficiencies in the current legal structure. The first is that Boston has limited home rule power when compared to other major competitor cities. As a result of the state-imposed constraints of Boston’s home rule, including its power to preempt local lawmaking more extensively than other states, Boston’s ability to pursue bold initiatives on its own authority is severely restricted. The second problem is that the current legal structure is unusually constraining when it comes to local fiscal discretion. State law makes Boston exceptionally dependent on a limited number of revenue sources, most conspicuously the property tax. As a result, Boston’s efforts to plan for its future are artificially constrained by a need to ensure that its development maximizes a single, state-selected revenue source. This restriction distorts the kind of open and innovative planning process that the state should be encouraging Boston to pursue. The third problem is that the current legal structure places limitations on the city’s power to be creative in its approach to economic development. This is due to the fact that state law places important legal restrictions on innovative land use planning tools and fragments the city’s control over much of its infrastructure and territory. No other city in our study operates within a legal structure that has this combination of restraints. As a result, no other city seems as bound in facing its future as Boston does.

Lack of Confidence in Local Power Due to a Constrained Home Rule Grant

As we demonstrated in Chapter Three, the legal structure of home rule in Massachusetts exempts critical matters from Boston’s authority -- taxing, borrowing, the regulation of private and civil affairs, and municipal elections. These exemptions reduce Boston’s home rule authority more than that of any of the other city we have examined. The state’s power to preempt local lawmaking is also more extensive in Massachusetts than elsewhere. And, finally, Boston is subject to a number of special laws that impose particular burdens and constraints that do not apply even to the other cities and towns in the state. These and other restrictions -- such as the legal structure established by the state legislation that constitutes Boston’s city charter -- limit Boston’s ability to make important decisions on its own.

This legal structure imposes constraints on Boston's ability to pursue a variety of specific policies that other cities do not confront. But the most important impact of this legal structure may be less tangible. Officials in cities that operate under more permissive home rule grants – such as Chicago and Denver -- do not assume that they lack control over key policy decisions. They take action with confidence in their own authority, and they do not feel the need to gain approval from, or even check with, state officials. In Boston, by contrast, the shadow of preemption and the history of the state courts' narrow interpretations of the home rule grant engender a palpable sense that innovative policies are likely to overstep state-imposed legal limits. The problem with this attitude is not just that some cutting edge innovations will be invalidated if adopted locally. Other innovations will not even be explored because of the assumption that the legal hurdles are too onerous to overcome.

The city's charter – or rather, the city's lack of a charter – epitomizes this problem. A city charter is widely understood to be the city's governing document. In other cities, charter reform is therefore an important part of civic politics. In Boston, this is simply not the case. Boston's "charter" is a compendium of special state acts. Although these acts are sometimes modified at the city's instigation, it is widely recognized that any changes require state legislative involvement. While other cities independently debate fundamental aspects of their governance through charter reform proposals – from campaign finance reform to nonpartisan elections to the amount of benefits that should be available to public employees -- Boston can take up these issues only through petitions to the state legislature. Moreover, current state law makes it unlikely that Boston will ever take control of its own charter. The Home Rule Amendment prescribes unusual requirements for adopting a home rule charter that strongly discourage local officials from altering the status quo. Doing so requires a municipality to cede total control over the current structure of city government to a separately elected charter commission. As a consequence, while in other cities the whole citizenry is periodically engaged in the process of contemplating basic features of the local governance structure, this experience does not take place in Boston.

This absence of civic involvement in local government organization is more troubling than simply its effect on diminishing the possibility of making any particular governmental reform. Active civic engagement both within city government and among city residents may be the most important ingredient that a successful urban center can cultivate. Given the fast pace of economic and demographic change and the competition among cities nationally and worldwide, efforts to promote the city (and region) are likely depend upon an engaged civic sentiment. As long as Boston operates under one of the nation's more restrictive home rule amendments, it will be inhibited in developing this kind of popular participation and energy. This is particularly true given the fact that Boston officials are discouraged from developing confidence in their own authority. While city officials have been quite creative in making the most of the authority that they now have, the undeniably limited nature of the legal structure exerts a drag on local action that is both problematic and unusual.

Boston's Constrained Fiscal Structure Hampers City Planning and Operations

When we examine the more concrete effects of the current legal structure, state-imposed restrictions on Boston's fiscal power stand out as being especially important. From taxing to borrowing to imposing fees, state law gives Boston comparatively little authority to raise local revenue. Other cities either enjoy a more free wheeling authority to devise new taxes or a more permissive borrowing environment. Their capacity to raise funds through the imposition of fees is also much greater. The revenue constraints Boston faces are particularly significant because, as Chapter Five details, Boston lacks control over its expenditures as well. Eighty percent of the city's expenditures are devoted to schools, police, fire, debt service, state assessments, retirement expenses, and health insurance. Many of these expenditures are mandated by the state, and others leave little room for reduction if Boston wants to remain attractive to its residents and visitors. As a result, Boston has very little discretionary income – and thus can do little to

target its expenditures to pursue any of its possible futures.

Of course, other cities are constrained in their ability to control their expenditures too. But some have more discretionary income than Boston because they have fewer direct state spending mandates and because they can spend money, by issuing bonds, in ways that Boston cannot. Moreover, giving Boston more of an ability to make targeted budget allocations is not simply a question of increasing its revenue. The city needs flexibility to allocate money to support city priorities. City spending plays a critical role in determining the extent to which services can be aimed at tourists or residents – or to support of financial institutions or educational institutions. No doubt the state has a role to play in ensuring that Boston adequately supports important city services and the livelihood of city workers. Nevertheless, to see how relatively restricted Boston is, one has only to compare its legal authority to negotiate with municipal employees about benefits with Denver's power over the same issue.

State aid provides another good example of the way that fiscal constraints limit Boston's ability to make choices about how to spend even the funds that it does have. In other cities, state aid comes as a fixed percentage of a state tax. This structure is beneficial even if it does not result in the city receiving more revenue. It enables the city to make budget calculations in advance and to plan with a good idea of the revenue it can expect. In Massachusetts, by contrast, state aid comes as a discretionary grant from the legislature. This means that it is tied up with annual budget politics in the legislature. Planning in advance at the local level is difficult because the city cannot rely on financial forecasts. It must also guess about state politics.

Indeed, the conflict between Massachusetts's municipal finance structure and Boston's ability to plan for the future goes even deeper. The financial structure indirectly – and perhaps even unintentionally -- encourages Boston to favor some planning goals over others simply to achieve its revenue goals. Every city in our study wishes it had more funds on hand. But, as Chapter Four shows, no other city has as little diversity in its revenue sources as does Boston. The current fiscal structure distorts local planning in Boston not simply by restricting the absolute amount of money but by limiting the kinds of revenue that the state permits the city to raise. Boston has not chosen to be uniquely dependent on the property tax; state law gives Boston little choice but to rely on it. Those cities that have been given greater discretion have invariably chosen to use it to allocate their tax burden in a far more balanced manner. For example, Chicago, which is not subject to the kind of state law property tax cap that applies to Boston, has voluntarily imposed its own local cap on property taxes. It has elected instead to use a variety of other revenue raising devices to cover its expenses. Even a reform of local finance that produced no more revenues for Boston, therefore, would enhance Boston's ability to plan for its future. What the city needs as much as new money, in other words, is different sources for money.

One can understand the state's interest in requiring fiscal discipline at the local level. To that end, Massachusetts separately requires that Boston maintain a balanced budget. Given this limit, the state should be more willing than it has been to permit the city to determine for itself how best to meet its obligation to stay in the black. The state's refusal to grant the city greater local revenue authority encourages Boston to think about its future possibilities for development through the narrow lens of the property tax.

1. Fiscal Discretion and the Middle Class City

Consider the effect of limited tax diversity on Boston's interest in maintaining itself as a middle class city. Since a middle class city needs to be affordable, a rise in property values might appear to be counter-productive. Yet Boston has powerful incentives to keep the property tax burden high because it has few tools for shifting tax burdens to other sources. This state-imposed taxing structure makes the city's economic development policy less focused on promoting housing affordability than it might otherwise be and therefore makes it less likely for the city to move along a path consistent with its tradition of being a comfortable home for middle class families.

To the extent that the city does try to promote itself as a home to the middle class, it must look to a single revenue source, the property tax, to find the funds to promote affordability. Predictably the city will make new office development bear a significant portion of the cost of efforts to promote affordability or to shift an increasing portion of the levy onto commercial properties and high-end real estate. These choices may not be objectionable as a matter of tax policy. They may even be the right choices. But it is important to understand that they occur within a legal structure that offers the city few other options insofar as it wishes to generate funds for residents who do not constitute a tax base that can easily support housing initiatives. Indeed, the exercise of local fiscal policymaking available to Boston may itself raise legal problems, given the limited discretion to make local tax policy that the state confers.

2. Fiscal Discretion and the Tourist City

The state's requirement of property tax dependence is also not well suited to Boston's effort to maintain and build upon its reputation as a tourist city. Non-resident visitors might well be more attractive to the city if Boston had a sales tax. This does not mean that the city should necessarily have its own sales tax, although many cities do. Boston could simply receive a portion of the state sales tax based on a guaranteed formula that accounted for its unique status as a retail and entertainment destination. Currently, unlike other cities in our study, Boston gets no fixed percentage of any state tax.

Whatever form a local sales tax might take, the key point is that the city's desire to invest in programs that would add to its status as a tourist city – from tougher regulation of taxicabs to the promotion of tourism itself – might be greater if there was a more direct connection between the city's fiscal authority and this aspect of Boston's economy. If the city had revenues from the sales tax, increases in tourism would have direct, positive fiscal consequences for the city, making investments in efforts to attract tourism easier to justify in budgetary terms.

One can see how this dynamic might work in Boston by considering the city's relatively recent receipt of the power to impose a hotel tax. It's no coincidence that Boston is now in the midst of a hotel boom. Attracting hotel guests to the city is more in its direct financial interest than was previously the case. By contrast, a recent Boston Foundation report notes that Boston has no dedicated tax for culture and the arts, even though arts funding can be an important means of enhancing tourism as well as have beneficial impact on the urban experience for residents.¹⁵²⁸ The cities identified by the Boston Foundation as having a dedicated funding mechanism for culture and the arts have much broader taxing authority than does Boston. They all rely on either a sales tax or a hotel tax. The likely reason for this is the perceived equity of funding investments in tourism with funds collected in significant part from tourists themselves. Boston could probably provide equivalent support for the arts only by dedicating a portion of its property tax, even though dunning residents to attract visitors is a much less politically attractive – and arguably less equitable -- option. True, Boston could also use its hotel tax for these purposes. But, while San Francisco uses part of its hotel tax to fund the arts, it has a wide variety of other non-property tax levies on which it can also rely. In Boston, the hotel tax is one of the few non-property tax revenue sources that Boston can tap, making it much less likely that the city will be willing to dedicate a portion of it to a particular program rather than to support the general budget.

3. Fiscal Discretion and the Global City

Even though Boston's heavy property tax reliance might seem to push the city in the direction of favoring downtown office development – and thus comport with local efforts to make Boston a financial center – the incentives regarding this objective are in fact more complex. Consider the effect of property tax dependence on the city's likely approach to the knowledge-based industries that do so much to position Boston favorably in the global marketplace. Many of these key "industries" – from universities to health care providers -- are not directly connected to the financial services industry or to the downtown business district. Indeed, they are often non-

profit institutions and thus exempt, by virtue of state law, from Boston's key source of revenue. The city's tax structure thus perversely encourages Boston to view such entities as drains on its tax base. This attitude may have subtle effects on the way the city responds to the myriad requests it receives from some of these institutions – institutions that are among its largest employers. Were Boston empowered – as other cities in our study are -- to rely on a broader range of revenue powers, it might have more reason to view these institutions as important components of its fiscal health. At the very least, it might have fewer incentives to look upon such institutions as obstacles to the city's capacity to balance its budget.

4. Fiscal Discretion and the Regional City

At present, there is little incentive for Boston and the region's other localities to work collectively. On the contrary, like other cities and towns, Boston has every incentive to act in a narrowly self-interested manner. Each city and town in Massachusetts is organized to be competitors for real estate development rather than participants in a collective endeavor to further the regional economy. Boston's largest non-tax source of local revenue, as we noted in Chapter Four, is parking fines. This fact hardly attests to a high level of cooperation between Boston and the municipalities that are home to those who regularly visit the region's center.

If the city's fiscal discretion were broader, more opportunities for creative regional financing agreements could be developed. State-aid could be structured to foster this kind of cooperation. So could fees, given the fact that fees for many services are paid by residents and non-residents alike. And additional taxes, whether on sales or income, could be structured with the goal of benefiting the region as a whole rather than stimulating intra-regional competition. Ironically, the very fact that Boston is so fiscally constrained presents the state with an unusually good opportunity to encourage efforts by Boston to become a regional city. Precisely because Boston and its neighbors have no authority to adopt a sales tax, and are so restricted in their ability to impose fees, there is room for the state to expand these kinds of local revenue-raising authority on the condition that the expansion promotes regional cooperation. In states that already have conferred broad local revenue powers, efforts to tie the exercise of such powers to requirements to work with the city's neighbors might be treated as a limitation on home rule. In fact, judges in Colorado struck down a financing scheme of this kind on the ground that it infringed a city's home rule powers. In Massachusetts, it would be hard to treat enhanced fiscal discretion, even if tied to regional cooperation, as anything other than a grant of additional local power. Such an addition would certainly raise no problems under the Home Rule Amendment, given the broad preemptive powers it gives to the state.

These days, Boston seems to have the worst of both worlds. It receives far less local fiscal discretion than many of its competitor cities yet it does not enjoy the benefits of greater connection to its surrounding suburbs that intensive state oversight might have engendered. Other cities have been given broader benefits of home rule authority over revenue generation even as their states are contemplating ways to make the fiscal structure more conducive to collective regional decision making. San Francisco has far greater tax diversity than Massachusetts affords to Boston. And efforts are underway in California to establish a regional sales tax. To be sure, California's regional financing initiative has not become law. Still, no comparable activity has even begun in Massachusetts. That is not to say that there are no promising signs on this front. The passage of the Community Preservation Act (check) and of recent state legislation favoring local transit zoning indicates a growing recognition of the connection between enhanced local power and greater regionalism. Nevertheless, Massachusetts, largely hostile to fiscal home rule, has also done little to check fiscal parochialism.

5. Conclusion

The relationship between local reliance on property taxes and the local pursuit of different

goals for the city's future is by no means determinative. A decision to promote the vision of a global city in order to raise property taxes might backfire, with housing prices rising so fast that other global cities might become more attractive to potential investors and newcomers. At the same time, the promotion of a tourist city, a middle-class city, or a regional city might in fact produce more property tax income than decision makers might have thought. The state requirement that Boston rely heavily on the property tax therefore does not obviously induce the city to favor one vision of its future over another. The point is not to suggest a mechanical link between revenue source and outcome. The point instead is that the current revenue structure generates incentives, whether or not the decisions the city makes in response to them turn out to be mistaken. The current fiscal structure is problematic because it makes the city unduly focused on a single tax in thinking about how to plan for any of its possible futures. The consequence may be that the city lacks the proper incentives to undertake a range of actions that would promote useful development along any possible path.

Boston is powerless to alter its current incentives. The incentives have been imposed by the state even though, we suspect, the state had no intention of using its fiscal oversight as a covert means of shaping local planning decisions. If the state did have this intention, the incentives would still be a problem: decisions about the city's future should be made on the merits of the alternatives, not because of state-created revenue rules. This kind of distortion would be reduced if Boston, like other cities, had a diverse array of income sources on which to rely and more flexibility as to the expenditures it must make.

Limits on Economic Development Tools and Fragmentation of Land Use Power:

The most visible way to see the extent to which the alternative visions of the global city, the regional city, the tourist city, and the middle class city can be embraced is to look at land use and development decisions. Very different kinds of investments are needed to promote financial services, cultural attractions, middle-class housing, hotels, better schools, or a better airport. As we have seen, the Boston Redevelopment Authority -- whose composition is mandated by state law in a unique way rather than chosen by the city itself -- is a powerful vehicle for making city policy on these kinds of decisions. A separation of development and planning -- like a change in the actors who make these kinds of decisions -- can affect the direction of city policy, as Denver's city government has demonstrated.

Development decisions, however, are not simply the product of the power and structure of the BRA. They also are affected by the power and structure of state-created authorities like the Turnpike Authority, the Convention Center Authority, and Massport -- entities that powerfully influence development decisions within the city's borders. In addition, as Chapter Six demonstrated, Boston must strategize for its future without having a number of basic planning tools at its disposal. Boston's ability to use development tools such as tax increment financing and business improvement districts is limited by state decision making. In sum, a great deal of the city's power over land use is restricted by state law, is in the hands of others, or is exercised by a agency created almost fifty years ago when Boston was a very different city.

1. Development Discretion and the Middle-Class City

It is not hard to see how Massachusetts' narrow home rule grant adversely affects Boston's ability to regulate land uses to preserve its middle class. As we explained at length in Chapter Six, Boston lacks affordable housing not only for low-income residents but for middle-class families. Yet the city's efforts to exercise land use power in ways that might promote housing affordability have regularly run into legal trouble. A succession of local affordability efforts -- from rent control to condominium conversion laws to linkage -- have been either prohibited or permitted only pursuant to express state legislative grants that the city cannot easily alter. At the same time, the Massachusetts Home Rule Amendment has been construed to give the city only limited authority to regulate in ways that depart from traditional zoning. Many other

cities operate under home rule grants that do not contain the two exemptions from the Massachusetts Home Rule Amendment that create the most legal problems – the ones covering taxation and the regulation of private or civil affairs.

Boston's legal problems are not limited to its constrained ability to formulate its own housing policy. In addition to the problems engendered by the city's imbalanced reliance on the property tax, discussed above, the city lacks development tools that might facilitate its effort to promote businesses that would nurture the growth of a stable middle-class. One of the city's more innovative projects designed to promote this objective has been the Back Streets Initiative.¹⁵²⁹ The program seeks to create local jobs that are better paying and more secure than many service sector jobs while not requiring the high skills and advanced educational attainment that the best service sector jobs often demand. As the Mayor explained when he began the effort in 2001, the Back Streets Initiative is designed to "retain and grow Boston's small and mid-sized industrial and commercial businesses." At the time of the announcement, the Mayor noted that roughly 20% of the city's jobs came from such businesses. He set a goal of ensuring no net job losses among these businesses.

A key focus of the Back Streets Initiative is land use development, and certain features of the legal system help Boston pursue its development goals. The combined development and planning powers of the BRA, which administers the Back Streets Initiative, helps the city preserve industrial areas. The BRA can both ensure that they are not rezoned for new luxury residential development and offer a relatively efficient means of assembling parcels for industrial businesses in need of different space. Other aspects of the state's legal structure, however, are problematic. Because many local industrial sites are along the harbor, they occupy city land that is subject to state land use controls. That is true of the Boston Marine Industrial Park, which has been deemed a "designated port area" by the state office of coastal zone management. Certain uses of the area are prescribed by state regulation, namely those that the state deems incompatible with port uses. The state initially relied on this authority to reject a city proposal to make the area available for a concert series. The city sought to justify the proposal on the grounds that the resulting revenue could be invested in the city's Back Streets Initiative, particularly since the concert series would not oust any existing industrial uses. Ultimately, the city prevailed, but only because of a special state legislative act, passed over the Governor's veto.

The story exemplifies the difficulty Boston can expect to encounter when it attempts to find creative ways of engaging in land use planning, given the extensive degree of state control over large swaths of city territory including such critical aspects of its infrastructure as its waterfront. Another way in which state law indirectly inhibits Boston's industrial job preservation efforts is by limiting the city's power to use tax increment financing. As we noted in Chapter Six, Massachusetts permitted its cities to exercise this authority only in 2003, and even then the authorizing legislation was comparatively limited. By contrast, Chicago used tax increment financing throughout the 1980's and 1990's to develop more than 1.5 million square feet of industrial space through renovations and new construction of decaying industrial sites. In the process, Chicago leveraged \$200 million of local investment into nearly \$2 billion in private investment, creating more than 10,000 industrial jobs along the way. Only now can Boston attempt to follow that model of success.

2. Development Discretion and the Tourist City

These last two examples – the Boston Marine Industrial Park and the use of tax increment financing -- are also relevant to Boston's efforts to promote itself as a tourist city. The state's attempt to preclude the city from making an underutilized industrial site available for a concert series is emblematic of Boston's relative lack of control over many of its potential tourist attractions. As we discussed in Chapter Six, the city has had very little control over the development of perhaps its most important new attraction – the green space that will be made available as a result of the Big Dig. Consistent with the fragmented manner in which many major land use development decisions are often made in Boston, much of the planning for that critical

public space has been controlled by state agencies or by public authorities in which the city has only a limited input.

The state limits on the use of tax increment financing that we highlighted in connection with Boston's effort to implement its Back Streets Initiative inhibit development aimed at attracting visitors and tourists as well. Other cities' efforts to revitalize downtown shopping districts have relied upon the use of tax increment financing. San Francisco used its authority to do tax increment financing to support to creation of Pac Bell Park, where Major League Baseball's San Francisco Giants now play.¹⁵³⁰

Another tool used by cities interested in developing attractive retail destinations is the Business Improvement District. Here, too, as Chapter Six noted, Boston is disadvantaged. While virtually every other city in our study has experimented with this device -- and while cities like New York have made it an important ingredient in urban governance -- Boston's efforts to establish a Business Improvement District in one its prime retail centers, Downtown Crossing, have continually been stymied. State law in effect permits a district to be formed only with the unanimous approval of affected properties because it permits each property holder to opt out of the fee requirement if they wish. That unanimity requirement is not contained in the enabling legislation that applies to other cities, and it has proven to be a serious obstacle in the Downtown Crossing Area given the number of properties held by absentee owners. The city has presented the state legislature with a home rule petition seeking the authority to permit a majority of the businesses in the area to form a district that could bring about improvements, but thus far the request has not been successful.¹⁵³¹ Given the limited discretionary revenue the city possesses, Boston's inability to secure the power to facilitate private sector development -- authority that its competitor cities already possess -- is particularly revealing of its limited power.

3. Development Discretion and the Global City

Many of the restrictions on local power just canvassed are also relevant to Boston's effort to promote itself as a global city. Boston lacks the legal powers to pursue some of the policies that urban analysts suggest are critical to making a city attractive to key actors in the global marketplace. As we have noted, one way that a city can enhance its competitive position is by making itself a vital and attractive place to live and work. For this reason, state law constraints on Boston's ability to be a tourist city may equally undermine its efforts to be a global city. The city's limited regulatory power -- and the omnipresent specter of state preemption -- also preclude Boston from adopting policies often identified as keys aspects of a globalizing strategy, including policies that signal its openness and tolerance. (As we pointed out above, Boston is the only city in our study that does not have the power to adopt a domestic partnership ordinance.) Finally, Boston's current legal structure is problematic when it comes to the connection between economic development and land use policy. Boston's undue reliance on the property tax may make Boston less eager to promote the expansion of nonprofit employers -- health care providers and universities -- that are critical to its globalizing efforts. And the city's lack of development tools such as a broad tax increment financing authority are equally troublesome.

To be sure, the Boston Redevelopment Authority has recently made a point of courting the life sciences industry. Attracting biotech companies is likely to be a good strategy from a global cities perspective.¹⁵³² But in making these efforts, Boston confronts a very competitive environment, in which other cities enjoy powers that Boston does not. San Francisco began promoting itself as a biotech home early on with its redevelopment of an area known as the China Basin. That redevelopment project relied heavily on the use of tax increment financing to retrofit an aging industrial district. These efforts in turn enabled the city to attract the University of San Francisco to the site. Many critics derided the redevelopment project as a giveaway to the private developer, but the city's early investment recently has paid off, at least in part.¹⁵³³ The state recently selected the site as the home of California's new stem cell research institute. Since Boston has only recently been given what once was a cutting edge redevelopment tool, its pursuit of the life sciences industry has been handicapped from the outset. The risk is that Boston will be

similarly late in receiving the authority to experiment with the next innovation in urban redevelopment, whatever it might be. This structural problem cannot be solved through the state legislative authorization of financing or land use tools *after* other cities have already proved their utility. It requires a more fundamental change in the basic legal structure, so that the city is empowered to take a lead role in pursuing new forms of development on its own.

Attracting foreign capital is only one way in which a city can engage with the global marketplace. Another is by making itself a gateway for global trade.¹⁵³⁴ Here, Boston enjoys some advantages. It has a major airport within the city limits, and it is a port city. Yet Boston has little legal control over either of these entry points. Other cities in our study have direct incentives to pursue global trade, given their financial stake in their airports and ports. Other cities assume the lead role when it comes to policy decisions concerning airport expansion. As our recounting of the controversy concerning the runway expansion at Logan Airport attests, this is not the case in Boston. None of this is to say that Boston has to be given back its airport or its port or even that Boston would want to own these assets. It does suggest, however, that power once lost is hard to recover.

4. Development Discretion and the Regional City

It is important to evaluate development decisions – like all city decisions -- from a regional perspective, not just on a city-by-city basis. If Boston is to become a more effective regional city, it needs to provide something that the region needs – something that can serve as a basis for regional negotiations on a wide variety of matters. Boston's influence in the region is not simply a result of its declining percentage of the regional population. Boston's transference of important assets to state-created entities in the 1950s and 1960s reduced its power in the region while simultaneously increasing the power of the state. For this reason – and not just because of the revenue that it might generate or the role it might play in promoting Boston's global status – Boston's lack of ownership of its airport matters. Other cities' ownership of their airports has provided them with a variety of development options not now available to Boston. Denver's experience with airport development – and its effect on regional relations -- is particularly instructive.

If Boston's economic, cultural, and intellectual leadership were adequately taken into account in defining its legal power, its development and that of the region as a whole could change dramatically. Nowhere is this more obvious than in decisions about affordable housing. We examined earlier the limits on what Boston can do about its own housing shortage – limits imposed by state law. But it is widely recognized that affordable housing is a regional problem, not just Boston's problem. Boston's future development will not be promoted simply by those who live within its borders. Many of those who work in the city will continue to live in the suburbs, and many of Boston's residents will continue to work in the suburbs. This regional nature of the affordable housing problem is well known, but there is no regional structure that can address it. Creating such a structure does not require empowering the state or a regional government at the expense of Boston and its neighbors. As we argued in some detail in an earlier report, the state can further regional goals by empowering cities in a way that enables them to work together on issues like affordable housing.¹⁵³⁵

This requires the development of regional institutions. Boston has begun to engage with close-in neighboring municipalities in a way that is encouraging – notably through the Metro Mayors Coalition. But Boston is not nearly as far a long in this regard as are other cities. In Denver, the city initiated a Metro Vision 2020 plan, which grew out of the city's own local planning efforts. The Metro Vision 2020 plan seeks to provide guidance towards ensuring the Denver Metro Region is thoughtfully and efficiently designed. Not limited to Denver's local government itself, the Metro Vision 2020 plan is steered by the Denver Regional Council of Government¹⁵³⁶ and describes a plan requiring cooperation and negotiation between Denver's metro area local governments.¹⁵³⁷ One innovative feature of this initiative is the Mile High Compact, the first city and county-led agreement of its kind in the nation. The compact is a legally binding contract

which commits signatories to work together to guide growth. As of mid-2000, the cities and counties which had bound themselves to the compact represented 73% of the Denver Metro Region's population and 40% of the state's population.

Conclusion: Revising the Legal Structure

Without a legal structure that fosters civic confidence, that decouples the general endeavor of planning from local dependence on a narrow revenue base, and that provides the city the full range of economic development tools that cutting edge planning requires, Boston will face the 21st century at a disadvantage. Boston might overcome these legal obstacles, just as it has reversed its declining fortunes over the last three decades. Boston has a set of advantages – from its physical amenities to its educated citizenry to its strength in finance and higher education – that position it to continue along an upward trajectory. But Boston faces a set of challenges. Its demographics are in the midst of a substantial change. It is not gaining population as are many of its competitors, and its region is relatively stable in population as well. The high cost of housing both within the city and in the metropolitan area poses a major challenge. And there remains the continuing task of improving the city's public schools.

To enable Boston to profit from its advantages and address its problems, the state should facilitate Boston's efforts to take control of its future. So far, the state seems to have recognized the virtue of enhancing local control over one key area of city policy: education. As Chapter Seven emphasized, Boston is using its authority over its schools in ways that bode well for future gains in performance. Significantly, the state has not simply withdrawn from the education field; it remains an important actor when it comes to educational policy in Boston. But it has usefully permitted Boston itself to assume a leading role. Our suggestion is that the state would do well to follow this approach in other areas as well.

To spur the kind of rethinking needed to make the current structure of local government law appropriate for Boston in the 21st Century, new initiatives are needed. These initiatives should focus not just on substantive issues of land use, education, and city finance but on the legal structure that now defines the power of the City of Boston. The changes made in local government law are likely to be most successful – and most politically powerful – if they are formulated in a democratically responsible manner, rather than by the authors of this report. Moreover, they are likely to be most useful if they are proposed in the context of a broad consideration of the proper direction for the city's future development. This report is an effort to spur just this kind of action. One essential point should underlie these future undertakings. Boston should not be subject forever to a legal structure designed in another era for another kind of city. Boston is changing, as everyone who lives or works or visits here can readily see. Its legal structure needs to keep up with these changes.

Endnotes

¹ BOSTON FOUNDATION, *Preface* to THE WISDOM OF OUR CHOICES: BOSTON'S INDICATORS OF PROGRESS, CHANGE, AND SUSTAINABILITY 1 (2000), available at <http://www.tbf.org/uploadedFiles/01-Preface.pdf> (last visited Sept. 12, 2004).

² See U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, COUNTY AND CITY DATA BOOK: 2000 (2002), at 644-61, available at http://www.census.gov/prod/2002pubs/00ccdb/cc00_tabC1.pdf (last visited Sept. 12, 2004) [hereinafter U.S. CENSUS BUREAU, COUNTY AND CITY] (reflecting the information shown in the first chart's first three columns). The land area in square miles for each city is rounded to the nearest whole number. See also U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, POPULATION IN METROPOLITAN AND MICROPOLITAN STATISTICAL AREAS IN ALPHABETICAL ORDER AND NUMERICAL AND PERCENT CHANGE FOR THE UNITED STATES AND PUERTO RICO: 1990 AND 2000 (2003), at <http://www.census.gov/population/cen2000/phc-t29/tab01a.pdf> (last visited Sept. 12, 2004) [hereinafter U.S. CENSUS BUREAU, METROPOLITAN] (noting the information listed in the last two columns).

³ While the figures for city populations are never the same in all census surveys, the census defines the relevant metropolitan areas in different ways. If one adopts another census definition of the relevant area -- the primary statistical area -- the population figures are (except for Denver and Atlanta) quite different, but the comparative metropolitan rates of population change are (except for San Francisco) roughly the same.

CITY	PRIMARY METROPOLITAN STATISTICAL AREA POPULATION 2000 CENSUS	PERCENT PMSA POPULATION CHANGE 1990-2000	METROPOLITAN AREA POPULATION 2000 CENSUS	PERCENT METROPOLITAN POPULATION CHANGE 1990-2000
New York	9,314,235	9.0	18,323,002	8.8
Chicago	8,272,768	11.6	9,098,316	11.2
San Francisco	1,731,183	8.0	4,123,740	11.9
Boston	3,406,829	5.6	4,391,344	6.2
Seattle	2,414,616	18.8	3,043,878	18.9
Denver	2,109,282	30.0	2,179,240	30.7
Atlanta	4,112,198	38.9	4,247,981	38.4

See AUDREY SINGER, BROOKINGS INSTITUTION, THE RISE OF NEW IMMIGRANT GATEWAYS 20-21 (2004), available at http://www.brookings.edu/dybdocroot/urban/pubs/20040301_gateways.pdf (last visited Sept. 27, 2004) (stating the figures in the first two columns); U.S. CENSUS BUREAU, METROPOLITAN, *supra* note 2 (containing the data for the last two columns). In this report, we -- along with the Metropolitan Area Planning Council and other Boston Foundation reports -- will often adopt yet another, smaller figure: the population of 101 cities and towns, including Boston, located largely within Interstate 495. Not only is the area's population smaller -- 3,066,394 -- but so is the metropolitan population growth rate: 4.9%. (For a map showing this version of the Boston metropolitan area, see Appendix A.) For this comparison, see CHARLOTTE KAHN & GEETA PRADHAN, BOSTON FOUNDATION, CREATIVITY AND INNOVATION: A BRIDGE TO THE FUTURE 25 (2002) [hereinafter BOSTON FOUNDATION, BRIDGE].

⁴ For the data in the first two columns of the chart, see U.S. CENSUS BUREAU, COUNTY AND CITY, *supra* note 2, at 644-61; U.S. CENSUS BUREAU, METROPOLITAN, *supra* note 1. For the state population figures, see U.S. CENSUS BUREAU, COUNTY AND CITY, *supra* note 2, at 3, available at http://www.census.gov/prod/2002pubs/00ccdb/cc00_tabA1.pdf (last visited Sept. 12, 2004). The "City

Percent of Region” column was determined by dividing each city’s population by the corresponding figure in the “Regional (MSA) Population” column, and then rounding the result to the nearest tenth. The “City Percent of State” figure was derived by dividing each city’s population by the corresponding figure listed under “State Population,” and rounding the result to the nearest tenth.

⁵ Each city’s ethnic proportions can be obtained by accessing the U.S. Census Bureau, U.S. Dep’t of Commerce, American Fact Finder: *List All Tables*, at http://factfinder.census.gov/servlet/DatasetTableListServlet?_ds_name=DEC_2000_SF1_U&_type=table&_program=DEC&_lang=en&_ts=114393625763 (last visited Sept. 28, 2004). Upon entering this website, then select table “DP-1. Profile of General Demographic Characteristics: 2000” and search each city accordingly.

⁶ Each city’s “percent college/grad student” figure was calculated by adding the number of college and graduate students in each city together, and dividing that sum by the total population of each city. These raw data can be found at U.S. Census Bureau, U.S. Dep’t of Commerce, American Fact Finder: *Select Geography*, at

http://factfinder.census.gov/servlet/QTGeoSearchByListServlet?_ds_name=DEC_2000_SF3_U&_lang=en&_ts=114397602611 (last visited Sept. 28, 2004). After choosing the city to search, then select table “QT-P19. School Enrollment: 2000.” To locate the information provided in the last three columns of this chart, see U.S. Census Bureau, U.S. Dep’t of Commerce, *Fact Sheet*, at http://factfinder.census.gov/servlet/SAFFacts?_sse=on (last visited Sept. 28, 2004). After the screen loads, search each city and the cited numbers will appear.

⁷ See U.S. CONFERENCE OF MAYORS, *Appendix to THE ROLE OF METROPOLITAN AREAS IN THE US ECONOMY 3* (2003) (listing the gross metropolitan products for all seven cities).

⁸ EDWARD L. GLAESER, BROOKINGS INSTITUTION, *JOB SPRAWL: EMPLOYMENT LOCATIONS IN U.S. METROPOLITAN AREAS 3-5* (2001), *available at*

<http://www.brookings.edu/es/urban/publications/glaeserjobsprawl.pdf> (last visited Sept. 20, 2004) (revealing the data found in the last three columns of the following chart in the text).

⁹ See Memorandum from David Rusk to Professor Gerald E. Frug (June 18, 2004) (on file with authors).

¹⁰ See Bureau of Labor Statistics, U.S. Dep’t of Labor, *Unemployment Rates for the 50 Largest Cities* (2004), at <http://www.bls.gov/lau/lacilg02.htm> (last modified June 9, 2004) (showing each city’s unemployment rate).

¹¹ To access the data in the first three columns of this chart, see Brookings Institution, *COMMUTING – 100 Largest Cities in the U.S.*, at

<http://apps89.brookings.edu:89/livingcities/redirect.jsp?info=Commuting&city=No&display=display&redirect=Continue> (last visited Sept. 27, 2004).

¹² GEOFF LEWIS ET AL., BOSTON REDEVELOPMENT AUTHORITY, *HISTORY OF BOSTON’S ECONOMY: GROWTH AND TRANSITION 1970-1998*, at 4 (1999), *available at*

<http://www.cityofboston.gov/bra/PDF/Publications/pdr529.pdf> (last visited Sept. 14, 2004).

¹³ MASS. CONST. amend. art. LXXXIX.

¹⁴ MASS. GEN. LAWS ch. 43B (2003).

¹⁵ MASS. LEGISLATIVE RESEARCH COUNCIL, *MUNICIPAL HOME RULE 14* (Senate Report No. 580, 1961) [hereinafter LEGISLATIVE RESEARCH COUNCIL, No. 580].

¹⁶ Chicago actually enjoyed some very limited home rule protection well before Boston, pursuant to a state constitutional provision that prohibited the state from passing special laws targeting Chicago alone. *See id.* at 13.

¹⁷ *Id.* at 71.

¹⁸ See MASS. LEGISLATIVE RESEARCH COUNCIL, *MUNICIPAL HOME RULE 103* (Senate Report No. 950, 1965) [hereinafter LEGISLATIVE RESEARCH COUNCIL, No. 950].

¹⁹ The early history of Boston related here is derived from JAMES BUGBEE, *THE CITY GOVERNMENT OF BOSTON* (Baltimore, John Hopkins University 1887).

²⁰ *Id.* at 6 (citation and internal quotation omitted).

²¹ LEGISLATIVE RESEARCH COUNCIL, No. 950, *supra* note 18, at 84-85.

²² *Id.* (quoting 1 RECORDS OF THE GOVERNOR AND COMPANY OF MASSACHUSETTS BAY 172 (Nathaniel B. Shurtleff ed., 1853)).

²³ See LEGISLATIVE RESEARCH COUNCIL, No. 950, *supra* note 18, at 85.

²⁴ *Id.* at 86.

²⁵ *Id.* at 85.

²⁶ *Id.* at 86.

²⁷ *Id.* at 87.

²⁸ 13 Mass. 272 (1816)

²⁹ *Id.* at 281 (“For the powers of towns, as well as parishes, are either entirely derived from some legislative act, or defined and limited by the general statutes prescribing the powers and duties of both classes of corporations.”).

³⁰ See LEGISLATIVE RESEARCH COUNCIL, No. 950, *supra* note 18, at 88-89 (summarizing this line of cases).

³¹ See *Rawson v. Spencer*, 113 Mass. 40, 45 (1873).

³² See *Commonwealth v. Plaisted*, 19 N.E. 224, 227 (Mass. 1889).

³³ BUGBEE, *supra* note 19, at 21.

³⁴ *Id.* at 18.

³⁵ *Id.* at 20.

³⁶ *Id.* at 18-19.

³⁷ See 1822 Mass. Acts 110.

³⁸ *City Council of Boston v. Mayor of Boston (City Council I)*, 421 N.E.2d 1202, 1205 (Mass. 1981).

³⁹ See 1822 Mass. Acts 110 § 1.

⁴⁰ See *id.* § 2. The division of the wards was to be done by the current Board of Selectmen “in such manner as to include an equal number of inhabitants in each ward, [and] as nearly as conveniently may be, consistently with well defined limits to each ward . . .” *Id.*

⁴¹ See *id.* §§ 5-6.

⁴² See *id.* § 7.

⁴³ See *id.* § 13 (“[T]he administration of police, together with the executive powers of the said corporation generally, together also, with all the powers heretofore vested in the Selectmen of the Town of Boston . . . shall be, and hereby are vested in the Mayor and Aldermen . . .”); see also *City of Boston v. Doyle*, 68 N.E. 851, 855 (Mass. 1903) (noting that by the original Boston charter, “the important executive and administrative duties . . . were imposed upon the mayor and aldermen . . .”).

⁴⁴ 1822 Mass. Acts 110 § 15.

⁴⁵ See *id.* § 19.

⁴⁶ 1854 Mass. Acts 448. The same provision quoted from the 1822 charter was repeated almost word for word in the 1854 charter, albeit written with a comma separating Mayor from Aldermen: “mayor, aldermen and common council.” *Id.* § 30.

⁴⁷ See *id.* § 47. The amendment of 1854 also granted the mayor power of removal over all officers that were appointed by the mayor and consented to by the board of aldermen. *Id.* § 49.

⁴⁸ *Id.* § 2.

⁴⁹ See *id.* §§ 53-54. The number does not include the Mayor and the President of the Council.

⁵⁰ THOMAS H. O’CONNOR, *THE HUB: BOSTON PAST AND PRESENT* 162-163 (2001) [hereinafter O’CONNOR, *THE HUB*].

⁵¹ *City Council of Boston v. Mayor of Boston (City Council I)*, 421 N.E.2d 1202, 1204 (Mass. 1981) (citing NATHAN MATTHEWS, *THE CITY GOVERNMENT OF BOSTON* 168 (Boston, Rockwell & Churchill 1895)).

⁵² See 1885 Mass. Acts 266 § 6 (“The executive powers . . . and all the executive powers now vested in the board of aldermen, . . . shall be and hereby are vested in the mayor, to be exercised through the several officers and boards of the city in their respective departments . . .”).

⁵³ See *id.* § 1.

⁵⁴ See *id.* § 9.

⁵⁵ See *Boston Licensing Bd. v. City of Boston*, 455 N.E.2d 469, 475 n.14 (Mass. App. Ct. 1983) (“The Senate rejected an amendment to the 1885 [police] bill which would have made the 1885 act subject to the approval of a majority of voters of Boston.”).

⁵⁶ *Id.* at 475; see also 1885 Mass. Acts 323.

⁵⁷ See *City Council of Boston v. Mayor of Boston (City Council II)*, 512 N.E.2d 510, 512 n.13 (Mass. App. Ct. 1987).

⁵⁸ See *id.* (“The period was one when the Legislature was wont to look upon Boston politics with a leery eye.”); see also O’CONNOR, *THE HUB*, *supra* note 50, at 186.

⁵⁹ *City Council II*, 512 N.E.2d at 512 n.13 (quoting House Doc. No. 1311, at 70–77 (Mass. 1909)).

⁶⁰ O’CONNOR, *THE HUB*, *supra* note 50, at 186–90.

⁶¹ 1909 Mass. Acts 486 § 9.

⁶² *Id.* § 12. Allowing the appointees to stay after four years actually strengthened the mayor’s sway over these appointees more than if the law simply required the appointee to leave after their term or be reappointed and reconfirmed to another four year term. Barbara Ferman, in her book comparing mayoral power in San Francisco and Boston, noted how Mayor White acquired power over his appointees by keeping them after their term to serve at his pleasure. This not only secured his control over all the departments under him, but also restricted others, such as the City Councilors, from going “directly to department heads for patronage as they had done in the past.” BARBARA FERMAN, *GOVERNING THE UNGOVERNABLE CITY: POLITICAL SKILL, LEADERSHIP, AND THE MODERN MAYOR* 91–92 (1985).

⁶³ 1909 Mass. Acts 486 § 4.

⁶⁴ See *id.* § 2. It is true that the procedure for ordinances proposed by the mayor did not change. Indeed, it would likely be very rare that political strategizing could take advantage of this provision by impeding the ability of the Council to act (although blatant abuse of quorum could get ordinances passed that would normally be rejected). Nevertheless, the switching of presumptions goes a long way in indicating the inferior role that the Council had come to occupy.

⁶⁵ *Id.* § 3.

⁶⁶ See *id.*

⁶⁷ *Id.* § 18.

⁶⁸ See *id.* § 17. The chairmen of the commission is also designated specifically by the governor. *Id.*

⁶⁹ See *id.* § 10.

⁷⁰ THOMAS O’CONNOR, *BUILDING A NEW BOSTON: POLITICS AND URBAN RENEWAL 1950-1970*, at 42–43 (1993) [hereinafter O’CONNOR, *BUILDING*]. See generally *Boston Licensing Bd. v. City of Boston*, 455 N.E.2d 469 (Mass. App. Ct. 1983).

⁷¹ O’CONNOR, *THE HUB*, *supra* note 50, at 199.

⁷² See FERMAN, *supra* note 62, at 23.

⁷³ *Id.*

⁷⁴ See *City Council of Boston v. Mayor of Boston (City Council II)*, 512 N.E.2d 510, 512 (Mass. App. Ct. 1987).

⁷⁵ Granted, much of the political framework that Ferman discusses was incorporated into these limited and prefabricated plans. Nevertheless, given the fact that the final structure was not actually set by the legislature, and given the difference between the mayor-council and council-manager forms of government, it is questionable whether this choice was orchestrated to accomplish a single and knowable political objective. See FERMAN, *supra* note 62.

⁷⁶ See 1948 Mass. Acts 452 § 5 (“The question of the adoption of not more than one plan may be submitted at any regular municipal election.”). When submitted to the voters, only one plan may be presented to them at a time. Therefore the voters of Boston are not selecting between all three of the plans at the ballot box. The voters may file a petition, with the requisite number of signatures, requesting that one of the three plans be placed before the voters, but not more than one simultaneously. See *id.*

⁷⁷ See *id.* § 18-18A. Nevertheless, considering that most ordinances, acts, or resolutions can arguably be described as requiring some expenditure of municipal funds, the mayor's remaining unchecked veto powers are still significant.

⁷⁸ See *id.* §§ 21 - 22 (Plan D); *id.* §§ 23 - 24 (Plan E).

⁷⁹ O'CONNOR, BUILDING, *supra* note 70, at 28-30.

⁸⁰ See 1951 Mass. Acts 376 § 1.

⁸¹ Even though Plan A contained some limits on the mayor's power, its passage continued the tradition of expanding mayoral authority. City councilors served only two year terms, *see id.*, which made it difficult for Council members to form coalitions with one another, especially against the Mayor. Furthermore, the fact that they were elected at large, without a district constituency to continually support them as incumbents, meant that their positions were unstable. Every two years they had to run against their fellow incumbents, severely reducing the level of trust that can develop between the Council members. Indeed, according to Barbara Ferman, Mayors such as Kevin White exploited the Council's "vulnerab[ility] to divide-and-conquer tactics . . ." See FERMAN, *supra* note 62, at 28..

⁸² The most recent comprehensive charter amendment, enacted in 1953, clarified more than it changed the current division of power. The 1909 amendment had allowed the "mayor and city council" to reorganize, consolidate, or abolish municipal departments through an ordinance. 1909 Mass. Acts 486 § 5 (emphasis added). The 1953 Amendment makes clear that this is to be accomplished by the "city council with the approval of the mayor . . ." 1953 Mass. Acts 473 § 1 (emphasis added). If there had been any question of whether the city council may reorganize independently, or that it could be permitted to override a mayoral veto, the 1953 amendment ensured that the Mayor must give his affirmative approval.

⁸³ Patrick A. Simmons & Robert E. Lang, *The Urban Turnaround*, in REDEFINING URBAN & SUBURBAN AMERICA: EVIDENCE FROM CENSUS 2000, at 57 (Bruce Katz & Robert E. Lang eds., 2003).

⁸⁴ Demographia, *U.S. Central City Population Trends by Decade: 1950-2000* (2001), at <http://www.demographia.com/db-city1970sloss.htm> (last visited Sept. 17, 2004).

⁸⁵ Simmons & Lang, *supra* note 83, at 57.

⁸⁶ EDWARD L. GLAESER, REINVENTING BOSTON, 1640-2003 1 (2003), available at http://www.ksg.harvard.edu/rappaport/downloads/glaeser_final_report.pdf (last visited Sept. 17, 2004).

⁸⁷ O'CONNOR, BUILDING, *supra* note 70, at 147.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 89.

⁹¹ *Id.* at 106, 117-18, 148.

⁹² *Id.*

⁹³ *Id.* at 118.

⁹⁴ See *id.* at 119.

⁹⁵ See *id.* at 78.

⁹⁶ *Id.* at 91.

⁹⁷ See *Appleton v. Massachusetts Parking Auth.*, 164 N.E.2d 137, 138 (Mass. 1960). See also O'CONNOR, BUILDING, *supra* note 70, at 86-88, 120 (discussing the mayor's support for the authority's creation after years of delay).

⁹⁸ *Appleton*, 164 N.E.2d at 141.

⁹⁹ See Massachusetts Convention Center Authority, *Your Best Parking Garage in Boston*, at <http://www.mccahome.com/garage/default.aspx> (last visited Nov. 8, 2004).

¹⁰⁰ 1956 Mass. Acts 465. The founding charter of the Massachusetts Port Authority is unique in that it requires a 4-3 split on party affiliation and reserves one seat for a union official with connections to Massport. See *id.* § 2.

¹⁰¹ See BOSTON REDEVELOPMENT AUTHORITY, TAX EXEMPT PROPERTY IN BOSTON: ANALYSIS OF TYPES, USES, AND ISSUES 4 (2002), available at http://www.cityofboston.gov/bra/PDF%5CPublications%5C/pdr_562.pdf (last visited Sept. 17, 2004).

¹⁰² See Massachusetts Turnpike Authority, *Questions & Answers*, at <http://www.massturnpike.com/about/about-QA.html> (last visited Sept. 17, 2004); see also LAWRENCE W. KENNEDY, *PLANNING THE CITY UPON A HILL: BOSTON SINCE 1630*, at 171-72 (1992) (describing emergence of the Turnpike Authority in Boston's development).

¹⁰³ O'CONNOR, *BUILDING*, *supra* note 70, at 82-86.

¹⁰⁴ *Id.* at 86.

¹⁰⁵ *Id.* at 146.

¹⁰⁶ See KENNEDY, *supra* note 102, at 181.

¹⁰⁷ *Id.*; see also 1982 Mass. Acts 190 § 33 (establishing the Massachusetts Convention Center Authority).

¹⁰⁸ See LEGISLATIVE RESEARCH COUNCIL, No. 950, *supra* note 18, at 98.

¹⁰⁹ See KENNEDY, *supra* note 102, at 161, 172.

¹¹⁰ *Id.* at 161, 181.

¹¹¹ See *id.* at 172.

¹¹² 1962 Mass. Acts 322.

¹¹³ *Curtis v. City of Boston*, 132 N.E. 181, 184 (Mass. 1921).

¹¹⁴ 1962 Mass. Acts 322.

¹¹⁵ MASS. CONST. amend. art. LXXXIX, § 1.

¹¹⁶ *Id.* § 2.

¹¹⁷ The Georgia General Assembly adopted Atlanta's current charter in 1996, after significantly revising it in 1974 by creating a "broad framework for government, leaving much of the operational detail to be worked out by the Mayor and Council." David L. Sjoquist & Marshall Sanders, Research Atlanta, Inc., *An Overview of the Charters of the City of Atlanta and the Atlanta Board of Education*, Policy Research Center, College of Business Administration, Georgia State University, Report Series Number 2, at 9 (1995). In doing so, it replaced Atlanta's 'weak mayor' form of government, where much political power (and accountability) was fragmented in aldermanic committees" with an "empowered mayor" with clearly defined powers and authority. *Id.* Additional changes that resulted from the 1974 amendments included the establishment of the Office of President of Council and a reduction of "at-large" Council representatives in favor of legislators elected at the district level. *Id.* Likewise, certain municipal functions, such as land use planning, budget considerations, and functions of the municipal court were "elevated in importance." *Id.* The impetus for this 1974 revision came largely from an independent commission of business people, leaders in academia, civic leaders and other public officials, rather than from elected officials. *Id.* at 8. As for Chicago, voters elected in 1875 to repeal their Charter and to operate under the Illinois Cities and Villages Act of 1872, now codified in Chapter 65 of the Illinois Compiled Statutes. Chicago continues to operate under that act, which is in lieu of a Charter. See Municipal Reference Collection, Chicago Public Library, *Legal Organization and Charter, City of Chicago*.

¹¹⁸ *Edwards v. City of Boston*, 562 N.E.2d 834, 838 (Mass. 1990).

¹¹⁹ OFFICE OF THE CITY CLERK, *BOSTON CITY CHARTER 1* (n.d.) (emphasis omitted).

¹²⁰ See generally San Francisco, Cal., *Charter of the City and County of San Francisco* (1935).

¹²¹ WASH. REV. CODE § 35.01.010 (2002); Municipal Research & Services Center of Washington, *Classification of First Class Cities*, at <http://www.mrsc.org/Subjects/Governance/firstclass.aspx> (updated Aug. 2003).

¹²² WASH. CONST. art. XI, § 10; Seattle Municipal Archives, *City Charters*, at <http://www.cityofseattle.net/CityArchives/Reference/Kwikfact.htm#charters> (last visited Sept. 18, 2004). City voters also rejected new charters in 1914 and 1975. *Id.*

¹²³ Denver, Colo., *Charter of the City and County of Denver* (1904). The charter created a city council that was to be composed of between 16 to 21 aldermen. *Id.* art. II, § 7. The powers and role of the mayor were described as well. *Id.* art. III, §§ 25-32. The charter also divided the various offices into a legislative, executive, and judicial branches. See *id.* arts. II-IV.

¹²⁴ The New York charter commission was appointed in January 1935 and submitted its proposal to the city for a referendum vote in November 1936; the charter was passed by a significant majority. See

LAWRENCE A. TANZER, THE NEW YORK CITY CHARTER 5-7, 9-14 (1937). Before the November 1936 vote, the New York Court of Appeals commented on the nature of the constitutional amendment affecting home rule: “[it] authorizes the legislative body of a city to submit to the electors the proposition of having a Charter Commission, and if this be voted then the legislative body is authorized to submit the proposed charter to the electors for approval.” *Mooney v. Cohen*, 4. N.E.2d 73, 74 (N.Y. 1936). See also Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 COLUM. L. REV. 775, 807 n.159, 812 (1992) (noting that New York’s Home Rule Amendment was amended in 1923).

¹²⁵ See DAVID J. BARRON, GERALD E. FRUG & RICK T. SU, DISPELLING THE MYTH OF HOME RULE: LOCAL POWER IN GREATER BOSTON 4 (2004).

¹²⁶ MASS CONST. amend. art. LXXXIX, § 3.

¹²⁷ *Id.*

¹²⁸ COLO. CONST. art. XX, § 5.

¹²⁹ CAL. CONST. art. XI, § 3.

¹³⁰ WASH. CONST. art. XI, § 10.

¹³¹ MASS. CONST. amend. art. LXXXIX, § 4.

¹³² *Id.*

¹³³ See *id.*

¹³⁴ See COLO. CONST. art. XX, § 5; WASH. CONST. art. XI, § 10.

¹³⁵ GA. CODE ANN. § 36-35-3(b)(1) (2000).

¹³⁶ MASS. CONST. art. LXXXIX, §§ 3, 4, 9.

¹³⁷ Section 9 of the Home Rule Amendment would seem to permit Boston to use the charter amendment process to effectively repeal requirements contained in special laws that have the force and effect of a charter, and the Home Rule Procedures Act would seem to confirm this authority. See MASS. GEN. LAWS ch. 43B, § 20 (2003).

¹³⁸ COLO. CONST. art. XX, § 1.

¹³⁹ Richard Briffault, City Powers Project: New York City (2004) [hereinafter Briffault, New York City] (unpublished manuscript on file with authors)

¹⁴⁰ Richard Schragger, City Powers Project: Denver, Colorado 38-39 (2004) [hereinafter Schragger, Denver] (unpublished manuscript on file with authors)

¹⁴¹ Trent Siebert, *Voters to Decide on Amendments to City’s Charter; Council Pay Hike UP for Approval*, DENVER POST, Aug. 7, 2002, at B-02.

¹⁴² See Schragger, Denver, *supra* note 140, at 38-39.

¹⁴³ GABRIEL METCALF, SAN FRANCISCO PLANNING AND URBAN RESEARCH ASSOCIATION, SPUR HISTORY: FORTY YEARS OF CITIZEN PLANNING FOR SAN FRANCISCO 9 (1999), available at <http://www.spur.org/documents/40th.pdf> (last visited Nov. 8, 2004).

¹⁴⁴ See *id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ See generally BOSTON HOME RULE COMMISSION, FINAL REPORT OF THE HOME RULE COMMISSION: CITY OF BOSTON (1971).

¹⁴⁸ See MASS. CONST. amend. art. LXXXIX, § 6. Interestingly, a separate state statute in Washington grants broader regulatory authority in some respects to so-called “code cities,” namely ones that have not adopted home rule charters. ROBERT F. HAUTH, THE EROSION OF HOME RULE – THE NEED TO STRENGTHEN POWERS OF MUNICIPAL SELF-GOVERNMENT IN WASHINGTON 20 (1990); WASH. REV. CODE § 35A.11.020 (2002) (defining powers of code cities). For this reason, Seattle might well have more powers of initiative if it did not have its own home rule charter. See, e.g., *Hous. Auth. v. City of Pasco*, 86 P.3d 1217, 1220 (Wash. Ct. App. 2004). The Illinois Constitution’s home rule provision ensures that Chicago benefits from the home rule initiative power even though it has no home rule charter, see ILL. CONST. art. VII, § 6(a), and it also allows home rule cities to vote by referendum to

relinquish their home rule. *See id.* § 6(b). Massachusetts has no provision by which municipalities may relinquish their home rule.

¹⁴⁹ MASS. CONST. amend. art. LXXXIX, § 6.

¹⁵⁰ *Bd. of Appeals v. Hous. Appeals Comm.*, 363 Mass. 339, 359 (1973).

¹⁵¹ *See* Donovan Slack, *Boston Sends Smoking Outdoors*, BOSTON GLOBE, May 6, 2003, at A1.

¹⁵² MASS. CONST. amend. art. LXXXIX, § 7.

¹⁵³ *See e.g.*, BARRON, FRUG & SU, *supra* note 125, at 15 (detailing a Concord official's frustration in working with the state legislature).

¹⁵⁴ *See id.* at 17.

¹⁵⁵ A legislative committee concluded in the 1960s that approximately 20 percent of the bills considered by the state legislature in four recent legislative sessions concerned local matters. *See* LEGISLATIVE RESEARCH COUNCIL, No. 950, *supra* note 18, at 95-96. A recent analysis concluded that the percentage of bills concerning local affairs considered by the state legislature was approximately 15 percent, the third highest category by subject. *See* MassInsider.com, *Bills by Subject* (2003), at www.massinsider.com/archives/001702.phtml (last visited Sept. 26, 2004). It is possible that the more recent study used a broader definition of "local" than did the legislative commission. Nonetheless, it is clear that the state legislature still spends a significant period of time considering the very kinds of bills that the grant of home rule was intended to make unnecessary.

¹⁵⁶ *See* Beard v. Town of Salisbury, 392 N.E.2d 832, 836 (Mass. 1979).

¹⁵⁷ *See* Marshal House, Inc. v. Rent Review & Grievance Bd., 260 N.E.2d 200, 207-08 (Mass. 1970).

¹⁵⁸ Bloom v. Worcester, 293 N.E.2d 268, 283 (Mass. 1973).

¹⁵⁹ *See* Greater Franklin Developers Ass'n v. Town of Franklin, 730 N.E.2d 900, 904 (Mass. App. Ct. 2000).

¹⁶⁰ ILL. CONST. art. VII.

¹⁶¹ *Id.* § 6(a).

¹⁶² *Id.* § 6(m).

¹⁶³ *See* Boytor v. City of Aurora, 410 N.E.2d 1, 3-4 (Ill. 1980).

¹⁶⁴ COLO. CONST. art. XX, § 1.

¹⁶⁵ *Id.* § 6.

¹⁶⁶ *Id.*

¹⁶⁷ Berman v. City of Denver, 400 P.2d 434, 437-38 (Colo. 1965).

¹⁶⁸ *Id.* at 437 (quoting Four-County Metro. Capital Improvement Dist. v. Bd. of County Comm'rs, 369 P.2d 67, 72 (Colo. 1962)).

¹⁶⁹ *See, e.g.*, Glendale v. Trondsen, 308 P.2d 1, 6-7 (Cal. 1957).

¹⁷⁰ *See generally* Law v. City of San Francisco, 77 P.2d 1014 (Cal. 1904) (upholding the validity of ten San Francisco City bonds). *See also* San Francisco, Cal., Charter of the City and County of San Francisco § 101 (1935) ("The general laws of the State of California . . . establish[] the procedure for the creation of bonded indebtedness . . . by the city and county . . ."). The charter then specifically details the various procedures for issuing different types of bonds. *Id.* §§ 102-05.

¹⁷¹ CAL. CONST. art. XI, § 5(b)(3).

¹⁷² *Id.* §§ 5(a), 6(b); *see also id.* § 5(b).

¹⁷³ N.Y. CONST. art. XVI, § 1.

¹⁷⁴ New York State Clubs Ass'n v. City of New York, 505 N.E.2d 915, 921 (N.Y. 1987).

¹⁷⁵ Vatore v. Comm'r of Consumer Affairs, 634 N.E.2d 958, 961 (N.Y. 1987).

¹⁷⁶ *See also* Laura D. Hermer, *Municipal Home Rule in New York: Tobacco Control at the Local Level*, 65 BROOK. L. REV. 321, 353 (1999) (finding that New York municipalities have the authority to adopt a wide range of youth access restrictions and to regulate environmental tobacco smoke).

¹⁷⁷ Hertz Corp. v. City of New York, 607 N.E.2d 784, 786 (N.Y. 1992).

¹⁷⁸ Council for Owner Occupied Hous. v. Koch, 61 N.Y.2d 942 (1984).

¹⁷⁹ 210 E. 68th St. Corp. v. City Rent Agency, 34 N.Y.2d 560 (1974).

¹⁸⁰ WASH. CONST. art. XI, § 11.

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- ¹⁸¹ See generally HAUTH, *supra* note 148.
- ¹⁸² GA. CODE ANN. § 36-35-6(b) (2000).
- ¹⁸³ City of Atlanta v. McKinney, 454 S.E.2d 517, 521 (Ga. 1995).
- ¹⁸⁴ City of Tacoma v. Taxpayers of Tacoma, 743 P.2d 793, 801 (Wash. 1987).
- ¹⁸⁵ Heinsma v. City of Vancouver, 29 P.3d 709, 715 (Wash. 2001).
- ¹⁸⁶ Compare GA. CONST. art. IX, § 2, ¶ 1(c)(4) (limiting home rule power to tax), and GA. CODE ANN. § 36-35-6(a)(3) (2000) (same), with Peacock v. Georgia Mun. Ass’n, 279 S.E.2d 434, 437 (Ga. 1981) (recognizing some local home rule taxing power).
- ¹⁸⁷ 1996 GA. LAWS 1019 §§ 1-102(c)(1), (c)(5).
- ¹⁸⁸ MASS. CONST. amend. art. LXXXIX, § 6.
- ¹⁸⁹ Powers v. Sec’y of Admin., 587 N.E.2d 744, 750 (Mass. 1992) (citing Opinion of the Justices, 332 N.E.2d 896 (Mass. 1975)).
- ¹⁹⁰ Connors v. City of Boston, 714 N.E.2d 335, 338 (Mass. 1999).
- ¹⁹¹ See MASS. LEGISLATIVE RESEARCH COUNCIL, REVISING THE MUNICIPAL HOME RULE AMENDMENT 82-92 (Senate Report No. 1455, 1971).
- ¹⁹² Anderson v. City of Boston, 380 N.E.2d 628, 633 (Mass. 1978) (quoting the Home Rule Amendment) (internal quotation omitted).
- ¹⁹³ See also BARRON, FRUG & SU, *supra* note 125, at 9-11 (finding shadow of preemption to be a constraint on home rule in interviews with local officials throughout greater Boston).
- ¹⁹⁴ MASS CONST. amend. art. LXXXIX, § 8.
- ¹⁹⁵ 1994 Mass. Acts 282.
- ¹⁹⁶ Howard Fain, Center for Voting and Democracy, *The 1994 Rent Control Initiative in Massachusetts*, at <http://www.fairvote.org/reports/1995/spot2/fain2.html> (last visited Oct. 9, 2004) (“In 1994, the rent control question, banning rent control in Massachusetts, was approved statewide with 51%, but . . . was rejected in Cambridge, 58% to 42%. Voters in Boston and Brookline also rejected the question, by narrower margins.”).
- ¹⁹⁷ See Greater Boston Real Estate Bd. v. City of Boston 705 N.E.2d 256, 257 (Mass. 1999).
- ¹⁹⁸ MASS. CONST. amend. art. LXXXIX, § 9.
- ¹⁹⁹ Press Release, City of Boston, Boston Transportation Department Gets the Green Light To Increase Towing Fees (Jan 16, 2004), available at <http://www.cityofboston.gov/news/pr.asp?ID=1946> (last visited Sept. 19, 2004).
- ²⁰⁰ MASS. GEN. LAWS ch. 71, § 20 (2003).
- ²⁰¹ MASS. CONST. amend. art. LXXXIX, § 8.
- ²⁰² 1991 Mass. Acts 108 §§ 2, 4, 6.
- ²⁰³ COLO. CONST. art. XX, § 6.
- ²⁰⁴ See *id.* § 1; Berman v. City of Denver, 400 P.2d 434, 439 (Colo. 1965).
- ²⁰⁵ See, e.g., Fraternal Order of Police v. City of Denver, 926 P.2d 582, 592 (Colo. 1996) (invalidating state statute that imposed training and certification requirements on Denver police officers).
- ²⁰⁶ Winslow Const. Co. v. City of Denver, 960 P.2d 685, 695 (Colo. 1998).
- ²⁰⁷ CAL. CONST. art. XI, § 5.
- ²⁰⁸ Bishop v. City of San Jose, 460 P.2d 137, 141 (Cal. 1969).
- ²⁰⁹ See, e.g., Piledrivers’ Local Union No. 2375 v. City of Santa Monica, 198 Cal. Rptr. 731, 733 (Cal. Ct. App. 1985).
- ²¹⁰ See generally Bishop v. City of San Jose, 460 P.2d 137 (Cal. 1969).
- ²¹¹ See Rees v. Layton, 86 Cal. Rptr. 268, 272 (Cal. Ct. App. 1970).
- ²¹² See City of Glendale v. Trondsen, 308 P.2d 1, 3-4 (Cal. 1957).
- ²¹³ ILL. CONST. art. VII, § 6(k).
- ²¹⁴ *Id.* § 6(l).
- ²¹⁵ *Id.* § 6(l).
- ²¹⁶ *Id.* § 6(g).
- ²¹⁷ *Id.* §§ 6(i), (m).

²¹⁸ Scadron v. City of Des Plaines, 606 N.E.2d 1154, 1163 (Ill. 1992) (citation and internal quotation omitted).

²¹⁹ See City of Seattle v. Auto Sheet Metal Workers Local 387, 620 P.2d 119 (Wash. Ct. App. 1980).

²²⁰ After interpreting a Seattle Charter Amendment so as to avoid a conflict with a subsequently enacted ordinance, the court specifically noted that “[t]he primary purpose of providing for home rule charters here and in other states has been stated to be to permit local communities complete powers over matters peculiarly local or municipal in concern so that they might operate economically and efficiently.” *Id.* at 126-28.

²²¹ See Oneto v. City of Fresno, 183 Cal. Rptr. 552, 555 (Cal. Ct. App. 1982) (holding that while an ordinance may not conflict with a city’s charter, such conflicts will not be implied).

²²² 149 N.E. 659 (Mass. 1925). Admittedly, *McCaffrey* was decided in 1925, significantly before the Home Rule Amendment was adopted. Consequently, it must be noted that the ideological vision of municipalities during that time may be very different from the framework that is at play right now. Nevertheless, from a legal perspective, not much has changed. *McCaffrey* did not involve a determination of whether Boston possessed the inherent power to act in a way not specifically empowered, nor preempted, by state law. Rather, it simply involved interpretation of the state’s special legislation (the charter) with a cursory consideration of potentially conflicting general legislation from the state. See *id.*

²²³ *Id.* at 659.

²²⁴ *Id.* (quoting 1909 Mass. Acts 486 § 49).

²²⁵ *Id.* (quoting MASS. GEN. LAWS ch. 40, §5(30) (1921) (hence amended)).

²²⁶ *Id.* at 660.

²²⁷ 562 N.E.2d 834 (Mass. 1990).

²²⁸ 416 N.E.2d 1363 (Mass. 1981).

²²⁹ Laurie Reynolds, City Powers Project: Chicago 32 (2004) [hereinafter Reynolds, Chicago] (unpublished manuscript, on file with authors).

²³⁰ Schragger, Denver, *supra* note 140, at 30.

²³¹ For this summary of Boston’s revenue picture, see 1 OFFICE OF BUDGET MANAGEMENT, CITY OF BOSTON, OPERATING BUDGET FISCAL YEAR 2007, at 8 (2006), available at <http://www.cityofboston.gov/budget/> (last visited Apr. 11, 2006).

²³² *Id.*

²³³ See Reynolds, Chicago, *supra* note 229, at 69. Besides New York City and Boston, no other city in this study directly allocates part of its revenue for school-related expenditures.

²³⁴ See CITY AND COUNTY OF SAN FRANCISCO, MAYOR’S PROPOSED BUDGET 2004-2005 13-14 (2004), available at http://sfgov.org/site/uploadedfiles/mayor/budget04_05/BudgetSummry0405.pdf (last visited Nov. 29, 2004).

²³⁵ CITY OF SEATTLE, 2003 ADOPTED AND 2004 ENDORSED BUDGET 30 (2003), available at <http://www.seattle.gov/budget/03-04budget/GeneralSubfundRevenueOverview.pdf> (last visited Nov. 29, 2004).

²³⁶ See CITY OF ATLANTA, 2004 BUDGET 2-13 (2003), available at http://www.atlantaga.gov/client_resources/government/finance/budget%20&%20fiscal%20policy/city%20of%20atlanta%202004%20budget.pdf (last visited Nov. 29, 2004).

²³⁷ See CITY AND COUNTY OF DENVER, MAYOR’S PROPOSED CITY AND COUNTY OF DENVER 2004 BUDGET 26 (2003), available at <http://www.denvergov.org/admin/template3/forms/SummarySept03.pdf> (last visited Nov. 29, 2004).

²³⁸ See Briffault, New York, *supra* note 139, 4-5; NEW YORK CITY INDEPENDENT BUDGET OFFICE, ANALYSIS OF THE MAYOR’S PRELIMINARY BUDGET FOR 2004 AND FINANCIAL PLAN THROUGH 2007 104 (2003), available at <http://www.ibo.nyc.ny.us/> (last visited Nov. 29, 2004).

²³⁹ CHARLES K. COBB, TAX LAW IN MASSACHUSETTS: 1629 – 2000, at 14 (1999).

²⁴⁰ See City of Glendale v. Trondsen, 308 P.2d 1, 3 (Cal. 1957) (“The levy and collection of taxes by a city having a charter under our Constitution is a municipal affair. The power is broad, being limited only by the charter and the Constitution.”). It is important to note at this point that in California, taxes

imposed on financial corporations are not considered matters of “municipal affairs.” See *Cal. Fed. Savs. & Loan Ass’n v. City of Los Angeles*, 812 P.2d 916, 930 (Cal. 1991).

²⁴¹ *Ex parte Braun*, 74 P. 780, 782 (Cal. 1903) (quoting *United States v. New Orleans*, 98 U. S. 381, 393 (1878)).

²⁴² See *Winslow Const. Co. v. City & County of Denver*, 960 P.2d 685, 694 (Colo. 1998) (“The Colorado Constitution specifically commits the imposition of municipal taxes to home rule cities, and local taxation is a matter which has traditionally resided in local government.”) (citation omitted).

²⁴³ See, e.g., *id.* at 687, 695 (upholding local use tax on construction equipment by a company building the Denver International Airport and invalidating state statute limiting imposition of local use taxes on personal property purchased more than three years prior to its use); see also *Sec. Life & Accident Co. v. Temple*, 492 P.2d 63, 63-64 (Colo. 1972) (striking down state statute establishing a gross premium tax on insurance companies and limiting the authority of local governments to impose additional taxes on such companies.).

²⁴⁴ See COLO. CONST. art. X, § 3(1)(b).

²⁴⁵ See ILL. CONST. art. VII, §6(g)-(i); see also Stephanie Cole, *Home Rule in Illinois: No. 3 General Assembly Action*, at <http://www.lib.niu.edu/ipo/ii7507204.html> (last visited Nov. 12, 2004) (“These sections [of the 1970 amendment] make it more difficult for the General Assembly to deny or limit the exercise of a home rule power than to decide to exercise this power itself.”).

²⁴⁶ *Reynolds, Chicago*, *supra* note 229, at 69 (quoting John C. Parkhurst, *Article VII – Local Government*, 52 CHICAGO BAR REC. 94, 100 (1971)).

²⁴⁷ See *id.* at 7-8.

²⁴⁸ MASS CONST. pt. 2, ch. 1, § 1, art. IV.

²⁴⁹ See *Opinion of the Justices*, 393 N.E.2d 306, 311-13 (Mass. 1979); *Associated Indus. of Massachusetts, Inc. v. Comm’r of Revenue*, 393 N.E.2d 812, 816-17 (Mass. 1979).

²⁵⁰ CITY AND COUNTY OF DENVER, *supra* note 237, at 25.

²⁵¹ See *Reynolds, Chicago*, *supra* note 229, at 6, 8.

²⁵² See CITY AND COUNTY OF SAN FRANCISCO, *supra* note 234, at 14, 18.

²⁵³ CITY OF ATLANTA, *supra* note 236, at 2-13.

²⁵⁴ CITY OF SEATTLE, *supra* note 235, at 24.

²⁵⁵ See *Briffault, New York*, *supra* note 139, at 5. The disparity between Boston’s reliance on the property tax for own source revenue compared to the other cities is similarly striking. For example, the property tax represents about 37% of New York City’s own source revenue, which is only half of Boston’s reliance on property taxes. *Id.*

²⁵⁶ See *Reynolds, Chicago*, *supra* note 229, at 6; CHICAGO BOARD OF EDUCATION, FY2004 RESOURCES OVERVIEW: ALL FUNDS 1, 4 (2003), available at http://www.cps.k12.il.us/AboutCPS/Financial_Information/FY2004_Final/Resources/FY2004ResourcesOverviewAllFunds.pdf (last visited Nov. 14, 2004).

²⁵⁷ CHICAGO BOARD OF EDUCATION, *supra* note 256, at 1, 4.

²⁵⁸ See MASSACHUSETTS BUDGET AND POLICY CENTER, *Appendix to MA BUDGET CRISIS 19*, available at http://www.umass.edu/usa/updates/MA_Budget_Crisis_Packet.pdf (last visited Nov. 1, 2004) (noting that whereas Massachusetts had the fourth highest combined local and state taxes in 1979, as of 1999 it ranks at 29 out of all 50 states).

²⁵⁹ Constance K. Burns, *The Irony of Progressive Reform: Boston 1898 - 1910*, in *BOSTON 1700 - 1980: THE EVOLUTION OF URBAN POLITICS* 135 (Ronald P. Formisano & Constance K. Burns eds., 1984).

²⁶⁰ Ronald P. Formisano, *Conclusion*, in *BOSTON 1700-1980: THE EVOLUTION OF URBAN POLITICS*, *supra* note 259, at 275.

²⁶¹ COBB, *supra* note 239, at 33.

²⁶² *Id.*

²⁶³ These provisions, which never applied to towns, but only to cities, were repealed in the 1930s. *Id.*

²⁶⁴ There was a legislative precursor to Proposition 2 ½ passed in the 1970s that capped property taxes at 4%. As one commentator explained, this “early measure was a stalking horse for Proposition 2½ . . .

.” Michael J. Long, *Basic Rules of Public School Budgeting and Finance*, in MASSACHUSETTS CONTINUING LEGAL EDUCATION, INC., SCHOOL LAW § 16.2.2 (2003).

²⁶⁵ MASS. GEN LAWS ch. 59, § 21(c) (2003).

²⁶⁶ COBB, *supra* note 239, at 33 (quoting MASSACHUSETTS DEPARTMENT OF REVENUE, A GUIDE TO FINANCIAL MANAGEMENT FOR TOWN OFFICIALS § 2.2, at 16 (n.d.), *available at* <http://www.dls.state.ma.us/publ/misc/town.pdf> (last visited Nov. 12, 2004)).

²⁶⁷ *Id.*

²⁶⁸ *See id.* at 34.

²⁶⁹ For example, in recent years, residents in Boston have faced a potential 40% increase in their property taxes. *See* Chris Reidy, *A Taxing Issue: Rising Values in Boston Area Shifting the Burden to Homeowners*, BOSTON GLOBE, Dec. 14, 2003, at J1 (“[P]robably in late March [2004], single-family homeowners could see an average 40 percent increase.”). Yet because of depreciation in commercial property values, this increase will still keep Boston’s overall tax levy under the 2½ percent plus new growth limit.

²⁷⁰ COBB, *supra* note 239, at 34 (quoting MASSACHUSETTS DEPARTMENT OF REVENUE, *supra* note 266, § 2.2, at 16).

²⁷¹ *Id.*

²⁷² *See id.*

²⁷³ *See Tough Times for Mayor*, BOSTON GLOBE, Mar. 21, 1993 (“During most of the 1980s municipal officials found Proposition 2½ a bit less onerous than they had feared because of . . . rising state aid.”).

²⁷⁴ 1 OFFICE OF BUDGET MANAGEMENT, CITY OF BOSTON, OPERATING BUDGET FISCAL YEAR 2006 106(2005) [hereinafter OFFICE OF BUDGET MANAGEMENT, FISCAL YEAR 2006].

²⁷⁵ *Id.*

²⁷⁶ Some argue, however, that Boston did have that opportunity throughout most of the 1990s, but continued to tax at the upper-most limits of its authority while spending on excessive capital improvement projects, salary and benefit increases, and educational policy improvements that limited its ability to put money into reserves. *See* Scott S. Greenberger, *Critics Say Boston Spent Too Much, Saved Too Little*, BOSTON GLOBE, Feb. 26, 2003, at B1. Although some of the spending was indeed excessive during Boston’s economic upswing, other expenditures, especially in education, appear to be simply remedial measures intended to meet up to the government’s responsibility to educate. Furthermore, echoing Mayor Menino’s comments on another subject, much of this spending may have also been fueled by a desire for “the people in the city to have the same quality of life as suburban people have.” *Id.* Indeed, reliance on property taxes has produced a bitter battle for residents and property values between Boston and its surrounding suburban communities.

²⁷⁷ *See* Scott W. Helman, *The Case to Amend Proposition 2: Lawmaker’s Comments Spur a Discussion*, BOSTON GLOBE, Apr. 2, 2002, at B2.

²⁷⁸ *See, e.g.,* Rhonda Stewart, *Time Runs Short for State to Act on Tax Relief Bills*, BOSTON GLOBE, July 18, 2004, at 11 (“Wayland has passed five Proposition 2½ overrides since fiscal year 1990.”).

²⁷⁹ Scott S. Greenberger, *In Fight for Funds, Menino’s Hands Tied by History: State has Long Sought to Control City’s Purse*, BOSTON GLOBE, Mar. 11, 2003, at B1.

²⁸⁰ James M. Banovetz, *Illinois Home Rule:: A Case Study in Fiscal Responsibility.*, 32 J. REGIONAL ANALYSIS & POL’Y 79, 93-95 (2002).

²⁸¹ *See* BOSTON REDEVELOPMENT AUTHORITY, TAX EXEMPT PROPERTY IN BOSTON: ANALYSIS OF TYPES, USES, AND ISSUES 3 (2002) [hereinafter BOSTON REDEVELOPMENT AUTHORITY, TAX EXEMPT], *available at* http://www.cityofboston.gov/bra/PDF%5CPublications%5C/pdr_562.pdf (last visited Nov. 1, 2004).

²⁸² BOSTON MUN. RESEARCH BUREAU, INC., BOSTON: FACTS AND FIGURES 64 (2002).

²⁸³ Richard Ford, *City Powers Project: San Francisco* 54 (2004) [hereinafter Ford, San Francisco] (unpublished manuscript on file with authors).

²⁸⁴ *See See* Schragger, *Denver*, *supra* note 140, at 6.

²⁸⁵ *See See* Keith Aoki, *City Powers Project: Seattle*, Washington 22 (2004) [hereinafter Aoki, Seattle] (unpublished manuscript, on file with authors).

²⁸⁶ See DEP'T OF FINANCE, CITY OF NEW YORK, ANNUAL REPORT: THE NEW YORK CITY PROPERTY TAX FY 2004, at i (2004), available at http://www.nyc.gov/html/dof/pdf/03pdf/taxpol_proptax04.pdf (last visited Nov. 29, 2004). Most of the tax-exempt property belonged to the city of New York. Unlike Boston however, the state owned a surprisingly small amount of land in New York. At first blush, one may assume that this is due to the fact that New York City is not the state capital while Boston is. Yet, it must be remembered that most of the property owned by Massachusetts in Boston were not capital buildings, but other proprieties held by a variety of state agencies like Massport. Indeed, the discrepancies ultimately reflect a difference in how closely the state controls each respective city.

²⁸⁷ See BOSTON REDEVELOPMENT AUTHORITY, TAX EXEMPT, *supra* note 281, at 3-4. Property owned by the United States Federal Government are also exempt from property taxes, although they account for less than 1% of the property in Boston. BOSTON MUN. RESEARCH BUREAU, *supra* note 282, at 64.

²⁸⁸ BOSTON REDEVELOPMENT AUTHORITY, TAX EXEMPT, *supra* note 281, at 3-4.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ BOSTON MUN. RESEARCH BUREAU, *supra* note 282, at 64.

²⁹² BOSTON REDEVELOPMENT AUTHORITY, TAX EXEMPT, *supra* note 281, at 11.

²⁹³ *Id.*; 1 OFFICE OF BUDGET MANAGEMENT, CITY OF BOSTON, OPERATING BUDGET FISCAL YEAR 2007, *supra* note 232, at 105.

²⁹⁴ *Id.*

²⁹⁵ See 1 OFFICE OF BUDGET MANAGEMENT, CITY OF BOSTON, OPERATING BUDGET FISCAL YEAR 2007, *supra* note 232, at 8.

²⁹⁶ See MASS. CONST. amend. art. CXII. Although these classifications seem self-evident, other cities that adopted statutory classifications actually differ in interesting ways. For example, the four classifications used in New York, codified by Section 7000A are as follows: "Class One, primarily 1-, 2-, and 3-family homes and certain condominiums; Class Two, all other residential property; Class Three, utility property and Class Four, all other property, primarily commercial property." OFFICE OF TAX POLICY, NEW YORK CITY, ANNUAL REPORT: THE NEW YORK CITY PROPERTY TAX FY 2003, at 1, available at http://www.nyc.gov/html/dof/pdf/02pdf/taxpol_property_03.pdf (last visited Nov. 2, 2004). Furthermore, much like Proposition 2½, caps are placed on how much property tax levy can be increased over the previous year. *Id.* at 2. The cap, however, is significantly more generous than that of Massachusetts and actually varies or disappears as you move across the classifications.

²⁹⁷ See *Town of Sudbury v. Comm'r of Corps.*, 321 N.E.2d 641, 645-48 (Mass 1974).

²⁹⁸ COBB, *supra* note 239, at 18.

²⁹⁹ See *Opinion of the Justices*, 393 N.E.2d at 307-08 (citing MASS. CONST. amend. art. CXII).

³⁰⁰ See Scott S. Greenberger, *Panel Urges Temporary Tax Cushion: Homeowners Would Get Short-Term Benefit*, BOSTON GLOBE, Jan. 13, 2003, at B1.

³⁰¹ Interestingly, this sensitivity, which manifests itself most prominently in initiative and referendums, also affects and threatens state revenue sources. In 2002, the State of Massachusetts was a few percentage points away from abolishing the state income tax, Massachusetts' primary source of income, even while it was facing a tremendous budget shortfall. See Alan Lupo, *Where Have the Idealists Gone?*, BOSTON GLOBE, Nov. 17, 2002, at 4 (noting that the state measure was favored by 45% of voters).

³⁰² Proposition 13 has been codified at Article XIII A of the California Constitution.

³⁰³ CAL. CONST. art. XIII A § 1(A); see also Larry J. Obhof, *Rethinking Judicial Activism and Restraint in State School Finance Litigation*, 27 HARV. J.L. & PUB. POL'Y 569, 579 n.58 (2004).

³⁰⁴ CAL. CONST. art. XIII A, § 2(A). The amendment does make provisions to account for inflation and other factors such as significant "economic downturns."

³⁰⁵ See *id.* § 4.

³⁰⁶ See Jared Eigerman, *California Counties: Second-Rate Localities or Ready-Made Regional Governments?*, 26 HASTINGS CONST. L.Q. 621, 659 (1999).

³⁰⁷ Robert B. Gunninson, *Group Urges Reversal of Prop. 13*, S.F. CHRON., Mar. 1, 1995, at A17 ("[T]he California Citizens Budget Commission . . . said the lack of local control over property taxes [created

by Proposition 13] has made cities, counties, schools and special districts increasingly dependent on a shrinking supply of state aid to make up their financial shortages.”).

³⁰⁸ See Michael R. Johnson et al., *State Constitutional Tax Limitations: The Colorado and California Experience*, 35 URB. LAW. 817, 830 & n.77 (2003).

³⁰⁹ See *id.* at 831.

³¹⁰ See *id.* at 833. Criticism has also been levied against the refund provision for producing fiscal instability. Under this regime, cities like Denver can not save money in a reserve fund to prepare for economic downturns. Therefore, when a shortfall does occur, the only option is to slash services.

³¹¹ COLO. CONST. art. X, § 20(4)(a).

³¹² See 18 ILL. COMP. STAT. 200/18-185 (2002).

³¹³ Andrew Fegelman, *Tax Cap Imposed for Cook County Board Puts 5% Limit on its Own Levies*, CHI. TRIB., Mar. 2, 1994, at 5.

³¹⁴ Chris Reidy, *Property Tax Pain: How Boston Stacks up to its Neighbors*, BOSTON GLOBE, Jan. 11, 2004, at J1.

³¹⁵ See Mass. Gen. Laws ch. 121A, § 2 (2003).

³¹⁶ *Id.* § 10.

³¹⁷ BOSTON REDEVELOPMENT AUTHORITY, HISTORY OF BOSTON'S ECONOMY GROWTH AND TRANSITION: 1970–1998, at 3 (1999), available at <http://www.cityofboston.gov/bra/pdf/publications/pdr529.pdf> (last visited Nov. 2, 2004).

³¹⁸ *Id.* at 3-4.

³¹⁹ CITY OF SEATTLE, *supra* note 235, at 24.

³²⁰ CITY AND COUNTY OF SAN FRANCISCO, *supra* note 234, at 14.

³²¹ Reynolds, Chicago, *supra* note 229, at 8; CITY AND COUNTY OF DENVER, *supra* note 237, at 25.

³²² See CITY AND COUNTY OF DENVER, *supra* note 237, at 25.

³²³ See City of Atlanta, *Municipal Option Sales Tax*, at <http://apps.atlantaga.gov/most/disclaimer.htm> (last visited Nov. 13, 2004).

³²⁴ See *1st Property Tax May Be Voted On*, CHI. TRIB., Oct. 12, 2003, at 7J.

³²⁵ See *Dueling for Dollars*, S.F. CHRON., Apr. 4, 2002, at A20 (“Although most of the sales tax still goes to the state, cities get 1 percent of every taxable dollar.”).

³²⁶ CITY OF SEATTLE, *supra* note 235, at 32.

³²⁷ City and County of Denver, *Motor Vehicle: Fees and Sales Tax*, at <http://www.denvergov.org/MotorVehicle/template14635.asp> (last visited Nov. 13, 2004).

³²⁸ Joe Mahoney, *Legislature Overrides Governor's Veto of Bailout Package for New York City*, N.Y. DAILY NEWS, May 20, 2003.

³²⁹ Dan Mihalopolous & Gary Washburn, *Daley plan for budget leaves few taxes alone; Entertainment, parking, sin taxes may be increased*, CHI. TRIB., Nov. 6, 2004, at 1.

³³⁰ CITY AND COUNTY OF SAN FRANCISCO, *supra* note 234, at 13 (noting the city's approximately \$4.8 billion budget); San Francisco Convention & Visitor's Bureau, *Breakdown of San Francisco Annual Visitor Volume & Spending* (2002 vs. 2003), at http://onlysf.sfvistor.org/media/downloads/2003_visitor_statistics.pdf (last visited Nov. 13, 2004) (listing \$347 million as the amount of sales tax revenue generated for the city by visitors in 2003).

³³¹ See COBB, *supra* note 239, at 68.

³³² *Id.* at 68-69.

³³³ To be sure, as the commute threshold increases in the Boston Metropolitan Region, more and more commuters are living in southern New Hampshire and commuting into Massachusetts to work. Not only is the cost of living lower, but they also exempt themselves from income and sales taxes. See Clare Kittredge, *N.H. Seeks West Coast Work: Officials Tour California Hoping to Lure Businesses*, BOSTON GLOBE, Sept. 25, 2003, at 1.

³³⁴ See Brian C. Mooney, *In Tally, a Rejection of One-Party Rule*, BOSTON GLOBE, Nov. 6, 2002, at B9 (“A Libertarian Party-inspired effort to repeal the state income tax went down yesterday but by a far smaller margin than most pre-election polls had indicated. There was a send-'em-a-message quality to the vote . . .”). Interestingly, polls conducted after the initiative vote polling who had voted for and

against the repeal turned up surprising figures. Out of the 500 randomly polled, only 26% said they voted in favor of the repeal on their ballot. Frank Phillips, *Arrest Won't Help Cause of Evening*, BOSTON GLOBE, Feb. 16, 2003, at B7. It may have been the case that the drafting of the initiative was so unclear that people did not know exactly what they were voting for, except that it would mean "less taxes." Furthermore, the poll also indicated that of those 26% that said they voted in favor of the repeal, "over half - or 56 percent - said they were just sending a message with their vote while 35 percent said they actually wanted to repeal it." *Id.*

³³⁵ Sec. Life & Accident Co. v. Temple, 492 P.2d 63, 64 (Colo. 1972).

³³⁶ See CITY OF SEATTLE, *supra* note 235, at 30.

³³⁷ See N.Y. CONST. art. XVI, § 1.

³³⁸ See N.Y. TAX LAW § 1301 (McKinney 2004).

³³⁹ New York City Office of the Comptroller, *Who Pays NYC's Personal Income Tax?* (2000), at <http://www.comptroller.nyc.gov/bureaus/bud/personalincome.shtm> (last visited Nov. 14, 2004).

³⁴⁰ See NEW YORK CITY INDEPENDENT BUDGET OFFICE, *supra* note 8, at 13, 16-19.

³⁴¹ See ILL. CONST. art. VII, § 6(e).

³⁴² 30 ILL. COMP. STAT. 115/1 (2002).

³⁴³ Reynolds, Chicago, *supra* note 229, at 7.

³⁴⁴ City & County of Denver v. Sweet, 329 P.2d 441 (Colo. 1958) (invalidating Denver's attempt to levy an income tax because such power is preempted by COLO. CONST. art. X, § 17).

³⁴⁵ CITY AND COUNTY OF DENVER, *supra* note 237, at 25.

³⁴⁶ GA. CODE ANN. § 48-7-41 (1999).

³⁴⁷ CITY AND COUNTY OF SAN FRANCISCO, *supra* note 234, at 14.

³⁴⁸ BOSTON REDEVELOPMENT AUTHORITY, INSIGHT: BOSTON'S POPULATION DOUBLES -- EVERY DAY 2 (1996) [hereinafter BOSTON REDEVELOPMENT AUTHORITY, INSIGHT], available at <http://www.ci.boston.ma.us/bra/pdf/publications/pdr96-1.pdf> (last visited Nov. 14, 2004)

³⁴⁹ D.C. CODE ANN. §§ 47-18.01.01 - .06.06 (2001).

³⁵⁰ See Cobb, *supra* note 239, at 11 (The constitutional amendment was "designed to remove intangible property from local taxation . . .").

³⁵¹ See *id.* at 12-13.

³⁵² For example, in early 1900s San Francisco, a strong Home Rule amendment along with a California State Supreme Court decision confirmed the ability of California cities to pass various taxes ranging from what we currently call sales taxes to others that we may refer to as excises or fees. The Supreme Court decision upheld a Los Angeles' business license tax, declaring local taxation a municipal affair in the process and thus protected from state pre-emption by the recent amendment. *Ex Parte Braun*, 74 P. 780, 783-84 (Cal. 1903). The Separation of Sources Act, which allocates property taxes exclusively to localities, further strengthened the fiscal autonomy of cities and did not restrict their ability to impose taxes, excises, and fees. See *ITT World Communications, Inc. v. City & County of San Francisco*, 693 P.2d 811, 814 (Cal. 1985). In 1935 the state pre-empted the local taxation of motor vehicles and established the Vehicle License Fee. See *Consol. Rock Prods. Co. v. Carter*, 129 P.2d 455, 455-56 (Cal. Ct. App. 1942) (quoting the language of the 1935 act). In 1955 the legislature passed the Bradley-Burns Uniform Sales and Use Act, pre-empting then-existing local sales taxes and replacing them with a uniform, state-wide system of sales taxation and collection. *County of Sonoma v. State Bd. of Equalization*, 241 Cal. Rptr. 215, 216 (Cal. Ct. App. 1987).

³⁵³ Schragger, *Denver*, *supra* note 140, at 77.

³⁵⁴ CITY AND COUNTY OF SAN FRANCISCO, *supra* note 234, at 14.

³⁵⁵ See Reynolds, Chicago, *supra* note 229, at 6-9

³⁵⁶ CITY OF SEATTLE, *supra* note 235, at 30.

³⁵⁷ CITY OF ATLANTA, *supra* note 236, at 2-16.

³⁵⁸ See, e.g., GA. CODE ANN. § 48-5-351 (1999) (pension tax on teacher retirement).

³⁵⁹ 1 OFFICE OF BUDGET MANAGEMENT, FISCAL YEAR 2006, *supra* note 232, at 8.

³⁶⁰ *Id.* at 101. Actual revenue from the excise tax on the sale jet fuel in FY 2005 was \$18.4 million, but this included a extra payment of \$3.2 million from FY 2004. *Id.*

³⁶¹ Indeed, the title of the chapter on the excise, see MASS. GEN. LAWS ch. 60A (2003), is “Excise Tax on Registered Motor Vehicles in Lieu of Local Tax.”

³⁶² See COBB, *supra* note 9, at 27.

³⁶³ See MASS. GEN. LAWS ch. 60A, § 1.

³⁶⁴ See MASS. GEN. LAWS ch. 64G, § 3A (2003).

³⁶⁵ See Kathy McCabe, *Hot Market Stokes Hotel Building in Region: Developers Eye Sites Along Routes 1 and 1A*, BOSTON GLOBE, July 23, 2000, at 1 (“The hotels, with the promise of millions of dollars in property and hotel/motel taxes, are generally regarded as a windfall for host communities at a time when cities and towns are faced with high capital costs for such things as new school construction and open space preservation.”).

³⁶⁶ Jordana Hart, *Menino to Seek State Aid for Cup, Eyes Proceeds of Hotel Excise Tax*, BOSTON GLOBE, Dec. 26, 1993, at 35.

³⁶⁷ It is not clear from research on this subject whether Menino’s request was granted. Nevertheless, considering the momentous precedent this would set, it appears that because of the fact follow-up stories were not reported in the Boston Globe it is appropriate to assume that the state did not give it much consideration.

³⁶⁸ See Scott S. Greenberger, *Fiscal ’04 Forecast: Trouble for City State Budget Woes may Affect Local Aid*, Boston Globe, Nov. 19, 2002, at A1 (“Romney, who has pledged strict fiscal discipline, last week decried ‘political welfare’ in cautioning that the state won’t necessarily pick up a large piece of Boston’s tab for the Democratic convention -- even though that event will fill the state’s coffers as surely as the city’s.”).

³⁶⁹ Rick Klein, *Menino Eyes Billing State for DNC: Says City Should get Half of the Extra Tax Revenues*, BOSTON GLOBE, Feb. 25, 2004, at B1.

³⁷⁰ MASS. GEN. LAWS ch. 64J, § 1(i) (2003). For the text of the statute regulating the Jet Fuel excise, see generally MASS. GEN. LAWS ch. 64J.

³⁷¹ See *id.* § 14.

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ These proposals actually have a long history. In a report issued in the late 1980s assessing Proposition 2½, one of the many recommendations was that the state allow localities to pass these three revenue raising taxes. See Renee Loth, *Prop. 2 ½ Report Strikes a Nerve*, BOSTON GLOBE, Dec. 15, 1989, at 1.

³⁷⁵ Scott S. Greenberger, *Menino Offers a Credit on Meals Tax Proposal*, BOSTON GLOBE, Apr. 24, 2004, at A1.

³⁷⁶ See Raphael Lewis, *Senate Approves Local-Option Sales, Meals Tax-Hikes*, BOSTON GLOBE, June 13, 2003, at B6.

³⁷⁷ BOSTON REDEVELOPMENT AUTHORITY, INSIGHT, *supra* note 349, at 1.

³⁷⁸ See *id.* at 2.

³⁷⁹ Greenberger, *supra* note 375 (quoting Bruce Wallin, an associate professor at Northeastern University).

³⁸⁰ 1 OFFICE OF BUDGET MANAGEMENT, FISCAL YEAR 2006, *supra* note 274, at 106.

³⁸¹ BOSTON MUN. RESEARCH BUREAU, *supra* note 282, at 24.

³⁸² 1 OFFICE OF BUDGET MANAGEMENT, FISCAL YEAR 2006, *supra* note 274, at 106-107.

³⁸³ For example, Denver has seen a \$33 million dollar decrease in sales tax collection from 2001 to 2003, losing approximately 5% of their total budget. See CITY AND COUNTY OF DENVER, *supra* note 237, at 26.

³⁸⁴ See, e.g., Mike McIntire, *Fed Says City Leans Heavily on Income Tax*, N.Y. TIMES, May 28, 2004, at B1.

³⁸⁵ PAUL G. LEWIS & ELISA BARBOUR, PUBLIC POLICY INSTITUTE OF CALIFORNIA, CALIFORNIA CITIES AND THE LOCAL SALES TAX xiii-xvi (1999) (noting that retail consumption appears to be relatively stagnant in recent years).

³⁸⁶ See Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763, 1825-26 (2000).

³⁸⁷ MASS. CONST. amend. art. LXXXIX, § 7.

³⁸⁸ See MASS. GEN. LAWS ch. 40, §22F (2003) (allowing municipalities to adopt fees as a local option).

³⁸⁹ 462 N.E.2d 1098 (Mass. 1984)

³⁹⁰ *Id.* at 1105 (internal quotations and citations omitted).

³⁹¹ *Id.* at 1100.

³⁹² *Id.* at 1100 n.2 (quoting 1982 Mass. Acts 190 § 30).

³⁹³ *Id.* at 1105-07.

³⁹⁴ *Id.*

³⁹⁵ See, e.g., *Silva v. City of Fall River*, 798 N.E.2d 297 (Mass. App. Ct. 2003). (invalidating a regulatory fee imposed on burial permits because it constituted a tax and not a fee). The battle over fees and whether they offer particular benefits to payees has been a point of constant contention. Several cases have been decided on this matter, indicating the lack of clarity over this distinction. See, e.g., *Commonwealth v. Caldwell*, 515 N.E.2d 589 (Mass. App. Ct. 1987) (fee particularized to people choosing to moor boats); *Town of Winthrop v. Winthrop Hous. Auth.*, 541 N.E.2d 582 (Mass. App. Ct. 1989) (particularized benefit to those users who hooked up to sewer system, assessed to everyone who was hooked up); *Aiello v. Comm'rs of Dukes County*, 617 N.E.2d 663 (Mass. App. Ct. 1993) (charge for town communications center follow-up on electronic alarm signals was particularized to users).

³⁹⁶ See *Greater Franklin Developers Ass'n v. Town of Franklin*, 730 N.E.2d 900, 903 (Mass App. Ct. 2000).

³⁹⁷ In *Bertone v. Department of Public Utilities*, 583 N.E.2d 829 (Mass. 1992), for example, the town of Hull was allowed to levy a fee for new development hookups for electricity because the system was already running at full capacity and new hookups would have required the construction of new facilities which would benefit the new residents alone. *Id.* at 836. The Court also noted that the collected fees are segregated into separate funds and not deposited in the town's general funds. *Id.* A year later, however, a similar fee for sewer hookups was struck down by the state appellate court in *Berry v. Town of Danvers*, 613 N.E.2d 108, 111-12 (Mass. App. Ct. 1993). The court there distinguished *Bertone* by noting that the funds were being deposited into the general town fund and that the sewer facilities has been running over capacity for several years, and moneys charged for facility upgrades would benefit the whole town and not just those seeking to be added into the system. *Id.* at 111.

³⁹⁸ See *Emerson Coll. v. City of Boston*, 462 N.E.2d 1098, 1105-07 (Mass. 1984).

³⁹⁹ The specific standard for assessing preemption requires courts to look "to see whether there was either an express legislative intent to forbid local activity on the same subject or whether the local regulation would somehow frustrate the purpose of the statute so as to warrant an inference that the Legislature intended to preempt the subject." *Boston Gas Co. v. City of Somerville*, 652 N.E.2d 132, (Mass. 1995).

⁴⁰⁰ Press Release, Boston Transportation Department Gets the Green Light To Increase Towing Fee (Jan .16, 2004), available at <http://www.cityofboston.gov/news/pr.asp?ID=1946> (last visited Nov. 3, 2004).

⁴⁰¹ See *Boston Gas Co. v. City of Newton*, 682 N.E.2d 1336, 1338 (Mass. 1997). There were also two other fees that were involved in the case: an application fee and a maintenance fee. *Id.* The application fee, which compensates the city for its administrative cost, was upheld. *Id.* at 1338-39. The maintenance fee, which intended to compensate for the wear and tear that any excavation necessarily creates in the area being excavated, was struck down because the state statute appeared to operate under a belief that the street can be returned to perfect original condition and it would be inappropriate to essentially assess long-term impact fees on excavating utilities. See *id.* at 1339. The application fee was justified under the state statutory language which requires a town to grant their approval for such excavations. *Id.* at 1343. As the Court explains, if they have to give permission, they can seek to be compensated for the cost of granting that permission. See *id.* Nevertheless,

considering the language used to strike down the other two fees, it appears to be a fine line between upholding the administrative fees in the shadow of the state statute while striking down the others.

⁴⁰² California is a good example. Keeping in mind that the legal structure of California's taxing authority is quite different, it is interesting to note that preemption, a doctrine common to both states, is interpreted quite differently when it comes to taxing authority. In *In re Groves*, 351 P.2d 1028 (Cal. 1960), the California Supreme Court explained that even though the state has regulated extensively in a given profession, the municipality can condition a tax or fee for the practice of that profession as long as it is just for a revenue raising purpose and does not seek to "regulate" in the preempted field through the use of that tax or fee. *See id.* at 157 ("The municipality, in imposing an occupational tax upon attorneys, is not interfering with state regulations, for it is not attempting to prescribe qualifications for attorneys different from or additional to those prescribed by the state. It is merely providing for an increase in its revenue by imposing a tax upon those who, by pursuing their profession within its limits, are deriving benefits from the advantages especially afforded by the city."). Although this is referring to a local tax, which California municipalities are allowed to impose contrary to Boston's abilities, the preemption concern is quite similar to that in *City of Newton*, with the court reaching, interestingly, the opposite result.

⁴⁰³ However, Denver showed even less reliance on fees; they accounted for approximately 3% of Denver's receipts. *See CITY AND COUNTY OF DENVER, supra* note 237, at 26.

⁴⁰⁴ *See CITY AND COUNTY OF SAN FRANCISCO, supra* note 234, at 17.

⁴⁰⁵ *Id.* at 18. To be fair, Boston collected in 1996 \$200 million from their hospital, which was still an overall loss for the city, before privatizing it. BOSTON MUN. RESEARCH BUREAU, *supra* note 282, at 24. In 1996, that was approximately 13% of Boston's total revenues. *See id.*

⁴⁰⁶ Indeed, figures indicate that out of the \$1.5 billion generated from enterprise departments, only 8% is returned to the general fund for the city's discretionary use. The low figure appears to be partially a result of the fact that the hospital loses money every year and enterprise revenues from other sectors compensate for that loss, lowering the surplus that is deposited in the general fund. Indeed, revenues recouped from all the major enterprises were around or well above the 8% mark, with the hospital reporting a 22% deficit that is filled by the other funds. Furthermore, as will be explored in the expenditures section, insofar that much of general expenditures coming from a city's general fund can be said to be as staple as the enterprises themselves, there may not be that much of a difference. *See Ford, San Francisco, supra* note 283, at 76.

⁴⁰⁷ CITY AND COUNTY OF SAN FRANCISCO, *supra* note 234, at 14.

⁴⁰⁸ Reynolds, Chicago, *supra* note 229, at 8.

⁴⁰⁹ *Id.* at 9. Another \$163 million in 2004 came from Chicago's other airport, Chicago Midway Airport. *Id.*

⁴¹⁰ *Id.* at 65.

⁴¹¹ *Endsley v. City of Chicago*, 745 N.E.2d 708, 711 (Ill. App. Ct. 2001).

⁴¹² As should be clear, this fear is not at all unfounded. Drastically varying rates for permits, licenses, and user fees across the state reveal that there is often little correlation between the cost of a fee and what it actually costs the city or town to provide that service. *See Jordana Hart, Local Fees for Permits or Services Vary Wildly*, BOSTON GLOBE, Sept. 2, 1990, at 1 (noting recent compilation of fees by the Massachusetts Municipal Association, which revealed, among other things, that "[i]n Tewksbury, you can hold an auction for \$10. The same permit would cost an auctioneer \$75 in Andover and \$100 in Concord. . . . Likewise, you would have to pay \$4,000 to establish a massage parlor in Dracut and only \$50 in Burlington, Acton or Belmont."). Of course, it is not entirely clear that excessively high rates or extreme discrepancies between communities are indicators that municipalities are using fees to offset their lack of taxing authority. As one commentator explains, communities with high fees "have probably done a very detailed cost analysis. . . . [and] that those communities with comparatively low permit and license fees are probably doing no more than subsidizing the cost of a service." *Id.* (quoting MMA's executive director, Sheila Cheimets).

⁴¹³ This was in response to a court decision that upheld Chicago's "employers' expense tax" that imposed a monthly per employee charge on every Chicago employer with at least 15 full time

employees. In *Paper Supply Co. v. City of Chicago*, 317 N.E.2d 3 (Ill. 1974) the court upheld the tax, noting that it did not fit within the court's own well-established definition of occupation tax as "a tax for the privilege of exercising, undertaking, or operating a given occupation, trade, or profession The payment of the tax itself is a condition precedent to the privilege of carrying on a business or occupation." *Id.* at 9-10 (quoting *Reif v. Barrett*, 188 N.E. 889, 892 (Ill. 1933)).

⁴¹⁴ See ILL. CONST. art. VII, § 6(e).

⁴¹⁵ See Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 933-34 (2003).

⁴¹⁶ See Terri A. Sexton et al., *Proposition 13: Unintended Effects and Feasible Reforms*, 52 NAT'L TAX J. 99, 107 (1999).

⁴¹⁷ *City & County of San Francisco v. Farrell*, 648 P.2d 935, 938-39 (Cal. 1982).

⁴¹⁸ *Id.* at 938.

⁴¹⁹ See Anthony Flint, *Doubling of Linkage Fees Faces Scrutiny: Cambridge Seeks Affordable Housing*, BOSTON GLOBE, Sept. 9, 2002, at B1 (The proposed increase in the so-called "linkage" fee makes Cambridge . . . about even with Boston in what it requires developers to pay into a housing trust.").

⁴²⁰ *Russ Bldg. P'ship v. City & County of San Francisco*, 234 Cal.Rptr. 1, 3-4 (Cal. Ct. App. 1987).

⁴²¹ See *id.* at 6.

⁴²² *Id.*

⁴²³ See COLO. CONST. art. X, § 3.

⁴²⁴ *Bloom v. City of Fort Collins*, 784 P.2d 304, 309-11 (Colo. 1989).

⁴²⁵ The San Francisco Chronicle, reporting on a California Supreme Court decision, noted that while "[c]ities and counties are barred from receiving any state reimbursement if they can pay for . . . new programs without resorting to new taxes," local governments could still impose a user charge. Harriet Chiang, *Justices Deal Fiscal Blow to Cities, Counties / State need not pay cost of programs it requires*, SAN FRANCISCO CHRON., Apr. 23, 1991, at A1 (referring to *County of Fresno v. State*, 808 P.2d 235 (Cal. 1991)).

⁴²⁶ 1 OFFICE OF BUDGET MANAGEMENT, FISCAL YEAR 2006, *supra* note 274, at 104

⁴²⁷ *Id.*

⁴²⁸ *Id.*

⁴²⁹ See *id.*

⁴³⁰ *Id.*

⁴³¹ See *id.* at 14, 98.

⁴³² 1993 Mass. Acts 71 § 32.

⁴³³ The foundation budget calculation is immensely complex. As one report explains, it "is the sum of six factors composing eighteen budget categories, adjusted by a regional wage adjustment factor." FOUNDATION BUDGET REVIEW COMMISSION, REPORT OF THE FOUNDATION BUDGET REVIEW COMMISSION (2001), available at <http://www.state.ma.us/legis/reports/foundation.htm> (last visited Nov. 4, 2004). The six factors are payroll, non-salary expenses, professional development, expanded programs, extraordinary maintenance, and books and equipment. *Id.* The calculations that go into these categories are rigid and highly technical.

⁴³⁴ See 1993 Mass. Acts 71 § 32.

⁴³⁵ *Id.*

⁴³⁶ FOUNDATION BUDGET REVIEW COMMISSION, *supra* note 434.

⁴³⁷ See *id.*

⁴³⁸ See 1 OFFICE OF BUDGET MANAGEMENT, FISCAL YEAR 2006, *supra* note 274, at 11.

⁴³⁹ See Alexander Reid, *After State Cuts, Budget Mending Begins: Officials Seek Ways to Cover Loss of Aid*, BOSTON GLOBE, Feb. 6, 2003, at 1 ("[O]f the state's 351 communities . . . additional assistance . . . goes to 159 cities and towns in the state.").

⁴⁴⁰ Muriel Cohen, *Weld Cuts Would Drop School Aid to 49th in US*, BOSTON GLOBE, Feb. 2, 1991 ("[C]ommunities can choose to use [additional assistance] for any municipal purpose, including schools.").

⁴⁴¹ Dan Ring, *Legislature Approves States Budget*, REPUBLICAN, June 17, 2004, available at <http://www.masslive.com/springfield/republican/index.ssf?/base/news-1/1087458423230610.xml> (last visited Nov. 29, 2004) (“Additional assistance . . . is distributed in an uneven manner with no formula.”).

⁴⁴² 1 OFFICE OF BUDGET MANAGEMENT, FISCAL YEAR 2006, *supra* note 274, at 104.

⁴⁴³ *Id.*

⁴⁴⁴ *See id.*

⁴⁴⁵ *See id.* at 8, 105 (referring to the expected budget numbers for Fiscal Year 2004).

⁴⁴⁶ *See* 1971 Mass. Acts 813.

⁴⁴⁷ *See id.* § 3.

⁴⁴⁸ The increase in lottery aid after the cap was removed also included appropriations that came directly from the state treasury to “return[]” the divested lottery income that was taken over those years. Massachusetts Municipal Association, *Local Aid Background and Factsheet* (2003), at http://www.mma.org/policies_positions/position_papers/local_aid_facts.html (last visited Nov. 5, 2004).

⁴⁴⁹ *See* 1 OFFICE OF BUDGET MANAGEMENT, CITY OF BOSTON, OPERATING BUDGET FISCAL YEAR 2007, *supra* note 232, at 99.

⁴⁵⁰ *Id.* at 105.

⁴⁵¹ *See* Briffault, New York City, *supra* note 139, at 4-5 (2004). New York, however, receives significant amounts of federal grants in their aid package. *Id.* at 4. Boston does not appear to receive as large a proportion of direct federal grants without it being filtered through the state. *See* 1 OFFICE OF BUDGET MANAGEMENT, FISCAL YEAR 2006, *supra* note 274, at 76-78.

⁴⁵² *See* Ford, San Francisco, *supra* note 283, at 50-51. San Francisco also depends on the state remitting to it portions of the property taxes that are levied within its borders. Yet even if state property tax transfers are viewed as state aid, they still constitute less than 21 percent of the city’s general-purpose revenue. *See id.*

⁴⁵³ *See* CITY OF ATLANTA, *supra* note 236, at 2-16; CITY OF SEATTLE, *supra* note 235, at 24.

⁴⁵⁴ *See* CITY OF ATLANTA, *supra* note 236, at 2-21.

⁴⁵⁵ Reynolds, Chicago, *supra* note 229, at 6, 46. Chicago publishes their budget with internal categorization that makes it difficult to assess the total budgetary capacity of the city, especially in comparison to other cities who do not conduct their municipal accounting in the same manner. Indeed, state and federal grants are actually excluded from Chicago’s “revenues,” because their disbursement does not follow the timeline of the city’s fiscal year. Furthermore, the school budget, traditionally included in other city’s overall budget, is accounted for in a separate category. The general government reliance was calculated after adding in the state and federal grants it receives to its overall operating budget. The school budget already accounts for its substantial reliance on state and federal moneys.

⁴⁵⁶ *Id.* at 8.

⁴⁵⁷ 30 ILL. COMP. STAT. 115/1 (2002).

⁴⁵⁸ *See* 30 ILL. COMP. STAT. 105/6z-18 (2002).

⁴⁵⁹ Reynolds, Chicago, *supra* note 229, at 59.

⁴⁶⁰ *Id.* at 8.

⁴⁶¹ CITY AND COUNTY OF DENVER, *supra* note 237, at 26.

⁴⁶² 1 OFFICE OF BUDGET MANAGEMENT, FISCAL YEAR 2006, *supra* note 274, at 177 (“A cherry-colored form showing all Commonwealth and county charges, distributions and reimbursements to a city or town as certified by the state Director of the Bureau of Accounts.”).

⁴⁶³ Loth, *supra* note 374.

⁴⁶⁴ *Id.*

⁴⁶⁵ *See* NEW YORK CITY INDEPENDENT BUDGET OFFICE, *supra* note 238, at 2 (“IBO estimates the city’s share of Medicaid in 2004 will equal \$4.4 billion.”); ALICIA H. MUNNELL & LYNN E. BROWNE, MASSACHUSETTS IN THE 1990S: THE ROLE OF STATE GOVERNMENT 49-62 (1990).

⁴⁶⁶ *See* MUNNELL & BROWNE, *supra* note 465, at 154.

⁴⁶⁷ *Id.*

⁴⁶⁸ 1 OFFICE OF BUDGET MANAGEMENT, CITY OF BOSTON, OPERATING BUDGET FISCAL YEAR 2007, *supra* note 232, at 129.

⁴⁶⁹ *See id.* (demonstrating that the two components of public safety are the police and fire departments).

⁴⁷⁰ *See* BOSTON MUN. RESEARCH BUREAU, *supra* note 282, at 34 (using FISCAL YEAR 2002 Budget figures).

⁴⁷¹ *Id.*

⁴⁷² *Id.*

⁴⁷³ *Id.*

⁴⁷⁴ 1 OFFICE OF BUDGET MANAGEMENT, OPERATING BUDGET FISCAL YEAR 2006, *supra* note 469, at 16.

⁴⁷⁵ Scott S. Greenberger, *No Department Spared as Menino Cuts \$73M from Budget*, BOSTON GLOBE, Apr. 9, 2003, at A1 (“Mayor Thomas M. Menino yesterday unveiled a bleak budget for the coming year, slashing \$73 million across departments and . . . expects to lay off as many as 1,650 workers.”)

⁴⁷⁶ *See* CITY OF SEATTLE, *supra* note 235, at 12.

⁴⁷⁷ *See* Memorandum from Richard Ford to Professor Gerald E. Frug (on file with authors).

⁴⁷⁸ *See* Memorandum from Laurie Reynolds to Professor Gerald E. Frug (on file with authors); Memorandum from David Rusk to Professor Gerald E. Frug (on file with authors).

⁴⁷⁹ Greenberger, *supra* note 475 (quoting the letter of transmittal) (internal quotation marks omitted).

⁴⁸⁰ *See* BARRON, FRUG & SU, *supra* note 125.

⁴⁸¹ 172 N.E. 338 (Mass. 1930).

⁴⁸² *Id.* at 339.

⁴⁸³ MASS. CONST. amend. art. LXXXIX, § 6.

⁴⁸⁴ *See id.*

⁴⁸⁵ MASS. GEN. LAWS ch. 40, § 5 (2003).

⁴⁸⁶ *See id.* Section 5 refers only to the spending power of “towns,” but a separate provision of state law provides that, unless otherwise provided, “cities shall have all the powers of towns . . . and all laws relative to town shall apply to cities.” *Id.* § 1. One question that is not addressed in any case law we have researched is how expansively the term “corporate powers” is to be interpreted.

⁴⁸⁷ *Id.* § 6A.

⁴⁸⁸ *See, e.g., id.* § 13 (municipal building insurance fund capped at 1/20th of one percent of equalized value); *id.* § 13A (workmen’s compensation insurance fund capped at 1/20th of one percent of equalized value).

⁴⁸⁹ 380 N.E.2d 628 (Mass. 1978).

⁴⁹⁰ *Id.* at 630-32.

⁴⁹¹ *Id.* at 633 n.7 (“The plaintiffs argue that the Legislature must have intended [Chapter 40] to be exhaustive on the subject of municipal appropriations because it has made additions to the list of permitted appropriations since adoption of the Home Rule Amendment.”).

⁴⁹² *Id.* at 633.

⁴⁹³ *Id.*

⁴⁹⁴ *Id.* (citing MASS. GEN. LAWS. ch. 55 (2003)).

⁴⁹⁵ *Id.* (quoting MASS. CONST. amend. art. LXXXIX, § 6) (internal quotation marks omitted).

⁴⁹⁶ 714 N.E.2d 335 (Mass. 1999).

⁴⁹⁷ *Id.* at 342.

⁴⁹⁸ *Id.* at 340-42 (citing Mass. Gen. Laws ch. 32B (2003)).

⁴⁹⁹ 1 OFFICE OF BUDGET MANAGEMENT OPERATING BUDGET FISCAL YEAR 2006, *supra* note 469, at 154 (internal quotation marks omitted). The statutory provisions discussed in this paragraph were established by the Funding Loan Act, 1982 Mass. Acts 190, which was subsequently amended by 1986 Mass. Acts 701. These and similar provisions are discussed in 1 OFFICE OF BUDGET MANAGEMENT OPERATING BUDGET FISCAL YEAR 2006, *supra* note 469, at 153-162.

⁵⁰⁰ See 1 OFFICE OF BUDGET MANAGEMENT OPERATING BUDGET FISCAL YEAR 2006, *supra* note 469 at 155.

⁵⁰¹ 1986 Mass. Acts 701 § 7.

⁵⁰² 1 OFFICE OF BUDGET MANAGEMENT OPERATING BUDGET FISCAL YEAR 2006, *supra* note 469, at 155-6.

⁵⁰³ *Id.* at 127.

⁵⁰⁴ MASS. GEN. LAWS ch. 29, § 27C(a) (2003).

⁵⁰⁵ See *Town of Lexington v. Comm’r of Educ.*, 473 N.E.2d 673 (Mass. 1985).

⁵⁰⁶ See Jerry W. Markham, *Accountants Make Miserable Policemen: Rethinking the Federal Securities Laws*, 28 N.C. J. INT’L L. & COM. REG. 725, 749 n.156 (2003).

⁵⁰⁷ See Bill Buzbee, *City Powers Project: Atlanta, Georgia* 76-79, 85, 116-19 (2004) [hereinafter *Buzbee, Atlanta*] (unpublished manuscript, on file with authors).

⁵⁰⁸ COLO. CONST. art. V, § 25.

⁵⁰⁹ See MASS. CONST. amend. art. LXXXIX.

⁵¹⁰ 841 P.2d 990 (Cal. 1992).

⁵¹¹ See *id.* at 991, 1004.

⁵¹² *Id.* at 1002 (internal quotation marks omitted).

⁵¹³ *City of Atlanta v. Morgan*, 492 S.E.2d 193 (Ga. 1997).

⁵¹⁴ *Crawford v. City of Chicago*, 710 N.E.2d 91 (Ill. App. Ct. 1999).

⁵¹⁵ *Schaefer v. City & County of Denver*, 973 P.2d 717 (Colo. Ct. App. 1998).

⁵¹⁶ *Slaterry v. City of New York*, 686 N.Y.S.2d 683 (N.Y. Sup. Ct. 1999), *aff’d*, 697 N.Y.S.2d 603 (N.Y. App. Div. 1999).

⁵¹⁷ *Heinsma v. City of Vancouver*, 29 P.3d 709 (Wash. 2001).

⁵¹⁸ See *Schaefer*, 973 P.2d at 721.

⁵¹⁹ See *id.*

⁵²⁰ See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

⁵²¹ See *Fraternal Order of Police v. City & County of Denver*, 926 P.2d 582, 592-93 (Colo. 1996).

⁵²² The scope of these limitations varies, and Boston’s seems to be more restrictive of state authority than those that apply to some other cities. See Robert M.M. Shaffer, Comment, *Unfunded State Mandates and Local Governments*, 64 U.CIN. L. REV. 1057 (1996).

⁵²³ See *County of Los Angeles v. State*, 729 P.2d 202, 203 (Cal. 1987) (increasing worker’s compensation); *City of Sacramento v. State*, 785 P.2d 522, 523 (Cal. 1990) (extending unemployment benefits).

⁵²⁴ 1 OFFICE OF BUDGET MANAGEMENT, CITY OF BOSTON, OPERATING BUDGET FISCAL YEAR 2007, *supra* note 232, at 8.

⁵²⁵ *Id.* at 160.

⁵²⁶ *Id.*

⁵²⁷ *Id.* at 161.

⁵²⁸ *Id.* at 147.

⁵²⁹ *Id.* at 160.

⁵³⁰ *Id.* (citing MASS. GEN. LAWS ch. 44, § 7-8 (2003)).

⁵³¹ The City of Boston Bond and Minibond Procedure Act of 1983—the result of a successful Boston Home Rule Petition—contains a number of Boston-specific borrowing rules. *Id.* at 133.

⁵³² *Karsh v. City & County of Denver*, 490 P.2d 936, 939 (Colo. 1971) (“The limitation of ‘said powers and purposes’ upon home rule cities was removed by the grant of powers in local and municipal matters.”).

⁵³³ Denver, Colo., Charter of the City and County of Denver § 7.5.2 (1960) (stating that the city “shall not become indebted for general obligation bonds, to any amount which, including indebtedness, shall exceed (3) per cent of the actual value . . . of the taxable property within the City and County of Denver”).

⁵³⁴ Charles N. Wheeler, III, *Tax Accountability Amendment* (1990), at <http://www.lib.niu.edu/ipo/ii900606.html> (last visited Dec. 6, 2004).

⁵³⁵ ILL. CONST. art. VII, § 6(k).

⁵³⁶ See Reynolds, Chicago, *supra* note 229, at 70.

⁵³⁷ See CIVIC FEDERATION, CITY OF CHICAGO FY 2004 PROPOSED BUDGET, ANALYSIS AND RECOMMENDATIONS 13 (2003), available at http://www.civicfed.org/articles/civicfed_69.pdf (last visited Dec. 6, 2004).

⁵³⁸ See ROLAND CALIA & SCOTT METCALF, CIVIC FEDERATION, A SNAPSHOT OF REGIONAL FINANCE IN NORTHEASTERN ILLINOIS: 1997-2000 64-65 (2003), available at http://www.civicfed.org/articles/civicfed_64.pdf (last visited Dec. 6, 2004).

⁵³⁹ See Reynolds, Chicago, *supra* note 229, at 70.

⁵⁴⁰ *Id.*

⁵⁴¹ *Id.*

⁵⁴² *Id.*

⁵⁴³ A more cynical interpretation is the possibility that the bond rating reflects the agencies' self-interest in a lively bond market. Conversation with Eugene Munin, Deputy Budget Director, Office of Management and Budget, City of Chicago (Mar. 10, 2004).

⁵⁴⁴ See Buzbee, Atlanta, *supra* note 508, at 132.

⁵⁴⁵ GA. CONST. art. IX, § V, ¶ 3.

⁵⁴⁶ See GA. CODE ANN. § 36-82-121(2) (2000) (providing the definition of a general obligation bond).

⁵⁴⁷ GA. CONST. art. IX, § V, ¶ I (a).

⁵⁴⁸ *Id.*

⁵⁴⁹ ATLANTA, GA. CODE § 2-59 (2004).

⁵⁵⁰ CITY OF BOSTON, BASIC FINANCIAL STATEMENTS AND REQUIRED SUPPLEMENTARY INFORMATION 54 (2005), available at http://www.cityofboston.gov/auditing/pdfs/bfs_05.pdf

This figure includes \$73 million in state funding for teachers' retirement, meaning that Boston's net contribution was approximately \$71 million. *Id.* This figure does not include costs allocated to the Public Health Commission or to Suffolk County. 1 OFFICE OF BUDGET MANAGEMENT, CITY OF BOSTON, OPERATING BUDGET FISCAL YEAR 2007, *supra* note 232.

⁵⁵¹ Retirement Board, City of Boston, *Some Facts & Figures*, at <http://www.cityofboston.gov/retirement> (last visited Dec. 7, 2004).

⁵⁵² *Id.* The plan covers municipal employees, as well as the employees of a number of quasi-independent agencies such as the BRA. And, under unique arrangement mandated by state law, the State-Boston system—rather than the State-Teachers' Retirement System—covers teachers in the Boston School System. Boston is reimbursed by the state for these expenses through the cherry sheet. 1 OFFICE OF BUDGET MANAGEMENT FISCAL YEAR 2006, *supra* note 474. It is worth noting that this arrangement has the effect of artificially inflating Boston's overall state aid figure as compared to the rest of the state.

⁵⁵³ CITY OF BOSTON, *supra* note 550, at 50 (citing MASS. GEN. LAWS ch. 32 (2003)).

⁵⁵⁴ Retirement Board, *supra* note 551. The mayor appoints one member, two others are appointed by plan participants, the city auditor serves ex officio, and the last member is elected by the other four.

⁵⁵⁵ CITY OF BOSTON, *supra* note 550, at 51.

⁵⁵⁶ Jennifer Wriggins, Kinship and Marriage in Massachusetts Public Employee Retirement Law: An Analysis Of The Beneficiary Provisions, and Proposals for Change, 28 NEW ENG. L. REV. 991, 995-96 (1994) (citing statewide figures).

⁵⁵⁷ See *id.* at 996.

⁵⁵⁸ 1 OFFICE OF BUDGET MANAGEMENT OPERATING BUDGET FISCAL YEAR 2006, *supra* note 469, at 23.

⁵⁵⁹ See *generally* Everett Retirement Bd. v. Bd. of Assessors, 473 N.E.2d 1162 (Mass. App. Ct. 1985) (stating that both fund contributions and funds requested for administration on part of retirement boards must be granted by municipalities).

⁵⁶⁰ See MASS. GEN. LAWS ch. 32, §§ 6, 12A, 16, 102-03.

⁵⁶¹ Anthony Flint, *Pension Board Set To OK Paying Cost-of-Living Hikes*, BOSTON GLOBE, Nov. 18, 1997, at B2.

⁵⁶² 1997 Mass. Acts 17.

⁵⁶³ Editorial, *A Threat To Local Governments*, BOSTON GLOBE, June 2, 1997, at A16.

⁵⁶⁴ 1987 Mass. Acts 697.

⁵⁶⁵ See Steven Marantz, *Pension Politics: Arcane Names and Disputed Figures*, BOSTON GLOBE, Aug. 22, 1988. In Fiscal Year 2002, the city's pension liability was 69.5% funded. 1 OFFICE OF BUDGET MANAGEMENT, *supra* note 468, at 20.

⁵⁶⁶ *Id.*

⁵⁶⁷ For a good overview of the Pension Reform Act's effects, and the state pension law generally, see Mass. Collectors & Treasurers Assoc., *MCTA Treasurer's Manual Chapter 8* (2003), at <http://www.masscta.com/TreasurersManual/chapter08.php> (last visited Dec. 7, 2004).

⁵⁶⁸ See, e.g., 2003 Mass. Acts 46 § 116.

⁵⁶⁹ DENVER, COLO., REV. MUN.CODE §18-391 (2004).

⁵⁷⁰ *Id.* §18-403.

⁵⁷¹ *Id.*

⁵⁷² *Id.* §18-405.

⁵⁷³ Steins v. Fire & Police Pension Ass'n, 684 P.2d 180, 181 (Colo., 1984)

⁵⁷⁴ See FIRE & POLICE PENSION ASSOC., FINANCIAL STATEMENTS AND SUPPLEMENTARY INFORMATION (2003), available at http://www.fppaco.org/pdfs/annual_audit_reports/FPPA%2003%20Audit%20Rpt%204.8.pdf (last visited Dec. 7, 2004).

⁵⁷⁵ See Fire & Police Pension Assoc., *FPPA Overview*, at http://www.fppaco.org/toc_frames.html (last visited Dec. 7, 2004).

⁵⁷⁶ See 40 ILL. COMP. STAT. 5/1-101 *et seq.* (2002).

⁵⁷⁷ See *id.*

⁵⁷⁸ See Reynolds, Chicago, *supra* note 229, at 11.

⁵⁷⁹ Memorandum from Laurie Reynolds, *supra* note 479.

⁵⁸⁰ See Peters v. City of Springfield, 311 N.E.2d 107 (Ill. 1974).

⁵⁸¹ MASS. GEN. LAWS ch. 32B (2003).

⁵⁸² *Id.* § 10.

⁵⁸³ *Id.* § 19(g).

⁵⁸⁴ Broderick v. Mayor of Boston, 374 N.E.2d 1347, 1348 (Mass. 1978).

⁵⁸⁵ MASS. GEN. LAWS ch. 32B, § 7A.

⁵⁸⁶ Broderick, 374 N.E.2d at 1348-49.

⁵⁸⁷ *Id.* at 1350-51.

⁵⁸⁸ See Schaefer v. City and County of Denver, 973 P.2d 717, 720 (Colo. Ct. App. 1998).

⁵⁸⁹ More than two-thirds of voters approved of the measure. See City & County of Denver, *Election Archive* (2003), at http://www.denvergov.org/Election_Archive/template23802.asp (last visited Dec. 8, 2004).

⁵⁹⁰ Schragger. Denver, *supra* note 140, at 41.

⁵⁹¹ DENVER, COLO., REV. MUN.CODE §18-7(a) (2004).

⁵⁹² *Id.* §18-7(c).

⁵⁹³ See, e.g., Denver, Colo., Charter of the City and County of Denver § 9.7.5 (1960) (obligating firefighters to participate in collective bargaining).

⁵⁹⁴ See, e.g., *id.* § 9.7.10 (prohibiting firefighters from striking).

⁵⁹⁵ See, e.g., *id.* § 9.8.5 (obligating police officers to bargain in good faith).

⁵⁹⁶ See *id.* §§ 9.7-9.9.

⁵⁹⁷ Pension payments are approximately \$328,500,000. Reynolds, Chicago, *supra* note 229, at 11. Health insurance costs the City \$225,000,000 for employees and 85,000,000 for retirees. Memorandum from Laurie Reynolds, *supra* note 478.

⁵⁹⁸ See Memorandum from Laurie Reynolds, *supra* note 478.

⁵⁹⁹ 1 OFFICE OF BUDGET MANAGEMENT, CITY OF BOSTON, OPERATING BUDGET FISCAL YEAR 2007, *supra* note 232, at 8.

⁶⁰⁰ *Id.* at 23.

⁶⁰¹ *See id.* Interestingly, while the MBTA's overall assessment to municipalities is covered by the Proposition 2 1/2 and thus cannot increase by more than 2.5% per year, there is no prohibition on redistributing the burden of the statewide assessment in such a way as to increase a particular municipality's share by more than 2.5% in a given year. *See id.*

⁶⁰² Massachusetts Water Resources Authority, *Mission, Governance and Organization*, at <http://www.mwra.state.ma.us/02org/html/gov.htm> (last visited Dec. 8, 2004). This authority was created pursuant to 1984 Mass. Acts 372.

⁶⁰³ *See* Scott Allen, *MWRA Asks Water Rate Increase*, BOSTON GLOBE, Feb. 10, 1996, at 1.

⁶⁰⁴ Aaron Zitner, *Residents, Officials Chafe at New City Aid: Some See Suburbs Already Carrying Costs for Hub*, BOSTON GLOBE, Jan 17, 1993, at 1

⁶⁰⁵ *See id.*

⁶⁰⁶ *See* Allen, *supra* note 603.

⁶⁰⁷ *See id.*

⁶⁰⁸ 1 OFFICE OF BUDGET MANAGEMENT OPERATING BUDGET FISCAL YEAR 2006, *supra* note 468, at 23.

⁶⁰⁹ MASS. GEN. LAWS ch. 71, § 89 (2003).

⁶¹⁰ 1 OFFICE OF BUDGET MANAGEMENT OPERATING BUDGET FISCAL YEAR 2006, *supra* note 468, at 115-116.

⁶¹¹ MASS. GEN. LAWS ch. 71, § 89(a).

⁶¹² 1 OFFICE OF BUDGET MANAGEMENT OPERATING BUDGET FISCAL YEAR 2006, *supra* note 468, at 115-116.

⁶¹³ *Id.*

⁶¹⁴ *See id.*

⁶¹⁵ 1 OFFICE OF BUDGET MANAGEMENT OPERATING BUDGET FISCAL YEAR 2006, *supra* note 468, at 116.

⁶¹⁶ *Id.* at 27.

⁶¹⁷ *Id.*

⁶¹⁸ *See id.* at 27-31.

⁶¹⁹ 1909 Mass. Acts 486 §§ 17-18.

⁶²⁰ City of Boston, *City of Boston Licensing Board* (2004), at <http://www.cityofboston.gov/licensing/> (last visited Dec. 8, 2004).

⁶²¹ *See, e.g.,* O'CONNOR, BUILDING, *supra* note 70, at 42-43.

⁶²² Boston Licensing Bd. v. City of Boston, 455 N.E. 2d 469, 471 (Mass. App. Ct. 1983).

⁶²³ O'CONNOR, BUILDING, *supra* note 70, at 105.

⁶²⁴ BOSTON FOUNDATION, BRIDGE, *supra* note 70, at 11,

⁶²⁵ The Supreme Judicial Court has recently confirmed that "[p]romoting economic development is a proper basis for . . . exercise of [the] zoning power." *Durand v. IDC Bellingham, LLC*, 793 N.E.2d 359, 368 n.19 (Mass. 2003).

⁶²⁶ *See* CYNTHIA M. BARR, BOSTON ZONING: A LAWYER'S HANDBOOK § 4.1.1, at 20 (2d ed. 2003) [hereinafter BARR, BOSTON ZONING].

⁶²⁷ *See* MASS. CONST. amend. art. LXXXIX.

⁶²⁸ *See id.* §§ 6, 8.

⁶²⁹ *See* BARR, BOSTON ZONING, *supra* note 626, at vii (citing 1956 Mass. Acts 665 (hence amended)).

⁶³⁰ KENNEDY, *supra* note 102, at 135.

⁶³¹ *See* BARR, BOSTON ZONING, *supra* note 626, § 16.3, at 192.

⁶³² *Id.*

⁶³³ Cynthia M. Barr, *Zoning in Boston*, in HANDBOOK OF MASSACHUSETTS LAND USE AND PLANNING LAW § 13.02[A], at 420 n.9 (Mark Bobrowski ed., 2002) [hereinafter Barr, *Zoning in Boston*].

⁶³⁴ *See* 1956 Mass. Acts. 665 § 2.

⁶³⁵ 1990 Mass. Acts. 362.

⁶³⁶ *Id.* § 2.

⁶³⁷ See 1992 Mass. Acts c. 384.

⁶³⁸ One provision of Chapter 40A – prohibiting discrimination through land use law of the disabled -- does apply to Boston. MASS. GEN. LAWS ch. 40A, § 3 (2003).

⁶³⁹ See *Bonan v. City of Boston*, 496 N.E.2d 640, 644 n.9 (Mass. 1986).

⁶⁴⁰ BARR, BOSTON ZONING, *supra* note 626, § 2.3, at 8.

⁶⁴¹ *Emerson Coll. v. City of Boston*, 471 N.E.2d 336, 339 (Mass. 1984).

⁶⁴² See BARR, BOSTON ZONING, *supra* note 626, § 2.3, at 9 (“Where the Enabling Act and G.L. c. 40A . . . set forth similar provisions, the courts frequently have considered cases decided under one statute to be relevant in interpreting provisions of the other.”).

⁶⁴³ MARK BOBROWSKI, HANDBOOK OF MASSACHUSETTS LAND USE AND PLANNING LAW, *supra* note 633, § 2.02, at 31-32 (quoting 1975 Mass. Acts 808 § 2A).

⁶⁴⁴ See *id.* at 32-34.

⁶⁴⁵ BARR, BOSTON ZONING, *supra* note 626, §§ 3.1-3.2, at 12-15.

⁶⁴⁶ *Id.* (citing 1956 Mass. Acts. 665 §§ 3, 8-10 (as amended)).

⁶⁴⁷ 1956 Mass. Acts 665 § 1 (codified as amended by 1993 Mass. Acts 461 § 1).

⁶⁴⁸ Compare *id.* § 8 with MASS. GEN. LAWS ch. 40A, § 12 (2003) (revealing the more flexible regulations cities other than Boston must comply with when selecting their board of appeals).

⁶⁴⁹ MASS. GEN. LAWS ch. 40A, § 5 (2003).

⁶⁵⁰ See MASS. GEN. LAWS ch. 40A, § 1A (2003) (“‘Special permit granting authority,’ shall include the board of selectmen, city council, board of appeals, planning board, or zoning administrators as designated by zoning ordinance or by-law for the issuance of special permits.”).

⁶⁵¹ See *id.*; see also BOBROWSKI, *supra* note 643, § 1.03[F], at 7-8; Interview with Jay Wickersham.

⁶⁵² This review role is performed instead by a quasi-independent public authority that the state has established – the Boston Redevelopment Authority. See BARR, BOSTON ZONING, *supra* note 626, § 8.1.1, at 92.

⁶⁵³ See *supra* note 640 and accompanying text.

⁶⁵⁴ MASS. GEN. LAWS ch. 40A, § 5 (“No zoning ordinance or by-law or amendment thereto shall be adopted or changed except by a two-thirds vote of all the members of the town council, or of the city council where there is a commission form of government or a single branch, or of each branch where there are two branches, or by a two-thirds vote of a town meeting.”).

⁶⁵⁵ BARR, BOSTON ZONING, *supra* note 626, § 14.5, at 174 (citing 1956 Mass. Acts 665 § 3 (as amended)).

⁶⁵⁶ *Id.* § 14.6, at 174-75.

⁶⁵⁷ *Id.* at 176 (citing 1956 Mass. Acts. 665 § 1 (as amended)).

⁶⁵⁸ *Id.* It is worth noting that, unlike other cities, Boston is not required to submit its zoning amendments to the state attorney general for approval. MASS. GEN. LAWS ch. 40A, § 5.

⁶⁵⁹ See generally 1993 Mass. Acts 461.

⁶⁶⁰ Compare BARR, *supra* note 626, § 14.1, at 170 (“Formerly, such petitions could be brought only by owners of property that would be affected by the proposed amendment.”), with 1993 Mass. Acts 461 § 2 (“Any resident of the city of Boston or any owner of property therein may petition the zoning commission to adopt an amendment of a zoning regulation, but shall not be entitled to have her or his proposed amendment considered by the commission unless he or she pays the City such reasonable sum . . . as may . . . be established by [the] zoning regulation . . .”).

⁶⁶¹ See MASS. GEN. LAWS ch. 40A, § 5.

⁶⁶² *McNeely v. Bd. of Appeal*, 261 N.E.2d 336, 344 (Mass. 1970) (quoting Opinion of the Justices, 168 N.E.2d 858, 872 (Mass. 1960)).

⁶⁶³ MASS. GEN. LAWS ch. 40A, § 3 (2003).

⁶⁶⁴ MASS. GEN. LAWS. ch. 40A, § 10 (2003). See generally 1956 Mass. Acts. 665 §§ 3, 8-10 (as amended).

⁶⁶⁵ See *McNeely*, 261 N.E.2d at 342 (holding that a “‘substantial hardship’” “must mean something more than financial hardship”) (quoting 1956 Mass. Acts 665 (as amended)).

⁶⁶⁶ MASS. GEN. LAWS ch. 41, §§ 81K – 81 GG (codifying the Massachusetts Subdivision Control Law).

⁶⁶⁷ For Atlanta's method for approving zoning amendments, see Atlanta Code of Ordinances, § 6-4015C (1995), and for its method of appointing zoning officials, see *id.* at § 6-4022. For Chicago's method of approving zoning amendments, see Chicago Zoning Ordinance, §§ 17-13-0204, 17-13-0307 (2004), and for its method of appointing zoning officials, see § 17-14-0301. For Denver's method of approving zoning amendments, see City of Denver, "Zoning Changes," at <http://www.denvergov.org/dephome.asp?depid=417> (last visited May 6, 2005), and for its method of appointing zoning officials, see City of Denver, "Board of Adjustment," at <http://www.denvergov.org/BOA/51aboutus.asp> (last visited May 6, 2005). For New York's method of approving zoning amendments, see New York City Charter, Chpt .8, § 200, and for its method of appointing zoning officials, see City of New York, "Board of Standard and Appeals," at <http://www.nyc.gov/html/bsa/html/mission/mission.shtml> (last visited May 6, 2005). For San Francisco's method of approving zoning amendments, see San Francisco Planning Code, § 306 (2005), and for its method of appointing zoning officials, see San Francisco Charter, § 4.106. For Seattle's method of approving zoning amendments, see Seattle Municipal Code, § 23.76 (2004); *Cf.* WASH. REV. CODE § 35A.63.170 (2004).

⁶⁶⁸ New York, N.Y., New York City Charter ch. 27, § 659(b) (2004).

⁶⁶⁹ See *Pioneer Trust & Sav. Bank v. Village of Mount Prospect*, 176 N.E.2d 799, 801-02 (Ill. 1961).

⁶⁷⁰ *Northern Ill. Home Builders Ass'n v. County of Du Page*, 649 N.E.2d 382, 392 (Ill. 1995).

⁶⁷¹ See Gregory Overstreet & Diane M. Kirchheim, *The Quest for the Best Test To Vest: Washington's Vested Rights Doctrine Beats the Rest*, 24 SEATTLE U. L. REV. 1043, 1044 (2000).

⁶⁷² See Roger D. Wayne, *Washington's Vested Rights Doctrine: How We Have Muddled a Simple Concept and How We Can Reclaim It*, 24 SEATTLE U. L. REV. 851, 851 (2001).

⁶⁷³ Brier Dudley, *Subdivision Loophole Closed: Developers Skirted Laws With Pre-1937 Platting*, SEATTLE TIMES, Mar. 19, 1999, at B1; Neil Modie, *Sims' Emergency Order Hits Subdivision Loophole*, SEATTLE POST-INTELLIGENCER, Mar. 19, 1999, at B3.

⁶⁷⁴ 1956 Mass. Acts 665 § 5 (as amended).

⁶⁷⁵ See *Brougner v. Bd. of Public Works*, 271 P. 487, 490 (Cal. 1928); see also *McCann v. Jordan*, 24 P. 457, 458 (Cal. 1933).

⁶⁷⁶ *Raley v. Cal. Tahoe Reg'l Planning Agency*, 137 Cal. Rptr. 2d 699, 705, 712 (Cal. Ct. App. 1977).

⁶⁷⁷ MASS. GEN. LAWS ch. 41, § 81A (2003).

⁶⁷⁸ *Id.*

⁶⁷⁹ *Id.* § 81D.

⁶⁸⁰ See, e.g., *Rando v. Town of Attleborough*, 692 N.E.2d 544, 550 (Mass. App. Ct. 1998) ("Neither the master plan itself nor the law requires that zoning be in strict accordance with a master plan. The most that can be thought required is an analysis by town officials before the zoning decision of land use considerations.") (citations omitted).

⁶⁸¹ BOBROWSKI, *supra* note 643, § 1.03[B], at 5.

⁶⁸² *Id.*

⁶⁸³ MASS. GEN. LAWS ch. 41, § 81A.

⁶⁸⁴ Boston had its own planning board prior to 1960, until the legislature gave its authority to the Boston Redevelopment Authority. 1960 Mass. Acts 652 § 12 ("[Boston's] city planning board . . . is hereby abolished; and all property of [Boston] in the custody of said board and all appropriations of [Boston] for the use of said board are hereby transferred to and vested in the authority.").

⁶⁸⁵ See BARR, BOSTON ZONING, *supra* note 626, § 3.4, at 17.

⁶⁸⁶ See MASS. GEN. LAWS ch. 121B, §§ 5-6 (2003).

⁶⁸⁷ See BARR, *supra* note 627, at 4-5.

⁶⁸⁸ Boston Redevelopment Authority, *About the BRA*, at http://www.ci.boston.ma.us/bra/HomePageUtils/about_us.asp (last visited Jan. 16, 2005).

⁶⁸⁹ See Thomas C. Palmer Jr., *Elastic Zoning in Boston, Negotiation Matters More Than Written Rules*, BOSTON GLOBE, July 13, 2003, at J1.

⁶⁹⁰ See, e.g., Shirley Kressel, *BRA Lacks a Vision for Boston*, BOSTON GLOBE, June 8, 1998, at A15 ("The BRA uses its planning and zoning powers not to pursue a long-term vision for our residents, but

to further its primary mandate of promoting development, providing a 'planning context' for projects. In its dual function, BRA is a fox guarding the henhouse.”).

⁶⁹¹ See *id.* (“Other cities kept a separate planning agency, and for good reason: a combined agency has a conflict of interest.”).

⁶⁹² The acting president of the Conservation Law Foundation argues: “[The BRA planning] process produces lovely documents -- the Longwood plan, the Seaport plan -- but they don't bear any relationship to zoning, The working assumption is that, even if there is applicable zoning language, it's no more than a starting point of a conversation between the developer and the BRA.” Palmer, *supra* note 689.

⁶⁹³ The entire Boston 400 draft of the report was once available at the City of Boston's website, but has since been removed. However, some of the chapters have been archived and can still be read at City of Boston, *Boston 400*, available at <http://web.archive.org/web/20040226005223/http://www.cityofboston.gov/boston400/boston400doc.asp> (last visited Jan. 16, 2005).

⁶⁹⁴ City of Boston, *Boston 400*, at <http://web.archive.org/web/20040226005241/www.cityofboston.gov/boston400/default.asp> (last visited Jan. 16, 2005).

⁶⁹⁵ *Id.*

⁶⁹⁶ *Id.*

⁶⁹⁷ These themes are listed as titles to individual chapters in the draft report.

⁶⁹⁸ *Id.* (“The objective of Boston 400 is to assess Boston's current condition, analyze how the projects under way will change the City, and develop and prioritize other complementary initiatives and implementation strategies that will ensure our status as a livable city.”).

⁶⁹⁹ *Id.* (“Boston 400 does not seek to impose rigid prescriptions for the City.”).

⁷⁰⁰ See *id.*

⁷⁰¹ Mary Hurley, *A Reunion for Chester Park?*, BOSTON GLOBE, Apr. 18, 1999, at 4.

⁷⁰² See BARR, BOSTON ZONING, *supra* note 626, § 3.4, at 16.

⁷⁰³ KENNEDY, *supra* note 102, at 126.

⁷⁰⁴ *Id.*

⁷⁰⁵ *Id.*

⁷⁰⁶ See *id.*

⁷⁰⁷ *Id.* at 138-139.

⁷⁰⁸ Morton H. Aronson, *The Boston Redevelopment Authority: A Quasi Public Authority*, 43 B.U. L. REV. 466, 470 (1963).

⁷⁰⁹ In 1960, Boston—the tenth largest city in the nation—ranked twenty-first in federal grants. *Id.* at 469.

⁷¹⁰ Such permitting also requires the approval of the mayor.

⁷¹¹ 1960 Mass. Acts 652 (as amended by 1965 Mass. Acts 859); see *Simonian v. Boston Redev. Auth.*, 174 N.E.2d 429, 431 n.1 (Mass. 1961) (outlining state housing board powers); see also *Opinion of the Justices*, 168 N.E.2d 858 (Mass. 1960) (approving the constitutionality of the 1960 Act). The power to grant zoning variances, it is worth noting, is more liberal than the Zoning Commission's power to do so for non-121A properties. See *Shriners' Hosp. v. Boston Redev. Auth.*, 353 N.E.2d 778, 784 (Mass. App. Ct. 1976).

⁷¹² O'CONNOR, BUILDING, *supra* note 70, at 98-102.

⁷¹³ *Opinion of the Justices*, 167 N.E.2d 745 (Mass. 1959) (rejecting legislation proposing tax concessions to the Prudential Insurance Company because they were not clearly for a predominantly public purpose); *Opinion of the Justices*, 126 N.E.2d 795, 801 (Mass. 1955) (rejecting proposed tax concessions for the Back Bay land as violating state constitution because it “would charge the corporation with less than its share of the public expense, [and] necessarily produce disproportion . . .”).

⁷¹⁴ O'CONNOR, BUILDING, *supra* note 70, at 177.

⁷¹⁵ *Opinion of the Justices*, 168 N.E.2d at 868.

⁷¹⁶ O'CONNOR, BUILDING, *supra* note 70, at 177

⁷¹⁷ *Id.*

⁷¹⁸ See Aronson, *supra* note 708, at 477-78. Banks and insurance companies must receive permission from state regulatory bodies; the creation of urban redevelopment corporations requires the approval of the mayor and the BRA. *Id.* at 478.

⁷¹⁹ The entity with control over Chicago's planning is called the Northeastern Illinois Planning Commission, which also has the authority over planning for six counties: Cook, Lake, McHenry, DuPage, Kane and Will. Northeastern Illinois Planning Comm'n, *NIPC: Planning at the Speed of Change*, at <http://www.nipc.org/about/> (last visited Jan. 16, 2005); see also 70 ILL. COMP. STAT. 1705/1 (2002) (creating the Northeastern Regional Planning Commission). The Community Development Commission ("CDC") was created by the Chicago City Council in 1992. Neighborhood Capital Budget Group, *What is the Community Development Commission?*, at <http://www.ncbg.org/tifs/cdc.htm> (last visited Jan. 16, 2005).

⁷²⁰ New York City Dep't of City Planning, *About Us*, at <http://www.nyc.gov/html/dcp/html/subcats/about.html> (last visited Jan. 17, 2005) ("The Department of City Planning is responsible for the city's physical and socioeconomic planning, including land use and environmental review.").

⁷²¹ New York City Dep't of Hous. Pres. & Dev., *Description of Services and Mission Statement*, at <http://www.nyc.gov/html/hpd/html/about-us/description-of-services.html> (last visited Jan. 17, 2005) ("HPD protects the existing housing stock and expands housing options for New Yorkers as it strives to improve the availability, affordability, and quality of housing in New York City.").

⁷²² Seattle Planning Comm'n, *The Mission*, at <http://www.ci.seattle.wa.us/planningcommission/mission.htm> (last visited Jan. 17, 2005) ("The Planning Commission advises the Mayor, City Council and City departments on broad planning goals, policies and plans for the physical development of the City.").

⁷²³ Seattle Office of Economic Dev., *About OED*, at http://www.ci.seattle.wa.us/EconomicDevelopment/pages/about_oed.htm (last visited Jan. 17, 2005) ("To create a robust economy and broadly shared prosperity, the City of Seattle's Office of Economic Development is committed to balancing economic growth with the pursuit of economic and social justice.").

⁷²⁴ Denver Urban Renewal Auth., *Mission Statement*, at <http://198.202.202.66/DURA/template2632.asp> (last visited Jan. 17, 2005).

⁷²⁵ Denver Urban Renewal Auth., *DURA Board of Commissioners*, at <http://198.202.202.66/DURA/template2556.asp> (last visited Jan. 17, 2005).

⁷²⁶ City & County of Denver, *Urban Renewal Authority, Denver (DURA)*, at http://www.denvergov.org/Boards_and_Commissions/template22431.asp (last visited Jan. 17, 2005).

⁷²⁷ See *id.*

⁷²⁸ Denver Urban Renewal Auth., *Redevelopment Authority*, at <http://www.denvergov.org/DURA/template2552.asp> (last visited Jan. 17, 2005) ("DURA itself does not actually conduct a redevelopment effort. Instead, it works through its appointed Board of Commissioners to find the right private developer for a specific project.").

⁷²⁹ City & County of Denver, *Planning Board, Denver*, at http://www.denvergov.org/Boards_and_Commissions/template22437.asp (last visited Jan. 17, 2005).

⁷³⁰ *Id.*

⁷³¹ Ryan Morgan, *City Ready to Adopt Major Planning-Process Revisions*, DENVER POST, Feb. 27, 2002, at B2.

⁷³² Jennifer T. Moulton & Bill Hornby, *Blueprint Denver Plan for the Future Melds Land Use, Transportation*, DENVER POST, Mar. 17, 2002, at E1, available at http://www.denvergov.org/Blueprint_Denver/1323news.asp#3955 (last visited Jan. 17, 2005).

⁷³³ *Id.*

⁷³⁴ *Id.*

⁷³⁵ See *id.*

⁷³⁶ Schragger, Denver, *supra* note 140, at 90.

⁷³⁷ Atlanta, Ga., Charter § 3-601 (1996).

⁷³⁸ TIM TROHIMOVICH, 1000 FRIENDS OF WASHINGTON, THE GROWTH MANAGEMENT ACT (GMA) AFTER MORE THAN 10 YEARS: ANOTHER LOOK & A RESPONSE TO CRITICISMS 14 (2002), *available at* www.1000friends.org/current_work/publications/GMA_another_look.pdf (last visited Jan. 17, 2005).

⁷³⁹ CAL. GOV'T CODE § 65302 (West 1997); *see also supra* note 668 (providing citations for procedures in various cities for approving zoning amendments).

⁷⁴⁰ Mass. Dep't of Conservation & Recreation, *DCR History*, at <http://mass.gov/dcr/dcrHistory.htm> (last visited Feb. 10, 2005) ("DCR merges the functions of the former Metropolitan District Commission (MDC) with the former Department of Environmental Management (DEM), with the goal of consolidating the resources of these agencies.").

⁷⁴¹ *See* Mass. Dep't of Conservation & Recreation, *Master Plan for the Charles River Basin: The Second Century*, at <http://www.mass.gov/mdc/CRBasinHomepage.htm> (last visited Feb. 10, 2005).

⁷⁴² BARR, BOSTON ZONING, *supra* note 626, § 5.3.3, at 43.

⁷⁴³ *Id.* at 44.

⁷⁴⁴ The state's policies are set out in MASS. GEN. LAWS ch. 91 (2003). "Tidelands" are defined in accompanying regulations as "present and former submerged lands and tidal flats lying between the present or historic high water mark, whichever is farther landward, and the seaward limit of state jurisdiction. Tidelands include both flowed and filled tidelands" MASS. REGS. CODE tit. 310, § 9.02 (1987).

⁷⁴⁵ BARR, BOSTON ZONING, *supra* note 626, § 5.3.3, at 44.

⁷⁴⁶ A "Municipal Harbor Plan" is defined as "a document (in words, maps, illustrations, and other media of communication) setting forth, among other things: a community's objectives, standards, and policies for guiding public and private utilization of land and water bodies within a defined harbor or other waterway planning area; and an implementation program which specifies the legal and institutional arrangements, financial strategies, and other measures that will be taken to achieve the desired sequence, patterns, and characteristics of development and other human activities within the harbor area." MASS. REGS. CODE tit. 310, § 9.02 (1987).

⁷⁴⁷ BARR, BOSTON ZONING, *supra* note 626, § 5.3.3(a), at 44.

⁷⁴⁸ *See id.* at 47.

⁷⁴⁹ Boston Redevelopment Auth., *Planning Initiatives: South Boston Waterfront Public Realm Plan*, at <http://www.cityofboston.gov/bra/Planning/PlanningInitsIndividual.asp?action=ViewInit&InitID=3> (last visited Jan. 22, 2005).

⁷⁵⁰ *See* BARR, BOSTON ZONING, *supra* note 626, § 5.3.3(a), at 46-47.

⁷⁵¹ Stephanie Elbert, *BRA to Seek Extension for Waterfront Review*, BOSTON GLOBE, Aug. 2, 2000, at B3.

⁷⁵² *See id.*

⁷⁵³ *Id.*

⁷⁵⁴ *See* BARR, BOSTON ZONING, *supra* note 626, § 5.3.3(a), at 46.

⁷⁵⁵ BOSTON REDEVELOPMENT AUTHORITY, TAX EXEMPT, *supra* note 281, at 3.

⁷⁵⁶ In 2000, public or semi-public land represented 7.2% of Denver's territory. City & County of Denver, *Denver Facts*, *available at* <http://www.denvergov.org/admin/template3/forms/DENVER%20FACTS%202002-3.pdf> (last visited Jan. 22, 2005). Approximately 6% of Atlanta's land is owned by the city. Buzbee, Atlanta, *supra* note 508, at 29. In terms of sheer acreage, however, Boston owns less territory than either of these cities. Meanwhile, "Chicago is currently involved in the construction of a data base that will catalogue all city-owned parcels." Reynolds, Chicago, *supra* note 229, at 60. Currently, that information is held in three separate departments, and is not inventoried systematically. *Id.* First, there is the Department of General Services which tracks what it terms 'surplus land,' which can be termed as land left over from earlier projects, land acquired for streets never built, or land that is acquired via lien foreclosures, etc. *Id.* Second, the Department of Housing catalogues land it acquires related to city affordability initiatives. *Id.* Third, the Department of Planning collects "information about land that the City owns and acquires for purposes of redevelopment." *Id.* Approximately, "the City estimates that it owns

approximately 13,000 parcels, but there is currently no way to tell how much of that land is city owned and permanently held (e.g., city facilities such as police stations, parks, etc.), acquired purposefully pursuant to an acquisition strategy (e.g., condemnation for purposes of redevelopment), or derelict property that it has taken from the owner and is holding for future use.” *Id.* The inventory process should be completed by the end of 2004, “but it is unlikely to provide an easy way to gather information on total acreage or assessed valuation of city owned parcels.” *Id.*

⁷⁵⁷ BOSTON REDEVELOPMENT AUTH., TAX EXEMPT, *supra* note 281, at 3 (noting that the state owns 26% of Boston’s land, while the city owns only 14%).

⁷⁵⁸ DEP’T OF FINANCE, CITY OF NEW YORK, THE NEW YORK CITY PROPERTY TAX FY 2004 13 (2004), available at http://www.nyc.gov/html/dof/pdf/03pdf/taxpol_proptax04.pdf (last visited Jan. 22, 2005).

⁷⁵⁹ BOSTON REDEVELOPMENT AUTH., TAX EXEMPT, *supra* note 281, at 4.

⁷⁶⁰ *See id.* at 9. In addition to Logan Airport, Massport’s land in Boston includes waterfront properties in the Port of Boston and the Tobin Memorial Bridge, which connects Boston and Charlestown, MA. Mass. Port Auth., *Who Are We*, at <http://www.massport.com/about/about.html> (last visited Jan. 22, 2005).

⁷⁶¹ *See* Mass. Port Auth., *Logan International Airport: Then and Now*, at http://www.massport.com/logan/about_histo.html (last visited Jan. 22, 2005).

⁷⁶² *See id.*

⁷⁶³ *See id.*

⁷⁶⁴ MASS. PORT AUTH., COMPREHENSIVE ANNUAL FINANCIAL REPORT 106 (2005) [hereinafter MASS. PORT AUTH., COMPREHENSIVE], available at http://www.massport.com/about/pdf/c_fy05_cafr.pdf (last visited Apr. 6, 2006).

⁷⁶⁵ The city does receive payments in lieu of taxes from Massport, approximately \$10.9 million in FY 2003, *see* 1 OFFICE OF BUDGET MANAGEMENT, CITY OF BOSTON, OPERATING BUDGET FISCAL YEAR 2005 87 (2004), available at http://www.cityofboston.gov/budget/pdfs/02_Summary_Budget.pdf (last visited Jan. 22, 2005), but this is substantially less than it would receive were the land taxable.

⁷⁶⁶ MASS. PORT AUTH., COMPREHENSIVE, *supra* note 765, at 106, 108. These figures, however, are not calculated in accordance with “Generally Accepted Accounting Principles (GAAP),” and do not include some revenues and expenses, such as amortization costs, “properly allocable to Logan Airport” *Id.* However, under GAAP principles, Massport’s airport properties—Logan Airport, Worcester Airport, and Hanscom Field—together generate over \$66 million in net revenue. *See id.* at 50. Given that the Authority loses money on both Hanscom Field and the Worcester Airport, *see id.* at 4, 109, it seems that Logan’s net revenue, under GAAP principles, is somewhat greater than \$66 million.

⁷⁶⁷ *See* BOSTON REDEVELOPMENT AUTHORITY, TAX EXEMPT, *supra* note 281.

⁷⁶⁸ *See* MASS. PORT AUTH., COMPREHENSIVE, *supra* note 764, at 101.

⁷⁶⁹ Reynolds, Chicago, *supra* note 229, at 61.

⁷⁷⁰ David T. Norton, *Recent Developments in Aviation Law*, 67 J. AIR LAW & COM. 1107, 1162-63 (2002) (“The City of San Francisco, through its Airport Commission, owns and operates the San Francisco International Airport.”).

⁷⁷¹ Briffault, New York, *supra* note 139, at 54.

⁷⁷² Schragger, Denver, *supra* note 140, at 62.

⁷⁷³ *Id.*

⁷⁷⁴ *See id.*

⁷⁷⁵ *See id.*

⁷⁷⁶ Rebecca L. Watson, *Administrative Law Survey: Transportation*, 72 DEN. U. L. REV. 549, 555 (1995) (“In February of 1995, the city of Denver replaced Stapleton International Airport with a new airport ten miles northeast of Stapleton.”).

⁷⁷⁷ Colorado Sprawl Action Center, E. Stapleton Development Plan, at <http://www.sprawllaction.org/halloffame/ESTapleton.html> (last visited Jan. 23, 2005).

⁷⁷⁸ Forest City Enterprises, Inc., *History: From Planning to Action*, at <http://www.stapletondenver.com/history/planningtoaction.asp> (last visited Jan. 23, 2005).

⁷⁷⁹ *See* Forest City Enterprises, Inc., *History: Preparing for Urban Living*, at <http://www.stapletondenver.com/history/urbanliving.asp> (Jan. 23, 2005).

⁷⁸⁰ See Colorado Sprawl Action Center, *supra* note 777.

⁷⁸¹ Forest City Enterprises, Inc., *New Urbanism & Stapleton*, at <http://www.stapletondenver.com/community/newurbanism.asp> (last visited Jan. 23, 2005).

⁷⁸² FOREST CITY STAPLETON, INC., STAPLETON SUSTAINABILITY MASTER PLAN 37 (2003), *available at* http://www.stapletondenver.com/pdf/misc/Stapleton_Sustainability_Plan.pdf (last visited Jan. 23, 2005).

⁷⁸³ Press Release, Forest City Enterprises, Inc., Stapleton Development Wins Major International Recognition (May 2, 2002), *available at* http://www.stapletondenver.com/news/press_detail.asp?pressReleaseID=21 (last visited Jan. 23, 2005).

⁷⁸⁴ See Colorado Sprawl Action Center, *supra* note 777.

⁷⁸⁵ The Illinois legislature recently passed an act that allows the city to make decisions about O'Hare, related to expansion, without first garnering approval from the Illinois Department of Transportation. See 65 ILL. COMP. STAT. 5/11-102-2 (2002).

⁷⁸⁶ Mass. Port Auth. v. City of Boston, No. 012731BLS2, 2003 WL 23163113, at *2 (Mass. Sup. Ct. Nov. 18, 2003).

⁷⁸⁷ *Id.*

⁷⁸⁸ *Id.*

⁷⁸⁹ *Id.*

⁷⁹⁰ *Id.* at *3 & n.12.

⁷⁹¹ See *id.* at *4 ("Massport submitted a combined draft EIS/EIR to the Secretary in February 1999.").

⁷⁹² *Id.* at *5-*6.

⁷⁹³ See *id.* at *17-*18.

⁷⁹⁴ Michael S. Rosenwald & Sean P. Murphy, *Judge Allows Long-Fought Runway at Logan*, BOSTON GLOBE, Nov. 19, 2003, at A1.

⁷⁹⁵ Mac Daniel, *US Court Backs 5th Runway at Logan: FAA Approval Upheld; Foes May Appeal Ruling*, BOSTON GLOBE, Jan. 31, 2004, at A1.

⁷⁹⁶ Anthony Flint, *Pact on Logan Runway Reached: Conditions Must Get Judges OK*, BOSTON GLOBE, Apr. 15, 2004, at B3.

⁷⁹⁷ In 2003, the bridge yielded \$13.6 million in net operating revenue from the \$2 toll it charges passenger cars to enter Boston. MASS. PORT AUTH., COMPREHENSIVE, *supra* note 764, at 102. These figures are not calculated in accordance with GAAP principles. Under GAAP principles, the bridge would be responsible for a \$6.4 million increase in net revenues. *Id.* at 47.

⁷⁹⁸ Mass. Turnpike Auth., *Turnpike History*, at <http://www.masspike.com/aboutus/history.html> (last visited Jan. 23, 2005).

⁷⁹⁹ See, e.g., Anthony Flint, *Group's Report on Tolls Offers Little Direction, Critics Say*, BOSTON GLOBE, Jan. 1, 2004, at B12 ("Tolls for the Ted Williams Tunnel and the Sumner Tunnel . . . are \$3.").

⁸⁰⁰ *Id.*

⁸⁰¹ These figures can be calculated on the Massachusetts Turnpike Authority's website. Mass. Turnpike Auth., *Toll/Mileage Calculator*, at <http://www.masspike.com/user-cgi/tollcalc.cgi> (last visited Feb. 10, 2005).

⁸⁰² Jim Sulski, *Riding High for 45 Years, the Skyway has Risen Above Financial Trouble and the Southeast Side*, CHI. TRIB., Nov. 10, 2002, at 1.

⁸⁰³ See *id.*

⁸⁰⁴ Reynolds, Chicago, *supra* note 229, at 65.

⁸⁰⁵ See *Endsley v. City of Chicago*, 745 N.E.2d 708, 714 (Ill. App. Ct. 2001) ("[T]he City was acting within its home rule unit power when it used revenue from the 1996 bonds sale to fund nonskyway improvements.").

⁸⁰⁶ Mac Daniel, *Harvard Land Deal Finalized: \$75 Million Purchase Gives University Rights Over Turnpike Area*, BOSTON GLOBE, May 31, 2003, at A1.

⁸⁰⁷ See, e.g., Corey Dade, *Governor Urged To Void Pike Sale*, BOSTON GLOBE, June 1, 2003, at B1 ("Boston Mayor Thomas M. Menino and Secretary of State William F. Galvin yesterday demanded that

Governor Mitt Romney void the Turnpike Authority's \$75 million land deal with Harvard University, arguing that the agency essentially sold its control of a vital portion of the pike.”).

⁸⁰⁸ Daniel, *supra* note 807.

⁸⁰⁹ Editorial, *Tax Exempt Fairness*, BOSTON GLOBE, June 7, 2003, at A12 (“Boston University occupies less than half as much land in Boston as Harvard yet pays twice as much in lieu of taxes.”).

⁸¹⁰ See Mass. Turnpike Auth., *Project Background* at <http://www.masspike.com/bigdig/background/index.html> (last visited Jan. 25, 2005) (“Preliminary design began in the 1980’s and final design began in the late 1980’s.”).

⁸¹¹ See *id.*

⁸¹² See *id.* (noting that the project should be finished by mid-2005).

⁸¹³ Mass. Turnpike Auth., *Project Updates*, at <http://www.masspike.com/bigdig/updates/index.html> (last visited Jan. 25, 2005) (noting that the Central Artery/Tunnel Project’s budget is \$14.6 billion).

⁸¹⁴ Mass. Turnpike Auth., *Project Background*, *supra* note 810 (“The solution, called the Central Artery/Tunnel Project (CA/T), was constructed under the supervision of and is operated by the Massachusetts Turnpike Authority.”).

⁸¹⁵ DAVID LUBEROFF ET AL., THE CENTRAL ARTERY/THIRD HARBOR TUNNEL PROJECT: A POLITICAL AND INSTITUTIONAL HISTORY AND ANALYSIS IV-6 (1992) (manuscript, on file with authors).

⁸¹⁶ See Peter J. Howe, *Boston Seeks Binding Pacts with State on Artery Dig*, BOSTON GLOBE, May 1, 1989, at 13.

⁸¹⁷ *Id.*

⁸¹⁸ *Id.*

⁸¹⁹ *Id.*

⁸²⁰ See *City, State Settle on Artery Ramp*, BOSTON GLOBE, Feb. 9, 1990, at 22; Peter J. Howe, *State, City OK Design for Artery*, BOSTON GLOBE, Nov. 18, 1988, at 1.

⁸²¹ Peter J. Howe, *State and City Agree on Plan To Kill Rodents*, BOSTON GLOBE, Feb. 11, 1990, at 29 (“[T]he state will pay for special rodent-proof trash cans for affected neighborhoods, lay poisoned bait along a quarter-mile corridor through the construction zone and launch a joint city-state education program to teach residents better sanitation to thwart rodent infestation.”).

⁸²² Steve Marantz, *State, City Agree on Job Training: Aimed at Qualifying Workers for Projects*, BOSTON GLOBE, Oct. 5, 1989, at 49 (“[T]he state’s Department of Employment Training is putting up \$435,000 for immediate training on the initial design phase of the projects.”).

⁸²³ MASS. TURNPIKE AUTH., MEMORANDUM OF UNDERSTANDING BETWEEN MASSACHUSETTS TURNPIKE AUTHORITY AND THE CITY OF BOSTON, ACTING BY AND THROUGH THE BOSTON REDEVELOPMENT AUTHORITY (1997) (on file with authors) [hereinafter MASS. TURNPIKE AUTH., MEMORANDUM OF UNDERSTANDING].

⁸²⁴ A number of city permits were, however, required in order for the project to go forward. See, e.g., Sean P. Murphy, *Big Dig Said to Break Rule with Pumping; Volume Far Exceeds Permit, MWRA Says*, BOSTON GLOBE, at A1 (noting that a city permit was given to the Big Dig for the discharge and pumping of water).

⁸²⁵ Peter J. Howe, *Dukakis Seeks To Mollify Flynn on Artery Project*, BOSTON GLOBE, May 22, 1988, at 37.

⁸²⁶ LUBEROFF ET AL., *supra* note 815 (manuscript at IV-15).

⁸²⁷ MASS. GEN. LAWS ch. 81A, § 15 (2003).

⁸²⁸ See *id.* (“The construction or occupancy of any building or other thing erected or affixed under any lease under this section of air rights respecting land *outside the territorial limits of the city of Boston* shall be subject to the building, fire, garage, health and zoning laws and the building, fire, garage, health and zoning ordinances, by-laws, rules and regulations applicable in the city or town in which such building or other thing is located.”) (emphasis added); see also Editorial, *Wrong Authority over the Pike*, BOSTON GLOBE, Aug. 10, 1999, at A22 (“An outmoded state law denies Boston, and only Boston, the right to exercise normal zoning powers over air rights developments. That puts too much power in the hands of the Turnpike Authority, an agency that knows how to run a road but brings no special expertise to building, fire, or health codes or other zoning-related issues.”).

⁸²⁹ MASS. GEN. LAWS ch. 81A, § 15.

⁸³⁰ Editorial, *Air Rights Solutions*, BOSTON GLOBE, Feb. 27, 2000, at E6.

⁸³¹ Anthony Flint, *Big Dig's Real Estate an Untapped Gold Mine*, BOSTON GLOBE, Feb. 17, 2000, at B1 [hereinafter Flint, *Big Dig's*].

⁸³² MASS. TURNPIKE AUTH., MEMORANDUM OF UNDERSTANDING, *supra* note 823, §§ 1.1-1.2.

⁸³³ *Id.* §§ 2.1-2.2.

⁸³⁴ *Id.* §§ 3.1-3.2. Essentially, the BRA still must conduct an investigation and approve the project under Article 80 of the zoning code, which sets out procedures for BRA approval of large developments. *See id.* However, the BRA Article 80 approval, which normally takes place in addition to regular zoning code approval requirements, it appears to be the only required city permit in the case of Turnpike Authority projects on Turnpike land.

⁸³⁵ *Id.* § 3.2(f)(3) (stating that one arbitrator would be chosen by the BRA, one by the Turnpike Authority, and the third by the first two); *see also* Anthony Flint, *City, Turnpike Authority Set Accord on Use of 'Air Rights'*, BOSTON GLOBE, July 31, 1997, at A1 (summarizing the Memorandum's terms).

⁸³⁶ *See* MASS. TURNPIKE AUTH., MEMORANDUM OF UNDERSTANDING, *supra* note 823.

⁸³⁷ *See* MASS. GEN. LAWS ch. 81A, § 16 (2003).

⁸³⁸ *See, e.g.,* Cosmo Macero Jr., *Conflict Towers Over Plan; Zoning, Building Height Snags for Pike Project*, BOSTON HERALD, July 2, 1999, at 25; Stephanie Pollack, Editorial, *CLF Clarification*, BOSTON HERALD, July 8, 1999, at 32 (letter from Vice President and Senior Attorney of the Conservation Law Foundation stating that "[t]he bottom line is that the state law which defines where and how the Pike is subject to local regulation clearly gives Boston zoning authority over Pike-owned land, and nothing in the agreement between the city and the Pike can change that"); Press Release, Fenway Action Coalition, Millennium Partners' "Boylston Place" Bombshell (Dec. 3, 1998), *available at* <http://www.fenwayaction.org/parchive/millennium.html> (last visited Jan. 25, 2005) ("Because of Section 16 [of Chapter 81A] . . . the Boylston Square tower is controlled by normal Article 80 BRA review. Moreover, the 600-foot high structure itself would be subject to local Boston building regulations and require massive zoning variances. These, I think, may be more difficult hurdles than the MOU process would raise, it being heavily leveraged in favor of the Turnpike Authority.") (quoting attorney Tracey Cusick) (internal quotation marks omitted).

⁸³⁹ *See supra* note 838; *see also* Flint, *Big Dig's*, *supra* note 832; Editorial, *Air Rights Solution*, BOSTON GLOBE, Feb. 27, 2000, at E6 ("The Strategic Development Study Committee . . . proposes to keep any new building on the western site to 15 stories . . ."). As of today, the project appears to be dead. Whether its demise was related to this legal uncertainty is difficult to determine.

⁸⁴⁰ *See* MASS. GEN. LAWS ch. 81A, §§ 15, 16 (2003).

⁸⁴¹ *See* LUBEROFF ET AL., *supra* note 815 (manuscript at IV-38).

⁸⁴² DAVID LUBEROFF & ANN ALTSHULER, MEGA-PROJECT: A POLITICAL HISTORY OF BOSTON'S MULTIBILLION DOLLAR ARTERY/TUNNEL PROJECT IV-7 (rev. ed. 1996) (internal quotation marks and citation omitted) (on file with authors).

⁸⁴³ *See id.* at IV-7-8.

⁸⁴⁴ *Id.* at IV-8.

⁸⁴⁵ *Id.* at IV-8-9.

⁸⁴⁶ *See id.* at IV-33-34

⁸⁴⁷ It also appears that, in exchange for getting the state's support for ceding control over the air rights to the city, the state got city officials to drop their objection to another controversial aspect of the Big Dig plans. *Id.* at IV-34.

⁸⁴⁸ Due to the 1997 state law transferring control over the Big Dig to the Turnpike Authority, this land is in fact now under the control of that state independent agency and not the state itself. *See* Anthony Flint, *Romney To Assert Control of Big Dig Parkland*, BOSTON GLOBE, Mar. 25, 2004, at A1 [hereinafter Flint, *Romney*] ("[The] 1997 state law requir[ed] the transfer of all Big Dig-related property from the state to the Turnpike Authority.").

⁸⁴⁹ *See* Anthony Flint, *City, Pike Seen Near Parks Plan: Dismantling of Artery Spurs Race for Role*, BOSTON GLOBE, Feb. 21, 2004, at A1 (noting that there has been a "decade- long impasse over control

over the coveted open space” and that “[c]ompeting interests including the state, the city, the Turnpike Authority, and the Legislature have been jockeying to shape what is expected to be a signature stretch of Boston”) [hereinafter Flint, *City*].

⁸⁵⁰ See *id.*

⁸⁵¹ See David Luberoff, Civic Leadership and the Big Dig (2004), http://www.ksg.harvard.edu/rappaport/downloads/bigdig/abc_final_version.pdf.

⁸⁵² *Id.* at 31.

⁸⁵³ See Flint, *City*, *supra* note 849.

⁸⁵⁴ See Flint, *Romney*, *supra* note 848 (stating that the Turnpike Authority awarded contracts for the North End, in front of the New England Aquarium, and Chinatown).

⁸⁵⁵ Anthony Flint, *Pact Reached on Greenway Management; Turnpike Will Help Jump-Start Conservancy*, BOSTON GLOBE, July 12, 2004, at A1.

⁸⁵⁶ See *id.*

⁸⁵⁷ *Id.*

⁸⁵⁸ BOSTON REDEVELOPMENT AUTHORITY, THE BOSTON ECONOMY 2003 25-29 (2003) [hereinafter BOSTON REDEVELOPMENT AUTHORITY, BOSTON ECONOMY], available at <http://www.cityofboston.gov/bra/PDF/Publications//Rpt589.pdf> (last visited Jan. 26, 2005).

⁸⁵⁹ *Id.* at 23

⁸⁶⁰ The Metropolitan Transit Authority was created by 1947 Mass. Acts 544. It then became the Massachusetts Bay Transportation Authority by 1964 Mass. Acts 563.

⁸⁶¹ See BOSTON REDEVELOPMENT AUTHORITY., BOSTON ECONOMY, *supra* note 858, at 16.

⁸⁶² *Id.* at 16-18.

⁸⁶³ See Thomas C. Palmer, Jr., *Retailers Could Lead the Way to a New Waterfront, Some Say*, BOSTON GLOBE, Mar. 24, 2004, at C1.

⁸⁶⁴ 1982 Mass. Acts 190.

⁸⁶⁵ 1997 Mass. Acts 152 § 23 (codified as amended by 1998 Mass. Acts 23). Two members are ex-officio. *Id.*

⁸⁶⁶ BOSTON REDEVELOPMENT AUTHORITY., BOSTON ECONOMY, *supra* note 858, at 22 (citing 1997 Mass. Acts 152).

⁸⁶⁷ Mass. Bay Transp. Auth., *The Chronicle of the Boston Transit System: The New MBTA*, at http://www.mbta.com/insidethetaag_history11.asp (last visited Jan. 26, 2005).

⁸⁶⁸ Rappaport Institute for Greater Boston, *Boston State Hospital Site (as a Whole)*, at <http://ksgaccman.harvard.edu/hotc/DisplayPlace.asp?id=11457#ownership> (last visited Jan. 26, 2005).

⁸⁶⁹ See *id.*

⁸⁷⁰ For example, “Invesco Field is owned by the Metropolitan Football Stadium District (MFSD). The MFSD is a corporate body and political subdivision of the State of Colorado” Invesco Field at Mile High, *Metropolitan Football Stadium District*, at <http://www.invescofieldatmilehigh.com/stadium/general.html#mfsd> (last visited Jan. 26, 2005).

⁸⁷¹ See 70 ILL. COMP. STAT. 210/1-28 (2002).

⁸⁷² See, e.g., Press Release, Port Authority of New York & New Jersey, Rebirth of World Trade Center Site Highlights 2004 Port Authority Accomplishments (Dec. 29, 2004), available at <http://www.panynj.gov/> (last visited Jan. 26, 2005).

⁸⁷³ Briffault, New York, *supra* note 139, at 53.

⁸⁷⁴ 70 ILL. COMP. STAT. 3605/20 (2002).

⁸⁷⁵ *Id.*

⁸⁷⁶ BOSTON REDEVELOPMENT AUTH., TAX EXEMPT, *supra* note 281, at 3-4.

⁸⁷⁷ Nat’l Assoc. of Indus. & Office Props., *District Improvement Financing Overview*, at http://www.naiopma.org/DV/Pages/eco_dif_overview.html (last visited Jan. 26, 2005).

⁸⁷⁸ See *id.*

⁸⁷⁹ See *id.*

⁸⁸⁰ CHOATE, HALL & STEWART, REAL ESTATE, LAND USE AND ENVIRONMENTAL NEWSLETTER 1 (2003), available at http://www.choate.com/file/pdf/publications/re_newsletter_sept_oct_03_final.pdf (last visited Jan. 26, 2005).

⁸⁸¹ See *id.*

⁸⁸² 2003 Mass. Acts 46 § 18 (codified at MASS. GEN. LAWS ch. 40Q §§ 1-4 (2003)).

⁸⁸³ Editorial, *Local Improvements*, BOSTON GLOBE, July 22, 2003, at A12.

⁸⁸⁴ Nat'l Assoc. of Indus. & Office Props., *supra* note 877.

⁸⁸⁵ Atlanta Dev. Auth., *Atlantic Station*, at http://www.atlantada.com/ecopro_atlanticsteel.htm (last visited Jan. 27, 2005) (“A Tax Allocation District, typically referred to as Tax Increment Financing, is a tool used to publicly finance redevelopment activities in underdeveloped or blighted areas.”).

⁸⁸⁶ For example, the Denver Urban Renewal Authority is created by state enabling legislation for such purposes. See *supra* at notes 724-7307.

⁸⁸⁷ See City & County of San Francisco, *San Francisco Redevelopment Agency*, at http://www.sfgov.org/site/sfra_page.asp?id+5127 (last visited Jan. 27, 2005) (“Authorized and organized under the provisions of the California Community Redevelopment Law, the Agency is an entity legally separate from the City and County of San Francisco, but existing solely to perform certain functions exclusively for and by authorization of the City and County of San Francisco.”).

⁸⁸⁸ See MASS. GEN. LAWS ch. 40Q, § 3(a) (2003) (“The city or town may retain all or part of the tax increment of an invested revenue district for the purpose of financing the development program.”).

⁸⁸⁹ *Id.* § 2(a)(1).

⁸⁹⁰ GA. CODE ANN. § 36-44-17 (2000).

⁸⁹¹ Memorandum from Laurie Reynolds to Professors Gerald E. Frug & David J. Barron 6-7 (2004) (on file with authors). Interestingly, “TIFs in Chicago have grown rapidly over the past 20 years. In 1985, there was one TIF, which covered the central Loop area. In 1986, four more were created to revitalize smaller pockets of the City. In the early 1990s, when the federal government discontinued its UDAG funding, Chicago turned to TIFs as a primary source of redevelopment funds. Currently there are 135 TIF districts in Chicago. . . . City officials predict a continual increase in the number of TIFs within the City. In 2003, 6.16% of the total City EAV was locked up in the incremental TIF portion (and pledged to repayment of the TIF bonds). The foregone tax revenues total approximately \$200,000,000 (that is, the incremental EAV times the tax rates of all taxing districts). TIF revenues are not included within the City’s budget figures; currently the TIF increments are equal to only approximately 4% of the City’s overall budget, but that number is likely to rise over the next few years.” *Id.*

⁸⁹² MASS. GEN. LAWS ch. 40Q, § 2(a)(2).

⁸⁹³ See 1996 Ga. Laws 1019 § 3-603 (“[T]he council shall adopt the comprehensive development plans, after making any amendments or revisions thereto that the council considers appropriate . . .”).

⁸⁹⁴ See Memorandum from Laurie Reynolds, *supra* note 8942, at 5.

⁸⁹⁵ *Id.*

⁸⁹⁶ See Editorial, *supra* note 883.

⁸⁹⁷ See, e.g., Ford, San Francisco, *supra* note 283, at 38. Furthermore, because California itself normally takes a share of San Francisco’s property tax revenue but does not where it is devoted to a TIF, meaning that the state in effect subsidizes the development project. See *id.* The state also reimburses the San Francisco school district for the portion of the property tax it would otherwise be entitled to under California law. *Id.*

⁸⁹⁸ See Andrew Garber, *Democrats Revive Bills in Graveyard*, SEATTLE TIMES, Jan. 31, 2005, at A1 (noting that school districts currently have the power to increase property taxes for education-related purposes upon a 60% vote of the voters). Interestingly, in San Francisco, the city, through the redevelopment authority, “is able to capture *all* of the increase in property tax revenue, effectively depriving the state and other local government units (such as the school district) normally entitled to a share of property tax revenues under AB8 of their usual share.” Ford, San Francisco, *supra* note 283, at 38. Further, “because the state reimburses the school district for revenues lost to tax increment financing, the entire cost of the project is effectively borne by the state. For instance, in fiscal year 2002-03 the Agency captured roughly \$40 million in tax increment revenue. The fiscal impact on the city’s general fund will be only roughly \$28 million. Assuming that in the absence of the Agency, the city would fund the projects through its own revenue, the city effectively gains \$12 million through the device of the Redevelopment Agency. In addition it gains the ability to effectively deficit spend—a

power denied local government in California: the Agency ran a \$45 million deficit in fiscal year 2002-03.” *Id.*

⁸⁹⁹ See Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 366 (1999) [hereinafter Briffault, *Business Improvement Districts*].

⁹⁰⁰ *Id.* at 377 – 78.

⁹⁰¹ See *id.* at 413.

⁹⁰² *Id.* at 425.

⁹⁰³ *Id.* at 366.

⁹⁰⁴ Generally, critics focus on the private governance structures of these institutions, which they allege are undemocratic. *Id.* at 371. Critics also complain that the increased level of services provided within BIDs make property owners less likely to support citywide increases in services such as sanitation and police protection. *Id.*

⁹⁰⁵ *Id.* at 370 – 71.

⁹⁰⁶ David Harding, *Inner City Magic*, PUB. FINANCE, Mar. 28, 2003, available at <http://www.publicfinance.co.uk/> (last visited Jan. 27, 2005).

⁹⁰⁷ See *Grais v. City of Chicago*, 601 N.E.2d 745, 755 (Ill. 1992) (“The special service area defined by the city includes 34% of the city’s tax base. That is a significant percentage, but it appears that the percentage is that large mainly because the special service area is located in the downtown area, where the city’s most expensive real estate is located.”).

⁹⁰⁸ Memorandum from Laurie Reynolds, *supra* note 8942, at 5.

⁹⁰⁹ Schragger, Denver, *supra* note 140, at 54.

⁹¹⁰ See, e.g., *City of Seattle v. Roger’s Clothing for Men, Inc.*, 787 P.2d 39 (Wash. 1990) (upholding a Seattle ordinance creating the “Downtown Seattle Retail Core Business Improvement Area”).

⁹¹¹ Union Square Bus. Imp. Dist., *About Us*, at <http://www.unionsquarebid.com/aboutus.html> (last visited Jan. 27, 2005) (“The Union Square Business Improvement District (BID) is a 10-block area where property owners assess themselves to make their district cleaner, safer and more vibrant. The assessment is used by the BID to provide services that supplement those provided by the city.”).

⁹¹² Buzbee, Atlanta, *supra* note 508, at 104-05.

⁹¹³ Thomas Grillo, *Bid Considered Anew To Create Business Improvement District*, BOSTON GLOBE, Sept. 13, 2003, at E2.

⁹¹⁴ *Id.*

⁹¹⁵ *Id.*

⁹¹⁶ See *id.*

⁹¹⁷ See *id.*

⁹¹⁸ 1994 Mass. Acts 173 (codified at MASS. GEN. LAWS ch. 40O (2003)).

⁹¹⁹ *Id.* § 2.

⁹²⁰ *Id.* §§ 3-4.

⁹²¹ *Id.* § 4 (“Any property owner within the BID may, within thirty calendar days after such declaration of organization by the local municipal governing body, elect not to participate and not be subject to the BID fee.”).

⁹²² Briffault, *Business Improvement Districts*, *supra* note 899, at 393 n.173.

⁹²³ See *id.* at 393.

⁹²⁴ Buzbee, Atlanta, *supra* note 508, at 100.

⁹²⁵ NEIL PEIRCE & CURTIS JOHNSON, BOSTON FOUNDATION, *Greater Boston in the 21st Century*, in BOSTON UNBOUND 2 (2004), available at <http://www.tbf.org/tbfggen1.asp?id=1904> (last visited Jan. 27, 2005).

⁹²⁶ See *id.*

⁹²⁷ BONNIE HUEDORFER ET AL., BOSTON FOUNDATION, THE GREATER BOSTON HOUSING REPORT CARD 2003: AN ASSESSMENT OF PROGRESS ON HOUSING IN THE GREATER BOSTON AREA 5 (2004), available at <http://www.tbf.org/uploadedFiles/HousingRCard2c.pdf> (last visited Jan. 27, 2005); see also BOSTON FOUNDATION, “Boston Indicators Report 2002,” available at <http://>

www.tbf.org/indicators/housing/overview.asp?id=254 (last visited May 6, 2005); NATIONAL LOW INCOME HOUSING COALITION, “Out of Reach 2004) at http://www.nlihc.org/oor_current/; NATIONAL ASSOCIATION OF HOME BUILDERS, “NAHB-Wells Fargo Housing Opportunity Index (HOI),” at <http://nahb.org/page.aspx/category/sectionID=135> (last visited May 6, 2005).

⁹²⁸ BONNIE HUEDORFER ET AL., *supra* note 928, at 8.

⁹²⁹ *Id.* at 24.

⁹³⁰ *Id.*

⁹³¹ EDWARD C. CARMAN ET AL., BOSTON FOUNDATION, BUILDING ON OUR HERITAGE: A HOUSING STRATEGY FOR SMART GROWTH AND ECONOMIC DEVELOPMENT 7 (2003), *available at* <http://www.tbf.org/uploadedFiles/HousingReport.pdf> (last visited Jan. 27, 2005).

⁹³² *See* MASS. GEN. LAWS ch. 40B (2003).

⁹³³ CITY OF BOSTON, LEADING THE WAY: A REPORT ON BOSTON’S HOUSING STRATEGY FY 2001 – 2003, at 3 (2000) (on file with authors) [hereinafter CITY OF BOSTON, LEADING THE WAY I].

⁹³⁴ *See id.*

⁹³⁵ The state’s zoning law does not apply to Boston. *See* MASS. GEN. LAWS ch. 40A (2003).

⁹³⁶ *See* Anthony Flint, *Zoning at Issue in Affordable Housing*, BOSTON GLOBE, Mar. 31, 2003, at B2.

⁹³⁷ The act will go into effect in July, 2005. Ctr. For Urban & Reg’l Policy, *This Week at CURP*, at <http://www.curp.neu.edu/sitearchive/thisweek.asp?id=2142> (last visited Jan. 27, 2005).

⁹³⁸ *See* MASS. GEN. LAWS ch. 40P (2003).

⁹³⁹ MASS. GEN. LAWS ch. 41, §§ 81K – 81GG (2003). It is worth noting that the subdivision control law does not apply to Boston itself.

⁹⁴⁰ CITY OF BOSTON, LEADING THE WAY II: A REPORT ON BOSTON’S HOUSING STRATEGY FY2004 – FY 2007 1-2 (2004) [hereinafter CITY OF BOSTON, LEADING THE WAY II], *available at* http://www.cityofboston.gov/DND/pdfs/LTW_2_final_2.pdf (last visited Jan. 27, 2005).

⁹⁴¹ This \$50,000 figure though is not an exact one. *See id.* at 50 (listing the 80% median figure for the Boston Primary Metropolitan Area as \$52,850); *see also* HUEDORFER ET AL., *supra* note 927, at 10 (noting that Boston’s regional median household income was \$60,612, meaning that 80% of this figure would be \$48,489). *But see id.* at 47 (listing Boston’s own median household income at \$44,590 in 2003, meaning that the 80% median income amount would be \$35,672).

⁹⁴² BARR, BOSTON ZONING, *supra* note 626, § 8.4, at 103 (citing BOSTON, MASS., ZONING CODE art. 80, § 80B-7 (1996), *available at* <http://www.cityofboston.gov/bra/pdf/ZoningCode/Article80.pdf> (last visited Jan. 28, 2005)).

⁹⁴³ Meg Kiely, *Boston’s Policy Gives Developers Choice*, in INCLUSIONARY ZONING: LESSONS LEARNED IN MASSACHUSETTS 26 (2002), *available at* http://www.mhp.net/termsheets/zoning_12_14_01.pdf (last visited Jan. 27, 2005).

⁹⁴⁴ *See* MASS. GEN. LAWS ch. 40B, § 20 (2003).

⁹⁴⁵ CITY OF BOSTON, LEADING THE WAY II, *supra* note 940, at 21.

⁹⁴⁶ *Id.* at 23.

⁹⁴⁷ YOLANDA PEREZ ET AL., BOSTON REDEVELOPMENT AUTHORITY, RESIDENTIAL LAND USE IN BOSTON 8 (2004), *available at* <http://www.cityofboston.gov/bra/PDF/Publications//Rpt592.pdf> (giving the percentage of subsidized housing units that are publicly owned).

⁹⁴⁸ BOSTON REDEVELOPMENT AUTHORITY, BOSTON ECONOMY, *supra* note 858, at 33.

⁹⁴⁹ CITY OF BOSTON, LEADING THE WAY II, *supra* note 940, at 25.

⁹⁵⁰ CITY OF BOSTON, LEADING THE WAY I, *supra* note 933, at 3.

⁹⁵¹ CITY OF BOSTON, LEADING THE WAY II, *supra* note 940, at 23, 25-26.

⁹⁵² *See* CITY OF BOSTON, LEADING THE WAY I, *supra* note 933, at 4.

⁹⁵³ *Id.* at vi.

⁹⁵⁴ *See id.* at 4; CITY OF BOSTON, LEADING THE WAY II, *supra* note 940, at 25-26.

⁹⁵⁵ *See* HUEDORFER ET AL, *supra* note 927, at 34.

⁹⁵⁶ *See, e.g.,* RYAN ALLEN ET AL., BOSTON FOUNDATION, THE GREATER BOSTON HOUSING REPORT CARD 2002 52 (2002), *available at* <http://www.curp.neu.edu/pdfs/completedraft.pdf> (last visited Jan. 28, 2005) (showing housing’s decreasing share of the state budget over the last 15 years) .

⁹⁵⁷ See CITY OF BOSTON, LEADING THE WAY II, *supra* note 940, at 1.

⁹⁵⁸ See *Id.* at 6-8, 12.

⁹⁵⁹ *Id.* at 6.

⁹⁶⁰ *Id.* at 7.

⁹⁶¹ CITY OF BOSTON, LEADING THE WAY I, *supra* note 933, at iv.

⁹⁶² See CITY OF BOSTON, LEADING THE WAY II, *supra* note 940, at 1 (noting the recent state cuts); CITY OF BOSTON, LEADING THE WAY I, *supra* note 933, at iv.

⁹⁶³ Corey Dade, *Cuts Crimp City Plans for New Housing*, BOSTON GLOBE, Apr. 14, 2003, at B1.

⁹⁶⁴ CITY OF BOSTON, LEADING THE WAY II, *supra* note 940, at 14 (showing the data as noted in the text).

⁹⁶⁵ See Blair Kamin & Patrick T. Reardon, 'Worth Fighting For:' *The Daley Administration Changes Course and Searches for New Ways to Slow the Destruction of Potential Landmark Buildings*, CHI. TRIB., Apr. 25, 2003, at 1.

⁹⁶⁶ See *id.*

⁹⁶⁷ Memorandum from Laurie Reynolds, *supra* note 892, at 10.

⁹⁶⁸ David W. Chen, *One Housing Woe Gives Way to Another*, N.Y. TIMES, Dec. 21, 2003, § 1, at 49.

⁹⁶⁹ See Dennis Hevesi, *Transforming City's Housing: Act 2*, N.Y. TIMES, May 2, 2004, § 11, at 1.

⁹⁷⁰ See *id.*

⁹⁷¹ Chen, *supra* note 968.

⁹⁷² Hevesi, *supra* note 969.

⁹⁷³ CITY OF NEW YORK, THE NEW HOUSING MARKETPLACE 8 (2002), available at <http://www.nyc.gov/html/hpd/pdf/new-marketplace.pdf> (last visited Jan. 29, 2005).

⁹⁷⁴ *Id.* at 9.

⁹⁷⁵ See *id.*

⁹⁷⁶ *Id.* at 12.

⁹⁷⁷ *Id.*

⁹⁷⁸ BARR, BOSTON ZONING, *supra* note 626, § 8.4, at 103.

⁹⁷⁹ JOHN AVAULT ET AL., BOSTON REDEVELOPMENT AUTH., SURVEY OF LINKAGE PROGRAMS IN OTHER U.S. CITIES WITH COMPARISONS TO BOSTON 4 (2000), available at http://www.cityofboston.gov/bra/PDF%5CPublications%5C/pdr_534.pdf (last visited Jan. 29, 2005).

⁹⁸⁰ BOSTON REDEVELOPMENT AUTHORITY, BOSTON ECONOMY, *supra* note 858, at 34-35.

⁹⁸¹ *Id.*

⁹⁸² See *id.* at 35.

⁹⁸³ Bonan v. City of Boston, 496 N.E.2d 640, 641-42 (Mass. 1986) ("The city's appeal challenges the Superior Court judge's determination that, on the record before him, the plaintiffs were entitled to entry of a judgment declaring [the Development Impact Project Exaction] . . . invalid.").

⁹⁸⁴ See *id.* at 645-46.

⁹⁸⁵ *Id.* at 645.

⁹⁸⁶ 1987 Mass. Acts 371 § 3 (as amended by 2001 Mass Acts 170).

⁹⁸⁷ *Id.* The legislation did authorize the Zoning Commission to increase the required fees, but only up to a ceiling established by the law pegged at the consumer price index. See *id.*

⁹⁸⁸ See generally 2001 Mass Acts 170.

⁹⁸⁹ See Kiely, *supra* note 943, at 26. The affordability restrictions are written into the deed and are guaranteed for 30 years, with a possible extension for another 20. *Id.*

⁹⁹⁰ Stephanie Ebbert, *Menino Orders Low Cost Housing: Raises Demands on Home Builders*, BOSTON GLOBE, Feb. 29, 2000, at B1; memo from Sameul Tyler to authors.

⁹⁹¹ See Kiely, *supra* note 943, at 26.

⁹⁹² In light of several rulings by United States Supreme Court, the ability of municipalities to condition the receipt of normal zoning approval upon "unrelated" payments or other concessions have been called into question. See *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (holding that there must be "rough proportionality" between some conditions placed upon permitting approval and the impact of the proposed development); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). Interestingly, the City of Seattle has thus far refrained from exercising its statutory authority to charge

developmental impact fees on the basis of these decisions. The city is hesitant to impose impact fees, fearing that if they do not provide an individualized assessment to prove the proportionality of each developer's fee—which would be prohibitively costly—they could be sued. Aoki, Seattle, *supra* note 285, at 41-42 & n.312. In Illinois, the state Supreme Court has held that subdivision extractions must be “specifically and uniquely attributable” to the proposed development. *See Pioneer Trust & Sav. v. Vill. of Mount Prospect*, 176 N.E.2d 799, 802 (Ill. 1961). This test, which is stricter than the Court's rough proportionality test, presumably would apply to any Chicago inclusionary zoning or development impact fee program.

In addition to problems under the U.S. Constitution, mandatory inclusionary zoning ordinances have also failed scrutiny under the Massachusetts constitution. In *Dacey v. Town of Barnstable*, Civil Action No. 00-53 (Barnstable Sup. Ct. Oct. 18, 2000), *available at* http://www.mhp.net/termsheets/dacey_vs_barnstable.pdf (last visited Jan. 29, 2005), for instance, a Massachusetts court struck down an ordinance requiring developers wishing to subdivide land to pay a fee into an affordable housing fund. The court held that the required payment was in fact an impermissible tax rather than a permissible regulatory fee, and thus that it required explicit approval on the part of the legislature. *Id.* (citing *Emerson Coll. v. Boston*, 462 N.E.2d 1098 (Mass. 1984)). Boston's inclusionary development policy, however, would likely be immune from a challenge on these grounds, but only because it does not extend to developments as of right.

⁹⁹³ CITY OF BOSTON, LEADING THE WAY: BOSTON'S HOUSING STRATEGY FY 2001 – 2003 COMPLETION REPORT 4 tbl. 2 (2003), [hereinafter CITY OF BOSTON, LEADING THE WAY I COMPLETION REPORT], *available at* http://www.cityofboston.gov/dnd/pdfs/D_LTW_Final_Report_Oct_03.pdf (last visited Jan. 29, 2005); Memo from Samuel Tyler to authors.

⁹⁹⁴ Ebbert, *supra* note 340.

⁹⁹⁵ *See id.*

⁹⁹⁶ *Id.*

⁹⁹⁷ 496 N.E. 2d 640, 642 (Mass. 1986).

⁹⁹⁸ *Id.* at 644 n.9.

⁹⁹⁹ 359 N.E.2d 1279 (Mass. 1977).

¹⁰⁰⁰ *See id.* at 1280-83.

¹⁰⁰¹ *Bonan*, 496 N.E.2d at 643 n.9 (quoting MASS. GEN. LAWS ch. 40A, § 9 (2003)).

¹⁰⁰² *See Emerson Coll. v. City of Boston*, 471 N.E.2d 336, 338 (Mass. 1984) (noting that “zoning in Boston was never governed by . . .” MASS. GEN. LAWS ch. 40A).

¹⁰⁰³ 1956 Mass. Acts. 665 § 10.

¹⁰⁰⁴ NICK BRUNICK ET AL., BUS. & PROF'L PEOPLE FOR THE PUB. INTEREST, LARGE CITIES AND INCLUSIONARY ZONING 7 (2003), *available at* http://www.bpichicago.org/rah/pubs/large_cities_iz.pdf (last visited Jan. 29, 2005).

¹⁰⁰⁵ *Id.*

¹⁰⁰⁶ *Id.* at 7-8.

¹⁰⁰⁷ *See* Editorial, *Let Housing Measure Work*, DENVER POST, Jan. 31, 2003, at B6.

¹⁰⁰⁸ *See, e.g., Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 38 (Colo. 2000) (discussing what constitutes a “state concern”).

¹⁰⁰⁹ AVAULT ET AL., *supra* note 979, at 4-5; *see also* San Francisco Planning Code, § 306 (2005).

¹⁰¹⁰ Policylink, *City and County of Sacramento's Linkage Programs*, at <http://www.policylink.org/EDTK/Linkage/action.html#Sacramento> (last visited Jan. 29, 2005) (“[S]upport for the linkage fee only really jelled when the realtors decided that a linkage fee was preferable to the real estate transfer fee also being considered by the Task Force.”).

¹⁰¹¹ *See Jane Schukoske, Housing Linkage: Regulating Development Impact on Housing Costs*, 76 IOWA L. REV. 1011, 1035 n. 166, 1040 n. 208 (1991) (citing the advisory group report).

¹⁰¹² *See* WASH. REV. CODE 82.02.020 (2004).

¹⁰¹³ *San Telmo Assocs. v. City of Seattle*, 735 P.2d 673, 673 (Wash. 1987).

¹⁰¹⁴ *Id.*

¹⁰¹⁵ *Id.*

¹⁰¹⁶ *Id.* at 673-74.

¹⁰¹⁷ *Id.* at 674.
¹⁰¹⁸ *Id.*
¹⁰¹⁹ *Id.* at 675.
¹⁰²⁰ *Id.*
¹⁰²¹ *Garneau v. City of Seattle*, 147 F.3d 802, 804 (9th Cir. 1998) (citing WASH. REV. CODE § 59.18.440(1) (2004)).
¹⁰²² *Id.*
¹⁰²³ *Id.*
¹⁰²⁴ *Schukoske*, *supra* note 1011, at 1036-38 (describing density bonus program).
¹⁰²⁵ There might be questions as to whether it would be lawful under the Illinois Supreme Court’s strict constriction of the state constitution’s takings clause. *See, e.g., St. Lucas Ass’n v. City of Chicago*, 571 N.E.2d 865, 875 (Ill. App. Ct. 1990) (“[T]he courts of this State have acknowledged that our constitution provides greater guarantees to landowners against takings than the parallel guarantee provided under the fifth and fourteenth amendments of the United States Constitution.”).
¹⁰²⁶ Memorandum from Laurie Reynolds, *supra* note 8942, at 9.
¹⁰²⁷ *See* Gary Washburn, *Housing Advocates State Case; They Ask Builders to Offer More Aid*, CHI. TRIB., Jan. 27, 2005, at 1 (“Mayor Richard Daley contends the measure would stifle development and hurt the city’s tax base.”).
¹⁰²⁸ *See Dacey v. Town of Barnstable*, Civil Action No. 00-53 (Barnstable Sup. Ct. Oct. 18, 2000) (invalidating mandatory inclusionary zoning ordinance on grounds that it constituted a tax that had not been expressly authorized by the state).
¹⁰²⁹ *See* BOSTON REDEVELOPMENT AUTHORITY, BOSTON ECONOMY, *supra* note 858, at 29.
¹⁰³⁰ 1970 Mass. Acts. 842 §§ 1-2.
¹⁰³¹ *See Marshal House, Inc. v. Rent Review & Grievance Bd.*, 260 N.E.2d 200, 207-08 (Mass. 1970).
¹⁰³² This was discussed earlier in some detail in Chapter 3.
¹⁰³³ Adrian Walker & Peter J. Howe, *Landlords Rail Against Moves To Undo Rent-Control Rejection*, BOSTON GLOBE, Nov. 11, 1994, at 34.
¹⁰³⁴ *Id.*.
¹⁰³⁵ *Id.*
¹⁰³⁶ CITY OF BOSTON, LEADING THE WAY I COMPLETION REPORT, *supra* note 993, at 1.
¹⁰³⁷ CITY OF BOSTON, LEADING THE WAY I, *supra* note 933, at 8.
¹⁰³⁸ HUEDORFER ET AL., *supra* note 927, at 24.
¹⁰³⁹ *Id.*
¹⁰⁴⁰ *See id.*
¹⁰⁴¹ Andrea Estes, *Council Shuts Down Rent Control; Protest Erupts After Defeat of Measure*, BOSTON GLOBE, Dec. 9, 2004, at B1.
¹⁰⁴² *Id.*
¹⁰⁴³ 1994 Mass. Acts ch. 282 (codified at MASS. GEN. LAWS ch. 40P (2003)).
¹⁰⁴⁴ *See* Greater Boston Real Estate Bd. v. City of Boston, 705 N.E. 2d 256, 257 (Mass. 1999) (citing 1983 Mass. Acts 527 § 4).
¹⁰⁴⁵ *Id.* at 258 (emphasis omitted) (quoting the Boston ordinance in question).
¹⁰⁴⁶ *Id.*
¹⁰⁴⁷ *Id.* at 259.
¹⁰⁴⁸ *Id.*
¹⁰⁴⁹ *See* CITY OF BOSTON, LEADING THE WAY I, *supra* note 933, at 7.
¹⁰⁵⁰ Exceptions to the rent control ordinance include some single family homes and, significantly, buildings constructed after 1979. San Francisco Tenants Union, *Rent Control Coverage & Rent Increases*, at <http://www.sftu.org/rentcontrol.html> (last visited Jan. 29, 2005).
¹⁰⁵¹ This enforcement of this initiative is currently enjoined by a court order pending the issuance of implementing regulations. *Id.*
¹⁰⁵² In 1996, the New York Department of Housing and Urban Preservation performed a survey showing that “[t]here are 1,013,097 rent-stabilized apartments and 101,798 rent-controlled units in the

city.” Dennis Hevesi, *As Battle Looms on Rent Law, Skirmishing Has Begun*, N.Y. TIMES, June 16, 1996, at 1.

¹⁰⁵³ See *id.* (“[T]he 1993 law renewed rent regulation until midnight on June 15, 1997, but included provisions that, among other things, allowed for the decontrol of “luxury” apartments for the first time since the late 1950’s, and, for the first time ever, used tenant income as a determinant for deregulating an apartment.”).

¹⁰⁵⁴ See Tenant Net, *Rent Regulation Reform Act of 1997*, at <http://tenant.net/Alerts/Guide/legmemo.html> (last visited Jan. 29, 2005).

¹⁰⁵⁵ New York City Rent Guidelines Board, *Rent Law of 2003*, at <http://www.housingnyc.com/html/resources/renewal2003.html> (last visited Jan. 29, 2005).

¹⁰⁵⁶ See Steven Morris, *Apartments Boom Again, Thanks to Investors*, CHI. TRIB., May 5, 1985, at 1 (noting Chicago’s lack of rent control laws).

¹⁰⁵⁷ WASH. REV. CODE § 35.21.830 (2004) (“The imposition of controls on rent is of statewide significance and is preempted by the state.”).

¹⁰⁵⁸ See *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 39-40 (Colo. 2000).

¹⁰⁵⁹ CITY OF BOSTON, LEADING THE WAY II, *supra* note 940, at 2-4.

¹⁰⁶⁰ BOSTON REDEVELOPMENT AUTH., BOSTON ECONOMY, *supra* note 858, at 34-35.

¹⁰⁶¹ CITY OF BOSTON, LEADING THE WAY II, *supra* note 940, at 13.

¹⁰⁶² BOSTON REDEVELOPMENT AUTH., BOSTON ECONOMY, *supra* note 858, at 29.

¹⁰⁶³ See BARRY BLUESTONE & MARY H. STEVENSON, *THE BOSTON RENAISSANCE* 379 (2000) (“Unless measures are taken to increase the housing stock, affordability will continue to be a problem.”).

¹⁰⁶⁴ June Median Sale Price for Calif Homes and Condos, by County, SAN FRANCISCO CHRON., July 19, 2004, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/news/archive/2004/07/19/financial2048EDT0154.DTL> (last visited Jan. 29, 2005).

¹⁰⁶⁵ Kelly Zito, *Home sales at 16-Year High; Bay Area Prices Keep Breaking Records -- Median Hits \$545,000*, SAN FRANCISCO CHRON., July 17, 2004, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2004/07/17/MNGDS7NC471.DTL> (last visited Jan. 29, 2005).

“According to the 1990 Census, 104,789 San Francisco households (38.1%) at all income levels expended 30% or more of their gross income on housing costs. Among extremely-low income households, fully 75% paid more than 30% of their income for housing, and 55% paid more than 50% of their income for housing. The 1993 American Housing Survey shows 137,900 households that expend more than 30% of gross income on housing costs; this figure represents 45% of total households. Of this number, 61,700 San Francisco households (20% of total households) spent more than 50% of gross income on housing costs. There is little doubt that the percentages are significantly higher today.” Mayor’s Office of Housing, City & County of San Francisco, *San Francisco Affordable Housing Fact Sheet*, at http://www.ci.sf.ca.us/site/moh_index.asp?id=5812 (last visited Jan. 29, 2005).

¹⁰⁶⁶ BARRON, FRUG & SU, *supra* note 125, at 49-52.

¹⁰⁶⁷ Hugo E. Castillo, *How California Can Harmonize a Tenant’s State Rights and a Landlord’s Right to Go Out of Business Pursuant to the Ellis Act*, 31 GOLDEN GATE U. L. REV. 251, 251 (2001) (noting San Francisco’s strict rent control provisions).

¹⁰⁶⁸ No residential building over 6 units may convert to condos. See SAN FRANCISCO, CAL., SUBDIVISION CODE § 1396(a) (2003). For buildings between 2 and 6 units, a lottery is held and only a specified number of units (currently 200 are allowed to convert to condos each year at market resale prices and an additional 200 at a restricted resale price). See *id.* In addition, in order to convert a unit in a building of 6 units or less to condos, the units must be owner occupied for a period of three years prior to submitting the application to convert. *Id.* § 1396.1(b)(1)4.

¹⁰⁶⁹ Memorandum from Laurie Reynolds, *supra* note 892, at 10-11.

¹⁰⁷⁰ See PIETRO NIVOLA, *LAWS OF THE LANDSCAPE: HOW POLICIES SHAPE CITIES IN EUROPE AND AMERICA* 22-24 (1999).

¹⁰⁷¹ See William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335, 1336 (1991).

¹⁰⁷² Memorandum from Laurie Reynolds, *supra* note 892, at 10.

¹⁰⁷³ *Id.*

¹⁰⁷⁴ Dep't of Hous. Pres. & Dev., City of New York, *HomeWorks Homeownership Program* (2004), at <http://www.nyc.gov/html/hpd/html/for-homebuyers/homeworks.html> (last visited Jan. 29, 2005).

¹⁰⁷⁵ *Id.*

¹⁰⁷⁶ *Id.*

¹⁰⁷⁷ *Id.*

¹⁰⁷⁸ *Id.*

¹⁰⁷⁹ *Id.*

¹⁰⁸⁰ *Id.*

¹⁰⁸¹ See Memorandum from Laurie Reynolds, *supra* note 892, at 9.

¹⁰⁸² Boston Foundation, *Education*, at <http://www.tbf.org/indicators2004/education/index.asp> (last visited May 16, 2005).

¹⁰⁸³ *Id.*

¹⁰⁸⁴ Craig Bolon, *School-Based Standard Testing*, 23 EDUC. POL'Y ANALYSIS ARCHIVES No. 8 (May 12, 2000), at <http://epaa.asu.edu/epaa/v8n23/> (last visited May 16, 2005).

¹⁰⁸⁵ *Id.*

¹⁰⁸⁶ Surprisingly, the enrollment in Boston schools is almost half of its peak enrollment during the 1930s. In 1933, student population of the public school system peaked at 133,339. See Cindy Rodriguez, *Minority Students Treading Path to Private School*, BOSTON GLOBE, Feb. 16, 2002, at B2. Since the beginning of the era of the streetcar suburb, and then the automobile suburb, enrollment has been declining steadily. *Id.*

¹⁰⁸⁷ The data cited in this paragraph can be found by searching for information about each school district from the National Center of Education Statistics website. The data is from year 2002-2003. See Nat'l Ctr. of Educ. Statistics, *Search for Public School Districts*, at <http://nces.ed.gov/ccd/districtsearch/> (last visited May 16, 2005).

¹⁰⁸⁸ Nat'l Ctr. of Educ. Statistics, *Characteristics of the 100 Largest Public Elementary and Public Secondary School Districts in the United States* tbl.9, [hereinafter Nat'l Ctr. of Educ. Statistics, *Free Lunch*] at http://nces.ed.gov/pubs2001/100_largest/table09.asp (last visited May 16, 2005).

¹⁰⁸⁹ BOSTON REDEVELOPMENT AUTHORITY, BOSTON CITY: 2000 CENSUS OF POPULATION AND HOUSING 2 (2003), available at <http://cityofboston.gov/bra/PDF/Publications/570Boston.pdf> (last visited May 16, 2005).

¹⁰⁹⁰ Nat'l Ctr. of Educ. Statistics, *Free Lunch*, *supra* note 1088. For Seattle's information, see NW Reg'l Educational Laboratory, *Lessons from the Cities, Part Eight: Urban Northwest: By the Numbers*, at <http://www.nwrel.org/nwedu/winter99/lessons8.html> (last visited May 16, 2005).

¹⁰⁹¹ For Boston's general non-Hispanic white population, see chapter two of this report. For Boston's non-Hispanic population in its public schools, see Nat'l Ctr. of Educ. Statistics, *Free Lunch*, *supra* note 1089.

¹⁰⁹² See *id.*

¹⁰⁹³ The percentage of Black teachers has increased significantly over the past decades, primarily because of aggressive court orders requiring school recruitment to reach at least a 25% Black faculty and 10% of all other minorities. See *Morgan v. Nucci*, 831 F.2d 313, 327-28, 333 (1st Cir. 1987) (hearing a challenge to the faculty recruitment order instituted as a result of *Morgan v. Kerrigan*, 388 F. Supp. 581 (D.Mass.1975)). Well into the late 1980s, more than a decade after the original recruitment order, black faculty had yet to reach the lower 20% threshold. See generally *id.* Black faculty enrollment now is just over the 25% mark, with other minority faculties (Hispanic and Asian) also exceeding the 10% mark slightly at 13%.

¹⁰⁹⁴ See NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., CHARACTERISTICS OF THE 100 LARGEST PUBLIC ELEMENTARY AND SECONDARY SCHOOL DISTRICTS IN THE UNITED STATES: 2001-02 56-57 tbl.20 (2003), [hereinafter NAT'L CTR. FOR EDUC. STATISTICS, 100 LARGEST PUBLIC], available at <http://nces.ed.gov/pubs2003/2003353.pdf> (last visited Mar. 18, 2005).

¹⁰⁹⁵ *Id.*

¹⁰⁹⁶ *Id.*

¹⁰⁹⁷ When Congress enacted the Individuals with Disabilities Education Act (“IDEA”), the federal government provided school districts with money to provide disabled students with a “free appropriate public education” (“FAPE”). FAPE includes the right of each disabled or special education student to receive an “individualized education program” (“IEP”). The number of students in each school district who have an IEP appears to be the way national statistics define who is receiving “special education.” Rachel R. Womack, *Autism and the Individuals with Disabilities Education Act: Are Autistic Children Receiving Appropriate Treatment in our Schools?*, 34 TEX. TECH L. REV. 189, 191 (2002); 20 U.S.C. § 1401(8) (2004); see also U.S. Dep’t of Educ., *A Guide to the Individualized Education Program*, at <http://www.ed.gov/parents/needs/speced/iepguide/index.html> (last visited Mar. 18, 2005) (providing an in depth explanation of IEPs).

¹⁰⁹⁸ See NAT’L CTR. FOR EDUC. STATISTICS, 100 LARGEST PUBLIC, *supra* note 1094, at 35-36 tbl.11.

¹⁰⁹⁹ *Id.*

¹¹⁰⁰ McDuffy v. Sec’y of the Exec. Office, 615 N.E.2d 516, 553 (Mass. 1993).

¹¹⁰¹ Bd. of Educ. v. City of New York, 362 N.E.2d 948, 954 (N.Y. 1977) (“Education is expressly made a State responsibility, and is explicitly exempted from home rule restriction.”) (internal citations omitted).

¹¹⁰² See Eric Hubler, *Vouchers Stricken Down: Colorado School Program Violates State Constitution, Judge Determines*, DENV. POST, Dec. 4, 2003, at A1.

¹¹⁰³ MASS. GEN. LAWS ch. 71, § 20 (2003).

¹¹⁰⁴ See FERMAN, *supra* note 62, at 147.

¹¹⁰⁵ See BOSTON MUN. RESEARCH BUREAU, BUREAU BRIEF: HISTORY OF THE BOSTON SCHOOL COMMITTEE STRUCTURE (1996) [hereinafter BOSTON. MUN. RESEARCH BUREAU, HISTORY]. Although it would be excessively unnecessary to detail all the changes that the school committee underwent, it may be helpful to highlight a few landmarks in its institutional journey. Soon after the school committee’s inception in 1789 through authorizing statute from the General Court, it went from a 21-member committee which included the mayor and the alderman in 1822, to a 74-member committee elected from the wards in 1854, to a 116-member committee after the annexation of Boston’s surrounding communities in 1875. Starting from that same year in 1875, a string of legislation would slowly reduce the committee’s numbers -- first to a 25-member committee, then 24 after eliminating the mayor’s seat in 1885, and down to 5 members in 1905. Although the 5-member structure persisted for more than half a century, in 1981, a referendum instituted a 13-member committee partially elected from districts and partially at-large. Recently, in 1991, the General Court approved a Home Rule Petition from Boston establishing a seven member committee that was, for the first time, entirely appointed by the mayor from a list of nominees provided to him. [is all this info from the source above?]

¹¹⁰⁶ See, e.g., Alan Lupo, *School Committee Format: A Debate Renewed* *Factions in Boston Push Elected vs. Appointed*, BOSTON GLOBE, Mar. 31, 1996, at 7

¹¹⁰⁷ *Id.*

¹¹⁰⁸ See *id.*

¹¹⁰⁹ *Id.*

¹¹¹⁰ *Id.*

¹¹¹¹ See Brian C. Mooney et al., *A Mission Obstructed by Politics: School Committee Fighting Takes Focus off Education*, BOSTON GLOBE, May 22, 1991, at 1.

¹¹¹² See BOSTON MUN. RESEARCH BUREAU, BUREAU BRIEF: WHY THE CHANGE TO THE APPOINTED SCHOOL COMMITTEE? (1996). See also Diego Ribadeneira, *Can Anyone Save the Boston Public Schools?*, BOSTON GLOBE, Sept. 23, 1990, at 16; Mooney et al, *supra* note 1111.

¹¹¹³ BOSTON MUN. RESEARCH BUREAU, SPECIAL REPORT: BUREAU REAFFIRMS SUPPORT FOR APPOINTED SCHOOL COMMITTEE (1990).

¹¹¹⁴ *Id.*

¹¹¹⁵ *Id.*

¹¹¹⁶ Since Boston did not go to a 13-member elected committee until 1984, the 5-member elected committee was also implicated in this study from 1978 to 1984.

¹¹¹⁷ See BOSTON MUN. RESEARCH BUREAU, BUREAU BRIEF: QUESTION 2 -- A CHOICE THAT WILL IMPACT BOSTON'S FINANCES (1996). The \$30 million deficit was in 1981 under a 5-member elected committee. The 13-member committee set its own record with close to a \$13 million deficit in 1989.

¹¹¹⁸ Ribadeneira, *supra* note 1112.

¹¹¹⁹ *Id.* (internal quotation marks omitted).

¹¹²⁰ See Brian Mooney, *Mayor Gets Wakeup Call on School Committee*, BOSTON GLOBE, Dec. 11, 1995, at 17.

¹¹²¹ *Id.*

¹¹²² See *id.* (quoting Secretary of State William F. Galvin).

¹¹²³ See generally *id.*

¹¹²⁴ Mooney et al., *supra* note 1111; see also Lupo, *supra* note 1106.

¹¹²⁵ Mooney, *supra* note 1112.

¹¹²⁶ See 1991 Mass. Acts 108.

¹¹²⁷ See *id.* § 7(c).

¹¹²⁸ See *id.* § 7(a) – (g). The composition of the panel includes four parents: with the Citywide Parents Council, Citywide Educational Coalition, Special Needs Parents Advisory Council, and the Bilingual Education Citywide Parent Advisory Council each selecting one. The panel also includes one teacher selected by the Boston Teacher's Union, one headmaster or principle selected by the Boston Association of School Administrators, a president of a college of university selected by the Chancellor of Higher Education of the Commonwealth, and the Commissioner of Education of the Commonwealth. The one representative from the business community rotates in from another three person panel which includes one individual from the Private Industry Council, the Boston Municipal Research Bureau, and the Boston Chamber of Commerce. See *id.* On top of this, the mayor rounds out the 13-member group by appointing four more individuals of his choosing. See *id.*

¹¹²⁹ *Id.* § 7(a).

¹¹³⁰ See BOSTON MUN. RESEARCH BUREAU, HISTORY, *supra* note 1105.

¹¹³¹ See 1978 Mass. Acts 333.

¹¹³² See 1986 Mass. Acts 701 § 1.

¹¹³³ BOSTON MUN. RESEARCH BUREAU, SPECIAL REPORT: BOSTON MOVES TO IMPROVE SCHOOL GOVERNANCE AND ACCOUNTABILITY (1987) [hereinafter BOSTON MUN. RESEARCH BUREAU, BOSTON MOVES].

¹¹³⁴ 1987 Mass. Acts 613 § 1(b).

¹¹³⁵ *Id.* § 1A(b). The committee does have recourse however. If an appointment or promotion receives objections from the majority of the committee within six days, then it is defeated unless a majority of the school committee subsequently votes to approve it. *Id.* See also Mooney et al., *supra* note 1111.

¹¹³⁶ 1987 Mass. Acts 613 § 1A(e).

¹¹³⁷ *Id.* § 2(a). Collective bargaining agreements and contracts for transportation of students are an exception to this power. *Id.*

¹¹³⁸ *Id.* The school committee can still act after receiving the recommendation, or if the superintendent fails to provide a recommendation within the specified time limit.

¹¹³⁹ See *id.* § 1(a). The power of the school committee to set the salary of the superintendent was actually a recent addition (or return) instituted by the 1987 amendments. Prior to this amendment, the salary set by the school committee required both Mayoral and City Council approval. As one group noted, before this amendment was passed: "Boston [was] the only municipality in the Commonwealth that require[d] local legislative and executive approval of a superintendent's salary." BOSTON MUN. RESEARCH BUREAU, BOSTON MOVES, *supra* note 1133.

¹¹⁴⁰ See, e.g., Mooney et al., *supra* note 1111.

¹¹⁴¹ *Id.*

¹¹⁴² 1987 Mass. Acts 613 § 1D.

¹¹⁴³ Although if the school committee does not take action before a certain date, it is presumed that the recommended budget is approved. *Id.* Taking a look at the statutes regulating the Boston school committee as a whole, it appears that fears of committee inaction due to infighting has structured the

presumption in all circumstances where committee approval is required to be approval unless affirmative action is taken.

¹¹⁴⁴ See Mooney et al., *supra* note 1111.

¹¹⁴⁵ See BOSTON MUN. RESEARCH BUREAU, SPECIAL REPORT: COMPARING BOSTON'S SCHOOL COMMITTEE STRUCTURE (1997).

¹¹⁴⁶ See Educ. Comm'n of the States, *Local School Boards*, at <http://mb2.ecs.org/reports/Report.aspx?id=170> (last visited May 26, 2005).

¹¹⁴⁷ Nat'l League of Cities, *About Cities: City School Districts*, at http://www.nlc.org/about_cities/cities_101/130.cfm (last visited May 26, 2005).

¹¹⁴⁸ See discussions in chapters four and five.

¹¹⁴⁹ Ford, San Francisco, *supra* note 283, at 56.

¹¹⁵⁰ See *id.*

¹¹⁵¹ *Id.*

¹¹⁵² *Id.* Two reasons lead to the fiscal control of all school districts by the state: "first, the *Serrano v. Priest* ruling, required the state to equalize resources across school districts. The second, Proposition 13, shifted control over what had been the main source of school financing, the property tax, from local governments to the state. The combined effect was to move control over education funding from local school districts to state government." *Id.*

¹¹⁵³ See *id.*

¹¹⁵⁴ See *id.* at 57.

¹¹⁵⁵ ANNE MITCHELL ET AL., FINANCING CHILD CARE IN THE UNITED STATES 19 (2001), available at http://www.wkkf.org/Pubs/Devolution/EMKF_Child_Care_Financing_00331_02746.pdf (last visited May 26, 2005).

¹¹⁵⁶ See *id.* at 19-20.

¹¹⁵⁷ See Aoki, Seattle, *supra* note 285, at 26.

¹¹⁵⁸ See *id.*

¹¹⁵⁹ See, e.g., Seattle Public Schools, *Levy Information*, at http://www.seattleschools.org/area/levy-info/Levy_Overview.htm (last visited May 26, 2005).

¹¹⁶⁰ See Aoki, Seattle, *supra* note 285, at 26.

¹¹⁶¹ See *id.* ("Despite the school board's autonomy, it is limited to a relatively small policy role because of the extensive state and federal laws the schools must satisfy.").

¹¹⁶² *Id.* at 27.

¹¹⁶³ CITY OF SEATTLE, FAMILIES AND EDUCATION LEVY: PROGRESS REPORT 2003 4 (2003), available at http://www.ci.seattle.wa.us/neighborhoods/education/FE_Levy_090203.pdf (last visited May 26, 2005).

¹¹⁶⁴ See Aoki, Seattle, *supra* note 285, at 27.

¹¹⁶⁵ *Id.*

¹¹⁶⁶ *Id.*

¹¹⁶⁷ See *id.* In Atlanta, state law also requires the separation of the school system from the city government. The district's elected school board appoints the district's superintendent and, under Georgia Constitution, operates pursuant to its own charter. Buzbee, Atlanta, *supra* note 508, at 119. All changes to the charter, with the exception of compensation, must be approved by the state's General Assembly. *Id.* The school district has its own independent power to levy a property tax to fund the system, and, with voter approval, may also impose a 1 percent sales tax to fund special education-related capital projects. CATHERINE C. SIELKE, GEORGIA 1, <http://nces.ed.gov/edfin/pdf/StFinance/Georgia.pdf> (last visited May 26, 2005).

¹¹⁶⁸ See David W. Meinecke & David W. Adamany, *School Reform in Detroit and Public Act 10: A Decisive Legislative Effort With an Uncertain Outcome*, 47 WAYNE L. REV. 9, 16-19 (2001). The Chicago school system has gone through several financial crises during those decades, each prompting the state to step in and institute different governing structures. For example, in 1980, the School Finance Authority was established to resuscitate the failing school budget and keep schools from closing. See generally Polich v. Chicago Sch. Fin. Auth., 402 N.E.2d 247 (Ill. 1980). The Act gave the Authority taxing authority as well as supervisory control over the fiscal affairs of the Chicago Board of

Education. *Id.* at 248. The Illinois Supreme Court uphold the legislative creation of the Authority, rejecting the argument that it impermissibly intruded on Chicago's home rule authority. *Id.* at 257. A corporate style governance board made up of five Board of Trustees and a new position of Chief Executive Officer was tried in the mid-1990s and set to expire at the end of the decade. Although the format was drafted with a sundown provision, there were indicia of its success: "a balanced budget, a new teachers' contract, and improving test scores." *See* Reynolds, Chicago, *supra* note 229, at 46.

¹¹⁶⁹ 105 ILL. COMP. STAT. 5/34-3 (2002).

¹¹⁷⁰ Compare *id.* with Jacquelyn Heard, *Hearing Set on Raising School Levy*, CHIC. TRIB., Nov. 26, 1992, at C12 (describing the nominating panel when it still existed).

¹¹⁷¹ *See* Reynolds, Chicago, *supra* note 229, at 46.

¹¹⁷² Educ. Comm'n of the States, *School-Based Management* (2001), at <http://www.ecs.org/clearinghouse/26/58/2658.htm> (last visited Mar. 19, 2005).

¹¹⁷³ Internal fragmentation in the form of Local School Councils seems to be a feature of large school districts. For example, New York, which as a school system of comparable size to Chicago, hires numerous separate regional superintendents to manage their schools across internally created school regions.

¹¹⁷⁴ *See* Briffault, New York, *supra* note 139, at 83.

¹¹⁷⁵ *Id.* at 83-84.

¹¹⁷⁶ *Id.* at 84.

¹¹⁷⁷ *See* Gail Robinson, *School Reforms*, GOTHAM GAZETTE, July 5, 2004, available at <http://www.gothamgazette.com/article//20040705/200/1026> (last visited May 28, 2005).

¹¹⁷⁸ *See* Briffault, New York, *supra* note 139, at 83.

¹¹⁷⁹ Julie Zwibelman, Note, *Broadening the Scope of School Finance and Resource Comparability Litigation*, 36 HARV. C.R.-C.L. 527, 535 (2001).

¹¹⁸⁰ *See generally* chs. 4, 5.

¹¹⁸¹ *See* Reynolds, Chicago, *supra* note 229, at 82.

¹¹⁸² *See, e.g., id.* at 46.

¹¹⁸³ *See* Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326 (N.Y. 2003).

¹¹⁸⁴ Serrano v. Priest, 557 P.2d 929 (Cal. 1976).

¹¹⁸⁵ Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978).

¹¹⁸⁶ *See* SIELKE, *supra* note 1168, at 1.

¹¹⁸⁷ DONALD R. JOHNSON, NAT'L CTR. FOR EDUC. STATISTICS, ILLINOIS 1, available at <http://nces.ed.gov/edfin/pdf/StFinance/Illinois.pdf> (last visited May 28, 2005).

¹¹⁸⁸ *See* Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005 (Colo. 1982).

¹¹⁸⁹ 557 P.2d at 951-58.

¹¹⁹⁰ 411 U.S. 1 (1973).

¹¹⁹¹ *See* Campaign for Fiscal Equity, Inc. v. State, 744 N.Y.S.2d 130, 138 (N.Y. App. Div. 2002).

¹¹⁹² *See* Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326 (N.Y. 2003).

¹¹⁹³ *See* Campaign for Fiscal Equity, Inc., *Ensuring All Children the Opportunity for an Adequate Education: A Costing Out Primer*, http://www.accessednetwork.org/resource_center/research/CostingOutPrimer.pdf (last visited May 28, 2005).

¹¹⁹⁴ DIANE W. CIPOLLONE, CAMPAIGN FOR FISCAL EQUITY, INC., *DEFINING A "BASIC EDUCATION": EQUITY AND ADEQUACY LITIGATION IN THE STATE OF WASHINGTON* 25-28 (1998), available at http://www.schoolfunding.info/resource_center/research/WASHINGTON.PDF (last visited May 28, 2005).

¹¹⁹⁵ *See id.*

¹¹⁹⁶ GA. CODE ANN. §§ 20-2-130 to - 131 (2000).

¹¹⁹⁷ SIELKE, *supra* note 1168 at 1.

¹¹⁹⁸ McDuffy v. Secretary of Executive Office, 615 N.E.2d 516, 518 (Mass. 1993).

¹¹⁹⁹ *See id.*

¹²⁰⁰ *Id.*

¹²⁰¹ *Id.*
¹²⁰² *See generally id.*
¹²⁰³ *Id.* at 552.
¹²⁰⁴ *Id.* at 554-56.
¹²⁰⁵ 1 OFFICE OF BUDGET MANAGEMENT, CITY OF BOSTON, OPERATING BUDGET FISCAL YEAR 2006, at
¹⁰⁴ (2005), *available at*
http://www.cityofboston.gov/budget/pdfs/04_Revenue_Estimates_and_Analysis.pdf (last visited May
28, 2005).
¹²⁰⁶ *See id.* at 117, *available at*
http://www.cityofboston.gov/budget/pdfs/05_Innovations_in_Education.pdf (last visited May 28,
2005).
¹²⁰⁷ For a detailed summary of the operations of the formula, see Report of the Foundation Budget
Review Commission, at <http://www.state.ma.us/legis/reports/foundation.htm#figure15> (last visited
May 28, 2005). Nevertheless, because the formula is itself regulatory, it should be noted that the
governor has proposed recent changes to the formula calculation.
¹²⁰⁸ *See id.*
¹²⁰⁹ 1 OFFICE OF BUDGET MANAGEMENT, *supra* note 1206, at 117.
¹²¹⁰ Press Release, Boston School Committee, Boston School Committee and Superintendent Urge
Governor to Increase State Aid to Schools (Mar. 31, 2003), at
http://boston.k12.ma.us/bps/news/news_3_31b_03.asp (last visited May 28, 2005).
¹²¹¹ *Id.*
¹²¹² *Id.*
¹²¹³ *Id.*
¹²¹⁴ Megan Tench, *Budget Hits Some Schools Hard*, BOSTON GLOBE, Mar. 25, 2004, at B10.
¹²¹⁵ *Id.*
¹²¹⁶ *Id.* (quoting Susan Naimark).
¹²¹⁷ No. 02-2978, 2004 WL 877984, at *3 (Mass. Super. Ct. Apr. 26, 2004).
¹²¹⁸ *See generally id.*
¹²¹⁹ *See* *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134 (Mass. 2005).
¹²²⁰ Goodschooolsformass.org, *Hancock v. Driscoll*, at <http://www.goodschooolsformass.org/> (last visited
May 28, 2005).
¹²²¹ Compare Mass. Dep’t of Educ., *Net School Spending and Foundation Budget, FY04 and FY05*
(listing Boston’s FY05 foundation budget as \$574,863,382), at
<http://finance1.doe.mass.edu/SchFin/chapter70/comply04.xls> (last visited May 28, 2005), with 1
OFFICE OF BUDGET MANAGEMENT, *supra* note 1205, at 8 (proposing \$680.15 million in FY05
education funds), available at http://www.cityofboston.gov/budget/pdfs/02_Summary_Budget.pdf (last
visited May 28, 2005). When doing the physical math, Boston ends up at just over 118% of the
foundation budget.
¹²²² *See* MASS. GEN. LAWS ch. 69, §§ 1D, 1E (2003). The Current frameworks can be found at Mass.
Dep’t of Educ., *Massachusetts Curriculum Frameworks* [hereinafter Mass. Dep’t of Educ., *Current*
Curriculum Frameworks], at <http://www.doe.mass.edu/frameworks/current.html> (last visited May 28,
2005).
¹²²³ *Id.* § 1D.
¹²²⁴ MASS. GEN. LAWS ch. 71, §§ 2, 3 (2003).
¹²²⁵ MASS. GEN. LAWS ch. 69, §§ 1G, 1J (2003).
¹²²⁶ 20 U.S.C. § 6301 (2002).
¹²²⁷ *See* Mass. Dep’t of Educ., *Current Curriculum Frameworks*, *supra* note 1222 (most recent
framework in August 2003); *see also* Mass. Dep’t of Educ., Curriculum Framework Archives (first
frameworks adopted in 1996), at <http://www.doe.mass.edu/frameworks/archive.html> (last visited May
28, 2005).

¹²²⁸ MASS. DEP'T OF EDUC., SUPPLEMENT TO THE MASSACHUSETTS ENGLISH LANGUAGE ARTS CURRICULUM FRAMEWORK 2 (2004), available at <http://www.doe.mass.edu/frameworks/ela/0504sup.pdf> (last visited May 28, 2005).

¹²²⁹ Hancock v. Driscoll, No. 02-2978, 2004 WL 877984, at *126 (Mass. Super. Ct. Apr. 26, 2004).

¹²³⁰ MASS. GEN. LAWS ch.69, § 1I (2003).

¹²³¹ *Id.*

¹²³² Andover Public Schools, *Overview of the MCAS Program*, at <http://www.aps1.net/District/MCAS/mcas2.htm> (last visited May 29, 2005).

¹²³³ BOSTON FOUNDATION, CREATIVITY AND INNOVATION: A BRIDGE TO THE FUTURE, A SUMMARY OF THE BOSTON INDICATORS REPORT 2002 § 4.5.2 (2002), available at <http://www.tbf.org/indicators/education/indicators.asp?id=510> (last visited May 29, 2005); see also ROBERT D. GAUDET, EFFECTIVE SCHOOL DISTRICTS IN MASSACHUSETTS (2002), available at http://www.edbenchmarks.org/schoolimprovement/MCAS_2001_Report.pdf (last visited May 29, 2005).

¹²³⁴ *Id.*

¹²³⁵ *Id.*

¹²³⁶ *Id.*

¹²³⁷ Ga. Dep't of Educ., *Georgia's Testing Program*, at <http://www.doe.k12.ga.us/curriculum/testing/programs.asp> (last visited May 29, 2005).

¹²³⁸ *Id.*

¹²³⁹ See Chicago Public School, 2004 CPS School Accountability System, available at <http://acctplan.cps.k12.il.us/pdfs/CPS%20Accountability%20System%20presentation%20-%202004.pdf> (last visited May 29, 2005).

¹²⁴⁰ Press Release, Chicago Public Schools, 75 Schools Rise to Challenge, Scale New Probation Bar (Sept. 24, 2004), http://www.cps.k12.il.us/AboutCPS/PressReleases/September_2004/Probation_Challenge_Schools.htm (last visited May 29, 2005).

¹²⁴¹ Boston Public Schools, *The Boston Public Schools at a Glance*, at <http://boston.k12.ma.us/bps/bpsglance.asp> (last visited May 29, 2005).

¹²⁴² BOSTON MUN. RESEARCH BUREAU, INC., BOSTON: FACTS AND FIGURES 83 (2002) [hereinafter BOSTON MUN. RESEARCH BUREAU, FACTS AND FIGURES].

¹²⁴³ Erik Lacitis, *Nowadays, Parents Give the Seattle Public Schools a Failing Grade*, SEATTLE TIMES, Feb. 13, 2003, at D1.

¹²⁴⁴ Briffault, New York, *supra* note 139, at 12.

¹²⁴⁵ Schragger, Denver, *supra* note 140, at 19.

¹²⁴⁶ Reynolds, Chicago, *supra* note 229, at 25.

¹²⁴⁷ Ford, San Francisco, *supra* note 283, at 8.

¹²⁴⁸ BOSTON MUN. RESEARCH BUREAU, FACTS AND FIGURES, *supra* note 1243, at 83; see also Jonathan Finer, *Boston's Racial Barriers Slow to Fall*, WASH. POST, Sept. 16, 2003, at A2 ("Boston also stood out from the rest of the 330 urban centers . . . analyzed because almost half of all white children who live in the city center attend private schools.").

¹²⁴⁹ See *supra* ch. 2.

¹²⁵⁰ Cindy Rodriguez, *Minority Students Treading Path to Private Schools*, BOSTON GLOBE, Feb. 16, 2002, at B1.

¹²⁵¹ *Id.*

¹²⁵² See Megan Tench, *Group Weights Future of School Choice*, BOSTON GLOBE, Jan. 11, 2004, at B1.

¹²⁵³ See *id.*

¹²⁵⁴ Joseph M. O'Keefe, *What Research Tells Us About the Contribution of Sectarian Schools*, 78 U. DET. MERCY L. REV. 425, 434 (2001). Of course, there may be variation among types of private schools on this score.

¹²⁵⁵ *Id.* at 428.

¹²⁵⁶ Michele Kurtz, *Catholic Schools Struggle in the City*; BOSTON GLOBE, Mar. 9, 2003, at A1; Suzanne Sataline, *Catholic Schools Turn to Marketing to Survive*, BOSTON GLOBE, Apr. 17, 2004, at B1.

¹²⁵⁷ See MASS. GEN. LAWS ch. 76, § 1 (2003). Home school proposals must also garner the same approval from the school committee under the same standards.

¹²⁵⁸ See *Care & Protection of Charles*, 504 N.E.2d 592 (Mass. 1987). Note that this kind of approval has not received the same interpretation in other states. For example, New York has operated without mandatory registration for private schools since its state statute was struck down in 1948 for being an improper delegation of the legislature to a state administrative agency. *Packer Collegiate Institute v. Univ. of New York*, 81 N.E.2d 80 (N.Y. 1948). Nevertheless, a series of strict guidelines ensure that private schools comply with state educational requirements.

¹²⁵⁹ See *New Life Baptist Church Acad. v. Town of East Longmeadow*, 885 F.2d 940 (1st Cir. 1989).

¹²⁶⁰ Opinion of the Justices, 259 N.E.2d 564 (Mass. 1970).

¹²⁶¹ SchoolChoiceInfo.org, Education Tax Credits and Deductions, at http://www.schoolchoiceinfo.org/facts/index.cfm?fl_id=7 (last visited May 29, 2005).

¹²⁶² See *Griffith v. Bower*, 747 N.E.2d 423 (Ill. App. Ct. 2001); *Toney v. Bower*, 744 N.E.2d 351 (Ill. App. Ct. 2001).

¹²⁶³ *Owens v. Colorado Congress of Parents, Teachers, & Students*, 92 P.3d 933 (Colo. 2004).

¹²⁶⁴ *Id.* at 936.

¹²⁶⁵ See *id.*

¹²⁶⁶ These purposes, among others, are outlined in the General Laws. See MASS. GEN. LAWS ch. 71, § 89(d) (2003).

¹²⁶⁷ Marc Kenen, Charter School Leadership Council, *Another Round of Education Reform in Massachusetts* (2005), at http://www.charterschoolleadershipcouncil.org/views_archive/Kenen_Feb_2005.asp (last visited May 29, 2005).

¹²⁶⁸ Scott S. Greenberger, *Romney backed on Charter Schools, Veto Sustained on Moratorium*, BOSTON GLOBE, July 21, 2004, at A1.

¹²⁶⁹ MASS. GEN. LAWS ch. 71, § 89(a).

¹²⁷⁰ *Id.* § 89(e).

¹²⁷¹ *Id.*

¹²⁷² Indeed, charter schools are specifically prohibited from receiving assistance from the school construction fund. See *id.* § 89 (mm).

¹²⁷³ According to the statute, a charter school may be located within an existing school building or other public building leased for its use. *Id.* § 89(g). Nevertheless, because of the tension and politics surrounding charter school in general, this is exceptionally rare.

¹²⁷⁴ *Id.* § (j)(6).

¹²⁷⁵ AUDITOR OF THE COMMONWEALTH, INDEPENDENT STATE AUDITOR'S REVIEW OF CERTAIN ASPECTS OF CHARTER SCHOOL FINANCIAL RESULTS AND FINANCIAL REPORTING: FISCAL YEARS 2002 AND 2003 1 (2004), available at <http://www.mass.gov/sao/charterschoolsfinancesreport04.pdf> (last visited May 29, 2005).

¹²⁷⁶ Charter School Office, Mass. Dep't of Educ., *Charter School Pre-Enrollment for the 2004-2005 School Year*, at <http://www.doe.mass.edu/charter/reports/2004/enroll.xls> (last visited June 6, 2005).

¹²⁷⁷ See *supra* note 1242.

¹²⁷⁸ MASS. GEN. LAWS ch. 71, § 89(bb).

¹²⁷⁹ See *id.* § 89(n).

¹²⁸⁰ *Id.* § 89(l).

¹²⁸¹ *Id.* § 89(m).

¹²⁸² See *id.* § 89(mm).

¹²⁸³ See Richard Weizel, *Experiment in Education with High Hopes and 1,000 Students, Connecticut Launches its First Charter Schools*, BOSTON GLOBE, Sept. 28, 1997, at F5.

¹²⁸⁴ See *id.*

¹²⁸⁵ MASS. GEN. LAWS ch. 71, § 89(l).

¹²⁸⁶ Connie Paige, *Charter Schools Draw Raves, Hits Test Scores High, But Some See Flaws*, BOSTON GLOBE, Mar. 7, 2004 at G7 (internal quotation marks omitted).

¹²⁸⁷ Anne Wheelock, *Boston Charter School Enrollments Favor Most Advantaged Students* (2004), at http://www.massparents.org/charter_schools/boston-enrollment.htm (last visited May 29, 2005).

¹²⁸⁸ *Id.*

¹²⁸⁹ *Id.*

¹²⁹⁰ Anne Wheelock, *Boston's Charter Schools Show Concentrated Enrollment of African-American Students, Underenrollments of Asian and Latino Students*, at http://www.massparents.org/charter_schools/concentrated-enrollment.htm (last visited May 29, 2005).

¹²⁹¹ *See id.*

¹²⁹² *Id.*

¹²⁹³ Kathleen A. Kelley & Phillip F. Flaherty, Editorial, *Are Charter Schools Worth the Cost?*, BOSTON GLOBE, Apr. 17, 2004, at A11.

¹²⁹⁴ Kristin Ventresca, Editorial, *Charter Schools Work, She Argues, So Where's the Beef?*, BOSTON GLOBE, Apr. 11, 2004, at 7.

¹²⁹⁵ *See supra* note 1269.

¹²⁹⁶ *See* Peter Schworm, *Urban Charter Schools Score a Win; Beyond Cities, Lesser Showing*, BOSTON GLOBE, May 10, 2004, at A1 (“More than 60 percent of urban charter schools in Massachusetts outpaced comparable schools in their cities on the most recent MCAS exams.”).

¹²⁹⁷ *See* Paige, *supra* note 1287.

¹²⁹⁸ *See* MASSACHUSETTS DEPARTMENT OF EDUCATION, CHARTER SCHOOL PRE-ENROLLMENT FOR THE 2006-2007 SCHOOL YEAR (2006) 1, available at http://finance1.doe.mass.edu/charter/enrollfy06_cha.xls (last visited Apr. 5, 2006).

¹²⁹⁹ *Id.*

¹³⁰⁰ *See id.* For example, in February of 2004, the Fulton County school board rejected five of six proposed charter schools. Its reasons for rejection ranged from “lack of specificity in the application” to “an approach prohibited by state law.” *Id.*

¹³⁰¹ RANDY DEHOFF, COLORADO CHARTER SCHOOLS 31 (2003), available at http://www.nasbe.org/Standard/14_Autumn2003/dehoff.pdf (last visited May 29, 2005).

¹³⁰² *See* Karen Rouse, *Charter-School Creation Discussed*, DENV. POST, Mar. 2, 2004, at B3.

¹³⁰³ The first two charter schools that petitioned directly to the voters for more funds were defeated by a wide margin. *See* Monte Whaley & John Ingold, *2 Charter Schools Study Reasons for Election Losses*, DENV. POST, Nov. 10, 2003, at B01. Yet attempts by Denver charter schools to acquire bond issues directly from the voters were successful. *Id.*

¹³⁰⁴ *See* LOUANN B. PALMER & REBECCA GAU, THOMAS B. FORDHAM INSTITUTE, CHARTER SCHOOL AUTHORIZING: ARE STATES MAKING THE GRADE? 48-50 (2003), available at <http://www.asu.edu/copp/morrison/ChartAuth.pdf> (last visited May 29, 2005).

¹³⁰⁵ *See* Ctr. for Educ. Reform, Illinois, at <http://www.edreform.com/index.cfm?fuseAction=cLaw&stateID=25&altCol=2> (last visited May 29, 2005).

¹³⁰⁶ 105 ILL. COMP. STAT. 5/27A-4 (1997).

¹³⁰⁷ *Id.*

¹³⁰⁸ 2003 Ill. Legis. Serv. 93-3 (West 2003).

¹³⁰⁹ Chicago Public Schools, *Charter schools Office*, at <http://www.cps.k12.il.us/schools/Charter/charter.html> (last visited May 29, 2005).

¹³¹⁰ *See* Press Release, Chicago Public Schools, CPS CEO Duncan Calls for More Charter Schools; State Sen. Emil Jones, Jr., Recognized for his Support of Charter Schools, at http://www.cps.k12.il.us/AboutCPS/PressReleases/March_2003/charter_3_7_2003.html (last visited May 29, 2005).

¹³¹¹ *Id.*

¹³¹² Ctr. for Educ. Reform, *supra* note 1307.

- ¹³¹³ See Ctr. for Educ. Reform, *California*, at <http://www.edreform.com/index.cfm?fuseAction=cLaw&stateID=10&altCol=2> (last visited May 29, 2005).
- ¹³¹⁴ See *id.*
- ¹³¹⁵ Charter Schs. Dev. Ctr., *Profiles Search*, at <http://profiles.cacharterschools.org/action.lasso> (last visited May 29, 2005).
- ¹³¹⁶ Linda Shaw, *Backers are Eager to Get New Schools Off Ground, Passage of Education Bill Creates Buzz*, SEATTLE TIMES, Mar. 12, 2004, at B1; Jennifer Lloyd, *Charter Schools Approved*, SEATTLE POST-INTELLIGENCER, Mar. 11, 2004, at A1.
- ¹³¹⁷ Aoki, Seattle, *supra* note 285, at 30.
- ¹³¹⁸ WASL Passed on Election Day, SEATTLE TIMES, Nov. 5, 2004, at B6 (“Referendum 55, the charter-schools proposal, suffered a resounding loss.”).
- ¹³¹⁹ Kurtz, *supra* note 1257.
- ¹³²⁰ See Heather Knight, San Francisco Public School Enrollment Down 5% in 4 Years, The Drop is Costly – State Funding Tied to Attendance, S.F. CHRON., Mar. 18, 2004, at B4.
- ¹³²¹ Paul Donsky, APS Enrollment Now Trails Clayton, ATLANTA J. & CONST., Sept. 23, 2004, at 3.
- ¹³²² Editorial, A Painful Need to Shut Schools, ATLANTA J. & CONST., May 17, 1990, at A18.
- ¹³²³ Bill Kossen, 100 Years in the Northwest, SEATTLE TIMES, Jan. 1, 2000, at D6.
- ¹³²⁴ Chicago Public Schools Report 2,400-Student Enrollment Jump, CHIC. TRIB., Oct. 10, 2002, at 2.
- ¹³²⁵ Patrick Reardon & R. Bruce Dold, No Clout and No Concern Add Up to No Education, CHI. TRIB., May 17, 1998, at C1.
- ¹³²⁶ Michael Moylneux et al., Snapshots of New York: 1993 and 2003, N.Y. TIMES, Dec. 14, 2003, § 14, at 13.
- ¹³²⁷ Thomas J. Lueck, Immigrant Enrollment Rises in New York City Schools, N.Y. TIMES, Apr. 16, 1993, at B1.
- ¹³²⁸ Julie Poppen, DPS Enrollment ‘Holds Up,’ ROCKY MTN. NEWS, Nov. 22, 2003, at 14A.
- ¹³²⁹ See *id.*; see also Holly Yettick, Dwindling Diversity, Ethnic Groups Tend to Cluster in DPS’ Post-Busing Era, ROCKY MTN. NEWS, May 26, 2001, at 25A.
- ¹³³⁰ Metro. Council for Educ. Opportunity, Inc., *Chronology of the Early Developments of METCO*, at <http://metcoinc.org/history.htm> (last visited May 29, 2005).
- ¹³³¹ See Metro. Council for Educ. Opportunity, Inc., *Mission*, at <http://metcoinc.org/aboutus.htm> (last visited May 29, 2005).
- ¹³³² See *supra* note 1241.
- ¹³³³ See Metro. Council for Educ. Opportunity, Inc., *The Harvard Study: Massachusetts’ Investment in the METCO Program Returns Big Dividends*, at <http://www.metcoinc.org/news.htm> (last visited May 29, 2005).
- ¹³³⁴ See *id.* (stating that the wait list is around 15,500). But see Derrick Z. Jackson, *With Full Funding, METCO Could Shine*, BOSTON GLOBE, Apr. 28, 2004, at A13 (claiming that waitlist is at 16,500).
- ¹³³⁵ See Ric Kahn, *METCO Forever: It was Supposed to be a Three-Year Band-Aid, but 36 Years Later, Another Generation of Boston Children is Vying to Escape City Schools Through Suburban Learning. When Won’t it Be Worth it?*, BOSTON GLOBE, Nov. 10, 2002, at 1 (“25.7 percent of parents surveyed enrolled their children in Metco before they had reached age 1.”).
- ¹³³⁶ *Id.*
- ¹³³⁷ GARY ORFIELD ET AL., CITY-SUBURBAN DESEGREGATION: PARENT AND STUDENT PERSPECTIVES IN METROPOLITAN BOSTON 11 (1997), available at <http://www.civilrightsproject.harvard.edu/research/metro/CitySuburbanDeseg.pdf> (last visited May 29, 2005).
- ¹³³⁸ See Kahn, *supra* note 1337.
- ¹³³⁹ *Id.*
- ¹³⁴⁰ *Id.*
- ¹³⁴¹ See James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L. J. 2043, 2070 (2002) (“[A] very small number of suburban districts participate in programs that allow a

limited number of urban students to attend suburban schools. These include suburban districts surrounding Boston and Springfield, Massachusetts, Hartford, Rochester, Milwaukee, and St. Louis.”); see also James E. Ryan, Brown, School Choice, and the Suburban Veto, 90 VA. L. REV. 1635, 1647 (2004); Larry Tye, St. Louis Provides a Lesson in Suburbs-to-City Schooling, BOSTON GLOBE, Dec. 5, 1995, at 1.

¹³⁴² RICHARD D. KAHLENBERG, ALL TOGETHER NOW: THE CASE FOR ECONOMIC INTEGRATION AND THE PUBLIC SCHOOLS 131 (2001).

¹³⁴³ DAVID RUSK, CITIES WITHOUT SUBURBS 98 (3d ed. 2003).

¹³⁴⁴ Metro. Council for Educ. Opportunity, Inc., *Fact About the Success of the METCO Program*, at www.metcoinc.org/success.htm (last visited May 29, 2005).

¹³⁴⁵ See Boston Public Schools, *Focus on Children II: 2001-2006*, at <http://boston.k12.ma.us/teach/foc.asp> (last visited May 30, 2005).

¹³⁴⁶ BOSTON SCH. COMM., FOCUS ON CHILDREN II: BOSTON’S EDUCATION REFORM PLAN: 2001-2006 2-4 (2001), available at <http://boston.k12.ma.us/teach/FocusOnChildrenII.doc> (last visited Jun 3, 2005).

¹³⁴⁷ Megan Tench, *Long-Delayed Bargaining Resumes for BTU, School Leaders Sides Deadlocked as a Prime Issue Remains Pay Hikes*, BOSTON GLOBE, Feb. 13, 2004, at B3.

¹³⁴⁸ BOSTON SCH. COMM., *supra* note 1348, at 2.

¹³⁴⁹ See Anand Vaishnav, *Budget Cuts Bring Larger Class Sizes*, BOSTON GLOBE, Sept. 11, 2003, at B1.

¹³⁵⁰ See Nanette Asimov, *Special Permits Sought for Underqualified Teachers, Push to Hire New Staff for Small Classes*, S.F. CHRON., Sept. 2, 1996, at A17.

¹³⁵¹ Joan McRobbie, WestEd Policy Support Program, *Smaller Classes Aim to Launch Early Literacy* (1996), at http://www.wested.org/online_pubs/focus_fall96/csr.htm (last visited May 30, 2005).

¹³⁵² *Id.*

¹³⁵³ One study, however, indicated that reduction in class size only led to a small increase student performance. See AMER. YOUTH POL’Y FORUM, RAISING MINORITY ACADEMIC ACHIEVEMENT: CLASS SIZE REDUCATION, at <http://www.aypf.org/rmaa/pdfs/ClassSizeRed.pdf> (last visited May 30, 2005). Another report explained that this may have been caused by the fact that the initiative ushered in an increased amount of inexperienced and untrained teachers to fill the gap. See PUB. POL’Y INST. OF CAL., RELATIONSHIPS BETWEEN CLASS SIZE REDUCATIONS, NEW TEACHERS, AND STUDENT ACHIEVEMENT (2002), http://www.ppic.org/content/pubs/RB_602CJRB.pdf (last visited May 30, 2005). San Francisco Unified School District did claim that test gains were a result of the reduction. See Press Release, San Francisco Unified Sch. Dist., SFUSD Students Shine on the Star Test: Growing Evidence that Smaller Classes Make a Difference (July 17, 2000, available at http://portal.sfusd.edu/template/default.cfm?page=news.story&story_id=173 (last visited May 30, 2005).

¹³⁵⁴ See Seattle Pub. Schs., *I-728: Student Achievement Fund*, at <http://www.seattleschools.org/area/govt/index.xml> (last visited May 30, 2005).

¹³⁵⁵ See Memorandum from Stephen Mark & Lorie Logan, to Douglas Criscitello (Aug. 24, 1998), at <http://www.ibo.nyc.ny.us/iboreports/csrmemo.html> (last visited May 30, 2005). Although Georgia attempted to shrink class sizes as a key component of its comprehensive “A Plus Education Reform Act of 2000,” the plan is currently delayed, for grades four through twelve, until the 2004 - 2005 school year due to state budget cuts. See Jill Hay, *Maximum Class Size*, PAGEONE, Jan./Feb. 2005, at 19. (In addition to providing additional funds, the Georgia plan also sought to implement penalties for schools that failed to comply with the maximum limit the state wanted to impose.) Georgia’s fiscal troubles may delay the program further, and recent economic downturns threaten the more successful efforts elsewhere as well. Federal grants for class size reduction were eliminated in 2002, see Nat’l Educ. Assoc., *Class Size*, at <http://www.nea.org/classsize/> (last visited May 30, 2005), and cities like New York and San Francisco are starting to cut back their funding and subsidization for this purpose.

¹³⁵⁶ BOSTON PUBLIC SCHOOLS, BPS FACTS: THE BOSTON PUBLIC SCHOOLS AT A GLANCE 2005-06, at 2 (2006), at <http://boston.k12.ma.us/bps/BPSglance.pdf> (last visited April 5, 2006).

Note: The student-teacher ration is still 13-1, so the article text accompanying Footnote 1357 need not change.

¹³⁵⁷ Nat'l Ctr. for Educ. Statistics, *Search for Public Schools Districts*, at <http://nces.ed.gov/ccd/districtsearch/> (June 2, 2005).

¹³⁵⁸ BOSTON PUBLIC SCHOOLS, *supra* note 1358.

¹³⁵⁹ See SAN FRANCISCO UNIFIED SCH. DIST., SUMMARY OF SFUSD 2004-2005 BUDGET PLANNING PROCESS 15 (2004), <http://orb.sfusd.k12.ca.us/forms/BudgetPresent.pdf> (last visited Jun 2, 2005).

¹³⁶⁰ The average class size in Atlanta is slightly over 14 to 1. Nat'l Ctr. for Educ. Statistics, *supra* note 135759.

¹³⁶¹ See Atlanta Parent, 2005 Public School Profiles, at <http://www.atlantaparent.com/schools/publicschoolinfo.html> (last visited June 2, 2005).

¹³⁶² See KAREN HAWLEY MILES, RETHINKING SCHOOL SPENDING: A CASE STUDY OF BOSTON PUBLIC SCHOOLS (1993). Although written more than a decade ago, the figures that she works with have remained the same.

¹³⁶³ This statistic is also higher when compared to other Massachusetts communities. The statewide average of special education students is just above 15%. See MASS. DEP'T OF EDUC., MASSACHUSETTS STUDENTS WITH DISABILITIES ANNUAL REPORT: 2002-2003 2 (2003), available at <http://www.doe.mass.edu/sped/2003/annual.pdf> (last visited June 2, 2005). Furthermore, the identification of special education students correlates relatively well with the racial and ethnic breakdown of student enrollment. Although African-Americans and Hispanics experienced a slightly higher rate of special education identification, the figures across the board are relatively close. See *id.* at 5.

¹³⁶⁴ BOSTON PUBLIC SCHOOLS, *supra* note 1357, at 2. This is also significantly higher than the state average, which remains steady at 21%. MASS. DEP'T OF EDUC., *supra* note 1364, at 10. Yet considering the lower percentage of special education students across the state, it appears that the overall burden per student is equally hard on other districts within Massachusetts as well.

¹³⁶⁵ SEATTLE PUBLIC SCHOOLS, SEATTLE PUBLIC SCHOOLS 2004-05 RECOMMENDED BUDGET 58 (2004), available at <http://www.seattleschools.org/area/finance/recommendedbudget05.pdf> (last visited Mar. 18, 2005) (providing the raw numbers from which this calculation is made).

¹³⁶⁶ See *id.* (providing the raw numbers from which this calculation is made).

¹³⁶⁷ James Vaznis, *Day in the Life of a School CEO is a Long One for Andover Bach, It's All About Numbers*, BOSTON GLOBE, Dec. 21, 2003, at 9.

¹³⁶⁸ Anand Vaishnav, *More Funds Expected for Special Ed*, BOSTON GLOBE, Nov. 15, 2005, at B7.

¹³⁶⁹ See *id.* The 35% rate was higher than initial projects however that promised slightly over 27%. *Id.* After a series of complaints from superintendents, the "state officials recalculated how much money they could allocate and pegged the reimbursement rate at 35 percent. That's because they freed up about \$7 million to use for new claims, instead of using it to cover excess special-education expenses from last year." *Id.*

¹³⁷⁰ MASS. DEP'T OF EDUC., *supra* note 1356, at 4.

¹³⁷¹ *Id.*

¹³⁷² *Id.* at 5.

¹³⁷³ *Id.*

¹³⁷⁴ See Joanna Massey, *Educators Decry Shift from Bilingual Educaiton*, BOSTON GLOBE, Nov. 17, 2002, at 8.

¹³⁷⁵ Ctr. for Collaborative Educ., *The Boston Pilot/Horace Mann Schools Network*, at <http://www.ccebos.org/pilotschools/bostonpilotschools.html> (last visited June 3, 2005).

¹³⁷⁶ Ctr. for Collaborative Educ., *The Boston Pilot Schools Network History and Purpose*, at <http://www.ccebos.org/pilotschools/history.html> (last visited June 3, 2005).

¹³⁷⁷ *Id.*

¹³⁷⁸ ROSANN TUNG ET AL., CTR. FOR COLLABORATIVE EDUC., HOW ARE BOSTON PILOT SCHOOL STUDENTS FARING? STUDENT DEMOGRAPHICS, ENGAGEMENT, AND PERFORMANCE 1998-2003 38 (2004), available at <http://www.ccebos.org/pilots.faring.2004.pdf> (last visited June 3, 2005).

¹³⁷⁹ *Id.* at 37.

¹³⁸⁰ *Id.* at 5.

¹³⁸¹ *Id.*

¹³⁸² *See id.* at 9.

¹³⁸³ *Id.*

¹³⁸⁴ Press Release, Boston Foundation, Boston Foundation to Fund Public Schools Converting to Pilot Schools (Oct. 17, 2002), at <http://www.tbf.org/About/about-L2.asp?ID=97> (last visited Mar. 18, 2005).

¹³⁸⁵ Robert Pearlman, *Smarter Charters? Creating Boston's Pilot Schools*, in CREATING NEW SCHOOLS: HOW SMALL SCHOOLS ARE CHANGING AMERICAN EDUCATION 39 (Evans Clinchy ed., 2000), available at <http://www.bobpearlman.org/Articles/SmarterCharters.htm> (last visited Mar. 19, 2005) (“Boston’s public schools are enabled not by state legislation but instead through the 1994-97 contract between the Boston School Committee and the Boston Teachers Union.”).

¹³⁸⁶ *See* MASS. GEN. LAWS ch. 150E (2003) (authorizing school committees to engage in collective bargaining); *see also* Mass. Gen. Laws ch. 71, § 36A (2003) (requiring new school committee members to have an orientation including the subject of collective bargaining); *id.* § 37E (allowing school committee members to hire “legal counsel in connection with collective bargaining with employee organizations for school employees . . .”). In generally defining the powers of the school committee, Massachusetts state law provides: “[t]he school committee in each city and town . . . shall establish educational goals and policies for the schools in the district consistent with the requirements of law and statewide goals and standards established by the board of education.” *Id.* § 37. Despite this language, there is nothing in the statutes or regulations that would appear to render the pilot schools as being in conflict with the policies of the legislature and state board of education.

¹³⁸⁷ Pearlman, *supra* note 1385, at 39.

¹³⁸⁸ *Id.* at 40.

¹³⁸⁹ Anemona Hartocollis, *The 10 Biggest Little Stories of 1997: Crew's Misstep on Small Schools*, N.Y. TIMES, Dec. 28, 1997, § 14, at 10.

¹³⁹⁰ Lissa Gootman, *Small Schools in City Program to Grow by 52 in September*, N.Y. TIMES, Feb. 2, 2005, at B1.

¹³⁹¹ *Id.*

¹³⁹² Sam Dillon & Joseph Berger, *Multiple Choice: New York's Alternative Schools – First Article of a Series; New Schools Seeking Small Miracles*, N.Y. TIMES, May 22, 1995, at 1.

¹³⁹³ *Id.*

¹³⁹⁴ Sara Mosle, *A City School Experiment that Actually Works*, N.Y. TIMES, May 28, 1995, at 27.

¹³⁹⁵ PATRICIA A. WASLEY ET AL., SMALL SCHOOLS: GREAT STRIDES. A STUDY OF NEW SMALL SCHOOLS IN CHICAGO 5-6 (2000), available at <http://www.bankstreet.edu/gems/publications/SmallSchoolsStudy.pdf> (last visited Mar. 19, 2005).

¹³⁹⁶ *Id.* at 6.

¹³⁹⁷ *Id.* at 9.

¹³⁹⁸ *Id.*

¹³⁹⁹ *Id.* at 10.

¹⁴⁰⁰ *Id.*

¹⁴⁰¹ *Id.*

¹⁴⁰² *See id.* at 47, 60.

¹⁴⁰³ *Id.* at 33.

¹⁴⁰⁴ Heather Knight, *The Big Move to Small Schools; S.F. Programs Show New Face of Public Teaching*, S.F. CHRON., Aug. 25, 2003, at A1.

¹⁴⁰⁵ *Id.*; *see also* Press Release, San Francisco Unified School District, SFUSD Superintendent Announces Grantees for New and Redesigned Secondary Schools (Nov. 18, 2002), available at http://portal.sfusd.edu/template/default.cfm?page=news.story&story_id=417 (last visited Mar. 20, 2005).

¹⁴⁰⁶ *See supra* note 1405.

¹⁴⁰⁷ Heather Knight, *District Adds Small Schools to Keep Kids on Track; Project Also Involves Reshaping High Schools into Small Groups*, S.F. CHRON., Feb. 13, 2004, at E3, available at

<http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2004/02/13/WBG9C4SP7S1.DTL> (last visited Mar. 20, 2005).

¹⁴⁰⁸ CAL. EDUC. CODE § 52070(d), (e)(2) (West 2002) (apparently “award[ing] grants” for several possible reasons, including the creation of “[f]ree-standing small high schools”).

¹⁴⁰⁹ Editorial, *Students Benefit from Smaller Schools*, ATLANTA J. & CONST., June 22, 2000, at A18.

¹⁴¹⁰ Paul Donsky, *Carver’s Big Idea is to Think Small*, ATLANTA J. & CONST., Nov. 18, 2004, at 1.

¹⁴¹¹ See *id.*

¹⁴¹² Allison Sherry, *Reforms Envision More Autonomy for Denver High Schools*, DENV. POST, Feb. 2, 2005, at B3.

¹⁴¹³ In December 2000, Seattle decided to open a high school that would be an “intimate, arts-infused school of 150 students that will operate . . . on the fourth floor of Seattle Center’s Center House.” Katherine Long, *Seattle’s New School Will Focus on the Arts*, SEATTLE TIMES, Dec. 5 2000, at B1.

¹⁴¹⁴ Ctr. for Collaborative Educ., *The Boston Pilot Schools Network Principles*, at <http://www.ccebos.org/pilotschools/bostonpilotschools.html> (last visited June 3, 2005).

¹⁴¹⁵ BOSTON SCH. COMM., *supra* note 1346, at 15.

¹⁴¹⁶ CTR. FOR EDUC. RESEARCH & POL’Y AT MASS INC., HEAD OF THE CLASS: CHARACTERISTICS OF HIGHER PERFORMING URBAN HIGH SCHOOLS IN MASSACHUSETTS 23 (2003), *available at* http://www.massinc.org/about/ceerp/research/head_of_class/head_of_class.pdf (last visited June 3, 2005).

¹⁴¹⁷ GAUDET, *supra* note 1233, at 7.

¹⁴¹⁸ CLARENCE STONE, BUILDING CIVIC CAPACITY: THE POLITICS OF REFORMING URBAN SCHOOLS 6-8 (2001).

¹⁴¹⁹ Marilyn J. Gittell, *School Reform in New York and Chicago*, in STRATEGIES FOR SCHOOL EQUITY: CREATING PRODUCTIVE SCHOOLS IN A JUST SOCIETY 151 (Marilyn J. Gittell ed., 1998).

¹⁴²⁰ ARCHON FUNG, EMPOWERED PARTICIPATION: REINVENTING URBAN DEMOCRACY 3, 44 (2004).

¹⁴²¹ *Id.* It should be noted that this initial LSC system, which elected all members other than the principal, was held to be unconstitutional as a violation of the “one person one vote” doctrine under the Equal Protection Clause by the Illinois Supreme Court in 1990. See *Fumarolo v. Chicago Bd. of Educ.*, 566 N.E.2d 1283 (Ill. 1990). The constitutional problem cited was that the teachers could only be voted onto the LSC by school staff, the parents by other parents, and the community members by other residents. See *Pittman v. Chicago Bd. of Educ.*, 64 F.3d 1098, 1100 (7th Cir. 1995). As a result, the state legislature amended the selection by having the teachers appointed (rather than elected) by the board of education and the principal (the principal was always an ex officio member of the LSC); for the 8 remaining elected positions, all adult residents of the school district and parents (whether or not they were residents) of children attending the school could vote for them. *Id.* This amendment was upheld by the Seventh Circuit, even though the state still required that 6 of the LSC be parents and 2 be community members. *Id.* at 1100-03. It does not appear that the Illinois Supreme Court has ruled on this amendment’s constitutionality to date.

¹⁴²² FUNG, *supra* note 1420, at 44.

¹⁴²³ Gittell, *supra* note 1419, at 153.

¹⁴²⁴ *Id.*

¹⁴²⁵ FUNG, *supra* note 1420, at 61.

¹⁴²⁶ *Id.*

¹⁴²⁷ Gittell, *supra* note 1419, at 151.

¹⁴²⁸ FUNG, *supra* note 1420, at 74.

¹⁴²⁹ Educ. Comm’n of the States, *School-Based Management* (2001), at <http://www.ecs.org/clearinghouse/26/58/2658.htm> (last visited Mar. 19, 2005).

¹⁴³⁰ See Jolayne Houtz, *The Consummate Leader: John Stanford*, SEATTLE TIMES, Oct. 18, 1999, at A1.

¹⁴³¹ Dick Lilly, *School Board Determined to Carry on Stanford Plans*, SEATTLE TIMES, Nov. 29, 1998, at A7.

¹⁴³² See *id.*

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- ¹⁴³³ Dick Lilly, *School's Ending, But District Still has Plenty to Do*, SEATTLE TIMES, June 18, 1998, at A1.
- ¹⁴³⁴ Linda Shaw, *School-Chief Search Isn't Easy, Just Ask Portland*, SEATTLE TIMES, Aug 25, 2003, at B1.
- ¹⁴³⁵ Gittell, *supra* note 1419, at 156. As Archon Fung skeptically wrote, "[i]t should be noted that the New York program broke the system into some 33 'community' districts, each averaging 20,000 students. The sense in which these districts offer local control is unclear, as each of New York's small districts is still larger than 98 percent of the school districts in the United States." FUNG, *supra* note 1420, at 244 n.4.
- ¹⁴³⁶ Gittell, *supra* note 1419, at 157.
- ¹⁴³⁷ *Id.*
- ¹⁴³⁸ *Id.*
- ¹⁴³⁹ *Id.*
- ¹⁴⁴⁰ Lydia Segal, *Corruption Moves to the Center: An Analysis of New York's 1996 School Governance Law*, 36 HARV. J. ON LEGIS. 323, 326-37 (1999).
- ¹⁴⁴¹ See *infra* note 1487.
- ¹⁴⁴² Kelly C. Rozmus, *Education Reform and Education Quality: Is Reconstitution the Answer?*, 1998 BYU ED. & L.J. 103, 103-04 (1998).
- ¹⁴⁴³ *Id.* at 103-04.
- ¹⁴⁴⁴ Paul Donsky, *Atlanta School Chief Retained for 3 Years*, ATLANTA J. & CONST., Dec. 14, 2004, at C3.
- ¹⁴⁴⁵ *Id.*
- ¹⁴⁴⁶ Annie E. Casey Foundation, *Success in Schools: Education Ideas that Count*, at <http://www.aecf.org/initiatives/success/decent.htm> (last visited Mar. 16, 2005).
- ¹⁴⁴⁷ *Id.*
- ¹⁴⁴⁸ *Id.*
- ¹⁴⁴⁹ *Id.*
- ¹⁴⁵⁰ Eric Hubler, *DPS Seeks Boost for Teamwork Panels*, DENV. POST, Sept. 23, 2000, at B2 (quoting Rev. Aaron Gray, head of DPS' community relations department).
- ¹⁴⁵¹ Eric Hubler, *DPS Literacy Plan Draws Praise, Skeptics; District Likes Results; Some Target Spending*, DENV. POST, Nov. 3, 2003, at B1.
- ¹⁴⁵² *Id.*
- ¹⁴⁵³ Tina Griego, *A Revolution is Brewing in School Reform*, ROCKY MTN. NEWS, Nov. 22, 2004, at 7A.
- ¹⁴⁵⁴ *Id.*
- ¹⁴⁵⁵ *Id.* (citing DPS Superintendent Jerry Wartgow).
- ¹⁴⁵⁶ It should be noted that many who send their children to private schools "walk a shaky financial tightrope" in order to do so. *City Assignment: Lure Pupils Back*, BOSTON GLOBE, Mar. 14, 2005, at B8.
- ¹⁴⁵⁷ See e.g., *Story Delivered Much Nuance About METCO, but Questions Remain*, BOSTON GLOBE, Nov. 24, 2002, at 8 (noting how some parents "identified with the sentiment . . . that, if Metco disappeared, they would enroll the kids in parochial or private schools or just plain move out of Boston").
- ¹⁴⁵⁸ See Tara Murphy, *To Act the Exam School Test, No Lazy, Hazy Days*, BOSTON GLOBE, Aug. 22, 2004, at 4.
- ¹⁴⁵⁹ Boston Pub. Schs., *Introducing, the Boston Public Schools 2005*, at <http://boston.k12.ma.us/schools/assign.asp#exam> (last visited June 4, 2005).
- ¹⁴⁶⁰ *Id.*
- ¹⁴⁶¹ Megan Tench, *School Board Weighs New Grading System*, BOSTON GLOBE, Jan. 29, 2004, at B3. Some of the concerns arise from criticisms that private and parochial schools engage in grade inflation which automatically gives their students a leg up. See *id.*
- ¹⁴⁶² See Karen Avenoso, *Relatively Few Schools Fill Most Seats at Boston Latin*, BOSTON GLOBE, Aug. 29, 1996, at A1.

¹⁴⁶³ See *id.*

¹⁴⁶⁴ See CHUNGMEI LEI, RACIAL SEGREGATION AND EDUCATIONAL OUTCOMES IN METROPOLITAN BOSTON A-2 (2004), available at http://www.civilrightsproject.harvard.edu/research/metro/Segregation_Educational_Outcomes.pdf (last visited June 4, 2005).

¹⁴⁶⁵ *Id.*

¹⁴⁶⁶ See Don Aucoin, *Judge Garrity has City Buzzing Again*, BOSTON GLOBE, Aug. 26, 1996, at B1 (noting that the racial quotas were imposed on the city by Judge Garrity's order in 1976).

¹⁴⁶⁷ See *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998). The plan that was struck down sought to establish two pools of 50% each at the Boston Latin School. One pool would select purely on the basis of scores, while the second pool would be selected with race in mind. *Id.* at 793. However, the process was more nuanced than straight racial balancing. The entire examination pool would first be split into the top half and the bottom half. The top half would be designated the "qualified applicant pool." The racial proportion of that qualified applicant pool would be taken. Then the top score-getters would be allocated to 50% of the open spaces (the first pool), which the rest of the seats will draw the next top students in the pool while trying to maintain a racial proportion close to the racial proportion of the qualified applicant pool. Diversity and past discrimination were articulated as the "state interest" for this method -- both of which were rejected by the court. *Id.* at 795, 809.

¹⁴⁶⁸ See Katherine Robertson, *Affirmative Action – Fourteenth Amendment – Public Educational Institutions*, 84 MASS. L. REV. 92, 94 (1999) ("The court probably found the grounds for the policy less than compelling in part because many of the beneficiaries of the policy were black and Hispanic students who applied to BLS from private and parochial schools, rather than disadvantaged students from Boston's inner city schools"); Karey A. Vering, Note, *Voluntary Desegregation Measures Aimed at Achieving A Diverse Student Body Lose Ground in Wessman v. Gittens*, 160 F.3d 790 (1st Cir. 1998), 79 NEB. L. REV. 485, 504 (200) (noting that the concurrence "pointed out the overbroad and inexplicable granting of preferences to minority groups that were never discriminated against in the Boston school system, specifically Asian students and black students from private and parochial schools").

¹⁴⁶⁹ See Beth Daley, *New Admission Options Sought for Entry to Exam Schools*, BOSTON GLOBE, Sept. 29, 1999, at B4.

¹⁴⁷⁰ For a profile of the Boston Latin Schools, see BOSTON PUB. SCHS., BOSTON LATIN SCHOOL 1, <http://boston.k12.ma.us/schools/RC612DEC2004.pdf> (last visited June 5, 2005).

¹⁴⁷¹ *Id.*

¹⁴⁷² *Id.*

¹⁴⁷³ See *id.* ("The Guidance and Support Services Department provides a variety of supports for students at all levels.").

¹⁴⁷⁴ *Id.*

¹⁴⁷⁵ *Id.*

¹⁴⁷⁶ See Megan Tench, *Tighter Residency Rules Sought; Bill is a Response to Latin Standoff*, BOSTON GLOBE, Jan. 8, 2004, at B5. The awareness began when two students, one from Lincoln and another from Arlington, were kicked out when it was discovered that although they lived in apartments in Boston during the week, they returned to their "primary" home during the weekends in the suburbs. *Id.* Technically, this qualified under Massachusetts' residency requirement, although efforts are being taken to limit the loophole for Boston's schools. *Id.*

¹⁴⁷⁷ See, e.g., Editorial, *Cheating the Exam Schools*, BOSTON GLOBE, Dec. 1, 2003, at A14.

¹⁴⁷⁸ See MASS. ADVOCACY CTR., LOCKED IN / LOCKED OUT: TRACKING AND PLACEMENT PRACTICES IN BOSTON PUBLIC SCHOOLS (1990).

¹⁴⁷⁹ See Jordana Hart, *Curriculum Reform Plan is Backed by Analysts*, BOSTON GLOBE, Aug. 25, 1994, at 25.

¹⁴⁸⁰ See *id.*

¹⁴⁸¹ See Editorial, *Advancing in Boston's Schools*, BOSTON GLOBE, Jan. 21, 1998, at A14.

¹⁴⁸² *Id.*

¹⁴⁸³ Joan Walsh, *A New Racial Era for San Francisco Schools*, SALON NEWSREAL, Feb. 11, 1998, at <http://www.salon.com/news/1999/02/18news2.html> (last visited June 5, 2004).

¹⁴⁸⁴ Editorial, *Open Up the Classrooms*, S.F. CHRON., Oct. 26, 2001, at A26.

¹⁴⁸⁵ See *Id.*

¹⁴⁸⁶ See Ken Garcia, *Hey Kids: Slack off to Get Ahead at School; S.F. Schools Lowering the Bar; Admissions Standards Get Watered Down*, S.F. CHRON., Nov. 6, 2001, at A15.

¹⁴⁸⁷ SAN FRANCISCO UNIFIED SCHOOL DISTRICT, EXCELLENCE FOR ALL: A FIVE-YEAR COMPREHENSIVE PLAN TO ACHIEVE EDUCATIONAL EQUITY IN THE SAN FRANCISCO UNIFIED SCHOOL DISTRICT attach. M at 6 (2002), available at <http://www.sfusd.edu/news/pdf/X4Allrev021302.pdf> (last visited Mar. 8, 2005).

¹⁴⁸⁸ Elisabeth Bumiller, *Putting Dreams to the Test: A Special Report; Elite High School is a Grueling Exam Away*, N.Y. TIMES, Apr. 2, 1998, at A1.

¹⁴⁸⁹ *Id.*

¹⁴⁹⁰ *Id.*

¹⁴⁹¹ Tamar Lewin, *Public Schools Confronting Issue of Racial Preferences*, N.Y. TIMES, Nov. 29, 1998, § 1, at 11.

¹⁴⁹² Stuyvesant High School, *Admissions Process*, at <http://www.stuy.edu/about/admissions.php> (last visited Mar. 24, 2005) (“New York State Education Law makes a written examination a requirement for admission to the science high schools.”).

¹⁴⁹³ Tracy Dell’Angela, *Schools May Drop Race Policy; City to Study Keeping Magnet Sites Diverse if Preferences Ruled Illegal*, CHI. TRIB., Sept. 18, 2004, at C1.

¹⁴⁹⁴ *Id.*

¹⁴⁹⁵ Ana Beatriz Cholo, *City’s Selective Schools Urged to be More Open; Consider Abilities as well as Test Scores, Panel Recommends*, CHI. TRIB., Mar 1., 2005, at C1.

¹⁴⁹⁶ *Id.*

¹⁴⁹⁷ *Id.*; see also *id.* (“Students also could be selected if they show academic potential despite family difficulties, a language barrier or attending an underperforming school.”).

¹⁴⁹⁸ Anderson *ex rel.* Dowd v. City of Boston, 375 F.3d 71, 75-76 (1st Cir. 2004). A “walk zone” is defined as follows: “[f]or elementary schools, the walk zone includes the geocodes, or smaller geographic units within each Attendance Zone, within a one-mile radius of the school. For middle schools, the walk zone radius increases to 1.5 miles.” *Id.* at 75 n.3.

¹⁴⁹⁹ *Id.* at 76.

¹⁵⁰⁰ *Id.* The First Circuit went on to further explain how this system worked in substantial detail: “[u]nder the New Plan, which went into effect for the 2000-01 school year, students still rank their choice of schools and receive random numbers. Students are sorted by their school choice and ordered by their random number, with the lowest numbers put at the top of the list. BPS then computes the number of available seats at each school and sets aside 50% of those seats for students who live within the school’s walk zone. The seats at each school are then filled according to the following priorities: first priority to students within the school’s walk zone and with a sibling already in attendance; second priority to students outside the school’s walk zone but with a sibling already in attendance; and third priority to students within the school’s walk zone but with no sibling already in attendance. If there are more students in a priority tier than seats available, the seats will go to the students with the better random numbers. As students are admitted, the system updates the number of walk zone seats that are available. Once those walk zone seats are filled, a student’s walk-zone status drops out of consideration and students are assigned in accordance with the school preferences by the rank of their random number. Finally, the applications and assignments are done in rounds; if a student fails to meet the first round application deadline, she can submit her preferences in the second round, and so on.” *Id.* at 76-77.

¹⁵⁰¹ *Id.* at 85.

¹⁵⁰² See *id.* at 88-89.

- ¹⁵⁰³ Jeffrey R. Henig & Stephen D. Sugarman, The Nature and Extent of School Choice, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW* 20 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999).
- ¹⁵⁰⁴ See *id.*
- ¹⁵⁰⁵ See *id.*
- ¹⁵⁰⁶ Paul Donsky, No Child Law May Curb Transfers, *ATLANTA J. & CONST.*, Jan. 10, 2003, at C4.
- ¹⁵⁰⁷ Paul Donsky, Transfer Rules Must Change, Schools Told, *ATLANTA J. & CONST.*, Jan. 15, 2003, at B5.
- ¹⁵⁰⁸ See, e.g., Sanjay Bhatt, Seattle's Alternative Schools Still a Big Draw, Bulk of Students Assigned to Their 1st or 2nd Choice, *SEATTLE TIMES*, Apr. 21, 2004, at B1.
- ¹⁵⁰⁹ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 377 F.3d 949, 1004 (9th Cir. 2004) (Graber, J., dissenting).
- ¹⁵¹⁰ *Id.*
- ¹⁵¹¹ *Id.* at 969-70.
- ¹⁵¹² *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 395 F.3d 1168 (9th Cir. 2005).
- ¹⁵¹³ Editorial, School Plan Isn't Broken, *SEATTLE TIMES*, Nov. 7, 2000, at B6.
- ¹⁵¹⁴ Julian Guthrie, *Judge Lets S.F. Schools Get Desegregation Funds; Using Race for Admissions Remains Banned*, *S.F. CHRON.*, July 12, 2001, at A22. Judge Orrick, in 1999, ended San Francisco's school assignment system of not allowing more than 45% of one race attend each school. *Id.*
- ¹⁵¹⁵ See *SAN FRANCISCO UNIFIED SCHOOL DISTRICT*, *supra* note 1487, at 96.
- ¹⁵¹⁶ David I Levine, *Public School Assignment Methods After Grutter and Gratz: The View From San Francisco*, 30 *HASTINGS CONST. L.Q.* 511, 529 n. 89 (2003).
- ¹⁵¹⁷ *SAN FRANCISCO UNIFIED SCHOOL DISTRICT*, *supra* note 1487, at 97-99. The term "diversity" is defined "broadly as a combination of factors: socioeconomic status, academic achievement; English Language Learner status of the student; geographic area of residence within SFUSD; mother's educational background; educational quality of the elementary/middle school attended; and home language." *Id.* at 99. It is interesting that this diversity policy noticeably does not explicitly mention race as a category. See *id.*; see also *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, Nos. C-78-1445 WHO, C-94-2418 WHO, 2001 WL 1922333, at *3 (N.D. Cal. Oct. 24, 2001) ("The District agrees to assign students to its schools, other than Lowell High School and the School of the Arts, in accordance with a student assignment plan that uses a multifactor diversity index that does not include race or ethnicity as one of the factors.").
- ¹⁵¹⁸ SASKIA SASSEN, *THE GLOBAL CITY* (2nd edition 2001)
- ¹⁵¹⁹ *Id.* at 3-4
- ¹⁵²⁰ BOSTON REDEVELOPMENT AUTHORITY, *BOSTON AMONG 35 AMERICAN CITIES: EMPLOYMENT GROWTH AND SPECIALIZATION IN THE NATION'S LARGE CITIES DURING THE 1990S* at 11 (2004)
- ¹⁵²¹ RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS* (2002)
- ¹⁵²² PETER CALTHORPE AND WILLIAM FULTON, *THE REGIONAL CITY* 15 (2001)
- ¹⁵²³ CHARLES EUCHNER (ed.), *GOVERNING GREATER BOSTON: THE POLITICS AND POLICY OF PLACE* 3 (2002)
- ¹⁵²⁴ DENNIS JUDD AND SUSAN FAINSTEIN (eds.), *THE TOURIST CITY* (1999)
- ¹⁵²⁵ *Id.* at 155
- ¹⁵²⁶ SAM B. WARNER, JR., *STREETCAR SUBURBS: THE PROCESS OF GROWTH IN BOSTON 1870-1900*, 8-9 (1962)
- ¹⁵²⁷ BARRY BLUESTONE AND MARY HUFF STEVENSON, *THE BOSTON RENAISSANCE: RACE, SPACE, AND ECONOMIC CHANGE IN AN AMERICAN METROPOLIS* 1-22 (2000)
- ¹⁵²⁸ THE BOSTON FOUNDATION, *FUNDING FOR CULTURAL ORGANIZATIONS IN BOSTON AND NINE OTHER METROPOLITAN AREAS*, 47-53 (2003)
- ¹⁵²⁹ EMILY THATCHER-RENSHAW, *INDUSTRIAL JOB RETENTION IN BOSTON: THE BACK STREETS INITIATIVE* (2005) (paper on file with the authors).). The rest of the discussion in the text of the Back Streets Initiative is based on this paper.
- ¹⁵³⁰ See <http://www.baseball-statistics.com/Ballparks/SF/> (last visited May 17, 2005).

¹⁵³¹ Lorlene Hoyt, *Importing Ideas: The Transnational Transfer of Urban Revitalization Policy*, 19-20 (forthcoming in the International Journal of Planning Administration).

¹⁵³² See www.lifetechboston.com (last visited May 17, 2005).

¹⁵³³ Savannah Blackwell, *The Real Welfare Problem in San Francisco: Giving Away the Store*, at www.sfbg.com (last visited, May 17, 2005).

¹⁵³⁴ See STEVEN P. ERIE, *GLOBALIZING L.A.: TRADE, INFRASTRUCTURE, AND REGIONAL DEVELOPMENT* (2004)

¹⁵³⁵ BARRON, FRUG & SU, *supra* note 125.

¹⁵³⁶ <http://www.drcog.org>

¹⁵³⁷ See *Metro Vision 2020*, http://www.drcog.org/reg_growth/mv2020.htm.