Nebraska Home Rule: The Record and Some Recommendations

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Nebraska Home Rule: The Record and Some Recommendations

I. INTRODUCTION

Municipal home rule is a rearrangement of the American state-municipal relationship which increases the legal authority of cities over local affairs and reduces state legislative control.\(^1\) Home rule is a movement toward federalization of the traditional state-local relationship; but it has thus far not undermined the essentially unitary character of American state government.\(^2\) Municipal home rule can be conferred by constitution or statute. Constitutional home rule gives cities protection against state legislative intrusion into proscribed areas of local affairs, while statutory home rule depends on the current legislative mood. The state governing body may delegate a vast amount of authority to home rule cities at one legislative session and retrieve some of that delegated authority at the next legislative meeting.

The underlying philosophy of municipal home rule is the notion that local self-government prospers when local problems are solved by those who are most familiar with both the problems and the alternative methods of settling them. Municipal home rule also offers promise of benefit to the state as a whole: if a legislature enacts many laws for many local units of government, home rule could provide that legislature additional time which could be used for consideration of weightier matters of statewide concern.

Missouri was the first state to initiate home rule—in 1875.\(^3\) Constitutional home rule came to Nebraska in 1912, an action which

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* Professor of Political Science, University of Nebraska; A.B., 1947, Emory University; M.S., 1948, University of Denver; Ph.D., 1955, Duke University.
1. In a few states, home rule is also authorized for counties. See 1 McQuillin, THE LAW OF MUNICIPAL CORPORATIONS § 1.25 (3d ed. 1971).
Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State.
brought to twelve the total number of home rule states in the nation that year.\(^4\) Since then the number of home rule states has increased to over forty.\(^5\)

The constitutional home rule provisions adopted by the first group of states (1875-1912) were quite similar: all established home rule through the use of a specific charter document, and all provided for voter approval of the charter.\(^6\) Michigan, Minnesota and Texas required implementary state legislative action to set up home rule, but the other state constitutions allowed cities to frame charters on a “self-executing” basis without legislative intervention.\(^7\) Only California required legislative approval of individual city charters.\(^8\) In Arizona and Oklahoma (whose home rule provisions are nearly identical), the governor has power to approve or disapprove each charter commission’s finished product.\(^9\)

II. THE NEBRASKA HOME RULE EXPERIENCE: SUMMARY

Five years passed after the adoption of the constitutional provision allowing home rule before any Nebraska cities took advantage of the option. The city of Lincoln was the first, in 1917; Omaha followed in 1922; and Grand Island became the third home rule city in 1928. In 1963, Grand Island abandoned home rule and reorganized under the “city manager plan.”\(^10\) At present, Lincoln and Omaha are the only home rule cities, although approximately thirty others are constitutionally eligible.\(^11\)

Examination of the basic working relationships of municipal government under exclusive control of a legislative body and under home rule is a prerequisite to understanding the development of Nebraska home rule. As is true of all American municipalities, Nebraska cities are set up in pursuance of state legislative acts which: (1) describe qualifications for incorporation, (2) pre-

\(^4\) These were: Missouri, 1875; Washington, 1889; California, 1896; Minnesota, 1898; Oregon, 1906; Oklahoma, 1907; Texas, 1909; Arizona, 1910; and Colorado, Michigan, Ohio and Nebraska, 1912. See J. McGoldrick, supra note 3, for a detailed account of the development of home rule.

\(^5\) The Municipal Yearbook 28-54 (1972).


\(^7\) See note 6 supra.

\(^8\) Id.

\(^9\) Id.


\(^11\) There are approximately 30 cities with a population of over 5,000. Nebraska Blue Book 1974-1975, 787.
scribe precise procedures to be used by communities desiring incorporation, and (3) grant authority for the formation of municipal structures and the performance of various functions. The day-to-day work of municipal government is in the hands of: (1) the elected city council whose major task is the translation of municipal policy into ordinances; and (2) the mayor and other officials who administer the laws passed by the council. The body of state law by which the mayor and council is governed is sometimes called a statutory charter.

Nebraska cities working under home rule charters are governed by a more complicated set of legal relationships. There are, to be

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12. See 2 McQuillin, supra note 1, § 9.06.
13. As a Nebraska city cannot have home rule status unless it has population of at least 5,000, the residents of a city must wait until the city is large enough to enjoy home rule status. In some states, for example, Iowa, Kansas and South Dakota, municipalities can acquire home rule status from the initial incorporation time with no population minimum to be eligible for home rule. See IOWA CONST. art. III, § 38A; KAN. CONST. art. 12, § 5; S.D. CONST. art. IX, § 2.

These relationships are illustrated by the following:

Lincoln City Charter Law Components

CONSTITUTIONAL LIMITATIONS, BOTH OF THE:

I. HOME RULE CHARTER
   Made by Charter Convention and approved by the voters

II. STATE STATUTES SPESLALLY APPLICABLE . . .
   R.S. '43 ch.15 Applicable to Primary Cities

III. OTHER STATE STATUTES . . .
   E.g., R.S. '43 ch.18, appropriate parts of ch.19—plus other misc. secs.

IV. COURT DECISIONS
   Which interpret & determine the applicability of I, II, III, and the Constitutionality of Charter Provisions in terms of both the U.S. & Nebraska Cons'ns

sure, no essential differences between the tasks of the mayor and the municipal administration in home rule and non-home rule cities. But in the legislative area, home rule raises a number of additional problems, especially for a conscientious city council. These additional problems stem from the fact that Nebraska statutory and common law require that home rule cities be governed not only in pursuance of their home rule charter texts, but also in pursuance of state legislative acts which remain as a residuum from their statutory charters. Therefore, when city council members are faced with the job of drafting legislation, they must search the texts of both state statutes and their home rule charter to ensure that they do not stray into illegal areas.

The constitutional provision authorizing home rule contains a list of permissible legislative subjects in some states, but not in Nebraska. Thus, the city councils of Nebraska home rule cities must examine each proposed subject of legislation to determine whether it is constitutionally permissible.

Nebraska non-home rule cities: their charters, ordinances, structures and functions are all monitored by the courts, but their essential features are not determined primarily by the judiciary. The reverse is true of Nebraska home rule cities: their charters, ordinances, structures and functions have largely been fashioned according to specifications dictated by the state judiciary. This phenomenon, which might be labelled “judicial determinism,” has developed because the courts have been asked to determine whether a home rule charter clause or a state statutory section is the proper authority for a home rule city ordinance. Judicial decisions have, almost without exception, turned on the pivotal question: “Is the subject a matter of local, or a matter of statewide, concern?” If it is a matter of local concern, the home rule charter is the authority; if the subject is of statewide concern, then the legislative act will prevail. As the litigation record of more than sixty years shows, the development of Nebraska home rule has been controlled by the judicial process. In short, knowledge and understanding of Nebraska home rule depends almost totally upon the study of judicial opinions rather than statutory or home rule charter texts.

Accordingly, this article includes selected information and data on charter and statutory textual materials; but the most significant portion of the text is devoted to the work of Nebraska courts. A

14. COLO. CONST. art. XX, § 6; OR. CONST. art. XI, § 2; UTAH CONST. art. XI, § 5.
short description of Kansas home rule is offered as another model for those interested in considering changes in the Nebraska system.

III. THE NEBRASKA HOME RULE CHARTER AND ITS DEVELOPMENT

Sections two through four of article XI of the Nebraska Constitution set forth the procedures by which cities with populations over 5,000 may create home rule charters and amend or extinguish them if the electors so desire. An amendment was added in 1920, specifically authorizing cities of over 100,000 population to “adopt” their statutory charter as a home rule charter. The substantive language authorizing constitutional home rule is very brief. It states:

Any city having a population of more than five thousand (5000) inhabitants may frame a charter for its own government, consistent with and subject to the constitution and laws of this state . . . .

. . . . No charter or charter amendment adopted under the provisions of this amendment shall be amended or repealed except by electoral vote.

15. In order to form a charter, the city council must call a special election or use the occasion of a general election to elect fifteen freeholders, who must have been qualified electors for five years, to serve as members of a home rule charter convention. No more than four months after election of its members the convention must meet and draft a charter. The document is then signed by the officers and members of the convention and delivered to the city clerk. In turn, the clerk publishes the draft charter in either an official city paper or, if none exists, in a newspaper of general circulation. The charter must be published three times, at one week intervals. The charter must then be voted upon by the municipal electorate not more than thirty days after the last publication date. A simple majority of those voting is sufficient to ratify; and the vote may either be taken at a special election for that purpose or at a general election. If approved, the charter goes into effect sixty days after the election. As a final step to the formation procedure, the city clerk duly seals and certifies the charter and a copy is also sent to the Nebraska secretary of state, NEB. CONST. art. XI, § 2. If the electorate rejects the charter, the mayor and council may repeat the process within six months. The procedure may be repeated until a charter is finally approved. Id. § 3.

The charter can be amended on a motion passed by the city governing body which is approved by a majority of the electors. The qualified electors, “in number not less than 5% of the next preceding gubernatorial vote,” may also initiate a charter amendment which is submitted to the council or governing authorities. Id. § 4. The amendment is then submitted to the voters at the next general election “or special election not held within thirty days after such petition is filed.” Id. Either the voters, through the initiative, or the council can submit the question “Shall a charter convention be called?” to the voters. If approved by a majority of the voters, a convention must be initiated through a “special election ordinance.” Id.
And no such charter or charter amendment shall diminish the tax rate for state purposes fixed by act of the Legislature, or interfere in any wise with the collection of state taxes.\(^{18}\)

The remainder of article XI is devoted to procedural language designed to facilitate the self-executing features of Nebraska home rule. Of course, it should also be noted that Nebraska home rule cities are limited in their actions by other provisions of the Nebraska and United States constitutions by both the specific language of these basic laws\(^{19}\) and the construction of that language through court interpretation, as are all other governments in the state.

Three procedures are available for Nebraska home rule charter amendment: (1) proposals of a charter convention, referred to the voters; (2) piecemeal amendment by a city council, referred to the voters; and (3) piecemeal amendment, using the initiative process, also using the referendum.\(^{20}\)

Both Lincoln and Omaha converted their statutory charters into home rule charters through the action of their founding charter conventions in 1917 and 1922, respectively. After this initial action, their charters were amended piecemeal. Since 1917 Lincoln has added 144 charter amendments,\(^{21}\) and Omaha 12.\(^{22}\)

\(^{18}\) Id. § 4.

\(^{19}\) See Axberg v. City of Lincoln, 141 Neb. 55, 58, 2 N.W.2d 613, 614 (1942). For example, the due process clauses of both the United States and Nebraska Constitutions serve to limit the authority of the cities.

\(^{20}\) See note 15 supra.

\(^{21}\) Table 1

<table>
<thead>
<tr>
<th>Charter Topical Heading &amp; Article Number</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Prior Corporate Entity Preserved</td>
<td>1</td>
</tr>
<tr>
<td>II. General Powers of the City</td>
<td>22</td>
</tr>
<tr>
<td>III. Elections and Qualifications of Electors and Officers</td>
<td>2</td>
</tr>
<tr>
<td>IV. Elections and Organization of Administration Recall, Initiative and Referendum</td>
<td>29</td>
</tr>
<tr>
<td>V. Ordinances</td>
<td>1</td>
</tr>
<tr>
<td>VI. Utilities</td>
<td>2</td>
</tr>
<tr>
<td>VII. Contracts</td>
<td>8</td>
</tr>
<tr>
<td>VIII. Streets, Public Improvements, Public Utilities, Special Assessments</td>
<td>29</td>
</tr>
<tr>
<td>IX. Finance and Taxation</td>
<td>27</td>
</tr>
<tr>
<td>IXA. Merit System</td>
<td>8</td>
</tr>
<tr>
<td>IXB. Planning Department</td>
<td>12</td>
</tr>
</tbody>
</table>
In 1956, Omaha radically changed her 1922 charter and con-

X. Human Rights 2

XI. Section 1. When Charter in Force
Section 2. Purpose of Catchheads 1
Section 3. Effective Date

TOTAL: 144

Charter, LINCOLN MUNICIPAL CODE.

Table II
Number of Amendments to Lincoln Home Rule Charter of 1917: By Year 1918 - 1978

<table>
<thead>
<tr>
<th>Year</th>
<th>Number</th>
<th>Year</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>1918</td>
<td>1</td>
<td>1962</td>
<td>18</td>
</tr>
<tr>
<td>1919</td>
<td>5</td>
<td>1963</td>
<td>2</td>
</tr>
<tr>
<td>1922</td>
<td>1</td>
<td>1966</td>
<td>25</td>
</tr>
<tr>
<td>1934</td>
<td>1</td>
<td>1968</td>
<td>1</td>
</tr>
<tr>
<td>1935</td>
<td>2</td>
<td>1970</td>
<td>2</td>
</tr>
<tr>
<td>1943</td>
<td>1</td>
<td>1973</td>
<td>1</td>
</tr>
<tr>
<td>1949</td>
<td>2</td>
<td>1974</td>
<td>4</td>
</tr>
<tr>
<td>1954</td>
<td>2</td>
<td>1975</td>
<td>1</td>
</tr>
<tr>
<td>1956</td>
<td>5</td>
<td>1978</td>
<td>6</td>
</tr>
<tr>
<td>1959</td>
<td>64</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
TOTAL: 144

Id.

Table III
Number of Amendments to Omaha Home Rule Charter of 1956: by Charter Topical Heading 1956 - 1978

Charter Topical Heading & Article Number | Number
--- | ---
1. Incorporation: Form of Government, Powers of the City, Corporate Limits 0
II. The Council and Legislation 0
III. The Executive Branch 0
IV. Boards, Commissions and Authorities 0
V. Finance 3
VI. Personnel 3
VII. Planning 2
VIII. Miscellaneous, General 0
IX. Transitional Provisions 3
X. 3
XI. 1

TOTAL: 12
verted from the commission to the strong mayor form of government. The changes were accomplished by a convention which was assembled according to the constitutional prescription.23

The objectives which guided the 1956 Omaha Charter Convention are stated in the prefatory section of the new charter and appear as follows:

The new Charter abandons the Commission form of government under which Omaha has operated for many years and proposes in its place the Mayor-Council form. Among the many reasons contributing to this decision are the desires:
1. To separate the executive and legislative functions as is done in both the national and state governments.
2. To clearly fix and identify executive and administrative responsibility and authority.
3. To simplify the government structure so that the citizen may readily identify and locate responsibility.
4. To bring tried and proven administrative organization and procedures into our city government.
5. To create a government that would be both responsive and responsible to the people.24

In addition to changing Omaha’s form of government, the 1956 convention performed an interesting bit of legal legerdemain with certain selected portions of the 1922 charter. Article VIII of the 1956 charter contains the following changes:

1. Designated provisions of the 1922 charter are to be reduced to the status of ordinances and incorporated into the municipal code under the 1956 charter.

<table>
<thead>
<tr>
<th>Year</th>
<th>Amendments per Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>1957</td>
<td>4</td>
</tr>
<tr>
<td>1964</td>
<td>1</td>
</tr>
<tr>
<td>1966</td>
<td>4</td>
</tr>
<tr>
<td>1967</td>
<td>1</td>
</tr>
<tr>
<td>1970</td>
<td>2</td>
</tr>
</tbody>
</table>

Data extrapolated from id.

23. Id. at I.
24. Id.
2. Designated provisions of the 1922 charter are to be expressly repealed, and
3. Designated sections of the 1922 charter, all of which derive their force and effect from the fact that they are laws of the State . . . and provisions of the . . . Charter of 1922 . . . shall not in the future have force and effect as charter provisions.25

Omaha citizens who were adversely affected by the changes wrought by the trifold classification in Article VIII brought suit challenging the changes. The Nebraska Supreme Court held

[i]t was legally competent for the qualified voters of the city to make designated and properly identified provisions of the prior 1922 home rule charter of the city a part of the new 1956 home rule charter of the city so that they would be applicable to and would govern and control local affairs of the city as duly enacted ordinances containing the identical subject matter as the designated provisions could have done until the designated provisions were superseded by ordinances of the city which the council of the city was by the charter of the city authorized to enact.26

In the early 1960's, after approximately a decade of discussion and prodding from various civic groups and leaders, the Lincoln City Council, having decided that certain major charter changes were desirable, authorized the establishment of a body which would accomplish the same tasks as a constitutionally prescribed form of charter convention, but which would be convened and report to the council itself rather than directly to the voters. This new body was called the "Charter Revision Committee," and the results of its labors brought forth a new form of city government for Lincoln, similar to the one in Omaha.27 The Charter Revision Committee's reorganization work is reflected by the fact that of the eighteen amendments passed in 1962, thirteen dealt with elections and administrative organization, and one dealt specifically with the form of government.28 Lincoln accomplished governmental reorganization through a modest schedule of revisions rather than re-writing a totally new charter as Omaha did. Lincoln has employed the services of Charter Revision Committees several times since reorganization in 1962.29

As a final word on Nebraska home rule charter development,

25. Id., art. VIII.
27. Since before 1917, the form of Lincoln's government was the commission form, as was Omaha's. Local pundits had termed that form "the Three-Headed Monster."
28. See note 16 supra.
29. It did so in 1966 and again in 1973. The 1966 Committee's proposals resulted in the adoption of 25 charter amendments which were designed primarily to correct "inconsistencies" caused by conversion from the commission to the strong mayor form of government. The Committee also submitted five amendments designed to "harmonize the Charter with statutes adopted by the 1965 Legislature." See Report of the Charter Revision Committee of the City of Lincoln (February 1, 1966).
perhaps the only remarkable or novel things discovered were a provision in the Lincoln charter authorizing a municipal gasoline station\textsuperscript{30} and the details of Omaha's conversion of certain charter provisions to the status of municipal ordinances.\textsuperscript{31}

IV. NEBRASKA HOME RULE CITY STATUTORY ChARTERS

Except for the excerpted annotations from court decisions, nothing in the current Nebraska statutes gives firm recognition to the fact that the cities of Omaha and Lincoln operate under home rule charters.\textsuperscript{32} The Omaha chapter declares that cities of the Metropolitan Class shall be "governed by this Act."\textsuperscript{33} The Lincoln

\textsuperscript{30} Local folklore credits Mayor Charles Bryan with the idea. He was tremendously displeased with the high prices charged for gasoline by one of the oil companies which operated stations in Lincoln. See, Charter, Lincoln Municipal Code art. VIII, § 13b. The municipal station operated from the 1920's until 1966.

\textsuperscript{31} See notes 25-26 & accompanying text supra.

\textsuperscript{32} Neb. Rev. Stat. §§ 14-101 to -2004 (Reissue 1977), governing metropolitan class cities serves as the Omaha statutory charter. Id. §§ 15-101 to -1307, governing primary class cities, serves as the Lincoln charter.

\textsuperscript{33} § 14-101.

Table IV
Statutory Charter Articles: City of Omaha;
in Nebraska Code

<table>
<thead>
<tr>
<th>Article #</th>
<th>Topic</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>General Powers.</td>
</tr>
<tr>
<td>3</td>
<td>Public Improvements.</td>
</tr>
<tr>
<td>(a)</td>
<td>Streets and Sidewalks. Repealed.</td>
</tr>
<tr>
<td>(b)</td>
<td>Viaducts. Repealed.</td>
</tr>
<tr>
<td>(c)</td>
<td>Sewerage, Drainage, Sprinkling, Paving Repair and Contractors' Bonds.</td>
</tr>
<tr>
<td>(d)</td>
<td>Eminent Domain; City Planning Board.</td>
</tr>
<tr>
<td>(e)</td>
<td>Building Restrictions. Repealed.</td>
</tr>
<tr>
<td>(f)</td>
<td>Parks, Recreational Areas, and Playgrounds.</td>
</tr>
<tr>
<td>(g)</td>
<td>Streets and Highways.</td>
</tr>
<tr>
<td>(h)</td>
<td>Special Assessment Bonds.</td>
</tr>
<tr>
<td>4</td>
<td>City Planning, Zoning.</td>
</tr>
<tr>
<td>5</td>
<td>Fiscal Management, Revenue and Finances.</td>
</tr>
<tr>
<td>(a)</td>
<td>General Provisions.</td>
</tr>
<tr>
<td>(b)</td>
<td>Municipal Bonds for Various Purposes.</td>
</tr>
<tr>
<td>(c)</td>
<td>Street Improvement; Bonds; Grading; Assessment.</td>
</tr>
<tr>
<td>(d)</td>
<td>City Treasurer.</td>
</tr>
<tr>
<td>(e)</td>
<td>Taxation.</td>
</tr>
<tr>
<td>(f)</td>
<td>Investments; Supplies; Official Newspaper.</td>
</tr>
<tr>
<td>6</td>
<td>Police Department.</td>
</tr>
<tr>
<td>(a)</td>
<td>General Provisions.</td>
</tr>
<tr>
<td>(b)</td>
<td>Police Relief and Pension Fund. Repealed.</td>
</tr>
</tbody>
</table>
chapter merely states the population limits and announces that cities within those limits shall be “known as cities of the Primary Class.” By inference, this suggests that Omaha’s home rule sta-

7 Fire Department
8 Miscellaneous Provisions.
9 Water Department.
10 Water Districts.
11 Metropolitan Utilities District.
12 Interstate Bridges.
13 Municipal University.
14 Housing Authority. Repealed.
16 Slum Clearance. Transferred to Chapter 19, article 26.
17 Parking Authority.
   (a) Parking Authority Law of 1955.
   (b) Parking Facilities.
   (c) Off-Street Parking.
18 Metropolitan Transit Authority.
19 Urban Renewal. Repealed.
20 Landmark Heritage Preservation Districts.

Id. §§ 14-101 to -2004 (Reissue 1977).
34. Id. § 15-101.

Table V
Statutory Charter Articles: City of Lincoln; in Nebraska Code

<table>
<thead>
<tr>
<th>Article #</th>
<th>Topic</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Incorporation, Extensions, Additions, Wards, Consolidation.</td>
</tr>
<tr>
<td>2</td>
<td>General Powers.</td>
</tr>
<tr>
<td>3</td>
<td>Officers, Elections, Employees.</td>
</tr>
<tr>
<td>4</td>
<td>Council and Proceedings.</td>
</tr>
<tr>
<td>5</td>
<td>Water Department.</td>
</tr>
<tr>
<td>6</td>
<td>Contracts and Franchises.</td>
</tr>
<tr>
<td>7</td>
<td>Public Improvements.</td>
</tr>
<tr>
<td>8</td>
<td>Fiscal Management, Revenue and Finances.</td>
</tr>
<tr>
<td>9</td>
<td>City Planning, Zoning.</td>
</tr>
<tr>
<td>10</td>
<td>Pensions.</td>
</tr>
<tr>
<td>11</td>
<td>Planning Department.</td>
</tr>
<tr>
<td>12</td>
<td>Appeals.</td>
</tr>
<tr>
<td>13</td>
<td>Community Development.</td>
</tr>
</tbody>
</table>

tus is legally "unknown," but that Lincoln's home rule status is tacitly admitted, through omission.

As with the home rule charter texts, the Lincoln and Omaha statutory charters follow different formats and seem to reflect different topical emphases. For example, the Lincoln act includes two articles relating to planning while the Omaha law covers the same topic with one.\textsuperscript{35} In the area of fire and police administration, the Omaha statute contains a separate article for each,\textsuperscript{36} but the Lincoln statute ignores both departments. Another distinguishing feature of the Omaha act is the inclusion of statutory charters for four public corporations which are legally independent of the municipality of Omaha.\textsuperscript{37} None of them can constitutionally enjoy home rule status in Nebraska. In neither the Omaha nor Lincoln statutory charters is the specific organizational form of government mentioned.

Two additional large blocs of applicable legislation are found in code chapters 18 and 19 respectively, entitled: "Cities and Villages, Laws Applicable to All" and "Cities and Villages: Laws Applicable to More Than One And Less Than All Classes." In addition, there are a myriad of state statutes which would qualify as legislative charter components for Nebraska home rule as well as non-home rule cities; some of these would include Chapter 11, "Bonds and Oaths, Official," Chapter 12, "Cemeteries," Chapter 47, "Jails" and Chapter 51, "Libraries and Museums."

Yet another important feature of the Lincoln and Omaha statutory charters deserves comment: each is the only city in its population bracket class, an arrangement which predates both cities' conversion to home rule status. Moreover, since the beginning of the century, the legislature has adjusted the population limits of Primary and Metropolitan class cities so as to bar competitive cities from inclusion into either category. As will be seen from the tabulation below, it appears that the major competitor with Omaha was Lincoln. Legislators may have anticipated that Grand Island would reach eligibility for primary city status unless the popula-

\textsuperscript{35} Compare \textit{NEB. REV. STAT. §§ 14-401 to -419} (Reissue 1977) with \textit{id. §§ 15-901 to -905 & §§ 15-1101 to -1106.}
\textsuperscript{36} \textit{Id. §§ 14-601 to -620; id. §§ 14-701 to -708.}
\textsuperscript{37} Metropolitan Utilities District, \textit{id. §§ 14-1101 to -1117} (Reissue 1977); Metropolitan Transit Authority, \textit{id. §§ -1801 to -1826; Omaha Parking Authority, id. §§ -1701 to -1740; Landmark Heritage Preservation Districts, id. §§ -2001 to -2004.}
tion brackets were changed. The pertinent legislative "adjustments" are shown as follows:

<table>
<thead>
<tr>
<th>Primary Class (Lincoln)</th>
<th>Metropolitan Class (Omaha)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1901) 40,000 - 100,000</td>
<td>(1921) 100,000 inhabitants or more</td>
</tr>
<tr>
<td>(1947) 40,000 - 150,000</td>
<td>(1947) 150,000 inhabitants or more</td>
</tr>
<tr>
<td>(1961) 40,000 - 200,000</td>
<td>(1961) 200,000 inhabitants or more</td>
</tr>
<tr>
<td>(1985) 100,000 - 300,000</td>
<td>(1985) 300,000 inhabitants or more</td>
</tr>
</tbody>
</table>

Municipal reformers, including those who propose home rule, have long criticized both special legislation and classification systems which in effect produce the same results. But others conclude that the use of special legislation or a classification system which may place but one city in a bracketed class is a desirable arrangement because it makes possible "tailor-made" legislation designed to deal with problems peculiar to one city. The Nebraska Constitution prohibits special legislation; but the Nebraska Supreme Court has, on several occasions, announced its approval of the existing classification system for cities. For example, as far back as 1884, Chief Justice Cobb said:

> There may not be more than one city [Lincoln] now in the state to which its provisions apply; but should our population continue to increase in the future . . . it is reasonably safe to predict that before the end of the present decade there will be twenty. If an act is to be deemed inimical to the provision of the constitution above referred to, [Article III, section 18] simply because in point of fact its operation is confined to one city, then it would follow that our only city of the first class [Omaha] is utterly without legal corporate existence—a state of things which could not have been intended by the framers of the constitution . . . .

In 1905, the supreme court again held that population classifications do not constitute special legislation even though only one city in the state falls within the particular class.

Generally, the Nebraska legislature has not gone out of its way to pass laws displeasing to either Lincoln or Omaha. Perhaps the fact that both cities use lobbyists to keep watch at the state capitol accounts for the generally peaceful relationship. The record, however, is not entirely satisfactory from the municipal viewpoint because, from time to time, individual or ad hoc legislative blocs press for passage of acts which are undesirable to the home rule cities. For example, one of the most recent conflicts arose when an Omaha senator decided to push for ward or district elections in-

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40. E.g., Anderson, Special Legislation in Minnesota, 7 Minn. L. Rev. 133 (1923); Cloe & Marcus, Special and Local Legislation, 24 Ky. L.J. 351 (1936).
stead of at-large elections for Omaha city council members. Soon thereafter, a member of the Lincoln delegation introduced a similar bill. Newspaper comment at the time noted that "Senator Wally Barnett, who introduced the bill, said . . . that Lincolnites do not feel represented under the present system." In response, a Lincoln city council member queried: "Is this what we have the [sic] look forward to—our state senators dictating to us what we can and cannot put in our charter?" The cities won the battle but subsequently lost the war; in 1979, the Omaha charter was amended by the legislature to require elections by district.

One criticism of the statutory charter system is that it wastes legislative resources. All Nebraska cities—in addition to Lincoln and Omaha—are governed by the statutory charter applicable to their population bracket. Most of these cities seem content to work together and apply political pressure through their various interest groups, professional organizations and the League of Nebraska Municipalities. Lincoln and Omaha also receive certain beneficial support from the same groups; but, because of their unique status, they not only are required to keep a "weather eye" peeled on general legislative matters applicable to all or some cities, but they also must lobby to keep their statutory charters from being changed in an objectionable manner. The net result of home rule status, therefore, is to increase the lobbying work-load and expense of Lincoln and Omaha as compared with other state municipalities. Unfortunately, the record does not reveal any advantages to this system, with the possible exception of some intangible prestige stemming from the possession of the home rule label.

V. NEBRASKA HOME RULE AND THE COURTS

It was early established that "[i]t is emphatically, the province and duty of the judicial department, to say what the law is. . . . If two laws conflict with each other, the courts must decide on the operation of each." This principle may have led to the attenuating development of home rule in Nebraska. The constitutional home rule amendment requires the charters to be "subject to the constitution and laws of this state . . . ;" and the first supreme

45. L.B.448, id.
47. Id.
50. NEB. CONST. art. XI, § 2.
court pronouncement on a home rule charter question held that "laws of this state" were "any general statute." The overall effect of court decisions touching home rule charter actions is to transform the decisions into the "laws of this state." In any common law jurisdiction, when charter provisions conflict with statutes over a long enough period of time and embrace a sufficient number of municipal functional, organizational and jurisdictional phenomena, a body of law emerges as controlling. Not only did the Nebraska Supreme Court's exercise in judicial law-making begin to erode the purposes of home rule through the injection of new rules which reduced municipal freedom of choice, but the process was further hastened when judges incorrectly employed precedents enunciating principles of state-city relationships which existed prior to the advent of home rule. This long term strategy moved the law toward restoration of the state as sovereign, with a resultant weakening of the local autonomy which home rule constitutional amendments were intended to provide.

A. The Municipal Affairs Doctrine

Missouri's pioneering contribution to the development of home rule includes interpretive opinions handed down by its supreme court. The first significant opinion dealt with a conflict between the home rule charter of St. Louis and a state statute. In deciding the case the court spoke of "municipal matters" as those which legally fell within the purview of the home rule charter. "Municipal matters" were later characterized as "matters of municipal government," "matters of municipal concern," "municipal affairs," "local matters," and "matters of local concern." The particular term employed will of course vary according to the preferences of individual judges and commentators, but each alludes to those municipal functional, organizational and jurisdictional phenomena which present themselves as so peculiarly local in nature that they may be properly controlled by a home rule charter rather than a statute. In 1904, the Missouri Supreme Court first distinguished "matters of local concern" from "matters of statewide concern" and suggested that state acts would overturn municipal ordinances only if an ordinance attempted to trespass on the realm of statewide concern. On its face the new doctrine seemed to make plausible and useful distinctions but only a year later a member of the same court expressed dissatisfaction with its newly-created "state-local concern" rule:

52. Ewing v. Hoblitzelle, 85 Mo. 64 (1884).
53. Louis v. Meyer, 185 Mo. 583, 598, 84 S.W. 914, 918 (1904).
It is extremely unfortunate that this Court ever attempted to solve the problem by drawing a distinction between matters of mere local concern and matters of state concern, and to say that as to matters of mere local concern the municipality has power to legislate, to my mind, no fixed, certain, general or intelligible rule can be formulated upon such a distinction, which will answer or solve the problems that will arise.\(^{54}\)

This expression of judicial regret was apparently too late: the municipal affairs doctrine had in just one year been recognized and accepted as an adequate guideline in other home rule states and has continued to be used in all jurisdictions where home rule charter documents rest as foundation pieces of a home rule system.\(^{55}\) In Nebraska, displeasure with the rule was expressed five years after the establishment of home rule in Lincoln by Judge Ridick: "It is not easy . . . in all cases to distinguish between municipal and state powers, and when they come within the classification of police powers, they are as impossible of accurate definition as the police power itself . . . . We must therefore content ourselves with the consideration of each case as it arises, applying those principles which precedent and logic approve."\(^{56}\) The judiciary may consider the municipal affairs doctrine a "bitter pill to swallow," but it is one it has swallowed. As each new confrontation between a home rule charter and the statutes has appeared, the court has reluctantly applied the municipal affairs doctrine.\(^{57}\)

The ultimate effect of the doctrine, which has no basis in the constitutional language of the home rule amendment, has been to amend the amendment in such a way as to undermine its basic purpose.\(^{58}\)

**B. The Doctrine of Municipal Affairs—Subsidiary Rules**

The courts have expanded and elaborated the municipal affairs doctrine, further increasing the power and expanding the scope of state legislative control while reducing the power and narrowing the scope of the charter city's jurisdiction. As first applied,\(^{59}\) the state-local distinction simply considered the merits of a case on the basis of "state concerns" versus "local concerns." Two decades later, the Nebraska Supreme Court introduced the distinction between "matters which are purely of local concern" and those of


\(^{55}\) This is not the case in states such as Kansas which do not use a locally-framed home rule charter document.

\(^{56}\) Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 58, 189 N.W. 643, 646 (1922).

\(^{57}\) See Figure 1 of text *infra*.

\(^{58}\) Application of the municipal affairs doctrine has had the same effect in other states: for example, Arizona, Minnesota, Ohio and Oklahoma.

\(^{59}\) Louis v. Meyer, 185 Mo. 583, 84 S.W. 914 (1904).
statewide concern.\textsuperscript{60} As one opinion puts it: "As to all subjects of strictly [purely] local municipal concern such charter cities operate free and independent of state legislation."\textsuperscript{61} To a casual observer, the use of the words "purely" or "strictly" may seem to be of no legal significance; but further reflection reveals that "purely" or "strictly" effectively subdivides the phrase "municipal concern" or "local concern" so as to evoke its logical opposite, "not purely" or "not strictly" of local or municipal concern. However, in actual practice, when the Nebraska Supreme Court decides to shear away more home rule authority, it avoids accentuating the negative and refrains from using the phrases "not purely" or "not strictly" a matter of municipal or local concern. Instead, it introduces a more positive construction and speaks of laws "affecting municipal affairs, but which [are] also of state concern . . . ."\textsuperscript{62} Subjects which fall within the mixed "municipal/state" category will be regulated by the state legislature. But that did not always seem to be exactly the court's position. In \textit{Consumers Coal Co. v. City of Lincoln},\textsuperscript{63} the court outlined what might be considered an invitation to home rule cities to experiment widely in many heretofore forbidden areas of legislative domain. The court stated, "the city may . . . under the Constitution provide for the exercise by the council of every power connected with the proper and efficient government of the municipality, including those powers so connected, which might lawfully be delegated to it by the legislature, without waiting for such legislation."\textsuperscript{64} Similarly, in \textit{State v. City of Lincoln},\textsuperscript{65} the court said, "The purpose of section 2, art. XI . . . . was to render such cities as nearly independent as possible of state legislation."\textsuperscript{66} But neither Judge Ridick in 1922\textsuperscript{67} nor Justice Boslaugh, who quoted Judge Ridick's two opinions with approval in a 1959 opinion,\textsuperscript{68} apparently really meant that home rule cities should venture very far into legislative regions traditionally guarded by the state. Judge Ridick, in closing the panegyric encouraging home rule innovation, added one cautionary point which essentially nullified a substantial portion of the invitation: he indi-

\begin{footnotes}
\item[60.] Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 58, 189 N.W. 643, 646 (1922).
\item[61.] Niklaus v. Miller, 159 Neb. 301, 308, 66 N.W.2d 824, 829 (1954).
\item[62.] Axberg v. City of Lincoln, 141 Neb. 55, 58, 2 N.W.2d 613, 615 (1942).
\item[63.] Id. at 55, 58, 2 N.W.2d 613, 615 (1942).
\item[64.] Id. at 58-59, 189 N.W. 643, 646 (opinion by Ridick, J.).
\item[65.] 137 Neb. 97, 288 N.W. 499 (1939).
\item[66.] Id. at 101, 288 N.W. 499, 501.
\item[67.] Notes 56, 62 & accompanying text supra.
\item[68.] Mollner v. City of Omaha, 169 Neb. 44, 48-49, 98 N.W.2d 33, 36-37 (1959).
\end{footnotes}
icated that the home rule charter "may provide for the exercise of power on subjects, connected with municipal concerns, which are also proper for state legislation, but upon which the state has not spoken, until it speaks." Thus, the Nebraska Supreme Court, though willing to offer comforting words to home rule cities, is prepared to support state legislative preemption.

C. The Area of Statewide Concern

Looking for guidelines in matters of statewide concern, the Nebraska Supreme Court in Axberg turned to the words of an Ohio state tribunal's opinion, perhaps to lend a touch of variety to an otherwise routine pronouncement:

The state, considered in relation to its subdivisions, is the imperium and as such by its very nature has state control in state affairs. Since the municipality is imperium in imperio only in the exercise of powers conferred upon it by the state Constitution, it must in all other respects be subordinate to state authority. If fire, police and health departments be deemed purely matters of local self-government, they could be abolished and the state would be unable to step in. Obviously the abolition of any or all of them would affect state interests. So would even impairment. Indeed, police and fire protection and health preservation are essential to the administration of state government in such a way as to accomplish vital purposes expressed in its organic law... The Constitution guarantees life, liberty and property and imposes upon the state the duty to protect and defend these rights. That duty does not end at city limits. Control of deadly, contagious diseases may often require uniform state action; prevention of fire may be ineffective without unified effort reaching into urban, suburban and rural sections; and the policing of the state might well be inadequate to public need if done by a state constabulary with power to act only in areas outside municipalities. The state must remain sovereign in all such affairs else its authorities cannot protect rights assured to its citizens by its Constitution. These are fundamental reasons why police, fire and health undertakings are essentially attributes of state sovereignty and matters of state-wide concern.

It can be inferred from this passage that matters of statewide concern are partially congruent with the areas regulated by the police powers. As might also be expected, the powers of eminent domain and taxation—both attributes of state sovereignty—are now ex-


70. For example, in Axberg v. City of Lincoln, 141 Neb. 55, 2 N.W.2d 613 (1942), Justice Carter vehemently rejected the notion that firemen's pensions should be brought under charter control. In fact, he merely "slides by" the contention that municipal concern exists in that area at all. Chief Justice Simmons and Justice Messmore each authored a dissent which firmly disagreed with the majority. Id. at 65, 66, 2 N.W.2d at 618, 618. Justice Rose concurred with each.

71. Id. at 59, 2 N.W.2d 613, 615 (1942) (quoting City of Cincinnati v. Gamble, 138 Ohio 220, 231-32, 34 N.E.2d 226, 232 (1941)).
cluded from regulation by home rule charter provisions. Exclusive
state regulation of eminent domain has always been upheld as a
state prerogative.72 As for taxation, in 1959 the court reversed the
position it had taken in *Eppley Hotels Co. v. City of Lincoln* by
limiting the cities' powers to tax.74 In addition to police powers,
eminent domain and taxation, a number of other subjects are ex-
cluded from the home rule legislative jurisdiction. Some can be
rationally defended under the statewide interest label; and others
seem to be excluded as a reminder to anyone concerned that
"whether an act of the Legislature [or a charter provision] pertains
to a matter of local or statewide concern" is a *judicial* question.75

VI. HOME RULE AND THE COURTS: SPECIFIC
APPLICATIONS AND ANALYSIS

Figure 1 shows that since 1925, the Nebraska judiciary has con-
sistently increased areas of statewide concern and reduced the
reach of home rule charters. Of the thirty-six cases studied,
twenty represent findings for the state and fifteen for home rule
cities. Moreover, while the cities won more cases than they lost
until the mid 1950's, the state's winnings have steadily increased in
both numbers and percentages—decade by decade.76

72. See *Van Patten v. City of Omaha*, 157 Neb. 741, 94 N.W.2d 664 (1959); *State v.
Butler*, 145 Neb. 638, 17 N.W.2d 683 (1945); *Nagle v. City of Grand Island*, 144
Neb. 67, 12 N.W.2d 540 (1943).

73. 133 Neb. 550, 276 N.W. 196 (1937).

357, 360 (1959), suggests strongly that no room exists for further experimenta-
tion by home rule cities in this area: "Municipalities have only such power of
taxation as are specifically granted by the Legislature. ... This appears so
fundamental that a citation of authority seems unnecessary."

75. *Axberg v. City of Lincoln*, 141 Neb. 55, 58, 2 N.W.2d 613, 615 (1942).

76. 

<table>
<thead>
<tr>
<th>Decades</th>
<th>For Local Concern</th>
<th>For Statewide Concern</th>
</tr>
</thead>
<tbody>
<tr>
<td>1925 - 35</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>1935 - 44</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>1945 - 54</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>1955 - 64</td>
<td>2</td>
<td>8</td>
</tr>
<tr>
<td>1965 - 74</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Totals:</td>
<td>15</td>
<td>20</td>
</tr>
</tbody>
</table>

Purposely omitted from Figure 1 is *Bodkin v. State*, 132 Neb. 535, 272 N.W.
547 (1937) which harmonized a home rule-statutory conflict.

Included in the tabulation are thirty-one cases which represented direct
adversary proceedings between state and local authority and five cases which
are used simply because they contained descriptions of what is a statewide or
a local concern. Except for *Mutual Oil Co. v. Zehrung*, 11 F.2d 887 (8th Cir.
1925), all cases were decided by the Nebraska Supreme Court.
## Figure 1

**MATTERS OF LOCAL CONCERN AND MATTERS OF STATEWIDE CONCERN AS RELATED TO NEBRASKA HOME RULE CITIES: COURT DECISIONS FROM 1925 TO THE PRESENT**

<table>
<thead>
<tr>
<th>Court Decision</th>
<th>Matter in Question</th>
<th>Category Upheld</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mutual Oil Co. v. Zehrung, 11 F.2d 887 (8th Cir. 1925).</td>
<td>the sale of gasoline by the city is a proper function of local government</td>
<td>Local&lt;sup&gt;a&lt;/sup&gt;</td>
</tr>
<tr>
<td>Standard Oil Co. v. City of Lincoln, 114 Neb. 243, 207 N.W. 172 (1926).</td>
<td>the sale of gasoline by the city does not violate the Nebraska Constitution</td>
<td>Local&lt;sup&gt;a&lt;/sup&gt;</td>
</tr>
<tr>
<td>Salsbury v. City of Lincoln, 117 Neb. 465, 220 N.W. 827 (1928).</td>
<td>improvement of streets, alleys and highways within city is strictly of municipal concern</td>
<td>Local</td>
</tr>
<tr>
<td>Carlberg v. Metcalfe, 120 Neb. 481, 234 N.W. 87 (1930).</td>
<td>education is a matter of state and not of strictly municipal concern</td>
<td>State</td>
</tr>
<tr>
<td>Omaha and Council Bluffs Street Ry. v. City of Omaha, 125 Neb. 825, 252 N.W. 407 (1934).</td>
<td>regulation of mass transportation by common carriers is a matter of state concern</td>
<td>State</td>
</tr>
<tr>
<td>Pester v. City of Lincoln, 127 Neb. 440, 255 N.W. 923 (1934).</td>
<td>the extension of a water main and the assessment of real estate are matters of local and municipal concerns</td>
<td>Local</td>
</tr>
<tr>
<td>Bodkin v. State, 132 Neb. 533, 272 N.W. 547 (1937).</td>
<td>the court has a duty to harmonize state and municipal legislation concerning liquor traffic</td>
<td>Concurrent</td>
</tr>
<tr>
<td>Eppley Hotels Co. v. City of Lincoln, 133 Neb. 550, 276 N.W. 196 (1937).</td>
<td>city taxes to be used strictly for city purposes are a matter of municipal and not state concern</td>
<td>Local</td>
</tr>
<tr>
<td>State v. City of Lincoln, 137 Neb. 97, 288 N.W. 497 (1939).</td>
<td>dismissal of fireman is purely of local concern</td>
<td>Local</td>
</tr>
<tr>
<td>State v. the Araho, 137 Neb. 389, 289 N.W. 545 (1940).</td>
<td>control of horse race gambling is a question of statewide interest</td>
<td>State&lt;sup&gt;a&lt;/sup&gt;</td>
</tr>
<tr>
<td>Munch v. Tusa, 140 Neb. 457, 300 N.W. 385 (1941).</td>
<td>there is no legislation on Omaha firemen's pensions except the provisions of the Omaha home rule charter</td>
<td>Local</td>
</tr>
<tr>
<td>Axberg v. City of Lincoln, 141 Neb. 55, 2 N.W.2d 613 (1942).</td>
<td>firemen's pensions are matters of statewide concern</td>
<td>State</td>
</tr>
</tbody>
</table>
Nagle v. City of Grand Island, 144 Neb. 67, 12 N.W.2d 540 (1943).

Lickert v. City of Omaha, 144 Neb. 75, 12 N.W.2d 644 (1944).


State v. City of Grand Island, 145 Neb. 150, 15 N.W.2d 341 (1944).


State v. Cunningham, 158 Neb. 708, 64 N.W.2d 465 (1954).

Omaha Parking Authority v. City of Omaha, 163 Neb. 97, 77 N.W.2d 982 (1956).


d eminent domain proceedings are matters of statewide concern

d pension rights of Omaha police are to be determined by charter provisions of the city

d a contest over the election of a municipal official is a matter of statewide concern

d the firemen's pension law is a matter of statewide concern applicable to all cities, whether home rule or not

d eminent domain is a matter of state concern

d the pension rights of firemen in the city of Omaha are to be determined from the home rule charter of the city

d health and sanitation are matters of statewide concern

d the extension of a water main is a matter of local and municipal concern—same would be true where construction of reservoir is involved

d the right to pave the streets of a home rule city is purely of local character

d city streets are necessarily part of the highway system of the state and are therefore a matter of general rather than strictly local concern

d the law concerning police dismissals is related to the maintenance of law and order and thus of statewide concern

d the power to tax is a matter of statewide concern

d adoption of a particular form of government [dictum]

eminent domain

statutes which are enacted for the transfer or protection of property rights are of statewide concern
A. Matters of Local Concern—The Current Picture

Of the various municipal functions and jurisdictional areas tested through litigation, there are now only five which remain as properly approved matters of local or municipal concern for Nebraska home rule cities. These are: (1) authority to sell gasoline at retail,77 (2) control of water systems and reservoirs,78 (3) power to select organizational form of government for home rule cities,79

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77. Such a provision can be found in the Lincoln charter. See Standard Oil Co. v. City of Lincoln, 114 Neb. 243, 207 N.W. 172 (1926).


79. See Mollner v. City of Omaha, 169 Neb. 44, 98 N.W.2d 33 (1959); State v. City of Lincoln, 137 Neb. 97, 288 N.W. 499 (1939).
MUNICIPAL HOME RULE

(4) zoning authority, and (5) the municipal budgetary process.

Since the supreme court approved charter control in four of the six cases dealing with fire and police personnel pension systems, it might be inferred that this particular area was securely protected as a matter of local concern. However, close inspection of the cases shows that only Omaha-based actions were won; both the Grand Island and Lincoln cases were declared to be matters of statewide concern as the result of legislative preemption. It seems, therefore, that Omaha was allowed to regulate fire and police personnel pension systems only because the legislature has not yet chosen to preempt the area. Furthermore, if the legislature does decide to write a covering statute for Omaha, Axberg v. City of Lincoln will provide ample authority to overturn the four Omaha cases.

As has already been pointed out, reduction of home rule authority seems to be furthered by judicial use of the adjectives “purely” and “strictly” as modifiers of “municipal affairs” or “local affairs.” But in actual experience, that does not seem to be the case. Of the five areas which still remain within the province of home rule charters, none was denoted as “purely” or “strictly” a local or municipal matter. Contrariwise, those municipal activities which were considered of purely local or municipal concern when they were first judicially reviewed, upheld and declared to be immune from legislative preemption, have, without exception been “converted” to matters of statewide concern.

B. Matters of Statewide Concern—The Current Picture

In a Wisconsin home rule decision, the Wisconsin Supreme Court observed, “When is an enactment of the legislature of statewide concern? We find no answer to this question in any decision of any court in this country.” Since that question was asked over forty years ago, when home rule was a much younger idea, per-

83. Axberg v. City of Lincoln, 141 Neb. 55, 2 N.W.2d 613 (1943).
84. 141 Neb. 55, 2 N.W.2d 613 (1943).
haps the court really was puzzled. Today, however, in the domain of Nebraska home rule, nearly every municipal function, organizational component, or jurisdictional matters merely appears to be waiting its turn to be placed in the category of statewide concern. Furthermore, to date, no case exists where a Nebraska court has reversed itself and shifted a municipal matter from the "statewide" into the "local concern" category.

The following have been held to be matters of statewide concern by the Nebraska Supreme Court:

I. Matters Relating to Attributes of Sovereignty
   A. Eminent Domain\(^{87}\)
   B. Taxation\(^{88}\)
   C. Police Powers
      1. Education\(^{89}\)
      2. Control of liquor\(^{90}\)
      3. Control of gambling\(^{91}\)
      4. Protection of life and property\(^{92}\)
      5. Health and sanitation\(^{93}\)
      6. Labor relations regulation\(^{94}\)

II. Regulation of Public Utilities\(^{95}\)

III. Local Government Regulation
   A. Elections\(^{96}\)
   B. Dissolution of Municipal Corporations\(^{97}\)
   C. Annexation\(^{98}\)
   D. Personnel Actions\(^{99}\)
   E. Streets\(^{100}\)
   F. Public Buildings\(^{101}\)

92. Dell v. City of Lincoln, 170 Neb. 176, 102 N.W.2d 62 (1960); Simpson v. City of Grand Island, 166 Neb. 393, 89 N.W.2d 117 (1958); State v. City of Grand Island, 146 Neb. 150, 15 N.W.2d 341 (1944); Axberg v. City of Lincoln, 141 Neb. 55, 2 N.W.2d 613 (1942).
100. Omaha Parking Authority v. City of Omaha, 163 Neb. 97, 77 N.W.2d 862 (1956).
In *Omaha Parking Authority v. City of Omaha*, the Nebraska Supreme Court shifted street administration from home rule charter to statutory jurisdiction. The opinion, written by Justice Carter, seems to develop as follows: (1) Parking areas are connected to alleys, (2) Alleys are connected to streets, (3) And streets are connected to state highways. Therefore, since the state has the power to "establish, maintain, and control the highways of the state, including those within corporate limits . . . ." and, since the highways are connected to the city streets; and the streets are connected to the alleys; and the alleys are connected to parking areas; it follows that state authority follows these physically connected components of the state highway system and thus, the entire system is also a matter of statewide concern. One might suggest that Mr. Justice Carter developed a new anti-home rule doctrine which could be called, "the knee-bone-connected-to-the-thigh-bone" rule. And, with a modicum of additional imagination, the doctrine could be employed to dismantle the five remaining judicially-approved areas of local concern.

C. Analysis

Based upon decisions of the Nebraska Supreme Court, the following general juridical principles apply to home rule cities:

1. Home rule charters must conform to the federal and state constitutions.
2. Home rule charters are to be construed as grants of power from the state, not limitations of power.
3. In matters purely or strictly of local concern, home rule charter provisions take precedence over state legislation.
4. In matters of municipal concern, which are also of statewide concern, home rule charter provisions govern, unless preempted by state legislative acts.
5. In matters of statewide concern state legislative acts govern.
6. It is a matter for the courts to decide whether a home rule charter provision or a state legislative act applies in any given case.

There is, today, no area which has been designated a matter of strictly or purely local concern which has not been shifted to the statewide classification. It follows then, that those areas which have been denoted as matters of local or municipal concern in prior court decisions, are, on the basis of rule four above, subject to

102. 163 Neb. 97, 77 N.W.2d 862 (1956).
103. *Id.* at 105, 77 N.W.2d at 869.
104. With apologies to the composer of the "spiritual" from which the phrase is taken.
legislative preemption whenever the time is ripe. Accordingly, for all practical purposes, home rule in Nebraska does not really exist.

VII. RECOMMENDATIONS AND CONCLUSIONS

The statement, "Home rule does not really exist in Nebraska," is, from a legal standpoint, essentially correct. Yet, throughout the state, few people know or understand the significance of that fact; and even fewer are upset by it. The city governments of Lincoln and Omaha seem reasonably content with the status quo; and neither seems inclined to consider another form of government as desirable. When conflicts threaten because of differences between a statutory provision and the text of the home rule charter, Lincoln and Omaha leaders now work through political channels rather than taking the matter to court.

A. Proposed Constitutional Amendment

Despite the high degree of political competence of home rule leadership, there are some indications of dissatisfaction in the home rule centers of the state. Evidence of a desire to "tidy up" the home rule problem surfaced in a recent attempt to amend the constitutional home rule provision.\footnote{L.B.917, 86th Leg., 2d Sess. (1980) (the bill died in committee).} An article in a Lincoln newspaper noted that Lincoln and Omaha "collaborat[ed] on a proposal to amend the state Constitution so that cities with home rule charters [could] enjoy all powers that the Legislature doesn't specifically prohibit."\footnote{Lincoln Journal, January 22, 1980, at 5, col. 1.} The article quotes Lincoln and Omaha city lobbyists as saying that "right now home rule charter cities have only those powers that are granted to them by the Legislature."\footnote{Id.} The story also indicated political support for the proposed amendment from the League of Nebraska Municipalities.

At first glance, it seems that the proposed constitutional amendment might serve to eliminate the problem. But, on further examination, the proposal seems to contain several flaws. First, it focused on a legislative rather than a judicial solution, and second, the change in the text of the constitution would have required traversing a tedious and difficult path with results which would not change a thing. Consumers Coal Co. v. City of Lincoln\footnote{109 Neb. 51, 189 N.W. 643 (1922).} states a rule almost identical to the proposed amendment:

We hold that the city may by its charter under the Constitution provide for the exercise by the council of every power connected with the proper and efficient government of the municipality, including those powers so connected, which might lawfully be delegated to it by the legislature, within...
out waiting for such delegation. It may provide for the exercise of power on subjects connected with municipal concerns, which are also proper for state legislation, but upon which the state has not spoken, until it speaks. It should be pointed out that the language of the court actually has greater practical legal force than that of the proposed amendment because a judicial pronouncement spells out the last word in constitutional interpretation. It has obviously not been recognized by some that the heart of the problem lies neither in the textual adequacy of the constitution nor in the passage just quoted. The problem lies in the fact that most supreme court decisions since 1922 have retreated from the position taken in Consumers Coal. Both the spirit and the letter of the rule have been ignored or effectively nullified.

Therefore, if home rule is to be revitalized through a change in the constitution, the change must provide a means of forcing the Nebraska judiciary to allow home rule cities greater latitude in providing solutions to problems that are, in fact, really "local."

B. Another Alternative: Kansas Model

In a few states (North Carolina, for one), a long history of amicable, cooperative, associations between cities and the state general assembly make municipal home rule a matter of little interest. In other states, notably Arizona, California and Colorado—whose home rule systems resemble Nebraska's—state judicial tribunals have been much less inclined to protect state legislative "preserves" and have frequently given very broad meaning to "matters of local concern." But there are also state home rule systems which are not so dependent upon judicial approval. One such state is Kansas. A brief description of the essentials of the Kansas home rule plan is outlined for the benefit and consideration of those who are interested in improving home rule in Nebraska.

Kansas home rule was launched by a 1960 constitutional amendment which passed and became effective in 1961. The system includes many features different from Nebraska's.

109. Id. at 58, 189 N.W. at 646.
111. See generally 2 McQuillin, supra note 1, §§ 4.89 to 4.113.
112. Kansas home rule is based on the Wisconsin model, but the governmental researchers responsible for developing the Kansas home rule amendment investigated the Wisconsin home rule experience thoroughly, discovered its defects and designed the Kansas plan in such a manner as to avoid Wisconsin's mistakes. It appears from the record to date that they have been successful. See Clark, State Control of Local Government in Kansas: Special Legislation and Home Rule, 20 KAN. L. REV. 631 (1972).
It includes all cities. Unlike Nebraska and a number of companion states with population qualifications, all Kansas cities are given the opportunity to participate in the home rule plan. Moreover, the scope and quantitative aspects of participation depend entirely upon the desires of the individual city, its people and its city officials.

It does not require cities to "frame" individual home rule charters. Participation in Kansas home rule is, for the most part, confined to the actions of individual city councils following prescribed constitutional guidelines. Thus, Kansas municipalities are not put to the trouble and expense of electing charter convention members, framing suitable home rule charters, presenting such charters to the electorate for approval or following any of the traditional home rule establishment scenario which is required in Nebraska and other traditional home rule states.

It is self-executing. No legislative or gubernatorial approval is required for it to go into effect. No implementary state laws need be passed to set up procedures. No local voter approval is necessary in order to activate the home rule plan. No charter must be passed, because no charter document is required for the system to work.

It mandates liberal judicial interpretation. Precise constitutional language points the Kansas judiciary to the proper approach to be used in home rule cases: "Powers and authority granted cities pursuant to this section shall be liberally construed for the purpose of giving to cities the largest measure of self-government."

It permits cities to exempt themselves from legislative acts. By passing what is constitutionally entitled a "charter ordinance," a Kansas city council can exempt its municipality from the jurisdictional impact of any non-uniform state legislative act. The "charter ordinance" must be labeled as such, must name the statute from which the city is to be exempted and must be passed by a two-thirds vote. "Charter ordinances" may not be used to nullify statutes relating to: (1) municipal incorporation, (2) annexation, (3) consolidation and (4) dissolution; nor may they be used against legislative acts establishing municipal debt or certain tax limitations.

114. E.g., Arizona, Colorado, Michigan, Oklahoma and Oregon.
116. Id. § 5(d). One commentator contends: "Perhaps most important, the Kansas Supreme Court can afford to construe article 12, section 5 broadly in favor of local initiative because it knows that the state legislature may always negate local action if it sees fit." Clark, supra note 112, at 662.
The key word to an understanding of the "charter ordinance" is "uniform." Although the Kansas constitution permits the state to set up four classes of cities, the state judiciary has held that an act applicable to one or several of the four classes is not a uniform act within the meaning of the home rule article. Therefore, a "charter ordinance" can prevail against even such an act. During the first decade of Kansas home rule, the cities passed, on the average, approximately 70 "charter ordinances" per year—with over 200 cities participating.

It permits cities to take legislative initiative without prior state delegation of authority. The significance of the preceding words is that in Kansas, Dillon's Rule has become a "dead letter." The essence of Dillon's Rule, named for the Iowa judge who wrote it, is that no municipality—home rule or non-home rule—is to be permitted to legislate or perform any action which is not precisely in pursuance of statutory law. In non-home rule cities that means a state legislative act; and in home rule jurisdictions of the conventional variety, it may mean either in pursuance of a state statute or a home rule charter provision. The Kansas home rule article declares:

Cities are hereby empowered to determine their local affairs and government including the levying of taxes, excises, fees, charges and other exactions . . . by ordinance[s] passed by the governing body with referendums only in such cases as prescribed by the legislature, subject only to enactments of the legislature of statewide concern applicable uniformly to all cities . . . .

A survey of Kansas case law from 1961 to the present gives convincing support for the assertion that Kansas courts have followed

119. This is true even if the city passing the "charter ordinance" is within the class covered. For additional comments, see Clark, supra note 87, at 656-658.
120. Id. at 658.
121. Dillon's Rule:

It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.


It has been noted that judicial adherence to the spirit of Dillon's Rule accounted in large part for the lack of progress in home rule development in Nebraska. See Winter, Municipal Home Rule, A Progress Report? 36 NEB. L. REV. 447 (1957).

122. KAN. CONST. art. 12, § 5(b).
fairly closely the constitutional "mandate" to interpret liberally the home rule article so as to give cities a great amount of discretion. That position is also supported by Clark, who comments:

The key to understanding home rule in Kansas is that cities are free to experiment with all kinds of imaginative legislation 'subject only to enactments of the legislature applicable uniformly to all cities . . . . ' The magic words—'subject to'—mean that local ordinances to solve local problems are supported . . . unless . . . they conflict with a state statute.123

The total effect of Kansas home rule is drastically to alter the traditional position of local governmental units vis à vis the state. In most states local governments are purely and simply "creatures of the state" as noted in Hunter v. City of Pittsburgh.124 In Kansas, the home rule article establishes what amounts to nearly a federal relationship: the cities of Kansas now legislate under a law which allows them to do what is not prohibited. They enjoy merely a limitation on their powers; they are no longer constrained by Dillon's Rule which envisages the municipal charter as a "grant of power."125 The Kansas home rule article does not confer sovereign status on the cities; but it does permit them sufficient latitude so that they can perform competitively with the sovereign state legislature—as if they were sovereigns. Thus, they can qualify as having quasi-sovereign status.

123. Clark, supra note 112, at 660.
124. 207 U.S. 161 (1907).
125. See Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 189 N.W. 643 (1922).