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I. INTRODUCTION

On a sunny morning in 1997, seven pipefitters working at the Hanford Nuclear Site (Hanford) refused to install a valve in a pipe that would be used to transfer high-level nuclear waste from tank to tank.[1] The workers expressed concerns that the valve was potentially unsafe, asserting that it was not rated to handle the pressure test outlined in the job specifications.[2] After they refused to install the valve, they were sent home and laid off.[3]

The pipefitters filed a complaint with the US Department of Labor (DOL), the agency tasked with adjudicating claims related to whistleblower protections.[4] The workers claimed retaliatory discharge under the federal Energy Reorganization Act (ERA) of 1974.[5] The ERA, as amended, applies to workers employed at commercial and defense sites, including contractors hired by the US Department of Energy (DOE). The pipefitters were employed by DOE contractor Fluor Federal Services. After a DOL investigator ruled in favor of the workers, Fluor agreed to reinstate them.[6]

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1 Annette Cary, *Court Upholds Hanford Pipefitter $4.8M Jury Award*, TRI-CITY HERALD, Sept. 5, 2008, http://www.tri-cityherald.com/2008/09/05/305618/court-upholds-hanford-pipefitter.html.

2 Brundridge v. Fluor Fed. Servs., Inc., 191 P.3d 879, 884 (2008).

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

But in 1998, Fluor again laid off the seven workers, as well as four additional workers who claimed they were targeted for supporting the original group.[7]

The eleven workers filed claims with the DOL alleging retaliatory discharge for the 1998 dismissals, but ultimately withdrew them to pursue their claims in court.[8] In 1999, the eleven workers filed a lawsuit in Benton County Superior Court, alleging wrongful discharge in violation of public policy.[9] In 2008—eleven years after the original incident—the Washington Supreme Court upheld a 2005 jury award of $4.8 million in damages for the workers and $1.4 million in attorney fees.[10] Plaintiffs' attorney Jack Sheridan stated, "[the pipefitters] stood up for safety when everyone else put their heads down for fear of being fired. It took a while, but this decision proves that the system works."[11]

While the eleven pipefitters were vindicated in court, their struggle lasted over a decade and, if the experiences of other high profile whistleblowers are any indication, it surely took a toll on their professional, personal, and financial lives.[12] The lengthy proceedings focused on the legal question of whether these workers were wrongfully discharged, rather than on the policies or practices that gave rise to the original safety concern.[13] For

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[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] Cary, *supra* note 1.
[11] *Id.*
[12] *See, e.g.*, C. FRED ALFORD, WHISTLEBLOWERS: BROKEN LIVES AND ORGANIZATIONAL POWER 1–2 (2001) (summarizing the experiences of whistleblowers interviewed in the book); *id.* at 125–27 (drawing conclusions about why whistleblowers ultimately sacrifice personal and professional relationships); MYRON PERETZ GLAZER & PENINA MIGDAL GLAZER, WHISTLEBLOWERS: EXPOSING CORRUPTION IN GOVERNMENT AND INDUSTRY 3–8 (summarizing the risks that whistleblowers face); *id.* at 239–40 (describing the forces that make "dissent increasingly dangerous").
[13] The DOL is mandated to investigate and make a determination about whether an employee was wrongfully discharged for engaging in a "protected activity," such as raising a safety concern, and whether the employee faced "adverse action" as a result of

workers remaining on the job, this incident and subsequent proceedings can create a "chilling effect," which has been defined as "the unwillingness or reluctance of workers to engage in protected activity (i.e., to raise concerns) because of a fear of retaliation or reprisal."[14] In short, retaliation against the pipefitters for raising a concern seems likely to discourage workers from speaking out about health, safety, or environmental concerns that could result in an accident.

The pipefitters' case could have been resolved through an alternative to the traditional system that federal whistleblower statutes or state laws outline. At Hanford, private contractors and members of public interest groups agreed to establish—with the support of the DOE and elected officials—a council for resolving concerns that operates outside of administrative claims and court proceedings (the Hanford Council, or Council).[15] This alternative approach is different from other forms of mediation or arbitration that are generally available to parties at any point in

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their protected activity. U.S. DEP'T OF LABOR, WHISTLEBLOWER INVESTIGATIONS MANUAL 2–7 (2011), *available at* http://www.osha.gov/OshDoc/Directive_pdf/CPL_02-03-003.pdf. Investigations are carried out by the DOL's Occupational Safety and Health Administration (OSHA). *Id.* at 1–16. The Washington Supreme Court focused on the issue of wrongful discharge in violation of public policy. *Brundridge*, 191 P.3d at 885. The court summarized the legal question as follows: "(1) that a clear public policy exists (the 'clarity' element), (2) that discouraging the conduct in which the employee engaged would jeopardize the public policy (the 'jeopardy' element), and (3) that the employee's public-policy-related conduct caused the dismissal (the 'causation' element)." *Id.*

[14] BILLIE PIRNER GARDE, REPORT TO THE U.S. DEP'T OF ENERGY, AUTHORITY, RESPONSIBILITY, AND JURISDICTION OF THE DOE, EMPLOYEE CONCERNS PROGRAM TO ENSURE EMPLOYEES MAY RAISE CONCERNS WITHOUT FEAR OF REPRISAL 6 n.12 (2000) (on file with author). *See also* U.S. NUCLEAR REGULATORY COMMISSION, NRC ENFORCEMENT MANUAL 26 (Aug. 1998), *available at* http://www.orau.org/ptp/PTP%20Library/library/NRC/NUREG/0195/Ch1-8.pdf (describing a chilling effect as discrimination "broadly defined and should include intimidation or harassment that could lead a person to reasonably expect that, if he or she makes allegations about what he or she believes are unsafe conditions, the compensation, terms, conditions, and privileges of employment could be affected").

[15] *See History*, HANFORD CONCERNS COUNCIL, http://www.hanfordconcernscouncil.org/doc/council_history.htm (last visited Oct. 9, 2012).

the litigation process or that are mandated by labor agreements.[16] The Hanford Council is granted authority to resolve worker concerns through a charter, which serves as a touchstone for the resolution process.[17] Workers are not required to engage in litigation, secure legal counsel, file formal claims, or incur any expense.[18] The resolution process focuses on the circumstances that gave rise to a worker's concern rather than on procedural requirements or legal questions.[19] Although the pipefitters' employer, Fluor Federal Services, was a signatory to the Council's charter in 1997,[20] and the dispute could have been resolved through this mechanism, the case proceeded through the traditional system of administrative adjudication and court proceedings. Comparing this case to those resolved through the Hanford Council, this article proposes that the alternative model does more to further the policy goal of protecting workers who raise concerns than does the traditional model outlined in whistleblower statutes such as the

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[16] *See, e.g.*, JOHN T. DUNLOP & ARNOLD M. ZACK, MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES 53 (1997). "Society now has a growing interst in arbitration a the faster, more economical, and preferred means of resolving employment disputs, particularly as they concern rights protected by state and federal statutes." *Id.* S*ee also id.* at 75 (describing the proliferation of employer mandated arbitration agreements); *id.* at 90 (regarding enforceability).

[17] *See Hanford Concerns Council Charter*, HANFORD CONCERNS COUNCIL, http://www.hanfordconcernscouncil.org/doc/council_charter.htm (last visited Oct. 9, 2012).

[18] *Bringing Concerns to the Council: Questions and Answers*, HANFORD CONCERNS COUNCIL, http://www.hanfordconcernscouncil.org/doc/bring_qna.htm (last visited Nov. 24, 2012).

[19] HANFORD CONCERNS COUNCIL, PROGRESS REPORT 2010 4 (2010), *available at* http://www.hanfordconcernscouncil.org/download/report_progressreport2010.pdf [hereinafter PROGRESS REPORT 2010].

> Unlike adversarial forums for resolving disputes, the Council focuses on preserving an employee's career progress and resolving the underlying issues that gave rise to the dispute. Instead of seeking to assign blame, the process focuses on addressing the underlying safety, health, or environmental concerns and fostering shared goals for a safety-conscious workplace.

Id.

[20] *See* HANFORD CONCERNS COUNCIL, *supra* note 15.

ERA or the litigation options granted in some federal and state statutes.[21]

Implicit in the policy goal of whistleblower protection is a desire to prevent catastrophic accidents that could harm workers, the environment, and members of the public. This article argues that the promise of achieving safe operations by granting formal legal rights to raise concerns in the workplace is best fulfilled through an alternative approach to administrative claims and litigation. Finally, this article suggests that the conditions which gave rise to this alternative model at Hanford are not unique to this site or statute and that lessons learned from the Hanford Council alternative method offer principles to guide similar alternative mechanisms towards similar ends.

To reach these conclusions, Part II of this article reviews the circumstances that gave rise to the formation of the Hanford Council. It identifies the interests of elected officials, agency leaders, private contractors, and public-interest advocates that led these groups to agreement on this alternative model, and proposes a general framework for identifying when interests might align and lead to agreement on an alternative approach. As part of this analysis, Part II provides a theoretical discussion about the intended goals of traditional dispute resolution models, and makes the case that alternative dispute resolution models may be more effective in achieving underlying policy goals in some circumstances.

Part III of the article reviews outcomes achieved by the Hanford Council and suggests theoretical underpinnings that, if followed, may give rise to similar outcomes in different situations. Part IV reviews lessons learned from the Hanford Council. It suggests principles necessary to underpin and

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[21] Eighteen states have enacted public policy exceptions to at-will employment, recognizing that raising concerns is anathema to the public interest. *See generally* THOMAS DEVINE & TAREK MAASSARANI, GOV'T ACCOUNTABILITY PROJECT, RUNNING THE GAUNTLET: THE CAMPAIGN FOR CREDIBLE CORPORATE WHISTLEBLOWER RIGHTS (2008), *available at* http://www.whistleblower.org/storage/documents/RunningTheGauntletpdf.pdf.

sustain alternative models in disputes ranging from hazardous waste cleanup and energy production to natural resource and land use disputes.

II. CHOOSING A MECHANISM FOR DISPUTE RESOLUTION

A. Conditions that Prompted a Shift to an Alternative Dispute Resolution Mechanism at the Hanford Site

The Hanford Nuclear Site, located in the desert of southeastern Washington State, produced plutonium during World War II and the Cold War.[22] Throughout the years of plutonium production, over 25 million cubic feet of solid waste was dumped at the site, and an estimated 400 million gallons of liquid waste was dumped into the soil and groundwater.[23] Currently, 56 million gallons of high-level nuclear waste are stored in 177 underground tanks, awaiting treatment and long-term storage.[24] The DOE is tasked with cleaning up the 586 square-mile site—a challenge that is estimated to cost billions over the next several decades.[25]

As the Cold War came to a close and site operations began to focus on cleanup in the early 1990s, a number of whistleblower concerns made their way to the courts and into the local and national press.[26] Reflecting on this time period, Council Chair Jonathan Brock stated, "lengthy lawsuits, negative newspaper coverage, congressional or state legislative hearings

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[22] *See Hanford History*, WASH. STATE DEP'T OF ECOLOGY, http://www.ecy.wa.gov/programs/nwp/hanford.htm (last visited Dec. 13, 2012).

[23] ROY E. GEPHART, A SHORT HISTORY OF HANFORD WASTE GENERATION, STORAGE, AND RELEASE 8–9 (4th rev..2003), *available at* http://www.pnl.gov/main/publications/external/technical_reports/PNNL-13605rev4.pdf.

[24] *Tank Farms*, HANFORD, DEP'T OF ENERGY, http://www.hanford.gov/page.cfm/TankFarms (last visited Dec. 13, 2012).

[25] Peter Eisler, *Problems Plague Cleanup at Hanford Nuclear Waste Site*, USA TODAY, Jan. 18, 2012, http://usatoday30.usatoday.com/news/nation/environment/story/2012-01-25/hanford-nuclear-plutonium-cleanup/52622796/1.

[26] *See, e.g.*, GLAZER & GLAZER, *supra* note 12, at 171–77 (providing an account of whistleblower Casey Ruud, whose story was covered by the *Seattle Times* and national media, and received attention from members of Congress).

and other embarrassing exposure followed."[27] The coverage and exposure, in turn, seemed to undermine confidence in the government and contractor organizations responsible for site safety or environmental cleanup, and to do so at a substantial cost.[28]

In 1992, the Washington State Department of Ecology invited the University of Washington to conduct a study outlining the feasibility of establishing a forum for alternative dispute resolution.[29] After consulting with the DOE and its contractors, nuclear safety advocates, and elected officials, the University of Washington study recommended a mechanism for resolving individual whistleblower cases, but noted that "a case review mechanism would only be successful if it had legitimacy in the eyes of the broad range of interested parties."[30]

In 1994, with the agreement of all relevant stakeholders, the DOE sponsored the chartering of the Hanford Council—formally known as the Hanford Joint Council for Resolving Employee Concerns.[31] The Council was comprised of representatives of DOE contractors, nuclear safety

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[27] Jonathan Brock, *Full and Fair Resolution of Whistleblower Issues: The Hanford Joint Council for Resolving Employee Concerns, a Pilot ADR Approach*, 51 ADMIN. L. REV. 497, 501 (1999) (providing a detailed account of news coverage and public and political attention to Hanford).

[28] *See* MICHAEL D'ANTONIO, ATOMIC HARVEST: HANFORD AND THE LETHAL TOLL OF AMERICA'S NUCLEAR ARSENAL (1993) (detailing an account of news coverage, and public and political attention paid to Hanford and DE Weapons Complex). S*ee also* Brock, *supra* note 27, at 501.

[29] Betty Jane Narver et al., INST. PUB. POL'Y AND MGMT., UNIV. WASH., *External Third-Party Review of Significant Employee Concerns: The Joint Cooperative Council for Hanford Disputes* (Univ. of Wash. Graduate School of Pub. Affairs, Working Paper No. 93-9, June 1992), *available at* http://www.hanfordconcernscouncil.org/download/council_resources_uwpapers.pdf.

[30] Brock, *supra* note 27, at 507.

[31] *See* HANFORD CONCERNS COUNCIL, *supra* note 15 (describing a history of the evolution of the council). As described later in the article, the Hanford Joint Council briefly ceased operations and reorganized in 2005 as the Hanford Concerns Council. *Id.*

advocates, a former whistleblower, and neutral members.[32] Acceptance of all cases and recommended resolutions would be by consensus only, and, as agreed to in the charter, all recommendations of the Council were "presumptively implemented" by the contractor.[33] In other words, the parties signed an ex-ante agreement to implement all consensus resolutions.

What prompted these parties to agree to an alternative approach to resolving disputes? The following discussion analyzes how each group's interests led to agreement on an alternative forum, and proposes a generalizable framework for identifying when interests may align to form an alternate mechanism for dispute resolution in other circumstances.

1. Elected Officials and Agency Leaders

Both elected officials and agency leaders had an interest in finding a more efficient way to deal with whistleblower complaints. Elected officials were spending time in hearings and answering questions from the press as a result of whistleblower cases in the courts.[34] Stakeholders, such as Hanford workers and nuclear safety advocates, came to elected officials and agency leaders to voice their disagreement about worker protection practices at the site. Elected officials from the state of Washington wanted the site cleaned up, safely and without diverting resources to litigation. In the same vein, DOE agency leaders received scrutiny in congressional hearings and in the local and national press.[35] Given these drawbacks, elected officials from Washington State and agency leaders at the DOE were willing to shift from the traditional system of courts and administrative claims outlined in

[32] *A Membership that Ensures Neutrality*, HANFORD CONCERNS COUNCIL, http://www.hanfordconcernscouncil.org/doc/work_neutrality.htm (last visited Nov. 14, 2012).
[33] *Hanford Concerns Council Charter*, *supra* note 17.
[34] Brock, *supra* note 27, at 507.
[35] *Id.* at 506, 526.

whistleblower statutes to a consensual process.[36]

2. Private Contractors

Contractors hired by the DOE had an interest in developing a system that would resolve concerns with less publicity and expense than the traditional system. Contractors were spending funds on legal fees and management time on responding to subpoenas, congressional hearings, and media requests. Confidence in the contractors' ability to safely conduct the cleanup of the site waned—a potentially costly result when cleanup contracts next came up for bid. In short, these conditions made contractors willing to shift away from a system of administrative claims and court proceedings to an alternative approach.

3. Public Interest Advocates

Public interest advocates supported a system that would increase worker safety while maintaining focus on cleanup operations. Advocates spent significant amounts of time and resources bringing congressional and media attention to these important issues and initiating court proceedings. Yet, although they were often successful in court, they did not believe that individual cases brought about changes in worker protection policies and practices, or they thought the changes were too incremental and slow to protect workers commencing cleanup of the site. Therefore, advocates were also willing to engage in an alternative mechanism that could reduce their costs and potentially further their goals more quickly and efficiently.

In short, each of these groups had an interest in the safe and efficient cleanup of the site and in worker protection. Because all of these groups were dissatisfied with the traditional system, they were willing to try an alternative. This may not be the case in every situation where there are

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[36] *See* HANFORD CONCERNS COUNCIL, *supra* note 15 (providing statements from Washington State elected officials).

repeat interactions among stakeholders around a common issue or at a single site. But the following table suggests a framework for recognizing when interests may align and allow for the development of an alternative approach.

Table 1. Summary of Conditions under which Parties May Select Adjudication or Mediation

Conditions under which Parties May Prefer a Traditional Model of Dispute Resolution	***Conditions under which Parties May Prefer an Alternative Mechanism for Dispute Resolution***
Legislators/Agency Leaders: in situations in which relying on the courts or administrative review helps to achieve broader goals or where public and media attention is desired, elected officials and agency leaders may prefer adjudication by a third party	*Legislators/Agency Leaders:* when traditional means of resolving disputes create unwanted political attention that detracts from broader goals, elected officials and agency leaders may prefer an alternative approach that focuses on mutual goals
Business Interests: in instances where formalized filing and standing procedures and precedent-based decisions are desired, disputants are likely to prefer formal adjudicatory resolution mechanisms	*Business Interests*: when administrative review and litigation heighten the costs of dispute resolution—both in terms of time, legal costs, or even negative publicity—disputants may prefer an alternative approach which can reduce those costs
Public Interest Advocates: in instances where heightened media and political attention to an issue seems likely to help accomplish	*Public Interest Advocates:* if there is (or has been) legislative resistance to change, and if prior litigation efforts have been unsuccessful in

larger goals for changes in policies or practices, public interest advocates are likely to prefer traditional means of dispute resolution	changing underlying policies and practices, public interest advocates may prefer an alternative approach

B. Theoretical Underpinnings of Traditional and Alternative Methods of Dispute Resolution

This section analyzes why the traditional model of administrative adjudication and court proceedings is often the default mechanism for resolving claims or ensuring that policies are implemented as intended. It suggests how and why important decisions are often delegated to a judge or other adjudicative body to resolve disputes, and the potential impact of that delegation on important policy issues. Second, this section suggests why important problems may be left unresolved and why policy goals may remain unfulfilled when dispute resolution authority is delegated to a third party. Finally, it suggests why an alternative to the traditional system of third party adjudication may be more effective for achieving policy goals.

1. Delegating Dispute Resolution Authority

Delegating authority to a third party to resolve a dispute when two parties cannot come to an agreement is an age-old practice. Some scholars argue that delegation of dispute resolution authority is becoming increasingly common due to the emergence of international tribunals, constitutional review courts, and civil litigation where a judicial authority resolves disputes that affect important economic and social policies.[37] The reasons for delegating dispute resolution authority to a third party are many and

[37] *See, e.g.*, Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. POL. SCI. 95, 102 (2008); TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 1–11 (2003).

varied, but include legislators' desire to delegate politically contentious issues to a neutral third party,[38] private corporations' desire for predictable processes and precedent-based outcomes,[39] and advocates' attempts to change accepted norms or values that underlie civil or other rights.[40] Yet, despite these perceived advantages, there are disadvantages to delegating authority to a neutral third party—namely, subjecting the dispute to the standards and values of an outsider and losing control over publicity and outcomes.[41]

Martin Shapiro and Alec Stone Sweet have described the resolution of disputes between two parties as a circular process.[42] In their conception, the circle begins when two disputing parties cannot come to agreement without delegating some authority to a third party to help resolve their differences. In this case, "delegation is likely when, for each disputant, going to a third party is less costly, or more likely to yield a desired outcome, than either breaking the dyadic contract and going it alone, or attempting to impose a particular settlement against the wishes of the other disputant."[43] In other words, a "dyadic" dispute between two parties leads to "triadic" dispute resolution when a third party is introduced.

In the second phase of this process, the neutral third party makes a

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[38] *See, e.g.*, Mark Graber, *The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 61–70 (1993); GEORGE I. LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY xx–xxvi (2003).

[39] *See, e.g.*, MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION 72–78 (2002). The authors' suggest shifting preferences among WTO members away from mediation to formal, written rulings that estalish precedent. *Id.*

[40] *See, e.g.*, CHARLES EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 2–3 (1998); RACHEL A. CICHOWSKI, THE EUROPEAN COURT AND CIVIL SOCIETY: LITIGATION, MOBILIZATION AND GOVERNANCE 6 (2007).

[41] SHAPIRO & STONE SWEET, *supra* note 39, at 69.

[42] *Id.* at 60–65.

[43] *Id.* at 61.

decision that is "concrete, particular, and retrospective."[44] In formal dispute resolution processes, this decision leads to a new "rule" to settle the specific conflict between the parties.[45] Stated differently, this decision sets precedent for future resolutions and mandates compliance through compulsory rulings and resolutions determined by a third party. Thus, this final step in the circular process of individual dispute resolution leads, gradually and incrementally, toward broader changes in governance.[46]

The legal scholars who proposed the conception of a circular process, Shapiro and Stone Sweet, posit that "as the scope and intensity of these interactions increase, so will demand for the adaptation of norms, values, and rules by way of formal dispute resolution. If and when dyadic dispute resolution fails to satisfy this demand, there will be pressure to use TDR [triadic dispute resolution] if a triadic mechanism exists, or to invent such a mechanism if it does not exist."[47]

This hypothetical discussion suggests that disputing parties will turn to a third party to resolve disputes, and, if no default mechanism exists, they will invent one. The following discussion considers how dispute resolution mechanisms are established and when parties are likely to turn to them. It suggests that delegation of dispute resolution authority comes both from the "top down" through legislation and from the "bottom up" (i.e., from members of civil society who seek to have an effect on policy through the courts).

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[44] *Id.* at 64.
[45] *Id.*
[46] *Id.* at 59. Shapiro and Stone Sweet consider governance to be constructed through "strategic behavior: how individual actors conceive and pursue their interest within any given community; policy-making: how values and resources are distributed within any given community; and systemic change: how the normative structure in place in any given community is constructed, maintained and revised." *Id.*
[47] *Id.* at 72.

2. Legislative Delegation

Legislators may delegate decision-making authority to the courts in cases where the issues are politically charged or in instances where government is fractured along party lines.[48] For example, legislators may want to take credit for enacting legislation in response to public pressure on issues such as antitrust or workplace rights, but might lack a coalition to enact specific rules or remedies.[49] In these instances, legislators may delegate authority to resolve disputes in the courts through grants of standing in legislation. Grants of standing allow affected parties to challenge the interpretation or implementation of policies by bureaucratic agencies in court. Under these conditions, legislation establishes a system of third party adjudication that assigns dispute resolution authority to administrative agencies or grants standing to pursue claims in court. In this way, legislators delegate authority to the courts to develop specific rules that set precedent for the resolution of disputes about the intent and implementation of laws.

This delegation of authority provides attractive political cover for elected policymakers, creating a buffer between elected officials and a divided constituency. Although delegation results in legislators' loss of power over decision making, it is not unusual for this tradeoff to be judged a desirable one. As Ran Hirschl notes, there is a "growing reliance on adjudicative means for clarifying and settling fundamental moral controversies and highly contentious political questions[,]" which has "transformed national high courts into major political decision-making bodies."[50] In other words, the "top down" delegation of responsibility to the judiciary, though often attractive to legislators, also results in a delegation of power over important political decisions and the interpretation of legislative intent.

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[48] *See, e.g.*, Graber, *supra* note 38, at 61–70; LOVELL, *supra* note 38, at 41.
[49] *Id.*
[50] Hirschl, *supra* note 37, at 95.

3. Delegation by Disputing Parties

Public interest and business advocates may appeal to legislative, administrative or legal forums to resolve disputes with important social or economic implications. When stakeholders choose to resolve disputes through the courts, we may think of this as delegation of dispute resolution authority from the "bottom up."

Hirschl posits that members of social movements, business groups, and public interest advocates are likely to choose legal over legislative forums when courts are perceived as "more reputable, impartial, and effective decision-making bodies than other institutions, which are viewed as bureaucracy heavy or biased."[51] For example, Shapiro and Stone Sweet observe this "bottom up" shift toward resolving disputes in third party adjudication among international business interests.[52] They note that the World Trade Organization (WTO) established independent panels to help resolve disputes between companies or countries regarding contractual obligations under international trade agreements using a collaborative approach.[53] Yet, the participating countries, presumably at the request of international businesses, enacted laws to formally enforce WTO agreements, and have since moved to a more formal adjudication process.[54] Similarly, Shapiro and Stone Sweet describe a shift in preferences among individual international businesses toward using formal court-like procedures, relying on precedence, and publishing decisions.[55]

Rachel Cichowski observes instances of "bottom up" delegation to a formal authority among public interest advocates engaged in social

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[51] *Id.* at 96.
[52] SHAPIRO & STONE SWEET, *supra* note 39.
[53] *Id.*
[54] *Id.*
[55] *See id.* at 75–78 (discussing the formalization of dispute resolution of international trade agreements under the WTO).

movements.[56] Cichowski describes this as the "litigation dynamic," which is initiated "as a result of strategic action by individuals who are either disadvantaged or advantaged by an available set of rules."[57] In this type of situation, individuals invoke a rule or procedure through a formal claim or court proceeding, which has broader implications for furthering their aims for social change.[58] Cichowski cites a number of examples in which individual claimants have secured additional rights for the environment and women's rights in the workplace through formal adjudication.[59] She concludes that "in any system of governance with an independent judiciary possessing judicial review powers, the judicial decision provides a potential avenue for institutional change."[60]

In general, these scholars and examples suggest that individual judicial rulings can alter the underlying rules and norms that grant civil or other rights. According to Cichowski, individual rulings can effect change both directly, "by creating new legal rights for an individual or group that enables subsequent claims," and indirectly, "by changing the rules and procedures in a way that impacts legislative action and creates a new set of rules that may become the basis for subsequent legal action."[61]

The discussion above suggests several reasons for disputing parties to delegate dispute resolution authority to courts and administrative agencies. Delegation results in increased opportunities for business interests, public interest advocates, and everyday citizens to bring forth formal claims or initiate litigation to ensure policies are implemented as intended. Normatively, these opportunities may be considered be benefits of the traditional system of administrative review and court proceedings. But the

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[56] *See* CICHOWSKI, *supra* note 40, at 8.
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.* at 9.
[61] *Id.* at 12.

following discussion suggests that important policy goals may not be achieved through this traditional system, prompting, in some cases, a shift toward an alternative system.

4. Leaving Problems Unresolved and Policy Goals Unfulfilled

In order to exercise a right, gain a remedy, or effect change through a legal ruling as described in the section above, an individual must first be aware that such right of action is available to them. But legal scholar Susan Silbey notes, "More often than not, as we go about our daily lives, we rarely sense the presence of the law."[62] Further, an individual must have standing, which usually means that he or she must have been negatively affected by another party. In the case of employees who raise a concern about health, safety, or environment within or outside the organization (i.e., a whistleblower), they must prove they have been adversely affected in the workplace as a result of their actions. This means the whistleblower must prove the employer has taken an adverse action as a result of the employee raising a concern that is specifically protected by statute. Finally, the whistleblower must be capable of navigating the system of administrative review or court proceedings, or of employing counsel to do so.

Scholars have noted that grievances or disputes rarely become formal legal claims. Instead of pursuing administrative claims or litigation, studies suggest that would-be claimants may just decide to forego pursuit of their claims.[63] This is particularly true of workers who may be reticent to bring a claim against their employer or assume the role of victim.[64] As the example of the Hanford pipefitters suggests, the process of pursuing a claim through

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[62] Susan S. Silbey, *After Legal Consciousness*, 1 ANN. REV. L. & SOC. SCI. 323, 332 (2005).
[63] *See* Richard Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 525 (1981).
[64] *See generally* KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS (1988).

administrative or legal processes may take years and exact a toll on a worker's financial and emotional resources.

As the pipefitters' example suggests, for every worker who speaks out about a health, safety, or environmental concern, there may be many more who remain silent. Without workers or managers raising concerns outside their chains of command or outside their organizations, serious safety issues may go unaddressed. Silence ultimately defeats the purposes of whistleblower protection laws, which, in the case of nuclear facilities, are intended to prevent injury to workers or the public and avoid environmental damage.

Because all parties at Hanford shared mutual goals for safe operations and a focus on cleanup, they looked toward an alternative dispute resolution system that could focus on those mutual interests, lower the potential risks and costs to concerned workers and their employers, and retain control of the dispute resolution process.

5. Shifting to an Alternative Approach

Disputes resolved through mediation focus on mutual gains and future interactions, and this approach may result in more sustainable solutions and outcomes than a traditional approach. For example, some evidence suggests that disputes resolved through mediation can improve environmental outcomes,[65] resolve labor disputes,[66] and encourage agreement on commercial or industrial developments.[67] As the discussion in this article

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[65] *See, e.g.*, TOMAS M. KOONTZ ET AL., COLLABORATIVE ENVIRONMENTAL MANAGEMENT: WHAT ROLES FOR GOVERNMENT? (2004); EDWARD WEBER, BRINGING SOCIETY BACK IN GRASSROOTS ECOSYSTEM MANAGEMENT, ACCOUNTABILITY, AND SUSTAINABLE COMMUNITIES (2003); JULIA M. WONDOLLECK & STEVEN L. YAFFEE, MAKING COLLABORATION WORK: LESSONS FROM INNOVATION IN NATURAL RESOURCE MANAGEMENT (2000).

[66] DUNLOP & ZACK, *supra* note 16.

[67] *See, e.g.*, LAWRENCE SUSSKIND & PATRICK FIELD, DEALING WITH AN ANGRY PUBLIC: THE MUTUAL GAINS APPROACH TO RESOLVING DISPUTES (1996).

proposes, approaches based on alternative dispute resolution principles offer several possible benefits.

a) Focus on Mutual Goals in the Resolution Process

According to Deborah Hensler, alternative dispute resolution stemmed from a 1960s populist movement that centered on the principle of returning the power to resolve a dispute back to the disputants.[68] The proponents of this movement sought to substitute "mediative processes in which the disputants would fashion a solution to their problem for adjudicative processes that assign control of outcomes to a neutral third party."[69] The consequences of such processes, proponents argued, would be that disputants would "negotiate outcomes more appropriate to their situation, more satisfactory, and more likely to contribute to the continuation of long-term relationships."[70]

Consensual mechanisms also minimize the influence of an outside party's standards, values, and knowledge (or lack thereof) of the specific circumstances or technical issues involved in the dispute.[71] As Hensler suggests above, the mediation mechanism can help parties identify mutual interests and maximize the use of local knowledge that could contribute to a solution agreeable to both parties.[72]

b) Reduce Risks and Costs

Other benefits of the alternative dispute resolution process are lower risks and lower costs of resolution.[73] Formal adjudicative processes usually

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[68] Deborah R. Hensler, *Science in the Court: Is There a Role for Alternative Dispute Resolution?*, 54 LAW & CONTEMP. PROBS. 171, 178 (1991).
[69] *Id.*
[70] *Id.*
[71] *Id.* at 173–74.
[72] *See id.* at 178.
[73] *E.g.*, Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 2 (1995).

require legal assistance and are often protracted due to court capacity and lengthy appeals processes.[74] Some scholars caution that the high costs of court participation and the potential for delays may create unfair barriers to entry for citizens or public interest groups, discouraging those with legitimate claims from bringing them forward.[75] In the case of whistleblowers, the availability of a lower cost and lower risk alternative may encourage those who might otherwise stay silent to speak out.

c) Sustainable Outcomes

Agreements reached through alternative dispute resolution are less likely to be appealed and more likely to be implemented than resolutions reached through the traditional system.[76] Alternative dispute resolution may also increase trust and reciprocity in future interactions between disputing parties. In that sense, alternative dispute resolution processes could accelerate the circular process of normative change envisioned by Shapiro and Stone Sweet (and do so through a consensual approach to dispute resolution, rather than through precedent and rule change handed down by a third party). As discussed below, the Hanford example shows that resolving individual disputes in a consensual process may result in an agreement to examine and change the policies that initially gave rise to the dispute.

III. OUTCOMES OF AN ALTERNATIVE APPROACH

The discussion below evaluates the outcomes achieved through the alternative dispute resolution approach at Hanford. It seeks to compare and contrast the outcomes that might be reached through the traditional system (i.e., formal claims and litigation) and the alternative, consensual approach

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[74] *See* MARC GALANTER, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 119–25 (1974).
[75] *See, e.g.*, EPP, *supra* note 40, at 25; GALANTER, *supra* note 74, at 119–25.
[76] *See generally* Shavell, *supra* note 73.

taken by the Hanford Council. This comparison proves challenging, as public records are accessible for formal court proceedings, but not for Council cases, which are protected under mediation proceedings as outlined in the Revised Code of Washington.[77] As such, the comparisons in this article rely upon public records, reports published by the Hanford Council, and media accounts.

A. Retaining Control over the Resolution

As described in the introduction, the pipefitters' underlying concerns about a Hanford manager's disregard of safety specifications went unresolved as they proceeded through the traditional process of depositions, court hearings, and appeals. Because the adjudicatory process turns the decision-making authority over to a DOL investigator or judge, the resolution usually focuses on legal questions, such as wrongful dismissal and appropriate remedies. The adjudicator gains control over the resolution, and the resolution process generally discourages disputing parties from talking directly to each other or to the investigator.[78] The shift of control fails to resolve the underlying problem that gave rise to the concerns.[79] This is particularly troubling if workers perceive that serious health, safety, or environmental concerns may ultimately go unresolved even if they raise these concerns.

One of the primary benefits of the Hanford Council process is its focus on resolving the underlying health, safety, or environmental concern rather than assigning blame. Such a focus meets the interests of all parties by establishing a resolution mechanism for disputes that "represent[] an

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[77] WASH. REV. CODE § 42.56.600 (2006).

[78] *See* OCCUPATIONAL SAFETY AND HEALTH ADMIN., WHISTLEBLOWER INVESTIGATIONS MANUAL 3-15 to -17 (2011) (discussing representation by legal counsel).

[79] Shavell, *supra* note 73, at 8 (regarding parties learning more from each other during an ADR resolution process than through litigation).

important public policy concern, namely that whistleblowers be able to express their views and have issues addressed without retaliation."[80]

B. Costs to Resolving Disputes

The eleven workers in the pipefitters' case were ultimately awarded $6.2 million, including reimbursement for legal fees.[81] The award represents an average cost per employee of over $500 thousand, but does not include the funds spent by the contractor on legal fees or the cost of the time spent by management preparing for depositions and court hearings.[82] Records obtained through public disclosure show that a sampling of cases "resolved through litigation or settlement in the late 1980s and early 1990s cost taxpayers an average of $500,000 in contractor legal fees and $60,000 to $600,000 in settlements or awards."[83]

In contrast, the Hanford Council process has a record of much smaller awards and expenses, aided in part by faster resolution times.[84] As Council Chair Jonathan Brock noted, "[t]he average cost of a Council case resolution is about $33,000, about one-sixteenth of the direct legal costs of the cases that gave rise to its creation, even if the other direct and indirect costs and settlement costs are excluded."[85]

For the contractors, the most significant cost savings may be in the indirect costs of management time spent on litigation. Within the traditional system, "[f]or the companies, the indirect costs in management time . . . [were] measured in months, and the issues lingered for years."[86] Using the

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[80] Brock, *supra* note 27, at 525.
[81] Cary, *supra* note 1.
[82] *Id.*
[83] Brock, *supra* note 27, at 499–500.
[84] *See Taxpayer Benefit*, HANFORD CONCERNS COUNCIL, http://www.hanfordconcernscouncil.org/doc/work_benefit.htm (last visited Nov. 24, 2012).
[85] Brock, *supra* note 27, at 499.
[86] *Id.* at 525.

Hanford Council system, however, "cumulative management time can be measured in days and the diversion from corporate obligations to site operations is negligible. The reputation of supervisors and managers—and public confidence in the company or the government—are no longer affected by motions, depositions, news stories, or periodic legislative inquires."[87]

Whistleblowers benefit from the legal assistance and sense of legitimacy that public interest groups provide.[88] Savings in terms of time and legal fees are also an important consideration for advocates, particularly if they are able to advance their larger goals for improved safety through a less expensive alternative mechanism.

C. Building Trust over Time

The development of trust over time, through repeat interactions and successful case resolutions, has benefited disputing parties and fostered long-term working relationships.[89] Yet trust has not always been a constant in the Hanford Council. With a change of contractors, the original Hanford Council—the Hanford Joint Council—was dissolved in 2003, after having resolved over fifty cases over the prior nine years.[90] The new contractor did not have a shared history of trust, nor had it experienced the conditions that prompted its predecessor to originally sign the Hanford Council charter.[91]

But after only a year of relying on the traditional adjudicatory system to resolve disputes, the CEO of the new contractor, with the support of the

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[87] *Id.* at 503.
[88] *See, e.g.*, GLAZER & GLAZER, *supra* note 12, at 59, 170.
[89] PROGRESS REPORT 2010, *supra* note 19, at 6.
[90] HANFORD CONCERNS COUNCIL, PROGRESS REPORT 2007 3 (2007), *available at* http://www.hanfordconcernscouncil.org/download/report_progressreport2007.pdf [hereinafter PROGRESS REPORT 2007].
[91] *See* Brock, *supra* note 27, at 527–28.

DOE, initiated a process to reinstate an alternative mechanism.[92] In June 2005, the Hanford Concerns Council, modeled after the prior Hanford Joint Council, opened its doors for business.[93] Some individuals who served as members of the Hanford Joint Council have become current members of the Hanford Council, and the cycle of building trust and long-term working relationships continues.[94]

The Hanford Council's 2007 progress report describes this cycle,

> Employees' trust in the Council and its processes ultimately extended to the company representatives and managers, furthering DOE's goals for the human performance initiative, which encourages open examination of operations and feedback. The increased trust, improved problem solving, and openness have contributed to a safety conscious work environment and translated directly to on-the-ground results.[95]

In fact, the outcomes of cases, and the processes for resolving them, appears to have accelerated the rate of normative change in worker protection practices. For example, in 2007, the government contractor and nuclear safety advocates on the Hanford Council commissioned a joint-sponsored study of the scientific underpinnings of the worker protection practices at the Hanford tank farms.[96] The parties signed a memorandum of understanding, and after a nationwide search, the Council selected a small panel of experts to conduct the review.[97] The experts were tasked with

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[92] *New Independent Council to Resolve Wishtleblower Concerns*, HANFORD CONCERNS COUNCIL (June 27, 2005), http://www.hanfordconcernscouncil.org/download/press_release20050627.pdf.
[93] *Id.*
[94] PROGRESS REPORT 2007, *supra* note 90, at 3.
[95] *Id.* at 11.
[96] *See* Press Release, Hanford Concerns Council, Independent Panel Reviews Technical Basis for Worker Protection Practices at Hanford Tank Farms (Sept. 29, 2008), *available at* http://www.hanfordconcernscouncil.org/download/press_release20080929_techreport.pdf.
[97] *Id.*

determining whether worker protection practices were consistent with industry best practices for setting exposure limits, and whether those limits were sufficiently conservative to be protective of workers.[98]

As often happens in questions of environmental or public health protections, the parties learned that scientific certainty, particularly in a relatively unique and complex setting like Hanford, relies upon underlying assumptions and contains many caveats; and, where the science ends, value judgments begin.[99] For example, the evidence prompted questions, such as, what is an acceptable level of uncertainty about the potential for unintended worker exposures?[100] The Council has proven to be an ideal place for those discussions to take place and to effect changes in worker protection practices.[101]

D. Legitimacy Embedded in the Dispute Resolution Process

Working on broad policy questions (such as worker safety practices) through a representative forum lends more legitimacy to outcomes than a court decision in an individual dispute. An alternative forum lends legitimacy in several ways. First, decisions emerging from a representative forum may be more legitimate than those emerging from a more traditional forum, such as a court or administrative agency, because they are decided within a context that seeks to resolve the underlying concern, unlike individual court cases or administrative claims, which are adjudicated based

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[98] *Id.*

[99] *See, e.g.*, DAVID MICHAELS, DOUBT IS THEIR PRODUCT: HOW INDUSTRY'S ASSAULT ON SCIENCE THREATENS YOUR HEALTH (2008); Wendy Wagner, *The Perils of Relying on Interested Parties to Evaluate Scientific Quality*, 95 AM. J. OF PUB. HEALTH S99 (2005).

[100] *See* PATRICK N. BREYSSE ET AL., THE INDUSTRIAL HYGIENE CHEMICAL VAPOR TECHNICAL BASIS REVIEW REPORT (June 2008), *available at* http://www.hanford concernscouncil.org/download/report_techreviewfinal_20080929.pdf.

[101] Annette Cary, *Review Helps Hanford Workers With Vapor Protection*, TRI-CITY HERALD, Oct. 29, 2010, *available at* http://www.hanfordconcernscouncil.org/download/ press_tricityherald20101029.pdf.

on the legal question at hand.

Second, decisions made within the scope of the Hanford Council's task must be reached through consensus and implemented per the charter agreement. Although the Charter provides some exemptions for "presumptive implementation" (such as if the consensus agreement violates a DOE rule), and allows the whistleblower to reject the Council's decision, all cases resolved by the Council have been implemented to date. This history suggests that decisions reached through a consensus process, such as the Council's, are less likely to be appealed. In contrast, the pipefitters' case wended through the appellate courts until a decision was finally handed down from the Washington Supreme Court eleven years after the incident. The pipefitter's case resulted in multiple appeals while the Council process has resulted in recommendations that are implemented per an ex-ante agreement. The Council process and consensus agreements have a record of successful implementation, and suggestions for improving worker protection practices are usually incorporated.[102] In sum, the consensus process and ex-ante agreements, such as the charter and memoranda of understanding, have led to the successful resolution of dozens of cases and changes in worker protection practices.

E. Sustainability of the Process and Mutually Agreeable Decisions

Perhaps the most significant benefit of the Hanford Council's alternative dispute resolution process is that it draws upon and furthers the mutual interests of all parties for the safe and efficient cleanup at Hanford. Because the process prompts a problem-solving focus rather than blame-assigning focus, the energies of all parties are directed at seeking mutual gains.

Cases that utilize the adjudicatory mechanism can take years or decades

[102] Editorial, *Council Ensures that Mediation Beats Litigation*, TRI-CITY HERALD, Aug. 12, 2008, *available at* http://www.hanfordconcernscouncil.org/download/press_tricityherald20080812.pdf.

to resolve,[103] but the contention and mistrust they engender lasts far longer. Cases resolved using the Council mechanism allows for learning by managers of private contractors, which almost always results in system changes designed to correct underlying problems.

As the Hanford Council's review of worker protection practices demonstrates, long-term trust and relationships can lead to broader problem solving. The Council's 2007 progress report affirms this notion, asserting that "[t]he interactions generated improved and productive problem-solving capabilities that will outlast the case resolution process."[104] In short, the kind of circular process for normative change envisioned by Shapiro and Stone Sweet is sustained, or even accelerated, through this alternative process.

The following table summarizes some of the potential outcomes of traditional and alternative approaches to dispute resolution:

Table 2. Summary of Potential Outcomes Resulting from Traditional Third Party Adjudication and Alternative Approaches

Potential Consequences of Formal Third Party Adjudication	***Potential Consequences of Consensual Resolution***
Control: resolution process is subject to the standards, values, expertise, and judgment of a third party, and often encourages polarized viewpoints rather than mutual interests	*Control*: resolution process allows for application of local knowledge, identification of mutual interests of the parties, and solutions appropriate for the situation

[103] *See generally* Annette Cary, *Hanford Concerns Council Open for Business*, TRI-CITY HERALD, June 28, 2005, *available at* http://www.hanfordconcernscouncil.org/download/press_tricityherald20050628.pdf.
[104] PROGRESS REPORT 2007, *supra* note 90, at 9.

Costs: disputants face potentially increased costs in terms of time and legal fees, which some may argue discourages bringing legitimate disputes before a third party adjudicator	*Costs:* disputants will pay potentially lower costs to participate in consensual forums, which some may argue encourages disputants to bring disputes forward that might otherwise be resolved dyadically
Trust: because the third party adjudication system encourages polarized viewpoints, there is little opportunity to build trust or relationships that can help resolve future disputes	*Trust:* because the disputants work together with the help of a third party, they often develop trust and norms which contribute to long-term working relationships and an ability to resolve future disputes
Legitimacy: since courts are often considered to be anti-majoritarian, as well as influential in important public policy issues via decisions rendered in individual cases, outcomes of adjudicatory processes can be criticized as illegitimate	*Legitimacy:* since participants in the resolution process may include more than just the disputing parties themselves, the outcomes are often seen as more legitimate, especially if the resolution has broader policy implications
Sustainability: because the disputing parties leave the final decision to a third party, they may be more likely to appeal a decision unfavorable to them or to refuse to implement the decision	*Sustainability:* because the disputing parties work together to develop solutions, the outcomes are more likely to be implemented without appeal or resistance

V. PRINCIPLES THAT MAY BE APPLIED IN ESTABLISHING ALTERNATIVE APPROACHES IN OTHER SETTINGS

This article has explored conditions which may prompt a shift away from a traditional system of adjudication to an alternative mechanism for dispute resolution, as well as the potential consequences of such a shift. The Hanford Council example suggests that an alternative approach offers a number of beneficial outcomes that are often difficult to quantify, but that may accomplish a greater fulfillment of policy goals to protect workers and prevent accidents. The lessons learned from this example may help policymakers and stakeholders recognize when an alternative approach might work in addressing situations that involve repeat players in an ongoing dispute or struggle to effect change. These kinds of situations might include cleanup efforts at other toxic waste sites, production or transport of oil, or public safety issues, such as transportation or emergency preparedness.

Rather than prescribing specific arrangements that may apply in these situations, this article outlines principles that could provide a foundation for constructing an alternative approach. These principles are derived both from lessons learned at the Hanford site, as well as the literature on dispute resolution.

A. Focus on Mutual Gains

The Hanford example and the alternative dispute resolution literature suggest that an alternative mechanism should recognize the parties' interests in terms of their goals.[105] If these interests are not being met using the traditional system of administrative claims or court proceedings, or if they

[105] *See, e.g.*, ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1991) (discussing the benefits of alternative dispute resolution); GERALD W. CORMICK, BUILDING CONSENSUS FOR A SUSTAINABLE FUTURE: PUTTING PRINCIPLES INTO PRACTICE (1996); LAWRENCE SUSSKIND ET AL., THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT (1999).

could be better met by an alternative system, then conditions are ripe for the formation of a consensual mechanism.

A focus on mutual interests is also supported by the notion of the "rational actor," which suggests that individuals will seek to maximize their own interests. Institutional scholars have built upon the concept of a rational actor, and those embracing the "rational institutionalist" model posit that the relevant actors within an organization "have a fixed set of preferences or tastes, behave entirely instrumentally so as to maximize the attainment of these preferences, and do so in a highly strategic manner that presumes extensive calculation."[106] In other words, the rational institutionalist model, which expands from the individual to institution, suggests that organizations will originate and sustain based on "the value those functions have for the actors affected by the institution."[107] In sum, this view suggests that organizations are most likely to shift toward an alternative mechanism if key actors believe it is most likely to facilitate the achievement of organizational goals.

A new mechanism should also be responsive to the conditions and concerns that gave rise to it. A history of past interactions shaped the perceptions and preferences of each actor in the Hanford example, and led to the embrace of an alternative mechanism. Since every situation involving ongoing conflict and historical contention will be different, consideration of the unique histories and perceptions of disputants will be important when establishing a charter or an ex-ante agreement. The Hanford Council has been successful in large part because advocates agreed to refer cases to the alternative mechanism and contractors agreed ex-ante to implement recommendations.

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[106] Peter Hall & Rosemary Taylor, *Political Science and the Three New Institutionalisms*, 44 POL. STUD. 936, 944–45 (1996).
[107] *Id.* at 945.

B. Foster Reciprocity

Reciprocity can be fostered by "enlarging the shadow of the future" or "increasing the possibility and importance of future interactions."[108] This conception suggests that if disputing parties see the resolution of an individual dispute not as a single transaction, but as part of a series of repeat interactions, they will place greater emphasis on resolving disputes in a way that preserves their ability to resolve future disputes. In a formal adjudicatory setting, the shadow of the future is short, as the parties are likely to meet only in the courtroom. In the case of whistleblowers, this meeting often comes after working relationships have been severed and the parties have no expectation of working together in the future. An adjudicatory forum prompts the presentation of polarized views and a focus on narrow legal questions, with little focus on problem solving or future interactions.

One way to lengthen the "shadow of the future" is to concentrate interactions "so that relationships are built among small groups within the organization."[109] This concentration of interactions holds true of the model designed at Hanford, where delegates from the contractor and advocacy community serve three-year appointed terms on the Council, creating the opportunity and expectation of repeated interactions. By establishing an alternative forum that ensures ongoing interactions, such as individual dispute resolutions, parties are encouraged to understand the perspectives that contractors, advocates, and neutral members bring to the table. In fact, the Hanford Council experience suggests that these differing worldviews can contribute to a greater understanding between disputing parties and to a greater capacity for resolving disputes.[110] The ex-ante agreement and

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[108] ROBERT AXLEROD, THE EVOLUTION OF COOPERATION 129 (Basic Books 2d ed. 2006).
[109] *Id.*
[110] *See, e.g.*, *A Membership that Ensures Neutrality*, *supra* note 32.

consensus requirement prompt not only understanding, but efforts to find mutually beneficial resolutions. In this way, trust and working relationships established through the Council process have led to ongoing reciprocity as described above, lengthening the shadow of the future.

C. Assure Predictability

Ex-ante agreements, charters, or rules of engagement that ensure predictable interactions are an important principle for an effective consensual mechanism. Written agreements can help ensure sustainability over time through predictable provisions for reaching resolution and implementing consensual decisions, and future adaptations. According to Peter Hall and Rosemary Taylor, such agreements can sustain institutions "by helping to identify the present and future behavior of other actors based on their preferences."[111] Hall and Taylor emphasize that "the institution enforces agreements and penalizes defections. In sum, institutions inform the individuals' strategic decisions by providing some certainties about the strategies that other actors might employ."[112]

By following the principle of encouraging cooperative behavior through agreements, charters, procedures, or rules of engagement, parties can predict when and under what circumstances their interests might be met in a consensual process. At Hanford, assurances (such as criteria for accepting a case), consensus on resolutions, and "presumptive implementation" of Council resolutions are embodied in the Council charter,[113] offering a degree of predictability for how others will participate in the resolution process. As a result, the Hanford Council mechanism (with the exception of a brief interruption due to a change of contractors) has sustained for nearly fifteen years, resolved over sixty cases, and improved safety for workers at

[111] Hall & Taylor, *supra* note 106, at 939.
[112] *Id.*
[113] *See Hanford Concerns Council Charter*, *supra* note 17.

the nuclear site.[114]

D. Ensure Legitimacy

Those skeptical of mediation might argue that closed-door negotiations lack legitimacy. They might be concerned that agreements are not publicly available. Settlements achieved in this way do not set precedent for future cases, and will not contribute to rule change that ultimately affects future resolutions and broader governance. Therefore, it is important to consider the perceived legitimacy of a resolution process that affects broader public policy issues, such as worker safety and whistleblower protections.

On the other hand, resolution through the traditional system of administrative filings and court proceedings can also be criticized as lacking legitimacy. For example, critics might suggest that rulings that affect future interactions and broader governance are best achieved through the legislative branch rather than through the courts.[115] In other words, critics might suggest that court adjudication represents de facto policy making through an anti-majoritarian mechanism.[116]

The Hanford Council addressed potential concerns about legitimacy by including repeat players in the resolution process of individual disputes in situations where there was ongoing conflict. Those most likely to be concerned with the legitimacy of an outcome are included. Further, resolutions that emerge from an alternative process are not construed as "creating law."

Concerns about legitimacy should be addressed during the formation of an alternative mechanism. If concerns about legitimacy are not addressed, disputing parties may not be willing to use the system or accept its resolutions. Parties outside the process must also view the system as

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[114] *See generally* PROGRESS REPORT 2010, *supra* note 19.
[116] Martin Shapiro, *Judges as Liars*, 17 HARV. J. L. & PUB. POL'Y 155 (1994).
[116] *Id.* at 156.

legitimate. If a forum for resolution does not have legitimacy, either through statutory grants of authority (in the case of administrative adjudication or court proceedings) or agreement among stakeholders (in the case of a consensual mechanism such as the Hanford Council), then those outside the process may not accept a resolution or its influence on future interactions.

One way to help assure perceptions of legitimacy is to ensure that all perspectives are represented in an established consensual mechanism. This principle has thus far defrayed any criticism of illegitimacy at the Hanford site, particularly in outcomes that affect broader policies for worker protection.

VI. CONCLUSION

This article has examined traditional and alternative systems for resolving disputes, their theoretical underpinnings, and their potential outcomes. Building upon the example of whistleblower concerns at the Hanford Nuclear Site, this article has shown that an alternative form for resolving workplace concerns and disputes has effectively furthered the policy goal of protecting workers who raise concerns. Although this example has focused on a specific site and type of dispute, the lessons learned from the Hanford Council may be broadly applicable.

The Hanford Council illustrates that an alternative approach based upon a consensual process can achieve the same ends as third party adjudication while at the same time allowing for a focus on problem-solving and future interactions. For example, the Hanford Council has provided an alternate venue for raising concerns while meeting the interests and mutual goals of the parties. For elected officials and agency leaders, the Council offers political cover by keeping highly polarized cases from leading to congressional hearings and media broadcast. Public interest advocates have benefitted from a lower cost forum that offers an opportunity to effect change in policies and practices that affect worker safety at the site.

Additionally, the Hanford Council has met the needs of parties concerned

about predictable processes by using ex-ante agreements. It has prompted accelerated normative change by focusing on problem solving and larger policy implications. By participating in the consensus process, representatives from both the contractor and the advocacy communities have lent legitimacy to Council resolutions.

Perhaps most importantly, the Hanford Council has lowered the cost and risk threshold for workers who wish to raise a concern. Workers at the site are not faced with a choice of remaining silent or engaging in a decade-long court battle if their concerns are not well received. The availability of this alternative helps to make real the rights granted to workers in ERA's whistleblower provisions and helps to ensure that serious concerns can be heard and resolved by company leadership. In this latter respect, an alternative approach helps to further the goal of accident prevention that is implicit in whistleblower protection laws.

This article has provided a framework for recognizing when an alternative approach might be used to resolve ongoing disputes at other sites. This could include other commercial and defense nuclear facilities, or sites that produce and ship oil, manufacture chemicals, or mines. This article proposes a set of principles upon which alternative mechanisms might be established—mechanisms that allow for concerns to be raised and dissenting voices to be heard in decision processes that govern hazardous sites or activities. The principles upon which an alternative dispute resolution mechanism might be built—a focus on mutual interests and a commitment to fostering reciprocity, creating predictability, and ensuring legitimacy—may not only bring about resolution of existing disputes, but may also shape the course of future interactions and dispute resolutions.