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CAUGHT IN THE MIDDLE: HOW STATE POLITICS, STATE LAW, AND STATE COURTS CONSTRAIN TRIBAL INFLUENCE OVER INDIAN GAMING

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I. INTRODUCTION

A basic tenet of federal Indian law is that, as sovereign nations, tribes ordinarily are not subject to the strictures of state law.¹ In its 1987 landmark decision, *California v. Cabazon Band of Mission Indians*,² the U.S. Supreme Court applied that principle to hold that states could not regulate Indian gaming. On the heels of the Court's decision, Congress enacted the Indian Gaming Regulatory Act of 1988 ("IGRA"),³ which recognizes tribal sovereignty while giving states a significant role in setting the parameters of gaming within their borders.

Under IGRA, tribes may conduct gaming only in those states that "permit[] such gaming for any purpose by any person."⁴ As a result, state law in the first place dictates the permissible scope of Indian gaming. For casino-style, or "Class III" gaming,⁵ IGRA requires that

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1. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) ("The Cherokee nation . . . is a distinct community occupying its own territory, with boundaries accurately described . . . which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.").

2. 480 U.S. 202 (1987).

3. 25 U.S.C. §§ 2701–21 (2000).

4. *Id.* §§ 2710(b)(1)(A), 2710(d)(1)(B). This "permits such gaming" restriction applies to both Class II, which consists primarily of bingo and similar games, *see id.* § 2703(7), and Class III gaming, a residual category that includes most casino-style games, *see id.* § 2703(8).

5. *See id.* § 2703(8) (defining Class III gaming as "all forms of gaming that are not class I gaming or class II gaming").

the tribe enter into a regulatory agreement with the state, called a tribal-state compact.⁶ Gaming compact negotiations are highly politicized,⁷ as evidenced by increasing state demands for a share of tribal profits.⁸ Through IGRA's "permits such gaming" provision and tribal-state compact requirement, state law, including the decisions of state policymakers in negotiating compacts and the interpretations of state courts, establishes the terms under which a tribe may conduct Class III gaming.⁹

Because state law determines the permissible scope of tribal gaming and may drive compact negotiations, it can also act as a constraint on tribes' abilities to negotiate favorable compacts or to influence Indian gaming policy. Without formal representation in state legislatures or significant numbers of state constituents,¹⁰ tribes across the United States by necessity have adopted interest group style strategies, both to gain leverage in compact negotiations and to participate in state political processes, and have seen varying success.¹¹ Even where seemingly successful, tribes' efforts may be mooted by the actions of state political branches and state courts. In state court, tribes may not even be party to, nor their interests relevant in, a lawsuit that will determine how and whether Indian gaming occurs.¹²

6. *Id.* § 2710(d).

7. See generally Kathryn R.L. Rand, *At Odds? Perspectives on the Law and Politics of Indian Gaming*, 5 GAMING L. REV. 297 (2001).

8. See Steven Andrew Light, Kathryn R.L. Rand & Alan P. Meister, *Spreading the Wealth: Indian Gaming and Revenue-Sharing Agreements*, 80 N.D. L. REV. 657 (2004).

9. See *infra* text accompanying notes 62–77.

10. According to state-by-state estimates by the U.S. Census Bureau, American Indians and Alaska Natives make up more than one percent of the state population in just fifteen states. See U.S. CENSUS BUREAU, STATES RANKED BY AMERICAN INDIAN AND ALASKA NATIVE POPULATION (1999), available at <http://www.census.gov/population/estimates/state/rank/aiea.txt>. Alaska has the largest percentage with about 16%; New Mexico and South Dakota rank next with 9.5% and 8.2%, respectively. Only five other states—Oklahoma, Montana, Arizona, North Dakota, and Wyoming—have American Indian and Alaska Native populations exceeding two percent of the state's total population. The majority of states count American Indians and Alaska Natives as less than one percent of their populations. *Id.*

11. See, e.g., W. DALE MASON, INDIAN GAMING: TRIBAL SOVEREIGNTY AND AMERICAN POLITICS 70–128, 146–75 (2000) (including two case studies describing the political strategies of tribes in the context of Indian gaming issues). See generally ENFRANCHISING INDIAN COUNTRY: THE POLITICS AND ORGANIZATION OF NATIVE AMERICAN GAMING INTERESTS (Tracy A. Skopek & Kenneth N. Hansen eds., forthcoming 2007) (analyzing tribal interest group behavior in the context of Indian gaming issues).

12. See *infra* text accompanying notes 156–74.

Indian gaming is a \$23 billion industry whose upward trajectory suggests continued rapid growth and expansion in the years to come.¹³ Some 400 tribal gaming establishments in 30 states are operated by over 220 tribes that have decided to pursue gaming to create jobs, facilitate economic development, and provide public services to their members.¹⁴ Gaming profits are a major source of government revenue for many tribes, increasing the capacity of tribal governments to provide public services and catalyzing a renaissance of sorts on reservations throughout the United States.¹⁵ States with Indian gaming operations, as well as the numerous non-reservation communities located near tribal casinos, have received extensive economic and social benefits from tribal gaming operations, ranging from increased tax revenues to decreased public entitlement payments to the disadvantaged.¹⁶ The politics of Indian gaming at the state level, including the interpretation of state law by state courts, has the potential to dramatically transform the Indian gaming industry—and not necessarily to the benefit of either tribes or states. As the intended beneficiaries of tribal gaming and those who are affected most by changes in the law and policy governing it, do tribes have a say in the matter, and if so, how much of one?

Wisconsin provides a particularly pertinent case study of state law constraints on Indian gaming as well as tribes' ability to influence legal and political outcomes. The state has experienced dramatic growth in tribal gaming, substantive changes in state public policy toward gambling, conflict between the governor and the state legislature over Indian gaming, and both federal and state court interpretations of state law, including two recent landmark Wisconsin Supreme Court

13. See NAT'L INDIAN GAMING COMM'N, TRIBAL GAMING REVENUES 2000–2005, available at <http://www.nigc.gov/Portals/0/NIGC%20Uploads/Tribal%20Data/tribalgamingrevenues05.pdf>.

14. See STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE 163–68 (2005) [hereinafter LIGHT & RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY]; KATHRYN R.L. RAND & STEVEN ANDREW LIGHT, INDIAN GAMING LAW AND POLICY 5, 5 n.9 (2006) [hereinafter RAND & LIGHT, INDIAN GAMING LAW AND POLICY].

15. See, e.g., LIGHT & RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY, *supra* note 14, at 100.

16. See generally Jonathan B. Taylor, Matthew B. Krepps & Patrick Wang, *The National Evidence on the Socioeconomic Impacts of American Indian Gaming on Non-Indian Communities* (2000), available at <http://www.ksg.harvard.edu/hpaied/docs/PRS00-1.pdf>. For a summary of tribal gaming's economic benefits to states and communities, see LIGHT & RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY, *supra* note 14, at 84 tbl.4.1. For a general discussion of studies of Indian gaming's socioeconomic impacts, see LIGHT & RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY, *supra* note 14, at 77–104.

decisions.¹⁷ The impact of state law and state politics on Indian gaming in Wisconsin has clear and important legal and political implications for tribal gaming across the United States, as well as for the law- and policymakers at the state and tribal level who must negotiate the parameters of far-reaching decisions by the state judiciary—the so-called “non-political” branch of state government.

In this Article, I explain how and why this is the case. I explore the relationship of state law and state courts to Indian gaming in Part II, briefly detailing how a landmark 1987 decision by the U.S. Supreme Court set the stage for Congress to enact IGRA and provide states with a role in regulating Indian gaming within their borders. After a 1996 Supreme Court decision effectively granted states greater political leverage over tribes, state legislatures and state courts have become increasingly involved in governing tribal gaming, with contentious results. I develop the case study of Indian gaming in Wisconsin in Part III, describing its contemporary socioeconomic impact before laying out how state public policy toward Indian gaming has changed over time. Throughout this Part, I detail the involvement and interbranch contestation of state political actors, demonstrating how new officeholders frequently meant new political terrain for tribes to negotiate. This culminated in two legal challenges to tribal-state compacts that made their way to the Wisconsin Supreme Court. Although the issues impacted tribes the most, the state court treated them as matters of state law while marginalizing or even mooting tribal influence over the outcomes. I step back from the Wisconsin case study in Part IV to draw generalizable observations about the role of state law and state courts, first illustrating how similar lawsuits and the interpretation of state law and constitutions have arisen in other states before drawing out the broader implications of how events in Wisconsin reveal the extent to which state politics, state law, and state courts may influence the future of Indian gaming throughout the United States.

II. STATE LAW AND INDIAN GAMING

To examine the role of state law and state courts in governing Indian gaming, one must first turn back the clock to the mid-1980s, at which time a few tribes, notably in Florida and California, had been exploring economic development opportunities by operating high-stakes bingo

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

palaces for several years.¹⁸ The states sought to enforce their gambling regulations on tribal reservations and chafed at tribes' assertion that the states lacked authority to do so. As the arguments between states and tribes became more heated, the issue eventually found its way into federal court.¹⁹

A. California v. Cabazon Band of Mission Indians

The U.S. Supreme Court's landmark 1987 decision in *California v. Cabazon Band of Mission Indians*²⁰ answered the question of whether states could regulate gaming on reservations. Relying on a congressional grant of legal authority over tribes in Public Law 280,²¹ California argued that state law allowing only limited charitable bingo should apply to high-stakes bingo and card rooms operated by the Cabazon and Morongo Bands of Mission Indians on their reservations near Palm Springs. Enacted during the "termination" era²² of federal Indian policy, Public Law 280 gave a handful of states, including California, a broad grant of criminal jurisdiction and a limited grant of civil jurisdiction over tribes within their borders.²³ In *Bryan v. Itasca County*,²⁴ the Supreme Court ruled that Public Law 280's grant of civil jurisdiction was not a blanket authority for the states to regulate the tribes generally, as that "would result in the destruction of tribal institutions and values."²⁵ Public Law 280 would allow California to enforce a criminal prohibition against gaming on reservations, but would

18. See Eduardo Cordeiro, *The Economics of Bingo: Factors Influencing the Success of Bingo Operations on American Indian Reservations*, in WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT 205, 212-13 (Stephen Cornell & Joseph P. Kalt eds., 1992).

19. See RAND & LIGHT, INDIAN GAMING LAW AND POLICY, *supra* note 14, at 20-24 (discussing tribal-state disputes leading to *Cabazon*).

20. 480 U.S. 202 (1987).

21. Act of August 15, 1953, ch. 505, 1953 U.S.C.A.N. (67 Stat. 588-90) 663 (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360 and other scattered sections in 18 and 28 U.S.C. (2001)).

22. See generally RENNARD STRICKLAND ET AL., FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 152-80 (1982) (discussing federal policy and legislation during the "termination" era, designed to end the federal-tribal relationship).

23. For more on the termination era and the genesis of Public Law 280, see, for example, Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 151-54 (1977); STEPHEN CORNELL, THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE 122-23 (1988).

24. 426 U.S. 373, 373 (1976).

25. *Cabazon*, 480 U.S. at 208. The Ninth Circuit followed this line of reasoning in *Barona*. See *Barona Group of the Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185, 1187-88 (9th Cir. 1982).

not allow California to exercise general civil regulatory authority over gaming on reservations.²⁶

In deciding whether California's gambling statutes were criminal prohibitions or civil regulations, the determinative question was not simply whether the state law carried a criminal penalty.²⁷ Instead, it turned on whether the state's intent was generally to prohibit certain conduct or generally to allow certain conduct subject to regulation.²⁸ "The shorthand test," said the Court, "is whether the conduct at issue violates the State's public policy."²⁹ Accordingly, the Court examined California's public policy concerning gambling and concluded, "In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular."³⁰

B. *The Indian Gaming Regulatory Act*

The Supreme Court's decision in *Cabazon* spurred congressional authorization of state regulation of tribal gaming through IGRA.³¹ Congress first codified the Court's "shorthand test" of state public policy by permitting tribes to operate gaming only in states that "permit[] such gaming for any purpose by any person, organization or entity."³² For Class III or casino-style games, Congress authorized an active state regulatory role through the "tribal-state compact"

26. *Cabazon*, 480 U.S. at 208.

27. The Court stated, "But that an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub. L. 280." *Id.* at 211.

28. As the Court explained, "if the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation." *Id.* at 209.

29. *Id.*

30. *Id.* at 210-11.

31. Pub. L. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-21 (2000)). One of IGRA's key innovations was to categorize types of gambling and assign regulatory authority accordingly. Traditional tribal games of chance, or "Class I" games, associated with tribal ceremonies and carrying little risk of corruption, were left to exclusive tribal jurisdiction. With almost a decade of tribal experience and relatively few problems, tribal governments would continue to regulate bingo and similar games, or "Class II" games, with some federal oversight. Casino-style gambling, or "Class III" gaming, as explained below, involves regulatory authority at the federal, tribal, and state levels.

32. 25 U.S.C. §§ 2710(b)(1)(A), 2710(d)(1)(B).

requirement, which mandated that the state and tribe negotiate the regulatory structure for casino-style gaming on the tribe's reservation.³³ Thus, state law determines whether a tribe may conduct casino-style gaming in the first place, and state policymakers may further determine the particulars of Class III tribal gaming through a compact.

By making the legality of tribal gaming dependent upon state public policy and by requiring the tribe to negotiate and enter into a tribal-state compact for Class III gaming, Congress delegated extraordinary authority to states.³⁴ Conscious of the dangers of subjecting tribal sovereignty to states' greater political power, Congress imposed on states a good-faith duty to negotiate tribal-state compacts, enforceable in federal court.³⁵ According to the Senate Committee report,

33. *Id.* § 2710(d).

34. As noted above, the U.S. Supreme Court long has construed Congress's authority in relation to tribes as exclusive. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) ("The whole intercourse between the United States and [the Cherokee] nation, is, by our constitution and laws, vested in the government of the United States.").

35. 25 U.S.C. § 2710(d)(3)(A) (providing that "the State shall negotiate with the Indian tribe in good faith to enter into such a compact"). To give teeth to the state's good-faith duty and to level the bargaining table between states and tribes, Congress created an enforcement mechanism in the form of a federal cause of action: if a state failed to negotiate in good faith, the tribe could sue the state in federal court. *Id.* § 2710(d)(3)(A), (d)(7)(A)(i). IGRA sets forth detailed procedures governing the tribe's legal cause of action against the state for its failure to negotiate in good faith. *Id.* § 2710(d)(7)(B). After the tribe's formal request that the state enter into compact negotiations, if the state fails to respond or if the state and the tribe are unable to reach a compact, then a cause of action accrues and the tribe may file suit against the state in federal court. In determining whether the state negotiated in good faith, the court may consider several factors, including the public interest of the state, as well as issues of "public safety, criminality, financial integrity, and adverse economic impacts on existing gaming" operations in the state. *Id.* § 2710(d)(7)(B)(i)–(iii). If the court finds that the state fulfilled its duty to negotiate in good faith, the court must decide the case in favor of the state. If the court finds that the state did not negotiate in good faith, the court must order the state and the tribe to reach a compact in 60 days, and if that fails, the court will appoint a mediator and direct the state and the tribe each to submit proposed compacts—the state's and the tribe's "last best offers"—to the mediator. *Id.* § 2710(7)(B)(iii), (7)(B)(iv). The mediator then will choose the proposed compact that "best comports with the terms of [IGRA] and any other applicable Federal law and with the findings and order of the court." *Id.* § 2710(d)(7)(B)(iii), (iv). If the state accepts the mediator's compact, then the compact is treated as though the state and the tribe successfully negotiated it and the compact is submitted to the Secretary of the Interior for approval. *Id.* § 2710(d)(7)(B)(vi). If, however, the state does not agree to the mediator's compact, then the Interior Secretary will consult with the tribe to draft a "compact" to govern the tribe's Class III gaming. *Id.* § 2710(d)(7)(B)(vii). The Secretary has the power to approve or disapprove a tribal-state compact, whether reached through amicable negotiations between the state and the tribe or through the tribe's cause of action in federal court. *Id.* § 2710(d)(8)(A). The Secretary may disapprove a compact for any of three reasons: (1) the compact violates one or more of IGRA's provisions, (2) the compact violates federal law, other than the federal law allocating

Consistent with these principles [of tribal sovereignty and the exclusivity of federal law over tribes], the Committee has developed a framework for the regulation of gaming activities on Indian lands which provides that in the exercise of its sovereign rights, unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities.

The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of State laws to activities conducted on Indian land is a tribal-State compact.³⁶

Congress also set the terms of compact negotiations by limiting compact provisions.³⁷ In particular, IGRA expressly prohibits states from seeking, through a tribal-state compact, to tax or charge the tribe a fee for engaging in casino-style gaming, other than the reimbursement of the state's regulatory costs.³⁸

jurisdiction over gambling on reservation lands, or (3) the compact violates the federal government's trust responsibility to the tribes. *Id.* § 2710(d)(8)(B).

36. S. REP. NO. 100-446, at 5-6 (1988) as reprinted in 1988 U.S.C.C.A.N. 3071, 3075-76.

37. See § 2710(d)(3)(C). A compact (and, by logical extension, the lead-up negotiations between the state and the tribe) may include provisions concerning (1) the application of the state's and the tribe's criminal and civil laws and regulations "that are directly related to, and necessary for, the licensing and regulation" of Class III games, (2) "allocation of criminal and civil jurisdiction between the State and[] the tribe necessary for the enforcement of such laws and regulations," (3) payments to the state to cover the state's costs of regulating the tribe's Class III games, (4) tribal taxation of Class III gaming, limited to amounts comparable to the state's taxation of similar activities, (5) "remedies for breach of contract," (6) operating and facility maintenance standards, including licensing, and (7) "any other subjects that are directly related to the operation of gaming activities." *Id.* Despite these limitations, some states have sought to include in tribal-state compacts provisions not expressly authorized by IGRA, such as restrictions on tribal hunting and fishing or other treaty rights. See generally Kathryn R.L. Rand & Steven A. Light, *Do "Fish and Chips" Mix? The Politics of Indian Gaming in Wisconsin*, 2 GAMING L. REV. 129 (1998) [hereinafter Rand & Light, *Do "Fish and Chips" Mix?*]. Other states have included, with tribal approval, provisions authorizing direct payments to or revenue sharing with state and local governments. See generally Light, Rand & Meister, *supra* note 8 (detailing trends in revenue-sharing agreements).

38. 25 U.S.C. § 2710(d)(4). Additionally, "[n]o State may refuse to enter into the negotiations . . . based upon the lack of authority . . . to impose such a tax, fee, charge, or other assessment." *Id.*

As a legal codification of the political compromise between tribal and federal interests on the one hand and state interests on the other, IGRA's provisions reflect Congress's efforts to balance these competing interests as well as state and tribal authority.³⁹ The compact provision, according to the Senate Committee report accompanying the draft legislation, was "the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises."⁴⁰ Overall, through IGRA, Congress sought to encourage and protect Indian gaming as a means of effecting federal and tribal goals of tribal economic development, self-sufficiency, and strong tribal governments.⁴¹

C. Seminole Tribe v. Florida

In its 1996 landmark decision in *Seminole Tribe v. Florida*,⁴² the Supreme Court upset IGRA's careful but tenuous balance of tribal and state authority: the Court held that the Eleventh Amendment's grant of state sovereign immunity prevents Congress from authorizing suits by tribes against states for failure to negotiate Class III compacts in good faith.⁴³

Through IGRA, Congress unequivocally expressed its intent to abrogate state sovereign immunity by authorizing a cause of action against a state for failing to negotiate in good faith.⁴⁴ The Supreme

39. For an in-depth examination of the political and legal compromises present in Indian gaming law, see generally LIGHT & RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY, *supra* note 14.

40. S. REP. NO. 100-446, at 13 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3083.

41. See 25 U.S.C. § 2702(1) ("The purpose of this chapter is . . . to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.").

42. 517 U.S. 44 (1996).

43. *Id.* at 47. The Seminole Tribe filed a suit against the State of Florida and Governor Lawton Chiles under IGRA, alleging that the state had refused to negotiate a tribal-state compact allowing the Seminoles to offer Class III games on their reservation. *Id.* at 51-52. Florida moved to dismiss the tribe's action, arguing that the lawsuit violated state sovereign immunity under the Eleventh Amendment. *Id.* at 52. The Supreme Court has interpreted the Eleventh Amendment broadly to generally preclude federal suits against the states, including state officials acting in their official capacity, without the state's consent. See *Hans v. Louisiana*, 134 U.S. 1 (1890). This general rule has a few exceptions, including Congress's limited ability to abrogate states' immunity from suit through exercise of its enumerated powers.

44. *Seminole Tribe*, 517 U.S. at 56-57; see also *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 785 (1991) (stating that where Congress exercises its power to abrogate state sovereign immunity, it must do so "with unmistakable clarity").

Court had held in *Pennsylvania v. Union Gas Co.*⁴⁵ that Article I's Interstate Commerce Clause gave Congress power to override state sovereign immunity. Logically then, the nearly identically worded so-called Indian Commerce Clause, on which Congress relied in enacting IGRA, should grant Congress similar power.⁴⁶

The *Seminole Tribe* Court, however, expressly overruled *Union Gas* and held that neither the Interstate Commerce Clause nor the Indian Commerce Clause authorizes Congress to abrogate state sovereign immunity.⁴⁷ State sovereignty, said the Court, "is not so ephemeral as to dissipate when the subject of a suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government."⁴⁸ As a result, a state's assertion of its sovereign immunity would bar the tribe's action against it for failure to negotiate in good faith under IGRA, though states could consent to suit.⁴⁹

45. 491 U.S. 1 (1989) (plurality opinion).

46. Compare U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate commerce . . . among the several States . . ."), with U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate commerce . . . with the Indian Tribes."). Indeed, the Supreme Court's construction of Congress's so-called plenary power over tribes under the Indian Commerce Clause arguably is of greater scope than its authority under the Interstate Commerce Clause. See *Seminole Tribe*, 517 U.S. at 59–62 ("If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause.").

47. *Seminole Tribe*, 517 U.S. at 72.

48. *Id.*

49. The tribe also argued that the "*Ex parte Young* exception" to state sovereign immunity allowed the suit against Florida's governor for prospective injunctive relief based on a violation of federal law, namely IGRA's provision requiring the state to negotiate in good faith. *Id.* at 73–76. Under *Ex parte Young*, 209 U.S. 123 (1908), state sovereign immunity does not extend to state officials acting unconstitutionally or contrary to federal law, so that they may be sued for prospective injunctive relief despite the state's immunity from suit. Although a state official who violates federal law sheds the cloak of state sovereign immunity, the remedies afforded for such a violation may be limited by the federal law itself. Where Congress chooses a specific remedial scheme to enforce a statutory right, other more general remedies—such as a cause of action under the *Ex parte Young* exception—may be precluded. See *Seminole Tribe*, 517 U.S. at 74 ("[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based on *Ex parte Young*"). Under IGRA, upon a finding that the state failed to negotiate in good faith, the district court only has authority to take certain steps specified in the statute and meant to effect the negotiation of a tribal-state compact. See 25 U.S.C. § 2710(d)(7). In contrast, a suit under the *Ex parte Young* exception would allow the district court to exercise a broad range of judicial powers, including imposing sanctions on the state. Accordingly, the *Seminole Tribe* Court held that the *Ex parte Young* exception did not afford the Tribe a cause of action against the governor for failure to negotiate in good faith. *Seminole Tribe*, 517 U.S. at 74–76.

The Court's decision upset Congress's carefully constructed balance between state and tribal power by taking the teeth out of the state duty to negotiate tribal-state compacts in good faith.⁵⁰ In the wake of *Seminole Tribe*, a state effectively could prevent a tribe from engaging in Class III gaming simply by refusing to negotiate a tribal-state compact, or it could make unchecked demands in compact negotiations.⁵¹ In effect, the Court's decision gave states greater authority over tribes than did Congress through IGRA. Without the "referee" function of the federal court, states had even greater power to set the terms for Class III gaming.

D. State Politics After Seminole Tribe

Since *Seminole Tribe*, the terms of casino-style gaming on reservations increasingly have been determined by state politics.⁵² With reference only to the "State,"⁵³ IGRA's compact requirement does not establish which branch of state government is responsible for the negotiations. In many states, this authority is exercised by the governor, who serves as a gatekeeper for Class III gaming.⁵⁴ The political culture of a state has become a key factor in compact negotiations. The governor's own attitudes toward legalized gambling and Indian gaming, as well as her political viability, may determine the governor's posture toward the compacting process, and thus the nature of the compact

50. Most commentators agree that IGRA's severability clause protects IGRA's remaining provisions, so that *Seminole Tribe* invalidates only the tribe's cause of action against the state, rather than the entire Act. See 25 U.S.C. § 2721 ("In the event that any section or provision of this chapter, or amendment made by this chapter, is held invalid, it is the intent of Congress that the remaining sections or provisions of this chapter, and amendments made by this chapter, shall continue in full force and effect."). *But see* United States v. Spokane Tribe of Indians, 139 F.3d 1297, 1300-02 (9th Cir. 1998) (reasoning that because Congress would not have enacted IGRA without the tribal cause of action against the state for failing to negotiate in good faith, the Supreme Court's invalidation of that provision calls into question the entire statute).

51. See Kevin K. Washburn, *Recurring Problems in Indian Gaming*, 1 WYO. L. REV. 427, 430 (2001). Indeed, following *Seminole Tribe*, several states simply refused to negotiate compacts.

52. See LIGHT & RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY, *supra* note 14, at 56-59.

53. See, e.g., 25 U.S.C. §§ 2710(d)(1)(C), 2710(d)(3)-(8).

54. Kelly B. Kramer, *Current Issues in Indian Gaming: Casino Lands and Gaming Compacts*, 7 GAMING L. REV. 329, 332 (2003).

negotiations. By extension, the transition to a new governing regime may change the state's position on the existing compact.⁵⁵

Without prescribed authority in IGRA, the state legislature's role in the compacting process is left to state law, which may require legislative approval before a tribal-state compact takes effect, or may relegate the legislature to political criticism or support of the governor's compact negotiations. Legislative activity at the state level reflects a range of influence over the politics of tribal gaming. State legislatures have passed laws specifically intended to limit the scope or extent of Indian gaming,⁵⁶ participated in the policy debates over Indian gaming's social and economic effects on tribal and non-tribal communities, and encouraged governors to pressure tribes to renegotiate existing tribal-state compacts and incorporate revenue-sharing agreements to "level the playing field" and "spread the wealth" with state and local governments.⁵⁷ Similarly, state courts do not exercise a prescribed role under IGRA. Instead, the authorized statutory causes of action all fall under federal jurisdiction.⁵⁸

Yet state legislatures and state courts increasingly have asserted their influence over state policy toward Indian gaming.⁵⁹ The sometimes contentious politics of legislative delegation of the authority to negotiate compacts to the executive branch or a governor's unilateral assumption of that power have resulted in litigation.⁶⁰ State courts have been asked to answer important questions related to separation of powers and other

55. See, e.g., Steven A. Light & Kathryn R.L. Rand, *Are All Bets Off? Off-Reservation Indian Gaming in Wisconsin*, 5 GAMING L. REV. 351, 359-60 (2001) [hereinafter Light & Rand, *Are All Bets Off?*]; Rand & Light, *Do "Fish and Chips" Mix?*, *supra* note 37.

56. Connecticut provides such an example. See *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2d Cir. 1990); CONN. GEN. STAT. §§ 7-186a, 7-186 (1999) (repealed 2003); see also *Connecticut Governor Admits New Law Barring More Indian Casinos May Not Hold Up*, Jan. 7, 2003, <http://www.foxnews.com/story/0,2933,74904,00.html>. A similar situation arose in Idaho. See *Coeur d'Alene Tribe v. Idaho*, 842 F. Supp. 1268, 1269 (D. Idaho 1994) (addressing Tribe's contention that state officials pursued change in state public policy to avoid allowing tribal gaming).

57. See Light, Rand & Meister, *supra* note 8, at 665-69.

58. See 25 U.S.C. § 2710(d)(7)(A) (providing that "[t]he United States district courts shall have jurisdiction over" three causes of action authorized by the statute, including a tribe's ability to sue the state for failure to negotiate in good faith).

59. See RAND & LIGHT, INDIAN GAMING LAW AND POLICY, *supra* note 14, at 122-24.

60. See, e.g., *Taxpayers of Mich. Against Casinos v. Michigan*, 685 N.W.2d 221 (Mich. 2004); *Panzer v. Doyle*, 2004 WI 52, 271 Wis. 2d 295, 680 N.W.2d 666, *overruled in part by Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, 719 N.W.2d 408; *Saratoga County Chamber of Commerce v. Pataki*, 798 N.E.2d 1047 (N.Y. 2003).

dimensions of state constitutional law and public policy, including the scope of gaming permitted by the state.⁶¹

The invalidation of IGRA's legal cause of action against a state hindered the development of a legal standard to determine whether a state has fulfilled its duty to negotiate in good faith, as well as a uniform approach to the scope of gaming permitted under state law. As a practical result, for a state that refuses to consent to suit, good faith may equate simply to the state's posture toward Indian gaming: what the governor is willing to negotiate, the state legislature to approve, or the state courts to uphold. The increasing political and legal influence of state government in delimiting Indian gaming is manifest in two highly controversial areas: the scope of tribal gaming and tribal-state revenue sharing.

1. Scope of Gaming

State interbranch contestation often involves "scope of gaming" issues; that is, which games generally are permitted and which games generally are prohibited as a matter of state public policy. IGRA authorizes tribes to conduct Class III gaming in states that "permit such gaming for any purpose by any person, organization or entity."⁶² The meaning of "permits such gaming" is open to varying interpretations. Does "such gaming" refer to casino-style gaming in general, so that if a state allows some Class III games, a tribe may conduct any Class III game on its reservation? Or is "such gaming" game-specific, so that a tribe may conduct only those games specifically allowed under state law?

The answer speaks to the scope of gaming allowed under IGRA as well as the scope of the state's duty to negotiate in good faith. First, if a state does not "permit such gaming," then a tribe may not conduct that form of gaming on its reservation.⁶³ Second, federal courts have uniformly linked the scope of Class III gaming to the determination of whether the state negotiated in good faith during the compacting process: if a state does not "permit such gaming," then the state has no obligation to negotiate that form of gaming for purposes of a tribal-state

61. See generally Washburn, *supra* note 51, at 436–44.

62. 25 U.S.C. §§ 2710(b)(1)(A), 2710(d)(1)(B).

63. IGRA provides that "Class III gaming activities shall be lawful 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 . . ." *Id.* § 2710(d)(1)(B).

compact.⁶⁴ Third, some courts have construed “such gaming” as a limit on a state’s ability to negotiate specific types of Class III games: if a game is not allowed under state law, then a state cannot authorize a tribe to conduct the game.⁶⁵

The two general interpretations of “permits such gaming”—expansive and restrictive—reach very different results. Under an expansive interpretation, a state that permits some casino-style games will have to negotiate at least all games similar to those permitted under state law and perhaps all Class III games. As the U.S. Court of Appeals for the Ninth Circuit put it, “[T]he state cannot regulate and prohibit, alternately, game by game and device by device, turning its public policy off and on by minute degrees.”⁶⁶ The expansive interpretation envisions the games allowed under state law as a “floor” for compact negotiations; a state may agree to games that are not specifically allowed under state law.⁶⁷

The restrictive interpretation, on the other hand, limits both negotiations and compact terms to only those Class III games expressly authorized by state law, drawing distinctions between, for example, video keno and traditional keno.⁶⁸ If a state does not permit a specific game, then it has no good-faith duty to negotiate whether the tribe may offer the game, and depending on the interpretation of state law, it may be precluded from including the game in a tribal-state compact.⁶⁹

64. See, e.g., *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 279 (8th Cir. 1993) (“The ‘such gaming’ language of [IGRA] does not require the state to negotiate with respect to forms of gaming it does not presently permit.”).

65. See generally RAND & LIGHT, *INDIAN GAMING LAW AND POLICY*, *supra* note 14, at 70–79 (discussing the “scope of gaming” provisions and pertinent case law).

66. *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 539 (9th Cir. 1994).

67. See, e.g., *id.* (examining state law to determine whether the state permitted Class II gaming generally, rather than to determine which Class II games were permitted); *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1031–32 (2d Cir. 1990) (holding that even stringently regulated gaming, such as charitable “Las Vegas Nights” fundraisers, were “permitted” under state law); *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990) (same); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480, 487 (W.D. Wis. 1991) (interpreting “permits” to mean “does not prohibit” rather than “formally authorizes”).

68. In *Cheyenne River Sioux Tribe*, the court held that although the state permitted video keno, that did not require it to include traditional keno in compact negotiations. 3 F.3d at 279. “Because video keno and traditional keno are not the same and video keno is the only form of keno allowed under state law, it would be illegal . . . for the tribe to offer traditional keno to its patrons.” *Id.*

69. See, e.g., *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1258 (9th Cir. 1994) (holding that the state was not obligated to negotiate certain games not allowed under state law); *United States v. Santa Ynez Band of Chumash Mission Indians*, 33

“IGRA does not require a state to negotiate over one form of Class III gaming activity simply because it has legalized another, albeit similar form of gaming. . . . [A] state need only allow Indian tribes to operate games that others can operate”⁷⁰

2. Tribal-State Revenue Sharing

Through revenue sharing, some states directly reap the benefits of tribal gaming’s success. Although IGRA explicitly prohibits states from using compact negotiations to demand state taxation of tribal gaming,⁷¹ the Secretary of the Interior has approved compact terms that require tribes to make payments to states in exchange for economic benefits.⁷² Typically, states promise to maintain some level of tribal exclusivity over casino-style gaming through state law; for example, the Mashantucket Pequots in Connecticut agreed to pay twenty-five percent of gross slot machine revenues to the state in exchange for the exclusive right to operate slots.⁷³ Though controversial, as long as the payments provide what the Interior Department has labeled “a valuable economic benefit” in return for “substantial exclusivity” in the market, they

F. Supp. 2d 862, 863 (C.D. Cal. 1998) (characterizing as “uncompactable” specific games not authorized by state law); *Coeur d’Alene Tribe v. Idaho*, 842 F. Supp. 1268, 1276 (D. Idaho 1994) (limiting permitted games to those expressly authorized by state law).

70. *Rumsey Indian Rancheria*, 64 F.3d at 1258.

71. 25 U.S.C. § 2710(d)(4) (2000) states:

[N]othing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity.

72. See generally Light, Rand & Meister, *supra* note 8, at 666; Eric S. Lent, Note, *Are States Beating the House?: The Validity of Tribal-State Revenue Sharing Under the Indian Gaming Regulatory Act*, 91 GEO. L.J. 451, 456–69 (2003); Gatsby Contreras, Note, *Exclusivity Agreements in Tribal-State Compacts: Mutual Benefit Revenue-Sharing or Illegal State Taxation?*, 5 J. GENDER RACE & JUST. 487, 494–507 (2002). In *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, the Sixth Circuit Court of Appeals addressed the issue of a state’s abrogation of promised exclusivity and held that under such circumstances, a tribe would not be required to continue to make payments to the state according to the terms of the revenue-sharing agreement. 2001 FED App. 0392P, 271 F.3d 235, 235 (6th Cir.).

73. See NAT’L GAMBLING IMPACT STUDY COMM’N, FINAL REPORT 6–21 (1999), available at <http://govinfo.library.unt.edu/ngisc/reports/fullrpt.html>. Under the terms of the agreement, the tribe could consent to abrogate exclusivity, as it did to allow the Mohegans to build the Mohegan Sun Casino. See *id.*

presumably will not run afoul of IGRA's prohibition against state taxation.⁷⁴

Revenue-sharing agreements are becoming a commonplace point of negotiation in tribal-state compacts, especially in the state-dominated political environment post-*Seminole Tribe*.⁷⁵ In 2005, state and local governments received more than \$1 billion in direct payments from tribes under revenue-sharing agreements.⁷⁶ Growth in revenue-sharing payments outpaced growth in tribal gaming revenue.⁷⁷

After *Seminole Tribe*, scope of gaming issues increasingly play out in state courts and state politics, as do demands for tribal-state revenue sharing. Wisconsin provides a rich and informative case study of the influence of the state legislature, governor, and courts over Indian gaming.

III. WISCONSIN

In the last two decades, Indian gaming in Wisconsin has seen both dramatic growth and continuous challenge in the state political arena,

74. *Indian Gaming Regulatory Act: Hearing Before the Senate Comm. on Indian Affairs*, 108th Cong. 2-3 (2003) (statement of Aurene M. Martin, Acting Asst. Secretary, Indian Affairs). According to Acting Assistant Secretary of Indian Affairs Aurene M. Martin,

In general, the [Interior] Department has attempted to apply the law to limit the circumstances under which Indian tribes can make direct payments to a State for purposes other than deferring costs of regulating class III gaming activities. To date, the Department has only approved revenue sharing payments that call for tribal payments when the State has agreed to provide valuable economic benefit of what the Department has termed substantial exclusivity for Indian gaming in exchange for the payment. As a consequence, if the Department affirmatively approves a proposed compact, it has an obligation to ensure that the benefit received by the State is equal or appropriate in light of the benefit conferred on the tribe. Accordingly, if a payment exceeds the benefit received by the tribe, it would violate IGRA because it would amount to an unlawful tax, fee, charge or other assessment. Though there has been substantial disagreement over what constitutes a tax, fee, charge or other assessment within this context, we believe that if the payments are made in exchange for the grant of a valuable economic benefit that the Governor has discretion to provide, these payments do not fall within the category of a prohibited tax, fee, charge or assessment.

Id.

75. *Id.* (stating that another consequence of *Seminole Tribe* is that "more States have sought to include revenue sharing provisions in class III gaming compacts, resulting in a discernable increase in such provisions over the past 7 years").

76. See ALAN MEISTER, INDIAN GAMING INDUSTRY REPORT 3 (2004-2005 ed.).

77. See *id.* at 1-2; see also Light, Rand & Meister, *supra* note 8, at 666-69.

culminating in two recent state supreme court decisions that have major implications for Indian gaming and tribal-state relations.

A. Indian Gaming in Wisconsin

The eleven federally recognized tribes in Wisconsin each have entered into Class III compacts with the state and operate twenty-four gaming enterprises. As is the case throughout much of the United States, Indian gaming continues to grow in Wisconsin at a rapid pace. Between 2000 and 2004, total tribal gaming revenue in Wisconsin increased by thirty-four percent, from \$889.5 million to nearly \$1.2 billion.⁷⁸ In 2005, tribal gaming revenue rose 4.4 percent over the prior year, maintaining Wisconsin's eighth-place rank among states with Indian gaming.⁷⁹

Tribal casinos have catalyzed numerous positive changes in the quality of reservation life.⁸⁰ Thousands of tribal members have returned to their reservations and rediscovered their cultural and traditional roots, in large part due to the prospects for stable, well-paying jobs generated by tribal casinos.⁸¹ Indian gaming in Wisconsin is credited with improving tribal government service provision, including schools, clinics, day-care, fire protection, and law enforcement. Tribes also have leveraged gaming revenue to diversify tribal economies through such tribally owned businesses as hotels, convention facilities, restaurants, gas stations, fish hatcheries, and buffalo and deer ranches.⁸² By

78. WIS. LEGISLATIVE AUDIT BUREAU, REP. NO. 05-11, AN AUDIT: DIVISION OF GAMING: DEPARTMENT OF ADMINISTRATION 5 (June 2005), available at <http://www.legis.wisconsin.gov/lab/reports/05-11Full.pdf>. Class III net gaming revenue increased most markedly, by twenty-nine percent. *Id.*

79. *Tribal Casinos Now Bring in \$23 Billion Annually*, CAPITAL TIMES (Madison, Wis.), June 22, 2006, at 6B.

80. Light & Rand, *Are All Bets Off?*, *supra* note 55, at 352 (stating that "gaming has had profound positive economic and social effects on Wisconsin's tribes"). On the other hand, the Wisconsin Policy Research Institute, a pro-business think-tank, has commissioned a number of cost-benefit studies of tribal gaming's economic and social impacts on the state of Wisconsin and its residents. While at times conceding gaming's positive effects on tribes, the studies consistently find that Indian casinos cost the state in terms of lost or substituted revenue and social ills such as crime, bankruptcy, and problem or pathological gambling. See generally Wisconsin Policy Research Institute, *Gambling*, <http://www.wpri.org/pages/subjects/gambling.html> (listing the studies conducted under its auspices).

81. Light & Rand, *Are All Bets Off?*, *supra* note 55, at 352 ("More and more people are coming back to their homelands . . . because of the gaming. We don't need to go to the cities to work in the factories anymore. We found the golden egg, finally." (quoting Nettie Kingsley, Ho-Chunk Tribe's researcher for cultural preservation)).

82. *Id.* (citing Mike Johnson, *Heading Back Home*, MILWAUKEE J. SENTINEL, Apr. 30, 2001, at 1A).

strengthening tribal economies, Indian gaming is credited with reducing the burden on the state to make public entitlements payments.⁸³ Forest County Potawatomi Attorney General Jeff Crawford echoed the sentiments of a number of tribal governments and their members in Wisconsin: “Indian gaming has been an economic miracle for our tribe. . . . It has done in 10 years what 200 years of Indian policies by the federal government failed to do.”⁸⁴

As the Wisconsin Department of Administration notes, “The tribes are extremely valuable economic engines in Wisconsin. . . . The positive effects from gaming extend far beyond reservation or trust land borders.”⁸⁵ Indian gaming in Wisconsin provides more than 35,000 jobs to Indians and non-Indians throughout the state.⁸⁶ Beyond job creation and the “rippling” indirect economic benefits of Indian gaming, tribes also make direct payments to the state. Under the original compacts, the tribes agreed to pay the state \$350,000 annually to fund its regulatory costs.⁸⁷ Tribal payments increased with each renegotiation of compact terms. As discussed below, the tribes recently have agreed to make substantial revenue-sharing payments to the state. Wisconsin’s \$100 million in direct tribal payments ranked third in 2005, behind only Connecticut’s \$421 million and California’s \$253 million.⁸⁸

B. State Public Policy

For more than a century, Wisconsin’s state constitution prohibited the legislature from authorizing a lottery,⁸⁹ interpreted broadly to mean any game of chance involving the elements of prize, chance, and consideration.⁹⁰ Six constitutional amendments in three decades modified Wisconsin’s strict ban on all forms of gambling. Between 1965 and 1977, voters approved three amendments to allow promotional

83. See *Casinos Cut Welfare Rolls in Some Tribes*, GRAND FORKS HERALD (N.D.), Sept. 2, 2000, at 3A.

84. Juliet Williams, *Casino Gamble: Tribes Eye Off-Reservation Sites*, CAPITAL TIMES (Madison, Wis.), Mar. 9, 2001, at 6E.

85. WIS. DEP’T OF ADMIN., TRIBES OF WISCONSIN 7 (2006), available at <ftp://doafpt04.doa.state.wi.us/doadocs/tribesofwisconsin2006.pdf>.

86. See David Callendar, *Tribes Win in Ruling on Casinos*, CAPITAL TIMES (Madison, Wis.), July 14, 2006, at A1.

87. See WIS. LEGISLATIVE REFERENCE BUREAU, RESEARCH BULLETIN 97-1, THE EVOLUTION OF LEGALIZED GAMBLING IN WISCONSIN 27 (1997).

88. See Steve Schultze, *State’s Casino Collections High*, MILWAUKEE J. SENTINEL, June 21, 2006, at 6B.

89. WIS. CONST. art. IV, § 24.

90. See, e.g., *Kayden Indus., Inc. v. Murphy*, 150 N.W.2d 447, 447 (Wis. 1967).

contests and charitable bingo games and raffles.⁹¹ The relaxation of Wisconsin's strict public policy against gambling coincided with a few tribes' forays into high-stakes bingo. In 1980, Wisconsin attempted to shut down the Oneida Nation's bingo operation for noncompliance with state restrictions on the game.⁹² In *Oneida Tribe of Indians v. Wisconsin*, however, the federal district court ruled that Wisconsin's new laws governing bingo operations were civil regulations rather than criminal prohibitions and thus could not be enforced on the Oneida reservation.⁹³

Wisconsin loosened the reins on gambling again in 1987, the year the U.S. Supreme Court decided the *Cabazon* case. Two amendments to the state constitution authorized a state-operated lottery⁹⁴ and dog, horse, and snowmobile racing with on-track pari-mutuel betting.⁹⁵ Following IGRA's enactment in 1988, the Wisconsin legislature authorized the governor, on behalf of the state, to enter into Class III gaming compacts under IGRA.⁹⁶ Tribes in Wisconsin quickly requested compact negotiations with the governor.

1. Negotiating the Original Compacts

The scope of gaming allowed under Wisconsin law soon muddied the negotiations. At first, Governor Tommy Thompson indicated a willingness to include a number of casino-style games in the compacts.⁹⁷ Wisconsin Attorney General Donald Hanaway, responding to an inquiry from the Wisconsin Lottery, issued an opinion that casino gaming, though not unconstitutional, was illegal in Wisconsin. He argued that the term "lottery," as used in the 1987 amendment, was intended only to authorize the state to operate the game commonly understood as a lottery, in which chances to win a random drawing are sold.⁹⁸ Despite the broad definition of "lottery" in state law, according

91. See WIS. CONST. art. IV, § 24(3); WIS. STAT. ch. 563 (2005–2006).

92. See *Oneida Tribe of Indians v. Wisconsin*, 518 F. Supp. 712, 713 (W.D. Wis. 1981).

93. *Id.* at 712.

94. See WIS. CONST. art. IV, § 24(6); WIS. STAT. ch. 565 (2005–2006).

95. See WIS. CONST. art. IV, § 24(5); WIS. STAT. ch. 562 (2005–2006).

96. 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).").

97. See WIS. LEGISLATIVE REFERENCE BUREAU, *supra* note 87, at 11.

98. 79 Op. Wis. Att'y Gen. 26 (1990); see also *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 743 F. Supp. 645, 652 (W.D. Wis. 1990); *Panzer v. Doyle*, 2004 WI 52, ¶ 17, 271 Wis. 2d 295, ¶ 17, 680 N.W.2d 666, ¶ 17, *overruled in part by Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, 719 N.W.2d 408.

to Hanaway the amendment did not authorize state-run casino games.⁹⁹ At the same time, Hanaway concluded that the state constitution did not prohibit casino-style gaming; instead, casino games were illegal only by virtue of state statute, allowing the legislature to authorize casino games by changing the statutes.¹⁰⁰

The Hanaway opinion was a political “hot potato.”¹⁰¹ It appeared to require express legislative authorization for casino-style gambling to be included in tribal-state compacts, while acknowledging that the state constitution no longer barred casino games. On the heels of the attorney general’s opinion, the state legislature gave broad authority to the governor to negotiate tribal-state compacts under IGRA on behalf of the state,¹⁰² rejecting language that would have required legislative ratification.¹⁰³ But Thompson, citing the attorney general’s opinion, refused to negotiate further with the tribes regarding any Class III games other than lotteries and on-track betting.¹⁰⁴

The affected tribes sued the state in federal district court under IGRA, alleging that the state had failed to negotiate in good faith. In *Lac du Flambeau Band v. Wisconsin*, the federal district court held that “such gaming” was not limited to the particular games expressly allowed under state law.¹⁰⁵ The state argued that it permitted only those games in actual operation: on-track betting and the state lottery. The court disagreed, drawing a distinction between games expressly approved by the state and games expressly prohibited by state law. Invoking the Wisconsin courts’ earlier interpretation of “lottery,” the court held that “[w]hen the voters authorized a state-operated ‘lottery,’ they removed any remaining constitutional prohibition against state-operated games, schemes or plans involving prize, chance and consideration, with minor exceptions.”¹⁰⁶ Because the broad definition of “lottery” allowed the state to operate any game of chance, the state constitution “permitted such gaming” in theory even if the state chose not to operate any games

99. 79 Op. Wis. Att’y Gen. 31 (1990).

100. *Id.* at 31–32; *see also Panzer*, 2004 WI 52, ¶ 17, 271 Wis. 2d 295, ¶ 17, 680 N.W.2d 666, ¶ 17.

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

102. 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).”).

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

104. *See Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480, 483 (W.D. Wis. 1991).

105. *Id.* at 486.

106. *Id.*

beyond a lottery in practice. The court held that “[i]t is not necessary for [the tribe] to show that the state formally authorizes the same activities [the tribe] wish[es] to offer. The inquiry is whether Wisconsin prohibits those particular gaming activities. It does not.”¹⁰⁷ Because the amendments to the Wisconsin constitution shifted Wisconsin’s public policy toward gaming from generally prohibitive to generally permissive, the court ruled that “the state is required to negotiate with [the 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.”¹⁰⁸

Thompson swiftly negotiated and signed substantially identical compacts with all eleven tribes in the state, which authorized tribal operation of pull-tabs, blackjack, video games, and slot machines.¹⁰⁹ The state agreed to honor the compacts regardless of further litigation, and in exchange, the tribes agreed that the compacts would expire in seven years with automatic five-year extensions in the absence of either party’s written notice of nonrenewal.¹¹⁰ The compacts also provided that the tribes would make annual payments of \$350,000 to the state to cover its regulatory costs.¹¹¹

2. The State Seeks Tribal Concessions

In 1992, the state legislature passed a law providing that “lottery” did not include casino games and proposing a constitutional amendment banning casino games,¹¹² which voters approved in 1993.¹¹³ Accordingly,

107. *Id.* at 487.

108. *Id.* at 488. The State appealed the district court’s decision, but due to attorney error, its notice of appeal was untimely, and the Seventh Circuit dismissed the appeal. *See Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 957 F.2d 515, 515 (7th Cir. 1992).

109. *See* Wis. Dep’t of Admin., Gaming Compact Agreements, http://www.doa.state.wi.us/pagesubtext_detail.asp?linksubcatid=922 (providing the text of all eleven original gaming compacts and related documents, including amendments and memoranda of understanding concerning government-to-government relations and technical matters).

110. *See, e.g.,* Bad River Band of Lake Superior Compact of 1991, at 38, *in* Wis. Dep’t of Admin., *supra* note 109.

111. *See, e.g.,* Forest County Potawatomi Community Compact of 1992, at 38, *in* Wis. Dep’t of Admin., *supra* note 109 (providing that “the Tribe shall pay to the State, as reimbursement for State costs of regulation under this Compact, an annual amount.”).

112. WIS. CONST. art. IV, § 24.

113. WIS. LEGISLATIVE REFERENCE BUREAU, *supra* note 87, at 13. Voters were asked, “Shall article IV of the constitution be revised to clarify that all forms of gambling are prohibited except bingo, raffles, pari-mutuel on-track betting and the current state-run lottery

Wisconsin's constitution expressly authorized only bingo, raffles, pari-mutuel on-track betting, and the state lottery.¹¹⁴ The games allowed as part of the state lottery specifically excluded sports betting, poker, roulette, craps, keno, and house-banked card games such as blackjack.¹¹⁵ In direct response to the federal district court's interpretation of "lottery" in *Lac du Flambeau Band*, the constitutional amendment further provided, "Except as provided in this section, the legislature may not authorize *gambling* in any form."¹¹⁶

Five years later, when the compacts' initial terms expired, Thompson wielded the 1993 amendment to obtain concessions from the tribes.¹¹⁷ As a source close to Thompson's office put it, the change in state law gave the governor "the ability to issue the death penalty" for Indian gaming.¹¹⁸ Although Thompson was not interested in ending tribal gaming in Wisconsin, the precarious position of the games authorized by the 1992 compacts gave him political leverage to seek tribal-state revenue sharing as well as state taxation of reservation cigarette and gasoline sales and the abrogation of unrelated tribal treaty rights, including hunting and fishing rights.¹¹⁹ When the dust cleared after some of the most acrimonious compact negotiations since IGRA's

and to assure that the state will not conduct prohibited forms of gambling as part of the state-run lottery?" *Id.* Although phrased as a limitation on games the state could offer through its lottery, eight tribes formed a coalition to oppose the amendment because it could jeopardize the existing Class III compacts, while others "believed the future of tribal casinos would be unaffected by the amendment and realized it cemented the tribal monopoly on casino-type operations." *Id.* The timing of the constitutional amendment suggests that it may have been intended to limit the expansion of tribal gaming in the state, but the legislative history appears to address the scope of gaming operated by the state. *See Panzer*, 2004 WI 52, ¶ 214, 271 Wis. 2d 295, ¶ 214, 680 N.W.2d 666, ¶ 214 (Abrahamson, C.J., dissenting) ("[I]t cannot be persuasively asserted that the purpose of the constitutional amendment was to curtail Indian gaming.").

114. WIS. CONST. art. IV, § 24(3)–(6).

115. *Id.* § 24(6). The express narrowing of the scope of the state lottery resulted in what the Wisconsin Supreme Court called "arguably the most detailed provision in the constitution." *Panzer*, 2004 WI 52, ¶ 30, 271 Wis. 2d 295, ¶ 30, 680 N.W.2d 666, ¶ 30.

116. WIS. CONST. art. IV, § 24(1) (emphasis added) (replacing "lottery" with "gambling" to prohibit the legislature from authorizing "gambling in any form").

117. *See Cary Spivak, Tribe Offers a Cut if Casino is Approved*, MILWAUKEE J. SENTINEL, Nov. 15, 1997, at 1A.

118. *Id.*

119. *Rand & Light, Do "Fish and Chips" Mix?*, *supra* note 37, at 133–34; *see also* WIS. LEGISLATIVE REFERENCE BUREAU, *supra* note 87, at 28 (stating, at the time of the negotiations leading to the 1998 compact amendments, that "[t]he state is reportedly seeking increased contributions for regulatory expenses and lost local tax revenue and has raised other issues, such as hunting and fishing quotas and placing additional private land into tax-exempt reservation trust status").

passage,¹²⁰ Thompson had succeeded in requiring the tribes to pay the state approximately \$24 million each year.¹²¹ In exchange, the tribes were allowed to continue operating casino-style gaming with the benefit of a near monopoly under state law for the next five years, the term of the amended compacts.¹²²

When Governor James E. Doyle took office in 2002, he inherited a large budget shortfall and, like Thompson before him, looked to Indian gaming to provide much-needed state revenue. He proposed nearly a five-fold increase in the tribes' annual payments to the state, from \$24 million to \$100 million, with total payments of \$237 million during the first two years.¹²³ In exchange, the tribes would receive long-term compacts and additional casino-style games, such as craps, roulette, and poker.¹²⁴ Further, the state and the tribes agreed to waive their respective sovereign immunity for claims to enforce the compacts' terms.¹²⁵ Doyle's approach was somewhat less heavy-handed than Thompson's; he presented the revenue-sharing payments ostensibly as a partnership between the tribes and the state: "All the people of Wisconsin should join me in acknowledging the important effort the tribes of Wisconsin are making toward helping the state in this difficult time."¹²⁶ At the same time, state officials bragged about Wisconsin's revenue-sharing agreement with gaming tribes as being "the second-best deal in the nation," behind only Connecticut.¹²⁷

The governor's "win-win" attitude was not shared by some state legislators and commercial gaming interests. The compact amendments resulted in the "first test of wills" between Democrat Doyle and the

120. See LIGHT & RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY, *supra* note 14, at 58–59 ("Thompson's chief of staff defended the governor's stance, stating, 'It is not in any way unreasonable for the governor to expect [the tribes] to show flexibility on some nongaming issues if they are going to continue to benefit from the monopoly they enjoy on gaming enterprises.'").

121. WIS. LEGISLATIVE REFERENCE BUREAU, *supra* note 87, at 9.

122. See, e.g., Panzer, 2004 WI 52, ¶ 32, 271 Wis. 2d 295, ¶ 32, 680 N.W.2d 666, ¶ 32.

123. See Amy Rinard, *If State Gives a Little, It Can Take More From Casinos, Tribes Say*, MILWAUKEE J. SENTINEL, Feb. 19, 2003, at 1A.

124. *Id.*

125. *Id.*

126. *Id.* By one estimate, the 2003 compact amendments would result in \$1 billion in new investments and 20,000 jobs (on top of the 35,000 jobs already created by tribal gaming in Wisconsin). See Panzer, 2004 WI 52, ¶ 117, 271 Wis. 2d 295, ¶ 117, 680 N.W.2d 666, ¶ 117 (Abrahamson, C.J., dissenting).

127. Schultze, *supra* note 88, at 6B.

Republican-controlled state legislature.¹²⁸ In a political showdown, the legislature called a special session to pass a bill that would require legislative approval of the compact amendments. State lawmakers criticized the compact amendments as a bad deal for the state, and accused Doyle of giving tribes a “sweetheart deal” as payback for soft-money political contributions during his campaign.¹²⁹ “This whole thing stinks,” said one lawmaker.¹³⁰ Forest County Potawatomi Attorney General Jeff Crawford expressed confusion at the legislative furor over the revenue-sharing agreement’s terms. “We feel like the rules have been changed in the ninth inning with two outs, and we don’t understand why,” said Crawford.¹³¹ The acrimonious interbranch state politics involved led one tribal member to comment, “Indians are caught in the middle. We feel like the kids in a really bad divorce.”¹³²

Doyle exercised his first veto in rejecting the legislative approval requirement, which he characterized as a Republican “power grab.”¹³³ The legislation, he said, would jeopardize his plan to address the state’s budget deficit of some \$3.2 billion through tribal-state revenue sharing.¹³⁴ “Make no mistake,” he said, “every dollar we collect from the tribes is a dollar that taxpayers won’t have to pay.”¹³⁵ Responding to the veto, state Republicans scheduled an override vote and lobbied President Bush to prevent the Interior Secretary from approving the compact amendments.¹³⁶ Both efforts were unsuccessful; the override failed by a single vote,¹³⁷ and the Interior Secretary allowed the compact amendments to take effect while raising concerns that the tribe was paying more than the state’s concessions were worth.¹³⁸

128. Richard P. Jones, *Governor’s Veto Upheld*, MILWAUKEE J. SENTINEL, Mar. 5, 2003, at A1.

129. *Id.*

130. Dennis Chaptman, *Legislature Grabs for Gaming Power*, MILWAUKEE J. SENTINEL, Feb. 22, 2003, at 1A.

131. *Id.*

132. Jones, *supra* note 128 (quoting Wayne LaBine).

133. Chaptman, *supra* note 130.

134. *Id.*

135. Steven Walters, *Doyle Vetoes Casino Bill*, MILWAUKEE J. SENTINEL, Mar. 1, 2003, at 1A.

136. *Id.*

137. Jones, *supra* note 128.

138. See Steve Schultze, *Gambling Compact Barely Approved*, MILWAUKEE J. SENTINEL, May 2, 2003, at 1B. IGRA requires the Interior Secretary to review tribal-state compacts. 25 U.S.C. § 2710(d)(8) (2000). If the Secretary neither approves nor disapproves a compact within 45 days, the compact is considered approved. *Id.* § 2710(d)(8)(C).

Failing in the political arena, disgruntled state legislators and commercial gambling interests turned to the courts. Two legal challenges to the 2003 compact amendments made their way to the Wisconsin Supreme Court.

3. Enter the State Supreme Court

i. *Panzer v. Doyle*

In the first, *Panzer v. Doyle*,¹³⁹ state Senate Majority Leader Mary Panzer, state Assembly Speaker John Gard, and the state Joint Committee on Legislative Action brought an original action in the Wisconsin Supreme Court,¹⁴⁰ claiming that Doyle exceeded his gubernatorial authority by agreeing, in a compact with the Forest County Potawatomi Tribe, to a perpetual duration term, additional casino games, and a partial waiver of state sovereign immunity. The court's analysis of the challenged compact provisions turned entirely on state law. Indeed, the court noted that the tribe was not party to the suit and that because of tribal sovereignty, the court could not demand the tribe's participation:

[The Tribe] cannot be compelled to appear in these proceedings, and it has opted not to intervene. . . .

The Tribe has been aware of this litigation from its inception. This court would have welcomed its intervention. We will not venture the delicate balance of shared power among our three branches of government on the chosen absence of a potential party.¹⁴¹

139. 2004 WI 52, 271 Wis. 2d 295, 680 N.W.2d 666, *overruled in part by* Dairyland Greyhound Park, Inc. v. Doyle, 2006 WI 107, 719 N.W.2d 408.

140. Doyle sought to have the case removed to federal court on the ground that it involved a federal question under IGRA. The federal district court declined removal, ruling that the case involved only the issue of the governor's authority to enter into a compact: "Not only is this a question of state law, it is an issue which extends to the relationships between the branches of state government and should surely be addressed in the first instance by the courts of the state." See Brief of Petitioner at 29–30, *Panzer v. Doyle*, No. 03-0910 (Wis. Oct. 22, 2003); Richard Jones, *High Court Revives Case Against Doyle*, MILWAUKEE J. SENTINEL, June 13, 2003, at 3B.

141. *Panzer*, 2004 WI 52, ¶¶ 43–44, 271 Wis. 2d 295, ¶¶ 43–44, 680 N.W.2d 666, ¶¶ 43–44.

After laying out the convoluted history of legalized gambling in Wisconsin, the court turned to state constitutional principles. As to the legislature's delegation of authority to the governor to enter into gaming compacts on behalf of the state,¹⁴² the court relied on the Wisconsin Constitution's separation of powers to conclude that the governor did not have blanket authority to agree to compact terms. Instead, the court stated that each term must be examined to determine whether it fell within the power appropriately delegated to the governor.¹⁴³

The indefinite duration term in the 2003 amendments was beyond the scope of power delegated to the governor, concluded the court, because it mooted the political safeguards on the governor's exercise of authority:

The legislature would be powerless to alter the course of the state's position on Indian gaming The electorate might be able to voice its displeasure, and the Governor might in theory pay a heavy political price, but the voters would be powerless to elect a governor who could impact the terms that had already been agreed to.¹⁴⁴

Similarly, waiving state sovereign immunity without legislative ratification was outside the scope of gubernatorial power, as the state constitution vests authority to waive sovereign immunity with the legislature. "In the absence of a clear grant of authority from the legislature," the court stated, "the Governor exercised a core power of the legislature, and as such his action cannot stand."¹⁴⁵

142. See 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).").

143. *Panzer*, 2004 WI 52, ¶¶ 60–72, 271 Wis. 2d 295, ¶¶ 60–72, 680 N.W.2d 666, ¶¶ 60–72. The court considered similar state law challenges to compact terms arising in other jurisdictions. See *Saratoga County Chamber of Commerce v. Pataki*, 798 N.E.2d 1047 (N.Y. 2003) (relying on state constitutional principles to invalidate compact for lack of legislative ratification); *Am. Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012 (D. Ariz. 2001) (relying on state constitution to invalidate compact provisions as outside authority delegated to the governor), *vacated on other grounds*, 305 F.3d 1015 (9th Cir. 2002); *New Mexico ex rel. Clark v. Johnson*, 904 P.2d 11 (N.M. 1995) (holding that the governor lacked the authority to unilaterally negotiate compacts that added to the functions of the state lottery agency); *Narragansett Indian Tribe v. Rhode Island*, 667 A.2d 280 (R.I. 1995) (holding, on certified question from federal court, that the state constitution vested authority over "lotteries" with the state legislature rather than the governor); *Kansas ex rel. Stephan v. Finney*, 836 P.2d 1169 (Kan. 1992) (holding that the governor had no authority to enter into compacts on behalf of the state without the state legislature's approval).

144. *Panzer*, 2004 WI 52, ¶ 79, 271 Wis. 2d 295, ¶ 79, 680 N.W.2d 666, ¶ 79.

145. *Id.* ¶ 110, 271 Wis. 2d 295, ¶ 110, 680 N.W.2d 666, ¶ 110.

The new games permitted under the 2003 compact amendments also exceeded the governor's authority and, indeed, the legislature's authority. The court held that the Wisconsin Constitution prohibited "gambling in any form" other than the games expressly authorized by the 1993 constitutional amendment.¹⁴⁶ Because "[n]othing in [the constitution] authorizes electronic keno, roulette, craps, and poker,"¹⁴⁷ reasoned the court, these games were outside the scope of state public policy and therefore "uncompactable."

The governor argued that state law should provide a "floor" for compact negotiations; that is, that the expressly authorized games must be included in the compacts and other games could be negotiated, but did not have to be included. The court instead adopted a restrictive interpretation, holding that IGRA's "permits such gaming" provision created "in essence two categories of Class III games: those over which a state *must* negotiate with a tribe and those that are illegal to negotiate."¹⁴⁸ With the 1993 amendment, the court found the state constitution "quite clear" on which games were permitted and which were not.¹⁴⁹ Further, the court relied on state statutes criminalizing such games:

[T]he governor's agreement to the additional games of keno, roulette, craps, and poker in 2003 was contrary to criminal/prohibitory sections of state law in addition to the constitution. It is beyond the power of any state actor or any single branch of government to unilaterally authorize gaming activity in violation of the policy in Wisconsin's criminal code. The governor may not carve out exceptions to the state's criminal statutes unilaterally. We are unable to conclude that the legislature delegated such power or could delegate such power in light of the 1993 constitutional amendment.¹⁵⁰

The court recognized that its restrictive reading also cast doubt on games currently offered at tribal casinos under the 1992 compacts and the 1998 compact amendments. Because the original compacts preceded the 1993 constitutional amendment, the court concluded that

146. See WIS. CONST. art. IV, § 24.

147. *Panzer*, 2004 WI 52, ¶ 86, 271 Wis. 2d 295, ¶ 86, 680 N.W.2d 666, ¶ 86.

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

149. *Id.* ¶ 93, 271 Wis. 2d 295, ¶ 93, 680 N.W.2d 666, ¶ 93.

150. *Id.* ¶ 96, 271 Wis. 2d 295, ¶ 96, 680 N.W.2d 666, ¶ 96.

they did not “suffer[] from any infirmity under state law” when they were negotiated, but the court raised, and declined to decide, the issue of whether the compacts subsequently were invalidated by the changes to Wisconsin’s constitution.¹⁵¹

In the uncertain legal and political environment created by the court’s decision in *Panzer*, Doyle and the Forest County Potawatomi signed a twenty-five year compact in which the tribe would pay the state \$750 million over the life of the compact.¹⁵² The new compact was silent on the types of games the tribe could offer.¹⁵³ State Assembly Speaker Gard criticized the deal as falling short of Connecticut’s twenty-five percent take of slot revenue. “It’s more of the same,” he said, “Taxpayers [of Wisconsin] are getting a bad deal.”¹⁵⁴

ii. *Dairyland Greyhound Park, Inc. v. Doyle*

The question of Wisconsin’s scope of gaming was squarely before the state supreme court in *Dairyland Greyhound Park, Inc. v. Doyle*.¹⁵⁵ Dairyland Greyhound Park, a privately owned dog racetrack with a prime location in Kenosha, Wisconsin, on the heavily traveled interstate highway corridor between Milwaukee and Chicago, attributed its declining profits to the expansion of tribal casinos in Wisconsin and sought to eliminate its biggest competition.¹⁵⁶ At the same time, Dairyland hedged its bets and agreed to sell the track for \$40 million in connection with the Menominee Tribe’s plans for an \$808 million off-reservation casino on the site that would boast 3100 slots and a 400-room hotel.¹⁵⁷

151. *Id.* ¶ 102, 271 Wis. 2d 295, ¶ 102, 680 N.W.2d 666, ¶ 102.

152. Steve Schultze & Patrick Marley, *Casino Deal Restarts Payments*, MILWAUKEE J. SENTINEL, Oct. 5, 2005, at 1A.

153. *Id.*

154. *Id.*

155. 2006 WI 107, 719 N.W.2d 408.

156. *See Court Upholds Indian Gaming in Wisconsin*, BUS. J. (Milwaukee, Wis.), July 14, 2006, available at <http://milwaukee.bizjournals.com/milwaukee/stories/2006/07/10/daily41.html>. Dairyland’s revenue decreased from \$170 million in 1991 to \$86 million in 2000. *Id.* For some time, Dairyland had been the object of a controversial proposal by the Menominee Nation to purchase and redevelop the racetrack as an “off-reservation” casino. *See Light & Rand, Are All Bets Off?*, *supra* note 55, at 353–60 (describing the tribal-state-local political negotiations over Dairyland under the Thompson and McCallum administrations).

157. *See* M. Daniel Gibbard, *Kenosha Casino Proposal Betting on Illinois Gamblers*, CHI. TRIB., Jan. 15, 2006, 4:3.

In *Dairyland*, the court relied on the Contract Clauses of the Wisconsin and U.S. Constitutions¹⁵⁸ to hold that the original compacts and subsequent amendments were unaffected by the 1993 amendment to the Wisconsin Constitution.¹⁵⁹ “The essence of what is at issue here,” said the court, “is whether Wisconsin should break treaties with Tribes by walking away from its contractual obligations.”¹⁶⁰ In an opinion peppered with piecemeal withdrawal of “any language to the contrary in *Panzer v. Doyle*,”¹⁶¹ the court reasoned that because the 1993 constitutional amendment did not apply to the original compacts, the terms of the compacts determined allowable games.¹⁶² “[W]e conclude that, should the parties agree to amend the scope of gaming, the compacts clearly obligate the parties to abide by such amendments.”¹⁶³ Further, the court indicated that all Class III games were on the table, as the federal district court’s decision in *Lac du Flambeau*, rather than the 1993 amendment, controlled the scope of gaming under the original compacts and subsequent amendments.¹⁶⁴

It would seem necessarily to follow, then, that the 2003 compact amendments, which greatly expanded games allowed in tribal casinos, would be valid, contrary to the court’s holding in *Panzer*. Yet, the *Dairyland* court claimed not to reach the 2003 amendments, seemingly construing them as separate compacts rather than amendments to the original compacts.¹⁶⁵

158. See U.S. CONST. art. I, § 10, cl. 1 (“No state shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts”); 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”).

159. *Dairyland*, 2006 WI 107, ¶ 3, 719 N.W.2d 408, ¶ 3.

160. *Id.*, 719 N.W.2d 408, ¶ 3.

161. *Id.* ¶¶ 2, 23 n.24, 91, 95, 19 N.W.2d 408, ¶¶ 2, 23 n.24, 91, 95.

162. *Id.* ¶ 100, 719 N.W.2d 408, ¶ 100.

163. *Id.* ¶ 84, 719 N.W.2d 408, ¶ 84.

164. *Id.* ¶ 85, 719 N.W.2d 408, ¶ 85. The court explained,

[T]he law at the time the Original Compacts were entered into controls the compacts. The parties negotiated under the *Lac du Flambeau* decision, under which all Class III games were negotiable. Therefore, the Class III games that the State and the Tribes agreed to in their extension negotiations are lawful. We withdraw any language to the contrary in *Panzer* that would limit the State’s ability to negotiate for Class III games under the Original Compacts.

Id. ¶ 91, 719 N.W.2d 408, ¶ 91 (footnotes omitted).

165. In response to Justice Roggensack’s assertion that “[t]he majority opinion concludes that the games added to the compacts in 2003 do not violate Wisconsin law,” *id.* ¶ 285, 719 N.W.2d 408, ¶ 285 (Roggensack, J., concurring in part, dissenting in part)

Read together, the cases certainly reveal a rift not only among state political actors but also among the Wisconsin Supreme Court justices as to the validity of the 2003 compact amendments. Importantly, though, both cases viewed the issue as one of state law,¹⁶⁶ appropriately decided by the state court, regardless of the tribes' participation in the cases and their impact on tribal interests. Tribes' efforts to exert political influence in successfully negotiating compact terms were nearly all for naught in this instance and are plainly vulnerable to future challenges in the state's courts.

IV. OBSERVATIONS ABOUT THE ROLE OF STATE LAW AND STATE COURTS

The burgeoning role of state courts in setting the terms for tribal gaming was not anticipated by Congress, as it had carefully designed a federal cause of action to resolve Class III compacting disputes.¹⁶⁷ IGRA's tribal-state compact requirement, in its reference to the "State," presumably left it to state political branches to decide how to negotiate and approve compacts. The sometimes rancorous state politics over Indian gaming have resulted in litigation—not between a tribe and state in federal court, as IGRA authorized and Congress envisioned, but between state political actors in state court.¹⁶⁸ This phenomenon is not limited to Wisconsin, as evidenced by similar lawsuits and accompanying interpretations of state law and state constitutions in a number of states.

(footnotes omitted), the court flatly stated, "That is incorrect. We do not reach the 2003 gaming compacts. . . . [W]e are simply ruling on the scope of gaming provisions contracted for in the Original Compacts," *id.* ¶ 80 n.61, 719 N.W.2d 408, ¶ 80 n.61.

166. In her dissenting opinion in *Panzer v. Doyle*, Wisconsin Supreme Court Chief Justice Abrahamson took the majority to task for "attempt[ing] to frame the inquiry based only on state law":

The conclusion of the majority is that the Governor violated state law by authorizing the disputed new games. That conclusion misses the mark because it rests on an erroneous assumption that states can directly regulate Indian gaming, independent of IGRA. They cannot. Under IGRA, state law can only indirectly affect Indian gaming, and only through compact negotiations. Outside of that process, state law does not apply to Indian gaming. . . . That state law may play a role in the legal analysis does not detract from the overriding federal nature of the claim.

2004 WI 52 ¶¶ 236–38, 271 Wis. 2d 295, ¶¶ 236–38, 680 N.W.2d 666, ¶¶ 236–38 (Abrahamson, C.J., dissenting).

167. See 25 U.S.C. § 2710(d).

168. See *id.*

A. Other State Court Decisions

In New York, state legislators, joined by anti-gaming organizations and individual taxpayers, challenged the tribal-state compact negotiated by Governor Mario Cuomo (and later amended by Governor George Pataki) with the St. Regis Mohawk Tribe.¹⁶⁹ The compact, negotiated in 1993, allowed the Tribe to conduct casino-style gaming, including baccarat, blackjack, craps, and roulette on its reservation in upstate New York.¹⁷⁰ The Tribe opened its casino in April 1999, and a few months later, the plaintiffs filed suit challenging gubernatorial authority to negotiate casino-style games and to enter into a compact without legislative ratification.¹⁷¹ Both challenges were grounded in the New York state constitution.¹⁷²

As in *Panzer*, the state's highest court ruled that the tribe was not an indispensable party to the action, as "a contrary ruling would put Indian gaming compacts beyond [state] constitutional challenge or review."¹⁷³ The court reasoned,

While sovereign immunity prevents the Tribe from being forced to participate in New York court proceedings, it does not require everyone else to forego the resolution of all disputes that could affect the Tribe. While we fully respect the sovereign prerogatives of the Indian tribes, we will not permit the Tribe's voluntary absence to deprive these plaintiffs (and in turn any member of the public) of their day in court.¹⁷⁴

After noting that IGRA's reference to "the State" does not identify which state actor may negotiate compacts¹⁷⁵ and that its list of allowable

169. *Saratoga County Chamber of Commerce v. Pataki*, 798 N.E.2d 1047, 1061 (N.Y. 2003).

170. *See id.* at 1049–50. In 1999, the Tribe negotiated with Pataki to amend the compact to permit electronic Class III games. *Id.* at 1050. The court found the challenge to the 1999 amendment moot, as it had by its terms expired in 2000. *Id.* at 1051–52.

171. *Id.* at 1050.

172. *See* N.Y. CONST. art. III, § 1, art. IV, § 1 (separation of powers), art. I, § 9 (state prohibition on gambling).

173. *Pataki*, 798 N.E.2d at 1050–51 (citing *Saratoga County Chamber of Commerce v. Pataki*, 712 N.Y.S.2d 687 (App. Div. 2000)); *see also id.* at 1057–59 (addressing the issue of whether the tribe is an indispensable party).

174. *Id.* at 1058–59 (citations omitted).

175. *Id.* at 1060 ("IGRA imposes on 'the State' an obligation to negotiate in good faith, but identifies no particular state actor who shall negotiate the compacts; that question is left up to state law." (citations omitted)).

compact terms necessarily includes state policy choices,¹⁷⁶ the court easily found that the governor's negotiation of the 1993 compact "usurped the Legislature's power."¹⁷⁷ The court ruled that without legislative ratification, the compact was invalid (despite the tribe having relied on it to build its casino),¹⁷⁸ and went on to characterize its decision as "a commitment to the separation of powers and constitutional government."¹⁷⁹

Similarly, the Supreme Court of Kansas sided with the state attorney general in holding that the governor lacked authority to bind the state through a compact with the Kickapoo Nation.¹⁸⁰ The compact's terms gave the state regulatory and oversight authority over the tribe's casino through a "State Gaming Agency."¹⁸¹ Because under the Kansas state constitution only the state legislature had authority to create state

176. *Id.* (noting that given the range of permitted provisions under IGRA, "gaming compacts are laden with policy choices . . . [that] epitomize 'legislative power'").

177. *Id.* at 1061.

178. Although the state defendants raised a laches defense, arguing that the Tribe would be prejudiced by the delay in challenging the 1993 compact, the court rejected the defense.

Nowhere in the present case, however, is there any indication that the delay in bringing this action has caused the slightest harm to the Tribe. Plaintiffs point out that the Tribe has been operating the casino—and presumably profiting from it—during the entire pendency of this suit. . . .

Plaintiffs argue that the Tribe was on notice as to the possible illegality of the compact, citing a memorandum from Governor Cuomo's Counsel indicating that the Tribe had been informed that legislative approval would be required before the State could enter into effective compacts. Thus, while the casino is presumably expected to make large sums over the next several years, and while plaintiffs' suit threatens that source of revenue, the prejudice caused by a loss of expected profits based on a predictably vulnerable compact is not the sort of prejudice that supports a defense of laches. Were it otherwise, very few suits would proceed past laches analysis, and certainly no suits seeking to invalidate illegal contracts could ever proceed.

Id. at 1056–57 (citations omitted). The court later noted that "to the extent the Tribe is prejudiced by our adjudication of issues that affect its rights under the compact, the Tribe could have mitigated that prejudice by participating in the suit." *Id.* at 1059 (citation omitted).

179. *Id.* at 1061. Because its decision invalidated the compact, the court did not reach the merits of the scope of gaming permitted under state law. *Id.* at 1049 n.1, 1061.

180. *Kansas ex rel. Stephan v. Finney*, 836 P.2d 1169 (Kan. 1992).

181. *Id.* at 1182.

agencies and define their functions, the compact was void without legislative ratification.¹⁸²

State legislators successfully sued the governor of New Mexico for entering into tribal-state compacts and revenue-sharing agreements with fourteen tribes without legislative approval.¹⁸³ Again, the challenge was grounded in state constitutional law. The petitioners argued that the governor lacked unilateral authority to bind the state to the compact terms, and that the games permitted by the compact were illegal under state law.¹⁸⁴

Based on the broad definition of charitable “lotteries” allowed under state law—similar to Wisconsin, New Mexico law defined lottery as an enterprise involving the elements of consideration, chance, and prize¹⁸⁵—the compacts allowed tribes to conduct all forms of casino-style games.¹⁸⁶ While acknowledging the presumably broad range of charitable games allowed under state law, the court observed that charities were not exempt from the state’s criminal prohibition against “making a bet.”¹⁸⁷ Assuming that at least some casino games would constitute illegal “bets” under state law, the court found that the governor’s negotiation of all casino games was contrary to the state’s “unequivocal[] . . . public policy against unrestricted gaming.”¹⁸⁸ From there, the court had little trouble concluding that the governor lacked authority to enter into the compacts without legislative ratification. Because the compacts allowed casino-style games in the face of “the legislature’s expressed aversion to commercial gambling,” the court held that the compacts were invalid.¹⁸⁹

182. *Id.* at 1185. The case also raised the issue of the scope of gaming under state law. Like Wisconsin’s constitution, the Kansas state constitution “forever prohibited” lotteries, broadly defined to include any game with the elements of chance, prize, and consideration, including bingo and slot machines. *See id.* at 1176–77 (citing KAN. CONST. art. 15, § 3). Subsequent constitutional amendments excepted bingo, pari-mutuel betting on horse and dog racing, and a state lottery. *See id.* at 1177 (citing KAN. CONST. art. 15, §§ 3a–3c). The court, for purposes of its decision, presumed that state law permitted Class III gaming generally. *Id.* at 1178.

183. New Mexico *ex rel.* Clark v. Johnson, 904 P.2d 11, 15 (N.M. 1995).

184. *Id.*

185. *See id.* at 20 (citing N.M. STAT. § 30-19-1(C) (1994)).

186. *Id.*

187. *Id.* at 20–21 (citing N.M. STAT. § 30-19-2 (1994)). The New Mexico statute defines “bet” “as a bargain in which the parties agree that, dependent on chance, . . . one stands to win or lose anything of value specified in the agreement.” *Id.* (citing N.M. STAT. § 30-19-1(B) (1994)).

188. *Clark*, 904 P.2d at 21.

189. *Id.* at 24.

In a case “implicat[ing] fundamental [state] constitutional questions of great public importance,”¹⁹⁰ the state supreme court was dismissive of the tribal interests at stake:

Petitioners seek a writ of mandamus against the Governor of New Mexico, not against any of the tribal officials. Resolution of this case requires only that we evaluate the Governor’s authority under New Mexico law to enter into the compacts and agreements absent legislative authorization or ratification. Such authority cannot derive from the compact and agreement; it must derive from state law.¹⁹¹

In a later case challenging state law permitting Indian gaming, the New Mexico Supreme Court seemed to reverse its position, finding that gaming tribes and pueblos were indispensable parties.¹⁹² Because the tribes and pueblos did not consent to suit in state court, the court dismissed the case.¹⁹³

In Michigan, after an unsuccessful attempt to invalidate tribal-state gaming compacts on state constitutional grounds,¹⁹⁴ taxpayers filed a second suit against the state, arguing that the governor’s amendment of one of the compacts violated the state constitution.¹⁹⁵ The original compacts, approved by the state legislature, provided that the governor “shall act for the State” in proposing and accepting amendments to the compacts.¹⁹⁶ In 2003, Governor Jennifer Granholm agreed to

190. *Id.* at 18.

191. *Id.* at 19. Although the court noted that “several of the compacting tribes are in the process of establishing and building gambling resorts and casinos,” the potential prejudice to tribes persuaded the court only that speedy resolution of the issue was necessary. *Id.* at 18.

192. *New Mexico ex rel. Coll v. Johnson*, 990 P.2d 1277, 1277 (N.M. 1999).

193. *Id.* at 1281. The court distinguished *Johnson* on the ground that its holding was limited to a mandamus action. *Id.* The court also held that the plaintiffs lacked standing to challenge the state law. *Id.* at 1281–86.

194. *Taxpayers of Mich. Against Casinos v. Michigan*, 685 N.W.2d 221 (Mich. 2004). The taxpayers challenged the state legislature’s approval of the compacts through a concurrent resolution, arguing that the process violated the Michigan state constitution. *Id.* at 225–26. The state supreme court upheld the compacts, in part based on its characterization of the compacts as contractual agreements, so that the state legislature’s approval was not a legislative act binding upon all citizens and did not need to comply with state constitutional requirements for enacting legislation. *See id.* at 229–31.

195. *See Taxpayers of Mich. Against Casinos v. Michigan*, 708 N.W.2d 115, 115 (Mich. Ct. App. 2005).

196. *See id.* at 119–20 (quoting Tribal-State Compact Between the State of Michigan and the Little Traverse Bay Bands of Odawa Indians § 16).

amendments to the tribal-state compact with the Little Traverse Bay Bands of Odawa Indians, allowing the tribe to operate a second casino in exchange for increased revenue payments to the state.¹⁹⁷ The Little Traverse Bay Bands were allowed to intervene in the suit and argued that legislative approval of the original compact necessarily indicated authorization for the governor to amend the compact. Drawing upon state law and state constitutional principles, the state appellate court concluded that the governor's unilateral amendment of the compact violated the separation of powers required by the Michigan Constitution.¹⁹⁸

B. Implications

As the *Panzer* court observed, after the U.S. Supreme Court's decision in *Seminole Tribe*, disputes between tribes and states are "more likely to be resolved in a state court,"¹⁹⁹ as the availability of a federal forum depends upon state consent. Once in state court, not surprisingly, cases like *Panzer* and *Dairyland* are "dominated by questions of state law, which the Wisconsin Supreme Court has the right and duty to resolve."²⁰⁰ The Wisconsin case study demonstrates how state courts influence the ability of political actors to set the terms of debate and of public policy. Though state court constraints on the *state's* political actors—here, Wisconsin's governor—most certainly are appropriately determined under state law, the same cannot be said of tribes. Tribal sovereignty, alongside the tenet of federal Indian law that states generally may not exercise authority over tribes, makes problematic the Wisconsin Supreme Court's insistence that state law, as interpreted by state courts, was wholly determinative of the issues raised in the cases.

197. *See id.* at 120–21.

198. *Id.* at 123–24 (“[B]eing mindful of the constitutional prohibition that forbids the executive branch from assuming duties of the legislative branch unless expressly provided for in the Michigan Constitution, any amendment to a gambling compact must be presented to the Legislature for approval, at the very least by legislative resolution.”). The case currently is on appeal before the Michigan Supreme Court. *See Taxpayers of Mich. Against Casinos v. Michigan*, 711 N.W.2d 80 (Mich. 2006) (granting leave to appeal the decision of the Michigan Court of Appeals).

199. *Panzer v Doyle*, 2004 WI 52 ¶ 102 n.41, 271 Wis. 2d 295, ¶ 102 n.41, 680 N.W.2d 666, ¶ 102 n.41.

200. *Id.*, 271 Wis. 2d 295, ¶ 102 n.41, 680 N.W.2d 666, ¶ 102 n.41; *see also* James J. Wawrzyn, Note, *Panzer v. Doyle: Wisconsin Constitutional Law Deals the Governor a New Hand*, 88 MARQ. L. REV. 221, 238–41 (2005) (arguing that state law appropriately determines the governor's authority to negotiate gaming compacts and that accordingly, the state supreme court properly exercised its jurisdiction over the issue).

IGRA's "permits such gaming" and tribal-state compact requirements reflect Congress's intent to balance the authority of two sovereigns—state and tribal governments. In practical terms, the appropriate balance for any particular state and tribe would be struck either by a successfully negotiated compact or by a suit in federal court to enforce the state's good faith duty. Through the enforcement of IGRA, federal courts would perform a referee function to effect Congress's intent. The federal court would consider the scope of gaming permitted under state law and the state's reasons for refusing to agree to compact terms, and it also would consider federal law—namely IGRA. The tribe, as the plaintiff, would have an opportunity to argue its position, in terms of proper interpretation of both state and federal law, as well as in terms of its status as a sovereign government.²⁰¹

In state court, however, no balance is struck between state and tribal authority. Instead, tribal authority and tribal interests typically are literally absent, as the availability of a state forum usually does not turn on tribal consent.²⁰² State law and state power are determinative and thus the only issues the court need address.

The blanket and controlling authority of state law also speaks to tribes' ability to meaningfully participate in state court adjudication of their interests. The *Panzer* court indicated that it would have welcomed the tribe's intervention in the suit, but what would there have been for the tribe to say? The tribe likely would have found itself taking sides in arguing over the proper interpretation of Wisconsin's state constitution, rather than asserting its own interests. The tribe was treated no differently than any other potential intervener, despite its status as a government. Even when present, a tribe's interests may be "shelved"²⁰³ through the court's consideration of state law issues.

Although not acknowledged by the court, the tribe had good reason not to intervene. First, of course, tribal intervention would have submitted the tribe's interests to adjudication in the Wisconsin court, akin to Wisconsin volunteering to have its interests litigated in Illinois

201. See, e.g., *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1018 (9th Cir. 2002) (reversing the district court's holding, in challenge to validity of tribal-state compacts, that tribes were not necessary parties to the suit).

202. See generally Matthew L.M. Fletcher, *The Comparative Rights of Indispensable Sovereigns*, 40 GONZ. L. REV. 1, 73–117 (2004–2005) (discussing in detail cases involving Indian gaming and courts' consideration of tribes as indispensable parties).

203. *Id.* at 81 (describing a district court decision that tribes were not necessary parties in a case challenging tribal-state compacts under Arizona state law as "unreal in its shelving of the compacting tribes' interest").

state court. The tribe's participation is particularly problematic in state court because states, unlike the federal government, generally have no authority over tribal governments. Second, the court made clear that in its opinion, state law and state interests were determinative. The court's approach did not afford much if any room for tribal interests to impact the court's reasoning: "The Tribe's decision not to participate as a party cannot deprive this court of its own core power to interpret the Wisconsin Constitution and resolve disputes between coequal branches of state government."²⁰⁴

Despite the relatively favorable outcome in *Dairyland*, the case turned on the legally binding nature of the compacts as contracts—again, without regard to the government-to-government negotiation of tribal-state compacts. Although the *Dairyland* court characterized the "essence" of the issue as "whether Wisconsin should break treaties with Tribes,"²⁰⁵ the court's reasoning treated the compact terms simply as contractual obligations subject to state law.

Although Congress delegated some authority over Indian gaming to states through IGRA, the post-*Seminole Tribe* environment has resulted in state power eclipsing tribal authority. Wisconsin's roller coaster ride reveals the extent to which state law sets—and can change—the terms of Indian gaming. Tribes' efforts to influence legal and political outcomes are limited by state politics and state court interpretation of state law. Tribes may not be able to meaningfully participate in the processes that determine outcomes. Instead, they may find themselves "caught in the middle . . . like kids in a really bad divorce."²⁰⁶

V. CONCLUSION

IGRA's lack of direction on the appropriate and legitimate role of state government in negotiating and enacting compacts has led to litigation in state court of successfully negotiated compact agreements. As state courts decide questions of state constitutional and statutory law, tribes, who may not even be party to a state lawsuit, have been

204. *Panzer*, 2004 WI 52 ¶ 44, 271 Wis. 2d 295, ¶ 44, 680 N.W.2d 666, ¶ 44. This point was made in the petitioners' brief, which characterized the cases as "a dispute between two co-equal branches of state government." Brief for the Petitioner, *supra* note 140, at 32. Under the heading, "What This Case Is Not About," the petitioners stated, "Although the tribes may have a keen interest in the outcome of this case, a decision holding that the Governor of Wisconsin lacked adequate authority to negotiate the Compacts of 2003 turns exclusively on Wisconsin law and does not involve any law creating a tribal legal interest." *Id.*

205. *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 3, 719 N.W.2d 408, ¶ 3.

206. *Jones*, *supra* note 128 (quoting Wayne LaBine).

forced to forgo casino revenue to avoid coming under federal scrutiny for illegal gaming operations—without a valid state compact, casino-style gaming on tribal lands is illegal.²⁰⁷ Recent events in Wisconsin suggest that in that state and others, tribes, already relegated to interest group style political behavior, may see their efforts—and their gaming rights—mooted by state law as much as by state politics.

The fact that state political institutions can effectively relegate tribes to the role of bystanders during the determination of their own futures is infrequently noted, but merits a high degree of concern. Indian gaming is the most significant economic opportunity that many tribes have ever had; it may be the most important policy issue facing tribes today. Tribal interests should not be caught—and lost—in the middle of state law and politics.

207. See Washburn, *supra* note 51, at 430–31.