

The Last Battle of the Civil War: United States Versus Lee, 1861 1883

Richard Allen Gerber

Follow this and additional works at: <https://digitalcommons.lsu.edu/cwbr>

Recommended Citation

Gerber, Richard Allen (2011) "The Last Battle of the Civil War: United States Versus Lee, 1861 1883," *Civil War Book Review*: Vol. 13 : Iss. 4 .

DOI: 10.31390/cwbr.13.4.15

Available at: <https://digitalcommons.lsu.edu/cwbr/vol13/iss4/37>

Review

Gerber, Richard Allen

Fall 2011

Gaughan, Anthony J. *The Last Battle of the Civil War: United States Versus Lee, 1861 – 1883*. Louisiana State University Press, \$42.50 ISBN 978-0-8071-3774-1

Investigating the Legal Legacy of the Civil War

On May 15, 1883, the United States government paid George Washington Custis Lee, son of Robert E. Lee and Mary Lee, the sum of \$150,000 to purchase the title to the 1100 acre Arlington estate seized by Union troops under President Lincoln's order on May 24, 1861. Arlington protected Washington, just across the Potomac. As Arlington National Cemetery, the government used it to bury tens of thousands of blue-clad soldiers; some 250,000 Americans are now buried there. In April 1877, claiming that he, not the United States, owned Arlington, Custis Lee brought common law ejectment actions against Frederick Kaufman and Richard P. Strong, Arlington's superintendent and military commander. Lee had no intention of actually physically ousting the War Department from the estate or disinterring and moving the dead. Rather, he wished to receive "just" compensation for the seizure of his property under the Fifth Amendment "takings" clause.

According to attorney and historian Anthony J Gaughan, and professor at Drake University, *U.S. v. Lee* holds greater significance in American constitutional history than it has previously received. He contends that the Supreme Court ruling of December 4, 1882, reaffirmed the principle that America stands for a "government of laws and not of men," that no person is higher than the law, that even the U.S. government may not intrude on the individual rights (in this complex case, the property rights) of even the humblest Americans (173). Further, the case struck a blow for judicial review as the process by which justice is determined. Certainly, the Supreme Court remains the bulwark against arbitrary executive or congressional actions, Gaughan reminds us; those branches may not exercise power beyond their constitutional

jurisdictions --- even in crisis times as desperate as the Civil War. Constitutional separation of powers thus protects individuals against tyranny. If the courts could not hear Lee's plea, his remaining remedy would be a useless private bill in Congress, which angry Republican politicians would never pass.

In the Arlington case Lee had to prove both that he was the legal owner of the estate and that he had the right to sue the government for failure to comply with Fifth Amendment. The War Department had acquired Arlington by auction (there were no other bidders), following a default on payment of an obscure tax by the then technical owner, Custis Lee's mother Mary Lee, which required her to pay the tax in person. Not even her agent [Philip Fendall] could pay the tax on her behalf; the trial indicated that he had attempted to pay but was refused by the tax commissioners. Judge Robert W. Hughes, in trial in federal District Court in Alexandria, Virginia, had ruled that tax invalid and thus the U.S. had not acquired title; Custis Lee owned Arlington.

More important was the Justice Department's audacious assertion of "sovereign immunity," the doctrine that the United States may not be sued in its own courts without its consent and permission, to bar Lee's use of the courts to determine title and thus claim compensation. Hughes had rejected the government's argument on "sovereign immunity" as well. On appeal the Supreme Court at first split 4 – 4 on the issue. Chief Justice Morrison Waite scheduled re-argument to permit appointment and confirmation of the ninth Justice (Samuel Blatchford). The Justices actually permitted Lee himself to address the Court. On December 4, 1882, the Court then ruled 5 – 4 that "sovereign immunity" did not apply and that Lee was entitled to his day in court. Justice Samuel Miller wrote the majority ruling. Justice Horace Gray penned the dissent. Lee had won on all counts.

Why would the Justice Department insist that the Supreme Court rule on "sovereign immunity" in the face of powerful and numerous contrary precedents and the lower court ruling? Gaughan claims that the government's motivation had been personal, to punish the Lee family for the treasonous family betrayal of the Union, particularly that of Robert E. Lee. Custis Lee, too, had served as Confederate general. Thus, Lee's victory in the Supreme Court, Gaughan asserts, marked the Arlington case as a milestone in the process of reconciliation between North and South, hence the book's title.

U.S. v. Lee may well have hurried the decline of sectional bitterness. At least the case is consistent with the reconciliation process that was happening anyway by the late 1870s and early 1880s. Perhaps mirroring David W. Blight's *Race and Reunion: The Civil War in American Memory* (2001), Gaughan cites numerous instances of Union and Confederate joint celebrations of bravery on Memorial Day and the attempts to resurrect Robert E. Lee's reputation from traitor to American national hero. Unlike Blight, Gaughan does not, until the ending peroration of the book, acknowledge that reconciliation came at the expense of the freed people.

The strengths of this book lie in the clear, non-technical explication of the legal issues, ranging from English common law "writs of ejectment" to sovereign immunity, the officer-exception to suing the United States, and the distillation of lawyers' arguments on all sides of this case. Readers can appreciate the occasional repetition of these issues as they wended their way through the court system. On some occasions, in the absence of primary sources to refute the government's arguments, Gaughan introduces his own analysis to poke holes in the government's case, a technique he does not apply to the Lee arguments. This may be clearest in his explanations of the cases cited as precedent. Occasionally he cites the *New Orleans Daily Picayune* uncritically, when more official sources are absent. Despite the anti-government stance, the author attempts valiantly to achieve balance.

The placement of *U.S. v. Lee* in historical contexts is less successful. Sectional reunion is preferred as a national objective. Gaughan's book omits examination of Reconstruction issues. Current interpretations demonstrate that congressional Republicans sought to enact a bi-racial society in the South in the postwar decade as an alternative to the white southerners' determinations of the conditions of race relations on one hand and implantation of a semi-permanent military occupation of the ex-Confederate states on the other. Rights conferred on the freed people, through the Civil Rights Act of 1866, the Fourteenth Amendment, the Fifteenth Amendment and the Civil Rights Act of 1875, were designed to permit four million recently emancipated persons to protect themselves against their white neighbors. Reconstruction was defeated by racism and violence. Yet these expressions of racial equality before the law --- and particularly the devoted and sullen southern resistance to them through intimidation and violence -- may well account for the government's attitude in pursuing the *Lee* case to its conclusion.

Gaughan implies that the dissenters in *Lee*, especially Justice Joseph P. Bradley, were prolonging sectional antagonism. Yet Bradley wrote the majority opinions of the Supreme Court in *U.S. v Cruikshank* (1876) which denied the government power to enact a criminal code that properly belonged to the states, and *The Civil Rights Cases* (1883), which declared unconstitutional the Civil Rights Act of 1875, Congress's equal public accommodations statute.

Other contextual statements may raise an eyebrow. Did the New Immigration of the latter 19th century take America's mind away from sectional strife? Was reunion finally established in the victory against Spain, as soldiers of both sections fought side by side? Can historians connect sectional reconciliation, the Jim Crow enactments of the late 19th century, and the Civil Rights movement of the 1960's in a page or two? Was Justice Harlan's lone dissenting commentary on the color-blindness of the Constitution in *Plessy v. Ferguson* (1896) a demonstration of reconciliation?

This book – Gaughan's first - does fill a niche in American constitutional history. As with his publications on Watergate and on Woodrow Wilson, *The Last Battle of the Civil War* is amply researched in primary materials, published and unpublished. It is eloquently stated. Anthony J. Gaughan has lifted *United States v. Lee* to a substantive status among Court decisions upholding individual property rights. Whether the case was the last battle of the Civil War remains an open question.

Richard Allan Gerber: PhD University of Michigan 1967. Winner of Binkley-Stephenson Prize of the OAH in 1976 for "The Liberal Republicans of 1872 in Historiographical Perspective." Current work (with Alan Friedlander), The Civil Rights Act of 1875: A Reexamination.