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The Folly of the Famous Family: Why Matter of L-E- A's Definition of Distinction Does Not Merit Deference

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Note

The Folly of the Famous Family: Why *Matter of L-E-A-*'s Definition of Distinction Does Not Merit Deference

DANIELLE L. SCHMALZ FULLAM

Attorney General Barr abruptly changed the course of asylum law in the United States on July 29, 2019, in his decision in Matter of L-E-A-. Barr declared that usually, family-based, particular social group asylum claims would fail due to a lack of specific social distinction. Essentially, Barr decided that in order to constitute a cognizable particular social group, a family would have to be well-known within the society in question. While social distinction has been a component of asylum law jurisprudence for some time, never before was there the requirement of specific social distinction. Despite making a major change to asylum law, Barr offered little support for his argument, and the explanation he did provide is grounded in a misunderstanding and misquoting of case law; his decision is arbitrary and capricious. While Barr was acting within his authority as Attorney General and head of the Board of Immigration Appeals when he issued this decision, he was clearly motivated by a political agenda. This decision is yet another attack on immigrant families and will negatively impact hundreds of thousands of claims, especially those of unaccompanied children. In the interest of justice and the balance of powers, courts should use their power of judicial review to hold that Barr's decision does not merit deference under the second step of the Chevron doctrine.

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The Folly of the Famous Family: Why *Matter of L-E-A-*'s Definition of Distinction Does Not Merit Deference

DANIELLE L. SCHMALZ FULLAM*

INTRODUCTION

On July 29, 2019, there was a significant and abrupt change in asylum law. Previously, there had been well-established precedent that the nuclear family members of a named individual would usually meet all of the requirements necessary to constitute a particular social group for purposes of requesting asylum.¹ Attorney General Barr's decision in *Matter of L-E-A-* abruptly changed this precedent and attacked the particular social group of nuclear family members of named individuals due to a lack of *specific* social distinction.²

This Note will argue that federal courts should not consider *Matter of L-E-A-* a reasonable agency decision, and as such, courts are not required to defer to the Board of Immigration Appeals' ("BIA" or "the Board") decision under the *Chevron* doctrine. While courts may be tempted to avoid grappling with the Attorney General's decision in *Matter of L-E-A-*, courts should use their power-balancing authority to voice the fact that the decision is arbitrary, capricious, and contrary to the statute.

I will begin by explaining basic principles of asylum law and the framework of the BIA's authority, both of which are essential for understanding the argument. Next, I will discuss the development of the particular social group theory, beginning with its domestic origin in 1985. I will then examine the application of the particular social group theory to nuclear families and tribal clans throughout the years, leading up to the state of caselaw at the time of Barr's decision. Next, I will introduce *Matter of L-E-A-*, both the BIA's decision in 2017 and the Attorney General's decision in 2019. This will lead to an exploration of the relevance of the decision and the impact it has had. *Matter of L-E-A-* will be examined under both *Chevron* steps, revealing that courts should find Barr's decision to be arbitrary and capricious. Courts should determine that *Matter of L-E-A-* does not merit

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¹ See discussion *infra* Section V.C: Nuclear Families.

² *Matter of L-E-A-*, 27 I. & N. Dec. 581 (2019).

deference due to the folly of the famous family: Barr's incorrect conclusion that specific families must be socially distinct.

I. BASIC PRINCIPLES OF ASYLUM LAW

Unlike many other areas of law, our modern domestic asylum law results from our international obligations; Congress passed the Refugee Act of 1980 to ensure that domestic law complied with our international obligations under the 1967 United Nations Protocol.³ The term “refugee” was first defined at the United Nations Refugee Convention in 1951 (“UN Convention” or “1951 Convention”) in the aftermath of World War II.⁴ The key legal principle was non-refoulement, meaning refugees could not be forced to return to their countries of origin where their lives were in danger.⁵ The United Nation’s definition of a refugee is any person who:

As a result of events occurring before 1 January 1951 and 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, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁶

In 1967, the United Nations Refugee Protocol (“UN Protocol” or “1967 Protocol”) extended the definition of a refugee beyond the temporal and geographical limitations of the 1951 Convention.⁷ The United States signed on to the UN Protocol in 1968, officially obligating itself to comply with the international law concept of non-refoulement.⁸ After the signing of the UN Protocol, U.S. asylum policy was still *ad hoc*, prompting Congress to pass the Refugee Act in 1980, where the United States formally codified in statute the UN’s definition of a refugee:⁹

³ *Immigr. & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987).

⁴ U.N. HIGH COMM’R FOR REFUGEES, THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL 1, 3 (2011), <https://www.unhcr.org/en-us/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.html>.

⁵ The Choices Program, *Timeline of Major Refugee and Asylum Laws and Policies*, BROWN UNIV. DEP’T HIST., https://www.choices.edu/wp-content/uploads/2019/05/Seeking-Asylum_-Timeline-Revised.pdf (last visited Apr. 16, 2020).

⁶ U.N. HIGH COMM’R FOR REFUGEES, CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES 1, 14 (2010), <https://www.unhcr.org/en-us/3b66c2aa10>.

⁷ *Id.* at 4. The Holocaust motivated the United Nations to protect populations that were being persecuted for a fundamental characteristic, such as religion. With the Holocaust in mind, the Convention initially limited the definition of a refugee as someone who was European and experienced persecution prior to 1951. *Id.* at 2.

⁸ *Cardoza-Fonseca*, 480 U.S. at 436–37.

⁹ Refugee Act of 1980, Pub. L. No. 96-212, sec. 201, § 101(a), 94 Stat. 102, 102 (1980); Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a) (1980) [hereinafter INA].

The term “refugee” means any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution¹⁰ or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.¹¹

The Department of Homeland Security and the Department of Justice issued implementing regulations, codified mainly in 8 C.F.R. § 208.1, *et seq* and 8 C.F.R. § 1208.1, *et seq*. To meet the Immigration and Nationality Act’s (“INA”) definition of a refugee, it is generally the asylum applicant’s burden to prove each element by a preponderance of the evidence.¹² The elements are as follows:

- (1) The applicant must be outside of his or her country of origin and in the United States or at a U.S. port of entry.¹³
- (2) The persecution must be:
 - (a) Harm suffered or feared that is severe enough to rise to the level of persecution.¹⁴
 - (b) The government in the country of origin must be unable or unwilling to protect the individuals from persecution.¹⁵ For example, if an individual could have gone to the police and police action would have mitigated the situation, this element will likely not be met.
 - (c) There must be a well-founded fear of future persecution.
 - (i) The Supreme Court held in *Cardoza-Fonseca* that even if there were just a one in ten chance of persecution, the odds of persecution would constitute a well-founded fear.¹⁶
 - (ii) If an applicant shows she has already suffered persecution, it raises a rebuttable presumption of

¹⁰ Note how the United States largely adopted the definition from the United Nations Convention but added “because of persecution,” which indicates past persecution alone could be the basis for asylum in the U.S.

¹¹ INA § 101(a)(42)(A) (1980).

¹² 8 C.F.R. § 208.13(a) (2019).

¹³ *Id.* An asylum-seeker in the United States does not include all people outside of their countries of origin—it only includes people who are inside the United States or at a U.S. port of entry. For the purposes of this paper, I will be dealing exclusively with the asylum system, so any references to a “refugee” will refer to asylum-seekers only.

¹⁴ *Korablina v. Immigr. & Naturalization Serv.*, 158 F.3d 1038, 1044 (9th Cir. 1998).

¹⁵ *Navas v. Immigr. & Naturalization Serv.*, 217 F.3d 646, 655–56 (9th Cir. 2000).

¹⁶ *Immigr. & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).

well-founded fear of future persecution.¹⁷ If an applicant proves by a preponderance of the evidence that she suffered persecution in the past, the burden shifts to the Government to show that the fear of future persecution is not well-founded, due to changed circumstances, for example.¹⁸

- (d) There must be nexus between the protected ground and the persecution.¹⁹ To establish that an applicant is subject to persecution on account of one of the five protected grounds listed above, the applicant bears the burden of proving the causal connection between the protected class and the persecution, meaning the well-founded fear of persecution must be a direct consequence of membership in a protected class.²⁰ It is the applicant's burden to prove this with evidence.²¹ There could be mixed motives for persecution, as long as one central reason for the persecution is a protected ground.²²

Additionally, there are mandatory bars to asylum, meaning even if the above definition of a refugee is met and proved, asylum can be denied.²³ These mandatory bars also originate from the UN Convention and its 1967 Protocol.²⁴ An asylum-seeker is ineligible for asylum if she: (1) engaged in the persecution of others; (2) was convicted of a particularly serious crime and is considered a danger to the United States; (3) committed a serious nonpolitical crime outside the United States; (4) poses a threat to the security of the United States; or (5) has been firmly resettled in another country before arriving to the United States.²⁵

¹⁷ 8 C.F.R. § 208.13(b)(1)(i) (2019).

¹⁸ *Id.*

¹⁹ INA § 101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A) (1980).

²⁰ 8 C.F.R. § 208.13(b)(1)–(2) (2019).

²¹ *Id.*

²² 8 C.F.R. § 158 (b)(1)(B)(i) (2019).

²³ 8 U.S.C.A. § 1158 (b)(2)(A) (Westlaw through Pub. L. No. 116-193). Note, there are two forms of relief from deportation that derive from the Refugee Convention: (1) asylum and (2) withholding of removal. 8 U.S.C. § 1231(b)(3)(A) (2006). Both conform with our most basic international obligations not to return those who meet the definition of a refugee to their home countries if return would result in persecution. Asylum goes further than withholding of removal by allowing a pathway to lawful permanent resident status and eventually naturalization, so asylees must additionally convince adjudicators that they merit positive exercise of discretion—in other words, that they are deserving of the rights that come with asylum. 8 C.F.R. § 208.13(b)(1)(i) (2019). Withholding of removal provides the obligatory protection from deportation and a work permit, but no pathway to lawful permanent resident or citizen status. 8 U.S.C. § 1231(b)(3)(A) (2006). Withholding of removal is mandatory, not discretionary like asylum, as required by the 1967 Protocol. For purposes of this Note, however, the particular social group analysis is the same for asylum and withholding of removal, because both require nexus.

²⁴ U.N. HIGH COMM'R FOR REFUGEES, *supra* note 6, at 4.

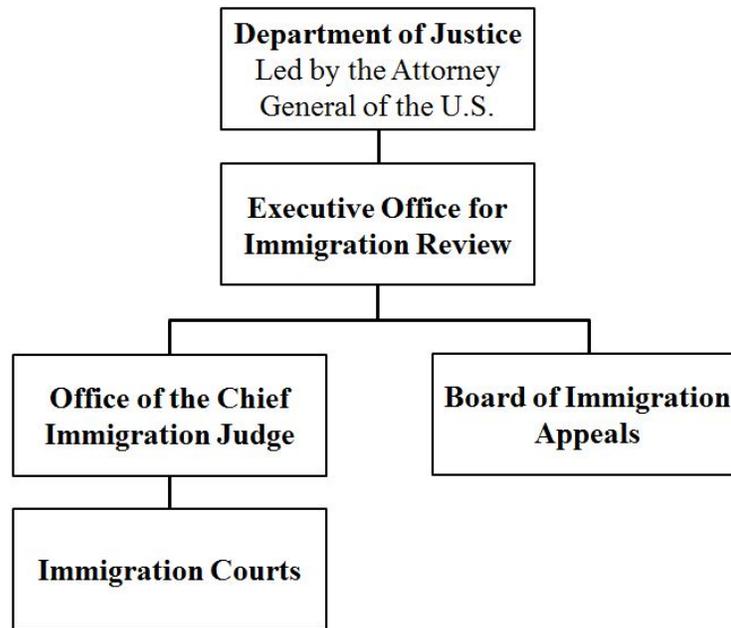
²⁵ 8 U.S.C.A. § 1158 (B)(2)(A) (Westlaw through Pub. L. No. 116-193).

II. FRAMEWORK OF THE BOARD OF IMMIGRATION APPEALS' AUTHORITY

A. *The Attorney General's Regulatory Power*

Congress designated the Department of Homeland Security (“DHS”) and the Department of Justice (“DOJ”) as the agencies to administer the immigration and refugee-processing functions described in the statutes.²⁶ Within the Department of Justice, there is the Executive Office for Immigration Review (“EOIR”) and within EOIR, the Board of Immigration Appeals.²⁷

FIGURE 1 – United States Immigration Agencies²⁸



The BIA’s published decisions have binding effect on immigration courts and United States Citizenship and Immigration Services (“USCIS”).²⁹ The attorney general has authority deriving from the INA, which includes the ability to make determinations and rulings,³⁰ certify cases for his or her

²⁶ *Executive Office for Immigration Review: An Agency Guide*, U.S. DEP’T JUST. (Dec. 2017), https://www.justice.gov/eoir/page/file/eoir_an_agency_guide/download. DHS is tasked with adjudicating claims of asylum-seekers who are *not* in immigration enforcement (removal) proceedings. DOJ is tasked with adjudicating claims of people encountered at a port of entry or in removal proceedings.

²⁷ *Organization Chart, Executive Office for Immigration Review*, U.S. DEP’T JUST. (Jan. 27, 2015), <https://www.justice.gov/eoir/organization-chart>.

²⁸ *Id.*

²⁹ Hon. Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General’s Review Authority*, 101 IOWA L. REV. 841, 920 (2016).

³⁰ 8 U.S.C. § 1103(a)(1) (2018).

review *sua sponte*,³¹ and issue decisions binding on all asylum adjudicators.³² This power exists regardless of how much time has passed since a BIA decision or how federal courts have already interpreted and applied that decision.³³

B. *Balance of Power Between the Executive & Judicial Branches*

Agency determinations are subject to judicial review.³⁴ While federal courts must usually defer to agency decisions, there are some important limitations. Judicial review is especially important as a power-checking mechanism here because the BIA decisions have more of a sweeping effect on policy than decisions from a court. The Supreme Court explained, “legal lapses and violations occur, and especially so when they have no consequence. That is why [courts have for] so long applied a strong presumption favoring judicial review of administrative action.”³⁵

C. *Chevron Deference*

One concept in the law governing the relationship between administrative agencies and federal courts is the *Chevron* doctrine.³⁶ The doctrine outlines when federal courts must defer to an agency interpretation of a statute and when courts can overrule an agency’s interpretation.³⁷

Three years after *Chevron*, the U.S. Supreme Court explicitly stated in *INS v. Cardoza-Fonseca* that *Chevron* applied to the INA’s asylum and withholding provisions.³⁸ While other statutes and legal concepts address the relationship between immigration agencies and federal courts, this Note focuses on the *Chevron* doctrine because it deals with federal court deference to the BIA’s interpretation of the Refugee Act’s term, “particular social group.”

³¹ 8 C.F.R. § 1003.1(h)(1) (2020).

³² 8 C.F.R. §§ 1003.1(g)–(h)(1)(ii) (2020). Determining whether Congress has delegated interpretative authority to an agency and whether the agency is utilizing this power are necessary requirements that are sometimes referred to as *Chevron* Step Zero because they are prerequisites to applying *Chevron* deference. *Motion Picture Assoc. of Am., Inc. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002); Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 813 (2002).

³³ 8 C.F.R. §§ 1003.1(g)–(h)(1)(ii) (2020).

³⁴ *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); 5 U.S.C. §§ 701–06 (2018).

³⁵ *Weyerhaeuser Co. v. U.S. Fish & Wildlife Servs.*, 139 S. Ct. 361, 370 (2018) (internal quotation marks omitted) (internal citation omitted).

³⁶ *Chevron*, 467 U.S. at 837–38 (establishing what is now referred to as the *Chevron* doctrine).

³⁷ *Id.* at 843.

³⁸ 480 U.S. 421, 446–48 (1987); Maureen A. Sweeney, *Enforcing/Protection: The Danger of Chevron in Refugee Act Cases*, 71 ADMIN. L. REV. 127, 133 (2019).

D. *The Steps of Chevron Analysis*

- (1) **First Step:** An agency’s authority to implement and administer laws must come from Congress, so an integral first step of *Chevron* includes determining whether Congress indicated how a particular term should be interpreted.³⁹ When congressional intent for statutory interpretation is clear, both courts and administrative agencies must follow it.⁴⁰ Courts can disregard an agency’s interpretation if it is contrary to clear congressional intent. Courts use a number of canons of construction to determine congressional intent,⁴¹ including a review of the plain language of the statute, the structure of the statute, and the legislative history.⁴² If congressional intent is clear, that is the end of *Chevron* analysis.
- (2) **Second Step:** “[I]f the statute is silent or ambiguous with respect to the specific issue [and an agency has issued a decision], the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”⁴³ In defining whether an interpretation is permissible, courts employ an “arbitrary, capricious, or manifestly contrary to the statute” analysis.⁴⁴ A court is not bound to an agency’s decision if it determines, after engaging in the above-described analysis, that the decision is unreasonable.⁴⁵ Review of agency action under the arbitrary and capricious standard can include other factors besides the reasonableness of an agency decision, such as reliance interests or whether the departure from prior policy was adequately explained.⁴⁶

Even when courts desire to hold differently than the agency did in its determination, or when a court’s prior decision conflicts with the agency’s

³⁹ *Chevron*, 467 U.S. at 842–43.

⁴⁰ *Id.*

⁴¹ *See, e.g., id.* at 863–64 (using context as a tool for determining statutory intent).

⁴² LARRY M. EIG, CONG. RSCH. SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 43–45 (2014), available at <https://fas.org/sgp/crs/misc/97-589.pdf>.

⁴³ *Chevron*, 467 U.S. at 843.

⁴⁴ *Id.* at 844. The Administrative Procedures Act (“APA”) does not apply to immigration courts. *Marcello v. Bonds*, 349 U.S. 302, 306 (1955) (describing various legislative enactments to clarify congressional intent and the exclusion of removal proceedings from the APA requirements); Catherine Y. Kim, *The President’s Immigration Courts*, 68 EMORY L.J. 1, 13 (2018).

⁴⁵ *Chevron*, 467 U.S. at 844.

⁴⁶ *See Grace v. Barr*, No. 19-5013, 2020 WL 4032652, at *18 (D.C. Cir. 2020) (describing part of the agency’s decision as arbitrary and capricious on the ground that it marked a change in policy without demonstrating “reasoned decisionmaking”); *Judulang v. Holder*, 565 U.S. 42, 64 (2011) (holding that the BIA’s decision was arbitrary and capricious because it was “unmoored from the purposes and concerns of the immigration laws” and was not supported by relevant considerations); *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (explaining that the Acting Secretary’s failure to discuss an important aspect of the problem is reason alone to render the decision concerning DACA arbitrary and capricious).

subsequent determination, courts must engage in *Chevron* analysis to determine whether the agency's interpretation merits deference.⁴⁷ "If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation."⁴⁸ Thus the bar for a court deferring to an agency decision is relatively low; the standard is reasonableness, not necessarily agreement.

Courts are required to engage in *Chevron* analysis even when an agency decision contradicts a court's prior decision. In *National Cable & Telecommunications Ass'n v. Brand X*, the court of appeals did not conduct a *Chevron* analysis, concluding that its previous decision on the matter had established precedent prior to the agency's decision, and, therefore, it did not need to defer to the agency's new decision.⁴⁹ The Supreme Court held that this was erroneous, and where Congress has been silent or ambiguous on a matter, agency decisions have the ability to reverse a court's precedent so long as the agency's determination is reasonable.⁵⁰ The Supreme Court clarified, "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."⁵¹ The Court credited *Chevron* for establishing "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."⁵²

An agency's authority to fill statutory gaps exists even when an agency makes a determination that is inconsistent with its prior determinations.⁵³ "Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework."⁵⁴

E. *How Courts Have Engaged in Chevron Analysis in Recent Years*

In the past few years, certain Justices of the Supreme Court have opined that federal courts have been too deferential to agencies in their application of the *Chevron* doctrine. Justice Kennedy, for example, has lamented the cursory nature with which circuit courts have applied the *Chevron* analysis:

⁴⁷ *Chevron*, 467 U.S. at 843–44.

⁴⁸ *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

⁴⁹ *Id.* at 982.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* (citing *Smiley v. Citibank (S.D.)*, N. A., 517 U.S. 735, 740–41 (1996)).

⁵³ *Id.* at 981.

⁵⁴ *Id.*

In *Urbina v. Holder*, [sic] for example, the court stated, without any further elaboration, that “we agree with the BIA that the relevant statutory provision is ambiguous.” It then deemed reasonable the BIA’s interpretation of the statute, “for the reasons the BIA gave in that case.” This analysis suggests an abdication of the Judiciary’s proper role in interpreting federal statutes.⁵⁵

Justice Kennedy further suggested that an appropriate future case could present a ripe opportunity to reexamine the premises that underlie *Chevron* and the constitutional separation of powers doctrine, echoing the concerns of other members of the Court, specifically Justice Thomas and Justice Gorsuch.⁵⁶ Because Justice Kennedy retired shortly after writing this concurrence⁵⁷ and these were some of his last words on the bench, some legal observers placed additional emphasis on his statements and hypothesized that this was a pressing issue for Justice Kennedy.

Chevron has been critiqued for its difficult and complicated implementation.⁵⁸ Experts have also questioned whether it is appropriate to engage in *Chevron* deference for immigration cases; perhaps Congress intended courts to engage in robust review, as opposed to deferring to the BIA and Attorney General, given the importance of immigration law.⁵⁹ *Chevron* remains the law for judicial review of agency statutory interpretation, however, and courts have a duty to engage in thorough analysis as a means of preserving the balance of power.

III. THE DEVELOPMENT OF PARTICULAR SOCIAL GROUP THEORY

The drafters of the UN Protocol and Convention added the particular social group (“PSG”) ground after the initial drafting of the other protected grounds, and intentionally left the PSG ground vaguer than the other categories, in the hopes of protecting groups that the Convention could not foresee or identify at the time of the drafting.⁶⁰ When asylum adjudicators began implementing the Refugee Act and interpreting the meaning of PSG, international jurisprudence construing the definition of a PSG was sparse,

⁵⁵ *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) (quoting *Urbina v. Holder*, 745 F.3d 736, 740 (4th Cir. 2014)).

⁵⁶ *Id.* at 2121. The Supreme Court’s recent decision in *Kisor v. Wilkie*, regarding *Auer* deference, has further called into question the fate of *Chevron* deference, but for now, *Chevron* remains the law. 39 S. Ct. 2400 (2019).

⁵⁷ Robinson Meyer, *Justice Kennedy’s Retirement Could Reshape the Environment*, ATLANTIC (June 27, 2018), <https://www.theatlantic.com/science/archive/2018/06/kennedys-departure-could-reshape-the-environment/563930/>.

⁵⁸ Sweeney, *supra* note 38, at 148.

⁵⁹ *Id.* at 128.

⁶⁰ Brienna Bagaric, *Revisiting the Definition of Particular Social Group in the Refugee Convention & Increasing the Refugee Quota as a Means of Ameliorating the International Displaced Person’s Crisis*, 69 S.C. L. REV. 121, 151 (2017).

requiring that U.S. agencies further develop PSG theory in domestic law.⁶¹ As the Board has remarked, “[t]he concept is even more elusive because there is no clear evidence of legislative intent”⁶² and “[r]ead in its broadest literal sense, the phrase is almost completely open-ended. Virtually any set including more than one person could be described as a ‘particular social group.’”⁶³

A. *Innate & Immutable Characteristics*

In 1985, the Board of Immigration Appeals addressed the meaning of PSG, for the first time in the landmark case *Acosta*.⁶⁴ The Board used a well-established doctrine for statutory interpretation, *ejusdem generis*, meaning “of the same kind.”⁶⁵ Given that membership in a PSG was listed with the other four protected grounds for asylum, the doctrine of *ejusdem generis* holds that the specific words in question should be interpreted in a manner that is consistent with the other words in the list.⁶⁶ The Board reasoned that the other four protected grounds constituted groups of people with characteristics that were immutable, meaning the characteristics were so fundamental to personal identity that they could not change or should not have to be changed.⁶⁷ The Board expanded on acceptable shared characteristics that could form the basis of a PSG: “[t]he shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances . . . a shared past experience such as former military leadership or land ownership.”⁶⁸

After *Acosta*, presenting a PSG claim became a multi-step process. Once a group is established that consists of members who share immutable characteristics, the applicant must show that he or she is a member of that group.⁶⁹ The applicant must then show that the reason he or she was being persecuted was *because* of his or her membership in that group (the nexus requirement).⁷⁰

The Board decided that this immutable characteristic analysis should take place on a case-by-case basis.⁷¹ At the time of this decision, issued only five years after Congress passed the Refugee Act of 1980, few asylum-seekers asserted claims on the basis of membership in a particular

⁶¹ Matter of *Acosta*, 19 I. & N. Dec. 211, 232 (B.I.A. 1985). “Congress did not indicate what it understood this ground of persecution [PSG] to mean, nor is its meaning clear in the Protocol.” *Id.*

⁶² Matter of *M-E-V-G-*, 26 I. & N. Dec. 227, 230 (B.I.A. 2014) (citing *Valdiviezo-Galdamez v. Att’y Gen. of the U.S.*, 663 F.3d 582, 594 (3d Cir. 2011)).

⁶³ *Id.* (citing *Fatin v. Immigr. & Naturalization Serv.*, 12 F.3d 1233, 1238 (3d Cir. 1993)).

⁶⁴ *Acosta*, 19 I. & N. Dec. at 212.

⁶⁵ *Id.* at 233.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ INA § 101(a)(42)(A) (1980).

⁷⁰ *Id.*

⁷¹ *Acosta*, 19 I. & N. Dec. at 233.

social group.⁷² The case-by-case approach allowed adjudicators maximum flexibility in considering the unique aspects of any given case, but it also led to confusion and inconsistencies, especially as the number of claims based on a respondent's membership in a particular social group increased.⁷³

B. *Additional Requirements*

In 2006, citing inconsistency in immigration court decisions and requests from federal courts for more clarity, the Board introduced the elements of social distinction⁷⁴ and particularity to the definition of a particular social group.⁷⁵ Thus, in order to present a cognizable particular social group, an applicant must propose a group that not only is immutable, but also socially distinct and particular. In justifying the new requirements, the Board looked to the Guidelines of the United Nations High Commissioner for Refugees.⁷⁶ The Board noted that the UN had always required that particular social groups be socially visible by stating that “persecutory action toward a group may be a relevant factor in determining the *visibility* of a group in a particular society.”⁷⁷ The Board also reviewed its previous decisions and determined that, although not expressly using the term social visibility/distinction, it already required that particular social groups possess characteristics that were “recognizable by others in the country in question.”⁷⁸

Although the BIA did not state particularity as an element in its holding in *In re C-A-*, it made a finding of particularity in dicta: “We find that this group [‘former noncriminal drug informants working against the Cali drug cartel’⁷⁹] is too loosely defined to meet the requirement of particularity.”⁸⁰

In 2008, the Board definitively held that there were now three requirements to meet the definition of a particular social group—shared immutable characteristics, social distinction, and particularity.⁸¹ In 2014, nearly thirty years after *Matter of Acosta*, the Board of Immigration Appeals reaffirmed the standards first established in *Matter of Acosta* and clarified

⁷² *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 231 (B.I.A. 2014).

⁷³ *Id.*

⁷⁴ At the time, the BIA and the United Nations referred to social distinction as “social visibility.” The Board subsequently changed the term to “social distinction” to emphasize that social distinction does not necessarily require literal, ocular visibility. *Id.* at 240.

⁷⁵ *In re C-A-*, 23 I. & N. Dec. 951, 957, 959–61 (B.I.A. 2006).

⁷⁶ *Id.* at 960.

⁷⁷ *Id.* (citing to U.N. HIGH COMM’R OF 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, HCR/GIP/02/02 para.14 (2002), <https://www.unhcr.org/3d58de2da.html> [hereinafter GUIDELINES ON INTERNATIONAL PROTECTION]).

⁷⁸ *Id.* at 960.

⁷⁹ *Id.* at 951.

⁸⁰ *Id.* at 957.

⁸¹ *Matter of S-E-G-*, 24 I. & N. Dec. 579, 582–83 (B.I.A. 2008).

the amended social distinction and particularity standards in two cases decided on the same day.⁸² The Board summarized its prior case law, stating:

[A]n applicant for asylum or withholding of removal seeking relief based on “membership in a particular social group” must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.⁸³

C. *Social Distinction*

The social distinction analysis centers on one main question—does the society in question view the proposed group as a class?⁸⁴ The perception of the society in question, and not just the perception of the persecutor, determines whether a social group is recognized for asylum purposes.⁸⁵ The Board also requires that the social distinction requirement is met without circular reasoning; the group must not be defined solely by the harm it may suffer.⁸⁶

D. *Particularity*

“A particular social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group. . . . The group must also be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective.”⁸⁷ Typically adjectives like “wealthy” and “young” are too broad to pass the particularity test.⁸⁸ In most cases, this is because if people from the same country of origin were asked to define who is “wealthy” and “young,” their answers would vary widely.

E. *Social Distinction & Particularity Critiques*

For almost twenty years, the immutability standard was the only defining element that the BIA identified for determining whether a proposed group was a cognizable particular social group for purposes of asylum. The requirements of social distinction and particularity have been criticized for numerous reasons. First, the requirements are somewhat redundant; as the Board itself has stated, “particularity” is included in the plain language of

⁸² *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 227 (B.I.A. 2014); *Matter of W-G-R-*, 26 I. & N. Dec. 208, 210–11 (B.I.A. 2014).

⁸³ *Matter of M-E-V-G-*, 26 I. & N. Dec. at 237.

⁸⁴ *Id.* at 240.

⁸⁵ *Id.*

⁸⁶ *Id.* at 242.

⁸⁷ *Id.* at 239.

⁸⁸ *See, e.g., In re A-M-E & J-G-U-*, 24 I. & N. Dec. 69, 76 (B.I.A. 2007); *Matter of S-E-G-*, 24 I. & N. Dec. 579, 585 (B.I.A. 2008). While some general principles emerge, there is always a case-by-case analysis that requires evidentiary support. A group that lacks particularity in one case may be found to be sufficiently particular in another.

the Act and is, by nature, part of the term “particular social group.”⁸⁹ Second, the requirements have been critiqued for being unworkable at times when applied together. Deborah Anker, an author and the founder and director of Harvard Law School’s Immigration and Refugee Clinic,⁹⁰ explained:

Another issue presented by the particularity and social distinction requirements is the difficulty of simultaneously meeting both. A category such as “youth” may meet the social distinction requirement because society recognizes youth as a distinct group, but fail the particularity requirement because “youth” has no strict, objective boundaries. If “youth” were more precisely defined as those aged 12–25, however, then the grouping may fail the social distinction requirement because the society may not perceive that specific age range as a distinct category. Indeed, the Tenth Circuit rejected such a PSG in *Rivera-Barrientos v. Holder*.⁹¹

Additionally, the fact that a particular social group must be viewed as socially distinct by society is problematic because persecutors could see a segment of the population as distinct, despite the lack of recognition from society as a whole.⁹² Society as a whole may not recognize a group due to ignorance or hate, leaving a segment of the population unprotected.

After the announcement of the two new requirements, some courts of appeals rejected the additional standards; the Seventh and Third Circuits initially held that the new standards were vague and unjustified.⁹³ These courts especially pushed back at the Board’s assertion that the requirements had always been a tacit part of the Board’s analysis and that the groups recognized as particular social groups in earlier cases would meet the new particularity and social distinction requirements.⁹⁴ Other federal courts deferred to the agency decision or accepted it without analysis.⁹⁵

⁸⁹ *Matter of M-E-V-G-*, 26 I. & N. Dec. at 239.

⁹⁰ Deborah Anker, HARV. L. SCH., <https://hls.harvard.edu/faculty/directory/10024/Anker> (last visited Aug. 2, 2020).

⁹¹ DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES § 5:43 (2020 ed.) (citing *Rivera-Barrientos v. Holder*, 666 F.3d 641, 650, 653 (10th Cir. 2012)).

⁹² *Id.* Refugee law aims to protect an individual from persecution when she enjoys no protection from her state due to a fundamental breakdown of the relationship between an individual and her state. Whether society as a whole recognized a group as socially distinct was not originally part of this equation. *Id.*

⁹³ Fatma E. Marouf, *The Role of Foreign Authorities in U.S. Asylum Adjudication*, 45 N.Y.U. J. INT’L L. & POL. 391, 422–24 (2013); *Gatimi v. Holder*, 578 F.3d 611, 616 (7th Cir. 2009); *Valdiviezo-Galdamez v. Att’y Gen. of the U.S.*, 663 F.3d 582, 604, 616 (3d Cir. 2011). The Third Circuit eventually adopted the new standards. *S.E.R.L. v. Att’y Gen. U.S.*, 894 F.3d 535, 539–40 (3d Cir. 2018).

⁹⁴ *Gatimi*, 578 F.3d at 615–16; *Valdiviezo-Galdamez*, 663 F.3d at 604, 616.

⁹⁵ Marouf, *supra* note 93, at 422–24; *see, e.g.*, *Mendez-Barrera v. Holder*, 602 F.3d 21, 26 (1st Cir. 2010); *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 73 (2d Cir. 2007); *Al-Ghorbani v. Holder*, 585 F.3d 980, 994 (6th Cir. 2009) (illustrating the adoption of the new standards by several circuit courts without robust analysis).

IV. PARTICULAR SOCIAL GROUP THEORY APPLIED

A. *Tribal Clans*

In *In re H-*, the Board found that tribal clans and subclans could be cognizable particular social groups.⁹⁶ The applicant presented a claim based on his membership in the Darood clan and Marehan subclan of Somalia, which he showed was targeted by the members of the United Somali Congress or Hawiye clan.⁹⁷ The subclan shared ties of kinship and identifiable linguistic commonalities.⁹⁸ The “ties of kinship” were an immutable characteristic and the linguistic differences made the subclan socially distinct in Somalia.⁹⁹ Somalis could recognize members of the Marehan subclan.¹⁰⁰ The subclan was also particular, as the kinship ties and linguistic differences made it clear who was in the subclan and who was not.¹⁰¹

B. *Family-Based Particular Social Groups Found Not to Meet the Legal Standard*

At times, family-based particular social groups claims have been unsuccessful due to the failure to show particularity, social distinction, or a nexus between the proposed group and the harm. In *Matter of S-E-G-*, the asylum-seekers proposed a claim based on two particular social groups: “(1) Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang’s values and activities; and (2) family members of such Salvadoran youth.”¹⁰² The BIA wrote, “the ‘proposed group of “family members,” which could include fathers, mothers, siblings, uncles, aunts, nieces, nephews, grandparents, cousins, and others, is . . . too amorphous a category.”¹⁰³ This particular social group failed the particularity element. Further, the Board held that the adjective “youth” in the first proposed group was not immutable, because by nature, age changes, and one does not stay “young” forever.¹⁰⁴ Because the second group was based on the characteristic of shared kinship ties to the first particular social group presented, the second group also failed the immutability element. Notably, the group did not fail on social distinction grounds.

⁹⁶ See generally *In re H-*, 21 I. & N. Dec. 337, 338 (B.I.A. 1996) (holding that Applicant H’s subclan constituted a particular social group).

⁹⁷ *Id.* at 337, 344.

⁹⁸ *Id.* at 343.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Matter of S-E-G-*, 24 I. & N. Dec. 579, 581 (B.I.A. 2008).

¹⁰³ *Matter of L-E-A-*, 27 I. & N. Dec. 581, 593 (Att’y Gen. 2019) (citing to *Matter of S-E-G-*, 24 I. & N. Dec. at 585).

¹⁰⁴ *Matter of S-E-G-*, 24 I. & N. Dec. at 583.

C. Nuclear Families

Prior to *Matter of L-E-A-*, the BIA recognized many particular social groups based on the shared characteristic of kinship ties because these groups satisfied the three elements of a particular social group: immutability, social distinction, and particularity. In *Matter of Acosta*, the BIA explicitly listed particular social groups with the shared characteristic of “kinship ties” as an example of an immutable characteristic that could define a valid particular social group.¹⁰⁵ Groups where members share kinship ties have been considered a PSG since the Board made an effort to define and clarify “particular social group” as a term in 1985.¹⁰⁶ *In re C-A-*, the first case in which the BIA announced the additional requirement of social distinction, also reaffirmed family relationships as a characteristic that could be the basis of a PSG.¹⁰⁷

While discussing social distinction, the BIA stated that “[s]ocial groups based on innate characteristics such as . . . family relationship are generally easily recognizable and understood by others to constitute social groups.”¹⁰⁸ Prior to Attorney General Barr’s decision in *Matter of L-E-A-*, families were considered to be socially distinct in many communities, although social distinction was evaluated on a case-by-case basis, taking into consideration the reference community (i.e., the applicant’s country of origin). For reference purposes, the United States is an example of a country where nuclear families are socially distinct. “The United States has family-based immigration status, family law, and family-size bags of chips. It shapes its laws, communities, and even schools around the concept of family because it recognizes that family is a special, socially distinct entity.”¹⁰⁹ To gauge the social distinction of a nuclear family, one would ask whether the society in the applicant’s home country views the nuclear family as a group. When it is common practice in a society to use last names as familial associations and to ask people who look alike if they are related, it is an indication that the nuclear family is indeed socially distinct.

Whether a family-based particular social group is particular largely depends on how the applicant frames his or her proposed group. For example, if an applicant states she belongs to the particular social group “children of Named Individual,” it would be clear who is in the group and who is out of the group.

¹⁰⁵ *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

¹⁰⁶ *Id.*

¹⁰⁷ *In re C-A-*, 23 I. & N. Dec. 951, 959 (B.I.A. 2006).

¹⁰⁸ *Id.*

¹⁰⁹ Erin Liechty, *No Fame Required: Where Matter of L-E-A- Went Wrong*, REFLAW (Jan. 29, 2020), <http://www.reflaw.org/no-fame-required-where-matter-of-l-e-a-went-wrong/>.

V. THE *MATTER OF L-E-A-* DECISION & THE RECOGNITION OF THE
COGNIZABILITY OF THE NUCLEAR FAMILY

The BIA issued the *Matter of L-E-A-* decision in 2017, which recognized L-E-A-'s nuclear family claim.¹¹⁰ The decision was often cited when practitioners represented asylum applicants who also had a family-based claim.

A. *Facts of the Case*

The Respondent, referred to by his initials, L-E-A-, entered the United States without inspection in 1998.¹¹¹ In May 2011, he voluntarily departed after being placed in removal proceedings by DHS due to an arrest for driving under the influence.¹¹² Upon returning to Mexico, L-E-A- lived with his parents in Mexico City and helped run his father's neighborhood general store.¹¹³ His father had refused to sell drugs out of his store for La Familia Michoacana, a Mexican drug cartel.¹¹⁴ About a week after returning to Mexico City, L-E-A- heard gun shots while walking in the street and dropped to the ground.¹¹⁵ He was not injured and was unsure if the shots were targeted at him or elsewhere.¹¹⁶ He did note, however, that the shots were coming from a black sport utility vehicle.¹¹⁷

A week later, he saw the same black sport utility vehicle and four armed cartel members, who identified themselves as La Familia Michoacana; they asked L-E-A- if he would sell the cartel's drugs out of his father's store.¹¹⁸ When L-E-A- refused, the cartel threatened him and told him to reconsider.¹¹⁹ Shortly after this incident, four masked cartel members in the same black sport utility vehicle tried to kidnap L-E-A-, but he successfully escaped.¹²⁰ Upon arriving in the United States, he was apprehended and sought asylum as a defense at his removal hearing.¹²¹ He asserted that he was persecuted by a criminal gang due to his membership in the group consisting of the "'immediate family of his father,' who owned a store targeted by a local drug cartel."¹²² The immigration judge denied relief to L-E-A-, holding "that the respondent had not shown he was the victim of anything more than criminal activity."¹²³

¹¹⁰ *Matter of L-E-A-*, 27 I. & N. Dec. 40, 42–43 (B.I.A. 2017).

¹¹¹ *Matter of L-E-A-*, 27 I. & N. Dec. 581, 583 (Att'y Gen. 2019).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 581.

¹²³ *Id.* at 583.

B. *The Board's 2017 Decision*

L-E-A- appealed the decision, and, on appeal, the Board of Immigration Appeals found that L-E-A-'s proposed particular social group of the immediate family of his father was a cognizable particular social group.¹²⁴ DHS had not contested the cognizability of L-E-A-'s PSG in its briefing.¹²⁵ The Board reviewed the longstanding recognition of family ties as a shared characteristic for a particular social group but explained that “[n]ot all social groups that involve family members meet the requirements of particularity and social distinction.”¹²⁶ The Board wrote: “In consideration of the facts of this case and the agreement of the parties, we have no difficulty identifying the respondent, a son residing in his father’s home, as being a member of the particular social group comprised of his father’s immediate family.”¹²⁷

The Board approved the social group but denied the Respondent’s asylum application because of the absence of the necessary nexus between his membership in his family group and the persecution.¹²⁸ The Board held that the cartel could have targeted L-E-A- because of his access to the store and not because he was the immediate family of his father who owned the store.¹²⁹ While L-E-A-'s claim ultimately failed due to nexus reasons, his case legitimized nuclear family particular social groups.

Acting Attorney General Whitaker directed the Board of Immigration Appeals to refer the decision for his review in December 2018, which stayed the proceedings.¹³⁰ In the meantime, Attorney General Barr took office and was the one to actually review the decision.¹³¹

C. *The Attorney General's 2019 Decision*

In his decision, Barr upended the longstanding precedent on particular social groups in holding that most groups based on membership in nuclear families could not meet the social distinction requirement of a particular social group. Before *Matter of L-E-A-* was referred for attorney general review, no party had contested the cognizability of L-E-A-'s family-based PSG.¹³² Once the case was before Attorney General Barr, however, he wrote that “[a]ll particular social groups must satisfy the criteria set forth in *Matter of M-E-V-G-* and *Matter of W-G-R-*, and a proposed family-based group is

¹²⁴ *Id.* at 583–84.

¹²⁵ *Id.*

¹²⁶ *Matter of L-E-A-*, 27 I. & N. Dec. 40, 42–43 (B.I.A. 2017).

¹²⁷ *Id.* at 43.

¹²⁸ *Matter of L-E-A-*, 27 I. & N. Dec. at 584.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 585.

¹³² *Id.* at 584.

no different. An applicant must establish that his *specific* family group is defined with sufficient particularity and is socially distinct in his society.”¹³³

Attorney General Barr’s addition of the word “specific” changed everything. To support his proposition, he cited to *Matter of A-B-*,¹³⁴ writing, “The fact that ‘nuclear families’ or some other widely recognized family unit generally carry societal importance says nothing about whether a *specific* nuclear family would be ‘recognizable by society at large.’”¹³⁵ In looking to *Matter of A-B-* for support, the Attorney General swapped the word “classes” in *Matter of A-B-*’s original phrasing for the word “specific.”¹³⁶ The original language in *Matter of A-B-* read: “But the key thread running through the particular social group framework is that social groups must be *classes* recognizable by society at large.”¹³⁷ This marked a significant and unsupported change.

Attorney General Barr wrote that nearly every person belongs to a family in a society where families as a concept are significant.¹³⁸ He sought to limit the number of cognizable particular social groups by stating that a shared characteristic most people have—kinship ties—failed the particular social group requirements. As Attorney General Barr himself recognized in his opinion, the new requirement of a *specific* family being socially distinct will mean that most families will not pass the requirements to constitute a particular social group.¹³⁹ He explained that the ordinary family “will not have the kind of identifying characteristics that render the family socially distinct within the society in question.”¹⁴⁰ He goes on to explain that “[t]he average family—even if it would otherwise satisfy the immutability and particularity requirements—is unlikely to be so recognized.”¹⁴¹ His decision means that only families that are famous, such as the Kardashian family, would be adequately socially distinct.¹⁴²

VI. IMPACT & RELEVANCE OF THE DECISION

Some practitioners and scholars have emphasized that the Attorney General’s holding is narrow—simply, that the Board must conduct a more

¹³³ *Id.* at 586 (emphasis added).

¹³⁴ *Id.* at 594 (citing *Matter of A-B-*, 27 I. & N. Dec. 316, 336 (Att’y Gen. 2018)). In *Matter of A-B-*, former Attorney General Sessions stated, “Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.” 27 I. & N. at 320.

¹³⁵ *Matter of L-E-A-*, 27 I. & N. at 594.

¹³⁶ Jeffrey S. Chase, L-E-A-: *How Much Did the AG Change?*, JEFFREY S. CHASE (Aug. 11, 2019), <https://www.jeffreyschase.com/blog/2019/8/11/l-e-a-how-much-did-the-ag-change> (quoting *Matter of A-B-*, 27 I. & N. Dec. at 336).

¹³⁷ *Matter of A-B-*, 27 I. & N. Dec. at 336 (emphasis added). See also Chase, *supra* note 136 (echoing the importance of the word “classes”).

¹³⁸ *Matter of L-E-A-*, 27 I. & N. Dec. at 594.

¹³⁹ *Id.* at 586.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 594.

¹⁴² Chase, *supra* note 136.

thorough analysis of particular social group claims even when DHS does not contest the proposed group.¹⁴³ These commenters further argue that the more concerning statements—those predicting that most family-based particular social groups will fail to meet the particular social group requirements—are merely dicta.¹⁴⁴ As such, these commenters contend that Barr’s opinion is not groundbreaking because dicta is not legally binding on courts.

While technically Barr’s statements on most families failing the social distinction requirements may be classified as dicta, evidently, the Attorney General sought to drastically change particular social group theory. Agency dicta is powerful because agency “dicta can represent an articulation of its policy, to which it must adhere or adequately explain deviations.”¹⁴⁵ The Attorney General’s agenda, commenced by Whitaker and executed by Barr, is plainly illustrated by the fact that the family-based particular social group was not an issue in L-E-A’s case before it was referred for review by the Attorney General.

This decision will change the course of asylum law for years to come. The decision will impact hundreds of thousands of claims, especially the cases of unaccompanied minors because unaccompanied minors often present family-based claims.¹⁴⁶ This, at its core, constitutes yet another attack on immigrant families. While this attack through the *Matter of L-E-A*-decision has received far less media attention than some other attacks on immigrant families, like family separation at the border,¹⁴⁷ the *Matter of L-E-A*- decision is perhaps even more impactful to immigrant families in the long run.

With one decision, thirty-five years of case law—precedent that upheld most family-based claims as a quintessential particular social group—was eviscerated. This abrupt change to asylum law, especially given the misinterpretation of caselaw and misquoted caselaw, undermines the stability of this area of law. This lack of stability is especially problematic given attorney general turnover and the inevitability of different policy goals and leadership styles. Regardless of the frequency with which an attorney general refers cases to himself, if the Executive Branch is using its legitimate

¹⁴³ CATH. LEGAL IMMIGR. NETWORK, INC., PRACTICE POINTER, *MATTER OF L-E-A*, 27 I. & N. DEC. 581 (A.G. 2019) 2-3 (2019), <https://cliniclegal.org/file-download/download/public/367>.

¹⁴⁴ *Id.* at 3.

¹⁴⁵ *Grace v. Whitaker*, 344 F. Supp. 3d 96, 116 (D.D.C. 2018) (citing *Kidd Commc’ns v. FCC*, 427 F.3d 1, 5 (D.C. Cir. 2005)).

¹⁴⁶ Isabela Dias, *Persecution Based on Family Ties Will No Longer Qualify as Grounds for Asylum, the Attorney General Rules*, PAC. STANDARD (July 29, 2019), <https://psmag.com/news/persecution-based-on-family-ties-will-no-longer-qualify-as-grounds-for-asylum>.

¹⁴⁷ See Jasmine Aguilera, *Here’s What to Know About the Status of Family Separation at the U.S. Border, Which Isn’t Nearly Over*, TIME (Oct. 25, 2019, 2:49 PM), <https://time.com/5678313/trump-administration-family-separation-lawsuits/> (“Approximately 5,500 migrant children have been separated from their parents [at the border] by the Trump Administration . . . [including] approximately 1,000 children [who] have been separated from their parents since the practice was declared over by the Trump Administration in June 2018.”).

regulatory power, the Judicial Branch must balance that power by using its own legitimate power of judicial review in the form of the *Chevron* doctrine.

VII. NECESSARY CIRCUIT COURT REACTIONS

A. *Motivating Factors*

In the interest of justice, the balance of powers, and the stability of asylum law, circuit courts must use their power to directly challenge Attorney General Barr's decision in *Matter of L-E-A-*. While it may be possible to side-step the decision,¹⁴⁸ a direct challenge is necessary and achievable under the *Chevron* doctrine.¹⁴⁹ As Justice Kennedy warned, courts must not abdicate their authority to conduct judicial review,¹⁵⁰ and robust analysis is necessary. The Judicial Branch has long prided itself for the role it plays in judicial review, reasoning as the Supreme Court did in 1803, "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."¹⁵¹

Despite extensive existing circuit court case law on the validity of family-based particular social groups, *Brand X* requires courts to conduct a review under *Chevron*, even when, like here, agency decisions are inconsistent.¹⁵² Now that the Board has changed its precedent with the amendments made in *Matter of L-E-A-*, courts can review the Board's amended interpretation of the INA. Courts should find the *Matter of L-E-A-* decision to be arbitrary, capricious, and contrary to the statute.

B. *Analyzing Matter of L-E-A- Under the First Step of Chevron*

Congressional intent surrounding the exact interpretation of particular social group is unclear. What *is* clear is that Congress defined the term "refugee" in the Refugee Act of 1980 to comply with its international obligations under the UN Protocol.¹⁵³ While the United Nations did not explicitly define the term either, the Convention's history shows that the particular social group ground was meant to be relatively undefined so it

¹⁴⁸ See *Nolasco-Yok v. Barr*, 801 F. App'x 800, 801 n.1 (1st Cir. 2020) (declining to consider Barr's decision in *L-E-A-* despite the Respondent presenting an extensive argument on the matter because "neither the BIA nor the IJ relied on *Matter of L-E-A-*, and both assumed that family constitutes a particular social group under the Immigration & Nationality Act.").

¹⁴⁹ Respondents argued in *Matter of L-E-A-* that the Attorney General did not have the jurisdiction to review the case. *Matter of L-E-A-*, 27 I. & N. Dec. 581, 585 (Att'y Gen. 2019). This analysis will assume that the Attorney General did have the jurisdiction and power to review the case and will focus on critiquing the decision that was delivered.

¹⁵⁰ *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

¹⁵¹ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

¹⁵² See *supra* Section III.D.

¹⁵³ *Matter of Acosta*, 19 I. & N. Dec. 211, 219 (B.I.A. 1985).

would be malleable enough to protect groups in similar situations to the other four grounds.¹⁵⁴

Looking at how other countries have adopted the United Nations Protocol into their domestic law has been a helpful statutory construction tool for the Board, even though international interpretation is not binding on the United States.¹⁵⁵ The Board also recognizes that while not controlling, UN publications may provide useful interpretive guidance.¹⁵⁶ The United Nations *Guidelines* define a particular social group as:

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.¹⁵⁷

In *Matter of Acosta*, the BIA executed its duty of defining the term “particular social group” domestically by using the tool of statutory construction; the Board applied the doctrine of *ejusdem generis* and concluded that PSG should be interpreted like the other four protected grounds: race, religion, nationality, and political opinion.¹⁵⁸ But since Congress was silent regarding its intent for the definition of PSG, and the use of statutory construction tools do not resolve the ambiguity, the BIA has authority to interpret the meaning of PSG.

C. Analyzing Matter of L-E-A- Under the Second Step of Chevron

Since the statute is silent or ambiguous with respect to the meaning of “particular social group,” then the question for the court is whether the Attorney General’s latest decision on particular social group theory in *Matter of L-E-A-* is based on a permissible interpretation of the statute. Because *Matter of L-E-A-* is arbitrary, capricious, and contrary to the statute, courts must reject its interpretation of PSG as it applies to nuclear families. While not common, it is certainly not impossible for a court to overcome the second step of *Chevron*; one study found that of 817 agency statutory interpretations that advanced to step two, the agency lost in fifty-one of them.¹⁵⁹ Interestingly, the most common subject area for an agency to lose was immigration, with nineteen agency interpretations, or 37.3% of the total interpretations, held to be arbitrary and capricious under the second step of *Chevron*.¹⁶⁰

¹⁵⁴ GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 77, at para. 1.

¹⁵⁵ *Matter of Acosta*, 19 I. & N. Dec. at 220.

¹⁵⁶ *Id.* at 211.

¹⁵⁷ GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 77, at para. 11.

¹⁵⁸ *See supra* Part III.

¹⁵⁹ Kent Barnett & Christopher J. Walker, *Chevron Step Two's Domain*, 93 NOTRE DAME L. REV. 1441, 1461 (2018).

¹⁶⁰ *Id.* at 1462.

Attorney General Barr disingenuously claims to be anchoring his decision on established precedent. In reality, by omitting the word “classes” from the original wording in *Matter of A-B-* and replacing it with “specific,” Barr changes the law and departs from nearly thirty-five years of caselaw precedent since *Matter of Acosta*.¹⁶¹ A class is a collection of individuals that share a common attribute.¹⁶² The BIA itself has stated that family-based particular social groups are a natural fit within particular social group theory, doing so not just in *Matter of Acosta*, but in numerous decisions following that landmark case.¹⁶³ Similarly, for decades, circuit courts have considered family-based claims valid particular social groups: former immigration judge Jeffrey Chase has noted that “the First, Second, Third, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits have all recognized that family can constitute a PSG, and all have reiterated that opinion in decisions issued in 2014 or later.”¹⁶⁴ For example, the First Circuit explained:

There can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family. Indeed, quoting the Ninth Circuit, we recently stated that “a prototypical example of a “particular social group” would consist of the immediate members of a certain family, the family being a focus of fundamental affiliational concerns and common interests for most people.”¹⁶⁵

Against this backdrop, when L-E-A- presented a particular social group claim based on his immediate family, opposing counsel did not disagree.¹⁶⁶ This is unsurprising, given the longstanding acceptance of family-based PSGs spanning multiple jurisdictions and many decades.

In *Matter of L-E-A-*, the Attorney General wrote that “the respondent did not show that anyone, other than perhaps the cartel, viewed the respondent’s family to be distinct in Mexican society.”¹⁶⁷ Where did this need for individual family distinction come from? The Attorney General states that the social distinction test must be applied to the *specific* group presented by the asylum applicant, such as “immediate family members of [Named Individual],” and not the *type* of group, such as a nuclear family.¹⁶⁸

¹⁶¹ See *supra* Section IV.A.

¹⁶² *Definition of Class*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/class> (last visited Aug. 2, 2020).

¹⁶³ See, e.g., *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 246 (B.I.A. 2014) (explicitly defining and explaining the particular social group elements and reiterating that the Board considers family relationships to be an innate characteristic that could form the basis of a particular social group).

¹⁶⁴ Chase, *supra* note 136.

¹⁶⁵ *Gebremichael v. Immigr. & Naturalization Serv.*, 10 F.3d 28, 36 (1st Cir. 1993) (citation omitted); see also Chase, *supra* note 136 (quoting the same language from *Gebremichael*).

¹⁶⁶ *Matter of L-E-A-*, 27 I. & N. Dec. at 581, 583–84. (Att’y Gen. 2019).

¹⁶⁷ *Id.* at 592.

¹⁶⁸ *Id.* at 594.

Barr's interpretation is flawed. The very case that introduced the requirements of social distinction and particularity also reaffirmed that family ties could serve as a characteristic for a PSG.¹⁶⁹ Under the doctrine of *ejusdem generis*, PSGs are supposed to be akin to the other four protected classes.¹⁷⁰ "Thus when the requirements for 'membership in a particular social group' are consistent with the other grounds of persecution, the overall burdens are equivalent to those placed on applicants asserting claims based on the other grounds."¹⁷¹ The Refugee Act allows an asylum applicant to name a protected class, so long as it fits the three requirements that will make it like the other protected classes.¹⁷² Naming a protected class as a PSG will often be broad; a nuclear family as a general concept is broad, just like religion as a general concept is broad. This is not to be confused with the applicant's burden to explicitly state he is applying as the immediate family member of a named individual. In a society where the nuclear family is an important grouping, if society members were told that the asylum applicant lives with his spouse and children, the society members would immediately recognize it as a group: the nuclear family.¹⁷³ There is no need for society members to personally know or recognize the name of the asylum applicant. Finally, we can consider a proof by contradiction. Assuming that social distinction *is* a requirement for the specific group that an individual belongs to, then an individual persecuted for their membership in a small religious cult, unknown to society at large, would not be eligible for asylum. We know, however, that religion as a general concept *is* a protected class; therefore, social distinction *cannot* be a requirement for specific subgroups within a protected class.

To support his argument, the Attorney General stated that since every person has a family, the particular social group net is cast wider than Congress intended.¹⁷⁴ The Attorney General did not consider the fact that Congress approved of other protected classes that are defined by characteristics that every person holds, such as race. Every person has a race, and most people also have a nationality, a religion, and a political opinion,¹⁷⁵ and yet the validity of these claims are never questioned. It is unclear, then, why the fact that most people have families has any bearing on the validity of a particular social group.

Attorney General Barr took the basic guidelines that were supposed to apply to protected classes generally and replaced them with a hyper-concern

¹⁶⁹ *In re C-A-*, 23 I. & N. Dec. 951, 959 (B.I.A. 2006).

¹⁷⁰ See discussion *supra* Section IV.A.

¹⁷¹ *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 244 (B.I.A. 2014).

¹⁷² See discussion *supra* Part IV.

¹⁷³ The BIA has made it clear that social distinction does not require ocular visibility. See *supra* note 74. Therefore, it is not necessary to show that society is aware which particular individuals belong to a group.

¹⁷⁴ *Matter of L-E-A-*, 27 I. & N. Dec. 581, 593 (Att'y Gen. 2019).

¹⁷⁵ Chase, *supra* note 136.

for individual examples of protected classes. Before *Matter of L-E-A-*, an asylum applicant had to show that his shared family ties with his proposed nuclear family group were immutable, socially distinct, and particular as a *general matter* in his country. He then had to show nexus by connecting the *specific* harm he suffered, or fears to suffer, to his membership in his *specific* family, in addition to all the other requirements. After *Matter of L-E-A-*, an asylum applicant must show that his *specific* family is immutable, socially distinct, and particular, and still show the nexus between the *specific* harm he suffered and his *specific* family. Barr essentially requires a family to be famous to meet the social distinction requirement.

Perhaps Barr's goal was to emphasize the need to not take certain groups, like the nuclear family, for granted as per se valid particular social groups. Barr wrote that "[t]he Board here did not perform the required fact-based inquiry to determine whether the respondent had satisfied his burden of establishing the existence of a particular social group within the legal requirements of the statute."¹⁷⁶ Yet if this were merely the Attorney General's aim, he could have remanded on this fact alone, instead of disrupting decades of Board and court precedent.

The Attorney General did not elaborate on his new requirement and in doing so created more confusion. He did not explain the size or scope of the community wherein the family in question must be socially distinct. Communities can range from a small, local village to an entire country. Social distinction requirements of specific families would likely be met more easily if specific families only needed to be distinct within their local communities. Further, Barr provided no guidance on how to gauge how socially distinct a family must be in a given community. If 30% of a population knows of a family, is that enough? How can immigration judges even determine how much of a given population knows of a family without extensive polling? Can a family be well-known through politics, through entertainment, through wealth? Rather than provide direction for courts, Attorney General Barr has all but assured that courts implementing his decision will produce a hodgepodge of inconsistent rulings. Given the decision's cryptic guidance and faulty reasoning, courts have no choice but to reject this opinion as arbitrary and capricious.

The Attorney General's conclusions in *Matter of L-E-A-* on Congressional intent for particular social group theory are misguided. Barr wrote, "[i]f Congress intended for refugee status to turn on one's suffering of persecution 'on account of' family membership, Congress would have included family identity as one of the expressly enumerated covered grounds for persecution."¹⁷⁷ This statement is dismaying for multiple reasons. As previously discussed, Congress adopted the United Nation's Protocol and

¹⁷⁶ *Matter of L-E-A-*, 27 I. & N. Dec. at 586.

¹⁷⁷ *Id.* at 593.

passed the Immigration and Nationality Act to comply with the Protocol.¹⁷⁸ Particular social group was intentionally drafted broadly to encompass people who were not initially considered at the United Nations Convention. Despite congressional intent's material importance in statutory interpretation, the Attorney General wrote without acknowledging the history of the Act.

The Attorney General's decision in *Matter of L-E-A-* fails the second step of *Chevron* and courts should not defer to the agency decision. Courts should find *Matter of L-E-A-* arbitrary, capricious, and contrary to the statute due to the faulty logic in the decision.

CONCLUSION

Matter of L-E-A- has negatively, swiftly, and irrationally changed asylum law in a drastic manner. Courts should use their judicial review power to highlight the arbitrariness and capriciousness of the ruling. Despite changing leaders in the Executive Branch, asylum law must stay true to the Immigration and Nationality Act. Courts should determine that *Matter of L-E-A-* does not merit deference. In the meantime, thousands of family-based asylum applicants will suffer, marking yet another attack by the United States Government on the immigrant family.

¹⁷⁸ *Immigr. & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421,436 (1987).

