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# LOG-ROLLING AND JUDICIAL REVIEW

MICHAEL J. WAGGONER

Much is written about judicial review. Too little of this writing also examines the legislative processes the judiciary is reviewing.<sup>1</sup> This essay is intended as a step toward remedying that deficiency.<sup>2</sup> Its purpose is to be thought-provoking and readable rather than exhaustive or definitive. Thus it will often rely on the reader's knowledge rather than on documentation.

A brief synopsis: Our democracy operates, as it should, much less by majority will than by minorities trading votes, also known as log-rolling. The appreciation that democracy operates through log-rolling reinforces the judiciary's traditional role of safeguarding the political process. In addition, the judiciary should enforce the constitutional requirement that legislation be general rather than narrow. The generality requirement, an aspect of the doctrine of separation of powers, is found by interpretation in the Constitution and Bill of Rights as a restraint on the federal government, and is explicit in the fourteenth amendment as a restraint on state governments. In conflict with the generality requirement are practical political forces which impel the legislature to enact particularized laws. The essay ends with a few suggestions on how legislators and judges might deal with this tension between constitutional requirements and practical politics.

## I. DEMOCRACY

That judges appointed for life are able to frustrate the will of legislators, chosen for limited terms by popular election, may seem an anomaly in a democratic society. That anomaly might be explained by the existence of a written constitution intended to be the

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1. The works I found most helpful are J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 80-87, 151-61 (1980) and Bishin, *Judicial Review in Democratic Theory*, 50 S. CAL. L. REV. 1099 (1977). See also A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-21 (1962); J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952).

2. This comment will not explore such related areas as the review of administrative or executive action, the problems of conflicts between legislative and executive branches, nor the policing of such particular federal policies as prevention of discrimination against the commerce or citizens of other states.

supreme law of the land. The questions remain why there should be such a constitution and why the judiciary should have ultimate responsibility for interpreting it. The answers require a brief examination of democracy.

Democracy, if viewed simply as government by the will of the majority, has little ethical appeal. The fact that 51% of a group is in favor of a particular project and the remainder of the group opposed provides little help in coming to a principled decision on whether that project should be undertaken. That 49% rather than 51% lose would help only the devout utilitarian or the expedient to evaluate outcomes. Nor is there any measure here of the intensity of concern of members of either group, so that one person's whim counts as much as another's ultimate value. This simplified view of democracy, however, is seriously misleading. To have an accurate picture it is necessary to consider both some of the reasons for majority rule and how majority rule is likely to be practiced.

Majority rule seems not to be a value for its own sake. It is rather merely one of the mechanisms by which citizens participate in the operation of a government that has many purposes.<sup>3</sup> Participation in the processes of government may be considered a value for its own sake, one of the experiences a life should include. Participation may also be a means to achieve other ends. Wide participation in government may be valued because of skepticism: no one can be fully trusted, so power should be divided and shared. This suggests that participation is a duty to fellow citizens, as well as right for oneself. Wide participation may also be a source of the government's legitimacy,<sup>4</sup> other sources such as hereditary monarchy and the blessing of the church having declined in the industrialized nations. Thus majority rule provides a useful mechanism to implement other values, rather than being valuable in and of itself. The goal is the good life, an aspect of the good life is wide participation in the political process, and majority rule is but the mechanism needed to make

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3. The Declaration of Independence states its "self-evident" premise that "governments are instituted" to preserve the "unalienable rights . . . life, liberty, and the pursuit of happiness." The Constitution states its purpose as being "to form a more perfect union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty. . . ." The Pledge of Allegiance concludes with a promise (or hope) that this Republic provides "liberty and justice for all."

4. The Declaration of Independence speaks of "governments . . . deriving their just powers from the consent of the governed." The only source of legitimacy invoked by the Constitution is, "We the People of the United States . . . do ordain and establish this Constitution of the United States of America."

decisions when there is wide participation.

Majority rule as practiced is heavily influenced by three major factors: (1) There are a great many public issues to be decided; (2) most people are little concerned about most issues, so that typically persons with strong commitments on how any particular issue is resolved will constitute relatively small minorities; (3) those united on one issue will be divided on other issues.

Because of these three factors democracy is not merely a matter of the majority working its will. The opposing minorities seriously concerned about a particular issue normally do not have enough votes among themselves to decide the matter.<sup>5</sup> Of course some votes will be obtained by persuasion. But there is often little time for persuasion, particularly if the issues are numerous, as we assume them to be, and complex and with fairly evenly balanced pros and cons, as is often the case. In such circumstances those seriously concerned minorities may be expected to attempt to "buy" enough votes from the unconcerned to become a majority on that issue. They will pay for the unconcerned votes by "selling" their votes on other issues. This process of trading votes is commonly called "log-rolling."<sup>6</sup> It should be emphasized that these references to buying and selling votes are not pejorative. On the contrary, as is set forth below, this process of exchanging votes provides the principled justification for democracy that mere "majority will" fails to provide.

Intensity of concern should be reflected in vote trading. How much one will pay for a vote on a particular matter is based on such factors as how many votes are available to be sold, the intensity of concern, and the chances of success. A person may choose not to buy votes on his matter of greatest concern, because he thinks that he and his allies do not have the resources or concern to out-bid his opponents; he will instead try for something of lesser concern but greater likelihood of reasonably-priced success. The invisible hand of competition is likely to produce from this market place of votes the

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5. THE FEDERALIST No. 10 (Madison) suggests that majorities are undesirable in a political system. That article is addressed to the problem of controlling "factions," which (with a little editing) are defined so broadly as to include most political interest groups: "a number of citizens actuated by some common impulse . . . adverse to the rights of other citizens." Factions are to be controlled by having a republic large and diverse enough that no faction is likely to be able to constitute a majority, so that those committed to a particular position will be required to seek and obtain the support of the uncommitted in order to prevail. *See also* THE FEDERALIST No. 51.

6. This use of the term has been traced back to 1823. *See* 6 THE OXFORD ENGLISH DICTIONARY 404 (1933).

greatest good for the greatest number. A person of course might vote based on a whim, but the more sensible, and thus more common, approach would be to trade that vote for votes on other matters of greater concern.

Even persons whose views on each issue are opposed to the views of a majority in the society can expect to win on a few issues through log-rolling. On some of those issues persons in the minority will be trying to buy the votes of any less concerned member of the majority, by selling to such a person votes on other issues of more concern to him on which he is in the minority. The competition for votes between the committed members of the majority and minority will produce a market in which the people always in the minority can trade for the votes necessary to win on some issues. It is obvious that people with such consistently eccentric views cannot hope to win as often as would be expected for persons whose ideas are nearer the mainstream. It is more interesting and more important that such eccentrics, in the minority on every issue, can nonetheless expect to win on some issues. Democracy under the influence of these three factors - many issues, most of concern to relatively few citizens, who will form shifting coalitions - thus does measure intensity of commitment and also makes it unlikely that anyone will lose on all issues.

Adding a few complications to this model of our political system should make it a fair representation for purposes of considering judicial review. First, log-rolling may not involve explicit vote sales.<sup>7</sup> Instead there may be a general sense that if a person votes as a colleague requests on one matter, that colleague is likely to honor a request from that person on how to vote on another matter. As the late Speaker of the House Sam Rayburn is reputed to have told new members, "To get along, go along." Informal log-rolling is still log-rolling.

Second, our political system at local, state, and federal levels operates largely by representative, rather than direct, democracy. Log-rolling should be expected both in the legislative process by which the representatives enact laws and in the electoral process by which citizens choose representatives.<sup>8</sup> The representatives in the legislative process are likely to engage in log-rolling as described

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7. Explicit vote trades may be illegal. For example, COLO. CONST. art. V, § 40, prohibits legislators selling votes for votes.

8. THE FEDERALIST No. 35 (Hamilton) notes that it is not possible to have members of every interest in the legislature, so that a person of one occupation will be required to represent the wishes of those in other occupations. The same theme returns in THE FEDERALIST No. 56. This suggests that log-rolling was expected at the electoral level as well as in the legislature.

above. They are likely to have the time and the expertise to engage in the bargaining log-rolling requires. The legislature thus operates in a manner resembling such commercial institutions as stock or commodity exchanges, with the legislators having a role analogous to that of brokers.

Citizen participation in the electoral process varies from not even voting to contributing substantial effort and resources even between electoral campaigns to particular candidates, political parties, or causes. Those who are most involved may engage in log-rolling as discussed above. Persons towards the passive end of the spectrum, however, are likely to decide whether to vote and for whom based on a candidate's statements on only one or two matters. Yet, the log-rolling here differs only in style from that discussed above. Candidates will compete in selecting patterns of statements that will attract as many votes as possible from these more passive participants, while minimizing loss of votes here and elsewhere along the spectrum. All along the spectrum majorities or pluralities are being assembled from groups of citizens of differing views - that at one end the initiative may be with the citizens and at the other with the candidates does not preclude fairly characterizing both as log-rolling.

Finally, the political process is not concerned merely with votes but also with such producers of votes as wealth, prestige, the ability to persuade, hard work, patronage, and other ways in which people influence each other. This complication means that peoples' political powers differ despite "one person, one vote," and that with many media of exchange available many different bargains are possible. Still, it is log-rolling.

## II. RESTRAINTS ON DEMOCRACY

The discussion thus far has not considered what questions the political system is to decide. The premise is that the political system is a neutral mechanism for resolving disputes, deciding any question enough citizens or their representatives want decided, and deciding that question according to any set of beliefs or values with enough support to prevail. The political system is concerned with the breadth and intensity of support for a particular viewpoint and with the skill with which that support is employed, but the political system otherwise generally has no preferences. Some matters, however, are specially treated. They have been decided by the Constitution, rather than being left to normal operation of the political system. These matters should be examined in a context of log-rolling to separate those particularly needing judicial enforcement from other con-

stitutional provisions where more deference to the legislature may be appropriate. Of course deference to the legislature's choices is the norm, because on most choices the Constitution does not speak, or it commits the decision to the legislature, or there is insufficient reason not to defer. Lack of deference receives more attention because it is unusual, like the dog not barking.

One sometimes finds statements in judicial opinions suggesting that the courts should defer to the wisdom or judgment of the legislature. Of course, one expects important institutions to operate wisely, and legislators by and large are capable people, acting in the public interest as they see it. A legislator will be reluctant to vote for a bill which appears to him (or which may be made to appear to his constituents) to be foolish or otherwise contrary to the public interest, even if his vote would produce others' votes needed for a matter of great importance to him or to his constituents. But a legislature should not be viewed as a temple of wisdom. Rather, a legislature is a place to resolve conflict, a refined substitute for a market place or a battle ground.<sup>9</sup> Legislative determinations should be accepted by a court, not so much because they are wise, as because, by analogy to the doctrine of *res judicata*, another forum's resolution of a particular conflict should normally be followed, unless some other principle can be opposed to the general rule of deference. To those other principles we now turn.

The Constitution suggests two concerns which may reduce the deference the judiciary owes to the political process. One, the integrity of the political process must be preserved, and two, legislation is intended to decide general policies rather than particular cases. After a brief discussion of the former, the remainder of this essay will be devoted to discussion of the requirement that legislation be general.

### *Preserving the Political Process*

Judicial protection of the political process, through such means as enforcement of the first amendment's guarantees of freedom of the press and of speech, has a long history.<sup>10</sup> Viewing the political process as log-rolling suggests two reasons why that protection is important. First, log-rolling theory provides a practical justification for

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9. THE FEDERALIST No. 10 (Madison) states, "No man is allowed to be a judge in his own case," then asks, "What are the . . . legislators but advocates and parties to the causes which they determine?"

10. See generally L. TRIBE, AMERICAN CONSTITUTIONAL LAW, chs. 12-13 (1978).

the protection of ideas. To protect obscure ideas on the ground that they might eventually receive majority support may seem unrealistic, as only the smallest fraction of obscure ideas are ever more than obscure ideas. The theory of log-rolling suggests, however, that an idea need not have majority support to be implemented, and probably most legislation is not supported by or even known to a majority of society. Rather, the votes needed to produce a majority are purchased from those unconcerned or even mildly opposed to the idea. Thus log-rolling suggests that judicial protection of obscure ideas is not just abstract idealism.

Second, log-rolling emphasizes the need to preserve the processes of the next election. The government may tend to follow the wishes of its citizens as much because another election is to be anticipated as because offices are held by winners of the most recent election.<sup>11</sup> One often has difficulty in getting an agent to do as the agent has been instructed. This problem may be even more serious in politics, as campaign promises cannot be specifically enforced. The issues to be decided during the term of office may not have been foreseen during the last election. But public officers are likely to keep a close eye on their constituents' concerns because of the desire to win the next election. Campaign promises are enforced primarily by the threat of retaliation at the next election if they are broken. Although citizens in general may not pay close attention to the activities of their representative, the representative's opponent is likely to bring to the constituents' attention differences between their views and their representative's activities. Log-rolling works as intended if each officer seeks to win the next election by coalition building, but not if the officer seeks to silence potential opponents or to disenfranchise some of his constituents. Log-rolling emphasizes that a change in electoral result is not caused only by a change in opinions by the electorate. That change may also occur, though opinions are constant, because of shifting coalitions. Those in the past minority may be joined by a few from the past majority, changing the past minority into a majority at the next election. Moreover, those who lose one election would seem more likely to accept that decision if they can confidently look forward to a future, fair contest. This focus on the next election by the public officers and their opponents requires that the integrity of the processes of that election be preserved. Thus viewing the political system as log-rolling emphasizes

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11. See THE FEDERALIST No. 57.

the need for the courts to enforce those portions of the Constitution providing for the operation of the political process.

### *Generality in Legislation*

#### The Constitution's Requirement

Although no provision of the Federal Constitution expressly provides that legislation must determine general principles rather than decide particular cases, a requirement of generality may be inferred from three different types of provisions: those limiting legislative action in regard to individuals, those requiring uniformity or prohibiting discrimination, and those establishing procedures. Of course "general principles" and "particular cases" are not opposite sides of a coin but rather ways of characterizing different portions of a spectrum. As such there can be no sharp line between them, they must instead be matters of continuing dispute. That these terms are not precise does not mean that they are not useful, of course, as many important legal concepts are necessarily vague.

The Federal Constitution authorizes the Congress to decide only limited types of individual cases, *i.e.* each house's powers in regard to its own members and officers, the impeachment process, and the Senate's power to confirm appointments.<sup>12</sup> Generally Congress is precluded from deciding individual cases by the prohibition against bills of attainder<sup>13</sup> and the limitation on judgment in impeachment to removal and disqualification from office.<sup>14</sup> The prohibition against *ex post facto* laws<sup>15</sup> may in part be intended to prevent legislative determination of individual cases: without the prohibition, a legislative majority might scan a person's past for an unusual act which could then retroactively be outlawed, thus permitting the imposition of criminal sanctions.

Several provisions of the Federal Constitution require uniformity or prohibit certain preferences. These include the requirement that "Duties, Imposts and Excises . . . be uniform,"<sup>16</sup> the authorization to "establish an uniform Rule of Naturalization, and uniform

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12. These powers include the House's power to elect its officers and impeach (art. I, § 2, cl. 5); the Senate's power to elect its officers (art. I, § 3, cl. 5), to try impeachments (art. I, § 3, cl. 6), and to confirm appointments (art. II, § 2, cl. 2); and the power of each house to judge the qualifications of its members (art. I, § 5, cl. 1) and to expel a member (art. I, § 5, cl. 2).

13. Art. I, § 9, cl. 3; state legislatures are similarly restricted by art. I, § 10, cl. 1.

14. Art. I, § 3, cl. 7.

15. Art. I, § 9, cl. 3 as to Congress; art. I, § 10, cl. 1 as to the states.

16. Art. I, § 8, cl. 1.

Laws on . . . bankruptcies,"<sup>17</sup> the requirement that direct taxes be apportioned,<sup>18</sup> and the prohibition against preferring the ports of one state over those of another.<sup>19</sup> These provisions seem primarily intended to prevent discrimination between states, though some would also apply to other kinds of discrimination.

Even before the Bill of Rights was enacted the Constitution contained various procedural safeguards. These include habeas corpus,<sup>20</sup> provision for federal courts with judges holding office during good behavior,<sup>21</sup> and - in criminal cases - trial to a jury and in the state where the crime was committed.<sup>22</sup> The Bill of Rights soon added a variety of procedural protections available in civil or criminal proceedings or against government action generally.<sup>23</sup> These procedural provisions complement the substantive provisions discussed above restricting legislative determination of individual cases and requiring uniformity. The substantive provisions suggest that legislative action must be general, the procedural provisions require that particularized action be accompanied by various safeguards. Put another way, this dichotomy represents the principle of separation of powers. Particular cases are decided by courts, general policies are established by the legislature. Just as courts should be alert to the possibility that their actions may violate the doctrine of separation of powers,<sup>24</sup> so too should legislatures.

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17. *Id.*, cl. 4.

18. Art. I, § 9, cl. 4.

19. *Id.*, cl. 5.

20. Art. I, § 9, cl. 2.

21. Art. III, § 1.

22. Art. III, § 2, cl. 3.

23. The provision in the fifth amendment prohibiting deprivation "of life, liberty, or property, without due process of law," although obviously procedural, may also contain a substantive requirement of generality. See, e.g., *Hurtado v. California*, 110 U.S. 516, 535-36 (1884), quoted in Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L. J. 1063, 1066 n.9:

It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must not be a special rule for a particular person or a particular case, . . . thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation.

More recently the U.S. Supreme Court has held that the fifth amendment's due process of law restriction on the federal government has the same substantive meaning as does the fourteenth amendment's equal protection limitation on the states, discussed below. *Bolling v. Sharpe*, 347 U.S. 497 (1954), *United States v. Kras*, 409 U.S. 434 (1973).

24. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978).

The discussion thus far has emphasized barriers created by the Constitution between the branches of the federal government and the people they govern.<sup>25</sup> By the period after the Civil War similar barriers were being created between state governments and the governed. The two most important of those barriers added to the Federal Constitution are in the fourteenth amendment: complementary provisions require a certain generality (the Equal Protection Clause) and require procedural safeguards before taking actions against persons (the Due Process of Law Clause). Those barriers were also being built at the state level. For example, many provisions of the Colorado Constitution of 1876, typical of its contemporaries in this regard, restricted the legislature's authority to deal with narrow or particular matters.<sup>26</sup>

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25. As indicated in notes 13 and 15 *supra*, the original constitution prohibited bills of attainder and *ex post facto* laws by states as well as by the federal government.

26. The following provisions of the Colorado Constitution of 1876 restricted the legislature's authority to deal with narrow or particular matters:

"[W]hether the contemplated use [for which property is taken through eminent domain] be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public." Art. II, § 15. This provision accepts the legislature's authority to condemn a particular piece of property—narrow authority yet necessary because a part of the decision whether to build a school or highway is where to build it—but checks that authority by requiring more strict judicial scrutiny.

"The general assembly shall not pass local or special laws in any of the following enumerated cases. . . ." Twenty-three cases are enumerated, including "granting divorces . . . changing county seats . . . providing for changes of venue in civil or criminal cases . . . the protection of game or fish . . . granting . . . the right to lay down railroad tracks. . . ." It then concludes, "In all other cases, where a general law can be made applicable, no special law shall be enacted." Art. V, § 25.

Art. V, § 38 prohibits the general assembly from releasing or transferring obligations owed the state or a municipal corporation, providing instead for extinguishing such obligations only on payment to the proper treasury.

"All laws relating to state courts shall be general and of uniform operation throughout the state. . . ." Art. VI, § 28.

"The general assembly shall . . . provide for . . . a thorough and uniform system of free public schools. . . ." Art. IX, § 2.

"All taxes shall be uniform upon the same class of subjects . . . and shall be levied and collected under general laws. . . ." Art. X, § 3. That article also provides that the state cannot impose taxes for a city (*id.* § 7) and that no city or inhabitants can be released from its proportionate share of state taxes (*id.* § 8).

"The general assembly shall have no power to remove the county seat of any county, but the removal of county seats shall be provided for by general law [requiring a majority vote in the county]." Art. XIV, § 2.

"No charter of incorporation shall be granted . . . by special law . . . but the general assembly shall provide by general laws for the organization of corporations hereafter to be created." Art. XV, § 2.

"No street railroad shall be constructed within any city . . . without the consent of the local authorities. . . ." Art. XV, § 11. This has been interpreted as a restraint on the general

This concern with the risk of abuses by state legislatures is to be expected based on the log-rolling model. As the political community becomes smaller in population and geography, the risk increases that the three conditions for log-rolling will not adequately develop. Federalist No. 10 warns that in small political units a faction may constitute a majority and easily co-ordinate its evil plans. Less dramatic, there may be a significant portion of the citizenry with similar views on most major issues, rather than those allied on one issue being opposed on others. These conditions may so hinder the market for votes that log-rolling does not become effective, leaving simple majority rule. The risk of these conditions developing is of course even greater in political units smaller than states: cities, counties, special districts.<sup>27</sup>

### The Reasons for Generality

Having sketched the source of the requirement that legislation be general, we turn to consideration of why there should be such a requirement. Federalist No. 57 suggests that representatives will be constrained from oppressive measures because laws will operate on them and their friends. This suggestion is true for laws of general application, but not for those dealing with more specific matters such as the interests of an individual or of a state. A more developed explanation of the requirement that legislation be general rather than particular could be found a few generations later:

[W]hen, in the exercise of proper legislative powers, general laws are enacted, which bear or may bear on the whole community, if they are unjust and against the spirit of the constitution, the whole community will be interested to procure their repeal by a voice potential. And that is the great security for just and fair legislation.

But when the individuals are selected from the mass,

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assembly. *City of Denver v. Mercantile Trust Co.*, 201 F. 790, 798-99 (8th Cir. 1912).

"The general assembly shall pass no law for the benefit of [any corporation or individual] . . . retrospective in its operation, or which imposes on the people of any . . . municipal subdivision . . . a new liability in respect to transactions . . . already past." Art. XV, § 12.

Similar restrictions were added to the laws of many states in the latter nineteenth century. For further discussion, see S. SATO & A. VAN ALSTYNE, *STATE AND LOCAL GOVERNMENT LAW* 191-208 (1970); D. MANDELKE & D. NETSCH, *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* 628-53 (1977).

27. See Note, *City Government in the State Courts*, 78 HARV. L. REV. 1596 (1965). It may be noted that the abuses feared here are directed at residents of the unit. The special concern of a federal system with discrimination against non-residents or interstate commerce would present further problems.

and laws are enacted affecting their property, . . . who is to stand up for them, thus isolated from the mass, in injury and injustice, or where are they to seek relief from such acts of despotic power?<sup>28</sup>

It is important to note also that narrow benefits may be as undesirable a legislative product as are narrow burdens:

The inherent vice of special laws is that they create preferences and establish irregularities. As an inevitable consequence, their enactment leads to improvident and ill-considered legislation. The members whose particular constituents are not affected by a proposed special law become indifferent to its passage. . . . The time which the Legislature would otherwise devote to the consideration of measures of public importance is frittered away in the granting of special favors to private or corporate interests or to local communities. Meanwhile, in place of a symmetrical body of statutory law on subjects of general and common interest to the whole people, we have a wilderness of special provisions . . . . Worse still, rights and privileges, which should only result from the decree of a court of competent jurisdiction after a full hearing and notice to all parties in interest, are conferred upon individuals and private corporations by special acts of the Legislature, without any pretense of investigation as to merits, or of notice to adverse parties.

. . . 'When it acts upon a public bill, a Legislature legislates; when it acts upon a private bill, it adjudicates. It passes from the function of a lawmaker to that of a judge. It is transformed from a tribune of the people into a justice shop for the seeker after special privilege.'<sup>29</sup>

These passages suggest why under log-rolling theory legislation should be general rather than particular. Log-rolling is a very sophisticated social institution. It allows a great many issues to be resolved quickly, in light of both the breadth and intensity of citizen concern,

28. *Ervine's Appeal*, 16 Pa. 256, 268 (1851), quoted in *ELY*, *supra* note 1. Courts provide relief to individuals selected from the mass and subjected to despotic acts. Non-discrimination has also been used as a check against state obstruction of interstate commerce (*South Carolina State Highway Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177 (1938)) or state taxes burdening the federal government (*United States v. County of Fresno*, 429 U.S. 452 (1977)).

29. *Anderson v. Board of Commissioners*, 77 Kan. 721, 95 P. 583 (1908). The court's quotation is from Orth, *Special Legislation*, 97 *THE ATLANTIC MONTHLY* 69 (1906). Of course citizens seeking to challenge a narrow legislative benefit may not succeed in demonstrating that they have standing.

in a way that makes it unlikely any citizen will lose on every issue. Yet it can be a crude process if addressed to narrow matters. Members of a small group may be at a serious disadvantage in the log-rolling process if its enemies are numerous, particularly if members of that small group are disinclined to engage in political activity. This small group will be less vulnerable, as indicated in the quoted passages, if its enemies must act generally rather than narrowly. The imposition of burdens, if done generally rather than only on this group, will produce allies for the group from among the other persons burdened. Some of these allies may be more inclined toward political activity, or might even have been originally among the group's enemies. In contrast, if the legislature is considered without regard for the process of log-rolling, i.e. if the legislature is considered to resolve issues on the basis of wisdom, then it would seem no less wise when it acted narrowly.

#### Pressure Toward Particularity

Unfortunately, the constitutional requirement that legislatures should operate on general principles rather than decide particular cases conflicts with practical forces pushing legislatures in the opposite direction. In economic terms, one engages in political activity in order to secure benefits. Only if the benefits' value as discounted by the risk of failure exceeds the cost of engaging in political activity will that activity be undertaken. Society as an aggregate has a net gain from a particular political activity if its total costs to the entire society are less than its total benefits. Whether to undertake a political project, however, is not decided by society but by individuals. It is likely that the person contemplating political activity will look only to his own costs and benefits. Thus the system is more likely to encourage pursuit of particular benefits, most of which those involved in the political campaign can expect to capture, than of general benefits, most of which will be enjoyed by free-riders.<sup>30</sup> A similar preference for particular rather than general benefits can be deduced without resort to economics. One might expect a person to be less grateful for the sun which, although vital to life, shines on everyone, than for a trinket which that person alone receives. Thus a participant in the political process, whether viewed as an economic or as a psychological being, is likely to seek particularized benefits.<sup>31</sup>

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30. See Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely To Constitutional Theory*, 89 YALE L. J. 1037, 1054 (1980).

31. For an analysis of the particularization of the federal income tax, see Surrey, *The*

The political system can be expected to respond to constituent interest in particular benefits by producing particular laws. The detail and complexity of much modern legislation<sup>32</sup> would seem to be as much the result of this process as a reflection of the complexity of our society and economy. Such detail and complexity, in addition to being a product of the political system not functioning properly, are also a barrier to that system's proper functioning. They conceal the legislative product, so that the citizen's ability to evaluate the representative is impaired. In some areas the complexity may become so great as to prevent representatives from understanding proposed legislation.<sup>33</sup> Hidden in the detail and complexity of special benefits may be special retribution for opponents, or special benefits may become so common that not to have a benefit is punishment enough.

### Constitutional Generality vs. Practical Particularity

The constitutional restrictions on particular action by legislatures suggest a hope by the drafters and ratifiers that competing groups in society would push back and forth as to the location of general lines. The reality is that the lines are often particular, intricate, and gerrymandered.

Thus we have a political system with a fundamental conflict: the Constitution seems to be premised on the idea that legislatures should decide general policies, yet practical forces incline the legislature instead to decide particular questions. The Constitution of course speaks to both legislators and judges, and both must respond to practical forces. How should their actions be affected by an

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*Congress and the Tax Lobbyist - How Special Tax Provisions Get Enacted*, 70 HARV. L. REV. 1145 (1957).

32. "We have had occasion to note the striking resemblance between some of the laws we are called upon to interpret and King Minos's labyrinth in ancient Crete." *Lok v. Immigration and Naturalization Service*, 548 F.2d 37, 38 (2nd Cir. 1977).

33. Congressional debates ordinarily do not illuminate technical problems of federal taxation. . . . The committee reports, on the other hand, are frequently helpful, and it is common for the courts to rely heavily on them. . . . Because of the profusion of technical detail and because some members of the committee may know little of the content of the committee's reports (and this is a fortiori true of the members of Congress who do not serve on the tax committees), it might be said that they are not evidence of the "intent" of Congress unless we apply the doctrine of respondeat superior. However, the same might be said of the statutes themselves (as well as many other complex statutes) since many members of Congress, including some on the tax committees, do not understand the technical detail of the statutes and instead rely on the representations of the "technicians" regarding the contents of the statute and the committee reports.

B. BITTKER & L. STONE, *FEDERAL INCOME TAXATION* 38-39 (5th ed. 1980).

awareness of this conflict? Unfortunately, here, as in so many places, the answer does not appear as a clear formula but only as some factors to be considered. A legislator should examine the many particular matters demanding attention, hoping to be able to find general or similar problems for which general solutions would be appropriate. This process would be analogous to the common law development of general rules by a process of induction from various particular cases.

Judges should of course be aware of the deference they owe to the politically responsible branches. But judges should also be aware that the political system presumes that legislative decisions will be achieved through log-rolling and that log-rolling is considered appropriate for general matters but not for narrow ones. If it were possible for courts to determine that log-rolling was not occurring, then it might be appropriate to give less deference to legislation not the product of log-rolling. But it is not clear that such determinations are possible.<sup>34</sup> Given the practical forces tending to produce narrow legislation, and the difficulty in identifying what is "narrow," it is probably unrealistic to suggest that legislation should be invalidated solely because it is narrow in scope. It seems appropriate, however, for the courts to give less deference to legislation as the legislation becomes more narrow. This judicial check on fairness is appropriate when the intended institutional checks of log-rolling and generality are not operating. Thus the constitutional ground for invalidating legislation is that the legislation violates the generality requirement. That ground will not be invoked merely because legislation is narrow, but only if, in addition to being narrow, the legislation is unfair.

### III. CONCLUSION

Professor Ely concludes his recent book with a discussion of a hypothetical statute banning gall bladder removal except where necessary to save the life of the patient.<sup>35</sup> He analyzes the statute under his theories: it is unfair, but unfairness alone is not enough to invalidate a statute, and he finds no additional vices. Under log-rolling theory the statute has an additional vice, its narrowness, which may make it unconstitutional. The concepts "narrow" and "unfair" will have to be developed before reaching a final conclusion about this statute, but to develop these concepts is a task for another day.

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34. For a suggestion of factors which might indicate the absence of log-rolling, see ELY, *supra* note 1, at 135-79.

35. ELY, *supra* note 1, at 182-83. The hypothetical is from Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L. J. 221, 304-05 (1973).

