



South Dakota Legislative Research Council

Issue Memorandum 94-28

CONSTITUTIONAL AMENDMENT E: VIDEO LOTTERY CONTINUATION

BACKGROUND

The introduction of gambling in South Dakota has had a dramatic impact on this state's economic and social environment over the past ten years, and the recent Supreme Court decision striking down video lottery, along with the proposed Constitutional Amendment E to restore video lottery on the 1994 general election ballot, again illustrate the importance and volatility of this issue to the people of South Dakota. During the summer of 1994, the controversy has involved two decisions of the state Supreme Court and two special sessions of the Legislature to address legal and budgetary issues.

Originally, South Dakota's constitution prohibited most types of gambling, and through the years, numerous attempts to authorize various forms of gambling have been defeated. However, in 1970, the state constitution was amended to allow some forms of gambling for charitable organizations, and in 1986 and 1988, the voters authorized a state lottery and specific provisions allowing limited casino gambling in Deadwood. Also, a change in federal law paved the way for gambling casinos to be operated on Indian reservations, and several new casinos were constructed on South Dakota reservations.

Taken together, these changes have had

important and visible impacts on the daily lives of South Dakotans and on this state's economy, with most gambling activities providing jobs and government revenues at some level. At the same time, some of the social consequences of gambling have made it a controversial subject and prompted opponents of gambling to challenge the constitutionality of the video lottery statutes, which has resulted in the video lottery statutes being overturned, along with loss of jobs and state revenues.

LEGISLATIVE AND CONSTITUTIONAL HISTORY

The immediate video lottery issue began with approval by the voters in 1986 of a constitutional amendment (Article III, Section 25 of the South Dakota Constitution) to allow "a state lottery which is regulated, controlled, owned and operated by the State of South Dakota" In 1987, SB 254 established a "scratch and match" instant lottery operated by the state (codified as SDCL chapter 42-7A), and in 1989, SB 129 authorized video lottery, with the state's share of "net machine income" set originally at twenty-five percent and subsequently increased to thirty-six percent. In 1990, SB 86 authorized South Dakota's participation in on-line lottery or "lotto" games. Video lottery has been the subject of considerable legislative activity each year, with proposed bills addressing such issues as the state's

share of proceeds, proper use of state video lottery revenues, the types of establishments in which video lottery is allowed, advertising restrictions, social problems caused by gambling, and so on.

Controversy continues to follow video lottery and other forms of gambling in this state, and in 1992, gambling opponents succeeded in placing Initiated Measure Number 4 on the ballot, which would have repealed video lottery. The voters rejected the 1992 initiated measure with 37% of the voters in favor of the measure and 63% opposed. In November 1992, following the election loss, a lawsuit was filed challenging the video lottery statutes. The lower court ruled that video lottery fit the definition of a "lottery" within the meaning of Article III, Section 25 of the state constitution; but on appeal, the South Dakota Supreme Court ruled on June 22, 1994, (*Poppen v. Walker*) that South Dakota's video lottery operation is unconstitutional.

The Supreme Court's decision was not based on social, economic, or other policy considerations. The decision rested on whether the activities that constitute video lottery are in fact a "lottery" within the meaning of that term or some other game of chance not authorized by the 1986 constitutional amendment. The original language in Article III, Section 25, which dates back to 1889, prohibits any ". . . game of chance, lottery, or gift enterprise" That language is still in effect, and the gambling provisions in the constitution are written as exceptions to the basic constitutional prohibition. The court reasoned that because the constitution uses two terms, "lottery" and "game of chance," the framers must have intended different meanings for those two terms. The 1986 amendment specifically authorized a state

lottery, but not games of chance, and the court held that video lottery machines in reality resemble games of chance, such as slot machines, more closely than they resemble a lottery as it is most often defined. Consequently, video lottery goes beyond the intent of the 1986 constitutional amendment authorizing a state lottery and is unconstitutional.

The court did not formally address other potential constitutional issues associated with video lottery but did suggest that there may also be constitutional problems with the "extent to which gaming devices must be regulated, owned, and operated by the state and the extent to which gaming proceeds must go to the state." The court advised the drafters of any potential constitutional amendment to restore video lottery to consider these issues as well as the definitional question.

Following the Supreme Court's decision, it was immediately clear that closing video lottery would mean the loss of many video lottery jobs and businesses around the state, as well as a serious loss of state revenue, with estimates ranging as high as \$65 million for the remainder of the fiscal year. It was not clear, however, when video lottery operations would have to be officially shut down. There was speculation that the games may not actually have been halted until the court considered further procedural questions, which could conceivably have taken until after the November elections when voters would possibly have restored video lottery. Such a delay would also have decreased the projected loss in state revenues. In addition, there were varying estimates on the size of the revenue loss.

Governor Miller then called a special session of the Legislature to consider a constitutional amendment to restore video

lottery and to consider possible fiscal measures to shore up the state budget. The special session, which convened on July 12, 1994, placed a constitutional amendment (Amendment E) to revive video lottery on the November ballot, and authorized the use of some budget reserve funds, but did not pass a temporary sales tax increase proposed by the Governor. On August 9, 1994, the Supreme Court ended speculation about video lottery continuing until the election by ordering the games to close within a few days.

With the immediate shutdown of video lottery, Governor Miller issued Executive Order 94-9 to implement a series of state budget cuts, which he had announced earlier during the special session, and which included reductions in major programs and appropriations, such as the closure of the State Library and the reduction of the appropriation to the counties for personal property tax relief by more than \$15 million, or 91%. The counties sued, contending that SDCL 4-8-23, on which the Governor's actions were based, is unconstitutional. The Sixth Circuit Court agreed, holding that SDCL 4-8-23, which dates back to 1963, is an overly broad and unconstitutional delegation of legislative authority, and that the Governor did not have the authority to reduce the budget, which left the state with no sure mechanism for dealing with the expected budget shortfall.

Following the decision in circuit court, and with video lottery now shut down, the Governor called a second special session of the Legislature to address the state budget issues. The Legislature met on September 9, 1994, and again refused to approve the Governor's temporary sales tax proposal. The Legislature did, however, essentially enact the Governor's proposed budget cuts, which will allow the 1995 Legislature to

address longer-term budget questions once the results of the election are known.

PROVISIONS OF CONSTITUTIONAL AMENDMENT E

Constitutional Amendment E would amend Article III, Section 25 of the South Dakota Constitution to allow video lottery to continue and to clarify provisions and requirements related to ownership and operation of video lottery games. The amendment would leave the use and distribution of lottery revenues up to the Legislature. The proposed amendment also ratifies video lottery laws, activities, and contracts adopted since 1987. The entire text of the proposed amendment is printed below, with existing language overstruck and proposed new language underlined:

Article III, § 25. Games of chance prohibited - Exceptions.

The Legislature shall not authorize any game of chance, lottery or gift enterprise, under any pretense, or for any purpose whatever provided, however, it shall be lawful for the Legislature to authorize by law, bona fide veterans, charitable, educational, religious or fraternal organizations, civic and service clubs, volunteer fire departments or such other public spirited organizations as it may recognize, to conduct games of chance when the entire net proceeds of such games of chance are to be devoted to educational, charitable, patriotic, religious or other public spirited uses. However, it shall be lawful for the Legislature to authorize by law, a state lottery ~~which is regulated, controlled, owned and operated by the state of South Dakota, either separately by this state or jointly or in cooperation with one or more other states. The entire net~~

proceeds of such lottery shall be devoted to the operation of state government or such other purposes as the Legislature shall determine or video games of chance, or both, which are regulated by the state of South Dakota, either separately by the state or jointly with one or more states, and which are owned and operated by the state of South Dakota, either separately by the state or jointly with one or more states or persons, provided any such video games of chance shall not directly dispense coins or tokens. However, the Legislature shall not expand the statutory authority existing as of June 1, 1994, regarding any private ownership of state lottery games or video games of chance, or both. The Legislature shall establish the portion of proceeds due the state from such lottery or video games of chance, or both, and the purposes for which those proceeds are to be used. SDCL 42-7A, and its amendments, regulations, and related laws, and all acts and contracts relying for authority upon such laws and regulations, beginning July 1, 1987, to the effective date of this amendment, are ratified and approved. Further, it shall be lawful for the Legislature to authorize by law, limited card games and slot machines within the city limits of Deadwood, provided that 60% of the voters of the

City of Deadwood approve legislatively authorized card games and slot machines at an election called for such purpose. The entire net Municipal proceeds of such card games and slot machines shall be devoted to the Historic Restoration and Preservation of Deadwood.

ISSUES

Even though the Supreme Court's June 22, 1994, decision to strike down video lottery was based on strictly-drawn definitional questions, the decision to place the issue on the general election ballot in November 1994 reopens the debate on the benefits and costs of gambling in South Dakota. Gambling opponents cite social problems that gambling creates and the potential unreliability of gambling revenues. Some persons who do not necessarily oppose gambling are opposed to the prevalence and high visibility of video lottery, noting that video lottery was not what was contemplated by many voters who supported the 1986 constitutional amendment authorizing a state lottery.

Video lottery supporters stress the need for video lottery revenues and the dislocation to state and local budgets and programs caused by the loss of video lottery, as well as the loss of video lottery jobs and businesses around the state. Some proponents also support gambling on the basis of personal freedom and peoples' right to pursue the recreational activities they choose, and they note that the voters approved video lottery during the 1992 election.

There is disagreement about the precise economic impact of video lottery or the loss of video lottery in terms of sales taxes

foregone and the magnitude of multiplier effects associated with spending money on lotteries versus other goods and services. Also, discussion about the loss of video lottery revenues often leads to debate about the need for certain government services and possibilities for reductions in spending. While the decision to invalidate video lottery was based on narrow grounds, the debate surrounding the amendment to restore video lottery encompasses a wide range of issues and concerns.

SUMMARY

The loss of video lottery has caused dislocation to the state of South Dakota in both the private and public sectors, resulting in a loss of state revenues and a loss of jobs

and business revenues around the state. The proposed constitutional amendment reopens the debate about the pros and cons of gambling as well as other issues related to state and local government budgets and services. A "yes" vote on Constitutional Amendment E will allow video lottery to continue. A "no" vote will end video lottery.

This issue memorandum was written by Tom Magedanz, Principal Research Analyst for the Legislative Research Council. It is designed to supply background information on the subject and is not a policy statement made by the Legislative Research Council.
