Patterico's Pontifications
Harangues that Just Make Sense

Emily Bazelon and Dahlia Lithwick Completely Misstate Holding of Controversial ObamaCare Opinion

November 6, 2013

UPDATE: Ed Whelan posted about this three days before Olson did, and appears to have been the one who triggered the non-correction correction. Ed's post opened:

Wow. Is it too much to ask that those condemning a decision actually read it enough to have a basic understanding of it?

Indeed. Apparently it is.

Apologies to Ed for failing to give him credit for being (as far as I can tell) the first analyst to bust Bazelon and Lithwick on their misstatements. Here is the original post:

The redoubtable Walter Olson of Overlawyered hits it out of the park with this excellent post at PowerLine. In the post, Walter demonstrates that Emily Bazelon and Dahlia Lithwick of Slate flatly misstated the holding of a controversial ObamaCare opinion by Janice Rogers Brown. Olson's post opens with this paragraph:

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.)

Brown's opinion (.pdf) ruled that the contraceptive mandate in ObamaCare violated the free-exercise rights of the owners of a company. Because the owners have a religious opposition to contraception, Brown wrote, the mandate infringed on their right to exercise their religion by requiring them to do an act — paying for contraception — that violated their deeply held religious beliefs.

In addition, the plaintiffs argued that *the company itself* was entitled to argue that its rights were violated. If a corporation's free speech rights under the First Amendment are protected, the argument went, the corporation should also be able to assert free-exercise rights under that very same First Amendment. Not a crazy argument, right?

But Brown's opinion rejected that argument, allowing only the individuals in the company — and *not* the company itself, to assert free exercise rights. Brown said that the Free Exercise Clause can extend to religious organizations and entities, such as churches. But, Brown wrote, the company in question was not a religious organization. And so, while it is not impossible that the Supreme Court could one day grant free-exercise rights to a non-religious corporation, Brown wrote that the precedent for doing so was too thin:

While we decline the Freshway companies' invitation to accept Townley's ipse dixit that closely held corporations can vindicate the rights of their owners, we understand the impulse. The free exercise protection—a core bulwark of freedom—should not be expunged by a label. But for now, we have no basis for concluding a secular organization can exercise religion.

I gleaned the above by reading the opinion. Evidently, Bazelon and Lithwick did not read the opinion — or, if they did, they either didn't understand it or consciously chose to lie to their readers about its holding. It's worth quoting Bazelon and Lithwick at length to see just how brazen their misstatement is:

On Friday, morning, it was the turn of another extremely conservative woman chosen for the bench by Bush, Janice Rogers Brown of the U.S. Court of Appeals for the District of Columbia Circuit. Brown handed down a similarly dramatic decision holding that the provision in the Affordable Care Act that requires companies to provide health care coverage that includes contraception "trammels" the religious freedom of an Ohio-based food service company, Freshway Foods, through its two owners, who claimed that the mandate violated its Catholic faith. This is a company we are talking about, not its owners. But following headlong in the wake of the Supreme Court's wrongheaded finding in Citizens United that corporations are people, too, Brown found that the mandate violates the company's strongly held religious convictions. To make the company provide a health care plan—from an outside insurer—that offers contraceptive coverage is a "compel[led] affirmation of a repugnant belief," Brown wrote. 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).

It's also a notion that Brown *rejected* as a legal matter. You see that quote above from the opinion? Here again is the part I bolded: "we have no basis for concluding a secular organization can exercise religion." That is the *exact opposite* of Bazelon and Lithwick's claim: that Brown argued that secular companies "pray." Here is more from the Brown opinion, showing that Brown was *not* saying that secular corporations pray:

Perhaps Appellants' constitutional arithmetic, Citizens United plus the Free Exercise Clause equals a corporate free-exercise right, will ultimately prevail. But we must be mindful that Citizens United represents the culmination of decades of Supreme Court jurisprudence recognizing that all corporations speak. See Conestoga Wood, 724 F.3d at 384. When it comes to the free exercise of religion, however, the Court has only indicated that people and churches worship. As for secular corporations, the Court has been all but silent.

As you can see, far from "following headlong in the wake of" Citizens United, Brown drew and explicit and quite clear distinction between corporations' ability to exercise free speech rights and their ability to claim free-exercise rights.

Bazelon and Lithwick *could have* written that Brown had rejected free-exercise rights for the company, but conferred them upon the company's owners. They *could have* argued that this was a distinction without a difference. They *could have* said that allowing a company's owners to raise constitutional objections to a mandate directed at a company in effect confers free-exercise rights on the company. In my view, that would be a losing argument, but at least it would not be a dishonest one.

But that is not what they argued. Instead, they told readers "[t]his a company we are talking about, not its owners"; and said Brown had "follow[ed] headlong in the wake of the Supreme Court's wrongheaded finding in Citizens United"; and indicated that Brown had ruled that a for-profit secular company is a person that prays — when Brown had said the exact opposite.

In short, they blatantly misstated the contents of the opinion to their readers. As Olson notes, it is as if they had their laugh lines written in advance, and they were going to be *damned* if they were going to let a little thing like the holding of the opinion cause them to rewrite their snark. And anyway: isn't it easier to make fun of the ruling when you can conjure up the image of a corporation getting on its knees in church? If the judge rules the corporation isn't a person for purposes of the Free Exercise Clause, there goes that cheap way to attack the opinion. Then you have to make a subtle argument equating owners' rights with that of the corporation, and subtle arguments iz hard.

So: what did Slate do when they got caught? Slate vaguely admitted a misstatement (good) — but hid the magnitude of the error (bad), and pretended that the argument made in the column was "effectively" correct (awful). Here is the "correction" now appended to the end of Bazelon and Lithwick's column:

Correction, Nov. 3, 2013: This article originally said the contraception mandate is losing 2–1 in the federal appeals courts. In fact it is tied 2–2. (Return.) It also misstated that the D.C. Circuit ruled that the contraception mandate in Obamacare "trammels" the religious freedom of the company Freshway Foods, and conferred personhood on the company. The court found that the contraception mandate violates the Religious Freedom Restoration Act because Freshway Foods is a closely held company, so the mandate violates the rights of its owners. The ruling effectively confers personhood on the company rather than directly doing so.

See? Brown's opinion, we are told, "effectively" did that which it absolutely did *not* do. And the "correction" still does not tell readers that Brown *rejected* the notion of personhood for the company for purposes of the Free Exercise Clause. Readers will have to go to Olson at PowerLine, or (horrors!) the language of the opinion itself, for that.

It is hard to put into words how shoddy this piece was, and how dishonest the "correction" is. This is an utterly embarrassing travesty for Slate, Bazelon, and Lithwick, and they should be

reluctant to show their faces in legal blawgland for some time to come. Kudos to Olson and PowerLine for giving them the whacking that they so richly deserved.