Reclaiming Lone Wolf?

Author : Bethany Berger

Tagged as : Native Peoples Law

Date : August 9, 2016

Review of Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Tribes*, 63 **UCLA L. Rev.** 666 (2016).

In the concentration camps of the Holocaust, a pink triangle marked gay men's uniforms to indicate why they had been singled out for imprisonment and death. Beginning in the 1970s, LGBT activists reclaimed the pink triangle, transforming it into a symbol of pride and a demand for respect. Like the Nazi use of the pink triangle, the US Supreme Court's 1903 decision in Lone Wolf v. Hitchcock represents some of the worst oppression of tribal nations in the United States. Rejecting a challenge to involuntary allotment of tribal lands, *Lone Wolf* declared that the United States had "plenary power" over Indian tribes, and this power was a "political one, not subject to be controlled by the judicial department of the government." The case was immediately decried as the *Dred Scott* for Indians, but unlike *Dred Scott*, much of *Lone Wolf* remains good law.

In her provocative new paper, *Plenary Power, Political Questions, and Sovereignty in Indian Tribes*, Michalyn Steele argues for a partial reclaiming of the plenary power and political question doctrines announced in *Lone Wolf* and other cases. As Steele notes, the doctrines have been "roundly, and rightly" criticized as leaving tribes "vulnerable to unchecked political whim." In the limited form Steele proposes, however, the doctrines may be a useful check to what she calls the "heads I win, tails you lose" bind tribes face in the courts today.

Steele begins with the observation that the plenary power doctrine appears to be here to stay. Post-*Lone Wolf* cases establish that Indian affairs legislation is subject to constitutional review, but the constitutional tests are often less stringent in the tribal context. In practice, as Steele writes, "Congress has had a free hand to legislate and regulate with regard to Indian affairs." Interpretive rules provided one check on this broad power, as cases both before and after *Lone Wolf* established that courts will interpret federal legislation as removing tribal property or sovereignty rights only if the intent to do so was clear.

Since 1978, however, the Supreme Court has violated the clear congressional intent principle in cases involving tribal jurisdiction. In a series of decisions, the Court has held that tribes lack all criminal jurisdiction over non-Indians, and retain civil and regulatory jurisdiction over non-Indians only in narrow circumstances. None of these decisions are based on express or even implicit statutory prohibitions, but rather on vague, often inaccurate judicial musings on history and federal policy. All of the decisions, moreover, run counter to congressional policy, which has, since the mid-1970s, focused on encouraging and protecting tribal self-government.

This free-ranging judicial intrusion on tribal sovereign authority, Steele argues, should be barred by the political question doctrine. Steele focuses on three of the factors Baker v. Carr announced would determine whether an issue is nonjusticiable: (i) judicial manageability of the standards, (ii) textual commitment to a coordinate branch, and (iii) policy determinations of a kind clearly of nonjudicial discretion. Pointing to the vague tests the Court has announced for when tribes will lack inherent

authority (the internal/external relations test, the necessary to protect self-government test, and the inconsistent with dependent status test), and to the divergent and inconsistent results under these tests, Steele argues that there is no judicially manageable standard for divesting tribes of inherent authority. On the textual commitment to a coordinate branch factor, she points to the constitutional commitment of Indian affairs to Congress in the Commerce Clause, and its similarity to the foreign affairs power, which is the most frequent subject of the political question doctrine. Similarly, as to the clearly nonjudicial discretion factor, she argues that the extent of tribal sovereign authority in dealing with non-Indians is at the heart of congressional and executive policymaking, and is an area in which courts should not intrude absent congressional guidance.

Steele's political question proposal has some support in recent Supreme Court decisions. Nebraska v. Parker 136 S. Ct. 1072 (2016), Michigan v. Bay Mills Indian Community, 134 S. Ct. 2024 (2014), and United States v. Lara, 541 U.S. 193 (2004) (most of the very few cases tribal interests have won in recent years) all endorsed the supremacy of Congress and the limited role for the judiciary in limiting tribal authority. Steele's proposal also accords with recent cases requiring clear evidence that Congress intended to intrude on either foreign or state sovereignty. *See Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010) (foreign authority); *Bond v. United States*, 134 S. Ct. 2077 (2014) (state authority).

Steele notes possible objections to her proposal. In particular, we should condemn any doctrine that would remove from tribal nations, or any group, the protections of judicial review. But invoking political question in this limited context does not unjustly interfere with judicial review. It does not say that the Court may not act to determine whether congressional action violates the Constitution, or whether executive action violates statutory law. It instead puts a stop to a new threat to tribal sovereignty: judicial intrusion untethered from guidance from the branches constitutionally entrusted with making federal Indian policy. One branch of government—Congress—already has plenary power. The judiciary cannot claim its own authority to remove tribal sovereignty as well.

Cite as: Bethany Berger, *Reclaiming Lone Wolf?*, JOTWELL (August 9, 2016) (reviewing Review of Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Tribes*, 63 **UCLA L. Rev.** 666 (2016)), https://lex.jotwell.com/reclaiming-lone-wolf/.