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THE ASYLUM MAKEOVER: *CHEVRON* DEFERENCE, THE SELF-REFERRAL AND REVIEW AUTHORITY

Jessica Senat*

I. INTRODUCTION

Historically, judicial deference under administrative law was a much-needed solution; it filled a void by providing specialized areas where the court lacked expertise. Administrative agencies in the Executive Branch carry legal expertise in a specialized area, and courts will defer to the agency's interpretation of law as long as it does not generally impede on constitutional rights and does not result in arbitrary application of law.¹ Judicial deference is known to be applicable in many areas of law, such as environmental and industrial law.² The landmark case, *Chevron U.S.A. v. Natural Resources Defense Council*,³ produced the *Chevron* test which requires courts to defer to an agency's interpretation of law, absent congressional interpretation on the statute in question.⁴ Courts termed it "*Chevron* deference" when they defer to agency interpretation of law where congressional interpretation is lacking.

Under immigration law, courts have applied the *Chevron* test to determine the interpretation of the Particular Social Group ("PSG") requirement under 8 U.S.C. § 1158(b)(1)(B)(i); the federal statute grants asylum to persecuted refugees.⁵ The statute states, in relevant part, that an "applicant must establish that race, religion, nationality,

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¹ J. Lyn Entrikin Goering, *Tailoring Deference to Variety with A Wink and A Nod to Chevron: The Roberts Court and the Amorphous Doctrine of Judicial Review of Agency Interpretations of Law*, 36 J. LEGIS. 18, 26 (2010); The Honorable Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 38 DUKE L.J. 511 (1989).

² Goering, *supra* note 1, at 38.

³ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

⁴ *Id.* at 842-43.

⁵ 8 U.S.C. § 1158(b)(1)(B)(i) (2018).

membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant” when seeking asylum protection.⁶ The Board of Immigration Appeal (“BIA”)⁷ held that in order to satisfy the PSG standard, the group must be based on (1) an immutable (shared) characteristic, (2) be socially visible; and (3) particularly defined.⁸ Circuit courts disagree on whether the BIA’s interpretation of the PSG merits *Chevron* deference.⁹ But a broader issue is whether *Chevron* deference should be used in immigration law at all. Although *Chevron* deference was implemented to solve interpretation issues, it poses the risk of uprooting basic constitutional rights of refugee applicants in today’s immigration reform efforts.

One major issue that results from the use of *Chevron* deference in immigration law is the threat of political and judicial biases to immigration reform. It is well known that all politicians hold personal biases. But these biases deserve more scrutiny when they threaten basic constitutional freedoms. Former Attorney General Jeff Sessions amplified this threat in the *Matter of A-B*.¹⁰ By using a rare referral

⁶ *Id.* (“To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.”).

⁷ The BIA is the highest administrative court in the Executive Office for Immigration Review or “EOIR.” The EOIR is an administrative agency under the Executive branch. It is authorized to adjudicate immigration cases under the authority of the Attorney General. The BIA has 21 Board Members. Its job is to “resolve the questions before it in a manner that is timely, impartial, and consistent” as well as “provide clear and uniform guidance to the service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations.” 8 C.F.R. §1003.1(d)(1) (2018). The BIA rarely holds courtroom proceedings, but only reviews and decides appeals by “paper review” of cases. Applicants may appeal to the BIA after receiving decisions from immigration judges and directors of the Department of Homeland Security (“DHS”). BIA decisions are binding on all DHS officers and immigration judges unless they are modified or overruled by the Attorney General or a federal court. *Board of Immigration Appeals*, U.S. DEP’T JUST. <https://www.justice.gov/eoir/board-of-immigration-appeals> (last updated Oct. 15, 2018).

⁸ *Matter of S-E-G-*, 24 I. & N. Dec. 579, 582-83 (B.I.A. 2008).

⁹ *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009) (holding that being a former gang member is recognized as a particular social group); *Martinez v. Holder*, 740 F.3d 902 (4th Cir. 2014), *as revised* (Jan. 27, 2014) (same); *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007) (holding that former/current gang membership does not constitute a particular social group for the purposes of the asylum statute); *Gonzalez v. U.S. Atty. Gen.*, 820 F.3d 399 (11th Cir. 2016) (same).

¹⁰ *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018).

and review mechanism to refer the case to himself,¹¹ Sessions reversed *Matter of A-R-C-G-*, a decision that allowed women fleeing domestic violence to apply for asylum.¹² In the opinion, he dismissed domestic and gang violence as a claim that is “unlikely to satisfy the statutory grounds for proving group persecution that the government is unable or unwilling to address.”¹³ Sessions did not implement new standards of law, but denounced the BIA’s failure to properly follow precedent in deciding *Matter of A-R-C-G-*.¹⁴ This conclusion is questionable because the decision itself is overshadowed by outdated views on gender violence, and inflated legal requirements that cause more confusion than clarity.¹⁵

In addition, the *Chevron* test promotes growth of judicial biases, which threatens any chances left for refugees to seek protections in the United States. In a George Washington Law Review article, *Chevron Bias*,¹⁶ Philip Hamburger puts the values of *Chevron* deference against the long-standing values of the U.S. Constitution.¹⁷ Hamburger argued that deference to agency interpretation produces “systematic biases”; the doctrine violates the Fifth Amendment right to due process because the *Chevron* test requires judges, absent congressional interpretational basis, to defer to the government’s interpretation of an issue.¹⁸ This problem is even more prominent in cases where the government is a party.¹⁹ The BIA is the perfect stage for these biases to work against refugee applicants, especially in the case of asylum protections.

This Note argues that judicial deference adversely impacts asylum applicants. Allowing flexibility in interpretation of important immigration laws causes confusion and distances U.S. immigration law from its initial purposes. Further, Jeff Sessions’ work as a senator, and later as U.S. Attorney General, amplified divisiveness, prejudice

¹¹ The provision states in relevant part “[t]he Board shall refer to the Attorney General for review of its decision all cases that: (i) The Attorney General directs the Board to refer to him.” 8 C.F.R. § 1003.1(h)(1).

¹² *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 390 (B.I.A. 2014).

¹³ *Matter of A-B-*, 27 I. & N. Dec. at 320.

¹⁴ *Id.* at 333.

¹⁵ *Id.*

¹⁶ Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1187 (2016) (discussing systematic biases).

¹⁷ *Id.* at 1191-92.

¹⁸ *Id.* at 1212.

¹⁹ *Id.*

and unfounded fear of the “other.” The self-referral provision should be amended to prevent abuse of the provision by the Attorney General.

This Note addresses the legislative history of the asylum statute in Part II.²⁰ The 1951 United Nations Convention Relating to the Status of Refugees was the foundation for asylum law in the United States.²¹ Part III discusses the PSG requirement and the resulting circuit split over its interpretation. Part IV briefly highlights the history of administrative law, and discusses the political, constitutional, and judicial ramifications of *Chevron* deference in modern day immigration reform.

Part V evaluates Jeff Sessions’ work under the Trump Administration and how constitutional rights have been disregarded for personal agendas. Part VI analyzes how the self-referral mechanism disrupts the immigration process and contravenes constitutional principles. Finally, Part VII looks at how Congress and the judiciary may regain some ground. Although deference is a necessary tool in ensuring that principles are applied in a fair and knowledgeable manner, for the sake of ensuring that constitutional right to due process remains intact, there should be a limit to when courts defer to an agency’s interpretation of the law. Where there is a threat to foundational principles and a call to answer basic human needs, the courts should take a closer look instead of deferring to agencies’ standards.

II. OVERVIEW OF U.S. IMMIGRATION LAW

The history of refugee laws in the United States errs more on the side of exclusivity than inclusivity.²² Discriminatory policies were prevalent: an example of this is the Emergency Quota Acts of 1921 and 1924.²³ Congress designed a quota system that limited the number of minorities entering the United States and made the process easier for Northern and Western Europeans.²⁴ Remnants of this

²⁰ Kathryn M. Bockley, *A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise*, 21 N.C. J. INT’L L. & COM. REG. 253 (1995).

²¹ *Id.* at 278.

²² *Id.*

²³ Bockley, *supra* note 20, at 259.

²⁴ *Id.* (“The Quota Act set forth percentages of immigrants eligible for admission from both northern and southeastern Europe based on percentages derived from the U.S. Census Bureau. However, immigration from the western European countries remained unrestricted. . . . [T]he Quota Act has been widely criticized for elevating the issues of race, ethnic prejudice and

discrimination remained when Congress enacted the Immigration and Nationality Act (“INA”) in 1955, even after the quota system was eliminated under the amendments to the INA laws.²⁵

In 1967, the United States began to take steps to eliminate discriminatory refugee policies.²⁶ Today’s immigration and refugee laws are based on the 1951 United Nations Convention Relating to the Status of Refugees or “Refugee Convention.”²⁷ The Refugee Convention was a response to the refugee crisis left in the wake of World War II. It defined its purpose to protect any “person who faces serious human rights abuses where a state has failed in its fundamental obligation of protection for reasons of the person’s status or beliefs, resulting in fundamental marginalization and an inability of the person to vindicate his or her rights in his or her home country.”²⁸ Under the Convention, an applicant only needed to show that he or she has a “well-founded fear” of persecution.²⁹

Congress incorporated these provisions of the Refugee Convention when it signed the United Nations Protocol Relating to the Status of Refugees (“Protocol of 1967”).³⁰ However, it was not until the Refugee Act of 1980 when the United States removed geographical or ideological biases and expanded the definition of refugee to include all persons regardless of ethnicity or nationality.³¹ Congress created the Refugee Act to bring the United States immigration laws in line with the United Nations Protocol.³² In addition, the Refugee Act

assimilation above any concerns for human suffering or the desperate situation of particular refugees.”).

²⁵ *Refugee Timeline: Immigration and Naturalization Service Refugee Law and Policy Timeline, 1891-2003*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/history-and-genealogy/our-history/refugee-timeline> (last updated Feb. 20, 2018) (discussing that the INA removed the quota system but still included preferences that favored immigrants from western Europe).

²⁶ *Id.*

²⁷ DEBORAH E. ANKER, *THE LAW OF ASYLUM IN THE UNITED STATES* § 1:2, Westlaw (database updated April 2018) (explaining that in the United States, there are three major forms of protections for refugees: asylum, withholding of removal, and convention against torture).

²⁸ *Id.*; see also Bockley, *supra* note 20, at 278.

²⁹ Bockley, *supra* note 20, at 278.

³⁰ *Id.*

³¹ *Id.* at 281; *Refugee Timeline*, *supra* note 25.

³² *Grace v. Whitaker*, 344 F. Supp. 3d 96, 106 (D.D.C. 2018) (“The Board of Immigration Appeals (‘BIA’), has also recognized that Congress’ intent in enacting the Refugee Act was to align domestic refugee law with the United States’ obligations under the Protocol, to give statutory meaning to ‘our national commitment to human rights and humanitarian concerns,’ and ‘to afford a generous standard for protection in cases of doubt.’” (citing *In re S-P-*, 21 I. & N. Dec. 486, 492 (B.I.A. 1998))).

included the new PSG standard.³³ Under this standard, an applicant is required to prove that he or she is fleeing persecution on the basis of being a member of a social group.³⁴ Although this standard established the requirement for proving persecution, the Act failed to clearly define the phrase “persecution on the basis of being a member of a social group.” As a result, the PSG requirement was left to the BIA for interpretation and clarification.

III. THE PSG STANDARD³⁵

Many disagree on how to interpret the PSG requirement. In 1987, the BIA sought to provide clarification of this term in *Matter of Acosta* and stated that

we interpret the phrase “persecution on account of membership in a particular social group” to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction *remains to be determined on a case-by-case basis*.³⁶

The BIA relied on the doctrine of “ejusdem generis” or “of the same kind” in establishing the PSG definition. It defined the PSG requirement in relation to the other categories listed in the statute: the particular social group must be a distinct persecuted group based on race, politics, religion, sex and nationality.³⁷ Furthermore, the BIA

³³ ANKER, *supra* note 27.

³⁴ Melissa J. Hernandez Pimentel, *The Invisible Refugee: Examining the Board of Immigration Appeals’ “Social Visibility” Doctrine*, 76 MO. L. REV. 575, 596 (2010).

³⁵ 8 U.S.C. § 1158(b)(1)(B)(i) (2018) (“To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.”).

³⁶ *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (emphasis added).

³⁷ *Id.*

stated that the “shared characteristic” is found in the fact that it cannot be changed.³⁸

In 2008, the BIA established additional requirements for satisfying the PSG standard.³⁹ In the *Matter of S-E-G-*, the BIA stated that in order to satisfy the PSG standard, the group must be based on (1) an immutable [shared] characteristic, (2) be socially visible; and (3) particularly defined.⁴⁰ The BIA stated that “[t]he essence of the ‘particularity’ requirement . . . is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.”⁴¹ In *Matter of M-E-V-G-*, the BIA further defined particularity as having “definable boundaries”; it must be defined specifically and not be “amorphous, overbroad, diffuse or subjective.”⁴² The “social visibility” element is satisfied if the society in question perceives the group as socially distinct.⁴³ Another requirement for the PSG standard is nexus,⁴⁴ which is established when the applicant shows that “his membership in a particular social group was or will be a central reason for his persecution.”⁴⁵ The BIA stated that the persecutor’s views and motives are important in establishing nexus.⁴⁶

The BIA claimed the PSG elements “may overlap in application, but each serves a separate purpose.”⁴⁷ Although the BIA acknowledges that the “social distinction” and “particularity” requirements overlap, the court explains that each requirement “emphasize[s] a different aspect of a particular social group.”⁴⁸

³⁸ *Id.*

³⁹ *Matter of S-E-G-*, 24 I. & N. Dec. 579 (B.I.A. 2008); *Matter of E-A-G-*, 24 I. & N. Dec. 591 (B.I.A. 2008) (in both cases, respondents were fleeing gang violence. The BIA reviewed the eligibility of persons who applied for asylum on the basis of being a member of a gang.).

⁴⁰ *Matter of S-E-G-*, 24 I. & N. Dec. at 582-83.

⁴¹ *Id.* at 584.

⁴² *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 240 (B.I.A. 2014).

⁴³ *Id.* at 241.

⁴⁴ *Id.* at 242.

⁴⁵ *Matter of W-G-R-*, 26 I. & N. Dec. 208, 223 (B.I.A. 2014).

⁴⁶ *Id.* (“[T]he persecutor’s views play a greater role in determining whether persecution is inflicted on account of the victim’s membership in a particular social group.”).

⁴⁷ *Matter of M-E-V-G-*, 26 I. & N. Dec. at 241 (“They overlap because the overall definition is applied in the fact-specific context of an applicant’s claim for relief.”).

⁴⁸ *Id.* The BIA further explained that “[s]ocietal considerations have a significant impact on whether a proposed group describes a collection of people with appropriately defined boundaries and is sufficiently ‘particular.’ Similarly, societal considerations influence

However, the BIA's interpretation creates a very narrow standard for applicants, increases the difficulty in providing proof, and confuses the requirements with overlapping definitional terms. In "*Rejecting the Children of Violence: Why U.S. Asylum Law Should Return to the Acosta Definition of 'A Particular Social Group,'*" Rachel Gonzalez Settlage noted the difficulty in proving the social distinction and the particularity requirements. Settlage stated "[p]articularity . . . suggests hard limits and requires specificity of definition. A group cannot be too broad or too diffuse. However, if a proposed social group has been defined with sufficient particularity, then it would likely be too narrow to meet the requirement of social distinction."⁴⁹ In other words, if the applicant provides evidence proving that the society in question uses specific parameters to define the social group, rendering them "socially distinct," these parameters may not satisfy the particularity requirement if the BIA finds that it is too "broad" or "amorphous."⁵⁰ Although Settlage discusses this difficulty for applicants that are fleeing gang violence,⁵¹ the standards can frustrate applicants from various backgrounds.

IV. ADMINISTRATIVE DEFERENCE AND THE *CHEVRON* TEST

Judicial deference grew from the "respect for the specialized expertise" government agencies held in addressing social and economic policy.⁵² Under the immigration law, many courts today cite *Chevron U.S.A. v. Natural Resources Defense Council* as the primary guide in determining when judicial deference is applicable to an agency's interpretation of law.⁵³ However, the *Chevron* Court failed to explicitly acknowledge the Administrative Procedure Act of 1946 as a foundational guideline.⁵⁴

whether the people of a given society would perceive a proposed group as sufficiently separate or distinct to meet the 'societal distinction' test." *Id.*

⁴⁹ Rachel Gonzalez Settlage, *Rejecting the Children of Violence: Why U.S. Asylum Law Should Return to the Acosta Definition of "A Particular Social Group,"* 30 GEO. IMMIGR. L.J. 287, 310 (2016).

⁵⁰ *Id.*; see also NAT'L IMMIGRANT JUST. CTR., PRACTICE ADVISORY: APPLYING FOR ASYLUM AFTER *MATTER OF A-B-* (Jan. 2019), <https://immigrantjustice.org/sites/default/files/content-type/page/documents/2019-01/Matter%20of%20A-B-%20Practice%20Advisory%20-%201.2019%20Update%20-%20Final.pdf>.

⁵¹ Settlage, *supra* note 49, at 328.

⁵² Goering, *supra* note 1, at 26.

⁵³ *Id.*

⁵⁴ *Id.* at 34.

A. Judicial Review Under the Administrative Procedure Act of 1946

The Administrative Procedure Act (“APA”) provides guidelines for administrative adjudication, hearings, rulemaking, and decisions.⁵⁵ Also, the APA provides standards for judicial review of agency action.⁵⁶ Under 5 U.S.C. § 706(2)(A), in order to set aside an agency’s action, courts must conclude that the regulation is “arbitrary and capricious, an abuse of discretion or otherwise not in accordance with the law.”⁵⁷

The APA’s goal is to strengthen the administrative process by providing limitations on the scope of judicial review.⁵⁸ In *Tailoring Deference to Variety with A Wink and A Nod to Chevron: The Roberts Court and the Amorphous Doctrine of Judicial Review of Agency Interpretations of Law*, J. Lyn Entrikin Goering observes that although the APA authorizes a broad range of judicial scrutiny, many courts fail to reference the APA or even take advantage of its full authority in reviewing agency actions.⁵⁹ However, there is no mention of the APA guidelines in *Chevron* or any reference to the APA as the initial foundation for the *Chevron* test itself.⁶⁰

B. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court held that judicial deference to an agency’s construction of a statute is warranted where the intent of Congress for that statute is unclear.⁶¹ In *Chevron*, respondents National Resources

⁵⁵ Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).

⁵⁶ *Id.*

⁵⁷ 5 U.S.C. § 706(2)(A) (2018).

⁵⁸ Goering, *supra* note 1, at 33.

⁵⁹ *Id.*

⁶⁰ *Id.* at 26. In the recent D.C. District Court decision *Grace v. Whitaker*, the Court applied both the APA § 706(2)(A) “arbitrary and capricious” standard and the *Chevron* balancing test. It pointed out that both doctrines overlap: “Although [this] review is deferential, ‘courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decision making.’” *Grace v. Whitaker*, 344 F. Supp. 3d 96, 122 (D.D.C. 2018) (citing *Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011)).

⁶¹ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (holding that “[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at

Defense Council, Inc., Citizens for a Better Environment, Inc., and North Western Ohio Lunch Association, Inc., challenged regulations announced by the Environmental Protection Agency (“EPA”).⁶² Specifically, respondents challenged the EPA’s construction of the “stationary source” in the 1977 Clean Air Act Amendments.⁶³ The Court of Appeals held for the respondents and set the regulations aside.⁶⁴ The Supreme Court held that the D.C. Circuit’s judgment resulted in error partly because it developed its own judicial definition of a term that lacked any congressional interpretation.⁶⁵ Under the *Chevron* test, the first step is to first determine whether the statutory language addresses the main question at issue.⁶⁶ If it does not, the court must determine whether Congress addressed the ambiguous provision in question.⁶⁷ According to the APA, if the statute includes an undefined term, its interpretation is considered to be a question of law and is generally within the court’s jurisdiction to apply traditional statutory interpretation.⁶⁸ If traditional statutory interpretation resolves the ambiguity, the court may apply its own interpretation, even if it differs from the agency’s interpretation.⁶⁹ Under *Chevron*, if the statute includes an undefined term, and Congress did not address the ambiguity, the Court is required to determine whether Congress delegated the authority to the agency to provide interpretation of the specific provision.⁷⁰ If “there is an express delegation of authority to the agency” to provide interpretation,⁷¹ the court will then review

issue, the court does not simply impose its own construction on the statute. . . . [T]he question for the court is whether the agency’s answer is based on a permissible construction of the statute.”); *see also* I.N.S. v. Aguirre-Aguirre, 526 U.S. 415 (1999).

⁶² *Chevron*, 467 U.S. at 841 n.3.

⁶³ *Id.* Under the 1977 amendments, industrialized states that failed to adopt the EPA’s 1970 amended air quality standards were required to establish permit programs for new stationary sources. The EPA defines “stationary sources” as “any building, structure, facility, or installation which emits or may emit any air pollutant.” *Id.* at 846. The 1977 amendments did not expressly reference “bubble concept” or contain the definition of the term “stationary sources.” *Id.* at 851. However, the EPA adopted an additional “plant wide” definition of stationary sources that allowed companies to exempt existing structures from complying with the permit requirement as long as the total amount of emissions did not increase. *Id.* at 854.

⁶⁴ *Id.*

⁶⁵ *Id.* at 842.

⁶⁶ Goering, *supra* note 1, at 43.

⁶⁷ *Chevron*, 467 U.S. at 842-43.

⁶⁸ Goering, *supra* note 1, at 43.

⁶⁹ *Id.*

⁷⁰ *Chevron*, 467 U.S. at 842-43.

⁷¹ *Id.* at 843.

“whether the agency’s answer is based on a permissible construction of the statute.”⁷²

The Supreme Court based its explanation on two basic principles. The first is acknowledging that Congress needs administrative agencies to fill in the gap where there is a lack of expertise knowledge: “The power of administrative agencies to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”⁷³ This “formulation of policy” includes technical as well as substantial knowledge. The second principle is acknowledging that Congress has expressly authorized the agencies to create the policies: “If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”⁷⁴

C. The Circuit Split

Applying the *Chevron* deference doctrine to the BIA’s interpretation of the PSG requirement spurred more confusion amongst the circuit courts. It cannot be denied that the visible social group interpretation is “largely a very malleable social construct.”⁷⁵ In *Persecution of Particular Social Groups and the much Bigger Immigration Picture*, R. George Wright stated that “[t]he circuit split is motivated in part by the availability of more, and less, literal families of interpretations of the idea of “social visibility.”⁷⁶ While many courts have applied the *Chevron* test and deferred to the BIA’s interpretation

⁷² *Id.* at 842-43.

⁷³ *Id.* at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199 (1974)).

⁷⁴ *Id.* at 843-44 (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.” (internal quotation marks omitted)).

⁷⁵ R. George Wright, *Persecution of Particular Social Groups and the Much Bigger Immigration Picture*, 62 CLEV. ST. L. REV. 163, 171-72 (2014).

⁷⁶ *Id.* at 170-71.

of the PSG requirement,⁷⁷ a minority of courts refuse to defer to the BIA's interpretation.

In *Scatambuli v. Holder*,⁷⁸ petitioners sought asylum protection because they feared persecution as “government informants.”⁷⁹ The Immigration Judge and the BIA denied the claim, finding that government informants were not a particular social group.⁸⁰ Petitioners argued that the BIA “improperly relied on the ‘social visibility’” aspect of the test.⁸¹ The First Circuit denied this argument, and found that the petitioners failed to satisfy the PSG requirement because the group was not well known and thus “not particularly visible.”⁸² In *Rivera-Barrientos v. Holder*, the Tenth Circuit upheld the social visibility and particularity standards and found the petitioner failed to satisfy the requirement.⁸³ Petitioner had claimed that she was persecuted on the basis of her membership in a particular social group: young females between the ages of 12 and 25 who resisted gang recruitment.⁸⁴ The BIA had rejected this as satisfying the PSG standard, finding that the group was not “defined with particularity” or “socially visible” enough to constitute a particular social group.⁸⁵ Petitioner argued that the BIA's determination was “arbitrary” and a limitation to the “statutory ‘particular social group’ basis for refugee status.”⁸⁶ However, the Tenth Circuit affirmed the BIA's determination, stating that “the particularity requirement flows quite naturally from the language of the statute [i]t is the BIA's responsibility to give meaning to all of the language of the statute, especially when there is some ambiguity as to its scope and application.”⁸⁷ In holding for the government, the Tenth Circuit

⁷⁷ The First and Tenth Circuits accepted the “social visibility” and “particularity” standards. *Id.* at 171; see also *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007) (holding that former/current gang membership does not constitute a particular social group for the purposes of the asylum statute); *Gonzalez v. U.S. Atty. Gen.*, 820 F.3d 399 (11th Cir. 2016) (same).

⁷⁸ *Scatambuli v. Holder*, 558 F.3d 53 (1st Cir. 2009).

⁷⁹ *Id.* at 55.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 60. The applicants argued that they were members of the purported group of “informants” who feared they would be killed if they returned to Brazil.

⁸³ *Rivera-Barrientos v. Holder*, 666 F.3d 641, 653 (10th Cir. 2012).

⁸⁴ *Id.* at 645. Petitioner was harassed, assaulted, and constantly pressured to join the “Mara Salvatrucha” or the “MS-13” gang in El Salvador. Gang members threatened to kill her family if she refused.

⁸⁵ *Id.* at 648.

⁸⁶ *Id.* at 649.

⁸⁷ *Id.*

expressed its support for and deference to the BIA's interpretation of the PSG requirement.

The Third and Seventh Circuit courts explicitly refused to apply *Chevron* deference to the BIA's interpretation of the particular social group. The Seventh Circuit addressed the new standards in *Gatimi v. Holder*.⁸⁸ Mr. Gatimi joined a political tribe in Kenya called Mungiki.⁸⁹ The group was known for violence, specifically they performed circumcision on the wives of other members.⁹⁰ Gatimi eventually left the group.⁹¹ The group then harassed Gatimi and threatened to kill him if he did not give up his wife to them for circumcision.⁹² The group killed his servant and pets and burned down his property.⁹³ Gatimi constantly asked the Kenyan government for assistance, but the government was unable to stop the group.⁹⁴ Both he and his wife eventually fled Kenya to the United States and applied for asylum.⁹⁵ The Seventh Circuit first noted that requiring the PSG to be socially visible did not make sense under circumstances of persecution:

Women who have not yet undergone female genital mutilation in tribes that practice it do not look different from anyone else. A homosexual in a homophobic society will pass as heterosexual. If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible; and to the extent that the members of the target group are successful in remaining invisible, they will not be "seen" by other people in the society "as a segment of the population."⁹⁶

⁸⁸ *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009).

⁸⁹ *Id.* at 613.

⁹⁰ *Id.*

⁹¹ *Id.* at 614.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 613.

⁹⁵ *Id.* at 614.

⁹⁶ *Id.* at 615.

The court declined to apply *Chevron* deference to the BIA's social visibility requirement because the BIA proved inconsistent in applying the new standard.⁹⁷

In the 2011 case *Valdiviezo-Galdamez v. Attorney General of U.S.*, the Third Circuit addressed the new particularity and social visibility standards for the PSG requirement.⁹⁸ Petitioner Valdiviezo-Galdamez argued that he had been persecuted on the basis of his membership in a particular social group and his political opinion, and had a well-founded fear that this persecution would continue if he returned to Honduras.⁹⁹ Valdiviezo-Galdamez had been kidnapped, beaten, and tortured by members of the MS-13 gang.¹⁰⁰ He had called police for assistance but the police failed to protect him.¹⁰¹ Petitioner eventually decided to come to the United States to flee the gang.¹⁰² The court evaluated the new standards under the PSG requirement.¹⁰³ It recognized that social visibility was not entitled to *Chevron* deference because it was inconsistent with the BIA's prior decisions.¹⁰⁴ The court explained that in previous decisions, the BIA recognized groups as "'particular social groups' where there was no indication that the group's members possessed 'characteristics that were highly visible and recognizable by others in the country in question' or possessed characteristics that were otherwise 'socially visible' or recognizable."¹⁰⁵ The court concluded that social visibility was an "unreasonable addition" to the PSG requirement.¹⁰⁶

Further, the court rejected the government's assertion that the particularity requirement was different from the social visibility element.¹⁰⁷ According to the government, the particularity requirement was an attempt to put boundaries on the size of the PSG,

⁹⁷ "When an administrative agency's decisions are inconsistent, a court cannot pick one of the inconsistent lines and defer to that one, unless only one is within the scope of the agency's discretion to interpret the statutes it enforces or to make policy as Congress's delegate." *Gatimi*, 578 F.3d at 616 (citing *AT & T Inc. v. FCC*, 452 F.3d 830, 839 (D.C. Cir. 2006) and *Idaho Power Co. v. FERC*, 312 F.3d 454, 461-62 (D.C. Cir. 2002)).

⁹⁸ *Valdiviezo-Galdamez v. Atty. Gen. of U.S.*, 663 F.3d 582 (3d Cir. 2011).

⁹⁹ *Id.* at 587.

¹⁰⁰ *Id.* at 586.

¹⁰¹ *Id.*

¹⁰² *Id.* at 587.

¹⁰³ *Id.* at 603.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 604.

¹⁰⁷ *Id.* at 608.

while social visibility helps to determine whether there is an identifying characteristic that confirms the group in question is set apart in society.¹⁰⁸ The court noted that particularity “appear[s] to be different articulations of the same concept” and the government’s attempt to distinguish between the two concepts produced more confusion than clarity.¹⁰⁹

D. *Chevron* Deference Should Not Be Applicable to Immigration Law

The concept of judicial deference is ill-fitted under immigration law. In the Duke Law Journal article, *The Judicial Deference to Administrative Interpretations of Law*, former Justice Antonin Scalia provided his perspective on *Chevron* and the history of judicial deference.¹¹⁰ As a supporter of the *Chevron* test, Scalia admitted that it is not readily clear why a court should accept an executive agency’s interpretation on a question of law.¹¹¹ Scalia noted that the *Chevron* test implicates traditional judicial authority outlined in *Marbury v. Madison*.¹¹²

However, Scalia pointed out that one of the “theoretical justifications” for the *Chevron* test was the fact that it was not meant to produce a genuine legislative intent, but was meant to operate “principally as a background rule of law against which Congress can legislate.”¹¹³ Scalia argued that if that justification is the real intended function for the test, then there is no reason to require that deference be consistent with agency interpretations of law.¹¹⁴ Without this requirement, it makes no sense to hold the agency to a strict standard of finding the one “correct” meaning of the statute.¹¹⁵ Instead, it is “free to give the statute whichever of several possible meanings it thinks most conducive to accomplishment of the statutory purpose.”¹¹⁶

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Scalia, *supra* note 1.

¹¹¹ *Id.* at 513.

¹¹² *Id.*

¹¹³ Scalia believed that in most cases subject to deference “Congress neither (1) intended a single result, nor (2) meant to confer discretion upon the agency, but rather (3) didn’t think about the matter at all.” *Id.* at 517.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

According to Scalia, this flexibility should be permitted in the administrative process.

Flexibility in the administrative process cannot work in the context of immigration law. The BIA has shown inconsistency in the way it applies its own standards. It is not justifiable to subject millions of refugee applicants who are seeking protection from violence to changing standards. This will only result in more inconsistent holdings and ambiguous language. Regarding the PSG requirement, it will be difficult for an applicant “to predict whether he or she will qualify as a refugee and obtain asylum or withholding of removal.”¹¹⁷

Furthermore, the courts’ obligation to adjudicate issues arising under the Refugee Act of 1980 should trump the *Chevron* doctrine.¹¹⁸ If courts continue to defer to the BIA’s interpretation of PSG, immigration law will become bifurcated with BIA’s interpretation on one side and the foundational principles of the Refugee Convention and the Refugee Act of 1980 on the other because the two are at odds with one another. In *The Board of Immigration Appeals’ New “Social Visibility” Test for Determining “Membership of A Particular Social Group” in Asylum Claims and Its Legal and Policy Implications*, Kristin A. Bresnahan argued that courts are “surprisingly willing to discount international law governing domestic asylum statutes by deferring to expansive Executive agency statutory interpretations that do not conform . . . with limitations created by U.S. international treaty obligations.”¹¹⁹ Not only does *Chevron* pose a threat to U.S. integrity regarding international treaties, but it also threatens domestic constitutional rights.

¹¹⁷ Hernandez Pimentel, *supra* note 34.

¹¹⁸ Kristin A. Bresnahan, *The Board of Immigration Appeals’ s New “Social Visibility” Test for Determining “Membership of A Particular Social Group” in Asylum Claims and Its Legal and Policy Implications*, 29 BERKELEY J. INT’L L. 649, 663-64 (2011) (“[s]uch ‘reflexive’ deference is not appropriate in the context of asylum law, where Congress’s passage of the Refugee Act of 1980 clearly and unambiguously stated its desire to conform domestic asylum law to the United States’ international obligations. As a result, congressional intent is thwarted when U.S. courts give *Chevron* deference to BIA decisions that do not conform to the Protocol’s provisions.”).

¹¹⁹ *Id.* at 662.

V. THREAT TO CONSTITUTIONAL RIGHTS IN JUDICIAL AND POLITICAL FRAMEWORKS

A. Unconstitutional Bias

The problem with *Chevron* deference is the potential risk of what Philip Hamburger calls “unconstitutional biases.”¹²⁰ In *Chevron Bias*, Hamburger argued that deference allows judges to defer, and essentially favor, the government’s position on a specific issue.¹²¹ This poses a greater risk in cases where the government is a party in the case.¹²² Deference poses a constitutional risk in two ways. First, it allows judges to distance themselves from the constitutionally mandated power of judicial review; it permits judges to abandon “independent judgment” for the sake of deferring to agency interpretation.¹²³ Article III of the Constitution imposes on a judge the highest honor of interpreting the law.¹²⁴ Judges are required to use independent judgment in reviewing the law, the basics of judicial review.¹²⁵ However, the act of deference is “an abandonment of a judge’s own independent judgment” and an abandonment of the judiciary itself. This act, he argues, contravenes with Article III of the Constitution.¹²⁶

Second, deference violates the Fifth Amendment by systematically favoring the government’s position on a specific interpretation of law and as a result, restricting due process.¹²⁷ The problem with *Chevron* is that judges defer to interpretations made by the government agencies even if the government is a party to the action. Hamburger states

¹²⁰ Hamburger, *supra* note 16, at 1211.

¹²¹ *Id.* at 1212.

¹²² *Id.*

¹²³ *Id.* at 1209.

¹²⁴ *Id.*

¹²⁵ *Id.* at 1206.

¹²⁶ *Id.* at 1209 (“Nonetheless, in administrative cases, although judges do not defer to the judgments of prosecutors, of employers, or of corporations, they regularly defer to the judgments of executive and other administrative agencies. The judges thereby abandon their very office as judges. A judge’s central office or duty, and therefore his power and very identity under Article III, is to exercise his own independent judgment in cases in accord with the law. He therefore cannot defer to executive or other administrative judgments about what the law is, but can defer only to the law.”).

¹²⁷ *Id.* at 1211.

under the Fifth Amendment's guarantee of due process, they [judges] at the very least are barred from engaging in systematic bias. Nonetheless, when they defer to administrative interpretation, they systematically favor executive and other governmental interpretations over the interpretations of other parties. They thus systematically exert bias toward the government and against other parties, in violation of the Fifth Amendment.¹²⁸

In light of this, it is not hard to imagine the challenges these threats pose in the context of refugee cases presented to administrative judges and the BIA. Asylum applicants already face challenges in facing immigration judges without representation.¹²⁹ Pro se applicants who may not be able to afford an attorney face a new and intimidating legal system, unfamiliar laws, and minimal to no resources. The idea that the *Chevron* deference doctrine affords judges the opportunity to implicate immigration cases with systematic biases is harrowing. It only proves that the odds are stacked against refugees before they have their day in court.

B. The Political Biases in Immigration Reform

As the highest officer of law enforcement in the country, the U.S. Attorney General plays an important role in executing our immigration system based on the immigration laws enacted by Congress. Some of the responsibilities of the position include overseeing the appointment of judges to immigration and administrative cases and determining how the laws should be interpreted.¹³⁰ The Attorney General also has broad discretion in deciding how the government should address the issue of immigrant

¹²⁸ *Id.* at 1212.

¹²⁹ TRAC IMMIGR., ASYLUM REPRESENTATION RATES HAVE FALLEN AMID RISING DENIAL RATES (Nov. 28, 2017), <http://trac.syr.edu/immigration/reports/491/> (demonstrating that the number of asylum seekers who are unable to obtain representation has risen over the last ten years and that statistics show that unrepresented cases are denied at a much higher rate than represented cases).

¹³⁰ "The Attorney General shall establish such regulations, prescribe such forms of bond, reports, entries, and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section." 8 U.S.C. § 1103(g)(2) (2018).

detention and rights to hearings.¹³¹ It is important that the Attorney General remain impartial and provide a balanced perspective in his decisions.

As a Republican Chairman of the Senate Judiciary Subcommittee on Border Security and Immigration, Jeff Sessions often took an anti-immigration stance on many issues.¹³² For example, he was a proponent of restricting legal immigration laws or “high skilled immigration” in favor of American workers and American taxpayers.¹³³ As senator, he also voted against the infamous “Gang of Eight” immigration reform deal in 2013, which proposed legislation that would simultaneously strengthen borders while creating a clearer pathway for legal immigration.¹³⁴ Although the position calls for impartiality, it is impossible for an Attorney General to be completely unbiased. The process of appointing the U.S. Attorney General is itself political: the president nominates and the U.S. Senate confirms the appointment. In the context of immigration, it is dangerous when the Attorney General abuses the political process to implement personal biases.

C. A Fight Against Crime or a Subtle Promotion of Xenophobia

As former Attorney General, Sessions took opportunities to further his anti-immigration agenda. In January 2017, President Trump signed an Executive Order to withdraw funding for sanctuary

¹³¹ *Id.*

¹³² Elizabeth B. Wydra, President, The Constitutional Accountability Center, Opposition Letter to Jefferson Sessions’ Nomination for Attorney General (Jan. 6, 2017), <https://www.judiciary.senate.gov/imo/media/doc/01.06.17%20CAC%20Letter%20on%20Sessions%20for%20AG.pdf> (“[A]fter the measure passed in the Senate, Sessions published the ‘Immigration Handbook for the New Republican Majority’ to aid House colleagues in defeating the House version.”).

¹³³ Sessions wrote an op-ed piece for the Washington Post in 2015, arguing for a “curb on immigration” to reduce the number of immigrants working in low wage jobs and preserve these jobs for U.S. workers. Jeff Sessions, *America Needs to Curb Immigration Flows*, WASH. POST (Apr. 9, 2015), <https://www.washingtonpost.com/opinions/slow-the-immigration-wave/2015/>

04/09/c6d8e3d4-dd52-11e4-a500-1c5bb1d8ff6a_story.html?utm_term=.c61035744b91.

¹³⁴ *Roll Call Vote 113th Congress – 1st Session*, U.S. SENATE (June 11, 2013), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm?congress=113&session=1&vote=00147 (voting on border security, economic opportunity, and the Immigration Modernization Act); see also Liz Halloran, *Gang of 8 Champion Plan, Declare ‘Year of Immigration Reform’*, NPR (Apr. 18, 2013), <https://www.npr.org/sections/itsallpolitics/2013/04/18/177780665/bipartisan-senate-gang-prepares-to-sell-immigration-plan>.

cities which refused to comply with the federal crackdown on immigration.¹³⁵ In March of 2017, Sessions announced that the administration would “claw-back” federal funds from sanctuary cities if the cities continued to “adopt policies designed to frustrate the enforcement of our immigration laws.”¹³⁶ He justified this decision on the grounds that (1) that sanctuary states are violating federal law, and (2) that crime will increase or go unfettered without limiting sanctuary policies.¹³⁷

These efforts to curtail immigration laws do not constitute a meaningful attempt at keeping our communities’ safe. Michael Hiltzik explained the misconceptions.¹³⁸ First, Hiltzik argued that Sessions mischaracterized the role of sanctuary laws. In the context of immigration law, sanctuary laws are laws that “limit government employees, particularly local police officers, from inquiring or disseminating information about the immigration status of immigrants whom they encounter.”¹³⁹ The laws intend to foster collaboration between local enforcement and communities, rather than a blatant disregard of federal laws.¹⁴⁰ These laws were not intended to be a shield to keep aliens within the cities and deny federal authority.¹⁴¹ Second, Hiltzik indicated that forcing states to comply with federal law infringes upon separation of powers and violates the constitutionally protected state police powers.¹⁴² Third, Sessions overstated the

¹³⁵ U.S. Courts have already declared the order unconstitutional. *See City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1235 (9th Cir. 2018).

¹³⁶ *Attorney General Jeff Sessions Delivers Remarks on Sanctuary Jurisdictions*, U.S. DEP’T JUST. (Mar. 27, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-sanctuary-jurisdictions>.

¹³⁷ *Id.*

¹³⁸ Michael Hiltzik, *Here’s What Atty. Gen. Sessions Got Wrong About the Law in His Attack on Sanctuary Cities*, L.A. TIMES (Mar. 28, 2017), <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-sanctuary-sessions-20170328-story.html>.

¹³⁹ Rose Cuison Villazor, *What is a Sanctuary?*, 61 SMU L. REV. 133, 148 (2008).

¹⁴⁰ “Localities have traditionally adopted these policies for a number of reasons, including the promotion of the general welfare and safety of all residents in their jurisdictions, including unauthorized immigrants. Local police departments, for example, have adopted ‘non-cooperation’ or ‘don’t ask, don’t tell’ policies to further public safety concerns.” *Id.*

¹⁴¹ “They’re not designed specifically to ‘shield aliens’ from deportation, but rather to create a working relationship between the police and the communities they serve.” Hiltzik, *supra* note 138.

¹⁴² The U.S. District Court in California concluded that the order violated the separation of powers and the President does not have the power to impose conditions of federal funds and, therefore, cannot delegate the power. *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 531 (N.D. Cal. 2017), *reconsideration denied*, 267 F. Supp. 3d 1201 (N.D. Cal. 2017), *appeal dismissed as moot sub nom.* *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1235 (9th

connection between a lack of immigration limitations and crime rates. A 2016 report proved that crime has fallen since the 1990s.¹⁴³ Finally, Sessions exaggerated when he claimed that sanctuary policies violated Section 1373.¹⁴⁴ The law did not require a state to gather information on an individual's status.¹⁴⁵

On the surface, Sessions' announcement demonstrated concern for the safety of American communities. He argued that these states are hiding immigrants, while letting crime infest the neighborhoods, at the expense of the community's safety. However, Sessions was in danger of implicating the anti-commandeering principal.¹⁴⁶ He used his platform to enact policies that aligned with his extreme views, something that he failed to do as Chairman of the Immigration subcommittee in the Senate. In other words, he interjected his own personal bias in policy making. In the immigration context, this conduct is dangerous. The Attorney General operates as the leader of these agencies that regulate and enforce immigration laws. He also may refer immigration decisions to himself to review.¹⁴⁷ The *Chevron* doctrine allows courts to defer to the agency's interpretation of the law. But a problem arises when the interpretation of the law is inconsistent with Congress's intentions.

Cir. 2018). Hiltzik states "Defenders of states and cities point to the 10th Amendment, which has been widely interpreted as protecting state and local law enforcement agencies from being "commandeered" by the federal government to enforce federal law—such as immigration law. That places serious limits on the government's ability to demand cooperation from localities for immigration sweeps or even detention of suspected undocumented immigrants." Hiltzik, *supra* note 138.

¹⁴³ Louis Jacobson, *Donald Trump said 'Crime is rising.' It's not (and Hasn't Been for Decades)*, POLITIFACT (June 9, 2016), <https://www.politifact.com/truth-o-meter/statements/2016/jun/09/donald-trump/donald-trump-said-crime-rising-its-not-and-hasnt-b/>.

¹⁴⁴ The law states in relevant part: "Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. § 1373(a) (2018).

¹⁴⁵ *See id.*

¹⁴⁶ *City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 873 (N.D. Ill. 2018) (holding that the law violated the Tenth Amendment on its face: "In the end, [Section 1373] robs the local executive of its autonomy and ties the hands of the local legislature. Such affronts to State sovereignty are not countenanced by the anticcommandeering principle of the Constitution. Section 1373 is unconstitutional and cannot stand.").

¹⁴⁷ 8 C.F.R. § 1003.1(h)(1) (2018).

VI. THE REFERRAL PROVISION AND THE EFFECT

A. Self-Referral Provision

8 C.F.R. § 1003.1(h)(1) states in relevant part that “the Board shall refer to the Attorney General for review of its decision all cases that (i) the Attorney General directs the Board to refer to him; (ii) [t]he Chairman or a majority of the Board believes should be referred to the Attorney General for review.”¹⁴⁸ This authority was first established in regulations issued in 1940¹⁴⁹ and has since gone through amendments.¹⁵⁰ Only three actors can use the self-referral: The Attorney General, the BIA, and the Secretary of the Department of Homeland Security.¹⁵¹ There is no regulations in place to guide the Attorney General on how to refer the case to himself or herself or how to review the case.¹⁵² Also, notice of self-referral is not required to be provided to the litigants.¹⁵³ The Attorney General reviews the case on a *de novo* standard.¹⁵⁴ The Attorney General’s decision is given precedential treatment and is binding on government and parties to the action.

The lack of procedural limitations on the authority poses a threat to an applicant’s right to due process. In *Disruptive Immigration Power*, Professor Bijal Shah evaluated the self-referral provision and the consequences of its use.¹⁵⁵ She argued that the lack of procedural limits to the referral power allows the Attorney General to prioritize the agency’s interests such as reaffirming the agency’s role in immigration policy making and the government’s defense in immigration litigation.¹⁵⁶ These interests favor the government’s position at the expense of the noncitizen litigant.¹⁵⁷

¹⁴⁸ *Id.*

¹⁴⁹ Hon. Alberto R. Gonzales & Patrick Glenn, *Advancing Executive Branch Immigration Policy Through the Attorney General’s Review Authority*, 101 IOWA L. REV. 841, 850 (2016) (citing to 8 C.F.R. § 90.12 (1940)).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 852.

¹⁵² *Id.* at 853.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 856.

¹⁵⁵ Bijal Shah, *The Attorney General’s Disruptive Immigration Power*, 102 IOWA L. REV. 129 (2017).

¹⁵⁶ *Id.* at 135.

¹⁵⁷ *Id.* at 136 (“And yet, to the extent aims furthering the agency’s immigration interests are achieved and maintained at the expense procedural transparency, due process, and of

Furthermore, the self-referral mechanism is disruptive.¹⁵⁸ When the Attorney General self-refers, the action is automatically stayed pending the review.¹⁵⁹ Shah describes this as an interruption of “the organic development of immigration law by the federal courts”¹⁶⁰ and an alteration of longstanding doctrine.¹⁶¹ The self-referral mechanism permits the Attorney General to review foundational decisions and overturn longstanding interpretation.¹⁶² Sessions’ decision in the *Matter of A-B-* portrays the disruptive use of the self-referral mechanism.

B. The *Matter of A-R-C-G-* & *Matter of A-B-*

On June 11, 2018, Sessions vacated *Matter of A-B-* and expressly overruled *Matter of A-R-C-G-*.¹⁶³ In *Matter of A-R-C-G-*, the BIA held that married women in Guatemala who are unable to leave their relationship is a particular social group within the meaning of the asylum statute.¹⁶⁴ Although Guatemala has laws to prevent domestic violence, enforcement of those law was “problematic.”¹⁶⁵ It was clear that the government refused to assist respondent; she appealed to the local police multiple times for protection, and the police refused to assist her.¹⁶⁶ Further, the BIA found evidence supporting the assertion

independent decision-making, exercise of the referral and review power runs counter to administrative decision-making norms and may even be unconstitutional.”).

¹⁵⁸ *Id.* at 144.

¹⁵⁹ Gonzales & Glenn, *supra* note 149, at 853.

¹⁶⁰ Shah, *supra* note 155, at 144.

¹⁶¹ *Id.* (“In one example, the Attorney General effectively altered longstanding judicial doctrine by adopting a minority court’s view. Here, most courts . . . had upheld the BIA’s decision in *Matter of C-Y-Z-*, which established that forced sterilization of one spouse is an act of persecution against the other spouse. The Second Circuit reversed the BIA by holding that the statute in question did not provide for per se refugee status for the spouses of those who had undergone involuntary or forced sterilizations and abortions. After the Second Circuit issued its decision, the Attorney General overruled the BIA in a subsequent case in order to reaffirm the federal court’s opinion.”).

¹⁶² *Id.* at 146 (“In one circumstance, the BIA twice reversed the immigration judge[’s] denial of asylum on the grounds that the immigration judge did not meet the standard set out in statute to prohibit status on the basis of national security. The Attorney General then reversed the BIA’s decision by creating and applying a new standard that diverged from statute in order to increase the national security barrier to asylum. Some, but not all federal circuits, including the Second, Third and Ninth Circuits, have questioned or declined to defer to the Attorney General’s new standard.”).

¹⁶³ *Matter of A-B-*, 27 I. & N. Dec. 316, 317 (A.G. 2018).

¹⁶⁴ *Matter of A-R-C-G-*, 27 I. & N. Dec. 388, 390 (B.I.A. 2014).

¹⁶⁵ *Id.* at 394.

¹⁶⁶ *Id.* at 389.

that married women were subject to sexual offenses such as spousal rape in Guatemala.¹⁶⁷

On March 7, 2018, Jeff Sessions moved to refer to himself the case *Matter of A-B-* for review.¹⁶⁸ The 2016 BIA case dealt with an El Salvadorian woman fleeing domestic abuse and found that the women successfully established the PSG standard, based on the test developed in *Matter of A-R-C-G-*.¹⁶⁹ Sessions requested parties to submit briefs answering the issue on “whether being a victim of private criminal activity constitutes a cognizable ‘particular social group’ for purposes of an application for asylum or withholding of removal.”¹⁷⁰

According to Sessions, the BIA failed to apply the correct applicable law in *Matter of A-R-C-G-*.¹⁷¹ Specifically, he argued that

[S]uch applicants must establish membership in a particular and socially distinct group that exists independently of the alleged underlying harm, demonstrate that their persecutors harmed them on account of their membership in that group rather than for personal reasons, and establish that the government protection from such harm . . . is so lacking that their persecutors’ actions can be attributed to the government.¹⁷²

He was critical of the BIA’s decision to accept stipulations from the Department of Homeland Security (“DHS”) confirming respondent as a member of a particular social group.¹⁷³ Sessions examined the particular social group standard and held that groups “defined by their vulnerability to private criminal activity” do not constitute a particular social group. For these reasons, he concluded, claims for domestic violence or gang violence would not qualify for asylum.¹⁷⁴

¹⁶⁷ *Id.*

¹⁶⁸ *Matter of A-B-*, 27 I. & N. Dec. at 317.

¹⁶⁹ The decision was unpublished, but counsel released a redacted copy of the court’s decision. Daniel M. Kowalski, *Due Process, Asylum Protections for Women Under Attack: Matter of A-B- Revealed*, LEXISNEXIS LEGAL NEWSROOM (Mar. 13, 2018), <https://www.lexisnexis.com/legalnewsroom/immigration/b/immigration-law-blog/posts/due-process-asylum-protections-for-women-under-attack-matter-of-a-b-revealed>.

¹⁷⁰ *Matter of A-B-*, 27 I. & N. Dec. at 317.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 331.

¹⁷⁴ *Id.* at 335; *see also* Grace v. Whitaker, 344 F. Supp. 3d 96, 108-09 (D.D.C. 2018).

Next, Sessions discussed the persecution requirement.¹⁷⁵ He explained that the persecution must include (1) an intent to target a belief or characteristic, (2) severe harm, and (3) suffering inflicted by the government or by persons the government was unable or unwilling to control.¹⁷⁶ A petitioner who suffers from a private actor, he explained, must show that “the government condoned the private actions ‘or at least demonstrated a complete helplessness to protect the victims.’”¹⁷⁷

Finally, Sessions discussed the nexus requirement between the harm inflicted and membership in a particular social group.¹⁷⁸ He explained that where a private actor inflicts violence, being a member of the social group may not be the “central” reason for the harm.¹⁷⁹ According to Sessions, in *A-R-C-G-*, there was no evidence that petitioner was attacked because her husband was hostile to her being a married woman in Guatemala who is unable to leave the relationship.¹⁸⁰

Sessions’ opinion is an example of why judicial deference may be ill-fitted under the immigration context: deferring to an opinion such as *Matter of A-B-*, which only fueled more confusion and put political and social biases on center stage, harms applicants who may not know how to satisfy the changing standards.¹⁸¹ In the case where an applicant is establishing past persecution to prove fear of future persecution, the petitioner’s alleged social group will inevitably be defined by the persecution itself.¹⁸²

VII. DUE PROCESS AS AN IRREVOCABLE RIGHT

Having evaluated the ways in which judicial deference and the self-referral mechanism can threaten basic constitutional rights for noncitizen applicants and risk undoing basic constitutional values in

¹⁷⁵ *Matter of A-B-*, 27 I. & N. Dec. at 337.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 338.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Courts have held that an applicant is required to only prove fear of future persecution. In order to do so, the applicant must establish past persecution on account of a protected ground. However, Sessions compiled the requirements for proving future persecution under the general umbrella of “persecution.” NAT’L IMMIGRANT JUST. CTR., *supra* note 50.

¹⁸² *Id.*

the name of favoritism and bias, the author in this Part evaluates ways in which these doctrines can be used to avoid infringing on a refugee's right to due process.

A. *Chevron* Deference Deserves More Scrutiny from The Courts

Under immigration law, the application of *Chevron* deference should be consistent with the principles of due process under the U.S. Constitution. One solution would be to cease deference in immigration cases. The *Chevron* doctrine allows courts to defer to an agency's interpretation of law, essentially abandoning their own constitutionally mandated authority to review and interpret the law. In extinguishing the *Chevron* doctrine, the rulemaking authority of agencies would be more defined and less indirect.¹⁸³

Another solution would be for courts to actually consider the constitutional ramifications of applying *Chevron* deference. Courts should consider whether deference would result in substantial deprivation of due process in litigation. Perhaps there should be additional standards applied on a case by case basis to determine whether the case merits *Chevron* deference: where a case involves the government, the court should look to see if the agency has a record of being unbiased and direct in its application of the law for that specific issue. In the context of immigration law, judges should not only look to see if the BIA's interpretation of the law is consistent with presumable congressional intent, but should also look to see if the BIA has applied the law consistently, without bias. This may ensure that judges do not blindly defer to an agency's interpretation, but instead take extra care in making sure that the foundational principle of due process is upheld. An example of this is the recent District Court decision *Grace v. Whitaker*, in which the court expressly overruled *Matter of A-B-*.

¹⁸³ Hamburger, *supra* note 16, at 1240 (“Many agencies would therefore eventually seek an expansion of express and specific congressional authorization of rulemaking, and Congress would probable oblige them. In place of relying on ambiguity to convey power to agencies, Congress would increase its express and specific statutory authorization, including substantial statutory detail and clarity about the parameters of the agencies’ rulemaking authority.”).

B. *Grace v. Whitaker & The Power of Judicial Review Under APA & Chevron Deference.*

In *Grace v. Whitaker*, asylum applicants brought an action against the Attorney General arguing that the new credible fear policies outlined in *Matter of A-B-* violated the APA and INA.¹⁸⁴ The plaintiffs in the action were twelve adults and children.¹⁸⁵ Each plaintiff was fleeing gang and/or domestic violence from Central America and seeking asylum in the United States.¹⁸⁶ Each applicant was found to have credible fear of persecution pursuant to 8 U.S.C. § 1225(b)(1)(B)(ii).¹⁸⁷ However, asylum officers determined that pursuant to the standards in *Matter of A-B-*, plaintiffs' claims resulted in negative credible fear determinations.¹⁸⁸

The court applied both the “arbitrary and capricious” standard under the APA and *Chevron* deference doctrine,¹⁸⁹ and held that the credible fear policies in *Matter of A-B-* violated immigration laws.¹⁹⁰ The court reviewed the PSG and persecution standards set forth in *Matter of A-B-*.¹⁹¹ Under step one of the *Chevron* test, the court determined that the phrase “particular social group” was ambiguous under 8 U.S.C. § 1158 because Congress did not attach any specific meaning to it in the Refugee Act of 1980.¹⁹² The Court acknowledged that although the INA does not define “particular social group,”¹⁹³ Congress intended that the Refugee Act conform to the Protocol of

¹⁸⁴ *Grace v. Whitaker*, 344 F. Supp. 3d 96, 122 (D.D.C. 2018). In laying out the legal foundation, the Court first outlined the asylum regulations: before determining whether an applicant is a refugee as defined under 8 U.S.C. § 1101(a)(42)(A), the applicant must be subjected to an expedited removal procedure in which petitioners are given a summary removal process instead of a full hearing before an immigration judge. However, under 8 U.S.C. § 1225(b)(1)(B)(ii), “if an alien indicates either an intention to apply for asylum . . . or a fear of persecution” the alien must be referred for an interview with a U.S. Citizenship and Immigration Services asylum officer. The standard for determining whether the alien has credible fear is a “low screening standard.” If the officer finds that credible fear exists, the alien is taken out of the expedited removal process and afforded a standard removal hearing before the immigration judge. *Id.* at 106-07.

¹⁸⁵ *Id.* at 111.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 112.

¹⁸⁹ *Id.* at 120-122.

¹⁹⁰ *Id.* at 105.

¹⁹¹ *Id.* at 122.

¹⁹² *Id.*

¹⁹³ *Id.* at 123.

1967.¹⁹⁴ The court explained that since Congress accepted the definition of “refugee,” it accepted the definition of “particular social group” under the Protocol.¹⁹⁵ As a result, “particular social group” at the time of the act “normally comprises persons of similar background, habits, or social status.”¹⁹⁶

In addition, the court held that Congress had not spoken directly to the issue of whether gangs and domestic-related violence satisfies the PSG requirement.¹⁹⁷ The court concluded that this issue, along with the term “particular social group,” was ambiguous under the first step of *Chevron* test.¹⁹⁸ This allowed the court to proceed to “step two” of the *Chevron* test to determine whether Sessions’ interpretation of the PSG standard was “arbitrary and capricious.”¹⁹⁹ Sessions’ decision and attempt to exclude gang and domestic related violence from credible fear determinations were not “adequately explained nor supported by agency precedent.”²⁰⁰ The court held that the “general rule against domestic violence and gang-related claims during credible fear determination is arbitrary and capricious and violates the immigrations laws.”²⁰¹ Finally, after going through the *Chevron* analysis, the court found that Sessions was not authorized to recreate a new persecution definition because the term was not historically an ambiguous term under the statute.²⁰²

Whitaker exemplifies how courts should utilize both the APA’s authorization for judicial review of agency actions and the *Chevron* doctrine. The doctrine should not be a mechanism where judicial courts blindly defer to an agency’s interpretation of statutes. It is true that the *Chevron* doctrine is a necessary tool for courts to utilize an agency’s technical knowledge in specialized area of law. But this does not mean courts are completely absolved from applying judicial review of agency actions. This Note does not argue that the BIA should

¹⁹⁴ *Id.* at 124.

¹⁹⁵ *Id.*

¹⁹⁶ The United Nations High Commissioner for Refugees (UNHCR) handbook defines the terms under the Protocol. The court explained “The UNHCR Handbook states that ‘a “particular social group” normally comprises persons of similar background, habits, or social status.’” *Id.* (citing UNHCR Handbook at Ch. II B(3)(e) ¶ 77).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 125.

²⁰⁰ *Id.* at 127.

²⁰¹ *Id.*

²⁰² *Id.* at 130.

become obsolete in its role. Nor should the judicial courts review all immigration cases. The goal of this article is to analyze the dangers of masquerading personal biases as precedential law and the effects this has under the current U.S. immigration system. Courts must apply judicial scrutiny to review agency interpretations of statutes and serve as a check on administrative adjudicators.

C. The Self-Referral Mechanism Needs Procedural Limits

In *Disruptive Immigration Power*, Professor Bijal Shah introduces various ways in which the Attorney General may use the referral mechanism to not infringe on one's rights to due process.²⁰³ One way is to provide more procedural limitation to ensure due process is given to applicants in litigation. In moving to self-refer a case, the Attorney General should be required to provide actual notice to the litigants detailing her intentions on the case and the guidelines in providing briefs to support opposing positions. In doing so, counsel will not be blindsided by the Attorney General's decision. Further, there should be time limits for the Attorney General to exercise the self-referral provision. The Attorney General should not be allowed to overturn precedent that resulted in years of rulings, reverting the status of many refugees and ultimately causing more disruption than clarity.

VIII. CONCLUSION

Permitting courts to defer to an agency's interpretation of important immigration laws causes confusion and distances U.S. immigration law from its initial purposes. U.S. Circuit courts providing deference to the BIA's interpretation of the PSG requirement has resulted in confusion and division amongst adjudicators and jurisdictions. Further, Jeff Sessions' work as a senator, and later as U.S. Attorney General, exacerbated his divisiveness, resulting in his overturning decades worth of

²⁰³ Shah, *supra* note 155, at 139 ("One targeted solution would be to prioritize rule of law values by creating uniform procedural requirements for the exercise of the referral and review tool. More specifically, these norms could be furthered by implementing standardized procedural requirements (such as notice, a briefing schedule, a consistent role for noncitizens' counsel, etc.) for the Attorney General's exercise of the referral and review mechanism. . . . [S]uch measures would be more effective if concretized by legislation or regulations, and thus not subject to discretionary alteration by the Attorney General.").

immigration precedents via an often-unused procedural mechanism: a self-serving decision rooted in political bias and improper generalizations about immigrants from Central America. As such, the self-referral provision should be amended to prevent abuse of the provision by the Attorney General.

The *Chevron* doctrine and self-referral mechanism contravene constitutional principles. They hurt asylum applicants by injecting political biases into the immigration process and allow adjudicators to discard their duties to interpret the law and apply independent judgment. It is important to have an efficient immigration system. However, this should not come at the expense of the rights to due process for those whose primary goal is to seek a better life and second chance in the United States.