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DISPUTE SYSTEM DESIGN AND BIAS IN DISPUTE RESOLUTION

Lisa Blomgren Amsler, Alexander B. Avtgis, and M. Scott Jackman*

ABSTRACT

This article examines the role of mediator race and gender in perceptions of procedural justice as measure of accountability and representative bureaucracy in a national mediation program for complaints of employment discrimination at a large federal organization, the United States Postal Service. Mediation represents a forum of accountability in which employees may hold an employer accountable for violating federal law prohibiting forms of employment discrimination, in this case, race discrimination, sex discrimination, and sexual harassment. Representative bureaucracy theory suggests passive or symbolic representation when the demographics of public officials should mirror those of the public they serve. Some research suggests active representation when race or gender of a public official match those of a member of the public. During the period 1997-99, mediation exit surveys collected information about the nature of an employee's claim. Using the nature of the claim as a proxy variable for a claimant's race or gender, researchers examine complainants' perceptions of mediation when the nature of the claim matches the demographics (race or gender) of the mediator. In this exploratory research, analyses show no statistically significant difference in satisfaction with the fairness of mediation process or mediator based on race of the mediator in race discrimination claims. However, there is statistically significantly lower satisfaction with mediation outcome based on mediator race as African American when it matches the nature of the claim of race discrimination. In all analyses of sex discrimination and sexual harassment claims, there are no statistically significant differences in satisfaction with the mediation process,

mediator, or outcome when the mediator is female, although findings are borderline as to sexual harassment claims. These findings suggest the need for further research on accountability and bureaucratic representation in the diversity of mediator rosters. In addition, researchers need to control for the dispute system design and context within which mediation occurs.

INTRODUCTION

INSPIRED by the landmark work of Professor Richard Delgado,[1] this symposium addresses evidence of informal dispute resolution's impact, for good or ill, on people of color, women, and people with less power in society. Do informal legal processes such as mediation disadvantage these communities?[2] Individual cases of mediator or arbitrator bias are notoriously difficult to detect, measure, and prove. Systemic patterns of bias may appear in quantitative studies of outcomes but present challenges as to causation. How do we address the issue of bias in dispute resolution?

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1. *See generally* Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee & David Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution,* 1985 Wis. L. Rev. 1359 (1985).

2. *See generally* Richard Delgado, *Conflict as Pathology: An Essay for Trina Grillo*, 81 Minn. L. Rev. 1391 (1997); Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 Va. L. Rev. 95 (1990).

Focusing on mediation in employment, this article approaches bias in dispute resolution through three academic literatures: dispute system design (DSD), accountability, and representative bureaucracy. First, we argue that scholars need to approach questions of bias in the context of the system in which people experience dispute resolution. When an employer constructs or selects a roster of mediators or arbitrators, this is a system design choice as to process or structure, an element of the Analytic Framework of DSD.[3] Another question in the Analytic Framework is how to make the system accountable to participants.[4] Procedural justice provides a frame through which to consider accountability as to the mediator's performance. The system's design and roster composition present questions of bureaucratic representativeness. Do the mediators on the roster reflect the composition of the workforce that uses the system? By examining accountability and representativeness in the context of a system's design, we approach bias in conflict resolution with more empirical rigor.

Using accountability theory and representativeness, this article analyzes a sample of data from the United States Postal Service (USPS) REDRESS Program, a mediation program for employment disputes, to address these questions. First, we review DSD and the design of REDRESS. Second, we review public affairs literature on accountability, arguing that procedural and distributive justice provide appropriate empirical measures. Third, we examine public affairs literature on representative bureaucracy and the impact of representativeness on program outcomes. Finally, we attempt to examine empirically the following questions: When an employee agrees to mediate their complaint of race or sex discrimination in employment, what impact does the race or gender of the mediator have on their perceptions? If the mediator's race or gender matches the nature of the complaint in a case of race (African-American or black) or sex (female) discrimination, and thus by inference matches that of the complainant, does this affect the complainant's perceptions of procedural justice? Using complainant perceptions of mediation fairness, mediator fairness, and satisfaction with outcomes in the USPS REDRESS program, we examined whether it affects a mediation participant's judgments when the mediator's race or gender match the nature of the claim or purview of an employee's complaint in race discrimination, sex discrimination, or sexual harassment cases.

I.   DISPUTE SYSTEM DESIGN AND THE USPS REDRESS PROGRAM

DSD is the applied art and science of designing the means to prevent,

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3. Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute System Design*, 14 Harv. Negot. L. Rev. 123, 129–33 (2009) (publishing the first version of the analytic framework with five elements: goals; stakeholders; processes and structure; resources; and success and accountability).

4. *Id.* at 132.

manage, learn from, and resolve streams of disputes or conflict.[5] "A conflict, issue, dispute, or case submitted to any institution for managing conflict, including one labeled alternative or appropriate dispute resolution (ADR), exists in the [institutional] context of a system of rules, processes, steps, and forums."[6] DSD treats dispute resolution in context, as a process step in a system rather than as a single case with standalone processes, such as mediation, arbitration, or litigation. This section addresses an overview of DSD and applies it to the USPS REDRESS program.

A. Dispute System Design

DSD emerged from the dispute resolution field when researchers began looking at effective conflict management as a system of practices and processes.[7] Ury, Brett, and Goldberg provided the term DSD, asserting dispute resolution processes within the system will function better for the stakeholders if they focus on interests or basic human needs, use rights-based processes (e.g., arbitration) only as a fallback upon impasse, and preferably avoid using power (e.g., strikes, war) if possible.[8] Much DSD literature focuses on design choices in the organizational context, in relation to external systems,[9] and evolved toward integrative approaches.[10] Early work on DSD focused on implementing new systems in federal agencies and private sector companies. Costantino and Merchant were leaders in implementing the Administrative Dispute Resolution Act

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5. CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS (1996); WILLIAM L. URY, JEANNE M. BRETT & STEPHEN B. GOLDBERG, Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict (1988); Smith & Martinez, *supra* note 3, at 126.

6. Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL. 1, 2 (2008).

7. *See generally* DAVID W. EWING, JUSTICE ON THE JOB: RESOLVING GRIEVANCES IN THE NONUNION WORKPLACE (1989); DOUGLAS M. MCCABE, CORPORATE NONUNION COMPLAINT PROCEDURES AND SYSTEMS: A STRATEGIC HUMAN RESOURCES MANAGEMENT ANALYSIS (1988); Mary Rowe, *Dispute Resolution in the Non-Union Environment: An Evolution Toward Integrated Systems for Conflict Management?*, *in* WORKPLACE DISPUTE RESOLUTION: DIRECTIONS FOR THE 21ST CENTURY 79 (Sandra E. Gleason ed., 1997); Mary P. Rowe & Michael Baker, *Are You Hearing Enough Employee Concerns?* 62 HARV. BUS. REV., May–June 1984, at 127 (examining multiple features, options for resolution processes, access channels, and organizational supports that increase accessibility and confidence in an organization's conflict management); Mary P. Rowe, *The Non-Union Complaint System at M.I.T.: An Upward-Feedback Mediation Model*, ALTERNATIVES TO HIGH COST LITIGATION, Apr. 1984, at 10.

8. URY, BRETT, & GOLDBERG, *supra* note 5, at 3–19.

9. *See* KARL A. SLAIKEU & RALPH H. HASSON, CONTROLLING THE COSTS OF CONFLICT: HOW TO DESIGN A SYSTEM FOR YOUR ORGANIZATION (1998).

10. For a review, see John P. Conbere, *Theory Building for Conflict Management System Design*, 19 CONFLICT RESOL. Q. 215 (2001). Integrated approaches include key features such as being accessible to all people for dealing with the full range of problems in the organization; accepting of dissent and encouraging of resolution at lower levels; many ways to access the system; a variety of resolution choices; and support structures and processes that fully integrate the system into the organization.

(ADRA) of 1990 and 1996[11] in the federal public sector and applied organizational development theories to DSD advocating purposeful and strategic design and evaluation of conflict management systems.[12] Agencies have applied DSD at the federal, state, and local levels.[13]

Lipsky, Seeber, and Fincher developed a framework for analyzing organizational conflict management choices by grouping variables into environmental factors or organizational motivations that together give rise to a conflict management strategy to contend, settle, or prevent workplace conflict.[14] They recommended that organizations employ a wide variety of internal methods such as ombudspersons, peer mediators, resolution facilitators, hotlines, and peer panels. Best practices permit systems that accept dissent and encourage resolution at lower levels. Contemporary conflict management systems include choices from preventative and early problem solving, open door policies, coaching, negotiation, and ombudsman support, to formal, rights-based solutions, like arbitration and peer adjudication.[15]

DSD refers to both a process and an outcome. In the Analytic Framework for DSD, Smith and Martinez propose examining a system's goals, stakeholders, processes and structure, resources, success and accountability,[16] context, and culture.[17]

B.   DSD in the USPS REDRESS Program

In elements of the Analytic Framework for DSD, culture and context include the legal and institutional framework within which a design operates. "The national REDRESS program provides mediation for equal employment opportunity (EEO) disputes involving [USPS employee] complaints of discrimination under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Reha-

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11. 5 U.S.C. §§ 571–584 (1996).

12. *See* Costantino & Merchant, *supra* note 5. In a special issue in memory of Christina Sickles Merchant, see David B. Lipsky, *The Future of Conflict Management Systems,* 33 Conflict Resol. Q. S27 (Supp. 2015).

13. *See* Jeffrey M. Senger, Federal Dispute Resolution: Using ADR with the United States Government (2004); Lisa B. Bingham & Charles R. Wise, *The Administrative Dispute Resolution Act of 1990: How Do We Evaluate Its Success?*, 6 J. Pub. Admin. Res. & Theory 383, 385 (1996); Tina Nabatchi, *The Institutionalization of Alternative Dispute Resolution in the Federal Government*, 67 Pub. Admin. Rev. 646, 646–47 (2007).

14. 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).

15. Charles L. Howard, The Organizational Ombudsman: Origins, Roles, and Operations: A Legal Guide (2010); Howard Gadlin, *The Ombudsman: What's in a Name?* 16 Negot. J. 37, 39 (2000); Lipsky, *supra* note 12, at S32; Jennifer F. Lynch, *Beyond ADR: A Systems Approach to Conflict Management*, 17 Negot. J. 207, 208 (2001).

16. Smith & Martinez, *supra* note 3, at 132–33.

17. Lisa Blomgren Amsler, Janet K. Martinez & Stephanie E. Smith, *Christina Merchant and the State of Dispute System Design*, 33 Conflict Resol. Q. S7, S18–19 (Supp. 2015) (citing Lisa Blomgren Amsler, Janet K. Martinez & Stephanie E. Smith, Dispute System Design: Preventing, Managing, and Resolving Conflict (forthcoming and on file with author)).

bilitation Act of 1973.[18]" Together these laws "prohibit discrimination based on race, sex, color, national origin, religion, age, and disability, and also prohibit sexual or racial harassment or retaliation for raising a claim of prohibited discrimination or harassment."[19] The USPS is not a federal agency that receives a budgetary appropriation from Congress; it is a public organization that generates revenue through fees for services.[20] At the inception of REDRESS, the USPS had over 800,000 employees nationwide;[21] as one of many businesses disrupted by technology and the Internet, the USPS employee population has declined and now stands at approximately 509,000 career employees.[22] The REDRESS Program stemmed in part from the Civil Rights Act of 1991, which both authorized new compensatory and punitive damages for employment discrimination claims and jury trials for victims and at the same time explicitly encouraged disputants to use a wide variety of ADR processes.[23] In 1994 when the program began, employees filed about 28,000 informal EEO complaints a year, about half of which went on to the EEOC as formal complaints. The REDRESS Program became the "largest employment mediation program in the world (mediating over 1,000 disputes a month across 90 different cities [by 2000])."[24] Indiana University "tracked and evaluated [it] for over 12 years, from its initial pilot in 1994, through national implementation in 1998, until 2006."[25]

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18. 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, 25 (2009) [hereinafter Bingham et al.] (footnotes omitted) (citing 42 U.S.C. §§ 2000e–2000e-17 (1991); 29 U.S.C. §§ 621–634 (2006); 29 USC §§ 701–718 (1991)).

19. *Id.*

20. The USPS is an "establishment of the executive branch of the Government of the United States." 39 U.S.C. § 201 (2012); *see also* U.S. Postal Serv. v. Flamingo Indus. (USA), 540 U.S. 736 (2004).

21. Lisa B. Bingham & Lisa-Marie Napoli, *Employment Dispute Resolution and Workplace Culture: The REDRESS™ Program at the United States Postal Service*, in FEDERAL ADMINISTRATIVE DISPUTE RESOLUTION DESKBOOK 507, 507 (Marshall J. Breger et al. eds., 2001).

22. *See Size and Scope*, USPS, https://about.usps.com/who-we-are/postal-facts/size-scope.htm [https://perma.cc/FH8H-XNZN].

23. R. Gaull Silberman, Susan E. Murphy & Susan P. Adams, *Alternative Dispute Resolution of Employment Discrimination Claims*, 54 LA. L. REV. 1533, 1533 (1993). "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title." *Id.* (quoting a portion of Pub. L. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.)).

24. Bingham et al., *supra* note 18, at 24.

25. *Id.* In 2006, financial circumstances at the USPS changed as a function of the Postal Accountability and Enhancement Act of 2006, H.R. 6407, 109th Cong. (2006), a new federal law regarding prefunding for future retiree health insurance benefits. The immediate result was to create a deficit. Lori Ann LaRocco, *The Truth About the Post Office's Financial Mess*, CNBC (Oct. 24, 2011, 12:39 PM), http://www.cnbc.com/id/45018432 [https://perma.cc/X3WE-RDJA]. Researchers and the USPS mutually agreed to end external data collection. We do not here address in detail the early history, implementation, and management of the program, which is documented and published elsewhere. *See* LISA B. BINGHAM, IBM CENTER FOR THE BUSINESS OF GOVERNMENT, MEDIATION AT WORK: TRANSFORMING WORKPLACE CONFLICT AT THE UNITED STATES POSTAL SERVICE (2003);

Prior to REDRESS, "[t]he organizational structure of the USPS was such that, given a choice, both supervisors and employees would litigate through the traditional EEO process rather than mediate."[26] "The USPS recognized that the named respondents to a complaint would be supervisors in most cases."[27] Thus, to be successful, it had to design REDRESS so that employees would prefer to mediate before pursuing litigation.[28] The Equal Employment Opportunity Commission (EEOC) had adopted regulations requiring that ADR be voluntary.[29] The Analytic Framework for DSD examines a design's structure and processes. The relevant REDRESS structure and process choices include the timing of mediation within two to four weeks of a complaint; location of mediation at the workplace; creating a national and diverse roster of mediators with a variety of graduate training from multiple disciplines; the model for mediation a initially facilitative but later transformative,[30] economic incentives to participate on the clock or paid time; communications regarding the program; training for key participants and stakeholders (union leadership and managers); a national evaluation and transparency about the program; and program management. These "were critical factors in encouraging employees to pursue mediation before litigation."[31]

The Analytic Framework also examines stakeholders and their interests. At the USPS, this includes a broad range of people within the organization nationwide: the Board of Governors; Postmaster General; his or her management team; regional and local managers; national, regional, and local union leadership for seven national bargaining units; and staff in the labor relations and EEO offices. It also includes the broader public and congressional oversight committees. "The USPS conducted focus groups with stakeholders as part of its initial design process, but did not negotiate about the specifics of the program."[32] It also conducted broad

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Bingham et al, *supra* note 18, at 26. The USPS continues to operate the REDRESS program nationwide. *See* REDRESS, USPS, https://about.usps.com/what-we-are-doing/redress/welcome.htm [https://perma.cc/E2ZA-SJ33]. This article addresses data from the early national model of the program during 1998–2001.

26. For a detailed discussion of incentive structures related to REDRESS within the USPS, see Tina Nabatchi & Lisa Blomgren Bingham, *From Postal to Peaceful: Dispute Systems Design in the USPS REDRESS Program*, 30 REV. PUB. PERS. ADMIN. 211 (2010).

27. Bingham et al., *supra* note 18, at 26.

28. *Id.*

29. The ADRA of 1996 required that ADR be voluntary. *See Federal Sector Alternative Dispute Resolution*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/federal/adr/ [https://perma.cc/8YYS-FQCN] (last visited May 14, 2017). 5 U.S.C. § 572(c) (1992) provides "[a]lternative means of dispute resolution authorized under this subchapter are voluntary procedures which supplement rather than limit other available agency dispute resolution techniques." The EEOC implemented this for federal agencies through voluntary settlement attempts. 29 C.F.R. § 1614.603 (1999).

30. *See* Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 MEDIATION Q. 263 (1996).

31. Bingham et al., *supra* note 18 at 26.

32. *Id.* As an EEO program, REDRESS was not a mandatory subject of collective bargaining. Alexander v. Gardner-Denver Co., 415 U.S. 36, 54–55 (1974). Moreover, the same program applied across multiple bargaining units.

training for stakeholders likely to participate in the program or its administration.

The key system design features that continue to be part of the program are that mediation is voluntary for the EEO complainant, but mandatory for the supervisor who represents the USPS as an organizational entity. As required by EEOC regulations, complainants are entitled to bring any representative that they choose to the table. These can include lawyers, union representatives, professional association representatives, family members, co-workers, or friends. The USPS, as a party, also designates a representative. The supervisor must have settlement authority, or be in immediate telephone contact during the process with someone else in the organization authorized to approve the settlement. Mediation occurs privately during work hours, and generally occurs within two to three weeks of a request. That the national REDRESS program is voluntary for complainants but mandatory for supervisors, is comparatively fast, and uses outside mediators that meet stringent training requirements provided incentives for disputants to mediate.[33]

As to resources under the Analytic Framework, the USPS funded the program and its management within EEO offices and initially the USPS Law Department.[34] It created the roster by identifying mediators nationwide with graduate education and at least ten cases of professional mediation experience. The USPS REDRESS "Task Force created a national roster of approximately 1,500 experienced mediators."[35] National outreach produced the most diverse roster then available, made up of 44% women and 17% minorities,[36] reflecting a fairly high level of racial diversity.

Its regional EEO ADR staff members assigned mediators to individual cases. It paid the full cost of mediator fees. In the final national model, the mediators are independent contractors. As to accountability in terms of transparency and evaluation, the USPS contracted with the Indiana University School of Public and Environmental Affairs to conduct an external, independent evaluation by collecting exit surveys after each mediation, brief mediator reports on each case, limited interview data, and

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33. Bingham et al, *supra* note 18, at 26 (footnotes omitted) (citing 29 C.F.R. § 1614.605 (1999)).

34. Cynthia J. Hallberlin, *Transforming Workplace Culture Through Mediation: Lessons Learned from Swimming Upstream,* 18 HOFSTRA LAB. & EMP. L.J. 375, 378 (2001) (reporting 105 full-time positions for EEO ADR coordinators and $22 million budget).

35. *See* Traci G. Gann & Cynthia J. Hallberlin, *Recruitment and Training Outside Neutrals, in* FEDERAL ADMINISTRATIVE DISPUTE RESOLUTION DESKBOOK 623, 627 (Marshall J. Breger et al. eds., 2001).

36. The USPS did not limit the roster to mediators who were lawyers with substantive employment law expertise since mediators were not expected to evaluate cases. Instead, the roster included mediators from psychology, counseling, and social work, as well as teachers, academics, human resource professionals, and retirees from these professions. Many of the mediators had extensive experience in family and domestic relations practice. *See* Bingham et al., *supra* note 18, at 27 n.123 (citing Gann & Hallberlin, *supra* note 35).

analyses of archival data regarding case flow.[37] This article addresses the evaluation design and data collection in more detail with the methodology for the instant data analysis of a sample *infra*.

There was an important limit on REDRESS data collection relevant to this study. Due to the adverse history of its experience with previous researchers on sensitive issues (e.g., drug testing), it was of utmost importance to ensure the confidentiality of all data collection even beyond a level normally approved by university internal review boards for research involving human subjects (i.e., reporting demographic data in the aggregate with no personally identifiable information is permitted). Its concern for confidentiality related to the perceptions of the program. It is a voluntary program; the USPS cannot coerce a complainant to participant. Hence, the USPS prohibited data collection of participant demographics in exit surveys or mediator tracking reports. Researchers did not collect any personally identifiable information. There were no exit survey questions on race, sex, national origin, age, disability, religion, education level, marital status, family status, specific location of employment, etc. In other words, Indiana University was not able to analyze data using demographic information such as race or gender of mediation participants.

However, in an early version of the exit survey, the USPS did ask about the nature of the claim in a case, such as purviews of race, sex, or national origin discrimination, or racial or sexual harassment, and reverse discrimination. For purposes of this article, we have inferred that the nature of the claim is likely highly correlated with the claimant's demographics. In other words, where a complaint alleges race discrimination, we infer the claimant likely was African-American or black. Where a complaint alleges reverse discrimination, we infer the claimant was Caucasian. Where a complaint alleges sex discrimination, we infer the claimant was likely a woman. Anecdotal accounts suggest few, if any, claims of sex discrimination by transgender or LGBTQ+ community members during this early period of the program.[38]

For purposes of this article, key Analytic Framework issues are structure and processes in terms of the mediator roster and mediation model.

II.   ACCOUNTABILITY IN DISPUTE SYSTEM DESIGN

One element of the Analytic Framework for DSD is accountability, defined in terms of transparency, an evaluation component, and success.[39] The system needs transparency in terms of operation, access, and results to ensure credibility. It needs evaluation to judge whether it functions effectively, its costs, its outcomes, and how to continue to improve its design and implementation. Particularly relevant to the symposium,

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37. For a comprehensive final report on USPS REDRESS data analysis and findings, see Bingham et al., *supra* note 18.

38. Personal conversation with Cynthia J. Hallberlin, Tacoma Park, MD on June 10, 2017.

39. Smith & Martinez, *supra* note 3, at 132–33.

Smith and Martinez ask, "Are neutrals failing to deliver quality services or violating ethics rules? Are users satisfied with the options and services provided?"[40] However, there is a separate literature on accountability in public affairs; it addresses the promise of justice. Yet, how do we define justice? Much of the evaluation literature for courts and dispute systems frames analyses in terms of procedural and distributive justice. This section addresses these questions.

A. Accountability in Public Affairs

In public affairs, accountability refers to the relationship between a public servant or official and the duty they owe the public, elected officials, and their supervisors.[41] Superiors or the public may call a public servant to account for his or her actions to carry out the public will and public values in public law. Accountability is an instrument for a higher authority to exert control. There are two broad meanings for accountability.[42] First, accountability is a mechanism or means between an account-giving party and an account-receiving party or forum. Second, accountability is a virtue for an institution and an end in itself. These two senses are complementary. There are three key elements to accountability: information provided by the accountable party, discussion between the accountable party and the oversight body, and the consequences for the accountable party.[43] Public administration scholars have deepened theory on accountability by arguing institutions make six possible accountability promises that are either means or ends.[44] "There are three promises of instrumental value: control (inputs), ethical behavior/choices (processes), and performance (outcomes)" and "three promises of intrinsic value: integrity (inputs), legitimacy (processes), and justice (outcomes)."[45] "Dubnick and Frederickson explain that the promise of justice 'assumes the opportunity to seek justice in light of some claimed act or possible act

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40. *Id.* at 132.

41. Lisa Blomgren Amsler & Jessica Sherrod, *Accountability Forums and Dispute System Design*, 40 Pub. Performance & Mgmt. Rev. 529, 529–30 (2017).

42. Mark Bovens, *Two Concepts of Accountability: Accountability As a Virtue and As a Mechanism*, 33 West Eur. Pol. 946, 946–48 (2010).

43. Gijs Jan Brandsma & Thomas Schillemans, *The Accountability Cube: Measuring Accountability*, 23 J. Pub. Admin. Res. & Theory 953, 955–56 (2013).

44. Melvin J. Dubnick & H. George Frederickson, *Accountable Agents: Federal Performance Measurement and Third-Party Government*, 20 J. Pub. Admin. Res. & Theory i143, i144–45 (2009) [hereinafter Dubnick & Frederickson (2009)]; Melvin J. Dubnick & H. George Frederickson, *Introduction: The Promises of Accountability Research*, in Accountable Government: Problems and Promises xiii, xiii–xvii (Melvin J. Dubnick & H. George Frederickson eds., 2011) [hereinafter Dubnick & Frederickson (2011)]; Melvin J. Dubnick & Kaifeng Yang, *The Pursuit of Accountability: Promise, Problems, and Prospects*, in The State of Public Administration: Issues, Challenges, And Opportunities 171, 172–76 (Donald C. Menzel & Harvey L. White eds., 2011).

45. Amsler & Sherrod, *supra* note 41, at 531 (citing Melvin J. Dubnick, *Seeking Salvation for Accountability* (Am. Political Sci. Ass'n, 2002); Dubnick & Frederickson (2009), *supra* note 44; Dubnick & Frederickson (2011), *supra* note 44; Melvin J. Dubnick & H. George Frederickson, Public Accountability: Performance Measurement, the Extended State, and the Search for Trust (2011); Dubnick & Yang, *supra* note 44).

[that] will result in justice or fairness' and also refer to it as 'justice or equity.'"[46] They relate this promise to judicial settings that provide due process. The promise of justice also includes social equity in management decisions enforcing policies. Scholars observe "these promises are built on assumptions"; "the link between account giving and each promise [is] uncertain."[47]

In downstream quasi-judicial processes like ADR programs, the account-giving disputants seek to resolve a conflict over their rights and responsibilities in an accountability forum.[48] Accountability forums are DSDs, from the familiar trial court or administrative agency adjudication to the less formal ADR forums like mediation and arbitration. "DSD focuses on more than a single case; it entails designing and evaluating the forum for a stream of cases within a system."[49]

"Within the context of DSD, justice is a core concern."[50] People value the accountability forum for delivering justice, an intrinsic promise. Dubnick defines "the promise of justice as 'access to impartial arenas where abuses of authority can be challenged and judged'";[51] he "incorporates criteria for judging the forum . . . [as] impartiality as to the disputants and the substance of the dispute, due process, standing to raise the challenge, and a judgment or decision. . . . [T]he link between the mechanism and the promise depends on whether system participants can trust the accountability forum, a [DSD], as fair and just."[52]

There is little empirical research on the connection between accountability mechanisms and just outcomes or individual perceptions of justice. Generally, public affairs scholars have focused research more on public management and public policy programs; there is relatively little research on the quasi-judicial work of agencies and the few programs that use ADR in administrative enforcement.[53]

B.   How Should We Define the Promise of Justice?

Public affairs scholars have yet to fully develop the term justice in the accountability promise of justice. For example, "access to impartial arenas where abuses of authority can be challenged and judged"[54] essentially defines justice as a process. Justice as equity defines it as outcome. Scholars from economics, law, philosophy, political science, and psychology

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46. *Id.* (internal citation omitted) (citing Dubnick & Frederickson, *Accountable Agents*, *supra* note 44, at i145).

47. *Id.* (citing Dubnick & Yang, *supra* note 44, at 174).

48. Amsler & Sherrod, *supra* note 41, at 529–30.

49. *Id.* at 531.

50. *Id.*

51. *Id.* (citing Melvin Dubnick, *Accountability and the Promise of Performance: In Search of the Mechanisms*, 28 Pub. Performance & Mgmt. Rev. 376, 376 (2005)).

52. *Id.* (discussing Dubnick & Yang, *supra* note 44).

53. *Id.* at 529–30.

54. Dubnick, *supra* note 51, at 376.

provide many analyses and conceptions of justice.[55] How do conceptions of justice apply to the design of forums of accountability? Do they provide different underlying norms for fairness? To measure and judge accountability in DSD, we have to examine varying conceptions of justice embodied in various DSDs.

The Analytic Framework for DSD includes goals as one of the six categories for analysis. Goals may suggest which definition of justice applies, expressly or implicitly, to a DSD. The many conceptions of justice for DSD fall into roughly five categories[56]: (A) justice as to outcomes, including substantive, distributive, utilitarian, and social justice; (B) justice as to processes, including voice and procedural justice; (C) justice within organizations, including organizational, interactional, informational, and interpersonal justice; (D) justice for people living in a community, including corrective, retributive, deterrent, restorative, transitional, communitarian, and communicative justice; and (E) injustice in various settings and processes. These categories simplify the array of definitions, which are not mutually exclusive. Procedural justice is the dominant theoretical frame for evaluations of, or research on, agency adjudicatory systems for civil enforcement and organizational justice for agency mediation of workplace disputes. Distributive justice frames how some researchers assess outcomes in adjudication and courts, including agency litigation. All three represent forums of accountability.

For justice as process, we must examine how an agency has designed the process, such as the specific nature of access (on paper or in person), nature of the process for raising the challenge (adjudicatory, consensus-based, or negotiated), or its timing before or after agency action. As an example of a decision process, one definition of perfect procedural justice might include a throw of the dice or the random draw of a draft number in the Vietnam War. For justice as outcome, the rule of law provides decision standards that determine the substance of what a disputant achieves or receives, such as at-will employment, a statutory standard for discrimination like Title VII, or a burden and standard of proof like preponderance of the evidence or beyond a reasonable doubt that define when someone is guilty.

The REDRESS exit surveys contained questions drawn from procedural and distributive justice literature, as well as organizational justice literature, including interactional and informational justice.[57] These questions assess mediation as a forum of accountability;[58] in this forum, the USPS is accountable for discrimination by its employees as agents of the organization.

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55. A comprehensive analysis of the justice literature is outside the scope of this article. For a more comprehensive review, see Bingham, *supra* note 6, at 2.

56. Adapted from a more detailed discussion. *Id.* at 33–46.

57. Tina Nabatchi et al., *Organizational Justice and Workplace Mediation: A Six Factor Model*, 18 INT'L J. CONFLICT MGMT. 148 (2007).

58. Lisa Blomgren Amsler & Jessica Sherrod, *Accountability Forums and Dispute System Design*, 40 PUB. PERFORMANCE & MGMT. REV. 529, 529–30 (2017).

III.   REPRESENTATIVE BUREAUCRACY: ANOTHER TOOL FOR LOOKING AT DSD, ACCOUNTABILITY, AND BIAS

Public affairs scholars have explored the role of demographic representativeness in bureaucracy, meaning the composition of the government workforce in relation to the general public it serves.[59] While related in some respects to literature regarding the contribution a more diverse workforce makes to business success,[60] this literature stems from the role bureaucracy plays in serving the public, particularly in a democracy. Does representative bureaucracy theory suggest another way to consider bias in ADR generally, and mediation specifically, as informal dispute resolution? In the USPS REDRESS Program, mediators are independent contractors; the USPS hires and pays them for individual cases once they are on the REDRESS roster. In this capacity, while not public employees like administrative law judges who mediate as settlement judges, they nevertheless serve an analogous function. Because the USPS is a federal organization, it handles the informal complaint and conciliation stages of Title VII in house; formal complaints go to the EEOC. Mediators serve a public role; the diversity of the profession is a public policy issue that receives continuing attention. This section briefly reviews representative bureaucracy and its relationship to selected legal scholarship on diversity in the mediator and arbitrator professions.

A.   Passive, Active, and Symbolic Representative Bureaucracy

Representative bureaucracy theory has examined passive, active, and symbolic representation. Passive representativeness, also called descriptive representation,[61] examines the representative ratio or percentage of women, racial, and ethnic minorities in government bureaucracy compared to the general population: "A representative ratio of 1.0 indicated perfect representation; anything below 1.0 suggested that the bureaucracy underrepresented those groups in the general population; and anything above 1.0 connoted overrepresentation."[62] Researchers have found that even when there is good passive representation, it is hierarchical, meaning representation is stratified within the organization by rank or pay grade.[63] Alternatively, passive representation is stratified by functions so

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59. *See generally* Norma M. Riccucci & Gregg G. Van Ryzin, *Representative Bureaucracy: A Lever to Enhance Social Equity, Coproduction, and Democracy*, 77 Pub. Admin. Rev. 21 (2017) (presenting a current and comprehensive review of the literature on representative bureaucracy in public affairs).

60. *See, e.g.*, Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 Am. Soc. Rev. 208 (2009).

61. Brandy Kennedy, *Unraveling Representative Bureaucracy: A Systematic Analysis of the Literature*, 46 Admin. & Soc'y 395, 401–03 (2014).

62. Riccucci & Van Ryzin, *supra* note 59, at 22 (citing Norma M. Riccucci & Judith R. Saidel, *The Representativeness of State-Level Bureaucratic Leaders*, 57 Pub. Admin. Rev. 423 (1997)).

63. *Id.*

that it is lower in higher level jobs but higher in jobs deemed traditionally associated with women (nursing, education) or minorities (housing, welfare).[64] There is greater diversity overall of the federal public service in race, gender, ethnicity, and ability but less at the highest levels.[65]

Active representativeness asks whether representativeness corresponds with values that "translate into better policy and administrative outcomes for [the] underrepresented group."[66] In other words, its premise is that race, ethnicity, and gender matter in policy and decision-making. Women advocate for policy for women. People hold more favorable opinions of others based on group identity. Some studies suggest that active representation is more likely at lower street bureaucrat than higher policy-making levels.[67]

Symbolic representativeness suggests that the mere presence of passive representation promotes trust in and legitimacy of government.

Much dispute resolution practice occurs in state or federal public agencies or courts, or in analogous quasi-public institutions like community mediation centers. Little of the representative bureaucracy research in public affairs has addressed the quasi-judicial work of executive branch agencies or the judiciary. Empirical research on representativeness has examined passive, active, and symbolic representation. For example, it has focused on active representativeness in police interaction with the public and found that active representation by female police improve outcomes for women in sexual assault cases;[68] passive representativeness in terms of race reduces citizen complaints about police;[69] and symbolic representativeness improves trust in public officials.[70]

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64. *Id.*

65. *Id.* (citing U.S. Office of Personnel Management (OPM) studies reporting a workforce of 2.045 million, 1.159 million men and 0.886 million women, and all minorities constitute a total of 35%, black 17.7%, and Hispanic 8.4%. Interestingly, OPM studies report a reduction in women's salary gap: in the federal sector, it is 87% instead of 77% of average men's salaries).

66. *Id.* at 23 (citing Kenneth J. Meier & Jill Nicholson-Crotty, *Gender, Representative Bureaucracy, and Law Enforcement: The Case of Sexual Assault*, 66 PUB. ADMIN. REV. 850, 858 (2006)) (reporting studies finding that women working in a bureaucracy are more likely than male coworkers to push for programs and issues that benefit women in the general population).

67. *See generally* Rhys Andrews, Rachel Ashworth & Kenneth J. Meier, *Representative Bureaucracy and Fire Service Performance*, 17 INT'L PUB. MGMT. J. 1 (2014) (exploring the relationship between gender and minority ethnic representation and the performance of fire authorities in England and finding more representative authorities have more effective performance).

68. Meier & Nicholson-Crotty, *supra* note 66, at 857–58.

69. Riccucci & Van Ryzin, *supra* note 59, at 24 (citing Sounman Hong, *Does Increasing Ethnic Representativeness Reduce Police Misconduct? Evidence from Police Reform in England and Wales*, 77 PUB. ADMIN. REV. 195 (2017)).

70. Nick A. Theobald & Donald P. Haider-Markel, *Race, Bureaucracy, and Symbolic Representation: Interactions Between Citizens and Police*, 19 J. PUB. ADMIN. RES. & THEORY 409, 417 (2009) (finding that the presence of African-American police officers increases African-American residents' trust of the police). *But see* Sean Nicholson-Crotty, Jill Nicholson-Crotty & Sergio Fernandez, *Will More Black Cops Matter? Officer Race and Police-Involved Homicides of Black Citizens*, 77 PUB. ADMIN. REV. 206, 213–14 (2017) (finding support for representative bureaucracy theory that hiring more black police of-

What about judges, administrative law judges, arbitrators, and mediators? Specifically, what relevance or impact is the bureaucratic representativeness of mediators and arbitrators, particularly in race, ethnicity, and gender discrimination cases? What role does their race, ethnicity, or gender play, if any? What role should it play? The accountability literature suggests that when effectively acting as public officials in accountability forums, mediators should be impartial and maintain fair process. Mediators practice not only independently or through third-party rosters, but as employees in court ADR programs. This might suggest they are ethically bound to *avoid* active representativeness. Passive and symbolic representation would not pose a similar problem in an accountability forum requiring impartial neutrals.

B.   Diversity in the ADR Profession and Representative Bureaucracy

Early commentary on ADR did not address issues of race, ethnicity, or gender demographics in its practice, either in terms of mediators or mediation participants.[71] The ADR profession called for more diversity in mediation and arbitration rosters; the mediation profession is comprised mostly of white men.[72] The founders and practitioners of restorative justice, a form of mediation, too are mostly white men; critics point out the paradox that restorative justice is little practiced for race with our racialized criminal justice system.[73] Scholars have long since observed that the language and purported objective criteria regarding the justice system and ADR are gendered and would benefit from developing a feminist voice.[74]

Researchers who have conducted empirical studies disagree on the actual role that mediator demographics play. Some studies examine mediation participants' demographics, while others examine those of the neutrals; few look at both participants and mediators. Representative bureaucracy theorizes about the relationship between those in the bureaucracy and those they serve in terms of demographics, suggesting passive, active, and symbolic representation have a positive effect on the public that their servants serve. This study focuses primarily on that relationship as to race and gender. For a comprehensive review of the impact of race and gender in dispute resolution processes, we defer to other articles in

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ficers may reduce police violence against black citizens but only once the percentage of blacks on the force is high enough to reach critical mass).

71. *See, e.g.*, Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 Harv. L. Rev. 668 (1986); Frank E.A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 U. Fla. L. Rev. 1 (1985).

72. For a discussion and review of recent commentary on the absence of racial diversity in mediation, a profession comprised mostly of white men, see Art Hinshaw, *Regulating Mediators*, 21 Harv. Negot. L. Rev. 163 (2016).

73. *See* Theo Gavrielides, *Bringing Race Relations into the Restorative Justice Debate: An Alternative and Personalized Vision of "the Other"*, 45 J. Black Stud. 216 (2014).

74. Eve Hill, *Alternative Dispute Resolution in a Feminist Voice*, 5 Ohio St. J. on Disp. Resol. 337 (1990).

this symposium.[75] However, a few studies are particularly relevant to our attempt to address this question as to the USPS REDRESS Program.

In general, findings have been mixed. In social psychology, Tyler and Lind have inspired numerous studies of dispute processing framed by procedural justice theory.[76] In the classic study of litigation and ADR, Lind and co-authors found that litigants' race, gender, income, or employment status did not affect procedural justice and outcome satisfaction ratings of trial, arbitration, bilateral settlement, and settlement conferences in three different trial courts.[77] Subsequent studies found differences in preferences for ADR procedures based on ethnicity and gender, but these differences are small in comparison to an overall and shared pattern of preferring persuasion and negotiation to other procedures.[78] Cross-cultural studies found gender differences in preferences for adversary compared to non-adversary procedures depending on the status of the investigator; the theory suggested Americans would prefer adversary procedures as more competitive when compared to Chinese students, and women were less competitive than men depending on context and more likely to prefer non-adversary procedures.[79] The National REDRESS Evaluation Project at Indiana University used procedural justice to frame data collection and analysis as a way to ensure program accountability and performance. However, prior to this study, there was no published analysis of REDRESS data using demographics of USPS employees, their representatives, or mediators.

In contrast to studies using procedural justice theory to judge participant perceptions in litigation and ADR, other studies look at mediator demographics in relation to their impact on likelihood of settlement or settlement outcome. For example, one study found that having a female mediator increased the likelihood of settlement by almost five percentage points.[80] The National REDRESS Evaluation Project collected exit sur-

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75. *See* Charles B. Craver, *Do Alternative Dispute Resolution Procedures Disadvantage Women and Minorities?*, 70 SMU L. REV. 891 (2017); Michael Z. Green, *Reconsidering Prejudice in Alternative Dispute Resolution for Black Work Matters*, 70 SMU L. REV. 639 (2017); Carol Izumi, *Implicit Bias and Prejudice in Mediation*, 70 SMU L. REV. 681 (2017); Andrea Schneider, *Negotiating While Female*, 70 SMU L. REV. 695 (2017).

76. *See* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988).

77. E. Allan Lind, Robert J. MacCoun, Patricia A. Ebener, William L.F. Felstiner, Deborah R. Hensler, Judith Resnik & Tom R. Tyler, *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 966 (1990).

78. E. Allan Lind, Yuen J. Huo & Tom R. Tyler, . . . *And Justice for All: Ethnicity, Gender, and Preferences for Dispute Resolution Procedures*, 18 LAW & HUM. BEHAV. 269, 279 (1994) (ethnicity was defined as African-American, Hispanic-American, Asian-American, and European-American).

79. Kwok Leung & E. Allan Lind, *Procedural Justice and Culture: Effects of Culture, Gender, and Investigator Status on Procedural Preferences*, 50 J. OF PERSONALITY & SOC. PSYCHOL. 1134, 1138 (1986) (researchers theorized that women are less competitive with high status authority figures and thus more likely to prefer non-adversary procedures in that context).

80. Barry Edwards, *Renovating the Multi-Door Courthouse: Designing Trial Court Dispute Resolution Systems to Improve Results and Control Costs*, 18 HARV. NEGOT. L.

vey data on participant perceptions and qualitative data from interviews. The exit surveys had employee self-reports on outcomes; however, comparisons of complainant and respondent exit surveys, when matched on the same case, revealed differing perceptions and reports on the outcome.[81] Thus, we could not use this data source for analyses of objective mediation outcomes. There was no analysis of mediator characteristics and settlement.

There are few studies that put together mediation participants and mediators in terms of demographics and compare mediated and litigated outcomes. The first such study is anecdotally known as the *MetroCourt Study*.[82] In 1990–1991, using multivariate analyses of demographic and outcome data on mediated small-claims court civil cases, researchers systematically explored the hypothesis that people with less social power, defined by race, class, and gender, do worse in formal and informal legal systems.[83] Citing, among others, Richard Delgado, who inspired this symposium, they specifically tested (1) "the 'disparity' hypothesis that minority and female disputants will achieve poorer outcomes . . . whether their cases are mediated or adjudicated," and (2) the "informality hypothesis" that the results will be worse for minority and female disputants in mediation than litigation.[84] They theorized that "low visibility and lack of formal rules and structures in mediation, facilitated settlement, and other relatively informal processes reduce the rights of less powerful participants."[85] Researchers used cases from a state court and local community mediation center with mediators who had received standard forty-hour mediation training; the mediators practiced in a co-mediation model in which mediators were pairs of women, men, or mixed gender, and pairs of minority, nonminority, and mixed ethnicity.[86] Both judge and mediator pools were diverse. In general, Anglo male claimants received a greater proportion of their claim than other ethnic or gender groups in both adjudicated and mediated cases.[87] In adjudicated cases, minority men and An-

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Rev. 281, 305 (2013). This rigorous study used multivariate regression analysis to examine the impact of a number of system design features on likelihood of settlement; the author observed: "The independent impact of a mediator's gender on the likelihood of settlement remains significant despite a host of control variables. Ceteris paribus, the selection of a female mediator significantly increases the likelihood of settlement." *Id.* at 312.

81. Rebecca Nesbit, Tina Nabatchi & Lisa Blomgren Bingham, *Employees, Supervisors, and Workplace Mediation: Experiences of Justice and Settlement*, 32 Rev. Pub. Pers. Admin. 260, 267–80 (2012).

82. The original report is Michelle Hermann, Gary LaFree, Christine Rack & Mary Beth West, An Empirical Study of the Effects of Race and Gender on Small Claims Adjudication and Mediation (1993) (a variety of Google searches failed to turn up an accessible copy of this report, including a search of the University of New Mexico website). However, the data from this report was re-analyzed and reported in Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 Law & Soc'y Rev. 767 (1996), upon which the following discussion exclusively relies.

83. *Id.* at 768.

84. *Id.*

85. *Id.* at 769.

86. *Id.* at 771.

87. *Id.* at 776.

glo women claimants received less than Anglo men; in mediated cases, minority women and men claimants received less than Anglo men.[88] However, when compared as respondents—not claimants—in mediation, there were no significant differences between Anglo male respondents and other respondents. Results for respondents in adjudication were mixed. In multivariate analyses controlling for a number of objective case factors, the authors concluded that there was considerable support for Galanter's repeat player hypothesis; in general, white males were more likely to be repeat players and minorities and women more likely to be one-shot players, except for white females in mediation.[89] They had some support for the informality hypothesis in mediation.[90] In other words, gender and ethnicity are associated with a number of one-shot player disadvantages in the civil justice system.

The *MetroCourt Study* also analyzed the impact of matching mediator demographics with those of participants. The main results show that, although recovery for claimants is lower overall when both mediators are minorities, it is significant that minority male and female claimants do better in their recovery ratio than with Anglo mediators.[91] In contrast, mediator pairs with at least one Anglo resulted in significantly higher recoveries for Anglo claimants than minorities, while minority mediator pairs resulted in comparable recoveries across ethnicities.[92] There were also significant gender effects. Anglo women claimants received higher recoveries and minority male respondents paid out more when the mediator pair was comprised of a woman and a man; yet, minority women claimants received statistically significantly lower recoveries when both mediators in the pair were women.[93] In mediation, Anglo women did better as respondents than Anglo men. In general, there was limited support for the informality hypothesis in mediation. However, there was support for the disparity hypothesis in the pattern of lower recoveries for minority claimants from Anglo respondents.[94]

Charkoudian and Wayne analyzed conflict behavior, mediator behavior, and the interaction between mediator and participant gender or mediator and participant racial or ethnic group.[95] In their literature review, they conclude that most research shows "no relationship between mediator gender and measures of mediation success such as settlement rate, participants' perception of the fairness of mediation, and satisfaction with

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88. *Id.* at 776–77.
89. *Id.* at 781.
90. *Id.* at 780–81.
91. *Id.* at 786.
92. *Id.*
93. *Id.*
94. *Id.* at 789.
95. Lorig Charkoudian & Ellen Kabcenell Wayne, *Fairness, Understanding, and Satisfaction: Impact of Mediator and Participant Race and Gender on Participants' Perception of Mediation*, 28 Conflict Resol. Q. 23, 24 (2010).

the mediation process or outcome."[96] However, Charkoudian and Wayne express concern that the research on demographics in mediation "over-simplifies the concept of group identification."[97] They examine what happened when mediators and one or both participants matched either by gender and racial or ethnic backgrounds.[98] They found that when mediator and participant share the same gender, there is more communication between the two, possibly due to shared and gendered communication behaviors. However, they reported significant findings by looking at cases where the participant and mediator did not match by gender and the mediator's gender matched that of the other party:

> Participants who attended a mediation with no same-gender mediator present saw the mediator(s) as listening judgmentally and as taking sides in the mediation. When the participant was outnumbered in the mediation session because the mediator's gender matched only that of the opponent, these perceived bias effects worsened. Mediation participants with *no gender match* were also less satisfied with the mediation process.[99]

This suggests that, in practice, ADR program managers should consider either matching mediators by gender, co-mediation models where one mediator matches each disputant, or assignments where the mediator's gender matches neither disputant.

In contrast, matching participant and mediator by racial or ethnic identity had little or no impact on perceptions of mediation fairness or mediator ability and fairness.[100] However, when a participant was outnumbered by a mediator and other participant of a different racial or ethnic identity, it did affect the outnumbered participant's perceptions about the likelihood "that [the] conflict can be dealt with productively."[101]

In sum, the empirical work on demographics in mediation varies widely in research design and has produced mixed results. The *MetroCourt Study* uncovered systemic patterns of bias in adjudication and mediation when examining patterns by demographics, but when they control with repeat player case factors, many effects disappear, probably because gender and ethnicity correlate with one-shot player status, which also correlates with lower economic power. Charkoudian and Wayne did not directly address actual patterns of bias in outcomes but reached perceptions of bias. It has

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96. *Id.* at 27 (citing Jess K. Alberts, Brian L. Heisterkamp & Robert M. McPhee, *Disputant Perceptions of and Satisfaction with a Community Mediation Program*, 16 INT'L J. CONFLICT MGMT. 218 (2005); Peter J.D. Carnevale, Rodney G. Lim & Mary E. McLaughlin, *Contingent Mediator Behavior and Its Effectiveness*, in MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION 213 (Kenneth Kressel, Dean G. Pruitt & Associates eds., 1989); Roselle L. Wissler, *The Role of Antecedent and Procedural Characteristics in Mediation: A Review of Research*, in THE BLACKWELL HANDBOOK OF MEDIATION: BRIDGING THEORY, RESEARCH, AND PRACTICE 129 (Margaret S. Herrman ed., 2006)).

97. *Id.* at 45.

98. *Id.*

99. *Id.* at 44.

100. *Id.* at 45.

101. *Id.*

produced practice recommendations aimed at reducing these perceptions. Both studies suggest support for greater diversity on mediator rosters, which we might also construe as greater passive or symbolic representative bureaucracy. Greater roster diversity and matching mediator demographics to participants may improve ADR program management and practice. However, it is also a guide to creating the appearance of fairness when the actuality may be otherwise.

This suggests we continue to need systemic level analyses of outcomes controlling for demographic variables that include and disentangle the effects of gender, racial, or ethnic identity of both participants and mediators. Returning to the Analytic Framework for DSD, this also suggests that best practices include a transparent program evaluation as an accountability system that regularly collects and reports such data by demographics in the aggregate as a measure of the system's performance.

Given the mixed findings in past research on mediator and/or disputant demographics, we do not suggest specific hypotheses. Instead, this represents preliminary research.

IV. REDRESS DATA: SAMPLE AND METHODOLOGY

The USPS began national implementation of REDRESS on January 1, 1998 and completed it by July 1, 1999.

The evaluation design entailed collecting data from multiple independent sources and using both qualitative and quantitative methods. Sources included participants, their representatives, non-participant employees, the mediators, program administrators, and archival datasets. Indiana University designed two instruments in collaboration with the USPS to track and assess the program: the participant exit survey and a data tracking form. Both of these forms were used from the inception of the national program until 2006, when Indiana University concluded its data collection.[102]

A. Exit Survey Data and its Limitations

"The confidential exit survey collected information about each party's role (complainant, supervisor, or a representative of either the complainant or supervisor), position (supervisor, manager, or craft employee), and if applicable, the nature of the representative (attorney, union official, coworker, or other such as friend or family member)."[103] As previously addressed, the exit survey asked no questions regarding participant demographics, including race, ethnicity, national origin, sex or gender, age, or ability.[104] The survey asked whether the dispute was fully, partially, or not resolved, and measured the participants' satisfaction with

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102. Bingham et al, *supra* note 18, at 27–28.
103. *Id.* The survey was distributed by mediators at the close of the session and mailed directly to researchers.
104. The USPS Law Department determined that it would not publish analyses by demographic category due in part to a negative past experience related to an outside evalu-

the process, mediator, and outcome using a five-point Likert scale, which ranges from very satisfied/strongly agree to very dissatisfied/strongly disagree.[105] "Additional measures assessed the 'transformative' aspects of the model as implemented in the program, such as questions addressing disputant empowerment and recognition and mediator behaviors."[106] These data provided the basis for a wide variety of analyses.

The exit survey and mediator tracking report were part of the DSD of REDRESS. Both contained national zip codes. The USPS tracked program results by geographic region, and the Indiana Conflict Resolution Institute did periodic analyses for program administrators. This enabled the USPS to create incentives for regional program managers to increase participation. In addition, all participants in the system were conscious of the continuous outside evaluation, giving the program internal credibility.[107]

This article analyzes procedural justice indicators on the exit surveys. Important for the analysis that follows, there was a question in the exit survey during a limited time period for participants to report the nature of the discrimination claim, also known technically as purview:

What was the nature of the EEO complaint in this case? Circle all that apply, and please specify on the space provided.

1. Race _____
2. Color ____
3. Reverse Discrimination (white) ____
4. National Origin ____
5. Sex Discrimination ____
6. Sexual Harassment ____
7. Disability (physical or mental) ____
8. Religion ____
9. Age ____
10. Retaliation ____
11. Other ____

However, this question appeared only on the early versions of the exit survey, prior to national implementation of the transformative mediation model. Evaluators published procedural justice analyses of this early exit survey.[108] This question permitted researchers to consider how mediator demographics interact with the nature of an employment discrimination

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ator publishing drug-testing results in the aggregate but by demographic category. Personal conversation with Cynthia J. Hallberlin (May 15, 2017).

105. Bingham et al., *supra* note 18, at 28 (citing Tina Nabatchi et al., *Organizational Justice and Workplace Mediation: A Six Factor Model*, 18 INT'L J. CONFLICT MGMT. 148 (2007)). For a review of the procedural and organizational justice literature and a factor analysis examining and validating the relationship of survey indicators to this literature, see Nabatchi et al., *supra*. "These measures are common and have a strong theoretical foundation in procedural justice research on mediation." *Id.* at 28 n.127.

106. *Id.* at 28.

107. *Id.* at 29.

108. *See* Lisa B. Bingham, *Mediating Employment Disputes: Perceptions of Redress at the United States Postal Service*, 17 REV. PUB. PERS. ADMIN. 20 (1997).

claim to shape claimants' perceptions of procedural and distributive justice. We argue here that, given the time period in which the participants completed these exit surveys (1997–1999), it is reasonable to infer aspects of the complainant's demographics from the nature of the claim. We infer that in claims of race discrimination, the claimant is likely African-American. In claims of sex discrimination and sexual harassment, the claimant is likely female. Due to our limited sample size, we are unable to conduct meaningful chi-square analyses on claims involving discrimination based on color, national origin, reverse discrimination, or other categories. These are limitations on the dataset.

Employees could answer more than one purview or nature of claim in the question above. It is possible for a complainant to circle both sex discrimination and sexual harassment, for example. For purposes of analysis, we broke out all claims within a given purview, such as race discrimination, regardless of whether the complainant circled additional purviews. Thus, the percentages of exit surveys reported by purview alone sum to more than 100%. The following information concerns percentages based on the total number of purviews indicated on exit surveys used prior to the national rollout and containing the question regarding nature of claim or purview. In approximately 20% of the total, race was one of the purviews and the highest category of claim reported. Approximately 12% of the total claims were for discrimination based on the purviews color, national origin, or reverse discrimination as being the nature. In roughly 17% of the total, participants reported claims of either sexual discrimination or sexual harassment as a purview.

B.   Mediator Survey Data and its Limitations

To ensure that REDRESS was implemented as designed, evaluators also designed a mediator survey, which sought to evaluate all mediators who participated in the REDRESS program from April 1998 until July 2001 against the ten hallmarks of mediation.[109] Administered by mail, the mediator survey measured how frequently they employed different transformative and directive/evaluative behaviors in their mediation sessions.

Important for the purposes of the analysis that follows, researchers included at the end of the mediator survey a demographic section asking mediators to self-report their gender, age, race, and education level. Eleven hundred and thirty (N=1130) mediators reported either their race or gender. Approximately 48% (N=547) of the mediators were female and around 52% (N=582) were male. An overwhelming majority of the mediators—approximately 83% (N=940)—were Caucasian. Approximately 11% (N=128) were African-American, and the remaining mediators who responded to the survey were Asian-American (0.1%, N=8), Native American (0.1%, N=7), Latino (2.3%, N=26), or another

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109. *See* Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 Mediation Q. 263 (1996).

non-listed race (0.94%, N=21). The following table summarizes the mediator demographics as self-reported in the mediator survey.

Table A. Demographics of REDRESS Mediators.

	Female	Male	No Gender Self-Reported	% of Total
Caucasian	452	487	1	83.19%
African-American	67	61	0	11.33%
Asian-American	6	2	0	0.1%
Native American	5	2	0	0.1%
Latino	11	15	0	2.3%
Other	6	15	0	1.9%

The mediator roster and mediator survey provided data for matching mediator demographics to exit surveys on cases they mediated. For purposes of this analysis, researchers pulled a sample of all complainant exit surveys that contain both this question and a mediator code allowing researchers to connect the exit survey to an individual mediator for whom there is demographic information.[110] There were 1,388 complainant exit surveys for which we had both the question of nature of claim or purview and the identity of and demographics for the mediator.

This sample (N=1,388 cases) presented the same pattern of purviews for claims of discrimination (N=2,609) as did the dataset of all surveys containing the question nature of claim or purview. Race claims represented approximately 19% of all purviews (N=501) presented within the sample. Color claims, reverse discrimination claims, and national origin claims collectively represented an approximate 13% of all purviews (N=344), while sexual discrimination and sexual harassment claims represented approximately 19% of cases (N=494).

V.   RESULTS

To explore the relationships among the nature of the claim or purview, the race or gender of the mediator, and procedural justice indicators regarding satisfaction with the mediation process, the mediator, and overall outcome, researchers conducted an exploratory multivariate regres-

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110. Researchers used the MS Access database program to connect complainant exit surveys to the individual mediator. The Access query function built out (and, as needed, cleaned, transformed, restructured, etc.) consecutive tables and eventually crafted a new integrated and combined sample. The researchers settled on MS Access for two primary reasons: first, the Indiana Conflict Resolution Institute utilized MS Access for the RE-DRESS evaluation (thus saving on any costs associated with transferring the data to another database); and, second, the ease of MS Access when it came to combining "children" and "parent" fields. This second reason was very important to the researchers: since any given mediator had freedom under the REDRESS program to complete any number of mediations, their footprint appeared across several mediations. Thus, the MS Access query function allowed researchers to match the characteristics of any given mediator to the appropriate mediation easily and without error.

sion.[111] Based on those results, researchers conducted nine chi-square analyses reported below in tables. Tables 1, 2, and 3 examine differences in satisfaction with mediation process, mediator, and outcome for race discrimination claims comparing African-American and Caucasian mediators. Tables 4, 5, and 6 examine satisfaction with mediation process, mediator, and outcome for sex discrimination claims comparing male and female mediators. Tables 7, 8, and 9 examine satisfaction with mediation process, mediator, and outcome for sexual harassment claims comparing male and female mediators.

Of all the tables, only Table 3 reports a statistically significant difference (P<.02) in participant perceptions based on the demographics of the mediator. Specifically, in race discrimination claims, we found that complainants were equally satisfied with fairness of the mediation process (Table 1) and the fairness of the mediators (Table 2) whether mediators were African-American or Caucasian.

Table 1. Race Discrimination Complaint: Fairness of the Mediation by Race of Mediator

Satisfaction with the Fairness of the Mediation Process	Race of Mediator		
	Caucasian	*African-American*	**Total**
*Very or Somewhat **Satisfied***	359 (92.77%)	53 (89.83%)	412 (92.38%)
*Very or Somewhat **Unsatisfied***	28 (7.23%)	6 (10.2%)	34 (7.62%)
Total	387	59	446

Note, $\chi^2 = .626$, *df = 1.* Numbers in parentheses indicate column percentages.

Table 2. Race Discrimination Complaint: Fairness of the Mediator by Race of Mediator

Satisfaction with the Fairness of the Mediator	Race of Mediator		
	Caucasian	*African-American*	**Total**
*Very or Somewhat **Satisfied***	396 (99.00%)	60 (98.4%)	456 (98.9%)
*Very or Somewhat **Unsatisfied***	4 (1.0%)	1 (1.6%)	5 (1.1%)
Total	400	61	461

Note, $\chi^2 = .202$, *df = 1.* Numbers in parentheses indicate column percentages.

However, Table 3 shows that complainants were statistically significantly less satisfied with the overall outcome of the mediation when they had African-American mediators.

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111. Results available upon request. This work is still in progress.

Table 3. Race Discrimination Complaint:
Satisfaction with Overall Outcome of Mediation by Race of Mediator

Satisfaction with the Overall Outcome of the Mediation	Race of Mediator		
	Caucasian	*African-American*	**Total**
*Very or Somewhat **Satisfied***	274 (76.5%)	34 (61.8%)	308 (74.6%)
*Very or Somewhat **Unsatisfied***	84 (23.5%)	21 (38.2%)	105 (25.4%)
Total	358	55	413 (100%)

Note, $\chi^2 = 5.447$, *df = 1.* Numbers in parentheses indicate column percentages.
Significant at *p < .05

There were no statistically significant differences based on the gender of the mediator in any of Tables 4 through 9. Descriptive statistics (percentages) show that for sex discrimination claims reflected in Tables 4, 5, and 6, there is very little difference in satisfaction with the mediation process, mediator, or overall satisfaction whether the mediator is male or female.

Table 4. Sexual Discrimination Complaint:
Fairness of the Mediation by Gender of Mediator

Satisfaction with the Fairness of the Mediation Process	Gender of Mediator		
	Male	*Female*	**Total**
*Very or Somewhat **Satisfied***	185 (94.4%)	163 (91.6%)	348 (93.0%)
*Very or Somewhat **Unsatisfied***	11 (5.6%)	15 (8.4%)	26 (7.0%)
Total	196	178	374

Note, $\chi^2 = 1.143$, *df = 1.* Numbers in parentheses indicate column percentages.

Table 5. Sexual Discrimination Complaint:
Fairness of the Mediator by Gender of the Mediator

Satisfaction with the Fairness of the Mediator	Gender of Mediator		
	Male	*Female*	**Total**
*Very or Somewhat **Satisfied***	198 (99.5%)	177 (100.0%)	375 (99.7%)
*Very or Somewhat **Unsatisfied***	1 (0.5%)	0 (0.0%)	1 (0.3%)
Total	199	177	328

Note, $\chi^2 = .892$, *df = 1.* Numbers in parentheses indicate column percentages.

Table 6. Sexual Discrimination Complaint: Satisfaction with Overall Outcome of Mediation by Gender of Mediator

Satisfaction with the Overall Outcome of the Mediation	Gender of Mediator		
	Male	*Female*	**Total**
*Very or Somewhat **Satisfied***	131 (71.2%)	110 (71.0%)	241 (71.1%)
*Very or Somewhat **Unsatisfied***	53 (28.8%)	45 (29.0%)	98 (28.9%)
Total	184	155	339

Note, $\chi^2 = .002$, *df = 1.* Numbers in parentheses indicate column percentages.

However, with Tables 7, 8, and 9, which reflect claims of sexual harassment, descriptive statistics (percentages) reflect that complaints report higher levels of satisfaction with the mediation process, mediator, and overall outcome when the mediator is female. The results did not attain statistical significance because the sample size is too small and several cells have values of fewer than five.

Table 7. Sexual Harassment Complaint: Fairness of the Mediation by Gender of Mediator

Satisfaction with the Fairness of the Mediation Process	Gender of Mediator		
	Male	*Female*	**Total**
*Very or Somewhat **Satisfied***	39 (90.7%)	46 (95.8%)	85 (93.4%)
*Very or Somewhat **Unsatisfied***	4 (9.3%)	2 (4.2%)	6 (6.6%)
Total	43	48	91

Note, χ^2 *= .971, df = 1.* Numbers in parentheses indicate column percentages.

Table 8. Sexual Harassment Complaint: Fairness of the Mediator by Gender of Mediator

Satisfaction with the Fairness of the Mediator	Gender of Mediator		
	Male	*Female*	**Total**
*Very or Somewhat **Satisfied***	43 (95.6%)	47 (100.0%)	90 (97.8%)
*Very or Somewhat **Unsatisfied***	2 (4.4%)	0 (0.0%)	2 (2.2%)
Total	45	47	92

Note, χ^2 *= 2.135, df = 1.* Numbers in parentheses indicate column percentages.

Table 9. Sexual Harassment Complaint: Satisfaction with Overall Outcome of Mediation by Gender of Mediator

Satisfaction with the Overall Outcome of the Mediation	Gender of Mediator		
	Male	*Female*	**Total**
*Very or Somewhat **Satisfied***	27 (61.4%)	31 (75.6%)	58 (68.2%)
*Very or Somewhat **Unsatisfied***	17 (38.6%)	10 (24.4%)	27 (31.8%)
Total	44	41	85

Note, χ^2 *= 1.987, df = 1.* Numbers in parentheses indicate column percentages.

VI. DISCUSSION

We argue here that DSD is an important way to identify variables that influence the perceptions of and outcomes for participants in mediation programs in employment. REDRESS is a mediation program for discrimination complaints; a key element of the program's structure is its roster of mediators. Every mediation program is a system design. A key element for any system design in the Analytic Framework for DSD is accountability, a concept directly relevant to concerns over bias in dispute resolution. How can we make a system accountable? We argue here that procedural

justice provides an important frame for evaluating a system design. Using complainant perceptions of mediation fairness, mediator fairness, and satisfaction with outcome in the USPS REDRESS program, we examined whether it affects a mediation participant's judgments when the mediator's race or gender matches the nature of the claim or purview of an employee's complaint in race discrimination, sex discrimination, or sexual harassment cases.

Our results support bringing a representative bureaucracy frame to this work. Our main results suggest that African-American complainants are equally satisfied with the mediation process and mediators, regardless of mediator race or ethnicity, in race discrimination cases with the USPS. However, they are less satisfied with the overall outcome in cases where they have an African-American mediator. This result is actually consistent with representative bureaucracy research on police, which has found that a police force must achieve critical mass in diversity before positive effects of representativeness kick in.[112]While the USPS REDRESS mediator roster was during this period diverse compared to other rosters, African Americans nevertheless represented a small percentage of the roster as a whole. Moreover, mediators must remain impartial; while a complainant may expect a better outcome when they are the same race as their mediator, professional training may limit the degree to which mediators may advocate for either party.

In contrast, women complainants are equally satisfied with the mediation process, mediators, and overall outcome in sex discrimination cases regardless of mediator gender. However, though the result is not statistically significant in a chi-square analysis, they *may* be more satisfied with the mediation process, mediators, and overall outcome in sexual harassment cases when the mediator is a woman. This is consistent with active representative bureaucracy research on police dealing with sexual assault claims that finds women police officers have a positive impact on victims coming forward.[113]

The results also support researchers' calls for more empirical research to untangle the subtle effects of demographics of race or ethnicity and gender as to both mediators and participants in mediation. The results in both our studies and previous studies suggest that perceptions and the objective outcomes of mediation may play out differently depending upon whether we examine: (1) racial or ethnic identity compared to gender identity; (2) participants alone; (3) differences in matching participants' and mediators' demographics; and (4) how both mediators and participants interact.

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112. S. Nicholson-Crotty, J. Nicholson-Crotty & Fernandez, *supra* note 70, at 211–12 (finding support for representative bureaucracy theory that hiring more black police officers may reduce police violence against black citizens but only once the percentage of blacks on the force is high enough to reach critical mass).

113. Meier & Nicholson-Crotty, *supra* note 68, at 856.

Race, ethnicity, and gender must be examined as factors in the context of a system or DSD. These studies present substantially differing contexts, from civil trial and small claims courts, to community mediation, to the workplace of a large organization. These contexts in turn are nested in our justice system, local, state, and national government, and culture.[114] By using analysis of the DSD in which a given mediation case is nested, we may be able to control for more of the exogenous variables that give us a clearer picture of how bias manifests itself in these systems. The *MetroCourt Study* provides one such example by comparing the structure of litigation in court to the informal process of mediation and controlling for structural factors such as the differential role of lawyers and the gendered nature of repeat players. The rule of law and legal rules act as a check or balance in court that is absent in a community mediation setting. Controlling for DSD informs the social power dynamics that underpin research findings, which on first analysis were labeled race or gender bias. Moreover, that study provided an in-depth look at factors shaping the distributive justice in these settings in the proportion of claim awarded or settled for.

By analyzing the DSD of a dispute resolution program, and making it accountable through evaluation and assessment of the procedural and distributive justice it delivers, we can take measured steps toward uncovering systemic bias in ADR. By designing programs with a conscious view toward representative bureaucracy as diversity in the mediator and arbitrator rosters, over time we may be able to enhance perceptions of procedural justice and the reality of distributive justice.

VII.　CONCLUSION

Current scholarship is moving toward a more nuanced analysis, one that considers that people's biases may be implicit;[115] people act on biases of which they are not consciously aware regarding racial, ethnic, or gender differences. These biases play out in the workplace through the implementation of systems intended to enforce discrimination law, but shaped in subtle ways by human interaction daily.[116] Workplace conflict management systems may purport to address workplace bullying, but although workplace bullying is often cast in terms of status-blind harassment, studies suggest that there is also some linkage among workplace bullying, gender, race, and ethnicity.[117] Implicit biases may play out in

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114. Elinor Ostrom, Understanding Institutional Diversity (2005).

115. *See* Elayne E. Greenberg, *Fitting the Forum to the Pernicious Fuss: A Dispute System Design to Address Implicit Bias and 'Isms in the Workplace*, 17 Cardozo J. Conflict Resol. 75, 77 (2015).

116. *See* Lauren B. Edelman, Howard S. Erlanger & John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 Law & Soc'y Rev. 497 (1993); Lauren B. Edelman, Aaron C. Smyth & Asad Rahim, *Legal Discrimination: Empirical Sociolegal and Critical Race Perspectives on Antidiscrimination Law*, 12 Ann. Rev. L. & Soc. Sci. 395 (2016).

117. Lamont E. Stallworth & Daniel J. Kaspar, *Employing the Presidential Executive Order and the Law to Provide Integrated Conflict Management Systems and ADR*

differences regarding our varying definitions of communities.[118] By deepening our empirical research subjects and methods, researchers may be able unveil the structures in society that shape that bias.

Processes: The Proposed National Employment Dispute Resolution Act (NEDRA), 28 Ohio St. J. on Disp. Resol. 171, 227 (2013).

  118. Clark Freshman, *Privatizing Same-Sex "Marriage" Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. Rev. 1687 (1997).