



The embarrassment of Slate

By: Walter Olson – November 5, 2013

What happens when the legal analysts at Slate get things flatly wrong, in the service of generating a desired ideological *frisson* for their liberal-minded readers? Does anyone act embarrassed or make humble noises about not letting it happen again? These questions arise following a November 1 column in which Emily Bazelon and Dahlia Lithwick baldly, flagrantly misstate the holding of a new opinion by Judge Janice Rogers Brown deeming the Obamacare contraceptive mandate in present form to violate the Religious Freedom Restoration Act (RFRA). (RFRA, enacted in 1993, requires government to take certain steps to avoid, when it can readily do so, substantially burdening religious observance.)

As Brown's opinion explains beginning on page 7, *Gilardi v. HHS* raised at its outset an interesting threshold question: everyone agrees individuals and religious organizations can sue under RFRA, but can non-religious businesses also invoke it? In the case at hand, the plaintiffs argued that not only the Gilardi family, which owns the Freshway food and logistics companies, but also the companies themselves, could challenge the contraceptive mandate under RFRA. The latter argument is not frivolous on its face — in the *Hobby Lobby* case, the Tenth Circuit ruled that under the Dictionary Act the definition of "individual" could indeed include a business — but Judge Brown disagreed. She found the Supreme Court precedent too thin on the point: "for now, we have no basis for concluding a secular organization can exercise religion." Only the Gilardis as individuals could sue.

Apparently Bazelon and Lithwick had already preloaded dismissive witticisms about how silly and uncouth and radical it would be to imagine that a business might have experienced an infringement of religious liberty, and how it recalls the *Citizens United* case which legendarily invented the idea of corporate personhood (except that it didn't, as even big-time progressives concede). And rather than let those laugh lines go to waste, they went ahead and used them even though Brown ruled *the other way*. Brown, they claimed, ruled that the contraceptive mandate "trammels" the freedom of a company — adding "This is a company we are talking about, not its owners," in case anyone missed the point. Then the inevitable reference to *Citizens United* as having made the same confusion. Bazelon and Lithwick: "The argument that a for-profit secular company has a religious conscience — separate and apart from the religious beliefs of its owners — is a notion that vaults the concept of personhood from the silly ('corporations are people, my friend') to the sublime (also they pray)."

That's not actually what the plaintiffs were arguing, and it's definitely not what Brown ruled, since she denied the claim of corporate standing. In fact liberal Senior Judge Harry Edwards, the dissenter on the three-judge panel, praised and joined in both halves of Brown's standing ruling, while going on to differ from her on the later merits of the substantive claim.

Of course it might be a defensible liberal position to argue that RFRA *shouldn't* be so broad as to apply in ordinary business and commercial settings, aside from perhaps the manufacture of religious articles and the like. But that might mean arguing with the Congresspeople who drafted and passed RFRA — who could easily have inserted into the bill language excluding business settings, but chose not to — rather than write as if the question arose only because conservative and libertarian judges are being arbitrary and unreasonable, as is Slate's wont.

After readers began pointing out the error, the Slate editors eventually got around to appending an easy-to-miss little correction in which Bazelon and Lithwick still claim to have been right in effect — since the court did allow the Gilardis as individual owners to sue, they now assert, it “effectively” treated the company as a person. That's not how Judge Edwards saw it.

The Slate piece currently has 1,800 Facebook “likes,” most from readers who one may suspect never grasped, if they even saw, the belated and equivocal correction. Attention Facebookers and everyone else: if you rely on Slate for your legal news, you're not well informed.