Death of the Particular Social Group

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Abstract

Applicants seeking asylum in the United States must demonstrate that they fear persecution on account of one of five protected grounds—race, religion, national origin, political opinion, or membership in a particular social group (PSG). The PSG ground has long been the most complex and challenging avenue for relief, and in the Trump era, already precarious protections for vulnerable people such as survivors of intimate partner and gang violence were further impaired.

The Board of Immigration Appeals’ first, and longstanding, definition of a PSG in Matter of Acosta required members to possess “common immutable characteristics,” those that, like the other statutory grounds, either could not be changed or were so fundamental that one should not be required to change them. This Article reveals that since the Board imposed two additional requirements—that PSGs possess social distinction and particularity—over a decade ago, the Board has recognized only two new particular social groups. Both of those groups, one protecting survivors of domestic violence and the other family membership, were invalidated by Trump administration attorneys general. Thus, when examining BIA jurisprudence, it appears that the particular social group is dead.

This Article discusses the evolution of the particular social group ground in both domestic and international law and reviews the disparate treatment of PSGs by the Board of Immigration Appeals and federal circuit courts. It then makes recommendations—including legislation, reconsideration of the attorney general’s broad authority to overrule cases using the power of self-referral, and consideration of whether Chevron deference remains appropriate for PSG jurisprudence—for a return to the more equitable, and legally sound, Acosta immutability test.

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Asylum seekers faced relentless attacks in the Trump era. The former president “consistently characterized asylum as a ‘loophole’ in U.S. southern border security” and sought to curtail both access to asylum and the rights of those seeking refuge in the United States.1 After instituting a “zero tolerance” policy,2 under which asylum seekers who enter the United States without authorization are


criminally prosecuted, the administration separated children from their parents detained pursuant to the new directive.\(^3\) A rule promulgated in July 2019 stated that anyone who had passed through a country other than their own while en route to the southern border of the United States would be denied asylum if they did not apply for protection in the transit country.\(^4\) The administration placed limits on the number of individuals who are permitted to enter the United States to apply for asylum at ports of entry each day; this “metering” policy led to people “waiting weeks or sometimes months for their opportunity to request asylum.”\(^5\) Those who were able to enter and declare their intention to apply for asylum were sent to Mexico to await future court hearings.\(^6\) Others, including children, are held in overcrowded and unhygienic detention centers.\(^7\) Those who can overcome the newly heightened standards\(^8\) for passing credible fear interviews\(^9\) are ineligible for release on bond if transferred from expedited to full removal proceedings.\(^10\) Asylum applicants are no longer entitled to full evidentiary hearings,\(^11\) are being


9. Individuals who enter the United States without authorization and claim fear of returning to their home country must demonstrate “credible fear” in order to remain in the United States. 8 C.F.R. § 1208.30 (2020). During the credible fear interview, an asylum officer determines whether there is a “reasonable possibility” that the applicant could establish eligibility for asylum. 8 C.F.R. § 1208.31(c) (2020).


charged fees for their applications for the first time in history, and can be denied work permits as they wait years for their applications to be adjudicated. And after years of methodically chipping away at the rights and dignity of asylum seekers, in June 2020, the Trump administration launched its most significant attack, when it issued comprehensive regulations that would systematically dismantle nearly every aspect of our nation’s asylum laws.

Another significant but underexplored way that the Trump administration attempted to undermine the rights of asylum seekers was by limiting the already precarious jurisprudence of “particular social group” (PSG), one of the five grounds for asylum in the United States. Unlike the other bases for asylum—race, religion, national origin, and political opinion—the particular social group ground is more subjective and open to interpretation. It is not defined in either international or domestic law, which has led to varied and evolving definitions across time and jurisdictions. As its jurisprudence has developed, the PSG ground has provided critical protections to many fleeing serious harms, in particular, harms that were not foreseen when the asylum regime was created in the aftermath of World War II, such as intimate partner abuse, gang-based violence, and persecution of LGBTQ and disabled individuals.

The Board of Immigration Appeals (BIA), the highest administrative body to interpret U.S. immigration laws, defined particular social group in the landmark 1985 case Matter of Acosta. Its definition—requiring groups to possess common immutable characteristics—drew from international interpretations as well as established concepts of statutory construction. Several PSGs were recognized by the Board after the Acosta decision, but approximately 20 years later, the court

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15. See Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36,264 (June 15, 2020). The regulations impact nearly every facet of asylum law, including who may enter the United States to seek asylum, who is eligible for a hearing before an Immigration Judge, and the definitions of key terms in the refugee definition, such as persecution, political opinion, and particular social group. See id.


17. See infra Section III.A.
introduced two new criteria—particularity\(^{18}\) and social distinction\(^{19}\)—to the PSG definition. Since that time, the Board has recognized only two new particular social groups: a group encompassing survivors of domestic violence in 2014,\(^{20}\) and a group defined by family membership in 2017.\(^{21}\)

As was extensively detailed in the media,\(^{22}\) in June 2018, Attorney General (AG) Sessions issued Matter of A-B-\(^{23}\) overruling the case that granted asylum to those fleeing intimate partner abuse. A little over a year later, AG Barr overruled Matter of L-E-A-\(^{24}\) the case that recognized family as a particular social group. The actions of these two attorneys general have effectively eradicated the particular social group ground, as the Board of Immigration Appeals has not recognized a valid social group that its parent agency, the Department of Justice (DOJ), has upheld since new requirements were added fifteen years ago.\(^{25}\)

\(^{18}\) See Matter of S-E-G-, 24 I. & N. Dec. 579, 584 (B.I.A. 2008) (defining “particularity” as “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”).

\(^{19}\) See Matter of C-A-, 23 I. & N. Dec. 951, 951 (B.I.A. 2006) (“The social visibility of the members of a claimed social group is an important consideration in identifying the existence of a ‘particular social group’ for the purpose of determining whether a person qualifies as a refugee.”); Matter of M-E-V-G-, 26 I. & N. Dec. 227, 227 (B.I.A. 2014) (renaming the “social visibility” element “social distinction,” and holding that “[a]n applicant for asylum . . . based on ‘membership in a particular social group’ must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question”); Matter of W-G-R, 26 I. & N. Dec. 208, 208 (B.I.A. 2014) (pronouncing the same).

\(^{20}\) Matter of A-R-C-G-, 26 I. & N. Dec. 388, 389–90 (B.I.A. 2014) (finding that “the lead respondent, a victim of domestic violence in her native country, is a member of a particular social group composed of ‘married women in Guatemala who are unable to leave their relationship’”).

\(^{21}\) Matter of L-E-A-, 27 I. & N. Dec. 40, 42 (B.I.A. 2017) (“We agree with the parties that the members of an immediate family may constitute a particular social group.”).


\(^{24}\) 27 I. & N. Dec. at 40.

\(^{25}\) As will be detailed, infra Section IV, a small number of federal courts have declined to follow the BIA’s PSG jurisprudence. Further, because decisions of a federal circuit court are binding on the BIA when it considers cases arising in that circuit, the PSG is alive and well in those jurisdictions. See Singh v. Ilchert, 63 F.3d 1501, 1508 (9th Cir. 1995) (citing NLRB v. Ashkenazy Prop. Mgmt. Corp., 817 F.2d 74, 75 (9th Cir. 1987), cert. denied, 501 U.S. 1217 (1991) (asserting that “[a] federal agency is obligated to follow circuit precedent in cases originating within that circuit”). However, the BIA’s decisions remain critically important in this area because they provide uniformity and, perhaps more importantly, are a statement of values from the agency tasked with interpreting immigration law.
This Article describes and explains the particular social group’s evolution and demise. Section II details the PSG definition in both international and domestic law. Section III discusses the application of the U.S. definition by the Board of Immigration Appeals, which has imposed requirements that are unduly restrictive and inconsistent with international law. Section IV examines the federal courts of appeals’ review of the BIA’s PSG jurisprudence, with some circuit courts accepting and others rejecting the administrative court’s evolving definition. Section V proposes ways to resuscitate the particular social group, including through legislative action, addressing the overuse of attorney general certification, and a reexamination of whether *Chevron* deference remains appropriate for PSG jurisprudence. Section VI concludes.

II. EVOLUTION OF THE PARTICULAR SOCIAL GROUP DEFINITION

The term “particular social group” is not defined in either the international treaties or domestic statutes in which it originated. Neither the United Nations nor U.S. legislative history provide insight into the meaning of the term. As such, “[b]oth courts and commentators have struggled to define” the phrase. This section traces the origins and evolution of the definition of particular social group, first in the international community and in its eventual adoption and modification in the United States, in an effort to better understand its meaning and significance.

A. International Definitions

The grounds for asylum that are widely in use across the world today were established in the 1951 Convention Relating to the Status of Refugees. Nations came together to protect European refugees who had been displaced in the aftermath of World War II. Sixteen years later, the 1967 Protocol Relating to the Status of Refugees expanded the scope of the Convention to refugees beyond Europeans impacted by the second World War. Together, the Convention and the...
Protocol “remain the cornerstone of refugee protection” to this day. The United States acceded to the Protocol in 1968 and is therefore bound by all the substantive provisions of the Refugee Convention.

The Convention defines a refugee as an individual who:

[o]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

This refugee definition was developed over a series of meetings at the Conference of Plenipotentiaries held in Geneva in 1951. At the third meeting of the conference, the Swedish representative proposed an amendment to add membership of “a particular social group” as a ground for asylum. In support of his proposal, he simply noted that “experience had shown that certain refugees had been persecuted because they belonged to particular social groups. The draft Convention made no provision for such cases, and one designed to cover them should accordingly be included.” At a later meeting, he added that “such cases existed, and it would be as well to mention them explicitly.”

The conference unanimously adopted the amendment to add “particular social group” to the refugee definition without discussion, debate, or comment. Scholars and jurists have speculated about the drafter’s intentions, suggesting that the PSG ground was included to protect against persecution for reasons that could not be foreseen or “in order to stop a possible gap in the coverage of the U.N. Convention.” But in the absence of a written historical record, a conclusive answer remains elusive.

31. UNHCR Convention Background, supra note 29, at 1.
33. 1951 Convention, supra note 28, at art. 1.
35. Id.
The United Nations High Commissioner for Refugees (UNHCR)\(^{39}\) attempted to provide some clarity by issuing guidelines on the particular social group ground in 2002.\(^{40}\) A product of the Global Consultations on the International Protection of Refugees, the PSG Guidelines are intended to provide “legal interpretive guidance for governments, legal practitioners, decision-makers and the judiciary.”\(^{41}\) As the Guidelines were issued more than fifty years after the refugee definition was created, their standards inherently take into account nations’ analysis and application of the PSG ground in the intervening time.

The Guidelines recognize that PSG “is the ground with least clarity” but that any “proper interpretation must be consistent with the object and purpose of the Convention,” which requires that the term be understood “in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.”\(^{42}\) UNHCR then describes two potential ways in which the term “particular social group” had come to be understood in international jurisprudence—the “protected characteristics” approach and the “social perception” approach.

A particular social group that is defined by protected characteristics requires members of the group to possess “a characteristic or association that is so fundamental to human dignity that a person should not be compelled to forsake it.”\(^{43}\) The protected characteristics approach is followed by many “major common law countries, [including] the United States, Canada, New Zealand, and the United Kingdom.”\(^{44}\) Courts in Canada, New Zealand, and the U.K. utilized theories of

\(^{39}\) The UNHCR functions as the “administrative body for the Refugee Convention.” Nicholas R. Bednar & Margaret Penland, Asylum’s Interpretive Impasse: Interpreting “Persecution” and “Particular Social Group” Using International Human Rights Law, 26 MINSJ 145, 162 (2017).


\(^{41}\) Id. at 1.

\(^{42}\) Id. at 2.

\(^{43}\) Id. at 3. The Guidelines elaborate on how “[a] decision-maker adopting this approach would examine whether the asserted group is defined: (1) by an innate, unchangeable characteristic, (2) by a past temporary or voluntary status that is unchangeable because of its historical permanence, or (3) by a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it.” Id.

\(^{44}\) Fatma E. Marouf, The Emerging Importance of “Social Visibility” in Defining a “Particular Social Group” and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender, 27 YALE L. & POL’Y REV. 47, 48 (2008). The protected characteristics approach is called “immutability” in the United States. See id. at 47–49. See also discussion infra Section II.B. Professor Marouf details the “significant attention” the “persuasive” reasoning utilized in the Acosta case, which established immutability as the test for PSG in the United States, has received in foreign courts. Marouf, supra note 44, at 54–57.
non-discrimination and human rights—ideas they understood as central to the Refugee Convention—to arrive at the protected characteristics approach.45

A particular social group defined by social perception, on the other hand, “examines whether . . . a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large.”46 Australia is the only common law country to define a PSG by social perception.47 Notably, however, the High Court of Australia rejected a purely subjective approach to social perception, which it believed would be an unreliable indicator of whether a particular social group existed and also impose a criterion that had no basis in the 1951 Convention.48

The Guidelines review both methods of defining “particular social group” and ultimately recommend a single definition that merges the two approaches, defining PSG as “a group of persons who share a common characteristic . . . or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.”49 The term “or” in UNHCR’s definition is critical, as it indicates that the analysis should proceed in sequential steps: “[i]f a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental[,] further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society.”50 In other words, the UNHCR Guidelines do not create dual requirements; a particular social group defined by immutability or protected characteristics alone is sufficient.51

Ultimately, a review of international law reveals that the particular social group ground stemmed from international agreement, and the definition ultimately arrived at similar international consensus. Intended to be construed broadly and with a recognition of its humanitarian origins, a valid PSG under international law

45. Id. at 54–57.
46. UNHCR PSG Guidelines, supra note 40, at art. 7.
47. The High Court of Australia created the social perception approach for defining particular social group in Applicant A and Another v Minister for Immigr. and Ethnic Affs. [1997] 190 CLR 225 (Austl.).
49. UNHCR PSG Guidelines, supra note 40, at art. 11 (emphasis added).
50. Id. at art. 13 (emphasis added).
51. In a 2009 amicus brief, the UNHCR explained its goal in defining PSG this way as giving “validity to both approaches, which may frequently overlap.” Brief of the United Nations High Commissioner for Refugees as Amicus Curiae Supporting the Petitioner at 10, Valdiviezo-Galdamez v. Att’y Gen., 663 F.3d 582 (3d Cir. 2011) (No. 08-4564), 2009 WL 8754827, at *10. The agency confirmed that its intent “was by no means . . . to create a further requirement nor to serve as a basis to exclude otherwise eligible refugees from protection. . . .  While social perceptions may provide evidence of immutability or the fundamental nature of a protected characteristic, heightened social perception is merely an ‘indicator’ of the social group’s existence rather than an additional factor.” Id.
DEATH OF THE PARTICULAR SOCIAL GROUP

is made up of members who possess immutable protected characteristics or who are perceived as a group by the society in which they exist. As the next Section will demonstrate, the U.S. definition also includes these requirements but has implemented them in a way that significantly narrows the PSG’s reach.

B. Domestic Definitions

It was not until 1980 that the United States enacted legislation to implement its obligations under the Refugee Convention and Protocol. When Congress passed the Refugee Act of 1980, it adopted a refugee definition in the Immigration and Naturalization Act (INA) that was taken almost word-for-word from the 1951 Convention:

any person who is outside any country of such person’s nationality . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.52

As a result, “[a]sylum law is one of the most thoroughly international areas of U.S. law.”53

In another parallel to the Convention and Protocol, the phrase “membership in a particular social group” is not defined in the INA or in the Code of Federal Regulations.54 It was not until 1985 that the Board of Immigration Appeals provided the first definition of the term in Matter of Acosta.55

Mr. Acosta was a 36-year-old taxi driver from El Salvador. He founded a co-op that became a target for guerillas, who tried to force the drivers to participate in work stoppages in order to advance their goal of harming the Salvadoran economy. The co-op refused to comply, and the guerillas retaliated with threats, beatings, and murders. Mr. Acosta was beaten and received three death threats that were similar to those received by others who were ultimately killed. He fled to the United States and claimed asylum based on his membership in the particular social

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55. Matter of Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (“[W]e 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.”).
groups of “COTAXI drivers” and “persons engaged in the transportation industry of El Salvador.”

In attempting to determine whether Mr. Acosta’s proposed particular social groups were viable, the Board first had to define the term. The Board began by utilizing the doctrine of *ejusdem generis*, a Latin phrase that translates to “of the same kind” and holds that “general words used in an enumeration with specific words should be construed in a manner consistent with the specific words.” In this case, the general term “particular social group” appears alongside four more specific terms—race, religion, national origin, and political opinion. Thus, the Board found that PSG should be defined in a manner that is consistent with the other four grounds for asylum protection.

Applying *ejusdem generis*, the BIA defined a “particular social group” as a “group of persons all of whom share a common, immutable characteristic.” The common characteristic “must be one that the members of the group . . . cannot change,” like one’s race or nationality, or one that they “should not be required to change because it is fundamental to their individual identities or consciences,” like their religion or political opinion. Only when defined in this way, the Board held, “does the mere fact of group membership become something comparable to the other four grounds of persecution under the Act.” The Board further explained that the shared characteristics that could potentially comprise a particular social group might be “innate . . . such as sex, color, or kinship ties, or in some circumstances . . . might be a shared past experience such as former military leadership or land ownership.”

The analysis in *Acosta* derived from close textual scrutiny and resulted in a definition that “is sufficiently open-ended to allow for evolution in much the same way as has occurred with the four other grounds, but not so vague as to admit persons without a serious basis for claim to international protection.” It also served as a model for other countries’ PSG definitions.

The definition established by the Board of Immigration Appeals in *Matter of Acosta* remained good law, and led to recognition of several PSGs, until a series of cases in the early 2000s imposed additional requirements for applicants seeking relief based on their membership in a particular social group. The first of those cases was *Matter of C-A*.

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56. Id. at 232.
57. Id. at 233.
58. Id.
59. Id.
60. Id.
61. Id.
62. Id.
64. See Marouf, supra note 44, at 56–57.
65. See infra Section III.
The applicant in *Matter of C-A-* was a Columbian baker who was friendly with both the head of security for the Cali drug cartel and the General Counsel for the city of Cali. After sharing information he learned about the cartel with the General Counsel, both Mr. C-A- and his son were threatened and assaulted. Mr. C-A- eventually fled to the United States at the recommendation of the General Counsel and sought asylum based on his membership in the particular social group of “noncriminal informants working against the Cali drug cartel.”

In analyzing Mr. C-A-’s claim, the Board said that it would “continue to adhere to the *Acosta* formulation” but “consider[] as a relevant factor the extent to which members of a society perceive those with the characteristic in question as members of a social group.” Applying this new “social visibility” test to the case at hand, the BIA found that “the very nature of the conduct at issue is such that it is generally out of the public view” and could therefore not satisfy the requisite social visibility. Thus, although the Board did not officially make social visibility a requirement at this time, it utilized the concept to deny Mr. C-A-’s claim for asylum.

The Board in *C-A-* also noted that the proposed group was “too loosely defined to meet the requirement of particularity.” The following year, the BIA elaborated on the concept of particularity in *Matter of A-M-E & J-G-U-*, a case involving a couple who faced threats and feared extortion, kidnapping, and physical harm as a result of their status as, and membership in the particular social group of, “affluent Guatemalans.” The Board held that the proposed group was “too amorphous to provide an adequate benchmark for determining group membership” and denied the couple’s claim. Particularity was thus cemented as a mandatory element of the PSG definition, and groups that were “too subjective, inchoate, and variable” were no longer considered valid. Additionally, the BIA used *Matter of A-M-E & J-G-U-* as an opportunity to reaffirm social visibility, recognizing it as a required factor in the particular social group analysis.

A year after *Matter of A-M-E & J-G-U-*, the Board issued companion decisions that shed more light on its views regarding the definition of “particular social

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67. *Id.* at 956–57.
68. *Id.* at 960.
69. *Id.* at 957 (emphasis added).
71. *Id.* at 76.
73. The Board stated: “In reaffirming the requirement that the shared characteristic of the group should generally be recognizable by others in the community . . .” *Matter of A-M-E- & J-G-U-, 24 I. & N. Dec. at 74 (emphasis added).*
group”—Matter of S-E-G- and Matter of E-A-G-. Both cases involved young men fleeing violent gangs in El Salvador; when issued, they were the BIA’s most comprehensive articulation of the social visibility and particularity requirements to date. Blurring the lines between the two requirements, the Board in Matter of S-E-G- described “the essence of the particularity requirement” as “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.”77 “The key question,” according to the Board, was “whether the proposed description is sufficiently ‘particular’ or is ‘too amorphous . . . to create a benchmark for determining group membership.’”78 Both decisions also addressed social visibility and ultimately concluded that the proposed gang-based PSGs were insufficiently visible.79 As the Board stated in Matter of S-E-G-, “the respondents are . . . not in a substantially different situation from anyone who has crossed the gang, or who is perceived to be a threat to the gang’s interests” because “gangs have directed harm against anyone and everyone perceived to have interfered with, or who might present a threat to, their criminal enterprises and territorial power.”

Another key step in the Board of Immigration Appeals’ efforts to define “particular social group” was a second set of companion cases: Matter of M-E-V-G- and Matter of W-G-R-. The cases were issued in response to federal courts’ calls for “more clarity” about the Board’s PSG framework. The facts in both cases once again centered around young men from Central America fleeing gang-based violence. The PSG articulated in Matter of M-E-V-G- was “Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs.”84 Mr. W-G-R- asserted, as his basis for protection, the PSG “former members of the Mara 18 gang in El Salvador who have renounced their gang membership.”

The Board used the cases as a vehicle to rename social visibility as “social distinction.” Emphasizing that the decisions did not constitute “a new

76. The proposed PSG in S-E-G- was “Salvadoran youth who have been subjected to recruitment efforts by the MS-13 gang and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang’s values and activities” and “family members of such Salvadoran youth.” 24 I. & N. Dec. at 581. The proposed PSG in E-A-G- was “persons resistant to gang membership.” 24 I. & N. Dec. at 593.
77. 24 I. & N. Dec. at 584.
78. Id. (quoting Davila-Mejia v. Mukasey, 531 F.3d 624, 628–29 (8th Cir. 2008)).
80. 24 I. & N. Dec. at 587.
83. Matter of M-E-V-G-, 26 I. & N. Dec. at 236. An in-depth discussion about the concerns expressed by both the federal judiciary and legal scholars can be found infra Section II.B.1.
84. 26 I. & N. Dec. at 228.
interpretation,”

but instead a further explanation of the visibility requirement, the Board clarified that social visibility “was never intended to, and does not require, literal or ‘ocular’ visibility,” as critics had argued. In doing so, the Board implicitly addressed concerns about the validity of groups like Matter of C-A’s “noncriminal informants,” LGBT individuals, or survivors of intimate partner violence, who by definition, or for their own safety and protection, were hidden from public view and were thus not actually visible to those in the applicant’s society, including persecutors.

Thus, after eight years of post-Acosta tinkering, the Board’s definition of “particular social group” seems to have settled on three required elements: 1) immutability, 2) social distinction, and 3) particularity.

1. Critiques of the Board of Immigration Appeals’ Approach

The definition of “particular social group” promulgated by the Board of Immigration Appeals has been the subject of robust critique. First, as detailed in Section II.A, the UNHCR PSG Guidelines provide critical guidance on international interpretations of the phrase “particular social group.” The PSG definition suggested by the Guidelines incorporates both the Acosta immutability approach and the “social perception” or “social distinction” approach. However, UNHCR considers these to be alternative, as opposed to dual, requirements. As former Immigration Judge (IJ) and Senior Advisor to the BIA Jeffrey Chase stated, “by changing the ‘or’ to an ‘and,’ the Board required applicants to establish both immutability and social distinction, thus narrowing the ranks of those able to qualify,” which is contrary to UNHCR’s intent.

As such, when the Board cited to the Guidelines to support its addition of what was then called social visibility to the PSG definition, this “justification . . . was most disingenuous.”

Another significant concern relates to the Board’s abandonment of traditional standards of statutory interpretation. As discussed above, in arriving at its initial definition of PSG, the Board utilized the principle of *ejusdem generis*, which requires words in a group or series to be construed in a manner consistent with one
another. Matter of Acosta created the immutability test for particular social group because the other bases for asylum—race, religion, national origin, and political opinion—are similarly immutable. No additional criterial are required to prove the non-PSG asylum grounds. Thus, “the adoption of social visibility signaled abandonment by the Board of an approach that interpreted the PSG ground homogenously with the [other asylum] grounds.”

The non-PSG grounds do not require proof of social distinction and particularity. For example, in Matter of S-A-, the BIA found that a young Moroccan woman was persecuted by her father because her liberal Muslim beliefs differed from his conservative religious views, specifically as related to the role of women. In that case, the Board did not inquire whether Ms. S-A’s religious views were publicly known or whether Muslims were too amorphous of a group to receive protection. The Board simply recognized that Ms. S-A had been persecuted on account of her religion and granted her relief. Similarly, the law does not require inquiry beyond evidence of nationality if, for example, a woman claims persecution in Eritrea based on her Ethiopian ancestry. As such, because the BIA’s “particular social group” definition demands more than what is needed to prove the other four grounds for asylum, it violates the principle of ejusdem generis.

The social distinction and particularity requirements are also mutually exclusive. In demanding both elements to satisfy the PSG definition, the Board has created an impossible needle to thread. If a proposed group is too big, it risks not satisfying the particularity requirement. As the BIA has said, “major segments of the population will rarely, if ever, constitute a distinct social group.” Yet, if a group is defined discreetly enough to be sufficiently particular, it could fail to satisfy the requirement of social distinction, because a small group is unlikely to be perceived as a group by society.

This catch-22 is not the only one relating to size. The Board’s claim that large or numerous groups are not viable PSGs is also inconsistent with the way it analyzes the other grounds for asylum. For example, 34% of Lebanese citizens are Christians, a total of nearly two million people. Christians account for approximately “10% of Syria’s 22 million people.” Yet if a Christian sought asylum from one of these majority-Muslim countries based on religious persecution, an

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92. See supra text accompanying notes 57–59.
95. See Giday v. Gonzales, 434 F.3d 543, 545 (7th Cir. 2006).
immigration court would not be required to deny the claim because too many other Christians were at risk of harm. Nor would a group composed of Christians be considered “too subjective, inchoate, and variable” even though it could be made up of multiple denominations or individuals with diverse levels of religious observance.  

What is likely at the root of these “numerosity” limitations is a fear of opening the floodgates; in other words, the fear that recognizing a broad group will lead to an overwhelming influx of asylum seekers from that group into the United States. Yet such concerns are supported neither by the law nor the reality of migration. As the UNHCR Guidelines plainly state, “the fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate.”\(^{100}\) U.S. courts agree: the Seventh Circuit Court of Appeals, for one, asserted that it is “antithetical to asylum law to deny refuge to a group of persecuted individuals . . . merely because too many have valid claims.”\(^{101}\) Even the BIA has recognized that humanitarian immigration law should not be influenced by political concerns, noting that the “distinction between the goals of refugee law (which protects individuals) and politics (which manages the relations between political bodies) should not be confused.”\(^{102}\)

Fear that an expansive definition of particular social group will lead to skyrocketing claims also ignores historical reality. As Professor Karen Musalo explains, opponents of gender-based asylum evoked floodgate concerns as the U.S. immigration court system considered a PSG that would provide protection for survivors of female genital mutilation/cutting (FGM/C).\(^{103}\) Yet, after Matter of Kasinga\(^{104}\) established the right to asylum for women who feared FGM/C, “the dire predictions of a flood of women seeking asylum never materialized.”\(^{105}\) Similarly, when Canada recognized gender as a basis for asylum, gender-based claims “actually declined.”\(^{106}\) The absence of a rise in claims after a change that applied

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100. UNHCR PSG Guidelines, supra note 40, at 5.
101. Ceece v. Holder, 733 F.3d 662, 675 (7th Cir. 2013). See also Reyes v. Lynch, 842 F.3d 1125, 1135 (9th Cir. 2016) (“The BIA’s statement of the purpose and function of the ‘particularity’ requirement does not, on its face, impose a numerical limit on a proposed social group or disqualify groups that exceed specific breadth or size limitations.”).
105. Musalo, supra note 103, at 132.
106. Id. at 133. As Professor Musalo explains, “the number of women asylum seekers has not dramatically increased with the legal recognition of gender claims for protection” for a number of reasons, including women’s inability to leave their home countries to seek protection, caretaking responsibilities, and lack of resources. Id.
to such a significant portion to the world’s population poses a serious challenge to arguments based on a fear of opening the floodgates.

Moreover, Canada is not alone in its willingness to accept broad groups as PSGs. As Professor Maryellen Fullerton explains, neither the Canadian nor German governments have allowed concerns about size “to influence the development of the social group concept.” Instead, “they have recognized that other elements of the refugee definition will narrow the pool of those who have claims to refugee status.” For example, even with an expansive PSG definition, the INA still requires asylum seekers to prove that they suffered or fear harm that amounts to persecution, that the persecution was perpetrated on account of a protected ground, and that the government is either the persecutor or is unable or unwilling to protect them from the persecutor. Numerous bars to asylum, including for those who did not apply within one year of entering the United States, have been found to

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108. Id.
110. See 8 U.S.C. § 1158(a)(2)(B) (2012) (stating that applicants are ineligible for asylum unless they demonstrate “by clear and convincing evidence that the application has been filed within 1 year after the date of the alien’s arrival in the United States.”). Scholars and advocates alike have critiqued the requirement to file for asylum within one year of entry as unduly restrictive. See, e.g., Roy Xiao, Refuge from Time: How the One-Year Filing Deadline Unfairly Frustrates Valid Asylum Claims, 95 N.C. L. REV. 523 (2017) (critiquing the one-year asylum filing deadline); Nat’l Immigrant Just. Ctr., Report: The One-Year Asylum Deadline and the BIA: No Protection, No Process (Oct. 21, 2010), https://immigrantjustice.org/research-items/report-one-year-asylum-deadline-and-bia-no-protection-no-process [https://perma.cc/R5Y5-Z5FHK] (examining how the BIA has ruled on issues concerning the one-year filing deadline).
have persecuted others,\textsuperscript{111} or have been convicted of a particularly serious crime\textsuperscript{112} or an aggravated felony\textsuperscript{113} in the United States, also apply.

Lastly, but importantly, the current definition of “particular social group” presents significant disadvantages to pro se litigants. Because asylum seekers do not have the right to counsel at government expense, a significant percentage of applicants appear in immigration court without an attorney.\textsuperscript{114} An unrepresented migrant faces substantial obstacles in establishing and proving membership in a post-

\textit{Acosta} particular social group. Language barriers,\textsuperscript{115} trauma, and lack of familiarity with the U.S. legal system present significant challenges in formulating a group that would be sufficiently immutable, socially distinct, and particular. The impact of these issues was exacerbated by the BIA’s holding in \textit{Matter of W-Y-C- & H-O-B-}, which permits an immigration judge to summarily deny the claim of an asylum seeker who fails to articulate a viable PSG in an initial hearing.\textsuperscript{116}

\begin{itemize}


  \item \textsuperscript{113} 8 C.F.R. § 208.13(c)(2)(D) (2020). The aggravated felony bar is a sweeping limit to asylum access, having “been interpreted broadly to reach misdemeanor offenses such as shoplifting and other types of conduct that would not normally be considered ‘aggravated’ or ‘felonious.’” Shoba Sivaprasad Wadhia, \textit{The Policy and Politics of Immigrant Rights}, 16 TEMP. POL. & CIV. RTS. L. REV. 387, 394 (2007).

  \item \textsuperscript{114} A study of cases decided between 2007 and 2012 found that only 37% of all immigrants, and 14% of detained immigrants, secured representation in immigration court. Ingrid V. Eagly & Steven Shafer, \textit{A National Study of Access to Counsel in Immigration Court}, 164 U. PA. L. REV. 1 (2015).

  \item \textsuperscript{115} The Trump administration eliminated interpretation services for initial hearings in immigration court. See Tal Kopan, \textit{Trump Administration Ending In-Person Interpreters at Immigrants’ First Hearings}, S.F. CHRON. (July 3, 2019), https://www.sfchronicle.com/politics/article/Trump-administration-ending-in-person-14070403.php [https://perma.cc/Y77K-SAQC].

  \item \textsuperscript{116} 27 I. & N. Dec. 189, 191 (B.I.A. 2018).
\end{itemize}
Moreover, the BIA’s heightened PSG standard requires significant proof. The Board has explained that “[e]vidence such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like may establish that a group exists and is perceived as ‘distinct’ or ‘other’ in a particular society.” Obtaining such corroboration of social distinction is challenging even with an attorney, but likely impossible for the typical asylum applicant who faces significant financial, logistical, and psychological constraints.

In sum, the Board of Immigration Appeals’ PSG definition ignores international guidelines, is discordant with the other asylum grounds, is internally inconsistent, relies on unproven floodgates narratives, and harms pro se asylum seekers. These concerns prompted challenges to the definition in federal courts; a discussion of that jurisprudence follows in Section IV, after a review of how the BIA and DOJ implemented the PSG definition.

III. APPLICATION BY THE BOARD OF IMMIGRATION APPEALS

The Board of Immigration Appeals’ evolving definition of “particular social group” led to a varied line of cases from the court after its initial decision in 1985. The Board recognized a number of PSGs after Acosta, but when the requirements of social visibility/distinction and particularity were introduced, the rate of PSG recognition slowed dramatically. Eventually, the only two PSGs recognized after the BIA added new elements to the definition were overruled by Trump administration attorneys general. Put another way, since adding additional criteria to the

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117. This is particularly true because petitioners bear the burden of proof in an asylum case, which is heard in an adversarial system. See 8 C.F.R. § 1208.13 (2020) (“The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act.”).


119. See Joline Doedens, The Politics of Domestic Violence-Based Asylum Claims, 22 DUKE J. GENDER L. & POL’Y 111, 125 (2014) (describing the “fact-intensive” process involved in demonstrating asylum based on intimate partner violence, a claim almost certain to be based on membership in a particular social group); Sarah R. Goodman, Asking for Too Much? The Role of Corroborating Evidence in Asylum Proceedings in the United States and United Kingdom, 36 FORDHAM INT’L L.J. 1733, 1739–42 (2013) (concluding that evidentiary requirements are unrealistic when considering the situation of refugees).
Acosta definition, no particular social groups have survived BIA and DOJ scrutiny.\textsuperscript{120}

\textbf{A. Particular Social Groups Recognized Under the Acosta Immutability Test}

Although it denied the proposed PSGs in \textit{Matter of Acosta}, the Board of Immigration Appeals soon thereafter issued a series of precedent decisions recognizing several new particular social groups based on its newly created PSG test.\textsuperscript{121} In \textit{Matter of Fuentes}, the Board found that former members of the national police of El Salvador were a valid PSG.\textsuperscript{122} A few years later, in the landmark case \textit{Matter of Toboso-Alfonso}, the Board recognized persecution based on sexual orientation as a basis for asylum.\textsuperscript{123}

In \textit{Matter of H-}, the Board held that “members of the Marehan subclan of Somalia who share ties of kinship and linguistic commonalities” constitute a particular social group.\textsuperscript{124} In reaching its conclusion, the Board reasoned that “clan membership is a highly recognizable, immutable characteristic that is acquired at birth and is inextricably linked to family ties.”\textsuperscript{125}

\textsuperscript{120} As of March 2021. Some examples of particular social groups the Board rejected after imposition of the particularity and visibility/distinction criteria include “secularized and westernized Pakistanis perceived to be affiliated with the United States,” Ahmed v. Holder, 611 F.3d 90, 91 (1st Cir. 2010); “Guatemalan citizens who [do] not sport gang colors and tattoos,” Paiz-Morales v. Lynch, 795 F.3d 238, 240 (1st Cir. 2015); “women with children whose husbands live and work in the U.S. and it is known to society as a whole that the husbands live in the U.S.,” Granada-Rubio v. Lynch, 814 F.3d 35, 39 (1st Cir. 2016); “young Albanian women between the ages of 15 and 25,” Paloka v. Holder, 762 F.3d 191, 193 (2d Cir. 2014); “individuals with bipolar disorder who exhibit erratic behavior,” Temu v. Holder, 740 F.3d 887, 890 (4th Cir. 2014); “active and long-term former gang members,” Zaldana Menijar v. Lynch, 812 F.3d 491, 497 (6th Cir. 2015); “trucker who, because of their anti-FARC views and actions, have collaborated with law enforcement and refused to cooperate with FARC,” Escobar v. Holder, 657 F.3d 537, 545 (7th Cir. 2011); “effective honest police,” R.R.D. v. Holder, 746 F.3d 807, 809 (7th Cir. 2014); “family business owners” in Guatemala, Davila-Mejia v. Mukeasa, 531 F.3d 624, 627 (8th Cir. 2008); “Mungiki defectors,” Gathungu v. Holder, 725 F.3d 900, 904 (8th Cir. 2013); “escapee Mexican child laborers,” Gonzalez Cano v. Lynch, 809 F.3d 1056, 1058 (8th Cir. 2016); “Guatemalan repatriates who have lived and worked in the United States for many years and are perceived to be wealthy,” Cinto-Velasquez v. Lynch, 817 F.3d 602, 605 (8th Cir. 2016); and “imputed wealthy Americans,” Ramirez-Munoz v. Lynch, 816 F.3d 1226, 1229 (9th Cir. 2016).

\textsuperscript{121} Only a small number of cases are designated as precedent by the BIA. See 8 C.F.R. § 1003.1(g)(3) (2020) (“By majority vote of the permanent Board members, selected decisions of the Board rendered by a three-member panel or by the Board en banc may be designated to serve as precedents in all proceedings involving the same issue or issues.”). Similarly, “[t]he vast majority of the Board’s decisions are unpublished.” Dep’t of Just., Board of Immigration Appeals Practice Manual 8 (2018), https://www.justice.gov/eoir/page/file/1101411/download [https://perma.cc/AZ3E-E8Z9].


\textsuperscript{125} Id. at 342.
Later that same year, the Board issued a decision in *Matter of Kasinga*, recognizing the particular social group of young women of the Tchamba-Kunsuntu tribe of Northern Togo who did not undergo “female genital mutilation, as practiced by that tribe, and who opposed the practice.”\(^{126}\) Although the wordy PSG appears on its face to be limited, and the specific facts of the case centered around the practice of female genital mutilation/cutting, the case was groundbreaking in its recognition of gender as a basis for asylum. Finally, in *Matter of V-T-S-*, the Board found that Filipinos of “mixed Filipino-Chinese ancestry”—a group that could arguably also fall under the nationality ground—are a viable particular social group.\(^{127}\)

**B. Particular Social Groups After the Addition of the Social Distinction and Particularity Requirements**

In contrast to the relatively generous acceptance of particular social groups in the decade after the *Acosta* decision, in the 14 years since the Board of Immigration Appeals began instituting additional requirements for PSGs, it has only recognized two new groups—one providing protection to survivors of intimate partner violence and the other relating to family membership. Both have since been overruled by Trump administration attorneys general.

1. **Claims Based on Intimate Partner Violence**

After *Matter of Kasinga* opened the door for the United States’ acceptance of gender-based asylum claims, the path to recognition of domestic violence as a ground for asylum was a long and winding one. The first significant intimate partner violence case to be adjudicated by the immigration court system was *Matter of R-A-*.\(^{128}\) Ms. R-A- (whose full name is Rodi Alvarado) endured horrific violence at the hands of her husband, a former soldier in the Guatemalan army, from the time she married him at age sixteen.\(^{129}\) In the face of increasing and nearly deadly abuse, Ms. Alvarado fled to the United States and sought asylum.\(^{130}\)

A 14-year legal battle ensued. After the government appealed her original asylum grant by the immigration judge, the BIA concluded that “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination,” did not constitute a

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129. *Id.* at 909.
130. *Id.*.
PSG. The brief filed by DHS in support of Ms. Alvarado marked the first time that this “unable to leave” social group formulation, one that would become entrenched in domestic violence asylum claims in years to come, was officially posited. Several years, remands, and attorneys general later, an immigration judge in San Francisco granted Ms. Alvarado asylum.

Because the grant of asylum in Matter of R-A- was at the immigration judge, or trial court, level, the lack of precedent meant that another domestic violence asylum case was soon ripe for consideration. In Matter of L-R-, DHS originally defended the IJ’s denial of Ms. L-R-’s claim before the BIA, but as the case progressed, the agency came to support Ms. L-R-’s request for asylum. In a brief to the BIA, DHS posited two alternative groups that Ms. L-R-, and supporters of intimate partner violence more generally, could advance—“Mexican women in domestic relationships who are unable to leave” and “Mexican women who are viewed as property by virtue of their positions within a domestic relationship”—and explained how each met the immutability, visibility, and particularity requirements.

After the parties filed supplemental briefings with BIA, DHS requested remand of Matter of L-R- to the immigration judge. DHS stipulated that Ms. L-R- was eligible for asylum, and in August of 2010, she was granted asylum in a

131. Id. at 917.
132. Because the Board of Immigration Appeals is an administrative court housed within the Department of Justice, the Attorney General has the authority to intervene in any case before the BIA and issue decisions on that matter. See infra note 219.
135. Matter of Alvarado-Pena, [redacted] (Exec. Off. for Immigr. Rev. Dec. 10, 2009) (on file with author). The immigration judge’s decision was brief, reading simply, “Inasmuch as there is no binding authority on the legal issues raised in this case, I conclude that I can conscientiously accept what is essentially the agreement of the parties to grant asylum.” Id.
137. Id. at 14–19.
summary order, once again, a procedural history that left future survivors and domestic violence advocates without binding precedent upon which to rely.139

After decades of uncertainty and ambiguity during both the pendency and after the resolution of Matter of R-A- and Matter of L-R-, the BIA issued a precedent decision addressing the eligibility of survivors of domestic violence for asylum in August of 2014. In Matter of A-R-C-G- the Board considered the case of a woman from Guatemala, who, like Ms. Alvarado and Ms. L-R-, was subjected to brutal abuse by her intimate partner.140 The BIA found, and DHS conceded, that the abuse Ms. A-R-C-G- suffered was on account of her membership in the particular social group of “married women in Guatemala who are unable to leave their relationship.”141 Matter of A-R-C-G- was hailed as a landmark case, one which, after decades of advocacy and litigation, finally established precedent for the right to asylum for survivors of intimate partner violence.142

139. Much like the final order in Matter of R-A-, this decision is also extremely brief. The order simply states that asylum is granted, with a notation that the grant was a result of “stipulation of the parties.” Id. (quoting the summary order).
141. Id. at 388–90.
The relative certainty provided by Matter of A-R-C-G- was, however, short-lived. In March 2018, then-AG Jeff Sessions referred to himself a domestic violence asylum case, Matter of A-B-, with the stated goal of seeking to answer the question of “whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable ‘particular social group’ for purposes of an application for asylum or withholding of removal.” Three months later, Sessions used Matter of A-B- to overrule Matter of A-R-C-G- and generally cast doubt on the viability of asylum claims based on intimate partner violence.

In his opinion, Sessions makes the sweeping assertion that claims “pertaining to domestic violence . . . perpetrated by non-governmental actors will not qualify for asylum.” His decision is based in part on his view that “married women in Guatemala who are unable to leave their relationship” lack social distinction as a particular social group because “there is significant room for doubt that Guatemalan society views these women, as horrible as their personal circumstances may be, as members of a distinct group in society, rather than each as a victim of a particular abuser in highly individualized circumstances.”

A full exploration of Matter of A-B- is outside the scope of this Article, but scholars and others have critiqued Sessions’ antiquated views of intimate partner violence as a “private matter;” the excessive dicta throughout the opinion; his understanding of nexus, or the requirement that persecution be inflicted “on account

143. Despite the significance of the precedent decision in A-R-C-G-, it was not a panacea. Even after the decision, “arbitrary and inconsistent outcomes . . . continued to characterize asylum adjudication in this area of the law.” Blaine Bookey, Gender-Based Asylum Post-Matter of A-R-C-G-: Evolving Standards and Fair Application of the Law, 22 Sw. J. Int’l L. 1, 2 (2016).

144. As discussed above, supra note 132, Attorneys General, as head of the Department of Justice, which houses the Board of Immigration Appeals, have broad power to refer cases to themselves. See also infra note 219. However, the manner in which Matter of A-B- reached Sessions’ desk is a matter of some controversy. The case was originally heard by an immigration judge, who denied Ms. A-B-’s claim. On appeal, the BIA reversed and remanded the case to the IJ for approval. However, the IJ did not do as instructed, instead attempting to recertify the case to the Board. At some point thereafter, the Attorney General learned of the decision (through unknown means) and certified the case to himself. See Nat’l Immigrant Just. Ctr., Asylum Practice Advisory: Applying for Asylum After Matter of A-B- 7–8, https://www.immigrantjustice.org/sites/default/files/content-type/resource/documents/2018-06/Matter%20of%20A-B-%20Practice%20Advisory%20-%20Final%20-%206.21.18.pdf [https://perma.cc/333L-BMJM] (last visited Aug. 26, 2020). The immigration judge, V. Stuart Couch, who presided over the original trial, denied the claims of 93.2% of applicants who appeared before his court, one of the highest denial rates in the country. Judge V. Stuart Couch, TRAC Immigration, https://trac.syr.edu/immigration/reports/judgereports/00394CHL/index.html [https://perma.cc/P3QC-NCCY] (last visited Sept. 11, 2020). After his actions relating to Matter of A-B-, IJ Couch was appointed by AG Barr to serve on the Board of Immigration Appeals. See Executive Office for Immigration Review Swears in Six New Board Members, DOJ Exec. Off. for Immigr. Rev., (Aug. 23, 2019), https://www.justice.gov/oir/page/file/1197631/download [https://perma.cc/K2EX-7GGE].


147. Id. at 320.

148. Id. at 336.
of” or “in order to overcome” a protected characteristic; and his creation of a heightened, and ultra vires, standard for claims of persecution at the hands of non-state actors.\footnote{149} Despite these critiques, Matter of A-B- is now the precedent case on intimate partner violence and asylum and the PSG recognized by Matter of A-R-C-G- has been abrogated. Although asylum claims are still adjudicated on a case-by-case basis\footnote{150} and survivors of domestic violence continue to have a path to lawful immigration status by positing PSGs that are immutable, socially distinct, and particular, the lack of precedent poses serious challenges.\footnote{151} Moreover, the reasoning utilized by then-Attorney General Sessions in Matter of A-B- was soon cited and echoed by Attorney General Barr to overrule the only other post-Acosta particular social group.

2. Claims Based on Family Membership

A particular social group based on family membership has an unparalleled foundation in the BIA’s jurisprudence. Matter of Acosta listed “kinship ties” as one of the prototypical characteristics of an immutable particular social group,\footnote{152} and in Matter of H-, the Board, citing the link between clan and family ties, recognized clan membership as the basis for a PSG.\footnote{153} In 2017, the Board decided Matter of L-E-A-, which explicitly recognized a particular social group based on immediate family.\footnote{154}


\footnote{151} Although significant legal hurdles remain for those seeking asylum based on intimate partner violence, a number of federal courts have questioned the analysis in Matter of A-B- and rejected Sessions’ categorical rule precluding asylum based on domestic abuse. See, e.g., De Pena-Paniagua v. Barr, 957 F.3d 88, 89 (1st Cir. 2020); Juan Antonio v. Barr, 959 F.3d 778, 785 (6th Cir. 2020); Grace v. Whitaker, 344 F. Supp. 3d 96, 126–27 (D.D.C. 2018).

\footnote{152} Matter of Acosta, 19 I. & N. Dec. at 233.


\footnote{154} 27 I. & N. Dec 40, 42 (B.I.A. 2017).
DEATH OF THE PARTICULAR SOCIAL GROUP

The applicant in Matter of L-E-A- was the son of a Mexican grocer who refused to allow La Familia Michoacana, a criminal cartel, to sell drugs in his store. A week after Mr. L-E-A- also rejected a similar demand, the cartel attempted to kidnap him, leading him to flee to the United States.155 In analyzing Mr. L-E-A-’s claim, the BIA, echoing the language of social distinction, first stated that “a claim based on family membership will depend on the nature and degree of the relationships involved and how those relationships are regarded by the society in question.”156 It then concluded that in the instant case, it had “no difficulty identifying the respondent, a son residing in his father’s home, as being a member of the particular social group comprised of his father’s immediate family.”157

Recognizing a PSG, however, is only one step in the asylum analysis. Applicants must also demonstrate that the persecution they suffered or fear is “on account of” their membership in that PSG, also known as the “nexus” requirement.158 In its discussion of nexus in Matter of L-E-A-, the Board stated that “the fact that a persecutor targets a family member simply as a means to an end is not, by itself, sufficient to establish a claim, especially if the end is not connected to another protected ground.”159 It then concluded that Mr. L-E-A- did not meet this new and heightened nexus standard because he “did not establish that his membership in a particular social group comprised of his father’s family members was at least one central reason for the events he experienced and the harm he claims to fear in the future.”160 In reaching this decision, the Board appeared to create a separate requirement, a so-called “double nexus” requirement,161 applicable only to family-based particular social groups—that an applicant must suffer persecution on account of a second protected ground in order to merit asylum protection.

Analyzing nexus in this way would mean that a family-based PSG is subject to requirements that other groups—and other grounds—are not. This is, of course, contrary to the statute, which makes no such distinction. Moreover, as federal courts have unequivocally stated, “the law in this circuit and others is clear that a family may be a particular social group simply by virtue of its kinship ties, without requiring anything more.”162

155. See id. at 41.
156. Id. at 43.
157. Id.
Concerns about nexus did not have much time to manifest in future cases, however, because in December 2018, Acting Attorney General Matthew Whitaker (who served in his position for a little over three months) referred Matter of L-E-A- to himself. The question posed in Whitaker’s order was “[w]hether, and under what circumstances, an alien may establish persecution on account of membership in a ‘particular social group’ . . . based on the alien’s membership in a family unit.”

In July 2019, Attorney General William Barr issued a decision that overruled the part of Matter of L-E-A- that recognized family membership as a basis for a particular social group. Barr’s order asserts that most families likely cannot constitute a valid PSG because they are not sufficiently socially distinct. According to the Attorney General, only families with “greater meaning in society” or with “societal importance” satisfy the element of social distinction. “The average family,” he argues, would be “unlikely” to satisfy meet his new PSG criteria.

Barr’s order also asserts that since “almost every alien is a member of a family of some kind, categorically recognizing families as particular social groups would render virtually every alien a member of a particular social group.” This statement echoes the reasoning of those who fear that a broad PSG definition would open the floodgates of asylum seekers. The flaw in Barr’s argument becomes readily apparent by substituting the word “family” with “race” or “national origin.” In doing so, one can easily see that broad membership in an asylum ground should not disqualify it from serving as a basis for protection under existing law.

The Attorney General’s opinion in Matter of L-E-A- also claims that if “Congress intended for refugee status to turn on one’s suffering of persecution ‘on account of’ family membership, Congress would have included family identity as one of the expressly enumerated covered grounds for persecution.” This too is a disingenuous argument and an unsound reason for rejecting an otherwise valid PSG. Particular social group has long been “understood to constitute a dynamic category, open to future developments.”

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164. Id.
166. Id. at 582 (citing Matter of W-G-R-, 26 I. & N. Dec. 208, 217 (B.I.A. 2014)) (“[W]hat qualifies certain clans or kinship groups as particular social groups is not merely the genetic ties among the members. Rather, it is that those ties or other salient factors establish the kinship group, on its own terms, as a ‘recognized component of the society in question.’”).
167. Id. at 594.
168. Id.
169. Id. at 593.
170. Every person has a race or a national origin, yet asylum law explicitly recognizes those expansive categories as bases of protection. 8 U.S.C. § 1101(a)(42)(A) (2018).
171. Id.
DEATH OF THE PARTICULAR SOCIAL GROUP

were not explicitly mentioned in the refugee definition, but the statute has long been interpreted in a way that protects unenumerated groups that fall under the broad categories of the other asylum grounds (especially particular social group).  

Barr’s order addresses, but ultimately dismisses, the firmly established legal precedent recognizing families as viable PSGs. Since Acosta, family has been described as the “quintessential particular social group” and courts have declared that “the family provides a prototypical example of a ‘particular social group.’” Many federal circuit courts agree with the Seventh Circuit’s assessment that “case law has suggested, with some certainty, that a family constitutes a cognizable ‘particular social group.’” Barr’s decision in Matter of L-E-A- was thus a drastic break with not only sound precedent but the reasoned analysis of nearly every court or jurist who has considered the issue.

It is important to note that Matter of A-B- and Matter of L-E-A- do not eliminate domestic violence or family-based asylum. When stripped of dicta, Sessions’

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173. In fact, when the House of Representatives debated the 1980 Refugee Act, Representative Elizabeth Holtzman noted that the Act “does not specifically refer to any particular group, because this is legislation not for today or next year, but for many years to come.” 125 CONG. REC. 35,813 (1979).

174. Matter of L-E-A-, 27 I. & N. Dec. at 589 (“I recognize that a number of courts of appeals have issued opinions that recognize a family-based social group as a ‘particular social group’ under the asylum statute. . . . I also recognize that certain courts of appeals have conserved the requisite elements of a ‘particular social group’ and, despite the requirements set forth in M-E-V-G- and W-G-R-, have nonetheless suggested that shared family ties alone are sufficient to satisfy the INA’s definition of ‘refugee.’”).

175. Rios v. Lynch, 807 F.3d 1123, 1128 (9th Cir. 2015).

176. Crespin-Valladares v. Holder, 632 F.3d 117, 125 (4th Cir. 2011) (recognizing family members of “those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses” as a PSG). The court further opined: “[W]e can conceive of few groups more readily identifiable than the family.” Id. See also Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986) (finding that a group of family members was a “prototypical example” of a PSG).

177. Iliev v. INS, 127 F.3d 638, 642 n.4 (7th Cir. 1997) (noting that “other circuits have found that family is perhaps the most easily identifiable ‘particular social group’ that could serve as the basis for persecution”). See also Gebremichael v. INS, 10 F.3d 28, 36 (1st Cir. 1993) (“There can, in fact, be no plainer example of a social group based on common identifiable and immutable characteristics than that of the nuclear family.”); Vumi v. Gonzales, 502 F.3d 150, 154–55 (2d Cir. 2007) (“The Board has unambiguously held that membership in a nuclear family may substantiate a social group basis of persecution.”); Fatin v. INS, 12 F.3d 1233, 1238–40 (3d Cir. 1993) (accepting that “kinship ties” qualify as a particular social group); Lopez-Soto v. Ashcroft, 383 F.3d 228, 235 (4th Cir. 2004) (“We join our sister circuits in holding that ‘family’ constitutes a ‘particular social group.’”); Al-Ghorbani v. Holder, 585 F.3d 980, 995 (6th Cir. 2009) (“The first characteristic of their proffered social group—membership in the same family—is widely recognized by the caselaw.”).
and Barr’s opinions rest only on their objection to the BIA accepting too many stipulations from the parties, which led them to conclude that the court’s analysis “lacked rigor and broke with [its] own precedents.” Eligibility for asylum is still, as it has always been, determined on a case-by-case basis, which means that judges remain free to recognize particular social groups based on intimate partner violence and family membership even in the absence of BIA precedent. However, with precedent-setting cases overruled, future decisions will lack predictability, uniformity, and consistency.

The volatility of the Board of Immigration Appeals’ jurisprudence—the changing PSG definition and the inconsistency of its application—led to the intervention of the federal courts. A discussion of federal circuit courts of appeals’ particular social group jurisprudence follows.

IV. APPLICATION BY FEDERAL COURTS

Although the Board of Immigration Appeals is the highest administrative body to interpret U.S. immigration laws, appeals of its decisions can be made to

178. Matter of L-E-A-, 27 I. & N. Dec. at 596 (“[T]he Board’s particular social group analysis merely cited past Board and federal court precedents recognizing family-based groups and then agreed with the parties’ stipulations. The Board summarily concluded that ‘the facts of this case present a valid particular social group,’ without explaining how the facts supported this finding or satisfied the particularity and social visibility requirements. This cursory treatment could not, and did not, satisfy the Board’s duty to ensure that the respondent satisfied the statutory requirements to qualify for asylum.”). Barr’s arguments and concerns relating to stipulations are surprising, because the family-based particular social group was firmly settled precedent, so such stipulations were routine and even expected. In fact, the rare consensus between immigration advocates and the Department of Homeland Security could arguably indicate the strength of the domestic violence and family-based particular social groups. The attacks are also disingenuous because the Trump administration argued it sought to make the system “more efficient” when it imposed quotas on immigration judges. Tal Kopan, Justice Department Rolls Out Case Quotas for Immigration Judges, CNN POLITICS (Apr. 2, 2018), https://www.cnn.com/2018/04/02/politics/immigration-judges-quotas/index.html [https://perma.cc/JBR5-PNAT]. Were that truly the case, it seems illogical for Sessions and Barr to ignore the role of stipulations in increasing judicial efficiency.


180. See supra note 150.

181. According to studies conducted by Professors Jaya Ramji-Nogales, Andrew Schoenholtz, and Philip Schrag, the asylum adjudicatory system is already beset with rampant inconsistency. See Jaya Ramji-Nogales, Andrew Schoenholtz & Philip Schrag, Refugee Roulette: Disparities in Asylum Adjudication, 60 STAN. L. REV. 295, 389 (2007). The authors describe “remarkable variation in decisions . . . even during periods when there has been no intervening change in the law” based on non-substantive factors such as the national origin or current geographic location of the applicant or the attitude and identity of the adjudicator. Id. at 302. See generally Phillip G. Schrag, Andrew Schoenholtz & Jaya Ramji-Nogales, Lives in the Balance: Asylum Adjudication by the Department of Homeland Security (2014).
the federal court of appeals. A federal court’s decision is binding on the BIA when it considers cases arising in that circuit.¹⁸²

Every federal court of appeals in the United States has considered the Board’s post- Acosta criteria. Many courts have accepted the social distinction and particularity tests,¹⁸³ but several others have rejected the imposition of these additional requirements. This section will review the decisions of the Seventh Circuit Court of Appeals, the Third Circuit Court of Appeals, and the Ninth Circuit Court of Appeals to highlight the varied approaches taken by federal courts.

The Seventh Circuit Court of Appeals has rejected outright the social visibility and particularity requirements. In Gatimi v. Holder, the court found that social visibility was inconsistent with past decisions, and thus not entitled to Chevron deference.¹⁸⁴ The principle of deference under Chevron v. Natural Resources Defense Council will be discussed in detail in Section V.C. below, but in brief, it is a doctrine that requires courts to defer to an agency’s (in this case, the Board of Immigration Appeals’) reasonable interpretation of an ambiguous statute.¹⁸⁵

Judge Posner, who authored the Gatimi opinion, concluded that the Board’s formula “makes no sense” and that the BIA had not “attempted, in this or any other case, to explain the reasoning behind the criterion of social visibility.”¹⁸⁶ In holding that the Board’s interpretation of particular social group was unreasonable, the court highlighted concerns about the BIA’s lack of uniformity in decision-making, stating that when “an administrative agency’s decisions are inconsistent, a court cannot pick one of the inconsistent lines and defer to that one . . . [s]uch picking

¹⁸². See Singh v. Ilchert, 63 F.3d 1501, 1508 (9th Cir. 1995) (“A federal agency is obligated to follow circuit precedent in cases originating within that circuit.”) (citing NLRB v. Ashkenazy Prop. Mgmt. Corp., 817 F.2d 74, 75 (9th Cir. 1987), cert. denied, 501 U.S. 1217 (1991)).

¹⁸³. See Mendez-Barrera v. Holder, 602 F.3d 21, 25 (1st Cir. 2010) (holding that social visibility is not a departure from the Acosta standard, but rather an “elaboration of how the immutable characteristic requirement operates”); Ucelo-Gomez v. Mukasey, 509 F.3d 70, 73 (2d Cir. 2007) (finding the social visibility requirement “consistent with this Court’s reasoning that a ‘particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general’”) (quoting Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991)); Lizama v. Holder, 629 F.3d 440, 447 (4th Cir. 2011) (recognizing both social distinction and particularity as criteria for a valid particular social group); Orellana-Monson v. Holder, 685 F.3d 511, 521 (5th Cir. 2012) (upholding additional PSG requirements as “a subtle shift that evolved out of the BIA’s prior decisions on similar cases”); Umama-Ramos v. Holder, 724 F.3d 667, 669 (6th Cir. 2013) (upholding social distinction and particularity criteria); Costanza v. Holder, 647 F.3d 749, 754 (8th Cir. 2011) (holding that “a social group requires sufficient particularity and visibility such that the group is perceived as a cohesive group by society”); Rivera-Barrientos v. Holder, 658 F.3d 1222, 1230–35 (10th Cir. 2011) (upholding and elaborating on the definitions of particularity and social visibility); Pinzon Pulido v. U.S. Att’y Gen., 427 F. App’x 729, 730 (11th Cir. 2011) (stating that “[i]n assessing whether the alien’s alleged group constitutes a particular social group, we consider the group’s immutability and social visibility”).

¹⁸⁴. 578 F.3d 611, 615–16 (7th Cir. 2009).


¹⁸⁶. Gatimi, 578 F.3d at 615.
and choosing would condone arbitrariness and usurp the agency’s responsibilities.”

The *Gatimi* decision was issued before the Board redefined social visibility as social distinction, and the court devoted significant attention to the illogical nature of the visibility requirement. It noted the obvious—that those at risk of persecution will often hide, and that “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.’”

Even after the Board subsequently clarified that ocular visibility was not required and renamed social visibility as social distinction, the Seventh Circuit did not reverse its position. In the 2018 case *W.G.A. v. Sessions*, the court noted that “[w]hether the Board’s particularity and social distinction requirements are entitled to *Chevron* deference remains an open question in this circuit.”

The court also validated concerns that “social distinction and particularity create a conceptual trap that is difficult, if not impossible, to navigate” because “[t]he applicant must identify a group that is broad enough that the society as a whole recognizes it, but not so broad that it fails particularity.”

Like the Seventh Circuit, the Third Circuit Court of Appeals initially rejected the BIA’s imposition of the visibility and particularity requirements. However, in 2018, the Third Circuit reversed its position and now accepts the Board’s formulation.

The Third Circuit’s initial precedent arose in the case of *Valdiviezo-Galdamez v. United States Attorney General*, in which it considered the particular social group of “Honduran youth who have been actively recruited by gangs but have refused to join because they oppose the gangs.”

The court concluded that because the BIA had departed from *Acosta* without a principled explanation, the visibility and particularity requirements were not entitled to *Chevron* deference. The court based its decision on its view that the Board’s actions were both inconsistent and irrational.

Understanding social visibility to impermissibly mandate on-sight visibility, the court determined that the new requirement was “inconsistent with past BIA decisions . . . [and therefore] an unreasonable addition” to

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187. Id. at 616.
188. Id. at 615.
189. 900 F.3d 957, 964 (7th Cir. 2018). See also Orellana-Arias v. Sessions, 865 F.3d 476, 484 (7th Cir. 2017) (reviewing the Board’s factual determinations for substantial evidentiary support and its legal conclusions de novo).
190. *W.G.A.*, 900 F.3d. at 965 n.4.
192. 663 F.3d 582, 617 (3d Cir. 2011).
193. Id. at 608–9.
194. Id. at 604 (“Although we afforded the BIA’s interpretation of ‘particular social group’ *Chevron* deference in *Fatin*, this did not give the agency license to thereafter adjudicate claims of social group status inconsistently, or irrationally.”).
the PSG requirements. The court also took issue with social visibility’s inconsistent application, finding that the Board sometimes described visibility as recognizability by others in society but at other times in reference to internal characteristics, such as sexual orientation, that are invisible absent self-disclosure.

Finally, irreconcilability lay at the root of the Valdiviezo-Galdamez court’s explicit rejection of the particularity requirement. As it stated, social visibility and particularity “appear to be different articulations of the same concept” with the latter being “little more than a reworked definition [of the former].” Thus, because it was “hard-pressed to discern any difference between the requirement of ‘particularity’ and the discredited requirement of ‘social visibility,’” the Third Circuit declined to support the Board’s definition of particular social group.

However, after the BIA’s decisions in Matter of M-E-V-G- and Matter of W-G-R- reclassified social visibility as social distinction, the Third Circuit reversed course. In S.E.R.L. v. United States Attorney General, the court stated that the BIA had responded to the concerns expressed in Valdiviezo-Galdamez by providing a “‘principled reason’ and explanation” for the new requirements and distinguishing between particularity and visibility/distinction. As such, the appeals court found that the BIA’s new “statutory interpretation is entitled to Chevron deference.”

Lastly, the Ninth Circuit Court of Appeals takes a wholly different approach. In Sanchez-Trujillo v. INS, the court stated that a particular social group “implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest.” The court further explained that “[o]f central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.” Later, in Hernandez-Montiel v. INS, the court clarified that this “voluntary associational relationship” test is an alternative to the Acosta immutability definition.

After Hernandez-Montiel, the court further elaborated on its PSG standard by addressing the BIA’s jurisprudence. In Henriquez-Rivas v. Holder, the Ninth Circuit found that social visibility was a “refinement” of Acosta and required

195. Id. at 603–04.
196. Id. at 608.
197. Id. at 608.
198. Id.
199. 894 F.3d 535, 547 (3d Cir. 2018).
200. Id. at 540. Despite its acceptance of the BIA’s PSG definition, the court also acknowledged “arguable inconsistencies in the [BIA’s] precedent” that pose a risk of the requirements being “applied arbitrarily and interpreted to impose an unreasonably high evidentiary burden.” Id. at 550.
201. 801 F.2d 1571, 1576 (9th Cir. 1986).
202. Id.
203. 225 F.3d 1084, 1092 (9th Cir. 2000).
“perception” as opposed to on-sight visibility.204 As such, because the visibility (and particularity) requirements could be applied in such a way as to avoid direct conflict with prior precedent, the court did not reject outright the new criteria as unreasonable under its *Chevron* analysis.205 However, the court left the matter unresolved, concluding that it “need not decide, in this case, at this time, whether [it] should align [itself] with the Third and Seventh Circuits and invalidate these requirements.”206

In sum, federal courts have had varied responses to the BIA’s imposition of the social visibility/distinction and particularity requirements on top of *Acosta*’s immutability test. Some courts have accepted the new requirements, some have rejected them entirely, and others have adopted different standards and definitions. What remains is a circuit split and continuing critiques of the BIA’s PSG jurisprudence, particularly in light of the Trump administration’s elimination of the only two particular social groups recognized by the BIA after new criteria were introduced in 2006. The next Section proposes recommendations that could resuscitate the now-dead PSG ground.

V. RECOMMENDATIONS

The stated goal of the 1980 Refugee Act was “to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States.”207 The Act’s language suggests a desire for consistency and fairness in the adjudication of claims for asylum, regardless of shifting political winds.

Notably, nearly all of the cases that imposed extra conditions on the particular social group definition accepted by the international community and originally adopted by the Board of Immigration Appeals involved applicants facing persecution at the hands of Central American gangs. As Professor Susan Bibler Courtin has noted, the United States government has long treated Central Americans “as generally undeserving of political asylum,” regardless of the legal merits of their

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204. 707 F.3d 1081, 1089 (9th Cir. 2013) (en banc). The court stated: “‘On-sight’ visibility would be inconsistent with previous BIA decisions and likely impermissible under the statute. However, we do not read C-A- and subsequent cases to require ‘on-sight’ visibility.” *Id.* at 1087–88.

205. *Id.* at 1089 (“So long as the ‘social visibility’ and ‘particularity’ criteria area are applied in a way that did not directly conflict with prior agency precedent, we would be hard-pressed to reject the new criteria as unreasonable under *Chevron.*”).

206. *Id.* at 1091. In *Reyes v. Lynch*, the court held that the BIA’s particularity and social distinction requirements were entitled to *Chevron* deference. See 842 F.3d 1125, 1133–37 (9th Cir. 2016).

This politicization of asylum was exacerbated in the Trump era, as “[r]efugees of the Northern Triangle . . . face[d], in many courts, something of a Sisyphean struggle to obtain asylum with denial rates for these cases remaining far higher than for other countries.”

Discrimination and animus against asylum seekers from Central America are evident in PSG jurisprudence. As Professor Helen Grant has explained, “[i]n the twenty-first century, it is former gang members, youth vulnerable to recruitment by gangs . . . females subject to forced sexual relationships with gang members, and informants on drug cartels and organized crime that form a sample of the groups now seeking protection under the PSG ground.” These applicants do not look like the political dissidents and survivors of race and religious-based persecution who were originally envisioned by the drafters of international and domestic asylum law. They also evoke floodgates and modern domestic political concerns. Yet although these asylum seekers face as serious and deadly risks as their forbearers, U.S. courts have methodically curtailed particular social group eligibility to exclude them.

While the BIA systematically denied claims of asylum seekers fleeing gang violence in the 2000s, claims based on intimate partner violence and family membership were ultimately approved, perhaps because they seemed “safer” or more

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208. See Susan Bibler Coutin, *Falling Outside: Excavating the History of Central American Asylum Seekers*, 36 LAW & SOC. INQUIRY 569, 570 (2011). Echoing the current Justice Department’s view of intimate partner violence as a personal matter, Professor Coutin explains that the change in law and policy regarding Central American asylum seekers resulted in part from the United States’ shifting view of “the character of violence” in the region “from overtly political to seemingly criminal in nature.” *Id.* at 570.

209. Sarah Sherman-Stokes, *Reparations for Central American Refugees*, 96 DENV. L. REV. 585, 608 (2019). Professor Sherman-Stokes explains the rationale behind the low grant rates for Central American asylum seekers by noting that “[e]arly on, it was clear what law enforcement, Congress, political leaders, courts, and adjudicators thought of these Central Americans: that they were undeserving economic migrants whose admission would open the ‘floodgates’ for the world’s most poor and vulnerable to come pouring into the United States.” *Id.* at 593.

210. See Grant, supra note 93, at 899.

politically palatable for the BIA and DOJ.212 But in an administration that was hostile to asylum seekers and attempted, in countless ways,213 to curtail rights of those who seek refuge in the United States, even these more sympathetic applicants were denied.

A review of PSG jurisprudence suggests that what truly underlies the actions of the Board of Immigration Appeals and the Department of Justice is politics. As such, the way to depoliticize asylum, and return to the balanced and rights-protective system the drafters of both international and domestic law intended, is to legislate a PSG definition, address the overuse of attorney general certification, and reconsider the application of the *Chevron* doctrine. This Section will address each in turn.

**A. Enact Legislation to Codify the Acosta Standard**

In imposing the social distinction and particularity requirements, the Board of Immigration Appeals has effectively stripped the particular social group ground of all efficacy. Thus, in order to restore the law’s intent, Congress should amend the refugee definition in the Immigration and Nationality Act and codify the *Acosta* immutability standard alone as the definition of particular social group. Alternatively, Congress could adopt a PSG definition modeled on the UNHCR Guidelines—one in which social distinction is an alternative, used only when a group does not possess the requisite immutability.214 In this way, the Board of Immigration Appeals’ desire for particular social groups to be perceived as such by society would be achieved without compromising protections for survivors.

A return to the *Acosta* test would not constitute a dramatic shift in PSG jurisprudence. Despite the BIA’s imposition of additional criteria between 2006 and 2014, the 1980s-era *Acosta* immutability standard continues to be a core part of the particular social group definition.215 Requirements have been added, but *Acosta* remains, which suggests its strength and its critical place in PSG jurisprudence.

Moreover, an *Acosta*-centered definition best comports with the intentions of the drafters of 1951 Refugee Convention (and the 1967 Protocol that incorporated the Convention by reference), international jurisprudence that has developed to

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213. *See supra* notes 1–15 and accompanying text.


implement it, and UNHCR guidance. And because, as described above, the goal of the 1980 Refugee Act was to align domestic law with the Convention and Protocol, a definition emphasizing immutable characteristics also respects the intent of Congress.

Since 2009, Congress has advanced a number of bills defining “particular social group” as “any group whose members share a characteristic that is either immutable or fundamental to identity, conscience, or the exercise of the person’s human rights such that the person should not be required to change it, shall be deemed a particular social group, without any additional requirement.” These bills containing Acosta-only language have not gained sufficient traction in the legislature, and in today’s divisive political climate, may be difficult to pass. As such, until such time as legislation is practicable, regulatory reform may provide an easier path.

B. Create Article I Immigration Courts to Address the Politicization of Immigration Adjudication

As described above, the two particular social groups recognized after the BIA added social distinction and particularity requirements onto the Acosta test were both overruled by Trump-appointed attorneys general. A single individual has the power to overturn an appellate tribunal’s decision because immigration courts are administrative bodies located within the Department of Justice. As such, AGs have the authority to review, and overrule, decisions issued by the Board of Immigration Appeals.

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216. See Marouf, supra note 44, at 54–57 (detailing the use of the Acosta standard in foreign courts).


218. See Jessica Marsden, Domestic Violence Asylum After Matter of L-R-, 123 YALE L.J. 2512, 2539–44 (2014) (positing that regulatory reform would be easier and more effective than amending the INA).

The power of case certification has been used with significantly increasing frequency in recent years. Trump’s attorneys general certified 16 cases to themselves, which is more than triple the number of cases certified in the Obama and Clinton administrations combined. Attorney General William Barr, who issued the opinion in Matter of L-E-A-,, did not certify any cases to himself when he was the AG from 1991–1993 in the George H. W. Bush administration.

In 2018, the Department of Justice took steps to further expand the circumstances in which attorneys general can refer cases to themselves for review. A proposed rule would give the AG power to hear cases pending before (as opposed to decided by) the BIA, as well as certain decisions by immigration judges that have not been appealed to the BIA.

The attorney general’s certification authority allows the politically appointed head of an executive department to singlehandedly override the opinions of judges. This is not, however, the only example of partisan interference in the immigration courts. For example, in 2002, former Attorney General John Ashcroft cut the BIA’s membership “by more than half, removing four of the five members who ruled in favor of noncitizens at the highest rates.” In a strikingly similar move, in June 2020, nine members of the 23-member Board were reassigned, which critics argued was a mechanism to dilute “the independence of an important appeals body by filling it with new hires more willing to carry out the Trump administration’s restrictive immigration policies.”

The executive branch also houses both the prosecutors and the judges in the immigration court system,

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221. Id.


creating, at bare minimum, the appearance of conflict and collusion. Concerns about fairness in the immigration court system generally, and the asylum adjudicatory process more specifically, were exacerbated in the Trump era, when “the President, the Attorney General, and the Secretary of Homeland Security . . . applied extraordinary pressure on IJs and [Asylum Officers] to deny both applications for asylum and requests for asylum hearings, with predictable results.” In these and many other ways, justice in immigration court is politicized and the independence of judges undermined.

Establishing an immigration court system that is independent from the Department of Justice could solve the problem of politicization of immigration justice. Many have called on Congress to establish the immigration courts as federal Article I courts, unaffiliated with the Department of Justice. Precedent exists for such a move, as other specialized courts, including the Court of Veteran’s Appeals, the Court of Federal Claims, and the U.S. Tax Court, function as Article I courts. Such systems provide independence, transparency, and impartial justice for all who appear before them, characteristics now lacking in our nation’s immigration courts.

C. Reconsider Chevron Deference

As discussed above in Section IV, the federal courts’ dominant jurisprudential lens for evaluating the BIA’s particular social group decision-making is whether the administrative court’s opinions should be entitled to deference under *Chevron v. Natural Resources Defense Counsel*. The *Chevron* doctrine states that courts should defer to reasonable agency interpretations of ambiguous statutes. This

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225. AMERICAN IMMIGRATION LAWYERS ASSOCIATION, AILA Policy Brief: Restoring Integrity and Independence to America’s Immigration Courts (Jan. 24, 2020), https://www.aila.org/File/DownloadEmbeddedFile/77605 (noting “a conflict of interest built into the [U.S. immigration court] system itself” because “[t]he Executive Office for Immigration Review (EOIR), which manages the Immigration Court and the Board of Immigration Appeals (BIA), is currently housed under DOJ. While trial-level immigration prosecutors are housed under the U.S. Department of Homeland Security (DHS) within Immigration and Customs Enforcement (ICE), the Attorney General supervises the Office of Immigration Litigation (OIL) which defends immigration cases on behalf of the government in the circuit courts of appeals.”).


227. See, e.g., Letter from the American Bar Association, American Immigration Lawyers Association, Federal Bar Association, and National Association of Immigration Judges, *Congress Should Establish an Independent Immigration Court* (July 11, 2018) (on file with author) (arguing that “in its current state, the immigration court system requires a structural overhaul to solve its foundational problems”). An Article I court is a federal court organized under Article I of the United States Constitution, which confers upon Congress the power “[t]o constitute tribunals inferior to the Supreme Court.” U.S. CONST. art. I, § 8, cl. 9.


Section will address *Chevron*’s applicability in cases involving immigration law, examine the waning strength of the *Chevron* doctrine, and explain why the BIA’s PSG definition should not be entitled to deference.

1. *Chevron* and Its Applicability in Immigration Cases

*Chevron* analysis is applicable to the decisions of the Board of Immigration Appeals because although the attorney general is the final interpreter of immigration laws,230 the AG has delegated this power to the Board.231 Several exceptions to the applicability of *Chevron* deference to the Board exist, however. Deferral is only accorded to published BIA decisions232 and cases decided by a three-member panel of the Board.233 A federal court also does not have to defer to the BIA if “neither the IJ’s nor BIA’s decision contains any analysis with persuasive power.”234

The process for judicial review of agency decision-making under *Chevron* involves two steps, which are discussed in turn below.235 Step One requires a court to decide whether Congress has spoken to the question at issue. To determine this, a court looks at whether Congress’ intent is “clear” and “unambiguously expressed.”236 If the court determines, using traditional tools of statutory

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231. See INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (“The Attorney General, while retaining ultimate authority, has vested the BIA with power to exercise the ‘discretion and authority conferred upon the Attorney General by law’ in the course of considering and determining cases before it.”); Garcia-Quintero v. Gonzales, 455 F.3d 1006, 1012 (9th Cir. 2006) (“It is well-established that Congress delegated to the BIA the authority to promulgate rules, on behalf of the Attorney General, that carry the force of law ‘through a process of case-by-case adjudication.’” (quoting Aguirre-Aguirre, 526 U.S. at 425)).
232. Marmolejo-Campos v. Holder, 558 F.3d 903, 909 (9th Cir. 2009) (“We have held that the Board’s precedential orders, which bind third parties, qualify for *Chevron* deference because they are made with a ‘lawmaking pretense.’ We have not accorded *Chevron* deference to the Board’s unpublished decisions, however, because they do not bind future parties.” (citations omitted)).
233. Garcia-Quintero, 455 F.3d at 1012–13 (holding that a case must be decided by a three-member panel if it presents “[t]he need to establish a precedent construing the meaning of laws, regulations, or procedures”) (alteration in original). Only a small number of cases are decided by a three-member panel; panel decision are reserved for times when the BIA is required “to settle inconsistencies among the rulings of different immigration judges,” 8 C.F.R. § 1003.1(e)(6)(i) (2020); “to establish a precedent,” 8 C.F.R. § 1003.1(e)(6)(ii) (2020); “to resolve a case or controversy of major national import,” 8 C.F.R. § 1003.1(e)(6)(iv) (2020); or “to resolve a complex, novel, unusual, or recurring issue of law or fact,” 8 C.F.R. § 1003.1(e)(6)(vii) (2020). More often, a single Board member will “affirm the decision of . . . the immigration judge, without opinion. . . .” 8 C.F.R. § 1003.1(e)(4)(i) (2020).
234. Mendis v. Filip, 554 F.3d 335, 338 n.3 (2d Cir. 2009).
235. Professor Cass Sunstein, among others, has argued that *Chevron* also has a “Step Zero,” wherein federal courts should determine whether *Chevron* is applicable. See generally Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187 (2006).
construction, that Congress expressed its intent, that intent must control.\footnote{237} If, however, the court determines that the statute is silent or ambiguous, it can infer that Congress intended to vest definitional authority in the agency that regularly administers in that area of law. The court then moves to Step Two of the \textit{Chevron} analysis.

The goal of Step Two is to decide whether the agency’s approach is “based on a permissible construction of the statute.”\footnote{238} The Court has generally defined “permissible” as either “reasonable”\footnote{239} or not “arbitrary or capricious.”\footnote{240} In making its Step Two determination, a court can review the text, structure, and purpose of the statute.\footnote{241} But if, after doing so, a court finds that the agency did not “provide a reasoned explanation for its action”\footnote{242} or that the outcome is unreasonable, it fails at Step Two and its action cannot stand.

\section*{2. The Waning Strength of the \textit{Chevron} Doctrine}

Although \textit{Chevron} is a pillar of administrative law jurisprudence,\footnote{243} scholars argue that its “importance is fading,”\footnote{244} noting that in “recent years, we have seen a growing call from the federal bench, on the Hill, and within the legal academy to rethink administrative law’s deference doctrines to federal agency interpretations of law.”\footnote{245} A full review of the critiques of \textit{Chevron} is outside the scope of

\footnote{237. The \textit{Chevron} Court stated that courts “must reject administrative constructions that are contrary to clear congressional intent.” \textit{Id.} at 843 n.9.}
\footnote{238. \textit{Id.} at 843.}
\footnote{239. See, e.g., \textit{Id.} at 845; Edelman v. Lynchburg College, 535 U.S. 106, 121 (2002).}
\footnote{240. The reasonableness analysis of \textit{Chevron} Step Two is similar to the “arbitrary and capricious” standard in the Administrative Procedures Act (APA), 5 U.S.C. §§ 551–559 (2018). See Kenneth A. Bamberger & Peter L. Strauss, \textit{Chevron’s Two Steps}, 95 VA. L. REV. 611, 621 (2009) (“Courts and commentators have converged on an emerging consensus that the ‘arbitrary, capricious, and abuse of discretion’ standard set forth in Section 706(2)(A) supplies the metric for judicial oversight at \textit{Chevron}’s second step.”). See also Nat’l Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 1000 (2005) (finding that an “arbitrary or capricious” deviation from previous agency policy was impermissible under a \textit{Chevron} analysis); Judulang v. Holder, 565 U.S. 42, 52 n.7 (2011) (noting that the arbitrary and capricious standard used in Step 2 of the \textit{Chevron} analysis was the same as arbitrary and capricious review under the Administrative Procedures Act).}
\footnote{241. See, e.g., Troy Corp. v. Browder, 120 F.3d 277, 285 (D.C. Cir. 1997) (requiring an agency’s interpretation to “be reasonable and consistent with the statutory purpose”).}
\footnote{242. \textit{Judulang}, 565 U.S. at 45. The Court in \textit{Judulang} further expounded that the bar is “not... high... but it is an unwavering one.” \textit{Id}.}
\footnote{243. \textit{Chevron} is often described as the most cited decision in administrative law. See Jack M. Beermann, \textit{Chevron at the Roberts Court: Still Failing After All These Years}, 83 FORDHAM L. REV. 731, 731 (2014) (stating that \textit{Chevron} is the most cited Supreme Court administrative law decision); Thomas J. Miles & Cass R. Sunstein, \textit{Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron}, 73 U. CHI. L. REV. 823, 823 (2006) (labeling \textit{Chevron} the most cited case in “modern public law”).}
\footnote{245. Christopher J. Walker, \textit{Attacking Auer and Chevron Deference: A Literature Review}, 16 GEO. J.L. & PUB. POL’Y 103, 104 (2018).}
this Article, but briefly, its legitimacy has been questioned on grounds that include concerns about separation of powers and a view that the doctrine vests too much power and authority in both the executive branch and the federal government as a whole.246

A majority of the justices currently sitting on the Supreme Court have criticized or call the Chevron doctrine into question. Justice Thomas authored a concurring opinion in Michigan v. EPA, writing separately solely to “note that [the EPA’s] request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes.”247 Thomas argued that Chevron was a threat to separation of powers, as it vested too much authority in the executive branch and precluded judges from exercising independent judgment.

A few years earlier, Chief Justice Roberts authored a dissent joined by Justice Alito, in which he warned that “the danger posed by the growing power of the administrative state cannot be dismissed.”248 Justice Alito also questioned the judiciary’s deference to agency interpretations of regulations in the 2015 case, Perez v. Mortgage Bankers Association.249

Chevron critiques have also arisen in the Court’s examination of immigration law. In Pereira v. Sessions, a case in which the Court considered the validity of a notice to appear in immigration court that does not designate a specific time or place for the removal proceeding, Justice Kennedy drafted a concurrence, writing separately “to note [his] concern with the way in which the Court’s opinion in [Chevron] has come to be understood and applied.”250 He critiqued the Fourth Circuit’s decision-making process in another immigration case, Urbina v. Holder, arguing that the court’s limited “analysis suggests an abdication of the Judiciary’s

246. Professor Christopher Walker recently published a detailed overview of Chevron critiques. See id. See also Emily Hammond, Elizabeth Garrett & M. Elizabeth Magill, Judicial Review of Statutory Issues Under the Chevron Doctrine, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 67 (2015).


249. 575 U.S. 92 (2015). Justice Alito’s concurring opinion addressed the Paralyzed Veterans doctrine, which required federal agencies to engage in notice-and-comment rulemaking when they substantially altered an “interpretive” rule. See generally Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579 (D.C. Cir. 1997). He speculated that the “creation of that doctrine may have been prompted by an understandable concern about the aggrandizement of the power of administrative agencies as a result of the combined effect of (1) the effective delegation to agencies by Congress of huge swaths of lawmaking authority, . . . and (3) this Court’s cases holding that courts must ordinarily defer to an agency’s interpretation of its own ambiguous regulations.” 575 U.S. at 107–08 (Alito, J., concurring).

250. 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring). Justice Alito also used the Pereira case as an opportunity to express his view that Chevron is an “increasingly maligned precedent.” Id. at 2121 (Alito, J., dissenting).
proper role in interpreting federal statutes.”

Kennedy concluded that he found “the type of reflexive deference exhibited in some of these cases . . . troubling.”

Similarly, Justice Kennedy’s replacement, Justice Kavanaugh, “indicated skepticism of the [Chevron] doctrine in both academic and judicial writings” prior to his confirmation to the Supreme Court. In a 2016 Harvard Law Review article, he argued that the Chevron framework should not apply when “an agency is . . . interpreting a specific statutory term or phrase.” In a dissent in United States Telecom Association v. FCC, then-Judge Kavanaugh argued that “for an agency to issue a major rule, Congress must clearly authorize the agency to do so.”

Thus, if his past writings are any indication, Justice Kavanaugh may, like his predecessor, join his colleagues in seeking to limit the Court’s deference to administrative agency decisions.

Like Justice Kavanaugh, Justice Gorsuch also expressed skepticism about the Chevron doctrine prior to his appointment to the Court. In Gutierrez-Brizuela v. Lynch, then-Judge Gorsuch raised separation-of-powers as well as other concerns, noting that “[t]ransferring the job of saying what the law is from the judiciary to the executive unsurprisingly invites the very sort of due process (fair notice) and equal protection concerns the framers knew would arise if the political branches intruded on judicial functions.” He added that both “Chevron and Brand X permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design.” Thus, given his prior decisions, Justice Gorsuch would likely vote to limit Chevron’s reach in any case that came before the Supreme Court.

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251. Id. at 2120.
252. Id.
255. 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).
256. 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).
257. Id. at 1149.
Finally, although Justice Amy Coney Barrett does not have an extensive record on administrative law matters,\textsuperscript{259} she too may be inclined to limit \textit{Chevron} deference. Experts who have studied Barrett’s record and writings believe that her commitment to textualism and her expressed willingness to overrule precedential cases may make her open to revisiting the doctrine.\textsuperscript{260}

In sum, one might assume that the increasingly conservative Supreme Court would be reluctant to expand protections to immigrants. However, if the Court does intervene to resolve the circuit split regarding the definition of particular social group, support for a return to the \textit{Acosta} standard may come from the Court’s desire to uphold its preferred values in the area of administrative law.\textsuperscript{261}

3. \textit{The BIA’s Definition of “Particular Social Group” Does Not Merit \textit{Chevron} Deference}

Whether the Supreme Court or federal courts of appeals should afford \textit{Chevron} deference to the definition of particular social group promulgated by the Board of Immigration Appeals is, of course, more than just a matter of who sits on those courts. A closer analysis of \textit{Chevron} and the BIA’s jurisprudence reveals that the Board’s interpretation of the phrase “particular social group” fails at \textit{Chevron} Step Two.\textsuperscript{262}

The Board of Immigration Appeals’ PSG definition is unreasonable for two distinct reasons: (i) it is not in keeping with Congress’ intent for the Refugee Act to comport with international law and obligations; and (ii) the Board’s actions have defined the PSG out of existence, which cannot be a reasonable outcome. As such, deference to the Board of Immigration Appeals’ interpretation is no longer appropriate.


\textsuperscript{261} Some have expressed concern about this “circuit conflict on an issue where national uniformity is vital.” Henriquez-Rivas v. Holder, 707 F.3d 1081, 1095 (9th Cir. 2013) (Kozinski, C.J., dissenting).

\textsuperscript{262} The BIA’s interpretation of PSG likely satisfies \textit{Chevron} Step One because Congress did not explicitly express its intent regarding the definition of particular social group when enacting the Refugee Act of 1980, nor is the term defined in the statute or in the implementing regulations. \textit{See supra} Section II.B.
DEATH OF THE PARTICULAR SOCIAL GROUP

i. The BIA’s Definition of “Particular Social Group” Is Inconsistent with Congressional Intent

There exists no single definition for what constitutes a “reasonable” agency interpretation under Chevron Step Two, but scholars have suggested that “by ‘reasonable,’ the Court seemed to mean reasonable in light of the text, history, and interpretative conventions that govern the interpretation of a statute by a court.”

The Supreme Court itself has explained that “reasonable statutory interpretation must account for both ‘the specific context in which . . . language is used’ and ‘the broader context of the statute as a whole.’” Similarly, the Supreme Court has held that Chevron deference does not apply to an agency interpretation that is not “rationally related to the goals of the statute.”

Although legislative history regarding the PSG definition is absent, great clarity exists with respect to congressional intent regarding the refugee definition and U.S. asylum law as a whole. An examination of the statute reveals that the current “particular social group” definition is not in keeping with the history, context, or goals of the 1980 Refugee Act that created it. As such, the BIA’s interpretation of the term cannot be considered reasonable under Chevron.

First, there is no question that Congress intended that the Refugee Act “be interpreted in conformance with the [1967] Protocol’s definition.” As the Supreme Court stated in INS v. Cardoza-Fonseca,

If one thing is clear from the legislative history of the new definition of ‘refugee’ and indeed the entire 1980 Act it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the [Protocol] . . . Indeed, the definition of ‘refugee’ that Congress adopted . . . is virtually identical to the one prescribed by Article 1(2) of the Convention . . .

As such, the phrase “particular social group” must be understood within the broader context of a statute that both originated in international law and sought to

264. Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 321 (2014) (citing Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)). See also Albuquerque Indian Rights v. Lujan, 930 F.2d 49, 59 (D.C. Cir. 1991) (explaining that the canons of construction in [the court’s] review of administrative decisions [is] normally . . . limited to determining whether or not the agency interpretation is ‘rational and consistent with the statute’” (emphasis added) (citation omitted)).
266. See supra note 26.
268. Id. at 436. The Court added that “there were . . . many statements indicating Congress’ intent that the new statutory definition of ‘refugee’ be interpreted in conformance with the Protocol’s definition.” Id. at 437.
maintain a strong connection between domestic asylum law and international refugee law.

Moreover, Congress passed the Refugee Act in 1980, nearly thirty years after “particular social group” was defined in the Refugee Convention. In the intervening time, both international bodies and States had begun to give meaning to the otherwise ambiguous term. Thus, “although the United States Congress may not have articulated the meaning it intended for social group-based persecution, a substantial body of academic, administrative, and judicial interpretations of this term had developed, and Congress gave no indication that it intended to reject those developments.”

As Professor Bassina Farbenblum has explained, “the Refugee Act is one of a small number of incorporative statutes that directly incorporate international treaty language and concepts into U.S. domestic law.” Yet the Board of Immigration Appeals’ definition of “particular social group” has caused “domestic asylum law [to] become jurisprudentially unmoored from international refugee law.”

The United States’ particular social group requirements are now significantly more stringent than those applied in every other developed country; they also disregard the approach suggested by UNHCR. The increasing detachment from international jurisprudence created by the Board of Immigration Appeals’ interpretation of PSG squarely contravenes congressional intent.

Lastly, in addition to seeking to align domestic and international refugee law, Congress also passed the Refugee Act with a recognition of the underlying aims of the statute. As the BIA itself recognized, “it is important to keep in mind the fundamental humanitarian concerns of asylum law.” The court noted that “in enacting the Refugee Act of 1980, Congress sought to bring the Act’s definition of ‘refugee’ into conformity with the United Nations Convention and Protocol Relating to the Status of Refugees and, in so doing, give ‘statutory meaning to our national commitment to human rights and humanitarian concerns.’” And as a result of this context, the Board held that the asylum system should “afford a generous standard for protection in cases of doubt,” an axiom that should extend to the definition of “particular social group.”

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270. Farbenblum, supra note 53, at 1069.
271. Id. at 1059.
272. See Marouf, supra note 44, at 56–57.
273. See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 § 101(a) (1980) (“The Congress declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including, where appropriate, humanitarian assistance for their care and maintenance in asylum areas.”).
276. Id.
language, the effect of, and perhaps arguably the motivation behind, the BIA’s imposition of additional requirements onto the Acosta immutability test has been to exclude many in need from lifesaving legal protections.277

In sum, the Board of Immigration Appeals’ PSG definition is not in keeping with either the intent of Congress to conform the Refugee Act to international law, specifically the 1951 Convention and the 1967 Protocol, and to comport with international obligations. It also disregards the humanitarian underpinnings of U.S. asylum law. Consequently, when considering the history of the statute in which PSG was established and “the broader context of the statute as a whole” the Board’s interpretation of the phrase “particular social group” must be unreasonable under Chevron Step Two.278

ii. The BIA’s Definition Cannot Be Reasonable Because It Has Defined the Particular Social Group out of Existence

As the Supreme Court has stated, “[e]ven under Chevron’s deferential framework, agencies must operate ‘within the bounds of reasonable interpretation.’”279 Reasonableness, as mentioned above, has no precise definition, but increasingly, “[a]rguments for narrowing Chevron at Step Two call for a more searching analysis regarding what should constitute a ‘reasonable’ interpretation.”280

A growing number of courts are placing limits on what constitutes reasonable for Chevron purposes. For example, “[a]gencies are not free, under Chevron, to generate erratic, irreconcilable interpretations of their governing statutes.”281 The D.C. Circuit stated that deference is not “owed to any agency action that is based on an agency’s purported expertise where the agency’s explanation for its action lacks any coherence.”282 When an agency interprets a statutory term in a manner that conflicts with its prior positions and does not provide an plausible explanation

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277. See, e.g., Joan Fitzpatrick, The International Dimension of U.S. Refugee Law, 15 BERKELEY J. INT’L L. 1, 12 (1997) (noting that “divorcing international and domestic law tends to operate to the grave detriment of asylum-seekers.”). See also Farbenblum, supra note 53, at 1121 (“Interpreting the INA consistently with the Convention will invariably provide a more rights-protective framework than the domestic immigration statute alone.”).


280. Walker, supra note 245, at 118. See also Nicholas R. Bednar & Kristin E. Hickman, Chevron’s Inevitability, 85 GEO. WASH. L. REV. 1392, 1411 (2017) (“The Supreme Court has shown substantially greater willingness to invalidate agency interpretations at Chevron step two.”).


for that departure, *Chevron* deference may not apply.\(^{283}\) Lastly, an unreasonable outcome may also cause an agency’s interpretation to fail at Step Two.\(^{284}\)

In *Matter of M-E-V-G-* and *Matter of W-G-R-*., the BIA satisfied federal courts’ concerns about the social visibility element by clarifying the requirement and renaming it social distinction. However, the Board has still not provided an explanation for the tension between the social distinction and particularity elements. In fact, in both *Matter of M-E-V-G-* and *Matter of W-G-R-* the court conceded the “considerable overlap” between particularity and social distinction and could not offer an example of a group that would be both socially distinct and particular.\(^{285}\) Even DHS has advocated for the two requirements to be combined.\(^{286}\)

In *Mellouli v. Lynch*, a case considering whether possession of drug paraphernalia was a deportable offense, the Supreme Court held that if an agency’s interpretation does not lead to a sensible outcome, deference is not appropriate.\(^{287}\) The Board of Immigration Appeals’ definition of particular social group has led to a result that, like in *Mellouli*, “makes scant sense.”\(^{288}\) It has crafted a definition of particular social group whose requirements—social distinction and particularity—are mutually exclusive. This has led to only two PSGs being recognized since the imposition of the new elements, both of which have since been overruled by attorneys general largely on social distinction and particularity grounds.

As the Supreme Court stated in *Judulang v. Holder*, “[t]he BIA may well have legitimate reasons for [making a decision, b]ut still, it must do so in some rational way. . . . [T]he BIA’s approach must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system.”\(^{289}\) Here, the Board has effectively defined the particular social group out of existence, which is neither a rational nor a reasonable result. It is, like in *Judulang*, an outcome “unmoored from the purposes and concerns of the immigration laws. . . . [I]t

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283. *See Nat’l Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (finding that an “[u]nexplained inconsistency is . . . a reason for holding an interpretation to be an arbitrary and capricious change from agency practice”).


286. *See Matter of M-E-V-G-, 26 I. & N. Dec. at 253 n.11 (explaining that DHS “argued for the combination of the ‘social visibility’ and ‘particularity’ requirements into a single ‘social distinction’ requirement because of the close relationship between the two concepts”).*

287. 135 S. Ct. 1980, 1982 (2015). The Court explained that the Board’s decision led to “[t]he incongruous upshot . . . that an alien is not removable for possessing a substance controlled only under Kansas law, but he is removable for using a sock to contain that substance.” *Id.* It ultimately held that, because the BIA’s decision “makes scant sense, [its] interpretation is owed no deference under the doctrine described in *Chevron*.” *Id.*

288. *Id.*

is not supported by text or practice or cost considerations. The BIA’s approach therefore cannot pass muster under ordinary principles of administrative law.”

iii. The Rule of Lenity

Lastly, another consideration relevant to the Chevron analysis is the rule of lenity, a principle of statutory interpretation originating in criminal law that requires a court to construe ambiguity in the manner most favorable to the defendant. The rule of lenity was first applied in the immigration context in Fong Haw Tan v. Phelan, when the Supreme Court stated that because “deportation is a drastic measure and at times the equivalent of banishment or exile,” deportation provisions should be strictly construed in favor of the noncitizen. As the Court explained, “since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.”

The rule of lenity is firmly established in immigration law. Its relationship to Chevron, however, is more uncertain. In 2017, the Supreme Court declined to decide whether Chevron deference or the rule of lenity should be prioritized. When to consider the rule of lenity also remains an open question. As Professor David Rubenstein has noted, courts’ “treatment of the issue has . . . been quite varied. Indeed, just about every conceivable approach has been employed or
suggested by the circuit courts . . .”296 Scholars and the Board of Immigration Appeals are similarly divided. Professor Rebecca Sharpless has argued that the rule of lenity should apply at Step Zero.297 In Matter of Small, Board Member Lory Rosenberg stated that the rule should apply at Step One.298 Other scholars have argued that it is applicable at Step Two299 and even “at the very end of the process—after the court determines both that the statute is ambiguous under step one and [that deference is not warranted because] the agency’s interpretation is unreasonable under step two.”300

Ultimately, while the precise relationship of the rule of lenity to the Chevron doctrine continues to be debated, what is certain is that the rule serves as another mitigating factor against any deference to the Board of Immigration Appeals that would result in draconian outcomes for asylum seekers.

VI.

CONCLUSION

When Congress enacted the Refugee Act in 1980, it declared that asylum seekers were “of special humanitarian concern to the United States,” and highlighted “the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands.”301 From its origin, U.S. asylum law was intended to conform with international refugee law, which is an expansive and rights-protective doctrine.302 In generating particular social group jurisprudence that does not allow any applicants to qualify, the Board of Immigration Appeals has abrogated both its legal and moral responsibilities to those seeking refuge in the United States.

The particular social group ground is the mechanism by which many who are facing grave violence at the hands of gangs, their intimate partners, or their


297. See, e.g., Rebecca Sharpless, Zone of Nondeference: Chevron and Deportation for a Crime, 9 DREXEL. L. REV. 323, 377 n.88 (2017) (“Like the criminal rule of lenity, the presumption against deportation in immigration cases arguably kicks in at Chevron step zero—when courts are deciding whether Chevron even applies in the first place.”).

298. In re Small, 23 I. & N. Dec. 448, 454 (B.I.A. 2002) (Rosenberg, Mem., dissenting) (stating that the rule of lenity “maintains its currency today and applies even to interpretations of the plain language of the statute under the first prong of the test prescribed in Chevron”).

299. See, e.g., Brian G. Slocum, The Immigration Rule of Lenity and Chevron Deference, 17 GEO. IMMIGR. L.J. 515, 575 (2003) (arguing that the rule of lenity should be considered in Step Two of the Chevron analysis, as part of a court’s determination of whether an agency’s interpretation is reasonable).

300. Rubenstein, supra note 296, at 504.


302. See Farbenblum, supra note 53, at 1063 (noting that the international refugee law framework has a rights-protective purpose).
families seek solace and protection. Out of a misplaced fear of opening floodgates, the Board of Immigration Appeals has effectively closed our borders to them. We must do what we can to save a legal doctrine that stands to save so many lives.\footnote{See Shane Dizon & Nadine Wettstein, Immigration Law Service § 10:137 (2d ed. 2008) (“After political opinion claims, the largest body of U.S. asylum and withholding jurisprudence is based upon claims of membership in a particular social group.”).}