How SCOTUS May Rule on Potentially Seismic Cases for Business and Society
Sam Gandhi, Carter Phillips and Kwaku Akowuah
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Sam Gandhi:

Hello, I'm Sam Gandhi and welcome to *The Sidley Podcast*. In our annual Supreme Court episode, we present my talk with two of Sidley's experienced Supreme Court lawyers, Carter Phillips and Kwaku Akowuah. Shortly after we recorded this episode, the justices heard oral arguments in the Harvard and University of North Carolina cases. The issue before the court was whether colleges and universities can continue to take race into consideration in admission programs. Carter and Kwaku observed that the majority of the justices appeared skeptical that the continuation of affirmative action in higher education admissions could be justified. We hope you enjoy this episode. We think it provides valuable insights on how this very significant term of the Supreme Court will play out. Now on with the podcast.

This could be the most controversial Supreme Court term ever. After overturning *Roe v. Wade*, the court now considers more profound change in election law, affirmative action, and regulations affecting business. As the court welcomes a new justice, it faces continued questions over its own legitimacy and how far the conservative majority will go. In today's podcast, we'll find out what's next for this term's Supreme Court.

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Kwaku Akowuah:
The business community's concern is if you lack viability, you rest on internet service providers in those circumstances there are very difficult decisions to be made about whether the internet can continue to exist as it has.

Carter Phillips:
If you accept the argument that the state legislature has unbridled discretion to decide time, place, and manner with respect to all federal elections, there's a lot of opportunity for mischief.

Sam Gandhi:
From the international law firm Sidley Austin, this is *The Sidley Podcast* where we tackle cutting edge issues and the law and put them in perspective for business people today. I'm Sam Gandhi. Hello and welcome to this edition of *The Sidley Podcast*, episode number 30.

Today we speak with two of Sidley's experienced Supreme Court advocates Carter Phillips and Kwaku Akowuah about the Supreme Court's new term, the arrival of Justice Ketanji Brown Jackson, and how the justices may rule on potentially seismic cases for businesses in society.

Carter is a partner in the firm Supreme Court and Appellate practice and is one of the most experienced supreme court and appellate lawyers in the country. Since joining Sidley, Carter has argued 80 cases before the high court, more than any other lawyer in private practice. Prior to joining Sidley, Carter served as an assistant to the Solicitor General. In that position, he argued nine cases before the Supreme Court on behalf of the U.S. government. In all, he's now made 89 oral arguments before the court and more than 145 before the U.S. Courts of Appeals.

Kwaku was the co-chair of the firm's Supreme Court and Appellate practice. His work encompasses traditional appellate litigation, administrative law disputes, contract disputes, and pre-litigation counseling. Prior to joining the firm, Kwaku served as a law clerk to Justice Stephen Breyer of the U.S. Supreme Court. Carter, Kwaku, great to have you on the podcast.

Carter Phillips:
Happy to be here Sam. Thanks.

Kwaku Akowuah:
Thanks for having us.

Sam Gandhi:
For the first time ever in *Dobbs v. Jackson*, the high court took away a fundamental constitutional right, the right to abortion that we've had for over five decades. A monolith university poll now finds it nearly six in 10 Americans say the court is out of touch with the country and that opinion has crystallized even further since the *Dobbs* decision. And when we're recording this we're about two weeks away from the midterm elections and at least the Democrats have made that ruling a significant political issue for the election.

In light of the ruling, even the President recently said that the Supreme Court was more of an advocacy group than even-handed. So, Carter as a long time Supreme Court practitioner how do you process this new environment in which the court's legitimacy is being called into question, not just by people but the President himself.

Carter Phillips:
Well, I got 40 years of experience advocating before the court and for all of that 40 years whenever I describe myself as a Supreme Court lawyer that almost immediately generated reactions ranging from deep appreciation sometimes even to awe, etcetera. I will say in the last six months saying that I'm a Supreme Court advocate has generated slightly different reactions, at least in some categories about where the court standing is somehow my fault or the fault of the advocates, and I consistently say no, I don't think so.

But you know, it's changed the environment to some extent. It certainly changed the public perception of the court. I think it's important to keep in mind that the public's perception is generally driven by about five to 10 cases out of the 60 to 70 that the court decides every year, and they are important cases to be sure, and they justifiably generate serious scrutiny. But the reality is the court decides the other 90% of the cases or maybe even more than that and on that score, those are non-ideological cases where I think the court is at its very best, and I think it's important in thinking about the legitimacy of the court to focus on the significant cases that the court decides that don't have the landmark quality to them but are very, very important to the constituencies whose interests are being resolved by the Supreme Court.

So, if you look at that and you focus on that I think there's no question about the legitimacy of the court or even candidly the quality and efficiency of the court. I understand the issue with respect to some of the other cases. It's not unlike what's happened in the past.

Obviously, the Supreme Court has been a focus of real attention at certain points in our history such as right before the Civil War with decisions that came down there, and then the wake of the Great Depression when there was obviously a significant amount of controversy with regard to how the court was resolving issues that helped with the depression.

This is another one of those times in history. I've been able to avoid for the first 40 years, but I guess my ultimate bottom line here is I think this too will pass with time.

Sam Gandhi:
Kwaku, what's your view about the questions that have been raised about the court's legitimacy in the term going forward?

Kwaku Akowuah:
I think it's interesting Sam. I think people have different ideas about legitimacy or maybe legitimacy is one of those words that can have shades of different meaning. One version of legitimacy or a suggestion that the courts lost its legitimacy would be people are no longer going to pay attention to its holdings and its judgements.

The Supreme Court faced that kind of legitimacy crisis in the wake of *Brown v. Board of Education*. I don't think we're anywhere close to that today. An atmosphere in which people will say they wrote it down on a sheet of paper, who cares. We're not there and I certainly hope we won't be.

Another version of legitimacy might be something more along the lines of well the Supreme Court can have its views, but they don't have the effect of settling controversies in public life. People will look to other sources or other forms of discussion to have a conversation about what the Constitution and the laws of the United States do and should mean. We might be in that kind of era where the Supreme Court is just less conclusive

and less of a driver of cultural and political debate in the sense of settling disputes.

Maybe we've been there for a long time. Maybe that's where we always should be, but it does feel like to my mind the Supreme Court has less of the marble posture where everyone says the Supreme Court has its say and now we're done. I think we're not really in the era in the same way.

Sam Gandhi:
If you don't think we're there yet what do you think would result in us being there?

Kwaku Akowuah:
Being there in the sense of a place where people no longer will follow the judgements of the Supreme Court, I don't know.

Sam Gandhi:
I mean, call it faux illegitimacy if we're not at that point yet.

Kwaku Akowuah:
I don't think we're really anywhere close to that point, right. In terms of are people angry and upset about decisions in the Supreme Court including *Dobbs*, absolutely. Are people saying it just doesn't matter the Supreme Court or a lower court entered a judgement in reliance on what the Supreme Court thinks? I haven't seen that. I think you'd have to get into a real place of crisis before the position of the Supreme Court in that way were challenged, but I also think that the less dramatic version of legitimacy matters, right.

It matters to whether people think of the Supreme Court as an apolitical place, whether they hold the Supreme Court in very high esteem or do they start viewing the Supreme Court much like Congress, an institution that's not particularly popular and not held as a place of high regard. I think that matters to the Supreme Court and I think it matters to our public institutions as a whole. And I do think you could approach that kind of place and then some corners of the country I think we are there.

Sam Gandhi:

Carter let me come back to you on one of the things that preceded *Dobbs* which was somewhat unique in what we've ever seen which was the leak and that before the *Dobbs* decision was issued it was of course leaked to the public when *Politico* posted a draft version of majority opinion. What impact in your view has the leak had on how the justices communicate with and possibly trust each other and what potential effects can that have on how the court behaves going forward?

Carter Phillips:
Well, Justice Thomas reacted to the leak at one point by expressing at least some discomfort with the state of the court itself and from his perspective the court was in a less comfortable position, at least as he viewed it, than it was back when William Rehnquist was the Chief Justice.

I'm not sure exactly what other changes may have influenced his thinking about this, but I have no doubt that the leak caused some consummation on his part. And realistically it's hard to imagine the leak not affecting how the justices interact because the operating assumption within the court and this applies as much to law clerks as to the justices is that what goes on inside the court stays inside the court. And while there have been leaks of information in earlier times there's never been the leak of a full fledged opinion in a draft version that was drafted months ahead of the issuance of the opinion and was released weeks before the opinion was released. So, you had the opportunity to look at how the draft varies with respect to the final product, etcetera.

So, that's a complete breakdown in a working assumption of confidentiality within the court and I do think it will affect to some extent access to information, and when they get access to that information, Kwaku can speak to this as well as I can, but at least when I was clerking there was an easy flow of communication among justices and particularly among the law clerks of various justices. I would worry about whether that would break down. Again, it may not make much difference in terms of how the court deals with the high visibility issues.

The truth is, if the court becomes more complicated in how it decides the 90% of its business that really keeps the institution going that would be really significant negative consequence of this leak. The other interesting thing of course is the Marshal of the Court has authorized to investigate,

and we're all sort of sitting back waiting to see whether we'll ever find out who was the source of the leak and what was the motivation for the leak.

And even if the court finds out that information whether it will be leaked out or otherwise released by the court once that investigation is concluded, that might help depending on who was the source of the leak. If it's not a justice and it's not a law clerk and it's just somebody in the court that will probably be good news candidly, so that the working operations of the court in terms of how the decision makers and those who directly aid the decision makers operate could go back to the way it was.

Sam Gandhi:
Kwaku, what's your thoughts here on the leak and how that affects how the justices behave?

Kwaku Akowuah:
I agree with Carter. I think it's tremendously corrosive of the court's ordinary processes and the way that the court thinks about itself. I think the Supreme Court thinks of itself as distinct among Washington institutions as being a place that doesn't leak, that has been very successful in holding its internal deliberations internal at least until the justices release their papers which traditionally has been decades after they've left the court.

So, to have this kind of release of information in the middle of the court's deliberations just as a seat change can't be welcome to any of the justices. That's in part because anyone who's worked inside the court knows that the first draft is sometimes just a first draft. It can move very significantly from one draft to another as feedback is received both from people who plan to join the majority opinion, people are thinking about running concurring opinions, justices considering or committed to writing dissenting opinions.

So, for the possibility of one of those midstream drafts to end up, the reality it can end up, in the front pages of the newspaper is really quite a shift. You could imagine justices reacting to this by saying I won't share drafts as broadly. I'll wait until they get to a deeper place of finality before I'm ready to release a draft because I don't want a true working draft to get released. I'll only pass it around within a circle of trust or they'll be conversations

rather than drafts exchanged and all of that would make the courts work less efficient and probably worse frankly.

Sam Gandhi:
With the combination of the leak, the questions from the public of the court's legitimacy as well as some of the security issues and violence directed at certain of the justices, do you think any of that affects the product or the opinions or the direction that any of the justices may take in terms of being less bold, less courageous, more conservative — not in the political sense of that term — but more measured about their opinions or actions going forward, like for instance the cases they may be willing to take?

Carter Phillips:
I think it's premature to try to evaluate that because obviously the release of the opinion came relatively late in the term, and I certainly didn't see any changes immediately in terms of the opinions themselves and the Alito draft did not morph into something significantly different in the final opinion of the court. There were a few changes at the margins of some of the writing, but nothing significantly changed. We'll see now.

We have a new term, new set of issues, obviously some controversial, and we'll get a better sense I think as to whether this has fundamentally altered how the justices are operating and whether you can see a difference in terms of not necessarily the quality of the work. But let's see how the court does in terms of the timeliness of the work and whether there's some kind of a disconnect there that you could attribute at least in some ways to the shifts and how the justices are being perceived and on how they operate among themselves.

Sam Gandhi:
Kwaku, what's your thoughts on that?

Kwaku Akowuah:
You know, as Carter says it's probably too soon to say for sure. I think the justices would be very reluctant to allow the perception that controversy let alone security threats change the way the institution works in terms of the kinds of cases that they hear and how they decide them. I'm sure they would all take the view that if you let that particular cat out of that bag you'll

never have the end of people trying to drive up controversy around the Supreme Court to affect the way that it makes decisions.

So, I'm sure that the presentation that they will try to make will be much like what the Chief Justice said after the *Dobbs* leak occurred, that this will not affect the work of the court. The harder question is whether despite what they say, and what I think they will intend to do, it could have some effect. I think we're just not going to have a good answer to that for some time.

Sam Gandhi:
We have seen a little bit of a window into the court's actions with the new Justice of the Supreme Court, the Honorable Ketanji Brown Jackson who has already made an indelible impression, and last month and just her second day on the bench in a case involving a dispute over Alabama's congressional district map, Justice Jackson spoke about the Constitution's 14th Amendment and its goal to address historic harms to Black people. It was a moving moment inside the courtroom in which only three Black justices had ever sat.

So, Kwaku, based on what we've seen so far, what impact do you think Justice Jackson can have on this conservative majority court and we should say that you clerked for her predecessor Justice Breyer whose seat on the court she's taken. So, feel free to weigh in on what Justice Breyer's retirement will mean for the court as well.

Kwaku Akowuah:
Let me start with the personal reflection on my time as a law clerk for Justice Breyer now a decade ago and his tenure on the court. I think that Justice Breyer what you saw from him on the bench is very similar to what we experienced as his law clerks.

You've got someone with enormous intellect who cared very, very deeply about the pragmatic consequences of the Supreme Court's rulings and understanding that the United States is a very big and very complicated place and in which the Supreme Court is only one actor out of many that count.

Congress counts and the President counts and all the companies and all the citizens they count too, and each of them will have a say in how the law

works in practical effect. So, his hypotheticals, his multi-factor tests, some of those were for purposes of good humor, but I think all of them ultimately were driving at how do we come to decisions as a court that will work in real and work for the purposes of ensuring that the law reaches just outcomes.

So, I think to remove someone like that from the Supreme Court is inevitably a loss. For those of us who are in the Breyer clerk family there's certainly a measure of gain too because Justice Jackson is one of us. There's a sense of joy in seeing a Breyer clerk take the boss's seat on the bench.

In terms of your first question Sam, what influence can she have on the conservative majority, it's hard to say. I mean, she starts out from a difficult position of being one of three Democratic appointees out of the nine. So, one easy was is to say look at the math. A majority can be reached without Justice Jackson or any other left wing Justice in any case the court chooses to decide.

So, I think her influence may come from her ability to shape the conversation, and I think maybe that's some of what you saw in the Section 2 case. She took an opportunity to articulate a position about the meaning and scope and purpose of the 14th Amendment that I think likely wouldn't have been articulated by anyone else in exactly the same kind of way, and it shaped the public conversation around that case, and it shaped to some degree I think the argument within the court.

So, to the extent she has influence would be partly there, how does she shape the conversation, and then it will be in the parts of the work of the court that we don't see. The relationships that she has and builds with other justices and the lines of communication and the behind the scenes conversations and how they shape the court's decisions about what cases to take and how they're decided.

Sam Gandhi:
Carter, you argued before Justice Breyer for years and years and years and what are your views now on Justice Jackson and how do you prepare for an oral argument with her on the bench.

Carter Phillips:
Let me at least give one tip of the hat to Justice Breyer before I answer the question about Justice Jackson. I did argue 69 times in front of him. I cannot say that I convincingly persuaded him on a frequent basis that my client's position was correct, but it was always a pleasure to appear before him because he was incredibly genteel in his approach even if his hypotheticals were a bit wild.

The one thing as a lawyer standing at a podium that I deeply appreciated about Justice Breyer was because his questions tended to have multiple parts and would go on for a while, it was an excellent opportunity to grab the glass of water that stands behind the podium and for those of us who suffer a bit of dry mouth to get a little refreshment knowing that he wasn't going to stop his question at a point where you're in mid-drink. So, that worked out. That was very nice.

I gather that Justice Jackson has already made a bit of an impression by asking not quite those same wow hypotheticals but asking questions that are multi-pronged and therefore take a little while to get through at least via reading the transcript. So, maybe she'll be the source of additional refreshment for me going forward.

In terms of preparing for oral argument it's a little trickier now. I think I had a pretty good sense of what I thought Justice Breyer might ask and I suppose I can view Justice Jackson to some extent as a bit of a surrogate for Justice Breyer, but the truth is she comes from a very different perspective and background and I'm going to have to figure out how she'll react. I don't think I can prejudge on any particular case. I may know how I think she'll come out or at least I have a guess as to how she'll resolve the issue but how she'll ask questions in that regard is to my mind much harder to tell.

You know, and as far as her impact on the court generally, it may be cliché that Justice White said every justice changes the court in some fundamental ways, but you know, the truth is she has a very different background and I can remember from clerking back in the Burger era that Justice Marshall because he had a very different background and was listened to in ways on some kinds of issues and I do think it made a difference.

Whether it will make a difference on the highest most visible questions I don't know but my guess is that Justice Jackson will find ways to inject into the conversations with the other justices' different ways of thinking about problems and it will alter their perspective. Will it switch votes at some point, time will tell, but I do think White was right, every new justice has something new that he or she brings to the table, and it affects how the entire court operates.

Whether it'll make a difference in a handful of big visibility cases hard to judge at this point, but I suspect in a lot of other cases it will make a difference.

Sam Gandhi:
Earlier I said that we're recording this podcast on kind of the eve of the 2022 midterm elections but in fact the 2024 election is in many ways under way, a fact that invariably impacts the Supreme Court this term. It's already set to hear arguments on the election law case involving legitimacy of a controversial legal theory the independent state legislature's doctrine, and *The New York Times* said that if the court adopts this theory it will radically reshape how federal elections are conducted.

Carter, on behalf of the firm you represent the conference of Chief Justice as a group representing the top state judicial officers in the nation and they filed a brief in the Supreme Court in the case concerning this theory. What's the significance of this case?

Carter Phillips:
The name of the case is *Moore v. Harper*. It's a redistricting case. So, it doesn't come up in the context of what the state legislature does in response to a specific electoral dispute that might arise in any of the closely divided states that could come up, but the basic question that has arisen is essentially who gets to be the final decision maker on behalf of the state with regard to the time, manner, and place of federal elections. Okay. We're talking about federal elections here.

Article 1 Section 4 says that these rules will be prescribed in each state by the state legislature and the question is when the Constitution refers to the legislature specifically does it really mean to invest in the legislative body of the state, essentially unchecked authority, other than perhaps by the U.S.

Supreme Court to decide what is an appropriate time, place, and manner restriction or time, place, and manner provision for handling federal elections.

The progressive position that's been put forward by a petitioner, and some of it is *amici* in this case, is yes that's exactly what happened here. The constitutional framers wanted the state legislature to have complete authority into the exclusion of the, certainly the exclusion of state courts deciding whether or not the issue was constitutional under the state, whether the statute was constitutional under the state.

I'll give you a very concrete illustration of what might be the concept. So, the Constitution of the state may say that all elections should be conducted with a secret ballot because that was a big ticket issue at the time of the framing of the Constitution whether ballots are going to be secret or not. Some states have provisions that specifically say there will be secret ballots.

Let's say the legislature comes up and enacts a statute that says no, we're in an emergency. We're worrying about fraud. Everybody has got to show up, you got to raise your hand. You got to vote in this particular way. It's the time, place, and manner for conducting a federal election. It's clearly unconstitutional in the state Constitution. And so, the question is does the state legislature trump the state Constitution under those circumstances and can therefore dictate whatever rules it wants subject only and ultimately to whether something might violate the federal Constitution.

The broadest state legislature theory presumably would also preclude something like the governor vetoing state legislation, right, because the state legislature has enacted it and has promulgated it therefore by that reading of the Constitution that should be the end of it.

The Supreme Court long ago held that governor vetoes are in fact included as part of promulgating by the state legislature that that means the ordinary state law operations, and I would argue that the state law operations are just as much a part of those operations as the governor's veto is and therefore what the framers had in mind was not that the legislature would get some preeminent authority but that the legislature would be the body

that would start the process subject obviously to veto and other provisions that are out there.

It is interesting in the redistricting context in this particular case in North Carolina that the legislature itself provides for judicial review of the redistricting maps that were drawn and that the state court has in fact adopted interim temporary maps.

So, in addition to the question of whether the state legislature has all encompassing power, even if you granted that you might still say doesn't that power include the ability to delegate to the state courts the opportunity to decide what the appropriate map should be under the state Constitution.

So, there are two issues in there but the bottom line, the reason why *The New York Times* has a provocative editorial is if you accept the argument that the state legislature has unbridled discretion to decide time, place, and manner with respect to all federal elections, there's a lot of opportunity for mischief that could be developed in there depending on whether one particular party could get ahold of the state legislature and get it to adopt legislation that maybe even postdates the actual election but nevertheless might be framed as time, place, and manner of how the counting takes places, etcetera.

Sam Gandhi:
You're listening to *The Sidley Podcast*. We're speaking with two of Sidley's experienced Supreme Court advocates, Carter Phillips and Kwaku Akowuah about the new Supreme Court term, crucial cases that are being heard, and the fallout after the *Dobbs v. Jackson* decision. So, last month the Supreme Court heard oral arguments *in National Pork Producers Council v. Ross*.

The case essentially asked whether California is permitted to enact an animal cruelty law that the industry says could have a monumental impact on how pork is produced in every state around the country. *Bloomberg Law* headlined it this way: "Supreme Court Pork Court Case Could Provide Road Map for Moral Warfare." Kwaku, what do you think of Bloomberg's characterization and how significant is this case?

Kwaku Akowuah:
Sam, you know, I would have thought that was a pretty strange headline for a case about the commerce clause of the United States until I heard the argument itself and the argument did feature a lot of discussion about the moral implications of the law being challenged and the moral power of the state legislatures to enact legislation. So, it may be worth just taking a step back for a second. What's this case all about?

The commerce clause of the Constitution expressly gives Congress the right to regulate interstate and foreign commerce. That much is clear. It's a pretty old idea in constitutional law that that has a negative or dormant or flip side effect that states can't regulate interstate and foreign commerce. That's the exclusive domain of Congress. It sounds cut and dry maybe from the beginning, but you pretty quickly run into the problem that anyone engaged in business understands that almost any local law can have some effect on interstate and foreign commerce.

Take something like a speed limit. So, you can only go 20 miles an hour down this road. Well, if your plant is on that road, that's going to affect the flow of inputs in and outputs out of your plant and can have knock down effects down the line. So, from the beginning the Supreme Court has recognized this basic dichotomy and then struggled frankly to apply clear and consistent rules about how to distinguish between the local law making that's basically just life and the kinds of local and state rules that either on purpose or effect step on Congress's authority to regulate the international and interstate commerce.

So, this is one further working out of this 200 year old debate about exactly how far is too far for state and local officials to go. The law here adopted by a referendum in California says that pork can only be sold to consumers in California if it was raised in a manner that is consistent with humane treatment standards adopted by California. Two facts are highly relevant to understanding why the Pork Producers Council is in the Supreme Court arguing about this.

One is that almost no pork is raised in California. Almost no pigs are raised in California for slaughter. It's something like 99% of the pork that is consumed in California is raised outside of California. The other fact at least as alleged by the challengers is that almost none of the pork that's

raised today meets the new California standards. So, the practical effect we're told is that the California law will effectively restructure the way that pigs are raised for sale and slaughter in the United States as a whole and that they say goes too far.

So, you have this very interesting kind of dispute about California adopting a law in its most direct application of what's for sale in a supermarket in California is quite local but with potentially dramatic national effects, and if you apply that across industry after industry after industry you can see how a decision along almost any lines could have impacts for business in the United States.

To come back to the moral question, one of the drivers of this case seems to be the notion that what California is really doing here is making sure that the state, its consumers are not complicit in animal cruelty. That comes both from in fact what motivates the law but also that it sounds like, and again relying here on what the challengers are saying, California has almost nothing to say about how its humane treatment laws ultimately affect consumers.

So, there's not a good argument or there's not a good scientific basis it's said for the view that California consumers will be safer, will have better or more nutritious products, if this humane treatment law stands. So, then the weight of the law comes down to well does California have another justification and the justification that's been predominantly relied on is this idea of not being complicit in inhumane treatment of animals which of course has a significant moral component.

The other reason why morality is at play here even though this has nothing to do with the suit directly or this case directly is that abortion is in the background and the after effects of *Dobbs*, and so, when you hear justices saying well can a state say we in our businesses, in our consumers won't be complicit in amoral conduct, one thing that people should be hearing is a debate and kind of through this proxy case about to what extent states can regulate in state activity or in state actors in a manner that touches on people attempting to procure an abortion outside the state.

So, for both of those reasons, this case could have very significant ramifications. My own view is I think and I hope the Supreme Court will

steer away from thinking about this in moral terms because I think that is just going to be a quagmire. Almost every state regulation can be defended in some way by describing it as having a moral component.

Again, you come back to traffic laws. You can say well protecting people who are pedestrians or drivers on the street is a moral component and that is certainly true and always true. It just doesn't advance the conversation very far. I think the court will do better to pull it back to the commercial standpoint, but I think *Bloomberg* is right to say if you listen to an argument into the way that the justices and the advocates were talking about this case, the right of states to make moral judgements did seem to be very significantly part of the conversation.

Sam Gandhi:
Carter, what are some of the other cases that have implications for businesses in the upcoming term?

Carter Phillips:
Sam let me start by kind of a disclaimer here to some extent I suppose. There are cases that the business centers are usually most focused on are anti-trust, securities, class actions, punitive damages, some of the bigger statutory issues that are flowing around. The court doesn't have any of those kinds of cases at this point this term. So, what the traditional case law that the business community is most concerned about is just not there.

There are nevertheless a couple three cases, the pork producers' case is one that will significantly affect how states can regulate out of state businesses. The second one, which is also another case about one state regulating out of state operations is *Mallory v. Norfolk Southern*. I should tell you I represent Norfolk Southern in this case, so you can discount my presentation of it to some extent at least as obviously I have a biased release. I have a dog in the show.

It's an interesting case in the sense that every law student will know something about this case if you've been through Civil Procedure I. it's probably the only reason in my 40 years in practicing where I went back and read *Pennoyer v. Neff* again just for fun because it was actually germane to this case. The circumstances are pretty straightforward.

A Virginia resident sues a Virginia corporation, Norfolk Southern, who's principle place of business is in Virginia on injuries that were caused by exposure to either asbestos and or other carcinogenic materials and the exposure took place either in Virginia or in Ohio where sometimes the plaintiff worked.

The lawsuit then went to the courts naturally. Filed in the court of common pleas in Philadelphia, Pennsylvania. The reason for filing in Pennsylvania I gather is because the plaintiff's lawyer lives in Philadelphia and Philadelphia is generally regarded as a pro-plaintiff jurisdiction for litigation. So, it was a classic form shopping.

The Supreme Court almost a decade ago decided the *Daimler* case which was a pretty important decision at least viewed at the time for the business community because it said that for purposes of general jurisdiction, that is to be sued on any cause of action regardless of whether the action arises on a basis of local activity.

So, you could be sued for whatever you did anywhere in the world. In order to be subject to that kind of a lawsuit can only be where the corporation views itself as at home and that the prototypical examples of that are expensable place of businesses or its incorporated. In this particular case, those would be Virginia and that for all other litigation if you want to force the corporation to litigate outside its home jurisdiction they would have to be on a basis of specific jurisdiction. That is on causes of action that arise from the activities of the state in that particular state.

So, arguably in the facts of this case, had they filed this lawsuit in Ohio where the claim is that the plaintiff was exposed to the carcinogens in Ohio that would be an appropriate place to exercise specific jurisdiction. Pennsylvania can only exercise general jurisdiction, which it has a statute that says…has two statutes actually.

The first one says you must register to do business in order to do business in the state, and the second one says if you are registered to do business then you can be sued on the basis of general jurisdiction or on the basis of any claim that may exist anywhere in the world under these circumstances.

Interesting, the Pennsylvania Supreme Court declared the statute unconstitutional. It said that it was inconsistent with the *Daimler* decision and that the notion the petitioners put forward is that by registering to do business the corporation effectively consented to being sued on the basis of general jurisdiction in Pennsylvania was not a legitimate use of the concept of consent.

Consent ordinarily arises as a transactional matter for a particular deal or problem. It doesn't grant consent to being sued by anyone under any circumstances. So, the Pennsylvania Supreme Court rejected that issue. The petitioners have put the case before the Supreme Court.

Their argument is that even though *Daimler* says that you can only be sued on general jurisdiction in the state where you are at home, that if you look at statutes around a period of 1868 when the due process clause was applied there were a lot of state laws out there that seemed to suggest you could sue a corporation under any circumstances as long as they registered to do business or were in fact doing business within the state.

And so, the argument of the petitioners is that the public meaning of the due process clause at the time of its claiming would have allowed this kind of a lawsuit to go forward. The response to that is that those statutes actually were designed to deal with what the court has now come to describe as specific jurisdiction. That the real concern was that the states could enforce laws where injuries are caused in their state. Even though the language of the statutes might be read more broadly, they typically and pretty consistently actually were not interpreted by the state courts that way and that this notion of exercising general jurisdiction because you do business in a state is one that was never embraced by the due process clause framers.

And then if that's true you look at *Daimler* and it tells you what the right outcome is in this case because we're not at home in Pennsylvania. The importance to the business community obviously is that if we lose this case what you can imagine will happen is that there will be other states that become litigation towards destinations. That is, they will encourage plaintiffs to bring litigation in their states for claims that have nothing to do with the state making form shopping a much more complicated problem for corporations to deal with.

So, that's probably one of the biggest issues that the business community is facing these days. I'll have it better assessed of where the court is after the argument. I think the court is apt to the argument.

Sam Gandhi:
Another case that's being argued shortly and a hot button issue before the court and in the news is affirmative action. Oral arguments and two related cases are being heard on October 31. Kwaku, if the Supreme Court overturns its precedent for affirmative action in higher education, is there a larger implication beyond universities and will those decisions potentially impact businesses?

Kwaku Akowuah:
It definitely could. I think as we're looking around the litigation landscape today, even in advance of any decision by the Supreme Court in the affirmative action cases, we're already seeing litigation that is challenging companies, DEI initiatives, and affirmative action plans as constituting a form of reverse discrimination that is prohibited under the nation's Civil Rights law.

So, those suits are already out there and I think increasing in number and intensity. The affirmative action cases right now in front of the Supreme Court are not directly germane to business. They are educational institutions and whether the affirmative action plans adopted by the University of North Carolina and by Harvard University are consistent with the equal protection clause and with Title VI which bars discrimination in educational institutions but there are other laws that apply directly to businesses. But there are other law that are directly applied to business. Title VII of the 1964 Civil Rights Act which bars discrimination in employment. Section 1981 post Civil War statute that prohibits discrimination in contracting.

One of the ways that businesses have been able to defend against such suits is by invoking the idea that bonified affirmative action plans are not a form of discrimination. If the court wipes that notion away in the Title VI and equal protection context I think the heavy betting would be that those defenses would lose a lot of their force.

And so, you really could see an even further increase in challenges to DEI initiatives adopted by a really wide range of businesses in a lot of different settings. So, from that perspective I think it could really be significant to businesses down the road, although not the day the decision lands.

Sam Gandhi:
Carter, your view on the Harvard and the North Carolina cases given your history in some of the similar cases from before.

Carter Phillips:
If you go back in time when *Bakke* was decided then the entire Title VII followed *Bakke* which allowed…that was the decision that braced the holistic approach to hiring admissions in the university setting and the Title VII followed that naturally.

So, it's pretty clear to me that whatever ruling, if the court were to say that the Constitution is quote truly color blind and therefore anything that benefits that intentionally discriminates on the basis of race whether it's an affirmative action matter or it's a matter of straight racial discrimination is both prohibited in exactly the same measure.

The focus on DEI is going to have to end otherwise you're essentially handing over claims to people in particular groups that if they don't get hired, if they don't get admitted, the don't get promotions, etcetera, are going to be able to claim that the decisions were influenced directly by employers based on diversity, equity, and inclusion and not on purely race neutral basis.

So, at a minimum, the conversations within law firms shift pretty dramatically and obviously the aims of all those efforts could be seriously if not undermined made more complicated if the court goes down this path, which is why frankly there are a host of business communities that have come out in favor of North Carolina in order not to essentially upend what's been for most people 50 years of progress. We're nowhere near the end of where we should be in those issues but a lot further ahead than we would have been if *Bakke* had gone the other way.

Sam Gandhi:

As we wrap up the podcast, what are clients concerned about? What are you hearing from clients regarding the new court term and what seems to be the issues on their minds?

Kwaku Akowuah:
One case that a lot of clients are watching is the *Gonzalez v. Google* case which was recently granted and has to do with the scope of immunity provided to internet service providers to simplify under Section 230 of the Communications Decency Act, and it's sometimes thought of as the lynch pin of the internet because what it allows providers to do is moderate platforms and then the views that are exchanged across the platforms and even the goods that are transacted across them without adopting liability for anything that they don't moderate or cull from the platform.

So, it allows them to let conversation and let content multiply. The issue in the *Gonzalez* case is frankly one of the serious downsides of relative hands off approach. The claims there are that Google failed to take adequate steps to prevent ISIS, the international terrorist organization from using YouTube to organize and recruit and radicalize people and that the deaths of people in the Paris attacks in 2015, San Bernardino attacks are attributable in part to Google's failures.

That's very serious claims obviously but the business community's concern is if you let liability rest on internet service providers in those circumstances there are very difficult decisions to be made about whether the internet can continue to exist as it has because assuming liability for whatever happens on a platform would be prohibitive in many circumstances and companies would have to make very different moderation decisions than they do today.

It's obviously the part of the pitch of the plaintiffs is that Google, YouTube, should have made very different moderation decisions and if they had the plaintiffs' relatives would be alive today. So, these are serious issues but from a business perspective a change to Section 230 and the judicial interpretation in a manner that visits more reliability on more companies could have very significant changes.

Sam Gandhi:
Carter, your thoughts.

Carter Phillips:
One thing I would just say with respect to the Section 230 of the CDA, it is in some ways unfortunate it comes up in the context of terrorism claims because in some ways that is probably the least obvious issue under 230. I would have expected frankly the Supreme Court to take up a case involving either kicking somebody off of the platform and whether that was permissible or not. Or more kind of classic illustration of somebody putting some information onto the platform that was offensive in one way or another and the issue of whether or not the platform operator could have done more with respect to that.

This is kind of a classic situations that have created some controversy with 230. I don't think most people were thinking about the effect of Facebook and Twitter on ISIS's operations. Not to say that they aren't significant but that just seems like an odd vehicle for the court to revisit or to visit in the first sense as Section 230.

Kwaku Akowuah:
Carter if I could just jump in there. I need to offer an example of some of the other kinds of controversies that are closer to core business activity but implicate significant issues under Section 230. Trademark infringement on sites, copyright infringement, knock off goods being sold. Those are closer to the core of the kinds of issues that the courts have addressed that are again significant, have significant commercial salience but don't come with all the difficult and emotional surrounding circumstances of a terrorist, a case involving terrorist threats and highly significant publicized terrorist acts.

Carter Phillips:
Thanks Kwaku. That was helpful. The other issue, the broader issue that the business community seems concerned about is simply the lack of predictability the court presents these days because the court is much more in the business of rethinking a lot of its precedent and seems willing to set aside precedent on less serious grounds that might otherwise have existed in the past. I think it's fair to say you cannot assume that any particular set of rulings necessarily are free from further scrutiny and business community needs some predictability in order to plan its primary activities.

And so, being told that simply because something was the law and has been the law for 50, 60, 70, 150 years doesn't mean it's going to be the law going forward. It's not something the business community is enthusiastic about. The example I've used over the years that I'm still concerned about is punitive damages. The Supreme Court 20 years ago said that size of punitive award has to be proportional to the size of the compensatory award. Did that on the basis of due process clause.

There was certainly a view at the time that that was not the understanding of due process's operation at the time of the adoption of that clause in 1868. Question if the Supreme Court today were to revisit the issue of the size of punitive damages would they say there's no limit on how large a jury can impose punitive award on a business corporation in order to deter it and others from doing similar misdeeds in the future.

That kind of a ruling would obviously have an extraordinarily detrimental impact on the businesses in general, and it's only one area where you can envision that what you thought was settled law going forward may not be settled law as we stand here right now. That I think is a serious concern for the business community.

Kwaku Akowuah:
On the flip side, and I think this is an issue that cuts both ways but also goes to how settled is the law, there is a lot of movement when it comes to administrative law. How the agencies and bureaucracies of government are structured. What kinds of actions can they take? That in some ways opens up new opportunities for business community when as is sometimes the case there are loggerheads with regulators, but it also opens up different avenues of instability.

If the courts are more prone to start essentially reorganizing or striking down different forms of organization of the federal government or more prone to taking particular interpretations of those agencies and saying no good, start over, here's how it goes. You can have relatively rapid movement in terms of how the federal government is organized and interprets the law that are least our regulated company clients are focused on. So, both opportunity and risk depending on exactly where our clients sit with respect to each of these controversies.

Sam Gandhi:
We've been speaking with two of Sidley's Supreme Court advocates, Carter Phillips and Kwaku Akowuah. Carter, Kwaku, been a great look at the Supreme Court's new term. Thanks for sharing your insights and being on the podcast.

Kwaku Akowuah:
Thanks for having us Sam.

Carter Phillips:
Thank you Sam. It's been a pleasure.

Sam Gandhi:
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