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Elusive Equality: Reflections on Justice Field's Opinions in Chae Chan Ping and Fong Yue Ting

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ELUSIVE EQUALITY: REFLECTIONS ON JUSTICE
FIELD'S OPINIONS IN *CHAE CHAN PING* AND *FONG
YUE TING*

VICTOR C. ROMERO*

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Introduction

Stephen Field, a New York lawyer, traveled to California to join the Gold Rush, ended up serving as alcalde (mayor) of a local town, and soon developed a reputation for procedural fairness.¹ He became involved in state-level politics, eventually rising to Chief Justice of the California Supreme Court and also serving as a federal circuit court judge.² In time, Field was selected by President Lincoln to serve as the newly created tenth justice of the U.S. Supreme Court.³

For immigration scholars, Justice Field is perhaps best remembered for his majority opinion in *Chae Chan Ping v. United States*,⁴ the Supreme Court's decision upholding Chinese exclusion, and credited for introducing the plenary power doctrine to immigration law. Yet, despite the opinion's xenophobic rhetoric reflecting his personal views of the Chinese, Justice

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1. See generally PAUL KENS, *JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE* (1997). For an account of Field's California days in his own words, see STEPHEN J. FIELD, *PERSONAL REMINISCENCES OF EARLY DAYS IN CALIFORNIA* (Da Capo Press 1968) (first privately printed in 1893).

2. *Id.*

3. *Id.*

4. 130 U.S. 581 (1889).

Field dissented in *Fong Yue Ting v. United States*,⁵ reasoning that, once they became lawful residents, the Chinese were entitled to be treated as equals under the law regardless of citizenship,⁶ a position supported by his earlier federal circuit court opinion in *Ho Ah Kow v. Nunan*.⁷

Regardless of one's particular views of his opinions in these cases, it appears Field sought to balance his unfavorable personal and political views about mass Chinese immigration against his duty as a federal judge to uphold the constitutional rights of individual persons within the United States, regardless of their race and citizenship, before Congress's plenary power. This tension between viewing immigrants as an undifferentiated mass and recognizing each immigrant as a person worthy of constitutional protection pervades contemporary debates regarding immigration today.⁸

Further, research in social psychology suggests that, within immigration policy, seldom will personhood trump membership as an organizing principle when benefitting noncitizen outsiders is perceived to come at the expense of U.S. citizen insiders.⁹ Put another way, immigration law presumes differences among citizens and noncitizens and creates others among noncitizens; thus, while it is already difficult to extend the circle of empathy beyond family and friends to strangers, it is particularly difficult to do so within a field like immigration law, which is designed to maintain boundaries between citizen and "alien." Nonetheless, recognizing and working within these constraints, immigrant rights advocates would do well to emphasize and guard against our inherent parochialism, as Field appeared to do in *Fong* notwithstanding his opinion in *Chae*.

I. Field's Views on Exclusion and Racial Division in Chae

Most students of immigration law remember *Chae Chan Ping v. United States* for the proposition that Congress has plenary power to exclude noncitizens—including returning residents—for any reason, including

5. 149 U.S. 698 (1893).

6. *Id.* at 753-56.

7. 12 F. Cas. 252, 255-57 (C.C.D. Cal. 1879).

8. *See, e.g.*, Stephen H. Legomsky, *Portrait of the Undocumented Immigrant: A Dialogue*, 44 GA. L. REV. 65, 159-60 (2009) (arguing that one's perception of proper immigration policy depends in part on whether one views migrants as individuals needing help or as a mass of undifferentiated, undocumented persons who are inherently lawbreakers).

9. *See infra* Part III.

race.¹⁰ Laborer Chae Chan Ping was a twelve-year resident of Chinese descent who had secured a certificate of return from federal authorities prior to leaving the United States.¹¹ When he returned, however, Chae Chan Ping's certificate was revoked pursuant to the Chinese Exclusion Act of 1882, which had since been passed.¹² Justice Field's majority opinion for the Court emphasized Congress's prerogative to withdraw permission to enter as part of a larger policy of exclusion by race, and that returning residents like the plaintiff must turn to their home nation—and not the Court—for redress.¹³

One aspect of the opinion that often draws criticism from modern commentators is Justice Field's xenophobic, anti-Chinese rhetoric. Field was writing at a time when the previously valued Chinese workers had outlived their usefulness in the eyes of some, especially Californians who saw them as threats to white laborers and/or Anglo-Saxon culture.¹⁴ Although acknowledging the workers' industry and frugality,¹⁵ Field noted that differences in race exacerbated tensions between the natives and newcomers, describing the Chinese as "strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country."¹⁶ Field thought these cultural differences insurmountable: "It seemed impossible for them to assimilate with our people or to make any change in their habits or modes of living."¹⁷ In describing California's reaction to the Chinese, Field insisted "their immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization."¹⁸

Although one might frame Field's unfortunate word choice as reflecting California's—not the Justice's—views, an April 1882 letter to law

10. See, e.g., Gabriel J. Chin, *Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power*, in *IMMIGRATION STORIES* 7 (David A. Martin & Peter H. Schuck, eds., 2005).

11. *Chae Chan Ping v. United States*, 130 U.S. 581, 582 (1889).

12. *Id.*

13. *Id.* at 581-82.

14. Historian Paul Kens, who wrote a 1997 biography of Field, acknowledges the anti-Chinese racism rampant at the time, but also noted the perception that the Chinese laborers' willingness to work long hours for little pay undermined the advances white workers had struggled to achieve. See KENS, *supra* note 1, at 133.

15. *Chae Chan Ping*, 130 U.S. at 585 ("[The Chinese workers] were generally industrious and frugal.").

16. *Id.*

17. *Id.*

18. *Id.*

professor John Norton Pomeroy belies that perspective. In the letter expressing his disappointment with then-President Arthur's veto¹⁹ of the first version of the Chinese Exclusion Act, Field makes clear that his immigration policy would reserve the United States for Caucasians only:

It must be apparent to every one, that it would be better for both races to live apart—and that their only intercourse should be that of foreign commerce. The manners, habits, mode of living, and everything connected with the Chinese prevent the possibility of their ever assimilating with our people. They are a different race, and, even if they could assimilate, assimilation would not be desirable. If they are permitted to come here, there will be at all times conflicts arising out of the antagonism of the races which would only tend to disturb public order and mar the progress of the country. It would be better, therefore, before any larger number should come, that the immigration be stopped. You know I belong to the class, who repudiate the doctrine that this country was made for the people of *all* races. On the contrary, I think it is for our race—the Caucasian race. We are obliged to take care of the Africans; because we find them here, and they were brought here against their will by our fathers. Otherwise, it would be a very serious question, whether their introduction should be permitted or encouraged.²⁰

It appears, then, that the rhetoric—though perhaps not as offensive then as it is today—reflected not just California's views on the Chinese, but Justice Field's as well. Given his long sojourn in California before joining the Court, it is no surprise that his negative views about the Chinese may have been influenced in part by his time in that state.

II. *Field's Views on Deportation and Equality in Fong*

And yet, in *Fong Yue Ting v. United States*, while the majority inferred Congress's power to deport from its *Chae* power to exclude, Justice Field saw a "wide and essential difference"²¹ between the two:

19. H.R. Res. 282, 4, 112th Cong. (2011). In President Arthur's view, the initial version violated the terms and spirit of the Angell Treaty with China. *Id.*

20. *Four Letters of Mr. Justice Field*, 47 *YALE L.J.* 1100, 1104 (Howard J. Graham, ed., 1938).

21. 149 U.S. 698, 746 (1893).

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 June 25, 1798 can be considered as recognizing that doctrine.²²

For Field, noncitizen residents had never been removable at Congress's whim; indeed, only criminal and enemy noncitizens could be deported. Noncitizens that already enjoy resident status and are "engaged in the ordinary pursuits of life"²³ were not to be arbitrarily removed.

Field's approach seems similar to modern heightened rational basis²⁴ review of amendments to the Chinese Exclusion Act, which required Chinese laborers to apply for a certificate of residence.²⁵ Failure to do so made each Chinese worker presumptively deportable, unless he could prove "by at least one credible white witness, that he was a resident of the United States at the time of the passage of [the] act."²⁶ Although Field deemed constitutional Congress's desire to distinguish between those lawfully and unlawfully present, he questioned the means by which this objective was to be achieved.²⁷

22. *Id.*

23. *Id.*

24. Gerald Gunther coined the phrase "rational basis with bite" to describe this quasi-heightened form of rational basis scrutiny where the Court overturns legislation despite claiming to apply a deferential standard of review. *See generally* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18-24 (1972). For an illuminating discussion on the different formulations of the rational basis test, see ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 694-96 (4th ed. 2011).

25. *Chinese Exclusion Act (1882)*, OUR DOCUMENTS, <http://www.ourdocuments.gov/doc.php?doc=47> (last visited Aug. 7, 2015).

26. *Fong Yue Ting*, 149 U.S. at 727 (quoting the Chinese Deportation Act of May 6, 1892, § 6).

27. *Id.* at 753-54 (Field, J., dissenting). "This object being constitutional, the only question for our consideration is the lawfulness of the procedure provided for its accomplishment, and this must be tested by the provisions of the constitution and laws intended for the protection of all persons against encroachment upon their rights." *Id.*

Field's primary objections to the statute proceeded in three steps: (1) noncitizen residents are entitled to the same constitutional protections as U.S. citizens; (2) because of the hardship exile wrought upon deportees, removal without due process constitutes an arbitrary exercise of congressional power; and (3) the procedures set forth in the statute—including the white witness requirement—do not provide due process and are therefore unconstitutional. Let us consider each argument in turn.

First, Field believed that all lawful residents of the United States, regardless of citizenship, are entitled to constitutional protection: "Aliens from countries at peace with us, domiciled within our country by its consent, are entitled to all the guaranties for the protection of their persons and property which are secured to native-born citizens."²⁸ Unlike the majority, which saw exclusion and deportation as two sides of the same coin of sovereign political power, Field believed that it was the judiciary's duty to ensure that all lawful residents received constitutional protection from "[a]rbitrary and despotic power."²⁹ In support, Field cited two California cases involving anti-Chinese discrimination, *Yick Wo v. Hopkins* and *Ho Ah Kow v. Nunan*.³⁰

In *Yick Wo*, the U.S. Supreme Court struck down a race-neutral San Francisco laundry ordinance that was almost exclusively enforced against Chinese residents, noting that the Fourteenth Amendment's guarantees 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."³¹ Awarding habeas corpus to the Chinese petitioners prosecuted under the San Francisco ordinance, the Court reasoned that such selective prosecution could only be explained by "hostility to the race and nationality to which the petitioners belong, and which in the eye of the law, is not justified."³²

In *Ho Ah Kow*, then-federal circuit judge Field invalidated a state prison ordinance requiring all men to sport short hair, which led to the shearing of Chinese "queues," the braids some wore for spiritual reasons.³³ Declaring

28. *Id.* at 754.

29. *Id.*

30. *Id.* at 755 (citing *Yick Wo v. Hopkins*, 118 U.S. 336 (1886); *Ho Ah Kow v. Nunan*, 12 F. Cas. 252 (C.C. D. Cal. 1879)).

31. *Yick Wo*, 118 U.S. at 369.

32. *Id.* at 374.

33. *Ho Ah Kow*, 12 F. Cas. at 253, 256-57.

the provision “hostile and spiteful,”³⁴ Field was troubled by the state’s encroachment on federal treaty power and its failure to afford state residents equal protection pursuant to the Fourteenth Amendment, the same source of constitutional protection at issue in *Yick Wo*.³⁵ Field articulated the following vision for equal protection:

[T]he equality of protection thus assured to every one whilst within the United States, from whatever country he may have come, or of whatever race or color he may be, implies not only that the courts of the country shall be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs and the enforcement of contracts; but that no charges or burdens shall be laid upon him which are not equally borne by others, and that in the administration of criminal justice he shall suffer for his offenses no greater or different punishment.³⁶

Although *Yick Wo* and *Ho Ah Kow* articulated a robust “personhood” theory grounded in the Fourteenth Amendment’s textual commitment of equality for all “persons,” not just citizens,³⁷ both cases involved discrimination by a state—California—not by the federal government.³⁸ Nonetheless, the Fifth Amendment’s text, while without similar equal protection language, guarantees due process as against the federal government, a point which fellow *Fong* dissenter Chief Justice Fuller noted in citing *Yick Wo*.³⁹

34. *Id.* at 256.

35. *Id.*

36. *Id.* at 256.

37. See, e.g., VICTOR C. ROMERO, *ALIENATED: IMMIGRANT RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA* 162 (2005) [hereinafter ROMERO, *ALIENATED*] (distinguishing between personhood and membership theories). See generally Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707 (1996) (same).

38. *Yick Wo v. Hopkins*, 118 U.S. 356, 356 (1886); *Ho Ah Kow*, 12 F. Cas. at 253.

39. Fuller stated:

I entertain no doubt that the provisions of the Fifth and Fourteenth Amendments, which forbid that any person shall be deprived of life, liberty, or property without due process of law, are in the language of Mr. Justice Matthews, already quoted by my Brother Brewer, ‘universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality,’ and although in *Yick Wo*’s case [118 U. S. 356, 6 Sup. Ct. Rep. 1064] only the validity of a municipal ordinance was involved, the rule laid down as much applies to Congress, under the Fifth Amendment, as to the States, under the Fourteenth. The right to

Just as his California experiences may have influenced his personal views on the Chinese as expressed in *Chae*, his role as a federal judge ruling on California's anti-Chinese statutes may have informed Justice Field's judicial opinion in *Fong*, this time to the noncitizens' benefit. For instance, it is noteworthy that Field specifically cited his own federal circuit court opinion in *Ho Ah Kow*.⁴⁰ While the two other dissenting justices cited *Yick Wo*,⁴¹ neither cited Field's opinion in *Ho Ah Kow*. In citing to *Ho Ah Kow*, Field defined equal protection thusly:

What once I had occasion to say of the protection afforded by our government, I repeat: "It is certainly something in which a citizen of the United States may feel a generous pride that the government of his country extends protection to all persons within its jurisdiction, and that every blow aimed at any of them, however humble, come from what quarter it may, is 'caught [sic] upon the broad shield of our blessed constitution and our equal laws.'"⁴²

Curiously, in *Fong*, Field did not cite to an earlier case in which he ruled against the California commissioner of immigration, who had attempted to bar certain Chinese women from entry because they were prostitutes. In *In re Ah Fong*, Field recognized that discrimination against Chinese prostitutes, while promoting an arguably legitimate goal, both infringed upon federal treaty power and was excessively underinclusive by not targeting all prostitution.⁴³ Field articulated the following equality

remain in the United States, in the enjoyment of all the rights, privileges, immunities, and exemptions accorded to the citizens and subjects of the most favored nation, is a valuable right, and certainly a right which cannot be taken away without taking away the liberty of its possessor. This cannot be done by mere legislation.

Fong Yue Ting v. United States, 149 U.S. 698, 761-62 (1892) (Fuller, C.J., dissenting). It was not until 1954 that a majority of the Court read the guarantees of equal protection into the Fifth Amendment's due process in *Bolling v. Sharpe*, 347 U.S. 497 (1954), a companion case to *Brown v. Board of Education*, 347 U.S. 483 (1954).

40. *Fong Yue Ting*, 149 U.S. at 754-55.

41. *See id.* at 739 (Brewer, J., dissenting); *id.* at 762 (Fuller, C.J., dissenting).

42. *Id.* at 755 (internal citation omitted).

43. Field stated:

I am aware of the very general feeling prevailing in this state against the Chinese, and in opposition to the extension of any encouragement to their immigration hither. It is felt that the dissimilarity in physical characteristics, in language, in manners, religion and habits, will always prevent any possible

principle: “equality of protection implies not only equal accessibility to the courts for the prevention or redress of wrongs, and the enforcement of rights, but equal exemption with others of the same class from all charges and burdens of every kind.”⁴⁴

Aside from his citation of *Yick Wo*, Justice Field’s own opinion in *Ho Ah Kow*—and perhaps in *Ah Fong*—appeared to influence his view that noncitizen residents were to be treated as persons under the Constitution, regardless of their citizenship, irrespective of his *Chae* opinion’s implications to the contrary. According to Field, noncitizen residents like Fong Yue Ting enjoy protections that entering noncitizens like Chae Chan Ping do not.

Second, Field believed that because of the hardship exile wrought upon deportees, removal without due process constituted an arbitrary exercise of congressional power. The forced exile of a lawful resident noncitizen was a disproportionately cruel punishment, in Field’s eyes: “As to its cruelty, nothing can exceed a forcible deportation from a country of one’s residence, and the breaking up of all the relations of friendship, family, and business there contracted.”⁴⁵ As such, Field objected to the majority’s view that these residents might be removed administratively, “without judicial trial or examination.”⁴⁶ Carried this far, such power would be tantamount to Congress’s arbitrary authority over lawful resident noncitizens:

According to its theory, Congress might have ordered executive officers to take the Chinese laborers to the ocean and put them

assimilation of them with our people. Admitting that there is ground for this feeling, it does not justify any legislation for their exclusion, which might not be adopted against the inhabitants of the most favored nations of the Caucasian race, and of Christian faith. If their further immigration is to be stopped, recourse must be had to the federal government, where the whole power over this subject lies. The state cannot exclude them arbitrarily, nor accomplish the same end by attributing to them a possible violation of its municipal laws. It is certainly desirable that all lewdness, especially when it takes the form of prostitution, should be suppressed, and that the most stringent measures to accomplish that end should be adopted. But I have little respect for that discriminating virtue which is shocked when a frail child of China is landed on our shores, and yet allows the bedizened and painted harlot of other countries to parade our streets and open her hells in broad day, without molestation and without censure.

In re Ah Fong, 1 F. Cas. 213, 217 (C.C. D. Cal. 1874).

44. *Id.* at 218.

45. *Fong Yue Ting*, 149 U.S. at 759.

46. *Id.* at 755.

into a boat and set them adrift; or to take them to the borders of Mexico and turn them loose there; and in both cases without any means of support. . . .⁴⁷

Finally, Field believed that the procedures set forth in the statute—including the white-witness requirement—did not provide due process and were therefore unconstitutional. For instance, Field worried that abuse of the Chinese may lead to abuse of white noncitizens over time. Field wrote,

Is it possible that Congress can, at its pleasure, in disregard of the guarantees of the Constitution, expel at any time the Irish, German, French, and English who may have taken up their residence here on the invitation of the government, while we are at peace with the countries from which they came, simply on the ground that they have not been naturalized?⁴⁸

Field held particular contempt for the white-witness requirement:

Here the government undertakes to exact of the party arrested the testimony of a witness of a particular color, though conclusive and incontestible testimony from others may be adduced. The law might as well have said, that unless the laborer should also present a particular person as a witness, who could not be produced, from sickness, absence, or other cause, such as the archbishop of the state, to establish the fact of residence, he should be held to be unlawfully within the United States.⁴⁹

Despite his personal distaste for Chinese immigration, Field acknowledged that one's race did not determine one's veracity.

A critic might contend the distinctions Field drew were neither consistent with the facts in *Chae* and *Fong*, nor respectful of either legislative expertise over immigration or state interests in regulating immigration.

First, one might be unconvinced by the exclusion and deportation distinctions Field drew because Chae Chan Ping was a twelve-year lawful resident of the U.S. prior to his journey abroad,⁵⁰ not unlike resident Fong Yue Ting.⁵¹ Moreover, he legally sought to protect his interests by securing a certificate to return.⁵² While being at the border is different from being

47. *Id.* at 756.

48. *Id.* at 750.

49. *Id.* at 759-60.

50. *Chae Chan Ping v. United States*, 130 U.S. 581, 581-82 (1889).

51. *Fong Yue Ting*, 149 U.S. at 731-32.

52. *Chae Chan Ping*, 130 U.S. at 582.

within it, does this otherwise reasonable legal fiction⁵³ make sense within the facts of the *Chae* case? Of course, one might respond that eroding the differences between exclusion and deportation may, instead of extending protection to returning residents like Chae Chan Ping, lead to the diminishment of protection for current residents reflected in the majority opinion in *Fong*. Put differently, abandoning the distinction between exclusion and deportation may advance immigrant rights via robust judicial review or it may lead to virtually no judicial review, as the majority held in *Chae* and *Fong*.

How one chooses between the three options—(1) robust plenary power over immigration (*Chae* and *Fong*); (2) judicial review of deportations but not exclusions, even of returning residents (Field’s view); or (3) robust judicial review of immigration decisions—depends on the extent to which one believes that deportation is a form of punishment. Viewing deportation as simply holding noncitizens to the terms of their immigration contract,⁵⁴ the majority’s perspective in *Chae* and *Fong* does nothing more than return noncitizens to their home countries. Indeed, outside the forced migration context, some might contend that it borders on arrogance to assume that a native of another country might refuse to live in her own nation. Further, such a perspective assumes that, irrespective of the harm or potential harm to the immigrant, the receiving nation has a sovereign right to secure its borders and protect its own citizens.

The opposite of this view is the third one: that a forced return violates free movement and choice, and, in the context of current (like Fong Yue Ting) or returning residents (like Chae Chan Ping), separates them from relationships made and property acquired while in the United States. Indeed, one of the touchstones of our modern immigration law is family unity, exemplified by the citizen’s privilege of petitioning for her partner to enter the country as an immigrant.⁵⁵ As Justice Brandeis famously noted, deportation may deprive a person of “all that makes life worth living.”⁵⁶

53. For an interesting discussion of arguably troublesome legal fictions in immigration law, see Ibrahim J. Wani, *Truth, Strangers, and Fiction: The Illegal Uses of Legal Fiction in Immigration Law*, 11 *CARDOZO L. REV.* 51 (1989).

54. See, e.g., Won Kidane, *Immigration Law as Contract Law*, 34 *SEATTLE U. L. REV.* 889 (2011) (reviewing VICTOR C. ROMERO, *EVERYDAY LAW FOR IMMIGRANTS* (2009)).

55. In immigration parlance, such spouses are “immediate relatives” not subject to quota. See Immigration & Nationality Act, 8 U.S.C. § 1151(b)(2)(A)(i) (2012). President Obama’s recent executive action deferring the deportation of qualifying undocumented parents of U.S. citizen children has a similar goal of keeping families together. See, e.g., *Executive Actions on Immigration*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <http://www.uscis.gov/immigrationaction> (last visited Apr. 5, 2015) (“On November 20,

In choosing option two, Field split the difference, arguing in his *Fong* dissent that deportation is more punitive than exclusion.⁵⁷ Factually, this cannot always be true—as the *Chae* facts imply—but it was reasonable for Field and his co-dissenters to assume that longtime residents would have established greater ties with the United States than first-time entrants. Analogously, in Fourth Amendment jurisprudence, former Chief Justice Rehnquist implied that noncitizens could not avail themselves of protection against government searches and seizures unless they could demonstrate their “voluntary connection” with the United States.⁵⁸

Further implicated in this choice among the three options is the proper role of the judiciary vis-à-vis the political branches of the federal government. Under this horizontal separation of powers analysis, advocates of the broad plenary power afforded Congress in *Chae* and *Fong* might contend that immigration policy can only reasonably be handled by an elected, deliberative, legislative entity. To have the judiciary second-guess the contours of the nation’s contract with noncitizens would violate the limited role unelected federal judges should play under the Constitution. On the other hand, because individuals are ultimately affected by any policy Congress adopts, the judiciary should be wary of legislative overreaching where the consequences are grave for actual residents.⁵⁹

A third issue underlying this discussion is finding the appropriate balance between federal and state power over immigration. As has always been true, states and local communities bear the biggest burdens of mass

2014, the President announced a series of executive actions to crack down on illegal immigration at the border, *prioritize deporting felons not families*, and require certain undocumented immigrants to pass a criminal background check and pay taxes in order to temporarily stay in the U.S. without fear of deportation.”) (emphasis added); Linda Hartke, *President Obama’s Executive Action Puts Families First*, REDEFINING WELCOME BLOG (Nov. 21, 2014), <http://blog.lirs.org/president-obamas-executive-action-puts-families-first/>.

56. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

57. *Fong Yue Ting v. United States*, 149 U.S. 698, 748-50, 758-60 (1892).

58. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990). For a more detailed exploration of *Verdugo*, see ROMERO, *ALIENATED*, *supra* note 37, ch. 4.

59. Scholars have long debated the virtues and vices of Congress’s plenary power over immigration. *See, e.g.*, Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, *passim* (1998); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, *passim* (1987); Stephen H. Legomsky, Essay, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, *passim* (1995); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, *passim*.

immigration.⁶⁰ Some today would argue that states like California should play a more active role in regulating immigration, as it crudely tried to do in *Ah Fong*, by barring Chinese prostitutes from entry into the state.⁶¹ In our federal system, high-volume receiving states should be able to regulate the influx of noncitizens into the state, so the argument goes. In *Arizona v. United States*, for instance, Justice Scalia recently stressed the impact of undocumented migration on the border state of Arizona:

As is often the case, discussion of the dry legalities that are the proper object of our attention suppresses the very human realities that gave rise to the suit. Arizona bears the brunt of the country's illegal immigration problem. Its citizens feel themselves under siege by large numbers of illegal immigrants who invade their property, strain their social services, and even place their lives in jeopardy. Federal officials have been unable to remedy the problem, and indeed have recently shown that they are unwilling to do so. Thousands of Arizona's estimated 400,000 illegal immigrants—including not just children but men and women under 30—are now assured immunity from enforcement, and will be able to compete openly with Arizona citizens for employment.⁶²

Yet, as Justice Field recognized in *Ho Ah Kow* and *In re Ah Fong*, states may sometimes violate the due process and equal protection rights of noncitizens lawfully resident in their midst.⁶³ Because the Fourteenth Amendment textually protects all persons and not just citizens, Field was wary of not just federal government abuse in *Fong Yue Ting*, but indeed, his

60. Gerald Neuman reminds us how, prior to 1875, immigration policy was largely the province of the several states before becoming predominantly a national affair. Gerald Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1834 (1993) ("Regulation of transborder movement of persons existed, primarily at the state level, but also supplemented by federal legislation."). In *A Localist Reading of Local Immigration Regulations*, Rick Su challenges the conventional notion that municipal regulations affecting immigrants should be viewed exclusively through the prism of federalism or federal supremacy. Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619 (2008). Instead, Su suggests that they be viewed as emanating from more mundane local concerns including "kinship and community interests, the standing of newcomers versus old timers, [and] the decision of who bears the tax burden for local services" that have little to do with immigration. *Id.* at 1621.

61. See *supra* text accompanying notes 43-44.

62. 132 S. Ct. 2492, 2522 (2012) (Scalia, J., dissenting).

63. *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 256-57 (C.C.D. Cal. 1879); *In re Ah Fong*, 1 F. Cas. 213, 216 (C.C.D. Cal. 1874).

concern for the constitutional rights of Chinese residents grew from witnessing their unfair treatment during his time in California.⁶⁴

In the end, Justice Field secured half a victory for his vision of constitutional immigration law. In *Chae*, he wrote the majority opinion establishing sweeping power for Congress to enact exclusion rules free from judicial review, even those based on the race of returning noncitizens. Yet in *Fong*, Field failed to persuade a majority of the Court that lawful Chinese residents deserved constitutional protection from the plenary power unleashed in *Chae*; instead, the *Fong* Court extended *Chae*'s reach to curtail deportees' ability to seek judicial review.⁶⁵

While one might justify both *Chae* and *Fong* on the (horizontal, and implicitly, vertical) separation of powers grounds previously discussed, modern readers might nonetheless be troubled by the implication that race may reasonably provide the basis for exclusion or deportation, as Congress wills. In our post *Brown v. Board of Education* society, few would support the idea that government should be able to remove noncitizens simply because of their race. Indeed, notwithstanding his ruling in *Chae*, Justice Field was apparently so upset about the result in *Fong* that he seriously contemplated a court-packing plan to reverse the outcome:

It might be possible to increase the size of the bench, he confided to Dickinson. "As a general rule it would be dangerous to increase the size of the bench for the purpose of correcting a bad decision," he admitted, "but where that decision goes to the very essentials of Constitutional Government, the question of an increase of the bench may be considered and acted upon."⁶⁶

In a nutshell, we see Justice Field seeking to create a balance between respecting national sovereignty for U.S. citizens' benefit and ensuring that noncitizens are treated fairly pursuant to constitutional mandates. Taken together, Field's *Chae* and *Fong* opinions suggest a territorially bound view of the Constitution—that is, that the Constitution's equality provisions have greatest force when applied to lawful U.S. residents, regardless of citizenship.

Having explored the legal reasons supporting and detracting from Field's approach, the next section turns to psychology to better understand the third way advocated by Field. As discussed below, we learn that empathy for others is difficult to generate and sustain, making it particularly vexing for

64. See *supra* text accompanying notes 27-44.

65. *Fong Yue Ting v. United States*, 149 U.S. 698, 741-44 (1893).

66. KENS, *supra* note 1, at 284 (citations omitted).

immigrant advocates in a legal field designed to draw distinctions between insider-citizens and outsider-immigrants.

III. Empathy and Its Limits: Field's Views, the Modern Immigration Debate, and Social Psychology

Justice Field's struggle with trying to find a third way between complete congressional power over immigration and mandatory judicial review over migrants' claims seems to reflect the similarly bimodal current public opinion over immigration issues. For instance, the racial makeup of Americans polled seems to affect their view of whether increasing the number of deportations of the undocumented is good or bad policy. A 2014 Pew Research Center report revealed that "60% to 35%, most Hispanics view the increased number of deportations negatively, while whites are more likely to see this trend as a good thing (49%) rather than bad (42%)."⁶⁷

While it might be tempting to attribute such differences in perspective to (c)overt racism, social psychology suggests several other explanations that go to the empathic limits humans have for the outgroup. Unlike other studies that focus on the subtle⁶⁸ or not-so-subtle⁶⁹ ways in which

67. Pew Res. Center for the People & the Press, *Public Divided Over Increased Deportation of Unauthorized Migrants*, PEW RES. CENTER (Feb. 27, 2014), <http://www.people-press.org/2014/02/27/public-divided-over-increased-deportation-of-unauthorized-immigrants/>. Even among Republicans, victors during the recent midterm elections, sentiment over the plight of the undocumented is mixed. See Trip Gabriel, *Republican Voters Want to Get Things Done, but Differ on Priorities*, N.Y. TIMES, Nov. 6, 2014, at P7 (New York ed.), available at http://www.nytimes.com/2014/11/06/us/politics/republican-voters-want-to-get-things-done-but-differ-on-priorities.html?_r=0 ("Immigration reform was also on voters' minds, though there was disagreement over whether to deport workers who are in the country illegally or offer them a path to legal status. Geography seemed to influence views."). Interestingly, while the public seems focused primarily on Latin American migration, today's Chinese restaurant workers appear to be the current incarnation of "coolie" laborers like Chae and Fong. See, e.g., Lauren Hilgers, *The Kitchen Network: America's Underground Chinese Restaurant Workers*, NEW YORKER, Oct. 13, 2014, <http://www.newyorker.com/magazine/2014/10/13/cooka%C2%80%C2%99s-tale?intcid=most-popular>.

68. See, e.g., IAN HANEY-LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* (2014) (noting that coded racial appeals have served as a proverbial "dog-whistle" to help perpetuate structural racism).

69. See, e.g., EDIBERTO ROMÁN, *THOSE DAMNED IMMIGRANTS: AMERICA'S HYSTERIA OVER UNDOCUMENTED MIGRATION* (2013) (a socio-legal response to critics of contemporary Hispanic migration); LEO R. CHAVEZ, *THE LATINO THREAT: CONSTRUCTING IMMIGRANTS*,

outgroups are demonized by in-groups, this section will focus on research that suggests human beings are limited in their ability to empathize. In the modern immigration context, this means there are limits to U.S. citizens' empathy for noncitizens, especially if noncitizens are viewed en masse rather than as individuals.

Psychologist Jonathan Baron describes "parochialism" as the "tendency of people to favor a group that includes them while underweighing or ignoring harm to outsiders."⁷⁰ Specifically, Baron notes that parochialism manifests in a failure to help rather than an active desire to harm.⁷¹ This "omission bias"⁷² does vary considerably from person to person, however, and so Baron notes that the proper framing of issues may help to trigger empathy:

The distinction between groups and individuals examined here is almost a "framing effect," an effect of two different ways of describing the same situation. When we harm groups, we harm the individuals who comprise those groups, yet many people are less willing to harm the individuals than to harm the groups. It should not be difficult to find political opponents of more lenient treatment of illegal immigrants who, at the same time, respect and help particular illegal immigrants whom they know. Arguments against parochialism, in addition to emphasizing the equivalent effects of acts and omissions, should also emphasize the humanity of out-group members.⁷³

Reducing parochialism by pointing out omission biases and individual (as opposed to group) effects may explain, for example, Good Samaritan laws, but may be more difficult to lead to sweeping reform within immigration law, a system specifically premised on distinctions between citizens and noncitizens. Indeed, "system justification theory" teaches there

CITIZENS, AND THE NATION (2008) (a sociological study of the media-driven xenophobia underlying the resistance to current Latino migration).

70. Jonathan Baron, *Parochialism as a Result of Cognitive Biases*, in UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS 203, 203 (Ryan Goodman, Derek Jinks & Andrew K. Woods eds., 2012). Lu-in Wang has observed a similar phenomenon in her important book, *Discrimination by Default*. See LU-IN WANG, DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE 8-16, 18-23 (2006) (noting that discrimination is more the process of default actions that perpetuate the status quo racial order rather than the product of overt bias and prejudice).

71. Baron, *supra* note 70, at 235.

72. *Id.*

73. *Id.* at 236.

is a “general tendency to defend, legitimize, and bolster the social and political systems on which people are psychologically dependent.”⁷⁴ Thus, even the most ardent of immigrant rights advocates still tend to operate under a respect for sovereign borders, even while clamoring for greater protections for noncitizens.

And to the extent that the public views the immigration problem as overwhelmingly complex and dire, attempts at eliciting empathy toward legal change may be difficult. In revealing research done on moral attitudes toward genocide, psychologists Paul Slovic and David Zions argue that numbers often overwhelm us:

One fundamental mechanism that may play a role in many, if not all, episodes of mass-murder neglect involves the capacity to experience *affect*, the positive and negative feelings that combine with reasoned analysis to guide our judgments, decisions, and actions. Research shows that the statistics of mass murder or genocide, no matter how large the numbers, fail to convey the true meaning of such atrocities. The numbers fail to spark emotion or feeling and thus fail to motivate action. Genocide in Darfur is real, but we do not “feel” that reality.⁷⁵

Slovic and Zions affirm the intuition that, even in the face of horrible brutality, our capacity to empathize falls short:

Fundamental qualities of human behavior are, of course, recognized by others besides scientists. American writer Annie Dillard cleverly demonstrates the limitation of our affective system as she seeks to help us understand the humanity of the Chinese nation: “There are 1,198,500,000 people alive now in China. To get a *feel* for what this *means*, simply take yourself—in all your singularity, importance, complexity, and love—and multiply by 1,198,500,000. See? Nothing to it.”

We quickly recognize that Dillard is joking when she asserts “nothing to it.” We know, as she does, that we are incapable of

74. SOCIAL AND PSYCHOLOGICAL BASES OF IDEOLOGY AND SYSTEM JUSTIFICATION 8 (John T. Jost, Aaron C. Kay & Hulda Thorisdottir eds., 2009).

75. Paul Slovic & David Zions, *Can International Law Stop Genocide When Our Moral Intuitions Fail Us?*, in UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS, *supra* note 70, at 100, 101.

feeling the humanity behind the number 1,198,500,000. The circuitry in our brain is not up to this task.⁷⁶

This example may help us understand the holdings in *Chae* and *Fong* from a psychological perspective. If the Chinese are viewed en masse as outsiders, foreign subjects less worthy of empathy than insider U.S. citizens, then the opinions become less about overt racism than about the human tendency to draw lines separating the familiar from the unfamiliar. To accommodate a large, undifferentiated mass of people strains the limits of our human capacity to empathize.

Slovic and Zions posit an evolutionary reason for our limited empathy: “[T]his may be because we evolved in an environment in which we lived in small groups and developed immediate, emotionally based intuitive responses to the needs and transgressions of others. There was little or no interaction with faraway strangers.”⁷⁷

Slovic and Zions do not, however, offer this “psychic numbing” as an excuse.⁷⁸ While appeals to our empathy are necessary, they are insufficient. Like Baron, Slovic and Zions believe that highlighting harm to individuals (as opposed to groups) is important to elicit the desired emotional response, but must be done in conjunction with appeals to reason.⁷⁹ Citing our evolutionary development, they posit that while our primitive affective responses to experiences were sufficient to deal with early dangers (e.g., is this plant safe to eat?), as society became more complex, humans developed analytical ways of thinking to solve more sophisticated problems.⁸⁰ In the context of curbing genocide, they emphasize alerting society to the limits of empathy appeals and encouraging deliberation and a moral commitment toward protecting individuals.⁸¹

Cognitive scientist Steven Pinker sees similar promise in the theory of reciprocal altruism:

So what are the prospects that we can expand the circle of sympathy outward from babies, fuzzy animals, and the people bound to us in communal relationships, to lasso in larger and larger sets of strangers? One set of predictions comes from the theory of reciprocal altruism and its implementation in Tit for

76. *Id.* at 109 (internal citation omitted).

77. *Id.* at 119.

78. *Id.* at 128.

79. *Id.*

80. They refer to these two modes of thinking as System 1 and System 2. *Id.* at 117-18.

81. *Id.* at 119-27.

Tat and other strategies that are “nice” in the technical sense that they cooperate on the first move and don’t defect until defected upon. If people are nice to strangers in this sense, they should have some tendency to be sympathetic to strangers, with the ultimate (that is, evolutionary) goal of probing for the possibility of a mutually beneficial relationship. Sympathy should be particularly likely to spring into action when an opportunity presents itself to confer a large benefit to another person at a relatively small cost to oneself, that is, when we come across a person in need. It should also be fired up where there are common interests that grease the skids toward a mutually beneficial relationship, such as having similar values and belonging to a common coalition.⁸²

Now, if the fight against genocide has been difficult, one might conclude that the prospects for robust immigrant rights reform seem dim, notwithstanding the suggested interventions of psychologists to lessen the effects of parochialism and increase empathy for the individual. Still, the practical experiences of former Amnesty International Director William Schulz suggest that empathy, though insufficient, may have its place in the contemporary debate over immigrant rights, the same struggle Field grappled with in his *Chae* and *Fong* opinions.⁸³ Citing philosopher Richard Rorty, Schulz observes:

[A]s the philosopher Richard Rorty pointed out, parochialism—at least in the sense of caring first and most for the welfare of those who are most like us—may well be the starting point for a robust commitment to human rights. It is almost impossible, in Rorty’s view, to identify with the abstraction called “humanity.” We first identify with those who are most like us and then, through hearing stories and learning of the travails of others outside our group, gradually “see more and more traditional differences (of tribe, religion, race, customs and the like) as unimportant when compared with similarities with respect to pain and humiliation—the ability to think of people widely different from ourselves as included in the range of us.” I emphasize this point because I have seen so many people come

82. STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* 581-82 (2011).

83. William F. Schulz, *The Difference It Makes*, in *UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS*, *supra* note 70, at 298, 305 (internal citation omitted).

to the human rights movement—first because they cared foremost about Ethiopians or Uighurs or women or lesbian and gay people, often because they themselves fell into one of those categories, but who then came to extend their caring to others whose rights were being denied.⁸⁴

In Schulz's words, I sense optimism borne of experience. Just as Pinker suggests that altruistic acts toward a stranger may engender empathy in the giver, Schulz reminds us that even acts of empathy toward in-group members may eventually lead to empathy toward outsiders. Similarly, Justice Field was no progressive with respect to either immigration policy or race relations, yet he appeared to guard against the parochialism evident in his *Chae* opinion to recognize the equal dignity of all persons—even outsiders—outlined in his *Fong* dissent.

84. *Id.*