

Boston Bound:

A Comparison of Boston's Legal Powers with Those of Six Other Major American Cities

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Boston is an urban success story. It has emerged from the financial crises of the 1950s and 1960s to become a diverse, vital, and economically powerful city. Anchored by an outstanding array of colleges and universities, world-class health care providers, leading financial institutions, and numerous other assets, today's Boston drives the metropolitan economy and is one of the most exciting and dynamic cities in the world.

Boston is also a city at a crossroads, facing new challenges bred by its own success, by changes in the national and local economy, and by increased competition from cities across the country and around the world. Unlike many of its competitors, Boston is not gaining population. The high cost of housing, both within the city and in the metropolitan area, poses a major threat to Boston's ability to continue to attract and retain workers whose innovation fuels the economy. There also remain serious inequities along racial and class lines and the continuing task of improving the city's public schools in order to prepare the city's young people to participate in and contribute to the city's future.

Yet the City of Boston lacks the power that six other major American

cities — Atlanta, Chicago, Denver, New York City, San Francisco, and Seattle — enjoy to shape its own future. It is hard to understand why the Commonwealth should want its major city—the economic driver of its most populous metropolitan area—to be constrained in a way that comparable cities in other states are not. Like Boston, the six cities are large, economically influential actors within their states and regions, have ethnically and racially diverse populations, and are doing fairly well when compared with other American cities. And, like Boston, they all face substantial related challenges occasioned by increasing suburban growth, significant immigration, the persistence of concentrated poverty, and an increasingly competitive global environment. But there is no doubt that Boston, at present, is a city bound.

The constraining legal structure that now governs Boston forces the city to rely on a narrow revenue base, limits the city's ability to control its own expenditures, and distorts the city's efforts to plan. It also places the city at a competitive disadvantage at a time when all major cities are looking to deploy as many tools as possible in order to secure their economic future. It has long been recognized that

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Boston has limited legal authority. In fact, city officials have long complained about the city's lack of power, especially its restricted ability to raise revenue. But the city's complaints have largely been to no avail, in part because 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

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in terms of Boston's immediate financial circumstances, its complaints are likely to reinforce the popular view that city officials are simply trying to avoid hard budgetary choices.

Background on Home Rule

The state-imposed limits on Boston's powers have come in two major waves. The first wave spanned the early to mid twentieth century. During this period, the state twice revised the city's charter and greatly restricted the powers of the city to raise revenues, borrow, and spend. These efforts were the byproduct of the region's unique political history and culture, marked both by an exceptionally activist state legislature and sharp ethnically-motivated political rivalries between the Yankee-dominated legislature (and business community) and the Irish-controlled city.

The second wave took place in the 1950s and 1960s when the city elected to transfer key parts of its infrastructure to the state to address the severe fiscal crises of that time. Repeatedly during this period, the city ceded important authority to the state in return

for additional access to funds or relief from burdensome costs. It should be noted, however, that the city elected to do so as a last resort after failing to gain back new powers from the state that had been significantly curtailed in the first wave. 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 (with some exceptions) than it had decades before. State-created public authorities—and sometimes the state itself—took over important city assets.

The other noteworthy event was an amendment of the state constitution in the 1960s that gave home rule to all cities and towns in the state, including Boston. Even though the Home Rule Amendment to the Massachusetts Constitution appears to grant broad powers to all localities in the state, it explicitly exempts taxing, borrowing, the regulation of private and civil affairs, and municipal elections from its scope. Moreover, under the Home Rule Amendment, Boston 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. Such a process gives city officials little incentive to push for charter reform. Additionally, the decisions of the Massachusetts Supreme Judicial Court reflect a judicial inclination to treat the grant of home rule power narrowly rather than as a broad affirmation of local self-governance.

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. Still, state home rule provisions are important in and of themselves. 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.

Key Findings

Boston's ability to shape its own future is limited in three important ways. The first is that Boston has a much more limited grant of home rule power than other major competitor cities. As a result, 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.

Boston Has Limited Home Rule Power

Home Rule Amendment: Because the Home Rule Amendment to the Massachusetts Constitution exempts taxing, borrowing, the regulation of private and civil affairs, and municipal elections from its scope, Boston has less authority than the six other major U.S. cities we examined. For example, the

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Illinois Constitution grants municipalities home rule powers that pertain to local matters and then expressly defines them in an expansive fashion.¹ As a result, Chicago has the power to tax, the power to borrow, and the power to “regulate for the protection of the public health, safety, morals, and welfare . . .”² 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.”³ Consistent with that instruction, the Illinois 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.⁴ Similarly, none of the other cities we studied 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.

Preemption: The state's power to preempt local lawmaking is also more extensive in Massachusetts than elsewhere. The

Massachusetts Home Rule Amendment permits state statutes to preempt local laws even in the absence of a clear conflict as long as the state is thought to have decided the appropriate policy on the issue covered by the local law. Since the areas in which the state has legislated are

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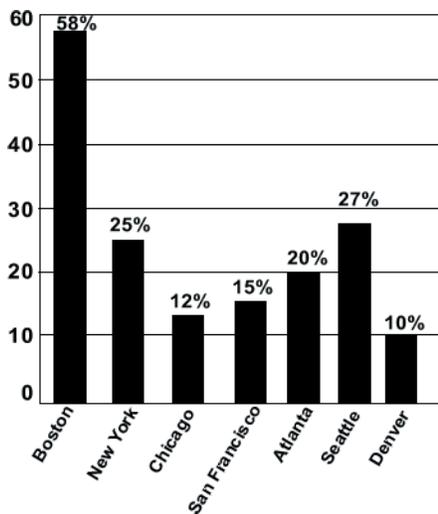
diverse and comprehensive, this means that virtually any local regulation can be understood to trench on some state policy. Other cities enjoy substantially more protection from state laws. The Colorado Constitution specifically identifies Denver as a home rule city and invests it with powers, including borrowing powers, that the state courts have held are beyond state control.⁵ As a result, Denver has successfully challenged directly conflicting state statutes that attempted to regulate municipal employment practices⁶ and to limit the city's ability to impose sales taxes for local purposes.⁷

The City Charter: Boston's city charter is a patchwork of special laws enacted by the state legislature. Although the Home Rule Amendment gives the city the power to enact a "home rule charter," it has chosen not to do so and for good reason. The reason is that, under state law, 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. State law enables the charter commission to pursue an unlimited reform agenda once established

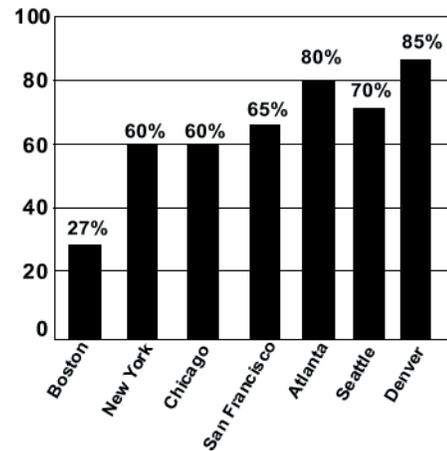
and, then, to submit its proposal for an up-or-down vote by city residents. The city itself has no role in the process. In limited instances, two-thirds of the city council can propose a change that voters can approve by referendum, but this too is unwieldy and restrictive. Other state constitutional 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, and California also permits its cities to propose charters without resorting to a commission. Under Washington's state constitution, cities like Seattle may present voters with an alternative to the elected charter commission's proposal. In Denver and San Francisco, the charter revision process has been a focal point of civic debate and discussion about the city's organization and future.

The Impact on Civic Engagement: Because Boston operates under one of the nation's more restrictive home rule amendments, it is less able than other cities to develop the kind of popular participation and energy necessary to promote active civic engagement in local government. The absence of this kind of civic involvement is more troubling than simply its diminishing the possibility of making a particular governmental reform. Given the fast pace of economic and demographic change and the competition among cities nationally and worldwide, efforts to promote any possible future for the city are likely to depend on an engaged civic sentiment. No doubt, there is room now for significant innovation within the city's current legal structure. And it is equally clear that city officials have been quite creative in making the most of the authority that they currently have. Nevertheless, the limited nature of the legal structure exerts a drag on local action that is both problematic and unusual.

Percent of Total Revenues
Derived from the Property Tax in 2003



Percent of Non-School Budget Covered by Own-
Source, Non-Property Tax Revenue in 2004



Boston's Constrained Fiscal Structure Distorts the Planning Process

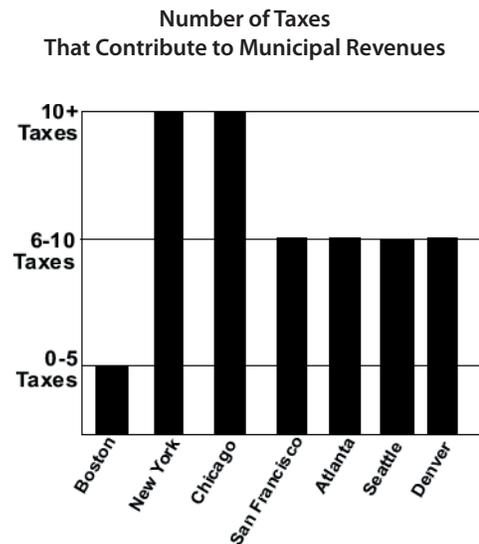
Revenue Restraints: From taxing to borrowing to imposing fees, Massachusetts state law gives Boston comparatively little authority to raise local revenue. As a result, Boston is exceptionally dependent on a limited number of revenue sources, most notably the property tax, which provides more than half the city's total revenue and about three-quarters of its own source revenue, significantly more than any other city in our study. Every other city in our study 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. Because of these differences, the property tax in Seattle accounts for only about a quarter of the city's general fund revenues, while the retail sales tax, business and occupation taxes, and utility taxes each provide between 15 and 20 percent of the city's general fund revenues. Similarly, San Francisco raises more revenue from a combination of other local taxes than from the property tax, while Atlanta and Chicago both receive, in total, twice the revenue from a

combination of other local taxes than they get from the property tax. Like Boston, Chicago has limits on the amount of property taxes it can raise. But Chicago's limits are self-imposed, not imposed by the state. Chicago's ability to exercise this kind of self-restraint is important in itself, in that it signals to everyone that the city has the ability to handle its own finances.

State Aid: In addition to its dependence on property taxes, Boston is unusually reliant on state aid. For the past decade, state aid has been the city's second largest source of revenue, providing about 20 to 30 percent of the city's funding. Boston is by no means unique in terms of its reliance on state aid. New York City receives about 30 percent of its revenue in the form of state grants. Other cities, however, are far less dependent, particularly on state aid that is not earmarked for education. The structure of state aid also differs in significant ways. Boston receives non-education state aid from programs that can be—and have been—altered by the legislature and the Governor. In recent years, for example, the legislature capped the

amount of aid cities and towns could get from the state lottery, even though it was established to give localities an additional source of funds. Chicago, by contrast, 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. Under a strict formula established by state law, Chicago (along with other Illinois municipalities) receives ten percent of the income taxes collected by the state on a per capita basis. If a sale occurs in Chicago, the city also receives one percent of the state sales tax, in addition to the revenue from its own sales tax.

Targeted Taxes: While the state has authorized Boston to impose excise taxes on motor vehicles, hotels and motels, and jet fuel, the city’s efforts to obtain legislative authorization for other targeted taxes have been unsuccessful. Other cities can impose these kinds of taxes themselves because they have home rule authority to tax. Denver has a lodging 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. San Francisco levies a business license tax, a real property transfer tax, a utility users tax, a parking tax, and a transient occupancy tax. Chicago has more than a dozen taxes. Even Atlanta, which lacks home rule taxing power, imposes a hotel/motel tax, an alcohol tax, a public utility tax, a car tax, and an insurance premium tax, and 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. Boston thus has four types of taxes (including the property tax) while other cities have from three to seven times that number. Like the sales and income taxes, these targeted taxes present another way that cities diversify their source of revenue.



Fees: Although the Home Rule Amendment denies Boston the power to levy taxes without state authorization, the city can assess and collect fees on its own authority. But the definition of a fee is unusually constrained in Massachusetts, thereby leaving Boston with less power than would otherwise appear. For example, the Supreme Judicial Court construed a state-authorized additional charge for fire services to high-rise buildings as a tax rather than a fee. California courts have taken the opposite stance, broadly construing cities’ ability to impose fees. San Francisco’s transit fee, imposed on new downtown developments, was upheld as a fee, not a tax. In Massachusetts, the opposite result would be likely. Like San Francisco, Denver and Chicago have substantially relied on fees as a source of income, enabled in part by these cities’ ownership of assets, such as airports, that Boston no longer controls.

Expenditure Control: The revenue constraints Boston faces are particularly significant because 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 are mandated by the state, and others cannot be significantly reduced without making Boston less attractive to residents, businesses, 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. Other cities also are constrained in their ability to control their expenditures. But they are less restricted than Boston. For example, Boston has little ability to negotiate with municipal employees about changes in benefits while Denver has significant ability to do so. Boston is also more subject than other cities to state decisions reversing local spending allocations. The Supreme Judicial Court determined that Boston's decision to extend group health insurance to domestic partners was preempted by state law, while every other state court decided the same issue the opposite way. It is ironic that Boston is the only city without the power to spend city funds to provide health insurance benefits to domestic partners of city workers. After all, it is also the

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only city that must confer marriage licenses as a matter of state constitutional law to same-sex couples.

Impact on Planning: Boston's fiscal structure distorts local planning not only by restricting the absolute amount of money the city can raise but also by limiting the kinds of revenue that the city can generate. It's no coincidence that Boston is in the midst of a hotel boom. Attracting hotel guests is more in the city's direct financial interest than it previously was

because the city recently received the power to impose a hotel tax. On the other hand, as a Boston Foundation report has noted, 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.⁸ Cities that do have a dedicated funding mechanism for culture and the arts rely on either a sales tax or a hotel tax. The fact that the hotel tax is one of the few non-property tax revenue sources that Boston can tap for this purpose makes it less likely that the city will be willing to do so rather than use it to support the general budget. San Francisco uses part of its hotel tax to fund the arts, but it also has a wide variety of other non-property tax levies on which it can rely.

Revenue and Policy: There is no mechanical link between revenue source and policy outcomes. But revenue structures generate incentives, whether or not the decisions a city makes in response to these incentives turn out to be mistaken. Boston's current fiscal structure is problematic because it makes the city unduly focused on a single tax in thinking about how to plan for its future. The city thus lacks the proper incentives to undertake a range of actions that would promote useful development. For example, many people contend that the future of the city's economic health depends on the willingness of universities and hospitals to maintain a strong presence in Boston. But without the power to tap revenue streams other than the property tax, it is harder for Boston than it is for cities like Chicago to see beyond the loss of property tax revenue generated by these tax-exempt institutions and focus instead on the value they provide the city. Yet Boston is powerless to alter its current incentives, because they have been imposed by the state. We suspect that the state had no intention of using its fiscal

oversight as a covert means of shaping local planning decisions. Still, 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. That would be true even if the state expanded Boston's discretion without increasing the overall amount of revenue the city can raise.

Limited Tools to Spur Development and Build Affordable Housing

Tax Increment Financing: In addition to the problems engendered by Boston's unbalanced reliance on the property tax, the city lacks tools it can use to promote economic development. Until 2003, state law did not allow Boston (or other Massachusetts communities) to use Tax Increment Financing to help fund redevelopment efforts. Even the current law only allows this financing tool under comparatively constricted circumstances. Chicago used Tax Increment Financing throughout the 1980s and 1990s to develop more than 1.5 million square feet of industrial space. And San Francisco made extensive use of Tax Increment Financing as part of its efforts to redevelop the China Basin area as a major new locus for biomedical research.

Business Improvement Districts: State law has also made it difficult for Boston to establish Business Improvement Districts (BIDs). BIDs allow an entity created by the city and run by local business owners to collect additional taxes from commercial establishments and use the additional money for improvements that will make the area more attractive to shoppers and commercial tenants. New York City has made extensive use

of BIDs to improve many commercial areas, particularly in Manhattan, and virtually every other city in our study has experimented with BIDs as well. Massachusetts' 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. This

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requirement, which is not contained in the enabling legislation that applies to other cities, has proven to a serious obstacle to efforts to create a BID in Boston's Downtown Crossing.

Inclusionary Zoning and Impact Fees: Boston's efforts to fund affordable housing programs by imposing impact fees on new commercial development and establishing an inclusionary zoning program for new residential projects have been limited by the state courts' concern that these programs were illegal taxes or were otherwise not allowed by state law. San Francisco has had more leeway to shape (and reshape) its impact-fee program, and Denver's inclusionary zoning program has not even been challenged in court because Colorado's home rule provisions give its cities much more discretionary power than Boston.

State Authorities: State authorities have considerable power in Boston. Massport owns an unusually large amount of land in the city, including Logan Airport. Thus, unlike Chicago, Atlanta, Denver, and San Francisco, a state authority, not the city, owns and operates its airport.⁹ Yet control of the airport can be

critical because airports have positive effects on the local economy and negative impacts on nearby neighborhoods. The state could give Boston a much greater say in airport policy than it has now even if Massport continued to own it. Massport is but one of many state authorities that make policy for parts of the city. The Massachusetts Turnpike Authority has a major impact on the city's development, above all through its control of the Big Dig.

Providing Affordable Housing: Boston is engaged in a number of efforts to maintain and increase its supply of affordable housing. But state limitations on housing policy and revenue constraints limit what it can do. These constraints are more severe than those in other cities. San Francisco, like Boston, has an affordability problem. But San Francisco has tools to respond to this problem that Boston lacks. Unlike Boston, the city strictly controls condominium conversions. 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 percent of the apartments are leased to low- and moderate-income households. Other innovative strategies, such as the promotion of limited equity ownership, are not within Boston's power to implement.

Education: Development is not simply a matter of land use policy. The future of Boston depends as well on the quality of the city's schools. Unlike other matters, the mayor of Boston now has an unusual amount of control over the city's public schools. But there remain significant limits to that control. Class size in Boston's schools is affected by the substantial number of classes devoted to special education—significantly more than in other cities. Provision of special education is a

state mandate, and state funding has fallen short of the needed expenditures. State mandates also require English-language immersion for the education of students with limited English proficiency.

Conclusion

Boston might overcome the legal obstacles surveyed in this report, just as it has reversed its declining fortunes over the last three decades. But it should not be forced to do so. If, in the future, Boston is less able than other comparable American cities to respond to the economic and demographic shifts that are affecting major urban areas, it will operate at a disadvantage in an increasingly competitive atmosphere. Boston should be as free as other major cities in the country are to develop its own plans for the future. The current legal structure provides Boston with more disincentives than incentives for doing so. To enable Boston to profit from its advantages and address its problems, the state should help Boston take control of its future.

Boston has less power than New York, Chicago, Atlanta, Denver, Seattle, or San Francisco to control its own destiny. Not every one of these other cities has each of the following powers – but one or more does. The important point is that Boston has none of them.

- The power to amend its city charter without following a detailed state-imposed process
- The power to enact “private laws” without explicit state authorization
- The power to pass a local law (for example, one that offers domestic partnership benefits or that sets municipal employee benefits) that the state has no power to overrule
- The power to levy new kinds of taxes without state permission

- The power to have a fixed share of a state-wide income or sales tax or to levy such a tax on its own
- The power to receive a dependable share of state aid without an annual legislative authorization
- The power to borrow money in excess of 5 percent of the valuation of the city's property tax base
- The power to exercise substantial control over health and pension costs for city employees
- The power to design its own governmental structure for zoning and redevelopment without new state legislation
- The power to own its own airport
- The power to engage in Tax Increment Financing without significant state restrictions
- The power to create Business Improvement Districts without giving landowners the ability to opt out of assessments
- The power to establish linkage and inclusionary zoning policy without state legislative authorization
- The power to control the number of charter schools in the city's school system
- The power to regulate municipal elections
- The power to control city transportation systems and infrastructure
- The power to ensure that the state can override a city ordinance only by making its intention to do so clear

As noted above, the state seems to have recognized the virtue of enhancing local control over one key area of city policy: education. Boston is now using its unusually high degree of control over its schools in ways

that bode well for future gains in performance. Its pilot school program is an important example. 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 to assume a leading role.

As the education structure illustrates, the point of legal reform is not simply to transfer power from the state to the City of Boston. The state has a creative role to play. But Boston should not be subject forever to a legal structure designed in another era for another kind of city. 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.

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. One essential point should underlie these future undertakings. 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 ILL. CONST. art. VII.

² Id. § 6(a).

³ Id. § 6(m).

⁴ See *Boytor v. City of Aurora*, 410 N.E.2d 1, 3-4 (Ill. 1980).

⁵ See id. § 1; *Berman v. City of Denver*, 400 P.2d 434, 439 (Colo. 1965).

⁶ 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).

⁷ *Winslow Const. Co. v. City of Denver*, 960 P.2d 685, 695 (Colo. 1998).

⁸ The Boston Foundation, “*Funding for Cultural Organizations in Boston and Nine Other Metropolitan Areas*,” 47-53 (2003).

⁹ Seattle’s airport is owned and operated by the Port of Seattle, which is governed by an five-member commission elected by the voters of King County, a 2,340 square mile entity that includes the city of Seattle. Kennedy and LaGuardia airports, which are located in New York City, are owned by the city but leased to the Port Authority of New York and New Jersey, a bi-state agency that is governed by a board comprised of six members appointed by the governor of New York and six by the governor of New Jersey.

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