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A Louisiana Civilian in the Supreme Court: *The Selective Service Cases Revisited*

by Charles J. Reid, Jr.

1. Introduction

The *Selective Draft Law Cases* of 1918 present a challenge to constitutional scholars. In his opinion in these consolidated cases, Chief Justice Edward Douglass White endorsed the constitutionality of the conscription law adopted by the United States upon its entry into World War I. But he did so most anomalously, grounding his opinion principally on the doctrine of state necessity as explained and expounded by the Continental legal theorist Emmerich Vattel and only secondarily on the American Constitution itself.

This article seeks to unpack this strange-looking-looking constitutional decision regarding a War long forgotten by most Americans. It will consider first the constitutional background to American conscription. It will then look some salient facts about Chief Justice White – especially focused on his military record, his training as a civilian, and his sophisticated use of Roman law as a sitting judge. The article then examines the structure of White’s opinion in the *Selective Draft Law Cases* and reviews the jurisprudential premises that governed his reasoning. The article closes with a discussion of the jurisprudential world in which he operated – one very different from the highly positivistic one that prevails today.

2. Conscription: Its Constitutional Background

In late 1916 and early 1917, only months after winning re-election on the campaign slogan «He Kept Us Out of War», President Woodrow Wilson and his advisors readied a proposed Selective Service Act for submission to Congress should it be needed. Using euphemistic language (“Selective Service” avoided the politically-risky vocabulary of “draft” or “conscription”), the Act meant to ensure that the Armed Forces had a ready supply of young men to fight in World War I¹.

¹S.D. Cashman, *America Ascendant: From Theodore Roosevelt to FDR in the Century of American Power, 1901-1945*, New York 1998, p. 154); and J.W. Chambers, *Decision for the Draft*, in «OAH Magazine of History», 17 (2002), pp. 26-30, 33.

Indeed, in early 1917, the United States was woefully unready to fight a major European War. In 1914, at the outbreak of European hostilities, the Army had fewer than 100,000 active duty personnel. And while Congress had taken some small steps to increase the Army's size, the numbers had barely budged by January, 1917².

In the early spring of 1917, Germany resorted to unrestricted submarine warfare upon neutral shipping as a last desperate measure to put Great Britain in a chokehold. In March, 1917 alone, five American merchant ships were sunk, and President Wilson, his patience exhausted, requested Congress declare war on Germany and her allies³. War was declared on April 6, 1917, and a few weeks later, on May 18, Congress enacted the Selective Service Act of 1917⁴.

The Act's passage was greeted by a tidal wave of protest. Socialist leader and perennial presidential candidate Eugene Victor Debs denounced the draft and was imprisoned⁵. Emma Goldman, the Russian immigrant anarchist and feminist, urged people to resist conscription and was also systematically prosecuted⁶. Riots, violence, and active subversion occurred in a number of places⁷. Soon enough, the Selective Service Act was made the subject of a constitutional challenge.

In truth, the American constitutional order never contemplated widescale involuntary conscription. A *Yale Law Journal* article dryly summarized what has been a consistent American attitude toward the draft: «The Selective Service System is the only government institution outside the criminal courts with the power to condemn a man to possible death»⁸.

During the Revolutionary War, General George Washington called upon the Continental Congress to conscript men, and while some states responded to this summons with local drafts, these efforts were not widespread nor very successful⁹.

² M.E. Grotelueschen, *The AEF Way of War: The American Army and Combat in World War I*, Cambridge 2007, p. 11.

³ R.P. Carlisle, *World War I*, New York 2009, p. 208.

⁴ Selective Service Act of 1917, P.L. 65-12, 40 Stat. 76 (1917).

⁵ R.A. Smolla, *Free Speech in an Open Society*, New York 1992, pp. 100-101; cf. *Debs v. United States*, 249 U.S. 211 (1919) (upholding Debs' conviction for alleged espionage).

⁶ P. and K. Avrich, *Sasha and Emma: The Anarchist Odyssey of Alexander Berkman and Emma Goldman*, Cambridge, MA, 2012, p. 272; *Criminal Law, Conspiracy: Inducing Resistance to Selective Draft Act*, in «*Yale Law Journal*», 27 (1918), pp. 955-956; and *Goldman v. United States*, 245 U.S. 474 (upholding Goldman's conviction).

⁷ D.W. Grantham, *The South in Modern America: A Region at Odds*, New York 1994, p. 80 (violent draft resistance in the South); W.R. Douglas, *The Germans Would Court Martial Me Too: St. Paul's World War I Socialist Draft Resisters*, in «*Minnesota History*», 55 (1997), pp. 286-301 (draft resistance in the upper Midwest); and J. Keith, *The Politics of Southern Draft Resistance, 1917-1918: Class, Race, and Conscription in the Rural South*, in «*Journal of American History*», 87 (2001), pp. 1335-1351 (draft resistance in the deep South).

⁸ «*The Selective Service*», *Notes and Comments*, in «*Yale Law Journal*», 76 (1966), p. 160.

⁹ J.W. Chambers II, *Conscription*, in *The Oxford Companion to American Military History*, edited by J.W. Chambers, II, Oxford 1999, p. 180.

While conscription was never directly raised as a concern at the time of the American Founding and the Constitution is officially silent on the matter, there was raised, during the drafting and ratification debates, a strong fear of «standing armies»¹⁰. A large, permanent military establishment was seen as a threat to individual liberty and conscription only served to make this danger even more vividly real¹¹. As finally ratified, the United States Constitution merely granted Congress the power to raise an Army with no instructions on how to do it¹².

The need for manpower during the War of 1812 prompted the first national discussions on conscription. Although Congress tried many inducements to recruit volunteers, the American war effort suffered chronic unmet needs for well-trained soldiers¹³. In the fall of 1814, at the request of Senator William B. Giles of Virginia, Secretary of State James Monroe proposed conscription legislation to Congress¹⁴.

The young New Englander, Daniel Webster, who would go on to argue more than 200 cases before the United States Supreme Court and gain respect as among the greatest constitutional thinkers¹⁵, stood on the floor of the U.S. House of Representatives to denounce the proposed legislation. The bill must be defeated, Webster declaimed, because it demanded the «surrender» of «the most essential rights of personal liberty» while «embrac[ing]» «despotism (...) in its worst form»¹⁶. A draft conferred upon the government «a power more tyrannical, more arbitrary, more dangerous, more allied to blood and murder, more full of every form of mischief, more productive of every sort of misery, than has been exercised by any civilized government, with one exception, in modern times»¹⁷. Monroe's proposal was never enacted into law.

The Civil War saw both sides resort to conscription. The Confederacy passed far-reaching conscription legislation in 1862¹⁸, and the Union followed suit in March, 1863¹⁹. Conscription met with resistance in both the North and the

¹⁰ R. Spitzer, *Right to Bear Arms* (II), in *Encyclopedia of American Civil Liberties: A-F*, edited by P. Finkelman, New York 2006, pp. 1337, 1339-1340.

¹¹ Ch.J. Reid, Jr., *John T. Noonan, Jr., On the Catholic Conscience and War: Negre v. Larsen*, in «Notre Dame Law Review», 76 (2001), pp. 881, 892-894.

¹² U.S. Constitution, Art. I, Sec. 8. Cf. B. Donohoe and M. Smelser, *The Congressional Power to Raise Armies: The Constitutional and Ratifying Conventions, 1787-1788*, in «Review of Politics», 33 (1971), pp. 202-211.

¹³ M.A. Kreidberg and M.G. Henry, *History of Military Mobilization in the United States Army, 1775-1945*, Washington, DC, 1955, pp. 43-53.

¹⁴ *Ibidem*, p. 53.

¹⁵ M.G. Baxter, *Daniel Webster and the Supreme Court*, Amherst 1966, p. 1: «In the formative years from the end of the War of 1812 through the famous Compromise of 1850, no lawyer had more effect upon the United States Supreme Court (...) than Daniel Webster».

¹⁶ Daniel Webster, *Speech on the Conscription Bill*, U.S. House of Representatives, December 9, 1814. Reprinted in *The Letters of Daniel Webster*, edited by C.H. van Tyne, New York 1902, p. 57.

¹⁷ *Ibidem*, p. 62. Webster does not explain his «one exception» reference, but it is fair to guess he meant France in the Reign of Terror and under Napoléon Bonaparte.

¹⁸ See generally W.L. Shaw, *The Confederate Conscription and Exemption Acts*, in «American Journal of Legal History», 6 (1962), pp. 369-405.

¹⁹ The Enrolment Act, ch. xxxv, 12 Stat. 731 (1863).

South, but it was in the North, whose law was particularly raw in its class favoritism, where violence broke out. The Union law permitted wealthier conscripts to hire substitutes to serve in their place but made no accommodations for poor draftees²⁰ – and poor young men met the call to arms in the summer of 1863 with mayhem and rioting, especially in New York City²¹. Although the question was never litigated in the federal courts,²² Roger Taney, the sitting Chief Justice, wrote in his private capacity to advise Congress that he believed the Enrolment Act to be unconstitutional²³.

After this unfortunate history, conscription lapsed for half a century, until that fateful winter of 1916/1917, when Wilson and his advisors girded for war.

3. *Edward Douglass White*

In December, 1917, the Supreme Court considered a consolidated appeal involving several challenges to the draft raised in different parts of the country. Edward Douglass White, the Chief Justice, authored a single opinion responsive to these different cases, which issued in early January, 1918²⁴. White, then aged seventy-two and nearing the close of his career, was unique among justices of the Supreme Court in that he remains to this day the only trained civilian to serve on the nation's highest court.

White had been born into a prominent political family in 1845. His father, Edward, Sr., seventy years old when young Edward was born, had been a force in Louisiana politics for decades, serving as a local judge, a representative to Congress, and as governor. His wife Catherine, Edward's mother, hailed from a wealthy Catholic family with deep roots in Maryland²⁵.

Descended from an aristocracy of wealth and connections on both sides, White was the beneficiary of the best Catholic education available. He was tutored by Jesuits in New Orleans, and afterwards received a higher education at Mount St. Mary's College in Emmitsburg, Maryland, and Georgetown University in the District of Columbia²⁶.

²⁰ N.C. Kimmons, *Federal Draft Exemptions, 1863-1865*, in «Military Affairs», 15 (1951), pp. 25, 30.

²¹ See generally J. McCague, *The Second Rebellion: The Story of the New York City Draft Riots of 1863*, New York 1968; and P. Levine, *Draft Evasion in the North During the Civil War, 1863-1865*, in «Journal of American History», 67 (1981), pp. 816-834.

²² The constitutionality of conscription was ruled upon twice by the Pennsylvania Supreme Court. In 1863, a closely-divided court held the federal law unconstitutional and not binding in Pennsylvania. *Kneedler v. Lane*, 3 Grant 465 (1863). A few months later, after a change in membership, the Pennsylvania Court reversed itself, ruling in favor of conscription. *Kneedler v. Lane*, 3 Grant 523 (1864).

²³ J.F. Leach, *Conscription in the United States: Historical Background*, Rutland, VT, 1952, p. 356.

²⁴ *Selective Draft Law Cases*, 245 U.S. 366 (1918). The consolidated cases included four from Minnesota and two from New York.

²⁵ R.B. Highsaw, *Edward Douglass White: Defender of the Conservative Faith*, Baton Rouge, LA, 1981, pp. 15-16. Cf. Sr M.C. Klinkhamer, O.P., *The Family Background of Chief Justice White*, in «Catholic Historical Review», 33 (1947), pp. 191-205 (tracing White's full lineage).

²⁶ Highsaw, *Edward Douglass White*, p. 18.

He left college in 1863, however, to enlist in the Confederate Army. He was taken prisoner of war, however, near the end of the War, which brought his military ambitions to their proper conclusion²⁷. Years later, he expressed fervent gratitude that the South had lost the Civil War²⁸.

Following the War, White studied law and entered politics. He learned law by reading it in the office of Edward Bermudez, a gifted Romanist who was himself descended from Spanish aristocracy, an ancestor having served as Spanish Minister of State and ambassador to France²⁹. Bermudez was a worthy mentor to White, being himself one of the most accomplished civil lawyers of his day, serving on the Louisiana Supreme Court from 1880 to his death in 1892.

White swiftly ascended to the pinnacle of Louisiana's governing structure. He was elected to the State Senate in 1874, at the age of twenty-nine. He was appointed to the State Supreme Court in 1878 but required to step down two years later, when an age limit was adopted making him ineligible to serve. He assisted in the founding of Tulane University and briefly served in the University's administration. He cultivated relationships in the American Catholic hierarchy, especially with James Cardinal Gibbon and the Jesuit Order, for which he retained a life-long fondness. In 1891, this careful coalition-building paid off when the Louisiana legislature elected White to the United States Senate³⁰. A mere two-and-one-half years later, furthermore, thanks to his own good luck and the misfortune of two more prominent rivals³¹, White was appointed to the Supreme Court, first as Associate Justice and then elevated, in 1910, to the rank of Chief Justice³².

As a Louisiana-trained civilian, White often used Roman law sources in his opinions and relied on Romanist texts and commentaries on a number of occasions as a principal foundation of his constitutional reasoning³³. The *Selective Draft Law Cases* are a prominent example of this practice, but hardly the only instance. In *Coffin v. United States*, White concluded that the Constitution mandated a presumption of innocence in criminal cases and found support for this

²⁷ Questions surround the timing of his capture. William Rehnquist, following the standard historiography, indicates that he was taken captive following the Battle of Port Hudson in 1863. See W.H. Rehnquist, *Remarks of the Chief Justice: My Life in the Law Series*, in «Duke Law Journal», 52 (2003), pp. 787, 796. Civil War records, however, show that he was more likely captured in March, 1865, a few weeks before the War's end. See the entry for Edward Douglass White, Roll M598_106, Selected Records of the War Department Relating to Confederate Prisoners of War, 1861-1865.

²⁸ Highsaw, *supra*, p. 20.

²⁹ Hon. Edward Bermudez, in «Green Bag», 4 (1892), p. 454.

³⁰ Sr M.C. Klinkhamer, O.P., *Edward Douglass White: Chief Justice of the United States Supreme Court*, Washington, DC, 1943, pp. 18-25.

³¹ P.A. Freund, *Appointment of Justices: Some Historical Perspectives*, in «Harvard Law Review», 101 (1988), pp. 1146, 1151.

³² W.F. Pratt, *The Supreme Court Under Edward Douglass White, 1910-1921*, Columbia, SC, 1999, pp. 14-16.

³³ Ch.J. Reid, Jr., *Edward Douglass White's Use of Roman and Canon Law: A Study in the Supreme Court's Use of Foreign Legal Citations*, in «University of St. Thomas Law Journal», 3 (2006), pp. 281-310.

holding in Justinian's texts and the literary work of Ammianus Marcellinus³⁴. In *Cubbins v. Mississippi River Commission*, White looked to commentaries on the Code Napoléon to justify the building of private levees on the banks of the Mississippi River³⁵.

In *Geer v. Connecticut*, a case famous among environmental lawyers for its expansive recognition of state regulatory power³⁶, White supported his holding by reference to the powers Roman law granted the sovereign in its control of animals *ferae naturae*³⁷. And in *Cunnius v. Reading School District*, White once again relied on nineteenth-century commentaries on French and Roman law to resolve thorny property questions in a presumption of death case where, after an absence of many years, the party declared dead suddenly returned home, quite alive and well³⁸.

Usage of foreign law, especially Romanist materials and Continental jurisprudence, was a steady feature of White's opinion writing. And it his employment of these sources in the *Selective Draft Law Cases* that is considered next.

4. *The Selective Draft Law Cases*

The petitioners' brief in the *Selective Draft Law Cases* aimed to build the case that conscription was incompatible with ancestral notions of Anglo-American liberty. To that end, the brief sketched a historiography, extending from the medieval Saxons to the English Glorious Revolution, attempting to show that there ran a deep aversion in the tradition to standing armies and the concentrated governmental power they represented³⁹. This aversion was second nature to the Framers and the reason they did not include conscription in the Constitution. For confirmation, the brief turned to Daniel Webster's denunciation of conscription during the War of 1812⁴⁰. The brief even distinguished Civil-War conscription from that imposed by the World War I statute by noting that individuals could buy their way out of the earlier draft by hiring a substitute⁴¹. But now, «for the first time in the history of this nation Congress attempts to

³⁴ *Coffin v. United States*, 156 U.S. (1895), pp. 432, 452-460.

³⁵ *Cubbins v. Mississippi River Commission*, 241 U.S. (1916), pp. 351, 363-366

³⁶ T. Smith, *Fiduciary Duty and the Atmospheric Trust*, Burlington, VT, 2012, p. 113 (connecting White's opinion, Roman law, and the "public trust doctrine" that holds that the environment is a public responsibility subject to state regulation).

³⁷ *Geer v. Connecticut*, 161 U.S. (1896), pp. 519, 521-527.

³⁸ *Cunnius v. Reading School District*, 198 U.S. (1905), pp. 458, 469-471.

³⁹ Authored by T.E. Latimer, Herbert Dunn, and Frank Healy, the brief asserted that England's primeval liberty was threatened by William the Conqueror's standing army and then more comprehensively by the professional military assembled by the Tudor and Stuart monarchs. The English Glorious Revolution was a reassertion of ancestral liberty against these encroachments just as was the American Revolution ninety years later. See Brief of Plaintiff-in-Error, *Arver v. United States*, no. 663 (December, 1917). Arver was the first named plaintiff in the consolidated cases reviewed by the Court.

⁴⁰ *Ibidem*, pp. 11-12.

⁴¹ *Ibidem*, p. 13.

provide for the raising of a regular army, an organization [supposedly] based upon voluntary enlistment, by conscription»⁴². This step amounted to involuntary servitude under the Thirteenth Amendment and effectively re-established on American shores the despotism of late Stuart England⁴³.

The government's brief appeared under the name of John W. Davis, the nation's Solicitor General. Davis was one of the greatest lawyers of his generation, and the Democratic nominee for President in 1924, although today he is remembered chiefly for his ignominious role in arguing on behalf of the segregationists in *Brown v. Board of Education*⁴⁴.

The opening portion of Davis's brief consisted of a series of inferences that led inexorably to a governmental power to conscript young men for the armed forces. «The highest duty of every citizen is to serve his country in time of need», the brief opened⁴⁵. One could view conscriptions from each of two perspectives, Davis continued – either as an obligation of citizenship or as a necessary power of the State⁴⁶. True, he acknowledged, the Constitution did not provide affirmatively for conscription among its enumerated powers, but it also did not prohibit the practice and logic demanded its acceptance⁴⁷.

With bravado masking an absence of direct constitutional authority, Davis asserted: «Only sheer hardihood would seriously deny that among the appropriate means to which Congress may resort in raising armies is the selective draft»⁴⁸. Davis contended that the Constitution had to be interpreted in light of the necessities of modern states. Thus the United States possessed all of the powers of a sovereign nation and like other sovereigns – Canada, Great Britain, the South African Republic, the German Empire – it had the power to compel men to serve in the military⁴⁹. He dismissed the claim of involuntary servitude, asserting that the Thirteenth Amendment had to be read narrowly, as eliminating chattel slavery and as contributing nothing on the subject of conscription⁵⁰.

Davis's arguments were convincing to White. As he justified his decision to uphold the draft, he viewed the case as involving a clash of two rival and incompatible principles as to the relationship of the individual to the modern state. The claims of the draft resisters, White declared, would exalt the individual above the

⁴² *Ibidem*, p. 16.

⁴³ *Ibidem*, pp. 19-25.

⁴⁴ On Davis's career, see W.H. Harbaugh, *Lawyer's Lawyer: The Life of John W. Davis*, New York 1973. Davis did not merely present a lawyer's brief favoring school segregation, he endorsed it as an «immutable principle» so long practiced in the United States as to have «passe[d] the limits of judicial discretion and disturbance». L.L. Gould, *Born With His Trousers Creased*, in «Yale Law Journal», 83 (1974), pp. 866, 875 (quoting Davis).

⁴⁵ Brief For the United States, *Ruthenberg v. United States*, nos. 656 *et al.*, December, 1917.

⁴⁶ *Ibidem*, pp. 10-11.

⁴⁷ *Ibidem*, p. 13.

⁴⁸ *Ibidem*, p. 14.

⁴⁹ *Ibidem*, pp. 16-17.

⁵⁰ *Ibidem*, pp. 63-64.

state and this would lead to anarchy⁵¹. Trust individual decision-making on a matter this important and the military itself might disappear⁵².

When the Constitution conferred power on Congress to raise an army, therefore, it must have implicitly granted the authority to compel the needed manpower. To support this proposition, White turned to the work of Emmerich Vattel (1714-1767). Vattel, a Swiss legal scholar who wrote in French⁵³, was enjoying something of a renaissance in the middle 1910s⁵⁴. Charles G. Fenwick, the eminent Catholic scholar of international law⁵⁵, had written a pair of influential articles on Vattel and had prepared a new French edition of his work for the Carnegie Institution⁵⁶. John W. Davis, furthermore, had cited Vattel in his brief⁵⁷.

Vattel must have seemed like a convenient authority since he built a powerful case, on the basis of the logic of state necessity, for conscription. «No person is naturally exempt from taking up arms in defence of the state», wrote Vattel⁵⁸. «A good government», he continued, would direct its human resources into those «posts and employments» in a way «that the state may be most effectually served in all its affairs»⁵⁹. Reading and citing the chapter in which these comments were contained, White endorsed Vattel's views and concluded: «It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it»⁶⁰. Thus a constitutional provision that authorized Congress to raise an army but was silent as to means came to be interpreted as requiring, as a logical corollary, a military draft where the needs of the nation mandated it.

⁵¹ 245 U.S. p. 378 (claim based on individual liberty «is so devoid of foundation that it leaves not even a shadow of a ground upon which to base the conclusion»). *Ibidem*.

⁵² *Ibidem*, p. 377 («As the mind cannot conceive an army without the men to compose it, on the face of the Constitution the objection that it does not give power to provide for such men would seem to be too frivolous for further notice»).

⁵³ On Vattel's background, see M.G. Forsyth, H.M.A. Keens-Soper and P. Savigear, *The Theory of International Relations: Selected Texts From Gentili to Treitschke*, London 1970, pp. 87-88. Vattel's principal work, *Le droit des gens*, was translated as *The Law of Nations* (Philadelphia 1863).

⁵⁴ Interest in Vattel has recently been revived. See D.G. Lang, *Foreign Policy in the Early Republic: The Law of Nations and the Balance of Power*, Baton Rouge, LA, 1985, pp. 13-33; and P. Onuf and N. Onuf, *Federal Union, Modern World: The Law of Nations in an Age of Revolutions, 1776-1814*, Madison, WI, 1993, pp. 1-26. Onuf and Logan both maintain that Vattel was read and recommended by some members of the founding generation, but White nowhere in his opinion makes the originalist claim that Vattel was important in 1918 because he had been important in 1789.

⁵⁵ On Fenwick, see *Charles G. Fenwick Dies at 92; Was International Law Expert*, in «The New York Times», April 26, 1973; J.R. Hailey, *Dr. Charles G. Fenwick Dies*, in «The Washington Post», April 26, 1973.

⁵⁶ See Ch.G. Fenwick, *The Authority of Vattel*, Part I, in «American Political Science Review», 7 (1913), pp. 395-410; and Ch.G. Fenwick, *The Authority of Vattel*, Part II, in «American Political Science Review», 8 (1914). Cf. Emmerich de Vattel, *Le Droit des gens: ou Principes de la loi naturelle*, edited by Ch.G. Fenwick and A. Geouffre de Lapradelle, eds., 3 volumes, Washington, DC, 1916.

⁵⁷ Brief for the United States, *supra*, pp. 9-10.

⁵⁸ Vattel, *Law of Nations*, *supra*, p. 294.

⁵⁹ *Ibidem*.

⁶⁰ 245 U.S. p. 378 (citing Vattel, *Law of Nations*, Bk. III, chapters one and two).

What prompted White to rely on Vattel in this way? What led him to such statist premises? White may well have felt some attraction since Vattel was a French writer and White, fluent in French, made frequent use of francophone sources in his judicial opinions. But it is probable that White had other motives, also, for taking the turn he did.

5. *The Historical Progress of the Law*

A main current of early twentieth-century jurisprudence stressed the centrality of a progressive model of legal history. The history of law was more than a mere curiosity. A lawyer immersed in the rich data of the past could find there guidance for how life must be governed in the here and now. «Understanding current law», this school of thought maintained, «depend[ed] on tracing its evolution from its earliest origins»⁶¹.

This mode of thinking, called by its practitioners “historical jurisprudence”, was traceable to the writings of the English statesman Edmund Burke and the German jurist Friedrich Carl von Savigny, although its roots were sunk deep in the soil of Tudor-Stuart legal history⁶². Historical jurisprudence stressed the cultural experiences of the group – the people, the *Volk*, the nation, or the civilization. Depending on the motives of its practitioners, historical jurisprudence might manifest itself in narrow-minded provincialism, heated nationalism, or, on the other hand, an openness to comparative study⁶³. Common to all of this, however, was a commitment to normativity – the past mattered because in important ways it continued to bind us today.

Anglo-American historical jurists of the late nineteenth and early twentieth centuries overwhelmingly understood the law to be struggling, through trial and error, in historical time, toward certain beneficial ends. When Henry Sumner Maine recited the story of the growth of sophisticated legal institutions, he told it as the inevitable progress from status to contract. Western civilization began in a straightjacket-like rigidity, in which all of our relations were defined for us by our birth and our station in life, to a fluid, open modern society in which we define relations for ourselves, through our power to contract with others⁶⁴.

While Maine operated on the level of grand theory, this historical teleology could also focus more specifically on particular legal or political institutions. Thus when John Maxcy Zane authored his treatise on banking law, seeking not only to restate but to redefine its content, he began with the confluence of historical legal doctrines – bailment, trust, contract – that helped form

⁶¹ D.M. Rabban, *Law's History: American Legal Thought and the Transatlantic Turn to History*, Cambridge 2013, p. 326.

⁶² See generally H.J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, in «Yale Law Journal», 103 (1994), pp. 1651-1738.

⁶³ Reid, *Edward Douglass White*, *supra*, pp. 309-310.

⁶⁴ H.S. Maine, *Ancient Law*, London 1861, pp. 99-100.

modern banking practice. From these primitive elements, he contended, the law of banking progressed and all future reform must keep true to these historical sources⁶⁵.

This was a world in which it was impossible for lawyers not to think historically. And, as noted above, this mode of thought was often nationalistic, or at least tribal. This tribalism manifested itself, among Anglo-American lawyers, in a readiness to celebrate the superiority of their own tradition. James Barr Ames, the great popularizer of casebooks and Dean of the Harvard Law School, saw his mission as the doing of “genealogy”⁶⁶. And that genealogy led back to Germany: «The English law is more German than the law of Germany itself»⁶⁷.

By this, Ames meant to compare and contrast the commitment of the Anglo-American tradition to freedom, to justice, and to progress with those legal systems that had come under the influence of Romanist modes of thought. Ames was far from alone in making this argument. John Forrest Dillon saw the roots of America’s free institutions in the the «love of personal freedom and independence» of the ancient Germans⁶⁸. James Coolidge Carter praised the «harmonious blending of law and liberty» found in the American system in contrast to the civilian where the old «maxim that law proceeds from the pleasure of the sovereign» still prevails⁶⁹.

World War I obviously diminished the enthusiasm for the Germanic foundations of American law, but, if anything, it strengthened the nationalism of American jurists⁷⁰. White’s assertion of continental sources acted as a subtle corrective to these trends. For the sources he wished to promote were neither Germanic nor natively Anglo-American. He sought, rather, to read romanist traditions into the American constitutional order. He did this with *Coffin* and *Cubbins*, *Cunnius* and *Geer*. And he was doing it again with the *Selective Draft Act Cases*. As only an American romanist who simultaneously sat as a judge on America’s highest tribunal could appreciate, White grasped the essential unity of Western law. I myself have quarrels with the outcome in the *Selective Draft Act Cases*. I remain convinced that the proper way to handle conscription is by constitutional amendment, not judicial opinion⁷¹. But despite personal misgivings about his support for conscription, I esteem White’s larger project, his ambition of integrating Anglo-American and Continental jurisprudence through a sophisticated expansion of legal sources.

⁶⁵ J.M. Zane, *The Law of Banks and Banking*, Chicago 1900, pp. 15-26.

⁶⁶ J.B. Ames, *Lectures on Legal History and Miscellaneous Legal Essays*, Cambridge, MA, 1913, p. 145.

⁶⁷ *Ibidem*, p. 34. Cf. Rabban, *Law’s History*, *supra*, p. 291 (evaluating Ames on this point).

⁶⁸ J.F. Dillon, *The Laws and Jurisprudence of England and America*, Boston 1894), p. 159.

⁶⁹ J.C. Carter, *The Proposed Codification of the Common Law*, New York 1884, p. 8.

⁷⁰ J.M. Zane, *German Legal Philosophy*, in «Michigan Law Review», 16 (1918), pp. 287-375 (an extreme xenophobic rant).

⁷¹ L. Friedman, *Conscription and the Constitution: The Original Understanding*, in «Michigan Law Review», 67 (1969), pp. 1493-1552.

6. Conclusion

The conscription law so fervently defended by Davis and White was, like its Civil-War antecedent, only haphazardly enforced. In a mobile society lacking sophisticated means of tracking its residents, it is estimated that somewhere between 300,000 and three million young men avoided military service, most by the simple expedients of remaining mobile and refusing to register⁷². Still, if one judges the legislation by the success of the War effort, it can be said to have achieved its purposes.

Today, the case stands also as a reminder that members of the United States Supreme Court have often resorted to the use of foreign legal sources in the resolution of leading cases. This should barely warrant mention at all, except for the fact that eight or nine years ago, members of the Supreme Court debated this point vigorously, conservative members of the court viewing reliance on foreign law as a kind of unconstrained extra-constitutional reasoning. This internal debate stimulated a large scholarly response and it seems that the Court is no longer keen to argue this point⁷³.

Most important for our purposes, however, most significant in a volume honoring the many great accomplishments of Mario Ascheri, is the unity that this case reveals in Western law. America and Europe might be separated by an ocean, our legal traditions may have depended upon different sources, but still one can find the great bridge-builders. Chief Justice Edward Douglass White was one such bridger of continents. And Mario Ascheri is another.

⁷² Ch. Capozzola, *Uncle Sam Wants You: World War I and the Making of the Modern American Citizen*, Oxford 2008, p. 30.

⁷³ Among the most important studies is St. Calabresi and St. Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Cases*, in «William and Mary Law Review», 47 (2005), pp. 743-909.