

ITEM #51

ADDITIONAL MATERIAL

**Regular Meeting
OCTOBER 9, 2018**

SUBMITTED AT THE REQUEST OF

COMMISSIONER STEVE GELLER

Proposed Amendment Three to the Florida Constitution (Voter Control of Gambling) is misleading and far more expansive than most people believe. The exact impact of the Amendment is unknown, and it may have an unintended impact on Florida's two Indian tribes. If it is passed now, it will be extremely difficult to undo.

By [Steve Geller](#) on September 7, 2018

Summary: Proposed Amendment Three to the Florida Constitution (Voter Control of Gambling) is misleading and far more expansive than most people believe. The exact impact of the Amendment is unknown, and it may have an unintended impact on Florida's two Indian tribes. If it is passed now, it will be extremely difficult to undo.

The Seminole Indian Tribe of Florida and Walt Disney World have been the two main funders of proposed Amendment Three to the Florida Constitution. This Amendment, entitled "Voter Control of Gambling in Florida", takes away from the Legislature much of the Legislature's authority to amend gambling laws in Florida (the extent of which is uncertain), and instead requires a "citizens' initiative pursuant to Article XI, section 3, in order for casino gambling to be authorized under Florida law."

Many people mistakenly believe that the "casino gambling" referred to in Amendment Three is limited to bringing in big new casinos. The wording of the Amendment cross-references 25 CFR 502.4, and includes

- (a) Any House banking game, including but not limited to –
 - (1) Card games such as baccarat, chemin de fer, blackjack (21) and pai gow (if played as house banking games;
 - (2) Casino games such as roulette, craps, and keno
- (b) Any slot machines as defined in 15 U.S.C. 1171(a)(1) and electronic or electromechanical facsimiles of any game of chance
- (c) Any sports betting and pari-mutuel wagering, including but not limited to wagering on horse racing, dog racing or jai alai; or
- (d) Lotteries

The wording of the amendment specifically exempts pari-mutuel wagering by stating "As used herein, 'casino gambling' does not include pari-mutuel wagering on horse racing, dog racing, or

jai alai exhibitions.” **Note that there is no exemption in Amendment Three for the lottery language listed in 25 CFR!** Depending on how Amendment Three is interpreted, this could have a significant negative effect on the Florida Lottery.

It is unclear what the actual effect of Amendment Three would be if it passes. This could be the Gaming Attorney/Administrative Law Attorney/Appellate Attorney full employment act. The Amendment may or may not be retroactive, meaning that it may or may not prevent types of gambling that are already legal in Florida. As the Florida Supreme Court determined when they ruled that the language could go on the ballot:

“The opponents primarily argue that the Initiative should not be placed on the ballot because it is unclear whether, if passed, the amendment would apply retroactively and what effect, if any, the amendment would have on gambling that is currently legal in Florida—including gambling that was previously authorized by general law rather than by citizens’ initiative. However, as the sponsor points out, the opponents’ arguments concern the ambiguous legal effect of the amendment’s text rather than the clarity of the ballot title and summary.” (Florida Supreme Court SC16-778, SC16-871)

Thus, the Florida Supreme Court specifically stated that the Amendment has “an ambiguous legal effect” and declined to rule whether or not the amendment is retroactive. If they haven’t determined if it’s retroactive, and say it’s ambiguous, how can voters know what it will do?

The wording of Amendment Three states that “Florida Voters shall have the exclusive right to decide whether to authorize casino gambling in the State of Florida.” What does that mean? Slot machines at Pari-Mutuels in Miami-Dade and Broward Counties are authorized by the Florida Constitution. Would it require a new Constitutional amendment to authorize it in different Counties, or at locations other than Pari-Mutuels? The Florida Lottery has certain types of games. Would a new Constitutional Amendment be required to change the tickets, add locations, or sell the tickets in a new style? Could the Florida Lottery use its existing authority to add keno? Would “skill-based gaming” be permitted as a variation on slot machines, or would they require a new constitutional amendment? Can slot machine manufacturers even bring out new styles or themes of slot machines? There are far more questions than answers.

If Amendment Three is construed broadly, so as to require an initiative for any new types of gambling in Florida, I believe that would eventually bring gambling at Florida’s pari-mutuels to an end. A few decades ago, slot machines were electromechanical. Today they are electronic, and video poker, video blackjack, etc. have been determined to be slot machines because they contain random number generators. I can’t predict what new types of gambling will occur in the decades to come, but I do know that there will be new types of gambling, and if the Seminoles and/or the rest of the U.S. can keep up, but the Florida pari-mutuels and Florida Lottery can’t, then the pari-mutuels and Lottery will fall by the wayside. Would any significant number of people gamble today at a quasi-casino that only had electromechanical games?

Amendment Three could be construed more narrowly and be interpreted as saying that this would only prevent new people from entering legal gambling in Florida. It could be interpreted as saying that because Florida’s current Constitution specifically permits casino gambling at pari-mutuels and specifically permits the Lottery, that casino gambling is already permitted at

those locations (maybe just in Miami Dade and Broward, maybe not). Therefore, while no other new operators can be permitted to operate places where casino gambling as defined above occurs, any type of casino gambling would be permitted at the current locations authorized in Florida's Constitution. It is impossible to tell at this time what the Amendment actually does.

Also, the wording of the amendment seems perhaps intentionally confusing. As a County Commissioner in Broward County, Florida, and a former State Senator, I am frequently asked questions about the proposed amendments. Broward has generally been supportive of casino gambling. Many people seem to be supporting this amendment because they are supportive of expanded gambling in Florida, frustrated with the inability of the Florida Legislature to expand this gambling, and therefore believe that passing this will give more local control, enabling the voters of Broward to pass expanded gambling.

The summary of the Amendment says that "Florida voters shall have the exclusive right to decide whether to authorize casino gambling", but unless you follow the cross-reference to Article XI, section 3 of the Florida Constitution, the summary never explains whether the vote is a local vote or a Statewide vote. For example, the Platform Subcommittee of the Broward Democratic Party voted to support Amendment Three, because "#Homerule. Gives citizens the right to decide on casinos being built in their cities, instead of Tallahassee". That is almost exactly the opposite of what the Amendment does. When I explain that Amendment Three requires a statewide petition drive, followed by a statewide vote (not a local vote) and passage by 60%, Broward voters seem horrified, and then oppose it. Please note that the Supreme Court ruling permitting the existing wording was approved by a vote of 4-2. Two Supreme Court Justices ruled that the Ballot Title and Summary were misleading.

In order to begin the initiative required by Amendment Three, it would require signatures from 8 percent of the voters in each of 1/2 of the state's Congressional districts, and 8% of the total voters statewide, based on the number of votes cast in the last Presidential election. This is an amazingly high bar, and normally requires an extremely high expenditure of funds for paid petition gatherers. The Supreme Court of Florida would have to approve the wording of the proposed Petition. If all of this occurs, the proposed initiative would need 60% of the votes cast in order to pass. It is worth noting that many experts believe that Amendment Three will pass despite these obstacles. As of the date that I write this, it is estimated that the supporters of Amendment Three have raised over \$27 million dollars, without any well-funded opposition thus far.

It seems quite clear that if Amendment Three does pass, it would be extremely difficult and expensive to try and rewrite the Constitution again to undo or amend this language to permit additional types of "casino gambling" in Florida. It is clear that an investment of tens of millions of dollars would be required to attempt to change the gambling laws, with no guarantee of success. Few if any companies would be willing to make that commitment. It may make sense for the Seminole Tribe to invest over ten million dollars because if Amendment Three passes, they believe that they would have a monopoly on all new types of gambling on Florida, including Sports Betting. It would make far less economic sense for any one company, which would be one of many companies engaging in gambling in Florida, to put up similar dollars without the same exclusivity that the Seminoles (and potentially the Miccosukees) would enjoy.

Finally, one of the biggest questions remaining is whether or not the Seminole Tribe of Florida may suffer from the law of Unintended Consequences. The Seminole Tribe clearly intended Amendment Three to not apply to Seminole Gambling. The wording of the Amendment states “In addition, nothing herein shall be construed to limit the ability of the State to negotiate gaming compacts pursuant to the Federal Indian Gaming Regulatory Act...”(emphasis added) However, because of the wording that is used in the Amendment (and in a twist that only Lawyers can love), this may not be sufficient.

On November 14, 2007, and against my advice, Governor Charlie Crist signed a “Compact” with the Seminole Tribe of Florida. Former Governor Crist is a close friend, and I warned him in advance that the Governor does not have the authority to enter into a compact under the Indian Gaming Regulatory Act (IGRA). The Governor has the authority to negotiate a compact, but he does not have the authority to execute the compact without Legislative approval. When Crist signed the Compact, he was sued five days later by the Florida House of Representatives. The Florida Supreme Court decided this issue in *Florida House of Representatives v. The Honorable Charles J. Crist, Jr.*, (999 So. 2d 601). The Court chose not to take up the general question of whether the Governor has the authority to enter into a Compact with Florida Indian tribes under any circumstances without Legislative approval, although they cited to several other State and Federal decisions, and in each cited case, the Governor was ruled not to have such authority. Following judicial principles of deciding cases on narrow grounds when possible, the Supreme Court ruled that it would violate the Constitutional Separation of Powers for the Governor to enter into a compact with the Indian Tribes when the compact gives the Indians a type of gambling otherwise illegal in Florida. The Court stated at page 613:

“The House claims that the Compact violates the separation of powers on a number of grounds.⁸ We find one of them dispositive. The Compact permits the Tribe to conduct certain Class III gaming that is prohibited under Florida law. Therefore, the Compact violates the state’s public policy about the types of gambling that should be allowed. We hold that, whatever the Governor’s authority to execute compacts, it does not extend so far. The Governor does not have authority to agree to legalize in some parts of the state, or for some persons, conduct that is otherwise illegal throughout the state.”

Crist negotiated a Compact with the Seminoles, but it required Legislative approval or ratification. The wording of Amendment Three only exempts negotiation of a Compact from Amendment Three. Of course, the New Governor of Florida will be able to negotiate a compact with the Seminole or Miccosukee tribes, as Governor Crist did. However, there is nothing in the language of Amendment Three that appears to exempt Legislative approval or ratification from Amendment Three. I believe that it would have been far clearer if Amendment Three said ““In addition, nothing herein shall be construed to limit the ability of the State to negotiate and ratify gaming compacts pursuant to the Federal Indian Gaming Regulatory Act...”(emphasis added). The word ratification is missing from Amendment Three. I know that the Seminoles feel that the wording of Amendment Three is sufficient to cover both negotiations and ratification. I know that other Lawyers who I respect have a different opinion. I offer no conclusion here, but I believe that this is another ambiguity which may need to be decided by the Florida Supreme Court, if Amendment Three passes by the required 60% vote.