Louisiana Law Review

Volume 78
Number 2 *Spring 2018*

Article 12

3-26-2018

Over-Manipulated and Under-Funded: Louisiana's Pension Problem and Its Impact on Public Employees

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INTRODUCTION

A well-dressed salesperson is explaining to a potential customer, Bernie, an investment opportunity that will provide high returns with little to no risk. All Bernie has to do is deposit a percentage of his salary each month into a larger fund that will be invested in the stock markets by experts. When Bernie needs money someday, the funds will have grown exponentially. Additionally, some of Bernie's hard-earned money will be used to pay out customers who have invested during prior years because the investments are not generating a large enough return to pay everyone what was promised.

At first Bernie thinks he is hearing a pitch for a classic Ponzi scheme,[1] but, as it turns out, the salesperson is giving a description of a public pension system.[2] Scholars have argued that public pensions are similar to Ponzi schemes, with the major difference being that the latter are illegal.[3] This criticism may be harsh; after all, pensions are not created with the *intent* to defraud employees out of their hard-earned money with the promise of guaranteed investment returns. Public pensions, however, do have a "consistent theme of understating liabilities, overstating assets, and pushing costs into the future."[4]

For public employees, retirement concerns are mounting in light of the nationwide public pension crisis, resulting from mismanaged funds and

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1. *Ponzi Schemes*, U.S. SECURITIES AND EXCHANGE COMM'N, https://www.sec.gov/answers/ponzi.htm (last visited Sept. 22, 2017) [https://perma.cc/P947-3PLX]. A Ponzi scheme is an investment scheme in which the operators attract new investors by promising to generate high returns with little to no risk. The funds taken from the new investors then are used to pay existing investors, disguised as high returns. *Id.*

2. *Definitions*, INTERNAL REVENUE SERV., https://www.irs.gov/retirement-plans/plan-participant-employee/definitions (last visited Sept. 22, 2017) [https://perma.cc/7UXG-2EVL]. A traditional pension plan promises the participant a specified monthly benefit at retirement. Often, the benefit is based on factors, such as the participant's salary, age, and the number of years she worked for the employer. *Id.*

3. *See, e.g.*, Christopher Carosa, *Are Pensions Merely Ponzi Schemes?*, FIDUCIARY NEWS (Aug. 28, 2014), http://fiduciarynews.com/2014/08/are-pensions-merely-ponzi-schemes/ [https://perma.cc/E7AP-ENEX].

4. JOE NATION, STAN. INST. FOR ECON. POL'Y RES., PENSION MATH: HOW CALIFORNIA'S RETIREMENT SPENDING IS SQUEEZING THE STATE BUDGET 15 (Dec. 13, 2011), https://www.scribd.com/document/75598848/Pension-Math-How-California-s-Retirement-Spending-is-Squeezing-the-State-Budget [https://perma.cc/3NP8-LLEG].

empty promises.[5] To date, public pensions nationwide are over $900 billion short of the amount that governments have promised to their workers in pension benefits for a given fiscal year.[6] Although pension problems transcend state borders, Louisiana's pension systems are especially underfunded.[7] In a 2016 study, the two largest systems in Louisiana were ranked in the top 25 most underfunded systems across the United States.[8]

Public-sector employees in Louisiana, particularly teachers, have limited retirement plan options when they enter the workforce. Most public employees are required to pay into a statewide pension plan,[9] the two largest being Louisiana State Employees' Retirement System ("LASERS") and Teachers' Retirement System of Louisiana ("TRSL").[10] LASERS and TRSL are categorized as defined benefit plans, which give the retired employee a fixed income, usually calculated as a percentage of the employee's highest earning salary years.[11]

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5. *See* JOSHUA D. RAUH, HOOVER INST., HIDDEN DEBT, HIDDEN DEFICITS 1–2 (Apr. 11, 2016), http://www.hoover.org/sites/default/files/research/docs/rauh_debtdeficits_36pp_final_digital_v2revised4-11.pdf [https://perma.cc/5C9C-HE6Y]. Most state and local governments provide retirement benefits to their employees through *guaranteed* pension programs. The government body contributes taxpayer money to public systems to fund these promises. Despite states' optimistic assumptions about future investment returns, assets in the pension systems will be insufficient to pay for the pensions of current public employees and retirees and eventually will have to be supplemented heavily by additional taxpayer dollars to make up the difference. *Id*.

6. PEW CHARITABLE TRUSTS, THE STATE PENSION FUNDING GAP: 2014, at 1 (Aug. 24, 2016), http://www.pewtrusts.org/en/research-and-analysis/issuebriefs/2016/08/the-state-pension-funding-gap-2014 [https://perma.cc/8EW6-H7KX].

7. REBECCA A. SIELMAN, MILLIMAN, 2016 PUBLIC PENSION FUNDING STUDY 8–10 (Sept. 2016), http://www.milliman.com/uploadedFiles/insight/Periodicals/ppfs/2016-public-pension-funding-study.pdf (analyzing data from 2014 and 2015 for the 100 largest pension programs in the United States) [https://perma.cc/QN9J-VCT2].

8. *Id.*

9. Some public employees in Louisiana may choose the Optional Retirement Plan ("ORP") instead of selecting TRSL. ORP is a defined contribution plan administered through private carriers. *Optional Retirement Plan (ORP)*, TEACHERS' RET. SYS. OF LA., https://www.trsl.org/main/optional_programs/optional_retirement_plan (last visited Sept. 22, 2017) [https://perma.cc/64G2-VCEW].

10. *State Data: Louisiana*, PUB. PLANS DATA (2015), http://publicplansdata.org/quick-facts/by-state/state/?state=LA [https://perma.cc/4ZG2-MEGM].

11. *Choosing a Retirement Plan: Defined Benefit Plan*, INTERNAL REVENUE SERV., https://www.irs.gov/retirement-plans/choosing-a-retirement-plan-defined-benefit-plan (last updated Oct. 20, 2015) [https://perma.cc/R8KU-5NRX]; *Retirement Topics – Defined Benefit Plan Benefit Limits*, INTERNAL REVENUE

Public employees in Louisiana lack the option to pay into Social Security, precluding these employees from receiving the additional retirement benefits that the federal program provides.[12] Although states are not required to offer public employees the option to pay into Social Security, Louisiana's state retirement system for public employees must provide benefits substantially equivalent to Social Security benefits to qualify as an alternative to the federal program.[13]

With some of the most underfunded pension systems in the United States, Louisiana's solution to its pension crisis should be a multi-faceted approach from four angles. First, any efforts to supplement the current framework with Social Security benefits must be considered carefully because it is unclear whether public employees participating in Social Security are in a more advantageous position at retirement than non-participants.[14] Second, the legislature should enact corrective measures to restrain political leaders whose underfunding of current pension programs has caused much of the long-term harm.[15] Third, public employers must modify the current pension structure to mitigate the damage that has been

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SERV., https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-defined-benefit-plan-benefit-limits (last visited Sept. 22, 2017) [https://perma.cc/6UJG-MSX2]. For example, if a person's highest earning wage was $75,000 for the last few years of her career, then the defined benefit payout would be a percentage of that amount. *Id.*

12. TASK FORCE ON STRUCTURAL CHANGES IN BUDGET & TAX POL'Y, LA. DEP'T. OF REV., LASERS AND TRSL RETIREMENT SYSTEMS OVERVIEW 3 (Aug. 12, 2016), http://www.revenue.louisiana.gov/Miscellaneous/Budget%20Presentation.ppt [https://perma.cc/B8XL-TAC4]; s*ee also* MONIQUE MORRISSEY, ECON. POL'Y INST., POLICY MEMORANDUM: NEW LOUISIANA RETIREMENT PLAN IS BAD FOR WORKERS AND TAXPAYERS 1 (Dec. 12, 2012), http://www.epi.org/publication/pm198-louisiana-retirement-plan-workers-taxpayers/ [https://perma.cc/VN5Z-BRYE]. Social Security is funded by contributions that workers make while employed. The funds are used to pay current beneficiaries of the Social Security program, including Medicare recipients. Funds take the form of Federal Insurance Contributions Act ("FICA") taxes that are withheld from most paychecks. When the worker becomes eligible, she will receive Social Security benefits that replace a portion of her previous income. SOCIAL SECURITY ADMIN., UNDERSTANDING THE BENEFITS (June 2017), https://www.ssa.gov/pubs /EN-05-10024.pdf [https://perma.cc/V58U-5DRH].

13. LA. STATE EMPS.' RET. SYS., COMPACT GUIDE TO LASERS 2 (Apr. 2011) (on file with author). Federal law requires public employers to participate in Social Security unless they can demonstrate that their alternative plans provide benefits comparable to the benefit provided by Social Security. I.R.C. § 3121(b)(7)(F) (2012).

14. *See* discussion *infra* Part III.C.2.

15. T. Leigh Anenson, *Reforming Public Pensions*, 33 YALE L. & POL'Y REV. 1, 35 (2014).

done to the system and reduce pension costs.[16] Finally, government employers must provide incentives and make it easier for government employees to save more on their own for retirement. Strengthening the pension system will provide economic stability to a state struggling to balance its budget.[17] Additionally, because taxpayers ultimately will be required to fund current retirees' benefits, stabilizing the pension systems will lessen the burden placed on taxpayers. Pension directors and lawmakers must be proactive and make changes now to provide future stability.

Part I of this Comment provides background information on Louisiana's current pension system, specifically the role of larger pension programs, such as LASERS and TRSL. Part I also includes significant historical changes in the Social Security system and Louisiana's legislative history regarding both its state pensions and Social Security. Part II examines the current financial state of Louisiana's two largest pension programs: LASERS and TRSL. Part III introduces an empirical strategy to estimate the differences in retirement income between individuals affected by their state's participation in Social Security. Part IV proposes reform measures and recommendations for Louisiana's public pensions and addresses barriers to such reform. Implementation of these proposals will allow for greater security for individuals upon retirement and will ease the burden placed on taxpayers.

I. UNDERSTANDING RETIREMENT: THE SOCIAL SECURITY ACT AND LOUISIANA STATE PENSION SYSTEMS

Labor force participants in the United States have several saving mechanisms available to aid them in preparing for retirement. First, the majority of employees receive Social Security benefits upon retirement.[18] Second, in addition to receiving Social Security, employees may receive a traditional pension or 401(k) provided by their individual employer.[19]

16. *Id.* at 48–49.

17. *See* Julia O'Donoghue, *Louisiana's budget crisis: TOPS will loom over Legislature's upcoming session*, TIMES-PICAYUNE (Mar. 13, 2016, 11:26 AM), http://www.nola.com/politics/index.ssf/2016/03/legislature_tops_budget_session.html [https://perma.cc/2F7W-7FQB].

18. Chris Chen, *Who is exempt from paying Social Security taxes?*, INVESTOPEDIA (Dec. 2016), https://www.investopedia.com/ask/answers/013015/who-exempt-paying-social-security-taxes.asp [https://perma.cc/9T8P-RSLQ].

19. Retirees receiving both Social Security and a pension are subject to the Windfall Elimination Provision ("WEP") and the Government Pension Offset ("GPO"). In 1983, the WEP was enacted to lower Social Security benefit payments to beneficiaries "whose work histories include both Social Security-covered and noncovered employment, with the noncovered employment also

Third, an employee also may elect to set up commonly used Individual Retirement Arrangements ("IRAs").[20] This section provides a synopsis of the current programs available to retirees in Louisiana.

A. The Social Security Act

When Congress passed the Social Security Act ("Act") in 1935,[21] public employees were not eligible for Social Security benefits,[22] primarily because "there were concerns that imposing a Social Security tax on state and local government employees might be unconstitutional."[23] In addition to government employees, about half the workers in the American economy were excluded from coverage.[24]

Beginning in 1951, § 218 of the Act allowed states to "opt in" to Social Security coverage for public employees who were not already covered under

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providing pension coverage." Alan L. Gustman, Thomas L. Steinmeier & Nahid Tabatabai, *The Social Security Windfall Elimination and Government Pension Offset Provisions for Public Employees in the Health and Retirement Study*, 74 SOCIAL SECURITY BULL. 55, 55 (2014), https://www.ssa.gov/policy/docs/ssb/v74n3/v74n3p55.html [https://perma.cc/M3FM-PPXB]. The GPO reduces the Social Security benefits, including a spouse's survivor benefits, of an individual who also is entitled to a government pension based on non-covered employment. 42 U.S.C. § 402(k)(5)(A) (2012); 20 C.F.R. § 404.408a(a) (2016). Both provisions were enacted to prevent "double-dipping." Gustman, Steinmeier & Tabatabai, *supra*.

20. *Traditional and Roth IRAs*, INTERNAL REVENUE SERV. (Aug. 12, 2017), https://www.irs.gov/retirement-plans/traditional-and-roth-iras [https://perma.cc/MJ4Z-TSCX].

21. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620. The purpose of the Social Security Act was

> [t]o provide for the general welfare by establishing a system of Federal old-age benefits, and by enabling the several States to make more adequate provision for aged persons, blind persons, dependent and crippled children, maternal and child welfare, public health, and the administration of their unemployment compensation laws; to establish a Social Security Board; to raise revenue; and for other purposes.

Id.

22. Pub. Emps. Ret. Bd. v. Shalala, 153 F.3d 1160, 1161 (10th Cir. 1998).

23. *Id*.

24. *The Decision to Exclude Agricultural and Domestic Workers from the 1935 Social Security Act*, 70 SOCIAL SECURITY BULL. 49, 49 (2010), https://www.ssa.gov/policy/docs/ssb/v70n4/v70n4p49.html [https://perma.cc/YKR2-7RQ5].

a retirement plan.[25] This "opt-in" is referred to as a "Section 218 Agreement" and is entered into with the Social Security Administration.[26] Once a coverage group enters and is provided coverage through such an agreement, the contract cannot be terminated.[27] On July 2, 1991, Social Security participation became mandatory for state employees who were not members of a public retirement system.[28] To date, Louisiana is one of 15 states in which teachers have not opted into Social Security by way of Section 218 Agreements.[29]

For public employers to remain opted out of providing Social Security benefits to their employees, the state must offer a retirement program that qualifies as an alternative to Social Security by providing retirement benefits "substantially equivalent" to the retirement portion of Social Security."[30] Federal law primarily governs Social Security decisions and permits Louisiana to implement such a scheme under § 218 of the Social Security Act.[31] Louisiana entered into a Section 218 Agreement with the Social Security Administration in 1952 but only for certain state and local government employees.[32] According to § 218, states can amend their agreements to extend Social Security coverage to any employees to whom the agreements did not apply previously,

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25. 42 U.S.C. § 418(d)(5)(A) (2012) (showing that although most public employees were allowed to opt in, the 1954 amendment still excluded police officers and firefighters from Social Security).

26. *Social Security*, LA. DEPT. OF THE TREAS., https://www.treasury.state .la.us/Home%20Pages/SocialSecurity.aspx (last visited Sept. 22, 2017) [https://per ma.cc/JBY5-SDBP].

27. *See* § 418(f); *see also* Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41 (1981).

28. *Program Operations Manual System: RS 01505.001 Introduction to Section 218 and State and Local Coverage*, SOC. SEC. ADMIN. (Nov. 19, 2009), http://policy.ssa.gov/poms.nsf/lnx/0301505001 [https://perma.cc/SRS4-REC4].

29. *Social Security Offsets: Frequently Asked Questions*, NAT'L EDUC. ASS'N, http://www.nea.org/home/16819.htm (last visited Sept. 22, 2017) [https://perma.cc/U W2V-R697]. Other states include Alaska, California, Colorado, Connecticut, Illinois, Kentucky, Texas, Maine, Massachusetts, Minnesota, Missouri, Nevada, and Ohio. *Id.*

30. Mallory Chatelain, *Same-Sex Marriages Are Not Created Equal:* United States v. Windsor *and Its Legal Aftermath in Louisiana*, 75 LA. L. REV. 303, 306 (2014); *see also* COMPACT GUIDE TO LASERS, *supra* note 13, at 2; 26 C.F.R. § 31.3121(b)(7)–2 (2000).

31. § 418; *Program Operations Manual System SL 20001.210: Determinations Regarding Section 218 Agreements*, SOC. SEC. ADMIN. (Dec. 11, 2003), http://policy .ssa.gov/poms.nsf/lnx/1920001210 [https://perma.cc/AY79-TJAJ].

32. *See Social Security*, *supra* note 26.

regardless of whether these employees were previously members of a public retirement system, such as LASERS.[33]

B. Louisiana's Public Pension Systems

Louisiana has 19 pension programs for public employees[34]—the two largest of which are LASERS and TRSL. Established in 1946, LASERS has a mandatory membership requirement for most Louisiana state employees.[35] Additionally, because LASERS previously qualified as a substitute to the Social Security program, members of LASERS are not eligible to receive Social Security benefits.[36]

TRSL was founded in 1936 and is Louisiana's largest public retirement system, providing services and benefits to more than 160,000 individuals.[37] TRSL is qualified under the Internal Revenue Code as a public trust fund,[38] which is meant to provide retirement benefits for its members.[39] All teachers in Louisiana must become members of this system as a condition of their employment.[40]

Both LASERS and TRSL are categorized as defined benefit plans, as opposed to defined contribution plans. A distinguishing characteristic of a defined benefit plan is that the employer bears the risk and responsibility "to make sufficient contributions to the plan to insure that the benefits the

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33. § 418(a)(1), (c)(4). "The Commissioner of Social Security shall, at the request of any State, enter into an agreement with such State for the purpose of extending the insurance system established by this subchapter to services performed by individuals as employees of such State or any political subdivision thereof." § 418(a)(1).

34. *Member Systems*, LA. ASS'N OF PUB. EMPLOYEES' RET. SYS., http://www.lapers.org/MemberSystems.html (last visited Sept. 22, 2017) [https://perma.cc/Y5XU-7H5F].

35. COMPACT GUIDE TO LASERS, *supra* note 13, at 2; *Introduction to Section 218: State and Local Coverage*, SOC. SEC. ADMIN. Slide 16 (2008), www.ssa.gov/section218training/documents/Resource_3.ppt [https://perma.cc/WN9B-59DS].

36. COMPACT GUIDE TO LASERS, *supra* note 13, at 2; *Social Security Impact*, LA. STATE EMPLOYEES' RET. SYS., https://lasersonline.org/resources/legislative-issues/2017-regular-session-frequently-asked-questions/ (last visited Sept. 22, 2017) [https://perma.cc/F52L-F8MM].

37. *About TRSL*, TEACHERS' RET. SYS. OF LA., https://www.trsl.org/main/about_trsl (last visited Sept. 22, 2017) [https://perma.cc/X3NW-NMUY].

38. Also known as a "charitable trust," a public trust fund is a fund of money whose principal and interest monies are available for the benefit of the general public rather than a private individual or entity. *Public Trust Fund*, BLACK'S LAW DICTIONARY (10th ed. 2014).

39. *About TRSL*, *supra* note 37.

40. LA. REV. STAT. § 11:721 (2017).

employee is entitled to receive . . . at retirement will be paid."[41] Further, under defined benefit plans, a qualified plan trustee makes the investment decisions.[42]

Contrary to defined benefit, under a defined contribution plan, the employee is not entitled to a particular payout at retirement.[43] The amount of benefits that the employee will receive at retirement is based upon the amount of contributions the employer and employee make to the plan and the interest earned on those contributions.[44] The burden is on the employee—not the employer—to direct his investments in certain mutual funds.[45]

Most public pensions are run by a board of trustees—TRSL and LASERS are no exception. A 13-member Board of Trustees administers LASERS operations.[46] Louisiana law permits the board to adopt rules and regulations in administering LASERS programs and benefits.[47] Similarly, the TRSL Board of Trustees is made up of 12 elected members and 5 ex officio members and is responsible for safeguarding and managing the assets held in trust to provide retirement income for system members.[48]

Together, TRSL and LASERS have approximately 260,000 members[49] and account for over 70% of public retirement members.[50] Because these two systems are so large, their fiscal decisions have a significant impact not only on a large portion of public employees and retirees but also on the state economy as a whole.[51]

41. DENNIS R. LASSILA & BOB G. KILPATRICK, EMPLOYEE COMPENSATION AND BENEFITS TAX GUIDE ¶ 502.2 (2016); *see also* Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 453 (2004).

42. LASSILA & KILPATRICK, *supra* note 41.

43. *Id.*

44. *Id.* at 9.

45. *Id.* at 10.

46. *Board of Trustees*, LA. STATE EMPS' RET. SYS., https://lasersonline.org/about/board-of-trustees/ (last visited Sept. 22, 2017) [https://perma.cc/SQ6E-2R7J].

47. *Id.*; *see also* LA. REV. STAT. § 11:515(2).

48. *TRSL Board of Trustees*, TEACHERS' RET. SYS. OF LA., https://www.trsl.org/main/about_trsl/board_of_trustees (last visited Sept. 22, 2017) [https://perma.cc/TKP8-5WHG].

49. *About TRSL*, *supra* note 37; *About LASERS*, LA. STATE EMPS. RET. SYS., http://www.lasersonline.org/about (last visited Sept. 22, 2017) [https://perma.cc/M8QQ-PUHZ].

50. *Member Systems*, *supra* note 34.

51. COMPACT GUIDE TO LASERS, *supra* note 13, at 5, 17. Because "[o]ver 90% of LASERS retirees live in Louisiana," the retirement system's economic impact amounts to $782 million. *Id*. Additionally, "LASERS invests over $230

II. THE DIRE FINANCIAL STATE OF LOUISIANA'S TWO LARGEST PENSION PROGRAMS: LASERS AND TRSL

The Louisiana Legislature consolidated public retirement law in the Louisiana Revised Statutes to comply with the requirement in the Louisiana Constitution "to maintain public retirement systems on a sound actuarial basis."[52] Despite this effort by the legislature, Louisiana's largest pension systems still are severely underfunded compared to other comparable programs.[53] The LASERS actuarial report, published on June 30, 2016, declared that its pension program has over $6.9 billion in unfunded actuarial accrued liability ("UAAL").[54] Similarly, TRSL had more than $11 billion in UAAL for the 2015 fiscal year.[55] In its basic form, UAAL is the difference between the amount in benefits that a pension has committed to pay in the future and the total amount of assets currently on hand.[56]

Determining whether a pension plan has become underfunded is based on the actuarial valuation of that plan. The Louisiana Constitution requires "that the legislature establish for each state or statewide public retirement system[] a particular method of actuarial valuation . . . ."[57] For both LASERS and TRSL, the "'funded percentage' for each state public retirement system" is the amount of assets available divided by the liability of the system for future payouts.[58]

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million in Louisiana companies." *Id*. LASERS is a "major economic driver" for the state of Louisiana. *Id.*

52. LA. REV. STAT. § 11:2.

53. *See* SIELMAN, *supra* note 7.

54. *Summary of Valuation Results: LASERS Actuarial Valuation*, FOSTER & FOSTER ACTUARIES AND CONSULTANTS (June 30, 2016), http://lasersonline.org/wp-content/uploads/2016/07/ValuationSummarySheet-1.pdf [https://perma.cc/BNP7-FWGA].

55. TEACHERS RET. SYS. OF LA., 2015 COMPREHENSIVE ANNUAL FINANCIAL REPORT 110 (2015), https://www.trsl.org/uploads/File/Annual%20Reports/CAFR/2015_CAFR_web.pdf [https://perma.cc/X494-W5BM] [hereinafter TRSL ANNUAL REPORT].

56. *See* Anna K. Selby, *Pensions In A Pinch: Why Texas Should Reconsider Its Policies On Public Retirement Benefit Protection*, 43 TEX. TECH L. REV. 1211, 1216 (2011).

57. LA. CONST. art. X, § 29(E)(1); *see also* LA. REV. STAT. § 11:21.

58. LA. REV. STAT. § 11:23. For both LASERS and TRSL, the "funded percentage for each state public retirement system shall mean the valuation assets used to determine the actuarially required contributions pursuant to [Louisiana Revised Statutes §] 11:102 divided by the accrued liability of the system

The presence of unfunded accrued liabilities in the actuarial equation is not in and of itself problematic with the constitutional requirement that the public retirement systems maintain actuarial soundness.[59] The unfunded accrued liability is just one factor "in the multi-level formula for determining actuarial soundness of the system."[60] To evaluate the strength of a pension program, industry-leading financial researchers measure the percentage of total commitments a pension has made that are funded.[61] Researchers assign a "below average" rating for pensions that are 60% to 80% funded and a "weak" rating for pensions that are funded below 60%.[62] With LASERS and TRSL funded at 62.75% and 62.5% in 2016, respectively, these two large systems are approaching the weakest financial rating available for public pension programs.[63] If Louisiana faces a financial crisis and is forced to make cuts to expenditures and pension benefits, then devastating financial consequences could impact the stability of public employees' pensions.

The exorbitant amount of UAAL, combined with low actuarial ratings, clearly indicates that there is insufficient revenue and over-spending—or, more likely, a combination of both—plaguing Louisiana's largest pension systems.[64] This underfunding causes instability for Louisiana's economy, particularly because the law, regardless of the availability of funds,

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determined by utilizing the funding method established in [Louisiana Revised Statutes §] 11:22." *Id.*

59. Following accounting standards for state and local government-sponsored pension plans, the term "actuarial soundness" references plans that have a logical pattern of funding that is anticipated to accumulate sufficient assets to make pension payments when they come due—a period that can extend many years into the future and even after an employee stops working. AM. ACAD. OF ACTUARIES, ACTUARIAL SOUNDNESS 13 (2012), http://www.actuary.org/files/publications/Actuarial%20Soundness%20Special%20Report%20FINAL%205%2010%2012.pdf [https://perma.cc/LNV2-BL6P].

60. La. Mun. Ass'n v. State, 893 So. 2d 809, 855 (La. 2005).

61. STANDARD & POOR'S, U.S. STATE RATINGS METHODOLOGY 19 (Jan. 3, 2011), http://www.nasra.org/Files/Topical%20Reports/Credit%20Effects/StateRatingsMethodology.pdf [https://perma.cc/KS77-8DN5].

62. *Id.* Standard and Poor's Global Ratings provide high-quality market intelligence in the form of credit ratings, research, and thought leadership. *Id.*

63. SIELMAN, *supra* note 7.

64. Over-spending could include the state borrowing from pension funds to pay other debts, giving benefit increases to members, or making COLAs. *See generally* Jack M. Beermann, *The Public Pension Crisis*, 70 WASH & LEE L. REV. 3, 34 (2013). For more information on COLAs, see *infra* note 121.

guarantees pension benefits.[65] Further negative consequences of an insolvent pension system include the inability to pay future commitments, workers not being paid for retirement, and taxpayers bearing the burden to fulfill the promised funding.[66]

III. SOCIAL SECURITY PERKS: ARE PUBLIC EMPLOYEES IN LOUISIANA MISSING OUT?

Although public-sector employees in Louisiana have not opted into the Social Security program for the last 60 years, this delay does not prevent particular groups of employees[67] from opting in at any point in the future.[68] Some scholars argue that Social Security benefits could provide a "safety net" to public employees by preventing gaps in coverage.[69] This part provides the steps that Louisiana could take to opt-in to Social Security, the expected consequences, and an empirical analysis of the impact that the lack of Social Security has had on both Louisiana's public school teachers and public school teachers nationwide.[70] This study is the first in Louisiana to evaluate the long-term effects of the decision made over the last several decades to abscond from Social Security benefits for public employees.

A. How Could Louisiana "Opt-in" to Social Security, and What Would the Consequences Be?

Louisiana could form an agreement with the Social Security Administration if the governor of Louisiana certified to the Commissioner

65. "The accrued benefits of members of any state or statewide public retirement system shall not be diminished or impaired." LA. CONST. art. X, § 29(E)(5). The promised pension benefits have to be paid regardless of the availability of funds. *Id.*

66. Hannah Heck, *Solving Insolvent Public Pensions: The Limitations Of The Current Bankruptcy Option*, 28 EMORY BANKR. DEV. J. 89, 89–90 (2011).

67. For example, an entire school district could vote by referendum to opt in to Social Security by following the steps laid out in Part III.A. of this Comment.

68. *See* discussion *infra* Part III.A.

69. Anenson, *supra* note 15, at 57; *see also* DAWN NUSCHLER ET AL., CONG. RES. SERVICE, R41936, SOCIAL SECURITY: MANDATORY COVERAGE OF NEW STATE AND LOCAL GOVERNMENT EMPLOYEES 3 (July 25, 2011), http://www.nasra.org/Files/Topical%20Reports/Social%20Security/CRS%202011%20Report.pdf [https://perma.cc/HR6A-FEXG].

70. Public school teachers make up a large portion of public pension employees in Louisiana and therefore provide a significant test group for this empirical study. TRSL ANNUAL REPORT, *supra* note 55, at 37.

of Social Security that the following five conditions have been met.[71] First, a referendum by secret written ballot must be held to consider whether the particular pension group in question should be covered under a Section 218 Agreement.[72] Second, the opportunity to vote in the referendum can be given only to eligible employees.[73] Third, all employees who are eligible to vote must receive at least 90 days' notice of the referendum.[74] Fourth, the referendum should be directed under the supervision of the governor or an entity designated by him.[75] Lastly, a majority of the eligible employees must participate in the vote for the decision to be effective.[76]

There are several immediate consequences that would result from Louisiana's public employees entering a Section 218 Agreement. These consequences are evidenced in the increased contributions from teachers' annual salaries. If an agreement opting into Social Security were executed, teachers would be required to contribute an additional 6.2% of the first $118,500 of their annual salaries to federal income tax.[77] Adding this amount to pension contributions already made by teachers would cause teachers' total contributions to rise to nearly 15%.[78] Further, the school districts, which under a non-Social Security framework pay nothing into Social Security, would have to match employee contributions with an additional 6.2% in payroll tax.[79] These immediate effects would put a large strain on both school systems and individual teachers, particularly after recent years of budget cuts.[80]

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71. 42 U.S.C. § 418(d)(3) (2012). The governor also could designate another official to certify that the conditions have been met. *Id.*

72. § 418(d)(3)(A).

73. § 418(d)(3)(B). An employee is deemed an "eligible employee" for purposes of a referendum if, at the time the referendum was held, the employee was in a position covered by the retirement system and was a member of such system. § 418(d)(3)(E). The exception to this definition includes an employee whose position to which the state agreement does not apply and is covered by a different retirement system. § 418(d)(5)(B).

74. § 418(d)(3)(C).

75. § 418(d)(3)(D).

76. § 418(d)(3)(E).

77. JUDITH S. LOHMAN, OLR RESEARCH REPORT: TEACHERS AND SOCIAL SECURITY (2006), https://www.cga.ct.gov/2006/rpt/2006-R-0547.htm (analyzing the direct consequences if teachers in Connecticut were to opt into Social Security) [https://perma.cc/6FBA-EXYN].

78. *Id.*

79. *Id.*

80. *See* Julia O'Donoghue, *Latest Louisiana Budget Cuts K-12 Funding, Protects Higher Ed*, TIMES-PICAYUNE (June 22, 2016, 5:41 PM), http://www.nola.com/politics/index.ssf/2016/06/budget_public_schools_cut.html [https://per

In addition to the short-term financial stress that this option would put on public employers and employees, Social Security may not actually provide any long-term stability for new members. Demands on the Social Security Administration have reached all-time highs in recent years as a result of the "baby boom generation" reaching its peak years for retirement.[81] The negative financial outlook attached to the Social Security program is further emphasized by the 2016 Trustees Report on Social Security's Financial Outlook,[82] which reported that the program faces critical deficits.[83] Because the Social Security program is so strained, it likely would not provide enough future benefit to Louisiana state employees to make opting in worthwhile.[84]

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ma.cc/7SMH-FU7Q]. *See generally* Joseph Rallo, *Letters: Cuts to Higher Education Harming the Future of Louisiana*, ADVOCATE (July 7, 2016, 3:15 AM), http://www.theadvocate.com/baton_rouge/opinion/letters/article_064d2bea-43ac-11e6-abf1-e3246d5fdb6c.html [https://perma.cc/4R5S-EF3A].

81. KATHLEEN ROMIG, CTR. ON BUDGET AND POL'Y PRIORITIES, SOCIAL SECURITY ADMINISTRATION CUTS HURT EVERY STATE 1 (Sept. 12, 2016), http://www.cbpp.org/research/social-security/social-security-administration-cuts-hurt-every-state [https://perma.cc/K42B-AAJ4].

82. The Trustees of the Social Security and Medicare trust funds publish an annual report on the current and projected financial status of the two programs. Both programs face long-term financing shortfalls under the current scheduled benefits and funding, and lawmakers have a broad range of policies that, if implemented, could reduce the deficiencies of both programs. The Trustees' Report recommends the urgency with which lawmakers should address these shortfalls and implement timely solutions. This recommendation is important because early action by elected officials can minimize negative impacts on vulnerable populations, including lower-income workers, and people already dependent on program benefits. *Status of the Social Security and Medicare Programs*, SOCIAL SEC. ADMIN. (Jan. 18, 2017), https://www.ssa.gov/oact/trsum/ [https://perma.cc/4NXL-DG9H].

83. ALICA H. MUNNELL, CTR. FOR RET. RES. AT B.C., SOCIAL SECURITY'S FINANCIAL OUTLOOK: THE 2016 UPDATE IN PERSPECTIVE 1 (June 2016), http://crr.bc.edu/wp-content/uploads/2016/06/IB_16-10.pdf (stating a 75 year deficit of 2.66% of taxable payrolls) [https://perma.cc/X5V4-26T9].

84. Social Security's main program, Old-age and Survivors Insurance ("OASI"), is projected to reach insolvency in 2035. The program

> is expected to have only enough revenue from payroll taxes, interest on the Trust Fund balance, and repayment of borrowed Trust Fund dollars to pay out scheduled benefits until 2035 . . . If no action is taken to improve Social Security's solvency before its Trust Fund runs dry, benefits will either be delayed or reduced across the board by 23 percent.

ROMINA BOCCIA, HERITAGE FOUND., SOCIAL SECURITY: $39 BILLION DEFICIT IN 2014, INSOLVENT BY 2035, at 22 (July 29, 2015), http://www.heritage.org/research/reports/2015/07/social-security-39-billion-deficit-in-2014-insolvent-by-2035

Further, providing Social Security as an option for public employees could have a negative impact on Louisiana's current pension programs. For example, if Louisiana implemented a scheme to make LASERS optional rather than mandatory for all state employees, the state may face substantial consolidation concerns. Specifically, allowing Louisiana's employees to have the option between LASERS and Social Security would pose a threat to its viability as an independent retirement system because it would not be able to attract new members at the same rate as it had previously.[85] Although new employees still may choose to join LASERS, many others may choose to go with Social Security, thus diminishing the pool of participants who would be paying into LASERS.

If the number of participants in LASERS starts to diminish, this could prompt lawmakers to consolidate LASERS with other state retirement plans to create a larger public pension system.[86] Therefore, though it may be in the best interest of an individual LASERS member to supplement with or switch over to Social Security, it would weaken LASERS severely as a whole if the program starts losing participants faster than they can be replaced. Because LASERS is a "major economic driver" for the state,[87] Louisiana has a considerable public interest in protecting LASERS by declining proposals that would encourage LASERS members to participate in other benefit plans, such as Social Security.[88]

Further, teachers in Louisiana, who make up the largest public pension group in the state, are relatively better off at retirement than their counterparts in states who are paying into Social Security.[89] The following section introduces an empirical strategy to estimate the difference in retirement income between individuals who reside in states that have entered into a Section 218 Agreement, compared to those individuals who do not. This comparison attempts to isolate the financial consequences of paying into Social Security.

[https://perma.cc/XS4D-XUXJ].

85. COMPACT GUIDE TO LASERS, *supra* note 13, at 6, 7.

86. *Id.*

87. *Id.* at 5, 17. Because "[o]ver 90% of LASERS retirees live in Louisiana," the retirement system's economic impact amounts to $782 million. Additionally, "LASERS invests over $230 million in Louisiana companies." *Id*.

88. *Id*. at 17.

89. *See* discussion *infra* Part III.B.

B. Empirical Strategy and Data Analysis

This empirical strategy uses data from the American Community Survey ("ACS"), which was collected from 2009 to 2014.[90] The ACS is a nationally representative survey conducted by the United States Census Bureau.[91] It is the largest administered survey in the United States and is sent to approximately 3.5 million individuals each year.[92] The ACS is a commonly used data source and is conducted to facilitate economic research in the United States.[93] It provides a wide array of information for each person surveyed, including demographic characteristics and income measures.[94]

1. An Introduction to the Difference-in-Difference Framework

The empirical strategy used in this study employs a difference-in-difference estimation framework that has become widely popular in economic and legal research.[95] The difference-in-difference estimation strategy isolates the difference between the outcomes of two groups from simultaneous effects that may influence the same outcome.[96] Particularly,

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90. Steven Ruggles et al., *Integrated Public Use Microdata Series: Version 6.0*, MINNEAPOLIS: UNIV. OF MINN. (2015), http://doi.org/10.18128/D010.V6.0 [https://perma.cc/A7N2-5GFF].

91. U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY INFORMATION GUIDE 1 (Apr. 2013), https://www.census.gov/acs/www/about/acs-information-guide/flipbook/files/inc/d6425564bc.pdf [https://perma.cc/YQH6-7LPY].

92. *Id.* at 8, 13.

93. *American Community Survey (ACS)*, U.S. CENSUS BUREAU (Jan. 18, 2017), https://www.census.gov/programs-surveys/acs/about.html [https://perma .cc/9MW6-J239]. In addition to facilitating academic research, the ACS provides a wealth of data that is relied on by government agencies to make important decisions about the distribution of nearly $400 billion in federal funds each year. REGINA POWERS, DAVID BEEDE & RUDY TELLES, JR., ECONS. AND STATS. ADMIN., THE VALUE OF THE AMERICAN COMMUNITY SURVEY: SMART GOVERNMENT, COMPETITIVE BUSINESS, AND INFORMED CITIZENS 1 (Apr. 2015), http://www.esa.gov/sites/default/files/the-value-of-the-acs.pdf [https://perma.cc /62RF-EGCF].

94. *American Community Survey (ACS)*, *supra* note 93.

95. *See* David S. Abrams & R. Polk Wagner, *Poisoning the Next Apple? The America Invents Act and Individual Inventors*, 65 STAN. L. REV. 517, 521 (Mar. 2013) (citing JEFFREY M. WOOLDRIDGE, INTRODUCTORY ECONOMETRICS: A MODERN APPROACH 450–54 (4th ed. 2009) (discussing the use and implementation of the difference-in-difference approach in analyzing policy)); *see also* David S. Abrams, *Did TRIPS Spur Innovation? An Analysis of Patent Duration and Incentives to Innovate*, 157 U. OF PENN. L. REV. 1613, 1619 (2009).

96. *See supra* note 95.

the average annual retirement income of teachers in a state *without* a Section 218 Agreement—a non-Section 218 state—is compared to the average annual retirement income of retired teachers in a state *with* a Section 218 Agreement—a Section 218 state. This analysis focuses on public employees who are teachers because they comprise the largest pension group in Louisiana.[97]

Any difference observed in the average annual retirement income of these two groups could be the result of retired teachers in non-Section 218 states not receiving Social Security income. The difference, however, could instead be the result of fundamental differences between states that chose to enter or not enter a Section 218 Agreement. Specifically, any difference in annual retirement income of retired teachers between Louisiana and Alabama may be caused by other economic factors and not the state's decision to enter a Section 218 Agreement.

To avoid this dual effect, the average annual income of retired non-teachers in a non-Section 218 state is compared to the average annual income of retired non-teachers in a Section 218 state.[98] These non-teachers likely worked in private sector jobs and, therefore, are not affected by their state's Section 218 Agreement status. Therefore, the difference in their average annual retirement incomes represents the general difference between non-Section 218 and Section 218 states. The dissimilarities across the two types of states could be caused by contemporaneous factors, such as state-specific economics, rather than the state's decision to enter a Section 218 Agreement.

The difference in means between the retired teachers across the two types of states then is compared to the difference in means from the retired non-teachers across the two types of states.[99] The difference in these

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97. The ACS data provides information indicating an individual's undergraduate degree. The individuals used for this analysis all have an undergraduate education degree. Although some may not be using their education degree to teach, the assumption made for this study is that those with an education degree are likely employed as teachers. *American Community Survey (ACS)*, *supra* note 93.

98. Giorgo Sertsios, *Bonding Through Investments: Evidence from Franchising*, 31 J. OF LAW, ECON. & ORG. 187, 200 (2015) (using a difference-in-difference approach to analyze the impact of good-cause laws on investment requirements). "A key assumption in a difference-in-difference estimation is that the variation in the variable of interest attributed to the treatment[—that is, not having a Section 218 agreement—]is not a mere consequence of prior trends." *Id.*

99. In its basic function, the difference-in-difference approach "contains a treatment sample and a control sample." Mark Humphery-Jenner, *Strong Financial Laws Without Strong Enforcement: Is Good Law Always Better than No Law?*, 10 J. EMPIRICAL LEGAL STUD. 288, 299 (2013). "The treatment sample is exposed to the treatment in the second period but not in the first, [and] [t]he

amounts is known as a difference-in-difference estimate.[100] This estimate represents the additional annual retirement income that retired teachers have in non-Section 218 states, relative to Section 218 states, after conditioning out contemporaneous effects caused by systematic differences between the two types of states.

C. Application of the Difference-in-Difference Estimation Strategy

The difference-in-difference estimation strategy is applied through two levels of analysis, which helps postulate the most robust results.[101] The first level provides a direct comparison between Louisiana and Alabama—two states similar in median income, labor force participation, geography, and demographics.[102] The second level of analysis increases the number of observations used by comparing all non-Section 218 states to all Section 218 states.

1. Louisiana vs. Alabama

The first level of analysis applies the difference-in-difference estimation strategy to compare the retirement income of Louisiana residents, who are ostensibly affected by their state's choice not to enter into a Section 218 Agreement, with similar individuals in Alabama, who

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control sample is never exposed to the treatment." *Id.* In the study at hand, the difference-in-difference model uses the control sample to adjust for changes in retirement income that are not related to outside factors.

100. J. D. ANGRIST & J. S. PISCHKE, MOSTLY HARMLESS ECONOMETRICS: AN EMPIRICIST'S COMPANION 227–43 (2008). The difference-in-difference technique is "a statistical technique used in econometrics and quantitative research in the social sciences that attempts to mimic an experimental research design using observational study data, by studying the differential effect of a treatment on a 'treatment group' versus a 'control group' in a natural experiment." *Id.*

101. *See* Michael Lechner, *The Estimation of Causal Effects by Difference-in-Difference Methods*, 4 FOUNDS. AND TRENDS IN ECONOMETRICS 165, 168 (2011). As Lechner explains,

> The basic idea of this identification strategy is that if the two treated and the two nontreated groups are subject to the same time trends, and if the treatment has had no effect in the pre-treatment period, then an estimate of the "effect" of the treatment in a period in which it is known to have none, can be used to remove the effect of confounding factors to which a comparison of post-treatment outcomes of treated and nontreated may be subject to.

Id.

102. *See* discussion *infra* Part III.C.1.

have received Social Security income because of their state's decision to enter into a Section 218 Agreement. Alabama is a natural control state for Louisiana because both states are in the southern region of the United States and have similar observable characteristics. For example, the median income of employed individuals in Louisiana is $34,000, and the median income for comparable individuals in Alabama is $32,000.[103] Further, these two states have similar labor force participation rates: 57.1% in Louisiana and 54.4% in Alabama.[104] Likewise, the level of education attained is similar in both states. In Louisiana, 84.6% of individuals ages 24 and older have a high school degree, and in Alabama, 85.3% of individuals ages 24 and older have a high school degree.[105]

Table 1 shows the mean retirement income for individuals 67 and over who are no longer participating in the labor force.[106] The income measures were adjusted for inflation by being converted into 2014 dollars using the Consumer Price Index ("CPI").[107] The first column reports the mean and standard deviation of retirement income for retirees in Louisiana and Alabama who have a teaching degree. As displayed in the table, retired teachers in Louisiana have $394.76 less in annual retirement income than teachers in Alabama.[108]

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103. Statistics from 2009-2014 ACS data. AMERICAN COMMUNITY SURVEY INFORMATION GUIDE, *supra* note 91, at 8 (calculations on file with author). *See supra* Part III.B.1. for an explanation of these calculations.

104. AMERICAN COMMUNITY SURVEY INFORMATION GUIDE, *supra* note 91, at 8.

105. *Id*.

106. *See infra* Table 1.

107. Consumer Price Index 1913-, FED. RESERVE BANK OF MINNEAPOLIS, https://www.minneapolisfed.org/community/teaching-aids/cpi-calculator-information/consumer-price-index-and-inflation-rates-1913 (last visited Sept. 22, 2017) [https://perma.cc/XU89-5CF8]. The CPI is a measure of the average change in prices over time in a market basket of goods and services. The Bureau of Labor Statistics releases CPI data monthly. *Consumer Price Index*, BUREAU OF LABOR STATS., https://www.bls.gov/cpi/ (last visited Sept. 22, 2017) [https://perma.cc/3NBS-2DMN].

108. *See infra* Table 1.

Table 1: Louisiana and Alabama Mean Annual Retirement Income and Difference-in-Difference Estimates

	School Teachers	**Non-School Teachers**
Louisiana	17113.38	15776.48
	(20276.18)	(24743.43)
Number of Observations	1,697	2,758
Alabama	17508.14	22230.66
	(21734.36)	(31110.56)
Number of Observations	1,747	3,613
Difference in Louisiana and Alabama	-394.76	-6454.18***
	[-0.55]	[-8.95]
Difference-in-Difference	6059.42***	
	[5.46]	

Data comes from the 2014 American Community Survey. Standard deviations are reported in parentheses. Test statistics (t-stats) from difference in means tests are reported in square brackets. * 0.10, ** 0.05 and *** 0.01 denote significance levels from the difference in means tests.

The initial comparison demonstrated in the first column of Table 1 does not reveal whether the lower retirement income of Louisiana teachers is caused by Louisiana teachers not participating in Social Security through a Section 218 Agreement or if retired individuals in Louisiana generally have a lower retirement income relative to retired individuals in Alabama. To account for general differences in retirement income between the two states, the mean retirement income of non-teachers[109] is reported in the second column of Table 1.[110] As displayed, individuals in Louisiana have a retirement income that, on average, is $6,454.18 lower than individuals in

109. It may be the case that teachers who have not filed Section 218 agreements receive Social Security income through other jobs they have participated in that were not teaching jobs in Louisiana. Similarly, individuals who are non-teachers may not receive Social Security income due to unknown variables.

110. *See supra* Table 1.

Alabama. The difference-in-difference estimate is calculated by subtracting the difference in retirement income of non-teachers between the two states from the difference in retirement income of teachers between the two states.

The difference-in-difference estimate suggests that retired Louisiana teachers have $6,059.42 more in retirement income because they have not opted into Social Security.[111] The disparity of non-teacher salaries across Louisiana and Alabama suggests that Louisiana teachers may have been at a disadvantage if they had opted into Social Security. In the next subsection, this study is followed up by a more robust study of retirement income in the two types of states.

2. Teachers in Non-Section 218 States vs. Teachers in Section 218 States

The second level of analysis expands upon the first by considering retirement income in all states in the United States. More specifically, it compares the mean retirement income of teachers in non-Section 218 states to that of teachers in Section 218 states. The difference in retirement income between those two groups then is subtracted by the difference in retirement income of non-teachers in non-Section 218 states and non-teachers in Section 218 states. This second difference, calculated from non-teachers in the two types of states, factors out any contemporaneous effects in retirement income that may be triggered by other economic or social characteristics of a state.

Table 2 presents the results from the second analysis. As displayed, the difference-in-difference estimate shows that the annual retirement income of teachers in non-Section 218 states that do not participate in Social Security is $2,005.86 more than teachers in Section 218 states that participate in Social Security, after conditioning out general differences in retirement incomes in these two types of states.[112]

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111. *See supra* Table 1.
112. *See infra* Table 2.

Table 2: Non-Section 218 and Section 218 Agreement States Mean Annual Retirement Income and Difference-in-Difference Estimates

	School Teachers	**Non-School Teachers**
Non-Section 218 Agreement States	19310.16	17911.90
	(25698.63)	(29217.70)
Number of Observations	42,217	119,666
Section 218 Agreement States	16938.12	17545.71
	(22445.59)	(27697.79)
Number of Observations	68,415	168,213
Difference in Section 218 Agreement States	2372.04***	366.19***
	[16.14]	[3.42]
Difference-in-Difference	2005.86***	
	[10.19]	

Data comes from the 2014 American Community Survey. Standard deviations are reported in parentheses. Test statistics ("t-stats") from difference in means tests are reported in square brackets. * 0.10, ** 0.05 and *** 0.01 denote significance levels from the difference in means tests.

Although the difference-in-difference estimate is lower when comparing all non-Section 218 states and Section 218 states instead of comparing just Louisiana and Alabama, the amount is still significant. At a minimum it indicates that Louisiana teachers—and teachers in other non-Section 218 states—certainly have not been negatively impacted by not opting in to Social Security. Indeed, the estimate in Table 2 implies that teachers who do not participate in Social Security have more income at retirement than teachers who do.

IV. REFORM MEASURES FOR LOUISIANA AND OTHER NON-SECTION 218 STATES

As a result of the Great Recession,[113] nearly every state took steps to improve the financial condition of its pension plans.[114] As one of the states with large and severely underfunded public pensions, Louisiana must continue to remedy the problem through three affirmative approaches. First, the existing pension plans should be modified to require the balance of in-flow and out-flow of funds and move toward replacement of defined benefit with defined contribution plans. Second, moral hazard must be minimized through lawmakers and taxpayers. Third, federal and local lawmakers need to incentivize public employees to maximize their current savings plans.

A. Strategies to Modify Existing Pension Structures

To create a more stable retirement income for public employees, modifications should be made to Louisiana's existing state pension programs, specifically LASERS and TRSL. The state legislature and each pension fund board of trustees should take initiatives to bring about changes to current pension structures. These changes need to focus on restricting income increases to retirees unless there has been an increase of revenue to the pension funds, strengthening the reliability of the pension funds through defined contribution plans, and encouraging the provision of diverse programs for retirement savings. Although attempts have been made to strengthen existing pension plans, more must be done.[115]

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113. The Great Recession was the longest recession since World War II, spanning from December 2007 to June 2009. Its duration and effects were severe. For example, real gross domestic product ("GDP") fell 4.3%, the largest decline in the postwar era. The unemployment rate, which was five percent in December 2007, rose until it peaked at ten percent in October 2009. Additionally, home prices fell approximately 30%. Robert Rich, *The Great Recession of 2007-09*, FED. RESERVE HISTORY (Nov. 22, 2013), http://www.federalreservehistory.org/Events/DetailView/58 [https://perma.cc/C6H9-3ENB]; *see also* CHRISTIANO EICHENBAUM TRABANDT, BD. OF GOVERNORS OF THE FED. RESERVE SYS., No. 1107r, UNDERSTANDING THE GREAT RECESSION (Aug. 2014), https://www.federalreserve.gov/econresdata/ifdp/2014/files/ifdp1107.pdf [https://perma.cc/2XAC-38N6].

114. *See* Tyler Bond, *The Great Recession and Public Pensions*, NAT'L PUB. PENSION COAL. (July 11, 2016), https://protectpensions.org/2016/07/11/great-recession-public-pensions/ [https://perma.cc/W8YK-3V8J].

115. Mark Ballard, *Louisiana Legislators Want to Increase Monthly Pension Checks For State Retirees*, ADVOCATE (Apr. 7, 2016, 4:47 PM), http://www.the

1. Make Money Before Spending Money

Louisiana's pensions are some of the most severely underfunded in the country, yet Louisiana's pensions continue to pay more money to retirees than pensions of other states.[116] These facts indicate that the pensions are expending more money than what they are earning in revenue. Recent legislation regarding pension payouts provides an example of how this problem occurs.

The Louisiana Legislature recently passed[117] Senator Barrow Peacock's proposed Senate Bill 2 ("Peacock's Senate Bill"), in which pensioners over the age of 60 who have been retired for at least a year and are drawing checks from one of the four state systems would receive a 1.5% increase in payments for state workers and teachers; a 1.8% increase for public school employees; and a 2% increase for state police.[118] Peacock's bill proposed the first increase in benefits in two years.[119] The funds to pay for this increase are not supposed to come from the state general fund but from the "Experience Account" fund, which collects excess investment dollars.[120] The money in this account legally cannot be used to pay for anything but Cost of Living Adjustments ("COLAs"),[121] although portions are supposed to be used for paying down part of the billions of dollars in retirement system debt.[122]

Although on the surface this senate bill appears to have adhered to the standard of only increasing payouts when there has been an increase in revenue, it is difficult to conclude that the money from excess investment

advocate.com/baton_rouge/news/politics/legislature/article_aab379fd-55e1-53af-ba91-520757c0b3b0.html [https://perma.cc/H5LJ-LW7T].

116. *See* SIELMAN, *supra* note 7.

117. Peacock's Senate Bill went into effect on May 19, 2016. S.B. 2, 2016 Leg., Reg. Sess. (La. 2016).

118. *Id.*; *see also* Ballard, *supra* note 115.

119. Ballard, *supra* note 115.

120. *Id.*

121. COLAs are general benefit increases given to a savings program that are based on increases to the cost of living, as measured by the Consumer Price Index. *Cost-Of-Living Adjustment (COLA)*, SOCIAL SEC. ADMIN. (Jan. 18, 2017), https://www.ssa.gov/OACT/COLA/colasummary.html [https://perma.cc/A54K-N2TP]. The Consumer Price Index is an aggregate of the prices of a relatively fixed "basket of goods," which reflects price changes associated with the cost of living, and is published monthly by the Bureau of Labor Statistics. *Consumer Price Index*, BUREAU OF LABOR STATS. (Jan. 18, 2017), https://www.bls.gov/cpi/ [https://perma.cc/VFA9-LN8Q]. COLAs are often made to state-run pensions and to Social Security. *Id.*

122. Ballard, *supra* note 115.

dollars is truly revenue. The obvious concern is that because this revenue is not consistent—as the revenue from a tax increase would be—it is not a stable source of funding to justify this increase in COLAs. Further, there is an additional concern that in a down year in the stock market, the "Experience Account" will not accrue enough excess revenue to pay for the promised COLAs, leaving taxpayers to make up the difference.[123] Peacock's senate bill provides just one example of how politicians increase payouts without first building up a base of funds to pay for them.[124]

2. Let's Swap: Defined Benefit for Defined Contribution

Louisiana pension programs such as LASERS and TRSL would benefit from transitioning from a defined benefit to defined contribution[125] structure, primarily because defined contribution plans have the "distinct advantage" of "contribution stability."[126] Defined benefit plans are vulnerable to contribution unpredictability because of changing market and demographic conditions, but defined contribution plans do not have the same sensitivity to market changes.[127] Although the defined contribution structure at one time seemed to be a "radical departure from the status quo," defined contribution plans have become the primary framework for retirement savings.[128]

Although positive benefits exist from implementing a defined contribution structure, the switch from defined benefit to defined contribution comes with transition costs.[129] Recent research shows that the type of

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123. *Id.*

124. John C. Goodman, *Detroit is a Dying Example of How All Ponzi Schemes End*, FORBES (July 25, 2013), http://www.forbes.com/sites/johngoodman/2013/07/25/detroit-is-a-dying-example-of-how-all-ponzi-schemes-end/#2c93629211f0 (describing the city of Detroit's pension default) [https://perma.cc/LVS7-DH8E].

125. A defined contribution plan is "a plan which provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." I.R.C. § 414(i) (2012).

126. NAT'L CONF. ON PUB. EMP. RET. SYS., WHAT IS THE COST OF TRANSITIONING FROM A DB PLAN TO A DC PLAN? 9 (Apr. 2015), http://www.ncpers.org/files/NCPERS%20Research%20Series_2015_Transition%20Costs.pdf [https://perma.cc/KKE5-GEZS].

127. *Id.*

128. Zelinsky, *supra* note 41, at 453.

129. NAT'L CONF. ON PUB. EMP. RET. SYS., *supra* note 126, at 2 ("Most public sector employers offer both a traditional [defined benefit] plan, funded with employer contributions and most often employee contributions, and a [defined

investment returns expected after switching from a defined benefit to a defined contribution plan may shrink by one to two percent over the life of the participant.[130] Although experts anticipate that this difference may stabilize as defined contribution participants mature and retirees invest more conservatively in retirement, the apparent savings from switching to a defined contribution plan do not come from increased investment returns and actually result in reduced investment returns.[131] Reduced investment returns, however, are a small concession to make for future retirees' pensions to be protected from the unpredictability of the investment markets.

In addition to the stability that a defined contribution plan can provide for an employee, it allows the employee to have more autonomy over her retirement savings. In a culture that places a high value on private property and personal freedom, an individualized notion of retirement savings carries tremendous appeal.[132]

B. Minimize Moral Hazard Through Lawmakers and Taxpayers

People often lack the incentive to guard against risk when it comes to making decisions that do not affect them personally—a concept known as "moral hazard."[133] A clear example of the effects of this principle is evident in many public pension systems in which the political leaders and board members making decisions regarding large pensions often are not affected personally by the consequences of those decisions.[134] Indeed, "[s]hort-term political manipulations" have caused long-term detriment to public employee retirement systems.[135] Moral hazard issues typically do not occur in the private sector because of the absence of political risks

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contribution] plan, typically a §457 deferred compensation plan or §403(b) defined contribution plan funded with employee contributions.").

130. *Id*.

131. *Id.*

132. Zelinsky, *supra* note 41, at 469.

133. A moral hazard is a circumstance that either creates an incentive for someone to act inefficiently from an economic evaluation or removes the risks that usually would be the consequence of inefficient acts. *Moral Hazard*, WOLTERS KLUWER BOUVIER LAW DICTIONARY (Desk ed. 2012) ("The moral hazard of agency is present in the immunity of legal officials and poor oversight of corporate officials, so that neither is likely to be held accountable for their mistakes or misdeeds.").

134. *See* Maria O'Brien Hylton, *Combating Moral Hazard: The Case for Rationalizing Public Employee Benefits*, 45 IND. L. REV. 413, 415–16 (2012) (showing statistics that fault political dimension, or moral hazard, as the predominant source of the public pension problem).

135. Anenson, *supra* note 15, at 35.

associated with public pension.[136] Remedial procedures should attempt to "restrain political leaders who are incentivized to supply potentially excessive benefits . . . that demand such benefits for their members without regard for whether these obligations can be met."[137] Corrective measures to address the issue of moral hazard should be approached through two major avenues: (1) promoting lawmaker responsibility; and (2) addressing taxpayer passivity.

1. Promote Lawmaker Responsibility

The first approach is to impose a duty on lawmakers to be more fiscally responsible. Elected officials are often criticized for spending "public dollars with less care than they would spend private dollars."[138] A common problem is that pension benefits usually are increased during economic boom cycles but then are not decreased during bust cycles.[139] To avoid this ratchet effect,[140] Louisiana should impose modified state funding requirements, divert from budget provisions that promote underfunding, and enact prohibitions against the misuse of fund assets.[141]

An example of the moral hazard problem in Louisiana is evident in both the responsibilities and composition of the board of trustees for TRSL. The board of trustees has the "full power to invest and reinvest available funds and to hold, purchase, sell, assign, transfer, and dispose of any of the . . . investments of the system."[142] Of course, these actions are to be "taken in compliance with the rules," but, interestingly, the trustees

136. *Id.*

137. *Id.*

138. *Id.* at 36; *see also* Olivia S. Mitchell & Robert S. Smith, *Pension Funding in the Public Sector*, 76 REV. ECON. & STAT. 278, 282–83 (1994).

139. Anenson, *supra* note 15, at 36; *see also* Hylton, *supra* note 134, at 421–22. When the housing bubble formed between 2000 and 2006, there was a dramatic increase in property tax revenues. State and local governments had an influx in cash and responded to union demands by increasing employee benefits, often at decreased contribution levels. *Id.*

140. *See* ROBERT HIGGS, CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT (1989).

141. Anenson, *supra* note 15, at 37. *See generally* Kathleen Paisley, *Public Pension Funds: The Need for Federal Regulation of Trustee Investment Decisions*, 4 YALE L. & POL'Y REV. 188 (1986) (seeking federal regulation of trustee investment decisions); Sharon Reece et al., *Regulating Public Pension Fund Investments: The Role of Federal Legislation*, 6 BYU J. PUB. L. 101 (1992) (advocating federal tax policy to promote state pension funds to target certain kinds of investments in the state).

142. LA. REV. STAT. § 11:851 (2017).

establish the rules.[143] Board members establish the regulations in accordance with the provision of Louisiana Revised Statutes § 11:263.[144] Each fiduciary or trustee running the financial operations of the system are held to a "prudent-man" standard, that is, he must "act with the care, skill, prudence, . . . diligence[,] . . . [and] reasonable care" of a prudent institutional investor under the circumstances.[145]

Although TRSL is governed by strict and specific rules through legislation, it is curious that the board of trustees, which governs TRSL's financial decisions, is made up of 17 people, a third of whom are not members of the pension program.[146] Thus, although this one-third has a large portion of the votes, their retirement funds are not affected personally by the consequences of their votes. Because high-ranking officials in both the education and government systems comprise the one-third group,[147] they likely have unequal bargaining power when it comes to decisions regarding TRSL's pension funds.

2. Address Taxpayer Passivity

The second approach requires employers, pension boards, and the legislature to target taxpayers' passivity.[148] This step is crucial to "make the financial effects of pension reform more salient."[149] To encourage public response, politicians must "inform and enable" taxpayers to participate in the running of public pensions.[150] Taxpayer involvement can be accomplished through three mechanisms.

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143. *Id.*

144. *Id.*

145. *Id.* § 11:263(B)–(C). Ironically enough, the legislature has provided a mechanism to deal with any excess funds in the instance of the system absolving. "[I]f the system shall be terminated and all obligations under the system are fully funded and provided for, then any excess funds held by the system shall be returned to the employer." *Id.* § 11:856.

146. The board of trustees for "TRSL" is made up of 17 people, 12 of whom are voting members of the program; the other five are not members. *Id.* § 11:822.

147. The state superintendent of education, the state treasurer, the commissioner of administration, a member of the House Committee on Retirement appointed by the speaker of the House of Representatives, and the chairman of the Retirement Committee of the Senate of the Louisiana Legislature. § 11:822(A)(1)–(6).

148. Anenson, *supra* note 15, at 42.

149. *Id.*

150. *Id. See* Hylton, *supra* note 134, at 471–72 (recommending reforms that "encourage taxpayers to function like shareholders and others with a serious stake in the financial health of a private enterprise").

First, the public needs to understand and appreciate the magnitude of state public pension liabilities.[151] Louisiana voters likely will be more critical of policy changes if fully informed of the dire situation of their own pensions. Due to taxpayer disinterest, many of the problems with public pensions have gone unnoticed through the last several decades, and only recently has scholarly interest ignited discussion of the topic.[152] Research shows that academic interest in public pension liabilities is a recent phenomenon and usually corresponds with financial obstacles suffered in various economies.[153] Because pension policy changes have long-term effects, taxpayers should show constant concern, not just during an economic downturn.

Second, the lack of uniformity in the pension systems has "further complicate[d] comparisons of reported information among public pension systems."[154] Inconsistent reporting comes as a result of different assumptions about what determines liabilities, which confuse the reported information that is dispersed to the public.[155] Assumptions that are inconsistently reported include demographics, assumed rates of return on investments, other economic indicators, and information about the plan.[156] One of the solutions to disjointed reporting procedures is for Louisiana to consolidate its systems for purposes of reporting or disclose data separately for each system within the state. Implementing the uniform criteria for reporting within and between states would permit a complete and transparent evaluation of each system.[157]

Third, the board of trustees for each pension system, as well as the governmental entities involved, must be held to a higher standard for accurate reporting.[158] In many states, the reporting methods understate

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151. Anenson, *supra* note 15, at 42.

152. Stephen P. D'Arcy et al., *Optimal Funding of State Employee Pension Systems*, 66 J. RISK & INS. 345, 347 (1999) (comparing the volume of research done on private pension funding with the lack of research on state pension funding).

153. *Id.*

154. Anenson, *supra* note 15, at 44.

155. Mitchell & Smith, *supra* note 138, at 288 (discussing various methods used by actuaries to determine pension plan liabilities).

156. Anenson, *supra* note 15, at 44. *See generally* NAT'L EDUC. ASS'N, NEA COLLECTIVE BARGAINING AND MEMBER ADVOCACY, CHARACTERISTICS OF LARGE PUBLIC EDUCATION PENSION PLANS 93 (2016), https://www.nea.org/assets/docs/HE/CharacteristicsLargePubEdPensionPlans2016.pdf [https://perma .cc/LUD8-MT8T].

157. Anenson, *supra* note 15, at 44. So far, only Wyoming and Maryland have adopted the substance of the uniform law. *Id.* at 46. More states should consider enacting a uniform law to ensure clear and complete information to those monitoring the system and to create political incentives for leaders who address pension difficulties.

158. Anenson, *supra* note 15, at 46.

taxpayer liability, and the magnitude of fiscal stress is misrepresented.[159] The lower the reporting, the lower the apparent amount of contributions that are owed to the plans, thus creating the appearance that excess funds exist that can be used elsewhere.[160] These misrepresentations of the extent of fiscal stress are frequently credited as contributing to the imminent demise of many public pension plans.[161] Implementing these mechanisms to reduce taxpayer passivity will lead to an increased demand in legislative responsibility and therefore an increase in pension stability.

C. Incentivize Public Employees to Maximize Current Contributions

Because of the unstable nature of public pensions, "[w]orkers today must save to gain a secure retirement."[162] Researchers recently examined the existing options that provide encouragement for future retirees to take more ownership of their retirement.[163] One option offered by the federal government provides traditional incentives for saving through favorable tax treatment for employer plans and IRAs.[164] Although the IRA incentive involves a substantial loss of government revenue, the growth of IRA program use has had a significant impact on retirement savings.[165] With the rising popularity of the IRA program, there is ongoing debate about whether the use of this savings program is actually because of the government tax incentive.[166]

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159. *Id.*

160. *See generally* J. Fred Giertz & Leslie E. Papke, *Public Pension Plans: Myths and Realities for State Budgets*, 60 NAT. TAX J. 305, 305–23 (2007) (finding evidence that assumptions are manipulated in order to lower the necessary contributions to pension plans).

161. *Id*.

162. STEVEN A. SASS, CTR. FOR RET. RES. AT B.C., NO. 16-15, CAN WE INCREASE RETIREMENT SAVING? 1 (Sept. 2016), http://crr.bc.edu/wp-content/uploads/2016/08/IB_16-15.pdf [https://perma.cc/5B8W-FSZQ].

163. *Id*.

164. *Individual Retirement Account*, WOLTERS KLUWER BOUVIER LAW DICTIONARY (Desk ed. 2012).

165. SASS, *supra* note 162, at 2. "The Joint Committee on Taxation estimates the cost in foregone revenue for 401(k)s and IRAs at $110 billion in 2015. These plans hold a tremendous amount of retirement savings–$13.6 trillion at the end of 2015." *Id.*

166. *Id.* Some research supports the claim that small changes in tax incentives have little effect on the saving of high-income workers, who are the workers getting the largest financial benefit from the favorable tax treatment of retirement saving. *Id.*

Further, there is conclusive research affirming that behavior incentives, as opposed to tax incentives, can increase retirement savings significantly on an individual level.[167] Congress encouraged the use of behavioral initiatives by passing the Pension Protection Act ("PPA") of 2006.[168] Congress enacted the PPA primarily because, although individuals were saving, they often were not saving *enough* to maximize the potential of their investments by receiving the entire employer match.[169] The PPA attempted to remedy this problem by creating incentives for employers to set up automatic enrollment arrangements with automatic escalation features; expanding tax benefits for low- and moderate-income households by making the "saver's credit"[170] permanent and indexing it for inflation; and allowing individuals to have their directly deposited federal income tax refunds split among as many as three different accounts to eliminate temptation to spend the funds.[171]

A decade later, research shows that the automatic escalation feature alone has increased overall 401(k) accumulations, particularly for low to moderate-income groups.[172] Although these tools sometimes are associated with a reduction in employee contributions and employer match rates,[173] the

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167. *Id.* at 5.

168. Ericca Maas, *Aim of Pension Protection Act is to Increase Personal Retirement Savings*, FED. RESERVE BANK OF MINNEAPOLIS (May 1, 2007), https://www.minneapolisfed.org/publications/community-dividend/aim-of-pension-protection-act-is-to-increase-personal-retirement-savings [https://perma.cc/78K9-F7K6].

169. *Id.*

170. The "[s]aver's [c]redit" is known formally as the Retirement Savings Contribution Credit. Codified in Internal Revenue Code § 25B, this credit can be applied against the total amount of taxes owed by a taxpayer. The credit is calculated by taking 10%, 20%, or 50% of the amount the taxpayer has contributed to a qualified retirement savings, up to a maximum credit of $2,000. Contributions that are considered "[q]ualified [r]etirement [s]avings" include those made to a traditional or Roth IRA; 401(k); SIMPLE IRA; SARSEP; 403(b); 501(c)(18) or governmental 457(b) plan; and voluntary after-tax employee contributions to qualified retirement and 403(b) plans. *Retirement Savings Contribution Credit*, INTERNAL REVENUE SERV. (Oct. 31, 2016), https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-savings-contributions-savers-credit [https://perma.cc/8PQH-D2VN].

171. Maas, *supra* note 168.

172. Robert Powell, *Time for a Pension Protection Act of 2016/17*, MARKETWATCH (Aug. 25, 2016), http://www.marketwatch.com/story/time-for-a-pension-protection-act-of-201617-2016-08-25 [https://perma.cc/4STB-NQFD].

173. SASS, *supra* note 162, at 5.

conclusive report on the effects of behavioral incentives shows that behavior interventions can increase retirement savings significantly.[174]

Several solutions exist that, if taken together, can address the deeply rooted issues in public pension systems across the nation. Requiring existing pensions to have balanced accounts and replacing defined benefit with defined contribution plans will help stabilize funds. Encouraging lawmakers to avoid moral hazard and increasing taxpayer awareness will spurn thoughtful resolutions and informed voting. Lastly, providing incentives for public employees to maximize their current savings plans will help them more thoroughly prepare for retirement. By implementing these affirmative approaches, Louisiana could strengthen its struggling pension programs and provide a secure future for its retirees.

CONCLUSION

Louisiana's pension systems, particularly LASERS and TRSL, are severely underfunded because of overspending and a shortage of revenue. There are several suggested approaches for dealing with this underfunding. First, and most importantly, the state should reject the notion that public employees—particularly teachers—should opt into Social Security through a Section 218 Agreement. Second, current defined benefit plans should transition to a defined contribution structure, shifting the risk and responsibility of investment to the employee. Third, lawmakers and pensions boards must refrain from engaging in moral hazard issues that can lead to irresponsible decisions regarding pension funds. Finally, more incentives should be given to employees to have greater autonomy over their own pension plans, either through governmental tax benefits or employer-created pension contributions. Implementing these structures will provide stability to suffering pension programs in Louisiana, offering overall economic stability to the state.

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174. *Id.*

∗ J.D./D.C.L., 2018, Paul M. Hebert Law Center, Louisiana State University. The author would like to thank Elizabeth Carter, Dustin Cooper, and Heidi Thompson for their thoughtful edits and feedback. A special thanks to Briggs Depew for his invaluable comments and support.