Due Process and the Right to an Individualized Hearing

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Due process requires the government to provide notice and a hearing before depriving individuals of protected rights. This right—the right to an individualized hearing—is powerful. It gives individuals the ability to know why the government is taking action that affects them; and it lets them oppose the government's plans, often by presenting facts and arguments to a neutral decision-maker. As a result, the right to an individualized hearing can help shape the government's substantive aims—and it even can prevent the government from acting at all. But, despite its importance, there is a longstanding exception to the right to an individualized hearing. Individualized procedures normally are not required when the government acts on more than a few people at the same time. Although the right to an individualized hearing and its exception are fundamental to due process doctrine, scholars disagree about this right's origin, and courts have struggled to delineate its contours.

This Article offers a new explanation for the scope of the right to an individualized hearing: it is a living relic of the once-pervasive "class legislation" doctrine. At one time, class legislation doctrine was a robust constitutional mechanism used both to prevent the elevation of one "class" of society at the expense of another and to minimize arbitrary distinctions between groups. Accordingly, class legislation doctrine helped courts enforce the key rule of law value of generality. Although class legislation doctrine has faded from its prominent place in constitutional law, shades of it survive in the right to an individualized hearing. Indeed, courts sorting out the contours of the right to an individualized hearing often invoke class legislation concepts that have been discarded from other areas of the law. Reconnecting the right to an individualized hearing with its class legislation origin sheds light on this mysterious but fundamental corner of due process doctrine. It also can help courts apply the right to an individualized hearing in ways that emphasize its crucial role in protecting the rule of law.

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INTRODUCTION

An individualized hearing is among the most potent tools available for checking the government's power. It gives individuals the opportunity to know why

the government is taking action that affects them. And it gives these individuals the chance to oppose the government, often by presenting facts and making arguments to a neutral decision-maker.[1] As a result, the right to an individualized hearing can be used to resist the government's power, sometimes even forcing it to abandon its plans entirely.[2] But, because of its powerful ability to delay or derail government action, an individualized hearing is a double-edged sword. To a party who prefers the *status quo* to the government's proposed change, an individualized hearing appears to be a fundamental component of the rule of law.[3] But, to a party hoping for the government to act, an individualized hearing emerges as an unwanted tool of obstruction.

Imagine, for example, that the government proposes to open a wildlife refuge to oil drilling.[4] Here, a conservation organization might want the protections of an individualized hearing in order to allow it to present evidence, make arguments, ensure that the government is complying with its legal obligations, and—even if the change is inevitable—delay the outcome. A member of the oil industry, by contrast, might want the government to act without an individualized hearing in order to avoid unwanted scrutiny and delay. But, when the situation is reversed and the government proposes to *prevent* drilling by creating a wildlife preserve, preferences for an individualized hearing are also reversed. Now, it is the industry member who might want the protections of an individualized hearing while the conservationists might prefer an expedited decision. As this example suggests, groups with conflicting substantive interests often disagree about the procedures that the government should use before reaching a substantive decision. As a result, properly defining the scope of the *right* to an individualized hearing—that is, determining when a hearing is required and when the government can act without one—is crucial for ensuring that the administrative state operates both fairly and efficiently.[5]

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1. Henry Friendly, *Some Kind of Hearing*, 123 U. PENN. L. REV. 1267, 1279–1295 (1975) (describing elements of a fair hearing); *see also* Goss v. Lopez, 419 U.S. 565, 579 (1975) ("[S]tudents facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing").

2. JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 5 (1985) ("Rights to trial-type hearings may ultimately empower citizens or groups to impose costs on government that result in the transformation, even the abandonment, of governmental activities.").

3. The rule of law is a contested concept. Jeremy Waldron, *The Rule of Law as an Essentially Contested Concept*, *in* THE CAMBRIDGE COMPANION TO THE RULE OF LAW 121 (Jens Meierhenrich & Martin Loughlin eds., 2021). Here, I refer to the view that the rule of law includes attributes such as generality, prospectivity, an open and fair hearing, and clarity. For explanations of these and other attributes widely held to be part of the rule of law, see LON L. FULLER, THE MORALITY OF LAW 46–50 (1964) (setting out the conditions for the internal morality of law); JOSEPH RAZ, *The Rule of Law and its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 214–18 (1979) (describing attributes of the rule of law); and John Tasioulas, *The Rule of Law*, *in* THE CAMBRIDGE COMPANION TO THE PHILOSOPHY OF LAW (John Tasioulas, J. ed.) 119–20 (2020) (describing attributes of the rule of law). PAUL GOWDER, THE RULE OF LAW IN THE REAL WORLD 31 (2016) (describing the rule of law value of generality).

4. This example is based on the federal government's recent reversal of its position on oil and gas leasing in the Arctic National Wildlife Refuge. Secretary of Interior Order No. 3401, 2021 WL 2307313, § 4 (June 1, 2021) (directing a halt on oil and gas leasing in the Arctic Refuge).

5. This basic tension was recognized by the authors of the influential FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941) [hereinafter FINAL REPORT], a foundational document detailing the procedures of key federal administrative agencies

Because of the practical importance of individualized procedures, the scope of the right to an individualized hearing has become a centerpiece of constitutional law doctrine. The Supreme Court has long held that due process requires the government to provide individuals notice and an opportunity for a hearing before depriving them of protected rights.[6] But, there is a longstanding exception to the individualized hearing requirement: individualized procedures are not required when the government promulgates policy-type rules and standards, acting on more than a few people at the same time.[7] For more than a century, the government's obligation to provide an individualized hearing has turned on the distinction between two progressive-era Supreme Court decisions, *Londoner*[8] and *Bi-Metallic*.[9] Despite similarities between these cases, the Court held that the *Londoner* challengers were entitled to a hearing before the government acted[10] while the *Bi-Metallic* challengers were not.[11] Reconciling the outcomes, the *Bi-Metallic* Court intimated that one of the relevant differences between them was the number of people affected.[12] While a deprivation that affects a "relatively small number of persons" gives rise to the right to a hearing, no hearing is required for a deprivation that affects "more than a few people." [13] This distinction, with some later elaboration, is still applied today. It controls whether state and federal agencies are constitutionally required to provide a hearing before taking official action.[14] And this distinction has been transplanted, by judicial gloss, onto the Administrative Procedure Act's (APA's) definitions of "rule" and "order," controlling when federal agencies must proceed by informal rulemaking rather than by adjudication.[15]

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prepared in the lead-up to the enactment of the Administrative Procedure Act (APA). There, the Committee noted that

> "[o]ne can point out situations where obviously a regulation should not be made until all those to be regulated have been given an opportunity to present facts and argument to those in authority for the purpose of enlightening or persuading them….It is also plain that persons dealing with the Government have an interest—one might say right—to prompt knowledge of the official understanding of the law, of the way in which it will be enforced, of the path by which it is intended to achieve the congressional purpose."

Id. at 2.

6. Fuentes v. Shevin, 407 U.S. 67, 80 (1972) ("For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'") (quoting Baldwin v. Hale, 68 U.S. 223, 233 (1864)).

7. United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 244 (1973) (noting the "recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other").

8. Londoner v. Denver, 210 U.S. 373 (1908).

9. Bi-Metallic Inv. Co. v. Colorado, 239 U.S. 441 (1915).

10. *Londoner*, 210 U.S. at 386.

11. *Bi-Metallic*, 239 U.S. at 445–446.

12. *Id.*

13. *Id.*

14. Harris v. Riverside, 904 F.2d 497, 502 (9th Cir. 1990) (holding that the fact that the county knew that that one particular person would be affected by the change triggered the due process right to an individualized hearing).

15. Safari Club v. Zinke, 878 F.3d 316, 355 (D.C. Cir. 2017) (noting that the statutory definitions of rule and order follow the *Londoner*/*Bi-Metallic* distinction).

Although the *Londoner/Bi-Metallic* distinction is well-settled, scholars have puzzled over its origin and courts have struggled to delineate its contours.[16] After setting out the standard justifications for the *Londoner/Bi-Metallic* distinction—and raising some doubts about their explanatory power—this Article will reexamine the distinction through the lens of "class legislation." In its most basic formulation, "class legislation" is legislation that benefits one group, or class, at the expense of another.[17] Until the early twentieth century, the class legislation doctrine gave courts a conceptual and doctrinal basis for invalidating class legislation in order to prevent the government from making arbitrary distinctions between groups, elevating one class of society at the expense of another, or instituting formally unequal laws.[18] Accordingly, class legislation doctrine helped courts enforce key rule of law values. Reconnecting the *Londoner/Bi-Metallic* distinction with the class legislation doctrine can help scholars understand the origin of this mysterious but fundamental corner of due process doctrine. It also can help courts implement the *Londoner/Bi-Metallic* distinction in a way that supports rule of law values. And it can help give life to a fundamental principle of administrative law, that agency power "must be effectively exercised in the public interest" but must not be "exercised with partiality for some individuals and discrimination against others."[19]

This Article contributes to three lines of scholarship that lie at the intersection of constitutional law and administrative law. First, this Article contributes to a growing literature recognizing the importance of class legislation doctrine to modern constitutional law. Class legislation doctrine, once a central feature of federal constitutional law, has long been out of fashion because of concerns that it encourages judicial overreach. More recently, however, scholars have started to reexamine the power of class legislation doctrine to address modern problems of bias, discrimination, and inequality.[20] This Article contributes to the modern trend of exploring the power of class legislation doctrine by identifying the nuanced ways

16. *E.g.*, Onyx Properties v. Elbert County, 838 F.3d 1039 (10th Cir. 2016) (displaying some confusion when applying the distinction).

17. For a comprehensive discussion of class legislation, see HOWARD GILLMAN, THE CONSTITUTION BESIEGED (1993).

18. Formal equality corresponds to the concept that like things must be treated alike. Formally unequal laws treat like things differently. For a critique of formal equality without reference to substantive equality, see Paul Gowder, *Equal Law in an Unequal World*, 99 IOWA L. REV. 1021, 1031 (2014) ("'The demand to 'treat like cases alike' requires a non-formal criterion by which we may pick out the features of the cases that are relevant for determining whether they are 'like,' for generality purposes, or not.").

19. FINAL REPORT, *supra* note 5, at 2. For more on the relationship between administrative law doctrine and Fuller's internal morality of law, see Cass Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924 (2018).

20. William Eskridge, *Original Meaning and Marriage Equality*, 52 HOUS. L. REV. 1067, 1091 (2015) (arguing that class legislation doctrine can combat discrimination based on sexual orientation); William D. Araiza, *Animus and its Discontents*, 71 FLA. L. REV. 155, 201–02, 209 (2019) (same); Jack Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 319–20 (2007) (arguing that class legislation doctrine can combat discrimination based on sex); Mark G. Yudof, *Equal Protection, Class Legislation, and Sex Discrimination*, 88 MICH. L. REV. 1366 (1990); Joshua Weishart, *Separate But Free*, 79 FLA. L. REV. 1139, 1181 (2021) (arguing that class legislation doctrine can be used to guarantee the right to education); V.F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955, 965 (2009) (arguing that class legislation doctrine can be a roadmap to good governance).

that courts applied class legislation doctrine's strategies when class legislation doctrine was common. This robust explanation of class legislation doctrine's strategies helps us evaluate how implementing class legislation doctrine in the context of the right to an individualized hearing supports or undermines rule of law values.

Second, this Article contributes to a long and rich, but still incomplete, literature that attempts to explain the *Londoner/Bi-Metallic* distinction, an elusive but foundational administrative law concept. Famously, Kenneth Culp Davis analogized *Londoner* and *Bi-Metallic* to the distinction between legislative and adjudicative facts.[21] Other scholars have justified the *Londoner/Bi-Metallic* distinction on political process grounds.[22] Still others argue that the *Londoner/Bi-Metallic* distinction can be seen as an extension of the Bill of Attainder clauses' basic guarantee of protection against targeted legislative punishment.[23] And finally, others view the distinction in pragmatic terms, arguing that the demands of an increasingly complex society require agency policymaking unencumbered by individualized hearings.[24]

Although each of these standard justifications sheds some light on the *Londoner/Bi-Metallic* distinction, each explanation also has its limitations: some rest on imperfect analogies to other legal principles, others are rooted in incomplete and unsatisfying legal theories, and still others fail to fit the facts of the *Londoner* and *Bi-*

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21. KENNETH CULP DAVIS, ADMINISTRATIVE LAW AND GOVERNMENT 149–50 (1975) (explaining the difference between adjudicative facts and legislative facts as it relates to the *Londoner/Bi-Metallic* distinction); Kenneth Culp Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193, 199 (1956) (same); KENNETH CULP DAVIS & RICHARD PIERCE, ADMINISTRATIVE LAW TREATISE § 9.2 (3d ed. 1994) (same); *see also* Ronald M. Levin, *The Administrative Law Legacy of Kenneth Culp Davis*, 42 SAN DIEGO L. REV. 315, 320 (2005) (describing the importance of Davis' distinction between "adjudicative facts" and "legislative facts"); BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 5.7 (3d ed. 1991) (noting that legislative facts "are the types of materials that one would normally present to a legislative committee").

22. Edward L. Rubin, *The Mistaken Idea of General Regulatory Takings*, 2019 MICH. ST. L. REV. 225, 243 (2019); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2362–63 (2001); William D. Araiza, *The Trouble with Robertson*, 48 CATH. U. L. REV. 1055 (1999) [hereinafter Araiza, *Trouble with Robertson*]; Peter Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251 (1992).

23. William D. Araiza, *Agency Adjudication, the Importance of Facts, and the Limitations of Labels*, 57 WASH. & LEE L. REV. 351, 382–83 (2000) [hereinafter Araiza, *Agency Adjudication*]; *see also* Araiza, *Trouble with Robertson*, *supra* note 22, at 1104–05 (noting the connection between *Klein* and Bi-*Metallic*); Rubin, *supra* note 22, at 242–43 (explaining *Londoner/Bi-Metallic* distinction); Edward Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1119 (1984); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 503 (1978) (arguing that the case for due process "grows stronger as the identity of the persons affected by a governmental choice becomes clearer"); Paul Gowder, Procedural Due Process: The Missing Casebook Chapter (2013) (unpublished source) (on file with author).

24. DAVIS & PIERCE, *supra* note 21, at § 9.2; Kagan, *supra* note 22, at 2262 ("The divergent (constitutional and statutory) rules may reflect sheer pragmatism—a recognition that participatory rights are harder and more costly to implement in the rulemaking context."); *see also* Richard E. Levy & Sidney A. Shapiro, *Administrative Procedure and The Decline of the Trial*, 51 KAN. L. REV. 473, 485–86 (2003) (noting *Bi-Metallic*'s pragmatic argument); MASHAW, *supra* note 2, at 78–79 (noting that the shift from *Londoner* to *Bi-Metallic* can be seen as part of growing deference to agency officials); Matthew Steilin, *Due Process Choice of Law: A Study in the History of the Judicial Doctrine*, 24 WM. & MARY BILL RTS. J. 1047, 1089–90 (2016) ("What mattered were the practical demands of government in a complex society and the public's interest in effective government.").

Metallic cases themselves. This Article contributes to the *Londoner/Bi-Metallic* literature by offering a novel but robust explanation for the distinction between them. A close reading of *Londoner* and *Bi-Metallic*, along with a deep dive into contemporaneous Supreme Court doctrine, strongly suggests that these cases are part of the class legislation tradition that was a central part of constitutional law at the time they were decided. Viewing the *Londoner/Bi-Metallic* distinction as part of the class legislation tradition provides a satisfying historical,[25] conceptual, and doctrinal justification for these cases.

Third, this Article contributes to a burgeoning literature on administrative constitutionalism.[26] Scholars have begun to explore the role that agencies play in "constructing constitutional norms," including recognizing that agencies play a primary role in interpreting and implementing the Constitution.[27] This Article contributes to the literature on administrative constitutionalism by identifying the right to an individualized hearing as a constitutional right that is constructed largely by administrative practice. Judicial guidance about the constitutional scope of the right to an individualized hearing has left gaps for agencies to fill. As a result, agency practice is largely responsible for defining the constitutional right to an individualized hearing sketched out only roughly by the Court.

Part I of this Article lays the groundwork for understanding the right to an individualized hearing. It first describes the iconic pair of canonical due process cases, *Londoner* and *Bi-Metallic*, and shows how the differences between these terse, even cryptic, opinions have laid the foundation for modern doctrine dictating the contours of the right to an individualized hearing. Next, Part I describes the most persuasive justifications for the *Londoner/Bi-Metallic* distinction and raises some doubts about their explanatory power.

Part II offers a new explanation for the *Londoner/Bi-Metallic* distinction: these cases can be explained as an implementation of the once-pervasive "class legislation" doctrine. Part II will explain the class legislation doctrine and evaluate the *Londoner/Bi-Metallic* distinction in light of it. Ultimately, Part II concludes that the concerns that drove the class legislation doctrine and the strategies courts used

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25. For more on the turn to historical analysis of foundational administrative law concepts, see Emily S. Bremer & Kathryn E. Kovacs, *Introduction to the Bremer-Kovacs Collection: Historic Documents Related to the Administrative Procedure Act*, 106 MINN. L. REV. HEADNOTES 218, 220 (2021) (noting the recent turn of "courts and scholars to focus renewed attention on the text and origins of the APA.").

26. WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 26–27 (2010) (describing that agencies engage in administrative constitutionalism when they consider and interpret the Constitution); Sophia Z. Lee, *Race, Sex, and Rulemaking*, 96 VA. L. REV. 799, 801 (2010) (agencies engage in administrative constitutionalism when they interpret and implement constitutional law); Gillian Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1900 (2013) ("[A]dministrative constitutionalism also encompasses the elaboration of new constitutional understandings by administrative actors.").

27. Sofia Z. Lee, *Our Administered Constitution*, 167 U. PENN. L. REV. 1699, 1703, 1706 (2019) ("[A]dministrative agencies have been the primary interpreters and implementers of the federal Constitution throughout the history of the United States."); Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519, 529 (2019) (defining administrative constitutionalism as "[a]gencies' constitutional value judgments, made in the process of interpreting statutes").

to police legislative classifications explain the otherwise murky *Londoner* and *Bi-Metallic* opinions.

Part III turns from the descriptive to the normative, exploring the implications of Part II. It concludes that class legislation strategies do tend to support the value of generality, a key component of the rule of law. Moreover, reconnecting class legislation with the right to an individualized hearing also helps bridge the conceptual divide that exists between substantive and procedural due process. However, the results are decidedly more mixed for the values of coherence, clarity, and congruence.

Part IV offers some brief conclusions and highlights how this Article lights the way toward future scholarship.

I. THE RIGHT TO AN INDIVIDUALIZED HEARING

The Constitution's due process clauses prohibit both the states and the federal government from depriving any person of "life, liberty, or property, without due process of law."[28] It is hard to overstate the number of ways that these clauses have been used in American law, from the most mundane[29] to the most ambitious.[30] Among its many applications, due process requires the government to provide individuals "some kind of notice" and afford them "some kind of hearing" before taking action that finally deprives them of protected rights.[31] This simple-sounding standard obscures important details, to be sure, including *what* kind of notice and *what* kind of hearing are required. Rather than imposing bright-line rules, the Supreme Court has opted for context-specific results.[32] In a longstanding formulation, courts normally determine what process is due by using a three-factor test that balances the interests of the affected party, the interests of the government, and the value of augmenting the procedures.[33]

But, despite the centrality of notice and a hearing to the Court's due process doctrine, there is an exception to these requirements. While individualized procedures are constitutionally required when a governmental entity takes action involving particular and identifiable parties, individualized notice and a hearing are not required when the government takes generally applicable action affecting more

28. U.S. CONST. amend. V; *Id.* amend. XIV.

29. Ford Motor Co. v. Montana, 141 S. Ct. 1017, 1024 (2021) (interpreting personal jurisdiction component of due process).

30. *E.g.*, Obergefell v. Hodges, 576 U.S. 644, 675 (2015) ("[U]nder the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty."); *see also* VIRGINIA WOOD, DUE PROCESS OF LAW 417 (1951) (arguing that "due process" means "the elements of social justice and liberty…which the justices deem essential").

31. Goss v. Lopez, 419 U.S. 565, 579 (1975) ("[S]tudents facing suspension . . . must be given some kind of notice and afforded some kind of hearing."); *see also* Friendly, *supra* note 1, at 1279–95 (describing elements of a fair hearing).

32. Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."); s*ee also* Goldberg v. Kelly, 397 U.S. 254 (1970) ("The fundamental requisite of due process of law is the opportunity to be heard . . . at a meaningful time and in a meaningful manner.") (internal citations omitted).

33. Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (setting out three factors for determining what process is due).

than a few people.[34] The general rule requiring individualized notice and a hearing, and its exception, were articulated in a pair of progressive-era Supreme Court cases, *Londoner* and *Bi-Metallic*, which are universally cited for this distinction.[35] The *Londoner/Bi-Metallic* distinction is well-settled,[36] even though the boundary between the two categories it creates can be fuzzy.[37]

The rest of Part I describes the foundational *Londoner* and *Bi-Metallic* cases and the contours of the distinction they articulate. It next describes the major justifications for the *Londoner/Bi-Metallic* distinction. Finally, it raises some doubts about these justifications. In Part II, I offer a new interpretation of the *Londoner/Bi-Metallic* distinction, one based on the once-pervasive, but now mostly dormant, concept of class legislation.

A. The Londoner/Bi-Metallic Distinction

1. The Londoner and Bi-Metallic Cases

It is the similarities between the Supreme Court's *Londoner* and *Bi-Metallic* cases that make the Court's treatment of them so intriguing. Both cases turned on the question of the state's obligation to provide a hearing, they were decided within a decade of one another, and they both involved challenges to tax-related classifications. And they even involved property in the same location—Denver, Colorado. But, despite these superficial similarities, the Court required an individualized hearing in *Londoner* while declining to impose this requirement less than a decade later in *Bi-Metallic*. A close look at these cases reveals the distinction

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34. United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 244 (1973) (noting the "recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other"); *see also* DAVIS & PIERCE, *supra* note 21, § 9.2 ("Procedural due process does not apply when government makes a policy decision that has an adverse impact on an entire classification of individuals or firms."); SCHWARTZ, *supra* note 21, at 232–33 ("If agency action depends on an adjudicative determination, a trial-type procedure or evidentiary hearing is ordinarily required. If the action is legislative in nature, a hearing is not usually required."); Kagan, *supra* note 22, at 2362–63 (noting that due process requires individualized notice and a hearing for particularized government action but not for rules of general applicability).

35. *E.g.*, DAVIS, *supra* note 21, at 150 (1960) (noting that the crucial difference between *Londoner* and *Bi-Metallic* is the distinction between legislative and adjudicative facts); Rubin, *supra* note 22, at 242–260; (same); Nicholas Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power*, 130 YALE L.J. 1288, 1304, 1305 (2021) (noting that *Bi-Metallic* "has long been administrative law's touchstone for defining rulemaking"); Kagan, *supra* note 22, at 2362–63 (referring to *Londoner* and *Bi-Metallic* as "famous, now always paired" cases describing when notice and a hearing are required by due process); Levy & Shapiro, *supra* note 24, at 485–86 (noting that *Londoner* and *Bi-Metallic* "now represent the classic statement of the distinction between rulemaking and adjudication in administrative law"); *see also Fla. E. Coast Ry.*, 410 U.S. at 244 (1973) ("The basic distinction between rulemaking and adjudication is illustrated by this Court's treatment of two related cases under the Due Process Clause of the Fourteenth Amendment.").

36. SCHWARTZ, *supra* note 21, § 5.7 (The *Bi-Metallic* and *Londoner* results . . . were approved by the Supreme Court not long ago.").

37. Friendly, *supra* note 1, at 1310 (noting the blurry line between rulemaking and adjudication); Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1278–79 (2008) ("Today's automated systems, however, resist this traditional [*Londoner/Bi-Metallic*] classification."); Kagan, *supra* note 22, at 2263 (noting that the *Londoner/Bi-Metallic* "distinction is not hard-edged").

that they state and offers some initial clues as to the reason for their different outcomes.

In *Londoner*, the Supreme Court considered whether due process required the state to grant an individualized hearing to landowners before imposing a special assessment on their property.[38] The assessment in *Londoner* was connected to the improvement of the Eighth Avenue Paving District, a group of streets in Denver, Colorado.[39] The assessment process began when landowners petitioned the board of public works to pave the streets in the Paving District.[40] Before the work began, the board prepared a plan of the proposed improvement, including prospective costs to each landowner, and forwarded it to the city council.[41] The city council then passed an ordinance authorizing the completion of the work but, crucially, not yet authorizing the assessment itself.[42] Only after the improvements were made did the board certify to the city clerk a statement of the cost and proposed assessment of specific lots of land.[43] After receiving the board's report, the city clerk published a notice inviting written objections to the proposed assessment, promising that objections "would be heard and determined by the city council before the passage of any ordinance assessing the cost."[44]

Some landowners did in fact file lengthy written objections, two of which—as will be discussed more fully below—reflect class legislation concerns. First, the landowners objected that the assessments were arbitrary because they did not "fit" the property assessed: that is, the assessments unduly burdened some Paving District landowners for the benefit of landowners outside of the Paving District.[45] Second, they argued that the assessments treated unequal parcels of land as if they were equal by imposing assessments unconnected to the actual benefit that would accrue to the assessed property.[46] Despite these objections, the city provided no opportunity for the landowners to make objections at an in-person hearing.[47] In very few words, the Supreme Court invalidated this process under the Fourteenth Amendment, holding that "due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice."[48]

Londoner's promise of robust individualized hearing rights was cut short less than a decade later by *Bi-Metallic*, a case raising a similar issue. In *Bi-Metallic*, owners of real property in Denver challenged a state agency order increasing the assessed

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38. Londoner v. Denver, 210 U.S 373, 375–76.

39. City of Denver v. Londoner, 33 Colo. 104, 80 Pac. 117, 118 (1905) (noting that the tax was levied to "pay the expense of paving certain streets in what is known as the Eighth Avenue Paving District").

40. *Londoner*, 210 U.S at 375–76.

41. *Id.*

42. *Id.*

43. *Id.* at 380.

44. *Id.* at 380–81.

45. *Id.*

46. *Id.* at 382.

47. *Id.* at 384.

48. *Id.* at 385–86. Interestingly, the Court held that "a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal." *Id.* at 386.

value of all property in Denver by forty percent.[49] As in *Londoner*, the plaintiff argued that it was denied due process because it was given no opportunity to be heard prior to the agency's action.[50] The Court acknowledged that taxpayers would have no opportunity to present any arguments before the agency imposed its new assessed value.[51] Nevertheless, the Court framed the issue as whether "all individuals have a constitutional right to be heard before a matter can be decided in which all are equally concerned."[52] The Court answered in the negative.[53]

In explaining its holding, the Court offered some clues as to the difference between *Bi-Metallic* and its previous *Londoner* opinion. First, the Court considered the practicality of individualized hearings when the property of an entire city was involved.[54] The Court explained that "it is impracticable that everyone should have a direct voice" in the adoption of a new rule.[55] "The Constitution does not require all public acts to be done in town meeting or an assembly of the whole."[56] The Court added, in a pragmatic plea, that there "must be a limit to individual argument in such matters if government is to go on."[57] Second, the Court considered the ability of affected taxpayers to influence the political process.[58] The Court acknowledged that generally applicable rules may lawfully be enacted that affect property rights of individuals, "sometimes to the point of ruin, without giving them a chance to be heard.[59] Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule."[60] Third, the Court distinguished *Londoner* by noting that the number of people affected by the rule differed.[61] In *Londoner*, the *Bi-Metallic* Court noted, a "relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds."[62] By contrast, in *Bi-Metallic*, no hearing was required because the assessment "applie[d] to more than a few people.[63]

2. The Modern Londoner/Bi-Metallic Distinction

Londoner and *Bi-Metallic* did not instantly become the iconic duo that they are today.[64] Indeed, these cases were cited relatively rarely before the enactment of the APA in 1946.[65] And it was only when the Supreme Court revisited the pair in *Florida*

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49. Bi-Metallic Inv. Co. v. Colorado, 239 U.S. 441, 443 (1915).
50. *Id.* at 444.
51. *Id.* at 445.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 446.
62. *Id.*
63. *Id.* at 445.
64. Kagan, *supra* note 22, at 2362–63 (noting that the cases are "famous" and "now always paired").
65. Ronald A. Cass, *Models of Administrative Action*, 72 VA. L. REV. 363, 369 (1986) ("The *Londoner* and *Bi-Metallic* cases did not become important staples of administrative law until the next

East Coast Railway[66] that they became inseparable in case law. But, despite their slow rise to prominence, the modern meaning of *Londoner* and *Bi-Metallic* has proved durable and strikingly uniform[67] and is now considered to "lie at the core of administrative procedure."[68] Today, these cases are invariably cited for two related points, one constitutional and the other statutory. First, they set out the constitutional line separating government deprivations that require an individualized hearing from those that do not. Under this approach, if the government takes action that is generally applicable (normally because it applies to more than a few people), then due process requires no individualized hearing. By contrast, if the government adjudicates individual disputes, then due process requires some individualized procedures.[69] For example, in *Harris*, a county agency revised a zoning plan with the knowledge that it would prohibit a use planned by one individual.[70] The Court of Appeals held that the fact that the county knew that a particular person would be affected by the change triggered the due process right to an individualized hearing.[71]

Second, *Londoner* and *Bi-Metallic*'s constitutional distinction has been imported into the non-constitutional rulemaking process by mapping it (roughly) onto the APA's definitions of "rule" and "order."[72] The APA's informal rulemaking requirements—that is, notice and comment rulemaking—apply only when an

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generation of scholars turned their attention to the field."). Notably, Kenneth Culp Davis interpreted these cases as a pair as early as 1942. Kenneth Culp Davis, *The Requirement of Opportunity to Be Heard in the Administrative Process*, 51 YALE L.J. 1093, 1117 (1942) ("Requiring the trial technique in the *Londoner* case and refusing to require it in the *Bi-Metallic* case was thoroughly sound."). Indeed, it does not appear that any federal case cited both cases until after the APA was enacted. Gart v. Cole, 263 F.2d 244, 251 (2d Cir. 1959).

66. United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 245 (1973)

67. 75 Acres, LLC v. Miami-Dade Cty., 338 F.3d 1288, 1294 (11th Cir. 2003) ("*Londoner* and *Bi-Metallic* . . . have served as the foundation for a strikingly uniform approach to procedural due process."); *see also* DAVIS & PIERCE, *supra* note 21, § 9.2 ("The Court continues to rely upon [the *Londoner*/*Bi-Metallic*] distinction in many of its most important modern decisions.").

68. DAVIS & PIERCE, *supra* note 21, § 9.2.

69. Kagan, *supra* note 22, at 2362–63 (noting that *Londoner* and *Bi-Metallic* "require notice and a hearing as a matter of due process when an administrative authority resolves disputes involving particular and identifiable parties, but not when it adopts rules of general application"); *see also* Onyx Props. v. Elbert Cty, 838 F.3d 1039, 1046 (10th Cir. 2016) ("When the action has a limited focus (only a few people or properties are affected) and is based on grounds that are individually assessed, it may be more adjudicative than legislative and therefore subject to traditional procedural requirements of notice and hearing."); 75 Acres, 338 F.3d at 1294; Gallo v. U.S. Dist. Ct., 349 F.3d 1169, 1181–82 (9th Cir. 2003) ("When the action is purely legislative, the statute satisfies due process if the enacting body provides public notice and open hearings. . . . When the government action is adjudicative, however, due process requires 'notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'"); SCHWARTZ, *supra* note 21, § 5.7 ("If agency action depends on an adjudicative determination, a trial-type procedure or evidentiary hearing is ordinarily required. If the action is legislative in nature, a hearing is not usually required.").

70. Harris v. Riverside, 904 F.2d 497, 502 (9th Cir. 1990).

71. *Id.*

72. Levy & Shapiro, *supra* note 24, at 485–86 (noting that *Londoner* and *Bi-Metallic* "now represent the classic statement of the distinction between rulemaking and adjudication in administrative law"); Daniel B. Rodriguez, *Whither the Neutral Agency? Rethinking Bias in Regulatory Administration*, 69 BUFF. L. REV. 375, 404 (2021) (noting the "*Londoner*/*Bi-Metallic* dichotomy underlying the rulemaking/adjudication distinction").

agency takes action that is considered rulemaking. By contrast, when the agency is adjudicating, notice and comment procedures are not required.[73] In conformity with *Londoner* and *Bi-Metallic*'s constitutional distinction, but in tension with the text of the APA itself,[74] courts hold that agency action that singles out a small number of individuals who are exceptionally affected is an adjudication that need not comply with the notice and comment process. By contrast, when agency action is generally applicable, it is a rule for the purposes of the APA and must be conducted in accordance with statutory rulemaking procedures.[75] For example, in *Safari Club*, an agency prohibited the importation of sport-hunted elephant trophies after determining that the killing of elephants did not "enhance the survival of the species."[76] The question turned on whether the determination was a rule that should have gone through the notice and comment process rather than an adjudication for which notice and comment were not required.[77] The Court of Appeals held that the distinction between a rule and an adjudication follow the precepts set out by *Londoner* and *Bi-Metallic*.[78] The court then found that the agency's determination "applied to all potential imports of sport-hunted elephant trophies" rather than to "individual parties" and that the ban had "no immediate legal consequences for any specific parties."[79] Because of its general applicability, the court held that the determination was a rule subject to notice and comment requirements rather than an adjudication.[80]

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73. *Compare* 5 U.S.C. § 554 (adjudication), *with* 5 U.S.C. § 553 (rulemaking).

74. Courts have ignored the plain text of the APA, which provides definitions that do not map neatly onto the *Londoner/Bi-Metallic* distinction. In the APA, "rule means the whole or a part of an agency statement of general *or particular* applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. §551(4) (emphasis added). Rulemaking, in turn, "means agency process for formulating, amending, or repealing a rule." *Id.* § 551(5). Order is defined as "a final disposition . . . of an agency in a matter other than rule making." *Id.* § 551(6). Because the definition of "rule" in the APA extends to statements of *particular* applicability, however, an adjudication, as commonly understood, would also be considered a "rule" under this plain text. As a result, it is widely acknowledged that these provisions are "poorly drafted and cannot be literally applied." JEFFREY B. LITWAK, A GUIDE TO FEDERAL AGENCY ADJUDICATION 6–7 (2d ed. 2012). *See also* Ronald M. Levin, *The Case for (Finally) Fixing the APA's Definition of "Rule,"* 56 ADMIN. L. REV. 1077, 1077–78, 1083 (2004) (recounting the history of the mistaken inclusion of "or particular" in the APA).

75. Rubin, *supra* note 23, at 1117 (1984) ("[R]ules are governmental actions affecting relatively large groups of people, whereas adjudications are applications of the law or determinations of fact concerning specific individuals."); Levin, *supra* note 74 at 1077–78 (noting that the rulemaking/adjudication determination is modeled on the *Londoner/Bi-Metallic* distinction); *see also* U.S. v. Fl.a E. Coast Ry. Co., 410 U.S. 224, 244–45 ("The basic distinction between rulemaking and adjudication is illustrated by this Court's treatment of two related cases under the Due Process Clause of the Fourteenth Amendment."); Safari Club Intern. v. Zinke, 878 F.3d 316, 319 (D.C. Cir. 2017) ("Here, the agency statement was general and applied in the future, so it was a rulemaking and required N&C process."); Abraham Lincoln Mem'l Hosp. v. Sebelius, 698 F.3d 536 (7th Cir. 2012) (holding that agency decision was adjudication because it "had an immediate, concrete effect on the parties to the dispute [and] . . . did not affect a broad class of unspecified individuals"); Yesler Terrace, 37 F.3d 442, 448–49 (9th Cir. 1994) ("[A]djudications resolve disputes among specific individuals in specific cases, whereas rulemaking affects the rights of broad classes of unspecified individuals.").

76. *Safari Club Intern.*, 878 F.3d at 319.

77. *Id.*

78. *Id.* at 332.

79. *Id.* at 333–34.

80. *Id.* at 333.

The application of the *Londoner/Bi-Metallic* distinction is not always straightforward, to be sure. Courts often struggle with the boundaries of the *Londoner/Bi-Metallic* distinction in hard cases,[81] a circumstance that I hope the findings of this Article can ameliorate. Nevertheless, despite some indeterminacy in application, there is virtually universal agreement that the above-described constitutional and statutory determinations turn on the *Londoner/Bi-Metallic* distinction.[82]

B. The Standard Justifications

As is often the case with an old, well-settled rule, courts and scholars have given multiple, somewhat overlapping, justifications for the *Londoner/Bi-Metallic* distinction. Each of these explanations sheds some light on the *Londoner/Bi-Metallic* distinction because each is supported, at least in part, either by the *Londoner* and *Bi-Metallic* cases themselves, normative or descriptive visions of the political and administrative processes, or analogies to related legal principles. In this section, I will describe the most persuasive, longstanding explanations for the distinction. In the following section, I will raise some doubts about their explanatory power.

1. Adjudicative and Legislative Facts

The most well-known explanation for the *Londoner/Bi-Metallic* distinction is that it tracks the difference between "adjudicative facts" and "legislative facts."[83] As explained by Kenneth Culp Davis, adjudicative facts are "facts about the parties and their activities, businesses, and properties. Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury."[84] Because adjudicative facts are facts about the parties, it is the parties who know more about them than anyone else; and it is the parties who are in "an especially good position to rebut or explain evidence" that bears on them.[85] Adjudicative facts can be contrasted with legislative facts. Legislative facts are not specific to the parties before the tribunal but rather are "general facts which help the tribunal decide

81. *E.g.*, Anaconda v. Ruckelshaus, 482 F.2d 1301 (10th Cir. 1973) ("The fact that Anaconda alone is involved is not conclusive on the question as to whether the hearing should be adjudicatory.").

82. 75 Acres, LLC v. Miami-Dade Cty., 338 F.3d 1288, 1294 (11th Cir. 2003) ("The Supreme Court's statements in *Londoner* and *Bi-Metallic* years ago have served as the foundation for a strikingly uniform approach to procedural due process."). One conceptual, rather than practical, disagreement is worth noting although it does not affect the analysis in this Part. Some suggest that, when a group rather than an individual is affected by government action, the Due Process Clause simply does not apply. DAVIS & PIERCE, *supra* note 21, § 9.2 (describing disagreement between the authors); SCHWARTZ, *supra* note 18, § 5.6 ("procedural due process does not limit the legislature, the same principle applied where rule-making powers were exercised under legislative delegation"). Other times, courts and scholars suggest that the Due Process Clause *does* apply to groups, but that all the process that is due is the political process. RONALD E. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 17.8 (3d ed.1999).

83. DAVIS, *supra* note 21, at 149–50 (explaining the difference between adjudicative facts and legislative facts as it relates to the *Londoner/Bi-Metallic* distinction); DAVIS & PIERCE, *supra* note 21, § 9.2 (same).

84. DAVIS, *supra* note 21, at 149.

85. *Id.*

questions of law and policy and discretion."[86] As a result, the parties have no advantage when it comes to explaining legislative facts. Indeed, agencies and their staff frequently know more about these facts than the parties themselves.[87]

The *Londoner*/*Bi-Metallic* distinction can be read to mirror the adjudicative/legislative fact distinction.[88] On this reading, *Londoner* required a hearing because adjudicative facts were in dispute; that is, the proper valuation of each landowner's property was based on individual facts related to each piece of property.[89] Moreover, each landowner was in the best position to relate those facts to the agency because each landowner was the best source of information about his or her assessed property. This view was explicitly suggested by the *Londoner* taxpayers themselves. In their briefing before the Supreme Court, they argued that because the question on which the assessment turned was "a question of the purest fact" rather than one involving policymaking, it could not be "conclusively determined without investigation, notice and opportunity to defend."[90] By contrast, the *Bi-Metallic* Court did not require a hearing because the agency's across-the-board increase in assessed value was a policy decision that did not depend on any information about any individual taxpayer's property. Accordingly, no knowledge that any taxpayer possessed would have affected the outcome. *Bi-Metallic* itself suggests this distinction, distinguishing the *Londoner* landowners as "exceptionally affected, in each case *upon individual grounds*," by the agency action.[91]

2. Political Process

Another common rationale for the *Londoner*/*Bi-Metallic* distinction rests on the relative strengths and weaknesses of democratic institutions and the courts.[92] Because self-interest leads representatives to be concerned with the views of the majority of their constituents, groups can exert influence over the political branches through the ordinary political process.[93] Even groups making up less than the majority can form temporary majorities through coalition-building with other minority groups to exert political pressure. So long as the majority or minority status of an individual or group is fluid—that is, no individual or group is always in the minority—the political process will ensure that the interests of everyone in the society are represented.[94] That does not mean that everyone's interests will prevail on every issue—that would be impossible in any society with a multiplicity of interests. But, it does mean that a rational representative will feel constrained to consider the interests of a wide variety of groups.

By contrast, breakdowns in the political process can vitiate protections for members of the minority. Individuals or groups perpetually excluded from the

86. *Id.*
87. DAVIS & PIERCE, *supra* note 21, § 9.2
88. *Id.*
89. Londoner v. Denver, 210 U.S. 373, 382 (1908) (noting the claim that "individual pieces of property . . . are not benefitted to the extent assessed against them").
90. Petitioner's Brief at 71, Londoner v. Denver, 210 U.S. 373 (1908).
91. Bi-Metallic Inv. Co. v. Colorado, 239 U.S. 441, 446 (1915); *see also* DAVIS, *supra* note 21, at 150.
92. *E.g.*, Rubin, *supra* note 22, at 243; Kagan, *supra* note 22, at 2362.
93. Rubin, *supra* note 22, at 243.
94. JOHN HART ELY, DEMOCRACY AND DISTRUST 103 (1980).

majority are unable to protect themselves through coalition-building and other normal operations of the political process. When this occurs, courts—providing individualized processes—are institutionally superior to legislatures for protecting minority interests.[95] As John Hart Ely argued, the power of courts to invalidate democratically enacted legislation is justified when the legislation represents a malfunction of the political process. Specifically, the courts (rather than the political branches) are the proper institution to check laws by which the "ins are choking off the channels of political change to ensure that they will stay in" or when the majority denies a "minority the protection afforded other groups by a representative system."[96]

The *Londoner/Bi-Metallic* distinction can be seen through the lens of the political process. The proposed action in *Bi-Metallic* affected all property owners in the city of Denver. And if a majority of Denver's property owners disapproved of the agency's action, they had recourse through the normal political processes: they could throw the bums out! That is, those people most opposed to the assessment could, either alone or in coalition with other groups, put political pressure on the relevant political actors to change the substantive law or remove the agents responsible for the policy.[97]

Contrast this situation with *Londoner*. There, the burden of a special assessment rested on a small number of property owners. But, because they were so few, the members of the Paving District could not amass enough votes to penalize members of the city council for imposing the special assessment. And, because residents in other parts of the city did not stand to lose (and perhaps stood to gain, albeit marginally) from the assessment of the Paving District, coalition-building to oppose the assessment was unlikely. Accordingly, because members of the Paving District were unable to protect their rights through the ordinary political processes, an individualized determination of their rights was appropriate.[98] The *Bi-Metallic* Court made precisely this point when it distinguished *Londoner*. The Court acknowledged that generally applicable rules may lawfully be enacted even if they affect the property rights of individuals, "sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule."[99]

3. Administrative Convenience

A more prosaic justification for the distinction is the practical difficulty that would attend providing individualized hearings to a large number of people. A

95. Araiza, *Trouble with Robertson*, *supra* note 22, at 1103.

96. ELY, *supra* note 94, at 103; *see also* Nourse & Maguire, *supra* note 20, at 995 ("[P]olitical-process theories . . . are prefigured in the doctrine of class legislation."). For a recent critique of the argument that courts are institutionally superior to legislatures at policing discrimination, see Ryan Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 VAND. L REV. 769, 774 (2022) ("Ely's claim that courts are historically more attentive to the interests of minorities is uncertain at best. (It is dubious at worst)."). I neither defend nor critique Ely's political process theory in general; rather, I raise it to show the limits of its logic in the context of *Londoner* and *Bi-Metallic*.

97. Bi-Metallic Inv. Co. v. Colorado, 239 U.S. 441, 446 (1915).

98. *See* DAVIS & PIERCE, *supra* note 21, § 9.2.

99. *Bi-Metallic*, 239 U.S. at 445.

generally applicable rule normally applies to many people. Offering an individualized hearing to every person affected by a generally applicable rule could be impractical or even "prohibitively expensive."[100] Indeed, depending on how many people are affected by the proposed rule, individualized process could grind the rulemaking to a halt.[101] As Matthew Steilin articulated, "the practical demands of government in a complex society" made trial-like, individualized procedures the wrong "fit" for the task of evaluating *Bi-Metallic*'s generally applicable property valuation increase.[102] The *Bi-Metallic* Court made this point explicitly. Appealing to the pragmatic argument that "[t]here must be a limit to individual argument in such matters if government is to go on," the Court concluded that the "Constitution does not require all public acts to be done in town meeting or an assembly of the whole."[103]

4. Legislative v. Judicial Power

Another possible justification for the *Londoner*/*Bi-Metallic* distinction is the formal distinction between legislative and judicial power.[104] On this view, the Court was operating from the premise that a generally applicable agency rule is "legislative" in character while an individualized determination is "judicial" in character.[105] Therefore, because the city council in *Londoner* resolved the rights of a few people only, it was obligated to provide individualized process, as would a court. By contrast, because the state board in *Bi-Metallic* formulated a generally applicable rule, its action more closely resembled legislation than adjudication. As a result, the Court required no individualized process, consistent with the fact that the legislature need not provide an individualized hearing before legislating. The *Bi-Metallic* Court itself suggested this reading by analogizing the board's action to the action of a legislature.[106]

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100. DAVIS & PIERCE, *supra* note 21, § 9.2.

101. Kagan, *supra* note 22, at 2262 ("The divergent (constitutional and statutory) rules may reflect sheer pragmatism—a recognition that participatory rights are harder and more costly to implement in the rulemaking context."); *see also* Levy & Shapiro, *supra* note 24, at 485 (noting *Bi-Metallic*'s pragmatic argument) (noting that the distinction was based on pragmatic considerations).

102. Steilin, *supra* note 24, at 1089–90 ("What mattered were the practical demands of government in a complex society and the public's interest in effective government.").

103. *Bi-Metallic*, 239 U.S. at 445. For a modern Court statement of the pragmatic argument, see *Minnesota v. Knight*, 465 U.S. 271, 285 (1984) ("Government makes so many policy decisions affecting so many people that it would likely grind to a halt were policymaking constrained by constitutional requirements on whose voices must be heard.").

104. SCHWARTZ, *supra* note 21, § 5.6 ("The agency was exercising legislative power and should be no more subject to constitutional hearing requirements than the legislature itself.").

105. Kathryn A. Watts, *Rulemaking at Legislating*, 103 GEO. L.J. 1003 (2015) ("[T]he holdings of *Londoner* and *Bi-Metallic* embrace a legislative model of rulemaking."). *Cf.* Steilin, *supra* note 24, at 1089–90 (noting the distinction "is really a policy argument, rather than a categorical distinction between adjudication and legislation").

106. *Bi-Metallic*, 239 U.S. at 445 (comparing action of the state board to a hypothetical action of the state legislature).

5. Anti-Targeting

The *Londoner/Bi-Metallic* distinction has been explained by scholars, including William Araiza,[107] Edward Rubin,[108] and Laurence Tribe,[109] as implementing a value that prevents an agency from acting "in a targeted way against a particular party."[110] This anti-targeting value has been analogized to the protections of the Bill of Attainder clauses.[111] Just like the Bill of Attainder clauses prohibit individualized legislative punishment, Rubin argued, due process "forbids the government from enacting legislation that singles out an individual for disadvantageous treatment."[112] And famously, in *Hurtado*, the Supreme Court explained the requirement of due process by noting that law "must be not a special rule for a particular person or a particular case."[113]

Among other purposes, an anti-targeting value could prevent the type of abuse that particularized legislative action makes possible. When a legislature is permitted to act on an individual, the suspicion arises that it may be driven by animus against the affected individual rather than a motivation to promote the public interest.[114] An anti-targeting principle can be found not only in the Bill of Attainder clauses, but also, as have I discussed in previous work, in the Ex Post Facto, Contract, Equal Protection, Due Process, and Takings Clauses.[115] Each of these clauses supports an anti-targeting value in the context of legislation—that is, a value of legislative generality—because each can fairly be read to prohibit a certain type of particularized legislation.[116]

The *Londoner/Bi-Metallic* distinction can be viewed in light of a value of legislative generality, implementing a rule that "procedural controls do not apply when rules of general applicability are declared, but do apply to binding legal

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107. Araiza, *Agency Adjudication*, *supra* note 23, at 382–83.

108. Rubin, *supra* note 22, at 242.

109. TRIBE, *supra* note 23, at 503 (1978) (arguing that the case for due process "grows stronger as the identity of the persons affected by a governmental choice becomes clearer").

110. Araiza, *Agency Adjudication*, *supra* note 23, at 382–83.

111. U.S. CONST. Art. I, §§ 9–10.

112. Rubin, *supra* note 22, at 242.

113. Hurtado v. California, 110 U.S. 516, 535 (1884). Although the Court does not explicitly connect the Bill of Attainder and Due Process Clauses, the connection is often just below the surface. *See also* Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 144 (1951) (Black, J., concurring) (referring to government blacklists prepared without a hearing by the executive branch as "pseudo-bills of attainder"); Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) (noting that due process comes into play when an agency attaches "a badge of infamy" to a citizen (quoting Wieman v. Updegraff, 344 U.S. 183, 191 (1952))).

114. *See generally* WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW (2017).

115. Evan C. Zoldan, *Reviving Legislative Generality*, 98 MARQ. L. REV. 625, 632 (2014) (describing clauses of the Constitution that suggest a problem with legislative targeting).

116. *See e.g.*, *id.* at 632 (describing a value of legislative generality based on constitutional text and history and normative considerations); Evan C. Zoldan, *The Equal Protection Component of Legislative Generality*, 51 U. RICH. L. REV. 489, 493 (2016) (describing the connection between equal protection and legislative generality); Evan C. Zoldan, *The Vanishing Core of Judicial Independence*, 21 NEV. L.J. 531, 568–71 (2021) (describing the *Klein* component of legislative generality); Evan C. Zoldan, *The Klein Rule of Decision Principle and the Self-Dealing Solution*, 74 WASH. & LEE L. REV. 2133 (2017) (same); Evan C. Zoldan, *Bank Markazi and the Undervaluation of Legislative Generality*, 35 YALE L. & POL'Y REV. 1 (2016).

determinations regarding specified individuals."[117] On this reading, the *Londoner* Court required a hearing because the government assessment affected a known, or easily identifiable, group of people who lived within a geographic area defined by the board of public works.[118] The government's action, therefore, affected known individuals, and only known individuals, without setting generally applicable government policy.[119] By contrast, the *Bi-Metallic* Court did not require a hearing because the individuals affected by the government's action included landowners throughout the city of Denver.[120] An anti-targeting argument was advanced forcefully by the *Londoner* taxpayers themselves.[121] They dedicated a significant part of their briefing before the Supreme Court to the argument that the special assessment was prohibited "special legislation,"[122] a term used at the time to describe impermissibly targeted legislation.[123] And indeed, an anti-targeting value is suggested by *Bi-Metallic*. Distinguishing *Londoner*, the *Bi-Metallic* Court noted that a "relatively *small number of persons* was concerned."[124] By contrast, in *Bi-Metallic*, no hearing was required because the assessment "applies to *more than a few people*."[125]

C. Some Doubts about the Standard Justifications

Each of the justifications described above sheds some light on the *Londoner*/*Bi-Metallic* distinction. And, although I don't want to understate the explanatory power of each of these justifications, none of them is fully satisfying. The rest of this Part introduces some doubts about the standard justifications. Because each of these justifications for the *Londoner*/*Bi-Metallic* distinction is limited in some way, there is room for a new, more robust explanation. I introduce and defend that new explanation in Part II, below.

1. Adjudicative and Legislative Facts Revisited

First, Davis's adjudicative fact/legislative fact distinction does not fully explain the *Londoner*/*Bi-Metallic* distinction. For one reason, and as Davis himself acknowledged, this distinction does not prove useful at the border between these two categories, where the distinction blurs.[126] Rubin adds that the distinction between legislative facts and adjudicative facts, however sound, leaves out a major category of agency action, that is, where the agency is acting in a discretionary

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117. Rubin, *supra* note 23, at 1051.

118. Londoner v. Denver, 210 U.S. 373, 375 (1908).

119. *Id.*

120. Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 444 (1915).

121. Petitioner's Brief at 23–25, Londoner v. Denver, 210 U.S. 373 (1908).

122. *Id.*

123. Robert M. Ireland, *The Problem of Local, Private, and Special Legislation in the Nineteenth-Century United States*, 46 AM. J. LEGAL HIST. 271, 277–78 (2004) (describing special legislation).

124. *Bi-Metallic*, 239 U.S. at 446.

125. *Id.* at 445.

126. DAVIS, *supra* note 21, at 150 ("The distinction between legislative and adjudicative facts . . . is sometimes difficult or impossible to draw . . . ."); *see also* Samuel Estreicher, *Pragmatic Justice: The Contributions of Judge Harold Leventhal to Administrative Law*, 80 COLUM. L. REV. 894, 911 (1980) ("Whatever force Professor Davis's distinction between issues of 'legislative fact' and 'adjudicative fact' generally may enjoy, it does not justify the difference in procedural regimes; both types of issues may be present in a given rulemaking.").

manner without reference to facts at all.[127] More critically, as Judge Friendly argued, it is not just at the legislative/adjudicative border that Davis's rationale is unsatisfying. It is circular, Friendly argued, to define adjudicative facts, as Davis does, as those facts that "ordinarily ought not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them."[128] This definition merely explains that due process requires parties to have the opportunity to present evidence when we expect parties to have this opportunity![129]

Moreover, the legislative/adjudicative distinction is a poor fit with the facts of the *Londoner* and *Bi-Metallic* cases themselves. Just like in *Londoner*, the taxpayers in *Bi-Metallic* had knowledge of facts that might have influenced the agency's decision. Specifically, any property that was properly valued *before* the across-the-board increase would be *overvalued* after the across-the-board increase. Accordingly, if the agency's goal was to properly assess the value of property in the city of Denver, the *Bi-Metallic* taxpayers, too, should have been given an opportunity to show the value of their property before the across-the-board increase.[130]

2. Political Process Revisited

Second, the political process rationale for the *Londoner/Bi-Metallic* distinction rests on an unrealistic view of the differences between the taxpayers affected in the two cases. For the sake of argument, let's assume that the Paving District taxpayers did not have enough voting power, on their own, to respond effectively to the proposed assessment approved by the city. Even so, Paving District taxpayers would have had ample opportunity to form a coalition with other Denver voters to exert political pressure. Paving District members shared an interest with other Denver voters to avoid a special assessment. As a result, Paving District members and other Denver voters would have a shared interest in opposing the special assessment on the Paving District, with the understanding that the coalition also would oppose future assessments on other areas of the city. Indeed, logrolling on matters of local interest was common at the turn of the twentieth century.[131] As a result, the members of the Paving District, though not a majority, were not permanently excluded from the majority. They had just the sort of commonality of interests with other Denver taxpayers that made the exercise of political power possible, and which therefore made judicial intervention inappropriate.[132]

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127. Rubin, *supra* note 23, at 1124. Moreover, many situations will require the resolution of both adjudicative and legislative facts. Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 262 (2014) (doubting that the adjudicative/legislative fact distinction should determine choice of procedures).

128. Davis, *supra* note 21, at 199.

129. Friendly, *supra* note 1, at 1268 n.6*; see also* SCHWARTZ, *supra* note 21, § 5.7 ("The adjudicative-legislative facts distinction has been criticized as unduly circular . . . .").

130. *Bi-Metallic Inv. Co.*, 239 U.S. at 444 ("[I]t is obvious that injustice may be suffered if some property in the county already has been valued at its full worth.").

131. Ireland, supra note 123, at 273 (describing prevalence of logrolling).

132. *See* ELY, *supra* note 94 at 103 (arguing that judicial safeguards are most appropriate when majorities systematically deny the minority "the protection afforded other groups by a representative system").

Just like the political process rationale paints an overly pessimistic view of the *Londoner* taxpayers' political power, it reflects an overly rosy view of the *Bi-Metallic* taxpayers' ability to protect themselves through the ordinary political processes. At the turn of the century, anti-urban sentiment painted city life as unnatural and unhealthful[133] and city governments as corrupt, inefficient, and incompetent.[134] It was in this context that the Colorado state legislature adopted special legislation to assume state control over Denver's municipal affairs.[135] Viewed in this light, the drastic 40% increase in the valuation of taxable property in Denver might well be seen—not as a compromise borne of the political process—but instead as evidence of its malfunction, that is, Denver's inability to protect itself from the state's rural interests. On this reading, the political process theory does not explain the *Londoner*/*Bi-Metallic* distinction.[136] Rather, if a breakdown in the political process was sufficient to warrant an individualized hearing in *Londoner*, then the *Bi-Metallic* taxpayers should have been entitled to one as well. At the very least, the distance between the taxpayers in *Bi-Metallic* and *Londoner*, in terms of political power, is not so great as to warrant the bright-line constitutional rule attributed to these cases.

3. Administrative Convenience Revisited

Third, an argument from the perspective of administrative convenience proves too much. Perhaps the *Bi-Metallic* Court was imagining the expense and time associated with jury trials when it noted that "there must be a limit to individual argument . . . if government is to go on."[137] But, here, the Court (perhaps understandably) failed to imagine the wide variety of ways that courts and agencies would adapt their procedural rules to accommodate the large, economically complex, and litigious society that was developing. Today, court and agency procedures permit the adjudication of massive numbers of disputes. Class action rules permit courts to accommodate millions of class members with similar claims.[138] And government agencies, including executive agencies[139] and legislative courts,[140] adjudicate countless disputes annually. As a result of these and other changes, government functions are not materially impeded by individualized adjudication of disputes. Administrative convenience, therefore, appears to be less compelling than the *Bi-Metallic* Court imagined.[141]

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133. STEVEN CONN, AMERICANS AGAINST THE CITY 25–26 (2014).

134. Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1195–96 (2018).

135. Howard C. Klemme, *The Powers of Home Rule Cities in Colorado*, 36 U. COLO. L. REV. 321, 324 (1964).

136. ELY, *supra* note 94 at 103; Rubin, *supra* note 22, at 243.

137. Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445–46 (1915).

138. Carnegie v. Household Int'l Inc., 376 F.3d 656, 661 (7th Cir. 2004) ("The more claimants there are, the more likely a class action is to yield substantial economies in litigation.").

139. To take just one data point, "AJs and ALJs together likely preside, at the least, over more than 750,000 proceedings annually." Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1652 (2016).

140. For example, bankruptcy courts receive hundreds of thousands of petitions annually. 2020 CHIEF JUSTICES' YEAR-END REPORT ON THE FEDERAL JUDICIARY 7.

141. Donald A. Dripps, *Delegation and Due Process*, 1988 DUKE L.J. 657, 682–83 (1988) ("Individual hearing rights in this context are not so much impractical as they are redundant.").

4. Legislative v. Judicial Power Revisited

Fourth, agencies' legislative-type behavior and judicial-type behavior are not distinct enough to suggest a bright-line constitutional rule to separate them. For one reason, the line between rulemaking and adjudication can be fuzzy, making it difficult to map the distinction onto the dichotomy between legislation and judicial decision-making. The rulemaking/adjudication distinction has never been "hard-edged"[142] because some types of action, notably ratemaking and licensing, easily could be characterized, without statutory guidance, either as rulemaking or adjudication.[143] In addition, because an agency can both make rules and adjudicate in the same proceeding, it is impossible to definitively characterize an agency proceeding either as exclusively "legislative" or "adjudicative."[144] And the line between rulemaking and adjudication has been blurred further by technological advances that allow agencies to take a single action that appears to be a factual determination, a policy pronouncement, or both.[145]

More fundamentally, it is unsatisfying to make a constitutional requirement depend on the fiction that agency action is either legislative or judicial in nature. It is neither, of course. An agency may not actually legislate—that is, enact statutes—nor may it actually exercise the judicial power. Moreover, even as an analogy, the distinction between legislation and judicial decision-making does not support the *Londoner/Bi-Metallic* distinction. Although courts do take evidence and hear arguments, they also routinely decide cases without arguments or evidence.[146] Similarly, although courts usually make decisions retrospectively, it does not violate due process for courts to make decisions of law prospectively.[147] Conversely, although rarely, legislatures sometimes legislate both retrospectively[148] and for particular cases.[149] For all of these reasons, while analogizing rulemaking to legislation and adjudication to judicial power is useful for some purposes, these analogies are far from perfect.[150] Resting the *Londoner/Bi-Metallic* distinction on them, therefore, is tenuous at best.

5. Anti-Targeting Revisited

Fifth, although an anti-targeting principle is the most attractive of all the standard explanations, it is too narrow to explain the *Londoner/Bi-Metallic* distinction because the government's action in *Londoner* was not "targeted"—at least not as that concept is normally understood. The paradigm of prohibited

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142. Kagan, *supra* note 22, at 2363.

143. SCHWARTZ, *supra* note 21, §§ 4.2, 5.8 (noting that licensing and ratemaking do not fit squarely with the legislative/judicial function dichotomy).

144. Davis, *supra* note 21, at 201–02.

145. Citron, note 37, at 1278–79.

146. Davis, *supra* note 21, at 201–02.

147. *Id.* at 202–03.

148. *E.g.*, Kansas v. Hendricks, 521 U.S. 346, 369–70 (1997) (upholding retrospective "civil commitment" scheme).

149. Bank Markazi v. Peterson, 136 S. Ct. 1310, 1315 (2016) (upholding statute that permitted claims against Iran to be satisfied by claims against Bank Markazi, the Central Bank of Iran).

150. Araiza, *Agency Adjudication*, *supra* note 23, at 404 (arguing that we should "abandon the attempt to superimpose traditional conceptions of legislation onto agency rulemaking, and traditional conceptions of judicial action onto agency adjudication").

government targeting, a bill of attainder, normally names one or a few people and assigns them some punishment or badge of infamy. Confederation-era bills of attainder (and the British bills on which they were modeled) normally singled out individuals by name before ordering the confiscation of property, banishment, or even death.[151] By contrast, the *Londoner* taxpayers were not specifically named. Rather, they were described as part of a class. Moreover, targeted government action is normally disfavored only if it is motivated by some kind of animus, like anti-Tory sentiment in the confederation period,[152] anti-confederate feeling after the Civil War,[153] or anti-communist fervor during the Cold War.[154] The assessment in *Londoner* seems devoid of this kind of animus; at the very least, the taxpayers in *Londoner* do not seem to have been subjected to a greater level of animus than their *Bi-Metallic* counterparts.[155]

In addition, the number of people affected by *Londoner* does not seem to justify the distinction. *Bi-Metallic* hinted that the right to a hearing disappears when the government's action affects "more than a few people."[156] While the Court avoided describing how many people trigger the right to a hearing, the Paving District affected by the *Londoner* assessment *did* affect more than a few people.[157] Indeed, it appears that the property affected by the assessment spanned up to three miles of a major street in the city of Denver, affecting all of the landowners along the way.[158]

Although the facts of *Londoner* and *Bi-Metallic* do not support an explanation based on an anti-targeting principle in the sense that a bill of attainder targets an individual, I hasten to note that there is another conception of targeting that is a better fit with the *Londoner/Bi-Metallic* distinction. This other conception of targeting, which has deep roots in American constitutional and administrative law, is found in the once-pervasive "class legislation" doctrine. In Part II, below, I explain class legislation and its connection to the *Londoner/Bi-Metallic* distinction.

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151. United States v. Brown, 381 U.S. 437, 441–42 (1965).

152. *E.g.*, Respublica v. Gordon, 1 U.S. (1 Dall.) 233, 233 (Pa. 1788); *see also* ZECHARIAH CHAFEE, JR., THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787 (1956).

153. Cummings v. Missouri, 71 U.S. 277, 316 (1867). *Cummings* and its companion case, *Ex Parte Garland*, manifest the Court's most expansive definition of a bill of attainder, extending it to a statute that targeted no identifiable person, either by name or description, and imposed a penalty only for those who enter certain professions in the future without taking a loyalty oath. *Ex Parte* Garland, 71 U.S. 333, 390 (1866). The Court has later trimmed this expansive definition. Nixon v. Adm'r of Gen. Services, 433 U.S. 425, 470–73 (1977).

154. *E.g.*, United States v. Brown, 381 U.S. 437, 440 (1965); Bridges v. Wixon, 326 U.S. 135, 158 (1945) (Murphy, J., concurring).

155. As noted above, it is likely that state politics would have made Denver a target for mistreatment at the hands of the state's rural representatives at the time of *Londoner* and *Bi-Metallic*.

156. Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 444–45 (1915).

157. *See also* Strauss, *supra* note 22, at 1257 (noting that the distinction cannot turn on the number of people affected).

158. Petitioner's Brief at 27, Londoner v. Denver, 210 U.S. 373 (1908) (describing that a majority of the frontage of the district was 8,497 feet, suggesting that the length of the district was up to 17,000 feet, or more than three miles in length). For the connection between the Due Process and Bill of Attainder clauses, see *supra* note 113.

II. CLASS LEGISLATION AND THE RIGHT TO AN INDIVIDUALIZED HEARING

As befits an old and well-settled rule, there are several plausible explanations for the *Londoner/Bi-Metallic* distinction. But, as we have seen, each explanation has its limitations, either because it rests on imperfect analogies to other legal principles, because it rests on a theory that itself is incomplete, or because it fails to fit the facts of *Londoner* and *Bi-Metallic* themselves.

As we begin to search for a new and more satisfying explanation for the *Londoner/Bi-Metallic* distinction, we can start by examining a clue that has been hiding in plain sight. Tasked in 1939 with preparing a study of federal administrative procedure, the Attorney General's Committee on Administrative Procedure prepared a thorough and comprehensive review of the procedures of dozens of agencies.[159] The Committee's Final Report was a key step in the formulation of the APA and, today, serves as key evidence of the purposes and meaning of the APA. The Committee's Final Report noted the tension between two great "objectives" of administrative law. On one hand, the Committee noted, it is "well recognized that the purpose of Congress in creating or utilizing an administrative agency is to further some public interest or policy."[160] But, on the other hand, "everyone also recognizes that these public purposes are intended to be advanced with impartial justice to all private interests involved."[161] The Committee concluded that while administrative "[p]owers must be effectively exercised in the public interest, . . . they must not be arbitrarily exercised or exercised with partiality for some individuals and discrimination against others."[162] It is "these two ideas"—serving the public interest while avoiding arbitrariness, partiality, and discrimination—that Louis Jaffe called "the great postulates" of administrative procedure.[163]

The Committee's great postulates were not new ideas at the time the APA was framed. Indeed, we can find strong echoes of them in the "class legislation" doctrine, a constitutional doctrine prevalent at the time *Londoner* and *Bi-Metallic* were decided, which helped courts distinguish between permissible and impermissible classifications. The class legislation doctrine, like the Committee's great postulates, called on courts to distinguish government action taken in the public interest from action that was arbitrary, partial, or discriminatory. A close look at class legislation cases contemporaneous with *Londoner* and *Bi-Metallic* suggests that these cases are implementations of the class legislation doctrine, including its focus on the same values emphasized by the Attorney General's Committee. This Part will first explain the intellectual tradition that contributed to and grew into the class legislation doctrine. Next, it will describe the contours of the class legislation doctrine as it existed at the time of *Londoner* and *Bi-Metallic*. Finally, it will show that class legislation doctrine can explain the Court's *Londoner/Bi-Metallic* distinction.

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159. FINAL REPORT, *supra* note 5, at 2.

160. *Id.*

161. *Id.*

162. *Id.*

163. Louis Jaffe, *The Report of the Attorney General's Committee on Administrative Procedure*, 8 U. CHI. L. REV. 401, 405 (1941).

A. The Long Class Legislation Tradition

In its most basic formulation, "class legislation" is legislation that benefits one group, or class, at the expense of another class without linking the special benefits or burdens to interests of the public.[164] From the middle of the nineteenth century through the beginning of the twentieth century, courts and commentators expressed a deep aversion to class legislation, although identifying it and distinguishing it from legitimate legislative classification was far from simple. As Howard Gillman described, the class legislation doctrine, which gave courts a doctrinal mechanism for prohibiting class legislation, stems from the idea that "it was illegitimate for government to single out for special treatment and attention certain groups or classes simply to improve their position in relation to competing classes."[165] By contrast, "government could impose special burdens and benefits only if it could be demonstrated that the special treatment would advance public health, safety, or morality."[166]

The class legislation doctrine used by the courts during the *Londoner*/*Bi-Metallic* period is not sui generis. Instead, it contained shades of related concepts that developed during preceding generations. Each of these related concepts, broadly speaking, valorized generality in law, a fundamental component of the rule of law.[167] That is, these principles preferred legislation when it was generally applicable and disfavored targeted legislation. Together, the class legislation doctrine and the preceding generality-related concepts can be thought of as a class legislation tradition. Describing the class legislation tradition provides context essential to understanding the class legislation doctrine as it was used during the period of *Londoner* and *Bi-Metallic*. As this Section will explain, the class legislation doctrine is related to (but not identical to) legal and political concepts used from the confederation period through the early twentieth century,[168] including "special,"[169] "partial,"[170] and "local"[171] legislation; state constitutional "law of the land"[172] and

164. Barbier v. Connolly, 113 U.S. 27, 32 (1884) ("Class legislation, discriminating against some and favoring others, is prohibited.").

165. GILLMAN, *supra* note 17, at 125.

166. *Id.*

167. *See* FULLER, *supra* note 3, at 39 (describing conditions for the rule of law, including generality); Tasioulas, *supra* note 3, at 119–20; Gowder, *supra* note 18, at 1021. There are different accounts of what generality requires in the context of the rule of law, and even different accounts of whether generality is a component of the rule of law at all. *See also* GOWDER, *supra* note 3, at 31–32 (arguing for a substantive rather than formal view of generality).

168. Wallace Mendelson, *A Missing Link in the Evolution of Due Process*, 10 VAND. L. REV. 125 (1956) (describing an intellectual history connecting class legislation to founding-era special legislation).

169. Evan C. Zoldan, *Equal Protection*, *supra* note 116, at 523 (describing class legislation as "a close relative of special legislation").

170. Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 251, 263 (1997) (connecting class legislation with partial legislation); *see also* GILLMAN, *supra* note 17, at 128 (connecting "partial" and "class" legislation).

171. Saunders, *supra* note 170, at 263 (connecting equal protection doctrine with class legislation).

172. THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 354–55 (1871) (describing "law of the land" clauses and their connection with class legislation).

"exclusive privileges"[173] clauses; due process;[174] and equal protection.[175] This Section will describe the class legislation tradition, highlighting those concepts that are most relevant to evaluating the *Londoner/Bi-Metallic* distinction.[176]

1. Generality in the Revolutionary Era

Well before the terminology "class legislation" was used, Americans articulated the concept that law ought to be generally applicable rather than targeted. This principle, at a high level of abstraction at least, has ancient origins.[177] But, even if there is no connection between these ancient sources and modern American law, the idea that law ought to be general was well-known by the end of the confederation period.[178]

The emphasis on generality in law in the newly independent states came on the heels of a decade of social dislocations precipitated, to a large degree, by the practice of targeting named individuals for special treatment.[179] The most notorious category of targeted laws, bills of attainder, were used to condemn and punish named individuals who were neither formally accused nor tried.[180] While bills of attainder have served as the paradigm of the evils of targeted legislation for centuries, they were merely one category of targeted laws enacted during the confederation period. In addition to bills of attainder, state legislatures passed laws confiscating private property,[181] immunizing named individuals from civil suit,[182]

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173. MASS. CONST. pt. I, art. VI.

174. JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 11 (2003).

175. Saunders, *supra* note 170, at 272 (describing the connection between the Equal Protection Clause and class legislation).

176. For some of the extensive literature on class legislation, including a critique of Gillman's work, see David E. Bernstein, *Class Legislation, Fundamental Rights, and the Origin of Lochner and Liberty of Contract*, 26 GEO. MASON L. REV. 1024, 1030 (2019) (arguing that Gillman overstated the role that class legislation played in Court doctrine during the *Lochner* era); Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881, 883–85 (2005); Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 789 (2009).

177. Scholars have connected the concept of generality with the Magna Charta by way of state constitutional "law of the land" clauses. COOLEY, *supra* note 172 at 353–54 (connecting "law of the land" clauses to notion of generality); *see also* William N. Eskridge, *Original Meaning and Marriage Equality*, 52 HOUS. L. REV. 1067, 1075–76 (2015) (connecting class legislation with Hobbes's argument that obedience to the state was predicated on the "notion that the state is obliged to provide protection" for all citizens); *cf.* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 440 (2010) ("'There is little support on the face of the early state constitutions for interpreting 'law of the land' . . . as a general prohibition of retrospective or targeted legislation.").

178. This Section draws from my previous work, Zoldan, *supra* note 116, at 660–70.

179. Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 258 (1914) ("legislation modifying the position of named parties before the law, as one of the most potent causes of general disrepute into which state legislatures had fallen before 1787").

180. Zoldan, *supra* note 116, at 662–65; *e.g.*, Respublica v. Gordon, 1 U.S. (1 Dall.) 233 (Pa. 1788); *An Act to Attaint Josiah Phillips and Others*, *in* ch. 12, 9 STATUTES AT LARGE; LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, at 463–64 (1778).

181. REPORT OF THE PENNSYLVANIA COUNCIL OF CENSORS 39–40 (1784) (denouncing confiscation of property); *see also* THE FEDERALIST NO. 84 (Alexander Hamilton).

182. Mortimer v. Caldwell, 1 Kirby 53, 54 (Conn. Super. Ct. 1786).

canceling individual debts,[183] granting individuals immunity from prosecution,[184] transferring public lands to private hands,[185] granting monopoly rights,[186] and appointing named individuals to public office.[187] Among the most vexing of targeted laws, legislatures routinely targeted individuals' rights and liabilities by explicitly interfering with the normal judicial processes. They set aside court judgments, suspended the general law for named individuals, and even decided pending court cases.[188] It is in this context that James Madison, in Federalist No. 48, roundly criticized state legislatures for putting judicial proceedings affecting individuals "into the form of acts of Assembly. . . . They have, accordingly, in many instances, decided rights which should have been left to judiciary controversy."[189]

After a long decade of experience with targeted laws, members of the generation that framed the Constitution spoke out against them in no uncertain terms. In their speeches and writing, both prominent and ordinary Americans alike roundly condemned targeted legislation and praised the concept of generality in law. In his highly regarded *Lectures on Law*, James Wilson[190] criticized statutes that exempted individuals from the generally applicable laws, emphasizing that for any member of society to be "privileged from the awards of equal justice, is a disgrace, instead of being an honour."[191] In contrast, he praised legal systems that he considered to have *impartial* laws, that is, laws that produced no advantage for particular individuals or groups.[192]

Similarly, the Pennsylvania Council of Censors, charged with assessing the Pennsylvania Assembly's compliance with its constitution, reproached the Assembly for enacting targeted legislation. Proclaiming that lawmakers must not extend their "deliberations to the cases of individuals," the Censors criticized the legislature for interfering with pending legal disputes by altering the ordinary legal processes.[193] The Vermont Council of Censors, performing an analogous role, excoriated its legislature for enacting targeted laws in that state.[194] Invoking Locke's notion that the legislature was bound to enact "one rule for rich and poor, for the

183. Address of the Council of Censors (Feb. 14, 1786), *in* RECORDS OF THE COUNCIL OF CENSORS OF THE STATE OF VERMONT 61–67 (Paul S. Gillies & D. Gregory Sanford eds., 1991).

184. *Id.*

185. GORDON WOOD, CREATION OF THE AMERICAN REPUBLIC 191 (1969).

186. Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL'Y 983, 984 (2013).

187. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 314–15 (Max Farrand ed., 1911).

188. EDWARD S. CORWIN, LIBERTY AGAINST GOVERNMENT 70 (1948); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219–21 (1995) (describing frequent legislative incursions on powers traditionally assigned to courts during the confederation period).

189. THE FEDERALIST NO. 48 (James Madison).

190. James Wilson was among the most influential members of the Philadelphia Convention and undoubtedly the most learned in the history and theory of government. William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 901, 1002–09 (2008).

191. JAMES WILSON, *Of the Nature of Courts*, *in* 2 LECTURES ON LAW at 943, 947 (Kermit L. Hall & Mark D. Hall eds., 2007).

192. JAMES WILSON, *Of the Constitutions of the United States and Pennsylvania—Of the Legislative Department*, in LECTURES ON LAW, *supra* note 191 at 829, 864.

193. REPORT OF THE PENNSYLVANIA COUNCIL OF CENSORS, *supra* note 181, at 37–40.

194. RECORDS OF THE COUNCIL OF CENSORS OF THE STATE OF VERMONT, *supra* note 183, at 60–70.

favourite at court, and the country man at plough,"[195] the Censors expressed disbelief that the legislature presumed to make a named individual an "exception to the general rule" by altering or dispensing "with the operation of the law" in individual cases.[196]

A frequent source of dissatisfaction was the legislature's practice of targeting individuals for the purpose of granting "monopolies of legal privilege—to bestow unequal portions of our common inheritance on favourites."[197] Monopolies, along with other "unequal or partial distribution of public benefits," were regarded as tantamount to the "establishment of an aristocracy."[198] No doubt it was this sentiment that led the people of Massachusetts to adopt a broad prohibition on special benefits in its Constitution of 1780, which provided that "[n]o man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public."[199] This provision reflected the growing belief that granting "peculiar privileges," either to individuals or to "any body of men," was considered "repugnant to the spirit of the American republics."[200]

2. Generality in the Early Constitutional Era

How well the lessons of the confederation period were implemented in the early constitutional era is the subject of some debate.[201] Without a doubt, the most abusive forms of targeted legislation, bills of attainder, were explicitly prohibited by the U.S. Constitution and some state constitutions.[202] Similarly, early state constitutions prohibited legislative grants of exclusive, unearned privileges,

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195. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 142 (1690).

196. RECORDS OF THE COUNCIL OF CENSORS OF THE STATE OF VERMONT, *supra* note 183, at 61.

197. WOOD, *supra* note 185, at 402. On some readings, the revolutionary generation was influenced by Lord Coke's opinion in *The Case of Monopolies*, (1602) 77 Eng. Rep. 1260 (K.B.) 1262–63.

198. WOOD, *supra* note 185, at 401.

199. MASS. CONST. pt. I, art. VI.

200. WOOD, *supra* note 185, at 401.

201. Maggie Blackhawk has argued that "the ideal that law should be general arose during the 1840s and 1850s, not at the Founding." Maggie Blackhawk, *Equity Outside the Courts*, 120 COLUM. L. REV. 2037, 2079–80 (2020). It is true that state constitutional prohibitions against special legislation were not adopted *by that name* until the nineteenth century. But, as a brief review of revolutionary-era documents has shown, prominent American individuals and institutions clearly criticized the legislative practice of targeting individuals for special legal treatment well before the 1840s. *See supra* Section II.A.1. Moreover, a review of early state constitutional provisions shows that the most abusive forms of targeted legislation, like bills of attainder and grants of exclusive privileges, were prohibited by early state governments. *See infra* Section II.A.2. Moreover, state courts reaffirmed an aversion to targeted legislation in the last decades of the eighteenth century and first decades of the nineteenth century. *See infra* Section II.A.2. As a result, an aversion to targeted legislation and a preference for generality in law was expressed continuously from the confederation period (at the latest) through the nineteenth century.

202. U.S. CONST. art. I, §§ 9–10; *see e.g.*, MARYLAND CONST. OF 1776, art. XVI; CONST. OF NEW YORK of 1777, art. XLI.

including titles of nobility.[203] On the other hand, both state legislatures and Congress continued to enact some targeted legislation during the early constitutional era.[204] Nevertheless, it is clear that the concerns about the evils of targeted legislation raised during the confederation period continued to find expression in the last decade of the eighteenth century and the first decades of the nineteenth century.[205] In particular, both federal and state courts continued to invoke a value of legislative generality to disfavor or disregard targeted legislation, now increasingly called "special" laws or acts.[206] Consider the 1792 South Carolina case, *Bowman v. Middleton*.[207] There, the parties each claimed the right to certain real property, one by right of inheritance and the other by right of a special act confirming title.[208] The court held that the special statute was of no effect, declaring that "the plaintiffs could claim no title under the act in question, as it was against common right, as well as against Magna Charta, to take away the freehold of one man, and vest it in another."[209] As in *Bowman*, for the first few decades under the new Constitution, state courts routinely invalidated or declined to give effect to special laws, including laws confiscating property from named individuals,[210] laws suspending statutes of limitations in ongoing cases,[211] and laws ordering the payment of money to named individuals.[212]

The Supreme Court, too, was sensitive to issues about special legislation, although its cases suggesting a value of legislative generality are better known for other propositions. Most famously, the *Dartmouth College* case reveals an explicit denunciation of special laws.[213] There, the state legislature intervened in a dispute between the president and trustees of Dartmouth College.[214] After the trustees deposed Dartmouth's president, the legislature transferred the assets of the College to the newly created Dartmouth University.[215] Daniel Webster, on behalf of the College, argued that the legislature's attempt to single out a particular corporation

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203. William Webster, *Comparative Study of the State Constitutions of the American Revolution*, 9 ANNALS AM. ACAD. POL. & SOC. SCI. 64, 70 (1897) (noting that all states "forbade the granting of titles of nobility, hereditary honors and exclusive privileges").

204. *E.g.*, Act of June 4, 1790, ch. 16, 6 Stat. 2 ("adjusting and satisfying the claims of Frederick William de Steuben").

205. Mendelson, *supra* note 168 at 129–31 (describing cases from first decades of nineteenth century that invoked generality principles)*; see also* Saunders, *supra* note 170, at 252 ("In the first half of the nineteenth century, state courts across America developed a decided hostility to laws that singled out certain persons or classes of persons for special benefits or burdens.").

206. *E.g.,* Ellicott v. Levy Court, 1 H. & J. 359, 359 (Md. 1802) (refusing to issue mandamus on the authority of a special law that directed payment to particular, named individuals). St. Clair v. Rempublican, 4 Yeates 207, 208 (Pa. 1805) (referring to a special act legalizing payment to a particular individual); Starr v. Robinson, 1 D. Chip 257, 258 (Vt. 1814) (referring to a special act freeing a particular individual from debtors prison).

207. Bowman v. Middleton, 1 S.C.L (1 Bay) 252 (S.C. 1792).

208. *Id.* at 250-51.

209. *Id.* at 252.

210. Bayard v. Singleton, 1 N.C. (Mart.) 42, 45 (N.C. 1787) (noting that the property owner was expressly named in the act of confiscation).

211. Holden v. James, 11 Mass. 396, 405 (1814) (refusing to give effect to a "new and different rule for the government of one particular case").

212. *Ellicott*, 1 H. & J. 359.

213. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

214. *Id.* at 518-519.

215. *Id.* at 554–55.

and give its property to another was unconstitutional because "these acts are not the exercise of a power properly legislative."[216] Webster argued that "acts of the legislature, which affect only particular persons and their particular privileges" are not, properly speaking, laws.[217] In his opinion, Justice Story agreed with Webster that New Hampshire's statute was defective because it was special, as opposed to general, legislation.[218] Story distinguished New Hampshire's statute from a general law that permitted individuals to divorce, arguably breaking their marriage contract.[219] Story noted that "*general* laws regulating divorces" certainly were not prohibited by the Constitution.[220] By contrast, the legislative dissolution of a *particular* marriage, like New Hampshire's special statute, "entrench[ed] upon the prohibition of the constitution."[221] The transfer of property from one corporation to another, wrote Story, falls within the paradigmatically unconstitutional mold of a statute that "take[s] the property of A. and give[s] it to B."[222] In light of Story's distinction between general and special laws, and his equation of A-to-B statutes with special legislation, Story's opinion is best read as a rejection of the legislature's property transfer because it was special rather than general in nature.

A principle disfavoring special legislation, as articulated in *Dartmouth College*, is also evident in the contemporaneous *McCulloch v. Maryland*, in which the Court struck down a tax imposed by the legislature of Maryland on a branch of the Bank of the United States.[223] In striking down the tax, the Court emphasized that its unconstitutionality was linked to its special nature.[224] Specifically, the Court noted that the tax was "levelled *exclusively* at the branch of the United States' Bank established in Maryland."[225] By contrast, the Court suggested that Maryland's tax would not have been unconstitutional if, instead, it taxed "the real property of the bank, *in common with* the other real property within the state."[226] Nor would the Court have struck down a law that imposed a tax on "the interest which the citizens of Maryland may hold in this institution, *in common with* other property of the same description throughout the state."[227] In other words, the Court's conclusion that the statute was unconstitutional was driven by the fact that the tax was levied on a single institution and a single type of property, but not similar property held by other institutions in other locations.[228]

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216. *Id.* at 558.
217. *Id.* at 580.
218. *Id.* at 580-81.
219. *Id.* at 580.
220. *Id.*
221. *Id.* at 696–97.
222. *Id.* at 702–03*; see also* Calder v. Bull, 3 U.S. 386, 388 (1798) (noting that it is "contrary to the great first principles of the social compact" for a legislature pass a law that "takes property from A. and gives it to B").
223. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 391 (1819).
224. *Id.* at 392-93.
225. *Id.* at 392.
226. *Id.* at 436 (emphasis added).
227. *Id.* (emphasis added).
228. *See also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 28 (1824) (striking down a state law granting exclusive right to two individuals).

3. Generality in the Antebellum Era

The foregoing record demonstrates that Americans' revolutionary-era experiences with special legislation were not wholly forgotten post-ratification. Rather, a current of thought condemning targeted legislation survived the founding era. As the Jacksonian era proceeded, courts and commentators continued to express their aversion to targeted legislation, articulating this sentiment using new terminology and expanding it to include new concepts. Most saliently, as the Civil War approached, the generality concerns that animated the rejection of special legislation, A-to-B legislation, bills of attainder, and other targeted legislation gave rise to the denunciation of "class legislation." In doing so, courts and commentators extended the well-known principle against "targeting" from the paradigmatic case of individualized legislation to reach the targeting of groups.

At times, antebellum courts described targeted legislation as a violation of separation of powers.[229] On this theory, targeted legislation was defective because it supplanted the courts' role—to apply the law to a particular factual situation—by applying the law directly to a named individual. This justification resonated with a contemporaneous emphasis on the differences between legislative and judicial functions, including the Supreme Court's statement in *Fletcher v. Peck* that it is "the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." [230] Consider, for example, *Lewis v. Webb*, a Massachusetts case that reviewed the constitutionality of legislation that extended a statute of limitations for a particular party.[231] The court refused to apply the special statute of limitations on the ground that "it can never be within the bounds of legitimate legislation, to enact a special law, or pass a resolve dispensing with the general law, in a particular case."[232] Rather than relying solely on a stand-alone principle of legislative generality, however, the court now situated its decision within a broader discussion of separation of powers, noting that special laws implicated the "boundary lines of those powers which are given by the constitution of this State to the legislative and judicial departments."[233] Similarly, courts relied on separation of powers principles to invalidate other special laws, including a statute freeing a particular named person from imprisonment[234] and a statute granting a legislative divorce.[235]

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229. Mendelson, *supra* note 168, at 126 (arguing that the concept of separation of powers helped bridge the conceptual gap between procedural and substantive due process). Saunders, *supra* note 170, at 258 (noting that some courts relied on separation of powers rationales to justify special laws).

230. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810).

231. Lewis v. Webb, 3 Maine 326, 336 (1825).

232. *Id.* at 336.

233. *Id.* at 328.

234. Ward v. Barnard, 1825 WL 1089, at *1 (Vt. 1825) (invalidating a statute providing "that the body of Eli Barnard, of Burlington, in the county of Chittenden, be freed from imprisonment, and arrest, on any civil process, by, or under the authority of this state, upon all contracts, covenants, debts, or judgments, now in existence against him, for the term of five years, from and after the passing this act").

235. State *ex rel.* Gentry v. Fry, 4 Mo. 120, 194 (1835) (invalidating legislative divorce on separation of powers grounds).

During this period, courts also relied on state constitutional "law of the land" clauses to invalidate or refuse to apply special legislation.[236] In this view, "law of the land" meant the promulgated, standing laws, and a special law did not comport with the law of the land because it was an exception to, or exemption from, the standing laws. For this connection, some courts drew their inspiration directly from Locke's *Second Treatise*, which argued that the legislature is bound to "govern by promulgated established laws, not to be varied in particular cases." [237] A Pennsylvania court invalidating a special inheritance law struck a similar tone when it held that the "law of the land" means "a pre-existent rule of conduct, declarative of a penalty for a prohibited act."[238] Also likely, some courts were following the lead of Webster's argument in *Dartmouth College*, in which he had famously argued that acts "which affect only particular persons and their particular privileges" are not "laws of the land."[239]

Perhaps most consequentially for the modern concept of generality in law, the antebellum era saw the equation of generality and "equal protection," a term that would influence dramatically the course of constitutional law after the ratification of the Fourteenth Amendment. The Jacksonian conception of democracy included a "preoccupation" with the "belief that government power could not be used by particular groups to gain special privileges or to impose special burdens on competing groups."[240] In his famous veto of the Second Bank of the United States, Jackson decried the ability of the "rich and powerful" to "bend the acts of government to their selfish purposes."[241] In his view, the bank legislation granted a monopoly that would make "the rich richer and the potent more powerful."[242] This was, in his view, neither constitutional nor the proper role of government. Instead, he argued, the government's proper role was to "confine itself to *equal protection*, and, as Heaven does its rains, shower its favors on the high and the low, the rich and the poor."[243] With these words, Jackson expressed two main motivations behind contemporaneous calls for generality: it would both prevent the politically powerful from entrenching their power at the expense of the common person and prevent the government from favoring some groups financially at the expense of others.[244]

As the Civil War approached, other concepts and terminology describing the limits of targeted legislation emerged. While courts and commentators continued to

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236. *E.g.*, Vanzant v. Waddel, 10 Tenn. 260, 270 (1829) (refusing to apply a special law as violative of the state's "law of the land" clause).

237. LOCKE, *supra* note 195, § 142.

238. *See e.g.,* Norman v. Heist, 1843 WL 5009, at *3 (Pa. 1843).

239. *Woodward*, 17 U.S. at 580; *see also* Mendelson, *supra* note 168 at 126 (describing connection between Webster's argument in the *Dartmouth College* case and later state cases).

240. GILLMAN, *supra* note 17 at 12; *see also* Caleb Nelson, *Vested Rights, "Franchises," and the Separation of Powers*, 169 U. PENN. L. REV. 169, 1429, 1468 (2021) (noting that Jacksonian Democrats "raised pointed concerns about the very concept of special acts of incorporation").

241. Andrew Jackson, *Veto Message (July 10, 1832)*, *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1139, 1153 (1910).

242. *Id.*

243. *Id.*

244. During this period, courts also often relied on the concept of "vested rights" to describe why special legislation sometimes was restricted or prohibited. Corwin, *supra* note 179, at 259 (drawing a connection between vested rights and an aversion to special legislation).

describe the evil of targeted legislation as the fact that it singled out an *individual* for particular advantages or disadvantages,[245] they also increasingly described the problem of targeted legislation as one of impermissible legislative *classification*. As one state supreme court put it, the "very frame and theory of our government repudiates the idea of distinct *classes*."[246] Viewed in this light, the flaw with targeted legislation was that it classified some members of society differently than others without adequate justification. As a result of this shift in focus, the impermissible nature of legislation targeted to reach an individual could now also be recognized in legislation that created different rules for different groups, or *classes* of society, without regard to the number of people in each class. Freed from the constraint of particularity, impermissible legislative classification, sometimes still called special legislation, was now alternatively called partial, [247] local, [248] private, [249] or, increasingly, *class* [250] legislation, although these terms were not always used interchangeably. By the time of the Civil War, an aversion to class-based legislation was well-articulated and widespread.[251]

4. Generality During Reconstruction and the Gilded Age

During the Reconstruction era and the Gilded Age, courts and commentators continued to invoke the different generality-related concepts that had been introduced in previous periods. But, although these terms and concepts—like special, private, local, and class legislation—were developed at different times and sometimes denoted different concepts, they were sometimes used

245. *E.g.,* Bull v. Conroe, 13 Wis. 233, 244 (1860) (noting that it is "contrary to the spirit and intent of the constitution" to "legislate specially for or against certain persons"); Jones' Heirs v. Perry, 18 Tenn. 59, 77 (1836) (distinguishing a "the law of the land" from "a special, partial act of the legislature, applicable to their case alone"); Pierce v. Kimball, 9 Me. 54, 59 (1832) (noting that statutes "granting personal privileges or exemptions to certain individuals by name" are unconstitutional).

246. Aulanier v. Governor, 1 Tex. 653, 662–63 (1846) (emphasis added).

247. Morgan v. Reed, 39 Tenn. 276, 283 (1858) (describing as "partial" a law with an objective "to exempt particular individuals, or special cases, from the operation of the general law of the land; or, to suspend the general law") (internal quotations omitted); *Aulanier*, 1 Tex. at 662 ("The law is partial—operates on one citizen and not upon others—and is not 'the law of the land,' operating on all.").

248. *E.g.*, *Ex Parte* Pritz, 9 Iowa 30, 32–33 (1858) (holding that the state constitution prohibits the legislature from enacting "special or local legislation"); People v. Collins, 3 Mich. 343, 378 (1854) (referring to "special acts, acts local in their character"); People v. McCann, 16 N.Y. 58 (1857) (describing local acts).

249. *E.g.*, Holloway v. Memphis, E.P. & P.R. Co., 23 Tex. 465, 467 (1859) (describing a private act); Bank of Newberry, S.C. v. Greenville & C.R. Co., 43 S.C.L. 495, 499 (S.C. Err. 1855) (distinguishing between public and private acts); *In re* Wakker, 1847 WL 4359 (N.Y. Sup. Ct. 1847) ("Special or private acts operate only on particular persons and private concerns."); Wally's Heirs v. Kennedy, 10 Tenn. 554, 555 (1831) ("[E]very partial or private law which directly proposes to destroy or affect individual rights, . . . is unconstitutional and void.").

250. *E.g.,* Bethune v. Hughes, 28 Ga. 560, 565 (1859) ("[C]lass legislation is to be found frequently upon our statute book."); Crow v. State, 14 Mo. 237, 256 (1851) (noting that state constitution is designed to "repudiate and repress all favoritism or oppression, in the nature of class legislation").

251. *E.g.,* Aulanier, 1 Tex. at 662–63 ("The very frame and theory of our government repudiates the idea of 'distinct classes.'").

interchangeably.[252] As a result, the lines separating these concepts blurred significantly. Thomas Cooley, in his authoritative *Constitutional Limitations* treatise, equated "law of the land" with "due process," writing that although some state constitutions require statutes to comport with the law of the land and others with due process of law, "the meaning is the same in every case."[253] Due process was also often equated with general, as opposed to special, laws.[254] Moreover, due process (or rather, a lack of it) was used to describe what was wrong with A-to-B laws; and A-to-B laws, in turn, were equated with class legislation.[255]

The most enduring developments in the history of generality took place outside of the courts. Even before the Civil War, states began to adopt explicit constitutional prohibitions on special legislation.[256] By the time that *Londoner* was decided, almost every state had done so, incorporating many of the lessons learned about the deleterious effects of targeted legislation during the previous decades.[257] And during the Civil War and Reconstruction eras, Congress began to transition away from enacting private bills for the benefit of named individuals—although that transition would take several decades[258]—by permitting the federal courts to render final money judgments against the United States.[259] These statutes freed Congress from its time-consuming responsibility of compensating citizens who had been wronged by the government, although it did not prohibit Congress from enacting private bills when it chose to do so. Moreover, while Congress continued to enact private bills, it denied this power to federal territorial legislatures, a decision that influenced state constitutional prohibitions on special legislation.[260]

Most consequentially, the adoption of the Fourteenth Amendment helped transplant the concept of class legislation from state law to federal law. As noted above, Jacksonian Democrats had earlier used the term "equal protection" to reflect

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252. CHARLES C. BINNEY, RESTRICTIONS UPON LOCAL AND SPECIAL LEGISLATION 6 (1896) (describing the confused terminology around targeted legislation); *see e.g.,* William C. Howard, Note, *The Decision in the District of Columbia Minimum Wage Law Case*, 9 VIRG. L. REV. 639, 643 (1923) (referring to "legislation governing the employment of women" as "special legislation"); Saunders, *supra* note 170, at 289 (noting that by the time of Reconstruction, class legislation was used interchangeably with partial or special legislation).

253. COOLEY, *supra* note 172, at 353.

254. Hurtado v. California, 110 U.S. 516, 535 (1884) ("[L]aw . . . must be not a special rule for a particular person or a particular case.").

255. ORTH, *supra* note 174, at 54–55.

256. *E.g.*, IND. CONST. of 1851, art. IV, § 22.

257. BINNEY, *supra* note 252, at 130–31. The few states without explicit constitutional restrictions on special legislation were among the first to include provisions in their constitutions prohibiting individualized legislative privileges and punishments more generally. The Vermont Constitution's Common Benefits Clause provides that the "government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons." VT. CONST. art. I, § 7. Massachusetts and New Hampshire's constitutions included similar language prohibiting exclusive privileges. MASS CONST. pt. I, art. VI; N.H. CONST., pt. I, art. X.

258. Evan C. Zoldan, *Legislative Design and the Controllable Costs of Special Legislation*, 78 MD. L. REV. 415, 466 (2019) (describing the Congressional reference process).

259. 28 U.S.C. § 1491; *see* Evan C. Zoldan, *The King is Dead, Long Live the King! Sovereign Immunity and the Curious Case of Nonappropriated Fund Instrumentalities*, 38 CONN. L. REV. 455 (2006) (describing the history of the United States Court of Federal Claims). Congress still, very rarely, enacts private bills of the kind over which the Court of Federal Claims has jurisdiction.

260. 24 Stat. 170, c. 818 (prohibiting the passage of local or special laws in the territories).

the idea that the government had no authority to benefit one class of society at the expense of another.[261] Moreover, the phrase "due process" had long been associated with the idea of generality, including its equation with the prohibition of A-to-B laws, state "law of the land" clauses, and the idea of established, promulgated laws.[262] By including Equal Protection and Due Process clauses, the Fourteenth Amendment helped transform the concept of generality, including the class legislation doctrine, into a centerpiece of the new postbellum constitutional order.[263]

Some scholars have argued persuasively that the adoption of the class legislation doctrine into the Fourteenth Amendment was intentional,[264] although there is far from universal agreement on this point.[265] But, whatever the extent of the 39th Congress's intention to adopt class legislation principles into the Constitution, it is certain that federal courts began to read class legislation principles into the Fourteenth Amendment soon after its ratification.[266] In *Barbier v. Connolly*, the Court considered a municipal ordinance that prohibited public laundries from washing and ironing clothes at night.[267] The owner of a laundry challenged the restriction, claiming that it discriminated between the class of businesses that included laundries alone and the class of businesses that included all other enterprises.[268] Ultimately, the Court rejected the laundry owner's claim, holding that the regulation fell within the state's police power.[269] Importantly, however, the Court distinguished laws that fell within the state's police power, which are lawful, from *class legislation*, opining that "class legislation, discriminating against some and favoring others, is prohibited" by the Constitution's Fourteenth Amendment.[270]

In this same vein, for decades after the ratification of the Fourteenth Amendment, the Court considered class legislation principles when reviewing legislative classifications.[271] During this period, the Court did continue to uphold

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261. Jackson, *supra* note 241, at 1153.

262. COOLEY, *supra* note 172, at 351–52.

263. GILLMAN, *supra* note 17, at 62; Saunders, *supra* note 170, at 271–74.

264. Saunders, *supra* note 170, at 292.

265. Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 GEO. L.J. 1, 32 (2021) (disputing Saunders's conclusion and offering an alternative reading of the clause); *see also* Earl A. Maltz, *The Concept of Equal Protection of the Laws*, 22 SAN DIEGO L. Rev. 499, 537 (1985) ("The equal protection clause was apparently not intended primarily as a safeguard against unfair classifications."); Christopher R. Green, *The Original Sense of the Equal Protection Clause*, 19 GEO. MASON U. C.R. L.J. 1, 30–31, 71–75 (2008) (rejecting the class legislation explanation for the Equal Protection Clause).

266. GILLMAN, *supra* note 17, at 68–72.

267. Barbier v. Connolly, 113 U.S. 27 (1885).

268. *Id.* at 29.

269. *Id.* at 32.

270. *Id.*

271. *The Civil Rights Cases*, 109 U.S. 3, 30 (1883) ("[D]enying to any person, or class of persons, the right to pursue any peaceful avocations allowed to others . . . is called class legislation . . . and would be obnoxious to the prohibitions of the Fourteenth Amendment."); Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U.S. 655, 663 (1874) ("No court, for instance, would hesitate to declare void a statute which enacted that A. and B. who were husband and wife to each other should be so no longer. . . . Or which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B.").

many laws that arguably were class legislation.[272] And, as described in Part III, the Court ultimately abandoned class legislation in most areas of the law at the end of the *Lochner* era. Nevertheless, at the time that *Londoner* was decided, the class legislation doctrine "loomed large" in federal constitutional doctrine.[273] It is in this context—a legal environment pervaded by concerns about targeting—that *Londoner* and *Bi-Metallic* were decided, and it is in this context that the distinction between them can be explained.

B. Individualized Hearings in the Class Legislation Tradition

As described above, the class legislation doctrine can be seen as part of a long tradition that favors generality in law and disfavors laws conferring special benefits or imposing special burdens on individuals and, ultimately, classes of individuals. By the time that *Londoner* and *Bi-Metallic* were decided, the class legislation doctrine pervaded both state and federal constitutional law, although it was applied unevenly at best. Understanding the class legislation doctrine, and the related generality-supporting principles that fed into it, helps explain the *Londoner/Bi-Metallic* distinction. This Section first elaborates on the contours of the class legislation doctrine; it next revisits the *Londoner/Bi-Metallic* distinction to show the extent to which the class legislation tradition can help explain it.

1. Class Legislation Strategies in the Era of Londoner and Bi-Metallic

As *Barbier* suggests, by the turn of the twentieth century it was well-accepted that class legislation was prohibited—or at least disfavored.[274] The more difficult question for courts was how to identify it. That is, how could courts distinguish the legitimate power of legislatures to classify from the illegitimate power to benefit or burden a class.[275] This task is difficult, to be sure; and perhaps impossible—after all, a widely held modern assumption is that *all* legislation burdens some and benefits others.[276] But, at the time of *Londoner* and *Bi-Metallic*, courts took the distinction seriously, developing strategies to articulate the difference between impermissible class legislation and permissible legislative classifications. These strategies were informed by the long class legislation tradition described above, drawing on the generality-related concepts that had been percolating since, at the

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272. Most notably, perhaps, in the *Slaughterhouse Cases*, the Court upheld a law that arguably created a monopoly conferring "exclusive privileges upon a small number of persons at the expense of the great body of the community of New Orleans." 83 U.S. 36, 60 (1872).

273. Nourse & Maguire, *supra* note 20, at 979.

274. GILLMAN, *supra* note 17, at 103 ("[B]y the late nineteenth century the Supreme Court expected the nation's legislation to be free from the injustice of special burdens or benefits imposed on favored or despised classes.").

275. *Id.* at 105 ("[I]t was not always easy to distinguish valid exercises of the police power from class politics.").

276. *See* John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1247 (1970). Indeed, the difficulty that attends making this distinction is in part responsible for the ultimate marginalization of the class legislation doctrine and the rise of the more familiar tiers of scrutiny applied to legislative classifications. *See e.g.,* Clark v. Jeter, 486 U.S. 456, 461 (1988) (setting out tiers of scrutiny)*; see* Gary Lawson, *Take the Fifth…Please!: The Original Insignificance of the Fifth Amendment's Due Process of Law Clause*, 2017 BYU L. REV. 611, 661 (2017) (arguing that the "the key element" of modern due process is "the kinds of procedures that executive agents employ, not whether the executive agent complies with the principle of legality").

latest, the confederation period. The doctrinal strategies most relevant to assessing *Londoner* and *Bi-Metallic* are described below.

First, courts employing the class legislation doctrine drew a distinction between legislation enacted for a public purpose and legislation enacted to aid private individuals or industries, holding that legislation enacted to advance a private purpose was impermissible class legislation. In *Loan Association v. Topeka*, the Court considered whether taxation for the purpose of aiding manufacturing businesses is in the public interest.[277] The Court acknowledged that it is not always easy to tell whether a tax is imposed for a public purpose or a private one.[278] Moreover, the Court acknowledged that assistance for manufacturers arguably benefits the public.[279] However, the Court reasoned, just as manufacturers claim that assistance to them benefits the public, so too could any other class of industry claim the right to assistance for its private endeavors.[280] As the Court noted, merchants, innkeepers, and bankers are "equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions."[281] Echoing earlier denunciations of special legislation[282] and the Jacksonian explication of equal protection,[283] the Court held that the legislation, which singled out one industry alone for special benefits, bestowed public wealth on "favored individuals to aid private enterprises and build private fortunes."[284] Because the statute allowed municipalities to impose taxes for the purpose of assisting certain classes of business and not others, the Court held that it was impermissible class legislation.[285]

Similarly, in *Connolly v. Union Sewer Pipe*, the Court invalidated a statute that prohibited certain acts taken for the purpose of restraining trade but explicitly excluded from its reach producers of agricultural products.[286] In sympathy with the confederation-era rejection of laws that created special exemptions from generally applicable laws, the Court held that if restraint of trade was injurious to the public, then so too was restraint of trade by agricultural producers.[287] As a result, the Court refused to uphold the law, which appeared to create a "favored class" of agricultural producers that could do with impunity what was prohibited to others.[288]

Second, impermissible class legislation included statutes that classified for the purpose of "favoritism" or out of "spite."[289] In *Yick Wo v. Hopkins*, an ordinance required laundries to obtain a license to operate in wooden buildings.[290] The Court

277. Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U.S. 655, 664 (1874).

278. *Id.*

279. *Id.* at 665.

280. *Id.*

281. *Id.*

282. Ireland, *supra* note 123, at 274 (describing criticisms of special legislation).

283. Jackson, *supra* note 241, at 1153 (arguing that the government's proper role is to "confine itself to *equal protection*, and, as Heaven does its rains, shower its favors on the high and the low").

284. *Citizens' Sav. & Loan Ass'n*, 87 U.S. at 664; *see also* GILLMAN, *supra* note 17, at 63.

285. *Id.*

286. Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 563 (1902).

287. *Id.* at 563-64.

288. *Id.*; *see also* GILLMAN, *supra* note 17, at 12 (noting class legislation principle that disfavored unearned privileges for individuals or groups).

289. Richard Kay, *The Equal Protection Clause in the Supreme Court* 1873–1903, 29 BUFF. L. REV. 667, 696 (1980).

290. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

criticized the fact that the ordinance did not distinguish between wooden and nonwooden buildings, but rather distinguished *among* wooden buildings.[291] That is, the ordinance allowed some, but not all, launderers to operate in wooden buildings, distinguished by nothing other than the discretion of the administrators empowered to grant licenses.[292] This discretion allowed government officials to administer the program in a racially discriminatory way, evidenced by the fact that the government consistently denied licenses to Chinese launderers.[293] Ultimately, the Court invalidated the legislation with reasoning that echoes the reasons why states prohibited special legislation during the nineteenth century, including to stamp out legislation prompted by improper motives.[294] Similarly, in *Yick Wo*, the Court held that legislation was prohibited if it proceeded from "enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives."[295] And as the Court subsequently put it, the Fourteenth Amendment "was aimed at undue favor and individual or class privilege," on one hand, "and at hostile discrimination or the oppression of inequality, on the other."[296]

Third, courts employing class legislation doctrine distinguished between "real" or "natural" classes and "arbitrary" selections. Of all class legislation-related concepts, this distinction is probably most foreign-sounding to modern scholars of federal constitutional law.[297] On this view, legislatures were permitted to classify in a way that mapped onto a distinction that exists in the real world. That is, the legislature could legislate for a subset of society if that subset represented a "real" class. By contrast, when the legislature excluded members of a real class from a classification or included in a classification people or things that were not part of a real class, it impermissibly made an arbitrary selection.[298] In *Southern Railway Company v. Greene*, the Court considered legislation that categorized foreign corporations investing in railroad infrastructure differently than domestic corporations engaged in the same business.[299] The state argued that the differential treatment was justified because the two classes—foreign corporations and domestic corporations—were different.[300] The Court rejected this argument, holding that, while "reasonable classification is permitted," the Constitution requires that a "classification must be based on some real and substantial distinction."[301] If the classification was not made on a "substantial basis"—that is, there is no substantial distinction between the two groups classified differently—then the legislature has

291. *Id.* at 368.

292. *Id.*

293. *Id.*

294. Frank E. Horack, *Special Legislation: Another Twilight Zone Part I*, 12 IND. L.J. 109, 115 (1936) (connecting nineteenth century special legislation-related corruption to state constitutional conventions).

295. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

296. Truax v. Corrigan, 257 U.S. 312, 332–33 (1921).

297. But it is still commonly used in state constitutional law. *E.g.*, Colorado v. Canister, 110 P.3d 380, 383 (2005) ("[W]e must first answer a threshold question of whether the classification adopted by the legislature is a real or potential class, or whether it is logically and factually limited to a class of one and thus illusory.").

298. *E.g.*, Haynes v. Lapeer, 201 Mich. 138, 142 (Mich. 1918).

299. S. Ry. v. Greene, 216 U.S. 400, 417 (1910).

300. *Id.*

301. *Id.*

made an "arbitrary selection" rather than a lawful classification.[302] Because the Court found no real or substantial difference between domestic and foreign corporations that own railroad infrastructure, the state law taxing these two groups differently was impermissible class legislation. Similarly, courts employing class legislation doctrine invalidated legislative classifications after finding that the legislature carved "a class out of a class," creating an arbitrary subclassification,[303] or disregarded "real resemblances and real differences between things, and persons" when making a classification.[304]

By contrast, courts upheld classifications that mapped onto a real or natural class. In *Muller v. Oregon*, the Court considered the constitutionality of a statute that imposed maximum working hours for women but not men.[305] To the Court, the sex-based maximum hour law was justified because of the real differences it perceived between men and women.[306] Because of the "inherent difference between the two sexes," reasoned the Court, "legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained."[307]

The Court's distinction between men and women may ring hollow, even distasteful, today. But the broader strategy, that of attempting to distinguish between real and illusory categories, had a long pedigree. It echoed the confederation-era distinction between morally acceptable distinctions and morally unacceptable ones. On this view, legal distinctions were acceptable when they were warranted—privileges could be earned through service to the community, for example.[308] But, distinctions based on family connections—like hereditary titles or, conversely, punishment through "corruption of blood," were anathema to the republican ideals of equality.[309] At the turn of the twentieth century, courts continued to take this strategy seriously, opining on whether there were "real and substantial" or "natural" differences between, *inter alia*, irrigation canals and other canals,[310] mountain railroads and other common carriers,[311] picketers who protested former employers and other picketers,[312] and anthracite and bituminous coal.[313]

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302. *Id.*

303. *E.g.*, *Haynes*, 201 Mich. at 142 (invalidating a statute that applied different rules for forced sterilization to individuals in the care of state institutions as opposed to individuals outside of state institutions as arbitrary).

304. Truax v. Corrigan, 257 U.S. 312, 337–38 (1921).

305. Muller v. Oregon, 208 U.S. 412, 412 (1908).

306. *Id.* at 422-23.

307. *Id.*

308. MASS. CONST. of 1780, pt. I, art. VI.

309. U.S. CONST. art. III, § 3; Wallach v. Van Riswick, 92 U.S. 202, 210 (1875) ("[C]hildren should not bear the iniquity of their fathers.").

310. Farmers Irrigation v. Nebraska, 244 U.S. 325 (1917) ("This statute applies equally to all owners of irrigation canals. The fact that it does not embrace canals constructed for other uses and purposes does not make it obnoxious to the equal protection clause of the 14th Amendment.").

311. Consumers League v. Colorado, 53 Colo. 54 (1912) (upholding statute after finding that there is a "real and substantial" difference between different kinds of roads, making one kind of road a "distinct and real class by themselves").

312. Truax v. Corrigan, 257 U.S. 312, 337–38 (1921).

313. Commonwealth v. Alden Coal Co., 251 Pa. 134 (1915).

Fourth, courts were attentive to whether the burdens imposed by a statute were congruent with the benefits it provided. Class legislation doctrine prohibited legislation that imposed "a burden on one class (employers or railroads) in order to promote the health or well-being of another (employees or farmers)."[314] However, courts did permit legislation that burdened one class and favored another to make up for harms created by the relationship between the classes. For example, legislation requiring employers to maintain workplace safety burdened employers as a class and benefitted employees as a class; however, this kind of legislation was *permitted* because it accounted for workplace hazards—presumably caused by the employers themselves—suffered by employees as a class.[315]

As a corollary to this general proposition, courts permitted legislation that burdened a class if the legislation was accompanied by benefits congruent to the burden.[316] Consider *Norwood v. Baker*.[317] Here, the Court reviewed a special assessment connected with condemnation proceedings meant to improve adjacent roads.[318] The Court held that the special assessment was permitted on the theory that the burdened property "is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement."[319] But, a special assessment was not permitted if the burdens imposed were in "substantial excess" of the expected benefits.[320] And, to determine whether the burdens were in substantial excess of the expected benefits, the Court held, justice demanded that taxpayers be granted the right to a hearing.[321] This strategy of searching for congruence has echoes in the early principle that A-to-B laws were unlawful,[322] and the related proposition that a taking of real property must be accompanied by its own kind of congruence—just compensation.[323]

The principle that a special assessment was permitted only if it was accompanied by congruent benefits was reiterated by the Court even as it tended to uphold state and local taxation plans.[324] In *Phillip Wager v. Leser*, for example, the

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314. GILLMAN, *supra* note 17, at 182.

315. *Id.* at 182–83 (noting that minimum wage laws were justified as requiring employers to pay employees what they were worth in order to avoid class legislation critique).

316. *E.g.,* Norwood v. Baker, 172 U.S. 269, 278–79 (1898); Phillip Wager v. Leser, 239 U.S. 207 (1915); Illinois Cent. R.R. Co. v. City of Decatur, 147 U.S. 190 (1893); Williams v. Eggleston, 170 US 304 (1898); Dane v. Jackson, 256 U.S. 589 (1921).

317. *Norwood*, 172 U.S. at 278–79.

318. *Id.* at 270.

319. *Id.* at 278–79.

320. *Id.* at 279.

321. *Id.* The idea that taxation must be in proportion to the benefit received, and its connection with the idea of uniform, impartial laws, is described in 2 KENT'S COMMENTARIES (Lecture XXXIV) (1827) ("[T]he legislature itself shall cause all public taxation to be fair and equal in proportion to the value of property, so that no one class of individuals, and no one species of property, may be unequally or unduly assessed.").

322. ORTH, *supra* note 174, at 40–42 (describing critique of A-to-B laws).

323. *Id.* at 47–48 (connecting just compensation with A-to-B laws).

324. *E.g.*, Illinois Cent. R.R. Co. v. City of Decatur, 147 U.S. 190, 199 (1893) (opining that persons "made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby, their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay"); Williams v. Eggleston, 170 US 304, 311 (1898) (noting that "the burden of this improvement" is justified by the judicially determined benefit); Dane v. Jackson, 256 U.S. 589,

Court upheld the special assessment of property in connection with its improvement.[325] But, even here, the Court was careful to note that there was "neither allegation nor proof of *disproportion* between the assessment made and the benefit conferred."[326] Indeed, the Court went on to note that there was "no question" that the improvement would provide a "substantial benefit" to the property.[327] Similarly, the Court held that, although a legislature need not make an exact calculation of benefits and burdens, the Constitution prohibits the state from subjecting property owners to "a local burden for the benefit of others or for purposes in which they have no interest, and to which they are therefore not justly bound to contribute."[328]

2. Londoner and Bi-Metallic in the Class Legislation Tradition

We can now compare the class legislation tradition, including the strategies employed by courts to distinguish between permissible and impermissible classifications, to the *Londoner/Bi-Metallic* distinction. This comparison demonstrates that *Londoner* and *Bi-Metallic* can be explained as cases reflecting the principles and preoccupations of the class legislation tradition, including the class legislation doctrine and the generality-related concepts that preceded and informed it.

a. Specificity

Consider first the issue of specificity. The key clue that the *Londoner/Bi-Metallic* distinction is an implementation of class legislation principles is the fact that *Bi-Metallic* distinguished *Londoner* as a case about no "more than a few people,"[329] suggesting that it was the specificity of the tax in *Londoner* that led to the hearing requirement. At first blush, it is puzzling that the Court would focus on the number of people affected by the government's action. Certainly, the Court could not have been focused on specificity in the bill-of-attainder sense of the term; indeed, the Court has always relied on the Bill of Attainder clauses sparingly.[330] Moreover, a focus on specificity seems particularly odd because the *Londoner* assessment itself seems to have affected more than a few people. Indeed, it appears that the property affected by the assessment may have spanned up to three miles of a major street in the city of Denver, affecting all the landowners along the way.[331] What's more, not even the *Londoner* taxpayers conceived of their claim as one affecting only a few people. In filings with the Supreme Court, the *Londoner* litigants stated that the question involved "is one of common and general interest to a large number of

599 (1921) ("[A] state tax law will be held to conflict with the Fourteenth Amendment only where it proposes . . . inequality between the burden imposed and the benefit received.").

325. Phillip Wager v. Leser, 239 U.S. 207 (1915).

326. *Id.*

327. *Id.*

328. Henderson Bridge Co. v. Henderson City, 173 U.S. 592, 616 (1899).

329. Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colo., 239 U.S. 441, 444–45 (1915).

330. Nixon v. Admin. of Gen. Serv., 433 U.S. 425, 425 (1977).

331. Petitioner's Brief at 3, Londoner v. Denver, 210 U.S. 373 (1908) (describing that a majority of the frontage of the district was 8,497 feet, suggesting that the length of the district was up to 17,000 feet, or more than three miles in length).

persons" and that they were suing "for the benefit of all such persons and parties similarly situated" as well as for themselves.[332]

But, although it is not plausible that the Court considered the *Londoner* assessment a bill of attainder, the Court's focus on specificity in *Londoner* fits squarely with how the concept of specificity had developed within the class legislation tradition. The long tradition disfavoring targeted legislation, dating at least to the confederation period, certainly included legislation targeting identifiable individuals, as was typical of bills of attainder. As the nineteenth century proceeded, however, the concept of impermissible specificity evolved to include the targeting not only of individuals, but also of classes of indeterminate size.[333] By the time of *Londoner* and *Bi-Metallic*, it would have been perfectly intelligible for courts steeped in the class legislation tradition to find that the *Londoner* assessment was impermissibly targeted despite the fact that it concerned more than a few people. Class legislation doctrine would have given courts a justification for being suspicious of an ordinance that levied a tax on one part of a city while leaving the rest of the city free from the tax.[334] And, importantly, class legislation doctrine would have provided a mechanism for dealing with such a tax: an *individualized hearing* to determine whether the benefits and burdens were congruent. Indeed, a class legislation-focused understanding of impermissible specificity also explains why the *Londoner* taxpayers themselves challenged the ordinance as "special legislation,"[335] despite the fact that they readily acknowledged that it affected a "large number of persons."[336]

In addition to explaining *Londoner*, reference to the class legislation tradition also can explain the different outcome in *Bi-Metallic*. Once the concept of "specificity" was freed from the restraints of particularity, there is no categorical reason to hold that legislation affecting an entire city cannot be impermissibly specific. Nevertheless, it is easy to see how the *Bi-Metallic* Court could consider the state's valuation decision to be more like general legislation than special legislation. For one reason, as described by the Colorado Supreme Court in a companion case to *Bi-Metallic*, Denver was not unique in being subjected to an across-the-board increase in the valuation of its property.[337] Indeed, the state Board of Equalization found that the property in more than 90% of Colorado's counties was undervalued and ordered each county assessor to increase the assessed value appropriately.[338] As a result, *Bi-Metallic* may well have considered the individual county decisions to be part of a general, state-wide plan rather than targeted. For another reason, state courts often upheld municipality-wide legislation against special legislation challenges, provided that it affected only the largest city or county in a state, on the

332. *Id.* at 1.

333. Bell's Gap Gap R. Co. v. Pa., 134 U.S. 232 (1890) (noting unconstitutionality of "clear and hostile discriminations against particular persons and classes").

334. BINNEY, *supra* note 252, at 52 (describing local and special legislation within the context of taxation); *see also* Norwood v. Baker, 172 U.S. 269, 278–79 (1898).

335. Londoner v. City & Cty. of Denver, 210 U.S. 373, 375 (1908).

336. Petitioner's Brief at 1, Londoner v. Denver, 210 U.S. 373 (1908).

337. People *ex rel.* Colo. Tax Comm'n, 56 Colo. 343, 345, 138 P. 509, 510 (1914).

338. Specifically, fifty-eight of Colorado's then sixty-three counties were undervalued. *Id.*

theory that a state's largest municipality is unique.[339] The view that *Bi-Metallic*'s valuation decision was general while *Londoner*'s tax was special is consistent with this practice.

b. Favoritism and Animus

Consider next the complementary concepts of favoritism and animus.[340] Courts steeped in the class legislation tradition often held legislation impermissible when they discerned a legislative purpose of "favoritism" or "spite."[341] Relatedly, courts employing class legislation concepts often invalidated legislation that applied differently to different groups, creating favored and disfavored classes.[342] In doing so, courts often expressed concern that the legislature was animated by an improper motive to privilege or punish a person or group.[343]

The class legislation tradition's concern about the creation of favored and disfavored classes helps explain the *Londoner*/*Bi-Metallic* distinction. On this reading, the assessment in *Londoner* was defective in the absence of a hearing because it created a burden for one class and a benefit for another. As the *Londoner* taxpayers argued, they were taxed—not for their own benefit—but for the benefit of the entire city of Denver.[344] As a result, the city of Denver could be considered a favored class benefitted at the expense of the *Londoner* taxpayers. The taxpayers, conversely, could be seen as a disfavored class, burdened to benefit the city of Denver. Accordingly, in this view, the *Londoner* taxpayers were entitled to be heard on the issue of benefits and burdens.[345]

By contrast, concerns about the creation of favored and disfavored classes would not have been as salient in *Bi-Metallic*. As noted above, the across-the-board increase in the valuation of Denver's property could be seen as part of a state-wide effort to raise property valuations to their actual value. Nearly all of Colorado's counties were affected in a similar way. Because of the general nature of the valuation increase, it is less likely that the Court would have had the suspicion that the residents of Denver were being treated as a disfavored class for the benefit of some other favored class. Rather, the Court could well have characterized the new taxing rules as limiting disparate benefits and burdens rather than creating them.

c. Real or Natural Classes

Consider next the class legislation tradition's distinction between real or natural classes and, on the other hand, arbitrary selections—that is, legislative classifications were permissible only so long as they were "based on some real and

339. BINNEY, *supra* note 252, at 52–53 (discussing permissibility of local taxes); WILLIAM BACKUS GUITTEAU, CONSTITUTIONAL LIMITATIONS UPON SPECIAL LEGISLATION CONCERNING MUNICIPALITIES 15, 61 (1905).

340. Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U.S. 655, 664 (1874).

341. Kay, *supra* note 289, at 696.

342. Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 563 (1902); *see also* GILLMAN, *supra* note 17, at 12 (noting class legislation principle that disfavored unearned privileges for individuals or groups).

343. Yick Wo v. Hopkins, 118 U.S. 356 (1886); Truax v. Corrigan, 257 U.S. 312, 332–33 (1921).

344. Londoner v. Denver, 210 U.S. 373, 382 (1908).

345. Norwood v. Baker, 172 U.S. 269, 269 (1898).

substantial distinction" between the groups created by the classification.[346] The tax assessment in *Londoner* can be viewed in light of this distinction. Before the Supreme Court, the *Londoner* taxpayers argued explicitly that the classification was impermissible because the boundaries of the Paving District were selected arbitrarily.[347] Specifically, they argued that the assessment taxed properties of different values at the same fixed amount, treating unlike things alike. Moreover, by excluding property from the Paving District that also would benefit from the improvements, the government treated like things (properties that would benefit from the improvements) in an unlike manner.[348] Here, the *Londoner* taxpayers can be understood to argue that the selection of the contours of the Paving District was arbitrary. This argument fits with the distinction between real classes and arbitrary selections that pervaded class legislation thinking. In other words, to the *Londoner* taxpayers, there *was* a hypothetical paving district boundary that would have described a real class—that is, a class that exists in the real world. However, the government's selection of property to tax did not match that real boundary.

Although it may be difficult for modern courts and scholars to imagine what it means for a classification to be real or natural, courts steeped in the class legislation tradition often made these kinds of determinations. Perhaps, as the *Londoner* taxpayers alleged, the government's classification treated like things in an unlike manner and unlike things in a like manner, thus ignoring "real resemblances and real differences between things."[349] Or perhaps the Court believed that a natural class should also include property outside of the Paving District. If so, then the Paving District might be illegitimate because it "carved a class out of a class."[350] But whatever the real or natural class that the Court had in mind, the *Londoner* Court appears to have been influenced by class legislation principles when it required an individualized hearing because of concern that the government made an arbitrary selection rather than a legitimate classification based on a natural class.

By contrast, it is more likely that the legislation at issue in *Bi-Metallic* would have been seen to describe a real or natural class. For one reason, the revaluation of property applied state-wide, largely diffusing the argument that the government was selecting less than a real or natural class. Moreover, even to the extent that the government could be seen as acting on each county individually, legislation that affected an entire city or county, especially in the field of taxation, was more likely to be viewed as describing a real or natural class under class legislation principles.[351]

d. Congruence

Finally, consider the concept of congruence between burdens and benefits. Courts once were sensitive to the argument that statutory benefits should be

346. S. Ry. v. Greene, 216 U.S. 400, 417 (1910).

347. *Londoner*, 210 U.S. at 382.

348. *Id.*

349. *Truax*, 257 U.S. at 337–38.

350. Haynes v. Lapeer, 201 Mich. 138, 142 (Mich. 1918).

351. BINNEY, *supra* note 252, at 52 (noting that local legislation "does not necessarily involve the same injustice" as special legislation); GUITTEAU, *supra* note 339, at 61 (noting that constitutional limitations on special legislation had little effect on special municipal legislation).

congruent with the burdens they imposed.[352] As the Court held, taxpayers are not obligated to endure "a local burden for the benefit of others or for purposes in which they have no interest."[353] *Londoner* reflects this concern. During the course of the litigation, and before the Supreme Court, the *Londoner* taxpayers objected that the assessment they experienced was arbitrary because it did not "fit" the property assessed.[354] They argued that taxpayers throughout Denver, though not subject to the assessment, benefitted from it; and, conversely, that Paving District property did not benefit from the planned improvements "to the extent of the assessment."[355] Moreover, they presented facts showing that the improvements linked to the special assessment raised the value of the property minimally, if at all. As a result, they argued, the burden of the assessment outweighed, and was therefore not congruent with, the benefits they received.[356] The *Londoner* taxpayers' allegations—that the burdens imposed by the special assessment were incongruent with the benefits that flowed from it—would have resonated deeply with courts steeped in the class legislation tradition.

By contrast, considerations of congruence do not lead to the same result in *Bi-Metallic*. For one reason, the *Bi-Metallic* Court considered the valuation a general tax, for which no congruence analysis was required. The *Bi-Metallic* Court specifically distinguished *Londoner* on the ground that the earlier case dealt with a tax "levied for special benefits."[357] But, because the *Bi-Metallic* tax was not a special assessment, the legal basis for levying the tax on property of Denver was not contingent on the presence of any concomitant benefit.[358] For this reason, it would not have made sense for the Court to consider whether there was a mismatch between the burdens and the benefits of the tax—it simply was not relevant to a challenge to a general tax. Moreover, the *Bi-Metallic* Court seems to have credited the explanation of the statute given by the Colorado Supreme Court in the companion case to *Bi-Metallic*. There, the Colorado court explained that the purpose of the statute authorizing the state Board of Equalization to increase the valuation of real property was to enhance the uniformity of the benefits and burdens of taxation throughout the state. The predecessor system, by contrast, encouraged "gross inequalities in distribution of the tax burden" among the state's different counties because of the wide variety of ways in which county assessors valued

352. Norwood v. Baker, 172 U.S. 269, 278–79 (1898). Under modern-day takings doctrine, the Supreme Court has required rough proportionality between the government's exaction and the value of the development. Dolan v. Tigard, 512 U.S. 374, 391 (1994) (holding that the "rough proportionality" required by the Fifth Amendment means that "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development"). However, the Court has been hesitant to find a taking simply because regulation burdens a landowner in a way that is incongruent with the benefits provided. *E.g.*, Penn Central v. N.Y.C., 438 U.S. 104, 135 (1978) (rejecting argument based on allegation that landowners "believe they are more burdened than benefited by the law"). For more on the connection between substantive due process, class legislation, and regulatory takings, see Steven J. Eagle, *Penn Central and Its Reluctant Muftis*, 66 BAYLOR L. REV. 1, 20–21 (2014).

353. Henderson Bridge Co. v. Henderson City, 173 U.S. 592, 616 (1899).

354. Londoner v. Denver, 210 U.S. 373, 377 (1908).

355. *Id.* at 382.

356. Petitioner's Brief at 45–47, Londoner v. Denver, 210 U.S. 373 (1908).

357. Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colo., 239 U.S. 441, 445–46 (1915).

358. *E.g.*, Norwood v. Baker, 172 U.S. 269 (1898).

property in their counties.[359] On this reading, the statute challenged in *Bi-Metallic* did not create incongruities between benefits and burdens; rather, it likely led to their reduction.

* * *

In conclusion, some of the standard justifications for the *Londoner/Bi-Metallic* distinction are meant to describe it in contemporaneous terms—that is, to explain why the Court distinguished *Bi-Metallic* from *Londoner*.[360] But, these theories fit neither the facts of *Londoner* and *Bi-Metallic* themselves nor the legal environment contemporaneous with them.[361] Compared with these standard justifications for the distinction, the class legislation explanation fares better. This Article's exploration of the class legislation doctrine and related concepts suggests that that *Londoner* and *Bi-Metallic* can be explained as part of the class legislation tradition. The factual distinctions that the Court emphasized, the terminology employed by the Court, and even the arguments made by the litigants all suggest that the different outcomes reflect the implementation of class legislation strategies once widely used to distinguish between permissible and impermissible classifications. Because of the symmetry between the *Londoner/Bi-Metallic* distinction and class legislation doctrine, the class legislation explanation should take a place alongside the other descriptive explanations for this mysterious corner of due process doctrine and fundamental component of administrative law.

III. INDIVIDUALIZED HEARINGS, CLASS LEGISLATION, AND THE RULE OF LAW

In addition to explaining the origin of the *Londoner/Bi-Metallic* distinction, the class legislation doctrine also provides guidance about how *Londoner* and *Bi-Metallic* should be applied today. As Cass Sunstein and Adrian Vermeule have noted, modern critics of the administrative state often argue, implicitly or explicitly, that administrative law fails to adhere to rule of law principles as described by Lon Fuller in *The Morality of Law*.[362] Accordingly, one way to determine whether the connection between class legislation and the *Londoner/Bi-Metallic* distinction should be fostered is by evaluating whether importing class legislation principles into the *Londoner/Bi-Metallic* analysis would enhance rule of law values.[363] The rest of this

359. People *ex rel.* Colo. Tax Comm'n, 56 Colo. 343, 377 (1914).

360. *See supra* Section I.B.

361. *See supra* Section I.C.

362. Cass Sunstein and Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924, 1927 (2018) (assessing administrative law doctrine in light of rule of law principles described by FULLER, *supra* note 3 at 39). Sunstein and Vermeule did not address specifically the connection between the rule of law principle of generality and the *Londoner/Bi-Metallic* distinction. Indeed, when discussing this distinction, they argue that "none of Fuller's concrete principles are involved." *Id.* at 1961.

363. Moreover, the Fullerian attributes of the rule of law align with some of the standard justifications given for administrative hearings. In describing administrative adjudications before the enactment of the APA, Louis Jaffe considered it an "axiomatic" proposition that

> [a] person charged to obey the law should have a reasonable opportunity to know of its existence, and some time before or after its initial promulgation to protest against its terms. A man charged with violating the law must have adequate notice of the charges against him, an opportunity to know the evidence offered against him, and, normally, some form of hearing, to test this evidence and to present countervailing evidence.

Part does just that, exploring the extent to which conforming the *Londoner/Bi-Metallic* distinction to the class legislation doctrine promotes the rule of law.[364] Specifically, it examines class legislation strategies identified in Part II in light of the rule of law values of generality, coherence, clarity, and congruence. It concludes that implementing class legislation values when interpreting the scope of the right to an individualized hearing supports the value of generality. But, with respect to coherence, clarity, and congruence, the results are mixed.[365]

A. Generality

Importing class legislation principles into the *Londoner/Bi-Metallic* determination would promote the value of generality, a key rule of law value.[366] The class legislation doctrine grew out of an abiding, if difficult to manage, belief in the value of generality—that society should be governed by *rules* as opposed to a patternless set of ad hoc orders.[367] On some accounts of generality, including one that I adopt here, law ought to be generally applicable rather than targeted or particularized. [368] Importing class legislation principles explicitly into the *Londoner/Bi-Metallic* distinction would give courts the conceptual and doctrinal tools to recognize a value of generality when determining the scope of the right to an individualized hearing. Accordingly, courts would be more likely to require individualized hearings when agencies take action that appears to be targeted. Consider *Quivira*, in which an agency regulated certain byproduct material by rulemaking rather than by adjudication.[369] The processor of the regulated byproduct argued that it was entitled to an individualized hearing because it was the sole entity

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Louis Jaffe, *The Report of the Attorney General's Committee on Administrative Procedure*, 8 U. CHI. L. REV. 401, 406–07 (1941). Similarly, widely held accounts of the rule of law require notice of the existence and content of the law that is to be applied and officials who act according to set legal standards. *E.g.*, FULLER, *supra* note 3, at 39.

364. Here, I adopt the widely (but not universally) held view that rule of law includes clarity, generality, congruence, and coherence. *See* FULLER, *supra* note 3, at 39; *see also* Tasioulas, *supra* note 3, at 119–20. *But see* GOWDER, *supra* note 3, at 29 ("[S]ome commentators would more or less strip generality from our conception of the rule of law. Most notable among these is Raz . . . .").

365. There are, to be sure, other ways to assess the merits of incorporating class legislation into the *Londoner/Bi-Metallic* analysis. For example, we could consider whether doing so would enhance or restrain the ability of administrative agencies to do their work. Indeed, depending on the kind of hearing required, applying class legislation principles to determine the scope of the right to an individualized hearing might impede agencies' ability to carry out their obligations. Although administrative efficiency is not the focus of this Article, I will briefly consider class legislation's potential impact on administrative functions in Part IV, Conclusions and Future Work.

366. FULLER, *supra* note 3, at 46–47.

367. *See supra* Section II.A.

368. The concept of generality is not necessarily coextensive with a preference for general rules as opposed to individualized rules. In *The Morality of Law*, Fuller expresses a preference for generality but is clear that this is a preference for rules over the absence of rules; in his view, individualized rules like special legislation can be "general," albeit perhaps unfair, provided that they are direct general principles of conduct. FULLER, *supra* note 3, at 46–47. However, contrary to this view, in his subsequent Reply to Critics, Fuller later explains that the kind of generality demanded by the rule of law prohibits the government from enacting special legislation to punish a named individual. FULLER, *supra* note 3, at 210. In this Part, I adopt this latter view of generality, consistent with the view of generality valorized by the class legislation doctrine.

369. Quivira Min. Co. v. U.S. Nuclear Regul. Comm'n, 866 F.2d 1246, 1248 (10th Cir. 1989).

affected by the regulation.[370] Although acknowledging that the regulation would apply to one entity alone, the Tenth Circuit rejected the request for an individualized hearing.[371] But, employing class legislation principles would have brought the issue of specificity into focus, giving the court the language and tools to describe what might be wrong with agency action targeting a single entity. Similarly, in *LC&S*, the Seventh Circuit upheld a zoning amendment made without any notice or opportunity to the affected plaintiffs—despite the court's acknowledgment that "the plaintiffs were the target, and so far as appears the only target" of the zoning change.[372] As in *Quivira*, taking class legislation principles into account would have allowed the court to focus explicitly on the issue of specificity when making a determination about the scope of the right to an individualized hearing. In both cases, employing class legislation principles would have increased the likelihood that the court would have required the agency to provide a hearing before taking targeted action.[373]

In still other cases, courts do appear to take generality into account, but fail to articulate a firm basis for doing so. In *Harris*, for example, the Ninth Circuit held that due process required an individualized hearing when a county government targeted an individual person's property for rezoning, prohibiting his planned use of the property.[374] The outcome appears to be justified under standard class legislation doctrine because it turned on the government's unique treatment of the property owner.[375] Explicitly importing the class legislation doctrine into the *Londoner/Bi-Metallic* distinction would probably not change the result in cases like *Harris*. However, doing so could give the court a firmer doctrinal basis for the result it reached.

B. Coherence

The rule of law is promoted when legal requirements are coherent with one another.[376] In one formulation, two propositions are coherent if they not only are

370. *Id.* at 1261.

371. *Id.* at 1261–62.

372. LC&S, Inc. v. Warren Cty. Area Plan Comm'n, 244 F.3d 601, 604 (7th Cir. 2001) (upholding zoning amendment even when "the plaintiffs were the target, and so far as appears the only target").

373. To be sure, there are difficult cases. For example, it is possible to frame a regulation in facially general terms even though, as a practical matter, it applies only to known individuals. But, here, too, a focus on class legislation principles can help courts apply the principle of generality. State courts often tend to find that a provision creating a closed class, although written in general terms, is impermissibly specific. By contrast, courts tend to find that classifications are permissibly general if they create an open class, that is, one into which others plausibly could fall in the future. *E.g.*, Ark. Health Servs. v. Reg'l Care, 93 S.W.3d 672, 681 (Ark. 2002). If class legislation principles are imported into the *Londoner/Bi-Metallic* distinction, courts will be able to apply the value of generality even in difficult cases.

374. Harris v. Riverside, 904 F.2d 497, 502 (9th Cir. 1990).

375. *Cf.* Loan Ass'n v. Topeka, 87 U.S. 664 (1874) (invalidating legislation that singled out one industry alone for special benefits).

376. FULLER, *supra* note 3, at 68–69. Rather than coherence, Fuller expresses the idea in the negative: the rule of law is compromised when the law is full of contradictions. By contradictory laws, he means not necessarily logically incompatible but also laws that do not fit well together. *Id.* The failure to make law because of contradictions in the laws, as Fuller describes it, can be considered the converse of coherence.

logically consistent, but also "fit together" or are mutually supporting.[377] In a slightly different formulation, Fuller described the converse relationship: two legal propositions as "incompatible" or "inconvenient" when they "do not go together or do not go well together," even if they are not strictly contradictory.[378] Under either of these views of coherence, conforming the *Londoner/Bi-Metallic* distinction to class legislation principles reveals mixed results: a class legislation-based distinction does not closely cohere with standard doctrine related to legislative classifications. It does, however, closely cohere with some discrete doctrinal areas that also reflect class legislation strategies. And equally importantly, reading class legislation analysis into the *Londoner/Bi-Metallic* distinction makes the Due Process Clause internally coherent by joining its substantive and procedural components in a single doctrine.

1. Class Legislation Undermines Coherence

While it once held a primary place in constitutional law,[379] the class legislation doctrine has become all but dormant. In the familiar telling of the story, the concepts and strategies necessary to sustain the class legislation doctrine became increasingly untenable in light of the massive social and economic upheaval precipitated by the Great Depression.[380] As the Court began to uphold New Deal economic and social legislation more reliably,[381] the class legislation doctrine began to fade as a serious impediment to state and federal regulation. The well-known case, *West Coast Hotel v. Parrish*, is a useful inflection point.[382] Because it upheld legislation protecting women and minors, groups viewed as real and natural classes,[383] it could easily be seen as a case within the class legislation tradition.[384] However, because the Court also referred to the plight of workers, a group not traditionally viewed as a real or natural class,[385] *West Coast Hotel* also could easily be

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377. There are different ways of formulating coherence. *See* Catherine Z. Elgin, *Non-Foundationalist Epistemology: Holism, Coherence, and Tenability*, *in* CONTEMPORARY DEBATES IN EPISTEMOLOGY 244, 246 (2014) ("There is no universally accepted criterion of coherence. But at least this is required: the components of a coherent account must be mutually consistent, cotenable and supportive. That is, the components must be reasonable in light of one another."); *see also* KEITH LEHRER, THEORY OF KNOWLEDGE 94–96 (1990) (describing the explanatory coherence theory).

378. FULLER, *supra* note 3, at 68–69. Fuller's contradictions in the laws can be considered the converse of coherence as described above.

379. GILLMAN, *supra* note 17, at 193.

380. *Id.*

381. *E.g.*, W. Coast Hotel v. Parrish, 300 U.S. 379, 400 (1937).

382. *Id.* There is disagreement as to whether *West Coast Hotel* represents the affirmative rejection of the *Lochner* era. Because there were cases before *West Coast Hotel* that seemed to reject class legislation doctrine, *West Coast Hotel* does not appear to be a definitive dividing line ending the *Lochner* era.

383. *E.g.*, Muller v. Oregon, 208 U.S. 412 (1908).

384. *West Coast Hotel*, 300 U.S. at 398. The Court's language supports this reading:

> The legislature of the State was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances.

Id.

385. GILLMAN, *supra* note 17, at 89 ("In an age of increasingly large combinations of capital, acceptance of the argument that workers working in large industries were 'helpless' and in need of

described as a case departing from the class legislation tradition.[386] Indeed, the Court's language in *West Coast Hotel* supports both of these readings.

Around the same time as *West Coast Hotel*, the Court began to uphold statutes that appeared to reject class legislation doctrine definitively. Famously, in *Carolene Products*, the Court upheld the Filled Milk Act without considering whether the legislation created classifications that mapped onto real-world classes, suggesting the rejection of traditional class legislation strategies.[387] Specifically, the Court held that neither the Fifth nor Fourteenth Amendment requires "legislatures to prohibit all like evils, or none. A legislature may hit at an abuse which it has found, even though it has failed to strike at another."[388] And in the *Semler* case, even more explicitly, the Court held that a regulated party has no "ground for objection because the particular regulation is limited to dentists and is not extended to other professional classes. The State was not bound to deal alike with all these classes, or to strike at all evils at the same time or in the same way."[389] This language appears to definitively reject the class legislation doctrine strategy of searching for real or natural classes.

This same basic approach characterizes the vast majority of cases in which modern courts consider legislative classifications.[390] In *Minnesota v. Clover Leaf*, the Court considered a state statute that banned the sale of milk in plastic, nonreturnable, nonrefillable containers while permitting sales of other nonreturnable, nonrefillable containers.[391] The challenger's argument was one that would have resonated deeply with a court employing class legislation strategies: that the legislature could not ban one type of container in order to reduce environmental waste while permitting another type of container that also created environmental waste.[392] But, as is typical in modern cases, the Court rejected the challenge, holding that a legislature's classification need not be based on real differences.[393] Rather, "a legislature need not strike at all evils at the same time or in the same way" and "may implement [its] program step by step, . . . adopting regulations that only *partially ameliorate a perceived evil* and deferring complete elimination of the evil to future regulations."[394]

'special protection' would have signaled the collapse of the long-standing distinction between legitimate public-purpose legislation and illegitimate class politics, at least as applied to most labor legislation.").

386. *West Coast Hotel*, 300 U.S. at 399. The Court's language also supports this alternative reading:

> The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well-being but casts a direct burden for their support upon the community.

Id.

387. United States v. Carolene Prods., 304 U.S. 144 (1938). These concepts were already part of constitutional thinking before *Carolene Products*.

388. *Id.* at 151.

389. *E.g.*, Semler v. Oregon, 294 US 608, 610 (1935).

390. Minnesota v. Cloverleaf Creamery, 449 U.S. 456 (1981).

391. *Id.*

392. *Id.* at 463–64.

393. *Id.* at 466.

394. *Id.* (emphasis added) (internal citations omitted).

Just as the Court rejected the real or natural class component of class legislation doctrine in *Semler*, *Carolene Products*, and *Clover Leaf*, modern doctrine also largely rejects other class legislation strategies, including challenges to statutes based on the specificity of the classification,[395] challenges based on economic favoritism of one class over another,[396] and challenges based on congruence between benefits and burdens.[397] In light of the modern Court's rejection of class legislation doctrine strategies when reviewing legislative classifications, a *Londoner/Bi-Metallic* distinction based on the class legislation doctrine would be incoherent with major strains of modern constitutional law.

2. Class Legislation Supports Coherence

Although a *Londoner/Bi-Metallic* distinction based on the class legislation doctrine would be an outlier in modern constitutional law, some areas of constitutional law continue to reflect class legislation principles. Recognizing the class legislation origin of the *Londoner/Bi-Metallic* distinction, therefore, would make it more coherent with these areas of the law. For example, consider the Court's "class of one" theory of equal protection.[398] In *Village of Willowbrook v. Olech*, homeowners claimed that the local government demanded an abnormally large easement compared with the demand made on other homeowners. [399] Although the homeowners claimed no membership in a protected class, the Court held that their claim implicated traditional equal protection analysis.[400] Recognizing a theory that had been developed in the lower courts, the Supreme Court held that a person may not be singled out as a "class of one" by government action if the differential treatment was "irrational and wholly arbitrary."[401] The "class of one" theory bears a strong resemblance to parts of the class legislation tradition. Just like the long line of cases disfavoring or invalidating special legislation, the class of one theory of equal protection recognizes that there is something illegitimate about legislative targeting, even if the person targeted is not targeted because of a suspect trait.

Similarly, the Court's "animus" cases suggest that the Court will apply rational basis "with bite" when it identifies animus on the part of the legislature.[402] The

395. Patchak v. Zinke, 138 S. Ct. 897 (2018) (upholding statute that applied to a single lawsuit challenging a single agency action).

396. Williamson v. Lee Optical, 348 U.S. 483 (1955); *see also* Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 108 (2003) ("'The task of classifying persons for . . . benefits . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.") (internal citations omitted); Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 287 (2d Cir. 2015) ("Much of what states do is to favor certain groups over others on economic grounds. We call this politics. Whether the results are wise or terrible is not for us to say, as favoritism of this sort is certainly rational in the constitutional sense.").

397. Penn Central Transpo. Co. v. N.Y.C., 438 U.S. 104, 104. *But see* Dolan v. Tigard, 574 U.S. 374, 391 (1994) (requiring rough proportionality between exaction and value of development).

398. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564–65 (2000).

399. *Id.*

400. *Id.* at 565.

401. *Id.*

402. *See* Romer v. Evans, 517 U.S. 620, 623 (1996); William D. Araiza, *Regents: Resurrecting Animus*, 51 SETON HALL L. REV. 983 (2021) [hereinafter Araiza, *Regents*].

Court has held that a legislative "desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[403] Importantly, this desire to harm can be unconstitutional even if the person harmed is not targeted because of a suspect trait. In *Cleburne*, the Court specifically rejected the argument that intellectual disability is a suspect trait.[404] Nevertheless, the Court held that it would not be legitimate for the city to deny a permit for a group home for the intellectually disabled out of a "bare desire to harm" them.[405] And famously, in *Windsor*, the Court considered the validity of the Defense of Marriage Act's definition of marriage to include only a man and a woman.[406] The Court invalidated the statute, holding that "DOMA singles out a class" of people joined in same-sex marriage and "imposes a disability" on them with "the purpose and effect to disparage and to injure" them.[407] In fact, here the Court explicitly interwove the concepts of due process and equal protection when prohibiting animus-based discrimination, bringing *Windsor* into line with traditional class legislation cases that conflated these and other provisions in the service of addressing impermissible classifications.[408] *Windsor*, *Cleburne*, and other animus cases appear to be direct descendants of class legislation cases rejecting legislation based on spite[409] or creating favored and disfavored classes.[410] As in these previous class legislation cases, animus is enough: even without showing that the injured person is classified according to a suspect trait, it is impermissible to classify for the purpose of imposing unequal burdens when these burdens are driven by aversion, fear, or distaste.[411]

In addition, there appears to be a relationship between modern exactions cases under the Fifth Amendment's Takings Clause and the class legislation doctrine. Often, a state or local agency demands some kind of payment or allocation of land in return for agreeing to grant a landowner a permit to develop the land—in other words, an "exaction." In *Dolan*, the Court held that the government's exaction must be in "rough proportion" to the additional burden on the public anticipated from the land use.[412] This rough proportion requirement resonates with the class legislation requirement that government burdens must be roughly congruent with anticipated benefits.[413] And as was the case with other class legislation cases,[414]

403. United States v. Moreno, 413 U.S. 528 (1973) (italics in original omitted).

404. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985).

405. *Id.* at 446–47.

406. United States v. Windsor, 570 U.S. 744, 752 (2013).

407. *Id.* at 775.

408. *Id.* at 769.

409. Kay, *supra* note 289, at 696.

410. Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 563 (1902).

411. Arguably, the continued vitality of the class of one and animus doctrines are in doubt. In *Engquist v. Or. Department of Agriculture*, 553 U.S. 591 (2008), the Court read the class of one doctrine narrowly. *See* Robert C. Farrell, *The Equal Protection Class of One Claim*, 61 S.C. L. REV. 107, 124 (2009) (arguing that there may be nothing left of the class of one claim). Similarly, in *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1915 (2020) the Court rejected animus arguments despite significant evidence of governmental hostility. *But see* Araiza, *Regents*, *supra* note 402 (arguing that animus might still be available after *Regents of the University of California*, 140 S. Ct. 1891).

412. Dolan v. Tigard, 512 U.S. 374, 391 (1994).

413. Norwood v. Baker, 172 U.S. 269, 278–79 (1898) (requiring congruence between burdens and benefits).

414. For scholarship considering the connection between exactions cases and substantive due process, see Eagle, *supra* note 352, at 20–21 (connecting exaction cases with substantive due process

Dolan's rough proportion analysis requires the government to "make some sort of individualized determination" before imposing a burden.[415]

Finally, recognizing the remnants of the class legislation doctrine in modern constitutional law—the class of one, animus, and exaction doctrines—suggests one final, powerful way that incorporating class legislation into the *Londoner/Bi-Metallic* distinction can bring coherence to the law: it creates a bridge connecting substantive and procedural due process. By its text, of course, the Due Process Clause is not divided into substantive and procedural components. Moreover, as a historical matter, the bifurcation of due process into distinct substantive and procedural concepts is a relatively recent development, postdating the adoption of the clause into the Constitution's Fifth Amendment.[416] The conceptual division of due process into substantive and procedural components, therefore, obscures the common origin and function of the protections we normally categorize separately as procedural and substantive due process.

But, reconnecting the right to an individualized hearing with the class legislation doctrine helps due process reemerge as a coherent whole, incorporating both its substantive and procedural components.[417] Class legislation—including a value favoring generality and a disfavoring classifications based on favoritism or animus—is often associated with substantive due process.[418] Concomitantly, the right to an individualized hearing—including notice and the opportunity to present facts and arguments to a decision-maker—are key components of procedural due process.[419] Incorporating class legislation principles into the right to an individualized hearing, therefore, makes it evident that due process is a single concept, unified across both substance and procedure.

C. Clarity and Congruence

The rule of law valorizes both clarity in law and congruence between the law as written and the way that officials enforce it.[420] These two attributes might be seen as complementary: they ensure that individuals know what conduct is permitted, prohibited, or required; and they ensure that the meaning of the law is not so

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and class legislation doctrine); William Funk, *Reading* Dolan v. Tigard, 25 ENV. L. 127, 133 (1995) (noting the role of specificity in the *Dolan* Court's analysis).

415. *Dolan*, 512 U.S. at 391 (1994).

416. Simona Grossi, *Procedural Due Process*, 13 SETON HALL CIR. REV. 155, 158 ("[N]o such distinction originally defined due process. The distinction was rather a product of that separation of procedure and substantive law that came with the demise of the original writs and forms of action . . . ."); Williams, *supra* note 177, at 416–17 ("distinction between the two concepts was not generally recognized until the early twentieth century").

417. Yudof, *supra* note 20, at 1377.

418. GILLMAN, *supra* note 17, at 9–10 (arguing that state and federal courts during the *Lochner* era were engaged in an effort to distinguish between legitimate promotions of the public interest and illegitimate efforts to impose special burdens and benefits, that is, class legislation); Cushman, *supra* note 176, at 882, 999 (describing the debate over the role of class legislation in Lochnerism and concluding that "the principle of neutrality, and particularly the prohibition on taking from A and giving to B, constituted the preeminent strand of substantive due process jurisprudence"). Bernstein disputes the extent to which substantive due process in the *Lochner* era should be associated with class legislation doctrine. Bernstein, *supra* note 176, at 1031.

419. Friendly, *supra* note 1, at 1279–95 (1975) (describing elements of a fair hearing).

420. FULLER, *supra* note 3, at 39.

indeterminate as to leave individuals wholly at the mercy of official discretion. Here, as with coherence, linking the *Londoner/Bi-Metallic* distinction to class legislation doctrine yields mixed results. On one hand, it promotes clarity and congruence by providing helpful guidelines for government actors to follow when classifying and reviewing classifications. On the other hand, it introduces significant interpretive challenges, making the law less clear and widening the berth for official discretion.

1. Class Legislation Supports Clarity and Congruence

Importing the class legislation doctrine into the *Londoner/Bi-Metallic* distinction will promote clarity and congruence by helping courts define the scope of the right to an individualized hearing in some difficult cases. It does so both by directing courts toward useful strategies to implement the *Londoner/Bi-Metallic* distinction and also by directing them away from less helpful strategies that courts commonly employ.

First, courts can employ class legislation principles as useful strategies when implementing the *Londoner/Bi-Metallic* distinction. As noted above, courts sometimes struggle with how to handle classifications that single out a particular entity. Class legislation strategies make these cases easier and more predictable by suggesting that targeting an individual is normally sufficient to warrant an individualized hearing.[421] Similarly, courts are inconsistent about considering the government's motivations for classifying, even when it appears likely that the government is motivated by a desire to provide a special benefit as a favor[422] or to levy a burden out of animus.[423] A court employing class legislation principles would better be able to recognize the problem with a classification based on favoritism or animus and require an individualized hearing before the agency acts.

Second, employing class legislation principles when determining the scope of the right to an individualized hearing would help courts steer clear of considerations that sometimes muddy their analysis or make it less predictable. For example, courts often rely on the standard justifications for the *Londoner/Bi-Metallic* distinction when deciding whether to grant an individualized hearing, sometimes trying to determine whether the government's action is formally "legislative" or "judicial" in character[424] and sometimes attempting to disentangle legislative from adjudicative facts.[425] Although these explanations have some intuitive appeal, as argued above,

421. *See supra* Section II.B.

422. Mack Trucks v. EPA, 682 F.3d 87, 93 (D.C. Cir. 2012) ("[T]he only purpose" of the agency's action is to "rescue a lone manufacturer from the folly of its own choices.").

423. LC&S, Inc. v. Warren Cty. Area Plan Comm'n, 244 F.3d 601, 604 (7th Cir. 2001) (upholding action taken without an individualized hearing although it was taken to prohibit a planned use that was "anathema" to the town council).

424. *Id.* (relying on legislative character of ordinance to deny an individualized hearing); Onyx Prop. v. Elbert Cnty., 838 F.3d 1039 (10th Cir. 2016) (relying on fact that zoning is "legislative" to deny an individualized hearing).

425. Mascow v. Franklin Park, 950 F.3d 993, 996 (7th Cir. 2020); Virgin Islands Hotel Ass'n, Inc. v. V.I Water & Power Auth., 476 F.2d 1263, 1268–69 (3d Cir. 1973).

they have limited explanatory power and probably provide little predictability for courts employing the *Londoner/Bi-Metallic* distinction.[426]

Similarly, and in a valiant attempt to make sense of the language of the APA, the D.C. Circuit has purported to consider whether the government's action has a prospective effect when determining whether an agency action is a rule or an adjudication. [427] In *Safari Club*, the court of appeals reviewed an agency determination that the killing of elephants in Zimbabwe in 2014 and 2015 did not "enhance the survival of the species;" the effect of the determination was to prohibit the importation of sport-hunted elephant trophies taken in Zimbabwe during that period.[428] The court concluded that the determination was a rule—and therefore should have gone through notice and comment—in part because "rules generally have only 'future effect' while adjudications immediately bind parties by retroactively applying law to their past actions."[429]

Whether a government action is retrospective or prospective may well be relevant to a court employing class legislation principles; indeed, rules are often made retroactive specifically to target a particular individual.[430] But, as a stand-alone factor, a retroactive/prospective distinction provides little guidance to courts making a *Londoner/Bi-Metallic* distinction. Indeed, even in *Safari Club* itself, the government's action *was* retroactive—its effective date preceded its promulgation by several months. Nevertheless, the court of appeals held that the guidance did not trigger a hearing because its "issuance resulted in no immediate legal consequences for any *specific party*."[431] As the court's reasoning suggests, the retroactive nature of the government's action was not actually relevant to its decision. Rather, the court was using it as a proxy for specificity. Read in this way, the court's detour into a discussion about retroactivity did not assist in its analysis. Like other courts' attempts to sort out adjudicative from legislative facts or the formal distinction between the legislative or judicial character of agency action, the D.C. Circuit's inquiry into prospectivity was of little assistance and would have been better avoided altogether.

2. Class Legislation Undermines Clarity and Congruence

Although applying class legislation strategies to the *Londoner/Bi-Metallic* distinction supports rule of law values by providing courts with some strategies to improve both the clarity of the law and congruence between the law and its application, the story is not so simple. Indeed, interpreting the right to an individualized hearing according to class legislation principles might detract from rule of law values by injecting significant, perhaps fatal, uncertainty into its application.

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426. And still other courts rely on the importance of the rights at stake to determine whether a hearing is required. Appalachian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973). This factor is probably too subjective to be usefully applied.

427. Safari Club Intern. v. Zinke, 878 F.3d 316, 319 (D.C. Cir. 2017).

428. *Id.*

429. *Id.*

430. Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 693 (1960).

431. *Safari Club Intern.*, 878 F.3d at 333–34.

First, class legislation has a very real "public relations" problem because of its association with *Lochner*.[432] As is well-known, the Court's 1905 *Lochner* case invalidated a state law setting the maximum number of hours that bakery employees could work per week.[433] There is near-universal agreement that the case was wrongly decided—and not only that, but that both the case itself and the era that bears its name are worthy of moral condemnation.[434] *Lochner* is a "famously indefensible" part of the constitutional "anticanon," a group of cases so universally reviled that they are considered to be exemplars of "how not to adjudicate constitutional cases."[435] Accordingly, any doctrinal strategy associated with *Lochner* has an uphill battle, to put it mildly, to acceptance. Irrespective of any merits it might possess, an association with *Lochner*, whether real or imagined, would make a doctrine anathema to most courts.[436]

Although there is no consensus about what animated the Court's *Lochner*-era cases,[437] one serious contender is that it was motivated to some degree by an aversion to class legislation.[438] There is, to be sure, some debate about how much *Lochner* was motivated by class legislation concerns.[439] Nevertheless, the mere possibility of employing a strategy used by the *Lochner* Court is likely disconcerting enough to dissuade judges from sifting through class legislation doctrine for strategies to resolve questions about the right to an individualized hearing. As a result, the connection, real or imagined, between *Lochner* and class legislation presents a serious challenge to using the class legislation strategies today.[440]

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432. For a discussion about modern concerns about resurrecting *Lochner*, see Thomas Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527 (2015).

433. Lochner v. New York, 198 U.S. 45, 60–61 (1905).

434. David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 373 (2001) ("*Lochner v. New York* would probably win the prize, if there were one, for the most widely reviled decision of the last hundred years."); Colby & Smith, *supra* note 432, at 528 ("[T]he overwhelming majority of scholars and judges, liberal and conservative alike, agree on Lochner's disfavored status."); *see also* MICHAEL J. PHILLIPS, THE LOCHNER COURT, MYTH AND REALITY 7 (2001) (arguing that *Lochner* has been "almost universally condemned").

435. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 380, 386, 417 (2011).

436. Strauss, *supra* note 434, at 373 ("You have to reject Lochner if you want to be in the mainstream of American constitutional law today."). However, *Lochner,* broadly defined, has its defenders. DAVID E. BERNSTEIN, REHABILITATING LOCHNER 123 (2011) (arguing that *Lochner* itself was not particularly radical).

437. Strauss, *supra* note 434, at 374 ("The striking thing about the disapproval of *Lochner*, though, is that there is no consensus on why it is wrong."); Greene, *supra* note 435, at 418 (noting that there is disagreement about why *Lochner* is nearly universally condemned); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1460 (2015) (noting some of the different ways that *Lochner* has been read). David E. Bernstein, *Lochner Era Revisionism, Revised*, 92 GEO. L.J. 1, 10–11 (2003) (describing the debate over the origin of *Lochner*).

438. GILLMAN, *supra* note 17, at 9–10 (arguing that *Lochner*-era courts were engaged in an effort to distinguish between legitimate promotion of the public interest and illegitimate efforts to impose special burdens and benefits, that is, class legislation); Cushman, *supra* note 176, at 882, 999 (describing the debate over the role of class legislation in Lochnerism and concluding that "the principle of neutrality, and particularly the prohibition on taking from A and giving to B, constituted the preeminent strand of substantive due process jurisprudence").

439. Bernstein, *supra* note 176, at 1030 ("Gillman also overstated the degree to which the prohibition on class legislation led the late-nineteenth-century Supreme Court to invalidate legislation.").

440. *See e.g.*, Nourse and Maguire, *supra* note 20, at 1004 (reviving class legislation doctrine can lead to concerns about Lochnerism).

On the other hand, and despite the potentially toxic effect of its association with *Lochner*, class legislation already has made scholarly inroads in ways that have not drawn criticisms of Lochnerism. In recent decades, a few scholars have argued that insights from class legislation should be used to inform modern doctrine. William Eskridge, for example, argued that the Equal Protection Clause can be read to include a prohibition on class legislation, including bans on same-sex marriage.[441] Similarly, William Araiza has argued that the class legislation tradition can give modern courts firmer ground to develop the line of cases that prohibit government action based in animus against a disfavored group. In his view, *Obergefell* can be read as a case employing traditional class legislation doctrinal strategies.[442] Jack Balkin has argued that laws limiting abortion access can be considered class legislation because they "discriminate against women and keep them in conditions of dependency."[443] Mark Yudof has argued that reading class legislation principles into the Fourteenth Amendment can give courts a justification for striking down laws that discriminate based on sex.[444] And Victoria Nourse and Sarah Maguire argued that class legislation principles can provide a roadmap to good governance, arguing that general laws are better laws because they link the governors to the governed.[445] As these arguments show, class legislation is by no means a shibboleth for Lochnerism in modern scholarship, no matter whether they are connected as a historical matter. In conclusion, although the possible connection between class legislation and *Lochner* would likely have dissuaded judges from pursuing class legislation-based arguments for many years, the stigma seems to have faded considerably, at least among scholars. As a result, courts might also feel free to explore the applicability of class legislation strategies.

Second, and closely related to the atmospheric condition described above, using the class legislation doctrine does, in fact, require some significant subjective judgments that undermine the kind of clarity and congruence normally associated with rule of law values. For example, whether a statute is sufficiently targeted to trigger a hearing can be challenging. Indeed, state courts applying special legislation principles under their state constitutions still sometimes struggle to distinguish between laws that are permissible despite their specificity and legislation that is impermissibly targeted.[446]

Similarly, whether legislative burdens and benefits are congruent is also steeped in subjectivity. Even during the period in which class legislation was taken seriously, courts balked at doing the type of calculations necessary to determine whether the legislature had offset burdens with concomitant benefits.[447] However, it should be noted that this objection is not as strong in the context of hearing rights

441. Eskridge, *supra* note 20, at 1091.

442. Araiza, *supra* note 20, at 201–202, 209.

443. Balkin, *supra* note 20, at 319–20.

444. Yudof, *supra* note 20, at 1366.

445. Nourse & Maguire, *supra* note 20, at 965; *see also* Weishart, *supra* note 20, at 1179 (connecting class legislation with the right to education).

446. DANIEL MANDELKER, JUDITH WEGNER, JANICE GRIFFITH, EVAN ZOLDAN & CYNTHIA BAKER, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 669–671 (9th ed. 2020) (describing wide variety of ways that courts interpret state special legislation provisions).

447. Henderson Bridge Co. v. Henderson City, 173 U.S. 592, 616 (1899) (noting that courts need not make an exact calculation of benefits and burdens).

as it is in the context of a constitutionalized class legislation doctrine. Applying class legislation strategies in the context of hearing rights does not lead courts to *strike down* laws when they cannot calculate benefits and burdens; rather, it merely asks them to remand for an individualized hearing so that the agency can make this determination.

Finally, and perhaps most troubling, consider the difficulty that attends distinguishing a classification that maps onto a real or natural class from an arbitrary selection.[448] No two things or people are identical. As a result, any grouping of people or things into a class must rest on a judgment about whether their similarities and differences are *relevantly* similar or different.[449] To the progressive-era Court, it was obvious that the differences between men and women are relevant to employment decisions. [450] To modern eyes, these differences appear largely irrelevant; and any legal distinctions that flow from them appear to be arbitrary and illegitimate, even vicious. Like the decision about whether men and women workers are part of the same class, many decisions that require distinguishing real classes from arbitrary selections will require judges to rely heavily on their intuition rather than on preexisting legal or scientific categories. The prospect of allowing judges to second-guess legislative classifications in a way that invites such overt reliance on intuition raises at least some concerns that sound in Lochnerism.

IV. CONCLUSIONS AND FUTURE DIRECTIONS

The modern right to an individualized hearing tracks the distinction between *Londoner* and *Bi-Metallic*, two progressive-era Supreme Court cases that have generated more than their share of scholarly and judicial attention. This Article's investigation into the origin of the *Londoner/Bi-Metallic* distinction allows us to draw a number of conclusions—some of them quite surprising—and all of which light the way toward future scholarship.

A. Rethinking Londoner and Bi-Metallic

First, this Article suggests that scholars rethink the standard justifications for the *Londoner/Bi-Metallic* distinction. Many of these justifications are wanting, either because they lack a persuasive theoretical basis or because they fail to fit the facts of *Londoner* and *Bi-Metallic* themselves. This Article suggests an explanation for these cases that has been hiding in plain sight. *Londoner* and *Bi-Metallic* fit neatly within the intellectual and legal environment in which they were decided—an environment resonant with concerns about class legislation. Because of the importance of the right to an individualized hearing, scholars will continue to rely on these cases in their work. And when they write about these cases in the future, scholars can, and should, explain them as a routine implementation of the once-pervasive doctrine of constitutional law, the class legislation doctrine.

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448. Courts sometimes attempt to distinguish between real classes and arbitrary selections in the context of determining the right to an individualized hearing. *See* Coniston Corp. v. Vill. of Hoffman Ests., 844 F.2d 461, 468–69 (7th Cir. 1988) (distinguishing between targeted agency action and action that affects "a whole class of people").

449. Joseph Tussman & Jacobusten Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 343–44 (1949); *see also* GOWDER, *supra* note 3, at 30–32 (adopting a substantive view of equality).

450. Muller v. Oregon, 208 U.S. 412 (1908).

B. Reserving Judgment on Class Legislation

Second, this Article suggests that scholars adopt a more nuanced view of class legislation than is typically presented. Class legislation has been characterized as a mechanism for courts to arrogate power to themselves by second-guessing policy judgments reached by democratically elected representatives. By contrast, some modern scholars see it as way to combat legislative bias, discrimination, and inequality. Although these characterizations seem starkly at odds, the uncomfortable truth appears to be that these two aspects of class legislation doctrine are both true—and indeed, are two sides of the same coin. It is the ability of class legislation doctrine to pierce the façade of formally equal government action that allows it to combat bias in a meaningful way. However, this very same ability is a temptation for courts to overreach their bounds; once they arrogate to themselves the authority to opine on the persuasiveness of a classification, it is easy for courts to migrate overtly from interpretation to policymaking. This Article's identification of the doctrinal *strategies* that composed the class legislation doctrine can help scholars evaluate class legislation doctrine in a more nuanced way. Before rejecting it outright, scholars should take note of the strategies that made it a viable conceptual tool in state and federal courts for so long. But before advocating for its revival too enthusiastically, scholars should soberly assess which of its strategies might lead to unanticipated, and unwanted, consequences.

C. Reviewing Normative Conclusions

Third, this Article suggests that, as a normative matter, whether courts should adopt the class legislation doctrine as a model for the *Londoner/Bi-Metallic* distinction is not straightforward. At the very least, with respect to many of the characteristics of the rule of law, the results are mixed.[451] And to be sure, considerations other than the rule of law are important as well. For example, we could consider whether linking class legislation to the scope of the right to an individualized hearing will impede the work of agencies to an unacceptable degree. Although a full normative assessment on the grounds of administrative convenience is important, I have excluded this question from the scope of the present Article because I believe it deserves more lengthy treatment than space here permits. But future scholarship addressing the issue of administrative convenience and class legislation should focus on the following point: whether imposing additional hearing requirements on agencies is unduly burdensome depends both on what process the hearing replaces and what kind of hearing is required.

Consider the following examples: If a federal agency wants to engage in rulemaking but is required to offer an individualized hearing instead, one might think that the agency is facing an additional burden. However, if the agency is required to offer only an informal hearing, then a hearing requirement would often be *less* onerous than the rulemaking alternative. This unintuitive result is driven by the fact that statutory rulemaking procedures, that can be burdensome in their own right. By contrast, if the agency is required to offer a formal proceeding rather than

451. *See supra* Part III.

an informal one, then the hearing requirement would likely be more onerous than the rulemaking alternative.

Consider, also, a different scenario: the agency wants to proceed without any hearing because it believes it is engaging in a "legislative" act—perhaps a zoning board or city council seeks to approve amendments to a zoning plan. One might think that any hearing would increase the burden on the agency compared with having no hearing. However, whether a hearing requirement increases the burden on the agency depends on the alternative: perhaps the city council meets rarely or meets in open session with live, public participation. Under these circumstances, moving the decision-making process out of a quasi-legislative process and into an administrative hearing might be more efficient. By contrast, if the city council or zoning board makes decisions summarily, then the addition of any hearing requirement, even an informal one, might increase the burden on the agency.

Finally, concluding that a hearing requirement increases the burden on an agency is the not the same as concluding that the increased burden is *undue*. There is not universal agreement that increasing burdens on agencies is always negative—in some persuasive accounts, whether the additional burden is worth it depends on the kind of information that the agency is seeking and the kind of action it is contemplating.[452] The additional burden placed on an agency might be worth it if, for example, it reduces the likelihood that the agency acts out of favoritism or animus.

D. Reviving Legislative Generality

Fourth and finally, this Article suggests that a value of legislative generality continues to play a significant role in modern constitutional law. In previous work, I have identified a value of legislative generality present in early American law. Although legislative generality is no longer regularly applied as a stand-alone constitutional doctrine, this Article demonstrates how the value has persisted—changed, no doubt, but persisted—since the early days of the republic. As a result, this Article connects seemingly unrelated concepts within modern constitutional law, including the *Londoner*/*Bi-Metallic* distinction, the class of one doctrine, and the animus doctrine. These doctrines are normally considered to be unconnected islands of meaningful judicial oversight in a sea of rational basis review. But, as this Article suggests, they are better seen as an archipelago formed by a common origin, the value of legislative generality.

452. *See* Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 259 (2014) (arguing that "the criticisms leveled against formal rulemaking should sometimes be rethought"). For an argument that the APA was drafted against a background assumption that there would be more formal adjudications, see Emily Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377 (2021).