It's fairly common to refer to environmental law or energy law as being like the Law of the Horse – implying that they are somewhat ersatz legal fields. For those who are not familiar with the reference, *The Law of the Horse* was apparently the title of a legal treatise that collected all the cases having to do in some way with horses. Given that the cases had nothing else in common except their subject matter, this was an enterprise without much intellectual content. And so, too, it is implied, with environmental law or energy law – just a bunch of disparate legal topics with nothing much in common except that they happen to relate to Nature or electricity and oil. The comparison is a bit unfair – there *are* some important unifying concepts in environmental law– but the accusation seems to stick nonetheless.

The implicit contrast is with traditional fields of law like contracts or torts or civil procedure. But it's not immediately obvious what these fields have in common either, that makes them "non-Horsey." There are some superficial differences. For instance, the traditional fields are either common law or involve a single canonical statute. But on thinking it over, I think they do share a fundamental characteristic. Understanding this helps us see some of the attractions and limitations of the traditional ways of defining legal fields.

We can think of any legal rule as involving the following simple structure:

Policy –> Legal Rule –> Real World

Traditional legal fields are generally organized around characteristics of the legal rules. For instance, torts is about "civil liability not based on consent," while contracts is about "civil liability based on consent." Procedural and structural constitutional areas are secondary legal rules governing legal institutions rather than directly applying to the real world, so in a way they're internal to the "legal rule" stage. Criminal law is "punitive legal rules."

What is appealing about this approach is that it leads scholars to focus on problems that are in some sense internal to the legal system, by organizing the world around features of legal rules rather than either policy goals or features of the real world. Thus, the approach fits perfectly with formalist approaches to the law in which law is supposed to be an autonomous system. Even in less formalist approaches, this way of thinking about the world is appealing to legal academics because it organizes the world around the subject we know the most about, the legal system itself.

American legal scholarship stopped being formalist many decades ago. Still, it's possible to consider policy while maintaining this traditional organization in two ways. One way is to

focus on policy issues that are in a sense internal to law, like predictability and certainty versus flexibility and individual fairness. The other is to adopt a theory of how law relates to the real world that is universal in scope (and therefore does not depend on knowing anything about the subject matter of the rule). Old-style law and economics was perfect in this respect since it led to very simple models that would essentially apply to all contracts or all torts regardless of subject matter.

A simple rule of thumb is that an area of law is best accepted and most prestigious to the extent that it (a) does not involve a high level of legal detail, so the legal issues posed are quite general, and (b) does not require deep understanding of either policy issues or the real world. Fields like Con. Law that are defined in those terms are perfect for very smart people with JDs. It's not surprising that law reviews publish heavily in those areas (being edited by very smart people who are about to get JDs) or that the faculty in the very top law schools are weighted in favor of Con. Law and related fields. These areas have often tended to occupy the legal elite as well, being fodder for Big Law and for federal appellate judges. So there was a very nice fit between this paradigm, the qualifications that were important in the legal academy, and the role of major law schools as feeders for big law firms and appellate clerkships.

These are genuine virtues of the anti-Horse paradigm. But this paradigm seems to be facing increasing problems that put its long-run viability in doubt. One major problem is that this paradigm leaves out most of the modern legal system, and in particular, almost all of the modern regulatory state – notably including subjects such as environment and energy, but also health care, telecommunications, international trade, food and drug safety, financial regulation, and information technology.

All of those areas of law require knowing a distressing amount about complicated policy issues, legal regimes, and real world activities. For that reason, they tend to be marginalized at the very top law schools. Yet if these fields are excluded or treated as minor add-ons, legal scholarship risks becoming increasingly irrelevant to the modern world, not to mention actual legal practice.

A second major problem is the increasingly interdisciplinary nature of legal scholarship, combined with developments in allied disciplines. For example, people who did law and economics used to be able to use simple conceptual models that would apply almost everywhere. But economics itself has moved toward more empirical work, including work on traditional areas of legal interest such as financial markets and corporate governance. Empirical work by its nature requires deep involvement with the facts on the ground in a way that is antithetic to the anti-Horse school of legal scholarship.

A final problem is that anti-Horse scholarship is by its nature primarily directed at appellate judges. The reason is that making arguments to legislatures or administrative agencies generally involves knowing a lot of specifics about the real world, whereas appellate judges are primarily interested in legal rules as informed by fairly abstract policy considerations. But to the extent that the most important decisions about law are made by legislators and agencies, speaking exclusively to appellate judges comes to feel very limiting.

There seem to be two possible futures for the legal academy. One maintains the anti-Horse paradigm for legal academics, whose work and teaching will focus on the relatively confined areas where judicial discretion is large and deep immersion in policy issues and empirical evidence is not necessary. Since those areas are only a small subset of what lawyers need to learn about, the remaining curriculum will be turned over to practitioners to teach as adjuncts.

In the other world, legal academics will stop fearing the Law of the Horse and learn to embrace subjects where policy is complex, empirical evidence is crucial, and agencies and legislators are as much the audience as courts. This approach requires legal scholars to become involved in a lot of complex statutes, messy policy issues, and messy realities. But the result would be much more relevant to the needs of society. Maybe it is time for law schools to embrace the Horse.