Wanna Bet?

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another "five-minute bite of background about the Court and Constitution."

The Court's mid-May decision in *Murphy v. National Collegiate Athletic Association* got substantial news coverage because of the outcome. A six-justice majority in *Murphy* invalidated the 1990's Professional and Amateur Sports Protection Act, which had prevented state and local governments from operating sports-betting schemes or authorizing private casinos and individuals to do so.

No wonder, then, the public attention. As Justice Alito's majority opinion noted, "Americans have never been of one mind about gambling" in general or sports gambling in particular.

But beyond the high social and economic stakes on the table in *Murphy*, the recent decision illustrates three important Supreme-Court-litigation facets.

First, *Murphy* is noteworthy because the issue it supposedly turned on didn't ultimately divide the justices. (This happens from time to time, and provides Court watchers with some refreshing unpredictability!)

The big controversy in *Murphy* appeared to center on federalism. As I've profiled in previous podcasts, federalism (the unusual arrangement by which our national government coexists with strong independent state power sources) has created ongoing fights over constitutional dynamics. The particular federalism dispute in *Murphy* centered around the so-called "anti-commandeering" principle; this two-plus-decades-old constitutional doctrine holds that the federal government violates the respect due state sovereign powers and undermines voters holding the right officials accountable when it dictates how states should use their legislative or executive powers. Congress can offer states a *choice* to dance the federal tune (for example, in order to receive federal funding). But Congress can't force a reluctant state partner onto the dance floor.

Lower courts and litigants gave the justices detailed and starkly different versions of whether the disputed anti-sports-betting federal-law provision violated the "anti-commandeering" limit. But none of this much mattered. Seven justices – including Justice Breyer, who would have saved Congress' anti-sports-gambling impulse on other grounds – found the disputed section to be unconstitutional dictation to States. Even the remaining two justices (Justices Ginsburg and Sotomayor) couldn't muster enthusiasm to argue *for* the disputed statutory snippet; instead they "assumed" the controverted section's "alleged" illegality and rooted their disagreement in other grounds.

These grounds bring up the second legally interesting aspect of *Murphy* – the bigger fight among the justices about whether the *unconstitutionality* of the disputed section

required that *other* key statutory sections be invalidated as well. This issue – known as "statutory severability" – is not strictly a constitutional issue. But severability often accompanies – and sometimes affects – how justices view constitutional disputes.

Once a majority invalidates part of a statute, it faces the question of whether Congress would want related provisions to remain on the statute books or instead "would not have enacted" the remainder if it couldn't have the now-invalid part. As the phrasing implies, discerning *hypothetical* legislative intent can be even more difficult than gauging what Congress *did mean* by enacting the law it did.

Murphy shows the difficulties severability poses: the justices divided – interestingly enough, not along purely ideological lines! – on these questions: 1) Without the challenged statutory provision, would *private* sports-betting still be outlawed? 2) If not, would Congress still want *states* to stay out of the sports-betting business? Six justices answered no, and so struck down the entire law.

Finally, *Murphy* is a pointed reminder of the high political gamble that congressional-intent rulings pose. In theory, if the Court gets it wrong, Congress is free to reinstate its judicially misunderstood intent by enacting a new law. In practice, legislative correction often founders on a very different political and social landscape. For example, the 1992 federal law at issue in *Murphy* reflected quite different societal and legal attitudes about sports, gambling, state-revenue needs and a very different alignment of interest groups.

In reality, then, any Supreme Court statutory resolution may be – to risk one last gambling metaphor – the only "sure bet."