A STEP TOO FAR: *MATTER OF A-B-*, "PARTICULAR SOCIAL GROUP," AND *CHEVRON*

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Every day, thousands of Central American asylum seekers, many fleeing persecution from domestic abusers and gangs, attempt to seek refuge in the United States. To receive asylum, those escaping such violence typically must show membership in a "particular social group." In Matter of A-B-*, issued in June 2018, then-Attorney General Jefferson B. Sessions III attempted to destroy the viability of domestic-violence-related particular social groups altogether. As we demonstrate in this Article, this far-reaching decision should not receive* Chevron *deference from reviewing courts.*

A-B- *is concerning both for its potentially calamitous effect on individuals fleeing domestic and gang violence and for its abrupt, unwarranted departure from established immigration law. As a result of* A-B-*, individuals, many of them women, are being subjected to both different and higher standards for certain aspects of their asylum claims and must "reinvent the wheel" of establishing that domestic violence can be a basis for asylum.*

Federal courts reviewing immigration decisions apply the Chevron *two-step framework, which requires a court to begin by using statutory interpretation to examine the meaning of the term at issue. In this Article, we provide a fresh analysis of "particular social group" through statutory construction, legislative history, and international context to find that there are some unambiguous parameters around the term. Then, advancing arguments under both steps of* Chevron, *we find that* A-B- *contradicts congressional intent, misinterprets precedent, and oversteps the discretionary authority afforded to the agency. Therefore, reviewing courts should not give* A-B- *deference.*

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> "The United States has every right to control immigration. But Congress has not authorized the immigration service to do so by denying asylum applications in unreasoned decisions."[1]

INTRODUCTION

Asylum seekers from Central America face innumerable hurdles in today's political and legal environment. Since at least the summer of 2014,[2] such groups have been the focus of copious increasingly restric-

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[1] Iao v. Gonzales, 400 F.3d 530, 533 (7th Cir. 2005).

[2] *See*, *e.g.*, Remarks on Immigration Reform, 2014, DAILY COMP. PRES. DOC. 00504 (June 30, 2014) (stating "We now have an actual humanitarian crisis on the border.").

tive policies,[3] scapegoating,[4] and national outrage.[5] The result of this attention is that, while the violence and extreme risks for certain communities in Central America continue to grow,[6] the U.S. government

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[3] *See*, *e.g.*, Hamed Aleaziz, *Immigrant Asylum-Seekers May Get Less Time to Prepare Their Cases Under a New Trump Administration Rule*, BUZZFEED NEWS (July 9, 2019), https://www.buzzfeednews.com/article/hamedaleaziz/immigrant-asylum-seekers-less-time-to-prepare (describing proposed policy to administer credible fear interviews within a day of arrival in the United States); Zolan Kanno-Youngs & Caitlin Dickerson, *Asylum Seekers Face New Restraints Under Latest Trump Orders*, N.Y. TIMES (Apr. 29, 2019), https://www.nytimes.com/2019/04/29/us/politics/trump-asylum.html (discussing new work-permit restraints for asylum seekers); *see generally* EXEC. OFF. FOR IMMIGR. REV., EOIR PERFORMANCE PLAN (2018) (issuing new requirements for immigration judges to meet high case-completion quotas); Tal Kopan, *New Rules Will Give AG William Barr More Say Over Immigration Courts*, S.F. CHRON. (July 1, 2019), https://www.sfchronicle.com/politics/article/AG-Barr-moves-forward-with-immigration-court-14063716.php (describing a proposed regulation that would allow the Attorney General to unilaterally decide which Board of Immigration Appeals decisions become precedential); Tal Kopan, *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; Monica Ortiz Uribe, *Trump Administration's 'Remain in Mexico' Program Tangles Legal Process*, NPR NEWS (May 9, 2019), https://www.npr.org/2019/05/09/721755716/trump-administrations-remain-in-mexico-program-tangles-legal-process (describing the impact of the Trump Administration's Migrant Protection Protocols, or "Remain in Mexico" Policy). See also Am. Soc'y of Int'l L., *Trump Administration Tightens Procedures with Respect to Asylum Seekers at the Southern Border*, *in* 113 AM. J. INT'L L. 377 (Jean Galbraith ed., 2019), for a detailed description of numerous additional policies.

[4] *See*, *e.g.*, Eric Lach, *Trump's Dangerous Scapegoating of Immigrants at the State of the Union*, NEW YORKER (Feb. 5, 2019), https://www.newyorker.com/news/current/trumps-dangerous-scapegoating-of-immigrants-at-the-state-of-the-union (dissecting the anti-immigrant rhetoric employed during the State of the Union and in other settings); Amber Phillips, *'They carve you up with a knife': Trump is even more Hyperbolic About Immigration Now Than in 2016*, WASH. POST (Oct. 23, 2018), https://www.washingtonpost.com/politics/2018/10/23/trump-is-even-more-hyperbolic-about-immigration-now-than/?utm_term=.4ef9336d1699.

[5] *See, e.g.*, Isaac Chotiner, *Inside a Texas Building Where the Government Is Holding Immigrant Children*, NEW YORKER (June 22, 2019), https://www.newyorker.com/news/q-and-a/inside-a-texas-building-where-the-government-is-holding-immigrant-children (discussing detention of migrant children in unsafe conditions); Ben Fenwick, *'Stop Repeating History': Plan to Keep Migrant Children at Former Internment Camp Draws Outrage*, N.Y. TIMES (June 22, 2019), https://www.nytimes.com/2019/06/22/us/fort-sill-protests-japanese-internment.html?action=click&module=relatedLinks&pgtype=article (discussing internment of migrant children); *Migrant Caravan: What is It and Why Does It Matter?* BBC NEWS (Nov. 26, 2018), https://www.bbc.com/news/world-latin-america-45951782 (discussing Honduran asylum seekers traveling in a group to the United States, many of them family units); Alexandra Yoon-Hendricks & Zoe Greenberg, *Protests Across U.S. Call for End to Migrant Family Separations*, N.Y. TIMES (June 30, 2018), https://www.nytimes.com/2018/06/30/us/politics/trump-protests-family-separation.html (discussing family separation at the border).

[6] The United States Department of State annually publishes country-conditions reports for each nation. The reports for El Salvador, Honduras, and Guatemala—the three main Central American countries from which people are fleeing—describe conditions of severe human rights abuses and violence against women committed with impunity, in addition to other major humanitarian concerns. *See generally* U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., 2018 Country Reports on Human Rights Practices: El Salvador (2019); U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., 2018 Country Reports on Human Rights Prac-

has drastically reduced asylum seekers' ability to receive[7] or even apply for[8] protection. These policies have increased the risks for a certain group of vulnerable asylum seekers in particular: those fleeing domestic violence and targeting by gangs.

Consider, for example, the situation of Yessica,[9] a 20-year-old Honduran woman who was forced by a 50-year-old gang member to be his "girlfriend" as he held a gun to her head. He carried a machete at all times and would attack her while drunk, stating that he was the boss and she had to obey him. Another woman, Marta, fled Guatemala after her partner tried to choke her on multiple occasions and raped her 12-year-old daughter. Her partner told her that he would kill Marta, her daughter, and the rest of their family members, "chopping them up like salsa" if she reported the abuse.[10]

Similar facts appear in *Matter of A-B-*, the June 2018 decision of then-Attorney General Jefferson Sessions.[11] *A-B-* is one of the most devastating developments in modern United States asylum law, for both its breathtaking reversal of protections for domestic violence survivors as

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tices: Guatemala (2019); U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., 2018 Country Reports on Human Rights Practices: Honduras (2019).

7 Jeffrey S. Chase, *The Immigration Courts: Issues and Solutions*, JEFFREYSCHASE.COM: OPINIONS/ANALYSIS ON IMMIGRATION LAW (Mar. 28, 2019), https://www.jeffreyschase.com/blog/2019/3/28/i6el1do6l5p443u1nkf8vwr28dv9qi (describing the increasing series of policies enacted by the Trump administration to curtail immigration judges' ability to adjudicate cases in accordance with due process and noting, "Sessions's most egregious decision attempted to unilaterally strip women of the ability to obtain asylum as victims of domestic violence" under *Matter of A-B-*).

8 Richard Gonzales, *Trump Administration Begins 'Remain in Mexico' Policy, Sending Asylum-Seekers Back*, NPR NEWS (Jan. 29, 2019), https://www.npr.org/2019/01/29/689819928/trump-administration-begins-remain-in-mexico-policy-sending-asylum-seekers-back (describing policy requiring asylum-seekers to wait for their immigration court hearings in Mexico rather than in the United States). This policy has significantly increased the difficulty in applying for asylum, in part because of increased wait times and due to dangers at the border. *See also* Yael Schacher, *'Remain in Mexico' Policy Pushes Asylum Seekers into Grave Danger*, HILL (May 28, 2019, 6:00 PM), https://thehill.com/opinion/immigration/445840-remain-in-mexico-policy-pushes-asylum-seekers-into-grave-danger.

9 Names and identifying details have been changed to protect privacy.

10 Yessica, Marta, and many others with similar stories shared these struggles directly with the authors of this Article. In addition to our work as immigration attorneys in non-profits and clinical spaces, we have provided legal assistance to asylum seekers detained in Dilley, Texas, and those waiting in Tijuana, Mexico, for the opportunity to have their asylum case heard in the United States. We note that these stories are not unusual for Central American asylum seekers. *See generally* Bill Ong Hing, *My Asylum Clients Are Not "Gaming the System*," SLATE (July 30, 2019, 11:10 AM), https://slate.com/news-and-politics/2019/07/lindsey-graham-my-asylum-clients-are-not-gaming-the-system.html (describing the "desperation and fear" that asylum seekers experience and how skepticism about the danger they face is unwarranted).

11 *See Matter of* A-B-, 27 I. & N. Dec. 316, 321 (A.G. 2018) ("The respondent asserted that her ex-husband . . . repeatedly abused her physically, emotionally, and sexually during and after their marriage.").

well as its racist undertones and targeted language.[12] The respondent in the case, Ms. A.B., sought asylum in the United States after fleeing her native El Salvador to escape years of brutal physical, sexual, and emotional abuse by her husband.[13] He frequently threatened to kill her while brandishing weapons; he beat her, raped her, and treated her like a slave.[14] She finally fled her country after her then ex-husband attacked her with a large knife and described in detail how he planned to kill her.[15] An immigration judge initially denied Ms. A.B.'s asylum application based on a negative credibility finding, which was overturned by the Board of Immigration Appeals ("Board").[16] The Board found that Ms. A.B. had suffered persecution on account of her particular social group and directed the judge to grant her asylum on the merits.[17] During this process, Sessions certified[18] the case to himself for review.[19] His decision ultimately denied Ms. A.B. asylum,[20] overruled 2014 precedent es-

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12 *See id.* at 345 (noting that the applicant in *A-B-* had entered the United States without inspection, chastising her, and suggesting that those who enter without inspection are only "seeking a better life" rather than fleeing for their lives.).

13 *Backgrounder and Briefing on* Matter of A-B-, CTR. FOR GENDER & REFUGEE STUD., https://cgrs.uchastings.edu/matter-b/backgrounder-and-briefing-matter-b (last updated Aug. 2018) [hereinafter *Backgrounder*].

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 A provision in the Code of Federal Regulations grants the Attorney General the power to "certify" cases for review, plucking the case from the immigration-court system and staying the matter. 8 C.F.R. § 1003.1(h)(1)(i) (2018) ("The Board [of Immigration Appeals] shall refer to the Attorney General for review of its decisions all cases that . . . [t]he Attorney General directs the Board to refer to him."). *See* Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841 (2016) (describing how a "little used mechanism, Attorney General referral and review, . . . could play an efficacious role in the executive branch's development and implementation of its immigration policy" and explaining how the procedure works); Fatma Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707, 741, 743 (2019) (examining forms of political interference in immigration law, including certification cases); Maureen A. Sweeney, *Enforcing/Protection: The Danger of* Chevron *in Refugee Act Cases*, 71 ADMIN. L. REV. 127, 138–139 (2019) (describing how former Attorney General Sessions used his "powers aggressively" while in office, "with the apparent goals of limiting both procedural rights and substantive legal claims, especially in the asylum arena."); Jeffrey S. Chase, *The AG's Certifying of BIA Decisions*, JEFFREYSCHASE.COM: OPINIONS/ANALYSIS ON IMMIGRATION LAW (Mar. 28, 2018), https://www.jeffreyschase.com/blog/2018/3/29/the-ags-certifying-of-bia-decisions. This article does not address Attorney General certification, but such a discussion may arise in a future scholarly project.

19 *Matter of* A-B-, 27 I. & N. Dec. 227 (A.G. 2018); *Backgrounder*, *supra* note 13. In addition, the immigration judge questioned the validity of the Board's decision and certified it back to the Board, a relatively rare procedural move. Thus, when Sessions certified the case to himself, jurisdiction still rested with the Board. *Backgrounder*, *supra* note 13.

20 *Matter of* A-B-, 27 I. & N. Dec. 316, 317 (A.G. 2018) (vacating the lower court's decision granting asylum).

tablishing domestic violence as a basis for a particular social group,[21] and also contained sweeping language raising the bar for domestic violence- and gang-based particular social group claims.[22] In dicta,[23] Sessions attempted to foreclose these claims entirely going forward, stating "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum."[24]

In the wake of *A-B-*, former immigration judges, numerous scholars, activists, politicians, and stakeholders weighed in with resounding indictments against the new decision.[25] Commentators immediately predicted the decision's detrimental impact on the ability of asylum seekers to gain protection.[26] At present, *A-B-* remains in place for individuals pursuing

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21 *Id.* at 319 ("I do not believe [*Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014)] correctly applied the Board's precedents, and I now overrule it.").

22 *Id.* at 337 (the applicant must show that the government "condones" the actions of private actors perpetrating violence and is "complete[ly] helpless[ ]" to control such actors). This is a higher standard than the "unable and unwilling" standard in the Immigration and Nationality Act. *See* Grace v. Whitaker, 344 F. Supp. 3d 96, 127, 130 (D.C. Cir. 2018) (agreeing with plaintiffs that *A-B-* "set forth a new, heightened standard for government involvement" in the case of violence by private actors).

23 The court in *Grace*, 344 F. Supp. 3d at 116, noted that "it is well-settled" that agencies can make policy via adjudication, not only by rule-making, suggesting that the dicta of *A-B-* holds weight as policy, not only as persuasive reasoning. The court in *Grace* proceeded to find part of *A-B-*'s dicta unlawful, in addition to the legal holdings, in credible fear interview context.

24 *Matter of* A-B-, 27 I. & N. Dec. at 321. Attorney General Barr recently issued a decision similarly attempting to foreclose a class of particular social group claims: those based on membership in a family; *see also Matter of* L-E-A, 27 I. & N. Dec. 581, 586 (A.G. 2019) (issuing a decision similarly attempting to foreclose a class of particular social group claims: those based on membership in a family).

25 *See, e.g.*, Theresa A. Vogel, *Critiquing* Matter of A-B-*: An Uncertain Future in Asylum Proceedings for Women Fleeing Intimate Partner Violence*, 52 U. MICH. J.L. REFORM 343, 373–74 (2019) (critiquing the decision for disregarding 30 years of progress in U.S. domestic-violence laws and for characterizing domestic violence as a "personal" matter); *Attorney General Sessions Attempts to Close the Door to Women Refugees*, CTR. FOR GENDER & REFUGEE STUD. (June 11, 2018), https://cgrs.uchastings.edu/news/attorney-general-sessions-attempts-close-door-women-refugees; *465 Groups Ask Sessions to Rescind* Matter of A-B-, LEXISNEXIS LEGAL NEWSROOM (June 27, 2018), https://www.lexisnexis.com/LegalNewsRoom/immigration/b/immigration-law-blog/posts/465-groups-ask-sessions-to-rescind-matter-of-a-b-; *Retired Immigration Judges and Former Members of the Board of Immigration Appeals Statement in Response to Attorney General's Decision in* Matter of A-B-, AILA Doc. No. 18061134 (June 11, 2018), https://www.aila.org/infonet/retired-ijs-and-former-members-of-the-bia-issue; Cody Wofsy & Katrina Eiland, *Jeff Sessions' Illegal Attacks on Asylum Seekers*, ACLU.COM (Aug. 7, 2018), https://www.aclu.org/blog/immigrants-rights/deportation-and-due-process/jeff-sessions-illegal-attacks-asylum-seekers.

26 *See, e.g.*, Erin Corcoran, *The Construction of the Ultimate Other: Nationalism and Manifestations of Misogyny and Patriarchy in U.S. Immigration Law and Policy*, 20 GEO. J. GENDER & L. 541, 572 (2019) ("On a practical level, [the decision in *Matter of A-B-*] means most people fleeing gender-based violence . . . will not qualify for asylum and refugee protection in the United States."); Jennifer Lee Koh, *When Shadow Removals Collide: Searching for Solutions to the Legal Black Holes Created by Expedited Removal and Reinstatement*, 96

their claims before an immigration judge,[27] and it is impeding the ability of those fleeing domestic violence to receive asylum.[28]

This Article demonstrates why reviewing courts should not defer to *A-B-*'s definition of "particular social group" by conducting a thorough statutory analysis[29] of the term and applying that analysis to determine that reviewing courts must deny *Chevron* deference.[30] Federal courts are

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WASH. U. L. REV. 337, 356 (2018) (discussing the high likelihood of increased expedited removal orders at the border in light of *Matter of A-B-*); Fatma Marouf, *Becoming Unconventional: Constricting the 'Particular Social Group' Ground for Asylum*, 44 N.C. J. INT'L L. 487, 512 (2019) (arguing that *A-B-*, among other recent cases, unduly restricts the particular social group definition and will lead to denials of domestic-violence-based claims).

[27] *Matter of A-B-* was immediately felt at the border. *See, e.g.*, Tal Kopan, *Impact of Sessions' Asylum Move Already Felt at Border*, CNN (July 14, 2018), https://www.cnn.com/2018/07/14/politics/sessions-asylum-impact-border/index.html. In December 2018, a federal judge permanently enjoined part of *A-B-*, preventing the government from applying the guidance provided in its implementing policy memo, PM-602-0162, because it was both arbitrary and capricious and contrary to the INA. Grace v. Whitaker, 344 F. Supp. 3d 96, 126 (D.C. Cir. 2018). *Grace* leaves *A-B-* in effect with respect to cases in front of immigration judges—the procedural posture in the lower court that is relevant here.

[28] Asylum applicants pursuing relief in immigration courts, rather than at the border, are still governed by *A-B-*. *See Grace*, 344 F. Supp. 3d at 105 (deciding only whether *A-B-* and PM-602-0162 should be enjoined with regard to credible fear determinations). *A-B-* continues to impact asylum claims in court. *See, e.g.*, Joel Rose, *As More Migrants Are Denied Asylum, An Abuse Survivor Is Turned Away*, NPR NEWS (Jan. 18, 2019), https://www.npr.org/2019/01/18/686466207/its-getting-harder-for-migrants-to-win-asylum-cases-lawyers-say; *but see* Linda Kelly, *The Ejusdem Generis of* A-B-*: Ongoing Asylum Advocacy for Domestic Violence Survivors*, 75 NAT'L LAW. GUILD REV. 65 (2018) (discussing practice tips for how immigration attorneys can litigate domestic violence claims in immigration court notwithstanding *Matter of A-B-*).

[29] Generally, we do not address matters of comparative and international law in this Article. Instead, we focus solely on the sources we observe courts to use in their written opinions and reserve such discussions for consideration later in our scholarly agenda.

[30] This is the first article to conduct the analysis at this level of detail, providing a concrete outline for how advocates or courts can argue for or reach the conclusion that *A-B-* does not warrant deference. Fatma Marouf noted in a recent article that *A-B-* should be reviewed under *Chevron* and that Attorney General's interpretation of particular social group delineated in the case "may well fail that standard as arbitrary or unreasonable interpretations of the INA." Marouf, *supra* note 26, at 512. This Article explains why *A-B-* is in fact unreasonable.

Further, we build on the work of scholars who have analyzed "particular social group" and called for solutions to clarifying the term. *E.g.* Liliya Paraketsova, *Why Guidance from the Supreme Court is Required in Redefining the Particular Social Group Definition in Refugee Law*, 51 U. MICH. J.L. REFORM 437, 449 (2018) (discussing the general history of the term in international and domestic law and calling for the Supreme Court to "provide detailed guidance for the BIA to revise the PSG definition to one that removes the particularity requirement and changes the social distinction requirement into a flexible standard"); Rachel Gonzalez Settlage, *Rejecting the Children of Violence: Why U.S. Asylum Law Should Return to the Acosta Definition of a "Particular Social Group*," 30 GEO. INT'L L. REV. 287, 302 (2016) (arguing that the Board improperly limited the definition of particular social group through adding additional factors); Kristen Armstrong, *A Deferential Crisis: The Board of Immigration's* Chevron *Struggle Concerning Refugee Principles*, 52 SUFFOLK U. L. REV. 273, 288 (2019) (arguing that the current definition of particular social group does not deserve *Chevron* deference, but not addressing *A-B-* specifically); Claudia B. Quintero, *Ganging Up on Immigration Law: Asylum Law and the Particular Social Group Standard – Former Gang Mem-*

the only avenue for review of Board or Attorney General immigration decisions.[31] Reviewing courts must ascertain whether an agency decision should get deference under the two-step analysis first introduced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*.[32] Courts[33] and scholars alike[34] generally accept the application of the *Chevron* analytical framework to Board of Immigration Appeals (Board) decisions. The Supreme Court has suggested that Board decisions resolving statutory ambiguities should typically receive deference under the

bers and Their Need for Asylum Protections, 13 U. MASS. L. REV. 192, 223 (2018) (arguing that the Board's interpretation of particular social group is arbitrary and capricious, particularly with respect to gang members' asylum claims).

Other scholars have considered *A-B-* from a variety of angles, including Corcoran, *supra* note 26, at 572 (discussing how *A-B-* will result in victims of numerous kinds of gender-based violence being denied asylum); *see also* Vogel, *supra* note 25, at 407 (critiquing the decision for its failure to understand intimate partner violence and suggesting legislative reforms). Additionally, scholars have discussed the lack of asylum protection for victims of gender-based violence even before *A-B-*. *See, e.g.*, Fatma 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, 96-98 (2008) (explaining why most domestic-violence claims would fail the Board's social visibility test); Sarah Rogerson, *Waiting for Alvarado: How Administrative Delay Harms Victims of Gender-Based Violence Seeking Asylum*, 55 WAYNE L. REV. 1811, 1845 (2009) (proposing incremental reforms to improve adjudication of such cases); Elizabeth Zambrana, *The Social Distinction of "Invisible" Harms: How Recent Developments in the Particular Social Group Standard Fall Short for Victims of Gender-Based Harms Committed by Private Actors*, 36 WOMEN'S RTS. L. REP. 236, 261–62 (2015). This Article does not directly address *A-B-*'s problematic construction of gender and violence. This issue is not a subject of this Article, but we acknowledge that it is a critical problem directly implicated by *A-B-*.

31 Congress has delegated the authority to administer immigration law to the Attorney General, and Board of Immigration Appeals and Attorney General certification cases are not subject to review by a higher administrative tribunal. *See* Vogel, *supra* note 25, at 349–50 (explaining that the Board of Immigration Appeals is the highest administrative body in the immigration court system, and Circuit Courts of Appeal have *de novo* review over questions of law); *see also* Paraketsova, *supra* note 30, at 449 ("Appeals from the BIA go up to the relevant circuit court that the Immigration Judge sits in.").

32 467 U.S. 837 (1984) (holding that where Congress has left a policy question ambiguous, courts should generally defer to the decisions of an executive agency charged with administering a statutory scheme).

33 *See, e.g.*, INS v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999) ("It is clear that the principles of *Chevron* deference are applicable to [the immigration] statutory scheme."); Henriquez-Rivas v. Holder, 707 F.3d 1081, 1087 (9th Cir. 2013) ("The BIA's construction of ambiguous statutory terms in the INA through case-by-case adjudication is entitled to deference under *Chevron*."); Valdiviezo-Galdamez v. Att'y Gen., 663 F.3d 582, 590, 603 (3d Cir. 2011) (applying the *Chevron* framework to the Board's interpretation of particular social group factors and declining to grant deference); Negusie v. Holder, 555 U.S. 511, 517 (2009) (stating that *Chevron* application to immigration agency decisions is "well-settled"); *Grace*, 344 F. Supp. 3d at 121 (applying the "familiar *Chevron* framework" to *A-B-*).

34 *See, e.g.*, Paul Chaffin, *Expertise and Immigration Administration: When Does Chevron Apply to BIA Interpretations of the INA?*, 69 N.Y.U. ANN. SURV. AM. L. 503, 505–06, 547 (2013) (explaining "the universal view that Chevron applies to BIA interpretations"); Marouf, supra note 26, at 512 (assuming Board interpretations of the INA should be reviewed under *Chevron*); Settlage, *supra* note 30, at 298 (stating that federal courts typically use the *Chevron* framework to review Board decisions).

second step of *Chevron*.[35] However, some scholars argue that it is time to revisit this assumption in light of intervening doctrinal development, the nature of Refugee Act cases, and international human rights obligations.[36] Further, some Supreme Court justices have signaled increasing reluctance to defer to agency interpretations.[37] Building on this opening, we consider anew both steps of *Chevron*, finding that "particular social group" is not entirely ambiguous and concluding that *A-B-* should not be given deference.

Part I provides an overview of the international and domestic origins of the key term "particular social group" and details precedent interpreting that term, including *A-B-*. Part II explains the basic *Chevron* framework and conducts a detailed analysis of the meaning of the term "particular social group" through the lens of statutory analysis, including the canons of construction, considerations of legislative history, and statutory context. Part III employs step one of the *Chevron* framework to show how *A-B-* contravenes the unambiguous parameters of the particular social group term and should not receive deference at this step. Part IV turns to *Chevron* step two to argue that Sessions' interpretation of particular social group is unreasonable because it departs from the accepted methods of legal reasoning for ambiguous terms, misinterprets particular social group, and violates even the prior Board decisions it purportedly exalts. We conclude that *A-B-* cannot withstand judicial scrutiny.

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[35] INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987) (citing *Chevron* and explaining that, while statutory interpretation remains the province of the courts, when the agency has engaged in filling "any gap," courts should defer to the agency's ruling).

[36] Chaffin, *supra* note 34, at 564 (arguing for use of *Chevron* step zero for a more robust analysis to determine whether *Chevron* should be utilized on a case-by-case basis); Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron*, 60 DUKE L.J. 1059, 1104 (2011) (arguing that that courts can break out of their "lockstep deference" to Board decisions, including by acknowledging the limited applicability of *Chevron* in the context of the asylum statute, which has an international treaty underpinning it); Sweeney, *supra* note 18, at 133 (arguing that the Supreme Court's *Chevron* analysis in the immigration context is outdated and that Board decisions should not automatically get deference).

[37] *See, e.g.*, Paul Daly, *Doubts About Deference:* Chevron USA v. Natural Resources Defence Council, 32 CAN. J. ADMIN. L. & PRAC. 137 (2019) (summarizing a series of decisions and trends away from *Chevron*, including noting that Justices Gorsuch, Thomas, and Kavanaugh have expressed concern and skepticism with regard to the doctrine); *see also* Pereira v. Sessions, 138 S. Ct. 2105, 2120–21 (2018) (Kennedy, J., concurring) (stating that the "reflexive deference" granted by circuit courts with respect to immigration cases is "troubling" and "suggests an abdication of the Judiciary's proper role in interpreting federal statutes." Justice Kennedy went on to suggest that, should an appropriate case arise, the court should reconsider the premise and use of *Chevron*). Additionally, the Supreme Court recently decided to limit deference to agency interpretations of the agency's own regulations—known as the *Auer* doctrine—though this decision does not affect *Chevron*; *see also* Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019) (deciding to limit deference to agency interpretations of the agency's own regulations—known as the *Auer* doctrine—though this decision does not affect *Chevron*).

I. BACKGROUND

A. *Asylum Law and "Particular Social Group"*

We begin with a brief overview of asylum law and the international origin of the refugee definition. Because immigration law is extremely complex,[38] and because many scholars have provided excellent outlines of different areas within immigration law,[39] we focus our explanation on only the most relevant background for our analysis. Below, we discuss the international and domestic background of the refugee definition, with an especial focus on the term at issue in *A-B-*: particular social group.[40]

The United States incorporated the modern refugee definition into domestic law following the model of the United Nations 1951 Convention Relating to the Status of Refugees (Refugee Convention)[41] and 1967 Protocol relating to the Status of Refugees (1967 Protocol).[42] Reeling from the refugee crisis in the aftermath of World War II, the United Nations Economic and Social Council had created the Ad Hoc Committee on Statelessness and Related Problems to develop a system to protect the human rights of displaced populations.[43] Composed of government representatives from thirteen states, including the United States, the Committee began crafting the refugee definition at its first meeting.[44] Ultimately, this definition was incorporated into the Refugee Conven-

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38 Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1637 (2010) ("Immigration law presents special complexities. The sheer size and chaotic layout of the principal statute and related sources of law bewilder specialists and nonspecialists alike.").

39 *See, e.g.*, Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 372–77 (2006) (providing a detailed history of the specific administrative bodies and actors in the U.S. immigration scheme); Marouf, supra note 26, at 489–94 (discussing the evolution of particular social group in U.S. law); Paraketsova, *supra* note 30, at 438–45 (giving an overview of the history of immigration law from its international basis to the present); Rachel E. Rosenbloom, *Remedies for the Wrongly Deported: Territoriality, Finality, and the Significance of Departure*, 33 HAW. L. REV. 139, 144–45 (2010) (explaining the basics of removal proceeding procedures); Vogel, *supra* note 25, at 348–49 (explaining the structure of the different administrative agencies with a hand in asylee protection).

40 Vogel, *supra* note 25, at 350–52. Although *A-B-* at times uses the phrase "membership in a particular social group," for purposes of this paper, we have isolated the term to "particular social group" as a distinct analytical matter. We also note that the 1967 Protocol from which Congress drew the refugee definition uses the phrase "membership *of* a particular social group." Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol] (emphasis added).

41 Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

42 1967 Protocol, *supra* note 40.

43 Economic and Social Council Res. 248 B (XI) (Aug. 8, 1949); *see also* Paraketsova, *supra* note 30, at 440; Vogel, *supra* note 25, at 351.

44 THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY 308 (Andreas Zimmermann ed., Oxford Univ. Press 2011). [hereinafter COMMENTARY]

tion's Article 1A[45] as the first internationally recognized definition of a refugee.[46] The 1967 Protocol adopted the Convention's refugee definition while removing some of its limitations to make the Convention's provisions applicable to new refugees.[47] The refugee definition encompassing protections for particular social groups represents a near-universal consensus[48] in international law, with 148 state party signatories to either the Refugee Convention or its implementing Protocol, including the United States.[49]

Although the United States first attempted to create a broad immigration system through the Immigration and Nationality Act (INA) of 1952,[50] the U.S. refugee definition, drawn from international law, did not appear in its current form until the Refugee Act of 1980.[51] To address the discriminatory policies[52] and procedural shortcomings of the 1952 INA, in late 1978, Senator Edward M. Kennedy, Chairman of the Senate Judiciary Committee, initiated consultations between congressional committee staff and the executive branch to revise the Act.[53] The result of these collaborations was ultimately the passage of the Refugee Act of 1980, substantially amending the INA. The Refugee Act defines a refugee as

> any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return

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45 Article 42 of the Convention forbids any reservations to this article. *See* Refugee Convention, *supra* note 41, at 182.

46 Nicholas R. Bednar & Margaret Penland, *Asylum's Interpretative Impasse: Interpreting "Persecution" and "Particular Social Group" Using International Human Rights Law*, 26 MINN. J. INT'L L. 145, 149 (2017); *see also* Vogel, *supra* note 25, at 351.

47 U.N. HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS AND GUIDELINES ON INTERNATIONAL PROTECTION UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 8 (2019) [hereinafter HANDBOOK].

48 1967 Protocol, *supra* note 40, at 267. The Protocol's popularity is apparent from its speed of adoption: passing the General Assembly in 1966, it entered into force 10 months later, and was ratified by 27 states within two years. COMMENTARY, *supra* note 44, at 623.

49 U.N. HIGH COMM'R FOR REFUGEES, STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL, https://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html (providing data as of April 2015). The United States is not a party to the Refugee Convention but did sign the 1967 Protocol on November 1, 1968. *Id.* at 4.

50 Immigration and Nationality Act of 1952, Pub. L. No. 82-414, ch. 477, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.). *See infra* Part IIC (discussing the 1952 Act as deeply-flawed, inherently discriminatory legislation).

51 Refugee Act of 1980, Pub. L. No. 96-212, § 201(a), 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C.).

52 In his opening statement to the Committee on the Judiciary, Senator Kennedy stated that the Refugee Act "will help ensure greater equity in our treatment of refugees." *The Refugee Act of 1979: Hearing on S. 643 Before the S. Comm. on the Judiciary*, 96th Cong. 2 (1979) (statement of Sen. Kennedy, Chairman of the Sen. Comm. on the Judiciary). *See also infra* Part IIC.

53 S. REP. NO. 96-212, at 3756–57 (1980) (Conf. Rep.).

> 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 . . . [54]

The Refugee Act plucked most of this definition directly from the Refugee Convention and 1967 Protocol,[55] which explicitly include membership in a particular social group as a ground for asylum.[56]

Congress's adoption of the international definition of a refugee was widely applauded by both political branches.[57] For example, in his opening statement at the Hearing Before the Committee on the Judiciary regarding the Refugee Act, Senator Edward Kennedy noted that this change would "make our law conform to the United Nations Convention and Protocol" and deemed it a significant accomplishment.[58] According to the House Committee on the Judiciary, "[a]ll witnesses appearing before the Committee strongly endorsed the new definition" for its conformity to international standards.[59] Likewise, the Department of Justice itself testified before the Committee that it "favor[ed] the broadening of the refugee definition" as Congress had done.[60]

In addition to international law and the domestic law incorporating it, the term "particular social group" developed further through guidance from the United Nations High Commissioner for Refugees (UNHCR).[61] The UNHCR functions as the "administrative body for the Refugee Con-

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54 8 U.S.C. § 1101(a)(42)(A) (2013) (emphasis added).

55 Refugee Convention, *supra* note 41, at art. IA(2) ("For the purposes of the present Convention, the term 'refugee' shall apply to any person who: . . . owing 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 . . . is unable or, owing to such fear, is unwilling to return to it.").

56 *See, e.g.*, S. REP. NO. 96-212, at 3756 (1980) (comments of Sen. Kennedy).

57 Indeed, even skeptics of the entire Act itself approved of this change to conformity with international law. *See, e.g.*, 125 CONG. REC. 37,201 (1979) (explaining that although Representative Fascell criticized other parts of the Act, he "applaud[ed] the inclusion of the internationally accepted definition of 'refugee' in section 201(a)").

58 *The Refugee Act of 1979: Hearing on S. 643 Before the S. Comm. on the Judiciary*, 96th Cong. 2 (1979) (statement of Sen. Kennedy, Chairman of the Sen. Comm. on the Judiciary). Similarly, speaking on the alignment of the U.S. and international refugee definitions in a hearing with the Subcommittee on International Operations, Representative Fascell stated "I am not sure that this will solve all the problems, but we hope that it will make some progress." *The Refugee Act of 1979: Hearing on H.R. 2816 Before the Subcomm. on Int'l Operations of the H. Comm. on Foreign Affairs*, 96th Cong. 1 (1979) (statement of Rep. Fascell, Member, H. Comm. on Foreign Aff.).

59 H.R. REP. NO. 96-608, at 9 (1979).

60 *Admission of Refugees into the United States: Hearing on H.R. 3056 Before the Subcomm. on Immigration, Citizenship, and Int'l Law of the H. Comm. on the Judiciary*, 95th Cong. 82 (1977) [hereinafter *Hearing on H.R. 3056*].

61 *Infra* Part IIC.

vention"[62] and publishes guidelines to serve as "legal interpretative guidance" for governments, among other actors.[63] In addition to reiterating membership in a particular social group as a potential ground for refugee status, the 1967 Protocol also codified the importance of the UNHCR, requiring "[t]he States Parties to the present Protocol undertake to cooperate with the Office of the United Nations High Commissioner for Refugees . . . in the exercise of its functions . . . ."[64] As indicated by the Protocol and acknowledged by subsequent courts,[65] the UNHCR is a useful resource[66] for analyzing the nuance of the refugee definition because courts frequently invoke its guidance, including in interpreting *A-B-*.[67]

Next, we turn to the jurisprudence interpreting the specific element of the refugee definition we will analyze in Part II: particular social group.

B. Precedent Interpreting "Particular Social Group"

Initially an underused ground for asylum, asylum seekers have increasingly presented claims of persecution based on their membership in a particular social group.[68] But courts have struggled to define its mean-

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62 Bednar & Penland, *supra* note 46, at 162.

63 U.N. HIGH COMM'R FOR REFUGEES, GUIDELINES ON INTERNATIONAL PROTECTION: "MEMBERSHIP OF A PARTICULAR SOCIAL GROUP" WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, at 1 (May 7, 2002), http://www.unhcr.org/3d58de2da.html [hereinafter GUIDELINES 2002].

64 1967 Protocol, *supra* note 40, at 267.

65 *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 438–39 (1987) ("In interpreting the Protocol's definition of 'refugee' we are further guided by the analysis set forth in the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1979)."); *see also American Courts and the U.N. High Commissioner for Refugees: A Need for Harmony in the Face of a Refugee Crisis*, 131 HARV. L. REV. 1399, 1402–10 (2019) (tracing Supreme Court jurisprudence incorporating UNHCR guidance since the Refugee Act of 1980 and concluding that, while many cases reference UNHCR guidance, there is not a clear unifying principle as to how persuasive that guidance is).

66 Although principles of international and comparative law may be useful in analyzing particular social group, we do not apply them here in favor of focusing on the sources courts most often draw upon. *See, e.g.*, Farbenblum, *supra* note 36, at 1073–74 (discussing when treaty interpretation methodology might be applicable to the Refugee Convention); Sital Kalantry, *The Intent-to-Benefit: Individually Enforceable Rights Under International Treaties*, 44 STAN. J. INT'L L. J. 63, 66 (2008).

67 Grace v. Whitaker, 344 F. Supp. 3d 96, 124 (2018) (analyzing the term "particular social group" under the guidance of the UNHCR Handbook, which "constru[ed] the term expansively" in interpreting the 1967 Protocol).

68 *See Matter of* M-E-V-G, 26 I. & N. Dec. 227, 231 (B.I.A. 2014) ("At the time we issued *Matter of Acosta*, only 5 years after enactment of the Refugee Act of 1980, relatively few particular social group claims had been presented to the Board."); COMMENTARY, *supra* note 44, at 390.

ing.[69] The term's ambiguity is arguably a strength; indeed, "one major advantage of the social group criterion is seen to lie in its subtle character, which allows types of groups which are presently unknown, or not yet in existence, to be covered. The social group category is, thus, understood to constitute a dynamic category, open to future developments."[70] Over the last thirty-plus years, courts have issued various decisions attempting to define this elusive term.

The Board made its first attempt to define a particular social group in *Matter of Acosta* in 1985, five years after the passage of the Refugee Act.[71] In this seminal case, the Board recognized the phrase's inherent ambiguity in evaluating the claim of a Salvadoran asylum seeker claiming persecution based on his membership in a particular social group of taxi drivers.[72] Applying *ejusdem generis*,[73] the Board examined the other four enumerated statutory grounds and determined that, like individuals covered by each of those grounds, members of a particular social group share "an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed."[74] The canon *ejusdem generis* requires a judge to "interpret a general term to

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[69] *See, e.g.*, *Matter of* Acosta, 19 I. & N. Dec. 211, 234 (B.I.A. 1985) (holding that Salvadoran taxi drivers did not constitute a particular social group because occupation as a taxi driver was not an immutable characteristic); *Matter of* Toboso-Alfonso, 20 I. & N. Dec. 819, 823 (BIA 1994) (holding that homosexuals in Cuba constitute a particular social group because homosexuality is an immutable characteristic); *Matter of* Kasinga, 21 I. & N. Dec. 357, 358, 365 (B.I.A. 1996) (holding "young women of the Tchamba-Kunsuntu Tribe who have not had FGM [female genital mutilation], as practiced by that tribe, and who oppose the practice" constitute a particular social group because each component of that group's formulation is fundamental and the applicant should not be required to change it); *Matter of* C-A-, 23 I. & N. Dec. 951, 961 (B.I.A. 2006) (holding "former noncriminal drug informants working against the Cali drug cartel" did not constitute a particular social group because it lacked social visibility); *Matter of* A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 75 (B.I.A. 2007) (holding "wealthy Guatemalans" did not constitute a particular social group because it lacked social visibility).

[70] COMMENTARY, *supra* note 44, at 391; *see also* 125 CONG. REC. 35,813 (1979). Some members of Congress recognized the ambiguity in a particular social group's specialized meaning at the time of the Refugee Act's drafting. 125 CONG. REC. 35,813 (1979). During House debates, for example, Congressman Lott acknowledged that "[o]ne of the most obvious [issues with the refugee definition] is the lack of criteria which will be used in evaluating which refugees and how many will be admitted." *Id.* (statement of Rep. Lott).

[71] 19 I. & N. Dec. 211 (B.I.A. 1985).

[72] *Acosta*, 19 I. & N. Dec. at 213, 232 (overruled on other grounds by *Matter of* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987)). Before undertaking this analysis, the Board also noted the lack of a clear definition from Congress and that "[a] purely linguistic analysis" does not resolve the phrase's ambiguity, but rather "suggests that it may encompass persecution seeking to punish either people in a certain relation, or having a certain degree of similarity to one another or people of like class or kindred interests, such as shared ethnic, cultural, or linguistic origins, education, family background, or perhaps economic activity." *Id.* at 223–33.

[73] *See infra* Part IIB, discussing *ejusdem generis* and related canons of statutory construction.

[74] *Acosta*, 19 I. & N. Dec. at 233.

reflect the class of objects reflected in the more specific terms accompanying it."[75] When a statute enumerates specific items in a list and includes a "general" or "catch-all" term,[76] that general term should be interpreted similarly to the more specific items that precede it.[77] This canon needs at least two specific terms to precede the general term and for the general term to occur near the list's end.[78] *Ejusdem generis* compels the judge to resist reading a general term in a list more broadly: Congress meant to confine that general term "to covering subjects comparable to the specifics it follows."[79] For example, when analyzing a statute that applies to an "owner, importer, consignee, agent" and "other person," the Supreme Court read the phrase "other person" as "of a like class" with the previously enumerated items and interpreted it accordingly.[80]

Using *ejusdem generis*, the Board in *Acosta* explained that each protected ground requires an immutable characteristic, which for particular social group may "be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience . . . ."[81] Indeed, the Board explicitly declined to enumerate specific groups that qualify under the statute, but rather emphasized the need for case-by-case determinations of asylum claims.[82] This concrete yet open framing of a particular social group has been widely accepted by scholars, international courts, and all U.S. domestic circuit courts.[83]

But subsequent cases muddied the waters. While avowing its continued adherence to *Acosta*—which was the definitive rule on particular social group for over twenty years—the Board introduced the additional requirements of "particularity" and "social visibility" with *Matter of C-A-* in 2006.[84] In subsequent cases regarding the relationship between

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75 WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 323 (Harv. Univ. Press eds., 1994).

76 Gustafson v. Alloyd Co., 513 U.S. 561, 587 (1995) (Thomas, J., dissenting).

77 Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1023 (2015).

78 ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 203–06 (Thomson/West ed., 2012).

79 Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 586 (2008).

80 U.S. v. Mescall, 215 U.S. 26, 31 (1909).

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

82 *Id.*

83 Paraketsova, *supra* note 30, at 463.

84 *Matter of* C-A-, 23 I. & N. Dec. 951 (B.I.A. 2006), *aff'd sub nom.* Castillo-Arias v. U.S. Att'y Gen., 446 F.3d 1190 (11th Cir. 2006). These requirements contravene the UNHCR guidelines which establish particularity and social visibility as *alternative* means to establishing a particular social group, not *conjunctive* means; as such, *C-A-* marks the beginning of the major U.S. departure from UNHCR guidelines on particular social group which continues today. KAREN MUSALO ET. AL., REFUGEE LAW & POLICY: A COMPARATIVE & INTERNATIONAL APPROACH 707–08 (5th ed. 2018); Jeffrey S. Chase, *Particular Social Group: Errors in the BIA's Post-*Acosta *Analysis*, JEFFREYSCHASE.COM: OPINIONS/ANALYSIS ON IMMIGRATION LAW

gang membership and particular social group, the Board attempted to clarify these terms: particularity requires the group to be defined with sufficient distinction to be recognized by society "as a discrete class of persons,"[85] whereas social visibility concerns "the extent to which members of a society perceive those with the characteristic in question as members of a social group."[86] But instead of providing clear, workable guidance for application of the particular social group term, these cases garnered further confusion among the circuit courts.[87] For example, the courts debated whether "social visibility" constituted "a literal, 'on-sight' requirement."[88] The First, Second, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits all adopted *C-A-*'s new particularity and social visibility factors applied in conjunction with the *Acosta* immutable characteristics test, whereas the Third and Seventh Circuits rejected the two new requirements.[89]

The particular social group analysis was further complicated by *Matter of R-A-* and its convoluted procedural history.[90] In the first published Board case to tackle domestic violence, the Immigration Judge initially granted the applicant asylum based on persecution for her membership in the particular social group "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination."[91] The Board reversed, reasoning that Guatemalans would not perceive such a group in their society and continuing that the applicant also failed to demonstrate sufficient nexus.[92] Then-Attorney General Janet Reno vacated the Board's decision and remanded pending a final rule on persecution.[93]

(Sept. 14, 2017), https://www.jeffreyschase.com/blog/2017/9/14/particular-social-group-errors-in-the-bias-post-acosta-analysis. Although we agree that U.S. law is incorrect on these points, we do not dispute these requirements for purposes of our argument in this Article, in favor of focusing on how to address the most recent issues raised by *A-B-* within the parameters of existing doctrine.

85 *Matter of* S-E-G-, 24 I. & N. Dec. 579, 584 (B.I.A. 2008).

86 *Matter of* E-A-G-, 24 I. & N. Dec. 591, 594 (B.I.A. 2008).

87 Linda Kelly, *The New Particulars of Asylum's Particular Social Group*, 36 WHITTIER L. REV. 219, 224 (2015).

88 *Id.*

89 Kenneth Ludlum, *Defining Membership in a Particular Social Group: The Search for a Uniform Approach to Adjudicating Asylum Applications in the United States*, 77 U. PITT. L. REV. 115, 123 (2015). Indeed, the Seventh Circuit criticized the social visibility requirement as "mak[ing] no sense" because group members may try to avoid visibility to protect against persecution. Gatimi v. Holder, 578 F.3d 611, 615–16 (7th Cir. 2009).

90 *Matter of* R-A-, 22 I. & N. Dec. 906 (B.I.A. 1999) (en banc), *vacated*, 22 I. & N. Dec. 906 (A.G. 2001), *remanded*, 23 I. & N. Dec. 694 (A.G. 2005), *remanded and stay lifted*, 24 I. & N. Dec. 629 (A.G. 2008).

91 *Matter of R-A-*, 22 I. & N. Dec. at 911.

92 *Id.* at 918.

93 *Id.* at 906; *see also* Asylum and Withholding Definitions, 65 Fed. Reg. 76588, 76592-93 (Dec. 7, 2000) (proposing a rule on asylum intended to correct *R-A-*'s possible foreclosure of relief to individuals targeted by an actor who does not target other members of her group).

When later Attorney General Michael Mukasey ordered the Board to reconsider the case, the Department of Homeland Security (DHS) stipulated the applicant's eligibility for asylum, and her petition was granted.[94] As a result, the requisite particular social group analysis remained nebulous.

In 2014, the Board sought to clarify its interpretation of a particular social group in *Matter of M-E-V-G-*[95] and *Matter of W-G-R-*,[96] a pair of companion cases.[97] According to the Board in these cases, the new requirements of particularity and social distinction were consistent with *Acosta*[98] and constituted a "subtle shift" rather than "a radical departure" from earlier cases.[99] In line with precedent, *Acosta*'s immutable characteristic test remained essential to the analysis.[100] The Board also reiterated that the phrase "particular social group" must be interpreted in accordance with the other grounds of asylum, explaining that "the proper

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[94] *Matter of* A-R-C-G-, 26 I. & N. Dec. 388, 391 (B.I.A. 2014) (summarizing the procedural history of *Matter of R-A-*.).

[95] 26 I. & N. Dec. 227 (B.I.A. 2014).

[96] 26 I. & N. Dec. 208 (B.I.A. 2014).

[97] We pause to note that many scholars have critiqued *M-E-V-G-* and *W-G-R-* for their incompatibility with international standards and for cementing the additional hurdle begun with *C-A-* on asylum seekers attempting to rely on the particular social group ground. *See supra* note 84. For instance, the UNHCR itself submitted an amicus brief in *M-E-V-G-* criticizing the particularity and social distinction requirements as inconsistent with its guidance. *Brief for UNHCR as Amicus Curiae Supporting Applicant*, *Matter of* M-E-V-G-, 26 I. & N. Dec. 227 (B.I.A. 2014) at 7. Moreover, scholars have noted that, after *M-E-V-G-* and *W-G-R-*, an asylum seeker presenting particular social group claim has "the additional, confounding task of demonstrating that their claimed ground is cognizable under the Immigration and Nationality Act." Bernardo M. Velasco, *Who Are the Real Refugees: Labels as Evidence of a Particular Social Group*, 59 ARIZ. L. REV. 235, 237, 252–53 (2017); *see also* Settlage, *supra* note 30, at 298 (arguing that the Board improperly limited the definition of particular social group by adding particularity and social distinction). We generally agree with these critiques. However, here, we decline to challenge them in favor of focusing our argument to show that, even accepting *M-E-V-G-* and *W-G-R-* as good law, *A-B-* goes beyond the scope of these precedent cases.

[98] *Matter of M-E-V-G-*, 26 I. & N. Dec. at 234, n. 9 ("Our decision in this case is not a new interpretation, but it further explains the importance of particularity and social distinction as part of the statutory definition of the phrase 'particular social group.'"). Initially, however, the Third Circuit disagreed; this case was the Third Circuit's second remand of *Valdiviezo-Galdamez v. Att'y Gen.*, 502 F.3d 285 (3d Cir. 2007). In fact, initially, the Third Circuit found the new requirements "inconsistent with prior Board decisions," accused the Board of failing to provide a "principled reason" for the change and determined that the Board's decision was not entitled to *Chevron* deference. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 292 (citations omitted). However, several circuit courts have granted *Chevron* deference to these classifications. *See, e.g.*, S.E.R.L. v. Att'y Gen., 894 F.3d 535, 549 (3rd Cir. 2018); Reyes v. Lynch, 842 F.3d 1125, 1133 (9th Cir. 2016).

[99] *Matter of W-G-R-*, 26 I. & N. Dec. at 212 (quoting Orellana-Monson v. Holder, 685 F.3d 511, 521 (5th Cir. 2012)). Indeed, the Board's failure to invoke the *Brand X* agency standard to overrule circuit court precedent further indicates that the Board intended particularity and social distinction to inform, not supplant, particular social group precedent. *See also* Kelly, *supra* note 87, at 234.

[100] *Matter of M-E-V-G-*, 26 I. & N. Dec. at 232–34 (B.I.A. 2014).

interpretation of the phrase can only be achieved when it is compared with the other enumerated grounds of persecution . . . and when it is considered within the overall framework of refugee protection."[101] Through *M-E-V-G-* and *W-G-R-*, the Board confirmed its three criteria for a viable particular social group: a group must be "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question."[102]

In these companion cases, the Board also defined the supplemental requirements to *Acosta*. Particularity, the Board explained, sets the "outer limits" of who falls into the group, preventing a particular social group from becoming "amorphous, overbroad, diffuse, or subjective."[103] Additionally, the Board clarified that the term "social visibility" was not meant to refer to the literal "ocular" ability to observe a trait by looking at a person.[104] The Board renamed this concept "social distinction" to capture the question of "whether those with a common immutable characteristic are set apart, or distinct, from other persons in society in some significant way."[105]

Moreover, *M-E-V-G-* and *W-G-R-* offered further guidance for evaluating future particular social group claims. First, suffering persecution may be a factor in analyzing a viable particular social group. Although "a social group cannot be defined *exclusively*" by its members' experience of persecution, the persecution "may be relevant, because it can be indicative of whether society views the groups as distinct."[106] Importantly, the fact that a group shares a trait of persecution does not invalidate the group, provided its members have another immutable characteristic in common.[107] *M-E-V-G-* and *W-G-R-* effectively cemented *C-A-*'s additional requirements to the criteria of *Acosta*.[108]

Second, the Board was clear that its precedent "should not be read as a blanket rejection of all factual scenarios involving gangs."[109] The Board thus maintained the requirement of case-by-case basis determinations of claims, even in the context of gang-related violence.

Six months after *M-E-V-G-* and *W-G-R-*, the Board in *Matter of A-R-C-G-* granted an applicant asylum based on her membership in the particular social group "married women in Guatemala who are unable to

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101 *Id.* at 234.
102 *Id.* at 237.
103 *Id.* at 239 (citations omitted).
104 *Id.* at 227.
105 *Id.* at 238.
106 *Id.* at 242.
107 *Id.* at 243.
108 *Matter of* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).
109 *Id.* at 251.

leave the relationship."[110] Focusing on gender as a common immutable characteristic per *Acosta*, the Board reasoned that the group was also particular because each term had "commonly accepted definitions within Guatemalan society" and was socially distinct because Guatemalan society "makes meaningful distinctions" based on that immutable characteristic.[111] The Board relied on the respondent's experiences, State Department Country Reports on Guatemala, and news articles to make this determination.[112] Although the DHS conceded this particular social group was cognizable and the Board agreed, four years later, Attorney General Sessions would rule otherwise in *A-B-*.

C. Matter of *A-B-*

On March 7, 2018, then-Attorney General Sessions invoked his certification power[113] and directed the Board to refer *A-B-* to his review.[114] At issue in the case was the narrow question of the viability of the particular social group "Salvadoran women who are unable to leave their domestic relationships where they have children in common" with their partner.[115] However, Sessions expanded the scope of the question far beyond the issue the parties had initially litigated,[116] asking "whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable 'particular social group,'" focusing on victims of both gang and domestic violence.[117]

Despite previous cases' recognition of persecution by domestic partners and gang members,[118] Sessions explicitly overruled *A-R-C-G-*, claiming that, because the Board accepted the DHS's concession that the proposed particular social group was cognizable in that case, it failed to perform the necessary analysis and apply the appropriate standards to reach that conclusion.[119] To Sessions' understanding, the Board in *A-R-C-G-* recognized private violence as a new category of potential social

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110 *Matter of M-E-V-G-*, 26 I. & N. Dec. at 390.

111 *Matter of* A-R-C-G-, 26 I. & N. Dec. 388, 393–94 (B.I.A. 2014).

112 *Id.*

113 "The Board shall refer to the Attorney General for review of its decision all cases that: (i) The Attorney General directs the Board to refer to him[;] (ii) The Chairman or a majority of the Board believes should be referred to the Attorney General for review[; and] (iii) The Secretary of Homeland Security . . . refers to the Attorney General for review." 8 C.F.R. § 1003.1(h)(1) (2008). *See also supra* note 18.

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

115 *Id.* at 321.

116 *Recent Adjudication: Asylum Law—Attorney General's Certification Power—Attorney General Holds that Salvadoran Woman Fleeing Domestic Violence Failed to Establish A Cognizable Particular Social Group—In re* A-B-, 27 I. & N. Dec. 316 (A.G. 2018), 132 HARV. L. REV. 803, 808 (2018) [hereinafter *Recent Adjudication*].

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

118 *See supra* Part IB.

119 27 I. & N. Dec. at 319, 339.

group claims in contravention of precedent.[120] In dicta, Sessions opined that victims of private violence will rarely be able to demonstrate that the government condoned the actions of private individuals or was completely helpless to protect victims.[121]

Furthermore, Sessions reasoned that police in certain countries struggle to respond to certain crimes, and thus many individuals will fit these "new" groups consisting of victims of private violence.[122] Because victims of gangs and domestic violence may potentially constitute large groups, Sessions considered it unlikely that particular social groups based on these types of persecution will be sufficiently particular.[123] Moreover, Sessions emphasized that the experience of persecution is irrelevant to the particular social group analysis.[124] As such, according to Sessions, victims of private violence "generally" will not qualify for asylum.[125] To justify his interpretation, Sessions cited *Chevron*, claiming his "reasonable construction" of particular social group was entitled to deference.[126]

II. INTERPRETING PARTICULAR SOCIAL GROUP THROUGH THE TRADITIONAL TOOLS OF STATUTORY CONSTRUCTION

In this Part, we provide an overview of the *Chevron* framework we will use to determine whether *Matter of A-B-* merits *Chevron* deference from a reviewing court, as Sessions claimed. To conduct step one and step two of the test, we must first analyze "particular social group," a phrase that many courts and commentators have found to be ambiguous.[127] To provide this comprehensive analysis, this Part examines both

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120 *Id.* at 339.

121 *Id.* at 337, 320.

122 *Id.* at 335 ("Social groups defined by their vulnerability to private criminal activity likely lack the particularity required under *M-E-V-G-*, given that broad swaths of society may be susceptible to victimization.").

123 *Id.* at 337, 320.

124 *Id.* at 334–35.

125 *Id.* at 320.

126 *Id.* at 326–27 (citations omitted). Sessions elaborated that "there is 'a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Id.* Attorney General Barr subsequently reiterated that *Chevron* applies to AG decisions in *Matter of L-E-A-*, 27 I. & N. Dec. 581, 592 (A.G. 2019).

Only one Circuit Court of Appeals has issued a published decision concerning *A-B-*. Gonzalez-Veliz v. Barr, 938 F.3d 219 (5th Cir. 2019). The court did not decide whether *A-B-* should in fact receive *Chevron* deference, but did hold that *A-B-* was not arbitrary and capricious under the Administrative Procedures Act. *Id*. at 236; *see also infra* Part IIA, discussing *Chevron* and the APA.

127 *See, e.g.*, GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 30 (Oxford Univ. Press ed., 3d ed. 1983) (recognizing there is limited international interpretive jurisprudence); *see also Matter of* M-E-V-G, 26 I. & N. Dec. 227, 230 (B.I.A. 2014)

the statute's text and the legislative purpose, drawing upon the many tools of statutory construction:[128] textualist tools of ordinary meaning and applicable interpretive canons, and purposivist tools of legislative history and statutory context.[129] These tools offer helpful guidance to determine the meaning behind particular social group, its consequent application, and the amount of ambiguity actually in the statute. We find that, using these tools, we can glean certain definitive parameters around the term. In addition, we flesh out remaining ambiguities in the term using legislative history, international sources, and past agency practice to help to shape what Congress meant by this term.

A. Chevron *Framework*

In *A-B-*, Sessions invoked *Chevron* to justify the new restrictions he placed on membership in a particular social group.[130] To determine whether *A-B-* deserves such deference by a reviewing court, we first describe the *Chevron* principles that courts use to make this determination.[131]

Courts frequently use the *Chevron* framework to assess whether an agency's interpretation of a statutory term is permissible.[132] To begin, the Administrative Procedures Act (APA) requires courts to determine whether agencies' statutory interpretations are unlawful or "in excess of

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(describing particular social group, which is not defined in the Immigration and Nationality Act, the 1951 Refugee Convention, or its 1967 Protocol Relating to the Status of Refugees, as "ambiguous and difficult to define") (citations omitted); *see also* Valdiviezo-Galdamez v. Att'y Gen., 663 F.3d 582, 594 (3d Cir. 2011) (labeling particular social group as "elusive"); *see also* Fatin v. INS, 12 F.3d 1233, 1238 (3d Cir. 1993) ("Read in its broadest literal sense, the phrase [membership in a particular social group] is almost completely open-ended."); *see also supra* Part IB (summarizing the precedent that analyzes this term).

128 There is significant precedent for applying the tools of statutory construction to asylum law. In *INS v. Cardoza-Fonseca*, Justice Stevens's majority opinion used a plethora of statutory construction techniques, examining the text's history, plain meaning, legislative record, and UNHCR policy guidance to inform the Court's reading of the refugee definition. 480 U.S. 421, 436–40 (1987). Recently, the Sixth Circuit conducted an extensive statutory construction analysis in an immigration case in deciding whether to grant *Chevron* deference. Arangure v. Whitaker, 911 F.3d 333, 339–42 (6th Cir. 2018). More broadly, statutory construction is important for human rights statutes generally as "the critical battleground for most human rights issues in the United States." ESKRIDGE, *supra* note 75, at 8.

129 VALERIE C. BRANNON, CONG. RESEARCH SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS n. 188 (2018). Additionally, relevant judicial precedent, another tool of statutory construction, is discussed *supra* Part IB.

130 *Matter of A-B-*, 27 I. & N. Dec. at 326–27 (citing *Chevron* and stating "The Attorney General's reasonable construction of an ambiguous term in the Act, such as 'membership in a particular social group,' is entitled to deference.").

131 Although this framework indisputably still applies, we note that the *Chevron* doctrine is in a time of possible flux. *See supra* note 37.

132 RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 399 (5th ed. 2009) ("[t]he Court has applied the *Chevron* two-step in over one hundred cases decided since 1984, and circuit courts have applied it in thousands of cases.").

statutory jurisdiction, authority, or limitations."[133] The court should set aside an interpretation that goes beyond the bounds of law.[134]

In *Chevron*, the Supreme Court developed a method to discern those bounds more precisely. When analyzing the agency's interpretation, a court asks two questions.[135] The first question, commonly called "step one," is "the question whether Congress has directly spoken to the precise question at issue."[136] If the intent of Congress is clear and unambiguous, the court and the agency must follow such intent.[137]

The second question, commonly called "step two," arises only if "the court determines Congress has not directly addressed the precise question at issue."[138] If the statute is ambiguous, the court should not "impose its own construction on the statute."[139] Rather, the court should evaluate the agency's interpretation of the ambiguous provision and determine whether that interpretation is a permissible construction of the statute.[140]

Step one. In its first step, the court looks to whether Congress has already provided the meaning of the term at issue or restrained the agency's power to regulate.[141] To make this determination, *Chevron* requires the court to use "traditional tools of statutory construction."[142]

The tools of statutory construction provide invaluable guidance to understanding potentially unclear statutory phrases. Statutory construction has been long and widely used[143] even before *Chevron* to ascertain

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133 5 U.S.C. § 706(2)(A), (C) (2019).

134 VALERIE C. BRANNON & JARED P. COLE, CONG. RESEARCH SERV., R44954, *Chevron* Deference: A Primer 1 (2017).

135 In later cases, the Court added a *Chevron* "step-zero" to determine if Congress has delegated to the agency the authority to speak with the force of law. Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006); *see also* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) ("*Chevron* deference [applies] when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."). Because the Attorney General's ability to make rules is not a question in the immigration context, we do not apply step zero here.

136 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842 (1984).

137 *Id.* at 842–43.

138 *Id.* at 843.

139 *Id.*

140 *Id.* at 842–43.

141 *Id.* at 842.

142 *Id.* at 843 n.9.

143 ESKRIDGE, *supra* note 75, at 2 (claiming statutory construction is traceable back to at least Aristotle). However, despite its long history and wide use, the tools of statutory construction are not universally accepted. Many judges and scholars alike reject the purported coherence and consistency of the theory of statutory construction. *See*, *e.g.*, Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2088 (2002) ("The interpretive status quo is cacophonous. Every judge and scholar has his own theory of how best to interpret statutes, and this diversity renders the interpretive project unpredictable."); *see also* Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84

the meaning of statutes[144] when a straightforward reading of the text proves insufficient.[145] There are a variety of statutory construction tools at the courts' disposal, and approaches to statutory construction are by no means uniform. When applying *Chevron*, courts at step one typically rely upon two main theories of statutory construction: purposivism and textualism.[146] Proponents of these theories "generally share the goal of adhering to Congress's intended meaning, but disagree about how best to achieve that goal."[147] Purposivist judges concentrate on understanding the statute's purpose, often by "focus[ing] on the legislative process" and considering the precise issue the legislature attempted to resolve through the ambiguous statute.[148] To purposivists, the legislative history, including the committee reports and floor statements, aids the judge in "try[ing] to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case

U. CHI. L. REV. 81, 81 (2017) (arguing it is "doubtful" whether there are practices in the field of legal interpretation). But the Supreme Court itself remains convinced of the utility of the tools of statutory construction. *See, e.g.*, United States v. Am. Trucking Ass'ns, Inc., 310 U.S. 534, 543–44 (1940) ("When aid to the construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'").

144 *See* 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, § 45.05 (Norman Singer, ed., 4th ed. 1984) ("For the interpretation of statutes, 'intent of the legislature' is the criterion that is most often recited.").

145 *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529 (1947). When applied to an agency's reading of a statute, a proper statutory construction analysis preserves the distinction between the roles of the judiciary, executive, and legislature: by methodically deciphering a statute's meaning, courts conscientiously applying the various methods of statutory construction can determine congressional intent and employ appropriate executive deference without usurping the legislative function. Some Justices, however, disagree that *Chevron* serves this function and instead argue that *Chevron* deference violates the separation of powers principle and further maintain that *Chevron* usurps judicial function. *See, e.g.*, Michigan v. EPA, 135 S. Ct. 2699, 2712–13 (2015) (Thomas, J., concurring) (stating that *Chevron* circumvents judges' ability to exercise their judgment to make the best reading of an ambiguous statute while giving the executive the authority to say what the law is and further alleging "*Chevron* deference raises serious separation-of-powers questions"); *see also* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149, 1153 (10th Cir. 2016) (Gorsuch, J., concurring) (sharing separation of powers concerns and adding that, by applying *Chevron*, "*courts* are not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them"). However, with regard to statutory construction generally, courts have held if Congress uses an ambiguous phrase—such as particular social group—"without defining it, then courts must give the phrase content by bringing various tools of statutory construction to bear on the ambiguity" because "[d]efining terms that *Congress did not* is an inherent incident of the judicial power." Rosenkranz, *supra* note 143, at 2103–05; *see also* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842–43 (1984); BRANNON & COLE, *supra* note 134, at 1. Statutory construction, then, allows the judiciary to ascertain and evaluate the formulated policy that Congress intended (albeit ambiguously expressed) and the executive interpreted rather than impermissibly initiate policy itself.

146 Lisa Shultz Bressman, *Chevron's Mistake*, 58 DUKE L.J. 549, 551 (2009).

147 BRANNON, *supra* note 129, at 2.

148 *Id.* at 10–12.

at bar."[149] In contrast, textualist judges largely reject the quest to discover legislative purpose,[150] preferring to prioritize the statute's text and specific words to decipher its meaning.[151] However, despite the differences in the theories' focus, in practice, judges typically combine elements of both purposivism and textualism[152] and use many of the same tools to reach their conclusions.[153]

Relying on the tools of statutory construction to assess ambiguity and also considering past agency practice,[154] if the court concludes that Congress has directly spoken on the matter, the court must straightforwardly apply the congressional edict.[155] Conversely, if the term remains ambiguous, the court proceeds to *Chevron* step two.[156]

Step two. If the court reaches the second step, there is a presumption of gap filling applied to the ambiguous statute: the ambiguity serves as a "delegation of authority to the agency to elucidate a specific provision of the statute . . . ."[157] In this instance, the court cannot substitute its own interpretation of that statutory term;[158] it must defer to the agency if the agency's interpretation is reasonable.[159] *Chevron*'s second step is admittedly deferential, but does not grant agencies unfettered discretion: "[f]ederal administrative agencies are required to engage in reasoned decisionmaking."[160] Essentially, an agency is required to "operate within

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149 Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983).

150 Indeed, Judge Posner has criticized the endeavor of statutory construction to discover the purpose of the legislature as "imput[ing] omniscience to Congress." *Id.* at 811.

151 In addition, many textualist judges reject the tools of purposivism specifically, even when they agree with the end result. For example, despite concurring with the judgment of *Blanchard v. Bergeron* in which the majority relied on legislative history, Justice Scalia "decline[d] to participate in this process." 489 U.S. 87, 99 (1987) (Scalia, J., concurring). According to Scalia, seeking guidance in legislative history "is neither compatible with our judicial responsibility of assuring reasoned, consistent, and effective application of the statutes of the United States, nor conducive to a genuine effectuation of congressional intent . . . ." *Bergeron*, 489 U.S. at 99 (Scalia, J., concurring); *see also* BRANNON, *supra* note 129, at 13–14.

152 *See, e.g.*, Church of the Holy Trinity v. United States, 143 U.S. 457, 462–64 (1892) (engaging in both a plain meaning and legislative history analysis).

153 For example, Judge Easterbrook, an avowed textualist, concedes that "[l]egislative history may be invaluable in revealing the setting of the enactment and the assumptions its authors entertained about how their words would be understood," but maintains this is distinct from relying on "legislative intent [as] *the* basis of interpretation . . . ." *In re* Sinclair, 870 F.2d 1340, 1342 (7th Cir. 1989).

154 INS v. Cardoza-Fonseca, 480 U.S. 421, 434–35 (1987).

155 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842–43 (1984).

156 There is, however, confusion over the level of statutory ambiguity necessary to advance to the second step of *Chevron* as a result of courts' tendency to "blur the line between the two steps." BRANNON & COLE, *supra* note 134, at 16.

157 *Chevron*, 467 U.S. at 843–44.

158 *See* Mayo Found. for Med. Educ. & Res. v. United States, 562 U.S. 44, 58 (2011).

159 *Chevron*, 467 U.S. at 843–44.

160 Michigan v. EPA, 135 S. Ct. 2699, 2707 (2015) (citations and internal quotation marks omitted).

the bounds of reasonable interpretation,"[161] and "the process by which [the agency] reaches that result must be logical and rational."[162] Although an agency may change its course and alter a previous interpretation,[163] the agency's new construction is still held to the reasonableness requirement.[164]

Overlap with the Administrative Procedures Act. The step two reasonableness analysis is similar[165] to the "arbitrary and capricious" standard set forth in the Administrative Procedures Act (APA).[166] Courts typically review agency decisions and policy under Section 706(2)(A) of the APA to assess the reasonableness of such decisions.[167] Although we frame our analysis as a *Chevron* analysis, we note that the step two discussion in Part IV would follow essentially a parallel analysis and result in the same outcome if litigated under the APA. Evaluating reasonableness in step two or under the APA involves again applying the traditional tools of statutory construction, mirroring the step one analysis.[168]

If a reviewing court declines to defer to an agency decision, either under the *Chevron* reasonableness test or under the APA's arbitrary and capricious standard, it will remand the case to the court below for further proceedings consistent with its decision.[169] In the immigration context, if

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161 Utility Air Reg. Grp. v. EPA, 134 S. Ct. 2427, 2442 (2014) (internal quotation marks omitted).

162 Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 374 (1998) (internal quotation marks omitted).

163 *See* Rust v. Sullivan, 500 U.S. 173, 186–87 (1991). Justice Gorsuch, however, is critical of "the possibility that the agency will reverse its current view 180 degrees anytime based merely on the shift of political winds and *still* prevail." Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149, 1153 (10th Cir. 2016) (Gorsuch, J., concurring).

164 Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005).

165 Kenneth A. Bamberger & Peter L. Strauss, 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 *Chevron*'s second step.") Indeed, this is how the District Court interpreting *A-B-* characterized the tests: "*Chevron* step two analysis overlaps with arbitrary and capricious review under the APA." Grace v. Whitaker, 344 F. Supp. 3d 96, 121 (D.D.C. 2018).

166 5 U.S.C. § 706(2)(A) (2018) (stating that a reviewing court shall set aside any agency decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

167 ALFRED C. AMAN JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 435 (3rd ed. 2014).

168 BRANNON & COLE, *supra* note 134, at 20; *see also Grace*, 344 F. Supp. 3d at 121 (explaining that to determine whether an agency interpretation is permissible, "a court again employs the traditional tools of statutory interpretation."); Bell Atl. Tel. Cos. v. FCC, 131 F.3d 1044, 1049 (D.C. Cir. 1997) ("Under step one we consider text, history, and purpose to determine whether these convey a plain meaning that requires a certain interpretation; under step two we consider text, history, and purpose to determine whether these permit the interpretation chosen by the agency.") (emphasis omitted).

169 *See, e.g.*, Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361 (2018) (declining to defer to the U.S. Fish and Wildlife Service's interpretation of the phrase "critical

a circuit court declined deference, it would remand the case to the Board.[170]

B. Statutory Construction of Particular Social Group

Ordinary meaning. The process of statutory construction should always begin with the text.[171] This necessary first step looks to the statute's plain meaning[172] to read its words as a member of Congress or reasonable person would do.[173] The ordinary meaning approach, the "most fundamental semantic rule of interpretation[ ],"[174] rejects the discrepancy between ordinary language and "legalese" and "assume[s] that [C]ongress uses common words in their popular meaning, as used in the common speech of [people]."[175] Discerning ordinary meaning often involves the use of dictionaries.[176] For example, in an early and straightforward application of the ordinary meaning analysis, the Supreme Court perused dictionary definitions and considered "the common language of the people" to resolve whether tomatoes are vegetables or fruits within the meaning of the Tariff Act of 1883 (and determined, although they may be fruits "[b]otanically speaking," a tomato is legally a vegetable).[177]

Of course, the challenge with an ordinary meaning approach generally is that, as Judge Easterbrook explained, "ordinary readers are dealing with newspapers, not statutes."[178] Looking to a word's ordinary meaning assumes the word's definition and common usage has remained consistent since the statute's enactment[179] and that the author and reader would share an understanding of the context and linguistic rules of legislative drafting necessary to reach the same interpretation.[180] Ordinary meaning

habitat" under the APA and remanding to the Fifth Circuit); Valdiviezo-Galdamez v. Att'y Gen., 663 F.3d 582, 612 (3rd Cir. 2011) (declining to defer to the Board's interpretation of "particular social group" and remanding to the Board).

170 Vogel, *supra* note 25, at 349 (explaining that Board decisions are reviewed by Circuit Courts of Appeal).

171 Frankfurter, *supra* note 145, at 535.

172 *See* Conn. Nat'l Bank v. Germain, 503 U.S. 249 (1992).

173 Nix v. Hedden, 149 U.S. 304, 307 (1893); BRANNON, *supra* note 129, at 13–14.

174 SCALIA & GARNER, *supra* note 78, at 69.

175 Frankfurter, *supra* note 145, at 536.

176 For example, to ascertain the meaning of "carry" to interpret a statute that punishes one who "uses or carries a firearm" during a drug trafficking crime, the Court quoted definitions from four different dictionaries. Muscarello v. U.S., 524 U.S. 125, 128–30 (1998). *See also* SCALIA & GARNER, *supra* note 78, at 70.

177 Nix v. Hedden, 149 U.S. 304, 306–07 (1893).

178 Easterbrook, *supra* note 143, at 87.

179 *In re* Sinclair, 870 F.2d 1340, 1342 (7th Cir. 1989).

180 *In re* Erickson, 815 F.2d 1090, 1092–93 (7th Cir. 1987).

analysis loses its utility when the context has changed or the words at issue are combined in a manner outside the scope of common usage.[181]

Applying the ordinary meaning strategy to tackle the phrase "particular social group" exemplifies these problems and the pitfalls of relying on assumptions of plain meaning. Attempts to clarify this phrase through an ordinary meaning approach typically tend to obfuscate rather than illuminate.[182] For instance, the Eleventh Circuit in *Perez-Zenteno v. Att'y Gen.* made a valiant effort to delve into the text of particular social group by cracking a dictionary.[183] The court determined that:

> [w]hile the phrase 'particular social group' is not altogether illuminating, there are some guideposts to be drawn from this language. A 'group' is a number of individuals bound together by a community of interest, purpose or function as a class. A 'class' means a 'society-wide grouping of people according to social status, political or economic similarities, or interests of ways of life in common.' Thus, the phrase 'social group' implies a subset of the population bound together by some discrete and palpable characteristics. The addition of the modifier 'particular' suggests some narrowing from the breadth otherwise found in the term 'social group.' 'Particular' means 'of, relating to, or being a single definite person or thing as distinguished from some or all others.' Thus, a particular social group denotes some characteristic setting the group off in a definite way *from the vast majority of society*; indeed, 'particular' must meaningfully narrow the possibilities or it would be mere surplusage and redundant of the word 'group.' These limited textual clues, then, tell us that a particular social group must be defined more narrowly.[184]

Essentially, perusing the dictionary resulted in the borderline tautological conclusion that a particular social group is a number of individuals with characteristics in common that can be distinguished from society at large.

Yet, in cobbling together these definitions and nesting the terms within one another, the Eleventh Circuit's reading of a particular social

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181 *See* BRANNON, *supra* note 129, at 20. Similarly, one cannot rely on an ordinary meaning analysis when "the context indicates [that the common words] bear a technical sense." SCALIA & GARNER, *supra* note 78, at 69.

182 Indeed, even determined textualists do not insist on relying on ordinary meaning when the results are confusing or "absurd." Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring).

183 913 F.3d 1301, 1310 (11th Cir. 2019).

184 *Id.* at 1310 (emphasis added) (citations omitted).

group is more restrictive than the dictionary's implications. The ordinary meaning of particular social group based on the cited dictionary definitions indicates simply that the group is narrower than society as a whole; the definitions limit the group by its "distinguished" and "definite" characteristic, not its size. The group, then, cannot be defined so broadly as to subsume the entire population. Moreover, "particular" implies the ability to be distinguished from "some," not necessarily most or "all." Consequently, the Eleventh Circuit's extrapolation that a particular social group can be set apart "in a definite way *from the vast majority of society*"[185] is internally contradictory and unsupported by the sources the court references. Even this seemingly straightforward tool of statutory construction, then, can be misapplied and result in misguided precedent.

Furthermore, the Eleventh Circuit failed to appreciate an important caveat in the ordinary meaning strategy: the assumption that common words have their popular, everyday meaning is overcome when those common words are combined in a manner that infuses them with a specialized legal meaning.[186] "Particular," "social," and "group" are common words, yet their combination elevates the phrase's meaning from the everyday to the technical.[187]

Thus, rather than providing a conclusive definition of a particular social group, the ordinary meaning analysis is a useful initial step in understanding the term.[188] In light of the above pitfalls of a purely textualist analysis, we turn to other tools of statutory construction necessary to further define this phrase.[189]

Canons of Construction. The canons of statutory construction "are a familiar staple of statutory interpretation."[190] Another preferred strategy of textualists, the canons developed through common law,[191] focuses on the language of the statute and operating as assumptions for how Con-

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185 *Id.*

186 *See* Nix v. Hedden, 149 U.S. 304, 306 (1893) ("There being no evidence that [the terms at issue] have acquired any special meaning in trade or commerce, they must receive their ordinary meaning.")

187 Paraketsova, *supra* note 30, at 448 ("In common language, particular social group has no plain meaning, as people typically do not use those three words together.").

188 In fact, when "the isolated language" of the statute results in a definition incompatible with congressional intent, courts have advised moving on to "the legislative history and the statutory purpose" to gain a better understanding of the term. Moore v. Harris, 623 F.2d 908, 913 (4th Cir. 1980).

189 The limitations of an ordinary meaning approach are also apparent in *Matter of Acosta*, where the Board of Immigration Appeals offered a straightforward reading of the term, but implicitly conceded the insufficiency of this endeavor by immediately after applying the *ejusdem generis* canon of construction, discussed below. 19 I. & N. Dec. 211, 232–33 (BIA 1985) (citations omitted).

190 Rosenkranz, *supra* note 143, at 2148.

191 *Id.*

gress expresses meaning rather than as strict rules.[192] Textualists use numerous types of statutory canons, ranging from those with proverbial significance,[193] ancient origins, and Latin pedigree to newcomer canons that lack the Latin nomenclatures of their predecessors.[194]

Ejusdem Generis *and* Noscitur a Sociis. Two of the most relevant canons for interpreting the refugee definition are *ejusdem generis* ("residual clause canon") and *noscitur a sociis* ("associated words canon").[195] *Ejusdem generis*, discussed above,[196] requires courts to interpret a general term similarly to more specific items in the same list.[197] The canon *noscitur a sociis* also attempts to extrapolate a term's meaning from its fellow list items.[198] This canon states that "the meaning of a word may be known from accompanying words,"[199] and a judge applying this "commonsense canon" gives a vague term "more precise content by the neighboring words with which it is associated."[200] For *noscitur a sociis* to apply, "terms must be conjoined in such a way as to indicate that they have some quality in common."[201] Essentially, if several items in a list share an attribute, the judge interprets other items in that list to share that attribute as well.[202] To illustrate, in understanding the verb

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192 *See* United States v. Mescall, 215 U.S. 26, 31 (1909) ("[*Ejusdem generis*] is only a rule of construction to aid us in arriving at the real legislative intent."); *see also* United States v. Marshall, 908 F.2d 1312, 1318 (7th Cir. 1990) ("Canons are doubt-resolvers, useful when the language is ambiguous . . . ").

193 *Noscitur a sociis*, for example, is essentially a proverb. Riley's Dictionary of Latin Quotations defines *noscitur a sociis* by other proverbs such as "[h]e is known from his companions[ ]" and "[b]irds of a feather." 4 DICTIONARY OF LATIN QUOTATIONS: PROVERBS, MAXIMS, AND MOTTOS, CLASSICAL AND MEDIÆVAL, INCLUDING LAW TERMS AND PHRASES: WITH A SELECTION OF GREEK QUOTATIONS 289 (Henry Thomas Riley ed., London, Bell & Daldy 1866).

194 Rosenkranz, *supra* note 143, at 2148.

195 Walker, *supra* note 77, at 1004.

196 *See supra* Part IB.

197 *See supra* Part IB (discussing *ejusdem generis* in *Acosta*).

198 In fact, the canons are so similar that courts sometimes use *ejusdem generis* and *noscitur a sociis* interchangeably. *See, e.g.*, Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 720–21 (1995) (O'Connor, J., concurring) (After quoting a case that purportedly uses *ejusdem generis*, Justice O'Connor writes, "I would call it *noscitur a sociis,* but the principle is much the same: The fact that 'several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well[.]'") (citing Beecham v. United States, 511 U.S. 368, 371 (1994)). Similarly, in regard to particular social group specifically, the Supreme Court in *Matter of Acosta* stated its analysis used *ejusdem generis*, but arguably applied *noscitur a sociis* instead. 19 I. & N. Dec. 211, 233 (BIA 1985).

199 Rosenkranz, *supra* note 143, at 2148 n. 285; *see also* Russell Motor Car Co. v. United States, 261 U.S. 514, 519 (1923) (" . . . a word may be known by the company it keeps . . . ").

200 United States v. Williams, 553 U.S. 285, 294 (2008).

201 SCALIA & GARNER, *supra* note 78, at 196.

202 *See* Beecham v. United States, 511 U.S. 368, 371 (1994). However, the Supreme Court has also repeatedly emphasized that examining the associated words provides helpful guidance but does not justify reading the term at issue more narrowly than Congress intended. *See, e.g.*, United States v. Powell, 423 U.S. 87, 90 (1975); *see also* Gustafson v. Alloyd Co., 513 U.S. 561, 587 (1995) (Thomas, J., dissenting).

"take" in the context of a statute that prohibits the taking of endangered animals, the Supreme Court looked to the related statutory terms ("harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect") to define "take" as consistent with those functions.[203]

Despite some judicial skepticism of the canons' utility, legislators themselves know of and often rely upon certain canons in their lawmaking. Empirical studies of agency officials involved in rulemaking[204] and congressional counsels responsible for legislative drafting concluded that the majority of respondents "were not only aware of some of the interpretive rules that courts employ . . . but told [researchers] that these legal rules affect how they draft . . . ."[205] Specifically, *ejusdem generis* and *noscitur a sociis* were both demonstrably well-known among lawmakers and the most commonly used of the approximation canons.[206] This agency and congressional reliance on the canons bolsters their use by the judiciary and further justifies their application here to assess ambiguity.

Turning to particular social group, we examine the other items in the refugee definition list: race, religion, nationality, and political opinion.[207] As fellow grounds of asylum, their inclusion in the same list implies that they have sufficient qualities in common to justify the application of *ejusdem generis* and *noscitur a sociis*. However, there is an immediate challenge to defining the general term "particular social group" by the more specific terms in the list: it presupposes the other items in the list *are* in fact more specific. Examining the other grounds of asylum reveals the nebulousness inherent in each seemingly straightforward list item.[208]

Race. The first ground of asylum, race, is a problematic term that "should be understood broadly to include all kinds of ethnic groups[.]"[209]

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203 *Babbitt*, 515 U.S. at 691.

204 Walker, *supra* note 77, at 1025.

205 Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 906 (2013).

206 *Id.* at 932–33 (finding that 71 percent of the 137 congressional counsels surveyed understood the general concepts behind *ejusdem generis* and *noscitur a sociis*). Similarly, of the 128 agency rulemaking officials, 60 percent used the principles behind *ejusdem generis* and 79 percent used the principles of *noscitur a sociis*, although only 35 percent and 26 percent knew the canons' names, respectively. Walker, *supra* note 77, at 1025.

207 8 U.S.C. § 1101(a)(42)(A) (2019).

208 This endeavor requires recourse to judicial precedent, another tool of statutory construction. *See supra* Part IB (examining judicial precedent regarding particular social group specifically).

209 U.S. CITIZENSHIP & IMMIGR. SERVS., RAIO DIRECTORATE—OFFICER TRAINING: NEXUS AND THE PROTECTED GROUNDS 23 (June 13, 2018) (citing UNHCR Handbook), https://www.uscis.gov/sites/default/files/files/nativedocuments/Nexus_minus_*PSG_RAIO_Lesson_Plan.pdf* [hereinafter 2018 USCIS TRAINING]; *see also* HANDBOOK, *supra* note 47, at 68; *see, e.g.*, Guinac v. INS, 179 F.3d 1156 (9th Cir. 1999) (finding an indigenous Quiche ethnic group or "Indians" were a race); *see also* Pramatarov v. Gonzales, 454 F.3d 764 (7th Cir. 2006);

In fact, because science has debunked the belief that races are biologically distinct,[210] courts frequently prefer the term "ethnicity" to race.[211] Race, then, is not a "scientific concept, but rather *a social phenomenon of stigmatization* leading to a subjective position where collective identities are social constructs dependent upon variable perceptions."[212] Recognizing the social component of race also necessitates deference to racial delineations in an asylum seeker's country of origin rather than in the United States.[213] Race may overlap with nationality[214] and religion.[215] Importantly, courts do not find a group's relative size in society relevant to determining if that group constitutes a race; for example, in *Singh v. INS*, the Ninth Circuit held an Indo-Fijian experienced race-based persecution in Fiji by Fijian civilians even though there were similar numbers of ethnic Fijians and Indo-Fijians.[216] This example also evidences courts' consistently holding that a private actor may be the agent of persecution for race and ethnicity based asylum claims. Often, the asylum applicant is targeted for his or her race by a nongovernmental actor whom the government is unable or unwilling to control. These claims are cognizable when the applicant meets the other requirements for asylum.[217]

Religion. Courts also define religion broadly and are reluctant to place high hurdles on demonstrating membership in a religion.[218] In-

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Mihalev v. Ashcroft, 388 F.3d 722 (9th Cir. 2004) (finding the Gypsy or Roma ethnic group to constitute a race).

210 2018 USCIS TRAINING, *supra* note 209, at 23.

211 *See, e.g.*, *Guinac*, 179 F.3d at 1159 n. 5 ("Throughout this opinion, we use 'race' to designate the ground on account of which Guinac was persecuted. More precisely, he was persecuted on account of his 'ethnicity,' a category which falls somewhere between and within the protected grounds of 'race' and 'nationality.'").

212 COMMENTARY, *supra* note 44, at 376 (emphasis added). As a result, persecution on account of being a foreigner in a country may also be considered race based. *See, e.g.*, Mashiri v. Ashcroft, 383 F.3d 1112 (9th Cir. 2004) (finding persecution of an Afghani who moved to Germany to be persecution based on race); *see also* Surita v. INS, 95 F.3d 814 (9th Cir. 1996) (finding race based persecution of a family of Indian descent in Fiji).

213 2018 USCIS TRAINING, *supra* note 209, at 23.

214 Knezevic v. Ashcroft, 367 F.3d 1206, 1210 (9th Cir. 2004) ("Claims of persecution based on race and nationality often overlap. . . . Recent cases use the more precise term of ethnicity, which falls somewhere between and within the protected grounds of race and nationality.") (internal quotations and citations omitted).

215 *See* Kourski v. Ashcroft, 355 F.3d 1038, 1039 (7th Cir. 2004) ("Jews constitute an ethnic group as well as a religious one.").

216 94 F.3d 1353, 1356 (9th Cir. 1996).

217 *See, e.g.*, Eduard v. Ashcroft, 379 F.3d 182 (5th Cir. 2004) (Chinese applicant persecuted by Indonesian civilians); Guchshenkov v. Ashcroft, 366 F.3d 554 (7th Cir. 2004) (applicant of Macedonian descent persecuted by Bulgarian civilians); Singh v. INS, 94 F.3d 1353 (9th Cir. 1996) (ethnic Indian persecuted by ethnic Fijian dock workers); Surita v. INS, 95 F.3d 814 (9th Cir. 1996) (ethnic Indian persecuted by ethnic Fijian civilians).

218 *See* Canas-Segovia v. INS, 970 F.2d 599, 601 (9th Cir. 1992) (stating that in comparison to political opinion, the concept of religion is "much broader, describing both beliefs and practices").

stead, courts are clearer in defining what a religion is *not*:[219] Adherence to a religion does not require comprehensive knowledge of doctrine or custom,[220] consistently attending church or religious meetings,[221] or participating in a strict hierarchical religious structure.[222] Like race, the number of adherents to a religion is immaterial to determining religion-based persecution.[223]

Partly as a result of the vague criteria extrapolated from precedent,[224] courts have struggled with how to conceptualize new spiritual movements that eschew easy categorization. This is exemplified in the courts' evaluation of asylum claims based on the practice of Falun Gong. "Falun Gong is an international movement, though primarily Chinese, that is often referred to as a 'religion' . . . though it is not religion in the Western sense"[225]—indeed, "Falun Gong does not consider itself a religion."[226] In fact, there is no doctrine, symbol, hierarchy, deity, or requirement for membership, and the movement is more akin to traditional Chinese medicine.[227] But courts have accepted that Falun Gong is a religion because the Chinese government recognizes it as such[228] and de-

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219 Moreover, courts often conflate what constitutes a religion with how to define a religion itself; consequently, these takeaways from these analyses are discussed interchangeably here.

220 *See, e.g.*, Rizal v. Gonzales, 442 F.3d 84, 90 (2d Cir. 2006) ("To the extent that the IJ's conclusion stemmed from the rationale that a certain level of doctrinal knowledge is necessary in order to be eligible for asylum on grounds of religious persecution, we expressly reject this approach."); Yong Ting Yan v. Gonzales, 438 F.3d 1249, 1255 (10th Cir. 2006) ("We agree with the Eighth Circuit that a detailed knowledge of Christian doctrine may be irrelevant to the sincerity of an applicant's belief . . . "); Iao v. Gonzales, 400 F.3d 530, 533–34 (7th Cir. 2005) (noting with concern the "disturbing feature[ ]" of courts' "exaggerated notion of how much religious people know about their religion."); Muhur v. Ashcroft, 355 F.3d 958, 961 (7th Cir. 2004) ("One can question the weight that the asylum officer and the immigration judge placed on ignorance of the details of religious doctrine . . . as evidence that an individual is not a true believer. . . . Yet how many Roman Catholics know who founded the Catholic Church . . . ?").

221 *See, e.g.*, *Yong Ting Yan*, 438 F.3d at 1256 (discounting the importance of frequent church attendance to defining membership in a religion).

222 *See Muhur*, 355 F.3d at 961 (noting that Jehovah's "Witnesses don't even distinguish between laity and clergy").

223 *Iao*, 400 F.3d at 533 ("The number of followers of Falun Gong in China is estimated to be in the tens of millions, all of them subject to persecution.").

224 Some judges have challenged the idea that a uniform test of religion is even possible. Judge Posner, for instance, notes that "[d]ifferent religions attach different weights to different aspects of the faith[,]" which calls into question courts' ability to construct a bright line religion rule. *Id.*

225 *Iao*, 400 F.3d at 532.

226 Zhang v. Ashcroft, 388 F.3d 713, 719 (9th Cir. 2004).

227 *Iao*, 400 F.3d at 532–33.

228 *Zhang*, 388 F.3d at 719–20 ("Chinese authorities have banned Falun Gong as a religious cult.").

termine membership in that religion by an individual's avowed personal belief.[229]

Further, because belief and commitment to a religion may manifest "in public or private, in teaching, practice, worship, and observance[,]"[230] a crucial marker of membership in a religion can be self-identification.[231] A religion might not issue a document indicating membership;[232] in fact, some religions have no formal requirements for membership at all.[233] Membership in a religion instead may be measured by "the sincerity of an applicant's belief[.]"[234] Consequently, religion does not need to be limited to adherence to a specific theological doctrine but may be construed more broadly as an identity or way of life.[235] Further, in some cases, societal persecution or discrimination can enhance the analysis of the group's boundaries.[236]

Although religion cases often involve governmental persecution, numerous religion-based asylum cases show that private actors may be the source of persecution.[237] The Sixth Circuit explicitly stated that "[a] violent attack on the basis of religion amounts to past persecution, even if perpetrated by civilians."[238]

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229 *Iao*, 400 F.3d at 532 (explaining an individual who engages in Falun Gong exercises in accordance with its teachings can "truthfully declare himself or herself a bona fide adherent to Falun Gong.").

230 HANDBOOK, *supra* note 47, at 74.

231 Rizal v. Gonzales, 442 F.3d 84, 90–91 (2d Cir. 2006).

232 *See* Muhur v. Ashcroft, 355 F.3d 958, 961 (7th Cir. 2004) (finding "an identification card issued by the Church" is not required to prove membership in a religion). Because harm due to a lack or rejection of religion paradoxically may qualify as religion-based persecution as well, requiring documentation to demonstrate religion would be counterintuitive. *See* 2018 USCIS TRAINING, *supra* note 209, at 24; *see, e.g.*, Ahmadshah v. Ashcroft, 396 F.3d 917 (8th Cir. 2005) (finding that the death sentence for converting out of Islam under Sharia law (apostacy) is persecution based on religion).

233 *Iao*, 400 F.3d at 533.

234 *Ahmadshah*, 396 F.3d at 920 n. 2.

235 COMMENTARY, *supra* note 44, at 380, 382.

236 For example, even a religious sect within a religion can experience religious persecution from society at large, and that group is identified partly through the persecution. *See, e.g.*, Sahi v. Gonzales, 416 F.3d 587, 587 (7th Cir. 2005) ("[Applicant] is a member of the Ahmadi religious sect. The Ahmadis consider themselves Muslims, but many Muslims disagree.").

237 Pavlova v. INS, 441 F.3d 82, 91 (2d Cir. 2006) (citations omitted) (Baptist persecuted by Russian nationalist group); *see also* Ivanov v. Holder, 736 F.3d 5 (1st Cir. 2013) (Pentecostal Christian persecuted by skinheads); Afriyie v. Holder, 613 F.3d 924 (9th Cir. 2010) (Baptist preacher persecuted by Muslim civilians); Paul v. Gonzales, 444 F.3d 148, 151 (2d Cir. 2006) (Christian persecuted by business owners and Muslim fundamentalists); Rizal v. Gonzales, 442 F.3d 84 (2d Cir. 2006) (Christian persecuted by Muslim society broadly in Indonesia); Krotova v. Gonzales, 416 F.3d 1080 (9th Cir. 2005) (Jew persecuted by Russian civilians).

238 Marouf v. Lynch, 811 F.3d 174 (6th Cir. 2016) (granting asylum for Christian Palestinian applicants persecuted by Muslim civilians).

Nationality. Nationality, a deceptively simple concept, is not equivalent to citizenship.[239] Rather, nationality can extend to a describe "'a group of people with the same language, culture, and history who form part of a political nation'"[240]—a description reminiscent of the "social group" definition discussed above that the Eleventh Circuit decried as too broad to serve as a proper ground for asylum.[241] United States Citizenship and Immigration Services (USCIS)[242] agrees with this expansive view of nationality, recognizing this protected ground as "a broad concept that includes ethnic groups, linguistic groups, and groups defined by common cultures."[243] As with race and religion, the persecutor may be a private actor inflicting "anti-foreigner violence" whom the government is unable or unwilling to control.[244]

Political Opinion. Finally, political opinion is perhaps the other ground with as murky a definition as particular social group.[245] USCIS maintains that political opinion "should be understood in the broad sense to incorporate . . . any opinion on any matter in which the machinery of state, government and police may be engaged."[246] Courts have seen many topics as political: feminism,[247] exposing government human rights abuses, union membership, participating in certain student groups, opposition to gangs or drug cartels, whistleblowing,[248] refusing to join

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239 HANDBOOK, *supra* note 47, at 74; *see* Agha v. Holder, 743 F.3d 609 (8th Cir. 2014); *see also* Faddoul v. INS, 37 F.3d 185 (5th Cir. 1994) (discussing statelessness leading to persecution).

240 COMMENTARY, *supra* note 44, at 388.

241 *See* Perez-Zenteno v. Att'y Gen., 913 F.3d 1301, 1310 (11th Cir. 2019).

242 USCIS is the branch of the Department of Homeland Security responsible for administering affirmative asylum claims and conducting credible fear interviews.

243 2018 USCIS TRAINING, *supra* note 209, at 27. Nationality may therefore overlap with race and religion as protected grounds.

244 Mashiri v. Ashcroft, 383 F.3d 1112, 1121 (9th Cir. 2004) (Afghani in Germany persecuted by Neo-Nazis); *see also* Hengan v. INS, 79 F.3d 60, (7th Cir. 1996) (Hungarian persecuted by Romanian civilians); *Matter of* O-Z- & I-Z-, 22 I. & N. Dec. 23 (B.I.A. 1998) (applicant with Jewish nationality persecuted by members of a nationalistic, pro-Ukrainian independence movement).

245 We note that Congress has expressly stated that forced abortion and sterilization constitute persecution on the basis of political opinion. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, § 601(a)(1), 110 Stat. 3009-546, 3009-689 (1997) (enacted as Division C of Omnibus Consolidated Appropriations Act, 1997, and codified at INA § 101(a)(42), 8 U.S.C. § 1101(a)(42)). However, this definition was essentially a political decision by Congress in response to anti-abortion activists rather than a carefully-considered definition of what constitutes a political opinion. Orly Gez, *A Compromise Solution to Prevent Fraudulent Claims Under IIRIRA Section 601(2): A System of Conditional Grants*, 74 BROOK. L. REV. 1147, 1155 (2009).

246 2018 USCIS TRAINING, *supra* note 209, at 28–29 (citing GOODWIN-GILL & MCADAM, *supra* note 127, at 30 (internal citations omitted)).

247 Fatin v. INS, 12 F.3d 1233, 1242 (3d Cir. 1997).

248 2018 USCIS TRAINING, *supra* note 209, at 29–30.

guerilla forces,[249] deserting the military[250]—and not holding a political opinion at all.[251] Further, a private actor may be the source of persecution for political opinion-based asylum claims; often, these private actors are guerilla groups or political parties who are not currently in control of the government.[252] For instance, the Colombian leftist guerilla group Fuerzas Armadas Revolucionarias de Colombia (FARC), originally established as the military wing of the Colombian Communist party, is a frequent nongovernmental agent of persecution in political asylum claims that the government is unable or unwilling to control.[253]

Overall, determining whether an applicant holds a political opinion involves a "complex and contextual factual inquiry into the nature of the asylum applicant's activities in relation to the political context in which the dispute took place."[254] Political opinion can take various forms, demonstrated through both speech and action,[255] and spans the gamut of ideologies and identities, from a clear affiliation with a political party to an activity seen as supporting or opposing a particular governmental regime or institution.[256] The centrality of that political opinion to an applicant's life is not relevant. Political opinion persecution may apply both to diplomats and to "individuals who fled revolution" who may

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249 Del Valle v. INS, 776 F.2d 1407, 1413–14 (9th Cir. 1985).

250 Ramos-Vasquez v. INS, 57 F.3d 857, 863 (9th Cir. 1995).

251 Sangha v. INS, 103 F.3d 1482, 1488 (9th Cir. 1997) ("[A]n applicant can establish a 'political opinion' under the Act [by showing] political neutrality in an environment in which political neutrality is fraught with hazard, from governmental or uncontrolled anti-governmental forces. We have held that political neutrality can be political opinion under the Act.") (citations omitted).

252 *See, e.g.*, Sharma v. Holder, 729 F.3d 407 (5th Cir. 2013) (Nepal Student Union member persecuted by Maoist party members); Sok v. Mukasey, 526 F.3d 48 (1st Cir. 2008) (Sam Rainsy Party member persecuted by Cambodian People's Party members): Vente v. Gonzales, 415 F.3d 296 (3d Cir. 2005) (persecuted by an unidentified paramilitary group in Colombia); Hoque v. Ashcroft, 367 F.3d 1190 (9th Cir. 2004) (Bangladesh Nationalist Party member persecuted by rival political party Awami League); Sotelo-Aquije v. Slattery, 17 F.3d 33 (2d Cir. 1994) (persecuted by Maoist guerilla organization The Shining Path); Rivas-Martinez v. INS, 997 F.2d 1143 (5th Cir. 1993) (persecuted by guerilla faction FMLN); Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1984) (persecuted by Salvadoran guerilla group).

253 *See, e.g.*, Escobar v. Holder, 657 F.3d 537 (7th Cir. 2011); Espinosa-Cortez v. Att'y Gen., 607 F.3d 101 (3d Cir. 2010); Gomez-Zuluaga v. Att'y Gen., 527 F.3d 330 (3d Cir. 2008); Lopez v. Att'y Gen., 504 F.3d 1341 (11th Cir. 2007); Orejuela v. Gonzales, 423 F.3d 666 (7th Cir. 2005).

254 Castro v. Holder, 597 F.3d 93, 101 (2d Cir. 2010) (internal quotations omitted); *see also* Yueqing Zhang v. Gonzales, 426 F.3d 540, 547 (2d Cir. 2005).

255 Hui-Mei Li v. Gonzales, 416 F.3d 681, 685 (7th Cir. 2005); Arriaga-Barrientos v. INS, 937 F.2d 411, 414 (9th Cir. 1991).

256 *See generally Castro*, 597 F.3d at 100–01. As a caveat, however, opposition to the government based on purely personal motives does not qualify as a political opinion. *See, e.g.*, *Yueqing Zhang*, 426 F.3d at 547; Marku v. Ashcroft, 380 F.3d 982, 987 (6th Cir. 2004).

not be politically active but are threatened by disruptions to their country's political stability.[257]

In light of these diverse interpretations, exactly what constitutes "political" remains open-ended.[258]

As Applied to Particular Social Group. Applying the principles of *ejusdem generis* and *noscitur a sociis* to particular social group reveals some commonalties among list items that should be attributed to particular social group as well. First, the protected grounds are meant to be interpreted broadly. Courts and policymakers reiterate the importance of taking an expansive view of each of the protected grounds.[259] Examining the other protected grounds shows that the characteristic that unites the group may be flexible.[260] The common characteristic that is part of a particular social group's definition must be distinguishable, but the law does not require strict precision.

Second, membership in or qualification for a protected ground can be evidenced by how society views and treats that group. For example, where members of a race or religion are stigmatized by society, such discrimination can help an adjudicator comprehend the group.[261]

Third, the government itself need not be the agent of persecution; private, non-governmental actors may be the perpetrators. If a private actor persecutes the individual based upon a protected ground, that individual may qualify for asylum, even where the government itself is not the persecutor.[262] A viable claim grounded on race, religion, nationality, or political opinion—and therefore for membership in social group— requires persecution either by the government *or* by actors the government is unable or unwilling to control.

Fourth, the canons allow us to draw an additional conclusion concerning a factor that does *not* delineate a particular social group. Reinforcing the takeaway from the original meaning analysis, the other protected grounds are not limited by the applicable group's potential size. Race as a ground for asylum is not reserved for members of a racial minority, and religious groups are not limited in size either: the pre-World War II European Jewish population (the group of asylum seekers

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257 The ECOSCO Social Committee, which drafted the 1951 Refugee Convention, contemplated that both such groups could fall into the political opinion category. COMMENTARY, *supra* note 44, at 400.

258 *See* COMMENTARY, *supra* note 44, at 398–400.

259 See, for example, the recent Fifth Circuit decision regarding *A-B-* in Gonzalez-Veliz v. Barr, 938 F.3d 219 (5th Cir. 2019); see also *supra* note 72 for a discussion of *Matter of* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (noting that particular social groups could be based on an innate characteristic "such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience"); *see also infra* Part IIC.

260 *See, e.g.*, COMMENTARY, *supra* note 44, at 376, 388.

261 *See* discussion of race and religion *infra* notes 209–38 and accompanying text.

262 Rizal v. Gonzales, 442 F.3d 84, 92 (2d Cir. 2006).

most pertinent at the time of the Refugee Convention's drafting) with presumable religion-based asylum claims was approximately 9 million.[263] Nationality does not depend on a country's population, and there are no numerical quotas on endorsing a political opinion. Circumscribed size, then, is evidently not a common characteristic of the other grounds of asylum. Using the canons of construction to apply size limitations to the definition of "particular social group," as done by the court in *Perez-Zenteno*, among others, is arbitrary and unwarranted considering the particular social group's statutory context.

Expressio Unius Est Exclusio Alterius. Additionally, another syntactic canon is relevant to evaluating what limitations can be properly placed on a particular social group: the negative expression canon.[264] *Expressio unius est exclusio alterius*, or "[t]he expression of one thing implies the exclusion of others[,]"[265] assumes that Congress, when it expressly *includes* certain items terms or exceptions from a statute, meant to *exclude* the other terms or exceptions it did not include.[266] This canon also serves as a default rather than constitutional rule,[267] although many agency drafters agree that this principle is "often or always true."[268] As a result of its general acceptance and intuitive nature, the negative expression canon is frequently applied without being named.[269] When a judge reads a list of exceptions to a statute, this canon prohibits the judge from independently creating and inserting another, unlisted exception; Congress, the negative expression canon maintains, knows how to write a complete list.[270]

Congress has not stated that certain characteristics cannot form the basis of a particular social group. However, the INA contains a clear and lengthy list of classes of noncitizens ineligible for asylum for other reasons.[271] For example, Congress excluded aliens who participated in persecuting another based on a protected ground;[272] committed a particularly serious crime and therefore constitute a danger to the United States;[273] committed a serious nonpolitical crime outside the United

263 G.L. Esterson, *The Given Names Database*, JEWISHGEN, https://www.jewishgen.org/databases/givennames/dbdespop.htm (last visited Sept. 4, 2019).

264 *See* Rosenkranz, *supra* note 143, at 2109.

265 SCALIA & GARNER, *supra* note 78, at 107.

266 Walker, *supra* note 77, at 1028.

267 Rosenkranz, *supra* note 143, at 2107.

268 Walker, *supra* note 77, at 1028.

269 SCALIA & GARNER, *supra* note 78, at 111.

270 *See, e.g.*, Tenn. Valley Auth. v. Hill, 437 U.S. 153, 188 (1978).

271 8 U.S.C. § 1182 (2013).

272 8 U.S.C. § 1158(b)(2)(A)(i) (2009).

273 § 1158(b)(2)(A)(ii).

States;[274] present a danger to United States' security;[275] or have engaged in a terrorist activity,[276] among others. Thus, even where an applicant meets the substantive criteria for asylum, Congress has narrowed the group of applicants eligible for asylum by excluding those with criminal history.

Overall, using the principles of these canons to examine the list items reveals important commonalities. The parameters of a particular social group should be delineated by a common and articulable characteristic, but the group should not be invalidated by its potential size, and there is some latitude in the pertinent characteristic's specificity. Considering the specific enumerated exceptions shows that we cannot categorically bar an unlisted class of noncitizens from advancing a particular social group argument; instead asylum requires case-by-case determinations. The text of the statute provides a rough outline of the meaning of a particular social group, and after exhausting these tools of textualism, we must explore the statute's underlying purpose[277] to resolve the remaining ambiguity.[278]

C. Legislative History of Particular Social Group

There is a general consensus that statutory construction begins with the text.[279] Although pure textualists insist upon ending the inquiry there and argue that attempting to divine legislative intent is beyond a judge's role and capabilities,[280] purposivists maintain that the context in which a statute was enacted also bears on its interpretation.[281] Legislative history, "the record of Congress's deliberations when enacting a law,"[282] is there-

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274 § 1158(b)(2)(A)(iii).

275 § 1158(b)(2)(A)(iv).

276 § 1182(a)(3)(B)(i); § 1182(a)(4)(B).

277 BRANNON, *supra* note 129, at 37.

278 ESKRIDGE, *supra* note 75, at 325 ("Consider legislative history when the statute is ambiguous.").

279 Frankfurter, *supra* note 145, at 535.

280 *See, e.g.*, Easterbrook, *supra* note 143, at 81 ("Intents are irrelevant even if discernable (which they aren't), because our Constitution provides for the enactment and approval of texts, not intents. The text is not evidence of the law; it *is* the law."). However, "[j]udges do not always use legislative history to determine a statute's *purpose*. Even textualist judges may use legislative history to determine whether a statutory term has a specialized meaning . . . " BRANNON, *supra* note 129, at 37.

281 *See, e.g.*, Posner, *supra* note 149, at 810; *see also* Frankfurter, *supra* note 145, at 535 (recognizing the importance of "the significance of an enactment, its antecedents as well as its later history, its relation to other enactments . . . ").

282 BRANNON, *supra* note 129, at 36.

fore an important (albeit controversial)[283] tool to ascertaining legislative purpose.[284]

Even a relatively ambiguous statute "may have a rich legislative history[.]"[285] By examining a law's progression through the legislative process, a judge considers "the problem that Congress was trying to solve by enacting the disputed law" to discern congressional intent.[286] In regard to the codification of asylum law, the legislative process for both the INA and Refugee Act of 1980, as well as the definition's origins in the Refugee Convention and its 1967 Protocol, provide context to understand the meaning behind a particular social group. Although we unearthed no clear criteria buried in a congressional hearing or committee report, the legislative history does reveal helpful guidance for shaping the parameters of a particular social group.

Immigration and Nationality Act. The refugee crisis in the aftermath of World War II forced the United States to recognize the insufficiency of its immigration system.[287] Previously, Congress's reactionary approach to refugees had involved a "series of temporary responses to emergency crises[,]" and critics of this piecemeal legislative strategy hoped that the unprecedented numbers of European refugees would galvanize Congress to establish clear criteria for asylum.[288] Instead, Congress passed the Immigration and Nationality Act in 1952.

The INA, the basis for U.S. immigration law, is mired in a history of intentional congressional discrimination. Writing on statutory construction generally, Judge Easterbrook warns us that "[r]elying on the text does the least harm, for the text is visible to everyone, while legislative history can take people by surprise . . . ."[289] The INA demonstrates this point. The Act's legislative history is replete with Congress's self-congratulation for "remov[ing] the last vestige of racial discrimination" from the immigration system.[290] In reality, "enacted . . . at the depth of

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283 For a more detailed discussion of textualists' criticisms of legislative history, see Judge Easterbrook's critiques in *U.S. v. Marshall*, 908 F.2d 1312, 1318–19 (7th Cir. 1990).

284 *See* Rosenkranz, *supra* note 143, at 2150 ("The fiercest debate in the field of statutory interpretation involves the proper use of legislative history."). However, Supreme Court justices have recently acknowledged the utility of exploring legislative history for statutory construction. *See, e.g.*, Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 782 (2018) (Sotomayor, J., concurring) (describing committee reports as "a particularly reliable resource" to interpret a statutory term).

285 ESKRIDGE, *supra* note 75, at 7.

286 BRANNON, *supra* note 129, at 11–12.

287 *See, e.g.*, COMMENTARY, *supra* note 44, at 299.

288 Deborah E. Anker and Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. Rev. 9, 12 (1981).

289 Easterbrook, *supra* note 143, at 97.

290 98 CONG. REC. 4,302 (1952) (statement of Rep. Walter).

the cold war and the restrictionist atmosphere of that era[,]"[291] the INA codified xenophobia.[292] An assumption that immigrants are potentially dangerous to the U.S. underpins the INA. For instance, Representative Wood, opposing refugee rights, declared on the House floor that, because "Western European races have made the best citizens in America" it would be unwise to welcome into the U.S. people who "are not yet of the type that can easily be built into good American citizens. It seems to me that the question of racial origins—though I am not a follower of Hitler—there is something to it."[293]

Congress incorporated these racist beliefs into the Act by instituting quotas based on ethnicity without including a separate provision for admitting refugees.[294] Its quota provisions were so suspect that President Truman established a commission to review the INA; it concluded that the Act "rests upon an attitude of hostility and distrust against all aliens."[295] Based upon these conclusions, on June 25, 1952, Truman vetoed the INA, finding the Act to be "at variance with . . . American ideals" and "deliberately and intentionally" discriminatory.[296] According to Truman, one purpose of the INA was to "virtually eliminate immigration to this country" from disfavored parts of the world.[297] Despite Truman's criticisms, Congress overrode his veto just two days later, and the INA became law.[298]

The 1965 amendments to the INA did little to remedy its defects. Although these amendments included "[t]he first permanent statutory basis for the admission of refugees[,]" the refugee standards put in place were extremely restrictive by country of origin and grounds for protection.[299] The Act limited refugees to individuals fleeing communist-dominated or Middle Eastern countries and situations in which such flight was

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291 *U.S. Immigration Law and Policy 1952-1979: A Report Upon the Formation of the Select Commission on Immigration and Refugee Policy*, 96th Cong. 2 (1979) (introduction by Sen. Kennedy, Chairman of the Sen. Comm. on the Judiciary).

292 Anker & Posner, *supra* note 288, at 10 ("While the United States attempted to build new alliances with nations in different parts of the world, foreign policy aims were continually frustrated by the restrictive and xenophobic immigration policy embodied in the national origins system and codified in the Immigration and Nationality Act of 1952 (INA).").

293 *See, e.g.*, 98 CONG. REC. 4,314 (1952) (statement of Rep. Wood) ("I believe that possibly statistics would show that the Western European races have made the best citizens in America and are more easily made into Americans.").

294 Anker & Posner, *supra* note 288, at 10.

295 U.S. PRESIDENT'S COMM'N ON IMMIGR. AND NATURALIZATION, WHOM WE SHALL WELCOME 263 (1953).

296 PRESIDENT TRUMAN, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES RETURNING WITHOUT APPROVAL THE BILL TO REVISE THE LAWS RELATING TO IMMIGR. AND NATIONALITY, H.R. DOC. NO. 82-520, at 2–3 (1952).

297 *Id.* at 3.

298 H.R. REP. NO. 96-608, at 8 (1979).

299 Anker & Posner, *supra* note 288, at 17.

caused by "persecution or fear of persecution on account of race, religion, or political opinion."[300]

Refugee Act of 1980. Broadly, the Refugee Act codified the refugee admissions quota while repealing the discriminatory national origins system.[301] Additionally, as stated by Representative Weiss in support of the Refugee Act during House debates, the 1952 INA had created "a hodgepodge of legislative and administrative authorizations. Indeed, it is not a program at all but many disparate provisions which were established to accommodate different refugee groups as crises occurred."[302] Congress intended the Refugee Act to therefore establish uniformity and provide much-needed administrable guidance for the asylum system, which would accept both refugees located overseas[303] and asylees located at the border or inside the United States.[304]

Importantly, the Refugee Act also incorporated into U.S. law for the first time "membership in a particular social group" and nationality as explicit grounds for asylum. Examining the legislative history of the Refugee Act, including the statements made during debates in the congressional record, committee reports, and testimony of experts during congressional hearings, reveals that Congress intended to (1) provide a flexible definition for the grounds of asylum that would remain workable in changing circumstances; (2) reemphasize Congress's role in immigration policy and limit the discretion of the executive; and (3) recognize the value of the United Nations High Commissioner for Refugees.

Providing Flexibility. The legislative history of the Refugee Act reveals that Congress intended to create a refugee definition in which the grounds of asylum would be flexible and applicable to future developments in refugees' circumstances. The necessity for procedural and substantive flexibility is apparent from the Act's very conception. In calling up the bill on the House floor, Representative Claude Pepper declared that "the purpose of this . . . very salutary and desirable bill, is to establish a coherent and comprehensive U.S. refugee policy, this being accomplished by creating a *systematic and flexible* procedure for the admission and resettlement of refugees."[305]

To Congress, flexibility was necessary to ensure the Act's longevity. Indeed, some members of Congress viewed the criteria's adaptability as a strength of the legislation. Rather than itemize a complete list of

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300 The Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911, 913 (1965).

301 *See* Anker & Posner, *supra* note 288, at 10–12.

302 125 CONG. REC. 37,241 (1979).

303 8 U.S.C. § 1157 (2013).

304 *Id.* § 1158 (2013).

305 125 CONG. REC. 35,812 (1979) (emphasis added).

groups potentially eligible for asylum,[306] Representative Elizabeth Holtzman argued in House debates that the Refugee 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."[307] When drafting the Refugee Act, Congress rejected the restrictions of the 1965 INA amendments' refugee definition; the House Committee on the Judiciary Report found that the 1965 definition was "clearly unresponsive to the current diversity of refugee populations and [did] not adequately reflect the United States' traditional humanitarian concern for refugees throughout the world."[308] Instead, drafters wanted to replace the "haphazard system with a permanent program for the admission of refugees,"[309] but simultaneously meant to maintain flexibility "to respond to emergent refugee situations which may rise at any time around the world."[310]

Speaking to the grounds of asylum specifically, the legislative history of the Refugee Act offers some indication of certain groups that Congress contemplated as qualifying for refugee status.[311] An example of a particular social group was proposed in a House Subcommittee Hearing on Immigration, Refugees, and International Law. In a prepared statement before the Subcommittee, Harvard Society of Fellows witness Virginia Dominguez discussed the plight of Cuban refugees.[312] According to Dominguez, the half a million Cubans who had entered the United States in the two decades following the Cuban Revolution "fit fairly closely the stereotype of the refugee" in the Refugee Act.[313] Dominguez

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306 The legislative history of the Refugee Act does, however, give some indication of certain groups would have qualified in 1980. References to eligible refugees often concerned nationality as a ground for asylum, focusing on refugee crises for Indochinese and Vietnamese asylum seekers. *See, e.g.*, *Briefing on the Growing Refugee Problem: Implications for International Organizations: Hearing Before the Subcomm. on International Organizations of the H. Comm. on Foreign Affairs*, 96th Cong. 2–3 (1979) [hereinafter *Briefing on Refugee Problem*]; *see also Refugee Act of 1979: Hearing on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law*, 96th Cong. 185 (1979) [hereinafter *1979 Hearing before Immigration Subcomm.*].

307 125 CONG. REC. 35,813 (1979).

308 H.R. REP. NO. 96-608, at 9 (1979).

309 125 CONG. REC. 35,812 (1979). The Act's intended responsivity to new crises was immediately put to the test just weeks after its passage with an influx of approximately 120,000 Cuban refugees. Unfortunately, the Act proved ill-equipped to appropriately handle these claims. Although "[t]he Refugee Act was designed primarily to control the admission of refugees through an orderly admissions process, . . . these mass claims for asylum . . . severely strained the existing legal framework." Anker & Posner, *supra* note 288, at 64.

310 *Hearing on H.R. 3056*, *supra* note 60, at 14.

311 *See e.g.*, *Briefing on Refugee Problem*, *supra* note 306, at 2–3 (1979*); see also 1979 Hearing before Immigration Subcomm*, *supra* note 306, at 185. For instance, in the record, references to eligible refugees often concerned nationality as a ground for asylum, focusing on refugee crises for Indochinese and Vietnamese asylum seekers.

312 *1979 Hearing before Immigration Subcomm*, *supra* note 306, at 324.

313 *Id.*

continued that many of the first wave of Cuban refugees involved in the Batista government

> were capitalists, high-level managers of foreign companies, and simply upper-class Cubans. Their professions, their landholdings, their family backgrounds, and their capital made them likely enemies of the socialist revolution. . . . Their "particular social group" and their "political opinion" caused them to have 'a well-founded fear of persecution.' They were, on the whole, classic refugees.[314]

This accepted framing of a particular social group demonstrates that the group, contrary to subsequent interpretations, has no size restrictions, can overlap with other parameters, and does not need to be particularly discrete in society.

Such examples, however, were not meant to be exhaustive. Overall, the legislative record consistently shows that Congress[315] purposefully refused to constrain the government's ability to extend asylum to those in need of protection with a rigid or fixed refugee definition.[316] Rather, flexibility in the grounds of asylum was "particularly essential" to allow the U.S. to address the evolving nature of refugee crises and to remove "ideological and geographic limitations" created by prior legislation.[317] Further, allowing two routes for protection—overseas admission and application at the border—shows that Congress intended to leave the door open to evolving situations. Consequently, although Congress intended the Refugee Act of 1980 to conform the U.S. refugee definition to the language of the Refugee Convention and 1967 Protocol, Congress did not limit the definition's use to the types of refugees that existed in 1951, 1967, or 1980[318]—Congress expected and intended our understanding

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314 *Id.*

315 This understanding of adaptability and future applicability was shared by President Carter. In his signing statement for the Refugee Act, Carter anticipated the refugee definition would be adapted to accommodate new refugees, writing that "[t]he Refugee Act improves procedures and coordination to respond to the often massive and rapidly changing refugee problems that have developed recently." Presidential Statement on Signing S. 643 Into Law, 1 PUB. PAPERS 503 (Mar. 18, 1980).

316 *See, e.g.*, *1979 Hearing before Immigration Subcomm*, *supra* note 306, at 185 (in refusing to limit the refugee definition, Congressman Ellsworth commented, "I think what we are after here is that . . . [there will be a refugee policy] . . . [with the] definition of refugee being wide enough . . . so that certain situations can be handled in a way in which we can bring in the prisoners of conscience . . . ").

317 *Hearing on H.R. 3056*, *supra* note 60, at 14.

318 For instance, the House Committee on the Judiciary reported that the types of recognized refugees had evolved in the nearly 30 years since the 1951 Refugee Convention. H.R. REP. NO. 96-608, at 9 (1979) (explaining that, although detainees and political prisoners "are not covered by the U.N. Convention, the Committee believes it is essential in the definition to

and application of the grounds of asylum to change with changing circumstances.

Constraining Executive Discretion. Additionally, another significant purpose of the Refugee Act was to reassert Congress's role in delineating immigration policy; this intent of Congress, as evidenced by the Act's legislative history, informs the extent to which we defer to the executive's interpretation of a particular social group. In contrast to the modern assumption that the executive takes the lead on immigration policy as a matter of national security, Congress intended the new refugee definition to place some constraints on the discretion of the executive in conferring asylum.

For example, in a hearing before the House Subcommittee on Immigration, Citizenship, and International Law, Representative Joshua Eilberg articulated the need to maintain the separation of powers in the context of asylum law:

> [w]hile I agree that some administrative flexibility is certainly required, I do not feel that it is reasonable or proper for the Congress to delegate to the executive branch its constitutional obligation to enact laws establishing this Nation's refugee policy. *I do not believe the Attorney General should be the sole decisionmaker on this subject . . .*[319]

The Refugee Act was therefore meant to remedy an overreliance on executive discretion, in part by refining the definition of the term "refugee" in addition to other criteria.[320] One such congressional authority that Representative Eilberg explicitly declined to abdicate was "[w]ho should be considered as 'refugees' under our law?"[321]

Likewise, Senator Strom Thurmond feared giving too much power to the executive and differentiated the role of Congress in crafting the policy versus the executive's responsibility to implement it.[322] In his

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give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world").

319 *Hearing on H.R. 3056*, *supra* note 60, at 1 (emphasis added). According to Rep. Eilberg, the Attorney General and Commissioner did not promulgate criteria for deciding asylum cases, so his bill would do so. *Id.* Today, USCIS promulgates a handbook for asylum officers that more clearly explains the standards officers should implement in their assessments of asylum seekers. *See, e.g.*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, ASYLUM DIVISION, AFFIRMATIVE ASYLUM PROCEDURES MANUAL (Nov. 2013), https://www.uscis.gov/sites/default/files/files/nativedocuments/Asylum_Procedures_Manual_2013.pdf.

320 *Hearing on H.R. 3056*, *supra* note 60, at 1, 3, 4–6 (discussing numerical limits on overseas refugee admissions and the procedure for admitting refugees pursuant to "emergent" situations).

321 *Id.* at 59.

322 *Refugee Consultation: Hearing Before the S. Comm. on the Judiciary*, 96th Cong. 1–2 (1979).

opening statement concerning additional presidential parole authority, Senator Thurmond maintained "[a]s a Member of the Senate, I am committed to support the President in his proper execution of our foreign policy and refugee policy, but I will not waive the right of the Congress to consent and be consulted."[323] These statements both emphasize the importance of ascertaining congressional intent to discern the meaning of policy—the province of Congress—and make clear that the Act at least limits the discretion of the Attorney General.

Recognizing the Value of the UNHCR. Finally, Congress intended to refer to the United Nations High Commissioner for Refugees (UNHCR) to interpret the Refugee Act's language, and the executive branch also recognized the UNHCR's value. In a hearing before the House Subcommittee on Immigration, Citizenship, and International Law, the Department of State Deputy Coordinator for Human Rights and Humanitarian Affairs explicitly extolled the importance of the UNHCR because of "its ability to internationalize refugee problems."[324] The Deputy Coordinator also described favorably the collaboration between the Department of State and the UNHCR.[325] Congress agreed with the Department of State on connecting the UNHCR to domestic law; in that same committee hearing, Representative Eilberg noted that "[o]ne of the basic theories underlying our refugee bill which is before us is that refugee situations should be internationalized; and I am aware that the United Nations High Commissioner for Refugees, is the primary mechanism for achieving this objective."[326]

Taken together, the legislative history further elucidates the meaning of the particular social group ground for asylum. First, based on the evidence produced during the drafting of the Refugee Act of 1980, a particular social group is not to be limited by a rigid definition or confined to specific, unchanging groups; rather, Congress intended the ground to apply to groups it did not currently recognize. Second, to properly preserve the policymaking role of Congress, the Attorney General lacks the authority to enact refugee policies that unilaterally contravene the Refugee Act's purpose but instead must consider a particular social group's intended flexibility to address emerging world crises in exercising his discretion. Third, to further define the particular social group, the Refugee Act's legislative history supports recourse to the Refugee Convention, the 1967 Protocol, and guidance by the UNHCR. We turn to these sources next.

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323 *Id.* at 2.

324 *Hearing on H.R. 3056*, *supra* note 60, at 19.

325 *Id.* at 40.

326 *Id.* at 31.

D. Statutory Context of the Refugee Definition

When understanding an ambiguous statutory term, after considering the statutory language and legislative history, the court looks to the statutory context to dispel its remaining confusion.[327] Although the origins of the refugee definition provide limited guidance on the intended interpretation of a particular social group, the UNHCR has subsequently disseminated helpful guidance for understanding the asylum ground's parameters.

The Refugee Convention & 1967 Protocol. As discussed above,[328] the 1951 Refugee Convention's refugee definition included the grounds for asylum later adopted into U.S. law.[329] But despite the importance of the particular social group ground today, the Refugee Convention's drafting history offers little insight into its meaning. Rather, particular social group "was a last minute amendment to the draft proposed by a Swedish delegate."[330] According to this delegate,

> 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. . . . [P]ersons . . . might be persecuted owing to their membership of a particular social group. Such cases existed, and it would be as well to mention them explicitly.[331]

Although there is no further discussion of the meaning of particular social group in the Refugee Convention's drafting history (or in early court decisions or academic writings), the Swedish amendment passed with a vote of 14–0–8,[332] and a Conference of the Plenipotentiaries of the United Nations adopted the entire Refugee Convention on July 28, 1951.[333]

The United States is not a party to the Refugee Convention but did sign the 1967 Protocol, which adopted the Convention's refugee definition while removing some of its limitations[334] to make the Convention's

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327 *See, e.g.*, Montana Wilderness Ass'n v. U.S. Forest Serv., 496 F. Supp. 880, 886 (D. Mont. 1980) ("In this case, however, such an inquiry is fruitless, for neither the language of the statute, nor the extensive Congressional debates mentions the question of access to the granted lands. It is necessary, then, to 'look at the condition of the country when the grant was made, as well as the declared purpose of the grant.'") (citation omitted).

328 *See supra* Part II.

329 Bednar & Penland, *supra* note 46, at 147–50.

330 COMMENTARY, *supra* note 44, at 391.

331 *Id.*

332 Id. at 391 n. 783.

333 HANDBOOK, *supra* note 47, at 5.

334 1967 Protocol, *supra* note 40, at 268.

provisions applicable to new refugees.[335] Besides reiterating membership in a particular social group as a ground for refugee status, the Protocol also codified the importance of the UNHCR, requiring "[t]he States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees . . . in the exercise of its functions . . . ."[336]

Guidance from the United Nations High Commissioner for Refugees. The UNHCR Guidelines on International Protection concerning membership in a particular social group specifically recognize the discrepancies between countries' interpretations of that protected ground.[337] The *protected characteristics approach*, favored by Canada,[338] requires members of a particular social group to be joined by an immutable characteristic or a characteristic fundamental to human dignity.[339] Also referred to as the "ejusdem generis approach," the Board first used this framework *Matter of Acosta*,[340] discussed above. There are several advantages to this approach: it establishes a particular social group analysis consistent with the other grounds of asylum; it promotes consistency and clear decision-making; and it allows for the evolution and extension of the particular social group category. However, critics argue that this approach goes beyond ordinary meaning of the terms; it can be difficult to apply; and there may be uncertainty regarding which groups deserve protection.[341] In contrast, the Australian and French courts'[342] *social perception approach* looks to whether a particular social group has a common characteristic that sets them apart from society or makes them a cognizable group.[343] This "sociological approach" attempts to apply an

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335 HANDBOOK, *supra* note 47, at 6.

336 1967 Protocol, *supra* note 40, at 270. The U.S. is bound only by international treaties that are either self-executing or ratified by the Senate and incorporated into domestic law. Although the Protocol is not self-executing, U.S. courts also follow *The Charming Betsy* doctrine canon of statutory construction, under which "domestic law is to be interpreted to avoid conflicts with international law." Bednar & Penland, *supra* note 46, at 160; *see also* Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains."); *see* Paraketsova, *supra* note 30, at 466; *see also* Anker & Posner, *supra* note 288, at 77–78 ("By adopting the Protocol Relating to the Status of Refugees, the United States made a commitment to abide by international law in its treatment of refugees. Congress gave meaning to this commitment by adopting the Refugee Act of 1980[.]"). Therefore, the UNHCR is a persuasive, albeit nonbinding, authority for the U.S.

337 GUIDELINES 2002, *supra* note 63, at 2–3. These discrepancies are further evidence of the term's ambiguity.

338 COMMENTARY, *supra* note 44, at 392.

339 GUIDELINES 2002, *supra* note 63, at 2–3.

340 19 I. & N. Dec. 211 (BIA 1985). *See supra* Part IB for our discussion of *Acosta*.

341 *See* James C. Hathaway & Michelle Foster, *Membership of a Particular Social Group*, 15 INT'L J. REFUGEE L. 477, 480–82 (2003).

342 COMMENTARY, *supra* note 44, at 393.

343 GUIDELINES 2002, *supra* note 63, at 3.

ordinary meaning analysis; advantages include its use without recourse to external legal standards, broader judicial discretion, and more inclusive understanding of what constitutes a particular social group.[344] This approach has received criticism for being overly broad and challenging decision-makers to assess social perceptions of other countries.[345] The UNHCR seeks to reconcile these approaches:

> a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, 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.[346]

This definition differs from the United States' approach: a particular social group is delineated by a common characteristic *or* its perception as a group in society, and the immutability of that common characteristic is a factor in the analysis, but not dispositive.[347] UNHCR documents strongly criticize a particular social group test like that of the United States that combines these approaches into a concomitant standard, rather than allowing two different paths toward establishing a group.[348]

Although the Guidelines do not have a complete list of qualifying particular social groups—indeed, the UNHCR instead emphasizes that the Refugee Convention contained no "closed-list" of groups—the Guidelines do provide further guidance for identifying a particular social group.[349] This guidance further conforms the analysis of a particular social group with the other grounds of asylum. For instance, the UNHCR notes that the persecutor of an individual on the basis of membership in a particular social group does not need to be a government actor.[350] Rather, persecution may be established when government authorities "knowingly tolerate[ ]" the violence, or "refuse, or prove unable, to offer effective protection."[351] Additionally, the group's size is irrelevant to determining

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344 *See* Hathaway & Foster, *supra* note 341, at 482–84.

345 *See id.* at 484.

346 GUIDELINES 2002, *supra* note 63, at 3.

347 The UNHCR approach is not without its critics. For instance, some scholars have challenged the basis for and effectiveness of merging these tests, claiming "that despite its advocacy of conceptual merger, UNHCR is effectively endorsing the social perception test as the determinative paradigm without recommending any modifications to take account of the conceptual and practical concerns identified by some courts and commentators." Hathaway & Foster, *supra* note 341, at 490.

348 *See, e.g.*, *Matter of* M-E-V-G-, 26 I. & N. Dec. 227, 236 n. 11 (B.I.A. 2014) (arguing protected characteristics and social perception are "alternate approaches, not dual requirements.").

349 GUIDELINES 2002, *supra* note 63, at 2.

350 *Id.* at 5.

351 *Id.*

if the group is cognizable.[352] Moreover, although a particular social group "cannot be defined *exclusively*" by its experience of persecution, persecution "may be a relevant element for determining the visibility of a particular group."[353] The UNHCR recognizes that a group's experience of persecution based on another common characteristic may distinguish the group in society by making it more visible.[354]

Similarly, the UNHCR has produced a handbook to serve as a practical guide to refugee law.[355] Its comprehensiveness and wide use has resulted in its international recognition "as the key source of interpretation of international refugee law."[356] The Handbook contains a brief description of a particular social group: "a 'particular social group' normally comprises persons of similar background, habits, or social status."[357]

Although the UNHCR rules are not binding upon U.S. courts, drafters of domestic law intended to employ UNHCR guidance as a tool to inform our application of the asylum law.[358] Yet, as discussed below, the UNHCR has a broader and more flexible interpretation of the particular social group than what has evolved in U.S. law—and is a stark contrast to the restrictive perspective endorsed by Attorney General Sessions in *A-B-*.[359]

E. Statutory Construction Takeaways

As Part II has explained, in determining how the term "particular social group" should function within the U.S. refugee regime, the canons of statutory construction, legislative history, and statutory context can provide much-needed guidance. The term is by no means structureless,

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352 *Id.*

353 *Id.* at 2.

354 Citing McHugh, J., in *Applicant A v. Minister for Immigration and Ethnic Affairs*, (1997) 190 CLR 225, 264 (Austl.), the UNHCR provides an example that

> Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognizable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.

GUIDELINES 2002, *supra* note 63, at 4.

355 *See* HANDBOOK, *supra* note 47, at V.

356 Brief for the Office of the United Nations High Comm'r for Refugees as Amicus Curiae Supporting Applicant, *Matter of* Thomas, 24 I. & N. Dec. 416 (B.I.A. 2007) at 2.

357 HANDBOOK, *supra* note 47, at 17.

358 *See generally supra* notes 66, 336.

359 GUIDELINES 2002, *supra* note 63, at 4. The Seventh Circuit has agreed; to justify its broader view of a particular social group, the Seventh Circuit has noted that even if many individuals would fit into the proposed group, the number who meet the refugee definition would still be limited to those who show persecution based upon that nexus. *See* Cece v. Holder, 733 F.3d 662, 673 (7th Cir. 2013).

and certain components of the term are *not* ambiguous: a particular social group (1) does not require a size limitation and (2) can include groups victimized by private actors. Further, in considering remaining ambiguities in the term, the above analysis demonstrates that particular social group (3) is meant to be a dynamic category that adapts to modern refugee crises; and (4) can include consideration of the persecutor's perspective in defining the group.

III. *CHEVRON* STEP ONE: *A-B-* CONTRAVENES THE UNAMBIGUOUS INTENT OF CONGRESS

As discussed above, the first step of *Chevron* requires a reviewing court to consider whether Congress has spoken unambiguously regarding the term at issue.[360] Although Congress has not directly stated whether domestic-violence-related groups can fit the definition of a particular social group, it has given guidance as to the broader term. The statutory construction analysis indicates that the particularity requirement does not require limited group size and that the source of persecution can be private actors: two parameters breached by *A-B-* at step one.[361]

A. A-B- *Incorrectly Implies that the Particularity Requirement Requires Limited Group Size*

The most obvious departure from the unambiguous parameters of particular social group is *A-B-*'s strong suggestion that a group's potential size works against its particularity.[362] Sessions contended that victims of "private violence"—that is, individuals targeted by gangs, domestic partners, or other non-governmental actors—are generally unable to demonstrate sufficient particularity due to the groups' potential size.[363] Sessions reasoned that police in certain countries struggle to respond to certain crimes, and thus many individuals will fit these categories of victims of private violence.[364] To Sessions, the widespread risk of violence and potential group size obviates the viability of the particular social group; because these victims "often come from all segments of society," they "likely lack the particularity" required by precedent.[365]

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360 *See generally supra* Part IIA.

361 There is recent precedent supporting a reviewing court's ability to decline deference at step one in the immigration context. The Sixth Circuit utilized the canons of construction and reversed a Board decision, finding that Congress' intent was unambiguous and "the *Chevron* analysis begins and ends at step one." Arangure v. Whitaker, 911 F.3d 333, 345 (6th Cir. 2018).

362 *Matter of* A-B-, 27 I. & N. Dec. 316, 335 (A.G. 2018).

363 *Id.* at 335.

364 *Id.* ("Social groups defined by their vulnerability to private criminal activity likely lack the particularity required under *M-E-V-G-*, given that broad swaths of society may be susceptible to victimization.").

365 *Id.*

However, while some boundaries around the group are necessary for its definition, applying the tools of *ejusdem generis* and *noscitur a sociis* to the question of what particular social group's boundaries should be, it is clear that the size of the group subjected to persecution need not be limited.[366] Looking at the other bases for asylum as examples, a racial group need not be a minority to experience race-based persecution,[367] nor need it be limited to a racial group of a small size. Similarly, claims based on religion do not require a small or even countable number of members to delineate the religious group.[368] Further, UNHCR guidance makes clear that the group's size is irrelevant to determining whether the group is cognizable.[369]

Indeed, in a recent opinion, the First Circuit articulated this precise concern.[370] Relying exclusively upon *A-B-*, the Board had sustained the Immigration Judge's finding that "married women in Guatemala who are unable to leave their relationship" was not a cognizable particular social group.[371] The First Circuit disagreed, rejecting the Board's holding that such a group is inherently deficient as "arbitrary and unexamined."[372] The court took issue expressly with *A-B-*'s implication that particular social groups are limited by their size.[373] After acknowledging the Supreme Court's use of *ejusdem generis* in *Matter of Acosta*, the First Circuit applied that analysis, supported by a slew of precedent, specifically to the question of group size to conclude that a particular social group cannot be limited by its size.[374] The court elaborated that "[i]t is unsurprising, then, that if race, religion, and nationality typically refer to large classes of persons, particular social groups—which are equally based on

366 *See generally supra* Part III.

367 Singh v. INS, 94 F.3d 1353, 1356 (9th Cir. 1996) (holding that an Indo-Fijian experienced race-based persecution in Fiji even though there were similar numbers of ethnic Fijians and Indo-Fijians); *see also supra* Part IIB.

368 Iao v. Gonzales, 400 F.3d 530, 533 (7th Cir. 2005) ("The number of followers of Falun Gong in China is estimated to be in the tens of millions, all of them subject to persecution."); *see also supra* Part IIB.

369 GUIDELINES 2002, *supra* note 63, at 5.

370 De Pena-Paniagua v. Barr, No. 18-2100, 2020 WL 1969458 (1st Cir. Apr. 24, 2020).

371 *Id.* at *3.

372 *Id.* at *5. The court also took this opportunity to reject the contention that *A-B-* did or could categorically preclude such a group from asylum eligibility. *Id.* at *1. Furthermore, the court held that the particular social group articulated in this case may be sufficiently particular and socially distinct and is not necessarily circular. *Id.* at *4–5.

373 *Id.* at *7.

374 *Id.* at *7 ("*See* Perdomo v. Holder, 611 F.3d 662, 669 (9th Cir. 2010) (explaining in the context of a claimed gender-based particular social group that the 'size and breadth of a group alone does not preclude a group from qualifying as . . . a social group'); *see also* N.L.A. v. Holder, 744 F.3d 425, 438 (7th Cir. 2014) (noting that the court 'does not determine the legitimacy of social groups by the narrowness of the category'); Cece v. Holder, 733 F.3d 662, 674-75 (7th Cir. 2013) (en banc) (rejecting 'breadth of category' as grounds for denying a social group, citing to examples of large social groups, such as Jews in Nazi Germany and ethnic Tutsis during the Rwandan genocide)").

innate characteristics—may sometimes do so as well."[375] Instead, in accordance with *Acosta*, the First Circuit opined that the key to defining a particular social group is the existence of "an underlying immutable characteristic[,]" irrespective of group size.[376]

As the canons of construction indicate and at least one appellate court has stated, holding size to be a limiting factor impermissibly distinguishes particular social group from the other nexuses. In suggesting that certain particular social groups are likely too large to be particular, Sessions departs from the statutory principles that demonstrate that the size of the group is not a disqualifying attribute to find that a person suffered persecution on that basis.

B. A-B- *Impermissibly Raises the Standard for Persecution by Private Actors*

The source of persecution for members of a particular social group may be private actors, just as is possible for the other grounds for asylum—and the standard to show persecution by such private actors is clearly stated in the statute, applying to all grounds. Yet in *A-B-*, Sessions claimed that *A-R-C-G-* created a *new* category of particular social groups based on private violence.[377] He then attempted to impose a higher standard for these private-violence claims. In fact, *A-R-C-G-* was a continuation of both the circuit courts' and the Board's practice of granting asylum on the basis of membership in a social group where the applicant was persecuted by a private actor. Violence perpetrated by spouses,[378] criminals,[379] family members,[380] and community members[381] qualified as persecution on account of membership in a particular social group even before *A-R-C-G-* was decided in 2014. These cases undercut

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375 *Id.* at *7,

376 *Id.* at *8. In fact, the First Circuit went further and attempted to assuage the fear that "'women,' or 'women in country X,' or even 'women in a domestic relationship,' might be too large or too distinct a group to serve as a particular social group." *Id.* at *6. By recognizing sex as an immutable characteristic, the court opined that this group is almost universally particular and well-defined—although it declined to rule as a matter of law that this particular social group was cognizable because this group formulation was not asserted before the Board. *Id.* at *7, *9.

377 *Matter of* A-B-, 27 I. & N. Dec. 316, 319 (A.G. 2018) ("The opinion [in *A-R-C-G-*] has caused confusion because it recognized an expansive new category of particular social groups based on private violence.").

378 *See, e.g.*, Alonzo-Rivera v. U.S. Att'y Gen., 649 F. App'x 983 (11th Cir. 2016).

379 *See, e.g.*, R.R.D. v. Holder, 746 F.3d 807 (7th Cir. 2014).

380 *See, e.g.*, Sarhan v. Holder, 658 F.3d 649 (7th Cir. 2011); Ornelas-Chavez v. Gonzales, 458 F.3d 1052 (9th Cir. 2006); Fiadjoe v. Att'y Gen., 411 F.3d 135 (3rd Cir. 2005); *Matter of* S-A-K- & H-A-K-, 24 I. & N. 464 (B.I.A. 2008); *Matter of* S-A-, 22 I. & N. Dec. 1328 (B.I.A. 2000).

381 *See, e.g.*, Hassan v. Gonzales, 484 F.3d 513 (8th Cir. 2007); *Matter of* Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996).

Sessions' efforts to cast *A-R-C-G-* as an outlier and demonstrate that *A-B-* itself actually constituted a radical departure from precedent. Instead, acknowledging that private actors may be the agents of persecution of members of a particular social group is consistent with the principles of *ejusdem generis* and *noscitur a sociis*.[382]

In addition to denying the viability of particular social group claims based on private violence, Sessions raised the standard for the government's response. Going beyond the "unwilling or unable" requirement of the INA, Sessions insisted that an asylum applicant demonstrate "that the government condoned the private actions" or showed "a complete helplessness to protect" the applicant.[383]

This divergent "condoned or showed complete helplessness" language originated in *Galina v. INS*, a Seventh Circuit decision regarding a political opinion claim.[384] In *Galina*, the court noted that a finding of persecution "ordinarily requires" a finding that the government "condoned" the persecution "or at least demonstrated a complete helplessness to protect the victims."[385] However, this statement was only dicta in *Galina*, because the court did not conduct an analysis using that reworded standard.[386] Rather, the court concluded that the applicant in the case could still meet the persecution standard even when police might take some action to help.[387] Thus, as dicta, this language should not have been adopted by other courts conducting the government acquiescence analysis. Although several published circuit court decisions do use this language,[388] the vast majority of cases discussing government acquiescence to persecution across the circuit courts have never adopted it, nor had the Board, before *A-B-*. Indeed, the Sixth Circuit recently rejected this language, stating that an unable or unwilling analysis that relies on

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382 *See supra* Part IIB (analyzing the other grounds for asylum).

383 *Matter of* A-B-, 27 I. & N. Dec. 316, 337 (A.G. 2018).

384 213 F.3d 955, 958 (7th Cir. 2000).

385 *Id.*

386 *Id.*; *see also* Grace v. Whitaker, 344 F. Supp. 3d 96, 129 (D.C. Cir. 2018) (noting that the *Galina* court used "condone" and "complete helplessness" to describe the standard but did not actually apply these terms).

387 *Galina*, 213 F.3d at 958; *Grace*, 344 F. Supp. 3d at 129.

388 Nevertheless, in nine published cases between *Galina* and *A-B-*, courts in the 5th, 7th, and 8th circuits applied the "complete helplessness" language in their government response analysis. Saldana v. Lynch, 820 F.3d 970, 977 (8th Cir. 2016); De Castro-Gutierrez v. Holder, 713 F.3d 375, 382 (8th Cir. 2013); Guillen-Hernandez v. Holder, 592 F.3d 883, 887 (8th Cir. 2010); Youkhana v. Gonzales, 460 F.3d 927, 932 (7th Cir. 2006); Shehu v. Gonzales, 443 F.3d 435, 437 (5th Cir. 2006); Setiadi v. Gonzales, 437 F.3d 710, 714 (8th Cir. 2006); Menjivar v. Gonzales, 416 F.3d 918, 921 (8th Cir. 2005); Roman v. INS, 233 F.3d 1027, 1034 (7th Cir. 2000).

the standard that a government is "helpless" is incorrect because that standard has been deemed arbitrary and capricious.[389]

Nevertheless, both the Second and Fifth Circuits have now opined that that *A-B-* did not raise the standard for government response because "complete helplessness" is simply an interchangeable way of stating "unable or unwilling."[390] This conclusion rests on the idea that the standard is not new, which the government also contended in *Grace*.[391] However, the *Grace* court found multiple reasons why *A-B-* did in fact set a new standard for government response. In addition to noting that *Galina* never applied the standard it ultimately created, the *Grace* court stated that the statutory plain language of "unable and unwilling" is different because it permits a finding of persecution even when there could be some government response.[392] Because the "condone or complete helplessness" test significantly changes this standard, it does not merit *Chevron* deference at step one.

The Second Circuit addressed the reasoning of the *Grace* court, disagreeing with the conclusion that the "complete helplessness" language would deny relief to an applicant who the government had assisted, albeit unsuccessfully, because "[a] government that can offer its citizens only ineffective assistance is a government unable to protect them."[393] However, this statement is in tension with the court's assertion that the "complete helplessness" standard "ensures that a government is not charged with persecution for failing to provide a particular standard of protection, or for lapses in protection."[394] If a government attempts to provide protection—for example, by issuing a restraining order, but the assailant continues to stalk the victim without officer interference, is that a mere "lapse in protection"? Or is it "ineffective assistance"? How much protection is too much, such that an applicant cannot prevail? Rather than deferring to prior courts' diversion from the statutory language, courts should eschew the "complete helplessness" formulation in favor of the statutory standard.

In light of these errors and inconsistencies, reviewing courts should find that *A-B-* diverged from the discernable parameters of the term particular social group and decline to apply *Chevron* deference at step one. Even if a court moves to *Chevron* step two, Part IV demonstrates that *A-B-*'s conclusions misinterpret the meaning of the particular social group

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389 Juan Antonio v. Barr, No. 18-3500, 2020 WL 2537427, *9 (6th Cir. May 19, 2020) (citing *Grace*, 344 F. Supp. 3d at 130).

390 Scarlett v. Barr, No. 16-940, 2020 WL 2046544, at *11 (2d Cir. Apr. 28, 2020); Gonzalez-Veliz v. Barr, 938 F.3d 219, 231 (5th Cir. 2019) (citing *Galina*, 213 F.3d at 958).

391 344 F. Supp. 3d at 129.

392 *Id.*

393 *Scarlett*, 2020 WL 2046544, *12.

394 *Id.*

and distort precedent by going beyond the term's inherit ambiguities to create new limitations that unreasonably disregard preexisting law.

IV. *CHEVRON* STEP TWO: *A-B-* GOES BEYOND THE DEGREE OF DISCRETION THE AMBIGUITY ALLOWS

Ambiguity in *Chevron* step one does not entitle the agency to a boundless interpretation of the term at issue. As the Supreme Court has recently reiterated, despite *Chevron*'s deferential standard, "the process by which [the agency] reaches that result must be logical and rational. It follows that agency action is lawful only if it rests on a consideration of the relevant factors."[395] In accordance with *Chevron*'s second step, courts next conduct a deeper analysis of the reasonableness of the agency's interpretation applying the tools of statutory construction and policy considerations of "whether the agency's position comports with the overall purpose of the statute in question."[396] A court conducting a *Chevron* step-two analysis to *A-B-* should find Sessions' decision unreasonable because it contravenes Congressional intent regarding flexibility.

A. A-B-'s Interpretation of Particular Social Group Does Not Permit Flexibility to Adapt to Modern Crises as Envisioned by Congress

Congress incorporated the international refugee definition into U.S. law to create a policy that could apply to evolving crises.[397] The refugee definition—including the particular social group ground of asylum—was codified to remedy the INA's jumble of provisions adopted as crises occurred,[398] and Congress intentionally declined to refer to specific groups to ensure the definition could be applied to groups "for many years to come."[399] Indeed, a court reviewing *A-B-* recently noted that the entire purpose of the Refugee Act, as stated by Congress, was to "enforce the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands."[400] Yet *A-B-* under-

395 Michigan v. EPA, 135 S. Ct. 2699, 2706 (2015) (internal quotation marks omitted) (quoting Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

396 BRANNON & COLE, *supra* note 134, at 18–19 (quoting Troy Corp. v. Browner, 120 F.3d 277, 285 (D.C. Cir. 1997) ("Therefore, under *Chevron*, as the wording of the statute is at most ambiguous, the most that can be required of the administering agency is that its interpretation be reasonable and consistent with the statutory purpose."). Alternatively, in conducting analysis under *Chevron*'s second step, courts defer to the agency if its interpretation was within the realm of reasonable possibilities discussed in a step one analysis. *Id.*

397 *See supra* Part IIC (describing the advantageous flexibility of the Refugee Act).

398 125 CONG. REC. 37,241 (1979).

399 125 CONG. REC. 35,813 (1979).

400 Grace v. Whitaker, 344 F. Supp. 3d 96, 104 (D.C. Cir. 2018) (internal citations and quotations omitted).

mined the flexible utility of particular social group by attempting to foreclose a ground of asylum to applicants fleeing a major and unanticipated crisis: domestic violence and gang violence ravaging the Northern Triangle.[401]

Despite hedging that "there may be exceptional circumstances when victims of private criminal activity could meet [the] requirements" he enumerated, Sessions predicted most such claims cannot prevail.[402] According to Sessions,

> [g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum. While I do not decide that violence inflicted by non-governmental actors may never serve as the basis for an asylum or withholding application based on membership in a particular social group, in practice such claims are unlikely to satisfy the statutory grounds for proving group persecution that the government is unable or unwilling to address.[403]

Instead of appropriately applying the refugee definition with its intended flexibility to the burgeoning crisis in Central America,[404] this pronouncement contradicted the explicit legislative intent revealed through the Refugee Act's legislative history[405] and the statutory context of the Refugee Convention and 1967 Protocol giving rise to the international

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401 Despite intense divisions over immigration policy and disagreements concerning the causes and solutions, many agree that the number of asylum seekers and the conditions at the U.S.-Mexican border constitute a crisis. In his first address to the nation from the Oval Office, on January 8, 2019, President Donald Trump himself declared the situation "a growing humanitarian and security crisis[.]" Philip Rucker & Felicia Sonmez, *Trump Calls Wall Only Solution to 'Growing Humanitarian Crisis' at Border*, WASH. POST (Jan. 8, 2019), https://www.washingtonpost.com/politics/trump-declares-a-growing-humanitarian-crisis-at-the-border-in-demand-for-wall-funding-to-end-shutdown/2019/01/08/bdd2767e-1368-11e9-803c-4ef28312c8b9_story.html.

402 *Matter of* A-B-, 27 I. & N. Dec. 316, 317 (A.G. 2018). Indeed, Sessions continues that these victims must "establish that the government protection from such harm in their home country is so lacking that their persecutors' actions can be attributed to the government," a restatement of asylum law that effectively creates new criteria. *Recent Adjudication*, *supra* note 116, at 808.

403 *Matter of A-B-*, 27 I. & N. Dec. at 317, 320. Attorney General Barr recently issued a decision similarly attempting to undercut a specific particular social group, declaring that "in the ordinary case, a family group will not meet [the particular social group] standard." *Matter of* L-E-A-, 27 I. & N. Dec. 581, 586 (A.G. 2019).

404 Honduras, El Salvador, and Guatemala are among the most violent countries in the world, with some of the highest homicide rates per capita. *See, e.g.*, *Between a Wall and a Dangerous Place: The Intersection of Human Rights, Public Security, Corruption, & Migration in Honduras and El Salvador,* LATIN AM. WORKING GRP. (Mar. 2018), https://www.lawg.org/wp-content/uploads/Between-a-Wall-and-a-Dangerous-Place-Report-2018.pdf; *see generally supra* note 6 (citing Human Rights Reports for these countries).

405 *See generally supra* Part IIC.

refugee definition originally.[406] *Chevron* deference does not apply to such an agency interpretation that is not "rationally related to the goals of the statute."[407]

Furthermore, Sessions' suggestion that an entire group's asylum claims are "unlikely" to succeed[408] contravenes the conclusions from the canons of statutory construction.[409] Although the *ejusdem generis* and *noscitur a sociis* analysis illustrates the challenges of finding commonalities, courts consistently emphasize that the protected grounds must be interpreted broadly, with each ground being applied adaptively to the facts in case-by-case determinations.[410] Foreclosing asylum for certain particular social groups would restrain courts from undertaking that adaptive and individualized analysis of asylum cases[411] and is therefore inconsistent with the other grounds of asylum. Similarly, eliminating private actor persecutors from the statutory scheme violates the negative expression canon.[412] Congress did not choose to disallow claims based on persecution by a private actor (and, as the UNHCR noted, the Refugee Convention likewise refrained from excluding these claims).[413]

Further, Sessions lacked the power to go beyond congressional limitations to singlehandedly legislate. Through an abuse of the certification power, he shaped the law in an area where Congress intended to place constraints on the discretion of the executive in setting the refugee definition.[414] Indeed, members of Congress from both the House and Senate[415] were adamant that Congress establish criteria for who would be eligible for asylum.[416] A reviewing court should take into account the specific legislative history that demonstrates that the inclusion of the

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406 *See generally supra* Part IID.

407 AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366, 388 (1999); Pharm. Res. & Mfrs. of Am. v. FTC, 790 F.3d 198, 208 (D.C. Cir. 2015) (quoting Vill. of Barrington v. Surface Transp. Bd., 636 F.3d 650, 667 (D.C. Cir. 2011)).

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

409 *Grace v. Whitaker* applied *Chevron* step two to *A-B-*'s "general rule" against gang-related and gender-based claims and struck it down as arbitrary and capricious, in part because the rule is inconsistent with Congress' intent to bring "United States refugee law into conformance with the Protocol." 344 F. Supp. 3d 96, 126 (D.C. Cir. 2018) (internal citations and quotations omitted). The Sixth Circuit found *Grace*'s reasoning persuasive and considers it to have abrogated *A-B-*. Juan Antonio v. Barr, No. 18-3500, 2020 WL 2537427, *6 n.3 (6th Cir. May 19, 2020).

410 *See generally supra* Part IIA.

411 *See Recent Adjudication*, *supra* note 116, at 132; *see also Matter of* L-E-A-, 27 I. & N. Dec. 581, 587 (A.G. 2019).

412 *See generally supra* Part IIB.

413 GUIDELINES 2002, *supra* note 63, at 2.

414 *See supra* Part IIC (describing the goals of the Refugee Act of 1980).

415 *See supra* Part IIC (describing the comments of Representative Eilberg and Senator Thurmond).

416 *See supra* Part IIC. Congress focused on limiting executive discretion in overseas admissions, but also expanded the five protected grounds.

term particular social group was part of a wider congressional effort to limit the overreach of the executive branch and decline to defer to *A-B-*.

B. A-B- *Errs by Stating that the Persecutor's Perspective is Never Relevant for the Social Distinction Analysis*

In *A-B-*, Sessions stated that the analysis of a particular social group cannot take into account the perspective of the persecutor or the harm experienced by the group as a method of determining that the group exists.[417] He dismissed the potential importance of persecution in establishing the group, declaring that including persecution in the group definition "moots the need to establish actual persecution"[418] and refusing to consider that harm can be an overlaying element of a group that helps define the group.

The harm suffered by an asylum applicant is, of course, a freestanding element of the refugee analysis: an applicant must establish that she has suffered, or that there is at least a 10 percent chance that she will suffer, persecution.[419] Sessions is correct that a group cannot be defined *exclusively* by its experience of persecution.[420] Indeed, many groups are cognizable without reference to harm at all, just like the other four grounds for asylum.[421] However, because U.S. law has added additional requirements beyond *Acosta* immutability and UNHCR guidelines to establish a particular social group—particularity and social distinction[422]—these hurdles may also require considering an applicant's experience or risk of persecution. Although the existence of harm is not enough to establish social distinction alone, such consideration can help define the group.

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417 Sessions discussed *A-R-C-G-* and stated that the group in that case, "married women in Guatemala who are unable to leave their relationship," was invalid because it "was effectively defined to consist of women in Guatemala who are victims of domestic abuse because the inability 'to leave' was created by harm or threatened harm." *Matter of* A-B-, 27 I. & N. Dec. 316, 334–35 (A.G. 2018) With this analysis, he implies that harm cannot be considered when defining a group. *Id.* Instead, the "inability to leave" component of the group formulation helps to establish social distinction and particularity.

418 *Id.* at 335; *but see* Sessions' subsequent suggestion that perhaps the perspective of the persecutor does matter: "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."

419 *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987).

420 *Matter of A-B-*, 27 I. & N. Dec. at 334–35.

421 *See, e.g.*, Mohammed v. Gonzales, 400 F.3d 785, 798 (9th Cir. 2005) (stating that "Somalian females" or "young girls in the Benadiri clan" can be a particular social group); Karouni v. Gonzales, 399 F.3d 1163, 1171 (9th Cir. 2005) (stating that "homosexuals" are a particular social group).

422 *See supra* Part IB (discussing *M-E-V-G-* and *W-G-R-*); *see also supra* notes 95–97 (explaining why these requirements are incompatible with international asylum law).

Prior courts have considered the persecution, or the perspective of the persecutor, in determining whether a group is socially distinct.[423] Indeed, *M-E-V-G-*, cited with approval in *A-B-*,[424] stated that shared past experiences—including harm—can help define a group.[425] For example, *M-E-V-G-* offered a hypothetical case in which the perspective of the persecutor, or the harm itself, could be relevant for determining social distinction: "[t]he former employees of the attorney general may not be considered a group by themselves or by society unless and until the government begins persecuting them."[426] In experiencing maltreatment, this group may begin to self-identify, and society may "discern that this group of individuals, who share a common immutable characteristic, is distinct in some significant way."[427] However, in *A-B-*, Sessions ignored this line of reasoning and overruled *A-R-C-G-* ostensibly because the group was partly informed by the persecutory acts.[428] Thus, even taking *M-E-V-G-* and *W-G-R-* as good law, *A-B-* falls out of step, and the decision does not merit deference.

CONCLUSION

Matter of A-B- was not only a source of concern and outrage in the public view, but it is also legally concerning because it misinterprets the law. In *A-B-*, Sessions set out to foreclose the claims of groups of people fleeing modern humanitarian crises such as domestic violence and gang violence, limit groups by size, and oblige those who were persecuted by private actors to meet new, higher hurdles than the statute requires to show government acquiescence. This unilateral expansion of some and contraction of other requirements to meet the particular social group term must be seen by a reviewing court as agency overreach, flouting Congressional intent to curb such extensive reinterpretation of the law by the agency. Further, *A-B-* is all the more concerning because it appears to be

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423 *See, e.g.*, Temu v. Holder, 740 F.3d 887, 894 (4th Cir. 2014) (In determining social distinction, "one highly relevant factor is if the applicant's group is singled out for greater persecution than the population as a whole."); Henriquez-Rivas v. Holder, 707 F.3d 1081, 1089 (9th Cir. 2013) ("Looking to the text of the statute, in the context of persecution, we believe that the perception of the persecutors may matter the most."); *Matter of* A-M-E- and J-G-U-, 24 I. & N. Dec. 69, 74 (B.I.A. 2007) ("Although a social group cannot be defined exclusively by the fact that its members have been subjected to harm, we noted that this may be a relevant factor in considering the group's visibility in society.").

424 27 I. & N. Dec. at 333.

425 *Matter of* M-E-V-G-, 26 I. & N. Dec. 227, 242–43 (B.I.A. 2014) (while that the defining the group *exclusively* by perspective of the persecutor is not permitted, it can help demonstrate society's view of the group).

426 *Id.*

427 *Id.* at 243; *see also* Pirir-Boc v. Holder, 750 F.3d 1077, 1083 (9th Cir. 2014) ("[T]he persecution of a group may cause a group for the first time to recognize itself and be recognized by society as a group.").

428 *Matter of A-B-*, 27 I. & N. Dec. at 319.

the beginning of a new trend of Attorney General certification cases as a method to attack particular social group cases involving asylum seekers from Central America, given the recent decision in *Matter of L-E-A*.[429]

In Part II, this Article analyzed particular social group, the component of the refugee definition that previous case law had established as a viable category for victims of domestic violence. Parts III and IV provide a road map of the unreasonable departures of *A-B-*, arguing that the case is invalid at both step one and step two of *Chevron*. We conclude that reviewing courts need not and should not defer to the Attorney General's incorrect interpretations of particular social group. Indeed, denying deference would be both in alignment with scholarly concerns about overuse of *Chevron* in asylum cases[430] and consistent with the current trend away from affording deference to agency decisions.[431]

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429 27 I. & N. Dec. 581 (A.G. 2019) (undermining claims based on membership in an immediate family, a common theory for those fleeing gang violence).

430 *See, e.g.*, Sweeney, *supra* note 18, at 133 (arguing that the Supreme Court's *Chevron* analysis in the immigration context is outdated and that Board decisions should not automatically get deference).

431 *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400 (2019) (limiting judicial deference to agencies' interpretations of their own regulations. Some members of the Supreme Court have signaled interest in similar limitations for *Chevron*); *see supra* note 37.