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Hobby Lobby And Corporate Social Responsibility: A View From The Right

Posted by Alan Meese

1. Thanks to Conglomerate for organizing this symposium and for inviting me to participate!

2. Several thoughtful scholars have asserted that Hobby Lobby's discussion of corporate religious exercise ("CRE") endorsed "corporate social responsibility" ("CSR") over "profit maximization" as the guiding principle of corporate conduct. Usha Rodrigues [claims](#) that the Court's opinion implies "Milton Friedman be damned." Lyman Johnson [asserts](#) that it is "time to change the syllabus on corporate purpose" and that those "on the right . . . won the battle on religions freedom but . . . suffer[ed] a major setback on corporate purpose." Finally, Brett McDonnell [contends](#) that the opinion "fits perfectly with the expansive view of corporate purpose that liberal proponents of social responsibility usually advocate[.]" Brett also wonders why those who ordinarily champion CSR nonetheless reject CRE by firms that seek to make a profit.

3. I do not disagree that Hobby Lobby recognized that state corporate law sometimes allows business corporations to pursue something other than profit maximization. But I think Usha, Lyman and Brett might overstate the nature and significance of the Court's language. For those who do not know, I am "on the right," at least among law professors. I also embrace the shareholder primacy norm and the Chicago School's views on CSR as articulated by Milton Friedman. However, I do not view Hobby Lobby as a "setback," let alone a major one, on the question of corporate purpose. Instead, I view the Court's discussion of corporate purpose and CRE as entirely consistent with shareholder primacy and Friedman's views of CSR.

4. In my view it is useful to distinguish between two different versions of CSR. The first, "weak" version allows managers to pursue policies that reduce profits, so long as shareholders expressly agree. Under this approach altruistic shareholders may authorize managers to divert corporate profits to charity, thereby enhancing shareholder welfare. Such an approach treats shareholder welfare, not profit, as the proper corporate maximand and thus furthers the shareholder primacy norm. The second "strong" brand contemplates that managers can pursue policies that reduce profits so as to improve the overall welfare of society, to the detriment of shareholder welfare if necessary. Under this latter approach managers can donate corporate funds to charity or overpay employees without shareholder approval even if the managers are certain that shareholder welfare will suffer as a result. Shareholders' only remedy is to sell their stock or elect new directors. Friedman, it should be noted, objected to this latter form of CSR in his famous 1970 essay. In particular, he contended that this form of CSR authorized managers of corporations characterized by the separation of ownership from control to ignore the welfare of their principals (shareholders) so as to further the welfare of a different principal (society). According to Friedman, managers who endorsed such CSR were "preaching pure and unadulterated socialism" and were "unwitting puppets of the intellectual forces that have been undermining the basis of a free society these past decades." Implicit in this critique, it seems, was a belief that widely dispersed shareholders of large public corporations do not really consent to their agents' use of their property to pursue social ends at the expense of profits.

5. Hobby Lobby's discussion of corporate purpose apparently embraces the weak version of CSR. Indeed, the Court twice qualifies its assertion that corporations may forsake profits to pursue other objectives. For instance, the Court asserts that many business corporations pursue charitable objectives "with ownership approval." The Court also states that a business corporation "may take costly pollution control and energy-conservation measures that go beyond what the law requires" but prefaces this statement with the caveat "so long as the owners agree." While the Court does not

specify what form such agreement can take, there was no doubt that Hobby Lobby's shareholders, some of whom also managed the firm, "agreed" with and "approved" the firm's religious exercise, even when such exercise reduced profits. Thus, the Court treated profit maximization as a default rule, which shareholders could alter if they wished. This focus on shareholder consent necessarily excludes the stronger view of CSR defined above, whereby directors can serve the greater social good regardless of the resulting impact on shareholder welfare. Indeed, the whole point of the Court's opinion on corporate personhood and religious exercise is that, in closely held corporations, shareholders, as owners, may induce the corporation to adopt practices that reflect shareholders' personal religious beliefs. This is so, the Court said, even if such practices contradict a regulatory edict. Shareholder primacy, not any notion of greater social good, is the animating principle here.

6. Usha, Lyman and Brett are thus absolutely correct that Hobby Lobby rejects an immutable requirement that business corporations pursue profit and only profit. However, Hobby Lobby's embrace of this weak form of CSR, which treats profit maximization as a default rule, is in my view no setback for the right or Friedman's views on CSR. Indeed, about six weeks before Hobby Lobby Nate Oman and I endorsed just such an approach in [this essay](#), arguing (among other things) that profit maximization is a default rule, which shareholders may waive to pursue religious objectives that may reduce profits. (Stephen Bainbridge [articulated](#) a similar approach in response to Lyman's reaction.)

We also rejected the suggestion that directors who execute such shareholder preferences must invoke some pretextual profit-maximizing rationale to justify such conduct. Moreover, [as I explained](#) a few days after Hobby Lobby, Friedman expressly opined that the "individual proprietor" should feel perfectly free to "reduce the returns of [his or her] enterprise in order to exercise [his or her] 'social responsibility[.]'" As Friedman explained, this individual "is spending [his or her] own money, not someone else's. If [he or she] wishes to spend [his or her] money on such purposes, that is [his or her] right, and I cannot see that there is any objection to [his or her] doing so." I doubt that Friedman would have objected if, instead of an individual proprietor, five shareholders of a closely held corporation unanimously agreed that the firm should give money to charity or decline to sell alcohol, even if such steps reduced the firm's profits. Such shareholders, after all, would be spending their own money. Friedman did not object to private charity that is truly voluntary.

7. The Court's implicit rejection of a strong version of CSR may help explain the left's failure to applaud the decision. There is also, I suspect, a deeper reason that the Court's language on corporate purpose has not mollified many on the left. Simply put, the correlation between CRE and traditional examples of CSR is imperfect. No doubt some CRE, e.g., charitable donations or the voluntary installation of pollution control equipment, correlates perfectly with CSR. But what about the business that also exercises its religion by declining to sell alcohol or closing on the sabbath of its owners? While these practices may reduce profits, they do not confer obvious benefits on other segments of society. Businesses that close on a sabbath inconvenience those customers who wish to shop on that day. Those who decline to sell alcohol force some consumers to shop at a less convenient location. True, some employees might welcome the predictable day off, but some others might desire the extra wages and/or profits that bolster the ESOP. More to the point (of Hobby Lobby), a firm that does not purchase certain forms of medical care for its employees thereby declines to confer a benefit on its employees, a benefit that "society" (the presumed object of "social" responsibility) has chosen to create. While such a decision may be a bona fide example of CRE entitled to an exemption from the general law, any analogy to CSR would appear to be strained.

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