

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.**

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 to shift 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 the 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 equity 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 emphasis on mobility-related disabilities, especially age ones. I’ve tried to hint at the tension between emphasizing age and designing for disability <i>per se</i>, and am 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 civic participation and control, which is not something discussed in Malloy. I also spend more time exploring mechanisms of control, rather than Malloy’s rather crude “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. Checking his SSRN page, I found his other works on the topic (the sidewalk maintenance article and the earlier 90-something page article he based LUS&D on—<i>Inclusion by Design</i>); I think I end up citing them both. Trying to skate around the contours he set helped shape this paper, and following the citation trail lead me to a few other sources—including Schindler’s. In a way, tracing the citations on this is almost a preemption check in itself; nothing on this topic is going to be published without citing Malloy.</p>
Google: “ADA legislation”	<p>There are a few tweaks to the CFR regs for the ADA, but no <i>new</i> regulations. If anything, disability regulations and enforcement protocols are being revoked and rolled back, as I note.</p>

Sarah Schindler, <i>Architectural Exclusion</i>	Surprisingly, I didn't cite this article half as much as I thought I would. Her thesis—(roughly) that architectural exclusion is tolerated because it's harder to see, more pervasive, and harder to counter through judicial means—lurks under the surface of many of my arguments. She focuses on race, rather than disability and, 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 exemplar, as 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 suing over these green design mandates. I know I reference these three articles by different 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, where (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 enforce desegregation requirements in the public housing contract, showing how every government carrot, dangled on a string, can provide an opening for a private stick. <i>Pluralism</i> explores community benefits agreements and equity initiatives—flexible creatures of contract law allowing local governments to offer incentives, beyond tax breaks, to developers who agree to incorporate certain agreements—like hiring from worker centers or labor peace agreements. Most of the studies of these “other” CBA's have been in the labor law and local government context; my work 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 fairly comprehensive, but never delves deeply into urban design or theory—and the urban design books never get much into disability. Most of the articles are short enough not to preempt what I wrote, and none of them describe the mechanisms, or make the comparisons, that I do. I found the comparative law sections, along with York 2016, to be useful in illustrating how carrots could be used to nudge blue design into fruition—more useful than Malloy's rather abstract formulation. However, the unique features of American law, and our distaste for centralized 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 were 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 and Universal Design. Might work that into future versions of this. Most articles are 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 pull up 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. Develop and refine search strategies
 - b. Look for legal research guide that may list specialized journals and/or bibliographies
 - c. Consider Legal Theory Blogs, Law Professor Blogs, Jotwell, ect.
 - d. 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.
 - b. Additionally, conduct similar searches on Amazon, Tarlton (by Reverse Year), UT Libraries (by Reverse Year)
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.

PREEMPTION CHECKLIST

- Google
 - Develop and then refine search strategies (keywords, dates)
 - Look for legal research guide that may list specialized journals and/or bibliographies
 - Figure out key authors and organizations for further, separate research
- Blogs
 - Google for blogs on point
 - Legal Theory blog: https://www.google.com/advanced_search
 - Law Professor Blogs
 - Jotwell
 - <http://legalscholarshipblog.com/law-review-companions/> control F
- Draft/pre-print papers
 - SSRN
 - Search within LSN only via “Advanced Search” page
 - Search entire site
 - Browse "Subject Matter eJournals"
 - Use Google's advanced search feature to search entire site
 - (https://www.google.com/advanced_search) - site:papers.ssrn.com
 - Digital Commons Network
- Law reviews (full-text searching):
 - Westlaw
 - LexisAdvance
 - Bloomberg Law
 - HeinOnline
- Indexes (subject searching):
 - CILP on Westlaw
 - ILP
 - LegalTrac
 - [IFLP]
- Interdisciplinary databases
 - Google Scholar
 - UT Libraries Databases >
 - Academic Search Complete
 - Dissertations and Theses Global
- Books
 - Amazon
 - Google Books
 - Tarlton catalog and then sort results by “Reverse Year”
 - UT Libraries catalog and then sort results by “Reverse Year”
 - New Books in Law: <https://newbooksnetwork.com/category/politics-society/law/>
 - OCLC's WorldCat: <https://uttarlton.worldcat.org/>
- Before you move on from a resource or as you discover an author, decide how to track
 - Set up an alert via the database or create your own via Google

- Ex for SSRN: set up a Google alert (<https://www.google.com/alerts>) to track your topic going forward. (Ex: "domestic violence" site:papers.ssrn.com)
- Sign up for an email update
- Follow on Twitter

EXAMPLE OF A QUALITY PREEMPTION CHECK

An extensive preemption check has revealed a substantial body of scholarship regarding the corporate governance issues associated with public retirement systems. Public-sector pensions continue to be a subject of contentious debate regarding funding shortfalls and matters relating to sound administrative governance. My Note intends to revitalize the discussion by highlighting specific case studies of pension funds that have successfully and unsuccessfully navigated these thorny issues and using these case studies to provide practical policy solutions that may alleviate the crisis facing public retirement in the United States. The differences between my submitted Note and the existing scholarly literature are outlined below:

Source	Topic Treatment in Source v. Topic Treatment in Note
<p>DAVID DRAINE & ALEENA OBERTH, PUBLIC RETIREMENT SYSTEMS NEED SUSTAINABLE POLICIES TO NAVIGATE VOLATILE FINANCIAL MARKETS, PEW CHARITABLE TR. (Nov. 8, 2023), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2023/11/public-retirement-systems-need-sustainable-policies-to-navigate-volatile-financial-markets.</p>	<p>This policy brief by the Pew Charitable Trusts documents the fiscal situation facing state and local governments with respect to public-sector pension solvency. It illustrates the deleterious state that America’s public retirement system is in, and offers some tepid reforms to increase employee contributions as well as reforming benefits to lower future expenses. This paper largely focuses on questions of fiscal management and omits more granular aspects of the problem, such as institutional structure and its effects on pension governance. By contrast, my Note focuses squarely on the issue of pension governance by identifying problems with the selection process used to appoint trustees to supervise administration.</p>
<p>DAVID KNAPP <i>et al.</i>, CAUSES AND CONSEQUENCES OF THE CRISES IN STATE AND LOCAL PENSION FUNDING, RAND CORP. (June 30, 2023).</p>	<p>This extensive paper is a comprehensive review of the various problems afflicting state and local pensions. It addresses a wide variety of problems, from chronic underinvestment to lackluster investment returns and the flaws of existing benefit structures. While it does address the issue of pension</p>

	<p>governance, it only briefly reviews the topic and provides few, if any recommendations for reform. In contrast, my Note concentrates on the issue of pension governance, specifically the question of trustee selection. It also investigates how problems with trustee selection influence governance outcomes and explores various policy suggestions to achieve better outcomes, as well as highlighting case studies of proper and improper pension governance to guide the analysis.</p>
<p>Neil Weinberg, <i>Investing Novices Are Calling the Shots for \$4 Trillion at US Pensions</i>, BLOOMBERG, Jan. 3, 2023, https://www.bloomberg.com/news/features/2023-01-04/us-public-pension-plans-run-by-investing-novices-are-on-the-edge-of-a-crisis.</p>	<p>This magazine article reviews various personnel management problems at various public-sector pension funds, primarily as it relates to the professional competence and experience of the trustees involved. My Note also discusses the issue of professional competence and pension governance, although it adopts a more systematic analysis of the issue, reviewing potential causes for misgovernance as well as identifying and recommending policy solutions as a palliative remedy.</p>
<p>Leah Malone <i>et al.</i>, <i>ESG Battlegrounds: How the States Are Shaping the Regulatory Landscape in the U.S.</i>, HARV. L SCH. F. ON CORP. GOVERNANCE (Mar. 11, 2023), https://corpgov.law.harvard.edu/2023/03/11/esg-battlegrounds-how-the-states-are-shaping-the-regulatory-landscape-in-the-u-s/.</p>	<p>This article discusses recent developments in the broader discourse about ESG investing and how state governments are grappling with ESG-related products and investment strategies. ESG is a primary focus on this article, which reviews how some state governments have sought to actively discourage ESG investing, either through regulatory action or by discouraging public pensions from investing in ESG-related</p>

	<p>products. My Note only briefly mentions the topic of ESG, and only then as an example of how the governance structure of major pension funds can be distorted by political influence from elected officials.</p>
<p>Joshua Lichtenstein <i>et al.</i>, <i>ESG and Public Pension Investing in 2023: A Year-To-Date Recap and Analysis</i>, HARV. L SCH. F. ON CORP. GOVERNANCE (Nov. 22, 2023), https://corpgov.law.harvard.edu/2023/11/22/esg-and-public-pension-investing-in-2023-a-year-to-date-recap-and-analysis/.</p>	<p>This article also discusses the issue of ESG investment, although it takes a longer look at how public pensions are navigating the debate over ESG investing. My Note only briefly discusses the topic of ESG, and only then as an example of how pension governance structures are often distorted by political objectives and affect overall fund performance.</p>
<p>Jean-Pierre Aubry & Caroline V. Crawford, <i>Does Public Pension Board Composition Impact Returns?</i>, 67 <i>CTR. FOR RET. RSCH. AT BOSTON COLLEGE</i>, Aug. 2019.</p>	<p>This article investigates the structural composition of public pension boards and its potential effects on investment performance. My Note extensively discusses the issue of pension board composition and its effects on financial performance, but only as part of a broader discussion about pension governance. Moreover, my Note includes case studies that aim to illustrate these problems in detail, as well as providing concrete policy solutions that go beyond the recommendations made in this paper.</p>
<p>Gordon L. Clark & Roger Urwin, <i>Best-practice pension fund governance</i>, 9 <i>J. ASSET MGMT.</i> 2 (May 2008).</p>	<p>This paper also provides an in-depth investigation about pension fund governance and potential best-practices that may improve fund performance. My Note relies extensively on this paper to inform its analysis of pension misgovernance as well as in crafting policy solutions. That said, my Note emphasizes the centrality of the trustee</p>

	<p>selection process in shaping board incentive as well as exposing board decisions to undue influence from external parties. Moreover, it uses more recent case studies to explore this phenomenon as well as providing policy solutions informed by this more up-to-date analysis.</p>
<p>Aleksandar Andonov <i>et al.</i>, <i>Pension Fund Board Composition and Investment Performance: Evidence from Private Equity 3</i> (Hoover Inst. Econ. Working Paper No. 16104, March 2016).</p>	<p>This working paper investigates the empirical relationship between pension governance structures and investment performance with respect to private equity investments. It highlights how board composition impacts investment performance, especially as it relates to professional experience and compensation. My Note expands on this analysis in a more general sense, going beyond the narrow question of private equity investments and investigating board governance in a more general and comprehensive sense. Moreover, my Note includes specific case studies of functional and dysfunctional pension funds, as well as providing policy recommendations informed by those case studies.</p>
<p>Odd J. Stalebrink, <i>Public Pension Fund Investments: The Role of Governance Structures</i>, 14 J. OF L., ECON. & Pol’y RSCH. 35 (2018).</p>	<p>This paper examines the relationship between the legal rules that shape public pension governance structures and the subsequent performance of those pension funds. It employs a binary logistic regression model to analyze the data and concludes that performance is positively correlated with board autonomy, transparency, and practices that limit “inefficient” investment practices. My Note expands on</p>

	<p>this point by emphasizing the importance of board structure and composition, as well as examining the political and financial incentives facing board members. My Note also employs a number of case studies to provide examples of ideal as well as dysfunctional pension governance.</p>
<p>Michael Useem & Olivia S. Mitchell, <i>Holders of the Purse Strings: Governance and Performance of Public Retirement Systems</i>, 81 Soc. Sci. Q. 489 (June 2000).</p>	<p>This paper draws upon national surveys to explore how pension governance policies affect investment strategies and overall performance. It identifies a strong relationship between pension governance policies and the investment strategies and performance of major public retirement systems. My Note employs a somewhat different methodology by relying on case studies while also relying on more recent data on investment performance in the first two decades of the twenty-first century. It also examines pension governance policies from the perspective of the board, thereby highlighting the importance of board selection processes in shaping policy.</p>
<p>Aleksandar Andonov <i>et al.</i>, <i>Political Representation and Governance: Evidence from the Investment Decisions of Public Pension Funds</i>, 73 J. OF FIN. 2041 (June 2018).</p>	<p>This paper investigates the empirical relationship between board composition and pension fund investments in private equity. It finds that boards with a higher proportion of state officials, selected either by the political branches or by virtue of holding public office, are more likely to underperform, partly due to poor investment strategies and exposure to third-party political interests. My Note expands on this issue by exploring how the presence of politically-appointed</p>

	<p>representatives contributes to investment performance, as well as exploring policy solutions that aim to increase board quality and independence.</p>
<p>David Hess, <i>Protecting and Politicizing Pension Fund Assets: Empirical Evidence on the Effects of Governance Structures and Practices</i>, 39 U.C. DAVIS L. REV. 187 (Nov. 2005).</p>	<p>This article reviews the relationship between governance structure and pension fund performance. It discusses the relevance of board structure and composition as well as investigating how the resulting incentives affect board governance. My Note similarly focuses on the connection between board structure and pension fund performance, although it relies on more up-to-date data from the post-Great Recession period as well as utilizing case studies to explore examples of ideal and dysfunctional pension governance.</p>
<p>Daniel DiSalvo, <i>How Public Pension Boards Are Making a Crisis Worse</i>, GOVERNING MAG. (Sept. 27, 2018), https://www.governing.com/gov-institute/voices/col-how-public-pension-boards-making-crisis-worse.html.</p>	<p>This article reviews how board structure creates bad incentives for trustees managing major public pension funds. It provides a brief summary of existing governance problems and provides tentative suggestions for potential reform. My Note expands on this issue by exploring how governance structures shape pension performance as well as discussing the relative merits of various policy proposals. Moreover, it differs from this article in that it reviews case studies of successful and unsuccessful pension funds to help inform its analysis as well as its policy prescriptions.</p>
<p>Steven L. Willborn, <i>Public Pensions and the Uniform Management of Public Employee Retirement Systems Act</i>, 51 RUTGERS L. REV. 141 (Feb. 1999).</p>	<p>This paper extensively reviews the promulgation of the Uniform Management of Public Employee Retirement</p>

	<p>Systems Act, or UMPERSA. It discusses the individual components of UMPERSA and the statutory history of this model legislation. My Note briefly reviews the history of UMPERSA and draws upon its provisions about liability when making policy recommendations, but it omits the more substantive components of the Act as it relates to the fiduciary relationship between pension trustees and their beneficiaries. UMPERSA is primarily focused about using trust law to impose ERISA-style fiduciary obligations on public pension trustees and non-trustee fiduciaries, whereas my Note focuses more on the governance structure of said pension funds.</p>
<p>T. Leigh Anenson <i>et al.</i>, <i>Reforming Public Pensions</i>, 33 YALE L. & POL’y REV. 1 (2014).</p>	<p>This paper broadly investigates the fiscal and structural problems facing public retirement systems in the aftermath of the Great Recession. It evaluates the legality and feasibility of numerous policy proposals addressing areas as varied as pension governance, benefit structure, and the mechanisms financing said operations. There is a considerable degree of overlap between this paper’s objectives and that of my Note. That said, it is worth noting that this paper is far more comprehensive and systematic in scope, whereas my Note is more targeted and narrowly addresses the question of board selection and its effects on pension governance and overall fiscal performance.</p>

T. Leigh Anenson, *Public Pensions and Fiduciary Law: A View From Equity*, 50 U. OF MI. J. OF L. REFORM 251 (Winter 2017).

This paper reviews the problems facing major public pension funds through the perspective of equity law, attempting to use insights drawn from the history and development of equity to inform potential reforms to the fiduciary obligations that public pension funds bear towards their beneficiaries. My Note generally eschews the topic of fiduciary obligation, focusing instead on governance structure and its relationship to fund performance.