



# On Academic Fads and Fashions

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# Academic Fads and Fashions (with Special Reference to Law)

Cass R. Sunstein

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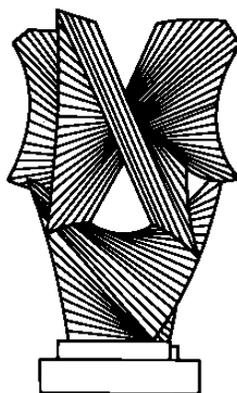
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## ACADEMIC FADS AND FASHIONS (WITH SPECIAL REFERENCE TO LAW)

*Cass R. Sunstsein*

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## **Academic Fads and Fashions (with special reference to law)**

Cass R. Sunstein\*

### **Abstract**

*Like everyone else, academics are susceptible to informational and reputational signals. Sometimes academics lack confidence in their methods and beliefs, and they pay a great deal of attention to the methods and beliefs of others. The academic study of law is particularly subject to cascade effects, as people follow signals that they participate in amplifying. Some of these effects run their course quickly, whereas others last a long time. Leaders can play a special role in starting and stopping cascades; external shocks play a special role in the academic study of law; sometimes like-minded people within academia move one another to extremes. This informal essay, the Foreword to the forthcoming annual book review issue of the Michigan Law Review, discusses these points in a tentative and impressionistic way, with brief comparisons to other fields.*

### **I. Introduction**

Why did critical legal studies disappear? Will it reappear? Why does the Federalist Society prosper? Why, and when, do people write books on constitutional law, rather than tort law or antitrust? Why did people laugh at the notion of “animal rights,” and why do they now laugh less? Why do law professors seem increasingly respectful of “textualism” and “originalism,” ideas that produced ridicule and contempt just two decades ago? How do book reviewers choose what books to review? Why has law and economics had such staying power?

Academics are generally committed to truth, and they are drawn to ideas that can be shown to be good ones. Hence the most optimistic answer to these questions is that ideas survive because and to the extent that they are true or good. On this view, law and economics has outlasted critical legal studies because it has much more to offer.

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\* Karl N. Llewellyn Distinguished Service Professor of Jurisprudence, University of Chicago, Law School and Department of Political Science. I am grateful to Jack Balkin, Jack Goldsmith, Tracey Meares, Eric Posner, and Richard Posner for helpful comments on an earlier draft.

Textualism and originalism have had a resurgence because much can be said on their behalf. Book reviewers, in the academic domain, tend to choose to review the best books.

In my view, these claims contain some truth, but they are far too optimistic. Academics, like everyone else, are subject to cascade effects. They start, join, and accelerate bandwagons. More particularly, they are subject to the informational signals sent by the acts and statements of others. They participate in creating the very signals to which they respond. Academics, like everyone else, are also susceptible to the reputational pressures imposed by the (perceived) beliefs of others. They respond to these pressures, and by so doing, they help to amplify them. It is for these reasons that fads, fashions, and bandwagon effects can be found in academia, emphatically including the academic study of law. Fortunately, the underlying forces can spark creativity and give new ideas a chance to prosper. Unfortunately, these same forces can also produce error and confusion.

Sometimes cascades have enduring effects; but in many fields, academic cascades are fragile, with numerous people focussing on issues and adopting methods that disappear in short order. Some cascades produce unpredictable and seemingly random movements, as external shocks sometimes lead in dramatic directions. In social life, small sparks cause wildfires; it is for this reason, among others, that we cannot easily predict future academic trends, or foresee new movements in the academic study of law. (In 1985, would it have been possible to predict the resurgence, in the 1990s, of interest in the study of social norms<sup>1</sup>? Or the rise of interest in the Second Amendment?) There is even a tipping point phenomenon here, in which a certain pressure, from the perceived views of others, can produce a kind of sudden “rush” toward a methodology or point of view.<sup>2</sup>

In this essay, I attempt to cast some preliminary light on the general topic of academic bandwagons and cascades, with particular reference to law. Several caveats are in order at the outset. First, my focus here is on trends in academic law, but informational and reputational signals are of course ubiquitous. The same forces discussed here help explain many social movements, including reactions to environmental risks, the rise and fall of communism, the success or failure of students and job candidates, the creation of ethnic identifications, and the rise and partial fall of

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<sup>1</sup> Fueled by Robert Ellickson, *Order Without Law* (1991).

<sup>2</sup> For a popular treatment, see Malcolm Gladwell, *The Tipping Point* (2000).

affirmative action.<sup>3</sup> Second, I do not mean to present any criticism of legal scholarship in general, or to depict those who produce it as especially prone to informational and reputational influences. A general attack on legal scholarship would be senseless, if only because so much of it is obviously excellent. Third, I aim only to establish the existence of cascade effects, not to give a clear test for distinguishing cascades from cases in which approaches and arguments have spread because of their merits or independent appeal (though some of my remarks will bear on that issue). Fourth, my treatment will be informal and anecdotal, offering examples that will, I hope, be intuitive and familiar. With respect to the underlying phenomena, I draw on some more systematic and formal treatments,<sup>4</sup> both general and particular, and try to apply the central ideas to the academic context. Obviously a great deal might be said about this topic; the brief treatment here is intended to be a start.

## **II. A Note on Academic Utility Functions and the Market For Ideas**

To make progress on this topic, it is necessary to have some sense of what academics care about, and also to know something about the nature of the market for academic ideas. On these subjects, I hope not to say anything controversial. But because some account is implicit in any description of cascades, I offer some brief notations.

Most academics care about what most people care about. They seek to retain their jobs and to have the good opinion of (relevant) others. Few of them are indifferent to status. But they also care, more than most, about ideas, and they are willing to forego benefits of various sorts in order to be able to think and talk about issues suitable for teaching and academic research. Many academics are interested in pursuing truth as such; those who do or use empirical work often fall in this category. The same is true for

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<sup>3</sup> See, e.g., David Hirschleifer, *The Blind Leading the Blind: Social Influence, Fads, and Informational Cascades*, in *The New Economics of Human Behavior* 188, 189 (Mariano Tommasi and Kathryn Ierulli eds 1995); Timur Kuran, *Public Lies, Private Truths* (1997).

<sup>4</sup> See note supra. A helpful overview is Sushil Bikchandani et al., *Learning From the Behavior of Others: Conformity, Fads, and Informational Cascades*, 12 *J Econ Persp* 151 (1998). In the social sciences, the analytical literature on cascades begins with Magoroh Maruyama, *The Second Cybernetics: Deviation-Amplifying Mutual Causal Processes*, 51 *American Scientist* 164 (1963); Thomas C. Schelling, *Micromotives and Macrobehavior* (1978); and Mark Granovetter, *Threshold Models of Collective Behavior*, 83 *American Journal of Sociology* 1420 (1978). For analysis of purely informational cascades, see Sushil Bikchandani, David Hirschleifer, and Ivo Welch, *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 *Journal of Political Economy* 992 (1992); Lisa Andersson and Charles Holt, *Information Cascades in the Laboratory*, 87 *Am. Ec. Rev.* 847 (1997); Abhijit Banerjee, *A Simple Model of Herd Behavior*, 107 *Q. J. Econ.* 797 (1992). See also B. Douglas Bernheim, *A Theory of Conformity*, 102 *J. Polit. Economy* 841 (1994) (discussing similar mechanisms).

those whose basic goal is to help produce clarity and coherence in the law. In the particular context of law, there is an additional point: Many academics would like to contribute to improvements in law and society by helping to make law better in the domains of (for example) antitrust law, race or sex equality, and freedom of speech. Of course academics are a diverse lot on these counts. For some, reputation matters a great deal, whereas for others, the pursuit of truth, or justice, is what is really important.

There is also a market for academic ideas, and this market will have significant effects on what academics do. In the market for academic law, law professors are the producers, while consumers include other law professors, students, government officials, judges, and law clerks. The extent of interest from these various groups will of course vary with the material; some academic work is of direct interest only to other academics. The market here is unusual in many ways, above all because no one pays directly for what academics produce. Of course law reviews usually do not compensate people for articles and essays, and the same is true for other journals (in economics and philosophy, for example) in which law professors might publish. Boo publishers will pay for the right to publish books, and professors receive royalties, but for academic books, little money is usually involved, and hence the motivation for writing books is rarely material.

On the other hand, indirect compensation, monetary and nonmonetary, is omnipresent. Job opportunities are a direct function of what academics produce, and at many schools, salary is partly a reflection of quality and quantity of publications. Invitations to conferences and the like – dreaded by some, welcomed by most – are also affected by the perceived quality of academic work. It is here, above all, that the market disciplines academic activity.

In a well-functioning market, only or mostly valuable ideas will be produced – although of course some ideas will be valuable even if they are misleading or incorrect. But it is not at all clear that an ordinary economic market, based on the willingness to pay criterion, is a good way to produce valuable ideas in law or elsewhere. Such a market might well cater unduly to existing tastes or to the interests of those with a great deal of money to pay. (Research funding by groups with a large financial stake in outcomes is therefore a problem.) A large point of academic work, in many fields, is to challenge and transform current preferences and values, not to reinforce them.

In fact the complex system of indirect compensation, alongside the tenure system, is commonly defended as a way of insulating the production of ideas from ordinary markets. And if this complex system works extremely well (by the appropriate criteria), it will lack “bad cascades,” that is, cascades in which valueless

ideas travel not because they are valuable, but because of the mechanisms that I will be discussing here. But I will suggest that in many contexts, an absence of private information, together with a concern for reputation and various features of human condition, can produce academic cascades that are bad as well as good.

### **III. Information-Induced Academic Cascades**

Academic cascades take two forms: informational and reputational. Let us begin with the role of information.

Most people, in most domains, lack reliable information about what is true and what is right. For this reason, they are interested in the signals of others. The point holds for the selection of movies, restaurants, and carpets; it holds for ideas as well. If you are unsure whether textualism is a sensible or instead pernicious approach to constitutional interpretation, you might care a great deal about other people's views. Of course academics, especially older ones, are sometimes settled in their beliefs. Often they are confident that they know what to think, and to the extent that this is so, they are not terribly susceptible to the views of others. (Notice here that the precondition for immunity to informational influences is confidence about one's preexisting views, not adequate or accurate information.) But among some groups, and in some fields, any settlement is provisional and somewhat fragile. In many fields, including law, young people in particular can both influence and be influenced by informational signals. If many people are susceptible to influence, cascades can readily develop. The significant swings in legal scholarship over the last decades suggest that academic lawyers are vulnerable to them.

Suppose, for example, that John, a young academic, does not know whether textualism is a sensible approach to constitutional interpretation, but that Mary, a slightly older academic, is in favor of it.<sup>5</sup> If John is otherwise in equipoise, but attaches value to what Mary thinks because she seems wise or has often been right in the past, it is easy to see how John might come to Mary's view. If John and Mary believe that textualism makes sense, Sally, a contemporary of John, might be moved to agree, at least if she lacks reasons to be confident that they are wrong. And once John, Mary, and Sally come to a certain view, David, a recently hired faculty member, will likely agree with them unless he has enough private knowledge, or (more precisely) confidence about his antecedent view, to stand in their way. At some point one or more of these people might even produce an article or book in defense of textualism.

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<sup>5</sup> The example adapts from the treatment in Bikchandani, *supra* note.

As stylized as the example seems, I believe that it captures a great deal about academic movements, in law and elsewhere. Consider, for example, the spread of feminism within American law schools, starting roughly in the late 1980s. In many places, feminism appears to have succeeded through a kind of informational cascade, as people who would otherwise be skeptical, or unsure, came to think that feminist approaches had something to offer -- not (in many cases) because they carefully investigated the underlying claims and believed that they were illuminating or right, but because the beliefs of others seemed hard to resist for those lacking a great deal of confidence in their own (skeptical) judgments. If so many people seemed to think feminist approaches to law are valuable, mustn't they be right? <sup>6</sup>

Or consider the life and apparent death of the critical legal studies movement, which flourished (again speaking roughly) from 1977 to 1989. When I was a visiting professor at Harvard Law School in 1987, critical legal studies was having a truly extraordinary influence on both students and younger faculty. A significant number of students seemed to have a sense of what critical legal studies was about; and they seemed to agree with it. A significant number of assistant professors (some of them now professors, with apparently little continuing interest in critical legal studies) were in the same category. Within both groups, the informational signals sent by the large number of critical legal studies members were extremely important.

At the University of Chicago Law School, much the same can be said, then and now, about the economic analysis of law. Many faculty members engage in economic analysis of law, and a strong majority of the faculty shows considerable interest in the basic approach. As a general rule, younger faculty members are especially interested in the informational signals sent by their colleagues, and at Chicago, many of them end up doing work that is influenced by economics. Cascade effects are even easier to observe within the student body, as certain concepts (involving, for example, the value of efficiency, the implications of the Coase theorem, the futility of redistributive regulation) spread as if by contagion. Of course it is true that many students, and some faculty members, show no interest in economic analysis of law. But mere exposure to economic thinking, voiced in many settings (including workshops, lunch discussions, and comments on drafts of articles), lead in the expected directions.

As informational cascades develop, people end up amplifying the very informational signals to which they have responded. Scholarship, including the production of articles and books, is much affected by processes of this kind. If this is so,

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<sup>6</sup> Of course a possible answer is: They might be wrong, especially if they are participating in a cascade, rather than acting independently.

it is possible to predict, with some confidence, that the publication of books on various topics or with various methodologies will often be highly concentrated over time, showing that fads and fashions play a role in the academic world as elsewhere.

In making these claims, I do not mean to make any normative claims about feminism, critical legal studies, or economic analysis of law. Nor do I mean to suggest that those who are vulnerable to informational pressures are weak or irrational. People who know that they have limited information certainly should pay attention to the signals given by others. And whether pressures of this kind will lead in desirable directions cannot be decided in the abstract. Certainly a field that is susceptible to cascade effects will not be unduly settled or complacent. All that can be said is that the underlying mechanisms give little reason for confidence that academic "movements" will be good ones. Ideas can spread, even among people with some expertise, despite the fact that little is to be said on their behalf.

From the examples that I have given, we can also see the possibility of purely or mostly **local** informational cascades. Outside of the academic world, some communities come to believe that abandoned hazardous waste dumps are extremely dangerous, whereas others think that they pose no hazard at all. So too, some law schools might come to embrace the economic analysis of law, whereas others might see enthusiasm for traditional doctrinal analysis – not because of a large number of independent judgments, but because of mutual interactions and influences.

#### **IV. Reputation and Reputational Cascades**

It should be clear that something important is missing from the picture: people's concerns about their reputations.<sup>7</sup> Generally people care about what others think of them, and most academics are, on this count, like most other people.

At many law schools, and in many economics departments, an effort to show that centralized planning really can work well, or to vindicate socialism, or to show that people are irrational, would be very risky, no matter the quality of the relevant work. People might be ridiculed. They might well jeopardize their careers. In many law schools, the same would be true for people who attempted to show that current differences between men and women are biological rather than social, and to bring evidence to that effect to bear on legal issues.

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<sup>7</sup> On reputation and signalling in general, see Eric Posner, *Law and Social Norms* (2000).

Reputational considerations influence the public behavior of most people, not excluding academics. This is not because people lack integrity, or are sycophantic, or are unwilling to follow their own paths. It is simply because most people, most of the time, want others to think well, or at least not ill, of them. Of course people have varying susceptibility to reputational pressures. Some people can withstand a great deal; others will be inclined to take the safe course, showing reluctance to say, or especially to publish, anything that could create trouble for them in the future. And of course sometimes those who incur reputational sanctions in one place (the nonacademic world, for example) will reap reputational benefits elsewhere (perhaps their local academic community). Thus those who seem to be venturing out on their own, and to be “brave,” might in fact be motivated by the goal of gaining status within a particular group.

Because most people care about the views of others, and because people have varying rather than uniform susceptibility to reputational pressures, it is easy to imagine reputational cascades with respect to actions or stated beliefs.<sup>8</sup> Suppose, for example, that A and B would think ill of anyone who argues that the minimum wage should be significantly increased. C, who is not sure what to think about a higher minimum wage, might be unmoved privately by the views of A and B, but might nonetheless not want to incur the wrath of A and B, or to seem ignorant of basic economic principles, or to appear indifferent to economic efficiency. If so, C might show no enthusiasm for an increase in the minimum wage, or might even agree publicly with A and B that an increase would be a bad idea. If D is otherwise in equipoise, she might be most reluctant to oppose A, B, and C publicly. Mounting reputational pressures might well lead E, F, G, and H, and many more, to join the bandwagon. Eventually a large number of people might speak as if the minimum wage should not be increased. The result would be to affect academic discussion of government’s role in the labor market, including the treatment of this topic in articles and books.

Here too, a highly stylized example seems to help account for many shifts in the academic world, including the field of law. The rise of feminism within legal academia undoubtedly has a great deal to do with reputational as well as informational incentives. In the early 1980s, those who expressed contempt for feminist scholarship were rarely punished for doing so, and were sometimes rewarded. Currently those who express contempt for feminist scholarship generally (not always) put their reputation in considerable danger. If a young academic chooses to write on certain topics, or from certain points of view, the reputational sanctions might be quite severe. At the University of Chicago Law School, I cannot recall many faculty members expressing

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<sup>8</sup> See Kuran, *supra* note.

public support for a substantial increase in the minimum wage, though I would not be surprised if more than one faculty member actually believes that such an increase would be a good idea. Five years ago, those who borrowed from behavioral economics were viewed with considerable suspicion inside the world of law and economics; through a kind of cascade effect, this is decreasingly true.

It follows that “political correctness” is hardly a narrow phenomenon involving the practices of left-leaning academics. Wherever reputational pressures are in place, a form of “political correctness” will discipline action and public statements. Reputational cascades are a possible consequence.

### **V. Group Polarization - and Academic "Schools"**

A closely related phenomenon helps explain the initial growth of academic fashions, and also gives some guidance on how to create, and how not to create, an academic "school." The phenomenon is that of group polarization.<sup>9</sup> In brief, the claim of group polarization is that when a group of people engages in deliberation, group members *will move toward a more extreme position in line with their predeliberation inclinations*. This is the typical pattern among deliberating bodies. Thus, for example, a group of Federalist Society members, inclined to support originalism, is likely to be extremely enthusiastic about originalism after discussing it with one another. So too, a semi-formal organization of law professors, meeting one a month, is likely to emerge with a stronger commitment to critical race theory if its members are inclined, before discussion, to be favorably disposed toward critical race theory. It would be easy to multiply examples.

Massive evidence, from many different countries, supports the basic prediction. Why does group polarization occur? Though no cascade need be involved,<sup>10</sup> the two principal explanations are close to the explanations for informational and reputational cascades. The first involves informational influences. In a deliberating group with an initial tendency in favor of X and against Y, there will be a disproportionate number of arguments in favor of X, simply because most people will speak out on behalf of X. Group members will have thought of some, but not all, of the arguments in that direction. After deliberating, the arguments for X will seem stronger, to individual members, and the arguments for Y will seem even weaker. Hence it is to be expected

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<sup>9</sup> See Roger Brown, *Social Psychology* (2d ed. 1986); Cass R. Sunstein, *Deliberative Trouble: Why Groups Go To Extremes*, 110 *Yale LJ* (2000).

<sup>10</sup> This is because group polarization can result from simultaneous independent influences on group members.

that discussion will move people to a more extreme form of their original enthusiasm for X.

The second explanation for group polarization points to social influences. Most people, emphatically including professors of law, care about their reputations and their self-conception. Suppose, for example, that you are inclined to think that affirmative action does not offend the Constitution, but you are not entirely sure; suppose too that you find yourself in a group which also rejects the idea that affirmative action offends the Constitution. If you think of yourself as the sort of person who is, more than most, inclined to support the constitutionality of affirmative action programs, you might move a bit, if only to maintain your reputation within the group and your self-conception on the issue at hand. The evidence strongly supports the proposition that this happens.<sup>11</sup>

In the academic context, the lesson is simple. A group of like-minded people, thinking about some issue or topic, is highly likely to move toward a more extreme position, not merely fortifying but amplifying their predeliberation inclinations. Through this route, it is possible to make some progress in understanding the creation and effects of academic "schools." In the early 1980s, for example, the critical legal studies movement flourished at Harvard Law School in particular, no doubt in part because of the presence of members who talked a great deal with one another and fueled their predeliberation inclinations. Several influential books emerged from these discussions.<sup>12</sup> In roughly the same period, the Federalist Society was created at Chicago and Yale, and the existence of a group of like-minded people undoubtedly helped to fuel certain commitments. In fact it is reasonable to speculate that the growth of conservative legal thought, within both faculties and students, has had a great deal to do with the existence of a group of people who are relatively well-organized and who are able to ensure that like-minded people can find some kind of home.

## **VI. Qualifications, Extensions, Implications**

Informational and reputational influences, and group polarization, play a significant role in academic life. Cascade effects are present here as elsewhere. If the account here is correct, we should expect a large number of fads and fashions in the academic study of law. I would predict, for example, that a citation analysis would

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<sup>11</sup> See Brown, *supra* note.

<sup>12</sup> See, e.g., Roberto Unger, *The Critical Legal Studies Movement* (1985).

show many academic “bubbles”: rapid rises and declines in references to certain ideas and people.<sup>13</sup> But this basic sketch omits important parts of the overall picture.

### **A. Leaders, Followers, Polarizers**

With respect to both informational signals and reputational pressures, all people are not created equal. Some people carry more weight than others. For example, the signals sent by well-known academics, and academics at well-known schools, are likely to be especially loud. If faculty members at Yale end up endorsing a new method for understanding law, there might seem to be particularly good reason to take that method seriously; and it is less likely that people who do so will face the kind of reputational sanction that would be imposed if the method was being used at a little-known school. Those who are in a position to start cascades operate as leaders, above all because of the social amplification of their voices.<sup>14</sup> Note that this amplification can occur independently of the merits of the argument being made. In listening especially carefully to well-known people, or to people at well-known schools, followers are generally behaving rationally, because such people are unusually likely to be interesting or correct, simply as a statistical matter. But there are no guarantees here, and hence arguments can be amplified even if they are meritless. (Perhaps the resulting bubble will eventually pop, as discussed below.)

Some of the relevant leaders are simply saying what they think to be true; others affirmatively want followers, perhaps because they seek status, perhaps because they want to ensure that their ideas are disseminated. Such people take steps self-consciously to promote cascade effects, perhaps by organizing conferences, reading groups, or even journals. More specifically, we can describe as “polarization entrepreneurs” those people who foster deliberative groups of like-minded people, and to ensure that participants share a common methodology or point of view. Exclusion of outsiders, and inclusion of a large number of insiders, is an important component of this strategy.

An obvious implication is that if the goal is to spread ideas, it is probably best to begin by promoting discussion among groups of like-minded people. If members of such groups speak mostly or only to one another, views might become entrenched, and the entrenchment among the views of increasingly large groups might initiate a cascade effect. A much worse strategy - often a doomed strategy - is to ensure that people with

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<sup>13</sup> Some support can be found in Robert Ellickson, Trends in Legal Scholarship: A Statistical Study, 29 J Legal Stud 517, 527 (2000).

<sup>14</sup> Cf. Gary Becker and Kevin Murphy, Social Economics 140-43 (2001).

new ideas are placed in heterogeneous groups, where their ideas are unlikely to travel, or might be squelched, or might even be subject to self-silencing.

In fact the forces here are compounded by another: the availability heuristic.<sup>15</sup> It is well known that certain facts and ideas are cognitively “available,” or highly salient, and that this cognitive availability can exert a large influence on beliefs and decisions.<sup>16</sup> If a leader, or an idea, ends up widely known, through independent decisions or through cascade effects, dramatic changes in scholarly paths can be expected. Hence availability cascades occur, within academia, when a particular person or idea becomes salient, and when through the informational and reputational mechanisms discussed here, a certain point of view becomes widely known and widely held.

### **B. Starting and Stopping Cascades**

Some people are relatively immune to the influences explored thus far. As I have suggested, people who are confident about their views are especially likely to resist informational and reputational incentives. The point suggests that in some arenas, cascades are likely to arise quite infrequently. Academic areas are highly variable on this count, and some domains, most academics have a great deal of confidence, thus immunizing themselves from cascade effects. In fields with well-established methods and goals, we should expect cascades to be uncommon. In the sciences, for example, large-scale shifts certainly occur, but the existence of settled methods makes cascade effects unlikely<sup>17</sup> – far less probable than in, for example, comparative literature. Law, economics, and psychology are perhaps intermediate cases.

This point raises an important question: When and why do academic cascades start and stop? A crucial reason has to do with external shocks. Suppose, for example, that a group of people believes some fact. Suppose that evidence shows that the belief is false. The belief will fade because it has been demonstrated to be wrong.

But external shocks can take many different forms. Sometimes academic trends, perhaps especially in law, have nothing to do with demonstrated fact, but are greatly affected by what happens outside of the academic domain. For example, the selection of Antonin Scalia to be a member of the Supreme Court undoubtedly had a great deal to do with the legitimation of originalism and textualism, methods favored by Justice

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<sup>15</sup> See Timur Kuran and Cass R. Sunstein, Availability Cascades and Risk Regulation, 51 Stan. L. Rev. 683 (1999).

<sup>16</sup> See Jonathan Baron, Thinking and Deciding (3d ed. 2000).

<sup>17</sup> This is a possible reading of Thomas Kuhn, The Structure of Scientific Revolution (1969).

Scalia. This is partly because Justice Scalia's opinions provided a kind of focal point for academic debate; it is also because his office conferred a kind of legitimacy on arguments that might otherwise have been easy to dismiss. Nor is it irrelevant that some of Justice Scalia's law clerks became academics. In fact a significant source of informational and reputational influences will come, directly and indirectly, from the selection of Supreme Court clerks, and from the choice, among clerks of particular justices, to become law professors. In a previous generation, the law clerks of Felix Frankfurter, much influenced by Frankfurter, became influential academics; the same appears to be true of Scalia clerks today.

More generally, the 1980 election of President Reagan made it most unlikely that the Supreme Court would continue to use the equal protection and due process clauses as a basis for announcing a series of new rights for disadvantaged people; hence academics interested in social reform showed decreasing interest in elaborating legal doctrine for that purpose. Perhaps the rise of interest in constitutional deliberation outside of the courtroom had something to do with the Court's lack of receptivity to the professors' arguments. Perhaps decreasing interest in judicial review had something to do with the changing composition of the Court.<sup>18</sup> Highly visible public events with legal dimensions, such as the 1998 Clinton impeachment and the 2000 post-election struggle between George W. Bush and Al Gore, will inevitably affect people's choice of what to write about. (Perhaps *Bush v. Gore* will inaugurate a new era of neo-realism, questioning the division between law and politics. Perhaps *Bush v. Gore* will lead to an outpouring of work on the law of elections.) Academics may or may not follow the election returns, but in law, the election returns can set the academic agenda.

Other external shocks can come from developments in adjacent fields. If, for example, economists show a great deal of interest in the idea of spontaneous ordering, academic lawyers are eventually likely to show an interest in that topic too. Part of the reason is informational: The fact that a certain topic interests economists is likely to be important to academic lawyers, who care about what economists think. If there is a resurgence of interest in utilitarianism within philosophy, law professors are likely to write about utilitarianism; the extraordinary interest in the work of John Rawls helps to confirm the point. Critical theory provides another case in point, with Jurgen Habermas and Michel Foucault, for example, exerting a significant influence on legal scholarship by virtue of their prominence within closely related fields. Of course developments within adjacent fields might well be a product of the kinds of influences discussed here.

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<sup>18</sup> See Mark Tushnet, *Taking the Constitution Away From the Court* (2000).

There is a final issue, perhaps in tension with the general argument offered here. It is useful to distinguish between ideas and methods on which multiple people can build for a long time, and ideas and methods that do not and cannot lead to much in the way of further work.<sup>19</sup> The notion that people are rational, self-interested profit maximizers is fertile, in the sense that it has applications to many domains of law, helping to produce predictions that can be tested and used. Though it is too early to say, I believe that the same is true for the notion that people are boundedly rational, and also for the claim that people are not only self-interested.<sup>20</sup> The idea that law is pervasively based on male practices and understandings is also easily used as a basis for assessing, or reassessing, many domains of law. But some claims tend to “burn out,” in the sense that once they have been voiced, there is little that can be done with them, even if they are true. Perhaps this is the case for the contention that law is “political,” an important and illuminating partial truth, but one with which it is not easy to do a great deal of illuminating further work.

### **Conclusion: The Marketplace of Ideas**

Academics, like everyone else, are susceptible to informational and reputational influences, and cascade effects are likely to be found in the academic domain as elsewhere. Notwithstanding the expertise and confidence of many academics, academic life has its own fads and fashions, and the factors discussed here play a role in their development. I believe that the factors discussed here have played a role in many trends in legal theory, including critical legal studies, economic analysis of law, feminism, textualism and originalism in constitutional law, critical race theory, rights-based accounts associated with Ronald Dworkin and others (many at New York University), law and literature, and (more recently) behavioral law and economics.

By way of conclusion, it is worth emphasizing that the basic account contains both a prescription and a cautionary note. The prescription is that those who seek to promote ideas will do best to ensure, above all, that those ideas have an opportunity to develop through frequent discussions among like-minded people. Most would-be “schools” fail. But those that succeed often transform the field; and when they do so, group polarization is part of the reason.

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<sup>19</sup> Cf. the discussion of progressive and degenerate research programs in Imre Lakatos, *Falsification and the Methodology of Scientific Research Programmes*, in *Criticism and the Growth of Knowledge* (Imre Lakatos & Alan Musgrave eds., 1970).

<sup>20</sup> See Richard Thaler, *Quasi-Rational Economics* (1993); *Behavioral Law and Economics* (Cass R. Sunstein ed. 2000).

The cautionary note is that in law and many other academic fields, ideas may spread and prosper, not because they are good, but because dozens, hundreds, or even thousands of imperfectly informed people have fortified the very signals by which they have been influenced. Whether bad ideas can prosper for a long time is another matter. Frequently good arguments and good evidence will puncture them, at least when there is agreement about the underlying criteria. But if the account here is correct, longevity, even for bad ideas, is hardly out of the question.

Readers with comments should address them to:

Cass R. Sunstein  
Karl N. Llewellyn Distinguished Service Professor of Jurisprudence  
Law School and Department of Political Science  
University of Chicago  
1111 East 60th Street  
Chicago, IL 60637  
csunstei@midway.uchicago.edu  
773-702-9498

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