

THE UNIVERSITY OF CHICAGO LAW REVIEW

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To: 2Ls and 3Ls
From: Barry Frett and Jamie Lee, Topic Access and Recruitment Editors,
The University of Chicago Law Review
Date: April 26, 2018
Re: *Law Review* membership via the Topic Access Program

Thank you for your interest in the Topic Access Program. This memorandum will help guide you through the process of writing a publishable Comment to join the *Law Review*. If you have questions, please contact the Topic Access and Recruitment Editors, Barry Frett (barryfrett@gmail.com) and Jamie Lee (jamiej.lee44@gmail.com). As Topic Access and Recruitment Editors, Barry and Jamie will guide you through the Topic Access Program and help prepare your Comment for submission. Please do not hesitate to contact them with questions, either by e-mail or in person. Once you begin the process, either Barry or Jamie will be assigned as your primary contact and will work with you to establish an individual timeline. Please also note the deadlines provided in Part VII at the end of this memorandum.

I. ADMISSION TO THE *LAW REVIEW*

To be admitted as a member of the *Law Review* via the Topic Access Program, a student must complete a Comment deemed publishable by the Volume 86 Managing Board.¹ The Board will evaluate a Topic Access candidate's work using the same standard used to evaluate submissions by current *Law Review* members. A publishable Comment written for the *Law Review* can serve as one of the substantial pieces of written work required for graduation. Students do not receive academic credit for writing a Comment through the Topic Access Program.²

Students admitted through the Topic Access Program are full members of the *Law Review*. Members must complete all responsibilities outlined in the Volume 86 Staff Contract during the course of the school year, regardless of the date on which they obtain membership.³ In addition, all 2Ls who submit a final, accepted Comment by November 9, 2018, and complete the required duties before selection of the Volume 87 Managing Board, are eligible to apply for positions on the Board.⁴ It is

¹ In the unlikely event that an applicant's Comment is preempted late in the process or other extraordinary circumstances arise that are out of the applicant's control, the Board may, at its discretion, nonetheless consider the applicant for membership on the *Law Review*.

² Candidates may receive credit for their Comment through separate arrangements, such as an Independent Study ("499") with faculty members. Any credit-granting process associated with a 499 is separate from the decision by the *Law Review* to admit the candidate.

³ Responsibilities of *Law Review* staff members include conducting substantive cite checks, reviewing pieces of scholarship for preemption risk, and proofing pieces for publication.

⁴ Please see the deadlines and optimal timelines in Part VII of this memorandum. November 9, 2018 is the last possible date for a final Comment submission for 3Ls to be considered for *Law Review* membership and for 2Ls interested in a Volume 87 Managing Board position; however, there are several earlier deadlines

therefore a good idea for 2Ls to work on their Comments early, ideally beginning in the summer before 2L year.⁵

II. BASIC PROCESS

There are five sequential steps to crafting a Comment: an initial preemption check with Jamie and Barry, the Topic Proposal (“TP”), the Topic Analysis (“TA”), the Outline, and the Comment. Candidates must receive approval at each stage *before* proceeding to the next stage. Approval depends on a vote from the Comments Group to either accept or reject each submission. The Topic Access and Recruitment Editors will provide feedback after every vote and will establish individualized timelines to help ensure that each candidate continues to make progress. Note that it often takes multiple drafts at each stage before a submission is approved, and it is therefore strongly recommended that candidates start early.

This memorandum discusses each stage in greater detail below, but in short, Candidates must first run their idea by Jamie and Barry to verify that it is not preempted by staffer work. At the next stage, a TP is usually about five to seven pages and focuses on describing a potential topic. An approved TP advances a candidate to the TA stage. A TA is usually about six to ten pages and contains a more thorough analysis of the topic, an exhaustive description of the existing cases and commentary on the issue, and a description of the Comment’s contribution to legal scholarship. It is not unusual for candidates to repeat the first two stages (TP and TA) multiple times. The Board sets a high bar for acceptance at the TA stage in an effort to save candidates the work of writing a full Comment on a topic that will face problems later. If the Board approves a candidate’s TA, the next step is to submit a detailed Outline of the topic to Barry and Jamie. Once they approve the Outline, the candidate will be ready to write a Comment draft.

At each of these stages (preemption check, TP, TA, Outline, and Comment), candidates should e-mail their work to Barry and Jamie, who will share it with other members of the Board for evaluation (with the exception of Outlines, which Barry and Jamie evaluate on their own). Please note that at each step of the process, it is essential to adhere to the citation, formatting, and length guidelines provided below. **Approval at any of these stages is not a guarantee of ultimate admission to the Law Review or of publication of the Comment.**

III. WHAT IS A COMMENT?

A Comment is an essay of moderate length (10,000–13,500 words, including footnotes) that undertakes a detailed analysis of a significant, unresolved legal issue and then proposes a viable new legal solution or approach to that issue.

The key component of a Comment is its contribution to legal scholarship. This component must exhibit two elements: originality and thoroughness. A Comment that merely adopts one side of an existing legal debate or critiques an existing article will not suffice; there must be a novel approach to the issue. Similarly, a Comment must provide an extremely thorough analysis of every portion of the question proposed. Broad questions that cannot be comprehensively addressed in the space of a

outlined in Part VII that must also be met. If a 2L is interested in being on the Managing Board, please let Barry and Jamie know.

⁵ LLMs who wish to participate in the Topic Access Program must begin during the summer prior to their year at the Law School. They will follow the timeline for rising 3Ls and will be responsible for all responsibilities outlined in the Volume 86 Staff Contract. Please note the Topic Access Program is the only way for an LLM to join the *Law Review*.

Comment are inappropriate. On the other hand, beware of simply trying to analyze the implications of a new law or a new case for an existing doctrine. That type of issue often more closely resembles a law school exam hypothetical than a Comment.

To ensure the originality of Comments, the *Law Review* has a very high standard for preemption (discussed below). If a Comment is preempted, even late in the process, it will not be selected for publication in the *Law Review*.⁶ In that case, the Board may, at its discretion, nonetheless consider the applicant for membership. There are two main types of preemption. First, if the Supreme Court grants certiorari on any of the cases or issues addressed in the Comment, that Comment will be considered preempted. A similar situation may arise if a Court of Appeals grants en banc review of a decision that is central to the Comment's legal issue. Second, if a Comment seeks to answer a question that has been addressed in the existing legal literature, it will be presumed preempted unless demonstrated otherwise. A candidate may propose a substantially different approach from those taken in existing scholarship, but that new approach must be clearly distinguishable from existing scholarship and must not merely represent a disagreement with the current approaches. However, candidates should not necessarily shy away from a topic simply because it has already been written about. Changing circumstances or the development of new legal doctrines may provide new ways to think about the issue. Nevertheless, it is *very important* that candidates flag any potential preemption issues *as soon as they arise*. Candidates should work, in consultation with the Topic Access and Recruitment Editors, to ensure that their approach is sufficiently novel to warrant continuing down a proposed path. Efforts to conceal or hide preemption issues at any stage of the process may result in immediate disqualification of the topic. Such efforts also run counter to a candidate's own interests, as they will eventually be discovered and will make the Comment unpublishable.

Comments generally fit into one of the following categories:⁷

- **The Circuit Split / Unresolved Legal Issue Comment**

This type of Comment takes a set of cases, points out the disagreement among them, and resolves the issue.

There are many advantages to this type of Comment. For example, these Comment topics are easy to find, easy to research, and useful to judges, clerks, and attorneys. However, it can be very hard to find an innovative solution when several courts have already addressed the issue. Comments must come up with a novel solution—that is, they must suggest an approach to the problem that is distinct from those found in the cases or in the existing scholarly literature. The problem with circuit splits is that often courts and other commentators have already picked the low-hanging fruit, and in some cases have picked the trees clean.

A cautionary word on circuit splits: choosing a circuit split—especially a recently developed split—creates significant preemption risks. If a candidate chooses to write on a circuit split, the candidate should keep in mind the possibility that a Comment on the same topic will be published in a different journal before his or her Comment is published. There are many other law reviews publishing student scholarship; if a candidate finds a circuit split topic in a news

⁶ In the event that a *Law Review* staffer and a Topic Access Candidate submit similar TPs, the one who submitted first reserves that topic. The other TP will be preempted.

⁷ The Volume 86 Comments Group is interested in publishing Comments on a wide variety of topics. Therefore, it is recommended that candidates think broadly when considering potential topics, rather than limiting themselves to a particular kind or structure.

publication or on a blog, chances are that multiple other students have seen and considered the same topic. If someone else publishes first, the candidate's Comment will be preempted and will not be published.

For examples of successful circuit-split Comments, see generally Lindsay Calkins, Comment, *Is Drug Quantity an Element of 21 USC § 841(b)? Determining the Apprendi Statutory Maximum*, 78 U Chi L Rev 965 (2011); Eric M. Fraser, Comment, *Reducing Fraud Against the Government: Using FOIA Disclosures in Qui Tam Litigation*, 75 U Chi L Rev 497 (2008); Rakesh A. Mital, Comment, *The Accrual of Wrongful Death Claims Under the FTCA*, 82 U Chi L Rev 2169 (2015); Channing J. Turner, Comment, *Too Late to Stipulate: Reconciling Rule 68 with Summary Judgments*, 81 U Chi L Rev 361 (2014).

- **The Changed Circumstances Comment**

This type of Comment addresses a situation in which the law has not changed but the underlying situation has. For example, in the 1980s, many Comments addressed how the existing rules of evidence should deal with new understandings regarding Battered Woman Syndrome, the reliability of testimony from children, etc. The Federal Rules of Evidence (FRE) had not changed, but the types of testimony had changed. And it was not clear how the FRE would apply to the new testimony.

These Comments can be very rewarding. They provide candidates an opportunity to be at the forefront of a developing issue, which makes them much more likely to be cited. Several of the Comments on evidentiary issues mentioned above were the authoritative works on the issue and were cited numerous times by federal courts. In addition, it is much easier to come up with a solution for these Comments because courts have not addressed these issues as often. Unfortunately, these topics are relatively difficult to find and may be publishable only in a narrow window of time.

See generally, for example, Tara E. Levens, Comment, *Too Fast, Too Frequent? High-Frequency Trading and Securities Class Actions*, 82 U Chi L Rev 1511 (2015).

- **The Empirical Comment**

These types of Comments attempt to give a definitive answer to an issue by analyzing empirical data. The upside to these Comments is that they can be very useful. They can resolve an abstract legal debate and offer an idea as to which side is "right." Further, the solution is obvious; it is the data and your interpretation of it.

However, these Comments can be quite a bit of work. Empirical Comments depend on data, and a candidate will often have to collect that data herself. If the solution to an empirical Comment requires data collection, the Board will be significantly more likely to approve the Comment if (a) the candidate has prior experience collecting and analyzing empirical data or (b) the data has already been collected. Note that, given the space limitations of a Comment, extensive empirical analysis can be difficult or even infeasible. Candidates should ask the Topic Access and Recruitment Editors if they have concerns about the scope of a potential topic.

See generally, for example, Matthew B. Kugler, Comment, *The Perceived Intrusiveness of Searching Electronic Devices at the Border: An Empirical Study*, 81 U Chi L Rev 1165 (2014); Michael

Lockman, Comment, *In Defense of a Strict Pleading Standard for False Claims Act Whistleblowers*, 82 U Chi L Rev 1559 (2015).

- **The Historical Comment**

A historical Comment seeks to describe and analyze the history of developments in certain areas of the law, with an eye toward informing the contemporary legal process. These Comments are useful because they do the legwork of finding and synthesizing historical sources. This has become increasingly useful to lawyers given the rise of originalism. The downside to these Comments is that doing a thorough job with the research can be difficult because, for historical research to be novel, the topic must often be obscure. Candidates should think carefully before choosing this type of Comment, especially if they do not have prior experience with historical research.

See generally, for example, James A. Kraehenbuehl, Comment, *Lessons from the Past: How the Antebellum Fugitive Slave Debate Informs State Enforcement of Federal Immigration Law*, 78 U Chi L Rev 1465 (2011); Abigail B. Molitor, Comment, *Understanding Equal Sovereignty*, 81 U Chi L Rev 1839 (2014).

- **The Cross-Disciplinary Comment**

If a candidate has experience in another field, such as computer science, psychology, or economics, she may be able to borrow insight or analytical methods from this discipline to shed light on a particular legal problem. These Comments are particularly difficult and are significantly more likely to be approved if the Topic Access candidate has verifiable expertise in the area.

See generally, for example, Nicholas A. Deuschle, Comment, *Fun with Numbers: Gall's Mixed Message Regarding Variance Calculations*, 80 U Chi L Rev 1309 (2013).

- **Mixed Comments**

Some Comments involve mixed approaches. For example, the Comment cited below involved a circuit split that was brought about by changed circumstances. The author attempted to resolve the circuit split by reconciling the language in *Ashcroft v Iqbal* with pre-*Iqbal* law. Another example would be using empirical research to prove that a circuit split exists. Mixed Comments are more complicated than “pure” Comments, but if the issue itself is complicated, multiple approaches can help.

See, for example, William N. Evans, Comment, *Supervisory Liability after Iqbal: Decoupling Bivens from Section 1983*, 77 U Chi L Rev 1401 (2010).

Some things candidates should *not* do with their Comments:

- Suggest a new law or contradict a decision of the Supreme Court. A candidate may discuss Supreme Court decisions and their relative limitations but should not rest her solution on contradicting established precedent, either by calling for the Court to reverse itself or by calling for a legislative reversal.

- Simply take a side in an existing legal debate. Of course, candidates can agree with one side of a circuit split, but they must contribute a novel perspective to the debate.
- Address a question so broad that it cannot be fully answered in the space provided.
- Advocate for an approach based on policy, as opposed to legal, concerns. Although candidates may wish to raise policy arguments to support their solutions, candidates must have a strong legal grounding to their proposals. Candidates should ask themselves: Is this approach one that a judge could plausibly adopt based on current law?
- Propose a solution based exclusively on factual changes—it is important to highlight the *legal* implications of the argument and to move beyond pointing to a factual change.

IV. DEVELOPING A TOPIC

Judging the quality of a Comment is inherently subjective, and this description should serve only as a rough guide. Candidates should keep two things in mind:

- Candidates must check with Barry and Jamie before writing a TP to ensure that their idea is not preempted by existing Comments or Topic Proposals internal to the *Law Review*.
- Candidates should use the TP/TA process (described in more detail in Part V of this memorandum), as well as meetings with the Topic Access and Recruitment Editors, to ensure that their Comments are on the right track. A Comment should never be written and submitted as a complete draft to the *Law Review* without first following the four-step process: TP, TA, Outline, and Comment. As further described below, even Topic Access candidates who wish to submit papers written for a class must follow this process, albeit with different timing requirements.
- Candidates should look at previously published Comments in the *Law Review*. Those examples will be the best guide for what the Board looks for in a publishable Comment.

The following list suggests sources for developing topics. Candidates should not be alarmed or disappointed if some sources do not turn up promising topics. Developing a good topic can be the hardest part of writing a Comment. Candidates should be persistent, as developing a topic will require significant time and effort.

- Talk to professors. Many Comment topics that ultimately develop into publishable Comments originate from conversations with professors. If candidates are not sure how to broach the topic, they should reach out to the Topic Access and Recruitment Editors for suggestions.
- Talk to colleagues and classmates who might have helpful ideas. Current *Law Review* members have all gone through this process and can provide useful insights. The Topic Access and Recruitment Editors are happy to meet with candidates and be a sounding board throughout the topic development process. Colleagues and other attorneys that a candidate knows can also be great sources of information regarding newly emerging or unsettled legal issues. Many

young associates at law firms spend a lot of time writing memoranda on unclear legal issues and might be of great assistance. Note, however, that some legal employers may prefer that candidates ask for permission before using a topic that arose in the course of employment as the basis for a Comment.

- Think about legal questions from courses that appear to have no clear or satisfactory answer.
- Read the newspaper. It is an obvious yet invaluable resource. For example, the *Wall Street Journal* has an excellent column called “Legal Beat.”
- Read *US Law Week*. It provides recent Supreme Court and lower court cases of interest. It also provides summaries of cases and identifies legal issues currently facing the courts.
- Check the library’s Law Databases website at <http://www.lib.uchicago.edu/e/law/db/> under the “U.S. Topical” heading for access to a great variety of legal news focused on different subject areas.
- Visit <http://www.lib.uchicago.edu/e/law/db/bna.html> and sign up for BNA newsletters on particular research areas by e-mailing BNAsubscribe@lib.uchicago.edu.
- Read legal blogs. They can help generate ideas about current noteworthy legal issues. There are also lots of blogs covering particular legal areas (for example, criminal law, corporate law, labor and employment law, etc.) that can be helpful. General legal blogs that have been useful for writers in the past include:
 - *Concurring Opinions*, <http://www.concurringopinions.com>
 - *Feedly Legal*, <http://feedly.com/index.html#explore%2FLegal>
 - *How Appealing*, <http://howappealing.law.com>
 - *Prawfsblawg*, <http://prawfsblawg.blogs.com>
 - *The Volokh Conspiracy*, <http://www.washingtonpost.com/news/volokh-conspiracy>

Talk to the research librarians about other resources available at the law school.

V. STEPS TO WRITING A COMMENT

A. Preliminary Preemption Check

The *Law Review* keeps an internal list of topics that other staffers have proposed or written Comments about in recent years. Ideas on that list are not available for Comments written via the Topic Access program. All Candidates should check with Jamie or Barry to verify that their idea is not preempted by topics on the *Law Review*’s internal list before beginning their TP.

B. Topic Proposal

A Topic Proposal (TP) is a short memorandum that states a candidate’s proposed topic, provides a brief discussion of the topic and of existing commentary, and concludes with a brief bibliography. The TP should be **five to seven pages** single-spaced, in twelve-point Garamond font,

with one-inch margins, and all citations in footnotes (in eleven-point Garamond font). An approved TP “reserves” the topic for that candidate. Extensive legal research is not necessary, but candidates should try to set out the legal question in a way that shows how a Comment on that topic will make an interesting, timely, important, and original contribution to legal scholarship. The TP should briefly describe the most important cases that frame the legal issue. It must also demonstrate that the candidate performed an initial preemption check (see below for description) and should briefly summarize and distinguish any existing commentary on the legal issue.

Candidates should consult the sample TP on the *Law Review* website for guidance. Candidates should take this not as a perfect model but rather as a rough guide. They should also follow the guidelines in this memorandum, including using footnotes for citations. Keep in mind that legal issues often seem minor at first. In many cases, a seemingly uninteresting topic will reveal itself as just the opposite on further exploration. Candidates should cast their nets widely and write about something they feel they can make interesting. The Topic Access and Recruitment Editors are happy to answer any questions about writing the TP.

A candidate that is a member of another law journal may not submit a TP to the *Law Review* that was already submitted to that journal. **Finally, candidates must ensure that all submissions conform to the *Chicago Manual of Style* and are in proper *Maroonbook* form.** Because the Topic Access Program is about becoming a *Law Review* staffer in addition to possibly having a Comment published, it is essential that candidates follow these guidelines. The *Maroonbook* can be found on the *Law Review*'s website, <http://lawreview.uchicago.edu/page/maroonbook>. The *Chicago Manual of Style* is available through the law library's website.

A TP should include the following heading:

From: Candidate's Name
To: Barry Frett and Jamie Lee
Date: Date
Re: Topic Proposal: One-sentence description of the issue

A TP should be organized in six parts:

I. Issue: State the issue succinctly in question form. One sentence should suffice.

II. Discussion: Provide an introduction to the issue, citing relevant cases and statutes. Explain any background law that is relevant to the issue's resolution. Point out any existing approaches to the idea, if there are any.

III. Proposal Ideas: Describe the new approach the TP proposes. Keep in mind that the more detail included in this section, the better the Board will be able to provide guidance on appropriate paths for the TA. A candidate can suggest different ways of tackling the issue or different areas of the topic on which a Commentator can focus. While in-depth research is not required, this section should give the Board a sense of what solutions will be the most viable. For instance, if legislative history might be useful, the candidate should do a brief search through the legislative history and see if there is anything that could serve as the basis for a Comment. Similarly, analogies to other comparable legal issues are often helpful. If analogizing to other areas of the law might be useful, the candidate should begin to discuss what areas of law provide the most fruitful similarities.

IV. Existing Commentary: Candidates should explain where they looked, what they found, and whether there are any possible preemption issues. Running a thorough preemption check at this point can often save the candidate a lot of work down the road. Remember that not all existing commentary is preemptive. If there is significant existing commentary, the candidate should explain why it is not preemptive.

V. Bibliography: Provide proper *Maroonbook* citations to the cases, statutes, and commentary they found. This section can include sources that the candidate did not have space to discuss in the Discussion section. If the relevance of a source is not clearly described in the Discussion section, the citation in the bibliography should provide pin cites to the material in the cited piece that are most relevant to the topic, as well as a brief parenthetical explaining the source's relationship to the topic. This section should take the form of a bulleted list broken down by type of source (case, statute, article, etc.).

VI. Research Path: Provide a brief step-by-step synopsis of how the candidate found the initial topic idea and sources discussed in the Bibliography. Candidates *must* include a brief history of their search terms from Westlaw or Lexis.

Not every unsettled area of law creates a suitable Comment topic. In brief, there are four major characteristics that a TP should have to make its proposed topic strong:

- The TP should illustrate that the topic indeed involves an unsettled area of law.
- The TP should persuade its readers that the TP's unresolved question could be addressed through a legal solution that can be adequately discussed in a Comment. Although solutions tend to crystallize later in the process, the TP should expose a problem in the law for which a solution can be proposed in 13,500 words (including footnotes). For purposes of the TP, more proposed solutions are better than fewer. The Board can help identify which solutions would be most fruitful for a Comment, but presenting too few potential lines of analysis might foreclose moving onto the next stage.
- The TP should demonstrate that the area of unsettled law—and most importantly, the proposed solutions—have not been discussed in depth by another scholarly piece.
- Finally, keeping in mind that the goal of the *Law Review* is to publish Comments that have a tangible effect on the legal community, the TP should demonstrate why the topic matters. There are lots of unsettled areas of law, but some are unsettled simply because the stakes are low, because they are esoteric and arise rarely in court, or because they generally affect very few people and entities. While this is not simply a volume game (even issues directly affecting only a small group can have significant effects), make sure that your TP at least makes a preliminary showing that it could have a significant effect.

For all submissions, clear writing is essential. It enables the Board to focus on the substance of the arguments and assess the value of the topic. Candidates should use road maps, repeated phrases, and topic sentences to guide readers through the piece.

After a TP has been approved, candidates may wish to find a faculty advisor who can supervise their further writing and research. If candidates do not find a faculty advisor at this stage, the *Law Review* will assign a faculty advisor after the TA is approved.

C. Topic Analysis

Once a TP is approved, a candidate will write a Topic Analysis (“TA”). The TA serves two functions. First, it demonstrates the topic is not preempted by case law or other scholarship. Second, it focuses on and communicates the question at issue, the current law, and why the topic and the candidate’s approach to it will make a good Comment.

1. Preemption check and initial research.

Although candidates will have already performed a preliminary preemption check for the TP, they must conduct a *very* thorough preemption check in the TA phase that does not simply repeat the information found during the TP preemption check. Preemption checks are vital. A thorough preemption check greatly reduces (but does not completely eliminate) the risk that a finished Comment will be unacceptable for publication or as the basis for membership.

A topic can be preempted either by another piece of legal scholarship, by Supreme Court review, or by en banc review of a case that is central to the topic. If published scholarship or court opinions sufficiently cover the topic such that the potential for further original commentary is scant, the topic is preempted. Likewise, if the Supreme Court has granted certiorari on the legal question proposed by the Comment, the topic has been preempted. It is imperative that candidates do an exhaustive preemption check as soon as a TP is approved, since they may need to select a new topic if the original topic is preempted. Additionally, it is essential that candidates continue to monitor any ongoing preemption risks to their topics throughout the Comment-writing process.

While the preemption check is extremely important, not every case or article touching on the topic is preemptive. Sometimes an article will discuss only one aspect of a larger legal question and a Comment can tackle a different aspect. Sometimes articles or notes predate major developments in the law. And often articles only assess one solution whereas a Comment could mount an argument for a different solution. That said, occasionally, there will be no alternative to abandoning a topic and starting fresh with a new one. However, many proposed topics can be reworked into more viable ones in the face of potential preemption concerns. The rule to remember is: when in doubt, contact the Topic Access and Recruitment Editors. It is imperative that candidates never hide preemption issues. Concealing or hiding preemption can result in automatic disqualification of the topic.

At this stage of the process, candidates will be more familiar with their topics than anyone else and can therefore tailor preemption checks to their topic’s specific needs. The following steps must, however, be a part of every preemption check.

- i. Check whether certiorari or en banc rehearing has been applied for or granted on the cases germane to the topic. Candidates can search for certiorari petitions by running searches on the relevant cases in the *US Law Week* database on Lexis and Westlaw. Generally, losing parties in cases in state courts, as well as in civil cases heard in federal courts, have ninety days to file for certiorari. Parties must apply for certiorari in federal criminal cases within thirty days. Candidates should note that *US Law Week* takes some time to report a filing, so a few days should be added to these time limits. If certiorari is pending on a candidate’s topic, the candidate should not continue work on the topic unless she and the Board can be sure that the Comment will be published before the case is resolved. If an appellate-level panel decision

is important to the Comment (for example, if there is a circuit split), candidates should also check for a rehearing en banc.

- ii. Use Lexis, Westlaw, SSRN, and LegalTrac to find articles online. Candidates should be sure to sign up for Westlaw or Lexis alerts keyed to cases and articles that are important to their topics. This will keep candidates informed of any new developments and alert them of potential preemption. In Westlaw and Lexis, run key words using the “Law Reviews and Journals” filter. A Google or SSRN search will also alert candidates to any forthcoming preemptive scholarship.

If a candidate thinks that there is any possibility that her topic may be preempted, she should *immediately* consult the Topic Access and Recruitment Editors.

2. Writing the TA.

If the topic survives this more exhaustive preemption check, the candidate will write a TA. TAs should be approximately **five to seven pages**, single-spaced in twelve-point Garamond font (with footnotes in eleven-point Garamond font), and should comply with *Chicago Manual of Style* and *Maroonbook* rules. It is important for candidates to do great work at this stage: Board members evaluate a proposal based on the TA, and careful planning early on will make the rest of the writing much easier.

Besides reporting on the preemption check, the goals of the TA are to show why the topic will make an interesting Comment and how the candidate plans to analyze and resolve the issue. As candidates write their Comments, the analysis and resolution will undoubtedly undergo changes. However, candidates should develop a direction for analysis (or two) at this stage. This way, the Board can tell whether the Comment topic is likely to make a workable Comment before a candidate gets too far into writing. Of course, there are no guarantees. But having a sketch of a viable solution at the TA stage will greatly enhance the chances that a Comment will ultimately be accepted. Thoroughness is paramount; do not favor brevity at the expense of completeness. Finally, candidates should keep in mind that an approved TA does not ensure acceptance for membership or publication after the Comment is finished.

A TA should include the following heading:

From: Candidate’s Name
To: Barry Frett and Jamie Lee
Date: Date
Re: Topic Analysis: One-sentence description of the issue (can be the same one used for the Topic Proposal)

Each TA the candidate submits should have a copy of the original TP attached—paste the TP into the end of the TA. The TA should emphasize assessing preemption risks and the overall viability of the topic, rather than summarizing the law. The TA must include the following:

I. Introduction: One page framing the issue. This section should succinctly state the issue presented and why it is important.

II. Analysis of Current Law: The TA should concisely summarize the state of the law in the area, indicating the major decisions and discussing relevant legal doctrine. However, this section should not be duplicative of the “Discussion” section in the TP. Set out the relevant cases, statutes, secondary materials, and nonlegal sources. Research should be thorough and systematic but should avoid being mechanical. This section should synthesize relevant cases to reveal agreement or disagreement about the law and to identify trends and majority views. In describing cases, candidates should state and explain the cases’ novelty or value as authority.

III. Existing Commentary: This section, along with the “Evaluation” section below, should form the bulk of the TA. A one- to two-page discussion of what has been said in academic work—and more importantly, what has *not* been said. In describing existing academic works relating to the topic, candidates should include assessments of their quality, the extent of their coverage of the issues to be dealt with in the proposed Comment, and their continuing validity in light of later developments. If a topic is close to being preempted, it should be noted here. If it is not, this section should explain why different articles, comments, and notes do not preempt the proposed topic. Anything that looks at first glance like it might preempt the Comment should be carefully evaluated for possible distinctions, lines of argument left open, and positions not taken. Summarize the outcome of the preemption check and give a thorough and honest evaluation of whether a piece of scholarship is preemptive.

IV. Evaluation: The central function of the TA is to analyze whether the topic is viable for a Comment. At this point, the candidate has already undertaken the first step in addressing this issue in the Analysis of Current Law and Commentary sections. In this section, the TA should do two things. First, it should advise the Board on why it should approve the TA and explain the foundation for the TA’s recommendation. Second, it should outline the arguments the candidate would like to make and suggest lines of further research. Candidates should make sure that the scope of the topic is appropriate for a student Comment (about **10,000–13,500 words**, including footnotes). Some topics simply aren’t meaty enough to dedicate 10,000 words to; while others are so large in scope that thorough treatment would well exceed 13,500 words. A TA should convince readers that the proposed idea hits the mark. The TA should also identify potential weaknesses in the candidate’s arguments and address them forthrightly. If the Supreme Court has granted certiorari on a key case, or if certiorari is pending or likely, note this. Another type of preemption can come from exhaustive discussion in existing court opinions, even lower court or state court opinions. For example, if a district court has discussed the topic at length, pursuing all the different types of analysis and argument proposed in the TP, there may not be much else new and original for a Comment to do. Note that the topic could be reframed to avoid potential preemptions. Do not shortchange this section of the TA. This section of the TA should generally be at least two pages long.

V. Annotated Bibliography: In the bibliography, candidates should add brief parentheticals describing the sources, especially for sources not discussed in the body of the TA. This is very important, especially because thorough research can go a long way toward resolving doubts in Board members’ minds about preemption and unexplored avenues. The materials should be grouped by cases, statutes, and secondary materials, and the cases should be grouped by outcome (for instance, if there are two sides to a circuit split, the bibliography should organize

the cases by their position). As in the TP phase, candidates should include a history of their search terms from Westlaw or Lexis.

D. Outline

Once a TA has been approved, candidates should set up a meeting with their Topic Access and Recruitment Editor to discuss goals, priorities, and a tentative timeline for their work. Candidates *must* write an Outline and have it approved by both Topic Access and Recruitment Editors before beginning to write a first draft of the Comment. The Outline should be detailed and thorough, and it should be five to ten pages long. The Topic Access and Recruitment Editors should be able to track all of the arguments, evaluate their support, and understand the direction in which a candidate wishes her Comment to go.

During the outlining stage, it can be helpful to consult previous Comments to acquaint oneself with the structure of a student Comment. Writing an Outline can be a very helpful way to organize thoughts. It also gives the Topic Access and Recruitment Editors a chance to provide detailed feedback. Candidates who are a member of another journal must demonstrate to the Topic Access and Recruitment Editors that they have notified the other journal's Editor-in-Chief regarding their work for the Topic Access Program before beginning their Outline.

The following are suggestions for organizing your Outline:

- I. Introduction: A very brief description of the question that the Comment will address and seek to resolve. In a first draft, this will be expanded to include a short road map of the Comment.
- II. Background Law: Here, a candidate should detail the law to the extent necessary for a legal reader unfamiliar with the topic to understand the legal issues that the Comment confronts.
- III. Presentation of the Problem: This section should explain the legal issue that the Comment will attempt to resolve.
- IV. Proposed Solution: This section should propose an approach to solving the problem. This proposal should be as detailed as possible, as it greatly helps the Topic Access and Recruitment Editors identify potential issues and provide guidance. Keep in mind that a solution may neither contradict a holding of the Supreme Court nor require legislative action.

E. Comment Drafting

1. Preliminaries.

The candidate's Topic Access and Recruitment Editor will be aggressive in editing and making suggestions. Candidates should feel free to exercise discretion in adopting these suggestions. Candidates should keep in mind, however, that all published Comments undergo extensive revisions. Also, a candidate should not be disheartened if a Comment is not accepted after the first time it is submitted. Comments are rarely accepted on their first submission. The process of writing a publishable Comment requires a substantial amount of time, but the payoff in the end is worth the effort.

Comments must be submitted in *Maroonbook* format. If a Comment does not properly follow these rules, the Topic Access and Recruitment Editors will return it for revisions before Board members vote on whether to approve it. All submissions must be in twelve-point Garamond font, single-spaced with footnotes in eleven-point Garamond, and must have one-inch margins. The submission must also conform to the Volume 86 submission formatting and procedures applicable to all staffers. The Topic Access and Recruitment Editors will provide a copy of these standards before submission.

2. Tips and suggestions.

- Candidates should set up a Google alert for their topic at: <http://www.google.com/alerts>. They should also set up Westlaw and Lexis alerts on their topics and central cases.
- Candidates should keep a source list as they progress through various drafts of their Comments. This reduces the need to look up bibliographic details when time would be better spent focusing on writing.

In early drafts, candidates should not use “id” in the footnotes. Text inevitably gets moved around, and using short citations instead of “id” prevents difficulty in tracking down the sources of quotations or propositions. Similarly, candidates should hyperlink all cross-references from the outset to avoid footnote-renumbering problems.

The first draft of any piece of writing is likely to need significant revisions. Candidates should accept that, write a draft, and be ready to move on. The candidate should convert every portion of her Outline into full paragraphs and fill in the sections that were spotty on the Outline. The first drafts of Comments are rarely selected for publication, so candidates should not attempt perfection at this stage. The goal is to get ideas out in an organized fashion to get feedback on what to do next.

For formatting the first draft, heed the following instructions:

- Use *Maroonbook* format for citations.
- Adhere to *Chicago Manual of Style* rules and recommendations.
- Use twelve-point Garamond type for text and eleven-point Garamond type for footnotes.
- Use one-inch margins on all sides.
- Left-justify your text.
- Single-space all documents.
- Use one space after periods.
- Use underlines, not italics. Do not use bold.
- Number each page at bottom center.

Candidates should try to set aside times for extensive work on their Comments and times when they won't work on it at all. Time away will give candidates new insights and allow them to recharge their batteries.

Candidates should meet regularly with the Topic Access and Recruitment Editors. The more feedback candidates seek out, the easier the process is.

Candidates should take note of the deadlines for submission detailed in Part VII of this memorandum. The Board *strongly* encourages submission in advance of those deadlines. Because it is

very rare that a Comment is accepted on the first or second submission, the likelihood of acceptance is higher the earlier a Comment is submitted.

1. General Advice for the Writing Process

- **Do not underestimate the importance of road maps, repeated key phrases, and topic sentences.** The *Law Review* is a general legal publication. Readers who are not experts in a particular area of law should still be able to follow the Comment's structure and argument. Road maps are a big help to casual readers. Many readers are looking for a good explanation of the state of the law in a given area. Be simple, clear, and precise in the explanations.
- **Do not cite to sources that cannot be accessed by other researchers.** Good scholarship leaves clear footprints for others to follow. Follow *Maroonbook* Rule 4.13 by using Perma links instead of citations to traditional URLs; avoid citing to e-mails or other content that cannot be easily accessed by a potential reader (if necessary, link to and archive these sources); and do not cite to online resources that are not adequately vetted.
- **Be careful with advocacy in your analysis section.** The Comment is not an appellate brief or an advocacy piece. One of its primary functions is to explain the current state of the law, so it is important to be objective and to avoid presenting a biased view of the existing law. The tone of the Comment should never be snide or condescending. However, the candidate should try to argue for a solution.
- **Look for creative solutions.** Avoid Comment solutions that merely argue for one side or the other of a circuit split. Likewise, avoid Comments that require congressional action (such as recommending that Congress write a new law). While one can make observations about hypothetical changes in the law, a solution that rests on legislative action is considered policy based and thus inappropriate for a *Law Review* comment.

3. Publication Standard

The standard for publication is the highest standard a Comment will be held to. Judges, professors, practitioners, and students value Comments for their succinct analysis of the current law and creative solutions for resolving legal issues. A published Comment is a thoughtful, rigorous contribution to legal scholarship and will be evaluated as such. Should you hope to publish your Comment, the entire Comment-writing process, from the generation of TPs to the consideration of different solutions to your Comment question, should all be geared toward satisfying the following standards:

- *Originality.* This is perhaps the most important standard. The ideal Comment will be one that contributes something new to legal scholarship. As such, the preemption bar at the publication stage is set extremely high.
- *Analysis.* The second requirement of a publishable Comment is that it must provide an extremely thorough analysis of every portion of the question proposed. Perhaps it is easiest to illustrate this point by explaining what a Comment is not. A student Comment should not mimic the depth or breadth of Articles published in the Law Review. Articles may be over one hundred pages and as such can answer questions that are broader than a traditional Comment

can cover. Additionally, professors and practitioners with years of relevant experience in their fields can more easily assess the intricacies of broader questions that might implicate entire fields or areas of policy analysis. Recognize that a broad Comment will face an uphill battle to convince the Board that the Comment adequately addresses all the relevant areas of analysis. One of the purposes of writing a Comment is to become an expert on the Comment's topic and then to illustrate that expertise in the Comment—a task made difficult by an overly broad topic.

- *Interest to a General Readership.* The third requirement is that a Comment should be written about an interesting topic. In the past, staffers have submitted Comments that are well written and contain strong legal analysis. However, if the topic is so narrow or technical that few will be interested in the issue, then its chances of publication are low. Although the Topic Access Editors will try to screen these topics out during the selection stages, it is important to consider the potential readership of your topic before selecting it.
- *Composition and Organization.* The fourth requirement, and hopefully the most obvious, is that the Comment must demonstrate polished writing and organization. A staff member submitting with the hope of publication should have substantially edited the piece so that the argument flows logically between sections with topic sentences that provide an easy-to-follow progression. The staff member should also have edited the piece so that there are no missing sources, the Maroonbooking is correct, and grammatical and spelling errors have been removed. The Topic Access Editors will not force subsequent staffers in the editorial process to complete the heavy editorial lifting that should have been completed by the Comment author.

Please note that not all of these requirements need to be met to merely submit the Comment to the group for feedback. To submit to the Comments Group, the only real requirement is that the staff member thinks that the Comment has reached the standards for substantiality discussed above and is within the prescribed word limit. As such, as soon as you believe your Comment meets the substantiality bar, you should submit to the Comments Group. The Group's feedback can guide the editing process in the future.

VI. COMMENTS GENERATED BY A 499 OR SEMINAR PAPER

Second- and third-year students may submit 499 (that is, Independent Study) papers or seminar papers for consideration. However, past experience has taught the Board that there is often a significant difference between papers for credit (even those receiving high grades) and Comments that meet the *Law Review's* membership and publication requirements. The *Law Review* has a different readership than a typical 499 paper and, thus, has different requirements for the content of Comments. For example, 499 papers often base their arguments in policy rather than legal doctrine. A student who wishes to successfully use a 499 paper for a Comment should expect to revise the paper substantially.

Candidates who wish to use a 499 paper as the basis for a Comment must notify the Topic Access and Recruitment Editors as soon as they know that they are contemplating using a 499 or seminar paper as the basis for a Topic Access submission. This should be done before the submission of a Topic Proposal.

To receive any substantive feedback on a Topic Proposal, Topic Analysis, Outline, or Comment draft from the *Law Review* for work that is also being done for a 499 or seminar paper, candidates **must** first obtain written permission from the faculty member who will be evaluating the

paper. The Topic Access and Recruitment Editors cannot give any substantive feedback without first receiving this written preapproval from the faculty member. In addition, all feedback from any *Law Review* member must also be disclosed to the evaluating faculty member. For further information, candidates should reach out to Bianca and Matt, or see the Student Handbook.

To increase the likelihood that a 499 or seminar paper will be appropriate for the Topic Access Program, candidates should ideally submit a Topic Proposal before beginning the paper. All Topic Access participants must complete a Topic Proposal and a Topic Analysis before they can submit a Comment to be considered for publication, regardless of whether they have already written the paper.

VII. DEADLINES AND SUGGESTED TIMELINE

A. Final Deadlines

Please note that the deadlines listed below are *absolute, final dates*. It is very rare that a TA or a Comment is approved after the first submission; it frequently takes three or more submissions of a Comment before it is accepted for publication. We strongly encourage candidates to submit drafts early. While it is certainly possible to start later, beginning the process early in the 2L year gives applicants the greatest opportunity to develop their work and submit multiple times. Please contact Bianca and Matt if there are any concerns with the deadlines below.

Date	Requirement
Rolling	TP/TA/Outline/Comment
Rising-3L Deadlines	
August 17, 2018	Final TA submission
September 21, 2018	A <i>first</i> Comment draft must be submitted for 3Ls
November 9, 2018	Final Comment submission for 3Ls to be considered for membership
Rising-2L v87 Board Consideration Deadlines	
August 17, 2018	Final TA submission for 2Ls who wish to be considered for Volume 87 Board membership
September 21, 2018	A <i>first</i> Comment draft must be submitted for 2Ls who wish to be considered for Volume 87 Board membership
November 9, 2018	Final Comment submission for 2Ls who wish to be considered for Volume 87 Board membership

B. Optimal Timelines

As noted, starting the Topic Access process early increases the opportunities to develop work and, thus, ultimately increases the chances of having a Comment accepted by the *Law Review*. The Topic Access and Recruitment Editors will create an individualized timeline for candidates once they begin the process to help ensure that candidates stay on track. However, for reference, below are a few optimal guideline dates for each stage.

Date	Deadline
Optimal Rising-3L Timeline	
May/June 2018	Final TP and initial TA submissions
Early July 2018	Final TA submission
Early September 2018	First Comment draft submission
Optimal Rising-2L Timeline	
Early August 2018	First TP and initial TA submissions
Mid-August 2018	Final TA submission for those interested in being considered for Volume 87 Board membership
Mid-September 2018	Submission of first Comment draft for those interested in being considered for Volume 87 Board membership