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ATTACHMENT ISSUES: ASSESSING THE RELATIONSHIP BETWEEN NEWCOMERS AND THE CONSTITUTION

Ashley Mantha-Hollands*

ABSTRACT

Are you attached to the principles of the U.S. Constitution? How do you prove it—do you feel it, or just know it? What role does it play in your daily life as a citizen? Ever since one of the first acts of the U.S. Congress, the Naturalization Act of 1795, applicants for citizenship have been required to demonstrate that they are “attached to the principles of the [C]onstitution of the United States.”¹ This requirement has been at the forefront of fierce debates in U.S. constitutional history and, although it has had limited usage after WWII, it has recently been brought up again. In 2021, President Biden announced a new bill (Citizenship Act 2021) which if passed by Congress would facilitate the pathway to citizenship for 11 million undocumented migrants that would need to show attachment as part of their naturalization requirements.² Attachment requirements have also mushroomed in other liberal democracies, which have had the U.S. model in mind when designing their naturalization procedures. This Article is the first to present a systematic updated legal analysis of the attachment requirement in U.S. constitutional law and citizenship policy from a comparative perspective. The Article tracks the historical roots of the attachment requirement since the American colonies to date, demonstrates the controversies and disputes over its essence, and assesses its underlying theory, purpose, content, and methods. Overall, the Article provides normative insights, comparative lessons, and historical contexts to one of the most fundamental questions of the political community—who belongs, under what conditions, and why?

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¹ Naturalization Act of 1795, ch. 20, § 1, 1 Stat. 414 (repealed 1802).

² Diana Ransom, *Biden’s Immigration Overhaul: Bring on the Entrepreneurs*, INC. (Jan. 20, 2021), <https://www.inc.com/diana-ransom/employment-visas-citizenship-act-2021-biden-immigration-reform.html> [<https://perma.cc/WA3D-VJN2>].

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INTRODUCTION

Ever since the *Naturalization Act of 1795*, applicants for naturalization have had to demonstrate that they are “attached to the principles of the constitution of the United States.”³ First, what does attachment entail: Does it require that the applicant love the Constitution? Or to believe in its principles? Or know its essentials? Second, how should attachment be demonstrated: Is it by following the law? Or actively participating in the community? Or declaring it by pledging some words or signing a contract? And third, what are the principles that an applicant be attached to: Should it include the whole Bill of Rights? Or do some principles matter more than others; and, if so, which and why?

Since the end of the 18th century, the attachment requirement has taken on many meanings. The purpose of this Article is to survey its numerous legal interpretations; however, in doing so, it shows how past debates relate to contemporary constitutional, citizenship, and immigration issues. Part I examines how attachment has been understood by policymakers and implemented by judges and administrators since its inception in the American colonies. The earliest attachment requirements were inspired by religion, classical philosophy, and enlightenment thinking. Once Congress

³ § 1, 1 Stat. 414.

passed a uniform rule of naturalization in 1795, the courts in the 19th century focused on determining its substantive content.⁴ There was a plea among some courts to recognize a basic minimum standard.⁵ By the early 20th century, tensions over its meaning emerged between the judiciary and the political branches of government. The courts attempted to clarify a definition, wrestling with the distinction between an applicant's beliefs and actions.⁶ Immigration and Naturalization Services (INS), meanwhile, was focused on the Americanization movement and teaching immigrants "how to be American."⁷ The attachment requirement was considered as a tool to determine a newcomer's ideological affinity. In 1943, the Supreme Court made ideological exclusions nearly impossible, requiring "clear, unequivocal, and convincing" evidence that a petitioner knew of any violent or hostile activities of barred groups and in turn, the decision diluted the use of the requirement.⁸ However, in recent years, the Controlled Application Review and Resolution Program (CARRP) has taken advantage of the attachment requirement's elastic meaning to indefinitely delay applicants from "Arab, Middle Eastern, Muslim, and South Asian communities."⁹ Thus, demonstrating that the requirement is once again used as a tool for administrators to impede certain groups from accessing citizenship. The judicial and administrative discretion that has characterized the implementation of the attachment requirement has allowed it to be "a rule for all seasons." Reviewing hundreds of cases and legislation spanning more than three centuries, weaving its evolution through societal changes and trends, this Article finds that there has never been a stable definition of the attachment requirement and it has often been invoked as a response to different policy challenges.

Part II evaluates the attachment requirement by reflecting on its conceptual construction: theory, purpose, content, and methods. It shows: i) the overarching *theory* of membership has never been clarified; ii) the *purpose* of the requirement has not been consistent; iii) the *content* has not been sufficiently determined or equally applied; and iv) the *methods* of approval have oscillated from substantive, procedural, and technical. Understanding the theoretical underpinnings of the attachment requirement helps navigate the question of whether attachment is necessary for membership and, if so, in what ways. The implementation of the attachment requirement represents a case of what Cass Sunstein calls an "incompletely

⁴ See Note & Comment, 8 MICH. L. REV. 39, 42–43 (1910).

⁵ See *id.* at 43–44.

⁶ See *infra* notes 60–61.

⁷ *Overview of INS History to 1998*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/about-us/our-history/overview-of-ins-history/overview-of-ins-history-to-1998> [<https://perma.cc/3T7R-YN9Z>] (last visited May 8, 2023).

⁸ *Schneiderman v. United States*, 320 U.S. 118, 157–59 (1942).

⁹ USCIS CARRP Program, ACLU S. CALIF., <https://www.aclusocal.org/CARRP> [<https://perma.cc/LZG8-N3MJ>] (last visited May 8, 2023).

theorized agreement” i.e., when policy or law makers agree on the necessity of an outcome or principle but not on the overarching theory.¹⁰ While such agreements can hold some value in diverse societies, when the solution is abstract there is a risk that it will be applied differently across applicants or groups—raising questions of fairness and equality. A clarified revision of the attachment requirement is important as debates over membership and belonging surge into mainstream politics. Recently, President Biden has proposed a new bill (the Citizenship Act 2021), which if passed by Congress, would open a pathway to citizenship for nearly 11 million undocumented migrants, their spouses, and children who would need to fulfill this requirement.¹¹ Since the attachment requirement has previously been threatening for marginalized groups, reflecting on how attachment can be established for naturalization is essential to safeguard equality, dignity, and human rights.¹²

Part III looks at uses of attachment as a guiding concept for membership in other liberal democracies: Denmark, Canada, and France. This part considers the pros and cons of other approaches to understanding the attachment between citizen and state through marriage, residency, and merit.¹³ In these liberal democracies, attachment has become a basis for designing membership policies which have been inspired by the U.S. model. But the U.S. case should serve as a warning—that such a test can be exploited when there are no clear demarcations of what constitutes “attachment” and its interpretation is based on the discretion of judges and administrators. Moreover, the United States can now look to other states to see the different ways that “attachment” is considered established to decide if such a requirement is still needed and in what ways.

This Article sheds light on the trade-offs of having a discretionary test for naturalization. On the one hand, it allows the state to accept the diversity of the many relationships newcomers may have to a political community in a pluralist democracy. The state can be flexible to evolving societal concerns and new contexts. Since 1795, it allowed the U.S. government to test certain conditions for naturalization that later became their own requirements, such as English language and civic knowledge tests.¹⁴ On the other hand, too much discretion in naturalization requirements can be

¹⁰ Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735–36 (1995).

¹¹ See Ransom, *supra* note 2.

¹² See Emily Ryo & Reed Humphrey, *The Importance of Race, Gender, and Religion in Naturalization Adjudication in the United States*, 119 PROC. NAT’L ACAD. SCI., no. 9, 2022, at 4–5 (studying racial disparities in naturalization approvals by race, ethnicity, gender, and religion; assessing how certain requirements can play into this discrimination is timely).

¹³ Ashley Mantha-Hollands & Jelena Džankić, *Ties That Bind and Unbind: Charting the Boundaries of EU Citizenship*, J. ETHNIC & MIGRATION STUDS., Aug. 5, 2022, at 3–5; see also *infra* Part III.

¹⁴ *In re Katz*, 21 F.2d 867, 867–68 (E.D. Mich. 1927); *In re Meakings*, 164 F. 334, 334–35 (E.D. Wash. 1908).

prone to abuse by states that apply it differently between groups or have variation in implementation across jurisdictions. The legal history of the requirement shows that it has been deployed to limit accessibility for groups considered undesirable.¹⁵ This Article concludes with a reflection on the future of attachment requirements.

I. THE HISTORY OF THE ATTACHMENT REQUIREMENT

A. Historical Roots

Historically, the concept of “attachment” played an important role in determining who could become a U.S. citizen. Attachment requirements existed in the naturalization laws of the American colonies. Maryland would only admit foreigners to citizenship who “always manifested a firm attachment to our government and laws.”¹⁶ The applicant would then have to “repeat and subscribe a declaration of his belief in the Christian religion.”¹⁷ In Georgia, an applicant had to produce a certificate signed by a circuit or county judge in the place they resided certifying their attachment “to the liberties and independence of the United States of America.”¹⁸ In Virginia, citizenship required more than words; aliens, who resided for two years in the state, had to give “satisfactory proof by their own oath or affirmation that they intend to reside therein, and moreover shall give assurance of fidelity to the Commonwealth.”¹⁹ The residency requirement could be lifted if the newcomer “shall have evinced a permanent attachment to the state, by having intermarried with a citizen of this commonwealth, or a citizen of any other of the United States.”²⁰ Based on these first naturalization requirements in the colonies there was a consensus that newcomers should have to show some sort of attachment to their new home; however, there were already

¹⁵ See *Ex parte Sauer*, 81 F. 355, 355–56 (D. Tex. 1891).

¹⁶ An Act for the Relief of Certain Foreigners who Have Settled Within this State, and for Other Purposes, Supplemental to the Act of Naturalization (Nov. 1789), in 2 THE LAWS OF MARYLAND 1785–1799, at Ee (William Kilty ed., Annapolis, Fredrick Green 1800). See generally MD. CONST. (Yale Law School, The Avalon Project through Nov. 11, 1776), https://avalon.law.yale.edu/17th_century/ma02.asp.

¹⁷ MILTON D. PURDY ET AL., REPORT TO THE PRESIDENT OF THE COMMISSION ON NATURALIZATION APPOINTED BY EXECUTIVE ORDER at 54 (Mar. 1, 1905).

¹⁸ Constitution of Georgia (Rules and Regulations of the Colony of Georgia) (1776); CONSTITUTIONS OF THE WORLD FROM THE LATE 18TH CENTURY TO THE MIDDLE OF THE 19TH CENTURY: THE AMERICAS CONSTITUTIONAL DOCUMENTS OF THE UNITED STATES OF AMERICA 1776–1860 at 9 (Horst Dippel ed., 2006); An Act for Preventing Improper or Disaffected Persons Emigrating from Other Places, and Becoming Citizens of this State, and for Other Purposes therein Mentioned (August 1782); THE COLONIAL RECORDS OF THE STATE OF GEORGIA 162–63 (Allen D. Candler ed., 2013).

¹⁹ PURDY ET AL., *supra* note 17, at 8.

²⁰ An Act for Admission of Emigrants and Declaring their Rights to Citizenship (1783), in 10 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 1619, at 323 (William Waller Hening ed., 1823).

different considerations for how “attachment” should be demonstrated i.e., by declaring a belief, taking an oath, or through an act of marriage.

The first federal naturalization law, passed in 1790, allowed Congress to create a uniform rule for naturalization: “free white person[s],” resident for two years, would be able to apply to a court (in the jurisdiction they had resided for at least a year) for naturalization as long as they could prove that they were of good character and take an oath to support the Constitution.²¹ The objective of these requirements was to encourage immigration from Europe.²² However, several congressmen were not satisfied with these obligations and feared a scenario in which too many foreign-born people would acquire voting rights. The period was marked by the first wave of American “nativism” and the framers worried that newcomers would have competing allegiances.²³ James Madison, the leader of the House, agreed with this sentiment, stating that the naturalization requirements did not guarantee the “wealth or strength of the community” and could jeopardize “national security.”²⁴ Thus, in 1794, a House committee led by Madison prepared a bill to amend the act of 1790.²⁵ House records show that members debated the exact wording of the new requirements. William Branch Giles (Virginia) suggested “attached to a Republican form of government.”²⁶ Jonathan Dayton (New Jersey) asserted that the word ‘republican’ was ambiguous, meaning too many things to different groups who “might come to this country, and take the oath as proposed, and then excuse himself by saying, ‘it was the Republican form of my own country which I had in view.’”²⁷ Samuel Dexter (Massachusetts) preferred “attached to the Constitution of the United States.”²⁸ But it was later amended to: “attached to the principles of the Government of the United States.”²⁹ For some, this was considered to inadequately represent the purpose. The wording then changed to what it remains today: “attached to the principles of the

²¹ To Establish a Uniform Rule of Naturalization, ch. 3, 1 Stat. 103 (1790).

²² See PURDY ET AL., *supra* note 17, at 9.

²³ ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 140 (1997); see also GEORGE FITZPATRICK WASHINGTON, WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745–1799, at 69 (John C. Fitzpatrick ed. 1938) (Washington wrote newcomers “may bring with them strong prejudices against us, and our form of government, and equally strong attachments to the country and constitution they leave”). *Contra* Mathew Spalding, *From Pluribus to Unum: Immigration and the Founding Fathers*, 67 POL. REV. 35, 40 (1994) (Alexander Hamilton stated, “to enable aliens to get rid of foreign and acquire American attachments; to learn the principles and imbibe the spirit of our government; and to admit of a philosophy at least, of their feeling a real interest in our affairs”).

²⁴ PURDY ET AL., *supra* note 17, at 9.

²⁵ SMITH, *supra* note 23, at 138–40.

²⁶ FRANK GEORGE FRANKLIN, THE LEGISLATIVE HISTORY OF NATURALIZATION IN THE UNITED STATES FROM THE REVOLUTIONARY WAR TO 1861, at 52 (1906).

²⁷ 4 ANNALS OF CONG. 1022–23 (1794).

²⁸ *Id.* at 1022.

²⁹ *Id.*

Constitution of the United States.”³⁰ The final agreement required an applicant for naturalization, after five years residency, to forswear allegiance to every other sovereign; be of good moral character; be attached to the principles of the Constitution; take an oath of allegiance; and, if the person was a noble, renunciation of noble title.³¹

The dispute in Congress demonstrates that members were concerned about creating a requirement that was too flexible in its interpretation by newcomers. Members did not want to use terms that could be understood in relation to other governments or states. They believed that specifying the wording to “principles of the Constitution of the United States” would help mitigate this risk. From these early debates it’s evident that the framers intended that the requirement be used to ease potential security threats and competing allegiances.³² However, from the beginning there was little specification of what the framers meant by “attachment” and how exactly they expected it to be demonstrated.

To further elucidate the original intention of the “attachment” requirement, the *Federalist Papers* provide a good point of departure as they are the first to reference the concept of “attachment.”³³ This truth offers useful framing when analyzing judicial decisions and policy papers from the 19th and 20th centuries. Scholarly endeavors using textual analysis of the *Federalist Papers* find at least three inspirations in the work of the framers: religion, classical philosophy, and the Enlightenment.³⁴ A look at each of these influences offers insights into what the framers may have had in mind when instituting the “attachment” requirement.

First, *religion* was a pillar of the framers’ understanding of membership and belonging. In *Federalist No. 2*, John Jay puts forth a view that political attachment is fostered by a shared cultural heritage—rooted in a collective religion, customs, and beliefs.³⁵ The U.S. “civil religion” is said to act as a unifying structure in American political and social life by associating personal religious belief with political society.³⁶ At the center are ‘sacred objects’ such as the Bill of Rights, the flag, and the Constitution. From this point of view, the Constitution is considered an object of worship and faith as the nation’s ultimate sacred text. A person is “attached” if they share the collective belief in the Constitution.

Second, the framers were inspired by *classical philosophy*, especially Aristotle, whose work influenced their views on republican government and the rule of law.³⁷

³⁰ Naturalization Act of 1795, ch. 20, § 1, 1 Stat. 414, 414 (repealed 1802).

³¹ *Id.*

³² 4 ANNALS OF CONG. 1022–23 (1794).

³³ See THE FEDERALIST No. 1 (Alexander Hamilton).

³⁴ Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189, 192 (1984).

³⁵ See THE FEDERALIST No. 2 (John Jay).

³⁶ SANFORD LEVINSON, CONSTITUTIONAL FAITH 9–12 (1988).

³⁷ ARISTOTLE, POLITICS 240 (Ernest Barker tran., 1998).

Citizenship from this perspective is both a set of freedoms and obligations—for example, political participation and military service. In *Politics*, Aristotle describes how the law could enforce and sustain the principles of a particular regime and, when agreed to in advance, be impartial to any given case.³⁸ From Aristotle’s viewpoint, to maintain a democratic regime “the proper policy, wherever it can be pursued, is to keep all citizen alike *attached to the constitution*, or at any rate, failing that, to prevent them from regarding those in authority as their enemies.”³⁹ Thus, to preserve citizens’ loyalty to the regime, the state must create and sustain a connection between citizens and the law. This perspective can be found in the writings of James Madison, who saw attachment as a mere acceptance of U.S. government institutions.⁴⁰ Madison was less concerned about whether newcomers believed in the Constitution but rather that they would follow the law. According to Madison, citizens will calculate a cost benefit for each government based on the set of freedoms and obligations offered to them.⁴¹ Thus, attachment from this perspective is about an acceptance of the Constitution and the corresponding obligations of citizenship.

Third, *Enlightenment thinkers* also inspired the framers’ views on the nature of citizen bonds.⁴² The social contract theorists in the 17th and 18th centuries “justified rights claims as a function of membership in a political community of free and equal self-governing members.”⁴³ For the framers, this concept was essential to the establishment of the rule of law.⁴⁴ One of the most cited in American historical political thought is John Locke, whose egalitarian politics in the *Two Treatises on Government* argued that once the consent of the people to be governed has been achieved, the government is required to protect its citizens’ natural rights (life, liberty, and property).⁴⁵ The framers believed that this consent was conferred through an oath or pledge of allegiance. Moreover, Locke alleged that citizens’ primary obedience was to law—after God—and membership was based on a mutual agreement between person and society.⁴⁶ Similarly, Jean-Jacques Rousseau reasoned that representative

³⁸ *Id.*

³⁹ *Id.* at 240 (emphasis added).

⁴⁰ Emily Pears, *Chords of Affection: A Theory of National Political Attachments in the American Founding*, 6 AM. POL. THOUGHT 1, 9 (2017).

⁴¹ *Id.*

⁴² SMITH, *supra* note 23, at 71.

⁴³ ELIZABETH COHEN & CYRIL GHOSH, CITIZENSHIP 32 (2019).

⁴⁴ *See generally* LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION (1955); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC TRADITION (1975); GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 (1969).

⁴⁵ JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 159–61 (Ian Shapiro ed., Yale Univ. Press 2003).

⁴⁶ *See generally id.*

government secures its authority through the “general will” of its citizens which requires a common bond.⁴⁷ For Rousseau, when citizens participate equally in deciding what the “general will” constitutes, they have a duty to support just political institutions.⁴⁸ This perspective is found in the writing of James Wilson who believed that attachment was demonstrated through political participation which would allow citizens to cultivate bonds with each other and their representatives.⁴⁹ From this approach, the sense of ownership that was considered necessary for the flourishing of the political community is created through behavior, such as voting and other participatory activities.

Understanding these theories and influences is a useful springboard in examining how the attachment requirement has been interpreted over the past three centuries. From the beginning, the exact definition of attachment was unclear. In the colonies, it was expected that newcomers’ establish attachment but to different things in different ways.⁵⁰ When Congress came together and agreed on a uniform rule of naturalization, their intent was to create a requirement that would mitigate security risks. In what ways “attachment” would achieve this was abstract. The framers themselves had different visions of membership and citizenship and did not collectively specify what exactly “attachment” entailed. Thus, it can only be presumed what they individually had in mind based on the influences of their earlier writing. Looking to the *Federalist Papers* highlights: i) religious frameworks that put the Constitution as the center of the American creed; ii) classical philosophy which emphasized being attached to the Constitution as a way to ensure citizens recognized the form of government and institutions; and iii) enlightenment thinkers who believed following the law and political participation as evidence of attachment.⁵¹

B. Shaping the Attachment Requirement: Knowledge and Belief

At the turn of the century, in order to become a citizen, applicants would be required to declare their intention to naturalize three years before submitting their application to a local court.⁵² Once the application was presented and the newcomer had completed the oath of allegiance, the court would be tasked with interpreting whether the newcomer was attached to the principles of the Constitution.⁵³ Judicial discretion was thus structured into the naturalization procedure. Over this early period of attachment legislation, case law surveys show two main approaches to

⁴⁷ ANNA STILZ, LIBERAL LOYALTY: FREEDOM, OBLIGATION, AND THE STATE 117–18 (2009).

⁴⁸ *Id.* at 79.

⁴⁹ Pears, *supra* note 40, at 19.

⁵⁰ FRANKLIN, *supra* note 26, at 49–50, 52.

⁵¹ See Lutz, *supra* note 34, at 192; THE FEDERALIST No. 1 (Alexander Hamilton).

⁵² To Establish a Uniform Rule of Naturalization, and to Repeal the Acts Heretofore Passed on that Subject, ch. 28, 2 Stat. 153 (1802).

⁵³ See *In re Bodek*, 63 F. 813, 815 (C.C. E.D. Pa. 1894).

inferring attachment. First, some judges adopted a perspective emphasizing the need for constitutional knowledge—but the criteria for measuring constitutional knowledge was determined in different ways.⁵⁴ A second approach is reflected in other decisions that were concerned over the ideological assimilation of applicants echoing the framers who considered belief in the Constitution as a form of attachment.⁵⁵

In 1801, Thomas Jefferson was elected President and pushed for civic education to become a part of the naturalization process.⁵⁶ Therefore, on April 14, 1802 Congress passed a new Naturalization Act, overturning previous measures.⁵⁷ To become a citizen, an applicant would need to submit a naturalization petition;⁵⁸ there would then be an investigation followed by an interview and exam that would cover both the “good moral character” and “attachment” requirements.⁵⁹ The Act of 1802 would be the main naturalization legislation for the entire 19th century with several modifications, the most important of which was the automatic granting of citizenship to alien wives of U.S. citizens, 1855, 10 Stat. 604, and when naturalization became available for persons of African descent, 1870, 16 Stat. 256.⁶⁰

At the end of the Civil War, naturalizing judges became increasingly concerned with what established attachment and how it should be shown by applicants.⁶¹ This concern came at a time when there was a massive influx of immigration from Europe and Asia. The early cases citing the “attachment requirement” reflect a push from the courts to try to connect citizenship policies with their views on the tenets of the American regime. Thus, judicial decisions during this period concentrated on two interpretations of “attachment”: i) whether some constitutional *knowledge* should be factored into its meaning and how that should be proven,⁶² and ii) ensuring applicants *believed* in the Constitution and not a ‘subversive’ ideology.⁶³

On the question of constitutional knowledge, judicial decisions show that there was a split between different courts on how exactly knowledge should be established.⁶⁴ Some courts began at a thin and minimal approach, requiring “satisfactory proof” that the applicant had met the requirements through the testimony of two

⁵⁴ *See id.*

⁵⁵ *In re Rodriguez*, 81 F. 337, 356 (W.D. Tex. 1897).

⁵⁶ *See SMITH, supra* note 23, at 165.

⁵⁷ *See* 2 Stat. 153.

⁵⁸ *See id.* (requiring a declaration of intent submitted three years prior to that).

⁵⁹ Susan M. Gordon, *Integrating Immigrants: Morality and Loyalty in US Naturalization Practice*, 11 *CITIZENSHIP STUD.* 367, 370–71 (2007).

⁶⁰ To Secure the Right of Citizenship to Children of Citizens of the United States Born Out of the Limits Thereof, ch. 71, 10 Stat. 604 (1855); To Amend the Naturalization Laws, and to Punish Crimes Against the Same, and for Other Purposes, ch. 254, 16 Stat. 254 (1870). Many groups were still excluded from naturalization. For example, the Chinese Exclusion Act would bar all Chinese immigrants from citizenship until 1940. *See* ch. 126, 22 Stat. 58 (1882).

⁶¹ SMITH, *supra* note 23, at 370.

⁶² *See In re Rodriguez*, 81 F. 337, 356 (W.D. Tex. 1897).

⁶³ *In re Bodek*, 63 F. 813, 815 (C.C.E.D. Pa. 1894).

⁶⁴ *See id.*; *In re Rodriguez*, 81 F. at 337.

witnesses. One example is a case from a district court in Texas involving an applicant born in Mexico.⁶⁵ Mr. Rodriguez was unable to read or write which made him “lamentably ignorant” of the contents of the Constitution.⁶⁶ But Mr. Rodriguez was a man of his community, having lived in San Antonio for nearly ten years and taking a daily walk around his neighborhood.⁶⁷ The court decided to rely on the testimony of his witness—according to whom, “whatever the principles of the [C]onstitution of the United States might be . . . he would uphold them if he knew what they were.”⁶⁸ The court decided that Rodriguez was “a very good man, peaceable and industrious, of good moral character, and law abiding ‘to a remarkable degree’” and granted him citizenship.⁶⁹ Thus, the condition of constitutional knowledge for attachment was considered fulfilled by following the law and taking part in the community.

Other courts saw the requirement as something demanding proof of thicker substantive constitutional knowledge—i.e., knowledge as “understanding.”⁷⁰ One circuit court judge suggested that applicants must have some degree of knowledge of the contents of the Constitution to be considered attached, arguing that “the court ought not to admit any alien to citizenship without being satisfied that he has at least some general comprehension of what the [C]onstitution is, and of the principles which it affirms.”⁷¹ This requirement entailed, in the judge’s view, to be able to read the Constitution at the very minimum; however, what constituted ‘general comprehension’ was not specified.

The end of the 1800s were marked by economic struggle, the growth of socialist and anarchist groups, as well as the arrival of millions of new immigrants.⁷² The ensuing social instability was attributed to an increase in foreigners and “subversive” aliens.⁷³ Thus, some judges became concerned with how the attachment requirement could be used to keep out those with certain ideological affinities. In 1891, a district court judge in Texas denied naturalization to a German applicant who said that he believed in socialism, as those beliefs were “un-American, impracticable, and dangerous in the extreme.”⁷⁴ Attachment interpreted as ideological affinity was an attempt to mitigate against perceived risks to social cohesion.

⁶⁵ *In re Rodriguez*, 81 F. at 337.

⁶⁶ *Id.* at 355.

⁶⁷ *Id.* at 338.

⁶⁸ *Id.*

⁶⁹ *Id.* at 337.

⁷⁰ Note & Comment, *supra* note 4, at 43.

⁷¹ *In re Bodek*, 63 F. 813, 815 (C.C.E.D. Pa. 1894).

⁷² SMITH, *supra* note 23, at 349–51; see *Anarchism in the Americas*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/anarchism/Anarchism-in-the-Americas> [https://perma.cc/N6ZK-VYGA] (last visited May 8, 2023).

⁷³ See SMITH, *supra* note 23, at 349; William Safran, *Citizenship and Nationality in Democratic Systems: Approaches to Defining and Acquiring Membership in the Political Community*, 18 INT’L POL. SCI. REV. 313, 318–19 (1997).

⁷⁴ *In re Rodriguez*, 81 F. 337, 355–56 (W.D. Tex. 1897).

The early cases of the attachment requirement show that judicial discretion allowed the courts to take conflicting approaches to defining its meaning even within the same jurisdiction. Some courts saw constitutional knowledge as evidence of attachment which would help applicants participate in the community. However, the courts were applying different standards for accepting constitutional knowledge; the expectations varied from a thin participatory perspective to a thicker substantive understanding of the text. Anti-immigrant sentiment would push policymakers to consider mandatory literacy and knowledge tests as their own naturalization requirements; and by the beginning of the 20th century English language and civic knowledge would become a separate part of the naturalization process. Cases involving these requirements as an indicator for attachment would eventually taper out.⁷⁵

Attachment interpreted as *belief* in the Constitution echoes how some of the framers conceptualized the requirement—as a symbol of the American civil religion and a way to ensure that newcomers were assimilated into central values. In this period, this interpretation was used to exclude anarchists, socialists, and those with views considered as a risk to social cohesion. While judges were using this requirement to prohibit these groups, there was no standard on how belief in the Constitution could be proven, by which criteria or methods, or how certain beliefs related to the functions of citizenship.⁷⁶ The implementation of the attachment requirement through judicial discretion raises the question of whether this was a meaningful way of processing naturalization cases. Is it acceptable for its meaning to waver from one case to the next? As shown, several interpretations of the attachment requirement had emerged and were applied inconsistently. This inconsistency would continue to define its use.

C. Expanding the Attachment Requirement: Belief, Affection, Behavior, and Acceptance

By the early 20th century, the federal government had increased both practical and legal control over naturalization—bringing in their own nativist views onto

⁷⁵ For other cases involving knowledge and language in the early 20th century see *Ex parte Johnson*, 31 So. 208, 208–09 (Miss. 1902); *In re Meakins*, 164 F. 334, 334–35 (E.D. Wash. 1908); *In re Katz*, 21 F.2d 867, 867–68 (E.D. Mich. 1927). Without spending the time to enable himself to read, the Court in *In re Katz* decided that the applicant was “not sufficiently interested in, nor attached to, its principles to entitle him to the privilege of American citizenship.” *In re Katz*, 21 F.2d at 868. The petitioner did not read the English language and was therefore determined not to be attached to the principles of the Constitution. The judge affirmed that an alien cannot be “said to be sufficiently attached to the principles of a written document which he cannot read” and, consequently, “his understanding must necessarily be limited and uncertain.” *Id.*

⁷⁶ See PATRICK WEIL, *THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC* 65–66, 74–75 (2013). For examples of how judges approached attachment in different ways and how it was applied to different ideologies see *In re Spenser*, 22 F. Cas. 921, 921 (C.C.D. Or. 1878).

citizenship acquisition. This involvement would expand the judicial interpretations of attachment. Along with the interpretation of attachment as belief in the Constitution, three new views on the requirement were introduced: attachment as affection, acceptance, and behavior. The Americanization movement was growing, along with the perspective that immigrants were impeding the “ideal society.” This sentiment would be exacerbated in 1901, when President William McKinley was assassinated by an anarchist who was the son of Polish immigrants.⁷⁷ At the same time, there had been widespread accusations of naturalization irregularities due to fraud and corrupt officials.⁷⁸ By 1905, Congress was pushing for a greater number of group-based exclusions and more stringent requirements due to the fear of fraudulent naturalization claims.⁷⁹

In response, President Theodore Roosevelt commissioned a report on naturalization by executive order.⁸⁰ Unlike Congress at the time, Roosevelt was generally pro-immigration as it was tied to his nation-building agenda; becoming an American, according to Roosevelt, was possible for anyone with the “spirit” or “conviction” to give up their old-world loyalties and become “like the rest of us.”⁸¹ The report outlined several recommendations for naturalization reform providing that applicants must have i) an intention to permanently reside, ii) speak English,⁸² and iii) submit a petition to be filed by the court ninety days before the hearing.⁸³ Furthermore, only federal courts in cities with over 100,000 inhabitants would have naturalization

⁷⁷ See Hans Krabbendam, ‘*In the Interests of All of Us . . .*’: Theodore Roosevelt and the Launch of Immigration Restriction as an Executive Concern, EUR. J. OF AM. STUD., Summer 2015, at 12. In a government publication from the time, Americanization was summarized as: “We Americans welcome you. We want you to speak our language, take part in our social life, and assume civic responsibilities with us. Let us understand each other; let us get together.” E.J. Irwin, *An Americanization Program*, 1923 DEP’T INTERIOR BUREAU EDUC. BULL., no. 30, at 2 (1923).

⁷⁸ For example, reported cases of possible fraudulent naturalization before an election in St. Louis. See SMITH, *supra* note 23, at 446.

⁷⁹ Gordon, *supra* note 59, at 370. See generally Richard Flournoy, *Naturalization and Expatriation*, 31 YALE L.J. 848 (1992).

⁸⁰ See PURDY ET AL., *supra* note 17, at 7.

⁸¹ Krabbendam, *supra* note 77, at 1, 11–14, 16–17.

⁸² See *id.* at 11. The requirement to speak and read English in order to possess some constitutional knowledge was also affirmed by the Report of the Commission on Naturalization which wrote:

[H]e can not understand the questions which the court may put to him when he applies for naturalization nor read the Constitution which he swears to support. When, afterwards, he votes, he can not read his ballot. The Commission is aware that some aliens who can not learn our language make good citizens. They are, however, exceptions, and the proposition is incontrovertible that no man is a desirable citizen of the United States who does not know the English language.

PURDY ET AL., *supra* note 17, at 11.

⁸³ PURDY ET AL., *supra* note 17, at 28.

authority, there would be a uniform fee, and most importantly, the creation of a Bureau of Immigration and Naturalization.⁸⁴ The Commission's recommendations became the bedrock of the Naturalization Act of 1906 which also included (for the first time) a provision for denaturalization.⁸⁵

The new Bureau of Immigration and Naturalization's role would be to "enforc[e] the law, administe[r] the processing of naturalization petitions, exami[ne] petitioners and submi[t] its recommendations to the naturalization courts, and provid[e] federal oversight of the decisions of the naturalization courts."⁸⁶ The increasing federal control over naturalization authority can be seen as an attempt to ensure that government priorities were being exercised in admission decisions. The Bureau, led by Richard Campbell and his deputy director Raymond Crist, began a federal citizenship education program.⁸⁷ The focus of the program was to help immigrants become "American" through evaluating their daily life.⁸⁸ The Bureau developed citizenship education textbooks which focused on teaching "American" attitudes on personal hygiene, going to church, and the nuclear family.⁸⁹ Like Roosevelt, Crist and Campbell believed that newcomers could be molded into citizens through learning the "American way of life."⁹⁰ The process of naturalization would start with the submission of a naturalization petition, followed by an investigation, interview, and an examination. Crist and Campbell were skeptical about knowledge tests that were based on memorized facts as indicators of a person's attachment—they were interested in observing a person's "interior condition," i.e., the process by which American consciousness was developed; attachment was interpreted as "being primarily a matter of the heart."⁹¹ To be attached, according to the Bureau, newcomers would need to *believe* in and have *affection* for the Constitution.

Many courts were aligned with Crist and Campbell's perspective of attachment demonstrated through *belief* and *affection*. For example, in one case from a district court in Washington, an applicant admitted to frequenting "assemblages of socialists in which he participate[d] as a speaker advocating a propaganda for radical changes in the institutions of the country."⁹² Those who advocated for 'radical changes' were

⁸⁴ *Id.* at 28–29.

⁸⁵ WEIL, *supra* note 76, at 17.

⁸⁶ Gordon, *supra* note 59, at 370.

⁸⁷ *See id.* at 368, 370, 372 (showing how there was no uniform standard on the naturalization exam).

⁸⁸ *See id.* at 376.

⁸⁹ *See id.* at 377, 381. The first federal textbook was developed in 1918. *See id.* at 378, 381. *See generally* James J. Davis & Richard Campbell, U.S. Dept. of Labor, Bureau of Naturalization, Teacher's Manual: To Accompany Part I Federal Citizenship Textbook English for American Citizenship (Preliminary ed. 1922).

⁹⁰ *See* Gordon, *supra* note 59, at 373. The Immigration Act of 1917 further barred immigration on certain political beliefs. Safran, *supra* note 73, at 319.

⁹¹ Gordon, *supra* note 59, at 370, 372, 376.

⁹² *United States v. Olsson*, 196 F. 562, 564 (W.D. Wash. 1912). *See generally* United

therefore considered to not believe in the fundamentals necessary for attachment. In *United States v. Stuppiello*, the government claimed the petitioner had fraudulently procured his citizenship because his anarchist views prevented attachment; the District Court of New York judge agreed: “at the time of its procurement he was an alien anarchist . . . who disbelieves in and is opposed to organized government.”⁹³ This interpretation was held in *United States v. Olsson*, in which the District Court of Washington argued that no one “who is opposed to organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in, or opposition to organized government . . . shall be naturalized or be made a citizen of the United States.”⁹⁴

Moreover, other judges upheld the government’s interpretation of attachment as “having regard and *affection* for” the principles of the Constitution.⁹⁵ This approach would eventually be affirmed by the Supreme Court in the case of Rosika Schwimmer. Schwimmer was an intellectual from Hungary who was unable to take the oath of allegiance for naturalization.⁹⁶ Due to her strong beliefs as a pacifist, Schwimmer would not take up arms against another person.⁹⁷ The Supreme Court described her as “an uncompromising pacifist with no sense of nationalism but only a cosmic sense of belonging to the human family.”⁹⁸ Schwimmer argued that she could support and defend the Constitution by other means (she was an active community member and ready to engage in civic life).⁹⁹ However, the Supreme Court found that this would not suffice, affirming that:

one who is without any sense of nationalism is not well bound or held by the ties of affection to any nation or government. Such persons are liable to be incapable of the attachment for and devotion to the principles of our Constitution that are required of aliens seeking naturalization.¹⁰⁰

For the Supreme Court, Schwimmer’s beliefs would prevent her from the affection necessary to be attached to the U.S. Constitution.

States v. Swelgin, 254 F. 884 (D. Or. 1918) (denaturalizing a citizen due to his involvement in a political organization that also advocated for unlawful actions).

⁹³ *United States v. Stuppiello*, 260 F. 483, 486 (W.D.N.Y. 1919). *See generally* Allan v. United States, 115 F.2d 804 (9th Cir. 1940) (denying an immigrant citizenship because of his affiliation with Communist organizations).

⁹⁴ *Olsson*, 196 F. at 565 (quoting Naturalization Law of June 29, 1906, ch. 3592, § 7, 34 U.S. Stat. 596, 598–99).

⁹⁵ *See, e.g., In re Siem*, 284 F. 868, 870–71 (D. Mont. 1922) (emphasis added).

⁹⁶ *United States v. Schwimmer*, 279 U.S. 644, 646–47 (1929).

⁹⁷ *Id.* at 646–48.

⁹⁸ *Id.* at 651–52.

⁹⁹ *Id.* at 647.

¹⁰⁰ *Id.* at 652.

By the end of the 1930s, as extreme ideological movements were growing in Europe,¹⁰¹ the Bureau and the courts were increasingly concerned over excluding those with views considered to be potential risks to public order. Unsurprisingly, judging an applicants' beliefs became the dominant interpretation of the attachment requirement. In one case, a judge from a district court in Missouri stated:

Citizenship is available for aliens who in good faith, by example, and mental attitude disclose their sincere adherence to the political philosophy of the Constitution. Those who come in any other frame of mind are asking for a privilege that they have no right to receive. No matter how well founded their political beliefs may be, conformity to principles of the Constitution is indispensable.¹⁰²

The applicant in this case was the editor of a newspaper that regularly advocated for the amendment of the U.S. Constitution.¹⁰³ This in and of itself was not considered objectionable, some courts accepted that a person could promote some constitutional amendments (a departure from previous decisions) so long as the method for going about the change followed the legal route.¹⁰⁴ However, it was what the applicant wanted to amend that the court lamented: "to abolish the executive, the legislative, and the judicial departments."¹⁰⁵ The court argued, "this [desire] is more than the amendment of the Constitution. It is nothing short of the destruction of the same."¹⁰⁶ The court elaborated on the meaning of attachment which was stated as "a stronger word than 'well disposed,' and implies a depth of conviction which would lead to an active support of the Constitution."¹⁰⁷ Thus, for the court, attachment was about both *belief* in and an *acceptance* of certain fundamentals.

Before the Supreme Court's decision in *Schwimmer*, another important approach to evaluating attachment had been emerging in some lower courts. Rather than interpreting "attachment" as an interior condition, these courts interpreted attachment as the outward *behavior* of applicants. However, the kind of behavior that was indicative of attachment varied. In *Ex parte Johnson*, for example, the court stated that an applicant "should behave as one should behave who is attached to the principles

¹⁰¹ Antonis Klapsis, *Economic Crisis and Political Extremism in Europe: From the 1930s to the Present*, 13 EUR. VIEW 189, 190–91 (2014).

¹⁰² See Sanford Levinson, *Pledging Faith in the Civil Religion: Or, Would You Sign the Constitution?*, 29 WM & MARY L. REV. 113, 135–37 (1987); *In re Saralieff*, 59 F.2d 436, 437 (E.D. Mo. 1932).

¹⁰³ *Saralieff*, 59 F.2d at 437.

¹⁰⁴ *Id.* at 437; see also *United States v. Tapolcsanyi*, 40 F.2d 255, 257 (3d Cir. 1930) ("[W]hile all citizens have a right to work for [the Constitutions] amendment in an orderly way, that is a right of a citizen. . . . As an alien he had no such right."); Levinson, *supra* note 102, at 138.

¹⁰⁵ *Saralieff*, 59 F.2d at 437.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 436.

of the [C]onstitution.”¹⁰⁸ “The most ignorant day laborer may so conduct himself as to be as worthy a citizen.”¹⁰⁹ What sort of behavior was deemed ‘worthy’ the court did not specify. In one interpretation, the District Court of Wisconsin found an applicant for naturalization should not be expected to act differently than the average citizen; the city of Milwaukee required all saloon keepers to close on Sundays.¹¹⁰ However, the law was not enforced and most saloon keepers kept their shops open illegally.¹¹¹ The applicant argued he would not be able to compete with the other saloon owners if required to stay closed.¹¹² The court stated, “to meet such a test a man must be a philosopher, while the statute is satisfied with a citizen whose behavior is up to the level of the average citizen.”¹¹³ In this case, attachment is not only what is written in the law but of the common norms of the community at the time.

In a similar case, a circuit court judge took a contradicting view of behavior deciding that the applicant should “conform” to the laws of the state.¹¹⁴ Jacob Gerstein was a saloon keeper in Chicago.¹¹⁵ Like his fellow saloon owners, he regularly kept his shop open for business on Sunday.¹¹⁶ The judge stated, “a person who habitually violates the law, whether the act is *malum prohibitum* or *malum in se*, is not, within the meaning of the statute, a person of good moral character.”¹¹⁷ Similarly, the Supreme Court of Illinois argued that:

The courts should not be, and as a rule are not, charged with executive or legislative functions, but they are charged with the responsibility of deciding, when the question is properly presented, that a law is in force even if it is not observed by all citizens or enforced by all public authorities.¹¹⁸

Unlike the Milwaukee case, the court decided that the failure to obey the law would make them unattached to the Constitution.

¹⁰⁸ *Ex parte Johnson*, 31 So. 208, 209 (Miss. 1902).

¹⁰⁹ *Id.*

¹¹⁰ *In re Hopp*, 179 F. 561, 561–62, 563 (E.D. Wis. 1910).

¹¹¹ *Id.* at 562.

¹¹² *Id.*

¹¹³ *Id.* at 563.

¹¹⁴ *United States v. Gerstein*, 119 N.E. 922, 923 (Ill. 1918) (quoting *In re Centi*, 211 F. 559, 560 (W.D. Tenn. 1914)).

¹¹⁵ *Id.* at 922.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 923; *see also In re Spenser*, 22 F. Cas. 921, 921 (C.C.D. Or. 1878); *Groscop v. Rainier*, 12 N.E. 694 (Ind. 1887) (denying Groscop a liquor license because the Court determined he was an immoral character due to his frequent violations gambling laws); *Whissen v. Furth*, 84 S.W. 500 (Ark. 1904) (also denying a liquor license to an appellant for a lack of good moral character after frequently violating gambling laws).

¹¹⁸ *United States v. Hrasky*, 88 N.E. 1031, 1033–34 (Ill. 1909); *see also Note & Comment, supra* note 4, at 42.

The period leading up to World War II uncovered clear divides as the courts and the Bureau grappled with defining ‘attachment.’ The Bureau of Naturalization was concerned with its nation building project and mitigating potential security threats.¹¹⁹ Consequently, this concern meant that some people who had lived and worked in the United States for years were excluded from citizenship because of their presumed beliefs, ties of affection, or lack of acceptance even if they had met all other statutory criteria.¹²⁰ While many courts upheld this view, confirming that attachment was ‘an interior condition,’ other courts were more concerned about the behavior of applicants. However, what sort of behavior indicated attachment was applied in conflicting ways.¹²¹

These interpretive divisions show there were competing visions of U.S. citizenship that were guided by different goals. The Bureau of Naturalization’s focus on the Americanization of immigrants emphasized the creation and maintenance of a shared ‘American’ identity through developing attachment as an interior condition. Conversely, other courts had been orienting towards a view of attachment as shown through specific standards of behavior. However, since the criteria used to demonstrate ‘attachment’ oscillated between following the law and community-based norms, the implementation varied by jurisdiction.

A bird’s eye view of this period of attachment litigation puts a spotlight on some important questions on the relationship between these interpretations. As debated in *Schwimmer*, do beliefs prevent the possibility for affection or prescribe behavior? Can a person love something and behave accordingly without believing in it? Take religion as an analogy. One can imagine a scenario where a person who does not believe in God may continue to behave in accordance with the tenets of the religion. Or love the traditions and sense of community that the religion offers. For the Supreme Court at this period, it seems as if beliefs were considered an indicator of future conduct or “good American” behavior. This perspective would become controversial, and these questions would continue to emerge in naturalization litigation for the next fifty years.

D. From Substantive to Procedural Attachment

At the beginning of World War II, keeping subversive beliefs out of the United States was a key priority of the political branches of government and, as such, there were attempts to limit the court’s authority on naturalization decisions. A new act, the Nationality Act of 1940, was the first attempt to unify all the existing laws on citizenship and naturalization.¹²² Importantly, one of the stated goals of the Act was

¹¹⁹ See Gordon, *supra* note 59, at 367–68, 374–75; *United States v. Stuppiello*, 260 F. 483, 483 (W.D.N.Y. 1919).

¹²⁰ See, e.g., *In re Rodriguez*, 81 F. 337, 355–56 (W.D. Tex. 1897); WEIL, *supra* note 76, at 67.

¹²¹ See *supra* text accompanying notes 110–18.

¹²² The initiative to unify the existing laws began as early as 1933 when President Franklin

to provide greater uniformity in the implementation of the law.¹²³ In terms of regulating the beliefs of newcomers, the Act provided that,

no person shall hereafter be naturalized as a citizen of the United States Who believes in, advises, advocates, or teaches, or who is a member of or affiliated with any organization, association, society, or group that believes in, advises, advocates, or teaches—(1) the overthrow by force or violence of the Government of the United States or of all forms of law.¹²⁴

Ideological exclusionary criteria were not new to membership laws (for example, the Anarchist Act of 1903 and the Immigration Act of 1917 excluded those with anarchist beliefs, polygamists, and political radicals);¹²⁵ however, in practice it had become difficult for the courts to both prove and apply. Thus, the new law was considered to aid with this goal.

The Department of Justice took over immigration and naturalization services and started a nationwide denaturalization program.¹²⁶ Hundreds of naturalization cases came up for investigation. Two cases mark an important shift in the application of the attachment requirement. The most significant was *Schneiderman v. the United States*, in which the majority in the Supreme Court concurred that “real and substantive attachment to constitutional principles is required”;¹²⁷ however, in contrast to the Department of Justice’s perspective, the Supreme Court stated that an applicant’s subjective beliefs were not considered incompatible with attachment.¹²⁸ William Schneiderman was a member of the Workers Party and had received his certificate of naturalization in 1927.¹²⁹ Once his U.S. citizenship was issued, Schneiderman became the organizational secretary for the Communist Party in several different states (California, Connecticut, and Minnesota).¹³⁰ Twelve years

D. Roosevelt established, by executive order, a committee to review U.S. nationality laws and recommend revisions to Congress. The report was completed in 1935. After various government body reviews and many hearings, a bill was introduced in the House of Representatives in September 1940 and passed in October. See George S. Knight, *Nationality Act of 1940*, 26 A.B.A. J. 938, 938 (1940).

¹²³ See *id.* at 939.

¹²⁴ Nationality Act of 1940, ch. 876, § 305, 54 Stat. 1137, 1141 (1940).

¹²⁵ See Safran, *supra* note 73, at 319; Anarchist Exclusion Act of 1903, ch. 1012, § 2, 32 Stat. 1213, 1214 (1903).

¹²⁶ WEIL, *supra* note 76, at 49–50; D.E. Balch, *Denaturalization Based on Disloyalty and Disbelief in Constitutional Principles*, 29 MINN. L. REV. 405, 405–06 (1945).

¹²⁷ See Balch, *supra* note 126, at 406–07, 411; see *United States v. Schneiderman*, 320 U.S. 118, 132–38 (1943).

¹²⁸ See *Comment on Recent Decisions*, 28 WASH. U. L.Q. 275, 276 (1943).

¹²⁹ *Schneiderman*, 320 U.S. at 120–22.

¹³⁰ WEIL, *supra* note 76, at 111.

later, the government filed a denaturalization petition against him for fraudulent acquisition, since as an active member of the Communist Party he could not be attached to the principles of the Constitution.¹³¹ Consequently, the District Court for the Northern District of California revoked his citizenship (later affirmed by the Ninth Circuit Court of Appeals).¹³²

Schneiderman appealed to the Supreme Court. The approach followed by Schneiderman became: if one obeys the law, the attachment requirement is satisfied.¹³³ Unsurprisingly, this was a controversial conclusion. Justice Felix Frankfurter saw Schneiderman as an “active organizer” of the Communist Party and pleaded with the court to affirm the revocation decision.¹³⁴ Chief Justice Harlan Stone agreed: since the Communist Party promoted the overthrow of the U.S. government, Schneiderman could not be attached.¹³⁵ However, the majority viewed attachment specifically as obedience to the law, which would exempt Schneiderman— “[h]is conduct,” Justice Hugo Black stated, “was exemplary. He never did an act of violence.”¹³⁶ For Justice Frank Murphy, who would write the majority opinion, the primary issue was the constitutional protection of freedom of thought.¹³⁷ The majority in *Schneiderman* would thus focus on procedure over substance—concentrating on the apparatus Schneiderman would have hypothetically invoked for changing the Constitution.¹³⁸ In contrast, Chief Justice Harlan Stone and Justice Felix Frankfurter were concerned over substance. Justice Felix Frankfurter eventually wrote a letter to Justice Frank Murphy showing his discontent with the decision:

Thorough and comprehensive as your opinion in *Schneiderman* is, you omitted one thing that, on reflection, you might want to add. I think it is only fair to state, in view of your general argument, that Uncle Joe Stalin was at least a spiritual co-author with Jefferson of the Virginia Statute for Religious Freedom.¹³⁹

Despite this, Justice Frank Murphy and the majority remained unconvinced.

Going forward, the Supreme Court decided that denaturalization decisions needed to find “‘clear, unequivocal and convincing’ evidence which does not leave

¹³¹ *Id.*

¹³² *Id.* at 111–12.

¹³³ *See id.* at 112, 114–15, 117, 119.

¹³⁴ *See id.* at 115.

¹³⁵ *Id.* at 116–17 (Justice Stone, included: “the principle that constitutional laws are not to be broken down by planned disobedience”).

¹³⁶ Jeffrey F. Liss, *The Schneiderman Case: An Inside View of the Roosevelt Court*, 74 MICH. L. REV. 500, 509 (1976).

¹³⁷ *Id.*

¹³⁸ David Fontana, *A Case for the Twenty-First Century Constitutional Canon: Schneiderman v. United States*, 35 CONN. L. REV. 35 (2002).

¹³⁹ WEIL, *supra* note 76, at 118.

the issue in doubt” that a person’s beliefs were for violent or hostile overthrow of the form of government.¹⁴⁰ A standard that was near impossible to prove. Prior to this decision, as this survey of the case law has shown, the courts held beliefs did matter, and the requirement of attachment was a test for those beliefs. Schneiderman questioned this conclusion—and the Supreme Court held that following the law was the true test of attachment. While the Supreme Court recognized that expatriation required a much tougher stance than granting citizenship, the decision would also affect the application of the attachment requirement in naturalization cases.¹⁴¹

The decision effectively ended the Department of Justice’s denaturalization program, frustrating lawmakers.¹⁴² Dewey Balch, the head of the program’s Criminal Division, attempted to provide a legislative history of the attachment requirement arguing that it meant more than behavior.¹⁴³ He maintained that because the requirement asks that two witnesses speak to the applicant’s ‘facts’ of attachment, this is a testament to revealing the applicant’s mental attitude.¹⁴⁴ Many legal scholars and practitioners also attempted to clarify the attachment requirement’s original meaning at this time.¹⁴⁵

During the *Schneiderman* case, Justice Felix Frankfurter had alluded to how the decision would bind the Court in other ideological cases.¹⁴⁶ In 1944, a case involving a German applicant with sympathies to the Nazi Party tested the *Schneiderman*

¹⁴⁰ *Schneiderman v. United States*, 320 U.S. 119, 135 (1942).

¹⁴¹ *See Sittler v. United States*, 316 F.2d 312 (2d Cir. 1963); *Nowak v. United States*, 356 U.S. 660, 665 (1958).

¹⁴² *See WEIL*, *supra* note 76, at 4–5, 8.

¹⁴³ Balch, *supra* note 126, at 411–13 (showing the evolution of the Act which was further amended in 1929 when it replaced “appear to the satisfaction of the court” with “possession of the necessary qualifications” and ultimately became, “has been and still is . . . attached to the principles of the Constitution” by 1940).

¹⁴⁴ *Id.* at 412.

¹⁴⁵ *See also* N.S. Timasheff, *The Schneiderman Case—Its Political Aspects*, 12 FORDHAM L. REV. 209, 210–11, 227–30 (1943) (disputing that Schneiderman could simultaneously be attached to the principles of the Constitution while being a loyal member of the Communist Party); W.B. Kenned, *The Schneiderman Case—Some Legal Aspects*, 12 FORDHAM L. REV. 231, 232–51 (1943) (analyzing “what degree of proof is required to set aside the grant of citizenship [and] whether [an] applicant’s behavior or belief determines the necessary degree of attachment to the Constitution”); Liss, *supra* note 136, at 500; Robert Emmet Heffernan, *Communism, Constitutionalism and the Principle of Contradiction*, 32 GEO. L. J. 405 (1944) (criticizing the Supreme Court in *Schneiderman* for a drastic departure from previous doctrine); Fontana, *supra* note 138, at 35 (discussing the impact of *Schneiderman* post 9/11). The Solicitor General Charles Fahy devised a test to measure whether a person was attached to the Constitution: “The test is . . . whether [an alien] substitutes revolution for evolution, destruction for construction, whether he believes in an ordered society, a government of laws, under which the powers of government are granted by the people.” Fontana, *supra* note 138, at 44.

¹⁴⁶ Liss, *supra* note 136, at 515. *See generally* Baumgartner v. United States, 322 U.S. 665 (1944).

interpretation.¹⁴⁷ The claim of fraudulent acquisition put forth by the Department of Justice was not held in the Supreme Court's view because "there was no competent evidence" that Baumgartner "entertained these strong beliefs or . . . had any mental reservations in . . . 1932."¹⁴⁸ Thus, the requirement of "clear, unequivocal and convincing evidence" was not met. The Supreme Court stated that applicants, as native-born Americans, have the right to different views and to change their minds: "[h]e is not required to imprison himself in an intellectual or spiritual straitjacket; nor is he obliged to retain a static mental attitude."¹⁴⁹ These two decisions would characterize the Supreme Court for over forty years regarding cases of attachment.¹⁵⁰

On the Department of Justice's side, there are reports from this period of officers attempting to disqualify naturalization applicants through "opinion questions" discovering "un-American" beliefs to claim that they were part of seditious groups.¹⁵¹ Identifying belief is a nearly impossible task. It was maintained by the courts "that under our traditions beliefs are personal and not a matter of mere association, and that men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles."¹⁵² The narrower definition of attachment to simply mean behavior as obedience to the law had shifted the requirement towards a view that focused on the constitutional protections of freedom of speech and thought.¹⁵³

Two other Supreme Court cases from this period further expound on the perspective on behavior, differentiating between active versus passive behavior, in which the Court considered the relationship between "attachment" and citizenship. At the time, U.S. law provided that citizenship could be lost automatically if a

¹⁴⁷ *Id.* at 666.

¹⁴⁸ *Id.* at 679 (Murphy, J., concurring).

¹⁴⁹ *Id.* at 679 (Murphy, J., concurring). Some legal scholars have agreed with the Court's interpretation, that "[d]enying naturalization on the basis of constitutionally protected actions, then substantially furthers no important social interest." Note, *Constitutional Limitations on the Naturalization Power*, 80 *YALE L.J.* 769, 790 (1971).

¹⁵⁰ WEIL, *supra* note 76, at 133. For example, in the case of Mr. Nowak, an applicant who had come to the United States at the age of ten from Poland. Nowak was granted citizenship in 1938. Fourteen years later, the Department attempted to denaturalize him claiming that he had obtained his citizenship fraudulently as he was a member of the Communist Party when he was naturalized. In line with *Schneiderman*, the Supreme Court reversed the petition, claiming that to denaturalize there would need to be proof that Nowak knew of the party's illegal advocacy or desire to "overthrow of the Government by force and violence." *Nowak v. United States*, 356 U.S. 660, 665 (1958).

¹⁵¹ Note, *supra* note 149, at 790.

¹⁵² *Nowak*, 356 U.S. at 665; *see also Stasiukevich v. Nicolls*, 168 F.2d 474, 479 (1948) (quoting *Schneiderman v. United States*, 320 U.S. 119, 136 (1942)).

¹⁵³ *Schneiderman*, 320 U.S. at 139 ("Whatever attitude we may individually hold toward persons and organizations that believe in or advocate extensive changes in our existing order, it should be our desire and concern at all times to uphold the right of free discussion and free thinking to which we as a people claim primary attachment.").

citizen voluntarily conducted certain “expatriating acts.” The first case involved a naturalized citizen who voted in a foreign election—an act that was considered an indication of voluntary expatriation.¹⁵⁴ The petitioner challenged the constitutionality of the case and the District Court, as well as the Court of Appeals, held the revocation decision.¹⁵⁵ However, the Supreme Court—going against previous precedent—ruled that the petitioner’s right to citizenship was guaranteed by the Fourteenth Amendment and could not be revoked without their consent.¹⁵⁶ The previous rationale, according to the Court, was from a contentious and dated logic that when a U.S. citizen voted in a foreign election, “the individual ha[d] given the strongest evidence of attachment to a foreign potentate and an entire renunciation of the feelings and principles of an American citizen.”¹⁵⁷ The Court viewed that the revocation of citizenship required something “active”, i.e., an act of consent.¹⁵⁸ Despite the ruling, U.S. citizenship law continued to list certain performances that would, if taken, be presumed to have been done voluntarily and thus, lead to the loss of citizenship.¹⁵⁹ This theme later reemerged in *Vance v. Terrazas*, in which the Supreme Court held that expatriation required more than “clear, convincing and unequivocal evidence” that a citizen had committed an act worthy of expatriation, i.e., a person’s consent.¹⁶⁰

By assessing attachment through behavior, the requirement was increasingly conflated with the good moral character requirement. By the end of this period, one judge had defined good moral character “to mean a broad ‘attach[ment] to the principles of the Constitution of the United States, and [disposition] to the good order and happiness of the United States.’”¹⁶¹ By the 1970s, cases involving attachment were less and less common.¹⁶² This period of litigation highlights the tension

¹⁵⁴ *Afroyim v. Rusk*, 387 U.S. 253, 254 (1967).

¹⁵⁵ *Id.* at 254–55.

¹⁵⁶ *Id.* at 257.

¹⁵⁷ *Id.* at 259.

¹⁵⁸ *See id.* at 257.

¹⁵⁹ 8 U.S.C. § 1481.

¹⁶⁰ *Vance v. Terrazas*, 444 U.S. 252, 258, 263 (1980).

¹⁶¹ *Sugarman v. Dougall*, 413 U.S. 634, 660 (1973) (citing H.R. Rep. No. 82-1365, 82d Cong. 2d Sess., 78, 80 (1952)).

¹⁶² There are some notable exceptions: In one case, a California District Court questioned whether a person could be attached if their beliefs bar them from taking part in certain citizenship essentials such as, bearing arms, jury duty, or voting. Haesoon Kook Matz and Louise Nikola had been lawful permanent residents before their applications for naturalization. Neither of the petitioners were willing to take the oath because, as Jehovah’s witnesses, they would not be able to take up arms or support any war effort. The courts argued that “a person who refuses to participate in the political affairs of the nation displays an attitude inconsistent with a claim of attachment to the principles of the Constitution and active support of the Constitution.” *In re Pisciatano*, 308 F. Supp. 818, 819 (D. Conn. 1970). The same reasoning is found in *In re Williams*, 474 F. Supp. 384, 387 (D. Ariz. 1979). This conclusion was reinforced in another decision where the examiner from the Bureau of Naturalization found the

between two primary interpretations of the attachment requirement: *behavior* and *belief*. During World War II, the Department of Justice was utilizing the requirement to solve a particular issue: keeping certain groups out of the citizenry that it considered a threat.¹⁶³ It was an attempt to protect the polity, maintain solidarity, and was a tenet of U.S. security policy. Because of its elasticity in meaning and discretion in interpretation, the attachment requirement could be used as a tool for its policy goals.¹⁶⁴ However, the Supreme Court attempted to put limitations on this.¹⁶⁵ From the perspective of the Court, citizenship law should remain neutral in relation to other state policy goals. An applicant's personal life was considered to be private and so long as they *behaved* in accordance with the law they could be granted citizenship. In doing so, the scope and meaning of the attachment requirement was thinned down.

E. Uncertain Times: Between Administrative and Character-Based Attachment

The attachment requirement evolved into an administrative and technical obligation—determined by taking the oath of allegiance, which asks for applicants to “support the Constitution.”¹⁶⁶ In 1990, Congress shifted naturalization authority from federal district courts to Immigration and Naturalization Services (Immigration Act of 1990).¹⁶⁷ This alteration changed the historically judicial system to an administrative one.¹⁶⁸ Lauren Gilbert shows how this change has had several important implications.¹⁶⁹ First, while judges still have the power of *de novo* review in cases

refusal to participate in political affairs was not in line with the attachment requirement. The District Court disagreed, arguing demonstrating attachment means more than political participation, stating, “the petitioner loves this country and its institutions.” *Pisciattano*, 308 F. Supp. at 820. The District Court found that a Jehovah's Witness with a similar reservation can become a citizen since “[i]nvolvement in politics and jury service are not the only ways to demonstrate an attachment to the principles of the Constitution,” as these requirements are not explicitly regulated by Congress. *Id.* These cases highlight the continued discrepancies among interpretations of the nature of attachment. However, the approach over beliefs was different from earlier views. Rather than focusing on beliefs as a sign of an interior condition, beliefs were seen as an indicator of an ability to participate in the duties of citizenship.

¹⁶³ WEIL, *supra* note 76, at 2, 4.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 4.

¹⁶⁶ See U.S. CITIZENSHIP & IMMIGR. SERVS., M-476, A GUIDE TO NATURALIZATION 1 (2016).

In the current USCIS attachment procedures, attachment requires the applicant to “demonstrat[e] an acceptance of the democratic, representational process established by the U.S. Constitution” this is proven by taking the oath of allegiance. See U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL 12(D)(7)(A), <https://www.uscis.gov/policy-manual/volume-12-part-d-chapter-7> [<https://perma.cc/53EQ-D3FV>] (last visited May 8, 2023).

¹⁶⁷ See Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978.

¹⁶⁸ See Lauren Gilbert, *Citizenship, Civic Virtue, and Immigrant Integration: The Enduring Power of Community-Based Norms*, 27 YALE L. & POL'Y REV. 335, 340–61 (2009) (discussing the good moral character requirements relationship to state morality laws).

¹⁶⁹ *Id.* at 358–59.

that have denied applicants naturalization, there has been further growth in discretion.¹⁷⁰ Second, there is little transparency, which means that researchers are not able to identify the standards United States Citizenship and Immigration Services (USCIS) officers use to determine cases.¹⁷¹

Despite this, the few cases available show that some of the past tensions persist today.¹⁷² In *Galvez-Letona v. Kirkpatrick*, the Government argued that a petitioner with Down Syndrome was not attached as he could not complete the oath.¹⁷³ While the language and civics requirements were waived because of the severity of his disability, Immigration & Naturalization Services expected him to still demonstrate attachment and take the oath.¹⁷⁴ The Service stated that the oath was mandatory to prove attachment.¹⁷⁵ Mr. Galvez-Letona's lawyer argued his attachment was demonstrated through his behavior, that he had never broken the law, and that he "act[ed] in general accord with the basic principles of the community."¹⁷⁶ Mr. Galvez-Letona's case was denied by USCIS.¹⁷⁷ However, the District Court did not agree, eventually reversing the decision as they viewed it to be in violation of the Rehab Act.¹⁷⁸ Interestingly, the District Court also stated, "that showing attachment to the Constitution must consist of more than a negative. . . . Although the attachment and oath requirements do play an important role in becoming a citizen, these requirements are not essential" as certain groups are exempt, such as children.¹⁷⁹ Thus, for the District Court, attachment is more than just obeying the law, it is also about positive actions. The decision did not specify exactly what such positive actions or behavior would be.

While the attachment requirement has become more administrative and technical for most, this has not been the case for all. For example, Mahmoud Kassas, a national of Syria, was admitted in the United States for permanent residency in

¹⁷⁰ *Id.*

¹⁷¹ *See id.* at 359.

¹⁷² *See, e.g.,* Nio v. U.S. Dep't of Homeland Sec., 385 F. Supp. 3d 44 (D.D.C. 2019). For recent cases see generally: (1) False marriage schemes, *Tan v. U.S. Dep't of Just., Immigr. & Naturalization Serv.*, 931 F. Supp. 725, 727 (D. Haw. 1996); *Gordon v. Chertoff*, No. 04C V673, 2005 WL 2989706, at *2–3 (E.D. Va. Nov. 4, 2005). (2) Criminal acts during statutory period, *United States v. Egner*, No. C08-1078, 2008 WL 11508546, at *1 (W.D. Wash. Nov. 17, 2008). (3) False testimony at the time of naturalization, *United States v. Schiffer*, 831 F. Supp. 1166, 1170 (E.D. Pa. 1993) (serving in a foreign army as an American citizen); *Lezzar v. Heathman*, No. 11-CV-4168, 2012 WL 4867696, at *1 (S.D. Tex. Oct. 11, 2012) (providing false statements on naturalization forms); *Hassan v. Dedvukaj*, No. 09-10716, 2010 WL 199931, at *1 (E.D. Mich. Jan. 19, 2010) (unable to complete the oath due to disability).

¹⁷³ *Galvez-Letona v. Kirkpatrick*, 54 F. Supp. 2d 1218, 1220, 1225 (D. Utah 1999).

¹⁷⁴ *Id.* at 1221.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 1223.

¹⁷⁷ *Id.* at 1220.

¹⁷⁸ *Id.* at 1226.

¹⁷⁹ *Id.* at 1224–25.

1987.¹⁸⁰ In 1992, Kassas applied for citizenship. His naturalization case was denied after he expressed reservations about taking the oath of allegiance which asks newcomers to “bear arms on behalf of the United States”; Kassas’ faith prohibits him from taking up arms against another Muslim person or country where Islam is the predominantly practiced religion.¹⁸¹ While Congress does recognize that it is against some people’s faith to bear arms (and in those cases there is a modified oath), since Kassas was not opposed to bearing arms in general, but only in certain cases, the court stated that Kassas, “by reserving unto himself when he will or will not serve in the armed forces, is, in effect, stating when he will or will not obey the law.”¹⁸² For the court, Kassas’ beliefs were an indicator of his character and behavior. According to the District Court, if Kassas was attached to the Constitution, he would not have doubts about taking the oath.¹⁸³

Furthermore, a troubling finding has been the recent abuse of the good moral character and attachment requirements under the Controlled Application Review and Resolution Program (CARRP). The CARRP program, created in 2008, instructs United States Citizenship and Immigration Service (USCIS) officers to delay decisions indefinitely and look for reasons to deny naturalization cases for individuals deemed to be “national security concerns.”¹⁸⁴ The program is reliant on racial and religious profiling—groups targeted are mainly from “Arab, Middle Eastern, Muslim, and South Asian communities.”¹⁸⁵ Criteria for “national security concerns” is vague; officers are instructed to look at profession, military training, language abilities, or national origin, and encouraged to find things that could be considered “lack of moral character.”¹⁸⁶ USCIS officers will exploit any kind of imprecise answers on the applicant’s N-400 application form.¹⁸⁷ This is especially challenging for Muslim applicants in the case of questions over ‘membership’ or ‘association’—as good moral character usually involves volunteer work with religious or civic organizations “activities which can flag Muslims as security threats.”¹⁸⁸ CARRP looks for cases where applicants have a connection to “an individual or organization [that] has been determined to have an articulable link to prior, current, or planned involvement

¹⁸⁰ *Pet. for Naturalization Kassas*, 788 F. Supp. 993, 993 (M.D. Tenn. 1992).

¹⁸¹ *Id.*

¹⁸² *Id.* at 994.

¹⁸³ *See id.*

¹⁸⁴ Many naturalization applicants waited periods of up to 13 years for decisions on their applications. KATIE TRAVERSO & JENNIE PASQUARELLA, ACLU S. CAL., PRACTICE ADVISORY: USCIS’S CONTROLLED APPLICATION REVIEW AND RESOLUTION PROGRAM 1 (2016), https://www.aclusocal.org/sites/default/files/carrp_practice_advisory_final.pdf [<https://perma.cc/Y3TF-MMQ6>].

¹⁸⁵ *Id.* at 2; *Chaudhry v. Johnson*, 572 U.S. 1123 (2014).

¹⁸⁶ TRAVERSO & PASQUARELLA, *supra* note 184, at 8, 14.

¹⁸⁷ *See Abusamhadaneh v. Taylor*, 873 F. Supp. 2d 682, 685, 720–21 (E.D. Va. 2012).

¹⁸⁸ Noora Lori, *Citizens-in-Waiting: Strategic Naturalization Delays in the USA and UAE*, 45 ETHNIC & RACIAL STUD. 1075, 1085 (2021).

in, or association with, an activity, individual or organization described in [the security and terrorism sections] of the Immigration and Nationality Act.”¹⁸⁹ Yet, the terms ‘articulable link’ and ‘association with’ are not defined. This lack of definition leaves much discretion to the officers who are instructed to look for reasons for deportation. As of 2016, there have been at least 41,805 CARRP cases.¹⁹⁰ The cases lack transparency on the condition for ‘clear,’ ‘unequivocal,’ and ‘convincing’ evidence of a link with these particular organizations. This trend is familiar to the Cold War cases which also excluded applicants for the relationship between their beliefs and associations; an interpretation that was ultimately squashed by a Supreme Court concerned with protecting freedom of thought and the right to a private life.¹⁹¹

Finally, the growing anxiety about undocumented migration has brought with it new questions over whether attachment is important to citizenship and if so, why. Part of the fear is that any children born on U.S. soil will automatically become U.S. citizens through the Fourteenth Amendment. Such an act is debated to lack the condition of consent by U.S. Congress.¹⁹² This argument has made policymakers and some prominent scholars question the original intention of the amendment. Peter Schuck and Rogers Smith, in their reading of the Citizenship Clause of the 14th Amendment, argue U.S.-born children of undocumented migrants are not entitled to birthright citizenship. They suggest that “this clause empowers Congress to decide the matter in its policy discretion.”¹⁹³ This has led them to propose that an attachment requirement should also be necessary to confer citizenship for those born in the United States to undocumented parents.¹⁹⁴ Schuck and Smith claim that undocumented migrants vary in their level of attachment to U.S. society. Schuck, in particular, argues for a “retroactive-to-birth citizenship for the U.S.-born children of illegal-immigrant parents who demonstrate a substantial attachment to, and familiarity with, this country by satisfying two conditions: a certain period of residence here after the child’s birth, and a certain level of education of the child in our schools” (completion of the eighth grade).¹⁹⁵ Attachment for this group, in their view, should be calculated based on residency ties and presumed social ties which are demonstrated through schooling and thus acquiring a civic education.

¹⁸⁹ See U.S. CITIZENSHIP & IMMIGR. SERV., CARRP OFFICER TRAINING 2 (2009); Naturalization Act of 1795, ch. 20, 1 Stat. 414 (1795).

¹⁹⁰ Lori, *supra* note 188, at 1085.

¹⁹¹ WEIL, *see supra* note 76, at 4.

¹⁹² Paul LeBlanc, *Trump Again Says He’s Looking ‘Seriously’ at Birthright Citizenship Despite 14th Amendment*, CNN (Aug. 22, 2019, 5:14PM), <https://edition.cnn.com/2019/08/21/politics/trump-birthright-citizenship-14th-amendment/index.html> [<https://perma.cc/BK24-CP98>].

¹⁹³ Peter H. Schuck & Rogers M. Smith, *The Question of Birthright Citizenship*, 50 NAT’L AFF. 50, 50 (2018).

¹⁹⁴ *Id.* at 66.

¹⁹⁵ *Id.*

F. A Rule for All Seasons

The history of the attachment requirement offers a window into the legal process of becoming an U.S. citizen. The requirement has remained an elastic test since its inception in 1795—interpreted in a range of ways and invoked to manage emerging policy challenges. Administrative and judicial discretion has structured the application of the attachment requirement in U.S. naturalization law. There have been at least five approaches to determining an applicant’s attachment: *knowledge, acceptance, belief, affection, and behavior*.¹⁹⁶ The benefits and drawbacks of the use of administrative and judicial discretion within naturalization has been under-researched; it is unclear what results it leads to.¹⁹⁷ On the one hand, when a requirement is elastic and evaluated in a discretionary manner it can be flexible enough to accommodate the diversity of ways people connect to their community, society, or state. The law is thus responsive and can adapt to the reality that people do not show something in a fixed way. Moreover, elastic tests allow the requirement to evolve along with the changing nature of society. The United States is not the same place it was 200 years ago when the requirement was first implemented. Therefore, the expectations for what attachment is and how it should be shown can adapt. Many of the past interpretations of attachment were also made into their own requirements over time—such as demonstrating English language competence and proving civic knowledge. The evolution of the requirement allowed policymakers to decide which interpretations were essential for citizenship and implement them as their own statutory requirements. Some scholars argue that “[d]iscretion vitalizes agencies, infusing them with energy, direction, mobility, and the capacity for change.”¹⁹⁸ Legislators may not “possess the variety of administrative, scientific, and technical expertise required to grapple with the complexities that administrators encounter.”¹⁹⁹ Thus, discretion may improve accountability and competence, as judges/administrators have a better understanding of the context and feel morally responsible for their actions.

On the other hand, such a test without clear demarcations or standards becomes vulnerable to misuse when it is applied to bar specific people or groups from citizenship that would have otherwise qualified. It could thus lead to variation in naturalization rates for certain groups over time. The result being that many people who lived in the United States for years are denied or revoked citizenship because

¹⁹⁶ See *infra* Part II.

¹⁹⁷ See Thomas Huddleston, *The Naturalization Procedure: Measuring the Ordinary Obstacles and Opportunities for Immigrants to Become Citizens* 1 (European Univ. Inst., Robert Schuman Ctr. Advanced Studs. Policy Paper 2013/16, 2013), <https://cadmus.eui.eu/handle/1814/28122> [<https://perma.cc/72FH-5Y2X>].

¹⁹⁸ PETER H. SCHUCK, *Controlling Administrative Discretion*, in FOUNDATIONS OF ADMINISTRATIVE LAW 175 (2004).

¹⁹⁹ David Dillman, *The Paradox of Discretion and the Case of Elian Gonzalez*, 2 PUB. ORG. REV. 165, 170 (2002).

of certain group or ideological affinities. The “exercise of powers must be based on reasons, and the reasons must be applied consistently, fairly, and impartially” to secure political morality.²⁰⁰ Moreover, as the survey of case law shows, applicants with similar circumstances have been treated in opposite ways (within and between jurisdictions) which questions both the equality and fairness of the requirement. A clear example is how certain behaviors were taken as indicators of attachment and at other times the same behavior was considered lacking.²⁰¹ In other cases, attachment as belief meant a person could advocate for changing the Constitution while in some cases applicants could not. More generally speaking, sometimes beliefs were considered unrelated to behavior while in other cases, beliefs were indicative of future behavior. In a way, having such an elastic test runs counter to the idea of having a uniform rule of naturalization as the requirement has varied from one case to the next and over time. The next part assesses the different interpretations of the attachment requirement to reflect on its overarching theory, purpose, content, and method.

II. ASSESSING THE ATTACHMENT REQUIREMENT

This part of the Article offers an appraisal of the attachment requirement. How should attachment be assessed? In what ways is it a legitimate or illegitimate requirement? First, the attachment requirement has fluctuated between different *theoretical* frameworks. It has never conformed to a consistent or hybrid model of membership. Second, the interpretations of attachment have not had a clear or consistent *purpose* and therefore cannot be easily evaluated. Third, the *content* of the requirement has varied between narrow and broad approaches and applied inconsistently. And fourth, the *methods* used for assessing attachment have not always been effective. The goal of this part of the Article is to offer a reflection for future consideration of the attachment requirement and a more thoughtful discussion on what is required to become a U.S. citizen.

A. Theory

The attachment requirement has not been interpreted through a consistent theory. From the beginning, the courts and the government have subscribed to liberal, republican, and communitarian models of membership. Gerald Neuman notes that justifications for naturalization requirements will depend on the theoretical model that is adopted and what vision of society is trying to be upheld.²⁰² States

²⁰⁰ *Id.* at 182.

²⁰¹ *See supra* notes 139–85 (discussing cases and how courts interpret differently “attachment” behaviors).

²⁰² The approaches act as a “heuristic device and not as a precise representation of available theoretical alternatives.” Gerald L. Neuman, *Justifying U.S. Naturalization Policies*, 35 VA. J. INT’L L. 237, 238 (1994).

must ask themselves if different models are used to interpret the same requirement in different ways; is this “waver[ing] between normative bases . . . [and is] such wavering is acceptable”?²⁰³ Neuman argues that it “might be too much to expect U.S. citizenship law to display coherence” across all forms of its citizenship law (for example, between birthright acquisition, naturalization, and citizenship loss); it should, however, see some consistency within one aspect and certainly within one requirement.²⁰⁴ The survey finds that the attachment requirement has never been endorsed by a single model and discretion has allowed judges and administrators to pick and choose which theory to subscribe to different cases.

In traditional *liberal* thought, citizenship is an articulation of the voluntary will where the rules of governing are agreed to by its members. Neuman finds that there are two strands of liberal justifications for naturalization requirements.²⁰⁵ The first, *unilateral liberalism*, argues that society’s motivation for admitting citizens is based on the desire to ensure that everyone that resides within the territory of the state is protected.²⁰⁶ The newcomer applies for naturalization out of self-interest. Therefore, anyone who satisfies certain objective criteria (such as residency) would be able to acquire citizenship if they request it. An attachment requirement from this standpoint would be quite technical and nondiscretionary—simply a matter of ‘checking boxes.’ Cultural requirements such as civic knowledge or beliefs could be considered too intrusive and subjective. The state would need serious justification to deny naturalization and only in cases when there was a legitimate threat to public interest.

The second, *bilateral liberalism*, is a thicker approach and suggests that society’s consent to accept the individual may be as important as the individual’s consent to become a member. This perspective creates an instrumental calculation of the benefits that the state accrues in acquiring new members by using certain naturalization criteria. From this strain of thought, the state might be interested in actions beyond following the law as indication of attachment if it helps the state in securing a competitive advantage in certain fields—as one case stated, attachment is “more than a negative.”²⁰⁷ The requirement, however, would need to conform to a coherent vision of public interest. From this perspective, in addition to accepting and behaving in accordance with the law, a language and knowledge condition may be justifiable if it conformed to state interests such as ensuring the financial independence of its citizens through employment. Discretion in decision-making would then still require administrators to refer to a variety of “instrumental” considerations to connect with a coherent vision of the public’s interest.

²⁰³ *Id.* at 242.

²⁰⁴ *Id.* at 248.

²⁰⁵ *Id.* at 238–40.

²⁰⁶ We might even call this perspective ‘libertarian,’ as it maximizes individual autonomy and freedom.

²⁰⁷ *Galvez-Letona v. Kirkpatrick*, 54 F. Supp. 2d 1218, 1224 (D. Utah 1999).

Republicans have critiqued liberal models due to their general thinness—republicans require more substantive attachments between individuals and their larger political communities.²⁰⁸ From this perspective, citizenship is based on political and civic participation.²⁰⁹ Certain activities are considered a prerequisite for citizenship. Newcomers will naturalize because it is part of the good for the polity and vice versa—the state will want to naturalize those that will engage in the requirements of citizenship. This could be, for example, voting or joining a jury. An attachment requirement would likely consist of a language and civic education component, helping facilitate the participation of newcomers. This perspective is found both in the early cases that focused on constitutional knowledge and those that involved communities that choose not to participate in civic life because of their religious affinity. In such a case, a judge found that “a person who refuses to participate in the political affairs of the nation displays ‘an attitude inconsistent with a claim of attachment.’”²¹⁰ If one cannot participate in the duties of citizenship, one could not be considered attached. While cultural grounds of exclusion would be less likely, ideological exclusions may be justified. Ideological necessities, however, would need to focus on the features of government that are necessary for political participation and engagement in community life.²¹¹ Decision-making from administrators could require discretion as the choice of who becomes a citizen needs to be justified in relation to the republican project as it may affect the outcome of future political decisions.

Communitarians see citizenship as a reflection: “[t]he individual seeks naturalization at some stage of her assimilation to the group identity.”²¹² The state views itself as a “communit[y] of character” with shared beliefs and values which it wants to preserve.²¹³ From this perspective, an attachment requirement would involve some degree of assimilation to the national culture, such as: language, affection, or ideology. However, as Neuman notes, the characterization of national identity would need to be proven accurate.²¹⁴ Neuman cautions against this since “[n]ational identities are dynamic, not static, and are subject to external contributions as well as internal development.”²¹⁵

In terms of language, English language ability was one of the earliest requirements for demonstrating attachment.²¹⁶ The communitarian would see this as an

²⁰⁸ COHEN & GHOSH, *supra* note 43, at 39–40.

²⁰⁹ Neuman, *supra* note 202, at 240–41.

²¹⁰ *In re Pisciatano*, 308 F. Supp. 818, 819 (D. Conn. 1970).

²¹¹ Richard Bellamy, *Introduction: The Making of Modern Citizenship*, in *LINEAGES OF EUROPEAN CITIZENSHIP: RIGHTS MEMBERSHIP AND PARTICIPATION IN ELEVEN NATION STATES 7* (Richard Bellamy, Dario Castiglione & Emilio Santoro eds., 2004).

²¹² Neuman, *supra* note 202, at 241.

²¹³ MICHAEL WALZER, *SPHERES OF JUSTICE* 62–63 (1983); Michael Walzer, *The Communitarian Critique of Liberalism*, 18 *POL. THEORY* 6, 17 (1990).

²¹⁴ Neuman, *supra* note 202, at 246–48.

²¹⁵ *Id.* at 246.

²¹⁶ *Id.* at 252–53, 263–65.

element of establishing national belonging. This perspective on attachment was key to the interpretations in the late 19th and early 20th centuries until the capacity to speak and read English became its own requirement.²¹⁷ Similarly, ideological proclivities could also be considered an appropriate indicator of attachment if the applicant's beliefs were incompatible with the national identity. For example, those that have been considered "un-American." Some courts subscribed to this framework as early as the 19th century to keep out anarchists.²¹⁸ Moreover, the government used such justifications in the denaturalization campaigns starting in the 1930s, examining how close an applicant's beliefs conformed with the vision of the national community.²¹⁹

The attachment requirement has been interpreted through the lens of each of these membership models at different points in time by the courts and administrators. The use of the attachment requirement since its inception in naturalization law has generally moved towards the bilateral liberal model—with the use of state discretion to connect decision-making to a vision of public interest.²²⁰ However, use of the attachment requirement to delay Muslim applicants is problematic under this theoretical framework since it is unclear what vision of public interest the USCIS is trying to uphold and whether that interest is legitimate.

B. Purpose

What are the different purposes of the attachment requirement? The review of legislation and case law has found no consistent purpose.

One purpose of the attachment requirement has been to encourage civic participation; citizens are thus expected to engage in certain fundamentals (voting, jury duty, etc.). To guarantee this purpose, some courts have suggested that *knowledge* of the Constitution may be necessary. As John W. Davis stated, "the Constitution has but two enemies. . . . The first of which is ignorance—ignorance of its contents, ignorance of its meaning, ignorance of the great truths on which it is founded."²²¹ But knowledge is an abstract concept. First, there are different types of knowledge; for example, theoretical knowledge and practical knowledge. Which one is essential for constitutional knowledge? A person could memorize and recite the contents of the Constitution but have a limited understanding of the underlying theories or goals of each article. Second, there are many sources of gaining knowledge—one can study in a library to learn that the Missouri River is the longest in the United States.²²² Or

²¹⁷ *Id.* at 263–65.

²¹⁸ *Id.* at 254, 261.

²¹⁹ *Id.* at 259–60.

²²⁰ *Id.* at 239–40 (discussing how states consider the benefits gained from admitting a certain citizenship applicant when structuring naturalization policy).

²²¹ John W. Davis, *What Does the Constitution Mean to You?*, 11 A.B.A.J. 442, 442 (1925).

²²² *State v. Dist. Ct. of Seventeenth Dist.*, 120 N.W. 898, 899 (Minn. 1909) ("One class

one can know because they live nearby and visit frequently. Third, there are different depths of knowledge. In one case, the judge stated that the applicant should possess “some knowledge of the science of human duty and of jurisprudence.”²²³ But should applicants be expected to carry the Constitution in their coat pocket as did Justice Hugo Black?²²⁴ Moreover, the relationship between knowledge and the purpose of encouraging participation lacks empirical justification. In a recent study, Steven Donbavand and Bryony Hoskins explored various educational techniques that help to create civic engagement.²²⁵ Their study finds doubt that knowledge alone translates into behavioral change.²²⁶ The state cannot guarantee that if a person knows the principles of the Constitution that they will choose to engage in civic life.

The second purpose of the attachment requirement has been to promote solidarity by ensuring that newcomers *accept* certain values, principles, and institutions. As one court determined, attachment is “merely an acceptance of the fundamental political habits and attitudes which here prevail.”²²⁷ Solidarity is defined as a sense of unity based on an acceptance of common interests. But what exactly constitutes acceptance is not clear—does it mean to accept organized government or obey the law? Or acceptance of the validity of the law? Or its legal interpretation? Acceptance of a legal norm can mean at least five things, for instance: a) I accept the norm; b) I accept the interpretative method of the norm (e.g., by a court); c) I accept the authority of the interpreter and its moral authority to resolve disputes regarding the norm; d) I accept the way to change or amend the norm; e) I accept only not to undermine these rules.²²⁸ In law, acceptance of a norm will also depend on whether it is considered a “rule” or a “standard.”²²⁹ The former is well-defined, highly predictable, and easily understood, which means that in practice it can be clearly regulated. The latter is abstract and subject to interpretation which then requires discretion

of cases takes a severely logical view of the question, and holds that a person cannot be attached to the principles of the constitution and intelligently make oath to support it unless he has some general knowledge of what the constitution is and the principles which it affirms.”).

²²³ *Id.*

²²⁴ RICHARD D. POLENBERG, *THE ERA OF FRANKLIN D. ROOSEVELT: A BRIEF HISTORY WITH DOCUMENTS* 59 (2000) (quoting Franklin D. Roosevelt, too for the statement that the Constitution is “[l]ike the Bible, it ought to be read again and again”).

²²⁵ Steven Donbavand & Bryony Hoskins, *Citizenship Education for Political Engagement: A Systematic Review of Controlled Trials*, 10 *SOC. SCIS.* 7–14 (2021); see also David Bartram, *The UK Citizenship Process: Political Integration or Marginalization?*, 53 *SOCIO.* 671, 671 (2019); Audrey Osler, *Testing Citizenship and Allegiance: Policy, Politics and the Education of Adult Migrants in the UK*, 4 *EDUC., CITIZENSHIP & SOC. JUST.* 63, 63–64 (2009).

²²⁶ Donbavand & Hoskins, *supra* note 225, at 8.

²²⁷ *United States v. Rossler*, 144 F.2d 463, 465 (1944).

²²⁸ Liav Orgad, *The Citizen-Makers: Ethical Dilemmas in Immigrant Education*, 25 *EUR. L.J.* 524, 534–37 (2019).

²²⁹ Yifat Naftali Ben Zion, *Moving Along the Continuum of Loyalty: From a Standard Towards Rules*, 35 *CAN. J.L. & JURIS.* 187, 189–94 (2021).

when evaluated. For example, a legal rule would be a clear law such as a speed limit—it is obvious when there has been a violation; whereas to “support and defend the Constitution” would be on the “standard” side—what exactly this means likely depends on the context. It may be easier to accept a legal rule than a standard since more information is available on the issue and the outcome.

From this view, the attachment requirement has asked (among other things) that newcomers accept U.S. norms and values; in turn, this will foster solidarity within the community. However, this view relies on the presumption that there are fixed norms and values that the community universally accepts. If this presumption is true, then should not all members of the community be expected to express the same acceptance at some stage, since solidarity depends on all people living within the bounded community? And if not, what are the implications for solidarity when different groups have different membership obligations? Alexander Aleinikoff and Ruben G. Rumbaut find that the way in which people “are invited or welcomed to become members of the society influences their joining behavior.”²³⁰ Thus, if some groups are expected to accept (in one way or another) certain essentials while others are not, this could undermine the solidarity which it intends to promote.

Another way to promote solidarity is to ask for something thicker than acceptance: that newcomers *believe* in these norms, values, or institutions. Shared beliefs, so the argument goes, will foster solidarity. Anxiety over subversive beliefs has a long history in the United States: the beliefs of radicals, monarchists, Catholics, anarchists, communists, and socialists, to name just a few, have been considered to undermine solidarity.²³¹ The U.S. Commission on Immigration and the Integration of Migrants (1997), for instance, wrote that unity of the people in the country depends on beliefs in the “principles and values embodied in the American Constitution.”²³² And until 1999, naturalization processes asked applicants whether they “believe in the Constitution and form of government of the U.S.?”²³³ One activist has even argued that in order to evaluate an applicant’s beliefs, every naturalization case should be composed of a panel of experts on extremism.²³⁴ Applicants would then be questioned and those whose views were considered to clash with the principles of the Constitution would be excluded. But attachment expressed through belief

²³⁰ Alexander Aleinikoff & Ruben G. Rumbaut, *Terms of Belonging: Are Models of Membership Self-Fulfilling Prophecies?*, 13 GEO. IMMIGR. L.J. 1, 2 (1998).

²³¹ See Philip Gleason, *The Melting Pot: Symbol of Fusion or Confusion?*, 16 AM. Q. 20, 24 (1964).

²³² U.S. COMM’N IMMIGR. REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRATION POLICY 117 (1997).

²³³ Application for Naturalization, 56 Fed. Reg. 20448, 20452 (May 3, 1991).

²³⁴ Ayaan Hirsi Ali argues that the process of naturalization has become too bureaucratic and is currently devoid of meaning. Thus, such a system, while administratively burdensome, would exclude those with politically dangerous views. Ayaan Hirsi Ali, *Swearing in the Enemy*, WALL ST. J. (May 18, 2013, 11:29 AM), <https://www.wsj.com/articles/SB10001424127887324767004578486931383069840> [<https://perma.cc/KXY3-RPQN>].

may look in practice like different things (likely a mix between belief, opinion, and knowledge). For example, I can believe that the Colorado Avalanche will win the Stanley Cup, but that is not the same as believing that hockey is the best sport and that everyone should watch. It can be difficult to distinguish between belief and opinion. I can have the opinion that the Constitution protects the right for a citizen to own a firearm, but that is different from the belief that it is a good law. And proving belief may be empirically challenging—it is often difficult to know what someone truly believes or to guarantee that belief over time. Moreover, James Madison (along with many judges throughout the past three centuries) questioned whether beliefs would accurately predict future wrongdoing and undermine solidarity.²³⁵ It could be that the applicant does not believe in the principles of the Constitution yet still accepts and behaves accordingly.

A third purpose of the attachment requirement may be to ensure that the newcomer grows a sense of *affection* or *love* to the political community. As George Washington stated in his farewell address, “citizens, by birth or choice, of a common country, that country has a right to concentrate your affections.”²³⁶ The concern with emotion was not new to the conception of U.S. nationality. Justice Felix Frankfurter, in a reflection over his own oath of citizenship, stated, “American citizenship . . . binds people together by devotion to certain feelings and ideas and ideals summarized as a requirement that they be attached to the principles of the Constitution.”²³⁷ In this sense, attachment would ask newcomers to “engage in an arduous ‘labor of love’ for the new country.”²³⁸ As Crist and Campbell described in their interpretation of the attachment requirement, it is “a matter of the heart.”²³⁹ One court confirmed this approach, stating that “the petitioner loves this country and its institutions” and that would suffice in demonstrating attachment.²⁴⁰ But by which standards can love or affection be measured? Is not love demonstrated through a person’s behavior? Can a person really claim to love another without showing it in some way? And can

²³⁵ See Frank George Franklin, *The Legislative History of Naturalization in the United States from the Revolutionary War to 1861*, at 23 (1906) (Ph.D. dissertation, Univ. of Chi.) (HeinOnline); see also *United States v. Schwimmer*, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting) (“[B]ut if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country.”).

²³⁶ See DAVIS & CAMPBELL, *supra* note 89, at 143 (quoting Washington’s farewell address).

²³⁷ Sanford Levinson, *Constituting Communities through Words That Bind: Reflections on Loyalty Oaths*, 84 MICH. L. REV. 1440, 1441 (1986).

²³⁸ Sara Kalm, *Affective Naturalization: Practices of Citizenship Conferment*, 44 ALTS.: GLOB., LOC., POL. 138, 147 (2019); Sarah Song, *The Significance of Territorial Presence and the Rights of Immigrants*, in *MIGRATION IN POLITICAL THEORY: THE ETHICS OF MOVEMENT AND MEMBERSHIP* 228 (Sarah Fine & Lea Ypi eds., 2016).

²³⁹ Gordon, *supra* note 59, at 372.

²⁴⁰ *In re Piscattano*, 308 F. Supp. 818, 820 (D. Conn. 1970).

states legitimately regulate these emotions?²⁴¹ These are psychological questions that have long been debated by experts. But answering them is important to justify this interpretation of the requirement and to determine if it works to serve this purpose.

Another purpose of the attachment requirement may be to ensure the newcomer will act like a citizen by judging their *behavior*. As one judge articulated, new citizens must “bear the obligations and duties of that status as well as enjoy its rights and privileges”; attachment is about behavior in the past (to be granted naturalization) as well as behavior in the future (“obligations and duties” as a new citizen).²⁴² In the surveyed case law two opposing types of behavior have been indicative of attachment—behavior as following the law and behavior as observing community-based norms.²⁴³ In terms of behavior as following the law, can someone who violates the law still be considered attached to the Constitution? Do the aims of the behavior matter? And if fidelity to law is the indicator of attachment, what does that say about convicted felons?²⁴⁴ Courts have not been coherent on this point. As some courts have found, newcomers should not be better than the average citizen.²⁴⁵ Therefore, if all members of a community are lawbreakers, then a candidate for citizenship cannot be denied merely for this reason. The standard for assessment has been in some cases the generally accepted conventions of a specific place and time. However, other courts have linked infidelity to law with nonattachment.²⁴⁶ In the new USCIS Policy Manual, an applicant who uses marijuana will be considered to have broken federal law and be ineligible for naturalization, even if it is not considered an offense under state law.²⁴⁷ Therefore, the different sorts of behavior that have been expected of applicants raises doubts that the attachment requirement is serving this purpose.

C. Content

How is the content of a law interpreted? Sanford Levinson notes that the Constitution is an “essentially contested concept” as it is “internally complex,” and “the rules of application . . . are relatively open.”²⁴⁸ Thus, does attachment to

²⁴¹ See David Abraham, *Solidarity and Particularity: E Pluribus Unum?*, 6 HAGAR: STUD. CULTURE, POLITY & IDENTITIES 137, at *6 (2005).

²⁴² *Luria v. United States*, 231 U.S. 9, 23 (1913).

²⁴³ See, for example, all the cases with Sunday saloon laws that came to different outcomes: *In re Nagy*, 3 F.2d 77, 77–78 (S.D. Tex. 1924); *In re Bonner*, 279 F. 789, 791 (Mon. 1922); *In re Hrasky*, 88 N.E. 1031, 1032–34 (Ill. 1909); *United States v. Gerstein*, 119 N.E. 922, 922 (Ill. 1918); *In re Hopp*, 179 F. 561, 563 (E.D. Wis. 1910).

²⁴⁴ LEVINSON, *supra* note 36, at 11.

²⁴⁵ *Hopp*, 179 F. at 563.

²⁴⁶ *Bonner*, 279 F. at 791 (explaining that the applicant was “obviously” not attached to the Constitution because of his criminal conduct); see also *supra* note 243 and accompanying text.

²⁴⁷ Policy Alert, U.S. Citizenship & Immigr. Servs., Controlled Substance-Related Activity and Good Moral Character Determinations (April 19, 2019), <https://www.uscis.gov/policy-manual/updates> [<https://perma.cc/ADS6-B6CW>].

²⁴⁸ LEVINSON, *supra* note 36, at 10 (emphasis removed).

the principles of the Constitution require a reflection on the principles that a new-comer should be attached to? There are at least two approaches to this question. One approach would focus on a specific principle or principles. This approach was articulated in Justice Oliver Holmes's dissent in *Schwimmer* when he argued attachment was not necessary to all principles; the primary principle that required attachment was the principle of free thought.²⁴⁹ This first approach creates a hierarchy between the principles, deciding which are more "essential" than the others. However, this approach lacks transparency, as it is not necessarily clear to newcomers which principles are more important than others. It can only be presumed that the right of freedom of speech is more important to citizenship than the day of the month that Congress meets.

A second, broader interpretation would be to focus on the "spirit" or "essentials" of the Constitution. In one case, the judge detailed the constitutional essentials an applicant should be attached to: i) a representative government; ii) a dual form of government; iii) distribution of governmental authority; and iv) guarantee of individual liberty.²⁵⁰ The theory here is that constitutions have both a "spirit as well as a body."²⁵¹ The spirit must always be maintained regardless of amendments made to the body. But again, this approach lacks the necessary transparency. "Spirit" is an elusive concept and could be interpreted differently depending on which constitutional theory one prescribes. Some could argue the spirit lies in the preamble where others may suggest that the spirit is embedded in the Bill of Rights. These questions remain unanswered by case law yet are important in developing meaningful membership practices.

D. Methods

The attachment requirement has been measured as a substantive test, procedural requirement, and a technical obligation. While state discretion can be structured into each of these methods of measurement, it has been most strongly integrated as a substantive test. As a substantive test, wide administrative discretion is "fostered by the doctrine of unfettered congressional power."²⁵² This wide discretion affects the naturalization process in two ways: first, the applicant will act according to the statute during the five-year period; second, if they realize they will be disqualified because they have violated the conditions they will likely not file a petition and those that do and are denied will probably not go to court. This decision is peculiar because going to court would likely have the decision overturned. For example, if

²⁴⁹ Henry B. Hazard, 'Attachment to the Principles of the Constitution' as Judicially Construed in Certain Naturalization Cases in the United States, 23 AM. J. INT'L L. 783, 790 (1929).

²⁵⁰ See generally *Ex Parte Johnson*, 31 So. 208 (Miss. 1902).

²⁵¹ William Hard, *The Spirit of the Constitution*, 185 ANNALS AM. ACAD. POL. & SOC. SCI. 11 (1936).

²⁵² See Note, *supra* note 149, at 769.

an officer decides the applicant lacks attachment because they do not conform to a certain substantive definition (for example, belief in the Constitution), the officer's decision would in most cases be reversed in court as many judges would find it difficult to prove that it is in violation of the requirement (clear, unequivocal, and convincing evidence being the standard).²⁵³ However, most lawyers will advise petitioners not to go to court because immigration officials have warned that if the decisions are overturned, they will "ask Congress to exercise its 'unfettered' power and write explicit statutory restrictions" which would make the situation more arduous for the next generation of applicants.²⁵⁴ Historically, this has been the case for several substantive definitions of attachment such as language and knowledge tests, which became their own statutory requirements.

The survey of case law has also highlighted several ways in which the naturalization procedure can be structured to facilitate further state discretion. One of the main procedural variables has been "time": At which point in time should the state evaluate attachment? Should it be from the beginning of the naturalization petition or before? And how long after gaining citizenship should attachment continue to be required? There are four possible cases of the temporal component of attachment: i) one is attached and has always been; ii) one is not attached and has never been; iii) one was not attached yet and now is attached; iv) one is not attached but was attached in the past. Previously, the assessment was based on a kind of "temporary attachment": officers were limited to evaluating conduct during the statutory period. Literally, it meant that an applicant did not need to show that he or she was always attached or will always be attached to it but only that they have been attached to the Constitution during the probation period of being a resident alien five years before the petition.²⁵⁵

Yet the current regulations (Section 316(a)) instruct the officer not to be limited to the probationary period:

In determining whether the applicant has sustained the burden of establishing good moral character and the other qualifications for citizenship specified in subsection (a) of this section, the [officer] shall not be limited to the applicant's conduct during the five years preceding the filing of the application, but may take into consideration as a basis for such determination the applicant's conduct and acts at any time prior to that period.²⁵⁶

²⁵³ *Id.* at 772.

²⁵⁴ *Id.* at 769.

²⁵⁵ 8 U.S.C. § 1427(e). *Contra* Levinson, *supra* note 102, at 136.

²⁵⁶ 8 U.S.C. § 1427(e); U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL 12(F)(2)(B), <https://www.uscis.gov/policy-manual/volume-12-part-f-chapter-2> [<https://perma.cc/VWM3-6F6T>] (last visited May 8, 2023).

The officer has full discretion to examine “the applicant’s current beliefs, principles, and attitude toward the United States,” even by using evidence (conduct, memberships, affiliations) prior to the probation period.²⁵⁷ Noora Lori demonstrates how the CARRP program used time as an instrument of exclusion to delay naturalization cases.²⁵⁸ For these applicants, the statutory period is extended indefinitely. Time becomes miscounted “when states delay incorporation of groups that have met temporal thresholds and legal status required for naturalization . . . but are nonetheless forced to wait longer for citizenship than others.”²⁵⁹ The time frame for this group is extended beyond that of ordinary applicants, which means that during this extended period applicants are living under a state of temporal anxiety—a kind of “precarious attachment.”²⁶⁰

Finally, attachment has been a bureaucratic and technical condition fulfilled by filling out a form and taking the oath of allegiance. This is interesting as it seems like Congress originally intended that the oath and attachment be separate requirements. When attachment is conflated with the oath of allegiance, administrators have little discretion whatsoever. In many ways, this is the thinnest method of approval and may raise questions as to whether it measures any kind of actual attachment at all. Legal theorist Liav Orgad has doubts as to the effectiveness of oaths: “[w]e do not know what transformation occurs in the hearts and minds of people taking a loyalty oath” and “their efficiency obviously depends on their content and context.”²⁶¹ Can we easily assume that once a person completes the oath, they will become attached to the Constitution? It will likely depend on the goal and substance of the oath. Oaths may serve as good reminders of our promises. Take wedding vows, which remind couples of their promise to stay together “till death do us part.” But couples break wedding vows all the time, and the swearing of an oath is likely not factored into the decision to break them. Thus, the question on whether oaths are effective in proving attachment remains uncertain. In this case, more state discretion may make the method more effective.

This analysis shows that there has not been much agreement on the theory, purpose, content, or method behind the attachment requirement. The attachment

²⁵⁷ 8 U.S.C. § 1427(e).

²⁵⁸ Lori, *supra* note 188, at 1076.

²⁵⁹ *Id.* at 1080.

²⁶⁰ Furthermore, temporal repercussions go beyond state policy. Currently, thousands of applicants have been waiting for over a year for USCIS to process their applications—because a category of records called “A-files” are stuck in the Federal Records Centers (underground in Kansas City)—because of COVID restrictions USCIS cannot access nor obtain. Walker Ewing, *U.S. Citizenship Applicants Are in Limbo Because Their Immigration Files Are Locked in Caves Underground*, IMMIGR. IMPACT (Jan. 28, 2022), <https://immigrationimpact.com/2022/01/28/uscis-citizenship-files-locked-caves/#.Yf1BOFjMJTa> [https://perma.cc/SYZ8-UTWY].

²⁶¹ Liav Orgad, *Liberalism, Allegiance, and Obedience: The Inappropriateness of Loyalty Oaths in a Liberal Democracy*, 27 CAN. J. L & JURIS. 99, 112 (2014).

requirement has been somewhat of “a rule for all seasons.” This lack of agreement could be seen as an example of what Cass Sunstein has called an “incompletely theorized agreement” while different theoretical perspectives can sometimes agree on a particular outcome—in this case, that a citizenship requires attachment of some kind—there is not necessarily an agreement on the justifications that reach the outcome or how to measure its success.²⁶² Sunstein argues that incompletely theorized agreements are an “important source of successful constitutionalism and social stability.”²⁶³ They can be valuable in diverse societies to accommodate differences in approaches while agreeing on specific outcomes. However, when the outcome is abstract and its interpretation left to the discretion of judges and administrators, as we have seen with the attachment requirement, people will receive different treatment under the same law. In Sunstein’s words, “[i]ncompletely theorized agreements have many virtues; but their virtues are partial. Stability, for example, is brought about by such agreements, and stability is usually desirable; but a constitutional system that is stable and unjust should probably be made less stable.”²⁶⁴ While it is generally agreed that newcomers must have some sort of attachment to a state, without a relevant guiding theory, what attachment means, in what ways it is established, and in what ways it should be shown are variable. Legislators, administrators, and judges create their own interpretations and the meaning changes over time—leading to a system that has historically marginalized certain groups or treated applicants with the same circumstances in different ways questioning its fairness and overall legitimacy. The next part explores the use of attachment as a precondition for naturalization in other jurisdictions: Denmark, Canada, and France.

III. ATTACHMENT REQUIREMENTS AROUND THE WORLD

Naturalization can be considered a means to an end—the way in which a political community defines the “we” and identifies the desired “they” who can become part of “us.”²⁶⁵ Over the last two decades, there has been a growing appeal to consider “attachment” as a condition for naturalization.²⁶⁶ The Canadian Government introduced the *Strengthening Canadian Citizenship Act*, which aimed to ensure

²⁶² Cass R. Sunstein, *Incompletely Theorized Agreements in Constitutional Law* 10 (U. Chi. L. Sch. Pub. L. & Legal Theory, Working Paper No. 147, 2007).

²⁶³ *Id.* at 2.

²⁶⁴ *Id.* at 19.

²⁶⁵ Liav Orgad, *Naturalization*, in *THE OXFORD HANDBOOK ON CITIZENSHIP* 338 (Ayelet Shchar, et al. Rainer Baubock, Irene Bloemraad & Maarten Vink eds., 2017).

²⁶⁶ A recent example is from the ex-Prime Minister of France, Bernard Cazeneuve, who said: “nous avons besoin d’entendre les musulmans dire leur attachement à la République” (*we need to hear Muslims state their attachment to the Republic*). Bernard Cazeneuve: “*Il Faut Que le Dialogue avec les Musulmans Soit Constant*”, EUROPE1 (Oct. 20, 2019, 8:49 PM), <https://www.europe1.fr/politique/face-a-lislamisme-les-musulmans-doivent-davantage-faire-entendre-leur-voix-appelle-bernard-cazeneuve-3926384> [<https://perma.cc/3SPG-G53H>].

that applicants for naturalization “have a strong attachment to Canada.”²⁶⁷ Attachment requirements are also prevalent in Europe. In France, the state asks newcomers to demonstrate attachment to the principles of the republic;²⁶⁸ in Denmark, couples seeking family reunification must prove that their aggregate attachment to Denmark is stronger than to any other state.²⁶⁹

International law supports an attachment requirement of some kind. In 1955, the International Court of Justice stated in a case between Liechtenstein and Guatemala that the recognition of citizenship is based on a “social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.”²⁷⁰ The spirit of this reflection, known as the “genuine link doctrine,” has been reiterated by regional courts and in international conventions. In 1984, the Inter-American Court on Human Rights defined citizenship as “the political and legal bond that links a person to a given state and binds him to it with ties of loyalty.”²⁷¹ On 23 January 2019, a report from the Commission to the European Parliament, Investor Citizenship and Residence Schemes in the European Union, asserted that some “genuine link” is necessary between person and state for citizenship acquisition.²⁷² The Commission stated that “the ‘bond of nationality’ is traditionally based either on a genuine connection with the people of the country (by descent, origin, or marriage) or . . . a genuine connection with the country, established either by birth in the country or by effective prior residence in the country for a meaningful duration.”²⁷³

Thus, based on international and regional law, attachment is deemed important to citizenship. For many states, attachment has been a guiding concept for naturalization policy; nevertheless, there has been little research on what “attachment” entails, whether and how it is accepted by the state, and what it reveals about the contemporary content of citizenship.²⁷⁴ Moreover, some scholars have warned about

²⁶⁷ *Strengthening Canadian Citizenship Act: Reinforcing the value of Canadian Citizenship*, GOV'T CAN., <https://www.canada.ca/en/news/archive/2014/02/strengthening-canadian-citizenship-act-reinforcing-value-canadian-citizenship.html> (last visited May 8, 2023).

²⁶⁸ CODE CIVIL [C. CIV.] [CIVIL CODE] arts. 21–24 (Fr.).

²⁶⁹ *Baio v. Denmark*, App. No. 38590/10, ¶¶ 32–34 (May 24, 2016), <https://hudoc.echr.coe.int/eng?i=001-163115> [<https://perma.cc/2TGA-BVCW>].

²⁷⁰ *Nottebohm (Liech. v. Guat.)*, Judgment, 1955 I.C.J. Rep. 4, 23 (Apr. 6).

²⁷¹ Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4, ¶ 35 (Jan. 19, 1984).

²⁷² *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Investor Citizenship and Residence Schemes in the European Union: Investor Citizenship and Residence Schemes in the European Union*, at 5–6, COM (2019) 12 final (Jan. 23, 2019).

²⁷³ *Id.*

²⁷⁴ The Eurobarometer survey, widely used by European policymakers, asks whether Europeans feel more attached to their community, region, state, the EU, or global community. Understanding the concept of attachment is not only important from an academic perspective it has policy relevance. *See, e.g., European Parliament Eurobarometer Parlemeter*

“genuine link” or “attachment” tests that are “infinitely elastic” in a globalized world where “[t]he threshold for demonstrating links with a state, its people and its economy are categorically lower than . . . in the past.”²⁷⁵ In the dissenting opinion in the *Nottebohm* case, one judge suggested that: “There must be objective tests, readily established.”²⁷⁶

This section looks at how attachment requirements have been used in three states through marriage, residency, and merit.²⁷⁷ It highlights where they have been elastic in interpretation and/or subject to state discretion. As such, it offers an assessment based on the flexibility (how accepting the requirement is to the different ways a person can demonstrate attachment) and objectivity (how impartial is the test in terms of state discretion). These approaches do not characterize the overall citizenship regime of the state; the purpose is to merely provide examples for different styles of interpreting and accepting a newcomer’s attachment. The goal of this comparative section is to demonstrate other uses of “attachment” to draw out lessons for the United States to decide whether such a requirement should remain and if so, in what way.

A. Denmark

Attachment can be considered links a person has to a state’s citizen. In Denmark, an attachment requirement was formally adopted into migration regulation in 2000, stating that for family reunification a couple’s aggregate attachment to Denmark must be greater than their attachment to any other country.²⁷⁸ The requirement became an important pillar of Danish migration regulation.²⁷⁹ While what exactly constitutes “attachment” is not well defined in the legislation, it is stated to be calculated based on the couple’s residency in Denmark versus their country of origin, whether the couple has familial ties to Denmark, their Danish-language skills, and their educational and economic attachment to Denmark.²⁸⁰ On the official form for family reunification there are only two questions for measuring “attachment”: i) Have you visited Denmark before?; and, ii) Have you lived in any other country than your home country for more than six months? The couple must also sign a

2015, EB/EP 84.1 (Nov. 30, 2015), <https://www.europarl.europa.eu/at-your-service/en/be-heard/eurobarometer/2015-parlemeter> [<https://perma.cc/M6AE-BCWW>].

²⁷⁵ Peter Spiro, *Nottebohm and ‘Genuine Link’: Anatomy of a Jurisprudential Illusion* 20 (Inv. Migration, Working Paper No. IMC-RP 2019/1, 2019).

²⁷⁶ *Nottebohm* (Liech. v. Guat.), Judgment, 1955 I.C.J. Rep. 4, 46 (Apr. 6) (separate opinion by Read, J.).

²⁷⁷ See generally Mantha-Hollands & Džankić, *supra* note 13, at 1, 3.

²⁷⁸ Mons Bissenbakker, *Attachment Required: The Affective Governmentality of Marriage Migration in the Danish Aliens Act 2000–2018*, 13 INT’L POL. SOCIO. 181, 182 (2019).

²⁷⁹ *Id.* at 183.

²⁸⁰ *Id.* at 182.

declaration of integration that includes finding employment, learning Danish, “understanding . . . the fundamental norms and values of Danish society,” participating in the community, and facilitating the integration of any children the couple may have.²⁸¹

From the Danish perspective, attachment links personal connections to the access of citizenship.²⁸² In one case that went to the European Court of Human Rights, *Biao v. Denmark*, the applicant and his spouse were denied reunification as their aggregate attachment was decided to be greater to Ghana than to Denmark.²⁸³ Biao was born in Togo, but spent his teenage years in Ghana, where he went to high school.²⁸⁴ In 1993, Biao entered Denmark and acquired Danish citizenship in 2002.²⁸⁵ By this time, Biao spoke fluent Danish, had participated in a range of integration courses, and had lived and worked in Denmark for 10 years.²⁸⁶ In 2003, he married a woman from Ghana and applied for family reunification.²⁸⁷ The Ministry for Refugees, Immigration and Integration stated that the family should settle in Ghana as that would only require that Biao gain employment there.²⁸⁸ They argued that:

[A]ccording to the preparatory work of the Act, the overall aim of the attachment requirement, which is a requirement of lasting and strong links to Denmark, is to regulate spousal reunion in Denmark in such a manner as to ensure the best possible integration of immigrants in Denmark, an aim which must in itself be considered objective.²⁸⁹

Furthermore, “in general, a person of 28 years who has held Danish nationality since birth will have stronger real ties with Denmark and greater insight into Danish society than a 28-year-old person who—like [the first applicant]—only established links with Danish society as a young person or an adult.”²⁹⁰ This assumption shows that the state is given full discretion in determining who can be granted citizenship.

Prior to the formulization of the attachment requirement, the Aliens Act of 1997 framed attachment as a consequence rather than a prerequisite for membership.²⁹¹ It constituted “personal” attachment rather than a “national” attachment. The new

²⁸¹ DANISH IMMIGR. SERV., FORM FA1 APPLICATION FOR FAMILY REUNIFICATION OF SPOUSES (2023).

²⁸² Kalm, *supra* note 238, at 142.

²⁸³ App. No. 38590/10, ¶ 18 (24 May 2016), <https://hudoc.echr.coe.int/eng?i=001-163115> [<https://perma.cc/S653-VKA9>].

²⁸⁴ *Id.* ¶¶ 10–11.

²⁸⁵ *Id.* ¶¶ 11, 14.

²⁸⁶ *Id.* ¶¶ 11, 16.

²⁸⁷ *Id.* ¶¶ 15–17.

²⁸⁸ *Id.* ¶ 24.

²⁸⁹ *Id.* ¶ 26.

²⁹⁰ *Id.* ¶ 29.

²⁹¹ Bissenbakker, *supra* note 278, at 189.

expression displays the relationship between integration and family migration. As Saskia Bonjour and Albert Kraler find, “the alleged ‘failure’ of migrants to integrate is ‘often laid at the door of their families, or rather their practices of familial relations, and the (collectivist) principles (cultural, religious) which underpin them.’”²⁹² Furthermore, the choice of a partner from abroad is considered a failure of integration and demonstrates a lack of attachment.²⁹³

The Danish requirement is stated to be calculated based on a medley of different ingredients (and therefore, flexible to different contexts and considerations) but leaves much to state discretion (subjective): How can administrators realistically measure personal connections? In Denmark the attachment requirement is based on the couple’s collective relationship with Denmark as well as their previous state of citizenship. This further sets it apart from the U.S. model which focuses on the individual’s relationship with the state uniquely.

B. Canada

Residency is a common criterion for considering attachment; it is generally assessed by habitual or consecutive years lived within the state. Through residency, it is presumed the applicant becomes a member of society—for example, because of exposure to language, creating professional ties, or developing a public education. This interpretation imagines citizens linked through territorial presence which “is deemed to forge the special association that qualifies all individuals as citizens of one polity.”²⁹⁴

Between 2009 and 2015 the government in Canada passed several changes to citizenship laws together called the *Strengthening Canadian Citizenship Act* with the goal of reinforcing the value of Canadian citizenship—“the amendments support the government’s commitment to the successful integration of new citizens into our labor market and our communities, ensuring that they are better prepared to assume the responsibilities of citizenship and have a strong attachment to Canada.”²⁹⁵ The amendments changed a number of requirements for citizenship applicants, notably increasing the residency requirement, filing income tax in Canada, and demanding the applicant’s intention to continue to reside within the state once granted citizenship.²⁹⁶ In Canada, there has been a long and growing anxiety about people acquiring

²⁹² Saskia Bonjour & Albert Kraler, *Family Migration as an Integration Issue? Policy Perspectives and Academic Insights*, 36 J. FAM. ISSUES 1407, 1410 (2015).

²⁹³ *Id.* at 1411.

²⁹⁴ Neil Walker, *The Place of Territory in Citizenship*, in THE OXFORD HANDBOOK OF CITIZENSHIP 556 (Ayelet Shachar et al. eds., 2017).

²⁹⁵ *Changes to the Citizenship Act as a Result of Bill C-6*, GOV’T CAN., https://www.canada.ca/en/immigration-refugeescitizenship/news/2017/10/changes_to_the_citizenshipact/asareultofbillc-6.html (last visited May 8, 2023).

²⁹⁶ *Id.*

citizenship and then continuing to live abroad.²⁹⁷ Thus, the focus of the act was to ensure that applicants be physically present within the bounded territory.

Looking to case law, judges have considered attachment through residency as a proxy for other bonds. Take the case of Huiling Nie, who came to Canada as a student and received her permanent residence permit when she subsequently went to Harvard University for a postdoctoral position.²⁹⁸ In 2008, she applied for citizenship falling short of the 1095-day residency requirement by 750 days.²⁹⁹ The judge nevertheless approved her application arguing that “[s]he is as devoted to our country as anyone I have met. Her whole focus has been in being in Canada whenever possible and in living and working here in the future. I approve strongly.”³⁰⁰ In 2010, the Minister of Citizenship and Immigration appealed the judge’s decision on the grounds that: i) the applicant’s centralized mode of existence was not Canada; and ii) her connection to Canada was not more substantial than with any other country. “The court found that though she could prove her strong preference for Canadian culture, it was not enough to show a more substantial connection than the U.S.”³⁰¹ By failing to fulfill her residency requirement, Nie was not considered sufficiently attached to Canada.³⁰²

In another case, the basis for evaluating an applicant’s attachment was her time spent within the state. Helen Wang became a resident of Canada in 2007 and applied for citizenship in 2010 after fulfilling the residency requirement.³⁰³ In 2011, she completed and passed a written citizenship test.³⁰⁴ She subsequently left Canada to return to her husband in China.³⁰⁵ In 2013, after following up with her application, Helen was informed that she would be required to attend a hearing in which she would be asked questions about her language proficiency and knowledge of Canada.³⁰⁶ At the hearing in November 2013, the judge informed her that she would be required to take an oral knowledge test (not the standard multiple-choice format of the written test), which she failed.³⁰⁷ The judge justified the administration of a

²⁹⁷ In its most extreme form, is the anxiety over “birth tourism.” In 2014, a hospital in a suburb of Vancouver was exposed for helping women from overseas have babies in Canada thus, securing Canadian citizenship. This sparked a petition from some in the riding and a national conversation over whether to maintain such a generous *jus soli* model. *See, e.g.*, Nicholas Keung, *Ottawa Urged to Remove Citizenship by Birth on Canadian Soil*, TORONTO STAR (Aug. 19, 2014), https://www.thestar.com/news/immigration/2014/08/18/ottawa_urged_to_remove_citizenship_by_birth_on_canadian_soil.html [<https://perma.cc/TBV9-TGHU>].

²⁹⁸ *Minister of Citizenship & Immigr. v. Nie*, [2010] F.C. 449, para. 2 (Can.).

²⁹⁹ *Id.* ¶¶ 3, 10.

³⁰⁰ *Id.* ¶ 7.

³⁰¹ *Id.* ¶ 19.

³⁰² *Id.* ¶¶ 19–20.

³⁰³ *Wang v. Minister of Citizenship & Immigr.*, [2014] F.C. 1187, paras. 2, 8 (Can.).

³⁰⁴ *Id.* ¶ 3.

³⁰⁵ *Id.* ¶ 22.

³⁰⁶ *Id.* ¶¶ 4–5.

³⁰⁷ *Id.* ¶ 6.

retest because the previously completed written test was not considered a reliable indicator of the applicant's knowledge of Canada as she had resided outside of Canada since her application for citizenship.³⁰⁸ The judge stated: “[A] genuine concern arises that you have lost touch with Canada, its institutions, its people, its values and traditions. In order to find that you have met the knowledge requirement of the *Act*, I must be satisfied that you have preserved this basic understanding of Canada.”³⁰⁹ While there are arguably other normative issues with this case, the framework is consistent, residency is the determinant of attachment.

Unlike the U.S. model, Canada provides a primarily residency-based approach to attachment. It is a non-flexible and objective test that is completed by metrics: the applicant must have been physically present three out of five years within the state and continue to reside therein.³¹⁰ Attachment is not a condition for naturalization but a policy goal established through residency. While the U.S. requirement has fluttered between different interpretations, purposes, contents, and methods, the Canadian case has used a basic standard for determining attachment.

C. France

In France, applicants for naturalization must demonstrate their attachment to the values and principles of the republic.³¹¹ One way to establish this has been through merit. Attachment based on “merit” links citizens to states by means of a particular performance which is regarded as a condition for formal belonging. There are different views of what exactly “merit” is; however, it is connected to an idea of deservingness based on an individual's abilities and talent.³¹² In its most exaggerated forms, it includes wealth-based citizenship acquisition or fast-tracked investment-based entry,³¹³ as well as different notions of national interests or public service—such as in academia, science, technology, or the arts.³¹⁴ In some cases, states have included acts of national heroism.³¹⁵

³⁰⁸ *Id.* ¶ 11.

³⁰⁹ *Id.* ¶ 22.

³¹⁰ Minister of Citizenship & Immigr. v. Nie, [2010] F.C. 449, para. 9 (Can.).

³¹¹ CODE CIVIL [C. CIV.] [CIVIL CODE] arts. 21–24 (Fr.).

³¹² See, e.g., MICHAEL SANDEL, *THE TYRANNY OF MERIT: WHAT'S BECOME OF THE COMMON GOOD?* 34 (2020); Ayelet Shachar, *Picking Winners: Olympic Citizenship and the Global Race for Talent*, 120 *YALE L. J.* 2088, 2102 (2011); see also Peter Spiro, *The End of Olympic Nationality*, in ALLEGIANCE AND IDENTITY IN A GLOBALISED WORLD, 478 (Fiona Jenkins, Mark Nolan & Kim Rubenstein eds., 2014).

³¹³ Ayelet Shachar, *Unequal Access: Wealth As a Barrier and Accelerator to Citizenship*, 25 *CITIZENSHIP STUD.* 543 (2021).

³¹⁴ Shachar, *supra* note 312, at 2096.

³¹⁵ See, e.g., Mamoudou Gassama: Mali ‘Spiderman’ becomes French Citizen, BBC (Sept. 13, 2018), <https://www.bbc.com/news/world-europe-45507663> [<https://perma.cc/QL7Q-XG8S>].

Instituting naturalization requirements based on merit has a long history in France. Article 4 of the 1790 Constitution gave power to the legislature to offer naturalization “under special circumstances.”³¹⁶ In 1792, a similar but more specific decree was instituted: “to call upon all sources of the enlightenment and to bestow the right to join in this great act of reason on men who, through their sentiments, their writings, and their courage have shown themselves eminently worth; . . . the title of French citizen.”³¹⁷ Several prominent Enlightenment thinkers were offered French citizenship—for example, Thomas Payne and Jeremy Bentham.³¹⁸ In 1939, aliens who performed military services for the French army were granted citizenship under this same logic.³¹⁹ This is also true (especially since the 1990s) for prominent athletes who can benefit from citizenship in France as a form of public service.³²⁰

A recent illustrative (yet extreme) example of how merit is an indicator of attachment to France is the case of “Le Spider-man” who rescued a child who was hanging from a Paris balcony.³²¹ Mamoudou Gassama, a Malian migrant “sans papier” (undocumented), scaled up four balconies in September 2018 to save a child who had fallen and been dangling over the railing.³²² The scene was filmed by bystanders and quickly went viral. This performance earned him honorary French citizenship.³²³ Benjamin Griveaux, a government spokesperson under President Macron, stated: “this act of immense bravery, faithful to the values of solidarity of our republic, should open the door to him to our national community.”³²⁴ The official decree echoed this sentiment: “This act of great bravery exemplifies the values which help unite our national community, such as courage, selflessness, altruism and taking care of the most vulnerable.”³²⁵

In France, this form of citizenship acquisition is a reward for an act demonstrating attachment to the principles and values of France. It is performance-based and

³¹⁶ PATRICK WEIL, *HOW TO BE FRENCH* 14 (2008).

³¹⁷ *Id.* at 15.

³¹⁸ *Id.*

³¹⁹ Didier Fassin & Sarah Mazouz, *What Is It to Become French? Naturalization as a Republican Rite of Institution*, 50 *REV. FRANCAISE SOCIO.* 37, 43–44 (2009).

³²⁰ *Id.* at 44.

³²¹ Kim Willsher, *Spider-Man of Paris to Get French Citizenship After Child Rescue*, *GUARDIAN* (May 29, 2018), <https://www.theguardian.com/world/2018/may/28/spider-man-of-paris-to-get-french-citizenship-after-rescuing-child> [<https://perma.cc/UG6P-6U7Y>]. A second recent case involved Lassana Bathily who saved several people during the Hyper Casher Supermarket attack. *Malian hero of supermarket attack to be given French citizenship*, *FRANCE24* (Jan. 15, 2015), <https://www.france24.com/en/20150115-france-malian-hero-lassana-bathily-kosher-supermarket-attack-citizenship> [<https://perma.cc/G4W2-Q6S3>].

³²² Willsher, *supra* note 321.

³²³ *Id.* Article 21-19 of the French civil code offers citizenship for those who have performed “exceptional services” for the nation. *CODE CIVIL* [C. CIV.] [CIVIL CODE] art. 21-19 (Fr.).

³²⁴ Willsher, *supra* note 321.

³²⁵ SANDEL, *supra* note 312.

is flexible in nature as it can accommodate all sorts of acts and social or political relationships. However, it is unclear by which standards and achievements a person will qualify for earning citizenship and is therefore subjective as it is completely up to state discretion. Like in the United States, the methods of demonstrating attachment have been temporal, evolving based on the historical context and state priorities.

This comparative view sheds light onto the U.S. case. In the United States, the attachment requirement has had different degrees of flexibility and objectivity. Its large discretionary interpretation has at times allowed it to be a politically motivated tool for exclusion. Looking to other cases, the thickest attachment requirement exists in Denmark, where the methods of determining attachment are elusive and allow the state full discretion in interpretation. Denmark uses the attachment requirement to maintain the general status quo of restriction in immigration and citizenship law. Unlike the United States and Denmark, the Canadian perspective uses concrete indicators for attachment as residency within the state. Residency is the proxy for all other social, political, and economic ties.³²⁶ The mere fact of physical presence “links individuals to a state’s territory and/or its inhabitants in ways that ground certain duties and entitlements.”³²⁷ It uses clear demarcations for attachment—e.g., the number of days spent within the bounded territory. In France, newcomers can prove their attachment to French values through criteria such as heroism. Once the individual has established their worth the prize for performance is citizenship.

While the United States can look to these states for other examples of attachment to determine whether the requirement is still needed and in what ways, these states should be cautious of using attachment as a model to design membership policies. The benefits and drawbacks of discretionary and elastic tests have been understudied in social sciences. Thus, states should proceed with caution. First, because those without indicators of what constitutes “attachment” can use it as a tool for the state to exclude certain groups for political reasons. Second, these states should reflect on the exact purpose of such a test and whether the requirement is serving said purpose. This would be useful for applicants who need to become aware of the exact standards and criteria for membership. And third, these states should be transparent in the methods they use to accept attachment to prevent the test from becoming conflated with other naturalization criteria as the U.S. case has demonstrated.

CONCLUSION: THE FUTURE OF ATTACHMENT REQUIREMENTS

This Article has served three purposes: i) it is the first historical doctrinal analysis of the attachment requirement in U.S. naturalization law; ii) it explores judicial interpretations in case law and compares them with administrative approaches on the

³²⁶ See generally JOSEPH CARENS, *THE ETHICS OF IMMIGRATION* (2013).

³²⁷ Jakob Huber, *EU Citizens in Post-Brexit UK: The Case for Automatic Naturalization*, 41 J. EUR. INTEGRATION 801, 804 (2019).

implementation of a legal requirement; and iii) it reflects on the use of state discretion in naturalization decisions. The Article has examined the interpretations of the U.S. attachment requirement since its original founding in the American colonies. It has offered a legal, historical, and theoretical approach to show how it has been defined by the political branches of government based on evolving priorities in response to changing social phenomena. At the same time, the courts, never having any definition to refer to, have taken on their own interpretations of the purpose, content, and method for testing the requirement rooted in different theories of citizenship, membership, and belonging. The attachment requirement has over the years included a little bit of this and that—with little consistency. The elasticity of the attachment requirement has, on the one hand, rendered it meaningless, conflated with the good moral character requirement and the oath of allegiance. On the other hand, its interpretative flexibility has allowed for its instrumentalization to exclude certain applicants.

Attachment requirements relate to questions of where to draw the state's boundary. They highlight what Jo Shaw has called “constitutional citizenship,” i.e., the membership relationship between the citizen and the state, and the understandings of belonging lay at the heart of the polity.³²⁸ Looking at how attachment is used in other liberal democracies sheds light onto some potential lessons. These states have also at times struggled to define the content of membership and have used different approaches to determine the attachment of newcomers based on marriage, merit, and residency. The approaches deserve their own assessment based on the purpose, content, method, and theory—an exercise that is beyond the scope of the current Article. The point is to demonstrate potential alternatives to the attachment requirement. The comparative approach demonstrates the necessity of a social science inquiry into the benefits and drawbacks of discretionary naturalization procedures. How do outcomes for naturalization applicants change depending on the elasticity and objectivity of requirements?

Assuming that attachment is a necessary criterion for membership, how might states implement an attachment requirement moving forward? One approach would be through technology. A number of mobile applications have been developed in Europe and elsewhere to develop immigrant integration.³²⁹ The rationale “gamifies” membership by encouraging newcomers to become involved in their communities—where membership is the ultimate prize. A second approach would be to allow people to develop attachments spontaneously. This approach rests on a multicultural interpretation of attachment where citizens can live a plural way of life without too much intervention. It sees attachment as being something that will naturally form

³²⁸ See JO SHAW, *THE PEOPLE IN QUESTION: CITIZENS AND CONSTITUTIONS IN UNCERTAIN TIMES* 3–5 (2020).

³²⁹ See Nick Drydak, *Mobile Applications Aiming to Facilitate Immigrant's Society Integration and Overall Level of Integration, Health and Mental Health: Does Artificial Intelligence Enhance Outcomes?* (Glob. Lab. Org. Working Paper No. 734, 2020).

based on regular daily life. In essence, this is what Ayelet Shachar calls *jus nexi*.³³⁰ For Shachar, evaluating a person's attachment would be based on "the recipient's own actual behavior" as an indication of their connection to a particular polity.³³¹ This could include "establishing residency, in the relevant political community, sending remittances, [and] maintaining links with the country"—the ongoing maintenance of social ties.³³²

Whichever way attachment is used as a condition for citizenship requires a careful inquiry into the theory, purpose, content, and method of requirement. As global migration grows, and citizenship remains a fundamental organizing principle of states this will become more of a pressing issue. This Article has offered a substantive review of the attachment requirement in U.S. history and reflection into what ways attachment is still needed for citizenship. In doing so, it contributes to a richer understanding of the relationship between legal membership and social belonging.

³³⁰ See generally AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY* (2009).

³³¹ *Id.* at 173.

³³² *Id.*