William & Mary Journal of Race, Gender, and Social Justice

Volume *27 (2020-2021)*
Issue 1 *Justice Across Borders: Social Justice and Its Intersections with Law, Immigration, and Human Rights*

Article 7

November 2020

"De-Americanization" During the Trump Administration: Derivative Citizenship and Deceased Parents in the United States

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"DE-AMERICANIZATION" DURING THE TRUMP ADMINISTRATION: DERIVATIVE CITIZENSHIP AND DECEASED PARENTS IN THE UNITED STATES

ABSTRACT

The Trump Administration's war on immigration will be marked in history as one replete with white supremacy and terror. Much attention has been focused in the realm of undocumented immigrants, detention centers, and family separations because of the pervasiveness of those issues and the gravity of the human rights violations occurring in the United States. However, little focus has been given to immigrants who are lawful permanent residents or naturalized citizens at risk of denaturalization and deprivation of their constitutional rights. This Note highlights the effects of the Trump Administration's war on immigration on citizens and green card holders in the United States. This Note will analyze the Third Circuit's recent opinion in *Tineo v. Attorney General United States of America* that conferred citizenship upon a lawful permanent resident born in the Dominican Republic to unwed parents amidst strong government opposition. The government presented an archaic argument in saying that the Court was without power to remedy an equal protection violation that would result in conferring citizenship because of the plenary power doctrine. It is in that context of the Trump Administration's war on immigration that the government used an outdated interpretation of the plenary power doctrine to ensure that Tineo would not be granted citizenship. This Note will demonstrate how courts have the power to confer citizenship onto people whose constitutional rights have been violated.

INTRODUCTION

The Trump Administration has launched a war against immigrants.[1] He has revived old tactics and strategies in the process of "de-Americanization."[2] Though his policies have not been perfectly executed, they will have long-lasting impacts on all immigrants in the United States.[3] The Trump Administration's "anti-immigrant message was heightened when he embraced a proposal 'to slash legal immigration to the United States in half within a decade' by eliminating family reunification categories . . . further evidence of his desire 'to tear apart communities and punish immigrant families.'"[4] He has separated families, deported servicemen, and pushed his message forward through the use of white supremacy.[5] Although the case of José Francisco Tineo seems separate and apart from these efforts, this Note will explore how Tineo's story is very much part of the Trump Administration's era of "de-Americanization."[6]

Tineo was born to Dominican citizens on January 16, 1969, in the Dominican Republic.[7] Tineo's father, Felipe Antonio Tineo Nunez, and mother, Juana Margarita Sanchez Martinez,[8] were not married at the time of his birth.[9] While Tineo was still a child, his father Felipe left the Dominican Republic and moved to the United States.[10] During that time, Tineo remained in the Dominican Republic with his mother.[11]

In 1984, three years after his father became a naturalized United States citizen, Tineo's mother passed away.[12] Shortly thereafter, in

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1. *See* Bill Ong Hing, *Entering the Trump Ice Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 291–94 (2018).

2. *See id.* at 319–21. Although this Note uses the term "de-Americanization," it acknowledges that the term American refers to all the lands in the Western Hemisphere. *Contra id.* at 320–21. Using "American" to refer to the United States replicates hegemonic notions while completely ignoring the different countries throughout the region as a whole. As such, this Note uses "de-Americanization" to only refer to the process as applied to the United States. *See id.*

3. *See id.* at 256, 319.

4. *Id.* at 319.

5. Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 198, 201 (2019); Maria Ines Zamudio, *Deported U.S. Veterans Feel Abandoned by the Country They Defended*, NPR (June 21, 2019), https://www.npr.org/local/309/2019/06/21/733371297/deported-u-s-veterans-feel-abandoned-by-the-country-they-defended [https://perma.cc/4HHA-V89S].

6. *See* Hing, *supra* note 1, at 319–21.

7. Tineo v. Att'y Gen., 937 F.3d 200, 205 (3d Cir. 2019).

8. Telephone Interview with Jose Tineo, Petitioner in Tineo v. Att'y Gen., 937 F.3d 200 (3d Cir. 2019) (Sept. 8, 2019) [hereinafter Tineo Interview].

9. *Tineo*, 937 F.3d at 205.

10. *Id.*

11. *Id.*

12. *Id.*

1985, at the age of fifteen, Tineo moved to the United States to be raised by his father.[13] Tineo arrived to the United States as a green card holder and took up residence with his father in New York.[14]

In 1993, Tineo was convicted for the sale of a controlled substance, which in turn initiated removal proceedings in 2000.[15] Those proceedings were terminated in 2001 due, in part, to the fact that he submitted proof of his citizenship by presenting a United States passport that was issued to him by the State Department on June 20, 2001.[16] In the years following the first proceeding, Tineo traveled outside of the United States several times using the passport he was issued.[17]

On January 15, 2008, after returning from a trip abroad, Tineo presented his United States passport to Customs and Border Patrol.[18] Tineo was detained and later issued a Notice to Appear (NTA) in immigration court because "'[he] falsely represented [him]self to be a [U.S.] Citizen . . . to gain entry into the United States,' thus violating § 1182(a)(6)(C)(I) and (ii)" by presenting his passport.[19] "The NTA also charged Tineo as being a [foreigner] present in the United States without being admitted or paroled, in violation of § 1182(a)(6)(A)(I)."[20] Since U.S. citizens are not inspected upon re-entry in to the United States, Tineo was charged for not being paroled into the United States by an immigration officer.[21]

Tineo was subsequently put into removal proceedings for the second time in two decades after he pleaded guilty to passport fraud and aggravated identity theft in 2014.[22] During his immigration proceedings, "Tineo admitted to his criminal convictions, but challenged his removability" on the basis that his father was a U.S. citizen.[23] Tineo consistently argued that he derived citizenship from his father because his father became naturalized while Tineo was still a child.[24] And Tineo recalled the many times he tried to explain his immigration situation to his attorneys, family members, or anyone who would listen to him.[25]

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13. *Id.*
14. *See* Brief for Petitioner at 2, Tineo v. Att'y Gen., 937 F.3d 200 (3d Cir. 2019) (No. 16-1461) [hereinafter Tineo's Brief].
15. *Tineo*, 937 F.3d at 205.
16. *Id.*; Tineo Interview, *supra* note 8.
17. Tineo Interview, *supra* note 8.
18. *Tineo*, 937 F.3d at 206.
19. *Id.* (alteration in original) (quoting Admin. R. at 890).
20. *Id.*
21. *Id.*
22. *Id.* at 205–06.
23. *Id.* at 206.
24. Tineo Interview, *supra* note 8.
25. *Id.*

After being issued a United States passport in 2001, Tineo thought there would be little in the way of affirming his status as a U.S. citizen.[26] Yet, years later, he would encounter a roadblock that would impact the rest of his life.[27] Not being able to renew his passport, Tineo struggled to show that he was authorized to work in the United States.[28] In efforts to try to overcome his struggle, Tineo was found guilty of trying to get a passport with fraudulent documentation.[29] He was criminally convicted and again put into removal proceedings where an immigration judge ordered his removal.[30]

After losing his appeal to the Board of Immigration Appeals, Tineo appealed his case to the Third Circuit; he argued that he derived citizenship from his father and that the gender-based distinction, which required that he be legitimated by his father as a child, was unconstitutional.[31] However, the government combated Tineo's argument by saying that the remedy requested by Tineo could not be granted by the Court.[32] The government presents an archaic argument in saying that, even if the court were to find in Tineo's favor, the court does not have the power to confer citizenship onto Tineo at all because the legislature has plenary power over matters of immigration.[33]

The government argued that the court could not remedy the alleged violation of the equal-protection mandate under the Fifth Amendment because Congress has complete deference in making determinations about immigration, residence, and belonging in the United States.[34] The government presents this archaic argument relying on outdated principles of the plenary power doctrine, and it is particularly important to recognize that the argument is intrinsically connected to a broader War on Immigration.[35] It is part of a war exacerbated by the Trump Administration, and the weapons of choice include zero-tolerance policies, money, and white supremacy.[36] During his administration, Trump has promoted efforts to denaturalize citizens of the United States.[37] The Administration has

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26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. Tineo v. Att'y Gen., 937 F.3d 200, 206 (3d Cir. 2019).
31. *Id.* at 208.
32. *Id.* at 215.
33. *Id.* at 215–16.
34. *See* Brief for Respondent at 45–48, Tineo v. Att'y Gen., 937 F.3d 200 (3d Cir. 2019) (No. 16-1461) [hereinafter Government's Brief].
35. *See* Hing, *supra* note 1, at 259.
36. *See* Srikantiah & Sinnar, *supra* note 5, at 198–202.
37. Maryam Saleh, *Trump Administration Is Spending Enormous Resources to Strip Citizenship from a Florida Truck Driver*, THE INTERCEPT (Apr. 4, 2019, 6:00 AM), https://

separated thousands of migrant children from their families in detention centers, which are ill-equipped to support the populations.[38] The Trump Administration has gone as far as to threaten taking away birthright citizenship as a means to further his agenda to punish immigrants and their families.[39]

In Part I, this Note will analyze Tineo's case and the decision of the Third Circuit that conferred his right to citizenship. This Note will analyze the government's archaic argument that asserts that the court is without the power to provide Tineo with such a remedy in Part II. Next, this Note will examine whether similar arguments have been asserted by the government before and whether they have prevailed. In Part III, this Note will fit Tineo's case within the broader context of the Trump Administration's "de-Americanization" policies. In Part IV, this Note will highlight the plenary power doctrine and the power the court has exerted over issues of nationality. Finally, this Note will demonstrate why the government's argument holds no merit.

I. *TINEO V. ATTORNEY GENERAL UNITED STATES OF AMERICA*

On September 15, 2015, an immigration judge "order[ed] Tineo's removal to the Dominican Republic" because "he failed to meet the definition of a 'child'" to derive citizenship.[40] The immigration judge found that Tineo's father never "legitimated" him, which was required due to the unwed status of his parents, barring him to qualify for derivative citizenship under 8 U.S.C. § 1409, the immigration statute for children born out of wedlock.[41]

Tineo subsequently appealed his removal to the Third Circuit, alleging that the immigration judge's interpretation, the practical effect of which was to deny Tineo of his derivative citizenship based on his father's inability to "legitimate" him after his death, violated the equal-protection mandate of the Fifth Amendment of the Constitution.[42] The issue Tineo presented in his appeal to the Third Circuit

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theintercept.com/2019/04/04/denaturalization-case-citizenship-parvez-khan [https://perma.cc/8NSS-M8SX].

38. *See* Zolan Kanno-Youngs, '*He Turned Purple': U.S. Overlooks Ill Asylum Seekers*, N.Y. TIMES (Feb. 22, 2020), https://www.nytimes.com/2020/02/22/us/politics/trump-asylum-remain-in-mexico.html [https://perma.cc/NMV7-6GH9].

39. Patrick J. Lyons, *Trump Wants to Abolish Birthright Citizenship. Can He Do That?*, N.Y. TIMES (Aug. 23, 2019), https://www.nytimes.com/2019/08/22/us/birthright-citizenship-14th-amendment-trump.html [https://perma.cc/DAV5-GSWL]; *see* Bill Chappell, *Trump Administration Targets 'Birth Tourism' With New Visa Rule*, NPR (Jan. 23, 2020, 2:50 PM), https://www.npr.org/2020/01/23/798874112/trump-administration-targets-birth-tourism-with-new-visa-rule [https://perma.cc/99AZ-YU57].

40. Government's Brief, *supra* note 34, at 10.

41. Tineo's Brief, *supra* note 14, at 5–6; 8 U.S.C. § 1409 (2020).

42. Tineo v. Att'y Gen., 937 F.3d 200, 204 (3d Cir. 2019).

was whether an "illegitimate" child can derive citizenship from his unwed father, after the death of his mother and after never having been legitimated according to state statute.[43] The court also considered the broader issue of "whether precluding a father from ever having his born-out-of-wedlock child derive citizenship through him can be squared with the equal-protection mandate of the Due Process Clause of the Fifth Amendment."[44]

For Tineo to derive citizenship from his father, he needed to meet the definition of "child" under the naturalization laws at the time his father came to the United States.[45] To derive citizenship, "[a] *child* born outside of the United States of [non-citizen] parents . . . becomes a citizen of the United States upon . . . [t]he naturalization of the surviving parent if one of the parents is deceased."[46] In other words, citizenship can be derived from a single parent who becomes naturalized in the United States.[47] Under this statute, Tineo should have been able to derive citizenship from his father because his father was naturalized and his mother was deceased.[48] However, the definition of "child" under the immigration statute complicated Tineo's case.[49]

For the purposes of immigration and nationality, a "child" is defined as "an unmarried person under twenty-one years of age and includes a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in the United States or elsewhere."[50] Tineo was required to demonstrate that he was legitimated in New York or the Dominican Republic through a formal process in order to meet the definition of "child" for the purposes of the statute.[51]

The argument Tineo presented before the court was that the definition of "child"—as applied to the immigration statute regarding automatic citizenship for children born out of wedlock abroad—creates a gender-based distinction between mothers and fathers, and thus violates the Equal Protection Clause of the Constitution.[52]

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43. *Id.* at 206–08.

44. *Id.* at 203.

45. *Id.* at 209.

46. 8 U.S.C.A. § 1432(a)(2) (West) (repealed 2000) (emphasis added) (outlining the conditions for automatic citizenship for children born outside the United States to non-citizen parents).

47. Tineo's Brief, *supra* note 14, at 14.

48. 8 U.S.C.A. § 1432(a)(2) (West) (repealed 2000).

49. *See* Tineo's Brief, *supra* note 14, at 14–16; 8 U.S.C.A. § 1432(a)(2) (West) (repealed 2000).

50. 8 U.S.C.A. § 1101(c)(1) (West); *see also Third Circuit Holds that Gender-Based Distinction in Statute Governing Derivative Citizenship Violates Equal Protection*, 96 INTERPRETER RELEASES 36 (Sept. 16, 2019) [hereinafter INTERPRETER RELEASES] (defining "child" under the immigration statute).

51. *See* Tineo's Brief, *supra* note 14, at 1–2, 15–16.

52. INTERPRETER RELEASES, *supra* note 50.

The interplay between the statutes prevented Tineo's father from conferring citizenship onto his son; Tineo was never legitimated through a formal process, nor was he born in wedlock.[53] Tineo points to the fact that his father never could have legitimated him because the laws of both the Dominican Republic and New York required marriage as the only form of legitimation at the time he was born.[54] Because his parents were not married, the law did not recognize Felipe as his legitimate father.[55]

At first glance, the immigration statute regarding automatic citizenship for children born out of wedlock abroad may seem to apply to Tineo's case; however, it applies only to children legitimated by marriage.[56] This distinction creates an inconsistency because if his mother became naturalized, Tineo would have automatically derived citizenship from her.[57] In contrast, because his father was the one who was naturalized, Tineo could not automatically derive citizenship from him.[58]

Tineo argued that the distinction between mothers and fathers was unconstitutional.[59] Moreover, Tineo argued that the court must apply intermediate scrutiny to such gender-based classification in accordance with the Supreme Court's decision in *Morales-Santana v. Sessions*.[60] Tineo maintained that "[p]reventing a father from conferring citizenship on a child in his care—after his mother's death—is not substantially related to an important government interest" to overcome the equal protection violation.[61]

However, the government argued that Tineo could not derive citizenship from his deceased father because he did not meet the statutory qualifications of a "child."[62] The government argued that Congress *intended* to exclude "illegitimate" children in 8 U.S.C. § 1432(a)(3), the immigration statute regarding automatic citizenship for children born out of wedlock abroad.[63] Because the statute provides an exhaustive list of qualifications of a child, according to

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53. *See* Tineo's Brief, *supra* note 14, at 1, 3, 15–17.
54. Tineo v. Att'y Gen., 937 F.3d 200, 208 (3d Cir. 2019).
55. *Id.*
56. Tineo's Brief, *supra* note 14, at 16–17.
57. *Id.* at 18–19.
58. *Id.*
59. *Tineo*, 937 F.3d at 203–04.
60. *See* Tineo's Brief, *supra* note 14, at 11–12.
61. *Id.* at 20–21 (explaining that important government interests include promoting legitimate family relationships, preventing fraudulent claims of paternity, ensuring sufficient ties to the United States, preventing statelessness, and protecting the rights of a noncitizen parent).
62. *See* Government's Brief, *supra* note 34, at 24–26.
63. *See id.* at 24–27; 8 U.S.C.A. § 1432(a)(3) (West) (repealed 2000).

the government, Congress intended to exclude children born out of wedlock who were not legitimated.[64]

The government argued that mothers and fathers "are not similarly situated in . . . their legal relationship to a child born out of wedlock."[65] Moreover, the government argued that "[r]equiring [l]egitimation [s]erved [t]he [i]mportant [g]overnmental [o]bjective [o]f [r]especting [s]tates' [a]nd [f]oreign [c]ountries' [l]aws [r]egarding [p]aternal [r]ights."[66] The government argued that the distinctions made between mothers and fathers of "illegitimate" children were not built upon stereotypes but reasonable legal interpretations.[67]

Even if the government's arguments stand, they failed to acknowledge that the State Department issued Tineo a United States passport in 2001.[68] By submitting his birth certificate, his father's birth certificate, his father's citizenship certificate, and his mother's death certificate, the State found him eligible for a passport.[69] Tineo argued that the issuance of his United States passport established a prima facie case that he is a citizen.[70] The only way to rebut such a presumption is to present evidence that he obtained the passport fraudulently or illegally.[71] However, the government made no showing that the passport was obtained in a fraudulent way when it was first issued.[72]

II. "DE-AMERICANIZATION" DURING THE TRUMP ADMINISTRATION'S WAR ON IMMIGRATION

The Trump Administration has launched a war on immigration and has engaged in a tactic of de-Americanizing immigrants.[73] As defined by scholar Bill Hing, the concept of "de-Americanization is a process that involves racism, but unlike the racism directed at African Americans, with its foundations in the historically held beliefs of inferiority, de-Americanizers base their assault on loyalty and foreignness."[74] It is a process that combines "a mixture of racial profiling . . . with hate" that results in "othering" people not in the

64. Government's Brief, *supra* note 34, at 24–26; 8 U.S.C.A. § 1432(a)(3) (West) (repealed 2000).

65. Government's Brief, *supra* note 34, at 34.

66. *Id.* at 38.

67. *Id.* at 34–35.

68. Tineo v. Att'y Gen., 937 F.3d 200, 205–06, 208 (3d Cir. 2019).

69. Tineo's Brief, *supra* note 14, at 47; *see also Tineo*, 937 F.3d at 205 (noting that Tineo's first removal proceedings were dismissed upon the production of his U.S. passport).

70. *See Tineo*, 937 F.3d at 208.

71. Tineo's Brief, *supra* note 14, at 39.

72. *See id.* at 39–40.

73. *See* Saleh, *supra* note 37; Hing, *supra* note 1, at 319.

74. Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 441, 443–444 (2002).

majority.[75] "When de-Americanization occurs," people living in the United States begin to normalize the hate "they see around them."[76] "They begin to believe that those . . . who can hold the title of 'full-American' is [sic] narrow."[77]

De-Americanization is more than a xenophobic fear; it is a "nativism cloaked in a Euro-centric sense of America that combines hate and racial profiling," and throughout history, there have been different periods where the government has engaged in these efforts.[78] Despite how Hing limits the definition of de-Americanization to exclude the experience of African Americans, this Note recognizes that the process of de-Americanization traces to the first colonial encounter.[79] De-Americanization encompasses the history of indigenous genocide and slavery.[80]

More recently, following the terrorist attacks on September 11, 2001, de-Americanization has been weaponized to target Muslim Americans and Arab Americans.[81] This violent period of de-Americanization in the twenty-first century was cloaked by the government's attempt to wage a "war on terrorism."[82] The government arrested and "voluntarily"[83] interviewed men perceived to be of Middle Eastern descent, including lawful permanent residents and citizens.[84] The de-Americanization efforts spread from action taken by the government to actions taken by private citizens to reinforce the idea that some people were not part of the United States.[85]

While the government cannot outright strip naturalized citizens of their citizenship, if there is a finding that the citizenship was obtained "contrary to [the] law," it may be revoked through a denaturalization process.[86] Denaturalization started in the early twentieth century following the passage of the Naturalization Act of 1906.[87]

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75. Hing, *supra* note 1, at 321.

76. *Id.*

77. *Id.*

78. Hing, *supra* note 74, at 454–55.

79. *Cf. id.* at 443–44, 452–53. Early in the period of national formation, decisions were made by Americans through a Euro-centric vision of the United States. *See id.* at 452–53. This vision did not include the indigenous populations in the United States, the African slaves kidnapped and taken to the United States, or indentured servants. *Cf. id.* As a result, these groups were excluded and deprived of rights afforded to other "Americans," starting the process of de-Americanization. *See id.* at 453 n.68.

80. *Cf. id.* at 443–44.

81. Hing, *supra* note 1, at 261–63.

82. *See id.* at 261–62.

83. Hing, *supra* note 74, at 442. This was not voluntary by any means. *Id.*

84. *Id.*

85. *Id.* at 444.

86. *Federal Jurisdiction and Procedure*, 131 HARV. L. REV. 323, 343 (2017).

87. Cassandra Burke Robertson & Irina D. Manta, *(Un)Civil Denaturalization*, 94 N.Y.U. L. REV. 402, 424 (2019).

The earliest denaturalization efforts focused on gender and race as a means of narrowing the scope of United States citizens.[88] If women got married or if the immigrants seeking citizenship were of Asian descent, their status in the United States remained vulnerable.[89] Denaturalization became more prominent during the 1940s through the 1950s.[90] It was a tool used during the McCarthy era to combat fears of the spread of communism in the United States.[91]

Denaturalization was not revived again as a tool of de-Americanization until the Obama Administration.[92] But, the revival of denaturalization has been most greatly expanded under the Trump Administration.[93] A larger crackdown on immigration means a larger budget and more forceful attempts to denaturalize citizens, "taking denaturalization to [a] new level."[94] The Trump Administration requested $207.6 million to investigate nearly 1,000 United States citizens at risk of denaturalization.[95] They plan to review another 700,000 immigration files during 2020.[96]

The Trump Administration has created a denaturalization task force and sought civil sanctions, instead of criminal sanctions, in the process.[97] While it is true that U.S. Attorneys have discretion to file civil or criminal cases, the Trump Administration has encouraged the pursuit of civil actions, because civil actions have a lower burden of proof.[98] In addition, civil sanctions limit the overall rights of defendants, like the right to counsel or trial by jury.[99] Thus, the lower burden of proof streamlines the government's efforts to denaturalize citizens.[100]

The Trump Administration has had success in their efforts.[101] In 2017, the government filed an action against Baljinder Singh for denaturalization, alleging he obtained his naturalization through

88. *Id.* at 425.
89. *Id.*
90. *See id.* at 427–28.
91. *See id.* at 402, 264.
92. *See* Maryam Saleh, *The Justice Department Singled Out This Man in Expanding Efforts to Strip Citizenship. A Judge Doesn't Think the Case Is Open and Shut.*, THE INTERCEPT (Feb. 23, 2019, 6:00 AM), https://theintercept.com/2019/02/23/denaturalization-operation-janus-citizenship-trump [https://perma.cc/PBU3-Z2XW] (explaining that Obama's Operation Janus put immigrants at risk of denaturalization by identifying those obtaining citizenship through improper means).
93. Saleh, *supra* note 37.
94. Robertson & Manta, *supra* note 87, at 402, 411.
95. Saleh, *supra* note 37.
96. *Id.*
97. Robertson & Manta, *supra* note 87, at 402.
98. *Id.* at 405.
99. *Id.*
100. *Id.*
101. *E.g.*, *id.* at 416.

fraud.[102] Singh migrated to the United States as a teen in 1991, and shortly thereafter, he filed a petition for asylum.[103] He married a United States citizen and then adjusted his status, but under Operation Janus,[104] he was found to have entered the United States under a different name.[105] The government alleged that he was removed under one name, but proceeded with his other name for his immigration proceedings.[106] As a result, the government argued he obtained his status fraudulently and thus petitioned for his denaturalization.[107] In 2018, the government won its denaturalization case against Singh on summary judgement because Singh never appeared for court and never opposed the motion.[108] However, it is not clear if Singh actually ever received notice of the pending case because he was not served directly, but instead notice was mailed to his last known address.[109] It is likely that Singh was not even aware that he had lost his citizenship.[110] Singh is just one of many examples of how the Trump Administration has created a culture where no one is safe.[111]

Further proof of this unsafe culture is the Trump Administration's threats to take away birthright citizenship.[112] The Trump Administration has demanded that agencies refuse to issue pregnant women visas, allegedly to prevent "birth tourism."[113] Moreover, the Trump Administration has used tactics such as arresting spouses that are presenting for their interviews to obtain a visa.[114] The

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102. *Id.*

103. Robertson & Manta, *supra* note 87, at 414.

104. Emily C. Callan, *A Most Unnatural Body of Law . . . How the Complexities of Operation Janus and Denaturalization Illustrate the Need for Comprehensive Immigration Reform*, 11 ELON L. REV. 1, 3 (2019) ("In 2008, a Customs and Border Protection (CBP) officer identified more than 200 foreign nationals who were subject to deportation orders entered by immigration judges, but who later used a different biographic identity, such as an alias name or fabricated date of birth, to attain U.S. citizenship. After further research into this issue, the U.S. Justice Department launched Operation Janus, the official initiative to investigate these cases and commence denaturalization proceedings against the naturalized U.S. citizens, if necessary.").

105. Robertson & Manta, *supra* note 87, at 414–15.

106. *Id.* at 415.

107. *Id.* at 416.

108. *Id.*

109. *Id.*

110. *Id.*

111. Robertson & Manta, *supra* note 87, at 405.

112. *See* Lyons, *supra* note 39.

113. *See id.*; *see also* Chappell, *supra* note 39 (denying tourist visas to prevent "birth tourism").

114. Tom Jawetz, *Bait and Switch: How the Trump Administration Is Trying to Deport Spouses of U.S. Citizens,* CTR. FOR AM. PROGRESS (Feb. 18, 2020, 9:04 AM), https://www.americanprogress.org/issues/immigration/news/2020/02/18/480571/bait-switch-trump-administration-trying-deport-spouses-u-s-citizens [https://perma.cc/M6KT-8NPW] (explaining a tactic called a "bait and switch").

pervasive efforts being used against immigrants with any sort of criminal record has also been a focus of the Trump Administration.[115]

Additionally, the Supreme Court has given the government authorization to deny green cards to people who are "likely" to need the support of public benefits.[116] These benefits include Medicaid, food stamps, and other methods of public assistance.[117] In addition to being cut off from essential government resources, immigrants are forced to navigate harsh and confusing immigration laws without legal representation.[118] It is a clear demonstration by the Trump Administration that the immigrants who are favored in the United States are those who are highly skilled and high income earners.[119] However, this is not only a stark demonstration of a favor towards particular immigrants; by attacking access to public benefits, it is clear that the Trump Administration is further marginalizing immigrants with intersectional identities—particularly in the case of immigrants with disabilities that depend on these services.[120]

In the efforts to "de-Americanize" immigrants under the Trump Administration, the government has presented outdated arguments in the courts as seen in *Tineo*.[121] While Tineo's case is not one of denaturalization *per se*, it is a case of "de-Americanization" where the government has made a strong effort to prevent him from being conferred his citizenship, a right that should have been granted to him when he moved to the United States to live with his father.[122]

Prior to the Obama and Trump Administrations, the use of denaturalization as a scare tactic had become rare over the last fifty years, giving naturalized citizens "a sense of finality and security in their rights."[123] While this Note focuses on the Trump-era politics, it is important to emphasize that these problems will not go away just because the Trump Administration will eventually go away.[124]

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115. Hing, *supra* note 1, at 271, 273.

116. Adam Liptak, *Supreme Court Allows Trump's Wealth Test for Green Cards*, N.Y. TIMES (Jan. 27, 2020), https://www.nytimes.com/2020/01/27/us/supreme-court-trump-green-cards.html [https://perma.cc/TP76-PVD4].

117. *Id.*

118. Amit Jain, *Bureaucrats in Robes: Immigration "Judges" and the Trappings of "Courts"*, 33 GEO. IMMIGR. L.J. 261, 317 (2019).

119. *Cf.* Robert Barnes & Maria Sacchetti, *Supreme Court Allows Trump Administration to Proceed with 'Wealth Test' Rules for Immigrants*, WASH. POST (Jan. 27, 2020, 6:54 PM), https://www.washingtonpost.com/politics/courts_law/supreme-court-allows-trump-administration-to-proceed-with-immigration-rules/2020/01/27/6adb9688-412c-11ea-aa6a-083d01b3ed18_story.html [https://perma.cc/72K6-QWTN].

120. *See id.*

121. *See* Tineo v. Att'y Gen., 937 F.3d 200, 211–12 (3d Cir. 2019).

122. *See id.* at 204; Hing, *supra* note 1, at 320.

123. Robertson & Manta, *supra* note 87, at 402.

124. *See* Hing, *supra* note 1, at 318.

These problems will outlive the Trump Administration because the executive branch has repeatedly proven to be unwilling to take the necessary steps to change the law.[125] This leaves the courts (and maybe Congress, however doubtful in the current political climate) as the appropriate forums for effectuating the changes demanded by the constitutional mandate of equal protection.[126]

III. THE GOVERNMENT'S ARCHAIC ARGUMENT IN *TINEO* AND THE ISSUE OF REMEDY

Tineo argued that the court has "two remedial alternatives" when finding a defective statute.[127] The "court may either declare it a nullity and order that its benefits not extend to the class the legislation was intended to benefit, or it may extend coverage of the statute to include those who are aggrieved by exclusion."[128] Accordingly, the court must inquire what remedy Congress would have favored.[129] Moreover, Tineo argued that the Supreme Court has articulated that an "extension is typically appropriate unless Congress has indicated a preference for nullification, or unless extension would significantly disrupt the statutory scheme."[130]

In response, the government presented an argument archaic on its face.[131] The government asserted that the court cannot grant Tineo the remedy he seeks in this case because the "power to provide relief of the sort requested in this [petition]—namely, conferral of citizenship on a basis other than that prescribed by Congress."[132] The government contended that courts are to give the legislature much deference in its use of lawmaking powers in the realm of immigration, residence, and belonging.[133] The government goes on to say that "the power to make someone a citizen of the United States has not been conferred upon the federal courts, like mandamus or injunction, as one of their *generally applicable equitable powers*."[134] The government argued that the court would "exceed its authority

125. *See, e.g.*, Callan, *supra* note 104, at 3 (explaining how Operation Janus was launched during the Obama administration).
126. *See id.* at 20–21; *Tineo*, 937 F.3d at 203–04.
127. Tineo's Brief, *supra* note 14, at 48.
128. *Id.*
129. *Id.*
130. *Id.*
131. *See id.* at 8.
132. Tineo v. Att'y Gen., 937 F.3d 200, 215 (3d Cir. 2019) (alteration in original) (quoting Morales-Santana v. Sessions, 137 S. Ct. 1678, 1701 (2017) (Thomas, J., concurring)).
133. *See id.*
134. *Id.* at 216 (quoting INS v. Pangilinan, 486 U.S. 875, 883–84 (1998)).

if it created the remedy that Tineo seeks," which is to extend citizenship by means of deriving it from his father who did not legitimate him according to law of New York and the Dominican Republic.[135]

The government relied on an outdated Supreme Court case, *United States v. Ginsberg*, to assert this argument.[136] In *Ginsberg*, the Court asserted that a person born abroad "who seeks political rights as a member of this nation can rightfully obtain them only upon terms and conditions specified by Congress."[137] Accordingly, the *Ginsberg* Court held that courts cannot exceed the bounds of Congress in regard to issues of national security that are deemed to be issues vital to the "public welfare."[138]

The government articulated a similar argument in *INS v. Pangilinan*.[139] In *Pangilinan,* the respondents contended that they derived citizenship as Filipino-born World War II veterans because there existed a congressional statute that provided them with a window of time during which they could apply to become United States citizens.[140] The government argued that courts did not have the power to confer citizenship onto Filipino-born World War II veterans because of the limitations on the congressional statute, stating that "if Congress *refuse*[*d*] to provide relief, . . . that circumstance hardly provides a court of equity with justification to act for the purported purpose of carrying out Congress's intent."[141] The Supreme Court agreed, holding that the lower court did not have the power to confer citizenship in a way that directly contraposed the limitation imposed by Congress in its exercise of its power over naturalization.[142]

Appellate courts have construed the holding in *Pangilinan* narrowly to mean only that the conferral of citizenship cannot be so that it directly contraposes the limitations provided by Congress, and they have routinely conferred citizenship onto individuals in subsequent cases.[143] These courts have expressed that granting citizenship is merely a remedy that extends all the privileges and

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135. Government's Brief, *supra* note 34, at 29, 46.

136. *Id.* at 46.

137. United States v. Ginsberg, 243 U.S. 472, 474 (1917) ("Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.").

138. *See id.*

139. *See* INS v. Pangilinan, 486 U.S. 875, 883, 885 (1988).

140. *Id.* at 877–78. The respondents did not file their applications for citizenship within the window of time provided by statute. *Id.* at 880.

141. Brief for Petitioner at 50, INS v. Pangilinan, 486 U.S. 875 (1988) (No. 86-1992).

142. *See Pangilinan*, 486 U.S. at 875–76.

143. *See, e.g.*, Breyer v. Meissner, 214 F.3d 416, 431–32 (3d Cir. 2000); Tineo v. Att'y Gen., 937 F.3d 200, 218–19 (3d Cir. 2019).

immunities of citizenship to the individual, as opposed to some use of an affirmative power by the court.[144]

Another case involving derivative citizenship through a naturalized father was *Sessions v. Morales-Santana*.[145] The respondent in *Morales-Santana*, Luis Ramón Morales-Santana, lived in the United States starting from the age of thirteen.[146] His father, José Morales, moved from his home in Puerto Rico to the Dominican Republic days before his nineteenth birthday.[147] As a result, he did not satisfy the requirements set forth under the immigration statute, which mandated a five-year physical presence prior to the child's birth in order for the child to derive citizenship.[148] Morales-Santana argued that the one-year requirement for children of unwed mothers violated the "equal protection principle implicit in the Fifth Amendment."[149] The government argued that the child's first parent is the mother, and the parental relationship is established later with the child's father, thus justifying the physical presence distinction.[150] But the court did not buy that argument, finding little connection between the gender-based distinction and an important government interest.[151]

In addition to the argument presented regarding the gender-based distinction, the government presented an argument in *Morales-Santana* which was similar to their argument in *Pangilinan*, arguing that the lower court cannot provide a remedy of conferring "citizenship on a basis other than that prescribed by Congress."[152] In other words, the government argued that whatever remedy the court chose must be tailored to the intent of Congress.[153] This is different from the argument asserted in *Tineo*, because in *Tineo,* the government argued that the court has no power whatsoever to confer citizenship as a remedy.[154] The issue asserted by the government in *Tineo* focuses on the plenary power doctrine and whether the court has the power to confer citizenship in the first place.[155]

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144. *See, e.g.*, Catholic Soc. Servs., Inc. v. Thornburgh, 956 F.2d 914, 921–22 (9th Cir. 1992), *vacated sub nom.* Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43 (1993).

145. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1687 (2017).

146. *Id.*

147. *Id.*

148. *Id.* at 1686–87.

149. *Id.* at 1686.

150. *Id.* at 1695.

151. *Morales-Santana*, 137 S. Ct. at 1692–93.

152. Brief for Petitioner at 50–51, Morales-Santana v. Lynch, 804 F.3d 521 (2d Cir. 2015) (No. 15-1191) [hereinafter Lynch's Brief]; Morales-Santana v. Lynch, 804 F.3d 520, 537 (2d Cir. 2015) (quoting Miller v. Albright, 523 U.S. at 420, 453 (1998) (Scalia, J., concurring)), *overruled in part by* Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017).

153. *See* Lynch's Brief, *supra* note 152, at 51.

154. *See* Government's Brief, *supra* note 34, at 46.

155. *See id.*

It is important to note that this archaic argument asserted by the government in *Tineo* falls within a broader political framework, as is the case with many historical decisions regarding immigration law in the United States.[156] In particular, *Tineo* falls within a contentious political climate for immigrants exacerbated by the Trump Administration.[157] Under the Trump Administration, it has been made clear that immigrants are not welcome in the United States, and even those who have become naturalized citizens are no longer safe.[158] There is an overwhelming effort to denaturalize citizens as part of this broader overhaul and war on immigration.[159]

Although the case of Tineo is not considered a "denaturalization" case in the traditional sense, what was done to Tineo can appropriately be considered an attempt to strip him of his right to citizenship.[160] Although Tineo obtained a United States Passport, a legal privilege extended to all citizens of the United States, he was stripped of that document and all the legal rights that should have been conferred onto him as a child who derived citizenship from his father.[161] The government attempted to find legal arguments to prevent him from being able to exercise his rights, ultimately settling on the archaic arguments found in *Ginsberg* and its progeny.[162]

Tineo appeared *pro se* during his immigration appeal proceeding and, had he not made the argument asserting the statute's gender-based discrimination, would have lost his right to establish his belonging in the United States on appeal.[163] What has been made clear under this contemporary political context is that no one is safe, not even green card holders within the United States.[164] The government is willing to use antiquated arguments to fulfill a right-wing, anti-immigrant agenda if necessary.[165]

On September 4, 2019, the Third Circuit granted Tineo's petition, finding that "precluding a father from ever having his born-out-of-wedlock child derive citizenship through him" cannot "be squared with the equal-protection mandate of the Due Process Clause of the Fifth

156. *See* Robert J. Steinfeld, *Subjectship, Citizenship, and the Long History of Immigration Regulation*, 19 L. & HIST. REV. 645, 651 (2001).

157. *See* Robertson & Manta, *supra* note 87, at 402.

158. *See id.*

159. *See* Saleh, *supra* note 37.

160. *See* Tineo's Brief, *supra* note 14, at 1.

161. *See* Tineo v. Att'y Gen., 937 F.3d 200, 207–08 (3d Cir. 2019).

162. *See id.* at 208, 215.

163. *Id.* at 206, 208.

164. *See, e.g.*, Robertson & Manta, *supra* note 87, at 414–15.

165. *See Tineo*, 937 F.3d at 215–16 (arguing that complete deference should be given to Congress in deciding the validity of Tineo's alleged constitutional violation, an argument whose validity is clearly contradicted by the Supreme Court's derivative citizenship jurisprudence in cases like *INS v. Pangilinan*).

Amendment."[166] Applying intermediate scrutiny,[167] the court found that the government did not articulate "how deferring to state legitimation rules constitutes an important governmental interest."[168] The court added that the distinction between legitimated and "un-legitimated" children has little importance under state law, reasoning that the distinction "turns these largely meaningless vestiges of a bygone era into the defining characteristic for whether naturalized fathers can ever transmit citizenship to their born-out-of-wedlock children."[169]

The court found that the interplay between the statutes[170] "treated women and men differently: a naturalized mother could transmit her citizenship to her out-of-wedlock child, regardless of whether the father was alive; whereas a naturalized father in the same position had the additional requirement of having to legitimate the child in order to transmit his citizenship."[171] Accordingly, the court held that this distinction violated the "equal-protection mandate" of the Fifth Amendment.[172]

While the Court's holding addressed most of the government's arguments, the court seemed to pay nominal attention to the government's assertion that the plenary power doctrine does not permit the court to grant a remedy in this case of conferring citizenship on Tineo.[173] Instead, the court implied that if Tineo were to prevail in this case, they would confirm his citizenship rather than grant him rights that he does not possess.[174]

IV. PLENARY POWER AND IMMIGRATION IN THE UNITED STATES

Congress and the Executive branch have what is known as "plenary power" over immigration and thus enjoy limited judicial intervention.[175] As a result, the judiciary has provided much deference to

166. *See id.* at 203–04, 217 ("[T]he plenary-power doctrine—while affording Congress great discretion—'is subject to important constitutional limitations,' and 'it is the province of the courts' to enforce those constraints.'").

167. *See* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1689 (2017) ("Laws granting or denying benefits 'on the basis of the sex of the qualifying parent,' . . . post-1970 decisions affirm, differentiate on the basis of gender, and therefore attract heightened review under the Constitution's equal protection guarantee.").

168. INTERPRETER RELEASES, *supra* note 50.

169. *Id.*; *see* 8 U.S.C.A. § 1101(c)(1) (West); 8 U.S.C.A. § 1432(a) (West) (repealed 2000).

170. *See* 8 U.S.C.A. § 1101(c)(1) (West); 8 U.S.C.A. § 1432(a) (West) (repealed 2000).

171. *See Tineo*, 937 F.3d at 204.

172. INTERPRETER RELEASES, *supra* note 50.

173. *See Tineo*, 937 F.3d at 216–17.

174. *Id.* at 215 (quoting Miller v. Albright, 523 U.S. 420, 432 (1998)) ("[A] judgment in Tineo's favor 'would confirm [his] pre-existing citizenship rather than grant [him] rights that [he] does not now possess.'").

175. *See* David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 35, 41–42 (2015).

the political branches in the realm of immigration.[176] However, this interpretation of the plenary power has changed as the courts have become more concerned with protecting individual rights and curbing the unfettered discretion of the other branches of government in the realm of immigration.[177]

As a result, this puts courts in the position to confer citizenship.[178] As some scholars have articulated, the Courts have equity powers in cases of equal protection in which an equitable remedy is required.[179] Derek Ludwin argues that "[t]he principles of modern equity, which mandate appropriate remedies in equal protection cases, provide the Court with the power to confer citizenship."[180] In *United States v. Wong Kim Ark*, the Supreme Court exercised its equity powers and conferred the respondent's citizenship.[181] The respondent was born in the United States to parents who were residing in the country as lawful permanent residents.[182] Although the Fourteenth Amendment granted birthright citizenship to white people born within the sovereignty of the United States, it did not include people of color.[183] However, the Civil Rights Act of 1866 affirmed the rights of non-white people to birthright citizenship.[184] As a result, the Court established the modern conception of birthright citizenship by conferring the respondent's status.[185] Notwithstanding deferential treatment from the judiciary, Congress does not have the final word on immigration matters under the plenary power doctrine, which is when the courts' equitable power to confer citizenship comes into play.[186] Based on this framework, the Court has the equitable power to confer Tineo's citizenship.[187]

A. The Plenary Power Doctrine Then and Now

In the early years of the United States, states governed decisions about immigration and nationality.[188] It was not until the late

176. *Id.* at 29.
177. *See* Derek Ludwin, Note, *Can Courts Confer Citizenship? Plenary Power and Equal Protection*, 74 N.Y.U. L. REV. 1376, 1398 (1999).
178. *E.g.*, *Tineo*, 937 F.3d at 215.
179. Ludwin, *supra* note 177, at 1379.
180. *Id.*; *see, e.g.*, United States v. Wong Kim Ark, 169 U.S. 649, 705 (1898).
181. *Wong Kim Ark*, 169 U.S. at 705.
182. *Id.* at 652.
183. *Id.* at 674–75.
184. *Id.* at 675, 703.
185. *Id.* at 649.
186. *See id.* at 700.
187. *See* Ludwin, *supra* note 177, at 1397–98.
188. *See, e.g.*, Steinfeld, *supra* note 156, at 651.

nineteenth century that the first federal immigration law was passed, the Chinese Exclusion Act of 1882.[189] It marked one of the many periods in United States history when the Court legitimized the government's xenophobic gatekeeping on the basis of race, ethnicity, and what would later include gender, ability, and so on.[190]

The plenary power doctrine can be traced to the Supreme Court's decision in *Chae Chan Ping*, and more generally to the period of Chinese exclusion.[191] In *Chae Chan Ping*, the petitioner appealed an order that refused his release from detention in San Francisco, California.[192] The petitioner, a native of China, was residing in the United States where he worked as a laborer.[193] The petitioner had a certificate granting him permission to take a trip to China to visit his family, but upon his return to the United States, customs officers detained him on the ground that there was a new law passed by Congress excluding Chinese nationals from entering into the United States.[194] The petitioner argued that prohibiting his re-entry into the United States violated a treaty that existed between China and the United States.[195]

Although it was true that the law violated the treaty between the countries, the Court still held that "the last expression of the sovereign will must control."[196] The Court asserted that "[t]he power of the government to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments."[197] The threat of subjecting measures during "times of crisis" to "detailed litigation would interfere with the flexibility often necessary to act beyond [the country's] border[s]."[198] This power of the federal government was not a power found in the Constitution, but rather asserted by the Court.[199]

Scholars have critiqued this expansion of federal power not found in the Constitution because prior to *Chae Chan Ping*, decisions regarding migration and belonging were upheld under the

189. *See id.* at 647.

190. *See* Erika Lee, *The Chinese Exclusion Example: Race, Immigration, and American Gatekeeping, 1882–1924*, J. AM. ETHNIC HIST., Spring 2002, at 38.

191. Martin, *supra* note 175, at 30.

192. Chae Chan Ping v. United States, 130 U.S. 581, 581–82 (1889).

193. *Id.* at 582.

194. *Id.*

195. *Id.* at 589.

196. Martin, *supra* note 175, at 33.

197. *Chae Chan Ping*, 130 U.S. at 606–07.

198. Martin, *supra* note 175, at 42.

199. Michael Kagan, *Plenary Power Is Dead! Long Live Plenary Power!*, 114 MICH. L. REV. FIRST IMPRESSIONS 21, 23 (2015).

Commerce Clause of the Constitution.[200] In *Chae Chan Ping*, the Court introduced a "novel theory of power devolved from sovereignty" that seemed to confer upon the legislative and executive branches extreme deference in the realm of immigration.[201] It is on this conception of the plenary powers that the government ultimately rests its argument in *Tineo*.[202]

Although the plenary power doctrine is "premised explicitly on the notion that the political branches of the federal government are responsible for the nation's security and for its relations with other sovereigns[,]"[203] the Court shifted that framework, particularly in cases dealing directly with individual rights.[204] The plenary power doctrine went from meaning "absolute federal power over borders" and "non-justiciability of challenges to immigration law" to applying judicial scrutiny in determining whether to uphold an immigration statute.[205] The new approach provided less deference to legislative and executive decisions regarding immigration.[206] Lower courts have decided cases by using traditional tools of statutory interpretation and have rejected the idea that the political branches have unrestrained power over immigration.[207]

One example of when the Court has been critical of the political branches' power over immigration is in *Zadvydas v. Davis*.[208] In that case, the Supreme Court held that the government did not have the power to detain an immigrant admitted into the United States for an indefinite period of time.[209] Whereas the government in *Tineo* argued that the Court must provide extreme deference to the political branches, *Zadvydas* is an example of the Court's check on those powers.[210] Justice Breyer, writing for the majority of the Supreme Court, stated that Congress "is subject to important constitutional

200. *See* Stephen H. Legomsky, *Immigration Exceptionalism: Commentary on Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 307, 308–09 (2000).

201. *Id.* at 309.

202. *See* Tineo v. Att'y Gen., 937 F.3d 200, 213, 215 (3d Cir. 2019).

203. Natsu Taylor Saito, *Asserting Plenary Power over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427, 436 (2002).

204. *See id.* at 437; Ludwin, *supra* note 177, at 1379; Carrie Rosenbaum, *Immigration Law's Due Process Deficit and the Persistence of Plenary Power*, 28 BERKELEY LA RAZA L.J. 118, 120 (2018); Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1, 53–54 (2010).

205. Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO STATE L.J. 13, 30–31 (2019).

206. *See* Kevin R. Johnson, *Immigration in the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 65 (2015).

207. *See id.*

208. *See* Zadvydas v. Davis, 533 U.S. 678, 680 (2001).

209. *Id.*

210. *See* Government's Brief, *supra* note 34, at 15–16; *Zadvydas*, 533 U.S. at 699.

limitations," demonstrating another chip away at the strength of the plenary power doctrine.[211]

Even though the Court has been unpredictable in its outcomes, it is nevertheless willing to push back on the political branches.[212] *Nguyen v. INS* pointed to a clear departure from the plenary power doctrine by expanding constitutionally mandated rights to non-citizens.[213] Although the Supreme Court upheld the gender-based distinction for derivative citizenship for unwed mothers and fathers, the most important takeaway from *Nguyen* is that the Court used an equal protection analysis to resolve the issue.[214] The analysis was not one of plenary power and deference to Congress, but instead subjecting the statute to the scrutiny applied for other constitutional violations.[215]

In *Tineo*, the government argued that "[t]he issue of derivative citizenship is a purely legal issue of statutory interpretation . . . over which the Court exercises *plenary review* . . . [i]f Congress has so spoken, the inquiry is at an end, for courts."[216] However, it is clear under *Nguyen* that the government's argument holds no merit, as evinced by the fact that the Court has applied heightened scrutiny to equal protection violations in other cases.[217] In *Miller v. Albright*, for example, the petitioner was born in the Philippines to a United States citizen father and non-U.S. citizen mother, but the Court denied the petitioner United States citizenship on the grounds that the court order of paternity was not enough evidence to assert that she had a "bona fide parental relationship" with her father.[218] The petitioner challenged the constitutionality of the gender-based distinction under the immigration statute for children born out of wedlock, which required that a child be legitimated by their father to derive citizenship.[219] Although the Court found that the statute was necessary to advance the government's interest in "protecting" legitimation laws, it nonetheless applied a heightened standard of review,[220]

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211. *Zadvydas*, 533 U.S. at 695; T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 GEO. IMMIGR. L.J. 365, 366 (2002).

212. *E.g.*, *Zadvydas*, 533 U.S. at 699.

213. *See* Nguyen v. INS, 533 U.S. 53, 53–55; Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 339 (2002).

214. Spiro, *supra* note 213, at 339.

215. *See id.*

216. Government's Brief, *supra* note 34, at 15, 17 (emphasis added).

217. *See Nguyen*, 533 U.S. at 61.

218. Miller v. Albright, 523 U.S. 420, 425–26 (1998); Aubry Holland, Comment, *The Modern Family Unit: Toward A More Inclusive Vision of the Family in Immigration Law*, 96 CAL. L. REV. 1049, 1063 (2008); *see* 8 U.S.C.A. § 1409(a)(4) (West).

219. Miller, 523 U.S. at 426; 8 U.S.C.A. § 1409(a)(4) (West).

220. *See* Holland, *supra* note 218, at 1063.

marking an important shift from unfettered government power over immigration toward individual liberties and rights.[221]

B. The Equitable Remedy to Confer Citizenship

Scholars have articulated that courts have equity powers that can outweigh those of the plenary powers, particularly in cases of equal protection in which an equitable remedy is required.[222] According to Derek Ludwin, "equity has been 'stretched' to offer relief to whole social classes, and the Supreme Court has 'fused' the idea of equity with the right to equal protection under the law," as seen by the Supreme Court's jurisprudence during the Civil Rights Era.[223]

The Court most prominently exercised their equity powers in remedying Constitutional violations in the desegregation cases.[224] *Brown v. Board of Education* is the "most prominent example" of federal court expression of modern equitable remedy actions.[225] Courts interpreted the decisions in desegregation cases, like *Brown*, to include the scope by which courts can remedy an equal protection violation.[226] In other words, courts have broad and flexible powers to remedy a violation when it has been established that there has been an equal protection violation.[227] The implication of *Brown* exceeds that of desegregation and extends to other constitutional rights, as "the nature of the [constitutional] violation d[ictates] . . . the remedy."[228]

In *Missouri v. Jenkins*, the Court required Kansas City to use tax dollars to fund a school desegregation plan.[229] The Supreme Court rejected the state's argument that "the federal judicial power can go no further than to require local governments to levy taxes *as authorized under state law*."[230] Moreover, the Court held that "a local government with taxing authority may be ordered to levy taxes in excess of the limit set by state statute where there is reason based in the Constitution for not observing the statutory limitation."[231] The Court ordered Kansas City to impose greater property

221. *See Miller*, 523 U.S. at 440–41.
222. Ludwin, *supra* note 177, at 1404–05.
223. *Id.* at 1397–98.
224. *Id.* at 1398.
225. *See id.*
226. *Id.* ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.").
227. *See id.*
228. Ludwin, *supra* note 177, at 1398.
229. *See* Missouri v. Jenkins, 495 U.S. 33, 57 (1990).
230. *Id.* at 56.
231. *Id.* at 57.

taxes on its residents to find the capital required to be able to pay the debt to desegregate the school districts.[232]

In *Cody v. Caterisano*, the Fourth Circuit acknowledged this departure from the concept that the legislative and executive branches have almost complete deference in the realm of immigration.[233] The Fourth Circuit held that "[c]ourts have the power to confer citizenship only 'in strict compliance with the terms of an authorizing statute.'"[234] Moreover, "though the plenary power doctrine forecloses most direct constitutional challenges against congressional immigration statutes, it is hardly the blank check for the executive that is sometimes suggested. Significant statute-based challenges to executive action remain available, as do procedural due process challenges. . . ."[235]

And in *Breyer v. Meissner*, the Third Circuit conferred citizenship upon the petitioner who had been ordered to denaturalize.[236] In that case, the petitioner challenged his denaturalization, which was based upon his service as a Nazi guard in World War II.[237] The petitioner was born abroad to a United States citizen mother in 1925.[238] At the time, the law granted citizenship to children born abroad to United States citizen fathers and not mothers.[239] A subsequent immigration statute retroactively granted citizenship to children of United States citizen mothers so long as the child had not intentionally engaged in Nazi activities.[240] Applying intermediate scrutiny, the court found that the government did not provide an important interest to justify the gender-based distinction.[241] The court concluded that he was improperly denied citizenship at birth and thus conferred his right to citizenship.[242]

In *Tineo*, the Third Circuit stated that in situations when a statute, in violation of equal protection principles, benefits one class and excludes another from the benefit, the right invoked is that of equal treatment to the unbenefited class.[243] "[T]he appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class."[244]

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232. Ludwin, *supra* note 177, at 1399; *see Jenkins*, 495 U.S. at 36.
233. *See* Cody v. Caterisano, 631 F.3d 136, 142 (4th Cir. 2011).
234. *Id.* (quoting INS v. Pangilinan, 486 U.S. 875, 884 (1988)).
235. Martin, *supra* note 175, at 31.
236. Breyer v. Meissner, 214 F.3d 416, 432 (3d Cir. 2000).
237. *Id.* at 419–20.
238. *Id.* at 419.
239. *Id.* at 420.
240. *See id.* at 422, 428.
241. *Id.* at 428.
242. *Breyer*, 214 F.3d at 432.
243. *See* Tineo v. Att'y Gen., 937 F.3d 200, 217–18 (3d Cir. 2019).
244. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1698 (2017).

In *Tineo*, the court turned to the issue of remedy and extended the right that confers on unwed mothers the benefit of passing their citizenship status to their child to fathers.[245] Distinguishing *Tineo* from *Morales-Santana,* the court held that extending Tineo's father the same treatment asserted by the statute did not "disrupt the statutory scheme in any significant way."[246] In *Morales-Santana,* the Court dismissed the government's plenary power argument.[247] There the government argued that extreme deference should be given to Congress and the executive.[248] Instead, the Court focused on the gender-based discrimination issue to determine what remedy was suitable to resolve the case.[249] Moreover, "[t]he Court in *Morales-Santana*—and in *Nguyen*—declined to adopt the nonremediability theory, . . . because it is premised on a constitutional conception of the federal courts' powerlessness in citizenship cases that a majority of the Justices have not embraced."[250] It is not the holding of the Supreme Court that the plenary power prohibits the courts to remedy an equal protection violation.[251] The Supreme Court continues to check the power of the executive and legislative branches in the realm of immigration.[252]

Although Tineo's past criminal convictions do not garner much sympathy, the court held that the consequences of Tineo's actions were "what the law provides is permissible for any other citizen who is convicted of the same offenses."[253] These are clear examples of when the Court has conferred citizenship as a means to remedy a constitutional violation because the Court has the power to confer citizenship under its equity powers.[254]

Issues of naturalization and taxation provide the federal government with much deference, but the Court was still willing to exercise its equity power to override that deference.[255] The Supreme Court's decision in *Pangilinan* presents the strongest opposition to the Court's power to confer citizenship as a remedy to a constitutional

245. *See Tineo*, 937 F.3d at 217–18.

246. INTERPRETER RELEASES, *supra* note 50.

247. *See Morales-Santana*, 137 S. Ct. at 1698. *Contra* Lynch's Brief, *supra* note 152, at 13–14.

248. Lynch's Brief, *supra* note 152, at 13–14.

249. Kristin A. Collins, *Equality, Sovereignty, and the Family in* Morales-Santana, 131 HARV. L. REV. 170, 171 (2017).

250. *Id.* at 215.

251. *See id.* at 221.

252. *See, e.g.*, *Morales-Santana*, 137 S. Ct. at 1700–01.

253. Tineo v. Att'y Gen., 937 F.3d 200, 218–19 (3d Cir. 2019).

254. *See* Ludwin, *supra* note 177, at 1397, 1405–06 ("The Supreme Court was given authority under the Judiciary Act of 1789 to promulgate rules of equity, which it did in accordance with the British model.").

255. *Id.* at 1404–05.

violation.[256] Still, the Court decided *Morales-Santana* years later, which on its face appears to directly contradict the opinion in *Pangilinan*.[257] The Court had a greater concern to remedy the equal protection violation than to reconcile the tension between the two cases.[258]

Justice Marshall and Justice Brennan stressed in their jurisprudence that "for every constitutional violation there is a remedy."[259] Citizens have the power to vote out representatives when faced with taxation issues; the same cannot be said for noncitizens who lack that power.[260] This perhaps is the foundation under which justifies the Court's rejection of the government's argument in the context when an equal protection violation is encountered in the naturalization process.[261] When Congress is unwilling to remedy the inconsistencies in immigration laws and the President chooses to wage a war against some of the most vulnerable people, the judiciary has no choice but to intervene.[262] This case is reflective of that tension and is reflective of the powerful role the courts play.[263]

CONCLUSION

On October 2, 2015, before the Board of Immigration Appeals, Tineo argued that as a child, he derived citizenship from his father (who passed away in 2006) and thus should have been deemed a United States citizen.[264] The burden imposed on Tineo, appearing *pro se* before an immigration judge to ensure that he was properly conferred citizenship, was insurmountable.[265] Tineo knew that he

256. *See* INS v. Pangilinan, 486 U.S. 875, 883 (1988).

257. *Compare Pangilinan*, 486 U.S. at 883, *with Morales-Santana*, 137 S. Ct. at 1700–01.

258. *See Morales-Santana*, 137 S. Ct. at 1700–01.

259. Collin O'Connor Udell, *Miller v. Albright: Plenary Power, Equal Protection, and the Rights of an Alien Love Child*, 12 GEO. IMMIGR. L.J. 621, 654 (1998).

260. Ludwin, *supra* note 177, at 1404–05.

261. *Id.* at 1404–05; *see* Collins, *supra* note 249, at 221 ("[*Morales-Santana*] explicitly rejects the proposition that the plenary power doctrine is applicable in constitutional challenges to the derivative citizenship statute, refuses to credit the government's justifications for the gender lines drawn in that statute, and holds that, going forward, statutory citizenship must be administered in conformity with modern constitutional equality principles.").

262. *See* Tineo v. Att'y Gen., 937 F.3d 200, 212–13, 215; Lyons, *supra* note 39; Paul Kane, *'Get So Close—and Nothing Happens': Congress's Record on Immigration Is Repeated Failures*, WASH. POST (June 23, 2018, 5:30 PM), https://www.washingtonpost.com/powerpost/get-so-close--and-nothing-happens-congresss-record-on-immigration-is-repeated-failures/2018/06/23/702660c0-7624-11e8-b4b7-308400242c2e_story.html [https://perma.cc/3NH3-U7DL].

263. *See Tineo*, 937 F.3d at 212–13, 215.

264. *Id.* at 205–06; Tineo Interview, *supra* note 8.

265. *See Tineo*, 937 F.3d at 206, 208.

should have derived citizenship; he was unable to convince officials of such.[266]

This case falls within the heart of the Trump Administration's war on immigrants.[267] However, the term "immigrants" is too broad to define the group of people on which this war is being waged. The war is against the poor, uneducated, and most vulnerable immigrants.[268] With greater intersections of identities like that of Tineo, who is an Afro-Latinx immigrant, of a lower income bracket, without a higher education, and a criminal record, his chances in this fight were meant to be slim.[269]

The Third Circuit already conferred citizenship as a remedy in other cases, and it was well within their power to do so.[270] It is clear that the Court was well within its power to provide Tineo with a proper remedy and that remedy was to confer his status as a citizen.[271] The courts have a role in this war, and it is well within their power to prevent these de-Americanization efforts.

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266. *See id.* at 207–08.

267. *See* Masha Gessen, *Trump's New War on Immigrants*, NEW YORKER (Aug. 10, 2018), https://www.newyorker.com/news/our-columnists/trumps-new-war-on-immigrants [https://perma.cc/J9T2-4FQD].

268. *See* Hing, *supra* note 1, at 293–94, 296 (describing the fears of members of marginalized communities in the face of the Trump Administration's immigration policies); *see also* Gessen, *supra* note 267 ("[T]he White House's plan is to make immigrants who have received any public assistance ineligible to become citizens").

269. Tineo's Brief, *supra* note 14, at 1–3.

270. *See Tineo*, 937 F.3d at 218–19.

271. *See Tineo*, F.3d at 218–19.

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