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Pulling the Lilly from the Pond? Minneapolis Wades into Domestic Partner Benefits Legislation Once Again

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**COMMENT: PULLING THE *LILLY* FROM THE POND?
MINNEAPOLIS WADES INTO DOMESTIC PARTNER
BENEFITS LEGISLATION ONCE AGAIN**

Chad Bayse[†]

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I. INTRODUCTION

Minnesota law prohibits the city of Minneapolis from extending employment benefits to the domestic partners of city workers.¹ Nevertheless, on December 13, 2002 the Minneapolis City Council approved by an 8-4 vote a measure requiring large contractors with the city to provide benefits to their employees' domestic partners.² As a result, Minneapolis now requires city contractors to provide benefits that the city itself cannot legally provide.³ The question is, does a Minnesota city have the authority under state law⁴ to mandate that contracting employers provide

1. David Hawley, *Minneapolis Approves Domestic Partner Provision*, ST. PAUL PIONEER PRESS, Dec. 14, 2002, at 5B, available at 2002 WL 104725048.

2. See Rochelle Olson, *Minneapolis City Council; Rule on Domestic Partner Benefits OK'd; Many Firms That Have Contracts with the City of Minneapolis Will Have to Comply*, MINNEAPOLIS STAR TRIB., Dec. 14, 2002, at 2B, available at 2002 WL 5388600.

3. *Id.*

4. Although intriguing federal issues are raised by the Minneapolis domestic partner-city contractor ordinance, this comment does not address them. For the purposes of this comment, it suffices to observe that the ordinance raises issues as to whether it is preempted by the federal Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.*, or violates the dormant Commerce Clause of the U.S. Constitution, U.S. CONST. art. III, § 2, cl. 1. Both issues have been litigated extensively in California. See *S.D. Meyers, Inc. v. San Francisco*, 336 F.3d 1174, 1180 (9th Cir. 2003) (upholding San Francisco's domestic partner-city contractor ordinance on the grounds that it does not conflict with the state's domestic partner benefits registration statute); *Air Transp. Ass'n of Am. v. San Francisco*, 266 F.3d 1064 (9th Cir. 2001); *S.D. Meyers, Inc. v. San Francisco*, 253 F.3d 461, 470-71, 474 (9th Cir. 2001) (holding San Francisco's domestic partner-city contractor ordinance did not directly violate the Commerce Clause and did not violate the California Constitution); *Air Transp. Ass'n of Am. v. San Francisco*, 992 F. Supp. 1149, 1165, 1180 (N.D. Cal. 1998) (holding San Francisco's domestic-partner-city contractor ordinance did not violate the dormant Commerce Clause "as an excessive burden on interstate commerce[,] but is preempted by ERISA to the extent its mandated benefits are "covered by ERISA and provided through ERISA plans").

Numerous commentaries have already been offered on these subjects as well. See generally Jeffrey A. Brauch, *Municipal Activism v. Federal Law: Why ERISA Preempts San Francisco-Style Domestic Partner Ordinances*, 28 SETON HALL L. REV. 925 (1998); William C. Duncan, *Domestic Partnership Laws in the United States: A Review and Critique*, 2001 BYU L. REV. 961 (2001); Catherine L. Fisk, *ERISA Preemption of State and Local Laws on Domestic Partnership and Sexual Orientation Discrimination in Employment*, 8 UCLA WOMEN'S L.J. 267 (1998); Todd Foreman, Comment, *Nondiscrimination Ordinance 101 San Francisco's Nondiscrimination in City Contracts*

domestic partner benefits?⁵

Part II of this comment traces the recent evolution in municipal domestic partner benefits legislation nationwide.⁶ After comparing the various domestic partner-contractor ordinances in San Francisco, Los Angeles, Seattle, and Minneapolis,⁷ Part III surveys the history and status of “home rule” authority with a focus on Minnesota law.⁸ Parts IV, V, and VI then analyze whether Minneapolis’ recent domestic partner benefits scheme is consistent with *Lilly v. City of Minneapolis*,⁹ in which the court held that Minneapolis exceeded its “home rule” authority by providing domestic partners benefits to city employees.¹⁰ Part VI also ponders whether *Lilly* was properly decided.¹¹ Part VII explores new state issues raised by Minneapolis’ domestic partner ordinance.¹² This comment concludes that *Lilly* employed the correct interpretation of “home rule” authority in Minnesota and the decision renders Minneapolis’ domestic partner benefits law invalid.¹³

and Benefits Ordinance: A New Approach to Winning Domestic Partnership Benefits, 2 U. PA. J. LAB. & EMP. L. 319 (1999); Emily V. Griffen, Comment, “*Relations Stop Nowhere*”: *ERISA Preemption of San Francisco’s Domestic Partner Ordinance*, 89 CAL. L. REV. 459 (2001); Richard W. Helms, Note, *Air Transport Association of America v. City and County of San Francisco: Domestic Partner Benefits Upheld, Except Where Preempted by ERISA*, 27 W. ST. U. L. REV. 323 (1999-2000); Jeffrey G. Sherman, *Domestic Partnership and ERISA Preemption*, 76 TUL. L. REV. 373 (2001); Mark A. Tumeo, *Civil Rights for Gays and Lesbians and Domestic Partner Benefits: How Far Could an Ohio Municipality Go?*, 50 CLEV. ST. L. REV. 165 (2002-03); Alex Turner, *The Denial of Benefits to the Same-sex Domestic Partners of State Employees: How Do Claims of Discrimination Fare Outside the Shadow of ERISA Preemption?*, 4 U. PA. J. LAB. & EMP. L. 669 (2002). This is not to imply these federal issues are settled, however.

5. The question of the legality of city ordinances requiring contractors to provide benefits to unmarried domestic partners is “on the cutting edge of law and has a number of sub-parts. The answers are only partially in view at this time because there has been little litigation on the issue.” Jordan Lorence, Corporate Resource Council, *Answers to an Employer’s Legal Questions About Domestic Partner Benefits and Sexual Orientation Nondiscrimination Policies*, at 2, available at http://www.corporateresourcecouncil.org/white_papers/Legal_Questions.pdf (last visited March 6, 2004).

6. *See infra* Part II.

7. *See infra* Part II.B.

8. *See infra* Part III.

9. 527 N.W.2d 107 (Minn. Ct. App. 1995).

10. *Id.* at 113; *see infra* Parts IV-VI.B.

11. *See infra* Part VI.C.

12. *See infra* Part VII.

13. *See infra* Part VIII.

II. HISTORY AND OVERVIEW OF MUNICIPAL DOMESTIC PARTNER BENEFITS LEGISLATION

A. *History of Domestic Partner Benefits Legislation in the United States*

Minneapolis has been at the forefront of the movement to recognize domestic partners since 1991.¹⁴ Minneapolis was neither the first nor the only city to enact domestic partner ordinances, however.¹⁵ Thus it is helpful to understand the meaning and origins of the term “domestic partner” in order to understand the goals and context of Minneapolis’ domestic partner benefits legislation.

The term “domestic partner” is a fairly recent innovation in the English language, going back only about twenty years.¹⁶ The meaning of the term is less clear than its origins, however. The definition of “domestic partner” remains “an empty vessel that legislatures or employers may fill as they wish.”¹⁷ If a generally accepted definition of a “domestic partner” does exist, it is someone who lives together with another partner, is at least eighteen years old, is not married, is jointly responsible for expenses, is not a close relative, and is competent to consent to the arrangement.¹⁸ Although “domestic partner” is often coterminous with same-sex partner, a vast majority of jurisdictions define a “domestic partner” as someone of either the same or opposite sex as the other partner.¹⁹

Domestic partner benefits legislation soon followed the

14. See Steve Brandt, *City to Recognize Incoming Domestic Partners*, MINNEAPOLIS STAR TRIB., Sept. 5, 2003, at 2B, available at 2003 WL 5543173. “Minneapolis was the second large city in the nation [after San Francisco] to allow domestic partners to register when it adopted its law in 1991.” *Id.* Minneapolis is also among the first large cities to recognize domestic partners registered in other cities. *Id.* The city currently has three homosexuals on its city council. *Id.* This is not to imply that the issue of domestic partner benefits only impacts homosexuals, however.

15. See *infra* Part II.B.

16. See Sherman, *supra* note 4, at 382-83. The *New York Times* did not use the term “domestic partner” until 1982. *Id.* at 382.

17. *Id.* at 383. Contrast “domestic partner” with the term “widow,” which has a meaning that all states presumably agree upon. *Id.* This definitional ambiguity may be the result of the fairly recent introduction of the term. See *id.* at 383-83.

18. Duncan, *supra* note 4, at 969-72.

19. *Id.* at 972. Montgomery County, Maryland and Philadelphia, Pennsylvania are two jurisdictions that “allow only same-sex couples to register.” *Id.*

development of the term. Berkeley, California birthed the municipal domestic partner benefit in 1984.²⁰ A number of cities in recent years have since enacted ordinances providing employment benefits to domestic partners of city employees.²¹ As many as seventy-four cities and counties currently offer their employees or residents domestic partner benefits.²² Some of these measures provide domestic partner benefits only to same-sex partners of employees, while others encompass both same and opposite-sex partners.²³ Minneapolis joined the fray by enacting its first domestic partner ordinance providing benefits to city employees in 1991,²⁴ though this legislation was later struck down.²⁵

B. “A Tale of Four Cities”: Domestic Partner Legislation Affecting City Contractors

While legislation providing benefits to city employees’ domestic partners has become more common,²⁶ some cities have not stopped at providing such benefits to their own employees. Recently, four large cities have gone a step further by enacting ordinances mandating that city contractors, rather than city governments, provide domestic partner benefits to their own employees.²⁷ These cities are San Francisco,²⁸ Los Angeles,²⁹ Seattle,³⁰ and (most recently) Minneapolis.³¹ Rather than provide

20. *Id.* at 965.

21. Robin Cheryl Miller, Annotation, *Validity of Governmental Domestic Partnership Enactment*, 74 A.L.R.5th 439, § 2 (1999).

22. Duncan, *supra* note 4, at 965.

23. Miller, *supra* note 21, at § 2.

24. Adrienne K. Wilson, Note, *Same-Sex Marriage: A Review*, 17 WM. MITCHELL L. REV. 539, 539 (1991); see also Kate Latimer, *Domestic Partners and Discrimination: The Need for Fair Employment Compensation*, 12 HAMLINE J. PUB. L. & POL’Y 329, 329 (1992).

25. *Lilly v. City of Minneapolis*, 527 N.W.2d 107 (Minn. Ct. App. 1995).

26. See Duncan, *supra* note 4, at 964-65.

27. See Dean Scott, *Companies Take Lead in Extending Benefits to Unmarried Partners*, KIPLINGER BUSINESS FORECASTS, July 17, 2003, available at 2003 WL 10080583.

28. S.F., CAL., ADMIN. CODE ch. 12B, § 12B.1-6 (2002), available at http://www.sfgov.org/site/government_index.asp#codes (last visited March 6, 2004).

29. L.A., CAL., ADMIN. CODE div. 10, ch. 1, art. 1, § 10.8.1-2 (2002), available at <http://lacodes.lacity.org/NXT/gateway.dll?f=templates&fn=default.htm> (last visited March 6, 2004).

30. SEATTLE, WASH., MUN. CODE tit. 20, ch. 20.45, § 20.45.010-050 (2002), available at <http://www.ci.seattle.wa.us/council/legdb.htm> (last visited March 6, 2004).

benefits to city employees, these cities require contractors who bid on city contracts to offer domestic partner benefits to their workers.³² San Francisco was the first city to enact such legislation, which took effect in 1997.³³ Seattle and Los Angeles soon followed suit with their own ordinances.³⁴ As was the case with domestic partner benefits legislation aimed at city employees, Minneapolis followed San Francisco's lead with its own city contractor ordinance as well.³⁵

1. *Similarities among City Contractor Ordinances*

The four cities' ordinances share many basic similarities. The crux of each ordinance is that city contractors must offer the same benefits to their workers' domestic partners as they do to workers' spouses.³⁶ Each city includes in its definition of domestic partner persons registered as domestic partners with the city, and none of the statutes limits the definition to same-sex couples.³⁷ Exceptions to compliance are provided in each ordinance, which are generally given at the discretion of the city under certain limited conditions.³⁸ Under these exceptions, a city contractor may be granted an exception to compliance if the city faces an emergency,³⁹ the contractor is the only provider of services the city

31. MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200 (2003), available at <http://livepublish.municode.com/13/lpext.dll?f=templates&fn=main-j.htm> (last visited March 6, 2004).

32. Scott, *supra* note 27.

33. See Sherman, *supra* note 4, at 378-79.

34. See *id.* at 378, n.13 (citing J. Martin McOmber, *Benefits for Gay Couples Approved by City Council*, SEATTLE TIMES, Nov. 23, 1999, at B3, available at 1999 WL 6300935; Rick Orlov, *Domestic Partner Benefits at Issue; City Panel Wants Contractors Forced to Offer Care*, L.A. DAILY NEWS, Aug. 17, 1999, at N3, available at 1999 WL 7031585).

35. See MINNEAPOLIS CODE tit. 2, ch. 18 (2003).

36. L.A., CAL., ADMIN. CODE div. 10, ch. 1, § 10.8.2 (2002); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(d) (2003); S.F., CAL., ADMIN. CODE ch. 12B, § 12B.1(b) (2002); SEATTLE, WASH., MUN. CODE tit. 20, ch. 20.45, § 20.45.020A (2002).

37. See L.A., CAL., ADMIN. CODE div. 10, ch. 1, § 10.8.2.1(b)(8) (2002); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(c) (2003); S.F., CAL., ADMIN. CODE ch. 12B, § 12B.1(c) (2002); SEATTLE, WASH., MUN. CODE tit. 20, ch. 20.45, § 20.45.010.E (2002).

38. L.A., CAL., ADMIN. CODE div. 10, ch. 1, § 10.8.2.1(i) (2002); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(g) (2003); S.F., CAL., ADMIN. CODE ch. 12B, § 12B.5-1; SEATTLE, WASH., MUN. CODE tit. 20, ch. 20.45, § 20.45.020.C (2002).

39. L.A., CAL., ADMIN. CODE div. 10, ch. 1, § 10.8.2.1(i)(1)(c) (2002);

requires,⁴⁰ or the contractor is a public entity.⁴¹ Each city, save Seattle, also allows exceptions to contractor compliance if the exceptions are in the perceived best interest of the city.⁴² All four cities include provisions indicating that the ordinances are to be interpreted consistently with federal and state law.⁴³ Finally, each ordinance is severable⁴⁴ in the event that any parts are modified or stricken in court.⁴⁵

2. Differences among City Contractor Ordinances

Despite sharing many similarities, the four cities' ordinances contain a few noteworthy differences. Whereas Minneapolis and San Francisco require compliance by subcontractors as well as contractors, Los Angeles and Seattle do not.⁴⁶ While no city

MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(g)(1) (2003); S.F., CAL., ADMIN. CODE ch. 12B, § 12B.5-1(a)(2) (2002); SEATTLE, WASH., MUN. CODE tit. 20, ch. 20.45, § 20.45.020.C.1 (2002).

40. L.A., CAL., ADMIN. CODE div. 10, ch. 1, §§ 10.8.2.1(i)(1)(a), (g) (2002); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(g)(2)(c)-(e) (2003); S.F., CAL., ADMIN. CODE ch. 12B, § 12B.5-1(a)(1) (2002); SEATTLE, WASH., MUN. CODE tit. 20, ch. 20.45, § 20.45.020.C.2 (2002).

41. L.A., CAL., ADMIN. CODE div. 10, ch. 1, § 10.8.2.1(i)(1)(e) (2002); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, §§ 18.200(f)(5), (8) (2003); S.F., CAL., ADMIN. CODE ch. 12B, § 12B.5-1(b) (2002); SEATTLE, WASH., MUN. CODE tit. 20, ch. 20.45, § 20.45.020.C.4-5 (2002).

42. L.A., CAL., ADMIN. CODE div. 10, ch. 1, § 10.8.2.1(i)(1)(h) (2002); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(g)(2)(f) (2003) (using the term "substantial cost savings" instead of "best interest"); S.F., CAL., ADMIN. CODE ch. 12B, § 12B.5-1(a)(3) (2002).

43. L.A., CAL., ADMIN. CODE div. 10, ch. 1, § 10.8.2.1(j) (2003); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(c) (2003) (noting under the definition of "employee benefits" that such benefits shall be provided "unless otherwise prohibited by state, federal[,] or other law"); S.F., CAL., ADMIN. CODE ch. 12B, § 12B.6 (2002); SEATTLE, WASH., MUN. CODE tit. 20, ch. 20.45, § 20.45.010.F (2002) (noting under the definition of "employee benefits" that "it does not include benefits to the extent that . . . such benefits may be preempted by federal or state law").

44. A "severability clause" is "[a] provision that keeps the remaining provisions of a contract or statute in force if any portion of that contract or statute is judicially declared void or unconstitutional." BLACK'S LAW DICTIONARY 1378 (7th ed. 1999).

45. L.A., CAL., ADMIN. CODE div. 10, ch. 1, § 10.8.2.1(k) (2002); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, tit. 1, ch. 1, § 1.20 (2003); S.F., CAL., ADMIN. CODE ch. 12B, § 12B.6 (2002); SEATTLE, WASH., MUN. CODE tit. 20, ch. 20.45, tit. 1, ch. 1.04, § 1.04.010 (2002).

46. Compare MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, §§ 18.200(c), (k) (2003) (requiring all subcontractors to comply if they meet the minimum contract amount and employee number requirements) and S.F., CAL., ADMIN. CODE ch. 12B, §§ 12B.1(c), 12B.2 (2002) (requiring subcontractors to

requires the provision of domestic partner benefits by contractors whose contracts are of marginal monetary value, the cities substantially differ on how large the city contract must be to trigger their domestic partner benefit requirement.⁴⁷ Minneapolis' ordinance is somewhat more limited than other cities in that its ordinance applies only to contractors that employ twenty-one or more employees.⁴⁸ The cities differ as to whether the contracting entity must provide benefits to all its employees or only those whose work involves the city contract.⁴⁹ The benefits city contractors must offer domestic partners differ slightly, with Seattle requiring the provision of the most comprehensive list of benefits, and Minneapolis requiring the least.⁵⁰ Finally, each city except Seattle

comply if their work comprises ten percent or more of any subcontract), *with* L.A., CAL., ADMIN. CODE div. 10, ch. 1, § 10.8.2(b)(12) (2002) (not requiring subcontractors to comply "unless they have another contract directly with the City") *and* SEATTLE, WASH., MUN. CODE tit. 20, ch. 20.45, § 20.45.030 (2002) ("[t]he requirements of this chapter shall not apply to . . . subcontractors").

47. *See* L.A., CAL., ADMIN. CODE div. 10, ch. 1, § 10.8.1 (2002) (defining "contract" as any agreement with the city, large or small); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(c) (2003) (requiring that contractors provide domestic partner benefits only if the value of the city contract exceeds \$100,000); S.F., CAL., ADMIN. CODE ch. 12B, § 12B.1(c) (2002) (limiting "contract" to only those agreements that cumulatively exceed \$5,000 per year); SEATTLE, WASH., MUN. CODE tit. 20, ch. 20.45, § 20.45.010.A (2002) (applying the ordinance only to contractors whose contract with the city is valued at \$33,000 or more).

48. MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(c) (2003).

49. *Compare* L.A., CAL., ADMIN. CODE div. 10, ch. 1, § 10.8.2.1(e)(2) (2002) (requiring the contractor offer benefits only to the employees whose work is related to the city contract) *and* SEATTLE, WASH., MUN. CODE tit. 20, ch. 20.45, § 20.45.030 (requiring the same as L.A.), *with* MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, §§ 18.200(c), 18.200(f)(1) (2003) (requiring city contractors to allow "every employee" to be eligible for benefits) *and* S.F., CAL., ADMIN. CODE ch. 12B, § 12B.1(d) (2002) (mandating that city contractors provide benefits to all their employees regardless of whether all the employees are engaged in work related to the city contract).

50. L.A., CAL., ADMIN. CODE div. 10, ch. 1, § 10.8.2.1(b)(2) (2002) (including bereavement leave, family medical leave, health benefits, membership discounts, moving expenses, pension and retirement benefits, and travel benefits); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(c) (2002) (including bereavement leave, disability insurance, life insurance, health benefits, dental benefits, family leave, memberships, moving expenses, and travel benefits); S.F., CAL., ADMIN. CODE ch. 12B, § 12B.1(b) (2002) (including bereavement leave, family medical leave, health benefits, membership or membership discounts, moving expenses, pension and retirement benefits, and travel benefits); SEATTLE, WASH., MUN. CODE tit. 20, ch. 20.45, § 20.45.020F (2002) (including bereavement leave; disability, life, other types of insurance; family medical leave; health benefits; membership or membership discounts; moving expenses; pensions and retirement benefits; vacation; and travel benefits). Seattle defines benefits in the broadest

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mandates contractor compliance only for the duration of the city contract.⁵¹

C. *The Impact of Municipal Domestic Partner Legislation*

The recent expansion of domestic partner benefits legislation is illustrative of the general trend among large cities to enact social policies intended to reach well beyond their own borders.⁵² San Francisco has a “Burma” ordinance prohibiting companies that have employees in Burma or hold an interest in Burmese corporations from contracting with the city.⁵³ For its part, Minneapolis has attempted to “address social issues ranging from organic food to the country of Myanmar.”⁵⁴

The results of municipal domestic partner benefits legislation have been far-reaching. Approximately 5700 employers nationwide offer health insurance benefits to same-sex domestic partners.⁵⁵ Most companies that offer domestic partner benefits to their employees ostensibly do so in connection with city ordinances requiring domestic partner benefits.⁵⁶ As of October 2001, more than seventy percent of companies across the nation that provide domestic partner benefits have contracted with San Francisco, Los Angeles, or Seattle.⁵⁷ While subsequent litigation has narrowed the

terms, requiring also that contractors provide domestic partners with “any other benefits given to employees [consistent with federal and state law].” *Id.* Minneapolis mandates the narrowest range of benefits by excluding retirement and pension benefits altogether. *See* MINNEAPOLIS CODE § 18.200(c).

51. L.A., CAL., ADMIN. CODE div. 10, ch. 1, §§ 10.8.2, 10.8.2(c)(3) (2002); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(f)(3) (2003); S.F., CAL., ADMIN. CODE ch. 12B, § 12B.2 (2002) (“In the performance of a contract . . .”). Seattle makes no mention of the limitation that the benefits provided be during the duration of the contract with the city. *See* SEATTLE, WASH., MUN. CODE tit. 20, ch. 20.45, § 20.45.010-050 (2002).

52. *See* Brauch, *supra* note 4, at 929.

53. Allen Samuelson, *Doing Business with the Sovereign: Unique Terms and Disputes in Public Agency IT Contracts*, 700 PLI/PAT 91, 111 (2002) (referring to S.F., CAL., ADMIN. CODE ch. 12J, § 12J.1 (2002)).

54. Olson, *supra* note 2.

55. *See Access Domestic Partners: More Employers Offer Health Benefits, Study*, 10 AM. POL. NETWORK-AM. HEALTH LINE No. 9 (May 19, 2003).

56. Glen E. Lavy, Corporate Resource Council Manual, *Behind the Rhetoric: The Social Goals of GLBT Advocacy in Corporate America*, at 5, available at http://www.corporateresourcecouncil.org/white_papers/Behind_The_Rhetoric.pdf (citing Human Rights Campaign (HRC), *The State of the Workplace 2001*, at 18-19 (fig. 6), available at www.hrc.org/worknet/publications/state_workplace/2001/sow2001.pdf) (last visited Dec. 28, 2003)).

57. *See id.*

breadth of some of these ordinances,⁵⁸ companies have been forced to act with the understanding that unless they provide benefits to their employees' domestic partners anywhere they do business, they will lose their contract(s) with these cities.⁵⁹ For its part, Minneapolis' ordinance has the potential to affect 150 contractor-employers per year.⁶⁰ In a very real sense, San Francisco, Los Angeles, and Seattle are dictating employment policy beyond their own borders.⁶¹ The question is, is it within Minneapolis' legal discretion to join these cities?

III. "HOME RULE" AUTHORITY

A. Definition and Significance

The ramifications of domestic partner ordinances have not gone unnoticed. Since the movement to recognize domestic partnerships began, measures requiring municipalities to provide domestic partner benefits to employees frequently have been challenged in court.⁶² Challenges to local domestic partnership laws usually encompass the argument that such measures go beyond the "home rule" authority.⁶³

"Home rule" authority is defined generally as the discretion given to municipalities by the state to manage municipal affairs.⁶⁴ More specifically, "home rule" authority is "the ability of a local

58. See *supra* note 4 and accompanying text.

59. See Brauch, *supra* note 4, at 929.

60. See Olson, *supra* note 2. In 2002, Minneapolis "took 150 bids and proposals for contracts worth more than \$100,000." *Id.*

61. See HRC, *supra* note 56, at 18-19.

62. See Miller, *supra* note 21, at § 2.

63. *Id.* A list of cases ruling on domestic partner benefits follows: *Irizarry v. Bd. of Educ. of Chicago*, 251 F.3d 604 (7th Cir. 2001); *Schaefer v. City & County of Denver*, 973 P.2d 717 (Colo. Ct. App. 1998); *Martin v. City of Gainesville*, 800 So. 2d 687 (Fla. Dist. Ct. App. 2001); *Lowe v. Broward County*, 766 So. 2d 1199 (Fla. Dist. Ct. App. 2000); *City of Atlanta v. Morgan*, 492 S.E.2d 193 (Ga. 1997); *City of Atlanta v. McKinney*, 454 S.E.2d 517 (Ga. 1995); *Crawford v. City of Chicago*, 710 N.E.2d 91 (Ill. App. Ct. 1999); *Tyma v. Montgomery County*, 801 A.2d 148 (Md. 2002); *Connors v. City of Boston*, 714 N.E.2d 335 (Mass. 1999); *Opinions of the Justices to the House of Representatives*, 696 N.E.2d 502 (Mass. 1998); *Lilly v. City of Minneapolis*, 527 N.W.2d 107 (Minn. Ct. App. 1995), *rev. denied* (Minn. Mar. 29, 1995); *Slattery v. City of New York*, 686 N.Y.S.2d 683 (N.Y. Sup. Ct. 1999), *appeal transferred*, 711 N.E.2d 640 (N.Y. Apr. 1, 1999); *Devlin v. City of Philadelphia*, 809 A.2d 980 (Pa. Commw. Ct. 2002); *Arlington County v. White*, 528 S.E.2d 706 (Va. 2000); *Heinsma v. City of Vancouver*, 29 P.3d 709 (Wash. 2001).

64. 56 AM. JUR. 2D *Municipal Corporations, Counties, and Other Political Subdivisions* § 108 (2003).

government to act and make policy in all areas that have not been designated to be of statewide interest through general law.”⁶⁵ In spite of its name, “home rule” authority “admits to the possibility that state government actions may severely limit local autonomy and discretion.”⁶⁶ “Home rule” authority can be granted by either statute or state constitution.⁶⁷ “Under home-rule [constitutional] amendments, cities no longer are dependent upon the state legislature for their authority to determine their local affairs and government”⁶⁸ “Although home-rule power generally is subject to some limitation by constitutional provision or legislation, the extent of limitations on home-rule powers varies from state to state.”⁶⁹

B. Diversity among State “Home Rule” Authority Laws

The breadth of a state’s “home rule” authority laws may determine the fate of a particular jurisdiction’s domestic partner benefits legislation.⁷⁰ Further, courts’ analysis of whether local ordinances are consistent with state law is an important factor in deciding whether such laws will survive court challenges.⁷¹ Some jurisdictions “have construed the preemptive effect of state civil rights legislation narrowly[] to leave ample room for locally initiated measures,” whereas others have “adopted an expansive view of state preemption,” leaving such measures ripe to be struck down.⁷² Largely as a consequence of different state interpretations of “home rule” authority, some domestic partner benefits ordinances have survived court challenges, while others have been struck down on the grounds that they conflict with, or are preempted by, state law.⁷³ Atlanta appears to be the only city that

65. Dale Krane et al., *Introduction to HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 2* (Dale Krane et al. eds., CQ Press 2001).

66. *Id.*

67. See 56 AM. JUR. 2D *Municipal Corporations, Counties, and Other Political Subdivisions* § 110 (2000).

68. *Id.* § 108.

69. *Id.*, § 110.

70. See David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2357 (2003).

71. See Miller, *supra* note 21, at § 2.

72. Barron, *supra* note 70, at 2357.

73. See *id.* The following cases have upheld domestic partner ordinances: *Irizarry v. Bd. of Educ. of City of Chicago*, 251 F.3d 604 (7th Cir. 2001) (holding that a Chicago Board of Education policy extending health benefits to same-sex domestic partners did not violate the equal protection rights of employees who

has successfully defended domestic partner benefits legislation in state court after having its initial ordinance struck down.⁷⁴

While San Francisco, Los Angeles, Seattle, and Minneapolis have substantially similar domestic partner benefits ordinances requiring city contractors to provide benefits to their employees,⁷⁵ the “home rule” authority laws vary among their respective states.

cohabited with opposite-sex couples); *Schaefer v. City & County of Denver*, 973 P.2d 717 (Colo. Ct. App. 1998) (holding that a city ordinance extending health benefits to domestic partners of city employees did not exceed home rule authority granted by the state); *Martin v. City of Gainesville*, 800 So. 2d 687 (Fla. Dist. Ct. App. 2001) (denying a challenge to domestic partner ordinance on the grounds that plaintiff taxpayer lacked the requisite standing under state law to bring suit); *Lowe v. Broward County*, 766 So. 2d 1199 (Fla. Dist. Ct. App. 2000) (holding a county did not intrude on a matter reserved for the state alone in providing domestic partner benefits); *City of Atlanta v. Morgan*, 492 S.E.2d 193 (Ga. 1997) (holding that a city ordinance was within the city’s home rule authority to enact because it did not use any language recognizing new family relationships similar to marriage); *Crawford v. City of Chicago*, 710 N.E.2d 91 (Ill. App. Ct. 1999) (holding a city domestic partner ordinance was a permissible exercise under the state’s home rule authority); *Tyma v. Montgomery County*, 714 N.E.2d 335 (Md. 2002) (same); *Opinions of the Justices to the House of Representatives*, 696 N.E.2d 502 (Mass. 1998) (advising state legislature that a bill authorizing cities to offer domestic partner benefits to their employees’ partners did not constitute an unlawful delegation of authority); *Slattery v. City of New York*, 686 N.Y.S.2d 683 (N.Y. Sup. Ct. 1999) (dismissing taxpayer’s action challenging city domestic partner ordinance that extended health and retirement benefits); *Heinsma v. City of Vancouver*, 29 P.3d 709 (Wash. 2001) (holding that a “home rule” city could enact domestic partner benefits legislation).

The cases that struck down domestic partner benefits ordinances include: *City of Atlanta v. McKinney*, 454 S.E.2d 517 (Ga. 1995) (holding a city ordinance that recognizes domestic partners as family relationships as well as providing benefits to domestic partners exceeds home rule authority); *Connors v. City of Boston*, 714 N.E.2d 335 (Mass. 1999) (striking down a domestic partner benefits order because the city’s mayor exceeded his authority in issuing the executive order); *Lilly v. City of Minneapolis*, 527 N.W.2d 107 (Minn. Ct. App. 1995), *rev. denied* (Minn. Mar. 29, 1995) (holding that a city domestic partner ordinance conflicted with state law and was an exercise beyond the city’s “home rule” authority); *Devlin v. City of Philadelphia*, 809 A.2d 980 (Pa. Commw. Ct. 2002) (holding that a city domestic partner ordinance created a new form of marital relationship in violation of state public policy); *Arlington County v. White*, 528 S.E.2d 706 (Va. 2000) (holding that a county attempt to provide insurance coverage for employees’ unmarried domestic partners is *ultra vires*).

74. Compare *McKinney*, 454 S.E.2d 517 (striking down a city domestic partner benefits ordinance), with *Morgan*, 492 S.E.2d 193 (upholding the same city’s revised version of a domestic partner ordinance). The *Morgan* court upheld Atlanta’s revised domestic partner benefits ordinance on the grounds that the city “carefully avoided the constitutional flaw in its previous benefits ordinance by eliminating . . . [from its] definition of ‘dependent’ any language recognizing any new family relationship similar to marriage.” *Morgan*, 492 S.E.2d at 195.

75. See *supra* Part II.B.1.

This variance in part explains why Minneapolis' city employee-domestic partner benefits legislation was struck down in court⁷⁶ while similar domestic partner benefits legislation was upheld in California⁷⁷ and Washington.⁷⁸ In contrast to Minnesota,⁷⁹ California grants expansive "home rule" powers.⁸⁰ California gives power permissively to its local governments, leaving them "subject to few limitations other than to abstain from running deficit spending."⁸¹ In Washington, "the parameters within which local governments can exercise home rule powers are quite limited."⁸² The fact that Washington courts upheld domestic partner benefits legislation is an anomaly given the state's stringent interpretation of "home rule" authority generally.⁸³ In any event, the different outcomes of prior domestic partner benefits legislation helps illustrate the importance of focusing on a particular state's interpretation of "home rule" authority in determining whether such legislation will survive a court challenge.

76. See *Lilly*, 527 N.W.2d at 107.

77. See *S.D. Myers, Inc. v. City & County of San Francisco*, 336 F.3d 1174 (9th Cir. 2003) (holding that the San Francisco ordinance is neither duplicative nor contradictory to state law, and is not an exercise beyond the city's authority); *S.D. Myers, Inc. v. City & County of San Francisco*, 253 F.3d 461 (9th Cir. 2001) (holding the San Francisco ordinance is valid because a city may regulate outside its geographic bounds so long as its actions are an exercise of the city's proprietary contracting power).

78. See *Heinsma*, 29 P.3d at 713 (holding that a home-rule city could enact domestic partner benefits legislation).

79. See *infra* Part III.C.

80. See Michael A. Woods, *The Propriety of Local Government Protections of Gays and Lesbians from Discriminatory Employment Practices*, 52 EMORY L.J. 515, 532 (2003).

81. *Id.* "In California . . . localities trace the source of their power to two key state constitutional sections. The first provides that '[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.' " *Id.* at 531-32 (quoting CAL. CONST. art. XI, § 7). "The second permits a city or county to adopt and amend its charter '[f]or its own government,' by a majority vote of those citizens entitled to vote." *Id.* (quoting CAL. CONST. art. X., § 3(a)). "California courts have broadly construed the constitutional grant of local power over 'municipal affairs' " *Id.* (citing Alvin D. Sokolow & Peter M. Detwiler, *California*, in HOME RULE IN AMERICA, *supra* note 65, at 58). Municipalities in California have thus had "considerable discretion in the crafting of social policy." *Id.*

82. Meredith A. Newman & Nicholas P. Lovrich, *Washington*, in HOME RULE IN AMERICA, *supra* note 65, at 437.

83. See *generally Heinsma*, 29 P.3d 709. The court, while noting that Washington had statutes in place favoring heterosexual marriage, concluded that the legislature did not define "dependents" to exclude domestic partners, and therefore upheld the municipal ordinance. *Id.* at 712.

C. “Home Rule” Authority in Minnesota

Minnesota, though far from stingy in allowing for local autonomy, exercises more oversight over localities than California but less than Washington. Historically, the Minnesota Legislature was slow to embrace a process for localities to obtain “home rule.”⁸⁴ After originally rejecting legislation authorizing “home rule” in 1895, the Minnesota Legislature passed legislation authorizing cities to adopt “home rule” charters in 1896.⁸⁵ This legislation did not extend to municipalities such as towns, villages, and other local governments until 1987, however.⁸⁶ Since then, the Minnesota Constitution has permitted local government units to obtain and adopt their own “home rule” charters.⁸⁷

“Home rule” status in Minnesota does not necessarily mean more autonomy for localities.⁸⁸ Despite the formal legal designation of “home rule” for some Minnesota cities, the “operational differences evident [in such cities’] powers and functions” are not always apparent.⁸⁹ Minnesota courts have long sought to oversee city actions to enforce the boundaries of “home rule” authority.⁹⁰ In so doing, Minnesota courts often recite something akin to Dillon’s Rule,⁹¹ which reflects the long-standing notion that municipal power is wholly derived from the state.⁹²

84. See Philip H. Wichern, *Minnesota*, in HOME RULE IN AMERICA, *supra* note 65, at 225.

85. *Id.*

86. *Id.* For a more complete history of the limits of “home rule” in Minnesota, see generally *id.*; Note, *Municipal Civil Rights Legislation—Is the Power Conferred by the Grant of Home Rule?*, 53 MINN. L. REV. 342 (1968); Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643 (1964).

87. See MINN. CONST. art. 12, § 4, which states, in pertinent part: “Any local government unit when authorized by law may adopt a home rule charter for its government.”

88. See Wichern, *supra* note 84, at 225.

89. *Id.*

90. See *id.* (citing *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926); *State v. Clarke Plumbing & Heating, Inc.*, 238 Minn. 192, 56 N.W.2d 667 (1952); *State v. Houston*, 210 Minn. 379, 298 N.W. 358 (1941)).

91. Dillon’s Rule states that “[m]unicipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature.” *City of Clinton v. Cedar Rapids & M.R.R. Co.*, 24 Iowa 455, 475 (1868). Although the “modern trend has been toward a broad grant of authority to municipalities and other local government bodies,” Dillon’s Rule remains influential and persists to this day. Woods, *supra* note 80, at 521.

92. See *Welsh v. City of Orono*, 355 N.W.2d 117, 120 (Minn. 1984) (stating “[a] municipality has no inherent powers, but only such powers as are expressly

Courts have stated that Minnesota cities have “wide discretion in dealing with matters of local importance.”⁹³ Despite this proclamation, “[t]he distinction between statewide and local concern has a rich and confused history in local government law.”⁹⁴ The “external effects of local activity have typically been at the core of the inquiry [into whether an ordinance is of local or statewide concern].”⁹⁵

The “home rule” authority test applied by Minnesota courts states that a municipal regulation may be invalid if it either expressly or impliedly conflicts with a state statute,⁹⁶ or if it legislates in a realm occupied by the state.⁹⁷ Minnesota courts have

conferred by statute or are implied as necessary in aid of those powers which are expressly conferred.) (citing *Minnetonka Elect. Co. v. Vill. of Golden Valley*, 273 Minn. 301, 141 N.W.2d 138 (1966); *Vill. of Brooklyn Ctr. v. Rippen*, 255 Minn. 334, 96 N.W.2d 585 (1959)); *Arcadia Dev. Corp. v. City of Bloomington*, 267 Minn. 221, 225, 125 N.W.2d 846, 849 (1964) (indicating “[t]he city’s right to act . . . as always, is dependent upon a grant from the state”); *Mangold Midwest Co. v. Vill. of Richfield*, 274 Minn. 347, 357, 143 N.W.2d 813, 820 (1966) (stating “municipalities have no inherent powers . . .”).

93. *Arcadia*, 267 Minn. at 225, 125 N.W.2d at 850 (citing *City of Duluth v. Cervený*, 218 Minn. 511, 16 N.W.2d 779 (1944)).

94. Clayton P. Gillette, *The Exercise of Trumps by Decentralized Governments*, 83 VA. L. REV. 1347, 1400 (1997) (discussing the statewide concern issue in reference to the *Lilly* decision).

95. *Id.*

96. See *Mangold*, 274 Minn. at 352, 143 N.W.2d at 816 (ruling that conflict exists between a local ordinance and state statute when “both the ordinance and the statute contain express or implied terms that are irreconcilable with each other”). Express conflict between an ordinance and statute occurs when a statute “specifies withdrawal, limitation, or restriction of [the] municipal power [at issue],” or limits the “methods of procedure open to municipalities [so as to render the ordinance invalid].” George D. Vaubel, *Toward Principles of State Restraint upon the Exercise of Municipal Power in Home Rule*, 22 STETSON L. REV. 643, 647 (1993). Implied conflict exists when “the [state] legislature intends to deny that power [a municipality is trying to exercise] which [the legislature] does not expressly grant.” *Id.*

97. See Vaubel, *supra* note 96, at 647; see also *Mangold*, 274 Minn. at 356, 143 N.W.2d at 819 (noting “it is our opinion that preemption and conflict are separate concepts and should be governed by separate doctrines.”). The court likened preemption to the “occupation of the field” concept familiar in federalism disputes between states and the federal government. *Id.* The U.S. Supreme Court has summarized the concept as follows:

[I]n the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a “scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” or where an Act of Congress “touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to

not hesitated to use state powers when localities tread on issues that reach beyond their borders.⁹⁸ Despite the limited nature of “home rule” in Minnesota, it is noteworthy that as a general rule “[c]ontracting, purchasing, and bidding procedures are primarily within the powers of local governments.”⁹⁹ Even this discretion is limited, however, “by state requirements.”¹⁰⁰

As ambiguous or confusing as Minnesota’s “home rule” authority may seem, it may simply be described as an attempt to allow localities to address matters of concern to them while preserving for the state the sole prerogative of addressing matters of concern to the entire state.

IV. THE *LILLY* DECISION

The City of Minneapolis’ (the City) recent attempt to mandate domestic partner benefits is part of an ongoing effort by the city to expand domestic partner benefits.¹⁰¹ The Minneapolis City Council attempted to legislate in the area of domestic partner benefits on January 25, 1991.¹⁰² Under the Domestic Partner Ordinance (DPO)¹⁰³ and city resolutions 93R-106 and 93R-342, domestic partners of city employees were entitled to receive the same health benefits that legal spouses would otherwise have received from the city, unless the domestic partner already had access to other health insurance coverage.¹⁰⁴ The DPO defined domestic partners as two adults who are not related, unmarried, have no other domestic partner, are “jointly responsible to each other for the necessities of life,” and “are committed to one another to the same extent as

preclude enforcement of state laws on the same subject.”

English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

98. See, e.g., *Welsh v. City of Orono*, 355 N.W.2d 117, 122-24 (Minn. 1984) (ruling a municipality is without jurisdiction to regulate dredging public waters because the state Department of Natural Resources (DNR) has exclusive jurisdiction over such matters); *Arcadia*, 267 Minn. at 224, 228, 125 N.W.2d at 849, 852 (concluding city council’s action to deny permit for corporation to display its business sign on its property exceeded the bounds of city authority); *Nordmarken v. City of Richfield*, 641 N.W.2d 343, 350 (Minn. Ct. App. 2002) (holding that state law preempts a home rule city from using the referendum process to approve or disapprove municipal land use and development laws).

99. *Wichern*, *supra* note 84, at 227.

100. *Id.*

101. See *supra* Parts II.A-B and accompanying text.

102. *Lilly v. City of Minneapolis*, 527 N.W.2d 107, 109 (Minn. Ct. App. 1995).

103. MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 7, ch. 142 (1991).

104. *Lilly*, 527 N.W.2d at 109.

married persons are to each other.”¹⁰⁵

Soon after the DPO passed, a Minneapolis resident and taxpayer, James A. Lilly (Lilly), sought to enjoin the City from disbursing benefits to domestic partners.¹⁰⁶ Lilly argued that the City’s “health care coverage for same sex domestic partners contravened state public policy and violated state law.”¹⁰⁷ Both the district court¹⁰⁸ and court of appeals¹⁰⁹ ruled in favor of Lilly.

The court of appeals based its decision on the limitations of Minnesota’s “home rule” authority.¹¹⁰ In so doing, the court emphatically rejected the City’s claim that “its action is of a local concern only and does not conflict with state law.”¹¹¹ Although the “home rule” authority Minnesota grants to its cities is not restrictive, it is only as broad as the state constitution and state statutes allow.¹¹² According to the court:

A municipality has no inherent powers, but only such powers as are expressly conferred by statute or are implied as necessary in aid of those powers which are expressly conferred. . . . [I]f a matter presents a statewide problem, the implied necessary powers of a municipality to regulate are narrowly construed unless the legislature has expressly provided otherwise.¹¹³

The court affirmed the district court’s determination that the provision of insurance coverage for municipal employees and their dependents is a matter of statewide concern.¹¹⁴ Moreover, the court determined that the matter of domestic partner benefits

105. MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 7, ch. 142, § 142.20 (1991).

106. *Lilly*, 527 N.W.2d at 109.

107. *Id.*

108. *See Lilly v. City of Minneapolis*, No. MC 93-21375, 1994 WL 315620, at *4 (Minn. Dist. Ct. June 3, 1994).

109. *Lilly*, 527 N.W.2d at 108.

110. *Id.*

111. *See id.* at 111.

112. *Lilly*, 1994 WL 315620, at *2 (conclusion of law no. 5) (citing MINN. CONST. art. 12, § 4; MINN. STAT. §§ 410.04, 410.03, & 410.07 (1993); *State ex rel. Town of Lowell v. City of Crookston*, 252 Minn. 526, 91 N.W.2d 81 (1958); *Park v. City of Duluth*, 134 Minn. 296, 298, 59 N.W. 627, 628 (1916); *Am. Elec. Co. v. City of Waseca*, 102 Minn. 329, 330, 333-34, 113 N.W.2d 899 (1907); *City of Minneapolis Comm’n on Civil Rights v. Univ. of Minn.*, 356 N.W.2d 841, 843 (Minn. Ct. App. 1984) (citing *Welsh v. City of Orono*, 355 N.W.2d 117, 120 (Minn. 1984))).

113. *Lilly*, 527 N.W.2d at 111 (quoting *Welsh v. City of Orono*, 355 N.W.2d 117, 120 (Minn. 1984)).

114. *Id.*

concerns “the statewide problem of discrimination.”¹¹⁵ The court ruled that “the definition of family relationships and dependent status, are statewide concerns.”¹¹⁶ The court therefore concluded that the City’s authority to combat discrimination must be narrowly construed.¹¹⁷

The court rejected the City’s argument that in providing domestic partner benefits to its employees it was merely applying the Minnesota Human Rights Act,¹¹⁸ which prohibits discrimination on the basis of sexual orientation.¹¹⁹ The court noted clear legislative intent to eliminate discrimination but to not endorse homosexual lifestyles or provide additional benefits to domestic partners,¹²⁰ citing Minnesota’s anti-discrimination statute prohibiting discrimination on the basis of sexual orientation, which in pertinent part provides: “Nothing in this chapter shall be construed to . . . mean that the state of Minnesota condones homosexuality or bisexuality or any equivalent lifestyle [or to] authorize the recognition of marriage between persons of the same sex.”¹²¹ Also cited were comments in the Senate during debate to amend Minnesota’s Human Rights Act indicating “there is nothing in [the Act] about [] domestic partners benefits. Nothing that could lead to it.”¹²²

The court concluded that the DPO, narrowly construed, conflicted with Minnesota’s municipal benefits statute.¹²³ Under

115. *Id.*

116. *Id.* at 113.

117. *Id.*

118. MINN. STAT. §§ 363-363.15 (1992).

119. MINN. STAT. § 363.10 (1992).

120. *See Lilly*, 527 N.W.2d at 112 (quoting MINN. STAT. § 363.021 (1993); *Prohibiting Unfair Discriminatory Practices on the Basis of Sexual or Affectional Orientation: Hearing on S.F. 444*, 1993 Leg., 78th Sess. (1993) [hereinafter *Hearing*] (statement of Sen. Allen Spear)).

121. *Lilly*, 527 N.W.2d at 112 (quoting MINN. STAT. § 363.021 (1993)).

122. *Id.* (quoting *Hearing*, *supra* note 120 (statement of Sen. Allen Spear)).

123. *Id.* at 113 (referring to MINN. STAT. § 471.61 (1992)). Minnesota’s municipal benefits statute, in pertinent part, reads as follows:

A . . . municipal corporation, . . . other political subdivision or other body corporate and politic of this state . . . may insure or protect its or their officers and employees, and their dependents, or any class or classes of officers, employees, or dependents, under a policy or policies or contract or contracts of group insurance or benefits covering . . . medical and surgical benefits and hospitalization insurance or benefits for both employees and dependents A payment is deemed to be additional compensation paid to the officers or employees.

MINN. STAT. § 471.61, subd. 1 (2002).

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the court's reasoning, the statute specifically defined "dependents" to the exclusion of unmarried domestic partners.¹²⁴ The *Lilly* decision sent a clear message to Minnesota cities considering enactment of domestic partnership measures: leave it to the state to legislate in the area of domestic partner benefits.¹²⁵

V. MINNEAPOLIS' DOMESTIC PARTNER ORDINANCE
AIMED AT CITY CONTRACTORS¹²⁶

Despite the clear message of *Lilly*, Minneapolis recently reentered the realm of domestic partner benefits legislation.¹²⁷ This time, Minneapolis passed an ordinance targeted at city contractors rather than the city itself.¹²⁸

A. *Purpose*

Minneapolis has framed the debate over domestic partners as one of social justice and economic efficiency.¹²⁹ The stated purpose of Minneapolis' city contractor ordinance is to recognize that "a nationwide debate has advanced an expanded concept of familial relationships beyond traditional, marital relationships."¹³⁰ According to the City, "this expanded concept includes relationships between two (2) non-married, adult partners who are committed to one another to the same extent as married persons are to each other."¹³¹ In requiring city contractors to provide domestic partner benefits, the City claims that "the quality of goods and services that city receives" will improve.¹³² The ordinance nowhere states, however, that the City will receive equivalent goods or services at the same or lower cost.¹³³

124. The court noted that the legislature had twice amended the statute to define dependents, once to include "spouse and minor unmarried children" and once to include "dependent students under the age of 25." *Lilly*, 527 N.W.2d at 111. Nowhere did the definition include non-marital relationships, however. *See id.*

125. *See id.*

126. MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200 (2003).

127. *See supra* notes 1-3 and accompanying text.

128. *See id.*

129. *See* MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(a) (2003).

130. *Id.*

131. *Id.*

132. *Id.*

133. *See id.*

B. Scope

The ordinance at first glance appears to be broader in scope than it actually is. The ordinance states:

No contractor shall discriminate by policy or practice in the provision of employee benefits between an employee with a domestic partner and an employee with a spouse. Any employee benefit provided in any manner contingent upon the existence of a marital relationship must also be provided to an employee who has a domestic partner.¹³⁴

The definitions used in the statute narrow the ordinance's scope.¹³⁵ A "contractor" is an employer who "maintains 21 or more employees on the payroll during 20 or more calendar workweeks."¹³⁶ "Contract" is limited to deals with the city in which the estimated total value exceeds \$100,000.¹³⁷ "Employee benefits" include "bereavement leave, disability insurance, life insurance, health benefits, dental benefits, family leave, memberships, moving expenses, and travel benefits."¹³⁸ "Domestic partners" are any two partners, including same-sex couples, who are not relatives and "are committed to one another to the same extent as married persons are to each other."¹³⁹

In addition to its definitional qualifications, the Minneapolis City Council attempted to narrow its compliance requirements.¹⁴⁰ The ordinance applies to the portions of a contractor's operations that occur "within the City" or "[e]lsewhere within the United States where work related to a contract is being performed."¹⁴¹ The statute leaves unclear what exactly these terms mean to a contractor whose operations overlap, or whose employees' work bears an indirect relationship to other employees' work.¹⁴² The ordinance also states that contractors need only offer domestic partner

134. MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(d) (2003).

135. See MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(c) (2003).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. See MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(i), (j) (2003).

141. MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(i)(1), (3) (2003).

142. See MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(i)(1), (3) (2003).

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benefits during the duration of the contract with the City.¹⁴³ Employers must create and implement a domestic partner registry for their employees before bidding with the city, however.¹⁴⁴ The ordinance applies to subcontractors as well as contractors, adding significant breadth to its scope.¹⁴⁵

C. Exceptions

Several noteworthy exceptions to the ordinance exist. Contractors that need not comply with the ordinance include those with a grant or agreement with a public agency, government entities,¹⁴⁶ and religious organizations and institutions.¹⁴⁷ Further, the city council itself may grant exceptions to the ordinance in response to an emergency or if it is in the “best interests” of the City.¹⁴⁸ Factors the city council can use to determine “best interests” include whether any bidder can comply with the ordinance, the services are unique and can be provided by only one bidder, there is only one bidder, and the City would gain “substantial cost savings” by granting an exception.¹⁴⁹

VI. DOES MINNEAPOLIS’ RECENT DOMESTIC PARTNER ORDINANCE COMPLY WITH *LILLY*?

Minneapolis’ ordinance employs different means to achieve the same objective of the ordinance struck down in *Lilly*. The

143. MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(j) (2003).

144. See MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(f) (2003).

145. MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, §18.200(k) (2003).

146. It is here that Minneapolis ironically exempts itself from its own ordinance.

147. MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(f) (5)-(8) (2003). The religious exception ostensibly is Minneapolis’ attempt to avoid First Amendment difficulties under the Free Exercise Clause. See U.S. CONST. amend. I; MINN. CONST. art. I, § 16 (“The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship”).

148. MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(g) (1)-(2) (2003).

149. MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(g) (2) (b)-(f) (2003).

question is whether Minneapolis' domestic partner-city contractor ordinance should be struck down under Minnesota law as an *ultra vires*¹⁵⁰ act. An act is *ultra vires* if it expressly or impliedly conflicts with state law, or if it is preempted because the state has already chosen to legislate in a particular field.¹⁵¹ It is true that Minneapolis' two domestic partner ordinances¹⁵² are factually distinct in that requiring private contractors to provide domestic partner benefits is not the same as mandating the city do the same for its employees.¹⁵³ Nevertheless, this comment argues that the ordinance is *ultra vires* under a *Lilly* analysis principally because the overarching objective to legislate municipal benefits, marriage and family, and anti-discrimination policies beyond the borders of the city remains the same.¹⁵⁴ Applying the *Lilly* analysis to Minneapolis' recent domestic partner ordinance renders it an *ultra vires* act.¹⁵⁵

A. *Should Minnesota Law Be Strictly Construed Against the City?*

The standard under which a court reviews Minneapolis' domestic partner benefits ordinance will in large part determine whether it withstands judicial scrutiny. In *Lilly*, the implied necessary powers of the City of Minneapolis to legislate in the realm of domestic partner benefits were strictly construed vis-à-vis Minnesota Statutes section 471.61 because such legislation intruded upon three realms of policy occupied by the state.¹⁵⁶ The rule of *Lilly* is that the state already occupies three areas of law: oversight of the provision of insurance benefits for municipal employees under section 471.61, anti-discrimination law, and marriage law.¹⁵⁷ If a city intrudes upon any one of these three areas, state law is strictly construed against the locality because each

150. *Ultra vires* means "unauthorized; beyond the scope of power allowed or granted by a corporate charter or by law." BLACK'S, *supra* note 44, at 1525.

151. See *supra* notes 96-97 and accompanying text. Note the distinction between conflict and preemption, either of which taken separately can render an ordinance invalid.

152. MINNEAPOLIS, MINN. CODE OF ORDINANCES tit. 2, ch. 18, § 18.200 (2003) & tit. 7, ch. 142, § 142.20 (1991).

153. Compare MINNEAPOLIS, MINN. CODE OF ORDINANCES tit. 2, ch. 18, § 18.200 (2003) (requiring city contractors to provide benefits to their employees), with MINNEAPOLIS, MINN. CODE OF ORDINANCES tit. 7, ch. 142, § 142.20 (1991) (providing benefits directly to city employees).

154. See *infra* Parts V.A.-C. and accompanying text.

155. See *infra* Parts VI.A.-C. and accompanying text.

156. See *Lilly v. City of Minneapolis*, 527 N.W.2d 107, 113 (Minn. Ct. App. 1995), *rev. denied* (Mar. 29, 1995).

157. See *id.* at 111-13.

is considered a statewide concern.¹⁵⁸ Minneapolis' recent domestic partner benefits ordinance may intrude upon state municipal benefits policy. The Minneapolis ordinance almost certainly intrudes upon state anti-discrimination and family policies in the same way as Minneapolis' first domestic partner benefits ordinance.

Whether the Minneapolis ordinance intrudes upon the realm of state municipal benefits policy is unclear. Section 471.61 of Minnesota Statutes provides:

A . . . municipal corporation . . . other political subdivision or other body corporate and political of this state . . . may insure or protect its or their officers and employees, and their dependents, or any class or classes of officers, employees, or dependents, under a policy or policies or contract or contracts of group insurance benefits covering . . . medical and surgical benefits and hospitalization insurance or benefits for both employees and dependents A payment is deemed to be additional compensation paid to the officers or employees.¹⁵⁹

Thus, the state affirmatively grants municipalities the power to insure their own employees' dependents.¹⁶⁰ Depending on how the court interprets the statute, this could mean one of two things. Broadly interpreted, the statute means that the state occupies the realm of municipal employee benefits policy.¹⁶¹ This interpretation would lend itself to a strict construction against Minneapolis' power to mandate contractors provide employee benefits. Narrowly interpreted, the statute shows the state occupies policies surrounding the provision of benefits to municipal employees only, lending itself to a broad construction of city power.¹⁶² That interpretation would avoid a strict construction of the City's powers under state law.

This dispute over statutory interpretation can be settled by looking to the policy issue that undergirds statutory construction of municipal powers, which is to avoid city intrusion into matters of statewide concern.¹⁶³ Viewed in this light, Minneapolis' ordinance

158. *Id.* at 113.

159. MINN. STAT. § 471.61, subd. 1 (2002).

160. *See id.*

161. *See id.*

162. *See id.*

163. *See Lilly v. City of Minneapolis*, 527 N.W.2d 107, 113 (Minn. Ct. App. 1995), *rev. denied* (Mar. 29, 1995).

reaches further beyond city boundaries than did its first. Whereas the first ordinance applied only to city employees,¹⁶⁴ the second potentially applies to any contractor within the state with more than twenty employees.¹⁶⁵ Still, the first of the three bases for determining that the City's first ordinance concerned a statewide problem is open to debate.

While some question exists as to whether Minneapolis' city contractor ordinance intrudes upon the realm of state municipal benefits policy, the two other factors the *Lilly* court used to find that the first ordinance legislated in a matter of statewide concern remain applicable. First, the City still attempts to legislate in the realm of domestic partner benefits, which the *Lilly* Court said dealt with "the statewide problem of discrimination."¹⁶⁶ Second, under a *Lilly* analysis, domestic partnership laws deal with "the definition of family relationships and dependent status," which the court said are "statewide concerns."¹⁶⁷

Under the *Lilly* framework, Minneapolis' domestic partner-city contractor ordinance enters at least two, maybe three, fields of law occupied by the state. Therefore, the power of the City to require city contractors to provide domestic partner benefits should be construed narrowly, provided that *Lilly* is upheld.¹⁶⁸

B. Does Minneapolis' Recent Domestic Partner Benefits Ordinance Conflict with State Law, or Is It Preempted by State Public Policy?

Given that the City's powers should be narrowly construed, the ordinance is ripe to be struck down if it in any way conflicts with state statutory law.¹⁶⁹ "Municipal legislation must also comply with the state constitution, and with state public policy as disclosed in the general law."¹⁷⁰ A close analysis reveals that the ordinance is not entirely harmonious with state law and public policy with

164. See MINNEAPOLIS, MINN. CODE OF ORDINANCES tit. 7, ch. 142 (1991).

165. See MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(c) (2003).

166. *Lilly*, 527 N.W.2d at 111.

167. *Id.* at 113.

168. See *id.*

169. See *id.* at 111 (stating that the cities have no power to legislate in areas "expressly or impliedly withheld" by the state (quoting *State ex rel. Lowell v. City of Crookston*, 252 Minn. 526, 528, 91 N.W.2d 81, 83 (1958)); *Lilly v. City of Minneapolis*, 1994 WL 315620 at *3 (Minn. Dist. Ct. 1994) (conclusion of law no. 9) (same).

170. *Lilly v. City of Minneapolis*, 1994 WL 315620 at *3 (Minn. Dist. Ct. 1994) (conclusion of law no. 9) (citing *Lowell*, 252 Minn. at 528, 91 N.W.2d at 83).

regard to municipal benefits, family, and anti-discrimination policy.

The first issue is whether the Minneapolis ordinance conflicts with Minnesota Statutes section 471.61. Section 471.61 only authorizes a city to “insure or protect *its* . . . employees . . . and their dependents.”¹⁷¹ In the absence of express authorization permitting a municipality to mandate benefits for contracting employees, a Minnesota city may not have such authority.¹⁷² A municipality, perhaps, is only expressly given the statutory power to insure its own employees.¹⁷³ Requiring city contractors to provide domestic partner benefits could be an *ultra vires* act because Minnesota cities have the authority only to provide employment benefits to their own employees.¹⁷⁴ On the other hand, it could be argued that section 471.61 only relates to benefits municipalities can offer their own employees, and has nothing to say about cities dealing with their contractors.¹⁷⁵ If that were so, then no conflict would exist between the ordinance and section 471.61.¹⁷⁶ Hence, the characterization game: Is section 471.61 a statute about a city’s power to provide benefits generally or simply city benefits to city employees? It is here that a court’s standard of statutory construction becomes relevant.¹⁷⁷ Because family and anti-discrimination policies are deemed to be statewide concerns, the state statute must be construed narrowly.¹⁷⁸ Under a narrow construction of state law, the City again finds itself in trouble because section 471.61 authorizes cities only to offer benefits to the beneficiaries of their own employees.¹⁷⁹

In addition to conflicting with section 471.61, Minneapolis’ ordinance should also be preempted because it treads upon state domestic relations and marriage policy, both of which are fields of

171. MINN. STAT. § 471.61 subd. 1 (2002) (emphasis added).

172. See *Welsh v. City of Orono*, 355 N.W.2d 117, 120 (Minn. 1984).

173. See MINN. STAT. § 471.61 (“A municipal corporation . . . may insure or protect *its* . . . officers and employees”) (emphasis added).

174. See MINN. STAT. § 471.61 (2002).

175. See *id.*

176. See *id.*

177. See *Lilly v. City of Minneapolis*, 527 N.W.2d 107, 111 (Minn. Ct. App. 1995), *rev. denied* (Mar. 29, 1995).

178. See *id.*

179. An even more interesting question is whether cities can require that benefits be given to contractors’ employees that they cannot offer their employees. That is, to what extent does a city have the right to mandate that private contractors do something that it cannot do itself?

law reserved by and for the state.¹⁸⁰ Minnesota law expressly and pervasively speaks to the area of domestic relations and the benefits to be derived from state recognized marital relationships.¹⁸¹ Indeed, Minnesota has a long-standing public policy to provide state recognition and benefits to marriage as the state defines it.¹⁸² The Minnesota Supreme Court, in the landmark decision of *Baker v. Nelson*,¹⁸³ was among the first courts to uphold a state statute prohibiting same-sex marriage.¹⁸⁴ Minnesota statutes define marriage as between one man and one woman.¹⁸⁵ In 1997, Minnesota passed a Defense of Marriage Act (DOMA) expressly prohibiting marriage between persons of the same sex.¹⁸⁶ In addition, Minnesota statutes expressly disclaim any condoning, authorization, or recognition of “homosexuality, bisexuality, or any equivalent lifestyle.”¹⁸⁷ Most recently, Minnesota repealed the state law enabling state agencies to offer domestic partner benefits to state employees.¹⁸⁸ Taken together, Minnesota case law and statutes

180. See *Lilly*, 527 N.W.2d at 113 (stating that the definition of family relationships is a statewide concern); *Lilly v. City of Minneapolis*, 1994 WL 315620 at *8 (Minn. Dist. Ct. 1994) (stating “marriage is the essence of [the d]efendant’s argument”).

181. See, e.g., MINN. STAT. § 518.54 subd. 5 (2002) (legislating in the area of domestic relations, including benefits considered as income concerning the disbursement of marital property upon dissolution of marriage).

182. See *infra* notes 178-81 and accompanying text.

183. 291 Minn. 310, 191 N.W.2d 185 (1971).

184. *Id.* at 315, 191 N.W.2d at 187; Bradley J. Betlach, *The Unconstitutionality of the Minnesota Defense of Marriage Act: Ignoring Judgments, Restricting Travel and Purposeful Discrimination*, 24 WM. MITCHELL L. REV. 407, 412 (1998) (noting “[w]hile challenging the prohibition of same-sex marriage may have seemed ripe . . . Baker was clearly a case before its time.”).

185. MINN. STAT. § 517.01 (2002).

186. See MINN. STAT. § 517.03 (2002). “On May 16, 1997, the [DOMA] legislation easily passed 54-12 in the Senate and 112 to 19 in the House.” Betlach, *supra* note 184, at 427. The date is potentially significant because Minnesota did not have a DOMA statute when *Lilly* was decided in 1995. Thus, an even stronger public policy favoring marriage exists in Minnesota than when *Lilly* was decided.

187. MINN. STAT. § 363.021 (2002).

188. See Act of Apr. 10, 2003, ch. 11, 2003 Minn. Laws S.F. No. 293, § 1 subd. 19(a) available at <http://www.revisor.leg.state.mn.us/slaws/2003/c011.html> (last visited March 6, 2004) (“Any provision of a collective bargaining agreement or compensation plan in this section that provides a benefit based on a person’s status as a domestic partner of a state employee is not ratified and must not be implemented.”). “State worker contracts were ratified by the Legislature [during the 2003 legislative session], but they were missing a provision that provides health benefits for same-sex domestic partners. Former Gov. Jesse Ventura’s administration included the offering in most union contracts for 2002-03.” Associated Press Newswires, *How Some Major Issues Are Faring in the 2003 Legislative*

indicate that the state has clearly chosen to occupy the field of marriage policy.

Reasonable minds could potentially differ on whether domestic partner benefits in themselves infringe upon state marriage policy. It becomes more difficult to argue that Minneapolis does not in any way seek to influence, augment, or protest state marriage policy when the ordinance itself purports to do as much. One of the stated purposes of the ordinance is to recognize relationships between adult partners “who are committed to each other to the same extent as *married persons* are to each other.”¹⁸⁹ The ordinance also mandates that contractor employee benefits be provided to domestic partners if these benefits are provided “in any manner contingent upon the existence of a *marital relationship*.”¹⁹⁰ Assessing the language of a domestic partner ordinance becomes potentially critical given that the Georgia Supreme Court, the only other court to rule on state preemption of municipal domestic partner benefits twice, upheld Atlanta’s domestic partner ordinance the second time only because Atlanta removed any language relating to marriage.¹⁹¹ Unlike Atlanta, Minneapolis made no attempt to draw a distinction between its domestic partner benefits law and state marriage policy.¹⁹² The City Council could have crafted words that do not indicate a clear intent to enter the realm of marriage policy in drafting its domestic partner ordinance, but it chose not to do so.¹⁹³ In crafting its ordinance, Minneapolis plainly disregarded *Lilly*.

In addition to state family policy, Minneapolis’ ordinance has the potential to intrude upon the realm of state anti-discrimination policy, thereby triggering preemption. The *Lilly* court ruled that

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189. See MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(a) (2003) (emphasis added). The full passage in pertinent part reads:

The City of Minneapolis recognizes that a nationwide debate has advanced an expanded concept of familial relationship beyond traditional, marital relationships. This expanded concept includes relationships between two (2) non-married, adult partners who are committed to one another to the same extent as married persons are to each other, except for the traditional marital status and solemnities.

190. MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(d) (2003) (emphasis added).

191. See *supra* note 74 and accompanying text.

192. See MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(a) (2003).

193. *Id.*

discrimination policy is a power of the state and is not to be altered by municipal legislation.¹⁹⁴ The legislative intent of Minnesota's Human Rights Act shows that by adding sexual orientation to its non-discrimination policies, the state had no intent of creating domestic partner benefits.¹⁹⁵ Indeed, the statute itself expressly disclaims recognition of alternative lifestyles.¹⁹⁶ It could be argued that Minneapolis did affect state discrimination policy in enacting domestic partner benefits legislation. Yet, the wording of the ordinance again suggests that this is precisely what the City attempted to do.¹⁹⁷ The ordinance states, "no contractor shall *discriminate* . . . in the provision of employee benefits."¹⁹⁸ Wording aside, logic dictates that if Minneapolis' first attempt to legislate in the area of domestic partner benefits was preempted on the basis that the state occupies the field of anti-discrimination policy, then so does its city contractor ordinance; domestic partner benefits are equally related to anti-discrimination policy when provided by city contractors as compared to the city itself.

Under a *Lilly* framework, Minneapolis' ordinance conflicts with Minnesota statutes and is preempted by state public policy. Because the state already occupies the fields of marriage and anti-discrimination policy, Minneapolis law must be in accord with state law in every reasonable respect. At minimum, some discord exists between state and city law with regard to marriage and anti-discrimination policy.

C. *Reconsidering Lilly*

1. *Potential Arguments against Lilly*

As is apparent thus far, the wording of the Minneapolis ordinance offers the City little room to argue that the ordinance is not an attempt to legislate in the realm of state family and anti-

194. See *Lilly v. City of Minneapolis*, 527 N.W.2d 107, 113 (Minn. Ct. App. 1995), *rev. denied* (Mar. 29, 1995) (noting that discrimination policy is a "statewide concern"); *City of Minneapolis Comm'n on Civil Rights v. Univ. of Minn.*, 356 N.W.2d 841, 843 (Minn. Ct. App. 1984) (same).

195. See *supra* notes 120-22 and accompanying text.

196. See MINN. STAT. § 363.021 (2002) (stating that the statute should not be "construed to authorize the recognition of or the right of marriage between persons of the same sex").

197. See MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(d) (2003).

198. See *id.* (emphasis added).

discrimination policies.¹⁹⁹ If Minneapolis' domestic partner-city contractor ordinance is to be upheld, the City will have to argue against *Lilly*. Although it is always an uphill battle to argue against precedent, some grounds for questioning *Lilly* do exist.

In order to challenge *Lilly*, Minneapolis must attempt to narrow the realm of state family policy to exclude domestic partner benefits by insisting that domestic partner benefits are not an attempt to infringe upon state policy concerning marriage and family.²⁰⁰ Some authority exists from other jurisdictions supporting such a claim.²⁰¹ In the absence of state legislation directly concerning state benefits, the City could argue that the field of family policy triggering preemption by the state does not include benefits to non-marital partners. To support such a proposition, the City could draw the distinction that “[m]arriage is generally a relationship between two individuals and the state, whereas, a domestic partner benefit plan is a relationship between two individuals and an employer or between two individuals and a municipality.”²⁰² In addition, the City could point out that marriage still conveys a host of legal rights emanating from the state that domestic partnerships do not.²⁰³ The City could argue state family policies²⁰⁴ merely place an affirmative burden on city governments to support and encourage marriage. This burden need not exclude providing certain rights to domestic partners.²⁰⁵

Even if Minneapolis successfully argues its domestic partner ordinance is harmonious with state family law, the City must

199. See *supra* Part VI.B.

200. Cf. *Lilly v. City of Minneapolis*, 527 N.W.2d 107, 113 (Minn. Ct. App. 1995), *rev. denied* (Mar. 29, 1995) (holding that Minneapolis' first domestic partner ordinance intrudes upon the definition of family relationships, which is a statewide concern).

201. See *supra* note 73 and accompanying text.

202. Debbie Zielinski, *Domestic Partnership Benefits: Why Not Offer Them to Same-Sex Partners and Unmarried Opposite Sex Partners?*, 13 J.L. & HEALTH 281, 296 (1999) (citing Demian, *Comparing Legal Marriage/Ceremonial Marriage/Domestic Partner Benefits* at <http://www.buddybuddy.com/mar-comp.html> (last visited Feb. 25, 2003)).

203. See *id.* at 296-98. Some of the rights married partners enjoy but domestic partners would not enjoy under a domestic partner benefits law include certain property rights, child custody, crime victim's recovery, divorce protections, domestic violence intervention, exemption of property taxes upon a partner's death, immunity from testifying, joint adoption and foster care, joint bankruptcy, medical decisions on behalf of a partner, and wrongful death benefits. *Id.*

204. See *supra* notes 180-88 and accompanying text.

205. See *supra* notes 189-90 and accompanying text.

additionally discredit the analysis in *Lilly* that municipal anti-discrimination policy related to domestic partners is a realm of policy normally occupied by the state.²⁰⁶ It does appear odd that Minneapolis has a Human Rights Commission,²⁰⁷ yet any policy regarding anti-discrimination benefits is subject to a high standard of judicial scrutiny.²⁰⁸ The *Lilly* court did not explain why the City had the “home rule” power to establish a city Human Rights Commission but lacked the “home rule” power to fully act in the area of discrimination policy.²⁰⁹

Supposing that Minneapolis can undermine the *Lilly* rationale for strictly construing state law against the City,²¹⁰ it still must demonstrate that a broader construction of state law would allow for domestic partner benefits.²¹¹ The dissent in *Lilly* provides the

206. See *Lilly v. City of Minneapolis*, 527 N.W.2d 107, 111 (Minn. Ct. App. 1995), *rev. denied* (Mar. 29, 1995) (stating that the court disagreed with the city’s contention that its action was of local concern only and not in conflict with state law).

207. Minneapolis has a Human Rights Commission established by the City Council. See MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 7, ch. 141, § 141.40 (2003). The Commission’s mandate is to:

Seek to prevent and eliminate bias and discrimination because of race, color, creed, religion, ancestry, national origin, sex, *affectional preference*, disability, age, marital status, status with regard to public assistance, or familial status by means of education, persuasion, conciliation and enforcement, mediation and the impartial resolution and adjudication of disputes, and utilize all the powers at its disposal to carry into execution the provisions of this title.

MINNEAPOLIS CODE § 141.40(a) (emphasis added). Minneapolis also has other declarations of state anti-discrimination policy; see MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 7, ch. 139 §§ 139.10 *et seq.* (2003). The ordinance reads, in pertinent part:

It is the public policy of the City of Minneapolis and the purpose of this title . . . [t]o prevent and prohibit all discriminatory practice based on race, color, creed, religion, ancestry, national origin, sex, including sexual harassment, affectional preference, disability, age, marital status, or status with regard to public assistance with respect to employment, labor union membership, housing accommodations, property rights, education, public accommodations or public services.

MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 7, ch. 139, § 139.10(b)(2) (2003).

208. See *Lilly*, 527 N.W.2d at 111 (noting that when local legislation involves a statewide problem, the court must apply the Minnesota Supreme Court’s “directive to ‘narrowly construe’ the city’s power to act ‘unless the legislature has expressly provided otherwise.’”) (citing *Welsh v. City of Orono*, 355 N.W.2d 117, 120 (Minn. 1984)).

209. Barron, *supra* note 70, at 2356 n.411.

210. See *Lilly*, 527 N.W.2d at 111.

211. *Cf. id.* (“If a matter presents a statewide problem, the implied necessary powers of a municipality to regulate are narrowly construed . . .”). It is not clear

most obvious grounds for interpreting Minnesota statutes to allow for domestic partner benefits legislation.²¹² The crux of the dissent is that in the absence of express statutory prohibition of a city ordinance, the ordinance should be upheld.²¹³ The dissent lists statutes that do in fact expressly limit city power to show that the legislature can act directly when it seeks to prevent city action on a particular matter.²¹⁴ Thus, the City could argue that in the absence of an express statutory prohibition against cities mandating domestic partner benefits be provided to their contractors, no conflict with state law exists.

2. *Arguments for Preserving Lilly*

Minneapolis' potential arguments that family and discrimination policies do not occupy the realm of domestic partner benefits ultimately fall short. While state family policy never expressly excludes domestic partner benefits, Minnesota statutes make it clear that the state legislature has no desire to endorse or promote familial relationships outside of traditional marriage.²¹⁵ Further, numerous scholars, including those who support domestic partner benefits legislation, have recognized the essential nexus between domestic partner benefits and state family or marriage policy.²¹⁶

what a non-narrow (broad) construction of a state statute would be, but it would doubtless be more deferential in allowing for cities to enact ordinances that do not directly conflict with state statutes.

212. *Lilly*, 527 N.W.2d at 113-16 (Schumacher, J., dissenting).

213. *Id.* at 114 (noting “[i]t is well-settled that a home rule city cannot pass legislation that ‘permits what [a] statute forbids’ . . . [but t]here is no language in Minn. Stat. § 471.61 that forbids a home rule charter city from expanding the list of employee healthcare benefits.”) (citation omitted).

214. *Id.* For example, Judge Schumacher cited Minnesota Statutes section 471.633 (1992), which provided that the “‘legislature preempts all authority of a home rule charter’ city to regulate firearms except as expressly provided by that statute.” *Id.*

215. See MINN. STAT. § 363.021 (2002).

216. See, e.g., William N. Eskridge, Jr., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS, 115-18 (2002) (observing that movements toward recognizing different forms of marriage and family throughout Europe and North America have empirically moved in gradual, parallel, and consistent increments); Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN, AND INTERNATIONAL LAW 437, 441 (Robert Wintemute & Mads Andenas eds., 2001) (noting that the groundwork for same-sex marriage in the Netherlands was laid out by other, more incremental legal changes, and how each legal step leads closer to same-sex marriage); Frances N. Balonwu, *Rights and Entitlement of Same-Sex Cohabitants: Should Gays and Lesbians Have a Right to Their*

The argument that discrimination is not a statewide problem also runs into trouble because the state has long entered and occupied the realm of employment discrimination policy.²¹⁷ Apparently, even the drafters of the ordinance establishing the City Commission on Human Rights recognized that the commission is ultimately subordinate to state law.²¹⁸ The ordinance notes that the

Partners' Employment Benefits?, 23 T. MARSHALL L. REV. 483, 498 (1998) (noting “[o]ne of the goals of the gay and lesbian community is to expand the meaning of ‘family’ so that same-sex couples are legally protected”) (citing Libby Post, *The Question of Family: Lesbians and Gay Men Reflecting on Redefined Society*, 19 FORDHAM URBAN L.J. 747, 748 (1992)); Shoshana Bricklin, *Legislative Approaches to Support Family Diversity*, 7 TEMP. POL. & CIV. RTS. L. REV. 379, 380 (1998) (characterizing Philadelphia’s Domestic Partnership Bill as part of “the campaign for family diversity rights”); M.R. Carrillo-Heian, *Domestic Partnership in California: Is It a Step Toward Marriage?*, 31 MCGEORGE L. REV. 475, 488, 492 (2000) (arguing that domestic partnerships, while inferior to same-sex marriage, are a plausible alternative for states who wish to confer the legal benefits of marriage without actually calling it “marriage”); Barbara J. Cox, *Alternative Families: Obtaining Traditional Family Benefits through Litigation, Legislation, and Collective Bargaining*, 15 WIS. WOMEN’S L.J. 93, 131 (2000) (linking a proposed Madison domestic partner ordinance with “[t]he fight to obtain legislative extension of alternative family benefits”); *Development in the Law—The Law of Marriage and Family: Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004, 2009 (2003) (observing that “[t]he path of reform has been remarkably consistent in each of the European countries that have legalized same-sex partnerships, leading one scholar to label it a ‘necessary process,’ in which each step in the expansion of civil rights is critical to enabling the next) (citations omitted); James M. Donovan, *An Ethical Argument to Restrict Domestic Partnerships to Same-Sex Couples*, 8 L. & SEXUALITY 649, 649 (1998) (noting that “[domestic] partnerships are often viewed as . . . a way of according economic and legal equality to gay and lesbian couples while withholding the magic symbolism of ‘marriage’ ”); Steven N. Hargrove, *Domestic Partnerships Benefits: Redefining Family in the Work Place*, 6 LOY. CONSUMER L. REV. 49, 49 (1994) (noting that the domestic partnership movement sprang up as a result of the fact that “lesbians and gay men are not allowed to marry”); Libby Post, *The Question of Family: Lesbians and Gay Men Reflecting a Redefined Society*, 19 FORDHAM URB. L.J. 747, 748 (stating that “the goal of the lesbian and gay community today [in pushing for domestic partnership legislation] is to expand the meaning of ‘family’ ”). Cf. Charles R.P. Pouncy, *Marriage and Domestic Partnership: Rationality and Inequality*, 7 TEMP. POL. & CIV. RTS. L. REV. 363, 365 (1998) (drawing a distinction between domestic partnership legislation and the same-sex marriage movement, and arguing domestic partnerships are preferable as an alternative, rather than movement toward, same-sex marriage). Recall that the Minneapolis ordinance also states its purpose is to redefine familial relationships. See MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(a).

217. See MINN. STAT. § 363.03 (2002) (prohibiting employment discrimination on the basis of “race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, sexual orientation, or age”).

218. See MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 7, ch. 141, § 141.90 (2003) (stating that “No matter shall be heard . . . pursuant to the provisions of

Commissioner cannot act on matters “previously considered by the State of Minnesota Commissioner of Human Rights.”²¹⁹ The mere fact that Minnesota has a Board of Human Rights suggests the legislature thought discrimination was a statewide, rather than purely local, problem.²²⁰ Undermining the *Lilly* preemption rationale would also undermine the decision in *City of Minneapolis Commission on Civil Rights v. University of Minnesota*,²²¹ which in the broadest of terms noted, “[c]ivil rights problems are not confined to a metropolitan area. They can fairly be stated to be a statewide problem. [Minnesota law], then, requires a narrow construction of Minneapolis’ powers to regulate civil rights.”²²²

Supposing Minneapolis can convince a court that familial and anti-discrimination policies are not realms occupied by the state, even a broader construction of state law probably results in a conflict between domestic partner benefits ordinances and state policy. Even broadly construed, Minnesota statutes give cities only the express power to provide insurance benefits to their own employees.²²³ Further, the *Lilly* court notes in its discussion of section 471.61 of Minnesota Statutes that the term “dependents” is exclusively defined as spouses and minor unmarried children younger than eighteen and dependent students younger than 25.²²⁴ If a municipality had inherent powers, then perhaps the City could require benefits to be provided to contractors and make new categories of beneficiaries like domestic partners. However, a city has no powers save those expressly conferred by statute.²²⁵

VII. NEW ISSUES RAISED BY THE MINNEAPOLIS ORDINANCE:
DOES THE ORDINANCE CONFLICT WITH STATE LAW,
OR IS IT PREEMPTED BY STATE CONTRACTING POLICY?

Minneapolis’ domestic partner-city contractor ordinance raises new issues beyond those raised by *Lilly*. These issues relate to the

this title when the matter has been previously considered by the State of Minnesota . . .”).

219. *See id.*

220. *See id.*

221. 356 N.W.2d 841 (Minn. Ct. App. 1984).

222. *Id.* at 843 (referring to *Welsh v. City of Orono*, 355 N.W.2d 117, 120 (Minn. 1984)).

223. *See* MINN. STAT. § 471.61 subd. 1 (2002).

224. *See Lilly v. City of Minneapolis*, 527 N.W.2d 107, 110-11 (Minn. Ct. App. 1995).

225. *Welsh*, 355 N.W.2d at 120.

authority that a “home rule” city has to enact legislation affecting city contractors rather than the City’s own employees. The City will want to point out that municipalities are generally given discretion in matters of contracting.²²⁶ Those opposed to the ordinance will want to highlight potential conflicts between Minnesota state contracting policy and the ordinance as well as argue that the state already occupies the field of mandatory anti-discrimination clauses in city contracts.

Minneapolis’ domestic partner benefits legislation risks conflict with state law regarding expenditures for state contracts. According to Minnesota administrative rules, “[u]nless otherwise provided for by law, awards for all acquisitions, except building and construction contracts, must be based on best value.”²²⁷ Yet, requiring all major contractors with the city to provide domestic partner benefits has the potential to cost taxpayers across the state extra money because Minneapolis derives a significant portion of its budget from the state.²²⁸ The City apparently attempts to avoid

226. See Wichern, *supra* note 84, at 227.

227. MINN. R. 1230.0800 (2003), available at <http://www.revisor.leg.state.mn.us/arule/1230/0800.html> (last visited March 6, 2004). Municipal legislation that deals with statewide concerns must fully comply with “state public policy as disclosed in the general law,” which includes administrative rules. See Lilly v. City of Minneapolis, 1994 WL 315620, at *3 (conclusion of law no. 9) (Minn. Dist. Ct. June 3, 1994) (citing State *ex rel.* Town of Lowell v. City of Crookston, 252 Minn. 526, 91 N.W.2d 81 (1958)).

The term “best value” is somewhat ambiguous on its face, so some historical explanation may be helpful. Rule 1230.0800, recently updated, previously read, “[a]ward of contracts shall be made in conformity with Minnesota Statutes, section 16B.09 and with no material variance from the terms and conditions of the bid invitation.” MINN. R. 1230.0800 (2002). Thus, it is necessary to refer back to Minnesota statutes for greater clarity. Minnesota statutes previously read:

All state contracts and purchases made by or under the supervision of the commissioner or an agency for which competitive bids are required *must be awarded to the lowest responsible bidder*, taking into consideration conformity with the specifications, terms of delivery, the purpose for which the contract or purchase is intended, the status and capability of the vendor, and other considerations imposed in the call for bids.

MINN. STAT. § 16B.09 (1998), *repealed by* Minn. Laws, ch. 386, art. 1, § 35 (1998). (emphasis added). Thus, “best value” can best be interpreted to mean lowest price put forth by a lawful bidder.

The Commissioner of Administration has authority to make or retain rules related to state contracting in order to best articulate and effectuate state statutes. The existing statute gives the commissioner the power to “supervise, control, review, and approve all state contracts and purchasing.” MINN. STAT. § 16B.04 subd. 2(1) (2002).

228. State government funds accounted for roughly thirteen percent of Minneapolis’ \$1.179 billion budget in 2003. *City of Minneapolis FY 2003 Budget*,

the appearance of spending extra money on contracts by asserting that domestic partner benefits improve the quality and value of the goods provided to the city.²²⁹ The fact remains, however, that unless the City grants a special exception, it will end up rejecting lower bids from equally skilled and capable contractors who do not offer domestic partner benefits in favor of contractors who do.²³⁰

Minneapolis has ample ground to contend that its ordinance does not conflict with Minnesota administrative law, however. The City will want to first argue that Rule 1230.0800 does not conflict with its own contracting practices as a city. In so doing, the City will want to distinguish Minnesota's contracting rule from Minnesota statutes, which historically applied to state contracts and purchases as opposed to municipal ones.²³¹ Thus, the state law would apply to save money for state contracts, but not necessarily city ones.²³² The City could additionally point out that municipalities are generally given broad leeway in awarding city contracts so long as there is no contradiction with state law.²³³ The City could also argue that those who bid for contracts yet do not offer domestic partner benefits are not lawful bidders within the meaning of Rule 1230.0800 because such bidders do not conform to city requirements.²³⁴ The City could argue that its purpose in awarding contracts is to achieve the highest quality of goods and services possible, and that domestic partners must be given benefits to achieve "best value" for the state.²³⁵

In addition to the preceding arguments, the City by analogy can point to its other regulatory ordinances in place for contractors who bid for city contracts that are lawful regardless of their immediate economic impact to the state. These regulations

Financial Overview, at 17, available at <http://www.ci.minneapolis.mn.us/city-budget/2003adopted/TAB3-FinancialOverview.pdf> (last visited March 6, 2004).

229. See MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(a) (2003).

230. See MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(d) (2003).

231. See *supra* note 227 and accompanying text.

232. *Id.*

233. See Wichern, *supra* note 84, at 227.

234. See *supra* note 227 and accompanying text.

235. The Minneapolis ordinance states: "Requiring contractors to provide to employees with domestic partners benefits equal to those provided to employees who are married will require contractors to maintain a competitive advantage in recruiting and retaining the highest quality work force, thereby improving the quality of goods and services that the city receives." MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(a) (2003).

include: a fair wage requirement²³⁶ (including a submission of statements and payroll records),²³⁷ a requirement that no contractor charge its employees fees for obtaining employment,²³⁸ and a requirement that wages and materials be paid for before the contractor takes its profits.²³⁹ Thus, the city could argue that these are examples that demonstrate it is within its authority to enact regulations vis-à-vis city contractors.

The fact that Minneapolis has other regulations that potentially raise the price on city contracts only has legal significance, however, if it can be shown that these requirements go beyond the bounds of state law.²⁴⁰ In other words, such an argument carries legal weight only if the city demonstrates that cities have certain intrinsic powers to enact regulations related to city contracts independent of state public policy in the first place.²⁴¹ It is here that the City's argument may fall short. The state has similar statutes requiring state workers to be paid a fair wage, for example.²⁴² Minnesota law even expressly authorizes such municipal labor standards.²⁴³ Therefore, the City's other labor

236. MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 24, § 24.220 (2003) (stating "all contracts . . . to which the city is a party . . . shall contain a provision stating that all federal labor standards and prevailing wage provisions applicable to federal contracts . . . are applicable to this contract . . . and all contractors and subcontractors shall fully comply with such provisions regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and his employees.").

237. MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 24, § 24.220 (2003).

238. MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 24, § 24.60 (2003) (stating "[n]o person shall be employed on any public work done by contract for the city through the agency . . . which charges the employee a fee for securing such employment . . .").

239. MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 24, § 24.200 (2003) (stating city contracts "shall contain a special provision for the payment of the laborers, employees and those furnishing materials for such work . . . out of the amount due said contractors from the city, before any part is paid to said contractors").

240. See, e.g., *State ex rel. Town of Lowell v. City of Crookston*, 252 Minn. 526, 528, 91 N.W.2d 81, 83 (1958) ("The adoption of any [city] charter provision contrary to the public policy of the state, as disclosed by general laws or its penal code, is . . . forbidden.").

241. See *id.*

242. See MINN. STAT. § 177.41 (2002) (requiring that highway workers be paid "wages of laborers, workers, and mechanics . . . comparable to wages paid for similar work in the community as a whole"); see also MINN. STAT. § 177.43 subd. 1(2) (2002) ("a laborer or mechanic may not be paid a lesser rate of wages than the prevailing wage rate").

243. See MINN. STAT. § 471.345 subd. 7 (2002).

Nothing in this section shall be construed to prohibit any municipality

standards tend to only buttress existing state public policy, leaving the City as a political subdivision of, rather than an autonomous agent from, the state.²⁴⁴

In addition to conflicting with state contracting law, the ordinance may more directly conflict with, or be preempted by, existing Minnesota law regarding anti-discrimination policy for municipal contracts. In prescribing the anti-discrimination requirements for all state and municipal contracts, the state's criterion does not include domestic partner benefits, or even sexual orientation:

Every contract for or on behalf of the state of Minnesota, or any county, city . . . or any other district in the state, for materials, supplies, or construction shall contain provisions by which the contractor agrees . . . [t]hat, in the hiring of common or skilled labor for the performance of any work under any contract, or any subcontract, no contractor, material supplier, or vendor, shall, by reason of race, creed, or color, discriminate against the person or persons who are . . . qualified and available to perform the work to which the employment relates.²⁴⁵

The statute may conflict with the Minneapolis ordinance. The canon of construction *expressio unius est exclusio alterius*,²⁴⁶ if used to construe the statute, would indicate an intent by the legislature to exclude the possibility that cities could add anti-discrimination categories other than race, creed, or color.²⁴⁷ Preemption is a

from adopting rules, regulations, or ordinances which establish the prevailing wage rate as defined in section 177.42, as a minimum standard for wages and which establish the hours and working conditions prevailing for the largest number of workers engaged in the same class of labor within the area as a minimum standard for a contractor's employees which must be agreed to by any contractor before the contractor may be awarded any contract for the furnishing of any labor, material, supplies, or service.

Id.

244. This is not to say that every city ordinance must match verbatim the terms of a comparable state statute. However, when presented with a statewide problem that the state has attempted to address, a Minnesota city cannot act in contravention to the state. See *Lowell*, 252 Minn. at 528, 91 N.W.2d at 83.

245. MINN. STAT. § 181.59 (2002).

246. *Expressio unius est exclusio alterius* means "that to express or include one thing implies the exclusion of the other." BLACK'S, *supra* note 44, at 602.

247. Minnesota courts have applied the *expressio unius* construction as an aid in interpreting legislative intent. See *N. Pac. Ry. Co. v. City of Duluth*, 243 Minn. 84, 88-89, 67 N.W.2d 635, 638 (1955).

possibility as well. The statute potentially indicates the state intended to occupy the field of mandatory anti-discrimination provisions in state and city contracts, thus constituting preemption. Given that the sweeping language of the statute applies to both state and city governments, both conflict and preemption arguments appear strong.

Minneapolis' ordinance raises novel issues related to a city's authority to enact contracting policy. The ordinance is probably *ultra vires* because it conflicts with state contracting law and is preempted because the state ostensibly has occupied the field of law mandating anti-discrimination provisions in state and city contracts.

VIII. CONCLUSION

Minneapolis' domestic partner ordinance, while a clever attempt to avoid the *Lilly* decision, is an exercise beyond the City's "home rule" authority. The ordinance either conflicts with state law or is preempted by state public policies regarding municipal employee benefits, marriage, anti-discrimination,²⁴⁸ and contracting.²⁴⁹ These factors mean that Minneapolis' domestic partner ordinance is *ultra vires*.²⁵⁰

This is not to say that Minnesota cities should not have the leeway to act in matters of primarily local importance. The issue of domestic partner benefits is much broader than a city issue, however.²⁵¹ Given that Minnesota's interpretation of "home rule" authority seeks to delineate between state and local functions,²⁵² distinctions between statewide and local issues should be made where possible to preserve the integrity of "home rule" authority.

Domestic partner benefits are an emerging and important issue best addressed at the state level. The *Lilly* should stay in the pond, lest the frog of federalism²⁵³ have one less place to rest.

248. See *supra* Part V.B.

249. See *supra* Part VI.

250. See *supra* Parts V-VI. Of course, a court decision would not be necessary if the Minnesota legislature intervened by passing a statute expressly prohibiting municipalities from mandating that contractors provide domestic partner benefits. See *supra* note 97 and accompanying text.

251. See *supra* Part II.C and accompanying text.

252. See *supra* Part III.C and accompanying text.

253. I use federalism in this context to refer to the balance of power between the state and localities as articulated by the courts in accordance with Minnesota's "home rule" authority laws, discussed in Part III, *supra*.