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Do I Need to Pin a Target to My Back?: The Definition of “Particular Social Group” in U.S. Asylum Law

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DO I NEED TO PIN A TARGET TO MY BACK?: THE DEFINITION OF “PARTICULAR SOCIAL GROUP” IN U.S. ASYLUM LAW

*Nitzan Sternberg***

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* *See* *Gatimi v. Holder*, 578 F.3d 611, 616 (7th Cir. 2009) (noting that “[t]he only way, on the Board’s view, that the Mungiki defectors can qualify as members of a particular social group is by pinning a target to their backs with the legend ‘I am a Mungiki defector.’”).

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INTRODUCTION

More than ten years ago in Cameroon, Elizabeth became a widow.¹ Elizabeth's in-laws accused her of killing her husband for his property, and took away everything she owned.² Her in-laws shaved her head with a broken bottle, although scissors are customary.³ She was not allowed to see her children, bathe, or wear clothes for two months.⁴ Her husband's family forced her to sleep on the ground.⁵ After two months, she escaped with her children to her sister's home.⁶ A month later, her in-laws found her and demanded that she either pay the bride price or marry her husband's older brother, who already had two wives.⁷ When she told them that she would not marry her husband's brother and that she could not pay the bride price, her in-laws beat her.⁸ The in-laws threatened that if she did not comply with their demands within one month, they would kill her and take her children.⁹ Fortunately, Elizabeth and her children were able to leave Cameroon and come to the United States.¹⁰

1. See *Ngengwe v. Mukasey*, 543 F.3d 1029, 1031 (8th Cir. 2008).

2. See *id.* at 1030–32; T.S. Twibell, *The Development of Gender as a Basis for Asylum in United States Immigration Law and Under the United Nations Refugee Convention: Case Studies of Female Asylum Seekers From Cameroon, Eritrea, Iraq and Somalia*, 24 GEO. IMMIGR. L.J. 189, 213 (2010) (providing a more detailed version of the facts of Elizabeth Ngengwe's case than is presented in the Eighth Circuit case).

3. See *Ngengwe*, 543 F.3d at 1031; Twibell, *supra* note 2, at 214.

4. See *Ngengwe*, 543 F.3d at 1031; Twibell, *supra* note 2, at 214.

5. See *Ngengwe*, 543 F.3d at 1031.

6. See *id.* at 1032.

7. See *id.*

8. See *id.*

9. See *id.*

10. See *id.*

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More than eight years after requesting asylum, Elizabeth was granted asylum in the United States.¹¹ To be eligible for asylum, an asylum seeker must establish that she experienced persecution or fear of persecution on account of one of five enumerated grounds, including membership in a “particular social group” (“PSG”).¹² When Elizabeth’s case came before the United States Court of Appeals for the Eighth Circuit, the court held that Cameroonian widows constitute a PSG, and that the Immigration Judge (“IJ”) and Board of Immigration Appeals (“BIA”) erred in holding otherwise in her earlier asylum proceedings.¹³ One year after the Eighth Circuit’s decision, the BIA found Elizabeth eligible for asylum.¹⁴ After more than eight years, Elizabeth found refuge in the United States.¹⁵

Elizabeth’s case highlights how the confusion about which groups constitute PSGs can seriously delay meritorious asylum applications.¹⁶ Here, the immigration courts’ erroneous rulings invalidating Elizabeth’s PSG of female Cameroonian widows stood as a barrier to her asylum claim.¹⁷ Just before Elizabeth was granted asylum, the attorney who represented her explained that “Elizabeth’s case is approaching almost nine years in the asylum process, and one of the highest courts of the United States has found serious errors with the decision of both the Immigration Judge and the BIA.”¹⁸ Based on the duration of Elizabeth’s case, the attorney concluded that “[t]he oppression that Elizabeth has experienced in Cameroon has continued in the U.S. through the asylum process.”¹⁹

Thousands of refugees like Elizabeth seek asylum in the United States every year.²⁰ In 2010, the United States received more than

11. *See id.* (noting that Elizabeth submitted her asylum application in 2001).

12. *See* Immigration and Nationality Act § 1101(a)(42), 8 U.S.C.A. § 1101(a)(42) (West 2006).

13. *See Ngengwe*, 543 F.3d at 1034.

14. *See Elizabeth Ngengwe*, WORLD ORGANIZATION FOR HUMAN RIGHTS USA, http://www.humanrightssusa.org/index.php?option=com_content&task=view&id=203&Itemid=158 (last visited Jan. 20, 2012) (noting that after Human Rights USA filed an amicus brief, the BIA found Elizabeth Ngengwe eligible for asylum in December 2009).

15. *See id.*

16. *See Ngengwe*, 534 F.3d at 1034.

17. *See id.*

18. Twibell, *supra* note 2, at 229.

19. *Id.*

20. *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, OFFICE OF PLANNING, ANALYSIS, AND TECH., FY 2010 STATISTICAL YEAR BOOK I1 (2011), *available at* <http://www.justice.gov/eoir/statspub/fy10syb.pdf> (noting that the United States received 32,961 asylum applications in 2010 and granted asylum to 9,869 cases).

32,000 asylum applications,²¹ the second-highest number of applications in the world.²² The large number of refugees that seek asylum in the United States every year indicates the importance of U.S. asylum law and its substantial effect on the world refugee population.²³

A refugee seeking asylum in the United States must establish the eligibility of her asylum claim.²⁴ To be eligible for asylum in the United States, an applicant has to establish “persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”²⁵ The statute governing asylum law, the Immigration and Nationality Act (“INA”), does not define the phrase “particular social group.”²⁶ Asylees whose claims do not fit within the categories of race, religion, nationality, or political opinion often try to fit their claims within the undefined category of PSG.²⁷ As a result, a court’s interpretation of PSG can determine the outcome of a case.²⁸ In fact, among the five

21. *See id.*

22. U.N. HIGH COMM’R FOR REFUGEES, 2009 GLOBAL TRENDS, REFUGEES, ASYLUM-SEEKERS, RETURNEES, INTERNALLY DISPLACED AND STATELESS PERSONS 1 (2010), available at <http://www.unhcr.org/4c11f0be9.html> (noting that South Africa received more asylum applications than any other country in the world, and that the United States received the second largest number of asylum applications in the world in 2009).

23. *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, OFFICE OF PLANNING, ANALYSIS, AND TECH., FY 2009 STATISTICAL YEAR BOOK (2010), available at <http://www.justice.gov/eoir/statpub/fy09syb.pdf>.

24. *See* Immigration and Nationality Act, 8 U.S.C.A. § 1101(a)(42) (West 2006).

25. *Id.*

26. *See* Poroj-Mejia v. Holder, 397 F. App’x 234, 237 (7th Cir. 2010) (stating that the INA does not define PSG); *In re Acosta*, 19 I. & N. Dec. 211, 232 (B.I.A. 1985) (noting that “Congress did not indicate what it understood [‘PSG’] to mean”), overruled on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987); Victoria Neilson, Symposium, *Globalization, Security & Human Rights: Immigration in the Twenty-First Century: Homosexual or Female? Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims*, 16 STAN. L. & POL’Y REV. 417, 421 (2005).

27. *See* Poroj-Mejia, 397 F. App’x at 236; *In re Acosta*, 19 I. & N. Dec. at 232; Neilson, *supra* note 26, at 420 (noting that the INA does not define PSG, making it a desirable category for leftover claims which do not fit within race, religion, nationality or political opinion).

28. *See, e.g., In re C-A-*, 23 I. & N. Dec. 951, 961 (B.I.A. 2006), *aff’d sub nom.* Castillo-Arias v. Att’y Gen., 446 F.3d 1190 (11th Cir. 2006) (dismissing the appeal for the asylum case based on the holding that noncriminal drug informants of the Cali drug cartel do not constitute a PSG); *In re Kasinga*, 21 I. & N. Dec. 357, 365-68 (B.I.A. 1996) (holding that young women in a Togolese tribe, who have not had female genital mutilation (“FGM”) and who oppose the practice, constitute a PSG); *In re Acosta*, 19 I. & N. Dec. at 234-36 (denying eligibility for asylum based, among other factors, on the holding that Salvadoran taxi drivers do not constitute a PSG).

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grounds for asylum, PSG is the second most frequently used.²⁹ Additionally, the definition of PSG is the most debated ground for asylum.³⁰ For these reasons,³¹ the definition of this term merits analysis.

The debate about asylum law and the definition of PSG is partly informed by policy.³² Commentators advocating for a more inclusive definition of PSG assert that asylum law should comport with the humanitarian purpose of international refugee law.³³ On the other side of the debate, commentators in favor of restricting the definition of PSG make arguments based on the risk of tipping the balance struck by multilateral treaties, the risk of making the other enumerat-

29. See ANNA MARIE GALLAGHER & SHANE DIZON, 2 IMMIGR. LAW SERV. § 10:138 (2d ed. West 2010).

30. See James C. Hathaway & Michelle Foster, *Membership of a Particular Social Group*, 15 INT'L J. REFUGEE L. 477 (2003); see also *Fatin v. INS*, 12 F.3d 1233, 1238 (3d Cir. 1993) (Alito, J.) (citations omitted) (noting that “[b]oth courts and commentators have struggled to define ‘particular social group’”); *Summary Conclusions: Membership of a Particular Social Group, Expert Roundtable, San Remo, September 2001*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 312 (Erika Feller, Volker Turk & Frances Nicholson eds., 2003) [hereinafter UNHCR’S GLOBAL CONSULTATIONS] (noting that “membership in a particular social group is the Convention ground with the least clarity”).

31. See *supra* notes 26-30 and accompanying text.

32. In this policy debate, the yardstick problem of how to measure whether asylum law admits too many or too few refugees arises. The yardstick problem is best resolved by Congress as a policy matter and is outside the scope of this Note. This Note does, however, respond to the argument that adopting the Third and Seventh Circuits’ approach will open the floodgates for refugees. See *infra* notes 35–38 and accompanying text; *infra* notes 357-362 and accompanying text. The yardstick problem centers on the question of whether asylum law admits the correct number of refugees. In contrast, the floodgates argument criticizes various asylum approaches and decisions based on fears of a dramatic increase of refugees in the United States. This Note only tackles the floodgates argument to the extent of defending the Third and Seventh Circuits’ approach against it, without commenting specifically on whether the overall number of persons granted asylum in the United States is too high or too low.

33. See Leonard Birdsong, Symposium, *Immigration: To Admit or Deny?: “Give Me Your Gays, Your Lesbians, and Your Victims of Gender Violence, Yearning To Breathe Free of Sexual Persecution . . .”*: *The New Grounds for Grants of Asylum*, 32 NOVA L. REV. 357, 360 (2008) (asserting that asylum law and human rights law are closely interrelated) (citations omitted); Arlene Kanter & Kristin Dadey, *The Right to Asylum for People with Disabilities*, 73 TEMP. L. REV. 1117, 1118, 1120 (2000) (asserting that after World War II, the United States and other countries “sought to fulfill their humanitarian obligations to refugees” in the development of asylum law); Kristen Walker, *Defending the 1951 Convention Definition of Refugee*, 17 GEO. IMMIGR. L.J. 583, 585 (2003) (citing James Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT’L L.J. 129, 173 (1990)) (rebutting Hathaway’s argument that the 1951 Convention is about the triumph of state interest and arguing that the 1951 Convention has a humanitarian purpose).

ed categories redundant, and the dangers of using PSG as a “safety net.”³⁴

The most prominent argument in favor of restricting the definition of PSG is based on concerns about opening the floodgates.³⁵ Advocates of restricting asylum law argue that if the definition of PSG is too broad, the United States will “open the floodgates” of refugees.³⁶ Other commentators contend that floodgate concerns are unwarranted.³⁷ These commentators base their contention on three factors: the negligible effect of past expansions in U.S. asylum law, how floodgates fears did not materialize in other nations, and the hurdles asylum applicants must overcome to obtain asylum.³⁸

The policy debate about U.S. asylum law can be boiled down to arguments about whether asylum laws are too inclusive or too restrictive.³⁹ This Note advocates the position that adjudication concerning PSG should be uniform across jurisdictions to avoid inconsistency and

34. See JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 158-61 (1991) [hereinafter HATHAWAY, *REFUGEE STATUS*]; T. Alexander Aleinikoff, *Protected Characteristics and Social Perceptions: An Analysis of the Meaning of “Membership in a Particular Social Group,”* in UNHCR’S GLOBAL CONSULTATIONS, *supra* note 30, at 285.

35. See MICHELLE FOSTER, *INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS: REFUGE FROM DEPRIVATION* 344 (2007) (observing that there is “a ‘Bresnahan’ concern . . . either explicitly or implicitly underpinning decision-makers’ caution” in claims based on socio-economic deprivation and other bases); KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* 27 (2007) (stating that “the deep-seated fear persists that, absent strict migration controls, the United States risks being overwhelmed by hordes of immigrants of different races, cultures, and creeds who will ‘take over’ the country . . . Thus, any debate about immigration—from relatively minor efforts to more aggressive ones—must invariably confront the floodgates concern.”).

36. See *supra* note 35 and accompanying text.

37. See, e.g., Marisa Silenzi Cianciarulo & Claudia David, *Pulling the Trigger: Separation Violence as a Basis for Refugee Protection for Battered Women*, 59 AM. U. L. REV. 337, 380-81 (2009); Aubra Fletcher, Note, *The REAL ID Act: Furthering Gender Bias in U.S. Asylum Law*, 21 BERKELEY J. GENDER L. & JUST. 111, 129 (2006); Sarah Siddiqui, Note, *Membership in a Particular Social Group: All Approaches Open Doors for Women to Qualify*, 52 ARIZ. L. REV. 505, 527-28 (2010).

38. See, e.g., Cianciarulo & David, *supra* note 37, at 380-81 (citing *In re Kasinga*, 21 I. & N. Dec. 357, 366 (B.I.A. 1996)) (discussing how the BIA’s recognition of a social group based on female genital mutilation in *Kasinga* faced similar floodgate fears which never materialized and explaining how asylees have other obstacles to surpass after establishing membership in a social group); see Fletcher, *supra* note 37, at 129 (explaining the favorable experience of Canada); Siddiqui, *supra* note 37, at 527-28 (describing how the addition of gender as a basis for asylum had a negligible effect on asylum applications and other elements that asylees need to prove).

39. See *supra* notes 33-38 and accompanying text.

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arbitrariness.⁴⁰ There are significant differences among the circuit courts' approaches to defining PSG.⁴¹ These differences come from the circuit courts' use of different legal tests to define PSG.⁴² The different approaches to defining PSG have led to a circuit split between the Ninth Circuit, the Third and Seventh Circuits, and the circuit courts that follow the BIA.⁴³ Specifically, in *Gatimi v. Holder*, the Seventh Circuit rejected the approach used by the BIA to define PSG, thus moving away from the definition of PSG used by the majority of circuit courts.⁴⁴ Two years later, the Third Circuit followed suit, also rejecting the BIA's approach.⁴⁵ This Note will refer to the Third and Seventh Circuits as the "dissenting circuits."⁴⁶

This Note analyzes the definition of PSG in asylum law. Specifically, it examines the various tests that different circuit courts use to define PSG. Rather than focus on a specific affected group,⁴⁷ this Note

40. See Lindsay M. Harris & Morgan M. Weibel, *Matter of S-E-G: The Final Nail in the Coffin for Gang-Related Asylum Claims?*, 20 LA RAZA L.J. 5, 25 (2010); Michael G. Heyman, *Protecting Foreign Victims of Domestic Violence: An Analysis of Asylum Regulations*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 115, 120 (2008) [hereinafter Heyman, *Protecting Foreign Victims*]; Michele A. Voss, Note, *Young and Marked for Death: Expanding the Definition of "Particular Social Group" in Asylum Law to Include Youth Victims of Gang Persecution*, 37 RUTGERS L.J. 235, 252-53 (2005); see also JAYA RAMI-NOGALES ET AL., REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 79 (2009) [hereinafter, RAMI-NOGALES, PROPOSALS FOR REFORM]; Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 299 (2007).

41. See, e.g., *Perdomo v. Holder*, 611 F.3d 662 (9th Cir. 2010); *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009).

42. See *infra* Part II.

43. See *infra* Part II (describing the conflict between the Ninth Circuit, the Third and Seventh Circuits, and the courts that follow the BIA, which include the First, Second, Third, Fourth, Sixth, Eighth, Tenth and Eleventh Circuits); see also *infra* notes 314 and accompanying text (noting that the Fifth Circuit has not taken a definitive position on the issue); see also *Bayavarpur v. Holder*, 390 F. App'x 353 (5th Cir. 2010); *Orellana-Monson v. Holder*, 332 F. App'x 202, 203 (5th Cir. 2009); *Nkwonta v. Mukasey*, 295 F. App'x 279, 285-86 (10th Cir. 2008).

44. See 578 F.3d at 615 (rejecting the BIA's social visibility test).

45. See *Valdiviezo-Galdamez v. Att'y Gen.*, No. 08-4564, 2011 U.S. App. LEXIS 22565, at *67 (3d Cir. Nov. 8, 2011).

46. Although the Ninth Circuit's approach also differs from the approach of the majority of the circuits that follow the BIA, the designation of "dissenting circuits" for the approach of only the Third and Seventh Circuits is merely for purposes of clarity and does not imply that the Ninth Circuit agrees with the circuits that follow the BIA.

47. See, e.g., Cianciarulo & David, *supra* note 37 (proposing that battered women from severely abusive relationships should be recognized as a social group); Tessa Davis, Note, *Lost in Doctrine: Particular Social Group, Child Soldiers, and the Failure of U.S. Asylum Law to Protect Exploited Children*, 38 FLA. ST. U. L. REV. 653,

looks at the definition of PSG in general, emphasizing strengths and weaknesses of the different approaches currently practiced in the United States. This point of view allows for a resolution to the conflict among the circuits that is not dependent on the fate of a specific group. Part I explains the domestic and international legal framework of PSG in U.S. asylum law. Part II analyzes the different tests that the circuit courts use to define PSG. Finally, Part III proposes a resolution to the conflicting definitions and argues that the Third and Seventh Circuits have formulated the best approach to defining PSG⁴⁸ because the approach is easiest to apply, based on coherent statutory analysis, and consistent with the United States' international obligations. Given the difficulty of passing immigration legislation creating

677 (2011) (arguing that courts should recognize child soldiers as a PSG); Fatma E. Marouf, *The Emerging Importance of "Social Visibility" in Defining a "Particular Social Group" and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL'Y REV. 47, 78-102 (2008) (analyzing the effect of the definition of social group on claims based on sexual orientation and gender); Siddiqui, *supra* note 37 (arguing that women should be a cognizable social group); Voss, *supra* note 40 (assessing the impact of the definition of social group on former gang members).

48. For a similar argument in an article focused on a gang-related BIA case and the problem of PSG in the context of gang-related asylum claims, see Harris & Weibel, *supra* note 40, at 23 (stating that "[t]he authors are hopeful that the Seventh Circuit's decisions in *Gatimi* and *Benitez Ramos* will encourage other circuits to free themselves from the confines of the *Chevron* deference that they have been applying to *S-E-G*'s social visibility and particularity requirements and return to the original *Acosta* test as Judge Posner [of the Seventh Circuit] and other Circuit Judges, including Judge B. Fletcher [of the Ninth Circuit] suggest"); Valdiviezo-Galdamez, 2011 U.S. App. LEXIS 22565, at *67; *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009); *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009); *In re S-E-G-*, 24 I. & N. Dec. 579 (B.I.A. 2008); *In re Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985), *overruled on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). For different solutions to the problems posed by the social visibility test, see Kristin A. Bresnahan, Note, *The Board of Immigration Appeals's New "Social Visibility" Test for Determining "Membership of a Particular Social Group" in Asylum Claims and Its Legal and Policy Implications*, 29 BERKELEY J. INT'L L. 649, 677-78 (2011) (proposing that the BIA adopt the approach of the United Nations High Commissioner for Refugees ("UNHCR")—defining a PSG as a group that satisfies either immutable characteristics or social visibility); Brian Soucek, Comment, *Social Group Asylum Claims: A Second Look at the New Visibility Requirement*, 29 YALE L. & POL'Y REV. 337, 338-39 (2010) (arguing that "[p]roperly interpreted, the [social] visibility criterion serves as a test of objectivity . . . it prevents applicants from concocting ad hoc social groups in their quest for asylum. What it does not do is demand that individuals be visually recognizable as group members in order for courts to recognize their asylum claims," and that the solution should not consist of abandoning the social visibility test, but instead, "the government need only reaffirm what should be obvious: Social visibility has nothing to do with how groups look").

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a uniform definition of PSG,⁴⁹ this Note proposes that the Supreme Court⁵⁰ should adopt the approach of the dissenting circuits to achieve the goals of uniformity and consistency in asylum law.

I. ASYLUM LAW

To set up the circuit split about the meaning of PSG that will be discussed in Part II, this Part presents an overview of the domestic and international legal framework for PSG in U.S. asylum law. It first discusses the domestic and international legal framework, and then goes on to present the cases that have developed the term PSG.

A. U.S. Asylum Law

The United States has a robust legal framework that shapes the definition of PSG. The statutory basis for “membership in a particular social group” as a ground for asylum comes from the Refugee Act of 1980, which amended the INA.⁵¹ The statute defines a “refugee” as:

[A]ny 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

49. See RUTH ELLEN WASEM, CONGRESSIONAL RESEARCH SERVICE, R41704, TITLE 1 (2011), available at http://digitalcommons.ilr.cornell.edu/key_workplace/810/. Bills in the House and Senate propose a clarification of the definition of PSG. See Refugee Protection Act of 2011, H.R. 2185, 112th Cong. § 5(a)(D) (2011); Refugee Protection Act of 2011, S. 1202, 112th Cong. § 5(a)(D) (2011); see also 157 Cong. Rec. H5150-02 (2011); *Bill Summary & Status: 112th Congress (2011-2012) H.R. 2185* THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.2185>: (last visited Sept. 12, 2011); *Bill Summary & Status: 112th Congress (2011-2012) S. 2012*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN01202>: (last visited Sept. 12, 2011).

50. The Court has never expressly decided the meaning of PSG. See Stanley Dale Radtke, *Defining a Core Zone of Protection in Asylum Law: Refocusing the Analysis of Membership in a Particular Social Group to Utilize Both the Social Visibility and Group Immutability Component Approaches*, 10 J.L. & SOC. CHALLENGES 22, 37 (2008). The Supreme Court denied certiorari on an unpublished case about the meaning of PSG. See Petition for Writ of Certiorari at *10, *Contreras-Martinez v. Holder*, 346 F. App’x 956 (4th Cir. 2009) (No. 09-830), 2010 WL 128010; see also Brief for the Respondent in Opposition at 8, *Contreras-Martinez*, 346 F. App’x 956 (No. 09-830), 2010 WL 1513110. For a discussion of why this unpublished case alleging a PSG of youths who refuse to join gangs, however, was not a good vehicle for resolving the circuit split about the meaning of PSG, see *infra* notes 301-306 and accompanying text.

51. See 8 U.S.C.A. § 1101(a)(42) (West 2006); H. R. Rep. No. 96-781 (1980) (Conf. Rep.) (stating how the Refugee Act of 1980 amends the Immigration and Nationality Act’s definition of refugee).

herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.⁵²

Neither the statute nor its legislative history define PSG.⁵³ Therefore, the statute does not determine the meaning of PSG.⁵⁴

When ruling on an asylum claim, most courts look at several elements derived from both statutory and case law. First, the asylum applicant has the burden to show that she meets the definition of refugee.⁵⁵ Specifically, she has to show that she has a well-founded fear of persecution on account of one of the enumerated categories.⁵⁶ Second, persecution must be caused by the government or by someone who the government is unwilling or unable to control.⁵⁷ Third, the “nexus” requirement necessitates evidence that the persecution or threatened persecution is “on account of” race, religion, nationality, political opinion, or membership in a particular social group.⁵⁸ Finally, “well-founded fear” of persecution has both objective and subjective components.⁵⁹

52. 8 U.S.C.A. § 1101(a)(42) (West 2006).

53. *See* Poroj-Mejia v. Holder, 397 F. App'x 234, 237 (7th Cir. 2010) (stating that the INA does not define social group); *In re Acosta*, 19 I. & N. Dec. at 232; 3-33 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 33.04 (2010) (citing *Fatin v. INS*, 12 F.3d 1233, 1239 (3d Cir. 1993)) (discussing the scant legislative history about the definition of social group); Radtke, *supra* note 50, at 28.

54. *See supra* note 53.

55. *See* Immigration and Nationality Act § 208(b)(1)(B), 8 U.S.C.A. § 1158(b)(i) (West 2009).

56. *See* *I.N.S. v. Elias Zacarias*, 502 U.S. 478, 483 (1992) (holding that an asylum applicant, who was allegedly coerced into performing military service by a Guatemalan guerilla organization, must show evidence of a “well-founded fear” of persecution on account of his political opinion); *Sangha v. I.N.S.*, 103 F.3d 1482, 1486-87 (9th Cir. 1997) (noting that an asylum applicant must show that he has a well-founded fear of persecution on account of his political opinion).

57. *See, e.g.*, *Pavlova v. I.N.S.*, 441 F.3d 82, 91-92 (2d Cir. 2006) (reversing BIA asylum denial where applicant showed that the Russian government was unwilling to control persecution of Baptists driven by religious motives); *Fiadjoe v. Att'y Gen.*, 411 F.3d 135, 160-63 (3d Cir. 2005) (reversing BIA denial of asylum where country report explained that it was futile to report slave practices of Trokosi religious sect because the police were unwilling to stop such persecution); *Singh v. I.N.S.*, 94 F.3d 1353, 1360 (9th Cir. 1996).

58. *See* GORDON, MAILMAN & YALE-LOEHR, *supra* note 53, at § 33.04 (citing 8 U.S.C.A. § 1101(a)(42) (West 2006)).

59. *See generally* GORDON, MAILMAN & YALE-LOEHR, *supra* note 53, at § 33.04 (summarizing cases dealing with the subjective and objective components of the “well-founded fear” of persecution and their implications for the asylum applicant).

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Even if an asylum applicant can establish the elements of her claim, she may still face several hurdles before her application will be approved. For example, an application for asylum will be denied if the applicant has participated in the persecution of others, has a prior conviction of a serious crime, constitutes a security risk, or has firmly resettled in a third country.⁶⁰ Additionally, an asylum applicant usually must request asylum within one year of entering the United States.⁶¹

Asylum applicants can request alternative forms of relief, such as withholding of removal.⁶² Most cases that decide an applicant's eligibility for asylum also determine eligibility for withholding of removal.⁶³ As opposed to asylum, which is a discretionary form of relief,⁶⁴ withholding of removal is a mandatory form of relief.⁶⁵ Yet, withholding of removal is a less appealing form of relief because it puts a heightened burden on the applicant⁶⁶ and grants a lesser immigration status.⁶⁷

60. See 8 U.S.C.A. § 1158(b)(2) (West 2009).

61. See 8 U.S.C.A. §§ 1158(a)(2)(B), 1158(a)(2)(D) (West 2009) (permitting the consideration of an asylum application filed after the one year deadline if the applicant "demonstrates . . . the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application.")

62. See generally RICHARD D. STEEL, *STEEL ON IMMIGRATION LAW* § 8:15 (2d ed. 2010) (providing an overview of withholding of removal); GORDON, MAILMAN & YALE-LOEHR, *supra* note 53, at § 33.06 (presenting an overview of withholding of removal).

63. See STEEL, *supra* note 62, at § 8:15.

64. See 8 U.S.C.A. § 1158(b)(1) (West 2009) (establishing that "[t]he Secretary of Homeland Security or the Attorney General *may* grant asylum") (emphasis added).

65. See Immigration and Nationality Act § 241(b)(3), 8 U.S.C.A. § 1231(b)(3)(A) (West 2005) (mandating that "the Attorney General *may not* remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion") (emphasis added).

66. See STEEL, *supra* note 62, at § 8:8 (citing *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987)) (noting that the Supreme Court determined that asylum has a lesser standard than the clear probability standard required for withholding of removal).

67. See Immigration and Nationality Act § 209, 8 U.S.C.A. § 1159 (West 2010) (mandating that asylum applicants are eligible for permanent resident status); *Cardoza-Fonseca*, 480 U.S. at 429 n.6 (noting that unlike asylum applicants, those who have obtained withholding of removal are not eligible to become permanent residents); STEEL, *supra* note 62, at § 8:15 (2010) (noting that withholding of removal does not result in legal permanent resident status and only continues as long as eligibility for withholding of removal can be demonstrated).

Depending on whether the asylum application is affirmative⁶⁸ or defensive,⁶⁹ an asylum case can be decided in an asylum office or in proceedings.⁷⁰ After an interview at a local asylum office, asylum officers decide affirmative asylum applications.⁷¹ An IJ adjudicates both affirmative asylum applications, referred by an asylum officer for hearings, and defensive asylum applications.⁷² On appeal, the case goes before the BIA.⁷³ Further appeal can bring the case to a federal circuit court.⁷⁴

When an asylum case reaches the circuit courts, the relationship between the administrative decisions of the BIA and the judicial decisions of the circuit courts has two aspects. First, the decisions of a circuit court are binding on the BIA when it considers cases arising in that circuit.⁷⁵ Second, in certain circumstances, the circuit courts are required to give *Chevron* deference to administrative decisions of the BIA.⁷⁶ The landmark *Chevron* decision addressed whether the Environmental Protection Agency's decision regarding polluting devices

68. Affirmative asylum applications are filed by noncitizens in valid nonimmigrant status. See GORDON, MAILMAN & YALE-LOEHR, *supra* note 53, at § 34.02.

69. Defensive asylum applications can be filed either as “a defensive action in response to expedited removal proceedings” or as “a defensive application filed with an immigration judge (IJ) in response to regular removal proceedings.” *Id.*

70. See STEEL, *supra* note 62, at § 8:9, 8:12 (providing an overview of asylum procedure); GORDON, MAILMAN & YALE-LOEHR, *supra* note 53, at § 34.02 (describing the procedures involved in an asylum application).

71. See STEEL, *supra* note 62, at §§ 8:9, 8:12; GORDON, MAILMAN & YALE-LOEHR, *supra* note 53, at § 34.02.

72. See 8 C.F.R. § 208.2(b) (2011) (determining the jurisdiction of IJs); GORDON, MAILMAN & YALE-LOEHR, *supra* note 53, at § 34.02.

73. See 8 C.F.R. § 1003.1(b)(9) (2011) (determining the BIA's appellate jurisdiction over IJ asylum decisions); STEEL, *supra* note 62, at § 8:12; GORDON, MAILMAN & YALE-LOEHR, *supra* note 53, at § 34.02.

74. See 8 U.S.C. § 1252 (2005); STEEL, *supra* note 62, at § 8:12; GORDON, MAILMAN & YALE-LOEHR, *supra* note 53, at § 34.02.

75. See *Singh v. Ilchert*, 63 F.3d 1501, 1508 (9th Cir. 1995) (citing *NLRB v. Ashkenazy Prop. Mgmt. Corp.*, 817 F.2d 74, 75 (9th Cir. 1987), *cert. denied* 501 U.S. 1217 (1991)) (asserting that “[a] federal agency is obligated to follow circuit precedent in cases originating within that circuit” in the context of the BIA's failure to discuss and distinguish Ninth Circuit precedent); Memorandum from Joseph E. Langlois, Chief, Asylum Div., to All Asylum Office Staff (Mar. 2, 2010), available at <http://www.uscis.gov/USCIS/Laws/Memoranda/2010/Asylum-Ramos-Div-2-mar-2010.pdf> (“The Seventh Circuit's decision is binding on those asylum cases arising within the jurisdiction of the Seventh Circuit. Within the Seventh Circuit, former gang membership may form a particular social group if the former membership is immutable and the group of former gang members is socially distinct.”).

76. See *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984).

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was based on a reasonable interpretation of the Clean Air Act.⁷⁷ In *Chevron*, the Court mandated a two-step process for courts reviewing an agency's construction of the statute that the agency applied.⁷⁸

Chevron calls for different approaches to judicial statutory interpretation depending on whether or not Congress has addressed the precise issue in the case.⁷⁹ First, if Congress has clearly spoken on the precise issue, then the agency and the court must give effect to Congress' intent.⁸⁰ But the court must reject administrative decisions that contravene congressional intent because the court is the final authority on statutory interpretation.⁸¹ Second, if Congress has not addressed the precise issue, a court can construe the statute only if there is an absence of a reasonable administrative interpretation of the issue.⁸² When the administrative agency has already construed a statute that is silent or ambiguous on a specific issue, the court must decide whether the agency's statutory construction is permissible.⁸³

The issue of the meaning of PSG falls under the second step of the *Chevron* analysis.⁸⁴ Given that PSG is not defined in the INA,⁸⁵ "Congress did not speak on the issue of what constitutes a 'particular social group,' one of the five listed categories that qualify for refugee . . . within the meaning of the INA."⁸⁶ The BIA construes the term PSG in cases determining whether an asylum applicant's purported PSG is cognizable.⁸⁷ In cases where PSG is at issue, *Chevron*

77. *See id.* at 840.

78. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 444-50 (1987) (rejecting the BIA's legal interpretation of asylum provisions as contrary to the intent of Congress); *Chevron*, 467 U.S. at 842-43 (citations omitted) ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First . . . is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."). *See generally* 6-51 ADMINISTRATIVE LAW § 51.01 (2010) (citing *Chevron*, 467 U.S. at 837).

79. *See Chevron*, 467 U.S. at 842-43.

80. *See id.*

81. *See id.*

82. *See id.*

83. *See id.*

84. *See, e.g., Castillo-Arias v. Att'y Gen.*, 446 F.3d 1190, 1196 (11th Cir. 2006).

85. *See supra* note 53 and accompanying text.

86. *Castillo-Arias*, 446 F.3d at 1196.

87. *See, e.g., id.*

requires the circuit courts to decide whether the BIA's interpretation of PSG is a permissible statutory construction.⁸⁸

B. International Origins of U.S. Asylum Law

U.S. asylum law fits within the larger framework of international law. Specifically, the definition of refugee in U.S. asylum law comes from a treaty that lays out the United States' obligations under international refugee law.⁸⁹ Under the Convention Relating to the Status of Refugees ("1951 Convention"),⁹⁰ a "refugee" is defined as someone who:

[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁹¹

The Convention and the travaux préparatoires⁹² do not define PSG.⁹³ As part of the definition of refugee, the meaning of PSG is

88. *See Chevron*, 467 U.S. at 842-43.

89. *See* Immigration and Nationality Act § 1101(a)(42), 8 U.S.C.A. § 1101(a)(42) (West 2006); 1967 Protocol Relating to the Status of Refugees, art. 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol]; Convention Relating to the Status of Refugees, art. 1, opened for signature July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter 1951 Convention].

90. The United States ratified the 1967 Protocol Relating to the Status of Refugees, which incorporated the 1951 Convention Relating to the Status of Refugees. *See* 1967 Protocol, *supra* note 89, art. 1 (acceding to the 1967 Protocol, the United States became a party to the treaty in 1968); JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 111 (2005) (explaining how the 1967 Protocol did not amend the 1951 Convention but instead incorporated the provisions of the 1951 Convention by reference, so by becoming a signatory to the 1967 Protocol, the U.S. accepted the terms of the 1951 Convention).

91. 1951 Convention, *supra* note 89, art. 1(A)(2).

92. Travaux préparatoires are "[m]aterials used in preparing the ultimate form of an agreement or statute, and esp., of an international treaty; the draft or legislative history of a treaty." BLACK'S LAW DICTIONARY (9th ed. 2009).

93. *See Fatin v. INS*, 12 F.3d 1233, 1239 (3d Cir. 1993) (quoting Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Rec. of the 3d Mtg., U.N. Doc. A/CONF.2/SR.3 at 14 and ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 219 (1966)) (noting that the history of the international agreement does not shed "much light on the meaning of the phrase 'particular social group'" because "membership in a particular social group" was added as an "afterthought" to the 1951 Convention after the Swedish representative proposed the language explaining only that "experience has shown that certain refugees had been persecuted because they belonged to particular social groups."); Maryellen

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significant for state parties and individuals seeking asylum.⁹⁴ The Refugee Act of 1980 adopted the definition of refugee from the ratified 1967 Protocol Relating to the Status of Refugees (“1967 Protocol”), which incorporated the 1951 Convention’s definition of refugee.⁹⁵ Congress implemented the United States’ international asylum obligations in the Refugee Act of 1980.⁹⁶ In addition, Congress codified a definition of refugee that the U.S. Supreme Court described as “virtually identical” to the definition of refugee in the 1951 Convention.⁹⁷ Therefore, the definition of refugee in U.S. statutory law comes directly from international law.⁹⁸

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, 509-10 (1993) (quoting U.N. Doc. A/CONF.2/SR.3, at 14 (1951)) (discussing how the Swedish delegate who proposed the incorporation of social group simply stated that “certain refugees have been persecuted because they belonged to particular social groups,” which does not help determine the meaning of social group); Elyse Wilkinson, Comment, *Examining the Board of Immigration Appeals’ Social Visibility Requirement for Victims of Gang Violence Seeking Asylum*, 62 ME. L. REV. 387, 401 (2010) (noting how the 1951 Convention did not define social group for the U.S or the international community).

94. Walker, *supra* note 33, at 583 (citing PIRKKO KOURULA, BROADENING THE EDGES: REFUGEE DEFINITION AND INTERNATIONAL PROTECTION REVISITED 40 (1997)) (noting that “[d]efining a refugee is not an inconsequential matter; rather, it is of practical importance and has significant consequences for both States and individuals”).

95. See 8 U.S.C.A. § 1101(a)(42) (West 2006); Pub. L. No. 96-212, 94 Stat. 102 (1980); 1967 Protocol, *supra* note 89, art. 1 (ratifying the 1967 Protocol, the United States became a party to the treaty in 1968); 1951 Convention, *supra* note 89, art. 1(A)(2). The 1967 Protocol is persuasive authority governing domestic asylum law. See 1967 Protocol, *supra* note 89, art. 1; *Abdelwahed v. INS*, 22 F. App’x 811, 815 (9th Cir. 2001) (holding that 1967 Protocol does not give the alien any rights beyond what is in U.S. immigration statutes and explaining that “the Protocol itself . . . is only a guide in determining Congressional intent”). The majority view is that the 1967 Protocol is nonself-executing, meaning that the 1967 Protocol is not binding. See *Abdelwahed*, 22 F. App’x at 815 (asserting that the 1967 Protocol is not self-executing); *Haitian Refugee Ctr. v. Baker*, 949 F.2d 1109, 1110 (11th Cir. 1991) (holding that Article 33 of the 1967 Protocol is not self-executing); Bret Thiele, *Persecution On Account Of Gender: A Need For Refugee Law Reform*, 11 HASTINGS WOMEN’S L.J. 221, 223 (2000). See generally RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, § 111 cmt. h, i (1987) (providing an overview of how nonself-executing treaties are persuasive authority, as opposed to mandatory authority, which courts are not obligated to follow).

96. See Patrick J. Glen, *Is the United States Really Not a Safe Third Country?: A Contextual Critique of the Federal Court of Canada’s Decision in Canadian Council for Refugees, et al. v. Her Majesty the Queen*, 22 GEO. IMMIGR. L.J. 587, 615 (2008) (noting that the text and practice of U.S. asylum law is commensurate with the international provisions governing asylum).

97. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 437 (1987) (stating that the Congressional definition of refugee and the definition of refugee in the 1951 Convention

The international law framework for the definition of PSG in the United States comes from the international treaties discussed above, and from the guidelines of the United Nations High Commissioner for Refugees (“UNHCR”). The 2002 UNHCR Guidelines shed light on the meaning of PSG in U.S. asylum law.⁹⁹ The UNHCR Guidelines instruct State parties to the 1967 Protocol to determine whether a PSG has a common protected characteristic, and only if there is no protected characteristic, to determine whether society recognizes the group.¹⁰⁰ Although the UNHCR Guidelines, a complement to the UNHCR Handbook,¹⁰¹ are not binding on the United States, the U.S. Supreme Court has given the UNHCR Handbook considerable weight in informing the meaning of the 1967 Protocol.¹⁰² In addition, both the BIA and the circuit courts have referred to the UNHCR Handbook and Guidelines in determining the meaning of PSG.¹⁰³

Article 1(2) are “virtually identical”); Glen, *supra* note 96, at 615 (noting that the text and practice of U.S. asylum law is commensurate with the international provisions governing asylum).

98. See Immigration and Nationality Act, 8 U.S.C.A. § 1101(a)(42) (West 2006); 1967 Protocol, *supra* note 89, art. 1; 1951 Convention, *supra* note 89, art. 1.

99. See U.N. High Comm’r for Refugees, Guidelines on Int’l 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, U.N. Doc. HCR/GIP/02/02, at 3 (May 7, 2002) [hereinafter UNHCR, Guidelines] (providing interpretive legal guidelines to State parties of the 1951 Protocol and/or 1967 Protocol regarding the meaning of “particular social group”).

100. See *id.* at 3-4 (stating that “a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society” and that “[i]f a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society”); see also Hathaway & Foster, *supra* note 30, at 480-84, 489-90 (discussing how the UNHCR Guidelines purport to adopt a merged framework using both the protected characteristics approach and the social perception test, but do not succeed in doing so, and providing an overview of the merits and criticisms of the protected characteristics approach and the social perception test).

101. See UNHCR, Guidelines, *supra* note 99, at 1.

102. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438-39 n.22 (1987) (noting that although the UNHCR Handbook does not have “the force of law . . . the Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform [and] [i]t has been widely considered useful in giving content to the obligations that the Protocol establishes”).

103. See, e.g., *Perdomo v. Holder*, 611 F.3d 662, 668 (9th Cir. 2010) (citing the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (Geneva 1992)) (referring to the UNHCR Handbook as support for the statement that a PSG does not have to be defined narrowly); *Castillo-Arias v. Att’y Gen.*, 446 F.3d 1190 (11th Cir. 2006) (citing *Cardoza-Fonseca*, 480 U.S. at 436-37); *Castellano-Chacon v. INS*, 341 F.3d 533, 546-47 (6th Cir. 2003); *In re C-A-*, 23 I. & N. Dec. 951,

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The UNHCR Guidelines, 1951 Convention, and 1967 Protocol are important sources of international law for determining the definition of PSG in U.S. asylum law.¹⁰⁴ The United States' intention to abide by international law is significant in determining how courts should define PSG.

C. Board of Immigration Appeals and Federal Circuit Court Cases

After having discussed the domestic and international framework for PSG, this section provides a chronological overview of BIA and circuit court cases that interpret PSG. This case law serves as a critical foundation for the current circuit split on the meaning of PSG. The BIA's interpretation of PSG informs the decisions of the circuit courts through *Chevron* deference.¹⁰⁵ Additionally, the Ninth Circuit cases in the next section serve as important precedent for the Ninth Circuit's approach today.¹⁰⁶

1. 1985: The Immutable Characteristics Test

In re Acosta, the BIA's earliest decision interpreting PSG,¹⁰⁷ established the immutable characteristics test.¹⁰⁸ This test requires that a PSG share a common characteristic that is either unchangeable or should not have to be changed.¹⁰⁹ *Acosta* held that a Salvadoran cooperative organization of taxi drivers, COTAXI, does not constitute a

956-57 (B.I.A. 2006) (citing UNHCR, Guidelines, *supra* note 99, at 2) (referring to the UNHCR Guidelines as support for the immutable characteristics test and the social visibility test), *aff'd sub nom.* Castillo-Arias v. Att'y Gen., 446 F.3d 1190 (11th Cir. 2006); *In re Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985), *overruled on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987); UNHCR, Guidelines, *supra* note 99, at 11, 14 (affirming the reasonableness of the BIA's decision in *C-A-* on appeal, the circuit court focused the BIA's use of the UNHCR Guidelines and asserted that "[r]eference to the UNHCR Guidelines by the BIA in elucidating the *Acosta* formulation is permissible because the U.S. Supreme Court has held that Congress intended to conform United States refugee law with 1967 United Nations Protocol Relating to the Status of Refugees").

104. See *supra* notes 89–103 and accompanying text.

105. See *supra* notes 76–88 and accompanying text.

106. See *infra* Part II.C.

107. See Karen Musalo, *Ruminations on In re Kasinga: The Decision's Legacy*, 7 S. CAL. REV. L. & WOMEN'S STUD. 357, 366 (1998).

108. See *In re Acosta*, 19 I. & N. Dec. at 233 (holding that a particular social group must have immutable characteristics and that a Salvadoran cooperative organization of taxi drivers, COTAXI, does not constitute a social group); GORDON, MAILMAN & YALE-LOEHR, *supra* note 53, at § 33.04.

109. See *In re Acosta*, 19 I. & N. Dec. at 233–34.

PSG because it does not satisfy the immutable characteristics test.¹¹⁰ In developing the immutable characteristics test, the court relied on the “well-established doctrine of *ejusdem generis*,¹¹¹ meaning literally ‘of the same kind.’ The doctrine holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words.”¹¹² The BIA reasoned that the other enumerated grounds—race, religion, nationality, and political opinion—are immutable characteristics that an individual cannot or should not be required to change.¹¹³ Based on *ejusdem generis*, the BIA held that “the phrase ‘persecution on account of membership in a particular social group’ . . . mean[s] persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic.”¹¹⁴ The common characteristic “either is beyond the power of an individual to change or . . . is so fundamental to his identity or conscience that it ought not be required to be changed.”¹¹⁵

Acosta provides the foundation for the definition of PSG.¹¹⁶ The protected characteristics approach, otherwise known as *ejusdem generis*, refers to the overall methodology of statutory construction first used by the BIA in *Acosta*.¹¹⁷ Many jurists and scholars endorse the protected characteristics approach, which is based on *Acosta*’s immu-

110. *See id.* at 234.

111. *See* 82 C.J.S § 438 (2011) (citations omitted) (explaining that *ejusdem generis* is a “canon of statutory construction . . . [that applies] when, as part of an enumeration in a statute, general words follow specific words, the general words are presumed to be and are construed as restricted by the particular designations; thus the general words include only things of the same kind, character, and nature as those specifically enumerated”).

112. *In re Acosta*, 19 I. & N. Dec. at 233 (citing *Cleveland v. United States*, 329 U.S. 14 (1946)); 2A C. SANDS, SUTHERLAND ON STATUTORY CONSTRUCTION (4th ed. 1972)).

113. *Id.*

114. *See id.*

115. *See id.* at 234.

116. *See* Marouf, *supra* note 47, at 51-52. *See generally* Hathaway & Foster, *supra* note 30 (providing an overview of the protected characteristics theory first advanced by *Acosta*’s immutable characteristics test, and describing the strengths and criticisms of the protected characteristics approach and of the alternative approach—the social perception test).

117. *See* Hathaway & Foster, *supra* note 30, at 480 (citing *In re Acosta*, 19 I. & N. Dec. 211). The test from *Acosta* has been called the immutable characteristics test in subsequent cases and commentary. *See In re Acosta*, 19 I. & N. Dec. at 233 (using the language of “common, immutable characteristic,” later coined as the name for the test in U.S. asylum law—the immutable characteristics test).

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table characteristics test.¹¹⁸ The protected characteristics test is the leading approach in common law jurisdictions.¹¹⁹ The major criticisms of the *ejusdem generis* approach used in *Acosta* include: the unnecessary complexity of the test as opposed to using the plain meaning of PSG; the test's difficult application which requires knowledge of other fields such as human rights; and uncertainty as to whether groups perceived as deserving protection, such as street children, will qualify for asylum under this approach.¹²⁰

118. See, e.g., *Ward v. Canada*, [1993] 2 S.C.R. 689 (Can.); Hathaway & Foster, *supra* note 30, at 486 (stating that in contrast to the social perception test, “the *ejusdem generis* approach is specifically conceived so as to ensure a fit between the meaning attributed to the ‘membership of a particular social group’ ground and the other four Convention grounds of claim, as well as to advance the purposes of the nexus clause and Convention more generally. . . . As a matter of international law, the preceding analysis suggests that the *ejusdem generis* approach ought to be preferred.”). But see Anjana Bahl, *Home is Where the Brute Lives: Asylum Law and Gender-Based Claims of Persecution*, 4 CARDOZO WOMEN’S L.J. 33, 46 (1997) (citations omitted) (internal quotation marks omitted) (noting that *Acosta*’s holding that members of COTAXI did not constitute a PSG “has been criticized as being narrow and elitist and as demonstrating a class bias in the interpretation of the term particular social group” and that “[t]he B.I.A. neglected to consider *Acosta*’s case in a comprehensive and generous manner”); Fullerton, *supra* note 93, at 562 (stating that *Acosta*’s approach “will pose a major hurdle to many groups”).

119. See, e.g., Applicant S v. Minister for Immigration & Multicultural Affairs [2004] HCA 25, ¶ 36 (concluding in an Australian case that a PSG “must be identifiable by a characteristic or attribute *common* to all members of the group” (emphasis added)); *Ward*, [1993] 2 S.C.R. at 689 (Can.) (citing *In re Acosta*, 19 I. & N. Dec. at 211) (approving the approach in *Acosta* in an important Canadian Supreme Court case that incorporated a test based on “innate, unchangeable characteristic[s]” into Canadian refugee law); Refugee Appeal No. 71427/99, N.Z.A.R. 545, ¶¶ 93-106 (1999) (citing *Ward*, [1993] 2 SCR at 689 (Can.)) (following *Ward*’s protected characteristics test in a New Zealand case); *Islam v. Sec’y of State for the Home Dep’t*, [1999] 2 A.C. 629 (citing *In re Acosta*, 19 I. & N. Dec. at 211) (applying *Acosta*’s immutable characteristics test to define PSG in an important case from the United Kingdom); see also Marouf, *supra* 47, at 53-58; Crystal Doyle, Note, *Isn’t “Persecution” Enough? Redefining the Refugee Definition to Provide Greater Asylum Protection to Victims of Gender-Based Persecution*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 519, 542-45 (2009).

120. See Hathaway & Foster, *supra* note 30, at 480-82 (explaining that criticisms of the protected characteristics approach include the approach’s unnecessary complexity “that could be avoided by simply giving the phrase [particular social group] its ordinary meaning,” difficult application “since it requires a knowledge of non-discrimination and related areas of human rights law,” and uncertainty as to whether the approach will encompass arguably deserving groups such as “street children, students, professionals, and refugee camp workers”); see also Fullerton, *supra* note 93, at 562 (noting that *Acosta*’s standard will pose a serious obstacle to numerous groups).

2. *2000: The Voluntary Association or Innate Characteristics Test*

One year after *Acosta*, the Ninth Circuit's *Sanchez-Trujillo* adopted a voluntary association test, requiring that PSGs have a common identity based on the members' intentional affiliations with each other.¹²¹ The court reasoned that a PSG could not simply have a distinguishing characteristic.¹²² Otherwise, "a statistical group of males taller than six feet" that had a greater risk of persecution than others would be a PSG.¹²³ The court wanted to avoid constituting PSGs based on "demographic division[s]."¹²⁴ This fear comes from the fact that "this court was evidently anxious to guard against 'sweeping demographic divisions' that encompass a plethora of different lifestyles, varying interests, diverse cultures and contrary political leanings."¹²⁵ With these motivations in mind, the court formulated a new test based on voluntary association.¹²⁶ The Ninth Circuit explained the voluntary association test in the following way:

[T]he phrase "*particular social group*" implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.¹²⁷

Based on this test, the court held that a group of young, working class, urban males of military age was not a PSG.¹²⁸

In *Hernandez-Montiel*, the Ninth Circuit later modified the test for PSG.¹²⁹ The court expanded the voluntary association test to better

121. See *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571, 1576 (9th Cir. 1986); see also Michael G. Heyman, *Asylum, Social Group Membership and the Non-State Actor: the Challenge of Domestic Violence*, 36 U. MICH. J.L. REFORM 767, 775 (2003) [hereinafter Heyman, *Challenge of Domestic Violence*] (analyzing the rationale of the *Sanchez-Trujillo* and noting how it conflicted with the BIA approach).

122. See *Sanchez-Trujillo*, 801 F.2d at 1576-77 (holding that the definition of PSG depends on voluntary association and that a group of young, working class, urban males of military age are not a particular social group).

123. See *id.* at 1576.

124. See *id.* at 1577.

125. GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 359 (2d ed. 1998).

126. See *Sanchez-Trujillo*, 801 F.2d at 1576.

127. See *id.*

128. See *id.* at 1576-77.

129. See *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1093 (9th Cir. 2000) (holding that the new test for social group is based on either voluntary association or innate characteristics), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005).

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align it with the BIA's immutable characteristics test.¹³⁰ The Ninth Circuit's new test for PSG required voluntary association or innate characteristics.¹³¹ For purposes of this Note, the Ninth Circuit's test from *Hernandez-Montiel* is called the "two-alternatives test." Using the two-alternatives test, the Ninth Circuit held that gay men with female sexual identities were a cognizable PSG.¹³²

3. 2006: The Social Visibility Test and Particularity Requirement

Following the lead of the Second Circuit,¹³³ the BIA's *In re C-A* added social visibility to the analysis of PSG.¹³⁴ The social visibility test requires that other members of the asylee's society perceive her group as a PSG.¹³⁵ In *C-A*, the BIA reviewed various approaches to defining PSG, including the UNHCR Guidelines' approach.¹³⁶ From this review, the BIA concluded that the definition of PSG consists of not only the immutable characteristics test, but also requires consideration of the social visibility of the group.¹³⁷ The social visibility test requires that characteristics of the group be "recognizable and under-

130. *See id.* (holding that voluntary association or innate characteristics define PSG); GORDON, MAILMAN & YALE-LOEHR, *supra* note 53, at § 33.04.

131. *See Hernandez-Montiel*, 225 F.3d at 1093 (holding that "a 'particular social group' is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it"); *see also* Heyman, *Challenge of Domestic Violence*, *supra* note 121, at 776 (describing "the Ninth Circuit's idiosyncratic view").

132. *See Hernandez-Montiel*, 225 F.3d at 1094.

133. *See* Gao v. Gonzales, 440 F.3d 62, 64 (2d Cir. 2006) (holding that the definition of social group would no longer be based on the voluntary association test but instead would be based on the immutable characteristics test with an added "visibility" requirement that the group be "identifiable to would-be persecutors"); Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991) (citations omitted); GORDON, MAILMAN & YALE-LOEHR, *supra* note 53, at § 33.04.

134. *See In re C-A*, 23 I. & N. Dec. 951, 957 (B.I.A. 2006), *aff'd sub nom.* Castillo-Arias v. Att'y Gen., 446 F.3d 1190 (11th Cir. 2006); GORDON, MAILMAN & YALE-LOEHR, *supra* note 53, at § 33.04; Marouf, *supra* note 47, at 63-65.

135. *See In re C-A*, 23 I. & N. Dec. at 956-57.

136. *See id.* at 955-61; *see also* Marouf, *supra* note 47, at 63.

137. *See In re C-A*, 23 I. & N. Dec. at 956-57 (citing *In re Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985), *overruled on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987)) (asserting that the BIA would "continue to adhere to the *Acosta* formulation" but would "consider[] as a relevant factor the extent to which members of a society perceive those with the characteristic in question as members of a social group"); *see also* Marouf, *supra* note 47, at 63-65 (describing how the BIA continued to use the immutable characteristics test while adding social visibility to the analysis of social group).

stood by others to constitute social groups.”¹³⁸ The BIA held that “noncriminal drug informants working against the Cali drug cartel” were not a PSG because they lacked social visibility,¹³⁹ reasoning that the nature of a confidential informant’s hidden identity places him “generally out of the public view.”¹⁴⁰ The BIA also rejected the purported PSG because the group lacked particularity.¹⁴¹ Most importantly, *C-A-* added social visibility and particularity as factors in the analysis of PSG.¹⁴²

C-A- mentioned a fourth factor in the analysis of PSG, which this Note refers to as the “circular definition test.”¹⁴³ Using this test, *C-A-* excluded from the definition of a PSG any group “defined *exclusively* by the fact that [the group] is targeted for persecution.”¹⁴⁴ There is a general point of consensus that

[A] particular social group may not be defined on the basis simply of a shared fear of being persecuted, as to find otherwise would result in tautological reasoning whereby a person would be at risk of being persecuted because they were at risk of being persecuted—an outcome that would also make the nexus clause superfluous . . .¹⁴⁵

In other words, a PSG cannot consist of a group targeted for persecution without any other unifying characteristic or recognizable trait.¹⁴⁶ Without the circular definition test, a PSG defined only by persecution would automatically satisfy the nexus element of an asylum claim, which requires persecution or fear of persecution “on account of” an unenumerated ground.¹⁴⁷ Consequently, a circularly defined PSG would make the nexus element of an asylum claim

138. *In re C-A-*, 23 I. & N. Dec. at 959.

139. *Id.* at 961.

140. *Id.* at 960.

141. *See id.* at 957 (finding that “noncriminal informants” is a group “too loosely defined to meet the requirement of particularity”). The particularity requirement demands that a PSG not be too “amorphous” or “indeterminate.” *See In re A-M-E-*, 24 I. & N. Dec. 69, 76 (B.I.A. 2007), *aff’d sub nom.* Ucelo-Gomez v. Mukasey, 509 F.3d 70 (2d Cir. 2007); *infra* notes 163-164 and accompanying text.

142. *See In re C-A-*, 23 I. & N. Dec. at 957-60; 3-33 GORDON, MAILMAN & YALE-LOEHR, *supra* note 53, at § 33.04; Marouf, *supra* note 47, at 63-65.

143. *See In re C-A-*, 23 I. & N. Dec. at 960 (citing UNHCR, Guidelines, *supra* note 99, at ¶ 2) (noting that a PSG could not be defined solely by being persecuted).

144. *Id.*

145. Hathaway & Foster, *supra* note 30, at 479.

146. *See In re C-A-*, 23 I. & N. Dec. at 960.

147. *See* Hathaway & Foster, *supra* note 30, at 479; *supra* note 58 and accompanying text.

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unnecessary, contravening congressional intent.¹⁴⁸ This uncontroversial reasoning¹⁴⁹ has been adopted by many circuit courts.¹⁵⁰

The commentary and response to *C-A-* highlight the strengths and weaknesses of the decision. Some commentators praise *C-A-* and the addition of social visibility to the analysis of social group.¹⁵¹ While others strongly criticize the decision as inaccurately portraying cases from the past and not acknowledging a departure from precedent.¹⁵²

Some commentators contend that *C-A-* mischaracterized the UNHCR Guidelines as support for the social visibility test.¹⁵³ Com-

148. *Cf.* Hathaway & Foster, *supra* note 30, at 479 (discussing the same circularity problem in the international context).

149. *See id.* (noting that there is a general consensus around the requirement that a PSG not be defined exclusively by persecution).

150. *See, e.g.,* Kante v. Holder, 634 F.3d 321, 327 (6th Cir. 2011) (rejecting a PSG of “women subjected to rape as a method of government control” because it is circularly defined by persecution); Bayavarpu v. Holder, 390 F. App’x 353 (5th Cir. 2010) (rejecting a PSG because the group is defined exclusively by being targeted for persecution); Velasquez-Garzon v. Att’y Gen., 387 F. App’x 295, 297-98 (3d Cir. 2010) (rejecting PSG, among other reasons, for being defined only by persecution); Lushaj v. Holder, 380 F. App’x 41, 43 (2d Cir. 2010) (noting a PSG cannot be circularly defined only by persecution); Scatambuli v. Holder, 558 F.3d 53, 59 (1st Cir. 2009) (citations omitted) (asserting that a PSG must not be “defined *exclusively* by the fact that its members have been targeted for persecution”); Nkwonta v. Mukasey, 295 F. App’x 279, 286 (10th Cir. 2008) (citations omitted) (asserting that “it is an impermissible circular definition, defining a group in terms of those who suffer persecution”); Castillo-Arias v. Att’y Gen., 446 F.3d 1190, 1198 (11th Cir. 2006) (noting that “risk of persecution alone does not create a particular social group”); Rreshpja v. Gonzales, 420 F.3d 551, 556 (6th Cir. 2005) (noting that “a social group may not be circularly defined by the fact that it suffers persecution. The individuals in the group must share a narrowing characteristic other than their risk of being persecuted.”).

151. *See, e.g.,* David A. Martin, *Major Developments in Asylum Law over the Past Year*, 83 No. 34 INTERPRETER RELEASES 1889, 1894 (2006) (using the UNHCR Guidelines and Second Circuit precedent to support the assertion that the addition of social visibility to the analysis of social group “appears to be on more solid ground”).

152. *See* Marouf, *supra* note 47, at 63-65 (criticizing *C-A-* as not acknowledging a departure from precedent, not adopting the social perception test as laid out in the UNHCR Guidelines and incorrectly describing how past cases were based on socially visible characteristics).

153. *See* Harris & Weibel, *supra* note 40, at 13; Marouf, *supra* note 47, at 63-65 (criticizing *C-A-* as not adopting the social perception test as laid out in the UNHCR Guidelines); *see also* Danielle L.C. Beach, *Battlefield of Gendercide: Forced Marriages and Gender-Based Grounds for Asylum and Related Relief*, 09-12 IMMIGR. BRIEFINGS 1 (citing *In re Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985), *overruled on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987)); Marouf, *supra* note 47, at 49 (“Marouf’s insightful analysis found that the Board’s ‘social visibility’ requirement diverges from the international accepted approach of discerning a social group, undermines the principle framework of analysis set forth in *Acosta*, and ‘will lead to incoherent, inconsistent decisions’ that have no basis under international law.”).

mentators point out that the BIA's interpretation of social visibility significantly diverges from the UNHCR's interpretation.¹⁵⁴ The UNHCR follows both the protected characteristics and the social perception approaches, and presents them as alternative approaches to defining PSG.¹⁵⁵ In contrast to the protected characteristics approach that focuses on the internal characteristics of a group,¹⁵⁶ the social perception approach looks at the external perception of a group in a given society and the perception of persecutors.¹⁵⁷

The BIA's interpretation of "social visibility" in *C-A-*, however, diverged from the international community's understanding of the 'social perception' approach, as it focused on the visibility of group members rather than whether the group as a whole was recognized by society, and stressed a subjective rather than an objective standard.¹⁵⁸

In three subsequent cases, *A-M-E-*, *S-E-G-* and *E-A-G-*, the BIA established the use of social visibility as a requirement for a PSG.¹⁵⁹ This further diverges from the UNHCR Guidelines which present protected characteristics and social perception as alternative approaches, not dual requirements, to defining PSG.¹⁶⁰ The UNHCR presented its own view on the BIA's social visibility test in an amicus brief asserting that the BIA's social visibility test was inconsistent with the UNHCR Guidelines.¹⁶¹ The UNHCR's amicus brief lends

154. See *In re C-A-*, 23 I. & N. Dec. 951, 961 (B.I.A. 2006), *aff'd sub nom.* Castillo-Arias, 446 F.3d 1190; Marouf, *supra* note 47, at 49 (citing *In re A-M-E-*, 24 I. & N. Dec. 69 (B.I.A. 2007), *aff'd sub nom.* Ucelo-Gomez v. Mukasey, 509 F.3d 70 (2d Cir. 2007)).

155. See Marouf, *supra* note 47, at 49.

156. See *supra* note 117 and accompanying text.

157. See Hathaway & Foster, *supra* note 30, at 483 (citing *Applicant "A" and Anor v. MIMA* (1997) 190 CLR 225 (Austl.)) (noting how the social perception is embraced by the Australian courts, as evidenced by the leading case of *Applicant A v. MIMA*).

158. Marouf, *supra* note 47, at 49.

159. See *In re E-A-G-*, 24 I. & N. Dec. 591, 594 (B.I.A. 2008); *In re S-E-G-*, 24 I. & N. Dec. 579, 582 (B.I.A. 2008); *In re A-M-E-*, 24 I. & N. Dec. at 73-75; GORDON, MAILMAN & YALE-LOEHR, *supra* note 53, at § 33.04; Harris & Weibel, *supra* note 40, at 5; Marouf, *supra* note 47, at 65-67 (discussing *In re A-M-E-*'s adoption of the social visibility test as an additional requirement (citing *In re A-M-E-*, 24 I. & N. Dec. 69)).

160. See Marouf, *supra* note 47, at 49; *supra* note 155 and accompanying text.

161. See U.N. High Comm'r for Refugees, Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in the matter of Michelle Thomas et al. (2007) [hereinafter UNHCR, Amicus Curiae in Thomas] (amicus brief for an unpublished BIA case); Elizabeth A. James, Comment, *Is the U.S. Fulfilling Its Obligations Under the 1951 Refugee Convention? The Colombian Crisis in Context*, 33

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support to the divergence of the BIA's social visibility test in *C-A-* from the UNHCR's approach in the Guidelines.¹⁶²

4. 2007-2008: The Particularity Requirement

The BIA's *In re A-M-E-*, *In re S-E-G-* and *In re E-A-G-* established social visibility and particularity as requirements for PSG qualification.¹⁶³ Particularity requires that the PSG not be "amorphous," "indeterminate," or "too subjective, inchoate, and variable to provide the sole basis for membership in a particular social group."¹⁶⁴ These cases shifted the focus of the analysis away from immutable characteristics to social visibility either by relying on social visibility to invalidate a PSG that satisfied the immutable characteristics test, or by discussing social visibility in significantly greater detail than immutable characteristics.¹⁶⁵ These decisions, together with *C-A-*, were designed to "give greater specificity" to the definition of PSG.¹⁶⁶ In *S-E-G-*, the BIA rejects the PSG of youths who resist gang membership for lack of social visibility and particularity.¹⁶⁷ This case provides a critical foundation for understanding the Ninth Circuit's special treatment of youths who resist gang membership.¹⁶⁸ The BIA and circuit court cases mentioned in this section set the stage for the dis-

N.C. J. INT'L L. & COM. REG. 455, 504 (2008); Marouf, *supra* note 47, at 65 (citations omitted); Wilkinson, *supra* note 93, at 410.

162. See UNHCR, Amicus Curiae in Thomas, *supra* note 161; James, *supra* note 161, at 504 (2008); Marouf, *supra* note 47, at 65; Wilkinson, *supra* note 93, at 410.

163. See *supra* note 159.

164. In re *A-M-E-*, 24 I. & N. Dec. at 76.

165. See *In re E-A-G-*, 24 I. & N. Dec. 591, 593-96 (B.I.A. 2008) (analyzing the alleged PSG mostly under the social visibility test with less attention given to analysis under the immutable characteristics test); *In re S-E-G-*, 24 I. & N. Dec. 579, 582-84, 586-88 (B.I.A. 2008) (noting that an age-based PSG might be cognizable under immutable characteristics but holding that youths who resist gang recruitment does not constitute a PSG under the social visibility test); In re *A-M-E-*, 24 I. & N. Dec. at 73-75 (noting that while wealth might satisfy the immutable characteristics test, the IJ correctly ruled that the category of wealthy Guatemalans does not constitute a PSG because it fails under the social visibility test).

166. See *In re S-E-G-*, 24 I. & N. Dec. at 582.

167. See *id.* at 585-87 (holding that the group lacked social visibility because there is insufficient evidence that Salvadoran youths who refuse to join gangs are seen as a group by society or that they suffer a higher incidence of crime than the general population, and holding that the group lacked particularity because "[t]hey make up a potentially large and diffuse segment of society, and the motivation of gang members in recruiting and targeting young males could arise from motivations quite apart from any perception that the males in question were members of a class").

168. See *infra* Part II.C.

discussion of the circuit split surrounding the definition of PSG in Part II.

II. CONFLICT: THE DEFINITION OF PARTICULAR SOCIAL GROUP

The circuit courts have different approaches to defining PSG in asylum cases. This circuit split has significant effects because each circuit's precedent binds the immigration agency's proceedings within the circuit.¹⁶⁹ This Part explains the circuit split by first discussing the approach of the circuit courts that follow the BIA, then by examining the Seventh Circuit's approach and the subsequent Third Circuit decision adopting that approach, and finally by presenting the Ninth Circuit's approach. This Part concludes with a discussion of the justifications and criticisms of each approach to defining PSG.

A. Circuits that Follow the Board of Immigration Appeals: Immutable Characteristics, Social Visibility, and Particularity

The majority of circuit courts follow the BIA's approach to defining PSG. The First Circuit,¹⁷⁰ Second Circuit,¹⁷¹ Third Circuit,¹⁷²

169. See *supra* note 75 and accompanying text.

170. See *Scatambuli v. Holder*, 558 F.3d 53, 59 (1st Cir. 2009) (citing *In re A-M-E-*, 24 I. & N. Dec. 69, 76 (B.I.A. 2007), *aff'd sub nom. Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007)); *In re C-A-*, 23 I. & N. Dec. 951, 957, 960 (B.I.A. 2006), *aff'd sub nom. Castillo-Arias v. Att'y Gen.*, 446 F.3d 1190 (11th Cir. 2006)) (establishing the First Circuit standard that "[i]n addition to immutability, the BIA requires that a 'particular social group': (1) have 'social visibility,' meaning that members possess 'characteristics . . . visible and recognizable by others in the [native] country'; (2) be defined with sufficient particularity to avoid indeterminacy," and rejecting drug smuggling informants as a PSG for lack of social visibility); see also *Ahmed v. Holder*, 611 F.3d 90, 94-95 (1st Cir. 2010) (rejecting "secularized and westernized Pakistanis perceived to be affiliated with the United States" as a PSG for lack of particularity and social visibility); *Larios v. Holder*, 608 F.3d 105, 108-09 (1st Cir. 2010) (rejecting "young Guatemalan men recruited by gang members who resist such recruitment" as a PSG for lack of social visibility and particularity); *Mendez-Barrera v. Holder*, 602 F.3d 21, 26-27 (1st Cir. 2010) (rejecting proposed PSG of "young women recruited by gang members who resist such recruitment" for lack of visibility and particularity); *Faye v. Holder*, 580 F.3d 37, 41-42 (1st Cir. 2009) (rejecting proposed PSG of "women who had a child out of wedlock/are considered adulterers because they gave birth to a child allegedly not their husband's/have been abused by their husbands" based on lack of social visibility and particularity).

171. See *Lushaj v. Holder*, 380 F. App'x 41, 43 (2d Cir. 2010) (rejecting proposed PSG of "women whom 'members of the Haklaj gang wished to kidnap . . . and force . . . into prostitution, at least in part to punish [their] family members for their political activities in Albania'" for lack of social visibility because not perceived as a discrete group by Albanian society); *Qeta v. Holder*, 378 F. App'x 93, 94 (2d Cir. 2010) (rejecting PSG of "young single women in Albania who do not have male relatives to protect them from sex traffickers" because the group lacked a common immutable

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Fourth Circuit,¹⁷³ Sixth Circuit,¹⁷⁴ Eighth Circuit,¹⁷⁵ Tenth Circuit,¹⁷⁶ and Eleventh Circuit¹⁷⁷ use the social visibility test and particularity

characteristic, social visibility, and particularity); *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 72-74 (2d Cir. 2007) (holding, after a discussion of social visibility and particularity, that “[t]he BIA’s interpretation of the statutory phrase ‘particular social group’ . . . was . . . reasonable” and rejecting PSG of “affluent Guatemalans” for lack of particularity).

172. *See Velasquez-Garzon v. Att’y Gen.*, 387 F. App’x 295 (3d Cir. 2010) (rejecting proposed PSG of “FARC [Revolutionary Armed Forces in Columbia] victims” for lack of immutable characteristic, and rejecting proposed PSG of “person[s] who would be able to provide some service to the FARC” as too vague, lacking particularity); *Galindo-Torres v. Att’y Gen.*, 348 F. App’x 814, 816, 817-18 (3d Cir. 2009) (rejecting “influential, respected business people who refuse to aid, join or support the FARC” as PSG for lack of social visibility and particularity); *cf. Gomez-Zuluaga v. Att’y Gen.*, 527 F.3d 330, 348 (3d Cir. 2008) (accepting PSG of “women who have escaped involuntary servitude after being abducted and confined by the FARC” under the immutable characteristics test).

173. *See Crespin-Valladares v. Holder*, 632 F.3d 117, 125-26 (4th Cir. 2011) (finding that the family members of “those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses” satisfies immutable characteristics, social visibility and particularity); *Lizama v. Holder*, 629 F.3d 440, 444 (4th Cir. 2011) (rejecting the proposed PSG of “young, Americanized well-off Salvadoran male deportees with criminal histories who oppose gangs” for lack of immutability, particularity, and social visibility); *Bermudez-Botero v. Holder*, 375 F. App’x 314, 316 (4th Cir. 2010) (citing *In re A-M-E-*, 24 I. & N. Dec. 69; *In re C-A-*, 23 I. & N. Dec. 951) (rejecting PSG based on the BIA’s analytical framework set out in *C-A-* and *A-M-E-*); *Contreras-Martinez v. Holder*, 346 F. App’x 956, 958-59 (4th Cir. 2009) (*per curiam*) (rejecting “adolescents in El Salvador who refuse to join the gangs of that country because of their opposition to the gangs’ violent and criminal activities” as PSG for lack of social visibility and particularity).

174. *See Khozhaynova v. Holder*, 641 F.3d 187, 195 (6th Cir. 2011) (rejecting PSG of “business owners who refuses [sic] to pay for protection from the mafia”); *Qu v. Holder*, 618 F.3d 602, 607 (6th Cir. 2010) (citing *Gao v. Gonzales*, 440 F.3d 62 (2d Cir. 2006)) (holding that “women in China who have been subjected to forced marriage and involuntary servitude” constitute a PSG based on the immutable characteristics test); *Bonilla-Morales*, 607 F.3d 1132, 1137 (6th Cir. 2010) (asserting that, although the court did not need to reach the issue of PSG, the PSG likely does not meet the social visibility or particularity requirements); *Urbina-Mejia v. Holder*, 597 F.3d 360, 366-67 (6th Cir. 2010) (holding that former gang member is a PSG because “it is impossible for Urbina-Mejia to change his membership in the group of the former 18th Street gang members,” and noting that “[i]t is not that he is unwilling to cast off gang membership; indeed, he came to the United States in order to escape the gang,” but stating that “once one has left the gang, one is forever a former member of that gang”).

175. *See Costanza v. Holder*, 647 F.3d 749, 753 (8th Cir. 2011) (holding that proposed PSG of “a family that experienced gang violence” failed for lack of social visibility and particularity, and proposed PSG of “persons resistant to gang violence” failed under particularity); *Davila-Mejia v. Mukasey*, 531 F.3d 624, 628-29 (8th Cir. 2008) (rejecting proposed PSG of Guatemalan family business owners for lack of “social visibility to be perceived as a group by society” and for lack of particularity as it was “too amorphous to adequately describe a social group”).

as requirements for a cognizable PSG. Even though the immutable characteristics test has a less important role in the analysis of PSG, these circuit courts continue to refer to the immutable characteristics test from *Acosta* in their cases.¹⁷⁸

The social visibility test, from *C-A*-, *A-M-E* and other BIA decisions, has been engrafted on top of the immutable characteristics test and often plays a significant role in the analysis of PSG.¹⁷⁹ In *Mendez-Barrera*, the First Circuit relied on social visibility as a basis for

176. See *Rivera-Barrientos v. Holder*, 658 F.3d 1222, 1228-29, 1231, 1235 (10th Cir. 2011) (holding that PSG of “women in El Salvador between the ages of 12 and 25 who resisted gang recruitment” fails social visibility and that the group meets the freshly-adopted particularity requirement).

177. See *Pierre v. U.S. Att’y General*, No. 09-1624, 2011 WL 2506053, at *2 (11th Cir. June 24, 2011) (rejecting argument that social visibility should not be the law because of the Eleventh Circuit’s earlier decision affirming the use of the social visibility test in *Castillo-Arias*); *Vasquez v. U.S. Att’y Gen.*, 345 F. App’x 441, 446-47 (11th Cir. 2009) (per curiam) (rejecting PSG of “young Salvadoran students who expressly oppose gang practices and values and who wish to protect their family members against such practices” for lack of social visibility and particularity).

178. See *Rivera-Barrientos*, 658 F.3d at 1229 (referring to immutable characteristics without relying on it because the BIA did not base its decision on the immutable characteristics test); *Bonilla-Morales*, 607 F.3d at 1137 (quoting *Castellano-Chacon v. INS*, 341 F.3d 533 (6th Cir. 2003), *overruled on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987)) (using the language from *Acosta* of “common, immutable characteristic”); *Contreras-Martinez*, 346 F. App’x at 958; *Davila-Mejia*, 531 F.3d at 629; *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 73-74 (2d Cir. 2007); *Galindo-Torres*, 348 F. App’x 814, 817 (3d Cir. 2009) (mentioning but not relying on the immutable characteristics test because the BIA did not base its decision on immutability); *Vasquez*, 345 F. App’x at 445; *Scatambuli v. Holder*, 558 F.3d 53, 59 (1st Cir. 2009) (noting the BIA requires that the purported PSG satisfy the immutable characteristics test); *supra* Part I.C.1.

179. See *Rivera-Barrientos*, 658 F.3d at 1234 (citations omitted) (holding that “we therefore join those circuits that have accepted the BIA’s social visibility test in interpreting the statute”); *Bonilla-Morales*, 607 F.3d at 1137 (noting that “an alleged social group must be . . . socially visible”); *Contreras-Martinez*, 346 F. App’x at 958 (noting that the a social group must have social visibility); *Galindo-Torres*, 348 F. App’x at 817 (citations omitted) (noting that a social group “must . . . exhibit a shared characteristic that is socially visible to others in the community”); *Scatambuli*, 558 F.3d at 59 (citations omitted) (internal quotation marks omitted) (following the BIA’s approach where “the BIA requires that a particular social group . . . have social visibility”); *Vasquez*, 345 F. App’x at 446 (citations omitted) (holding that the “purported group . . . fails the social visibility test” because they are not “generally recognizable by others in the community”); *Davila-Mejia*, 531 F.3d at 629 (holding that “petitioners . . . failed to establish that their status as ‘competing family business owners’ gave them sufficient social visibility to be perceived as a group by society”); *Ucelo-Gomez*, 509 F.3d at 73 (affirming the BIA’s social visibility test); see also *supra* notes 134-138, 142 and accompanying text (defining the social visibility test and discussing its development in BIA precedential case-law).

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rejecting the PSG.¹⁸⁰ In this case, the First Circuit held that “young women recruited by gang members who resist such recruitment” did not constitute a PSG for lack of social visibility.¹⁸¹ The court explained that to satisfy social visibility, a group “must be generally recognized in the community as a cohesive group.”¹⁸² In discussing social visibility, the court highlighted that “[t]he petitioner failed to provide even a scintilla of evidence to this effect. By the same token, she failed to pinpoint any group characteristics that render members of the putative group socially visible in El Salvador.”¹⁸³

The additional requirement of particularity also plays an important role in the analysis of PSG.¹⁸⁴ In *Ucelo-Gomez*, the Second Circuit held that “affluent Guatemalans” could not be a cognizable PSG for lack of particularity.¹⁸⁵ The court discussed the BIA’s observation that if affluence in Guatemala were defined as not living in poverty, then twenty percent of the population would be considered affluent.¹⁸⁶ The court noted that:

[T]he BIA must not mean that a group’s size can itself be a sound reason for finding a lack of particularity. Instead, we interpret the BIA’s observation as merely illustrating how “the concept of wealth

180. *See Mendez-Barrera v. Holder*, 602 F.3d 21, 26-27 (1st Cir. 2010).

181. *See id.* (holding that young men who resisted gang membership did not constitute a PSG based on lack of social visibility and particularity).

182. *Id.* at 26 (citations omitted).

183. *Id.*

184. *See Rivera-Barrientos*, 658 F.3d at 1231 (holding that “we therefore defer to the BIA’s formulation of ‘particular social group’ as requiring the group be defined with particularity”); *Lizama v. Holder*, 629 F.3d 440, 447 (4th Cir. 2011); *Bermudez-Botero v. Holder*, 375 F. App’x 314, 316 (4th Cir. 2010) (noting that particularity is a required criterion for a cognizable PSG); *Bonilla-Morales*, 607 F.3d at 1137 (noting that “[a]n alleged social group must be . . . particular”); *Contreras-Martinez*, 346 F. App’x at 958-59 (noting that a social group cannot be “inchoate,” “diffuse,” or indeterminate); *Galindo-Torres*, 348 F. App’x at 817 (citations omitted) (noting that a social group must “be defined with sufficient particularity”); *Scatambuli*, 558 F.3d at 59 (citations omitted) (internal quotation marks omitted) (following the BIA’s approach where “the BIA requires that a particular social group . . . be defined with sufficient particularity to avoid indeterminacy”); *Vasquez*, 345 F. App’x at 446 (citations omitted) (concluding that the “proposed group lacks particularity . . . because its members ‘make up a potentially large and diffuse segment of society’”); *Davila-Mejia*, 531 F.3d at 629 (concluding that petitioners failed to establish that the social group was sufficiently particular); *Ucelo-Gomez*, 509 F.3d at 73 (affirming the BIA’s particularity requirement); *see also supra* notes 163-164 and accompanying text.

185. *Ucelo-Gomez*, 509 F.3d at 72-74 (holding that “affluent Guatemalans” were not a PSG for lack of social visibility and particularity).

186. *See id.* at 73 (citing *In re A-M-E-*, 24 I. & N. Dec. at 76 n.8).

is so indeterminate”—the purported social group could vary from one to twenty percent of the total population.¹⁸⁷

The court then explained that “[t]his indeterminacy is a relevant consideration in light of *In re C-A*’s concerns about groups that are ‘too loosely defined to meet the requirement of particularity.’”¹⁸⁸ An important rationale underlying the approach of the circuit courts that follow the BIA is the application of *Chevron* deference to the BIA’s definition of PSG, which will be discussed further at the end of Part II.¹⁸⁹

B. Third and Seventh Circuits: Immutable Characteristics and Rejection of Social Visibility and Particularity

Continuing to adhere to the immutable characteristics test, the dissenting circuits have rejected the social visibility test and the particularity requirement.¹⁹⁰ In *Gatimi v. Holder*, the Seventh Circuit rejected the BIA’s social visibility test.¹⁹¹ The Court held that “defectors from the Mungiki” constitute a PSG.¹⁹² Distinguishing the present case from the Supreme Court’s *Gonzales v. Thomas*, which directed the circuit courts to give deference to the BIA’s definition of PSG, the Seventh Circuit contrasted the prior silence of the BIA on the PSG at issue in *Thomas* with the inconsistent use of social visibility in past BIA decisions.¹⁹³ *Chevron* deference does not apply where the agency’s ruling is inconsistent with past decisions.¹⁹⁴ Judge Posner as-

187. *Id.* at 73 n.2 (citing *In re A-M-E*, 24 I. & N. Dec. at 76).

188. *See id.* (citing *In re C-A*, 23 I. & N. Dec. 951, 957 (B.I.A. 2006), *aff’d sub nom.* Castillo-Arias v. Att’y Gen., 446 F.3d 1190 (11th Cir. 2006)).

189. *See infra* Part II.D.1 (explaining the role of *Chevron* deference in the approaches of the circuit courts).

190. *See* Valdiviezo-Galdamez v. Att’y Gen., No. 08-4564, 2011 U.S. App. LEXIS 22565, at *67 (3d Cir. Nov. 8, 2011) (rejecting social visibility and particularity); Benitez Ramos v. Holder, 589 F.3d 426, 431 (7th Cir. 2009) (rejecting the particularity requirement); Gatimi v. Holder, 578 F.3d 611, 615-16 (7th Cir. 2009) (rejecting the social visibility test).

191. *See Gatimi*, 578 F.3d at 615-16; *see also* Eugenia Pyntikova, *Seventh Circuit Decision in Gatimi v. Holder Rejects Social Visibility as Necessary Criterion for Membership in a “Particular Social Group”*, 24 GEO. IMMIGR. L.J. 101, 101-05 (2009).

192. *See Gatimi*, 578 F.3d at 616. The Mungiki is a violent Kenyan political and religious group that compels the wives of members and defectors to undergo female genital mutilation.

193. *See id.* at 615-16 (citing *Gonzales v. Thomas*, 547 U.S. 183 (2006) (per curiam)) (discussing whether a family could be a PSG).

194. *See* Harris & Weibel, *supra* note 40, at 11 (explaining that *Chevron* does not apply to an agency’s inconsistent approach (citing *Chevron USA v. Natural Res. Def.*

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serted that social visibility “makes no sense” and that the BIA has not even tried to explain the reasoning behind social visibility.¹⁹⁵ Additionally, social visibility would lead to perverse results because “[i]f you are a member of a group that has been targeted for . . . persecution, you will take pains to avoid being socially visible.”¹⁹⁶ The court continued by noting that “[t]he only way, on the Board’s view, that the Mungiki defectors can qualify as members of a particular social group is by *pinning a target to their backs* with the legend ‘I am a Mungiki defector.’”¹⁹⁷ Later, in *Benitez Ramos v. Holder*, the Seventh Circuit affirmed the rejection of the social visibility test.¹⁹⁸ Furthermore, in the dicta of *Benitez Ramos*, the Seventh Circuit rejected the particularity requirement.¹⁹⁹

Following the Seventh Circuit’s lead, the Third Circuit also rejected social visibility and particularity.²⁰⁰ In *Valdiviezo-Galdamez*, the Third Circuit rejected social visibility for largely the same reasons that the Seventh Circuit’s *Gatimi* rejected this BIA test.²⁰¹ Quoting heavily from *Gatimi*, Chief Judge McKee indicated his circuit’s approval of the Seventh Circuit’s approach.²⁰² Additionally, the Third Circuit rejected the particularity requirement in the following way:

[W]e are hard-pressed to discern any difference between the requirement of “particularity” and the discredited requirement of “social visibility.” Indeed, they appear to be different articulations of the same concept and the government’s attempt to distinguish the two oscillates between confusion and obfuscation “Particularity” appears to be little more than a reworked definition of “social visibility”²⁰³

Based on this understanding of particularity as a reformulation of social visibility, the court rejected particularity for the same reasons it rejected social visibility.²⁰⁴ Specifically, McKee described particularity as “unreasonable” because it is inconsistent with earlier BIA deci-

Council, Inc., 467 U.S. 837 (1984)); Marouf, *supra* note 47, at 68 (citing Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005)).

195. See *Gatimi*, 578 F.3d at 615.

196. See *id.*

197. *Id.* at 616 (emphasis added).

198. See 589 F.3d 426, 430 (7th Cir. 2009).

199. See *id.* at 431.

200. See *Valdiviezo-Galdamez v. Att’y Gen.*, No. 08-4564, 2011 U.S. App. LEXIS 22565, at *67 (3d Cir. Nov. 8, 2011).

201. Compare *id.* at *53-*64, with *Gatimi*, 578 F.3d at 615-16.

202. See *Valdiviezo-Galdamez*, 2011 U.S. App. LEXIS 22565, at *56-*60.

203. *Id.* at *66-*67.

204. See *id.*

sions.²⁰⁵ Based on the inconsistency of these tests with prior BIA decisions, the Third Circuit held that social visibility and particularity are not entitled to *Chevron* deference, and declined to follow the BIA's approach.²⁰⁶

C. Ninth Circuit: Voluntary Association or Innate Characteristics Test, or the Application of *Chevron* Deference

In defining PSG, the Ninth Circuit has a dual approach that depends on the facts of the case.²⁰⁷ When the BIA has decided a precedential case about a very similar group, the Ninth Circuit gives *Chevron* deference to the BIA's approach to defining PSG.²⁰⁸ When the BIA has not ruled about a very similar group in a precedential decision, the Ninth Circuit uses its own two-alternatives test.²⁰⁹ The Ninth Circuit's two-alternatives test for PSG requires voluntary association or innate characteristics.²¹⁰ According to the Ninth Circuit, "[a] 'particular social group' is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it."²¹¹ This two-alternatives test comes from Ninth Circuit precedent.²¹²

In *Perdomo v. Holder*, a case about a group that the BIA had not previously ruled on in a precedential decision, the Ninth Circuit used

205. *See id.* at *67.

206. *See id.*

207. For a recent case that does not follow this dual approach but instead seems to use a mix of the two approaches without giving a satisfying explanation of the court's methodology, see *Velasco-Cervantes v. Holder*, 593 F.3d 975, 978-79 (9th Cir. 2010) (holding that proposed PSG failed the two-alternatives test in part because the group did not possess social visibility and particularity, thus presenting a mixed approach of the two-alternatives test and *Chevron* deference). This mixed approach can be better understood by looking at *Arteaga v. Mukasey*, 511 F.3d 940, 944-45 (9th Cir. 2007), which the *Velasco-Cervantes* court cited as the source for the proposition that the two-alternatives test is given content by social visibility and particularity.

208. *See, e.g.*, *Barrios v. Holder*, 581 F.3d 849, 855-56, 858 (9th Cir. 2010) (citing *In re S-E-G-*, 24 I. & N. Dec. 579, 582, 583 (B.I.A. 2008)) (determining that *Chevron* deference is due to the BIA's analysis of the proposed PSG of Guatemalan youths who refuse to join gangs based on the BIA's earlier precedential decision in *S-E-G-*, which rejected those who resist recruiting by a Salvadoran gang as a PSG); *cf. infra* notes 228-230 and accompanying text (discussing the Ninth Circuit's *Skidmore* deference to non-precedential BIA decisions).

209. *See, e.g.*, *Perdomo v. Holder*, 611 F.3d 662, 666 (9th Cir. 2010).

210. *See id.*

211. *Id.* (quoting *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000)).

212. *See supra* Part I.C.2.

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its two-alternatives approach to define PSG.²¹³ *Perdomo* held that the BIA erred in concluding that women in Guatemala could not be a cognizable PSG.²¹⁴ The Court began its analysis of PSG by noting that “[t]he BIA has not yet specifically addressed in a precedential decision whether gender by itself could form the basis of a particular social group.”²¹⁵ After mentioning the BIA’s precedential decision in *Kasinga*, holding that women in a particular tribe who oppose FGM constitute a PSG,²¹⁶ the court explained that “[w]hether females in a particular country, without any other defining characteristics, could constitute a protected social group remains an unresolved question for the BIA.”²¹⁷ Then the court reviewed the development of its own two-alternatives test and case law on gender.²¹⁸ Finally, the court remanded the case back to the BIA to determine whether women in Guatemala were a cognizable PSG “[b]ecause the BIA failed to apply both prongs of the *Hernandez-Montiel* definition to *Perdomo*’s claim that women in Guatemala constitute a particular social group and because the BIA’s decision is inconsistent with its own opinions in *Acosta* and *C-A*.”²¹⁹ Given that gender-based claims have been largely unsuccessful in the past,²²⁰ this Ninth Circuit decision was truly one of a few “broad-based, dramatic decisions in the past year.”²²¹

In two recent cases, the Ninth Circuit gave *Chevron* deference to the BIA’s precedential decision about a similar PSG.²²² In *S-E-G*, the BIA firmly established as precedent that Salvadoran youths resisting gang membership do not constitute a PSG.²²³ The Ninth Cir-

213. See 611 F.3d at 669.

214. See *id.*

215. *Id.* at 666.

216. See *id.* (citing *In re Kasinga*, 21 I. & N. Dec. 357, 366 (B.I.A. 1996)).

217. *Id.*

218. See *id.*

219. See *id.* at 669 (citations omitted).

220. See generally Siddiqui, *supra* note 37 (arguing that women should constitute a particular social group given the challenges that women asylum seekers face).

221. Gerald Seipp, *A Year in Review: Social Visibility Doctrine Still Alive, but Questioned*, 87 No. 27 INTERPRETER RELEASES 1417, 1417 (2010).

222. See *Ramos Barrios v. Holder*, 581 F.3d 849, 855 (9th Cir. 2009) (asserting that *Chevron* deference be given to the BIA’s analysis of the purported PSG of Guatemalan youths who refuse to join gangs); *Ramos-Lopez v. Holder*, 563 F.3d 855, 856 (9th Cir. 2009) (holding that *Chevron* deference is due to the BIA’s interpretation of the alleged PSG of Salvadoran youths who refuse to join gangs).

223. See *In re S-E-G*, 24 I. & N. Dec. 579, 582-83 (B.I.A. 2008) (rejecting PSG of “Salavadoran youths who have resisted gang recruitment” for lack of social visibility and particularity).

cuit explained that the BIA expected the reasoning of *S-E-G* to apply to other gangs in different countries.²²⁴ As a result, the Ninth Circuit gave *Chevron* deference to the BIA's approach in *S-E-G* in two cases dealing with youths who resist gang membership, *Ramos Barrios* and *Ramos-Lopez*.²²⁵ In these two cases, the court affirmed the BIA's analysis of PSG based on social visibility and particularity, instead of applying the Ninth Circuit's own two-alternatives test.²²⁶ The Ninth Circuit's use of *Chevron* deference depends on the putative PSG in a given case.²²⁷

The Ninth Circuit's deference to the BIA has an additional layer of complexity. An *en banc* Ninth Circuit case from March 2009 clarified that the analysis of PSG should proceed under *Chevron* if the BIA has already made a precedential ruling on a similar PSG.²²⁸ This clarification further explains that *Chevron* deference is due to the BIA's interpretation of the term's definition in precedential cases, while *Skidmore* deference is due to the BIA's interpretation in non-precedential decisions.²²⁹ Following this methodology, the Ninth Cir-

224. See *Ramos Barrios*, 581 F.3d at 855 n.4 (noting that “[t]he BIA’s reasoning in *Matter of S-E-G* is no less applicable to the Mara 13 (or an equivalent gang) in Guatemala [than in El Salvador]”); *Ramos-Lopez*, 563 F.3d at 860.

225. See *Ramos Barrios*, 581 F.3d at 856, 858-60 (asserting that *Chevron* deference be given to the BIA’s analysis of the purported PSG of Guatemalan youths who refuse to join gangs); *Ramos-Lopez*, 563 F.3d at 860 (holding that *Chevron* deference is due to the BIA’s interpretation of the alleged PSG of Salvadoran youths who refuse to join gangs).

226. See *Ramos Barrios*, 581 F.3d at 855 (noting that the PSG in *Ramos-Lopez* was rejected for lack of social visibility and particularity, reasoning that the argument for PSG here is “indistinguishable from the argument made in *Ramos-Lopez*,” and thus rejecting the PSG); *Ramos-Lopez*, 563 F.3d at 862 (holding that “it was reasonable for the BIA to conclude that the group was not sufficiently particular . . . [and] that the groups lacked social visibility”).

227. See *supra* notes 207-209, 222-226 and accompanying text.

228. See *Ramos-Lopez*, 563 F.3d at 858, 860 n.4 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Marmolejo-Campos v. Holder*, 558 F.3d 903, 908-12 (9th Cir. 2009); *Santos-Lemus v. Mukasey*, 542 F.3d 738 (9th Cir. 2008)) (noting that the Ninth Circuit’s March 2009 *en banc* decision in *Marmolejo-Campos* “clarified the method by which we determine the degree of deference owed to BIA decisions” and holding that “the BIA’s determination, in a published disposition, that a group is or is not a ‘particular social group’” was due *Chevron* deference).

229. See *Marmolejo-Campos*, 558 F.3d at 909-11 (internal quotation marks omitted) (citations omitted) (noting that “[u]nder *Skidmore*, the measure of deference afforded to the agency varies depend[ing] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control” and that the Ninth Circuit accords *Chevron* deference to precedential BIA decisions and *Skidmore* deference to nonprecedential BIA decisions); see also *Ramos-Lopez*, 563 F.3d at 860 n.4 (citations omitted) (internal quotation marks omit-

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cuit gave *Skidmore* deference to a non-precedential BIA decision in a recent case.²³⁰ The analysis in this section focuses on Ninth Circuit cases that come after this analytical clarification.²³¹

D. Justifications and Criticisms of the Different Approaches to Defining Particular Social Group

The approaches of the circuit courts that follow the BIA, the dissenting circuits, and the Ninth Circuit each have strengths and weaknesses.²³² This Section explores the justifications and criticisms of each approach through several lenses, including *Chevron* deference,²³³ social visibility,²³⁴ and the Ninth Circuit's two-alternatives test.²³⁵

ted) (“We first had occasion to consider the BIA’s decision in *In re S-E-G* in *Santos-Lemus v. Mukasey*. We did not analyze the BIA’s decision under the *Chevron* framework, noting instead that the BIA’s decision was not binding on us. We decided *Santos-Lemus*, however, before our en banc decision in *Marmolejo-Campos*, in which we clarified the method by which we determine the degree of deference owed to BIA decisions. Thus, to the extent *Santos-Lemus* is inconsistent with *Marmolejo-Campos*, the later en banc decision must control.”). The BIA’s precedential decisions are published while the BIA’s nonprecedential decisions are unpublished. See *Marmolejo-Campos*, 558 F.3d at 908-12.

230. See *Soriano v. Holder*, 569 F.3d 1162, 1164 n.1 (9th Cir. 2009) (citations omitted) (internal quotation marks omitted) (“When, as here, the BIA’s decision is an unpublished decision by one member of the BIA, we give *Skidmore* deference to the BIA’s interpretation of the governing statutes and regulations, recognizing that, while not controlling upon the courts by reason of their authority, [these interpretations] do constitute a body of experience.”) *Soriano* further explained that some analysis of the alleged PSG beyond *Chevron* deference was necessary because the BIA had ruled in a precedential decision on “noncriminal drug informants working against the Cali drug cartel who act out of a sense of civic duty and moral responsibility,” *Id.* at 1165, which was distinguishable from the group at hand of “criminal government informant[s] who neither act[] from altruistic motives nor turn[] in participants in a *drug cartel*,” and subsequently finding that the group does not constitute a PSG for lack of innate characteristics under the two-alternatives test. *Id.*

231. *Id.*

232. See *supra* Part II.A (characterizing the approach of the circuit courts that follow the BIA by the use of immutable characteristics, social visibility, and particularity); *supra* Part II.B (explaining that the Third and Seventh Circuits use the immutable characteristics test and reject both social visibility and particularity); *supra* Part II.C (showing that the Ninth Circuit’s approach entails the two-alternatives test, comprised of innate characteristics or voluntary association, or the application of *Chevron* deference).

233. See *supra* notes 76-88 and accompanying text.

234. See *supra* notes 134-38 and accompanying text.

235. See *supra* Part I.C.2.

1. *The Application of Chevron Deference*

Chevron deference plays a crucial role in all three approaches to defining PSG. The circuit courts following the BIA justify their adoption of the BIA's approach to defining PSG with the *Chevron* doctrine.²³⁶ *Chevron* deference plays an important role here because, according to the Supreme Court, "judicial deference to the Executive Branch is especially appropriate in the immigration context"²³⁷ and in the context of defining PSG.²³⁸ Given that PSG is not defined in the INA,²³⁹ circuit courts must decide whether the immigration agency's interpretation of PSG is a permissible construction of the INA.²⁴⁰ When these circuit courts find that the BIA's construction of the statute is reasonable, they give *Chevron* deference to the BIA's interpretation of PSG in the INA.²⁴¹ Generally, the circuit courts following

236. See *Rivera-Barrientos v. Holder*, 658 F.3d 1222, 1226-27 (citations omitted) (10th Cir. 2011); *Bermudez-Botero v. Holder*, 375 F. App'x 314, 316 (4th Cir. 2010) (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)); *Al-Ghorbani v. Holder*, 585 F.3d 980, 991 (6th Cir. 2009); *Galindo-Torres v. Att'y Gen.*, 348 F. App'x 814, 817 (3d Cir. 2009); *Scatambuli v. Holder*, 558 F.3d 53, 58 (1st Cir. 2009) (quoting *Elien v. Ashcroft*, 364 F.3d 392, 397 (1st Cir. 2004)); *Davila-Mejia v. Mukasey*, 531 F.3d 624, 627 (8th Cir. 2008); *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 72 (2d Cir. 2007); *Castillo-Arias v. Att'y Gen.*, 446 F.3d 1190, 1195 (11th Cir. 2006).

237. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (citing *INS v. Abudu*, 485 U.S. 94, 110 (1988)).

238. See *Gonzales v. Thomas*, 547 U.S. 183, 186-87 (2006) (requiring the Ninth Circuit Court of Appeals to remand the case to the BIA for consideration of the alien's eligibility for asylum based on membership in the PSG of a particular family, rather than considering *de novo* the question of whether the particular family constituted a PSG where the BIA had not yet considered this PSG); *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009) (citing *Gonzales*, 547 U.S. 183) (distinguishing deference for the BIA's social visibility test from the BIA's determination of whether a particular family constitutes a PSG in *Gonzales* by noting that "[w]e are mindful of the Supreme Court's admonition to the courts of appeals . . . that the Board's definition of 'particular social group' is entitled to deference. The issue in that case was whether a family could be a particular social group, a difficult issue on which the Board had not opined; and the Court held that the Board should have an opportunity to do so. But regarding 'social visibility' as a criterion for determining 'particular social group,' the Board has been inconsistent rather than silent"). See generally *Supreme Court Finds "Membership in Particular Social Group" Must First Be Determined by Agency Not Court*, 83 No. 17 INTERPRETER RELEASES 769 (2006) (providing a history and overview of *Gonzales*).

239. See *supra* note 53 and accompanying text.

240. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); see also *supra* notes 76-88 and accompanying text.

241. See *Bermudez-Botero*, 375 F. App'x at 316 (noting that "this court will defer to the Board's 'reasonable interpretation' of the term" (quoting *Chevron*, 467 U.S. at 843-44)); *Al-Ghorbani*, 585 F.3d at 991 (citations omitted) (internal quotation marks omitted) (noting that "substantial deference is given to the BIA's interpretation of

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the BIA apply *Chevron* deference to the BIA's interpretation of PSG, and consequently determine that immutable characteristics, social visibility, and particularity constitute a permissible statutory construction of PSG.²⁴²

To illustrate, the Eleventh Circuit applies *Chevron* deference to the definition of PSG in the following way. The Eleventh Circuit explains the meaning of permissible statutory construction by specifying that “[a]n agency’s interpretation is deemed reasonable unless it is ‘arbitrary, capricious, or clearly contrary to law.’”²⁴³ In *Castillo-Arias*, the Eleventh Circuit framed the analysis by declaring, “we must follow the BIA’s determination that noncriminal informants working against the Cali cartel are not a social group under the INA unless the interpretation is unreasonable, i.e., arbitrary, capricious, or clearly contrary to law.”²⁴⁴ Then, the court determined that the BIA’s tests used to define PSG and their application to the facts were reasonable.²⁴⁵ Consequently, the Eleventh Circuit and the other circuits that follow the BIA justify their recent adoption of the social visibility and particularity tests (in addition to the older immutable characteristics test) using *Chevron*.²⁴⁶

In contrast, the dissenting circuits do not apply *Chevron* deference to the BIA’s construction of PSG.²⁴⁷ By way of rejecting the ap-

the INA” and that “[t]he BIA’s interpretation of the statute and regulations will be upheld unless the interpretation is arbitrary, capricious, or manifestly contrary to the statute”); *Galindo-Torres*, 348 F. App’x at 817 (citations omitted) (explaining that because of the ambiguity of the statutory phrase “particular social group,” the court has generally given deference to the BIA’s interpretation); *Scatambuli*, 558 F.3d at 58 (quoting *Elfen*, 364 F.3d at 397) (asserting that “[w]hen a statute is silent or ambiguous, therefore, we uphold the implementing agency’s statutory interpretation, provided it is ‘reasonable’ and consistent with the statute”); *Davila-Mejia*, 531 F.3d at 627 (noting that the court accords “substantial deference to the BIA’s interpretation of the statutes . . . it administers”); *Ucelo-Gomez*, 509 F.3d at 72 (analyzing whether the “BIA’s construction [of social group] was a reasonable interpretation of the statute”); *Castillo-Arias*, 446 F.3d at 1195-96 (citations omitted) (discussing the application of *Chevron* deference to the BIA’s interpretation of PSG “unless the interpretation is unreasonable, i.e., arbitrary, capricious, or clearly contrary to the law”).

242. See *Chevron*, 467 U.S. at 842-43; *supra* notes 76-88 and accompanying text; *supra* note 236.

243. *Castillo-Arias*, 446 F.3d at 1195 (citing *Alabama Power Co. v. Fed. Energy Regulatory Comm’n*, 22 F.3d 270, 272 (11th Cir. 1994)); cf. *supra* Part II.C. (discussing the Ninth Circuit’s application of *Chevron* based on whether the BIA has already ruled on a very similar group to the alleged PSG in the case at hand).

244. *Castillo-Arias*, 446 F.3d at 1196.

245. See *id.* at 1196-99.

246. See *supra* note 236.

247. See *supra* notes 193-194, 206 and accompanying text.

proach of the BIA (that the majority of circuits follow), the Seventh Circuit's *Gatimi v. Holder* stated that *Chevron* should not apply because of the inconsistent use of social visibility in past BIA decisions.²⁴⁸ Referring to this inconsistency, Judge Posner, in *Gatimi*, explains that the BIA "has found groups to be 'particular social groups' without reference to social visibility, as well as, in this and other cases, refusing to classify socially invisible groups as particular social groups but without repudiating the other line of cases."²⁴⁹ Furthermore, "[w]hen an administrative agency's decisions are inconsistent, a court cannot pick one of the inconsistent lines and defer to that one," and "[s]uch picking and choosing would condone arbitrariness and usurp the agency's responsibilities."²⁵⁰ As a result, the Seventh Circuit did not adhere to the BIA's definition of PSG because *Chevron* deference does not apply where the BIA's prior rulings are inconsistent.²⁵¹ For similar reasons, the Third Circuit also rejected the BIA's approach after concluding that it was not entitled to *Chevron* deference.²⁵²

As the discussion above highlights, the finding that *Chevron* applies or does not apply to the definition of PSG is critical. The determination that *Chevron* deference is due to the BIA's definition of PSG leads courts to follow the BIA's approach by adopting immutable characteristics, social visibility, and particularity.²⁵³ On the other hand, the determination not to give *Chevron* deference to the BIA can lead a court, such as the Seventh Circuit here, to reject the social visibility and particularity components of the BIA's definition of PSG.²⁵⁴ If *Chevron* deference applies, then *Chevron* serves as a justification for the approach of the deferential circuit courts that follow the BIA,²⁵⁵ and as a criticism of the allegedly non-deferential dissent-

248. See *Gatimi v. Holder*, 578 F.3d 611, 615-16 (7th Cir. 2009) (citing *Gonzales v. Thomas*, 547 U.S. 183 (2006)) (discussing whether a family could be a PSG).

249. *Id.* (internal citations omitted).

250. *Id.* at 616 (internal citations omitted).

251. See Harris & Weibel, *supra* note 40, at 12 (internal quotation marks omitted) (claiming that "[u]nlike *Matter of C-A-*, where social visibility was treated as a relevant factor, in *S-E-G-*, the BIA concluded that the proposed social group fails the social visibility test. This lack of clarity on whether social visibility is a factor or a requirement indicates a lack of consistency, so under *Chevron*, Circuit courts should not afford the BIA deference in this inconsistent approach."); *supra* notes 193-194 and accompanying text.

252. See *supra* note 206 and accompanying text.

253. See *supra* notes 242, 246 and accompanying text.

254. See *supra* note 251 and accompanying text.

255. See *supra* notes 236-242 and accompanying text.

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ing circuits' approach.²⁵⁶ If *Chevron* deference does not apply, then lack of deference justifies the dissenting circuits' approach,²⁵⁷ and serves as a basis for criticizing the deferential circuit courts following the BIA.²⁵⁸

Finally, the Ninth Circuit applies *Chevron* deference in a different way. The Ninth Circuit gives *Chevron* deference to the BIA's precedential decisions about very similar groups, and uses the BIA's approach to defining PSG in these instances.²⁵⁹ Otherwise, the Ninth Circuit applies its two-alternatives test.²⁶⁰ This use of *Chevron* deference depends on the purported PSG in the case at hand.²⁶¹ For example, the Ninth Circuit rationalizes following BIA decisions about groups resisting gangs by relying on the doctrine of *Chevron* deference.²⁶² The Ninth Circuit's application of *Chevron* differs from that of the circuit courts that follow the BIA and the dissenting circuits, which respectively give and refuse to give *Chevron* deference to the BIA's definition of PSG, regardless of the facts of the case.²⁶³ If the Ninth Circuit's fact-specific application of *Chevron* is appropriate, then this serves as both a justification for the Ninth Circuit's approach and as a criticism of the other two approaches.²⁶⁴ If the fact-specific application is improper, however, this serves as a criticism of the Ninth Circuit's approach.²⁶⁵

256. See, e.g., *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled on other grounds by* *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005), *vacated*, *Gonzales v. Thomas*, 547 U.S. 183 (2006). For a similar argument criticizing another circuit court's lack of deference to the BIA under the *Chevron* doctrine, see James H. Martin, Note, *The Ninth Circuit's Review of Administrative Questions of Law in the Immigration Context: How the Court in Hernandez-Montiel v. INS Ignored Chevron and Failed to Bring Harmony to "Particular Social Group" Analysis*, 10 GEO. MASON L. REV. 159, 172-82 (2001).

257. See *supra* notes 193-194, 206, 247-252 and accompanying text.

258. See *supra* note 251 and accompanying text.

259. See *supra* note 208.

260. See, e.g., *Perdomo v. Holder*, 611 F.3d 662, 666 (9th Cir. 2010).

261. See *supra* notes 207-209, 222-226 and accompanying text.

262. See *Ramos Barrios v. Holder*, 581 F.3d 849, 855 (9th Cir. 2009) (asserting that *Chevron* deference should be granted to the BIA's analysis of the purported PSG of Guatemalan youths who refuse to join gangs); *Ramos-Lopez v. Holder*, 563 F.3d 855, 856 (9th Cir. 2009) (citing *Chevron*, 467 U.S. 837) (holding that *Chevron* deference is due to the BIA's interpretation of the alleged PSG of Salvadoran youths who refuse to join gangs); see also *supra* notes 76-88 and accompanying text.

263. Compare *supra* notes 259-262 and accompanying text, with *supra* notes 236-242 and accompanying text, and *supra* notes 247-252 and accompanying text.

264. See *supra* note 263.

265. See *supra* note 263.

2. *Social Visibility: Strengths and Weaknesses*

In addition to *Chevron*, an examination of the strengths and weaknesses of the social visibility test sheds light on the overall justifications and criticisms of the three different approaches to defining PSG. Some commentators praise the addition of social visibility to the analysis of social group. For example, a commentator noted that adding social visibility to the analysis of PSG “appears to be on more solid ground,” and can find support both in Second Circuit precedent and the UNHCR Guidelines.²⁶⁶ Commentators also praise the social perception approach, which serves as the foundation for the social visibility test,²⁶⁷ by highlighting the adaptability of the approach to changing and developing social contexts.²⁶⁸ Other strengths of social perception include “the fluidity of [the] approach [which] is a pragmatic recognition of the absence of a completely settled and authoritative set of external standards of reference,” and that “the scope of judicial discretion is greater than under the *ejusdem generis* approach, thus enabling judges to take account of the political and cultural specificity of circumstances in the applicant’s country of origin.”²⁶⁹

Other commentators, however, have voiced criticism of the social visibility test.²⁷⁰ First, the social visibility test would change the results in some well-respected, older cases.²⁷¹ The use of social visibility might jeopardize important precedent and thus harm the ability of

266. See, e.g., Martin, *Major Developments in Asylum Law over the Past Year*, *supra* note 151 (referencing the UNHCR Guidelines and Second Circuit precedent as support for the assertion that the addition of social visibility to the analysis of social group “appears to be on more solid ground”). For an argument that social visibility does not really draw support from the UNHCR Guidelines, see *supra* notes 153-60 and accompanying text.

267. See *supra* notes 153-60 and accompanying text.

268. See Aleinikoff, *supra* note 34, at 299-300.

269. See Hathaway & Foster, *supra* note 30, at 484.

270. See *infra* notes 271-284 and accompanying text. For an argument that social visibility needs clarification, see Melissa J. Hernandez Pimentel, Note, *The Invisible Refugee: Examining the Board of Immigration Appeals’ “Social Visibility” Doctrine*, 76 MO. L. REV. 575, 597 (2011) (“The continuing discrepancies of the social visibility doctrine will only lead to a greater divide until the BIA clarifies the social visibility doctrine or until the Supreme Court ultimately decides the doctrine’s fate.”).

271. See, e.g., Marouf, *supra* note 47, at 65 (citing *In re C-A-*, 23 I. & N. Dec. 951, 957 (B.I.A. 2006), *aff’d sub nom.* *Castillo-Arias v. Att’y Gen.*, 446 F.3d 1190 (11th Cir. 2006); *In re Fauziya Kasinga*, 21 I. & N. Dec. 357, 365-66 (B.I.A. 1996)) (arguing that *Kasinga* and other BIA decisions that preceded *In re C-A-* and the social visibility test would come out differently under the new BIA approach adopting social visibility as a criterion for social group).

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asylum applicants to obtain asylum on the ground of a PSG based on opposition to FGM,²⁷² a PSG of Cuban homosexuals,²⁷³ and a PSG based on the past experience of working as Salvadoran policemen.²⁷⁴ While the BIA claimed that it had been using social visibility all along,²⁷⁵ the facts in these cases suggest that these PSGs would have failed under the social visibility test.²⁷⁶ Other commentators note that the fate of many claims involving gender and sexual orientation might be negatively impacted by the social visibility test.²⁷⁷

Second, the social visibility test is difficult to apply. One commentator explains that “the ‘social visibility’ test will be inherently difficult to apply.”²⁷⁸ Because this approach seems mostly subjective and sociological in nature, not based on legal norms and principles like the ‘protected characteristic’ approach, it poses unique evidentiary challenges and likely will result in inconsistent and incoherent deci-

272. See *Kasinga*, 21 I. & N. Dec. at 365 (holding that young Togolese women who have not had FGM and who oppose the practice constitute a PSG); see also Deborah E. Anker, *Boundaries in the Field of Human Rights: Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 146 (2002) (citing *Kasinga*, 21 I. & N. Dec. 357) (discussing *Kasinga* and then concluding that “because of the cultural relativist conundrum, the continued failure to take women’s rights seriously and the complexity of the state responsibility question, gender asylum law is one of the few areas where the question of FGS [“female genital surgery”] as a human rights violation is confronted”).

273. See *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 820-23 (B.I.A. 1990) (holding that homosexuals known to the Cuban government constitute a PSG).

274. Cf. *In re Fuentes*, 19 I. & N. Dec. 658, 662 (B.I.A. 1988) (recognizing that former Salvadoran policemen might constitute a PSG in subsequent cases).

275. See *In re C-A-*, 23 I. & N. Dec. at 960.

276. See *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009); Marouf, *supra* note 47, at 64-65 (noting that “[t]he BIA’s decision in *Kasinga*, for example, contains no information indicating that young women who oppose female genital cutting are publicly vocal about their opinion, or that anyone outside their families has reason to know whether or not they have undergone the practice” and that “the UNHCR points out that ‘the general population of Cuba would not recognize homosexuals [regarding *Toboso-Alfonso*], nor would average Salvadorans necessarily recognize former members of the national police [referring to *Fuentes*], nor would a typical Togolese tribal member inevitably be aware of women who opposed female genital mutilation but had not been subjected to the practice’ [referring to *Kasinga*]”); Brief for U.N. High Comm’r for Refugees as Amicus Curiae Supporting Claimants at 8, Thomas, No. A75-597-0331-034/-035/-036 (B.I.A. Dec. 27, 2007); see also Danielle L.C. Beach, 09-12 IMMIGR. BRIEFINGS 1 (Dec. 2009).

277. See Harris & Weibel, *supra* note 40, at 23-25 (citations omitted) (discussing the negative impact that social visibility will likely have on claims by women who oppose and suffer domestic violence because domestic violence often occurs in private; noting the negative impact that social visibility is likely to have on claims based on sexual orientation because social stigma often leads asylum applicants to hide their sexual orientation in their country of origin).

278. See Marouf, *supra* note 47, at 71-78.

sions.”²⁷⁹ The way the BIA explains the social visibility test leaves many questions unanswered, such as whether the test focuses on actual visibility “in the literal sense or in the ‘external criterion’ sense”, which would subject a group without a literally visible characteristic to different treatment, “or even[]whether it understands the difference.”²⁸⁰ This lack of clarity on how to apply social visibility and what the test means contributes to inconsistent results.²⁸¹ Additionally, social visibility arguably leads to the strange outcome where a group that tries to remain unnoticed to avoid persecution cannot obtain asylum based on PSG.²⁸² As discussed earlier, the BIA’s interpretation of social visibility substantially differs from the UNHCR’s Guidelines, even though the BIA’s adoption of the social visibility test purported to rely on these Guidelines.²⁸³ Finally, “[b]ecause social visibility is often not a black or white issue, making it a requirement for a valid social group will lead to inconsistent and unreliable results.”²⁸⁴

3. *The Ninth Circuit’s Innate Characteristics or Voluntary Association Test*

In addition to *Chevron* and social visibility, it is important to examine the Ninth Circuit’s two-alternatives test before evaluating the different approaches in Part III. The Ninth Circuit justifies its two-alternatives test, which requires either innate characteristics or voluntary association, by relying on Ninth Circuit precedent, which in turn partially relies on *Acosta*.²⁸⁵ Additionally, the two-alternatives test “embraces individuals who are actually persecuted—even if they fail to qualify for asylum under the statute’s other enumerated categories,” and provides “a mechanism that meets the needs of those who do not fit neatly into a particular racial or religious group.”²⁸⁶ Finally,

279. *Id.* at 71. The criticisms of the BIA’s *C-A*- decision also apply as a justification of the Seventh Circuit’s approach. See *supra* notes 152-162 and accompanying text.

280. *Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009).

281. See *Bresnahan*, *supra* notes 48, at 670-71.

282. See *supra* notes 196-197 and accompanying text.

283. See *In re C-A*-, 23 I. & N. Dec. 951, 961 (B.I.A. 2006), *aff’d sub nom. Castillo-Arias*, 446 F.3d 1190 (11th Cir. 2006); *Marouf*, *supra* note 47, at 49 (citing *In re A-M-E-*, 24 I. & N. Dec. 69 (B.I.A. 2007), *aff’d sub nom. Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007)).

284. *Harris & Weibel*, *supra* note 40, at 25 (citations omitted).

285. See *supra* Part I.C.2.

286. *Immigration Law—Asylum—Ninth Circuit Holds That Persecuted Homosexual Mexican Man with a Female Sexual Identity Qualifies for Asylum under Par-*

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the two-alternatives test comports with congressional intent in adopting the Refugee Act of 1980, and with international obligations under the 1951 Convention and 1967 Protocol.²⁸⁷

Courts and commentators have also criticized the two-alternatives test. The voluntary association part of the two-alternatives test has been “widely criticized,” and even “[t]he Ninth Circuit . . . seems to have recognized the weakness” of the approach.²⁸⁸ Discussing the voluntary association test, one critic claims that “[t]o the extent that *Sanchez-Trujillo* presents an inconsistent and unclear framework—emphasizing ‘voluntary associational relationship’ and then providing the family as a ‘protyp[e]’—its test should probably be disregarded and subsumed within the Board’s approach [following the immutable characteristics test], which has been endorsed by commentators and other courts.”²⁸⁹ In addition, the application of the two-alternatives test in *Perdomo* can be criticized as defying the very meaning of “particular” by defining Guatemalan women, which make up half of a country, as a PSG.²⁹⁰ Finally, commentators criticize the Ninth Circuit for “finding *S-E-G*-dispositive on the factual issue” of whether the purported PSG is socially visible in several cases, including *Ramos-Lopez* and *Ramos Barrios*.²⁹¹ These commentators explain that “[s]ocial visibility determinations must be based on the facts and context of a particular country,”²⁹² and that an older Ninth Circuit case mandates that cases be determined based on the facts of the individual’s case, not on the cases of others.²⁹³ As this Part demonstrated,

particular Social Group Standard—*Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000), 114 HARV. L. REV. 2569, 2573 (2001).

287. *See id.*

288. *See* Aleinikoff, *supra* note 34, at 277, 278 (citations omitted) (noting the “significant tension” between the voluntary association test and the immutable characteristics test, as demonstrated by the fact that the distinct group of homosexuals, for example, has immutable characteristics but is unlikely to satisfy the voluntary association test); *accord* DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 382 (3d ed. 1999) (citations omitted) (noting “the criticism leveled against *Sanchez-Trujillo*”); *see also* Hathaway & Foster, *supra* note 30, at 478 (asserting that there is a consensus that voluntary association is not required for a cognizable PSG).

289. ANKER, *supra* note 288, at 382 (citations omitted).

290. *See* Doyle, *supra* note 119, at 548 (arguing that “defining a group of people who comprise about half of society (females who live as women) as a ‘particular social group’ would seem to defy the addition of the modified ‘particular’” and that using gender as a PSG is “illogical”).

291. *See* Harris & Weibel, *supra* note 40, at 16-17 & n.99.

292. *Id.* at 16.

293. *See id.* at 17 (citations omitted) (finding that an individual is “entitled to a determination” based on the factual circumstance of his own case, “not [that] of others” (quoting *Kovac v. INS*, 407 F.2d 102, 105 (9th Cir. 1969))).

there is a conflict between the circuit courts that follow the BIA, the dissenting circuits, and the Ninth Circuit about the meaning of PSG. This conflict leads to disparate outcomes in asylum cases depending on where the asylum proceedings take place.

III. RESOLUTION: THE SEVENTH CIRCUIT'S APPROACH

After presenting the conflict regarding the definition of PSG among the circuit courts in Part II, Part III proposes the adoption of the Third and Seventh Circuits' approach as a resolution to the conflict. This Part begins by proposing that uniformity and consistency in the definition of PSG is a desirable goal, and that the Supreme Court should resolve the conflict by adopting a uniform definition of PSG. The dissenting circuits' approach to defining PSG should be adopted for the following reasons: proper application of *Chevron* deference; relative ease of application; basis in coherent statutory analysis; consistency with international obligations; and rejection of the social visibility test and particularity requirement.

A. Uniformity and Consistency of Law, and the Supreme Court

An important argument in the debate about PSG is that the law should be uniform and consistent.²⁹⁴ *Refugee Roulette*, an article about the disparities in asylum outcomes, opened with the following statement about judicial consistency in the United States:

We Americans love the idea of "equal justice under law," the words inscribed above the main entrance to the Supreme Court building. We want like cases to come out alike. We publish tens of thousands of judicial decisions and have enshrined the concept of stare decisis in order to reduce the likelihood that Jane's case, adjudicated in December 2006, will come out very differently from Joe's very similar case adjudicated in January 2007. . . . Americans don't love consistent decision making merely because we think that fairness to the parties requires that similar cases should have similar outcomes. We also like the predictability that stare decisis offers.²⁹⁵

Uniformity in the law is desirable because it prevents arbitrary outcomes.²⁹⁶ In the context of PSG, "the complexity of U.S. social group jurisprudence" begs for "additional clarity."²⁹⁷ Judge Posner made the following comment about the inconsistency of asylum law:

294. See Voss, *supra* note 40, at 252-53.

295. Ramji-Nogales, Schoenholtz & Schrag, *supra* note 40, at 299.

296. See Voss, *supra* note 40, at 252-53.

297. Harris & Weibel, *supra* note 40, at 28.

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[G]iven the uncertainties in the law, the difficulties in the facts, [and] the seemingly arbitrary variance among the immigration judges, the court of appeals judges are also going to be falling back on . . . personal reactions, intuitions, values, and so on This is supposed to be a uniform body of federal law.²⁹⁸

The goal of uniformity in the law is particularly important in this context because the absence of a clear, uniform definition of PSG has led to many failed asylum applications in the United States.²⁹⁹

To help create uniformity in asylum law, the Supreme Court should resolve the conflict about the definition of PSG. In light of the fact that the Court has never expressly decided the meaning of PSG,³⁰⁰ a recent Petition for Writ of Certiorari asked the Supreme Court to resolve the circuit split over the definition of PSG.³⁰¹ Although the Supreme Court did not explain why the Petition was denied, the arguments of the government might shed light on the denial. The unpublished, brief case of *Contreras-Martinez* discusses a consistently unsuccessful type of PSG—youths who refuse to join gangs.³⁰² According to the government, this case was not a good vehicle for resolving the circuit split on how to define PSG because there is substantial agreement that refusal to join gangs should not constitute a PSG.³⁰³ If the Court accepted the government's narrow framing of the issue as whether youths who refuse to join gangs constitute a PSG,³⁰⁴ then the case would have been easy to dismiss.³⁰⁵ The denial

298. RAMI-NOGALES, PROPOSALS FOR REFORM, *supra* note 40, at 79.

299. See Heyman, *Protecting Foreign Victims*, *supra* note 40, at 120; Heyman, *Challenge of Domestic Violence*, *supra* note 121, at 771 (arguing specifically for a clearer definition of PSG and that “[u]nless consensus is reached on this issue [of the definition of PSG], asylum cannot address claims effectively based on social group membership”).

300. See Radtke, *supra* note 50, at 37.

301. See Petition for Writ of Certiorari at *10, *Contreras-Martinez v. Holder*, 346 F. App'x 956 (4th Cir. 2009) (No. 09-830), 2010 WL 128010; Radtke, *supra* note 50, at 37.

302. See *Contreras-Martinez*, 346 F. App'x 956, *cert. denied*, 130 S. Ct. 3274 (2010); Brief for the Respondent in Opposition, *supra* note 50, at 8 (asserting that “no court of appeals has held that people who refuse to join a gang because they object to the gang’s violent activities constitute a ‘particular social group’ under the INA”).

303. See *Contreras-Martinez*, 346 F. App'x 956; Brief for the Respondent in Opposition, *supra* note 50, at 8.

304. See Brief for the Respondent in Opposition, *supra* note 50, at 9; *cf.* Petition for Writ of Certiorari, *supra* note 50, at 9-10. *But see* Brief for the Respondent in Opposition, *supra* note 50, at 10 (arguing that even assuming that there is a split on the “permissible methodology for evaluating ‘particular social group’ claims,” the split is “lopsided and less well developed than petitioner suggests”).

of the Petition for Writ of Certiorari indicates that the case was not a good vehicle for resolving the conflict.³⁰⁶ The Supreme Court, therefore, should resolve the circuit split when a better case comes along.

Alternatively, Congress could amend the INA to clarify the definition of PSG.³⁰⁷ In the 112th Congress, bills in both the House and the Senate propose to amend the definition of PSG.³⁰⁸ House Bill 2185, introduced by Democratic Representative Lofgren, and Senate Bill 1202, introduced by Democratic Senator Leahy, both include the same definition of PSG.³⁰⁹ Both bills, entitled the Refugee Protection Act of 2011, suggest the following amendment to the INA:

For purposes of determinations under this Act, any group whose members share a characteristic that is either immutable or fundamental to identity, conscience, or the exercise of the person's human rights such that the person should not be required to change it, shall be deemed a particular social group, without any additional requirement.³¹⁰

The bills are currently in Committee in both the House and Senate.³¹¹ Given the "daunting" challenge of passing immigration legisla-

305. See *Contreras-Martinez*, 346 F. App'x 956; Brief for the Respondent in Opposition, *supra* note 50, at 8, (asserting that "no court of appeals has held that people who refuse to join a gang because they object to the gang's violent activities constitute a 'particular social group' under the INA").

306. See *supra* notes 301-305 and accompanying text.

307. See Harris & Weibel, *supra* note 40, at 28 (claiming that "clarity could be achieved . . . by amending the Refugee Act of 1980 to include a definition for social group").

308. See Refugee Protection Act of 2011, H.R. 2185, 112th Congress, § 5(a)(D) (2011); Refugee Protection Act of 2011, S. 1202, 112th Cong. § 5(a)(D) (2011).

309. See Refugee Protection Act of 2011, H.R. 2185, 112th Congress, § 5(a)(D) (2011). The same day the Refugee Protection Act was introduced in the House, the Bill was introduced in the Senate, proposing the same language to define PSG. Refugee Protection Act of 2011, S. 1202, 112th Cong. § 5(a)(D) (2011). This language came from Senator Leahy's Bill introduced the year before in the 111th Congress. See S. 3113, 111th Cong. § 5(a)(D) (2010).

310. See H.R. 2185, 112th Congress, § 5(a)(D) (2011); S. 1202, 112th Cong. § 5(a)(D) (2011).

311. This House of Representatives Bill has eight co-sponsors. See H.R. 2185, 112th Congress, § 5(a)(D) (2011); 157 Cong. Rec. H5150-02 (2011). In August 2011, the House Bill was referred to the Subcommittee on Immigration Policy and Enforcement. See *Bill Summary & Status: 112th Congress (2011-2012) H.R. 2185*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.2185>: (last visited Sept. 12, 2011). Currently, the Senate Bill has three co-sponsors, and is in the Committee on the Judiciary. See *Bill Summary & Status: 112th Congress (2011-2012) S. 2012*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN01202>: (last visited Sept. 12, 2011).

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tion in Congress,³¹² the Supreme Court's resolution of the meaning of PSG would be more efficient and effective.

B. Adopting the Third and Seventh Circuits' Approach

The Third and Seventh Circuits' approach to defining PSG (the immutable characteristics test) should be adopted to resolve the circuit split. The dissenting circuits' approach properly applies *Chevron*, is easiest to apply, has a basis in coherent statutory analysis, comports with international obligations, and rejects the problematic social visibility test and particularity requirement. If given the opportunity to rule on the definition of PSG, the Supreme Court should adopt the approach of the Third and Seventh Circuits.³¹³ In addition, the Fifth Circuit,³¹⁴ which has not yet taken a definitive position on the issue of PSG, should adopt the approach of the dissenting circuits.

Significantly, the dissenting circuits properly apply *Chevron* in the context of the BIA's definition of PSG. Judge Posner's well-founded conclusion that the BIA's prior rulings on PSG were inconsistent, especially with regard to the social visibility test, led to the decision not to afford *Chevron* deference to the BIA's approach.³¹⁵ Based on this determination, the dissenting circuits properly rejected the social visibility test and particularity requirements.³¹⁶ In contrast, the circuit courts that follow the BIA improperly applied *Chevron* deference to the BIA's social visibility test and particularity requirement because they did not recognize that the BIA's prior rulings on PSG were inconsistent.³¹⁷ The BIA's prior inconsistent decisions also undermine the Ninth Circuit's approach, which gives *Chevron* deference to precedential BIA cases about similar groups.³¹⁸

312. See WASEM, *supra* note 49, at 1 (noting that while "selected immigration issues are likely to be a major concern for the 112th Congress, . . . legislative action on such contentious issues appears daunting").

313. See *supra* Part II.B.

314. See, e.g., *Bayavarpu v. Holder*, 390 F. App'x 353, 353 (5th Cir. 2010) (discussing the BIA's social visibility and particularity requirements favorably, but basing its holding only on the criterion that the PSG not be defined exclusively by persecution); *Orellana-Monson v. Holder*, 332 F. App'x 202, 203 (5th Cir. 2009) (rejecting PSG without explaining the rationale for this holding).

315. See *supra* notes 193-194, 247-251 and accompanying text. Cf. *supra* notes 76-88 (providing an overview of the *Chevron* doctrine).

316. See *supra* notes 193-194, 206, 247-252, 257-258 and accompanying text.

317. See *supra* note 258 and accompanying text; see also *supra* notes 236-242 and accompanying text.

318. See *supra* note 265 and accompanying text.

The dissenting circuits' approach is also theoretically coherent.³¹⁹ The Third and Seventh Circuits reject the approach of *C-A-* and therefore avoid the questionable rationale of that decision.³²⁰ In rejecting social visibility and particularity, the dissenting circuits returned to the immutable characteristics test, which had generally been the law for twenty years.³²¹ The protected characteristics theory, which is built on *Acosta's* foundations, is respected and rests upon strong theoretical underpinnings.³²² Even assuming that the social perception theory is a more coherent theory than the protected characteristics theory, the BIA misapplied the social perception theory in *C-A*.³²³ Therefore, even if the momentum of the social perception theory worldwide is acknowledged,³²⁴ the social visibility test significantly diverges from the theoretical framework of social perception.³²⁵ Consequently, whatever merits the social perception theory may have, it cannot fully justify the social visibility test.³²⁶

The dissenting circuits' approach is also theoretically coherent because these circuits reject particularity.³²⁷ According to the BIA, "[t]he essence of the 'particularity' requirement . . . is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question,

319. See *infra* notes 320-331 and accompanying text.

320. See *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987); *In re C-A-*, 23 I. & N. Dec. 951, 957 (B.I.A. 2006), *aff'd sub nom. Castillo-Arias v. Att'y Gen.*, 446 F.3d 1190 (11th Cir. 2006); Marouf, *supra* note 47, at 50 (citing *In re C-A-*, 23 I. & N. Dec. 951) (arguing that adjudicators "should not give deference to the BIA's decisions in *C-A-* and . . . [another BIA decision] because they do not provide a permissible interpretation of the Convention and represent a sudden, unexplained change in the way the BIA defines 'membership of a particular social group'"); *supra* notes 191, 195, 200, 271-276 and accompanying text.

321. See *In re Acosta*, 19 I. & N. Dec. at 233; Harris & Weibel, *supra* note 40, at 23 (expressing the hope that other circuit courts follow the Seventh Circuit's rejection of social visibility and particularity and return to the original immutable characteristics test from *Acosta*).

322. See *supra* notes 99, 118-119, 155 and accompanying text (observing that the protected characteristics approach, which is incorporated in the UNHCR Guidelines, is endorsed by many jurists, scholars, and common law jurisdictions).

323. See *supra* notes 153-162 and accompanying text (explaining how the BIA's social visibility test differs from the UNHCR's social perception approach).

324. See Hathaway & Foster, *supra* note 30, at 482-83 (describing how the social perception approach has been adopted by the Australian courts, has influenced U.S. national guidelines, and is sometimes relied upon by other jurisdictions).

325. See *supra* notes 100, 153-162.

326. See *supra* notes 100, 153-162.

327. See *supra* notes 199, 203-206 and accompanying text.

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as a discrete class of persons.”³²⁸ As this excerpt highlights, social visibility and particularity are not distinct tests.³²⁹ Emphasizing this blending of the two tests, the Third Circuit concluded that particularity merely articulates the same concept underlying social visibility, and ultimately rejected the particularity requirement.³³⁰ The inability to meaningfully distinguish particularity from social visibility illustrates that particularity is not a coherent legal test.³³¹

In terms of statutory construction, the dissenting circuits’ approach is the most advantageous. The *Acosta* test, which the dissenting circuits follow, does the following:

By basing the definition of “membership of a particular social group” on application of the *ejusdem generis* principle, we respect both the specific situation known to the drafters—concern for the plight of persons whose social origins put them at comparable risk to those in the other enumerated categories—and the more general commitment to grounding refugee claims in civil or political status. . . . Most important, the standard is sufficiently open-ended to allow for evolution in much the same way as has occurred with the four other grounds, but not so vague as to admit persons without a serious basis for claim to international protection.³³²

As a result, the immutable characteristics test comports with the intentions and the balance struck by the 1951 Convention.³³³ In addition, the immutable characteristics approach avoids the PSG as a “safety net” position,³³⁴ which makes the persecution requirement of asylum claims redundant.³³⁵ *Acosta*’s “middle ground position,” followed by the dissenting circuits, also avoids making the other categories redundant.³³⁶

328. *In re S-E-G-*, 24 I. & N. Dec. 579, 584 (B.I.A. 2008).

329. *See id.*

330. *See supra* notes 203-204 and accompanying text.

331. *See supra* notes 203-204 and accompanying text.

332. *See* HATHAWAY, REFUGEE STATUS, *supra* note 34, at 161 (citations omitted).

333. *See id.*; Aleinikoff, *supra* note 34, at 285.

334. *See* HATHAWAY, REFUGEE STATUS, *supra* note 34, at 157-60 (citing Arthur C. Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39 (1983)).

335. *See* HATHAWAY, REFUGEE STATUS, *supra* note 34, at 156-60; Aleinikoff, *supra* note 34, at 285.

336. *See* HATHAWAY, REFUGEE STATUS, *supra* note 34, at 160 (citations omitted); Aleinikoff, *supra* note 34, at 285.

U.S. asylum law should comport with international obligations by providing humanitarian protection for refugees,³³⁷ and the dissenting circuits' approach adheres to these international obligations. The following highlights the relationship between PSG and the 1951 Convention:

The analysis is guided by the underlying premise that a sensible interpretation of the term [refugee] must be responsive to victims of persecution without so expanding the scope of the 1951 Convention as to impose upon States obligations to which they did not consent. In striking that delicate balance, it must be kept in mind that international refugee law bears a close relationship to international human rights law—that refugees are persons whose human rights have been violated and who merit international protection.³³⁸

The United States has clearly indicated its intention to abide by international refugee law obligations,³³⁹ and therefore should adopt the approach that best adheres to these obligations. A definition of PSG, which discards social visibility and particularity, is better aligned with the United States' international obligations based on the case law that the immutable characteristics test has generated in the past.³⁴⁰ By continuing the trajectory of cases that have developed claims based on gender and sexual orientation—claims which traditionally have had difficulty under asylum law—the United States would better comply with the obligations of international refugee law.³⁴¹ The adoption of the dissenting circuits' test would safeguard the development of these valid and important asylum claims, and help ensure that U.S. asylum law continues to abide by international obligations.³⁴²

The dissenting circuits' approach is preferable to the approaches of both the Ninth Circuit and the circuits that follow the BIA. Critiquing the other two approaches to defining PSG highlights the strengths of the dissenting circuits' approach. The Ninth Circuit's approach is not ideal for several reasons. First, both courts and commentators

337. See *supra* note 33; *infra* notes 338-339 and accompanying text; see also *supra* Part I.B.

338. Aleinikoff, *supra* note 34, at 265.

339. See *supra* Part I.B. and accompanying text.

340. See *supra* Part I.B.; *supra* notes 271-277 and accompanying text.

341. See Aleinikoff, *supra* note 34, at 309 (citations omitted); *supra* notes 271-277 and accompanying text (claiming that the social visibility test threatens the future of cases based on gender and sexual orientation, which developed under the immutable characteristics test); see also *supra* Part I.B.

342. See Aleinikoff, *supra* note 34, at 309 (quoting *R v. Sec'y of State for the Home Dep't, Ex parte Shah*, [1997] Imm. AR 145, 153 (A.C.)); *supra* notes 271-277 and accompanying text; see also *supra* Part I.B.

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criticize the voluntary association part of the Ninth Circuit's two-alternatives test as inconsistent and problematic.³⁴³ Second, the Ninth Circuit impermissibly uses the BIA's *S-E-G*-decision as dispositive on the factual issue of social visibility in its own cases involving youths that refused to join gangs.³⁴⁴ This use was improper because determinations about an applicant's PSG should be based on the facts of the specific case, not on the outcome of an unrelated case.³⁴⁵ Finally, the overall complexity of the Ninth Circuit's approach makes it less attractive than the dissenting circuits' simpler approach.³⁴⁶ In an area of law already plagued by inconsistency,³⁴⁷ the Ninth Circuit's splintered approach, which may, depending on the facts, apply the voluntary association or the innate characteristics test (and may give the BIA either *Chevron* deference or *Skidmore* deference), is not the best route to a clear, uniform body of asylum law.³⁴⁸

Criticism of the social visibility test, utilized by the circuits that follow the BIA, also highlights the reasons the dissenting circuits' approach is preferable. The social visibility test leads to a strange result: a group that tries to remain invisible to avoid persecution cannot obtain asylum based on PSG.³⁴⁹ Another criticism of this approach is that well-respected cases that crucially developed asylum law based on gender and sexual orientation would have had different outcomes under social visibility, even though the BIA claims that it was using the social visibility test all along.³⁵⁰ In addition, the social visibility test is more difficult to apply than the immutable characteristics test.³⁵¹ The immutable characteristics test's twenty years of precedent makes it easier to apply than the social visibility test, which has only been used for a few years.³⁵² Additionally, the BIA's opaque expla-

343. See *supra* notes 288-290 and accompanying text.

344. See *supra* notes 291-293 and accompanying text.

345. See Harris & Weibel, *supra* note 40, at 17 (citations omitted) (finding that an individual is "entitled to a determination" based on the factual circumstance of his own case, "not [that] of others" (quoting Kovac v. INS, 407 F.2d 102, 105 (9th Cir. 1969))).

346. Compare *supra* Part II.C, with *supra* Part II.B.

347. See *supra* notes 297-299 and accompanying text.

348. See *supra* Part II.C.

349. See *supra* notes 196-197, 282 and accompanying text.

350. See *supra* notes 271-277 and accompanying text.

351. See *supra* notes 278-279 and accompanying text.

352. See *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987); *In re C-A-*, 23 I. & N. Dec. 951, 957 (B.I.A. 2006), *aff'd sub nom. Castillo-Arias v. Att'y Gen.*, 446 F.3d 1190 (11th Cir. 2006).

nation and application of social visibility has not only contributed to inconsistent results in the past,³⁵³ but will likely lead to future inconsistency and arbitrariness.³⁵⁴

After reviewing the criticisms of the circuits that follow the BIA and the Ninth Circuit, certain concerns about the dissenting circuits' approach should be considered. The main concerns about the Seventh Circuit's approach are its lack of *Chevron* deference, which has been addressed above,³⁵⁵ and worries about opening the floodgates.³⁵⁶ Concerns about the dissenting circuits' definition of PSG opening the floodgates of refugees are not well-founded.³⁵⁷ The floodgates argument has been raised at numerous points in American history and has proved to be an unsubstantiated argument.³⁵⁸ For example, when *Kasinga* held that a group that opposed FGM was a PSG, the concerns about a floodgates problem did not materialize.³⁵⁹ When Canada greatly expanded its grounds for asylum, the country did not experience a "flood" of new asylum seekers.³⁶⁰ Specifically, the addition of gender as an enumerated ground for asylum in Canada only increased asylum applications by two percent.³⁶¹ Finally, concerns about floodgates should be alleviated by the fact that applicants still need to establish the other elements of an asylum claim.³⁶² In sum, the Third and Seventh Circuits' approach has many advantages over the approaches of the other circuit courts.³⁶³

353. See *Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009); Bresnahan, *supra* note 48, at 670-71.

354. See *supra* notes 279, 284 and accompanying text.

355. See *supra* notes 315-316 and accompanying text.

356. See *supra* notes 35-36 and accompanying text.

357. See *supra* notes 37-38 and accompanying text.

358. See, e.g., *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996); Cianciarulo & David, *supra* note 37, at 381.

359. See Cianciarulo & David, *supra* note 37, at 381-82; Siddiqui, *supra* note 37, at 528.

360. See Fletcher, *supra* note 37, at 129; Siddiqui, *supra* note 37, at 527-28.

361. See *supra* note 360.

362. See, e.g., Cianciarulo & David, *supra* note 37, at 380-81 (discussing how the BIA's recognition of a social group based on FGM in *Kasinga* created similar floodgate fears which never materialized and explaining how asylees have other obstacles to surpass after establishing membership in a social group); Fletcher, *supra* note 37, at 129 (explaining the favorable experience of Canada); Siddiqui, *supra* note 37, at 527-28 (explaining that the addition of gender as a basis for asylum had a negligible effect on asylum applications and describing the other elements that asylees need to prove).

363. See *supra* Part III.B.

CONCLUSION

The resolution of the conflict between the circuit courts about the definition of PSG is an important goal that would help achieve consistency and uniformity in the law.³⁶⁴ The Supreme Court should adopt the approach of the Third and Seventh Circuits because of the approach's proper application of *Chevron*, relatively easy application, coherent statutory interpretation, rejection of social visibility and particularity, and consistency with the United States' international obligations.³⁶⁵

Elizabeth, the brutally mistreated Cameroonian widow, was granted asylum in the United States more than eight years after her initial asylum application.³⁶⁶ Given that the IJ and BIA erred in their rulings on Elizabeth's PSG,³⁶⁷ the lack of clarity about the definition of PSG probably contributed to the duration of these proceedings. Hopefully, when this conflict is resolved, asylum applicants like Elizabeth, will be able to find refuge in the United States through a timely, consistent, and fair asylum process.

364. *See supra* notes 294-299 and accompanying text.

365. *See supra* Part III.B.

366. *See supra* notes 11, 13, 14 and accompanying text.

367. *See supra* notes 13, 17, 18 and accompanying text.