

CONSTITUTIONAL ISOLATIONISM AND THE LIMITS OF STATE SEPARATION OF POWERS AS A BARRIER TO INTERSTATE COMPACTS

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I. INTRODUCTION

Interstate compacts are a longstanding and increasingly important mechanism for establishing, managing, enforcing, and coordinating regulation. Compacts address an array of issues, including political boundaries, common resource allocation, and environmental regulations, reflecting the need to deal with the state and local regulatory approach cooperatively and providing uniformity in approaches to many regulatory problems without locking states into a federal solution. Since Congress must approve such compacts,¹ states entering into compacts typically do so against the backdrop of some federal law. Yet federal law rarely speaks to which branch of government within a state—the executive or legislative—has the power to negotiate compacts on behalf of a state.

In this Essay, I address the question of which branch of state government ought to have the authority to negotiate interstate compacts—a question of state separation of powers. Recent case law interpreting the Wisconsin Constitution in the context of Indian gambling compacts provides a particularly fertile ground for exploring this question, as it illustrates how courts are struggling to find a way to allow state executive officials greater autonomy to negotiate interstate compacts. Part II illustrates how traditional notions of separation of powers under state constitutions can be understood to pose a barrier to executive branch negotiation of interstate compacts, using a recent Wisconsin case as a springboard for discussion. Part III illustrates how

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1. “No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . .” U.S. CONST. art. I, § 10, cl. 3.

Wisconsin courts have found this approach unsatisfactory and discusses how later cases in Wisconsin and elsewhere have looked to Contract Clause² principles to override traditional state separation of powers concerns. I argue that Contract Clause principles are an unsatisfactory way of resolving concerns with the state allocation of powers to negotiate compacts, for both legal and policy reasons.

The Essay concludes in Part IV by arguing that, to date, Wisconsin courts have used an isolationist interpretive method to address the problem. As an alternative, I propose that courts interpret the separation of powers provisions of state constitutions in the context of the federal programs states may be furthering when they enter into interstate compacts. Specifically, by drawing on implied preemption principles under the Supremacy Clause of the U.S. Constitution,³ courts could adequately address state separation of powers problems in this area. Where Congress has indicated some preference for compacts and has authorized states to enter into compacts, I propose a presumption of state executive authority to negotiate compacts on behalf of the state. Where a state legislature has not specifically prohibited the executive from negotiating a compact in a regulatory area, this presumption would authorize the executive to act on behalf of the state subject to disapproval by the state legislature.

II. *PANZER V. DOYLE*: SEPARATION OF POWERS AS THE MODEL FOR DEFINING COMPACT AUTHORITY

States extend their regulatory authority to gambling activities on Indian reservations through the negotiation of interstate compacts with semi-sovereign tribes. In the landmark case of *California v. Cabazon Band of Mission Indians*, the U.S. Supreme Court indicated that state laws may be applied on tribal reservations only where Congress so

2. “No State shall enter into any Treaty, Alliance, or Confederation; . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts” U.S. CONST. art. I, § 10, cl. 1. State constitutions, such as Wisconsin’s, frequently contain a similar provision. *See, e.g.*, WIS. CONST. art. I, § 12 (“No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed . . .”).

3. The Supremacy Clause of the U.S. Constitution states, in relevant part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

provides.⁴ The Court stated, “if the intent of a state law is generally to prohibit certain conduct,” the state can apply its law on reservations, “but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory” and Congress “does not authorize its enforcement on an Indian reservation.”⁵ In other words, “[t]he shorthand test is whether the conduct at issue violates the State’s public policy.”⁶ Following this decision, Congress passed the Federal Indian Gaming Regulatory Act (“IGRA”), allowing states to regulate or prohibit Class III gaming activities,⁷ which include lotteries, pari-mutuel on-track betting, and casino games such as blackjack, roulette, craps, keno, and slot machines.⁸ Under the federal statute, such activities are lawful on Indian lands only to the extent they are “located in a State that permits such gaming for any purpose by any person, organization, or entity.”⁹

However, the IGRA does not speak to which specific branch of government—the legislative or executive—has the authority to negotiate compacts with Indian tribes regarding Class III gaming. This issue has been the topic of much litigation regarding state gambling compacts with Indian tribes—an issue that has important issues for state governments given the increasing size and significance of gambling revenue in state budgets. Wisconsin’s case law has oscillated on the topic, but proves instructive for other state courts addressing the constitutionality of gaming compacts.

In *Panzer v. Doyle*, the Wisconsin Supreme Court held that separation of powers principles under the Wisconsin Constitution bar the state’s governor from making commitments pursuant to interstate compacts with Indian tribes regarding gambling.¹⁰ In Wisconsin, 1987 constitutional amendments authorized pari-mutuel on-track betting and a state-wide lottery, changing a provision of the Wisconsin Constitution

4. 480 U.S. 202, 207 (1987).

5. *Id.* at 209.

6. *Id.*

7. 25 U.S.C. § 2710(d)(1)(B) (2000). Other activities are regulated by Indian tribes or by tribes along with the National Indian Gaming Commission. *Id.* § 2710(a)(1) (Class I activities are under the exclusive jurisdiction of Indian tribes); *id.* §§ 2710(a)(2), 2706(b)(1) (Class II activities are under the jurisdiction of Indian tribes and monitored by the National Indian Gaming Commission).

8. *See id.* §§ 2703(6), (7)(B), (8) (defining Class III gaming); *see also* WIS. STAT. § 562.057 (2005–2006) (defining Class III gambling).

9. *Id.* § 2710(d)(1)(B).

10. 2004 WI 52, ¶ 64, 271 Wis. 2d 295, ¶ 64, 680 N.W.2d 666, ¶ 64, *overruled in part by Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, 719 N.W.2d 408.

that prohibited the state legislature from authorizing “any lottery.”¹¹ These provisions created confusion regarding what, exactly, would be considered a “lottery,” but a 1990 state attorney general interpretation determined that the Wisconsin Constitution did not prohibit casino-type games.¹² The attorney general further elaborated that “it is not my responsibility to establish the public policy on gambling in Wisconsin [The] policy as it relates to gambling is within the role, responsibility and ability of the Legislature to address”¹³

This opinion was the political “hot potato”¹⁴ that set the stage for the dispute in *Panzer v. Doyle*. It purported to preclude the state from agreeing to casino-type gambling for Indian tribes without explicit approval by the state legislature.¹⁵ A month after the attorney general’s opinion was issued, the legislature approved a bill that gave the governor the authority to negotiate and enter into gaming compacts with Indian tribes.¹⁶ Both houses of the legislature rejected amendments to this bill that would have required the legislature to ratify any compacts before they became effective.¹⁷ In *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, a federal court read the IGRA to incorporate *Cabazon*, concluding that “the state is required to negotiate with [the] plaintiffs [Indian tribes] over the inclusion in a tribal-state compact of any activity that includes the elements of prize, chance and consideration and that is not prohibited expressly by the Wisconsin Constitution or state law.”¹⁸ In other words, under this case, activities that Wisconsin law does not prohibit constitute the floor for purposes of the state’s obligation to negotiate compacts regarding these activities.

By June of 1992, Wisconsin Governor Tommy Thompson had reached compact agreements with all eleven federally recognized tribes

11. As originally enacted, this section of the Wisconsin Constitution stated, “The legislature shall never authorize any lottery, or grant any divorce.” WIS. CONST. art. IV, § 24 (amended 1965, 1973, 1977, 1987, 1993, 1999).

12. *Panzer*, 2004 WI 52, ¶ 17, 271 Wis. 2d 295, ¶ 17, 680 N.W.2d 666, ¶ 17.

13. *Id.* ¶ 18, 271 Wis. 2d 295, ¶ 18, 680 N.W.2d 666, ¶ 18 (quoting 79 Op. Wis. Att’y Gen. 14, 31 (1990)).

14. *Id.* ¶ 19, 271 Wis. 2d 295, ¶ 19, 680 N.W.2d 666, ¶ 19.

15. *Id.*, 271 Wis. 2d 295, ¶ 19, 680 N.W.2d 666, ¶ 19.

16. *Id.*, 271 Wis. 2d 295, ¶ 19, 680 N.W.2d 666, ¶ 19. Section 14.035 of the Wisconsin Statutes provides in full: “The governor may, on behalf of this state, enter into any compact that has been negotiated under 25 U.S.C. 2710(d).” WIS. STAT. § 14.035 (2005–2006).

17. *Panzer*, 2004 WI 52, ¶ 19, 271 Wis. 2d 295, ¶ 19, 680 N.W.2d 666, ¶ 19.

18. 770 F. Supp. 480, 488 (W.D. Wis. 1991) (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987)).

in the state.¹⁹ Some of these agreements included electronic games of chance, blackjack, and pull-tabs or break-open tickets.²⁰ The compacts were generally effective for a period of seven years and would automatically be renewed for five-year terms unless one of the parties served written notice within 180 days prior to the end of the compact term.²¹ In 1993, however, the state again amended its constitution by changing the prohibition on the legislature authorizing any “lottery” to provide that “[e]xcept as provided in this section, the legislature may not authorize *gambling* in any form.”²² The amendments contained very detailed language, including language that prohibited games such as blackjack.²³

In 2003, Governor Jim Doyle agreed to new amendments to one of the gaming compacts.²⁴ The amended compact cleared the way for a tribe to conduct many games that had “never been legal in Wisconsin, such as keno, roulette, craps and poker.”²⁵ It also waived sovereign immunity “to the extent the State . . . may do so pursuant to law.”²⁶ The amendments not only extended the scope of tribal gambling in the state but also extended the compacts indefinitely.²⁷ The majority leader of the state Senate and the speaker of the General Assembly (both of whom had supported earlier legislation giving the governor the authority to negotiate compacts)²⁸ sued, alleging that the governor lacked inherent or delegated powers under separation of powers to negotiate the amendments to the compacts.

In *Panzer v. Doyle*, the Wisconsin Supreme Court embraced a strong notion of state legislative supremacy in disputes surrounding interstate compacts—effectively precluding state executives from making binding compacts unless the legislature approves the compact *ex post*, even where the legislature has authorized the executive to negotiate compacts *ex ante*. To begin, the court reasoned that federal law would not preempt any limits Wisconsin’s constitution imposed on the governor’s

19. *Panzer*, 2004 WI 52, ¶ 25, 271 Wis. 2d 295, ¶ 25, 680 N.W.2d 666, ¶ 25.

20. *Id.*, 271 Wis. 2d 295, ¶ 25, 680 N.W.2d 666, ¶ 25.

21. *Id.* ¶ 26, 271 Wis. 2d 295, ¶ 26, 680 N.W.2d 666, ¶ 26.

22. *Id.* ¶ 29, 271 Wis. 2d 295, ¶ 29, 680 N.W.2d 666, ¶ 29 (quoting WIS. CONST. art. IV, § 24(1) (emphasis added)).

23. *Id.* ¶¶ 30–31, 271 Wis. 2d 295, ¶¶ 30–31, 680 N.W.2d 666, ¶¶ 30–31.

24. *Id.* ¶ 33, 271 Wis. 2d 295, ¶ 33, 680 N.W.2d 666, ¶ 33.

25. *Id.* ¶ 34, 271 Wis. 2d 295, ¶ 34, 680 N.W.2d 666, ¶ 34.

26. *Id.* ¶ 37, 271 Wis. 2d 295, ¶ 37, 680 N.W.2d 666, ¶ 37.

27. *Id.* ¶ 35, 271 Wis. 2d 295, ¶ 35, 680 N.W.2d 666, ¶ 35.

28. *Id.* ¶ 192 n.111, 271 Wis. 2d 295, ¶ 192 n.111, 680 N.W.2d 666, ¶ 192 n.111.

authority to adopt binding compact provisions. The IGRA states that Class III gaming activities shall be lawfully conducted on Indian lands only if such activities are “located in a State that permits such gaming for any purpose by any person, organization, or entity.”²⁹ The majority in *Panzer* interpreted this statutory language to mean that the state must expressly allow each specific type of Class III gaming prior to any tribe conducting that particular activity.³⁰ Under the majority’s “ceiling” interpretation of the IGRA, the state may negotiate only over gaming that is explicitly permitted by state law.³¹ Although several cases support this “ceiling” approach,³² which is based on the premise that the IGRA supersedes the *Cabazon* criminal/prohibitory-civil/regulatory analysis, it is inconsistent with *Cabazon*³³ and other cases, including *Lac du Flambeau*,³⁴ *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States*,³⁵ and *Mashantucket Pequot Tribe v. Connecticut*,³⁶ which incorporate *Cabazon* into the IGRA to allow tribal gambling if not expressly prohibited by state law.³⁷

29. 25 U.S.C. § 2710(d)(1)(B) (2000).

30. *Panzer*, 2004 WI 52, ¶ 88, 271 Wis. 2d 295, ¶ 88, 680 N.W.2d 666, ¶ 88 (citing *Am. Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1067–68 (D. Ariz. 2001)). The majority in *Panzer* stated the “District Court [in *American Greyhound*] concluded that IGRA does not permit a state to enter into compacts authorizing tribes to engage in gaming otherwise prohibited by state law.” *Id.*, 271 Wis. 2d 295, ¶ 88, 680 N.W.2d 666, ¶ 88.

31. *Id.* ¶ 91, 271 Wis. 2d 295, ¶ 91, 680 N.W.2d 666, ¶ 91.

32. *See* *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1258 (9th Cir. 1994); *see also* *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 279 (8th Cir. 1993) (“The ‘such gaming’ language of 25 U.S.C. § 2710(d)(1)(B) does not require the state to negotiate with respect to forms of gaming it does not presently permit.”); *Am. Greyhound Racing, Inc.*, 146 F. Supp. 2d at 1067 (concluding that under § 2710(d)(1), “a compact cannot make legal [C]lass III gaming not otherwise permitted by state law Federal courts have adopted what the court shall call a ‘ceiling’ perspective, holding that [IGRA] requires compact games to be lawful under state law.”).

33. 480 U.S. 202 (1987); *see supra* text accompanying notes 5–6.

34. 770 F. Supp. 480, 488 (W.D. Wis. 1991); *see supra* text accompanying note 18. The majority in *Panzer* took the position that the Seventh Circuit’s application of the *Lac du Flambeau* case was merely dicta. 2004 WI 52, ¶ 92 n.36, 271 Wis. 2d 295, ¶ 92 n.36, 680 N.W.2d 666, ¶ 92 n.36. It did not, however, address whether it was convincing dicta, and thus failed to determine whether it is persuasive authority.

35. 367 F.3d 650 (7th Cir. 2004).

36. 913 F.2d 1024, 1031 (2d Cir. 1990); *see also* *N. Arapaho Tribe v. Wyoming*, 389 F.3d 1308, 1311 (10th Cir. 2004) (noting that the Second Circuit has adopted the “categorical” approach or “Wisconsin” analysis as set forth in *Lac du Flambeau*).

37. As one commentator has noted, “because IGRA incorporates the *Cabazon* test, the proper analysis is whether the state regulates gambling or prohibits it all together; it is not whether specific forms of gaming violate certain provisions of state law.” Steven D. Hamilton, Note, *Panzer v. Doyle: The Wisconsin Supreme Court Fires a Near Fatal Shot at the “New Buffalo,”* 55 DEPAUL L. REV. 1341, 1374 (2006). For more discussion of the issue, see

Based on its interpretation of the state constitution, the court rejected arguments that the governor's power to negotiate compacts with Indian tribes is an inherent power or a valid delegated power.³⁸ Although two federal district court opinions had authorized state governors to unilaterally sign a gaming compact and bind the state,³⁹ the Wisconsin Supreme Court did not find this approach convincing. Instead it followed the approach of federal and state courts in Arizona, Kansas, New Mexico, New York, and Rhode Island, all of which had characterized gaming compact authority as a legislative function.⁴⁰ Relying on a very formalistic notion of separation of powers under the Wisconsin Constitution, the court stated that "committing the state to policy choices negotiated in gaming compacts constitutes a legislative function."⁴¹

Because the Wisconsin Supreme Court refused to characterize gaming compact authority an inherent executive power, it also had to address whether it was a validly delegated power pursuant to past legislative decisions. Wisconsin's nondelegation doctrine limits the amount of legislative power the legislature can delegate to the executive branch where the legislature fails to provide sufficient standards and safeguards to constrain executive officials.⁴² By statute, Wisconsin law clearly made the governor the state's lead negotiator on Indian gaming compacts and also permitted the governor to bind the state once an agreement is reached.⁴³ However, the court reasoned that the state legislature had not specifically delegated authority to the governor and

Steve J. Coleman, Note, *Lottery Logistics: The Potential Impact of a State Lottery on Indian Gaming in Oklahoma*, 27 AM. INDIAN L. REV. 515 (2003) (discussing the varying approaches taken by the circuits that have addressed the issue); Amy Head, Comment, *The Death of the New Buffalo: The Fifth Circuit Slays Indian Gaming in Texas*, 34 TEX. TECH L. REV. 377, 391-95 (2003) (arguing that "Congress [i]ntended the *Cabazon* [r]ationale to [a]pply to IGRA").

38. *Panzer*, 2004 WI 52, ¶ 82, 271 Wis. 2d 295, ¶ 82, 680 N.W.2d 666, ¶ 82.

39. See *Langley v. Edwards*, 872 F. Supp. 1531 (W.D. La. 1995); *Willis v. Fordice*, 850 F. Supp. 523 (S.D. Miss. 1994).

40. See *Panzer*, 2004 WI 52, ¶ 62, 271 Wis. 2d 295, ¶ 62, 680 N.W.2d 666, ¶ 62 (citing *Am. Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1072 (D. Ariz. 2001); *State ex rel. Stephan v. Finney*, 836 P.2d 1169, 1185 (Kan. 1992); *State ex rel. Clark v. Johnson*, 904 P.2d 11, 23 (N.M. 1995); *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 798 N.E.2d 1047, 1061 (N.Y. 2003); *Narragansett Indian Tribe of R.I. v. State*, 667 A.2d 280, 282 (R.I. 1995)).

41. *Panzer*, 2004 WI 52, ¶ 64, 271 Wis. 2d 295, ¶ 64, 680 N.W.2d 666, ¶ 64.

42. *Id.* ¶ 79, 271 Wis. 2d 295, ¶ 79, 680 N.W.2d 666, ¶ 79.

43. *Id.* ¶ 19, 271 Wis. 2d 295, ¶ 19, 680 N.W.2d 666, ¶ 19; WIS. STAT. § 14.035 (2005-2006) ("The governor may, on behalf of this state, enter into any compact that has been negotiated under 25 U.S.C. 2710(d)."); see *supra* text accompanying note 16.

had not imposed any procedural safeguards on its exercise, so any compact the governor negotiated would lack the legislative imprimatur necessary for passage of a law within the state.⁴⁴ It bears noting that Wisconsin statutes did not prohibit the governor from negotiating compacts with Indian tribes. The constitutional amendments regarding gaming may have limited the ability of the state to address certain topics, but the court agreed to hear the case as a separation of powers challenge rather than a challenge under the 1993 amendments.⁴⁵ Given this, the court also reasoned that the existence of a constitutionally valid previous statute delegating expansive authority to negotiate compacts with Indian tribes was not sufficient to render the governor's action constitutional.⁴⁶ Oddly, at the same time the court did not condemn the 1992 compacts as unconstitutional or invalidate any games authorized by these compacts.⁴⁷

Three state justices dissented, observing that “[w]e do not understand how the legislature can simultaneously ratify the terms of a compact with one hand and attack it with the other.”⁴⁸ Further, the dissent observed, “[i]f the governor cannot make commitments,” the Midwest Interstate Low-Level Radiation Compact and other interstate compacts “are necessarily invalid.”⁴⁹ As the dissent highlights, the majority's approach in *Panzer* has significant implications for the approval of interstate compacts not only in the context of Indian gaming but also more broadly.

Panzer presents a major obstacle for Indian gambling in Wisconsin, a source of significant revenue for the state.⁵⁰ More broadly, after *Panzer*, binding compacts in Wisconsin seemingly require express

44. *Panzer*, 2004 WI 52, ¶ 82, 271 Wis. 2d 295, ¶ 82, 680 N.W.2d 666, ¶ 82. The majority failed, however, to indicate what would constitute adequate standards or safeguards—an ongoing problem with using the nondelegation doctrine to invalidate grants of legislative power to the executive branch. See Mark Seidenfeld & Jim Rossi, *The False Promise of the “New” Nondelegation Doctrine*, 76 NOTRE DAME L. REV. 1, 6 (2001) (noting that courts are unable to develop principled ways of enforcing the nondelegation doctrine).

45. For example, the court stated, “The question whether the legislature itself could approve a gaming compact of indefinite duration is not presented in this case.” *Panzer*, 2004 WI 52, ¶ 78 n.28, 271 Wis. 2d 295, ¶ 78 n.28, 680 N.W.2d 666, ¶ 78 n.28.

46. *Id.* ¶¶ 72–73, 271 Wis. 2d 295, ¶¶ 72–73, 680 N.W.2d 666, ¶¶ 72–73.

47. *Id.* ¶¶ 102, 112 n.46, 271 Wis. 2d 295, ¶¶ 102, 112 n.46, 680 N.W.2d 666, ¶¶ 102, 112 n.46.

48. *Id.* ¶ 186, 271 Wis. 2d 295, ¶ 186, 680 N.W.2d 666, ¶ 186 (Abrahamson, C.J., Bradley, J., Crooks, J., dissenting).

49. *Id.* ¶ 187, 271 Wis. 2d 295, ¶ 187, 680 N.W.2d 666, ¶ 187 (Abrahamson, C.J., Bradley, J., Crooks, J., dissenting).

50. An excellent discussion of its potential impact appears in Hamilton, *supra* note 37.

legislative ratification ex post and the authority of state executive branch officials to negotiate compacts is sharply limited. Also, to the extent *Panzer's* approach to separation of powers is followed, state legislatures may not be able to delegate broad compact negotiation authority to executives ex ante. This hamstringing the state executive to effectively act as nothing more than an agent of the state legislature in the compact negotiation process.

III. *DAIRYLAND GREYHOUND PARK, INC. V. DOYLE*: LOOKING TO THE CONTRACT CLAUSE AS A SOLUTION

While *Panzer* addressed gaming compacts through the lens of separation of powers, limiting the authority of the executive branch based on an allocation of powers argument, courts have also looked to the Contract Clause of the U.S. Constitution⁵¹ (and corresponding clauses of state constitutions) as a basis for understanding the scope of state executive authority to negotiate compacts.⁵² In other words, although state executives might not have the authority to act as a matter of state law, under separation of powers principles, once they do act in ways that create legally enforceable obligations, federal and constitutional guarantees trump any state constitutional separation of powers concern.

For example, the Michigan Supreme Court has held that Michigan's governor has broader authority to negotiate gambling compacts with Indian tribes than the Wisconsin Supreme Court recognized in *Panzer*. In 1997, Michigan's Governor Engler negotiated compacts regarding Indian gambling, providing that these would take effect after "[e]ndorsement by the Governor of the State and concurrence in that endorsement by resolution of the Michigan Legislature."⁵³ Following the Governor's endorsement, the Michigan legislature endorsed the compacts by joint resolution.⁵⁴ A separation of powers challenge to the

51. U.S. CONST. art. I, § 10, cl. 1.

52. The U.S. Supreme Court first suggested that interstate compacts are contracts in 1823, in *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823). As the Court stated there, "[i]f we attend to the definition of a contract, which is the agreement of two or more parties, to do, or not to do, certain acts, it must be obvious, that the propositions offered, and agreed to by Virginia, being accepted and ratified by Kentucky, is a contract. In fact, the terms compact and contract are synonymous . . ." *Id.* at 92.

53. See *Taxpayers of Mich. Against Casinos v. State*, 685 N.W.2d 221, 225 (Mich. 2004) (quoting the compacts at issue).

54. *Id.*

compacts claimed they were not valid because they had failed to go through Michigan's constitutional lawmaking process.

However, the Supreme Court of Michigan reasoned that legislative involvement in compact approval is best characterized as "contract[], not legislation."⁵⁵ The Indian Gaming Regulatory Act does not give states any authority to regulate Indian gaming, but only authorizes states to negotiate with tribes through the compacting process.⁵⁶ The court observed that Michigan's constitution gives the legislature the power to contract by expressing "assent," as occurred with passage of a joint resolution.⁵⁷ The court rejected the analogy to *Immigration & Naturalization Service v. Chadha's* requirement that exercises of legislative power meet constitutional lawmaking requirements, such as bicameralism and presentment prior to veto.⁵⁸ On this view, so long as the legislature has delegated the authority to negotiate contracts to the executive branch, once the executive negotiates a compact there is no requirement for the legislature to sign off on the compact *ex post*. While this approach—understanding gaming compacts through the lens of the federal statute as contracts rather than legislation—avoids the separation of powers problem by authorizing state executives to negotiate compacts, it can also have important implications for a state's ability to modify compacts.

Wisconsin's Supreme Court relied on the understanding of gaming compacts as contracts in *Dairyland Greyhound Park, Inc. v. Doyle*, a case that overrules portions of *Panzer*.⁵⁹ After *Panzer*, all forms of gambling not expressly permitted by Wisconsin law are presumably illegal, but *Panzer* expressly failed to address the amended compacts.⁶⁰

55. *Id.* at 226.

56. *Id.* at 227.

57. *Id.* at 232.

58. *Id.* at 232–34 (citing *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983)).

59. *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 2, 719 N.W.2d 408, ¶ 2.

60. *Panzer v. Doyle*, 2004 WI 52, ¶ 102, 271 Wis. 2d 295, ¶ 102, 680 N.W.2d 666, ¶ 102, *overruled in part by Dairyland Greyhound Park, Inc.*, 2006 WI 107, 719 N.W.2d 408. The majority stated:

[W]e do not believe the 1992 compact suffered from any infirmity under state law when it was entered into. Whether the 1992 compact is durable enough to withstand a change in state law that alters our understanding of what is 'permitted' in Wisconsin is a separate question. The resolution of this question is likely to turn, at least in part, on the application of the impairment of contracts clauses in the United States and Wisconsin Constitutions as well as IGRA.

Dairyland Greyhound relied on *Panzer* to argue that the 1993 constitutional amendment does not violate the impairment of contracts clauses in the federal and state constitutions. In its *Dairyland* opinion, the court held that that Wisconsin's 1993 constitutional amendment did not invalidate the original gaming compacts that had been negotiated by Governor Thompson. The court reasoned that the right to renewal in the original compacts is constitutionally protected by the Contract Clauses of the U.S. and Wisconsin Constitutions.⁶¹ The court also stated, "We withdraw any language to the contrary in *Panzer* . . . that would limit the State's ability to negotiate for Class III games under the [o]riginal [c]ompacts."⁶²

The Contract Clause argument for validating compacts negotiated by a state executive has an attraction in that it may give greater flexibility to state courts addressing the constitutionality of executive negotiated interstate compacts, but the argument is based on a misreading of Contract Clause cases and also has adverse policy consequences in the compact process. While bilateral compacts may not present difficulties regarding modification, as two parties will typically agree to any changes in a compact's terms, multilateral compacts are more likely to undergo revisions without approval of every compact party. If courts read the Contract Clause to preclude modifications to compacts, what is gained in judicial flexibility in upholding compacts comes at the cost of flexibility in the compact process and may undermine the power of an individual state to impose conditions on a compact during the bargaining process.

In holding that the compacts produced binding commitments, despite the failure of the compacts to expressly address the scope of the commitments, *Dairyland*'s majority seems to overextend the legal protections the U.S. Supreme Court has afforded in its Contract Clause cases. To begin, in order to assert a valid Contract Clause claim, a state must have acted in its sovereign capacity. This begs the separation of powers question of which institution—the legislature or the governor—has the authority to act as the sovereign on behalf of the state. The separation of powers problem, in other words, remains, and only if we rely on a meaninglessly capacious notion of state sovereignty—

Id., 271 Wis. 2d 295, ¶ 102, 680 N.W.2d 666, ¶ 102. The court further noted that the plaintiffs in *Panzer* conceded the validity of the 1992 original compacts and the 1998 amendments thereto, and the majority has "not as yet been presented with a persuasive case to conclude otherwise." *Id.* ¶ 98 n.38, 271 Wis. 2d 295, ¶ 98 n.38, 680 N.W.2d 666, ¶ 98 n.38.

61. *Dairyland Greyhound Park, Inc.*, 2006 WI 107, ¶ 2, 719 N.W.2d 408, ¶ 2.

62. *Id.*, 719 N.W.2d 408, ¶ 2.

effectively making every commitment by every state actor irrevocable—can the Contract Clause provide a legal answer to the question presented. In addition, the Supreme Court has recognized that the police power of states—the protection of public health and morals—is not generally something a state can bargain away.⁶³ The Court has consistently recognized that gambling and lotteries fall within this class of activities, casting doubt on the general claim that compacts regarding these activities are per se contract rather than legislation.⁶⁴ Recent case law affirms the principle that binding commitments can only be made by clear and unmistakable commitments by the relevant state sovereign. Under the unmistakability doctrine clarified in *United States v. Winstar Corp.*, the Court recognized that only clear and unambiguous contractual commitments can be enforced.⁶⁵ There the Court concluded that, absent an unmistakable provision by the sovereign to the contrary, “[c]ontractual arrangements, including those to which a sovereign itself is a party, ‘remain subject to subsequent legislation’ by the sovereign.”⁶⁶

Moreover, over reliance on the Contract Clause as a mechanism for validating interstate compacts negotiated by state executive actors may have negative policy implications for interstate compacts. To the extent the Contract Clause restricts a state’s ability to modify or renegotiate the terms of interstate compacts, it risks making all compacts binding commitments that can only be modified by consent of every party and thus undermines flexibility on compact terms. As a result, interstate compacts will be less likely to include enforceable legal obligations, and, when they do, these obligations will lack regulatory flexibility. In bilateral compacts, the adverse policy impacts may be minimal, but where compacts are more complex, involving multiple sovereigns, the Contract Clause argument may make compacts so rigid that the only way they can be renegotiated is with unanimity. It may also undermine

63. See *Atl. Coast Line R.R. v. City of Goldsboro*, 232 U.S. 548, 558 (1914) (noting that the Contract Clause does not have “the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community”); *Douglas v. Kentucky*, 168 U.S. 488, 502–03 (1897) (noting that a lottery grant is not a contract “but is simply a gratuity and license”); *Stone v. Mississippi*, 101 U.S. 814, 818–19 (1879) (“No legislature can bargain away the public health or the public morals.”).

64. For example, *Stone* held that the State of Mississippi could not bargain away its power to prohibit lotteries in the future, 101 U.S. at 818–19; *Douglas* allowed the Commonwealth of Kentucky to prohibit lotteries, 168 U.S. at 502–03.

65. 518 U.S. 839, 880 (1996).

66. *Id.* at 877 (quoting *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52 (1986)).

procedures that many interstate compacts set up that are designed to provide for renegotiation of compact terms in the future.

IV. TOWARDS A NONISOLATIONIST ALTERNATIVE: IMPLIED
PREEMPTION AND A PRESUMPTION OF EXECUTIVE AUTHORITY TO
NEGOTIATE COMPACTS WHERE CONGRESS HAS SPOKEN EX ANTE

While the two cases rely on different constitutional provisions and reach differing conclusions, the Wisconsin Supreme Court's approaches to gaming compacts in *Panzer* and *Dairyland* use similar methods in interpreting state constitutions. *Panzer* looks to state separation of powers provisions, relying on Wisconsin's constitution independent of federal goals and programs.⁶⁷ *Dairyland* looks to the Contract Clause of the U.S. Constitution, along with similar Wisconsin provisions, drawing on a constitutional protection to trump separation of powers provisions.⁶⁸ In this sense, both cases take an isolationist approach, relying on the positive textual protections provided by a single constitution to solve the problem of state executive authority to negotiate compacts. What both approaches ignore, however, is that this problem arises due to overlapping jurisdictions—between state constitutions, on the one hand, and interstate coordination, consistent with federally-articulated goals, on the other. By contrast, interpreting a state constitution's separation of powers issues in the context of the broader federal goals positioned in a national constitution would allow state courts to respect separation of powers without disabling states from participating in interstate solutions to problems, such as compacts.

Such an approach would recognize that the federal role in approving interstate compacts has changed substantially over the past one hundred years. Beginning in the 1930s, Congress modified its approach to approving interstate compacts—increasingly authorizing interstate compacts ex ante rather than merely approving them ex post.⁶⁹ The Crime Control Act of 1934—developed not by a group of appointed state representatives but by an ad hoc gathering of state officials, none of whom had been delegated the authority to enter into a compact on behalf of their states—contained Congress's consent for an interstate compact governing the supervision of parolees who move legally

67. See *supra* Part II.

68. See *supra* Part III.

69. CAROLINE N. BROUN ET AL., THE EVOLVING USE AND THE CHANGING ROLE OF INTERSTATE COMPACTS: A PRACTITIONER'S GUIDE 76–77 (2006).

between states and invited states to participate in the compact.⁷⁰ By 1937, the Interstate Compact for the Supervision of Parolees and Probationers was born; the compact was ultimately given legislative approval by all fifty states.⁷¹ Thereafter, numerous other interstate compacts originated out of similar congressional authorization *ex ante*, followed by informal efforts by state officials to negotiate compact terms. For example, in the Clean Air Act, Congress gave its *ex ante* consent to agreements for the “prevention and control of air pollution and the enforcement of their respective laws” between two or more states.⁷² The Clean Water Act contains similar language,⁷³ as does the Low-Level Radioactive Waste Policy Amendments Act.⁷⁴

One leading account of state constitutions, advanced by James Gardner, envisions courts as presumptively exercising the authority to interpret state constitutions where there are potential conflicts between state and national power.⁷⁵ Gardner’s account of state constitutional interpretation recognizes that state courts do not interpret their constitutions in isolation when dealing with issues of state/federal coordination.⁷⁶ Gardner argues that state courts serve an important function in interpreting state constitutions to the extent that they provide a resistance against the exercise of federal power, particularly in ways that reduce liberty.⁷⁷ As I have argued elsewhere, state courts also may play an important role in coordinating national goals.⁷⁸ For this to occur, state courts must avoid an isolationist approach to addressing

70. *Id.*

71. *Id.*

72. 42 U.S.C. §7402(c) (2000). This is an *ex ante* authorization only. As the Clean Air Act states, “No such agreement or compact shall be binding or obligatory upon any State a party thereto unless and until it has been approved by Congress” *ex post*. *Id.*

73. 33 U.S.C. §1253(b) (2000).

74. 42 U.S.C. §2021d(a)(2) (2000).

75. JAMES GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* (2005).

76. *Id.* at 87–94; *see, e.g.*, *Dep’t of Legal Affairs v. Rogers*, 329 So. 2d 257 (Fla. 1976); *McFaddin v. Jackson*, 738 S.W.2d 176 (Tenn. 1987); *Ex parte Elliott*, 973 S.W.2d 737 (Tex. App. 1998). Elsewhere, I argue that implicit authorization for state executive and local agencies to act on behalf of federal goals is the best interpretation of state separation of powers—a matter of state constitutional law that state and federal courts should acknowledge. *See* Jim Rossi, *Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federally Inspired Regulatory Programs and Standards*, 46 WM. & MARY L. REV. 1343 (2005).

77. GARDNER, *supra* note 75, at 91.

78. Jim Rossi, *The Puzzle of State Constitutions*, 54 BUFF. L. REV. 211 (2006) (reviewing GARDNER, *supra* note 75).

separation of powers issues where federal programs or interstate goals are at issue.

A non-isolationist approach to separation of powers would lead the Wisconsin Supreme Court down a very different path from *Panzer* or *Dairyland*. As the Supreme Court recognized in *Cabazon*, once a state allows some forms of gambling, the IGRA preempts the ability of the state to regulate Indian gaming.⁷⁹ Relying on this case, a federal judge in Wisconsin concluded that the “state is required to negotiate with plaintiffs over the inclusion in a tribal-state compact of any activity that includes the elements of prize, chance and consideration and that is not prohibited expressly by the Wisconsin Constitution or state law.”⁸⁰ Indeed, one analysis of *Panzer* observes that “the majority misinterpreted the statutory text of IGRA by reading the *Cabazon* analysis out of the statute.”⁸¹

It is important to distinguish between state legislative action that expressly prohibits the executive from negotiating compacts, on the one hand, and state legislation that is ambiguous or silent regarding the executive’s authority to negotiate compacts, on the other. Prohibiting an executive from acting is one thing, but failing to authorize it is another altogether. Where Congress has expressed a preference for interstate compacts and has authorized states to enter into compacts, courts could draw on the Supremacy Clause to preempt state separation of powers principles; in other words, Congress’ authorization of interstate compacts could be used to impliedly preempt any state constitutional requirement that a legislature specifically authorize the executive to negotiate compacts. Such a presumption would not reduce the power of state legislatures but would clarify that legislative power to limit the authority of the executive in the context of federally authorized interstate compacts only has legal effect where it is expressly invoked.⁸²

Indeed, such an approach could be agenda-forcing in the arena of state politics. Where a state legislature has not explicitly prohibited an executive from negotiating compacts, this approach would encourage

79. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 211–12 (1987).

80. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480, 488 (W.D. Wis. 1991).

81. Hamilton, *supra* note 37, at 1382.

82. Elsewhere, I argue for a presumption in the context of interstate crisis to deal with the alleged separation of powers limits on state executive emergency management. See Jim Rossi, *State Executive Lawmaking in Crisis*, 56 DUKE L.J. 237 (2006). A presumption of state executive authority to negotiate interstate compacts where Congress has signaled its preference for cooperation between sovereigns can be justified along similar lines.

the executive branch to negotiate compacts. The state legislature may reject the terms of those compacts after the fact, if it so wishes. In contrast, to preclude an executive from negotiating compacts unless a legislature first explicitly authorizes the executive to negotiate compacts—as in *Panzer*—would likely serve to keep states from participating in the compact process in the first place. This could undermine federal goals while also keeping state legislatures from addressing the real issues presented in a compact.

Moving beyond state constitutional interpretation, which depends primarily on the approach of state courts, one solution to such future disputes would be for Congress to expressly preempt state separation of powers in statutes addressing interstate compacts. Congress has certainly spoken to the issue of state officials before. In the context of presidential election disputes, the Constitution specifically assigns a role to state legislatures in selecting representatives to the national electoral college.⁸³ Congress itself has elaborated on the approach by which state legislatures should play this role.⁸⁴ As long as it is operating within its

83. Article II, Section 1, Clause 2 states the following:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

U.S. CONST. art. II, § 1, cl. 2.

84. As Congress has stated:

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

3 U.S.C. § 5 (2000). This statutory language, of course, was central to the dispute decided by the U.S. Supreme Court in *Bush v. Gore*, 531 U.S. 98 (2000). Interestingly, in the majority opinion in that case, state separation of powers played absolutely no role in resolving the issues presented. While that was an issue that inspired great criticism of the Court's approach, there is no doubt how the majority decided to approach the issue. For examples of criticism, see Erwin Chemerinsky, *How Should We Think About Bush v. Gore?*, 34 LOY. U. CHI. L.J. 1, 20 (2002) (criticizing the majority "for impermissibly usurp[ing] the Florida

constitutional powers, Congress could name the relevant state officials for purposes of negotiating and adopting interstate compacts, in effect expressly preempting any expected state separation of powers conflict. For example, in enacting legislation that favors interstate compacts, Congress might specifically provide that state executives have the authority to enter into compacts—even where a legislature has failed to delegate authority under a state constitution. It would be more controversial for Congress to preempt states by adopting *ex post* an interstate compact which was negotiated under questionable authority, but even this probably does not extend beyond Congress' power to preempt state separation of powers. As long as Congress does not require the state to enter into compacts, and elected state officials retain discretion, there is no Tenth Amendment problem presented with Congress naming state executives in legislation in order to encourage them to negotiate compacts independent of state legislatures.

While state courts could fashion a presumption of state executive power to negotiate compacts primarily from state constitutional law principles, a presumption of state executive power to negotiate compacts that draws on federal preemption principles could have important implications for litigation regarding interstate compacts. To the extent such a presumption draws on preemption principles under the Supremacy Clause, it is primarily a principle of federal—not state—law. State courts may have ways of resolving such issues on their own constitutional terms. However, should they fail to do so, the approach of this Essay suggests that many interstate compact issues, including the disputes raised in cases such as *Panzer* and *Dairyland*, are issues best decided by federal, not state, courts.

V. CONCLUSION

State constitutional isolationism has provided an unsatisfactory approach to resolving the separation of powers problems presented with executive negotiation of interstate compacts, such as the gambling

Supreme Court's authority to decide Florida law in this extraordinary case"); Louise Weinberg, *When Courts Decide Elections: The Constitutionality of Bush v. Gore*, 82 B.U. L. REV. 609, 654 (2002) (making the broad claim that "[t]here is inevitable offense to principles of federalism when the Supreme Court or other federal court takes a contested election from the processes, however clumsy, that a state legislature has prescribed to deal with it"). If *Bush v. Gore* is understood as relying on the U.S. Constitution and a federal statute to preempt state election laws, and to specifically assign powers to state legislatures, it is unclear how it would offend notions of federalism.

compacts that recently have been in dispute in Wisconsin. A nonisolationist approach would recognize the value of interstate cooperation through compacts. Such a recognition will not tolerate an isolationist separation of powers analysis, but instead interpret separation of powers in the context of federal preemption concerns. Where Congress has spoken clearly about the need for interstate cooperation, federal law will override state separation of powers concerns, allowing a state executive to take the lead in negotiating a compact. Separation of powers doctrine still may impose a barrier to compacts where there is no clear federal directive. In addition, a state legislature may pass a law rejecting the terms of a compact. However, where Congress has spoken *ex ante* regarding the desirability of interstate compacts, there is no reason for state separation of powers to stand in the way to the establishment of such compacts, especially where a state legislature has given the state executive *ex ante* authority to negotiate compacts.