

2021

Protecting Mixed-Status Families: Equal Protection Analysis of the Dual Social Security Number Requirement

Nena Gallegos

Follow this and additional works at: <https://chicagounbound.uchicago.edu/uclf>



Part of the [Law Commons](#)

Recommended Citation

Gallegos, Nena (2021) "Protecting Mixed-Status Families: Equal Protection Analysis of the Dual Social Security Number Requirement," *University of Chicago Legal Forum*: Vol. 2021, Article 15.

Available at: <https://chicagounbound.uchicago.edu/uclf/vol2021/iss1/15>

This Article is brought to you for free and open access by Chicago Unbound. It has been accepted for inclusion in University of Chicago Legal Forum by an authorized editor of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

Protecting Mixed-Status Families: Equal Protection Analysis of the Dual Social Security Number Requirement

Nena Gallegos[†]

I. INTRODUCTION

In response to COVID-19, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (CARES Act)¹ on March 27, 2020. One important provision of the CARES Act provided stimulus payments of \$1,200 to individual taxpayers (\$2,400 for individuals filing a joint return) plus \$500 for each qualifying child of the taxpayer.² However, 26 U.S.C. § 6428(g)(1)(B) limited this payment to individuals who have a social security number (SSN) and, in the case of a joint return, *both* spouses must have an SSN.³ The CARES Act was not the first federal economic benefit legislation to include this requirement (hereinafter referred to as “Dual SSN Requirement”⁴), as Congress has periodically included the Dual SSN Requirement since 1996.⁵ The Dual SSN Requirement in the CARES Act was, however, the first to face equal protection challenges from mixed-status family members.⁶ After the judges in two CARES Act cases denied the government’s motion to dismiss,⁷ Congress authorized a second round of stimulus payments that notably

[†] B.S., American University, 2019; J.D. Candidate, The University of Chicago Law School, 2022. Many thanks to Professor Aziz Huq for his invaluable guidance and thoughtful feedback. I would also like to thank the past and present editors of *The University of Chicago Legal Forum* for their insightful contributions.

¹ Pub. L. No. 116-136, 134 Stat. 281, 15 U.S.C. § 9001 (2020).

² 26 U.S.C. § 6428(a).

³ 26 U.S.C. §§ 6428(g)(1)(A)–(B).

⁴ This Comment uses “Dual SSN Requirement” to refer specifically to a statutory scheme that requires *both* spouses listed on a joint return to have an SSN to receive a federal economic benefit. As discussed in Part II.B *infra*, legislation could instead require only one spouse to have an SSN. That requirement is distinct from the Dual SSN Requirement this Comment discusses.

⁵ See *infra* Part II.B.

⁶ See *R.V. v. Mnuchin*, No. 20-cv-1148, 2020 WL 3402300 (D. Md. June 19, 2020); *Amador v. Mnuchin*, 476 F. Supp. 3d 125 (D. Md. 2020).

⁷ See *R.V.*, 2020 WL 3402300, at *8; *Amador*, 476 F. Supp. 3d at 152.

lacked the Dual SSN Requirement.⁸ More strikingly, Congress retroactively amended the CARES Act to remove the Dual SSN Requirement.⁹

Congress did not explain its reasoning for this retroactive change.¹⁰ It is possible that it is the result of a different configuration of negotiators in a changed political climate.¹¹ Another possibility is that Congress perceived a risk that the litigation would be successful and hoped to render the litigation moot to avoid the Court ruling that the Dual SSN Requirement is unconstitutional. By changing the law, Congress may have mooted the two CARES Act suits¹² but specifically left the equal protection issue open. Does the Dual SSN Requirement violate the equal protection rights of mixed-status families? If so, under what circumstances? This Comment is the first to provide a comprehensive answer to these questions.

The Dual SSN Requirement excludes roughly 15 million people who live in mixed-status families from receiving stimulus payments. A mixed-status family is defined as a family in which one spouse files their federal tax returns with an Individual Taxpayer Identification Number (ITIN) because they are ineligible for an SSN.¹³ In 2015, roughly 4.4 million immigrants filed their tax returns with an ITIN,

⁸ See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 272, 134 Stat 1182, 1965–66. Congress has since also passed a third round of stimulus payments that lacks the Dual SSN Requirement. See American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9601, 135 Stat 4, 138–39.

⁹ The amended language now reads:

In the case of a joint return, the \$2,400 amount in subsection (a)(1) shall be treated as being—

(i) \$1,200 if the valid identification number of only 1 spouse is included on the return of tax for the taxable year, and

(ii) zero if the valid identification number of neither spouse is so included.

See Pub. L. No. 116-260, § 273(a)(3).

¹⁰ There is no legislative history on this point. For a comparison of the legislative proposals, see MARGOT L. CRANDALL-HOLLICK, CONG. RSCH. SERV., IN11513, COVID-19 AND DIRECT PAYMENTS TO INDIVIDUALS: COMPARISON OF RECENT PROPOSALS FOR A SECOND ROUND OF PAYMENTS 1–4 (2020), <https://crsreports.congress.gov/product/pdf/IN/IN11513> [<https://perma.cc/Z5LK-J5EJ>].

¹¹ The history of Congress's uneven usage of the Dual SSN Requirement, explored in Part II.B *infra*, could arguably be explained in part by changes in administrations.

¹² Some of the *R.V.* plaintiffs may argue that their litigation is not moot because U.S. citizen children of two undocumented parents are still unable to receive stimulus payments even after the legislative changes. See Pub. L. No. 116-260, § 273(a). However, this Comment focuses on mixed-status families with at least one parent who has an SSN. The accuracy of that mootness argument is thus out of this Comment's scope.

¹³ See Zachary Parolin et al., *The CARES Act and Poverty in the COVID-19 Crisis*, CTR. ON POVERTY & SOC. POL'Y AT COLUM. U. 12 (June 21, 2020), <https://static1.squarespace.com/static/5743308460b5e922a25a6dc7/t/5eefa3463153d0544b7f08b4/1592763209062/Forecasting-Poverty-Estimates-COVID19-CARES-Act-CPSP-2020.pdf> [<https://perma.cc/GCE3-TAJ5>].

paying over \$23.6 billion in taxes.¹⁴ Married U.S. citizens could theoretically file their tax returns separately to obtain the stimulus payments, but filing separately often creates higher tax burdens for married individuals.¹⁵

Citizen spouses and citizen children in mixed-status families each have unique equal protection claims against the Dual SSN Requirement, which the two class action lawsuits challenging the CARES Act illustrated. The first suit, *R.V. v. Mnuchin*,¹⁶ was filed by seven U.S. citizen children with at least one parent without an SSN.¹⁷ The plaintiffs argued that the Dual SSN Requirement violated equal protection under the Fifth Amendment because it discriminated against them based on their parents' status.¹⁸ The second, *Amador v. Mnuchin*,¹⁹ was filed by sixteen U.S. citizens whose spouses lack an SSN.²⁰ These plaintiffs argued that the Dual SSN Requirement violated the Fifth Amendment by burdening their fundamental right of marriage in a discriminatory manner.²¹ To comprehensively understand the equal protection problems presented by the Dual SSN Requirement, this Comment will address the potential claims of both spouses and children in mixed-status families.

This Comment analyzes the equal protection issues raised by the Dual SSN Requirement and argues that it violates the equal protection rights of citizen children and spouses. Part II explains the operation of the Dual SSN Requirement by considering its most recent implementation in the CARES Act, provides a brief history of the Dual SSN Requirement in federal economic legislation, and distills the complex eligibility requirements for an SSN. Part III outlines the tiers of scrutiny within equal protection doctrine relevant to spouses and children in mixed-status families challenging the Dual SSN Requirement. Part IV analyzes whether the Dual SSN Requirement can survive an equal protection challenge under the applicable standards of review. This Part will demonstrate that Congress's use of the Dual SSN Requirement in

¹⁴ NINA E. OLSON, 1 ANNUAL REPORT TO CONGRESS 199 (2015), www.TaxpayerAdvocate.irs.gov/2015AnnualReport [<https://perma.cc/8QQB-FEHR>].

¹⁵ See *Amador v. Mnuchin*, 476 F. Supp. 3d 125, 152 (D. Md. 2020) (explaining that joint filers face a more favorable tax rate than married taxpayers filing separately); *Camara v. Comm'r*, 149 T.C. 317, 318 n.7 (2017) (stating that a married taxpayer filing separately can be disallowed the benefit of the standard deduction, the American Opportunity Credit, the Lifetime Learning Credit, and the Earned Income Tax Credit).

¹⁶ No. 20-cv-1148, 2020 WL 3402300 (D. Md. June 19, 2020).

¹⁷ *Id.* at *1.

¹⁸ *Id.* at *2.

¹⁹ 476 F. Supp. 3d 125 (D. Md. 2020).

²⁰ *Id.* at 135.

²¹ *Id.* at 138.

almost all federal economic benefit legislation is unconstitutional. Part V concludes.

II. OVERVIEW OF THE DUAL SSN REQUIREMENT

A. How the Dual SSN Requirement Operated in the CARES Act

The CARES Act authorized stimulus payments in the form of advanced refunds of tax credits based on “a legal fiction that qualified individuals ‘overpaid’ on previously filed taxes.”²² Section 6428(a) provided for a tax credit for “eligible individual[s]” of \$1,200 (\$2,400 in the case of eligible individuals filing a joint return) plus \$500 for each qualifying child of the taxpayer.²³ An “eligible individual” is any individual other than “(1) any nonresident alien individual, (2) any individual with respect to whom a deduction under section 151 is allowable to another taxpayer . . . and (3) an estate or trust.”²⁴

To receive the stimulus payments, eligible individuals must have met the Dual SSN Requirement. Section 6428(g)(1), before it was amended, stated:

No credit shall be allowed under subsection (a) to an eligible individual who does not include on the return of tax for the taxable year—

(A) such individual’s valid identification number,

(B) in the case of a joint return, the valid identification number of such individual’s spouse, and

(C) in the case of any qualifying child taken into account under subsection (a)(2), the valid identification number of such qualifying child.²⁵

Per § 6428(g)(2)(A), a “valid identification number” is defined in general as an SSN. The end result of these provisions is that for joint filers to receive the \$2,400 tax credit and \$500 per qualifying child, both spouses and each qualifying child must have listed their SSN on their 2019 joint tax return.²⁶ If one spouse listed an ITIN instead, no family member was allowed to receive the stimulus payments before the amendment authorized by the second stimulus package.

²² *R. V.*, 2020 WL 3402300, at *7.

²³ 26 U.S.C. § 6428(a).

²⁴ 26 U.S.C. § 6428(d).

²⁵ 26 U.S.C. § 6428(g)(1).

²⁶ 26 U.S.C. § 6428(f)(1). If the taxpayer did not file a tax return in 2019, then 2018 can be used instead. *See* 26 U.S.C. § 6428(f)(5).

B. Brief History of the Dual SSN Requirement

The three previous economic stimulus bills authorizing advanced refunds in 2001, 2008, and 2009 operated similarly to the pre-amendment CARES Act.²⁷ Each defined “eligible individual” using identical language codified at prior versions of § 6428.²⁸ Crucially, however, not all previous statutes contained the Dual SSN Requirement. While the Economic Stimulus Act of 2008²⁹ contained the Dual SSN Requirement,³⁰ the American Recovery and Reinvestment Act of 2009³¹ specifically did not require *both* spouses to have an SSN,³² and the Economic Growth and Tax Relief Reconciliation Act of 2001³³ did not have an identification number requirement at all.³⁴

The Dual SSN Requirement originally appeared in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.³⁵ This Act added the Dual SSN Requirement to the Earned Income Tax Credit (EITC), which is a tax subsidy to low-income workers.³⁶ The Joint Committee on Taxation explained that the reason for this new requirement was that “Congress did not believe that individuals who are not authorized to work in the United States should be able to claim the credit.”³⁷ Consistent with this justification of promoting work, the EITC has an earned income requirement.³⁸ The three rounds of COVID-19 relief payments did not have an earned income requirement,³⁹ but several past economic stimulus acts have contained such requirements.⁴⁰

The Economic Stimulus Act of 2008 was the first federal economic stimulus legislation to include the Dual SSN Requirement,⁴¹ and it also

²⁷ See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115; Economic Stimulus Act of 2008, Pub. L. No. 110-185, 122 Stat. 613; Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 42.

²⁸ See Pub. L. No. 111-5, § 1001(a); Pub. L. No. 110-185, § 101(a); Pub. L. No. 107-16, § 101(b)(1).

²⁹ Pub. L. No. 110-185, 122 Stat. 613.

³⁰ See *id.* § 6428(h).

³¹ Pub. L. No. 111-5, 123 Stat. 115.

³² See *id.* § 1001(a).

³³ Pub. L. No. 107-16, 115 Stat. 42.

³⁴ See *id.*

³⁵ Pub. L. No. 104-193, § 451, 110 Stat. 2105, 2276–77.

³⁶ *What Is the Earned Income Tax Credit*, TAX POL’Y CTR. (May 2020), <https://www.taxpolicycenter.org/briefing-book/what-earned-income-tax-credit> [<https://perma.cc/YT3F-XECJ>].

³⁷ JOINT COMM. ON INTERNAL REVENUE TAX’N, 104TH CONG., REVENUE PROVISIONS OF THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996, at 394 (Comm. Print 1996).

³⁸ 26 U.S.C. § 32(a).

³⁹ See Pub. L. No. 116-136, § 2201; Pub. L. No. 116-260, § 273; Pub. L. No. 117-2, § 9601.

⁴⁰ See, e.g., Pub. L. No. 107-16, § 101; Pub. L. No. 110-185, § 101.

⁴¹ Pub. L. No. 110-185, § 101(a).

introduced the Armed Forces exception.⁴² Congress included the Dual SSN Requirement after lobbying by anti-immigrant groups, including the Federation for American Immigration Reform.⁴³ Legislators were surprised when the Dual SSN Requirement also denied stimulus payments to thousands of Armed Forces members.⁴⁴ Congress swiftly responded by amending the law to add an exception to the Dual SSN Requirement if one spouse is a member of the U.S. Armed Forces.⁴⁵ An identical exception was included in the CARES Act.⁴⁶

C. SSN Versus ITIN Filers

The Dual SSN Requirement does not draw a clean line between undocumented—which scholars use interchangeably with unlawful or illegal⁴⁷—and lawful immigrants. The Department of Homeland Security (DHS) must provide work authorization for noncitizens to be eligible for an SSN, unless the noncitizen is lawfully admitted to the United States for permanent residence.⁴⁸ Noncitizens are generally admitted into the country either through one of the lawful permanent resident (LPR) visas or as a nonimmigrant via a visa to stay on a temporary basis.⁴⁹ Notably, refugees and persons granted asylum are not eligible to become LPRs until one year after admission to the United States or receiving asylum.⁵⁰

Most nonimmigrants, with some exceptions, are not allowed to work in the United States and are therefore ineligible for an SSN.⁵¹

⁴² Heroes Earnings Assistance and Relief Tax Act of 2008, Pub. L. No. 110-245, 122 Stat. 1624, § 101(a).

⁴³ See Ken McLaughlin, *Married a Foreigner? Kiss That Tax Rebate Goodbye*, CHI. TRIB. (May 11, 2008), <https://www.chicagotribune.com/news/ct-xpm-2008-05-11-0805100016-story.html> [<https://perma.cc/G98T-8U5M>].

⁴⁴ See *id.*

⁴⁵ Pub. L. No. 110-245, 122 Stat. 1624, § 101(a); ERIKA K. LUNDER, CONG. RSCH. SERV., RS21732, FEDERAL TAXATION OF ALIENS WORKING IN THE UNITED STATES 3 (2012), <https://fas.org/sgp/crs/misc/RS21732.pdf> [<https://perma.cc/6D49-7NEE>].

⁴⁶ 26 U.S.C. § 6428(a)(g)(4). This exception persists after the CARES Act amendment. See Pub. L. No. 116-260, § 273(a).

⁴⁷ See, e.g., Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35, 35 n.2 (1988).

⁴⁸ See *Social Security Numbers for Noncitizens*, SOC. SEC. ADMIN., <https://www.ssa.gov/pubs/EN-05-10096.pdf> [<https://perma.cc/2QAM-M6HV>] (last visited Oct. 18, 2020); *Immigration and Taxation*, IRS NATIONWIDE TAX F. (2014), <https://www.irs.gov/pub/irs-utl/20-Immigration%20and%20Taxation.pdf> [<https://perma.cc/8D23-JUG5>].

⁴⁹ MARGOT L. CRANDALL-HOLLICK & ABIGAIL F. KOLKER, CONG. RSCH. SERV., IN11376, NONCITIZENS AND ELIGIBILITY FOR THE 2020 RECOVERY REBATES 1 (2020), <https://crsreports.congress.gov/product/pdf/IN/IN11376> [<https://perma.cc/55EF-ERA4>].

⁵⁰ *How the United States Immigration System Works*, AM. IMMIGR. COUNCIL (Oct. 10, 2019), <https://www.americanimmigrationcouncil.org/research/how-united-states-immigration-system-works> [<https://perma.cc/T7FS-UP82>].

⁵¹ See JILL H. WILSON, CONG. RSCH. SERV., R45040, IMMIGRATION: NONIMMIGRANT

Common examples of nonimmigrant visas are international student, tourist, and business visitor visas.⁵² Foreign students with F-1 and J-1 visas can in very limited circumstances receive work authorization.⁵³ However, spouses and dependents of temporary workers and foreign students are generally ineligible to work.⁵⁴

There are thus several groups of noncitizens that lawfully reside in the United States without an SSN. The Social Security Administration drives this point home itself, by stating that “lawfully admitted noncitizens can get many benefits and services without a Social Security number,” and that “unless you are a noncitizen who wants to work in the United States, you probably don’t need a Social Security number.”⁵⁵

For U.S. income tax purposes, taxpayers can be required to file a federal tax return regardless of whether they have an SSN or are lawfully present in the country.⁵⁶ Taxpayers must use an SSN to file their federal tax returns, but a taxpayer can use an ITIN if they are ineligible for an SSN.⁵⁷ The IRS believes that “a large proportion of ITIN filers are unlawfully present aliens,” but there is little publicly available data to confirm this.⁵⁸ Because there are many groups of lawful immigrants who are ineligible for an SSN, it seems likely that a nontrivial percentage of ITIN filers are lawfully present in the U.S.⁵⁹ Additionally, foreign spouses that live abroad but want to file jointly with their U.S. citizen spouse also need to use an ITIN.⁶⁰

Just as not all ITIN filers are unlawful immigrants, not all SSN filers are lawful. For example, an immigrant may have obtained an SSN illegally or may have lawfully received an SSN but now have overstayed their visa.⁶¹ The Social Security Administration estimated in 2010 that

(TEMPORARY) ADMISSIONS TO THE UNITED STATES 3 (2019), <https://crsreports.congress.gov/product/pdf/R/R45040> [<https://perma.cc/T3UR-T2EE>].

⁵² See *id.* at 15.

⁵³ See *Working in the United States*, DEP’T OF HOMELAND SEC., <https://studyinthestates.dhs.gov/students/work/working-in-the-united-states> [<https://perma.cc/R9BD-M5U2>] (last visited Dec. 11, 2020).

⁵⁴ See WILSON, *supra* note 51, at App’x.

⁵⁵ *Social Security Numbers for Noncitizens*, *supra* note 48.

⁵⁶ CRANDALL-HOLLICK & KOLKER, *supra* note 49, at 1.

⁵⁷ *Id.* at 2.

⁵⁸ *Id.*

⁵⁹ *Fact Sheet: Individual Taxpayer Identification Numbers (ITINs)*, NAT’L IMMIGR. F. (July 1, 2020), https://immigrationforum.org/article/fact-sheet-individual-taxpayer-identification-numbers-itins/#_ftnref8 [<https://perma.cc/JE3J-NYTY>].

⁶⁰ The foreign spouse would be a nonresident alien, but if they are married to a U.S. citizen, they have the choice to elect to be a resident alien to file jointly with their spouse. See Jane A. Bruno, *US Tax Implications of a Non-American Spouse*, AM. CITIZENS ABROAD (Feb. 2019), <https://www.americansabroad.org/nonamerican-spouse-us-tax-implications/> [<https://perma.cc/DUY5-MJKH>].

⁶¹ Stephen Goss et al., *Effects of Unauthorized Immigration on the Actuarial Status of the Social Security Trust Funds*, SOC. SEC. ADMIN. (Apr. 2013), <https://www.ssa.gov/OACT/NOTES>

1.8 million immigrants worked with an illegitimate SSN, and 700,000 worked with SSNs obtained with fraudulent identification.⁶²

III. STANDARDS OF REVIEW

An equal protection claim challenges a law that creates benefits or burdens for a defined group, on the grounds that the government has created an impermissible distinction between favored and disfavored groups.⁶³ However, the Fourteenth Amendment's Equal Protection Clause, incorporated against the federal government via the Fifth Amendment,⁶⁴ does not uniformly prevent the government from treating classes of people differently.⁶⁵ To determine which government classifications are permissible, the Supreme Court reviews these claims within a tiered framework of scrutiny.⁶⁶

There are three tiers of scrutiny in equal protection doctrine: rational basis, intermediate scrutiny, and strict scrutiny.⁶⁷ The default tier of scrutiny that applies most often is rational basis review.⁶⁸ When a classification “disadvantage[s] a ‘suspect class’” or “impinge[s] upon the exercise of a ‘fundamental right,’” however, the Court instead reviews the classification using strict scrutiny.⁶⁹ Between strict scrutiny and rational basis review, there is also intermediate scrutiny, which is generally triggered when the law disadvantages a “quasi-suspect” class.⁷⁰ There are only two quasi-suspect classes: gender⁷¹ and illegitimacy.⁷²

The courts in the initial CARES Act litigation did not ultimately determine the applicable level of scrutiny because they held that the plaintiffs plausibly alleged that the Dual SNN Requirement would fail

/pdf_notes/note151.pdf [https://perma.cc/9VX4-F6AG].

⁶² *Id.*

⁶³ GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 509 (Rachel E. Barkow et al. eds., 8th ed. 2018).

⁶⁴ When an equal protection challenge is brought against a federal law, rather than a state law, that claim arises under the Fifth Amendment, not the Fourteenth Amendment. *See* *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Still, the equal protection analysis is the same. *See* *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (“This Court’s approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.”); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217 (1995). *But see infra* Part III.C.

⁶⁵ *Reed v. Reed*, 404 U.S. 71, 75 (1971).

⁶⁶ STONE ET AL., *supra* note 63, at 510.

⁶⁷ Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 136–37 (2011).

⁶⁸ STONE ET AL., *supra* note 63, at 510.

⁶⁹ *Plyler v. Doe*, 457 U.S. 202, 216–17 (1982).

⁷⁰ Strauss, *supra* note 67, at 137.

⁷¹ *See, e.g., Craig v. Boren*, 429 U.S. 190 (1976).

⁷² *See, e.g., Clark v. Jeter*, 486 U.S. 456 (1988).

even under rational basis review.⁷³ Therefore, this Part will explore the tiers of scrutiny that could be triggered by the Dual SSN Requirement's classification of citizen spouses and children in mixed-status families and outline the relevant doctrinal tests in each tier.

A. Strict Scrutiny

1. Citizen spouses and the boundaries of the fundamental right of marriage

The Court has long held that the right to marry is fundamental under the Due Process Clause.⁷⁴ In *Loving v. Virginia*,⁷⁵ the Court struck down a Virginia miscegenation statute under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.⁷⁶ Although that case focused on racial discrimination, the majority also emphasized the importance of intimate relationships, explaining that “[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”⁷⁷ More recently, in *Obergefell v. Hodges*,⁷⁸ the Court held that under the Due Process and Equal Protection Clauses, same-sex couples could not be denied the right to marry.⁷⁹

Whether the fundamental right of marriage is implicated for spouses in mixed-status families challenging the Dual SSN Requirement, thus triggering strict scrutiny, turns on how broadly the right is understood. Marriage is clearly a fundamental right, but the boundaries of that right are unclear. In *Zablocki v. Redhail*,⁸⁰ for example, the Court described the right of marriage as the right to *enter into* marriage.⁸¹ Applying strict scrutiny, the *Zablocki* Court struck down a Wisconsin law that required certain residents to obtain a court order granting permission to marry because it unconstitutionally interfered with the fundamental right of marriage.⁸² The Court then cautioned that its holding did not “suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny.”⁸³ Instead, “reasonable regulations that do

⁷³ See *R.V. v. Mnuchin*, No. 20-cv-1148, 2020 WL 3402300, at *8 (D. Md. June 19, 2020); *Ama-dor v. Mnuchin*, 476 F. Supp. 3d 125, 152–53 (D. Md. 2020).

⁷⁴ See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978).

⁷⁵ 388 U.S. 1 (1967).

⁷⁶ *Id.* at 12.

⁷⁷ *Id.* (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

⁷⁸ 576 U.S. 644 (2015).

⁷⁹ *Id.* at 674–76.

⁸⁰ 434 U.S. 374 (1978).

⁸¹ *Id.* at 386–91.

⁸² *Id.* at 375–82.

⁸³ *Id.* at 386.

not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.”⁸⁴

The Court’s later cases describe the fundamental right of marriage differently than in *Zablocki*.⁸⁵ The Court in *Obergefell* focused extensively on the discriminatory impact of same-sex marriage bans, presenting a distinct departure from prior cases that focused “mechanistically” on the marriage restrictions themselves.⁸⁶ The Court held that same-sex couples could not be denied “the constellation of benefits that the States have linked to marriage.”⁸⁷ Two years later, in *Pavan v. Smith*,⁸⁸ the Court affirmed that the holding of *Obergefell* extends to states’ differential treatment of same-sex marriages, not just the requirement that states allow same-sex marriages to be performed.⁸⁹ The case considered an Arkansas law on artificial insemination, which required a birth mother’s male spouse to be listed on the child’s birth certificate but allowed state officials to omit a birth mother’s female spouse.⁹⁰ The Court held that this disparate treatment violated equal protection and due process, similar to *Obergefell*.⁹¹ Thus, the Supreme Court’s recent cases suggest that, at least in cases of differential treatment, the fundamental right of marriage is broader than simply the legal ability to enter into marriage.

It is still uncertain how far the fundamental right of marriage extends. Some “distinction[s] between married persons and unmarried persons” remain constitutionally permissible.⁹² For example, in *Califano v. Jobst*,⁹³ the Supreme Court upheld a federal law that terminated a dependent child’s social security benefits upon marriage.⁹⁴ The Court explained that “tradition and common experience support the conclusion that marriage is an event which normally marks an important

⁸⁴ *Id.* (citing *Califano v. Jobst*, 434 U.S. 47, 55 n.12 (1977)).

⁸⁵ See Holning Lau, *From Loving to Obergefell: Elevating the Significance of Discriminatory Effects*, 25 VA. J. SOC. POL’Y & L. 317, 326 n.67 (2018).

⁸⁶ *See id.*

⁸⁷ *Obergefell*, 576 U.S. at 670.

⁸⁸ 137 S. Ct. 2075 (2017) (per curiam).

⁸⁹ *See id.* at 2078; *Henderson v. Box*, 947 F.3d 482, 484 (7th Cir. 2020) (“The [district court] judge concluded that . . . *Obergefell v. Hodges* oblige[s] governmental bodies to treat same-sex couples identically to opposite-sex couples. . . . The district court’s understanding of *Obergefell* has been confirmed by *Pavan v. Smith* . . .” (internal citations omitted)), *cert. denied sub nom.* *Box v. Henderson*, 141 S. Ct. 953 (2020) (mem.).

⁹⁰ *See Pavan*, 137 S. Ct. at 2078.

⁹¹ *See id.*

⁹² *Califano v. Jobst*, 434 U.S. 47, 53 (1977).

⁹³ 434 U.S. 47 (1977).

⁹⁴ *Id.* at 58.

change in economic status,” which can be rationally relied on as an indicator of financial dependency.⁹⁵ Similarly, the Second Circuit in *Druker v. Commissioner*⁹⁶ upheld “the so-called ‘marriage penalty’” that results from higher federal income tax rates for married taxpayers than single taxpayers.⁹⁷ It is not possible to maintain horizontal equity between married couples and keep an individual’s tax liability unaffected by a change in marital status, so the court concluded that Congress could permissibly choose to maintain horizontal equity.⁹⁸

2. The strict scrutiny test

To survive strict scrutiny, the government’s classification must be “narrowly tailored to further compelling governmental interests.”⁹⁹ The Court has never provided clear guiding principles as to which governmental interests are “compelling.”¹⁰⁰ The Court has sometimes derived compelling interests from the text of the Constitution,¹⁰¹ but the Court has also declared some interests compelling without any serious inquiry whatsoever.¹⁰² Scholars have described the Court’s approach as akin to a “know it when I see it” standard,¹⁰³ relying on “unelaborated social or moral value judgments.”¹⁰⁴ For example, without any discussion, the Court has established that national security is “obvious[ly]” a compelling interest,¹⁰⁵ while “speed and efficiency” is not.¹⁰⁶

Scholars note that this ad hoc approach results in part from the Court’s common practice of declining to decide whether the government’s interest is compelling by holding instead that the government’s means are not narrowly tailored regardless.¹⁰⁷ Determining whether a

⁹⁵ *Id.* at 53.

⁹⁶ 697 F.2d 46 (2d Cir. 1982).

⁹⁷ *Id.* at 49–50.

⁹⁸ *Id.*

⁹⁹ *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

¹⁰⁰ *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1321 (2007).

¹⁰¹ *See, e.g.*, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (plurality opinion) (stating that a public university has a compelling interest in attaining diversity as part of its academic freedom, which is “a special concern of the First Amendment”).

¹⁰² *See* Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 932–37 (1988).

¹⁰³ *See id.* at 937.

¹⁰⁴ Note, *Let the End Be Legitimate: Questioning the Value of Heightened Scrutiny’s Compelling-and-Important-Interest Inquiries*, 129 HARV. L. REV. 1406, 1410 (2016).

¹⁰⁵ *Haig v. Agee*, 453 U.S. 280, 307 (1981).

¹⁰⁶ *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

¹⁰⁷ *See* Robert T. Miller, *What is a Compelling Governmental Interest?*, 21 J. OF MORALITY & MKTS. 71, 73–74 (2018); Note, *Let the End Be Legitimate*, *supra* note 104, at 1409–16 (describing the Court’s tendency to define a governmental interest narrowly when there are perceived flaws in the government’s chosen means).

classification is “narrowly tailored” is relatively more straightforward. The classification must be “‘necessary . . . to the accomplishment’ of its purpose or the safeguarding of its interest.”¹⁰⁸ It also must be the “least restrictive” means to achieving the compelling interest.¹⁰⁹ The Court often finds that overinclusive and underinclusive statutes are not narrowly tailored.¹¹⁰ The Court’s logic in rejecting underinclusive statutes is that the government cannot infringe on fundamental rights when it is expected to fail to meet its goals. This predictable failure “diminish[es] the credibility of the government’s rationale” for infringing on the fundamental right in the first place.¹¹¹

Strict scrutiny is thus an incredibly difficult standard to meet, and there are very few examples of the Court sustaining a classification after determining that strict scrutiny applied.¹¹² For this reason, scholars often describe strict scrutiny as “‘strict’ in theory and fatal in fact.”¹¹³

B. Intermediate Scrutiny Analysis

1. Citizen children and extending *Plyler v. Doe*

In general, intermediate scrutiny is reserved for laws that implicate a quasi-suspect class.¹¹⁴ Citizen children in mixed-status families do not fall within either quasi-suspect classes: gender or illegitimacy.¹¹⁵ The Court has not recognized another quasi-suspect class since 1977.¹¹⁶ *Plyler v. Doe*,¹¹⁷ however, presented a unique and consequential deviation from this general rule that could provide citizen children in mixed-status families a path to intermediate scrutiny.

¹⁰⁸ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978) (plurality opinion) (quoting *In re Griffiths*, 413 U.S. 717, 721–22 (1973)).

¹⁰⁹ See Gottlieb, *supra* note 102, at 918 n.6.

¹¹⁰ See Fallon, *supra* note 100, at 1327–28.

¹¹¹ *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994).

¹¹² See Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. PA. L. REV. 1, 4 (2000).

¹¹³ See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). The Court has recently pushed back against this understanding, but only in the context of affirmative action. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (“[W]e wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’ . . . When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the ‘narrow tailoring’ test this Court has set out in previous cases.” (internal citations omitted)).

¹¹⁴ See Strauss, *supra* note 67, at 138.

¹¹⁵ See *id.* at 146 (identifying the two quasi-suspect classes).

¹¹⁶ EVAN GERSTMANN, *THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION* 24 (1999).

¹¹⁷ 457 U.S. 202 (1982).

In *Plyler*, the Court used intermediate scrutiny to invalidate a Texas statute that denied public schooling to undocumented children.¹¹⁸ The Court first analyzed the characteristics of undocumented children as a group and found a close analogy to the quasi-suspect class of illegitimate children.¹¹⁹ The Court stated that, like illegitimate children, undocumented children “can affect neither their parents’ conduct nor their own status.”¹²⁰ Therefore, “[e]ven if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice.”¹²¹

The Court’s use of intermediate scrutiny in *Plyler* was striking, as it neither held that undocumented aliens are a quasi-suspect class nor that education was a fundamental right.¹²² The Court reasoned that Texas’s law would “impose[] a lifetime hardship on a discrete class of children not accountable for their disabling status.”¹²³ Thus, the Court seemed to suggest that the combination of the importance of the right at stake and the injustice of punishing the children for their parents’ actions can justify intermediate scrutiny, even if either alone would not.¹²⁴

The Supreme Court after *Plyler* was quick to confine the case to its facts.¹²⁵ In *Kadrmas v. Dickinson Public Schools*,¹²⁶ the plaintiffs challenged a law that allowed school districts to charge a transportation user fee.¹²⁷ The Court declined to extend *Plyler*, reiterating that intermediate scrutiny has “generally been applied only in cases that involved discriminatory classifications based on sex or illegitimacy.”¹²⁸ The Court acknowledged that *Plyler* did not fit this general rule but stated that *Plyler* has not been extended “beyond the ‘unique circumstances.’”¹²⁹ The Court framed the unique circumstances of *Plyler* as two-pronged. First, children were penalized for the illegal conduct of

¹¹⁸ *Id.* at 230.

¹¹⁹ *Id.* at 220 (citing *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *See id.* at 223–24.

¹²³ *Id.*

¹²⁴ *See id.* (“[M]ore is involved in these cases than the abstract question whether [the statute at issue] discriminates against a suspect class, or whether education is a fundamental right.”).

¹²⁵ *See* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 *IND. L. REV.* 357, 385–87 (1999).

¹²⁶ 487 U.S. 450 (1988).

¹²⁷ *Id.* at 452.

¹²⁸ *Id.* at 459.

¹²⁹ *Id.* (quoting *Plyler*, 457 U.S. at 239 (Powell, J., concurring)).

their parents.¹³⁰ Second, the law at issue “promot[ed] the creation and perpetuation of a subclass of illiterates” that would worsen problems of “unemployment, welfare, and crime.”¹³¹ The Court easily decided that a user fee neither punishes children for the illegal conduct of their parents nor creates a subclass of illiterates, so *Plyler* was inapplicable.¹³²

Although the Supreme Court has declined to extend *Plyler*, the Second Circuit did so a decade later in *Lewis v. Thompson*.¹³³ *Lewis* presented facts more analogous for our purposes than *Plyler* because *Lewis* concerned a federal classification discriminating against citizen children of undocumented parents.¹³⁴ In *Lewis*, the Second Circuit held that the Medicaid statute that denied automatic Medicaid coverage at birth for citizen children of undocumented mothers violated equal protection.¹³⁵ The court first concluded that the appropriate review is intermediate scrutiny by analogizing the case to *Plyler*.¹³⁶ Like *Plyler*, the plaintiffs in *Lewis* claimed that “a social welfare benefit, itself unrelated to immigration, has been denied on a discriminatory basis that violates the Equal Protection Clause.”¹³⁷

The court acknowledged that the Supreme Court “has not extended *Plyler* beyond its ‘unique circumstances’” but nevertheless found that *Plyler* applied.¹³⁸ In doing so, the Second Circuit provided a broader interpretation of the unique circumstances in *Plyler* than the Supreme Court had in *Kadrmas*. The Second Circuit described the two prongs as “(a) penalizing children for the illegal conduct of their parents and (b) risking significant and enduring adverse consequences to the children.”¹³⁹ The court found both circumstances met because the children lose automatic eligibility due to their mother’s illegal status, and this can be expected to have serious consequences.¹⁴⁰ The court acknowledged that *Plyler* may have been a stronger case for intermediate scrutiny because denying public education “is more burdensome than the brief postponement of obtaining Medicaid coverage.”¹⁴¹ The court countered, however, by stating that the plaintiffs’ claim was stronger in this

¹³⁰ *Id.* (citing *Plyler*, 457 U.S. at 220).

¹³¹ *Id.* (quoting *Plyler*, 457 U.S. at 230).

¹³² *See id.* at 459–60.

¹³³ 252 F.3d 567 (2d Cir. 2001).

¹³⁴ *Id.* at 569.

¹³⁵ *See id.* at 590–91.

¹³⁶ *See id.* at 591.

¹³⁷ *Id.*

¹³⁸ *Id.* (quoting *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 459 (1988)).

¹³⁹ *Id.* (citing *Kadrmas*, 487 U.S. at 459).

¹⁴⁰ *See id.*

¹⁴¹ *Id.* at 591.

case because, unlike in *Plyler*, the children discriminated against were citizens.¹⁴²

2. The intermediate scrutiny test

Under intermediate scrutiny, a classification only survives if it is “substantially related to an important governmental objective.”¹⁴³ The Court has never clearly articulated the difference between “compelling” and “important” governmental interests, but intermediate scrutiny is certainly not as demanding as strict scrutiny.¹⁴⁴ Still, the government’s justification must be “exceedingly persuasive,” and “genuine, not hypothesized or invented post hoc in response to litigation.”¹⁴⁵ The government alone bears the “demanding” burden of justification.¹⁴⁶ For example, in *Plyler*, the state claimed its policy was needed to deter illegal immigration, but the Court quickly rejected this justification, stating that state’s chosen means were “ludicrously ineffectual” at preventing illegal immigration compared to other alternatives.¹⁴⁷

Unlike in the strict scrutiny context, the Court has generally recognized efficiency as an important interest when analyzing a law under intermediate scrutiny. But the Court has a high bar for the means-ends fit for this interest.¹⁴⁸ For example, in *Plyler*, the state claimed its policy was needed to reduce costs, but the Court rejected this justification.¹⁴⁹ The Court found any cost-savings to be unsubstantiated by the record and “wholly insubstantial in light of the costs involved to these children, the State, and the Nation.”¹⁵⁰ In *Jimenez v. Weinberger*,¹⁵¹ the Court struck down a provision of the Social Security Act that allowed certain illegitimate children to qualify for benefits only if their disabled wage-earner parent provided the child’s support or lived with the child before developing the disability.¹⁵² The Court rejected the state’s efficiency justification because it found no evidence that allowing illegitimate children to receive benefits would “significantly impair the federal Social

¹⁴² See *id.*

¹⁴³ *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

¹⁴⁴ Strauss, *supra* note 67, at 137 n.14.

¹⁴⁵ *United States v. Virginia*, 518 U.S. 515, 530–31 (1996).

¹⁴⁶ *Id.* at 533.

¹⁴⁷ *Plyler v. Doe*, 457 U.S. 202, 228–29 (1982) (internal citations omitted).

¹⁴⁸ See *id.* at 229–30.

¹⁴⁹ See *id.*

¹⁵⁰ *Id.* at 230.

¹⁵¹ 417 U.S. 628 (1974).

¹⁵² *Id.* at 630.

Security trust fund and necessitate a reduction in the scope of persons benefited by the Act.”¹⁵³

The Court’s intermediate scrutiny cases also illustrate the means-ends fit required to justify the government’s interest in preventing fraud.¹⁵⁴ In *Jimenez*, the Court rejected the Government’s claim that the statute was needed to prevent fraud because “the blanket and conclusive exclusion” of certain illegitimate children is not “reasonably related to the prevention of spurious claims.”¹⁵⁵ In contrast, in *Tuan Anh Nguyen v. I.N.S.*,¹⁵⁶ the Court upheld a statute proscribing different requirements for a child’s acquisition of citizenship depending on whether the child’s citizen parent is the mother or father.¹⁵⁷ The Government claimed an interest in preventing fraudulent claims of a biological parent-child relationship.¹⁵⁸ The Court held that imposing extra steps on the father to prove paternity is “neither surprising nor troublesome” because it “takes into account a biological difference between the parents.”¹⁵⁹

C. Rational Basis

1. The default rational basis test

Rational basis is the default standard of review for equal protection claims.¹⁶⁰ If a classification does not trigger strict or intermediate scrutiny, then the Court reviews the legislation only for rational basis, which is usually quite deferential.¹⁶¹ Rational basis review only requires the classification to “bear [] some fair relationship to a legitimate public purpose.”¹⁶² Underinclusiveness and post hoc justifications are permitted.¹⁶³ “In other words, a legislative choice is not subject to court-

¹⁵³ *Id.* at 633.

¹⁵⁴ The Court generally recognizes this interest as important. *See, e.g.*, *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 63–64 (2001).

¹⁵⁵ *Jimenez*, 417 U.S. at 636.

¹⁵⁶ 533 U.S. 53 (2001).

¹⁵⁷ *See id.* at 56–57.

¹⁵⁸ *See id.* at 62.

¹⁵⁹ *Id.* at 63–64.

¹⁶⁰ *See Strauss, supra* note 67, at 135.

¹⁶¹ *See, e.g.*, *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (“If the classification has some ‘reasonable basis,’ it does not offend the Constitution simply because the classification ‘is not made with mathematical nicety or because in practice it results in some inequality.’ ‘The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.’” (internal citations omitted)).

¹⁶² *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

¹⁶³ *See, e.g.*, *McGowan v. Maryland*, 366 U.S. 420, 426 (1961) (“A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.”); Jeffrey H. Blattner,

room fact-finding and may be based on rational speculation unsupported by evidence or empirical data.”¹⁶⁴ The burden is on the challengers of the classification to “to negative every conceivable basis which might support it.”¹⁶⁵ As a result, scholars have called rational basis review “minimal scrutiny in theory and virtually none in fact.”¹⁶⁶

For example, in *Dandridge v. Williams*,¹⁶⁷ the Court upheld Maryland’s welfare system that created maximum grant limits for families, such that larger families received less than smaller families.¹⁶⁸ The Court declared that the law can be justified by the state’s interest in encouraging employment, even though the Court acknowledged that all the plaintiffs were unemployable.¹⁶⁹ Under rational basis review, “the Constitution does not empower th[e] Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients,” even if a better system exists.¹⁷⁰

2. “Rational basis with bite”

Scholars have long noted that despite the deference typically accorded under rational basis, the Court in some instances applies a seemingly heightened rationality review without explanation.¹⁷¹ Scholars have termed this rationality review “rational basis with bite.”¹⁷² The Supreme Court does not recognize “rational basis with bite” as a standard of review, although dissenting opinions have certainly pointed out the Court’s departure from typical rational basis when it occurs.¹⁷³ For

The Supreme Court’s Intermediate Equal Protection Decisions: Five Imperfect Models of Constitutional Equality, 8 HASTINGS CONST. L.Q. 777, 784 (1981).

¹⁶⁴ *FCC v. Beach Commc’ns., Inc.*, 508 U.S. 307, 315 (1993).

¹⁶⁵ *Id.* (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (internal citations omitted)).

¹⁶⁶ Gunther, *supra* note 113, at 8.

¹⁶⁷ 397 U.S. 471 (1970).

¹⁶⁸ *Id.* at 473–75, 486.

¹⁶⁹ *See id.* at 486 n.20.

¹⁷⁰ *Id.* at 487.

¹⁷¹ *See, e.g.*, Gunther, *supra* note 113, at 18–19; Farrell, *supra* note 125, at 358–60.

¹⁷² *See* Gunther, *supra* note 113, at 12; Ian Bartrum, *The Ninth Circuit’s Treatment of Sexual Orientation: Defining Rational Basis Review with Bite*, 112 MICH. L. REV. FIRST IMPRESSIONS 142 (2014). *But see* Thomas B. Nachbar, *Rational Basis “Plus”*, 32 CONST. COMMENT. 449, 449 (2017) (calling this review “rational basis plus”); Katie R. Eyer, *Protected Class Rational Basis Review*, 95 N.C. L. REV. 975, 979 n.15 (2017) (arguing this review is more appropriately encapsulated by the idea of “protected class rational basis review”). The preferable terminology is outside the scope of this Comment.

¹⁷³ *See, e.g.*, *United States v. Windsor*, 570 U.S. 744, 793–94 (2013) (Scalia, J., dissenting) (“As nearly as I can tell, the Court . . . does not apply strict scrutiny, and its central propositions are taken from rational-basis cases like *Moreno*. But the Court certainly does not *apply* anything that resembles that deferential framework.”).

instance, Justice Thurgood Marshall argued in *City of Cleburne v. Cleburne Living Center*¹⁷⁴ that the Court engaged in “second order” rational basis review that is “most assuredly” not the typical rational basis test.¹⁷⁵ Furthermore, lower courts have identified and applied this heightened rational basis review.¹⁷⁶ This has effectively resulted in “two sets of rationality cases, one deferential and one heightened, operating as if in parallel universes with no connection between them.”¹⁷⁷

*U.S. Department of Agriculture v. Moreno*¹⁷⁸ presents the earliest example of the Court’s analysis that scholars describe as rational basis with bite.¹⁷⁹ In *Moreno*, the Court held that the federal food stamp program that excluded any household containing individuals unrelated to any other member of the household violated equal protection, purportedly under traditional rational basis review.¹⁸⁰ The Government justified its exclusion by claiming it was needed to prevent fraud, which the Court strikingly rejected.¹⁸¹ The Court stated that “in practical operation” the exclusion harms “those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility,” rather than prevent fraud.¹⁸² This analysis was exceptional in the context of traditional rational basis jurisprudence, given that the facts in the case provided some justification for the rule.¹⁸³

The reason for the Court’s departure from traditional rational basis review stemmed from the Court’s suggestion that the true purpose of the food stamp program amendment was “to prevent so-called [*sic*] ‘hip-

¹⁷⁴ 473 U.S. 432 (1985).

¹⁷⁵ *Id.* at 458 (Marshall, J., concurring in part and dissenting in part); *see also* *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring) (“When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.”).

¹⁷⁶ *See, e.g.*, *Massachusetts v. U.S. Dep’t of Health & Hum. Servs.*, 682 F.3d 1, 9–10 (1st Cir. 2012) (declining to recognize sexual orientation as a suspect class but applying heightened review to a DOMA provision because “the Supreme Court has now several times struck down state or local enactments without invoking any suspect classification . . . [when] the protesting group was historically disadvantaged or unpopular, and the statutory justification seemed thin, unsupported or impermissible”).

¹⁷⁷ Farrell, *supra* note 125, at 358.

¹⁷⁸ 413 U.S. 528 (1973).

¹⁷⁹ There are earlier examples of heightened review under the guise of rational basis review, but these were in the context of gender and illegitimacy, which ultimately officially received intermediate scrutiny by the Court. *See Nachbar, supra* note 172, at 451 n.17.

¹⁸⁰ *Moreno*, 413 U.S. at 529–33.

¹⁸¹ *Id.* at 535.

¹⁸² *Id.* at 538.

¹⁸³ *See Nachbar, supra* note 172, at 458.

pies' and 'hippie communes' from participating in the food stamp program."¹⁸⁴ The Court stated that this purpose could not sustain the classification. "For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."¹⁸⁵

The Court's subsequent cases applying rational basis with bite followed a similar line of reasoning as *Moreno*. For example, in *City of Cleburne*, the Court invalidated a zoning ordinance that required special permits for those with intellectual disabilities because "requiring the permit . . . rest[s] on an irrational prejudice."¹⁸⁶ Later, in *Romer v. Evans*,¹⁸⁷ the Court invalidated a Colorado constitutional amendment that would prevent the state from prohibiting discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships."¹⁸⁸ Citing *Moreno*, the Court held that the amendment "raise[d] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."¹⁸⁹ Most recently, in *United States v. Windsor*,¹⁹⁰ the Court invalidated a federal law that excluded a same-sex partner from the federal definition of spouse.¹⁹¹ This definition controlled over 1,000 federal laws and had the effect of "ensur[ing] that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages."¹⁹² Again citing *Moreno*, the Court invalidated the law.¹⁹³

Yet, for every case decided under this heightened rational basis review, there are dozens that apply the typical, deferential rational basis review.¹⁹⁴ Scholars have struggled to find any pattern that predicts when the Court will use rational basis with bite review.¹⁹⁵ Because of this unpredictability, both justices and scholars have criticized rational basis with bite.¹⁹⁶ Critics disparage so-called rational basis with bite for

¹⁸⁴ *Moreno*, 413 U.S. at 534.

¹⁸⁵ *Id.*

¹⁸⁶ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985).

¹⁸⁷ 517 U.S. 620 (1996).

¹⁸⁸ *Id.* at 624 (internal quotation marks omitted).

¹⁸⁹ *Id.* at 634–35 (citing *Moreno*, 413 U.S. at 534).

¹⁹⁰ 570 U.S. 744 (2013).

¹⁹¹ *Id.* at 769–71.

¹⁹² *Id.* at 753, 771.

¹⁹³ *Id.* at 770–71 (citing *Moreno*, 413 U.S. at 534–35).

¹⁹⁴ See Farrell, *supra* note 125, at 416 (finding only ten heightened rationality cases among one hundred deferential rational basis cases between 1973 and May 1996).

¹⁹⁵ See, e.g., *id.* at 411–15.

¹⁹⁶ See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 458 (1985) (Marshall, J., concurring in part and dissenting in part); GERSTMANN, *supra* note 116, at 10.

encouraging judicial unaccountability and creating confusion among lower courts.¹⁹⁷ Regardless, this does not stop plaintiffs and lower courts from citing these cases, even if not using the terminology of rational basis with bite, as demonstrated in the CARES Act litigation.¹⁹⁸

3. Rational basis in the immigration context

Because the Dual SSN Requirement operates in the context of immigration law, the Court's unique constitutional jurisprudence in this area, known as the "plenary power doctrine," is relevant to the applicable tier of scrutiny.¹⁹⁹ Under the plenary power doctrine, federal power to regulate immigration is "an incident of sovereignty belonging to the government of the United States" that is "buffered against judicially enforceable constitutional constraints."²⁰⁰ Thus, when the Court determines that a federal law is a "regulation of immigration per se," the Court will engage in highly deferential rational basis review.²⁰¹

*Mathews v. Diaz*²⁰² is the quintessential example. In *Mathews*, the Court upheld a congressional statute that required aliens to have been a permanent resident in the United States for five years to be eligible for a federal medical insurance program.²⁰³ The Court stated that decisions involving immigration are "more appropriate to either the Legislature or the Executive than to the Judiciary."²⁰⁴ Using rational basis scrutiny, the Court upheld the law because the residency requirement was not "wholly irrational."²⁰⁵ The Court distinguished *Graham v. Richardson*,²⁰⁶ which had five years previously found a very similar *state* law unconstitutional, because "it is the business of the political branches of the Federal Government, rather than that of either the States or the Federal Judiciary, to regulate the conditions of entry and residence of

¹⁹⁷ See Nachbar, *supra* note 172, at 450–52; Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 780 (1987); Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2770 (2005).

¹⁹⁸ See Substantive Legal Issues – Addressing, *R.V. v. Mnuchin*, No. 20-cv-1148 (D. Md. May 22, 2020), ECF No. 32 [hereinafter "R.V. Substantive Legal Issues"]; Response Re 32 Substantive Legal Issues, *Amador v. Mnuchin*, 476 F. Supp. 3d 125 (D. Md. 2020) (No. 20-cv-01102), ECF No. 36.

¹⁹⁹ Mathew J. Lindsay, *Disaggregating "Immigration Law"*, 68 FLA. L. REV. 179, 183 (2016).

²⁰⁰ *Id.* (quoting *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889)).

²⁰¹ *Id.* at 183 n.15.

²⁰² 426 U.S. 67 (1976).

²⁰³ *Id.* at 69.

²⁰⁴ *Id.* at 81.

²⁰⁵ *Id.* at 83.

²⁰⁶ 403 U.S. 365 (1971).

aliens.”²⁰⁷ The Court later reaffirmed this position in *Fiallo v. Bell*,²⁰⁸ stating that special immigration preferences are “policy questions entrusted exclusively to the political branches of our Government, and we have no judicial authority to substitute our political judgment for that of the Congress.”²⁰⁹

Scholars have observed that the Court takes even the fundamental right to marriage less seriously in the immigration context.²¹⁰ For instance, in *Kerry v. Din*,²¹¹ the Court considered a U.S. citizen’s argument that the fundamental right to marriage includes the right to live in the United States with her spouse.²¹² The Court did not produce a majority opinion. The plurality opinion stated that no such constitutional right exists;²¹³ the four dissenting justices argued that the plaintiff should prevail on a *procedural* due process claim because “her freedom to live together with her husband in the United States” is “the kind of liberty interest to which the Due Process Clause provides procedural protections,”²¹⁴ and the tie-breaking concurrence assumed, but did not decide, the right’s existence.²¹⁵ Justice Scalia, author of the plurality opinion, cited *Fiallo* to argue that Congress’s immigration decisions cannot be second-guessed by the courts, requiring in essence an extremely deferential rational basis review.²¹⁶

The plenary power doctrine only applies to immigration laws, but the Court has not clearly explained what classifies a law as a regulation of immigration per se.²¹⁷ Although the Court’s language in *Mathews* and *Fiallo* refers broadly to the immigration context, the Court in later cases has declined to apply *Fiallo* when the plaintiff is a citizen and the case does not involve “entry preference for aliens.”²¹⁸ For example, in *Miller v. Albright*,²¹⁹ the Court stated that it “need not decide whether *Fiallo v. Bell* dictates the outcome of this case, because that case involved the claims of several aliens to a special immigration preference, whereas

²⁰⁷ *Mathews*, 426 U.S. at 84.

²⁰⁸ 430 U.S. 787 (1977).

²⁰⁹ *Id.* at 798.

²¹⁰ See, e.g., Beth Caldwell, *Deported by Marriage: Americans Forced to Choose Between Love and Country*, 82 BROOK. L. REV. 1, 3 (2016).

²¹¹ 576 U.S. 86 (2015) (plurality opinion).

²¹² See *id.* at 88.

²¹³ *Id.*

²¹⁴ *Id.* at 107 (Kennedy, J., concurring).

²¹⁵ *Id.* at 102 (Breyer, J., dissenting).

²¹⁶ See *id.* at 97.

²¹⁷ Lindsay, *supra* note 199, at 193–202.

²¹⁸ See, e.g., *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1693 (2017).

²¹⁹ 523 U.S. 420 (1998) (plurality opinion).

here petitioner claims that she is, and for years has been, an American citizen.”²²⁰

IV. ANALYSIS OF THE DUAL SSN REQUIREMENT’S CONSTITUTIONALITY

Whether the Dual SSN Requirement can survive a constitutional challenge largely depends on which standard of review applies. This Part will suggest that the appropriate standard of review for citizen spouses and children challenging the Dual SSN Requirement is strict scrutiny and intermediate scrutiny, respectively. This Part will then examine the extent to which the Dual SSN Requirement could survive under these standards. Lastly, this Part will discuss and evaluate the alternate, and arguably unlikely, possibility that the Court applies rational basis.

A. Strict Scrutiny for Citizen Spouses

Citizen spouses in mixed-status families can argue that the Dual SSN Requirement infringes on their fundamental right of marriage.²²¹ Given the Court’s focus in *Obergefell* and *Pavan* on the discriminatory impact of same-sex marriage bans,²²² citizen spouses could argue that the Dual SSN Requirement discriminates against them based on their choice of spouse. The Court in *Obergefell* specifically mentioned that “the constellation of benefits” that married couples cannot be denied includes “taxation” benefits.²²³ The Court explained in *Pavan* that its choice of items on this list “was no accident,” but based on actual discrimination the *Obergefell* plaintiffs alleged experiencing.²²⁴

It could be argued that the Dual SSN Requirement represents a less extreme denial of benefits than a ban on same-sex marriage, as in *Obergefell*, or not allowing a same-sex spouse’s name on their child’s birth certificate, as in *Pavan*. This counterargument would highlight the Court’s focus in *Obergefell* on human dignity and conclude that denying economic benefits has a lesser impact on human dignity than government recognition through marriage or birth certificates.

However, this argument suffers two fatal flaws. First, its conclusion is tenuous because the Dual SSN Requirement also affects dignity. Many mixed-status families have described feeling a lower sense of self-

²²⁰ *Id.* at 429.

²²¹ This was indeed the argument made by the *Amador* plaintiffs. See *Amador v. Mnuchin*, 476 F. Supp. 3d 125, 148 (D. Md. 2020).

²²² See *Obergefell v. Hodges*, 576 U.S. 644, 670 (2015); *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017) (per curiam).

²²³ *Obergefell*, 576 U.S. at 670; see also *United States v. Windsor*, 570 U.S. 744, 773 (2013) (including filing “federal taxes jointly” as a benefit of marriage).

²²⁴ *Pavan*, 137 S. Ct. at 2078.

worth as a result of discriminatory economic treatment.²²⁵ Second, *Obergefell* was concerned not just with “symbolic recognition,” but also “material benefits” that were denied to same-sex couples.²²⁶ The Dual SSN Requirement is often used to deny citizen spouses in mixed-status families material federal benefits that have long-lasting economic implications, especially during a pandemic.²²⁷ Thus, the Dual SSN Requirement’s discriminatory treatment is likely precisely the kind of treatment *Obergefell* and *Pavan* prohibit. A different result could be warranted if the Dual SSN Requirement is used to deny a very minor federal benefit, but the Dual SSN Requirement has never historically been used in this context.²²⁸

Additionally, one could argue, as the Government did in *Amador*, that the Dual SSN Requirement does not implicate the fundamental right of marriage following *Zablocki* and *Califano*.²²⁹ This counterargument should also fail. The Court’s language articulating the fundamental right of marriage in *Zablocki* does not seem to apply in cases where there are serious equal protection concerns, as in *Pavan*.²³⁰ If it were still true that only laws that present a “direct legal obstacle” to marrying trigger strict scrutiny regardless of the law’s differential treatment,²³¹ the Court’s decision in *Pavan* would be impossible to reconcile. *Califano* is also inapposite. *Califano* stands for the proposition that some distinctions between married and unmarried persons are permitted,²³² but the Dual SSN Requirement discriminates between different married couples.

²²⁵ See, e.g., Jane López, *Congress Does Not ‘Care’ about My American Family*, APPEAL (Apr. 24, 2020), <https://theappeal.org/cares-act-immigrants-mixed-status-households/> [<https://perma.cc/AG2R-ASXN>].

²²⁶ *Obergefell*, 576 U.S. at 669–70 (listing the material benefits of marriage, including: “taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers’ compensation benefits; health insurance; and child custody, support, and visitation rules”).

²²⁷ See, e.g., Jeehoon Han et al., *Income and Poverty in the COVID-19 Pandemic* 4–5 (Brookings Papers on Econ. Activity Draft, 2020), <https://www.brookings.edu/wp-content/uploads/2020/06/Han-et-al-conference-draft.pdf> [<https://perma.cc/F4JP-GUP7>] (explaining that the stimulus payments could lift a family of four out of poverty for an entire year); *Policy Basics: The Earned Income Tax Credit*, CTR. FOR BUDGET & POLY PRIORITIES (Dec. 10, 2019), <https://www.cbpp.org/research/federal-tax/policy-basics-the-earned-income-tax-credit> [<https://perma.cc/SR7T-UNYH>] (explaining that in 2018 the EITC lifted 5.6 million people out of poverty and reduced the severity of poverty for another 16.5 million).

²²⁸ See *supra* Part II.B.

²²⁹ Substantive Legal Issues – Addressing, at 8, *Amador v. Mnuchin*, 476 F. Supp. 3d 125 (D.Md. 2020) (No. 20-cv-01102), ECF No. 32 [hereinafter “*Amador Substantive Legal Issues*”].

²³⁰ *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017) (per curiam).

²³¹ *Zablocki v. Redhail*, 434 U.S. 374, 387 n.12 (1978).

²³² *Califano v. Jobst*, 434 U.S. 47, 53 (1977).

Lastly, one might argue that, under *Mathews* and *Fiallo*, rational basis is required because the Dual SSN Requirement is in the immigration context.²³³ Although the Court has exhibited flexibility when classifying laws as regulations of immigration per se,²³⁴ the Dual SSN Requirement is substantially different from the Court's plenary power doctrine cases because it does not involve any "entry preference for aliens."²³⁵ Moreover, the Dual SSN Requirement denies benefits to *citizens*. *Mathews* was specific to noncitizens, stating that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that *would be unacceptable if applied to citizens*."²³⁶ The citizen spouse's equal protection challenge would not implicate any entry preference for their noncitizen family member. They would instead be seeking an economic benefit provided by federal legislation. Thus, *Mathews* and its progeny are not applicable and could not be used to force rational basis review.

Therefore, it is plausible that the Dual SSN Requirement infringes on the fundamental right of marriage, and, as a result, would trigger strict scrutiny. The next step is to evaluate whether, under strict scrutiny, the Dual SSN Requirement could survive. Strict scrutiny requires the Dual SSN Requirement to be "narrowly tailored to further compelling governmental interests."²³⁷

It may be possible that the Court would find a compelling governmental interest motivating the Dual SSN Requirement.²³⁸ The government has offered three primary justifications for the Dual SSN Requirement during litigation. The government claims that Congress wanted to "disburse aid efficiently," ensure the credit was provided "only to individuals authorized to work," and "reduce fraud and abuse."²³⁹ The Court would not likely consider the first interest in efficiency to be compelling given its prior strict scrutiny cases that reject this exact interest.²⁴⁰ The second interest, however, presents a more novel question. Because the Court has not provided any test for compelling interests, it is possible that the Court could use "unelaborated . . . value judgments"

²³³ This was the argument made by the Government in *R.V. See R.V. Substantive Legal Issues*, *supra* note 198, at 5.

²³⁴ *Lindsay*, *supra* note 199, at 196.

²³⁵ *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1693 (2017).

²³⁶ *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976) (emphasis added); *see also* *Miller v. Albright*, 523 U.S. 420, 429 (1998) (plurality opinion).

²³⁷ *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *supra* Part III.A.

²³⁸ This conservatively assumes that the government actually relied on these interests when crafting the Dual SSN Requirement at issue, as post hoc justifications are not permitted outside of rational basis review. *See* *United States v. Virginia*, 518 U.S. 515, 533 (1996).

²³⁹ *Amador Substantive Legal Issues*, *supra* note 229, at 10; *R.V. Substantive Legal Issues*, *supra* note 198, at 5.

²⁴⁰ *See, e.g.*, *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

to decide that promoting work is a compelling governmental interest.²⁴¹ The third interest in preventing fraud would likely be considered compelling based on the Court's language in prior cases.²⁴²

Even if the Dual SSN Requirement served a compelling governmental interest, Dual SSN Requirements are not narrowly tailored. First, they are not necessary to prevent fraud. Although the government did not clarify what it meant by "fraud" during litigation, one could argue that the politics behind the Dual SSN Requirement's initial inclusion in the 2008 stimulus legislation suggest that Congress may have been concerned with undocumented immigrants receiving economic relief.²⁴³ The problem with even this conception of fraud is that many legal immigrants may not have SSNs.²⁴⁴ Thus, if the government justified the Dual SSN Requirement as necessary to prevent undocumented immigrants from receiving the economic benefit, there would be a serious overinclusiveness issue as many legal immigrants would also be prevented from enjoying the benefit. Overinclusive classifications often do not satisfy the narrowly tailored requirement.²⁴⁵

The Dual SSN Requirement is also not necessary to achieve the government's second interest in promoting work. There is a clearly less restrictive alternative: earned income requirements. The use of an earned income requirement rather than a Dual SSN Requirement within prior economic relief legislation²⁴⁶ shows that there is an alternative way to promote work without infringing on the fundamental right of marriage. When economic relief legislation does not provide an earned income requirement, as is the case in the CARES Act, a Dual SSN Requirement is weak substitute. At best, the Dual SSN Requirement just demonstrates that both spouses are *authorized* to work, not that they actually did. In the context of the EITC, which contains both an earned income requirement and a Dual SSN Requirement,²⁴⁷ the Dual SSN Requirement might actually operate to discourage work. If one spouse knows that, even if they generate the requisite earned income, they will be disqualified from the economic benefit due to their spouse's lack of an SSN, they may elect not to work at all.

For the government's plausibly compelling interests, the Dual SSN Requirement is problematically underinclusive for two reasons. First,

²⁴¹ Note, *Let the End Be Legitimate*, *supra* note 104, at 1410.

²⁴² See, e.g., *Bowen v. Roy*, 476 U.S. 693, 709 (1986) ("No one can doubt that preventing fraud in these benefits programs is an important goal.").

²⁴³ See *supra* Part II.B.

²⁴⁴ See *supra* Part II.C.

²⁴⁵ See Fallon, *supra* note 100, at 1328.

²⁴⁶ See *supra* Part II.B.

²⁴⁷ See *id.*

because the Dual SSN Requirement is coupled with a statutory exemption for members of the Armed Forces,²⁴⁸ Congress intentionally limited its ability to prevent fraud and promote work in all cases. Moreover, it “diminish[es] the credibility of the government’s rationale” for the Dual SSN Requirement in the first place.²⁴⁹ Second, Congress also left the fraud in the SSN system unaddressed,²⁵⁰ which makes relying on the Dual SSN Requirement to achieve the government’s stated interests questionable.

Lastly, the existence of prior emergency economic relief legislation that did not contain a Dual SSN Requirement demonstrates that the Dual SSN Requirement is not necessary to the legislation’s effectiveness.²⁵¹ One could argue that Congress’s goals may have been different in the previous legislative contexts due to different factual situations. However, the retroactive amendment to the CARES Act that removed the Dual SSN Requirement without any justification sends a clear message that the Dual SSN Requirement was not the least restrictive means to achieving effective economic relief.

Thus, the Dual SSN Requirement is likely unconstitutional on equal protection grounds for violating U.S. citizen spouses’ fundamental right of marriage. The Dual SSN Requirement as utilized in the CARES Act, with the credibility issues created by statutory exceptions and clear examples of less restrictive legislation, should fail the strict scrutiny test. The Dual SSN Requirement in the EITC may present a closer case because these unique factors are not present. Still, the existing earned income requirement is a suitable, less restrictive way to promote work. Under strict scrutiny, therefore, the Dual SSN Requirement as used in the EITC is likely unconstitutional, as well. The EITC is the only statute that currently uses the Dual SSN Requirement, but this analysis suggests that the Dual SSN Requirement would be unconstitutional in most statutes that provide significant economic benefits.

B. Intermediate Scrutiny for Citizen Children

Turning to citizen children of mixed-status families, a strong argument could be made that *Plyler* and *Lewis* should extend to provide intermediate scrutiny. Although *Plyler* was confined to its unique circumstances, those circumstances are arguably met in this case. The first

²⁴⁸ See *supra* Part II.

²⁴⁹ *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994).

²⁵⁰ See *supra* Part II.C.

²⁵¹ See *id.*

circumstance, penalizing children for the illegal conduct of their parents, seems straightforwardly applicable.²⁵² Citizen children in mixed-status families would be eligible for economic benefit if it were not for their parent's immigration status. Thus, the Dual SSN Requirement punishes citizen children merely for the fact that one of their parents does not have an SSN.

The second circumstance, “promot[ing] the creation and perpetuation of a subclass,” is more debatable.²⁵³ Upon first impression, denying economic benefits may carry a lesser risk of significant and enduring adverse consequences to children than denying public elementary education, which was the right at stake in *Plyler*.²⁵⁴ However, the Second Circuit in *Lewis* relied on studies that demonstrated the importance of automatic Medicaid enrollment to analogize to *Plyler*,²⁵⁵ and studies regarding the CARES Act stimulus payments and the EITC similarly show that they play a key role in reducing poverty.²⁵⁶ Children growing up in poverty experience worse outcomes “in virtually every dimension,” including education and health.²⁵⁷ Therefore, it is plausible that ensuring access to federal economic benefits, like the rights at stake in *Plyler* and *Lewis*, justifies intermediate scrutiny. Moreover, these children are citizens, which, as the Second Circuit emphasized in *Lewis*, creates an even stronger claim to intermediate scrutiny than in *Plyler*.²⁵⁸

As with the citizen spouses, one might again argue that the plenary power doctrine requires rational basis for the children.²⁵⁹ However, similar reasons counsel against this result here as well. In *Mathews* and *Fiallo*, the plaintiffs were undocumented immigrants, but here the Dual SSN Requirement denies benefits to *citizen* children. Additionally, even if one claimed that the Dual SSN Requirement is to some extent meant to deter illegal immigration, it still does not implicate any “entry preference for aliens,” which is a determining factor for whether *Mathews* applies.²⁶⁰ In *Lewis*, the Second Circuit distinguished the plaintiffs' case from *Fiallo* in part because “the claim on behalf of the children, like the

²⁵² See *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 459 (1988) (citing *Plyler v. Doe*, 457 U.S. 202, 220 (1982)).

²⁵³ *Id.* (quoting *Plyler*, 457 U.S. at 230).

²⁵⁴ *Plyler*, 457 U.S. at 230.

²⁵⁵ See *Lewis v. Thompson*, 252 F.3d 567, 590–91 (2001).

²⁵⁶ See sources cited *supra* note 227.

²⁵⁷ See, e.g., NAT'L ACADS. OF SCIS., ENG'G, & MED., A ROADMAP TO REDUCING CHILD POVERTY 67 (Greg Duncan & Suzanne Le Menestrel eds., 2019).

²⁵⁸ See *Lewis*, 252 F.3d at 591.

²⁵⁹ The first impulse may be to point to *Plyler* as support for applying intermediate scrutiny in an immigration context, but *Plyler* itself notes that its analysis is specific to state law. See *Plyler*, 457 U.S. at 225. If the law had been federal, the Court stated that “traditional caution” for Congress's policy judgement would have persuaded the court to show the law deference. *Id.*

²⁶⁰ *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1693 (2017).

alien children's claim in *Plyler*, is that a social welfare benefit, itself unrelated to immigration, has been denied on a discriminatory basis that violates the Equal Protection Clause."²⁶¹ Therefore, the Court's deferential review for per se immigration laws should not apply here. Instead, the Court would likely apply intermediate scrutiny.

If intermediate scrutiny is the applicable standard of review, the Dual SSN Requirement must be "substantially related to an important governmental objective" to survive.²⁶² Although the exact relationship between this test and the strict scrutiny analysis is ambiguous, it is clear that this is a less demanding standard. Thus, analysis of the Dual SSN Requirement's justifications in light of the Court's intermediate scrutiny cases is required.

The government's first interest in efficient aid distribution would likely not justify the Dual SSN Requirement. A claim of efficiency that is used to deny citizen children of mixed-status families economic benefits is simply "a concise expression of an intention to discriminate" that was rejected in *Plyler*.²⁶³ *Jimenez* also requires the government to present evidence that, without the Dual SSN Requirement, the scope of persons benefited by the legislation would have been reduced.²⁶⁴ In the context of the economic stimulus payments, the retroactive amendment to the CARES Act removing the Dual SSN Requirement is strong evidence suggesting otherwise.²⁶⁵

The government's second interest in promoting work is a closer case. The interest is likely important, but the Dual SSN Requirement may not be "substantially related" to this goal. On this point, *Plyler* is instructive. When the government's chosen means are "ludicrously ineffectual" compared to alternatives, they cannot be said to be substantially related.²⁶⁶ As discussed in the context of strict scrutiny, the Dual SSN Requirement is significantly less effective than an earned income requirement, and it might even be counterproductive.²⁶⁷ Following *Plyler*, this likely means that this interest cannot justify the Dual SSN Requirement.

The government's last interest in preventing fraud is similar to the anti-fraud interest recognized as important in *Nguyen* and *Jimenez*.²⁶⁸ The fit between that end and the means of Dual SSN Requirements,

²⁶¹ *Lewis*, 252 F.3d at 591.

²⁶² *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

²⁶³ *See Plyler*, 457 U.S. at 227.

²⁶⁴ *See Jimenez v. Weinberger*, 417 U.S. 628, 633 (1974).

²⁶⁵ *See supra* Part II.

²⁶⁶ *See Plyler*, 457 U.S. at 228–29 (internal citation omitted).

²⁶⁷ *See supra* Part IV.A.

²⁶⁸ *See Jimenez*, 417 U.S. at 633–36; *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 62 (2001).

however, is more like *Jimenez* than *Nguyen* because it is not “exceedingly persuasive.”²⁶⁹ In *Nguyen*, the statute provided steps that the father must take to prove paternity.²⁷⁰ Here, the children have already submitted their SSN, demonstrating that they are eligible for the federal benefit. If the government interest is preventing fraud, then the government must assume that children of one parent without an SSN are more likely to lie about their citizenship than children of two parents with SSNs. This assumption itself is certainly questionable. Even presuming it could be justified, the problem remains that instead of creating additional steps to improve the reliability of the children’s SSNs, as the Government did in *Nguyen*, the Dual SSN Requirement creates a blanket exclusion of citizen children in mixed-status families similar to *Jimenez*. Thus, an interest in preventing fraud would be insufficient to justify the Dual SSN Requirement under intermediate scrutiny.

In sum, the Dual SSN Requirement could plausibly trigger intermediate scrutiny when presented with a challenge by citizen children in mixed-status families. The Dual SSN Requirement would likely fail the intermediate scrutiny test, resulting in a violation of equal protection.

C. Rational Basis Review

If the Court did decide to default to its typical rational basis standard of review, the Dual SSN Requirement would probably survive given how deferential this review is.²⁷¹ The government would not need to present evidence that the Dual SSN Requirement actually reduces fraud, nor would Congress have needed any in the legislative record.²⁷² The Court could independently reason that the Dual SSN Requirement is a way to allocate limited federal funds that cannot be second-guessed.²⁷³

Although the Court could theoretically apply its default rational basis review, this Comment has explained why heightened scrutiny should be triggered for both citizen spouses and children. Thus, it is more likely that the Court, if it applied rational basis at all, would at least use the analysis scholars consider “rational basis with bite.”

It is not possible to accurately predict when the Court will employ rational basis with bite. The parallels between the Dual SSN Requirement and the Court’s previous heightened rationality cases, however,

²⁶⁹ *Nguyen*, 533 U.S. at 70 (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

²⁷⁰ *Id.* at 63–64.

²⁷¹ See *supra* Part III.C.1.

²⁷² See, e.g., *FCC v. Beach Commc’ns., Inc.*, 508 U.S. 307, 315 (1993).

²⁷³ See *Dandridge v. Williams*, 397 U.S. 471, 487 (1970).

are significant. First, as with the plaintiffs in *Moreno*, *Cleburne*, and *Romer*, mixed-status families are arguably politically unpopular given the Federation for American Immigration Reform's lobbying to exclude them from economic stimulus.²⁷⁴ One could certainly push back on this conclusion, however, with reference to the recent CARES Act amendment that benefited mixed-status families.²⁷⁵ The second, and perhaps stronger, parallel is that the Dual SSN Requirement treats mixed-status marriages as "second-class" by denying them economic benefits that other marriages are entitled to. The Court invalidated "second-tier" treatment that "demeans the couple" using rational basis with bite in *Windsor*.²⁷⁶ Therefore, even if the Court declined to apply strict and intermediate scrutiny to the Dual SSN Requirement, mixed-status families still have a plausible argument within rational basis review that *Moreno* and its progeny should control, rather than the Court's more deferential rational basis cases.

Under the *Moreno* line of cases, the Dual SSN Requirement would likely be invalidated. The government's interest in preventing fraud would be insufficient to justify the Dual SSN Requirement when, as in *Moreno*, the practical effect of the Dual SSN Requirement is to deny economic benefits to mixed-status families in dire need.²⁷⁷

V. CONCLUSION

The Dual SSN Requirement presents a novel equal protection issue. Although the second COVID-19 relief legislation likely mooted the ongoing litigation regarding the Dual SSN Requirement in the CARES Act, the underlying constitutional issue was left open. This Comment has argued that the Dual SSN Requirement is unconstitutional because it impermissibly violates the equal protection rights of citizen spouses and children in mixed-status families. Unlike the original litigation that narrowly focused on the Dual SSN Requirement in the CARES Act specifically, this Comment evaluates the Dual SSN Requirement holistically, demonstrating that the Dual SSN Requirement would be unconstitutional in any federal legislation that provides significant economic benefits.

The implication of this conclusion should not be understated. This Comment calls into question the Dual SSN Requirement's continued

²⁷⁴ See *supra* Part II.B.

²⁷⁵ See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 272, 134 Stat. 1182, 1965–66.

²⁷⁶ *United States v. Windsor*, 570 U.S. 744, 771–72 (2013).

²⁷⁷ See sources cited *supra* note 227.

presence in the EITC, which is currently the largest federal cash transfer program.²⁷⁸ Congress could potentially avert any litigation over the EITC by removing the Dual SSN Requirement, similar to its approach with the CARES Act. At some point, however, Congress's constant avoidance of any equal protection challenge to the Dual SSN Requirement would have the same practical effect as a Court decision holding the Dual SSN Requirement unconstitutional.

This conclusion also suggests that the Constitution requires Congress to include mixed-status families in any future emergency economic relief, rather than continuously relegating the eligibility of mixed-status families to political speculation.²⁷⁹ Although a future crisis would likely create some level of economic uncertainty for everyone, this constitutional guarantee would at least provide mixed-status families with the assurance that the federal government will not treat them worse than other families.

²⁷⁸ David R. Francis, *The Earned Income Tax Credit Raises Employment*, NAT'L BUREAU OF ECON. RSCH. DIG. (Aug. 2006), <https://www.nber.org/digest/aug06/earned-income-tax-credit-raises-employment> [<https://perma.cc/LU9K-KBGP>].

²⁷⁹ Even after the second round of COVID-19 stimulus payments included mixed-status families, there was still speculation regarding whether the subsequent third round of COVID-19 stimulus checks would include mixed-status families. *See, e.g.*, Rocky Mengle, *Biden Calls for \$1,400 Third Stimulus Checks as Part of \$1.9 Trillion Relief Package*, KIPLINGER (Feb. 3, 2021), <https://www.kiplinger.com/taxes/602204/biden-calls-for-1400-third-stimulus-checks-as-part-of-19-trillion-relief-package> [<https://perma.cc/ESK7-P7UC>].