Nebraska Law Review

Volume 36 | Issue 3 Article 4

1957

Municipal Home Rule, a Progress Report?

Arthur B. Winter
University of Nebraska

Municipal Home Rule, A Progress Report?

Arthur B. Winter*

I. THE HOME RULE CONCEPT

The concept of municipal home rule, a late nineteenth and early twentieth century development, finds its origins in the Anglo-American tradition of the "inherent right of local self-government." In essence the tradition embodies the idea that the people of a community, in order to enjoy most fully their responsibilities as citizens, should be accorded the fullest possible authority over their own municipal destinies.[1] At the same time it is understood that such locally exercised authority will not encroach upon the jurisdiction and prerogatives of Parliament or—in the United States—the several states.

* A.B. 1947, Emory University; M.Sc. 1948, University of Denver; Ph.D. 1955, Duke University; presently Assistant Professor of Political Science, University of Nebraska.

[1] Among the better judicial expressions extolling the policy of local autonomy is that of Brown, J, dissenting in People ex rel. Wood v. Draper, 15 N.Y. 532, 562 (1857). The case involved the constitutionality of an act by which the state legislature created a metropolitan police district encompassing the counties of New York, Kings, Westchester and Richmond. Control of the force was placed in the hands of the state government through its power to appoint the governing body of police commissioners. The New York Court of Appeals found the act valid, but Brown, J, dissented as follows:

> . . . Wherever the Anglo-Saxon race have gone, wherever they have carried their language and laws, these communities, each with a local administration of its own selection, have gone with them. It is here they have acquired the habits of subordination and obedience to the laws, of patient endurance, resolute purpose, and the knowledge of civil government, which distinguish them from every other people. Here have been the seats of modern civilization, the nurseries of public spirit, and the centers of constitutional liberty. They are the opposites of those systems which collect all power at a common center, to be wielded by a common will, and to effect a given purpose; which absorb all political authority, exercise all its functions, distribute all its patronage, repress the public activity, stifle the public voice, and crush out the public liberty.

A. CAUSE AND EFFECT

In America the New England colonies most probably were the seedbeds of the tradition of local autonomy.[2] As the pioneers moved westward, New England customs and traditions followed. This, coupled with the individualism engendered by the frontier, further nourished the basic desire for local autonomy. It was therefore to be expected that institutional manifestations of such a feeling would ultimately develop. So it is not surprising to note that home rule provisions appeared first in constitutions of the western states.[3]

The simple desire for self-government, however, was not the sole contributing factor in the development of municipal home rule. It may be more true to say that the tradition of local autonomy was simply a convenient rallying concept, rediscovered in the closing years of the nineteenth century by those communities which were beginning to suffer the adverse effects of centralized legislative and judicial control over local affairs. In many cases the desideratum was not strictly "local self-government" but rather an escape from the corrupt practices of state legislatures.[4] As put by a leading commentator on home rule, "the . . . movement is part of the broader movement to liberate cities from organized corruption, and restore control to the so-called, or self-called good citizens."[5] Abuses ran in two major channels. First, local measures of no partisan significance introduced by legislators from a given community (and affecting only that community) were, as a matter of legislative courtesy, allowed passage without debate and deliberation through the legislative houses. It was, of course, understood that reciprocity would rule for the passage of other local measures proposed and introduced by other local legislative delegations. This system placed communities completely at the mercy of the local legislative delegation. Charters were amended, taxes were raised, municipal officials were appointed and removed, grandiose construction projects were approved, and other steps were taken—all under the sponsorship of the local legislative delegation. The second major abuse was of a more quantitative nature. As populations within cities increased with growing rapidity and technological advances

[2] See Porter, County and Township Government in the United States 21-42 (1922).

[3] The first home rule state was Missouri which in 1876 adopted a constitutional provision granting St. Louis local self-governing powers. California (1879), Washington (1889) and Minnesota (1896) followed.

[4] McBain, The Law and Practice of Municipal Home Rule 5-12 (1916).

[5] McGoldrick, Law and Practice of Municipal Home Rule 1916-1930 3-4 (1933).

appeared, the resulting demand for an expansion of municipal activities required more and more local legislation. This meant ultimately that hundreds and hundreds of local acts had to be passed during each legislative session. A state general assembly became in fact city council for every municipality in the state. The natural consequences of such a state of affairs were that state-wide municipal business tended to impinge upon state business and more and more local matters came to be treated more and more perfunctorily. Moreover, underlying these legislative abuses and their attendant bad results, was a broad growing tendency to shift the responsibility for local government from the local communities to the state capital.

Generally speaking, the courts aided and abetted the centralization of power. The classic expression of judicial opinion supporting the centralizing tendency is found in the words of Iowa Chief Justice Dillon in the Cedar Rapids railway case: "Municipal corporations owe their origin to, and derive their powers and rights wholly from, the [state] legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, *it may abridge and control.*"[6] (Emphasis added.)

A counterbalancing judicial view supporting the "inherent right of self-government" is found in Judge Cooley's remarks in the Michigan decision, *People ex rel. Le Roy v. Hurlbut*:[7]

> The State may mould local institutions according to its views of policy or expediency; but local government is a matter of absolute right, and the State cannot take it away. It would be the boldest mockery to speak of a city as possessing municipal liberty where the State not only shaped its government, but at discretion sent in its own agents to administer it; or to call that system one of constitutional freedom under which it should be equally admissible to allow the people full control in their local affairs, or no control at all.
>
> What I say here is with the utmost respect and deference to the legislative department; even though the task I am called upon

[6] City of Clinton v. Cedar Rapids and M.R.R.R. Co., 24 Ia. 455, 475 (1868). The case sets out the basic ideas of state-municipal relations which have been formalized as Dillon's Rule. It has been restated as follows: "It is a general and undisputed proposition of law that a *municipal corporation possesses and can exercise the following powers, and no others*: . . . those granted in *express words;* . . . those *necessarily* or *fairly implied* in or *incident* to the powers expressly granted; . . . those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable." Kneier and Fox, Readings in Municipal Government and Administration 40-41 (1953).

[7] 24 Mich. 44 (1871).

> to perform is to give reason why a blow aimed at the foundation of our structure of liberty should be warded off. Nevertheless when the State reaches out and draws to itself and appropriates the powers which from time immemorial have been locally possessed and exercised, and introduces into its legislation the centralizing ideas of continental Europe, under which despotism, whether of monarchy or commune, alone has flourished, we seem forced back upon and compelled to take up and defend the plainest and most primary axioms of free government, as if even in Anglican liberty, which has been gained step by step, through extorted charters and bills of rights, the punishment of kings and the overthrow of dynasties, nothing was settled and nothing established.[8]

Despite these heroic words and congenial sentiments, the greater part of the state and federal judiciary gave support to the legal position in defense of centralization as held by Dillon.[9]

B. Advantages of Home Rule

It was because of the total effect of the legal, political and administrative disadvantages of too closely held state control that citizens turned to the constitutional remedy of the home rule amendment to provide more responsible and efficient local government. Specifically, the advantages sought were:

1. *To prevent legislative interference in local affairs.* This would mean not only that ill-conceived, ill-considered and otherwise undesirable local legislation need no longer emanate from the state legislature, but it would also allow that body more time for consideration of the broader problems of the commonwealth.

2. *To permit local self-government.* It has been said that local government is the "keystone of democracy"—the rationale being that responsible local self-government can serve as a school of government for the citizenry. With the elimination of state controls over local affairs, decisions must be made by the affected citizens. Thus, with home rule, authority for local government is made commensurate with responsibility. A further advantage lies in the fact that people "on the spot" are likely to know most about their own problems; so that it logically follows that their solutions to such problems are much more likely to be the correct ones—more likely than would be the case if the problems had to be referred to a legislative body hundreds of miles away.

3. *To give cities adequate powers.* Under the old system munic-

[8] Id. at 108.

[9] Only the courts of Indiana, California, Kentucky, Iowa, Nebraska and Texas have (at one time or another) adhered to Cooley's position. The broad language of Dillon received the blessings of the United States Supreme Court in Atkin v. Kansas, 191 U.S. 207 (1903).

ipal problems arising from greater urbanization and technological advancement were frequently deferred until the biennial meeting of the state general assembly. Under home rule provisions, charter amendments can be made with as great celerity as the local situation demands. Furthermore, home rule allows for innovation. A state legislature would be unlikely to authorize, for example, the establishment of a municipal gasoline station. While, at the same time, it might be felt within a specific municipality that such a facility would be highly desirable.

Naturally, these are but potential advantages. Without popular support they cannot be achieved. Home rule, like the short ballot and the initiative, the referendum and the recall, has failed to achieve its highly touted goals—where it has failed—simply because the citizens adopted it as a panacea. It is also true that ignorance of the advantages of constitutional home rule has deterred citizens in many communities from seeking its adoption. From reports gathered the writer concludes that the latter situation is the prevailing one in Nebraska.[10]

To date twenty-three states in the United States (including Nebraska) have adopted constitutional home rule. It is to be hoped that a growing interest and knowledge of municipal affairs will inspire citizens to launch further municipal home rule ventures.

C. Nebraska's Constitutional Provisions

Nebraska's constitution provides two major safeguards against state legislative interference with local affairs: (1) a "self-executing"[11] charter adoption procedure and (2) a ban on specific types of legislation which otherwise would permit the state to interfere with inherently municipal matters.

The self-executing home rule charter adoption procedure consists of a series of prescribed steps which can be undertaken independently by municipalities without recourse to permissive legislative action. In cities of the first, primary, and metropolitan

[10] See Shumate, Local Government in Nebraska, 5 Neb. Legis. Council Rep. 36 (1939): "It is significant that these three cities [Omaha, Lincoln and Grand Island—Nebraska's only home rule cities] are the largest in the state. Thus, it would appear that the smaller municipalities are satisfied with their old charters, or just indifferent in the matter."

And, Senning, Nebraska's Three Home Rule Charters, 21 Nat'l Munic. Rev. 564, 568 (1932): "The future success of home rule in Nebraska seems to depend upon the growth of an urban consciousness."

[11] Salsbury v. City of Lincoln, 117 Neb. 465, 220 N.W. 827 (1929).

classes,[12] the constitution permits qualified voters at a special or general election to choose fifteen freeholders (who have been qualified Nebraska electors for five years) to hold a home rule charter convention. Within four months of election, the convention delegates must meet, draft and adopt by majority vote a proposed charter document. The draft is then submitted to the city clerk who must publish it in the official or local newspaper three times. Such publication must precede by not more than thirty days a special or general election at which time the qualified voters by majority vote may approve or disapprove the draft charter. If approved, the new home rule charter takes effect after the passage of sixty days.[13] If rejected, the mayor and council have constitutional permission to reinstitute after six months the complete process of selection of delegates, convention and popular ratification of a draft charter.[14] There is also a constitutional provision allowing a subsequent charter convention to be held for revising or abolishing the home rule charter.[15] Still another provision authorizes either the city council or a specified number of qualified electors to propose charter amendments. Such proposal must then be ratified by a majority vote of the electorate.[16]

In addition to the protection afforded municipal autonomy by the home rule provisions, the state constitution has provided further insulation from legislative interference by expressly denying the legislature the power to enact local or special laws.[17] Authorities in the field of municipal government agree that such a two-pronged defense is necessary for the preservation of maximum autonomy for home rule cities. Specifically, the state legislature is prohibited from passing local legislation for the purposes of:

1. Changing the names of places;

2. Laying out, opening, altering and working roads;

3. Vacating roads, town plats, streets, alleys, and public grounds;

[12] Nebraska municipalities are classified as follows: Villages—population below 1,000; second-class cities—1,000 to 5,000; first-class cities—5,000 to 40,000; primary cities—40,000 to 150,000; metropolitan cities—more than 150,000.

[13] Neb. Const. art. XI, § 2.

[14] Neb. Const. art. XI, § 3.

[15] Ibid.

[16] Neb. Const. art. XI, § 4.

[17] See Note, 29 Neb. L. Rev. 139 (1949).

4. Incorporating cities, towns and villages, or changing or amending the charter of any town, city or village;

5. Providing for election of officers in townships, incorporated towns or cities;

6. Providing for the bonding of cities, towns, precincts, school districts or other municipalities.[18]

The general effect of the prohibitions listed has been to eliminate annually the passage of hundreds of special, local and private acts which have long been the curse of many other state governments.[19] Without a constitutional barrier such as this, Nebraska would likely witness each biennium the passage of hundreds of private acts dealing with insignificant local matters. Let it be emphasized again[20] that failure to ban local legislation is an open invitation to the state legislature to constitute itself as county commission, city council and school board for every governmental subdivision within the state. As will be noted below, there have been some tenuous judicial interpretations of these constitutional prohibitions with respect to public acts of local application affecting Lincoln and Omaha; but an analysis of state legislation since 1912 reveals that at maximum only twelve such acts per biennium have been in fact passed.

D. The Application of Home Rule

Nothing in the history of Nebraska's home rule movement seems in any way to have been done without caution and due deliberation.[21] Five years elapsed before the 1912 provisions for home rule were used by any city in the state. Lincoln, in 1917, was the first to act. In that year she adopted her statutory charter as a home rule charter. It is reported by a number of municipal officials from first-class cities that more adoptions have not been made because: (1) citizens seem to be content with the statutory charter provided

[18] Neb. Const. art. III, § 18.

[19] For example, Alabama, Arkansas, Maine, Michigan, Tennessee, and Texas have in the past, or are still plagued by the private act system.

[20] See note 4 supra.

[21] As noted above, each of the three Nebraska home rule cities adopted its statutory charter as its first home rule charter. It was not until late 1956 when Omaha adopted a new charter that any broad changes in municipal government were wrought through the home rule process. Lincoln is to consider substantial changes in its form of city government when sweeping revisions of its home rule charter go before the electorate in the spring of 1957.

for all cities in the class; and (2) many people are completely uninformed about home rule and its possibilities.[22]

One factor which has worked to reduce the effectiveness of municipal home rule is the peculiar application by the Nebraska Legislature of a classification system which fixes Lincoln as the state's only primary city, and Omaha as the only metropolitan city. Thus, under the facade of a rational classification system, the legislature passes acts (many of which have been subsequently blessed by the state's judiciary) which apply as private or local legislation.[23] The single-city classification was held not to clash with the state constitutional prohibition against special legislation in 1884,[24] but Chief Justice Cobb envisaged a growth of other cities into the class rather than a growth of classes with the city:

> . . . I am unable to see any objection to the act under consideration, which by its terms applies to all "cities of the second class having more than ten thousand inhabitants," which does not equally apply to the organic law or charter of all the cities in the state. *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 as in the past 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 provisions of the constitution above referred to [now art. III, § 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. [25] (Emphasis added.)

What Chief Justice Cobb had in mind in the *Graham* case seemed eminently rational; and, in part, as he predicted other cities gained sufficiently in population to enter what was then designated as second-class city status. But each time Lincoln or Omaha has been threatened with the possibility of sharing its classification with another municipality, the legislature has adjusted the classification, keeping the state's two largest cities isolated in separated classes. The last readjustment came as recently as 1947 when the unicameral legislature raised the lower population limit of metropolitan cities to 150,000. Lincoln's unofficial population had reached

[22] Eligible home rule cities are: Alliance, Beatrice, Columbus, Fairbury, Falls City, Fremont, Hastings, Kearney, McCook, Nebraska City, Norfolk, North Platte, Scottsbluff and York.

[23] Note 17 supra. See State ex rel. Jones v. Graham, 16 Neb. 74, 19 N.W. 470 (1884); State ex rel. Wheeler v. Stuht, 52 Neb. 209, 71 N.W. 941 (1897).

[24] State ex rel. Jones v. Graham, 16 Neb. 74, 19 N.W. 470 (1884).

[25] Id. at 77, 19 N. W. at 471.

the 100,000 mark which was then the dividing figure between metropolitan and primary cities. Omaha would then have had to share its metropolitan status with Lincoln.[26]

Because of the complexity of men's motives, it would be overly dogmatic to assert flatly the real reasons why the legislative delegations responsible for these changes did in fact effectuate them. Three plausible motives for such a move might be these: (1) Undoubtedly the rivalry between the state's two largest cities—an intangible thing to be sure—impelled the citizenry of each to support the status quo; inclusion of Lincoln in the same municipal category with Omaha would likely have been as unsatisfactory to the former as it would have been an affront to the civic *amour propre* of the latter. (2) As long as the courts allow public acts to apply to a municipal classification including only a single city within that classification, the legislative delegation from such a city wields a high power potiential. To include Lincoln and Omaha in the same classification would mean a substantial reduction in power for the legislative delegations of each. The legislators involved therefore had a vested interest in maintaining things as they were. (3) Classification of Lincoln as a metropolitan city might have required alterations of laws and ordinances in conformity with "public acts" affecting that class.

Thus, though local legislation is constitutionally prohibited, through custom and usage, public acts of local application to Lincoln and Omaha are almost unquestionably acceptable both to the courts and the principal legislative authority of the state.

In contrast to the state's two largest cities, Grand Island as the third home rule city enjoys considerably more independence from legislative control because she is one of fifteen first-class cities and could not by any reasonable means be slipped into a special legislative category. Thus, the delegation from the Grand Island area can in no way "tailor" measures for application to Grand Island only. The delegation is therefore prevented from exercising the same type of control over its home town as can be exercised by the groups from Lincoln and Omaha. Certain it is that Grand Island is affected by all statutes pertaining to first-class cities generally. But since so many cities are involved, conflicting pressures from such municipalities and from other interests affected assure greater consideration of any pertinent legislation. Under these circumstances, ill-favored measures are much less likely to control the destinies of first class in contrast to the primary and metropolitan cities.

[26] See Breckenridge, The Mockery of Classification, 36 Nat'l Munic. Rev. 571 (1947).

E. HOME RULE AND THE COURTS—GENERALLY

Five years elapsed before the people of Lincoln were to know something of the judicial attitude towards the new home rule charter. The first presentation of a matter concerning the charter arose in *Schroeder v. Zehrung*[27] over a question not precisely peculiar to the home rule aspect of Lincoln's city government. A glimpse of the court's liberal attitude towards home rule is seen in the following:

> . . . While a home rule charter adopted pursuant to the constitutional provisions may not contravene any provisions of the Constitution or of any general statute enacted by the legislature, it is, in all other respects, binding and controlling. A city may enact and put into its charter any provision for its government that it deems proper, so long as they do not run contrary to the Constitution or any general statute.[28]

In the same year as the *Schroeder* case was decided, the Nebraska Supreme Court touched on another feature of Lincoln's charter, holding that that document ". . . falls within that class of 'Constitutions' which are to be construed as grants rather than limitations of power; [and] that the principles of construction applicable thereto are the same as to a grant by the legislature . . ."[29] This rule was explained more fully by the court in *Standard Oil Co. v. Lincoln* by Mr. Justice Dean: The difference, he said, between charters based on a grant of powers and those based on the other hand upon a limitation of powers is that ". . . in the former case all powers not expressly or impliedly granted to the city government are reserved to the people; in the latter all powers are granted

[27] 108 Neb. 573, 188 N.W. 237 (1922). The case involved no attack upon the home rule charter. Essentially, the plaintiff desired to compel the city to refer for popular approval a council resolution "making . . . a contract to collect information and data necessary to the preparation of an ordinance . . . " for zoning purposes. The court held that the resolution was not a proper subject for referendum as it was *administrative* not *legislative* in character. The court noted that general statutory provisions concerning municipal referenda did not apply to home rule cities.

[28] Id. at 576, 188 N.W. at 238.

[29] Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 69, 189 N.W. 643, 650 (1922). By ordinance, the City of Lincoln provided for the organization and operation of a municipal fuel yard to sell wood and coal. At the time there existed a statute (Neb. Laws c. 87, § 4 ½ (1917)) permitting metropolitan cities to engage in the coal business. Lincoln invoked the statute to justify the ordinance. But the court ruled that since the charter had not been amended to permit the activity, the ordinance was invalid. In dictum, however, the court admitted that the operation of a municipal coal yard was not beyond the constitutional powers of a city. Lincoln, at that time, was classed as a metropolitan city.

to the city government except those expressly or impliedly withheld."[30] What he was attempting to compare was the power exercised by the state general assembly with the power of the city council. The council may do only those things specifically granted in the charter. The legislature, on the other hand, is granted by the constitution plenary power to legislate—except where specific prohibitions exist. That the city (by charter) may authorize much is not denied; but the council of its own volition may not act without specific authorization. At this point, however, the court mistakenly invoked Dillon's Rule[31] in support of its argument. It held "that a municipal corporation possesses and can exercise these powers only: (1) those granted in express terms; (2) those necessarily or fairly implied in, or incidental to, the powers expressly granted; and (3) those essential to the declared objects and purposes of the municipality, not merely convenient, but indispensible."[32] It would have been quite appropriate for the court to use this rule in the orthodox state-municipal situation—in the absence of a home rule amendment. It was incorrect, however, to use it when comparing the plenary legislative powers of the state general assembly with the delegated authority of a municipal legislative body in a home rule state. Perhaps it was an unconsciously given signal of coming judicial pronouncements.

The question of what sort of act, function or charter provision concerns public, general or state matters in contrast to an act or function which concerns local or municipal matters, is of paramount importance to those interested in ascertaining the limits of municipal autonomy in home rule cities. In *Consumers Coal Co. v. Lincoln*,[33] District Judge Ridick sketched broadly the general out-

[30] Standard Oil Co. v. City of Lincoln, 114 Neb. 243, 252, 207 N.W. 172, 176 (1926). As amended by referendum, sec. 136 of the Lincoln charter made provision for establishment by the city of a municipal gasoline station. An implementing ordinance was passed and the city began to operate a filling station. The Standard Oil Company filed suit to close down the city's facility alleging that there was no " 'agreement, trust or combination' among dealers in Lincoln or elsewhere, in the gasoline and oil business . . . " that competition was active, and that there was no shortage of supply. In addition the company alleged that the city's operation was in violation of the due process clause of the 14th amendment. The court held that the city "in carrying on the gasoline and oil business, . . . does no violence to the Fourteenth amendment nor to any provision of the Nebraska constitution."

[31] See note 6 supra.

[32] Consumers Coal Company v. City of Lincoln, 109 Neb. 51, 69, 189 N.W. 643, 650 (1922).

[33] Ibid.

lines which legislation by both the city and state should take. Developing the court's position, he said:

> 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, without 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.[34]

Although these words seem to support the concept of broad municipal autonomy, the reader will note that Judge Ridick's position here is not consistent with the position he assumed to defend with the questionable help of Dillon's Rule some ten pages later in the same decision. It also should be noted that the Judge was careful not to spell out the specific meaning of municipal powers as distinguished from state powers.

> It it 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, which Judge Cooley, in his work on Constitutional Limitations, characterized as (I quote here from memory) "That bastard power to which is referred for justification every infraction of the liberties of the people." We must therefore content ourselves with the consideration of each case as it arises, apply those principles which precedent and logic approve.[35]

Since precedent functioning through the doctrine of *stare decisis* utilizes the views of jurists of yesterday, it is not surprising to find that principles of state-city relationships existing prior to home rule frequently have been employed by the courts—thus contributing to the over-all weakening of this concept designed to achieve greater local autonomy. Vestiges of this attitude may be seen in *Nagle v. City of Grand Island,*[36] where the court said: ". . . 'Where the legislature has enacted a law affecting municipal affairs, but which is also of state concern, the law takes precedence over *any municipal action* taken under the home rule charter'."[37] (Emphasis added.) In the same opinion the court noted that the city's power was supreme only in matters of "strictly municipal concern." In only one opinion has an indication been found as to what functional areas would be properly considered as "matters

[34] Id. at 58, 189 N.W. at 646.

[35] Ibid.

[36] 144 Neb. 67, 12 N.W.2d 540 (1943). This decision involved a conflict of state versus home rule charter provisions for eminent domain proceedings.

[37] Id. at 69, 12 N.W.2d at 541.

of state concern."[38] At no point in any of the opinions examined were there expounded criteria for "matters of municipal concern" or "matters of strictly municipal concern."

Briefly, then, on the basis of the rules in the cases examined, the following general principles governing home rule generally may be set out:

1. Home rule charters in Nebraska must conform to the federal and state constitutions.
2. Home rule charters are to be construed as grants of power from the state to the municipalities.
3. In matters of general, of state-wide concern, or municipal concern (in the broad sense), state legislation takes precedence over home rule charter provisions.
4. In matters of *strictly* municipal or local concern home rule charter provisions take precedence over state legislation.
5. What is of general, of state-wide concern, of municipal concern (in the broad sense), or of strictly municipal or local concern will be decided as each case arises; and these are matters for the courts to decide.

As will be more evident at the conclusion of this paper, these principles governing the application of home rule to Nebraska cities are in the main somewhat less than satisfactory. Aside from the obvious necessity of requiring conformity with state and federal constitutional law, and the not unreasonable rule which requires a specific charter authorization before city council action involving a new municipal function may be undertaken, the principles cited above constitute no true guide as to what may legitimately be accomplished by home rule cities. Depending upon the social, economic and political inclinations of a court, almost any function except for those traditional corporate or business types of functions such as water, gas and electric service, may parade or masquerade as matters of state interest. Having made up its mind to designate some municipal activity as "a matter of state concern," the court need only show, for example, that the activity can be subsumed under the police powers, or that the function directly or indirectly affects interests which lie beyond the corporate limits of the home rule city. A municipal park might be a matter of state interest because the state protects the general welfare—or the public morals. Rules governing parking meters might be a matter of state interest because motorists from all parts of the state may be forced to use them. And a myriad of supporting opinions can easily be found

[38] Axberg v. City of Lincoln, 141 Neb. 55, 2 N.W.2d 613 (1942).

from non-home rule jurisdictions to justify the court's stand. Then finally, the court always can take refuge in Dillon's Rule. To escape from this present unsatisfactory state of affairs which seems bound to continue until home rule becomes completely meaningless, there seems to be no obvious or clear-cut solution. The judiciary could easily effectuate the ideas behind the home rule amendment, but the propensity so far is to move in the opposite direction, towards greater state control. Probably the only lasting solution would be found in the passage of amendments to the home rule amendment designating specifically what constitute (1) matters of state concern, (2) matters of municipal concern, and (3) matters of strictly municipal concern. If such a step were to be taken, it would only be proper to observe that there would be the possibility of making the law too rigid. There is of course the possibility of accomplishing a rational and lasting classification by legislative act.

It remains necessary now only to examine specific cases arising from disputes involving home rule cities in order to show more precisely how the general principles enunciated apply to the functions of government undertaken by Grand Island, Lincoln and Omaha.

II. SELECTED ASPECTS OF THE MUNICIPAL LEGISLATIVE PROCESS

A home rule city in Nebraska in the ordinary course of its day-to-day operation, for the most part, conducts its services, performs its functions, and administers its laws in the same way as those municipalities operating under the statutes governing cities generally. Exceptional situations develop in those fields of activity where home rule cities, by virtue of their allegedly autonomous position, have taken the initiative and amended their charters, ostensibly either to deal more effectively with some peculiarly local problem or to undertake additional activities not prescribed in the general statutes. Another area in which home rule cities differ from other municipalities grows from the self-executing provisions of the state constitution, specifically those governing the establishment and amendment of home rule charters. It is to these latter items that attention should now be turned.

As it adopts or amends a home rule charter, the city acts under a constitutional power in a fashion similar to the state legislature as it alters or amends provisions relating to cities generally. "The people of a city in the adoption or amendment of a home rule charter act legislatively."[39] Thus it has been said that a "charter

[39] Noble v. City of Lincoln, 153 Neb. 79, 87, 43 N.W.2d 578, 584 (1950).

provision in the home rule charter has the same force and effect as a statute."[40] In reviewing the procedural aspects of adoption and amendment of home rule charters, the Nebraska Supreme Court has been lenient. Probably Mr. Justice Dean had such procedural matters in mind when he wrote: "The trend of judicial pronouncements appears to sanction an enlargement of the powers of the municipality . . . within constitutional limits, rather than a curtailment of such powers."[41] The case then before the court involved a charter amendment which was challenged because it had been published three times at odd dates rather than the constitutionally prescribed "three times, a week apart . . ."[42] The court adopted the position that "Those omissions and errors which work no wrong to substantial rights are to be disregarded."[43]

Once authority is granted by the voters of a home rule city, the detailed execution of such authority is apt to be found an improper subject of the voter's legislative function. For example, Lincoln, within her home rule charter, was empowered to enact zoning ordinances. Preparatory to the enactment of such an ordinance the city council appropriated money to hire zoning experts. The resolution (ordinance) was then referred to the people under the referendum provisions of the charter. This latter action was voided by the supreme court which held that the resolution was administrative in character and did "not attain to the dignity of a legislative act."[44] In a more recent decision again resting on the distinction between legislative and administrative action, the court said:

> To permit a referendum on each of the various steps in carrying out a definite mandate of the voters to secure a site and build a city auditorium would delay executive conduct of the council and defeat the prompt and successful completion of the city auditorium as directed by vote of the people . . . . We hold that it was an act of legislation to direct and authorize the construction of a public building, to fix the cost, and provide bonds to pay for it, but it is an executive and administrative duty to select the site, buy same, select plans and let a contract . . . . No one of the many executive and administrative acts necessary to complete such project is referable to a vote of the people as a legislative act.[45]

[40] Bruett v. City of Omaha, 122 Neb. 779, 781, 241 N.W. 561, 562 (1932); cf. State ex rel. Herbert v. Anderson, 122 Neb. 738, 743, 241 N.W. 545, 547 (1932).

[41] Sandell v. City of Omaha, 115 Neb. 861, 868, 215 N.W. 135, 137 (1927).

[42] Id. at 863, 215 N.W. at 135; Neb. Const. art. XI, §§ 3-5.

[43] Id. at 865, 215 N.W. at 136.

[44] Schroeder v. Zehrung, 108 Neb. 573, 577, 188 N.W. 237, 239 (1922)

[45] State ex rel. Ballantyne v. Leeman, 149 Neb. 847, 858, 32 N.W.2d 918, 923 (1948).

Judicial action taken to prevent submission of charter amendments for approval of the electorate also arose in conjunction with the construction of Lincoln's city auditorium. Authorization to build, issuance of bonds, and choice of location had been passed at various municipal elections in 1939, 1941 and 1949. A further charter amendment bearing on the question of location was proposed and a taxpayer's suit was filed praying the court to enjoin the proceedings. Stating that ". . . courts will not, before the passage of legislation, enjoin it or consider its validity or constitutionality . . . [or] . . . inquire into the legality or constitutionality of an election before it is held . . . ," the supreme court held it would enjoin the proceedings when failure to do so ". . . would be followed by some irreparable loss or injury beyond the power of redress by subsequent judicial proceedings."[47] The opinion of the court also included the assertion that ". . . where by amendment to a home rule charter bonds for a project have been voted and directions given to the city council to acquire a site [etc.] . . . an election thereafter, the purpose of which is to select a site the effect of which would be to defeat the prompt . . . completion of the project as directed by the previous vote of the people, may be enjoined . . ."[48] Although Mr. Justice Yeager wrote the opinion of the court in the first of the Noble cases,[49] he dissented in the subsequent one. "I think," said he, ". . . it is in essence a long step toward destruction of the constitutional division of the powers of government [for the courts to enjoin consideration of a charter amendment]. To my mind it is an unwarranted invasion of the legislative by the judicial department."[50] Proponents of the maximum of local autonomy for home rule cities would undoubtedly agree.

A. The Exercise of Certain Quasi-Sovereign Powers

". . . [T]he preservation of order, the enforcement of the law, the protection of life and property and the suppression of crime are matters of state-wide concern . . ."[51] This is probably as comprehensive a statement of the meaning of the phrase "matters of state-wide concern" as can be found in any of the court's opinions governing the affairs of home rule cities. As the court said in the *Consumers Coal* case, it reserves the right to distinguish between

[46] Noble v. City of Lincoln, 158 Neb. 457,459, 63 N.W.2d 475, 478 (1954).

[47] Noble v. City of Lincoln, 153 Neb. 79, 88, 43 N.W.2d 578, 584 (1950).

[48] Id. at 89, 43 N.W.2d at 585.

[49] Note 47 supra.

[50] Noble v. City of Lincoln, 158 Neb. 457, 475, 63 N.W.2d 475, 486 (1954).

[51] Axberg v. City of Lincoln, 141 Neb. 55, 60, 2 N.W.2d 613, 615 (1942).

state matters, municipal matters, and matters of "strictly municipal concern."[52] In this and the subsequent sections of this paper almost every case deals with a conflict of authority between a state law of general application and a home rule city charter provision or ordinance passed in pursuance thereof. It would, at first, be thought that the orthodox distinctions of *public* as against *private* or *proprietary* functions, as they usually arise in cases involving municipal tort liability, would apply here. In some cases this appears to be true, but the Nebraska judiciary does not consistently follow that distinction in enough cases to support establishment of a rule.

1. *Eminent Domain*

It is understood that the power of eminent domain like the power to tax represents one of the hallowed hallmarks of a state's sovereign status.[53] It is further understood that in the exercise of this power by municipalities, uniformity of procedure is probably beneficial—especially to the private interests from which the property is taken for a public use. On these bases, the solution prescribed in the following decision may then be considered as a reasonable one in the conflict between state and municipal authorities.

Grand Island authorized establishment of a park. In pursuance of the home rule charter an ordinance was passed permitting the city to acquire land. This action was challenged in a suit wherein the plaintiffs contended that park land should be acquired under the eminent domain statute applying to first-class cities. Supporting the petitioner's contentions, the court ruled that eminent domain proceedings were matters of ". . . state-wide concern applicable in all cities within the class therein designated, which includes the city of Grand Island, whether they be home rule cities or not and the provisions of the home rule charter . . . must yield thereto."[54]

2. *Power to Tax and Assess*

Taxing for municipal purposes under a home rule charter is one area in which it is clear that the home rule charter overrides "general" state statutes. When Lincoln adopted its home rule charter in 1917, it absorbed the then existing limitation of municipal taxation which placed a general dollar limit on property tax revenues which could be levied in any year. By 1930, the city's revenue needs were growing beyond the limit and an amendment to the city charter raising the limit was adopted. In 1937, a suit challenging

[52] Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 189 N.W. 643 (1922).

[53] See May v. City of Kearney, 145 Neb. 475, 17 N.W.2d 448 (1945).

[54] Nagle v. City of Grand Island, 144 Neb. 67, 69, 12 N.W.2d 540, 541 (1943).

city authority to tax beyond the previous concurrent statutory-home rule dollar ceiling was initiated.[55] It was held that the amended home rule provision relating to the outer limits of taxing authority "superseded" the previous legislative charter and thus there was no violation of due process in exacting taxes above the statutory limit, which had remained at the 1917 level.[56] After discussing the problem of distinguishing between areas of municipal and state authority, the court stated:

> As we have intimated before, city taxes, to be used strictly for city purposes, are a matter of municipal concern and in no way concern the state in their subject matter nor in the way they were assessed and levied in the case at bar.[57]

3. *Regulation of Surface Transportation Systems*

Regulation of various public utilities by city councils sitting as public utilities commissions is not uncommon in the United States; nor are Nebraska cities deprived of this power. There arise, however, situations which call for a specific ruling as to what aspect of utility regulation should be a municipal responsibility on the one hand or a state responsibility on the other. Though this is an area of more than passing interest, only one Nebraska Supreme Court decision was found involving utility regulation and touching at the same time upon a conflict of authority between a home rule city and the state.

Having alleged its inability to meet expenses on certain bus routes within the city, the Omaha and Council Bluffs Street Railway Company applied to the Nebraska State Railway Commission for permission to curtail services. In response the commission granted the application and the city of Omaha appealed.[58] In its brief Omaha averred that the State Railway Commission ". . . erred

[55] Eppley Hotels Co. v. City of Lincoln, 133 Neb. 550, 276 N.W. 196 (1937).

[56] The same limit—$365,000, plus amounts sufficient to pay bonded indebtedness accruing during the year and any judgment against the city—still exists. Neb. Rev. Stat. § 15-804 (Reissue 1954). The court noted in the Eppley Hotels Co. case that the legislative charter tax restriction applies to other cities of the primary class which have not adopted home rule. "It and its amendments from time to time have continued to be and still are the charter of cities of the same population whose people have not taken advantage of the home rule charter of the Constitution." Eppley Hotels Co. v. City of Lincoln, 133 Neb. 550, 556, 276 N.W. 196, 200 (1937). Since at least 1921, there has been no primary city other than Lincoln.

[57] Eppley Hotel Co. v. City of Lincoln, 133 Neb. 550, 557, 276 N.W. 196, 200 (1937).

[58] Omaha and Council Bluffs St. Ry. Co. v. City of Omaha, 125 Neb. 825, 252 N.W. 407 (1934).

in assuming jurisdiction and in holding that it had jurisdiction to pass upon the application of the street car company."[59] The argument of the city was that, by virtue of its home rule charter, the city only had power to authorize the curtailment of the service involved. The court rejected the city's contention on two grounds. First, it noted that the constitutional home rule provisions stated that home rule charters were subject to the constitution and laws of the state. From this starting point, the court ruled that because the legislature had empowered the State Railway Commission to authorize street railways to employ motor buses, and subject the use of such buses to the same regulation of rates, fares and service as street railways,[60] that state law specifically had given jurisdiction to the Railway Commission. This, the court held, prevailed over the city's claim to jurisdiction through its home rule charter. The second ground stated that the court's support of Railway Commission jurisdiction was based on the distinction between matters of municipal and state concern.

> Mass transportation of passengers by common carriers within the state is, and ought to be considered, under our existing Constitution and laws, a matter of state concern. It would be anomalous to commit to a regulatory body, created by the Constitution, jurisdiction over intrastate steam railroads carrying passengers for hire everywhere within the state boundaries and to deny that jurisdiction over a carrier operating within a home rule charter municipality . . . . To adopt it would subject the various municipalities of the state . . . to a chaotic lack of uniformity of regulation.[61]

What is inherently bad about local variations in regulations pertaining to local transit systems does not appear in the opinion.

4. *Regulation of Liquor Traffic and Gambling*

To those familiar with the *generally* prevailing attitude of the Anglo-American judiciary toward regulation and control of the liquor and gambling interests, it is admittedly redundant to point out that in cases arising under such regulatory acts as federal, state and local governing bodies adopt towards this purpose, the courts generally set themselves to the task of "harmonizing" conflicts or utilizing enactments in such manner as to provide for the maximum impact upon the object of regulation. This too apparently is true of Nebraska's judicial approach. Two cases concerning regulations of liquor sales and gambling point in this direction.

[59] Id. at 829, 252 N.W. at 408.

[60] Neb. Rev. Stat. § 74-1103 (Reissue 1950).

[61] Omaha and Council Bluffs St. Ry. Co. v. City of Omaha, 125 Neb. 825, 831, 252 N.W. 407, 409 (1934).

In *Bodkin v. State*,[62] a conviction for selling liquor to a minor was had under a city ordinance in which knowledge on the part of the seller that the purchaser was a minor was *not* an element. The then existing state statute[63] covering the situation made it a misdemeanor to sell liquor to minors "knowing them to be such." The court said, "The duty of the court to harmonize state and municipal legislation if permissible in view of all enactments on the same subject has always been recognized."[64] No heed was given to the argument that the city ordinance was void for contradicting a state statute, the inconsistency being considered as a "mere lack of uniformity in detail." Thus the city and state regulations were construed together to gain the greatest impact. The court noted reasons why the city might reasonably require more stringent standards on the part of liquor dealers than the state:

> . . . In Lincoln, a populous educational center, where throngs of students attend school, many of them minors away from parental care in a new environment, the city lawmakers were prompted to adopt a stricter regulation than that provided by statute for the protection of minors generally from the sale of intoxicating liquors. On this subject the public policy of the state and the city is the same. The evils against which the legislation is directed is the same. [sic] The legislative purposes do not differ.[65]

In *State ex rel. Hunter v. The Araho*,[66] an Omaha ordinance licensing bookies was claimed to recognize the business as legitimate in that home rule city. The court had no difficulty in disposing of this contention for the ordinance itself stated it was solely a revenue measure not aimed at regulating or controlling the taking of bets as a business. Furthermore, with a specific constitutional mandate forbidding gambling, save in certain exceptional situations, the court had a sound basis upon which to hold the control of such activity a matter of state-wide interest.

B. Municipal Services to Citizens

Although it would seem that most services performed by cities primarily for the citizens thereof would be considered as matters primarily to be controlled by home rule charters, such is not the case. As will be found, such services occasionally will be interpreted as being of state-wide concern. Reciprocal situations have

[62] 132 Neb. 535, 272 N. W. 547 (1937).

[63] The knowledge element was soon dropped from the statute. Neb. Laws c. 125, § 1 (1937).

[64] 132 Neb. at 537, 272 N.W. at 548.

[65] Ibid.

[66] 137 Neb. 389, 289 N.W. 545 (1940).

also arisen, strangely enough, in, of all functions, the field of public safety.

1. *The Public Safety Function*

Authorities in the field of municipal government are generally agreed that the public safety activities carried on by police and fire departments are considered as governmental rather than proprietary or municipal functions. Respecting the fire protection function, this position has not always been accepted by the Nebraska Supreme Court. In 1939 Omaha proposed a charter amendment to place her policemen and firemen on the same pension basis. This action was challenged by interested parties who claimed that the proposed ordinance was an impairment of their rights arising from the existing state firemen's pension and relief laws.[67] The court denied that the statute was controlling since it had been passed before Omaha acquired home rule status. The charter applying to Omaha in her pre-home rule days, said the court, ". . . lost its qualities as a statutory charter . . . and in lieu thereof, by virtue of an explicit constitutional grant, its terms then existing became a home rule charter."[68] The court invoked the doctrine that the "silence of the state" permitted the home rule charter provisions to govern in the matter of firemen's pensions. The next year, however, an opposite result was reached in a case dealing with firemen's pensions in the home rule city of Lincoln.[69] In the second case, dealing not with the form but with the existence of a pension fund, the court determined that specific statutes concerning firemen's pensions in cities of the primary class were binding on the city. "We have come to the conclusion, after an examination of the authorities, that a statute providing for firemen's pensions is a matter of state-wide concern applicable to all cities within the designated class, whether they be home rule cities or not."[70] It is noteworthy that Lincoln was then, as now, the only city in the primary class. Still another dispute involving pension rights developed and was finally brought for adjudication before the state supreme court. This time the suit was pressed by members of the Omaha police force seeking a declaratory judgment ". . . declaring their rights, duties and liabilities under the pension provisions of the Omaha city charter . . . [and] . . . a declaration that a charter

[67] Munch v. Tusa, 140 Neb. 457, 300 N.W. 385 (1941).

[68] Id. at 468, 300 N.W. at 391.

[69] Axberg v. City of Lincoln, 141 Neb. 55, 2 N.W.2d 613 (1942).

[70] Id. at 58, 2 N.W.2d at 615.

amendment was unconstitutional and void . . ."[71] The plaintiff's argument again rested on the contention that pensions of policemen (as firemen) were subject to state rather than municipal acts. But Chief Justice Simmons and the majority of the court found for the city, holding that pension fund provisions might be amended and were determined by such charter provisions, as amended.[72] Both the *Munch* and the *Lickert* cases were bolstered by a 1945 opinion in which it was held that "The pension rights of firemen in the city of Omaha are declared to be presently determined from the home rule charter of the city and amendments thereto."[73] The *Axberg* case to the contrary notwithstanding, it is thus reasonable to assume that matters involving pensions of firemen and policemen in home rule cities may be considered of state-wide concern in substantive matters and of municipal concern in matters of form. Generally the same doctrine is found in *State ex rel. Fischer v. City of Lincoln*[74] where the dismissal of a fireman was upheld as against an allegedly controlling statute. According to the court the matter of dismissal was ". . . purely of local concern . . . [affecting] . . only indirectly or remotely . . . the people of the state outside the particular municipality. . . ."[75]

2. *The Educational Function*

By legislative act[76] the establishment and maintenance of a university was authorized for Omaha. Subsequently, the validity of this statute was attacked on the grounds that Omaha as a home rule city was exempt from such legislative interference into her allegedly local affairs. The courts, however, held that ". . . the schools in which are educated the children who are to become in time the directors of our political destinies are matters of state and not of strictly municipal concern. To have educated and intelligent men and women cannot be of strictly local concern. It concerns the whole state."[77] Bringing the reasoning in the decision to its logical conclusion, the court denied that a home rule city was exempted from the application of a public act touching upon matters of education.

[71] Lickert v. City of Omaha, 144 Neb. 75, 76, 12 N.W.2d 644, 645 (1944).

[72] Ibid.

[73] Sullivan v. City of Omaha, 146 Neb. 297, 19 N.W.2d 510 (1945). [headnote 8].

[74] State ex rel. Fischer v. City of Lincoln, 137 Neb. 97, 288 N.W. 499 (1939).

[75] Id. at 102, 288 N.W. at 502.

[76] Neb. Laws c. 200, p. 689 (1927).

[77] Carlberg v. Metcalfe, 120 Neb. 481, 488,234 N.W. 87, 91 (1930).

3. *Health and Sanitation*

A judicial horrible conjured up in the *Axberg* case apparently points toward a policy of state dominance in the field of health and sanitation. The evil foreseen in that case was a situation in which the state would be helpless to step in during emergency conditions where local authorities neglected or refused to act, if such matters as police, fire and health protection were allowed to be viewed as being of strictly municipal concern. The policy set forth in the *Axberg* decision was carried forward in *Michelson v. City of Grand Island*[78] where the power of the city to cut off a resident's water supply for non-payment of sewage charges was challenged. The question of the city's authority to compel payment in such a manner was upheld by the court—not upon the basis of power granted through the home rule charter, but upon statutory provisions enacted subsequent to the adoption of the charter. Though the statute offered two methods of enforcing payment, it did not include a discontinuance of water service.[79] However, the court held that the ". . . regulations adopted by the city ordinance . . . is [sic] not an unreasonable regulation and is permitted under . . ." the statute. [80]

4. *Streets and Parking Lots*

Until recently in Nebraska the municipal street function had been considered a matter of strictly local concern. For example, in 1929 it was held that:

> . . . . The matter of improving the streets, alleys and highways within the corporate limits of a municipality is one strictly of municipal concern and the municipal authorities in regard to such improvements are only required to act in conformity with the provisions of the charter under which such city has its legal existence, and under the charter of the city of Lincoln its municipal officers are authorized to pave and improve connecting as well as intersecting streets.[81]

In a conflict between Grand Island's charter and a general statute, the court resolved the dispute in like manner:

> The appellant appears to contend that the right to pave the streets of a home rule city . . . is derived from the general statutes of the state. Such is not the fact. As to matters purely local in character the Legislature is powerless to act. In the present case, the city of Grand Island did adopt the general statutory provisions then in ex-

[78] 154 Neb. 654, 48 N.W.2d 769 (1951).

[79] Neb. Rev. Stat. § 18-503 (Reissue 1954).

[80] 154 Neb. at 669, 48 N.W.2d at 777.

[81] Salsbury v. City of Lincoln, 117 Neb. 465, 468, 220 N.W. 827, 828 (1929).

> istence when it adopted its charter. *This is merely a coincidence* and does not change the fact that the origin of its powers was the Constitution and not the statute applicable to other than home rule cities.[82] (Emphasis added.)

The most recent decision in this field, however, marks a sharp reversal from the position expounded in the preceding statements. In 1956, when a challenge was made to the home rule city of Omaha's power to construct municipal off-street parking under authority of state statute, the Nebraska Supreme Court viewed the controls over city streets and parking facilities as one which the state legislature could delegate to cities as it sees fit.

> The state has inherent power to establish, maintain, and control the highways of the state, including those within corporate limits of municipalities. While the Legislature may properly delegate certain powers over streets, alleys, and highways to a municipality, it retains power to legislate with reference thereto, even in home rule cities, where a matter of state-wide policy and concern are involved.
>
> City streets are necessarily a part of the highway system of the state. The concentration of traffic in metropolitan cities through which traffic in and out of the city must move is a matter of general rather than strictly local concern.[83]

Thus it appears that municipal streets and parking facilities are matters of strictly municipal concern only so long as the legislature wills them to be so.

III. CONCLUSIONS

On the basis of the cases examined, one finds it impossible to believe that except with regard to functions of comparatively minor importance such as the assessment procedures of the local taxing process, the assessment of real estate for extension of water mains, and relatively unimportant procedural matters involving firemen's and policemen's pensions, municipal home rule charters in Nebraska are of value in fostering and maintaining local autonomy. In 1939 Mr. Justice Johnsen in *State ex rel. Fischer v. City of Lincoln*[84] asserted that liberal judicial construction encouraged municipalities in assuming the powers and responsibilities of self-government. "Recurrently . . ." he continued, ". . . we discover that democ-

[82] State ex rel. Martin v. Cuningham, 158 Neb. 708, 712, 64 N.W.2d 465, 467 (1954).

[83] Omaha Parking Authority v. City of Omaha, 163 Neb. 97, 105, 77 N.W.2d 862, 869 (1956).

[84] 137 Neb. 97, 288 N.W. 499.

racy is only the hearth-shadow of local self-government and try to preserve the crackle of its flame."[85] One dislikes initiation of a disagreement with such a distinguished jurist, but it is felt that now, for all practical intents and purposes, the law of municipal home rule in Nebraska is embalmed in Dillon's Rule instead of being enshrined in the state's constitution.

[85] Id. at 101, 288 N.W. at 501.