A Deferential Crisis: The Board of Immigration’s *Chevron* Struggle Concerning Refugee Principles

“Until the Board clarifies how otherwise legitimate refugees are to frame and prove their groups, [particular social group] doctrine will become increasingly problematic, and the United States will fail its noblest of humanitarian duties.”

I. INTRODUCTION

Those seeking refuge in the United States are arguably among the most vulnerable population. The 1951 United Nations Refugee Convention (1951 Convention) sets forth traditional asylum and withholding provisions; it allows aliens seeking refuge to avoid removal to their country of origin if it is likely that their life or freedom will be threatened upon return because of their “race, religion, nationality, [or] membership of a particular social group.” Though the United States was not a party to the 1951 Convention, in 1948 the Attorney General (AG) was granted statutory discretion to admit aliens to the United States.


2. *See* Velasco, *supra* note 1, at 237 (detailing troubles refugees face seeking asylum). The United States’s “noblest humanitarian commitment . . . [is] welcoming those who set foot on American soil rather than turning them away to face certain persecution.” *Id.* at 236.

States and to provide aliens with deportation relief.\(^4\) The United States used a similar process to that of the 1951 Convention to incorporate in 1967, by official protocol, the Protocol Relating to the Status of Refugees (1967 Protocol).\(^5\) The Refugee Act of 1980 (1980 Act) ultimately codified the 1967 Protocol into U.S. law.\(^6\)

Today, noncitizens can invoke the nonreturn right by seeking a withholding of removal, a process that is commonly referred to as “non-refoulment” (or “nonreturn” from the French word “refouler” for “send back”), to avoid being
sent back to their country of origin due to fear of persecution.\footnote{See AM. SOC’Y OF INT’L L., supra note 4, § III.E.4.a., d.i.1 (outlining application process and judicial review for withholding of removal claims). The applicant must have crossed the border into, and be present in, the United States to satisfy one aspect of the eligibility criteria. See id. § III.E.4.a. The applicant also has the burden of showing that it is more likely than not that their life or freedom will be threatened. See id. § II.E.4.d.i.1; see also 8 U.S.C. § 1231(b)(3)(C) (describing burden of proof and trier of fact’s role); Immigration & Naturalization Serv. v. Stevic, 467 U.S. 407, 422, 429-30 (1984) (discerning requisite level of certainty for non-refoulment eligibility). There appears to be a certain level of fear of persecution required; for example, a reading of the statute states that the life or freedom “would” be threatened, not simply “might” or “could.” See Stevic, 467 U.S. at 422.}

This process begins at the administrative level with a determination from an Immigration Judge (IJ), and, if taken up on appeal, the case then goes to the Board of Immigration Appeals (BIA).\footnote{See AM. SOC’Y OF INT’L L., supra note 4, § III.E.4.d.i.1 (explaining individual initially seeks withholding of removal at administrative level); see also John R.B. Palmer et al., Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review, 20 GEO. IMMIGR. L.J. 1, 13, 17-19 (2005) (detailing expulsion process and creation of BIA). “The bulk of the BIA’s work is to provide review of the decisions of IJs in expulsion proceedings.” Palmer et al., supra, at 19.} The BIA is the lead administrative agency that applies the INA, which is the primary immigration statute covering the removal of noncitizens, and interprets the statute’s occasionally ambiguous language.\footnote{See Katie R. Eyer, Administrative Adjudication and the Rule of Law, 60 ADMIN. L. REV. 647, 698-99 (2008) (describing administrative origins and decision procedure by agency). Some agencies choose to enact rules through legislative means, and some do so through adjudication, such as the BIA. See id.; see also Petition for Writ of Certiorari at 12, Reyes v. Sessions, 138 S. Ct. 736 (2017) (No. 17-241), 2017 WL 3500041 (describing IJ’s fact finding role and BIA’s reviewing role).}

One such ambiguous phrase is “particular social group” (PSG), which is a significant avenue for relief for withholding of removal applicants.\footnote{See Acosta, 19 I. & N. Dec. at 211, 232-33 (B.I.A. 1985) (acknowledging PSG option for withholding applicants).} The BIA first defined PSG via administrative interpretation—a valuable agency rulemaking power.\footnote{Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987) (emphasizing agency role when Congress leaves gaps). If Congress leaves gaps and an agency has been delegated the role to administer the statutory program, the courts should respect the agency interpretation. See id.} Since first defined in 1985, what constitutes a PSG under the U.S. Code has been the source of much debate, and, as the topic of immigration has evolved and become a forefront issue, it has also garnered attention from the federal courts.\footnote{See Acosta, 19 I. & N. Dec. at 232-33 (defining contours of PSG to establish requirements). The BIA stated that the term was taken from the language of the 1951 Convention, but the BIA did not provide a clear meaning or definition. See id. Based on a historical review, the phrase itself was “added as an afterthought.” See id. at 232. PSG was added as the fifth element at the last minute by a Swedish representative who argued that based on experience, refugees tend to be persecuted for their membership to a PSG, and that “the draft convention makes no provision for such cases.” See Maryellen Fullerton, A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group, 26 CORNELL INT’L L.J. 505, 509 (1993) (examining record of 1951 Convention vote for guidance). Further, the authors consider that a suggested definition, based on a handbook put forth after the 1951 Convention, was “persons of similar background, habits or social status,” and that this element overlaps with the other elements within the definition. See Office of the United Nations High Comm’r for Refugees, Handbook on Procedures and Criteria for Determining Refugee
two requirements to further define PSG: social visibility (later called social distinction) and particularity. The BIA subsequently stated in two separate decisions that an applicant must establish that the group is composed of members who share a common immutable characteristic, the group must be “socially distinct” within the society in question, and the group must be defined with “particularity.” Such an endeavor to interpret the statute has been done absent legislative intent or guidance, and has immense impacts for refugees seeking withholding of removal. Presently, there is a circuit split between the Third and Seventh Circuits and the majority as to whether the BIA should be afforded deference in its determination of who qualifies as belonging to a PSG for the purposes of withholding of removal. More specifically, the circuit split concerns whether the BIA should be provided Chevron deference—a longstanding deference principle establishing stricter guidelines for agency-judicial relationships than the traditional Administrative Procedure Act (APA).

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14. See W-G-R-, 26 I. & N. Dec. 208, 209-10, 212 (B.I.A. 2014) (addressing ambiguity of term PSG); see also M-E-V-G-, 26 I. & N. Dec. 227, 236 (B.I.A. 2014) (adhering to prior clarifications and renaming “social visibility” to “social distinction”). An immutable characteristic is “one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.” Acosta, 19 I. & N. Dec. at 233.


16. See Valdiviezo-Galdamez v. Att’y Gen., 663 F.3d 582, 603-08 (3d Cir. 2011) (holding “social visibility” prong inadequate); Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009) (scrutinizing BIA’s application of PSG). The Third and Seventh Circuits have held that the BIA is not entitled to deference regarding its definition of what constitutes a PSG. See Gatimi, 578 F.3d at 615 (holding interpretation of ambiguous statutory term unreasonable); see also Ceece v. Holder, 733 F.3d 662, 677 (7th Cir. 2013) (en banc) (holding BIA’s appeal decision based on definition of PSG inconsistent with own precedent). Importantly, the Seventh Circuit acknowledged that the BIA’s interpretation of the ambiguous term has been historically inconsistent; particularly, the BIA ruled in opposite ways based on cases with strikingly similar facts. See Ceece, 733 F.3d at 676-77. In Ceece, the court was hesitant to decide the case in line with the most recent interpretation due to these inconsistencies. See id. The Sixth Circuit inferably refused to provide the new definition deference, finding that membership in a certain gang constituted a PSG. See Urbina-Mejia v. Holder, 597 F.3d 360, 366-67 (6th Cir. 2010) (holding former gang member status sufficient for belonging to PSG). This decision is contrary to the majority position, which refuses to acknowledge such membership as a PSG. See id. However, the Sixth Circuit did not explicitly state whether it would be appropriate to provide deference to the BIA. See id.

17. Administrative Procedure Act § 10(e), 5 U.S.C. § 706 (2018); Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) (establishing deference test causing present circuit split). Agency-judicial relationships are governed largely by the APA. See Administrative Procedure Act § 10(e) (codifying standard of agency review); see also Eyer, supra note 9, at 661 (describing situations when courts step in to govern agency decisions). Chevron provided a more substantive framework allowing courts to apply a
This Note explores the history of immigration in America, the 1951 Convention, and the subsequent incorporation of the 1951 Convention principles into U.S. law. This Note then discusses the inception of BIA responsibility, Chevron deference, and its application in the administrative-judicial context. Through a review of the international and domestic legislative intent and applicable BIA case law, this Note tracks the evolution of the definition of what constitutes a PSG. This Note then applies the two-prong Chevron test to the current definition and argues that it should not be afforded deference. The current definition should be changed as it contravenes U.S. immigration law principles and, as evidenced by the current circuit split, misleads litigants and advocates alike. Trying to achieve Chevron deference, the BIA should eliminate the “particularity” and “social distinction” requirements, and re-broaden the definition to the original immutability definition. The BIA operated at its highest utility when applying PSG’s original definition, and this Note offers reasons in support of providing deference to the agency for that definition.

II. HISTORY

A. America as a Safe Harbor?

The United States of America was an “[o]pen [f]rontier” for the first hundred years of its existence, where legislation barring immigration was scarce and unpopular; in fact, much of the legislation encouraged immigration and protection of immigrants on U.S. soil. The opinions of those who opposed this “open frontier” finally gained legislative traction with a series of statutes between 1875 and 1917 that barred certain groups, races, and nationalities from entering the United States, mandated that immigrants receive medical inspections upon arrival, and implemented a “head tax” on immigrants. For example, the Immigration Act of 1882 imposed a “head tax” of fifty cents on immigrants and effectively excluded “idiots,
of 1917 and 1924 incorporated qualitative person-by-person restrictions and numerical, population-related limitations on immigration; each of these Acts provided broad discretion to bar and deport certain groups of people.\(^{27}\) In the wake of WWII, the United States began admitting large numbers of refugees and displaced persons to its shores, indicating a shifting attitude toward immigration.\(^{28}\)

The Displaced Persons Act that followed WWII was considered the “major liberalization” of immigration policy; thus, it is no surprise that this immediately preceded the INA, which afforded individuals seeking asylum or withholding of removal the first glimpses of avenues for relief.\(^{29}\) The INA “authorized” the AG to withhold deportation based on his or her opinion, granting the AG broad discretionary powers.\(^{30}\) The INA, however, was not free from criticism, as laid out in President Truman’s veto letter: “Conferring powers like [those given to the President in the Alien Act to deport any alien deemed dangerous] upon the [AG] is unfair to him . . . [and] to our alien residents. . . . The change from

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\(^{27}\) See id. As the list of excluded classes of people continued to grow, Congress enacted provisions designed to deport illegal aliens and established special inquiry groups to check arriving immigrants on ships. See id.

\(^{28}\) See id. § 2.02(3)-(4) (illustrating full shift toward stricter immigration tactics). The Immigration Act of 1917 imposed a controversial literacy test and codified deportation powers without limitation. See id. Even more controversial was the Immigration Act of 1924’s quota system that was incorporated into countless subsequent legislative acts. See Harry S. Truman, President of the U.S., Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality (June 25, 1952) (detailing Truman’s presidential proclamation vetoing 1952 INA due to quota incorporation). President Truman described the policy as discriminatory, arguing that it “denies the humanitarian creed . . . ‘[g]ive me your tired, your poor, your huddled masses yearning to breathe free.’” See id.

\(^{29}\) See Scanlan, supra note 4, at 847-48, 856 (arguing refugee admission post WWII limited to allied countries, thus deemed “acceptable”).

\(^{30}\) Immigration and Nationality Act, Pub. L. No. 82-414, § 244(a), 66 Stat. 163, 214 (1952) (outlining one of few initial attempts to protect immigrants), repealed by Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, § 308(b)(7), 110 Stat. 3009-615 (1996); see also GORDON ET AL., supra note 25, § 2.03(1) (detailing enactment process and features of 1952 INA).
objective findings to subjective feelings is not compatible with our system of justice.  

While immigration policy in America was shifting, 109 countries signed the 1951 Convention, which is considered one of the most important international instruments, primarily because it defines the term “refugee.” Arguably one of the most important provisions of the 1951 Convention is Article 33(1), which mandates all signing parties to withhold deportation of refugees who would otherwise face persecution. Because the United States was not a party to the 1951 Convention, this provision was incorporated into U.S. law through the 1967 Protocol, which “effectively adopted and extended the Convention’s protections.” It is unclear, however, whether the 1967 Protocol had the profound effect on immigration that it holds claim to, as courts still applied an objective “well-founded fear” test in contravention of the 1951 Convention and numerous procedural inconsistencies created varying results for refugees seeking asylum.

31. Truman, supra note 27 (detailing President Truman’s objections to 1952 INA).

32. See 1951 Convention, supra note 3, pmbl.-art. 6 (outlining purpose of 1951 Convention, signing parties, and definitions). The United Nations High Commissioner for Refugees (UNHCR), which is the world’s leading refugee agency, states that the core 1951 Convention principle is non-refoulement, and that it is a rule of customary international law. See United Nations High Comm’r for Refugees, The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol 4-5 (2011). See also United Nations High Comm’r for Refugees, supra, at 5 (formalizing points from 1951 Convention). Customary international law is an often-misunderstood concept, but it is defined as a sense of legal obligation that states generally and consistently follow and contains two parts. See 1 Guide to International Legal Research § 1.03(a) (Matthew Bender, rev. ed. 2018) (defining customary international law). Part 1, State Practice, deduces evidence of an objective consistent practice among states; this evidence includes diplomatic acts, instructions, public measures, and official statements of policy. See id. § 1.03(b). Part 2, Opinio Juris, analyzes whether a state acted in a certain way because it subjectively believed there was a legal obligation to do so; such evidence of a subjective belief can be “inferred from acts or omissions” or a “consistent course of activity.” See id. § 1.03(c). Because this provision of the 1951 Convention is a rule of customary international law, it is binding on all states, regardless of whether they have acceded to the convention or not. See Protocol Relating to the Status of Refugees, supra note 3, art. 1 (promulgating original 1967 Protocol); United Nations High Comm’r for Refugees, supra, at 5 (emphasizing importance of 1951 Convention and its 1967 Protocol); see also Restatement (Third) of the Foreign Relations Law of the United States § 111 cmt. D (Am. Law Inst. 1987) (stating customary international law U.S. federal law). The 1951 Convention defined refugee as “an individual who has a well-founded fear of persecution in his or her country of origin based on ‘race, religion, nationality, membership in a particular social group, or political opinion.’” See Gee, supra note 3, at 595 (highlighting importance of refugee protections extended under 1951 Convention).

33. See 1951 Convention, supra note 3, art. 33(1); Gee, supra note 3, at 596-97 (discussing importance of withholding provision under international law). To further protect refugees, the United Nations imposed an “affirmative duty” not to send any individual back to their country of origin who faced possible persecution. See 1951 Convention, supra note 3, art. 33(1); Bockley, supra note 29, at 278.

34. See Protocol Relating to the Status of Refugees, supra note 5, at 268 (detailing official 1967 Protocol); Gee, supra note 3, at 596-97 (equating 1967 Protocol to “embodiment” of international commitment to refugees). The United States has recommitted itself to the 1967 Protocol and is “bound to comply” with the instruments and organizations that are parties to it. See Huber, supra note 5, at 210 (discussing incorporation of deportation provisions).

35. See Bockley, supra note 29, at 278-79 (lamenting consequences of inconsistencies and misplaced deference to administrative authority). In 1970, a Lithuanian sailor escaped a Soviet fishing vessel and sought asylum in the United States, properly citing prior persecution. See id. He was promptly turned away—
On March 17, 1980, Congress enacted the 1980 Act, a crucial piece of legislation that “demonstrated [the United States’] concern for . . . the defenseless, and the persecuted peoples who fall victim to tyrannical and oppressive governmental regimes.” The 1980 Act provided procedure where there was none and “depoliticized” the admissions process, providing asylum seekers “absolute protection.” This “absolute protection” provided a procedure for withholding removal of a person physically present in the United States or at the border, eliminated the AG’s discretionary function, and mandated withholding removal if the applicant met the statutory requirements. The modern day statute incorporates the 1980 Act directly and states that the AG may not remove an alien if his or her life or freedom would be threatened because of their “race, religion, nationality, membership in a particular social group, or political opinion.”

B. Board of Immigration: Origins

1. Judicial Review

In 1940, the AG created the BIA, which is the leading agency for adjudicating immigration cases. The BIA’s primary mission is “resolving the questions...
before it in a manner that is timely, impartial, and consistent with the immigration laws,” and “to provide clear and uniform guidance” to the Department of Homeland Security, IJs, and the public. As an agency, the BIA is part of the administrative “fourth branch” of government. Since its inception, the BIA has been primarily responsible for interpreting the INA, reviewing IJs’ decisions, and issuing binding, precedential authority—all of which are subject to judicial review.

The APA governs the general concept of judicial review of agency decisions; however, pre-APA, and even in the nascent years of the APA, there was little agreement on what (if any) standard to apply. The Supreme Court was historically deferential to agencies for the first hundred years of their existence, noting that “the Administrator’s policies are made in pursuance of official duty, based upon . . . specialized experience and broader investigations.” Further, before 1948, “an agency needed no evidence, no record, and no statement of

43. See Eyer, supra note 9, at 669-70 (detailing BIA appellate review and decision-making powers). Agencies enact rules either through legislation or adjudication; since its inception, the BIA has created rules through case-by-case adjudication. See id. at 648 (introducing critiques of administrative adjudication used for lawmaking); see also 8 C.F.R. § 1003.1(d) (2018). The BIA reviews decisions of IJs at an appellate level, and the BIA’s opinion on such decisions is binding precedent for all other immigration officials. See 8 C.F.R. § 1003.1(g) (codifying BIA authority to make precedent law); see also Eyer, supra note 9, at 669 (explaining role of issuing precedent decisions vital). BIA decisions are subject to review by the AG. See 8 C.F.R. § 1003.1(h) (outlining AG’s review power and standards). The AG rarely steps in to overturn decisions, leaving the bulk of BIA decision reviews to the Federal Appeals Courts. See 8 U.S.C. § 1252 (codifying judicial review of immigration decisions); Palmer et al., supra note 8, at 19-20 (detailing appeals jurisdiction of certain final administrative orders).
44. See Administrative Procedure Act § 10(e), 5 U.S.C. § 706 (2018); infra notes 45-46. The APA provides courts with the power to review agency decisions and sets the standard of review. See Administrative Procedure Act § 10(e). Further, the Hobbs Act of 1948 provides appeals courts with exclusive jurisdiction over specific agency matters; importantly, this was extended to immigration cases in 1961, and thus the petitions for review from BIA go directly to the Federal Appeals Courts. See 28 U.S.C. § 2342 (2018) (codifying court of appeals review power); Palmer et al., supra note 8, at 19-20 (stating Hobbs Act used to challenge expulsion orders in immigration setting).
45. See Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944) (stating Supreme Court has long given "considerable . . . weight to [agency] decisions"). Agencies have been around for a long time; the first proposal for a Department of Foreign Affairs, an agency style department, was in 1789 by James Madison. See Office of the Historian, A New Framework for Foreign Affairs, U.S. Dep’t State, https://history.state.gov/departmenthistory/short-history/framework [https://perma.cc/PF6S-L6FL] (providing historical origins for State Department).
reasons to support a rule[,] rules were rarely challenged[,] and challenges were rarely successful.”46

2. Chevron Deference

Today, the review process is much stricter.47 To avoid having a decision or precedent overturned on review, an agency must typically provide an explanation for its decision—whether through specific reasoning or an explanation for implementing a new regulation (or modifying an existing one).48 In the 1984 landmark case, Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.,49 the Supreme Court interpreted the APA standard, and put forth a two-prong test based on agency-judicial relationships that is commonly referred to as “Chevron deference.”50 Prior to applying the two-prong test, courts first look to whether Congress delegated the questioned authority to make rules carrying out the “force of law” to the agency.51 Under Chevron, a reviewing court then must ask whether Congress has spoken on the issue specifically and, if so, defer to Congress’s position.52 If the term is ambiguous and Congress has not spoken, the reviewing court must determine whether the interpretation made by the agency was arbitrary and capricious, or reasonable.53


47. See Virelli, supra note 46, at 728-29 (identifying transition from simple “hard look” agency review to stricter process).

48. See id. The Supreme Court routinely states that when making a determination, the agency must have considered the “relevant factors,” and the Court reviews the administrative record and the rational connection between the agency’s explanation, choice, and policy position for the decision. See Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970) (stating decision likely overturned if agency has not taken “hard look” at problems); Virelli, supra note 46, at 729. The 1970 standard of review required the agency to engage in reasoned decision-making and provide support for its decision. See Judulang v. Holder, 565 U.S. 42, 45 (2011) (reiterating when agency sets policy, it “must provide . . . reasoned explanation for its action”); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 517 (2009) (holding action not arbitrary due to rational connection of reasons in administrative record); Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 56 (1983) (holding arbitrary standard met when agency failed to bring expertise to situation); Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974) (requiring discernible path in reasoning); Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-16 (1971) (holding bare administrative record indicative of failure of procedure).


50. See id. at 843 (highlighting Court’s lack of desire to substitute judgment for expertise of agency). Congress empowers agencies to fill the gaps it leaves, whether they are implicit or explicit; such a power “necessarily requires the formulation of policy.” Id.

51. See United States v. Mead Corp., 533 U.S. 218, 226-27 (2001) (detailing delegation of authority prerequisite to consider Chevron). The delegation of this authority can be shown in many ways, including if an agency has been delegated authority to engage in adjudicative lawmaking or notice and comment rulemaking. See id. at 227.

52. See Chevron, 467 U.S. at 842-43 (setting forth two-prong test for standard of judicial review).

53. See id. at 843-44 (detailing process if statutory term ambiguous).
Under the review process, the rule or regulation in question is attacked for its supposed “arbitrary and capricious” nature. This “arbitrary and capricious” standard, commonly referred to as a “hard look” standard, attempts to “provide[] a critical check against unconstrained agency power while . . . protecting agency expertise.” Whether a statutory construction is reasonable is fact specific; courts look most often to the “degree of agency’s care, its consistency, formality[,] . . . relative expertness, and to the persuasiveness of the agency’s position.” Further, an agency is not bound strictly by its precedent, and under *Chevron*, a new or varying interpretation is allowed, if adequately explained. Courts often (but not always) defer to the agency, as they are reluctant to substitute their judgment for the agency’s expert judgment. The principle of *Chevron* deference in the legal system seeks to attain uniformity within the law, and this is particularly essential in immigration law.

3. Defining a PSG: The BIA’s Decades-Long Attempt to Define an Ambiguous Term

The BIA is tasked with interpreting the INA—a complex, lengthy, and intricate statute requiring a narrow review of precedential and judicial opinions and a high level of statutory construction. In this vein, the term PSG has consistently been difficult to define and, as the Third Circuit laments, “read in its broadest literal sense . . . is almost completely open-ended.” This ambiguity
resulted in the BIA and courts adopting a range of conflicting constructions of the 1951 Convention language; which ultimately led to case-by-case standards, making it difficult to find one reliable definition.62 The magnitude of the disagreement and general controversy over the PSG definition has not been overlooked; rather, it is a conflict that is “mature, entrenched[,] and result[s] in starkly disparate outcomes for similarly situated individuals.”63

In addition to being ambiguous on its face, there is little convincing evidence of legislative intent to help shape the PSG definition, neither from Congress nor from international law.64 Specifically, as one scholar argues, it is “well known” that at the 1951 Convention, the term PSG was added as a mere “afterthought,” and the UNHCR guidance on the subject is “general and rather brief.”65 A look to other terms in the definition shows that the term “well-founded fear” has also

attempt at statutory interpretation. See Paraketsou, supra note 15, at 448 (citing multiple problematic interpretation issues in defining PSG compared to other terms).


64. See Fatin, 12 F.3d at 1238-39 (discussing lack of specific meaning tied to PSG). The only evidence regarding legislative intent of what PSG was intended to mean is that at the time Congress intended to conform U.S. refugee law with the 1967 Protocol. See id. at 1239.

65. See Aleinikoff, supra note 62, at 266-67 (highlighting inconsistencies and lack of guidance for defining PSG); supra note 12 and accompanying text (explaining PSG definition apparent afterthought and consequent lack of legislative record). One argument is that the PSG definition is not intended to be “all-encompassing” or too broad because: The record shows that the 1951 Convention was not intended to protect every potential victim, rather those who fell into a particular category, and as a matter of “legal logic,” the category need not exist if the line is not drawn somewhere. See Aleinikoff, supra note 62, at 285 (arguing despite lack of intent, overly broad definition contrary to supposed intent).
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been the subject of much litigation. The Supreme Court addressed this directly, reasoning it is best to “consider what the phrase . . . means with relation to the [1967] Protocol” using information from the record—something clearly unavailable for defining PSG. Because of these gaps in legislative history, the BIA promulgated and shaped the definition itself, beginning with the first interpretation of the term in 1985—which resulted in a definition that would last for nearly two decades.

In Acosta, the BIA defined PSG as a group of persons who share a common, immutable characteristic such as sex, color, or kinship ties, indicating the characteristic that defines the group must be one the member either cannot change, or should not be required to change. In promulgating this definition, the BIA used the ejusdem generis doctrine—a Latin term for “of the same kind”—to argue that PSG is in a list with innate characteristics such as race, nationality, religion, political opinion, or other characteristics that a person should not be required to change. Therefore, the PSG definition should encompass these qualities as well. While still routinely applying the immutable characteristic definition, the BIA clarified the process for determining what constitutes a PSG, stating that whether or not a characteristic is immutable is just the starting point, and a variety of factors and considerations may “properly bear on whether a [PSG] should be recognized.”

In 2006, the BIA added two considerations to the definition of PSG: social visibility and particularity. Social visibility is defined as something readily identifiable in the society in question, and particularity is defined as a characteristic that is objective and determinate. Later, in 2014, the BIA put

67. See id. (arguing incorporation of Protocol came with definitions established prior to its implementation).
68. See Acosta, 19 I. & N. Dec. 211, 232 (B.I.A. 1985) (implementing first definition of PSG); Petition for Writ of Certiorari, supra note 9, at 7-8 (documenting progression of definition of PSG).
70. See Acosta, 19 I. & N. Dec. at 233 (utilizing term of statutory construction to elaborate on PSG definition).
71. See HEARTLAND ALLIANCE, supra note 63, at 7-8 (providing step-by-step evolution and identifying problems of defining term PSG).
74. See A-M-E-, 24 I. & N. Dec. at 74-76 (holding particularity requires accurate description and social visibility requires recognition); C-A-, 23 I. & N. Dec. at 958-59 (noting groups based on innate characteristics generally recognizable and understood by others). The BIA did this several years after the UNHCR released a
forth two cases that changed the “social visibility” consideration to “social distinction,” where it argued that “social visibility” does not mean literal “ocular visibility,” but rather whether the group is recognized in society as a “distinct entity.”

Thus, the following are the final three criteria for satisfying the definition of a PSG: immutability, particularity, and social distinction.

C. The Circuit Split: The Third and Seventh Circuits’ Opposition to Chevron Deference

Presently, there is a circuit split between the Third and Seventh Circuits and the majority as to whether the BIA should be afforded deference in its most recent interpretation of the term PSG. Whether the Supreme Court will choose to take up the matter has yet to be seen—as of January 16, 2018, it denied the most recent Petition for Writ of Certiorari. The Third and Seventh Circuits argue that the BIA should not be entitled to deference due to its failure to provide adequate reasoning for its recent definition of PSG. The Ninth Circuit, among guidance document on the topic. See United Nations High Comm’r for Refugees, Guidelines on International Protection No. 2: “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 3-6, HCR/GIP/02/02 (2002), http://www.refworld.org/docid/3d36f23f4.html [https://perma.cc/779N-93GX] [hereinafter UNHCR Guidelines] (stating particularity potentially needs additional consideration).

75. See Heartland Alliance, supra note 63, at 4 (arguing social distinction requirement disingenuous). This advisory document argues that the social distinction requirement based on society’s perspective “draws false lines that honor neither the purpose nor intent of the statute,” because a persecutor may, and typically does, view his or her targeted victim differently than society as a whole. Id. at 8.

76. See W-G-R-, 26 I. & N. Dec. 208, 212 (B.I.A. 2014) (changing name of social visibility element to social distinction); M-E-V-G-, 26 I. & N. Dec. 227, 228, 236-37 (B.I.A. 2014) (clarifying social visibility requirement); Petition for Writ of Certiorari, supra note 9, at 15, 20-21, 35-37 (highlighting “clarity” argument of new definition operates similarly to complete change). The three criteria that make up the definition of PSG have evolved over time but arguably “comport[] with the statutory scheme.” See Brief for the Respondent in Opposition at 27-28, Reyes v. Sessions, 138 S. Ct. 736 (2017) (No. 17-241), 2017 WL 6206334 (stating argument for applicability of Chevron deference). The requirement that each of these three criteria be met is argued to be a broader, more difficult, and more reaching standard for applicants to meet. See Velasco, supra note 1, at 238 (discussing test more rigorous than UNHCR intended); see also Reply Brief for Petitioner at 2, 4, 8, 11-12, Reyes v. Sessions, 138 S. Ct. 736 (2017) (No. 17-241), 2017 WL 6524820 (arguing definition “graft[s]” new requirements onto original requirement).

77. See supra note 16 and accompanying text (identifying whether BIA afforded Chevron deference central reason for circuit split). All the circuit courts have spoken on this issue in one way or another, primarily as to whether they agree or disagree with the most recent 2014 “social visibility” requirement. See generally Paiz-Moralez v. Lynch, 795 F.3d 238 (1st Cir. 2015) (accepting new clarification of PSG definition without question); Rodas-Orellana v. Holder, 780 F.3d 982 (10th Cir. 2015) (holding new definition consistent with precedent); Paloka v. Holder, 762 F.3d 191 (2d Cir. 2014) (providing deference to BIA definition without analysis); Rojas-Perez v. Holder, 699 F.3d 74 (1st Cir. 2012) (doubting rational application of social visibility requirement); Orellana-Monson v. Holder, 685 F.3d 511 (5th Cir. 2012) (accepting social visibility new requirement).


79. See supra note 14 and accompanying text (elaborating on reasons for Third and Seventh Circuits’ positions).
others, has afforded deference to the BIA’s definition, arguing the BIA’s definition is consistent with its precedent of “group[s] having clear boundaries and [use of] commonly accepted definitions.”

III. ANALYSIS

*Chevron* deference should not be afforded to the BIA’s most recent definition of PSG because the definition is too narrowly confined by the terms “particularity” and “social distinction.” Much of the debate about whether to provide *Chevron* deference to the BIA rests on the idea that through the promulgation of new standards, and subsequent failure by federal courts to apply them, the system has failed to provide litigants with basic tenets of notice, stability, and predictability. This section argues that the current definition is in contravention of the goals of the U.S. immigration system and that the widespread confusion caused by the federal circuit split is damaging to an immigration system intended to protect refugees who rely on these basic tenets. The system, however, can be rectified by the BIA reverting to its original definition of PSG; furthermore, the existing agency has the requisite expertise and accountability to ensure these tenets are the touchstone of immigration law.

A. Particularity and Social Distinction: Undeserving of *Chevron*

The BIA has the requisite rulemaking authority as it was created through the Department of Justice to act as an administrative appellate body and it was granted the power to issue precedential, binding decisions on the administration of U.S. immigration law. The first *Chevron* prong is satisfied because it is clear from the record that the legislative intent regarding what the term PSG should mean is virtually non-existent. What deserves the most attention, and has garnered such attention from the federal circuits, is the second step of *Chevron*: If the term is ambiguous, the court discerns whether the BIA’s interpretation of

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80. See Reyes v. Lynch, 842 F.3d 1125, 1135 (9th Cir. 2016), cert. denied, 138 S. Ct. 736 (2018); Brief for the Respondent in Opposition, supra note 76, at 31 (citing respondent brief arguing for deference). The Ninth Circuit’s decision to afford deference to the BIA definition was on petition for certiorari, and denied as of January 16, 2018. See Reyes, 138 S. Ct. at 736; Petition for Writ of Certiorari, supra note 9, at 34-37 (citing petitioner brief arguing against deference).

81. See infra Part III.A.

82. See Eyer, supra note 9, at 666-67 (outlining basic arguments against continuous changing of rules); supra note 63 and accompanying text (detailing troubles for litigants and attorneys in application of PSG in removal proceeding).

83. See infra Part III.B.

84. See infra Part III.C.


86. See supra note 12 and accompanying text (highlighting lack of international input in addition to burden of lack of congressional input). That the term was added as a “mere afterthought” at the 1951 Convention is of little assistance, and the only sound indication of legislative intent is that Congress sought to get in line with international standards in the incorporation of the 1980 Act. See Acosta, 19 I. & N. Dec. 211, 232 (B.I.A. 1985); supra note 12 and accompanying text (lamenting lack of legislative intent for defining PSG).
the term is arbitrary, capricious, and contrary to law, or reasonable.\textsuperscript{87} The BIA’s additions of “particularity” and “social visibility” to PSG is contrary to law and capricious as the terms are inconsistent with precedent; arbitrary due to lack of care dedicated to the development of the terms; and altogether unreasonable and unpersuasive, as illustrated by the circuit split and negative ripple effects on asylum seekers and those involved with the system and, therefore, the BIA’s additions should not be afforded \textit{Chevron} deference.\textsuperscript{88}

While inconsistency with precedent alone does not necessarily preclude an agency from being a candidate for \textit{Chevron} deference, it can be a determinative factor when the agency does not clearly recognize that the change is a departure from precedent and provide adequate reasons why, as has occurred here.\textsuperscript{89} The BIA is “entitled to considerably less deference” than a consistent agency action as its two additional definitions are radical departures from precedent.\textsuperscript{90} The BIA states that it has merely clarified the test; but, the two new requirements make the test inherently more demanding on its face and substantively inconsistent with precedent as it narrows what qualifies as a PSG significantly.\textsuperscript{91} This inconsistency is supported in the Seventh and Third Circuits as well as the petitioner’s most recent petition for certiorari brief.\textsuperscript{92} In the most recent petition for certiorari, petitioner’s brief identified that respondent essentially had to concede inconsistency, as there was no other way to describe what the BIA had done.\textsuperscript{93} Using phrases such as “additional criteria” and “grafting” did not sufficiently explain away the addition of two entirely new requirements to a definition that previously had one.\textsuperscript{94} The Seventh Circuit refused to follow the new social distinction requirement, stating that it was inconsistent and “ma[de] no sense.”\textsuperscript{95} The court cited three specific examples of groups that met the

\begin{enumerate}
\item See Bockley, \textit{supra} note 29, at 279 (noting lack of consistent results); see also \textit{Chevron}, 467 U.S. at 843 (articulating agency’s ability to formulate policy).
\item See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (emphasizing \textit{Chevron} principle of initial agency interpretation not being “carved in stone”).
\item See Reply Brief for Petitioner, \textit{supra} note 76, at 2 (stating government “freely admits” BIA refined methodology).
\item See \textit{id.}; \textit{supra} note 16 and accompanying text (describing the Third and Seventh Circuits’ perspectives).
\item See Reply Brief for Petitioner, \textit{supra} note 76, at 2 (noting respondent said BIA grafted additional criteria).
\item See \textit{id.} at 3.
\item See \textit{Gatimi} v. Holder, 578 F.3d 611, 615 (7th Cir. 2009) (arguing definition should not receive deference).
\end{enumerate}
original PSG test, but not the new definitional requirements. The Third Circuit refused to afford deference on similar grounds.

The inconsistency between the new definition and the old makes it difficult to reconcile how groups who already had protection would maintain a claim. The requirement now poses an “unsurmountable obstacle to refugee status,” despite already granting protections under the first definition. The reliability of precedent is already threatened by change in executive leadership every four to eight years dictating agency policy; an agency should be reluctant to so swiftly change its long-held interpretation and should be required to provide numerous reasons as to why it has done so. Critics of agencies cite this as an issue—that when agencies are acting in response to the election of the president, although possibly reflecting public sentiment, the creation of such precedent is not that of legislative branch of Congress, and is in contravention with applying its agency expertise “dispassionately.” Thus, although there is a benefit to the style of adjudicative lawmaking the BIA engages in, each decision must be carefully drafted to maintain consistent, reliable precedent.

When an agency puts forth an inconsistent policy, it must provide adequate reason to do so or else such policy is arbitrary. The BIA did not spend the time to consider relevant factors or articulate a rational connection, nor did it attempt to do so when revisiting the requirements in subsequent opinions.

96. See id. (providing supporting examples of inconsistent results). The three groups that were afforded protection under PSG by the BIA, that have no socially visible characteristics as a group, were: women opposed to female genital mutilation, homosexuals required to register in Cuba, and former members of the El Salvador national police. See id. at 615-16. The Seventh Circuit opined that these groups would fail under the social visibility test. See id.

97. See Valdiviezo-Galdamez v. Att’y Gen., 663 F.3d 582, 608-09 (3d Cir. 2011) (refusing to provide deference to BIA).

98. See Valdiviezo-Galdamez, 663 F.3d at 608. The court suggests remand is necessary so the BIA can attempt to “reconcile the two interpretations in a coherent way.” See id. at 612 (Hardiman, J., concurring) (recommending remand to clarify differing explanations).

99. See id. at 604 (majority opinion) (questioning foundation of previously held protection under new definition).

100. See Shapiro & Levy, supra note 42, at 434-35 (discussing agency origins). Agencies are sometimes considered the “fourth branch” of government, have extensive powers, and are responsive to the electoral process—prompting some argument that they should be regulated more heavily as a check on executive power. See id. at 434-45, 434 n.223.

101. See supra note 42 and accompanying text (setting forth standard for providing reasons).

BIA did not consider the impact its decision would have on future cases, instead stating that its new articulation of the definition was to make case-by-case adjudication more concrete; however, as evidenced by what would be different outcomes for similarly situated individuals, that goal was not achieved. Additionally, it did not factor in the confusion circuit courts would face in pulling apart what exactly the social visibility requirement meant and who specifically needed to “see” the group for it to be socially visible, confounded, the Third and Seventh Circuits queried, “whether the BIA [even] understands the difference.” The BIA did not review any historical data pointing toward a need to evolve the definition, nor did it articulate a plausible explanation such as a change in circumstance or a new modern trend necessitating change. It follows, then, that a court “must reverse an agency policy when [it] cannot discern a reason for it.”

In addition to lack of reasoning, the definitions are unreasonable as they are misleading and appear to overlap, as the Third Circuit argued:

[A]ccording to the government, “social visibility” assesses whether the applicant has identified a group with a unifying characteristic that is perceived as discrete or set apart by the society, while “particularity” examines whether the proposed unifying characteristic for the proposed group is definable, as opposed to being too diffuse or subjective. . . . [W]e are hard-pressed to discern any difference between the requirement[s] . . . . Indeed, they appear to be different articulations of the same concept.

characteristic “so fundamental to identity or conscience”); C-A-, 23 I. & N. Dec. 951, 957-60 (B.I.A. 2006) (incorporating additional requirement). The original development of the social visibility requirement occurred because the BIA felt that it needed to add something to avoid PSG becoming a “catch all” applicable to all persons, and that recent U.N. guidelines had identified it as an important element. See C-A-, 23 I. & N. Dec. at 960-61.

105. See Henriquez-Rivas v. Holder, 707 F.3d 1081, 1083 (9th Cir. 2013). The BIA put forth the new requirements arguing groups in the past had commonly shared such characteristics; however, the Third Circuit identifies several groups that would not have met such a standard. See Valdiviezo-Galdamez v. Att’y Gen., 663 F.3d 582, 604 (3d Cir. 2011). They identified such groups as: women opposed to female genital mutilation, homosexuals required to register in Cuba, and former members of the El Salvador national police. See id. In identifying each of these, the court emphasizes that these characteristics are all internal and not visible whatsoever. See id.

106. See Valdiviezo-Galdamez, 663 F.3d at 606-07; see also Heartland Alliance, supra note 63, at 2 (stating BIA created confusion regarding social visibility meaning).

107. See Heartland Alliance, supra note 63, at 1-2. Significantly, circuit courts had to decide whether the departure was a meaningful change to the definition or a mere clarification; even the Second Circuit that decided it was more of a clarification remanded a case to the BIA to clarify their approach. See Paraketsova, supra note 15, at 459-60.

108. Judulang v. Holder, 565 U.S. 42, 64 (2011). This was an immigration case regarding a different provision of the INA; this court emphasized the inherent problems when the “rule is unmoored from the purposes and concerns of the immigration laws.” See id. Further, it argued that inconsistency due to lack of reasoning allows “irrelevant comparisons” surrounding laws that are in an area of “utmost importance” regarding immigration law. See id.

109. Valdiviezo-Galdamez, 663 F.3d at 608.
While not strictly bound by the UNHCR guidelines, it is illustrative that the United States consistently sought to get in line with international standards by way of its incorporation of the 1951 Convention through the 1967 Protocol.\footnote{While not strictly bound by the UNHCR guidelines, it is illustrative that the United States consistently sought to get in line with international standards by way of its incorporation of the 1951 Convention through the 1967 Protocol.} What is most concerning about these developments is that they seemingly reflect a 2002 United Nations update in which the UNHCR published a revised version of its guidelines offering “social perception” as an alternative test, allowing nations to add groups who were not traditionally included under the immutable characteristic test.\footnote{What is most concerning about these developments is that they seemingly reflect a 2002 United Nations update in which the UNHCR published a revised version of its guidelines offering “social perception” as an alternative test, allowing nations to add groups who were not traditionally included under the immutable characteristic test.} The BIA, however, placed arbitrary limits on avenues of relief, conflating social perception with a “requirement,” rather than providing separate options for withholding of removal applicants.\footnote{The BIA, however, placed arbitrary limits on avenues of relief, conflating social perception with a “requirement,” rather than providing separate options for withholding of removal applicants.} Based on these reasons, the courts should hold that the new PSG definition is undeserving of Chevron deference.\footnote{Based on these reasons, the courts should hold that the new PSG definition is undeserving of Chevron deference.}

B. Eroding American Immigration History and the System

1. The BIA’s Subjective Definitions Depart from a Necessary Objective Standard

The BIA’s subjective amendment of the definition is not rooted in American history and is far from the objective purpose of immigration law.\footnote{The BIA’s subjective amendment of the definition is not rooted in American history and is far from the objective purpose of immigration law.} Notwithstanding the fluctuations between the open frontier immigration era and the curtailing of immigration era, America’s history of immigration is generally indicative of a commitment to international refugee standards, the protection of refugees, and a desire for objectivity.\footnote{America’s history of immigration is generally indicative of a commitment to international refugee standards, the protection of refugees, and a desire for objectivity.} President Truman famously argued that

\footnote{President Truman famously argued that}
conferring overly broad discretionary powers to the then President, then the AG, and later the BIA, was unfair to alien residents. His argument was rooted in the idea that a move from objective findings to subjective feelings on a case-by-case basis was “not compatible with [the] system of justice.” However, the BIA—an agency that is supposed to help Americans “speak with one voice”—strays away from such objective ideals by creating a subjective, stringent standard.

Advocates argue that “it’s hard to see how any PSG-based claim can succeed, unless the BIA wants it to succeed.” Thus, allowing or disallowing applicants relief has become subjective and confusing. The result of the above criticized definition is that groups for which the BIA previously allowed withholding of removal under the Acosta definition are now subject to potential scrutiny under the lens of whether they groups with sufficient particularity or visibility; but by whom is this standard judged? The BIA drew “false lines that honor neither the purpose nor intent of the statute” when deciding such standards. It became an impossible requirement that the group be socially visible, in addition to the other requirements that left courts to query whether it meant literal ocular visibility, just a general knowledge, or further, as Judge Posner questioned, “[does] the asylum seeker need[] to put a target on his back announcing his PSG in order to qualify for asylum?”

2. Courts’ Differing Decisions Regarding Chevron Deference Fail to Provide Notice, Stability, and Predictability to Litigants

When only select appeals courts provide Chevron deference to the BIA, the results promote new conflicting legal standards, adversely affecting litigants’

116. See supra note 31 and accompanying text (relaying portion of Truman’s speech).
117. See Truman, supra note 27; supra note 31 and accompanying text.
118. See Chaffin, supra note 59, at 553 (identifying opinion of importance of uniform immigration-related regulations); supra notes 40-41 and accompanying text (citing creation of BIA and vital purpose of consistency interpreting standards).
119. HEARTLAND ALLIANCE, supra note 63, at 5 (questioning success of each claim against new definitions).
120. See Gatimi v. Holder, 578 F.3d 611, 615-16 (7th Cir. 2009) (illustrating inconsistent application and outcomes); HEARTLAND ALLIANCE, supra note 63, at 1-2.
121. See Gatimi, 578 F.3d at 615 (arguing against deference for definition). The three groups that were afforded protection under PSG by BIA that have no socially visible characteristics were: women opposed to female genital mutilation, homosexuals required to register in Cuba, and former members of the El Salvador National Police. See id. at 615-16. The BIA has clarified that social distinction is judged from the view of the society, not the persecutor, but it offers minimal guidance as to groups who develop from persecution because of the persecutor’s belief. See HEARTLAND ALLIANCE, supra note 63, at 8.
122. See HEARTLAND ALLIANCE, supra note 63, at 8 (discussing BIA’s misstep in failing to honor statute).
123. See id. at 2 (citing Third Circuit issues with new definitional requirements); see also Gatimi, 578 F.3d at 615-16 (discussing problems with visibility requirements). Judge Posner also addressed the inherent concept of a group that is persecuted being socially visible and felt that if a group is being persecuted, members of that group would not want to make themselves visible, which only makes the BIA requirement circular, at best. See Gatimi 578 F.3d at 615.
right to basic tenets of notice, stability, and predictability. On petition to the Supreme Court, a central argument was that announcing a new interpretation while reaffirming different precedents “thwart[ed] any semblance of notice and predictability, and constitute[d] ‘simpl[e] disregard [for] rules that are still on the books.’” This is evidenced by the public outcry that came from lawyers, advocates, and applicants alike. Law offices released document after document explaining how to best advise a client “in the wake of” the new guidelines, advocacy groups released advisory documents for the immigration community, and the media documented stories of the importance of immigration and the confusion associated with following the new guidelines. Such an outcry—a response to the failure of being provided with basic tenets of notice, predictability, and stability—directly contradicts U.S. history of protecting immigrants and the BIA’s long-standing, broad definition of what constitutes a PSG for the purposes of saving someone from their country of origin due to fear of persecution.

C. Opportunity for Hope

1. Revert to the Original Definition

The BIA can, and should, revert to its original definition of PSG. This Note does not do a full _Chevron_ analysis of the original definition, and thus cannot recommend one way or the other whether it would still be provided _Chevron_ deference today; however, several factors support the idea that the BIA should revert to the original 1985 proper and satisfactory definition of the term PSG—that a PSG was a group of persons who shared a common, immutable characteristic. The _Acosta_ court listed a wide range of characteristics that could possibly fall into this category, not placing any arbitrary limits. The

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124. See Eyer, supra note 9, at 666-67 (outlining basic arguments against continuous changing of rules); supra note 63 and accompanying text (detailing troubles for litigants and attorneys in application of PSG in removal proceeding).
126. See supra notes 59, 63 and accompanying text (arguing inconsistent application has significant consequences for noncitizens).
127. See supra note 63 and accompanying text (discussing clarification efforts after new definition).
128. See supra note 59 and accompanying text (arguing inconsistent application has significant consequences for noncitizens).
129. See supra notes 68-72 and accompanying text (explaining first definition of PSG).
130. See supra notes 68-72 and accompanying text (defining what characteristics PSG encompasses).
131. See Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985). The court writes “the shared characteristic might be an innate one, such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership.” Id.
During this time, cases were consistently decided based on this principle, circuit courts were not nearly as confused as they are today, and litigants had a clearer understanding of what was expected to meet the definition. 133

2. BIA’s Opportunity for Redemption

Immigration is a discretionary field with countless gaps in the statutes, and requires statutory construction and immigration-specific expertise to interpret the “excruciatingly technical provisions . . . of the INA,” provisions which are often overlapping and intertwined. 134 Despite the controversial new definitional requirements, the BIA is still the leading agency because of its unique position concerning immigration and its duty to interpret the INA. 135 The agency has been exercising its authority for over sixty years; such expertise has arguably become more of a specialization. 136 Additionally, the BIA is more politically 

132. See id. After much debate, the final definition appeared to appeal not just to those in the United States, but other countries as well, evidenced by Canada adopting a similar test and the United Kingdom suggesting that the test complemented the 1951 Convention standards. See Paraketsova, supra note 15, at 449-50.

133. See Paraketsova, supra note 15, at 449-50 (highlighting wide acceptance of definition). The test was “applauded by scholars and adopted widely” by circuit courts for over twenty years. See id. Over time, the test was refined so an individual could sort out what was and was not an immutable characteristic. See id. In fact, the Third Circuit, which currently refuses to provide the definition of Chevron deference, was quick to provide such deference under the original definition. See Valdiviezo-Galdamez v. Att’y Gen., 663 F.3d 582, 598 (3d Cir. 2011).

134. See Eyer, supra note 9, at 691 (highlighting need for BIA to eliminate discretionary nature and enhance uniformity); Legomsky, supra note 60, at 441 (bringing awareness to heightened complexities of INA). Not only is the INA complex, but the term PSG itself is a complex creature, where courts may be simply incapable or unreliable in making a determination of what bright line rule to apply. See Velasco, supra note 1, at 252 (questioning how courts confront question of what constitutes PSG). Velasco argues that PSG is difficult to define generally because it is a “prescriptive, legal construct rather than a descriptive of a naturally arising phenomenon.” Id.

135. See supra note 40 and accompanying text (detailing BIA responsibilities and listing high number of cases BIA issues).

136. See Eyer, supra note 9, at 698 (explaining BIA leading immigration agency in comparison to other agencies). There is a strong link between specialization and expertise, and the “expertise, in turn, should aid the BIA in achieving consistent outcomes. . . . Familiarity with one’s own prior decisions and the prior decisions of colleagues is an additional avenue for uniformity.” Legomsky, supra note 60, at 440 (emphasizing link between specialization and expertise). The BIA operates as a specialized board where members can be chosen because of preexisting experience, frequent contacts with governing legislation immerse the members in the statutory scheme, and if equipped with “specialized support staff . . . and resources” these ideals will enhance consistency. See id. at 440. Agency expertise may refer to simple expertise in the statute itself when the statute is particularly “complex, convoluted, or dependent on internal coherence for its consistency.” See Chaffin, supra note 59, at 532 (outlining categories of expertise satisfactory for Chevron). The BIA has identified that its mission is to attain uniformity principally through Chevron deference, stating that: 

[A] principal mission of the Board of Immigration Appeals is to ensure as uniform an interpretation and application of this country’s immigration laws as possible. . . . We certainly acknowledge the benefit to the adjudication process of having our decisions thus reviewable, particularly in view of the profound nature of the rights often at issue in the cases we review. . . . Assistance in achieving some measure of uniformity is provided by the “great deference” a court ordinarily must accord our interpretation of the governing statute.
accountable than the courts for the outcomes of its interpretation of a term, and thus is typically all the more likely to carefully review the message it is sending to the public.137 This political accountability stems from the BIA’s lawmaking role, which allows it to impose nationwide legal rules and act as leader of the frontline agencies that carry out the day-to-day operations of such legal rules, such as IJs and the Department of Homeland Security.138

Critics consistently argue that the expertise of statutory interpretation is better left to the courts and that courts should not defer to an agency.139 As illustrated in the previous Chevron analysis and discussion, this principle sometimes holds true; however, if the agency interprets a definition reasonably under Chevron, such as the BIA’s original interpretation of the term, its expertise should hold far greater weight.140 The BIA will hopefully have an opportunity for change; the agency should take that opportunity and revert to the original definition to align itself with Chevron deference principles and U.S. immigration principles, and to ensure equal protection for all refugees.141

IV. CONCLUSION

Chevron deference seeks to attain uniformity within the law, and in turn, such uniformity achieves consistent results for all those seeking refuge within the United States and sets out adequate guidelines for all those protecting the refugees. If we as a nation are to maintain our integral roots of taking in the poor, huddled masses in need of refuge, we must set out consistent, reliable principles that the federal courts are readily willing to defer to. To achieve these goals, we must defer to the BIA in its interpretation of the INA. However, such deference should only be provided if the definition meets the reasonableness test under Chevron. The current definition does not meet this test, however, there is still hope. The BIA is still the agency with the most expertise and it is in the best


137. See Chaffin, supra note 59, at 542-43 (questioning political accountability in immigration context). Despite Chaffin questioning which branch of government is more politically accountable, he immediately concedes that as a matter of judicial procedure, courts have a practice of reserving foreign policy or policy questions impacting international relations for agencies or the executive and legislative branches. See id. at 543-44.

138. See id. The belief is justified because the Court believes that those “‘directly responsible to the people whose welfare they advance or imperil’ are best suited to make the decisions.” See id. The courts’ role of making binding precedent alone holds them politically accountable. See id. at 544.

139. See id. at 523 (alleging courts “just as competent” to interpret PSG and denying BIA deference).

140. See id. at 507-08. “Institutional competence” divides interpretation cases into two categories: those that require the “traditional tools” of statutory construction and those that “manifest the application of the BIA’s immigration-specific expertise.” Id. at 508. The first definition, arguably the better definition, proffered by the BIA required basic tools of construction, but it also required immigration specific expertise and a deeper understanding of the area of law. See id. at 507-08.

141. See supra Section III.C.
position to execute day-to-day immigration operations and assist the system in achieving basic goals of notice and predictability. The BIA is deserving of the most respectful form of deference—Chevron deference—if the BIA reverts to its original definition, a definition in line with international standards and the most noble immigration goals of the United States.

Kristen Armstrong