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Hans Linde As Constitutional Theorist: Judicial Preservation of the Republic

IN a 1989 law review article[1] Hans Linde referred to a poster, then hanging in his chambers in the Oregon Supreme Court building. The poster was published in Denmark in 1941 to commemorate the 700th anniversary of the Danish version of the Magna Carta. Its inscription begins:

> With law shall a land be built . . . . But no law is so good to follow as the truth; where one is in doubt about the truth, there law shall find what is right.[2]

In 1941, Linde was a seventeen-year old junior in high school in Portland, Oregon. Only two years earlier he had been a German national, studying in Copenhagen, Denmark, which was about to be occupied by Hitler's Germany. Had Linde seen the poster when it was first published, one might imagine the associations it would have conveyed. Hans Linde, born in Berlin, was one of a generation of Germans who had witnessed the rise of the Nazis, their perversions of "truth," "right," and the German legal system, and their systematic persecution of German citizens who happened not to be "Aryans." By 1943, having graduated from high school, Linde was fighting against the nation of his birth in the United States Army. Imagine what the liberation of Denmark, and of Germany, from the Nazis, and his own participation in that liberation effort might have meant to someone with his background.

But in 1989, then Justice Linde quoted from the 1941 Danish poster for another purpose. He had been discussing the two major constitutional dramas of recent history: the Reagan administration's covert sales of arms to Iran and diversion of the proceeds

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[1] Linde, *A Republic . . . If You Can Keep It*, 16 HASTINGS CONST. L.Q. 295 (1989).

[2] *Id.* at 327.

from those sales to provide weapons for the Contra insurgents in Nicaragua, and the Senate hearings on the confirmation of Judge Robert Bork to an Associate Justiceship on the Supreme Court of the United States. He felt that both dramas highlighted the significance of Congress, and by extension the state legislatures, as the linchpins of the American Republic: the institutions charged with "us[ing] the power of law to find out what the truth is, and even against the wishes of the majority to debate what is right."[3] Linde believed that so long as legislatures took those obligations seriously, "we can take a chance on ratifying the republic for another century."[4]

Linde's invocation of the Danish poster in support of the view that law can "find out what the truth is" and use its power "to debate what is right" suggests that he was elevating those propositions to the stature of universals, beliefs that survived in the face of Nazi rule. This in itself does not seem surprising for one who grew up in Germany in the 1920s and 1930s and eventually became not only an American citizen, but a lawyer and a judge. What might seem more surprising is Linde's association of legislative institutions as the principal embodiments of law as a source of "truth" and a source of "right." It is senators and representatives who are to use the power of law in pursuit of those goals. Indeed, members of legislative bodies, in Linde's view, may use the power of law "to debate what is right" "even against the wishes of the majority."[5]

Linde's invocation of the 1941 poster thus represents a considerable investment in legislative bodies. The poster is a reminder of the capacity of truth and right to survive, through association with the power of law, even in regimes that systematically seek to pervert law. The "republic," as Linde conceives it, is a regime in which such perversion is not possible. It is not possible because under a republican form of government members of legislative bodies may maintain the associations between law, truth, and "what is right" even though elected by a majority of the citizens that would prefer otherwise.

The example of the Danish poster, when inserted against the backdrop of Linde's discussion of the Iran-Contra affair and the Bork nomination, thus appears to be designed to remind Linde's audience of the close connection between legislative autonomy and

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[3] *Id.*
[4] *Id.*
[5] *Id.*

the survival of the American Republic. One could view the Iran-Contra affair and the abortive Bork nomination as efforts on the part of the executive branch to usurp the power of Congress to use law to find the truth and debate what is right. By secretly selling arms to a nation (when Congress had not and would not have approved such arm sales), and then diverting the proceeds to support insurgents whose support Congress had specifically disapproved, the executive was seeking to interfere with Congress's truth-finding and policy-resolution functions. By seeking to place on the Supreme Court a nominee whose views on executive power were known to be latitudinarian, the executive was hoping to secure additional judicial support should Congress resist future attempts to circumvent those functions. Congressional resistance of both of those efforts, by instituting punitive action against the architects of the Iran-Contra affair and by declining to consent to Bork's nomination, becomes, through the poster example, the moral equivalent of Danish resistance to the Nazi occupation. Although the analogy may not be meant literally, it is offered for the reader's contemplation. When Linde later states that "the Bill of Rights was not the first or the only guarantee of liberty. The republic was meant to guarantee it,"[6] we are to assume that legislative autonomy and liberty are linked in a republican form of government.

One could argue that it is not unusual for someone with Justice Linde's background to view legislative restraints on executive power as closely identified with liberty. When he recalls that the original purpose of the American Republic was to provide an alternative to monarchy, and argues that "the risk of monarchy . . . always has come, when the executive demands funds and men to fight wars or to govern territory or peoples who do not share in the government,"[7] one can surmise that not only monarchy but totalitarian dictatorship may be on his mind. Moreover, when one notes that for four years, in his early thirties, Linde was a legislative assistant to Senator Richard Neuberger,[8] his interest in, perhaps even confidence in, legislative policy making can be more easily understood.

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[6] *Id.* at 300.

[7] *Id.* at 313.

[8] Richard Lewis Neuberger, Democrat from Oregon, served in the U.S. Senate from 1955 until his death in 1960. An account of his life in the *Dictionary of American Biography* described him as "less the ardent Democrat and more the nonpartisan" during his senate career. As a senator, he was "dedicat[ed] to improvement of the legislative process." DICTIONARY OF AMERICAN BIOGRAPHY 474-75 (J. Garraty, ed. 1980) (Supp. 6). Justice Linde was a legislative assistant to Neuberger from 1955 to 1958.

But any effort to reconstruct the constitutional theories of Justice Linde from scattered evidence in his earlier life would quickly reveal that there is one additional piece of the puzzle that requires investigation. That piece is the role of the Constitution as a counter-legislative document. It is all very well to say, as Linde said in 1989, that "the Bill of Rights was not the first or the only guarantee of liberty."[9] But a federal Bill of Rights has existed since 1791, and Oregon has a state constitution with the equivalent. More significantly, as we shall later see, Linde was not only a proponent of legislative autonomy in his constitutional decisions, he was also extremely mindful of constitutional restrictions on the power of the legislature. Indeed one could argue that alongside the formative experience of service for Senator Neuberger one should place another experience of Linde's earlier life, his clerkship with Justice William O. Douglas in the 1950-51 Supreme Court Term, a period when Douglas's determined opposition to congressional efforts to restrict free speech in the name of national security had surfaced.[10]

Thus, the most intriguing question about Hans Linde's constitutional jurisprudence is a twofold one. How did his reflections on the experiences of his early life and career result in his simultaneously emerging, as a judge, a proponent of legislative autonomy, and a guardian of rights against the legislature? And how did a person of Linde's considerable intellectual powers go about reconciling those two apparently conflicting perspectives in a coherent theory of the judicial role in constitutional cases? The remainder of this Article explores that two-pronged question. If in the process of that exploration I seem at times to be conducting a dialogue with Justice Linde as well as an exposition of his views, that posture is not inadvertent. It is nonetheless a posture grounded in respect, not only for the substance of views I am subjecting to scrutiny but for Justice Linde's commitment to the idea of scholarship as a medium in which views are sharpened and refined through exchange.

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[9] Linde, *supra* note 1, at 300.

[10] The legacy of Justice Linde's clerkship with Douglas is well apparent in Linde, *Justice Douglas on Freedom in the Welfare State: Constitutional Rights in the Public Sector*, 39 WASH. L. REV. 4 (1964), and Linde, *Constitutional Rights in the Public Sector: Justice Douglas on Liberty in the Welfare State*, 40 WASH. L. REV. 10 (1965).

I

THEORETICAL ASSUMPTIONS

One acquainted with Justice Linde's judicial and extrajudicial work would expect his reconciliation of the principle of legislative autonomy with the principle of solicitude for constitutional rights against the legislature to be worked out in a complex and subtle fashion. Linde joins the ranks of accomplished state judges with ongoing interests in academic scholarship, and, like two of his predecessors in that tradition, Cardozo and Traynor, he has been as comfortable in the realm of abstract theory as he has been in the realm of particularized application. His extrajudicial writings are embedded with jurisprudential observations, few of them simple or straightforward. Despite those obstacles, I have sought to extract a set of starting premises on which his approach to constitutional adjudication can be said to rest.[11]

Linde begins with the idea of America as a republic. Closely related to that idea is the principle of legislative autonomy. This principle flows from Linde's assumption that a representative lawmaking branch of government is an indispensable requirement of republics in a way that other branches are not. "When we speak of three 'equal' branches," he suggests, "let us recall which is first and indispensable."[12] In particular:

> The United States had a Congress before it had a president or federal courts. We could have kept a republic without a president or without federal courts. We could not have a republic without congress, or with only a powerless assembly. A state with only a governor and judges would fail the test of republican form of government.[13]

Why is the legislative branch "indispensable" to the preservation of a republican government? This question takes Linde to an even more abstract level, the theoretical basis of republicanism itself, as understood by the architects of the Constitution. In Linde's formulation, that theoretical basis can be encapsulated in three terms that had great evocative meaning for those architects: "interest," "passion," and "deliberation." He then proceeds to spell out the meaning of those terms.

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[11] There is no doubt that Justice Linde would prefer a more complex and subtle formulation than the summary that follows. But then Justice Linde would very probably be loath to emphasize the significance of starting premises in judicial reasoning in the first place.

[12] *See* Linde, *supra* note 1, at 313.

[13] *Id.*

In Linde's view, the Federalists, as architects of the Constitution, "distinguished republican government both from monarchy and from direct democracy. They stood for government by accountable representatives, government with the consent of the governed, not by the governed."[14] Their concern with instituting a republican form rather than either of the other two forms centered on their fear of "public acts derived from motives of 'interest' or 'passion' "[15] and their associated fear that "the mass of citizens, unlike a representative assembly, would lack the knowledge to make responsible decisions."[16] A republic symbolized a government composed of a representative body of citizens which would prevent self-interested or impassioned persons from having too much power in its deliberations. Those deliberations were themselves to approximate an "ideal of dispassionate debate and logical persuasion," in which "deliberative processes of choice" would be institutionalized.[17]

Given the "grounds on which the drafters in 1787 chose a republican . . . form of government: *deliberation, interest, and passion*,"[18] one can see how legislative bodies embody those grounds in their composition and functions. Linde spells out the details:

> Representatives do not react to each bill in isolation. They see many bills, some repeatedly over a period of several sessions. They relate the effect of a bill or its alternative to other laws and programs. In or out of committees, they can press proponents and opponents for answers to questions. They can request legal or fiscal analyses. They can amend a bill to clarify, to improve, or to compromise. . . .
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> . . . Legislators must deal with priorities other than their own or those of their narrow constituencies. They must make deliberate choices in allocating scarce resources. . . . Often a representative body chooses not to override the strongly felt objections of minority opinion or interests in order to effect the wishes of the popular majority. . . .
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> Unlike the voter who is given a menu of measures on the ballot, a legislator . . . cannot vote anonymously for or against a few bills and skip the rest; the legislator must take a stand on each bill that reaches the floor. . . . [R]epresentatives are expected to rationalize their acts as serving some interest beyond their private self-interests.[19]

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[14] Linde, *When Is Initiative Lawmaking Not "Republican Government?"*, 17 HASTINGS CONST. L.Q. 159, 164-65 (1989).

[15] *Id.* at 166.

[16] *Id.* at 168.

[17] *Id.* at 166, 168-69.

[18] *Id.* at 170.

[19] *Id.* at 169.

Under this formulation legislators in a republic emerge as persons whose potential "interests" or "passions" are significantly constrained by the requirements of deliberation.

One might ask at this point whether such a characterization of legislative activity is overly sanguine, given the currency of more skeptical views of the legislative process, and enhanced attention to the capacity of incumbent legislators to manipulate the legislative agenda to promote their interest in continued incumbency. We shall reserve that question at this point and assume that Linde's characterization is at least defensible. If one assumes the plausibility of his characterization, and the continued commitment of Americans to a republican form of government, the principle of legislative autonomy would appear to be a well-entrenched feature of republicanism. Linde, in fact, takes the entrenchment of legislative autonomy as a given, and formulates some sub-principles consistent with it.

The first appears surprising in light of Linde's previous emphasis on the constraints of the deliberation ideal. This sub-principle is that legislators, despite the concerns of republican theory with "interested" and "passionate" law making, have no obligation to pass rational legislation. "[A]t its best," Linde once said, "the legislative process is a far cry from the deliberative search for agreed ends and the informed assessment of means that is postulated by [models premised on an underlying assumption of legislative rationality]."[20]

What is one to make of this comment? If we think of rationality as the antithesis of "passion" or unconstrained self-interest, it would seem that one of the purposes of a republican government would be to create fora for decision making in which rationality would surface. Legislators, in the republican model, would be constrained to make decisions on the basis of prudence, consensus, collective wisdom, or other such criteria associated with the transcendence or subordination of individual passions. To deny that the legislative process facilitates decisions that are informed and achieved through deliberation seems to strip the legislative forum of one of its claims to legitimacy in a republican polity.

It turns out, however, that Linde's conception of legislative rationality is more complex than the above summary suggests. His critique of rationality in legislative decision making is not in fact directed at the performance of legislatures; instead, it is directed at the assumption of courts that legislative behavior can be tested

[20] Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 224 (1976).

against a standard of review predicated on a search for the "rational basis" of legislation. As he put it:

> [T]he ["rational basis"] test [for evaluating the constitutionality of legislation] depends on attributing a purpose to the lawmakers; but laws are often an accommodation of several unrelated purposes. . . . Although proponents might have wished for more and opponents for less, all that is certain about the law as a means to an end is that a majority could be found to undertake what the law in fact undertakes. . . . Many of our laws simply reflect old notions of right and wrong, or sympathy toward the equity of some particular claim to legislative consideration, without intending to achieve any pragmatic aim. Such a law may be unconstitutional if it pursues a goal that the Constitution forbids, but not because the values it reflects are merely sentimental, or parochial, or old-fashioned, or foolish, rather than goal-oriented.[21]

In this discussion of legislative "rationality" Linde revealed that his commitment to republicanism has a distinctively positivist bent. In discussing the ideal of a republic he emphasized the constraints of deliberation and accountability on legislators, constraints that by minimizing passion and self-interest facilitated the republican ideals of civic virtue and disinterestedness. Notwithstanding those constraints, he recognized that many laws are simply the products of "the equity of some particular claim to legislative consideration."[22] Such laws can be based on sentiment, parochialism, antiquated or even misguided beliefs. The question, in evaluating the legitimacy of such laws under the system of American constitutional republicanism, is not whether they are "rational" but whether they are expressly forbidden by the Constitution. If not, legislators have the power to enact them. Indeed one should expect that legislators will enact such laws, whether or not they appear on reflection to be based on rational ends.

Legislative autonomy is thus a much stronger concept for Linde than it might first appear. At an abstract level, it appears to rest on notions of deliberation and accountability that arguably distinguish the legislative branch from others in the American system. Deliberation and accountability constrain decision making so as to foster decisions that are justifiable on grounds other than the passions or self-interests of individual legislators, and thus conform to the ideals of a republican polity. But at a concrete level legislative autonomy presupposes that such decisions do not always occur. In fact Linde

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[21] *Id.* at 220-21.

[22] *Id.* at 221.

suggests that it is unrealistic, given the nature of the legislative process, to expect that they will occur, or even that any disinterested assessment of why a particular legislative decision occurred will be possible. Rationality turns out to be an elusive concept, both as a device for evaluating legislative conduct from the perspective of another branch — for instance, a court invoking "rational basis" review—and as a standard against which the behavior of legislatures can be tested even by themselves. The portrait of legislative decision making painted by Linde is one in which the elements of arbitrariness, fortuity, intuition, and mystery appear in bold relief.

These elements, paradoxically, are what lend strength to the idea of legislative autonomy as Linde formulates it. If intelligible criteria for determining the rationality of legislative decision making are not often available, but at the same time legislatures reflect the closest approximation to ideal republican institutions, one must believe that, left to their own devices, legislatures will preserve rather than dissolve the Republic.

It is not immediately obvious why this belief should be regarded as plausible. If one starts with the assumptions about human nature made by republican theorists, those assumptions are not optimistic about the capacity of persons given autonomy to make decisions for themselves and others to act in disinterested and virtuous ways. The structure of checks and balances envisaged by American constitutional republicanism appears designed to constrain the self-interested use of power by those granted decision making autonomy. Legislators are theoretically constrained by their constituents, by voters, and by other governmental branches, especially the judiciary as interpreter of the Constitution. But Linde's characterizations of the legislative process assume that the crucial ingredient in this system of theoretical constraints—the requirement of legislative deliberation—is something of an illusion.

Deliberation, which includes the requirement that legislators declare their votes on legislative issues for the record, is the crucial ingredient in the constraint system because it produces a record of legislator conduct which can be evaluated by others. In theory, voters, constituents, and other branches can then determine the basis for legislative action, individually and collectively, and react accordingly if the basis appears "passionate" or "interested" and thus not virtuous. They can vote legislators out of office or lobby against their views or declare their actions unconstitutional. But if deliberation is inherently elusive—as Linde's comments on the role of ra-

tionality in legislative decision making suggest—the basis for evaluation of legislative conduct appears elusive as well. It is not clear what an individual legislator's vote meant, what the purpose of legislation was, and whether the motivation of individuals or the legislative body could be designated "rational" or not.

In Linde's formulation, however, the elusiveness of deliberation does not undermine legislative autonomy. On the contrary, in his discussion of legislative rationality, the elusiveness of deliberation functions as an argument for autonomy by emphasizing the unintelligibility of review standards based on judgments of what the "rational basis" of legislation was or should have been. One could, however, draw other implications from the assumption that deliberation is elusive. If the deliberation requirement does not in fact produce intelligible information about the individual or collective motivations of legislators, it nonetheless provides abundant opportunities for legislators to justify their votes. Speeches on the floor of a legislature by members can offer rationales for voting behavior, but there is no easy way to assess the candor of such rationales. Legislators, being persons holding office and exercising power, have numerous other opportunities to publicize the reasons for their activity, some of which are directly related to their efforts to preserve their incumbency. Assessing the candor of those comments is perhaps even more difficult than assessing comments made on the legislative floor. Moreover, as Linde points out, the determination of legislative motivation by the judiciary is fraught with difficulties, whatever the standard of judicial review employed.

Given the elusiveness of deliberation and the opportunities for legislators to offer their own accounts of their motivation, most commonly in partisan contexts, why should the deliberative component of legislating, as Linde presents it, be an argument *for* legislative autonomy? Why should one not conclude that given the inherent elusiveness of deliberation and the abundant opportunities for legislators to offer self-interested accounts of their motivation in making decisions, the central linchpin of a theory that predicates legislative autonomy on accountability to others in the American Republic has been significantly vitiated? And if one were to add to that conclusion the significant access legislators have to sources of capital, lobby groups, the media, and other officials, and the acknowledged interest legislators have in their own incumbencies, why should one not take Linde's perceptive account of the legislative process as an argument *against* legislative autonomy?

This last set of questions takes us, I believe, to the heart of Linde's constitutional jurisprudence, for it is clear that he would not follow the last line of reasoning. In the next section of this Article I will argue that in Linde's constitutional jurisprudence, legislative autonomy and what I am calling textual "purity" are treated as self-reinforcing concepts, producing a positivistic approach toward constitutional decision making, one in which judges take the commands of texts seriously, whether those texts reinforce or restrain the powers of the legislature. How this jurisprudential point of view squares with Linde's solicitude for individual rights is one of the puzzles I address in that argument, but suffice it to say that the squaring is achieved. To unravel the question why a positivistic conception of legislative decision making is taken by Linde to be consistent with both republican theory and individual rights, I will direct my attention to two significant Linde opinions. After that discussion I will attempt to locate Linde's unique jurisprudential perspective on a continuum of other distinguished twentieth-century American appellate judges.

II

SQUARING LEGISLATIVE AUTONOMY WITH RIGHTS AGAINST THE STATE

A. Legislative Supremacy: City of La Grande v. Public Employes Retirement Board

One of Linde's most controversial, and at the same time most representative, opinions was that for a 4-3 majority in the petition for rehearing of *City of La Grande v. Public Employes Retirement Board*.[23] The case involved state efforts to intervene in the retirement and benefit schemes of municipal police and firemen in the face of the longstanding Oregon tradition of "Home Rule," reflected in 1906 amendments to article IV and article XI of the Oregon Constitution. These amendments emphasized that city and town voters could "enact and amend" their municipal charters, and "empower[ed] local voters to initiate or refer to popular vote all 'local, special and municipal legislation of every character in or for their municipality or district.' "[24] Oregon state laws mandated certain retirement and insurance benefits for police and firefighting per-

[23] 284 Or. 173, 586 P.2d 765 (1978). The original decision was 281 Or. 137, 576 P.2d 1204 (1978).

[24] 284 Or. at 176, 586 P.2d at 765-66 (quoting OR. CONST. art. IV, § 1, cl. 5 (1859, amended 1906)).

sonnel, including overtime pay, and insisted that municipalities dispense those benefits in conformity with the state public employees retirement system. Various cities challenged the constitutionality of these laws in light of the Home Rule amendments. The stakes in that challenge were high, since a conclusion that the statutes passed constitutional muster would not only increase the financial burden of municipalities, it would open the door to similar statutes creating state-imposed burdens. On one side was the entrenched Oregon tradition of local autonomy; on the other was a growing state interest in the equitable distribution of benefits and burdens in the public employment sector.

One reading of the Home Rule amendments precluded the state from passing legislation affecting local government. The amendments provided that " '[t]he Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town,' "[25] and that " '[t]he initiative and referendum powers . . . are further reserved to the qualified voters of each municipality and district as to all local, special and municipal legislation of every character in or for their municipality or district.' "[26] Linde noted that opponents of the public employee benefits legislation in *La Grande* treated those provisions "as though a constitutional grant of power to one level of government necessarily carries with it a corresponding withdrawal of power from the other."[27]

He easily disposed of that argument. Article XI, section 2 dealt only with city charters, not local enactments of all kinds.[28] The provisions of article IV dealing with "all local, special and municipal legislation of every character" anticipated the passage of such legislation through the processes of initiative or referendum. "[I]f the 'home rule' amendments had made the enactment of local laws by the Legislative Assembly unconstitutional," Linde noted, "it would obviously be neither necessary nor even proper to invoke [those processes] against such laws."[29] Thus, the arrangement contemplated by the provisions assumed that "[i]t is entirely possible to grant certain powers to local governments to act on their own initiative without at the same time limiting the powers of the state legisla-

[25] *Id.* at 175, 586 P.2d at 766 (quoting OR. CONST. art. XI, § 2 (1859, amended 1906)).

[26] *Id.* (quoting OR. CONST. art. IV, § 1, cl. 5).

[27] *Id.* at 176, 586 P.2d at 767.

[28] *Id.* at 178, 586 P.2d at 767-68.

[29] *Id.* at 184, 586 P.2d at 771.

ture."[30] Cities like La Grande could adopt retirement and insurance programs for their employees, but this did not mean that the state of Oregon was precluded from establishing statewide standards for those programs.[31]

Thus far, Linde's analysis was unexceptionable. The language in the Home Rule amendments referred to charters and acts of incorporation, not to all municipal legislation. The invocation of the initiative and referendum powers for local voters presupposed the existence of state laws against which those powers might be directed. It was "a truism" of federalism and separation of powers theory that a grant of power to one level of government did not constitute a corresponding withdrawal of power from any other levels.[32]

However, the constitutional limitation on legislative infringements of municipal charters and acts of incorporation remained. What did it mean? Here Linde and the other justices in *La Grande* confronted the central ambiguity of the case. If the Oregon Constitution prevented the state legislature from "enact[ing], amend[ing], or repeal[ing]" any municipal charter, and the "charter" of a municipality set forth a variety of municipal functions and services, did this mean that if cities such as La Grande sought to change the terms by which they provided services—such as raising the rates on their bus lines or allocating more money for garbage collection—those actions were alterations of their charters? And if they were not, what sort of municipal actions were sought to be protected from legislative oversight by the Home Rule provisions?

Clarification of this ambiguity, Linde assumed, required an analytical distinction, one not necessarily anticipated by the constitutional provisions under interpretation. In the original *La Grande* decision by the Supreme Court of Oregon the majority, also through Linde, had distinguished between state statutes affecting the "structure and procedures of local [government] agencies," and statutes involving "substantive social, economic, or other regulatory objectives of the state."[33] The distinction suggested that the former types of statutes were constitutionally forbidden by the Home Rule provisions except where a "state concern" was "justified by a need to safeguard the interests of persons or entities affected by the pro-

[30] *Id.* at 176, 586 P.2d at 767.

[31] *Id.*

[32] *Id.*

[33] City of La Grande v. Public Employees Retirement Bd., 281 Or. 137, 156, 576 P.2d 1204, 1215 (1978).

cedures of local government."[34] On the other hand, the latter types of statutes would prevail over local law whenever the legislature "clearly intended [them] to do so," except where a state statute was "irreconcilable with the local community's freedom to choose its own political form."[35] This distinction was employed again in the decision on rehearing. Under the Oregon Constitution, as interpreted in the two *La Grande* cases, the state was only forbidden from passing legislation that interfered with "the political arrangements made in local charters."[36] It was free to pass "general social, economic, or other regulatory statutes" even though they "contradict[ed] local policies."[37]

At one level, the distinction seemed to provide a helpful clarification of the relationships between cities and the state under the Oregon Constitution. The thrust of the Home Rule provisions, the distinction suggested, was to prevent legislatures from participating in the "organic and constitutive powers of self-government"[38] that were called into being when cities were chartered. The provisions sought to protect "[a] city's choice of its frame of government."[39] Seen in this fashion, the principle expressed in the provisions was that the citizens of a locality ought to be able to determine for themselves what form of local government they wanted.

Moreover, the distinction did not imply that cities were precluded from pursuing "substantive objectives" through municipal legislation, even when those objectives might be opposed to those of the state. It suggested only that when the pursuit of such objectives conflicted with substantive goals by the state, the state was not constitutionally prevented from reflecting its interests in competing legislation. "This holding," Linde stated, "concerns only the constitutional limits on the *state* legislature; it does not concern what may be done under local authority granted by charter, statute or 'municipal legislation.' "[40]

As a practical matter, however, the distinction seemed to carve out a large amount of state power to regulate substantive areas of municipal governance. In the *La Grande* case itself, for example,

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[34] *Id.*

[35] *Id.*

[36] City of La Grande v. Public Employes Retirement Bd., 284 Or. 173, 183, 586 P.2d 765, 770 (1978).

[37] *Id.*

[38] *Id.* at 181, 586 P.2d at 769.

[39] *Id.* at 181-82, 586 P.2d at 769-70.

[40] *Id.* at 183, 586 P.2d at 770 (emphasis added).

the issue involved the efforts of municipalities to save themselves money and perhaps take advantage of their bargaining power in markets where they employed a large number of the wage earners in the area by offering relatively modest benefit packages to their employees. Although the issue of benefit policies was "substantive" rather than "procedural" in that it did not pertain to the form and structure of local government, but rather to a specific policy enacted by a locality, the line was not as bright as the *La Grande* decision intimated. One could argue that in creating a municipal government and delegating to it the authority to provide police and fire services, the charterers of that government were empowering it with discretion to administer those services, discretion which encompassed the power to establish their wage scales and benefit packages.

Thus, the "substance/procedure" distinction offered in *La Grande* as a way of clarifying the constitutional limits on state legislation affecting municipalities could be read in two quite different ways. One possible reading was that the distinction, in practice, was a distinction without a difference, since any effort on the part of a city to "choose its frame of government" necessarily involved a recital of functions that the city was expected to perform, and any specification of those functions brought the city into the realm of substantive policy making. Distinguishing the "procedural" from the "substantive" dimensions of a city charter was therefore an illusory task. Another possible reading of the distinction was that it potentially obliterated the authority of chartered municipalities, since on reflection nearly all of the activities of a chartered municipality involved substantive policy making. Thus, almost all city business was in potential conflict with the business of the state. As Linde put it, "local charters are enacted to pursue substantive objectives, not just for their own sake. . . . [I]t is precisely because municipalities and the legislature often enact laws 'in pursuit of substantive objectives, each well within its respective authority,' that the problem of conflict can arise."[41]

If the first reading was accepted in its starkest form, the *La Grande* distinction was not a helpful guide in determining the constitutional reach of the Home Rule provisions, because the purpose of any local charter was to create a body designed to pursue substantive policy objectives. If the second reading was accepted in its starkest form, conflict between the substantive objectives of munici-

[41] *Id.* (quoting City of La Grande v. Public Employes Retirement Bd., 281 Or. 137, 148, 576 P.2d 1204, 1211 (1978)).

palities and those of legislatures was inevitable, and where it existed, the policies of the municipality yielded to those of the state. This was the message that the dissenters in *La Grande* took from Linde's opinion. The principal dissent described the majority opinion as "reaffirm[ing] the new rule of 'legislative supremacy' " which would have the effect of "strip[ping] Oregon cities of most exclusive 'home rule' powers, . . . and [would] subject cities to control by the state legislature in all matters involving 'substantive policy,' including liability for payment of financial burdens resulting from social programs mandated by the state legislature."[42]

Linde's assumptions about the role of legislative autonomy in a republic are consistent with the second reading of the "substance/procedure" distinction. In *La Grande* he claimed the distinction produced "identifiable criteria" by which courts could make decisions in cases where statewide and local policies were in conflict.[43] Those criteria—centered on a distinction "between legislation setting social goals for the state" and "laws prescribing the organization and processes of city government"[44]—appeared to be, if not meaningless, significantly restrictive of local autonomy. For example, consider the case of a municipality that passes an ordinance establishing an office designed to coordinate the city's efforts in a "war on drugs," such as education programs, police patrols in certain neighborhoods, the creation of a "hot line" to process confidential information about drug-related criminal activity, and the like. If the state subsequently sought to establish a statewide "drug czar's" office, charged with coordinating the efforts of localities in an anti-drug campaign, would a statute establishing such an office be constitutional? Linde's opinion in *La Grande* gave every indication that it would, even though in the example such a statute would have the effect, in a municipality that had created its own drug coordination office, of "amending" the municipal charter and of "prescribing the organization and processes of city government."[45]

In short, despite the characteristically tightly reasoned and unemotional character of Linde's *La Grande* opinion, two of its major premises are apparent and germane to the present discussion. The first is that constitutional restrictions on legislative activity should be construed narrowly. The Home Rule provisions, Linde argued in *La Grande*, had said only that the state legislature should not

[42] *Id.* at 187, 586 P.2d at 772 (Tongue, J., dissenting).
[43] *Id.* at 185, 586 P.2d at 771.
[44] *Id.* at 184 n.9, 586 P.2d at 771 n.9.
[45] *Id.*

" 'enact, amend or repeal' " city *charters*, not all city laws.[46] The provisions had also said that to the extent statewide legislation affected "local, special and municipal legislation of every character," the voters of a locality had the power to alter that legislation through a statewide initiative or referendum.[47] He read this language modestly, as creating only a requirement on the part of state legislatures not to interfere with the "procedures"—the "organization and processes"—of local government.[48] But as the drug example illustrates, one could characterize any instance in which a statewide office or policy arguably preempted a city office or policy as an "amendment" of the city charter that had initially created the office or instituted the policy. The fact that in *La Grande* Linde had intimated that any statewide legislation changing the benefit packages of city employees would pass constitutional muster suggests that he was not inclined to engage very readily in judicial oversights of state legislative policies.

The last suggestion can be reinforced if one extracts the second major premise of *La Grande*: judicial "balancing," in cases where state legislation is challenged as a constitutional restraint on competing municipal legislation, is undesirable. Linde's approach substituted "identifiable criteria derived from the constitutional command"—in *La Grande* the "procedure/substance" distinction—for "the court's reweighing the benefit-cost ratios of competing social demands."[49] Linde termed such balancing as "the very substance of politics."[50] He further suggested that legislatures were not even required, when their actions were constitutionally challenged, to state " 'findings' " or " 'reasons' " for "imposing a statewide policy,"[51] echoing his earlier observations about the role of "rationality" in legislative decision making. Legislatures, Linde said in *La Grande*, were bodies of "politically accountable, policy and lawmaking representatives of the people of the state, not . . . factfinding agenc[ies]."[52] Statements of purposes or goals accompanying the passage of legislation were matters "of legislative choice."[53]

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[46] *Id.* at 183, 586 P.2d at 770 (quoting OR. CONST. art XI, § 2).

[47] OR. CONST. art. IV, § 1, cl. 5; *see also* La Grande v. Public Employes Retirement Bd., 284 Or. 173, 183-84, 586 P.2d 765, 770-71 (1978).

[48] *La Grande*, 284 Or. at 184 n.9, 586 P.2d at 777 n.9.

[49] *Id.* at 185, 586 P.2d at 771.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 186, 586 P.2d at 771-72.

[53] *Id.*

When the premises of *La Grande* are extracted in this fashion, it is obvious why the principal dissent in the case characterized Linde's opinion as affirming a "rule of 'legislative supremacy.' "[54] Not only did the decision have the practical effect of allowing Oregon to impose state-designed public employee benefit plans on municipalities, it reinforced some of the jurisprudential principles we have previously identified with Linde's support for legislative autonomy. Legislators are policymakers, accountable to the people; their function is to weigh the costs and benefits of "competing social demands."[55] Courts are not policymakers and not accountable in the same sense; such "balancing" is inappropriate for them. When legislative activity is subjected to constitutional challenges, judicial review is appropriate, but that review should be confined to modest readings of the constitutional text and should not extend to any requirement that legislators justify their policies with statements of "reasons" or "findings." The constitutionality of a statute does not "hinge on such recitals."[56] Just as legislators have no obligation to enact "rational" legislation, they have no obligation to enact "purposive" or "instrumental" legislation. They can pass laws purely because of "politics," and they need not disclose the substance of their political motivation.

Seen in this fashion, *La Grande* appears to be not only a paean to legislative autonomy, but a quite restrictive statement of the constitutional obligations of a judge. "Balancing" is eschewed, judicial involvement with the process of assessing "competing social demands" is foreclosed, and scrutiny of legislative motivation in constitutional cases is deemed inappropriate. One might expect that this stance would produce a limited view of the extent of a legislature's constitutional obligations. In particular, one might expect a stance that forswore resort not only to "balancing," but to substantive readings of constitutional provisions restraining the legislature. One might expect, in short, that Linde's deference to legislative autonomy in the area of economic benefits might be carried over into areas where a legislature seeks to restrict individual rights.

B. First Amendment "Purity": City of Portland v. Tidyman

In first amendment cases, however, another sort of deference surfaces in Linde's opinions. Here his deference is not to legislative

[54] *Id.* at 187, 586 P.2d at 772.
[55] *Id.* at 185, 586 P.2d at 771.
[56] *Id.* at 186, 586 P.2d at 772.

autonomy, but to the principle of rights against the state, the idea that if a constitution seeks to restrain the power of a legislature to interfere with individual freedom of expression, it can do so to a very full extent, provided the limitation is made in express terms. This version of deference has resulted in Linde's being critical of some markedly speech-protective interpretations of the first amendment by the United States Supreme Court on the grounds that those interpretations were insufficiently respectful of the amendment as a limitation on legislatures. It has also resulted, as we will subsequently see, in some arguably "absolutist" readings of article I, section 8 of the Oregon Constitution, which provides that: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of that right."[57]

On closer examination, however, the deference Linde gives to constitutional texts in the area of free expression does not turn out to be in conflict with his general deference to legislative autonomy, but rather to reinforce that principle, and as a result to make Linde's first amendment jurisprudence[58] less potentially speech-protective than it might first appear. To proceed to that conclusion it is necessary to consider Linde's role as a first amendment commentator as well as his role as a state judge.

1. The Theoretical Background of Tidyman*: Linde's Commentary on First Amendment Jurisprudence*

In 1969 the United States Supreme Court delivered a per curiam opinion in *Brandenburg v. Ohio* [59] that overturned the conviction of a Klu Klux Klan organizer under an Ohio criminal syndicalism statute. The statute was constitutionally invalid under the first amendment, the Court concluded, because it failed to distinguish between "mere advocacy" and "incitement to imminent lawless action."[60] The *Brandenburg* opinion reframed the constitutionally operative test for determining whether "subversive" speech could be suppressed under the first amendment, concluding that such speech

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[57] OR. CONST. art. I, § 8 (1859).

[58] I am using the term "first amendment jurisprudence" to incorporate both Linde's comments on decisions by the United States Supreme Court interpreting the first amendment of the U.S. Constitution and Linde's decisions interpreting article I, section 8 of the Oregon Constitution, which embodies the principles of free expression, notwithstanding its departures from the language of the first amendment.

[59] 395 U.S. 444 (1969).

[60] *Id.* at 449.

could be made the basis for a criminal prosecution only when it was "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[61]

Brandenburg's rigorous reformulation of the test for determining when allegedly "subversive" speech could be restricted has been described by one commentator as "the most speech-protective standard yet evolved by the Supreme Court."[62] Linde, however, in an article on *Brandenburg*, declared that any test employing concepts such as "clear and present danger," even in a *Brandenburg* version, was "of no use in judging the constitutionality of legislation that in terms restricts the permissible content of speech," and that "[l]egislation directed in terms at expression, and particularly expression of political, social, or religious views, or against association for the purpose of such expression, should be found void on its face."[63] He found irrelevant the question whether a particular expression sought to be restricted had been uttered under circumstances that constituted a "clear and present danger" to the state. The expression could not be restricted at all by legislation directed at it "in terms."

Linde's view of the first amendment was thus that of a directive "addressed expressly to lawmakers."[64] It forbade Congress from making laws suppressing disfavored speech or publications by law. It was not intended to be "an instruction to courts directing judges to protect freedom of speech, press, assembly, and petition."[65] If legislators "are told that the first amendment leaves it open to them to strike against . . . words" as well as actions, Linde argued, they would use "later judicial determination whether individual rights have been infringed" as an excuse to outlaw advocacy of disfavored action as well as the action itself.[66] The proper interpretation of the first amendment, Linde concluded, was that

> [t]he first amendment invalidates any law directed in terms against some communicative content of speech or of the press, irrespective of extrinsic circumstances either at the time of enactment or at the time of enforcement, if the proscribed content is of a kind which falls under any circumstances within the meaning

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[61] *Id.* at 447.

[62] Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 755 (1975).

[63] Linde, *"Clear and Present Danger" Reexamined: Dissonance in the* Brandenburg *Concerto*, 22 STAN. L. REV. 1163, 1174 (1970).

[64] *Id.* at 1175.

[65] *Id.*

[66] *Id.* at 1179.

of the first amendment.[67]

At first blush, this formulation appears to be an "absolutist" approach to first amendment questions, and Linde indicated in his commentary on *Brandenburg* that he intended it to "state an 'absolute' prohibition" against laws "directed in terms against speech."[68] However, his formulation is not as speech-protective as it might seem. For example, it does not address the scope of "speech," which might or might not include symbolic expressions that could be labeled "conduct."[69] Nor does it address the scope of the word "abridge" in the first amendment, so that it is not clear that a law "indirectly" abridging speech, such as one promulgating licensing or disclosure requirements, would be a law "directed in terms" against speech.[70] Finally, the prohibition on legislative restrictions on speech is limited to those restrictions whose "content is of a kind which falls under any circumstances within the meaning of the first amendment."[71] That might mean that if it were well-settled that a class of expressions—such as expressions denominated "obscene"—did not fall within the ambit of first amendment protection, the prohibition would not apply to them even if it were directed "in terms." While on the whole Linde's formulation is hostile to extensive judicial definition of the categories of protected speech, he might include established judicial precedent as evidence that a certain category of expressions had not been treated as "under any circumstances within the meaning of the first amendment."[72]

Given Linde's general commitment to legislative autonomy, his approach to the first amendment raises some obvious questions. If balancing the costs and benefits of proposed social policies is the essence of the legislative function, and if the deliberation and accountability requirements, however imperfect, will provide a rough assurance that the policy bases of legislation will be rendered intelligible, why should legislators be precluded from weighing the costs and benefits of unrestricted speech, and on occasion concluding that the benefits gained from suppressing certain categories of speech outweigh the costs? Why is this conclusion any less a judgment of "policy" than other legislative determinations? And on the other side of the institutional equation, if, as Linde has suggested, judicial

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[67] *Id.* at 1183.
[68] *Id.* at 1183 n.66.
[69] *Id.*
[70] *Id.*
[71] *Id.* at 1183 (emphasis omitted).
[72] *Id.* (emphasis omitted).

"balancing" in areas such as the due process clause is unfortunate because it "plunge[s] judges into policy controversies," thereby resulting in "[j]udicial usurpation of policy-making,"[73] why should it implicitly be permitted in first amendment cases by allowing courts rather than legislatures to determine the meaning of "speech" and "abridge" in those cases?

Linde's response to these questions helps to clarify his constitutional jurisprudence. In his view, the first amendment is best seen as a law against government rather than as a law protecting "rights." It represents a decision by a majority of Americans—those who ratified the Constitution—that Congress should be prevented from making laws directed in terms against speech. It can thus be seen as a majoritarian limitation on the majoritarian decision making functions of the legislature. The central jurisprudential question in first amendment cases is therefore not whether the "right" of an individual to speak can be limited in a particular set of circumstances. Instead, the central question is whether a legislature can restrict speech by passing laws directed at the content of communicative expression.

Framing the question this way, Linde argues, properly focuses attention on the legislation itself rather than on the individuals to which it might be applied or the circumstances in which it might be challenged. As he puts it:

> It . . . is profoundly important whether governmental action against speech or press is based on a valid preexisting law . . . because the principle of lawmaking by elected representatives generally is important in a democracy. A bill proposed in Congress to protect the security of military operations, or in a state legislature to protect the fairness of trials, is open to scrutiny and debate by others than the parties to a single case. Its terms will threaten the rights of many rather than a specific few. . . . If its terms forbid publishing specified types of content, the bill proposes a law abridging the freedom of speech or of the press, and legislators may oppose it as such or amend it so as to be constitutional. . . . In short, the principle of no suppression without a valid preexisting law makes censorship a political issue before it becomes a judicial issue.[74]

In this passage the image of first amendment "balancing" is that of a balancing process carried out in legislative deliberation; the delib-

[73] The Commission for Constitutional Revision, *A New Constitution for Oregon*, 67 OR. L. REV. 127, 231 (1988) (separate views of seven members, including Hans Linde, opposing substantive due process). This comment was precipitated by a proposal to revise the bill of rights provisions in the Oregon Constitution.

[74] Linde, *Courts and Censorship*, 66 MINN. L. REV. 171, 204 (1981).

erative standard is whether a proposed law with first amendment implications abridges speech or the press "in terms." First amendment issues become subsumed in "the principle of lawmaking by elected representatives."[75] All of the reasons previously advanced in favor of legislative autonomy are implicitly summoned on behalf of *legislative* determinations of the scope and meaning of the first amendment.

Thus Linde's "absolutist" approach to first amendment issues becomes, on examination, another version of the positivism we have encountered in his analysis of legislative decision making in a republic. In his ideal of first amendment decision making, legislators appreciate that the amendment prevents them from passing laws restricting speech or the press "in terms." They are therefore alert to that restriction at the peril of having others hold them up to public censure or even seeking to replace them in office. When they seek to pass legislation that has first amendment implications, their actions are open to scrutiny and debate. They are required to pass "valid" legislation; the test for validity is whether the bill directly infringes speech or the press "in terms." Legislators will therefore simultaneously follow the strictures of the first amendment, which is itself a product of "the principle of lawmaking by elected representatives," and their own instincts to restrict various forms of expression. Where those strictures and their instincts collide, they will "balance." The balancing will presuppose that they must not restrict constitutionally legitimated expression "in terms."

I have previously described this approach to first amendment issues as positivist. One will notice that the analysis turns simply on the "terms" of the first amendment, or comparable state constitutional provisions protecting freedom of expression, and the "terms" of restrictive legislation. For example, the first amendment states only that Congress shall not make laws abridging the freedom of speech or of the press; this would suggest that there are no prohibitions on legislation that does not "abridge" speech or does not abridge "speech." While Linde's analysis does not make clear who bears the ultimate responsibility for distinguishing permissible restrictions from "abridgments," or actions from "speech," it suggests that those distinctions should presumptively be made by the legislature itself. In short, Linde would read the language of the first amendment broadly and categorically, but not as susceptible of judicial gloss including expressions that were not "speech," or indi-

[75] *See id.*.

rect restrictions that were not "abridgements." By eliminating the possibility of such glosses, Linde locates the center of power in first amendment decision making in the elected representatives of a republic, the same place where he located it in cases involving decision making about economic issues.

Linde's "absolutism" in first amendment cases is thus deceptive in the sense that it pertains only to "core" restrictions—to legislation abridging speech "in terms"—as distinguished from "marginal" restrictions, where the terms of the legislation or the nature of the abridgments are less clear. His "absolutism" is better described as textual "purity." *City of Portland v. Tidyman* [76] provides an illustrative example.

2. *The* Tidyman *Analysis: Textual "Purity" and Majoritarianism*

Tidyman concerned an ordinance passed by the city of Portland requiring "adult businesses" to locate at least 500 feet from any residential zone or any public or private school within the city limits. "Adult businesses" included "adult bookstores," which were defined as "establishment[s] having, as substantial or significant portions of [their] merchandise, items . . . which are distinguished by their emphasis on matters depicting specified sexual activities . . . and/or nudity."[77] In its discussion of the purposes of the ordinance, the Portland City Council stated that it had found that there was "an inherent incompatibility between such uses as adult bookstores or adult theaters and residential zones because these businesses adversely affect the quality and stability of nearby residential and commercial areas."[78] It also stated that it had found that "the clustering of adult bookstores, adult theaters, and . . . related businesses tended to create or accelerate blighted conditions . . . ."[79] The City Council characterized its regulations as "intended to reduce conflicts between adult businesses and residential uses," and "to protect the city from the blighting impacts of concentrations of adult businesses."[80]

Pursuant to the ordinance, the city of Portland brought consoli-

[76] 306 Or. 174, 759 P.2d 242 (1988).

[77] PORTLAND, OR., CODE § 33.80.030 (A) (1984), *quoted in Tidyman*, 306 Or. at 181, 759 P.2d at 245.

[78] Portland, Or., Ordinance 155387(1)(9) (Dec. 8, 1983), *quoted in Tidyman*, 306 Or. at 178 n.1, 759 P.2d at 243 n.1.

[79] *Id.* at 155387(1)(10) (Dec. 8, 1983), *quoted in Tidyman*, 306 Or. at 178 n.1, 759 P.2d at 243 n.1.

[80] PORTLAND, OR., CODE § 33.80.020 (1984), *quoted in Tidyman*, 306 Or. at 178 n.1, 759 P.2d at 243 n.1.

dated actions to enjoin, as a public nuisance, the operation of several "adult bookstores" at locations incompatible with the requirements of the ordinance. The injunctions were challenged as invalid restraints on free expression under article I, section 8 of the Oregon Constitution. Between the date the city of Portland first brought the actions and the date the *Tidyman* case was handed down, the Supreme Court of the United States sustained the constitutionality of a city ordinance that limited the showing of "adult" films to theaters located within a specified geographic area. In that case, *City of Renton v. Playtime Theatres, Inc.*,[81] the Court held that if cities could establish that their concern in restricting "adult bookstores" was with the "secondary effects" of those establishments rather than the content of the material displayed in them, they could constitutionally regulate such establishments. Moreover, in concluding that the presence of adult bookstores would have negative "secondary" effects the *Renton* majority held that cities could rely on their own legislative findings or on the experience of other cities; they did not need to show that the dissemination of adult materials outside the restricted area actually had such effects.[82]

The *Renton* case thus suggested that ordinances such as the one in *Tidyman* would pass constitutional muster. Nonetheless the Oregon Supreme Court, with Linde writing for the majority (two justices concurred separately), invalidated the ordinance under article 1, section 8 of the Oregon Constitution. Linde's analysis emphasized that the ordinance was a paradigmatic example of legislation "directed in terms" against the "communicative content" of speech.

Linde began by noting that article 1, section 8 did not prevent legislative bodies from enacting reasonable time, place, and manner restrictions that had incidental effects on speech. "A grocery store," he noted, "gains no privilege against a zoning regulation by selling *The National Enquirer* and *Globe* at its check-out counter."[83] In a variety of cases, cities could even "impose a permissible limitation on all location, time, manner, intensity, or invasive effect of some communicative activity,"[84] as in the example of ordinances restricting all use of soundtracks in residential areas

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[81] 475 U.S. 41, *reh'g denied*, 475 U.S. 1132 (1986).

[82] *Id.* at 50-52. The Court felt that so long as the evidence the city relied upon was "reasonably believed to be relevant to the problem," the zoning would pass constitutional muster. *Id.* at 51-52.

[83] City of Portland v. Tidyman, 306 Or. 174, 182, 759 P.2d 242, 246 (1988).

[84] *Id.* at 183, 759 P.2d at 246.

during specified hours. The ordinance in *Tidyman*, however, was not a restriction on all bookstores, nor a restriction on certain kinds of bookstores because of the noise level they generated. Instead, it was a restriction on certain kinds of bookstores because of the communicative content of materials they sold. It was "flatly directed against one disfavored type of pictorial or verbal communication."[85]

The city argued that the ordinance was not concerned with "speech itself," but with "the 'effect' of speech."[86] If this were so, Linde conceded, the ordinance would pass constitutional muster, at least on its face, because it would then no longer be directed at speech "in terms." However, the ordinance had undertaken "to prevent what the city believes to be the effects of the trade in sexually explicit verbal or pictorial material by describing the content of this communicative material."[87] The city's "findings" that adult bookstores and theaters "adversely affect[ed] the quality and stability" of nearby residential areas, or that they "tended to create or accelerate blighted conditions" were mere recitals of "premises for legislation."[88] The "findings" were "vague and conclusory" in that the city left unexplained "what is meant by 'the quality and stability of nearby residential and commercial areas' [or] by 'blighted conditions.' "[89] Moreover, "the factual predicates for legislation" were irrelevant in determining its constitutionality.[90] It was "the operative text of the legislation, not prefatory findings, that people must obey and that administrators and judges enforce."[91]

Linde gave the city a hint as to how it might draft an ordinance regulating adult businesses that could survive constitutional attack. Should an ordinance specify "adverse effects" that were attributable to the sale of "adult" materials, and should those effects be shown to have occurred or to have imminently threatened to occur, the sale or distribution of such materials could be enjoined as a nuisance. A law directed at the secondary effects and anticipated characteristics of an "adult" store, rather than at the primary characteristics of the "adult" materials, might well be a proper re-

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[85] *Id.* at 184, 759 P.2d at 247.

[86] *Id.*

[87] *Id.*

[88] *Id.* at 185, 759 P.2d at 247.

[89] *Id.*

[90] *Id.*

[91] *Id.*

sponse to a perceived "nuisance."[92] In the example Linde was fashioning a distinction between regulation that addressed the effects of expression and legislation that addressed the expression itself. "[A]pprehension of unproven effects as a cover for suppression of undesired expression," he argued, was the very tactic precluded by article I, section 8 of the Oregon Constitution.[93] But if the effects were proven, that was something different.

Linde then sought to articulate the jurisprudential basis for his distinction. While cities ordinarily "need not await the actual occurrence of substantial harm to a neighborhood before [they invoke] a nonpunitive, purely locational land use restriction,"[94] when the terms of such a restriction "include the specified harm from particular forms of expression" cities were required to demonstrate "the reality of the threatening effect at the place and time."[95] Linde's rationale here was that regulations restricting the content of expression were not "ordinary legislation"; instead, they affected "constitutionally privileged activity."[96]

In the case of ordinary legislation, "lawmakers may tackle a perceived problem on any theory of its causes, farfetched or realistic."[97] If they enact laws on such premises, "[t]he resulting enactment . . . remains the law whether or not the diagnosis or the cure ever was realistic, or remains realistic under changed conditions."[98] But when such regulations restrained free expression, lawmakers have a different obligation because "the constitutional guarantee" of freedom of expression "restricts lawmakers, . . . not merely the unconstitutional application of laws."[99] In short, one positivistic, majoritarian document (the text of the Oregon Constitution) restricts another positivistic, majoritarian document (an ordinance restricting the dissemination of "adult" literature as a "nuisance") because a majority of the voters of Oregon decided that its constitution should be a restraint on lawmakers. Only when a law regulating expression in terms "specifies the harm and not only the expression" could it pass constitutional muster, and then only when those who sought to enforce it could "demonstrat[e] the speci-

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[92] *Id.*

[93] *Id.* at 188, 759 P.2d at 249.

[94] *Id.*

[95] *Id.*

[96] *Id.* at 189, 759 P.2d at 249.

[97] *Id.*

[98] *Id.* at 189, 759 P.2d at 250.

[99] *Id.* at 190, 759 P.2d at 250.

fied harm under changing conditions."[100]

Linde's approach to free speech in *Tidyman* can thus be better described as "purist" rather than "absolutist." It proscribed any legislation directed at speech "in terms" unless the legislators and those seeking to enforce the legislation could demonstrate that there was a connection between the speech sought to be regulated and specified imminent harm to the community. Under this analysis, "adult" speech could conceivably be regulated "in terms" (that is, simply because of its "adult" content) if the regulators could show that "adult" speech invariably produced undesirable effects in the community. The regulation would then be an effort to curb the effects, even though they were inextricably linked to the speech. As a practical matter, such a linkage seemed very difficult to show; as a theoretical matter, it was possible.[101]

The approach taken by Linde in *Tidyman* is therefore not one that is necessarily more speech-protective, in cases where municipalities seek to impose content-based restrictions on "adult" literature, than that adopted by the Supreme Court of the United States in *Renton*. In his discussion of *Renton* in *Tidyman*, Linde noted two apparent differences between his approach and that of the *Renton* majority. One was that the *Renton* Court had stated that "a motive to suppress the disfavored expression would not invalidate an ordinance as long as a concern with secondary effects of the expression was predominant."[102] Another was that those drafting the municipal ordinance could "rely on the legislative findings or the experience of other cities as the basis for its own restrictive law."[103] It is clear that Linde's approach in *Tidyman* would not permit mere recitals of legislative premises, even when described as "findings," as a sufficient justification for restricting speech "in terms." However, his approach would permit restrictions of speech once the "secondary effects" of that speech had been specified and demon-

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[100] *Id.* at 190-91, 759 P.2d at 251.

[101] One concurring judge concluded that in the hypothetical situation where a city's "own documented and extensive experience, supported by scientific studies, shows that a particular undesirable and forbidden effect—for example, increased incidence of prostitution—*always* accompanies the establishment of any adult business," *id.* at 193, 759 P.2d at 252 (Gillette, J., concurring), a regulation directed at the content of materials sold in those businesses might pass constitutional muster. Although this judge suspected that "the majority is right—it can't be done," *id.*, his comments suggest that Linde at least envisaged the possibility that a city might sometimes be able to show an inextricable connection between the content of "adult" materials and undesirable effects.

[102] *Id.* at 187, 759 P.2d at 249.

[103] *Id.*

strated to exist when the law was sought to be applied. Should that be accomplished, it would be immaterial whether some of those drafting the ordinance had been motivated to suppress expression because it was "disfavored" because of its content, as distinguished from being inextricably tied to undesirable "secondary effects."

In short, the difference between *Tidyman* and *Renton* seems to be that the former decision places a greater burden on prospective regulators of the content of speech to show that the speech they are seeking to regulate is being regulated "in terms" solely because of its known harmful effects. The different burdens imposed, however, might not be significant in a given case. For example, assume that the incidence of crime increased in an area of a city after "adult" businesses were established there. If the city authorities could document this increase, they might be able to remove the businesses under *Tidyman* by demonstrating that their focus was on an undesirable secondary effect of the businesses. This might be so even though it was possible that the incidence of crime in the area would have increased if *any* businesses had been located there, so that the content of the materials sold in the "adult" businesses would have no necessary relationship to the incidence of crime. In such a case, the regulation would probably pass constitutional muster whether *Tidyman* or *Renton* was the operative standard. It is also entirely possible that in such a case some regulators would have been using the "effects" of increased crime as a "cover for suppression of undesired expression,"[104] but that motivation would not have been reflected in the "terms" of the ordinance.

It thus appears that the approach in *Tidyman* represents a significant deviation from *Renton* only if one assumes that it would not be possible for regulators to demonstrate that "a particular undesirable and forbidden effect . . . *always* accompanies the establishment of any adult business."[105] Such a demonstration would very likely be possible in the case where residential or vacant areas in a city were replaced with adult businesses, since an increased incidence in crime might well result, if for no other reason that the area would become more populated with transient persons. Thus, one needs to look at *Tidyman* from another perspective to grasp the sense in which it represents a significantly different approach to freedom of

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[104] *Cf. Tidyman*, 306 Or. at 188, 759 P.2d at 249 (Article I, section 8 of the Oregon Constitution precludes apprehension of unproven effects as a cover for suppression of undesired expression.).

[105] *Id.* at 193, 759 P.2d at 252.

expression cases from that currently prevailing on the United States Supreme Court.

Recall that in his commentary on *Brandenburg*, Linde distinguished between an approach to first amendment issues oriented toward "the individual's 'rights' and the judicial function," and an approach oriented toward "the constitutional limitation on lawmakers."[106] The former approach, he believed, fostered more judicial "balancing" in first amendment cases, with correspondingly greater (in the Warren Court) or lesser (in very recent history) definitions of the scope of first amendment "rights." Linde thought this approach was misguided in that it failed to provide clear guidelines for legislators and it overly aggrandized the role of the judiciary in deciding the rules in the area of free expression. He advocated the latter approach, in which "[t]he suggested rule would tell lawmakers that the first amendment does not let them choose *as a policy* restrictions on speech or on the press otherwise within the scope of the first amendment."[107] This meant no legislative restrictions on speech in terms at all, unless the speech restricted was of the kind clearly not eligible for first amendment protection.

Tidyman adopted this approach. Since "adult" literature, in most forms, qualified for first amendment protection (was not obscene or seditious), the Oregon Constitution forbade its being regulated "in terms," because of its content. However, "adult" literature could be regulated if its dissemination could be demonstrated to have produced the kind of "secondary effects" that a legislature or municipality had the power to eradicate. Thus for Linde, and the *Tidyman* majority, the critical dimension was whether a municipal regulation that affected "adult" bookstores or theaters was a regulation of the content or the effects of those enterprises. Everything turned on the "purity" of the legislative text.

In his *Brandenburg* commentary Linde maintained that such a distinction "does not exalt mere formalism."[108] One could argue that the distinction does just that: that conditioning protection for speech on a legislature's singling out the "content" of expression rather than its "effects" is to invite the legislature to make formalistic recitals of its premises, using the appropriate "terms." The distinction nonetheless goes to the heart of Linde's constitutional jurisprudence, and clarifies his reconciliation of legislative auton-

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[106] *See* Linde, *supra* note 63, at 1183.

[107] *Id.* at 1184.

[108] *Id.*

omy with an approach to first amendment issues that might first appear "absolutist." In his discussion of the distinction between the content and effects of speech Linde made the following argument:

> To think that a rule prohibiting legislating in terms against speech or press merely forces legislative draftsmen to recast the form of laws misjudges the legislative process. What a bill purports to do makes a good deal of difference to its chance of adoption. It may be much more difficult to identify and define the concrete objective of a proposed suppression of speech and press than to win agreement on the suppression for its own sake. The effort, if it is made obligatory by strict adherence to the first amendment, may show that what purports to be a means to an end may really be plausible only as an end in itself.[109]

Linde's distinction thus treats the first amendment, or other constitutional provisions setting forth the "terms" under which legislatures are precluded from restricting expression, as devices to ensure the textual "purity" of legislation. The distinction is ultimately grounded on the same set of positivist assumptions from which Linde's general argument for legislative autonomy in a republic is derived. Constitutions are positivist documents, written texts ratified by representatives of majorities. Their restrictions on legislative power are thus based on the same principles of deliberation and accountability as are legislative enactments. By prohibiting legislators from passing legislation restricting speech or the press, constitutional provisions such as the first amendment and Oregon's free expression clause shift the terms of legislative deliberation. The deliberators may not advance as reasons for the passage of bill that it restricts speech; the bill's "concrete objective" must be something else. Thus, even when there is tacit agreement among legislators "on the suppression [of speech] for its own sake,"[110] they need to proceed as if the legislation has another goal. That goal is open to debate and public scrutiny, and "what a bill purports to do makes a good deal of difference to its chance of adoption."[111] It may be that in the course of debate the true "policy" of the proposed bill may be shown either to be impermissible restrictions on speech, or a poorly conceived or imperfectly executed makeweight covering free speech restriction. Treating constitutional provisions prohibiting any legislative restrictions on constitutionally protected speech "in terms" as "absolute" restrictions both protects freedom of speech against cov-

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[109] *Id.*

[110] *Id.*; *see* text accompanying note 109.

[111] Linde, *supra* note 63, at 1184; *see* text accompanying note 109.

ert or surreptitious attacks and purifies the outcomes of the legislative process. Moreover, such an approach to constitutional clauses affecting freedom of expression is not inconsistent with legislative autonomy, first, because the clauses are themselves majoritarian documents, and second, because the reach of the clauses is limited to their "terms." They are read from the same perspective of textual purity grounded in majoritarianism.

At this point one is able to discern how Justice Linde could simultaneously have been an admirer of William O. Douglas, someone who treasured his experience as a senatorial legislative assistant, an opponent of judicial substantive due process, and a critic of *Brandenburg* as insufficiently protective of speech. An "absolutist" reading of "purified" constitutional provisions, a respect for the deliberative integrity of the legislative process, and a distrust of the anti-majoritarian dimensions of judicial "balancing" and judge-made interpretive formulas in constitutional interpretation are all combined in his theory of the meaning of constitutions in a republic. One can also better discern Linde's sense of the meaning of the Danish poster quoted at the beginning of this Article. Linde associated the meaning of the poster with a process where "Senators and Representatives can use the power of law to find out what the truth is, and even against the wishes of the majority to debate what is right."[112] Legislative deliberations, in his ideal of the republic, produce truth, and gleanings of truth prompt legislators to affirm what is right. When others challenge those affirmations, the result is law grounded on evidence and wisdom, law based explicitly on policy rather than in search of it, law "purified" by and grounded in majoritarianism, but capable of transcending majoritarian passion and prejudice.

III

LOCATING LINDE AS JURIST

The task remains to locate Justice Linde on the continuum of distinguished twentieth-century American judges that stretches back to Holmes and Brandeis and forward at least to Brennan. One might begin the exercise of placement by recapitulating the boundaries of that continuum.[113] Since the (delayed) acceptance of

[112] Linde, *supra* note 1, at 327.

[113] The following several paragraphs represent a synthesis of arguments I have advanced in several other places, notably G. WHITE, THE AMERICAN JUDICIAL TRADI-

Holmes's 1905 dissent in *Lochner v. New York*,[114] American appellate judges have functioned in a world in which judicial interpretation has been conceded to be a creative exercise, akin, though not identical, to law making. Holmes's *Lochner* dissent started from the premise of judicial creativity and warned against the intermingling of creativity and ideological bias in constitutional interpretation. He described the commonly interpreted provisions of the Constitution as indeterminate and thus inevitably amenable to ideological glossing. He argued that in a society premised on democratic theory, glossing in the guise of interpretation by unelected judges should be kept to a minimum.[115]

Holmes's views were slow to become judicial orthodoxy. As late as the 1930s, a majority of the Supreme Court was still prepared to give substantive meaning to the contract and due process clauses, but by the time of Linde's emigration to America "judicial self-restraint" had become entrenched, especially where legislation redistributing economic benefits or seeking to regulate markets was subjected to constitutional challenges. In the 1940s, however, as a growing consciousness of the egalitarian and libertarian premises of American civilization surfaced, statutory law began to proliferate, administrative agencies came into being, and a concern for protecting the rights of minorities against majoritarian prejudice began to creep into political discourse. The relatively simplistic talisman of "judicial self-restraint" appeared in need of reformulation. Were judges to defer not only to "progressive" economic legislation, but to majoritarian repressions of the powerless as well? Did the enhanced scope of statutory law, when coupled with the premise of judicial deference, mean that judicial creativity, especially in traditional common law areas, was to be stifled? Was the new class of agency administrators to carve out law-making fiefdoms without judicial oversight? Was constitutional interpretation to be restricted

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TION 292-94, 412-425 (2d ed. 1988), and G. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 137-55 (1978).

[114] 198 U.S. 45 (1905). Holmes's *Lochner* dissent was not immediately regarded as a major expression of a modernist jurisprudential sensibility. *Compare* Freund, *Limitation of House of Labor and the Federal Supreme Court*, 17 THE GREEN BAG 411, 416 (1905) and Pollock, *The New York Labor Law and the Fourteenth Amendment*, 21 L.Q. REV. 211, 212 (1905) *with* Pound, *Liberty of Contract*, 18 YALE L.J. 454, 464 (1909) and Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 669 (1909). Only the latter two articles found Holmes's dissent exceptional and innovative in its view of judging as necessarily creative and indeterminate.

[115] 198 U.S. at 74-76 (Holmes, J., dissenting).

to ratification of majoritarian outcomes, or did the Constitution embody anti-majoritarian principles as well?

Out of this swirl of developments and difficulties emerged, by the late 1940s and 1950s, a refined version of the "self-restraint" orthodoxy, institutional competence theory.[116] This jurisprudential perspective redefined law as a complex process in which various "law-making" institutions interacted yet retained their autonomous functions. Different institutions were "competent" at performing different "law-making skills," and the process worked smoothly if they were given autonomy within their spheres of competence and forbore invading the spheres of others. Legislatures were competent at gathering information and deliberating its consequences. They were also relatively competent at assessing public sentiment. Administrative agencies were competent at applying technical expertise to the solution of complex modern problems. The executive was competent in formulating and implementing policy, relying on the technical expertise or wider public access of other institutions. Courts were competent at identifying the legal principles which formed the basis for the adjudication of disputes. They relied heavily on others to gather information for them. Their task was to apply that information and the relevant body of legal principles to the resolution of adversarial claims.

In its pristine form, institutional competence theory prescribed an expansive role for the judiciary only when the "reasoned elaboration" of the legal principles governing a dispute was possible. This was often the case in common law cases, where a body of applicable precedents and principles existed; sometimes the case in statutory interpretation, if the "purpose" of a statute could be gleaned through its language or its legislative history; sometimes the case in administrative law, if the issues involved were of a general rather than a specialized and technical nature; occasionally the case in constitutional interpretation if the text of a constitutional provision had been consistently read to embody a legal principle, such as equality or liberty or fair notice. At best, however, the judicial role was to be limited to those instances in which decisions could fairly be based on "principle," as distinguished from "policy," which was the province of the legislative or executive branches, or from ideol-

[116] Institutional competence theory can be seen as a subcategory of the jurisprudential approach I labeled Process Jurisprudence in THE AMERICAN JUDICIAL TRADITION, *supra* note 113, at 230, 252, and which has generally settled into the literature as "process theory." *See id.* at 494 n.2 for a discussion of the origins of the term in my work and that of Bruce Ackerman.

ogy, which given the expectations of impartiality that were associated with judging would amount to inappropriate "bias."

Institutional competence theory reached a crisis stage in the 1950s when the momentum for substantive racial equality generated by the civil rights movement confronted institutional inertia. According to the premises of institutional competence theory, the alteration of patterns of racial segregation to achieve equality of opportunity regardless of race was a political question, appropriate for legislative deliberation and policy formulation. Moreover, segregation was settled law, both in the sense that it had been reflected in statutes and ordinances in southern states for generations and in the sense that the Supreme Court had found that it did not violate the Constitution. Racial integration was thus an issue within the sphere of competence of the legislative and executive branches of government, not within the sphere of competence of the judiciary.

But of course neither the executive branch of government, as represented by the offices of the President or governors of segregated states, nor the legislative branch, as represented by Congress and the relevant state legislatures, took any steps to address the problem of racial segregation in the 1950s. Consequently, persons who saw themselves as disadvantaged by segregationist policies and practices sought relief in the courts, arguing that the equal protection clause of the Constitution was incompatible with the forced separation of persons on the basis of skin color. When the Supreme Court of the United States accepted that argument in *Brown v. Board of Education*,[117] it did so before any other institution of American government had accepted it. It then declared that the policy of legally enforced racial segregation was incompatible with the Constitution. In the two *Brown* cases the Court, from the perspective of institutional competence theory, not only invaded the spheres of competence of other branches, but did so without any "principled" justification. The only "principle" the Court invoked in its declaration that legally enforced racial segregation was unconstitutional was substantive equality, the very principle it had previously declined to read into the equal protection clause where members of different races were granted "equal" though "separate" facilities.[118]

The segregation crisis of the 1950s and beyond thus precipitated a massive crack in the orthodoxy of institutional competence theory, and each of the significant appellate judges of that period were

[117] 347 U.S. 483 (1954).

[118] *See id.* at 493-96.

forced to confront the internal contradictions exposed by that crack. If institutional competence theory was premised on simple majoritarianism, then lawmakers of all kinds should defer to the wishes of the majority whether they were progressive or repressive. Even courts in their capacity as constitutional interpreters should so defer, because substantive judicial interpretations of constitutional provisions restraining the legislature were unprincipled and thus impermissible. If, however, institutional competence theory rejected simple majoritarianism where some overriding constitutional principle served as a check even on majoritarian policies, judicial deference to the policies rather than that constitutional principle was equally impermissible. The *Brown* cases, because of their momentous political significance, papered over that internal conflict in the guise of unanimity, but the conflict remained throughout the remainder of the Warren Court.

At the heart of the conflict was the so-called "counter-majoritarian difficulty" presented by the interaction of the "principles" embedded in the Constitution with democratic theory. If one assumed that the Constitution did contain some bedrock principles, it was clear that not all of them could be squared with democratic theory, at least if democratic theory were embodied by majoritarianism. In its Bill of Rights provisions, in its contracts clause, in its due process clauses and equal protection clause, the Constitution was clearly a counter-majoritarian document. But if institutional competence theory posited the existence of intelligible "principles" on which judges could ground their interpretations of the Constitution, and further posited the competence of the judiciary (and the principle of judicial review itself) as a justification for judicial interpretation, how could the presence of a nonelected, life-tenured group of constitutional interpreters be squared with democratic theory? Therein lay the "difficulty."

The influential judges of the post-*Brown* era have each implicitly associated themselves with one or another response to the counter-majoritarian difficulty. One set of judges has continued to treat the "difficulty" as endemic and central to enlightened adjudication. In various forms, they have advocated as limited a "usurpation" of majoritarian functions by the courts as possible, and sought to justify any exercises in judicial restraint of legislative majorities as based on a counter-majoritarian principle embedded in the constitutional text. Where such a principle appears less than explicit or otherwise weakened as a source of authority, they have fallen back

on the majoritarian premises of legislative supremacy in policy making and declined to restrict legislative authority. The line of such judges begins, in the Warren Court, with Justices Frankfurter, Jackson, and Harlan, and could be seen as stretching forward, in altered form, to contemporary advocates of "original intent" as a restriction on the interpretive powers of judges.

Another set of influential judges has treated the countermajoritarian "difficulty" as dissolving, once certain assumptions about the respective roles of courts and legislatures are abandoned. One such assumption is that the Supreme Court's status as an "undemocratic" institution (its members neither being elected nor directly accountable to the public) means that its decisions are necessarily inconsistent with democratic theory. Another is that legislatures are "democratic" institutions because of the requirements of deliberation and accountability and because their members are elected. Both assumptions can be seen as oversimple. To the extent that one has a conception of Supreme Court Justices as constrained by fidelity to the constitutional text, their own nonelected status would be irrelevant to their obligation to uphold the Constitution. And where the Constitution contains provisions grounded on democratic theory—for example, the requirement that no state shall deny any person equal protection of the laws—judicial invocation of such provisions against a legislature would seem to be conforming that legislature's policies to the mandates of democratic theory.

Further, one could argue that if the test of whether an institution is "democratic" is whether the power it wields emanates from the people at large, legislatures might fail that test as well as courts. Legislators can control to a great extent the issues that form the political agenda by which they are evaluated and reelected. Incumbent legislators exercise this control with sufficient ease to be overwhelmingly retained in office. Policy making in legislatures is arguably as influenced by the organized lobbying of professional interest groups as by the spontaneous views of constituents. The majoritarianism of a legislature is that of the voting representatives, not that of those who elected them. There is no way to ensure through the deliberative process that the views of representatives and constituents are identical. There is not even a guarantee that the views of representatives on any given issue will be discernible.

Thus one of the defining characteristics of the Warren and Burger Courts was that a group of Justices with a discernible commitment

to democratic theory did not conclude that that commitment required deference to legislatures in constitutional interpretation. On the contrary, Justices such as Warren, Douglas, and Brennan, to single out Justices with comparatively long tenures, combined an expansive view of their function as constitutional interpreters with what might be described as a skepticism about the tendency of legislatures to respect democratic principles. In their hands, the Constitution was regularly treated as a resolutely counter-majoritarian document, but at the same time as a document reflecting the premises of a democratic order.

With the above description of twentieth-century judicial history taken as a baseline, the position of Justice Linde on a continuum erected on the premises of institutional competence theory and the positing of a potential counter-majoritarian "difficulty" is a singular one that defies facile political characterization. The sanguinity Linde demonstrates toward legislative autonomy rests on assumptions about legislatures similar to those originally made by institutional competence theorists, particularly the assumption about deliberation as a mechanism for finding truth. In addition, Linde has surely taken the counter-majoritarian difficulty to be one not capable of easy dissolution, as his opposition to judicial "balancing" and his insistence on limiting the scope of interpretive judicial formulas in first amendment analysis suggest. Even his insistence that constitutional provisions with discernible "terms" be taken as categorical restraints on legislative majorities is ultimately based on an argument that the Constitution ratified the wishes of a majority.

Yet Linde's approach, because of its grounding of the constitutional text in a majoritarian ratification process (the process that created a republic), does not caution judges, where a textual mandate exists, about being too zealous to impose it in the face of majoritarian sentiment. On the contrary, where a current legislative majority decides to restrict an activity, such as free expression, given protection by the Constitution "in terms," Linde has no hesitation about insisting that "yesterday's" majority (the ratifiers of the constitutional text) prevail over "today's." He insists on the primacy of the constitutional text even though judges are ultimately charged, in difficult cases, with determining the meaning of that text.

For Linde, then, constitutional jurisprudence in its most enlightened form appears to be an extension of the original ideals of republicanism—deliberation, the transcendence of self-interest, the idea

of written documents serving as restraints on government as well as manifestations of the power of government, the search, through deliberation, political give and take, and policy formulation, for what is "right" and what is "true"—to all of the institutional spheres of modern American government. It is a jurisprudence that may in some situations produce extreme solicitude for the claims of minorities against majoritarian restrictions and in other cases extreme deference to the discretion judgments of majoritarian institutions. If theoretically consistent, it resists political labeling.

Over and over in Linde's constitutional jurisprudence, one finds surfacing the theme of preserving the republican form of government in its idealized version. Repeatedly one finds how strongly his jurisprudence has invested in representativeness, deliberation, enlightened policy making, and the other guideposts of the republican ideal. Representativeness for Linde is truly a phenomenon in which experienced and dedicated persons serve the interests of their constituents. Deliberative policy making is a process in which ideas and issues are identified and debated in an open and honorable fashion. Republicanism is a theory that has worked for two hundred years because it allows legislators to "use the power of law to find out what the truth is, and even against the wishes of the majority to debate what is right."[119] Legislative autonomy and a conception of constitutional provisions as formal restraints on lawmakers follow smoothly in pursuit of those themes. For Linde, the Republic is truly a place where truth and justice can be served. As a judge, he did his best to preserve it. If I cannot entirely share the sanguinity of his vision, I can admire its subtlety, internal consistency, and its faith in the capacity of humans to govern themselves. I can also admire the judicial career in which that vision was implemented with skill and distinction.

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[119] Linde, *supra* note 1, at 327.