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SHRINKING THE POST-PLenary POWER PROBLEM

*Michael Kagan**

I. INTRODUCTION

Professor Matthew J. Lindsay's excellent article *Disaggregating "Immigration Law"* arrives at a pivotal moment in the evolution of American immigration law.¹ My understanding of this moment is thus: A majority of Supreme Court justices appear to be at least occasionally uneasy with the plenary power doctrine that has shaped immigration law since the *Chinese Exclusion Case*,² but they are not all sure how to live without it either.³ So long as this remains the case, the Court's immigration jurisprudence is likely to be incrementally favorable to immigrants on the whole, but tentative, inconsistent, and incoherent in some important ways. In my view, the importance of Professor Lindsay's intervention is that it helps point a way to find clarity in this transitional period.

Since the 2001 decision in *Zadvydas v. Davis*,⁴ the Supreme Court has appeared increasingly willing to defend immigrants' due process rights vis-à-vis federal immigration authorities. The Court's decision in *Padilla v. Kentucky*⁵ undermines the formalistic distinction between criminal punishments and supposedly civil immigration enforcement, a distinction that had long been invoked to prevent immigrants from claiming more procedural rights when they face deportation. In addition to these two landmark cases, the Court has issued a series of decisions strengthening the categorical approach to interpreting criminal grounds of removal, in effect limiting the executive branch's power to broadly construe deportation powers.⁶ Finally, the Court has invoked federalism to block some state-level anti-immigrant legislation.⁷

But there are other winds blowing. A majority of the justices recently refused to apply meaningful scrutiny to the denial of a spousal visa based on opaque security grounds, even though the denial threatened a

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1. Matthew J. Lindsay, *Disaggregating "Immigration Law,"* 67 FLA. L. REV. 1 (2016).

2. Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581 (1889).

3. See Michael Kagan, *Plenary Power Is Dead! Long Live Plenary Power!*, 114 MICH. L. REV. FIRST IMPRESSIONS 21, 22–23, 26–27 (2015).

4. 533 U.S. 678 (2001).

5. 559 U.S. 356 (2010).

6. See, e.g., *Mellouli v. Lynch*, 135 S. Ct. 1980, 1990–91 (2015); *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1690, 1692, 1693–94 (2013).

7. *Arizona v. United States*, 132 S. Ct. 2492, 2502–03 (2012).

U.S. citizen's family unity.⁸ But the justices could not agree on a single rationale to explain that decision.⁹ Most recently, the depleted Court divided 4-4 about the propriety of President Barack Obama's deferred action programs.¹⁰ These decisions are strong indications that the justices remain divided and perhaps a bit unsure about some central issues in immigration law.¹¹

Even if I am right that many justices have doubts about plenary power, the sheer vastness of immigration law is a challenge for any judicial project aimed at getting rid of it. Some immigration cases involve substantive legal grounds for deporting people from the United States.¹² Some involve due process rights of people who are detained before deportation.¹³ Some involve eligibility for asylum.¹⁴ Some involve requests for visas for family members abroad.¹⁵ Some involve companies in the United States that want to import specialized workers.¹⁶ Some involve questions about the limits of Presidential power to shape immigration policy.¹⁷ Some involve questions about the limits of state power to shape immigration policy.¹⁸ And that's just a

8. *Kerry v. Din*, 135 S. Ct. 2128, 2138 (2015) (plurality opinion).

9. *See id.* at 2138–39 (Kennedy, J., concurring).

10. *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam), *aff'g* 809 F.3d 134 (5th Cir. 2015).

11. In the 2016-2017 term, the Court will hear more cases that will provide another reading on the current status of plenary power—potentially including the question of whether plenary power remains relevant at all. For example, *Jennings v. Rodriguez* involves an extension of due process to people detained for more than six months while their immigration cases are pending. *See Rodriguez v. Robbins*, 804 F.3d 1060, 1065–66 (9th Cir. 2015), *cert. granted*, 136 S. Ct. 2489 (2016); *see also Jennings v. Rodriguez*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/jennings-v-rodriguez/?wpmp_switcher=desktop (last visited Nov. 16, 2016). *Lynch v. Morales-Santana* revisits the question of whether Congress may treat mothers and fathers differently in the conferral of citizenship to foreign-born children. *See Morales-Santana v. Lynch*, 804 F.3d 520, 523–24 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 2545 (2016); *see also Lynch v. Morales-Santana*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/lynch-v-morales-santana/?wpmp_switcher=desktop (last visited Nov. 16, 2016).

12. *See, e.g., Moncrieffe v. Holder*, 133 S. Ct. 1678, 1683–84 (2013) (holding that conviction under a state statute that was punishable as a misdemeanor in certain circumstances was not equivalent to a federal felony for purposes of the Immigration and Nationality Act); *Esquivel-Quintana v. Lynch*, 810 F.3d 1019 (6th Cir. 2016), *cert. granted*, 2016 WL 3689050 (2016).

13. *See, e.g., Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016) (granting writ of certiorari).

14. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 449–50 (1987).

15. *See, e.g., Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2196–97 (2014).

16. *See, e.g., Fogo de Chao v. Dep't of Homeland Sec.*, 769 F.3d 1127, 1130 (D.C. Cir. 2014).

17. *See, e.g., United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam), *aff'g* 809 F.3d 134 (5th Cir. 2015).

18. *See, e.g., Arizona v. United States*, 132 S. Ct. 2492, 2502–03 (2012); *Chamber of Commerce of the United States v. Whiting*, 563 U.S. 582, 587 (2011).

partial list. The plenary power doctrine, broadly understood, has caused many problems. But it has the virtue of being a broad theory capable of guiding the resolution of all of these cases, even if it resolves them in problematic ways. Developing a replacement theory that can do similar work is daunting, which may make justices hesitant to entirely discard the devil we know, so to speak.

II. THE APPEAL OF DISAGGREGATION

Professor Lindsay argues that there were originally many splintered laws, mostly at the state level, that impacted non-citizens.¹⁹ These laws became federalized and to some extent unified under the rubric of plenary power, creating what we think of as immigration law.²⁰ But the justifications for a broad plenary power doctrine have long been questionable. In particular, Professor Lindsay highlights the fact that federal authority over foreign affairs and national security is not a helpful guidepost for many of the specific, practical questions that arise in daily practice of this thing we call immigration.²¹ In a narrow sense, these insights are not entirely new. For instance, other scholars have observed that the Supreme Court has probably overstated the foreign affairs dimension of immigration policy.²² But as I see it, the importance of Professor Lindsay's intervention is not in questioning the reach of the foreign affairs rationale. It is that he takes the next logical step by questioning whether immigration law should have a single coherent rationale in the first place. While Professor Lindsay focuses on foreign affairs, this logic is farther reaching because it suggests that only by disaggregating immigration can we correctly account for the importance of foreign affairs, national security, civil liberties, economic policy, and the many other policy interests that play a role in regulating non-citizens. In this sense, Professor Lindsay's most important argument is really right in the title: "*Immigration Law*" is in quotes.

Another way to think of this would be to say that many different bodies of law impact non-citizens in particular ways. These disparate bodies of law together are known as "immigration law," but perhaps the only thing they really share is that they all affect non-citizens. It may be

19. See Lindsay, *supra* note 1, at 22.

20. See *id.* at 32.

21. See *id.* at 41.

22. See, e.g., Hiroshi Motomura, *Whose Immigration Law?: Citizens, Aliens and the Constitution*, 97 COLUM. L. REV. 1567, 1594 (1997) (arguing that a shift to foreign affairs rationales supported a nationalization of immigration law, but that the importance of foreign affairs can be overstated); Peter J. Spiro, Rebuttal, *State Action on Immigration (Bad and Good) After Arizona v. United States*, 161 U. PENN. L. REV. ONLINE 105, 107 (2012) (questioning the Supreme Court's invocation of a broad foreign affairs power to justify preemption of state immigration measures).

a mistake to assume that they are one coherent legal system in the manner of torts law or criminal procedure. We understand that a decision in a traffic accident case might refine the concept of negligence, and thus impact a workplace injury case. We understand that a search and seizure decision in drug trafficking prosecution could later have ramifications in a larceny case. But we should not assume that a decision imposing constitutional limitations on detention of non-citizens in the United States necessarily changes the law about whether a person on the other side of the world can obtain a spousal visa to come here. We should thus not be surprised that the justices in the majority in *Kerry v. Din*²³ failed to even cite *Zadvydas v. Davis*.²⁴ These cases both deal with non-citizens, but they deal with non-citizens who are in very different situations, implicating very different interests, rights, and constitutional concerns. In this way, immigration law should be disaggregated.

It seems to me that a strong piece of evidence in favor of disaggregation is the way Congress has fragmented the regulation of immigration across many different federal agencies. Immigration law casebooks include elaborate organizational charts attempting to depict the ways in which different aspects of this body (or bodies) of law are administered by USCIS, ICE, CBP, the Department of Justice (EOIR), the Department of Labor, and the Department of State, among others.²⁵ Perhaps what we really have is a Law of Citizenship, a Law of Entry and Admission, a Law of Removal, a Law of Family Unity, a Law of Foreign Labor Regulation, and so on. There are probably many potential ways to disaggregate immigration and I will not attempt to develop a precise taxonomy here. The point is simply that by breaking immigration into narrower bodies of law, each focused on a unique context and set of concerns, the difficult legal problems should become easier to manage.

III. THE EXCEPTIONALISM TEMPTATION

A counterpoint to Professor Lindsay's thesis may be found in a similarly important study by Professors David S. Rubenstein and Pratheepan Gulasekaram.²⁶ Their article starts from a premise that is common to most critiques of plenary power: that immigration has often been treated differently for constitutional purposes than other areas of

23. 135 S. Ct. 2128 (2015).

24. *See generally id. But see id.* at 2144 (Breyer, J., dissenting) (citing *Zadvydas* in support of procedural due process).

25. *See, e.g.*, STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 5 (5th ed. 2009).

26. David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. (forthcoming 2017), <http://ssrn.com/abstract=2730956>.

law.²⁷ But they rebuke immigration scholars for sometimes opposing exceptionalism and sometimes invoking it so as to achieve particular results.²⁸ Thus, scholars who want to discard plenary power with regard to immigrants' civil liberties are all too willing to invoke it if it helps strike down Arizona's anti-immigrant legislation at the state level, or defend President Obama's deferred action programs.²⁹ Professors Rubenstein and Gulasekaram argue that for constitutional purposes, the civil liberties, federalism, and separation of powers problems of immigration law cannot be neatly partitioned from each other.³⁰ They argue that immigration law poses a constitutional "trilemma" because it requires accounting for each of these different problems through a holistic approach.³¹ Professors Rubenstein and Gulasekaram thus argue that disaggregation is not easily accomplished, and not necessarily wise.³²

A signal of this lurking danger can be seen in the frequent citation of *Reno v. American-Arab Anti-Discrimination Committee (AADC)*³³ in support of President Obama's use of deferred action.³⁴ *AADC* contains strong endorsement of prosecutorial discretion, which is why it is a convenient authority for backers of expanded deferred action.³⁵ But as I have explored in more detail elsewhere, *AADC* is an awful decision from the standpoint of immigrants' civil liberties.³⁶ It seems to endorse executive discretion in immigration enforcement to such an extreme extent that it would permit infringement of First Amendment liberties (although there are ways to read the decision more narrowly).³⁷

The solution, it seems to me, is to reconcile these two theses, which on the surface appear to be in conflict. It is important that Professors

27. *See id.* at 1.

28. *See id.* at 4–5, 24.

29. *See id.* at 28, 31.

30. *See id.* at 42–44, 51–53. Professor Lindsay appears to acknowledge that disaggregation of immigration law, especially narrowing the foreign affairs justification, may complicate preemption arguments against state immigration measures. *See Lindsay, supra* note 1, at n.258.

31. *See Rubenstein & Gulasekaram, supra* note 26, at 42–43.

32. *See id.* at 53.

33. 525 U.S. 471 (1999).

34. *See, e.g.*, Letter from Hiroshi Motomura, Susan Westerberg Prager Professor of Law, UCLA School of Law, et al., to President Barack Obama, 1 n.2, (May 28, 2012), <https://www.law.uh.edu/ihelg/documents/ExecutiveAuthorityForDREAMRelief28May2012withSignatures.pdf> [<https://perma.cc/S3EE-YGNW>] (quoting *AADC*).

35. *AADC*, 525 U.S. at 483–84 (“[T]he INS may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation. . . . A case may be selected for deferred action treatment at any stage of the administrative process.”).

36. *See Michael Kagan, When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment*, 57 B.C. L. REV. 1237, 1266–69, 1278–83 (2016).

37. *See id.* at 1266–69.

Rubenstein and Gulasekaram do not oppose immigration exceptionalism *per se*. Rather, if I may try to paraphrase, they critique exceptionalism of convenience. They warn against taking a particular position in a specific immigration case without accounting for the unintended doctrinal impact in other immigration cases. As I see it, the problem is that this is easier said than done. “Immigration law,” as conventionally conceived, is so vast that it may be difficult for lawyers and judges to successfully account for all of the potential doctrinal implications of moving one way or another in a particular case. The daunting nature of this problem can lead the Court in two unsatisfactory directions. The Court can fall back on the old, well-established but deeply problematic plenary power doctrine.³⁸ Or the Court can issue decisions that appear to deviate from established norms without explaining clearly if the Court really means to do so. This latter approach causes considerable confusion for practitioners and lower courts, but for the Supreme Court it has the virtue of maximizing flexibility and minimizing unintended consequences.³⁹

By pushing immigration law toward disaggregation, I believe Professor Lindsay makes this problem considerably less daunting because it suggests a manageable way to address the doctrinal spillovers that Professors Rubenstein and Gulasekaram warn of. The key is to find principled means by which to determine which immigration cases are inexorably linked and which maybe severed from each other doctrinally. The way to do this, it seems to me, is to be clear that disaggregation makes sense in terms of *subject matter*. A case concerning the interpretation of a statutory provision on family sponsorship is a different subject than a constitutional challenge to long-term pre-removal detention of immigrants. One case need not necessarily affect the other, which liberates justices to decide the cases in front of them without undue concern about unforeseen problems. This is the strength of Professor Lindsay’s argument and it is convincing so long as the cases really deal with different subjects.

The critique posed by Professors Rubenstein and Gulasekaram is at its most convincing when immigration cases involve a similar subject. We see this if we look at the cases of *Zadvydas v. Davis*,⁴⁰ *Arizona v.*

38. Justice Kennedy’s concurring opinion in *Kerry v. Din*, 135 S. Ct. 2128, 1239–41 (2015), can be seen as an example of this problematic approach.

39. An example of this phenomenon may be seen in the Court’s recent failure—without explanation—to invoke *Chevron* deference in cases concerning criminal grounds of removal, a failure that has been explained by the fact formally abandoning *Chevron* is a hard doctrinal choice that not all justices may be yet ready to make. See Asher Steinberg, *Torres v. Lynch—A Sub Silento Holding on Chevron Deference to Administrative Interpretations of Criminal Law?*, THE NARROWEST GROUNDS, (June 1, 2016, 12:18 AM), <http://narrowestgrounds.blogspot.com/2016/06/torres-v-lynch-sub-silentio-holding-on.html>.

40. 533 U.S. 678 (2001).

*United States*⁴¹ and *United States v. Texas*,⁴² three cases which embody the “trilemma” that Professors Rubenstein and Gulasekaram identify.⁴³ In a narrow sense, each of these cases asks a different question. One is about due process, one is about pre-emption doctrine, and one is about executive power. But all three of these cases concern immigration enforcement inside the United States. They share a common subject matter. Thus, doctrinal changes in one are likely to impact the others. Disaggregation among these cases is tempting for advocates who want to reach particular results. But there is a much greater risk of rendering the doctrine incoherent, or of producing unforeseen and undesirable results.

IV. SEARCHING FOR NEW ANALOGIES

In theory, the erosion of plenary power should lead to a corresponding erosion of immigration exceptionalism. The trouble is that if immigration is not unique, then it must be similar to something else. The decline of plenary power demands new analogies. If the goal is to normalize immigration law, an apparently useful set of tools appears to be offered by administrative law. Immigration law is usually seen as a species of administrative law.⁴⁴ It is comprised of a set of complicated, often ambiguous statutes that are interpreted and applied by a set of executive agencies. Major rules of administrative law, such as *National Cable & Telecommunications Association v. Brand X Internet Services*⁴⁵ deference, thus feature prominently in many immigration decisions.⁴⁶ Professor Alina Das has observed that federal authorities now often invoke *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁴⁷ deference to shield their decisions from judicial scrutiny, where in the past they might have been able to rely on plenary power.⁴⁸

On the surface, application of *Chevron* deference often seems completely appropriate in immigration cases.⁴⁹ Administrative law’s deference doctrines work best when there is an ambiguous statute

41. 132 S. Ct. 2492 (2012).

42. 136 S. Ct. 2271 (2016) (per curiam), *aff’g* 809 F.3d 134 (5th Cir. 2015).

43. *See supra* note 31 and accompanying text.

44. *See* Jill E. Family, *DAPA and the Future of Immigration Law as Administrative Law*, 55 WASHBURN L.J. 89, 89 (2015).

45. 545 U.S. 967 (2005).

46. *See, e.g.*, *Matter of Fajardo Espinoza*, 26 I&N Dec 603, 605 (BIA 2015); *Matter of Alfonso Cortes Medina*, 26 I&N Dec. 79, 81 (BIA 2013); *Matter of M-H-*, 26 I&N Dec. 46, 49 (BIA 2012).

47. 467 U.S. 837 (1984).

48. *See* Alina Das, *Unshacking Habeas Review: Chevron Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 163–64 (2015).

49. *See id.* at 148.

offering more than one reasonable policy choice, in which case it makes sense to defer to a branch of government that has more technical policy expertise and more accountability to the public.⁵⁰ *Chevron* deference also is a means by which the courts try to enforce congressional intent to allow agencies to have discretion about how to apply ambiguous statutes.⁵¹

But it is not clear that these rationales are strong enough to defend judicial deference in certain kinds of immigration cases. Professor Das has highlighted the problem that application of *Chevron* in immigration detention cases produces disturbing results because it limits judicial review in cases involving physical liberty and “operates as a presumption in favor of detention.”⁵² Recently I participated in an intriguing debate about why the Court has not cited *Chevron* in several recent cases interpreting ambiguous criminal grounds of removal.⁵³ This apparent inconsistency can feed a continuing sense that immigration is just different, though it doesn’t tend to produce a sense of coherency—in large part because the Supreme Court has yet to explain why it invokes *Chevron* in some cases, but not in others. It may be that some justices are uneasy with deferring to the political branches when physical liberty is at stake, but they are unsure how to explain this, since there are other immigration cases where such deference would not be so problematic.

Disaggregation can be helpful to bring some order to this apparent muddle. It teaches us to not assume that all cases involving non-citizens must be resolved using common legal doctrines. Instead, we should look at the specific concerns raised by different contexts. Cases that involve putting people in custody or deporting them raise constitutional concerns that make deference less appropriate than in other immigration cases that do not involve a deprivation of physical liberty.

In *Padilla v. Kentucky*,⁵⁴ the Supreme Court said that deportation is

50. *See id.* at 865–66 (identifying policy expertise and accountability to voters as justifications for judicial deference).

51. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013).

52. Das, *supra* note 48, at 149.

53. Compare Michael Kagan, *Does Chevron Have an Immigration Exception?*, YALE J. ON REG.: NOTICE & COMMENT (May 19, 2016), <http://yalejreg.com/nc/does-chevron-have-an-immigration-exception-by-michael-kagan/>, and Michael Kagan, *Chevron’s Immigration Exception, Revisited*, YALE J. ON REG.: NOTICE & COMMENT (June 10, 2016), <http://yalejreg.com/nc/chevron-s-immigration-exception-revisited-by-michael-kagan/>, with Patrick Glen, *Response to Kagan on Torres v. Lynch and Immigration Exceptionalism*, YALE J. ON REG.: NOTICE & COMMENT (May 27, 2016), <http://yalejreg.com/nc/response-to-kagan-on-torres-v-lynch-and-immigration-exceptionalism-by-patrick-glen/>, and Asher Steinberg, *Torres v. Lynch—A Sub Silento Holding on Chevron Deference to Administrative Interpretations of Criminal Law?*, THE NARROWEST GROUNDS (June 1, 2016), <http://narrowestgrounds.blogspot.com/2016/06/torres-v-lynch-sub-silento-holding-on.html>.

54. *Padilla v. Kentucky*, 559 U.S. 356 (2010).

analogous to imprisonment in criminal cases.⁵⁵ By this logic, it makes sense that *Chevron* might have less relevance in cases that involve grounds of removal or detention of immigrants before they are deported. Such measures are more analogous to criminal punishment and pre-trial detention in criminal procedure.⁵⁶ We do not defer to prosecutors to interpret criminal statutes the way we defer to the Environmental Protection Agency to interpret the Clean Water Act.⁵⁷ Instead, in these cases criminal procedure might be a better analogy than administrative law. However, there will be other immigration cases where the administrative law approach fits much better. This will typically be the case when there is a much weaker claim that any constitutional liberty is being infringed. The application of deference in *Scialabba v. Cuellar de Osorio*⁵⁸ might be such a case, since it involved criteria for family sponsorship visas but did not involve a loss of physical liberty.⁵⁹ Likewise, some immigration cases may raise foreign affairs and national security concerns more directly than others. *Kerry v. Din* appears to be such an example.⁶⁰

Disaggregation can be liberating. If we think of “immigration law” as merely a collection of disaggregated legal systems, then the justices need not develop a new, unifying theory for all cases involving non-citizens. They need only decide the case in front of them, worrying only about other cases touching on similar subject matter. Likewise, immigration law scholars need not worry about proposing a unifying replacement theory for plenary power. However, there is a catch. The constant struggle in our system of judicial precedent is to distinguish cases that are related from those that are not. The temptation will always be to distinguish doctrines that are inconvenient and to rely on those that are helpful to achieve a particular objective. Advocates writing briefs have little choice but to do this. But the task for judges and scholars is to find coherent ways to actually do the disaggregation. Otherwise, we will replace one form of incoherency with another.

55. *See id.* at 361–64.

56. *Cf.* *United States v. Salerno*, 481 U.S. 739, 748 (1987) (holding that pre-trial detention in criminal cases does not violate the Due Process Clause).

57. *Compare* *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009) (applying *Chevron* deference to EPA interpretation of the Clean Water Act), *with* *United States v. Salerno*, 481 U.S. 739, 748 (1987) (applying strict scrutiny standard to statute permitting pre-trial detention in criminal cases).

58. 134 S. Ct. 2191 (2014).

59. *See id.* at 2196–97.

60. *Kerry v. Din*, 135 S. Ct. 2128, 2132–33 (2015) (Scalia, J., concurring) (distinguishing a request for a spousal visa from deprivation of life, liberty or property as understood in the Magna Carta).