

# SEPARATE AND LEGALLY UNEQUAL - HOW THE DEMONIZATION OF IMMIGRANTS AFFECTS UNITED STATES POLICY

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## INTRODUCTION

The skirmish has begun. In retrospect, it seems the American political climate was destined for polarization. As far back as the presidential election of 2004, Democratic vice president candidate John Edwards spoke of two Americas.<sup>1</sup> At the time, most believed the divide was simply economic—a time honored debate between the haves and have-nots.<sup>2</sup> Income disparity was growing.<sup>3</sup> Americans were worried about the disappearance of the middle class. What most failed to recognize was the nation’s growing devotion to tribalism, which was a tribalism based on a set of inflexible values. The narrative appears to go like this: anyone who shares the tribe’s values is a patriot, a true American. All those who do not are the nationalistic equivalent of infidels.<sup>4</sup> In this time of “us against them,” it is not surprising that immigrants are the front line casualties. There is no better way to create an “other” than to establish a border—geographic, religious, or ethnic. Any border will suffice.

It is a battle of ideas. The war is over how the United States chooses to define itself and our notions of liberty, opportunity and equality. While it may not be immediately obvious, all of these core beliefs are interrelated when it comes to American policy on migration, and the opportunities available to immigrants, whether they are lawful permanent residents or recently arrived citizens. It is easy to focus solely on one issue at a time while missing the larger pattern.

This article argues that hostile policies on immigration translate directly to hostile policies in areas ranging from national security to public education.<sup>5</sup> If

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1. John Edwards, Democratic Nominee for Vice President, Address to Democratic National Convention (July 28, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A22230-2004Jul28.html> (“I stand here tonight ready to work with you and [Democratic presidential nominee] John [Kerry] to make America stronger. And we have much work to do, because the truth is, we still live in a country where there are two different Americas . . . one, for all of those people who have lived the American dream and don’t have to worry, and another for most Americans, everybody else who struggle to make ends meet every single day. It doesn’t have to be that way.”).

2. See Jodie T. Allen, *A Nation of “Haves” and “Have Nots”?: Far More Americans Now See Their Country As Sharply Divided Along Economic Lines.*, PEW RESEARCH CENTER (Sept. 13, 2007), <http://www.pewresearch.org/2007/09/13/a-nation-of-haves-and-havenots/>. (“Over the past two decades, a growing share of the public has come to the view that American society is divided into two groups, the ‘haves’ and the ‘have-nots.’ Today [in 2007], Americans are split evenly on the two-class question with as many saying the country is divided along economic lines as say this is not the case (48% each). In sharp contrast, in 1988, 71% rejected this notion, while just 26% saw a divided nation.”).

3. See Chad Stone, et al., *A Guide to Statistics on Historical Trends in Income Inequality*, CENTER ON BUDGET AND POLICY PRIORITIES (updated Nov. 7, 2016), <http://www.cbpp.org/research/poverty-and-inequality/a-guide-to-statistics-on-historical-trends-in-income-inequality>. (“Census family income data show that the era of shared prosperity ended in the 1970s and illustrate the divergence in income that has emerged since that time. . . from 1979 to 2007, just before the financial crisis and Great Recession, average income after taxes for the top 1 percent of the distribution quadrupled.”).

4. See Robert Reich, *The New Tribalism and the Decline of the Nation State*, ROBERT REICH BLOG (March 23, 2014), <http://robertreich.org/post/80522686347>. (“But America’s new tribalism can be seen most distinctly in its politics. Nowadays the members of one tribe (calling themselves liberals, progressives, and Democrats) hold sharply different views and values than the members of the other (conservatives, Tea Partiers, and Republicans). Each tribe has contrasting ideas about rights and freedoms. . . Each has its own totems.”).

5. After all, access to public education tends to empower the rising number of recently arrived

these policies are allowed to continue unchecked, the American dream will look vastly different for each of our “Americas.”

## I. THE BATTLE OF IDEAS OVER DIVERSITY

The outcome of the 2016 presidential election has left many Americans confounded.<sup>6</sup> Beyond the divisiveness of the campaign itself, one of the Americas is aghast at the worldview promulgated by President Trump—a country in despair, unsafe and weak.<sup>7</sup> Yet in the other America, voters found that vision compelling and accurate.<sup>8</sup> One way to better understand the split is to look at diversity, education, and economic prosperity in Trump country.

### A. The Rust Belt Electorate

Perhaps to make ourselves feel better, post-election analysis has concluded that the election of President Trump was an economic cry for help.<sup>9</sup> We want to believe that the discriminatory, exclusionary part of his message—build a wall!—was not the reason for Trump’s victory.<sup>10</sup> But, closer scrutiny of the demographics of those who live in Trump country show something quite different. The more homogenous the county, i.e., white, non-Hispanic, voters, the more likely it was to favor Trump.<sup>11</sup> This trend held true despite the wealth of that county.<sup>12</sup>

immigrant citizens.

6. Dan Hirschhorn, *How Donald Trump Shocked the World*, TIME MAG. (Nov. 9, 2016), <http://time.com/4563946/election-2016-donald-trump-victory-how/>. (“He had broken so many political norms. . . no one, Republican, Democrat or any other stripe, saw a tsunami of this size coming.”).

7. Jenna Johnson, *Donald Trump’s vision of doom and despair in America*, WASH. POST (July 21, 2016) [https://www.washingtonpost.com/politics/donald-trumps-message-of-doom-and-despair-in-america/2016/07/21/8afe4cae-3f22-11e6-80bc-d06711fd2125\\_story.html?utm\\_term=.ddd305a5efe4](https://www.washingtonpost.com/politics/donald-trumps-message-of-doom-and-despair-in-america/2016/07/21/8afe4cae-3f22-11e6-80bc-d06711fd2125_story.html?utm_term=.ddd305a5efe4). (“The Republican presidential convention this week has highlighted Donald Trump’s view of America — and it sounds like a terrible, terrible place. In Trump’s eyes, the United States is practically a Third World country, with crumbling roads, aging bridges and decrepit airports.”).

8. Rich Morin, *Behind Trump’s win in rural white America: Women joined men in backing him*, PEW RESEARCH CENTER (Nov. 17, 2016), <http://www.pewresearch.org/fact-tank/2016/11/17/behind-trumps-win-in-rural-white-america-women-joined-men-in-backing-him/>. (“The Pew Research Center survey. . . suggests that the broad economic concerns of rural white Americans align to a striking degree with several key issues that were among the cornerstones of the Trump campaign: jobs, immigrants and fears about an eroding standard of living.”)

9. Emma Alberici, *U.S. Election: Why did 61 million Americans vote for Trump?* ABC NEWS (Nov. 20, 2016), <http://www.abc.net.au/news/2016-11-20/us-election-why-did-61-million-americans-vote-for-trump/8040648>. (“More than 61 million Americans voted for Donald Trump. . . Most of them are willing to dismiss the offensive things Mr [sic] Trump has said, if it means his presidency has a chance of reviving their towns.”).

10. Romesh Ponnuru, *Trump Didn’t Win Because of Racism*, BLOOMBERG VIEW (Nov. 9, 2016), <https://www.bloomberg.com/view/articles/2016-11-09/trump-didn-t-win-because-of-racism>. (“[C]laims that bigotry are a major motivation for Trump voters have a thin evidentiary basis: They classify conservative views that aren’t necessarily rooted in racial hostility as ‘racial resentment,’ they ignore the decline in bigotry over time and they overgeneralize about a very large and in some ways diverse group of people.”).

11. See *infra* Appendix A. For the full Appendix, see <http://dfsc.law.duke.edu/hernandez-appendix>.

12. *Id.* at A-3 (Hamilton County, IN), A-6 (McHenry County, IL), A-11 (Warren County, OH). Hamilton County, Indiana had a population of White Alone of 88.5% and in 2015 of 87.8%. *Id.* at A-3.

The diversity within the geographic terrain of Trump country is low or non-existent.<sup>13</sup> While these voters admittedly felt left behind in the country's economic recovery from the 2008 recession, it is important to understand *why* new jobs are not available in the "Rust Belt."<sup>14</sup> One reason is this area's continued resistance to integration. In other words, refusal to diversify has ushered in an era of economic stagnation. Therefore, to "Make America Great Again" one must harken back to an era when white, male workers enjoyed a tilted playing field in their favor. It was a time when educational and employment opportunities were blocked for minorities and women.<sup>15</sup> By 2017, decades of legislation and case law have mostly removed this unfair advantage to allow equal opportunity access to education or employment.<sup>16</sup> Trump

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Hamilton County also had a median income of \$86,222, more than \$35,000 over the median income of the state, and a per capita income that was more than \$15,000 over the state per capita average. *Id.* Hamilton County voted for Trump over Clinton by 20 percentage points. *Id.* With a White Alone population of 87.8%, McHenry County, Illinois favored Trump by almost 8 percentage points. *Id.* at A-6. McHenry County had a median income of \$77,222 and per capita income of \$33,735, both above the state average. *Id.* State median income for Illinois was \$57,574 and state per capita was \$30,494. *Id.* With a White Alone population of 89.7%, Warren County, Ohio favored Trump by more than 30 percentage points. *Id.* at A-11. The median income of \$74,379 in Warren County was almost \$25,000 above the state average of \$49,429. *Id.* Warren County per capita income was \$34,271, about \$8,000 greater than the per capita average of \$26,953. *Id.*

13. See Appendix.

14. Joseph Bien-Kahn, *Trump Can't Deliver On The Rust Belt Jobs He Promised Because Work Has Changed*, WIRED (Dec. 7, 2016), <https://www.wired.com/2016/12/trump-cant-deliver-rust-belt-jobs-work-changed/>. ("But Trump will enter office with the nearly impossible challenge of rebuilding a sector of the economy that technology has altered at least as much as globalization has. . . Even then, the implacable forces of automation guarantee that whatever jobs may return to the Rust Belt won't look like those of days gone by.")

15. Kim Soffen & Denise Lu, *When Was America Great? It Depends On Who You Are.*, WASH. POST (Oct. 7, 2016), <https://www.washingtonpost.com/graphics/politics/2016-election/when-was-america-great/> ("For Trump's core supporters, America was at its greatest decades ago." and "It's not just economic - white men have lost political and social power, too. As women and minorities have gained seats at the table, white men have lost them.")

16. See *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955) (separate but equal is inherently unequal and unconstitutional); *Hernandez v. Texas*, 347 U.S. 475 (1954) (The 14th Amendment extends beyond a "two class" theory and includes other races/nationalities); *Browder v. Gayle*, 352 U.S. 903 (1956) (per curiam, the "Rosa Parks" case, affirming lower court decision that local ordinances requiring segregation on buses is unconstitutional); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (Indigent defendants have a right to appointed counsel in criminal trials.); Civil Rights Act of 1964, 78 Stat. 241-248 §§ 101-1101 (1964) (penalized discrimination in voting, public schools, and public accommodations.); *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241 (1964) (Civil Rights Act of 1964 is a valid exercise of Congressional commerce clause power, and private discrimination in public accommodations is prohibited.) See also *Katzenbach v. McClung*, 379 U.S. 294 (1964) (private discrimination in restaurant prohibited); *Reynolds v. Sims*, 377 U.S. 533 (1964) (State election systems should be designed to give approximately equal weight to each vote cast.); Voting Rights Act of 1965, 79 Stat. 437-436 § 3(b) (1965) (suspends the use of tests in voting); *Loving v. Virginia*, 388 U.S. 1 (1967) (Anti-miscegenation statutes violate equal protection and due process clauses of the 14th amendment.); Civil Rights Act of 1968, 82 Stat. 73, 81-90 §§ 801-901 (1968) (banning discrimination in housing rental and sale); *Jones v. Alfred H. Mayer*, 392 U.S. 409 (1968) (the Civil Rights Act of 1968 applies to discrimination in both private and public housing); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (Title VII of the 1964 Civil Rights Act prohibits both intentional discrimination in employment and practices that are fair in form but discriminatory in operation.); Title VII of the Civil Rights Act of 1964, 78 Stat. 241, 253-266 §§ 701-716 (1964); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (Certain actions making changes to voting districts required states to litigate validity in District

country, however, has not followed suit. Its failure to embrace diversity has deprived this region of economic benefits enjoyed by integrated communities, such as Silicon Valley and Wall Street, two very persuasive examples of thriving local economies.<sup>17</sup>

The data in Appendix A illustrates a number of voting trends. For the purposes of this analysis, counties within six states—Indiana, Illinois, Michigan, Ohio, Pennsylvania, and Wisconsin—were sampled.<sup>18</sup> Overall, counties that were more diverse, defined as having a population below 70% of “White Alone, Not Hispanic or Latino” [hereinafter, “White Alone”], voted for Democratic candidate, Hillary Clinton.<sup>19</sup> The data also includes the percentage of foreign-born persons in a county to wholly ascertain the level of diversity.<sup>20</sup> Diversity as a predictor of voting trends was more accurate than other possible indicators such as education level or income.<sup>21</sup> Meanwhile, counties that were less diverse, defined as a county that had a White Alone population in the mid-80% range or higher, voted for Trump.<sup>22</sup> Results were less uniformly predictable in those

Court.); *State of South Carolina v. Katzenbach*, 383 U.S. 301 (1967) (rejecting a challenge to the preclearance provisions in Voting Rights Act).

17. Mike Hager, *B.C. tech sector to get surge of talent fleeing Silicon Valley: insiders*, THE GLOBE AND MAIL (Jan. 30, 2017), <http://www.theglobeandmail.com/news/british-columbia/bc-tech-sector-to-get-surge-of-talent-fleeing-silicon-valley-insiders/article33845299/>. (“British Columbia’s burgeoning tech sector is set to get a big boost from entrepreneurs and their employees fleeing Silicon Valley to dodge U.S. President Donald Trump’s immigration policies, industry insiders say.”) Unsurprisingly, Silicon Valley companies are the most vocal objectors of President Trump’s immigration policies. *Id.*

18. App. A at A-1, Methodology.

19. *Id.* at A-4 (Lake County, IN)\*\*, A-5 (Marion County, IN), A-9 (Wayne County, MI), A-10 (Cuyahoga County, OH), at A-10 (Franklin County, OH), A-13 (Philadelphia County, PA). Lake County, Indiana had a 2010 population of White Alone, not Hispanic or Latino of 64.4% and in 2015, that percentage went up to 71%. *Id.* at A-4. Lake County, Indiana voted for Hillary Clinton 57.6% to Donald Trump’s 37.2%. *Id.* Marion County, Indiana had a White Alone population of 62.7% in 2010 and 65.8% in 2015. *Id.* at A-5. Marion County voted for Clinton 58% to Trump’s 35.5%. *Id.* Wayne County, Michigan had a White alone percentage of 52.3% in 2010 and 54.8% in 2015. *Id.* at A-9. Wayne County voted for Clinton 66.3% to Trump’s 29.2%. *Id.* Cuyahoga County, Ohio had a 2010 White Alone population of 63.6% and a 2015 White Alone population of 64.2%. *Id.* at A-10. Cuyahoga County voted for Clinton by 35 percentage points with Clinton at 65.2% and Trump at 30.5%. *Id.* Franklin County, Ohio had a White Alone population of 69.2% in 2010 and 69.3% in 2015. *Id.* Franklin County voted for Clinton 59.7% to Trump’s 33.9%. *Id.* Philadelphia County, Pennsylvania had a 2010 White Alone population of 41%, which increased in 2015 to 45.1%. *Id.* at A-13. Philadelphia County voted for Clinton by the largest margin of any other County in this category at 82.5% to Trump’s 15.3%. *Id.*

20. App. A at A-3–16.

21. App. A at A-3 (Hamilton County, IN), A-11 (Warren County, OH). Hamilton County, Indiana had 55.9% of their population with a Bachelor’s degree or higher, and a median household income of \$86,222, compared to the state averages of 24.1% with a Bachelor’s degree or higher and a median household income of \$49,255. *Id.* at A-3. Hamilton County voted for Trump at 56% to Clinton’s 36.7% and had a White Alone population in the high 80<sup>th</sup> percentile with 88.5% in 2010 and 87.8% in 2015. *Id.* Warren County, Ohio also had a more educated and higher earning population while voting for Trump at 65.6% and Clinton at 28.5%. *Id.* at A-11. Warren County had a median household income of \$74,379 compared to the state at \$49,429. *Id.* Warren County also had 39.6% of its population with a Bachelor’s degree or higher, compared to the state at 26.1%. *Id.* The determinative factor appears to be the White Alone population in Warren County, which was at 90% in 2010 and at 89.7% in 2015. *Id.*

22. App. A at A-3 (Daviss County, IN and Hamilton County, Indiana), A-4 (Jasper County, Indiana), A-6 (LaSalle County, IL), A-10 (McHenry County, IL), A-7 (Bay County, MI), A-8 (Ottawa

counties comprised of a White Alone population in the low to mid-80% range.<sup>23</sup>

Another factor that introduced unpredictability in voting results was an increase in a population's diversity over a five year period.<sup>24</sup> For example, in Portage County Ohio, 52.2% of voters chose Trump, while 42.14% chose Clinton.<sup>25</sup> These numbers are closer than most county election results in Trump

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County, MI), A-9 (Sanilac County, MI), A-11 (Portage County, OH), A-11 (Shelby County, OH) and Warren County, OH), A-12 (Clarion County, PA and Huntingdon County, PA), A-14 (Westmoreland County, PA), A-15 (Lincoln County, WI), A-15 (Marathon County, WI). Daviess County, Indiana voted for Trump at 78% and Clinton at 16% and had a White Alone population of 95% in 2010 and 96.5% in 2015. *Id.* at A-3. Hamilton County, Indiana voted for Trump 56% to Clinton's 36.7% and had a White Alone population of 88.5% in 2010 and 87.8% in 2015. *Id.* Jasper County, Indiana voted for Trump 69.61% to Clinton's 24.7% and had a White Alone population of 95.8% in 2010 and 97.1% in 2015. *Id.* at A-4. LaSalle County, Illinois voted for Trump 53.6% to Clinton's 39.2% and had a White Alone population of 93.2% in 2010 and 94.6% in 2015. *Id.* at A-6. McHenry County, Illinois voted for Trump at 50.3% and Clinton at 42.7% with a White Alone population of 90.1% in 2010 and 93.5% in 2015. *Id.* Bay County, Michigan voted for Trump at 53.1% and Clinton at 40.6%, and had a White Alone population of 94.1% in 2010 and 94.7% in 2015. *Id.* at A-7. Ottawa County, Michigan voted for Trump 61.5% to Clinton's 31.3% and had a White Alone population of 90.1% in 2010 and 92.7% in 2015. *Id.* at A-8. Sanilac County, Michigan voted for Trump at 69.8% and Clinton at 25.3% and had a White Alone population of 96.6% in 2010 and 97.3% in 2015. *Id.* at A-9. Portage County, Ohio voted for Trump at 52.2% and Clinton at 42.1% and had a White Alone population of 92.3% in 2010 and 91.3% in 2015. *Id.* at A-11. Shelby County, Ohio voted for Trump at 78% and Clinton at 17.8% and had a White Alone population of 94.7% in 2010 and 94.5% in 2015. *Id.* Warren County, Ohio voted for Trump at 65.6% and Clinton at 28.5% and had a White Alone population of 90.5% in 2010 and 89.7% in 2015. *Id.* Clarion County, Pennsylvania voted for Trump at 71.2% and Clinton at 24.2% and had a White Alone population of 97.2% in 2010 and 96.7% in 2015. *Id.* at A-12. Huntingdon County, Pennsylvania voted for Trump at 73% and Clinton at 22.8% and had a White Alone population of 92.5% in both 2010 and 2015. *Id.* Westmoreland County, Pennsylvania voted for Trump at 63.5% and Clinton at 35.5% and had a White Alone population of 95.3% in 2010 and 95% in 2015. *Id.* at A-14. Lincoln County, Wisconsin voted for Trump at 57.12% and Clinton at 36.5% and had a White Alone population of 97.2% in 2010 and 97% in 2015. *Id.* at A-15. Marathon County, Wisconsin voted for Trump at 56.1% and Clinton at 38% and had a White Alone population of 91.3% in both 2010 and 2015. *Id.*

23. App. A at A-5 (Dupage County, IL), A-6 (Lake County, IL), at A-7 (McLean County, IL), A-13 (Montgomery County, PA), A-14 (Dane County, WI), A-16 (Racine County, WI). Dupage County, Illinois had a White Alone population in 2010 of 77.9% and in 2015 of 80.7%. Dupage County Illinois voted for Clinton at 53.9% as opposed to Trump who won 39.2% of the vote. *Id.* at A-5. Lake County, Illinois had a White Alone population in 2010 at 75.1% and in 2015 at 82%. *Id.* at A-6. Lake County, Illinois voted for Clinton at 57.4% as opposed to Trump who won 36.8% of the vote. *Id.* McLean County, Illinois had a White Alone population that stayed steady between 2010 and 2015 at 84.3%, and it voted for Trump at 49.32% to Clinton's 41.1%. *Id.* at A-7. Montgomery County, Pennsylvania saw its White Alone population decrease slightly between 2010 and 2015, with the percentage going from 81.1% to 80.6%. *Id.* at A-13. Montgomery County voted for Clinton at 58.1% to Trump's 37.2%. *Id.* Dane County, Wisconsin had a 2010 White Alone population of 84.7% in 2010 and 85.8% in 2015. *Id.* at A-14. Dane County voted for Clinton at 70.4% to Trump's 23.1%. *Id.* Racine County, Wisconsin had a White Alone population that increased between 2010 and 2015 from 79.7% to 83.9%. *Id.* at A-16. Racine County voted for Trump at 48.1% to Clinton's 43.8%. *Id.*

24. App. at A-7 (McLean County, Illinois), A-16 (Racine County, WI). In McLean County, Illinois, the White Alone population was 84.3% in 2010 and 84.3% in 2015. Trump's win was narrower here at 49.3% of the vote compared to Clinton's 41.1% of the vote. *Id.* at A-7. In Racine County, Wisconsin, the 2010 White Alone population was 79.7% and the 2015 White alone population was 83.9%. *Id.* at A-16. The margin for Trump in Racine County was also narrow at 48.1% of the vote compared to Clinton's 43.87%. *Id.*

25. App. A at A-11 (Portage County, OH).

country.<sup>26</sup> In Portage County, the White Alone population shrank from 91.4% in 2010 to 89.9% in 2015.<sup>27</sup> An increase in diversity might explain why the presidential race was closer, relatively speaking, than in areas like Shelby County, Ohio, where the White Alone population is holding steady at approximately 94%.<sup>28</sup> Shelby County voted overwhelmingly for Trump at 78.06%.<sup>29</sup>

Interestingly, predicted voting results based on diversity did not contradict predictions based on income and education levels.<sup>30</sup> In Hamilton County, Indiana, the White Alone population held steady at 87.8% in 2015.<sup>31</sup> The percentage of foreign-born persons, however, was 7.5%, much higher than the percentage for the State as a whole.<sup>32</sup> Hamilton County's median income was more than \$30,000 above the State median, and the per capita income was more than \$15,000 more than the State per capita.<sup>33</sup> The number of individuals who hold Bachelor degrees or higher in Hamilton County was twice as high as the rest of Indiana.<sup>34</sup> Omitting the White Alone statistic, one might conclude this county's majority vote would favor Clinton. This conclusion is wrong. Hamilton County voted for Trump by approximately twenty points, 56% to 36.7%.<sup>35</sup> The diversity factor was determinative.

Alternative candidates were also considered in the voting results. In some counties that were in the "unpredictable" range established by diversity numbers, such as McLean County, Illinois (84.3% White Alone<sup>36</sup>), the alternative candidates garnered a sizeable percentage of the vote, which may have made the race closer for Clinton.<sup>37</sup> Third party candidates Johnson and Stein together won approximately 7.5% of the county's votes.<sup>38</sup> The race between Clinton and

26. See *supra* n. 10.

27. App. A at A-11 (Portage County, OH).

28. *Id.*

29. *Id.*

30. App. A at A-3 (Hamilton County, IN), A-6 (McHenry County, IL), A-8 (Ottawa County, MI), A-9 (Wayne County, MI), A-11 (Warren County, OH), A-13 (Philadelphia County, PA). Hamilton County had higher income and education levels than the rest of Indiana, but the White Alone population would predict that it would vote for Trump, and it did at 56% to Clinton's 36.7%. *Id.* at A-3. McHenry County also had higher income and education levels than the state averages for Illinois, but the White Alone population at 90% or more predicted that the County would vote for Trump. *Id.* at A-6. McHenry County voted for Trump at 50% to Clinton's 32.7%. Ottawa County, Michigan had higher than state average income and education levels yet voted for Trump at 61.5% to Clinton's 31.3%. *Id.* at A-8. Ottawa County's White Alone population was 92.7% in 2015. *Id.* On the opposite end of the spectrum, Wayne County, Michigan had lower education and income levels than the rest of the state of Michigan. *Id.* at A-9. However, the White Alone population at 54.8% in 2015 would lead to a prediction for Clinton, which turns out to be correct. *Id.* Wayne County voted 66.3% for Clinton and 29.27% for Trump. *Id.*

31. App. A at A-3 (Hamilton County, IN).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. App. A at A-7 (McLean County, IL).

37. *Id.* (McLean County, Illinois).

38. *Id.*

Trump ended with an 8-point split in favor of Trump, 49% to 41%.<sup>39</sup> Diversity numbers, however, belied an alternative candidate's appeal when those percentages fell above the mid-80% range (Trump), or below the 80% range (Clinton).<sup>40</sup>

There were only two counties that could arguably be called anomalies: Douglas County and Racine County, both located in Wisconsin. In 2015, Douglas County had a White Alone population of 92.5%, a lower percentage of the population with a Bachelor's degree than the state as a whole, and a very low percentage of foreign-born persons at 1.7%.<sup>41</sup> Yet, Douglas County voted for Clinton in favor of Trump, 50% to 42%.<sup>42</sup> This particular anomaly may simply reflect recent redistricting changes in Wisconsin.<sup>43</sup>

In 2015, Racine County had a White Alone population of 83.9%, only a slightly lower percentage of the population with a Bachelor's degree than the state as a whole, and a higher percentage of foreign-born persons at 4.8%.<sup>44</sup> Racine County voted for Trump in favor of Clinton, 48.1% to 43.8%.<sup>45</sup> Arguably, however, Racine's demographics brings it squarely within the gray area of unpredictability.<sup>46</sup>

The data reflects that economics alone did not predict the outcome of the presidential race. Once again, a message conveying fear of immigrants, or the dangerous "other," gained traction with a significant part of the American voting population. Sadly, this message is not new. It has enjoyed success in the United States for over a hundred years.

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39. *Id.*

40. App. A at A-1 (Hamilton County, IN), A-5 (Marion County, IN), A-5 (Dupage County, IL), A-6 (LaSalle County, IL), A-6 (McHenry County, IL), A-7 (Bay County, MI). In Hamilton County, Johnson received 5.85% of the vote, but the White Alone population at 87.8% had the vote overwhelmingly for Trump at 56% to Clinton's 36.7%. *Id.* at A-3. Marion County, Indiana had Johnson receiving 4.96% of the vote, but the White Alone population at 65.8% in 2015 had the county voting for Clinton at 58.03%. *Id.* at A-5. Dupage County, Illinois had Johnson and Stein at a combined 6.3% of the vote. *Id.* at A-5. The vote went to Clinton though with White Alone population in 2015 at 80.7% in Dupage County. *Id.* In LaSalle County, Illinois, Johnson and Stein together earned 5.9% of the vote. *Id.* The vote percentages between Trump and Clinton were not close with Trump earning 53.6% and Clinton earning 39.2%. *Id.* The White Alone population in LaSalle County was 94.6% in 2015. *Id.* at A-6. In McHenry County, Illinois, Johnson and Stein received 6.5% of the vote. *Id.* at A-6. However, the White alone population was 93.5% in 2015 and the vote reflected that with Trump earning 50.3% of the vote and Clinton earning 42.7%. *Id.* In Bay County, Michigan, Johnson and Stein earned a combined 5.13% of the vote. *Id.* at A-7. The White Alone population was just above 94% in both 2010 and 2015 and the vote was for Trump at 53.17% and Clinton earned 40.62%. *Id.*

41. App. A at A-15 (Douglas County, WI).

42. *Id.*

43. *Redistricting in Wisconsin*, BALLOTPEdia, [https://ballotpedia.org/Redistricting\\_in\\_Wisconsin](https://ballotpedia.org/Redistricting_in_Wisconsin) (last visited Feb. 12, 2017). ("On November 21, 2016, the United States District Court for the Western District of Wisconsin struck down the district map for the Wisconsin State Assembly, finding that the map constituted an illegal partisan gerrymander. The case was brought by a group of 12 state Democrats who alleged that Wisconsin's redistricting plan treated voters 'unequally, diluting their voting power based on their political beliefs, in violation of the Fourteenth Amendment's guarantee of equal protection.'").

44. App. A at A-16 (Racine County, WI).

45. *Id.*

46. *Id.* Racine County had a 2010 White Alone population of 79.7% and in 2015 the White Alone population was at 83.9%. *Id.*



## B. Fear of Immigrants – The Legislative and Judicial Beginnings

Apart from the Alien Sedition Act of 1798, the United States' immigration policy began as one of open borders. No restrictions to immigration existed. Policies changed in the mid-1800s when an influx of Chinese immigrants fleeing the Taiping Rebellion began to emigrate.<sup>47</sup> This wave of immigrants became the cheap labor force hired to construct the intercontinental railroad.<sup>48</sup> The work was hard and deadly.<sup>49</sup> When the railroad was finished, the United States was mired in an economic depression.<sup>50</sup> The country no longer needed the cheap labor provided by the Chinese.<sup>51</sup>

In an all too familiar refrain, political sentiment began to foment a movement to exclude the Chinese and to remove the population already present within the country.<sup>52</sup> Fear that the Chinese population would outnumber European immigrants was one of the motivating factors.<sup>53</sup> In 1882, Congress passed a statute limiting the movements of the Chinese.<sup>54</sup> It stated Chinese residents would not be permitted to re-enter the United States once they departed unless they met two conditions: (1) physical presence in the United States since 1880; and (2) a certificate of return that authorized re-entry, obtained prior to departure.<sup>55</sup>

In 1887, Chae Chan Ping, a resident since 1875 and laborer, obtained a re-entry certificate and then left the United States to visit China.<sup>56</sup> In 1888, while Mr. Ping was on his return voyage, Congress passed the Chinese Exclusion Act.<sup>57</sup> The statute unilaterally excluded all Chinese from entering the United States, even if they possessed a return certificate.<sup>58</sup> Immigration officials excluded Mr. Ping at the border.<sup>59</sup> He subsequently sued for relief in federal court on two grounds: (1) treaty obligations and (2) constitutional violations.<sup>60</sup>

In a seminal ruling, the United States Supreme Court denied relief, focusing on the nature of sovereignty.<sup>61</sup> Holding that immigration laws were reserved to the sovereign, among other bases, the Court refused to contradict Congress on its

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47. The Taiping Rebellion lasted from 1850 to 1869. Andrea Barton, Note, *Sitting on Ellis Island: The Fate of Disparate Immigration Policies in the Wake of the Guantanamo Bay Cases*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 233, 238 (2009).

48. Leila Higgins, *Immigration and the Vulnerable Worker: We Built This Country on Cheap Labor*, 3 AM. U. LABOR & EMP. L.F. 522, 528 (2013).

49. *See id.* at 530.

50. *Id.* at 532.

51. *Id.*

52. *Chae Chan Ping v. United States*, 130 U.S. 581, 595 (1889).

53. *Id.*

54. 8 U.S.C. § 261 (1882) ("The Chinese Exclusion Act").

55. *Id.*

56. *Ping*, 130 U.S. at 582.

57. *Id.* at 599. ("It shall be unlawful for any Chinese laborer who shall at anytime heretofor have been, or may now or hereafter be, a resident within the United States, and who shall have departed or shall depart, therefrom, and shall not have returned before the passage of this act to return to or remain in the United States.").

58. *Ping*, 130 U.S. at 582.

59. *Id.*

60. *Id.* at 589.

61. *Id.*

legislative pronouncement.<sup>62</sup> Tellingly, the language of the opinion communicated the country's fear of the Asian immigrant. The majority stated, "[a]s they grew in numbers each year the people of the coast saw, or believed they saw, in the facility of immigration, and in the crowded millions of China, where population presses upon the means of subsistence, great danger that at no distant day that portions of our country *would be overrun by them*, unless prompt action was taken to restrict their immigration."<sup>63</sup> Then again, "... their immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization."<sup>64</sup>

Because the United States was already "overrun" by European immigrants, the Court was not necessarily bothered by migrants. Instead, it was the identity of the immigrants themselves.<sup>65</sup> As Chief Justice Field explained in the majority opinion, newly arrived immigrants were not "American" enough. The Court reasoned that "[i]f the United States considers foreigners of different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time, there are no actual hostilities with the nations of which the foreigners are subject."<sup>66</sup>

*Ping*, or as it is more commonly known the Chinese Exclusion Case, laid the foundation for the plenary power of Congress over immigration laws and a broad grant of discretion to the Executive. Even in 1889, a dialogue grounded in fear existed to describe migrants of certain nationalities. The narrative contained multiple levels of fear—fear of invasion, fear of being overrun, and of course, fear over national security..

### C. More Fear: National Security and World War II

Fifty years later, the country's unease with Asian immigrants had not subsided. After the attack on Pearl Harbor, the country's suspicion and fear of anyone of Japanese descent was heightened. The United States' entry into World War II led to executive decisions regarding immigrants and asylum seekers that

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62. *Id.* at 609.

63. *Id.* at 595 (emphasis added).

64. *Id.* (stating the conclusions of a convention).

65. The United States did not pose the same restrictions on European migration. See *Fong Yue Ting v. United States*, 149 U.S. 698, 745 (1893) (Field, J. dissenting). Interestingly, Justice Field wrote the majority opinion in the Chinese Exclusion Act case. In *Fong Yue Ting*, Justice Field drew a distinction between excluding non-citizens at the border and removing non-citizens found within the United States. *Id.* ("I had the honor to be the organ of the court in announcing this opinion and judgment. I still adhere to the views there expressed, in all particulars; but between legislation for the exclusion of Chinese persons, that is, to prevent them from entering the country, and legislation for the deportation of those who have acquired a residence in the country under a treaty with China, there is a wide and essential difference. The power of the government to exclude foreigners from this country, that is, to prevent them from entering it, whenever the public interests, in its judgment, require such exclusion, has been repeatedly asserted by the legislative and executive departments of our government, and never denied; but its power to deport from the country persons lawfully domiciled therein by its consent, and engaged in the ordinary pursuits of life, has never been asserted by the legislative or executive departments, except for crime, or as an act of war, in view of existing or anticipated hostilities, unless the alien act of 1798 can be considered as recognizing that doctrine.")

66. *Ping*, 130 U.S. at 606. It is worth noting that the United States and China were on friendly terms in 1889. *Id.* at 590.

permanently stained the country's soul.

First, on February 19, 1942, President Franklin D. Roosevelt signed Executive Order 9066, detaining all residents of Japanese descent, both citizens and non-citizens, under the pretext of national security.<sup>67</sup> In his Order, President Roosevelt justified the incarceration by invoking the possibility of a fifth column within United States borders, an all too common fear mongering tactic:

Whereas the successful prosecution of the war *requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities. . . .*

Now, therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War. . .to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion."<sup>68</sup>

Internment of those of Japanese descent occurred quickly, forcing many to sell their homes or businesses.<sup>69</sup> Total property loss by the internees is estimated at \$2.7 billion.<sup>70</sup> With his Executive Order, President Roosevelt validated the unfounded fear of the Asian immigrant. Unlike the Chinese Exclusion Act, however, the United States was at war with Japan, which gave the national security justification more weight.

Second, before the United States' entry into World War II, President Roosevelt refused to admit Jewish refugees who were at the nation's border.<sup>71</sup> Approximately 937 Jewish refugees aboard the *St. Louis* had traveled from Nazi Germany seeking asylum.<sup>72</sup> After Cuba denied their entry, the Jewish passengers sought asylum from the United States through Miami.<sup>73</sup> Instead of admittance, the State Department informed passengers by telegram that they must "await their turns on the waiting list and qualify for and obtain immigration visas before they may be admissible into the United States."<sup>74</sup> The reasons for denying asylum varied, but included: (1) strict immigration quotas imposed by the Immigration and Nationality Act of 1924,<sup>75</sup> (2) public opinion, while sympathetic to the Jewish refugees, favored these immigration

67. National Archives, Transcript of Executive Order 9066: Resulting in the Relocation of Japanese (1942), <http://www.ourdocuments.gov/doc.php?doc=74&page=transcript>.

68. *Id.* (emphasis added).

69. National Archives, Executive Order 9066: Resulting in Relocation of Japanese (1942), <http://www.ourdocuments.gov/doc.php?doc=74>.

70. *Id.* (calculated in 1983 dollars).

71. *Voyage of the St. Louis*, HOLOCAUST ENCYCLOPEDIA, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005267> (last visited Feb. 4, 2017) [hereinafter *Voyage*].

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

restrictions,<sup>76</sup> (3) the Great Depression's strengthening of fears that immigrants would take available jobs,<sup>77</sup> (4) political considerations such as "Republican isolationism,"<sup>78</sup> and (5) President Roosevelt's interest in a constitutionally suspect third term of office.<sup>79</sup>

In another familiar refrain, the United States was deeply suspicious of refugees of a different faith who were forced to flee their homeland. Anti-Semitic sentiment was so pervasive that at a press conference President Roosevelt repeated the unproven claims from his advisers that some Jewish refugees were Nazi spies.<sup>80</sup> "Not all of them are voluntary spies. . . . It is rather a horrible story, but in some of the other countries that refugees out of Germany have gone to, especially Jewish refugees, they found a number of definitely proven spies."<sup>81</sup> After being denied entry, the Jewish refugees were forced to return to Europe where most perished at the hands of the Nazis.<sup>82</sup> Unlike the timing of Executive Order 9066 establishing Japanese internment camps, the United States was not yet at war with Germany in 1939.

These two examples of executive decisions reflect the broad grant of authority over immigration given to the Executive Branch, especially within the arena of national security. Unfortunately, President Roosevelt's actions demonstrate how capricious the use of that authority can be. More importantly, it shows that even citizens, naturalized or birthright, can be deprived of their constitutional rights if the nation's security is purportedly invoked. While it might be tempting to consider these executive decisions a thing of the past, President Trump is attempting to "Make America Great Again" by testing his executive authority in the exact same terms. Everything old is new again.

## II. MODERN POLICY: THE SPECTER OF NATIONAL SECURITY

On January 27, 2017, two weeks into his presidency, Donald J. Trump signed an Executive Order entitled "Protecting the Nation from Foreign Terrorist Entry into the United States."<sup>83</sup> The Order immediately banned entry into the United States by citizens from seven predominantly Muslim countries: Iran, Iraq, Syria, Yemen, Libya, Sudan and Somalia.<sup>84</sup> The Executive Order included non-citizens holding lawful permanent residence status, also known as green cards.<sup>85</sup>

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76. *Voyage*, *supra* note 71.

77. *Id.*

78. *Id.*

79. *Id.*

80. Daniel A. Gross, *The U.S. Government Turned Away Thousands of Jewish Refugees, Fearing That They Were Nazi Spies*, SMITHSONIAN.COM (Nov. 18, 2015), <http://www.smithsonianmag.com/history/us-government-turned-away-thousands-jewish-refugees-fearing-they-were-nazi-spies-180957324/>.

81. *Id.*

82. *Id.*

83. Proclamation No. 13769, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

84. *Id.* at § 3(c), 5(c).

85. *Id.* at § 3(c) ("I hereby proclaim that the immigrant and nonimmigrant entry into the United States of aliens from countries referred to in section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), would be detrimental to the interests of the United States, and I hereby suspend entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order."). While

The signing of the Order immediately disrupted the immigration process into the United States. Just like Mr. Ping, lawful permanent residents and other visa holders caught outside American borders on January 27 were excluded.<sup>86</sup>

President Trump invoked his power under Immigration and Nationality Act section 212(f) for such a sweeping use of executive power.<sup>87</sup> Section 212(f) states, in part:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.<sup>88</sup>

To be sure, the President does have almost unchecked authority to exclude a non-citizen who is outside of American borders and has no ties to the United States.<sup>89</sup> Non-citizens do not enjoy any protection under the United States Constitution.<sup>90</sup> Non-citizens with a visa and asylum claimants, however, are owed varying degrees of due process protection.<sup>91</sup> In other words, the Executive Order overreached when it deprived this category of non-citizens of entry without a hearing, as required by due process.<sup>92</sup>

President Trump signed this Executive Order without an ongoing conflict or war or even the prospect of war with the seven enumerated countries. Indeed, none of these countries have citizens who bear responsibility for any terrorist attack on United States soil.<sup>93</sup> As with the Chinese Exclusion Act, fear and paranoia about an invading force of disloyal non-citizens has motivated the federal government to behave in an erratic, extreme and uncalled-for manner. The only modern day difference is the targeting of Muslim believers, as opposed to the Chinese.<sup>94</sup>

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members of the Executive branch, including Secretary of the Department of Homeland Security John F. Kelly, scaled back the scope of the Executive Order in practice, its language does reach LPRs, as well as asylum holders and non-immigrant visa holders. *Id.*

86. The latest reports estimate that around 600 visa-holders were detained or denied admission in the weekend after the implementation of the Executive Order. Dara Lind, *The Pain of Trump's Immigration Ban Will Persist After the Airport Protests Have Faded*, VOX (Feb. 1, 2017, 1:35 PM), <http://www.vox.com/policy-and-politics/2017/1/31/14446080/muslim-ban-stopped-still-airport>.

87. 8 U.S.C.A. § 1182(f). The current version of the INA was originally adopted in 1952.

88. *Id.*

89. See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

90. *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904) (holding, "those who are excluded cannot assert the rights in general obtaining in a land to which they do not belong . . .").

91. See *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

92. *Washington v. Trump*, No. 17-35105, 2017 U.S. App. LEXIS 2369 (9th Cir. Feb. 9, 2017); *Washington v. Trump*, No. C17-0141JLR, 2017 U.S. Dist. LEXIS 16012 (W.D. Wash. Feb. 03, 2017).

93. Miriam Valverde, *No Terrorist Attacks Post 9/11 by People From Countries in Trump's Travel Ban?*, POLITIFACT (Jan. 29, 2017, 5:42 PM), <http://www.politifact.com/truth-o-meter/statements/2017/jan/29/jerrold-nadler/have-there-been-terrorist-attacks-post-911-countri/>.

94. Targeting religious believers has also weakened President Trump's argument of non-reviewable executive authority. *Washington*, 2017 U.S. App. LEXIS 2369, at \*15. Any non-citizen who can invoke constitutional protections, especially LPRs, are most likely protected by the First Amendment's Establishment Clause.

Another important break with history is in federal court intervention.<sup>95</sup> As gratifying as the stay on the implementation of the Executive Order is, it does not obviate the fact that the President has very broad power in the field of immigration. The Order might have survived judicial scrutiny if it were crafted more artfully and narrowly. The judiciary's power here is limited.

Nonetheless, the historical pattern of fearing the immigrant has emerged again using the same methodology. Lack of integration in key geopolitical parts of the country has delivered an Executive who is mired in the past with respect to migrants. The lack of diversity also leaves an opening for stereotyping of immigrants as dangerous or lazy. United States Supreme Court Justice Field illustrated this perspective in 1889 by arguing that "[Asian] immigration was in numbers approaching the character of an [] invasion, and was a menace to our civilization," illustrates this perception.<sup>96</sup> A shift in the public perception of the immigrant must occur. The public good associated with immigrants, such as innovation, hard work and ambition, must be added to the rhetoric.<sup>97</sup> Silence is now dangerous. The ongoing prosperity of the United States is at issue.

### III. THE BATTLE OF IDEAS IN PUBLIC SCHOOL EDUCATION

Since the early twentieth century, American citizens have benefited from compulsory public school education. Written and mathematical literacy imparts access to opportunity otherwise inaccessible. Nonetheless, public school education is now a political battleground. Disputes over funding, attendance and curriculum dominate headlines. In 1982, the United States Supreme Court ruled that all children within a school district's boundaries are entitled to its education, including undocumented immigrant children.<sup>98</sup> Therefore, the gutting of public schools has a direct effect on the prosperity of immigrants in our country. It is probably not a coincidence. What follows is the ongoing battle for equality in public school education.

#### A. Early Challenges to Public School Funding

Controversy over funding public schools is a well-worn topic in Texas. Litigation over unequal funding formulas began in the early 1970s. *San Antonio Independent School District v. Rodriguez* was a state-wide class action brought by Mexican-American parents, whose citizen-children attended elementary and secondary schools in the San Antonio area.<sup>99</sup> The class consisted of citizen-children throughout the state who were members of ethnic minority groups

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95. See generally *id*; see generally *Washington*, 2017 Dist. LEXIS 16012..

96. *Chae Chan Ping v. United States*, 130 U.S. 581, 595 (1889).

97. Tanvi Misra, *How Immigrants Changed the Geography of Innovation*, CITYLAB (Feb. 8, 2017), [http://www.citylab.com/work/2017/02/how-immigrants-influenced-the-geography-of-innovation/515901/?utm\\_source=nl\\_link1\\_020917](http://www.citylab.com/work/2017/02/how-immigrants-influenced-the-geography-of-innovation/515901/?utm_source=nl_link1_020917) (citing a new working paper by University of Chicago and Harvard economists listing the benefits of immigration such as innovation and long-term technological growth).

98. *Plyler v. Doe*, 457 U.S. 202 (1982). *Plyler v. Doe* is a consolidation of several class actions that were filed challenging the constitutionality of the Texas statute. *Id.* at 206-09.

99. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 4-5 (1973) (analyzing the Texas public school financing system).

residing within school districts having a low property tax base.<sup>100</sup> The Texas Minimum Foundation School Program relied on funding from both the state and local level.<sup>101</sup> The state would contribute funds to the local school districts, earmarking them for teacher salaries, operating expenses and transportation costs.<sup>102</sup> The local school districts, operating as an aggregate, were responsible for remaining funds, which they collected from district residents through an *ad valorem* property tax.<sup>103</sup> The *Rodriguez* class alleged that substantial discrepancies existed between economically rich and poor school districts in per-student school expenditures.<sup>104</sup> The class alleged the discrepancy violated the Equal Protection Clause because of the disproportionate affect on poor and minority students.<sup>105</sup> The United States Supreme Court rejected the challenge.<sup>106</sup> While the Texas system of school financing did have shortcomings, the *Rodriguez* Court held that it was an “enlightened approach to a problem for which there is no perfect solution.”<sup>107</sup> It did not violate the Equal Protection Clause.<sup>108</sup>

## B. Equal Access to Education

Nine years after *Rodriguez*, the Supreme Court heard another case involving Texas and public school education. In *Plyler v. Doe*, the Court decided the issue of whether undocumented immigrant children have the same right to a free secondary public education as citizen-children or legally present immigrant children.<sup>109</sup> Ostensibly responding to the rising cost of public education,<sup>110</sup> the Texas legislature enacted a law to withhold funds from local school districts for students of questionable immigration status.<sup>111</sup> The statute further empowered local school districts to deny enrollment to students who were unable to prove their lawful status.<sup>112</sup>

After concluding that the Equal Protection Clause applies to every individual domiciled in the United States, lawfully or not,<sup>113</sup> the *Plyler* Court

100. *Id.* at 5.

101. *Id.* at 7.

102. *Id.* at 9.

103. *Id.* at 7–11. Overall, the Texas Minimum Foundation School Program accounted for nearly half of the total education expenditures; the remaining funding came from a combination of local tax revenues and federal funding. *Id.* at 9 n.21.

104. *Rodriguez*, 411 U.S. at 15.

105. *Id.*

106. *Id.* at 6, 55.

107. *Id.* at 55.

108. *Id.*

109. *Plyler v. Doe*, 457 U.S. 202 (1982). *Plyler v. Doe* is a consolidation of several class actions that were filed challenging the constitutionality of the Texas statute. *Id.* at 206–09.

110. *See id.* at 227.

111. TEX. EDUC. CODE ANN. § 21.031 (Vernon Supp. 1981).

112. *Plyler*, 457 U.S. at 205.

113. “[E]very citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction of the United States.” *Id.* at 212 n.10. Therefore, undocumented aliens are clearly subject to protection, while domiciled in the state. *See id.* at 215. “That a person’s initial entry into a State, or into the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the State’s territorial perimeter . . . .And until he leaves the jurisdiction . . . he is entitled to the equal protection

reiterated, “[t]he Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.”<sup>114</sup> The Court concluded that an impermissible sub-class of residents is created when a state subjects an individual or group to its laws while simultaneously withholding the law’s protections.<sup>115</sup>

Two factors seemed to drive the Court’s analysis. The plaintiffs in *Plyler* were minor children, whose unlawful entry into the country was not within their control.<sup>116</sup> Explaining that children should not be punished for the actions of their parents, the Court found that “[e]ven if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice.”<sup>117</sup> The majority of the court could not conceive of any rational justification for penalizing the children.<sup>118</sup>

Further, while refusing to classify education as a fundamental right, the Court said “neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.”<sup>119</sup> Because education provides tools by which individuals can beneficially participate in society, it plays a fundamental role in maintaining the country’s political and cultural heritage.<sup>120</sup> The wholesale denial of secondary public education to these children would result in a permanent underclass of individuals who lacked the skills and resources to better their status in American society.<sup>121</sup> Invoking the memory of *Brown v. Board of Education*, the Court analogized the situation faced by undocumented immigrant children to that faced by black children educated in a segregated school system.<sup>122</sup> The Supreme Court struck the Texas statute down.

### C. Texas Has Not Improved Its Method of Funding Public Schools

In 2011, four groups of Plaintiffs sued the State of Texas in state court over alleged inequity in the funding formula for Texas schools.<sup>123</sup> Texas funds its schools with revenue collected through property taxes.<sup>124</sup> The State distributes

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of the laws that a State may choose to establish.” *Id.* The Court concluded that the Equal Protection was applicable to all persons within the boundaries of a state. *Id.*

114. *Id.* at 213.

115. *Id.*

116. *Id.* at 220.

117. *Id.*

118. *Plyler*, 457 U.S. at 220.

119. *Id.* at 221.

120. *See id.*

121. *Id.* at 222. The Court recognized the fact that undocumented immigrant children were unlikely to be deported to their country of origin. *Id.* at 230. Moreover, “undocumented children are ‘basically indistinguishable’ from legally resident alien children,” so the savings generated by the denial of these children a public education was wholly insubstantial in light of the costs. *Id.* at 229–30.

122. *Id.* at 222–23 (citing *Brown v. Board of Education*, 347 U.S. 483 (1955)). The *Plyler* Court also appeared to believe that some of the undocumented immigrant children might one day become American citizens. *Id.* at 230.

123. Plaintiffs Original Petition and Request for Declaratory Judgment, *The Tex. Taxpayer & Student Fairness Coal. v. Scott*, No. D-1-GN-11.003130, 2011 WL 4835580 (Tex. Dist. Oct. 10, 2011).

124. TEXAS EDUCATION AGENCY, OFFICE OF SCHOOL FINANCE, SCHOOL FINANCE 101: FUNDING OF



monies through complicated formulas that tend to give wealthier school districts more funding than less advantaged areas.<sup>125</sup> This is not surprising as the *Rodriguez* complaint made the same assertion.

After three years of litigation, Austin state court judge John Dietz ruled that the Texas school finance system was inadequate, specifically, holding that the funding formula violated the Texas Constitution.<sup>126</sup> As a result, Texas had created an unconstitutional de-facto property tax by shifting the burden for paying for schools to the local level.<sup>127</sup>

From the bench, Judge Dietz cited three principal reasons for his decision.<sup>128</sup> The first obligation was civic.<sup>129</sup> Judge Dietz stated that education is the key to the preservation of liberty—a fact embodied in the language of the Texas Constitution.<sup>130</sup> The second obligation was altruistic.<sup>131</sup> Texas citizens recognize the benefits garnered from education.<sup>132</sup> The third obligation was economic.<sup>133</sup> Society enjoys more economic benefits when it is educated.<sup>134</sup>

While Texas has yet to meaningfully change its funding formula, the litigation demonstrates that the quality of the State’s public school education is not certain. As the school districts fight for funding, immigrant children are easy targets. Sentiment against providing these children the “benefit” of public education leads to political challenges of the *Plyler* decision. The rhetoric against immigrants is so negative, it is politically damaging to acknowledge the utility of having an educated populace.<sup>135</sup> Yet, common sense tells us that this should not be our country’s ongoing policy. From the time of the founding fathers, it is acknowledged that an educated populace is the only way for our democracy to thrive and flourish. America is still great largely because education is available to all. In this analogy, great ideas are the result of greater diversity in ethnicity, religion and viewpoint.

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TEXAS PUBLIC SCHOOLS (2013), [tea.texas.gov/WorkArea/DownloadAsset.aspx?id=2147511834](http://tea.texas.gov/WorkArea/DownloadAsset.aspx?id=2147511834).

125. Plaintiffs Original Petition and Request for Declaratory Judgment, *The Tex. Taxpayer & Student Fairness Coal. v. Scott*, No. D-1-GN-11.003130, 2011 WL 4835580, at \*2 (Tex. Dist. Oct. 10, 2011).

126. *Tex. Taxpayer & Student Fairness Coal. v. Williams*, No. D-1-GN-11-003130, 2014 WL 4243277, at \*1–\*2 (Tex. Dist. Aug. 28, 2014). (citing TEX. CONST. art VII, § 1).

127. *Id.*

128. *Id.* at \*2.

129. *Id.*

130. *Id.*

131. *Williams*, 2014 WL 4243277 at \*2.

132. *Id.*

133. *Id.*

134. *Id.*

135. Karen Tumulty, *Rick Perry’s Immigration Record: A Hard Line at the Border, a Softer Touch in Austin* WASH. POST (Sept. 14, 2014), [https://www.washingtonpost.com/politics/rick-perrys-immigration-record-a-hard-line-at-the-border-a-softer-touch-in-austin/2014/09/14/3cd7adc4-3518-11e4-9e92-0899b306bbea\\_story.html?utm\\_term=.c095eff15da1](https://www.washingtonpost.com/politics/rick-perrys-immigration-record-a-hard-line-at-the-border-a-softer-touch-in-austin/2014/09/14/3cd7adc4-3518-11e4-9e92-0899b306bbea_story.html?utm_term=.c095eff15da1) (“The question is whether Perry represents the future of his party on immigration—or whether his nuanced positions on the issue will again become a liability in national politics.” It did become a liability.).

#### IV. CONCLUSION

The United States has always promulgated a narrative based on welcoming newcomers. It is our national brand. Tribalism, however, is creating a divide that is harmful to our country – economically, politically and idealistically. There are some immigrants who do not deserve admission into our country. The immigration laws already contain language to keep these individuals out. When our laws, however, are misappropriated to treat every immigrant as dangerous, something must change. Because immigration law is largely a policy decision, immigrants are uniquely susceptible to our political climate. We must embolden politicians to champion immigrants. It is still far too easy to garner votes by inventing a story that our country is on the precipice of invasion. Whether the invaders are Chinese, Japanese, Latinos or Muslims, the rhetoric remains the same. It is time for the country to unite behind a policy of economic and cultural empowerment through immigration.

#### V. APPENDIX: METHODOLOGY<sup>136</sup>

##### A. Selection of States and Counties for Inclusion

To obtain a variety of counties that voted for Trump or for Clinton, the election map for Politico.com<sup>137</sup> was used to select counties within states that are considered “rust belt” states. The actual states included in the “rust belt” vary depending on what source is used. This table includes states included in the rust belt from encyclopedia.com<sup>138</sup>: Indiana, Illinois, Michigan, Ohio, Wisconsin, and Pennsylvania. Once the state and county were selected using the Politico.com map, the actual results were obtained from each county’s County Election Boards or from the Secretary of State websites that contained county-by-county information.

##### B. Elections by County

Only counties that provided tabulated percentages were used in this chart. Many counties used raw number votes in their reporting. This table does not include calculations from those counties of percentages. Many county results are unofficial until certified at county board meetings. Unofficial results are clearly marked in the county reports.

Some counties allowed for Straight Party voting in addition to selection of candidates. Straight party voting is not included in the calculations in this table. However, straight party voting can be viewed in the same county results as the candidate voting percentages provided.

Third Party candidates Johnson and Stein were only included in the Table if

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136. For the full Appendix, including data charts, see <http://dfisc.law.duke.edu/herandez-appendix>.

137. *2016 Presidential Election Results*, POLITICO (last updated Dec. 31, 2016), <http://www.politico.com/2016-election/results/map/president>.

138. *Rust Belt: Dictionary of American History*. ENCYCLOPEDIA.COM (last visited February 13, 2017), <http://www.encyclopedia.com/places/united-states-and-canada/miscellaneous-us-geography/rust-belt>.

the percent of the voting block earned by either of the candidates was more than 1% of the county.

### C. Race Calculations

Census Data were used to determine the percentage of “White Only, not Hispanic or Latino.” Specifically “Quick Facts” data cites were used, as this information is available on a county-by-county basis. “White Only, not Hispanic or Latino” is defined by the Census as: “are individuals who responded “No, not Spanish/Hispanic/Latino” and who reported “White” as their only entry in the race question.”<sup>139</sup>

For the “All Other Races/Ethnicities” category, the Census does not pool the racial and ethnic groups together on the Quick Facts data sheets. All other races was calculated from simply subtracting the “White Only, not Hispanic or Latino” percentage from 100% to aggregate of the remaining population. The data in Quick Facts is from the 2010 Census for the year 2010 and from the 2015 Population Estimate by the Census.<sup>140</sup>

### D. Education and Income Information

All education and income information comes from the same “Quick Facts” data table as the information about the “White Alone, Not Hispanic or Latino” race information.

For income, both median and per capita income were included for comparison. The Census uses the following definition for median income: The **median** divides the income distribution into two equal parts: one-half of the cases falling below the median income and one-half above the median. For households and families, the median income is based on the distribution of the total number of households and families including those with no income. The median income for individuals is based on individuals 15 years old and over with income. Median income for households, families, and individuals is computed on the basis of a standard distribution.<sup>141</sup>

The Census uses the following definition for per capita income:

**Per capita income** is the mean income computed for every man, woman, and child in a particular group including those living in group quarters. It is derived by dividing the aggregate income of a particular group by the total population in that group. This measure is rounded to the nearest whole dollar.<sup>142</sup>

139. *Race*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/00> (last visited Nov. 22, 2016) (Click on lower-case-i icon to the left of entry titled “White alone, percent, July 2015”).

140. *Methodology for United States Population Estimates: Vintage 2015*, U.S. CENSUS BUREAU <http://www.census.gov/popest/methodology/2015-natstcopr-meth.pdf>. (last visited Dec. 18, 2016)

141. *Median Income*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045215/00> (last visited Dec. 18, 2015) (Click on lower-case-i icon to the left of entry titled “Median household income (in 2015 dollars), 2011-2015”).

142. *Per Capita Income*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045215/00> (last visited Dec. 18, 2015) (Click on lower-case-i icon to the left of entry titled “Per capita income in past 12 months (in 2015 dollars), 2011-2015”).

**E. Foreign Born Persons**

The Census uses the following definition for foreign born persons: The foreign-born population includes anyone who was not a U.S. citizen or a U.S. national at birth. This includes respondents who indicated they were a U.S. citizen by naturalization or not a U.S. citizen.