

Antitrust Law: Case Development and Litigation Strategy

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FASHIONING THE QUESTION FOR A LAW REVIEW ARTICLE

The first deadline for the writing portion of the course is approval of the question(s) or issue(s) the paper will address. Students sometimes confuse identifying a subject matter area with formulating a precise question to be addressed. Identifying a subject matter area—algorithmic pricing and antitrust, vertical merger enforcement, the Robinson-Patman Act—is merely the first step. The subject matter area defines the general territory in which you will work. It does not, however, define the question the paper will analyze or the conclusions the paper will reach. You cannot write a rigorous analytical paper on a subject matter area; you can only write one on a precise question within that area.

The difference between subject matter and question. Consider the difference between these two formulations:

Subject matter area: Antitrust liability for algorithm-facilitated price coordination.

Precise question: This paper examines the doctrinal challenges courts face in applying Section 1's agreement requirement to algorithm-mediated data sharing among competitors, evaluates the approaches taken in the RealPage litigation and the DOJ's proposed settlement, and proposes a framework for determining when the use of a common algorithmic pricing tool crosses the line from permissible parallel conduct to unlawful price coordination.

The first formulation identifies an interesting and timely area of law, but provides no direction for analysis. A paper on “algorithm-facilitated price coordination” could address the role of the algorithm provider in a hub-and-spoke conspiracy, the application of traditional information-sharing doctrine to machine learning, the adequacy of the DOJ's proposed settlement with RealPage, state legislative responses, or a dozen other questions. It would require a treatise to address comprehensively. The second formulation tells the reader precisely what doctrinal issue the paper will analyze (the agreement requirement), what authority the paper will evaluate (the RealPage litigation and the DOJ settlement), and what normative contribution the paper will make (a proposed framework for distinguishing lawful from unlawful conduct). It suggests a clear path to a definite conclusion.

Why precision matters. A precise question serves three critical functions. First, it constrains the scope of your analysis to something manageable. A three-credit paper must contain at least 6,000 words (excluding footnotes), and most papers in this course have run between 30 and 40 pages. That is enough space to analyze a well-defined question rigorously, but not enough to survey an entire field or address every open issue within a doctrine. A precise question forces you to be selective and rigorous rather than comprehensive and superficial.

Second, a precise question makes possible a clear conclusion—and a clear conclusion is essential to a persuasive paper. If your question is “What are the antitrust implications of algorithmic pricing?”, your conclusion will necessarily be descriptive and diffuse: “The implications include X, Y, and Z.” Descriptive conclusions are weak. If your paper examines the doctrinal challenges of applying Section 1 to algorithmic data sharing and proposes a framework for resolving them, your conclusion will be normative and actionable: “Courts should adopt the following approach for these reasons.” Normative conclusions that propose solutions are persuasive in a way that descriptive summaries are not.

This distinction matters because, as I note in the introductory memorandum to the course, getting the “right” answer is usually only about 60% of the exercise. The remaining 40% is convincing the relevant decision maker—whether a partner in a law firm, an enforcement agency, or a judge—that your answer is correct. A paper that meanders through a subject matter area without reaching a clear conclusion on a defined question will not be persuasive, no matter how much research it reflects.

Third, a precise question generates a roadmap. Once you know precisely what you are trying to answer, the analytical steps required to reach that answer become apparent. The example question above implies a natural structure: (1) background on algorithmic pricing in rental housing and the *RealPage* litigation; (2) the doctrinal requirements for finding an “agreement” under Section 1; (3) the tensions and unresolved questions in applying agreement doctrine to algorithm-mediated data sharing; (4) evaluation of the approaches taken in the *RealPage* litigation and the DOJ settlement; (5) a proposed framework for distinguishing lawful algorithmic pricing tools from unlawful coordination; (6) conclusions. If your question is merely “algorithmic pricing and antitrust,” neither you nor your reader will have a good idea where to begin or how to structure the analysis.

How to move from subject matter to question. Three-credit papers generally follow a common arc: they posit an issue, provide needed background, examine the state of the law on that issue, identify the tensions or unresolved questions in the application of the law, and then normatively propose solutions. When crafting your question, consider each of these elements.

Start by asking yourself what specific legal issue within your subject matter area is unsettled or presents unresolved tensions in its application. Then ask whether addressing that issue requires a three-credit paper or whether it can be resolved in a few pages. If the latter, the question is too narrow. If resolving the issue would require a treatise, the question is too broad.

A helpful exercise is to draft a “This paper examines . . .” statement that captures all four elements: the issue, the state of the law, the tensions or unresolved questions, and the normative proposal. If you cannot state these elements in two or three sentences, you have not yet identified a precise question. If your statement uses phrases like “surveys the current state of” or “explores issues related to” without identifying specific tensions or proposing solutions, you are still describing a subject matter area, not a question suitable for a three-credit paper.

Consider also whether your question admits of a clear answer. Some questions are interesting but indeterminate: there is no analytically rigorous way to resolve them either way. Other questions are determinate but uninteresting: the answer is obvious and requires no analysis. The best questions are those where reasonable minds could differ but where careful legal analysis can lead to a persuasive conclusion.

Testing your question. Before submitting your question for approval, apply these tests:

1. *Can you state the question in two or three sentences using the “This paper examines...” formulation?* The statement should identify the legal issue, the tensions or unresolved questions, and the normative proposal the paper will make.
2. *Does the question call for a normative conclusion that proposes a solution, not merely a descriptive summary of the law?* “What is the law?” is not a good question. “What should the law be, and why?” is better.
3. *Can you articulate, at least tentatively, what your normative proposal might be?* You need not know your final conclusion at the outset—conclusions often evolve through drafting. But if you have no idea what solution you might propose, you may not yet understand the question well enough to write about it.
4. *Is the question sized appropriately for a three-credit paper?* You should be able to outline, at least roughly, how you would analyze the question in four to six major sections following the introduction. If you need fifteen sections, the question is too broad. If you need only two, it is too narrow.
5. *Does the question suggest a roadmap?* A well-formulated question implies an analytical structure. If you cannot see how to get from the question to a conclusion through a logical sequence of steps, reconsider the question.

Conclusion. Fashioning the question is the first step in what the introductory memorandum describes as extensive back-and-forth throughout the semester. Experience indicates that it takes two to three rounds of email exchanges before we settle on a precise question for the paper. Once we agree on the question, we will work together on the analytical approach, the paper’s organization, the introduction, and the critique of your drafts. But we cannot begin that process until we have a precise question suitable for treatment in a three-credit paper.