

## Table of Contents

### **The Racist Algorithm?**

[Anupam Chander](#), University of California, Davis - School of Law

### **Marriage Equality and its Relationship to Family Law**

[Courtney G. Joslin](#), University of California, Davis - School of Law

### **Preliminary Injunctive Regulation**

[Albert Lin](#), University of California, Davis - School of Law

### **Interstitial Citizenship**

[Rose Cuison Villazor](#), University of California, Davis

[^top](#)

---

## LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES UC DAVIS SCHOOL OF LAW

### **"The Racist Algorithm?"**

*Michigan Law Review (2017 Forthcoming)*  
*UC Davis Legal Studies Research Paper No. 498*

**ANUPAM CHANDER**, University of California, Davis - School of Law  
Email: [achander@ucdavis.edu](mailto:achander@ucdavis.edu)

Are we on the verge of an apartheid by algorithm? Will the age of big data lead to decisions that unfairly favor one race over others, or men over women? At the dawn of the Information Age, legal scholars are sounding warnings about the ubiquity of automated algorithms that increasingly govern our lives. In his new book, *The Black Box Society: The Hidden Algorithms Behind Money and Information*, Frank Pasquale forcefully argues that human beings are increasingly relying on computerized algorithms that make decisions about what information we receive, how much we can borrow, where we go for dinner, or even whom we date. Pasquale's central claim is that these algorithms will mask invidious discrimination, undermining democracy and worsening inequality. In this review, I rebut this prominent claim. I argue that any fair assessment of algorithms must be made against their alternative. Algorithms are certainly obscure and mysterious, but often no more so than the committees or individuals they replace. The ultimate black box is the human mind. Relying on contemporary theories of unconscious discrimination, I show that the consciously racist or sexist algorithm is less likely than the consciously or unconsciously racist or sexist human decision-maker it replaces. The principal problem of algorithmic discrimination lies elsewhere, in a process I label viral discrimination: algorithms trained or operated on a world pervaded by discriminatory effects are likely to reproduce that discrimination.

I argue that the solution to this problem lies in a kind of algorithmic affirmative action. This would require training algorithms on data that includes diverse communities and continually assessing the results for disparate impacts. Instead of insisting on race or gender neutrality and blindness, this would require decision-makers to approach algorithmic design and assessment in a race and gender conscious manner.

### **"Marriage Equality and its Relationship to Family Law"**

*129 Harv. L. Rev. F. 197 (2016)*  
*UC Davis Legal Studies Research Paper No. 499*

**COURTNEY G. JOSLIN**, University of California, Davis - School of Law

Email: [cgjoslin@ucdavis.edu](mailto:cgjoslin@ucdavis.edu)

This Essay is a Response to Professor Douglas NeJaime's article *Marriage Equality and the New Parenthood*. NeJaime's piece offers critical new insights into the evolution of legal parenthood and its relationship to marriage. First, NeJaime shows how evolving protections for nonbiological parents served as stepping stones in the march toward marriage equality. Surprisingly, few scholars have acknowledged, much less carefully explored, this connection. Second, NeJaime uses his meticulous parentage case study to complicate our understanding of the extent to which this earlier parentage advocacy directly challenged marriage's privileged role in our society. Finally, NeJaime argues that this history suggests more progressive possibilities with regard to the future legal treatment of nonmarital children post-Obergefell.

After highlighting these three key contributions, this Essay makes two additional points. First, this Essay considers why this important story about parentage law and its relationship to marriage equality has attracted less attention than it deserves. Second, this Essay considers a critical possibility not addressed by NeJaime. NeJaime uses parentage law to show how Obergefell might facilitate, rather than foreclose, additional protections for nonmarital children. This Essay posits an even more radical proposition: it argues that marriage equality might open up progressive possibilities not just for nonmarital children, but also for nonmarital adult relationships.

### "Preliminary Injunctive Regulation"

*Arizona Law Review*, Vol. 58 (Forthcoming)

*UC Davis Legal Studies Research Paper No. 497*

**ALBERT LIN**, University of California, Davis - School of Law

Email: [aclin@ucdavis.edu](mailto:aclin@ucdavis.edu)

Rapid technological changes pose serious challenges for the Environmental Protection Agency (EPA) and other regulators charged with protecting human health and the environment. These changes can result not only in significant harms, but also in the entrenchment of new technologies that can be difficult to undo should the need arise. In urgent circumstances, agencies often must act quickly, but they face an increasingly ossified rulemaking process. The Administrative Procedure Act's good cause exception to notice and comment rulemaking offers the most promising option for a swift and effective response. Empirical analysis of EPA's use of that exception demonstrates that, contrary to concerns regarding potential agency abuse, EPA has exercised restraint in invoking the exception. Going forward, EPA should consider more aggressive use of the exception to respond to urgencies resulting from rapid technological developments and environmental changes. In justifying an expedited approach, EPA can make explicit reference to congressional inaction on an issue, the generally protracted nature of contemporary rulemaking, and the particular delays that the agency has encountered in ordinary rulemaking.

### "Interstitial Citizenship"

*Fordham Law Review*, 2017 Forthcoming

*UC Davis Legal Studies Research Paper No. 496*

**ROSE CUI SON VILLAZOR**, University of California, Davis

Email: [rcvillazor@ucdavis.edu](mailto:rcvillazor@ucdavis.edu)

We think of American citizenship as a binary concept. There is citizenship, which is acquired at birth or through naturalization, and there is non-citizenship accounting for everyone else. I argue that this understanding is woefully incomplete. Conventional framing of citizenship has overlooked a different type of political membership: American national status. American nationals possess some rights of citizenship, such as the right to enter and reside in the United States without a visa. Similar to non-citizens, however, they cannot vote or serve on the jury. Thus, the status of American nationals reveals that there are individuals who are neither citizens nor non-citizens or "aliens." Instead, they have what I have coined "interstitial citizenship." Disrupting the citizen/alien binary, interstitial citizenship demonstrates that citizenship is far more flexible than previously thought. Indeed, it reveals that citizenship rights may be unbundled and conveyed to non-citizens. In this way, interstitial citizenship offers important legal and policy implications for contemporary debates on comprehensive immigration reform, including the question of whether to provide undocumented immigrants with a path to citizenship.

[^top](#)

---

## About this eJournal

The University of California, Davis School of Law Legal Studies journal contains abstracts and papers from this institution focused on this area of scholarly research. To access all the papers in this series, please use the following URL: <http://www.ssrn.com/link/UC-Davis-Legal-Studies.html>

## Submissions

To submit your research to SSRN, sign in to the [SSRN User Headquarters](#), click the My Papers link on left menu and then the Start New Submission button at top of page.

## Distribution Services

If your organization is interested in increasing readership for its research by starting a Research Paper Series, or sponsoring a Subject Matter eJournal, please email: [RPS@SSRN.com](mailto:RPS@SSRN.com)

## Distributed by

Legal Scholarship Network (LSN), a division of Social Science Electronic Publishing (SSEP) and Social Science Research Network (SSRN)

## Directors

LAW SCHOOL RESEARCH PAPERS - LEGAL STUDIES

BERNARD S. BLACK

Northwestern University - Pritzker School of Law, Northwestern University - Kellogg School of Management, European Corporate Governance Institute (ECGI)

Email: [bblack@northwestern.edu](mailto:bblack@northwestern.edu)

RONALD J. GILSON

Stanford Law School, Columbia Law School, European Corporate Governance Institute (ECGI)



Email: [rgilson@leland.stanford.edu](mailto:rgilson@leland.stanford.edu)

Please contact us at the above addresses with your comments, questions or suggestions for LSN-LEG.

[^top](#)

Links: [Subscribe to Journal](#) | [Unsubscribe from Journal](#) | [Join Site Subscription](#) | [Financial Hardship](#)

## Subscription Management

You can change your journal subscriptions by logging into [SSRN User HQ](#). If you have questions or problems with this process, please email [Support@SSRN.com](mailto:Support@SSRN.com) or call 877-SSRNHelp (877.777.6435  or 585.442.8170 ). Outside of the United States, call 00+1+585+4428170.

## Site Subscription Membership

Many university departments and other institutions have purchased site subscriptions covering all of the eJournals in a particular network. If you want to subscribe to any of the SSRN eJournals, you may be able to do so without charge by first checking to see if your institution currently has a site subscription.

To do this please click on any of the following URLs. Instructions for joining the site are included on these pages.

[Accounting Research Network](#)

[Cognitive Science Network](#)

[Corporate Governance Network](#)

[Economics Research Network](#)

[Entrepreneurship Research & Policy Network](#)

[Financial Economics Network](#)

[Health Economics Network](#)

[Information Systems & eBusiness Network](#)

[Legal Scholarship Network](#)

[Management Research Network](#)

[Political Science Network](#)

[Social Insurance Research Network](#)

[Classics Research Network](#)

[English & American Literature Research Network](#)

[Philosophy Research Network](#)

If your institution or department is not listed as a site, we would be happy to work with you to set one up. Please contact [site@ssrn.com](mailto:site@ssrn.com) for more information.

### **Individual Membership** (for those not covered by a site subscription)



Join a site subscription, request a trial subscription, or purchase a subscription within the SSRN User Headquarters: <http://www.ssrn.com/subscribe>

### **Financial Hardship**

If you are undergoing financial hardship and believe you cannot pay for an eJournal, please send a detailed explanation to [Subscribe@SSRN.com](mailto:Subscribe@SSRN.com)

[^top](#)

---

To ensure delivery of this eJournal, please add [LSN@publish.ssrn.com](mailto:LSN@publish.ssrn.com) (**Legal Scholarship Network**) to your email contact list. If you are missing an issue or are having any problems with your subscription, please Email [Support@ssrn.com](mailto:Support@ssrn.com) or call 877-SSRNHELP (877.777.6435  or 585.442.8170 .

### **FORWARDING & REDISTRIBUTION**

Subscriptions to the journal are for single users. You may forward a particular eJournal issue, or an excerpt from an issue, to an individual or individuals who might be interested in it. It is a violation of copyright to redistribute this eJournal on a recurring basis to another person or persons, without the permission of Social Science Electronic Publishing, Inc. For information about individual subscriptions and site subscriptions, please contact us at [Site@SSRN.com](mailto:Site@SSRN.com)

[^top](#)

Copyright © 2016 Social Science Electronic Publishing, Inc. All Rights Reserved