Labor-Management Cooperation:
Competing Visions and Labor's Challenge

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Although labor-management cooperation has often been advanced as a panacea for the ailments that afflict American industry, this article argues that cooperation is not a workable or appropriate strategy for labor. The author contends that cooperation is not a single monolithic approach but actually encompasses various competing views, which in large part are simply extensions of existing perspectives on labor relations. Although centrist and leftist views of cooperation show links to traditional industrial pluralism, the rightist view is profoundly hostile to unionism and seeks to reorient workers toward management objectives. Because this rightist approach is dominant in today's workplaces, the author argues that those who seek to advance workers' interests should marshal their efforts toward blocking management-oriented cooperative programs until political conditions allow versions of cooperation more favorable to labor to gain ascendancy.

INTRODUCTION ................................................................................................................. 234

I THEIDEOLOGICAL VISIONS OF LABOR-MANAGEMENT COOPERATION .................................................. 241

A. Overview ..................................................................................................................... 241

B. The Rationales for Cooperation ................................................................................. 244

1. The Rise of Foreign Competition .............................................................................. 245
2. Increased Domestic Competition .............................................................................. 250
3. The Advance of New Technology .............................................................................. 252

C. Competing Visions of Cooperation Theory ............................................................. 254

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INTRODUCTION

In recent years considerable attention has been focused on labor-management cooperation. Although approaches differ widely, cooperative programs have now been instituted throughout the American economy—in factories and offices, in the private and in the public sector. The prevailing view of this development is that dramatically changing economic conditions have compelled labor and management to shed their traditional hostility and assume a new posture of mutual trust and shared enterprise. Within this context, the present system of labor law is often presented as a particularly important embodiment of conflict and a redoubtable barrier to change.

Labor-management cooperation is difficult to define because a panoply of programs and experiments, often quite different in scope and purpose, are placed under its umbrella—quality of worklife initiatives, quality circles, and the "team concept," to name only a few. Uniting

2. See, e.g., BUREAU OF LABOR-MANAGEMENT RELATIONS AND COOPERATIVE PROGRAMS, U.S. DEPARTMENT OF LABOR, PUB. NO. BLMR 119, U.S. LABOR LAW AND THE FUTURE OF LABOR-MANAGEMENT COOPERATION, SECOND INTERIM REPORT—A WORKING DOCUMENT 80 (1987) (hereinafter SECOND INTERIM REPORT) (statement of the National Association of Manufacturers ("NAM")) (suggesting that cooperative programs generally differ in name only); Goulet, The Role of Labor-Management Cooperation in Economic Development, 39 LAB. L.J. 538, 538 (1988) (observing that "[t]he term labor-management cooperation is the generic name for the several types of activities that involve workers in decisions about the work they perform or their work environment").

Katherine Stone suggests a different approach, however, rejecting attempts to conflate management-oriented "cooperation" and labor-oriented "participation." See Stone, Labor and the Corpo-
these different cooperative programs, however, is a common management-oriented intellectual heritage and ideological vision.

In this vision, cooperation appears as a dramatic break with the New Deal regime of industrial relations and the established system of collective bargaining. This model, as it is now widely understood, involves a system of industrial pluralism, in which labor and management, two parties of roughly equivalent strength but dramatically divergent interests, establish their relationship through collective bargaining and resolve their differences through arbitration. Even in its heyday, industrial pluralism was "based on a false assumption: the assumption

rate Structure: Changing Conceptions and Emerging Possibilities, 55 U. CHI. L. REV. 73, 79-81, 162 (1988) (hereinafter Stone, Labor and the Corporate Structure); see also Banks & Metzgar, Participating in Management: Union Organizing on a New Terrain, 14 LAB. RES. REV. 1, 7-8 (1989). Below, I reject both Stone's cooperation-participation distinction and the prevailing tendency to consider all cooperative programs as essentially alike, and instead present cooperation as a phenomenon whose importance arises in considerable part from its chameleon-like character of meaning different things to different people.

3. Thomas Kohler stresses that the genesis of the various integrative schemes of worker participation has come not from those who are to be enabled through their use to participate, i.e., the workers, but rather from members of the academy.... The integrative schemes share a common intellectual heritage: all stem from the research and theories of the human relations school of Elton Mayo and its successors .... whose work has been advanced on behalf of management. Kohler, Models of Worker Participation: The Uncertain Significance of Section 8(a)(2), 27 B.C.L. REV. 499, 516 (1986). For an overview of cooperation's origins, see Banks & Metzgar, supra note 2, at 6-7.

4. Kim Moody summarizes the effect of this ideological vision in particularly bold terms: "Whatever the name, [cooperative programs] share the purpose of getting workers to identify with company goals." K. MOODY, AN INJURY TO ALL: THE DECLINE OF AMERICAN UNIONISM 188 (1988). Cooperation's ultimate purpose, Moody argues, is "acceptance by the workers of management's competitive imperative as a day-to-day guiding principle of behavior." Id. at 189.

For a discussion of how cooperation reorients workers toward management goals, see text accompanying notes 94-99 below.

5. The existing system of labor relations is often labeled the "New Deal" regime because its legal bedrock, the Wagner Act, ch. 372, § 1, 49 Stat. 449 (codified at 29 U.S.C. §§ 151-169 (1982)) (hereinafter "Wagner Act") was passed in 1935, and because the 1930s saw the organization of basic industry in the United States by the Committee for Industrial Organization. The term is somewhat misleading, however, in that industrial pluralism—the dominant "paradigm" of American labor relations—was actually developed after World War II. See generally Stone, The Post-War Paradigm in American Labor Law, 90 YALE L.J. 1509 (1981) (hereinafter Stone, The Post-War Paradigm); see also Skocpol, Book Review—Why the Liberals Lost, 4 TIKKUN No. 4, 112, 113-14 (1989) (suggesting that "[t]he political and ideological limits of the modern U.S. economy were set only in the second half of the 1940s" and "questioning ... the very notion of a New Deal order stretching from the 1930s to the 1980s")


7. See generally Stone, The Post-War Paradigm, supra note 5.
that management and labor have equal power in the workplace." 8 Today, the ongoing decline in union density has undermined a second key principle of industrial pluralism: the notion that workers may be assumed to be represented by a union. 9 Because union representation and collective bargaining are no longer the norm, industrial pluralism simply does not describe the realities of contemporary American labor relations.

In contrast, cooperation holds that labor and management share essentially similar interests that should be advanced through fluid, open-ended processes that will improve both the satisfaction of employees and the productivity and creativity of business. 10 Unlike industrial pluralism, cooperation does not always assume that workers will be represented by a union; indeed, as I argue below, whether or not theorists assume a union presence provides a key distinction between different approaches to cooperation.

Despite these apparent differences between industrial pluralist and cooperative approaches, this article contends that cooperation is no new thing under the sun. Rather, I view theories of cooperation essentially as refinements of existing views of labor relations. In particular, I identify several distinct approaches to cooperation, and argue that these differing approaches reflect ongoing political differences that must be understood within broader historical and economic contexts. Although cooperation is generally presented as a desirable goal that should be shared by all, many of its incarnations are anything but neutral. Neither business nor labor has been slow to reach this conclusion: management has often taken aggressive steps to secure worker acquiescence in the adoption of cooperative programs, even to the point of threatening to transfer work or close plants unless cooperation is accepted. 11 At the same time, labor has sometimes organized forceful resistance to cooperation, especially in the auto industry, where workers confront the Japanese-style "team

8. Id. at 1511.

9. After reaching a postwar high of 34.7% in 1954, see M. Goldfield, The Decline of Organized Labor in the United States 10 (1987), union density in the United States has now dropped to slightly over 16%. See Union Membership Stays on Downward Trend, Falling to 16.1 Percent of Employment, DAILY LAB. REP. (BNA), February 7, 1991, at B-8.

10. One analysis of cooperation thus describes its "bedrock principle" as "one of human relations: the more that workers participate in the operations of the business, the more workers feel their individual contributions add to the quality and success of the product. The desired results are a more congenial collective bargaining relationship and a more competitive product." Introduction, Special Project: Labor-Management Cooperation, 41 VAND. L. REV. 539, 541-42 (1988). For a productivity-oriented analysis of cooperation, see Hoerr, The Payoff from Teamwork, BUS. WK., July 10, 1989, at 56.

11. See The Payoff from Teamwork, supra note 10, at 61; M. Parker & J. Slaughter, Choosing Sides: Unions and the Team Concept 5 (1988). In a number of instances, workers have agreed to accept cooperation only after repeated rerun elections in which pressure tactics are steadily increased. See id. at 212-14.
Cooperation may be best approached initially by considering the rationales advanced by its advocates. This advocacy is cast in unusually urgent terms and merits close examination. Indeed, this article devotes primary attention to the justifications and theoretical underpinnings of cooperation, rather than to the minutiae of specific existing programs. The intellectual and political struggles that underlie cooperation will effectively determine what forms of cooperation are actually implemented.

Cooperation theorists suggest that a number of developments, especially the fundamental economic and technological changes that have recently occurred in the United States and throughout the world, necessitate moves toward cooperation. Darwinian rhetoric—"adapt or die"—prevails. In Part II, I present a sketch of these problems, not with the obviously unrealistic goal of comprehensive analysis, but to attempt to assess these arguments for cooperation in their proper context and to demonstrate that cooperation advocates understate the complexity of these issues and neglect their most important aspects. As such, their conclusion that cooperation will provide a solution rests on dubious assumptions and unjustified optimism.

Although arguments urging the adoption of cooperation generally stress common themes, substantial divergences begin to appear when discussion turns to defining the proper parameters of a cooperative regime. I consider these divergences later in Part II. Crudely speaking, three visions, leftist, rightist, and centrist, may be discerned. In the centrist view, most dominant in theoretical and academic debate and prominently typified by the perspective of the United States Department of Labor, cooperation is a modification of collective bargaining in which labor and management share responsibility for a broad range of decisions concerning the enterprise. A key assumption, albeit one that is rarely


14. The distinctiveness of these strands is open to question. Kim Moody, for instance, sees no real difference between "rightist" and "centrist" approaches to cooperation, suggesting instead that "[w]hen [management] is able to rid itself of unions completely, it does so," but that "[w]hen the union is entrenched, it looks for another way." K. MOODY, supra note 4, at 187.
stated explicitly, is that workers will be organized into a union.\textsuperscript{15} In this regard, among others, the centrist view of cooperation demonstrates clear links to the established ideas of industrial pluralism.

The leftist vision adopts socialist\textsuperscript{16} rhetoric and presents cooperation as a new weapon in the struggle for industrial democracy and workers' rights. In this view, advanced by Katherine Stone and Karl Klare among others, cooperation is essentially an adaptation of European notions of codetermination, in which management and labor jointly share authority for the basic direction of the enterprise.\textsuperscript{17} Cooperation is viewed largely as a question of redesigning the institutions of the "corporate structure" to empower labor and expand workers' participation in the decisionmaking processes that control their jobs and their employer's basic direction.\textsuperscript{18}

It is the rightist vision, however, which reflects the values of the business community, that has become overwhelmingly dominant in practice.\textsuperscript{19} Considered as a whole, the American business community is decidedly hostile to unionism;\textsuperscript{20} its cooperative experiments thus have little room for employee organization. Instead, rightist cooperation is designed to transcend adversarial relationships by simply subsuming the interests of workers into the interests of management. Employees are only to be involved in decisionmaking at lower levels, and management will retain full control over cooperative mechanisms.

In my view, this rightist version of cooperation has not gained dominance by accident. Rightist cooperation should be seen as a sophisticated weapon in the struggle between labor and management, a struggle whose

\begin{itemize}
\item[15.] This assumption provides a key distinction between centrist and rightist views of cooperation. See infra notes 113-26 (centrist) & notes 150-55 (rightist). For an example of an explicit centrist pro-union statement, see Insight: A Look at the Bureau of Labor-Management Relations and Cooperative Programs, LAB. L. REP. (CCH), Nov. 1989, at 4 (quoting then-Deputy Under Secretary of Labor John R. Stepp) ("This Bureau . . . believes that trade unionism and collective bargaining are fundamental to a democratic society"); "without [them] . . . much is lost").
\item[16.] The term "socialist" is imprecisely used: the vision I seek to describe may include elements of European-style codetermination, or it may attempt to develop some form of "workplace democracy." See, e.g., Klare, The Labor-Management Cooperation Debate, supra note 6, at 72-73 n.94. Insofar as the word connotes a spectrum of worker-oriented concerns to which mainstream viewpoints are indifferent or hostile, however, I defend its use.
\item[18.] See generally Stone, Labor and the Corporate Structure, supra note 2.
\item[19.] As Mike Parker and Jane Slaughter point out in their study of cooperation in the auto industry, "whatever models [of cooperation] may be used in other countries, or whatever version American unionists may dream of implementing here, in the auto industry management is implementing its own vision." M. PARKER & J. SLAUGHTER, supra note 11, at 5.
\item[20.] The growing anti-unionism of the American business community has been widely noted. See, e.g., Weiler, Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA, 96 HARV. L. REV. 1769, 1778-81 (1983).
\end{itemize}
intensity has increased in recent years as business has seized and consolidated advantages and kept labor on the defensive. Rightist cooperation is the most advanced expression of non-union and anti-union business, and it is designed to advance business interests. As such, the rise of rightist cooperation should be of grave concern not only to unionists and progressives, but to all those who take the announced goals of cooperation seriously.

Given the dominance of rightist cooperation, I believe that indulging cooperation rhetoric and experimentation in the current political climate is to play into the hands of those who would use cooperation to eliminate unionism and reduce the quality of life for American workers. From labor’s standpoint, the cooperation debate should be considered highly dangerous; it is in essence a battleground—one on which workers are very likely to lose. Indeed, casualties may already be counted: cooperation has often been used as a sophisticated union-busting device, and as cooperative programs have taken root, many have evolved into intensely pressured, management-oriented systems.

Having sketched the basic contours of the cooperation debate, in Part III I consider the specifically legal issues that it generates. These issues have been addressed by a broad range of commentators, particularly those of a centrist perspective. These analysts present the New Deal system as inherently adversarial and confrontational—a proposition I contest—and suggest that the National Labor Relations Act (“NLRA”

21. The most graphic indicator of management’s recent assault is the “distributional looting” that occurred during the concessions wave of the early 1980s. Klare, The Labor-Management Cooperation Debate, supra note 6, at 63-64 n.71. Kim Moody estimates that “[c]oncessions may . . . have netted capital anywhere from $76 billion to $152 billion” during 1983-1985, a transfer Moody describes as money that workers simply “donated” to capital. K. MOODY, supra note 4, at 13.


24. See, e.g., The Payoff from Teamwork, supra note 10, at 56. In the auto industry, for example, the prototypical “quality of work life” programs have been discarded in favor of the “team concept” and related innovations imported from Japan, which one set of commentators labels “management-by-stress.” M. PARKER & J. SLAUGHTER, supra note 11, at 8, 14. Indeed, some managers “admit that they have been wasting their time on the ‘touchy-feely’ QWL-type programs” rather than the more aggressive “team concept.” Id. Parker and Slaughter’s book provides detailed, worker-oriented accounts of the cooperative programs that have been introduced at General Motors’ plants in Fremont, California, Shreveport, Louisiana, Oklahoma City, Oklahoma, Kansas City, Kansas, Van Nuys, California, Wentzville, Missouri, Flint, Michigan, Hamtramck, Michigan, Lake Orion, Michigan, Pontiac, Michigan, and Warren, Michigan; Ford’s plant at Hermosillo, Sonora, Mexico; Nissan’s plant at Smyrna, Tennessee; and Mazda’s plant at Flat Rock, Michigan. The stressful and abusive conditions at Flat Rock are considered more exhaustively in J. FUCINI & S. FUCINI, WORKING FOR THE JAPANESE: INSIDE MAZDA’S AMERICAN AUTO PLANT (1990).
or "the Act") imposes now-inappropriate restrictions on the roles of labor and management, restrictions that must be removed so as to allow cooperative experimentation. But the cooperation advocates' legal analysis is remarkably tenuous and speculative. No cooperative experiment has yet been struck down by the National Labor Relations Board ("NLRB" or "the Board") or by a court; indeed, courts have reached quite far to permit such schemes. Analysis of the potential legal problems that cooperation might engender has thus depended "upon obscure cases and nonspecific scraps of dicta." Actual legal controversy, meanwhile, has been nearly invisible, except for cases in which management has relied on cooperative fervor to secure judicial approval of worker committees that are introduced to defeat unionization.

It is my contention that this lack of litigation is no accident. Precisely because cooperation, as implemented, has followed a rightist agenda, and has neither seriously challenged management's power nor accorded significant new responsibility to workers, there has been no real basis for legal difficulty. I believe that under present circumstances this situation is not likely to change; legal boundaries will not be tested until labor gains the political and economic strength to implement programs

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26. See, e.g., SECOND INTERIM REPORT, supra note 2, at 79 (statement of the NAM) (suggesting that analysts have focused on "potential problems that might arise in the context of labor-management cooperation without providing . . . evidence that real barriers exist").

27. See, e.g., cases cited infra note 215.


29. See, e.g., cases cited infra note 228. A prominent exception was the National Right to Work Legal Defense Foundation's challenge to the Saturn project jointly developed by General Motors ("GM") and the United Auto Workers ("UAW"). Because GM in effect recognized the UAW as bargaining representative before employees were actually hired at GM's new facility in Spring Hill, Tennessee, the Foundation filed an unfair labor practice charge, alleging violation of employees' right to choose or decline unionization, as guaranteed by Section 7 of the NLRA, 29 U.S.C. § 157 (1988). The NLRB's General Counsel refused to issue a complaint, however, contending that because the prehire agreement depended on GM's decision to hire employees from other unionized facilities, the agreement was part of legitimate "effects bargaining" between the parties over previous, or possible future, decisions to restructure other plants. See General Motors Corp., 1985-86 NLRB Dec. (CCH) ¶ 20,270, at 33,483-84 (June 2, 1986). The General Counsel further argued that GM's grant of recognition was not premature, because the Board "read into the agreement the condition that the UAW must achieve majority status." Id. at 33,485 (citing Kroger Co., 219 N.L.R.B. 388 (1978)). Although this controversy did involve the legality of a highly publicized cooperative initiative, the Saturn decision did not implicate the legality of cooperation itself but dealt with rather exceptional peripheral issues. See Kafker, Exploring Saturn: An Examination of the Philosophy of "Total" Labor-Management Cooperation and the Limitations Presented by the NLRA, 5 LAB. LAW. 703, 704 n.4 (1989). Nonetheless, because the General Counsel appeared to finesse rather than address the issues, many analysts were dissatisfied, concluding that the decision was result-oriented. See id. at 720-21; Conclusion, Special Project: Labor-Management Cooperation, 41 VAND. L. REV. 659, 661-63 (1988).
that grant significant power to workers and thereby force challenges to existing law.30

In Part IV, I argue that supporters of labor should recognize that the current cooperation debate does not create an opening for serious discussion of worker participation, and that cooperation, in the current political climate, will bring little more than speedups and cutbacks. Rather than analyze and advocate structural changes or legal reforms, then, labor law scholars and practitioners should do their best to erect roadblocks to management-oriented cooperative programs until political conditions allow labor to impose more favorable versions than those presently on the agenda.

I

THE IDEOLOGICAL VISIONS OF LABOR-MANAGEMENT COOPERATION

A. Overview

Labor-management cooperation is a term that means many things to many people and provides refuge to a range of programs and visions which are by no means necessarily compatible with each other.31 Cooperation may involve participation at the strategic level, including decisions about marketing, research and development, and long-term investment; at the collective bargaining level, including the negotiation of basic agreements that fix the terms and conditions of employment; and, most commonly, the workplace level, which involves the day-to-day work lives of employees and their relationships with management.32 Despite these variations, all cooperative programs appear to grow from common ground because cooperation analysts of all stripes rely on similar arguments in pressing for cooperation’s advance. In Section B below, I examine these justifications, seeking to determine whether they present a convincing case for labor’s acceptance of cooperation.

If rationales are shared, however, conclusions vary, and different forms of cooperation begin to diverge as theory melds into practice. These variations appear to fall along political lines: I believe that there are three competing visions of labor-management cooperation, which may be labeled leftist, centrist, and rightist according to their respective

30. Cf. B. Crawford, U.S. Trends in Employee Participation 28 (unpublished manuscript presented to the Biennial Conference of the International Bar Association, Section on Business Law and Section on General Practice, Strasbourg, October 2-6, 1989) (contending that such challenges will only follow “radical social transformation”).

31. An earlier wave of cooperation after World War I was similarly heterogeneous. Cooperative initiatives of that era were “cultivated simultaneously by corporate executives, officials of the federal government, AFL leaders, and socialist militants,” and each of these “promoters had quite different purposes in mind.” D. MONTGOMERY, THE FALL OF THE HOUSE OF LABOR 411 (1987).

32. Abbott, supra note 1, at 1-2.
orientations to the interests of workers or management. These visions are described and assessed in Section C below.

Among the most influential voices advancing the cause of cooperation is the U.S. Department of Labor's Bureau of Labor-Management Relations and Cooperative Programs. The Bureau has initiated a systematic program to study cooperation by sponsoring academic work, promoting information sharing, and providing technical assistance and training. A particular concern has been a project to determine whether the existing labor laws create impediments to cooperation, and if so, what steps should be taken to overhaul the legal system.

This "Laws Project" was announced in the Bureau's 1986 publication *U.S. Labor Law and the Future of Labor-Management Cooperation*, authored by Stephen I. Schlossberg, then Deputy Under Secretary of Labor, and Steven M. Fetter, then Executive Assistant to Deputy Under Secretary Schlossberg. This report crystallizes the developments that the Bureau perceives as necessitating a shift toward cooperation, and provides an excellent introduction to the thinking of cooperation advocates.

Schlossberg and Fetter observe that:

> [A]fter many years of adversarial relations, many employers and unions have come to the realization that they can no longer ignore the real and persistent challenges from overseas and domestic competition and from technological change. In order to meet the demands of this more difficult environment, they have decided to abandon traditional confrontational attitudes to try working together to increase productivity and quality for the company and improve the quality of work life for the employees.

After a helpful overview of cooperative programs and their perceived potential legal problems, the report concludes with a rhetorical passage:

> [W]e should emphasize mutuality rather than militancy and seek to advance a new ordering of labor relations which aligns manager and worker on the same side—working together for the common good. Clearly, cooperation and problem solving offer more promise for productive labor-management relationships than the combat of the past.

These two brief extracts identify a number of the normative and factual considerations that advocates have invoked to suggest the importance of cooperative experiments and to urge their adoption. Most

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34. This report is reprinted at 37 LAB. L.J. 595 (1986).


36. *Id.* at 616.

37. Karl Klare suggests that these rationales, often advanced without particular subtlety, are particularly typical of non-academic commentary. See Klare, *The Labor-Management Cooperation Debate*, *supra* note 6, at 50, 51. This argument is not so much irrebuttable—although clumsy aca-
important among them are the notion that the American economy is besieged by foreign and domestic competition and overwhelmed by new technology; the perception that industrial relations in the United States have traditionally been confrontational and unproductive; and the view that productivity and quality are shared goals for which labor and management should jointly strive.

The glue that binds the Bureau's cooperative vision is a belief that economic change and unproductive confrontation have produced a crisis in American labor relations, and that cooperation is a matter of economic life or death. Set against this crisis, cooperation presents a transcendent vision: advocates believe that it will bring not only a new day but a better day. In this regard, as Katherine Stone observes:

[C]ooperation is more an ideology than a meaningful description of employee participation. It is an ideology that evokes a vision of the good—a world where labor and management work together to improve productivity, restore American competitiveness, and increase social wealth, all the while sharing the bounty fairly and equitably. While this vision is appealing and inspiring, its relationship to worker participation is heuristic at best.

The power of this ideological vision has won cooperation many converts;

demic advocacy pieces are legion—as irrelevant. In this era of "sound bite" public policy, subtlety of argument is a rather unnecessary commodity.

38. See, e.g., Hale, The New Industrial Relations in a Global Economy, 37 LAB. L.J. 539, 543 (1986) ("Neither management nor labor can afford the luxuries and excesses of the past."); Schlossberg & Fetter, supra note 28, at 599 ("While [both labor and management] recognize that there are risks in altering their traditional antagonistic relationship, they are convinced that the risks are even greater if they do nothing at all.").

39. This transcendental aspect of cooperation theory corresponds to what Katherine Stone has labeled the "teleological version of industrial pluralism":

This version of industrial pluralism would state that, by assuming an equality between management and labor, true equality is created; that is, that the pluralist interpretation of the NLRA sets in motion a process that, over time, will create joint sovereignty, neutral adjudication, and government by the consent of the governed—true industrial democracy. Stone, The Post-War Paradigm, supra note 5, at 1577. As Stone observes, however, "[t]he problem with this teleological version of industrial pluralism is that there is nothing in the theory that can explain why the realm of joint sovereignty will grow rather than shrink." Id. at 1579. Indeed, recent developments have sharply restricted the realm of "joint sovereignty," that is, the sphere of matters that will be resolved by collective bargaining. See, e.g., First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) (holding that the NLRA does not require management to bargain with affected unions over decisions to shut down part of its business); Otis Elevator Co., 269 N.L.R.B. 891, 892 (1984) (holding that management has no duty to bargain over decisions which "turn[ ] upon a change in the nature or direction of the business"); see also Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n, 491 U.S. 490 (1989) (holding that the Railway Labor Act does not require that management delay a decision to sell all its assets pending bargaining over the decision).

40. Stone, Labor and the Corporate Structure, supra note 2, at 170. See also D. WELLS, EMPTY PROMISES: QUALITY OF WORKING LIFE PROGRAMS AND THE LABOR MOVEMENT 1 (1987) (describing cooperation as "[t]he rising sun on [a] bright new day" that "combines a vision of genuine equality with a tough-minded dollars-and-sense practicality"); Levitan & Johnson, Labor and Management: The Illusion of Cooperation, 61 HARV. BUS. REV. Sept.-Oct. 1983 at 8, 8 ("In its present form, participative management is more of a placebo than a panacea.").
it has also caused potential critics to presume in its favor and refrain from searching scrutiny.41 But there is no guarantee that cooperative programs will evolve from vague principles to produce a utopian or pro-worker result; as I argue below, different people have different, politically based, ideas of the desired outcome of cooperation, and the actual results will depend primarily on the relative power of the people who hold these different ideas.

B. The Rationales for Cooperation

The economic developments that the Bureau invokes as crucial spurs to labor-management cooperation have been noted by a number of commentators, both those of centrist orientation and those further to the ideological extremes.42 In descending order of perceived importance, these developments are the rise of foreign competition, most obviously from Japan but also from other Asian countries, and indeed the entire world; the increased intensity of domestic competition, especially within recently deregulated industries; and the ever-advancing tide of technological advances, most prominently those involving computers.43

I examine these factors below. My purpose in doing so is not to attempt comprehensive analysis, but rather the opposite: to suggest that cooperation theorists have advanced a decidedly narrow understanding of these problems even though they urge the necessity of serious and substantial policy changes to overcome them. More important, I con-

41. See, e.g., Levitan & Johnson, supra note 40, at 9 (arguing that "many reporters, commentators, and consultants have a vested interest in finding that quality circles work, for the opposite conclusion leaves them without a story, a chance to pontificate, or a contract. Because of these biases, few question the success stories about labor-management cooperation"); D. WELLS, supra note 40, at 157 (asserting that much cooperation analysis is "at best naive, over-general, and irrelevant, at worst self-serving and intentionally propagandistic").


43. This list is obviously not exhaustive. Among other important developments which affect the relationship between labor and management is the trend of "capital formations [to] unite[e] in ever larger entities." Craver, The Vitality of the American Labor Movement in the Twenty-first Century, 1983 U. ILL. L. REV. 633, 644. Craver observes that "[a]s conglomerates of multi-product and multi-industry firms have proliferated, the loci of meaningful decision-making authority have frequently been transferred from local plants to the corporate or even conglomerate level." Id. "As a result of these developments," Craver notes, "representative labor organizations are finding it increasingly difficult to confront effectively such remote managerial centers, providing these behemoth entities with enormous superiority vis-à-vis such unions." Id. Specifically, management is more freely able to transfer work away from plants in which labor asserts its power and to rely on profits generated in distant parts of the enterprise/empire to weather labor disputes.

This increased agglomeration of capital should not, of course, be considered a random development. As Marx long ago predicted, the falling rate of profit ensures that capital must unite in ever larger combinations in order to survive. See L. KOLAKOWSKI, 1 MAIN CURRENTS OF MARXISM 297-301 (1978).
tend that these dominant accounts marginalize the viewpoints and interests of workers, and thus do not present a persuasive argument for labor's acceptance of cooperation.

1. The Rise of Foreign Competition

Cooperation theorists are clearly correct in their contention that the United States has lost its dominant position in the world economy and now faces significant foreign competition. In recent years, the United States' share of worldwide manufacturing has dropped by more than half.\textsuperscript{44} Imports have risen dramatically,\textsuperscript{45} and industries once dominated by American companies now face strong, even insurmountable, foreign competition.\textsuperscript{46}

In most analyses of cooperation, however, the problem of foreign competition is unduly mystified. Commentators generally describe foreign competition as an unprecedented threat, finding particular insidiousness in the development of radically different industrial methods in other countries, especially Japan.\textsuperscript{47} Yet foreign competition should not be understood as a fundamentally new phenomenon fueled by extraordinary new forces, but as a continuation and repetition of earlier developments, albeit intensified in this present incarnation. As such, cooperation analysts' conclusion that a putatively radical shift to cooperation must be the answer is a questionable one: old problems do not necessarily require new solutions.

First, from a long-term perspective, the decline of American economic dominance was inevitable. The United States achieved its advantage by developing innovative new production and management methods, and maintained its leadership by aggressively press this advantage.\textsuperscript{48} It was only a matter of time before these methods were imple-

\begin{itemize}
\item \textsuperscript{44} See Stepp, supra note 42, at 454.
\item \textsuperscript{45} Imports rose from 5% of domestic production in 1960 to 23% in 1980, and accelerated their pace in the 1980s. See R. Marshall, Unheard Voices: Labor and Economic Policy in a Competitive World 12 (1987).
\item \textsuperscript{46} Seventy percent of all U.S. manufactured goods now face international competition. See id. at 12. In some industries, such as consumer electronics, domestic companies' production has been almost completely eliminated by foreign competitors. See, e.g., Childs, New United Motor: An American Success Story, 40 Lab. L.J. 453, 453 (1989) (noting that foreign companies now control 82% of the U.S. consumer electronics market).
\item \textsuperscript{47} See, e.g., Briggs, The Japanese at Work: Illusions of the Ideal, in M. Parker & J. Slaughter, supra note 11, at 60. Although racial explanations of Japanese success have been widely propounded, it is now generally agreed that "[t]he keys to Japanese competitive superiority are their management and production systems, not some unique feature in Japan's group-oriented culture." The Payoff from Teamwork, supra note 10, at 60. For a critical discussion of cultural explanations, see Briggs, supra.
\item \textsuperscript{48} The initiatives of Henry Ford and Frederick Taylor were followed first by the huge industrial expansion during World War II and then by domination of other countries' war-devastated economies through initiatives such as the Marshall Plan and the Bretton Woods international monetary system. See, e.g., K. Moody, supra note 4, at 42-43; B. Bluestone & B. Harrison, The
mented elsewhere; other countries have previously experienced a similar pattern of dominance and decline. Cooperation theorists ignore this context, however, preferring to rely on ahistorical rhetoric that imparts a sense of unprecedented crisis and demands acquiescence in their prescriptions.

Second, in isolating Japanese management methods as startling new developments, cooperation advocates overlook the extent to which these methods are in large part only refinements of earlier industrial innovations. Although Japanese industry possesses a number of original features, the essence of its success in the international marketplace is something older: the speedup. The basic operating principles of Japanese management are its deliberate push toward maximum capacity and speed and its elimination of all slack in the production process. At
heart, Japan has merely applied and refined the ideas of Frederick Taylor and Henry Ford.\textsuperscript{55} Taylorism and Fordism are not generally considered neutral approaches; as such, cooperation advocates' insistence that Japanese business practices must be adopted in the United States cannot be considered entirely nonpartisan. At the shop-floor level if not necessarily in theory, the roots of Japanese-style management are readily apparent.\textsuperscript{56}

More important, cooperation advocates' account of foreign competition as a problem that may be resolved through managerial innovation distracts from a more important issue: the wage question.\textsuperscript{57} As industrial methods have diffused, the relative importance of labor costs as a factor in production has greatly increased. As a result, American unions are no longer able to fulfill their basic goal of taking wages out of competition,\textsuperscript{58} and must instead compete on a worldwide playing field on which international business continually presses toward low-wage havens.\textsuperscript{59}

Although the notion of competing on such a basis might seem absurd, most cooperation advocates do not appear to consider exactly how

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\item \textsuperscript{55} See, e.g., \textit{id.} at 19; M. PARKER, supra note 53, at 24 (explaining how cooperation adapts and refines Taylor's notions of expropriating workers' knowledge about their jobs). In particular, Japanese management has placed considerable emphasis upon advanced forms of time and motion study, a process pioneered by American scientific management. See M. PARKER \& J. SLAUGHTER, \textit{supra} note 11, at 91-93. For a summary of the development of Taylorism and Fordism, see D. MONTGOMERY, \textit{supra} note 11, at 214-56.
\item American plants that have adopted the Japanese-style "team concept" have received a barrage of favorable attention. See, e.g., Smith \& Childs, \textit{Imported from America: Cooperative Labor Relations at New United Motor Manufacturing, Inc.}, 9 INDUS. REL. L.J. 70 (1987). The principal selling point of experiments such as NUMMI, however, is their improved productivity—productivity that is largely achieved by speedup and stress. For a more searching (and less sanguine) account, see M. PARKER \& J. SLAUGHTER, \textit{supra} note 11, at 100-12.
\item In discussing this wage problem, cooperation advocates tend to mute their rhetoric rather noticeably. The Bureau of Labor-Management Relations and Cooperative Programs, for example, notes dryly that international competition has "focused attention on labor costs as a relatively more important competitive factor." \textit{SECOND INTERIM REPORT, supra} note 2, at 47.
\item As Kim Moody explains, "[s]tandard wages, benefits and conditions are the economic foundation of unionism. They underwrite the solidarity of the membership by establishing an egalitarian means of determining wages and benefits in place of employer favoritism or external economic criteria." K. MOODY, \textit{supra} note 4, at 174. The most important mechanism by which labor sought to take wages out of competition during the post-war "Pax Americana" period was pattern bargaining: the negotiation of master collective bargaining agreements between the unions and the major employers in particular industries. Pattern bargaining has been all but eliminated in the 1980s, however, bringing a return to whipsawing between different unions and destructive competition between workers. For accounts of this process, see Barbash, \textit{The New Industrial Relations}, 37 LAB. L.J. 528, 529 (1986); K. MOODY, \textit{supra} note 4, at 182-85. Labor's attempts to take wages out of competition are generally decried as monopolism by neoclassical economists and other rightist voices. See, e.g., M. REYNOLDS, \textit{Power and Privilege: Labor Unions in America} (1984).
\item Overall wage rates in the United States are, of course, considerably higher than those in Japan; and even Japan has already lost its wage advantage over South Korea and a number of other Asian nations. See, e.g., Stepp, \textit{supra} note 42, at 455. The disparity between extremely low wages and astoundingly low wages may be enormous. In 1988, average monthly earnings in South Korea were $633; in Taiwan, $598; in Singapore, $547; in Hong Kong, $544; in Thailand, $80; in the Philippines, $75; in Malaysia, $55; in Indonesia, $55; and in China, $40. \textit{See U.S. Importers Aren't Jumping Ship—Yet, BUS. WK.}, June 26, 1989, at 78. Thus, as labor militance brings wage increases
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wage differentials may be accommodated when underlying conditions and costs of production are roughly similar. Instead, commentators describe cooperation as a "miracle cure" or rely on the talisman of "productivity," even though cooperation can easily be implemented and its benefits replicated in low-wage countries. Only unusually candid business voices seem willing to draw the logical conclusion from the ongoing international wage competition: that efforts to boost American "competitiveness" must include a drive to reduce American wages to Third World levels. Workers obviously cannot accept forced impoverishment of this kind; less obviously, cooperation provides no real alternative if it arrives amid promises that it will solve all ills and then, when the miracle fails to occur, disintegrates into a justification for speedups in the name of productivity.

Despite its importance, however, the problem of wage disparity cannot be considered a radically new challenge. The principal task of organized labor since its earliest days has been to confront powerful economic actors that seek to reduce wages. Although changes in economic structures have drastically altered labor's traditional tactical arsenal of strikes and boycotts, the conceptual issues are well established, and certainly do not require labor to lapse into unquestioning acceptance of solutions to workers in Korea, Taiwan, and Singapore, business has pressed on to China and Malaysia, among other refuges. See Is the Era of Cheap Asian Labor Over?, Bus. Wk., May 15, 1989, at 45.

As Kim Moody observes, the flow of capital to low-wage Third World countries will continue "only as long as labor costs and political stability provide an above average rate of return on investment." K. MOODY, supra note 4, at xix. These two conditions are not unshakable natural forces; political and social unrest in South Korea, for example, has certainly changed the equation in that country.

60. Rosow, Teamwork: Pros, Cons, and Prospects for the Future, in TEAMWORK: JOINT LABOR-MANAGEMENT PROGRAMS IN AMERICA, 3, 5 (J. Rosow ed. 1986) (hereinafter TEAMWORK) (suggesting that, if properly implemented, cooperation "would become the miracle cure for what ails American productivity").

61. The generally unstated position of cooperation advocates with respect to this issue would appear to be that "by using our minds and giving our suggestions to management we can improve productivity to such an extent that we can compete successfully in the market against cheaper labor." M. PARKER, supra note 53, at 86.

62. See id. at 86 (suggesting that cooperation may be adopted in Mexico and South Korea); M. PARKER & J. SLAUGHTER, supra note 11, at 217-18 (describing the less-than-complete success of Ford's "team concept" program at its plant in Hermosillo, Mexico); see also Brand, East Germany: A Doubtful Future, 37 DISSENT 468, 470 (1990) (noting that the recent opening of Eastern Europe to capitalist development has provided a potential new field for the introduction of cooperative methods under low-wage conditions). This potential is augmented by continual reductions in transportation costs and improvement in Third World workers' skill levels. See Kafker, supra note 29, at 734.

63. See, e.g., Cohen, New Bargaining Approaches to New Economic Conditions: Pursuing a Mutuality of Interests, 5 LAB. LAW. 263, 265 (1989) (quoting Goodyear Executive Vice-President Stanley Mihelick) ("Until we get real wage levels down much closer to those of the Brazils or Koreas, we cannot pass along productivity gains to wages and still be competitive.").
advanced by business-oriented academics or by business itself.65

The truly new problem of foreign competition arises from the dramatic increase in the "internationalization of capital"—multinational corporations' creation of new production centers and penetration of new markets. Considered from this standpoint, rather than the less searching examination of "international competition," today's world economy becomes more complex. In an economy in which corporations produce, sell, and exchange goods in and among a number of countries, competition does not consist of challenges between the established economic power of one country and the newly developed economic power of another. Rather it consists of transfers and diversions of capital among countries by border-straddling entities that seek economic advantages wherever they may be found.

Rapid development and exploitation of new economies is not a new phenomenon,66 but the 1980s and 1990s are different in that the expatriation of capital means that "foreign competition" may actually be the product of domestic investment.67 As one analysis concluded, somewhat colloquially, we have met the foreign competition—and it is us.68 Al-

65. It is important to emphasize that, for the most part, cooperation is the product of business-oriented academics, not labor itself or other progressive sources. See supra note 3.

66. Other countries have previously undergone the recent experiences of South Korea, Taiwan, and other Third World countries. Lenin noted such a development in Russia at the end of the nineteenth century, for example, observing that foreign businessmen

have been very eagerly transferring their capital to Russia, where they are building branch factories and founding companies for running new enterprises. They are flinging themselves greedily on this young country in which the government is more favourable and obsequious to capital than anywhere else, in which they find workers who are less organized and less capable of fighting back than in the West, and in which the workers' standard of living, and hence their wages, are much lower, so that foreign capitalists are able to draw enormous profits, on a scale unparalleled in their own countries.


67. Private United States assets held abroad rose from $49.2 billion in 1960 to $579 billion in 1980. See K. MOODY, supra note 4, at 112.

The auto industry provides an unusually clear example of how international "competition" may actually involve international collaboration. Each of the Big Three American auto manufacturers holds a significant ownership stake in an Asian auto "competitor." Ford owns 25% of Mazda and 10% of Korea's Kia; General Motors owns 40% of Isuzu and 50% of Daewoo Motors; Chrysler owns 24% of Mitsubishi, itself the owner of 15% of Hyundai. See M. PARKER & J. SLAUGHTER, supra note 11, at 8; cf. B. BLUESTONE & B. HARRISON, supra note 48, at 143 (noting that General Electric owns 40% of Toshiba). Similarly, Japanese auto manufacturers have opened a number of facilities in the United States, including several "joint ventures" with American companies. See M. PARKER & J. SLAUGHTER, supra note 11, at 9; but see Risen, The New International Auto, L.A. Times, Feb. 12, 1989, Part IV, at 1, col. 4, at 4, col. 2 (questioning the degree to which auto industry "joint ventures" actually involve cooperation among competitors or whether they are really only temporary conveniences conducted at near-arms length).

68. M. PARKER & J. SLAUGHTER, supra note 11, at 8. Elsewhere, Parker and Slaughter have explained that management has invoked the competition issue to "whipsaw" American unions into competing against each other. Parker & Slaughter, Dealing With Good Management, 14 LAB. RES. REV. 73, 76 (1989).
most half of U.S. imports come from affiliates of American companies. Although a car built at a low-wage General Motors plant in Mexico may somehow be construed as "foreign competition" to a General Motors car built in Detroit, the relationship between these rivals is quite different from that of competition between entirely unrelated parties. In particular, the proposition that GM's American workers must submit to drastic workplace changes in order to fend off GM's Mexican operations is a curious one.

From labor's standpoint, the internationalization of capital presents a simultaneously familiar and novel challenge. The challenge is familiar in that American unions have for decades faced the problem of capital mobility, but novel in that a runaway to Taiwan instead of Tennessee presents a much more daunting difficulty. Unfortunately, labor has never succeeded in implementing a coherent anti-runaway policy. Cooperation with multinational corporations that have engineered the current crisis, however, seems an unlikely solution.

2. Increased Domestic Competition

Cooperation advocates also suggest that cooperation is required because domestic competition has stiffened in recent years, particularly in

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70. The Big Three auto manufacturers now own some 36 plants in Mexico and "import" 300,000 vehicles and 1.4 million engines from Mexico back to the United States each year. See M. PARKER & J. SLAUGHTER, supra note 11, at 8. Mexico's "maquiladora" program has been a particularly important source of "not-so-foreign" competition. Over 1,500 plants have now been set up under this program, which allows foreign, principally American, companies to establish manufacturing operations in Mexico, importing all necessary materials but exporting goods on a reduced-duty basis. See Mihaly, New Business Opportunities in Mexico: Maquiladora Operations, L.A. LAW., May 1989, at 18.

71. The traditional form of capital mobility is the runaway shop—a new plant opened in a location distant from existing operations for the purpose of avoiding unions. For an account, see K. MOODY, supra note 4, at 100-01. The runaways' historically favored destination was the southeastern United States, where employers found an economic and political climate that was hostile to unionism, an antipathy manifested most clearly in the presence of so-called "right-to-work" laws in eleven of the seventeen southern states. These laws prevent unions and employers from establishing "union shops," that is, from agreeing that all members of a bargaining unit will become members of the union as a condition of employment. "One result of the laws is that 20 percent of southern workers whose wages and working conditions are set by collective bargaining are not union members, whereas only 6 percent of workers covered by collective contracts outside the South are not members." R. FREEMAN & J. MEDOFF, WHAT DO UNIONS DO? 31 (1984) (citing Freeman & Medoff, New Estimates of Private Sector Unionism in the United States, 32 INDUS. & LAB. REL. REV. 143, 171 (1979)). The weakness of unionism in the South cannot properly be attributed to worker hostility: in Freeman and Medoff's survey, 35% of non-union Southern workers indicated that given the chance they would choose union representation, a percentage higher than in either the western or central states. See R. FREEMAN & J. MEDOFF, supra, at 29.

72. See Collingsworth, supra note 69, at 46-55.
recently deregulated industries such as transportation and telecommunications. This perceived increase in the intensity of competition, however, does not refer to some new social phenomenon of tenacity and aggressiveness, but merely to business' increasing difficulty in maintaining acceptable profit margins. These constraints have forced management to seek economies in aspects of their operations that would previously have been immune from such measures. In particular, labor costs—formerly off-limits—have been singled out for especially severe cost-cutting efforts.

This pattern of "competitiveness"-induced cutbacks is particularly striking in formerly strongly unionized industries in which aggressive non-union employers have recently established a toehold. This process of deunionization has had two effects: first, continual pressure for, and acquiescence in, wage cuts to establish parity with the substandard sector, and second, diagnosis of unionism as the key structural cause of the wage problem. Workers in recently deregulated industries have suffered most severely from this pattern; they have fallen into the maelstrom of bitter anti-unionism and declining wages after enjoying decades of

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73. See, e.g., Goulet, supra note 2, at 539 (citing transportation and communications).

74. Another, less widely discussed form of domestic competition of relevance to labor is the "accelerating bidding war among cities and states, first for the location of new business, then for the retention of the old," a war "which involves massive tax-abatement that drains the local and state treasuries, the issuing of industrial revenue and other bonds that add to the public debt, and the offering of other costly perks." Moody, What's Left About (Or Left Of) The Democratic Party?, 2 NEW POLITICS 13, 16 (1989). The "labor climate"—a code phrase for union-avoidance—is often an especially important consideration in this bidding war. See B. BLUESTONE & B. HARRISON, supra note 48, at 180-88.

75. Labor costs are also primary casualties of corporate raiding activity—a different form of "domestic competition" that has also intensified in recent years. As Paul Weiler points out, labor costs make up an overwhelming "share of the [firm's] costs which management can realistically seek to influence from inside," such that raiding activity is frequently accompanied by "the dismissal of significant numbers of 'surplus' employees, the reduction of wages... to 'competitive' levels, and the elimination of unduly 'generous' benefit plans." P. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 16 (1990).

76. See K. MOODY, supra note 4, at 169. Non-union competition has also grown as a result of "double-breasting," the practice of dividing a single enterprise into union and non-union components that operate side-by-side. See McCormick & Mills, Discussion, in IRRA 37TH ANNUAL PROCEEDINGS, supra note 22, at 285, 287.

The meatpacking industry provides a particularly vivid example. The industry leaders of a decade ago have been toppled by a new generation of resolutely anti-union giants such as IBP, "one of the country's most fiercely antiunion companies." How OSHA Helped Organize the Meatpackers, BUS. WK., Aug. 29, 1988, at 82, 82. As a result, unionization in the industry has dropped from 90% to 65% in the last fifteen years, and a series of concessions has brought real wages down substantially. See id.; see also K. MOODY, supra note 4, at 105, 176, 179-82. Wage cuts are not the only manifestation of intensified domestic competition. The meatpacking industry has been cursed by speedups and an alarming consequent increase in workplace injuries. See UFCW Packinghouse Director Sees Rebuilding, 134 LAB. REL. REP. (BNA) 151, 153-54 (June 4, 1990).

77. See K. MOODY, supra note 4, at 176.

78. See, e.g., Cappelli, supra note 50, § 1.05, at 1-10 (noting a substantial shift in corporate policy "from achieving gains through collective bargaining to avoiding unions altogether").
government-assured economic stability and worker protections. 79

Although labor's attempts to counter these consequences of intensified domestic competition have so far proved unsuccessful, cooperation does not represent an obvious panacea. Domestic competition requires business to maximize profits while minimizing costs, and requires labor to maintain the highest wage levels that it can under the circumstances. Cooperation does not provide the companies that adopt it with any special advantage that alters this basic dynamic. Even if it can be assumed that cooperation will boost productivity and improve a unionized employer's performance, its non-union competitors can likely match these gains, for cooperation can be and has been implemented in low-wage, non-union workplaces. Because all the players can acquire any advantages that cooperation provides, cooperation will not, in and of itself, ease domestic competition, and it will not aid labor in ending the pattern of undercutting from non-union enterprises.

3. The Advance of New Technology

The rapid pace of technological change, a third important pressure in cooperation advocates' accounts, is also self-evident. 80 Most obvious is the growing role of computers, now widely used in both design and manufacturing, 81 which have dramatically altered the methods and requirements of many industries. Cooperation advocates argue that technological change "undermines and erodes the 'status quo' at the workplace": "[i]t demands a fluidity and flexibility in the organization of work and work relationships" 82 and the integration of hitherto separate functions, requirements that cannot be satisfied by overly rigid management methods or traditional labor practices. 83 Cooperation may also directly facilitate the implementation of new technology, by allowing employees to communicate and share the ideas they develop in installing and "debugging" new systems. 84 Further, cooperation advocates link the growth of technology to the problem of foreign competition, suggesting that Japan has integrated technological changes more effectively than the United States. They suggest that Japanese businesses have allowed work-


80. The significance of technological advances may be overstated, however. See, e.g., Hunt, Technological Change and Unemployment: Fears and Reality?, in IRRA 39th Annual Proceedings, supra note 22, at 447, 448 (suggesting that analysts "tend to exaggerate the revolutionary aspects of any new technology" and "to concentrate on the elements of change rather than constancy," and are "wildly overoptimistic about the rate of diffusion of new technologies").

81. See, e.g., Stepp, supra note 42, at 455.

82. Id. at 455.


84. See M. Parker, supra note 53, at 25.
ers to participate in decisions to develop new technology and has given workers a real stake in technology-induced productivity gains through profit-sharing schemes.\textsuperscript{85}

Although technology does in some cases diminish the utility of traditional work practices and structures, it does not present an unprecedented challenge to which cooperation is the necessary response.\textsuperscript{86} Rather, technological change requires negotiation and accommodation between labor and management—traditional collective bargaining—with respect to the structure of the workplace. Insofar as "[t]he introduction of new technology is capitalism's historic response to anything that undermines profit margins,"\textsuperscript{87} the principal problems that labor faces in confronting new technology are those faced by the Luddites over 150 years ago: whether technology will eliminate or otherwise affect existing jobs, and whether it will reduce the number of jobs to be filled in the future. Although these questions are likely to answered in the affirmative,\textsuperscript{88} the prevailing myth that today's unions follow the Luddites in irrationally resisting any and all technological change is demonstrably inaccurate.\textsuperscript{89} What may perhaps be new is that given the current focus on "competing" by reducing labor costs, business is more likely to emphasize the job-eliminating possibilities of new technology.\textsuperscript{90} Through its adaptation to intrusive surveillance and monitoring systems, management may also begin using technology as a sophisticated means of worker control.\textsuperscript{91}

Negotiation or confrontation over technology issues

\textsuperscript{85} See R. MARSHALL, supra note 45, at 35-36.

\textsuperscript{86} See, e.g., Bamber, New Technology—The Challenge to Unions: A Comparative View, 37 LAB. L.J. 502, 502 (1986) ("In spite of all the speculation about current technological changes heralding a new industrial and social revolution, many of the industrial relations issues are not new; essentially they are those of the first industrial revolution.").

\textsuperscript{87} K. MOODY, supra note 4, at 115.


\textsuperscript{89} One survey found, for example, that local union leaders in the United States on the whole show "a rather mild form of encouragement" toward technological change. See Bamber, supra note 86, at 502 (citing Weikle & Wheeler, Unions and Technological Change: Attitudes of Union Leaders, in IRRA 37th Annual Proceedings, supra note 22).

\textsuperscript{90} Cf. A Conversation With... John R. Stepp: Reflections on a Decade of Labor-Management Cooperation, LAB. REL. TODAY, July-Aug. 1990, at 4 (hereinafter Reflections on a Decade) (noting that the standardization of technology causes production to "inevitably gravitate to the lowest cost area").

\textsuperscript{91} See D. NOBLE, supra note 88, at 350-51 (suggesting that "[c]omputerized monitoring and surveillance systems, remotely controlled and satellite-linked plants ... [and] robotization ... are being designed precisely to serve management's efforts to neutralize the power of unions and workers"). Despite the intrusiveness of these monitoring systems, some commentators have dismissed concerns about workers' rights in this area. See, e.g., Issues in Electronic Monitoring of Employees, 130 LAB. REL. REP. (BNA) 311, 312 (19–) (comments of Alan Westin of Columbia Law School) ("[t]o invoke a privacy claim [in the context of electronic surveillance of employees] does violence to the entire concept of employee privacy"). This cloud may have a silver lining, though: employers'
might thus become more frequent or more bitter; but it is not apparent that a basic reorientation of the workplace is necessarily required.  

C. Competing Visions of Cooperation Theory

Although advocates generally concur in identifying the rationales for cooperative endeavor, they differ sharply in describing the forms of cooperation that they believe will provide effective solutions to these problems. As I have suggested, these differences follow identifiable political fault lines. Most prominent on paper is the centrist approach, linked to industrial pluralist notions of collective bargaining and emphasizing the role of cooperation in increasing productivity and competitiveness. Less influential are the leftist voices that advance cooperation as a new form of workplace democracy and a means to expanding labor's role in corporate decisionmaking. Finally, the rightist approach, dominant in practice, explicitly rejects the goal of increasing labor's participation in fundamental decisionmaking and portrays cooperation as a new mobilization of workers for corporate objectives.

1. The Centrist Vision

Centrist theories share a number of distinct features. Most important, centrists believe that cooperation is a logical outgrowth of industrial pluralism; as such, a distinct union presence remains worthwhile and necessary as a vehicle for democratic worker expression. In this regard, among others, centrist cooperation differs sharply from its principal competitor, rightist cooperation, the vision of anti-union business.

In arguing for its overhaul, centrist cooperation theorists present the existing American industrial relations system as a deeply adversarial one in which management and labor treat each other with profound distrust, responding to discrete problems rather than seeking solutions to underlying questions. In the centrist view, management is largely to blame for this development, because it has insisted upon imposing excessively stringent limitations on the role of unions in decisionmaking. As a result, labor often fails to concern itself with the overall condition and direction of the enterprise. Cooperation, in contrast, will ensure that labor and management work together for a common goal, sharing their different information and viewpoints.

Despite this seemingly non-partisan objective, centrist analysts recognize that cooperation involves the reorientation of both labor and man-

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greater reliance on technology and skilled operators may create new opportunities for worker leverage in concerted activity. See M. PARKER, supra note 53, at 87.
93. See Reflections on a Decade, supra note 90, at 5.
agement toward a common business-oriented agenda. Seemingly neutral terms—principally “productivity” or “competitiveness”—conceal a subtle shift to management. Cooperation may also serve to inculcate workers with management values and priorities; if the employer designs and implements cooperation training without union participation—as is usually the case in fact if not in theory—this training will probably devote little attention to union interests. As cooperation evolves toward the Japanese-style “team concept,” moreover, its pro-management tilt is likely to increase.

In the centrist view, this shift toward management’s goals must be carefully controlled, for cooperative programs that do little more than “bootstrap productivity at the workers’ expense” are unlikely to suc-

94. In this respect, modern cooperation theories may be understood to have returned to their roots. See, e.g., Kohler, supra note 3, at 516 (noting that “[a] central concern of [early cooperation theorists was] the discovery and application of means by which to achieve employee acceptance of and cooperation in securing management’s goals”) (footnote omitted). However, at an intermediate stage—the early 1970s—industrial democracy and worker dignity were announced as the paramount values of cooperation. See M. Parker, supra note 53, at 6-7.

Centrist cooperation’s emphasis on business goals also provides a strong connection to industrial pluralism. See, e.g., Klare, Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law, 4 Indus. Rel. L.J. 450, 459 (1981) (hereinafter Klare, Labor Law as Ideology) (arguing that industrial pluralism’s “real preoccupations are with efficient management of the enterprise”).

95. See, e.g., The Changing Role of Union Leaders, supra note 13, at 21 (“advocat[ing] labor’s closer identification with management’s agenda”); Second Interim Report, supra note 2, at 52 (suggesting that “[a]lthough arguments can be made that productivity is an important issue for workers, it is at base an employer issue”) (footnote omitted). For a sophisticated analysis of how labor’s interest in productivity differs from management’s, see Banks & Metzgar, supra note 2, at 21-22.

In industrial pluralist theory, “industrial peace” served the totemic function that cooperation analysts now assign to “productivity” and “competitiveness.” Although industrial peace was presented as a shared and neutral goal, many critics have noted that institutional stability and preservation of the status quo are of primary benefit to the relatively powerful (management) rather than to the relatively powerless (labor). See, e.g., Stone, The Post War Paradigm, supra note 5, at 1565.

96. See G. Grenier, supra note 23, at xvii (suggesting that cooperation "create[s] the perpetual captive audience needed by management to socialize the work force").

97. See M. Parker, supra note 53, at 15-18. Irving Bluestone, a pioneer of cooperation as a UAW official, suggests, for example, that “[a]n essential ingredient [for successful cooperative programs] is the acceptance of coequality between management and the union in designing, planning, and implementing the process and obtaining feedback concerning its effectiveness.” Bluestone, Joint Action and Collective Bargaining—and Vice Versa, in Teamwork, supra note 60, at 41, 46 (emphasis removed).

98. See Second Interim Report, supra note 2, at 60. Some leftist commentators, in contrast, contend that cooperation training should not only pay attention to union interests but should ensure that union participants (including rank-and-file members) are trained entirely separately from management’s. See Banks & Metzgar, supra note 2, at 28-29.

99. See The Payoff from Teamwork, supra note 10, at 61 (quoting Haruo Shimada of Keio University, Tokyo) (suggesting that the Japanese-style “team concept is not intended to increase workers’ autonomy but [only] to help them find out the problems in the production line so that no defective goods will be produced”). Management is also more likely to resort to “hardball cooperation” and insist that unions “cooperate or else.” So Where Does the UAW Go From Here?, Bus. Wk., August 14, 1989, at 77 (quoting Harley Shaiken of the University of California at San Diego).
ceed. Management should therefore adopt appropriate safeguards to ensure that workers' interests and perspectives are taken into account. At the same time labor must "articulate its own vision of strategies for strengthening the competitiveness of the American economy so as to enhance the employment opportunities and the standard of living of American workers." One especially important manifestation of cooperation's alignment of workers' interests with management's is the establishment of links between employee compensation and the health of the enterprise—a new form of "risk-sharing." Older practices such as work rules and area wage standards are to be discarded. By linking profits and wages, centrists believe, labor and management will come to share a common goal.

Centrist cooperation theorists emphasize the connection between their vision of cooperation and industrial pluralist notions of collective bargaining. These commentators suggest that collective bargaining has evolved so as to encompass a greatly broadened range of issues, and that cooperation therefore provides a logical progression. Similarly, centrists contend, joint administration by management and labor of the collective bargaining agreement—"a unitary and responsible source of authority within an enterprise"—necessarily involves a considerable degree of cooperation, and prepares unions for a "new role" as "coordinator or facilitator between the cooperative goals and traditional

100. Second Interim Report, supra note 2, at 53.
101. Id. at 53-55. Former Deputy Under Secretary of Labor John R. Stepp, for example, emphasizes workers' need for job security as a vital interest. See Reflections on a Decade, supra note 90, at 4.
102. See The Changing Role of Union Leaders, supra note 13, at 21.
103. A. Veber, supra note 92, at 66. See Barbash, supra note 58, at 529 (noting that cooperation "replaces fixed wages with variable, performance-related compensation like merit pay, profit sharing, employee stock ownership, employee buyouts, and one-time, lump-sum payments, which are better tuned to market fluctuations"). In this respect, cooperation follows the lead of early twentieth-century scientific management. See, e.g., D. Montgomery, supra note 31, at 225-27.
105. See, e.g., Second Interim Report, supra note 2, at 42-43 (suggesting that cooperation and collective bargaining are "highly analogous and [that] those analogies exist as to important characteristics").
106. According to the Bureau of Labor-Management Relations and Cooperative Programs, collective bargaining has expanded to cover not only core issues such as wages, hours, vacations, and benefits, but has also come to include matters involving finance, personnel, productivity, and the location of plants. See Second Interim Report, supra note 2, at 43. Management acquiescence in submitting matters such as these to collective bargaining is not the norm, of course. A management decision to set up an employee stock ownership plan, moreover, can scarcely be considered an indication of general willingness to bargain about fundamental financial matters. Centrist commentators' idealized version of collective bargaining is thus a problematic restatement of industrial pluralist ideology. Cf. Stone, The Post War Paradigm, supra note 5, at 1577-79.
107. Centrists argue that "unions have always acted as fiduciaries of the industrial peace, serving both managerial and disciplinary functions with regard to the workforce." Second Interim Report, supra note 2, at 45 (citing Klare, Labor Law as Ideology, supra note 94, at 452). Klare is
distributive goals.\textsuperscript{108}

In the centrist view, however, cooperation demands a substantial extension of collective bargaining. Such an extension requires unions to assume a more active, ongoing role in the administration of labor contracts—to take a “clinical” approach to the grievance procedure and use it as the primary means of communication with management. This approach is used instead of following the traditional “action-reaction” system, in which management makes all decisions and labor merely questions some in passive fashion.\textsuperscript{109}

Centrist cooperation also requires important adjustments on management’s part. Management must change its role from that of sovereign, in which all decisions are management’s to make as owner of the enterprise, to that of trustee, in which management will hold a broadened responsibility for the entire enterprise, including both its overall health and the welfare of its members.\textsuperscript{110} This altered notion of management rights is extremely controversial: the central failing of the New Deal regime has been its inability to shape workable limitations on managerial authority,\textsuperscript{111} and the dominant theme of rightist cooperation is its unwillingness to accept such inroads.\textsuperscript{112}

Despite these changed roles for labor and management, centrists argue vehemently that cooperation should coexist with collective bargaining rather than replace it. Centrist advocates emphasize that the two processes should be kept as distinct as practicable, with a “proper separation” between the two being maintained,\textsuperscript{113} at least until the cooperative relationship has matured.\textsuperscript{114} Such an “invisible but impenetrable wall”\textsuperscript{115} would, among other things, allow unions to raise production-
related problems through cooperative structures while preserving the grievance procedure for more adversarial issues. Further, centrist advocates recognize that a healthy collective bargaining relationship necessarily involves a measure of conflict, and that cooperation should also accept this outlet.

In practice, the objective of "proper separation" has proved elusive: if cooperation is to tackle substantive matters, it simply must intrude on the domain of collective bargaining. This trend creates both theoretical and practical problems. From a theoretical standpoint, it demonstrates the difficulty centrists face in attempting to adapt industrial pluralist values to cooperation, a vision whose roots in enterprise theory cannot accommodate pluralism and collective bargaining. The practical difficulties are simply the consequences of the dilemma: centrist cooperation tends to return to its roots by reducing the union's significance or eliminating the union altogether. To prevent such "silent erosion" of the union's role, centrists advocate an active posture for unions at all levels of the cooperation process, but all too often, they rely on "lion will lie down with the lamb" rhetoric as a substitute for hard choices.

Centrists' emphasis on the continuing vitality of unionism in cooper-

116. See, e.g., SECOND INTERIM REPORT, supra note 2, at 58. Some labor-oriented commentators have criticized this aspect of centrist theory as producing "confusion" and even "schizophrenia" for unions. D. WELLS, supra note 40, at 146.

117. As the Bureau of Labor-Management Relations and Cooperative Programs observes in this regard:

Labor-management cooperation has operated efficiently alongside traditional adversarial relations. The presence of conflict need not mean that the organization is in trouble but rather that there is "a heterogeneity of preferences and values within the organization." Heterogeneity is necessary for an organization to adapt effectively to a complex and changing environment. Consequently, to preserve that element is to promote survival of the enterprise and the workers' long-term interests. To protect heterogeneity also helps to protect the dissenting voice, a state of affairs that is fundamental to democracy.

118. See Spector, supra note 113, at 858.

119. See Verma & McKersie, Employee Involvement: The Implications of Noninvolvement by Unions, 40 INDUS. & LAB. REL. REV. 556, 564 (1986) (describing survey results that "provide strong support for the hypothesis that [cooperation] help[s] increase identification with the firm and support for such goals as improving productivity, increasing competitiveness, and upgrading technology"); but see Kochan, Katz & Mower, supra note 104, at 282 (describing survey results that showed "no evidence . . . that participants [in cooperative programs] evaluated their union lower than nonparticipants did") (emphasis in original). In some cases, unions have even been decertified after the introduction of cooperation. See Hoerr, Worker Participation Then and Now, in PARTICIPATIVE SYSTEMS AT WORK: CREATING QUALITY AND EMPLOYMENT SECURITY 138, 171 (S. Rubinstein ed. 1987).

120. SECOND INTERIM REPORT, supra note 2, at 60-61; see Kochan, Katz & Mower, supra note 104, at 291.

121. See, e.g., Samuel, Coping with the New Realities in Industrial Relations, 37 LAB. L.J. 534, 539 (1986) (suggesting that, under cooperation, management and labor will come to work so closely "that there will even come a day when no one will know which is which").
ative systems also reflects at least two important external concerns. First, many centrists argue that union-oriented pluralism must be preserved so as to ward off the specter of government interference in matters involving employee rights, a "disastrous" but likely possibility "[i]f unions cease to be a viable counterweight" to management power. According to former Deputy Under Secretary of Labor John R. Stepp, such interference would jeopardize international competitiveness—the central objective of centrist cooperation—by stifling flexibility and creativity.

Second, centrists recognize that cooperation often consists of rhetoric without substance and is advanced merely as an instrument of "union avoidance." Manipulation of this kind would forestall the fruition of cooperation and belie its basic goals. Centrists recognize that given this pattern of management abuse, and business' continuing drive to de-unionize the economy, labor's acceptance of cooperation is threatened.

Centrist support for the union presence is thus intended to ensure that cooperative programs assure an adequate representational mechanism for workers and do not vest total control in management. In this regard, some commentators, notably Paul Weiler, have emphasized that cooperative mechanisms should not be wedded to traditional unionism, but should also rely upon alternative representation models, including German-style works councils and, in appropriate contexts, structures of the kind devised by employee resource managers. Flexible and hetero-

122. Stepp, supra note 42, at 460; see Raskin, Organized Labor—A Movement in Search of a Mission: Implications for Employers and Unions, 3 LAB. LAW. 41, 53 (1987) ("The inevitable effect, unhappily, if government becomes too intrusive in regulating industrial relations, is that rigid rules will compel more conformity where the need is for more flexibility in the workplace. Straitjackets are surely the wrong way to go."). Some centrist commentators do urge government activism in the form of progressive law reform, however. See, e.g., Labor Relations System Must Be Rebuilt If U.S. Is To Compete, Former Official Says, DAILY LAB. REP. (BNA), May 2, 1990, at A-4 (summarizing the comments of former Secretary of Labor Ray Marshall).

123. See Stepp, supra note 42, at 460 ("Government operates on principles of uniformity and consistency, while global competition requires flexibility and versatility. Collective bargaining enables the parties to craft their own arrangements, while the promulgation of rules and regulations discourages initiative and innovation.").

124. Centrist cooperation advocates from within the labor movement, not surprisingly, have been particularly vocal in this regard. See, e.g., Samuel, supra note 121, at 535.

Cooperative programs have been widely promoted by such notoriously anti-union entities as the Council for a Union-Free Environment and Modern Management, Inc. See K. MOODY, supra note 4, at 189; see also J. SIMMONS & W. MARES, WORKING TOGETHER: EMPLOYEE PARTICIPATION IN ACTION 235 (1985) (noting that "the president of the National Association of Manufacturers recommends the use of QWL projects as a useful tactic for keeping a 'union-free environment' "). Guillermo Grenier has comprehensively analyzed the use of cooperation as an anti-union strategy, focusing on Johnson & Johnson's campaign against the Amalgamated Clothing and Textile Workers at its Ethicon plant in Albuquerque, New Mexico. See G. GRENIER, supra note 23.

In addition to using cooperation as a device for avoiding unionization, management has occasionally implemented cooperative programs shortly before announcing a plant closing, as a means of defusing worker resistance. See Banks & Metzgar, supra note 2, at 19.

125. See Kochan, McKersie & Katz, supra note 22, at 272-73.

126. See P. WEILER, supra note 75, at 284-92, 206.
geneous responses of this kind, centrists contend, might best meet the challenges of a changing society and economy.

2. The Leftist Vision

Leftist theories of labor-management cooperation in the contemporary United States are comparatively sketchy and generally rely on innovations from other countries.127 Leftist approaches share a number of features with centrist views, and there is certainly a debate between leftists and rightists over the appropriate extent of worker participation in basic corporate decisionmaking, which leftists see as the sine qua non of cooperation. On the whole, however, leftist theorists attempt to create their own agenda for cooperation, and their views are decidedly marginal to the overall discussion.128 Although it is clear that leftist visions provide an important inspiration to workers and their allies who are affected by the cooperation debate, this inspiration may have the effect of instilling false hopes. As I argue below in Part IV, the current debate in the United States does not involve competing ideas about how to achieve industrial democracy, and leftists are mistaken to believe otherwise.

Leftists attach particular value to experiments that admit labor to existing corporate power structures,129 through stock ownership schemes, corporate buyouts, or representation on corporations' boards of directors.130 Labor's new role in corporate ownership thus provides a

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127. Most prominent, of course, are the codetermination systems of northern Europe. For an overview, see A. THIMM, THE FALSE PROMISE OF CODETERMINATION: THE CHANGING NATURE OF EUROPEAN WORKERS' PARTICIPATION (1980). Kim Moody has criticized those who suggest that existing American cooperative programs may lead toward codetermination, noting that the European countries that effected codetermination had prosperous, heavily unionized economies and strong socialist traditions, conditions not found in the United States. See K. MOODY, supra note 4, at 191.

128. Cf. Sharp, Codetermination: A Postmortem, 40 LAB. L.J. 323, 333 (1989) (quoting former Secretary of Labor John Dunlop) (suggesting that leftist cooperation is "damned insignificant and won't spread . . . codetermination is not about to sweep industrial relations in this country").

129. See Stone, Labor and the Corporate Structure, supra note 2, at 77-78. In addition to these mechanisms, Stone draws attention to labor's newly activated role in bankruptcy workouts and corporate transactions. See id. at 76-77; see also C. GOLD, LABOR-MANAGEMENT COMMITTEES: CONFRONTATION, COOPTATION, OR COOPERATION? 19 (1986) (noting that the "socialist approach [to cooperation] is involved more with the structural formalities of ownership and representation, while the human relations approach deemphasizes formal power structures").

130. The appointment of former UAW president Douglas Fraser to Chrysler's board in 1979 attracted widespread attention. Since that time, union representatives have joined corporate boards in a number of other industries, including airlines, rubber, steel, trucking, and food processing. See generally Stone, Labor and the Corporate Structure, supra note 2, at 77; but see Sharp, supra note 128, at 333 (suggesting that many of these initiatives have been unsuccessful, prompting their abandonment). Chrysler has since removed the current UAW President, Owen Bieber, from its Board. New York Times, March 14, 1991, § D, at 1, col. 4.

In many instances, however, the promise of union representation has been greatly diminished in practice. At Eastern Airlines, for example, collective bargaining led to the appointment of three union representatives to the board in 1983, but these union representatives were soon bypassed by "a rump executive board" and denied access to "confidential" financial information. Eventually, East-
link to old and new experiments in worker ownership, both in the United States and abroad.\(131\)

Leftists also emphasize the importance of granting workers a greatly increased role in firm decisionmaking—a position diametrically opposed to that of rightists.\(132\) Karl Klare suggests, for example, that cooperation can only succeed as a system of "power sharing" that involves fundamental "structural change within enterprises."\(133\) Klare argues, therefore, that participation in firm governance should become a basic right, guaranteed for union and non-union employees alike.\(134\) To realize this goal, Klare proposes programs that give workers an opportunity "to influence their company's basic strategic course": "some labor-management committees, union representation plans, and genuine worker ownership plans."\(135\) In this regard, other leftist commentators urge a substantially greater degree of worker control over sales and marketing policies and production and delivery processes.\(136\) Leftist cooperation's basic goal, then, is exactly what "management fear[s] the most: to change power relations in the workplace to the benefit of organized workers."\(137\)

An absolute necessity, in the leftist vision, is "the presence of a strong union and a healthy collective bargaining relationship;"\(138\) "productive cooperation requires the existence of autonomous, collective or-

\(131\) See infra Section III.

\(132\) See Sharp, supra note 128, at 324.

\(133\) Klare, The Labor-Management Cooperation Debate, supra note 6, at 67. Klare recognizes that his views are unlikely to be well received in management quarters:

In an environment in which most employers do not, and have not, accepted the legitimacy of an employee voice in making basic managerial decisions, one really must wonder whether most employers are prepared to make the sort of commitments and sacrifices that are required for cooperation to progress beyond superficial levels.

Id.

\(134\) See Klare, Workplace Democracy & Market Reconstruction, supra note 111, at 55. Six European countries presently recognize this right. See Sharp, supra note 128, at 324.

\(135\) Klare, The Labor-Management Cooperation Debate, supra note 6, at 68. Klare distinguishes between "genuine" worker ownership plans and such spurious creations as ESOPs, "which amount to little more than devices through which capital is raised, pension and shutdown liabilities are compromised, and some gain sharing occurs, without any real sharing of decisionmaking power." Id. at 68 n.82; see Rosen, Foreword, in M. Parker, supra note 53, at vi (referring to "authentic—not ESOP—worker ownership and control."). For a mainstream account of ESOPs, see J. Blasi, Employee Ownership: Revolution Or Ripoff? (1988).

\(136\) See Banks & Metzgar, supra note 2, at 26; Bluestone, Goodbye to the Management Rights Clause, 14 LAB. RES. REV. 66, 71 (1989).

\(137\) Banks & Metzgar, supra note 2, at 12.

\(138\) Klare, The Labor-Management Cooperation Debate, supra note 6, at 68.
ganization[s] of workers'\textsuperscript{139} to ensure employees' representation in the "enterprise community."\textsuperscript{140} Without such a presence, cooperation simply will not satisfy workers' needs for shared decisionmaking, sharing of productivity gains, or guaranteed job security.\textsuperscript{141} As in the centrist vision, leftist cooperation demands a more active role for unions in training workers and guiding the enterprise, but leftists urge a much greater degree of union control, sometimes to the extent of completely excluding management from cooperative structures.\textsuperscript{142}

Although leftists bring their own agenda to the cooperation debate, they often share others' emphasis on productivity\textsuperscript{143} and welcome centrist initiatives fairly uncritically.\textsuperscript{144} Leftists tend to see the limited initiatives currently propounded by centrists as the "entering wedge"\textsuperscript{145} to more significant measures that would ensure genuine workplace democracy. If centrists view cooperation as an extension of collective bargaining, leftists hope for cooperation as an extension of class struggle.

3. The Rightist Vision

Rightist cooperation shares certain features with the centrist vision, but differs in a number of important respects. Both views emphasize the importance of improving American competitiveness, but rightist analysts assess this problem from a more openly pro-business standpoint and criticize centrists' attention to employee interests.\textsuperscript{146} As such, rightists advance a vision of cooperation that does not assume, and often expressly renounces, a union role; they vigorously oppose inroads on management's plenipotentiary authority to direct the enterprise. Insofar as this

\begin{itemize}
  \item \textsuperscript{139} Id. at 60 (emphasis in original). See Rothstein, \textit{Lessons for Labor-Management Cooperation Drawn from Cases of Noncooperation in the French and American Steel Industries or What We Have Heah Is a Faiiya' to Cooperate}, 40 LAB. L.J. 512, 516 (1989) ("Real cooperation is not possible without a strong and autonomous organization of the workers.").
  \item \textsuperscript{140} See Rothstein, supra note 139, at 516.
  \item \textsuperscript{141} See Klare, \textit{The Labor-Management Cooperation Debate}, supra note 6, at 68-69. According to some leftists, satisfaction of these needs is necessary if workers are to develop fully. See C. Gold, supra note 129, at 19.
  \item \textsuperscript{142} Compare Rothstein, supra note 139, at 516-17 with Banks & Metzgar, supra note 2, at 25-29.
  \item \textsuperscript{143} See, e.g., Klare, supra note 111, at 12 (noting the productivity advantages of cooperation and proposing a "‘human capital strategy’ of economic growth" with heavy investment in retraining, childcare, and welfare programs).
  \item \textsuperscript{144} See, e.g., Stone, \textit{Labor and the Corporate Structure}, supra note 2, at 78 (describing employer-initiated cooperative programs as "attempts[s] to involve union members in discussions and decisions about many matters traditionally made by management").
  \item \textsuperscript{145} Klare, \textit{The Labor-Management Cooperation Debate}, supra note 6, at 69.
  \item \textsuperscript{146} See, e.g., Hatch, \textit{U.S. Labor Law and the Future of Labor-Management Cooperation}, 38 LAB. L.J. 3, 9-10 (1987) (arguing that "the changes in current practices suggested by [the Labor Department with respect to cooperation] virtually all deal with major concessions that employers would be forced to make," such that "[o]ne wonders just what the authors actually desire—all working together, two separate sides, or all working together on the side of the worker").
\end{itemize}
vision is prevalent in the business community—the primary force behind the actual implementation of cooperation—real-world cooperation has generally taken shape along rightist theoretical lines. Analysis of differing cooperation theories must therefore emphasize that these competing visions, although theoretically equal in importance, are not necessarily equal in practice.

Rightist cooperation theorists agree with centrists that businesses and their employees should work together—that is, that workers should adopt management’s viewpoints and goals. Cooperation, in the rightist view, may achieve a number of objectives, including increasing the fulfillment of workers, but it is primarily intended to achieve a common focus on meeting the employer’s basic need: the maximization of profit.

Rightist theorists of cooperation are aggressive in defining what they perceive to be its proper limits, which they feel centrist approaches exceed. Expressly beyond the scope of the rightist vision is any experiment which would strip management of its power to direct the enterprise. Cooperation should only take place at lower levels and will be jettisoned if it does not satisfy management’s objectives. These principles lead to rightist cooperation’s most noticeable features: forceful opposition to unions and vigorous defense of managerial prerogatives.

Rightist commentators vehemently dispute the implicit assumption of centrist analysts that a union presence is necessary for successful cooperation, and many are openly anti-union. Rightists point out that

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147. Although rightist cooperation has become favored by many American corporations, its sweep within the business community is less than universal. The Wall Street financial community, in particular, has tended to value traditional cost-cutting measures, such as wage reductions and mass layoffs, more highly than cooperative programs, which may require heavy front-end investment and pay off slowly. See, e.g., The Payoff from Teamwork, supra note 10, at 57; Cappelli, supra note 50, § 1.07, at 1-16 to 1-18. Cappelli notes that “the financial community almost without exception reacts positively to management programs to slash employment” and suggests that financiers’ ignorance of employee relations may account for the devaluation of cooperation. Cappelli, supra note 50, at 1-16 to 1-18. An important consequence of Wall Street’s disrespect for cooperation in this era of hostile takeovers is that companies must conform to Wall Street’s notions of proper management or risk possible buyouts. See id. at 1-18.

148. See Klare, The Labor-Management Cooperation Debate, supra note 6, at 63 (suggesting that rightist cooperation regards “[p]luralistic sub-group self-determination . . . as a threat to organizational effectiveness” and “treats organizational integration as the paramount objective”).

149. See Levitan & Johnson, supra note 40, at 9 (observing that when cooperation “fail[s] to meet management’s goals, the programs are scuttled and any gains in workers’ satisfaction are lost”); cf. Lawler & Mohrman, Quality Circles After the Fad, 63 HARV. BUS. REV. Jan.-Feb. 1985, at 65, 66 (suggesting that “management can easily eliminate [cooperative programs] if they become troublesome”).

150. The NAM, for example, has criticized the Bureau of Labor-Management Relations and Cooperative Programs for “suggesti[ng] . . . that effective cooperation can occur only where a union is present.” SECOND INTERIM REPORT, supra note 2, at 79. In the NAM’s view, the Bureau has “failed to give adequate recognition to the many successful cooperative endeavors that are occurring in the predominant unorganized, non-union setting,” where “some of the most innovative and effective human resources practices originated and have been refined.” Id. See also BUREAU OF LABOR-MANAGEMENT RELATIONS AND COOPERATIVE PROGRAMS, U.S. DEP’T OF LABOR, U.S. LABOR
"more employee participation programs are being utilized in non-union than unionized settings." They criticize the centrist focus on unionized experiments which, they contend, are "found only in rare circumstances in the United States." When rightist cooperation has been implemented in unionized workplaces, moreover, management does not maintain both cooperation and collective bargaining in "proper separation," as in the centrist vision. Instead, management seeks to exclude the union from cooperative structures and to build direct relationships with employees.

Similarly, rightists strongly reject any proposals that would force employers to "surrender major areas of managerial discretion to union leverage" or make labor an "equal partner with management in running the enterprise." The business-oriented Labor Policy Association, for example, has assailed the centrist Bureau of Labor-Management Relations and Cooperative Programs for seeking to give unions "co-equal status with management in the operation of the business" and for being


151. Consider, for example, the remarks submitted by attorney David W. Miller to the Bureau of Labor-Management Relations and Cooperative Programs in connection with its Laws Project:

  I believe that there is much opportunity and practice of cooperation between management and employees. . . . On the other hand...[the solution to these problems of international competitiveness] is not more "cooperation" between management and labor unions, but the elimination of labor unions. . . . The idea of [former Labor] Secretary [William] Brock's efforts to promote cooperation between management and labor should be terminated and the Secretary should encourage management to deal directly with its employees and not through paid representatives whose interests are unrelated to those of employees.

First Interim Report, supra note 150, at 12.


153. Id. at 89. One proffered explanation for the overemphasis on the union setting is that non-union companies with successful programs have been discreet "because of the competitive edge that they provide." Id. at 88.

154. See supra notes 113-121 and accompanying text.

155. See, e.g., Suddenly USX Is Playing Mr. Nice Guy, Bus. Wk., June 26, 1989, at 151 (describing USX Corporation's "management-driven strategy to build worker involvement outside the union contract"). A strategy of this kind could, of course, encounter serious legal problems as a form of illegal "direct dealing" with employees rather than with their statutory representative. Such a challenge has been successfully mounted by the Chemical Workers Association, in opposing the cooperative program implemented by Du Pont at its Deepwater, New Jersey plant. See Brief on Behalf of Charging Party, E.I. Du Pont de Nemours & Co., No. 4-CA-16801 (NLRB Dec. 22, 1989) (LEXIS, Labor library, Admin. file). Among the stated objectives of Du Pont's program were the following:

  "Recognize employees' right to union representation, but accomplish management job so well that there are no valid needs for third party representation."

  "Where unions exist, bargain in good faith but give no encouragement to continuance of a union and be prepared to accommodate a non-union status." Id. at 20-21.

156. First Interim Report, supra note 150, at 16 (comments of J. Bruce Johnston of USX Corp.).

“more concerned with reordering labor-management relations in this country by substantially expanding and strengthening the institutional power of unions instead of . . . making American business more competitive.”158 Indeed, rightists argue, centrists would “impose a form of codetermination”159—a model “inconsistent with U.S. traditions”160—and “go[] far beyond most European industrial democracy systems,” at a time when “European employers hold [these systems] primarily responsible for their decline in competitiveness.”161

Although this aspect of rightist cooperation has frequently been assailed as irrational anti-unionism, it has deep theoretical roots. Cooperation does pose serious questions about the role of unions; indeed, the original version of cooperation theory had “no room within it for unions whatever” and eschewed any organizations that would fracture the unitary voice of the enterprise.162 Contemporary rightist cooperation echoes this approach:

Unions exist for the very purpose of collective bargaining; therefore, attempts to supplement or replace the adversarial structure inevitably raise questions about the viability of the adversarial representative as well. Unions traditionally have argued that an adversarial system is the only way to guarantee protection of employee interests, but such a view may discount the employees’ ability to protect themselves through mechanisms other than unions.163

If worker interests and management interests are conflated and the employer’s goals made paramount, then conflict within the organization necessarily becomes a pathological condition. In this vision of the enterprise, unions provide nothing more than a source of unrest, and their very existence is a pathology.164

D. Conclusion

Debates about cooperation proceed on two tracks. Academic and public policy discussions constitute the first track; actual implementa-

158. Id. at 87-88 (comments of the Labor Policy Association).
159. Id. at 81 (comments of NAM). As an example of the codetermination it disfavored, the NAM referred to the Saturn project implemented by the United Auto Workers and General Motors—something rather less than a transformative experiment in industrial democracy.
160. B. Crawford, supra note 30, at 19 (quoting Statement of the Business Roundtable, 33 BUS. LAW. 2083, 2107 (1978)).
161. Second Interim Report, supra note 2, at 88 (comments of the Labor Policy Association). See also First Interim Report, supra note 150, at 13 (comments of Mark Rigg of the Southland Corporation) (“it seems implicit in [the Bureau’s] analysis that ‘full partnership with labor in every phase of planning and production’ is the ultimate goal. If this is true, it could be argued that the paper assumes this country is willing to adopt a form of co-determination that goes beyond European concepts.”).
162. Kohler, supra note 3, at 517.
163. Conclusion, Special Project, supra note 29, at 665.
164. See Kohler, supra note 3, at 517; G. Grenier, supra note 23, at xiv.
tion—through corporate planning or collective bargaining—the second. If the former is at least a limited marketplace of ideas, the latter is an arena of struggle between contending interests. Theories that flourish in academia will not survive in the real world without a powerful sponsor. In the 1980s and 1990s, an era of government abdication and labor collapse, business' dominance has become overwhelming. As such, corporate America's brand of cooperation—a doctrine that is fundamentally hostile to both worker participation and worker organization—has become predominant in practice. Labor and its sympathizers cannot afford to overlook the rise of rightist cooperation, nor can they assume that more favorable approaches will be taken seriously by virtue of their merits alone. Worker-oriented forms of cooperation will only see fruition when their proponents achieve the power to implement them.

II
THE ROLE OF LABOR LAW

Labor law plays an especially important role in many analyses of cooperation. Cooperation advocates generally view the existing structure of labor law as a serious and anachronistic obstruction to cooperative endeavor.\textsuperscript{165} By their account, the NLRA is a historical artifact that continues to impose upon a new socioeconomic landscape the preconceptions of a half-century ago.\textsuperscript{166} In particular, critics portray the NLRA regime as a structure built upon the fundamental principle of adversarial relations between labor and management\textsuperscript{167} and dedicated to the creation and perpetuation of these adversarial conditions.\textsuperscript{168} In this view, the NLRA is tailored to the context of the large manufacturing plant with a homogeneous workforce and hostile management, and fails to satisfy the needs of the complex and variegated economy of the 1980s.\textsuperscript{169} Cooperation advocates generally view the existing structure of labor law as a serious and anachronistic obstruction to cooperative endeavor.\textsuperscript{165} By their account, the NLRA is a historical artifact that continues to impose upon a new socioeconomic landscape the preconceptions of a half-century ago.\textsuperscript{166} In particular, critics portray the NLRA regime as a structure built upon the fundamental principle of adversarial relations between labor and management\textsuperscript{167} and dedicated to the creation and perpetuation of these adversarial conditions.\textsuperscript{168} In this view, the NLRA is tailored to the context of the large manufacturing plant with a homogeneous workforce and hostile management, and fails to satisfy the needs of the complex and variegated economy of the 1980s.\textsuperscript{169}
tion advocates conclude, therefore, that existing law must either be changed or carefully developed to ensure that cooperation is not impeded or restricted.

This vision of the law is particularly prominent in centrist accounts. Many rightists\(^{170}\) also assail the assumptions of the existing regime, but for these commentators "anachronistic, adversary attitudes" is a code phrase for collective bargaining,\(^{171}\) so that their blueprint for law reform might well involve the abolition of labor unions. Rightists also suggest a correlation between the extent of worker participation and the likelihood of legal difficulty under the NLRA. As such, rightist programs, which expressly renounce significant worker participation in basic decisionmaking, should not encounter the range of problems suggested by centrists, whose programs would permit workers to intrude further on management's traditional domain.\(^{172}\)

Below, I dispute both the historical and hortative aspects of the cooperation advocates' critique, and consider the principal legal obstacles to cooperation. I conclude that these problems have been greatly exaggerated, principally because the rightist assessment has proven accurate: as implemented, cooperation has not granted workers enough power to challenge existing legal boundaries, while courts have relied on the rhetoric of cooperation to sanction repressive employer initiatives. Indeed, judicial deference to cooperation concerns may have had an opposite effect—the weakening of workers' rights. Accordingly, I propose a somewhat different legal course that is designed to impede cooperative programs that are harmful to labor.

for the NLRA's provisions was a large manufacturing plant with predominantly blue-collar workers with fairly homogenous interests who needed unions to help counteract the power of large corporations." Marshall, The American Industrial Relations System in a Time of Change, 48 U. Pitt. L. Rev. 829, 838 (1987). Cf. St. Antoine, The Legal and Economic Implications of Union-Management Cooperation: The Case of GM and the UAW, in PROCEEDINGS OF NEW YORK UNIVERSITY FORTY-FIRST ANNUAL NATIONAL CONFERENCE ON LABOR § 8.03[2], at 8-19 (B. Stein ed. 1988) (suggesting that NLRA law developed from "a paternalistic, protective attitude exhibited toward the blue-collar workers of our mass production industries in the 1930s").

170. Leftists such as Katherine Stone also suggest certain legal problems. See infra note 182.

171. Klare, The Labor-Management Cooperation Debate, supra note 6, at 59. As explained above, centrists see no inherent conflict between cooperation and collective bargaining. See supra Part II, Section C 1.

172. Rightist commentators have observed a direct relationship between the strength of labor and the significance of legal problems. Thus, for example, the business-oriented Labor Policy Association notes that its members "have found no legal impediments of any significance to the employee participation programs that they have sought to implement." SECOND INTERIM REPORT, supra note 2, at 88 (comments of the Labor Policy Association). The Association concludes that the legal impediments to cooperation are "illusory" if, as in the Association's members' programs, cooperation merely means "giving employees and union representatives a greater voice in management decisionmaking," but that "the law would need to be altered dramatically" if cooperation meant "placing union representatives on a substantially equal footing with company officers with respect to the running of the enterprise." Id. at 90.
A. The Limitations of the Premise

Cooperation advocates’ tendentious account of labor law as a fossil and an obstacle is open to question in a number of respects. First, the legal regime institutionalized by the NLRA was not the mechanism by which the structures and demands of industrial relations in the 1930s were determined, but a response to preexisting structures and demands. As Karl Klare notes, “[t]he adversary spirit of American labor relations arose as an historically specific response to historically specific employer strategies designed to gain and maintain control over the work process.”

Second, although the passage of the NLRA and the organization of basic industry established the 1930s as a centrally important period in American labor relations, the dominant “post-war paradigm” of industrial pluralism—whose demise has been the primary impetus for the development of cooperation—only took shape during and after World War II, and cannot properly be understood as a direct consequence of the NLRA itself.

Third, it is inaccurate to portray the NLRA as the creature of the rank-and-file blue collar worker cast in irrevocable opposition to a distant employer: the historic impetus for labor militance generally came from skilled workers, rather than the unskilled.

A close examination of existing labor law principles further belies the conclusion that the NLRA regime advances unduly adversarial relations. At least as implemented by the Board and the courts, the...
NLRA does not allow workers great leeway to demonstrate their supposedly fundamental antipathy to management. The most notorious expression of the Act's limitations in this regard is the Jefferson Standard case,\(^{179}\) in which the Supreme Court described labor and management as sharing "loyalty to their common enterprise."\(^{179}\) These limitations are also apparent in the broad sanction given to employers to refuse to rehire strikers who engage in "misconduct" while exercising their right to engage in concerted activity.\(^{180}\) Furthermore, courts actually deciding cases involving cooperation have not found an insuperable obstacle in the Act's supposedly adversarial purpose; to the contrary, courts have occasionally suggested that the NLRA's precise purpose is to encourage cooperation.\(^{181}\)

### B. The Sources of Legal Difficulty

Cooperation theorists identify two key problems in the NLRA system, both of which arise from the definitions provided in Section 2 of the Act.\(^{182}\) The first issue involves the rigidity of the statutory distinction\(^{183}\) between "employees" and "employers"—a distinction many cooperation potential scope of the Act in the early years of its history. See Klare, *Judicial Deradicalization*, supra note 175.


179. *Id.* at 472. Having announced this principle, the Court held that management was privileged to discharge strikers who assailed the quality of their employer's product. *Id.* at 477.

180. See, e.g., Clear Pine Mouldings, 268 N.L.R.B. 1044 (1984), enforced, 765 F.2d 148 (9th Cir. 1985), *cert. denied*, 474 U.S. 1105 (1986). In *Clear Pine Mouldings*, the Board overruled earlier precedent and held that purely verbal "misconduct" may justify an employer's refusal to rehire. *Id.* at 1046.

181. See, e.g., Federal-Mogul Corp. v. NLRB, 394 F.2d 915, 918 (6th Cir. 1968) ("The Act does not prohibit cooperation between management and a labor organization; on the contrary it encourages it."); Modern Plastics Corp. v. NLRB, 379 F.2d 201, 204 (6th Cir. 1967) ("the purpose of the Act is to encourage cooperation"); cf. NLRB v. Walton Mfg. Co., 289 F.2d 177, 182 (5th Cir. 1961) (Wisdom, J., dissenting) ("[t]here is nothing . . . in any . . . law that makes it wrong for an employer to 'work together' with employees for the welfare of all"). See also infra note 228 and accompanying text.


Analysis of potential legal roadblocks to cooperation extends beyond these dominant issues, of course. Several commentators, notably Katherine Stone, have focused on problems that arise when labor becomes a part-owner or part-director of the corporate enterprise. See Stone, *Labor and the Corporate Structure*, *supra* note 2, at 121-26; see also McCormick, *Union Representatives as Corporate Directors: The Challenge to the Adversarial Model of Labor Relations*, 15 U. Mich. J.L. Ref. 219 (1982) (analyzing potential conflicts of interest in union representation on corporate boards); Note, *Serving Two Masters: Union Representation on Corporate Boards of Directors*, 81 Colum. L. Rev. 639 (1981) (same). The legal roadblocks in this regard, however, are similar to the *Yeshiva* problem described below: a narrow line of cases involving unusual arrangements such as furniture and plywood cooperatives or union-sponsored health centers is theorized as a general obstacle to union involvement in corporate ownership, even perhaps through mild schemes such as ESOPs. My disagreement with this analysis is both immediate and predictive: no genuine problem actually exists at present, and it is unlikely that either the Board or the courts would strike down union participation in existing initiatives like ESOPs. More important, I believe that leftist brands of cooperation
advocates seek to blur\textsuperscript{184}—and whether or not particular rights are to be accorded to particular individuals. I term this the \textit{Yeshiva} issue, after the Supreme Court’s decision in \textit{NLRB v. Yeshiva University}\textsuperscript{185} that private university professors who retain significant discretion in their jobs cannot be allowed to unionize, a holding which has greatly troubled cooperation analysts. The second issue involves the Act’s distinction between “employers” and “labor organizations,” and the impermissibility of certain interactions between the two under Section 8(a)(2) of the NLRA\textsuperscript{186}. I

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will not soon see fruition in the current economic and political environment, and that the doctrinal problems that might accompany them will simply not be tested.
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An additional widely discussed issue is the relationship between cooperation and unions' duty to represent their members fairly. This relationship might be tested in a variety of situations: if workers feel that their union has improperly resisted management’s proposals to implement cooperation, or, after adopting cooperation, has ceased to police the collective bargaining agreement effectively. \textit{See, e.g., Second Interim Report, supra note 2, at 48, 55, 62, and 65; Boal, The Team Concept and the Law, in M. Parker & J. Slaughter, supra note 11, at 48, 49; Fetter & Reynolds, supra note 33, at 8.}

Further, several analysts have found fault in the NLRA’s distinction between “mandatory” subjects of collective bargaining, those about which unions and employers must bargain, and “permissive” subjects, about which a party may, but cannot be compelled to, bargain. \textit{Cf. NLRB v. Wooster Div. of Borg-Warner Co., 356 U.S. 342 (1958) (refusal to agree on mandatory subjects unless agreement reached as to permissive subjects held unlawful). This distinction has been most important in keeping sacrosanct the so-called “core of entrepreneurial control,” see Fibreboard Paper Prods. Co. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring), but could also create difficulties when cooperative programs intrude on this domain or otherwise extend the existing scope of bargaining. See St. Antoine, supra note 169, § 8.03[1] at 8-14 to 8-15. Even if management agrees to place permissive subjects on the agenda through cooperative programs, the law might well permit unilateral retraction, and would clearly preclude union enforcement efforts. See Datz, Quality of Worklife Programs, in Proceedings Of New York University Fortieth Annual Conference On Labor, § 5, § 5.07 at 5-8 to 5-9 (B. Stein ed. 1987); Note, Viability, supra note 6.}

Finally, some commentators have suggested that cooperation might even lead to difficulties under the Fair Labor Standards Act of 1938, as amended, ch. 676, § 1, 52 Stat. 1060 (1937) (codified at 29 U.S.C. §§ 201-222 (1988)), if, for example, workers are required to attend mandatory “team meetings” at lunchtime. \textit{See, e.g.,} Richmond & Reynolds, \textit{The Fair Labor Standards Act: A Potential Legal Constraint Upon Quality Circles and Other Employee Participation Programs,} 37 LAB. L.J. 244 (1986).

183. Katherine Stone has explained the origin of this rigid dichotomy in the functionalism originated by Frederick Taylor. \textit{See Stone, Labor and the Corporate Structure, supra note 2, at 139-47; see also Stone, The Origins of Job Structures, supra note 174. In the end, Stone concludes, “the NLRB’s definition[s] of ‘employee’ and ‘management’ are normative claims about distributions of power.” Stone, Labor and the Corporate Structure, supra note 2, at 147. The distinction can, of course, be understood from a Marxist standpoint as an expression of the fundamental distinction between labor and capital. See K. Marx, Antithesis of Capital and Labor, in Economic and Philosophic Manuscripts Of 1844, at 120 (D. Struik ed. 1964).}

184. \textit{See, e.g.,} Hoerr, America’s Labor Laws Weren’t Written for a Global Economy, \textit{Bus. Wk.}, Jan. 13, 1986, at 38 (quoting then-Deputy Under Secretary of Labor Steven Schlossberg) (“we may have to blur distinctions between labor and management”); Schlossberg & Fetter, supra note 28, at 601 (“[m]any of the most promising experiments in labor-management cooperation deliberate[ly] set out to blur distinctions between manager and worker”).

185. 444 U.S. 672 (1980).

term this the Section 8(a)(2) issue. These two issues are discussed sequentially.

My argument emphasizes one key fact: despite the fears of cooperation advocates, neither the Board nor the courts have invalidated a cooperative program as a violation of Section 8(a)(2), or decided that workers who participate in such programs must be denied the right to unionize. Instead, two phenomena may be detected: first, that there are rather few decisions in this area, regardless of their substantive content, and second, that all harbingers to date have been favorable to cooperation.\(^{187}\)

Although cooperation advocates should not have to fear serious legal obstacles to the implementation of cooperation, labor and its allies cannot necessarily draw such comfort. Rather, having donned rose-colored pro-cooperation glasses, the courts have issued a number of careless and dangerous decisions, particularly with regard to the Section 8(a)(2) issue.\(^{188}\)

To protect workers from repressive rightist cooperation schemes, this body of law should be jettisoned. In addition, opponents of cooperation should also seek to use cooperation advocates' arguments to mount their own legal challenges to programs that jeopardize workers' rights.

1. The Yeshiva Issue

Under the NLRA, the pivotal rights to join unions and to engage in concerted activities\(^{189}\) are only granted to "employees,"\(^{190}\) a group which is distinguished both from "employers"\(^{191}\) and from "supervisors."\(^{192}\)

\(^{187}\) The two most important NLRB decisions are Anamag, 284 N.L.R.B. 621 (1987), and General Foods Corp., 231 N.L.R.B. 1232 (1977), both discussed below.

\(^{188}\) See, e.g., cases cited infra notes 215 and 228.

\(^{189}\) These rights are contained in Section 7 of the Act, 29 U.S.C. § 157 (1988), which provides: Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any and all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment. . .

\(^{190}\) Section 2(3) of the Act provides that "[t]he term 'employee' shall include any employee, . . . [including strikers] . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person in his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. §§ 151-188], as amended from time to time, or by any other person who is not an employer as herein defined.


\(^{192}\) Section 2(2) of the Act provides that the term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any state or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. §§ 151-188], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

To qualify as an employee for purposes of the NLRA, a worker must essentially remain a functionary; once she receives substantial authority in her job, she can no longer qualify as an employee under the Act. Although these distinctions are well developed and established, cooperation advocates believe that they may jeopardize cooperation. Commentators generally point to Yeshiva, in which the Supreme Court held that under the NLRA the university's professors could not be permitted to form a union because they were "in effect, substantially and pervasively running the enterprise." Cooperation advocates fear that Yeshiva could be applied to strip employees of their union rights if, as the result of a cooperative program, they come to "achieve substantial power over their own work and a substantial role in decisionmaking about production." Further, advocates are concerned that if participants in cooperative experiments are excluded from unionization, cooperative union-management relationships will be deprived of those people "with experience in formulating a structure of shared decisionmaking" who hold "the potential to be the important leaders of the future on the side of the worker." Even the mere risk of such consequences might

192. Section 2(11) of the Act defines "supervisor" as any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. 29 U.S.C. § 152(11) (1988).

193. Section 14(a) of the Act, 29 U.S.C. § 164(a) (1988), provides that "no employer . . . shall be compelled to deem individuals deemed herein as supervisors as employees" for collective bargaining purposes. Because employers frequently attempt to minimize the scope of unionization within their operations, an enormous body of law has been developed to consider which employees may be excluded from a bargaining unit as supervisors. For an analysis of the law, see 2 C. Morris THE DEVELOPING LABOR LAW 1451-57 (2d ed. 1983); for an account of its historical development, see Stone, Labor and the Corporate Structure, supra note 2, at 131-34.

The role of supervisors in cooperative programs has also attracted considerable attention. See, e.g., J. KLEIN, THE CHANGING ROLE OF FIRST-LINE SUPERVISORS AND MIDDLE MANAGERS (Bureau of Labor-Management Relations and Cooperative Programs, U.S. Dep't of Labor Pub. No. BLMR 126, 1988).

194. For a cooperation advocate's perspective on the dangers of these distinctions, see A Conversation With . . . Charles C. Heckscher: Creating New Workplace Organizations, LAB. REL. TODAY IV (U.S. Dep't of Labor, Bureau of Labor-Management Relations and Cooperative Programs, May-June 1989).


196. Stone, Labor and the Corporate Structure, supra note 2, at 137. Even some cooperation advocates recognize that Yeshiva signifies something rather less than an imminent menace. See, e.g., Deitsch, supra note 6, at 789 (suggesting that extension of Yeshiva to strike down cooperative programs is "not inconceivable").

197. Schlossberg & Fetter, supra note 28, at 604. A similar though less widely noted development is cooperation's tendency to drain away potential leaders from union service. See M. PARKER,
discourage the adoption of cooperative programs.\textsuperscript{198}

So far, however, these fears have not been realized. \textit{Yeshiva} has generally only been applied to exclude from the Act's protections certain kinds of professional employees, a group which has always received special treatment under the law.\textsuperscript{199} Indeed, the great majority of cases applying \textit{Yeshiva} involve the immediate context of unionization of university faculties.\textsuperscript{200} Even in this narrow context, no automatic ban on unionization has been imposed; the cases go both ways on the basis of fact-specific inquiries.\textsuperscript{201} On the other hand, \textit{Yeshiva} has sounded the death knell for union organizing among private university professors.\textsuperscript{202}

Cooperation advocates' fears about \textit{Yeshiva} were considerably defused by the Board's 1987 decision in \textit{Anamag},\textsuperscript{203} its first consideration of the legal validity of a 1980s-style cooperative program—the so-called

\textsuperscript{198} See Fetter, \textit{supra} note 13, § 3.07 at 3-10 to 3-11 (suggesting that \textit{Yeshiva} might "possibly convince those considering an entry into the cooperative arena that it would be easier (and safer) to do nothing at all").

\textsuperscript{199} See Stone, \textit{Labor and the Corporate Structure}, \textit{supra} note 2, at 138.

An important example of the Act's special solicitude for professional employees is proviso 1 to Section 9(b) of the Act, 29 U.S.C. § 159(b) (1988), which prevents the Board from certifying a bargaining unit that contains both professional and non-professional employees, unless a majority of the professional employees votes for inclusion in such a unit.


\textit{Yeshiva} has been used outside the representational context to determine whether certain discharged employees are managerial and thus not protected by the NLRA. \textit{See} Gino Morena Enters., 287 N.L.R.B. 1327 (1988) (beauty shop manager not protected); Joint Diseases, N. Gen. Hosp., 288 N.L.R.B. 291, 297-99 (1988) (hospital physician protected).

\textsuperscript{201} Compare Lewis & Clark College, 300 N.L.R.B. No. 20, 136 L.R.R.M. (BNA) 1012 (Sept. 28, 1990); University of Dubuque, 289 N.L.R.B. No. 34, 128 L.R.R.M. (BNA) 1259 (June 27, 1988); Livingstone College, 286 N.L.R.B. 1308 (1987); American Int'l College, 282 N.L.R.B. 189 (1986); Boston Univ., 281 N.L.R.B. 799 (1986), \textit{petition for review denied}, 835 F.2d 399 (1st Cir. 1987); NLRB v. Lewis Univ., 765 F.2d 616 (7th Cir. 1985); University of New Haven, 267 N.L.R.B. 969 (1983) (all applying \textit{Yeshiva} to bar faculty unionization) \textit{with} St. Thomas Univ., 298 N.L.R.B. No. 32, 134 L.R.R.M. (BNA) 1073 (April 25, 1990); NLRB v. Florida Memorial College, 820 F.2d 1182 (11th Cir. 1987); NLRB v. Cooper Union, 783 F.2d 29 (2d Cir. 1986) (per curiam); Kendall School of Design, 279 N.L.R.B. 281 (1986), \textit{en'fd sub nom}. David Wolcott Kendall Memorial School v. NLRB, 866 F.2d 157 (6th Cir. 1989); Loretto Heights College v. NLRB, 742 F.2d 1245 (10th Cir. 1984) (all \textit{contra}). \textit{See also} Marymount College of Va., 280 N.L.R.B. 486 (1986) (rejecting a \textit{Yeshiva}-based challenge to the unionization of a university's professional librarians and academic programs coordinators).


“team concept.” In Anamag, the Board held that team leaders remained "employees" under the Act and thus retained union rights. The Board's decision emphasized the carefully limited role of the team leader in dealing with management, assigning work, controlling overtime, handling grievances, enforcing discipline, and hiring. Recognizing that its decision broke ground by analyzing "a framework which surely was not contemplated by the drafters of the Act over 50 years ago," the Board qualified its holding by noting that "given the novelty of the team-leader concept and its potential for widely variant utilization in the workplace, it would be unrealistic to assume that the case before us is necessarily in any way representative.

The Board's analysis in Anamag was seriously deficient, however, in that its decision relied upon its finding that although the team leaders held authority over certain terms and conditions of employment, the team members themselves retained the power to hold the leaders in check. As such, the Board could logically have reached an opposite outcome by holding that, given their substantial authority, all the team participants were properly supervisors or even managers—the nightmare of cooperation advocates. Notwithstanding this theoretical possibility, however, it is certainly worthy of note that in the more than four years since the Anamag decision, neither the NLRB nor any federal court has ever cited it—a telling indicator that the Yeshiva problem may be exaggerated.

The absence of decisions applying Yeshiva to deny union rights to participants in cooperative programs leads to a rather simple conclusion: despite the rhetoric about employee involvement and control in these programs, those versions that have actually been implemented have not accorded genuinely significant authority to employees. Although the legal issues might be substantial in theory, real cases have simply not arisen to put these questions to the test.

204. See Anamag, 284 N.L.R.B. at 621-23.
205. Id. at 621.
206. See id. at 622.
207. Paul Weiler notes this possibility. See P. WEILER, supra note 75, at 217 n.46.
208. In somewhat different circumstances, however, NLRB Region 4 agreed with a union that team leaders should be excluded from a bargaining unit at Du Pont's Deepwater, New Jersey plant, on the ground that the team leaders no longer shared a "community of interests" with other employees. See Brief on Behalf of Charging Party, E.I. Du Pont de Nemours and Co., supra note 155, at 17.
209. Admittedly, an additional possible reason for the dearth of precedent is the general absence of aggrieved parties to initiate legal inquiry. Decisions involving supervisory status generally arise from the representation election process, in which management seeks to exclude certain people from the potential bargaining unit for strategic reasons. This was the case in Anamag, 284 N.L.R.B. 621 (1987). A program instituted through collective bargaining would not, of course, encounter this problem. Further, unions which have sought to organize workplaces in which employee committees have already been established have tended to attempt to disestablish the committee under Section 8(a)(2). It has also been suggested that employees in non-union cooperative workplaces are simply too "cowed" to file unfair labor practice charges. See Boal, supra note 182, at 96.
This result may best be explained by considering the respective sources of legal analysis and actual cooperative endeavor. The principal source of *Yeshiva* worries is centrist commentary; real-world cooperative programs—the object of actual legal decisionmaking—are the handiwork of the business community. Rightist analysts of cooperation, predominant within the business community, generally reject the view that the law necessarily obstructs cooperation. In particular, rightists do not consider *Yeshiva* to present any obstacle at all.\(^{210}\)

This conflict between centrists and rightists over the significance of *Yeshiva* does not necessarily redound to labor's benefit, however. *Yeshiva* does not easily lend itself to attempts to derail rightist cooperation schemes. Legal scholarship may be marginally useful, whether it seeks to exacerbate fears of legal difficulty and thereby discourage the introduction of such schemes or, like this article, attempts to delegitimate them in their entirety. Union attempts to use *Yeshiva* to scuttle existing cooperative programs, however, could have a suicidal quality: to argue that a cooperative program has eliminated participants' employee status is to argue against the union's right to exist. *Yeshiva* might prove more helpful in the bargaining stage, before cooperation is introduced: unions could try to discourage cooperation proposals by playing on management's fears of legal trouble. Alternatively, unions could seek to characterize management proposals\(^{211}\) to institute cooperation and effectively eliminate the union as violations of the duty to bargain in good faith.\(^{212}\)

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\(^{210}\) As Senator Orrin Hatch rather smugly puts it, there is a basic inconsistency in the . . . suggestion that by prohibiting employees whose duties result in their "substantially and pervasively operating the enterprise" to organize, the law denies them the opportunity to have substantial input regarding company operations. How can they be denied input in running the enterprise if they are, in fact, running the enterprise?

*First Interim Report, supra* note 150, at 19. Rightist cooperation advocates suggest that *Yeshiva* and its progeny "uniformly support, rather than undermine, the usual forms of cooperation which many companies have adopted." *Id.* at 14 (comments of Mark Rigg of the Southland Corporation). Rightists emphasize that there is nothing in *Yeshiva* that prevents management from voluntarily agreeing to bargain with a union despite the presence of a cooperative program, and that the only issue is whether management can be forced to do so. See, e.g., *id.; id.* at 15 (comments of J. Bruce Johnston of USX Corporation); *id.* at 21 (comments of David Y. Denholm of the Public Service Research Council). In summary, rightists believe that "some questions could arise in this area, but only if the concept of labor-management cooperation includes the union as an equal partner in all aspects of the employer's business." *Id.* at 14 (comments of Mark Rigg).

\(^{211}\) In some cases, management may not propose the adoption of cooperation, but may simply implement it unilaterally. If such a maneuver affects the terms and conditions of employment, management should be held to have failed to bargain in violation of Section 8(a)(5) of the NLRA. See Advertiser's Mfg. Co., 294 N.L.R.B. No. 51, 132 L.R.R.M. (BNA) 1024, 1030 (June 7, 1989).

\(^{212}\) See, e.g., Brief on Behalf of Charging Party, E.I. Du Pont de Nemours and Co., *supra* note 155, at 72-79 (contending that such acts by management are "inherently destructive of the union's role as exclusive bargaining agent").

It may be unrealistic to consider only those legal strategies that assume a harmony of viewpoints within unions with respect to cooperation. Workers have been deeply divided in their response; indeed, opponents of cooperation have gone so far as to contemplate forming a permanent
2. The Section 8(a)(2) Issue

Cooperation theorists see an equally significant potential obstacle in Section 8(a)(2) of the Act, which prohibits employer domination or support of labor organizations.\textsuperscript{213} Congress added this provision to the Wagner Act in response to the "company unionism" of the 1920s, which it sought to eliminate.\textsuperscript{214} For most of the Act's history, Section 8(a)(2) has been interpreted broadly, if rarely, so as to invalidate various forms of employer assistance. In more recent years, however, particularly during the current wave of cooperation euphoria, a number of dubious contrary decisions have emerged upholding a variety of non-union employee committees, even when initiated under suspicious circumstances.\textsuperscript{215}

Cooperation theorists fear that successful cooperative labor-management relationships might fall afoul of Section 8(a)(2). In particular, they suggest that Section 8(a)(2) might bar "the unilateral implementation and maintenance of integrative models of industrial relations as a man-

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opposition caucus within the UAW, whose leadership strongly favors cooperation. See Schwartz, \textit{Struggle for the Soul of the Union}, 249 NATION 8 (1989). Given these divisions, opponents of cooperation must consider legal maneuvers that challenge both management and pro-cooperation unions.

213. Section 8(a)(2) provides that it is an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." 29 U.S.C. § 158(a)(2) (1988). "Labor organization" is defined in Section 2(5) of the Act as "any organization of any kind...which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. § 152(5) (1988). Among the numerous articles which have focused on the potential barriers to cooperation in Section 8(a)(2) are Note, \textit{The Future of Labor-Management Cooperative Efforts Under Section 8(a)(2) of the National Labor Relations Act}, 41 VAN. L. REV. 545 (1988); Note, \textit{Rethinking the Adversarial Model}, supra note 166; Kohler, supra note 3; Note, \textit{Participatory Management Under Sections 2(5) and 8(a)(2) of the National Labor Relations Act}, 83 MIC. L. REV. 1736 (1985); Note, \textit{Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act}, 96 HARV. L. REV. 1662 (1983); and Note, \textit{New Standards for Domination and Support Under Section 8(a)(2)}, 82 YALE L.J. 510 (1973).

214. "Company unionism" is the common name for a variety of initiatives imposed by employers after the First World War. The principal structures of company unionism were known as "shop committees" or "employee representation plans," and generally involved the creation of advisory committees, consisting of both labor and management representatives, which were usually allowed input only in such secondary matters such as individual grievances and safety issues. For a useful overview of company unionism, see Kohler, supra note 3, at 519-27; for an account of company unionism in the electrical industry, see generally R. SCHATZ, supra note 176.

215. See, e.g., Airstream, Inc. v. NLRB, 877 F.2d 1291 (6th Cir. 1989) (approving an employer's "President's Advisory Council" system that was initiated shortly after filing of union representation petition); NLRB v. Streamway Div., Scott & Fetzer Co., 691 F.2d 288 (6th Cir. 1982) (permitting an employer to establish an "In-Plant Representation Committee" despite the pendency of union organization campaigns); NLRB v. Northeastern Univ., 601 F.2d 1208 (1st Cir. 1979) (allowing an employer's "Weekly Staff Cabinet" despite finding that the employer had illegally restricted union access to its premises); Hertzka & Knowles v. NLRB, 503 F.2d 625 (9th Cir. 1974) (upholding an in-house committee system that an employer initiated immediately after winning a decertification election through the use of unfair labor practices). \textit{But see, e.g.}, Jet Spray Corp., 271 N.L.R.B. 127 (1984) (ordering disestablishment of an employee committee that the employer recognized during the pendency of a representation petition).
agement sponsored alternative to collective bargaining" or jeopardize the status of unions that coexist with such integrative models as a result of collective bargaining. Analysis involves a two-part legal inquiry: first, whether the particular committee or team is a "labor organization" within the meaning of the Act, and second, whether the committee or team is in fact dominated or assisted by the employer.

The first question has traditionally been answered broadly so as to include almost any form of employee organization. In the lead case of *NLRB v. Cabot Carbon Co.*, the Supreme Court held that any employee group "dealing with" any subject enumerated in the Act constitutes a "labor organization" for purposes of Section 8(a)(2), and that the phrase "dealing with" is not synonymous with the narrower term "bargaining with."

More recently, however, the Sixth Circuit retreated from *Cabot Carbon*, holding in the widely cited *NLRB v. Streamway Division of the Scott & Fetzer Co.* that a committee consisting of elected employee representatives and upper-level management representatives which met to discuss working conditions and grievances did not constitute a "labor organization." The Court of Appeals distinguished *Cabot Carbon* on the ground that the statutory phrase "dealing with" requires "active, ongoing association" rather than the short-term, fluid relationship it saw at *Scott & Fetzer*. Similarly, the NLRB has not found Section 8(a)(2) problems inherent in the "team concept," although the contrary position is clearly substantial. In its only reported case on the issue—albeit a

216. Kohler, supra note 3, at 500.
217. Under the case law, "domination" involves a greater degree of employer support than does "assistance." Thus, if an independent union seeks to organize a workplace in which a company union is already established, the Board will order disestablishment of the company union pending a representation election only if "domination" is found; if mere "assistance" is involved, the employer will be required to withdraw recognition from the company union, but need not dismantle it. See *NLRB v. Homemaker Shops*, 724 F.2d 535, 547 (6th Cir. 1984). Thomas Kohler suggests that an intermediate question must also be answered: whether the members of the team or committee are in fact "employees," the necessary constituents of a labor organization. See Kohler, supra note 3, at 534. This is, of course, the *Yeshiva* problem. Although Kohler's approach is faithful to the terms of the statute, I believe that the *Yeshiva* issue deserves separate analysis because it poses problems beyond the 8(a)(2) context.
219. Id. at 213, 211.
220. 691 F.2d 288 (6th Cir. 1982).
221. See id. at 292-95.
222. Id. at 294. The NLRB performed a similar sleight-of-hand in *Sparks Nugget, Inc.*, 230 N.L.R.B. 275, 276 (1977), *modified on other grounds*, 623 F.2d 571 (9th Cir. 1980), by holding that employee members of an ad hoc grievance committee were not "dealing with," but rather performing a function for, management. Notwithstanding these decisions, *Cabot Carbon* is hardly a dead letter. See, e.g., *Sahara Datsun v. NLRB*, 811 F.2d 1317, 1320-21 (9th Cir. 1987) (applying a traditional *Cabot Carbon* analysis).
223. As Thomas Kohler notes,
boilerplate adoption of an administrative law judge's decision—the Board held that teams which assigned work, devised schedules, and met with management regarding grievances were "nothing more or less than work crews" and thus were not "labor organizations" within the meaning of the Act.\(^{224}\)

The second issue under Section 8(a)(2) is the problem of employer domination and assistance: how much is too much? As with the question of "labor organization" status, the Supreme Court laid down a broad early interpretation of employer domination, but more recent decisions have brought retrenchment. Thus, during the Wagner Act era, the Supreme Court established as the object of inquiry the employer's control of the "form and structure" of employee committees,\(^{225}\) but a "subjective" test, assessing domination as an "actual" rather than "potential" matter, has been advanced in later appellate cases.\(^{226}\) The Ninth Circuit has pushed this "subjective" test the farthest, holding that domination can only be shown where "the employee's free choice, either in the type of organization, or in the assertion of demands, is stifled by the degree of employer involvement at issue."\(^{227}\)

employer to communicate systematically and on a group basis with its employees about various aspects of their relationship, including wages, conditions, and other topics enumerated in the statute. As such, it is precisely the type of body that the statute, its legislative history and its construction by the Court in Cabot Carbon all indicate falls within the definition of a labor organization.

Kohler, supra note 3, at 539. See also Boal, Legal Challenges to QWL in M. Parker, supra note 53, at 96 (1985) (suggesting, without citation, that "[m]ost QWL committees would be considered 'labor organizations' as that word [sic] is defined by [the] NLRA"). In Ona Corp., 285 N.L.R.B. 400 (1987), the Board did strike down an "Employee Action Committee" notwithstanding the employer's contention that the committee was insulated by the National Productivity and Quality of Working Life Act of 1975, Pub. L. No. 94-136, tit. I, 89 Stat. 733 (1975) (codified at 15 U.S.C. §§ 2401-2471 (1988)). In Ona Corp., however, the employee committee in question represented a fairly obvious anti-union maneuver.

224. See General Foods Corp., 231 N.L.R.B. 1232, 1234 (1977). An important underpinning of this decision, however, was the Board's finding that anti-union animus was not present. Id. at 1234. See Schlossberg & Fetter, supra note 28, at 607 (commenting favorably on General Foods, including its treatment of the union animus problem).

The Board rarely has had the opportunity to consider the potential problems of labor-management cooperation raised by Section 8(a)(2). The General Counsel's Division of Advice, however, has held that management does not violate Section 8(a)(2) by requiring union membership as a condition for involvement in "Labor Management Participation Teams." See Titanium Metals Corp., 125 L.R.R.M. (BNA) 1375 (1987) (Advice Mem.)


226. Chicago Rawhide Mfg. Co. v. NLRB, 221 F.2d 165, 168 (7th Cir. 1955). See, e.g., NLRB v. Homemaker Shops, 724 F.2d 535, 545 (6th Cir. 1984); Modern Plastics Corp. v. NLRB, 379 F.2d 201, 204 (6th Cir. 1967); see also Barthelemy v. Air Lines Pilots Ass'n. 897 F.2d 999, 1015-16 (9th Cir. 1990) (applying NLRA Section 8(a)(2) law to determine whether a transportation "carrier" unlawfully assisted a labor organization under Section 2, Fourth, of the Railway Labor Act [45 U.S.C. § 152, Fourth (1988)])

227. Hertzka & Knowles v. NLRB, 503 F.2d at 630 (9th Cir. 1974). In Hertzka & Knowles, the
Many of the most recent appellate cases involving Section 8(a)(2) have self-consciously emphasized the current wave of labor-management cooperation to justify the diminution of scrutiny. This approach may mollify the fears of cooperation advocates, but it does little to ensure that workers' interests will not be sacrificed for the cause of cooperation. By presuming in favor of cooperation under all circumstances and ignoring the hallmarks of anti-union animus, courts have failed to fashion a Section 8(a)(2) test that will adequately protect American workers. Instead, this pattern of judicial encouragement "effectively invites antionion employers to experiment with plans that can dissipate support for a union." An obvious, though unlikely, solution would simply ban all employee committees or teams that are not developed through collective bargaining. Careful articulation of this position, though beyond the scope of this article, is certainly worthwhile: non-union committees may well be "creatures of the employer," "precisely the type of bodies . . . which the [NLRA] was designed to abolish." It would be unrealistic to foresee the adoption of such a standard, however, not least because of the virulence with which rightists defend non-union cooperative programs.
grams. More realistically, Karl Klare has proposed that Section 8(a)(2) analysis become attuned to employers' use of non-union committees to beat back union organizing, a widespread tactic of which courts have generally been insensitive. As such, "[n]on-bargained participation schemes initiated close in time to or during union representation campaigns or decertification elections, and non-bargained schemes linked to unfair labor practices or other evidence of employer resistance to collective bargaining should be presumptively illegal." Finally, given the bitter debate that cooperation has engendered within the American labor movement, union activists must consider whether Section 8(a)(2) may be used against their own duly certified "adversarial" unions. If a non-union committee is not to be presumed an anti-worker artifice, the converse principle suggests itself: that the mere fact of union presence and acquiescence does not insulate a cooperative program from Section 8(a)(2) inquiry. In effect, critics could argue, cooperation might involve a new kind of "sweetheart" deal.

As with the Yeshiva issue, however, cooperative programs have not encountered Section 8(a)(2) problems commensurate with the volume of legal scholarship that has been devoted to the issue. Indeed, despite the rhetoric about the potential Section 8(a)(2) problems raised by cooperative programs in the non-union sector, the Labor Department suggests that employers have implemented these programs without regard to possible legal difficulties.

C. Conclusion

Although the potential legal problems of cooperation have been

231. See supra Part II, Section C 3.

A per se ban on non-union cooperation finds no clear basis in the terms of Section 8(a)(2) itself. This textual problem may not be insuperable, however. Harold Datz, former Associate General Counsel for the NLRB's Division of Advice, notes that the Department of Labor has proposed a Section 8(a)(2) test that seeks to determine whether or not employee members of employer-employee committees serve as representatives of the workforce as a whole—a criterion that finds no support in the language of the statute. See Datz, supra note 182, § 5.02, at 5-5.

232. See supra note 215 and accompanying text; see also G. Grenier, supra note 23.


234. Activists could also argue that in ceding power to cooperative bodies, unions violate their duty of fair representation by failing to satisfy their obligation under Section 9(a) [29 U.S.C. § 159(a) (1988)] to be the "exclusive representative" of employees.

235. Cf. Kafker, supra note 29, at 724 ("[t]he mere presence of an independent union . . . is not a cure for all section 8(a)(2) concerns").

236. See Schlossberg & Fetter, supra note 28, at 610 (noting that "many [non-union] companies and employees have chosen to ignore the legal restrictions, apparently believing that the benefits from such programs are greater than the risk of being found in violation of the law"); see also B. Crawford, supra note 30, at 27 (suggesting that "most employers are willing to run the risk of a Section 8(a)(2) violation in order to achieve what they perceive as necessary shop floor participation").
widely discussed, examination of existing doctrine suggests that cooperative programs of the kind implemented in this country have not generated serious legal difficulties. Indeed, the furor over cooperation's legal obstacles seems to have converted some adjudicators to the cause of cooperation and dissuaded them from turning sharp legal corners. As a result, the announced values of centrist and leftist cooperation have been subverted. To reverse this trend, labor must take two steps: first, seek to overturn legal decisions that have sanctioned anti-worker programs under Section 8(a)(2), and second, agitate for the adoption of substantive initiatives that might challenge existing legal categories and boundaries. Action of this kind, if advanced within a bold and coherent general strategy, will ensure that cooperation presents labor with an opportunity rather than a threat.

III
THE ROAD AHEAD: LABOR'S RESPONSE TO COOPERATION

Cooperation has become perhaps the most important challenge facing the American labor movement today. Different responses to this challenge have generated intense controversy and struggle within unions, most notably the United Auto Workers. Many unionists welcome cooperation, seeing it as a mechanism to achieve security in
troubled times\textsuperscript{239} and a better system of labor relations;\textsuperscript{240} others criticize cooperation as a Trojan horse that will weaken unions and worsen American workers' quality of life.\textsuperscript{241} Unions and their allies have also attempted to develop their own counterview of cooperation—leftist cooperation—as an alternative to dominant approaches. Below, I consider some of these viewpoints and suggest various possible responses to cooperation.

Unionists scarcely need to be reminded that recent years have brought overwhelming corporate resurgence and union decline. Yet labor's response to cooperation often appears to ignore this political terrain. Many unions have accepted the rhetoric of cooperation without demanding real substance—that is, assurances that cooperation will extend to higher-level firm decisionmaking—or without questioning whether the present political situation is likely to generate such substance. Although unions have been quite vigilant in their opposition to cooperation as a "union avoidance" tactic,\textsuperscript{242} they have been less forceful in responding to other pernicious effects of cooperation upon unions and upon workers.

Pro-labor scholars often make a more fundamental mistake; they seem to view the cooperation debate as an opening to the serious discussion—and possible implementation—of genuine workplace democracy.\textsuperscript{243} In my view, cooperation does not create such an opening. It is instead a fixed agenda determined by management forces who are presently strong enough to resist alternative approaches, except in isolated circumstances.\textsuperscript{244} The currently dominant versions of cooperation are management initiatives designed to serve management ends, and worker-

\textsuperscript{239} See, e.g., M. Parker, supra note 53, at 85 ("[t]he main reason that unions go along with [cooperation] . . . is that they have adopted it as a strategy for job security").

\textsuperscript{240} In this regard, labor advocates of cooperation suggest that it may wean a section of the American business community away from anti-unionism. See, e.g., Bluestone, Changes in U.S. Labor-Management Relations, in PROCEEDINGS OF THE THIRTY-EIGHTH ANNUAL MEETING OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 165, 165 (B. Dennis ed. 1985) (suggesting that one group of employers “aggressively battles to maintain a union-free environment” and recalls “the dinosaur period of fierce management resistance to unions,” while another “embraces the notion that labor and management are partners” and is “moving toward the positive implementation of joint labor-management processes which reflect a mutuality of interest in solving problems of common concern”).

\textsuperscript{241} See, e.g., M. Parker & J. Slaughter, supra note 11; M. Parker, supra note 53.

\textsuperscript{242} See, e.g., Samuel, supra note 121, at 535.

\textsuperscript{243} See, e.g., Reisman & Compa, The Case for Adversarial Unions, 63 HARV. BUS. REV., May-June 1985, at 22, 23 (“proponents of labor-management cooperation today simply misread the real political and economic forces at work in this country: the agenda of the Reagan administration and numerous corporations is not cooperation but union busting”). Sumner Rosen sardonically notes that cooperation efforts frequently place workers in the position of “the people in Plato’s cave, mistaking the shadow of cooperation for the reality of employer exploitation and control.” Rosen, Foreword, in M. Parker, supra note 55, at v.

\textsuperscript{244} See Parker & Slaughter, supra note 68, at 78; see also Tauss, Participating in Managing the Philadelphia Transit System, 14 LAB. RES. REV. 80, 81 (1989) (noting that public sector unions may
oriented programs will remain marginal until labor gains sufficient strength to force their implementation on a wider scale.

In the meantime, experimentation with management-oriented cooperative programs means slow suicide, and theorizing about leftist cooperation may mean squandering precious time. Instead, labor must adopt a broad strategy that combines aggressive opposition to cooperation with intensified struggle for international labor solidarity. Both the propaganda of cooperation advocates and the business community's insistence that the international marketplace requires worker impoverishment must be rejected. Important groundwork has already been laid; labor should now try to reunify and develop shared strategies.

Unfortunately, one would be optimistic indeed to prophesy the imminent formation of such a united anti-cooperation front or the implementation of an effective response to the internationalization of capital. But labor scholars must do their best to assist the effort. In particular, they should divert their attention away from refining leftist cooperation in order to be able to take advantage of government employers' prominent public visibility so as to achieve worker-oriented cooperation.


Coats notes that this strategy has certain risks. As an example, Thai workers have expressed suspicion of the motives of the AFL-CIO in seeking to eliminate trade benefits for Thailand as a result of repression of labor rights, because of the AFL-CIO's orientation toward protecting employment in the United States, its sordid political activities in Thailand, and its interventionist and "imperialist" approach. See Coats, supra, at 10.

246. See M. Parker, supra note 53, at 88 (arguing that labor must oppose wage-slashing "market forces as a matter of policy") (emphasis in original). To effectuate this policy, "[t]he only alternative is to help [Third World] workers fight for better wages and working conditions." Garver, Book Review: Flawed Masterpiece About a Great Tragedy, 2 New Politics, at 177, 181.

247. In particular, Mike Parker and Jane Slaughter have outlined detailed strategies for resisting cooperation. See M. Parker & J. Slaughter, supra note 11, at 39-41; M. Parker, supra note 53, at 91-94.
theory that will not bear fruit under present conditions. In this part, therefore, I consider the arguments of cooperation advocates who are sympathetic to labor, and propose a redirection of inquiry. Although their efforts may be marginal, labor scholars should seek to help rather than harm labor, and to make sure that their work is germane and useful to labor’s struggles.

A. The Limits of Leftist Analysis

Although most sectors of the labor movement have either allied themselves with centrist cooperation or organized to struggle against it, two prominent critical scholars, Katherine Stone and Karl Klare, have advanced sweeping visions of the possibilities of leftist cooperation. Although Stone and Klare consider very different aspects of the problem, their work shares a fundamental flaw: neither assesses labor’s response to cooperation with attention to what is politically probable under present circumstances and what labor should do to alter those circumstances. Mere intellectual possibility, stripped of context, guides their proposals for using cooperation as a mechanism to reshape the workplace and the corporate structure. This is not enough in days like these.

1. Katherine Stone: The Limits of “Participation”

In considering the possibilities for redefining labor’s role within the existing corporate structure, Katherine Stone asks labor scholars “to articulate a conception of labor’s interests that is appropriate to our time,” so that the law may “be reshaped to accommodate labor participation in corporate decision making.” I question the utility of this project. Labor law reform is an intensely political and controversial matter, as demonstrated by labor’s most recent foray in this area. Labor will likely see little benefit from reform efforts unless it secures major gains in

248. See Stone, Labor and the Corporate Structure, supra note 2; Klare, The Labor-Management Cooperation Debate, supra note 6; Klare, Workplace Democracy and Market Reconstruction, supra note 111. Other leftist theorists, including Andy Banks and Jack Metzgar, have addressed the problem from perspectives closer to the shop floor. See Banks & Metzgar, supra note 2.

249. To be fair, it should be noted that Klare explains that much of his work in this area deliberately sets out to “look beyond the constraints of practical politics and sketch out a vision of desirable, if not necessarily presently enactable, paths of development.” Klare, Workplace Democracy and Market Reconstruction, supra note 111, at 2.

250. Stone, Labor and The Corporate Structure, supra note 2, at 168.

251. In 1977, the House of Representatives passed a mild package of labor law reforms which, among other things, would have made punitive damages available to the victims of unfair labor practices and permitted unions to secure NLRB certification on the basis of authorization-card majorities, thus avoiding employer abuse of the election process. The bill encountered ferocious business opposition, however, and died at the hands of a Senate filibuster in 1978. See Weiler, supra note 20, at 1770 & n.1, 1790-91, 1812-13.

A reform bill to prohibit employers’ use of permanent strike replacements (a practice which has become dramatically more common in recent years) has passed in the House. H.R. 5, 102d Cong., 1st Sess., Cong. Rec. H5565 (daily ed. July 17, 1991). President Bush has promised to veto the bill.
its political power.\(^{252}\) Articulating a new conception of labor's interests is an empty exercise unless that vision is likely to see fruition. Indeed, without basic political advances, cooperation-motivated reform efforts could well harm labor's interests. Reforms might, for example, further weaken Section 8(a)(2) so as to permit out-and-out company unionism, while doing little to ensure that workers actually achieve the strength sufficient to cause *Yeshiva* problems. Resources are scant: labor cannot afford impractical theorizing at a time when management's agenda is being redefined as the public interest, speedups as productivity, and "management-by-stress" as efficiency. As such, a more appropriate task for labor scholars and other sympathizers is to develop strategies to beat back rightist cooperation and to win labor the power to implement worker-oriented alternatives in its place.

Stone's argument for experimenting with cooperation shares the common emphasis on economic turmoil,\(^{253}\) but draws rather different conclusions. She draws a sharp distinction between "cooperation" and "participation," a distinction that roughly corresponds to my distinction between centrist and rightist approaches to cooperation, on the one hand, and leftist approaches on the other.\(^{254}\) By this device, Stone is able to disregard the reality of "cooperation" in the United States. Instead, her distinction allows her to declare that the "actual experience of participation" has been a success and supports her view of participation as an extension of collective bargaining that has preserved unions' adversarial relations with management while permitting their entry to new arenas of struggle.\(^ {255}\) This maneuver has dangerous consequences. By juggling terms in this idiosyncratic way, Stone turns a blind eye to the broader reality of the American workplace and to the fact that rightist cooperative experiments—with either the purpose or the effect of vitiating workers' rights—are far more prevalent, and thus ultimately far more significant to labor, than the examples on which she chooses to focus.

Stone is not inattentive to critiques of cooperation, of course. She devotes particular attention to the perspectives of critics who see cooperation as mere cooptation—"'one of the last tricks of capitalism'"\(^ {256}\)
that induces unions to adopt management viewpoints and further management goals.\textsuperscript{257} Stone agrees with these critics that power relations necessarily constrain the possibilities for significant participation. Participation is a "false promise," she suggests, unless "there is a real possibility of redistributing power . . . to the benefit of workers in both the long and short run."\textsuperscript{258} However, Stone then performs a standard critical maneuver to suggest that the answer to the cooperation-or-cooptation debate is indeterminate.\textsuperscript{259} This conclusion, while viable in theory, is untenable in the political context of the late twentieth century, and does labor a disservice as a basis for analysis.

Stone’s indeterminacy argument relies on abstract economic theory. She suggests that the degree to which a firm is constrained by market forces will determine the extent to which it is susceptible to union efforts to secure greater power. She concludes that because American unions are presently concentrated in oligopolistic industries that are relatively immune from market pressures, shifts of power to workers through cooperation are possible.\textsuperscript{260} On the other hand, Stone concedes that opponents of participation are correct to suspect cooptation, the mere "illusion of power," "[i]f the fate of the firm is totally controlled by the various markets in which it operates."\textsuperscript{261}

This theoretical argument falters under analysis. First, the give-and-take of labor-management power balances cannot necessarily be described or predicted through neat neoclassical graphs;\textsuperscript{262} throughout the 1980s, employers often demanded and received concessions not because of actual economic need but because they were simply able to take advantage of a weakened opponent.\textsuperscript{263}

\textit{Industrial Innovations}, in \textsc{Contract and Organization: Legal Analysis in the Light Of Economic and Social Theory} 261, 268 (T. Daintith \& G. Teubner eds. 1986)).

\textsuperscript{257}. See Stone, \textit{Labor and the Corporate Structure}, supra note 2, at 169.

\textsuperscript{258}. \textit{Id.} at 171.

\textsuperscript{259}. See \textit{Id.} at 171-72 (citing Teubner, supra note 256).

\textsuperscript{260}. See Stone, \textit{Labor and the Corporate Structure}, supra note 2, at 171. Stone relies on the work of Professors Freeman and Medoff with regard to the concentration of unionism. See R. Freeman \& J. Medoff, supra note 71, at 32.

\textsuperscript{261}. Stone, \textit{Labor and the Corporate Structure}, supra note 2, at 171. Cf. Kochan, Katz, \& Mower, supra note 104, at 295 (suggesting that before accepting cooperation unions should "consider both the external or uncontrollable economic factors that affect the survival of the business and the investment plans of the employer").

\textsuperscript{262}. See Bell, \textit{Union Concessions in the 1980s}, \textsc{Fed. Reserve Bank Of N.Y. Q. Rev.}, Summer 1989, at 44, 44 (concluding that "standard macro-economic models, which link wages to aggregate variables like unemployment and prices, cannot fully characterize the wage determination process in the 1980s").

\textsuperscript{263}. See \textit{Id.} at 56 (concluding that one-third to one-half of wage concessions between 1979 and 1987 could not be attributed to employers' economic needs); see also K. Moody, supra note 4, at 168 (noting that 19% of executives questioned in one survey indicated that their companies did not need concessions but were nonetheless "taking advantage of the bargaining climate" by demanding them from unions).
Second and more important, if labor can only hope to win power from employers who face minimal competitive pressures, then cooperation in the current economic situation will be a losing proposition. As cooperation advocates correctly point out, employers in recent years have experienced an enormous increase in the intensity of both foreign and domestic competition. This would therefore appear an extremely inopportune time for a shift to workplace democracy. If cooperation will only benefit workers in aberrational, uncompetitive sectors of the economy, then it is not a viable general strategy for labor, even if cooperation within these exceptional sectors may be warranted as a tactical matter. If, under present circumstances, cooperation will usually mean cooptation, then unions and sympathetic scholars should oppose it.

2. Karl Klare: The Limits of the Changing Workplace

Like Stone, Karl Klare attempts to rework the cooperation debate, opposing what he considers the false dichotomization of adversarial and cooperative relationships, and seeking to explore a “workplace democracy perspective” on America’s “postindustrial transition.” In considering this transition, Klare observes a “profound transformation . . . at the deepest cultural levels, regarding the meaning of and expectations about work,” caused in no small part by the massive influx of women into the workplace, and hopes “to develop a vision of workplace institutions and practices that will encourage economic growth and prosperity consistent with expanded and equitably distributed self-realization opportunities.”

Klare’s exploration of the possibilities of restructuring the demands

264. See supra Part II, Section B 1-2. Likewise, deficit financing has imposed stringent budgetary constraints on public sector employers, thus placing similar obstacles to worker-oriented cooperation in that context. See Banks & Metzgar, supra note 2, at 25.

265. By Stone’s theory, labor would have been better advised to seek power-shifting initiatives during the Pax Americana period, when American employers were economically dominant and thus had significant leeway.

266. Compare Parker & Slaughter, supra note 68, at 78 (suggesting that cooperation may be warranted when companies face ownership uncertainties or internecine warfare within management, or in divisions of larger corporate conglomerates that have been neglected by corporate planners) with Banks & Metzgar, supra note 2, at 5 (arguing that “[w]hether to cooperate with management is always a tactical question for unions” whose answer “always depends on the specific terms of cooperation and an assessment of the relative strength of the union in relation to management”).

267. See Klare, The Labor-Management Cooperation Debate, supra note 6, at 43; Klare, Workplace Democracy and Market Reconstruction, supra note 110, at 111.

268. Klare, The Labor-Management Cooperation Debate, supra note 6, at 44. Klare traces this transformation to the civil rights reforms and social innovations of the 1960s, and to feminist thinking, which have combined to create a desire for “active self-realization in work, an experience of work that is developmental, that enables one freely to actualize one's abilities to the fullest extent possible.” Id.

269. See Klare, Workplace Democracy and Market Reconstruction, supra note 111, at 9.

270. Klare, The Labor-Management Cooperation Debate, supra note 6, at 47 (emphasis in original removed).
and nature of work is imaginative and provocative. Unfortunately, however, Klare cannot set the agenda—it is being set for him and for labor in general. At times, he seems oblivious to the unfortunate reality of corporate initiatives in today’s workplace. Employers’ greater reliance on part-time employees, for example, has not brought flexible, multifaceted new lives to these workers, but has rather created an underclass stripped of essential benefits, especially health insurance.\(^2\) Similarly, Klare ignores the ability of the corporate status quo to use reforms to justify its basic discriminatory structures: the influx of professional women into the workplace has not led to a reexamination of priorities and values so as to strike a new balance of corporate and societal interests, but has instead prompted proposals to create a “mommy track.”\(^2\)

In surveying the nature of existing cooperative programs, Klare is more sensitive to context and thus rather less sanguine. A “constant danger,” he believes, is that such programs will be “corrupted by the context of profound social and economic inequality in which most employment relationships in the United States remain embedded.”\(^2\) Accordingly, in Klare’s view, it remains uncertain “whether cooperation schemes of the kind now in vogue can act as an entering wedge in a process designed to achieve genuine power-sharing and workplace democratization.”\(^2\)

Like Stone, however, Klare’s assessment involves an excessively narrow focus, on the tiny minority of workplaces which have implemented cooperation through “collective bargaining innovation” or the “establishment of worker-owned businesses.”\(^2\) Developments in these aberrational sectors have no necessary connection to the economy as a whole; as such, the wedge metaphor is inapposite.

Despite these uncertainties, Klare argues vigorously that the cooperation debate presents important opportunities for labor, and that labor must therefore not allow management to win by default. Instead, he suggests, “[l]abor’s advocates should fashion and champion a self-determination perspective on worker participation, not remain reluctant and defensive observers as the process of industrial relations innovation un-


\(^{272}\) See Schwartz, Management Women and the New Facts of Life, 67 Harv. Bus. Rev., Jan.-Feb. 1989, at 65. To be sure, corporations have sometimes agreed to make substantive changes to meet the needs of an increasingly female workforce. For example, the 1989-1992 collective bargaining agreement between AT&T and the CWA and the International Brotherhood of Electrical Workers requires the company to contribute $5 million to establish local day care centers that give priority to AT&T employees. See AT&T’s New Pact on Union Benefits, Bus. Week, June 12, 1989, at 32; see also Miller, Family and Work, 37 Lab. L.J. 484 (1986) (describing union efforts to secure changes to accommodate the influx of women into the workforce).

\(^{273}\) Klare, The Labor-Management Cooperation Debate, supra note 6, at 68-69.

\(^{274}\) Id. at 69.

\(^{275}\) Klare, Workplace Democracy and Market Reconstruction, supra note 111, at 53.
folds on the basis of other, integrative assumptions." Although this conclusion is right on the mark, Klare appears injudicious in his strategic approach. He strongly criticizes opponents of cooperation who adhere to what he labels the "renewed militancy perspective"—the notion that an aggressive new social unionism can effectively combat the internationalization of capital and threatening new business initiatives such as rightist cooperation. His argument contains two principal points. First, Klare suggests that the new militants lack imagination, and do not meet the challenges of a changing workplace and changing worker desires. Second, he argues that these militants fail to recognize the significance of worldwide economic changes and the diminished utility of traditional work practices.

In rejecting the new militants' opposition to cooperation, however, Klare appears to rely on the theoretical possibilities of cooperation rhetoric, rather than its fruits. Imagination, not political hardheadedness, is his touchstone. Klare thus greatly exaggerates "the opportunity presented by the rapidly changing business environment to give modern content to the age-old ideal of workplace democratization." If this opportunity exists at all, it does not prevail within the profit-obsessed world of rightist cooperation. The mere "rhetoric of participation and mutuality" does not necessarily provide labor with a valuable opportunity. Today's cooperation rhetoric, unfortunately, does not extend workers an invitation, but often simply provides a soundtrack for corporate aggression. Indulging that rhetoric is much more likely to legitimate re-
pressive rightist forms of cooperation than to foster worker-oriented programs and more humanistic workplaces.

B. A Sketch of Future Possibilities

A coherent labor strategy for opposing cooperation must proceed on a number of fronts. In any such strategy, the most important offensive is aggressive ground-level mobilization: organizing to oppose management attempts to force the acceptance of rightist cooperation, to fight off speedups and divide-and-conquer strategies in cooperative workplaces, and to build campaigns to remove the threat of capital flight, a threat management now wields to impose rightist cooperation. Although these are primarily political rather than academic efforts, labor scholars should do their best to assist these campaigns in any way they can.

Moreover, sympathetic scholars should act as critical participants in these efforts rather than dispassionate theorists. Writing about cooperation should be attuned to this objective. Systematic investigation of the day-to-day reality of cooperative workplaces—what really goes on after the press conferences are over and what changes are introduced when cooperation turns out to be something less than a miracle cure—will help offset the dangerously biased nature of many existing studies of cooperation. It is also important to focus on the perspectives of rank-and-file workers rather than managers or labor-relations professionals. Two practical aspects of cooperation that merit particular attention in this regard are its tendency to increase job stress—that is, precisely to diminish the quality of work life—and its role in chilling unionization.

Scholars should also continue to develop the theses proposed in this article, by conducting skeptical examinations of cooperation theory and seeking to determine how its rhetoric is adapted, corrupted, or subverted. Rightist cooperation, for example, is often unambiguous about its anti-worker purposes; the distinctions between different forms of cooperation should be exhaustively explored so that harmful programs are not validated by optimistic deference to the possibilities of competing notions of worker participation. Labor scholars should stress that rightist cooperation has nothing to do with workplace democracy or with participatory schemes that allow workers to become involved in basic enterprise decisions.

Finally, labor lawyers must develop legal strategies to assist workers in their attempts to delegitimize and dismantle anti-labor forms of coop-

283. In this regard, the proposals of Mike Parker and Jane Slaughter merit particular attention. See M. PARKER & J. SLAUGHTER, supra note 11; M. PARKER, supra note 53. Implementation of these proposals—especially in the auto industry, upon which the authors focus—requires pressuring not only management but also pro-cooperation union leadership.

284. The Campaign to Keep GM Van Nuys Open—a broad-based organizing effort anchored in minority communities—is carefully documented in E. MANN, supra note 238.
eration. The declining significance of Section 8(a)(2) represents an especially important agenda item; lawyers should attempt a reinvigoration so as to challenge both rightist non-union cooperation schemes and unions that have abdicated their representative roles by acquiescing in destructive forms of cooperation. Similarly, if management seeks to bypass or undermine existing unions through cooperative programs that are unilaterally adopted—or "bargained" with improper pressure—sympathetic labor lawyers should be prepared to mount vigorous legal challenges.

These proposals are preliminary, inconclusive, and vague. Unless they are developed and advanced, however, corporate-sponsored cooperation will continue its rise while the volume of irrelevant leftist theory grows. Labor scholars must be diverted from castles in the air and redirected to reality.

**CONCLUSION**

Analysts of labor-management cooperation often approach the subject with an attitude closer to religious awe than intellectual skepticism. Prepackaged questions produce ready-made answers; important distinctions are not drawn; problems are created out of thin air. In this article, I have attempted to assess the theory and practice of cooperation from an agnostic, if not jaundiced, perspective. In this light, cooperation appears as a response principally to management's problems rather than labor's; more important, management has succeeded in implementing forms of cooperation that press this bias still further. Labor cannot remain a true believer in the transcendental vision of cooperation, but must recognize that the vision has been subverted, and mobilize accordingly.