

An Informal Comment
by Lana Marcussen

“As to sovereignty, this is what the federalism argument addresses. It is the return to the Framers’ view of sovereignty embodied in the Constitution. So that there are three sovereigns-federal, state and individual sovereignty. And the greatest was to be individual sovereignty because this is what the concept of self-governance is based on. But the Dred Scott decision changed all the Framers’ definitions of sovereignty deliberately placing territorial sovereignty as separate from state sovereignty and rendering personal sovereignty completely subject to the federal government’s sovereignty. The Dred Scott decision is overruled but the sovereignty definitions have not been corrected in the law. The argument needed to be made is to correct this problem which means in this case is to define the various sovereignties.

Here it is in its simplest form. Dred Scott made the federal sovereignty much more supreme than the Framers intended. The Court did this by altering the other two definitions. They severed territorial sovereignty from state sovereignty. Up until Dred Scott, territorial sovereignty was considered to be the precursor of state sovereignty and the feds owed a duty to the future state to protect its future rights and to grant all the authority of the original 13 colonies to the new state upon statehood. This is as it was defined in Pollard’s Lessee v. Hagan. Personal or individual sovereignty was the concept of inalienable rights from God. Personal sovereignty is the divine right in our system. Dred Scott changes this by placing individual sovereignty as nothing more than citizenship rights defined by the federal government. With these changes you change the entire structural framework of the Constitution as enforced in the courts.

So to fix it we bring the confrontation between the original definitions and the Dred Scott definitions. Since Dred Scott was as much about Indians as it was Negro slaves this is very easy. To retain territorial sovereignty individual sovereignty must be prohibited on the territory. There cannot be both. So we need to say this--as long as there is tribal sovereignty (which is territorial in nature) there cannot be individual rights on the reservations. There cannot be both. At some point a choice must be made. Do we return to the Constitution or stay with Dred Scott?

Sherrill has brought this confrontation to a head. The Supreme Court has ruled that the Oneidas are to be treated as state citizens by citing Felix v. Patrick (1892). If they are state citizens they have individual sovereignty. Tribal recognition then revokes state citizenship by federal law exactly as allowed by Dred Scott. To enforce the tribal recognition the tribes must be territorial sovereigns to avoid the constitutional conflict between the federal and state governments. As Dred Scott laid out, once a tribe is recognized and on federal territory the feds are an absolute sovereign over that area. But now in Sherrill there is no federal territory and arguably no way to get there, at least without arguing Dred Scott was the right decision--good luck.

There cannot be tribal sovereignty and individual sovereignty. We must choose. Either all people are persons entitled to individual rights or the feds can take away anyone's rights by reclassifying their citizenship. If they can do it for the Indians they can do it against anyone. And against me they did, using the Navajo Agreement in a state court. Please notice the overlap to the Hawaiian situation as well as to tribal recognition. Every time they recognize a tribe or a new group as being sovereign they are taking away the state citizenship of everyone contained in the group. They are literally removing their individual sovereignty as defined by our Framers.

My argument works by using the 14th Amendment to reinforce state citizenship with equal protection of the law on the rights side. The structural side was preventing the land from being defined as territory by defining the land status up front in every suit. Now it has all come together in Sherrill and from Sherrill into all of the (pending) cases."