

**NOT  
ALL  
BETS  
ARE  
OFF**



**X FEATURE**

# The evolution of regulated sports gambling in Washington and around the country

BY BRIAN CONSIDINE AND CHRISTINE MASSE

**S**ports and gambling have been strongly tied throughout history and across cultures. From ancient Rome to indigenous communities, sports and gambling served a variety of purposes from religious to entertainment.<sup>1</sup>

The interconnection between sports and gambling in more recent times, however, has not been without its tension. The infamous 1919 “Black Sox” baseball scandal—in which there were accusations of player bribery in exchange for throwing the World Series—began the modern-day organization of sports leagues and shaped how states would come to look at sports and sports gambling.<sup>2</sup>

Sports gambling continued to gain pop-

ularity across the country over the next 70 years, including in the legal, regulated sportsbooks found in Nevada.<sup>3</sup> However, many sports leagues and legislators were uneasy with its popularity and in 1992 Congress intervened and passed the Professional and Amateur Sports Protection Act (PASPA).<sup>4</sup>

PASPA prohibited states and tribes from authorizing, offering, or conducting sports wagering and prohibited anyone from operating a sports gambling business under state or tribal law, except in Delaware, Montana, Nevada, and Oregon, where sports gambling was already permitted.<sup>5</sup>

Not surprisingly, neither PASPA nor the leagues could derail the popularity of sports gambling. Instead, its popularity only increased, with bettors using illegal local bookies and websites.<sup>6</sup> Nevada and European sportsbook companies also prospered.<sup>7</sup>

In 2012, New Jersey began its groundbreaking challenge to the legality of PASPA when New Jersey voters amended the state constitution and the Legislature authorized sports gambling. The NCAA and profes-

sional sports leagues were successful in challenging the law in 2012 and 2014 until the U.S. Supreme Court took up review in 2018.<sup>8</sup>

In *Murphy v. NCAA*,<sup>9</sup> New Jersey argued its partial repeal of all existing prohibitions on sports betting as applied to New Jersey casinos and racetracks should be upheld, and that PASPA was unconstitutional because gambling was a state regulatory issue and not an area in which the federal government could mandate

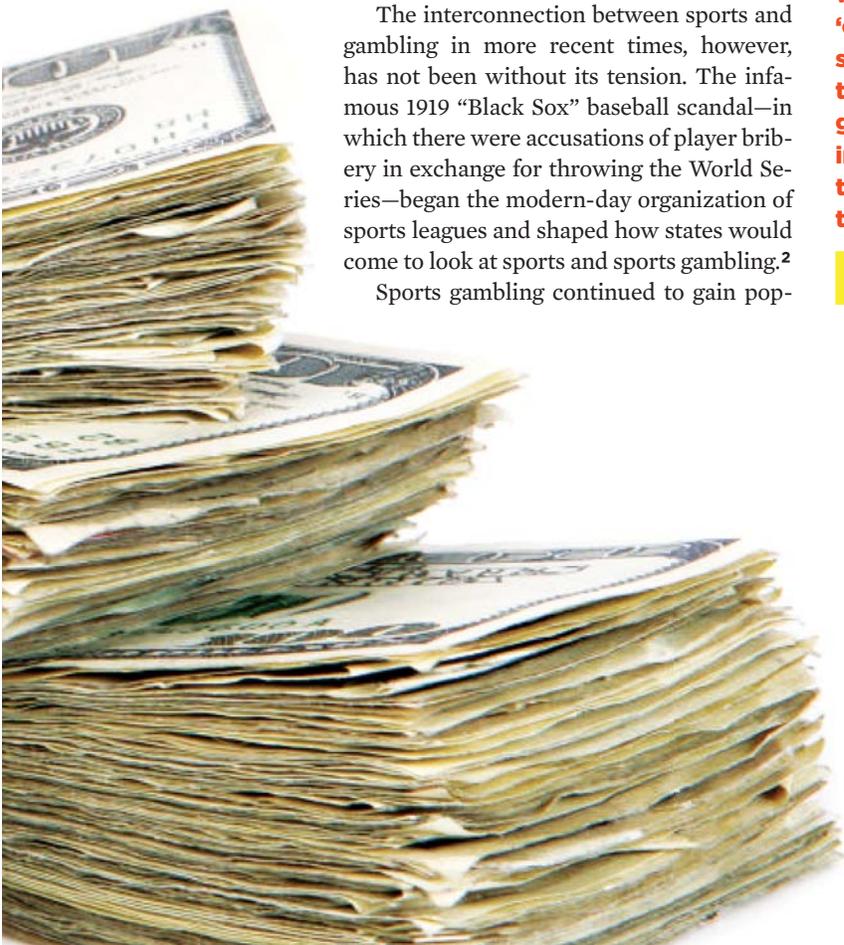
enforcement of federal regulations.

Taking the gambling industry by surprise, the Supreme Court agreed.<sup>10</sup> In a 6-3 decision authored by Justice Alito, the Court held that PASPA violated the 10th Amendment’s anti-commandeering clause. The Court found the federal government could not require states to enforce federal laws or policies. At its core, this landmark decision was based on federalism principles that Congress can pass a law prohibiting or regulating sports betting, but it cannot direct states to enforce the law.<sup>11</sup>

**The U.S. Supreme Court identified sports wagering as a ‘controversial subject,’ leaving the federal government and individual states to address the issue.**

CONTINUED >

Photo: Getty © spxChrome





## Not All Bets Are Off

CONTINUED >

However, the Court's decision did not authorize legal, regulated sports gambling or endorse it. Instead, the Court identified sports wagering as a "controversial subject," leaving the federal government and individual states to address the issue and determine whether to authorize and regulate sports gambling or continue to prohibit it.

### EXPANSION OF SPORTS GAMBLING THROUGHOUT THE UNITED STATES

After PASPA was invalidated on May 14, 2018, six states<sup>12</sup> had legal sportsbooks operating by January 2019.<sup>13</sup> Most states initially launched retail-only sportsbooks,<sup>14</sup> but New Jersey was the first to launch retail and online sportsbooks. To allow for online sportsbooks, New Jersey had to mirror its 2013 online casino gambling law requiring servers to be in Atlantic City because the state's constitution requires that all casino gambling occur there. Thus, online sportsbooks had to place their servers accepting bets in Atlantic City.<sup>15</sup>

In 2019, an additional 13 states<sup>16</sup> and Washington, D.C., authorized and/or launched sportsbooks, followed by Mon-

tana, Washington, and Virginia in 2020. The COVID-19 pandemic has stalled efforts in many states for the remainder of this year, but at least five states<sup>17</sup> may still authorize sports gambling in 2020.

### REGULATORY APPROACHES

In each state, regulators and legislators have faced common legal issues. First, they had to contend with federal laws still applicable to sports gambling, including the Wire Act and, in tribal gaming states like Washington, the Indian Gaming Regulatory Act (IGRA).

The Wire Act prohibits using interstate communications and transactions for gambling.<sup>18</sup> This likely ensures sports gambling must remain an intrastate activity until the Wire Act is amended or repealed by Congress. The Wire Act does have an exemption for news reporting and interstate transmission of information assisting the placement of a bet (i.e., lines for player account information) where sports gambling is legal.<sup>19</sup>

In tribal gaming states, the IGRA provides additional complexity that must be considered by both state and sovereign tribal governments. First, tribes and states must negotiate compacts that specifically address sports wagering. Second, tribes must follow specific regulations that limit the structure and terms of their contracts with their vendors.<sup>20</sup> And third, because the IGRA governs gaming on tribal lands, complications regarding tribal jurisdiction over online gaming can complicate internet offerings.<sup>21</sup>

The structure of the state system must also be developed, including: how sports gambling can occur (retail and/or online), where sports gambling can occur (casinos, lottery, sports venues, internet), what events can be wagered on (professional sports, collegiate sports, and/or esports), establishment of license fees and taxes, anti-money laundering and sport-integrity requirements, and strategies for addressing gambling addiction.

### WASHINGTON & SPORTS GAMBLING

Washington has a unique history with sports gambling, beginning with a ban on all gambling in its original state constitution.<sup>22</sup> In 1921, in response to the Black Sox scandal, the state criminalized bribery and corrupt playing in baseball.<sup>23</sup> In 1933, the Legislature ventured into sports gambling for the first time, authorizing horse racing and creating the Horse Racing Commission.<sup>24</sup> In 1972, the constitution was amend-



**Brian Considine** is the legal and legislative manager with the Washington State Gambling Commission. He manages the Gambling Commission's legislative, legal, rule-making, and records-management programs and works closely with the Legislature on all gambling-related issues being considered in Olympia. Considine is a graduate of John Carroll University and Seattle University School of Law.



**Christine Masse** is partner of Miller Nash Graham & Dunn and the leader of the firm's government & regulatory affairs practice group and tribal and cannabis teams. Masse specializes in representing businesses in highly regulated industries with their transactional, regulatory, and public policy needs and provides counsel to Northwest Native American tribes. She maintains a practice before the Washington State Gambling Commission relating to licensing issues and the approval and ongoing regulatory oversight of casino properties. She can be reached at [christine.masse@millernash.com](mailto:christine.masse@millernash.com).





ed to allow gambling only if authorized by a 60 percent vote,<sup>25</sup> and the Gambling Act<sup>26</sup> and Gambling Commission<sup>27</sup> were created in 1973. In 1976, the state authorized “sports pools,” a common term for sports gambling in that era, but limited betting to 100-square boards with wagers per square capped at \$1.<sup>28</sup> In 2004, the state authorized year-round off-track betting locations<sup>29</sup> and advance-deposit wagering,<sup>30</sup> for horse racing.

#### PASSAGE OF HOUSE BILL 2638

Once PASPA was overturned, the Washington Legislature began considering the possibility of authorizing sports gambling.<sup>31</sup> Similarly, due to the traction across the

country, the Gambling Commission began exploring regulatory approaches and presenting information at public meetings throughout the summer and fall of 2019.<sup>32</sup>

In January, the Gambling Commission identified five pillars it believed were necessary components of a strong regulatory structure for any sports gambling bill.<sup>33</sup> During the 2020 legislative session, two bills came before the Legislature that would

**Washington is the biggest tribal gaming state to expressly authorize sports gambling at tribal casinos.**

authorize casino-style sports gambling: House Bill (HB) 2638<sup>34</sup> authorized tribes in the state to operate retail sportsbooks at their casinos, including online access through mobile apps while a customer was on the casino premises. HB 2478<sup>35</sup> authorized sportsbooks at house-banked commercial card rooms, horse-racing tracks, and tribal casinos and allowed each licensed operator

to have one online sportsbook.

HB 2638 quickly gained momentum and passed the House of Representatives 83-14 and the Senate 34-15, meeting the constitutionally required 60 percent vote threshold. It was signed by Gov. Jay Inslee on March 25 and went immediately into effect due to the emergency clause in the bill.<sup>36</sup>

#### LAUNCH OF SPORTS GAMBLING IN WASHINGTON

The new law ushers in a historic moment in Washington. Not only does it provide a new offering to casino patrons, but Washington is the biggest tribal gaming state to expressly authorize sports gambling at tribal casinos. Additionally, the Legislature has continued its tradition of prioritizing sport integrity by passing new and enhanced match-fixing, corruption, and anti-money-laundering laws.

However, the work is not done for the state and the 29 federally recognized Washington tribes. Before sports gambling can launch, the state and tribes wishing to offer it must negotiate amendments to current gaming compacts. The Gambling Commission will also engage in rulemaking to assist in implementing an agreed-upon state regulatory structure while tribes and tribal gaming regulators will develop rules and

CONTINUED >





## Not All Bets Are Off

CONTINUED >

regulations for sportsbook operations at their casinos. There are many good models to guide the new regulatory structure in Washington, but this will take time and statewide launch of sports gambling is likely still several months away.

In the meantime, the Gambling Commission and the tribes will continue to work together to ensure that sports gambling is conducted with integrity: The state will work with professional sports leagues and teams, state universities, sportsbook operators, and tribal regulators to build a strong regulatory presence that precludes illegal local and online sportsbooks. **BN**

### NOTES

1. See Zach Schreiber, "The Time Is Now: Why the United States Should Adopt the British Model of Sports Betting Legislation," 27 *Fordham Intell. Prop. Media & Ent. L.J.* 353, 357 (2017); John T. Holden, "Regulating Sports Wagering," 105 *Iowa L. Rev.* (2020); see also 29 U.S.C. § 2703(6) (Definition of class I gaming).
2. See Nat'l Baseball Hall of Fame: <https://baseballhall.org/hall-of-famers/landis-kenesaw>. Major League Baseball hired Kennesaw Mountain Landis, a former federal judge, as the first MLB Commissioner and tasked him with ridding baseball of gambling and match fixing. The first thing he did was ban for life all eight Chicago White Sox players accused of being bribed to lose the World Series.
3. See Keith C. Miller & Anthony N. Cabot, "Regulatory Models for Sports Wagering: The Debate Between State vs. Federal Oversight," 8 *UNLV Gaming L.J.* 153, 154 (2018). According to [lexico.com](https://www.lexico.com), a sportsbook is "an establishment that takes bets on sporting events and pays out winnings."
4. See Justin Fielkow, Daniel Werly & Andrew Sensi, "Tackling PASPA: The Past, Present, and Future of Sports Gambling in America," 66 *DePaul L. Rev.* 23 (2016). Passage was noncontroversial at the time with 62 Senators signed onto the bill, including Sen. Orin Hatch (R-UT), Mitch McConnell (R-KY), Al Gore (D-TN), Bill Bradley (D-NJ), Slade Gordon (R-WA), and Brock Adams (D-WA).
5. A handful of other states, including Washington, that had some limited form of sports gambling, could keep their laws. New Jersey was given one year to legalize and establish a sports gambling regulatory system, but did not meet the deadline.
6. See Chil Woo, Note, "All Bets Are Off: Revisiting the Professional and Amateur Sports Protection Act (PASPA)," 31 *Cardozo Arts & Ent. L.J.* 569, 571 (2013); Nat'l Gambling Impact Study Comm'n, *Gambling in the United States*, 2-14 (1999), available at: <https://govinfo.library.unt.edu/ngisc/reports/2.pdf>. (In 1999, Congress published a study estimating that the illegal sports gambling market was worth between \$80 and \$380 billion annually).
7. See Schreiber, *supra* n.1, 27 *Fordham Intell. Prop. Media & Ent. L.J.* at 374; see also Fielkow, Werly & Sensi, *supra* n. 4, at 23, 24.
8. See Nat'l Collegiate Athletic Ass'n v. Christie, 926 F. Supp. 2d 551 (D. N.J. 2013); see also Nat'l Collegiate Athletic Ass'n v. Christie, 61 F. Supp. 488, 491-492 (D. N.J. 2014).
9. See *Murphy v. NCAA. & NJ Thoroughbred Horsemen's Assoc. v. NCAA*, 1138 S. Ct. 1461 (2018).
10. See *id.*
11. See *id.* "There is simply no way to understand the provision prohibiting state authorization as anything other than a direct command to the States," which "is exactly what the anti-commandeering rule does not allow."
12. Delaware, New Jersey, Mississippi, Pennsylvania, Rhode Island, and West Virginia were immediately ready to implement sports gambling because they had either passed laws prior to the Supreme Court's decision or were a safe harbor state identified in PASPA.
13. On June 5, 2018, Delaware became the first state outside Nevada to implement sports wagering, opening sportsbooks at three casinos overseen by its state lottery.
14. "Retail sportsbook" is the industry term for physical, brick-and-mortar sportsbooks.
15. See *New Jersey Sports Wagering Law*, P.L. 2018 c. 33, and *New Jersey Internet Gaming Law*, P.L. 2013 c. 27.
16. Arkansas, Indiana, Iowa, New York, New Hampshire, New Mexico, Oregon, Michigan, Colorado, Illinois, Tennessee, North Carolina, and Maine. Maine's governor vetoed the bill in 2020 and the state will now need to re-pass a bill in order to authorize sports gambling.
17. Maryland and South Dakota forwarded referendums to the voters to decide legalization in November. California tribes are attempting to have a ballot initiative authorizing sports gambling at tribal casinos on the state's November ballot. Massachusetts and Ohio appear to be frontrunners to pass legislation by the end of the year.
18. See 18 U.S.C. § 1084.
19. See *id.*
20. See 25 U.S.C. § 2710; Francisco Olea, "The Professional and Amateur Sports Protection Act: How Its Invalidation Will Impact Indian Gaming's Legal and Regulatory Framework," 9 *UNLV Gaming L.J.* 35 (2019); see also National Indian Gaming Commission Bulletin 2020-1 (Jan. 29, 2020), [www.nigc.gov/images/uploads/bulletins/2020.01.24\\_Bulletin\\_Sports\\_Betting\\_Models\\_and\\_Dec\\_Ltrs\\_%28Final%29.pdf](http://www.nigc.gov/images/uploads/bulletins/2020.01.24_Bulletin_Sports_Betting_Models_and_Dec_Ltrs_%28Final%29.pdf).
21. See Logan Blackmore, "Internet Gaming On & Off Tribal Lands," 43 *Amer. Indian L. Rev.* 389 (2019), <https://digitalcommons.law.ou.edu/ailr/vol43/iss2/4>.
22. Article II, Section 24: "Lotteries and Divorce. The legislature shall never authorize any lottery or grant any divorce."
23. See RCW 67.04. The recent MLB cheating scandals involving the Astros, Yankees, and Red Sox would all be punishable under our state's 1921 integrity laws if the players and coaches involved had cheated while playing the Mariners in Seattle.
24. See RCW 67.16.012.
25. Article II, Section 24 as amended in 1972 now reads: "The legislature shall never grant any divorce. Lotteries shall be prohibited except as specifically authorized upon the affirmative vote of sixty percent of the members of each house of the legislature or, notwithstanding any other provision of this Constitution, by referendum or initiative approved by a sixty percent affirmative vote of the electors voting thereon."
26. RCW 9.46.
27. See RCW 9.46.040. The Washington State Gambling Commission was the second ever created in the U.S. and only the Nevada Gaming Control Board is older.
28. See RCW 9.46.0335. The law established "sports pools" and limited them to hundred-square boards you may find at Super Bowl parties or at your local bar.
29. See RCW 67.16.200.
30. See RCW 67.16.260.
31. See HB 1975 (tribal-state gaming compact authorization): <https://app.leg.wa.gov/billsummary?BillNumber=1975&Year=2019&Initiative=false> and HB 1992 (tribal-state, horse track, card room authorization), <https://app.leg.wa.gov/billsummary?BillNumber=1992&Initiative=false&Year=2019>. HB 1975 was only bill to receive a hearing and passed out of committee.
32. See WSGC Public Meeting materials May 2018 through November 2019 at: <https://wsgc.wa.gov/commission/public-meeting-archive> and <https://wsgc.wa.gov/news/sports-gambling>.
33. Five areas that must be addressed are: (1) Licensing and Regulation; (2) Agency Funding; (3) Money Laundering and Criminal Enforcement; (4) Sport and Gambling Integrity; and (5) Responsible and Problem Gambling.
34. See HB 2638: <https://app.leg.wa.gov/billsummary?BillNumber=2638&Initiative=false&Year=2019>.
35. See HB 2478: <https://app.leg.wa.gov/billsummary?BillNumber=2478&Initiative=false&Year=2019>.
36. See 2020 c 127 §15.

**GET PUBLISHED**

See Your  
Name in  
Print!

Would you like to write for the WSBA's award-winning magazine, *Washington State Bar News*? All interested WSBA members are highly encouraged to fill out this brief form to be considered for future author recruitment:  
<https://forms.gle/J8pcUiHxcMjdQaJu5>.



**QUESTIONS?**

Contact [wabarnews@wsba.org](mailto:wabarnews@wsba.org).



**WASHINGTON STATE  
BAR ASSOCIATION**

# APPEALS

OVER **600** CASES ARGUED ON THE MERITS

JASON W. ANDERSON | LINDA B. CLAPHAM\*  
RORY D. COSGROVE | MICHAEL B. KING\*<sup>o</sup>  
JAMES E. LOBSENZ\*<sup>o</sup> | GREGORY M. MILLER\*  
SIDNEY C. TRIBE

<sup>o</sup>Fellow, American Academy of Appellate Lawyers

\*Founding Members, Washington Appellate Lawyers Association

CARNEY

BADLEY

SPELLMAN

(206) 622-8020

WWW.CARNEYLAW.COM

*When you need advice on attorney fees, an evaluation of fees, a declaration on fees, or testimony on fees—CALL US.*

***Our seminal law review article on attorney fees in Washington is:***

*The Lodestar Method for Calculating a Reasonable Attorney Fee in Washington,*  
52 Gonz. L. Rev. 1 (2017)

***We have a track record of success in fee cases:***

Estate of Hunter (\$2.8 million fee award in arbitration)  
Easterly v. Clark County, 2 Wn. App. 2d 1066 (2018)  
Arnold v. City of Seattle, 185 Wn.2d 510, 374 P.3d 111 (2016)  
Bright v. Frank Russell Investments, 191 Wn. App. 73, 361 P.3d 245 (2015)  
Tupas v. Washington State Dept. of Ecology, 191 Wn. App. 1036 (2015)

**Knowledgeable ♦ Experienced ♦ Efficient**

**TALMADGE  
FITZPATRICK**

206-574-6661 ♦ [www.tal-fitzlaw.com](http://www.tal-fitzlaw.com)