

ND Law Library Guide

PREEMPTION CHECKING

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What is a Preemption Check?

It is a thorough search for published materials on your proposed note topic.

Why Conduct a Preemption Check?

Use a preemption check to achieve these 3 goals:

1. First and foremost, you need to make certain that no one else has already written the article you expect to write.
2. However, you do want to find sources that will help you write about your issue. Your preemption check will put you in touch with seminal sources and will help you shape your topic so that it has a unique twist.
3. Finally, use a preemption check to follow your topic. This combines the two items above: you will discover whether someone's new article "preempts" the one you are writing, and you will immediately learn of new sources. If an article appears to preempt yours when you are in the early stages of writing, either take a new bent on the issue, or try another topic. The closer you are to your publication date the greater the likelihood that you will do whatever it takes to salvage your topic since you already have worked so hard.

How to do a Preemption Check

Determine which indexes include articles of the type you want to write; there is a list below. Weigh the costs and benefits to determine how thoroughly you should search. Follow the suggestions for searching.

The Indexes

Use periodical indexes, either hard copy or electronic. The two hard copy legal indexes are the *Index to Legal Periodicals and Books* (ILP) and the *Current Law Index* (CLI). CLI is available electronically in the Kresge Law Library as LegalTrac (CD-ROM), or Legal Resources Index on LEXIS or LRI on WESTLAW. Note, this is NOT a search through full text law review databases, such as Law Reviews, Combined on LEXIS or TP-ALL on WESTLAW, which contain the full text of selective journal titles for various years. Searching through the full text databases will only tell you whether LEXIS or WESTLAW carries an article online, NOT whether anyone has written one anywhere.

Determining how Comprehensive Your Check Should Be

Weigh several factors to measure the costs of failure to review all the indexes.

1. **Popular nature of your topic:** e.g., popular student note topics include criminal law, freedom of religion, sexual harassment and other employment discrimination topics.
2. **Differences in coverage:** The *Current Law Index* covers more journal titles and has narrower subject headings than the ILP. The electronic equivalents of the CLI also cover legal newspapers. Theoretically, LegalTrac (CD-ROM), Legal Resources Index (LEXIS) and LRI (WESTLAW) have the same coverage, however, an article published in 1991 reported differing results when the same searches were run in the 3 systems. You must weigh the risk of missing a pertinent article on the system you use and not discovering the article through additional research, against the additional time consumed by searching more than one system.
3. **Type subject headings** various indexes assign your topic: The *Current Law Index* and its electronic equivalents will subdivide constitutional law into several subheadings. To be comprehensive you may have to check several subject headings, and you will undoubtedly find the same articles listed under more than one heading. In contrast, the *Index to Legal Periodicals and Books* has comparatively general subject headings. There you will find numerous articles, some barely related to your topic, and you will have to sift through them all. Weigh **double look ups under specific headings against imprecise searching under broad headings** (plus CLI's electronic access as compared with ILP's hard copy format in our library).
4. **Ease of using particular sources:** Unless you are highly computer averse, you should run your preemption check electronically. If you decide to manually check the ILP and/or CLI you must look in each of the monthly supplements as well as the annual and/or cumulative ones for the years you want to cover. If you decide to use LegalTrac over LEXIS and/or WESTLAW you will need to document your searches carefully, because LegalTrac will send you to many "See Also" references. Furthermore, LEXIS and WESTLAW allow greater flexibility by offering free text searching alone or in combination with subject searches or natural language searching. In addition, because you can set up automatic searches using ECLIPSE (LEXIS) or WestClip (WESTLAW) in order to track new publications throughout the writing process, those systems are highly recommended.
5. **Interdisciplinary nature of your topic:** Are you writing in an area which overlaps with political science, philosophy, religion, economics, education, history, or might there be a recent dissertation on the topic? If so, you may need to check law related databases on LEXIS or WESTLAW, such as Dissertation Abstracts. Two other excellent sources of electronic, interdisciplinary indexes are the ND Libraries Home page and NT@ND. On the ND Libraries page click on E-Resources Gateway, then click on Indexes to Articles and browse through the list. Also, look at NT@ND,

under Basic, then Library Services where you can choose the applicable subject area(s) from which you can access various indexes.

6. **International aspects of your topic:** For example, do you need to use the CD-ROM *Foreign Index to Legal Periodicals*?

Suggestions for Searching

1. Subject Headings

Although you will also use free text searching on LEXIS and/or WESTLAW, you should first use **subject headings**. To do so, search by **segment descriptors**() on LEXIS or by the **field in**() on WESTLAW. The CLI contains a list of index headings at the front of each bound volume, so you can choose from that list, or look in the CLI under the subject headings to determine likely search terms to use within *descriptors* or *in*. You can also use a combination of limited searches along with free text searching.

2. Staying Current

Because a preemption check is not a one-time effort, choose a way to stay current. The automatic online methods are the easiest especially when you choose e-mail as your output method. On LEXIS, save your search in the ECLIPSE service or use WestClip on WESTLAW. On a periodic basis the system automatically sends you your search results.

Two less automatic methods include:

ILP and CLI: If you are running your continuing preemption check on a manual basis, remember to check the new paper supplements as they come out.

Current Index to Legal Periodicals (CILP) is a weekly alert that comes out about 2 months faster than the updates to ILP and CLI. On WESTLAW, CILP provides the last 8 weeks of coverage. You can easily set up a WestClip using terms you expect to appear in an article title covering your topic. Or, you can use the **field sublist**() to look at articles under CILP's general subject headings.

3. Subsequent History

Of course you will use Shepard's (LEXIS) or KeyCite (WESTLAW) to follow your case history. To follow your case at the U.S. Supreme Court level, you may also wish to use the *United States Law Week* (USLW) from reserve (also available online). Look under the names of both parties to avoid being misled by changes of case names on appeal.

Writing your case note or article is among your most consuming law school activities. A thorough preemption check allows you to assess the literature and shape an issue in a way that contributes to current development of the law. A continuing check using ECLIPSE or WestClip enables you to quickly react to new publications related to your piece. Feel free to obtain further search guidance from one of the LEXIS or WESTLAW reps or a research librarian. Good luck on your article; may you be cited often, by a high court, with approval!!!