

Neither a State of Nature nor a State of Exception

Law, Sovereignty, and Immigration

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Introduction

Since at least the second half of the nineteenth century, the U.S. federal government has enjoyed “plenary power” over its immigration policy. *Plenary power* allows the federal government to regulate immigration free of judicial review and thereby, with regard to immigration cases, minimize the Constitutional protections afforded to non-citizens. The justification for this broad and unchecked power is not found in the U.S. Constitution,¹ but comes from a set of Supreme Court decisions. In these cases, the Supreme Court has found that the power to regulate immigration, meaning the power to admit, exclude, and expel non-citizens, is a chief attribute of sovereignty and therefore lies outside the scope of judicial review. This understanding of sovereignty rests on the idea that limiting sovereign authority in immigration matters would undermine its legitimacy and potentially lead to something like a Hobbesian “state of nature.”

There are potential downsides to granting the federal government such a broad and unchecked power. For one, as I have argued elsewhere,² this can and has led to the establishment and perpetuation of white supremacy. Another downside is that this can potentially place non-citizens in a situation analogous to what Giorgio Agamben has called the “state of exception.” In this essay I will focus on this second downside, thereby addressing the following dichotomy: Without the *plenary power* doctrine we end up in a *state of nature*, but with the *plenary power* doctrine we end up in a *state of exception*.

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1. The Constitution only, and very indirectly, mentions the issue of immigration twice. See “The Constitution of the United States,” Article 1, Section 8, Clause 4; and Article 1, Section 9, Clause 1.
 2. José Jorge Mendoza, “A ‘Nation’ of Immigrants,” *The Pluralist* 5.3 (2010): 41–48.



This essay offers a two-part objection to the dilemma presented above. First, I argue that the *plenary power* doctrine goes against the spirit of the U.S. Constitution, specifically the Fourteenth Amendment. Non-citizens, even undocumented immigrants, are entitled to more Constitutional protections than they currently enjoy. Second, since extending these protections is more consistent with the spirit of the Constitution, I argue that curtailing the federal government's power over immigration does not undermine its sovereignty, but promotes it. In short, with regard to immigration, it is a false but seductive dichotomy that constitutional democracies must choose between a *state of nature* and a *state of exception*.

Sovereignty as a Response to the State of Nature

In *Leviathan*, Thomas Hobbes famously made the case that in order to get out of a state of war, the establishment and maintenance of a unitary and absolute sovereign would be required. In presenting his case Hobbes addressed three aspects of sovereignty: how political power is made legitimate, where it should be located, and to what degree it can be wielded.³ With regard to the first, Hobbes argued that political power is legitimate if everyone could ideally consent to it, and at the same time, would not be put in a worse position than that characterized by the *state of nature*. As for the other two, Hobbes's answer was that political power should be absolute, undivided and concentrated in the hands of one body.

This extremely strong notion of sovereignty was necessary, Hobbes argued, because anything less would put us in a *state of nature*, which for him was essentially a state of war; a state where everyone has a right to everything and everyone is equal, but only because anyone can potentially kill anyone else. In Hobbes's words, it is a place where the life of man [is] solitary, poor, nasty, brutish, and short."⁴ Hobbes concedes that there might never have been an actual *state of nature*, but he argues that it is nonetheless a possibility that must always be guarded against. A strong sovereign, Hobbes argued, would be sufficient to neutralize the threat of both lawlessness and a lack of personal safety.

With respect to the current issue of immigration, Phillip Cole argues that there are two versions of the Hobbesian view (with which neither he nor I agree). The first is the external view: "the international 'order' is a Hobbesian state of nature, in which liberal states are rare and vulnerable and are under

3. See Daniel Deudney, "Binding Sovereigns: Authorities, Structures, and Geopolitics in Philadelphian Systems," in *State Sovereignty as Social Construct*, ed. Thomas Biersteker and Cynthia Weber (Melbourne: Cambridge University Press, 1996).

4. Thomas Hobbes, *Leviathan*, ed. Edwin Curley (Indianapolis: Hackett Publishing, 1994), 76.



constant danger from external and illiberal threats.”⁵ Because of this threat, states have the right do what is in their best interest free of any external constraints, and this includes the right to control immigration. The second is the internal view where: “a policy of open borders would create such a level of instability that liberal institutions would be overwhelmed, and so on this particular question liberal states must have Hobbesian powers.”⁶ In other words, not allowing states to unilaterally control their immigration policy could have catastrophic consequences. For example, people who hold this view tend to argue that welfare services could become overwhelmed and severely damaged.⁷ According to Cole, both of these views share the principle “that individual states have the complete right to determine internal matters, such as immigration regulations, without external interference or constraint.”⁸

There are three critical responses to the Hobbesian view of sovereignty. The first is the liberal response, which holds that the liberty concern, and not the security concern, is primary. John Locke is usually credited with having articulated this view. Locke, unlike Hobbes, argued that the state of nature is not a state of war, but a place where liberty reigns supreme and at worst is only an inconvenient place to live.⁹ Working with this understanding of the state of nature, Locke did not believe that there could ever be a reason or need to grant any person, or body, absolute political power.¹⁰

The second response to Hobbes is the conservative response, best exemplified by David Hume and Edmund Burke.¹¹ This response rejects the notion that a legitimate government requires the consent of those ruled. In a nutshell, the conservative view holds that tradition and habit, not consent, provides political regimes with their legitimacy and stability (i.e., law and order). Therefore, according to this response, preserving tradition does more to address the security concern than does obtaining a reasoned consensus.

The third response to Hobbes, and the one I will focus on in this essay, is the *state of exception* response. In the next section I will provide a fuller

5. Phillip Cole, *Philosophies of Exclusion: Liberal Political Theory and Immigration* (Edinburgh: Edinburgh University Press, 2000), 165.

6. *Ibid.*

7. *Ibid.*, 168. For an excellent rebuttal to this claim, see Ryan Pevnick, “Social Trust and the Ethics of Immigration Policy,” *The Journal of Political Philosophy* 17.2 (2009): 146–167.

8. Cole, *Philosophies of Exclusion*, 18.

9. John Locke, *Second Treaties of Government*, ed. C. B. Macpherson (Indianapolis: Hackett Publishing, 1980).

10. *Ibid.*, 72.

11. See David Hume, “Of the Original Contract,” in *Political Writings*, ed. Stuart D. Warner and Donald W. Livingston (Indianapolis: Hackett Publishing, 1994), 164–181; Edmond Burke, *Reflections on the Revolution in France* (London: Penguin Books, 2004).



account of this response, but here I want to point out why this response is different from the two just mentioned. First, as opposed to the liberal response, the *state of exception* response continues to make security rather than liberty, its primary concern. This is important because if forced to choose between liberty and security, some would gladly give up their liberty for security. In those cases, the force of the two Hobbesian views mentioned above—the external and the internal justifications for unilateral immigration controls—would continue to hold sway against liberal objections.

Second, unlike the conservative response, the *state of exception* response is not worried about whether the Hobbesian sovereign can provide law and order. The *state of exception* response is more concerned with personal safety rather than overall social stability. According to the *state of exception* response, the threat to personal safety is never neutralized but is in fact aggravated when the sovereign is granted unrestrained power—even when doing so makes society more stable. In this case, neither external nor internal threats provide sufficient justification for a Hobbesian-style sovereign because in neither case does it deliver on the personal safety aspect of the security concern.

Sovereignty as the Condition for the State of Exception

Giorgio Agamben offers the third response to Hobbes. According to Agamben, the *state of exception* describes a situation where subjects have been “abandoned” by the sovereign. By *abandonment*, Agamben means a life (“bare-life”) that is no longer protected by the sovereign, but remains exposed to its potential violence.¹² In short, Agamben’s worry is that while Hobbes’s sovereign provides security in the form of law and order, it also introduces insecurity in the form of unrestrained sovereign power.

In making his case, Agamben relies heavily on the work of Hannah Arendt and Walter Benjamin. Agamben argues that Benjamin is prophetic in showing the link “between the violence that posits law and the violence that preserves it.”¹³ Here, Agamben is referring to what he calls the paradox of sovereignty: the sovereign’s ability to be both inside and outside the law. The sovereign’s ability to operate outside the law is justified in so far as it establishes and maintains law and order. This ability is also only meant for very exceptional circumstances and only for brief amounts of time. Yet, Agamben argues that what is supposed to be a brief exception tends to become the norm, and thereby itself becomes a threat to security, specifically the personal safety of all individuals because eventually everyone becomes susceptible to being *abandoned*. The thrust of Agamben’s criticism of Hobbes is that in order for Hobbes’s notion of sovereignty to function properly, it needs to be able to be

12. Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford, Calif.: Stanford University Press, 1998), 159.

13. *Ibid.*, 63.



both inside and outside law, but it is this ability that produces the threat of the *state of exception*, which then undermines the very concern (i.e., security) Hobbes had set out to address.

Agamben's critique of sovereignty not only has serious ramifications for Hobbes, but for all political philosophers who give priority to the security concern. It seems that the very notion of sovereignty creates as big of a security problem as the one it was intended to solve. One possible response would be to dispense with the notion of sovereignty and resort to subverting, as much as possible, all forms of concentrated political power and authority. If we opt for this alternative, however, it seems that we only re-open the *state of nature* threat: how can law and order be established and maintained? In short, it seems that Agamben brings us to a very unpleasant conclusion: we are left either with a *state of nature* or a *state of exception*.

What does this mean for immigration policy? As mentioned in the introduction, the U.S. federal government has enjoyed *plenary power* over immigration since at least the second half of the nineteenth century. *Plenary power* allows the federal government to regulate immigration free of judicial review, meaning the federal government has the power to admit, exclude, and expel non-citizens as it sees fit. One way to understand this is that, with regard to immigration cases, non-citizens have been *abandoned* by the U.S. government and therefore live in a *state of exception*. Most people would be aghast at this and would hope that all people have some protections against sovereign power. As we have seen, however, limiting the power of the sovereign (in this case the federal government) could undermine its legitimacy and potentially reduce or expose it to a *state of nature*.

This is not my conclusion. The case I want to make is that non-citizens, including undocumented immigrants, should be afforded some Constitutional protections, thus removing them from something like a *state of exception*. Furthermore, granting non-citizens Constitutional protections will not undermine U.S. sovereignty, but will be more consistent with it. This means that escaping the *state of exception* does not necessitate the possibility of a *state of nature* or vice-versa. In order to make this case, however, we see that there are two prongs that must be addressed. In the following section I will address both of these in reverse order from how I have presented them. First, I will address Agamben's worry about the *state of exception* and then I will address Hobbes's worry about the *state of nature*.

Subverting The Plenary Power Doctrine

In general, my response to the first prong is that judicial review can ameliorate many of the worries associated with the *state of exception*. By judicial review, I mean that the actions of the executive and legislative branches are subjected to possible Constitutional invalidation by the judiciary branch. The



1958 *Trop v. Dulles* case provides us with a great example in this regard. In that case, the U.S. government attempted to strip Albert Trop of his citizenship as a form of punishment. The Supreme Court ruled, however, that stripping a person of his citizenship was a violation of the 8th Amendment (i.e., protection against cruel and unusual punishment). Chief Justice Warren, delivering the majority opinion, reasoned, in this long but important passage, that as a form of punishment, taking away one's citizenship would constitute

the total destruction of the individual's status in organized society[and] is a form of punishment more primitive than torture. . . . The punishment strips the citizen of his status in the national and international political community. . . . In short, the expatriate has lost the right to have rights. . . . This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies. It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious.¹⁴

The law in this case not only sided with the potential *Muselmann* (Agamben's exemplar of "bare life") over and against the sovereign, but it did so for reasons and concerns not dissimilar to those articulated by Agamben. My point with this example is not to argue that the U.S. Supreme Court is perfect, beyond reproach and always on the side of the most oppressed (far from it), but to show, contra Agamben, that the law can at times be the *only* thing that protects the most vulnerable from the full wrath of the sovereign's powers.

Assuming for the moment that judicial review can ameliorate many of Agamben's concerns, this brings us to the second prong: Does extending judicial review to immigration cases involving non-citizens undermine U.S. sovereignty? My answer is no. Extending judicial review to these cases will not undermine U.S. sovereignty, but is in fact more consistent with it. This is so because one of the principle aims of the U.S. Constitution is to *disperse and check sovereign powers, not to enhance them*. One obvious reason the U.S. Constitution aims to check and disperse sovereign power is its concern with liberty (see the Lockean response above), but another reason is its concern with protecting those who are subject to the law from undue governmental infringements. This concern is made evident in the Fourteenth Amendment, which states that: "No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The key term in this passage is *person*, which by

14. *Trop v. Dulles*, 356 U.S. 86, 70 (1958).



definition extends beyond citizens to include non-citizens. This amendment provides anyone present in the United States with the right to due process and equal protection under the law.

If allowing for judicial review is more consistent with U.S. sovereignty, then why, if not to protect U.S. sovereignty, did something like the *plenary power* doctrine arise in the first place? Here it is fruitful to compare the Supreme Court decision in *Plessy v. Ferguson* (the separate-but-equal case) and two cases that form the foundation for the *plenary power* doctrine: *Chae Chan Ping v. United States* and *Fong Yue Ting v. United States*. These cases were decided by the same court and aim to circumvent the spirit of Fourteenth Amendment. For example, in *Plessy v. Ferguson* the Supreme Court ruled that having separate facilities for blacks and whites was consistent with the Fourteenth Amendment so long as the facilities were equal.¹⁵ This ruling has infamously come to be known as the “separate-but-equal” doctrine.

Similarly, in *Chae Chan Ping v. United States*, the Supreme Court upheld the constitutionality of the Chinese Exclusion Act. The case revolved around whether Chae Chan Ping, a Chinese national and legal permanent resident of the United States could reenter the United States. Ping had left for a visit to China in 1887 and during his return voyage Congress amended the Chinese Exclusion Act to discontinue the policy of return vouchers for Chinese nationals. When Ping arrived at the port of San Francisco, he was thus refused reentry. Ping sued to be admitted on the grounds that the amendment barring his reentry was *ex post facto* and therefore a violation of his constitutional rights. Ping’s case was eventually heard by the Supreme Court, which ruled that the idea that

the United States, through the action of the legislative department, can exclude [non-citizens] from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude [non-citizens] it would be to that extent subject to the control of another power.¹⁶

In other words, the Supreme Court ruled that, because the U.S. is a sovereign nation, the federal government has the authority to exclude non-citizens and to do so free of judicial review. The *ex post facto* nature of Ping’s exclusion, which normally would be a violation of his rights, was therefore preempted in this case by the federal government’s sovereign prerogative to admit and exclude non-citizens as it deems fit. This case set the precedent that, with respect to issues of admission and exclusion, non-citizens have no claims that the federal government is bound to respect.

The second *plenary power* case, *Fong Yue Ting v. United States*, came four

15. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

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



years later. In this case, the Supreme Court ruled that besides the power to admit and exclude, the federal government also had the power to expel non-citizens without judicial review. Justice Horace Gray, who delivered the majority opinion in the case, stated: “The power of Congress . . . to expel, like the power to exclude [non-citizens], or any specified class of aliens, from the country, may be exercised entirely through executive officers.”¹⁷ Furthermore, because deportation was not a punishment, the due process protections of the Constitution were not applicable. As Gray reasoned:

The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of [a non-citizen] who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application.

The result of *Plessy v. Ferguson* and the *plenary power* cases was therefore the same; the Supreme Court allowed for the circumvention of the equal protection and due process clauses of the Fourteenth Amendment. With respect to the *Plessy v. Ferguson* decision, the Supreme Court eventually recognized the error and tried to make amends, overturning the *separate-but-equal* doctrine in the landmark 1954 *Brown v. Board of Education* case.¹⁸ With respect to the *plenary power* doctrine, however, the same has not happened—even after the Chinese Exclusion Act, the legislation at the heart of both *plenary power* cases, has been repealed and is now considered a horribly racist mistake.¹⁹

Conclusion

I would like to end by looking at a case that might serve as a model for how non-citizens could be granted Constitutional protections, while at the same time not undermining U.S. sovereignty. This case is the 1982 *Plyler v. Doe* case. This case concerned a 1975 Texas provision allowing the state to withhold funds from schools that enrolled children lacking legal immigration status. The Court ruled that the Texas provision violated the Fourteenth Amendment’s commitment to equal protection under the law because undocumented immigrants

17. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

18. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

19. The Chinese Exclusion Act was officially repealed by the 1943 Magnuson Act, but was not repealed in practice until the passage of the Immigration and Nationality Act of 1965.



are persons and in denying persons an education the state was placing them at a severe disadvantage (i.e., *state of exception*). In striking down the law, the court set a precedent that is still in effect to this day: all persons, including undocumented immigrants, have access to emergency medical care and education through grade twelve.²⁰

This, again, is another case where the law was the *only* thing protecting the most vulnerable from the full wrath of the sovereign. Agamben's notion of "bare life," therefore does not seem to accurately describe the current situation of non-citizens, including undocumented immigrants, living in the United States. All non-citizens have protections against sovereign power, but those protections are limited by their ability to have standing in court. Because of the *plenary power* doctrine, non-citizens currently do not have any standing in court proceedings related to immigration, and hence any non-citizen, including legal permanent residents, can be deported at any time. Extending judicial review to immigration cases therefore needs to be the priority of those who advocate for immigrant rights. This means fighting for the elimination of the *plenary power* doctrine, while not succumbing to bogus fears of either an internal or external *state of nature*. — • —

20. *Plyler v. Doe*, 457 U.S. 202 (1982).

