Being American

Nicolas BARREYRE

What is an American? By exploring the history of the loss of citizenship, Patrick Weil argues that being American means being a sovereign citizen endowed with inalienable rights. The history of denaturalization, a seemingly marginal phenomenon, provides fresh insight into the legal construction of citizenship as a fundamental right.

Reviewed : Patrick Weil, *The Sovereign Citizen: Denaturalization and the Origins of the American Republic*, Philadelphia, University of Pennsylvania Press, 2012, 285 p., $34.95.

Sometimes the narrow end of things provides the best perspective. At times, the fringe or the borderline case sheds more light on a notion than facing it squarely. This is what Patrick Weil does in his latest work. Through the analysis of a rather recent and rare phenomenon—the loss of nationality—he offers a new vision of citizenship, a central notion in American history already addressed in an extensive historiography[1].

Is this the happy result of a shifting gaze, shaped by the encounter of two historiographies? Patrick Weil is a French scholar well-known for his work on French nationality[2] and immigration policies[3]. But he has also been teaching at Yale Law School for several years. The fact remains that *The Sovereign Citizen* deals with nationality in the context of a culture more ready to discuss citizenship—and only occasionally do these two terms have the same meaning. Obtaining citizenship has not always concerned only immigrants: in 1857, the Supreme Court ruled in *Dred Scott v. Sandford* that people of African descent could not be American citizens—even though they were Unites States nationals—until it was overruled by the 14th Amendment in 1868. Likewise, only a minority of Native Americans had access to American citizenship before 1924. On the contrary, during the 19th century, European immigrants sometimes had political rights, including the right to vote, even though they were not American nationals. Only in the 20th century did both notions permanently merge.

Perhaps this is why Patrick Weil's specific object of study—the loss of nationality—is so fruitful. Though it concerns a limited number of cases—approximately 22,000 in the 20th century—it entails a significant shift in the legal definition of American citizenship over two

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[1] Over the last five years, at least 36 books on American history published in the Unites States included the term *citizenship* in their title, according to bibliographical data provided by the *Journal of American History* : http://www.oah.org/rso/ [accessed January 7, 2013].

[2] *Qu'est-ce qu'un Français ? Histoire de la nationalité française depuis la Révolution*, Paris, Gallimard, « Folio Histoire », revised and expanded edition, 2005 ; *Être français. Les quatre piliers de la nationalité*, Paris, L'Aube, 2011.

[3] *La France et ses étrangers. L'aventure d'une politique de l'immigration de 1938 à nos jours*, Paris, Gallimard, « Folio Histoire », new consolidated edition, 2005.

thirds of the century. Citizenship went from being uncertain to unconditional. Citizens are no longer just participants in civic life: they have become a fragment of the sovereign. Thus in the 1960s, the *individual* was vested with popular sovereignty, the foundation of the Republican system. Patrick Weil illustrates how the Supreme Court's interpretation made citizenship prevail over the State. Henceforth, the loss of citizenship would only be possible if voluntarily relinquished.

Or rather, for citizens by birthright. For naturalized citizens can still potentially be denaturalized, even though it is rare and more difficult to order. The irony is tangible: in a series of rulings on denaturalization, the Supreme Court gave birth to the citizen's absolute sovereignty; but because it limited the scope of its own jurisprudence, this kind of citizenship was restricted to US-born Americans (thus establishing a somewhat absolute *ius soli* on the grounds of the 14th Amendment). Paradoxically, immigrants secured the rights of nationality for "home-born" Americans.

A History of Denaturalization

The history of denaturalization in the United States is recent, since its first legal mention appeared in a 1906 Act. Before that, only the 1868 assertion of citizens' right to relinquish their nationality in order to adopt a new one addressed this issue. But the purpose then was primarily to grant new citizens legal protection from the European powers they had left. Denaturalization is therefore a 20th century story: it tells the expansion of the Federal State, the broadening of the Executive's authority, and increasing bureaucratization; it combines the upsurge of patriotism and its byproducts, xenophobia and anticommunism. And it is solved through the transformation of the Supreme Court's role after the Second World War, when it became the punctilious guardian of broad constitutional rights for citizens.

Patrick Weil sets forth a three-phase account of this history. First, the essay analyzes how denaturalization helped strengthen the federal state and within it, the expanding bureaucratic apparatus. Nonetheless, this was not its initial purpose: denaturalization was established to combat the massive and often fraudulent naturalizations of immigrants performed right before an election to multiply voters for this or that party. This had been going on for a while but Congress only took action in 1906. However, by creating a Bureau within the Department of Labor in charge of the enforcement of the new law, it set off a process radically different from its initial intention. Bureaucracy is an autonomous institution: it sets its own goals, sometimes to assert its own power, sometimes in pursuit of an ideal of order. In this section, Patrick Weil describes the political rivalry between different Departments—Labor, Justice, State—as well as the changes in the work of federal and state courts, which erratically contributed to a protracted federalization and bureaucratization of the granting of American nationality, ultimately enshrined by a 1990 Act. In 1900, if an immigrant wanted citizenship s/he addressed the request to a state court; after a hearing, the court could decide to grant the person citizenship on behalf of the United States of America. In 2000, immigrants had to file an administrative request with the Immigration and Naturalization Service, sole body in charge of processing the request and making a decision. Courts—including federal courts—were thereby merely in charge of hearing the new citizens' Oath of Allegiance to the USA. (After 9-11, the procedure changed: the INS was dissolved and its remit was reorganized within the newly created Department of Homeland Security; how immigration has become a matter of "homeland security" is a whole other topic.)

Beyond Technical Matters, Political Stakes

This history shows that from very early on, *de*naturalization was used as a means to control naturalizations. A technical means: there had to be a way to undo what had been wrongly done. But above all, a political means: the fear of undercover agents, of foreign anarchists, and to put it bluntly, of anti-Americans-un-Americans—, ended up being an excellent means for the newly created Bureau of Naturalizations to demonstrate its political and patriotic value. The second part of Patrick Weil's work opens by summoning the first victim of political denaturalization: the anarchist Emma Goodman (the author had the brilliant idea to include in the book's appendices the text she wrote upon having been deprived of her civil rights).

At the beginning of the 20th century, massive immigration ignited a political controversy which ultimately led to the implementation of national quotas in 1921 and 1924. In 1907, this discussion also involved the creation of a conditional, revocable citizenship for naturalized Americans: all of a sudden, they were to meet a vast array of requirements not just to obtain but to *keep* their American citizenship. They were no longer entitled to live abroad. They were requested to comply with society's moral standards: adultery, advocating free love, or the possession of alcohol during Prohibition, were causes for denaturalization. First and foremost, a broad interpretation of the law quickly made political opinion offences grounds for denaturalization. As the Federal Government plunged headlong into the "Red Scare", in the aftermath of World War I, the administration and courts crafted jurisprudence according to which the expression of anarchist opinions, then communist and socialist opinions, constituted retrospect evidence of the naturalized individual's "mental reservations" to the Oath of Allegiance to the United States, thus entailing a *de facto* nullity of his or her naturalization. Odd token of magical thinking, which envisioned the ritual as ineffective if the candidate did not truly believe in it, just like children crossing their fingers behind their back to make a promise they won't have to keep. Notwithstanding, this legal interpretation was the grounds for depriving numerous anarchist and communist militants, and later fascists, of their civil rights, in the interwar years.

The conditionality of American citizenship therefore hinged on the idea of loyalty to the homeland—with all the subjective judgments this entails. Moreover, as the political tensions caused by the crisis in Europe rippled across the Atlantic, this conditionality was, for the first time, extended to Americans by birth. Up until then, besides Americans who became citizens of another country, the only cases of *denationalization* (the loss of the nationality for citizens born as such, as distinct from *denaturalization*, which is the revocation of citizenship previously granted to a person born a foreigner) had concerned women married to foreigners, said to be taking their husbands' nationality. In the United States, this provision came into force between 1907 and 1922. But a 1940 Act established a list of actions which could cause the loss of nationality for *any* American citizen since they were considered as *de facto* evidence of allegiance to a foreign power: fighting or working for a foreign army, participating in elections anywhere else than in the United States, deserting the American army, committing high treason. In short, political offence made citizenship revocable for all.

"War in the Supreme Court"

But even during the Second World War, there was hardly a consensus on this situation. The activism displayed by the Department of Justice, as it created a denaturalization program for those who sympathized with the enemy, impelled the Supreme Court to intervene. In a first 1943 ruling, *Schneidermann v. the United States,* the Court ruled that political opinions alone are not sufficient grounds for denaturalization. This case is the first of

a long series of rulings—over 25 between 1944 and 1971—which in 1967 led to the full protection of American citizenship: the "sovereign citizen" mentioned in the title.

The third part of the book focuses exclusively on the intense discussions between the Justices—a "war in the Supreme Court", as announced by Patrick Weil. The step-by-step account of the decision-making process is fascinating: the intellectual rivalries, the political oppositions, the personal friendships and enmities, the idiosyncratic rationale of American constitutional law. This reconstitution is based on archives and interviews with the main Justices' former clerks, in addition to the opinions delivered with each major ruling. Some well known figures stand out: Felix Frankfurter, a staunch advocate of judicial restraint, reluctant to limit the power of Congress by way of court rulings; Earl Warren and Hugo Black, the main authors of jurisprudence safeguarding citizens' rights against political abuse. Patrick Weil unfolds the rationale behind constitutional interpretations as well as the Court's internal evolutions which eventually led to the 1967 *Afroyim v. Rusk* ruling, putting an end to conditional citizenship. Since then, the 14th Amendment, by granting citizenship to all American-born individuals, has been regarded as putting citizenship beyond the reach of political power. The State is not sovereign; sovereignty is vested in the people and the State is merely a manifestation of this sovereignty. Therefore the State is not entitled to break the bond linking it to a citizen, who is an individual fragment of the sovereign.

The Limits of a Legal Approach

Patrick Weil's essay is essentially a history of "the legal dimension of citizenship", meaning "the formal linkage of each individual to the nation-state" (p. 5). This explicit position is quite meaningful. It entails a very sharp and insightful analysis of the evolution of a legal notion, as it is seized upon by Cabinet members, bureaucrats, district attorneys and judges and used to pursue their respective agendas. This approach is relevant to explain a legal system such as the American one, where constitutional practices and interpretations play a key role. But this specific angle often leaves broader social and political transformations out of view. And sometimes it even curtails the full potential significance of its conclusions.

This is the case for racial issues. Patrick Weil goes into great detail regarding Asian immigrants, who were the systematic target of denaturalization procedures by the Bureau of Naturalizations starting in 1906 and during the whole interwar period. The situation of Chinese immigrants was the most telling, since they were the specific targets of the 1882 Chinese Exclusion Act. For other Asian immigrants, the situation was more ambiguous: indeed, after 1870, citizenship was explicitly solely granted to "descendants of Whites and Africans". However some Asian immigrants were naturalized and they sometimes ended up, decades later, undergoing a revocation proceeding. The Federal administration's relentlessness led the Supreme Court to establish jurisprudence. Its tortuous argumentation is a compelling illustration of the difficulty to draw clear boundaries around racial categories in naturalization proceedings. For instance, the Supreme Court once refused to take skin color into consideration and claimed that "White" means being a member of the "Caucasian race". But in its next ruling, it refused to accept anthropological findings making Indians and Syrians members of the Caucasian race, and explained that it defined "free white persons" as "words of common speech" with the "understanding of the common man" (p. 80-81). This is but one example of how the American justice system often stretched its own logic when dealing with racial issues, just as it did in the 1896 *Plessy v. Ferguson* ruling. At this point, the argument could have been given additional breadth by linking this Supreme Court jurisprudence on denaturalization to the crucial issue in American society of legal discrimination against African Americans. Although they were not directly concerned by denaturalization, they were

the prime object of a racial legal mindset entirely shaped and governed by the intent to separate them, both on a conceptual and a practical level, from white society. When the Supreme Court took on the case of another group, in this case Asians, it was bound by this rationale on the color line.

In this sense, the post-Second World War shift displayed by the Supreme Court on denationalization and denaturalization was fully in line with the civil rights revolution, borne by a vast political movement. The creation of a sovereign citizenship took on its full meaning in the context of these transformations. It crowned the membership to the civic community which, ruling after ruling, the Supreme Court sanctioned, prohibiting political attempts to discriminate against specific, and especially racial, groups. In this regard, in grounding *Afroyim* in the 14th Amendment, it made it a building block in the legal construction of civil rights as much as the outcome of the battles surrounding denaturalization. It guaranteed the right to citizenship, just as other rulings guaranteed the rights pertaining to citizenship, namely the ones spelled out in the first ten amendments to the Constitution.

Thus the political significance of denaturalization and denationalization goes well beyond the legal saga analyzed by Patrick Weil. Signs of it surface throughout the essay. For instance, the American Legion, a right-wing patriotic veterans' organization, played a crucial role by reporting citizens whom they believed should be denaturalized—for political reasons. Voluntary organizations were often major players in political debates as well legal battles, as we know from the examples of temperance leagues or other anti-vice societies, which stepped in for the police when they deemed it ineffective. Their commitment provides insight into the political construction of citizenship as the affiliation to an exclusive body politic. More than a legal notion, denaturalization was a political creation. Congressmen made it law. Politicians often have different rationales and motivations from jurists. An incursion into the political aspects of the discussion on denaturalization would have proven enlightening on the legislator's intent or even on the state of mind of public opinion—two factors Justices are extremely attuned to. It would also raise the issue of the impact that the legal transformations of citizenship and the very possibility of losing one's nationality had on Americans' concrete experience of national and civic membership.

Conclusion

What is an American, then? Patrick Weil shows that Americans are first and foremost sovereign citizens endowed with inalienable rights. This has not always been the case, but the peculiar course taken by the notion of denaturalization ultimately led to a very solid status for citizens. For the last forty years, Americans have been enjoying the daily reality of this legal safety. Nevertheless, it does raise a question for the future: could the fact that the deprivation of nationality is virtually impossible endanger the rights pertaining to citizenship, in the event of political tension? America's legal tradition provides better protection for citizens than for foreigners: the administrative arrests of immigrants in the aftermath of 9-11 were a striking example of this and caused a surge in applications for citizenship. However, in the war on terror, some American citizens have been pursued not in criminal courts, but by military means. Is their inalienable tenure of citizenship somehow an opportunity to diminish the guarantees given to all citizens,, at a time when the USA is no longer waging a war on other states but on groups of individuals? This is a fundamentally political problem the Supreme Court will have to address when faced with the issue of the methods used in the war on terror.

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