NOTE

RE-DEFINING PARTICULAR SOCIAL GROUP IN THE UNITED STATES: LOOKING TO INTERNATIONAL GUIDANCE IN THE WAKE OF THE *MATTER OF A-B-* VACATUR

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ABSTRACT

Undefined in both the 1951 Refugee Convention and the Refugee Act of 1980, the phrase "particular social group," one of the five protected grounds for asylum, has been subject to various interpretations which have rendered US asylum law unpredictable, inconsistent, and incompatible with international refugee law. On June 16, 2021 Attorney General Merrick Garland vacated Matter of A-B- I*, a Trump-era asylum decision which significantly narrowed the definition of particular social group, and also restricted relief for many individuals seeking refuge from life-threatening persecution. Though a step in the right direction toward more equitable and consistent asylum law in the United States, the vacatur of this decision returned US particular social group jurisprudence to pre-*A-B- *precedent, leaving longstanding problems unaddressed. This Note argues that the United States must abandon pre-*A-B- *precedent to ensure lasting change. Rather than reinvent the wheel, this Note examines asylum procedures in Canada and Australia, both of which are common law nations that receive an amount of asylum applications that is comparable to the United States and, unlike the United States, possess UNHCR-endorsed definitions of particular*

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social group. Ultimately, this Note argues that the Australian approach may provide a realistic and workable means to address US problems.

ABSTRACT 575
I. INTRODUCTION 577
II. PARTICULAR SOCIAL GROUP JURISPRUDENCE IN THE UNITED STATES 579
A. PSG Jurisprudence Pre-Trump 581
1. *Matter of Acosta* and the Immutability Standard 581
2. Social Distinction and Particularity – The Development of a Narrow Three-Part Test for Cognizability of PSGs 584
a. Social Distinction 585
b. Particularity 586
B. Changes Under the Trump Administration: Matter of A-B- 587
C. AG Garland's Vacatur and Return to Pre-A-B- I Precedent 588
III. PROBLEMS WITH A RETURN TO PRE-A-B- PRECEDENT 589
A. Acosta and Cumulative Approach Circuit Split 589
B. Problems with Acosta 591
1. Sufficient or Necessary? Lack of Guidance Leads to Judicial Inconsistency 592
2. Floodgates Concerns, Gender, and International Standards 594
C. Problems with the Cumulative Approach 596
1. Particularity & Social Distinction are Vague and Confusing 597
2. The Three-Part Test is Overly Harsh 599
3. The Cumulative Approach is Inconsistent with International Law 600
IV. INTERNATIONAL EXAMPLES OF WORKABLE ALTERNATIVES: CANADA & AUSTRALIA 602
A. Canada: An Immutability Approach Grounded in Human Rights 603

1. Canada's Protected Characteristics Approach Goes Beyond *Acosta*'s Immutability Test........ 603
2. Protected Characteristics Approach as Endorsed by UNHCR 605
3. Gender and Floodgates: A Statistical Analysis 606
4. Canada's Protected Characteristics Approach Addresses Endemic Issues, but is it feasible in the United States?.. 607
B. Australia: The Alternative Approach........................ 609
1. The Social Perception Approach in Australian Caselaw as More Inclusive than Particularity and Social Distinction 610
2. The Migration Act Definition is More inclusive than either *Acosta* or the Cumulative Approach 613
3. Application of the Migration Act Since 2014. 614
4. Australia: Anti-Asylum or Comparable Example? 615
V.CONCLUSION.. 618

I. INTRODUCTION

Though the statutory basis for asylum has not changed since the United States enacted the Refugee Act of 1980,[1] US asylum law[2] over the last thirty years has nonetheless been characterized as

1. The United States has not ratified the 1951 Refugee Convention. However, it is a party to the 1967 Protocol Relating to the Status of Refugees. Parties to the 1967 Protocol are bound to the 1951 Convention's legal requirements. Protocol Relating to the Status of Refugees, art. 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Refugee Protocol]. The Refugee Act of 1980 subsequently incorporated the 1951 Convention's definition of a "refugee," including the five protected grounds, into U.S. national law. Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.); 8 U.S.C. § 1101(a)(42).

2. This paper explores only US and International jurisprudence regarding "asylum seekers": those seeking a refugee status determination in the first instance under 8 U.S.C. § 1158 and comparable international statutes. For the purposes of clarity and to avoid confusion with other areas of Refugee Law and Policy, such as overseas refugee application procedures and resettlement, I refer to this focus as "asylum law" rather than "refugee law." However, to be granted asylum, an asylum seeker in the United States must demonstrate that he or she is a "refugee" by within the meaning of 8 U.S.C. § 1101(a)(42).

inconsistent,[3] most notably in particular social group ("PSG") jurisprudence. Left undefined in both the 1951 Refugee Convention, a United Nations multilateral treaty outlining the rights of refugees post-WWII, and the United States' codification of the Convention in the Refugee Act of 1980,[4] the phrase PSG has been the subject of evolving legal analysis as to what constitutes a PSG and who gets to be a member of one. Over time, precedential decisions and guidance intended to elucidate the ambiguous protected ground have resulted in outcomes that are unpredictable, unfair, and incompatible with international law.

However, on June 16th, 2021, United States Attorney General Merrick Garland issued a decision vacating *Matter of A-B I*,[5] a Trump-era decision that restricted grants of asylum to individuals fleeing gender-based violence, gang violence, and other forms of "private persecution" through a narrow interpretation of PSG.[6] While the vacatur of this decision is a step toward more equitable asylum procedures, in the interim, immigration judges ("IJs") and the Board of Immigration Appeals ("BIA") are instructed to follow pre-*A-B-* precedent.[7] Problems of inconsistency and unpredictability, which have plagued PSG jurisprudence since well before the decision, remain unaddressed. With new rulemaking

3. While asylum is a legal right, guidance on how requirements to establish asylum are interpreted, as well as who seeks asylum and when, is impacted by both domestic politics and international geopolitics. *See generally* AM. IMMIGR. COUNCIL, AN OVERVIEW OF U.S. REFUGEE LAW AND POLICY (2021), https://www.americanimmigrationcouncil.org/research/overview-us-refugee-law-and-policy [https://perma.cc/9R8S-C3MT] (highlighting changes in refugee flows worldwide as well as changes in US refugee admission policies); AM. IMMIGR. COUNCIL, ASYLUM IN THE UNITED STATES (2020), https://www.americanimmigrationcouncil.org/research/asylum-united-states [https://perma.cc/UZY2-7VMQ] (discussing changes in guidance on asylum adjudications under the Trump administration).

4. Article 1 of the 1951 Refugee Convention lists the five protected grounds under which a person may apply for asylum as "race, religion, nationality, membership in a particular social group or political opinion," but does not provide guidance as to what a PSG is or define the phrase's composite terms. Convention Relating to the Status of Refugees, art. 1, July 28, 1951,19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter 1951 Refugee Convention].

5. *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018) [hereinafter *A-B- I*].

6. *Matter of A-B-*, 28 I. & N. Dec. 307 (A.G. 2021) [hereinafter *A-B- III*]. *A-B- III* also vacated *Matter of A-B-II*, 28 I. & N. Dec. 199 (A.G. 2021), which restricted PSG asylum claims on state protection and nexus grounds. *Id.* This paper primarily focuses on PSG cognizability in the wake of the vacatur, so *A-B- II* and its impact is largely outside of the scope of analysis.

7. *Id.* at 309.

pending, the vacatur presents US policymakers and the Biden administration with the opportunity to craft a new PSG definition that addresses these problems and is compatible with the Refugee Convention and international law.

This Note outlines the outstanding problems with PSG jurisprudence in the United States in the wake of the vacatur, with particular attention paid to the definition and establishment of a cognizable PSG. The Note then analyzes alternative approaches that the United States can adopt to both bring PSG jurisprudence in line with prevailing international law and address endemic issues. This Note places particular emphasis on gender-based claims, as such claims largely fall under the PSG ground and are disproportionately impacted by the *A-B-* decisions. Part II provides background on US PSG jurisprudence since the 1980 Refugee Act codification up until the June 16, 2021 vacatur. Part III highlights the current post-vacatur approach to PSG jurisprudence and explores how reversion to pre-*A-B-* precedent fails to address problems that have plagued US PSG jurisprudence for decades. Part IV considers international approaches to establishing membership in a PSG employed in Canada and Australia and analyzes the feasibility of these alternative approaches as they relate to US problems and conformity with international standards. Part V summarizes the arguments herein, recommends the United States enact a rulemaking that mirrors Australia's combination of a protected characteristics and social perception approach outlined in the Migration Act of 2014 to bring the United States into compliance with international asylum standards, and bring consistency and stability to US asylum adjudications. Part V also outlines outstanding obstacles to a more equitable and fair US asylum law that likely will persist despite proposed changes.

II. PARTICULAR SOCIAL GROUP JURISPRUDENCE IN THE UNITED STATES

There have been significant changes to the realm of asylum law since the passage of the Refugee Act, largely due to the fact that

US immigration law[8] is enforced by executive agencies.[9] Under delegated authority from the Attorney General, the Executive Office for Immigration Review ("EOIR") interprets and administers federal immigration laws, including those governing asylum, by issuing guidance to IJs and the BIA, and conducting immigration court proceedings and appellate reviews.[10] The Attorney General may also issue precedential opinions in cases on which the BIA requests guidance and in cases for which she directs the board to refer to her for clarification and policy reasons through a referral process known as "certification."[11] As PSG has never been defined by statute, successive administrations have used such tools to inform how the protected ground should be interpreted, resulting in an evolving and often fluctuating definition.[12]

This Part outlines the major changes in PSG jurisprudence in the United States since 1980 with particular focus on the *Acosta* decision and subsequent BIA narrowing tests which marked the years prior to the Trump administration, departures from

8. The Refugee Act of 1980, which incorporated the definition of a refugee into US law and established asylum procedures, amended the Immigration and Nationality Act of 1965, which was the primary statutory instrument governing US immigration law. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended in scattered sections of 8 U.S.C.); Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 102. Today, the provisions of the Refugee Act are incorporated into § 208 of the modern Immigration and Nationality Act. 8 U.S.C § 1101(42)(a).

9. The BIA and Immigration Courts operate as arms of the EOIR within the Department of Justice. Executive Office of Immigration Review, *About the Office*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/about-office [https://perma.cc/62TX-4CW2] (last updated Feb. 3, 2021); *see also Fact Sheet: US Asylum Process*, NAT'L IMMIGR. FORUM (Jan. 10, 2019), https://immigrationforum.org/article/fact-sheet-u-s-asylum-process/ [https://perma.cc/369W-AZHM].

10. *Supra* note 9.

11. 8 C.F.R. § 1003.1(h)(1)(i)-(ii). Such decisions are binding on future proceedings before IJs and the BIA. *Id.* § 1003.1(g)(1). Many immigration advocates have criticized the abuse of the self-certification mechanism to disrupt previously settled immigration precedent, most notably during the Trump Administration. *See* Letter from Danny Alicea, Immigr. & Nat'y Comm. Chair, N.Y.C. Bar Ass'n, to Merrick B. Garland, U.S. Att'y Gen. (May 21, 2021), https://s3.amazonaws.com/documents.nycbar.org/files/2020903-ImmigrationBIAdecisionsDOJ.pdf [https://perma.cc/BF32-2S4H]. As AG Garland indicated in *A-B- III* that the DOJ and EOIR would be pursuing a rulemaking to promulgate new PSG standards, this paper does not address the merits of Attorney General opinions as a policy-making tool.

12. *See* Letter from Danny Alicea, *supra* note 11; Nora Snyder, *Matter of A-B-, LGBTQ Asylum Claims, and the Rule of Law in the U.S. Asylum System*, 114 NW. U. L. REV. 809, 823 (2019) (discussing the impact of the AG's self-certification power on asylum applications during the Trump administration).

previously settled precedent with the *Matter of A-B-* decision, and changes made since President Biden's inauguration in January 2021.

A. PSG Jurisprudence Pre-Trump

While the Refugee Act failed to formally define a PSG, jurisprudence defining the term and the cognizability[13] of various PSGs began to take shape soon after the Act's passage, initially through the application of traditional principles of statutory interpretation, and later through the addition of a series of narrowing tests established by the BIA.

1. *Matter of Acosta* and the Immutability Standard

PSG was first defined in 1985 in the BIA decision *Matter of Acosta*.[14] In *Acosta* the BIA held that a PSG is a group defined by immutable characteristics that members of the group could not change, or by characteristics that they should not be required to change because they are fundamental to their individual identities or consciences.[15] In determining this definition, the BIA applied the *ejusdem generis* principle of statutory interpretation to the list of five protected grounds enumerated in the statute, and reasoned that PSG should be construed in a manner consistent with the race, nationality, religion, and political opinion.[16] The BIA observed that all four of these grounds were based on either immutable characteristics that a person either could not change, such as race and nationality, or should not be required to, as in religion and political opinion.[17] Applying the newfound definition in *Acosta*, the BIA held that the members of a Salvadoran taxi driver cooperative

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13. "Cognizability" is a term of art that is employed frequently in PSG jurisprudence. It refers to whether a specific, proposed PSG fits the definition of a PSG as interpreted in the statute. While a PSG's cognizability often makes or breaks an asylum claim, the identification of a cognizable PSG does not mean the individual applicant will be granted asylum; the applicant still must meet all of the other requirements for eligibility including a well-founded fear, a nexus between the persecution and group membership, and a failure of State protection. *See* NAT'L IMMIGRANT JUST. CTR., PSG PRACTICE ADVISORY: APPLYING FOR ASYLUM BASED ON MEMBERSHIP IN A PARTICULAR SOCIAL GROUP 7 (2021) [hereinafter NIJC Practice Advisory].

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

15. *Id.* at 233-34.

16. *Id.* at 233.

17. *Id.*

did not make up a cognizable PSG, as the Petitioner's job as a taxi driver and his membership in the taxi cooperative were neither immutable characteristics nor fundamental to his identity or conscience.[18]

In *Acosta*, the BIA emphasized that PSGs should be evaluated on a case-by-case basis, but opined that "the shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership."[19] Pursuant to this precedent, the BIA and the Federal Courts of Appeals which review BIA decisions have since recognized a variety of PSGs, including gender-based PSGs that do not fall under any of the four other protected grounds.[20] Federal Courts of Appeals endorsed *Acosta*'s definition of PSG as a reasonable interpretation of the statute[21] and adopted the *Acosta* immutability test[22] as the prevailing standard for determining PSG cognizability in US asylum cases for over twenty years.[23]

18. The Board noted that while unfortunate that the Respondent may have to change his career path, "the internationally accepted concept of a refugee simply does not guarantee an individual a right to work in the job of his choice." *Id.* at 234.

19. *Id.* at 233.

20. *See, e.g., Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990) (holding gay men in Cuba a cognizable PSG); *In re D-V-*, 21 I. & N. Dec. 77 (B.I.A. 1993) (finding that gang rape of a politically active Haitian woman warranted asylum on political grounds, and noting gender as a potential PSG broached in dicta); Safaie v. I.N.S., 25 F.3d 636, 640 (8th Cir.1994) (holding Iranian women who advocate women's rights or who oppose Iranian customs relating to dress and behavior as a cognizable PSG); *In re Kasinga*, 21 I. & N. Dec. 357, 357 (B.I.A. 1996) (holding women in Togo of a specific tribe fleeing female genital cutting as a cognizable PSG); Hernandez-Montiel v. I.N.S., 225 F.3d 1084 (9th Cir. 2000) (holding gay men with female sexual identities in Mexico a cognizable PSG); Sarhan v. Holder, 658 F.3d 649 (7th Cir. 2011) (holding Jordanian women who have flouted moral norms a cognizable PSG). It is worth noting that none of these PSGs rely exclusively on gender alone, but rather gender plus and an additional narrowing ground. *See* INS, ASYLUM GENDER GUIDELINES, AM. IMMIGR. L. ASS'N (1995), https://www.aila.org/infonet/ins-asylum-gender-guidelines [https://perma.cc/FB3Q-33UL] (noting that PSG is a narrow ground and that gender alone is likely insufficient). For further discussion on the treatment of gender-alone as a PSG under *Acosta*, please see *infra* Section II.A.

21. *In Fatin v. I.N.S.*, then-Judge Alito endorsed the BIA's decision in *Acosta*, stating that "this is a permissible construction of the relevant statutes, and we are consequently bound to accept it." 12 F.3d 1233, 1240 (3d Cir. 1993).

22. For the purposes of brevity and clarity I will refer to *Acosta* as an immutability test to encompass both the immutable and fundamental characteristics inquiries outlined in the decision.

23. For examples of Federal Appeals courts that have applied *Acosta* (both positively and negatively) in the decades after the decision see NIJC Practice Advisory, *supra* note 13, at 2 (citing Castillo-Arias v. Att'y Gen*.,* 446 F.3d 1190, 1196-97 (11th Cir. 2006); Niang v.

US practitioners and asylum advocates have noted that *Acosta* "is sufficiently open-ended to allow for evolution in much the same way as has occurred with the four other grounds," but stringent enough to reject PSGs without merit under international law.[24] They have accordingly endorsed the *Acosta* as "remaining true to the text, context, and object or purpose of the [Refugee] Convention."[25] The United Nations High Commissioner on Refugees ("UNHCR") has also accepted *Acosta* as a permissible interpretation of the Refugee Convention adopting its own immutability test[26] mirroring the language of the *Acosta* opinion:

> [A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.[27]

Gonzales, 422 F.3d 1187, 1199 (10th Cir. 2005)*;* Lwin v. I.N.S., 144 F.3d 505, 511 (7th Cir. 1998))*.*

24. 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, 52 (2008). *See*, *e.g.*, *Matter of Vigil*, 19 I. & N. Dec. 572, 572 (B.I.A. 1988) (rejecting the PSG of "young, male, urban, un-enlisted Salvadorans" because age, living environment, and military status are not factors that are immutable or fundamental to individual identity or conscience); Alvarez-Flores v. I.N.S., 909 F.2d 1, 7 (1st Cir. 1990) (rejecting the PSG of Salvadoran cheesemakers makers for lack of immutability); Arevalo v. I.N.S., 176 F.3d 475, 475 (4th Cir. 1999) (rejecting restaurant proprietors as a PSG for lack of immutability); Castellano-Chacon v. I.N.S*.*, 341 F.3d 533, 549 (6th Cir. 2003) (holding that proposed PSG of "Tattooed youth" cannot be seen as constituting a collection of people who share a "common, immutable characteristic" under *Acosta*).

25. Marouf, *supra* note 24.

26. UNHCR refers to this as the "protected characteristics approach" as it encompasses not just immutable and fundamental characteristics, but also associations fundamental to human dignity. *See* U.N. HIGH COMM'R FOR REFUGEES, GUIDELINES ON INTERNATIONAL PROTECTION: "MEMBERSHIP OF A PARTICULAR SOCIAL GROUP" WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL, RELATING TO THE STATUS OF REFUGEES, ¶ 2, U.N. Doc. HCR/GIP/02/02 (May 7, 2002), https://www.unhcr.org/en-us/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html [https://perma.cc/R7Y8-SFJD] [hereinafter UNHCR PSG Guidelines]. For further discussion on immutability approach as compared to the protected characteristics approach, see *infra* Section III.A.

27. *Id.* ¶ 11.

Furthermore, common law countries, including Canada[28] and Australia,[29] have viewed *Acosta* favorably and cited it as having influenced PSG jurisprudence in their countries.

2. Social Distinction and Particularity – The Development of a Narrow Three-Part Test for Cognizability of PSGs

Despite the near uniform acceptance of *Acosta* as the standard for determining PSG cognizability, in 1999 the BIA began a process of narrowing the immutability test established in *Acosta*. In *Matter of R-A-*, the BIA held that the proposed PSG of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" was not cognizable.[30] The Board held that while the group satisfied the immutability requirement outlined in *Acosta*, immutability was merely the starting point, and that "a number of factors are considered in deciding whether a grouping should be recognized as a basis for asylum, including how members of the grouping are perceived by the potential persecutor, by the asylum applicant, and by other members of the society."[31] Though President Bill Clinton's Attorney General Janet Reno ultimately vacated the decision in 2001,[32] *R-A-* set the wheels in motion for the establishment of two additional requirements to determine PSG cognizability: social distinction and particularity.[33] Taken together with the *Acosta* immutability test, these three standards

28. See *infra* Section IV.A for a discussion of the *Acosta*-inspired Canadian immutability PSG test.

29. See *infra* Section IV.B for a discussion of *Acosta*-inspired protected characteristics approach codified in Australia's Migration Act.

30. *See In re R-A-*, 22 I. & N. Dec. 906 (B.I.A. 1999: A.G. 2001). *In re R-A-* was later vacated by a 2001 Attorney General decision of the same name. *Id.*

31. *Id.* at 907, 919.

32. *Id.* at 906. Between the *R-A-* vacatur and the petitioner's subsequent grant of asylum in 2009, the BIA issued intervening precent which built upon the initial 1999 BIA opinion. *See Matter of R-A-*, CENTER FOR GENDER & REFUGEE STUD., https://cgrs.uchastings.edu/our-work/matter-r-a- [https://perma.cc/C9X6-4Q6Q] (last visited Nov. 21, 2021).

33. Stephen Legomsky & Karen Musalo, *Asylum and the Three Little Words that Can Spell Life or Death,* JUST SEC. (May 28, 2021), https://www.justsecurity.org/76671/asylum-and-the-three-little-words-that-can-spell-life-or-death/ [https://perma.cc/ZQ84-3KHL].

reflect cumulatively stricter requirements that asylum applicants must overcome to determine membership in a PSG.[34]

a. Social Distinction

Beginning with *Matter of C-A-,* the BIA refined the *Acosta* standard by stating that an applicant must also demonstrate that his or her proposed PSG has social visibility.[35] The Board noted that because social groups based on immutable or fundamental characteristics as established in *Acosta* are "generally easily recognizable and understood by others to constitute social groups,"[36] and because the PSG category was not intended to be a "catch all applicable to all persons fearing persecution,"[37] a broad all-encompassing definition of PSG is inappropriate.[38] Though not explicitly defined, the BIA uses social visibility synonymously with "readily recognizable," and accordingly determined that "former noncriminal drug informants working against the Cali drug cartel" did not constitute a PSG as it is unlikely that members of society in general would recognize them as a unique group.[39] While *C-A-* was the first instance of the Board applying the social visibility standard, it was not made a formal requirement for PSG claims until the 2008 decision of *Matter of S-E-G-*.[40]

Following the decisions in *Matter of C-A-* and *Matter of S-E-G-*, courts expressed confusion as to whether the social visibility test required a group to be visible to the eye or merely understood to be a group. Proffered PSGs that bewildered courts included young

34. These three requirements together are referred to as the "cumulative approach" to determining membership in a PSG. *See* MICHELLE FOSTER, THE 'GROUND WITH THE LEAST CLARITY': A COMPARATIVE STUDY OF JURISPRUDENTIAL DEVELOPMENTS RELATING TO 'MEMBERSHIP OF A PARTICULAR SOCIAL GROUP' 16-17 (2012), http://www.unhcr.org/4f7d8d189.html [https://perma.cc/LB8S-BLDX]. This contrasts to the "alternative approach" outlined in UNHCR guidance and codified in Australia's 2014 Migration Act. See *infra* Sections II.C and III.B for further discussion.

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

36. *Id.* at 959 (citing to BIA precedent decisions *Matter of V-T-S-*, 21 I. & N. Dec. 792 (B.I.A. 1997); *Matter of Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996); *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990); *Matter of Fuentes*, 19 I. & N. Dec. 658 (B.I.A. 1988)).

37. *Id.* (citing UNHCR PSG Guidelines, *supra* note 26).

38. *Id.*

39. *Id.* at 951.

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

women opposed to arranged marriage,[41] affluent Guatemalans,[42] and persons resistant to gang membership,[43] groups all imperceptible to the eye but organized around an otherwise distinctive unifying characteristic. In 2014 the BIA clarified in *Matter of M-E-V-G-* that a PSG need not be ocularly visible to satisfy the requirement of social visibility, and renamed the test *social distinction* to avoid such confusion.[44] The Board further noted in *M-E-V-G-* that the requirement of social distinction considers whether those with a common immutable characteristic are "set apart, or distinct, from other persons within the society in some significant way."[45]

b. Particularity

Following *Acosta* and *Matter of C-A-*, the BIA established the formal requirement that, in addition to immutability and what was later named social distinction, PSGs must also possess particularity.[46] In *Matter of A-M-E & J-G-U-*, the BIA held that PSGs must be defined with "sufficient particularity to delimit membership," and may not be amorphous or indeterminate.[47] The BIA opined that because the adjectives "wealthy" and "affluent" are vague, and could theoretically apply to groups ranging from the top one percent to the top twenty percent of wealth in the nation, the PSG of "wealthy Guatemalans" was not sufficiently particular, and thus not a cognizable PSG.[48] The BIA made particularity a formal requirement in 2008 in *Matter of E-A-G-,*[49] and subsequent decisions further refined the particularity inquiry to recognize PSGs that contain clear benchmarks for determining who falls within the group, such that the group possesses "discrete and . . . definable boundaries."[50]

41. *See Matter of A-T-*, 24 I. & N. Dec. 296 (B.I.A. 2007), vacated and remanded by *Matter of A- T-*, 24 I. & N. Dec. 617 (B.I.A. 2008).

42. *See Matter of A- M- E- & J- G-U-*, 24 I. & N. Dec. 69 (B.I.A. 2007).

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

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

45. *Id.* at 238.

46. *Matter of A- M- E-& J- G-U-*, 24 I. & N. Dec. at 76.

47. *Id.* at 69, 76.

48. *Id.* at 76.

49. *See generally* 24 I. & N. Dec. 591 (B.I.A. 2008).

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

B. Changes Under the Trump Administration: Matter of A-B-

Asylum procedures operated under the three-part cumulative approach until the presidency of Donald Trump. In 2018, under President Donald Trump's instruction, Attorney General Jeff Sessions issued *Matter of A-B- I*.[51] This decision significantly limited the ability of survivors of domestic violence and gender-based violence from obtaining asylum under PSG grounds.[52] Prior to *Matter of A-B-*, the cumulative approach, though more restrictive than *Acosta* alone,[53] had recognized PSGs involving domestic violence where the woman is unable to leave, such as in *Matter of A-R-C-G-*.[54] In *A-B- I*, Attorney General Sessions vacated *A-R-C-G-* and the line of cases that relied on it, characterized domestic violence as private criminal activity, and made the sweeping statement that asylum claims based on domestic violence and other private persecution generally do "not qualify for asylum."[55] *A-B- I* created numerous hurdles for individuals seeking asylum on a PSG basis and endangered asylum applications based on other protected grounds if a private actor carried out the persecution.[56]

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51. The pre-Trump era of PSG jurisprudence was not without its issues, with many circuits applying the requirements social distinction and particularity inconsistently. For more discussion on these issues, see *infra* Sections II.A and C.

52. 27 I. & N. Dec. 316 (A.G. 2018). *See also* NAT'L IMMIGR. JUST. CTR., MATTER OF A-B- AND MATTER OF L-E-A-: INFORMATION AND RESOURCES (2019), https://immigrantjustice.org/matter-b-and-matter-l-e-information-and-resources [https://perma.cc/U875-TJWL].

53. *See* Legomsky & Musalo, *supra* note 33.

54. 26 I. & N. Dec. 388, 392-93 (B.I.A. 2014). In *Matter of A-R-C-G-*, the BIA determined that "married women in Guatemalan who are unable to leave their relationship" was a cognizable PSG. The Board recognized that gender is a shared immutable characteristic and that marital status may be immutable where the woman is unable to leave "religious, cultural, or legal constraints." As to particularity, the Board found that an "inability to leave" a relationship "may be informed by societal expectations about gender and subordination, as well as legal constraints regarding divorce and separation." The Board also found it especially significant that the police refused to assist because of her status as a woman and normalization of abuse in a culture rife with "machismo." *Id.* at 393. As to social distinction, the Board considered evidence of "whether the society in question recognizes the need to offer protection to victims of domestic violence, including whether the country has criminal laws designed to protect domestic abuse victims, whether those laws are effectively enforced, and other sociopolitical factors. *Id.* at 394.

55. *A-B- I,* 27 I. & N. Dec. at 320.

56. IMMIGR. LEGAL RES. CTR., PRACTICE ADVISORY: MATTER OF A-B- CONSIDERATIONS 3 (2018), https://www.ilrc.org/sites/default/files/resources/matter_a_b_considerations-20180927.pdf [https://perma.cc/F38L-4CPH].

Subsequent Attorney General decisions built on the framework outlined in *A-B- I* and further restricted asylum applications asserting membership in a PSG on both nexus and state protection.[57] The President and the Attorney General may legally issue guidance to help inform practitioners, IJs, and the BIA as to how the outstanding questions of law should be interpreted. The guidance outlined in *A-B- I*, however, was not grounded in existing law, reason, or statutory interpretation, impermissibly restricted grants of asylum in violation of international law, and unraveled decades of accepted PSG jurisprudence.[58]

C. AG Garland's Vacatur and Return to Pre-A-B- I Precedent

On June 16, 2021, Attorney General Garland, using the self-certification system outlined in 8 CFR § 1003.1(h), certified *Matter of A-B-* to himself and authored an opinion titled *Matter of A-B- III.*[59] In *Matter of A-B- III*, Garland vacated *A-B- I* and instructed the BIA and IJs to follow pre-*A-B-* precedent, including *Matter of A-R-C-G*.[60] AG Garland also noted that in lieu of issuing additional interpretative guidance in the opinion, President Biden had directed him and the Secretary of Homeland Security to promulgate regulations "addressing the circumstances in which a person should be considered a member of a particular social group" through formal notice and comment rulemaking procedures.[61] The forthcoming rulemaking will likely elicit many opinions, including those that wish to retain, in whole or in part, pre-existing precedent.[62]

57. *See Matter of A-B- II*, 28 I. & N. Dec. at 199 (establishing a narrow two-part test to establish nexus, and a more restrictive standard for state protection in cases dealing with PSG asylum claims). Nexus and state protection inquiries are additional hurdles to establishing asylum not analyzed in this Note.

58. *See* Legomsky & Musalo, *supra* note 33; Snyder, *supra* note 12, at 822.

59. 28 I. & N. Dec. 307 (A.G. 2021).

60. *Id.* at 309. *A-B- III* also vacated *Matter of A-B- II*, another Trump-era AG decision that attempted to clarify *A-B-I*, however that decision is outside of the scope of this paper.

61. *Id.* at 308; Exec. Order No. 14010, § 4(c)(ii), 86 Fed. Reg. 8267, 8271 (Feb. 2, 2021).

62. Such positions are analyzed in detail *infra* in Part III.

III. PROBLEMS WITH A RETURN TO PRE-A-B- PRECEDENT

AG Garland's decision in *A-B- III*[63] and the return to pre-*A-B-* precedent is a welcome development for asylum law advocates. While rulemaking is forthcoming, many nonetheless advocate that the return to pre-*A-B-* precedent be made permanent. Though a return to early precedent is no doubt an improvement on the conditions put in place during the Trump administration, pre-*A-B-* precedent faced wide-spread endemic issues, including a circuit split in US Federal Courts of Appeals, and problems of inconsistency and incompatibility with international law associated with a return to either an *Acosta*-only approach, or the cumulative approach. This Part outlines these issues and suggests that a departure from pre-*A-B-* precedent is needed to address them.

A. Acosta and Cumulative Approach Circuit Split

Since the BIA began to narrow the definition of PSG in 2006,[64] US Federal Courts of Appeals have split over what definition of PSG to apply. On one hand, the Fifth Circuit,[65] Tenth Circuit,[66] and Eleventh Circuit[67] have cited *Chevron* deference to justify adherence to the BIAs tri-partite definition of PSG.[68] On the

63. 28 I. & N. Dec. 307 (A.G. 2021).

64. *See supra* Section II.A.2.

65. Orellana-Monson v. Holder, 685 F.3d 511 (5th Cir. 2012) (applying *Chevron* deference to hold that the BIAs additional requirements were valid as they were not a "vague or ambiguous" interpretation of the term PSG). *See* Seiko Shastri, *Moving Beyond Reflexive Chevron Deference: A Way Forward for Asylum Seekers Basing Claims on Membership in a Particular Social Group,* 105 MINN. L. REV. 1541, 1568-69 (Feb. 2021).

66. Rivera-Barrientos v. Holder, 666 F.3d 641, 648 (10th Cir. 2012) ("Congress did not define the term 'particular social group' in the INA, so we defer to the BIA's interpretation unless it is unreasonable."). *See* Shastri, *supra* note 65, at 1569 (noting that a complete *Chevron* analysis was not conducted by the Court).

67. Gonzalez v. U.S. Attorney General, 820 F.3d 399 (11th Cir. 2016) (holding "particular social group" is ambiguous in the INA and that therefore the BIA's interpretations merited Chevron deference). The Court failed to engage in a complete *Chevron* deference other than asserting that the BIA's interpretation was entitled to it. *See* Shastri, *supra* note 65 at 1576-77.

68. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). *Chevron* established that when a court review's an executive agency's interpretation of a statute which it administers, it must answer two: first, whether Congress has "spoken to the precise question at issue," and, if not, whether the agency's interpretation is based on a permissible construction of the statute. *Id.* at 843. Because the INA does not define PSG and because the BIA is an arm of the EOIR and overseen by DOJ, it is an executive agency and

opposite end of the spectrum, the Seventh Circuit has rejected the addition of the social distinction and particularity requirements completely, holding them unreasonable and arbitrary under a *Chevron* analysis.[69] The Third Circuit jurisprudence initially mirrored that of the Seventh Circuit,[70] but the court ultimately accepted the particularity and social distinction requirements after the BIA's clarifications on direct remand.[71] The Ninth Circuit has on multiple occasions acceded to the BIA's definition on account of *Chevron* deference,[72] but has echoed the concern expressed in the Third Circuit[73] that the particularity and social distinction inquiries have been blended together, such that an analysis of particularity now requires a society's understanding of a group's boundaries.[74] The Fourth Circuit seems to have waffled in their application of Chevron, inconsistently deferring to the BIA's

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Chevron analysis is applicable. *See* Natalie Nanasi*, Death of the Particular Social Group,* 45 N.Y.U. REV. L. & SOC. CHANGE 260, 292 (2021).

69. Gatimi v. Holder, 578 F.3d 611, 615–16 (7th Cir. 2009) ("[T]he Board has been inconsistent rather than silent. It has found groups to be 'particular social groups' without reference to social visibility, as well as . . . refusing to classify socially invisible groups as particular social groups but without repudiating the other line of cases."). *See* Fatma Marouf, *Becoming Unconventional: Correcting the 'Particular Social Group' Ground for Asylum*, 44 N.C. J. INT'L L. 489, 490 (2019); Isaac T.R. Smith, *Searching for Consistency in Asylum's Protected Grounds*, 100 IOWA L. REV. 1891, 1908 (2015).

70. Valdiviezo-Galdamez v. Att'y Gen. of U.S., 663 F.3d 582, 604 (3d Cir. 2011) ("Since the 'social visibility' requirement is inconsistent with past BIA decisions, we conclude that it is an unreasonable addition to the requirements for establishing refugee status where that status turns upon persecution on account of membership in a particular social group.").

71. See S.E.R.L. v. Att'y Gen. of U.S., 894 F.3d 535, 539 (3d Cir. 2018). *See also Marouf*, *Becoming Unconventional, supra* note 69, at 490.

72. *See* Ramos-Lopez v. Holder, 563 F.3d 855, 859 (9th Cir. 2009) (holding that the BIA's new definition was reasonable and required *Chevron* deference because by not defining PSG in the INA, Congress had authorized the BIA to resolve ambiguity in the definition).

73. *See supra* note 70 (referencing the Third Circuit's opinion in *Valdiviezo-Galdamez* that the additional requirement of social visibility was unreasonable and inconsistent with prior precedent); Benjamin Casper et al., *Matter of M-E-V-G- and the BIA's Confounding Legal Standard for "Membership in a Particular Social Group,"* 14 IMMIGR. BRIEFINGS 1, 14-15 (2014), https://www.law.umn.edu/sites/law.umn.edu/files/cna_resources_immigration_briefings_asylum_article_2014.pdf [https://perma.cc/9HHV-ARPU].

74. Henriquez-Rivas v. Holder, 707 F.3d 1081, 1090-91 (9th Cir. 2013). The Court did not explicitly reject the notion of particularity, but stressed that broad groupings could still constitute a PSG and that size was irrelevant to the existence of a PSG. *See also* Helen P. Grant, *Survival of Only the Fittest Social Groups: The Evolutionary Impact of Social Distinction and Particularity*, 38 U. PA. J. INT'L L. 895, 915 (2017).

construction, while also declining to opine on the social visibility requirement and recognizing PSGs in spite of the three part test.[75] Ultimately the court rejected the particularity requirement in January 2021.[76] The Eighth Circuit has its own set of rules that accept the BIA's definition, but don't require it to make affirmative findings on the three elements.[77] Other Circuits have yet to rule on the issue, so BIA precedent is controlling.

This plethora of varying rules and precedents in each of the different Federal Circuits presents the single most glaring problem with a return to pre-*A-B-* precedent, as inconsistency in the interpretation of the phrase PSG itself results in differing outcomes across the country in the presentation of otherwise equivalent claims. Many, including former Ninth Circuit Judge Alex Kozinski, have expressed deep concern about such "circuit conflict on an issue where national uniformity is vital."[78] Others have advocated for the United State Supreme Court to intervene to clarify this split one way or another.[79] A rulemaking affirming either *Acosta* or the BIA three-part PSG definition would address this split, however, there are issues with both of these approaches that merit reconsideration and deviation from precedent as a whole.

B. Problems with Acosta

The existence of a circuit split in US Federal courts alone warrants clarification as to which rule governs the adjudication of PSG claims. Many argue that a return to the *Acosta* standard which

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75. *See* Lizama v. Holder, 629 F.3d 440, 446–47 (4th Cir. 2011) (holding that the BIA's tripartite definition was reasonable and therefore entitled to deference under *Chevron*). *But see*, Crespin-Valladares v. Holder, 632 F.3d 117 (4th Cir. 2011) (recognizing the PSG of a specific family in a gang-related claim). *See also* Benjamin Casper et al., *supra* note 73, at 13 ("The Fourth Circuit has so far agreed that the Board's particularity requirement is reasonable but has repeatedly declined to decide whether to defer to social visibility, citing the Seventh Circuit's criticism."); Liliya Paraketsova, *Why Guidance from the Supreme Court is Required in Redefining the Particular Social Group Definition in Refugee Law*, 51 U. MICH. J.L. REFORM 437, 452-53 (2018).

76. Amaya v. Rosen, 986 F.3d 424, 432 (4th Cir. 2021) (holding that the BIA's interpretation of the particularity requirement was unreasonable under *Chevron*).

77. Mayorga-Rosa v. Session, 888 F.3d 379, 383 (8th Cir. 2018); Marouf, *Becoming Unconventional*, *supra* note 69, at 501.

78. Heriquez Rivas v. Holder, 707 F.3d 1081, 1095 (9th Cir. 2013) (Kozinski, A., dissenting); *see* Nanasi, *supra* note 66, at 296.

79. *See* Shastri, *supra* note 65, at 1578; Smith, *supra* note 69, at 1894; Casper et al., *supra* note 73, at 4; Paraketsova, *supra* note 75, at 25.

is endorsed by UNHCR and has been touted as a "workable rule" and valid interpretation of the Refugee Convention,[80] should be the prevailing rule moving forward. However, this fails to address long-standing issues of inconsistency, floodgates concerns, and problems with the treatment of gender.

1. Sufficient or Necessary? Lack of Guidance Leads to Judicial Inconsistency

Much criticism of the *Acosta* decision, and the subsequently adopted test, revolves around what the opinion failed to outline. Many, including Attorney General William Barr, have observed that the Board in *Acosta* failed to clarify whether the sharing of a single "common, immutable characteristic" was a sufficient, as opposed to just a necessary, condition for qualifying as a PSG.[81] Without guidance as to this point, many have argued that adjudicators in different jurisdictions will adopt their own guidelines, resulting in the inconsistent application of the *Acosta* framework.[82]

Historically, this has been the case, and was one of the main reasons for the BIA's departure from an *Acosta*-alone PSG definition.[83] For example, in *Sepulveda v. Gonzales*, the Seventh Circuit, in an opinion penned by Judge Richard Posner, highlights that subsequent caselaw applying *Acosta* helps to clarify the definition of a PSG, but ultimately articulates a narrower, guiding standard not outlined in *Acosta*:

> Everyone shares the experience of having been born, but no one would think that all human beings (plus all living things produced by parturition rather than by mitosis) constitute a single social group for purposes of asylum law. A social group has to have sufficient homogeneity to be a plausible target for persecution.[84]

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80. *See supra* Section I.A.1.

81. *Matter of L-E-A-*, 27 I. & N. Dec. 581, 587 (A.G. 2019) [hereinafter *L-E-A- II*]. While *L-E-A-* is a case about family-based PSGs, the criticism of sharing a single-immutable characteristic, such as family or gender, under the *Acosta* precedent applies to *A-B-* caselaw as well. Both *L-E-A-* and *A-B-* are branched of post-*Acosta* PSG caselaw that significantly narrow relief under PSG grounds.

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

83. *Id.* at 232.

84. Sepulveda v. Gonzales, 464 F.3d 770, 772 (7th Cir. 2006).

While Posner is not incorrect in his observation that there must be a unifying characteristic of the group to make it a cognizable PSG, that is the very essence of *Acosta*, nowhere in *Acosta* is "homogeneity" specifically required. Though Judge Posner asserts that the shared immutable characteristic must be "sufficient," he ultimately creates his own quasi-narrowing set of criteria, attaching other conditions that must be met to satisfy the definition of PSG outlined in *Acosta*.[85]

Similarly, the Ninth[86] and Second Circuits[87] have adopted their own narrowing tests to further guide *Acosta* analysis based on concerns about the potential breadth of social groups. While not illogical, such circuit-specific standards and guidance have resulted in slight deviations from the rule and subsequently inconsistent applications of the law among the Federal Courts of Appeals.[88] This concern is what prompted the BIA to adopt additional narrowing tests as a means of streamlining and unifying adjudication.[89]

This is particularly salient as PSG claims have grown in both number and variety since the early 2000s.[90] Though many have

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85. *Id.*

86. *See* Sanchez-Trujillo v. I.N.S., 801 F.2d 1571, 1572–73 (9th Cir. 1986). In *Sanchez-Trujillo*, the Ninth Circuit adopted a voluntary associational relationship test for PSGs, and found that the petitioners proposed PSG of young, working-class males who have not served in the military of El Salvador lacked a unifying characteristic and was not sufficiently "cohesive" and "homogeneous." *Id.*

87. *See* Gomez v. I.N.S., 947 F.2d 660 (2d Cir. 1991). The Second Circuit referred to the standard established by the Ninth Circuit in *Sanchez-Trujillo* to reject the proffered PSG of "women who have been previously battered and raped by Salvadoran guerillas." *Id.* The Court went further and held that PSG members must share "some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general." *Id.* at 664.

88. Casper et al., *supra* note 73, at 6-7.

89. This is the BIA's very reasoning behind the narrowing tests iterated in *M-E-V-G-*. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 233. Advocates also reason that the narrowing tests were a result of xenophobia due to the increase in claims on PSG grounds from individuals in Central America fleeing violence in the late 1990s and early 2000s. *See* Legomsky & Musalo, *supra* note 33.

90. While data on the grounds for asylum seekers' claims is not publicly available, domestic violence and gang violence are among the most common concerns cited by asylum seekers fleeing Central America. Doris Meissner et al., *The U.S. Asylum System in Crisis: Charting a Way Forward*, MIGRATION POLICY INST., 18–19 (2018). *See also* Danielle L. Schmalz Fullam, *The Folly of the Famous Family: Why Matter of L-E-A-'s Definition of Distinction Does Not Merit Deference*, 53 CONN. L. REV. 154, 175 (2021) (discussing gang-based claims as they were impacted by Matter of L-E-A-, a Trump-era AG decision issued alongside A-B- that limited PSG claims based on family membership); HILLEL R. SMITH,

praised the BIA for defining PSG broadly enough to leave room for discretion in individual cases,[91] *Acosta* was decided in 1985, only five years after the asylum framework had been codified and after only a limited number of cases had been brought before the BIA to inform a rule.[92] As the examples highlighted above illustrate, a case-by-case approach without further guidance can result in an uneven application of the law, thereby necessitating a consistent set of rules to guide adjudicators.

2. Floodgates Concerns, Gender, and International Standards

Another common critique of *Acosta* also relates to both the volume of PSG claims and a broad definition of PSG. Specifically, some critics note that that *Acosta* presents floodgates concerns, arguing that the breadth afforded by an immutability test, free of narrowing conditions, will result in a deluge of new asylum seekers to the United States.[93] While floodgates concerns have been historically proven to not be real threats,[94] are specious given other asylum requirements that limit successful claims,[95] and are

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CONG. RSCH. SERV., LSB10207, ASYLUM AND RELATED PROTECTIONS FOR ALIENS WHO FEAR GANG AND DOMESTIC VIOLENCE (2020).

91. *See* discussion *supra* Part III.A.1.

92. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 231; Schmalz Fullam, *supra* note 90.

93. Rachel G. Settlage, *Rejecting the Children of Violence: Why U.S. Asylum Law Should Return to the Acosta Definition of a Particular Social Group*, 30 GEO. IMMIGR. L.J. 287, 312-14 (2016), https://digitalcommons.wayne.edu/cgi/viewcontent.cgi?article=1469&context=lawfrp [https://perma.cc/6ZH6-C9UU]; DEBORAH E. ANKER, THE LAW OF ASYLUM IN THE UNITED STATES § 5:41 (2021).

94. "[T]he floodgates argument was made when the BIA found in In Re Kasinga that 'young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice' were members of a particular social group . . . . The floodgates argument was raised again when the courts were considering whether or not to acknowledge domestic violence as a potential basis for asylum." Settlage, *supra* note 93, at 313. In both instances, however, a grant of asylum did not increase subsequent claims on either FGM or DV grounds. *Id. See also* Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?,* 14 VA. J. SOC. POL'Y & L. 119, 132-33 (2007) (concluding that recognition of large PSGs does not lead to large influxes of asylum seekers following an analysis of claims in the United States and Canada based on female genital cutting following *Matter of Kasinga*).

95. Settlage, *supra* note 93, at 312 (discussing the hurdle of nexus, which is far more difficult to surmount than PSG cognizability).

largely based in xenophobic ideas about immigrants,[96] they are nonetheless politically salient in the United States.[97]

Such floodgates rhetoric has also had a disproportionately negative impact on gender-based claims. Under the *Acosta* standard gender alone should be sufficient to establish a PSG under a pure immutability test. In *Fatin v. I.N.S.*, then-Judge Alito himself noted that because *Acosta* "specifically mentioned 'sex' as" an innate characteristic "that could link the members of a 'particular social group,'" and satisfy "immutability," gender in and of itself was cognizable.[98] While the application of the *Acosta* standard has resulted in the recognition of a variety of gender-based PSGs, both the BIA and federal circuit courts have been reluctant to accept gender alone as a PSG without some other qualifying characteristic for fear of "opening the floodgates" to asylum seekers.[99] Indeed, gender alone has not been recognized as a PSG since *Fatin* and has never resulted in an award of asylum. Instead, Courts have recognized more narrow gender-based groups, including those modifying gender with an additional qualifier, such as nationality, or subgroup.[100]

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96. *See supra* note 87 and accompanying text.

97. *See, e.g.,* Tommy Pigott, *Biden Leaves "the Floodgates Open"*, REPUBLICAN NAT'L COMM.: RAPID RESPONSE (May 4, 2021), https://gop.com/rapid-response/biden-leaves-the-floodgates-open/ [https://perma.cc/RXZ3-6SAL]; Adam Edelman & Dartunorro Clark, *White House Attacks 'Activist Judges' After Federal Court Blocks Trump's Asylum Ban*, NBC NEWS (Nov. 20, 2018), https://www.nbcnews.com/politics/immigration/judge-bars-trump-administration-denying-asylum-migrants-who-enter-illegally-n938271 [https://perma.cc/35YS-H72W].

98. Fatin v. I.N.S., 12 F.3d at 1240. While gender alone was deemed cognizable, the asylum claim on this proposed PSG failed for lack of nexus. *Id.*

99. *See* Jesse Imbriano, *Opening the Floodgates or Filing the Gap: Perdomo v. Holder Advances the Ninth Circuit One Step Closer to Recognizing Gender-Based Asylum Claims,* 56 VILL. L. REV. 327, 330 (2011). *See also* Gomez v. I.N.S., 947 F.2d at 664 (holding that the possession of such broadly based characteristics like youth or gender does not create a PSG, and such characteristics by themselves do not distinguish members in the eyes of the persecutor); *supra* notes 84-85 and accompanying text.

100. At the broadest, US Courts have recognized gender in combination with nationality as a PSG in cases that actually resulted in an award of asylum. *See, e.g.,* Perdomo v. Holder, 611 F.3d 662 (9th Cir. 2010) (recognizing Guatemalan women at a PSG); Ngengwe v. Mukasey, 543 F.3d 1029 (8th Cir. 2009) (recognizing Cameroonian widows as a PSG); Uwais v. Att'y Gen., 478 F.3d 513 (2d Cir. 2007) (recognizing Tamil women as a PSG); Hassan v. Gonzales, 484 F.3d 513, 518 (8th Cir. 2007) (recognizing Somali females as a PSG); Mohammed v. Gonzales, 400 F.3d 785 (9th Cir. 2005) (recognizing Somalian females as a PSG); Fatin v. I.N.S., 12 F.3d 1233 (3d Cir. 1993) (recognizing Iranian women as a PSG). *But see* Fatin v. I.N.S., 12 F.3d at 1240 (acknowledging that gender *could* be a

That gender alone has not resulted in an award of asylum on PSG grounds before the BIA or Federal Courts of Appeals under the *Acosta* framework is problematic, as UNHCR has explicitly held that "sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently than men."[101] UNHCR has also stated that refusing to recognize women or gender alone as a PSG on the basis of the breadth of the group, does not comport with the Refugee Convention or Protocol:

> This argument has no basis in fact or reason, as the other grounds are not bound by this question of size. There should equally be no requirement that the particular social group be cohesive or that members of it voluntarily associate, or that every member of the group is at risk of persecution.[102]

This reference to size appears to reference both the floodgates argument and the aforementioned ad hoc narrowing tests adopted by circuit courts noted in Part III.B.1. That UNHCR has explicitly warned against this suggest that, as applied, an *Acosta* approach to PSG fails to satisfy internationally accepted standards of refugee law. Given the United States' status as a signatory to the Protocol, under this framework, the United States fails to meet its legal obligations as outlined in the Refugee Convention.[103]

C. Problems with the Cumulative Approach

While most asylum advocates argue for a return to *Acosta*, there are some who argue that the additional requirements of particularity and social distinction are necessary to provide guidance to and delimit a phrase that could otherwise serve as a catch all for claims not intended to be protected under the Refugee Act.[104] However, there are significant problems with this standard:

PSG, but failing to establish a well-founded fear of persecution on the basis of gender alone).

101. U.N. High Comm'r on Refugees, *Guidelines On International Protection: Gender-Related Persecution 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/02/01) ¶ 30 (May 7, 2002) [hereinafter UNHCR Gender Guidelines].

102. *Id.* ¶ 31.

103. *See* Refugee Protocol, *supra* note 1.

104. *See supra* Section II.B.

the terms are vague and difficult to apply; the three-part test is overly harsh; and the cumulative approach is inconsistent with international law.

1. Particularity & Social Distinction are Vague and Confusing

Though the BIA has now relied on the requirements of particularity and social distinction to decide PSG asylum claims for nearly fifteen years, the terms are woefully vague and confusing. The two terms are neither logically consistent nor jurisprudentially consistent, which presents difficulty for attorneys and pro-se asylum seekers alike.[105] Experts in the field argue that this confusion is largely because the BIA's various explanations have been contradictory.[106]

For example, the BIA has held that LGBTQ individuals, Somali subclans, victims of FGM, and former police officers (in some circumstances) are recognized by the respective home society as groups under a social distinction analysis,[107] but victims of domestic violence, and those who have refused to join or defected from gangs are not.[108] While each claim is considered on a case-by-case basis, advocates note that these results all lack a common foundation that can be mapped onto future BIA determinations.[109] It is also unclear based on the BIA precedent thus far whether a group that must be socially distinct from the asserted home society must be merely identifiable from shared characteristics, or that members must actually interact and socialize.[110] Groups like Somali subclans seem to indicate the latter, but victims of FGM seem to suggest the former, as the group is identified only by a shared experience of trauma.[111] Even in *M-E-V-G-*, the very case

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105. *See* Marouf, *Becoming Unconventional, supra* note 69, at 490-91.

106. *Id.*

107. *See Matter of M-E-V-G*, 26 I. & N. Dec. 227 at 239-40 (B.I.A. 2014) (citing *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990); *In re H-*, 21 I. & N. Dec. 337 (B.I.A. 1996); *In Re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996); *Matter of Fuentes*, 19 I. & N. Dec. 658, 662 (B.I.A. 1988)

108. *Matter of M-E-V-G,* 26 I. & N. Dec. at 235, 249-50 (noting that general lawlessness and gang violence does not warrant a PSG claim).

109. Legomsky & Musalo, *supra* note 33.

110. *Id.*

111. This reasoning also applies to PSGs such as victims of domestic violence, individuals with disabilities, or even members of the LGBTQ community living clandestinely.

intended to clarify social distinction, some confusion arises, as the Board's explanation includes reference to the members of the PSG "former employees of a country's attorney general" who also consider themselves to be a separate group.[112]

The particularity inquiry presents additional difficulties. Even though the BIA has defined particularity to mean that a group has "definable boundaries," it has rejected groups with clear boundaries on the basis that the group is too broad, such as groups with diverse membership such as gang defectors and deportees because their ranks include "men, women, and children of all ages."[113] Similarly, groups characterized by traits such as poverty, homelessness or youth are deemed "too vague and all encompassing" to set clear perimeters for a PSG.[114] However inherently diverse groups such as the LGBTQ community and young women who oppose FGM, which is likely a large group, satisfy the particularity requirement.[115]

Further, the different analysis of the two requirements often bleed together, blurring and confusing the distinction of social distinction and particularity for adjudicators and representatives alike.[116] Both factors are defined in reference to societal perceptions of discreteness and distinction, terms that are synonymous.[117] Such lack of clarity makes the outcome of PSG-based asylum claims impossible to predict. Though unpredictable law alone is cause enough for concern, "the arbitrary justice that it spawns is even more disturbing,"[118] and both suggest that a departure from precedent is necessary to ensure the fair and uniform adjudication of claims.

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112. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 242–43; Grant, *supra* note 74, at 919-20.

113. STEPHEN H, LEGOMSKY & DAVID B. THRONSON, IMMIGRATION AND REFUGEE LAW AND POLICY 1209 (7th ed., 2019); Legomsky & Musalo, *supra* note 33; Marouf, *Becoming Unconventional, supra* note 69, at 491.

114. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 240. *See also* Legomsky & Musalo, *supra* note 33.

115. *Id.*

116. Marouf, *Becoming Unconventional, supra* note 69, at 491 (citing Valdiviezo-Galdamez v. Att'y Gen. of U.S., 663 F.3d 582, 604 (3d Cir. 2011).

117. *Id.*; *See also Matter of M-E-V-G-*, 26 I. & N. Dec. at 241 (acknowledging that the social distinction and particularity requirements may overlap); Rios v. Lynch, 807 F.3d 1123, 1126 (9th Cir. 2015) (describing membership in a PSG as "an enigmatic and difficult-to-define term"); Rivera-Barrientos v. Holder, 666 F.3d 641, 647 (10th Cir. 2012) (noting "the evolving boundaries of social group membership").

118. Legomsky & Musalo, *supra* note 33.

2. The Three-Part Test is Overly Harsh

The difficulty presented by the inconsistent interpretation of the terms particularity and social distinction has also led advocates to critique the cumulative approach for being overly harsh. The two requirements often conflict, such that the satisfaction of one element undermines the other.[119] For example, to satisfy social distinction a group must be sufficiently large to be identifiable within the larger home society, but cannot be too sweeping to render the PSG lacking in particularity. This creates a "goldilocks problem" in which asylum seekers and representatives must thread the needle of social distinction and particularity to establish a PSG that is "just right."[120] Indeed, Attorney General Sessions noted these concerns in his opinion in *Matter of A-B- I*:

> What percentage of the home society has to agree that the individuals comprise a "group"? As to particularity, if "men, women, and children of different ages" cannot form a "group," who can? Just men? Just women? Just children of certain ages? This would exclude not only numerous groups already held to meet the test, but even those who qualify under the other persecution factors listed in refugee law (like race, religion, and nationality).[121]

Threading this needle not only places a higher burden on representatives crafting a "just right" PSG, it also places an exceedingly difficult evidentiary burden on the asylum seeker.[122] Proving that the PSG they claim to be a member of is thought to be socially distinct and particular in their home country generally requires submitting evidence from home, which even represented asylum seekers may not have access to.[123] Add to this country conditions documents and expert testimony which unrepresented asylum seekers realistically cannot obtain, the cumulative

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119. Marouf, *Becoming Unconventional, supra* note 69, at 491-92

120. *See supra* Section II.C.1; Nanasi, *supra* note 68, at 274.

121. *Matter of A-B-*, 27 I. & N. Dec. 316, 336 (A.G. 2018). While Sessions exploited this "goldilocks" problem presented by the cumulative approach to further restrict the requirements and PSG claims based on domestic violence, the issue is present in the application of the three-part test and of widespread concern. *See* Marouf, *Becoming Unconventional, supra* note 69, at 492.

122. *See* Marouf, *Becoming Unconventional, supra* note 69, at 492; Legomsky & Musalo, *supra* note 33.

123. *Id.*; Legomsky & Musalo, *supra* note 33.

approach creates an incredibly onerous standard detrimental to even the most valid PSG claims.[124]

In light of these rigorous prerequisites to establishing cognizability under the cumulative approach, it is unsurprising that following the addition of the requirements of social distinction and particularity in 2008, no proposed PSG was deemed cognizable for six years until the BIA decided *Matter of A-R-C-G-*.[125] *Matter of A-R-C-G-* remains the only case after the adoption of the cumulative three-part test that has met these stringent requirements.[126] As the PSG ground was intended to be protective of legitimate claims, rather than unduly harsh, the existing cumulative approach must be revised.

3. The Cumulative Approach is Inconsistent with International Law

Opponents of the three-part cumulative test also criticize the approach because the requirements of particularity and social distinction bear no logical connection to asylum or the international doctrine on which the US definition of a refugee is based, and were thus seemingly crafted out of thin air.[127] Though in *Matter of M-E-V-G-* the BIA asserted that it needed guiding criteria in light of an increased volume of claims,[128] the Board has never given a principled reason as to *why* it chose the requirements of particularity and social distinction, or what purpose those requirements serve in the asylum inquiry.[129] Many note that as a policy matter, it should not matter if a PSG is conditioned on a finding that the asylum seeker's home society thinks of the members of the PSG as a group or as discrete and different if the asylum seeker has satisfied the elements required to establish asylum, as this was not the intention of either Congress or the framers of the Refugee Convention.[130]

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124. Marouf, *Becoming Unconventional supra* note 69, at 492. Legomsky & Musalo, *supra* note 33.

125. *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014); Legomsky & Musalo, *supra* note 33.

126. Legomsky & Musalo, *supra* note 33.

127. *Id.*

128. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (B.I.A. 2014); *see supra* Part III.B.

129. LEGOMSKY & THRONSON, *supra* note 113, at 1211.

130. *Id.* at 1211; Legomsky & Musalo, *supra* note 33.

Indeed, UNHCR has denounced the cumulative approach and instead advocated for either a protected characteristics approach comparable to the *Acosta* immutability standard, or a social perception approach.[131] UNHCR defines social perception as "whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large."[132] While the BIA has insisted that the requirements of social distinction and particularity mirror the social perception guidelines adopted by UNHCR,[133] social distinction *requires* societal recognition of the proposed group, while social perception is not dispositive of the existence of a PSG,[134] and not necessary if the asylum seeker satisfies the other UNHCR avenue for relief.[135]

Despite the BIA's contention that the cumulative approach is compatible with UNHCR guidelines, it is notable that the Board's adoption of these requirements has had the opposite effect of those endorsed by UNHCR. UNHCR's application of the immutable characteristics approach and the social perception approach are "alternative tests rather than dual requirements,"[136] expanding PSG protection grounds, while the application of the tests cumulatively, as in the United States, significantly restricts those grounds. In *Matter of M-E-V-G-* the BIA ultimately acknowledged that their interpretation of PSG did not comport with UNHCR's guidelines, but nevertheless charged forward with the cumulative approach.[137] Pursuant to the United States commitment to the Refugee Protocol, the United States has an obligation under the Convention to cooperate with UNHCR in the exercise of asylum law in accordance with the Convention.[138] Accordingly, the existing tri-

131. UNHCR PSG Guidelines, *supra* note 26, ¶¶ 10-13.

132. *Id.* ¶ 7.

133. *Matter of S-E-G-*, 24 I. & N. Dec. 579, 586 (B.I.A. 2008); *Matter of C-A-*, 23 I. & N. Dec. 951, 956-57 (B.I.A. 2006) (citing guidelines adopted by UNHCR).

134. T. Alexander Aleinikoff, *Protected Characteristics and Social Perceptions: An Analysis of the Meaning of "Membership of a Particular Social Group"*, *in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 263, 297-98 (Erika Feller et al. eds., 2003) (noting that the social perception definition of PSG may recognize groups "marked as other" that are not visible in society); *see also infra* Section III.B.1. for a further comparison of the two standards.

135. Marouf, *The Emerging Importance of "Social Visibility"*, *supra* note 24, at 62.

136. *Id.*

137. 26 I. & N. Dec. at 248.

138. Refugee Protocol, *supra* note 1, art. II, ¶ 1; *see also* Guy. S. Goodwin-Gill, *The Office of the United Nations High Commissioner for Refugees and the Sources of International Refugee Law*, 69 INT'L & COMP. L. Q. 1, 20 (2020) ("[T]he duty of cooperation may now

partite cumulative approach taken by the United States to interpret PSG does not comport with existing standards of international refugee law, and must be changed.

IV. INTERNATIONAL EXAMPLES OF WORKABLE ALTERNATIVES: CANADA & AUSTRALIA

The issues that plague pre-*A-B-* precedent outlined in Part III suggest that the upcoming rulemaking ought to depart from precedent to ensure consistency, fairness, and predictability within the US asylum system, as well as to ensure that such system comports with international law. However, rather than start from square one, the United States can look to international examples of PSG jurisprudence for guidance on workable standards that are compatible with UNHCR guidelines and obligations under the Refugee Protocol and Convention. This Part analyzes two alternatives: examples set forth in Canada and Australia, nations that share with the United States a common-law tradition, nations that receive a similarly high volume of asylum applications,[139] and nations that also possess a detailed history of PSG jurisprudence.[140] This Part then weighs each potential solution against the endemic problems of US PSG jurisprudence, specifically those criticisms raised in Part III, and ultimately recommends the alternative approach outlined in Australia's 2014 Migration Act as a potentially workable alternative to existing US policy, despite notable shortcomings highlighted by legislative history and in other areas of the nation's asylum law.

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require of a State party that it show genuine willingness to reconsider its position, in light of UNHCR's views.").

139. *See* AUSTRALIAN HUMAN RIGHTS COMMISSION, FACE THE FACTS: ASYLUM SEEKERS AND REFUGEES 1 (2014), https://humanrights.gov.au/our-work/education/face-facts-asylum-seekers-and-refugees (noting that the United States, Canada, and Australia were ranked number one, two, and three, respectively, in refugee resettlement and asylum claims filed in 2014). Data in the United States has skewed down significantly since 2016 given the Presidency of Donald Trump and the COVID-19 pandemic. REFUGEE COUNCIL OF AUSTRALIA, AN ANALYSIS OF UNHCR'S 2018 GLOBAL REFUGEE STATISTICS 1, 5 tbl.4 (2018), https://reliefweb.int/sites/reliefweb.int/files/resources/2018-Global-Trends-analysis.pdf [https://perma.cc/729V-C53A] (noting that in 2018 Australia, Canada, and the United States ranked number sixty, fifty-one, and ninety, respectively, in asylum claims filed that year). *See also* UNHCR, REFUGEE DATA FINDER (2021), https://www.unhcr.org/refugee-statistics/download/?url=du747G [https://perma.cc/T7CL-TKGM].

140. Aleinikoff, *supra* note 134, at 268.

A. Canada: An Immutability Approach Grounded in Human Rights

The United States' neighbor to the north possesses a long history of PSG jurisprudence that may serve as a workable standard to adopt. The protected characteristics test established in *Canada v. Ward* presents a quasi-immutability test comparable to *Acosta*, that is endorsed by UNHCR, and has acknowledged gender as PSG without floodgates concerns being realized. Despite addressing many of the criticisms, the approach also presents issues of implementation, particularly due to the United States' human rights record and subtle nuances between the two standards that could likely go ignored, making any change moot.

1. Canada's Protected Characteristics Approach Goes Beyond *Acosta*'s Immutability Test

Canada, much like the United States, has established its PSG definition through case law. The leading authority on the PSG definition in Canada is *Canada v. Ward*,[141] a case that grappled with the asylum claim of a member of Irish National Liberation Army, a paramilitary organization in Northern Ireland, who was sentenced to death by the group for freeing hostages. Ward asserted that he would be persecuted if returned to Northern Ireland based on his membership in the INLA.[142]

Fearing a broad interpretation of PSG would render the PSG category a safety net for all claims and render the four other grounds unnecessary, the Court took a purposive approach and reasoned that the PSG ground should comport with "the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative."[143] Accordingly, the Court defined the term in a more narrow, human rights-centric manner, flagging three illustrative categories warranting protection under the ground:

> (1) groups defined by an innate or unchangeable characteristic [e.g. by gender, linguistic background, sexual orientation];

141. Canada v. Ward, [1993] 2 S.C.R. 689; (1993) 103 DLR (4th) 1.
142. *Id.* at 690.
143. *Id.* at 739.

> (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association [e.g. human rights activists]; and
>
> (3) groups associated by a former voluntary status, unalterable due to its historical permanence.[144]

Ward, which was decided in 1993, mirrors the language of the *Acosta* immutability test, and actually referenced *Acosta* as one of the authorities that inspired the *Ward* protected characteristics approach.[145] However, the *Ward* standard extends beyond *Acosta*, recognizing groups beyond those which share a characteristic that is immutable, such as voluntary associations that are likely changeable.[146] This differs from *Acosta* in that what is identified as the basis for a social group in this category is not the shared possession of a voluntarily assumed characteristic fundamental to human dignity, but rather the human right of voluntary association itself.[147]

Subsequent cases have built on *Ward* to clarify that a refugee alleging membership in a PSG does not have to be in voluntary association with other persons similar to themselves.[148] In *Chan v. Canada,* Justice La Forest, who authored the *Ward* opinion, emphasized that the inquiry is "whether the appellant is voluntarily associated with a particular status for reasons so fundamental to his human dignity that he should not be forced to forsake that association. That association or group exists by virtue of a common attempt made by its members to exercise a fundamental human right."[149]Accordingly, this standard has been referred to as the protected characteristics approach, because it encompasses more than just immutable or fundamental

144. *Id.* at 739; *see also* Aleinikoff, *supra* note 134, at 269.

145. *See Ward*, [1993] 2 S.C.R. 689, 695, 736-37.

146. Brienna Bagaric, *Revisiting the Definition of Particular Social Group in the Refugees Convention and Increasing the Refugee Quota as a Means of Ameliorating the International Displaced Person's Crisis,* 69 S.C. L. REV. 121, 168 (2017). However, the Ward Court did note that this definition excludes "groups defined by a characteristic which is changeable or from which disassociation is possible, so long as neither option requires renunciation of basic human rights." Canada v. Ward, [1993] 2 S.C.R. 689, 737-38; *see also* FOSTER, *supra* note 34, at 8.

147. Aleinikoff, *supra* note 134, at 269-70.

148. Chan v. Canada (Minister of Employment and Immigration), [1995] 3 S.C.R. 593, 644-46.

149. *Id.*

characteristics, but fundamental human rights as well.[150] This a subtle, more inclusive standard.

Refugee law scholar R. Alexander Aleinikoff explains the subtle differences between *Acosta* and protected characteristics approach highlighted in *Ward*, noting that if the exercise of freedom of thought is a fundamental human right, then arguably persons should not be compelled to forego associations with like-minded persons.[151] In this way, the Canadian protected characteristics standard protects more than just the right to believe what one wants in the privacy of one's home, but also the right to join with others who share the same views.[152]

2. Protected Characteristics Approach as Endorsed by UNHCR

Though tailored in narrower terms than *Acosta*, the protected characteristics approach is founded in and guided by human rights protection and anti-discrimination, concepts that embrace the very ethos of the Refugee Convention and the UNHCR guidelines.[153] Indeed, the opening paragraph of the Convention declares this: "Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms *without discrimination*."[154]

Accordingly, the UNHCR guidelines actively endorse the protected characteristics approach as one of the two authorized definitions of PSG, and explicitly state that for purposes of satisfying the test, "[h]uman rights norms may help to identify characteristics deemed so fundamental to human dignity that one ought not to be compelled to forego them."[155] Though the guidelines don't make reference to Canada's approach directly, they do recommend three similar illustrative examples as a means of understanding the protected characteristics approach:

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150. *See supra* note 26 (discussing the difference between the protected characteristics and immutability approaches).

151. Aleinikoff, *supra* note 134, at 270.

152. *See id.*

153. *See supra* Section III.A.1; Ward, [1993] 2 S.C.R. 689, at 739.

154. 1951 Refugee Convention, *supra* note 4, pmbl. (emphasis added); *see also* Aleinikoff, *supra* note 134, at 290-91.

155. UNHCR PSG Guidelines, *supra* note 26, ¶ 6.

> (1) by an innate, unchangeable characteristic,
>
> (2) by a past temporary or voluntary status that is unchangeable because of its historical permanence, or
>
> (3) by a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it.[156]

If this nearly identical language was not enough to signal Canadian compliance with UNHCR Guidelines and the Convention, the language of the UNHCR guidelines mirrors the formal guidelines published by Canadian Refugee Law enforcement authorities.[157] Further, the Canadian approach has had no difficulty in recognizing those PSGs, such as gender, that have been flagged by UNHCR as warranting relief within the meaning of the Convention.[158] Accordingly, adopting a PSG definition comparable to that employed in Canada would likely bring the United States into compliance with UNHCR guidance and its obligations under the 1951 Refugee Convention.[159]

3. Gender and Floodgates: A Statistical Analysis

Pursuant to UNHCR guidelines and compliance with human rights norms, Canada has recognized gender alone as a cognizable PSG.[160] Applying the newly adopted protected characteristics approach from *Ward*, the Canadian Immigration and Refugee Board issued guidelines that declared that women who cannot get state protection from spousal abuse, who are subjected to violence at the hands of public officials, or who fear persecution because they oppose laws or customs that discriminate against them, should be given special consideration for refugee status under the

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156. *Id.*

157. *See id.* (recognizing women, families, and "homosexuals" as PSGs under the UNHCR-endorsed protected characteristics approach); Immigration and Refugee Board of Canada, Interpretation of the Convention Refugee Definition in the Case Law, Ch. 4.5: Grounds of Persecution: Particular Social Group (Mar. 31, 2019) (highlighting recognition of PSGs such as family, gender, and "homosexuals"; *collecting cases*).

158. *See* UNHCR PSG Guidelines, *supra* note 26, at 6; Immigration and Refugee Board of Canada, *supra* note 155.

159. *See supra* note 155 and accompanying text.

160. CHAIRPERSON, CANADIAN IMMIGRATION AND REFUGEE BOARD, GUIDELINES ON WOMEN REFUGEE CLAIMANTS FEARING GENDER RELATED PERSECUTION (1993); *see generally* Pamela Goldberg, *Anyplace But Home: Asylum in the United States for Women Fleeing Intimate Violence*, 26 CORNELL INT'L L.J. 565, 590 (1993).

PSG ground.[161] Canada has also recognized violence against women on account of gender as persecution along these lines.[162] Though not the work of the application of the protected characteristics PSG definition alone, the Canadian approach nonetheless serves as an example how a comparable approach to *Acosta* could be tweaked to more thoroughly protect gender-based PSGs. Indeed, a formal rulemaking, such as that currently in process, would likely issue guidelines to frame any newly proposed PSG definition.

While many argue that the recognition of such a broad group such as gender presents floodgates concerns, data collected on PSG claims in Canada following the recognition of gender as a PSG suggest otherwise.[163] Since 1993, when Canada recognized that gender-based persecution was protected under PSG grounds, "gender claims consistently constituted only a miniscule fraction of Canada's total claims, and actually declined in the seven year period following."[164] Accordingly, a US rulemaking that mirrors the Canadian approach and is grounded in human rights would likely address politically salient floodgates concerns.

4. Canada's Protected Characteristics Approach Addresses Endemic Issues, but is it Feasible in the United States?

With a framework that is comparable to the *Acosta* approach that many US-based practitioners are familiar with and favor, the Canadian protected characteristics approach seems like a workable alternative definition of PSG. The approach provides clear guidelines through the reference to international human-rights standards which would likely address *Acosta* critics' desire for guidance in light of the breadth of the immutability test.[165] Further, this approach allows for the recognition of gender that has been lacking thus far in the United States, and has not led to any demonstrated influx of asylum seekers despite the breadth of

161. Kristine M. Fox, *Gender Persecution: Canadian Guidelines Offer a Model for Refugee Determination in the United States*, 11 ARIZ. J. INT'L & COMP. L. 117, 118-19 n.20 (1994) (citing Alan Thompson, *Canada First in Recognizing Abused Women as Refugees*, TORONTO STAR, Mar. 10, 1993, at A2).

162. *Id.* This inherently identifies the characteristic of "being a woman" as protected under Canadian PSG jurisprudence.

163. Musalo, *Protecting Victims of Gendered Persecution*, *supra* note 94, at 133.

164. *Id.*

165. *Supra* Section II.A.

protection, addressing floodgates concerns.[166] Finally, the approach is entirely compatible with UNHCR guidelines, and thus consistent with the Refugee Convention and international obligations.

While the Canadian protected characteristics approach addresses the shortcomings of *Acosta*, its basis in human rights and anti-discrimination, though aspirational, is not in accordance with existing US practice.[167] Though a US rulemaking could make reference to international human rights standards much like Canada does, the United States has a much worse record of protecting and living up to international human rights standards, particularly in the area of asylum and treatment of refugees.[168] If history is any indicator, any implementation of a human rights or anti-discrimination guidelines into a US rulemaking likely would have little practical effect.

Further, though *Ward* is more inclusive, the question remains as to whether it is substantially different enough from the *Acosta* approach to warrant a change and the effort of a rulemaking. The first and third prongs of *Ward* are nearly identical to *Acosta*. And while *Acosta* does reference voluntary associations, group membership, and fundamental characteristics in a manner

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166. *Supra* Section II.A.

167. The United States has not signed on to any of the major International Human Rights treaties, while Canada has. *See* HUMAN RIGHTS WATCH, UNITED STATES RATIFICATION OF HUMAN RIGHTS TREATIES (July 24, 2009), https://www.hrw.org/news/2009/07/24/united-states-ratification-international-human-rights-treaties# [https://perma.cc/3BWF-6VNJ]; GOVERNMENT OF CANADA, ABOUT HUMAN RIGHTS (Dec. 23, 2020), https://www.canada.ca/en/canadian-heritage/services/about-human-rights.html [https://perma.cc/W7NN-XLCZ].

168. *See, e.g.,* Zoya Wazir, *Countries Seen to Care About Human Rights*, U.S. NEWS (June 16, 2021), https://www.usnews.com/news/best-countries/articles/the-10-countries-that-care-the-most-about-human-rights-according-to-perception (noting that Canada's reputation as a champion of human rights is due in part to its refugee-friendly policies); *Refugee Rights are Human Rights: How Canada Lives Up — or Fails to Live up — to Its Human Rights Obligations Towards Refugees and Other Non-Citizens,* CANADIAN COUNCIL FOR REFUGEES (Mar. 2000), https://ccrweb.ca/sites/ccrweb.ca/files/static-files/refright.htm [https://perma.cc/L7DX-9TSY] (noting that Canada has one of the best human rights records because of abysmal records globally); NYC BAR ASSOC.: IMMIGRATION & NATIONALITY COMM., CALL FOR MEASURES TO ENSURE HEALTH, HUMAN RIGHTS AND PUBLIC HEALTH PROTECTIONS FOR DETAINED IMMIGRANT WOMEN (Feb. 23, 2021), https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/medical-abuses-of-immigrant-women-at-irwin-detention [https://perma.cc/4L75-WBRN] (referencing US violation of international human rights standards in detention of immigrants and refugees).

resembling prong two of *Ward*, the formulation is not quite the same as that adopted by the Canadian Supreme Court.[169] Unlike *Ward, Acosta* states that the characteristic—not the voluntary association based on the characteristic—must be so fundamental that an individual should not be compelled to forsake it.[170] Though, again, a rulemaking could flesh out the differences between these approaches, the subtle nuances here run the risk of being overlooked and disregarded, rendering the rulemaking moot and problems unaddressed. As one of the key concerns of the *Acosta* approach was the lack of guidelines, a new rule that is not substantially different from *Acosta* would likely retain these issues.

B. Australia: The Alternative Approach

Another compelling international example the United States could look to is that of Australia. In 2014, Australia codified the definition of PSG in s 5L of the *Migration Act,* formalizing the social perception definition outlined in pre-2014 case law, and adding in the alternative a protected characteristics approach.[171] Section 5L of the 2014 Migration Act defines PSG as:

> For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:
>
> (a) a characteristic is shared by each member of the group; and
>
> (b) the person shares, or is perceived as sharing, the characteristic; and
>
> (c) any of the following apply:
>
> > (i) the characteristic is an innate or immutable characteristic;

169. *C.f. Acosta*, 19 I. & N. Dec. 211, 233-34 (B.I.A. 1985); Ward, [1993] 2 S.C.R. 689, at 739.

170. *See* Aleinikoff, *supra* note 134, at 276 n.46.

171. Administrative Appeals Tribunal, *Guide to Refugee Law in Australia*, Ch. 5: Refugee grounds and nexus rimer 3, 18 (last accessed Nov. 23, 2021) https://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Guide%20to%20 Refugee%20Law/Chapter5_GroundsNexus.pdf [https://perma.cc/398B-VL4Y] [hereinafter Guide to Refugee Law]. This Guide provides an analysis of refugee law and complementary protection in Australia, as they relate to the assessment of protection visa (aka asylum) applications and other protection-related decisions made under the Migration Act 1958.

> (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
>
> (iii) the characteristic distinguishes the group from society; and
>
> (d) the characteristic is not a fear of persecution.[172]

Subsections (a) and (b) of this definition largely reflect the interpretation of PSG as understood in foundational social perception case law.[173] Subsection (c) of the Act touches on social perception but also closely resembles the language of the immutability test outlined in *Acosta.*[174] Indeed, legislative history reveals that the framers of the Act drew on principles from other jurisdictions including the United States and Canada for guidance.[175] Satisfaction of subsection (c) requires that the group satisfy *either* a traditional Australian social perception approach in (c)(iii), *or* one of the two protected characteristics approaches in (c)(i) and (ii). In enacting these changes, s 5L of the Migration Act fully conforms to UNHCR guidelines. Though the motivations behind the Act may be suspect, it has led positive asylum outcomes since its application and serves as a feasible and reproducible standard that is compatible with existing US precedent.

1. The Social Perception Approach in Australian Caselaw as More Inclusive than Particularity and Social Distinction

Prior to the codification of the Migration Act, Australian PSG jurisprudence was exclusively governed by a social perception approach.[176] The Australian court first explicitly defined PSG using social perception in the landmark case of *Applicant A*:

> If the group is perceived by people in the relevant country as a particular social group, it will usually but not always be the

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172. *Migration Act 1958* (Cth) s 5L (Austl.).

173. *See* Applicant A v. MIEA (1997) 190 CLR 225; Applicant S v. MIMA (2004) 217 CLR 387; *infra* Section III.B.i.

174. *Matter of Acosta,* 19 I. & N. Dec. 211, 233-34 (B.I.A. 1985).

175. Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014 (Cth), 11, 178 [hereinafter Explanatory Memorandum] (noting that amendments to 5L "draw from the approach taken in other jurisdictions including Canada, the United States of America, New Zealand and the European Union").

176. *See supra* Section III.B; *Migration Act 1958* (Cth) s 5L (Austl.).

> case that they are members of such a group. Without some form of internal linking or unity of characteristics, attributes, activities, beliefs, interests or goals, however, it is unlikely that a collection of individuals will or can be perceived as being a particular social group.[177]

The court emphasized that, ultimately, a PSG "is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large."[178] Under this approach, a PSG must have all the traditional characteristics of a unified and distinct social group, but the larger society's perception of the group as particular can evince the existence of such a group that satisfies these requirements.

Though such language mirrors the United States requirements of social distinction and particularity, the Australian court has emphasized that there is no *requirement* that there be a perception within the society that the collection of individuals is a group that is set apart from the rest of the society. Most notably, in *Applicant S*, the Court was explicit that:

> [P]erceptions held by the community may amount to evidence that a social group is a cognisable group within the community, [but that t]he general principle is not that the group must be recognised or perceived within the society, but rather that the group must be distinguished from the rest of the society.[179]

The Court stressed that above all, the members of the group "must be recognised by some persons—at the very least by the persecutor or persecutors—as sharing some kind of connection or falling under some general classification."[180] The court added, that while social perception is a useful tool for assessing whether the group is a PSG, it did not follow that the persecutor or anyone else in the society must perceive the group as a PSG in order to satisfy the requirements of membership in such group.[181] The court explained that it is enough that the persecutor or persecutors single out the asylum-seeker for being a member of a class whose members possess a uniting feature or attribute, and the persons in

177. Applicant A v. MIEA (1997) 190 CLR 225, ¶¶ 264–265.
178. *Id.* ¶ 241.
179. Applicant S v. MIMA (2004) 217 CLR 387 ¶ 27.
180. *Id.* ¶ 64.
181. Applicant S v. MIMA (2004) 217 CLR 387 ¶ 69.

that class are cognizable objectively as a PSG.[182] However, caselaw has shown that community perceptions are incredibly probative in determining the cognizability of a PSG within Australian courts.[183]

While US courts have held that social distinction mirrors social perception guidelines adopted by UNHCR,[184] social distinction *requires* societal recognition of the proposed group, whether the group is visible or not.[185] By contrast, social perception is not a hard and fast rule to determine whether a group exists, but rather serves merely to evidence the existence of a PSG within society.[186] The social perception analysis has been described as "sociological," looking to external factors rather than identifying a protected characteristic that defines and is shared by the group.[187] Because the social perception approach eschews any one defining feature, Guy Goodwin Gill has posited that it might well embrace groups of "apparently unconnected and unallied individuals, such as mothers, women at risk of domestic violence, capitalists, and homosexuals."[188] Accordingly, social perception is not delimited by a requirement that a group be particular, or easily identifiable, which significantly limits the ability for proposed groups to be recognized as cognizable under US law.

It is along these lines that the Australian High Court stated in *MIMA v. Khawar* that women in any society are a distinct and recognizable group.[189] As Australia has recognized gender alone as

182. *Id.*

183. Guide to Refugee Law, *supra* note 171, at 24 (highlighting caselaw of Applicant S v. MIMA (2004) 217 CLR 387, SZRAQ v. MIAC [2012] FMCA 371, and SZQKS v. MIAC [2012] FMCA 168 as relevant examples, however the latter two citations were inaccessible via database).

184. *Matter of C-A-*, 23 I. & N. Dec. 951, 956-957 (B.I.A. 2006) (citing guidelines adopted by the United Nations High Commissioner for Refugees); *see also supra* Section II.C.3.

185. *Matter of W-G-R-*, 26 I. & N. Dec. 208, 216 (B.I.A. 2014).

186. Applicant S v. MIMA (2004) 217 CLR 387 ¶¶ 68-69, 98; Guide to Refugee Law, *supra* note 171, at 24.

187. Aleinikoff, *supra* note 134, at 272.

188. *Id.* at 298 (citing G. S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW, 362 (2d ed., Oxford Univ. Press, 1996)).

189. MIMA v. Khawar, (2002) 210 CLR 1 at ¶ 35. Outside of the *Khawar* precedent, Australian social perception case law has been inconsistent, with narrowing tests often applied due to implicit floodgates concerns. *See* FOSTER, *supra* note 34, at 44-46; Joseph Rikhof & Ashley Geerts, *Protected Groups in Refugee Law and International Law*, 8 LAWS 1, 6 (2019) (citing Lek v. MILGEA (No 2) (1993) 45 FCR 418; NAIV v. MIMIA [2004] FCA 457; MIMA v. Ndege [1999] FCA 783.; MIMA v. Cali [2000] FCA 1026.; Jayawardene v. MIMA [1999] FCA 1577); *see also* Guide to Refugee Law, *supra* note 171, at 35-36. Such case law

a PSG under the social perception framework, the approach also comports with the UNHCR Guidelines on gender-based PSG claims.[190] Accordingly, UNHCR has explicitly endorsed social perception as an acceptable definition of PSG within the meaning of the Refugee Convention.[191]

2. The Migration Act Definition is More inclusive than either *Acosta* or the Cumulative Approach

While the 2014 codification of PSG guidelines did add additional elements to the social perception test to determine the cognizability of a PSG, they are not additional tests, but additional means to satisfy the definition, making the updated definition of PSG more inclusive than either the protected characteristics approach or the social perception approach alone.

The Australian protected characteristics approach allows an asylum seeker to satisfy the definition of PSG if they possess a characteristic that is innate or immutable, such as gender, or so fundamental to a member's identity or conscience that the member should not be forced to renounce it.[192] These requirements are meant to protect characteristics that one cannot change, or are so essential one should not be required to change.[193] While these requirements are noted as being initially inspired by "other jurisdictions," they are nearly identical to the *Acosta* standard employed in the United States.[194]

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pre-dates the Migration Act and more-recent cases have not addressed this issue since. However, *Khawar* remains exceptional in that Australia, unlike other countries, has recognized gender *alone* can be distinct and recognizable to satisfy the definition of particular social group. MIMA v. Khawar, (2002) 210 CLR 1.

190. *See* MIMA v. Khawar (2002) 210 CLR 1; *See generally* UNHCR Gender Guidelines, *supra* note 101.

191. *See* UNHCR PSG Guidelines, *supra* note 26, ¶ 7.

192. *See* Supplementary Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014 (Cth) 8 § 42.

193. *Id.*

194. Explanatory Memorandum, *supra* note 175, at 11. *Compare Matter of Acosta,* 19 I. & N. Dec. at 233 *with* Explanatory Memorandum, *supra* note 175, at 178 § 1220. The Explanatory Memorandum to the Bill which introduced section 5L indicates that an "innate characteristic" is intended to include inborn characteristics, and that the term "immutable" is intended to encompass characteristics which are not capable of change, such as certain health statuses, or past experiences like being a victim of human trafficking or a child soldier. The second alternative protected characteristic is that the characteristic must be so fundamental to a person's identity or conscience that he or she should not be forced to renounce it. While this phrase is not further defined, the Refugee Law Guidelines describe

This protected characteristics approach is accompanied in the alternative by the social perception approach, which is already much more inclusive than the most comparable US standard of social distinction on its own.[195] Factor in the additional cumulative requirements of particularity and immutability, and overall the US tri-partite PSG definition is, on paper, much less protective than the standards outlined in the Australian Migration Act.[196] Such approach directly reflects UNHCR Guidance that *either* the protected characteristics approach *or* the social perception approach is an appropriate interpretation of the PSG ground within the meaning of the Refugee Convention.[197] That Australia provides both avenues of relief is indicative of a particularly inclusive PSG definition, even if other areas of asylum law are more restrictive.[198]

3. Application of the Migration Act Since 2014

The 2014 Migration Act Amendments are not only inclusive in theory but have indicated an overall improvement on pre-2014 PSG jurisprudence. Though claims have skyrocketed since 2014, data made available by both UNHCR and Australia's Department of Home Affairs suggest that since the passage of the Migration Act, both total successful asylum claims and asylum grants as a percentage of claims filed have increased.[199] While unfortunately visibility over the given ground asserted in a claim for asylum is not available, overall global trends suggest the claims based on the

"fundamental" as synonymous with a "necessary base or core" or of "central importance." *Id.*

195. *See supra* Section III.C.

196. *See supra* Section II.C.3.

197. *See generally* UNHCR PSG Guidelines, *supra* note 26, at 2-3.

198. *See infra* Section IV.B.4 for discussion of other asylum restrictions, despite the inclusive PSG definition.

199. UNHCR publicly publishes data on refugee resettlement and asylum claims reported by signatories including Australia. *See Refugee Data Finder*, UNHCR, https://www.unhcr.org/refugee-statistics/download/?url=Upz79h [https://perma.cc/BD3R-TQJJ] (last visited Nov. 30, 2021); *Australia Refugee Statistics 1965-2021*, MACROTRENDS, https://www.macrotrends.net/countries/AUS/australia/refugee-statistics [https://perma.cc/AS4H-CPCJ] (last visited Nov. 30, 2021); *see also Visa Statistics*, AUSTRL. GOV'T: DEP'T OF HOME AFFS., https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/live/humanitarian-program [https://perma.cc/AS4H-CPCJ] (Dec. 15, 2021).

PSG ground have increased. According to UNHCR data, Australia receives the bulk of its asylum applications from Southeast Asia, India, and the Middle East, diverse regions that according to UNHCR have, in recent years, experienced a variety of forced displacement events.[200] While none of these events are dispositive of persecution on account of PSG, PSG claims are often asserted in addition to other protected grounds, suggesting an overall increase in PSG claims asserted and adjudicated.[201]

4. Australia: Anti-Asylum or Comparable Example?

Despite the otherwise inclusive and UNHCR-endorsed alternatives to satisfy member in a PSG in Australia, according to the bill which introduced the 2014 Migration Act , the purpose of s 5L was to explicitly narrow the broad avenues for relief under the pre-2014 social perception approach.[202] The Explanatory Memorandum highlights that pre-2014, with limited legislative guidance, courts had improperly imparted a broad interpretation onto PSG, resulting in "long lists of increasingly elaborate potential particular social groups being drawn for the purposes of

200. *See Statistics on People Seeking Asylum in the Community*, REFUGEE COUNCIL OF AUSTRALIA (Oct. 31, 2021), https://www.refugeecouncil.org.au/asylum-community/ [https://perma.cc/9TCW-M5SP] (highlighting major sources of asylum seekers and causes).

201. Convention grounds are not mutually exclusive. A person may claim refugee status based on membership in a PSG as well as the other grounds such as religion or political opinion, if they apply, and are encouraged to do so in UNHCR's Guidelines. *See* UNHCR PSG Guidelines *supra* note 26, ¶ 4 ("A claimant may allege that she is at risk of persecution because of her refusal to wear traditional clothing. Depending on the particular circumstances of the society, she may be able to establish a claim based on political opinion (if her conduct is viewed by the State as a political statement that it seeks to suppress), religion (if her conduct is based on a religious conviction opposed by the State) or membership in a particular social group."). Accordingly, PSG claims almost always accompany claims on other protected grounds. *Id.*

202. The overarching purpose of the 2014 Migration Act Amendments was to change the way Australia manages and processes asylum seekers in light of the "asylum legacy caseload," an influx of asylum seekers into Australia by boat between August 2012 and December 2013. *See* Parliament of Australia, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, 2014-15 BILLS DIGEST 40 (Oct. 23, 2014), https://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/3464004/upload_binary/3464004.pdf;fileType=application/pdf [https://perma.cc/8G3A-Z9S3]. *See also* Explanatory Memorandum, *supra* note 175, at 11 (highlighting that the s 5L definition proposed in 2014 seeks to "clarify and limit the definition of membership in a particular social group").

protection visa applications thereby making implementation of the term complex and difficult for decision makers to apply."[203] While such aims echo the criticism of *Acosta*, they also evoke xenophobic and anti-immigrant sentiment.[204]

Upon Australia's initial draft of the Bill, Australian Refugee rights organizations and UNHCR expressed dismay at the initial cumulative application of the two protected characteristics together with the social perception approach, rather than the UNHCR-approved application of these standards.[205] This draft not only mirrored the US cumulative approach, but also cited to US caselaw that significantly narrowed the PSG definition by establishing the requirements of particularity and social distinction.[206] Critics noted that this proposed cumulative approach ran counter to the intention of the Refugee Convention and to pre-existing caselaw noting that PSG is intended to be interpreted broadly.[207] Overall, Australian Refugee organizations have characterized the *Migration Act*, including the initial PSG definition, as narrowing refugee protections in violation of the purpose of the Refugee Convention and human rights standards.[208]

203. Explanatory Memorandum, *supra* note 175, at 11.

204. *See supra* Section II.B.1.

205. UNHCR Regional Representation in Canberra, Submission to the Senate Legal and Constitutional Affairs Legislation, Committee Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Oct. 31, 2014), https://www.unhcr.org/uk/5811919f7.pdf [https://perma.cc/57VX-TY3A].

206. Explanatory Memorandum, *supra* note 175, at 178.

207. *See* Submission to the Legal and Constitutional Affairs Committee of the Australian Senate concerning the Migration and Maritime Powers Legislation Amendment (resolving the Asylum Legacy Caseload) Bill 2014 (the Bill), NSW COUNCIL FOR CIVIL LIBERTIES (2014), https://d3n8a8pro7vhmx.cloudfront.net/nswccl/pages/597/attachments/original/1416963906/sub178.pdf?1416963906 [https://perma.cc/6HDU-P53Z]. The NSW Council for Civil Liberties noted that by codifying of Australia's interpretation of its protection obligations under the Refugee Convention, rather than referring to the Convention or directly employing an UNHCR endorsed standard, undermined the purpose of the Convention and allowed Australia to skirt its obligations.

208. *Id. See also Legislative Brief: Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*, ANDREW & RENATA KALDOR CTR. FOR INT'L REFUGEE L. (Dec. 5, 2014), https://www.kaldorcentre.unsw.edu.au/publication/legislative-brief-migration-and-maritime-powers-legislation-amendment-resolving-asylum [https://perma.cc/7JYH-BJC7]; UNHCR Regional Representation in Canberra, *UNHCR statement: Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, UNHCR (Sept. 16, 2014), https://www.unhcr.org/en-au/news/press/2014/9/58100e9a4/unhcr-statement-migration-and-maritime-powers-

Though Australian lawmakers adopted this feedback and codified the alternative paths to relief in the final iteration of the Act as we know it today, such intention to narrow refugee protections is concerning. When coupled with other restrictions outlined in the Act, such as increased detention and interception of asylum seekers at sea, the legislation as a whole perhaps suggests an overall anti-asylum ethos that ought not to be replicated in the United States.[209] However, this may serve as an actually workable standard given the attitudes toward asylum seekers and immigrants in the United States. The United States unfortunately has a history of both detaining and intercepting asylum seekers at sea that is comparable to that of Australia.[210] While looking to Canada as an example may be too aspirational to be feasible for the United States,[211] Australia perhaps presents an attainable standard that suggests change, albeit moderate and in only one subset of asylum law, is possible.

This is especially the case as the proposed US rulemaking only addresses the definition of PSG but fails to address other glaring issues in the US asylum system today, such as detention, and lack of refugee representation and due process.[212] Given the remote likelihood of addressing much more than the definition of PSG in the current US political climate, an inclusive PSG definition without much else may nonetheless be a victory for asylum advocates. While it could be argued that these similarities and shared foundation may limit truly innovative changes to the application of the definition of PSG in US asylum proceedings, the forthcoming rulemaking can't stray too far from existing jurisprudence for fear of being labelled arbitrary and capricious.[213] Further, as the

legislation-amendment-resolving.html [https://perma.cc/59A4-65F2] (noting that any refugee law or policy that is punitive or deterrent in nature or prolongs uncertainty would be of concern to UNHCR).

209. *See Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014: What it means for people seeking asylum*, REFUGEE COUNCIL AUSTL. (Feb. 1, 2019), https://www.refugeecouncil.org.au/legacy-caseload-brief/ [https://perma.cc/9E93-HUZC].

210. *See, e.g.,* Edwidge Danticat, *The U.S.'s Long History of Mistreating Haitian Migrants*, NEW YORKER (Sept. 24, 2021), https://www.newyorker.com/news/news-desk/the-uss-long-history-of-mistreating-haitian-migrants [https://perma.cc/MXZ2-44BJ].

211. *See supra* Section III.A.5.

212. Exec. Order No. 14010, 86 Fed. Reg. 8267, 8271 (Feb. 2, 2021).

213. Administrative Procedure Act, 5 U.S.C. § 706(2)(a).

Migration Act draws directly on existing US precedent, replication and implementation will likely be smoother given familiarity with the terms and standards. Accordingly, despite these shortcomings, the alternative approach laid out in Australia's 2014 Migration Act may present a reasonable, feasible, and workable standard that the United States could adopt to clarify the definition of PSG moving forward.

V. CONCLUSION

Over the last thirty years, US asylum law has been inconsistent, confusing, and non-compliant with international refugee law, particularly in PSG jurisprudence. The vacatur of *Matter of A-B-*, an Attorney General decision that restricted PSG claims, is a step in the right direction. A return to pre-*A-B-* precedent, however, leaves longstanding issues unaddressed. In light of the vacatur, the United States has an opportunity to craft a definition of PSG that is both consistent and predictable, and compliant with the Refugee Convention.

The United States need not reinvent the wheel, and instead can look to Canada and Australia, common law nations with comparable levels of asylum claims and rich histories of PSG jurisprudence, for guidance. Canada's protected characteristics approach is broad and flexible, grounded in human rights, consistent with UNHCR guidelines, and comparable to existing US precedent. But is it too similar to make a difference? And can the United States meet human rights standards that guide the approach, such that a change in US policy is meaningful? While such a rule may be aspirational and help to re-orient US PSG standards within international law, the United States' record on human rights and asylum suggests this unlikely.

Australia's 2014 Migration Act amendment provides two UNHCR-endorsed alternatives to asylum seekers: a protected characteristics approach much like the existing *Acosta* precedent, and a social perception approach that's more flexible than comparable US standards of social distinction and particularity. When applied in the alternative, this approach provides two separate avenues for relief, expanding the protections as compared to the existing US approaches. However, with suspicious motives and other provisions restricting asylum, is this an approach worth emulating? While not aspirational like the Canadian approach,

Australia's approach may present an actually feasible and reasonable alternative given the United States and Australia's shared history of asylum and human rights abuses. Further, given similarities between *Acosta*, the cumulative approach, and the Australian approach, implementation is as straightforward as changing an "and" in the cumulative approach to an "or" in the alternative approach. Ultimately this Note recommends that the forthcoming US rulemaking replicate the alternative approach taken in Australia's 2014 Migration Act, as it provides more avenues for relief, has a demonstrated positive impact despite aforementioned shortcomings, and poses a realistic and sensible adjustment in light of US political realities.

While such a reform would serve to be a workable solution that brings the United States into compliance with international human rights and asylum standards, and bring consistency and stability to US asylum adjudications, there are, nevertheless, outstanding obstacles to a completely fair and equitable asylum system. Though outside of the scope of this Note, the Attorney General's power to issue superseding precedent whenever she self-certifies a case clearly has the potential to be both disruptive and abusive, particularly in an area of undefined law as in the case of PSG. Though pre-*A-B-* precedent presents its own issues, the Attorney General opinions issued during the Trump administration added even more confusion to an already inconsistent area of law. Thus, it may be worth exploring additional regulations or legislation that restricts the unilateral use of this power.

Similarly, while a rulemaking no doubt possesses more staying power than an Attorney General decision, as it can only be replaced through formal notice and comment procedures, a more permanent solution, such as a formal codification of the definition of PSG similar to that in Australia's Migration Act, is necessary to address the thirty years of inconsistency associated with this protected ground. Unfortunately, given US congressional gridlock, it is unlikely that the United States possesses the political capital or motivation to pass such recommendations into law. Accordingly, a rulemaking, like the one the Biden Administration is currently undertaking, is the only path forward. In light of this political climate, the Australian approach, despite aforementioned

shortcomings, is likely the only means to feasibly and impactfully address issues in existing US PSG jurisprudence.