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EITC Correspondence Audits: An Equal Protection Issue

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EITC CORRESPONDENCE AUDITS: AN EQUAL PROTECTION ISSUE

I. INTRODUCTION

The Earned Income Tax Credit ("EITC") is a tax credit available to working individuals who make under a certain income level. Although the credit is offered to some childless workers, the main purpose of the credit is to aid working families with one or more dependent children.[1] Research suggests that the credit can have a considerable, positive impact on those who qualify for, and receive, the credit.[2]

While EITC claimants have some of the lowest incomes in the United States, their returns are audited at disproportionately high rates.[3] The focus on this group of taxpayers stems from several sources. First, data suggests that improper claims of the EITC is high, however, the actual number of improper claims is disputed.[4] Second, there is a focus on limiting improper payouts on EITC claims in Congress, despite the fact that improper payouts of the EITC make up only a tiny portion of the overall tax deficit.[5] Third, low- and medium-income returns, including EITC returns, are simpler and cheaper to audit than returns from higher income filers and businesses.[6]

This Comment will discuss why audited EITC claimants have a valid equal protection claim against the government for the Internal Revenue Services ("IRS")'s auditing practices. While the Court has never held that wealth is a suspect classification for the purposes of equal protection,[7] EITC claimants substantially satisfy the factors used by the Court to establish suspect classification. Despite this, it would be unlikely that the Supreme Court would find the indigent are a suspect class. A finding of suspect classification would require the Court to draw a hard line to delineate a class based on economic con-

1. *Earned Income Tax Credits*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/policy/hst/hi5/taxcredits/index.html (last reviewed June 30, 2021) [hereinafter CDC, *Earned Income Tax Credits*].

2. *Id.*

3. INTERNAL REVENUE SERVICE, IRS DATA BOOK, 2018 23–26 tbl.9a (2018). For consistency, the data and calculations in this Comment are based on the IRS's tax audit data from 2018.

4. *See infra* Part II.A.3.

5. *See infra* Part II.A.5.

6. *See infra* Part II.A.6.

7. Henry Rose, *The Poor as a Suspect Class Under the Equal Protection Clause: An Open Constitutional Question*, 34 NOVA L. REV. 407, 408 (2010).

dition, which it has been hesitant to do.[8] While the government may have a compelling interest in limiting the tax deficit, evidence suggests that the high rate of correspondence audits of EITC claimants—driven by desire for administrative efficiency—is not reasonably related to the government's goal of achieving a smaller tax deficit.

A case of this kind would be difficult for a plaintiff to win, as equal protection lawsuits that challenge patterns of enforcement by government entities require plaintiffs to show discriminatory intent.[9] Despite this, a lawsuit of this kind could encourage courts to reevaluate the indigent as a suspect class in a novel context. A challenge to the IRS's auditing practice would also draw attention to the negative impact of congressional budget cuts on the federal refund auditing system and Congress's disproportionate focus on EITC refunds. An equal protection challenge could also highlight the detrimental effect of certain IRS auditing practices on low-income claimants and encourage the IRS to follow the advice of taxpayer advocates and implement reforms to remedy the inequities in the U.S. tax system.

II. Background

A. The Earned Income Tax Credit

The EITC is one of the most significant anti-poverty features of the U.S. tax code today, but it began as a temporary measure to aid low-income, working families and encourage economic growth during a period of recession.[10] The credit was seen as an incentive for low-income people to work and, if successful, would cut back on unemployment and welfare costs.[11]

Despite the original intent of Congress, the EITC has remained part of the U.S. tax code, though the credit has grown and evolved since its inception. In the decades after its enactment, the maximum amount of credit was raised several times to reflect increases in the cost of living,

8. *See generally* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

9. Washington v. Davis, 426 U.S. 229, 239 (1976).

10. Thomas L. Hungerford & Rebecca Thiess, *The Earned Income Tax Credit and the Child Tax Credit* (Sept. 25, 2013), https://www.epi.org/publication/ib370-earned-income-tax-credit-and-the-child-tax-credit-history-purpose-goals-and-effectiveness/.

11. *Id.*; Margot L. Crandall-Hollick, Cong. Research Serv., R44825, The Earned Income Tax Credit (EITC): A Brief Legislative History 3–4 (2018) (quoting the Finance Committee Report on the Tax Reduction Act of 1975). As more recent data and research shows, the perception that individuals living at or below the poverty line who are able to work do not is a misconception. Elise Gould, *Poor People Work: A Majority of Poor People Who Can Work Do*, Econ. Pol'y Inst. (May 19, 2015), https://www.epi.org/publication/poor-people-work-a-majority-of-poor-people-who-can-work-do/.

inflation, and Social Security taxes.[12] Around twenty years after its enactment, the EITC went through a significant overhaul. Among the changes were those to combat noncompliance.[13] These changes had "the intention of reducing fraudulent claims, better targeting benefits, and improving administration."[14] The scrutiny of EITC claims continued into the 2000s with further changes to reduce improper payments.[15] Today, scrutiny of EITC refunds remains high.[16]

1. How Do People Qualify for the EITC?

The EITC targets low-income, working families. The amount of credit a filer is entitled to is measured by an individual's earned income multiplied by a credit percentage.[17] Eight different formulas are used to calculate credit returns. The formula used depends on whether a filer is married or unmarried and the amount of dependent children they have.[18] The EITC varies by income; the credit limit raises as an individual's income increases to a certain point until the credit is no longer available.[19] A claim for the credit is based on three factors—earned income, relationship of qualifying children, and minimum residency of qualifying children.[20]

2. Importance of the Credit for Claimants

Despite being a tax credit, the EITC can be viewed as part tax credit, part welfare.[21] One of the purposes of enactment, to mitigate cash welfare payments, is evidence of the credit's hybrid nature.[22] Though it is a tax credit, the EITC has become one of the largest

12. CRANDALL-HOLLICK, *supra* note 11, at 4.

13. *Id.* at 4–7 (In addition, the credit was increased, opened to childless workers, and modified to vary by family size.).

14. *Id.* at 4.

15. *Id.* at 10.

16. *See Improper Payments in Federal Programs: Hearing Before the Comm. on Finance*, 114th Cong. 7 (2015); *see generally Improper Payments in the Administration of Refundable Tax Credits: Hearing Before the Subcomm. on Oversight of the Comm. on Ways & Means*, 112th Cong. (2011).

17. 26 U.S.C. § 32(a)(1); Leslie Book, *The IRS's EITC Compliance Regime: Taxpayers Caught in the Net*, 81 OR. L. REV. 351, 361–62 (2002).

18. CRANDALL-HOLLICK, *supra* note 11, at 12.

19. 26 U.S.C. § 32(b)(1)(A); Book, *supra* note 17, at 362.

20. Karie Davis-Nozemack, *Unequal Burdens in EITC Compliance*, 31 LAW & INEQ. 37, 47–48 (2012).

21. Lawrence Zelenak, *Tax or Welfare? The Administration of the Earned Income Tax Credit*, 52 UCLA L. REV. 1867, 1869 (2005).

22. *Id.*; *see also* CRANDALL-HOLLICK, *supra* note 11, at 3 (One of the initial purposes of the enactment of the EITC was to mitigate that amount low-income individuals claimed in cash welfare.).

welfare programs in the country, second only to Social Security.[23] For those with children who received the credit, research shows that there is a significant, positive impact.[24] The Congressional Research Service ("CRS") found that unmarried households with children living in poverty who claimed the credit saw significant benefits.[25] For example, the percent of unmarried households with three children living with income between 50% and 100% of the poverty line dropped from 28.3% to 22.2% with the credit.[26]

Research also indicates the receipt of the EITC may have health and education benefits for families living at or below the poverty line.[27] While it is difficult to measure the precise impact of the EITC on the health and education of low-income recipients of the credit, the EITC is an effective anti-poverty measure and likely has a positive effect on the health and well-being of its recipients.[28] Studies that measure the impact of the EITC reflect this; receipt of the credit was associated with reduced occurrences of low birth weight and better maternal health.[29] This effect stems from the well-established notion that poverty is linked to poor health, especially in infants and children.[30] Research has similarly shown that receipt of the EITC has a positive effect on the education of children in households that receive the credit. Receiving the EITC may positively impact student test scores and college attendance.[31]

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23. Bekah Mandell, *Race and State-level Earned Income Tax Credits: Another Case of Welfare Racism?*, 10 RUTGERS RACE & L. REV. 1, 2 (2008).

24. CDC, *Earned Income Tax Credits*, *supra* note 1.

25. MARGOT L. CRANDALL-HOLLICK & JOSEPH S. HUGHES, CONG. RESEARCH SERV., R44057, THE EARNED INCOME TAX CREDIT (EITC): AN ECONOMIC ANALYSIS 14–17 (2018).

26. *Id.* at 16.

27. *Id.* at 20; CDC, *Earned Income Tax Credits*, *supra* note 1.

28. CDC, *Earned Income Tax Credits*, *supra* note 1.

29. CRANDALL-HOLLICK, *supra* note 11, at 18–19 ("Several recent studies suggest that the EITC is associated with increases in birth weight and a reduction in the incidence of LBW. One study found that a $1,000 increase in the EITC was associated with a reduction in the incidence of LBW by approximately 3%, and an increase in mean birth weight. Another study found that the EITC was associated with improvements in maternal health; EITC-eligible mothers were less likely to have risky levels of certain biomarkers (i.e., high blood pressure or other indicators associated with cardiovascular disease and inflammation).").

30. *Id.* at 18.

31. *Id.* at 20–21. "Researchers looking at the test scores of children in elementary school in a large urban school district found that children in families that received larger EITCs (and the refundable portion of the child tax credit) tended to score higher on English and math tests. (Similar results were found by researchers looking at the impact of legislative expansions to the EITC in the 1990s. They found that the children in families that received the largest increase in the credit tended to score higher on math and reading tests)." *Id.* at 20. However, it is still unclear in what way the increased credit is impacting the scores. Similarly, researchers cannot separate the possible effects of the EITC from the possible effects of employment on both health and education.

3. Improper Payments of EITC

Improper payments and overclaims have been a concern in the administration of the EITC for decades.[32] According to the U.S. Government Accountability Office ("GAO"), an improper payment is "any payment that should not have been made or that was made in an incorrect amount under statutory, contractual, administrative, or other legally applicable requirements. Among other things, it includes payment to an ineligible recipient, payment for an ineligible good or service, and any duplicate payment."[33] 2018 reports from the IRS placed the rate of improper payments at 25% with the balance of improper payments at $18.4 billion.[34]

It is difficult to pinpoint what percentage of improper EITC returns are claimed through fraud and what percentage of improper payments are attributable to mistake, though the IRS has acknowledged that most improper payments are caused by errors due to the complexity of the credit, rather than fraud.[35] In 2014, the IRS released a study that identified the three main ways that claimants improperly file their EITC refunds. The three main reasons were: claiming children who were not qualifying children, misreporting income, and using an incorrect filing status.[36]

There are a number of factors that likely impact the level of improper claims. First, initial eligibility for the credit is determined by the taxpayer, unlike other similarly situated programs, which require some type of application before claiming the benefit.[37] The complexity that surrounds child residency and whether a particular individual is a "qualified child," coupled with the self-reporting nature, also contributes to the erroneous claims.[38] The complex nature of claiming the benefit contributes to the erroneous filing.[39] Finally, low-income filers

32. *See generally* CRANDALL-HOLLICK, *supra* note 11 (providing chronological discussion of the compliance concerns through the decades); Stephen D. Holt, *Keeping it in Context: Earned Income Tax Credit Compliance and Treatment of the Working Poor*, 6 CONN. PUB. INT. L.J. 183, 185 (2006).

33. *Improper Payments in Federal Programs: Hearing Before the Comm. on Finance*, 114th Cong. 11–12 (2015) (statement from Hon. Gene L. Dodaro, Comptroller General of the United States).

34. NATIONAL TAXPAYER ADVOCATE, ANNUAL REPORT TO CONGRESS 91, 93 (2018).

35. *Id.* at 79; *see* Holt, *supra* note 32, at 186.

36. MARGOT L. CRANDALL-HOLLICK, CONG. RES. SERV., R43873, THE EARNED INCOME TAX CREDIT (EITC): ADMINISTRATIVE AND COMPLIANCE CHALLENGES 4 (2015).

37. *Improper Payments in Federal Programs: Hearing Before the Comm. on Finance*, 114th Cong. 8 (2015) (statement from Hon. Gene L. Dodaro, Comptroller General of the United States).

38. *Id.*

39. *See* Davis-Nozemack, *supra* note 20, at 38.

are less likely to be financially literate and have access to tax professionals and support services, which likely contributes to the improper payment rate.[40]

4. Challenges to IRS Data on Improper Payments

Data from other sources indicates that the percent of improper payments and overall balance of improper payments is actually much lower than the IRS estimates.[41] The National Taxpayer Advocate ("NTA") challenged the efficacy of the data produced by the IRS based on the fact that the IRS data is compiled before any recovery of improper payments.[42] Additionally, the IRS's error rate does not consider underpayments or cases when the incorrect parent claimed the EITC which resulted in an underpayment, or lack of payment, to the correct parent.[43] The NTA estimates that for every dollar of improper payments of the EITC, forty cents goes unclaimed.[44] In 2014, the Treasury Inspector General for Tax Administration estimated that improper payments of the credit equaled $17.7 billion, but that $7.3 billion of the credit went unclaimed.[45] Additionally, EITC improper payments and overclaims represent a relatively small place in the tax gap. In 2015, for example, even when only considering individual tax noncompliance, EITC overclaims accounted for only 6% of the tax gap.[46]

5. Targeting of EITC Returns for Audit

Despite the conflict over the actual level of overpayment of the EITC and the relatively small impact EITC overpayments have in the tax gap, the IRS's high estimates of EITC improper payments has encouraged the IRS and Congressional focus on EITC compliance.[47] Congress began targeting improper EITC claims in earnest in the mid-1990s.[48] Congress was concerned with, among other things, the amount of credit being claimed in error, and the subsequent improper payments. The changes made to the credit through the Taxpayer Relief Act of 1997 sought to limit the availability of the credit for certain

40. *Id.* at 64.
41. *Id.* at 69–70.
42. NATIONAL TAXPAYER ADVOCATE, *supra* note 34, at 91.
43. *See* Davis-Nozemack, *supra* note 20, at 70; *see* Holt, *supra* note 32, at 185 n.17.
44. NATIONAL TAXPAYER ADVOCATE, *supra* note 34, at 95.
45. *Id.* at 95 n.28.
46. CRANDALL-HOLLICK, *supra* note 36, at 3–4.
47. *See* Davis-Nozemack *supra* note 20, at 40.
48. CRANDALL-HOLLICK, *supra* note 11 at 7 (citing Speaker Gingrich, "Taming the EITC," *Congressional Record*, October 17, 1995, p. E1952).

individuals and reduce fraud. Among other changes, the Act established strict penalties for those who improperly claim the credit in a reckless or fraudulent manner.[49] Furthermore, in the 1990s, there was an increase in the IRS's budget and $100 million was specifically earmarked for EITC examinations.[50] Later, the Protecting Americans from Tax Hikes Act also sought to limit improper payments of the credit. One of the provisions of the Act required the IRS to withhold EITC refunds until a later date and required more compensation information from employers to evaluate EITC returns for income reporting errors.[51] Congress has continued to focus on EITC improper payments.[52]

Improper payment laws also impact the level of scrutiny of EITC returns.[53] The purposes of improper payment laws are to limit the government from improperly paying parties and produce a "systematic framework for improper payment identification, measurement, planning, and reporting."[54] These laws, stemming from federal statutes and an executive order, require agencies to report any improper payments amounting to $10 million or over.[55] Federal programs with the highest improper payments must report on their current and future actions for lowering the improper payments.[56] Because the EITC improper payment balance is over the $10 million threshold, it is subject to the increased scrutiny required by the improper payment laws.

The focus on improper payments of the EITC has led to high audit rates of EITC returns, relative to other groups. There were 195,750,099 returns filed in 2018; 76.6% were individual returns (including EITC returns), 0.9% were corporate returns, and 13.8% were EITC returns.[57] The audit rate of all tax returns in 2018 was 0.5% and the total recommended additional payment in thousands of dollars was $26,514,334.00.[58] Individual income tax returns were audited at an average rate of 0.6% and netted $9,050,651.00 in recommended additional payments, comprising 34% of the total recommended addi-

49. *Id.* at 7–8 (The penalties included a ten-year ban on claiming the credit for those who had claimed it fraudulently.).

50. *See* Davis-Nozemack, *supra* note 20, at 58.

51. CRANDALL-HOLLICK, *supra* note 11, at 11.

52. *See Improper Payments in Federal Programs: Hearing Before the Comm. on Finance*, 114th Cong. 3 (2015); *Improper Payments in the Administration of Refundable Tax Credits: Hearing Before the Subcomm. on Oversight of the Comm. on Ways & Means*, 112th Cong. 3 (2011).

53. *See* Davis-Nozemack *supra* note 20, at 59.

54. *Id.* at 42.

55. *Id.* at 43.

56. *Id.*

57. INTERNAL REVENUE SERVICE, *supra* note 3, at 23 tbl.9a.

58. *Id.* at 23–24.

tional payments.[59] Corporate returns were audited at 0.9% and netted additional payments of $14,380,571.00, comprising 54% of additional payments.[60] Individual return of EITC claimants with returns under $25,000.00 were audited at 1.4% with a recommended additional payment total of $1,679,971.00 and EITC returns over $25,000 were audited at 1% with a recommended additional payment of $268,416.00. Together, these recommended additional payments for EITC returns comprised 7.3% of the total recommended additional payments.[61]

6. *Budget Cuts to the IRS and Use of Correspondence Examinations*

Congressional budget cuts to the IRS over the past years have been significant.[62] The operating cost of the IRS has dropped from over $14 billion in 2010 to $11.7 billion in 2018.[63] When measured for inflation, that comes to approximately a 20% decrease.[64] Full-time positions with the IRS have dropped from 94,711 in 2010 to 73,519 in 2018.[65] The Congressional Budget Justification and Annual Performance Report and Plan for the 2020 fiscal year will increase the IRS's base budget and funds for enforcement, though most of that will be applied to aging IRS technical infrastructure.[66] Budget cuts have had a significant impact on the number of examinations conducted by the IRS. In 2010, examinations covered 0.9% of the total returns, while in 2018 that number was down to 0.5%, about a 44% decrease.[67] While examinations have dropped for both individual and business returns,[68] some

59. *Id.*

60. *Id.* at 23–25.

61. *Id.* at 23–24.

62. *See* Letter from Charles P. Rettig, Commissioner of the IRS, to Senator Ron Wyden, Ranking Member Committee on Finance (Sept. 6, 2019), *available at* https://assets.documentcloud.org/documents/6430680/Document-2019-9-6-Treasury-Letter-to-Wyden-RE.pdf [hereinafter "Rettig Letter"].

63. INTERNAL REVENUE SERVICE, *supra* note 3, at 63 (Data for 2010 adjusted for inflation using the U.S. Bureau of Economic Analysis Nondefense Gross Domestic Product Chain-type Price Index with a 2018 base year.).

64. *Increase Appropriations for the Internal Revenue Service's Enforcement Initiatives*, CONG. BUDGET OFF. (Dec. 13, 2018), https://www.cbo.gov/budget-options/2018/54826.

65. INTERNAL REVENUE SERVICE, *supra* note 3, at 74.

66. Janet Holtzblatt, *The Administration's IRS Budget Contains The Good, The Bad, And The Uncertain*, TAX POL'Y CTR. (Mar. 26, 2019), https://www.taxpolicycenter.org/taxvox/administrations-irs-budget-contains-good-bad-and-uncertain.

67. CONGRESSIONAL BUDGET OFFICE, *supra* note 64; INTERNAL REVENUE SERVICE, *supra* note 3, at 23–26 tbl.9a; INTERNAL REVENUE SERVICE, INTERNAL REVENUE SERVICE DATA BOOK, 2010, 22 tbl.9a. (2011), *available at* https://www.irs.gov/statistics/soi-tax-stats-irs-data-book-index-of-tables.

68. Rettig Letter, *supra* note 62, at 2.

examination rates have dropped more than others based on the type of examination used.[69]

The budget cuts have affected field and correspondence audits in different ways.[70] Correspondence audits are conducted by mail, while field audits are conducted face-to-face.[71] Between 2000 and 2010, the use of correspondence audits by the IRS for examining returns almost tripled.[72] According to the IRS, the increase in correspondence audits was directly related to the budget cuts within the IRS.[73] While the audit rate has plateaued at approximately 75% correspondence audits and the remaining 25% field audits, some groups, namely EITC returns, are much more likely to be audited by a correspondence audit than a field audit.[74] In 2018, the vast majority of EITC audits were correspondence audits.[75] For claimants with income below $25,000, 96.6% of the examinations conducted on the returns for that group were correspondence audits. [76]

When an EITC return is submitted, each return is compared against third-party data and past tax filing information. Certain returns are flagged for potential issues and assigned risk scores based on the potential noncompliance issue. Returns rated for the highest possibility of noncompliance are available for audit.[77] If a return is chosen for audit, a correspondence letter is automatically sent to the taxpayer requesting additional documentation. The taxpayer then typically has thirty days to respond and the refund is put on hold until the matter is resolved.[78] If the taxpayer does not respond to the notice, the credit is disallowed in full.[79] If the taxpayer responds with documentation, the

69. INTERNAL REVENUE SERVICE, *supra* note 3, at 23 tbl.9a, 22, tbl.9a (The examination rate for EITC recipients for income under $25,000 is at 1.4% and above $25,000 is at 1.0% in 2018. In 2010 the examination rates for those groups were at 2.4% and 1.8% respectively. The examination rate for returns for income at least $200,000 and under $1,000,000 was 0.6% for nonbusiness returns and 1.4% for business returns in 2018. In 2010 the examination rates for those groups were at 2.5% and 2.9% respectively. Examination rates for returns with total income over $1,000,000 or more was 3.2% in 2018. In 2010 the examination rate for that group was at 8.4%.)

70. *Id.* at 23–26.

71. *See* Holt, *supra* note 32, at 191.

72. *See* Davis-Nozemack, *supra* note 20, at 38.

73. Rettig Letter, *supra* note 62, at 2.

74. INTERNAL REVENUE SERVICE, *supra* note 3, at 23–26 tbl.9a.

75. *Id.*

76. *Id.*; INTERNAL REVENUE SERVICE, *supra* note 67, at 22, tbl.9a (The total amount of EITC returns examined from claimants making less than $25,000 was 363,098 and the amount of those which were correspondence audits was 350,838. There was not, however, a high rate of correspondence audits for EITC returns from claimants making $25,000 or more.).

77. John Guyton et al., *The Effects of EITC Correspondence Audits on Low-Income Earners*, 7 (Nat'l Bureau of Econ. Research, Working Paper No. 24465, 2019).

78. *Id.* at 8.

79. *Id.*

IRS will then either come to a decision or request additional information.[80] If the IRS determines the credit was claimed in full or in part in error, the taxpayer can either passively or actively (through a response letter) accept the decision or actively challenge the decision to disallow the credit.[81]

Correspondence audits are much cheaper for the IRS to administer.[82] According to the IRS, correspondence audits take approximately 5 hours per return while field audits take from 61 to 251 hours per return.[83] Examiners conducting field audits, usually reserved for higher yielding and more complex individual and business returns, require special expertise not required for examiners conducting correspondence audits.[84] Of the total additional tax dollars recommended after examinations in 2018, approximately 80% of those dollars were recommended from field audits despite the fact that only a quarter of all audits are field audits.[85]

7. Limitations and Effects of EITC Correspondence Examinations

There are benefits and shortcomings to both field and correspondence audits. Field audits are expensive and require more experienced examiners, though they produce more recommended additional payments. While correspondence audits are cheaper to conduct, the drawbacks of these audits are significant, especially in the context of EITC examinations.[86] The cited limitations of correspondence examinations include the lack of support services for audit exams and the self-administration of the credit. While this keeps EITC administrative costs very low, it shifts the costs of administration to the claimants due to the complicated nature of claiming the credit, which increases the claimant's need for professional assistance.[87] However, around 98% of taxpayers who experience EITC examination are unrepresented.[88] The examination process itself is complicated and the letters difficult to read for a variety of reasons, including readability and the financial literacy of the claimants.[89]

80. *Id.*
81. *Id.*
82. *See* Rettig Letter, *supra* note 62, at 1; *see* Davis-Nozemack *supra* note 20, at 54.
83. Rettig Letter, *supra* note 62, at 3.
84. *Id.* at 1–2.
85. INTERNAL REVENUE SERVICE, *supra* note 3, at 23–26 tbl.9a.
86. *See* Davis-Nozemack, *supra* note 20, at 38.
87. *Id.* at 55–56.
88. *Id.* at 38.
89. *Id.* at 64 (There are readability issues associated with certain formats of the correspondence letters, the letters are not written in plain language and use tax-specific terms unfamiliar to the average taxpayer. These issues are compounded by the fact that low-income individuals

> Confusing IRS correspondence, illiteracy, language barriers, and unequal access to competent tax professionals can cause taxpayers—particularly low-income taxpayers—to miss the deadline for filing a petition. Indeed, a 2007 TAS study found more than one-quarter of taxpayers receiving an EITC audit notice did not understand that the IRS was auditing their return, almost 40 percent did not understand what the IRS was questioning, and only about half of the respondents felt that they knew what they needed to do. In other words, there are circumstances in which deficiency procedures do not give taxpayers a realistic opportunity to petition the Tax Court.[90]

To compound this issue, the IRS's phone service is inaccessible and leaves claimants without resources to understand the examination process once a return has been selected for a correspondence audit.[91] It is also very challenging for a claimant to transfer the audit to a face-to-face setting.[92] Thus, most claimants who receive a correspondence audit do not apply for reconsideration[93] and a significant amount of disallowed EITC benefits are due to failure to receive correspondence or failure to respond.[94]

Recent research suggests that correspondence audits may have a significant effect on EITC claimants that extends past the initial difficulty in navigating the audit process.[95] In years after being audited,

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are more likely to have issues with functional and financial literacy.); *see also* NATIONAL TAXPAYER ADVOCATE, ANNUAL REPORT TO CONGRESS 104 (2007) (Over 70% found that the letter was not easy to understand, 26.5% did not know that the IRS was auditing their return, and 38.9% did not know what the IRS was questioning.).

90. NATIONAL TAXPAYER ADVOCATE, *supra* note 34, at 378.

91. *See* Davis-Nozemack, *supra* note 20, at 63, 67.

92. *Id.* at 63 ("[A] taxpayer may petition to change the venue, which could mean changing from a correspondence examination (i.e., a campus examination) to a face-to-face office examination. This regulation gives the Service the discretion to grant the request after considering six factors. Despite the list of factors, many IRS service centers take the view that correspondence examinations will be transferred only in the instances of hardship.") (internal quotations omitted).

93. *See* Holt, *supra* note 32, at 192 ("The original audit results may reflect the ability to negotiate the initial review process more than indicating eligibility for the EITC.").

94. *Id.* at 191 n.52 (citing NATIONAL TAXPAYER ADVOCATE, THE NATIONAL TAXPAYER ADVOCATE'S FISCAL YEAR 2004 OBJECTIVES REPORT TO CONGRESS 23 (2003)) ("Data from the EITC Program Office in 2003 indicated that more than 30% of taxpayers undergoing EITC correspondence audits over the previous three years had either not received the IRS notices or had failed to respond to them."); *id.* (citing NATIONAL TAXPAYER ADVOCATE, I.R.S., PUB'N NO. 2104b (Rev. 12-2004), 2004 ANNUAL REPORT TO CONGRESS, 2 EARNED INCOME TAX CREDIT (EITC) AUDIT RECONSIDERATION STUDY 21 (2004)) (In a sample of cases in which the taxpayer sought reconsideration of an adverse EITC audit determination, the primary cause of the determination in 42% of them was either no taxpayer response or a late response.); Guyton et al., *supra* note 77, at 3 (Within the research group in this study, 76% to 80% of claims were disallowed due to undelivered mail, nonresponse, or insufficient response and confirmed ineligibility due to error was around 15%.).

95. Guyton et al., *supra* note 77, at 20.

individuals are less likely to claim potential EITC benefits despite meeting the benefit criteria.[96] After undergoing a correspondence audit, EITC claimants are less likely to file a tax return in general.[97] Furthermore, audited wage earners may be less likely to have wage employment in the years right after a correspondence audit.[98]

B. Equal Protection

1. Generally

Equal protection refers to the doctrine that individuals must be given equal protection and treatment under the government's laws.[99] Equal protection in the U.S. stems from two amendments. The Fourteenth Amendment guarantees individuals equal protection from discriminatory state action, while the guarantee of equal protection from discriminatory federal action is read into the Due Process Clause of the Fifth Amendment.[100] Equal protection rights are anti-caste and anti-class,[101] and exist to ensure that individuals who are similarly situated are equally protected under the law.[102] The purpose of equal protection is to protect individuals against "legislation whose *purpose* or *effect* is to create discrete and objectively identifiable classes[ ]" based on invidious, arbitrary, or capricious discrimination.[103]

2. Types of Discriminatory Laws and Practices

A law or policy may violate an individual's equal protection if it is facially discriminatory.[104] A facially neutral law may also violate an individual's equal protection if the law has an underlying discriminatory purpose, if it is applied in a discriminatory way, or has a discriminatory impact.[105] A facially discriminatory law draws distinctions

96. *Id.*

97. *Id.* at 1.

98. *Id.* at 5 ("[F]or audited wage earners who have wage employment (i.e., have a W-2) in the year of selection, there are decreases in the likelihood of having wage employment in the years just after the EITC correspondence audits, and the decreases are larger for taxpayers with younger (ages 0-5) qualifying children.").

99. U.S. CONST. amend. XIV.

100. Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Schweiker v. Wilson, 450 U.S. 221, 226 n.6 (1981).

101. *See generally* Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994); Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 913 (2013).

102. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985).

103. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 60 (1973) (Stewart, J., concurring) (emphasis added).

104. *See generally* Korematsu v. United States, 323 U.S. 214 (1944).

105. *See generally* Yick Wo v. Hopkins, 118 U.S. 356 (1886); Gomillion v. Lightfoot, 364 U.S. 339 (1960).

between groups on its face.[106] Not all facially discriminatory laws violate equal protection; it depends on the groups affected by the law and whether fundamental rights are at issue in the legislation.[107] If a facially discriminatory law draws distinctions based on suspect classification, it will likely be invalidated.[108]

A facially neutral law can also be found to violate equal protection based on its discriminatory application or impact.[109] However, just because a law affects some differently than others does not mean it is discriminatory; a plaintiff challenging a law based on discriminatory impact must show that it was the intent of the government entity to discriminate.[110] In *Washington v. Davis*, plaintiffs challenged the administration of a police entrance exam and alleged that the test disproportionately excluded African Americans from police service.[111] In finding for the state, the Court held that a discriminatory impact is not enough to invalidate a facially neutral practice—a plaintiff must show discriminatory intent on the part of the government.[112] The Court found that discriminatory impact can be evidence of discriminatory intent, but cannot alone be evidence of a discriminatory purpose.[113] However, a plaintiff does not need to show that the discriminatory purpose was the sole motivation behind the law or practice.[114] The Court considers both direct and circumstantial evidence when determining discriminatory intent, including events leading up to the challenged practice, legislative or administrative history, or significant changes in procedure.[115] If a plaintiff is able to show an improper purpose, the burden shifts to the government to show that the same practice would be in place regardless of the discriminatory purpose.[116]

3. Standards of Review

Courts apply different standards of review in equal protection claims depending on what groups are affected by a law's classification

106. KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 678 (19th ed. 2016).
107. *Id*. at 678–82.
108. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).
109. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976); *Yick Wo*, 118 U.S. at 356.
110. *Davis*, 426 U.S. at 231.
111. *Id.* at 233.
112. *Id.* at 239.
113. *Id.* at 241.
114. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266, 269 (1977).
115. *Id.* at 267–68.
116. SULLIVAN & FELDMAN, *supra* note 106, at 690.

or whether the classification limits a fundamental right.[117] The general rule, known as the rational basis test, is that a law is presumed valid "if the classification drawn by the statute is rationally related to a legitimate state interest."[118] The rational basis test is the lowest level of scrutiny applied by courts to equal protection questions. Rational basis is applied when there are no issues of fundamental rights or suspect classifications at issue.[119]

Early articulation of a heightened standard of scrutiny came in *United States v. Carolene Products Co*.[120] In a footnote, the Court left open the possibility that a heightened form of scrutiny would be appropriate in certain circumstances.[121] Over time, the Supreme Court has established different standards of review depending on whether the classification drawn by the law affects members of a particular group or whether the law restricts a fundamental right.[122] Laws and policies that discriminate against suspect classes receive the highest level of scrutiny known as strict scrutiny.[123] Suspect classes are limited and include classifications based on race, alienage, and national origin.[124] Under strict scrutiny, the government must show that the law or policy is in place to further a compelling government interest and the policy must also be narrowly tailored to serve that interest.[125] Strict scrutiny is also applied when fundamental Constitutional rights are in question.[126]

Intermediate scrutiny sits between rational basis and strict scrutiny and is applied to laws and policies that discriminate against quasi-suspect classes.[127] Quasi-suspect classifications include gender[128] and legitimacy of birth.[129] Under intermediate scrutiny a law or policy must be substantially related to an important government interest.[130] Some

117. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985).

118. *Id.*

119. *Id.*

120. 304 U.S. 144, 152 n.4 (1938).

121. *Id*. (stating that heightened scrutiny may be appropriate where laws discriminated based on religious, racial, or nationality).

122. *City of Cleburne*, 473 U.S. at 440.

123. Palmore v. Sidoti, 466 U.S. 429, 432–33 (1984).

124. *Id.*; Graham v. Richardson, 403 U.S. 365, 371–72 (1971); *City of Cleburne*, 473 U.S. at 440 (Classifications at the state level based on alienage and national origin are subject to strict scrutiny; classifications at the federal level are reviewed through the rational basis test because of the federal government's power to regulate immigration.).

125. *Palmore*, 466 U.S. at 432–33.

126. *City of Cleburne*, 473 U.S. at 440.

127. *Id.* at 440–41.

128. Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

129. Mathews v. Lucas, 427 U.S. 495, 505 (1976).

130. Craig v. Boren, 429 U.S. 190, 197 (1976).

view the equal protection standards of review as a spectrum, rather than three clear-cut tests.[131]

4. Suspect Classification

Heightened scrutiny and suspect classification are interconnected, as suspect classification is only one of two ways a court will apply heightened scrutiny to a law or practice.[132] The reasoning behind the existence of suspect classification is three-fold. First, certain classifications reflect prejudice rather than the furtherance of some legislative objective.[133] Second, legislation based on those prejudices is in conflict with the notion at the center of our constitution—that every person should be judged as an individual.[134] Third, certain groups have suffered a history of discrimination and, thus, need greater protection from the political process.[135]

The Court has held that race, alienage, and national origin, are suspect classifications and gender and legitimacy of birth are quasi-suspect classifications.[136] Although the Supreme Court is not always clear as to what factors are required for suspect classification, the Court has applied the following factors to determine whether a group is a suspect class—whether the group has been subjected to a history of discrimination, whether the class shares an immutable trait, whether the group is a discrete and insular minority, whether the trait affects the individual's ability to contribute to society, and whether the group's political power is diminished.[137] While these factors are the most often cited in equal protection decisions, not every opinion from the Court regarding equal protection and suspect classification has addressed every factor.[138] Additionally, the way the Court has defined some of these factors has changed over time.[139]

131. *City of Cleburne*, 473 U.S. at 451–52 (Stevens, J., concurring) (discussing that the "standards of . . . review," rational basis, intermediate, and strict, are not well-defined but rather there is a spectrum of analysis applied to equal protection claims).

132. *See supra* note 117 and accompanying text.

133. Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982).

134. *Id.*

135. *Id.*

136. Loving v. Virginia, 388 U.S. 1, 9 (1967) (race); Graham v. Richardson, 403 U.S. 365, 371–72 (1971) (alienage); Oyama v. California, 332 U.S. 633, 644–46 (1948) (national origin); Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (gender); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175–76 (1972) (legitimacy).

137. Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 742 (2014).

138. Tiffany C. Graham, *The Shifting Doctrinal Face of Immutability*, 19 VA. J. SOC. POL'Y & L. 169, 178–79 (2011).

139. *See generally* Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CAL. L. REV. 323 (2016).

a. History of Discrimination

One important indicator of a suspect classification is whether the group has endured a "history of purposeful unequal treatment" that has relegated the group to a position of diminished political power.[140] In *Frontiero v. Richardson*, the Court applied a heightened level of scrutiny[141] to a policy discriminating against servicewomen for ease of administration of military benefits.[142] In doing so, the Court outlined the role the government played in enacting laws and authoring decisions that limited or denied women equal rights or equal role in the political process.[143]

Just because a group has been discriminated against does not mean that the conduct necessarily rises to historic purposeful discrimination. For example, when the Court held that mental disability was not a suspect classification, it did so despite the fact that people with mental disabilities have suffered significant mistreatment.[144] Similarly, the Court found that the elderly are not a suspect class, though it admitted that the group faced a history of discrimination.[145] The Court stated that the aged "unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."[146]

b. Obvious, Immutable, or Distinguishing Characteristics

Immutability refers to the permanent, often visible, nature of the characteristic that distinguishes a group as a suspect class.[147] In holding that race, national origin, gender, and illegitimacy of birth are suspect or quasi-suspect classifications, the Court addressed the fact that the characteristic that defines these groups is unchanging.[148] The factor of immutability is tied to the concept of culpability and individual responsibility.[149] The Court has reasoned that burdening a party for

140. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

141. *Frontiero*, 411 U.S. at 691–92 (Powell, J., concurring) (not strict scrutiny, the majority was split on what standard to apply).

142. *Id.* at 690–91.

143. *Id.* at 684–85.

144. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 454–55 (1985) (Stevens, J., concurring).

145. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976).

146. *Id.*

147. Graham, *supra* note 138, at 172.

148. Mathews v. Lucas, 427 U.S. 495, 505 (1976).

149. Graham, *supra* note 138, at 180.

something over which they have no control, like race, gender, or illegitimacy, offends our system of government.[150] For example, in *Weber v. Aetna Casualty and Surety Company*, the Court held that a statute that discriminated based on legitimacy of birth violated equal protection, in part, because illegitimacy was an unchangeable condition of birth, over which a child had no control.[151] Contrastingly, in *Plyler v. Doe*, the Court stated that undocumented immigrants are culpable for their undocumented status and, thus, suspect classification is inappropriate.[152]

While immutability is a traditional indication of a suspect classification,[153] it appears that it is not a necessary component in a suspect classification analysis.[154] Further, an immutable characteristic does not guarantee a suspect classification, and the Court has expressly declined to extend suspect classification to age and mental disability, both of which could be considered immutable characteristics.[155]

c. Discrete and Insular Minority

The Court has also looked to whether the group seeking suspect classification and heightened scrutiny for an equal protection claim is a discrete and insular minority. In *City of Cleburne v. Cleburne Living Center*, the Court held that the mentally disabled are not a quasi-suspect class, in part, because those with a mental disability vary in capacity, and "range from those whose disability is not immediately evident to those who must be constantly cared for."[156] The defining characteristic, mental disability, was too diverse to create a discrete group.[157]

The Court also addressed the discrete and insular factor in *Bullock v. Carter*, where the Court struck down a state election filing fee on the grounds of violating equal protection of those with lower income. There, the Court appeared to deviate from a strict definition of discrete and insular when it stated:

150. Craig v. Boren, 429 U.S. 190, 212 n.2 (1976) (Stevens, J., dissenting).

151. *Mathews*, 427 U.S. at 505.

152. Plyler v. Doe, 457 U.S. 202, 220 (1982) (Keeping with the idea that individuals should not be held responsible for conditions over which they have no control, the Court reasoned that the children of undocumented parents should not be held responsible for that condition.).

153. Johnson v. Robison, 415 U.S. 361, 375 n.14 (1974); Frontiero v. Richardson, 411 U.S. 677, 686 (1973); *Mathews*, 427 U.S. at 505.

154. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (failing to mention immutability as a factor for determining suspect classification).

155. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 454 (1985).

156. *City of Cleburne*, 473 U.S. at 442.

157. *Id.*

> This disparity in voting power based on wealth cannot be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the Equal Protection Clause, and there are doubtless some instances of candidates representing the views of voters of modest means who are able to pay the required fee. But we would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status.[158]

Thus, in *Bullock*, the Court was willing to overlook the fact that the lower income citizens affected by the election fee were not a discrete group and looked to the practical impact of the government's fee.[159] Only a year after *Bullock*, in *San Antonio Independent School District v. Rodriguez*, the Court appeared to apply a stricter definition of the discrete minority factor when it held that the lower-income plaintiffs from a disproportionately funded school district were not a discrete group for the purposes of an equal protection analysis.[160]

d. Contribution to Society

In determining whether a group is a suspect class, a court may look at whether the common characteristic of the group affects an individual's ability to contribute to society.[161] In defining race as a suspect classification, the Court noted that an individual's race has no bearing on his or her ability to contribute to society and classifications made along lines of race rarely serve any legitimate state purpose.[162] Similarly, both gender and illegitimacy are quasi-suspect classifications and subject to intermediate scrutiny because a person's gender and legitimacy of birth do not impact a person's ability to contribute to society.[163] Contrastingly, the Court declined to extend suspect classification status to the mentally disabled because, in part, those with mental disabilities "have a reduced ability to cope with and function in the everyday world."[164]

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158. Bullock v. Carter, 405 U.S. 134, 144 (1972).

159. *Id.*

160. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 69–70 (1973) (White, J. dissenting) (Justice White's dissent cites the Court's decision in *Bullock v. Carter* and argues that the Court "would blink reality to ignore the fact that school districts, and students in the end, are differentially affected by the Texas school-financing scheme . . ." For Justice White, that was enough to make the plaintiffs an identifiable class.).

161. *City of Cleburne*, 473 U.S. at 440–41.

162. *Id.* at 440.

163. Frontiero v. Richardson, 411 U.S. 677, 686 (1973); Mathews v. Lucas, 427 U.S. 495, 505 (1976).

164. *City of Cleburne*, 473 U.S. at 442.

e. Extent of Political Powerlessness

The definition of political powerlessness has changed over time. In *Frontiero*, the Court described the lack of or diminished political power as underrepresentation in political decision-making bodies.[165] In the years after *Frontiero*, the Court shifted and began to define political powerlessness as a lack of favorable legislation or democratic actions favoring a group.[166] Since that shift, the Court has not found a group to be a suspect class under the favorable democratic action definition of political powerlessness.[167]

The evolution of the definition of political powerlessness stemmed from *Massachusetts Board of Retirement v. Murgia*, where Justice Thurgood Marshall suggested that the definition of political powerlessness should be based on whether there have been laws passed benefitting the group.[168] That is to say, if the group can attract the attention of legislators and there is legislation that benefits the group in question, the group is not politically powerless.[169] In *Cleburne*, the Court solidified that definition of political power.[170] There, the mentally ill were not a suspect class because they benefited from the protection of various state and federal laws and could attract the attention of lawmakers.[171]

f. Criticisms of the Standard for defining Suspect Classes

The standard for defining suspect classifications has been criticized as inadequate for failing to protect vulnerable groups that may need judicial protection.[172] The criticism ranges from acceptance of the doctrine but a desire to include additional groups, to calling for a complete overhaul of the doctrine based on a view that suspect classification precedent is too unclear and contradictory to be consistently applied.[173] Some scholars have argued that defining political power as the existence of favorable legislation is a poor test and warrants reevaluation as it will preclude almost any group from benefiting

165. *Frontiero*, 411 U.S. at 686 n.17.

166. *See* Ross & Li, *supra* note 139, at 334–35.

167. *Id.* at 336.

168. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 325 (1976) (Marshall, J., dissenting); *see* Ross & Li, *supra* note 139, at 334.

169. *See* Ross & Li, *supra* note 139, at 334–35.

170. *Id.*

171. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442–46 (1985); *see* Ross & Li, *supra* note 139, at 336.

172. Pollvogt, *supra* note 137, at 788–95.

173. *Id.*

from strict or heightened scrutiny on equal protection issues.[174] The measure of political power based on favorable democratic action essentially ensures that no other group would be found suspect as "[e]ven the most politically marginalized groups (such as the poor, noncitizens, and felons) have benefited from laws favoring their interests."[175] Critics contend that favorable legislation is often not an accurate measure of a group's actual political power and advocate for an analysis of additional factors like a group's lobbying activities, political responsiveness, voter turnout rates, and descriptive representation in political office.[176]

5. Wealth as a Suspect Classification

There is contention as to whether the Supreme Court has expressly stated that the indigent are *not* a suspect or quasi-suspect class for the purposes of an equal protection analysis.[177] Certain cases in the 1950s, 1960s, and 1970s protected the indigent in various contexts and in some cases, the Court addressed poverty in ways that suggest a heightened level of scrutiny may be appropriate.[178] However, the most recent and extensive discussion of the indigent and suspect classification came in *San Antonio Independent School District v. Rodriguez*, where the Court held that a group of residents of a low-income school district were not a suspect class.[179] Though cited as the Court's decision not to hold the poor as a suspect class, the Court's narrow holding may not have foreclosed the possibility that policies or laws discriminating based on income level could be analyzed under a heightened level of scrutiny.[180]

In the 1950s, 1960s, and 1970s, the Court protected the poor in a number of decisions and indicated the possibility of the poor as a suspect class for the purposes of equal protection decisions, though many

174. *See* Ross & Li, *supra* note 139, at 324.

175. *Id.*

176. *Id.* at 376–79.

177. *See* Rose, *supra* note 7, at 408 (briefly discussing sources iterating the view that the Supreme Court has determined that the poor are not a suspect class).

178. Harris v. Comm'r of Corr., 860 A.2d 715, 735 (Conn. 2004) (discussing poverty as a suspect classification when a statutory scheme caused an individual to be imprisoned past the maximum period allowed because of his indigency); *see also* Rose, *supra* note 7, at 410–11 (discussing equal protection and the poor under a criminal law context and the interconnection of poverty and voting rights in certain cases. The author admits that viewing the cases that address both poverty and voting rights is problematic as the voting is a fundamental right and thus garners strict scrutiny on its own. However, the author notes that dicta in those cases is relevant to the question of the poor as a suspect or quasi-suspect class.).

179. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16–18 (1973).

180. *E.g.*, Rose, *supra* note 7, at 408; Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349, 397–98 (2012).

of these cases also dealt with fundamental rights.[181] Nevertheless, there was a period in the Court where "classifications on the basis of wealth stood on the same level as classifications on the basis of race—traditionally disfavored and subject to heightened judicial scrutiny."[182] In *Harper v. Virginia Board of Elections*, the Court stated that, "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored."[183] This analysis mirrors the Court's analysis in other equal protection cases involving suspect classes.[184] In the early 1970s, both a concurrence and a dissent in separate Supreme Court cases argued that the indigent should be viewed as a suspect class. [185] In *Boddie v. Connecticut*, a concurrence from Justice William O. Douglas called for a law that discriminated based on wealth to be scrutinized like those based on race and alienage. [186] Also, a dissent from Justices Brennan, Blackmun, and Marshall in *James v. Valtierra* called for the indigent to be viewed as a suspect class, stating that classifications based on poverty require "exacting judicial scrutiny[.]"[187]

The Supreme Court's decisions in *Dandridge v. Williams* and *San Antonio School District v. Rodriguez* show a transition away from favorable treatment of the poor in equal protection challenges.[188] In *Dandridge*, plaintiffs challenged a state practice of placing a limit on the public welfare dollars per month per family, regardless of family size.[189] In applying rational basis review, the Court held that the practice did not violate the equal protection clause.[190]

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181. Bullock v. Carter, 405 U.S. 134, 143–44 (1972) (In *Bullock v. Carter* the Supreme Court held that a filing fee requirement with no alternative to running for public office violated equal protection.); Goldberg v. Kelly, 397 U.S. 254, 264–65 (1970); Edwards v. California, 314 U.S. 160, 174–77 (1941); Griffin v. Illinois, 351 U.S. 12, 23–24 (1956) (Frankfurter, J., concurring); Douglas v. California, 372 U.S. 353 (1963); Julie A. Nice, *A Sweeping Refusal of Equal Protection*, *in* THE POVERTY LAW CANON 129 (Marie A. Failinger & Ezra Rosser eds., 2016); *see* Ross & Li, *supra* note 139, at 325.

182. *See* Ross & Li, *supra* note 139, at 341.

183. Harper v. Va. Bd. of Elections, 383 U.S. 663, 668 (1966) (in the context of poll taxes).

184. Frontiero v. Richardson, 411 U.S. 677, 682 (1973); Loving v. Virginia, 388 U.S. 1, 11 (1967).

185. *See generally*, Boddie v. Connecticut, 401 U.S. 371, 383–86 (1971); James v. Valtierra, 402 U.S. 137, 143–45 (Marshall, J., dissenting).

186. *Boddie*, 401 U.S. at 385–386.

187. *James*, 402 U.S. at 145 (Marshall, J., dissenting); *see* Rose, *supra* note 7, at 413.

188. *See generally* THE POVERTY LAW CANON Part II (Marie A. Failinger & Ezra Rosser eds., 2016) (Both decisions are discussed in the section entitled "Part II Losses.")

189. Dandridge v. Williams, 397 U.S. 471, 473 (1970).

190. *Id.* at 486–87.

The State of Maryland argued the practice was in furtherance of the legitimate state interests of encouraging employment, maintaining a fair balance between families receiving welfare and wage-earning families, incentivizing family planning, and allocating funding as to help the greatest number of families.[191] The Court reasoned that it was not federal courts' duty to determine whether a state government policy was wise or wholly logical in the furtherance of that goal. [192] Rather, the Court was only mandated to determine whether the practice was rationally related to the government interest.[193] The Court further stated that "the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court."[194] While *Dandridge* did not directly address the possibility of suspect classification of the indigent, the decision expressed the Court's aversion to scrutinizing legislative practices related to welfare and economics.[195]

Rodriguez is cited as the case which closed the door on the indigent as a suspect class,[196] though that notion is challenged.[197] In *Rodriguez*, plaintiffs sued a Texas school district on behalf of school children from that district.[198] The claim alleged that the state's system of school funding through local property taxation favored the wealthy and violated students' equal protection because of the imbalance in per-pupil expenditures.[199] The District Court found that wealth was a suspect class and that education was a fundamental right, and, thus, subjected the school funding program to strict scrutiny.[200] The lower court found that the defendant school district failed to show the funding program furthered a compelling government interest.[201] In a 5–4 vote, the Supreme Court overturned the decision, holding that strict scrutiny was inappropriate.[202] The Court held that the program did not negatively impact any suspect class as the group of "poor" students allegedly dis-

191. *Id.* at 483–84.

192. *Id.* at 484–86.

193. *Id.* at 484–85.

194. *Id.* at 487.

195. *Dandridge*, 397 U.S. at 487.

196. *See* Rose, *supra* note 7, at 408 n.1 (The author cites Erwin Chemerinsky's constitutional law hornbook, "In *San Antonio School District v. Rodriguez*, the Supreme Court expressly held that poverty is not a suspect classification and that discrimination against the poor should only receive rational basis review.").

197. *Id.*

198. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 4 (1973).

199. *Id.*

200. *Id.* at 16–18.

201. *Id.* at 16.

202. *Id.* at 16–18.

advantaged by the program could not be definitively classified.[203] In place of strict scrutiny, the Court applied the rational basis test and found that the funding program was rationally related to a legitimate government purpose.[204]

The Court reasoned that there was "no definitive description of the classifying facts or delineation of the disfavored class."[205] The Court outlined three ways the group could be defined—(1) "poor" persons whose incomes fall below a defined level of poverty, (2) those who are relatively poorer than others, or (3) all who reside in relatively poorer school districts, despite their individual wealth.[206]

For the first means of distinguishing the plaintiff, the Court stated that the plaintiffs failed to demonstrate the funding disadvantaged a group definable as indigent or living beneath a specific poverty level.[207] The Court also noted that the alleged discrimination did not fully deprive benefit of the service, as seen in earlier cases where state laws were invalidated.[208]

The Court also declined to extend suspect classification under the second analysis, that the plaintiffs comprise a group "relatively poorer than others[.]"[209] Under this definition, the Court found that the bulk of data presented as evidence–that the amount in school spending was directly dependent on the median income of a district–did not actually support the plaintiffs' claims of discrimination.[210] Lastly, the Court found that defining the plaintiffs as those who lived in the district, irrespective of wealth, was insufficient because it created a "large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts."[211] This categorization created a group that did not have the standard indicia of suspectness and, thus, strict scrutiny could not be applied based on a suspect classification.[212] Based on this analysis, the Court found that strict scrutiny was not appropriate in this case and that the rational basis test should have been applied.[213]

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203. *Id.* at 19 (Additionally, the Court found that there was no fundamental right at issue in the suit.).

204. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 19.

205. *Id.*

206. *Id.* at 19–20.

207. *Id.* at 22–23.

208. *Id.* at 23.

209. *Id.* at 20.

210. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 26–27.

211. *Id.* at 28.

212. *Id.*

213. *Id.* (The Court also determined that strict scrutiny should not have been applied as there was no fundamental right in question.).

III. Analysis

Strict, or at least heightened, scrutiny should be applied to the IRS's audit practice of EITC claimants because the indigent class meets the standard set for suspect classification and EITC recipients are a well-defined representation of that class. While the government may have an interest in limiting the tax deficit, the administrative motivation behind the high levels of EITC audits, the format of the correspondence audits, and the lack of productivity of the audits themselves are indications that the IRS practice is not adequately tailored to the goal of limiting the tax deficit.

A. EITC Recipients Under the Suspect Classification Standard

Though the factors used by the Court to determine suspect classification have varied, the factors laid out above are the characteristics the Court has used to create suspect or quasi-suspect classes or reject a suspect classification.[214] The Court looks to whether a group has experienced a history of discrimination, whether they share an immutable characteristic, whether they are a discrete and insular minority, whether the uniting characteristic impacts an individual's ability to contribute to society, and whether the group has diminished political power. However, not every factor is always addressed or given equal weight.[215]

This Section will analyze EITC recipients under the factors set forth by the Court to determine suspect classification and discuss how a finding that EITC claimants are a suspect or quasi-suspect class is consistent with the Court's precedent and the purpose of suspect classification. This Section will also address why, while audited EITC claimants meet the suspect classification factors set forth by the Court, it is unlikely that the Court would hold that the indigent are a suspect or quasi-suspect class. Such a holding at this time is unlikely because of the Court's conservative nature[216] and its hesitancy to draw distinctions based on economic condition.[217]

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214. *See supra* text accompanying notes 132–71.

215. *See supra* text accompanying notes 132–71.

216. *'Supreme Inequality' Argues That America's Top Court Has Become Right-Wing*, NPR Fresh Air (Feb. 24, 2020), https://www.npr.org/2020/02/24/808843704/supreme-inequality-argues-that-america-s-top-court-has-become-right-wing.

217. Dandridge v. Williams, 397 U.S. 471, 485 (1970).

1. History of Discrimination

Historical discrimination has consistently played a role in the Court's finding that a group is a suspect class.[218] The indigent have encountered systemic discrimination in many facets of life due to their economic condition.[219] The poor have been subjected to discriminatory laws, discriminatory treatment within the criminal justice system,[220] societal stigmatization,[221] and a lack of protection in the courts.[222] It would be difficult for the Court to state that the poor have not suffered a history of discrimination given the well-documented treatment of the poor as a group.[223]

2. Immutability

The Court has looked to whether a group shares immutable visible characteristics in order to determine whether the group is a suspect class.[224] While immutability of the characteristic that defines a group is a consideration when determining suspect classification, it is not a necessity.[225] An immutable characteristic also does not automatically indicate a suspect classification.[226] When the Court has discussed immutability as an indicator of suspectness, it has focused on the fact that a trait is an incidence of birth and that an individual is not culpable in choosing to belong to a group.[227] The groups that enjoy heightened scrutiny are all unified by a trait that was out of the individual's control—gender, national origin, race, and illegitimacy.[228] Poverty is analogous to these traits in that it is also, in some circumstances, an incidence of birth. However, while poverty is unlike these traits in that it *can* change, research indicates that poverty can be cyclical, endur-

218. Frontiero v. Richardson, 411 U.S. 677, 681–82, 685 (1973); Mathews v. Lucas, 427 U.S. 495, 520–21 (1976).

219. Note, *Bail and Its Discrimination Against the Poor: A Civil Rights Action as a Vehicle of Reform*, 9 VAL. U. L. REV. 167, 167 (1974); *see* Ross & Li, *supra* note 139, at 344; Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1283 (1993).

220. *Bail and Its Discrimination*, *supra* note 219, at 167.

221. *See* Ross & Li, *supra* note 139, at 344.

222. Loffredo, *supra* note 219, at 1283.

223. *See* Ross & Li, *supra* note 139, at 343–44.

224. Lyng v. Castillo, 477 U.S. 635, 638 (1986).

225. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 19–20 (1973) (did not directly discuss immutability).

226. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 435 (1985); Mass. Bd. Ret. v. Murgia, 427 U.S. 307, 312–13 (1976).

227. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972); Craig v. Boren, 429 U.S. 190, 212–13 (1976) (not culpable for gender); Plyler v. Doe, 457 U.S. 202, 223 (1982) (culpable for undocumented status).

228. Mathews v. Lucas, 427 U.S. 495, 505 (1976); *Craig*, 429 U.S. at 212–13.

ing, and not wholly within an individual's control.[229] While poverty is not wholly immutable, there is a high likelihood that an individual born poor will remain poor.[230]

Whether a trait is visible is also a consideration in determining suspect classification.[231] Race, gender, and national origin *may* be visible, though not always. An individual from a suspect class does not need to show that they visually represent the class for heightened scrutiny to be applied to their equal protection claim.[232] Thus, while the visual expression of a trait can be a factor in suspect class analysis, it is not a prerequisite for suspect classification.[233] Nevertheless, poverty is very visible.[234]

3. Discrete and Insular

In a suspect classification analysis, the Court also looks to whether the group is discrete and insular. The most thorough analysis of this factor came in *Rodriguez*.[235] It is important to distinguish the Court's holding in *Rodriguez* with regard to the discrete nature of EITC claimants as a group. The plaintiffs in *Rodriguez* argued that they were a sample of the poor who were being negatively impacted by the state's school funding policies.[236] The problem for the plaintiffs in convincing the Court of their suspect status, in part, was their inability to show that their group was defined by the trait of poverty.[237] The plaintiffs argued that the school in their community was negatively impacted, but could not show that only poor people were negatively impacted by the state's funding practice.[238] Because of this, the Court found that the plaintiffs were not individual members of a discrete and insular class.[239]

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229. Ann Huff Stevens, *Transitions into & out of Poverty in the United States*, CTR. FOR POVERTY RES. UNIV. OF CAL., DAVIS, https://poverty.ucdavis.edu/policy-brief/transitions-out-poverty-united-states (last accessed June 30, 2021); Caroline Ratcliffe, *Child Poverty and Adult Success*, URBAN INST. (Sept. 2015), https://www.urban.org/sites/default/files/publication/65766/2000369-Child-Poverty-and-Adult-Success.pdf.

230. Stevens, *supra* note 229; Ratcliffe, *supra* note 229.

231. *See supra* text accompanying notes 147–55.

232. Graham, *supra* note 138, at 178–79.

233. Mathews v. Lucas, 427 U.S. 495, 505–06 (1976).

234. *See* Ross & Li, *supra* note 139, at 343 ("We can generally determine that people are poor on the basis of where they live, what they possess, and their demonstrated levels of education."); Kendra Bischoff & Sean F. Reardon, *Residential Segregation by Income*, in DIVERSITY AND DISPARITIES: AMERICA ENTERS A NEW CENTURY (John Logan, ed., 2014).

235. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 22–23 (1973).

236. *Id.* at 22.

237. *Id.* at 22–23.

238. *Id.* at 54-55.

239. *Id.* at 25.

That is not an issue for audited EITC recipients. Qualification for the EITC is a numerical value based on income and dependent children, and thus, recipients are defined by a clear line.[240] Many EITC recipients fall below the poverty line, and most make up the lowest wage earners in the country.[241] Most importantly, all EITC recipients were deemed by the government in need of the credit based on their level of income, familial structure, and the state of the economy.[242] While being poor is difficult to define and is measured in different ways, the fact that the government has deemed EITC recipients in need of tax credits insulates the group as a discrete minority.

4. Ability to Contribute to Society

Being poor or receiving the EITC does not affect an individual's ability to contribute to society.[243] This is evident, in part, because all EITC recipients are wage earners. In finding that gender and illegitimacy of birth are quasi-suspect classes, the Court reasoned that a person's gender or legitimacy of birth does not impact their ability to contribute to society.[244] Contrastingly, the Court found that the characteristic of mental disability and age can affect an individual's ability to contribute to society.[245] Similar to gender and illegitimacy, the characteristic of being poor does not impact an individual's ability to participate in society.

5. Extent of Political Powerlessness

Political powerlessness is the suspect classification factor that has changed the most over time.[246] Political powerlessness was initially defined as the lack of descriptive representation in political offices.[247] In more recent decisions, the existence of favorable legislation is the indicator that a group is not politically powerless.[248] The definition of

240. *See supra* text accompanying notes 17–20.

241. CRANDALL-HOLLICK & HUGHES, *supra* note 25, at 1.

242. *Id.*

243. *See* Ross & Li, *supra* note 139, at 344 n.120.

244. Frontiero v. Richardson, 411 U.S. 677, 686 (1973); Mathews v. Lucas, 427 U.S. 495, 505 (1976).

245. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441–42 (1985); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314–15 (1976).

246. *See* Ross & Li, *supra* note 139, at 334–35; *see* Richard E. Levy, *Political Process and Individual Fairness Rationales in the U.S. Supreme Court's Suspect Classification Jurisprudence*, 50 WASHBURN L.J. 33, 42 (2010) (discussing the differences in the way the Court has applied the factor of political powerlessness).

247. *See* Ross & Li, *supra* note 139, at 326 (discussing *Frontiero*, 411 U.S. at 686 n.17).

248. *Mass. Bd. of Ret.*, 427 U.S. at 313; *City of Cleburne*, 473 U.S. at 443–45; Vance v. Bradley, 440 U.S. 93, 97 n.12 (1979).

political powerlessness as favorable legislation is criticized as an inadequate measure of political power and should be abandoned.[249] The favorable legislation definition should be abandoned because it fails to reflect the purpose of suspect classification and equal protection.[250]

The favorable legislation measure does not make sense as a measure of suspect classification because it would essentially preclude any group from enjoying heightened scrutiny and makes the notion of suspect classification superfluous.[251] Under the favorable legislation definition, EITC claimants would not be deemed politically powerless, as the existence of the EITC itself is evidence of favorable legislation for the working poor. However, under the older standard of political powerlessness, set forth in *Frontiero*, EITC claimants would likely meet that factor because the indigent lack political power as they are underrepresented at every level of government.[252]

6. Present Unlikelihood of Suspect Classification

While audited EITC claimants generally meet the factors set forth by the Supreme Court for establishing suspect classification, it is unlikely that the Court would hold that the poor are a suspect or quasi-suspect class. First, the Supreme Court has never held that economic condition is a suspect classification.[253] While the Court applied heightened scrutiny in invalidating laws regarding wealth classification and fundamental rights in an earlier series of decisions,[254] more recent holdings from the Court have not gone favorably for plaintiffs challenging laws that distinguish individuals based on wealth,[255] and the decision in *Rodriguez* looms large as precedent that the poor are not a suspect class, despite the Court's limited holding.[256] Further, the historic conservatism of the Supreme Court also suggests that, generally, a holding that benefits the indigent in any context would be unlikely.[257] While the Court is nominally apolitical, some scholars suggest that the Court has, and continues to be, dominated by

249. *See* Ross & Li, *supra* note 139, at 326–29.

250. *Id.* at 345–48.

251. *Id.* at 351.

252. Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 LAW & CONTEMP. PROBS. 109, 121–22, 121 n.67 (2009).

253. SULLIVAN & FELDMAN, *supra* note 106, at 804.

254. *See supra* text accompanying notes 181–87.

255. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54–55s (1973); Dandridge v. Williams, 397 U.S. 471, 485 (1970); James v. Valtierra, 402 U.S. 137, 142–43 (1971).

256. *See* Rose, *supra* note 7, at 418.

257. NPR FRESH AIR, *supra* note 216.

conservative ideals which has led the Court to rule against the indigent on a consistent basis.[258]

Although it is unlikely that the current Court would find a suspect classification in this case, history indicates that the judicial treatment of the poor for the purposes of equal protection fluctuates.[259] It is reasonable to believe that a future Court could move back toward the analysis of the poor more common in the 1950s to the early 1970s and view economic classifications as suspect, along with classifications such as race, national origin, and gender. Considering the narrowly split decision in *Rodriguez*,[260] it is not implausible that the Court could eventually move closer to protecting the poor as a suspect or quasi-suspect class for the purposes of equal protection.

The Court addressed economic condition as a suspect classification most fully in *Rodriguez* in the context of school funding when it held that the group of plaintiffs from a low-income area were not a discrete enough group to warrant the application of suspect classification.[261] However, no Court precedent has completely foreclosed on the issue of the poor as a suspect class.[262] Critics of the Court's narrowed suspect classification standard, specifically the favorable legislation definition of political power, cite the standard's failure to protect marginalized groups, like the poor.[263] EITC recipients, as a group, largely meet the factors set forth by the Court to determine suspect classification. EITC recipients are defined by the government as low-income, based on their qualification for the credit. This makes EITC claimants a discrete group and, unlike the plaintiffs in *Rodriguez*, good candidates to enjoy strict or heightened scrutiny on the basis of wealth. While EITC recipients meet the precedential standard for suspect classification, the Court's historic conservatism and hesitancy to treat economic conditions as suspect make it unlikely that the current Court would find the poor a suspect class in any context.

B. A Claim Challenging the IRS's EITC Auditing Practice

According to IRS data, EITC recipients are audited with correspondence audits at higher rates than any other tax group with the exception of the highest earners.[264] The receipt of a correspondence audit

258. *Id.*
259. *See* Ross & Li, *supra* note 139, at 343.
260. The *Rodriguez* decision was split 5–4. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 2.
261. *Id.* at 56–57.
262. Levy, *supra* note 246, at 36–37 n.17.
263. *See* Ross & Li, *supra* note 139, at 325.
264. INTERNAL REVENUE SERVICE, *supra* note 3, at 23–26 tbl.9a.

has a negative impact on an EITC claimant, including a reduction in the likelihood the individual will claim the credit in the future.[265] The IRS audits EITC returns at a higher rate because they are cheaper to audit, as low-income returns are less complex than those from businesses and wealthier individuals.[266] The IRS's auditing process also focuses on EITC recipients because of Congress's fixation on the erroneous claims of the credit, despite the fact that improper EITC claims make up a very small fraction of the overall tax deficit.[267] The IRS's focus on EITC returns based on administrative ease, and the continued focus of Congress on auditing the credit despite the disproportionately low yield of additional tax dollars, is an indication of discriminatory motivation for the auditing practice. It is possible that an audited EITC claimant could challenge the IRS's practice of using correspondence audits to audit EITC claimants at disproportionately high rates for violation of equal protection.

This Section will discuss why an audited EITC claimant would have standing to bring a claim, both challenging the IRS auditing practice and describing what an analysis may look like under various levels of scrutiny. It will also discuss why a claim of this kind is supported by evidence that suggests the IRS's practice of high levels of audits against this group is driven by a discriminatory purpose. Lastly, this Section will discuss why, despite the evidence that there is an improper purpose underlying the high rate of EITC audits, a lawsuit would be very difficult to win. Even if the Court were to apply strict or intermediate scrutiny, plaintiffs challenging laws based on discriminatory impact or enforcement face the significant hurdle of showing the government practice was motivated by discriminatory intent. While evidence points to an improper motivation behind the auditing practice, it would likely not be enough to show discriminatory motivation to satisfy Court precedent or overcome the Court's historic hesitancy to become involved with economic policies.[268]

265. Guyton et al., *supra* note 77, at 1; *see* Davis-Nozemack, *supra* note 20, at 65; CRANDALL-HOLLICK, *supra* note 36, at 4, 6; NATIONAL TAXPAYER ADVOCATE, *supra* note 34; Paul Kiel, *It's Getting Worse: The IRS Now Audits Poor Americans at About the Same Rate as the Top 1%*, PROPUBLICA (May 30, 2019, 10:16 AM), https://www.propublica.org/article/irs-now-audits-poor-americans-at-about-the-same-rate-as-the-top-1-percent; *see* Holt, *supra* note 32, at 192.

266. *See* Rettig Letter, *supra* note 62.

267. CRANDALL-HOLLICK, *supra* note 36, at 3–4.

268. Washington v. Davis, 426 U.S. 229 (1976).

1. Standing: A Claim Against the IRS for Its EITC Auditing Practices

The standing doctrine requirements of a claim are injury, causation, and redressability.[269] An equal protection claim brought by an individual who properly claimed the EITC and was audited through a correspondence audit would have standing. Research shows that there are negative implications for EITC recipients who are audited through correspondence audits.[270] In years after being audited, individuals are less likely to claim potential EITC benefits, claimants are less likely to file a tax return in general, and earners may be less likely to have wage employment in the years right after a correspondence audit.[271] If an individual who claimed the credit was negatively impacted by an audit could also show that they would qualify for the credit again and would be subject to audit and harm in the same way, they would meet the requirement for an injury in fact.[272]

The manner in which correspondence audits are conducted negatively impacts audits of EITC claimants.[273] The impersonal nature of correspondence audits and the confusing audit communications cause claimants to ignore the audit or respond with incorrect information.[274] This causes even proper claimants to lose the credit.[275] The shortcomings of the correspondence audits are exacerbated by the confusing process of applying for the credit, lack of access to information, minimal support from the IRS, and the lack of access to tax professionals.[276] The injuries to the audited are also redressable. A court could compel the IRS to implement more equitable auditing practices or apply auditing resources to groups that are responsible for a greater section of the tax deficit.

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269. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

270. Guyton et al., *supra* note 77, at 6–7.

271. Guyton et al., *supra* note 77, at 6 ("[F]or audited wage earners who have wage employment (i.e., have a W-2 reported to the IRS by their employer) in the year of selection, there are decreases in the likelihood of having wage employment in the years just after the EITC correspondence audit, and the decreases are larger for taxpayers with younger (ages 0-5) qualifying children.").

272. *Lujan*, 504 U.S. at 560.

273. Guyton et al., *supra* note 77, at 39.

274. *See* Davis-Nozemack *supra* note 20, at 62–66; Guyton et al., *supra* note 77, at 8.

275. *See* Davis-Nozemack *supra* note 20, at 65; Guyton et al., *supra* note 77, at 11.

276. *See* Davis-Nozemack *supra* note 20, at 37–39.

2. *Application of Standards of Scrutiny to the IRS's EITC Audit Practices*

If a court were to apply strict scrutiny to the issue of the IRS practice of auditing EITC recipients, the government would have to show that it has a compelling interest and that its EITC auditing practice is narrowly tailored to achieve the goal.[277] Additionally, the practice must be the least restrictive way to achieve the goal.[278] If a court were to apply intermediate scrutiny, the government would have to show that the challenged practice furthers an important government interest and that the practice does so by means that are substantially related to that interest.[279] Under a rational basis analysis, the government must have a legitimate interest and the practice must be rationally related to that interest.[280]

The government's interest or goal in auditing is to efficiently mitigate the tax deficit by avoiding improper payouts of the EITC. A court may find that limiting the tax deficit is a compelling, important, and legitimate government interest, as the collection of taxes is an important part of a functioning government.[281] Under that reasoning, the government's interest in limiting the tax deficit through the avoidance of improper payouts of the EITC is a compelling, important, and legitimate interest to satisfy any standard of scrutiny. However, a court could also find that limiting the tax deficit is not a compelling, important, or legitimate interest. In *Frontiero*, the Court found that administrative efficiency was not a sufficient reason to justify differing treatment of the sexes.[282] The Court found that while "efficacious administration of governmental programs is not without some importance," there are more important Constitutional interests.[283] Here, the government's interest in limiting the deficit is related to a desire for efficacious administration of the tax refund and auditing process. Similarly, a court could find that limiting the tax deficit in an efficacious manner is not a legitimate interest.

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277. *See supra* text accompanying notes 117–31.

278. *See supra* text accompanying notes 117–31.

279. *See supra* text accompanying notes 117–31.

280. *See supra* text accompanying notes 117–31.

281. *How Are Federal Taxes Spent?*, TurboTax, https://turbotax.intuit.com/tax-tips/general/how-are-federal-taxes-spent/L6kinGuUt (last updated 2019) (Taxes fund defense, social security, safety net programs such as unemployment, Medicare and Medicaid, and other health programs, the interest on national debt, and a variety of other programs, such as transportation, infrastructure, education, and scientific research.).

282. Frontiero v. Richardson, 411 U.S. 677, 690–91 (1973).

283. *Id.* at 690.

If a court finds that efficiently limiting the tax deficit is a compelling, important, or legitimate government interest, the EITC auditing practice must still be narrowly tailored to, substantially related to, or legitimately related to that goal. The IRS's practice of auditing EITC claimants through correspondence audits at high rates is not even reasonably related to the goal of limiting the tax deficit because improper EITC payouts represent only a small part of the tax deficit and the productivity of the audits themselves in lessening the deficit is disproportionately low.[284]

The audits to EITC recipients allow the IRS to avoid paying out improperly claimed credits, thus furthering the government's goal of limiting the tax deficit. However, according to IRS data, it is questionable whether the IRS's focus of auditing EITC claims is a legitimately productive way of limiting the tax deficit. First, estimates of the improper payments of the EITC make up only a small fraction of the overall tax deficit.[285] Further, research suggests that even those estimates are too high because the data is based on audits, which often improperly deny the credit and fail to account for underpayments.[286] This shows that the goal of lessening the tax deficit would be better achieved by auditing a group that represents a greater portion of the tax deficit.

In *Frontiero*, the Court drew attention to the government's failure to provide concrete evidence to support its contention that differing treatment of female and male servicepeople actually saved the government money.[287] The IRS has advised that the budget cuts and the loss of high-level employees, who are more able to carry out audits on higher income individuals and businesses, have made correspondence audits of EITC claimants a more viable option.[288] However, the audit data from the IRS indicates that the agency may get more bang for its buck auditing other income groups at higher rates.[289] There is little doubt that it is cheaper and easier to audit the poor because their returns are simpler, but each individual audit of an EITC claimant produces far less in payments per audit than an audit of an individual or business at another income level. For example, while corporate returns comprise only 0.9% of the total returns filed in 2018, audits to those returns accounted for 54% of the total additional recommended

284. CRANDALL-HOLLICK, *supra* note 36, at 3–4.

285. *Id.*

286. *See* Davis-Nozemack, *supra* note 20, at 70; *see* Holt, *supra* note 32, at 185 n.17.

287. *Frontiero*, 411 U.S. at 689.

288. Rettig Letter, *supra* note 62.

289. *See supra* notes 57–61.

payments.[290] In 2018, 13.8% of all returns were EITC returns but audits to those returns accounted for only 7.3% of the total recommended additional payments.[291] Despite the fact that much more money comes from the audits of corporations than EITC claimants, the EITC audit rate is higher than the average corporate audit rate.[292]

The government's interest in limiting the tax deficit as likely compelling, important, or legitimate. While auditing EITC recipients is one means of achieving the goal of limiting the tax deficit, the auditing practice is not the most effective or least restrictive means of doing so. The relatively low efficiency of the EITC audits in lessening the deficit compared to other methods indicates that the practice is not narrowly tailored to, or substantially or reasonably related to, the goal of minimizing the tax deficit.

3. Discriminatory Purpose?: The Motivation of the IRS's EITC Audit Practice

The greatest hurdle in a case of this kind would be to show that the IRS's auditing practice was motivated by a discriminatory purpose on the part of the government. Under the current standard, the plaintiff would need to show that the IRS auditing practice did not only have a discriminatory effect, but that the practice was motivated by a discriminatory intent or purpose.[293] In analyzing discriminatory intent, the Court looks to both circumstantial and direct evidence of an improper purpose, which need not be the only motivation underlying a government practice.[294] Events leading up to the challenged practice, legislative or administrative history, and significant changes in procedure are all considered when determining if there is a discriminatory purpose.[295]

Evidence suggests an improper purpose underlies the EITC auditing practice for two reasons. First, the IRS has admitted that EITC claimants are audited at high rates with correspondence audits because they have low-income returns which are simpler and, thus, cheaper to audit.[296] Second, the Congressional focus on EITC audits is

290. INTERNAL REVENUE SERVICE, *supra* note 3, at 23–26 tbl.9a.

291. *Id.*; Guyton et al., *supra* note 77, at 7 (EITC correspondence and field audits make up a significant portion of overall audits at 35-40% of all correspondence audits and around 10% of all field audits); Kiel, *supra* note 265 (In 2018, 43% of all individual audits were audits on taxpayers who claimed the EITC on their return.).

292. INTERNAL REVENUE SERVICE, *supra* note 3, at 23–26 tbl.9a.

293. Washington v. Davis, 426 U.S. 229, 239 (1976).

294. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

295. *Id.* at 267–68.

296. *See* Rettig Letter, *supra* note 62.

unjustified based on the small role of improper EITC payments in the tax deficit, the disproportionately small amount of money EITC audits collect, and the well-documented negative impact of correspondence audits. Though, despite these indications of improper purpose, it is unlikely that the current evidence would meet the high standard for finding discriminatory intent or overcome the Court's historic hesitancy to become involved with economic and welfare policies.

Generally, it is cheaper to audit EITC claimants, as lower income returns are simpler to review.[297] According to the IRS, correspondence audits can be used for EITC examinations because those returns are simpler than higher income or business returns, which often require field audits (also known as "office" or "face-to-face" audits) and the work of highly trained employees.[298] The simplicity of low-income, EITC returns allows the IRS to use automation and low-level employees to conduct the examinations.[299] This means that EITC returns are more likely to be audited through correspondence audits because they are low-income returns. This practice draws discretionary lines between groups on the basis of wealth, disadvantaging EITC claimants for no other reason than administrative ease.

A related problem with the IRS's practice of auditing EITC claimants because those refunds are cheaper to audit is an additional reason *why* this group is cheaper to audit. EITC returns are not just cheaper to audit because they are simpler. The major criticisms of correspondence audits are that they are confusing, largely automated, and fail to offer those audited sufficient support to navigate the examination process.[300] These shortcomings, coupled with the fact that many EITC recipients have low financial literacy and less access to tax professionals, leads to few challenges to the audit, large numbers of unanswered examination letters, and, thus, loss of the credit.[301] In this way, the IRS is able to save money through the use of correspondence audits for EITC examinations because EITC claimants, as low-income filers, are less likely to respond to, or challenge, an audit.[302]

The purpose of equal protection is to protect individuals against government practices whose *purpose* or *effect* is to create discrete groups based on arbitrary discrimination.[303] A court could find the

297. *Id.*
298. *Id.*
299. *Id.*
300. *See* Davis-Nozemack, *supra* note 20, at 38–39.
301. NATIONAL TAXPAYER ADVOCATE, *supra* note 34, at 378.
302. *See* Davis-Nozemack, *supra* note 20, at 54–57.
303. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 60 (1973) (Stewart, J., concurring).

explanation that correspondence audits are cheaper and easier to audit is unacceptable due to the arbitrary focus on those refunds, especially considering their negative effects.[304] In *Frontiero*, applying a heightened scrutiny, the Court held that administrative ease was not a sufficient reason to support the disparate treatment of female and male servicepeople.[305] While the Court acknowledged that efficiency and cost are important considerations in the administration of benefits, "the Constitution recognizes higher values than speed and efficiency."[306] Even if there was evidence of a cost-benefit that supported focusing on EITC claimants,[307] that may not be enough to support the IRS's practice.

An inference of an improper purpose can also be drawn from Congressional focus on auditing EITC refunds. On numerous occasions, Congress has earmarked funds specifically for the examination of EITC returns[308] and enacted special penalties for improperly claiming the credit.[309] The focus on EITC returns persists despite information from tax advocates that EITC overpayment is likely exaggerated[310] and information from IRS data and credible experts that EITC overpayments comprise only a fraction of the overall tax deficit.[311] The intention behind the Congressional focus on improper payments of the EITC is a mystery considering the relatively small amount of additional recommended payments recovered from EITC audits.[312] A court could infer improper purpose based on the Congressional drive to limit improper payments of the credit, despite its relatively small place in the tax deficit and the disproportionately low amount collected in audits.

From the IRS statement that the EITC claimants are audited because low-income returns are cheaper to audit and the inexplicable Congressional focus on auditing EITC refunds despite their disproportionately low impact on the tax deficit, a court could reasonably find that the IRS's practice of auditing EITC claimants is based on an improper purpose. If a plaintiff is able to successfully allege this improper purpose, the burden would shift to the government to show

304. Frontiero v. Richardson, 411 U.S. 677, 689–91 (1973).

305. *Id.*

306. *Id.* (quoting Stanley v. Illinois, 405 U.S. 645, 656 (1972)).

307. *See supra* notes 256–58.

308. *See* Davis-Nozemack, *supra* note 20, at 58.

309. CRANDALL-HOLLICK, *supra* note 11, at 6, 8.

310. *See* Davis-Nozemack, *supra* note 20, at 51.

311. *Improper Payments in Federal Programs: Hearing Before the Comm. on Finance*, 114th Cong. 27–28 (2015) (statement from the Hononorable Gene L. Dodaro, Comptroller General of the United States).

312. INTERNAL REVENUE SERVICE, *supra* note 3, at 23–26 tbl.9a.

that the same auditing practice would be in place regardless of the motivation to focus on EITC audits for ease of administration.[313]

4. Unlikelihood that a Challenge to the IRS's Auditing Practice Would Succeed

The chances of success in any equal protection challenge are dependent on the level of scrutiny the Court applies. Although strict or intermediate scrutiny would be unlikely, even under rational basis, a court could find that the auditing practice is not legitimately related to limiting the tax deficit and is based on arbitrary distinctions drawn to save money at the expense of EITC claimants. However, while evidence suggests that an improper purpose underlies the auditing practice, it would likely not be enough to show discriminatory purpose or to overcome the Court's historic hesitancy to become involved with economic policies.[314]

Plaintiffs who seek to invalidate a facially neutral practice must overcome the high burden of showing that the practice was put in place for a discriminatory purpose.[315] While evidence of discriminatory effect on a group is evidence of discriminatory purpose, impact is not enough on its own.[316] While the Court will consider both direct and circumstantial evidence as proof of intent, intent is difficult to show, and proof of discriminatory purpose will not immediately invalidate a government law or practice.[317] Additionally, the Court has generally acted conservatively in decisions regarding economics and state distribution of funds.[318]

For example, according to the Court in *Dandridge v. Williams*, "the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."[319] The Court in *Dandridge* required only a tenuous connection between a government practice related to welfare and public fund distribution and some stated government interest.[320] The Court stated that it is not the place of the judiciary to measure the wisdom of government eco-

313. SULLIVAN & FELDMAN, *supra* note 106, at 690.

314. Washington v. Davis, 426 U.S. 229, 239 (1976); Dandridge v. Williams 397 U.S. 471, 487 (1970).

315. SULLIVAN & FELDMAN, *supra* note 106, at 691.

316. *Washington*, 426 U.S. 229, 239–42.

317. SULLIVAN & FELDMAN, *supra* note 106, at 691.

318. *See generally* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); *Dandridge*, 397 U.S. at 485–87.

319. *Dandridge*, 397 U.S. at 487.

320. *Id.* at 486–87.

nomic practices, nor is it the Court's position to invalidate laws simply because they are imprecise or result in some inequality.[321] Under such a yielding standard, it is unlikely that a challenge to the IRS's auditing practice would succeed.

Based on the evidence of the negative impact of EITC audits on claimants, an audited EITC claimant would meet the basic requirements for bringing an equal protection case. While the finding of a suspect classification would be unlikely, following Supreme Court precedent on defining suspect classes, strict or intermediate scrutiny would be the appropriate standard of review for an equal protection claim by EITC claimants. However, even under a rational basis analysis, a court may find that the high rate of correspondence audits of EITC claims is not rationally related to the goal of limiting the tax deficit. While evidence suggests that an improper purpose underlies the auditing practice, the evidence would likely be insufficient to show discriminatory purpose or overcome the Court's historic hesitancy to become involved with economic policies.[322]

IV. Impact

If a lawsuit challenging the IRS's EITC audit practices was brought, the Court could again fully analyze the indigent as a suspect class for the first time in decades. Even though a claim of this sort may not succeed, it could encourage the IRS to change its audit procedure and provide more resources to aid EITC claimants in navigating the complicated tax system and auditing procedures. Additionally, a claim of this kind could shed light on the issues within the U.S. tax system that favor businesses and the wealthy.

Because EITC claimants are a well-defined group, the Court could find that the indigent are a suspect class. Certain well-defined groups that share the characteristic of being poor or low-income, like EITC claimants, could gain the protection of heightened scrutiny for equal protection claims. As income inequality grows and wages stagnate,[323] the need for greater judicial and legislative protection for low-income individuals and families is increasingly important. While the Court has

321. *Id.* at 485.

322. *See generally* Washington v. Davis, 426 U.S. 229 (1976).

323. Katherine Schaeffer, *6 facts about economic inequality in the U.S.*, Pew Res. Ctr. (Feb. 7, 2020), https://www.pewresearch.org/fact-tank/2020/02/07/6-facts-about-economic-inequality-in-the-u-s/; Drew DeSilver, *For most U.S. workers, real wages have barely budged in decades*, Pew Res. Ctr. (Aug. 7, 2018), https://www.pewresearch.org/fact-tank/2018/08/07/for-most-us-workers-real-wages-have-barely-budged-for-decades/.

been hesitant to invalidate economic legislation,[324] a challenge to the IRS's auditing practice could encourage legislators to focus their attention on regulation that would better protect the most vulnerable.

While a lawsuit of this kind is unlikely to succeed, the IRS's EITC auditing practice could be improved through other avenues. Improvements in the correspondence audit process could go a long way towards alleviating the negative impact of the audits on EITC claimants.[325] Tax reform advocates have called for a simplification of the eligibility criteria for EITC.[326] A challenge to the IRS's EITC auditing practice could encourage the IRS to follow the detailed suggestions from tax advocates and make changes in the eligibility requirements. A challenge may also encourage the agency to promote better tax education, especially for lower income taxpayers who might not have the resources to hire a tax professional. The IRS could also provide taxpayers with better access to information and provide claimants with the steps to appeal a correspondence audit, which could mitigate the negative impact that the audits have on proper and improper claimants alike.

The imbalanced nature of the IRS audit process of EITC claimants is only one example of inequality in the tax system and the inconsistent application of tax laws.[327] The discriminatory nature of EITC audits and other inconsistent applications of tax laws stems from the deeper funding issue that has hindered the IRS in the most recent decades. A challenge to the IRS's auditing practices could serve to alert Congress of the IRS's need for funding to support a fairer and more efficient tax system. Additional funding, and its proper allocation, could allow the IRS to improve or change automated correspondence audits. More funding would allow the IRS to increase field audits to higher-wealth individuals and entities where higher amounts of additional recommended dollars are acquired.

V. Conclusion

Following Supreme Court precedent on defining suspect classes, there is a good case for either strict or intermediate scrutiny to apply to equal protection claims by EITC claimants. Based on the evidence

324. *Dandridge*, 397 U.S. at 484–87; City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985).

325. Guyton et al., *supra* note 77, at 1–2, 4, 36; *see* Davis-Nozemack, *supra* note 20, at 64.

326. *See* Davis-Nozemack, *supra* note 20, at 71; National Taxpayer Advocate, Earned Income Tax Credit: Making the EITC Work for Taxpayers and the Government Improving Administration and Protecting Taxpayer Rights 4, 9 (2019), *available at* https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ JRC20_Volume3.pdf.

327. *See generally* National Taxpayer Advocate, *supra* note 34.

indicating the negative impact of EITC audits on claimants, an audited EITC claimant would meet the basic requirements for bringing an equal protection case. The government may have a compelling or important government interest in limiting the tax deficit. However, evidence suggests the high rate of correspondence audits of EITC returns is not a reasonable way to achieve the goal of mitigating the deficit. Further, the IRS's desire for administrative efficiency and the unjustified Congressional focus underlying the motivation for the auditing practice is evidence of improper purpose. While a case of this kind would be difficult to win, it would encourage courts to reevaluate the indigent as a suspect class and draw attention to the impact of budget cuts on IRS examinations, the detrimental effect of correspondence audits, and the inequities in the U.S. tax system.

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