CORPORATE VOLUNTARIsm: PANACEA OR PLAGUE? A QUESTION OF HORIZON
By ANTHony J. FEJfar*

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Associate Professor of Law, Widener University School of Law, Harrisburg,
Pennsylvania.
I. Introduction

Over ten years ago in an article for the Stanford Law Review, David Engel asserted that "the topic of corporate social responsibility cannot be debated except against the background of a general political theory." In order to forcefully demonstrate this assertion, and to provoke further debate, in his article Engel adopted what he openly acknowledged to be "a rather artificial model of our political process" as a vehicle for rationally analyzing corporate social responsibility.1

Engel's article has been recognized as one of the more insightful discussions of corporate social responsibility.2 Despite this recognition, his invitation to the proponents of corporate social responsibility to state an underlying political or philosophical basis for corporate voluntarism3 has received little attention.4 Why the lack of response?

1. David L. Engel, An Approach to Corporate Social Responsibility, 32 STAN. L. REV. 1 (1979). According to Engel, this is so because "[t]he resolution of nearly every issue of corporate social responsibility depends heavily on one's beliefs about how our political process operates and one's convictions about the ideal political process." Id.

2. Id. at 2.

3. See Christopher D. Stone, Public Interest Representation: Economic and Social Policy Inside the Enterprise, in CORPORATE GOVERNANCE AND DIRECTOR'S LIABILITIES 122, 141 n.25 (Klaus Hopt & Gunther Teubner eds., 1985) ("In my view, Engel's article contains some of the most thoughtful criticisms of the corporate social responsibility proponents (including myself)."). See also Roberta Romano, Metapolitics and Corporate Law Reform, 36 STAN. L. REV. 923, 924 (1984) ("What I find important in Engel's analysis is not the implicit claim for the superiority of a particular end, but rather, the recognition of the need to clarify and evaluate more precisely the means/end relationship.").

4. See Engel, supra note 1, at 2 (asking how the proponents of corporate social responsibility (or their opponents) can pretend to discuss the topic without having articulated an underlying political philosophy). The exact meaning of "corporate voluntarism" or "corporate social responsibility" is difficult to pin down. Engel defines these terms as essentially an end or "product" resulting from uncoerced corporate behavior that is non-profit maximizing, which we may wish to "purchase." Christopher Stone, although recognizing non-coercion as an essential dimension of corporate voluntarism or social responsibility, provides a "vaguer" but more en-
Perhaps Engel has implicitly exposed the Achilles' heel of the corporate social responsibility movement. There is no "rational" case for asserting the legitimacy of corporate voluntarism that can be made from within a liberal rationalist horizon.\(^6\) However, Engel fails

compelling process oriented definition:

For [the public at large] "corporate responsibility" offers to go to the heart of the matter—to bring about a decent economic order, springing not from threats (lame threats) of the laws and of consumer pressure, but from the better potential of informed human judgment. For the businessman, his sense of purpose flagging after decades of public criticism for doing "nothing more than making money," corporate responsibility holds the promise of a renewed sense of mission, of repaired public relations. . . . For the students at the business schools . . . the idea promises assuagement of similar career misgivings and gives them a chance to feel part of the social reform ethos that for some time has been brewing elsewhere on the campuses, on and off. If we are to look only at the face of the movement, corporate social responsibility has all the promise of Saint George stalking the dragon with a PR campaign. It is "needed," its "time has come," but it is not certain what it is. Even so, the notion of corporate social responsibility should not be put aside too readily. It is vague, true, and certainly will not be of much significance unless and until someone can define its scope and purpose with enough precision that its spirit can be translated into tangible institutional reform.

Christopher D. Stone, Where the Law Ends 72 (1975).

5. Roberta Romano explicitly responded to Engel's article in her 1984 piece. See Romano, supra note 3. The analytical approach which Romano employs, although differing in some respects, is similar to that of Engel. Her analysis, while certainly valuable, is not sufficient since, along with Engel, Romano's seems to assume a rationalist foundational horizon. The importance of "horizon" will hopefully become clearer as the present article progresses.

6. At this point in the article, it would be better for me to provide you with an incomplete definition of "horizon" (even though this definition is somewhat misleading). For now, you can assume that "horizon" means a consciously held ideological viewpoint or world view.

Paradoxically, the meaning of the term "horizon" will differ depending upon the mode of foundational consciousness you, the reader, are operating within. The full understanding of what I am trying to convey involves a difficult task, both in my writing and in your reading. This task is difficult because each reader potentially operates within a different foundational horizon or cognitive orientation. Pierre Schlag acknowledges the same difficulty in writing for a cognitively diverse audience:

[O]ne of the implications of the existence of various cognitive orientations is that it is extremely difficult to be understood in the way one wants or hopes to be. Given [the] cognitive fragmentation of the audience, there is virtually no chance that a message will be understood in the same way by each of the various constituent groups. The possibilities for the communication of "truth" in law or legal discourse thus range from dismal to zero—at least so long as one clings to a prerationalist or rationalist conception of truth. Indeed, the significance of any given text is bound to differ depending on the cognitive framework on the receiving end.

to explicitly point out that, from within a liberal rationalist horizon, there is no "rational" basis for assuming a "just" society without the actual presence of corporate voluntarism in our society. Additionally, Engel has avoided deeper questions: Is liberal rationalist consciousness a more adequate mode of consciousness from which to generate a critical analysis of corporate social responsibility? More generally, is liberal rationalist consciousness a more adequate or better mode of consciousness for knowing reality, making decisions, and being a fully developed human being?

It is precisely these questions which will be addressed in this article. In order to deal with these questions in a more critical manner, however, a departure from the organizational format of the typical law review article is necessary. In a typical law review article, the subject of analysis and the analysis itself are "ex-plained" in a linear sequence on a flat "logical" plane. Thus, the analysis presented to the reader within the article appears as an "objective," rational "view" of the subject. The central thrust of my article, however,

7. In his article, Engel fails to engage in a more comprehensive critical analysis of corporate social responsibility on the basis that such an analysis would be "radically" different than that of the typical abstract rationalist critique: [T]his essay may be viewed throughout as simply an illustration of just how political assumptions shape one's thinking about corporate social responsibility. Different assumptions would unquestionably produce different analytic results; but only assumptions so radically different as to be certainly a minority American view need produce a different kind of analysis.

Engel, supra note 1, at 3. "Among other things, this refers to the fact that I will assume continued private ownership of the means of production." Id. at 3 n.9. Thus, Engel excludes the possibility that an alternative critique could proceed from within a different horizon than that of liberal rationalism.

8. Such a "rational" view of knowing and scholarship is derived from a cultural-cognitive orientation which sees "knowing" as essentially involving a person "taking a look" at the world or at ideas. This "knowing" is both conceived and practiced as "looking at surfaces." Thus, Walter Ong states: "Formal logic is fundamentally an attempt to deal with the activity of the mind in terms of ... visualist analogies. It is interested in the 'structure' of our intellectual activity—a notion which cannot even be conceived except by analogy with some sort of spatial diagram." WALTER J. ONG, RAMUS: METHOD AND THE DECAY OF DIALOGUE 107 (1958). Accordingly, logical analysis, like sensory vision, tends not to reach interiors or involve depth or affectivity, but instead deals only with surfaces:

Because sight is thus keyed to surfaces, when knowledge is likened to sight it becomes pretty exclusively a matter of explanation or explication, a laying out on a surface, perhaps in chartlike form, or an unfolding to present maximum exteriority. . . . To say that knowing means being able to explain impoverishes knowing. Explanation is invaluable, but any mere explanation or explication is pretty thin stuff compared either with actuality
is that because such a "view" of objectivity is inadequate, any analysis proceeding from within such a "rational" view is inherently suspect. Accordingly, this article takes on the format of a dialogue, i.e., it involves a sort of conversation in which different "voices," speaking from within different "horizons," will engage one another in a rolling dialogue of critiques and responses.

Which "voice" is mine? On a purely "conversational" level, my voice is that which speaks in the latter part of the article from within the critical realist horizon. On a deeper, process level, my "voice" is present within the structure of the article itself. For it is through the engagement of you, the reader, that I will provide the opportunity for you to come to the critical judgment that an adequate analysis of the underlying legitimacy or possibility of corporate voluntarism does not merely involve ideal political assumptions. More importantly, an adequate analysis involves horizon or mode of consciousness. Thus, I suggest that, as a matter of critical judgment, a determination of whether corporate voluntarism is panacea or plague is a question of horizon.

Before proceeding with the critiques and responses, the initial subject of the critiques must be presented. As the first "subject" for critique, I will use Engel's self-described "artificial" model of our political process, as it relates to corporate social responsibility. After providing a short summary of Engel's model, I will set forth critiques and responses from within a liberal rationalist horizon, a critical rationalist horizon, and a critical realist horizon. Finally, I will present a general commentary on the critiques and their relationship to horizon and corporate voluntarism.

II. Engel's Model of the Political Process as it Relates to Corporate Voluntarism

Engel begins his discussion by openly and provocatively setting forth the following "political" assumptions:

I am going to assume a legislative process that is politically legitimate-except insofar as legitimacy is thrown into question by the political role of the particular corporation itself. I will assume that the measures coming out of the legislative process either accurately reflect the political will of the

or with understanding.

relevant constituencies-on the basis of facts known-or may be taken to reflect that will because of a widely shared acceptance of legitimacy. What is perhaps more extreme, I will assume that, at least in the long run, even legislative inaction should be taken to reflect political consensus—a consensus that nothing should be done about a particular matter. Only in terms of short run lags will I question this assumption.9

Given these assumptions, Engel frames the issue of desirability of corporate social responsibility as: “Whether it is socially desirable for corporations organized for profit voluntarily to identify and pursue social ends where this pursuit conflicts with the presumptive shareholder desire to maximize profit?”10 Engel defines any such corporate activity as “voluntarism” or “altruism.” Assuming this definition, the analytical framework set forth by Engel is designed to ascertain “analytically and empirically whether corporate voluntarism in particular areas of substantive conduct has the potential on net to be socially desirable.”11 Thus, the question of the means of implementing “voluntarism” must be answered after we are clear that acts of voluntarism (as a “product” which we may wish to “purchase”) are desirable.12

Before analyzing the desirability of corporate voluntarism as a “product,” Engel excludes certain actions from his conception of corporate voluntarism. Corporate voluntarism or social responsibility does not include corporate action resulting from the belief by management that long-term corporate profits will be maximized even if short-term profits suffer.13 Thus, corporate voluntarism excludes any corporate action resulting from compliance with legal prohibitions, as well as reactions to direct social pressure such as boycotts.14 Because corporate voluntarism is defined as a “product” which includes certain corporate actions but excludes others, the central question for Engel is whether we want to “buy” this “product” at all.15

10. Id. at 3.
11. Id.
12. Id. at 4.
13. Id. at 9.
14. Id.
15. Id. at 12. In analyzing this question, Engel notes that the “purchase” of the product of corporate voluntarism is not prohibited by legal constraints. The
In analyzing the desirability of "purchasing" the "product" of corporate voluntarism, Engel starts with the proposition that any social goal to be pursued by public corporations should have two closely related characteristics: first, a broad social consensus should support corporate pursuit of the particular goal in question; and second, some kind of reasonably clear social signal should be available to help each corporation figure out what actions are in furtherance of the goal.\textsuperscript{16}

Although not excluding the possibility that "noneconomic" goals could fall within the criterion set forth in Engel's proposition, two possible kinds of social goals are specifically excluded:

(1) corporations, and the internal political processes that they offer, may serve as an instrument in the essential social business judgment rule will protect management's decision to engage in corporate voluntarism as long as it is not in "bad faith." That is, the decision will be protected as long as management does not expressly say it is trying to be socially responsible. \textit{Id.} at 16. A clear example of this phenomenon in the case law is found in Shlensky v. Wrigley, 95 Ill. App. 2d 173, 237 N.E.2d 776 (1968).

Similarly, economic forces will not necessarily constrain corporate voluntarism. While it is assumed that, in a competitive market, a sustained commitment to any other goal than profit maximization will lead to bankruptcy unless collusion is allowed, this does not necessarily hold true with respect to the oligopolistic markets in which most large publicly held corporations compete. Engel, \textit{supra} note 1, at 25. "Rather, the essential economic limit on the kinds of voluntarism we are discussing is the level of altruistic activity at which, were an outsider to try to wrest corporate control from the current managers and eliminate the altruistic practice, his expected gains from so doing would exceed his costs." \textit{Id.} The expense of corporate voluntarism in such cases will be borne either by the shareholder or the customer. Thus, Engel notes that there is a general perception that managers of publicly held corporations have substantial "discretionary funds" at their disposal.

And if public corporations were somehow restructured, so that an increased tendency toward altruism would be not just an isolated leaning by one management but rather a general and unavoidable phenomenon—a phenomenon not to be dispelled in any given corporation merely by taking control of, say, the inside directorships—then this perceived room for management discretion could only be increased. \textit{Id.} at 26.

Further, if the practice of corporate voluntarism were to become institutionalized, even the constraint of a corporate takeover may not prove effective. Engel points out that if the practice of corporate voluntarism were institutionalized, then "[n]ew management might not be able to look forward to any increase of return on investment through the reduction of (the irreducible) voluntarism." \textit{Id.} at 26 n.74. Thus, "there is no reason in economic theory to believe that corporate voluntarism is impossible, or that it must be restricted to trivial dollar values." \textit{Id.} at 26.

16. Engel, \textit{supra} note 1, at 27.
process of choosing our direction when we lack consensus—or perhaps, in rare and delightful instances, of discovering or coming to a consensus we did not know that we shared; and (2) the process of corporate governance might be so reformed that, quite apart from having the outcome of the process serve broadly shared or otherwise appropriate social goals in particular instances, the process itself in some symbolic way would serve to affirm and reinforce general values and attitudes that those designing the reformation wished to foster in the society.¹⁷

With respect to the second, "process" goal of corporate voluntarism, Engel sets forth two major objections. First, in order for the "process" goal to be worthwhile, a balance would have to be struck between "process" goal benefits and the benefits resulting from the corporation’s current function of contributing to efficient resource allocation through profit maximization and the achievement of Pareto Optimality.¹⁸ Second, the values and attitudes engendered by corporate voluntarism may be harmful because they "tend to undercut our sense of management’s fiduciary role in general, or of

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¹⁷. Id. at 28.

¹⁸. See LaRue Tone Hosmer, Managerial Ethics and Microeconomic Theory, 3 J. of Bus. Ethics 315 (1984) (discussing microeconomic theory as it relates to managerial ethics). Hosmer presents a concise definition of Pareto Optimality:

The complete economic paradigm is more a normative theory of society than a descriptive theory of the firm. Profit maximization is a part of the theory, but it is only a part, and certainly not the central focus. . . . The central focus of the larger theory of society is the efficient utilization of resources to satisfy consumer wants and needs. At equilibrium, and an essential element in reaching general equilibrium throughout the entire economic system is the effort by business managers to balance marginal increases in revenues against marginal increases in costs—which automatically results in optimal profits for the firm within market and resource constraints—it is theoretically possible to achieve Pareto Optimality. Under this condition, as is well known, the scarce resources of society are being used so efficiently by the producing firms, and the goods and services are being distributed so effectively by the competitive markets, that it would be impossible to make any single person better off without harming some other person. This is the ethical substance of microeconomic theory: produce the maximum economic benefits for society, recognizing the full personal and social costs of that production, and then broaden the receipt of those benefits if necessary by political, not economic actions.

Id. at 317.
the obligations of all fiduciaries, or, to the extent this has not long ago disintegrated, of what it means to own property.19

Engel proceeds to the first mentioned goal of corporate voluntarism which he excluded, i.e., the corporation's "choosing social goals." Citing Milton Friedman as an authority, Engel points out that government or individual persons should be making "distributional" choices, not the corporation:

While the government is, we are assuming, legitimated (and given fact-gathering and opinion-gathering capability) to make distributional decisions, and while the distributional impact of each individual's consumption and investment and almsgiving choices has a very special legitimacy of its own, it is persuasively argued that corporate managements, at least as now structured, are altogether ill-suited to the job of distributing society's riches.20

Moreover, Engel suggests that there is not "available—however much we might wish there were—any system of corporate 'ethics' with which a given management can somehow legitimately and competently (but altruistically) make distributional decisions for the society."21 Engel bases this view on a rule-oriented view of ethics:

This pessimism rests on the belief that the substantive areas in which corporate social responsibility is generally demanded tend not to lend themselves to the kind of unambiguous rules necessary for ethical systems to arise; and that these areas tend to change rapidly and to involve conflicts of social interest rather than common social interests, both of which tendencies further reduce the fertility of these areas for the growth of ethical systems.22

Thus, Engel dismisses the "managerialist" school of thought which purports to be "balancing" social interests within the context of the corporate structure as it currently exists.23

Assuming that an internal corporate "ethic" is either impossible or at least implausible, Engel concludes that the only plausible case

19. Engel, supra note 1, at 29.
20. Id. at 30 (citing MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133-34 (1962)).
21. Id. at 30-31.
22. Id. at 31 n.92.
23. Id. at 32 n.93.
against his "starting proposition" is that "the structure of corporate governance can and should be reformed in such a way that either individuals or processes within it will be able and inclined to make substantive contributions to our choice among social priorities in the absence of consensus." Such structural reform would involve various methods for representation on corporate boards of directors by various groups, which might be implemented through the legislative-democratic process. Even if such structural changes involving democratization of the corporate board were "legitimated" by the legislature, Engel concludes that "this in no way establishes that any restructured management would be capable of contributing usefully to society's ordering of priorities, or that the processes it would employ in trying to make such a contribution should recommend themselves to the legislature."25

In summary: a corporate "ethic" is impossible or implausible, structural democratization of the board is implausible or undesirable, and the corporation is limited to pursuing goals supported by a broad consensus. Therefore, Engel concludes that the only legitimate activity a corporation may undertake is indicated by the "clear" signals which society can give to the corporation, which are provided by:

(a) presumed societal support for the corporation's pursuit of profit maximization as the corporation's well-directed contribution to society's pursuit of Pareto-Optimality;
(b) clear legislative action; and less clearly,
(c) societal desires with respect to certain activities.26

Thus, Engel assumes that the market is the primary vehicle for the achievement of "social responsibility": "[T]he profit maximization proxy communicates to corporate managements with relative clarity information about which available corporate actions are and are not likely to further society's chosen goals."27 And when the market does not reflect the values of "social consensus," the legislature will take action.28

Insofar as the profit-maximization proxy fails at any time to direct corporate energies down routes supported by social consensus, the legislature has the power, at least in theory,

24. Engel, supra note 1, at 32.
25. Id. at 33.
26. Id. at 34-35, 37, 59.
27. Id. at 35.
28. Id.
to modify the profit consequences of any given corporate
action, so as to nudge corporate behavior in the direction
society prefers.29

"But in a broad range of situations, it is not hard to argue that the
idea of profit-maximization gives corporations a reasonably accurate
and clear signal of what society wants them to do."30

Engel next clarifies how corporations are to follow legislative or
other clear public signals. He takes an "economic" approach to
compliance with both criminal and civil laws, apparently concluding
that there is no moral or societal problem with violating legal prohibitions as long as the corporation "rationally" takes into account
the economic value the legislature has assigned to violating the law.31
This "value" can be measured by looking at the penalty and the absence of enforcement. The corporation must consider this value before deciding whether or not to take internal measures to prevent illegal conduct.32

With respect to extra-legislative "signals," Engel suggests that, although there is no certain method of determining what constitutes a social consensus, he finds the "Kew Gardens principle" a suitable framework for analyzing the issue.33 Employing the Rawlsian notions of the "veil of ignorance" and "natural duty," Engel succinctly defines the Kew Gardens principle: "If I find myself specially well situated to improve A's lot, at cost to myself that I am reasonably certain will be vastly less than the gain to A, I should do so."34 Charity donations by a corporation involve the distribution of profits to persons or entities other than the shareholders, and the "cost" of such distributions to the shareholders is not "vastly less" than the "gain" to the persons or entities to whom the donations are made. Therefore, following the Kew Gardens principle, Engle concludes that corporate donations to charity would be unacceptable.

29. Engel, supra note 1, at 34.
30. Id. at 35.
31. See id. at 37-58.
32. Id.
33. Engel, supra note 1, at 60. The "Kew Gardens principle" is adapted by Engel from the Kitty Genovese story of the 1960s. JOHN G. SIMON ET AL., THE ETHICAL INVESTOR 22 (1972). The authors state that "the public was shocked by the news accounts of the stabbing and agonizingly slow death of Kitty Genovese in the Kew Gardens section of New York City while thirty-eight people watched or heard and did nothing [including telephoning the police]." Id.
34. Engel, supra note 1, at 60.
Since charitable donations are out of the picture, the Kew Gardens principle can only be potentially applied as a "constraint" on the actual operations or conduct of the corporation. But, as noted earlier, such a constraint is ordinarily presumed to be legitimate only if it is "signalled" by the legislature. Therefore, Engel addresses the question of why, in a particular instance or area, the legislature has chosen not to act. He determines that there are two potentially legitimate or properly cognizable reasons which can be proffered for the legislative inaction:

1. corporate conduct, which happens to escape the net of all existing general liability rules, is not known to the legislature or has not been known to the legislature very long—either because it escapes detection, or because it represents a newly proposed course of action by the corporation; and
2. that remedial failures which would be costly to eliminate have prevented the legislature from taking effective action in the area.35

Engel concludes that where the legislature has "good information" the Kew Gardens principle will rarely, if ever, be applicable:

[W]here the legislature has good information, it is to be expected that the law will give the corporation self-interested reasons not to behave so outlandishly as to violate the Kew Gardens principle. Particular instances of substantive corporate voluntarism are unlikely then to be required or justified by the principle—however precise may be management's own information on social costs.36

Thus, the only issue which really needs to be addressed is that of legislative ignorance, which can be divided into two categories: ignorance of facts relating to the past, where the facts theoretically could be made available; and ignorance of facts which are so recent that these facts cannot be made immediately available. Engel concludes that, other than voluntary disclosure of "recent" facts to the legislature, the Kew Gardens principle dictates that corporate voluntarism is only appropriate in the case of a "recent" social emergency:

35. Id. at 64.
36. Id. at 67.
[I]n order for the suggested Kew Gardens principle to justify corporate altruism other than disclosure (at least in the first instance), the argument must be (a) that the substantive problem is a new one, and (b) that the Kew Gardens principle will be offended by profit-maximizing corporate conduct before the legislature will have a chance to act.37

Since instances where substantive corporate voluntarism in the context of the Kew Gardens principle would rarely occur, Engel concludes that a strong case cannot be made for mandatory structural reforms.38 Having eliminated substantive corporate voluntarism as “product” or “process,” Engel then focuses on the issues of voluntary disclosure of information to the government and voluntary forbearance from interference in the political process.

Engel qualifies his overall assumption of the legitimacy of the legislative process in two instances. First, he recognizes that the legislature’s lack of pertinent information may preclude appropriate regulation of the corporation. However, assuming voluntary disclosure of information by the corporation has been made, the legislature is again assumed to be legitimate. Thus, any inaction on the part of the legislature after disclosure is assumed to “reflect a social consensus as to how the substantive problem at issue should be handled.”39 Second, Engel notes that the assumed legitimacy of the legislative process can be called into question on the basis of corporate involvement in the political process.40 Although recognizing various corporate effects on the political process, Engel limits his discussion to the direct involvement of corporations through lobbying. He excludes other corporate influences on the political process because they conflict with his initial restrictive assumption that the political process is legitimate.41 With respect to the narrow issue of lobbying,

37. Engel, supra note 1, at 68.
38. Id. at 69.
39. Id. at 72.
40. Id. at 73.
41. Although recognizing the influence of corporations on public “consensus,” Engel refuses to question the assumed legitimacy of the overall legislative process, or the legitimacy of how a public “consensus” is formed:

It is a vast oversimplification to think of corporate political participation as consisting of the lobbying for or against particular pieces of legislation. . . . [C]orporations shape our lives and tastes in thousands of ways ultimately reflected in whatever consensus we have about what is good—by selecting (with considerable discretion) the direction of technical de-
Engel admits that there are logical difficulties with the issue of limiting corporate lobbying. If corporate lobbying against “restrictions on corporate lobbying” results in no restrictions, then under Engel’s general assumptions, the lack of restrictions upon corporate lobbying accurately reflects a legitimate social consensus. Conversely, if corporate lobbying against “restrictions on lobbying” is assumed to taint the legitimacy of legislative inaction, then one must reject Engel’s general assumption that the political process, at least as to anti-lobbying legislation, is legitimate.

Further, if corporate lobbying taints the political process relating to anti-lobbying legislation, there would be no reason to necessarily conclude that corporate lobbying does not taint the political process in relation to a much broader range of issues. Consistent with his initial assumption of the overall legitimacy of the legislative process, Engel postulates that the “taint” issue is limited to the anti-lobbying area. Even so, he suggests that the legitimacy issue should be among the initial foci of any corporate social responsibility debate.

Having heard Engel’s analysis of corporate voluntarism, we are almost ready to listen to the major critiques. Before proceeding with these critiques, additional materials which form the basis for the first critiques must first be presented. These materials will involve a thematization of assumptions, ideas, and values which partially constitute, or can be described as a liberal rationalist horizon.

Before proceeding with our discussion involving the liberal rationalist horizon, it is important to understand what I mean when I am referring to such a “horizon.” This is problematic because a liberal rationalist by definition does not really recognize the existence of “horizon.” The closest the liberal rationalist comes to such recognition is the acknowledgment that a person can consciously “ra-

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42. *Id.* at 74-75.
43. *Id.*
44. *Id.* at 75 (“[C]onceivably a real distinction of degree can be made that the legitimacy of corporation-in-politics laws is more questionable than that of other rules affecting corporations.”).
45. *Id.*
tionally” assent to, or “irrationally” believe in, an ideological system of ideas, or an ideal world view. At this point in the article, I will maintain the foregoing conception of “horizon” as a working definition.

III. Critiques And Responses

A. Critiques from Within the Liberal Rationalist Horizon

1. Overview of the Liberal Rationalist Horizon

The liberal rationalist horizon is grounded in the foundational adequacy of ego-centric rationalist consciousness. Just what is such “ego-centric rationalism”? Although using the term “consciousness” in a different manner than I am employing in this article, Pierre Schlag provides a concise definition:

The hallmark of rationalist consciousness is the privileging of ego-centered reason. As its name indicates, ego-centered reason affirms the validity of the rule of reason as determined by the individual rationalist self. This consciousness posits a strongly idealist conception of reason in which the rationalist self knows few (if any) limits on its ability to understand and rationalize the world. Ego-centered reason understands that all claims or arguments about the nature of law or the world are addressed to the rational ego itself. The rationalist self is radically free—it need not (and should not) accept any claim that would de-center itself or its reason in adjudicating the nature of reality.46

46. Schlag, supra note 6, at 1210-11. Schlag seems to use “consciousness” as that cognitive orientation which is being used at a given point in time, recognizing that such consciousness can shift when a different activity is being undertaken or when a different type of written assertion is being made. In so doing, Schlag seems to understand the “self” not as integrated, but as truncated. While I do not disagree that, in some persons, the “self” can be described as truncated or scattered, in my judgment, this is not necessarily true. Thus, I tend to use “consciousness” as referring to a more consistently present state of being. Within such a more consistently present state of being, a person could utilize different cognitive capabilities to a greater or a lesser degree, depending upon the circumstances or the particular activity undertaken. To the extent that a person has developed an adult identity, then he or she will have developed a personality in which one or more cognitive capabilities are more fully developed and utilized. Such cognitive capabilities, however, may either dominate and may be relatively divorced from other capabilities,
The rationalist takes pride, then, in his or her ability to engage the cognitive capacity for analytic understanding, i.e., the overall ability to break down, clarify, and systematize ideas. More specifically, for the rationalist, reality is "rationally" known through several interrelated modes of "rational" understanding: idealist rationalism, pragmatic rationalism, and empiricist rationalism.

Empiricist rationalism describes a person's rational understanding that reality is known best through the use of the empirical method. This method involves the generation and systemization of scientific theory employing accepted scientific methods that observe and quantify sense data.

Pragmatic rationalism is closely allied to empirical rationalism. Just as the empiricist rationalist attempts to deal only with what "is," as explicated in scientific theory grounded in quantifiable sense data, the pragmatic rationalist also deals with what "is," but by using a popular, common sense understanding of the world to define what "is." As Schlag states, within the context of pragmatic rationalism, one uses "the categories, the expressions, and the relations of everyday life as the appropriate vehicles of thought. The result is a sort of unquestioning pluralistic consciousness that surrenders to the received description and understanding of the world."47

Finally, an idealist rationalist, while perhaps not rejecting the empiricist or pragmatic rationalist "modes of thought," subordinates them within his consciousness to a larger idealist framework. The idealist rationalist, who is mostly concerned with generating a logically coherent system of ideas or world view within which to understand reality, tends to discount what "is" in favor of generating the ideal scheme.48

or may complement and be more fully integrated with them. See Anthony J. Fejfar, A Road Less Traveled: Critical Realist Foundational Consciousness in Lawyering and Legal Education, 26 Gonz. L. Rev. 327 (1990/91) [hereinafter Fejfar, A Road Less Traveled] (discussing the cognitive capabilities in detail). See also Anthony J. Fejfar, Beyond Babel: A Critical Realist Reflection on Tom Shaffer's Legal Ethics as Ethics, 19 CAP. U. L. Rev. 1009 (1990) [hereinafter Fejfar, Beyond Babel] (discussing "consciousness" in relation to living and understanding legal ethics).

At this point, the reader should keep in mind that if he or she is functioning within a liberal rationalist horizon, then this discussion of what constitutes a rationalist horizon will seem, at best, rather superfluous since it is immediately apparent that such rationalism, with some divergences taken into account for ideal philosophical preferences, describes how all "rational" adults know reality. If this is your reaction, at this point, all I can ask you to do is to humor me, and keep on reading.

47. Schlag, supra note 6, at 1224.
48. While in philosophy there exist "schools" or traditions which can be
In general, the rationalist recognizes that morals or values are not subject to scientific verification the way in which "objective" quantifiable facts are. Instead, morals or values, unless they can be "rationally" grounded, are seen as purely subjective and irrational. The only "objective" values are those which are instrumental to the achievement of preference or satisfaction, or those which can be derived from a universal, systematic, ethical theory. Therefore, an ethical or political theory which involves the cognitive capacity for critical judgment, passionate caring love, and intuitive understanding merely describes a subjective matter of individual taste. Such a theory fails to qualify as rationally acceptable because it is not grounded primarily in analytic understanding. In order for an ethical or political theory to be qualified as legitimate, it would have to meet certain rationalist aesthetic standards involving specific criteria, including representational accuracy, coherence, elegance, sweep, determinacy and realizability.\textsuperscript{49} According to Schlag, "A theory that meets each of these aesthetic criteria will be powerful, at least in the way that a rationalist conceives power."\textsuperscript{50}

The political theory developed by John Rawls is a well known example of a "powerful" rationalist theory which proceeds from within

\textsuperscript{49} Id. at 1216.
\textsuperscript{50} Id.
the tradition of Enlightenment liberalism. Because of its notoriety and comprehensiveness, I have chosen Rawls’ theory as the basis for a description of an ‘ideal’ system which is partially constitutive of what I will refer to as a liberal rationalist horizon. As briefly as possible, I will set forth this ethical-political ‘world view’ which parallels Rawls’ work.

The starting point of the liberal rationalist world view is the isolated individual, set apart from society, who has an immediate common sense and a scientific grasp of contemporary political, economic, and historical facts in relation to society. This person is conceived as rational and autonomous. A person is assumed ‘rational’ when he or she has sufficient analytic understanding to grasp the basic facts stated above. In the more narrow economic sense, a person is assumed ‘rational’ when he or she: (1) has the ability to understand the means necessary to obtain ends; and (2) desires not only sufficient


52. I have attempted to integrate some of the ideas developed in Rawls’ later articles with the central thrust of the ideal framework set forth in A Theory of Justice. Although I am using Rawls’ work as a basis for describing a liberal rationalist horizon, I do not mean to suggest that other liberal theorists are not “liberal.” I use Rawls’ theory for several reasons. First, it is well recognized and comprehensive; second, Engel explicitly references Rawls in relation to his Kew Gardens discussion; and third, Rawls explicitly develops the idea that a “just” society can only be present where persons: (1) act “reasonably” to promote “justice” in their “public” roles, and (2) act in accord with natural duty at all times. I wish to stress, however, that the “model” which I use here is not to be equated with Rawls’ own work. While the interpretation presented here is, in my judgment, a reasonable extrapolation and synthesis of Rawls’ work, I make no representations as to the extent to which Rawls would agree with either my interpretation or my subsequent analysis.

53. Cf. Shapiro, supra note 51, at 251-54. Rawls suggests that the individuals in the original position do not “view themselves as single isolated individuals.” Rawls, supra note 51, at 206. However, Rawls’ entire analytic approach is to treat them as such.

54. See Rawls, supra note 51, at 137.

55. See id. at 143.
goods and services to live a comfortable life, but desires more goods and services rather than less.\textsuperscript{56} Finally, as a "rational" person, his or her "rationality" is not affected by the emotions of benevolence, hate, or envy.\textsuperscript{57}

The aforementioned person is also assumed autonomous in the sense that the principles underlying his or her actions are chosen as the "most adequate possible expression of his or her nature as a free and equal rational being."\textsuperscript{58} This individual is essentially disinterested in other persons. Community is considered only as an aggregate of individuals and is assumed not to have any collective reality which goes beyond the sum of the individuals comprising it.\textsuperscript{59}

The rational and autonomous person, however, is not totally self-seeking. Instead, he or she exercises reasonable full autonomy in order to ensure the cooperation necessary for the political implementation of the principles of justice derived from the notion of rational autonomy. Reasonable full autonomy, then, subsumes rational autonomy by integrating the personality characteristics of "natural duty."\textsuperscript{60} Natural duty includes the duty to: (1) respect others as free and equal moral beings; (2) help others in need (provided there is no excessive risk of harm or loss to oneself); (3) not harm or injure others or to cause unnecessary suffering; (4) support and comply with just institutions; (5) help to further just arrangements not yet established; and (6) support the existing political structure if it is just, or as just as is reasonable to expect in the circumstances.\textsuperscript{61} However, notwithstanding the obligation to act in accordance with natural duty, the person is also encouraged in "private" life to pursue any rational good or preference, i.e., rational self-interest.\textsuperscript{62}

\textsuperscript{56} See id. at 144.
\textsuperscript{57} See id.
\textsuperscript{58} See id. at 252.
\textsuperscript{59} See id. at 264.
\textsuperscript{60} Rawls discusses "rational autonomy" and "full autonomy" in his \textit{Kantian Constructivism} piece. In that article, he states that "rational autonomy" roughly parallels "the notion of rational autonomy found in neo-classical economics." Rawls, \textit{Kantian Constructivism}, supra note 51, at 521. "Full autonomy" is characteristic of "citizens in everyday life who think of themselves in a certain way and affirm and act upon [the principles of justice]." Id. In the present article, when I use the term "reasonable full autonomy," I am including within that notion the "natural duty" to promote the principles of justice as well as the other "natural duties" set forth by Rawls in \textit{A Theory of Justice}. See infra text accompanying notes 63-66 (describing the "principles of justice").
\textsuperscript{61} See Rawls, supra note 51, at 114-15.
\textsuperscript{62} See id. at 359-60.
Within the context of this liberal rationalist "world view," existing political structures are deemed just if they conform with the principles of justice.63 These principles provide that each person in society should have an equal right to the most extensive system of equal liberties compatible with a similar system of basic liberties for all others.64 A liberty or right derived from the principle of equal liberty can never be involuntarily sacrificed to achieve some secondary economic or social "good" for the benefit of another.65 Conflicts between primary rights of equal liberty relating to conscience, property, etc., are apparently to be decided on the basis of intuition.66

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63. See id. at 246.
64. See id. at 302.
65. See id. at 3-4.
66. For Rawls, "liberty of conscience" is the paradigmatic example of a first order liberty. This right serves as a model for other rights. Id. at 205-11. The "right to hold personal property," however, also constitutes a "basic liberty." Id. at 61. Additionally, "the means of production may or may not be privately owned." Id. at 66.

The classification of the rights of conscience and property as first order liberties, however, is problematic precisely because it would seem that the deprivation of property rights would result in the decreased ability of a person to exercise his or her freedom of conscience. Cf. H.L.A. Hart, Rawls on Liberty and its Priority, in Essays in Jurisprudence and Philosophy 223, 230 (1983) ("[A] decision to limit private ownership to consumer goods made on [the] grounds [of social and economic efficiency] would result in a less extensive form of liberty than would obtain if private ownership could be exercised over all forms of property.").

The status of property rights as a first order liberty, however, is even more unclear when considering other statements made by Rawls. On the one hand, a first order liberty can never be sacrificed for a second order liberty involving the fair distribution of offices and opportunities. Such a "sacrifice," however, apparently does not include the "sacrifice" of the payment of taxes necessary to provide equality of opportunity in education or the provision of a social welfare net. See Rawls, supra note 51, at 275. Additionally, the government is authorized to correct market imperfections and "[t]o this end suitable taxes and subsidies may be used, or the scope and definition of property rights may be revised." Id. at 276.

On the other hand, if one assumes the presence of "background institutions" which provide equality of opportunity, the social welfare net, and the regulation of the economy necessary to adjust for market imperfections, then the market is assumed to act in a neutral manner to promote the principles of justice. See id. at 309-10. Put another way, if one assumes that the societal status quo involves a "just" or "as near a just society" as one can expect given actual conditions, then "[t]here is no more justification for using the state apparatus to compel some citizens to pay for unwanted benefits that others desire than there is to force them to reimburse others for their private expenses." Id. at 283. Unless a person comes to the extreme conclusion that our democratic processes are merely a sham which must be overthrown and replaced (which of course a liberal rationalist is not likely to conclude) one inevitably ends up concluding that a "near-just" society is present, and therefore property rights are not to be adjusted to promote individual conceptions
The right to equal liberty or equal rights is, in essence, equivalent to the rights found in the United States Constitution.67 The regulation of economic activity and distribution of economic goods are to be performed by the legislature.68 However, the legislature is limited in the type of legislation it enacts. The legislature cannot enact legislation which promotes individual conceptions of the good.69 As a “neutral” means of assigning societal preferences as to the value of particular goods, the market is the preferred mechanism. Legislation is only appropriate to prevent physical harm, adjust for market imperfections, provide public indivisible goods, and ensure distribution necessary to provide a minimum income.70 Thus, discussion in the legislature is limited to the end, i.e., a society operating on the basis of the principles of justice, and the means, i.e., the use of information generated from the use of pragmatic rationalism and empiricist scientific rationalism which will provide a basis for “realistic” options.71 As a “near-just” society, our governing institutions are to be supported, deemed legitimate as they currently function, and reformed only to the extent necessary to protect equal liberty and to perform the functions described above.72

Having heard a discussion of Engel’s analysis as well as an overview of the liberal rationalist horizon, we can now begin our dialogue in earnest. Initially, we will listen to two critiques emanating from within the liberal rationalist horizon. The first “voice” will be that flowing from within a property-oriented liberal rationalist horizon.

2. Critique of Engel’s Discussion from Within a Property-Oriented Liberal Rationalist Horizon

A person operating within the context of a property-oriented liberal rationalist horizon “rationally” assents to the liberal rationalist world view outlined above, with the qualification that he or she places greater weight upon property rights as well as greater reliance

of the “good” which do not relate to increased market efficiency or government sponsored social welfare programs.

67. See Rawls, supra note 51, at 199.
68. See id.
69. See id. at 283-84. Rawls does allow for legislation promoting a particular good when there is unanimous support for such legislation. As a practical matter, it would seem that this possibility would rarely, if ever, occur.
70. See id. at 282-83.
71. See Rawls, Overlapping Consensus, supra note 51, at 8.
72. See Rawls, supra note 51, at 115.
on the market as the neutral arbiter of societal preferences. Subsequent property rights, as they exist, are considered fundamental rights. Where conflicts exist, property rights have a greater weight than another person’s right to act in accord with freedom of conscience and a greater weight than the assumed moral obligation of another person to act in accordance with natural duty. The argument supporting this priority of property rights suggests, with some plausibility, that freedom of conscience, i.e., freedom to exercise rational self-interest, is meaningless unless one can freely use one’s property in furtherance of one’s own conception of self-interest without being interfered with by the government or other persons. Thus, government should never, with the exceptions of extreme market dysfunctions, national defense, and the provision of some type of minimal social welfare net, interfere either in the regulation of the market generally or in the readjustment of property rights, which directly or indirectly result in the distribution of property from some persons to others.

A person critiquing Engel’s discussion from within a property-oriented liberal rationalist horizon would be in basic agreement with Engel’s approach. The protection of property rights and the accompanying fiduciary duty to property owners, i.e., to shareholders, is paramount. Any moral judgments relating to corporate activities by corporate actors, which do not have as an end the maximization of profit, are purely subjective and arbitrary value preferences, or notions of the good, which are being unjustly imposed upon shareholders and other participants in the neutral market, e.g., the corporation’s customers.

Within this property-oriented analytical framework, our governmental system in the United States (electoral processes, court systems, etc.) is assumed to be legitimate. The decisions of the legislature to enact or not to enact legislation represent an assumed societal consensus which shrouds all legislative action or inaction (which hopefully has not involved too much regulation of markets

73. This property-oriented horizon is generally consistent with the model of the corporation suggested by Robert Hessen. Robert Hessen, A New Concept of Corporations: A Contractual and Private Property Model, 30 Hastings L.J. 1327 (1979). If there is any justification for the concept of “social responsibility,” it cannot be found either in the concession theory or in the separation of ownership and control. The giant corporation is private property; it is a voluntary association created and sustained by an exercise of freedom of contract. Its right to function freely on an equal footing with other organizations and associations requires no further justification.

Id. at 1350.
or redistribution of property interests) in a cloak of unquestioned moral legitimacy. As a “near-just” society, the system is to be supported as is. Although there may be a natural duty to improve the system or enact legislation which would lead to a more “just” society, this duty cannot be invoked to institute any significant legal changes with respect to corporate governance, or corporate purpose, if doing so would require “unjust” interference with the neutral market system, or with an “unjust” redistribution of property rights. Thus, the status quo of the “near-just” society, which by definition cannot be made better without unjustly infringing upon rights, must be maintained.

Engel’s general approach, therefore, is perfectly acceptable. Since there are no legitimate “value” judgments of corporate actors which can be good in themselves, corporate voluntarism merely becomes a category of results, or a “product.” Hence, any analysis of corporate voluntarism must focus on whether or not the product is desirable, or whether it is a product which has a legitimate content. By definition, the legislative process and the “neutral” market are the only mechanisms which can confer moral legitimacy. Thus, the only morally acceptable content to the “product” or category of results of corporate voluntarism are those results which cannot be accounted for by an adequately functioning market or the legislative process. Not surprisingly, this ends up being virtually nothing.74

There is one major problem with the property-oriented analytic approach, however, and that involves “natural duty.” By definition, the just society only exists if persons are acting in accordance with reasonable full autonomy, which subsumes natural duty. Natural duty is assumed on the part of persons in society and, at a minimum, involves the duty to help another when the cost is low in comparison with the help given. It also requires that we not harm or injure another or cause unnecessary suffering. If a corporate actor were to harm or injure another, causing unnecessary suffering in the pursuit of profit maximization, then it would appear that he or she would not be acting in accord with natural duty. Moreover, it would seem that the corporate actor would be treating the persons in the community as a means, rather than an end, thus failing to treat each person with the respect due him or her as a free and equal rational being.

74. See Engel, supra note 1, at 83-85.
Within the context of the property-oriented liberal rationalist horizon, however, there is no such conflict and, therefore, no problem to be solved. The actions of corporate actors in pursuing profit maximization within the constraints of the neutral market, and existing legislative enactments, are, by definition, morally acceptable. Failure to maximize profit within the bounds of the law results in a loss of profit to the shareholder which is assumed to be equal to the gain to third persons. In other words, natural duty does not require such action precisely because the "cost" of the corporate actor's action will not be substantially less than the "benefit" to other persons or the natural environment. Thus, actors who "produce" corporate voluntarism inappropriately "use" the shareholders to achieve "goods," the "purchase" of which the shareholders have not freely agreed to. Accordingly, corporate actors are being truly responsible only when they are not acting on their "purely subjective" judgments of social responsibility. Persons, or the natural environment, which are actually harmed by such failure to act are not "harmed" for purposes of moral or social responsibility. Instead, such "rational" corporate actors are revealed as acting in accordance with natural duty, precisely because their actions have been legitimatized a priori by the system.

Having listened to a critique of Engel's analysis emanating from within a property-oriented liberal rationalist horizon, we will now listen to a critique of his analysis flowing from within a duty-conscience oriented liberal rationalist horizon.

3. Critique of Engel's Discussion from within a Duty-Conscience Oriented Liberal Rationalist Horizon

In addition to the critique from within a property-oriented liberal rationalist horizon, a critique of Engel's discussion can also occur from within a duty-conscience oriented liberal rationalist horizon. Within this latter horizon, greater weight is given to the rights of corporate actors to act in accordance with their individual judgments of conscience regarding natural duty. Contrary to the property-oriented

75. This duty-conscience oriented horizon is generally consistent with the "rights model" of the corporation suggested in R. Collin Mangrum, In Search of a Paradigm of Corporate Social Responsibility, 17 CREIGHTON L. REV. 21, 43-47 (1983). According to Mangrum, "The rights paradigm begins with the assumption that individuals have rights that even the public interest cannot override." Id. at 43.

An application of this form of [liberal] deontological reasoning to the
view, the duty-conscience orientation assumes that the scope of natural duty has not been *a priori* limited or defined by the system. Thus, corporate actors are deemed to have the right to exercise their individual consciences in such a way as to enable them to use their own judgments to decide whether or not a particular action, although legal and potentially profit maximizing, would cause unnecessary harm or suffering to persons in the community or damage to the natural environment. Within the duty-conscience oriented *liberal rationalist* context, Engel's discussion can be criticized on two grounds: It absolutizes property rights and does not give sufficient weight to the individual corporate actor's right and obligation to make first-hand judgments in accordance with natural duty.

The duty-conscience oriented view, however, is subject to criticism by the property-oriented *liberal rationalist* on the basis that corporate actors would be "using" shareholders or even customers as a means to their own "self-gratifying," "purely subjective," and "arbitrary" value preferences as ends. Thus, the actors fail to treat shareholders and customers as free and equal moral beings deserving respect. Furthermore, any redistribution of property through taxation or otherwise should be performed by the legislature.76

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76. Cf. Milton Friedman, *The Social Responsibility of Business is to Increase its*
In response, a duty-conscience oriented *liberal rationalist* would state that all persons, whether corporate actors or not, have an individual obligation to act in accordance with natural duty and that the property rights of shareholders or customers are subordinated to, or at least co-equal with, this obligation. Shareholders can sell their stock if they do not like the corporate actor’s judgments."

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Profs, N.Y. Times Mag., Sept. 13, 1970, at 192 (describing corporate voluntarism as “taxation without representation” and equating the use of social values, other than profit maximization, in business decision making as “socialistic”). But see W. L. Lacroix, PRINCIPLES FOR BUSINESS ETHICS 91 (1976):

The key presupposition here is the danger to our society of the practices of socialism. . . . I suppose that Friedman opposes economic values to political values here by subsumption [of the principle]—that to act in the social interest would be to usurp political power. But there is, of course, a basic fallacy in the identification of social values which the ethician may want to have operative in the business decisions of managers with the socialistic political values. The fallacy becomes obvious when it is put in form.

A type of decision has B effects (A entails B)
C type of decision has B effects (C entails B)

Therefore, C type is equal to or identical with A type.

Just because a political horizon or socialistic horizon may lead one to add social values to economic values in the decision process, it is a fallacy to conclude that anyone who so desires is acting as a politician or a socialist. This is the old fallacy that historically operated against Socrates.

Atheists question the gods.

Socrates questions the gods.

Therefore Socrates must be an atheist.

The technical name for this fallacy is the “Fallacy of the Undistributed Middle.”

77. Cf. Mangrum, supra note 75, at 47:

[A] dissatisfied shareholder could voice his or her opinion at shareholder meetings; seek to install different board members who would effect different policy decisions, seek to amend the articles to permit or prohibit the preferred conduct, or sell his or her shares to avoid further disappointment. Property rights are thereby maintained within the auspices of corporate decision-making processes.

*Id.* Given the fact that management controls the boards of directors of most major corporations, Mangrum’s “vote by walking” suggestion is not very realistic in terms of “effective” action by the shareholder in the absence of shareholder access to the proxy process, and the ability to use shareholder proposals:

Stockholder proposals play a unique role in the governance of large corporations. They constitute virtually the only device shareholders can employ to influence corporate decisions affecting them. In particular, they can serve as an effective tool for influencing those corporate decisions that have public policy implications. As a result, the stockholder proposal process has been recognized as providing the kind of safety valve for dissent that many believe is essential to the successful functioning of corporations in
Moreover, presumably the market price of stock in such a socially responsible company would decrease if the profit motive is not sufficiently taken into account, thus presenting the company as a "ripe plum" for a corporate takeover.\textsuperscript{78}

Thus, on the surface at least, within the \textit{liberal rationalist} horizon, the issue of whether corporate voluntarism is desirable appears to involve a "political" choice between the primacy of property rights over the right to act in accordance with duty-conscience or the right to act in accordance with duty-conscience over property rights.

At this point in our dialogue, it appears that Engel was correct in concluding that the issue of the underlying legitimacy of corporate voluntarism is rooted in "political" assumptions. In accordance with his thesis, Engel has set forth a logically coherent analysis based upon the "political" assumption of the priority of property rights. The right and obligation to act in accordance with natural duty is limited and defined \textit{a priori} by the system itself. While Engel does not present an analysis which begins with the assumption that citizens must act in accordance with duty-conscience in order for a just society to "exist," he invites others to present an analysis based on alternative "political" assumptions.\textsuperscript{79} The inadequacy of Engel's approach is not readily apparent when analyzed from within a \textit{liberal rationalist} horizon, although it does appear inadequate when analyzed from within a \textit{critical rationalist} horizon. Thus, our dialogue will now move to a different "level," with the "voice" of critique emanating from within a \textit{critical rationalist} horizon.

\section*{B. Critique of Engel's Discussion and the Liberal Rationalist Horizon from Within a Critical Rationalist Horizon}

The \textit{critical rationalist} horizon is somewhat difficult to describe because of its ambiguous attitude toward \textit{rationalist} consciousness. On
the one hand, the critical rationalist recognizes many of the problems associated with the “assumptions” made within the liberal rationalist horizon. On the other hand, the critique still proceeds in general, with the essential presupposition that reality is known primarily through the cognitive use of analytic understanding, even if the content of the critical rationalist critique itself tends to discount that presupposition. In other words, the critical rationalist engages in critical analysis which suggests, at least to some degree, that “rational” analysis itself may be “irrational.”

Initially, a critical rationalist might be interested in critiquing the analytical framework employed by Engel, attempting to identify and explicate any aesthetic problems or weaknesses in the discussion. The most obvious aspect of Engel’s discussion which the critical rationalist might be interested in analyzing is the presumed legitimacy of the legislative process. As previously mentioned, other than his treatment of the narrow issue of corporate lobbying against legislative restrictions on corporate lobbying itself, Engel excludes from his discussion the implications of corporations influencing legislation directly or indirectly. He limits his discussion on three grounds: (1) as it exists, the legislative process is assumed legitimate; (2) any discussion of the overall legitimacy of the legislative process would present difficulties because of the breadth of the subject matter;

80. Cf. Schlag, supra note 6, at 1213-17. What Schlag describes as “modernist” and “postmodernist” consciousness is analogous to what I am denominating critical rationalist consciousness. Schlag distinguishes “rationalist,” “modernist,” and “postmodernist” consciousness:

For the rationalist, everything remains on the plane of ideas. . . .

A modernist . . . treats reason and theory very differently from a rationalist. For a modernist, rationalism holds an incredibly flattering vision of its own role and its theoretical aesthetics. Not surprisingly, modernism questions the autonomy and the integrity of the rationalist account. Modernism acknowledges that the rationalists’ aesthetics of theory may have some connection to truth and understanding, but not an exclusive one.

Id. at 1215.

The question of whether there is any significant difference between postmodernism and modernism is certainly arguable. The difference may turn out to be largely one of form. Modernists attempt to put forward the unpresentable, but the form of presentation remains recognizable—offering the reader or viewer some solace. The form of modernist intellectual work is not wholly alien to the rationalist. The postmodernist, by contrast, puts the unpresentable forward in the presentation itself.

Id. at 1217.

81. Engel, supra note 1, at 73-74 n.288.
and (3) conceivably, "a real distinction of degree can be made that the legitimacy of corporation-in-politics laws is more questionable than that of other rules affecting corporations." \(^{62}\)

In relation to Engel's discussion of the legitimacy of the legislative process, a critical rationalist might raise several questions. First, is it "rational" to assume that the legislative process is legitimate when one has excluded all potentially delegitimizing influences from discussion on the basis that the demonstration of such influences would tend to contradict the initial assumption of legitimacy? Second, is it "rational" to exclude all potentially delegitimizing influences from discussion on the basis of the breadth of the subject matter when doing so excludes the possibility of demonstrating the persuasive existence of such influences? Third, is it "rational" to exclude all potentially delegitimizing influences from discussion on the basis that conceivably there is less corporate influence on general corporate legislation, than there is in relation to anti-lobbying legislation, when conceivably there is just as much influence exercised? Fourth, is it "rational" to exclude from discussion, as Engel essentially does, the possibility that corporations, as major institutional actors in our society, cannot avoid exercising enormous influence in our society generally, and thus on the legislative process? Finally, Engel suggests that if there is reason to question the legitimacy of a lack of anti-lobbying legislation, then this lack of legitimation may support a voluntary restraint on lobbying activities by corporations. Similarly, does it not seem, as a matter of logical consistency, that if it is unavoidable that corporations do have an influence upon society in general and corporate related legislation in particular, then the legitimacy of the legislative process, at least as to corporate regulation, is called into question?

Engel openly and provocatively sets up these questions in the reader's mind and then purposefully fails to answer them, presumably on the basis that his "political" presuppositions are accepted by his readers. However, it would seem that while there may be an "ideological" basis, critically speaking there is no "rational" basis for asserting the legitimacy of the legislative process. Thus, the only basis for making this assumption is an "irrational" belief.

Engel also excludes from serious discussion the possibility that the individual ethical judgments of corporate actors could somehow

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82. Id. at 75.
carry with them their own moral legitimacy. For Engel, ethics consists of abstract systems of rules:

The substantive areas in which corporate social responsibility is generally demanded tend not to lend themselves to the kind of unambiguous rules necessary for ethical systems to arise; and that these areas tend to change rapidly and to involve conflicts of social interests rather than common social interests, both of which tendencies further reduce the fertility of these areas for the growth of ethical systems.\(^{83}\)

A critical rationalist might point out that Engel is assuming the typical liberal rationalist viewpoint that ethics consists of following rules. Moreover, he seems to assume that corporate "profit-maximizing" decisions are made through the use of detached "objective" rational analysis not involving "subjective" value judgments.\(^{84}\) The

\(^{83}\) Engel, supra note 1, at 31 n.92.

\(^{84}\) Logically, it would seem that Engel must assume that business judgments relating to "profit maximization" must be "objective" in a way that business judgments relating to profit as an important, but not exclusive value, are not. If there is no difference then each type of judgment is equally "objective" or "subjective" in relation to imposing "personal" judgments on the shareholder, customer, or society in general. Assuming that there is a "rational" difference, as opposed to a difference which is purely based on an "irrational" ideological assertion, then Engel has the burden of telling us what this "rationally" distinguishing element is. Engel could argue that a "profit maximizing" judgment is really a "fact" judgment and therefore not "subjective" like a value judgment. However, the critical rationalist might respond that "rationally," the arguments which suggest that "value" judgments are "objective" or "subjective" are equally applicable to "fact" judgments. See Michael Moore, Moral Reality, 6 Wis. L. Rev. 1061 (1982). Moore summarizes his argument for the "objectivity" of moral judgment:

A more complete argument for the objectivity of moral judgment [has] two premises: (1) that moral judgments parallel factual judgments in their objectivity; and (2) that factual judgments are objective. Our partial proof that moral judgments are objective can only be convincing to someone already convinced that factual judgments are objective. One suspects that, in fact, most people who are moral skeptics are not fact skeptics. It is one of the hallmarks of modern thought to attempt to draw just the distinction that this [writer] has urged cannot be drawn. This is particularly true of skeptically minded lawyers . . . that think that facts are "hard" but values are "soft." If some such diagnosis [of lawyers] is correct, our partial proof addresses the premise most in need of addressing.

\(^{83}\) at 1153.

A critical rationalist might also point out that even if a person were to concede that value judgments are "subjective" in a way that fact judgments are not, the type of judgments business persons make are not purely fact judgments, but also involve values. Any time a person makes a decision to take action, or not to take
notion that the corporate decision-making process inherently involves fact judgments and value judgments does not seem to be taken seriously. Nor does Engel take seriously the possibility of a "responsibility" oriented ethic.  

In fairness to Engel, the moral development theory of Lawrence Kohlberg does offer some support for Engel’s notion of ethics. However, if Engel is asserting some sort of rational justification for his assumption of a rule-oriented ethics, then he must present arguments as to the normative validity of such an ethical approach.

In order to establish a rationalist post-conventional stage as normative, one could take two different approaches. First, one could argue empirically or descriptively that all "normal" adult persons operate on a rationalist post-conventional level. This argument, however, is problematic from two standpoints. On a purely logical plane, it assumes the naturalistic fallacy. Additionally, less than one-half

action, a value judgment is implicitly present as to the relative worthwhileness of either course of action. Since business judgments involve decisions as to possible courses of action, they involve judgments of value.

Engel might also argue, however, that even if a value judgment as to a course of action is involved, the criterion for this underlying judgment is "objective" since it is based upon microeconomic theory. This argument assumes in the first instance, however, that microeconomic theory does not implicitly contain a normative value dimension. Hosmer points out that microeconomic theory does contain a normative value dimension. See infra note 154.

85. See Fejfar, Beyond Babel, supra note 46 (discussing an ethics of critical responsibility).

86. Kohlberg has developed a theory which sets out different stages of moral development, categorized roughly as pre-conventional, conventional, and post-conventional. The rationalist post-conventional person engages in moral reasoning on the basis of agreed upon rules or upon universal principles similar to that suggested by Engel. See generally Fejfar, supra note 51.

87. A "rationalist" post-conventional stage of moral development is present where a person makes moral judgments primarily on the basis of analytic understanding involving the adherence to "objective" rules or principles. A non-rationalist post-conventional stage more fully develops and integrates intuitive understanding, affectivity, and critical judgment. See Fejfar, supra note 51, at 256 n.131.

88. This point was made by William P. Alston in Comments on Kohlberg's "From Is to Ought", in COGNITIVE DEVELOPMENT AND EPISTEMOLOGY 276-77 (Theodore Mischel ed. 1971) [hereinafter COGNITIVE DEVELOPMENT]:

[U]less Kohlberg can do more than he has done to show that his choice of a definition of "moral" is based on something more than a personal preference among the variety of definitions that have been proposed, the fact that his later stages conform more exactly to his conception of moral judgment has no objective significance. . . . If Kohlberg wants to investigate the development of moral reasoning according to some arbitrarily selected criterion of "moral," well and good; he may come up with
of the adult population in the United States operates at the post-conventional level.89

A second argument in support of the “normative” status of a rationalist post-conventional stage is that, from a cognitive standpoint, the developmental state or stage of the rationalist post-conventional person is cognitively more inclusive and provides a more adequate cognitive integration.90 While this argument makes some sense, problems arise in that it assumes that a rationalist post-conventional cognitive state is more advanced, more inclusive, and constitutes a more adequate integration than the other cognitive states potentially realizable.91 Obviously, if one can demonstrate the existence of a

something interesting. But if he wants to use the developmental approximations to the purely moral in this sense as a basis for pronouncements as to how people ought to reason in their action-guiding deliberations, that is another matter. If these pronouncements are to carry any weight, he will have to show that this sense of “moral” which is functioning as his standard has itself some recommendation other than congeniality to his predilections.

Id.


90. This is the approach taken by Kohlberg. See Lawrence Kohlberg, From Is to Ought: How to Commit the Naturalistic Fallacy and Get Away With It in the Study of Moral Development, in COGNITIVE DEVELOPMENT, supra note 88, at 151. Assuming a formalistic moral philosophy as normative, Kohlberg states:

What we are claiming is that developmental theory assumes formalistic criteria of adequacy, the criteria of levels of differentiation and integration. In the moral domain, these criteria are parallel to formalistic moral philosophy’s criteria of prescriptivity and universality. These two criteria combined represent a formalist definition of the moral, with each stage representing a successive differentiation of the moral from the nonmoral and a more full realization of the moral form.

Id. at 216-17.

91. The foregoing, of course, assumes that “inclusivity” and “development” provide an independent “rational” basis for analysis. Kohlberg has recognized that he must assume a formalist moral theory as “normative” in order to provide a basis for judging the higher developmental stages to be more “inclusive.” The problem is that formalist moral theory may not give an adequate account of how it is that persons actually make decisions and act in the real world. Carol Gilligan has suggested that it is precisely the assumed normativeness of formally differentiated reasoning that is the major weakness in Kohlberg’s work. She suggests that many persons who have been labeled as operating on the “lower” conventional level of moral judgment who make decisions on the basis of contextual judgments of caring responsibility have been miscategorized. Instead, these persons are engaging in a fundamentally different form of moral activity which more fully engages cognitive capabilities other than formal analytic understanding. She has found that this ability to make contextual judgments of moral responsibility is more prevalent in women
cognitive state which is more advanced, more inclusive, and constitutes a more adequate integration, then the legitimacy of the rationalist post-conventional cognitive stage, minimally, is thrown into doubt.\footnote{92}

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\item than in men:
\item [T]he standard of moral judgment that informs [these people's] assessment of self is a standard of relationship, an ethic of nurturance, responsibility, and care. Measuring their strength in the activity of attachment ("giving to," "helping out," "being kind," "not hurting"), these highly successful and achieving women do not mention their academic and professional distinction in the context of describing themselves. If anything, they regard their professional activities as jeopardizing their own sense of themselves, and the conflict they encounter between achievement and care leaves them either divided in judgment or feeling betrayed. . . .

Thus in all of the women's descriptions, identity is defined in a context of relationship and judged by a standard of responsibility and care. Similarly, morality is seen by these women as arising from the experience of connection and conceived as a problem of inclusion rather than balancing claims.

Carol Gilligan, In a Different Voice: Visions of Maturity, in Women's Spirituality: Resources for Christian Development 63, 71-72 (J. Wolski Conn ed. 1986). Gilligan points out that what is needed is a jurisprudence or developmental theory which is able to integrate both "equality-fairness" and "equity-responsibility":

The morality of rights is predicated on equality and centered on the understanding of fairness, while the ethic of responsibility relies on the concept of equity, the recognition in differences in need. While the ethic of rights is a manifestation of equal respect, balancing the claims of other and self, the ethic of responsibility rests on an understanding that gives rise to compassion and care. Thus the counterpoint of identity and intimacy that marks the time between childhood and adulthood is articulated through two different moralities whose complementarity is the discovery of maturity.

Id. at 76-77.

In the representation of maturity, both perspectives converge in the realization that just as inequality adversely affects both parties in an unequal relationship, so too violence is destructive for everyone involved. This dialogue between fairness and care not only provides a better understanding of relations between the sexes but also gives rise to a more comprehensive portrayal of adult work and family relationships.

Id. at 86.

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\footnote{92. If for example, through rigorous phenomenological analysis or psychological investigation, it appears that "creative intuitive imagination," "synthetic relational intuitive understanding," "nurturing care," and "interactive judgment" are all cognitive capabilities which are required for a person to \textit{really} be able to understand others better, make better judgments, and then \textit{act} on those judgments, then it would appear that the ability to engage in formal reasoning does not itself provide a "normative" basis for judging "inclusivity" and "development."}

Along the same line of argument, Craig Dykstra suggests that the presence of deep structuring symbols or stories, and lived experience can provide a functional equivalent to formally differentiated reasoning, thus suggesting that such post-
The difficulty of providing a "rational" grounding for Engel's assumptions, however, is not limited to ethics but is apparent when considering other aspects of his discussion. One such aspect is the "public-private" distinction which Engel implicitly assumes. The critical rationalist might point out that within the liberal rationalist horizon, the legitimization of our system of government is theoretically assumed on the basis that persons in society generally, including persons associated with corporations, will, in accordance with natural duty, promote more "just" structures in society through their "public" roles. If one assumes that the "corporation" is a "person" conventional moral reasoning is not necessarily more advanced. See Craig R. Dykstra, Vision and Character: A Christian Educator's Alternative to Kohlberg (1981):

Formal reversible thinking is often required for a systematic articulation of the justification of mature moral judgments and actions insofar as they can be systematically justified. But it is not necessary for making those judgments and carrying out those actions. Contrary to Kohlberg, one need not be a moral philosopher in order to be a moral person. People who have a sufficient cognitive capacity for empathizing with the needs of others, the capacity to sustain a sense of the continuous identity of other persons, a capacity for imaginatively interpreting the nature and meaning of situations, and a sufficiently rich, imaginal repertoire by means of which to carry out such interpretations may be able to make extremely perceptive and fully moral judgments. Whether such psychological capacities are in fact actualized or not will depend on a number of other variables, including, perhaps, the extent of a person's experience with other, less fortunate people, the way one is socialized to handle feelings of distress over troublesome situations, and that indefinable quality of spirit to which [Robert] Coles refers.

Id. at 19-20 (footnote omitted).

93. See supra text accompanying note 61. Hosmer discusses the interrelationship between microeconomic theory and political processes:

The microeconomic model is utilitarian, for it takes the position that the ultimate end is the greatest general good, and it defines that good as the maximum benefits of consumer products and services at the minimum cost of labor, capital and material. The problem, as with all utilitarian theories, is that the distribution of the benefits and the imposition of the costs may be unjust. Consequently, it is necessary to add a political process to the economic paradigm to ensure justice in the distribution of benefits and the imposition of costs. But "justice" is defined in theory as a democratically determined pattern of distribution and imposition; this pattern does not follow a rule such as to each person equally, or to each according to his or her need, to his or her effort, to his or her contribution, to his or her competence, or even to his or her ownership of production. Instead, the pattern varies with the collective opinions of the members of society. This requires all members of society to be actively concerned with the charitable distribution of social benefits and imposition of social costs at the same time as they are actively concerned with the personal maxi-
for purposes of having a "public" role to promote more "just" structures in society, then the corporate actors managing the "will" of the corporation also have such a "public" role. Moreover, even if one does not assume that the corporation as a "person" has such a "public" role, there seems no plausible justification for asserting that persons who are managing and are employed by a corporation, as individuals apart from the corporation they work for, have no "public" role to promote more "just" structures. In actuality, if there is no "public" role for managers and employees as representing the corporation, or acting as individuals apart from their corporate "identities," other than their mere pursuit of economic and political self-interest, then it would seem that the theoretical justification for the liberal rationalist assumption of the "just" or "near-just" society cannot be borne out in practice. Therefore, Engel would seem to have some obligation to establish that it is possible for a person, or an organization composed of persons, to idealize itself as a self-interested, profit maximizing entity "in private," while at the same time adopting a "public" role and acting in the public interest when participating in the legislative process.

mization of material goods and services in the product markets and of financial wages, rents and interest payments in the factor markets, solely for themselves.

Hosmer, supra note 18, at 323-24.

94. Based on my reading of his discussion, in my judgment, Engel would deny that the corporation as a "person" has any duty to promote a more "just" society other than maximizing profit. It is less clear whether or not he would recognize the duty of corporate managers or employees to promote a "just" or "near-just" society as individuals apart from their corporate roles. While Engel is certainly entitled to make any assumptions he wishes, if he is trying to put forth a "rational" justification for a "just" or "near-just" society as presented within the liberal rationalist framework I have suggested, it would seem that he would have some obligation to set forth why it is that the mere expression of market preference, as such, will automatically promote a "just" or "near-just" society. If he merely asserts that self-interested market preference produces a "just" or "near-just" society by definition, then logically, it would seem that other than a purely tautological argument, his only justification is that of preference utilitarianism, i.e., that the market allows more people to express their preferences than other possible political-economic structures. This utilitarian argument is problematic from two standpoints. First, if there is no political redistribution of property or wealth, then there is no reason to think that all persons in a given society will have an opportunity to participate in the market and thus express their preferences. Second, within a deontological rights perspective, there is nothing to prevent those persons who exercise economic power in the market from exercising that same power to subvert the political process in order to infringe upon or eliminate the "rights" of the minority, thereby denying the "rational autonomy" of a significant number of persons in society. See Hart, supra note 66, at 198-222 (discussing the problems associated with utilitarianism as an underlying justification for political legitimacy).
Drawing on the work of psychologist Erik Erikson, the critical rationalist might suggest that such role duality is not possible. If one's primary role is to "rationally" pursue self-interested profit-maximization, it would seem that one would exercise this role both in evading compliance with laws as well as in supporting or opposing legislation. While a person or corporation could treat its primary goal as profit maximization and then voluntarily engage in limited political action in the "public" interest, it does not seem likely that persons or corporations would actually do so when such conduct would go against the corporate grain.

Moreover, even if we assume that a corporation is composed of persons who operate on a rationalist post-conventional stage of moral development, the empirical evidence suggests that the actual conduct of such persons, as opposed to abstract ethical judgments, will conform to normal social expectations. Therefore, once a dominant corporate culture of unreflective self-interested profit maximization develops, it is unlikely that individual persons within the corporation who operate within a rationalist post-conventional stage, making judgments as to political actions necessary to promote "justice," will actually follow through with them. Accordingly, it appears that there is no "rational" basis for assuming the presence of a "just" or "near-just" society where such an assumption is theoretically grounded in the presence of both a "private" self-interested role and a "public" justice-interested role.

At this point in our dialogue, the critique emanating from within the critical rationalist horizon suggests that Engel has not provided a

95. See Fejfar, supra note 51, at 243-44 (discussing Erikson's theory of psychosocial identity).

96. This conclusion flows from this specific application of Erikson's general theory of psychosocial identity. While Hosmer seems to accept the possibility of some role duality, he too rejects the strict theoretical separation of concurrent "public" and "private" roles as implausible. See Hosmer, supra note 18:

I think we can safely say that human nature exhibits both selfish and generous traits, and we can doubtless go further and accept that human beings can perform selfish and then generous acts alternatively, but it would seem an extreme assumption to believe that people can concurrently be generously attentive to others in all political decisions, and selfishly attentive to themselves in all economic activities, and never confuse the two roles. The microeconomic model would appear to be based upon an exceedingly complex and unlikely view of the nature of human beings.

Id. at 324.

"rationally" demonstrable basis for his assumptions relating to: (1) a rule-oriented ethics as either descriptively or prescriptively normative, and (2) the legitimacy of the legislative process. His assumptions only appear legitimate on the basis of their conformity with the "irrational" ideological beliefs or assumptions of his readers.

Since the grounding of Engel's approach seems to involve an appeal to the reader's belief in liberal rationalist ideology, the critical rationalist might also be interested in presenting a more general critique of these basic ideological assumptions or beliefs. Thus, our dialogue moves to an even deeper level, involving a critical rationalist critique of "objective" principled decision making and "objective" science.

The foundation which underlies liberal rationalism is constructed upon two major supports: (1) "objective" principled ethical and legal decision making, and (2) "objective" science.9 A critical rationalist critique can greatly undercut the "rational" legitimacy of both of these supports. The first support to be discussed is "objective" science.

In The Structure of Scientific Revolutions,99 Thomas Kuhn distinguishes normal science from revolutionary science. Normal science resembles our previous description of empiricist rationalism.103 Science, within a purely rationalist horizon, is conceived of as involving: (1) pragmatic judgments about quantifiable sense data derived from experiments, and (2) the "rational" analysis of this data which "results" in the generation of theories. As Kuhn points out, however, science does not really work this way. Rather, "normal" science, which involves experiment and analysis, works within the constraints of pre-established theories or paradigms.101 Such "normal" activity ultimately leads to recognition of anomalies and to theoretical crises.102 These crises are not terminated by "rational" or logical deliberation or interpretation, but rather through a process which Kuhn denominates "revolutionary" science.103 From within a rationalist horizon, what appears to be an essentially "irrational" intuitive "paradigm shift" occurs wherein the scientist comes up with a totally different
theory, placing the data in a different explanatory perspective. A determination of whether or not the new theory replaces the old is made by a process involving new normal science activity. There is no "logical" reason to prefer the new theory over the old, and logic is unable to explain exactly how the new theory is generated. The best that can be said is that an intuitive non-linear insight occurs. It is then provisionally "believed in" until "tested" by normal science, at which time a more firm "belief" or a provisional judgment is placed in the comparative adequacy of the new theory. Thus, it appears that science involves intuitive creativity, "belief," and judgment, as well as "rational" analytic understanding. Because science, as we know it, cannot function without "irrational" creativity, belief, or judgment, the notion of science as "rationally" objective is refuted from within a rationalist perspective.

In addition to focusing on rationalist scientific "objectivity," a critical rationalist critique can also be focused upon the other support of liberal rationalist ideology—principled legal and ethical decision making. In the area of legal decision making, the rationalist assumes that "right" answers can be derived from abstract analytic reasoning. The critical rationalist might point out, however, that the Critical Legal Studies Movement (CLS) has presented a significant amount of scholarly analysis which, taken as a whole, tends to show that legal rules are indeterminate. Robert Gordon summarizes the results of the CLS analysis:

The common thread of these [critical] histories is the observation that the contradiction makes available for the decision of every case matched pairs of arguments that are perfectly plausible within the logic of the system but that can cut in exactly opposite directions. The managers of the legal system preserve their sense that law is actually relatively orderly and predictable by assembling a bunch of devices to keep these oppositions from becoming too starkly obvious (even to themselves). They classify some of the oppositions as "anomalies and exceptions." They stick others in separate categories (e.g., law/equity). They rule out still others . . . by a separation between law and politics.

104. See id. at 89-90 (stating that more often, the new paradigm comes to the scientist "all at once," usually to scientists who are very young or new to the field).
or simply by arbitrary ideological fiat (interpretations of rules that would too much alter the status quo are wrong per se). 105

A liberal rationalist may still maintain that even if there is indeterminacy in the interpretation of legal rules, a "right" answer is still obtainable through the use of "principled" reasoning employing "integrity." 106 The critical rationalist might respond, however, that Robert Lipkin has presented persuasive arguments that the notions of "principled" reasoning and "integrity" are chimerical when analyzed in relation to the actual development of constitutional adjudication. 107

Lipkin's work suggests that principled adjudication requires that "principle" be defined in one of two ways. 108 First, a principle can be seen as an abstract and ahistorical moral truth. Second, a principle can be seen as tied concretely to a particular case, series of cases, or other conventional legal "sources" or "materials." If a person employs the first definition of abstract principle in constitutional adjudication, then he or she is not really basing his or her decision on the Constitution, but rather is engaging in abstract moral reasoning utilizing extra-constitutional moral principles. On the other hand, if a person employs concrete principles, then in my judgment (and implicit in Lipkin's discussion), he or she must deal with the problem that no two fact patterns are exactly the same. The new case can always be included or excluded as following the previous concrete principle on the basis that the new case "is" or "is not" similar enough to come within the ambit of the previous concrete principle. Thus, the court is again necessarily put in the position of referring to an abstract moral principle or, more pragmatically, ruling in favor of the side which presents "the best argument." But since there is no criterion for "the best argument" other than the fact that the judge finds it to be "the best argument," one is left with

106. See, e.g., Ronald M. Dworkin, Law's Empire 166-67, 183-84 (1986); Rawls, supra note 51, at 235-43.
108. The argument made in the text is based on, but not identical to, the argument presented by Lipkin in his discussion of "abstract" and "concrete" principles.
either no justification at all or with an abstract extra-legal principle as the justification.

Finally, employing a Kuhnian analytical framework, Lipkin notes that in normal adjudication, a firmly endorsed constitutional paradigm governs a particular area of law: "The paradigm determines the standard of review as well as what type of factual considerations are relevant to reaching a decision."109 To the extent that the decision "fits" within the existing paradigm, that paradigm will remain essentially intact. In one type of revolutionary adjudication, however, the court overrules a previous case or line of cases, creating a new paradigm and a new concrete principle. While the new case certainly "fits" the new paradigm which it has just carved out, it in no way "fits" within the previously established paradigm. Thus, Lipkin alternately concludes that either one can never overrule a previous case or line of cases with "integrity," or the integrity requirement is rendered meaningless in revolutionary adjudication as it actually functions. Hence, integrity, as understood within a liberal rationalist horizon, does not analytically provide a "rational" justification for principled adjudication. Such adjudication always involves either an explicit or implicit appeal to "irrational" beliefs or judgments of value.110

109. Id. at 735.
110. Certainly a liberal rationalist’s understanding and practice of "integrity," "rationality," or "objectivity," could be broadened, but once he or she begins to do this, then no longer can he or she be characterized as operating within a liberal rationalist horizon. Thus, the mode of analysis and the mode of discourse which the liberal rationalist considers normative can no longer be considered "rationally" normative. In the conclusion to his article, Lipkin points to this result in the context of constitutional adjudication:

This Article argues that law as integrity cannot account for constitutional revolutions and therefore does not take the future seriously enough. The only way it can take the future seriously enough is by broadening the role pragmatism plays in its methodology. To do this, constitutional theory must take a more candid look at how abstract, cultural, moral, and political theories function in determining individual rights and responsibilities.

The language and framework of constitutional law must be restructured to include concepts that make the participation in constitutional practice accessible to everyone. To this end, we must integrate certain critical progressive concepts with the concept of individualism, and provide methods for the need for significant constitutional change. Only by doing so can liberal jurisprudence avoid skeptical refutation. But by doing so, the line is blurred distinguishing liberal and radical conceptions of constitutional
Thus, it appears that from within a critical rationalist horizon, both science and principled decision making are notrationally "objective" activities. Rather, they are inevitably dependent upon "irrational" beliefs, creative intuition, and the cognitive ability to make judgments of fact and value. Additionally, the critical rationalist might point out that the problems associated with the "objectivity" of both principled decision making and science point to even deeper concerns about the adequacy of the liberal rationalist horizon. These concerns become explicit in an exploration of philosophical hermeneutics.

Traditionally, hermeneutics has been perceived as being a discipline concerned with understanding the meaning of texts. However, Hans Georg Gadamer suggests that hermeneutics must be more broadly conceived as dealing with the entire "world of meaning." Thus, Gadamer rejects and goes beyond the liberal rationalist distinction

democracy.

Id. at 765. It is important to point out here, though, that as I understand him, Lipkin is not referring to pragmatic rationalist "pragmatism" when he suggests a broadened role for "pragmatism." Instead he seems to understand pragmatism in roughly the same sense that Schag does. Schag states: "The pragmatist understands the modernist critique of rationalism as a critique of ostensibly disinterested, universal, transcendent discourses. Accordingly, pragmatist endorses functional, contextual, and immanent discourses." Schag, supra note 6, at 1223. This understanding and practice of "pragmatism" is distinguished by Schag from the rationalist understanding of "pragmatism":

The rationalist (mis)reading of pragmatism goes something like this: if theory is embedded in practice, language in culture and values in convention, the mind must alter its view of theory, language, and values to take into account their practical, cultural, and conventional dimensions. Accordingly, one should systematically reject disinterested inquiries in favor of purposive inquiry, reject universality in favor of context, and reject transcendent discourse in favor of immanent discourse. In turn, this reorientation implies that one should use the categories, the expressions, and the relations of everyday life as the appropriate vehicles of thought. The result is not pragmatism at all, but instead a sort of unquestioning pluralistic consciousness that surrenders to the received description and understanding of the world.

Id. at 1224.

111. HANS G. GADAMER, TRUTH AND METHOD 146 (1975).

112. Thus, Gadamer states:

The classical discipline concerned with the art of understanding texts is hermeneutics. If my argument is correct, however, then the real problem of hermeneutics is quite different from its common acceptance . . . .

Understanding must be conceived as a part of the process of coming into being of meaning, in which significance of all statements—those of art and those of everything else that has been transmitted—is formed and made complete.

Id.
between public "objective" science (empiricist rationalism) and purely private "subjective" feelings or values. His point is that we both constitute, and are constituted by, a world of meaning which is anterior to the conscious use of analytic understanding. Thus our "being-in-the-world," or "horizon of understanding," involves much more than mere consciously held ideas. Gadamer states:

It is not so much our judgments as it is our prejudices that constitute our being. This is a provocative formulation, for I am using it to restore to its rightful place a concept of prejudice that was driven out of our linguistic usage by the French and English Enlightenment. It can be shown that the concept of prejudice did not originally have the meaning we have attached to it. Prejudices are not necessarily unjustified and erroneous, so that they inevitably distort the truth. In fact, the historicity of our existence entails that prejudices, in the literal sense of the word, constitute the initial directedness of our whole ability to experience. [Prejudices] are simply conditions whereby we experience some-

113. The term "horizon" is a metaphor Gadamer uses to describe human understanding:

The horizon is the range of vision that includes everything that can be seen from a particular vantage point. Applying this to the thinking mind, we speak of narrowness of horizon, of the possible expansion of horizon, of the opening up of horizons[,] etc. . . . A person who has [a blinding] horizon is a man who does not see far enough and hence overvalues what is nearest to him. Contrariwise, to have an [enabling] horizon means not to be limited to what is nearest, but to be able to see beyond it. . . . . [T]he prejudices that we bring with us . . . constitute the horizon of a particular present, for they represent that beyond which it is impossible to see. But now it is important to avoid the error of thinking that it is a fixed set of opinions and evaluations that determine and limit the horizon of the present, and that the otherness of the past can be distinguished from it as from a fixed ground.

In fact[,] the horizon of the present is being continually formed, in that we have continually to test all our prejudices. An important part of this testing is the encounter with the past and the understanding of the tradition from which we come. Hence[,] the horizon of the present cannot be formed without the past. There is no more an isolated horizon of the present than there are historical horizons. Understanding, rather, is always the fusion of these horizons which we imagine to exist by themselves . . . . In a tradition this process of fusion is continually going on, for there old and new continually grow together to make something of living value, without either being explicitly distinguished from the other.

Id. at 269, 272-73.
thing—whereby what we encounter says something to us.114

Gadamer insists then, that it is because of the existence of prejudices or forestructures of understanding that we are able to know anything at all. "Objectivity," or the capacity to make judgments about "truth," then, does not result from eliminating all "prejudices," but rather through eliminating "blinding" prejudices and through developing prejudices which are "productive of knowledge."115

If, as Gadamer suggests, "prejudices" constitute our "being-in-the-world" and our ability to "know" anything at all, then the liberal rationalist notion of "objectivity" is inadequate and must be radically revised. Moreover, Gadamer's work also suggests that a strict "public-objective"/"private-subjective" dichotomy is rendered illusory. Both "private" and "public" activity act to constitute a larger societal horizon or world of meaning which, in turn, impacts upon what we know and do in our "public" and "private" lives.116

Although Gadamer rejects the rationalist idea of objectivity, he does not reject the possibility of a radically personal form of "objectivity." Such objectivity would flow from a horizon that has developed "enabling" prejudices and has eliminated "blinding" prej-

115. Gadamer, supra note 111, at 247.
116. See Peter L. Berger, The Sacred Canopy (1967). Approaching the world of meaning from a sociological perspective, Berger states:

Society is a dialectic phenomenon in that it is a human product, and nothing but a human product, that yet continually acts back upon its producer. Society is a product of man. It has no other being except that which is bestowed upon it by human activity and consciousness. There can be no social reality apart from man. Yet it may also be stated that man is also a product of society. Every individual biography is an episode within the history of society, which both precedes and survives it. Society was there before the individual was born and it will be there after he has died. What is more, it is within society, and as a result of social processes, that the individual becomes a person, that he attains and holds onto an identity, and that he carries out the various projects that constitute his life. Man cannot exist apart from society. The two statements, that society is the product of man and that man is the product of society, are not contradictory. They rather reflect the inherently dialectic character of the social phenomenon. Only if this character is recognized will society be understood in terms that are adequate to its empirical reality.

Id. at 1. See also Peter L. Berger & Thomas Luckmann, The Social Construction of Reality (1965) (containing a further discussion of the world of meaning from a sociological perspective).
udices.\textsuperscript{117} Gadamer’s work, then, leaves open the possibility that a person not only can experience what can be described as a “diagonal” change in horizon, e.g., movement from within a property-oriented liberal rationalist horizon to a duty-conscience oriented liberal rationalist horizon, but a person can also undergo a “vertical,” more significant “foundational” shift in horizon.\textsuperscript{118}

Employing terminology analogous to that used by Gadamer, if a person’s foundational horizon (or core identity) is constituted by (or centered in) “prejudices productive of knowing and deciding” and is free from “blinding prejudices,” then that individual will be able to achieve a form of authentic subjectivity or “objectivity.” The development or presence of such authentic subjectivity is not merely a matter of attempting to “bracket” or “put aside” fully conscious blinding prejudices (such as racism), as a judge or a juror might attempt to do, but rather involves a real change in who one is as a person. Such a “foundational shift” to a “mode of consciousness” which is more “enabling” of authentic selfhood, knowing, and deciding, can take place over time through a radically personal, sustained, dialectic process involving communication, critical reflection, openness to transcendence, personal growth, decision, and action.\textsuperscript{119} You, of course, must assume this only as an interesting, if plausible, postulate or idea precisely because if you have critically and existentially evaluated the substance of the critique and then integrated the “lived results” of this process into your “being-in-

\textsuperscript{117} See Richard Bernstein, Beyond Objectivism and Relativism 128 (1983) (suggesting this usage).

\textsuperscript{118} A “horizontal” shift in horizon, as I use the term, involves a relatively insignificant change or difference in declarative memory content within human consciousness. A “vertical” shift in horizon involves a relatively significant change in foundational consciousness, e.g., a change involving core deep structuring feelings or images. A “diagonal” shift in horizon, falls somewhere in between a horizontal and a vertical shift, involving a relatively peripheral shift in foundational consciousness, e.g., where liberal rationalist deep structuring feelings, images, etc., remain the same, but where a shift from a property to a duty-conscience oriented “perspective” has occurred. See Fejfar, A Road Less Traveled, supra note 46 (generally discussing the difference between a “vertical” and a “horizontal” shift in horizon or consciousness).

In Truth and Method, Gadamer suggests the possibility of such non-rationalist objectivity. However, he does not specify which “prejudices” are “enabling,” or whether “prejudices” merely relate to forestructures which are conceptual categories. Thus, Gadamer does not explicitly suggest the notion of “diagonal” or “vertical” shifts in foundational horizon or consciousness.

\textsuperscript{119} See infra note 133 (discussing this sustained dialectical process).