

**Race, Citizenship, and the Anticanon: Why a Supreme Court Decision Upholding
Executive Order 14160 Would Become Anticanonical**

University of Richmond School of Law

Civil Rights History

Dr. Danielle Wingfield

December 19, 2025

TABLE OF CONTENTS

INTRODUCTION.....	1
I. THEORY OF THE ANTICANON.....	2
II. ASSESSING A DECISION ON EO 14160 USING THE CRITERIA FOR THE ANTICANON.....	13
A. <i>EO 14160 Is Unconstitutional Under Wong Kim Ark's Varied Reasoning</i>	13
B. <i>Race, Enforcement of EO 14160, and the American Ethos</i>	18
CONCLUSION.....	22

INTRODUCTION

The Citizenship Clause of the Fourteenth Amendment provides: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”¹ On January 20, 2025, President Donald Trump signed Executive Order (EO) 14160, titled “Protecting the Meaning and Value of American Citizenship,” challenging the long-held conventional understanding of the Fourteenth Amendment’s Citizenship Clause by attempting to deny birthright citizenship to children of undocumented immigrants or immigrants without permanent status.² Court challenges to EO 14160 were almost immediate, and the Supreme Court has agreed to hear these challenges.³ A Supreme Court decision which upholds the constitutionality of EO 14160, and which results in the future children of undocumented immigrants being denied birthright citizenship, will, in time, become an addition to the constitutional anticanon; such a decision would reflect the same ethical failures present in other anticanonical cases. In Part I, I explain the theory of the

¹ U.S. CONST. amend. XIV, § 1.

² Nick Miroff, Maria Sacchetti, Arelis R. Hernandez, and Dan Lamothe, *Trump signs executive order attempting to end birthright citizenship*, THE WASHINGTON POST (Jan. 20, 2025), <https://www.washingtonpost.com/immigration/2025/01/20/trump-immigration-executive-orders/>.

³ Amy Howe, *Supreme Court agrees to hear Trump’s challenge to birthright citizenship*, SCOTUSBLOG (Dec. 5, 2025), <https://www.scotusblog.com/2025/12/supreme-court-agrees-to-hear-trumps-challenge-to-birthright-citizenship/>.

anticanon. I primarily borrow from the anticanon theories that Professors Jamal Greene⁴ and Ilya Somin⁵ put forward. I will use these theories to explain why and how a Supreme Court decision becomes anticanonical. In Part II, I apply my anticanon criteria to a hypothetical Supreme Court decision on EO 14160, demonstrating how such a decision would be anticanonical, regardless of its reasoning, because of its inconsistency with the American ethos in denying citizenship effectively on the basis of the race at a historical inflection point.

I. THEORY OF THE ANTICANON

The constitutional anticanon consists of Supreme Court decisions which the legal community considers to be the worst of the worst.⁶ Contemporary legal professionals generally accept four cases, *Dred Scott v. Sandford*,⁷ *Plessy v. Ferguson*,⁸ *Lochner v. New York*,⁹ and *Korematsu v. United States*,¹⁰ as constituting the anticanon; while the Court has issued many decisions which the legal community and public opinion regard as disreputable, these four have traditionally held particular notoriety.¹¹ Although legal scholars largely share consensus on which cases function as the core of the anticanon, they may differ in explaining why and how a case becomes anticanonical.¹²

Professor Jamal Greene’s theory proposes that, to become anticanonical, a case must meet three conditions: (1) rejection of its holding must be incompletely theorized, allowing for pluripotency; (2) the erroneous holding must be, in some way, legally defensible, making the

⁴ Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011).

⁵ Ilya Somin, *The Case for Expanding the Anticanon of Constitutional Law*, 2023 WIS. L. REV. 575 (2023).

⁶ Greene, *supra*, at 387; *see also* Somin, *supra*, at 576 (“The anticanon is a kind of judicial Hall of Shame.”).

⁷ 60 U.S. 393 (1857).

⁸ 163 U.S. 537 (1896).

⁹ 198 U.S. 45 (1905).

¹⁰ 323 U.S. 214 (1944).

¹¹ Greene, *supra*, at 387.

¹² *Compare* Greene, *supra*, at 460-64, *with* Somin, *supra*, at 578.

error susceptible to repetition; and (3) it must be inconsistent with the American ethos.¹³

Professor Ilya Somin's anticanon theory identifies three distinct criteria: (1) the opinion's reasoning must be terrible and indefensible; (2) the case must have horrific real-world consequences which remain; and (3) one of the case's effects must be its promotion of racial discrimination and oppression.¹⁴ However, I will argue that neither of these two theories fully captures why a case receives the scorn and contempt necessary for the legal community to condemn it to anticanonicity. Instead, a combination of these two theories provides the best explanation for a case's anticanonical fate.

As Greene notes, universal invocation by individuals across the ideological spectrum is one of the most prominent features that each case in the anticanon shares.¹⁵ Individuals, such as justices, often invoke the anticanon as a rhetorical tool, recognizing that the case now represents ethical propositions that the public has collectively renounced, rhetorically pairing the anticanonical case with their opponents' arguments, and using it as a bludgeon with which to attack.¹⁶ Greene posits that this occurs because the rejection of anticanonical cases is incompletely theorized.¹⁷ Incomplete theorization arises when people agree, or disagree, on a particular result but do not agree on why the result is right, or wrong.¹⁸ With regard to the anticanon, legal elites disagree with the particular result of the anticanonical holding, but they disagree on why the holding's reasoning or argumentation is wrong.¹⁹ Because the United States, a liberal democracy, is a pluralistic society, justices and other individuals see anticanonical

¹³ Greene, *supra*, at 384.

¹⁴ Somin, *supra*, at 578.

¹⁵ See Greene, *supra*, at 460.

¹⁶ See *id.* at 384, 461.

¹⁷ *Id.* at 460-61.

¹⁸ Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735-36 (1995).

¹⁹ Greene, *supra*, at 460-61.

holdings as safe, useful touchstones that they may disparage for rhetorical points.²⁰ Greene argues that a case's capability for use by a variety of groups, its pluripotency, is an essential condition for it to become anticanonical.²¹

For Greene, an anticanonical case's pluripotency is tied to the case's feasible legal defensibility.²² Greene acknowledges that public perception of the anticanonical cases typically denounces both their holding and reasoning as wrong;²³ however, while he agrees that each case was wrongly decided, he argues that none of the cases in the anticanon bear analytic "errors...so monumental" to make their reasoning "unusually wrong, either by contemporary legal standards or by the conventional forms of legal argument that remain popular today."²⁴ To illustrate this point, Greene expounds on the plausible legal defensibility of each of the four core anticanon cases.²⁵

For example, in *Dred Scott*, the Court held that no Black American could be a citizen of the United States.²⁶ Taney, the infamous author of *Dred Scott*'s opinion, employed originalist and positivist approaches to reach this conclusion.²⁷ According to Greene, scholars can plausibly defend *Dred Scott*'s central holding by appealing to: (1) then-existing skepticism of Black

²⁰ See *id.* at 384, 396, 461; see also Sunstein, *supra*, at 1736 ("[Incomplete theorization] is an important source of social stability and an important way for diverse people to demonstrate mutual respect, in law especially but also in liberal democracy as a whole.").

²¹ See Greene, *supra*, at 461.

²² See *id.* at 384, 462.

²³ *Id.* at 404-05 ("[I]t is common practice to describe anticanonical cases...in terms of analytic errors that should have been obvious at the time...[W]e like to believe that such cases were wrong the day they were decided.").

²⁴ *Id.* at 405-06.

²⁵ *Id.* at 405-27.

²⁶ 60 U.S. at 403-04 ("The question before us is, whether the class of persons [whose ancestors were negroes of the African race] compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.").

²⁷ Greene, *supra*, at 407.

Americans' citizenship;²⁸ (2) then-existing legal precedents and legal norms which tended toward Scott losing on lack of diversity jurisdiction alone;²⁹ and (3) the degrading antebellum treatment of Black Americans that "no government would dare visit upon its white population."³⁰ Because the anticanon's reasoning is plausibly legally defensible, a danger exists that future courts may repeat such reasoning, which enhances the didactic utility of the anticanon's cases.³¹

Anticanonical holdings often spur feelings of disgust within the contemporary public.³² Today, people instinctively cringe at *Dred Scott*'s denial of citizenship to Black Americans, *Plessy*'s "separate but equal" doctrine, and *Korematsu*'s stamp of approval on the exclusion and internment of Japanese Americans during World War II; individuals' disgust with the anticanonical holdings stems from the widely-regarded immoral outcomes of the cases.³³ However, Greene argues that perceived immorality is not necessarily a decisive factor in a case becoming anticanonical and illustrates this point by expounding on cases that have equally immoral holdings but that are not considered anti-canonical.³⁴ Greene instead explains that a case becomes anticanonical when it is inconsistent with the American ethos.³⁵

Greene differentiates between morality, which "refers to values that make claims that span communities," and ethics, which refers "to the context-specific values of a particular

²⁸ *Id.* at 408 ("[T]he argument typically criticized by modern commentators as the most odious – that black Americans could not be U.S. citizens – 'reflected beliefs held by the overwhelming majority of antebellum jurists in both the North and the South' and was consistent with the views of large segments of the American public.") (quoting MARK GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 28-33 (2006)).

²⁹ *Id.* at 408-09.

³⁰ *Id.* at 409.

³¹ *See id.* at 463 ("[A]nticanonical cases must, on some reasonable metric, be correct. These are not the products of rogue judges – incompetent, drunk, or on the make. Hardly. Anticanonical cases tend toward the peculiar logic of judicial formalism so often praised in other contexts... These cases are useful because a certain style of reasoning may arguable lead both to the result in the anticanonical case and to a result that relevant participants in modern controversies also espouse.").

³² *Id.* at 467.

³³ *Id.* at 427.

³⁴ *Id.* at 427-34.

³⁵ *Id.* at 464.

community.”³⁶ The American ethos is ““reflected in the Constitution’”³⁷ and “embodies [the] values [of the American people] as refracted through existing legal and political institutions.”³⁸ Cases become anticanonical when they affront the American ethos, which implicates not only the Constitution but also issues “central to national identity.”³⁹ Greene does not enumerate these values, likely because he sees them as varying over time;⁴⁰ however, I will argue that some of these values, such as the ubiquitously encompassing nature of American identity, are more permanent than Greene apparently believes them to be.

In contrast to Greene’s plausible defense of anticanonical legal reasoning, Somin argues that each case in the anticanon features “terrible reasoning.”⁴¹ Additionally, while Greene focuses on the anticanon’s challenges to the American ethos in the abstract,⁴² Somin focuses on the anticanon’s concrete, real-world consequences.⁴³ These consequences must include large-scale, significant harm.⁴⁴ Finally, Somin highlights that three of the four anticanonical cases (*Dred Scott*, *Plessy*, and *Korematsu*) “facilitated racial discrimination and oppression.”⁴⁵ Somin’s articulation of anticanon theory aligns more with popular perception than Greene’s own theory,

³⁶ *Id.* at 463.

³⁷ *Id.* (quoting PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 20 (1991)).

³⁸ *Id.* at 464.

³⁹ *See id.* at 463.

⁴⁰ *See id.* at 464 (“[I]t takes work to establish that [*Dred Scott*] was unethical in its time – its claims about black citizenship were consistent with much of American legal and political practice late into the last century. Placing *Dred Scott* within the anticanon contributed to a project of conferring official recognition upon an ethical transformation with regard to race relations.”).

⁴¹ Somin, *supra*, at 578.

⁴² *See* Greene, *supra*, at 463.

⁴³ Somin, *supra*, at 578.

⁴⁴ *See id.* at 582 (“All [anticanonical cases] upheld significant injustices.”), 584 (“Badly reasoned cases that have large-scale horrible effects are worse than those that have few or none or perhaps even have beneficial consequences.”).

⁴⁵ *Id.* at 580.

which Somin seems to acknowledge.⁴⁶ However, Somin’s theory is less convincing than Greene’s for two reasons.

First, Greene correctly distinguishes between the anticanon’s reasoning and their results; he shows that the holdings – not necessarily the quality of reasoning – trigger anticanonicity.⁴⁷ Greene provides a variety of approaches, and evidence to support them, in arguing for the legal defensibility of the anticanon’s reasoning, which rebut the popular exaggerations of indefensibility that Somin puts forward.⁴⁸ In doing so, Greene correctly emphasizes that the holdings are what cause so much ire. Second, while Somin attempts to tie the anticanon to its practical effects,⁴⁹ Greene focuses on the anticanon’s ethical implications at a theoretical level.⁵⁰ Again, Greene’s focus is the correct focus: the anticanon is not necessarily egregious because of what it did but because of what it stands for. Greene’s focus on the American ethos better explains why some cases remain in the anticanon regardless of their doctrinal complexity.

Somin’s theory, however, does improve on Greene’s in one important respect: its explicit connection between the anticanon and the issue of race.⁵¹ None of Greene’s criteria directly references race. One likely reason is because a race criterion would not be able to account for *Lochner*’s traditional inclusion in the anticanon.⁵² As Somin notes, *Lochner*’s holding “struck

⁴⁶ See *id.* at 581 (“[M]y point is not to assess the traditional view of these four [anticanonical] rulings, but to emphasize that all four are part of the anticanon primarily because they are at least perceived as having the attributes of awful reasoning, terrible effects, and – in at last three of the four cases – links to racial oppression.”).

⁴⁷ See Greene, *supra*, at 406 (“The degree to which we collectively renounce these decisions [or holdings] is not nearly in proportion to the outrageousness of their [analytical] errors.”).

⁴⁸ See, e.g., *id.* at 406-12.

⁴⁹ See Somin, *supra*, at 582 (“[T]he practical effect of *Prigg* – while awful – was probably not as great as that of *Dred Scott* or *Plessy*...”) (explaining why *Prigg v. Pennsylvania*, 41 U.S. 539 (1842) should not be considered anticanonical), 583 (“[The] practical impact [of *Bowers*] was very limited, especially compared to rulings upholding oppressive laws that federal and state governments were eager to enforce. The latter surely described *Plessy*, *Dred Scott*, and *Korematsu*.”) (explaining why *Bowers v. Hardwick*, 478 U.S. 186 (1996) should not be considered anticanonical).

⁵⁰ See Greene, *supra*, at 463.

⁵¹ Somin, *supra*, at 580.

⁵² See *id.* (“Finally, at least three of the four anticanon cases are widely – and correctly – understood as having facilitated racial discrimination and oppression...*Lochner* is an exception on this point.”).

down a New York state law imposing a maximum-hours limitation and involved a white baker who employed white workers [and] does not seem...either motivated by racism or [to have] resulted in increased racial oppression.”⁵³ However, as both Greene and Somin recognize, the legal community is increasingly disputing *Lochner*’s anticanonicity.⁵⁴ Another reason Greene omits a race criterion is likely because he considers *Korematsu* to have “the weakest case for anticanonicity of the four principal cases”;⁵⁵ this perception may itself stem from the fact that, at the time of Greene’s article, the Court had not yet formally repudiated *Korematsu*.⁵⁶ However, since Greene’s article, the Court has formally repudiated *Korematsu*’s holding in *Trump v. Hawaii*.⁵⁷

Lochner’s gradual ascent out of, and *Korematsu*’s further descent into, “the lowest circle of constitutional hell”⁵⁸ alludes to what I earlier alluded to: some American values are more permanent than others. *Lochner*’s holding represents a “judicial commitment to ‘laissez-faire’ principles that facilitated exploitation of workers,”⁵⁹ which falls into a largely economic schema of public policy. On the other hand, *Korematsu*, by allowing for the exclusion and internment of Japanese Americans based solely on ethnicity,⁶⁰ falls into a largely racial schema of public policy. Economic injustice engenders less vitriol than racial injustice because racial injustice “is the

⁵³ *Id.*

⁵⁴ See, e.g., Greene, *supra*, at 417 (“*Lochner*...was once famously indefensible...Matters are different today. *Lochner* revisionism has become something of a cottage industry as libertarians have become more prominent at think tanks, in politics, and in the legal academy.”); see also Somin, *supra*, at 581 (“*Lochner* has attracted the most revisionist scholarship of the four, with critics of the conventional wisdom arguing not only that it was reasonable and not as bad as commonly thought, but actually correct.”).

⁵⁵ Greene, *supra*, at 422.

⁵⁶ See *id.* at 435.

⁵⁷ 585 U.S. 667, 710 (2018) (“The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority...*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and – to be clear – ‘has no place in law under the Constitution.’”) (citation omitted).

⁵⁸ See Akhil Reed Amar, *Plessy v. Ferguson and the Anti-Canon*, 39 PEPP. L. REV. 75, 76 (2011).

⁵⁹ See Somin, *supra*, at 580.

⁶⁰ See *Korematsu*, 323 U.S. at 218-19 (“[E]xclusion of those of *Japanese* origin was deemed necessary...” (emphasis added)).

closest thing we have to a massive original sin in American constitutional law and perhaps in our society more generally.”⁶¹ Greene appears to hover above this concept but never quite lands on it. He recognizes that “each of the cases in the anticanon focuses on individual rights”⁶² but never explicitly acknowledges that these cases deny individual rights on the basis of race.

One criterion that neither Greene nor Somin formally include in their anticanon theories is that of historical significance. Greene does note “that historical accident plays an important role in establishing a case as anticanonical” but focuses on the historical circumstances at the time of anticanonization rather than at the time the Court issued the holding.⁶³ However, the historical circumstances at the time of the holding also play a crucial role in a case becoming anticanonical. The Court issued *Dred Scott* in 1857, when the country was heatedly debating the issue of slavery expansion into the territories, and the holding arguably contributed to the outset of the Civil War;⁶⁴ *Plessy* arose at a time when the end of Reconstruction led to a society with “segregation or discrimination [that] existed almost everywhere to an identifiable degree”⁶⁵ and *Korematsu* came at a turning point during World War II, which made an American victory over Japan inevitable and undercut any threat of subversion from Japanese Americans.⁶⁶ Each of the cases in the anticanon arrived during a historical inflection point, during which the Court had a clear opportunity to vindicate the civil rights of a minority group, and in each case, the Court failed to do so. The notion that each of the anticanonical cases reflects an inflection point has support from subsequent, formal repudiations, where the Court and other political actors seem to

⁶¹ See Somin, *supra*, at 584.

⁶² See Greene, *supra*, at 466.

⁶³ See *id.* at 460.

⁶⁴ See Louise Weinberg, *Dred Scott and the Crisis of 1860*, 82 CHI.-KENT L. REV. 97, 98, 139 (2007).

⁶⁵ See Greene, *supra*, at 415 (citing CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* 17 (1987)).

⁶⁶ See *id.* at 424 (citing Alvin D. Coox, *The Pacific War*, in 6 THE CAMBRIDGE HISTORY OF JAPAN: THE TWENTIETH CENTURY 315, 362-63 (Peter Duus ed., 1988)).

recognize that a holding was momentarily bad. The ratification of the Fourteenth Amendment formally repudiates *Dred Scott*,⁶⁷ *Brown v. Board of Education* overruled *Plessy*,⁶⁸ and *Trump v. Hawaii* repudiated *Korematsu*.⁶⁹

Having discussed all of the relevant elements of the anticanon theories which Greene and Somin propose, I do not find either one entirely convincing but find strong criteria in both. Greene's strongest criteria are pluripotency⁷⁰ and inconsistency with the American ethos.⁷¹ Although Greene's historicist considerations of the anticanon are not a formal part of his criteria, they are helpful in understanding the anticanon. Somin's strongest criterion is that one of the effects of an anticanonical case must be its promotion of racial discrimination and oppression.⁷²

Using these strongest criteria from each, and reforming them according to the above discussion of the theories, I propose three criteria that determine how a case becomes anticanonical: its holding must be (1) pluripotent (individuals across the ideological spectrum can use the case for rhetorical purposes because the legal community universally acknowledges its holding as wrong but cannot agree on why it is wrong); (2) inconsistent with the American ethos because of its promotion of racial discrimination through the denial of civil rights stemming from citizenship; and (3) issued during a historical inflection point. While my criteria may exclude *Lochner* from the anticanon, both Greene and Somin acknowledge that *Lochner* has recently experienced a more positive reassessment from legal and economic circles,⁷³ and Somin

⁶⁷ *Id.* at 435 ("The first line of the Fourteenth Amendment was specifically intended to overrule the *Dred Scott* decision.").

⁶⁸ *Brown*, 347 U.S. 483, 494-95 (1954) ("Any language in *Plessy v. Ferguson* contrary to this finding is rejected. We conclude that in the field of public education the doctrine of 'separate but equal' has no place.").

⁶⁹ See *Trump v. Hawaii*, 585 U.S. at 710.

⁷⁰ See Greene, *supra*, at 461.

⁷¹ See *id.* at 463.

⁷² Somin, *supra*, at 578.

⁷³ See *supra* note 54.

even suggests that the legal community should no longer consider *Lochner* anticanonical.⁷⁴ For these reasons, I am comfortable with my criteria even if they result in the omission of *Lochner*.

I have married Greene’s ethical criterion with Somin’s race criterion to fully capture the underlying basis of the public’s negative reception of each case in the anticanon. Greene does not provide any examples of the values that constitute the American ethos, but does describe them, in part, as pertaining to issues “central to national identity.”⁷⁵ However, the anticanon itself sheds light on at least one of these central values: Fundamentally, the United States, as a nation, is the result of a “forging of one people from the diversity of many ethnic, racial, and religious elements.”⁷⁶ Attempted denials of this fundamental truth destine themselves to the hell of anticanonicity, and shame in the court of public opinion. The anticanon is the anticanon because, through their holdings, the Court has attempted to deny the fundamental truth of the United States’ diverse nature by denying complete citizenship, and its accompanying civil rights, to its constituent communities.

Dred Scott explicitly denied citizenship to all Black Americans, including those free from slavery, because of their “inferior” status⁷⁷ despite the fact that free Black Americans had been

⁷⁴ Somin, *supra*, at 584.

⁷⁵ See Greene, *supra*, at 463.

⁷⁶ Rudolph J. Vecoli, *The Significance of Immigration in the Formation of an American Identity*, 30 THE HISTORY TEACHER 9, 9 (1996). Even from its foundation, a diversity of people have constituted the United States and interacted to create its national identity. *Id.* at 9-10 (“[T]he American population in 1790 was hardly homogeneous. To begin with, almost nineteen percent was of African ancestry, another twelve percent Scot and Scots-Irish and ten percent German, with smaller numbers of French, Irish, and Welsh; the English stock comprised only forty-eight percent. This enumeration, of course, does not include the Indians...In short, America [at its founding] was already a ‘complex ethnic mosaic,’ divided into segregated, quarrelsome groups by culture, language, religion, and race.”).

⁷⁷ 60 U.S. at 404-05 (“[A]t [the] time [of the drafting of the Constitution, blacks were] considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.”), 407 (“[Blacks] had for more than a century been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.”).

considered citizens at the time of the founding.⁷⁸ *Plessy* effectively established a system of two citizenships (one white, the other colored) in which political actors could relegate citizens of color to a lower caste despite the fact that the Fourteenth Amendment was meant to make all citizens, regardless of race, equal under the law.⁷⁹ *Korematsu*'s Court questioned the allegiance of the Japanese American community, using their non-white ethnicity as an indicator of danger that justified a trampling of their civil rights as citizens,⁸⁰ effectively bringing into question the steadfast allegiance of all citizens of color, despite the fact that Asian American communities had exerted an incredible amount of effort for their successful integration into United States citizenry.⁸¹ Similarly, a decision upholding EO 14160 would deny birthright citizenship to the children of undocumented immigrants and immigrants without permanent residency, the vast majority of whom are Latino,⁸² effectively denying these children's American identity on the basis of their race and ethnicity; as Part II discusses, this denial, paired with pluripotent reasoning and a historical inflection point, is what would make such a decision a candidate for the anticanon.

⁷⁸ Greene, *supra*, at 407 (citing AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 252 (2005)).

⁷⁹ See 163 U.S. at 544 ("The object of the [fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation...do not necessarily imply the inferiority of either race to the other..."), 551-52 ("Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil rights and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.").

⁸⁰ 323 U.S. at 218-19 ("Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group.").

⁸¹ See Amanda Frost, "By Accident of Birth": *The Battle Over Birthright Citizenship After United States v. Wong Kim Ark*, 32 YALE J.L. & HUMAN. 38, 52-53 (2021).

⁸² Jeffrey S. Passel and Jens Manuel Krogstad, *U.S. Unauthorized Immigrant Population Reached a Record 14 Million in 2023*, PEW RESEARCH CENTER (Aug. 1, 2025), <https://www.pewresearch.org/race-and-ethnicity/2025/08/21/u-s-unauthorized-immigrant-population-reached-a-record-14-million-in-2023/>.

II. ASSESSING A DECISION ON EO 14160 USING THE CRITERIA FOR THE ANTICANON

A Supreme Court decision that upholds EO 14160 will become anticanonical for three reasons. First, *U.S. v. Wong Kim Ark*,⁸³ as the controlling interpretation of the Fourteenth Amendment's Citizenship Clause, requires a holding that invalidates EO 14160. *Wong Kim Ark*'s reasoning provides today's Court with different approaches to reach the executive order's unconstitutionality. Should the Court fail to invalidate EO 14160, the holding will be incorrect, but its reasoning may not necessarily be indefensible; this would provide such a decision with the pluripotency necessary for an anticanonical case. Second, an opinion which upholds EO 14160 will constitute a holding that is inconsistent with the American ethos because, by denying citizenship to a constituent American community, it would be an attempted denial of the truth of the United States' fundamentally diverse nature. Finally, Trump's second term, and its attacks on Latino American communities, presents a historical inflection point in which the Court has a clear opportunity to vindicate the civil rights of this minority group. The Court's failure to do so would be a repetition of its failure to do so in the other anticanonical cases.

A. EO 14160 Is Unconstitutional Under Wong Kim Ark's Varied Reasoning

Wong Kim Ark's interpretation of the Fourteenth Amendment is the controlling precedent for deciding who is entitled to birthright citizenship in the United States.⁸⁴ The Court in *Wong Kim Ark* begins its opinion with a question that incorporates the major facts of the case:

The question presented by the record is whether a child born in the United States, of parents of Chinese descent, who at the time of his birth are subjects of the emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the fourteenth

⁸³ 169 U.S. 649 (1898).

⁸⁴ See *Doe v. Trump*, 157 F.4th 36, 64 (2025) (“[I]t [is] appropriate...to address...the proper way to understand the Court’s decision in *Wong Kim Ark*.”) (applying *Wong Kim Ark* as the legal standard in evaluating whether EO 14160 violates the Fourteenth Amendment’s Citizenship Clause).

amendment to the constitution: ‘All persons or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.’⁸⁵

Wong Kim Ark primarily applies an originalist approach in answering this question.⁸⁶ The Court’s focus, and contemporary litigation, centers around the phrase “subject to the jurisdiction thereof.”⁸⁷ The Court first notes that “no common law of the United States, in the sense of a national customary law, [exists] distinct from the common law of England.”⁸⁸ In English common law, citizenship, or the then-state of being a subject, arose out of a relationship between allegiance and protection.⁸⁹ A person born within the king’s realm, or dominions, was subject to the king’s protection and power and therefore owed allegiance to the king.⁹⁰ English common law made no distinction, with regard to citizenship, between children born within English dominions, regardless of whether their parents were English, foreigners settled in England, or foreigners “merely temporarily sojourning” in England.⁹¹

However, the rule had three key exceptions, which excluded the following groups from English citizenship: (1) children born of foreign ambassadors;⁹² (2) children born of alien enemies during their hostile occupation of the king’s dominions;⁹³ and (3) children born on foreign public ships.⁹⁴ These exceptions stem from the sovereign’s lack of power over, or the

⁸⁵ 169 U.S. at 653.

⁸⁶ *See id.* (“The constitution nowhere defines the meaning of [citizen]...except in so far as this is done by the affirmative declaration that ‘all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.’ In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the constitution.”) (citation omitted).

⁸⁷ *Id.* at 682; *see also Doe v. Trump*, 157 F.4th at 56 (“To explain why [the plaintiffs are likely to succeed on the merits of their claim that EO 14160 violates the Citizenship Clause], it first helps to sketch the parties’ basic positions as to the meaning of the key phrase – ‘subject to the jurisdiction thereof.’”).

⁸⁸ *Id.* at 655 (internal quotation marks omitted) (citation omitted).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *See id.* at 657 (internal quotation marks omitted) (citation omitted).

⁹² *Id.* at 655.

⁹³ *Id.*

⁹⁴ *Id.* at 686.

immunity of, the parents of the groups described. A foreign ambassador's immunity arises from "a political fiction [which supposes] him to be extraterritorial" and therefore outside of the sovereign's power,⁹⁵ which is why ambassadors may be "[exempt] from arrest or detention."⁹⁶ When alien enemies have invaded a sovereign's dominions, the enemies may "[acquire] the rights of the conquered...dominion," but their children remain under the enemies' allegiance.⁹⁷ In a similar manner to foreign ambassadors, when foreign public ships enter a sovereign's territory, they do so "under an implied promise that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country."⁹⁸

The *Wong Kim Ark* Court asserts, and provides evidence to affirm, that American governments accepted this common law rule of citizenship by birth in the dominion, or territory, of the sovereign.⁹⁹ However, once the United States had become an independent nation, an additional exception arose for Native Americans born in tribes.¹⁰⁰ While Native American tribes are "within the territorial limits of the United States," they are "distinct political communities, the members of which [owe] immediate allegiance to their several tribes, and were not a people of the United States;"¹⁰¹ for this reason, Native Americans, while "subject in some respect or degree to the jurisdiction of the United States," are not "completely subject to [the] political

⁹⁵ *Id.* at 685 (internal quotation marks omitted) (citation omitted).

⁹⁶ *Id.* at 684 (internal quotation marks omitted) (citation omitted).

⁹⁷ *Id.* at 664-65 (internal quotation marks omitted) (citation omitted).

⁹⁸ *Id.* at 684-85 (internal quotation marks omitted) (citation omitted).

⁹⁹ *Id.* at 674-75 ("[I]t is beyond doubt that, before the enactment of the civil rights act of 1866 or the adoption of the constitutional amendment, all white persons, at least, born within the sovereignty of the United States, whether children of citizens or foreigners, excepting only children of ambassadors or public ministers of a foreign government, were native-born citizens of the United States.").

¹⁰⁰ *See id.* at 680 ("[I]t was decided [in *Elk v. Wilkins*] that an Indian born a member of one of the Indian tribes within the United States...was not a citizen of the United States, as a person born in the United States, 'and subject to the jurisdiction thereof,' within the meaning of the clause in question.").

¹⁰¹ *Id.* at 681.

jurisdiction of the United States” and are not among those eligible for birthright citizenship.¹⁰²

The Court argues that an interpretation of the phrase “subject to the jurisdiction thereof” must occur under a presumption that the drafters of the Citizenship Clause understood the historical common law rule of citizenship by birth in the territory and that they intended to codify it.¹⁰³

Thus, the Court concludes:

The real object of the fourteenth amendment of the constitution, in qualifying the words ‘all persons born in the United States’ by the addition ‘and subject to the jurisdiction thereof,’ would appear to have been to exclude, by the fewest and fittest words (besides children of members of the Indian tribes, standing in a peculiar relation to the national government, unknown to the common law), the two classes of cases, - children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state, - both of which, as has already been shown, by the law of England and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country.¹⁰⁴

Under this clear rule statement, which the Court distilled via a comprehensive, originalist, approach, the case necessitating the invalidation of EO 14160 is simple. EO 14160 prohibits federal departments or agencies from issuing documents, or accepting documents from other authorities, that recognize the citizenship of a child born in the United States if neither of their parents is a lawful permanent resident or citizen.¹⁰⁵ EO 14160 effectively denies citizenship to U.S.-born children without either a lawful permanent resident or citizen parent. *Wong Kim Ark*’s rule statement does not identify U.S.-born children without either a lawful permanent resident or citizen parent as being ineligible for birthright citizenship.¹⁰⁶ *Wong Kim Ark* is the controlling interpretation of the Citizenship Clause.¹⁰⁷ The enforcement of EO 14160 would contradict *Wong Kim Ark*’s rule statement. Therefore, EO 14160 is unconstitutional.

¹⁰² *Id.* at 680. This exception applied at the time of *Wong Kim Ark*. However, because of 8 U.S.C. § 1401(b), Native Americans born in tribes today are eligible for birthright citizenship. (West, Westlaw through P.L. 119-36).

¹⁰³ *See id.* at 687.

¹⁰⁴ *Id.* at 682.

¹⁰⁵ *See* Protecting the Meaning and Value of American Citizenship, 90 FR 8449 (Jan. 20, 2025).

¹⁰⁶ *Id.* at 682.

¹⁰⁷ *See Doe v. Trump*, 157 F.4th at 64.

Wong Kim Ark additionally provides a textualist approach to interpreting the Citizenship Clause. Aside from the Citizenship Clause, the second half of Section 1 of the Fourteenth Amendment provides: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”¹⁰⁸ The Court has previously held that, when the second half of Section 1 of the Fourteenth Amendment uses the word “jurisdiction,” in the context of a state, it has to do with “territorial jurisdiction.”¹⁰⁹ With this in mind, the *Wong Kim Ark* Court notes that “subject to the jurisdiction thereof,” in the context of the United States as a whole, must refer also to “territorial jurisdiction”; therefore, one cannot be subject to the jurisdiction of a state, by virtue of being within its territory, without being subject to the jurisdiction of the United States.¹¹⁰ Applying this logic, the Court would have to find EO 14160 unconstitutional. U.S.-born children without a lawful permanent resident or citizen parent are necessarily born in a state’s territory. Under Section 1 of the Fourteenth Amendment, any person within a state’s territory is subject to that state’s jurisdiction.¹¹¹ People subject to a state’s jurisdiction must also be subject to the United States’ jurisdiction.¹¹² U.S.-born children without a lawful permanent resident or citizen parent are subject to the United States’ jurisdiction by virtue of being subject to a state’s jurisdiction. Because U.S.-born children without a lawful permanent resident or citizen parent were born in the United States

¹⁰⁸ U.S. CONST. amend. XIV, § 1.

¹⁰⁹ See *Yick Wo v. Hopkins*, 118 U.S. 356, 359 (1886) (“[P]rovisions [of the Fourteenth Amendment] are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.”).

¹¹⁰ See *Wong Kim Ark*, 169 U.S. at 696 (“[I]t is impossible to attribute to the words, ‘subject to the jurisdiction thereof’ (that is to say, of the United States), at the beginning, a less comprehensive meaning than to the words ‘within its jurisdiction’ (that is, of the state), at the end of the same section; or to hold that persons, who are indisputably ‘within the jurisdiction’ of the state, are not ‘subject to the jurisdiction thereof.’”).

¹¹¹ See *Yick Wo*, 118 U.S. at 359.

¹¹² See *Wong Kim Ark*, 169 U.S. at 696.

and are subject to the United States’ jurisdiction, they are citizens of the United States. EO 14160 effectively denies citizenship to U.S.-born children without a lawful permanent resident or citizen parent,¹¹³ despite the fact that these children are citizens. Therefore, EO 14160 is unconstitutional. Thus, any contrary Supreme Court holding would satisfy the pluripotency prong of my anticanon criteria.

B. Race, Enforcement of EO 14160, and the American Ethos

EO 14160 does not use the words “illegal” or “undocumented.”¹¹⁴ However, the executive order’s principal intent is to restrict birthright citizenship from the children of undocumented immigrants.¹¹⁵ Additionally, on its face, EO 14160 is race-neutral. Undocumented immigrants can, and do, come to the United States from all parts of the world. However, the enforcement of EO 14160 would disproportionately harm children of color. As of 2023, the most recent year for which published data is available, approximately 14 million undocumented immigrants were present in the United States; 73.9% are from Latin America, 12.5% are from Asia, 7.5% are from Europe or Canada, 3.4% are from Africa, 1.8% are from the Middle East, and 0.6% are from Oceania.¹¹⁶ Notably, the vast majority of undocumented immigrants in the United States arrive from Latin America. Since 2014, when his political ambitions intensified, Donald Trump has long held an animus toward Latin American undocumented immigrants, repeatedly decrying their character as violent and criminal on his social media accounts.¹¹⁷ Trump has similarly denied the citizenship of

¹¹³ See Protecting the Meaning and Value of American Citizenship, 90 FR 8449 (Jan. 20, 2025).

¹¹⁴ *Id.*

¹¹⁵ See Initial Brief for Appellants at 10, *Doe v. Trump*, 157 F.4th 36 (2025) (“Just as [the Citizenship Clause] does not hold for certain tribal Indians, diplomats, or occupying enemies, it similarly does not hold for foreigners here temporarily or illegally. ‘[N]o one can become a citizen of a nation without its consent...’ And if the United States has not consented to someone’s enduring presence, it follows that it has not consented to making citizens of that person’s children.”) (alteration present in original) (citation omitted).

¹¹⁶ *Supra* note 82.

¹¹⁷ See, e.g., @realDonaldTrump, X (Feb. 24, 2015, 7:47 PM), <https://x.com/realDonaldTrump/status/570384640281870337> (“The Mexican legal system is corrupt, as is much of Mexico. Pay me the money that is owed me now – and stop sending criminals over our border”); *id.* (July 13, 2015,

the U.S.-born children of undocumented immigrants since his entry into politics, often describing them with the derogatory term “anchor baby,” even once advocating for the removal of American citizens who are the children of undocumented immigrants.¹¹⁸

Trump’s disparagement of undocumented immigrants, and their U.S.-citizen children, aligns well with white nationalists and their own rhetoric on these individuals. White nationalists, such as Ann Coulter, despise undocumented immigrants, legal immigrants, immigrants’ citizen children, and the Fourteenth Amendment’s grant of birthright citizenship in general.¹¹⁹ Hatred toward immigrants, whether legal or undocumented, from the contemporary white nationalist community largely stems from a “great replacement theory,” which is the idea that “a plot to diminish the influence of white people [exists and] is being achieved both through

6:53 AM), <https://x.com/realDonaldTrump/status/620546522556534784> (“[B]illions of dollars gets (sic) brought into Mexico (sic) through the border. We get the killers, drugs & crime, they get the money!”); @realDonaldTrump, TRUTH SOCIAL (Feb. 26, 2024, 10:26 AM),

“Vicious gangs and gang members are pouring into our Country from South America, and all over the World. They are being FORCED out of their Countries, in particular Venezuela and Mexico, and DEPOSITED into the Good Ole’ USA by the tens of thousands. But here’s the ‘wrinkle.’ THEY REFUSE TO TAKE THESE CRIMINALS BACK... Not being able to bring the worst of humanity back to where they came from is a BIG problem for the U.S... This is a COUNTRY DESTROYING EVENT!! Just think of it – Foreign countries will be sending us their WORST, Gang Members, Murderers, Drug Dealers, Human Traffickers, Terrorists, their Mentally ILL, and even, others, sick people, who need large scale help, and they have told the World, ‘WE WILL NEVER TAKE THEM BACK.’”).

¹¹⁸ See, e.g., Fox News, *Donald Trump’s immigration plan*, FOX NEWS (Aug. 19, 2015),

<https://www.foxnews.com/transcript/donald-trumps-immigration-plan.amp> (“[DONALD TRUMP:] ‘Bill, I think you are wrong about the 14th amendment and frankly the whole thing with anchor babies and the concept of anchor babies I don’t think you are right about that... What happens is they are in Mexico, they are going to have a baby, they move over here and a couple of days they have the baby... Bill, I don’t think they have American citizenship... We have to start a process where we take back our country. Our country is going to hell.’”) (excerpt from transcript of interview with Bill O’Reilly).

¹¹⁹ See Ann Coulter, *Ann Coulter: FOX NEWS Anchored In Stupidity On 14th Amendment*, VDARE (Aug. 19, 2015), <https://vdare.com/articles/ann-coulter-fox-news-anchored-in-stupidity-on-14th-amendment> (“[H]ow could anyone – even a not-very-bright person – imagine that granting citizenship to the children of illegal aliens is actually in our Constitution?... It is clear that in a divided 1898 case, *U.S. v. Wong Kim Ark*, the Supreme Court granted citizenship to the children born to *legal* immigrants, with certain exceptions, such as for diplomats. But that decision was so obviously wrong, even the *Yale Law Journal* ridiculed it... As ridiculous as it was to grant citizenship to the children born to legal immigrants under the 14th Amendment... that’s a whole order of business different from allowing illegal aliens to sneak across the border, drop a baby and say, *Ha-ha! You didn’t catch me! My kid’s a citizen* – while Americans curse impotently under their breath.”); see also Peter Brimelow, *Jared Taylor and Peter Brimelow: Let’s Put a Cherry on Top of the Trump Immigration Plan!*, VDARE (Aug. 27, 2015), <https://vdare.com/articles/jared-taylor-and-peter-brimelow-let-s-put-a-cherry-on-top-of-the-trump-immigration-plan> (“I would like to have a flat-out immigration moratorium indefinitely... What I personally would actually like to see is retroactivity in the abolition of birthright citizenship. I think the U.S. should strip citizenship from people who are the child of illegal immigrants.”).

the immigration of nonwhite people into societies that have largely been dominated by white people, as well as through simple demographics, with white people having lower birth rates than other populations.”¹²⁰ While great replacement theory, and the xenophobic sentiments it engenders, was once at the fringes of American society, it has become increasingly mainstream;¹²¹ even nationally popular pundits, such as Tucker Carlson, have fully embraced it.¹²²

Political actors have increasingly pushed forward policies which largely derive from these xenophobic concerns, such as EO 14160, which disproportionately prevents children of color from becoming American citizens. If the Court were to uphold EO 14160, which is ostensibly race-neutral by ignoring the fact that it actually deprives racial minorities of their citizenship and its accompanying rights, it would be engaging in a horrific repeat of *Plessy*, when it upheld a racially discriminatory statute while playing ignorant about its harmful racial effects.¹²³ Such a decision would deny citizenship to a constituent American community, effectively on the basis of race; this would be inconsistent with the American ethos because it would be an attempted denial of the truth of the United States’ fundamentally diverse nature. This inconsistency with the American ethos would condemn a decision upholding EO 14160 to anticanonical hell.

¹²⁰ David Bauder, *What is ‘great replacement theory’ and how does it fuel racist violence?*, PBS NEWS (May 16, 2022), <https://www.pbs.org/newshour/amp/politics/what-is-great-replacement-theory-and-how-does-it-fuel-racist-violence>.

¹²¹ Sandra L. Rierson, *From Dred Scott to Anchor Babies: White Supremacy and the Contemporary Assault on Birthright Citizenship*, 38 GEO. IMMIGR. L.J. 1, 35 (2023).

¹²² Tucker Carlson, *Great Replacement Theory Is a Reality*, YOUTUBE (Apr. 17, 2025), https://www.youtube.com/shorts/dDNF_RDQswo (“[TUCKER CARLSON:] ‘[Great replacement’s] not a theory. It’s reality. The Canadian population, like the American population, the European population, replaced!...[1.3 million foreigners immigrating to Canada, a country of 40 million is] an invasion.’”) (Carlson’s quotes from a YouTube short shared by Carlson on his YouTube channel).

¹²³ See 163 U.S. at 551 (“We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race would not acquiesce in this assumption.”).

Trump's second term presents a historical inflection point, especially with regard to the national treatment of Latino American communities. Trump has likely cemented himself in the annals of American history.¹²⁴ He is the first president to arguably instigate an insurrection at the Capitol,¹²⁵ the first president to be impeached twice, the first former president to be found liable for sexual abuse,¹²⁶ the first former president to become a convicted felon,¹²⁷ and yet was still elected to a second term, becoming the first since Grover Cleveland to serve two non-consecutive terms. Free of the restraint of needing to run for another term, Trump has acted in earnest to carry out his most controversial campaign promises.¹²⁸ Among these promises, now policy, is mass deportation.¹²⁹ Along with EO 14160, mass deportation is another Trump administration policy which harms minorities and Latino Americans in particular. For example, U.S. Immigration and Customs Enforcement (ICE), tasked with carrying out mass deportation efforts, employs controversial criteria which makes Latinos in the United States, including citizens, more susceptible to ICE detentions, arrests, and investigations.¹³⁰ If and when EO 14160 comes before

¹²⁴ Whether for better or for worse is still yet to be definitively seen.

¹²⁵ See Michael Klarman, *Who was Responsible for January 6th?*, HARV. ALI SOC. IMPACT REV. (Jan. 28, 2025), <https://www.sir.advancedleadership.harvard.edu/articles/who-was-responsible-for-january-6th> ("President Trump was the proximate cause of the violent assault on the Capital on January 6, 2021. His words of incitement to a crowd of thousands of angry supporters...may well qualify for criminal punishment notwithstanding the First Amendment.").

¹²⁶ Larry Neumeister, Jennifer Peltz, and Michael R. Sisak, *Jury finds Trump liable for sexual abuse, awards accuser \$5M*, AP NEWS (May 9, 2023),

¹²⁷ Michael R. Sisak, Jennifer Peltz, Erick Tucker, Michelle L. Price, and Jill Colvin, *Guilty: Trump becomes first former US president convicted of felony crimes*, AP NEWS (May 31, 2024), <https://apnews.com/article/trump-trial-deliberations-jury-testimony-verdict-85558c6d08efb434d05b694364470aa0>.

¹²⁸ See Ivan Pereira, *Trump, echoing Project 2025, using 'flood the zone' strategy to push agenda: Experts*, ABC NEWS (Apr. 29, 2025), <https://abcnews.go.com/Politics/trump-echoing-project-2025-flood-zone-strategy-push/story?id=121124118>.

¹²⁹ Times News, *Trump announces 'largest deportation in American history' if he is reelected*, YOUTUBE (Dec. 18, 2023), <https://www.youtube.com/watch?v=2ks12ctSXwg&t=7s> ("[DONALD TRUMP]: 'Given the unprecedented millions of Biden illegal aliens who are invading our country, it is only common sense that, when I'm reelected, we will begin, and we have no choice, the largest deportation operation in American history ever.'") (Trump's quote given at a campaign rally).

¹³⁰ Gabriel R. Sanchez and Edward D. Vargas, *Racial profiling by ICE will have a marked impact on Latino communities*, BROOKINGS INSTITUTION (Oct. 16, 2025), <https://www.brookings.edu/articles/racial-profiling-by-ice-will-have-a-marked-impact-on-latino-communities/>. The U.S. Supreme Court has allowed the use of these criteria to continue. See *Noem v. Vazquez Perdomo*, No. 25A169, 2025 WL 2585637 (U.S. Sep. 8, 2025).

the Court, it will have a major opportunity to address and repudiate a policy which results in harm to racial minorities, and particularly Latino Americans. Should the Court fail to do so and uphold EO 14160, which disproportionately harms Latino Americans and other racial minorities, during a time when Latino Americans' civil rights are being abridged, it would be a repetition of its failure to defend oppressed minorities' rights in other anticanonical cases.

CONCLUSION

Somin notes that “[t]he anticanon is a mechanism [for controlling the Supreme Court]” because, “[i]f a case is considered anticanonical, strong professional and political norms constrain current and future judges from reaching similar conclusions.”¹³¹ Lessons from the anticanon should be especially powerful constraints when the Court deals with issues that will have deeply profound effects on a great number of people. In 2018, around 297,000 children were born to undocumented immigrants in the United States; this means that children of undocumented immigrants accounted for approximately 7.5% of all births in the country that year.¹³² If EO 14160 successfully strips these children of their citizenship, it will have an immediate effect on hundreds of thousands, but it may have a long-term effect on millions by creating a hereditary noncitizen class within the United States. Citizenship is the fundamental right from which all other civil rights derive.¹³³ As the anticanon hauntingly reminds us, no person should be denied citizenship, or the civil rights

¹³¹ Somin, *supra*, at 585.

¹³² Steven A. Caramota, Karen Zeigler, and Jason Richwine, *Births to Legal and Illegal Immigrants in the U.S.*, CENTER FOR IMMIGRATION STUDIES (Oct. 9, 2018), <https://cis.org/Report/Births-Legal-and-Illegal-Immigrants-US>.

¹³³ See Evelyn Marcelina Rangel-Medina, *Citizenism: Racialized Discrimination by Design*, 104 B.U. L. REV. 831, 849-50 (“Noncitizens are almost entirely precluded from serving on juries and running for elected office. Noncitizens generally pay taxes but are not allowed to vote in federal and state elections and almost all local elections. Noncitizens without a formal immigration status cannot travel outside the United States and have a legal pathway of return. Noncitizens do not have the same rights and protections under civil rights law to assert a discrimination claim based on their status, even if this is informed or driven by race. Noncitizens detained in immigration proceedings are almost entirely prohibited from accessing criminal procedural due process rights under the Fourth and Fifth Amendment.”).

which accompany it, on the basis of their race. Fortunately, in this case, the Court can also learn from the actual constitutional canon. The traditional understanding of *Wong Kim Ark*'s interpretation of birthright citizenship has been so widespread, and its application to this case is so clear, that the Court has previously taken for granted that the child of undocumented immigrants is an American citizen.¹³⁴ *Wong Kim Ark* itself arose from xenophobic concerns, during a time when the West Coast was experiencing a surge in Asian immigration, and many in American society doubted whether these new immigrants could ever truly be a constituent part.¹³⁵ Even when confronted by significant social pressures to rule a different way, the Court held firm to the Fourteenth Amendment's guarantee of citizenship to all people born within the United States, and subject to the jurisdiction thereof, without regard to their color or race. A decision upholding EO 14160 would undermine *Wong Kim Ark*'s admirable holding, and its multiple avenues supporting birthright citizenship, and affront the American ethos by predominantly denying Latino children American citizenship on account of their race and ethnicity at a time when Latino Americans' civil rights are under assault for a variety of reasons. Any such decision will inevitably become anticanonical.

¹³⁴ See, e.g., *INS v. Rios-Pineda*, 471 U.S. 444, 446 (1985) ("Respondents, a married couple, are natives and citizens of Mexico. Respondent husband illegally entered the United States in 1972. Apprehended, he returned to Mexico in early 1974 under threat of deportation. Two months later, he and respondent wife paid a professional smuggler \$450 to transport them into this country, entering the United States without inspection through the smuggler's efforts. Respondent husband was again apprehended by INS agents in 1978. At his request, he was granted permission to return voluntarily to Mexico in lieu of deportation. He was also granted two subsequent extensions of time to depart, but he ultimately declined to leave as promised. INS then instituted deportation proceedings against both respondents. By that time, respondent wife had given birth to a child, who, born in the United States, was a citizen of this country.")

¹³⁵ See *Frost*, *supra*, at 53.