

Texas Law Review
Vol. 98
2019–2020



Notes Policies

Dear TLR Members,

Enclosed is a packet designed to assist you in developing a topic for your Note and preparing it for submission. The Volume 98 Editorial Board plans to publish 12–15 student-written works. This memo provides a brief overview of the most important information in the packet, but we encourage you to take the time to read the official Notes Policies in the packet.

▪ **Membership Requirement**

- Each member must submit a standard Note, Case Comment, or Book Review of at least 20 pages by **August 19, 2019 at the latest**. There are three submission deadlines for Notes. **The first deadline is June 7th, 2019**; members who submit their Notes by this deadline will receive a written Feedback Memorandum from the Notes Office. The second deadline is July 12, 2019, and the third deadline is August 19, 2019. **Only members who submit their Note by the first deadline will receive a Feedback Memorandum.** Notes will be selected on a rolling basis, **so submission by one of the first two dates increases your chances of publication.**
- TLR reserves the right of first refusal for all Notes submitted to fulfill the membership requirement. If you have submitted your Note to another journal, please notify tlr.notesubmissions@gmail.com immediately so we can expedite consideration of your piece.
- Each submission must also include a one-page abstract, a preemption check, and the Note Author Information Sheet (available on SharePoint).
- The Note must conform to the formal requirements found on pages 3–4.
- All Notes must be submitted electronically via email to tlr.notesubmissions@gmail.com.

▪ **“Good Faith” Standard**

- In order to satisfy the membership requirement, a Note must meet the “good faith” standard, which requires members to put forth an effort that reflects the high academic standards of the *Texas Law Review*. Please refer to pages 4–5 for more details regarding the good faith standard.

▪ **Opportunities for Publication**

- The Notes Office will first consider all pieces for publication in the *Texas Law Review*.
- The Notes Office will also work with the Online Content Office to consider student pieces for publication in *Texas Law Review Online*.

▪ **Impartiality**

- Impartiality is a crucial part of the Notes selection process. Therefore, *please do not reveal any information about your Note topic to Notes Editors that are not your Note Advisor!*

If you have questions or comments about any of the policies contained in this packet, please contact any member of the Notes Office. We look forward to working with all of you!

Sincerely,

Volume 98 Notes Office

VOLUME 98 NOTES POLICIES

Note Requirement

As a prerequisite for continued membership on TLR, each new member must submit a work of publishable quality. In order to satisfy the good faith requirement, Notes must be at least 20 double-spaced pages, including footnotes. While there is no maximum page limit, keep in mind that good notes share a common quality of clear, concise writing.

Students may elect to write a standard Note, Case Comment, or Book Review to satisfy the Note requirement (see pages 6–8). The Notes Office will refer any new member who fails to meet the deadline or to satisfy the guidelines outlined below to the Disciplinary Committee. The Committee will determine the appropriate disciplinary measure, including expulsion from TLR, based on the particular circumstances. **Please note that the Notes Office will not accept Notes marked “Not for publication” to fulfill the membership requirement.**

Deadlines

The deadlines for Note submission are as follows:

- Priority deadline: Friday, June 7, 2019, no later than midnight CST
- Intermediate deadline: Friday, July 12, 2019 no later than midnight CST
- Final deadline: **Monday, August 19, 2019** no later than midnight CST

Notes will be considered on a rolling basis. After each deadline, the Notes Office will select a number of Notes for publication in Volume 98 from the existing pool of submitted Notes. You will have a higher chance for publication by submitting your Note to an earlier deadline because the Note will be considered at each subsequent submission deadline. Additionally, **the Notes Office guarantees a written feedback memo for all submissions that meet the priority deadline.** The Notes Office hopes to notify all authors regarding their selection status by **October 11, 2019.**

Publication

The Editorial Board will make all decisions regarding the publication of student-written works. The Volume 98 Editorial Board expects to publish 12–15 student-written works.

There is no limit to the number of times a member may submit a piece for consideration. If you elect to resubmit a work, we simply ask that you include a brief statement explaining your changes and articulating how your revised work would better contribute to the relevant body of scholarship.

Once a student satisfies the membership obligation, she may submit for publication additional works on different topics that are not subject to the minimum page requirement. To afford former members seeking employment in the academic field an opportunity for publication, the Notes Office will also accept submissions from TLR graduates within one year of their graduation.

Notes submitted by members who have previously been published in TLR and Notes submitted by graduates will have lower priority than Notes submitted by current members.

Finally, the Volume 98 Editorial Board will accept Note submissions from the entire student body of the University of Texas School of Law. We hope that this program will increase the overall diversity and quality of Notes published in TLR, and build a bridge between TLR and the larger student community.

The Volume 98 Editorial Board will select a maximum of two Notes from a non-member for publication in the print version of Volume 98, and a maximum of one Note for publication in *Texas Law Review Online*.

Online Publication

In addition to opportunities for publication in *Texas Law Review*, the Volume 98 Editorial Board will consider student submissions for publication in *Texas Law Review Online*. *Texas Law Review Online* hopes to publish two member submissions and one non-member submission in Volume 98. The Notes Office will first consider every student submission for publication in *Texas Law Review*. The Online Content Editors will then consider all remaining, qualifying submissions for publication in *Texas Law Review Online*. The selection process for *Texas Law Review* maintains the same standards of quality as those governing publication in *Texas Law Review*.

Please note that a member may elect to submit works only for online publication, but submissions only to *Texas Law Review Online* will not satisfy a member's Note requirement.

Formal Requirements

All student-written works must adhere to the following requirements. Note or Notes refer to standard Notes, Case Comments, and Book Reviews submitted by students for publication:

- **Length:** To satisfy the membership requirement and the “good faith” standard, the minimum length is 20 double-spaced pages. There is no length requirement for subsequent submissions.
- **Format:** Please adhere to the following format guidelines:
 1. One-inch margins;
 2. Times New Roman font;
 3. 12-point, double-spaced text;
 4. 10-point font, single-spaced footnote text with a single 10-point space added between footnotes;
 5. Page numbers in the bottom-right margin; and
 6. The Note Author Information Sheet, available on SharePoint (**please do not put your name anywhere on your Note except on the cover sheet**, as Notes will be considered anonymously for publication).

- **Abstract:** Members must attach an abstract not exceeding one page. The abstract must include the following three points:
 1. A brief summary of the Note,
 2. An explanation of what the piece contributes to the relevant field of scholarship, and
 3. If relevant, any other information about the Note the author wishes to share with the Notes Office.

- **Preemption Check:** Members must also attach a preemption check summary. It should list the sources that are most similar to the author’s topic or argument and state why these sources do not preempt the Note. If there are no similar sources, the preemption check summary should explain this as well, and detail the member’s research process. Please see the Preemption Check Guidelines, available on SharePoint, for more detailed instructions.

Three common ways in which Note topics are preempted are by court decision, government action, or publication by another commentator. A court, particularly the U.S. Supreme Court, may decide a case that renders the Note moot. Similarly, a Note may be mooted if a legislature or regulatory agency passes legislation or promulgates regulations that adopt the proposal or otherwise solve the problems addressed in the Note. Finally, another author may make the Note obsolete by publishing an article or Note that advances essentially the same proposal or argument.

Preemption checks require at least ten hours. This time is not wasted. Preemption checks enhance your understanding of the area of law you have chosen, reveal how other authors have approached the subject matter, and provide useful footnote material. This information can be extremely useful as you refine your topic. Most importantly, dedicating the time necessary for a comprehensive preemption check will minimize the risk that you have to write another piece because the Notes Office determines after submission that your work has been preempted.

If a member turns in a Note that the Notes Office determines is preempted, that member will have to show good cause for the preemption (e.g., a case came out preempting the note one week before the member submitted it). If the member can show good cause for the preemption, the Note will not be disqualified for purposes of the membership requirement; however, a preempted Note will not be published. **A preempted submission will not fulfill the membership requirement absent a showing of good cause.**

“Good Faith” Standard

Notes submitted to fulfill the membership requirement must meet the “good faith” standard, which requires members to put forth a good faith effort that reflects the high academic standards embodied in membership on *Texas Law Review*. In order to meet the good faith standard, the Note must be of publishable quality and adhere to all of the following guidelines:

1. Members must submit a copy of the Note, an abstract not exceeding one page, and a thorough preemption check summary.

2. Notes must be at least 20 double-spaced pages in length. This is a bright-line rule. Notes submitted that are 19 double-spaced pages will not meet the good faith requirement.
3. Notes must adhere to the formal requirements laid out on pages 3–4.
4. Every above the line assertion in the Note that requires support must be cited.
5. All citations must conform to Bluebook and Greenbook citation rules.
6. Members must proofread their Notes extensively; Notes meeting the good faith standard will not have pervasive spelling or grammatical errors.
7. All members must conduct thorough preemption checks before submitting their Notes to the Notes Office. The Note must be written on a non-preempted topic.
8. As a general matter, a Note should make an argument; it will not suffice for a member to merely summarize the state of the relevant law or rehash arguments made by others. Should you elect to write a Book Review to fulfill your Note requirement, it will not suffice for you to merely summarize the arguments being made by the author of the book that you are reviewing. Rather, the Book Review must advance a novel argument with respect to the position taken by the author.

If a Note submitted to satisfy the membership requirement does not meet the good faith standard, the Notes Office may elect to allow the member to revise the Note; however, the Volume 98 Notes Office reserves the right to immediately refer to the Disciplinary Committee any members who fail to meet the good faith standard.

Submissions

All Notes must be submitted electronically. Please email your work, abstract, and preemption check to tlr.notesubmissions@gmail.com. Please combine these documents into a single Word file. Additionally, please submit a separate document that includes the Electronic Author Information Sheet. You will receive an email confirming the receipt of your submission. The same process applies to resubmissions.

Right of First Refusal

Texas Law Review reserves the right of first refusal for all members' Notes. The Notes Office understands that members might wish to cultivate other publication opportunities. If you wish to submit your Note to another journal, **please notify tlr.notesubmissions@gmail.com ASAP prior to submission**, and the Notes Office will attempt to review your Note on an expedited basis. Please do not notify the Notes Office directly, as to preserve anonymity.

Note Advisors

Each new member is assigned a Note Advisor. The Note Advisor can be a valuable source of advice throughout the Note-writing process. We know what qualities make a Note attractive for publication, and a large part of our job is devoted to helping you write the best Note possible. Your Note Advisor will recuse himself during the selection of your Note.

We encourage you to keep in touch with your Note Advisor and to contact your Note Advisor with any questions or concerns. Please remember that impartiality is a vital part of the Note

selection process; do not share any identifying information with a Notes Editor that is not your Note Advisor.

Note Awards

Historically, at the TLRA Banquet the writer of the best Note in each of several subject areas will receive an Outstanding Note Award and \$500. Subject areas for the awards vary each year depending on the Note topics members choose.

Types of Student-Written Works

Members may elect to write a standard Note, Case Comment, or Book Review.

- **Standard Note:** A Note typically addresses a relatively narrow legal question with a single well-developed and well-documented argument. A Note should advance legal scholarship in a specific area by *making or developing an argument* that has not been made in other publications. This might include a discussion of conflicts or inconsistencies between courts or problems that legislatures and courts have not addressed. Although a Note might need to describe pertinent legal doctrine on a subject, the focus of the Note should be to make and analyze legal and policy arguments and not merely to summarize an area of the law. One of the most common shortcomings of Notes not selected for publication is that they are overly descriptive and fail to make an argument. Choosing a topic amenable to a novel legal argument will help avoid this shortcoming.

There are a number of approaches one may take with respect to writing a Note.¹ The following list contains some common types of Notes:

- **The “Case-Cruncher”:** This type of Note analyzes case law in an area that is muddled, in conflict, or in transition. It suggests that a particular doctrine is antiquated or incoherent and needs to be reshaped. Often, the author resolves the conflict or problem by reference to policy, offering a solution that best advances goals of equity, efficiency, and so on. This type of Note frequently focuses on splits among circuit courts.
- **Law Reform:** This Note argues that a legal rule or institution is not just incoherent, but bad—it has negative consequences, is inequitable, or is unfair. The author demonstrates how to change the rule to avoid these problems.
- **Legislative Note:** In this type of Note, the author analyzes proposed or recently enacted legislation, often section by section, offering comments, criticisms, and suggestions for improvement.
- **Interdisciplinary Note:** The author uses insights from another field, such as psychology, economics, or sociology, to provide a means of clarifying and solving a troublesome legal issue.
- **Theory-Fitting Note:** As creatures of habit (and the common law), judges often apply terms of art to situations other than those in which they arose. By giving the impression

¹ Many of these ideas come from ELIZABETH FAJANS & MARY R. FALK, SCHOLARLY WRITING FOR LAW STUDENTS (1995). Please feel free to refer to this book for more ideas.

that a result follows from a simple application of earlier doctrines, this practice can obscure what is actually occurring. After examining recent developments on a legal issue, the author of a theory-fitting Note cuts through the borrowed language and inapplicable precedent to find and elucidate a novel underlying theory that explains the “true meaning” of the trend.

- **The Legal History:** These Notes delve into the origins and development of a legal rule or institution and shed light on its current operation or shortcomings.
- **Comparative Law:** These Notes examine and compare how different legal systems have approached a particular problem in the law, perhaps discussing lessons applicable to the United States.

For an example of a Standard Note, see Ross McDonald, *Setting Examples, Not Settling: Toward a New SEC Enforcement Paradigm*, 91 TEXAS L. REV. 419 (2012).

- **Case Comment:** Case Comments address recently decided cases. The best Case Comments analyze decisions that have the potential to significantly change an area of the law. In other words, it is good for the case to have interesting facts, but it is essential that it address an important legal controversy. Although many Case Comments focus on federal court of appeals cases for which petitions for certiorari have been filed or granted, TLR hopes to receive submissions on other federal, state, and international court decisions as well. It is unlikely that TLR will be able to publish Comments on cases decided by the Supreme Court as these are likely to be quickly preempted. If you wish to write on a Supreme Court case, please speak with your Notes Advisor first. It is not generally necessary to obtain express approval from a Notes Advisor, but if the case you wish to explore is pending before a court of last resort, we would strongly advise consulting with a Notes Advisor so as to minimize the risk of preemption and/or mootness.

Typically, successful Case Comments (1) present the case, its holding, and the facts in one to two paragraphs; (2) introduce the jurisprudential and/or political context of the case in two to four paragraphs; and (3) make a nuanced and innovative argument about the case. Please remember to include information on the subsequent history of the case, including whether an appeal or petition for certiorari has been filed.

The following are important elements of a successful Case Comment:

- **Focus on a single case or significant circuit (or state) split.** You must present more than an interesting legal issue: You must *analyze* a specific case.
- **Address an issue that has the potential to change the state of the law significantly.** The case at issue should do more than simply refine a settled legal doctrine.
- **Address one manageable issue.** Most good Case Comments have a simple, clear thesis that can be stated in one sentence.
- **Go beyond the opinions in the case.** A Case Comment should present a clear legal argument that goes beyond agreeing or disagreeing with the majority, a concurrence, or a dissent.

- **Offer a unique or creative “take.”** A Case Comment should contain an argument or perspective that is not otherwise readily available. This is more difficult for proposals addressing cases that have received a great deal of attention, particularly Supreme Court cases.

For an example of a Case Comment, see *Recent Case, Massachusetts v. United States Department of Health and Human Services*, 682 F.3d 1 (1st Cir. 2012), 126 HARV. L. REV. 611 (2012).

- **Book Review:** A Book Review is a review of a contemporary work of legal scholarship. It should assess the book’s subject critically, explaining and evaluating its thesis and contextually placing it within its academic field. Most importantly, a Book Review should focus on a single, innovative argument that engages the book and can be addressed effectively in 20–30 double-spaced pages. A Book Review should reflect the author’s knowledge of the relevant legal literature and should be fully cited, with reference to the book’s context in the academic debate.

A Book Review should begin with one or two introductory paragraphs that (1) place the book in *context*; (2) state the book’s *central thesis*; and (3) state the reviewer’s *basic assessment* of that central thesis. Next, the Book Review will *summarize* the book’s central thesis and supporting arguments. Finally, the Book Review will *assess* the book’s central thesis and supporting arguments. A reviewer should not focus on particular peripheral arguments of which the reviewer approves or disapproves. The focus should be on the thrust of the book as a whole. Book Comments should be critical, but not disparaging. The reviewer should identify both the strengths and weaknesses of the book. However, a reviewer should freely criticize a book with which she disagrees. If the work’s central thesis is persuasive, the reviewer should say so, perhaps pointing out additional areas for investigation or analysis.

Book Reviews should add to or enhance the scholarly debate. Reviews that simply regurgitate the book’s contents and/or provide only cursory opinions from the student author will not be published and will not satisfy the membership requirement.

In order for a Book Review to fulfill the membership requirement, it must conform to all of the standards for the membership requirement, including the 20-page minimum.

If you plan to write a Book Review, a Featured Content Editor must pre-approve the book before you begin writing your Book Review.

For an example of a Book Review, see Brett Max Kaufman, Book Review Note, *Weak Courts on Steroids: Improving Weak-Form Judicial Review*, 87 TEXAS L. REV. 639 (2009) (reviewing MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS* (2008)).

Helpful Tips

Topic Selection

This is the most critical stage of the entire Note-writing process. Selecting a topic that you find interesting and that offers an opportunity for new or creative arguments will make the Note-writing process easier and more enjoyable. Spend time considering potential topics, talking with professors and fellow students, and researching areas of the law that you find engaging. It is generally best **not** to confine your topic to the law of any single state unless, for example, Texas law provides a paradigm case on an issue of national importance or Texas is to be compared with other states on a national issue. Furthermore, Notes focusing on the law of a single state other than Texas are unlikely to be published or to win Note Awards.

- **How to find a good topic**—You can avoid many difficulties by carefully selecting your topic. Early research, reflection, and discussion with a Note Advisor, other members, and professors will save you considerable time and frustration. Professors are good sources for topics, but meeting with a professor typically is productive only if you bring to the meeting a concrete idea or several potential issues to discuss. Most professors cannot simply provide you with a topic, but will help you flesh out ideas. That said, many of the best Notes are written under a professor’s guidance, either through independent research or a seminar. Professors with expertise in a particular area are in an excellent position to guide you in selecting a topic and writing a Note that contributes to a discrete field of legal scholarship. Correspondingly, with the above caveat, the Notes Office strongly recommends consultation with a professor. Also, assorted print and computer resources are available that may help refine an idea into a workable topic:
 - Specialized current legal reports in an area of interest, such as the *Criminal Law Weekly Reporter*, *Products Liability Reporter*, or *Federal Securities Law Reports*.
 - Periodicals such as *The Wall Street Journal* or *The New York Times*.
 - Law review articles such as Harvard’s annual *Developments in the Law* issue.
 - *U.S. Law Week*, which reports on pending and recently decided Supreme Court cases.
 - Looseleaf services such as *Nimmer on Copyright*, which contain annual updates on new developments.
 - LexisNexis searches in the HOTTOP database.
 - Westlaw, LexisNexis, or Bloomberg searches using key words such as “question w/5 ‘first impression’” or “circuit w/8 split.”
 - LegalTrac, which is available online at the UT Law Library Web site. From the Tallons Home Page (<http://tallons.law.utexas.edu>), go to “Selected Online Resources” under the heading of “Research Tools.” Find LegalTrac under the “Law” subject heading or under the alphabetical list. The *Index to Legal Periodicals* (ILP) and the *Current Law Index* (CLI) all provide valuable information when identifying topics that have room for additional treatment.
 - The *United States Government Organization Manual* describes government agency mandates. The *Statistical Abstract of the United States* may help you find facts and data from government surveys on demography, economics, and commerce.

Organization

Many different organizational styles are appropriate for student-written work. Most conform to the following general format:²

- **Introduction:** This Part describes the subject matter of the Note and plainly states the thesis. It also contains the “roadmap” for the Note: “Part II sets out X. Part III analyzes X and concludes Y. . . .” Think carefully about your roadmap—it will help you to organize your Note and your arguments.
- **Background:** This Part should set out any background necessary for a reader with a law school education to understand your analysis. Background may be factual and methodological, or may consist of a critique of existing approaches to your problem. The depth of background should be appropriate to the subject matter—it should be specific and comprehensive, assuming nothing beyond general legal knowledge, but it should not be *too* long or contain irrelevant details. Finding the right balance requires exercising good judgment.
- **Analysis:** This Part presents your new and original analysis of the subject matter. The analysis is the heart of your Note and your original contribution to legal scholarship. This section must be well reasoned and thoroughly supported. Your analysis should fill at least half of your total pages. ***Solid analysis cannot be emphasized strongly enough.*** Notes containing insufficient analysis are poor candidates for publication.
- **Conclusion:** This Part should summarize your views and wrap up loose ends. You should make explicit the implications of your analysis and address its most important aspects. You may say, “This deserves further study,” but your readers will be frustrated if they think you have not provided enough analysis. Use your best judgment.

Footnotes

Your Note must be footnoted appropriately. An improperly footnoted submission will be deemed incomplete and may not meet the good faith standard.

Footnotes serve three purposes. First, they provide authority for the assertions you make in the text. Second, they help you avoid plagiarism. Third, they express ideas that do not fit into the legal reasoning and provide creative digressions or asides for the reader.

A common rule is that “authority footnotes must substantiate every proposition in the text, including every assertion of law or fact.”³ The only exceptions are “passages of pure argument, topic sentences, and conclusions.”⁴ Although we trust all of you to use your footnotes correctly, we must reiterate the importance of accurate citation—avoid quoting a source out of context where its use creates a misleading impression about the source, and avoid pasting together pieces of a work so as to give it a meaning inconsistent with the work taken as a whole. Failure to properly acknowledge the work of another can lead to charges of academic dishonesty and plagiarism, even without intent to deceive.

² Any of these sections, except the introduction, may actually develop into more than one Part, or can be split into subparts, sections, or subsections.

³ FAJANS & FALK, *supra* note 1, at 90.

⁴ *Id.*

Use proper signals, especially when the source does not squarely support the proposition in the text. Familiarize yourself with *Bluebook* Rule 1.2 and the guidance on signals found in the *MoUS Companion*. Additionally, write your footnotes as you draft your text. Taking the time to find the exact source you want to cite as you write will save you considerable time later and will help you avoid inadvertently neglecting to cite.

Some footnote guidelines:

- Provide footnotes for borrowed language, facts, or ideas, whether quoted or paraphrased in the text.
- When you borrow seven or more consecutive words, use quotation marks. When the wording is distinctive, use quotes for fewer than seven consecutive words.
- In addition to providing an attribution footnote for paraphrases, introduce the borrowed material with some reference to its source (e.g., “One commentator has noted . . .”).
- If you find a source through other sources, good research practice requires you to look up the original, cited source. Citation convention requires you to footnote the citing source as well as the cited source if the citing source uses the cited source in an original manner.

Tone

The tone of your Note should be consistent with formal legal writing. Avoid using contractions and minimize “conversational style.” Maintain a respectful tone toward the positions of the judges and professors you discuss. Your view may differ from that of a federal judge, but you should not call her ignorant, wrong-headed, shortsighted, etc.