# Legal Academia 2.0

## New and Old Models of Academic Engagement and Influence

Paul Daly*

Dans ce court texte, l'auteur contraste ce qu'il décrit comme les modèles anciens et nouveaux de l'engagement des professeurs de droit avec la communauté. L'ancien modèle est marqué par plusieurs caractéristiques : par exemple, l'implication des pairs par voie de comités de lecture; le processus long et lent de révision. Certes, les produits du processus ont parfois un impact sur l'évolution du droit, mais dans la plupart des cas, des décisions des tribunaux sont rendues avant que les commentaires des professeurs de droit apparaissent.

Par contre, le nouveau modèle se caractérise non par l'importance de révision par des pairs, mais plutôt par l'interactivité des forums rendus accessibles par Internet : les blogues et les réseaux sociaux. Dans le nouveau modèle, la diffusion de savoir s'avère rapide. Quant à lui, le savoir n'est plus seulement le domaine des juristes parce que les membres du grand public peuvent facilement s'impliquer dans des débats publics.

L'auteur illustre le nouveau modèle par référence à deux affaires juridiques récentes

In this short text, the author contrasts old and new models of legal academic engagement with the community. Several characteristics of the old model are discussed: it is notable for the involvement of peers in a long and slow process of editorial review. Undeniably, the outputs of this model have an impact on the evolution of the law. For the most part, however, judicial decisions are handed down before detailed academic commentary on the specific factual issues is published.

By contrast, the new model is characterized less by peer-review than by the interactivity of Internet forums, most notably blogs and social media. In the new model, the dissemination of knowledge is extremely rapid. Moreover, knowledge is no longer solely in the domain of the legal academic: the democratizing effect of the new model is such that anyone with an Internet connection can engage members of the legal academic community in debate about legal issues.

The author illustrates the new model by reference to two recent high-profile deci-





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bien connues : la décision de la Cour suprême du Canada dans l'*affaire Nadon (Renvoi relatif à La loi sur la Cour suprême, art. 5 et 6*, 2014 CSC 21) et celle de la *Cour suprême des États-Unis dans l'affaire Obamacare (National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566 (2012)). Dans les deux cas, l'implication des professeurs du droit sur des blogues et des réseaux sociaux a grandement influencé les conclusions des tribunaux. L'auteur suggère que ces cas d'étude démontrent l'importance du nouveau modèle, sur lequel une réflexion importante de la communauté juridique s'impose.

sions: the *decision of the Supreme Court of Canada in l'affaire Nadon (Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21) and that of t*he Supreme Court of the United States on the legality of Obamacare (National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566 (2012)). In these cases, the involvement of legal academics through blogs and social media greatly influenced the conclusions reached by the courts. The author suggests that these case studies demonstrate the importance of the new model and the need for further reflection on its implications.

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### INTRODUCTION

Across the country, legal and political aficionados hunched over their keyboards waiting for the announcement. Some were genuinely surprised by the decision. The leader of the country had staked a great deal of political capital on a legal argument that was rejected by a majority of the Supreme Court. It was a decision that rocked the legal establishment and forced a rethink of the fundamentals of constitutional law. And yet, for those in the know, the decision was not a surprise at all. Serious flaws in the government's legal arguments had been flagged long ago. A key aspect of the reasoning was drawn from an academic article posted in an online database. For those who had followed the case on blogs and social media, the decision was predictable, though no less monumental for that.

I am writing, of course, about *National Federation of Independent Businesses v. Sebelius*,[1] the case in which the Supreme Court of the United States upheld President Obama's landmark healthcare reform against a constitutional challenge. But I could have been writing about *Reference re Supreme Court Act, ss. 5 and 6*,[2] the case in which the Supreme Court of Canada concluded that, Marc Nadon, Prime Minister Harper's nominee to fill its vacant seat was ineligible. Both the *Obamacare case* and *l'affaire Nadon* have much in common. Apart from their political importance, they both highlight the new means that legal academics can use to engage with the wider community.

In this short essay, I will contrast what I call the old and new models of academic engagement, by particular reference to the *Obamacare* case and *l'affaire Nadon*. The lessons are straightforward. Whether concerned to increase their influence or mindful of the need to check it, academics should pay attention to the online world.

1. *National Federation of Independent Businesses* v. *Sebelius*, 132 S. Ct. 2566 (2012).
2. *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21.

The same goes for other actors in the wider community: judges, law clerks, lawyers, litigants, journalists, politicians, political staffers, and lay people.

As a participant in the unfolding drama of *l'affaire Nadon*, I had a privileged position from which to shape and observe the legal and popular argument about the challenge to Justice Nadon's eligibility. This inevitably affects my tone and aims in the pages that follow. I should not be understood as making sweeping claims about academic engagement: the claims made in this paper are anecdotal rather than scientific.[3] Moreover, the old and new models I describe are merely illustrations of different ways that legal academics can engage their audiences; they are not two radically different approaches one of which must be adopted to the exclusion of the other, but are complementary. Finally, I should emphasize that my primary goal is to stimulate reflection rather than to present a unified field theory of academic engagement. More work will undoubtedly need to be done on the issues raised herein, in which my account will prove a useful reference point for future researchers.

## 1. The Old Model

An academic sits in a dusty office in an ivory tower. All is calm as dusk falls. No sound is to be heard save for the scratching of a pen across parchment. She has had an idea! Probably one that germinated during a conference or a conversation with colleagues and that has gestated since. Her scratchings will turn in time into typeface and in time into a book or article to be stored and read in libraries the world over. Along the way, drafts of the fully formed idea will be pored over by her colleagues, editors and peer reviewers. Comments, gentle and sharp, will push and prod her work to its finished form.

This is the traditional model of producing cutting-edge scholarship in the humanities. It survives with some modifications – funded and empirical research is now hugely important – to the present day. It has the following characteristics.[4]

It is *peer-reviewed*. Decisions on whether the paper is worthy of publication are made by the academic's peers. Editors and reviewers are (usually) leading academics in their fields. This helps to explain why peer-reviewed journals are so prestigious. If leading academics signed off on the paper, it plainly represents a contribution to

3. Compare Craig Forcese, "The Law Professor as Public Citizen: Measuring Public Engagement in Canadian Common Law Schools" (2015) 36 Windsor Review of Legal and Social Issues 66.

4. American student-run law journals represent an interesting variant on the old model, in which papers are not formally peer-reviewed. Nonetheless, work produced in these journals shares the other features of the old model. In any event, top journals now occasionally rely on peer reviewers: see e.g. <https://lawreview.uchicago.edu/page/submissions>. For some early thoughts on whether new models of academic engagement might influence future law-review trends, see Lawrence B. Solum, "Blogging and the Transformation of Legal Scholarship" (2006) 84 Washington University Law Review 1071.

the store of knowledge. There are other ways of judging how important a paper is, for example by reference to how often it has been cited. But publication in a peer-reviewed journal is an excellent proxy for academic excellence.

It is *slow*. From germination to gestation to publication can take years. It rarely takes months and never takes weeks. When an academic submits a paper to a peer-reviewed journal, an editor will cast her eye over it and decide whether to send it for peer review. If so, the peer reviewers read and comment on the paper, providing recommendations about its suitability for publication. These recommendations are returned to the editor and author, who may make changes in response, before sending the revised paper back for final checks by the editor and peer reviewers. If all goes well, publication is the end result – after several rounds of copy editing and, depending on the neuroses of all involved, final panicked edits.

It is *linear*. Every step in the process is marked out in advance. There is no means of skipping ahead. Leading academics must follow the same slow steps as their junior colleagues.

It is *bounded*. The actors in the process are the author, editor and peer reviewers. Theirs are the voices that count. At various stages, the author may present the idea or drafts of the paper at a conference or to colleagues and receive useful feedback. The more adventurous may even write a newspaper article about the paper. Outreach is generally quite limited, however. Decisions are made by a very small group.

It makes a *distinction between inputs and outputs*. What goes into the paper is invariably the product of background reading, conversations with colleagues and feedback from conference presentations. Later, the content of the paper may change based on comments received from the editor and peer reviewers. All the way through the process, inputs and outputs are kept separate.

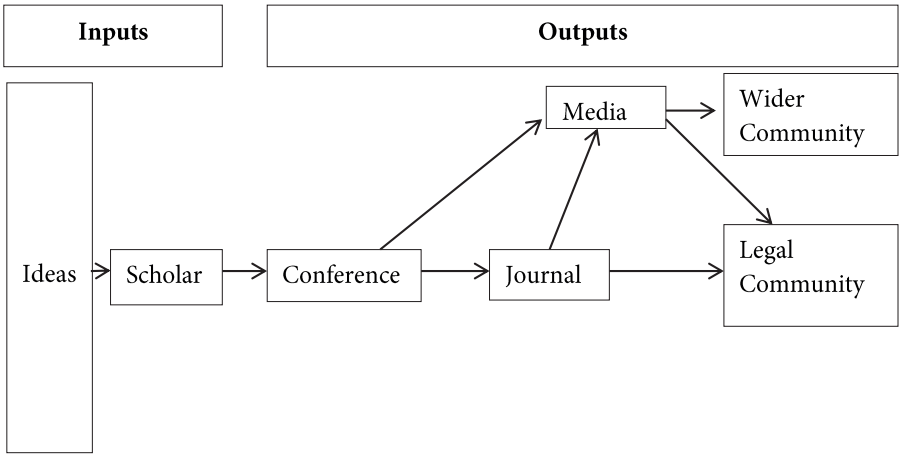
Finally, it makes a *distinction between the academic community and wider public*. Papers published in academic journals are not widely read. 'Normal' libraries do not subscribe to them. Nor do individuals. Lay people will continue their lives blissfully unaware of a paper published in an academic journal unless it is perchance publicized by the media. A legal academic's audience might be broader than the academic community: practicing lawyers and judges may also find the paper interesting or useful. But the legal community remains a subset of the wider public.

## 2. The New Model

When I say "new model", I do not mean to suggest that the old model is obsolescent, still less obsolete. To the contrary, it remains dominant. And the new model is, for the moment, complementary. It has the potential to be subversive, but need not be. On the one hand, academic journals are unlikely to disappear, for they are well-suited to detailed theoretical commentary that aims to advance knowledge about a

sector of the law or society.[5] On the other hand, the growing awareness of the possibility of formally measuring academic impact[6] raises the prospect that engagement with the broader public will play a larger role in assessing academic reputation.

The new model involves the dissemination of academic knowledge by means of the Internet. In one sense, the Internet simply makes it possible to diffuse knowledge to a larger audience. Once upon a time, only conference attendees could hear an author speak. Today, conferences are regularly recorded and made available on the Internet, on Youtube or some other content provider. Similarly, it is no longer necessary to subscribe to an academic journal in order to access academic articles. SSRN and other repositories store content that can be accessed by anyone with an Internet connection. At the very least, the old model must be updated to take account of technological advances. Both the legal and wider communities can access content uploaded by authors to Youtube or SSRN. Here is Legal Academia 1.0:




In particular, social media provides a means for academics to engage with the legal community and wider community. Twitter, Facebook and LinkedIn are tools

5. Roderick A. Macdonald, "Who's Afraid of the Cyber-law Journal?" (2011) 36 Queen's Law Journal 345.

6. See e.g. Simon Bastow, Jane Tinkler & Patrick Dunleavy, *The Impact of the Social Sciences: How Academics and their Research Make a Difference*, (Los Angeles: Sage Publishing, 2014). See also Neil Duxbury, *Jurists and Judges: An Essay on Influence*, (Oxford: Hart Publishing, 2001), at 5–22, discussing some of the difficulties experienced in attempting to measure academic influence in law.

not only for the dissemination of information but for discussion of it. Blogs have a similar quality, in perhaps an even greater intensity. They attract a hard core of readers, often experts in an area, who read and provide critical observations on the author's output.

It is *interactive*. All readers can comment on an author's observations. Papers uploaded to SSRN may invite comments via email. Blogs have comment functions which allow readers to leave their thoughts, sometimes anonymously (a boon for those who may, for various reasons, be unable to comment without the cloak of anonymity). And Twitter is an anarchic free-for-all, a platform to which anyone may invite himself or herself. To the question posed by the Irish passer-by at a brawl – "Is this a private fight or can anyone join in?" – the answer is a resounding yes.

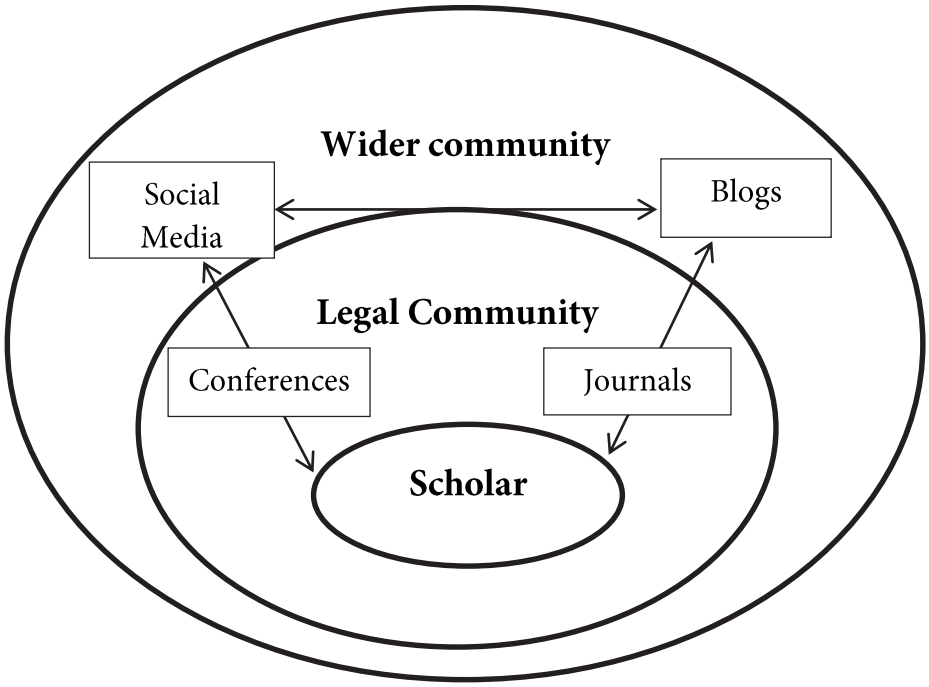
It is *exponential*. The audience for academic articles is small but the audience for online content is huge. Only an Internet connection is necessary to access SSRN, blogs and Twitter; only a keyboard is necessary to contribute one's point of view. Twitter has an especially exponential quality. An author's audience on Facebook or LinkedIn is limited in the first instance to her circle of friends and though the audience may grow in a series of concentric circles as the content is shared it remains bounded by readers' degrees of separation from the author. By contrast, Twitter's series of concentric circles are potentially boundless. Indeed, its platform allows users to identify interesting content by following particular hashtags or searching particular terms. Network effects mean its platform is unbounded.

It is *rapid*. A blog entry or idle thought shared on social media can have an instant impact. Shorn of the filter of an editor and peer reviewers, the author's ideas can be expressed and communicated in real time.

It is *non-linear*. The neat progressions of the old model are replaced by a lengthy feedback loop. Members of the legal and wider communities can contribute in real time to the development of the author's thinking. As soon as an idea is unleashed via social media, readers can respond with comments which may themselves cause the author to modify her initial position. Authors and readers interact in an endless feedback loop along which the author's idea is honed.

Finally, it *breaks down distinctions*. In the new model, the legal and wider communities merge into one another. Doubtless an author may give greater weight to contributions from those who are or seem to be expert, but the lines are necessarily blurred by anonymity and geographic scale: it is hard for the author to assess the credentials of an academic from some far-flung jurisdiction and pre-judge the contribution made. And, in the new model, interactivity breaks down the distinction between inputs and outputs entirely. An academic is no longer the one at the start of a chain but one of many in the midst of an ongoing conversation.

Here is Legal Academia 2.0:






# 3. Channels of Influence

## 3.1. The Ivory Tower

Actors in the old model engage a limited audience: the legal community. They may still influence how the legal community acts but given the characteristics of the old model, their influence holds mainly over future cases and rarely, if ever, over pending ones. There are some exceptions.

Sometimes, academic articles are published before cases are argued or decided. Before the Supreme Court of Canada opined on the constitutionality of a national firearms registry,[7] several authors penned pieces arguing in favour of its legality.[8] But given the slow pace of academic publishing, this is rare.

7. *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783.
8. Dale Gibson, "The *Firearms Reference* in the Alberta Court of Appeal" (1999) 37 Alberta Law Review 1071; David Beatty, "Gun Control and Judicial Anarchy" (1999) 10 Constitutional Forum 45; Allan Hutchinson & David Schneiderman, "Smoking Guns: The Federal Government Confronts The Tobacco and Gun Lobbies" (1995) 7 Constitutional Forum 16.

Parallel to the old model of academic publishing is the classic method of a 'Letter to the Editor'. Sometimes ideas which have not yet found their way into academic print can nonetheless be distilled into readable form and thereby influence public debate. Professor John Whyte notably contributed a critical opinion piece to the *Toronto Star* on the appointment of Justice Nadon and the attempt to validate it retrospectively.[9] On the other wide of the debate, Robert Décary and Gilles Letourneau (who would later intervene before the Supreme Court of Canada) wrote strongly worded pieces in *La Presse* emphasizing the civil-law character of much federal court adjudication.[10] A method more classic still is the whispered word. Judges and academics sometimes talk about legal issues, or even pending cases, though this is not "an everyday event".[11]

These examples of the channels of influence in the old model are largely independent of peer review. Those able to influence the courts are those who gained their reputations from regularly running the peer-review gauntlet with aplomb. But it is through their work on the fringes of the old model – dabbling in non-peer-reviewed publications, media and conferences – that they brought their influence to bear.

## 3.2. Academic Influence 2.0

*Obamacare* is a classic example of the new model in action. A lawsuit against the constitutionality of the 'individual mandate' (a requirement that individuals purchase health insurance or pay a fine) was not taken seriously by politicians or much of the legal academy when it was first mooted in a *Wall Street Journal* op-ed by Lee Casey and David Rivkin Jr.[12]

Yet in a sustained series of posts on the *Volokh Conspiracy* blog – which brings together libertarian and conservative legal academics – contributors honed arguments against the mandate's constitutionality. Randy Barnett led the merry gang, which also included Ilya Somin, David Kopel and Jonathan Adler. Their arguments prompted strong rebuttals, from one of their fellow conspirators, Orin Kerr, and from legal academics from opposing camps, such as the liberal, Jack Balkin. Commenters, from across the world and political spectrum, also weighed in. In the heat of battle, the arguments against the constitutionality of the mandate grew stronger.[13]

9. "Prime Minister Stephen Harper and Canada's pesky constitution", *Toronto Star* (28 October 2013).
10. Robert Décary, "Fier juge fédéral... et Québécois", *La Presse* (25 October 2013); Gilles Létourneau, "Une affaire rocambolesque", *La Presse* (30 October 2013).
11. Alan Paterson, *Final Judgement: The Last Law Lords and the Supreme Court* (Oxford: Hart Publishing, 2013), at 220.
12. "Is Government Health Care Constitutional?", *Wall Street Journal* (22 June 2009).
13. Trevor Burrus, ed., *A Conspiracy Against Obamacare: The Volokh Conspiracy and the Health Care Case*, (New York: Palgrave Macmillan, 2013).

The case made it to the Supreme Court in the wake of several lower-court decisions concluding that the mandate was neither a valid exercise of Congress's enumerated power to regulate interstate commerce nor of its authority to adopt ancillary measures that are necessary and proper to further its enumerated powers. Lower courts were not unanimous. Neither was the Supreme Court. But a majority held that the individual mandate was unconstitutional.

Notoriously, although he agreed with the arguments developed in cyberspace about the scope of the commerce clause, Chief Justice Roberts voted to uphold the individual mandate as a valid exercise of Congress's power to tax and spend for the general welfare. His opinion bore a remarkable similarity to an academic paper posted to SSRN by Robert Cooter and Neil Siegel, "Not the Power to Destroy: An Effects Theory of the Tax Power", which had been downloaded 162 times at the time of the decision.

*L'Affaire Nadon* had a similar quality. An opinion commissioned of retired Supreme Court of Canada judge Ian Binnie, released to coincide with the announcement of Justice Nadon's nomination,[14] failed to convince several legal academics on Twitter. A lively debate commenced, which continued through the launch of Rocco Galati's legal challenge to Justice Nadon's appointment.

The cut and thrust of the Twitter debates led me to post several entries on my blog, *Administrative Law Matters*. I noted that Galati's challenge was serious: the most natural reading of ss. 5 and 6 of the *Supreme Court Act* was that lawyers are generally required to have 10 years' experience to be eligible for appointment but that only current members of the Quebec bar may be named to the three seats reserved for civilian jurists.[15] I also noted that a reference to the Supreme Court of Canada was likely before subsequently unearthing some interesting legislative history in the 1875 debates establishing the Court and making provision for civil-law judges,[16] a post quickly picked up by Canada's leading legal blog, Slaw.ca.[17] I later appeared before the Senate Standing Committee on Legal and Constitutional Affairs, for which

14. See generally Ian Peach, "Reference re Supreme Court Act, ss 5 and 6 — Expanding the Constitution of Canada" (2014) 23 Constitutional Forum constitutionnel 1.
15. "Eligibility to sit on the Supreme Court of Canada", *Administrative Law Matters* (9 October 2013), online: <http://www.administrativelawmatters.com/blog/2013/10/09/eligibility-to-sit-on-the-supreme-court-of-canada/>.
16. "More on section 6 of the Supreme Court Act: Legislative History and Purpose", *Administrative Law Matters* (16 October 2013), online: <http://www.administrativelawmatters.com/blog/2013/10/16/more-on-section-6-of-the-supreme-court-act-legislative-history-and-purpose/>.
17. "Some Legislative History Relevant to the Appointment of Justice Nadon", *Slaw.ca* (16 October 2013), online: <http://www.slaw.ca/2013/10/16/some-legislative-history-relevant-to-the-appointment-of-justice-nadon/>.

I prepared written submissions. These were uploaded to SSRN; they have now been accessed 219 times.[18]

In the meantime, Carissima Mathen and Michael Plaxton posted on SSRN an essay entitled, "Purposive Interpretation, Quebec, and the Supreme Court Act", a critique of the Binnie opinion which has now been downloaded over 400 times. They drew on the same source material. Constitutional Forum, a non-peer-reviewed publication, published their article.[19] These numbers are extremely large for papers written by legal academics, especially given the narrow time frame. Professor Mathen's next most-downloaded paper was posted in 2010 and has been downloaded 192 times.

Critically, the arguments I made to the Senate and that Mathen and Plaxton made in their paper, were the product of the interactivity of the new model. Their wide diffusion meant that the challenge to Justice Nadon's appointment was taken much more seriously than it was at the outset. Moreover, the arguments seeped into the litigation. In their written submissions to the Court, Quebec, Rocco Galati and the Constitutional Rights Centre all cited my submissions and Mathen and Plaxton's paper. Mathen and Plaxton's paper was, indeed, cited by the Court for a key proposition about the purpose of the *Supreme Court Act*.[20] The development of the arguments and the way in which they influenced the argument and outcome are unprecedented in Canadian law.



18. "Submissions to Senate Standing Committee on Legal and Constitutional Affairs re Modifications to the Supreme Court Act", online: <http://ssrn.com/abstract=2357273>.
19. "Purposive Interpretation, Quebec, and the Supreme Court Act" (2013) 22 Constitutional Forum 15.
20. *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, at para. 58: "Parliament could have adopted different criteria to achieve the twofold objectives of s. 6 — for instance by requiring a qualitative assessment of a candidate's expertise in Quebec's civil law and legal traditions — but instead it chose to advance the provision's objectives by specifying objective criteria for appointment to one of the Quebec seats on the Court. In the final analysis, lawmakers must draw lines. The criteria chosen by Parliament might not achieve perfection, but they do serve to advance the provision's purpose: see Michael Plaxton & Carissima Mathen, "Purposive Interpretation, Quebec, and the Supreme Court Act" (2013) 22 Const. Forum const. 15, at 20–22."

## CONCLUSION

Legal Academia 2.0 is emergent. It has not yet eclipsed the old model and will probably never do so entirely. Peer-reviewed publications provide an objective benchmark of academic merit which allows hiring, promotion and research funding decisions to be made (for the most part) fairly and efficiently. At the very least, however, Legal Academia 2.0 extends the reach of individual academics beyond fellow members of the professoriate. As disseminators, as well as creators, of knowledge, academics can engage with new technologies and find new audiences and new ideas. Indeed, as social scientists' expertise in measuring impact increases, the case for including public engagement as an objective criterion of academic excellence will become much stronger.

However, the ability of academics to influence public policy debates in real time should be exercised with caution and not with ulterior motives in mind. Using public platforms for partisan advantage would foment public suspicion of academics and undermine the transformative potential of Legal Academia 2.0. But this problem should be a familiar one. Just as the lectern should not be used as a bully pulpit, nor should social media.

The implications for lawyers, journalists and the wider public are profound. Lawyers arguing high-profile cases can watch legal academics react to oral argument in real time. During their lunch breaks, they could profitably scour Twitter feeds to assist them in composing their replies. More generally, the era of the lawyer who keeps on top of her practice by reading the Law Reports and attending occasional professional development activities is nearly over. To close one's eyes to blogs and social media is to cut oneself off from important sources of information.

Journalists too would be well advised to keep an eye on blogs and social media feeds maintained by academics. Most of the developments in the *Obamacare* litigation and the *Nadon Reference* were presaged by blog and Twitter entries. And to the wider public, the message is to join in. Your understanding of the issues will be better for engaging with legal academics. And our understandings will be enriched by taking seriously the contributions of lay people. *Obamacare* and *l'Affaire Nadon* represent just the beginning of a new era in a legal scholarship, influence and engagement.