



AMERICAN CONSTITUTIONALISM
 VOLUME I: STRUCTURES OF GOVERNMENT
 Howard Gillman • Mark A. Graber • Keith E. Whittington

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Supplementary Material

Chapter 7: The Republican Era – Judicial Power and Constitutional Authority

United States v. Lee, 106 U.S. 196 (1882)

In 1861, Congress imposed direct taxes to be collected in each state, including those that had seceded. The next year, Congress declared that the taxes in the “insurrectionary districts” were to be imposed on the landholders of those states, with failure to pay resulting in forfeiture of the land to the U.S. government. The confiscated lands were then sold to the highest bidder.

George Washington Parke Custis had left his estate in Arlington, Virginia, to his daughter, Mary Anna, until her death when the estate would convert to her son, George Washington Parke Custis Lee. Mary Ann was the wife of Robert E. Lee, general of the Confederate army during the Civil War. In 1864, the Lee family was assessed \$92.07 in federal taxes owed on the Arlington estate. Although the Lees made arrangement for the taxes to be paid, the tax commissioners refused to accept payment unless Lee appeared in person to proffer payment. When he failed to do so, the eleven-hundred-acre estate was purchased at auction by the tax commissioners for the use of the government. The estate was immediately converted into a national cemetery.

When Mary Ann died, her son came into his inheritance on the estate. His petition to Congress to pay just compensation for the confiscated estate was ignored. He then petitioned a county court in Virginia for a writ of ejectment to remove the military officers in charge of the cemetery and grounds and recover his property as illegally seized. The federal government intervened and had the case removed to a federal circuit court. In the federal circuit, the U.S. attorney general moved that the case be immediately dismissed on the grounds that sovereign immunity precluded lawsuits against government property without its consent. The court ruled against the motion, and the jury, concluding that the tax commissioners had acted illegally in refusing to accept payment on the taxes due and thus the government did not have lawful title to the property, found in favor of Lee. The federal government appealed to the U.S. Supreme Court, which affirmed the decision of the lower court. The federal government had been found to be an unlawful trespasser on Lee’s land. Rather than seeking to execute the court’s order and remove the military from Arlington, Lee agreed to sell the land to the government.

Although the government itself may be immune to lawsuits seeking monetary damages without its consent, the courts were open to suits testing whether individual officers of the government were in lawful possession of particular properties. The ruling recognized but qualified sovereign immunity, creating a legal fiction that government officials could be distinguished from the government itself and stripped of sovereign immunity.

JUSTICE MILLER delivered the opinion of the Court.

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 . . . [I]t is beyond question that from the time of Edward the First until now the King of England was not suable in the courts of that country, except where his consent had been given on petition of right.

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 There is in this country, however, no such thing as the petition of right, as there is no such thing as a kingly head to the nation, or to any of the States which compose it. There is vested in no officer or body the authority to consent that the State shall be sued except in the law-making power, which may give such consent on the terms it may choose to impose. Congress has created a court in which it has authorized suits to be brought against the United States, but has limited such suits to those arising on contract, with a few unimportant exceptions.

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Mr. Justice Gray, of the Supreme Court of Massachusetts, in an able and learned opinion which exhausts the sources of information on this subject, says: "The broader reason is, that it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as a matter of right, at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on his government in war and in peace, and the money in his treasury." *Briggs & Another v. Light Boats*, 11 Allen (Mass.), 157 (1863). . . .

. . . [W]hile acceding to the general proposition that in no court can the United States be sued directly by original process as a defendant, there is abundant evidence in the decisions of this court that the doctrine, if not absolutely limited to cases in which the United States are made defendants by name, is not permitted to interfere with the judicial enforcement of the established rights of plaintiffs when the United States is not a defendant or a necessary party to the suit.

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession?

If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights.

If it be said that the proposition here established may subject the property, the officers of the United States, and the performance of their indispensable functions to hostile proceedings in the State courts, the answer is, that no case can arise in a State court, where the interests, the property, the rights, or the authority of the Federal government may come in question, which cannot be removed into a court of the United States under existing laws. In all cases, therefore, where such questions can arise, they are to be decided, at the option of the parties representing the United States, in courts which are the creation of the Federal government.

Dependent as its courts are for the enforcement of their judgments upon officers appointed by the executive and removable at his pleasure, with no patronage and no control of the purse or the sword, their power and influence rest solely upon the public sense of the necessity for the existence of a tribunal to which all may appeal for the assertion and protection of rights guaranteed by the Constitution and by the laws of the land, and on the confidence reposed in the soundness of their decisions and the purity of their motives.

From such a tribunal no well-founded fear can be entertained of injustice to the government, or of a purpose to obstruct or diminish its just authority.

The Circuit Court was competent to decide the issues in this case between the parties that were before it; in the principles in which these issues were decided no error has been found; and its judgment is *affirmed*.

JUSTICE GRAY, with whom CHIEF JUSTICE WAITE, JUSTICE BRADLEY, and JUSTICE WOODS join, dissenting.



The principles upon which we are of opinion that the court below had no authority to try the question of the validity of the title of the United States in this action, and that this court has therefore no authority to pass upon that question, may be briefly stated.

The sovereign is not liable to be sued in any judicial tribunal without its consent. The sovereign cannot hold property except by agents. To maintain an action for the recovery of possession of property held by the sovereign through its agents, not claiming any title or right in themselves, but only as the representatives of the sovereign and in its behalf, is to maintain an action to recover possession of the property against the sovereign; and to invade such possession of the agents, by execution or other judicial process, is to invade the possession of the sovereign, and to disregard the fundamental maxim that the sovereign cannot be sued.

That maxim is not limited to a monarchy, but is of equal force in a republic. In the one, as in the other, it is essential to the common defense and general welfare that the sovereign should not, without its consent, be dispossessed by judicial process of forts, arsenals, military posts, and ships of war, necessary to guard the national existence against insurrection and invasion; of custom-houses and revenue cutters, employed in the collection of the revenue; or of light-houses and light-ships, established for the security of commerce with foreign nations and among the different parts of the country.

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For more than sixty years after the adoption of the Constitution, no general provision was made by law for determining claims against the United States; and in every act concerning the Court of Claims Congress has defined the classes of claims which might be made, the conditions on which they might be presented, the forms of proceeding, and the effect to be given to the awards. . . . No act of Congress has conferred upon that court, or upon any other tribunal, general jurisdiction of suits against the United States to recover possession of real property, or to redress a tort. . . .

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If it is proper that the United States should allow themselves to be sued in such a case as this, public policy requires that it should rest with Congress to define the mode of proceeding, the conditions on which it may be maintained, and the manner in which the decision shall be enforced, -- none of which can be done if the citizen has an absolute right to maintain the action.

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To maintain this action, independently of any legislation by Congress, is to declare that the exemption of the United States from being impleaded without their consent does not embrace lands held by a disputed title; to defeat the exemption from judicial process in the very cases in which it is of the utmost importance to the public that it should be upheld; and to compel the United States to submit to the determination of courts and juries the validity of their title to any land held and used for military, naval, commercial, revenue, or police purposes.

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