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Collective Bargaining and Dispute System Design

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ARTICLE

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I. INTRODUCTION

From its very beginning, the field of dispute system design has been closely associated with the study of the collective bargaining process. The phrase "dispute system design" itself is attributed to the groundbreaking work of Professors Ury, Brett, and Goldberg, which drew heavily on a case study of the bituminous coal industry, an industry with a long tradition of unionization and collective bargaining.[1] Over the ensuing years, the field expanded tremendously, and its insights were applied in multiple other contexts.[2] In the specific context of workplace system design, scholars became more interested in the non-unionized workplace and so the interest in collective bargaining waned.[3] This trend is not surprising given the continuous decline in unionization rates among U.S. workers over the last several decades and the consequent decline in the practice of collective bargaining.[4] To some extent, our understanding of collective bargaining as a dispute system became frozen in time.

This article seeks to reestablish the conversation between collective bargaining and dispute system design scholars. Part II provides a brief description of the system of collective bargaining by focusing on the three

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1. WILLIAM L. URY, JEANNE M. BRETT & STEPHEN B. GOLDBERG, GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COST OF CONFLICT 87–168 (1988).

2. Lisa Blomgren Amsler, *The Dispute Resolver's Role within a Dispute System Design: Justice, Accountability, and Impact* 13 U. ST. THOMAS L. J. ___ (2017).

3. *See generally* DAVID B. LIPSKY, RONALD L. SEEBER & RICHARD D. FINCHER, EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS (2003) (exploring the systems organizations have developed to manage workplace conflicts involving supervisor–employee relationships).

4. Michael Goldfield & Amy Bromsen, *The Changing Landscape of US Unions in Historical and Theoretical Perspective*, 16 ANNU. REV. POLIT. SCI. 231, 234–38 (2013).

key steps of union organizing, contract negotiation, and contract administration. Part III does the same for the literature on dispute system design by identifying some of the seminal literature in the field as well as other work particularly relevant to workplace dispute resolution systems.

In Part IV, the article seeks to achieve one modest goal and one that is more ambitious. As to the modest goal, this article seeks to rekindle the interest among industrial relations and labor law scholars in exploring the relationship between collective bargaining and dispute system design. In particular, the article seeks to identify the core characteristics of the collective bargaining process and how those basic characteristics overlap with the various elements that dispute system scholars have identified as critical elements of a dispute system.

The more ambitious goal relates to one of the reasons why the interest in collective bargaining as a dispute system declined in recent years—the concurrent decline in unionization rates. Industrial relations and labor law practitioners and scholars have been concerned for years about the viability of collective bargaining if unionization rates continue to decline. In response, they have suggested alternative approaches to collective bargaining in order to safeguard some of the benefits of collective bargaining even as unionization rates continue to decline.[5] In line with those efforts, and relying on the insights from the system design scholarship, this article explores the possibility that collective bargaining, or at least aspects of it, could transcend beyond those workplaces in which workers have chosen to be represented by a union.

II. COLLECTIVE BARGAINING: BASIC PRINCIPLES

The system of collective bargaining in the U.S. spans nearly two centuries.[6] While collective bargaining as we know it today is heavily dependent on a legal framework that is supportive and protective of the rights of employees to engage in such a process, it is important to note that the process itself preceded such legislation.[7] This observation suggests that the legal environment, while certainly important, does not necessarily determine the viability of collective bargaining as a dispute system.[8]

At its core, collective bargaining involves employees coming together as a group to resolve workplace issues with their employers.[9] Collective bargaining involves three key steps: the organizing process, contract negoti-

5. *See* Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L. J. 148, 154–55 (2013).

6. *See* THOMAS A. KOCHAN & HARRY C. KATZ, COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS 20–22 (1988).

7. TERRY L. LEAP, COLLECTIVE BARGAINING AND LABOR RELATIONS 28–41 (1995).

8. *See* KOCHAN & KATZ, *supra* note 6, at 69–80.

9. *Id.* at 4.

ation, and contract administration.[10] Once the union is certified as the employees' bargaining representative, the union and the employer will begin negotiations over terms and conditions of employment.[11] These negotiations, particularly in mature bargaining relationships, are complex and protracted, sometimes taking many months to complete. Any agreed-upon terms become the collective bargaining agreement. Over time, these documents are likely to become very detailed and cover a multiplicity of terms.[12]

When the parties are unable to reach an agreement, a couple of alternative events can happen. In some instances, the parties can rely on self-help in the form of strikes or lockouts.[13] These actions are intended to put economic pressure on the opposing side by increasing the cost of continued dispute. Alternatively, and particularly in the public sector, the parties present their disagreement to a third-party neutral for possible resolution, either in the form of mediation or interest arbitration.[14]

Once the collective bargaining agreement has been negotiated, the parties are then expected to implement and enforce the terms of the new agreement. This is referred to as the contract administration process.[15] The goal of the contract administration process is to allow the parties to resolve "rights disputes"—disputes over the meaning and application of the terms of the collective bargaining agreement.[16]

At the center of the contract administration process is the grievance procedure.[17] A typical collective bargaining grievance procedure involves multiple steps in which the parties have the opportunity to address the disagreement at various levels of formality.[18] A well-functioning grievance procedure will encourage early resolution of most grievances at the initial levels.[19] The final step of most grievance procedures is binding arbitration. At this stage, the parties present their dispute to an arbitrator whose decision becomes final and binding.[20]

In short, collective bargaining is a multi-faceted process that involves bringing employees together, facing the employer in negotiations, and then

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10. *Id.* at 12–16.

11. *See* THOMAS R. COLOSI & ARTHUR E. BERKELEY, COLLECTIVE BARGAINING: HOW IT WORKS AND WHY 55–69 (1992).

12. David E. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663 (1973).

13. *See* COLOSI & BERKELEY, *supra* note 11, at 33–53 (describing the "weapons of conflict" unions and employers have to exercise bargaining leverage).

14. Martin H. Malin, *Two Models of Interest Arbitration*, 28 OHIO ST. J. ON DISP. RESOL. 145, 157 (2013) (describing the interest arbitration process).

15. *See* LEAP, *supra* note 7, at 370–71.

16. *Id.* at 10.

17. Peter Feuille, *Dispute Resolution Frontiers in the Unionized Workplace, in* WORKPLACE DISPUTE RESOLUTION: DIRECTIONS FOR THE TWENTY-FIRST CENTURY 17, 30–41 (Sandra E. Gleason ed., 1997).

18. *See* LEAP, *supra* note 7, at 377–83.

19. *Id.*

20. *Id.* at 407–15.

living under the terms of the agreement. The latter stage includes adopting procedures to solve disputes that might arise regarding the terms of the agreed-upon contract. Dispute system design scholars primarily have focused their attention on the contract administration stage, given the central role that the grievance process plays in that stage. However, as this short description illustrates, the entire collective bargaining process is amenable to description as a dispute system. The next couple of sections explore this connection.

III. Dispute System Design's Basics

The scholarship in dispute system design is rich in substance and broad in scope, as it has been applied to a variety of fields.[21] A thorough review of that literature is beyond the scope of this article. Our focus is on providing a framework in which to anchor the discussion of the collective bargaining process as a dispute system. To that end, this section reviews some of the existing literature, focusing particularly on several contributions which are particularly relevant to the field of labor and employment law.

Professors Stephanie Smith and Janet Martinez provide a helpful starting point.[22] Professors Smith and Martinez define a dispute resolution system as the process or processes that an organization adopts "to prevent, manage or resolve a stream of disputes."[23] They propose an analytic framework for thinking about design of dispute systems. They identify various key components of designing a dispute system including identifying the goals[24] and stakeholders of the system,[25] the resources that support the system,[26] and the accountability and success of the system.[27] Of particular rele-

21. Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 Ohio St. J. on Disp. Resol. 1, 17 (2008).

22. Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 Harv. Negot. L. Rev. 123 (2009).

23. *Id.* at 126.

24. With regard to goals, Smith and Martinez focus on whether the system is intended to solve only disputes internal to the organization or to also resolve disputes with external constituencies. They also note that it is important to identify the objectives of the system. They list a variety of possible objectives including: preventing or managing conflict; minimizing time spent dealing with conflict; helping the organization to increase productivity; improve the relationships among the various stakeholders; improve safety; achieve public recognition; and improve fairness, for example. *Id.* at 129–30.

25. Professors Smith and Martinez note that in adopting a dispute system, organizations need to clearly identify the parties with a stake in the design and operation of the system. Stakeholders can include the individuals who are directly involved in a particular dispute, or parties who might be just indirectly affected by the dispute. Smith and Martinez note that in identifying the stakeholders it is important to evaluate and understand the level of power and authority that they bring into the relationship. *Id.* at 131.

26. An important operational issue involves securing adequate support in terms of financial and personnel resources. Financial and personnel support are clearly essential to the establishment and operation of a dispute system. Experience in recent years, particularly in the areas of consumer and employment arbitration, demonstrate that this consideration also has implications for

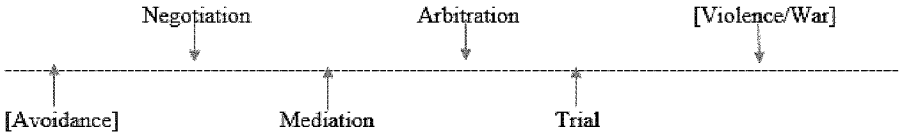
vance to this article is Professors Smith and Martinez's suggestion of identifying the processes and structures of the system.[28]

Professors Smith and Martinez note that any given dispute system can be designed to include a variety of processes including arbitration, mediation, negotiation, and others. In deciding which of these processes to incorporate into any given dispute system, organizations enjoy a great source of discretion, bound only by external forces, such as the legal environment.[29]

Relying on the work of Ury, Brett, and Goldberg, Professors Smith and Martinez helpfully identify three dimensions into which the various processes can be incorporated and arranged in a dispute system: interests, rights, and power.[30] Disputes over interests can address anything of importance to the parties such as economic, political, relational, and status. Flexible structures such as mediation are particularly well suited to deal with interest issues.[31] Disputes can also be resolved by relying on independent standards such as rules or laws and using a third-party neutral to apply those rules to a particular disagreement. Arbitration and trials tend to be used in this context.[32] Finally, disputes can be resolved by relying on the parties' leverage or power.[33] Power procedures vary and range from merely antagonistic to openly violent.[34]

Professors Smith and Martinez place the various approaches to dispute resolution along a spectrum bounded by avoidance at the left end and violence on the right. In between, they place the various dispute resolution processes (negotiation, mediation, arbitration, and litigation) from left to right in terms of their focus on interests versus rights:

Figure 1[35]



the accessibility of the system to potential disputants. Forethought in this particular dimension is critical to the success of the system. *Id.* at 131–32.

27. A dispute system should be evaluated to confirm that it is achieving the goals and objectives for which the system was designed. A key component of measuring success is the extent to which the system is transparent in the sense that it allows stakeholders to evaluate if the system is operating as it was designed to operate. *Id.* at 132–33.

28. Smith & Martinez, *supra* note 22, at 130–31.

29. *Id.* at 131.

30. *Id.* at 126. Ury, Brett and Goldberg frame it as follows: "In a dispute, people have certain interests at stake. Moreover, certain relevant standards or rights exist as guideposts toward a fair outcome. In addition, a certain balance of power exists between the parties. Interests, rights, and power then are three basic elements of any dispute." URY ET AL., *supra* note 1, at 4.

31. Smith & Martinez, *supra* note 22, at 126.

32. *Id.*

33. *Id.* at 127.

34. *See* URY ET AL., *supra* note 1, at 7–8.

35. Smith & Martinez, *supra* note 22, at 127.

Other scholars have advanced our understanding of dispute system design issues by focusing on the issue of control over the design process. The issue of control over design has become particularly relevant in recent years given the increase in the use of pre-dispute, mandatory arbitration clauses in employment and consumer contracts. As discussed below, the issue of control in the context of collective bargaining has become particularly significant given the decline in unionization rates.

Existing literature points to three important aspects of design control. First, there is the issue of control over the design of the process itself. In their discussion of workplace dispute systems, Professor Lisa Bingham and her colleagues[36] compare dispute systems in which the design choices are made by a third party (usually the state), by the two specific parties involved in a dispute, and by one party (the party with the greatest bargaining power). Not surprisingly, they conclude that dispute systems adopted by the parties themselves and those adopted by third parties for the benefit of the parties are better choices to reach fair outcomes.

A second dimension of the control issue relates to the choice of whether or not to participate in the dispute system. Professors David Lipsky, Ronald Seeber, and Richard Fincher note that individuals should have the option to decide whether to participate in the dispute system. For those who decide to participate, they also note, the system should guarantee privacy and confidentiality.[37]

Finally, there is the issue of control over the designation of the decision-maker. In comparing different designs of non-union dispute systems, Professor Alex Colvin notes that systems in which the parties share control over who makes the decisions and who conducts the investigation on which a final decision is based are likely to lead to outcomes that are perceived to be more fair.[38]

This very brief description of some of the basic elements of dispute system design highlights the importance of control and careful consideration of the variety of structures and processes that can be incorporated into any one dispute system. The criticisms recently levied against certain types of dispute systems, such as those used in the consumer and employment contexts, illustrates the importance of control over the design process. Below, the article explores the implications of control design issues in the context of the changing landscape of the collective bargaining process. This brief overview demonstrates the importance of recognizing that the various structures and processes selected operate in a very interactive environment

36. *See* Lisa Blomgren Bingham, Cynthia J. Hallberlin, Denise A. Walker & Won-Tae Chung, *Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace*, 14 HARV. NEGOT. L. REV. 1 (2009).

37. *See* LIPSKY ET AL., *supra* note 3, at 162.

38. Alexander J.S. Colvin, *The Relationship Between Employment Arbitration and Workplace Dispute Resolution Procedures*, 16 OHIO ST. J. ON DISP. RESOL. 643, 656–61 (2001).

and that such dynamic interaction provides both a challenge and an opportunity to the system designer.

IV. Reflections from a Labor Law Professor

Like the proverbial "kid in the candy store," my brief expedition into the dispute system design field leaves me both excited and unsatisfied: excited because of what seems like a broad set of possibilities in renewing the interest in exploring the system design features of the collective bargaining process; unsatisfied because there are many nuances I am just beginning to appreciate and am thus afraid to take a misstep that might expose my inexperience. With that as a background, I offer two observations which hopefully will be of some interest to both labor relations and system design scholars. The above discussion briefly summarizes key aspects of our understanding of the collective bargaining process and of the field of dispute system design. In terms of collective bargaining, Part II made clear that collective bargaining is a multi-stage process embedded with a variety of dispute resolution proceeses. Part III provides a framework that helps us appreciate the system design components of the collective bargaining process.

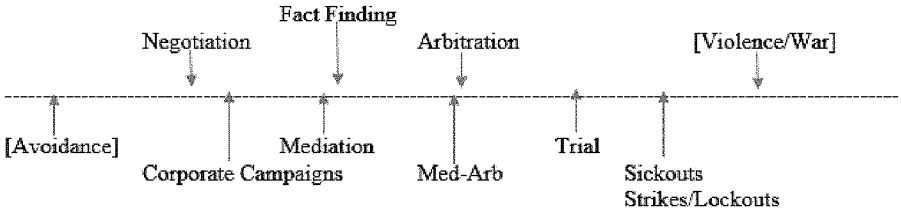
A. The relationship between collective bargaining and dispute system design

As noted earlier, the origins of the dispute system design field are closely connected to the study of collective bargaining. However, over the years a strange bifurcation developed in the literature. Scholarly discussions of dispute resolution in the collective bargaining context tend to focus on the grievance procedure process as the only part that involves dispute resolution. Less attention is paid to other collective bargaining that has a dispute resolution dimension. This divide has resulted in reluctance by commentators to think about the use of other dispute resolution mechanisms in workplaces where there is a union, as well as a tendency to ignore the possibility that collective bargaining structures can cross over into the non-unionized workplace. My initial observation in this article is that collective bargaining is very much a dispute system, and a system that is much broader than just the grievance procedure piece on which scholars traditionally focus.[39] In particular, if we expand our understanding of negotiation and grievance arbitration, we can quickly see that collective bargaining writ large encompasses a variety of dispute resolution processes. Below, I use the diagram

39. Lisa Blomgren Amsler, Janet Martinez & Stephanie Smith, Dispute System Design: Preventing, Managing, and Resolving Conflict (forthcoming). Professors Lisa Blomgren Amsler, Janet Martinez and Stephanie Smith, analyze the labor relations process from the dispute system design perspective. They methodically describe the goals of the parties, the stakeholders involved in the process, the context and culture in which the process plays out, the processes and structures used, and questions of accountability and evaluation.

used by Professors Smith and Martinez in order to illustrate this observation.

Figure 2



The revised diagram illustrates that the collective bargaining process involves a wide variety of dispute resolution processes. These processes might take place simultaneously and in a fluid, non-linear manner. For instance, negotiations over a collective bargaining agreement are often accompanied by a number of activities designed to exert pressure on the opposing side, such as strikes, sick-outs, lockouts, or corporate campaigns.[40] These tactics, which might seem tantamount to aggression, are common. At the same time, the parties are engaged in other "milder" forms of dispute resolution, such as formal and informal negotiations, or even mediation. The same is true regarding the contract administration process. Before the parties reach the arbitration stage of the grievance process, they have already engaged in a variety of other forms of dispute resolution, both formally and informally.[41]

The above discussion thus suggests that the collective bargaining process, writ large, is a complex and dynamic dispute system that involves a variety of dispute resolution processes. While traditionally these processes have been discussed in the context of a unionized workplace, one can think of scenarios in which similar dynamics could play out in a non-unionized workplace. Of course, all of the individual processes described in the diagram can and do take place in non-unionized workplaces. However, when taking place in a non-unionized workplace, those processes are rarely discussed in the context of a collective bargaining experience. I suggest that while these various processes are certainly linked by the presence of a union in the context of traditional collective bargaining, one could take a fresh look at the various processes to explore whether they can exist in a non-unionized environment as a different kind of dispute system.

Consider the contract negotiation stage of the collective bargaining process. Traditionally, the discussion of collective negotiations has focused on the conduct that occurs at the bargaining table once the employees have

40. *See* KOCHAN & KATZ, *supra* note 6, at 240–42.

41. *See, e.g.*, David Lewin, *Theoretical and Empirical Research on the Grievance Procedure and Arbitration: A Critical Review, in* EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE 137, 137–86 (Adrienne E. Eaton & Jeffery H. Keefe eds., 1999).

chosen to be represented by the union. While interesting in their own right, these negotiations tend to be fairly scripted in the sense that they occur in a fairly traditional format with the parties sitting across a table, exchanging proposals over a prolonged period of time, and usually reaching an agreement (when they do) at the eleventh hour.[42] But as Figure 2 indicates, employers, unions, and employees are constantly negotiating in a wide variety of contexts. The distinction between negotiation on the one hand and a strike on the other has been generally described as a clear bright-line dichotomy, easy to identify and clearly distinguishable. However, the figure illustrates the multiple ways in which employees and unions can exert pressure on employers, and consequently advance their negotiation interests, short of going on strike. Whether through corporate campaigns, the grievance process, or other collective action, employees are negotiating with their employers more often than we think.

Clearly, the ability of employees to engage in some of these activities might be simplified and enhanced when they are organized and represented by a union. However, that need not be the case. Consider corporate campaigns. Traditionally, a corporate campaign involves a coordinated effort by unions to exert pressure on employers' business relationships to obtain some desired result at the bargaining table.[43] Such campaigns require a fairly sophisticated infrastructure to implement, involving marketing, mobilizing, and organizing. The experience with recent public movements, such as "Black Lives Matter" and "Occupy Wall Street," show that social media technology has tremendously facilitated the ability of seemingly diverse individuals to quickly and effectively coalesce around a particular goal. It is clearly not beyond the realm of possibilities for employees who, unlike those involved in the movements mentioned above, have some fairly close ties (if nothing else) geographically, can harness the power of social media to put pressure on employers to achieve some workplace-related goal. If given an opportunity to engage in some form of negotiation with the employer, one can observe situations in which a group of employees, independent of whether or not they are represented formally by a union, could engage in similar multi-faceted negotiations with their employers.

As with negotiation, the traditional perception of the grievance process is that of a fairly well-defined, somewhat rigid process in which the parties mechanically follow a series of steps ending up in grievance arbitration. The process is a lot more fluid than what conventional wisdom suggests, however. For example, as several commentators have noted, many workplace complaints are never processed as grievances.[44] Some of these complaints are likely resolved through informal negotiations between the

42. *See* LEAP, *supra* note 7, at 311–22.

43. Paul Jarley & Cheryl L. Maranto, *Union Corporate Campaigns: An Assessment*, 43 INDUS. & LAB. REL. REV. 505, 506 (1990).

44. *See* Lewin, *supra* note 41, at 145–54.

parties. In fact, scholars have noticed that carrying a grievance through the entirety of the arbitration process is likely to have some negative consequences for both the grievants and their supervisor.[45] On the employee side, grievants tend to leave their employment faster than other employees. Supervisors also experience shorter employment tenure when grievance filing rates are higher. Given these effects, it will not be surprising to expect that both employees and supervisors have incentives to resolve complaints before formally initiating a grievance. Similarly, there is a well-established connection between the grievance process and the negotiation of the collective bargaining agreement. Parties often see the grievance process as a way of continuing negotiations over the existing collective bargaining agreement, either by using the grievance process as a way of clarifying contractual terms or as a way of trying to get, through the grievance process, terms that we were unable to obtain at the bargaining table.

In short, many of the pieces of what we have traditionally understood as the collective bargaining process fit nicely into what system design scholars have noted are the processes and structures that form part of any dispute system. Looking at the collective bargaining process writ large from a system design perspective might provide some new and helpful insights for industrial relations, dispute resolution, and system design scholars.

B. Collective Bargaining Beyond the Unionized Workplace

The discussion above proposes that when one looks at the collective bargaining process through the lens of dispute system design, the hard distinction frequently made in the literature between unionized and non-unionized workplaces seems to be blurred a little. Non-unionized employers have adopted a variety of approaches, which many times mimic closely the structure, if not the substance, of unionized workplaces. Unionized workplaces, in turn, have sought to reinvigorate traditional methods by seeking innovation through, for example, shifting their focus to interests as opposed to rights.

This leads me to my somewhat more ambitious claim. By taking a fresh look at the collective bargaining process from the dispute system design perspective, I would suggest that it might be possible to think of the possibility that processes akin to collective bargaining can exist outside the context of the unionized workplace. This section explores the conditions needed to allow for this to happen.

I propose that the core element is the ability of individuals to act collectively at any particular point in time, even if they do not seek to act collectively all the time. Encouraging and allowing employees to form allegiances on specific issues or at discrete points in time facilitates the operation of a variety of dispute resolution processes.

45. *Id.* at 158–66.

The ability to form alliances (or act in concert in the parlance of current labor law), will have two positive effects on the implementation of a collective bargaining approach of the type suggested in this article: alliances provide employees with the opportunity to exercise some control over the design choices of any potential dispute system, and the ability to act collectively is likely to increase the efficiency and operation of the dispute resolution system.

First, employee alliances give them leverage. One of the key differences between the traditional collective bargaining process and dispute resolution processes in non-unionized workplaces is the fact that in the non-unionized context, the employer is in complete control. Employers in the non-unionized context decide whether to adopt a conflict resolution process and the substance of that process. In fact, unilateral control by the employer has been one of the main criticisms raised against pre-dispute mandatory arbitration provisions.[46] The traditional collective bargaining process addresses this concern by protecting the right of employees to act in concert and by imposing on employers the obligation to bargain in good faith with the representatives chosen by the employees. While both of these elements are important, the ability to act in concert and form allegiances is particularly critical.

The ability of individuals to act in concert has direct and indirect effects on the type of employment-related outcomes they experience. As observed in the unionized context, formal collective negotiations make it possible for employees to directly affect the terms and conditions of employment. While the legal framework also requires the employer to bargain over certain subjects and imposes certain obligations regarding acceptable conduct during bargaining, ultimately it is the leverage that employees bring to the table, through their collective force, that creates the necessary incentives for the employer to negotiate. Protecting the ability of employees to form alliances will go a long way towards facilitating the kind of negotiation that we see in the traditional collective bargaining process, even in the absence of a traditional collective bargaining format.

Second, safeguarding and encouraging employees to form alliances will facilitate operation of the system. One of the reasons that collective bargaining as a system has been relatively successful and long-lasting is that employees are likely to come up with better outcomes by working together than by working individually. The ability of employees to act in concert also has indirect effects on employment outcomes. Employees' ability to share information, to help each other in difficult times, and to brainstorm about solving workplace problems is likely to lead to a more diverse and

46. *See* Alexander J.S. Colvin, *From Supreme Court to Shopfloor: Mandatory Arbitration and the Reconfiguration of Workplace Dispute Resolution*, 13 CORNELL J. L. & PUB. POL'Y 581, 583–85 (2004).

robust set of outcomes than when employees act on their own. In addition, giving employees a voice in the creation of the dispute mechanisms that will be used in the workplace is likely to increase the commitment to those processes as well as a greater sense of procedural, distributive, and interactional justice.[47] Protecting the ability of employees to form alliances will likely result in better dispute resolution outcomes.

This article proposes considering the possibility that a dispute resolution process similar to collective bargaining could exist even in the absence of a traditional bargaining relationship. The article also claims that a necessary condition for expanding collective bargaining in this way is to create the conditions which facilitate the ability of employees to form alliances, short of what we have traditionally understood as labor organizations.

C. "Concerted activity" and the National Labor Relations Act

Dispute resolution systems are nested within the larger structure of the legal system, and thus it is important to consider the viability of the system within the current legal structure.[48] The possible expansion of collective bargaining outside the context of the unionized workplace faces an important threshold within the existing legal framework. This final subsection explores that topic.

The National Labor Relations Act (NLRA) provides what is probably the broadest set of protections among all workplace laws regarding the ability of employees to engage in concerted activity. In addition to protecting employees who seek union representation, Section 7 of the NLRA protects employees who "engage in other *concerted activity* for the purpose of . . . *other mutual aid* or protection."[49] Section 8(a)(1) makes it an unlawful or unfair labor practice for an employer to "interfere with, restrain, or coerce employees" with respect to their NLRA Section 7 organizational rights.[50]

Employers' actions that interfere with concerted employee activity or with activities for other mutual aid or protection run contrary to the requirements of the NLRA. The NLRA protects employee "concerted activity" such as employee information exchanges and discussions about wages or other working conditions. This statutory protection is independent of whether employees are represented by a union, and it applies to nearly all private sector employees in the United States.

Concerted activities are activities undertaken together either by two or more employees[51] or by one on behalf of others.[52] Thus, when two or more

47. *See* Bingham et al., *supra* note 36, at 32–33.

48. Lisa Blomgren Amsler, *The Evolution of Social Norms in Conflict Resolution*, 6 J. OF NAT. RESOURCES POL'Y RES. 285, 286 (2014).

49. 29 U.S.C. § 157 (2012) (emphasis added).

50. 29 U.S.C. § 158(a)(1) (2012).

51. *See* N.L.R.B. v. Washington Aluminum Co., 370 U.S. 9 (1962) (where seven employees who walked off their jobs to protest the cold temperatures existing at the shop floor were found to be engaged in concerted activity).

employees together lodge a complaint with a supervisor, such an activity will meet the definition of "concerted" under Section 7.[53] On the other hand, when an employee in the non-unionized workplace acts alone and lodges exactly the same complaint, the "concerted" definition is not met and the employee can be terminated without raising an NLRA violation.[54]

However, there are some situations in which an employee acting alone might meet the concerted activity requirement. The easier cases involve situations in which an individual employee claims a right under an existing collective bargaining agreement. The National Labor Relations Board (NLRB), with the approval of the Supreme Court, has consistently held such activity to involve concerted action.[55] According to the NLRB, actions taken by individual employees intended to implement the terms of a collective bargaining agreement are "but an extension of the concerted activity giving rise to that agreement."[56] The concerted nature of other activities engaged in by an individual employee—such as situations in which an individual employee claims an employment right under state or federal laws—are less certain.[57]

Similarly, the NLRB has equivocated when dealing with the issue of whether employees who asked to have a representative present (e.g., during a workplace investigation) are engaging in concerted activity and thus protected under Section 7. In the unionized workplace, employees have the

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52. *See* Esco Elevators, 276 N.L.R.B. 1245 (1985) (finding of concerted activity where union officer raised safety complaint).

53. *See* Atl.-Pac. Constr. Co. v. N.L.R.B., 52 F.3d 260 (9th Cir. 1995) (finding concerted activity where a group of employees wrote a group letter protesting the selection of an unpopular co-worker as new supervisor).

54. *See* Joanna Cotton Mills Co. v. N.L.R.B., 176 F.2d 749 (4th Cir. 1949) (no concerted activity found. Here a petition for removal of a supervisor was being circulated by an individual with a personal grudge against the supervisor and the individual was not acting for mutual aid or protection).

55. *See* N.L.R.B. v. City Disposal Sys., 465 U.S. 822 (1984).

56. Bunney Bros. Constr. Co., 139 N.L.R.B. 1516 (1962).

57. Initially, the NLRB treated these cases the same as those involving individuals invoking a collective bargaining right. The NLRB found the necessary link to other employees' interests in the statutory mandate of the law the individual employee was seeking to enforce. Accordingly, the NLRB held that "in the absence of any evidence that fellow employees disavow" the actions of the single employee, there was "implied consent." *See* Alleluia Cushion Co., 221 N.L.R.B. 999, 1000 (1975). Years later, though, the NLRB reversed this broad interpretation. In a dispute involving an employee who refused to drive a truck which had been involved in an accident after having complained to his employer and to a state transportation agency about a known defect with the truck, the NLRB held that concerted activity requires the individual employee to act "with or on the authority of" fellow workers, and not only on his or her own behalf. The NLRB distinguished cases involving the assertion of a statutory right from those involving the assertion of a right grounded in a collective bargaining agreement. Under this approach, concerted activity will only be found where an individual employee is, although acting alone, trying to initiate group action, or acting for or on behalf of other workers after having discussed the matter with fellow workers. *See* Meyers Industries (*Meyers I*), 268 N.L.R.B. 493 (1984), and Meyers Industries (*Meyers II*), 281 N.L.R.B. 882 (1986). The NLRB today thus generally refuses to find concerted activity where an individual employee acts on his or her own behalf.

right to have a union representative present during interrogations which could lead to disciplinary action against the employee.[58] This right, commonly referred to as the Weingarten Right, is based on the rationale that a disciplinary measure against one employee can potentially have an effect on the interpretation of the terms of the collective bargaining agreement, and thus, the presence of a union representative is critical in enforcing the terms of the collectively bargained contract. For the purposes of this article, this legal concept is an example of the type of alliances employees engage in in the context of solving workplace disputes.

The NLRB, however, has vacillated regarding the possible extension of the Weingarten Right to the non-unionized workplace. The Board's current position is that non-unionized workers do not engage in concerted activity where they ask to have someone accompany them to investigatory meetings, which could result in disciplinary action.[59] This means that employees asking for such support are not entitled to receive it and could in fact be disciplined even for asking to have such representation. This policy stance of limiting the Weingarten Right to unionized workers serves as an impediment to the proposal this article makes. The ability of employees to form alliances is central to the viability of implementing a collective bargaining type system outside the unionized place. Forming alliances will be increasingly difficult where employees fear adverse employment outcomes when asking for the assistance of a co-worker when facing possible disciplinary action by the employer.

Thus, under existing law the ability of collective bargaining principles to exist beyond the unionized workplace is very possible. When two or more employees act together, at the same time, and towards the same goal—and in order to improve or change a term or condition of employment—they are engaging in concerted activity and thus they enjoy the protections of the NLRA. At the margins, such as in issues where one employee is requesting a representative, some clarification might be needed in order for collective bargaining to exist beyond the boundaries of the unionized workplace.

V. Conclusion

The relationship between collective bargaining and dispute system design dates back to the very origins of the dispute system design field. In this article I have shared some initial thoughts on application of system design features to our understanding of the collective bargaining process. One of the observations, which I hope is uncontroversial and perhaps obvious, is

58. The Weingarten Right refers to a 1975 Supreme Court decision which protects the right of employees to have a union representative present during investigatory interviews which could lead to the imposition of disciplinary action by the employer. N.L.R.B. v. J. Weingarten Inc., 420 U.S. 251 (1975).

59. IBM Corp., 341 N.L.R.B. 1288 (2004).

that collective bargaining is a rich and complex dispute resolution system. When discussing collective bargaining from the dispute system design perspective, scholars and practitioners have primarily focused their attention in the grievance and arbitration process. This article proposes that the collective bargaining process in its entirety can be understood as a dispute resolution system. A fresh look at the collective bargaining process from this perspective is likely to produce new insights for those interested in the study of industrial relations and labor law, as well as dispute system design scholars.

The other observation, is that there might be some value in exploring the extent to which collective bargaining processes and structures can exist beyond the traditional unionized workplace environment. While traditionally collective bargaining has been coupled with the existence of a union, this article has argued that there are aspects of the collective bargaining process that can be replicated outside unionized workplaces. When properly understood as a dispute resolution system, one can more readily appreciate that there is a rich set of dispute resolution processes that exist within the collective bargaining process. One can also more readily appreciate that some of those processes can exist outside the traditional unionized workplace. This article has identified the conditions under which such expansion can occur and some of the relevant legal issues.