

HOW TO PERFORM A PREEMPTION CHECK

The purpose of a preemption check is to ensure that the author’s note can significantly add to the public discourse on that topic. To do this, you must conduct a comprehensive search to make sure your argument has not already been expressed in the existing literature. Start the preemption check by following the steps on the next page. Keep the following things in mind:

- **Go through each step outlined on the next page.** If your search does not reveal any similar sources, make a note of that in the right-hand column. Do NOT simply leave a step off your preemption check (otherwise, we won’t know that you actually checked).
- It is NOT sufficient simply to state that your professor (or someone else) told you that your topic was unique. You must conduct a preemption check yourself.
- When you encounter a source similar to the Note, evaluate how the treatment of the topic in the source compares with the treatment of the topic in the Note.
- **Create a table** giving a cite to the source in one column and in the other column a paragraph explaining the similarities and differences of your Note as compared with all the sources you find that are substantially similar to the Note (**see example below**).
- In comparing your Note to other sources, state specifically why you think it is similar to your Note and any ways you think your Note is distinguishable itself from the source.

Search Terms	Source	Topic Treatment in Source v. Topic Treatment in Note
	Robin Paul Malloy, LAND USE LAW AND DISABILITY (and searching this in Weslaw/Google Scholar/etc)	<p>Malloy’s book is far and away the most in-depth treatment of the topic out there. At points, his analysis and mine come fairly close—especially his advocacy of what I’d call a Norwegian model, using lending and public housing policy default norms and standards. I don’t think that model would work in the United States—unlike Norway, where strings can be attached to carrots through government-run central housing bank, it’s a little harder to put strings directly on private home construction loans—though I do think there are ways, through public initiatives (described by Johnson) to nudge things a bit.</p> <p>I also try and describe a more general, universal-design paradigm than Malloy’s, with emphasis on mobility-related disabilities, especially age ones. I’ve tried to address the tension between emphasizing age and designing for disability <i>per se</i>, but I’m unconvinced that the one can be completely or successfully subsumed to the other.</p> <p>I also make comparisons to green design movements and methods of public participation and control, which is not something discussed in Malloy. I also spend more time exploring mechanisms of control, rather than Malloy’s rather “bribe your way to visitability” carrot diet method.</p> <p>While my work expands on Malloy’s, it’s still very much indebted to it. On his SSRN page, I found his other works on the topic (the sidewalk main article and the earlier 90-something page article he based LUS&D on—<i>Integrating Design</i>); I think I end up citing them both. Trying to skate around the citation he set helped shape this paper, and following the citation trail lead me to many other sources—including Schindler’s. In a way, tracing the citations on this topic is almost a preemption check in itself; nothing on this topic is going to be published without citing Malloy.</p>
	Google: “ADA legislation”	There are a few tweaks to the CFR regs for the ADA, but no <i>new</i> regulations. Nothing, anything, disability regulations and enforcement protocols are being rolled back, as I note.

	Sarah Schindler, <i>Architectural Exclusion</i>	Surprisingly, I didn't cite this article half as much as I thought I would. My thesis—(roughly) that architectural exclusion is tolerated because it's harder to counter through judicial means—lurks on the surface of many of my arguments. She focuses on race, rather than disability, unlike me, thinks that the ADA is an exception to the general rule of architectural exclusion, because of its enforcement provisions—while I see it as an exemption, because the enforcement provisions are often futile. Chasing citations lead me through a roundabout path to the articles on LEED and the law—or why nobody's sure about these green design mandates. I know I reference these three articles by their names at different points in the paper.
	O. Johnson, <i>Beyond the Private Attorney General and Equality Law Pluralism</i>	These two articles describe alternative approaches to traditional “regulatory” schemes, instead working on a more citizen and local “governance” scheme. (roughly) rules are created and followed in society, rather than imposed from above. <i>Beyond</i> focuses in significant part on the Westchester County litigation where community groups brought suit under the False Claims Act to challenge desegregation requirements in the public housing contract, showing how a government carrot, dangled on a string, can provide an opening for a private law. <i>Pluralism</i> explores community benefits agreements and equity initiatives—creatures of contract law allowing local governments to offer incentives, tax breaks, to developers who agree to incorporate certain agreements—like those from worker centers or labor peace agreements. Most of the studies of “other” CBA's have been in the labor law and local government context; mine is the first time they have been applied extensively to disability rights.
	UNIVERSAL DESIGN HANDBOOK	There's a lot here, including one or two short articles near the end (especially “Designing the Rhinoceros”) that I never got a good chance to work in. It's comprehensive, but never delves deeply into urban design or theory—urban design books never get much into disability. Most of the articles are useful enough not to preempt what I wrote, and none of them describe the mechanisms I make the comparisons, that I do. I found the comparative law sections, also in the New York 2016, to be useful in illustrating how carrots could be used to nudge design into fruition—more useful than Malloy's rather abstract forms. However, the unique features of American law, and our distaste for central government lending, lead me to propose a different mechanism than the one used in Norway, Japan, Germany, or elsewhere.
	YORK 2016	Most of these essays are short, and very tightly focused. While many of them are useful for establishing one or two propositions (I'd like to work in more of them in future editions), none of them preempt the overall thesis of my paper.
	Index to legal periodicals (disability design, disability urban, universal design, universal housing design, visitability)	Nothing preempting, though an interesting study of Washington Court on Universal Design. Might work that into future versions of this. Most articles on universal design in educational instruction, which I deliberately avoided here.
	CLIP (same terms)	Nothing.
	SSRN (same terms)	Nothing—well, except for Malloy and the Washington Court article

	OCLC (same terms)	Server unavailable <i>right now</i> —but, all the searching I did earlier didn't anything new that was significant.
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PREEMPTION CHECK GUIDELINES

1. Search Google (or your preferred search engine) for any terms related to your Note that may be in the news.
 - a. For example, if your piece suggests a reform that could be implemented by administrative rule or Congressional legislation, conduct a relevant search to ensure no such rule or legislation has been proposed.
2. Search [Google Scholar](#) with various keyword searches.
 - a. If Google does not have access to a full article that appears to be similar to yours, you will need to search through the UT databases to obtain the article. The easiest way to do this is to go to <http://www.lib.utexas.edu> and search for the title of your article.
3. Search [Google Books](#) with various keyword searches.
 - a. If book previews are incomplete, you may need to obtain a copy from the library to ensure that your topic is not preempted.
4. Search Westlaw full-text law review articles and Lexis full-text law review articles.
 - a. Search both databases because some articles will only appear in one.
 - b. Recommended databases:
 1. Westlaw: Law Reviews, Texts, and Bar Journals (TP-ALL)
 2. Lexis: Law Reviews & Journals
 - c. Covers most articles since 1990.
 - d. Performs a full-text search.
5. Search [Index to Legal Periodicals and Books](#).
 - a. Covers most articles since 1980 and books since 1993.
 - b. This is not a full-text search.
 - c. If articles on your topic may have been published prior to 1981, search [Index to Legal Periodicals and Books Retrospective: 1908-1981](#).
6. Search *Current Index to Legal Periodicals* ([CILP](#)) on Westlaw.
 - a. CILP is an index of sources not yet in print form.
 - b. You only need to search the latest eight issues.
7. Search the *Social Science Research Network* ([SSRN](#)).
 - a. SSRN compiles working papers on your topic.
8. Search the *Online Computer Library Center* ([OCLC WorldCat](#)).
 - a. Accessible through the Research Database link on the Tarlton website.
 - b. This database searches books and other materials in libraries worldwide.