2016

Gambling with Equal Protection: Connecticut's Exploitation of Mancari and the Tribal Gaming Framework Notes

Allison S. Ercolano

CONNECTICUT
LAW REVIEW

VOLUME 48 MAY 2016 NUMBER 4

Note

Gambling with Equal Protection: Connecticut's Exploitation of *Mancari* and the Tribal Gaming Framework

ALLISON S. ERCOLANO

Recent legislation passed in Connecticut grants two Indian tribes an exclusive right to pursue development of the state's third casino. On one hand, financial benefits stemming from casinos enhance tribal self-sufficiency, foster tribal wealth, and provide an economic benefit to the state. On the other hand, legislation that allows for these benefits often does so by singling out Indians as a separate and distinct entity. Connecticut's legislation comes at a precarious time as a legal attack on the preferential treatment of Indians gains traction in the courts. As it now stands, federal statutes singling out Indians are not subject to heightened judicial scrutiny, and will be upheld by a court so long as a legitimate end is furthered. This Note seeks to explore the boundaries of Connecticut's law in comparison with the federal Indian gaming regulatory framework and contemplates whether the law can serve a legitimate end. After describing and analyzing the state statute, this Note then suggests that the current void of legal guidance over preferential state tribal gaming laws will allow states like Connecticut to exploit Indians in the name of money.

NOTE CONTENTS

I. INTRODUCTION 1271

II. CONNECTICUT SPECIAL ACT 15-7 1275

III. CONSTITUTIONAL FRAMEWORK 1280

A. THE INDIAN GAMING REGULATORY ACT AND *MANCARI*: STATES' ROLES IN FEDERALLY AUTHORIZED TRIBAL GAMING 1280
B. THE FEDERAL TRIBAL GAMING SCHEME 1280
C. SUPREME COURT PRECEDENT: *MORTON V. MANCARI* 1283
D. CIRCUIT COURT APPLICATION OF AND SKEPTICISM TOWARD *MANCARI* 1286

IV. THE FUTURE OF *MANCARI* 1292

A. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT: MGM'S PENDING LITIGATION 1292
B. THE ATTACK ON *MORTON V. MANCARI* 1295
C. CONNECTICUT'S ROLE IN THE *MANCARI* ATTACK 1297

Gambling with Equal Protection: Connecticut's Exploitation of *Mancari* and the Tribal Gaming Framework

ALLISON S. ERCOLANO*

I. INTRODUCTION

MGM Resorts International Global Gaming Development, LLC ("MGM") is currently working on the construction of a casino in Springfield, Massachusetts, slotted to open by the fall of 2018, thereby joining the ranks of the major casinos located in New England.[1] More specifically, MGM's casino will be the third casino located along the Interstate 91 corridor between Massachusetts and Connecticut.[2] If combined net profits totaling nearly $1.5 billion in 2014 from nearby Foxwoods Resort Casino and Mohegan Sun Resort and Casino are any indication,[3] MGM's new casino stands to deliver significant revenue for the company. Despite expectations of high revenue, however, recent legislation passed in Connecticut stands to inhibit some of the expected profits and slow the success of MGM's new casino, at least initially.

The Connecticut legislature adopted Special Act No. 15-7 (the "Act") on June 19, 2015, after numerous debates and significant revisions to the

---

* J.D. Candidate, University of Connecticut School of Law, expected May 2017; B.A., Franklin & Marshall College, 2012. Thank you to my family for their unwavering support and encouragement, especially to Millie. Thank you also to the members of the *Connecticut Law Review* for their diligent and thoughtful input, and a special thanks to Professor Bethany Berger, for suggesting and encouraging the topic of this Note.

[1] *See* Philip Marcelo, *MGM Asks to Delay Opening Springfield Casino by a Year*, WBUR (June 25, 2015), http://www.wbur.org/2015/06/25/mgm-sprinfield-opening-delay [https://perma.cc/93WJ-5YWQ] (reporting MGM's expected opening date for its Springfield, Massachusetts casino to be September 5, 2018).

[2] *See* PYRAMID ASSOCS., LLC, NORTHEASTERN CASINO GAMING UPDATE 2015, at 4, 7 (2015), http://www.nathaninc.com/sites/default/files/Pub%20PDFs/2015_Northeastern_Casino_Gaming_Update.pdf [https://perma.cc/5EB5-CXW2] [hereinafter PYRAMID] (documenting that Foxwoods Resort Casino is located in Ledyard, Connecticut, approximately eight miles from Interstate 95, and that Mohegan Sun is located in Montville, Connecticut, which is also close to Interstate 95). Interstate 95 is connected to Interstate 91.

[3] *See id.* at 4 (providing revenue and employment statistics for the two casinos in Connecticut); Gale Courey Toensing, *Report: Foxwoods & Mohegan Sun Hard Hit by Regional Gaming Expansion*, INDIAN COUNTRY (Mar. 10, 2015), http://indiancountrytodaymedianetwork.com/2015/03/10/report-foxwoods-mohegan-sun-hard-hit-regional-gaming-expansion-159537 [https://perma.cc/ZMR6-TQ7L] (providing annual profits information for Connecticut's two casinos).

proposed legislation.[4] Entitled "An Act Concerning Gaming," the Act grants Connecticut's two federally-recognized tribes, the Mashantucket Pequot Tribe and the Mohegan Tribe of Connecticut (the "Tribes"),[5] the ability to jointly register as a "tribal business entity" to build a casino in Connecticut. After public registration with Connecticut's Secretary of State, the newly formed tribal business entity may issue a request to Connecticut towns to submit proposals for a gaming facility in their jurisdictions.[6] Unsurprisingly, the Act is the subject of recent litigation filed on behalf of MGM in the United States District Court for the District of Connecticut.[7]

This litigation adds to the debate regarding the proper level of judicial scrutiny to be applied to state legislation granting preferential treatment to Indian tribes. There has been a push within the last decade, resulting from the conflation of Indian law with affirmative action, to confine or overturn the pivotal Supreme Court case, *Morton v. Mancari*, which allows for preferential treatment of Indian tribes.[8] Connecticut's recent legislation extending an exclusive grant to its two federally-recognized tribes to pursue development of a new casino may result in a new constitutional framework regarding such preferential treatment. The Act challenges the traditional relationship established between Indians and the federal government that allows tribes to be classified as "political" rather than "racial" groups, by exploiting this relationship seemingly for the sole purpose of retaining cash flow within the state. This exploitation may be the trigger that causes an overhaul of Supreme Court jurisprudence regarding the level of judicial review applied to state gaming laws preferential to Indians.

Under the Fourteenth Amendment of the United States Constitution, a state cannot deny any person within its jurisdiction equal protection of the laws.[9] Accordingly, the Constitution requires that any state law carry out a

---

[4] *See* S.B. 1090, 2015 Leg., Reg. Sess. (Conn. 2015).

[5] *See* NAT'L CONFERENCE OF STATE LEGISLATURES, FEDERAL AND STATE RECOGNIZED TRIBES (Feb. 2015), http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx [https://perma.cc/2RPZ-NVTJ] (providing a list of all federal and state recognized tribes in the United States).

[6] 2015 Conn. Acts 1484 (Spec. Sess.).

[7] Complaint for Declaratory and Injunctive Relief, MGM Resorts Int'l Glob. Gaming Dev., LLC v. Malloy, No. 3:15-cv-1182-AWT (D. Conn. Aug. 4, 2015).

[8] 417 U.S. 535 (1974); *see also* Carole Goldberg, *American Indians and "Preferential Treatment"*, 49 UCLA L. REV. 943, 951 (2002) (discussing the recent litigation, scholarly work, and legislation vying to overturn the Supreme Court's decision regarding legislation that grants preferential treatment for Indians); *infra* Part IV.B (discussing further the mounting attack on the *Mancari* doctrine).

[9] U.S. CONST. amend. XIV, § 1.

legitimate interest in a manner that is rationally related to that interest.[10] This less scrutinizing standard of judicial review, known as rational-basis review, requires a court to uphold any law that meets a legitimate governmental purpose.[11] As rational-basis review is a less exacting standard, it is rare for a court to overturn a law under its application.

Supreme Court jurisprudence also requires courts to look closely at legislation that singles out groups of individuals because of race or national origin. Under the Equal Protection Clause of the Fourteenth Amendment, legislation that is facially discriminatory or discriminatory in its effect, is prohibited unless it serves a compelling state interest.[12] The standard applied to race-based or national-origin-based legislation, known as strict scrutiny review, is applied as a more rigorous standard of review by a court.[13] Ultimately, because of the difference in intensity of the two standards, the level of judicial scrutiny applied in a challenge to the constitutionality of the Act will be dispositive in any equal protection claims brought against it.[14]

In its lawsuit, MGM claims the Act violates the Equal Protection Clause because it is facially preferential to Indian tribes, a group that can be considered a "race" under the constitutional analytic framework. MGM further argues that Connecticut is unable to advance a compelling state interest to justify its preferential treatment towards the Tribes, and therefore the Act should be struck down.[15]

However, it is not seriously disputed whether Connecticut, or any state, has a legitimate interest in developing and maintaining casinos within their

---

[10] Romer v. Evans, 517 U.S. 620, 631 (1996) ("We have attempted to reconcile the principle with reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." (citations omitted)).

[11] U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973).

[12] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("Accordingly, we hold today that all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.").

[13] *Id.* State classifications based on race or national origin must advance a compelling government interest and must be narrowly tailored to achieve that compelling interest. *Id.*

[14] The level of scrutiny applied is important to the success of the litigation:

> If a rational basis test is applied, federal legislation helping federal tribes is usually found to complement governmental objectives, and easily found constitutional; conversely, if strict scrutiny is applied, such legislation is usually found unconstitutional. Thus, parties involved in applicable cases tend to battle over whether application of strict scrutiny or a rational basis test is most appropriate.

Alexa Koenig & Jonathan Stein, *Lost in the Shuffle: State-Recognized Tribes and the Tribal Gaming Industry*, 40 U.S.F. L. REV. 327, 364–65 (2006).

[15] *See* Complaint for Declaratory and Injunctive Relief at 13–14, *supra* note 7. For a more detailed discussion of MGM's complaint, see *infra* Part II.A.

borders.[16] For example, pursuant to existing agreements with the Tribes, Connecticut shares in the gaming revenues from the Foxwoods and Mohegan Sun casinos.[17] Not only does Connecticut receive twenty-five percent of the profits of the slot machines from its two casinos, but the casinos provide jobs for approximately 14,763 people in the state.[18] A third casino with additional slot machines will only increase the revenue the state receives from the Tribes.[19] Moreover, as the two casinos have already created thousands of jobs for the citizens of the state, a third would likely accomplish the same.[20] It is therefore in Connecticut's interest to develop casinos in order to continue to receive revenues from slot machines and to provide more jobs for its residents.[21] Congress itself has acknowledged the governmental interests of involvement in tribal gaming. A court noted that:

> In the [Senate] Committee's view, both State and tribal

---

[16] Presently, the sixty-four casinos in New England represent a $17 billion industry. PYRAMID, *supra* note 2, at vi.

[17] *See generally* Mohegan Tribe-State of Connecticut Gaming Compact, 59 Fed. Reg. 241 (Dec. 16, 1994); Tribal-State Compact Between the Mashantucket Pequot Tribe and the State of Connecticut, 56 Fed. Reg. 105 (May 31, 1991) (detailing the revenue-sharing agreements between Connecticut and the Tribes, among other specifications); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 12.05[2], at 891 (Nell Jessup Newton ed., 2012) [hereinafter, COHEN'S HANDBOOK] ("[S]tates have been able to share in tribal gaming revenues in exchange for exclusive rights to game within a state—at least as against non-Indian gaming."); PYRAMID, *supra* note 2, at 23 ("In Calendar Year 2014, Foxwoods paid $120,899,855 to the State of Connecticut. Mohegan Sun paid $145,978,050 to the State of Connecticut in CY 2014.").

[18] *See Frequently Asked Questions*, CONN. DEP'T. OF CONSUMER PROTECTION: GAMING DIV. (Sept. 4, 2012), http://ct.gov/dcp/cwp/view.asp?a=4107&q=483116 [https://perma.cc/5W2T-79WK] (explaining that Connecticut receives 25% of each casino's slot "win"); PYRAMID, *supra* note 2, at 4 (providing 2014 employment statistics for Connecticut's two casinos).

[19] The Tribes anticipate opening a third casino with at least 2,000 slot machines and 100 to 150 playing tables. Kenneth R. Gosselin, *Tribes Say They Don't Have Location Selected Yet*, HARTFORD COURANT (Feb. 9, 2016), http://www.courant.com/real-estate/property-line/hc-connecticut-third-casino-20160208-story.html [https://perma.cc/F8NB-3644].

Assuming the ultimate constitutionality and success of implementing the new Act, the question will likely become one of market oversaturation: will Connecticut be able to generate new demand, recapture revenue, and regenerate job positions lost to other states in order to successfully sustain a third casino? *See generally* PYRAMID, *supra* note 2, at viii (explaining that Connecticut will need to accept a new casino with lower operating and profit margins due to the increased number of casinos now located throughout New England).

[20] *See* Ken Dixon, *Pequots, Mohegans, Sign Deal to Create a Cooperative Casino*, CONN. POST (Sept. 10, 2015), http://www.ctpost.com/news/article/Pequots-Mohegans-will-sign-deal-to-create-a-6495639.php [https://perma.cc/RE2E-HM6S] ("A study commissioned by the tribes projected a new casino could create about 6,000 jobs and generate $78 million in new taxes.").

[21] In the wake of the 2008 recession, however, it is important to note the diminishing return stemming from gaming not just in Connecticut but across the nation. Gambling is a form of discretionary spending—that is, the type of spending that is the first to be abandoned in strained financial times, and the last to come back when the economy returns to normal. Revenue from casinos has been steadily falling due to the lingering effects of the recession. *See* PYRAMID, *supra* note 2, at iv, ix, xvi, 7 (providing a more in-depth discussion of the effects of consumer spending on revenue profits at casinos nationwide, including those in Connecticut).

> governments have significant governmental interests in the conduct of class III gaming. . . . A State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, *including its economic interests in raising revenue for its citizens*.[22]

Connecticut has a valid economic interest in establishing casinos in its borders. MGM, however, believes that Connecticut has gone too far in attempting to protect this economic interest.

In addition to raising constitutional questions of equal protection violations, the advent of Connecticut's innovative legislation paints a broader picture of the future relationship between states and tribes in the realm of tribal gaming. More specifically, Connecticut's legislation may serve as the type of legislation that finally results in a revision of Supreme Court Indian law jurisprudence. This Note proposes that, at this precarious time where the Supreme Court's stance on laws favorable toward Indians is under attack,[23] legislation such as this demands a more scrutinizing judicial review in order to sufficiently rein in states that are seeking to exploit tribal gaming within their borders.

The following section will introduce Connecticut's legislation and provide an overview of the pending MGM litigation. Part III will discuss relevant Supreme Court precedent in the tribal gaming field and its subsequent application throughout the circuit courts. Part IV will conclude with an analysis of the Act's role in the current framework of Supreme Court jurisprudence and a prediction of its effect on future constitutional challenges to state gaming laws granting preferential treatment to Indians.

II. CONNECTICUT SPECIAL ACT 15-7

The Act provides for the development of a casino gaming facility in any of Connecticut's towns or cities. Notably under the Act, a proposed casino can be developed on a site that is not specifically located on the Tribes' reservation land that has already been established in Connecticut.[24] The Act contains no express provision that the towns' proposals or the development agreement be limited to a site on Indian land. Rather, it provides that "[t]he tribal business entity may enter into a development

---

[22] Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 726 (9th Cir. 2003) (internal citations omitted) (emphasis added). For a description of Class III gaming, see *infra* Part III.A.

[23] Gregory Smith & Caroline Mayhew, *Apocalypse Now: The Unrelenting Assault on* Morton v. Mancari, 60 FED. L. 47, 51 (2013).

[24] *See* 2015 Conn. Acts 1485 (Spec. Sess.). The Foxwoods Casino and the Mohegan Sun Resort and Casino are located on the Tribes' reservation land in Connecticut. PYRAMID, *supra* note 2, at 4, 7.

agreement with a municipality regarding the establishment of a possible casino gaming facility *in such municipality*."[25] The Act details steps that the Tribes must take to develop a third casino.[26] First, the Tribes are required to create a "tribal business entity" that is owned exclusively by their members.[27] Leaders for the Tribes took such a step, and on August 24, 2015, registered "MMCT Venture, LLC" with Connecticut's Secretary of State.[28] In compliance with the Act, MMCT Venture next submitted a copy of their request for proposals for a development site with Connecticut's Department of Consumer Protection, which listed the request on its website.[29] Per the Act, any proposal and agreement is subject to approval by the Connecticut legislature, which must first amend state law to provide for the operation of a third casino gaming facility.[30] A proposed casino may not open until this law has been ratified, which is presumably an arduous process replete with debates and hearings at

---

[25] 2015 Conn. Acts 1484 (Spec. Sess.) (emphasis added).

[26] *See* Kat Greene, *MGM Isn't Harmed by Tribal Casino Law, Conn. Gov. Says*, LAW360 (Sept. 23, 2015), http://www.law360.com/articles/706607/mgm-isn-t-harmed-by-tribal-casino-law-conn-gov-says [https://perma.cc/6QM5-HPD4] ("The law creates a series of hurdles that the Mashantucket Pequot and Mohegan tribes—direct competitors in the casino business—must jump through to build a third casino in the state.").

[27] 2015 Conn. Acts 1484 (Spec. Sess.). The requirement that the tribal business entity be owned exclusively by the Tribes comports with the federal legislation regarding tribal gaming. Under the federal statute, an Indian tribe must maintain the sole proprietary interest in any gaming operation. Indian Gaming Regulatory Act, 25 U.S.C. §§ 2710(b)(2)(a), (d)(1)(ii) (2012) [hereinafter IGRA]; *see also* COHEN'S HANDBOOK, *supra* note 17, § 12.09, at 912 ("IGRA requires the Indian tribe to own any Indian gaming operation and retain the 'sole proprietary interest' in the enterprise . . . . In other words, a tribe is prohibited from alienating this valuable asset."). See *infra* Part III.B for a further discussion of the requirements of the federal statute.

[28] CONN. SEC'Y OF STATE, BUSINESS INQUIRY: MMCT VENTURE, LLC (Aug. 24, 2015), http://www.concord-sots.ct.gov/CONCORD/online?sn=PublicInquiry&eid=9740 [https://perma.cc/L3BT-E8QH]. MMCT Venture's registered principal officer, Kevin Brown, also serves as the chairman of the Mohegan Tribal Council. *See id.* (listing Kevin Brown as manager of MMCT Venture, LLC); *Government: The Mohegan Tribal Council*, MOHEGAN TRIBE (2015), http://www.mohegan.nsn.us/government/government-structure/tribal-council [https://perma.cc/JP8D-Q57V]; *see also Tribes Sign Agreement on Third Connecticut Casino Location*, WFSB-3 CONN. (Sept. 10, 2015), http://www.wfsb.com/story/29998185/tribes-to-sign-agreement-on-third-connecticut-casino-location [https://perma.cc/N3QL-JA2J] (detailing the signing of the partnership agreement between the two tribes at the capitol building in Hartford, Connecticut on September 10, 2015).

[29] The Connecticut Department of Consumer Protection listed the request on its website on October 1, 2015. 2015 Conn. Acts 1484 (Spec. Sess.) ("The department [of Consumer protection] shall post such requests for proposals on its Internet web site."); MMCT Venture, LLC, *Request for Proposals*, CONN. DEP'T OF CONSUMER PROTECTION (Oct. 1, 2015), http://www.ct.gov/dcp/lib/dcp/MMCT_Request_for_Proposal.pdf [https://perma.cc/3SC6-22D6] (detailing MMCT's request to Connecticut towns for proposals to build the state's third casino).

[30] 2015 Conn. Acts 1485 (Spec. Sess.) ("Any such development agreement shall be contingent upon amendment to state law enacted by the General Assembly that provides for the operation of and participation in a casino gaming facility by such tribal business entity."). Under IGRA, existing state law must already legalize gaming in order for any tribe to operate casinos on reservation land. 25 U.S.C. § 2701(5) (2012).

Connecticut General Assembly sessions.[31]

The current structure of Connecticut's law raises serious implications for its ability to comport with federal gaming requirements. First, the Act states that its provisions "shall not be construed to authorize the formation of more than one tribal business entity,"[32] meaning only the Mashantucket and Pequot tribes can open Connecticut's third casino. Second, Connecticut's new law does not require the tribal business entity and the state to enter into a tribal-state gaming compact, a provision required under federal law for gaming on Indian lands.[33] Lastly, as mentioned earlier, the Act does not require that the proposed casino be located on tribal land of either of the Tribes, another requirement listed under the federal statute.[34]

On July 22, 2015, MGM[35] attempted to register a tribal business entity with Connecticut's Secretary of State, pursuant to the Act. MGM received a prompt rejection on July 23, 2015, stating that its proposal did not comply with the Act because MGM had no affiliation with either of Connecticut's tribes.[36] MGM subsequently filed a lawsuit against Connecticut's Governor, Secretary of State, and the Commissioner of its Department of Consumer Protection on August 4, 2015.

---

[31] 2015 Conn. Acts 1485 (Spec. Sess.).

[32] *Id.*

[33] In fact, in lieu of a "tribal-gaming compact", the Act requires only that the Connecticut legislature amend state law "to provide for the operation of and participation in" a third casino run by the tribal business entity. 2015 Conn. Acts 1485 (Spec. Sess.). See *infra* Part II.A.1 for an explanation of the compacts required between a tribe and a state under IGRA.

[34] As noted above, the Act specifically states that the tribal business entity may review proposals "regarding the establishment of a possible casino gaming facility in a municipality." 2015 Conn. Acts 1484 (Spec. Sess.); *see also* Letter from George C. Jepsen, Attorney Gen., Office of the Attorney Gen., State of Conn., to Legislator Leadership, Conn. Gen. Assembly 2 (Apr. 15, 2015), http://www.ctnewsjunkie.com/upload/2015/04/20150415_Legislator_Leadership_Letter.pdf [https://perma.cc/W8R4-SXA6] ("As we understand it, the proposed legislation would include the following principal elements: The law would authorize the licensing of one or more casino gaming facilities to be operated by some form of joint venture by the Tribes. The facilities would not be located on reservation lands and would not involve the federal government taking any lands into trust for the Tribes.").

[35] MGM is registered with the Securities and Exchange Commission as a miscellaneous amusement and recreation business. *See MGM Resorts International Global Gaming Development, LLC*, WHALE WISDOM (2016), http://whalewisdom.com/filer/mgm-resorts-international-global-gaming-development-llc#tabsummary_tab_link [https://perma.cc/2YF3-73P9] (providing MGM's Securities and Exchange Commission listing code). Per its website, MGM "develops, builds and operates unique destination resorts designed to provide a total resort experience, including first-class accommodations and dining, world-class entertainment, state-of-the-art meeting and convention facilities, and high-quality retail and gaming experiences." *Company Overview*, MGM RESORTS INT'L (2016), http://www.mgmresorts.com/company/company-overview.aspx [https://perma.cc/7ASX-9F89]. Moreover, MGM describes itself as "one of the world's leading global hospitality companies, operating a world-renowned portfolio of destination resort brands." *MGM Resorts International Global Gaming Development, LLC*, EDGAR ONLINE (Mar. 2, 2015), http://yahoo.brand.edgar-online.com/displayfilinginfo.aspx?FilingID=10530371-9693499819&type=sect&TabIndex=2&companyid=877290&ppu=%252fdefault.aspx%253fcompanyid%253d877290 [https://perma.cc/ESS9-P7FV] (providing MGM's prospectus).

[36] Complaint for Declaratory and Injunctive Relief at 11–12, *supra* note 7.

At its core, MGM's lawsuit alleges that the Act defies the United States Constitution by violating the Equal Protection Clause of the Fourteenth Amendment and the dormant commerce clause.[37] MGM argues that the Act has created a "race-based set-aside in favor of the two Preferred Tribes at the expense of all other tribes, races, and entities[,]"[38] and that the Connecticut legislature violated the Equal Protection Clause by granting such preferential treatment to a racial group without simultaneously advancing a compelling government interest to justify the discriminatory treatment.[39] MGM further alleges that the Connecticut legislature has, in effect, created "an exclusive, no-bid process for the Preferred Tribes" to present a proposal for an otherwise off-reservation, commercial casino in the state.[40] This exclusive, no-bid process has a detrimental impact on non-tribal competitors, such as MGM, because it denies them a fair opportunity to compete for the construction of Connecticut's third casino.[41] MGM stated the "plain intent of the Act is that an agreement be reached between the Preferred Tribes and a municipality . . . with no opportunities for MGM or any other entities to compete" and that it was "unlikely subsequent legislation would allow MGM or other entities to compete for a Connecticut casino."[42] MGM further contended that even if it were allowed to compete for the casino, it would nonetheless be at a competitive disadvantage "given that the Preferred Tribes would have already reached an agreement with a municipality and have made other preparations to gain a preferred market position."[43]

---

[37] *Id.* at 2. This paper will focus exclusively on discussions of equal protection violations. The issues raised regarding dormant commerce clause violations will be discussed only briefly.

[38] *Id.*

[39] *Id.* at 13–14.

[40] *Id.* at 2.

[41] *Id.* at 12.

[42] *Id.*

[43] *Id.* MGM next alleges that the Act violates the dormant commerce clause of the Constitution. Specifically, MGM alleges that Connecticut has unconstitutionally discriminated against interstate commerce because the Act "prohibits all out-of-state entities, including MGM, from competing to develop a Connecticut casino and reserves those development opportunities to the Connecticut-based Preferred Tribes." *Id.* at 15. MGM believes that Connecticut is also unable to "make any showing that the Act is the only means available to advance a legitimate local interest," thereby violating the Constitution's prohibition on states from adopting legislation that improperly burdens interstate commerce. *Id.* On its face, MGM argues, the Act serves only to protect Connecticut's local interest in ensuring additional revenue flow to the Tribes from owning and operating the third casino. *Id.* at 16. MGM notes, however, that presumably any out-of-state casino developer could provide similar tax, employment, and other benefits to the state as what the Tribes could, arguing essentially that the Act's goal of ensuring an additional revenue flow to the Tribes is not a sufficient local interest to justify discrimination against out-of-state competition. *Id.*

This argument is unlikely to prevail in federal court. As explained previously, IGRA contemplates a revenue-sharing agreement between states and tribes, and one that can be designed to enhance the economic benefits to the states. *See* COHEN'S HANDBOOK, *supra* note 17, § 12.05[2], at

In response to the defendants' first motion to dismiss filed on September 23, 2015,[44] MGM filed an amended complaint on October 5, 2015.[45] In its amended complaint, MGM highlighted various developments that had occurred since the date of its original complaint.[46] In particular, MGM noted that since MMCT Venture's request for proposals had been posted on the Connecticut Department of Consumer Protection website, towns in Connecticut "have taken steps to convince the Preferred Tribes to engage in discussions with them about a casino development agreement."[47] Indeed, towns continue to vie for the opportunity to have a casino in their jurisdiction, rather than on the Tribes' reservations. As of September 28, 2015, the town of Enfield was considering a potential site for the casino at the town's aging Enfield Square Mall.[48] As of October 2015, the towns of East Windsor, East Hartford, and Windsor Locks also continued to discuss submitting plans for consideration of the casino site.[49] As MGM correctly noted, the Tribes will clearly be building a casino outside of any federally-recognized Indian land. The failure to locate the third casino on land belonging to either Tribe may be a decisive factor in the district court's

---

891 ("The Secretary of the Interior has approved revenue-sharing agreements on the ground that those [revenue shares going to states] are not taxes, but exchanges of cash for significant economic value conferred by the exclusive or substantially exclusive right to conduct gaming in the state.").

[44] *See* Memorandum of Law in Support of Defendants' Motion to Dismiss at 2, 22–24, MGM Resorts Int'l Glob. Gaming Dev., LLC v. Malloy, No. 3:15-cv-1182-AWT (D. Conn. Sept. 23, 2015) (arguing the court should dismiss plaintiffs' claims because (1) as MGM had not suffered a cognizable and particularized injury, it did not have standing to sue; and (2) even if MGM could claim some injury, its claims were not ripe for judicial review because MGM lacked such cognizable injury and the issue would be better decided later, when any harm was no longer so speculative).

[45] First Amended Complaint for Declaratory and Injunctive Relief, MGM Resorts Int'l Glob. Gaming Dev., LLC v. Malloy, No. 3:15-cv-1182-AWT (D. Conn. Oct. 5, 2015).

[46] *See* Complaint for Declaratory and Injunctive Relief, *supra* note 7.

[47] First Amended Complaint for Declaratory and Injunctive Relief at 18, *supra* note 45 (citations omitted). MGM noted that East Hartford's Planning and Zoning Commission approved a proposed casino site on September 23, 2015. *Id.* (citations omitted).

[48] *See* Mikaela Porter, *Clock Ticking As Enfield Starts Talking Casinos In Earnest*, HARTFORD COURANT (Sept. 28, 2015), http://www.courant.com/news/connecticut/hc-northern-connecticut-casinos-20150928-story.html [https://perma.cc/WX9V-E576] (discussing Enfield's considerations in hosting a casino).

[49] *See* Jordan Otero, *East Hartford Casino Proposal Moves Forward*, HARTFORD COURANT (Sept. 24, 2015), http://www.courant.com/community/east-hartford/hc-east-hartford-showcase-cinema-special-permit-vote-20150924-story.html [https://perma.cc/PAD3-CJAT] (discussing East Hartford's consideration of hosting a casino); Porter, *supra* note 48 (reporting on Enfield); Matthew Sturdevant, *East Windsor Prepares for Possible Casino Proposal*, HARTFORD COURANT (Apr. 25, 2015), http://www.courant.com/business/hc-east-windsor-casino-referendum-20150424-story.html [https://perma.cc/4V63-RB3C] (reporting on East Windsor's consideration of hosting a casino); Jeff Zalesin, *Conn. Town to Weigh Proposal for Tribal Airport Casino*, LAW 360 (Oct. 20, 2015), http://www.law360.com/articles/716490/conn-town-to-weigh-proposal-for-tribal-airport-casino [https://perma.cc/L5X3-NLCX] (discussing Bradley Airport's interest in establishing a casino site in the town of Windsor Locks).

analysis of the constitutionality of the state statute.[50]

III. CONSTITUTIONAL FRAMEWORK

A. *The Indian Gaming Regulatory Act*[51] *and* Mancari*: States' Roles in Federally Authorized Tribal Gaming*

Connecticut is not the first state to pass a law that grants preferential treatment to Indian tribes to conduct gaming operations.[52] Connecticut's law, however, is unique because it circumvents the traditional understanding of Indian-state gaming relations that has developed since the passage of the Indian Regulatory Gaming Act ("IGRA") in 1988.[53] Connecticut's law represents a new breed of a state tribal-gaming regimes—a breed that may finally tilt the balance in favor of a higher level of judicial scrutiny when courts assess constitutional implications of equal protection within the Indian-relations sphere.

B. *The Federal Tribal Gaming Scheme*

Congress passed IGRA to provide a statutory construction for the operation and regulation of gaming by Indian tribes.[54] Specifically, Congress passed the law in an effort to promote cooperation between the states and tribes in the wake of the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*.[55] In *Cabazon*, the Court was asked to determine the reach of a California law regulating vice activity and prohibiting gaming with regard to ongoing bingo operations conducted by federally-recognized tribes on reservation land.[56] The Court found that there was no express federal grant of power to the states to regulate gaming

---

[50] As of February 9, 2016, MMCT Venture had not selected an off-reservation site for the location of the third casino. Gosselin, *supra* note 19.

[51] For purposes of this paper, IGRA will be discussed only in relation to its creation and regulation of "Class III gaming": gaming that is not regulated under Class I ("social games solely for prizes of minimal value or traditional forms of Indian gaming . . . in connection with tribal ceremonies, or celebrations") or Class II gaming (bingo) but rather, those games traditionally seen at casinos such as baccarat, black jack, slot machines, and electronic or electromechanical facsimiles of any game of chance. 25 U.S.C. § 2703(6)–(8) (2012).

[52] For example, state laws and constitutional amendments in California and Massachusetts have reflected a preference for Indian gaming at the expense of non-Indian interests. *See, e.g.*, CAL. CONST. art. IV, § 19 (reflecting the Proposition 1A amendment); MASS. GEN. LAWS ch. 23k (2011) (referencing the Massachusetts Gaming Act, although § 91 has not been codified).

[53] *See generally* 25 U.S.C. §§ 2701–21 (2012).

[54] 25 U.S.C. § 2702(1) (2012) ("The purpose of this chapter is-(1) 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."); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 48 (1996) (noting the same).

[55] 480 U.S. 202 (1987).

[56] *Id.* at 204–06; *see also* Koenig & Stein, *supra* note 14, at 348.

and held that the federal policy promoting tribal economic development trumped California's interest in controlling crime at the gaming sites.[57] After this decision, states expressed a desire for greater involvement in tribal gaming and, accordingly, IGRA now embodies the idea of cooperative federalism as it balances the interests of both the federal and state governments with Indian tribes.[58]

IGRA's principal goal is to further establish federal policy of "promot[ing] tribal economic development, tribal self-sufficiency, and strong tribal government."[59] IGRA was designed to both preserve and balance the tribal business that had developed through the casino gaming industry on Indian lands, while still allowing states to retain some control over the federal reservations within their borders. IGRA streamlines the process for Indian tribes to become licensed to game within any state that does not already prohibit such gaming activity and defines the parameters of the competing sovereign interests involved in tribal gaming.

Additionally, IGRA also provides for and defines the federal government's regulatory role in tribal gaming. The law created the National Indian Gaming Commission ("NIGC"), which is vested with general oversight authority through the Secretary of the Interior.[60] Among the Secretary of the Interior's key functions under IGRA is the duty to approve or deny a "tribal-state compact."[61] A tribal-state compact is "a specific agreement between the particular state and the tribe that describes not only the type of games that the state will permit, but also the condition under which the casinos may operate the games."[62] A tribal-state compact is necessary in order for a state to permit a tribe to conduct Class III

---

[57] *Cabazon*, 480 U.S. at 207–08, 216–22.

[58] *See, e.g.*, Artichoke Joe's Cal. Grand Casino v. Norton, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002) ("IGRA is an example of 'cooperative federalism' in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme.").

[59] 25 U.S.C. § 2701(4) (2012); William Bennett Cooper III, *What's in the Cards for the Future of Indian Gaming Law?*, 5 VILL. SPORTS & ENT. L.J. 129, 131 (1998) ("As stated in the first section of IGRA, the purpose of the statute is to promote tribal economic development and simultaneous self-sufficiency."); Caitlin E. Flanagan, *The Need for Compromise: Introducing Indian Gaming and Commercial Casinos to Massachusetts*, 42 SUFFOLK U.L. REV. 179, 188 (2008) ("Congress and tribes believe that Indian gaming will promote self-determination by making tribes economically independent and providing the means to address chronic issues affecting many tribes such as poverty, poor health, and substance abuse.").

[60] 25 U.S.C. § 2704 (2012); *see also Mission, Principles and Priorities*, NAT'L INDIAN GAMING COMM'N, http://www.nigc.gov/commission/mission-and-responsibilities [https://perma.cc/5R99-6HMZ] (last visited Apr. 23, 2016) (stating that the mission of the NIGC is "[r]egulating Indian gaming to promote tribal economic development, self-sufficiency and strong tribal governments . . . and to ensure that tribes are the primary beneficiaries of their gaming activities.").

[61] 25 U.S.C. § 2705(a)(3) (2012).

[62] Cooper, *supra* note 59, at 135.

gaming within its jurisdiction.[63] The statute, therefore, facilitates state and tribal control over gaming falling exclusively on tribal land through the compacting process while retaining power in the federal government to ensure the law itself is not violated.[64]

In addition to the tribal-state compact requirement, IGRA contemplates other specifications for tribal gaming. First, IGRA requires that Indian gaming be conducted on Indian lands.[65] The term "Indian lands" as defined in the statute means:

> (A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.[66]

IGRA's terms, therefore, have limited the establishment of Class III gaming to land that is either held in trust or subject to a restriction by the federal government, or on federally-supervised Indian reservation land.[67] Second, the statute permits the state and tribe to enter into revenue-sharing agreements, which most often grant the tribe the exclusive right to game in a state in exchange for cash.[68] The Secretary of the Interior has mandated that revenues from gaming may be used by a state "so long as the

---

[63] 25 U.S.C. § 2710(d)(1)(A) (2012); *see also* COHEN'S HANDBOOK, *supra* note 17, § 12.02[1], at 876 (noting that Class III games "can only be conducted pursuant to tribal-state compacts approved by the Secretary of the Interior").

[64] Cooper, *supra* note 59, at 135–36. IGRA also provides for three requirements that must be met to allow Class III gaming: Class III gaming shall be lawful only on Indian lands only if such activities are authorized by a tribal-state compact, are located in a state that permits such gaming for any purpose by any person or organization, and are conducted in conformance with the tribal-state compact entered into by the Indian tribe and the state. 25 U.S.C. § 2710(d)(1).

[65] 25 U.S.C. § 2703(4)(A)–(B) (2012); COHEN'S HANDBOOK, *supra* note 17, § 12.02[1], at 876–77 (explaining that tribal gaming is permitted only on Indian lands); *see also The Commission: FAQs*, NAT'L INDIAN GAMING COMM'N, http://www.nigc.gov/commission/faqs [https://perma.cc/49GH-MQFK] (last visited April 23, 2016) ("IGRA requires that Indian gaming occur on Indian lands. Indian lands include land within the boundaries of a reservation as well as land held in trust or restricted status by the United States on behalf of a tribe . . . over which a tribe has jurisdiction and exercises governmental power."). *Cohen's Handbook* explains that when "[o]ff-reservation, however, whether on traditional trust land or on land not held in trust but subject to a restriction against alienation, a tribe may engage in gaming only if it exercises governmental authority over the off-reservation land." COHEN'S HANDBOOK, *supra* note 17, § 12.04[1], at 885 (citations omitted). *See generally id.* § 12.04[1]–[2], at 885-87 (discussing off-reservation land).

[66] 25 U.S.C. § 2703(4)(A)–(B) (2012).

[67] *See* Koenig & Stein, *supra* note 14, at 352–53 (explaining the definitions of "Indian land" and "Indian reservation" as understood under IGRA).

[68] *See supra* Part I (discussing revenue-sharing agreements further); COHEN'S HANDBOOK, *supra* note 17, §12.05[2], at 891 ("These arrangements are known as 'exclusivity provisions' and have become increasingly prevalent." (citations omitted)).

exclusivity provides 'substantial economic benefit' to the tribe."[69] Lastly, the tribes must use gaming-generated funds for "specific purposes."[70] A state can show it has complied with IGRA when it negotiates with a tribe to meet each of these requirements.

C. *Supreme Court Precedent:* Morton v. Mancari

Connecticut's recently enacted law and the potential outcome of the MGM litigation can be analyzed by comparison to the results of constitutional challenges to similar statutes and initiatives adopted in California and Massachusetts. Under the guidance of Supreme Court precedent regarding federal legislation with Indian tribes, circuit courts have so far upheld the constitutionality of state laws favoring Indian gaming.

The Supreme Court first heard constitutional due process and equal protection challenges to a federal law that allegedly discriminated on the basis of race in favor of Indians in 1974.[71] In *Morton v. Mancari*, the Court found that an employment policy of preferring qualified Indians at the Bureau of Indian Affairs was consistent with federal Indian policy and Congress' obligation to give Indians "greater participation in their own self-government" and in furthering the "[g]overnment's trust obligation toward the Indian tribes."[72] The Court expounded on the special relationship between the federal government and the Indian tribes, highlighting the fact that "[l]iterally every piece of legislation dealing with the Indian tribes and reservations . . . single out for special treatment a constituency of tribal Indians living on or near reservations."[73] The Court determined that in light of this "historical and legal context,"[74] the preferential treatment of Indians was "not directed towards a 'racial' group consisting of 'Indians'; instead, it applie[d] only to members of 'federally recognized' tribes . . . exclud[ing] many individuals who are racially to be classified as 'Indians.'"[75] Essentially, the Court held that, in the context of due process concerns, the Indian preference was "political rather than

---

[69] COHEN'S HANDBOOK, *supra* note 17, § 12.05[3], at 893 (citations omitted).

[70] Moreover, revenue produced by Class III gaming and retained solely by tribes must be used for a specific purpose. 25 U.S.C. §§ 2710(b)(2), (d)(1)(a)(ii) (2012) (mandating that net revenues from tribal gaming shall not be used for purposes other than funding tribal government operations and programs, providing for the general welfare of tribes, promoting tribal economic development, charitable donations, and funding local government operations).

[71] Morton v. Mancari, 417 U.S. 535 (1974).

[72] *Id.* at 541–42 (citations omitted). The Court went on to say that "[t]he overriding purpose of [the Indian Reorganization Act of 1934] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Id.* at 542.

[73] *Id.* at 552.

[74] *Id.* at 553.

[75] *Id.* at 553 n.24.

racial in nature."[76] In an oft-cited passage from the case, the Court articulated its test as to whether a preferential Indian law could survive a due process challenge:

> As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process.[77]

The employment preference at the BIA was found to benefit Indian tribes because it gave greater control to Indians over their "destinies"[78] and fulfilled the institutional change needed in Indian affairs to "further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups."[79] Thus, because the employment preference was reasonable and rationally designed to further Indian self-government—and therefore Congress' unique obligation to Indians—it did not violate the guarantee of equal protection of the laws.[80] Furthermore, because the preference was granted to a tribe as a whole, preferential treatment was not directed at a race or a national origin.[81] Therefore, under *Mancari*, federal laws identifying Indians along tribal lines need only survive a rational-basis review—again, the less exacting standard of judicial scrutiny.

Five years later, the Court addressed the issue of whether a preferential Indian *state* law could survive due process challenges. In *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, the Court described the circumstance in which the rational-basis review test established in *Mancari* applied to state laws that were preferential to Indians.[82] The state of Washington had enacted a law asserting partial civil and criminal jurisdiction over Indian lands pursuant to a grant of authority from Congress.[83] The Yakima Indian Nation contended that the state law,

---

[76] *Id.*

[77] *Id.* at 555. Since *Mancari*, the scope of the Court's preferential treatment rationale has extended outside the context of Indian self-government and employment preferences. For example, in *United States v. Antelope*, the Court applied its preferential-treatment test to a criminal law and reaffirmed the idea that tribal members are treated not as a discrete racial group but as members of quasi-sovereign tribal entities. 430 U.S. 641, 645 (1977). *See generally* Smith & Mayhew, *supra* note 23, at 49–50 (discussing the implications of the *Antelope* decision and other decisions extending the *Mancari* rationale beyond Indian self-government).

[78] *Mancari*, 417 U.S. at 553.

[79] *Id.* at 554.

[80] *Id.* at 555.

[81] *Id.* at 554.

[82] 439 U.S. 463, 481–483 (1979).

[83] *Id.* at 481.

even if authorized by Congress, nonetheless violated the equal protection and due process guarantees of the Fourteenth Amendment.[84] Emphasizing its holding in *Mancari*, the Court noted that while "[i]t is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians," states did not enjoy the "same unique relationship" with Indian tribes.[85] Despite this apparent deficiency, however, the Court went on to explain that Washington's law was "not simply another state law."[86] Rather, the law was "enacted in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over Indians," and that jurisdiction under the state law stemmed directly from the federal law.[87] In light of this presumed correlation between the federal and state laws, the Court applied rational-basis review to Washington's law as if it were federal and sustained the preferential treatment.[88] The key provision—that the state law was enacted *in response* to a federal goal—has since been employed to validate state laws granting explicit preference to Indians or distinguishing Indian tribes in constitutional equal protection challenges.[89]

The Court has repeatedly affirmed that *Mancari* is the proper test to use when scrutinizing federal Indian legislation in the equal protection context.[90] The Court, however, has not heard a case regarding the Equal Protection Clause in the context of tribal gaming and IGRA. Absent Supreme Court authority, circuit and state courts have grappled with funneling *Mancari* through *Yakima* when presented with preferential state tribal gaming laws. Questions have arisen regarding the scope of "Congress' unique obligations" towards Indian tribes and the corresponding reach of *Mancari*—particularly whether grants of exclusive, monopolistic gaming rights to Indians actually fulfill those "obligations."[91] Two recent circuit court decisions in the wake of *Mancari* and *Yakima* have reluctantly applied the tests articulated by the Court to decide constitutional challenges to states' preferential treatment of Indian tribes in the gaming context.

---

[84] *Id.* at 500.

[85] *Id.* at 500–01.

[86] *Id.* at 501.

[87] *Id.* ("In enacting [state law] Chapter 36, Washington was legislating under *explicit authority* granted by Congress in exercise of that federal power." (emphasis added)).

[88] *Id.* at 500–01.

[89] The Court explained how the state law furthered both Washington's and the federal government's interests as follows: "Chapter 36 is fairly calculated to further the State's interest in providing protection to non-Indian citizens living within the boundaries of a reservation while at the same time allowing scope for tribal self-government on trust or restricted lands." *Id.* at 502.

[90] *See* Smith & Mayhew, *supra* note 23, at 49–50.

[91] Morton v. Mancari, 417 U.S. 535, 555 (1974).

D. *Circuit Court Application of and Skepticism Toward* Mancari

1. Ninth Circuit: Artichoke Joe's California Grand Casino v. Norton

Various California card clubs and charities that were prohibited under California state law from offering Class III gaming brought an action challenging the validity of California's tribal-state compacts allowing only in-state tribes to engage in Class III gaming.[92] After voter ratification of Proposition 1A in March 2000, the California Constitution was amended to allow the governor to negotiate compacts with tribes, subject to state legislative approval, for the operation of slot machines and lottery games on Indian land.[93] However, "[b]ecause the California Constitution otherwise banned the same casino-style games that the amendment allowed for Indian tribes, the result was a tribal monopoly on class III gaming in California."[94] The plaintiffs, non-Indians who were then conducting gaming operations within the regulations of the state constitution, sought declaratory and injunctive relief claiming that the monopoly violated IGRA and equal protection guarantees.[95] After first finding that Proposition 1A permitted Class III gaming in the state[96] and that IGRA allowed California to grant a monopoly to their Indian tribes over Class III gaming,[97] the Ninth Circuit held Proposition 1A and the tribal-state compacts did not violate the plaintiffs' rights to equal protection of the laws.[98]

Pursuant to *Mancari*, the Ninth Circuit first reasoned that the distinction between Indian and non-Indian gaming interests was a political distinction rather than a racial one.[99] The court found that the express terms of IGRA (the exclusive right for an Indian tribe, not individual, to enter into gaming compacts) and the inherent nature of the tribal-state compact resembled an agreement between two sovereign nations, thereby solidifying the classification as political.[100] The court then found IGRA

---

[92] Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 714 (9th Cir. 2003).

[93] *Id.* at 717–18.

[94] Smith & Mayhew, *supra* note 23, at 51.

[95] *Artichoke Joe's*, 353 F.3d at 718.

[96] *Id.* at 721 ("Proposition 1A does more than authorize the Governor to enter into Tribal-State compacts. It explicitly states that 'slot machines, lottery games, and banking and percentage card games *are hereby permitted* to be conducted and operated on tribal lands' subject to the regulations embodied in the Tribal-State compact. Thus, there is law—separate from the compact itself—that 'permits such gaming' in certain circumstances." (emphasis in original) (citations omitted)).

[97] *Id.* at 731.

[98] *Id.* at 742.

[99] *Id.* at 734 (citing Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974)).

[100] *Id.* The court went on to state that:

> Further, through IGRA's compacting process, and through its reliance on tribal governments and tribal ordinances to regulate class III gaming, the statute relates to tribal status and tribal self-government. The very nature of a Tribal-State compact is

authorized gaming only on Indian lands and noted that this was a critical limitation in the federal statute "given the well-established connection between tribal lands and tribal sovereignty."[101] The court emphasized that IGRA centered on the importance of permitting special activities on Indian land as a means of furthering tribal sovereignty.[102] As promoting self-sufficiency and self-government was part of Congress' unique obligation towards Indians, the preferential state constitutional amendment was validated.[103]

Having concluded that IGRA satisfied *Mancari*, the court next applied *Yakima* to Proposition 1A and found that the state amendment was enacted in response to IGRA because "the people of California were legislating with reference to the authority that Congress had granted to the State of California in IGRA."[104] Specifically, because Proposition 1A was designed to readjust state and Indian regulatory authority over Class III gaming on Indian land, it "echo[ed]" the requirements of IGRA.[105] Since Proposition 1A furthered Congress' obligation to tribes and satisfied *Yakima*, the Ninth Circuit applied rational-basis review and found that (1) IGRA and the California tribal-state compacts were rationally related to the federal government's interest in furthering tribal self-government;[106] and (2) that Proposition 1A, despite granting a monopoly to the state's tribes, served a legitimate state interest in regulating a vice activity and promoting cooperation between the tribes and the state."[107] Thus, in an early application of *Mancari* to the tribal gaming context, the Ninth Circuit found that a state provision granting exclusive gaming rights to Indians did not violate equal protection.

2. *First Circuit:* KG Urban Enterprises, LLC v. Patrick

Nine years later, the First Circuit heard a similar equal protection challenge to a then-recently enacted Massachusetts law in *KG Urban Enterprises, LLC v. Patrick*.[108] Under Section 91 of the Massachusetts Gaming Act, Massachusetts's governor could enter into a compact with a federally-recognized tribe in the commonwealth that "has purchased, or

---

> political; it is an agreement between an Indian tribe, as one sovereign, and a state, as another.

Id.

[101] *Id.* at 735. ("Under IGRA, for example, individual Indians (or even Indian tribes) could not establish a class III gaming establishment on non-Indian lands.").

[102] *Id.*

[103] *Id.*

[104] *Id.* at 736.

[105] *Id.* See also *supra* Part III.B for a discussion of the requirements of IGRA.

[106] *Artichoke Joe's*, 353 F.3d at 736.

[107] *Id.* at 737.

[108] KG Urban Enterprises, LLC v. Patrick (*KG Urban II*), 693 F.3d 1 (1st Cir. 2012).

entered into an agreement to purchase, a parcel of land for the proposed tribal gaming development."[109] Section 91 further provided that the commonwealth's gaming commission would entertain non-tribal proposals only after it was clear that a compact could not first be reached between the governor and the commonwealth's tribes, or if it was clear the tribes would not have land on which to operate casinos.[110] Although Section 91 did not by its literal terms preclude non-tribal gaming, it nonetheless did so if a tribal-state compact was approved, regardless of whether any of Massachusetts's tribes had federal Indian land.[111] The plaintiff, KG Urban Enterprises, LLC ("KG"), an equity development company, had invested over $4.6 million in preparing to convert a brownfield site into a multi-use property including a gaming facility.[112] KG argued that because neither of Massachusetts' federally-recognized tribes possessed any land, tribal gaming could not be authorized under IGRA,[113] and therefore the tribal-state compact unreasonably harmed KG's ability to obtain a gaming license.[114]

An examination of the first decision in this litigation by a district court in Massachusetts, although overturned by the First Circuit on appeal, provides insight into judicial frustration with the application of the *Mancari* doctrine in the tribal-gaming context.[115] Although the district judge dismissed KG's complaint—finding Massachusetts's gaming scheme was authorized by IGRA[116] and that, pursuant to *Yakima*, a state law consistent with federal legislation is reviewed under the rational-basis standard[117]—the court nonetheless opined that *Mancari* "makes an artificial distinction which undermines the constitutional requirement of race neutrality."[118] Essentially, the court took issue with what could truly be considered as a "unique obligation" owed to Indians in order to trigger

---

[109] MASS. GEN. LAWS ch. 23k § 91(c) (2011). "The compact repeatedly refers to the tribe's 'exclusive' rights to conduct gaming in Region C if the compact receives legislative approval by July 31, 2012." *KG Urban II*, 693 F.3d at 6.

[110] MASS. GEN. LAWS ch. 23k § 91(e) (2011). At the time of the litigation, Massachusetts's two federally-recognized tribes did not own any federal reservation land within the commonwealth. *KG Urban II*, 693 F.3d at 11–12. The Mashpee Wampanoag Tribe had submitted a tribal-state compact to the Secretary of Interior, reflecting an application to take federal lands into its trust. *Id.* at 12.

[111] *KG Urban II*, 693 F.3d at 6.

[112] *Id.* at 11.

[113] Specifically, KG argued that "since the Secretary has not (and most likely cannot under present law) authorize a Mashpee-Massachusetts gaming compact under IGRA, the state has excluded KG from entering the gaming market and given the Mashpee a preference unlimited in duration." *Id.* at 12.

[114] *Id.*

[115] KG Urban Enters., LLC v. Patrick (*KG Urban I*), 839 F. Supp. 2d 388 (D. Mass. 2012), *aff'd in part, vacated in part*, *KG Urban II*, 693 F.3d 1 (1st Cir. 2012); *see also* Smith & Mayhew, *supra* note 23, at 54 (discussing the district court's first opinion in the litigation).

[116] *KG Urban I*, 839 F. Supp. 2d at 407.

[117] *Id.* at 404–05.

[118] *Id.* at 407.

rational-basis review and allow the state law to stand. The court suggested that a monopoly over in-state gaming might not qualify as a unique obligation towards Indians. The court stated:

> If this Court were addressing the issue as one of first impression, it would treat Indian tribal status as a quasi-political, quasi-racial classification subject to varying levels of scrutiny depending on the authority making it and the interests at stake. Federal laws relating to native land, tribal status or Indian culture would require minimal review because such laws fall squarely within the historical and constitutional authority of Congress to regulate core Indian affairs. Laws granting gratuitous Indian preferences divorced from those interests, such as . . . a law granting tribes a quasi-monopoly on casino gaming, would be subject to more searching scrutiny.[119]

Clearly, the district court did not think an exclusive right to game was part of Congress' obligation to Indians.

Massachusetts appealed the decision dismissing its complaint, arguing that even if the Commonwealth's classification was racial in nature, it was nonetheless authorized by IGRA and subject to rational-basis review under *Yakima*.[120] Interestingly, Paul Clement, the nationally-known attorney and former solicitor general under President George W. Bush, represented KG in the appeal.[121] Attorney Clement, at least once considered a top contender for a Republican nomination to the Supreme Court, has been involved in other cases advocating for an overhaul of *Mancari*.[122] In reversing the decision of the district court, the First Circuit started with the premise that

---

[119] *Id.* at 404.

[120] *KG Urban II*, 693 F.3d at 17.

[121] *Id.* at 3; *see also* Jason Zengerle, *The Paul Clement Court*, N.Y. MAG. (Mar. 18, 2012), http://nymag.com/news/features/paul-clement-2012-3/ [https://perma.cc/9YVN-TVU8] (noting that Paul Clement was the solicitor general under the Bush administration, and that "since leaving the position of solicitor general under Bush, [Clement] has become, in the Obama age, a sort of anti-solicitor general—the go-to lawyer for some of the Republican Party's most significant, and polarizing, legal causes.").

[122] *See* Camila Domonske, *Who Are the Possible Candidates to Fill Scalia's Seat?*, NPR (Feb. 17, 2016), http://www.npr.org/sections/thetwo-way/2016/02/14/466725863/who-are-the-possible-candidates-to-fill-scalias-seat [https://perma.cc/267W-V2KT] (reporting that Paul Clement remained on the short list of likely Republican nominations for a Supreme Court vacancy); Jeffrey Toobin, *The Supreme Court Farm Team*, NEW YORKER (Mar. 17, 2014), http://www.newyorker.com/news/daily-comment/the-supreme-court-farm-team [https://perma.cc/8FSJ-6G9A] (reporting that former solicitor general Paul Clement was a contender for a Republican nomination to the Supreme Court).

Paul Clement was counsel for the guardian ad litem before the Supreme Court in *Adoptive Couple v. Baby Girl*, a case that argued, in part, to overturn *Mancari*. See *infra* Part IV.B and accompanying footnotes for a discussion of the litigious attack on *Mancari*. Paul Clement may have a role in the MGM litigation, if the case proceeds to the appellate level.

IGRA "limits the conditions under which tribes are allowed to enter into gaming"[123] and that, pursuant to IGRA, tribal gaming may only be conducted by an Indian tribe on Indian lands.[124] The court, however, expressed doubts that *Mancari* could be extended to apply to preferential state classifications and noted the differences between the two cases: that *Mancari* involved several sources of federal authority—including the commerce clause, treaty power, and a special trust—and the Massachusetts law only dealt "with [the] establishment of gaming facilities and not employment of Indians within agencies whose mission is to assist Indians."[125] The court chided Massachusetts for failing to provide legal authority that state classifications based on tribal status *not authorized* by federal law nonetheless could qualify as political classifications.[126] The cases that Massachusetts did rely on—*Yakima* included—upheld those state laws that were *explicitly authorized* by federal law; laws that were "not like this case," according to the court.[127]

The First Circuit then voiced its doubts that a tribal-state compact negotiated under Section 91 would even be authorized by IGRA.[128] The court stated that:

> It would be difficult to conclude that the IGRA "authorizes" the Massachusetts statute under these circumstances—where there are no Indian lands . . . within the meaning of the IGRA. Further, [Supreme Court precedent] may in the end prohibit the Secretary from taking the Mashpee lands into trust and so making them Indian lands, a question not yet resolved.[129]

---

[123] *KG Urban II*, 693 F.3d at 7.

[124] *Id.* at 8.

[125] *Id.* at 19; *see also* Smith & Mayhew, *supra* note 23, at 54 ("The First Circuit's reading of *Mancari* focuses on that opinion's discussion of the relationship between tribes and the federal government, and less on the political/racial distinction, which is based not only on the federal relationship but also on the independent status of tribes as semi-sovereigns.").

[126] *KG Urban II*, 693 F.3d at 19 ("The defendants cite no authority holding that state preferential classifications based on tribal status which are not authorized by federal law are nonetheless not racial classifications under *Mancari*.").

[127] The court noted that instead, Massachusetts cited "a number of cases upholding state laws, which are not like this case, said to be authorized by federal law under the rational of *Yakima* . . . see *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 736 (9th Cir. 2003), *U.S. v. Garrett*, 122 Fed. Appx. 628, 631-33 (4th Cir. 2005), *Squaxin Island Tribe v. Washington*, 781 F.2d 715, 722 n.10 (9th Cir. 1986), *Greene v. Comm'r of Minn. Dep't of Human Servs*., 755 N.W.2d 713, 727 (Minn. 2008), *N.Y. Ass'n of Convenience Stores v. Urbach*, 699 N.E.2d 904, 908 (1998))." *Id.* at 19–20.

[128] *Id.* at 20 ("We turn next to the defendants' argument that nevertheless the state may still make the classification, because § 91 is authorized by the IGRA under *Yakima*. In the present posture of this case, that too is quite doubtful.").

[129] *Id.* at 21 ("KG does not dispute that if a federally recognized tribe in Massachusetts *currently* possessed 'Indian lands' within the meaning of the IGRA, § 91 would fall sufficiently within the scope

It was with this trepidation that the First Circuit ultimately found that KG's complaint should not have been dismissed because the issue still existed whether the state scheme was authorized by IGRA and therefore fell within *Yakima*, triggering rational-basis review.[130] The First Circuit was not convinced that Massachusetts's gaming law was authorized by IGRA, but left the question open on remand.[131]

The First and Ninth Circuits each concluded that the respective states' preferential treatment of Indians correlated closely enough with IGRA to not violate constitutional guarantees of equal protection. In regards to tribal gaming, the decisions thus reflect two routes a court can take. First, a court can require that a state law be *specifically authorized* by IGRA, as was found in *Artichoke Joe's*, to qualify for rational-basis review.[132] Conversely, a court can require that the state law not be explicitly authorized by IGRA, but rather merely implement or reflect IGRA, as the First Circuit indicated in *KG Urban*.[133] As noted previously, Connecticut's

---

of the IGRA's authorization and thus be subject to only rational basis review.") (internal citations omitted).

[130] *Id.* at 24. The First Circuit found that IGRA applied only to gaming on Indian lands, but with no such "Indian lands" held by the tribe in question, it was therefore doubtful IGRA could apply. *Id.* ("In sum, whether § 91 is 'authorized' by the IGRA such that it falls within *Yakima* and is subject to only rational basis review is far from clear, presents a difficult question of statutory interpretation, and implicates a practice of the Secretary of the Interior not challenged in the suit.").

[131] *Id.* at 27. On remand, the district court upheld the constitutionality of the state gaming law on summary judgment. KG Urban Enters., LLC v. Patrick (*KG Urban III*), 2014 U.S. Dist. LEXIS 2437, at *12 (D. Mass. Jan. 9, 2014). The court, however, again noted its skepticism (as it had in its first opinion) that "this constitutional framework faithfully reflects the text and purpose of the Equal Protection Clause." *Id.* at *4 (citations omitted). The district court went on to say that "acting upon such misgivings is not within the purview of a United States District Judge. The Supreme Court may choose to exercise its institutional prerogative to revisit questionable precedent but until then this Court is constrained." *Id.*

The district court found that although the Massachusetts Gaming Act was not fully authorized by IGRA, it could be considered a "parallel mechanism" to IGRA and therefore warranted rational-basis review for a limited period, while the Mashpee awaited its fate to see if its lands were taken into trust. *Id.* at 4 (citations omitted). The court reiterated the warnings of the First Circuit; namely, that if the Mashpee tribe were explicitly foreclosed from taking land into trust by the federal government, then KG Urban would prevail in the case, because the facts wouldn't be authorized by IGRA then. *Id.* at 5. Ultimately, the court determined the eighteen-month delay while awaiting approval from the Secretary of the Interior did not violate the Constitution. *Id.* at 6.

[132] Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712 (9th Cir. 2003); *see also* COHEN'S HANDBOOK, *supra* note 17, § 14.03[2][b], at 960 ("Some courts have concluded that unless a state law embodying an Indian classification is specifically authorized by a federal statute or treaty, it should not benefit from the more relaxed standard of review found in *Morton v. Mancari*.").

[133] In *KG Urban II*, the First Circuit noted that, "[i]f the Secretary is willing under the IGRA to approve a tribal-state compact contingent on the relevant land being acquired in trust, then the Commonwealth can argue that § 91 establishes *a parallel mechanism, meant to facilitate the purposes of the IGRA, even if not precisely authorized by the IGRA*, for a limited period of time." *KG Urban II*, 693 F.3d at 25 (emphasis added); *see also* COHEN'S HANDBOOK, *supra* note 17, § 14.03[2][b], at 960–61 ("Others have taken a broader view, asserting that state laws may be reviewed under the more

law does not comport with IGRA, and therefore, may not be specifically authorized by the statute. The issue that Connecticut's law raises, then, is what the contours of an IGRA reflection look like and if Connecticut's law comes close enough to matching those guidelines.

IV. THE FUTURE OF *MANCARI*

A. *United States District Court for the District of Connecticut: MGM's Pending Litigation*

Since the Supreme Court has yet to establish the proper constitutional analysis for state laws granting preferential treatment to Indians for tribal gaming, it is probable that the Connecticut district court will follow the reasoning employed by the circuit courts. According to the Ninth Circuit's holding in *Artichoke Joe's*, an analysis of a preferential state law for tribal gaming proceeds under both the *Mancari* and *Yakima* frameworks. Under *Mancari*, the state law must first designate an Indian tribe not along individual, racial determinations, but along tribal lines to establish its classification as political. Next, the state law must be enacted in response to the federal Indian regulatory framework; that is, the state law must be enacted in furtherance of a federal measure that advances Congress' obligation to Indians. Only after these first two requirements are met can a district court apply the less demanding rational-basis review in determining the state statute's constitutionality.

Connecticut's law differs significantly from the state laws reviewed by the First and Ninth circuits. In *Artichoke Joe's*, the case concerned Class III gaming operations that were located on Indian reservations or Indian trust lands[134] and tribal-state compacts had been approved three years prior to the litigation.[135] The court found that the state legislation at issue, Proposition 1A, had been ratified by the people of California "with reference to the authority that Congress had granted to the State of California in IGRA[,]" thereby associating the law with IGRA and qualifying the law for rational-basis review.[136] Likewise, the litigation in *KG Urban II* centered on the Mashpee tribal-state compact between Massachusetts and the Mashpee Wampanoag, thereby aligning the state law with IGRA.[137] Although the First Circuit was skeptical because of the

---

relaxed standard as long as they operate to implement, reflect, or effectuate federal laws, thereby fulfilling Congress's evidence intent to benefit Indians.").

[134] *Artichoke Joe's Cal. Grand Casino*, 353 F.3d at 735 n.16.

[135] *See id.* at 717 (discussing the tribal-state compacts negotiated by former California state Governor Gray Davis and approved by the Assistant Secretary of Indian Affairs).

[136] *Id.* at 736.

[137] *KG Urban II*, 693 F.3d at 6 (describing the tribal-state compact underlying the instant litigation).

Mashpee's lack of federally-recognized Indian land, the court nonetheless reinstated the plaintiffs' complaint. Contrarily, Connecticut's new law contains no reference to previously-established tribal-state compacts between Connecticut and the Tribes, or to Class III gaming on the Tribes' reservation land.[138]

Opponents of the Act may posit that it is conceivable that the district court will find that the Act fails the *Yakima* framework, since it is arguable that the Act does not reflect the federal Indian regulatory framework.[139] They will argue that first and foremost, Connecticut has already established the parameters of how its state legislation over tribal gaming would comport with IGRA. Connecticut has adopted two tribal-state compacts with its federally-recognized tribes, which have governed the state's two casinos for over twenty years.[140] If Connecticut wanted to continue in its tribal gaming framework, the Act surely would have contemplated a role within the two existing tribal-state compacts or at least an extension of them as they now exist. However, the Act contains no mention of the existing tribal-state compacts and grants only a new, exclusive right to the two tribes to form a "tribal business entity."[141] Opponents may further argue that even if it is assumed that the Act is in fact a state policy that "reflect[s]"[142] the federal regulatory framework, the Act does not contain any express provisions subjecting the new tribal entity to the provisions of IGRA. As mentioned previously, IGRA requires a state and tribe to enter into a gaming compact governing the conduct of gaming on reservation land,[143] but the Act is silent regarding a requirement

---

[138] In fact, as Senator Fasano noted in session hearings before the Connecticut General Assembly, the Act is "in contradiction of the compact" because it contemplates a third casino located off-site from the Tribes' reservation land. Memorandum in Support of Defendants' Motion to Dismiss Amended Complaint, Exhibit 6, at 4, MGM Resorts Int'l Global Gaming Dev., LLC v. Malloy, No. 3:15-cv-1182-AWT (D. Conn. Oct. 29, 2015); *see also* Mohegan Tribe-State of Connecticut Gaming Compact, 59 Fed. Reg. 241 (Dec. 16, 1994) (detailing the conduct and operations of casino gaming as specifically located on the Mohegan reservation in Uncasville, Connecticut); Tribal-State Compact Between the Mashantucket Pequot Tribe and the State of Connection, 56 Fed. Reg. 105 (May 31, 1991) (detailing the conduct and operations of casino gaming on the Pequot reservation in Mashantucket, Connecticut).

[139] The New York Court of Appeals described the reflection stating: "[W]hile States do not enjoy th[e] same unique relationship, they may adopt laws and policies to reflect or effectuate Federal laws designed 'to readjust the allocation of jurisdiction over Indians,' without opening themselves to the charge that they have engaged in race-based discrimination." N.Y. Ass'n of Convenience Stores v. Urbach, 699 N.E.2d 904, 908 (N.Y. 1998) (citations omitted).

[140] *See* Mohegan Tribe-State of Connecticut Gaming Compact, 59 Fed. Reg. 241 (Dec. 16, 1994) (detailing the conduct and operations of casino gaming on the Mohegan reservation in Uncasville, Connecticut); Tribal-State Compact Between the Mashantucket Pequot Tribe and the State of Connecticut, 56 Fed. Reg. 105 (May 31, 1991) (detailing the conduct and operations of casino gaming on the Pequot reservation in Mashantucket, Connecticut).

[141] 2015 Conn. Acts 1484 (Spec. Sess.).

[142] *Urbach*, 699 N.E. 2d at 908.

[143] *See* 25 U.S.C. § 2710(d) (2012) (listing the requirements for a tribal-state compact).

for Connecticut and MMCT Venture to enter into any such compact.[144] Moreover, the Act does not require that Connecticut's third casino be located on reservation land. Unlike the legislation at issue in *Artichoke Joe's* and *KG Urban*, the Act remains completely open-ended about where the new casino would be located and as seen from media accounts, towns and municipalities across the state have initiated steps to submit site proposals to MMCT Venture.[145] This blatant lack of federally-recognized Indian land certainly recalls the uncertainty the First Circuit had over whether the tribe in *KG Urban* would obtain such land.[146] Without adhering to the basic requirements of IGRA, it is plausible that the Connecticut district court will not uphold the legislation as a state regulation furthering the goals of Congress' relationship with Indians.[147]

Proponents of preferential treatment for Indians may counter that Connecticut's law is constitutional even though it is not specifically authorized by IGRA. First, it is arguable that a federal connection—here, a tribal-state compact and a third casino on federally-recognized Indian land—is not necessary for application of rational-basis review, as opposed to strict scrutiny review.[148] A preeminent Indian law source notes that the Supreme Court has held "that the federal relationship with tribes does not preclude protective state laws which do not infringe on federally protected rights. . . . If Indians are a legitimate classification for protective federal

---

[144] Rather, the Act calls only for an amendment to state law once the tribal business entity selects and enters into an agreement with a municipality. 2015 Conn. Acts 1485 (Spec. Sess.).

[145] *See supra* Part II.A.

[146] KG Urban Enterprises, LLC v. Patrick (*KG Urban II*), 693 F.3d 1 (1st Cir. 2012).

[147] If the Act met the requirements of IGRA, it would easily fulfill Congress' goals under IGRA. In *United States v. Garrett*, the Fourth Circuit upheld North Carolina's gaming law in an attack on its constitutionality regarding differing treatment of a non-Indian gaming operator from the state's Eastern Band of Cherokee Indians because it fulfilled the goals of IGRA. 122 F. App'x 628, 633 (4th Cir. 2005). First noting the existence of a state-tribal compact between North Carolina and the tribe, the court reasoned:

> Applying the rational basis standard for Indian tribal preferences set forth in *Mancari*, we hold that the gaming preferences given to the Eastern Band of Cherokee Indians are rationally related to a legitimate governmental interest. The laws creating this preference "promot[e] the economic development of federally recognized Indian tribes (and thus their members)[.]" . . . The Supreme Court has explicitly held that this goal constitutes not just a legitimate, but an important government interest . . . . It also appears undisputed that gaming operators derive significant profits from their business. Therefore, gaming preferences for Indian tribes conducted on tribal land are a rational means of ensuring the economic development of the Eastern Band of Cherokee Indians. For these reasons, North Carolina's State-Tribal Compact and the scheme set forth by the IGRA easily pass muster under the rational basis standard of review.

Id. (citations omitted).

[148] Koenig & Stein, *supra* note 14, at 370.

laws, their status is arguably the same for state laws of that character."[149] Such an argument would rely on the theory that the lack of a federal connection is not fatal to the constitutionality of Connecticut's law. Moreover, it can be argued that the character of classification does not change because a state, and not the federal government, defines it.[150] Secondly, proponents may argue that the Act's goals parallel those of IGRA: IGRA states that "a principal goal of Federal Indian policy is to promote tribal economic development, [and] tribal self-sufficiency" and as Connecticut's two casinos have been successful at this already, the third under the Act would do the same.[151] Proponents would demonstrate that casinos foster tribal economic development and self-sufficiency by relying on the fact that casino gaming has already generated thousands of jobs (including jobs for tribal members), raised revenue for tribes, and helped remove tribal members from welfare.[152] A third casino in Connecticut would presumably do the same for the state and for the region, thereby fostering the two Tribes' economic development and self-sufficiency.

B. *The Attack on* Morton v. Mancari

This Note posits that a developing trend, as seen in *Artichoke Joe's* and *KG Urban*, reflects insight more subtle than just the forthcoming judicial analysis of the constitutional challenges to the Act by the Connecticut district court. *Artichoke Joe's* and *KG Urban* represent circuit courts' skepticism of the constitutional framework regarding the analysis of state laws governing tribal gaming and the increasing attack on the *Mancari* "political versus racial classification" doctrine. Connecticut, by granting its two tribes a monopoly on casino-gaming completely outside of IGRA, has overstepped the boundaries and contours of the federal government's obligations to Indians. Connecticut's Act may be the first in a series of state laws "granting gratuitous Indian preferences"[153] that seek to retain the benefits of tribal gaming within their borders by manipulating the federal regulatory framework and the corresponding constitutional analysis. The Act has warped the outer contours of IGRA to a point where arguably the federal statute is no longer recognizable. As a result, the Supreme Court may be forced to adapt by implementing a more scrutinizing level of review to be applied when deciding challenges to state tribal-gaming laws.

---

[149] COHEN'S HANDBOOK, *supra* note 17, at 659.

[150] "On the one hand, the nature of a classification, in theory, should not change based upon the identity of the sovereign making it. If a classification is political when the federal government makes it, it is difficult to imagine that it could be anything other than political when a state or local government makes it." *KG Urban I*, 839 F. Supp. 2d 388, 403 (D. Mass. 2012).

[151] *See* 25 U.S.C. § 2701(4) (2012).

[152] Koenig & Stein, *supra* note 14, at 373–74.

[153] *KG Urban I*, 839 F. Supp. 2d at 404.

Litigation since *Mancari* and lawyers representing sides both for and against tribal interests have noted the mounting attack on preferential treatment for Indians.[154] Interests contrary to Indian preferences have made a "concerted effort to put key . . . doctrines before the [Supreme] Court. One of the best examples of this is the repeated effort to get the Court to revisit the critical holding in *Morton v. Mancari*."[155] Advocates for stricter judicial scrutiny of preferential Indian laws cite to the 1995 case *Adarand Constructors, Inc. v. Pena*, in which the Supreme Court held that *all* racial classifications must be analyzed under strict scrutiny review, as support that *Mancari* is no longer applicable.[156] The *Adarand* rule has been used by advocates against Indian interests to justify applying strict scrutiny, even for laws that further Congress' obligations toward Indians.[157] For example, in another opinion, the Ninth Circuit had the opportunity to reflect on the effect of *Adarand* on *Mancari*, stating that:

> The Supreme Court's recent decision in *Adarand* only adds to our constitutional doubts. . . . In *Adarand*, the Court ruled that racial classifications by the federal government are subject to strict scrutiny. . . . Justice Stevens in dissent argued that the majority's 'concept of consistency . . . would view the special preferences that the National Government has provided to Native Americans since 1834 as comparable to the official discrimination against African Americans that was prevalent for much of our history.' If Justice Stevens is right about the logical implications of *Adarand*, *Mancari*'s days are numbered.[158]

Another manner by which opponents have argued to reverse *Mancari* is to limit its application to only uniquely Indian interests, which is defined as interests protected by legislation that "relat[e] to Indian lands, tribal

---

[154] *See* Goldberg, *supra* note 8, at 951 (listing examples of litigation, legislation and scholarly work attacking the *Mancari* doctrine).

[155] Smith & Mayhew, *supra* note 23, at 48.

[156] 515 U.S. 200, 227 (1995).

[157] *See* Smith & Mayhew, *supra* note 23 (documenting uses of the holding in *Adarand* as the basis for several petitions to the Supreme Court to overturn *Mancari*).

[158] Williams v. Babbitt, 115 F.3d 657, 665 (9th Cir. 1997) (citations omitted). The Ninth Circuit reviewed an equal protection challenge to the Reindeer Act of 1937, which limited the sale of reindeers in Alaska to non-natives to provide Alaska natives with economic security and a stable food supply. In their petition for certiorari, the *Williams* appellees argued for Supreme Court review to decide whether rational-basis review adopted in *Mancari* would continue to be applied to constitutional challenges to congressional laws favoring Indians, however, the Supreme Court declined to consider the case. *See* Kawerak Reindeer Herders Ass'n v. Williams, 523 U.S. 1117 (1998) (denying the appellees' petition for writ of certiorari).

status, self-government or culture."[159] In *Mancari*, the unique Indian interest was the employment preference for hiring Indians to the federal Bureau of Indian Affairs and was designed expressly to foster tribal self-government.[160] It is doubtful that a casino monopoly, a sure result of Connecticut's law, would be such a "unique" Indian interest.[161] Against this backdrop of judicial skepticism and forceful advocacy to overturn the *Mancari* framework, Connecticut's legislation stands poised to finally push the Supreme Court to review its Indian law jurisprudence.[162]

C. *Connecticut's Role in the* Mancari *Attack*

The Supreme Court has not addressed whether state or local laws granting Indians preferential treatment should be reviewed under the same lenient rational-basis review as federal laws doing the same. In that void, states remain free to push the boundaries as far as this current constitutional framework will allow them. Accordingly, Connecticut has capitalized in this area. While questions of equal protection and the status of state classifications are crucial here, the dormant commerce clause issue still looms large in the background. Underlying a piece of legislation that on its face seems to abide by the Constitution, Connecticut has sought to advance its own economic interests in the name of tribal self-sufficiency and tribal self-government.[163] While there is nothing technically wrong with a state advancing certain industries within its borders or creating jobs for its individual citizens, a reviewing court must be wary when a state manipulates the Indian constitutional framework to achieve such goals. IGRA, *Mancari*, and their respective acceptance of racially preferential treatment of Indians must remain connected to Congress' obligation towards Indians. Without a stake in IGRA, states should be monitored closely when passing legislation that shows favoritism towards Indians at the expense of others. Courts, and most importantly the Supreme Court, must react accordingly. While the First and Ninth circuits rightfully expressed skepticism at the constitutional framework, they nonetheless

---

[159] *See* Response of Guardian Ad Litem in Support of Petition for Writ of Certiorari, Adoptive Couple v. Baby Girl, No. 12-399, 2012 WL 5209997, at *11 (Oct. 22, 2012) (advocating that the *Mancari* doctrine should be overturned upon Supreme Court review).

[160] Morton v. Mancari, 417 U.S. 535, 537 (1974).

[161] The *Williams* court, for instance, expressed its doubts that casino gambling is a uniquely Indian interest: "[f]or example, we seriously doubt that Congress could give Indians a complete monopoly on the casino industry or on Space Shuttle Contracts." *Williams*, 115 F.3d at 665.

[162] So far, the Supreme Court has denied petitions for certiorari in cases, among others, challenging the Reindeer Act of 1937, Kawerak Reindeer Herders Ass'n, 523 U.S. 1117; the California state constitutional amendment at issue in *Artichoke Joe's v. Norton*, 543 U.S. 815 (2004); and federal flight limitations over the Grand Canyon, AirStar Helicopters, Inc. v. FAA, 538 U.S. 977 (2003).

[163] *See* Memorandum in Support of Defendants' Motion to Dismiss Amended Complaint at Exhibit 6, *supra* note 138 (reporting Senator Looney's remarks on the Connecticut General Assembly's goals behind the Act).

upheld the state legislation at issue. Connecticut's law, however, may be finally starting to push the right buttons to trigger an overhaul of judicial scrutiny. If it does, this Note argues only that a more intricate level of analysis is required and not that a stricter level of scrutiny necessarily be applied in every challenge to state laws granting preferential status to Indians *per se*. Rather, courts should take the time to truly parse through state legislation to ensure it adheres to the framework established in IGRA. This can be accomplished by first ensuring that legislation dealing with tribal gaming adheres in some manner to IGRA, either explicitly or by reflection. Then, only after such determination, can a court apply the *Mancari* and *Yakima* frameworks to ensure that a state has acted constitutionally with its preferential legislation. Without a more detailed level of judicial scrutiny in this area, states will remain free to exploit tribal gaming in their borders for in-state economic benefits in the name of "tribal self-sufficiency and growth."