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THE POWER TO TAKE: The Use of Eminent Domain in Massachusetts

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EXECUTIVE SUMMARY

THE POWER OF EMINENT DOMAIN is a limited exception to fundamental constitutional principles protecting private property. Massachusetts legal practices during colonial times were crucial to the incorporation of property rights guarantees into the United States Constitution. The Fifth Amendment prohibits deprivation of property without due process and recognizes the need to limit the power of eminent domain through the “public use” and “just compensation” requirements.

Massachusetts is currently undertaking an array of large construction projects premised on eminent domain takings, such as the Third Harbor Tunnel/Central Artery Project and the new Boston Convention Center. Other large projects are in the planning stages, including the proposed TeleCom industrial park in Everett, Malden, and Medford, and the Acre Urban Revitalization and Development Project now getting under way in Lowell. These and other projects have generated increased public scrutiny of the use of eminent domain in Massachusetts.

This study is the first to analyze concrete data to determine patterns in the use of eminent domain. The analysis includes a survey of law review articles, practitioners’ manuals, and reported Massachusetts opinions; structured interviews with legal practitioners; and a review of Massachusetts eminent domain statutes, especially in comparison to the 1974 Model Eminent Domain Code.

From the earliest colonial times, Massachusetts was at the forefront of placing restrictions on the use of eminent domain and championing property rights. Over the course of the nineteenth century, however, Massachusetts courts supported broader use of the taking power for private industrial expansion. By century’s end, the public use requirement was relatively weak, but the just compensation principle remained vital. The United States Supreme Court took the lead in the twentieth century in interpreting and expanding the government’s eminent domain powers. Public works and public housing projects in the 1930s and large-scale urban redevelopment by private developers in the 1950s broadened definitions of public use. Under the Supreme Court’s imprimatur, the public use requirement has been gradually eroded to accommodate the growing involvement of government in all sectors of the economy.

Economic theory considers the government’s use of eminent domain to be justified in certain situations. The power of the government to condemn property reduces the holdout and monopoly power that property owners possess when a parcel is needed for a large project. The costs and inefficiencies that flow from the use of eminent domain, however, can be substantial. Takings can increase real, tangible costs to the condemnee if money spent on the acquisition of replacement property, relocation and removal costs, termination and startup costs, attorneys’ fees, loss of goodwill, loss of going-concern value, and interruption of business are not recoverable. Many other states have recognized the inequity of forcing the condemnee to assume these costs and have amended state laws accordingly.

This study is the first to analyze concrete data to determine patterns in the use of eminent domain.

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Eminent Domain Practice

Massachusetts is rare among the states in that government agencies overwhelmingly prefer to condemn property through the “quick take” procedure rather than through the judicial taking procedure. The “quick-take” procedure is more efficient for the state and also benefits the property owner, who receives a payment *pro tanto* up front without prejudicing his or her right to contest the amount of damages. The detriment of the “quick-take” procedure for the condemnee is the limited time available to bring an action to contest the validity of the condemnation before being forced to vacate.

Other key aspects of the condemnation process are *pre-taking financial analysis*, *pre-taking notice*, *filing the order of taking*, and *litigation*. Under the current legislative scheme, a financial impact analysis has limited applicability. *Pre-taking notice* gives condemnees more time to plan relocations, negotiate a fair settlement, or even contest the validity of the taking. The taking agency is also required to secure an appraisal of the targeted property before recording *the order of taking* because it must offer the condemnee a payment *pro tanto* (based on appraisals) within sixty days after recording the order of taking. In most Massachusetts takings, real estate appraisals are withheld from condemnees, creating hardship, particularly for small property owners. The condemnee may retain the *pro tanto* payment without prejudicing the right to *litigate* the amount of the damages or the validity of the taking.

Current statutes do not fully cover relocation expenses and attorneys’ fees expended in recovering the fair market value of property. In addition, the Massachusetts courts have determined that business goodwill and, by implication, the related concept of going-concern value are not compensable under the Massachusetts Constitution. In contrast, the Model Eminent Domain Code and several other states provide for reimbursement for lost goodwill when businesses are displaced by eminent domain. Finally, Massachusetts’ statutory scheme for determining interest is confusing and inaccurate.

Condemnees seeking to prevent a taking are likely to rely on a 1969 opinion in which the Supreme Judicial Court ruled that courts should give heightened scrutiny to cases falling outside the standard list of recognized public purposes, which include “supplying housing, slum clearance, mass transportation, highways and vehicular tunnels, educational facilities, and other necessities.”

Empirical Analysis

To determine patterns in the use of eminent domain, we collected and analyzed data on 501 separate eminent domain takings, totaling more than 38 million square feet, from 1987 to 1999. A convenience sample was chosen that included the City of Boston in Suffolk County and nine demographically diverse municipalities in Middlesex County: Cambridge, Dunstable, Everett, Framingham, Lowell, Newton, Tewksbury, Tyngsborough, and Waltham. Data were extracted and analyzed with regard to municipal demographic, economic, and political characteristics and annual state economic data.

The data analyses revealed the following trends. In many cases, a broader study of takings data, especially data from other states would confirm (or distinguish) the generality of the findings:

- Takings from private condemnees represented 74 percent of the total number of takings. Between 90 and 100 percent of takings in non-Boston municipalities were from private condemnees, compared to 59 percent in Boston and 78 percent in Cambridge.
- As has been the case since colonial times, road repair/construction remains the largest single category (59 percent of the number and 43 percent of the area) of takings.

Massachusetts is rare among the states in that government agencies overwhelmingly prefer to condemn property through the “quick take” procedure rather than through the judicial taking procedure.

Road repair/construction was a major purpose in every year of the study, while other purposes tended to have peak years only during strong economic times.

- Eighty-five percent of the total number of takings were for traditional government purposes (road repair, municipal services, conservation, public transportation, and utilities). While a fair number (11 percent) of takings were for urban renewal, only 2 percent of the number of takings from private condemnees was for urban renewal.
- A strong positive association between the number of takings and municipal population was observed. This could indicate that takings are largely driven by per capita service needs, or that, because population is strongly correlated with total municipal revenue, the number of takings is driven by available resources: when funds increase, more property is taken. Analysis of the total area of takings confirms the correlation of increased takings with both increased population and increased municipal revenue.
- There was also a possible trend toward larger takings in more rural municipalities. This could indicate that municipalities with more open land area tended to take larger (and relatively inexpensive) parcels of land. There was also a slight trend toward larger areas of takings in municipalities with less centralized forms of government.
- There was a slight trend toward fewer takings from private condemnees as government became less centralized. This may indicate that the institutional impediments toward property condemnation can be effective, particularly when affected parties take an active role in the deliberative process, as happens in open town meetings.
- Voting on property-related referenda was associated with number and area of takings *per area of municipality*. Municipalities with strong pro-property rights votes (to end rent control and to continue nuclear power generation) tended to have fewer takings per available area. Municipalities voting in larger numbers against property rights tended to have more takings per available area. These results may indicate that municipalities less concerned about property rights are more likely to be activist in exercising the power to take property and to accumulate large amounts of publicly owned (or controlled) property. Over time, this could lead to smaller tax bases in municipalities with weaker property rights sentiments.
- During strong economic times the number of takings increased. The number of eminent domain takings has grown in recent years. The smallest number of takings occurred in 1991 (18), the largest number in 1999 (65). The average number of takings per year was 39. Takings from private condemnees showed trends similar to those from all condemnees. These results indicate that takings agencies are paying higher damage awards for projects than they might if they were willing to defer projects until less prosperous economic times. They also indicate that when government has more revenues on hand, it tends to take more property.

The data collection process raised concerns about transparency and accountability. The failure of taking agencies to provide all relevant information and the exemption of much relevant information from the public records requirements make efforts to ensure accountability and openness more difficult. Two particular issues stood out: failure to record damage awards and unclear statements of purpose. The failure to provide payments *pro tanto* in the orders of takings suggests a deliberate attempt to avoid making that information readily available to the public at the Registries of Deeds. The failure to state a clear purpose for the taking hinders efforts to determine the intended use of the parcel (and whether the parcel is still being used for that purpose).

The number of eminent domain takings has grown in recent years.

Road repair/construction is the largest single category of takings, while other purposes tended to peak only during strong economic times.

Policy Recommendations

Our study demonstrates that while much of Massachusetts eminent domain practice is admirable, the Commonwealth lags behind other states in significant areas—especially in regard to recognizing and awarding full compensation for the pecuniary harms suffered by condemnees. In addition, the public use requirement has been eroded in Massachusetts, without an adequate substitute.

Statutory amendment is the policy approach most likely to achieve the goal of increased fairness in the eminent domain process. The other tools one could employ to address concerns with the just exercise of eminent domain—litigation and constitutional amendment—are more cumbersome and less likely to achieve results. The state has ample authority to enact statutory protections for property rights that are more extensive than the minimum mandated under current interpretations of the state and federal constitutions.

Colonial Massachusetts led America in protecting property owners from excesses in eminent domain practice. The following recommendations would help Massachusetts resume its leadership role in extending justice to all property owners:

- Require that condemning agencies undertake a rigorous cost-benefit analysis that acknowledges the multiple costs to the condemnees and society generally of the taking, and grant affected property owners standing to challenge the study.
- Require that explanatory materials, in plain English and other languages as needed, be provided to condemnees so that they understand both the legal processes and their rights regarding compensation and related issues.
- As is the case in federally subsidized taking projects, require that pre-taking appraisals are made available to condemnees after the notice of intent has been served in all cases.
- Require that orders of taking include names of condemnees, the approximate area of the taking, and the amount of the payment *pro tanto*. Along with a similar requirement that the purpose of the taking be stated clearly, these revisions would enhance public accountability and transparency in the takings process.
- Require that access to public records be granted for 40 years for all documents concerning the use and disposition of private-transferee takings in order to ensure continuing accountability.
- Authorize judicial review of all private-transferee takings to determine whether the standard for public use has been met.
- Make jury trials available under the Chapter 80A judicial taking process without the current cumbersome preliminary commission hearing. Jury trials should also be available in all cases for contested relocation payments.
- Adopt the Model Code provision awarding condemnees lost business goodwill damages with the addition of explicit coverage for lost going-concern value.
- Remove the existing caps on relocation payments and require full compensation for all verifiable legitimate relocation expenses.
- Require full compensation for attorneys' fees necessary to collect full compensation.
- Provide a fair-market-equivalent rate of interest to condemnees awaiting damage awards.

While much of Massachusetts eminent domain practice is admirable, the Commonwealth lags behind other states in significant areas.

The Power to Take: Use of Eminent Domain in Massachusetts

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I. INTRODUCTION

FEW STUDIES OF EMINENT DOMAIN give an overview of the history, theory, and practice of eminent domain¹ as applied in a particular state, despite the fact that the United States Supreme Court decisions lay down only the bare minimum of constitutional protection for property owners, which state courts and legislatures are free to enhance. Further, no other American study of eminent domain has collected data about the uses to which property taken by eminent domain has been devoted. This study is the first to analyze concrete data to determine patterns in the use of eminent domain and to provide a comprehensive overview of takings theory and practice in an individual state, in this case Massachusetts. The intent of the study is to explore the use of eminent domain in Massachusetts and to recommend methods to correct any inefficiency or unfairness brought to light by the research. The subject is highly relevant in today's Massachusetts, which is facing a number of large building projects premised on eminent domain takings. These projects include the Big Dig (the Third Harbor Tunnel/Central Artery Project) and the new Boston Convention Center.

The governmental power of eminent domain is a limited exception to fundamental constitutional principles protecting private property. The founding fathers of Massachusetts and of the United States resolved the conflict between property rights and the needs of the collective by constraining the power of eminent domain with the public use (property only to be taken for public benefit) and just compensation (fair reimbursement for the property taken) requirements.² The courts have long recognized that property has unique value for its owners: "It is well-settled law in this Commonwealth that real property is unique and that money damages will often be inadequate to redress a deprivation of an interest in land."³ Taking property for public purposes imposes costs on property owners such as emotional loss and move-related stress that cannot be quantified and recovered even through full monetary compensation. Nevertheless, the goal of the Fifth Amendment is to prevent the imposition of the costs of public benefits unevenly on individual property owners: "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."⁴

The purpose of the Fifth Amendment's public use requirement is to ensure that the eminent domain power is not used frivolously, so that individuals whose property is taken, and who therefore inevitably bear a heavier burden than the public as a whole, at least have the satisfaction of knowing that their sacrifice is for the greater good. Over the years, however, the courts have come to interpret the public use requirement broadly. Nationwide, concern

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has been raised by the perception that eminent domain is being used more frequently to benefit politically favored private parties.⁵ In Massachusetts, similar projects are currently in the planning stages. One example is the proposed TeleCom City industrial park in Everett, Malden, and Medford.⁶ The Acre Urban Revitalization and Development Project, a “new-style” urban redevelopment plan with spot clearance and targeted rehabilitation instead of large-scale neighborhood demolition, is now getting underway in Lowell.⁷ These national and local trends warrant investigation of the use of eminent domain in Massachusetts.

This study explores the use of eminent domain in Massachusetts and suggests practical ways to correct any inefficiency or unfairness brought to light by the research.

The justification often given for the courts’ dilution of the public use requirement is that the property owners have no reasonable complaint, since they are adequately compensated. Full compensation for loss is the aspirational goal of the just compensation provision: “In giving content to the just compensation requirement of the Fifth Amendment, this Court has sought to put the owner of condemned property ‘in as good a position pecuniarily as if his property had not been taken.’”⁸ Nevertheless, the United States Supreme Court has failed to recognize most non-tangible forms of property (such as business goodwill) as protected by the Takings Clause.⁹ Economic theory has illuminated the often unacknowledged costs to society caused by the failure of just compensation jurisprudence to cover condemnees fully when their property is taken.

This study reviews the way in which eminent domain has affected Massachusetts residents and property owners and suggests practical ways to address the public use requirement and current compensation practices. The Background section outlines the foundations of eminent domain law. It first explores the history of eminent domain in Massachusetts, including the philosophical and historical underpinnings of constitutional eminent domain provisions; then it discusses the economic theory of eminent domain. The Empirical Analysis section explores the ways in which current practice meets the political and economic goals of eminent domain. After examining current Massachusetts eminent domain practice from the practitioner’s perspective, the author summarizes the results of an analysis of a non-random convenience sample of takings data collected from Registries of Deeds. The paper closes with policy recommendations.

Methodology

Because eminent domain has so many different purposes and affects condemnees in a variety of ways, this study adopts a multi-faceted approach. In the Empirical Analysis section, the author surveyed law review articles, practitioners’ manuals, and reported Massachusetts opinions (concentrating on those written in the past fifteen years) to determine recent concerns. Structured interviews were conducted with legal practitioners in the field of eminent domain. Massachusetts eminent domain statutes were reviewed and compared to the 1974 Model Eminent Domain Code and the laws of other states. The author also surveyed the Massachusetts and national news for articles concerning eminent domain.

The data collected were reviewed and analyzed to discern any patterns in the use of eminent domain.

The data used in the Data Analysis section were collected for Boston and nine representative Middlesex County municipalities. Boston was chosen because it is the largest municipality in Massachusetts and the locus of many large regional development projects. Middlesex County was chosen because the wide variety of municipalities in the county would be representative of the uses of eminent domain in other areas of Massachusetts. Accurate computerized records are available from the Suffolk and Middlesex County Registries of Deeds for the period from at least 1987 through the present, which covers close to a full business cycle (from the last few years of the boom of the mid-1980s through

the slight recession of the late 1980s to early 1990s and recovery to the current economic boom).¹⁰ As Registry records are categorized by type of document, computer sorting capabilities could be utilized to isolate eminent domain takings. The data collected were then reviewed and analyzed to discern any patterns in the use of eminent domain. In addition, the data were reviewed for takings that might warrant follow-up investigations because the documentation was unclear or otherwise unusual.

II. BACKGROUND

A. Historical Analysis

Massachusetts was a leader in championing property rights and restricting the use of eminent domain during the colonial and revolutionary eras.¹¹ In the nineteenth century, however, Massachusetts courts supported broader use of the taking power for private industrial expansion. The Massachusetts Constitution contains language that could be read as sharply limiting eminent domain to cases of public exigencies, but this language has not been used to create any substantive relief for condemnees who challenge the validity of takings.

1. Colonial and Revolutionary Eras

At the time of the Revolution, the right to protection from eminent domain takings was one of the least well developed of the fundamental rights that subsequently became enshrined in the American Bill of Rights.¹² Although Blackstone mentions the right to just compensation (in terms that exaggerate the actual recognition of that right by English courts at that time),¹³ it was not included in any of the great English civil rights documents.¹⁴

The first known eminent domain statute in America was a 1639 Massachusetts statute compensating owners when developed land was taken for roadways and prohibiting laying out roads that would destroy a house, garden, or orchard.¹⁵ In the colonial era, as is the case today, road building was the principal reason for property takings.¹⁶ The first known statutory mention of the term “public use” was also in Massachusetts, in a provision granting compensation for takings of personal property contained in the groundbreaking 1641 Massachusetts Body of Liberties, “the first detailed American Charter of Liberties.”¹⁷ Massachusetts was also the first (if not the only) colony to grant compensation when taking undeveloped land for roads.¹⁸

After the Revolution, numerous states adopted new constitutions. Massachusetts remained in the vanguard in protecting property from eminent domain as the first state to include the right to just compensation in its constitution.¹⁹ At the time that the federal Bill of Rights was passed by Congress in 1789, only the constitutions of Massachusetts and Vermont (which had not yet been admitted as a state) contained just compensation provisions and only four additional states (Virginia, Pennsylvania, Delaware, and New Hampshire) had public use language in their constitutions.²⁰

The reasons that Massachusetts took the lead in providing for just compensation in its 1780 Constitution are not entirely clear. The draft constitution hastily prepared in 1778 was overwhelmingly defeated in the town-by-town ratification process. One of the principal reasons given by Massachusetts towns for the rejection of the 1778 draft constitution was its lack of a bill of rights and, in particular, its failure to protect property rights.²¹

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The first known eminent domain statute in America was a 1639 Massachusetts statute and the first known statutory mention of the term “public use” was also in Massachusetts.

Moreover, John Adams, the principal author of the 1780 Constitution, had long been an advocate for property rights.²² Yet, despite requests for protection of property generally, there is no mention of just compensation in the published sources containing the municipal returns rejecting the draft 1778 state constitution.²³ Part I (the Declaration of Rights), Article X, in the original draft of the 1780 Constitution contained only one sentence referring to eminent domain: “[N]o part of the property of any individual, can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people.”²⁴ This provision was modeled on similar provisions in other states, ultimately tracing their heritage to John Locke, that prohibited takings without prior legislative authorization.²⁵ The second eminent domain sentence in Article X, which included the compensation language,²⁶ was introduced by a floor amendment: “And whenever the public exigencies require, that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.”²⁷ The language is strongly protective of private property rights, prohibiting takings unless “public exigencies” require, potentially a separate requirement beyond the just compensation and public use provisions.

The Massachusetts Constitution was undoubtedly a principal inspiration for Madison’s inclusion of the takings clause in his draft Bill of Rights.

The process of drafting the federal Bill of Rights paralleled Massachusetts history. Although the federal Constitution was ratified in 1788, there was considerable protest over the lack of a bill of rights during the ratification debates. In 1789, James Madison, then a congressman from Virginia in the First Congress, attempted to rectify this situation by proposing his draft of what would become the American Bill of Rights. Despite few models and little grievance over the issue of eminent domain in American independence-related documents, Madison, apparently independently, inserted the Takings Clause in his draft of what became the Fifth Amendment.²⁸ As one of the few state constitutions to protect against uncompensated takings, the Massachusetts Constitution was undoubtedly a principal inspiration for Madison’s inclusion of the takings clause in his draft Bill of Rights.²⁹

2. Constitutional and Political Theory

The political theory behind the Takings Clause, which can be traced to the liberal individualism of John Locke, was that “property must be protected from aggression in order for civil society to flourish.”³⁰ Protection of property rights, in part through protection from unjustified or unnecessary government takings, is closely related to the protection of individual liberty, which includes the right to own property.³¹ Thus, America’s founding documents provide the framework for the protection of individuals’ property rights through the Due Process and Takings Clauses of the Fifth Amendment.

As noted, the Massachusetts Constitution’s language protecting property is considerably broader than that of the federal Bill of Rights, both generally and specifically in regard to the public exigency provision.³² These statements provide a basis for scholars who urge state courts to develop case law expanding individual economic rights when state constitutional provisions are more protective than parallel provisions of the federal constitution.³³ Yet, despite some early cases indicating that the public exigency provision created a separate requirement (in addition to public use and just compensation) necessary for the validity of a taking and subject to independent judicial inquiry,³⁴ the public exigency provision has failed to live up to its promise.³⁵ For all practical purposes, for the past 100 years the Massachusetts takings provision has not been interpreted any differently than taking clauses of other states without a “public exigencies” clause.³⁶ The Supreme Judicial Court has not addressed this issue recently, and reexamination in light of the clause’s history and original intent may well be warranted.

3. Nineteenth Century

Even before the Revolution, Massachusetts (in common with many other states) had Mill Acts, which allowed millers to flood uplands belonging to others upon payment of compensation.³⁷ After the Revolution, a long period of industrial expansion began. As the state could not finance necessary infrastructure, the right to develop canals, roads, and bridges was delegated to private corporations, which were granted the power of eminent domain to further these purposes, similar to the power to flood previously accorded to millers.³⁸ These early grants of eminent domain power to private corporations to build transportation infrastructure and milldams were hedged with restrictions and use regulations to insure access to the public (often at pre-established rates).³⁹ Presaging later developments in other states, an early Massachusetts opinion by Supreme Judicial Court Chief Justice Theophilus Parsons (1806–13) held that the courts should closely examine eminent domain takings and overturn them if the private benefit outweighed the public.⁴⁰ Although the next Chief Justice, Isaac Parker,⁴¹ generally supported legislative expansions of the private use of eminent domain in Mill Acts, he did so with reluctance, eventually stating that the policy reasons for the “encouragement of mills...may have ceased.”⁴² Consistent with other early nineteenth century jurists who tended to slight the just compensation prong of the Takings Clause in order to promote economic development, however, Chief Justice Parker interpreted the Mill Acts to allow dam owners to pay for flooding of uplands on an annual basis, instead of in a lump sum, essentially requiring a forced loan from upstream landowners to dam builders.⁴³

The coming of the railroads in the 1830s escalated the awarding of eminent domain powers to private corporations. Inevitably, the railroads sought to expand the powers and lessen the amount of compensation required for takings, while landowners urged the courts and legislatures to protect their rights.⁴⁴ The extensive, widely accepted, and (by now) long-established delegation of eminent domain to private infrastructure development corporations has complicated the interpretation of “public use” in the federal Takings Clause and parallel state constitutional provisions. The primary ideological dispute that developed as the nineteenth century progressed was between the “actual-use” and “public-benefit” schools.⁴⁵ In the context of private takings, the stricter “actual-use” school permitted takings as long as the private beneficiary provided a service that was accessible to the general public.⁴⁶ The theory was that railroads and other infrastructure development corporations were public accommodations and, as such, subject to regulation and required to accept the patronage of all comers over the taken property.⁴⁷ The theory was somewhat more strained as applied to public utilities, which did not allow public access, but were instead required to provide service to the general public through use of the taken property. The more lenient “public-benefit” school, on the other hand, weighed whether the taking provided *any* benefit to the public, including general economic benefits.⁴⁸

While Chief Justice Parsons may have been a forerunner of the “actual-use” school outside of Massachusetts, Chief Justice Lemuel Shaw (serving from 1830–60) established the broader “public-benefit” test in Massachusetts. Chief Justice Shaw supported expansion of business generally and railroads in particular, in part through the use of eminent domain.⁴⁹ His decisions embodied the statist “Commonwealth idea,” that “[t]he people of Massachusetts expected their Commonwealth to participate actively in their economic affairs.”⁵⁰ Chief Justice Shaw approved of awarding eminent domain power to infrastructure-related businesses with the understanding that they were “public works,” in effect subject to regulation as public utilities (under this theory, virtually all businesses would be

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potential beneficiaries of eminent domain power and also subject to government regulation).⁵¹ This resulted in considerable deterioration of the public-use principle, particularly evident in the area of the Mill Acts, which had been extended from the common public grist and saw mills of the primarily agricultural colonial society to manufacturing plants powered by watermills that were not open to the general public. Contrary to many other mid-nineteenth century jurists who were expanding public use protections,⁵² Shaw repeatedly upheld Mill Acts delegations to manufacturers in face of public use challenges.⁵³ Shaw's decisions presaged the judicial deference to the legislature and the conflation of the police power with the public use requirement that were eventually adopted by the United States Supreme Court in *Berman v. Parker*.⁵⁴

On the other hand, consistent with other mid-nineteenth century jurists,⁵⁵ Shaw strongly supported just compensation for property owners, to the extent that "property" was understood in nineteenth century terms. He increased damages by prohibiting offsets for general improvements in property values in the neighborhood caused by the railroad and allowed compensation for harm caused by the construction of railways, even when property had not been formally appropriated.⁵⁶ Thus, it might be said that in Massachusetts, after the long tenure of Chief Justice Shaw, the public use requirement was relatively weak, while the just compensation principle remained vital.

Since the time of Chief Justice Shaw, Massachusetts has continued a tradition generally supportive of legislative determinations and benefits to private parties through eminent domain. For example, *Dingley v. City of Boston*⁵⁷ may be considered the first authorization of an urban renewal project, for the areas now known as Park Square and Bay Village.⁵⁸ *Dingley* approved a statute that gave the City of Boston the right to take the area then known as the "Church Street District," which as built was low-lying and subject to sewage drainage problems, and raise the grade of the streets and buildings.⁵⁹ By statute, title to all the taken lands was to vest in the City, which could (but was not required to) return individual parcels to their original owners after the grade change, but only if the original owners agreed to make repairs on their properties at their own expense and waived takings damages claims against the City.⁶⁰ The City decided to build a ward room and hose house (fire station) on property that had belonged to Dingley before the grade change. Dingley sued, alleging that the state had no right to keep his property permanently after the grade change had been completed.⁶¹ The Supreme Judicial Court upheld the taking, in one of the earliest decisions analogizing the extent of the state's eminent domain powers to the police power.⁶² Developments like this in Massachusetts heralded adoption of similar positions in other states. By early in the twentieth century, the "public-benefit" school appeared to prevail almost everywhere.⁶³

4. Twentieth Century

After a century in which the federal courts generally left the development of eminent domain law to the states, the United States Supreme Court took the lead in the twentieth century in interpreting the government's eminent domain powers.⁶⁴ Much of this new federal takings jurisprudence had already long been in effect in Massachusetts under the basically pro-government stance towards takings developed under Chief Justice Shaw and his successors.

The large-scale federal involvement in the development of takings jurisprudence can be attributed to the significantly larger role in the economy taken by state and federal govern-

By early in the twentieth century, the "public-benefit" school appeared to prevail almost everywhere.

ments that started in the Progressive Era at the turn of the twentieth century and then expanded considerably during the Depression of the 1930s and World War II. In the 1930s, large tracts of land were taken for development of public housing projects to be owned and managed by government-run housing authorities.⁶⁵ In the 1950s, governments throughout the United States began to engage in large-scale urban redevelopment, which involved taking large “blighted” or “decadent” areas for redevelopment and disposition to private parties deemed to be able to make more productive use of the land.⁶⁶ Under the Supreme Court’s imprimatur, the public use requirement was gradually eroded through the course of the century to accommodate the growing involvement of government in all sectors of the economy.⁶⁷

The leading federal twentieth century cases are *Berman v. Parker*⁶⁸ and *Hawaii Housing Authority v. Midkiff*.⁶⁹ *Berman* allowed the condemnation of a sound building in a blighted area for an urban renewal project. The novel federal Takings Clause developments of *Berman* were the Supreme Court’s determination that courts should defer to Congressional determinations of public benefit⁷⁰ and that the public use requirement was co-terminous with the state’s police power.⁷¹ *Midkiff* upheld a land reform program to break up large estates. In *Midkiff*, the Supreme Court extended judicial deference to public use determinations made by state legislatures and disavowed any requirement for private property taken by eminent domain to pass through government ownership before vesting in another private party.⁷² After the decisions in *Berman* and *Midkiff*, many commentators have concluded that the “public use” requirement of the federal Constitution is essentially unenforceable.⁷³

The state case that is most often cited as the high-water mark of takings to benefit a private party is *Poletown Neighborhood Council v. City of Detroit*.⁷⁴ In *Poletown*, the Michigan Supreme Court permitted the taking of a complete, unblighted neighborhood for the construction of a General Motors assembly plant. A scathing dissent asserted that the decision “seriously jeopardized the security of all private property ownership...[H]ow easily government, in all its branches, caught up in the frenzy of perceived economic crisis, can disregard the rights of the few in allegiance to the always disastrous philosophy that the end justifies the means.”⁷⁵

Courts in Massachusetts followed the national trend. In the early twentieth century there were occasional precedents prohibiting takings that would “result in a direct benefit to individuals or businesses, regardless of the general advantage that would inure to the public...”⁷⁶ These cases have often, however, been overridden by constitutional amendments or confined to their facts by subsequent, more expansive precedents.⁷⁷ In keeping with national trends, as the twentieth century progressed “[t]he focus of judicial review in eminent domain disputes [in Massachusetts] began to turn more often to an analysis of whether the public taking primarily, rather than exclusively, benefited the public.”⁷⁸ Over time, “the Legislature continued to broaden the concept of public purpose, as the needs of society changed and expanded. The Supreme Judicial Court responded in kind.”⁷⁹ During this time, the just compensation provision as applied to actual, as opposed to regulatory, takings received less attention from the courts. Current compensation policies are discussed in Section III (A) (3) below.

In Boston, the first large-scale urban renewal project was the destruction of the residential New York Streets area of the South End (the area between East Berkeley Street and Herald Street), which was acquired in 1955 and demolished by 1957 to accommodate industrial development.⁸⁰ Currently the area houses several business enterprises, such as a

The public use requirement was gradually eroded through the course of the century to accommodate the growing involvement of government in all sectors of the economy.

In Boston, the first large-scale urban renewal project was the destruction of the residential area of the South End between East Berkeley Street and Herald Street to accommodate industrial development.

large-scale commercial bakery, warehouses, storage facilities, and a news printing plant, as well as a number of parking lots. The next major redevelopment project was the disastrous West End clearance, starting in 1958 and completed by 1960. The project was subsequently widely derided, even by proponents of urban renewal, “because it bulldozed the homes of poor people and replaced them with an enclave for the wealthy.”⁸¹ The luxury housing that largely replaced the vibrant mixed-ethnic neighborhood is now considered dated and unattractive.⁸² The then newly created Boston Redevelopment Authority did pay some relocation expenses for West End residents and businesses, which was a positive development in the area of just compensation, going beyond the bare minimum constitutional requirement.⁸³ Nevertheless, the relocation payments were limited and failed to cover most of the moving expenses of prior West End residents, who effectively involuntarily subsidized the later development of the site.⁸⁴ A sociologist who published a well-known study of the West End believed that the large-scale clearance occurred because the redevelopment agency valued the interests of the redeveloper and his luxury rental tenants over those of the community as a whole; in other words, the development was primarily for private use.⁸⁵

The brutal way that the West End project was carried out and the adverse publicity it engendered after completion discredited such large-scale redevelopment in the future.⁸⁶ Similar large-scale redevelopment projects have rarely been undertaken in Massachusetts since the West End fiasco. Instead “new-style” urban redevelopment projects have concentrated on targeted demolitions along with rehabilitation of many existing structures. Several subsequent redevelopment projects were stopped by neighborhood opposition, and after the early 1970s federal funding for large-scale projects was considerably reduced.⁸⁷ Large-scale urban renewal continues to be controversial and disfavored by much of the public. Since the 1970s, most urban renewal projects have been “new-style” redevelopment, which consists of spot clearance of individual buildings or small groups of buildings, takings of undeveloped property and certain existing buildings destined for rehabilitation, and continuation of private ownership and use of a significant number of parcels within the redevelopment area. The targeted clearance of “new-style” urban redevelopment, however, can easily be used for private-transferee takings to benefit favored or powerful interests. The effects of private-transferee takings on overall economic development are explored in the following section.

The next major redevelopment project was the disastrous West End clearance, which was primarily for private use.

B. Economic Issues

Government takings of private property are a significant exception to common practice in an essentially free market nation, such as the United States. Ordinarily, property prices are determined by considering various factors, including consumer demand, the relative scarcity of similar property, and the owner’s willingness to sell. The market plays a traditionally important role with respect to transactions in a scarce, unique, and non-renewable resource, such as land. Generally, the highest value of this scarce resource to society can be determined most accurately through use of a market system. Government circumvents the market mechanism when it exercises its power of eminent domain.

Economic theory considers the government’s use of eminent domain to be justified in certain situations.⁸⁸ The most common justification for eminent domain is the “holdout problem”: certain property owners may resist selling and hold out for the highest price they can extract for their properties when a developer (public or private) is trying to put together a contiguous parcel for a project. Such property owners will seek prices that exceed both the value of the properties to them and the prices the properties would command in

private, market transactions because bargaining power is increased when their properties are small parts needed for completion of a larger package.⁸⁹ A similar situation, termed the “monopoly problem,” exists when an entity would like to purchase a particular parcel that is uniquely well suited for an essential task of the entity, such as access to a public road from a landlocked parcel.⁹⁰ The power of the government to condemn property reduces the holdout and monopoly power that property owners possess in these particular circumstances.⁹¹ There are also some transaction efficiencies that result from elimination of separate negotiations with each parcel owner when several parcels are taken at the same time.⁹² Thus, there are certain situations in which economists generally agree that eminent domain has a legitimate role.⁹³ The costs and inefficiencies that flow from the use of eminent domain, however, can be substantial, warranting serious consideration of the circumstances when a taking is proposed.

The principal inefficiency of the eminent domain process is the failure of condemnation proceedings to capture the subjective value of the property to the condemnee as well as the costs associated with moving and reestablishing a business or residence elsewhere.⁹⁴ Under the current state of the law, takings increase real, tangible costs to the condemnee that are not generally recoverable, such as acquiring replacement property, relocation and removal costs, termination and startup costs, attorneys’ fees necessary to recover full value of taken property, loss of goodwill,⁹⁵ loss of going-concern value,⁹⁶ and interruption of business.⁹⁷ The subjective value of the property to the owner includes not only these tangible costs, but also the owner’s emotional attachment to property, which is a real, but difficult to determine, cost of eminent domain.⁹⁸ Thus, when the government pays less for property than a market transaction would require, the government fails to absorb the full cost of its projects.⁹⁹

Economic theory indicates that reimbursement for the “fair market value” (as defined by current legal precedents) of condemned real estate alone “systematically undercompensate[s] property owners.”¹⁰⁰ There has been considerable criticism of this practice over the years from both legal scholars (on justice grounds) and economists (on inefficiency grounds).¹⁰¹ Despite the constitutional goal of putting condemnees “in as good a position pecuniarily as if [their] property had not been taken,”¹⁰² courts have generally determined that businesses have a constitutional right only to the legally defined fair market value of taken property, and not to compensation for all expenses arguably incurred when property is taken.¹⁰³ For example, as discussed more fully in Section III (A) (3), Massachusetts has not generally compensated for lost goodwill and—following the federal relocation requirements—allows only limited recovery for relocation costs.¹⁰⁴ The reasons for the exclusion of these incidental damages are historical. In the early days of the Republic, when the doctrine of eminent domain was evolving, there were few complex businesses that would have incurred significant expenses or losses from a forced move. The courts of that era also had some doctrinal difficulty with understanding and recognizing intangible forms of property.¹⁰⁵ By the time that courts recognized the value of goodwill and going-concern value as property in other contexts, they had long defined “property” in concrete terms in the area of eminent domain.¹⁰⁶

Economic analysis also suggests that the costs borne by the condemnee are only part of the unrecognized economic costs of takings. Society at large absorbs general costs associated with the use of eminent domain. A major societal cost of takings is increased opportunity costs, because land taken is used by government directive for one purpose to the exclusion of an alternative, possibly more productive, purpose. For example, properties

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When the government pays less for property than a market transaction would require, it fails to absorb the full cost of its projects.

Massachusetts has not generally compensated for lost goodwill and allows only limited recovery for relocation costs.

Society at large absorbs general costs associated with the use of eminent domain.

taken are often tied to particular uses for extended periods of time, restricting the ability of the properties to be employed in more productive alternative uses in the future. Takings also increase transaction costs to society in the form of procedural costs,¹⁰⁷ deadweight losses from increased taxes to pay for the project,¹⁰⁸ and “moral hazard” concerns.¹⁰⁹ Finally, the exercise of eminent domain also results in demoralization costs. In other words, the government’s seizure of property, without paying truly adequate compensation, “discourage[s] capital] formation by private saving and investment, and encourage[s] emigration [of capital] to lands whose politics [a]re more favorable to property owners.”¹¹⁰ This disincentive to investment can be observed in the “drop in productive activity occasioned when owners of property realize[] that the fruits of their labor or investment could be snatched away.”¹¹¹

Some commentators believe that high demoralization costs are often bred by takings for private parties, even when full compensation is paid and even when there is in fact no favoritism. “In governmental condemnations for private use, the disruption of the sanctity of private property and the reductions in investment and productivity as a result of ‘unsafe’ title may outweigh the benefits obtained from the property’s alternative use prompted by the transfer.”¹¹² In addition to these demoralization costs, cynicism about government motives in private-transferee takings encourages cynicism about government motives and corruption generally and therefore decreases cooperation with legitimate government programs.¹¹³ These additional costs suggest that special procedures for private-transferee takings may be warranted.¹¹⁴

Takings for private parties may lead to high demoralization costs and foster cynicism.

Economists maintain that each of the unaccounted-for costs discussed above imposes negative externalities on property owners or taxpayers.¹¹⁵ Where property is taken without full compensation, the individual property owner bears a “disproportionate, concentrated burden relative to other property owners.”¹¹⁶ As a result, government has an incentive to undertake projects that are not truly cost-efficient.¹¹⁷ The perceived lower cost of land acquisition through eminent domain also encourages special interest groups engaged in rent-seeking¹¹⁸ in order to “shift private activities to the public sector in order to get their favored projects at a lower cost.”¹¹⁹ The government could then find itself entangled in projects properly belonging in the private sector and forcing existing property owners to subsidize favored property developers. Requiring the government to pay the full cost of projects would increase overall economic efficiency and decrease the incentive of rent-seekers to enrich themselves at the expense of forcing uncompensated externalities on unwilling condemnees.¹²⁰ The public use requirement is an institutional means of deterring influential rent-seeking interest groups and overly eager governmental decisionmakers who do not bear the costs of the taking themselves but stand to reap political or other intangible benefits from the proposed use of the property.¹²¹

Requiring the government to pay the full cost of projects would increase overall economic efficiency.

Economic analysis indicates that government projects such as eminent domain condemnations are thus economically efficient only when, among other things, their benefits exceed their costs, taking externalities into account.¹²² As discussed above, determination of the fair market value of the physical property taken is only one piece of the overall compensation picture. A fair and complete recovery would require compensation of condemnees for the other costs associated with takings, such as lost goodwill, lost going-concern value, attorneys’ fees, and full cost of relocation.¹²³ Ways to address the failure to pay full compensation under current state practices are discussed more fully in Section IV below.

III. EMPIRICAL ANALYSIS

A. Recent Eminent Domain Practice in Massachusetts

Certain aspects of contemporary Massachusetts condemnation practice are admirable. In other ways, current Massachusetts practices perpetuate inefficiencies and injustices that have been remedied elsewhere. This section will first discuss the general condemnation process in Massachusetts,¹²⁴ next review recent cases concerning the public use requirement, and finally explore current compensation practices. These subsections parallel the order of the statutory recommendations in Section IV (C) below.

1. Condemnation Process

Massachusetts is rare among the states in that government agencies overwhelmingly prefer to use the “quick take” procedure (where the state condemns the land and takes title first and then litigates about the damage award) to the judicial taking procedure (where the condemnation is completed only after litigation over validity and damages).¹²⁵ The “quick-take” procedure is more efficient for the state, which can commence its project sooner, while it also benefits the property owner, who receives a payment *pro tanto*¹²⁶ up front without prejudicing his or her right to contest the amount of damages. Under this procedure, the owner is not forced to maintain his or her property for a potentially lengthy period of litigation with effective limitations on the property’s use or development caused by the impending condemnation.¹²⁷ A fair payment *pro tanto* up front can also help a condemnee fund a legal challenge to the government’s valuation.¹²⁸ The detriment of the “quick-take” procedure for the condemnee is the limited time (ordinarily four months after the order of taking) available to bring an action to contest the validity of the condemnation before being forced to vacate.¹²⁹ The detriment to the government of the “quick-take” procedure is that the taxpayers may have to pay higher compensation than originally expected.¹³⁰ In general, the view of Massachusetts practitioners is that the benefits of the “quick-take” procedure considerably outweigh the detriments.¹³¹

The “quick-take” procedure is more efficient for the state and generally benefits the property owner.

Pre-taking financial analysis

Currently, a financial impact analysis, not a full cost-benefit analysis, is required before an urban renewal plan can be approved.¹³² A recent trial court case involving a challenge to a taking by the City of Springfield incorrectly described this analysis as a cost-benefit analysis. The statutory and regulatory requirements for an urban renewal financial impact analysis, however, fail to take into account all the costs of project development. In particular, the current rules ignore the full economic cost to those displaced and the internalized cost to the government of the takings and litigation process.¹³³ More important, such a financial impact analysis is not subject to challenge by affected property owners.¹³⁴

The ultimately unsuccessful Emerson College relocation in Lawrence illustrates some of the problems with current practice in pre-taking financial analysis. The Emerson project failed for financial reasons in 1990, and Lawrence subsequently had to pay property owners substantial damages.¹³⁵ Ironically, the property owners attempted to challenge the taking agency’s financial analysis, but were prevented from putting on contrary evidence because the court interpreted the redevelopment law as denying affected property owners standing to contest the validity and accuracy of the redevelopment agency’s financial assumptions.¹³⁶ The property remained undeveloped through at least 1995.¹³⁷ Recently the land has begun to be developed as an industrial park.

Pre-taking notice

Advance notice of a potential property taking can be extremely helpful to property owners and to the government. It allows both parties more time to plan relocations. For owners inclined to settle with the taking agency, a significant majority, it allows them time to assess their situation and negotiate a fair settlement; condemners know which property owners will sell voluntarily so that the added expense of the formal condemnation process will not be necessary. For condemnees who wish to contest the validity of the taking, it allows time to prepare and file their case for declaratory relief so that it is not necessary to file a last-minute petition for injunctive relief, which the government may have to expend tremendous urgent efforts to fight.¹³⁸ On the other hand, a longer notice period would also allow property owners interested in negotiating additional time to work out a fair settlement.¹³⁹

Advance notice allows both parties more time to plan relocations and work out a fair settlement. Generally, government agencies give property owners only the mandatory advanced notice.

Occasionally, Massachusetts property owners find out that their property is about to be taken well in advance and with sufficient notice to attempt to influence the process. For example, property owners in towns with open town meetings are entitled to prior notice in the town meeting warrant of a contemplated taking and to participation in the meeting, which must authorize the taking by a two-thirds vote.¹⁴⁰ Property owners in certain proposed urban redevelopment areas are entitled to notice in advance of the proposed redevelopment plan and to participation in a hearing on the merits of redevelopment designation.¹⁴¹ Generally, government agencies give property owners only the mandatory advanced notice, if any, required under applicable statutes or regulations.¹⁴²

Moreover, under current practice, condemnees generally have no right to information about how the condemnation process works or what the legal documents they receive mean in plain English. All they receive is the barebones notice of intent (if they are entitled to it) or the order of taking itself. While sophisticated property owners know to turn to legal counsel when faced with an order of taking, individuals and small businesses may be daunted by the process.¹⁴³ For example, the unfamiliarity of West End residents with takings procedures and the failure of the redevelopment authorities to describe the process led to serious misunderstandings and distrust of the government by West Enders.¹⁴⁴ This situation has not been rectified, and similar confusion continues with takings projects to this day. Current businesses in the TeleCom City area are uninformed about the progress of the redevelopment and continue to operate under a cloud, not knowing whether the project will continue, whether they will ever in fact be displaced, and, if so, when.¹⁴⁵

Condemnees generally have no right to information about how the condemnation process works or what the legal documents they receive mean in plain English.

On the other hand, the state relocation statute, following federal models, requires that individuals and businesses displaced by a taking be informed of relocation payments and assistance. The regulations require what is in effect an explanatory pamphlet, but the pamphlets are not required to discuss the eminent domain condemnation process (as opposed to the process of applying for relocation assistance) and rarely do.¹⁴⁶ In certain limited circumstances, Massachusetts regulations also require the entity to notify the property owner of the steps it will take to acquire the property.¹⁴⁷ There is no such requirement for takings generally, nor do most of the principal agencies engaged in takings regularly provide explanatory material to condemnees if the taking does not necessitate a relocation project.¹⁴⁸ The Boston Redevelopment Authority, for example, follows a standard unwritten internal procedure, based on expired federal regulations, in determining whether to take property and how to use it.¹⁴⁹ This process is consistent and well known in the development community but would come as a complete surprise to a small property owner

unconnected to the process and unfamiliar with eminent domain practitioners to turn to with questions. Thus, the takings process remains open to the kinds of misunderstanding and property-owner disempowerment that so adversely affected the West Enders 40 years ago.

Filing the order of taking

Generally the taking agency obtains an appraisal of the targeted property in advance of the taking in order to determine whether the contemplated project can be completed on budget. If the agency does not do so earlier, it is required to secure an appraisal before recording the order of taking because it must offer the condemnee a payment *pro tanto* (which is required to be based on appraisals) within 60 days after recording the order of taking.¹⁵⁰ Federally funded programs that take property must provide the condemnee a copy of the appraisal, which helps the condemnee assess whether an independent appraisal is necessary and whether a fair settlement is a realistic possibility.¹⁵¹ The Massachusetts Public Records Act, however, which would apply to takings when no federal funds are involved, contains an exception for real estate appraisals, explicitly shielding them from disclosure until after litigation is completed.¹⁵² This creates a hardship, particularly for small property owners for whom the cost of an appraisal is high relative to the value of their properties and who may not have the financial resources to commission an appraisal of their own. The concern of government agencies that prompted the appraisal exception is that appraisals would be a base for settlement if they were disclosed, whereas otherwise the agencies only need to offer a “reasonable amount.”¹⁵³ A recent Superior Court decision has stated in dictum that, while not obtainable through the Public Records Act, a taking agency’s appraisal is discoverable during the course of litigation if the government declares its intent to call the appraiser as either a fact or expert witness at trial.¹⁵⁴ While discovery of the appraisal during the pre-trial discovery phase would be useful, disclosure even earlier in the process might aid the negotiation and settlement process.

After the taking agency has secured an appraisal and served the preliminary notices, if applicable, it effects the taking by filing the order of taking in the Registry of Deeds.¹⁵⁵ Neither damage awards nor the names of the condemnees are required by statute to be included in the actual orders of taking filed with the Registry, even though damage awards are required to be made at the same time that orders of taking are adopted.¹⁵⁶ On the other hand, estimated damage awards for each condemnee are required to be included (along with an estimate of the total cost of the improvements caused by the taking) in the recorded orders of intention required in the judicial taking process.¹⁵⁷ Immediately after filing the order of taking, the agency must serve a notice informing the condemnee of the taking, the amount of the damage award, and the ability to contest the damage award in Superior Court.¹⁵⁸

Litigation

Within 60 days of filing the order of taking under the Chapter 79 procedure, the taking agency must offer the condemnee a payment *pro tanto*, which the condemnee may retain without prejudicing his or her right to contest the amount of the damages or the validity of the taking.¹⁵⁹ A property owner challenging the validity of a taking can do so before suing for damages or at the same time, and, in the latter case, either in the same complaint or separately.¹⁶⁰ This procedure gives the condemnee the flexibility to pursue his or her claim in the clearest and most straightforward manner, depending upon the circumstances of the case.

The takings process remains open to misunderstanding and property-owner disempowerment.

Having to pay for an appraisal of one’s own property is a hardship, particularly for small property owners.

Under the Massachusetts Constitution, jury trials for condemnations are required. Relocation payments are not considered constitutionally required.

Massachusetts also allows a jury trial, without any intermediate administrative hearing, in all condemnations under Chapter 79.¹⁶¹ Jury trials for condemnations are not considered constitutionally mandated by the federal Constitution and are not commonly required in other jurisdictions.¹⁶² They are, however, required under the Massachusetts Constitution, which has a broader jury trial right than the federal constitution.¹⁶³ Because of judicial deference to legislative and administrative determinations of public use, however, questions of validity have historically been determined as questions of law.¹⁶⁴ Relocation payments, on the other hand, are not considered part of the constitutionally required just compensation and are awarded by the relocating agency. If they amount to more than \$50,000 they must be approved by the Massachusetts Department of Housing and Community Development (“DHCD”), subject to review through an administrative appeal, rather than by jury trial.¹⁶⁵

Several practitioners mentioned the difficulty in getting paid after condemnation cases are settled or decided. Often special legislation must be passed to authorize the payment.¹⁶⁶ At least in the case of a formal court decision, the condemnee is entitled to interest. Unless a settlement agreement explicitly provides for it (and state agencies generally refuse to include such a clause),¹⁶⁷ the settlement sum does not accumulate interest. This practice can prove to be a deterrent to settlement.

2. Public Use

There does not appear to be evidence in Massachusetts of new urban development projects like those of the 1950s and 1960s.¹⁶⁸ Current eminent domain takings for redevelopment or other private-transferee takings are more likely to affect only a few properties in a particular area targeted for a specific project. Condemnees seeking to prevent a taking are likely to rely on a 1969 case in which the Supreme Judicial Court found that a proposed stadium would not be a public use.¹⁶⁹ The focus of the case was on determining whether the proposed taking satisfied a legitimate public purpose. The *Opinions of the Justices* was, in fact, the only appellate decision since the approval of urban renewal that prevented a proposed “good faith” taking as a private use.¹⁷⁰ In the 1969 *Opinions of the Justices* (and the recent *Dreison* decision, invalidating a municipal taking for a minor league baseball stadium,¹⁷¹ which relied heavily on it), the courts gave serious scrutiny to uses of eminent domain that gave significant benefits to private parties. The intensity of the courts’ scrutiny was couched in procedural language reflecting the courts’ long-standing deference to legislative public use determinations. The *Opinions of the Justices* listed the commonly used public purposes of that era: “supplying housing, slum clearance, mass transportation, highways and vehicular tunnels, educational facilities, and other necessities.” The Court ruled that courts should give heightened scrutiny to cases falling outside of the standard list of recognized public purposes.¹⁷² In such cases, the courts would look beyond the legislative declarations of purpose and examine the facts. The *Opinions of the Justices* expressed concern that the stadium proposed in 1969 could “be operated, so as to effect to subsidize private organizations operated for profit,” and, in particular “professional athletics.”¹⁷³ If so, the construction of the stadium would not be for a public purpose. The court agreed to allow a stadium (or other non-standard purpose) on the condition that the legislation “contain[] standards and principles governing and guiding the operation of the facilities in a manner which reasonably can be expected adequately (a) to protect all aspects of the public interest and (b) to guard against improper diversion of public funds and privileges for the benefit of private persons and entities...”¹⁷⁴ The court suggested that the stadium

Condemnees seeking to prevent a taking are likely to rely on a 1969 Supreme Judicial Court ruling that a proposed stadium would not be a public use.

could be approved if the legislation contained requirements that 1) “in making arrangements with persons and entities operating for profit, the Authority shall impose on them charges representing at least the fair market value of the privileges afforded and at least comparable to those which would be charged by a prudent and diligent private owner of the same facility”; 2) “in leasing the facilities, the Authority protect whatever public interest there may be in having the facilities available to a diversity of users on a fair basis, and not, for example, placed so exclusively at the disposal of one or more particular users that an equitable amount of use by others will be unduly restricted”; and 3) a “clear provision for reasonable review of compliance with appropriate standards...”¹⁷⁵ Since 1969, no reported appellate case has used these criteria to measure the legitimacy of a taking. *Opinions of the Justices* provides a useful framework for evaluating takings that significantly benefit private parties, but fails to establish a fully functional standard by avoiding discussion of non-profit beneficiaries (then a much smaller part of the overall economy than now) and limiting detailed scrutiny of intended purpose to non-traditional uses of eminent domain. Further development of these principles remains for future cases.

The trial court in the *Dreison* case early this year prohibited a taking for a minor league baseball stadium in Springfield, relying in part on the 1969 *Opinions of the Justices*. The court acknowledged that if enabling legislation had been drafted in compliance with the requirements laid out in the *Opinions of the Justices*, the takings would be considered for a valid public purpose.¹⁷⁶ *Dreison* suggested a shorthand test invalidating takings where “the primary beneficiary...was not the public,”¹⁷⁷ but did define more clearly the meaning of “primary beneficiary” of a taking. In *Dreison*, the city fathers were impatient with the legislative and regulatory process and attempted a municipal taking.¹⁷⁸ The court implied that the taking might well have been approved if the city had complied with the procedural requirements for modifying the existing urban renewal plan to allow for the stadium, which requires consideration of the public interest.¹⁷⁹ If the proper procedures had been followed and written determinations of public utility made, it would have been permissible to take land by eminent domain to build a baseball stadium that was “incidentally” used by a for-profit baseball team.¹⁸⁰ Neither the *Opinions of the Justices* nor *Dreison*, however, provides a clear test of what constitutes appropriate “incidental” use. These cases alone provide insufficient support for a property owner hoping to derail a proposed taking of his or her property primarily for use by a for-profit entity as a violation of the public use requirement.

3. Just Compensation

In the area of just compensation, as discussed in Section II (B), economists’ principal concern is the apparent failure to compensate condemnees fully for their business losses and relocation expenses.¹⁸¹ The Massachusetts courts have determined that business goodwill and, by implication, the related concept of going-concern value are not compensable under the Massachusetts Constitution.¹⁸² There have been several occasions in the past where special takings legislation has allowed such compensation. Recognizing that when an entire community is destroyed it is difficult for businesses to regain their prior patronage from their dispersed clientele, legislatures both in Massachusetts and elsewhere have granted compensation by special statute for lost goodwill when large areas were flooded to create reservoirs.¹⁸³ Special statutes as a matter of occasional legislative grace, however, would aid only a limited number of condemnees. The Model Eminent Domain Code, in contrast, provides for reimbursement for lost goodwill in all cases when businesses are displaced by eminent domain.¹⁸⁴

Opinions of the Justices provides a useful framework for evaluating takings that significantly benefit private parties...

...but fails to establish a fully functional standard. It also avoids and limits detailed scrutiny of intended purpose to non-traditional uses of eminent domain.

Failure to pay for lost goodwill is particularly harmful to long-term business tenants.

The lack of compensation for goodwill is considered by many commentators to be one of the greatest injustices in the takings area. Failure to pay for lost goodwill is particularly harmful to long-term business tenants who otherwise receive only minimal compensation for their lost leasehold value. For example, in the West End clearance, small businesses that were unable to relocate because of the dispersion of their local and long-established clientele received no compensation at all.¹⁸⁵ A hypothetical example might be a restaurant, which has been established for 15 years and built up strong local patronage in a neighborhood slated for demolition as part of an urban redevelopment plan. Neighborhood customers would probably not follow it to a different area, and it could take years to rebuild similar neighborhood goodwill elsewhere. Ironically, as is the case in all lost goodwill situations, before the announcement that their properties would be taken by eminent domain, these businesses could have received payment for established goodwill if the proprietors had voluntarily chosen to sell to a competitor and retire.¹⁸⁶ Under current eminent domain law, the government has effectively destroyed the ability of these businesses to continue as going concerns or to sell.

Current statutes also do not fully cover relocation expenses.

Current statutes also do not fully cover relocation expenses. Massachusetts relocation assistance¹⁸⁷ is modeled on the Federal Uniform Relocation Assistance Act,¹⁸⁸ which fails to compensate for all of the consequential damages to businesses displaced by eminent domain.¹⁸⁹ For example, the current Massachusetts statute provides for some caps (which have not been raised since 1973), such as new site search expenses capped at \$1,000 and reestablishment expenses (bringing the new property up to code and refitting it for the new business) capped at \$10,000.¹⁹⁰ A hypothetical example would be a long-established gas station, which, because of specialized equipment and high regulatory compliance costs might have to pay up to \$150,000 to install equipment at a new site. A gym with special aerobics flooring, showers, lockers, and sauna ventilation might need to spend up to \$300,000 to reconstruct similar facilities at a new location. Because of the caps, these businesses will have to absorb a large part of the relocation expense themselves and, without coverage for lost going-concern value, they may have to undergo an expensive and economically inefficient relocation to recoup any of the value of their long-running businesses.

If attorneys' fees are not recoverable, there is a strong incentive for the government to underpay.

There are also considerable gaps in relocation coverage. For example, loans needed for moving expenses are not covered.¹⁹¹ Since moving costs are often considerable, businesses have no choice but to finance them because relocation payments are not made until long after the move.¹⁹² Yet, despite the fact that owners are often forced to pay these expenses up front because of governmental tardiness, the interest payments are forced on the condemnees under the current system.¹⁹³ Moreover, in several recent cases personal property abandoned because of a taking was uncompensated, despite regulations that actually provide relocation coverage for such property.¹⁹⁴ In all, a business forced to relocate because of a taking faces considerable unreimbursed relocation expenses, despite the relocation assistance available.

The failure to cover attorneys' fees expended in recovering the fair market value of property adds to the costs borne by condemnees. Attorneys' fees are a definite expense suffered by the property owner when the payment *pro tanto* is below the actual value of the taken property.¹⁹⁵ If attorneys' fees are not recoverable, there is a strong incentive for the government to underpay in its payment *pro tanto*, especially to owners of residences and small businesses who are less likely to contest underpayments. Underpayments in such cases are often too small in absolute terms to warrant hiring counsel, but they are high relative to

the total value of the property and to the needs of the condemnee.¹⁹⁶ Many other states have recognized the inequity of forcing the condemnee to pay his or her own expenses to seek a full recovery for his or her own property.¹⁹⁷ These states regularly award attorneys' fees to the prevailing party in takings damage award cases. Thus, in contrast to practices in several other states, considerable uncompensated pecuniary harm is inflicted on condemnees by the failure of Massachusetts to recognize the property interests of lost goodwill and going-concern value, to reimburse attorneys' fees necessary to receive just compensation in valuation cases, and to remove caps on and gaps in coverage of relocation expenses.

A final inefficiency in the area of compensation is the current Massachusetts statutory scheme for determining interest, which combines floating and fixed elements in a manner that is confusing and inaccurate. If the condemnation damages trial results in an award above the payment *pro tanto*, the condemnee is entitled to interest from the time of the taking.¹⁹⁸ Based on federal precedents and contrary to earlier Massachusetts decisions, in 1967 the Supreme Judicial Court determined that Part I, Article X, of the Massachusetts Constitution required interest on condemnation judgments from the time of the taking until final payment,¹⁹⁹ but it failed to address the issue of the appropriate rate of interest. At that time, Chapter 79 provided for 6 percent interest, which was raised to 10 percent in 1981, and then in 1993 changed to a fixed rate based on the 52-week United States Treasury Bill immediately before the property was condemned.²⁰⁰ Interest based on the Treasury Bill rate, however, fluctuates regularly, which allows government agencies to time the takings process to their advantage by commencing the taking when the rate dips, a form of small-scale manipulation that would not be warranted if interest floated based on a standard scale.²⁰¹ Perhaps more important, the Treasury Bill rate is an inadequate basis for calculating the lost opportunity cost of deferred damages to condemnees because it reflects the government's cost of borrowing at a short interest rate.²⁰² Condemnees would be more adequately compensated for the lost use of their money if the interest rate on condemnation awards were based on the standard prime rate for mid-sized businesses available from a basket of large Massachusetts commercial banks, which is the cost for businesses of borrowing money medium-term in the commercial market.

Condemnees would be more adequately compensated if the interest rate on condemnation awards were based on the standard prime rate for mid-sized businesses.

B. Data and Analysis

A unique opportunity available through this project was the collection and analysis of data on eminent domain takings in several Massachusetts municipalities. A convenience sample of 10 eastern Massachusetts municipalities was chosen from municipalities in Middlesex and Suffolk Counties and included the City of Boston in Suffolk County and nine demographically diverse municipalities in Middlesex County: Cambridge, Dunstable, Everett, Framingham, Lowell, Newton, Tewksbury, Tyngsborough, and Waltham. Data on takings during the years 1987 (the earliest year for which accurate computer database summaries of all takings in both counties was available) through 1999 were extracted and analyzed with regard to municipal demographic, economic, and political characteristics and annual state economic data. The goals of the analysis were to determine whether takings activity was related to specific municipal characteristics (such as population and municipal assessed value) and annual state economic factors (such as rate of inflation and state expenditures). Because of limited available time and resources, a broader study was not feasible, but this study revealed sufficient statistically significant correlations and associations to warrant further investigation.

The data collection brought to light several issues that raised concern about the transparency and accountability of the eminent domain process in Massachusetts. The data analysis uncovered some interesting trends, in particular a growing number of eminent domain takings in the most recent years. They will be discussed in greater detail below.

Data Collection

Five hundred and one separate takings were identified for the 10 municipalities listed above during the years 1987 through 1999, and the following information was extracted from the record: date of taking, municipality, condemnor, condemnee, location of and purpose for the taking, area of taking in square feet, interest taken (easement or fee, temporary or permanent), and damages awarded. Condemnees were categorized into three categories: “private/ mixed,” which represented takings from private parties and a combination of private parties and public entities; “public” which represented takings from government agencies and from “persons unknown,” a term primarily used in combination with government condemnees in confirmatory takings to clear title for future uses; and “unclear” for takings in which the condemnee was not specified or its nature as public or private could not be determined.

Municipal demographic, economic, political behavior, and governance data were collected, including: 1990 population, 1980-1998 population change, 1999 population density, total 1999 municipal land area, and type of community (urban, suburban, rural), 1999 assessed value, assessed value per municipal area, municipal revenue, per capita and median household income, type of government (categorized by degree of centralization), and votes on the most recent state referenda on property-related issues (ending nuclear power generation and rent control).²⁰³

The following statewide economic and demographic data were also collected for the years 1987 to 1999: total state revenue, tax revenue, percent change in tax revenue from previous year, total state expenditures, yearly population growth, and rate of unemployment and inflation.²⁰⁴ These particular data were selected for analysis because of their ready accessibility. The study focused on demographic, economic, and political data that might be likely to explain variance in takings behavior over time and among municipalities, such as general economic indicators (unemployment, inflation), available government revenue (municipal revenue, state revenue and expenses), demographic distinctions (municipal density, character, household income, total population, and population-related indicators), political patterns (municipal government, voting on property-related referenda), geographic differences (total area), and local economic concerns (total assessed value and value-related indicators).

Correlation and regression analyses were used to evaluate associations between total number and total area of takings, on the one hand, and municipal characteristics and state economic indicators, on the other. Because of the small size of the dataset and the high degree of collinearity among several of the variables (such as 1) population, total municipal revenue, and total municipal assessed value, and 2) total state revenue, total tax revenue, and state expenditure), the separate effects of these variables and their relative magnitude on the association with the outcome variables could not be assessed.

Data on 501 takings from 1987 through 1999 in Boston, Cambridge, Dunstable, Everett, Framingham, Lowell, Newton, Tewksbury, Tyngsborough, and Waltham were analyzed.

Data also were collected on:

- ***general economic indicators***
- ***government revenue***
- ***demographic distinctions***
- ***political patterns***
- ***geographic differences***
- ***local economic concerns.***

To control for the large number of projects in Boston, the region's economic hub, analyses were performed with and without Boston to determine whether trends were still evident after excluding the large number of takings in Boston (caused in part by large projects such as the Central Artery/Third Harbor Tunnel and the Convention Center). Similarly, because of two anomalous large takings in Dunstable for conservation purposes (which tended to be very large tracts), analyses on area of takings were performed with and without this municipality in order to prevent the analysis from being driven by one influential data point.²⁰⁵ Most, if not all, of the takings from government agencies (referred to as "public takings") were not true takings, but instead confirmatory takings (when a government agency commences the eminent domain process to clear title prior to developing a site) or interagency transfers (when government agencies exchanging jurisdiction over a parcel find the eminent domain process more convenient than standard purchase by deed).²⁰⁶ Therefore, separate analyses were done on all takings and on takings from only from private condemnees ("private takings") in order to determine if confirmatory takings and interagency transfers caused any skewing of total results and to evaluate significant differences in takings behavior between private and public takings.

The lack of recorded information in many orders of takings made data analysis and interpretation of results more difficult and underscored concerns about lack of openness in the takings process. Two particular issues stood out: failure to record damage awards and unclear statements of purpose.

In addition to a large number of orders of taking that ignored payments *pro tanto* altogether, many recorded orders of taking indicated that the damage award was included in an unrecorded appendix.²⁰⁷ The failure to provide the payments *pro tanto* in these orders of taking therefore indicates a deliberate attempt to avoid making that information readily available to the public at the Registries of Deeds. While recording all appendices to orders of takings might occasionally be somewhat cumbersome, it should generally be required as a matter of completeness.²⁰⁸

The second major issue revealed during data collection was the failure to state a clear purpose for the taking, which hinders efforts to determine the intended use of the parcel and runs counter to the general goal of transparency in governmental actions.²⁰⁹ Despite clear case authority requiring specific statements of purpose and disapproving of the use of "municipal purposes" in orders of takings,²¹⁰ our survey indicated that municipalities continue to state "municipal purposes" as the reason for the taking.

The Massachusetts Highway Department was a model of clarity in the description of intended purpose, mentioning not only the specific highway, but the specific nature of the work, for example including a series of "whereas" clauses explaining the need for the particular work and clearly stating the reason for the taking: "for the purpose of allowing for the construction of the replacement [electrical substation] facility."²¹¹ The Boston Redevelopment Authority, on the other hand, was noticeably general in its descriptions, almost inevitably simply naming the relevant neighborhood urban renewal area as the "purpose." Because the process of obtaining public records describing actual intended uses of property taken for urban redevelopment can be lengthy (due to the voluminous files generated in such cases and the multiple amendments to long-standing urban renewal plans), it is difficult to assess the actual intended use of such parcels without site inspection

The lack of recorded information made data analysis more difficult and underscored concerns about lack of openness in the takings process.

or persistent request for the relevant records from the condemnor through the often lengthy public records process. The courts have recognized that the specification of a particular purpose keeps this relevant information readily available to the public and decision-makers, in conformity with the economic principle of improving transparency: “Without a definite statement of purpose, the condemned property can more easily be diverted to other uses.”²¹²

“Without a definite statement of purpose, the condemned property can more easily be diverted to other uses.”

A related issue concerns accountability of private condemnors and private-transferees. Investigation of the Dudley Street Neighborhood Initiative (“DSNI”) takings, the only takings by a private condemnor in the data set, indicated that 1) the condemned sites able to be verified were in fact empty lots before condemnation, many with outstanding tax liabilities; 2) they were taken for close to fair value; and 3) they are now built up with affordable housing. This review confirms the initial intent of the DSNI organizers to utilize primarily vacant parcels and avoid disputes with property owners who wanted to continue owning parcels within the development area.²¹³ Because of lack of accountability, however, it is unclear how well DSNI is maintaining the affordability restrictions on the taken property that were the basis for granting DSNI takings power.²¹⁴ Even a supportive reviewer of the Dudley Street takings voiced considerable concern about the lack of continuing accountability and the low standard for public use review of takings by (or for disposition to) private parties.²¹⁵ The failure of taking agencies to provide all relevant information, including clear statements of purpose and payments *pro tanto*, and the exemption of much relevant information from the public records requirements make efforts to ensure accountability and openness more difficult.

Data Analysis

Because of the small size of the database and non-random sample of municipalities, inferences regarding general trends in Massachusetts cannot be drawn with certainty.²¹⁶ The trends discerned in this study therefore call for further study on a broader sampling of municipalities over a relatively long time period.

Nevertheless, within the dataset, sufficient data were reported to evaluate purpose for takings, the condemnor, and the difference between private and public condemnee takings, and to perform analyses on the associations between number and area of takings per year and per municipality, and the municipal and state characteristics listed in the Data Collection section. Insufficient data, however, were reported to perform any statistically meaningful analyses for amounts of damage awards because damages were frequently not recorded: of public condemnees only 12 percent of takings, and of private condemnees only 54 percent of takings recorded the amount of damages awarded.

General Results

Data on 501 takings, totaling more than 38 million square feet, were collected and analyzed. Data on area were reported for 83 percent of all takings—78 percent of private takings and 92 percent of public takings. The average number of takings per year was 39, with the fewest number of takings in 1991 (18) and the largest number in 1999 (65). Of takings that reported area, the median area was 19,500 square feet (four-tenths of an acre), with the smallest area 21 square feet and the largest over 5.5 million square feet (126 acres). Of the seven takings that represented greater than two standard deviations above the mean, five were from private condemnees. The two largest were in Dunstable in 1987 and 1995

for conservation purposes, representing 5.7 million and 2.4 million in square feet respectively. The five other takings were considerably smaller, ranging from nearly 900,000 to 1.4 million square feet, and were for road repair and utilities in Boston and Framingham.

Takings from private condemnees represented the great majority of all takings: 74 percent of the total number of takings and 76 percent of the total area of takings. Takings from private condemnees totaled nearly 29 million square feet, with a median area of 16,500 square feet per taking. The median area for takings from public condemnees was 21,300 square feet.

Takings by Year

As illustrated in figure 1, there was little variation in annual number of takings except for years 1990–1991, during which there were the fewest takings (26 and 18), and years 1997 and 1999, during which there were the greatest number of takings (57 and 65). Takings from private condemnees showed trends similar to those from all condemnees.

Annual total and median area of takings did not, however, completely parallel annual number of takings per year. Excluding 1987 and 1995 because of anomalous large takings in Dunstable (5.7 and 2.4 million square feet), the largest total area of takings occurred in 1993 and 1996, and the smallest in 1989 (figure 2).

The largest annual median takings occurred in 1988 and the smallest in 1991 and 1999 (figure 3). Similar trends were seen with private takings only.

Figure 1. Number of takings by year

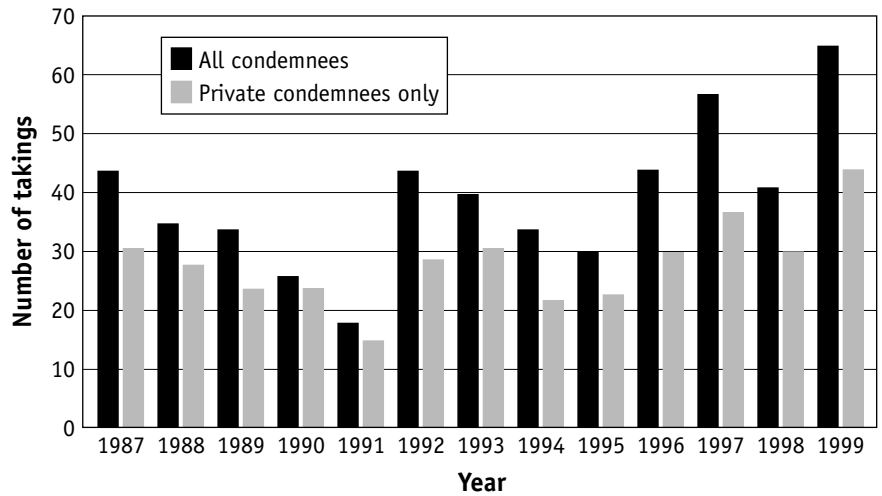


Figure 2. Total area of takings by year

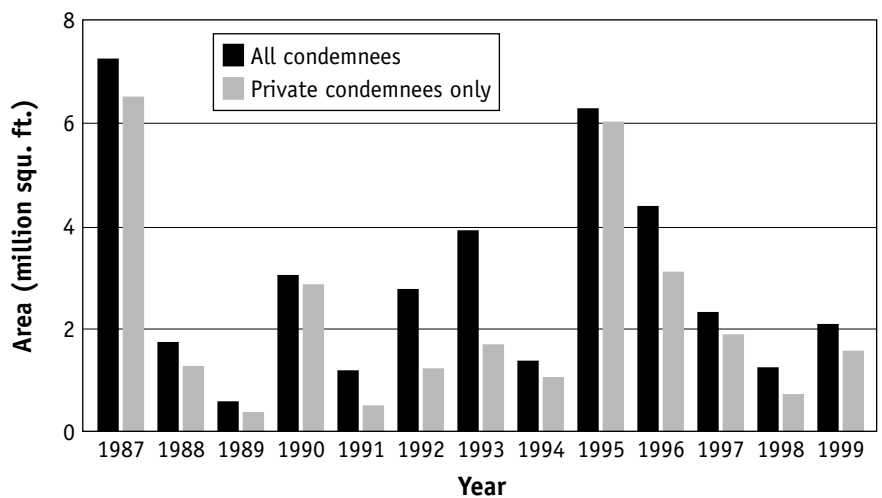
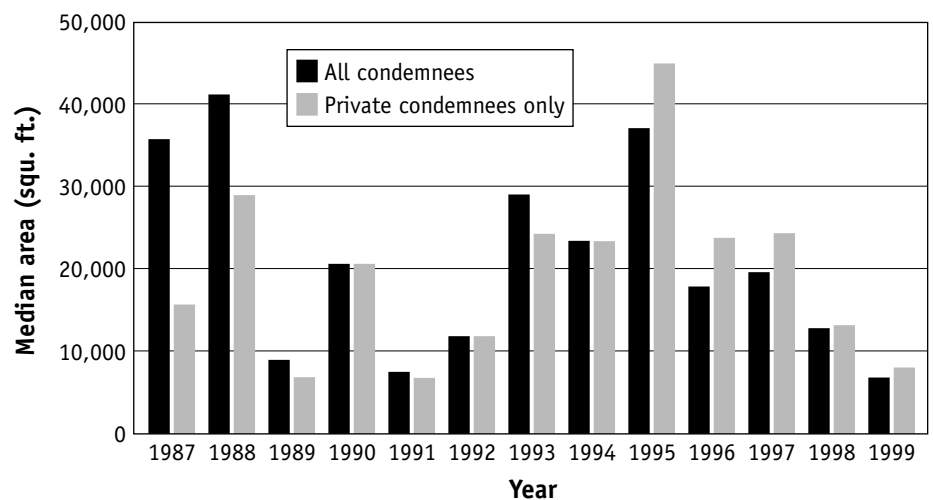


Figure 3. Median area of takings by year



Takings by Municipality

Figure 4 shows the number and total and median area of takings for each municipality studied. The total number and total area of takings in municipalities were not correlated, except for Boston, which had both the greatest number of and the largest area of takings. Cambridge and Waltham had the second and third highest number of takings, but Dunstable and Framingham were second and third in total area of takings.

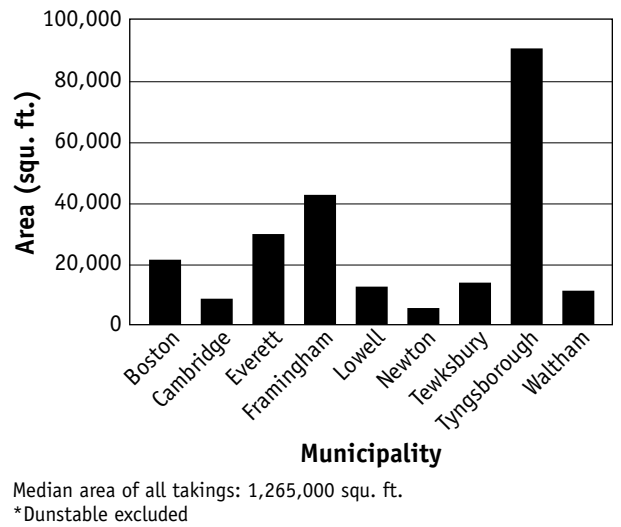
Similarly, median area of takings was not correlated with either number or total area of takings in a municipality. Dunstable had by far the largest median area of takings, followed by Tyngsborough and Framingham (figure 5).

Figure 4. Number and area of takings by municipality

| Municipality | Total Number of Takings | Total Area of Takings (squ. ft.) ^a | Median Area of Takings (squ. ft.) ^a |
|--------------|-------------------------|---|--|
| Boston | 266 | 19,425,600 | 21,800 |
| Cambridge | 50 | 1,580,200 | 9,127 |
| Waltham | 48 | 950,548 | 11,378 |
| Framingham | 42 | 4,499,900 | 43,144 |
| Newton | 36 | 189,100 | 5,416 |
| Lowell | 30 | 2,307,800 | 13,068 |
| Tewksbury | 16 | 311,300 | 13,848 |
| Tyngsborough | 10 | 852,900 | 90,531 |
| Dunstable | 2 | 8,066,500 | 4,033,242 |
| Everett | 1 | 30,200 | 30,180 |
| Total | 501 | 38,214,000 | Overall Median 19,500 |

^a Of those which recorded taking area

Figure 5. Median area of all takings*



This lack of correlation between number and area of takings also extended to number and area of takings adjusted for total municipal land area and municipal population. When controlled for municipal area, however, Boston and Cambridge stood out with the greatest number and area of takings (excluding Dunstable) *per municipal area*, as shown in figures 6 and 7.

Figure 6. Number of takings (1987-99) per 1999 municipal area

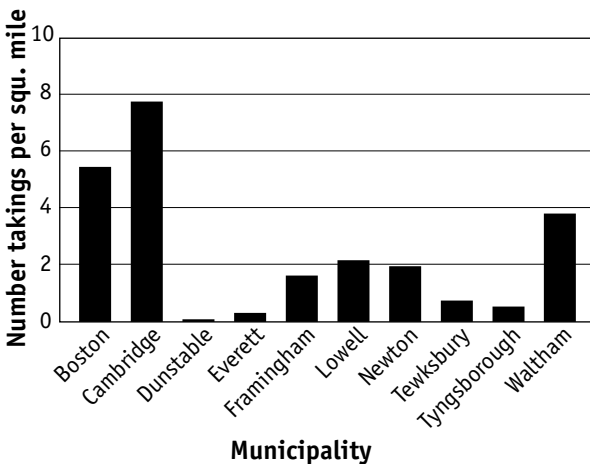
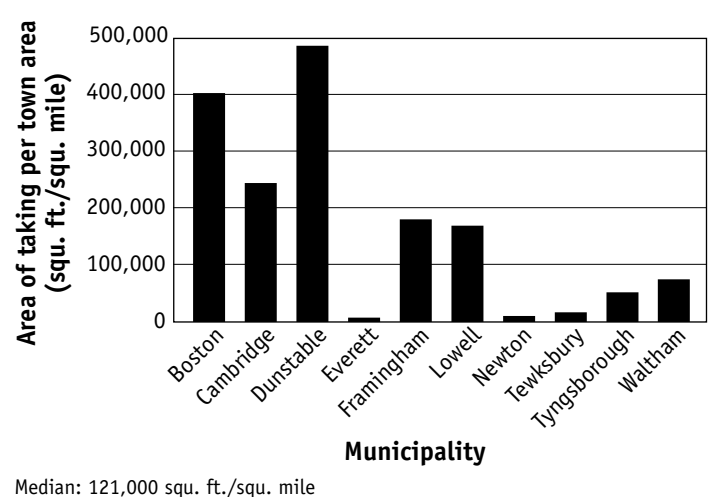
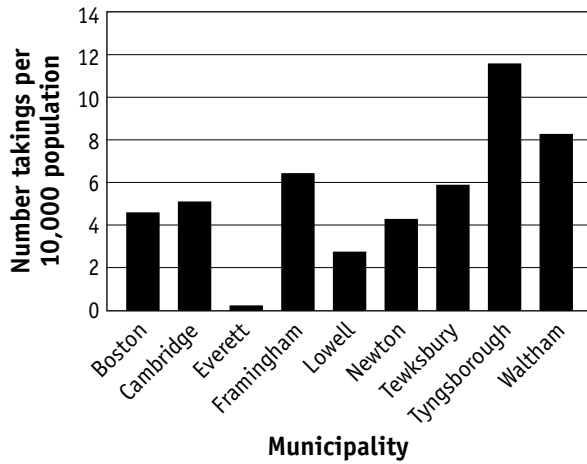


Figure 7. Total area of takings (1987-99) per 1999 municipal area



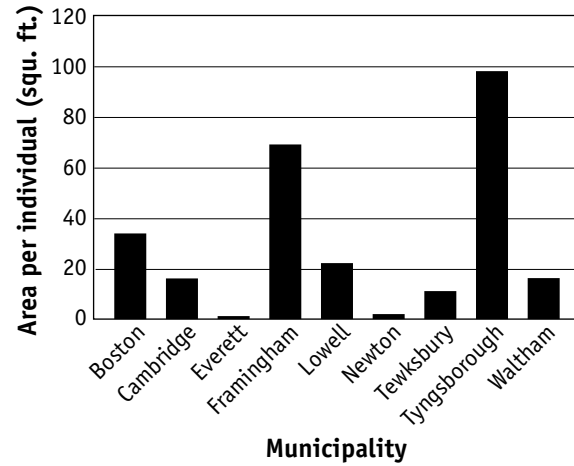
Tyngsborough, Waltham, and Framingham had the greatest number of takings per municipal population and Tyngsborough and Framingham had the largest total area of takings per population (figures 8 and 9).

Figure 8. Number of takings (1987-99) per 1999 municipal population*



Mean number of takings: 5.8
*Dunstable excluded

Figure 9. Total area of takings (1987-99) per individual*



Median area per individual: 19.4
*Dunstable excluded

When analyzed by municipality, percentages of takings from public and private condemnees were similar with the exception of Boston and Cambridge (figure 10): 86 percent of all takings from public condemnees occurred in Boston compared with 43 percent of all takings

from private condemnees. The vast majority of takings (90 to 100 percent) in non-Boston municipalities were from private condemnees, whereas only 59 percent of takings in Boston and 78 percent of takings in Cambridge were from private condemnees). Percentages of area of takings by municipalities were, however, similar for private and public condemnees with the exception of Dunstable, which had two extremely large takings from private parties for conservation purposes.

Figure 10. Municipal distribution of takings by number and area

| Municipality | Percent of takings by number ^a | | Percent of takings by area ^{a,b} | |
|--------------|---|-------------------------|---|-------------------------|
| | All Takings | Private Condemnees only | All Takings | Private Condemnees only |
| Boston | 53 | 43 | 51 | 39 |
| Cambridge | 10 | 11 | 4 | 4 |
| Waltham | 10 | 13 | 2 | 3 |
| Framingham | 8 | 9 | 12 | 14 |
| Newton | 7 | 10 | 0.5 | 0.7 |
| Lowell | 6 | 7 | 6 | 7 |
| Tewksbury | 3 | 4 | 1 | 1 |
| Tyngsborough | 2 | 2 | 2 | 3 |
| Dunstable | 0.4 | 0.5 | 21 | 28 |
| Everett | 0.2 | 0.3 | 0.1 | 0.1 |

^a May not add to 100 percent because of rounding
^b Of those reporting taking area

Takings by Purpose

Road repair and construction (considered as one category) was the most common recorded purpose for takings, accounting for 54 and 60 percent of takings from public and private condemnees, respectively. The next most common purpose for all takings was urban renewal, which accounted for 11 percent of all takings and 37 percent of takings from public condemnees. When, however, only private condemnees are considered, whether by number or by area, urban renewal accounted for a small percentage of takings. General municipal services and utilities, on the other hand, were the second and third most common reason for takings from private condemnees, accounting together for 24 percent of all takings from private condemnees. Figure 11 shows the distribution of takings and area of takings by purpose.

Figure 11. Distribution of takings by purpose

| Purpose | Percent of takings by number ^a | | Percent of takings by area ^{a,b} | |
|---|---|-------------------------|---|-------------------------|
| | All Takings | Private Condemnees only | All Takings | Private Condemnees only |
| Road repair and construction | 59 | 60 | 43 | 34 |
| Urban renewal | 11 | 2 | 4 | 1 |
| General municipal services ^b | 9 | 12 | 11 | 12 |
| Utilities | 9 | 12 | 12 | 13 |
| Transportation services | 5 | 6 | 3 | 3 |
| Civic arena | 3 | 3 | 4 | 3 |
| Conservation | 1 | 1.6 | 24 | 30 |
| Housing | 0.6 | 0.5 | 0.08 | 0.08 |

^a May not add to 100% because of rounding.

^b General municipal services include: schools, police, libraries, hospitals, and municipal office space.

There were several significant differences in purpose for takings between public and private condemnees. A significantly higher percentage of public condemnee takings were for urban renewal (37 vs. 2 percent for private condemnee takings), and significantly higher percentages of private condemnee takings were for general municipal services (12 vs. 2.4 percent for public condemnees), utilities (12 vs. 1.6 percent for public condemnees), and transportation services (6 vs. 0.8 percent for public condemnees). The percentages of takings for road repair, civic arena, conservation, and housing were not statistically different for public and private condemnees.

Takings by Condemnor

In Boston, a variety of state and municipal agencies were involved in eminent domain takings, whereas the condemnor in most other municipalities was most often the municipality or a related municipal authority. Overall, excluding non-Boston municipalities (considered together), the Massachusetts Department of Highways was the most frequent condemnor, followed by the Boston Redevelopment Authority and the Boston Housing Authority (considered together for purposes of analysis),²¹⁷ and the Massachusetts Public Works Department and the Massachusetts Division of Capital Planning (considered together for purposes of analysis).

Comparison of takings from private and public condemnees reveals some differences among condemnors (figure 12). The most frequent condemnor for takings from public condemnees was the Massachusetts Department of Highways (42 percent), followed by the Boston Redevelopment Authority and the Boston Housing Authority (taken together) (40 percent). Among private condemnees, the most frequent condemnors were non-Boston municipalities and municipal agencies (40 percent) followed by the Massachusetts Department of Highways (25 percent). Statistically higher percentages of takings from public condemnees

were made by the Massachusetts Department of Highways (42 vs. 25 percent for private condemnees) and the Boston Redevelopment Authority and Boston Housing Authority taken together (40 vs. 4 percent for private condemnees). Statistically higher percentages of takings from private condemnees were made by the City of Boston and Boston Public Facilities Department taken together (4 vs. 1.6 percent for public condemnees) and the Massachusetts Bay Transit Authority (6 vs. 0.8 percent for public condemnees).

Factors Affecting Total Number and Total Area of Takings

Given the small size of the dataset, firm conclusions regarding associations between demographic, political, and economic factors and number or area of takings cannot be made. Several patterns, however, emerged from correlation and regression analyses. Municipal population, municipal area, total municipal assessed value (TAV), and total municipal revenue (TMR) were all positively correlated with both number and total area of takings by municipalities. After exclusion of Boston data, all these factors except municipal area remained significantly associated with number of takings. The high degree of collinearity between municipal population, TAV, and TMR makes it difficult to determine the relative magnitude of association of these three variables; however, population appeared to be the strongest factor in regression analyses in determining number and area of takings.

Figure 12. Distribution of total number of takings by condemnor and condemnee

| Condemnor | All Takings (%)^a | Private Condemnees only (%)^a | Public Condemnees only (%)^a |
|---|------------------------------------|--|---|
| Non-Boston municipalities and municipal authorities | 33 | 40 | 7 |
| Massachusetts Department of Highways | 29 | 25 | 42 |
| Boston Redevelopment Authority and Boston Housing Authority | 13 | 4 | 40 |
| Massachusetts Department of Public Works and Massachusetts Division of Capital Planning | 10 | 11 | 8 |
| Massachusetts Bay Transportation Authority | 5 | 6 | 0.8 |
| City of Boston and Boston Public Facilities Department | 4 | 4 | 1.6 |
| Metropolitan District Commission | 3 | 5 | 0 |
| Massachusetts Water Resources Authority | 2 | 2 | 1 |
| Massachusetts Environmental Management ^b | 1 | 1.6 | 0 |
| Massachusetts Turnpike Authority | 0.4 | 0.5 | 0 |
| Dudley Neighbors | 0.2 | 0.3 | 0 |
| US Department of Interior | 0.2 | 0.3 | 0 |

^a May not add to 100 percent because of rounding

^b Includes Commissioner of Environmental Management, Mass. Department of Environmental Engineering, and Mass. Department of Fisheries and Wildlife

There was a very slight association between total *area* of takings by municipalities, on the one hand, and degree of urbanization and type of municipal government, on the other. More rural municipalities and less centralized forms of municipal government were associated with larger area of total takings. The type of government and degree of urbanization may themselves, however, be related, confounding the association with takings. There was no association between *number* of takings and degree of municipal urbanization or type of municipal government.

Analyses for only private takings yielded the same results. A slight, statistically borderline association between less centralized government and fewer number of takings was also observed, an association that was not evident when takings from public condemnees was included.

An interesting pattern emerged with regard to voting behavior. Boston and Cambridge had higher proportions of voters voting *against* ending rent control and *for* halting nuclear power generation in Massachusetts, *and* had the highest number and largest total area of

takings per municipal area compared with the other municipalities. Although there was no statistically significant correlation between voting behavior on the two propositions and the number or area of takings, voting behavior was strongly associated with number of takings *per municipal area* and moderately associated with area of takings *per municipal area*. Analyzing number and area of takings *per municipal area* addresses, to a certain extent, the effect of takings on municipal character. A higher area of takings per *municipal area* means that a larger percentage of the total land area of the municipality is directly owned by government or has passed through government redevelopment hands and is significantly restricted in its use by the government. Number of takings per municipal area to a certain extent gauges the amount of development carried out under government auspices in a particular area (many small takings indicates significant government activity).

Figure 13

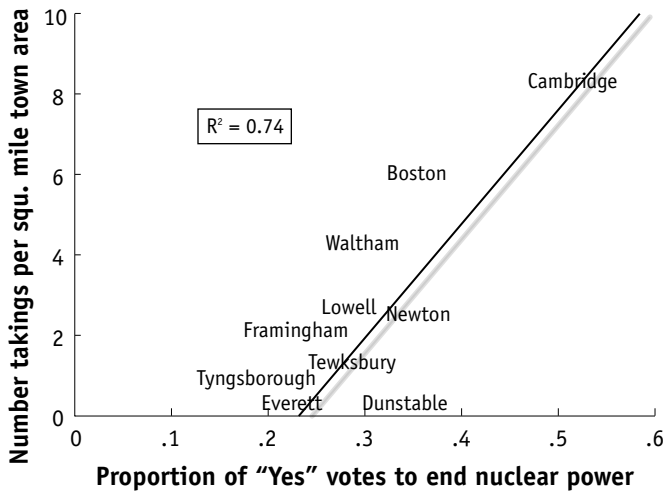
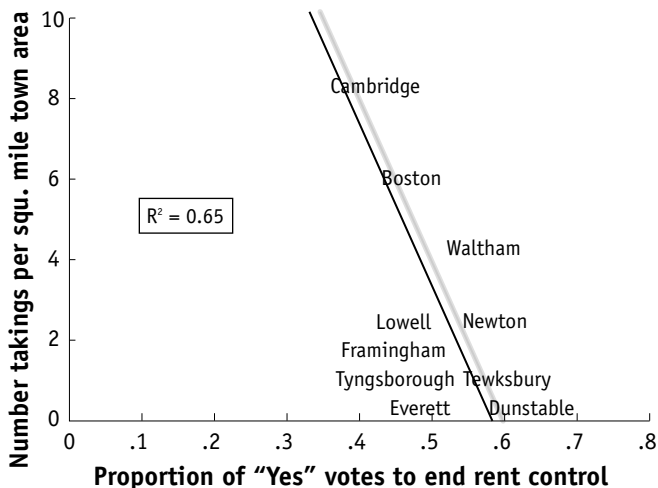


Figure 14



As shown in figure 13, there was a strong *positive* correlation between area of takings per municipal area and voting on Question 4 of 1988, indicating that as the proportion of voters voting to terminate existing nuclear power generation facilities increased, the number of takings per area of town also increased (R^2 equals 0.74).²¹⁸

As seen in figure 14, a strong *negative* correlation between number of takings per municipal area and voting on Question 9 of 1994 was observed, indicating that as the proportion of voters voting to end rent control increased, the number of takings per area of town decreased (R^2 equals 0.65).

Voting behavior on the propositions was similarly but more moderately correlated with area of takings per municipal area (figures 15 and 16).

Total state revenue, state tax revenue, and total expenditures were positively correlated with annual number of takings. Rate of inflation and rate of unemployment were negatively correlated with number of takings. Rate of inflation and rate of unemployment were the two most important factors in determining annual number of takings. After adjusting for these two economic indicators, no other variables significantly predicted number of takings. Results were the same for private takings only, except that the rate of inflation was not a determining factor. Because of the large area of takings in Dunstable in 1987 and 1995, and the variability of total area of takings in other years, no association could be made between state economic factors and annual area of takings.

Discussion of Significance of Results

The data on number of takings proved to be more indicative of trends than the data on area of takings because a few large takings in particular years or particular municipalities skewed results. Generally, results of analyses of private takings were parallel to those of all takings and results of analyses of number of takings by year and by municipality tended to be confirmed by total area of takings by year and by municipality.

The data analyses revealed the following trends:

1. As has been the case since colonial times, road repair and construction (considered together) remains the largest single category of takings (59 percent of all takings by number and 43 percent of all takings by area). Road repair and construction was a major purpose in every year included in the study (including slow economic times), while other purposes tended to have peak years only during strong economic times.²¹⁹
2. The vast majority of takings (85 percent of the total number of takings) were for traditional government purposes (road repair, municipal services, conservation, public transportation, and utilities). While a fair number of takings were for urban renewal (11 percent of the total number of takings and 4 percent of the total area of takings), approximately 82 percent of that number and 75 percent of that area were from public

Figure 15

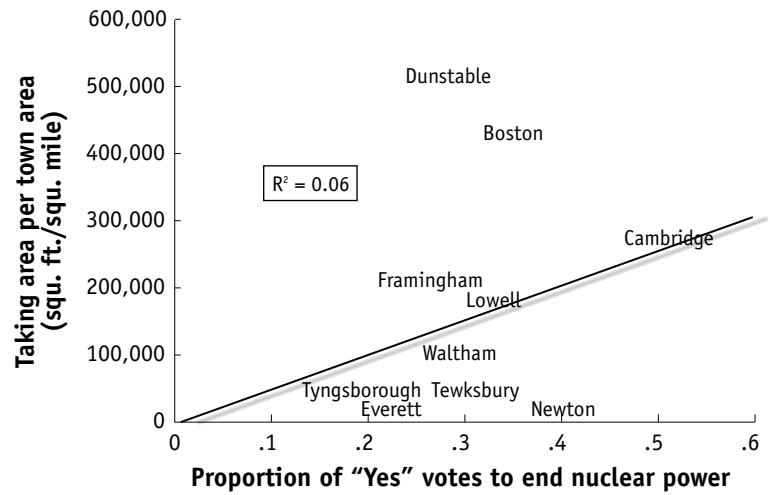
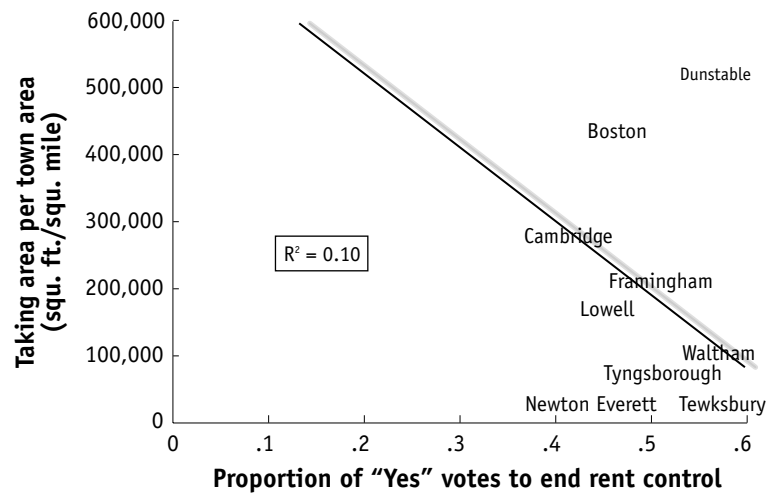


Figure 16



condemnees, even though takings from public condemnees represented only 26 percent of the total number of takings and 24 percent of the total area of takings. Thus, a very small percentage of takings from private condemnees was for urban renewal—only 2 percent of the number of takings from private condemnees and 1 percent of the area of takings from private condemnees were devoted to urban renewal purposes. For example, of all the takings in the dataset by the Boston Redevelopment Authority for non-convention center urban renewal, only one was from a private condemnee. That condemnation was a confirmatory taking as part of the Chinatown YMCA/Doubletree Hotel development project, in which the private condemnee (the Salesian Brothers) had voluntarily sold its property (the former Don Bosco High School) for development and the Boston Redevelopment Authority facilitated the development by condemning any rights of the Salesian Brothers to a discontinued road on the development site.²²⁰

3. A strong positive association between total number of takings and total municipal population was observed. This could indicate that takings are largely driven by per capita service needs. On the other hand, because population is strongly correlated with total municipal revenue,²²¹ these results may indicate that the number of takings is driven by available resources: when funds increase, more property is taken. Analysis of total area of takings confirms the correlation of increased takings with both increased population and increased total municipal revenue. This pattern warrants further study over an extended dataset, perhaps with comparisons to other states, to determine the basis for the apparent trend.
4. There was also a possible trend toward larger takings as municipal character became more rural. This could indicate that municipalities with more open land area tended to take more land when taking property because more open (and relatively inexpensive) land was available. In addition, available parcels of land may be larger in rural areas. No correlation between number or area of takings and population density was observed, however, indicating that availability of underdeveloped parcels of land shaping municipal character may be more important than actual population density in driving takings. There was also a slight trend towards larger areas of takings in municipalities with less centralized forms of government. This result may to a certain extent confirm the association of rural areas and larger takings because suburban and rural municipalities are more likely to be governed by the decentralized town meeting form of government.
5. There was a slight trend toward fewer takings as government became less centralized, when takings from private condemnees only were considered. This may indicate that the institutional impediments toward property condemnation (or any other form of government action) can be somewhat effective, as hypothesized by Kochan, particularly when affected parties can take an active role in the deliberative process, as they can in open town meetings.²²² Further study may be able to quantify with greater certainty the extent to which institutional impediments affect government action in the takings area.

6. Voting on property-related referenda was associated with number and area of takings *per area of municipality*. Municipalities with strong pro-property rights votes (to end rent control and to continue nuclear power generation) tended to have fewer takings per available area, while municipalities that voted in larger numbers against property rights (to continue rent control and to halt generation of nuclear power) tended to have more takings per available area. These results may indicate that municipalities that tend to be less concerned about property rights are more likely to be activist in the taking area as well, tending over time to accumulate larger relative amounts of land in public ownership or control.²²³ Over time, this could lead to smaller tax bases in municipalities with weaker property rights sentiments. In two of the municipalities most strongly affected by this trend, Boston and Cambridge, the size of the tax base is already an issue because of the large aggregate number of government institutions, parks, and private non-profit hospitals and educational institutions.²²⁴ Comparisons of the relationship between similar referenda results in other states and takings activity could illuminate whether this is a broadly applicable phenomenon and yield a better understanding of the forces driving takings activity.
7. Economic indicators showed a strong positive association between economic conditions and total number of takings, that is, during strong economic times the number of takings increased.²²⁵ Although low unemployment, used as a marker for strong economic times, was the factor most highly associated with the number of takings, other economic factors (such as total state revenue) were also highly associated. Thus, it could be hypothesized that the number of state projects requiring takings is largely driven by available funding.²²⁶ This trend corroborates a similar result in regard to higher total municipal revenue, which (as discussed at point 3 above) is also associated with higher numbers of takings. If this trend is confirmed, it would indicate that governments in this area are acting cyclically instead of counter-cyclically when they take property (contrary to the recommendations of the school of economist John Maynard Keynes).²²⁷ In addition, as property values increase with improving economic conditions, often precipitously, it would mean that takings agencies are paying higher damage awards for projects than they might if they were willing to defer projects until less prosperous economic times.²²⁸

These observations provide important background in considering how governments utilize eminent domain and how its use affects property owners and tenants. Until more detailed information from a larger and more representative sample is available, the results identify issues that planners should take into account in performing cost-benefit analyses for takings. While any trends suggested by the data in this sample are preliminary, they may be useful to planners and policymakers considering undertaking eminent domain projects, particularly those involving takings in areas with smaller tax bases and in more prosperous times in the economic cycle.²²⁹

IV. POLICY RECOMMENDATIONS

EMINENT DOMAIN PRACTICE AND CURRENT TRENDS in Massachusetts point to some issues that raise concern for Massachusetts property owners' rights. Particularly significant were the failure to compensate property owners fully for their expenses when their property is taken and the recent proposals for private-transferee takings in Lowell's Acre Plan and TeleCom City. This section explores and assesses three policy approaches to address these concerns: litigation, constitutional amendment, and statutory amendment. The conclusion is that statutory amendment is the most flexible tool and the most likely to achieve the goal of increased fairness in the eminent domain process.

It is unlikely that litigation at the state court level would result in substantially enhanced protections for property owners.

A. Litigation

Given existing Massachusetts and federal precedents, litigation is not a likely means of improving the position of property owners faced with potential takings. Historically, despite the apparently more protective language, Massachusetts courts have not interpreted Article X of the Massachusetts Declaration of Rights more broadly than the parallel takings language of the Fifth Amendment to the federal Constitution.²³⁰

In the area of just compensation, a number of states have found business losses compensable to varying degrees under state constitution just compensation provisions.²³¹ Oswald suggests that judicial reform should be the most effective means of expanding the eminent domain compensation requirements.²³² The slow pace of the incremental common law process, the number of directly applicable adverse precedents, and the disinclination of the Supreme Judicial Court in recent cases to expand on previously recognized eminent domain damages²³³ do not, however, inspire confidence of speedy change in the just compensation area by litigation of state constitutional issues. Therefore, it is unlikely that litigation at the state court level would result in substantially enhanced protections for property owners against private-transferee takings or inadequate compensation.

B. Constitution

Several states have adopted constitutional provisions that expand property owners' rights in the eminent domain area beyond the requirements of the federal Constitution. Most proposals for state constitutional reform in the takings area, however, address issues already encompassed by current Massachusetts law or deal with regulatory takings, an issue beyond the scope of this study.²³⁴ Louisiana's constitution has the strongest protections for property owners, providing for jury trial for all eminent domain compensation issues,²³⁵ a separate necessity requirement,²³⁶ compensation for government caused damage as well as actual takings,²³⁷ judicial interpretation of public use,²³⁸ and full economic recovery.²³⁹

Thus, the only eminent domain provisions in the Louisiana Constitution not already provided for in the Massachusetts Constitution or statutes are those concerning judicial determinations of public use and full recovery. While these are extremely important issues, they may not warrant invoking the awkward constitutional amendment procedure when they can be provided for legislatively. Moreover, once the issue of amending one of the venerable provisions of the Massachusetts Declaration of Rights is raised, there is a possibility that the strategy could backfire if the amendment is rejected²⁴⁰ or if unfavorable amendments are attached by the legislature.²⁴¹ It should be noted that previous amendments to Article X of the Declaration of Rights have largely expanded or clarified the scope of public use, rather than granting greater protections to property owners.²⁴² Only the 1972

Constitutional amendment of Article X is unlikely to be a successful strategy for improving the fairness of the current Massachusetts eminent domain process.

amendment adopted any restriction on the use of eminent domain, by requiring a two-thirds roll-call vote of both houses of the legislature whenever land taken for conservation or historical reasons is devoted to other purposes.²⁴³ Given this history, constitutional amendment of Article X is unlikely to be a successful strategy for improving the fairness of the current Massachusetts eminent domain process.

C. Statute

While statutes are more easily amended than constitutional provisions, they are also easier to pass initially and are generally more stable than regulations. The state has ample authority to enact statutory protections for property rights that are more extensive than the minimum mandated under current interpretations of the state and federal constitutions.²⁴⁴ In particular, as a matter of basic justice the state should cover condemnation-related costs fully, particularly when failure to compensate results in a subsidy from the condemnees to a private for-profit corporation. Institutional imperatives indicate that statutory reform is more likely than litigation or constitutional amendment to result in more equitable treatment in the near future. The following subsections suggesting statutory reforms are arranged in the same order in which they are discussed in Section III (A) above.

1. Process

Cost-benefit analysis subject to challenge by condemnees for private-transferee takings. One method to reduce inefficient takings would be a requirement that condemning agencies, particularly in the case of private-transferee takings,²⁴⁵ undertake a rigorous cost-benefit analysis that acknowledges the multiple costs to the condemnees and to society generally of the taking and to grant affected property owners standing to challenge the study. Accurate assessment of the cost to potential condemnees during the initial project evaluation phase would ensure that, to the extent possible, externalities are acknowledged and absorbed by the taking authority instead of the condemnees. Many states have recently enacted legislation requiring government agencies to follow specific procedures to assess the impact of their actions when condemning property, and many similar proposals have been floated elsewhere.²⁴⁶ Most of these proposals, however, are geared toward the effect of proposed regulations causing inverse condemnations, rather than actual condemnations, which are the subject of this study.²⁴⁷

In Massachusetts, Gans has suggested that much of the problem leading to the disastrous West End clearance was caused by inadequate study by planning agencies of the financial and social costs of the mass relocation and failure to take into account the public interest.²⁴⁸ Gans urges thorough study of the costs and effects of any redevelopment and relocation plan to avoid a similar debacle in the future.²⁴⁹ Decisions based on a thorough analysis, taking externalities into account, would reduce the costs and attendant inefficiencies inherent in nonmarket-based transactions, such as eminent domain takings.²⁵⁰ Any thorough cost-benefit analysis should also be required to address potential rent-seeking by private beneficiaries of the taking.²⁵¹ A thorough cost-benefit analysis should bring to light and eliminate any effective subsidies from those being displaced to the future possessors of the property. While it might be relatively easy for a motivated private-transferee to commission an apparently scientific cost-benefit study supporting its position, it would be more difficult for a bogus study to stand up under examination if there were detailed administrative requirements for such studies (addressing concerns such as externalities and rent-seeking), *de novo* judicial review, and a legal right for condemnees to challenge the validity

Statutory reform is more likely than litigation or constitutional amendment to result in more equitable treatment in the near future.

Accurate assessment of the cost to potential condemnees would ensure that externalities are acknowledged and absorbed by the taking authority.

of the study. After consideration of a thorough cost-benefit analysis, a court should allow a taking only when the benefit to the public clearly predominates over the benefit to private parties and where the total benefits to the public clearly outweigh all the economic costs, including the externalities to be absorbed by those displaced.

Notice of intent to condemnees before taking in all cases. There is no reason to exempt governing bodies from the 30-day notice of intent requirement.²⁵² The legislation could include an exception to cover the rare occasions when government agencies need to take property expeditiously in case of emergency.²⁵³

Explanatory materials explaining the eminent domain process for condemnees. Many unsophisticated condemnees are intimidated by the eminent domain process. DHCD—which currently supervises the relocation process—could easily develop a model explanatory pamphlet (based on existing relocation pamphlets). These pamphlets, describing the eminent domain process in plain English and similarly in other languages as needed, could be distributed to condemnees with notices of intent. The model pamphlets could be modified to reflect the different internal procedures of the principal taking agencies, with the modified pamphlets to be approved by DHCD.

Expanded availability of appraisals to condemnees before trial. As discussed above, pre-taking appraisals are provided to condemnees in all federally subsidized taking projects, but are exempted from public access in Massachusetts by statute in all other cases.²⁵⁴ Appraisals should be made available to condemnees after the notice of intent has been served in all cases. This would conform with federal practice, would add transparency to the process, and might help speed settlements.²⁵⁵

Full information about condemned property included in all recorded orders of takings. Orders of taking are not required to include the names of condemnees, the approximate area of the taking, or the amount of the payment *pro tanto*.²⁵⁶ For conveyancing purposes, this information should be required for an order of taking to be valid. The bulk of this information is required in deeds and under the judicial taking procedure, and it is particularly useful to conveyancers when only part of property or an easement is taken. The taking agency should also be required to file an amended order of taking if the owners at the time of the original taking are unknown or named incorrectly and the true owners are subsequently discovered.

Similarly, the data collection process revealed a failure to follow case law concerning the clarity required in stating the purpose of the taking.²⁵⁷ While it is difficult to delineate the parameters of what constitutes adequate clarity, incorporation of the Supreme Judicial Court's interpretive language in the order of notice statute²⁵⁸ would serve an admonitory purpose and remind those preparing orders of taking to include adequate detail to inform the public of the intended public use for the property: “[T]he order of taking shall state the purpose for which such property is taken [by detailing] some definite use...as the intent and design of the [taking authority].”²⁵⁹ These revisions would enhance public accountability and transparency in the takings process.

Jury trial right for relocation payment contests and jury trial without preliminary commission hearing under Chapter 80A. Although jury trials are generally available in Massachusetts takings cases, there are some lacunæ in the current process.²⁶⁰ Jury trials should be available under the Chapter 80A judicial taking process without the current cumbersome preliminary commission hearing. Jury trials should also be available in all cases for contested relocation payments.

2. Public use

Incorporate judicial definition of public use in takings statutes. One of the greatest difficulties with circumscribing takings for private use has been the difficulty in devising a clear definition of “public use” since the demise of the nineteenth century “actual-use” test. “The impracticability of defining ‘public use’ has been recognized in many jurisdictions.”²⁶¹ Courts, such as the Supreme Judicial Court in the 1969 *Opinions of the Justices*,²⁶² have generally opted for a case-by-case examination instead of a standard test. Several scholars have advocated particular tests to determine “public use” or have devised procedures to avoid the problems associated with the breadth of the term.

For example, Susan Crabtree considers, but ultimately dismisses, specifically listing the purposes for which eminent domain can be used in enabling legislation.²⁶³ She suggests changing the burden of proof of public use to the government as a way to prevent abuses of the eminent domain process.²⁶⁴ As Crabtree recognizes, the statutory list of purposes would be impractical, because it might unduly restrict government and thus be subject to frequent amendment. In addition, changing the burden of proof for this one area of the law would be a radical change in standard legal procedure, which generally puts the burden of proof on the plaintiff. Policymakers should not modify traditional burdens of proof before other less radical solutions have been attempted. The burden of proof is, however, a different issue from subjecting legislative determinations to *de novo* review and strict scrutiny in appropriate cases, as discussed below.

Lawrence Berger suggests a three-pronged public use test, which would allow a private-transferee taking when 1) the condemnee has a monopoly over the proposed use (in other words, the condemnee possesses property uniquely suited to meeting the legitimate needs of the private-transferee); 2) the expected increase in value of the property to be taken exceeds the cost of making any changes in resources (in other words, the property would be more valuable even after subtracting the private-transferee’s improvement expenses and the condemnee’s full reimbursement); and 3) the private-transferee’s needs outweigh the burdens imposed on the condemnee.²⁶⁵ Berger’s proposal contains the germ of a good cost-benefit analysis requirement, but ignores the public use issue for a pure cost-effectiveness criterion, slighting the demoralization effect discussed in Section II (B) above. Simple short-term economic utility should not supersede what John Adams referred to as the “sacred” right to private property.²⁶⁶ Unless the condemnor can demonstrate some definite and significant benefit to the general public, rather than the private beneficiary, eminent domain should be considered inappropriate.²⁶⁷

Because of the inefficiencies associated with takings generally, and the particular negative implications when the takings are for the benefit of private parties, Donald Kochan suggested in a recent article that all condemnations should be limited by a requirement of legislative approval in order to increase transaction costs.²⁶⁸ Such a procedure is, however, likely be impractical in actual application, when an omnibus takings authorization could be added to an unrelated bill in a late-night session virtually without oversight.²⁶⁹ As Kochan acknowledges, moreover, simple institutional barriers would add to the total societal cost of *all* takings without improving their fairness. Kochan feels that the adverse effect of some takings is sufficient to warrant this drastic step. The data analyzed in this study, on the other hand, have demonstrated that the vast majority of takings are for traditional purposes, such as roads and parks, so that Kochan’s proposed institutional barriers to *all* takings would increase public expense and procedural inefficiency without a significant public benefit.

Banning all use of eminent domain for the benefit of private parties is impractical and flies in the face of a long history of delegation of eminent domain powers to private parties acting in the public interest.

A more pragmatic approach is to impose additional safeguards where a significant portion of the property taken is intended to be acquired or leased long-term by a private party.

A more targeted approach requiring full compensation of condemnees and adding procedural safeguards primarily for private-transferee transfers would reduce excess costs and inefficiencies. Kochan further suggests banning all use of eminent domain for the benefit of private parties.²⁷⁰ This is not only impractical politically, but would also fly in the face of a long history of delegation of eminent domain powers to private parties, such as railroads and public utilities, acting in the public interest.²⁷¹

In his earlier 1996 policy recommendations, on the other hand, Kochan suggested language limiting the circumstances in which property can be taken for “private use” by requiring strong public necessity, continuing accountability, and “independent public significance” (in other words, a special public benefit distinct from the general prospect of economic growth) of the property in such cases.²⁷² While the proposed safeguards are useful guidelines, Kochan’s definition of “private use” harkens back to the nineteenth century “actual-use” theory. He would allow takings to benefit private parties without his additional safeguards as long as the public retained the right to use or to manage the property. As discussed above, this type of provision would easily allow takings for hotels and amusement parks, so long as the public is admitted (upon payment of a fee) and there is some regulatory oversight.²⁷³

Pragmatic recommendations regarding public use: disincentives for agency disregard of purpose stated in order of taking. This study suggests a more pragmatic approach, imposing additional safeguards in all circumstances where a significant portion of the property taken²⁷⁴ is intended to be acquired or leased long-term by a private party.²⁷⁵ In all such cases, a thorough cost-benefit analysis, as described above, should be required and should demonstrate a clear and significant public benefit outweighing the benefits to the private-transferee.

To prevent temporary warehousing, there should be a disincentive in place for a limited period²⁷⁶ that will apply if the property is subsequently disposed of for private use.²⁷⁷ One potential problem is that the government may initially take for a stated public use and allow the property to lie fallow, later disposing of it for an entirely different, and otherwise impermissible, purpose.²⁷⁸ This procedure of heightened institutional safeguards for private-transferee takings would be in keeping with existing Massachusetts law, which already has similar safeguards in place whenever one entity with eminent domain power seeks to take property from another such entity, when land of historical or archeological value or agricultural land is to be taken, and when the government seeks to dispose of property taken for conservation or historic purposes.²⁷⁹

This study suggests formalizing the de facto strict scrutiny applicable under Opinions of the Justices to all private-transferee takings.

Substantive judicial review of public use declarations. This study suggests formalizing the *de facto* strict scrutiny applicable under *Opinions of the Justices*.²⁸⁰ Rather than restricting such scrutiny to novel public purposes, however, as discussed in *Opinions of the Justices*, it should be applied to all private-transferee takings. As discussed above, 1) several states have adopted constitutional provisions providing for judicial review of public use determinations in all cases, 2) several scholars have suggested allowing courts to review such determinations *de novo*, and 3) at least one Massachusetts case has suggested that judicial review for public use was appropriate if authorized by statute.²⁸¹ This stricter judicial scrutiny, instead of the strong deference under the current federal and Massachusetts precedents, had been common in the past in many states.²⁸² There is no reason to fear that this proposal would engender a litigation explosion, since the data collected for this study indicate that there are relatively few private-transferee takings, and even in such cases property owners are often willing to settle for a reasonable amount.²⁸³ Legislation granting courts the power to review

public use determinations *de novo*, at least in private–transferee takings, would inject needed oversight and accountability into the takings process.

Improved public records access for private–transferee takings. As a final recommendation concerning the enforcement of the public use requirement, this study suggests that public records access be granted for 40 years for all documents concerning the use and disposition of private–transferee takings in order to ensure continuing accountability.²⁸⁴ Although the study discovered only one set of takings by a private condemner, the Dudley Street Neighborhood takings, such condemnations occur from time to time, and private–transferee takings may be somewhat more common.²⁸⁵ The fact that these condemnations take place under a power granted by the state for public purposes argues for the extension of the public records act to private–transferees, at least for a limited time.

3. Just compensation

The following points emphasize the principal concerns with inadequate compensation under current Massachusetts eminent domain practice.

Coverage of lost goodwill and going–concern value. As discussed in greater detail above, the failure to compensate for lost goodwill and going–concern value is considered by scholars to be a major injustice of the current eminent domain process.²⁸⁶ The Model Eminent Domain Code and numerous states allow compensation for these losses and Massachusetts has occasionally allowed compensation by special legislation in the past. As long ago as 1962, Gans pressed for “liquidation funds in lieu of moving allowances” for small business forced out of business by eminent domain.²⁸⁷ This study recommends the adoption of the Model Code goodwill provision with the addition of explicit coverage for lost going–concern value.

Full compensation of relocation costs. As discussed above, existing caps on relocation payments are unrealistic and have not been adjusted for inflation in decades.²⁸⁸ Even if the caps were inflation–adjusted, however, they would exclude expenses to condemnees directly attributable to their forced relocations, as would the gaps in existing coverage, such as failure to pay interest on moving expenses, which are usually incurred considerably before the taking agency pays relocation costs. All verifiable legitimate relocation expenses should be covered by the taking agency.

Awarding attorneys’ fees to successful condemnees. The final major failure to achieve just compensation in Massachusetts is the lack of reimbursement of attorneys’ fees and full costs of litigation.²⁸⁹ Without attorneys’ fee reimbursement, small property owners in particular are often forced to accept low *pro tanto* payments because the value of the property does not warrant the cost of litigation. A property owner can only be placed in a similar pecuniary position to that before the taking if his or her justifiable litigation expenses are covered by the taking agency. Under the current system, many (if not most) condemnees are required to enter into contingency fee agreements in order to secure legal representation.²⁹⁰ Their legal expenses then come out of the damage awards that were supposed to make them whole by paying for the full value of their property.

A statute reimbursing attorneys’ fees and costs of litigation could be modeled on the civil procedure rules concerning offers of judgment,²⁹¹ which awards court costs to a prevailing party who has offered a settlement in excess of the amount ultimately determined at trial. In the eminent domain situation, a condemnee forced to litigate the fair value of his or her property should be allowed all reasonable attorneys’ fees if damages after

This study recommends the adoption of the Model Code goodwill provision with the addition of explicit coverage for lost going–concern value.

All verifiable legitimate relocation expenses should be covered by the taking agency.

A statute reimbursing attorneys’ fees and costs of litigation could be modeled on the civil procedure rules concerning offers of judgment.

trial exceed the payment *pro tanto*.²⁹² The government should strive to achieve justice by ensuring that all condemnees are placed in the same position pecuniarily after the taking as they were in before. Full and fair recompense to condemnees would cover their lost goodwill, lost going-concern value, full relocation expenses, and the attorneys' fees necessary to collect full compensation.

Provision for fair, market-equivalent interest. As discussed above, currently interest in Chapter 79 "quick-take" cases is based on the 52-week Treasury bill rate at the time immediately before the taking, while interest under the Chapter 80A judicial taking procedure is capped at 6 percent.²⁹³ The technology exists to calculate variable interest easily. A variable rate more accurately reflects the cost of money to the condemnee while awaiting his or her damage award. Without a variable rate, in times of rapidly rising rates, the condemnee loses, while in times of falling rates the government loses. Changing the interest to a variable rate would be fairer to both sides and cause little administrative inconvenience.

In addition, the rate of interest to condemnees should be based on the prime rate for mid-sized businesses of a basket of leading Massachusetts commercial banks, which reflects more accurately the value of funds borrowed by a business on the open market to continue operations while awaiting a damage award. Finally, as property owners should not suffer from the vagaries of state finances if they have settled and saved the state the costs of trial, the eminent domain interest provisions should be amended to include interest from the date of settlement. This will slightly shift bargaining positions, but inclusion of the interest provision will allow the state to negotiate for a lower actual settlement amount (currently, the parties will settle at higher sums to compensate for the lack of interest) and encourage the state to process condemnation reimbursements promptly.

CONCLUSION

MUCH OF MASSACHUSETTS EMINENT DOMAIN practice is admirable, in particular the guarantee of jury trials, the requirement of payments *pro tanto* at the commencement of the condemnation process, and the emphasis on recording of documents effecting the taking. The eminent domain language of the Massachusetts Constitution remains a stirring declaration of the state's high esteem for private property. Analysis of takings data from Registries of Deeds showed that the vast majority of takings were for "traditional" public purposes, such as highway construction, but that takings tended to increase during times when governments had more available financial resources. Review of eminent domain practice demonstrates that Massachusetts lags behind other states in recognizing and awarding full compensation for the pecuniary harms suffered by condemnees. In addition, the public use requirement has been eroded in Massachusetts (as it has elsewhere), without an adequate substitute. At the same time, failure to compensate condemnees fully means that small property owners are often forced to absorb many of the costs of their own displacement. To address these concerns, this study recommends amending the Massachusetts eminent domain statutes to require full compensation for relocation costs, business goodwill, and attorneys' fees and to allow real judicial scrutiny of legislative determinations that individual takings benefit the general public. During the colonial and revolutionary eras, Massachusetts led America in protecting property owners from excesses in eminent domain practice. By adopting the recommendations of this report, Massachusetts can resume its leadership in extending justice and fairness to all property owners.

By adopting the recommendations of this report, Massachusetts can resume its leadership in extending justice and fairness to all property owners.

ENDNOTES

¹ The power of government to take property from its owner (in other words, to require a property owner to sell his or her property at a forced sale to the government or its delegatee) is commonly referred to as the power of eminent domain. This popular definition is the way that the term “eminent domain” is used in this study. In political theory, “eminent domain” refers to the broader concept that title to property is ultimately derived from the sovereign and therefore government retains certain rights over private property in various contexts, which include not only property takings for public use, but also escheat and the power to tax. See *Dingley v City of Boston*, 100 Mass. 544, 560–61 (1868) (“[A]ll property, real, as well as personal, is held under the government, and subject to all its reasonable needs for public exigencies.”) The term “eminent domain” was originated by Dutch legal theorist Grotius (Huigh de Groot) in *De Jure Belli ac Pacis* (1625). Buckner F. Melton, Jr., “Eminent Domain, ‘Public Use,’ and the Conendum of Original Intent,” *Natural Resources Journal* 36 (1996): 70 & n. 71; William B. Stoebuck, “A General Theory of Eminent Domain,” *Washington Law Review* 47 (1972): 559–60. It should be noted that the second American use of the term “eminent domain” in a judicial decision occurred in Massachusetts Chief Justice Lemuel Shaw’s opinion in *In re Wellington*, 16 Pick. (33 Mass.) 87, 102–03 (1834). Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Shaw* (New York: Oxford University Press, 1957), 120 & n. 7. This study concerns only the actual takings of property through condemnation. The issue of regulatory takings (also called inverse condemnation) is outside the scope of the study.

² U.S. Constitution, amend. 5; Massachusetts Constitution, part 1, art. 10. Part one of the Massachusetts Constitution is referred to as the “Declaration of Rights.” Revolutionary era Americans “at once viewed the power [of eminent domain] as necessary, perhaps inherent, but nevertheless dangerous and in need of restraint by consent and just compensation provisions.” Melton (see n. 1) 76. See Susan Crabtree, Note, “Public Use in Eminent Domain: Are There Limits after *Oakland Raiders* and *Poletown?*,” *California Western Law Review* 20 (1983): 85, 107 (“Because the power of eminent domain is so extraordinary, there has been a recognition that it must be exercised with caution.”).

³ *Greenfield Country Estates Tenants Ass’n, Inc. v Deep*, 423 Mass. 81, 88, 666 N.E. 2d 988 (1996). See *McCarthy v Tobin*, 429 Mass. 84, 89, 706 N.E. 2d 629 (1999).

⁴ *Armstrong v United States*, 364 U.S. 40, 49 (1960), quoted in *City of Monterey v Del Monte Dunes, Ltd.*, 526 U.S. 687, 702 (1999). See *Yankee Atomic Elec. Co. v Secretary of the Commonwealth*, 403 Mass. 203, 218, 526 N.E. 2d 1246 (1988) (Lynch, J. dissenting) (“It is a fundamental tenet that government may not single out a few citizens to bear burdens properly borne by the public as a whole.”).

⁵ See Stephen J. Jones, Note, “Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis under the Public Use Requirement of the Fifth Amendment,” *Syracuse Law Review* 50 (2000): 287–88, 302–04 (discussing recent instances of takings for disposition to private parties); Dean Starkman, “Condemnation Is Used to Hand One Business to Another,” *Wall Street Journal* (2 Dec. 1998): A1, A13.

⁶ See John Laidler, “Developer Chosen, Funding Bill on Track for TeleCom City,” *Boston Globe* (Northwest Weekly ed.) (7 Nov. 1999): 5; Gretta Nemcek, “Business to Lose Their Homes to TeleCom City,” *Malden Observer* (23 Oct. 1999): 1.

⁷ Jason Leferts, “Senate President Gets Behind Acre Rehab Plan,” *Lowell Sun* (2 March 2000): 1; Matt Wickenheiser, “Green Space, New Homes, Business in Acre’s Future,” *Lowell Sun* (4 Oct. 1998): 1. The largest area to be cleared is slated for construction of a middle school. Lowell Division of Planning and Development, *The Acre Urban Revitalization and Development Project 2* (1999). Other recent “new-style” redevelopment projects have been the Medical City Project in Worcester and the ultimately unsuccessful Emerson College relocation in Lawrence. See *Roberts v City of Worcester*, 416 Mass. 804, 625 N.E. 2d 1365 (1994); *Benevolent & Protective Order of Elks, Lodge 65 v Planning Board*, 403 Mass. 531, 531 N.E. 2d 1233 (1988).

⁸ *United States v 564.54 Acres Land*, 441 U.S. 506, 510 (1979) (quoting *Olson v United States*, 292 U.S. 246, 255 (1934)). See *United States v Miller*, 317 U.S. 369, 373. (1943); *Seaboard Air Line R. Co. v United States*,

261 U.S. 299, 304 (1923); *Boston Chamber of Commerce v City of Boston*, 217 U.S. 189, 195 (1910) (“[T]he question is, What has the owner lost? not, What has the taker gained?”). See also *Woodworth v Commonwealth*, 353 Mass. 229, 231, 230 N.E. 2d 814 (1967) (“Just compensation we construe to mean full compensation.”); *Isele v Schwamb*, 131 Mass. 337, 340 (1881) (“[T]he true theory of the Constitution, as it has been expounded, is that, when private property is taken for public use with one hand, full and complete compensation therefor shall be tendered with the other.”); *Old Colony & Fall River R.R. v County of Plymouth*, 14 Gray (80 Mass.) 155, 161 (1859) (“The word ‘property’ in the tenth article of the Bill of Rights ...should have such a liberal construction as to include every valuable interest which can be enjoyed as property and recognized as such.”); Stoebuck, (see n. 1) 606 (Lockean principle of just share requires that after a taking “citizens be evened up among themselves with compensation.”).

⁹ *564.54 Acres Land*, 441 U.S. 510–11 (“However, this principle of indemnity has not been given its full and literal force.”).

¹⁰ The business cycle is defined as “[t]he regular fluctuations in the level of national income. The business cycle is a well-observed economic phenomenon, though it often occurs on a generally upward growth path and has a variable time span....” Graham Bannock et al., *Dictionary of Economics* (London: Profile Books, 1998 ed.), 43.

¹¹ Massachusetts was an early leader in the development of the related “public purpose” doctrine limiting the permissible objects of government spending. Dale F. Rubin, “The Public Pays, the Corporation Profits, The Emasculation of the Public Purpose Doctrine and a Not for Profit Solution,” *University of Richmond Law Review* 28 (1994): 1322–23.

¹² Errol E. Meidinger, “The ‘Public Uses’ of Eminent Domain: History and Policy,” *Environmental Law* 11.(1980): 18 ; Nathan Alexander Sales, Note, “Classical Republicanism and the Fifth Amendment’s ‘Public Use’ Requirement,” *Duke Law Journal* 49 (1999): 360; William Michael Treanor, Note, “The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment,” *Yale Law Journal* 94 (1985): 697 n. 9.

¹³ William Blackstone, *Commentaries on the Laws of England* 1 (1765), 139.

¹⁴ See Meidinger, (see n. 12) 8–12; Sales, Note, (see n. 12) 358.

¹⁵ *General Laws and Liberties of Massachusetts* c. LII, § 1 (1672), reprinted in *Charters and General Laws of the Colony and Province of Massachusetts Bay* (1814), 126–27 (“*Charters and General Laws*”). The original 1639 statute is apparently no longer in existence, but it was incorporated into later statutory compilations. See Stoebuck, (see n. 1) 561 n. 28, 579; Sales, Note, (see n. 12) 359. A similar provision compensating property owners in towns (the 1639 act applied in the country) was passed in October 1641. *General Laws and Liberties* c. LII, § 2. See also *The Laws and Liberties of Massachusetts* (1648), 25 (reprinted Cambridge, Mass.: Harvard University Press, 1929).

¹⁶ Meidinger (see n. 12) 13–14, 18; Stoebuck, (see n. 1) 579–80; Sales, (see n. 12) 359.

¹⁷ Bernard Schwartz, *The Bill of Rights: A Documentary History* (New York: Chelsea House Publishers, 1971), 69–71, 73. This statute was passed only sixteen years after Grotius first used the term “public use (*utilitas*)” as a constraint on the power of eminent domain in 1625. See Melton (see n. 1) 70–71; Stoebuck (see n. 1) 586. The 1641 Massachusetts Body of Liberties was one of only two colonial fundamental documents that recognized a right to compensation when property was taken. William Michael Treanor, “The Original Understanding of the Takings Clause and the Political Process,” *Columbia Law Review* 95 (1995): 785; Sales (see n. 12) 359, 366–67. The other was the 1669 Fundamental Constitutions of Carolina, written by John Locke and never fully implemented. *Ibid*.

¹⁸ *An Act for Highways*, 1693 Mass. Province L. c. 23, reprinted in *Charters and General Laws* 267–70. See Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (1977), 61; Julius L. Sackman, *Nichols on Eminent Domain* 6 (rev. 3d ed. 1999) [hereinafter *Nichols*] § 24.03 [1]; James W. Ely, Jr., “That Due Satisfaction May Be Made: The Fifth Amendment and the Origins of the Compensation Principle,” *American Journal of Legal History* 36 (1992): 7–8 (stating colonial Rhode Island, New Hamp-

shire, and North Carolina also provided compensation for unimproved land, although later than Massachusetts); Sales (see n. 12) 376; Treanor (see note 12) 695 & n. 5. Stoebuck believes that the 1693 statute refers only to improved or built-up property, which would indicate that Massachusetts, like the other colonies, failed to pay for unimproved property when taken. Stoebuck, (see n. 1) 582. The majority of authors, as cited above, disagree with Stoebuck on this point. The difference may have to do with the language of the 1693 highway statute as transcribed in different nineteenth century compilations of colonial laws. Compare "An Act for Highways," (1693), reprinted in *Acts and Resolves, Public and Private, of the Province of Massachusetts Bay 1* (1869), 136–37 with "An Act for Highways," 1693 Mass. Province L. c. 23, reprinted in *Charters and General Laws 267–70*. Subsequent Massachusetts colonial highway statutes also provided compensation for takings of unimproved land. Ely, *supra*, 8 & n. 35 (1739 statute); Sales (see n. 12) 376 & n. 178 (1713 statute).

¹⁹ Stoebuck, (see n. 1) 567–68 & n. 57. Vermont's 1777 Constitution was the first Revolutionary War era fundamental document to mention just compensation. Stoebuck (see n. 1) 568 n. 57; Treanor (see n. 17) 827–30; Treanor (see n. 12) 708 n. 74. Vermont, however, was not one of the original thirteen states, as it had not been a separate colony, but an area disputed by New York, New Hampshire, and Massachusetts. In addition, there is some question whether the 1777 Vermont Constitution was ever properly ratified, although Vermont apparently operated under the 1777 Constitution until it adopted a second constitution in 1785. Charles T. Morrissey, *Vermont: A History* (New York: W.W. Norton & Co., 1984), 89–90; Stoebuck (see n. 1) 568 n. 57; Treanor (see n. 17) 827–30; Treanor (see n. 12) 708 n. 74. Published copies of the 1777 Vermont Constitution were available as a potential model for other Revolutionary War era fundamental documents.

²⁰ Horwitz (see n. 18) 64; Stoebuck (see n. 1) 591; Treanor (see n. 17) 825–26; Sales (see n. 12) 367–68; Treanor (see n. 12) 711. The Northwest Ordinance, a fundamental document for the governance of the Northwest Territories passed under the Articles of Confederation, also contained a just compensation provision. Nathan Dale, a member of the Continental Congress from Massachusetts, wrote the original draft of the Northwest Ordinance. Treanor (see n. 17) 831–33.

²¹ Oscar Handlin and Mary Handlin, eds., *Popular Sources of Political Authority* (Cambridge, Mass.: Harvard University Press, 1966), 22. See Treanor (see n. 12) 706.

²² See John R. Howe, Jr., *The Changing Political Thought of John Adams* (Princeton, N.J.: Princeton University Press, 1966), 175, 189.

²³ Treanor (see n. 17) 830. The voters of Pittsfield explicitly requested in their instructions to their representatives to the 1779 constitutional convention that the constitution contain a bill of rights, including a prohibition on takings without prior legislative authorization. *Popular Sources of Political Authority* (see n. 21), 410–11; Robert J. Taylor, ed., *Massachusetts, Colony to Commonwealth* (Chapel Hill, N.C.: University of North Carolina Press, 1961), 49. See Stoebuck (see n. 1) 593 & n. 139. It is noteworthy that Pittsfield was a hotbed of the Massachusetts "constitutional movement" that urged the adoption of a constitution, rather than continuing reliance on the colonial charter with modifications. *Massachusetts, Colony to Commonwealth, supra*, 13–14, 49, 90–92. (Both Connecticut and Rhode Island, for example, continued to be governed by modified colonial charters until well into the nineteenth century. Stoebuck (see n. 1) 568 n. 57.)

²⁴ Massachusetts Constitution, part 1, art. 10 (punctuation as in original).

²⁵ Stoebuck (see n. 1) 567–68, 586, 591–92. The inclusion of "public uses" can be traced to the first post-revolutionary Pennsylvania and Virginia constitutions. Stoebuck (see n. 1) 591.

²⁶ Massachusetts Constitution, part 1, art. 10

²⁷ Massachusetts Constitution, part 1, art. 10. There is no record of the debate on the issue or who made the floor amendment. See Melton (see n. 1) 76–77; Stoebuck (see n. 1) 592–93 (theorizing that amendment was prompted by distrust of elected representatives); Treanor (see n. 17) 830–31 & n. 252 (suggesting that Massachusetts compensation clause was based on 1777 draft Vermont Constitution or 1641 Massachusetts Body of Liberties); Sales (see n. 12) 344 n. 23. It has been speculated that the just compensation provision was included in the 1777 Vermont Constitution because Vermonters were highly sensitive to threats to the integrity of property owing to New York's refusal to recognize New Hampshire land

grants in the area unless high fees were paid. Treanor (see n. 12) 702–03. See Morrissey (see n. 19) 80. The area that became Vermont was long disputed between New York, New Hampshire, and Massachusetts, each of which granted land in the area. Although a large majority of the settlers were from New Hampshire, in 1764 the King awarded jurisdiction over the area to New York. Morrissey (see n. 19) 79. New York's refusal to recognize the New Hampshire land grants was the impetus for Vermont's independence from New York. *Ibid.* 80–81.

The Massachusetts compensation clause may have a similar origin. Massachusetts had long disputed jurisdiction with New Hampshire over what is now southwestern New Hampshire and Vermont and made several land grants and settlements in those areas. Charles E. Clark, *The Eastern Frontier: The Settlement of Northern New England, 1610–1763* (Hanover, N.H.: University Press of New England, 1983), 171, 299, 338; Morrissey (see n. 19) 76. In 1741, the King established the current boundary between Massachusetts and New Hampshire, and appeared to recognize New Hampshire's jurisdiction over Vermont in 1744 by directing New Hampshire to garrison Massachusetts-settled Fort Dummer, the first permanent settlement in what is now Vermont. Clark, *supra*, 172–73, 303, 310–12; Morrissey (see n. 19) 76, 78. In 1772 the Boston Town Meeting passed a statement of Rights of the Colonists and List of Infringements and Violations of Rights, drafted by Samuel Adams. Schwartz 1 (see n. 17) 199, 212. Such declarations of rights and grievances were common in colonial America. Pauline Maier, *American Scripture* (New York: Alfred A. Knopf, 1997), 54. The statement mentioned the commonly recognized right to be secure from land takings without consent in person or by the legislature and recounted as one of the King's infringements the insecurity of land titles caused by indefinite colonial borders, referring in specific to Vermont, where Massachusetts settlers first had to pay quitrents to New Hampshire for recognition of their titles, and then later to New York for the same purpose. Schwartz 1 (see n. 17) 203, 210–11. On the other hand, another author has suggested that the public exigency provisions may have been inspired by uncompensated seizures of goods by the military during the exigencies of the Revolutionary War. Treanor (see n. 17) 831.

²⁸ The amendment, as passed, reads: "[N]or shall private property be taken for public use, without just compensation." U.S. Constitution, amend. 5. See Meidinger (see n. 12) 17; Melton (see n. 1) 79; Stoebuck (see n. 1) 594–95. Madison had long been a champion of property rights. Treanor (see n. 12) 709. For background on Madison's proposal for a bill of rights, see Leonard W. Levy, *Origins of the Bill of Rights*, (New Haven, Conn.: Yale University Press, 1999), 32–43.

²⁹ See Meidinger (see n. 12) 17; Melton (see n. 1) 79; Stoebuck (see n. 1), 594–95; Treanor, (see n. 12) 709.

³⁰ Donald J. Kochan, "Public Use and the Independent Judiciary: Condemnation in an Interest Group Perspective," *Texas Review of Law & Politics* 3 (1998): 57. See *ibid.*, 57–59 (discussing effect of property rights on economic development).

The *Supream Power cannot take* from any Man any part of his *Property* without his own consent. For the preservation of property being the end of government, and that for which Men enter into Society, it necessarily supposes and requires, that the People should *have Property*.... 'Tis true, Governments cannot be supported without great Charge, and 'tis fit every one who enjoys his share of the Protections, should pay out of his Estate his proportion for the maintenance of it. But still it must be with his own Consent, *i.e.*, the Consent of the Majority, giving it either by themselves, or their Representatives chosen by them.

John Locke, *Second Treatise of Government* (spelling and emphasis as in original) (1690) § 138. See Locke, *supra*, § 124 ("The great and chief end therefore, of Mens uniting into Commonwealths, and putting themselves under government, *is the Preservation of their Property.*" (emphasis in original)); Richard A. Epstein, *Takings*, in *The New Palgrave Dictionary of Economics and Law* 3 (New York: Stockton Press, 1998), 561, 563 [hereinafter *Dict. Econ. & L.*]; Stoebuck (see n. 1) 566–67. The positive economic effect of property protections is discussed below in Section II (B).

Scholars have pointed out that Lockean liberalism, which highly values and protects individual rights, especially the right to property, was not the only political philosophy popular in the revolutionary era. A rival school of thought, called "republicanism," put more emphasis on the common

good and placed greater faith in legislators to identify and achieve the public good. Republicanism also valued property, but more as a surrogate test for civil virtue thought necessary for voter participation than as a possessory right. Republicanism was more popular than liberalism at the time of the Declaration of Independence, but faded slowly as liberalism became ascendant. Scholars have argued about the relative importance of republicanism and liberalism at the time that America's founding documents were drafted. Treanor (see n. 17) 819–23; Sales (see n. 12) 350–55, 363–64; Treanor (see n. 12) 699–701. The disputes center more on the effect of original intent on regulatory takings (the theory being that republicanism would favor government regulation of property for the public good) than on actual physical takings, which are the subject of this inquiry. The importance of property rights among the concerns voiced in rejecting the Massachusetts 1778 draft constitution leads to the conclusion that, at least for the 1780 Massachusetts Constitution, Lockean liberalism was the prevailing ideology behind the takings provisions in Article 5 of the Declaration of Rights. See *Popular Sources of Political Authority* (see n. 21) 22; Treanor, Note (see n. 12) 701, 706. It is also generally agreed that James Madison, the principal author of the federal Bill of Rights and an ideological liberal, drafted the Takings Clause to confirm liberal values protecting property. Treanor (see n. 17) 837; Sales, (see n. 12) 364–65; Treanor, Note (see n. 12) 709 & n. 85.

³¹ See *Lynch v Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (“[A] fundamental interdependence exists between the personal right to liberty and the personal right in property.”). See also William A. Fischel, *Eminent Domain and Just Compensation*, in *Dict. Econ. & L* 2, 35–37 (limitations on power of eminent domain to prevent oppression of disfavored individuals or groups); Kochan (see n. 30), 56; Stoebuck (see n. 1) 586–87 (early civil law jurists considered that one purpose of limiting eminent domain is to avoid oppression by an overpowerful or vindictive government).

³² Compare Massachusetts Constitution, part 1, art. 1 (“All men...have certain natural, essential and unalienable rights; among which may be reckoned the right of...acquiring, possessing, and protecting property....”) with U.S. Constitution, amend. 5 (“No person shall...be deprived of...property, without due process of law....”). The Massachusetts language is similar to numerous other state constitutional provisions modeled on George Mason's draft of the Virginia Declaration of Rights. See Maier (see n. 27) 165–67. The federal due process clause can be traced to Magna Carta and is similar to language in many early state constitutions that was the only protection of property against the use of eminent domain before passage of the Bill of Rights. Meidinger (see n. 12) 17; Stoebuck (see n. 1) 591–92 & nn. 133–34.

³³ See Developments in the Law, “Interpretation of State Constitutional Rights,” *Harvard Law Review* 95 (1982): 1480. See also *Commonwealth v Mavredakis*, 430 Mass. 848, 858, 72 N.E. 2d 169 (2000); *Lavelle v Massachusetts Comm'n Against Discrimination*, 426 Mass. 332, 339 n. 9, 688 N.E. 2d 1331 (1997); *ibid.*, 340 (Lynch, J., concurring); *Commonwealth v Hodge*, 386 Mass. 165, 169, 434 N.E. 2d 1246 (1982) (“The Massachusetts Declaration of Rights can...provide greater safeguards than the Bill of Rights of the United States Constitution.”).

³⁴ *Harback v City of Boston*, 10 Cush. (64 Mass.) 295, 296–97 (1852). See *Rockport v Webster*, 174 Mass. 385, 390–91, 54 N.E. 852 (1899); *Page v O'Toole*, 144 Mass. 303, 305 10 N.E. 851 (1887). One author has suggested that the seventeenth and eighteenth century civil law jurists (Grotius, Samuel Pufendorf, Emerich de Vattel, and Cornelius van Bynkershoek) intended “that the exercise of eminent domain power should be restricted to somewhat more necessitous situations than should other governmental powers.” Stoebuck (see n. 1) 595. In less “necessitous” situations, the government would be able to purchase land for public purposes like private parties. Perhaps under the influence of the civil law jurists, the 1777 Vermont draft constitution, Madison's draft Bill of Rights, and early Massachusetts highway takings statutes and cases appear to limit eminent domain to *necessary* situations as an additional requirement beyond public use and just compensation. See *An Act for Highways*, 1693 Mass. Province L. c. 23, reprinted in *Charters and General Laws*, 267–70; *Boston & Roxbury Mill Dam Corp. v Newman*, 12 Pick. (29 Mass.) 467, 480 (1832); Stoebuck (see n. 1) 592, 595. See also Meidinger (see n. 12) 45–47 (proposed 1965 Connecticut constitutional amendment to allow only takings necessary for a public purpose); Crabtree (see n. 2) 82, 104 n. 158 (concerning ques-

tions of public use and necessity). The Massachusetts Constitution's limitation of takings to public exigencies parallels these other restrictions of the eminent domain power to “necessitous” situations. See *Boston Water Power Co. v Boston & Worcester R.R.*, 23 Pick. (40 Mass.) 360, 392 (1839) (equating “public exigency” with “public convenience and necessity”). See Sales (see n. 12) 367–68 (“[T]he additional limitation of eminent domain to situations where the ‘public exigencies’ made it essential implies a narrower conception of what qualified as a public use.”). This idea of restricting eminent domain to necessary situations contrasts with the currently prevailing view that eminent domain can be used for any purpose available to the state under the police power. *Berman v Parker*, 348 U.S. 26, 32 (1954). While “public use” under *Berman* might permit a taking for any purpose for which the government could expend funds, the “public exigencies” provision could be read to limit takings to instances where there is a strong public need. For example, purchasing property for use as a municipal softball field might be an appropriate public use, but if there are already ample public recreational opportunities in the area, there would be no “public exigency” warranting taking private property instead of purchasing land for such a field in the open market.

³⁵ *Nichols* 1A (see n. 18) § 4.11 [4]. See *Lynch v Forbes*, 161 Mass. 302, 308 37 N.E. 437 (1894) (judges owe deference to legislative determinations of public exigency, although by statute legislature could permit judge or jury to make determination of public exigency).

³⁶ *Nichols* 1A (see n. 18) § 4.11 [4].

³⁷ Oscar Handlin & Mary Flug Handlin, *Commonwealth* (Cambridge, Mass.: Harvard University Press, 1969), 207. It is not clear that colonial citizens considered the Mill Acts to be takings, as they did not transfer title to land, but rather permitted riparian land to be occupied by water built up behind the dam. The underlying principle requiring compensation was essentially the same.

³⁸ Handlin & Handlin (see n. 37) 109, 111–12; William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830* (Cambridge, Mass.: Harvard University Press, 1975), 236 n. 84. See Richard A. Epstein, *Takings* (1985), 170–76. In light of the many colonial settlements (including Virginia and Massachusetts) sponsored and originally governed by trading corporations, it is not as strange as it might seem today to grant important governmental powers to private corporations. See Schwartz 1 (see n. 17) 50, 53–54, 69.

³⁹ Handlin & Handlin (see n. 37) 207; Horwitz (see n. 18) 256; Meidinger (see n. 12) 23–28.

⁴⁰ “[E]very individual is injured, if his land is encumbered with an easement against his consent, which is not required by the public necessity or convenience....” *Commonwealth v Cambridge*, 7 Mass. 158, 167 (1810).

⁴¹ Massachusetts Supreme Judicial Court Associate Justice 1806–14; Chief Justice 1814–30.

⁴² *Wolcott Woolen Mfg. Co. v Upham*, 5 Pick. (22 Mass.) 292, 294 (1827). See Levy (see n. 1) 257.

⁴³ *Stowell v Flagg*, 11 Mass. 364 (1814). See Horwitz (see n. 18) 260; Nelson (see n. 38) 159. It was not atypical in the early nineteenth century for eminent domain damages to be somewhat below fair market value as an effective subsidy to development interests. Horwitz (see n. 18) 66, 260.

⁴⁴ Handlin & Handlin, (see n. 38), 207; Horwitz (see n. 18), 65–66, 260–61.

⁴⁵ *Nichols* 2A (see n. 18) § 7.02 [2]–[5]; Lawrence Berger, *Oregon Law Review* 57 (1978): 205, 208–09; Sales (see n. 12) 344–48. See Arthur L. Eno, Jr. & William Hovey, *Real Estate Law (Mass. Practice)* 28 (St. Paul, Minn.: West Publishing Co., 3d ed., 1995 & Supp. 1999) §18.3 & n. 2.

⁴⁶ Berger (see n. 45) 208–09 (accessibility to public less important issue with government condemnor).

⁴⁷ After the initial few productive decades of railroad growth, a tremendous unproductive overbuilding of railroads occurred in the late nineteenth century, fueled in part by the advantages given to railroads by the states. Rubin (see n. 11) 1318.

⁴⁸ See sources cited at note 45. Although the more lenient “public-benefit” school ultimately prevailed, any attempt by property rights advocates to revive the “actual-use” school in Massachusetts today would be of

questionable benefit. While “actual-use” would prevent some of the concerns raised after *Berman* with the dedication of condemned property to private parties, some of the major current controversial “public uses” (such as amusement parks and private hotels attached to convention centers) are also public accommodations and thus would qualify as “public uses” under the “actual-use” theory.

⁴⁹ Meidinger (see n. 12) 24.

⁵⁰ Levy (see n. 1) 306–07 (1957). The “Commonwealth idea” follows republicanism, discussed in Section II (A) (2), and presages the statism of industrial policy, discussed in Section II (B) below. Consistent with the “Commonwealth idea,” Shaw indicated that the legislature may “trench somewhat largely on the profitable use of individual property” for the perceived benefit of the general public. *Commonwealth v Alger*, 7 Cush. (61 Mass.) 53, 88 (1851).

⁵¹ Levy (see n. 1) 121–22, 255, 311.

⁵² See Harry N. Scheiber, “The Road to *Munn*: Eminent Domain and the Concept of Public Purpose in the State Courts,” *Perspectives of American History* 5 (1971): 376–77, 386, 392 (Daniel Webster and Supreme Court Justice Joseph Story were theorists supporting vested property rights; other state courts overturned takings for manufacturing mill dams as without public purpose). After approximately 1840 there was a retrenchment in private use of eminent domain in much of the country outside Massachusetts, accompanied by renewed judicial scrutiny of private takings. Judges more frequently rejected takings as not for a public purpose when the primary object was simply to increase economic activity. Horwitz (see n. 18) 260–61. Horwitz argues that Shaw embodied the trend towards stricter scrutiny for public purpose by rationalizing the Mill Act as a special aspect of riparian law, rather than traditional eminent domain. Horwitz (see n. 18) 261. See Meidinger (see n. 12) 25. Horwitz’s position on this issue is difficult to maintain in light of the language in Shaw’s decisions discussed in this section.

⁵³ The establishment of a great mill-power for manufacturing purposes, as an object of great public interest, especially since manufacturing has come to be one of the great public industrial pursuits of the commonwealth, seems to have been regarded by the legislature and sanctioned by the jurisprudence of the commonwealth, and, in our judgment, rightly so, in determining what is a public use, justifying the exercise of the right of eminent domain.

Hazen v Essex Co., 12 Cush. (66 Mass.) 475, 477–78 (1853). See *Boston & Roxbury Mill Dam Corp.*, 12 Pick. (29 Mass.) 480; Horwitz (see n. 18) 260; Levy (see n. 1) 257; Scheiber (see n. 52) 372. In *Boston & Roxbury Mill Dam*, to demonstrate the constraints of the public use requirement, Shaw stated that a taking was permissible only “when the public wants it, not merely for ornamental, but for some necessary and useful purposes.” *Boston & Roxbury Mill Dam Corp.*, 12 Pick. (29 Mass.) 480. This contrasts with *Berman*, 348 U.S. 32–33, and its progeny, discussed in Section II (A) (4) below, which allow takings for aesthetic improvements.

⁵⁴ 348 U.S. 26 (1954). See Scheiber (see n. 52) 390.

⁵⁵ See Meidinger (see n. 12) 31.

⁵⁶ See Horwitz (see n. 18) 66; Levy (see n. 1) 130–32.

⁵⁷ 100 Mass. 544 (1868).

⁵⁸ See Scheiber (see n. 52) 399–400. See also Massachusetts Constitution, amend. 43 (1915).

⁵⁹ *Dingley*, 100 Mass. 544–45, 554–55.

⁶⁰ *Ibid.*, 100 Mass. 547, 558–59.

⁶¹ *Ibid.*, 100 Mass. 544, 559.

⁶² [W]here the sanitary condition of a large city requires an interference with the real estate of a great number of persons, making expensive and essential changes in the condition and character of the land, a case is presented within the clause of the [Massachusetts] Constitution which confers authority upon the legislature to make ‘all manner of wholesome and reasonable [...] laws [...]’ so as the same be not repugnant or contrary to this constitution [...]’.... [O]ne of the main purposes of this clause was to vest in the legislature a superintending and controlling authority, under and by virtue of which it might enact laws not repugnant to the Constitution of a police and municipal nature....

Ibid. 557 (citations omitted) (quoting Massachusetts Constitution, part 2, c. 1, § 1, art. 4) (omissions from original not noted in quotation).

⁶³ See sources cited at note 45. See also Laura Mansnerus, Note, “Public Use, Private Use, and Judicial Review in Eminent Domain,” *New York University Law Review* 58 (1983): 413–14.

⁶⁴ Meidinger (see n. 12) 30–31. The Supreme Court first applied the federal Takings Clause to the states through the Fourteenth Amendment in *Missouri Pacific Railway v Nebraska*, 164 U.S. 403, 417 (1896).

⁶⁵ Lawrence W. Kennedy, *Planning the City up on a Hill* (Amherst, Mass.: University of Massachusetts Press, 1992), 167; Thomas H. O’Connor, *Building a New Boston* (Boston: Northeastern University Press, 1993), 138; Berger, (see n. 45) 215; Meidinger (see n. 12) 33–34.

⁶⁶ Berger (see n. 45) 215; Meidinger (see n. 12) 34–36.

⁶⁷ Kochan (see n. 30) 66–76.

⁶⁸ 348 U.S. 26 (1954).

⁶⁹ 467 U.S. 229 (1984).

⁷⁰ Massachusetts courts had previously adopted deferential review for legislative determinations of public use. *Lynch*, 161 Mass. 308 (deference to legislative determinations of public expediency). See *Benevolent & Protective Order of Elks*, 403 Mass. 538–39 (deferential standard of review for administrative determinations of necessity for takings).

⁷¹ *Berman* was followed by state supreme courts in all but three states—South Carolina, Georgia, and Florida. *Berman* has been cited as authoritative numerous times in Massachusetts. See *Blakeley v Gorin*, 365 Mass. 590, 598, 313 N.E. 2d 903 (1974); *Moskow v Boston Redevel. Auth.*, 349 Mass. 553, 561, 210 N.E. 2d 699 (1965), cert. denied, 382 U.S. 983 (1966); *Dodge v Prudential Ins. Co.*, 343 Mass. 375, 387, 179 N.E. 2d 234 (1961); *Opinion of the Justices*, 334 Mass. 760, 763, 135 N.E. 2d 665 (1955); *Despatchers’ Cafe, Inc. v Somerville Housing Auth.*, 332 Mass. 259, 261, 724 N.E. 2d 528 (1955). In Georgia the state constitution was amended to allow for urban renewal and in Florida the courts eventually accepted *Berman*. Berger (see n. 45) 216 & n. 70; Mansnerus (see n. 63) 415 n. 31.

⁷² *Midkiff* applied the weak “rational relationship” test to legislative (and by extension administrative) determinations of public purpose, permitting takings “where the exercise of the eminent domain power is rationally related to a conceivable public purpose.” *Midkiff*, 467 U.S. 241. *Midkiff* has been cited only once in a reported appellate Massachusetts case, and in passing. *Roberts v City of Worcester*, 416 Mass. 804, 806, 625 N.E. 2d 1365 (1994).

⁷³ See Durham, “Efficient Just Compensation as a Limit on Eminent Domain,” *Minnesota Law Review* 69 (1985): 1283–84 (1985); Kochan (see n. 30) 75–76.

⁷⁴ 304 N.W.2d 410 Mich. 616, 455 (1981). *Poletown* has never been cited in a reported Massachusetts decision.

⁷⁵ *Poletown*, 304 N.W.2d at 464–65 (Ryan, J., dissenting). As opposed to the typical nineteenth century “instrumentality of commerce” cases when government delegated the eminent domain power directly to private corporations, cases such as *Berman*, *Midkiff*, and *Poletown* (where a government agency, typically an urban redevelopment authority, takes property itself with the intent of transferring it to a private party) may be referred to as “private-transferee takings.” Thomas Ross, “Transferring Land to Private Entities by the Power of Eminent Domain,” *George Washington Law Review* 51 (1983): 356. See Durham (see n. 73) 1281. Another well known case of a private-transferee taking was *Yonkers Community Dev. Agency v Morris*, 37 N.Y.2d 478, 335 N.E. 2d 327, 373 N.Y.2d 478, appeal dismissed, 423 U.S. 1010 (1975). Despite the city’s use of eminent domain to expand Otis Elevator’s plant and a \$14,000,000 site preparation subsidy, the company closed the plant less than ten years later, laying off 375 employees. Mansnerus (see n. 63) 453 n. 209.

⁷⁶ *City of Springfield v Dreison Invs., Inc.*, 11 Mass. L. Rptr. 379, 400 (Super. Ct. 2000) (tracing recent history of Massachusetts eminent domain jurisprudence). See *Salisbury Land & Improvement Co. v Commonwealth*, 215 Mass. 371 102 N.E. 619 (1913) (residential redevelopment); *Opinion of the Justices*, 211 Mass. 624 98 N.E. 611 (1912) (similar); *In re Opinion of the Justices*, 204 Mass. 607, 91 N.E. 405 (1910) (excess condemnation for commercial development along highways); *In re Opinion of the Justices*, 204 Mass. 616, 91 N.E. 578 (1910) (similar).

⁷⁷ *Salisbury Land*, 215 Mass. 371, and the *Opinion of the Justices*, 211 Mass. 624, were largely superseded by Massachusetts Constitution, amend. 43 (residential redevelopment 1915). The *Opinions of the Justices*, 204 Mass. 607, 204 Mass. 616, were largely superseded by Massachusetts Constitution, amend. 19 (property adjacent to highways 1911). See *Massachusetts Home Mortgage Fin. Agency v New England Merchants Nat. Bank*, 376 Mass. 669, 678 n. 3, 382 N.E. 2d 1084 (1978). Two Supreme Judicial Court cases in the latter half of the twentieth century prohibited private-transferee takings on public use grounds. In *re Opinions of the Justices*, 356 Mass. 775, 250 N.E. 2d 547 (1969) (stadium project for use by private sports team); In *re Opinion of the Justices*, 332 Mass. 769, 126 N.E. 2d 795 (1955) (direct sale or rental to private parties of taken property to enhance commercial development of area not a public purpose). The 1955 *Opinion of the Justices* was distinguished by *Opinion of the Justices*, 334 Mass. 721, 736, 740, 136 N.E. 2d 223 (1956), and *Opinion of the Justices*, 334 Mass. 760, 763–64, 135 N.E. 2d 665 (1956), which permitted properties taken by a government agency for redevelopment to be disposed of subsequently to private parties. The 1969 *Opinions of the Justices* is discussed in greater detail in Section III (A) below.

⁷⁸ *Dreison Invs., Inc.*, 11 Mass. L. Rptr. 400. See *Papadinis v City of Somerville*, 331 Mass. 627, 121 N.E. 2d 714 (1954) (slum clearance adequate public purpose, subsequent resale to private parties permissible); *Allydonn Realty Corp. v Holyoke Housing Auth.*, 304 Mass. 288, 23 N.E. 2d 665 (1939) (approving of public housing as a public purpose).

⁷⁹ *Dreison Invs., Inc.*, 11 Mass. L. Rptr. 401. See *Cumberland Farms, Inc. v Montague Econ. Dev. & Indus. Corp.*, 38 Mass. App. Ct. 615, 650 N.E. 2d 811 (1995) (public economic development corporations permissible); *Boston Edison Co. v Boston Redev. Auth.*, 374 Mass. 37, 371 N.E. 2d 728 (1977) (privately initiated clearance of decadent area for replacement by power plant a public use); *Omartian v City of Springfield*, 354 Mass. 439, 238 N.E. 2d 48 (1968) (excess condemnation to benefit private shopping center permissible if primary purpose was to build highway project); *Dodge v Prudential Ins. Co.*, 343 Mass. 375, 179 N.E. 2d 714 (1961) (clearance for commercial, as opposed to residential, redevelopment a public purpose); *Opinion of the Justices*, 341 Mass. 760, 168 N.E. 2d 858 (1960) (private redevelopment corporations permissible); *City of Boston v Merchants Nat. Bank*, 338 Mass. 245, 154 N.E. 2d 702 (1958) (convention center a public purpose).

⁸⁰ Kennedy (see n. 65).

⁸¹ *Ibid.*, 162–63.

⁸² *Ibid.*, 165.

⁸³ *Ibid.*, 164. For discussion of the constitutional issues surrounding relocation payments, see Section II (B).

⁸⁴ Herbert J. Gans, *The Urban Villagers* (New York: Free Press, 1962) 319, 321, 326–27, 333; Kennedy (see n. 65) 166; O'Connor (see n. 65), 137–38.

⁸⁵ Gans (see n. 84), 328.

⁸⁶ Gans (see n. 84), 318 n. 20, 334–35; Kennedy (see n. 65), 164, 166–67, 174; O'Connor (see n. 65), 137–38.

⁸⁷ Kennedy (see n. 65), 188, 190; O'Connor (see n. 65), 139, 284, 293, 295–96.

⁸⁸ See Fischel (see n. 31), 38.

⁸⁹ See Epstein (see n. 30), 564.

⁹⁰ Berger (see n. 45), 239–40; Meidinger (see n. 12), 50 & n. 176.

⁹¹ See sources cited at notes 89–90.

⁹² Kochan (see n. 30), 86.

⁹³ For a detailed discussion of why “eminent domain is not necessarily a more efficient institution than the free market,” particularly when attempting to consolidate into one ownership “many contiguous but separately owned parcels,” see Patricia Munch, “An Economic Analysis of Eminent Domain,” *Journal of Political Economy* 84 (1976): 473. See also Kochan (see n. 30), 88–89. Private developers have historically found ways to overcome the holdout problem. Fischel theorizes that the holdout problem may be greater for government than for private parties because of sunshine laws and other forms of public scrutiny. Fischel (see n. 31), 38. To the extent that the holdout problem is a justification for eminent domain, then, it would not justify using eminent domain for private-transferee takings.

⁹⁴ Typically, a property owner who has not put his or her property on the market is interested in holding that property for the purpose for which it is currently being used. The owner might not sell to a surprise visitor offering full market value because the owner values the property more highly owing to the costs associated with selling and moving, emotional attachment, and the property’s unique suitability or adaptation to the current owner’s purposes. Ordinarily, a property owner will only sell at a time when he or she has no independent plans to market the property if the purchaser is willing to offer a premium above fair market value to compensate the owner for the unplanned sale. Paying fair market value for condemned land therefore fails to compensate a property owner for the unmeasurable subjective worth of the property, which would include the premium necessary to prompt an unmotivated owner to sell. See Fischel (see n. 31), 41.

⁹⁵ “‘Goodwill’ refers to the ‘value which inheres in the fixed and favorable consideration of customers, arising from an established and well-known and well-conducted business.’” Lynda J. Oswald, “Goodwill and Going Concern Value: Emerging Factors in the Just Compensation Equation,” *Boston College Law Review* 32 (1991): 287 (quoting *Los Angeles Gas & Elec. Co. v Railroad Comm’n*, 289 U.S. 287, 313 (1933)).

⁹⁶ “‘Going-concern value’...refers to ‘the many advantages inherent in acquiring an operating business as compared to starting a new business with only land, buildings and equipment in place.’” Oswald (see n. 95), 287 (quoting *Gray Line Bus Co. v Greater Bridgeport Transit Dist.*, 188 Conn. 417, 449 A.2d 1036, 1039 (1982)). The distinction between goodwill and going-concern value is that while “goodwill can be measured by ‘capitalization of business earnings in excess of a normal industry-wide rate of return’ on capital assets, going concern value reflects the enhanced value of assets arising from their combination within an operating business. Unlike goodwill, which reflects the existence or expectation of excess earnings, going-concern value reflects only the ability of a going business to realize a higher rate of return than a newly established firm.” Oswald (see n. 95), 289 (quoting Comment, “Depreciability of Going Concern Value,” *University of Pennsylvania Law Review* 122 (1973): 485) (emphasis in original) (footnote omitted). Although both goodwill and going-concern value are well recognized as distinct issues in tax law, courts have not given much consideration to the distinction in the eminent domain field. Oswald (see n. 95) 289–90.

⁹⁷ See Epstein (see n. 38) 179, 182; Meidinger (see n. 12) 44; Oswald (see n. 95) 291, 372. One author argues that courts should award a condemnee what he terms “direct damages,” which would cover both lost goodwill and lost going-concern value and end concerns about potentially overlapping recoveries. D. Michael Risinger, “Direct Damages: The Lost Key to Constitutional Just Compensation When Business Premises are Condemned,” *Seton Hall Law Review* 15 (1985): 521. Risinger admits that his proposal would not end all of the difficulties under the present system. Risinger, *supra*, 523 & n. 205. Rather than utilize a new and potentially confusing legal term, this Study of Massachusetts takings suggests requiring the condemnor to pay for both lost goodwill and lost going-concern value (each of which is a long recognized concept used in corporate and tax law), but with clear instructions to prevent duplicate awards.

⁹⁸ “[F]inancial compensation does not cover non-financial attachments to property [that] can take the form of personal and neighborhood attachments.” Fischel (see n. 31) 41. See Durham (see n. 73) 1278–79, 1306; Stoebeck (see n. 1) 596–97; Mansnerus (see n. 63) 428 (“home and community, social and family ties, a way of life and perhaps of livelihood”). Fischel suggests that “[t]he government should offer extra compensation when personal values are at issue, as in residential acquisitions or for properties for which there are poor substitutes.” Fischel (see n. 31) 41. Massachusetts law, consistent with that of most other jurisdictions, compensates only for the fair market value of property, not the special value to the owner. *Meisel Press Mfg. Co. v City of Boston*, 272 Mass. 372, 382–83, 172 N.E. 356 (1930). For a discussion of the social and psychological costs of the West End clearance, see Gans (see n. 84) 320; O'Connor (see n. 65) 138–39. For similar effects on former Poletown residents, see Mansnerus (see n. 63) 431 n. 107 (for some dislocation a “wrenching experience that led to depression and illness”).

⁹⁹ Taken to the extreme for purposes of illustration, if the government did not have to pay for land acquired through eminent domain, it

could “regard [the land] as a free input and overuse it relative to [other] factors of production.” Fischel (see n. 31) 35. See Robert D. Tollison, “Comment on Economic Analysis and Just Compensation,” *International Review of Law & Economics* 12 (1992): 140 (arguing that, without a compensation policy, “the government’s production function would come to embody too much land” resulting in a “misallocation in the land market”).

¹⁰⁰ Michael DeBow, “Unjust Compensation: The Continuing Need for Reform,” *South Carolina Law Review* 46 (1995): 580.

¹⁰¹ See DeBow (see n. 100) 580 & n. 7; Risinger (see n. 97) 490 & n. 20.

¹⁰² *Olson*, 292 U.S. 255.

¹⁰³ DeBow (see n. 100) 582–83.

¹⁰⁴ 42 U.S.C. §§ 4621 *et seq.*; M.G.L. c. 79A; Laura A. Siegel, “Fenway: Another Hidden Cost,” *Boston Phoenix* (16 June 2000): 23.

¹⁰⁵ See *Callender v Marsh*, 1 Pick. (18 Mass.) 418, 430 (1823) (refusing compensation for lowering of street grade; eminent domain “has ever been confined, in judicial application, to the case of property actually taken and appropriated by the government.”).

¹⁰⁶ Oswald (see n. 95) 300–01, 363.

¹⁰⁷ Procedural costs are the internal costs to government of land assembly, evaluation, acquisition, and litigation, including cost of lawyers and appraisers. The inefficiencies of the political and bureaucratic processes may result in high overhead costs necessary to accomplish a condemnation and are rarely accounted for in considering the costs and benefits of property takings. See Fischel (see n. 31) 36; Meidinger (see n. 12) 53.

¹⁰⁸ Deadweight loss is “[a] loss in social welfare deriving from a policy or action that has no corresponding gain. Deadweight losses represent economic inefficiency and usually result when there is some flaw in the price-setting mechanism.” Bannock (see n. 10) 93. In this case deadweight losses are the often unaccounted-for cost to society of diversion of resources to taxes, some of which are spent inefficiently, estimated at twenty-five percent of tax income. Regarding deadweight loss from taxes, see Roger G. Noll & Andrew Zimbalist, eds., *Sports, Jobs and Taxes: The Economic Impact of Sports Teams and Stadiums* (Washington, D.C.: Brookings Institution, 1997), 61–63; Paul C. Weiler, *Leveling the Playing Field* (Cambridge, Mass.: Harvard University Press, 2000), 269.

¹⁰⁹ “Moral hazard” is the risk that market participants will vary their behavior in light of existing systemic protections; for example, banks may lend more freely than the market warrants if they know they are likely to be bailed out by the government in a collapse. See The Economist, *Economics: Making Sense of the Modern Economy* (London: Profile Books, 1999), 232. Moral hazards of eminent domain can result from a property owner needlessly subdividing or investing in property likely to be taken in hopes of enhancing the condemnation award. See Fischel (see n. 31) 36, 39. On the other hand, owners of property likely to be taken may delay needed repairs, knowing that they will not be fully compensated and minor deterioration is unlikely to be considered in a condemnation award. See Fischel, (see n. 31), 39.

¹¹⁰ Epstein (see n. 30) 564. See Durham (see n. 73) 1303. See also *Lucas v South Carolina Coastal Council*, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring) (purpose of Fifth Amendment Takings Clause is to “protect[] private expectations to ensure private investment.”).

¹¹¹ Fischel (see n. 31) 36. See Meidinger (see n. 12) 60 (increasing use of eminent domain inconsistent with stable property rights). This disincentive to investment, combined with other similar disincentives such as high taxes and overregulation, may result in less moderate-cost development and an overconcentration of development in the high-cost/high-profit sector where adequate profits to offset these disincentives are likely.

¹¹² Kochan (see n. 30) 87–88. See Kennedy (see n. 65) 164 (rumors persist that insiders obtained West End redevelopment rights at a discounted price because of connections); O’Connor (see n. 65) 134, 284 (similar); Durham (see n. 73) 1307; Epstein (see n. 30) 564; Fischel (see n. 31) 39; Stoebuck (see n. 1) 599 (“[T]ransfers [by eminent domain to private parties] tend more than transfers to the government to be for non-public purposes and so more or less tend to be suspect.”); Rubin (see n. 11) 1318 (public perception of rife corruption and fraud associated with government involvement in railroad development led to anti-aid amend-

ments, such as Massachusetts Constitution, amends. 62, 89); Barry Newman, “West End Story: A Neighborhood Died But One Bostonian Refuses to Let It Go,” *Wall Street Journal* (22 Aug. 2000): A1, A6 (continuing resentments over West End redevelopment).

Fischel indicates that there are some institutional constraints on private-transferee takings that make this a relatively rare situation, as is confirmed by the study database of takings. The relative rareness of the circumstance does not discount the destructive effect on the condemnees or the need for procedural protections for such condemnees. As private-transferee takings often generate significant adverse publicity out of proportion with their actual effect as a proportion of all takings, they contribute disproportionately to demoralization costs. According to Fischel, one constraint on private transferee takings is the high procedural costs associated with eminent domain, another the fact that government can more easily subsidize favored beneficiaries through the tax code and other regulatory and spending measures, and a third the open scrutiny under which government operates. Fischel (see n. 31) 39.

On the other hand, to the extent that procedural costs may not be transparent, the true cost of private-transferee takings are not evaluated, a reason to mandate inclusion of such costs in any takings-related cost-benefit analysis. While tax exemptions and spending policies may be ways for state or national politicians to ingratiate themselves with favored constituents, these tools are not so readily amenable to use by local politicians with fewer powers available to them, who may have more incentive to use eminent domain to reward favored parties. See Mansnerus (see n. 63) 432–35 (risk of abuse of power increases as size of governmental unit decreases; local officials particularly susceptible to powerful private interests). Moreover, as the *Dreison* case illustrates, powerful constituencies with much to gain can fairly easily overcome institutional barriers and seek benefits that combine eminent domain with other subsidies. *City of Springfield v Dreison Invs., Inc.*, 11 Mass. L. Rptr. 379 (Super. Ct. 2000). An invigorated, judicially enforced public use requirement could potentially reduce these incentives. Finally, public scrutiny may limit use of eminent domain to assist politically unpopular private parties, but public scrutiny is less of a disincentive when the condemnees are poorly organized or the beneficiary is a local hero: a popular department store, the largest employer in the city or a prominent local institution. See Meidinger (see n. 12) 44. These issues could be addressed by greater openness in the takings process and widespread distribution of a thorough, public, and professional examination of the extent of the costs to the public and the externalities forced onto those displaced by the favored beneficiary.

¹¹³ See *Dict. Econ. & L.* (see n. 30) 517, 519.

¹¹⁴ *But see* Ross (see n. 75) 355 (1983). Ross argues that private-transferee takings deserve no additional institutional barriers beyond those required for takings for public agencies. Ross would instead impose a high level of scrutiny for public purpose on all takings, which may not be either cost-efficient or politically feasible. Ross argues that private-transferee takings will not become widespread unless societal values change substantially, in which case the law would not be a significant barrier. *Ibid.* 356, 380. The concern, however, is not preventing widespread abuse; it is preventing instances of oppression and injustice against individuals and small groups. See note 31. Ross suggests three principal reasons for concern about private-transferee takings: (1) improper motive to benefit favored private interests; (2) lack of accountability; and (3) higher demoralization costs. Ross (see n. 75) 369–70. These arguments are responded to *seriatim* below:

(1) Ross feels that there can be improper motives in all takings and that even when taken property remains in government hands private parties can receive considerable non-possessory benefits. See, e.g., John R. McNamara & Joseph Doolin, “Shame on Our Leaders for Approving Lowell Housing Demolition,” *Boston Globe* (10 Aug. 2000): A19 (redevelopment of public housing project as mixed-income housing benefits property values of owners of neighboring property). Therefore, Ross would closely scrutinize all takings to determine if there is a true public use. Ross (see n. 75) 370–74. Ross neglects, however, to distinguish between the absolute and the relative; the likelihood of significant private benefit is much stronger when condemned property is transferred to a private party. (2) Ross suggests that private-transferees can be held accountable because the government can retake the property and can impose conditions. *Ibid.* 374–76.

The tremendous cost involved in re-taking property, the difficulty of getting politicians to “flip-flop” and admit to making a mistake, the continuing popularity of the favored party, and that party’s staunch protection of its vested rights would be strong disincentives to this “safeguard” being used. Conditions imposed on the property, including monitoring, will only be successful if there is ongoing oversight and public information. Ross opines that the government’s ability to impose land-use conditions is alone sufficient to enforce continuing accountability, but Ross does not account for the institutional inertia against drafting, negotiating over, and monitoring the conditions. Certainly, the adequacy of any conditions that might be imposed should be subject to review. Ross also downplays the opportunity costs of continuing conditions on the use of property. (3) Finally, Ross suggests that there are no additional demoralization costs in private-transferee takings because the condemnee (a) will be more upset over the loss of his or her property than over who his or her successor in interest will be and (b) will recognize and appreciate the public benefit even if a private-transferee also benefits. *Ibid.* 376–78. While Ross may be correct that frustration at loss of property may be the prevailing sentiment of condemnees, there is reason to believe that their frustration will be magnified, not minimized, by the fact that the state took their property to give to another. Widespread public cynicism, as mentioned in relation to the West End takings, (see n. 112), belies the assumption that condemnees will ascribe beneficent motives to private-transferee takings, particularly when they have suffered from inadequate compensation for their relocation-related losses.

¹¹⁵ Externalities occur “whenever the activities of one economic agent affect the activities of another economic agent in ways that are not reflected in market transactions.” Walter Nicholson, *Microeconomic Theory: Basic Principles and Extensions* (Fort Worth, Tex.: Harcourt College Publishers, 7th ed., 1998), 802. Externalities are “[c]onsequences for welfare or opportunity costs not fully accounted for in the price and market system.” Bannock (see n. 10) 147–48.

¹¹⁶ Fischel (see n. 31) 36.

¹¹⁷ Oswald (see n. 95) 371–72. See Durham (see n. 73) 1297, 1300–01 (under the “fiscal illusion,” government entities underestimate costs of their actions unless required to include such costs in their budgets); Daniel A. Farber, “Economic Analysis and Just Compensation,” *International Review of Law & Economics* 12 (1992): 130 (economic theory predicts that externalities will produce overproduction of products that do not absorb their true cost).

¹¹⁸ In economic terms, “Rent seeking is the socially costly pursuit of wealth transfers....” Robert D. Tollison, *Rent Seeking*, in *Dict. Econ. & L.* (see n. 3) 315. In other words, “[r]ent seeking [means] unproductive [forms of profit seeking]; it destroys value by wasting valuable resources.” *Ibid.* 316. See Bannock (see n. 10) 355 (Rent-seeking behavior is “[b]ehavior which improves the welfare of someone at the expense of someone else.”).

¹¹⁹ Epstein (see n. 30) 564. See Kochan (see n. 30) 85–88; Jones (see n. 5) 302 (discussing Donald Trump’s influence on Casino Reinvestment Development Authority). There are other benefits of the eminent domain process, such as immediate transfer and often pre-approval of regulatory development prerequisites, that encourage private sector actors to urge the use the power on their behalf. Kochan (see n. 30) 85–88.

¹²⁰ See Farber (see n. 117) 130 (citing Richard Posner, *Economic Analysis of Law* (Cambridge, Mass.: Harvard University Press, 1986), 51.).

¹²¹ See Fischel (see n. 31) 38. See also Durham (see n. 73) 1295 (politicians making takings determinations less likely to gather necessary information to weigh correct decision, more likely to decide based on political effect of determination at next election). Durham illustrates some of the perils of failing to include the full externalities of proposed taking projects in project analysis by reference to the planning of a portion of the Cross-Bronx Expressway in New York, which dislocated 1530 families when an alternate route was available that was shorter and would have dislocated only 19 families and a private bus terminal facility. Durham (see n. 73) 1298–1300. Speculation as to the reasons for this choice by the principal planner of the route include “political corruption and whim exacerbated by stubbornness.” *Ibid.* 1299. Politicians who endorsed the plan suffered no adverse consequences. *Ibid.* 1299–1300.

¹²² See Farber (see n. 117) 129.

¹²³ See Durham (see n. 73) 1279, 1305; Oswald (see n. 95) 371 (judiciary should “ensure that the property owner receives just compensation for all of the losses inflicted by a taking”).

¹²⁴ This section is not meant as a primer on the condemnation process, for which see Eno & Hovey (see n. 45) §§ 18.1–17, but as a compendium of process-related issues that raise concerns about inefficiencies and inequities in the current system.

¹²⁵ Compare M.G.L. c. 79 (“quick-take” procedure) with M.G.L. c. 80A (judicial taking procedure). The Chapter 80A procedure is rarely used. Interview with Mark S. Bourbeau (22 Sept. 2000); interview with Neal C. Tully (13 June 2000). See *Town of Swampscott v Remis*, 350 Mass. 523, 525, 215 N.E. 2d 777 (1966) (first case under c. 80A to reach Supreme Judicial Court); Eno & Hovey (see n. 45) § 18.6. The database of 501 takings in 10 municipalities over a thirteen year period that was collected for this project did not find any orders of intention, required to be filed at the commencement of the Chapter 80A process. The Registry searches were broad enough to have discovered any takings in this category in the municipalities covered by the study, as they located the one federal taking in the data set. Although federal law does not require filing of federal takings judgments, it is the practice of the United States Attorney for Massachusetts to record evidence of the condemnation proceedings as a courtesy to conveyancers. Eno & Hovey (see n. 45) § 18.7 405 n. 1. As the “quick-take” process under M.G.L. c. 79 is by far the prevailing eminent domain procedure in Massachusetts, comments below refer to Chapter 79 unless stated otherwise.

¹²⁶ The payment *pro tanto* is the taking agency’s initial award of damages to the condemnee based on the agency’s estimate of the property’s fair market value. Acceptance of the payment *pro tanto* does not prejudice the condemnee’s right to contest the adequacy of the payment. M.G.L. c. 79, § 8A. The payment *pro tanto* limits the interest on the ultimate damage award. M.G.L. c. 79, § 37.

¹²⁷ The loss in value of the property caused by uncertainty of outcome while the process drags on has been held to be uncompensable. See *Remis*, 350 Mass. at 529. This can be a significant cost over time as property cannot be developed, maintenance will be deferred, and tenants often will not renew leases when property is under threat of condemnation. Designation of an area as a part of an urban renewal or redevelopment zone with some planned takings raises similar concerns. Property owners are aware of a potential taking, but they do not necessarily know how or when they will eventually be effected while in the meanwhile, the designation of a property as a potential redevelopment site decreases the value of the property and the flexibility of the owner’s potential use of the site for an indefinite period without any compensation from the state. Interview by David A. Mittell, Jr., with Frank Carvalho, Coalition for a Better Acre (22 Aug. 2000).

¹²⁸ Interview with Mark S. Bourbeau (22 Sept. 2000).

¹²⁹ See M.G.L. c. 79, §§ 3, 5C, 8B, 18; 760 C.M.R. §§ 25.04 (1) (c). See also 49 C.F.R. § 24.203 (c) (minimum ninety days notice to vacate for federally funded programs). Even when a condemnee successfully contests the validity of a taking, he or she can incur significant costs beyond legal fees. For example, in a recent case, by the time that the condemnees were successful in invalidating the taking, at least one principal tenant on the site had already relocated. *Dreison Invs., Inc.*, 11 Mass. L. Rptr. 397.

¹³⁰ In other states where the judicial taking process is more common, occasionally agencies will decide not to follow through on condemnations after expensive and lengthy litigation when the damages are higher than expected. In the meanwhile, the condemnee’s land may have been tied up for years at considerable uncompensated cost.

¹³¹ Interview with Mark S. Bourbeau (22 Sept. 2000); interview with Nicholas J. Decoulos (28 Sept. 2000); interview with Neal C. Tully (13 June 2000).

¹³² See M.G.L. c. 121B, §§ 48, 57A; 760 C.M.R. §§ 12.01–07. See also 42 U.S.C. § 4625; M.G.L. c. 79A, § 4; 49 C.F.R. § 24.205; 760 C.M.R. § 27.03.

¹³³ *Dreison Invs., Inc.*, 11 Mass. L. Rptr. 396.

¹³⁴ See *Benevolent & Protective Order of Elks, Lodge 65 v Planning Board*, 403 Mass. 531, 545, 531 N.E. 2d 1233 (1988).

¹³⁵ *Benevolent & Protective Order of Elks, Lodge 65 v Lawrence Redev. Auth.*, 33 Mass. App. Ct. 701, 702, 604 N.E. 2d 1233 (1992); Matthew Brelis, "Emerson College Likely to Stay Put," *Boston Globe* (2 June 1990): Metro. Sec. 1; "Lawrence Loses \$4.8M More in Land Taking," *Boston Herald* (18 May 1994): 22.

¹³⁶ *Benevolent & Protective Order of Elks*, 403 Mass. 545.

¹³⁷ Andy Dabilis, "Community Lose on Tax Free Property," *Boston Globe* (16 April 1994): Northwest Weekly Sec. 1.

¹³⁸ See Donald J. Kochan, *Reforming the Law of Takings in Michigan* (Midland, Mich.: Mackinac Center, 1996), 23, 33.

¹³⁹ More advance notice of takings might reduce litigation by taking away some deadline pressure and establishing a more cooperative tone for the takings process. Interview with Nicholas J. Decoulos (28 Sept. 2000). A more cooperative tone could also encourage more opportunities for mediation and an early settlement. *Ibid.* Earlier inclusion of potential condemnees in the planning process can help condemnors as well, as the property owners often know their own properties best. An owner notified early in the planning process may make government aware of important concerns, such as unstable soil conditions or environmental contamination, before plans are close to final and much more difficult to revise. *Ibid.*

¹⁴⁰ M.G.L. c. 39, §10, c. 40, § 14.

¹⁴¹ See M.G.L. c. 121A, §§ 6, 6B. Government agencies are not statutorily required to notify all affected property owners before adopting urban renewal plans under M.G.L. c. 121B or economic development projects under M.G.L. c. 121C. See M.G.L. c. 121B, § 48, c. 121C, § 6. M.G.L. c. 121B, § 47, provides that a person aggrieved by the determination of an urban redevelopment agency to take property as a decadent or blighted area has only thirty days from the time of notice to appeal that determination. This time limit raises due process concerns, as it is unreasonably short for potentially unsophisticated property owners such as owners of residential property and small businesses. The time for appeals of urban redevelopment plans should be extended to allow property owners to appeal the determination to the courts for a longer period—for example, for as long as a property owner subject to an ordinary taking would have to challenge the validity of the taking before being required by the taking agency to vacate the premises.

¹⁴² In certain circumstances, a notice of intent procedure applies, requiring the condemnor to notify the condemnee at least thirty days in advance of a taking. M.G.L. c. 79, § 5C. See also M.G.L. c. 121B, § 47. (It should be noted that utility takings are exempt from the notice of intent procedure, but are required to give notice as part of the hearing required before a utility can take property. M.G.L. c. 79, § 5C, c. 164, § 72.) The procedure is flawed, however, because exceptions for the commonwealth, counties, and municipalities almost consume the rule. M.G.L. c. 79, § 5C. The notice of intent requirement therefore applies only to takings by independent public authorities, such as redevelopment, housing, port, and turnpike authorities. Currently, the Massachusetts Highway Department (legally, a branch of state government exempt from the mandatory notice of intent procedure) voluntarily gives property owners thirty-day notice of intent to take property, but few other state agencies give such notice. Interview with Mark S. Bourbeau (22 Sept. 2000). Interview with Neal C. Tully (13 June 2000).

¹⁴³ See Munch (see n. 93) 487–87 (empiric study indicated that when taken by eminent domain "low-valued properties receive less than market value and high-valued properties receive more than market value"). See also Meidinger (see n. 12) 48; Risinger (see n. 97) 523 & n. 205 (small business people are "most crushed" victims of business condemnation); interview with Mark S. Bourbeau (22 Sept. 2000). Even a well known chain store was apparently unaware that it was not required to refuse in order a payment *pro tanto* to preserve its rights and that there was a procedural requirement of demanding payment of post-judgment interest. *Cumberland Farms, Inc. v Montague Econ. Dev. & Indus. Corp.*, 168 B.R. 455, 558–59 (Bankr. D. Mass. 1994), *aff'd on subsequent appeal*, 78 F.2d 10 (1st Cir. 1996).

¹⁴⁴ Gans (see n. 84) 325.

¹⁴⁵ Telephone interview by David A. Mittell, Jr., with Robert Murphy, General Manager, Mystic Plating (24 Aug. 2000); telephone interview by David A. Mittell, Jr., with Ray Spinale, Manager, Bridge Terminal (29 Aug. 2000).

¹⁴⁶ 42 U.S.C. § 4625 (c) (5); M.G.L. c. 79A, § 7; 49 C.F.R. § 24.203 (a); 760 C.M.R. § 27.04 (1) (a). See *The Acre Urban Revitalization and Development Project* (see n. 7) App. E, F.

¹⁴⁷ 760 C.M.R. § 25.06 (takings by a M.G.L. c. 121A entity (a redevelopment agency or corporation)). See 49 C.F.R. § 24.102 (f).

¹⁴⁸ Telephone interview with Kevin J. Morrison, General Counsel, Boston Redevelopment Authority (28 June 2000).

¹⁴⁹ Telephone interview with Kevin J. Morrison, General Counsel, Boston Redevelopment Authority (BRA) (28 June 2000). The BRA's internal procedures were developed in the 1960s based upon federal regulations then in effect for urban redevelopment plans and require generation of standard documents and reports. These procedures for site selection, planning and carrying out the taking process, choice of use, development, and deaccession are consistent and have been used for many years. *Ibid.* At each stage of the process, BRA staff prepare detailed internal briefing memoranda describing the history, current ownership, and physical features of property to be developed and a lengthy discussion of the intended use for the property and what procedural details need to be finalized in order for that end to be accomplished. Unless they are for information on progress only, internal briefing memoranda usually contain draft orders for adoption by the BRA. Development of property by the BRA (which may include takings) is usually a several stage process, starting with requests for proposals, and continuing through tentative and final designations of the property developer. When the project is complete, the developer receives a certificate of completion. At each stage of the process, the BRA commissioners vote at a public meeting on how and whether to proceed, based on consideration of the briefing memoranda. Often the recommendations in a briefing memorandum are based on extensive negotiations with the proposed developer, whether there has been a public bidding process or not. Interview with BRA General Counsel Kevin J. Morrison (1 Nov. 2000).

¹⁵⁰ M.G.L. c. 79, §§ 6, 7A. A long-time practitioner stated that through the 1960s it was common for government to offer payments *pro tanto* that were so low as to be outside the reasonable range of estimates for the property, on the presumption that many condemnees would not sue. Interview with Nicholas L. Decoulos (28 Sept. 2000). Since the 1970s, practitioners' experience has been that the payments *pro tanto* are on the lower end of a reasonable range of estimates for the property, either at the lowest pre-taking appraisal or slightly below that. Interview with Mark S. Bourbeau (22 Sept. 2000); interview with Nicholas L. Decoulos (28 Sept. 2000).

¹⁵¹ 49 C.F.R. § 24.102 (b). See 42 U.S.C. § 4651 (3).

¹⁵² M.G.L. c. 4, § 7 (26) (i).

¹⁵³ M.G.L. c. 79, § 8A.

¹⁵⁴ *Disangro v Commonwealth*, 9 Mass. L. Rptr. 73, 74 (Super. Ct. 1998).

¹⁵⁵ M.G.L. c. 79, §§ 1, 3. Massachusetts also requires orders of intention under the Chapter 80A procedure to be recorded with the Registries of Deeds within ten days of their adoption. M.G.L. c. 80A, §§ 2–3. The Model Eminent Domain Code, on the other hand, does not require any information to be recorded until the commencement of litigation. *Model Eminent Domain Code* § 407. The Chapter 80A procedure is preferable to that of the Model Code, as it gives conveyancers earlier notice of the intended taking.

¹⁵⁶ M.G.L. c. 79, §§ 1, 6.

¹⁵⁷ M.G.L. c. 80A, § 3.

¹⁵⁸ M.G.L. c. 79, §§ 7C, 14, 16.

¹⁵⁹ M.G.L. c. 79, § 8A.

¹⁶⁰ M.G.L. c. 79, § 18; *Raimondo v Town of Burlington*, 366 Mass. 450, 451, 319 N.E. 2d 895 (1974); *Boyce v Greater Lowell Reg'l Vocational Sch. Dist.*, 7 Mass. App. Ct. 639, 640 n. 4, 389 N.E. 2d 451 (1979).

¹⁶¹ Chapter 80A, the cumbersome judicial condemnation procedure, adds the unnecessary, inefficient, and possibly prejudicial intermediate stage of a commission evaluation of the property value before the jury trial on damages. M.G.L. c. 80A, §§ 8–9.

¹⁶² *United States v Reynolds*, 397 U.S. 14, 18 (1970); *Nichols 1A* (see n. 18) § 4.105 [3].

¹⁶³ *Waltham Tele-Communications v O'Brien*, 403 Mass. 747, 749, 532 N.E. 2d 656 (1989). The Model Eminent Domain Code supports affording

jury trials upon request in all condemnation cases. Model Eminent Domain Code § 902. As long ago as 1795, condemnors tried to avoid jury trials because of higher (and possible more realistic) damage verdicts for property owners. Horwitz (see n. 18) 67. Practitioners tend to prefer jury trials because juries tend to be less jaded by the takings process and therefore understand better the full impact of the taking on the condemnee; jury trials also combat the widely held perception that government eminent domain actions are “inside jobs,” with favored condemnees amply rewarded and disfavored condemnees given little consideration. Interview with Mark S. Bourbeau (22 Sept. 2000); interview with Nicholas J. Decoulos (28 Sept. 2000); interview with Neal C. Tully (13 June 2000).

¹⁶⁴ See *In re Opinions of the Justices*, 356 Mass. 796; *Lynch v Forbes*, 161 Mass. 308.

¹⁶⁵ See M.G.L. c. 30A; 760 C.M.R. § 27.04 (4) (k). See *Worcester Redev. Auth. v Department of Housing & Community Dev.*, 47 Mass. App. Ct. 525, 527, 713 N.E. 2d 1033 (1999).

¹⁶⁶ Telephone interview with Leonard M. Singer (27 July 2000); interview with Neal C. Tully (13 June 2000). The statutory requirement that a condemnee be paid within thirty days of the exhaustion of all rights to appeal is only applicable if there are available funds. See M.G.L. c. 79, § 36A; *Bromfield v Treasurer and Receiver-General*, 390 Mass. 665, 670–73, 459 N.E. 2d 445 (1983).

¹⁶⁷ Telephone interview with Leonard M. Singer (27 July 2000).

¹⁶⁸ The Acre Plan in Lowell, mentioned above (see text accompanying note 7) is a “new-style” targeted redevelopment project. Many of the properties scheduled to be taken are vacant lots or run-down properties owned by absentee landlords, several of which have been previously condemned for building or housing code violations. Nevertheless, the project will entail some disruption of long-term residents to enhance industrial development in the immediate area. For example, the Soiles family has owned and resided at a home on Cushing Street since 1965. The current owners are the children of the original purchasers. They grew up in the house and are rearing their own children there. The house is a well maintained Greek Revival building, yet it is scheduled for demolition because other houses in the area are run down and there is an industrial site across the street. Interview by David A. Mittell, Jr., with Soiles family (18 Aug. 2000). Lowell authorities stated that the reason that the Soiles family property is scheduled to be taken is that it is adjacent to an industrial/commercial area and is needed as a buffer between industrial and residential areas and possible expansion of the redevelopment plan’s light industrial uses, which planning authorities feel are under utilized in the area. Interview by David A. Mittell, Jr., with Ann Barton, Deputy Director, City of Lowell Division of Planning (13 Nov. 2000). Authorities indicated that they were unaware that the Soiles family would prefer to continue living at their property and that the authorities might be willing to revise the Acre Plan if the Soiles family expressed a strong desire to remain. *Ibid.* The financial and emotional hardship to the Soiles family caused by their forced relocation would be substantial, especially as the family has remained in the struggling area and worked to keep up their property and the neighborhood. This proposed taking epitomizes the reasons for demoralization costs.

¹⁶⁹ *In re Opinions of the Justices*, 356 Mass. 797–99.

¹⁷⁰ Under the Massachusetts cases, a “good faith” taking is one in which the stated purpose is the actual intended purpose. In a “bad faith” taking, the taking agency states a purportedly legitimate reason for the taking but instead intends to carry out the taking for an unstated improper purpose. “It is perhaps possible to imagine a case where the authorities ostensibly taking land for a schoolhouse have no intention of building any schoolhouse at all but are really taking the land to let it lie open for the benefit of adjoining land owned by themselves or for some other irrelevant purpose.” *Despatchers’ Cafe, Inc.*, 332 Mass. 263. (The Massachusetts courts have not addressed the issue of a “good faith” pretextual purpose, when the stated reason for the taking is not the real reason, but the real reason is also a legitimate, but less politically acceptable, public purpose.) The “bad faith” exception to the deference generally shown by the courts to legislative and administrative determinations of public use has only been relied upon successfully in one Massachusetts appellate decision. *Pheasant Ridge Assocs. v Town of Burlington*, 399 Mass. 771, 775–76, 506 N.E. 2d 1152 (1987). *Pheasant Ridge* holds that where

there is evidence that the stated public purpose for a taking is a pretext for a predominantly improper motive, the taking can be invalidated. *Pheasant Ridge* involved the rare case where direct evidence of improper motive was available because the chairman of the board of selectmen at an open town meeting was recorded as saying that taking the property in question for a park would prevent its use for low and moderate income housing. 399 Mass. 779 & n. 8. Sustaining a challenge to a taking’s validity on grounds of “bad faith” with only circumstantial evidence would be much harder. Although *Pheasant Ridge* involved a bad faith motive for a classic public use (a park), the decision reemphasized that “the use of the power [of eminent domain] solely to benefit some private person or persons would be action taken in bad faith and grounds for declaring a taking invalid.” 399 Mass. 775 (emphasis added). Rare is the case, however, when a public agency cannot (through creative thinking) find, and articulate, some public benefit in any proposed taking.

¹⁷¹ *Dreison Invs., Inc.*, 11 Mass. L. Rptr. 379.

¹⁷² *Opinions of the Justices*, 356 Mass. 796. In 1969, slum clearance and supplying housing had only recently been added to the list of common purposes in the aftermath of the Supreme Court’s *Berman* decision and subsequent federal funding for large scale urban redevelopment. It is possible, given activity outside of Massachusetts, that in the intervening three decades additional uses might be considered to have been added to the list. Nothing in recent Massachusetts decisions, however, would point in that direction.

¹⁷³ 356 Mass. 796, 797.

¹⁷⁴ 356 Mass. 796–97. The *Opinions of the Justices* does imply that a stadium owned by a government stadium authority (and leased to a sports team) would have a better chance to pass public use vetting than one that was immediately transferred to the team’s ownership. *Ibid.* Publicly owned stadiums are, however, from an economic point of view, as they often require continuing unexpected maintenance subsidies and increase the team’s bargaining power for future subsidies because the government fears being left with an expensive unused stadium if the team leaves. See Raymond S. Keating, *Sports Pork: The Costly Relationship Between Major League Sports and Government* (Washington, D.C.: Cato Institute, 1999); Weiler (see n. 108) 264–65.

¹⁷⁵ 356 Mass. 798, 799.

¹⁷⁶ 11 Mass. L. Rptr. 401–02.

¹⁷⁷ *Ibid.* 406. Requiring the public to be the “primary beneficiary” of a taking may be somewhat more protective of private property than the traditional “public benefit” test permitting takings so long as there is a more than incidental public benefit.

¹⁷⁸ 11 Mass. L. Rptr. 406–07.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.* 403, 406 (providing family-oriented activities, increasing hotel and restaurant business, providing for increased employment, and increasing public pride and spirit are all public purposes). Both *Opinions of the Justices* and *Dreison* imply that, with adequate legislative attention, much “incidental” private use might be acceptable.

¹⁸¹ Although the focus of this study is uncompensated harms caused by eminent domain, it should be noted that the Supreme Judicial Court has also considered several cases in the past several decades concerning property valuation issues. In general, Massachusetts is aligned with the majority of states in evaluating condemned property as of the date of the taking. Nevertheless, the evaluation is to be made unaffected by any knowledge of the impending taking, regardless of whether the effect is to increase or decrease the value of the property. *Lipinski v Lynn Redev. Auth.*, 355 Mass. 550, 553–54, 246 N.E. 2d 429 (1969). On the other hand, income lost because of the impending taking (for example, inability to find a tenant for a vacant portion of the property) is not compensable. *Cayon v City of Chicopee*, 360 Mass. 606, 610, 277 N.E. 2d 116 (1971). On another evaluation issue, the Supreme Judicial Court supported the use in a particular taking case of the “lot” method of evaluation, which allows property taken during the process of subdivision to be evaluated as separate lots (leading to a higher evaluation), contrary to the decisions of a majority of states that had addressed the issue. *Clifford v Algonquin Gas Transmission Co.*, 413 Mass. 809, 817–20, 604 N.E. 2d 697 (1992). The “lot”

method is preferable for property owners as it fully compensates the expectations of those who have taken steps to develop their property before the condemnation.

¹⁸² *Connor v Metropolitan Dist. Water Supply Comm'n*, 314 Mass. 33, 41, 49 N.E. 2d 593 (1943); *Cobb v City of Boston*, 109 Mass. 438, 444 (1872); *Davidson v Commonwealth*, 8 Mass. App. Ct. 541, 551, 395 N.E.2d 1314 (1979). See *Mitchell*, 267 U.S. 343, 346 (business losses not constitutionally protected). Risinger claims that the Supreme Court effectively required the taking authority to compensate for going-concern value ("market value of the business less salvage") in *Almota Farmers Elevator & Warehouse Co. v United States*, 409 U.S. 470 (1973). Risinger, (see n. 97), 517–19. See *Durham* (see n. 73) 1286 ("For the *Almota* Court, just compensation was thus the amount the lessee would have received if a 'For Sale' sign had been placed in front of the grain elevator and a buyer had materialized."). Risinger's interpretation of *Almota* has not, however, generally been followed. For example, *Almota* has only been cited once in Massachusetts, in *Rite Media, Inc. v Secretary of the Massachusetts Highway Department*, 429 Mass. 814, 712 N.E. 2d 60 (1999). That opinion, denying compensation for taking a highway billboard, dismissed *Almota* as irrelevant in a footnote. *Rite Media*, 429 Mass. 816 n. 3. Justice Charles Fried, in a vigorous dissent, argued that *Almota* was directly on point and required compensation. *Ibid.*, 429 Mass. 817–19.

It should be noted that average annual net earnings, a devalued approximation of going-concern value (which is usually estimated at a multiple of annual profits), is available as an alternative to relocation payments when a business chooses to go out of business after a taking. M.G.L. c. 79A, § 7 (I) (C). Businesses that are able to relocate, even with substantial loss of patronage, and businesses with another location are not entitled to partial loss of goodwill or going-concern value under this provision. Moreover, the payments under the provision have been statutorily capped at \$10,000 since 1973 with no adjustment for inflation. The parallel federal provision, applicable in cases where relocation is required by a federally funded project, raised the cap to \$20,000 in 1987. 42 U.S.C. § 4622 (c); 49 C.F.R. § 24.306 (a). This amount is clearly inadequate to compensate fully for business losses of even a moderate-sized company forced out of business by eminent domain.

¹⁸³ See *Connor v Metropolitan Dist. Water Supply Comm'n*, 314 Mass. 35 (Quabbin Reservoir); *Whiting v Commonwealth*, 196 Mass. 468, 470, 82 N.E. 670 (1907) (Wachusett Reservoir); *Earle v Commonwealth*, 180 Mass. 579, 582–83, 63 N.E. 10 Ala. Code (1902) (Wachusett Reservoir); Oswald, (see n. 95), 321–22.

¹⁸⁴ *Model Eminent Domain Code* § 1016. The Model Eminent Domain Code has been adopted in Alabama and New Mexico and Section 1016 of the Model Code has been separately adopted in California and Wyoming. Cal. Civ. Proc. Code § 1263.510; §§ 18-1A-1 to 18-1A-311; N.M. Stat. Ann. §§ 42-3-1 *et seq.*, 42A-1-1 *et seq.*; Wyo. Stat. § 1-26-713. See Oswald (see n. 95) 329–33. The wording of the Model Code provision mentions lost goodwill, but not lost going-concern value. Oswald (see n. 95) 333–34. Oswald theorizes that the omission of going-concern value from the Model Code may be an oversight due to common confusion in legal circles over the distinction between goodwill and going concern value, and indicates that the explicit wording of the statute might not preclude going-concern recoveries if the courts interpret the intent underlying the statute of allowing full compensation. *Ibid.* Courts in other states have awarded either goodwill or going-concern value, or both, through common law development as well. *Ibid.* For example, in *City of Detroit v Michael's Prescriptions*, 143 Mich. App. 808, 373 N.W.2d 219, 220, 225 (1985), the proprietor of a pharmacy established for 40 years across the street from a hospital in the Poletown district was awarded going-concern value because of the difficulty of establishing a business with similar advantages elsewhere.

¹⁸⁵ Gans (see n. 84) 319.

¹⁸⁶ Moreover, they would have had to pay capital gains taxes on the lost goodwill, which would have benefited taxpayers generally.

¹⁸⁷ M.G.L. c. 79A. The relocation statute applies to takings "which result[] in displacement of occupants by acquisition of real property or by issuing of a written order to vacate for purposes of rehabilitation, demolition, or other improvement." M.G.L. c. 79A, § 3.

¹⁸⁸ 42 U.S.C. §§ 4621 *et seq.*

¹⁸⁹ See *Model Eminent Domain Code* § 1403 & comment. M.G.L. c. 79A in its original form was passed in 1965, largely in response to the inadequate relocation assistance to those displaced by the West End project. Siegel (see n. 103) 22 (quoting Neal C. Tully). Inadequate relocation payments and failure to reimburse for lost goodwill and going-concern value in the West End clearance brought considerable hardship on residents and small businesses. Gans (see n. 84) 319; O'Connor (see n. 65) 138–39. The relocation assistance provided under the federal relocation program, however, remained inadequate because of caps on and gaps in coverage, and the inadequacy increased with time as inflation eroded the value of the capped compensation provisions. The Model Eminent Domain Code relocation provisions, *Model Eminent Domain Code* §§ 1401 *et seq.*, conform to the Federal Uniform Relocation Assistance Act "to assure eligibility of state or local agencies for federal financial assistance...." *Model Eminent Domain Code* art. 14 preliminary comment. The only extension of the Federal Act in the Model Code is a widening of its applicability. While the Federal Act applies only to federally assisted public projects, the Model Code's relocation provisions apply to all public and private condemnations. *Model Eminent Domain Code* § 1401 comment. The Model Code does not expand on the types of relocation expenses covered or the amount of reimbursement.

¹⁹⁰ See 42 U.S.C. § 4622; M.G.L. c. 79, § 7; 49 C.F.R. §§ 24.201-505; 760 C.M.R. §§ 27.01-08.

¹⁹¹ Some of the other explicit exemptions from relocation coverage include: (1) purchase of "capital assets" such as office furniture, filing cabinets, or machinery necessary to establish the business at a new site; (2) manufacturing materials, production supplies, and product inventory, even if they are replacing similar assets unable to be moved; (3) lost profits during the move and installation periods; (4) loss of trained employees; (5) additional operating expenses at a new location; and (6) legal expenses in preparing the relocation claim. 49 C.F.R. §§ 24.304 (b), 24.305; 760 C.M.R. § 27.05 (1).

¹⁹² Siegel (see n. 163) 23; interview with Mark S. Bourbeau (22 Sept. 2000). Under certain circumstances, the condemner will offer a business condemnee "early release" of relocation payments. Essentially, this entails speedy, up-front payment of relocation expenses in exchange for agreeing to a smaller, but more certain, relocation package and waiving the right to challenge the validity of the taking and the amount of compensation. Interview with Mark S. Bourbeau (22 Sept. 2000); interview by David A. Mittell, Jr., with Robert Murphy, General Manager, Mystic Plating (24 Aug. 2000). "Early release" gives flexibility to condemnors when they know that a condemnee is likely to bear significant relocation expenses. The condemning agency, thus, obtains a favorable position in potential settlement negotiations.

¹⁹³ The gaps in coverage are addressed in limited circumstances by other more general relocation provisions. Even these "gap plugging" provisions, however, often have caps, such as the low \$25,000 cap for a business's relocation expenses caused by a development project sponsored by an economic development corporation, a ceiling that has not been changed since 1972. M.G.L. c. 121C, § 5. See *Cumberland Farms, Inc.*, 168 B.R. 462 & n. 4 (costs relating to licenses, inspections, new equipment, physical changes, and closing on purchase of new site not explicitly included in relocation statute were uncovered because explicitly allowed expenses were over cap for "gap-plugging" provision; \$66,564 of move-related expenses uncovered).

¹⁹⁴ In one recent case, the owner of a billboard located on condemned property was not reimbursed and the likelihood of recovery under the relocation act was disparaged in *dictum*. *Rite Media, Inc.*, 429 Mass. 817 & n. 5 (1999). See *ibid.* 817–19 (Fried, J., dissenting). In another case, a property owner was denied recovery for sand and gravel on his property on the theory that sand and gravel was "separable material" that he could theoretically take with him to a new location or sell off before the completion of the taking. *Mason v Town of Princeton*, 8 Mass. L. Rptr. 241, 242 (Super. Ct. 1998). As removal of all the marketable sand and gravel on the site would not be economically viable in the time available, the owner was forced to abandon this "personal" property to the town. This opinion did not mention 49 C.F.R. § 24.303 (a) (1), as incorporated through 760 C.M.R. § 27.5 (1), or its predecessors which provide some coverage for personal property the condemnee is forced to abandon because of a taking.

¹⁹⁵ See Kochran (see n. 138) 22, 32. Recently, in a trial court case, the Commonwealth argued that it (as opposed to municipalities and other governmental authorities) was not even liable for court costs in takings cases because Chapter 79 does not contain an express waiver of sovereign immunity for that purpose. Interview with Neal C. Tully (13 June 2000). Clearly, failure to pay court costs imposes an even higher unnecessary litigation burden on the condemnee.

¹⁹⁶ Munch (see n. 93) 473, 495; Crabtree (see n. 2) 102.

¹⁹⁷ *Nichols* (see n. 18) § 15.02.

¹⁹⁸ M.G.L. c. 79, §§ 8A, 37.

¹⁹⁹ *Woodworth v Commonwealth*, 353 Mass. 229, 231, 230 N.E. 2d 814 (1967) (concerning accrual of interest between date of judgment and date the judgment is paid). See *Miller*, 317 U.S. 373; *General Elec. Co. v Commonwealth*, 329 Mass. 661, 663, 110 N.E. 2d 101 (1953) (no interest due after judgment, constitutional issue not raised).

²⁰⁰ M.G.L. c. 79, § 37; 1993 Mass. Stat. c. 110, §§ 136–37; 1981 Mass. Stat. c. 800, § 3. Interest on the rarely used judicial taking proceeding has remained capped at six percent. M.G.L. c. 80A, § 12.

²⁰¹ Interview with Mark S. Bourbeau (22 Sept. 2000).

²⁰² Interview with Mark S. Bourbeau (22 Sept. 2000).

²⁰³ Demographic, economic, and political data were taken from *Information Publications, Massachusetts Municipal Profiles* (1999); *Massachusetts Secretary of the Commonwealth, 1988 Official State Election Results; Massachusetts Secretary of the Commonwealth, 1994 Official State Election Results*; Massachusetts Department of Revenue, Division of Local Services Databank (www.state.ma.us/scripts/dls/databank; 30 May 2000); and DHCD Community Profiles (www.state.ma.us/dhcd/iprofile; 30 May 2000).

Yankee Atomic Elec. Co. v Secretary of the Commonwealth, 403 Mass. 203, 526 N.E. 2d 1246 (1988), approved Ballot Question 4 of 1988, which was intended, in part, to end nuclear power generation in Massachusetts. The ballot question failed. See *1988 Official State Elections Results. Ash v Attorney General*, 418 Mass. 344, 636 N.E. 2d 229 (1994), approved Ballot Question 9 of 1994, which was intended to end rent control in Massachusetts. The ballot question passed. See *1994 Official State Election Results*.

Although some takings were by state or, in one instance, federal agencies, this study assumes a strong municipal involvement in any taking in the municipality, because generally municipalities affected by a state or federal taking are consulted about proposed takings in the municipality and often have effective veto power. Therefore, data analysis for aggregated takings in a municipality, including state and federal takings, should generally yield valid results.

²⁰⁴ Statewide demographic and economic data were taken from *Massachusetts Department of Revenue, Comprehensive Annual Report* (for years 1986–1999).

²⁰⁵ Site investigation of the most recent Dunstable environmental taking indicates that it was a “consensual taking” of a large, environmentally sensitive site as to which the state has not yet (five years later) taken any efforts to develop a plan for environmental conservation or public recreational use. A “consensual taking” is in reality a traditional land acquisition by a government agency that takes the form of a taking, instead of a deed of sale or gift, for the convenience of the parties. The takings process can be more expeditious than the bureaucratic process necessary for an open market property acquisition. Often the condemnee in a consensual taking is a willing seller approached by the government about buying his land before an adverse takings process is instituted. In the Dunstable case, investigation indicated that the condemnee wanted his land to be preserved by the state and was willing to receive less than market-rate for the land if it were dedicated to his intended purpose.

²⁰⁶ While occasionally takings from public condemnees may have been true takings (where a higher ranking government entity, such as a state agency, condemns property owned by a lower ranking government entity, such as a municipality, contrary to the desire of the lower ranking entity), BRA General Counsel Kevin J. Morrison confirmed that the vast majority of takings from public condemnees were confirmatory takings or inter-agency transfers. Telephone interview with BRA General Counsel Kevin J. Morrison (25 Sept. 2000). Conservative property developers chosen as designated

redevelopers by the BRA often request confirmatory takings from the BRA to insure against title challenges, which is why confirmatory takings are often against “persons unknown.” *Ibid.* If, in fact, the true owner of the property was unknown and later appears, his or her claim would be for money damages against the condemning agency instead of against the redeveloper. Interview with BRA General Counsel Kevin J. Morrison (1 Nov. 2000). BRA practice is to name known private property owners whenever a confirmatory taking is requested, which resulted in at least one taking classified as “private” that was, in fact, a confirmatory taking and not a true taking. Memorandum from Lawrence E. Brophy, Senior Planner, and Sue O. Kim, Project Manager/Regional Planner, to BRA and Thomas N. O’Brien, Director, *passim* (12 Nov. 1998) (on file with BRA) (Salesian Brothers’ interest in former Don Bosco High School mentioned in confirmatory order of taking for development of Doubletree Hotel and Chinatown YMCA). Because the BRA serves as both Boston’s principal planning agency and its redevelopment authority, the BRA often has occasion to use its takings power for confirmatory takings facilitating property development on formerly public land and for interagency transfers to aid development. See Memorandum from James Lydon, Director of Economic Development, *et al.* to BRA and Marisa Lago, Director, *passim* (15 Aug. 1996) (on file with BRA) (“sliver takings” by BRA from City of Boston of air space over small portions of public ways to allow development of addition to Colonnade Hotel). Much recent private development in Boston has taken place on property fully or partially owned by government entities. Interview with BRA General Counsel Kevin J. Morrison (1 Nov. 2000). The governmental process necessary to discontinue small portions of a public way is often more cumbersome than taking the property by eminent domain and transferring it to a property developer. Property developers may also feel more secure in their tenure when the BRA (an entity known to developers to follow the standard state-mandated disposition procedure) transfers property to them after a confirmatory taking or interagency transfer taking than they would if a less well known government agency transferred the property to them directly and they had to verify that all the procedures applicable to that agency had been properly followed.

²⁰⁷ The BRA, for example, has a general practice of including the payment *pro tanto* in an unrecorded appendix to its orders of taking. The reason for this practice is that the payment *pro tanto* often fails to reflect the amount ultimately paid for the property by the government. Interview with BRA General Counsel Kevin J. Morrison (1 Nov. 2000). While final damage awards might be more interesting and perhaps more accurate, the transparency gains of requiring final damage awards to be recorded might be outweighed by the inefficiency of requiring recorded amended orders of taking to include final damage awards. (M.G.L. c. 79, § 6, does provide for voluntarily amending takings awards.) The payment *pro tanto* is required to be based on appraisals, although, as discussed in Section III (A) (1) above, such appraisals are not generally made available to condemnees or the public. M.G.L. c. 79, § 7A. Many condemnees accept the payment *pro tanto* or negotiate a higher amount either before or during the course of litigation. The recording of such information would be useful for empirical study and in determining the value of neighboring parcels for tax purposes, but is not necessary from the point of view of conveyancing. Deeds are required to state the true consideration for each purchase, primarily to ensure that the state receives the proper excise tax, and orders of intention filed under the judicial taking process are required to include estimated damages. M.G.L. c. 80A, § 3, c. 183, § 6. Deed purchase price information is used in preparing tax assessments of neighboring parcels. Final takings damage awards could be used for similar purposes, as well as in determining appropriate taxes for private-transferee takings.

While the actual amount finally paid by the condemnor for each condemned parcel is generally available from public condemning agencies under the Public Records Act, this process is considerably more cumbersome than a registry search. M.G.L. c. 66. See M.G.L. c. 4, § 7 (26) (definition of public records). There is no requirement that the final amount of damages paid by a *private* condemnor be made public. See M.G.L. c. 184, § 26 (restrictions on use of land imposed on property by government agency or community development corporation are matters of public record only to the extent recorded at registries and land and probate courts).

The issue is somewhat different under other procedures such as Chapter 80A where the transfer of title generally takes place after the adjudica-

tion of the damage award. While M.G.L. c. 80A, § 10, requires Registry filing of a final or interlocutory condemnation judgment, the Model Eminent Domain Code § 1209 (c) permits, but does not require, the filing of the final order of transfer of title after the termination of a contested case. For conveyancing purposes, should the property ever be conveyed to another government agency, or a boundary dispute with a private owner ever arise, it is preferable that the transfer of title by eminent domain be a matter of record. Recording of the interest taken is particularly important when the government takes an easement over private property. Massachusetts practice in this area, which mandates recording of all transfer of title orders, is therefore superior to that proposed under the Model Code.

²⁰⁸ Of the other information voluntarily provided by condemners on orders of takings, both approximate area and name of condemnee were relatively consistently reported. (In 80 percent of orders of takings, the area of the taking was reported, a sufficiently high percentage to analyze takings by area as well as by number to confirm the effect of takings activity.) For a list of information required in orders of taking and notices of intent, see M.G.L. c. 79, § 1, c. 80A, § 3. The data on number of takings proved to be more indicative of trends than the data on area of takings because a few large takings (often for environmental/conservation purposes) in any particular year or municipality skewed results. Further study is warranted comparing the effect of takings by number, area, and value. Each basis of comparison adds greater depth to the picture of the effect of takings on the lives of residents and property owners. Number of takings is indicative of the overall amount of takings activity, for example in urban areas where parcels tend to be smaller. Area of takings is indicative of the effect of takings on the character of development, showing the extent of government control in shaping development. Value of takings is indicative of the economic effect of takings in the community, which may be much larger than otherwise apparent when the government takes a small, but very valuable piece of property. Confirmation of a trend in more than one basis of comparison may indicate that the trend is a strong one. Conversely, appearance of a trend in one basis of comparison but not another may yield useful hypotheses about the reasons for the trend. For instance, the number and value of takings in a dense urban area could be high, but the area of takings low because of the high cost of urban land and its heavily built-up character (developed parcels being less likely to be taken than undeveloped parcels when possible). All three bases of comparison thus complement each other.

Neither takings statute explicitly requires a statement of approximate area, only a general description of the property. Chapter 80A requires the name of condemnees to be recorded in orders of intention along with the amount of the estimated award, but Chapter 79 contains no parallel requirement. Compare M.G.L. c. 79, § 1, with M.G.L. c. 80A, §§ 2–3. See *HTA Limited Partnership v Massachusetts Turnpike Auth.*, 8 Mass. L. Rptr. 400, 401 (Super. Ct. 1998). Takings orders could be made more accessible to the general public if they were required to include approximate area along with a description of the property. The approximate area of the taking as part of a full description of the property in establishing secure boundaries would be important to conveyancers, especially in the case of partial takings. An amended order of taking could be filed if the area were subsequently determined to be different. Similarly, the name of the condemnee was generally included in orders of taking recorded in the data set, but nevertheless a fair number of orders indicated that the owners were unknown. Several of these sites were examined by the study investigators and the takings appeared to be confirmatory takings to clear government title to small parcels largely under government ownership. See telephone interview with BRA General Counsel Kevin J. Morrison (25 Sept. 2000). Special statutory provisions apply to takings when the owners are unknown, but are not applicable when the taking agency is actually aware of the identity of the condemnees. M.G.L. c. 79, §§ 6, 7D. From the available information, it is not clear how often “owners unknown” were real owners eventually discovered or merely straw men to ensure the unencumbered planned future use of the property. Public record requests were made to the BRA, which was involved in the largest number of takings from persons unknown, to obtain additional information about these transactions. Review of the records of BRA takings by the study investigators confirmed BRA General Counsel Kevin J. Morrison, who stated that parcels taken from “persons unknown” were generally for confirmatory takings. Interview BRA General Counsel Kevin J. Morrison (1 Nov. 2000). Title searchers will be

able to find partial takings and takings of easements readily only if the condemnee is named in the order. Ascertainment of property boundaries would also be enhanced when the prior owners of the property taken are clearly named.

²⁰⁹ For discussion of the importance of transparency and accountability in well working economic systems, see *The Economist* (see n. 109) 134–35, 209.

²¹⁰ *Bouchard v City of Haverhill*, 342 Mass. 1, 3–4, 171 N.E. 2d 848 (1961); *Byfield v City of Newton*, 247 Mass. 46, 57, 141 N.E. 658 (1923) (“The natural meaning of the requirement that the order of taking shall state the purpose for which such property is taken is that some definite use must be declared as the intent and design of the body exercising the power, and that a general, undefined and comprehensive statement will not satisfy the terms of the statute.”); *Dreison Invs., Inc.*, 11 Mass. L. Rptr. 406 (“The law requires that the purpose must be stated so that the intent of the taking authority is known.”).

²¹¹ Middlesex South Registry of Deeds, Book 18, 492, Page 1, 2 (9 Sept. 1993).

²¹² *Dreison Invs., Inc.*, 11 Mass. L. Rptr. 406. See *Byfield*, 247 Mass. 57.

²¹³ Elizabeth A. Taylor, Note, “The Dudley Street Neighborhood Initiative and the Power of Eminent Domain,” *Boston College Law Review* 36 (1995): 1061, 1080–81.

²¹⁴ As discussed in note 207, information concerning property taken by an urban renewal corporation is open as a public record only if the information is required to be filed in the Registry of Deeds. See M.G.L. c. 184, § 26. In other words, there is no way to verify through a public records request that the property continues to be used for a public purpose after the property has been taken. See *Crabtree* (see n. 2) (commenting on lack of public accountability for private-transferees).

²¹⁵ Taylor (see n. 213) 1083–85. See *Casino Reinvestment Dev. Auth. v Banin*, 320 N.J. Super. 342, 727 A.2d 102, 111 (N.J. Super. Ct. Law Div. 1998) (prohibiting taking for transfer to Donald Trump for casino parking lot because of lack of continuing accountability); Mansnerus (see n. 63) 452–53 (discussing cases where lack of accountability after takings resulted in windfalls for private beneficiaries). It is telling that the BRA, which was one of the least forthcoming taking agencies in providing information in its orders of taking, has recently come in for criticism that it uses takings to benefit private development and that its process is not sufficiently public. Stephanie Ebbert, “Officials Criticize Dual Roles of BRA,” *Boston Globe* (5 July 2000): B1; “Council Notes,” *Boston Tab* (30 June 2000): 3.

²¹⁶ See Meidinger (see n. 12), 66:

Because eminent domain is both such a sporadic and such an ubiquitous phenomenon, it is particularly difficult to study empirically. No single set of takings, for instance, can be “sampled” to somehow derive the effects of alternative policies. Consequences will only become manifest over relatively long time periods and across numerous instances.

²¹⁷ It should be noted that the vast majority of these takings by both number and area were from public condemnees.

²¹⁸ R^2 is the percentage response variation, in this instance a measure of how well voting behavior explains number and area of takings. The larger the R^2 number, the stronger the linear relationship between the two variables (an R^2 of 1 shows that 100 percent of the variation of the outcome variable can be explained by the independent (predictor) variable). Associations shown are unadjusted for other factors, such as demographic or economic characteristics of municipalities.

²¹⁹ As mentioned above, several large private-transferee takings in the data collection municipalities commenced in 2000 or are currently in final planning stages—Telecom City (in part in Everett) and the Acre (in Lowell). See text accompanying notes 6–7. Based on the data and these anecdotal post-collection takings, it might be hypothesized that during strong economic times eminent domain takings have a higher likelihood of extending beyond traditional purposes. Further research could shed additional light on this issue. These are the only redevelopment projects discovered in the course of the study that involve potential for significant private-transferee takings and they occurred after the close of the data collection period. Further research is therefore warranted on the extent to

which private-transferee takings might be used more frequently in Massachusetts in the future and how much private-transferees benefit from such takings. A useful area for additional research would be a comparison of government acquisition costs (including overhead) and societal costs in private-transferee takings with the price paid by the private-transferee upon disposition by the government condemnor.

²²⁰ Memorandum from Lawrence E. Brophy, Senior Planner, and Sue O. Kim, Project Manager/Regional Planner, to BRA and Thomas N. O'Brien, Director, *passim* (12 Nov. 1998) (on file with BRA). BRA General Counsel Kevin J. Morrison confirmed that in recent years, aside from the convention center project, the BRA has not taken private property for large-scale urban redevelopment because state and federal funding for such projects has been minimal. Interview with BRA General Counsel Kevin J. Morrison (1 Nov. 2000).

²²¹ In lower income municipalities, lower tax revenues are often made up by higher state and federal aid. See *Massachusetts Municipal Profiles* (see n. 203) for each studied municipality.

²²² Kochan (see n. 30) 110–11. See Andrew Caffrey, "In Midst of Crunch, Mass. Can't Get Apartments Built," *Wall Street Journal* (4 Oct. 2000): NE1 ("Massachusetts has a particularly deep sense of citizen activism on the town level. That means that numerous issues...tend to be subject to lengthy debate.").

²²³ "Control" would include private-transferee takings subject to governmentally imposed conditions.

²²⁴ Nothing unusual was discovered through site investigation of Cambridge takings locations by study investigators. Site investigation of the Cambridgeport Revitalization District Roadway Improvement Plan, the largest recent set of takings in Cambridge, showed redevelopment proceeding according to plans. Some businesses had been displaced for new roads and road widening. Site analysis of another recent larger taking in Cambridge in the area between Broadway and Harvard Street indicated that the site was acquired through an uncontested taking (with some displacement of tenants) for use as open space and school related play-space.

²²⁵ Although some projects can be in planning stages for several years (for example, starting with planning in slow economic times and initiating takings several years later in the development stage), these economic observations should remain valid. Most small projects can be accomplished with little lag time and even in large, multi-year projects, takings tend to take place relatively early in the process so that the property will be free for construction later in the process.

²²⁶ The economic trend is confirmed by the observation of Jeffrey Finkle, President of the Council for Urban Economic Development, who noted that nationwide urban development projects had nearly doubled over the course of the preceding decade, which largely corresponds to expansion phase of the current economic cycle. Starkman (see n. 5) A1. Finkle's comments did not refer to any slowdown in takings at the end of the prior economic cycle.

²²⁷ An oversimplified version of Keynes's economic prescription is that the government should stimulate the economy in recessionary times and rein it in somewhat in boom times. Because of lag times and difficulty in measurement, intentional stimuli often fail, but "automatic stabilizers," such as unemployment payments, which are automatic and counter-cyclical may be somewhat helpful in easing the swings of the business cycle. The Economist (see n. 109) 110–11. An alternative hypothesis to explain higher takings levels during better economic times is that political pressure for additional government projects mounts in slower economic conditions, but that implementation lagtime is significant, resulting in the counter-cyclical takings activity observed. This hypothesis is somewhat less likely because the current boom (and concurrent increase in takings) has lasted so long that the takings on most projects originating in the recession of the late 1980s and early 1990s are already long since out of the pipeline.

²²⁸ This is what happened in the failed Emerson College redevelopment in Lawrence. See *Benevolent & Protective Order of Elks*, 33 Mass. App. Ct. 702; "Lawrence Loses \$4.8M More in Land Taking," (see n. 135) 22. See also Paul Hemp, "State Must Pay \$70m for Garden Annex," *Boston Globe* (10 Oct. 1992): 21 (state acquired property during boom economic year 1988, valuation trial to take place during recession).

²²⁹ As relocation plans for larger takings are required to be approved by the Department of Housing and Community Development, M.G.L. c. 79A, § 4, an interesting area for further study would be to determine whether the patterns noted in the Registry of Deeds information is corroborated by eminent domain projects for which relocation plans have been filed.

²³⁰ See *Steinbergh v City of Cambridge*, 413 Mass. 736, 738, 604 N.E. 2d 1269 (1992) ("Although a similarity in standards under the 'takings' clauses of the two Constitutions has not been clearly established, the plaintiffs have advanced no reason why we should create takings principles more favorable to them than those developed under the Federal Constitution."), *cert. denied*, 508 U.S. 909 (1993); *Bromfield v Treasurer & Receiver Gen.*, 390 Mass. 668 ("[T]he Commonwealth's Constitution affords protection parallel to that of the United States."). But see *Yankee Atomic Elec. Co.* 403 Mass. 216 n. 2 (Lynch, J., dissenting) ("For while the United States Supreme Court has intimated that various parts of property are not to be 'segmented' to determine whether there has been a taking, that interpretation of the Fifth Amendment of the Federal Constitution is not necessarily applicable to article 10 of the Declaration of Rights, which states that 'no part of the property of any individual can, with justice, be taken from him....'" (citation omitted; emphasis added by dissent); *Developments in the Law* (see n. 33) 1487–88 (urging invalidation of private transfers by courts in states with constitutional public use protections).

²³¹ Oswald (see n. 95) 334–54 (Alaska, Georgia, Michigan, Minnesota, and Wisconsin).

²³² *Ibid.* 375.

²³³ See *Rite Media, Inc.*, 429 Mass. 816.

²³⁴ See Kochan (see n. 138) 20 (discussing proposals for reform of regulatory takings).

²³⁵ Louisiana Constitution, art. 1, § 4. Jury trial for eminent domain is already guaranteed by the Massachusetts Constitution, although there is no jury trial right for statutorily granted relocation assistance. See text accompanying note 165.

²³⁶ Louisiana Constitution, art. 1, § 4. As discussed above, the Massachusetts "public exigencies" provision is parallel to "necessity" provisions in several other states' constitutions. Because of Massachusetts judicial deference to legislative determinations of exigency, however, the "public exigencies" provision has not proved in practice to be an additional requirement of a proper Massachusetts taking or any significant barrier to "unnecessary" takings. See text accompanying notes 33–36.

²³⁷ Louisiana Constitution, art. 1, § 4. Several other states have constitutional provisions protecting private property from being taken or damaged by the government. Stoebuck (see n. 1) 555. Some have argued that such constitutions are more protective of property rights than those like that of Massachusetts that do not mention damage. Oswald, however observes that in the area of compensation for lost goodwill and going-concern value, courts in states with constitutional "damage" provisions are no more generous than other courts. Oswald (see n. 95) 307–08, 353. Compensation for damage to property is, moreover, already allowed in Massachusetts by statute. M.G.L. c. 79, § 12; *Cann v Commonwealth*, 353 Mass. 71, 74, 228 N.E. 2d 67 (1967).

²³⁸ Louisiana Constitution, art. 1, § 4. Several states have constitutional provisions making public use an issue to be determined by the judiciary. See *Mansnerus* (see n. 63) 410 & n. 11 (Arizona, Colorado, Louisiana, Missouri, Oklahoma, and Washington); Louisiana Constitution, art. 1, § 4 ("[W]hether the purpose is public and necessary shall be a judicial question."). While Massachusetts has no similar provision, *Opinions of the Justices*, 356 Mass. 796, indicated that the courts will give stricter scrutiny to takings that fall outside the traditional purposes and at least one case has suggested that judicial determination of public use could be provided for by statute. See *Lynch*, 161 Mass. 308.

²³⁹ "[T]he owner shall be compensated to the full extent of his loss." Louisiana Constitution, art. 1, § 4. See Montana Constitution, art 2, § 29 (full extent of loss provision). The intent of the "full extent of loss" provision was to cover cost of relocation, costs of litigation and attorneys fees, cost of reestablishing a business, inconvenience, and loss of business profits. Oswald (see n. 95) 357. Although Massachusetts law does not generally compensate condemnees to the full extent of the loss, it has provided for additional damages statutorily in particular circumstances in the past. See text accompanying note 183.

²⁴⁰ Rejection of an amendment might raise the objection in future cases that the subject of the amendment was not already included in the Constitution.

²⁴¹ Although some protection from detrimental amendments might be afforded by the provisions limiting encroachments on civil rights by the initiative process, the same provisions might also result in litigation over the propriety of revisions favorable to property owners. Massachusetts Constitution, amend. 42, The Initiative II § 2 (no initiative inconsistent with right of individual to receive compensation for private property appropriated to public use).

²⁴² Massachusetts Constitution, amend. 97 (conservation 1972); Massachusetts Constitution, amend. 51 (historic preservation 1918); Massachusetts Constitution, amend. 49 (conservation 1918); Massachusetts Constitution, amend. 43 (residential redevelopment 1915) (prompted by the decisions in *Opinion of the Justices*, 211 Mass. 624, and *Salisbury Land & Improvement Co. v Commonwealth*, 215 Mass. 371); Massachusetts Constitution, amend. 39 (property adjacent to highways 1911) (prompted by the decision in *In re Opinion of the Justices*, 204 Mass. 607). See *Massachusetts Home Mortgage Fin. Agency v New England Merchants Nat. Bank*, 376 Mass. 669, 678 n. 3, 382 N.E. 2d 1084 (1978) (discussing history of Massachusetts Constitution, amend. 43).

²⁴³ This is not to say that these constraints have necessarily proved a difficult barrier for determined politicians. See “Everett Park Grab,” *Boston Globe* (10 Aug. 2000): A18 (rider attached to another bill in a late-night legislative session permitted parkland taken by eminent domain to be used for a school).

²⁴⁴ See *Earle v Commonwealth*, 180 Mass. 579, 583, 63 N.E. 10 (1902) (“Very likely the plaintiff’s rights were of a kind that might be damaged if not destroyed without the constitutional necessity of compensation. But some latitude is allowed to the Legislature. It is not forbidden to be *just* in some cases where it is not required to be by the letter of paramount law.” (Emphasis added)). Like the concerns raised regarding the adverse implications from defeat of proposed constitutional amendments, see note 240, it is important to emphasize when proposing legislation to protect property rights that the proposal does not imply that existing constitutional provisions and judicial precedents do not already grant similar protections, albeit less succinctly.

²⁴⁵ Berger suggests that the expense of cost-benefit analysis may not warrant its use in all circumstances. Berger (see n. 45) 241. Restricting a cost-benefit analysis requirement to the few private-transferee takings would concentrate available resources on the most likely cases of unaccounted-for externalities and rent seeking.

²⁴⁶ See Meidinger (see n. 12) 45–46.

²⁴⁷ Kochran (see n. 138) 17–18, 23, 32–33.

²⁴⁸ Gans (see n. 84) 322, 327.

²⁴⁹ *Ibid.* 329.

²⁵⁰ See Meidinger (see n. 12) 45–46 (discussing North Dakota and Montana cost-benefit requirements before takings). A recent analysis suggests that federal government agencies rarely comply fully with regulatory impact analysis requirements, allowing for significant inefficiencies, and suggests means of addressing the issue. Robert W. Hahn *et al.*, Empirical Analysis, “Assessing regulatory Impact Analyses: The Failure of Agencies to Comply with Executive Order 12,866,” *Harvard Journal of Law & Public Policy* 23 (2000): 12, 866, 859.

“[E]fficient just compensation” [requiring full compensation of condemnees for external costs of taking] would not...prevent inefficient actions arising from overestimation of an action’s benefits or from corruption and unfairness of decision makers. The potential that these factors create for inefficient takings, however, indicates that the individual property owners should not suffer the consequences of these inefficiencies, but rather that the burden should fall on the public that fails to prevent these inefficiencies through effective review of government decisions to employ eminent domain.

Durham (see n. 73) 1301.

²⁵¹ Kochan (see n. 30) 83–84; Thomas Merrill, “The Economics of Public Use,” *Cornell Law Review* 72 (1986): 61, 93–109. If property owners

could have challenged the Emerson College and Otis Elevator takings with thorough impact analyses, these wasteful unsuccessful projects might well have been prevented. See *Benevolent & Protective Order of Elks*, 33 Mass. App. Ct. 702; Mansnerus (see n. 63) 453 n. 209. Massachusetts currently requires extensive fiscal analysis and study of cost-efficiencies before work performed by state employees can be contracted out to private suppliers or “privatized.” M.G.L. c. 7, § 52–55. If thorough analysis is required before public work can be done by private suppliers, certainly at least as rigorous an analysis should be required before a government agency (or a private entity acting under delegated eminent domain powers) can consider a mandated transfer from one private party to another to be a “public use.” The privatization analysis requirement, modified to require consideration of all costs to condemnees and the taxpayers in general, could provide the basis for a model private-transferee taking cost-benefit analysis.

²⁵² M.G.L. c. 79, § 5C. For full discussion of the exemptions from the notice of intent procedure, see text accompanying note 142.

²⁵³ The statutory review process provides a model for such situations by permitting statutes to take immediate effect if there is a declaration of emergency. Massachusetts Constitution, amend. 48, The Referendum, II.

²⁵⁴ See text accompanying notes 150–154.

²⁵⁵ Certainly, appraisals that will be relied on by the government during trial should be disclosed during the pre-trial process, if not sooner, as discussed in *Disangro*, 9 Mass. L. Rptr. 74. Under existing court rules, all parties in litigation must disclose, upon request, the subject matter on which their experts are to testify, the substance of the facts and opinions to which the experts are to testify, and a summary of the grounds for their opinions. Massachusetts Rule of Civil Procedure 26 (b) (4) (A) (i). The substantive information on which the appraisal is based is thus accessible to deeper-pocket condemnees who have the resources to engage in litigation. (The additional requirement of disclosing the appraisal itself is not onerous, particularly since this is already required in all federally funded takings.) Small property owners who have more difficulty financing litigation are thus left without equivalent assistance in negotiating a takings damage award settlement. Interview with Mark S. Bourbeau (22 Sept. 2000) (many owners of small condemned properties accept the payment *pro tanto* or settle early). While earlier disclosure is preferable because many small property owners do not generally litigate their damage awards, the public records statute should at least be amended to reflect the *Disangro* decision. There is a useful analogy to the rules concerning discovery of physicians’ expert reports. Massachusetts Rule of Civil Procedure 35 (b).

²⁵⁶ See text accompanying notes 155–57, 207.

²⁵⁷ See text accompanying notes 209–12.

²⁵⁸ M.G.L. c. 79, § 1.

²⁵⁹ *Byfield*, 247 Mass. 57.

²⁶⁰ See text accompanying note 165.

²⁶¹ *Nichols 2A*, (see n. 18) § 7.02 [1] n. 3. See *Ibid.* § 7.08 [3] 7-227–28. See also text accompanying notes 37–79, 169–80.

²⁶² 356 Mass. 775.

²⁶³ *Crabtree* (see n. 2) 104–05.

²⁶⁴ *Ibid.* 105–07. See Mansnerus (see n. 63) 439 (discussing cases shifting burden of proof to condemnor).

²⁶⁵ Berger (see n. 45) 203, 235. An example of an appropriate scenario for Berger might be a mine owner without access to a public highway who takes a neighbor’s grazing land to secure highway access. Berger’s proposals are explained in greater detail and critiqued in Meidinger (see n. 12) 51–59. Meidinger suggests a stricter public benefit test (combining necessity with cost-benefit analysis) and closer judicial scrutiny of government action (achieved through a somewhat complex shifting burden of proof). *Ibid.* 44–49, 64. See Mansnerus (see n. 63) 454 n. 210 (discussing proposals of Berger and Meidinger). Berger would circumvent the purely utilitarian transfer of property from one private entity to another by requiring a fifty percent premium on all private-transferee takings, in contrast to a twenty to twenty-five percent premium he would require for purely public takings to compensate to unquantifiable losses. Berger (see n. 45) 245.

²⁶⁶ Howe (see n. 22) 175.

²⁶⁷ It should be noted that regulations for M.G.L. c. 121A urban renewal entities require them to dispose of property at fair market value unless the entity can demonstrate “that a significant public purpose” will be served by a below-market disposition. 760 C.M.R. § 12.05 (1) (d). As the regulations thus expect government agencies and private non-profits acting as urban renewal entities to make public purpose determinations before disposition of property, it is reasonable to expect government agencies to make a similar determination that a taking serves a significant public purpose before they acquire property by eminent domain. See Mansnerus (see n. 63) 444 (suggesting closer review when private party to receive taken property).

[I]n evaluating a condemnor’s decision [in a condemnation with a private beneficiary], a court should inquire into the “public” nature of the transaction with reference to (1) the community’s interest in the proposed use; (2) the community’s interest in the existing use; (3) the municipality’s role in the transaction; and (4) the condemnee’s interests. Mansnerus (see n. 63) 449.

²⁶⁸ Kochan (see n. 30) 110–11.

²⁶⁹ See Everett Park Grab (see n. 243) A18 (rider attached to another bill in a late-night legislative session permitted parkland taken by eminent domain to be used for a school).

²⁷⁰ Kochan (see n. 138) 88.

²⁷¹ While some curtailment of the open-ended delegation of the right of eminent domain to private entities may well be warranted, in particular by imposing sunset clauses on new grants of eminent domain powers to private entities, the data from this study’s convenience sample does not indicate that this is a significant issue today. There was only one taking by a private party in the thirteen year period under study, and that private party was an urban renewal entity (DSNI) designated under M.G.L. c. 121A, rather than a business corporation (such as a railroad or utility) delegated eminent domain power by special statute. In addition, it is possible that withdrawing eminent domain powers included in legislative corporate charters might in itself constitute a taking by depriving a corporation of a valuable right without compensation.

²⁷² Kochan (see n. 138) 22, 31.

²⁷³ See text accompanying note 63.

²⁷⁴ For example 30 percent. The Supreme Judicial Court was willing to consider for purposes of argument that properties constituting slightly less than 30 percent of a redevelopment area can be considered a “sizeable portion” of the area. *Benevolent & Protective Order of Elks*, 403 Mass. 548. For federal tax-exempt bond purposes, for example, a bond is considered private if more than 10 percent of the proceeds are to be used for any private business use. 26 U.S.C. § 141 (b) (1).

²⁷⁵ Urban renewal programs may provide for disposition by long-term lease. 760 C.M.R. § 12.05 (1) (c). Leases (or similar arrangements, such as exclusive use licenses) of one year or more to a private party, with the possible exception of subsidized residential leases to low income individuals, should be considered private uses under this proposal. See *Opinion of the Justices*, 356 Mass. 782 (leases or grants of concessions in excess of one year to require approval by governor).

²⁷⁶ For example fifteen years. Fifteen years is the minimum period for use restrictions on property granted to private parties under an urban redevelopment plan. M.G.L. c. 121A, § 10, 18C. Government use or disposition of taken property can still be controversial almost forty years after the initial taking. Andrew Bollman, “Plaza Plan Angers Councilors,” *Boston Globe* (13 July 2000): B3. See Memorandum from James E. Lydon, Director of Economic Development, and Edward C. O’Connell, Assistant Director for Economic Development, to BRA and Marisa Lago, Director *passim* (6 June 1996) (on file with BRA). A possible disincentive would be the requirement of paying a six percent premium if land taken for use by a public agency is alienated or leased long-term to a private entity. Six percent is the standard real estate broker’s fee in the Greater Boston area. One author has described the role of the government in a taking for a private party as similar that of a broker. Mansnerus (see n. 63) 452. It would be reasonable for a broker’s “fee” to be given to the original owner if condemned property was later put to a different use for private benefit. Other

jurisdictions have authorized the payment of a premium to the condemnee when property is taken to benefit a private party. *Electric Co. v Dow*, 166 U.S. 489, 490 (1897) (50 percent premium); *Head v Amoskeag Mfg. Co.*, 113 U.S. 9, 10 n.* (1884) (similar). See *State ex rel. Tomasic v Unified Gov’t 265 Kan.* 779, 962 P.2d 543, 559 (1998) (25 percent premium on fair market value in taking to benefit privately operated race track); Epstein (see n. 38) 174–75, 184 (1985) (premiums common until recently in English takings). See Berger (see n. 45) 245 (suggesting 20–25 percent premium for public takings and 50 percent premium for private takings). Gans includes a suggestion of a fixed sum payment to compensate in part for the “discomforts” of relocation. Gans (see n. 84) 333 n. 34.

²⁷⁷ See *Wright v Walcott*, 238 Mass. 432, 436–37, 131 N.E. 291 (1921) (permissible to sell taken property for private improvement after achievement of aim contemplated by taking agency). With certain exceptions for industrial or commercial redevelopment, the disposition procedure for all government owned real estate, included property taken by eminent domain, is detailed in M.G.L. c. 30B, § 16, which requires publication of a written explanation when the government disposes of property for less than the actual value.

²⁷⁸ See *Despatchers’ Cafe, Inc.*, 332 Mass. 263; *Sellors v Town of Concord*, 329 Mass. 259, 262–63, 107 N.E. 2d 784 (1952) (anticipated public uses are sufficient); *Rindge Co. v County of Los Angeles*, 262 U.S. 700, 707 (1923) (similar). See also Kochan (see n. 30) 69.

²⁷⁹ Massachusetts Constitution, amend. 97; M.G.L. c. 79, §§ 5, 5A, 5B.

²⁸⁰ 356 Mass. 775.

²⁸¹ See text accompanying note 238. See also *Lynch*, 161 Mass. 308; Kochan (see n. 138), 31 (1996) (suggesting language); Jones, Note (see n. 5), 306 (urging strict scrutiny of takings for private parties); Mansnerus (see n. 63) 444–45 (suggesting *de novo* review and “actual rationality” standard); Taylor (see n. 213) 1083–85 (urging courts to review private-transferee takings closely).

²⁸² See *Poletown*, 304 N.W.2d 474–75 (Ryan, J., dissenting).

²⁸³ See Meidinger (see n. 12) 47 (concern for litigation if cost-benefit analysis required).

²⁸⁴ Forty years is the maximum period for use restrictions on property granted to private parties under an urban redevelopment plan. M.G.L. c. 121A, § 10, 18C.

²⁸⁵ The data studied—recorded orders of taking—provided only the purpose of the taking and did not indicate whether property taken was to be subsequently transferred to a private party. Assuming, however, that the purpose stated on the orders of taking were correct, only urban renewal and (possibly) housing purposes might in any likelihood result in private-transferee takings. Even if all the takings in these categories were private-transferee takings (which is unlikely), these two purposes combined accounted for only 2.5 percent of the total number of takings from private condemnees and 1.08 percent of the total area taken from private condemnees. For discussion of the current exclusion of private-transferees from public records requirements, see note 207.

²⁸⁶ See text accompanying notes 100–06, 182–54.

²⁸⁷ Gans (see n. 84) 331.

²⁸⁸ See text accompanying notes 187–94.

²⁸⁹ See text accompanying notes 195–97.

²⁹⁰ Interview with Mark S. Bourbeau (22 Sept. 2000); interview with Nicholas J. Decoulos (28 Sept. 2000); interview by David A. Mittell, Jr., with Robert Murphy, General Manager, Mystic Plating (24 Aug. 2000).

²⁹¹ Massachusetts Rule of Civil Procedure 68.

²⁹² Government agencies may object to covering attorneys’ fees in all cases when the condemnee is awarded damages in excess of the payment *pro tanto*, under the theory that this would encourage needless litigation when the payment *pro tanto* is reasonably close to the judgment amount. This concern could be addressed by a requirement that the damage award exceed the payment *pro tanto* by, for example, five percent or \$10,000, whichever is less, before attorneys’ fees would be covered.

²⁹³ M.G.L. c. 79, § 37, c. 80A, § 12. See text accompanying notes 198–202.

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