HOME RULE CHARTERS IN NEBRASKA

1. INTRODUCTION

The constitution of the State of Nebraska provides in part: "Any city having a population of more than five thousand (5,000) inhabitants may frame a charter for its own government, consistent with and subject to the constitution and laws of this state . . . which charter . . . shall . . . become the charter of said city, and supersede any existing charter and all amendments thereof." It is further stated that "(n)o charter or charter amendment adopted under the provisions of this amendment shall be amended or repealed except by electoral vote." This provision authorizes certain cities to adopt what is ordinarily called a "home rule charter." It may be helpful in understanding this concept to discuss at the outset the purpose and meaning of "home rule."

The use of "home rule," in the nebulous sense as a political symbol (synonymous with autonomy or freedom of a city from interference by the state legislature), is distinct from its usage as representative of a legal doctrine: "As a legal doctrine, by contrast, home rule does not describe the state or condition of local autonomy, but a particular method for distributing power between state and local governments . . . ." The "home rule charter" is simply the document describing and defining the adopted powers of a city. It can be analogized to a constitution (although as will be later discussed, there may be certain limitations on what powers may be permissibly exercised).

One authority in the area of municipal affairs has traced the motivating factors underlying the advent of home rule:

Home rule originated in the nineteenth century because state legislatures were predominately rural, because urban cities were opposed to state legislative action in drafting local charters. It was urged that municipal affairs be settled at city halls rather than in state capitol. State legislatures had exercised for decades the power to enact city charters, to change city charters without local consent and to write detailed spe-
cifications as to what powers a particular city might exercise. For developing American cities, this situation proved unworkable. Revolt, beginning with Missouri (1875), took the form of varied municipal home rule doctrines.5

Nebraska has, in addition to the state constitutional provision permitting the adoption of a home rule charter, enacted a system of “general law charters” applicable to certain classes of cities.6 Through this system, by an act of the legislature a municipality of a given size is granted certain powers to govern itself.7 Home rule charters, by contrast, may be drafted and adopted independently of the legislature, as the municipality obtains its power through the state constitution.8

6. A general law charter is one of four major systems by which power has been granted to municipalities: (1) Special Act Charters - special specific charters are developed, by the legislature, for individual cities: (2) General Law Charters - cities are placed in classes according to population, and municipal governments are created under a system of general laws which apply to all cities of a given class; (3) Optional Charters - municipalities are free to adopt one of several model charters: each model charter embodies a different form of government, e.g., weak mayor, strong mayor, commission, council, or manager; (4) Home Rule Charters - the municipality is granted authority to adopt and draft a charter of its own, and thus largely be freed from legislative control. Bromage, Home Rule as of Now, 53 National Civic Rev. 365-66 (1964).


The significant difference between a city operating under a charter prescribed by the Legislature and one operating under a home rule charter is that while the two charters are legislative, in the former instance the legislative body is the state Legislature whereas in the latter it is the voters of the organized community itself. The power to act in each instance is constitutional but the action taken under the power is legislative.
A major drawback to the general law system is that, unless the legislature otherwise so provides, the powers a municipality may exercise are defined, limited, and can be changed only by the state legislators; and, under what is known as "Dillon's Rule," any action beyond the limits of the power so granted is void. Dillon's Rule is expressed thusly:

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, that 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.19

One of the supposed major advantages of operating pursuant to a home rule charter is that Dillon's Rule should not apply, and the charter, if given a liberal interpretation, can serve as a broad and flexible source of power for the municipality. It has been stated that "the reversal of this doctrine (Dillon's Rule) was the distinctive contribution of home rule. At least with respect to what are usually termed matters of local or municipal concern, municipalities are, under a grant of home rule, empowered to exercise the initiative . . . ."11

It is important to note at this point that there are two basic concepts involved in an analysis of home rule charters. In one sense the question is whether a municipality can assume powers on its own initiative without the permission of the legislature. After a city has in fact assumed such powers, the inquiry becomes whether it has gone too far and intruded into an area reserved for the legislature (or is otherwise unconstitutional).

Stated otherwise:

Careful analysis requires, however, that the two functions of home rule be recognized as distinct. A decision as to whether certain matters ought to be within the initiative power of municipalities involves considerations quite different from a decision as to whether such matters ought to be beyond the competence of the legislature.12

The last sentence is clarified by a prior statement that: "[A] city operating under a home rule charter with regard to the matter of voting on amendments of its charter is a legislative body and operates legislatively . . . ." Id. at 86, 43 N.W.2d at 583-84.

12. Id. at 650.
Any analysis of a municipality's assertion of power should necessarily involve the following considerations: (1) Does the municipality in fact possess the power; (2) will the exercise of the power conflict with the state legislation; and (3) if a conflict exists, which body of lawmakers should prevail? (Of course, the exercise of power must also be permitted by both state and federal constitutions.)

This article will first discuss the judicial construction given to home rule charters adopted in Nebraska in the context of initiative powers of a city, and subsequently analyze the area of conflicts between charter provisions and state enactments, with particular emphasis placed on the conflict created by the annexation statutes and home rule charters. In both areas the Nebraska supreme court has consistently taken an approach which significantly limits the powers a municipality may permissibly exercise.

II. THE HOME RULE CHARTER IN NEBRASKA: GRANT OR LIMITATION

A review of Nebraska case law discloses that three cities in Nebraska have adopted a home rule charter: Lincoln in 1918, Omaha in 1922, and Grand Island in 1928.

The first important (and now landmark) case interpreting a home rule charter in Nebraska was Consumer Coal Co. v. Lincoln. The subject matter of the Consumer Coal Co. case was relatively insignificant. The city council had passed an ordinance which would have established a municipal coal and wood yard to sell these products at retail to the public. The plaintiffs brought the action to enjoin the city from engaging in the retail fuel business. The plaintiffs claimed the city had no authority to do so, and thus the ordinance was ultra vires.

The charter of Lincoln did not specifically provide authority to create such a retail establishment, and no emergency existed which would have justified the operation of the establishment pursuant to the general welfare section of the charter. The opinion does not disclose why the yard was established, but presumably it was for revenue purposes. The argument of the city was basically that the

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15. Falldorf v. Grand Island, 138 Neb. 212, 292 N.W. 298 (1940). Millard had initiated procedures to adopt a home rule charter when it was annexed by Omaha. The story of the Millard charter will be discussed later.
17. Id. at 53, 189 N.W. at 644.
18. Id. at 70, 189 N.W. at 652.
home rule charter adopted by the electorate of Lincoln was a limitation of power, and thus no express authorization was needed. The Supreme Court of Nebraska did not agree. Noting that a charter is "aptly termed the Constitution of the city . . . and Constitutions may be either grants or limitations," the court determined that whether the charter was a limitation or a grant depended upon its construction as a whole. The home rule charter adopted by the city was a nearly verbatim adoption of the general law charter which had governed Lincoln, and that was conceded by the city to be a grant of power. The city contended that the fact that the home rule charter rested on constitutional authority created a fundamental difference; however, the court was not persuaded:

(The charter) lays down with meticulous particularity what powers the council shall have . . . . The logical inference from the plain reading of this charter is that the electorate were unwilling to grant unlimited power to the council, but intended it to exercise only the powers granted and such powers as are therefrom necessarily implied.

The court then concluded:

(The) charter of the city of Lincoln falls within that class of 'Constitutions' which are to be construed as grants rather than limitations of power . . . . and . . . the principles stated in 7 McQuillin, Municipal Corporations (Supp.) sec. 352 . . . are as applicable to a charter adopted by the people in the form of the Lincoln charter as one granted by legislative act, to wit:

'A municipal corporation, therefore, possesses no powers or faculties not conferred upon it, either expressly or by fair implication, by the law which created it, or by other laws, constitutional or statutory, applicable to it. It is a creature of the law established for special purposes and its corporate acts must be authorized by its charter, or other laws applicable thereto. Every investigation, therefore, relating to its powers must be conducted from the standpoint of such laws. Wherefore the usual formula, invariably supported by judicial utterances and judgments, in substance, is: That a mu-

19. Id. at 61, 189 N.W. at 647-48. Under a limitation of powers charter the city could exercise any power except as restrained by a provision of the charter. Under a grant of power the city would necessarily have to look to specific provisions which authorized the act. Thus, under a limitation of power charter more freedom to legislate would exist. See also Standard Oil Co. v. Lincoln, 114 Neb. 243, 248, 207 N.W. 172, 174 (1926), aff'd per curiam, 275 U.S. 504 (1927), and Bromage, Home Rule-NML Model, 44 National Municipal Review 132 (1955).
20. 109 Neb. 64, 189 N.W. 648.
21. Id. at 67, 189 N.W. at 649.
22. Id. at 55, 189 N.W. at 645.
23. Id. at 61, 189 N.W. at 647.
24. Id.
25. Id. at 68-69, 189 N.W. at 649-650.
municipal corporation possesses and can exercise these powers only: (1) Those granted in express terms; (2) those necessarily or fairly implied in, or incident to, the powers expressly granted; and (3) those essential to the declared objects and purposes of the municipality, not merely convenient, but indispensable.

The court held that no authority was conferred either expressly or by necessary implication to establish a municipal fuel yard.

Thus, Dillon's Rule still applied, and under this rather strict construction of the home rule charter the initiative power of Lincoln was curtailed. Yet, the court left open the question of whether a home rule charter could be drafted and adopted in such form that much broader powers could be assumed. The court explicitly stated:

No doubt it was within the competency of the electorate of the city of Lincoln to adopt a charter which under settled principles of construction would be a limitation as distinguished from a grant of power....

In subsequent cases both the charters of Omaha and Grand Island were summarily characterized as grants of power. In neither case, however, did the court analyze the structure or content of the charter in question, but rather mechanically applied the Consumer Coal Co. conclusion. It appears that both cities also adopted the general law charter (applying to cities of their respective class) as their home rule charter, so that the result would most likely have been the same in any event.

In 1956 Omaha adopted a new home rule charter. In Philson v. Omaha the Nebraska supreme court, again absent any analysis of form and content, held that the new charter was a grant and not a limitation of power. Since the opinion does not mention the existence of a new charter, and since the court cited a case decided prior to 1956 as conclusive authority for its determination, it appears

26. Id. at 69-70, 189 N.W. at 650 [emphasis added].
27. Id. at 86, 189 N.W. at 649. See also Standard Oil Co. v. Lincoln, 114 Neb. 243, 248, 207 N.W. 172, 174 (1926).
28. Wagner v. Omaha, 156 Neb. 163, 55 N.W.2d 490 (1952); Hanson v. Omaha, 157 Neb. 403, 59 N.W.2d 622 (1953).
30. Id. at 215, 292 N.W. at 601. In Hanson the court, instead of citing the home rule charter, cited provisions of the general law charter stating: "Strictly speaking, such sections of the statute are not applicable to the city as such, but as provisions of the home rule charter." 157 Neb. at 405, 59 N.W.2d at 624.
33. To support this holding the court cited Manners v. Wahoo, 153 Neb. 437, 45 N.W.2d 113 (1950), which does not deal with a home rule charter adopted pursuant to the Nebraska constitution. It also cited Wagner v. Omaha, 156 Neb. 163, 55 N.W.2d 490 (1952), which was decided prior to the adoption of the 1956 charter. 167 Neb. at 363, 93 N.W.2d at 15.
very possible that the court was not even aware that the charter was newly adopted. However, Philson has been subsequently cited as authority for the proposition that the new Omaha charter is a grant of power.\textsuperscript{34}

It is not clear whether the approach taken in these cases reflects a lack of understanding of the rationale of the Consumer Goal Co. case (which certainly left open the possibility that a charter could be worded so as to be a limitation), or a judicial attitude that the powers of the cities should be strictly construed and restricted. If the latter is true, perhaps the court has no inclination to explore the form and content beyond a cursory examination. A major drawback of the method employed by the court is obvious: If a city desires to adopt a charter in the form of a limitation, it does not have any recent guidelines concerning how such a charter should be drafted.

III. CONFLICTS BETWEEN THE HOME RULE CHARTER AND STATE STATUTES

Perhaps the most unmistakable indication that a home rule charter does not render a city totally independent of the legislature is the constitutional provision which requires the charter to be "consistent with and subject to the constitution and laws of this state . . ."\textsuperscript{35} On the other hand, home rule charters would be rendered nugatory if this provision were construed to mean that cities with such charters could never act unless their ordinances were consistent with state legislation dealing with the same subject matter. The problem which has faced the courts, in cases wherein there exists a conflict between the content of an enactment by the legislature and one by a home rule charter city, is deciding which rule making body the Nebraska Constitution intended to prevail.

To solve the problem, the supreme court has looked to the object of the conflicting enactments. If the object is one which has importance on a state-wide level, the legislature has the primary power to cope with the issue and any law made by the municipality opposed to such state statute cannot be enforced. The result is contrary if the competing enactments are aimed at a situation which is local in nature:

Where the legislature has enacted a law affecting municipal affairs, but which is also of a state concern, the law takes precedence over any municipal action taken under the home rule charter. But when the legislative act deals with a strictly local municipal concern, it can have no application to a city which

\textsuperscript{34} Midwest Employers Council, Inc. v. Omaha, 177 Neb. 877, 884, 131 N.W.2d 609, 614 (1964).

\textsuperscript{35} NEB. CONSTR. art.XI, 2.
has adopted a home rule charter. Whether or not an act of the legislature pertains to a local or state-wide concern becomes a question for the courts when a conflict of authority arises.36

The difficulty which the court has encountered is that, while it is easy to say the decisions are based upon the state-wide or local nature of the enactment, in any given situation elements to support either position exist. Seldom is the court confronted with a case wherein all or even a clear majority of the characteristics clearly dictate the final outcome. Matters which are purely local or purely statewide are something rare.

Axberg v. Lincoln37 is a good case with which to illustrate this dilemma. Axberg concerned competing enactments dealing with firemen's pensions,38 and the majority of the court found that this matter was significant to the entire state:

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 abolishment 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. . . . (P)revention of fire may be ineffective without unified effort reaching into urban, suburban and rural sections. . . .39

The then Chief Judge was not convinced and filed a dissenting opinion:

If the reasoning of the majority is to be followed, then al-

37. Id.
38. Among the cases from outside Nebraska which the court in Axberg cited for the proposition that control of fire department personnel was a matter of statewide concern were Cincinnati v. Gamble, 138 Ohio St. 220, 34 N.E.2d 226 (1941); Van Gilder v. Madison, 222 Wis. 58, 267 N.W. 25 (1936); Luhrs v. Phoenix, 52 Ariz. 438, 83 P.2d 283 (1938); State ex rel. Reynolds v. Jost, 265 Mo. 51, 175 S.W. 591 (1915); People ex rel. Moshier v. Springfield, 370 Ill. 541, 19 N.E.2d 598 (1939). The appellant city made the contention that Pasadena v. Charleville, 215 Cal. 384, 10 P.2d 745 (1932) and Murphy v. Piedmont, 17 Cal. App. 2d 569, 62 P.2d 614 (1936) were persuasive authority for the proposition that maintenance of a fire department was of local interest only. The court found that the latter two cases were of no bearing whatsoever inasmuch as the California constitutional provision dealing with municipal powers was so different from the Nebraska provision that the holdings of California courts on the subject could have no application. The court in Axberg did recognize, however, that in Wewoka v. Rodman, 172 Okla. 630, 46 P.2d 334 (1935), the Supreme Court of Oklahoma found that the control of a freeholder charter city over the personnel of its fire department is solely a matter of municipal concern, hence not subject to legislative control. The Oklahoma court supported its assertion by citing State ex rel. Short v. Callahan, 96 Okla. 276, 221 P. 718 (1923), Klench v. Board of Pension Fund Comm'rs of Stockton, 79 Cal. App. 171, 249 P. 46 (1926), Lexington v. Thompson, 113 Ky. 540, 68 S.W. 477 (1902), and Davidson v. Hine, 151 Mich. 294, 115 N.W. 246 (1908).
39. 141 Neb. at 59, 2 N.W.2d at 615.
most any governmental action taken by a home rule city may be brought within the classification of 'The preservation of order, the enforcement of law, the protection of life and property, and the suppression of crime' and declared to be a matter of state concern. To do so is to weaken, if not to destroy, the advantage of the home rule provision of our Constitution.40

When a distinction is as difficult to define as that between a local and statewide concern, it is to be expected that there will be disagreement.

This article will not attempt to announce a rule or test which will provide means for making the determination; indeed, it is doubtful that the difference between local and statewide interests is subject to an accurate definition:

The Constitution does not define which laws relate to matters of strictly municipal concern and which to state affairs. There is no sure test which will enable us to distinguish between matters of strictly municipal concern and those of state concern. The court must consider each case as it arises and draw the line of demarcation.41

An attempt will be made to discuss a number of situations in which the Nebraska court has confronted the problem, in the hope that analysis of this sort will enable prediction of the course the court will take in a given case.

Before commencing on a study of the Nebraska cases, it might be helpful to note that conflicts between state statutes and municipal ordinances can arise in a variety of postures.42 This is important because a difference in the posture of the conflict may well result in a difference in the judicial treatment. Various situations have existed in Nebraska cases: (a) The state statute and the city charter may be in direct opposition, and the adoption of one requires the abolishment of the other;43 (b) the state legislation may have occupied the field and pre-empted any city ordinance, even though the two acts could be harmonized;44 (c) the mandates of both the statute

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40. 141 Neb. at 66, 2 N.W.2d at 618. Compare the decision in State ex rel. Martin v. Cunningham, 158 Neb. 708, 64 N.W.2d 465 (1954), with that in Omaha Parking Authority v. Omaha, 163 Neb. 97, 77 N.W.2d 862 (1956).
43. For example, in Eppley Hotels Co. v. Lincoln, 133 Neb. 550, 276 N.W. 196 (1937), cert. denied, 304 U.S. 576 (1938), the statute prohibited a city of the population size of Lincoln from levying more than $365,000 a year on all taxable property. The city charter raised the amount to $800,000. The court held that the city charter limit prevailed because city taxes used strictly for city purposes are of strictly municipal concern.
44. In this situation there is no conflict as such, and even consistent legislation by the city would be invalid. Midwest Employees Council, Inc. v. Omaha, 177 Neb.
and the ordinance cannot, for all practical purposes, be reconciled (even though it might be theoretically possible to do so); 45 (d) the city ordinance interferes with a plan or scheme established by state statute but is not repugnant to it, and the state has not pre-empted the field; 46 (e) the city ordinance prohibits what the state permits; 47

877, 131 N.W.2d 609 (1964) illustrates this principle. Omaha had passed an ordinance designed to eliminate discrimination in labor affairs.

After a general review of Nebraska statutes dealing with labor, the court further concluded that "the state by its Legislature has extensively entered the field of labor." 177 Neb. at 886, 131 N.W.2d at 615. The result was that, even though the legislature had refused on the occasion to pass fair employment legislation, the court found that the state had preempted the field, and therefore, despite the fact that there was an absence of precisely conflicting legislation the city ordinance should fall.

The court indicated that only if the legislature had given to the city the authority to legislate with regard to these matters could the city's conduct be upheld. There had been no such delegation.

Omaha, when its charter was adopted in 1956, never acquired any power delegated to it by the Legislature to pass an ordinance relating to fair employment practices or civil rights. 48


46. State v. Johnson, 175 Neb. 498, 122 N.W.2d 240 (1963), represents a case of this nature. The home rule charter permitted bonds for sewer construction to be issued if a majority of the voters approved, while the state statute required more than 60% of the vote. Since the city ordinance would have provided easier financing and presumably better sanitation conditions, the city ordinance cannot be said to be clearly repugnant to the state ordinance, but it would have created inconsistencies.

47. In Bodkin v. State, 132 Neb. 535, 272 N.W. 547 (1937), the City of Lincoln passed stricter regulations in the field of intoxicating liquors than was provided for by statute. Lincoln had made it unlawful to sell to minors, whereas the state statute made it unlawful only if the sale was made with the knowledge that it was to minors.

The court recognized that Lincoln had a home rule charter adopted pursuant to the constitution, and declared that "[t]he 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." 132 Neb. at 537, 272 N.W. at 548. The court concluded that although the provisions were different, they were not contradictory. It found that the differing provisions could co-exist because the ordinance was not inconsistent with the state enactment.

Yet in Arrow Club, Inc. v. Nebraska Liquor Control Comm'n, 177 Neb. 686, 131 N.W.2d 134 (1964), dealing with the same general subject matter, the court significantly limited the ability of the city to enact stricter requirements. An ordinance had placed restrictions on bottle clubs which were not contained in the legislative enactment.

The municipal law had prohibited Sunday operations and required the clubs to be formally organized with a membership list filed with the city. The state enactment permitted Sunday operation and did not require the bottle club to be formally organized with a membership list.

The analogy to the earlier liquor case lies in the fact that both city ordinances were stricter than the law passed by the legislature and prohibited activity which the state did not. But in the latter case, the municipal law was found to be inconsistent with the statute and it was therefore held to be void.

Apparently the distinction lies in that the state enactment in the later case expressly permitted Sunday operation and expressly negated the need for a formal club, whereas in the earlier case the statute did not expressly state that a sale to a minor was lawful if it was made without knowledge that the sale was to a minor. This appears to be a distinction without merit, as the statute in the earlier case included
(f) the city attempts to tax activity regulated by the state;\(^48\) (g) the statute and charter are at odds under one interpretation, but can be harmonized.\(^49\)

But even considering the fact that the posture of the conflict can be a critical factor, an inspection of Nebraska case law reveals an inclination on the part of the supreme court to find a statewide interest. Statements by the court can be found to the effect that "(a)s to all subjects of strictly local municipal concern such charter cities operate free and independent of state legislation,"\(^50\) and that "(t)he purpose of the constitutional provision is to render cities independent of state legislation as to all subjects which are of strictly municipal concern; therefore, as to such matters general laws applicable to cities yield to the charter."\(^51\) It has been announced that "(i)t is the well-established law of this state that, in matters of strictly municipal concern, cities which have adopted a 'home rule' charter . . . are not subject to state legislation."\(^52\) It has been, however, very seldom that these precepts have been given more than vocal respect. In the majority of cases the state enactments have prevailed. Paving improvements\(^53\) and the amount of the tax levy on property within the municipal boundaries are among the few which have been held to be of purely local concern.\(^54\) The construction of

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\(^{49}\) State ex rel. Omaha v. Lynch, 181 Neb. 810, 151 N.W.2d 278 (1967), represents a case where the court solved the conflict by construing two apparently conflicting acts. The case involved a conflict between two political subdivisions, the City of Omaha and Douglas County. The Omaha charter granted the city council authority to certify a tax levy for the fiscal year, but the state statute authorized the county board of equalization to actually make the levy of taxes. The city council certified a levy of 22 mills. The county board of equalization reduced the city's levy to 18.71 mills. An action was brought by the city for a writ of mandamus to require the board to levy the 22 mill tax certified by the city. The Nebraska supreme court granted the writ, and in so doing harmonized the two conflicting provisions by holding that the county board was only granted ministerial duties by the statute in question, and had no legislative power to lower such a levy.

\(^{50}\) Niklaus v. Miller, 159 Neb. 301, 308, 66 N.W.2d 824, 829 (1954).

\(^{51}\) Consumer Coal Co. v. Lincoln, 109 Neb. 51, 189 N.W. 643 (1922).

\(^{52}\) Carlberg v. Metcalfe, 120 Neb. 481, 484, 234 N.W. 87, 89 (1930).

\(^{53}\) State ex rel. Martin v. Cunningham, 158 Neb. 708, 711, 64 N.W.2d 465, 467 (1954). In Martin the court held "the assessment of special benefits to pay for paving improvements within a city is strictly a municipal matter." Id. at 710-11, 64 N.W.2d at 466. The court stated that it failed "to see where the state is generally concerned in the making of purely local paving improvements . . . It is a matter . . . which involves no matter of safety, health, policy, or other protection of the citizens of the state which must be deemed to generally concern all the people of the state." Id. at 711, 64 N.W.2d at 467.

water mains and reservoirs have also been held to be within the legislative jurisdiction of the city. On the other hand, there are a variety of items which have been held to involve the entire state. Parking facilities, labor relations and practices, sewers, and liquor operations have all been included in the latter category. Also found to be of statewide concern are eminent domain, taxation of public corporations, condemnation, and education. That the factual setting of the case might be physically located within city limits has not prevented the court from ruling that the predominant aspects were exterior to the municipal boundaries.

_Millard v. Omaha_ is a recent case dealing with the conflicts problem. The factual setting involved in _Millard_ is not complicated. Omaha, pursuant to a state statute regulating annexation, took final action to annex the City of Millard. At the time, Millard was in the process of adopting a home rule charter. The district court ruled

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57. Omaha Parking Authority v. Omaha, 163 Neb. 97, 105, 77 N.W.2d 862, 869 (1956). The court held that the construction of parking facilities in Omaha was a matter of statewide concern:

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. The state is concerned when traffic in a large city becomes congested and interferes with traffic, particularly that which is designated as through traffic. It is of state-wide concern that traffic lanes through congested areas be kept open and that such areas be not permitted to operate as a bottleneck in the free movement of traffic.

58. Midwest Employer’s Council, Inc. v. Omaha, 177 Neb. 877, 888, 131 N.W.2d 609, 616 (1964). The court held that “the power relating to labor relations and practices, and civil rights, lies in the state, and such matters are of statewide concern and not of local concern nor municipal government concern.”
60. Arrow Club, Inc. v. Nebraska Liquor Control Comm’n, 177 Neb. 686, 694, 131 N.W.2d 134, 139 (1964). With regards to the ordinance, the court stated:

The effect . . . is to prohibit the dispensing of liquor on Sunday . . . while the statute permits that to be done. The effect of (the municipal law) is to prohibit the operation of a bottle club by a licensee who has complied with the requirements of the statute . . . . _Id._
66. 185 Neb. at 619, 177 N.W.2d at 577. Although Omaha had adopted a home rule charter it was not precluded from exercising power pursuant to a state statute. Carlberg v. Metcalfe, 120 Neb. 481, 234 N.W. 87 (1930), held that a home rule city could act as a political subdivision of the state in a matter of state concern when expressly authorized to do so by statute.
67. 185 Neb. at 618, 177 N.W.2d at 577.
that the annexation was valid and Millard appealed.

The Supreme Court of Nebraska found relevant the fact that annexation was a matter of state-wide concern. There was no impairment of Millard's home rule charter because this was not a strictly municipal affair. It noted the constitutional provision that charters are required to be "consistent with and subject to the . . . laws of this state . . . ." The legislature, acting through the City of Omaha, could provide for the annexation of a home rule charter city because the subject matter of the legislation was not limited to the local interest of either the disappearing or the surviving municipalities.

The determination by the city of Omaha to annex or not to annex outlying property is a purely municipal concern, but this is not true of the annexation process which necessarily affects property outside the municipality and persons who are not inhabitants of the city. The protection of such persons and property is a matter of state concern and in fullfillment of its duties in this respect, the state must fix the rules and regulations pertaining to annexation procedures. A weakness in the Millard opinion is that while it acknowledges the existence of one conflict between state and local interests, it fails to recognize another. The conflict which the court discusses is that pertaining to the existence or non-existence of the city. The state interest which the court found was, as indicated by the preceding quote, in the proceedings which would terminate the Millard corporate entity. The court felt the significant item was that ""the life of the city is not guaranteed"" and ""the dissolution of the corporation is a matter of state, as distinguished from purely local municipal, interest."" The conclusion was justified because the process ""necessarily affects property outside the municipality and persons who are not inhabitants of the city."" The entire state was found to have an interest.

Before discussing the conflicts problem which the court ignored, it should be indicated that there is an insufficiency in the analysis which the court did make. The defect is in the authority cited to support the Millard decision. Burger v. Beatrice neither involved a home rule city nor dissolution of a municipality. Whether it has any application to the proposition for which it was cited is indeed questionable.

But the real problem with the conflicts discussion in Millard is

68. Id. at 618, 177 N.W.2d at 578.
69. Id. at 621, 177 N.W.2d at 579 (emphasis added).
70. Id.
71. Id.
72. Id.
73. 181 Neb. 213, 147 N.W.2d 784 (1967).
that no consideration was given to the legislative interference with municipal affairs which was the necessary result of the dissolution. Millard's home rule charter would naturally embrace certain matters of strictly local concern, e.g., street paving assessments, and to render the charter "nugatory" was seemingly a definite encroachment on municipal affairs. Thus, the disposal of the conflict interests which related to the dissolution process did not resolve the infringement upon Millard's ability to control those matters which were purely local.

The annexation proceedings, by necessity, intruded into all matters which were entrusted by the constitution to the Millard government. This intrusion, on the basis of previous holdings, could not have been accomplished directly. For example, had the legislature enacted a statute which conflicted with paving assessments of streets, it would have presumably been struck down. It would seem to follow that, as a corollary of this principle, what could not be accomplished directly could not be accomplished indirectly.

Perhaps the court saw fit to ignore this aspect of the conflicts problem because it felt that it was not at issue. The court may have reasoned that after the annexation the citizens of Millard were just as much in control of their local affairs as before. It is true that after the annexation the residents of what was formerly Millard were still under the governance of a home rule charter city. Perhaps this fact was sufficient to repel any argument that the people no longer had the power of self-direction.

In the resolution of conflicts between legislative enactments and the laws of home rule municipalities, Millard is quite unique. The principle of municipal independence in strictly local municipal affairs had not been previously applied to such a factual setting in Nebraska. Case law from other jurisdictions has offered little in the way of analogous situations. That principle has been ordinarily employed in the situation where the case deals only with one subject, and the issue is simply whether that subject is one of statewide concern or one of strictly local municipal interest. In the ordinary situation the terms are mutually exclusive. For example, eminent domain has been held to be of statewide concern. It cannot also be of strictly local interest because to so hold is to say that there is no statewide concern. It may be that the eminent domain proceedings

74. State ex rel. Martin v. Cunningham, 158 Neb. 708, 64 N.W.2d 465 (1954), held that the funding of paving improvements was a strictly municipal matter and that the charter provision prevailed over a conflicting state legislative statute.
75. Id.
76. MaCallen Co. v. Massachusetts, 279 U.S. 620, 630 (1929); Fairbank v. United States 181 U.S. 283, 300 (1901).
occur within the municipalities’ boundaries, but this does not mean that eminent domain is of strictly local municipal concern. It simply means that a matter of statewide concern also operates within the boundaries of a municipality. Eminent domain is typical in that it has some local concern, but is not strictly of municipal interest.

The unique characteristic of annexation is that the statute controls subjects within a municipality which are simultaneously of strictly local municipal concern and of statewide interest. That is, the annexation of a home rule city necessarily extends to matters in which there is no statewide interest per se, but which must be affected to permit the desired annexation which may well have statewide ramifications, and therefore be appropriate for state legislation.

The principle evolved by Millard would be most accurately stated to be that where a state statute by necessity controls subjects of strictly local municipal affairs, the home rule charter must yield in any respect required to effectuate the statute, providing that there is a simultaneous statewide concern. While it may be true that this is but an indirect method of controlling strictly local municipal affairs, it is not at all clear that the simultaneous existence of statewide and purely local interests can occur in a setting that does not involve annexation. It cannot be doubted, however, that in a situation with facts similar to Millard, there is no area in which a municipality is guaranteed complete freedom from the legislature.

In addition to being the basis for the traditional approach taken by the Nebraska court in dealing with statutory interference with home rule charters, the constitutional provision which authorizes such charters is the source of another attack directed at the annexation of a home rule city. The traditional approach has been, as was discussed above, to determine whether the subject matter of the conflict was of local or statewide concern. The other problem created by the same constitutional provision was, although given brief attention in Millard, discussed at length in a 1925 Texas case, Houston v. Magnolia Park.79

In Magnolia Park the Commission of Appeals of Texas was petitioned to rule on precisely the same facts as existed in Millard. The constitutional provision was in part similar to the Nebraska version

79. 115 Tex. 101, 276 S.W. 685 (1925).
80. Id. at 103, 276 S.W. at 687, the opinion set forth the provision of Texas constitution then applicable:
But on November 5, 1912, section 5 of article 11 of our Constitution was amended so as to read as follows:
"Cities having more than five thousand (5,000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that pur-
and one home rule city had annexed the other pursuant to the statute. The Texas court held that the annexation contravened the constitutional right of the annexed city to adopt a home rule charter. The court characterized the concept of home rule in Texas as follows:

The people of Texas have written into the fundamental law the provision that, where a city has more than 5,000 inhabitants, it has a right to govern itself.

... It was the purpose of the people to bestow upon the cities coming under the Home Rule Amendment 'full power of local self-government.'

... This statute is but an indirect method of taking away from cities of more than 5,000 people their right to enjoy the privileges of the Home Rule Amendment. Such indirect methods cannot be upheld.

The Magnolia Park court stressed that if the state constitution granted to 5,000 people the right to self determination, the legislature was powerless to interfere with that right. This theory was among those presented by Millard in the Nebraska case with the hope that it would invalidate the annexation. Millard asserted that once the effect of the annexation was to repeal the charter, the proceedings were invalid.

The Nebraska court summarily dismissed this argument. It reasoned that the constitutional provision that "(n)o charter . . . shall be . . . repealed except by electoral vote" was intended to apply only as a restriction on the city and not on the legislature.

It is evident that on adoption of a home rule charter, the inhabitants of the city may amend or repeal it only by electoral...
vote. This does not mean that it may not be rendered nugatory by the exercise of state law... 

Thus, the requirement for an electoral vote was applicable only on the municipal level as a restriction on the city council. There was no such limitation on the state lawmakers.

Municipal corporations are legislative creations and as such, subject to dissolution by legislative action.... The adoption of a home rule charter does not alter or diminish this basic power of control vested in the Legislature....

The court continued by distinguishing repeal of a charter and dissolution of the municipal corporation.

The amendment or repeal of a city charter is a municipal matter and can constitutionally be accomplished only by electoral vote of the inhabitants. The dissolution of the corporation is a matter of state, as distinguished from purely local municipal, interest.

Thus, it can be seen that the opinions of the Nebraska and the Texas courts are directly at odds on this issue. While the Texas court followed the literal view, the Nebraska court was more lenient, asserting that in adopting the constitutional provision the people did not intend the right to a home rule charter should be inviolable in all cases. The Texas decision has the virtue of being based on a literal translation of a legal document. The Nebraska opinion apparently justified its departure from the exact words of the constitution by reasoning that the practical exigencies of the situation outweighed the letter of the law.

On closing it should be noted that there are other issues relating to both state and federal constitutions which must be resolved when one home rule city annexes another. It can be theorized that the due process and contract clause have been violated. There are

85. 185 Neb. at 619, 177 N.W.2d at 578 (emphasis added).
86. Id. at 621, 177 N.W.2d at 579.
87. Id. [emphasis added].
88. One of Omaha's witnesses, an expert in annexation, testified that "ringing and strangling a central metropolitan city are a most serious obstacle to urban growth." Brief of Appellees at 20-21, Millard v. Omaha, 185 Neb. 617, 177 N.W.2d 576 (1970).
89. The court disposed of any federal contract clause and due process arguments by citing Hunter v. Pittsburgh, 207 U.S. 161 (1907), which provided in part: "Municipal corporations are political subdivisions of the State [and] ... their charters (do not) ... constitute a contract with the State within the meaning of the Federal Constitution. The State, therefore ... may ... repeal the charter ... with or without the consent of the citizens ...." Id. at 178-79. This opinion has been limited by subsequent cases, but there are several cases which would support a holding that a city per se has no protection under either the equal protection or due process clause of the fourteenth amendment.

Trenton v. New Jersey, 262 U.S. 182, 187 (1923), provides "(i)n the absence of state
equal protection arguments that will either support or invalidate the annexation. However, anything beyond this brief mention of these aspects is beyond the scope of this article.

IV. SUMMARY AND OPINION

Home rule in Nebraska has been significantly limited by decisional law in several respects. The holding that home rule charters are grants and not limitations of power has placed restrictions on the ability of a municipality to function in a broad area, because any acts not expressly authorized may well be beyond the competence of the municipalities' permissible authority. Also, the strictly local concern or statewide interest approach to resolving conflicts between municipalities and the state legislature favors the latter. Nearly any subject can be classified as of statewide concern because of

constitutional provisions . . . municipalities have no inherent right of self government which is beyond the legislative control of the state," and Newark v. New Jersey, 262 U.S. 192, 196 (1923), provided: "The City cannot invoke the protection of the Fourteenth Amendment against the State." Mr. Justice Cardozo in Williams v. Mayor, 289 U.S. 36, 40 (1933), stated: "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator."

However, it is too broad a statement to construe a state's power over municipalities as absolute regardless of other consequences. Gomillion v. Lightfoot, 364 U.S. 339 (1960), struck down a boundary change, ordered by the state, on the basis of the fifteenth amendment and noted that creditors of a municipality are also provided constitutional safeguards.

In Millard the Nebraska court was of the opinion that all cities must be equally susceptible to annexation or else there is discrimination that is constitutionally forbidden.

To hold that the life of a city of the first class without a home rule charter may be terminated by annexation, but that one having a home rule charter could not be so dissolved would violate Article III, section 18, of the Constitution of Nebraska, forbidding local or special legislation and the Fourteenth Amendment to the Constitution of the United States which provides in part: 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

185 Neb. at 621-22, 177 N.W.2d at 579.

On the other hand, the Texas court in Magnolia Park asserted that a statute which permitted one home rule city to annex another would violate the annexed city's right to equal protection. We do feel that the courts should be slow to deprive one home rule city of its rights in favor of another home rule city. They are supposed to be of equal dignity. At any rate, they are equal under the provisions of our Constitution. The statutes cannot make them otherwise. 276 S.W. at 689.

The Millard court seemed to recognize this problem but rejected it. As pointed out, the annexation laws deal on an equal basis with first class cities whether or not they have home rule charters and the laws controlling the annexation of one city by another are simply an exercise of the plenary powers vested in the Legislature over municipal corporations. 185 Neb. at 622, 177 N.W.2d at 579-80.
the indirect consequences that result from any act within a municipality. A municipality can expect that almost any act may have to be resolved by litigation if a conflict occurs. Since conflicts can occur in a variety of situations, a municipality cannot be confident that it is operating in a proper area until the court has spoken. This could conceivably act as a curb on initiative actions and create an attitude in municipal government that it would be prudent to defer to the state legislature. The holding that a home rule city can be annexed by another home rule city, without consent of the voters, at least reduces incentive for many municipalities to adopt a home rule charter where the possibility of being annexed exists. The charter will not necessarily guarantee independence or freedom from interference from the state legislature. In short, the trend of the judiciary has been to curtail the powers of municipalities and to shift a significant degree of control back to the legislature. If the trend continues, home rule may be reduced to a situation whereby a municipality operates independently only by the grace of the legislature.

This comment does not pass any judgment on whether the trend taken by the court has been wise or unwise, proper or improper, in terms of governmental efficiency. One method of government may well be as adequate as another to accomplish beneficial results within urban areas. It has been the aim, however, to provide some insight into the dynamics of home rule in Nebraska as that concept has been developed and shaped by and through court decisions. Value judgments on the trend of the developments must be left to those with expertise in the practical aspects of municipal government.

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