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

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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 Wisconsin's 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

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[1] "No state shall, without the Consent of Congress, ... enter into any Agreement of Compact with another State . . . ." U.S. Const. Art. I, Sec. 10.

greater autonomy to negotiate interstate compacts. Part I 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 cases as a springboard for discussion. Part II illustrates how Wisconsin courts have found this approach unsatisfactory, and discusses how later cases in Wisconsin and elsewhere have looked to Contract Clause[2] 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 III by arguing that, to date, Wisconsin courts have used an isolationalist 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

[2] "No state shall enter into any treaty, alliance, or consideration; . . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts . . . ." U.S. Const., Art. I, Sec. 10. State constitutions, such as Wisconsin's, frequently contain a similar provision. *See, e.g*., Wis. Const. Art. I, Sec. 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 of every state shall be bound thereby, anything in the constitution of laws of any state to the contrary notwithstanding.

U.S. Const. Art. VI.

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.

I. *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*,[4] the U.S. Supreme Court indicated that state laws may be applied on tribal reservations only where Congress so provides. The Court stated, "[I]f 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, which include lotteries, pari-mutuel on-track betting, and casino games such as black jack, roulette, craps, keno and slot machines.[7] Under the federal statute,

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[4] 480 U.S. 202 (1987).
[5] Id. at 207.
[6] Id.
[7] 25 U.S.C. § 2910(b)(1)(A). Other activities are regulated by Indian tribes or by tribes along with the National Indian Gaming Commission. Id. at § 2710(a)(1) (Class I activities are under the exclusive jurisdiction of Indian tribes); id. at §§ 2710(a)(2) &

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."[8]

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.[9] In Wisconsin, 1987 constitutional amendments authorized pari-mutuel on-track betting and a state-wide lottery, changing a provision of Wisconsin's Constitution that prohibited the state legislature from authorizing "any lottery."[10] 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.[11] The Attorney General further elaborated that "[I]t is not my responsibility to establish the public policy on gambling in Wisconsin . . . [The] policy as

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2706(b) (Class II activities are under the jurisdiction of Indian tribes and the National Indian Gaming Commission).
[8] Id. at § 2710(d)(1)(B).
[9] Panzer v. Doyle, 680 N.W.2d 666 (Wis. 2004).
[10] The original Constitution stated, "The legislature shall never authorize any lottery, or grant any divorce." Wis. Const. Art. IV, Sec. 24.
[11] 680 N.W.2d at 674.

it relates to gambling is within the role, responsibility and ability of the Legislature to address . . . ."[12]

This opinion was the political "hot potato"[13] 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. 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.[14] Both houses of the Legislature rejected amendments to this bill that would have required the Legislature to ratify any compacts before they became effective.[15] Following this federal decision, *Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wisconsin (Lac du Flambeau)*, 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."[16] In other words, under this case, activities that Wisconsin law do not prohibit constitute the floor for purposes of the state's obligation to negotiate compacts regarding these activities.

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[12] Id. (citing 79 Op. Wis. Att'y Gen 14, 31 (1990)).
[13] Id.
[14] Id. 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 (2000).
[15] 680 N.W.2d at 674.
[16] Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wisconsin, 770 F.Supp. 480, 488 (W.D. Wis. 1991).

By June of 1992, Wisconsin Governor Tommy Thompson had reached compact agreements with all eleven federally recognized tribes in the state.[17] Some of these agreements included electronic games of chance, blackjack, and pull-tabs or break-open tickets.[18] The compacts were generally effective for a period of 7 years, and would automatically be renewed for 5 year terms unless one of the parties served written notice within 180 days prior to the end of the compact term.[19] In 1993, however, the state again amended its Constitution by changing the prohibition on the legislature authorizing any "lottery" to provide "[e]xcept as provided in this section the legislature may not authorize gambling in any form."[20] The amendments contained very detailed language, including language that prohibited games such as blackjack.[21]

In 2003, Governor James Doyle agreed to new amendments to one of the gaming compacts. The amended compact cleared that way for a tribe to conduct many games that had never been legal in Wisconsin, such as keno, roulette, craps and poker.[22] It also waived sovereign immunity "to the extend the State . . .may do so by law."[23] The amendments not only extended the scope of tribal gambling in the state, but also extended the compacts indefinitely. The majority leader of the Senate and the speaker of the General Assembly (both of whom had supported earlier legislation giving the governor the authority to negotiate compacts)[24] sued, alleging that the Governor lacked

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[17] 680 N.W.2d at 676-77.
[18] Id. at 677.
[19] Id.
[20] Id.
[21] Id. at 677-79.
[22] Id. at 680.
[23] Id. at 681.
[24] Id. at 711 n.111.

inherent or delegated powers under separation of powers to negotiate the amendments to the compacts.

In *Panzer v. Dolye*, 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 limited Wisconsin's Constitution imposed on the Governor's 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 . . . ."[25] 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 conductive that particular activity.[26] Under the majority's "ceiling" interpretation of the IGRA, the state may negotiate only over gaming that is explicitly permitted by state law.[27] Although several cases support this "ceiling" approach,[28] which is based on the premise that the

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[25] 25 U.S.C. § 2710(d)(1)(B) (2000).
[26] Panzer, 680 N.W.2d at 694 (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.
[27] Id. at 695.
[28] *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."); American Greyhound, 146 F. Supp. 2d 1012, 1067-68 (D. Ariz. 2001) (concluding that under § 2710(d)(1), "a compact cannot make legal [C]lass III gaming not otherwise

IGRA supersedes the *Cabazon* criminal/prohibitory-civil/regulatory analysis, it is inconsistent with *Cabazon*[29] and other cases, including *Lac du Flambeau*[30]*, Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States* (*Lac Courte Oreilles*),[31] and *Mashantucket Pequot Tribe v. Connecticut*,[32] which incorporate *Cabazon* into the IGRA to allow tribal gambling if not expressly prohibited by state law.[33]

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. Although two federal district court opinions had authorized state governors to unilaterally sign a gaming compact and bind the state, the Wisconsin

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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.").

[29] *See* supra note >>.

[30] *See* supra note >>.

[31] Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States, 367 F.3d 650 (7th Cir. 2004). The majority in Panzer took the position that the Seventh Circuit's application of the *Lac du Flambeau* case was merely dicta. 680 N.W.2d at 695 n.36. It did not, however, address whether it was convincing dicta, and thus failed to determine whether it is persuasive authority.

[32] Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1031 (2d Cir. 1990). See also Northern 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).

[33] 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 (Student 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 Steve J. Coleman (Student 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 that "Congress intended the Cabazon rationale to apply to IGRA").

Supreme Court did not find this approach convincing.[34] 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.[35] 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."[36]

Since 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. 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.[37] However, the court reasoned that the state Legislature had not specifically delegated authority to the Governor, and 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

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[34] *See* Willis v. Fordice, 850 F.Supp. 523 (S.D. Miss. 1994); Langley v. Edwards, 872 F.Supp. 1531 (W.D. La. 1995).
[35] American Greyhound Racing Inc. v. Hull, 146 F.Supp.2d 1012, 1072 (D. Ariz. 2001); Kansas ex rel. Stephan v. Finney, 836 P.2d 1169, 1185 (1992); New Mexico ex rel. Clark v. Johnson, 904 P.2d 11, 23 (1995); Pataki, 78 N.E.2d at 1061; Narrangansett Indian Tribe of Rhode Island v. Rhode Island, 667 A.2d 280, 282 (R.I. 1995).
[36] 680 N.W.2d at 687.
[37] See supra note >> and accompanying text.

the state.[38] It bears noting that Wisconsin statutes did not prohibit its 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.[39] 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.[40] Oddly, at the same time the court did not condemn the 1992 compacts as unconstitutional or invalidate any games authorized by these compacts.[41]

Three state justices dissented, observing that "We do not understand how the legislature can simultaneously ratify the terms of a compact with one hand and attack it with the other."[42] Further, the dissent observed, "If the governor cannot make commitments," the Midwest Interstate Low-Level Radiation Compact and other interstate compacts "are necessarily invalid."[43] As the dissent highlights, the majority's approach in *Panzer* has significant implication for the approval of interstate compacts not only in the context of Indian gaming, but also more broadly.

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[38] The majority failed, however, to indicate what would constitute adequate standards or safefaurds – an ongoing problem with using the nondelegation doctrine to invalid 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).
[39] 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." 680 N.W.2d at 690.
[40] Id. at 688-89.
[41] Id. at 698; id. at n. 46.
[42] Id. at 717.
[43] Id.

Panzer presents a major obstacle for Indian gambling in Wisconsin, a source of significant revenue for the state.[44] More broadly, after *Panzer* binding compacts in Wisconsin seemingly require express 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 hamstrings state executive to effectively acting as nothing more than an agent of the state legislature in the compact negotiation process.

II. *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. Constitution (and corresponding clauses of state constitutions) as a basis for understanding the scope of state executive authority to negotiate compacts.[45] 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.

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[44] An excellent discussion of its potential impact appears in Hamilton, supra note >>.

[45] The U.S. Supreme Court first suggested that interstate compacts are contracts in 1823, in *Green v. Biddle*. As the Court stated there, "If 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 proposition offered, and agreed to by Virginia, being accepted and ratified by Kentucky, is a contract. In fact, the terms compact and contract are synonymous." 21 U.S. (8 Wheat.) 1, 92 (1823).

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 the endorsement by joint resolution of the Michigan Legislature."[46] Following the Governor's endorsement, the Michigan Legislature endorsed the compacts by joint resolution.[47] A separation of powers challenge to the compact claims that it was not valid because it had failed to go through Michigan's constitutional lawmaking process.

However, the Supreme Court reasoned that the legislative involvement in the compact approval is best characterized as "contract[], not legislation."[48] 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.[49] The Supreme Court observed that Michigan's Constitution gives the legislature the power to contract by "expressing assent", as occurred with passage of a joint resolution.[50] The Court rejected the analogy to *Chadha's* requirement that exercises of legislative power meet constitutional lawmaking requirements, such as bicameralism and presentment prior to veto.[51] On this view, so long as the legislature has delegated the authority to negotiate contracts to the executive branch, once the legislature negotiates a compact there is no requirement for the legislature to sign off on the compact ex post. While this approach –

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[46] 685 N.W.2d at 225.
[47] Id.
[48] Id. at 226.
[49] Id. at 227.
[50] Id. at 232.
[51] Id. at 232-34.

understanding gaming compacts through the lens of the federal statute as contracts rather than legislation – avoid 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*.[52] After *Panzer*, all forms of gambling not expressly permitted by Wisconsin law are presumably illegal, but *Panzer* expressly failed to address the amended compacts.[53] 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 which 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. The court also stated, "We withdraw any language to the contrary in

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[52] 719 N.W.2d 408 (Wis. 2006).

[53] 680 N.W.2d at 697. 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.

Id. 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. at 697 n.38.

Panzer [] that would limit the State's ability to negotiate for Class III games under the original compacts."[54]

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 the 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 – effectively making every commitment by every state actor irrevocable – can the Contract

[54] 719 N.W.2d at 416.

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.[55] 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.[56] 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*, the Court recognized that only clear and unambiguous contractual commitments can be enforced.[57] There the Court concluded that, absent an unmistakable provision by the sovereign to the contrary, "Contractual arrangements, including those to which a sovereign itself is a party, 'remain subject to subsequent legislation' by the sovereign."[58]

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

[55] Stone v. Mississippi, 101 U.S. 814, 818-19 (1879) ("No legislature can bargain away the public health or the public morals."); Douglas v. Kennedy, 168 U.S. 488, 502-03 (1897) (noting that a lottery grant is not a contract "but is simply a gratuity or a license"); Atlantic Coast Line Railroad Co. v. City of Goldboro, 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. . . . ").

[56] For example, *Stone* held that the state of Mississippi could not bargain away its power to prohibit lotteries in the future; *Douglas* allowed the state of Kentucky to prohibit lotteries. *See* supra note >>.

[58] Id. at 877 (quoting Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41, 52 (1986)).

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

III. 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. *Pamzer* looks to state separation of powers provisions, relying on Wisconsin's constitution independent of federal goals and programs. *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 power provisions. 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 that this problem arises due to overlapping jurisdictions – between state constitutions, on the one had, 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 1930's Congress modified its approach to approving interstate compacts – increasingly authorizing interstate compact ex ante rather than merely approving them ex post. 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 contract on behalf of their states--contained Congress's consent for an interstate compact governing the supervision of parolees who move legally between states and invited states to participate in the compact. By 1937, all 50 states had given the compact legislative approval, and the Interstate Compact for the Supervision of Parolees and Probationers was born.[59] 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 enforcement of their respective laws" between two or more states.[60] The

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[59] CAROLINE N. BROUN, ET AL., THE EVOLVING USE AND CHANGING ROLE OF INTERSTATE COMPACTS: A PRACTITIONER'S GUIDE 76-77 (2006).
[60] 42 U.S.C. §7402. 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.

Clean Water Act contains similar language,[61] as does the Low-Level Radioactive Waste Amendment Act.[62]

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.[63] 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.[64] 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, particular in ways that reduce liberty.[65] As I have argued elsewhere, state courts also may play an important role in coordinating national goals.[66] For this to occur, state court must avoid an isolationist approach to addressing 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

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[61] 33 U.S.C. §1253(a).

[62] 42 U.S.C. §2021d(a)(1).

[63] JAMES GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM (University of Chicago Press 2005).

[64] Id. at 87-94. *See, e.g.*, Ex Parte Elliott, 973 SW.2d 737 (Tex. App. 1998); McFaddin v. Jackson, 738 S.W.2d 176 (Tenn. 1987); Department of Legal Affairs v. Rogers, 329 So2d 257 (Fla. 1976). 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. Jim Rossi, *Dual Constitutions and Constitutional Duels: State Separation of Powers and the Implementation of Federal Programs*, 46 WM. & MARY L. REV. 1343 (2005).

[65] Gardner, supra note >>.

[66] Jim Rossi, *The Puzzle of State Constitutions*, 54 BUFF. L. REV. 211 (2006) (reviewing Gardner's book).

Court recognized in *Cabazon*, once a state allows some forms of gambling, the IGRA preempts the ability of the state to regulate Indian gaming.[67] 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."[68] Indeed, one analysis of *Panzer* observes that "the majority misinterpreted the statutory text of IGRA by reading the *Cabazon* analysis out of the statute."[69]

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

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[67] California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).
[68] Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wisconsin, 770 F.Supp. 480, 488 (W.D. Wis. 1991).
[69] DePaul article, supra note >>, at 1382.

in the context of federally authorized interstate compacts only has legal effect where it is expressly invoked.[70]

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 encourages 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.

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State constitutional isolationalism has provided an unsatisfactory approach to resolving the separations of powers problems presented with executive negotiation of interstate compacts, such as the gambling compacts that recent 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 but 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 of

[70] 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. __ (forthcoming 2006) (symposium). 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.

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 give the state executive ex ante authority to negotiate compacts.