

2011-2012 Publishable Notes Manual

COLUMBIA LAW REVIEW

WHAT IS A NOTE?

A Note is a work of legal scholarship, written by a student, which identifies a specific, unresolved legal problem and offers a solution.

Notes are frequently relied on in the legal world, though they are read more often than they are cited. Practitioners, judges, clerks, scholars, legislative staffers, and students all depend on Notes for clear, concise articulations of complicated areas of the law, for arguments to use in briefs, and for support in judicial opinions.

Notes are shorter than Articles (which are usually written by professors) and much narrower in scope. Notes rarely present ideas for “frameworks,” “approaches,” or doctrinal developments. The legal marketplace developed Notes as vehicles for focusing and solving discrete legal problems because students have time to delve into small but important issues that might not be worth a professional author’s time. A Note’s author will often be the best authority on the specific problem she addresses. The REVIEW favors Notes that answer discrete questions fully rather than broad questions shallowly, because the REVIEW seeks to influence legal thinkers—on the bench, in legislatures, and in academia.

Notes take clear positions on the issues they address, but they’re not advocates’ briefs. They’re academic contributions, so, like scholarly work in most fields, they must recognize all sides of the issue discussed and be as objective as possible. By doing so, a Note’s author assures her reader that nothing is being hidden, and so lends credibility to the position she ultimately takes. In short, a Note author should articulate his position forcefully while treating contrary arguments seriously and respectfully.

Notes serve a specific purpose for legal scholars and practitioners, and they serve this purpose best when they meet readers' expectations. A Note will be most useful when its author structures it as Notes in the past have been structured, allowing readers to find what they expect to find, where they expect to find it, and to use the Note easily. The next few pages describe the structure of Notes and their most common types.

The Wide World of Notes

The Notes below have been frequently cited over the past few years. Reading their titles and descriptions will give you a sense of the typical Note's scope. If any of these Notes sound interesting, pull them up on Lexis or Westlaw and skim them to get a sense of the genre.

- Laurence Drew Borten, Note, Sex, Procreation, and the State Interest in Marriage, 102 Colum. L. Rev. 1089 (2002) (describing historical justifications for the special legal status of sexual partners, and examining how courts, in determining the validity of marriages without intercourse, are influenced by this history).
- Nellie Eunsoo Choi, Note, Contracts with Open or Missing Terms under the UCC and the Common Law: A Proposal for Unification, 103 Colum. L. Rev. 50 (2003) (arguing that the UCC's treatment of open-term contracts for sale of goods should be extended to open-term contracts for services).
- Brian A. Jacobs, Note, Trademark Dilution on the Constitutional Edge, 104 Colum. L. Rev. 161 (2004) (asserting that courts have interpreted the Federal Trademark Dilution Act beyond what the Patent-Copyright Clause allows, and putting forward an interpretation of the Act that would be constitutional).
- Denise Ping Lee, Note, The Business Judgment Rule: Should It Protect Nonprofit Directors?, 103 Colum. L. Rev. 925 (2003) (noting that the move from nonprofits-as-trusts to nonprofits-as-corporations has led to some courts applying a more relaxed negligence standard to nonprofits).
- Matthew J. Medina, Note, The Constitutionality of the 2003 Revisions to Canon 3(E) of the Model Code of Judicial Conduct, 104 Colum. L. Rev. 1072 (2004) (arguing that the ABA's disqualification rule is unconstitutional in light of *Republican Party of Minnesota v. White*, and suggesting a replacement).
- Pankaj Venugopal, Note, The Class Certification of Medical Monitoring Claims, 102 Colum. L. Rev. 1659 (2002) (arguing that the split between state and federal courts as to class certification for "medical monitoring claims"—i.e., the harm complained of is an increased risk of injury, which requires monitoring—should be resolved in favor of allowing certification under Rule 23(b)(3) or its state-law counterparts).
- Bela August Walker, Note, The Color of Crime: The Case Against Race-Based Suspect Descriptions, 103 Colum. L. Rev. 662 (2003) (explaining how race-based descriptions of criminal suspects are not only discriminatory, but inefficient—and offering a more accurate alternative).
- Z.W. Julius Chen, Note, Following the Leader: Twombly, Pleading Standards, and Procedural Uniformity, 108 Colum. L. Rev. 1431 (2008) (arguing that, following *Twombly*, states should not abandon *Conley* notice-pleading standard merely to preserve uniformity with federal procedure).

The Structure of Notes

A good Note describes the background law, explains the problem at issue, and argues for a resolution that would solve the problem. The standard Note does these three things in Parts I, II, and III, respectively, and frames the three parts with an Introduction and Conclusion.

We don't require you to use the three-part structure. But you should recognize that, by writing a Note, you're performing a service to the legal community. To make your scholarship as helpful as possible, you should try to conform to the standards of the genre.

Readers expect Notes to be organized into three parts. If a student wants to learn the background law in a particular area, he will turn to Part I. If a clerk wants to read about why prior decisions got the issue wrong, or how a particular case unexpectedly impacts the fact pattern at bar, or where a current legislative policy breaks down, she will turn to Part II. If a litigator wants to argue for a solution that favors his client, he will turn to Part III. Sticking to the traditional structure allows readers to find what they need.

Some Notes have broken the three-part mold, though it is rare. Here are two examples:

- Saira Mohammed, Note, *From Keeping Peace to Building Peace: A Proposal for a Revitalized United Nations Trusteeship Council*, 105 Colum. L. Rev. 809 (2005) (discussing background in Part I; analyzing the problem in Part II; proposing a solution in Part III; and, in Part IV, considering significant counterarguments to the proposed solution).
- Eric Grannis, Note, *Fighting Words and Fighting Freestyle: The Constitutionality of Penalty Enhancement for Bias Crimes*, 93 Colum. L. Rev. 178 (1993) (in Part I, surveying bias-crime laws; in Part II, countering the critique that these laws punish thoughts; in Part III, discussing First Amendment law; in Parts IV and V respectively, showing how bias crimes pass First Amendment and case-law hurdles).

If it makes sense to do so, you can depart from the tripartite structure described below. However, be sure you can defend that decision to your Notes Editor, and be sure that your roadmapping is excellent throughout (see below).

Here is the standard format for the three-part Note:

- **Introduction:** Your Introduction should be succinct—usually about four short paragraphs. It should catch the reader's attention, provide the basic information necessary to know what the Note is about, and briefly state the problem. The final paragraph of the Introduction should explain what the Note argues. This sentence usually begins: "This Note argues that . . ." **It is the most important sentence of your Note.** The paragraph should then briefly outline what each Part of the Note will discuss, typically using only one sentence per Part. These sentences are the first and most important roadmap, and they are crucial to the success of your Note. Most practitioners and judges do not have time to slog through an entire Note when it's only partially relevant to the question they're facing, so they must be able to identify quickly which Part of the Note is important to their work.
- **Part I:** Part I gives background information and describes the case law that has preceded the issue you plan to discuss. Remember that Notes are aimed at nonexperts. It is better to explain too much than to risk losing readers on the points you make later. Don't worry that

you're not saying anything new in Part I—you're not supposed to. Just make sure that you clearly set up the issue you plan to discuss in Part II without dwelling on unnecessary background law. Try not to make any *arguments* in Part I; just describe the background law impartially. Be brief and descriptive.

- **Part II:** Part II describes in detail the problem or issue your Note addresses and explains why it is important. For example, it might describe a new development and why that development has made past interpretations or approaches somehow deficient; it might criticize past treatment of an issue and explain why what has gone before is inadequate to deal with the problem you're presenting; it might explore the nuances of a circuit split on an issue and explain why the issue is important enough to demand resolution. Be clear why the problem or issue you address is important and why the prior treatment described in Part I cannot resolve it.
- **Part III:** Part III presents your approach to the problem or issue presented in Part II. It is where you propose your solution. Be sure to argue thoroughly for your approach by addressing counterarguments and considering new concerns it might raise.
- **Conclusion:** Your Conclusion should be short and sweet, perhaps only a paragraph or two. Minimize footnotes and leave out "see supra" cites. The Conclusion should not simply restate your Introduction, but should put your solution into broader perspective.

Your Note should also follow these important practices:

- **Roadmaps:** Besides the roadmap in the Introduction, each Part should be roadmapped in an introductory paragraph. Tell the reader what the Part will do and how the Part fits into the overall structure of your Note. Address your roadmap to a reader who is skimming your Note or who is entering your Note at that point. Keep your roadmaps simple. The reader should have a good idea of what you are going to say, but the reader does not need to see every single detail of your argument up front. Roadmaps are also a good idea at the beginning of a particularly long or complex Section.
- **Sections and Subsections:** For the same reason you use roadmaps (to aid those who are skimming the Note to find only what they need to know), you should also divide Parts into Sections, and Sections into Subsections. The reader, by looking at only your Part, Section, and Subsection headings, should be able to understand roughly what is going on in the Note.
- **Headings:** The headings of your Sections and Parts should contribute to your Note. They should not be so general that they could fit any piece. For example, do not use "Background" or "The Solution" as the heading for a Section. Instead, try to incorporate a more substantive description of what each Section or Part discusses.

Common Types of Notes

- **The Circuit Split or “Messy Doctrine” Note:** Two or more circuit or district courts, or the highest courts in two or more states, will decide a discrete issue differently. The Note analyzes why courts have reached different decisions and instructs future courts to act in a certain way. One problem for Notes that address federal circuit splits is that your Note will be preempted if the Supreme Court grants cert or if another scholar writes with similar observations. (On the other hand, maybe the Court will cite your Note.) A recent “circuit split” example is Tina M. Woehr, Note, *The Use of Parol Evidence in Interpretation of Plea Agreements*, 110 Colum. L. Rev. 840 (2010). A recent “messy doctrine” example is Jaren Casazza, Note, *Valuation of Diversity Jurisdiction Claims in the Federal Courts*, 104 Colum. L. Rev. 1280 (2004) (detailing significant difficulties federal courts have in valuing claims for nontraditional damages and suggesting a consistent approach).
- **The “How X Impacts Y” Note:** These Notes draw attention to the fact that a recent decision or recent legislation might have an unexpected impact on a situation not considered by the judges or legislators involved. These Notes then discuss whether the impact is good or bad and whether the case or law should be extended in this way. Many of the Notes in the *Review* fit this mold. Some examples are Joshua Naftalis, Note, “Wells Submissions” to the SEC as Offers of Settlement under Federal Rule of Evidence 408 and Their Protection from Third-Party Discovery, 102 Colum. L. Rev. 1912 (2002) (arguing that Rule 408, which covers offers of settlement, should be extended to the “Wells submission” process, in which prospective defendants have the opportunity to dissuade the SEC from bringing formal actions against them); Joshua Wilkenfeld, Note, *Newly Compelling: Reexamining Judicial Construction of Juries in the Aftermath of Grutter v Bollinger*, 104 Colum. L. Rev. 2291 (2004) (applying *Grutter*, which upheld attempts to ensure student diversity, to the practice of selecting juries to ensure juror diversity).
- **The Policy Note:** When Notes criticize legislation on policy grounds, they can help advance the debate and may even influence legislative staffers; on the other hand, they will be preempted if the laws change. Good examples are David M. Adlerstein, Note, *In Need of Correction: The “Iron Triangle” of the Prison Litigation Reform Act*, 101 Colum. L. Rev. 1681 (2001) (criticizing the PLRA for not meeting its goals, such as controlling costs and instituting procedural conduits for the protection of prisoners’ rights); James R. Levine, Note, *The Federal Tort Claims Act: A Proposal for Institutional Reform*, 100 Colum. L. Rev. 1538 (2000) (arguing that the “discretionary function” exception to FTCA has swallowed much of the liability the FTCA creates and should be reformed). Farhang Heydari’s Note, published this year, is a good example of such a Note.
- **The Cross-Disciplinary Note:** Notes that borrow insights or analysis from other disciplines can shed light on legal thinking. These Notes work especially well if the author has significant expertise in another area (for instance, if you earned a doctorate before coming to law school). For a couple of examples, see Lisa Ells, Note, *Juvenile Psychopathy: The Hollow Promise of Prediction*, 105 Colum. L. Rev. 158 (2005) (arguing that the legal system’s methods for assessing criminal psychopaths and determining the likelihood of recidivism will not work on children); Sarah C. Haan, Note, *The “Persuasion Route” of the Law: Advertising and Legal Persuasion*, 100 Colum. L. Rev. 1281 (2000) (discussing how changes in commercial persuasion influence legal persuasion).

- **The Historical Note:** Remember that Notes must address a live legal issue. Therefore, a Note that traces legal history must, in Part III, demonstrate the relevance of that history to the current debate. For example, see Elissa Alben, Note, GATT and the Fair Wage: A Historical Perspective on the Labor-Trade Link, 101 Colum. L. Rev. 1410 (2001) (using history of GATT trade debates to argue that current WTO text has limited value as a tool to promote human-rights-based labor standards); Laurence Drew Borten, Note, Sex, Procreation, and the State Interest in Marriage, 102 Colum. L. Rev. 1089 (2002) (describing historical justifications for the special legal status of sexual partners, and examining how courts, in determining the validity of marriages without intercourse, are influenced by this history); Aziz Z. Huq, Note, Peonage and Contractual Liberty, 101 Colum. L. Rev. 351 (2001) (examining two turn-of-the-19th-century Thirteenth Amendment cases, arguing that these cases are best understood in light of freedom of contract jurisprudence, and demonstrating how this interpretation still influences the Supreme Court today).

- **The Empirical Research Note:** This type of Note is extremely useful but rare. It's hard to find an area that you can research in a limited amount of time. A good example is Sannu Shrestha, Note, Trolls or Market-Makers? An Empirical Analysis of Nonpracticing Entities, 110 Colum. L. Rev. 114 (2010) Empirical Notes are hard to preempt—you are only preempted if someone has done the same (or a similar) empirical study. In other words, you can say, “Professor X detailed legal theory Y. Theory Y is as follows. This Note will prove (or disprove) it.” Just because theory Y has been articulated elsewhere does not mean that your *empirical* Note is preempted. Tejas Narechania's Note, which is being published this year, is also an example of an empirical research Note. You can contact him if you have questions about this type of Note.

- **The “Looking at X Through Y Legal Philosophy” Note:** These Notes examine a particular legal problem through a well-defined, non-mainstream perspective, such as Feminism, Law & Economics, or Critical Legal Studies. Examples include Khiara M. Bridges, Note, On the Commodification of the Black Female Body: The Critical Implications of the Alienability of Fetal Tissue, 102 Colum. L. Rev. 123 (2002) (analyzing laws regulating fetal tissues from a critical race studies perspective); Justin A. Nelson, Note, The Supply and Demand of Campaign Finance Reform, 100 Colum. L. Rev. 524 (2000) (looking at campaign finance from a law & economics perspective).

- **The Broad Philosophical Note:** Every now and then a Note successfully takes a look at a big-picture question and proposes a new way of understanding the law, or develops an innovative analytic framework to be applied to the law. If these Notes are successful, they'll be cited for many years (because they're essentially preemption-proof). On the downside, this type of Note is incredibly difficult to write—not only because it's hard to be both creative and relevant, but also because it's difficult to find a “broad look” topic that fits into a Note's smaller scope. Published examples include Alexander K.A. Greenawalt, Note, Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation, 99 Colum. L. Rev. 2259 (1999) (arguing that culpability for genocide should extend to those who may personally lack a specific genocidal intent, but who have knowledge of the genocidal consequences of their acts); Olivia A. Radin, Note, Rights as Property, 104 Colum. L. Rev. 1315 (2004) (deducing the implicit framework the Supreme Court has used to determine when to treat rights as property).

Types of Notes to Avoid

- **The Musings Note:** These Notes amount to “a bunch of interesting thoughts about [X].” A Note that describes a recent Supreme Court decision or legal phenomena and merely offers a handful of observations fails to meaningfully contribute to the legal community. A Note should be an incisive identification of a discrete problem and a proposal of a targeted solution. It’s not a venue for various thoughts on an interesting topic.
- **The Research Note:** These Notes merely paint a portrait of the legal landscape without offering any creative thought or original analysis. Notes should offer more than a mere summary of the law—they should provide a thoughtful solution to a previously unidentified problem.
- **The Monster Note:** A Note like this proposes to tackle gargantuan topics and sweep legal academia off its feet. Notes should tackle narrow, modest topics rather than issues that are excessively broad and more likely to be preempted. Note topics should be manageable and well-defined, focused on one central idea or concept.
- **A Same Problem, New Solution Note:** These Notes fail to identify a new problem and instead merely propose a different solution to a problem already identified and addressed by others. The goal of a Note is to bring to light a legal problem that no one else has addressed.
- **The Supreme Court is Wrong Note:** These Notes usually rail against or heavily criticize a Supreme Court opinion. In this way, the Note isn’t valuable because it’s calling for a change that usually can’t be enacted. You might be able to avoid this by arguing that lower courts should read an opinion narrowly, but it’s a fine line to walk. In either case, a Note shouldn’t be just a lengthy criticism of established Supreme Court doctrine.

CHOOSING A TOPIC

Choosing a viable topic is the most important and often the most difficult part of the process. You should look for a topic that interests you, is manageable in the time you have, and hasn't been exhausted. A good phrase to keep in mind is that a Note should address a live legal controversy. A Note should identify a narrow, unaddressed problem and offer a solution that is novel and useful to the legal community. Below, this Manual details some ways to find a topic and provides information on how to avoid preemption.

Looking for a Note Topic

1. Talk to Contacts from Your Summer Job

Many Note topics come from summer jobs. That's partly because practitioners are often called on to research unsettled areas of the law, and partly because lawyers often ask summer clerks to tackle unresolved areas of the law that no one else has the time to examine.

A good way to begin is to review any memos you were asked to write over the summer. Do you recall any unresolved questions that were outside the scope of your assignment but seemed interesting? Did any memo conclude "I don't know"—either because there was authority on both sides of the question, or because it was unclear how a recent case or law might impact the subject you were asked to look into? Any of these things might indicate a fledgling Note topic.

If nothing Note-like sprung from your summer assignments, why not pick up the phone and call the people you worked with? They'll still remember you (at least in August). Ask whether they've stumbled on any interesting gray areas recently that might lend themselves to the kind of sustained inquiry required by a Note. This is their chance to receive six months of free legal research.

You might find that many workplace suggestions are memo-worthy but not Note-worthy (i.e., they might be too lightweight or too narrow to support the kind of research and legal thinking that goes into the average Note). Nevertheless, you may find some Note-sized topics in the mix.

One final comment: If you want to write about a case that you worked on last summer, you'll need to clear it with your former boss. Different organizations have different policies and confidentiality concerns, and as a future member of the bar it is important that you take these concerns into account. A Note scheduled to be published in 2004 was cancelled because of concerns raised at the last minute by the author's summer firm.

2. Look for Circuit Splits

To locate circuit splits generally, check out the "Circuit Split Roundup," published by *U.S. Law Week*. Ask the reference librarian to direct you to the collection, kept in the 3rd Floor Reserve Section of the Diamond Law Library. Alternatively, you can search the Westlaw directory of *U.S. Law Week* articles.

To find circuit splits that have been identified in judicial decisions, go to Westlaw or Lexis, select the U.S. Courts of Appeals database, and input a few words related to your topic. Then add one of the following phrases to your search terms: (1) circuit or authority /s split; (2) "decline to follow" /s circuit or appeals; or (3) disagree /s circuit /s first or second or third or fourth or fifth or sixth or seventh or eighth or ninth or tenth or eleventh or D.C.

Split Circuits, at <http://splitcircuits.blogspot.com/>, is a blog dedicated to tracking developments concerning splits among the federal circuit courts.

Casebooks and treatises highlight circuit splits and different treatments among states—in casebooks, check those notes that appear at the end of each subchapter (all the open-ended questions contained in those notes are just waiting to be tackled by enterprising law students). For once these questions might be helpful!

3. Think of “Side Effects” Stemming from Court Decisions or Legislative Enactments

You can often find a discussion of such side effects in *en banc* decisions or in lengthy dissents. If an appellate court decided to sit *en banc*, the case probably presents some tricky and important issues. *En banc* decisions are great ways to find Note topics, especially if the case is narrowly decided.

Periodicals or loose-leaf newsletters are also a great source for such topics. The most recent issues of the *National Law Journal*, the *New York Law Journal*, and *U.S. Law Week* often discuss developments in the law and the impact such developments might have on real life. Similarly, a reference librarian should be able to point you to loose-leaf services regarding your areas of law of interest. These services can be extremely specialized. For instance, Mealey’s Litigation Reports publishes loose-leaf newsletters on areas from “Business Interruption Insurance” to “Welding Rod Litigation.”

Finally, the “How Appealing” Blog, at <http://legalaffairs.org/howappealing>, rounds up links to the latest newsworthy or controversial opinions. It also provides links to media discussions of appellate opinions. It’s a good place to find controversial cases, which in turn lead to areas of the law that are unsettled and therefore good places to find Note topics.

4. Consult with a Professor or a Seminar Instructor

Professors can also be great sources of Note topics. You may need to approach a professor you’ve never met before. That’s okay—they’re used to hearing from students who are thinking about Notes, and many professors are happy to help. In general, your approach should be like this: First, narrow your topic to a few ideas, or to a discrete area of the law that would lend itself to exploration in one or two directions; Then, talk to your editor about which professors would be appropriate for your idea; Email those professors and ask if they’d be willing to meet with you for a few minutes, since you have some mutual interests. You’ll be surprised at how amenable most professors are to this approach.

If you meet with a professor, you don’t have to know the exact issue your Note will address, but you should have a clue about the contours of the law regarding the topic you’re investigating. Professors respond better to curious and motivated students than students seeking handouts. That said, if you suggest a Note topic, you might get a Note topic in return: Plenty of professors might respond, “I don’t think your Note Idea X would work, because of such-and-such. How about looking into Note Idea Y, which is closely related and would be so much more interesting?”

You should also **strongly consider** speaking to a professor who is teaching a seminar you are taking. Seminars are a great starting point for Note topics, and in several cases, you can “double dip” with your Note: use it for your seminar paper as well as for your final Note.

In general, professors are great resources for brainstorming and sharpening your Note’s focus. Keep in mind, however, that professors’ recommendations have not been vetted for

preemption. You may begin research on the professor's suggestion only to find that someone has recently covered the question, or that the topic is too big for one Note, or that your research has led you to an idea you like better than the one you began with. Don't be afraid to follow up with the professor as you discover new aspects of your topic.

5. Other Options

If you get stuck, you might want to try the following resources:¹

- Richard Delgado, How to Write a Law Review Article, 20 U.S.F. L. Rev. 445 (1986).
- Elizabeth Fajans & Mary R. Falk, Scholarly Writing for Law Students: Seminar Papers, Law Review Notes, and Law Review Competition Papers (2d ed. 2000). In particular, see their chapter titled "Inspiration: Choosing a Subject and Developing a Thesis."
- Heather Meeker, Stalking the Golden Topic: A Guide to Locating and Selecting Topics for Legal Research Papers, 1996 Utah L. Rev. 917.
- Eugene Volokh has made this area into a cottage industry. He has a book (Academic Legal Writing: Law Review Articles, Student Notes, and Seminar Papers (2003)) and a website (<http://www.law.ucla.edu/volokh/writing>). It's all based, more or less, on a piece he wrote a few years ago: Writing a Student Article, 48 J. Legal Ed. 246 (1998).

¹ These sources are adapted from <http://lib.law.washington.edu/ref/lawrev.html>.

Avoiding Preemption

The REVIEW wants to publish Notes that will impact the legal community for years to come. That's why your Note must address a live legal controversy. If your Note addresses an issue that's already been treated, it will have no impact. No one will use it or cite it, so there's no point in publishing it. The REVIEW does not publish preempted Notes.²

Your Note is preempted if it analyzes a legal problem that has been thoroughly analyzed elsewhere or that events have rendered irrelevant. Thus, even if your Note proposes a new solution to that problem in its Part III, it's preempted if the problem has been analyzed thoroughly elsewhere or has become irrelevant.

Here are some characteristic, but not exclusive, examples of preemption:

- If your Note analyzes a Circuit split and the Supreme Court grants cert to resolve the split, your Note has almost certainly been preempted. Even if you propose Solution "A" and the Court chose Solution "L", no one will ever use or cite your Note because it no longer addresses a live legal controversy. In this case, events have rendered the legal problem that your Note analyzes irrelevant.
- If your Note analyzes a statute that Congress substantially amends, your Note has almost certainly been preempted. Even if you propose weakening the law and Congress strengthened it, no one will ever use or cite your Note because it concerns an outdated legislative regime. In this case, events have rendered the legal problem that your Note analyzes irrelevant.
- If your Note analyzes a legal problem and a professor publishes an Article that analyzes the same problem, your Note has almost certainly been preempted. Even if you propose Solution "G" and the professor proposes Solution "M", no one will ever use or cite your Note because it's written by a student and a professor's work is available. In this case, the legal problem that your Note analyzes has been thoroughly analyzed elsewhere.
- If your Note analyzes a legal problem and another law student publishes a Note that analyses the same problem, your Note has almost certainly been preempted. In this case, the legal problem that your Note analyzes has been thoroughly analyzed elsewhere.

You don't want to devote time and effort to a topic that someone else has already exhaustively examined. You won't add anything to the scholarly literature on such a topic and no one will cite your work. Worse yet, readers may presume your research was poor, since you failed to notice someone else had already covered your very topic, or you proceeded in the face of such knowledge. Especially if you publish in the COLUMBIA LAW REVIEW—where you'll be on stage before the sharpest minds of legal academia—this ignorance of the prior literature would be a huge embarrassment, and a sign of academic negligence.

² There is a narrow exception to this rule. The *Review* does not cancel a preempted Note if that Note has progressed substantially through the production process before it is preempted. At that point, the logistical cost of removing the Note would be greater than the damage to the Review's reputation caused by publishing the Note.

Checking for Preemption:

You should keep an eye out for preemption soon after a topic has begun to engage your serious interest. This way, you won't invest too much time researching and writing on a topic already covered by someone else whose work you're merely replicating. Even after you've chosen a topic, preemption continues to be a threat when you're writing your Note and, if your Note is selected, when you're revising your Note in preparation for publication. It's possible that you'll write a Note, be selected for publication, and spend the summer slaving over your revisions, only to discover at the last minute that your Note has been preempted and lose your spot on the Note calendar. Note authors can often "write around" preemption, but it usually requires a lot of work. The preempted author would most likely have to change the Note's focus and spill a lot of ink distinguishing the preemptive authority.

Checking for preemption entails a meticulous survey of the pertinent legal or specialized literature to determine whether someone else has already published your Note topic and your treatment of your Note topic. You must do more than just survey some of the pertinent law or law-related scholarly literature that deals with your topic; you must locate and scrutinize all of it. There are four key areas to check:

- Law Periodicals: Including, Wilson's Guide to Legal Periodicals
- Full-Text Databases: Lexis, Westlaw, HeinOnline, and JSTOR.
- Soon-To-Be-Published Scholarship: SSRN
- Internet Source: Google, Google Scholar

WRITING YOUR NOTE

Once you've selected a topic for your Note, the writing process is really up to you. Nonetheless, there are few major things that will make the research and writing process easier, and a few hallmarks of an excellent Note.

As for your research, the most important thing is to make sure you thoroughly understand your problem and the background law. This means reading all of the relevant (and potentially tangential) background law, keeping up-to-date on the latest developments, and talking to professors who specialize in that area of law.

As for the writing, there are four major guideposts to a good note: (1) authority and sourcing; (2) structure and organization; (3) clarity and (4) roadmapping. Great sourcing in your Note is essential. A good indication of the level of sourcing is the ratio between the text above-the-line and below-the-line. In general, these should be roughly equivalent (more on this below).

Remember that writing a Note is like entering a conversation. Your Note should add something new to a broader scholarly discussion taking place in the legal world; but many of your Note's readers are coming late to the conversation and have no idea what's already been said in this conversation. Thus, it is important to have excellent sourcing which provides detailed background, is well organized and is easy to understand. The pages that follow can help you achieve this in your Note.

Organizing Your Research

There's no magic bullet to researching, or for organizing your research: The main trick is to, early in the process, develop your own a method for gathering and tracking your research material. Once you've done that, you should make sure that you try to do as much of the following as possible in the course of writing your Note.

- Learn the background law. Depending on your topic, you may have to learn the background law in related areas. In this regard, casebooks and hornbooks are often a good starting point.
- Talk with a professor with expertise in the particular areas to which your Note relates. They are great sources for getting a sense of what prior treatment has been given your issue, and for specific questions regarding background law that are still confusing you.
- Take notes on the cases and articles you read, and highlight the parts you're thinking about using. Always indicate page numbers in your notes. It is aggravating to think, "Oh, I read something two days ago that would back this point up perfectly," and not be able to track down where that something is located.
- Keep track of which sources you've looked at. One way is to keep a Master Source List (MSL) for yourself, writing down sources you want to check out and crossing them off as you go.
- Photocopy anything that is hard to find. You don't want to have to look for it twice. Along those lines, don't throw anything away, especially notes that you take from sources you've read. Keep a folder for seemingly useless items. You may find that you need them in the future as your topic develops.
- Organize your materials in a way that makes later reference easy. Keeping sources in one place will help you immensely as you write your draft, and will also help cite-checkers if and when your Note undergoes subbing. An alphabetized file folder can help.
- Keep track of the latest developments. If there is a certain statute, case, or article that anyone writing on your topic would need to quote from, enter that statute or case or article's citation into Westlaw's KeyCite Alert.

Hallmarks of Great Note Writing

When you're writing your note, you should focus on four major things: authority and sourcing, structure and organization, clarity and roadmapping. There are also several other things that you should make sure to address in your Note. These are all the same things that the Notes Committee considers about when evaluating Notes for publication.

Authority and Sourcing

Almost everything an author says should be backed up by something. Any and all support for your claims should be below the line. All information essential to a clear understanding of your Note should be above the line. If the above-the-line text of your Note does not make sense without referring to the footnotes, then you have put too much below the line. A draft of your Note should have roughly as many words of text as of footnotes. If the footnotes are substantially longer, it probably indicates that the author has not focused the Note, made the argument clearly in the text, or eliminated minimally useful material. If the text is substantially longer, the author's arguments probably have too little support.

Until now, you have probably thought of footnoting as a way to source your statements. That's true, but, for purposes of your Note, you should expand your view of the function of footnotes. Good Notes direct readers to the best scholarly thinking on a given topic. Thus, the footnotes are just as important as the text itself. Often, the footnotes are the main thing a reader is looking for. You should strive in your footnoting to be to address all relevant sources: It's important to list, where relevant, multiple "Sees," "Cfs," and "But sees." By referring to your footnotes, a reader should be able to assemble whatever significant scholarship exists on the broader issues implicated by your Note. Remember, though, that including every single remotely relevant or minimally useful source is not helpful, and can often obscure the important sources. An author's effective use of footnotes in these ways is a very important factor in evaluating the quality of a Note.

Structure and Organization

It should be obvious how every single sentence and paragraph fits into your overall argument. Clearly state what is shown or proven in the each paragraph. Clearly connect one paragraph or thought to the next. Make sure there are no gaps in your logic or writing. Don't belabor any point, and be overly repetitive. Don't get ahead of yourself. Remember: As the author, you know all the pieces of the puzzle, but reader does not. Make sure you clearly express each relevant point before moving on to the next one.

Roadmapping

Roadmapping is the single most important aspect of structure. You must tell the reader what you're going to say and then say what you said you'd say. In many other areas of writing, roadmapping is considered to be poor writing, redundant and mechanical. But for Notes, roadmapping is essential. That's because almost no one (except us) will read your Note all the way through. As mentioned earlier, Notes are used rather than read; readers scan Notes to get a feel for the law or an idea for a solution to a problem. Since readers may only read a single part of a Note, each Part must explain at the outset what that Part will

demonstrate and why that demonstration is important to the Note as a whole. Sometimes, individual Sections also call for roadmapping (the longer they are, the more useful a roadmap would be).

Clarity

Every sentence of your Note should be clear and easy to understand. Notes are not pitched to expert audiences. They should provide all of the knowledge necessary for a law student to understand the law. When beyond-the-basics legal knowledge is required, the Note must supply that knowledge.

Other Considerations

In addition to the four categories outlined above, there are several other characteristics which are shared by good Notes. Although this is not an exhaustive list, be sure to keep at least these things in mind when writing a Note:

- A good Note recognizes and addresses counterarguments, or accepts them as potential weaknesses. It doesn't exclude potential weaknesses in an attempt to prove a point; rather, it acknowledges and addresses them.
- A good Note reaches a strong conclusion. Notes offer solutions, and solutions require conclusions that are plausible, workable and concrete. As mentioned above, the solution can acknowledge weaknesses or trade-offs, but Note must suggest something definite to the legal community.
- A good Note adequately explains all essential background information, while leaving out irrelevant opinions and fact patterns. Similarly, a Note clearly states all assumptions (and defends them), rather than relying on implicit assumptions. Further, the Note should never be internally inconsistent.
- A good Note does not voice opinions that aren't anchored in legal arguments.
- A well-written Note does not contain unwieldy, nonsensical, or jargon-laden sentences. Further, the Note is free of grammatical errors or problems of style and tone.

Formatting Your Note

When submitting your Note, make sure it follows these formatting rules.

Length

Typically, Notes are between 40 and 45 word-processed pages. The further your Note goes beyond 45 pages, the more it will have to justify its length with very tight writing and worthy discussion. If you need more than 60 pages, then you haven't chosen a topic discrete enough for the time allotted or for the profession's expectation of a Note's scope. All things being equal, a shorter Note is a better Note. Understandably, many Note writers wish to include every case, every issue, every good quote, and every brilliant insight that they have. But including too much information will detract from the effectiveness of your argument. To be persuasive, use only those facts, issues, and points essential to solving the problem the Note addresses.

Font

Your main text should be in 12-point Times New Roman font double-spaced. Footnote text should be in 11-point Times New Roman font single-spaced (this isn't the standard Word format; you have to change it). Use Microsoft Word; let us know if you don't have it.

Text & Footnotes

Use the "Cross-reference" feature in Word (or the equivalent in your word processor) when making supra or infra references. This way, when you move things around, those references will also be updated. Otherwise, it becomes extremely difficult to keep track of what each footnote is referring to.

Preliminary Memo (October 17th, 2011)

In general, your Memo should address the following points:

- i. *Issue:* State your topic succinctly in two to three sentences.
- ii. *Background:* Assume that the reader does not know a great deal about the specific area of the law about which you're writing. In four to five pages, summarize the key concepts, caselaw, and developments. Conclude by explaining what your issue is in detail and why it is important.
- iii. *Conclusion:* Provide a brief, even if tentative, summary of the initial ideas you have about answering the question you've proposed. This answer may be incomplete as of yet, and may well change as your research progresses, but it's important to articulate at this stage an initial feeling about what the law should be or how we should consider a particular problem.
- iv. *Prior Treatment:* Summarize the Notes and Articles that have discussed your topic and explain why that piece does not preempt yours. It should be clear from this section how your argument differs from those of other authors.
- v. *Bibliography:* In addition to the pieces noted in Part IV, list the major sources you have consulted, and intend to consult.
- vi. *Preemption Check:* Before handing in a Memo, you must check your topic for preemption. Search the law review databases on: Lexis, Westlaw, Wilson's Guide to Legal Periodicals, the SSRN abstract database, and (always, always) Google and <http://scholar.google.com>.

List all the searches you did in each of these databases so that we will know if you overlooked something. It is very important to do a thorough preemption check right away, so that you don't come across a preemptive piece halfway through your research.

- vii. *Professors:* Please tell us the professor(s) with whom you've discussed your topic.

Above all, your Memo should convey that your Note will make an original contribution to the field. As indicated above, the deadline for your Memo is October 17th at 7:00 p.m. *Warning:* Don't expect to complete this Memo in an hour or two; it takes serious effort to put together, especially the Bibliography and Preemption Check.

Final Submission Draft (February 2, 2012)

This is your final draft: This version will be considered for publication in the COLUMBIA LAW REVIEW by the Notes Committee. You will need to submit five printed copies of your Note, along with five printed copies of your Preemption Check, by 7:00 pm on February 2, 2012. Your Note should be formatted according the guidelines described above, in the “Formatting Your Note” section.