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# Net Neutrality: Again?

*Sue Burum, MSU, Mankato MN*

## Introduction

“Let us not seek the Republican answer, or the Democratic answer, but the right answer. Let us not seek to fix the blame for the past. Let us accept our own responsibility for the future.”-John F. Kennedy (Rittle, 2016).

Everyone has an opinion on whether the Internet should be regulated and, if so, what that regulation should encompass (Hoffman, 2017). When issues of net-neutrality get wrapped up in partisan politics, peoples’ positions seem very extreme. To some people, the world will come to an end if the Internet is not regulated. To others, internet regulation is a solution in search of a problem. The Internet regulation debate heavily follows political lines, with Republicans looking to roll back regulation, and Democrats hoping to keep or even expanding the scope of new regulations. The resolution to this issue more than likely lies someplace in between. People seem to have strong opinions on net neutrality, but their opinions are not always based on facts and people do not always know the other side’s counter arguments. This paper will provide a historical outline of the issue as well as both sides’ arguments. This writer is less concerned on how this country decides to resolve this issue than the method the country uses to arrive at a solution. This writer advocates for Congress to hold hearings so citizens can hear both sides’ arguments to regulation. Then, it is hoped that Congress, in a bipartisan fashion, will provide a resolution to the issue. A congressional resolution is the only way to avoid the pendulum swing between Republican and Democrat executive order changes this country goes through when Congress does not act and leaves the other branches of government, along with the country’s administrative agencies and courts, to resolve issues. As Kennedy suggests, it is the only way to arrive at the right answer.

## What is Net Neutrality?

Net neutrality is the idea that Internet service providers (ISPs), like Comcast, should not give preferential treatment to users. Three examples are often used when explaining the type of behavior net neutrality is supposed to end (Reardon, 2015). The first example is *blocking*. In this activity, some service provider blocks access to some content on the web. The second example would be when a service provider *throttles* some users. In this activity, some users’ access to the Internet is slowed down while other users’ access is sped up. Finally, net neutrality would not allow for *paid prioritization*. This means service providers cannot charge content providers (edge) websites fees in order to give them advantages over other websites. In 2005, in response to the above examples of problem behavior, the Federal Communications Commission (FCC) established four principles of an open Internet. First, consumers should have access to the lawful Internet content of their choice. Second, consumers should be able to run applications and use the services of their choice, subject to the needs of law enforcement. Third, consumers should be able to use the legal devices of their choice as long as those devices do not harm the network. And fourth, consumers should be able to choose their network providers, application and service providers, and content providers. In 2009, FCC Commissioner Julius Genachowski added the idea that service providers should not discriminate against legal content in any way.

## A Fast History of Net Neutrality

Law Professor Tim Wu, the Isidor and Seville Sulzbacher Professor of Law at Columbia Law School, first used the phrase “net neutrality” in the 2003 law review article entitled *Network Neutrality, Broadband Discrimination* (Wu, 2003). In the article, Wu considered network neutrality in terms of neutrality between applications, data, and the ability of a network to provide better, preferential service to

some network traffic. Wu is considered the “father” of net neutrality, as he gave the subject a name, which focused the debate and popularized the concept.

### **The Communications Act of 1934 and the 1996 Amendment**

A thorough history of net neutrality should start with the Communications Act of 1934. This act was signed into law by President Franklin D. Roosevelt. This act replaced the Federal Radio Commission (FRC) with the Federal Communications Commission (FCC). It also transferred regulation of interstate telephone service to the FCC. The first section of the act states its purpose:

For the purposes of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, and for the purpose of securing a more effective execution of this policy by centralized authority... (Communications Act, 1934).

The Act of 1934 combined provisions of law from the Federal Radio Act of 1927 (Federal Radio Act, 1927) concerning radio licensing and the Mann-Elkins Act of 1910 (Mann-Elkins Act, 1910) relating to the telephone service. This act applied to the key communications of the age including telegraph communications. The goal was to have one agency regulate all the communication of the age just as the Interstate Commerce Commission regulated the railways and interstate commerce. The act was “technology biased,” which means whether something could be regulated depended on the specific technology used. This posed a problem for extending the act to new technologies like the Internet.

Title II of the Act discusses common carriers. A common carrier, under the common law, is a person or company that transports goods or people for any person or company and is responsible for any possible loss of the goods (Templeton, 2013). In the United States, the term also refers to telecommunications service providers and public utilities like a telephone company. A common carrier offers its service to the general public under license or authority provided by a regulatory body and the carrier may not refuse to provide its service to anyone. It needs to be accessible to any prospective customers. The regulatory body may create, interpret, and enforce its regulations upon the common carrier subject to judicial review (Dunn, 2017). For example, broadcasting can be regulated. The airways are a publically owned resource. The broadcasting stations do not own the airways; they are trustees of the frequencies. The government is entitled to ensure that the airways are used as a public service. A contract carrier is different from a common carrier. The contract carrier only transports goods for a specific, limited number of clients. It can refuse to do so for anyone else and it is not licensed to offer its services to the general public nor is it entrusted with publicly owned resources. It is not regulated to the same extent or in the same fashion as a common carrier (Templeton, 2013). Net neutrality advocates would like to see common carrier system applied to the Internet so the FCC could easily regulate the Internet.

In 1996, Congress amended or repealed sections of the Communications Act of 1934 with the new Telecommunications Act of 1996 (Telecommunications Act, 1996). This was the first major overhaul of the 1934 Act. The FCC received its jurisdiction to facilitate the deployment of broadband to Americans in Section 706 of the 1996 Act. According to this section, the FCC is to: “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.” The goals of the act are to broaden the deployment of broadband technologies, define broadband to include any platform capable of transmitting high-bandwidth intensive services, ensure harmonized regulatory treatment of competing broadband services, and encourage an environment that stimulates investment and innovation in broadband technologies and services. The act was less technology based because it was not tied to things like wires, cable and radio. The act regulates by content. However, the act *exempted* the newly developing Internet from common carrier regulation. Under this section, “fast lanes” are allowed. Fast lanes are where a company can pay to have its services streamed faster than other companies and people can pay for faster speeds of service for things like video and gaming. Companies like Netflix, under a fast lane system, could be regulated and dealt with differently than companies that distribute

email, which uses lower speeds. This did not change until 2015 when the FCC reclassified broadband ISPs as common carriers. Whether ISPs should be common carriers like utilities, and whether the FCC can reclassify them as such and regulate them, has been hotly debated in the net neutrality debate.

### **The Beginnings of FCC Regulation**

On October 1, 2003, the FCC decided to treat digital subscriber line (DSL) Internet access differently from cable internet access for regulatory purposes. This is because DSL connects to the Internet using phone lines and cable internet access connects to the Internet through cable television infrastructure. The justification for this was that cable modem services were information services and not telecommunications services, which was considered different, by the FCC. Television, phone lines, and the radio are common carriers and more heavily regulated. Thus, local governments could not regulate cable modem services through franchising authority. This contributed to the growth of the industry, but resulted in many petitions to treat DSL and Internet through phone lines the same.

The FCC decided to regulate and fined a North Carolina ISP, Brand X, for preventing its followers from using a Voice over Internet Protocol (VoIP) service that uses the Internet to make phone calls because that service competed with its own voice calling service. This fine was challenged in court. In 2005, in *NCTA v. Brand X Internet*, the US Supreme Court (the Court), using the *Chevron Doctrine*, upheld the FCC's ability to call a cable internet provider an information service (which is a type of contract carrier), and not a telecommunications service (which is a type of common carrier), under the Telecommunications Act of 1996 (NCTA, 2005). Brand X had argued that, under the Communications Act of 1934, the FCC must regulate cable internet providers as common carriers the same as ISPs like Brand X. Brand X wanted cable companies to unbundle their services for competitors' use. The FCC classification of cable providers as information service providers enabled the FCC to conclude that ISPs, like Brand X Internet, could not deny access to cable and phone wires by competing ISPs, but cable companies could.

Because Brand X lost, the case sets a precedent that the FCC can classify cable internet providers as information services. The *Chevron Doctrine* says courts should give deference to administrative agencies when they interpret the authority granted to them by Congress when the intent in Congress in the grant of authority is ambiguous and where the interpretation is reasonable or permissible (Chevron, 1984). The case also raised the question as to whether Congress should revise the Telecommunications Act of 1996 to ensure that communications, content, and applications could pass freely over the Internet. Some people suggested that Congress, through legislation, should deal with this issue. Many could see that internet services were provided by phone lines, cable, wireless phone networks, and even satellite. The FCC's distinction seemed very arbitrary. It also left the agency with less power to regulate since the agency did not label the ISP a common carrier.

In 2005, the FCC deregulated DSL after having already deregulated cable internet access. While many supported the deregulation, others voiced concerns that this deregulation removed some consumer protections for internet activity. The FCC, without any authority or guidance from Congress, then issued an Internet Policy Statement that set out pro-net neutrality rules for ISPs. In 2006, the Senate considered updating the Communications Act and including a statement favoring net neutrality. However, the Senate failed to pass the proposal.

### **A Light-Handed Approach to Regulation**

The FCC began to police violations of net neutrality on a case-by-case basis, based on consumer complaints. In 2007, Comcast began to interfere with BitTorrent traffic on its network. BitTorrent is a program used for high volume applications like peer-sharing of music or video. The FCC responded in 2008 by punishing Comcast for violating the net neutrality rules set out in their Internet Policy Statement. Comcast had to disclose practices and stop discriminating against BitTorrent by making BitTorrent pay more for faster service. Net neutrality proponents did not like Comcast managing the Internet. Some anticipated internet providers managing the traffic on their systems based on whether they liked or disliked the content. Net neutrality opponents concluded that this argument ignored the reality that internet traffic is not all the same. Some traffic has greater needs for speed, like BitTorrent, companies that provide speed-dependent games, or those with video-streaming services like Netflix. Broadband

networks could offer different levels of service. They could have fast and slow lanes of traffic. Net neutrality opponents argued that allowing some to pay for higher speeds could actually increase costs to users. For example, if newspapers could not charge advertisers for space, then the cost of the newspaper would be much higher for subscribers. All users have to subsidize the websites that need the greatest speeds whether they use those websites or not.

### **A Tougher Approach to Regulation and Struggle to Find Authority to Regulate**

As a presidential candidate in 2008, Barack Obama weighed in on the dispute and pledged to support net neutrality. After becoming president, Obama requested the Federal Communications Commission (FCC) to pass “the strongest possible” rules to preserve net neutrality (White House, 2015). However, a president cannot force the agency to act as the FCC is an independent regulatory agency. Nevertheless, the president’s statement undoubtedly contributed to the FCC’s desire to regulate. In February 2010, the FCC first passed net neutrality rules. The agency reclassified internet service providers as common carriers under Title II of the Telecommunications Act. This action treated the service providers like phone companies, public utilities. The change made the service providers more subject to regulation. The FCC said the change would “protect innovation and create a level playing field for the next generation of entrepreneurs” (Contract Reporter, 2015).

Later in 2010, in *Comcast Corp. v. FCC*, the Court of Appeals for the District of Columbia Circuit struck down these new FCC rules. The court concluded that the FCC did not have jurisdiction over Comcast’s internet service under the language of Title I of the Communications Act of 1934. Since the FCC had already classified cable internet providers as information services, the court concluded the FCC could not censure Comcast’s interference with traffic between their customers. Thus, the FCC did not have the power to enforce its net neutrality rules, and may not even have the power to make net neutrality rules in the first place (Comcast, 2010). The court’s decision caused the FCC to establish new rules regarding internet regulations. The FCC response to the decision justified their authority to act through section 706 of the Communications Act of 1996 as well as through Titles II and VI of the 1934 Act. While addressing some of the concerns the court raised, it was not clear whether the new justifications for jurisdiction and the ability to act would be upheld by the Supreme Court.

A second attempt at tougher regulations came in December 2010. The FCC approved new net neutrality rules in the FCC Open Internet Order of 2010 (FCC, 2010). The new order is a set of regulations that move toward establishing net neutrality. Opponents of the new order argued that this internet regulation would inhibit innovation by preventing internet providers from capitalizing on their broadband investments. The new order would also cause internet providers to continue reinvesting money into higher quality services for consumers. Supporters of net neutrality countered that any content restrictions by network providers represented a threat to freedom of expression. It was hoped by many that an open internet would strike a balance between these two camps by creating a compromised set of regulations that would treat all internet traffic the same.

In 2011, Verizon sued the FCC. Verizon argued that the Open Internet Order of 2010 exceeded the FCC’s authority as authorized by Congress, violated the company’s constitutional rights, and created uncertainty for the communications industry (Selyukh & Ingram, 2014). In 2014, in *Verizon v. FCC*, the Court of Appeals for the District of Columbia Circuit decided that their job was not to assess the wisdom of the Open Internet Order of 2010, but instead to determine whether the FCC established that their regulations fell within the scope of its statutory grant of authority. The court concluded that section 706 of the Telecommunications Act of 1996 gave the FCC the authority to enact internet rules. However, the court struck down portions of the Open Internet Order of 2010, which the court determined could only be applied to common carriers, since the FCC had classified cable internet providers as information service providers. The court decided that, since the FCC had classified broadband providers under Title I of the Communications Act of 1934, the FCC relinquished its right to regulate them as common carriers under Title II of the Communications Act of 1934. The FCC Open Internet Order of 2010 only applies to common carriers. It does not apply to broadband providers. Of the three orders that made up the FCC Open Internet Order of 2010, two were vacated by the court. The orders against blocking and no unreasonable discrimination in speed were struck down. The order requiring transparency was upheld as

the court found this order was not contingent on a network operator being classified as a common carrier (Verizon, 2014). Following the decision, both Comcast and Verizon stated that the Internet will continue to work for consumers. Multiple news outlets considered the case to be a loss for net neutrality and a victory for cable providers.

Later in 2014, in response to the ruling and a petition campaign that urged the president to direct the FCC to reclassify ISPs as common carriers, the Obama administration stated that, while it supports a robust, free, and open Internet, a president could not direct the FCC to reclassify because the FCC is an independent agency. Obama did state that internet rules should be based in Title II authority. Responding to the decision in the case, the FCC issued a statement that the agency would not appeal the decision. However, the agency would establish new rules to require transparency and prohibit blocking and discrimination. Also, the FCC stated that it had the authority to promote competition over state and local telecommunications markets, and could regulate methods to remove barriers to infrastructure investment.

In January 2015, the Republicans in Congress introduced a discussion draft of a bill addressing the FCC's authority over net neutrality. Net neutrality supporters raised concerns with the bill when it was introduced during a Senate hearing. Supporters considered the draft to be net neutrality in name only. Many Republicans argued that market forces could safeguard online innovation without government involvement. Critics of this approach said that the FCC needed to declare broadband providers to be common carriers so that the FCC could regulate them. They believed regulation was the only thing that would ensure net neutrality. Large broadband providers and many Republicans objected to increased regulation because they believed it opened the door to regulations that went far beyond regulating for net neutrality. Some of the laws that regulated common carriers, like Title II, go back to the 1930's. These laws could lead to the FCC dictating the prices broadband carriers could charge and the laws could allow for the FCC to micromanage how internet providers connect to each other.

The Republicans want light-handed regulation, but not Title II regulation, which could evolve into excessive FCC regulation. Democrats saw the Republicans' proposals as protecting some of the most serious threats to net neutrality like blocking, where service providers block access to some content on the web and throttling, where some users' access to the Internet is slowed down while other users' access is sped up. Democrats also thought the Republican proposal would strip the FCC of potential Title II authority to deal with future problems. For example, some can anticipate that ISPs may charge customers different rates for content from Netflix but not Hulu. The ability to stop this type of activity might be stripped from the FCC under the Republican bill. Critics of the Republican plan also did not like the case-by-case approach, the light-handed approach, to policing net neutrality problems. Democrats had little reason to compromise, as they believed they had control over the debate.

A third attempt at tougher agency regulation came when FCC Chairman Tom Wheeler endorsed internet rules grounded in Title II use. In February 2015, the FCC passed Title II net neutrality rules that applied to both wired and wireless internet connections in the 2015 Open Internet Order. Broadband service was reclassified as a telecommunications service and subject to common carrier regulation under Title II of the Communications Act (FCC, 2015). Thus, broadband service could be regulated much like telephone companies (Irwin, 2014). The FCC did not exercise its authority to forbear from applying many Title II provisions to broadband service and created rules to promote internet openness. Many broadband providers responded by petitioning the FCC to put on hold internet rules based in Title II. They argued that the FCC lacked the statutory authority to reclassify broadband as a telecommunication service without Congressional approval. The FCC denied this petition. In December 2015, in *U.S. Telecom Association v. FCC*, the U.S. Court of Appeals for the District of Columbia Circuit heard oral arguments concerning a challenge to the FCC's new authority to create net neutrality rules. In June 2016, the D.C. Circuit affirmed the FCC's 2015 Open Internet Order's net neutrality rules. The court concluded that the FCC could reclassify broadband services to telecommunications services subject to common carrier regulation under Title II of the Communications Act of 1934 (US Telecom, 2016).

### **A Return to a Light-Handed Approach to Regulation?**

In April 2017, new FCC Chairman Ajit Pai, a vocal critic of net neutrality (Chaitin, 2017) appointed by President Donald Trump in January 2017, announced his plan to repeal the 2015 internet rules.



“Nothing about the Internet was broken in 2015,” he said. Referring to the FCC moving to regulate the Internet as a public utility, he stated that “It was all about politics” (Newcomb, 2017). Real control is more likely to come from increased competition (Steimle, 2014). In May 2017, the D.C. Circuit Court of Appeals for the District of Columbia Circuit denied petitions asking the court to reconsider its prior decision. In July, the U.S. Supreme Court gave the cable industry more time to appeal the net neutrality ruling from the D.C. Circuit Court of Appeals for the District of Columbia Circuit. Industry groups asked the Court for a 60-day extension, to September 28, to appeal the FCC’s net neutrality rules. The groups asked for the extension because the FCC is currently moving to repeal the Obama-era rules. In March 2017, Trump indicated that he endorses the FCC’s plan to replace the earlier net neutrality rules (Lohr, 2017). The FCC could soon consider adopting a Notice of Proposed Rulemaking that would replace the 2015 Open Internet Order (Sohn, 2017). If this happens, it is unlikely the Court will hear the case as the Court would be deciding on rules the FCC has already decided to replace. Of course, even if the FCC changes course on net neutrality, the next president and a new chairman of the FCC could easily change back to Obama-era net neutrality rules. The country does not have a consensus on the issue and the Supreme Court may not weigh in on the issue during the Trump presidency. Congress also does not seem in any hurry to review old communication acts.

### **Arguments**

The current dispute over net neutrality does not really involve “open Internet” or free speech, as both sides agree to these goals. The issue is whether the government, through FCC rules, should be able to expand its power over the Internet by re-writing congressional laws (Spiwak, 2017). Some believe Congress should be the one to re-write their own laws, as FCC regulation, without congressional approval, could dictate internet products and costs. However, the FCC has said that it would not subject broadband providers to tariffs or other rates, unbundling, or other forms of utility regulation (Carroll, 2015).

#### **Arguments in Favor of Net Neutrality**

Groups in favor of net neutrality regulations are composed primarily of liberal, anti-corporate, activists, academics, think tanks, and self-proclaimed protectors of the public interest (Hoffman, 2017). These groups want regulation under Title II, despite these laws being very old and designed for utilities (John, 2017). Benefits that are supposed to come from net neutrality are the following: the stimulation of ISP competition, the promotion of the spread of ideas, the prevention of unfair pricing practices, the promotion of innovation, the promotion of the spread of ideas, the promotion of entrepreneurship, and the protection of freedom of speech. The threat to these ideas is explained below in the four arguments in favor of net neutrality laws.

**Competition.** These groups argue that ISPs, including cable companies which provide the internet access for homes along with satellite, phone lines, and mobile broadband over devices like cell phones, should be classified as common carriers. This would require these service providers to allow other ISPs free access to their cable and phone lines as well as their service towers. This will stimulate ISP competition. However, there cannot be competition if new ISPs are not able to develop a service with which to compete. If there are not enough companies to provide competition, many people would find that they have only one ISP. A lone ISP would likely be a monopoly and the company would be able to do whatever it pleases. There would be no competition from others to provide pressure for better service at the lowest prices. Common carriers are subject to FCC regulations, which keeps large ISPs from doing what they please at the expense of serving the people. Net neutrality advocates hope that the FCC will keep the ISP companies from becoming gatekeepers, in part by deciding if certain web sites will be accessible and at what speed. They do not want these companies to block access to other Internet phone company services. The Internet developed successfully because no authority controlled new content or new services. The Internet is undermined if broadband carriers can affect what people see and do online. Net neutrality is needed for competition and the prevention of unfair practices.

**Free Expression.** Net neutrality is necessary to safeguard free expression online. Net neutrality is supposed to preserve an open Internet and ensure that the Internet is not divided into different speed lanes. The fear is that media companies and other companies able to pay more for internet service would get

faster connections and everyone else would get slower access. What content can be accessed often depends on speed. For example, faster speeds are required to watch video than to read text. Net neutrality rules are necessary so everyone has equal access to all of the content on the Internet. If everyone has equal access, the practice will foster free speech and lead to further democratic participation on the Internet and the spread of ideas.

**Innovation.** If ISPs have the ability to demand a fee for premium delivery of content, the practice will turn these companies into gatekeepers. People are used to fast speeds. If they find some websites that function slowly, they will be less likely to visit those slow sites. They are unlikely to wait for a slow video to load or watch a video that buffers. This impatience on the part of consumers will result in self-imposed avoidance of slower sites. Slower sites are often newer sites or those with less popular coverage of events and thus, these often have less money to spend. Charging websites for access will stifle innovation, as new websites will not be able to afford these fees. Some companies, like ISPs, may want to stop competing services, like Brand X, from providing the same service that the ISP offers. Brand X will find that they are completely shut out. Unfair pricing practices restrict and stifle innovation. If everyone is on an equal footing, innovation will be able to thrive. If innovation can thrive, then competition can thrive as the best companies, including new content providers, will have an equal chance at competing with more established companies. If we do not do this, the Internet will move from innovation, where the quality of the website or service determines whether that business succeeds or fails, to the quality of one's deal-making. (Pogue, 2014).

**Prevention of unfair pricing practices.** If net neutrality is removed, it is unlikely that new investment will be made to create more infrastructure (Granados, 2017). Non-net neutrality practices mostly involve leveraging quality of service for acquiring payoffs for already existing service. These are simply payoffs to avoid being slowed down. In 2014, Netflix had to make payments to Comcast and Verizon to avoid having their video-streaming move at slower Internet speeds. The money did not result in greater infrastructure development on the part of ISPs because they did not want to develop cable and phone lines or satellites and towers that other companies could use for free (Hoffman, 2017). This is just one piece of evidence showing that removing net neutrality will not help spread high speed Internet to new areas.

#### **Arguments Opposed to Net Neutrality**

Groups opposed to heavy regulation are composed primarily of ISPs, cable and telephone companies, conservatives, free-market think tanks, and libertarians. They are not opposed to Open Internet principles per se, but they are very concerned about the effect of and unintended consequences of regulation. Using Title II and labeling ISPs as common carriers rather than as content providers results in ISPs becoming subject to more regulation. Those opposed would prefer a light touch to regulation by agencies. They would also prefer to follow Congressional mandates rather than an agency usurping authority through Title II interpretation and having to deal with the resulting mission-creep (John, 2017). Internet suppliers like Verizon, AT&T, and Comcast believe they are unfairly subject to utility style regulation. Obama-era rules place restrictions on Internet service suppliers, and not content providers. This picks winners and losers. Companies that are subject to regulation, like ISPs, will not achieve the same profit levels as companies that are labeled content providers and are not regulated. Telecommunications and cable companies do not want to be common carriers. This makes their companies subject to anti-blocking and anti-discrimination rules. The classification opened the door to government interference that would reduce incentives to invest, which would ultimately hurt consumers and result in higher prices.

**Confusion and overreach from an agency mandate that is too old.** Continued regulation by the FCC, without a new law and mandate from Congress, causes too much confusion and requires Congress to attack problems piecemeal. An example of this confusion happened when Congress, in March 2017, overturned a yet-to-take-effect regulation, enacted in 2016 by the FCC, which would have required ISPs to get customers' permission ("opt-in") before selling their data. ISPs collect data from websites people visit. This data can include personal information like medical and financial data. The FCC made privacy rules because the 2015 Open Internet Order basically defined the Internet as a public utility and the FCC put themselves in charge of privacy regulations. Until 2015, the FTC held jurisdiction over ISPs and

privacy regulation. This was considered a victory for ISPs like Comcast and Verizon, as it could have put those companies at a disadvantage compared to content providers like Google and Facebook. Google and Facebook are regulated by the FTC, which has less stringent privacy requirements. The FCC stripped the FTC of its authority over internet service providers. This was a loss to privacy advocates who preferred consumers have to opt-in before a company could sell gathered data. Those opposed to net neutrality argued that people can use a different search engine if they do not like Google's privacy rules, but people cannot always go to another internet provider, especially in rural areas. Others opposed argued the FCC overstepped their delegated powers to regulate and that it was up to the FTC to regulate privacy. Allowing both the FCC and the FTC to regulate the Internet causes confusion and can end up hurting consumers. Only Congress can set broad parameters in which the agencies can operate. One cohesive plan by Congress is better as it can set goals and settle what agencies operate in what areas, rather than reconfigure individual regulations. Sean Spicer, White House spokesperson, said President Trump will "continue to fight Washington red tape that stifles American innovation, job creation and economic growth" (Lohr, 2017). President Trump's position was seen as a prelude to further deregulation for broadband companies.

**Congress should be the one making the rules.** In July 2017, thousands of people participated in the Net Neutrality Day of Action. They were protesting the FCC's planned reversal of Obama-era Open Internet rules. They framed the issue as money-grubbing ISPs trying to penalize and shutout newer and smaller companies. BattleForTheNet.com sponsored a petition to stop Comcast, Verizon, and AT&T from ending net neutrality and controlling what people see and do online. Those companies want to gut FCC rules and then pass legislation that allows for extra fees, throttling, and censorship (Given, 2017). This is deceiving because ISPs already had the power to do these things under the 1934 Act. Under this act, ISPs were contract carriers not common carriers. While Obama-era Open Internet rules tried to change ISPs to common carriers, the 2016 appellate court decision, *U.S. Telecom Association v. FCC*, that upheld the FCC's ability to make the 2015 Open Internet Order, is not a Supreme Court case. Thus, the ruling can be overturned by the Supreme Court. The Court could conclude that the 2015 Open Internet Order provided no meaningful net neutrality protections if the FCC cannot make net neutrality regulations and enforce those regulations on ISPs as contract carriers. Is there even an urgent threat to a free Internet? There is no need for the FCC to make rules if there was no problem in the first place. Repealing the Obama-era rules would simply return the web to a time before 2015 when ISPs could block and throttle content. Did anti-net neutrality problems extensively develop that would justify comprehensive regulation? Every ISP at the time had de facto net neutrality without needing government regulation. However, if the public truly demands regulation for an Open Internet, then Congress needs to be the one to assess whether there even is a problem and what types of rules are needed to alleviate actual problems (Given, 2017).

**Heavy-handed regulation does not help people.** Net neutrality supporters are perceived as believing that ISPs are too big. They need to be broken up or they will become monopolies. To stay a monopoly, phone companies had to license use of their infrastructure for free. The government could control what customers were charged. All this may sound good, but Pai said regulation is not working. He wants to go back to the rules created in 1996 under President Clinton and the Republican Congress (Newcomb, 2017). "The Internet is the greatest free market success in history," Pai said. However, he believes the "heavy-handed" net neutrality rules were never needed, are not helping people, and are, in fact, doing the reverse" (Newcomb, 2017). He said the rules have led to reduced investment, which he said has cost 75,000 to 100,000 jobs such as laying cable and digging trenches to help bring high-speed internet access to rural and low income areas" (Newcomb, 2017). A heavy-handed framework will widen the digital divide as companies are avoiding rural and low income areas because they believe that it is not worth the time or money to invest there (Newcomb, 2017). This provider decision also reduces competition for those rural people (Kang, 2017).

**All internet traffic is not the same.** If the government reverses net neutrality, this would put consumers back in charge of how the Internet should operate, rather than five unelected government regulators in the FCC coming between consumers and ISPs. The fight over net neutrality is not about

digital egalitarianism. Its purpose was to restrict consumers' choices and prohibit paid prioritization. Paid prioritization is a technical term used to describe an agreement between a content provider and a network owner to allow the provider's data to travel on less-congested routes in exchange for an agreed upon fee. When networks are congested with data during high-traffic times, prioritization agreements allow consumers to receive requested data faster. Netflix and other high-volume data providers, mostly video, are already negotiating these deals with ISPs to have their content delivered faster (McMillan, 2014). Video data is less tolerant of delays (Hathaway, 2017). It causes buffering, distortions, and other playback problems. Net neutrality requires treating all data the same. This ignores basic differences between things like email and video. As Pai noted in a 2014 memo when he was a commissioner, "Title II only authorizes the FCC to prohibit 'unjust or unreasonable discrimination' and both the Commission and the courts have consistently interpreted that provision to allow carriers to charge different prices for different services" (Hathaway, 2017). No one wants unfair practices or pricing, but solutions should be based on the reality of the workings of the Internet.

**Heavy handed regulation lessens research and development.** When the FCC uses more regulation and control, every general counsel of every firm will face many complaints resulting in regulatory investigations. CEOs will find they are spending more money on lobbyists, lawyers, and public relations firms than they spend on research, expansion, and innovation (Davis, 2015). Consumers will suffer most as they can expect higher broadband prices, reductions in broadband speeds, less expansion of broadband, less innovation, and fewer offerings from fewer companies.

Should video and game content providers be able to negotiate faster lanes for their content? Supporters of net neutrality argue that this could lead to a Balkanization of the Internet. Others argue that all consumers are then free to pay for the services they need and not support the video watchers or game players when all they want is shopping, web surfing, and email. Reasonable people can disagree over these arguments and how much regulation is needed. In order to achieve net neutrality, however, opponents to net neutrality argue that the FCC made an unreasonable power grab. This power grab could result in less competition, free expression, and innovation if there is less money for new products and start-up companies from less access to satellites, lines, wires, and towers (Fung, 2016). Power grabs also often result in an agency going well beyond its grant of law making power from Congress.

**Open congressional hearings are best.** Just as Obama used executive orders in many other areas, he also set a precedent in 2008 of pressuring an independent regulatory agency into following his political orders (Davis, 2015). The resulting FCC net neutrality regulations were too secretive as the 317-page document that would govern the agency on net neutrality was not released for public comment until after the FCC vote. FCC Chairman at the time, Tom Wheeler, even refused to discuss the new regulatory rules before Congress. This was not the transparency Obama promised in government when elected. There also could be broad unintended consequences that could have been discovered and address in Congressional hearings had Congress passed an internet law. Wheeler promised a light touch in carrying out the new regulations, but the people need to hear both sides of the debate to understand the complexities. This should result in more informed decisions when there are trade-offs to be made from. Then Commissioner Pai, in his dissent to the adoption of the rules said the regulations give the FCC, "the power to micromanage virtually every aspect of how the Internet works...It allows the government to slap the 'universal service fee' that you now pay on your phone bill onto your broadband bill" (Davis, 2015). Congress should make these decisions after open hearings.

The bipartisan consensus reached between President Bill Clinton and the Republican Congress allowed the Internet to spontaneously grow and thrive. This is what ISPs would like in the Trump-era. In May 2017, the FCC voted along party lines to start the process of undoing the Obama-era net neutrality rules. The agency issued a Notice of Proposed Rulemaking. This notice starts the official period for public comment. The FCC will seek further public comment and then reply to comments before finalizing an order to undo the rules. They will probably vote again later this year to implement the new order. This will probably not be the end of the matter. Proponents of the Obama-era rules will probably challenge the new order in court (Dunn, 2017). However, those opposed to the Obama-era net neutrality rules hope that

Congress will intervene and develop laws that will keep the Internet free while providing the light touch to avoid stifling existing companies and entrepreneurs.

### Conclusion

What could happen with net neutrality? The FCC could revisit its earlier interpretations and take a more restrained approach to net neutrality regulations. The agency could even turn jurisdiction over privacy and broadband regulation back to the FTC (Downes, 2017). The FTC and state attorneys general have broad powers to protect consumers from harmful or deceptive practices. The Justice Department can assist and punish anti-competitive conduct (Forbes Contributors, 2017). This approach was used in the past. It was considered more of a light touch to regulation because it was done on more of a case-by-case basis as consumer complaints arose. It deters bad behavior as companies watch what practices result in legal troubles to other companies in their field. This was what Congress intended in 1996 when it declared that the Internet should remain “unfettered by Federal or State regulation,” yet it should not be lawless (Telecommunications Act, 1996).

It is time to resolve the net neutrality debate. Core concepts of net neutrality are not controversial. Pai does not oppose net neutrality. Pai opposes the broader powers the FCC commandeered in the disguise of enforcing net neutrality. An agency cannot put its net neutrality regulations on sound legal footing. This debate has been too polarized through interparty fighting. Only Congress can develop laws, through normal lawmaking procedure, that will have the legitimacy to survive different administrations.

This country has always swung between Republicans and Democrats. While Republicans hold both the Congress and the presidency, Democrats will regain power again in a future election. When this happens, there will be another chairman of the FCC and new agency mandates may be very different. The FCC could again invoke Title II, take a more activist role, and move the FCC back in control of ISPs. If the two parties insist on having net neutrality as some sort of political tool in elections, the issue will never settle and the country will keep swinging as if on a merry-go-round (Johnson, 2017).

Too many times this country turns to the Supreme Court to do what President Kennedy called “the right thing.” The Supreme Court could decide to hear a case on whether Title II gives the FCC the power to regulate the Internet, but opportunities to hear a case like this may not happen until the FCC again attempts to take control. The Supreme Court cannot act without a case. The Supreme Court could also grow weary of having to legislate and simply not take net neutrality cases.

Congress could stop this back and forth that has taken place for roughly 15 years. There needs to be bipartisan comprehensive legislation on net neutrality to answer questions like what agencies should regulate the Internet, in what areas there needs to be regulation, and how forcefully this regulation should be exercised by agencies. The ability to make regulations needs to be clearly delegated to agencies, and that law-making power needs to have clear parameters to avoid agency overreach. This would be “taking responsibility” and “doing what is right” for the future of the country with the problem of net neutrality.

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# **The Road to an Immigration Policy by Government Fiat: Should We Really Make Immigration Policy Through the Courts?**

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## **Introduction**

"We ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used ... We do not inquire what the legislature meant; we ask only what the statutes mean." - Oliver Wendell Holmes, Jr. (Holmes, 1920).

President Trump's temporary travel ban will be headed to the U.S. Supreme Court (the Court) for review in October 2017. The courts (all levels) have often had to intervene to settle major clashes involving assertions of presidential power. In the fourth year of President George W. Bush's term, the justices challenged his unilateral approach to the U.S. military prison at Guantanamo Bay, Cuba. In the fourth year of President Barack Obama's term, the courts took up the challenge to his healthcare law (Savage, 2017). However, within the second week in office, Trump's first temporary travel ban suffered a defeat from lower federal courts that stopped the implementation of the travel ban, as the lower courts believed the president was acting with improper motives in creating the ban. This essay will argue that courts should interpret executive orders of presidents and statutes from Congress based on what is written within the four corners of the document. These writers believe it is not proper for courts to second guess the motives of politicians. These writers believe that the very exercise of second guessing motives is the same as the courts saying that they believe Congress or the president are not being straight-forward with the courts. It is a better practice to take another branch of government at its word as to why the bill or executive order exists.

## **Facts**

### **First Travel Ban**

President Donald Trump signed the initial travel ban on January 27, 2017, during his first week in office. The Executive Order 13769 was called *Protecting the Nation from Foreign Terrorist Entry into the United States* (Executive Order 13769, 2017). When he read the title of the executive order, he said, "We all know what that means." This comment has been subject to different interpretations (Kendall 1, 2017). Rudy Giuliani, a former mayor of New York and prior surrogate for Trump's campaign, said that Trump was looking for a way to carry out his campaign promise to ban Muslims (Kendall 1, 2017). Candidate Trump had claimed that terrorists were using the refugee resettlement program to enter the U.S. In *Trump's Contract with the American Voter*, Trump pledged to suspend immigration from "terror-prone regions" (Trump 1, 2016). The executive order suspended the U.S. Refugee Admissions Program ("United States refugee", 2011) for 120 days; lowered the number of refugees that could be admitted into the U.S. to 50,000; suspended the entry of Syrian refugees indefinitely; suspended entry of people from Iran, Iraq, Libya, Somalia, Sudan, and Yemen for 90 days until better vetting procedures could be developed; and allowed for some exceptions to the policy on a case-by-case basis. The order also provided for an exemption to the act for religious minorities in the listed countries. This allowed Christians from the Muslim countries to more easily enter the U.S. Chaos ensued from the temporary ban when it was implemented. There were problems at both United States airports and airports abroad as airport officials tried to figure out the ambiguous orders on exactly who was to be admitted into the U.S. (Dwyer, 2017).



There were protests and legal challenges to the order. From January 28 through January 31, almost 50 cases against the order were filed in federal courts (“Special collection”, 2017). Courts granted temporary relief that included a nationwide temporary restraining order. On February 3, U.S. District Court Judge James Robart, for the Western District of Washington in Seattle, blocked the implementation of the order with a nationwide temporary restraining order in *State of Washington v. Trump* (“Read the federal judge’s ruling”, 2017). In addition to the executive order being ambiguous, the order was implemented so fast there was not enough notice to travelers that their ability to travel to the U.S. would be restricted. The rationale for the ban was questioned because there was no evidence that any alien from any of the seven listed countries where travelers were banned committed any attacks on the U.S. Also, excluding people from Syria, including refugees, indefinitely was a problem because the Immigration and Nationality Act said no person could be “discriminated against in the issuance of an immigrant visa because of a person’s race, sex, nationality, place of birth or place of residence” (Immigration 1, 1952). Thus, the ban violated the First Amendment’s Establishment Clause because it was based on an anti-Muslim bias. It also violated the due process rights of certain people who wished to enter the country (Kendall, 2017). The Department of Homeland Security stopped enforcing the order and the State Department re-validated visas that were revoked under the order.

The due process position of the lower court was upheld by a panel of the U.S. Court of Appeals for the Ninth Circuit on February 9, 2017. Procedural due process means government must be following appropriate procedures to carry out its law. Procedural due process was lacking with this ban because it was not clear who exactly the travel ban applied to, people did not have notice so they could modify their travel plans, and what, if any, appeals process travelers could use was not clear (Howe, 2017). The court also declined to decide the Establishment Clause claim, which bars the government from establishing a religion. The first travel ban could have been a violation of the Establishment Clause because Christians were given special treatment in entering the country under the travel ban. The procedural due process problems alone, however, were enough for the appeals court to refuse to lift the stay placed on the travel ban by the lower court. On February 16, the Trump Administration stated in a filing to the court that they would replace the executive order with a new one.

On February 13, Judge Leonie Brinkema, from the Eastern District of Virginia, ordered a preliminary injunction based on the rationale that the executive order was discriminatory against Muslims. This was the first ruling to challenge the executive order for violating the Establishment Clause (de Vogue & Jarrett, 2017).

### **Second Travel Ban**

The first travel ban was superseded by Executive Order 13780 (Executive Order 13780, 2017) on March 6, 2017. The new executive order (the second travel ban), dropped Iraq from the list of seven countries, no longer applied to green-card holders or people with valid visas who were inside the U.S., included a case-by-case waiver process for refugees from the affected countries, and lifted the indefinite ban on Syrian refugees (“Trump travel ban”, 2017). The new order also removed the exemption for religious minorities in the six banned countries. The six countries were singled out because they were either considered a state sponsor of terrorism, were considered compromised by terrorist organizations, or contained active conflict zones (“Trump travel ban”, 2017). Finally, the second executive order allowed for a 10-day lead time so people could prepare for the changes.

On March 15, 2017, U.S. District Court Judge Derick Watson, from the District of Hawaii, issued a temporary restraining order preventing key provisions of Executive Order 13780, the second travel ban, from taking effect. He concluded that the State of Hawaii demonstrated a strong chance of succeeding under the Establishment Clause. He called the new executive order a “Muslim Ban,” and concluded that the order was based on anti-Muslim sentiment. He also concluded there was questionable evidence to support the order on national security grounds. He arrived at these conclusions by considering evidence “beyond” the language of the executive order (Gomez, 2017). His order was broader than other district courts reviewing the second ban because it affected the 90-day period as well as suspended the Refugee Admissions Program and the lowering of the maximum number of refugees who can enter the country

(Chappell & Katkov, 2017). On the same day, U.S. District Court Judge Theodore Chuang, District of Maryland, reached a similar conclusion for staying the 90-day period (Domonoske, 2017).

Chief Judge Roger Gregory, from the Fourth Circuit Court of Appeals, while writing the majority opinion of the court, used the comment that President Trump made when signing the first executive order to conclude that the purpose of both executive orders was “to effectuate the promised Muslim ban” (de Vogue & Jarrett, 2017). The judge said the travel ban “drips with religious intolerance, animus, and discrimination.... Surely the Establishment Clause of the First Amendment yet stands as an untiring sentinel for the protection of one of our most cherished founding principles – that government shall not establish any religious orthodoxy, or favor or disfavor one religion over another” (Liptak 2, 2017). Although the president has broad power over immigration, “that power is not absolute. It cannot go unchecked” (Domonoske, 2017). Thus, the Maryland case decided against implementing the ban.

The dissenting justices in the case invited Supreme Court review, concluding the majority’s approach, unless overruled, ‘will become a sword for plaintiffs to challenge facially neutral government actions, particularly those affecting regions dominated by a single religion’ (Chappell & Katkov, 2017). Judge Paul Niemeyer, who wrote the dissenting opinion, concluded that the court’s ruling was particularly inappropriate on its national security analysis. He added that President Trump provided ample nonreligious justifications for imposing the ban. Niemeyer stated that the court’s decision to base its opinion mostly on Trump’s campaign statements “is fraught with danger and impracticability” (Kendall 1, 2017). On March 16, 2017, 5 of the 29 judges on the court wrote a letter saying that they believed the decision was in error. They concluded that the executive order was “well within the powers of the Presidency” (Ross, 2017). Claims of national security are not a “silver bullet” that will automatically defeat any additional probing or challenges, but a national security rationale for the ban was stated in the executive order.

In a surprising and late dissent on March 17, Judge Alex Kozinski, of the Ninth Circuit Court of Appeals, dissented to the Circuit opinion on the first travel ban (Hansen, 2017). He concluded that Trump’s speech during the campaign was protected under the First Amendment because relying on campaign statements to prove discriminatory motive violated the First Amendment rights of candidates to engage in political speech. Kozinski also stated that it was also inappropriate for the court to use campaign statements when deciding Establishment Clause claims. Trump’s statements during the campaign could not be taken seriously and could not be used in deciding the legitimacy of the first or second travel ban (Hansen, 2017). Kozinski concluded that using the statements would “chill campaign speech” and “eager research assistants” would mine the archives of campaign statements in a kind of “evidentiary snark hunt” (Hansen, 2017). As a result, candidates would not talk in an unscripted fashion.

U.S. District Judge Anthony Trenga in Alexandria, Virginia, in March, provided the one victory for Trump’s travel ban (Gomez, 2017). He wrote that the courts around him were ignoring the fact that the administration made significant changes to the second travel ban. The judge concluded that the administration also bolstered its national security justification (Gomez, 2017). He would uphold the second travel ban.

### **The Administration’s Request for Supreme Court Review**

On June 1, 2017, lawyers asked the U.S. Supreme Court to review the lower court rulings on the second travel ban (Liptak 3, 2017). They argued that banning some travelers from the six Muslim countries was not an unconstitutional, discriminatory, religious travel ban. The president has broad authority to suspend the entry of foreigners. The lawyers also asked the Court to immediately lift the stay of the travel ban and allow the temporary 90-day ban on travelers from those six countries. It takes four justices for the Court to review the case on the merits, but it takes five justices to lift the stay and allow the ban to take effect (Savage, 2017). The lawyers had to decide whether “irreparable harm” would result if they did not lift the stay while they decided the issues in the case, which would not happen until October 2017 (de Vogue & Jarrett, 2017). Shortly after the request for review, questions on mootness were raised as the case. The case is now being referred to as *Trump v. International Refugee Assistance*

*Project* (Trump 2, 2017). On June 2, 2017, the Court set a June 12 deadline for the American Civil Liberties Union, which represented the Muslim plaintiffs in the Maryland case, to respond to the petition (Chappell & Katkov, 2017).

### **The Request to Lift the Stay on the Travel Ban**

The administration asked for the travel ban to go into effect as soon as possible (for a stay on the lower court orders stopping the travel ban) while the Court looked at the ultimate legality of the executive order (a review on the merits of the case) in October 2017. The Court usually moves quickly on requests for stays. Five justices would have to agree to decide the request for a stay. The justices would have to consider whether there is a “reasonable probability” that four of the justices would eventually agree to hear the case and that there was a “fair prospect” that a majority would hold the lower court opinion in error. They also had to consider if irreparable harm would result from the delay of the implementation of the travel ban (de Vogue & Jarrett, 2017). Granting the stay would allow the travel ban to take effect while the Court waits until after their summer break to decide the actual merits of the case in the fall. Justices decide whether to grant the stay based on the written arguments from the government and, in this case, the Civil Liberties Union. They did not use oral argument to decide the request. The Court simply issued a per curium opinion to announce the outcome of their decision and included brief orders on exception criteria that the Court added to the ban. Consistent with a per curium opinion, there was little legal reasoning accompanying the orders (Liptak 3, 2017). However, this decision may be sending signals as to how the Court may ultimately decide the main issues in the case (Kendall 2, 2017). At least five justices agreed to hear the case to lift the stay, and nine justices agreed to a plan to lift the lower courts stay, with a few additional restrictions, and implement the travel ban. This may indicate that a majority on the Court may find the lower courts’ interference in the use of executive power to be improper when the case is heard on the merits in October.

The focus of the Court in lifting the stay was on whether irreparable harm would result if they did not grant the administration the emergency relief they requested. The Justice Department, in its court filing, said the harm is clear. “Preventing the executive from effectuating his national-security judgement will continue to cause irreparable harm to the government and the public interest” (Kendall 2, 2017). The 90-day ban was to develop better vetting procedures for people coming from the six listed countries and the 120-day ban was to develop better procedures for vetting refugees entering the country under the U.S. Refugee Admissions Program. The Justice Department claimed that the vetting procedures did not adequately vet people because the countries where the people are coming from or fleeing from do not have the capability to assist in the vetting process. New procedures are needed to account for a lack of information on the people from home or war-torn countries (Gomez, 2017). Peter Spiro, a professor at Temple University Beasley School of Law, commented, “There’s this long line of immigration law, of precedence at the Supreme Court, that are premised on that kind of reasoning. If they want to uphold the ban, the opinion writes itself” (Gomez, 2017). There is a long line of court precedent that gives the president wide ability to act in the areas of immigration and national security.

Challengers to the travel ban argue that national security was not the administration’s real motivation. They argue that the real motivation was to fulfill a campaign promise to stop Muslim entry into the U.S. In a tweet in June, after his administration asked for the court to grant a stay, Trump tweeted, “People, the lawyers, and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!” (Zapotosky, 2017). Neal Katyal, the lawyer who argued for the challengers in the U.S. Court of Appeals for the Ninth Circuit, wrote on Twitter, “We don’t need the help but will take it!” (Zapotosky, 2017). They hoped comments like this, made after the election and while president, would have made it harder for the administration to get five votes to implement the ban. They still hope these comments will be considered when the Court, this fall, decides the merits of the case. Lower federal judges focused on Trump’s comments to argue that the ban is really a tool for discrimination disguised as a national security device. They also argued that national security cannot be the motivation because the government has been slow to develop vetting procedures. The first ban, calling for time to develop better, enhanced vetting procedures, occurred in January. They argued that, if enhanced procedures were so

important for national security, certainly the administration would have developed and implemented them by now (Zapotosky, 2017).

### **The Travel Ban Again Is Implemented**

On June 26, 2017, the Court lifted the stay on the travel ban and allowed a partial travel ban to take effect (Kendall 1, 2017). The Court allowed a partial ban because the justices said Trump could enforce the ban against foreign nationals who have no connection to the U.S. The president's powers to ban U.S. entry "are undoubtedly at their peak" with these travelers (Kendall 1, 2017). However, foreign nationals from the six countries who have "a bona fide relationship" with people or organizations in the U.S. are to be treated differently. The president cannot prohibit the travel of these people while the case is pending with the Court. The Court also allowed the refugees to be banned unless they could show the same bona fide relationships as the other travelers. The 50,000 cap on refugees was allowed, but refugees entering with a bona fide relationship would not count against the cap (Kendall 1, 2017). The Court also decided to hear the case on the merits in October 2017, after the Court's summer recess. The justices did indicate that they realized that the case might be moot by then.

Supreme Court Justices Clarence Thomas, Samuel Alito, and Neil Gorsuch offered a partial dissent. These justices would have allowed the entire travel ban to take effect. They would not have created an exception for those with certain relationships as they concluded that applying this standard would be unworkable and "invite a flood of litigation until the case is finally resolved on the merits" (Mark, 2017). These cases, Justice Thomas noted, would likely reach the same courts that blocked the travel ban from being implemented in the first place, resulting in another stay.

What exactly a "bona fide relationship" is could cause confusion in deciding who can come into the country. The Court said a close familial relationship is required to enter the country. A spouse or mother-in-law were given as examples of close family relationships. A foreigner who wishes to enter the country to visit or live with a family member would also qualify to enter with the close family relationship. The Trump Administration concluded that "appropriate family relationships" means a parent, spouse, child, adult son or daughter, son-in-law, daughter-in-law, or sibling of a U.S. resident. State Department spokesperson Heather Nauert said officials looked to definitions of family in federal immigration law when crafting additional guidance to immigration officials. Fiancés, grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, and other extended family members did not meet the standard (Mark, 2017). The administration later added fiancées to the list of those in a close family relationship (Lee & Caldwell, 2017).

A relationship to an organization for entry purposes means that "the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of 'evading' the travel ban" (Mark, 2017). The Court noted that a student, accepted to the University of Hawaii, would have such an organizational relationship, as would a worker who has been offered and accepted an employment contract. People who have had green-card cases processed overseas would also gain admittance. However, the Court said that refugee resettlement agencies may not contact foreign nationals from the designated countries, add them to their client lists, and then bring them to the U.S. based on a connection to an organization. The administration concluded that ties to resettlement agencies are not bona fide relationships and are not enough of a connection to gain admittance. The Department of Homeland Security, the State Department, the Justice Department, and the White House all participate in decisions as to what relationships are bona fide ones (Mark, 2017).

### **New Challenges to The Revived Travel Ban**

As Justices Thomas, Alito, and Gorsuch predicted, The State of Hawaii asked U.S. District Court Judge Derrick Watson, from the District of Hawaii, to rule that the administration's newest plan to carry out the travel ban defies the Supreme Court's ruling and conditions to reinstate the travel ban (Gerstein, 2017). This is the same judge that placed the stay on the second travel ban, and went the broadest in imposing a stay that not only affected the part of the ban concerning travelers from the six countries, but also the part of the ban concerning refugees. The lawyers for the state are arguing that the guidance from the Trump Administration is too narrow in its list of family relationships that qualify to be exempt from the ban. At about the same time the motion was filed, the administration added fiancés to the list of those

who would be exempt from the travel ban (Gerstein, 2017). Watson indicated that he would not rule on the motion immediately, but he called for submission of briefs from the two sides to be submitted after the Fourth of July. The State of Hawaii argued that grandparents and grandchildren were ‘close’ family members. The Justice Department argued that if their interpretation did not mean ‘close’ family members, then all family members would be required to be admitted, which is beyond what the Court required (Hurley, 2017). Even the requirement necessitating ties to an organization was questioned. The Hawaii motion states, “It is extremely difficult to see how a foreigner with an agreement to give a lecture within the United States may be considered to have a ‘formal, documented’ relationship with an entity in the United States...but a refugee with a guarantee of a local sponsor and a place to live cannot” (Gerstein, 2017). When Watson ruled on the Hawaii decision, he expanded the list of relationships to include grandparents and grandchildren. He also allowed refugees formally working with a resettlement agency in the U.S. (“Trump administration appeals”, 2017). The Supreme Court justices may now find the need to interrupt their summer vacation to decide whether Watson’s ruling is consistent with their prior guidance in lifting the travel bans.

### **The October Supreme Court Review on the Merits**

#### **Potential Mootness Concerns**

Mootness occurs when the case cannot be heard by the courts because the issues in the case have resolved themselves before the case can be heard by the justices. The Supreme Court was aware of this problem when they lifted the stay on the travel ban. First, if the justices agreed to lift the stay and allow Trump’s executive order to take effect, the 90-day hold on travelers coming to this country would take effect and then expire before the issue of whether the ban was constitutional could be heard by the justices in October (Lovelace, 2017). Leah Litman, a University of California, Irvine, law professor and former clerk to Justice Kennedy, argues that Trump could simply issue an amended order to extend the timeframe in the executive order and avoid mootness (Lovelace, 2017). Second, Marty Lederman, a Georgetown University law professor, argued that, unlike the original order that was blocked by the lower courts, the second order that took effect March 16 did not have the 90-day period specifically blocked by courts. That 90-day period is running and will run out mid-June (Savage, 2017). The administration’s lawyers contend that the 90-day period in the second order was effectively put on hold when the larger issue of whether the president could even issue the order in the first place was addressed (Savage, 2017). The issue of mootness probably does not matter. The Supreme Court decided to take the case in October. If they did not wish to decide the case, they did not have to do this. They could have just dealt with the stay. If the Court wishes to decide the merits of the case, Trump could simply issue a new executive order or modify the timeframe in the second order. Either action could take care of any mootness problems. If the Court changes its mind and decides not to decide the merits of the case (does not wish to hear the case) they could simply find the case moot and dismiss the case without deciding it.

#### **The Request to Affirm the President’s Authority to Make the Travel Ban**

The Constitution divides foreign relations between the president and Congress. The command of the military is given to the president while the regulation of foreign commerce is given to Congress. A purpose of this division was to have the two branches check each other. Presidential power in foreign affairs has increased over time. Increases in presidential power often comes during periods of war or national emergency (Masters, 2017).

The Constitution gives Congress enumerated powers in Article 1 Section 8. For example, Congress can “regulate commerce with foreign nations,” “raise and support armies,” and “declare war.” Congress also has implied powers as the Constitution also says Congress can do whatever is “necessary and proper” to carry out the listed functions in Article I Section 8. The president’s authority in foreign affair comes more generally from Article II. The president has some listed powers in the Constitution such as being the Commander-in-Chief and having the power to negotiate treaties and appoint ambassadors. Congress does check the president. Congress must approve the treaties that the president negotiates with a two-thirds vote in the Senate, and the Senate approves the presidential appointments with a simple majority vote in the Senate before they can take the job. Implied powers, as with Congress, come from the ability to carry out listed powers. Implied powers, and maybe even inherent powers, also come from the fact that the

president is the Chief Executive. This concept has allowed powers that do not stem from the listed powers. In *United States v. Curtiss-Wright Export Corporation*, the Court held that President Franklin D. Roosevelt acted within his constitutional authority when he brought charges against the Curtiss-Wright Export Corporation for selling arms, in violation of federal law, to Paraguay and Bolivia (Curtiss-Wright, 1936). Justice George Sutherland justified expansive presidential powers in foreign affairs because the president is “the sole organ of the federal government in the field of international relations...He, not Congress, has the better opportunity of knowing conditions which will prevail in foreign countries and especially is this true in time of war” (Curtiss-Wright, 1936). The president was considered to have “plenary,” full and complete, powers in foreign affairs.

#### **First issue.**

The Court will hear the case on the merits in the fall of 2017. There are three issues the Court will probably have to resolve in the case when it starts its new session in October. The first, and arguably most important issue, is whether the courts can second guess a president in immigration and foreign affairs. The Constitution clearly leaves the making of policy to Congress and the president. The administration will also argue that, in the Immigration and Naturalization Act of 1952, Congress clearly authorized the president to make executive orders in immigration (Immigration, 1952). The law gives the president the authority to deny entry to any alien or class of aliens. One provision of the immigration laws passed by Congress says: The president may “suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants” if it is determined that their entry “would be detrimental to the interests of the United States” (Liptak 1, 2017). But another, later, congressional provision appears to limit that power by saying that “no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth or place of residence” (Liptak 1, 2017). The Court may not conclude that the second provision limits the president’s powers in immigration and the making of travel bans. Precedent may cause the Court to interpret this congressional provision differently. In *Youngstown v. Sawyer*, the 1952 Steel Seizure Case, the Court said that the president’s authority is most formidable when he is acting with Congress’s consent (Youngstown, 1952). The Court may accept the grant of power to the president from Congress to make laws in immigration, especially since the president already has implied authority to act from the Constitution in Article II. If the president is the primary player in foreign affairs, and if the president is in the best position to assess national security threats, the Court may not conclude that Congress limited the president unless the limitation is very clear and the Court follows the language closely, especially because the travel ban is temporary and in response to national security threats (Jarrett, 2017). Immigration visas are different from temporary travel bans. The congressional limitation may not apply to this case (Weiss, 2017).

A line of Supreme Court cases has traditionally given the president complete and nearly unchecked power to deny foreigners permission to enter the U.S. Three cases are cited often by the government in arguments (Rivkin & Casey, 2017). First, in *Kleindienst v. Mandel*, 1972, the Court rejected a petition from American scholars trying to bring a foreign colleague into the country (Kleindienst, 1972). The colleague was denied admission because he advocated communism. In the Immigration and Nationality Act of 1952, in the exercise of Congress’s plenary power to exclude aliens or create conditions for their entry into the country, Congress delegated conditional exercise of this power to the president. In the 1972 case, The Court concluded three things concerning the president’s exercise of the delegated power from Congress: first, aliens have no constitutional right to enter the country; second, U.S. citizens have no constitutional right to demand the entry of aliens; and third, the executive branch decision to deny admission into the country must be upheld if it is based on “a factually legitimate and bona fide reason” (Kleindienst, 1972). A common “factually legitimate and bona fide reason” for denying admission has been national security.

Second, in *Fiallo v. Bell*, 1977, the Court held that it was constitutional for Congress to grant special preference immigration status to legitimate children and their parents, or illegitimate children and their mothers, while denying admission to illegitimate children and their fathers (Fiallo v. Bell, 1977). Justice Powell, for the majority, said this distinction was a political question best left for Congress, not the

judiciary. These distinctions would be unconstitutional in a domestic-policy context, but in immigration, Congress's power is plenary.

Third, in *Kerry v. Din*, 2015, the Court upheld denying a visa to the complainant's husband who was a member of the Taliban (Kerry, 2015). Justice Kennedy, in a concurring opinion and quoting *Kleindienst v. Mandel*, stated that, once the government had articulated a facially legitimate purpose, the courts cannot probe whether there might be an additional improper purpose. Taken together, these three cases indicate that courts should give deference to Congress when Congress decides to delegate law making powers on immigration policy. The courts also should give deference to the executive branch when the president exercises the delegated powers and makes immigration rules.

Chief Justice Roger Gregory, writing for the majority of the Fourth Circuit in *International Refugee Assistance Project v. Trump*, said that "the stated national security interest is, on its face, a valid reason" for the order (International, 2017). The Court may conclude, when they review the case, that lower courts should have upheld the president's actions based on the fact the presidential powers on immigration are plenary, and they cannot be limited by implication by Congress. If Congress does not clearly limit the president when granting law making powers, the Courts can conclude that Congress did not limit the president. To counter this argument, those challenging the administration will point to the Immigration and Nationality Act of 1965 which bars discrimination against immigrants based on national origin (Immigration 2, 1965). They will make two arguments. First, they will argue the president is beyond delegated lawmaking powers because he is discriminating in the travel bans on national origin, and this is not allowed by Congress. Although this 1965 law protects immigrants from national origin discrimination, it does not apply to refugees or temporary visitors. Thus, it cannot apply to this case. Second, they will try to argue that the 1965 law bars religious discrimination. However, 1965 law also does not ban discrimination based on religion, or even mention religion, so the law cannot be used to try to strike down the travel bans for religious reasons. The Court may use these distinctions to ignore the 1965 provision and not apply it to this case.

A stronger attack on Trump's ban may be to challenge the ban based on religious discrimination that violates the First Amendment's Establishment Clause. This challenge would be important in the first travel ban which gave priority to Christian refugees. However, that provision was removed from the second travel ban. As not all Muslims or people from all Muslim countries are banned, it is hard to argue that a religion is being banned from the country.

It could be argued that, regardless of the 1965 limitation, a ban to keep Muslims out of the country violates the Establishment Clause of the Constitution. The Establishment Clause does not allow the government to treat one religion differently from another. Muslims cannot be kept out of the country simply because they are Muslim. It could be argued that the first travel ban is an unconstitutional and discriminatory travel ban. It clearly treated Muslims and Christians differently when entering the country. The second travel ban, however, may not violate the Establishment Clause. Taken on its face, the second travel ban does not seem to discriminate against Muslims. It all depends on how the Court decides executive orders should be interpreted.

The government will argue that Trump's travel bans do not ban all Muslims from around the world from coming into this country, only people from certain countries. The reason for banning people from certain countries is clearly stated in the travel ban. The listed countries are unstable and any people from those countries cannot be properly vetted. People coming from those countries are mostly Muslim simply because they are Muslim-majority countries. Should they come in the United States, any Christians from those countries are not treated differently from the Muslims in the second travel ban. The people from the listed countries are kept out for national security reasons. Thus, it is hard to argue that the second travel ban is a Muslim ban.

The only way to attempt to argue that the second travel ban is discriminatory against Muslims is to go past the language of the bans and consider Trump's statements about Muslims that he made during his campaign when trying to interpret the intent of the bans. However, this argument may not be persuasive because the Court could require interpretations of Congressional statutes and executive orders to be solely based on what is written in those laws and orders. The Court may also decide that the Fourth Circuit, in

this particular case, should not have concluded that Trump was acting in bad faith when making the travel bans based on statements about Muslims while a candidate. The fact that there were valid national security reasons stated in the executive order as the reason for making the ban should have ended the inquiry into its constitutionality. Like Justice Holmes once wrote, the job of the courts, when interpreting statutes of Congress, and in this case presidential executive orders, is to take the statute and order at face value (Holmes, 1920). If this approach is used, it would be hard to call the ban a “Muslim ban” because the executive order does not state that it is based on religion.

The Fourth U.S. Circuit Court of Appeals, among other federal courts, in the disguise of reviewing the travel ban, has ignored Supreme Court precedent. Acting Solicitor General Jeffrey B. Wall argued that the constitutional conflict over presidential powers and questions over how the judiciary should interpret statutes and executive orders have taken on greater importance than the details of the travel ban. He wrote, “This order has been the subject of passionate political debate. But whatever one’s views, the precedent set by this case for the judiciary’s role in reviewing the president’s national-security and immigration authority will transcend this debate, this order and this constitutional moment. Precisely in cases that spark such intense feelings, it is all the more critical to adhere to foundational rules” (Savage, 2017). If the lower courts are followed, looking beyond what is written in executive orders or looking past the text of a congressional statute will cause the courts to engage in unacceptable policy making. It could also cripple the president’s ability to defend the country. Making foreign policy is simply not the job of the courts.

As these two lines of attack may not be successful, challengers to the second travel ban are looking at Trump’s statements both before becoming president and as president. They are trying to argue that the president is making travel bans to discriminate against certain types of people and certain religions. They point to Supreme Court cases where the executive branch was checked by the Court. For example, in *Youngstown v. Sawyer*, President Truman was not allowed to seize and operate domestic, privately owned steel mills even in a time of emergency (Youngstown, 1952). But, in this case and others, the Court is very clear that there is a difference between domestic and foreign policy. The president has far more latitude to do things in foreign affairs than he can do in domestic affairs. No president can discriminate in domestic affairs. But these constitutional constraints have not been applied in the same way by the Court in foreign affairs. If the Court makes a sharp break with precedent and now looks beyond orders and statutes to decide their meaning and whether the framers of these documents are lying and secretly trying to achieve discriminatory purposes, this will be a very profound and far reaching case. Deciding the case this way would also, then, require the Court to decide two other issues.

#### **Second issue.**

A second issue, especially if the Court decides to go beyond the reasons stated in the executive orders for the ban, is whether the administration is banning a territory or a religion. Candidate Trump advocated for a Muslim ban. Justice lawyers argue that his thinking on the bans has evolved and he is focused on national security threats from particular areas (Gomez, 2017). They point to the fact that not all Muslims are banned. The ban only applies to six specific countries. They also point to the fact that Christians are not given preference under the second travel ban. Those challenging the bans will point to statements that Trump made around the same time that the administration requested Supreme Court review. He referred to the ban as a Muslim ban. Therefore, isn’t he really trying to discriminate on the basis of religion when he made these travel bans? This analysis is the type of analysis the courts will have to engage in if they do not limit their analysis to what is actually written in the order (“The Fourth Circuit presidency”, 2017). It is hard to see how courts would want to go down this road.

#### **Third issue.**

The third issue is whether the national security concerns are sufficient. The second travel ban included a country-by-country outline of on-the-ground conditions that makes it difficult, if not impossible, to have the countries input in the vetting process on people coming from those countries to the U.S. The second travel ban also includes ties of the banned countries to terrorist organizations. They have either been significantly compromised by terrorist organizations or they contain active conflict zones. The order says that these conditions “diminishes the foreign government’s willingness or ability to



share or validate important information about individuals seeking to travel to the United States” (“Trump travel ban”, 2017). Judge Dennis Shedd, a justice on the Fourth Circuit, also pointed to statements by Attorney General Jeff Sessions and Department of Homeland Security Director John Kelly who both argued that the ban was necessary for national security. Judge Shedd, during oral arguments, asked whether these statements should also be considered when analyzing the national security threat. Judge Barbara Milano Keenan, also on the Fourth Circuit, wrote that the travel ban outlines broad conditions of lawlessness in the six targeted countries and the travel ban establishes them as terrorist safe havens (Gomez, 2017). However, she was concerned because she believed that the government never clearly established a link between those countries and the likelihood that someone coming from one of those countries would become a terrorist. None of the people who committed major terrorist attacks against this country came from those countries. But, should a sitting president have the rationale for national security be so probed? This probing demonstrates more of a decision that the president is lying and trying to find ulterior motives for the president’s actions than it demonstrates a review that simply looks to see that a rational reason exists for the order.

### Conclusion

Justice Oliver Wendell Holmes did not want courts second-guessing what lawmakers and presidents meant in statutes and executive orders. Congress is in control of lawmaking including immigration. Congress is elected by, and answerable to, the people. If Congress is unhappy with the second travel ban, Congress should create and pass a comprehensive immigration policy. Until that time, the president has been delegated, by Congress, the ability to make immigration adjustments to the law Congress has passed and fill in the details of the law as needed. Judges do not make policy. Especially in the federal courts, judges are not elected and they are not directly answerable to the people. They are appointed and have their job for life. They are not given the power to make policy by the Constitution. Judges may disagree with this administration’s policies. They may believe the wrong person won the election and wish to correct what they consider to be a serious mistake on the part of the electorate. However, Alexander Hamilton, in Federalist No. 78, said that the judicial branch would be the weakest of the three branches. It had “no influence over either the sword or the purse, ...It may truly be said to have neither FORCE nor WILL, but merely judgement.” A courts job is to interpret and decide if what they interpreted is constitutional. It is not to make policy especially when they simply do not like a president or the president’s policies. If the courts go down this road, they will rapidly lose legitimacy. They need to allow political questions over whether the correct policy was chosen to resolve itself in the political arena. The courts only real authority to operate depends on whether citizens believe the courts have the authority to act and the courts actions are legitimate. If the courts start weighing in on political matters, they will easily lose a sense of authority and legitimacy with at least half of the nation. To avoid being seen as making policy or taking sides in the political arena, the courts need to assume that what is said in statutes or executive orders is legitimate. They need to resist the urge to assume other branches of government are lying to the courts to open the door to making policy. This would open the door to excessive legislating by courts.

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# Uradnik v. Inter Faculty Organization, et al: Can a Faculty Member Refuse Union Representation?

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At the core, labor unions are working men and woman, unified as one force. Despite any personal differences that may exist between us, we have banded together to protect and improve the lives of workers. We rise up together for the greater good. We defend one another like family. (Carney, 2014).

Union solidarity appears to be cracking along partisan lines. Some people represented by unions are no longer happy with their union representation. In June 2018, the U.S. Supreme Court (Court) came to a decision in *Janus v. AFSCME*. The Court decided that public employees do not have to pay agency fees (fair-share dues) to unions to cover the cost of collective bargaining (*Janus v. AFSCME*, 2018). The Court had five justices in the majority and four in dissent. These justices also split along partisan lines. In 2018, a Saint Cloud, Minnesota professor filed a federal lawsuit alleging that her Freedom of Speech rights were being violated because she is being represented by a union with whom she disagrees. This paper will analyze *Abood v. Detroit Board of Education* (1977) and *Janus* to compare the possible issues and potential outcomes in the new case, *Uradnik v. Minnesota*, and offer suggestions for public sector unions to survive in the future (*Uradnik v. Minnesota*, 2018).

## ***Abood v. Detroit Board of Education***

A Michigan statute, authorizing exclusive union representation of local government employees, permitted an agency fee agreement in which the union would represent all government employees under the condition that all employees must either join the union or pay an agency fee to cover bargaining expenses. The appellant teachers did not approve of this agreement. They objected to paying union dues because they oppose collective bargaining in the public sector. They also objected to certain union political and ideological activities that were beyond the scope of collective bargaining activities. These activities included endorsing certain political candidates, which they believe violates their First and Fourteenth Amendment Freedom of Association.

In *Abood*, Justice Potter Stewart wrote the majority opinion. He was joined by Justices William J. Brennan Jr., Byron White, Thurgood Marshall, William Rehnquist, and John Paul Stevens and three justices wrote concurring opinions. The Court concluded that the agency fees used in the private sector were also constitutional in the public sector. Those who did not choose to belong to the union could be required to pay agency fees to cover the cost of collective bargaining, but they did not have to pay for political or ideological activities that went beyond contract negotiation and administration. In arriving at this decision, the majority used private sector precedents in *Railway Employees' Dept. v. Hanson* (1956) and *International Assn's of Machinists v. Street* (1961). In *Hanson*, the Court held that requiring financial support for a collective bargaining agency by those who received the agency's benefits did not violate the First Amendment. The Taft-Hartley Act of 1947, which applied to the private sector, also allowed state law to provide for union security agreements (Taft-Hartley, 1947). Preventing free-riding was a valid rationale for the inclusion of agency fee clauses in collective bargaining agreements. In *Street*, the Court ruled that unions could not use agency fees for political purposes opposed by nonunion members. In *Abood*, the majority concluded:

A public employee who believes that a union representing him is urging a course that is unwise as a matter of public policy is not barred from expressing his viewpoint, but, besides voting in

accordance with his convictions, every public employee is largely free to express his views, in public or private, orally or in writing, and, with some exceptions not pertinent here, is free to participate in the full range of political and ideological activities open to other citizens (*Abood v. Detroit Board of Education*, 1977).

The use of the Taft-Hartley Act and these two private sector cases allowed the Court to conclude that the Constitution permitted compelled contributions from public sector employees, but only for the costs of performing the union's statutory duty to be the exclusive bargaining agent for all employees, regardless of union membership.

Since 2006, when Justice Samuel Alito joined the Court, anti-union groups tried to challenge *Abood*. The focus of attacks has concentrated on the difficulty of separating political activities from contract negotiation activities. For example, it is hard to argue that a union that campaigned for certain political candidates, who support workers and negotiated contracts, does not also help union contracts get adopted by the legislature. It is hard to know what activities are beyond negotiating and getting contracts ratified. Agency fees to nonunion members have become 75% of union dues or greater (Lehman & LaPlante, 2018). In 2016, the Court had been prepared to overrule *Abood* in *Friedrichs v. California Teachers Assn's* (2016), however, the sudden death of Justice Antonin Scalia caused the Court to deadlock 4-4. This left the *Abood* decision the law of the land.

#### ***Janus v. AFSCME***

In November 2014, Bruce Rauner was elected the governor of Illinois. He ran on an anti-union platform. He took office in January 2015 and issued an executive order that suspended the collection of agency fees from non-union members. The American Federation of State, County, and Municipal Employees (AFSCME) represented all Illinois public sector employees. They were selected to be the sole union to represent all workers equally. As a result, union members pay full union dues. In contrast, non-union members, who did not want to belong to the union and pay full union dues, were charged agency fees to cover the cost of union negotiation of their employment contracts. This is an agency shop agreement. Rauner also filed a lawsuit in the United States District Court for the Northern District of Illinois against AFSCME challenging the agency shop agreements and fees as being an unconstitutional violation of the First Amendment.

The union sought to dismiss the case and claimed that Rauner did not have standing to bring the lawsuit. In May 2015, the District Court found that Rauner did not have standing because he had "no personal interest at stake." Three employees, including Mark Janus, an Illinois child support specialist, tried to join the governor's suit as co-plaintiffs. The judge denied this request, but allowed the three employees to continue the case as the sole plaintiffs. In July 2015, the Court issued a writ of certiorari in *Friedrichs*, meaning the Supreme Court would be hearing the case. *Janus* was put on hold pending the outcome of *Friedrichs*. With no decision from *Friedrichs* after the Court split 4-4, the *Janus* case was restarted. The issue in the case was whether agency fees, required by the agency shop agreement, violated workers' First Amendment right of Freedom of Association and Freedom of Speech. Workers were forced to associate with the union as it was the only organization who could negotiate contracts with the state. Workers believed that their speech rights were violated because they had to pay fees used by the union to advocate positions they disagreed with. The union sought to dismiss the case by arguing that *Abood* was settled law and barred the *Janus* case as the *Abood* case decided agency shop agreements did not violate the Constitution. The District Court dismissed the case. The case was appealed to the Seventh Circuit. In May 2017, the appellate court affirmed the District Court's decision and dismissed the case on the basis of *Abood*.

#### **Majority Opinion**

Janus petitioned the Supreme Court for a writ of certiorari and the petition was granted in September 2017. In June 2018, the *Janus* case overruled *Abood* with the help of newly confirmed Justice Neil Gorsuch, who filled Scalia's seat on the Court. Writing for the Court, Justice Samuel Alito, joined by Chief Justice John Roberts and Justices Anthony Kennedy, Clarence Thomas, and Neil Gorsuch, wrote that *Abood* was "inconsistent with standard First Amendment principles," because fair-share fees for collective bargaining activity effectively compelled nonunion employees to subsidize union speech on

matters of “great public importance” (*Janus v. AFSCME*, 2018). He also wrote that *Abood* was “poorly reasoned,” “unworkable,” and inconsistent with other First Amendment cases (*Janus v. AFSCME*, 2018; Matthews, 2018).

Alito recognized the importance of *stare decisis*, which means courts should use prior decisions to decide current cases, even if a justice believed a prior case was wrongly decided. The justices should accept the case as precedent. Alito, however, had argued for six years that *Abood* was so poorly reasoned that it needed to be overturned. *Abood* was inconsistent with other First Amendment cases and the use of the case as precedent led to practical problems and abuse. Also, the cases relied upon in *Abood* are for private sector employees not public sector employees. A different First Amendment question arises when the government, versus a private employer, forces an employee to pay agency fees.

Alito also clarified that the approach the Court must use to resolve the dispute in this case is strict scrutiny. When a government interferes with a fundamental right, like Freedom of Speech or Association, the Court subjects the government’s law to the most ridged scrutiny. Under strict scrutiny, the government bears the burden of proof in the courtroom, not the one challenging the law. The government must establish a compelling need for its law in order for the Court to uphold a law that interferes with a fundamental right. The law also has to be written in the least restrictive fashion to achieve the government’s compelling need for the law. Alito criticized the dissent in the case for using rational basis to reach their conclusions. If rational basis is used, the burden of proof in the courtroom is on the challenger, not the one that made the law. The law simply needs to be rationally related to a legitimate government interest for the state to win. Rational basis is usually not used to protect rights. Only the most egregious enactments are overturned under this approach. Greater leeway is given to the government. Alito writes that strict scrutiny must be used in this case because the law interferes with a fundamental right. This is in part what concerned him when he wrote that *Abood* was not well reasoned. *Abood* did not clearly indicate that strict scrutiny was being used. Alito finds that the government’s compelling need for an agency shop agreements was to have one union solely represent the workers in contract negotiations. This was needed to encourage “labor peace.” In *Abood*, labor peace meant avoiding the conflict and disruption that would occur if employees were represented by more than one union. The Court in *Abood* predicted multiple unions would create inter-union rivalries and dissention among the workforce. The employer could face “conflicting demands from different unions” (*Abood v. Detroit Board of Education*, 1977). The employer would face confusion in attempting to enforce more than one labor agreement. This argument demonstrates an inconvenience to the government if an agency shop is not used to work with employees, but it does not establish a compelling need for agency fees. The Court in *Janus* left the argument of whether an employee can be forced to accept a union as the employees bargaining unit for another day and case. The focus in *Janus* was whether agency fees can be imposed on those public employees represented by the union, but do not pay union dues.

In *Abood*, the Court required the agency fee to be narrow. Agency fees were needed to support the work of that union in negotiations. It was important to avoid free-loading, meaning having non-union members get the benefit of the union’s contract negotiations without helping the union members pay for that activity. Since it was important to have one union represent the entire workforce, all employees should have to pay, regardless of union membership, to achieve labor peace. There would be too much worker conflict if non-union workers did not have to pay for contract negotiations when union members had to pay for everything. In *Abood*, the potential strife between union and non-union members over negotiation fees was compelling enough to support agency shop agreements and agency fees. However, in *Abood*, the Court decided the agency fee could only cover contract bargaining fees. This became the fair-share/agency fee cost non-union members had to pay for to keep the representation costs evenly distributed among benefited workers. The fees could not cover all union activities, especially those activities that advocated a political agenda, such as work done for a particular political party, a particular party candidate, or to advocate positions on non-contract issues. This would be overly broad and interfere too much with First Amendment freedoms like speech and association.

Alito did not agree with the Court in *Abood* that potential free loading posed such a compelling problem that agency fees should be allowed. He used several examples to support this assertion. First, in

the federal system, one union is elected by the members to negotiate contracts, but federal law does not permit agency fees. Nevertheless, out of nearly a million federal employees, about 27% of the federal workforce, are union members (*Abood v. Detroit Board of Education*, 1977). The same is true for the Postal Service. Second, 28 states are right to work states, meaning that a union is selected by the workers to represent them in contract negotiations, but agency fees are prohibited. Again, the worker strife predicted in *Abood* 40 years ago has not materialized. Therefore, labor peace can be achieved with fewer restrictions on First Amendment rights.

Union speech in the context of collective bargaining is not apolitical (McArdle, 2018). Alito argues that everything public sector unions do in collective bargaining is political and the speech has major political ramifications, especially as it affects pensions and public sector spending. He points to Illinois, which, as of 2013, had nearly \$160 billion in unfunded pension and retiree healthcare liabilities. By 2017, those unfunded costs had grown, and the state had \$15 billion in unpaid bills. Illinois' credit rating had fallen to "one step above junk" (*Janus v. AFSCME*, 2018). This was the lowest rating ever recorded for a U.S. state. The governor argued that employment-related debt is consuming the ability to spend on all the rest of government's functions such as education, public safety, human services, and the state's ability to pay its current bills. The government wanted to address the problem in part through collective bargaining in areas like health insurance benefits, overtime, promotions, and other employment expenses. The union countered with suggestions like "increasing taxes in accordance with one's ability to pay," "cutting spending to Wall Street financial institutions," "closing corporate loopholes," "expanding the base of the sales tax," and increasing wages (McArdle, 2018). Public sector employees disagree over these issues and are not solely represented by one political party. Forcing workers to support policies through contract negotiations that they do not believe in is compelling them to speak with their money for solutions they disagree with.

Since agency shop arrangements do not satisfy strict scrutiny and *Abood* did not clearly apply strict scrutiny analysis, Alito thought there were strong reasons that *Abood* should be overruled despite being the law of the land for over 40 years. The state may find it very convenient to have no more than one union to bargain with, but does convenience rise to the level of a compelling need? The practice of requiring all workers to support and be represented by one union was left for the upcoming *Urdrnik* case. A union and the state may find it necessary to have employees pay for that negotiation, since free-riding by non-paying union members is certainly not fair. However, Alito concluded that these concerns do not create a compelling need for the state to coerce employee speech by requiring them to pay union dues as a condition for their employment. Requiring non-union employees to pay agency fees was coerced speech, and coerced speech has traditionally been considered a major First Amendment violation. This caused *Abood* to be overruled despite the strong presumption that a court should not ignore *stare decisis* and overturn prior cases.

Finally, and unexpectedly, Alito required that, for the first time, workers in the public sector had to opt-in to unions and union dues. No longer can it be assumed that everyone is in the union and willing to pay dues, even agency fees. This procedure, he concluded, violates the First Amendment. Only by expressly agreeing to pay agency fees can it be said a worker has waived their First Amendment rights. A waiver cannot be presumed. This could substantially reduce union membership (Matthews, 2018).

### **Dissenting Opinion**

Justice Elena Kagan, joined by Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor, wrote a defense of *Abood* in a dissenting opinion to Alito's majority opinion in *Janus*. She was concerned that the Court is not giving proper deference to *stare decisis*. She sees the majority as tossing out precedent simply because they no longer like the case or find the case inconvenient. To her, this was the Court's attempt to usurp powers from legislatures and to make policies that are better left to elected branches of government. *Abood* struck a balance between employees' First Amendment rights and government employers' interests in running the workforce as they sought proper. Employees, not members of the union, had to pay agency fees to the union so they carried their own weight in negotiations. However, the union could not use any part of those agency fees for the union's political or ideological activities.



After 40 years, Kagan concluded that *Abood* is embedded in employment law. It has been cited in many other cases and the case is central to collective fair share bargaining fees, which government can charge to all workers, when full union fees cannot be charged to all. The government and the people have relied on this precedent. Instead of discussing strict scrutiny or even rational basis, she focuses on the fact that government entities have “substantial latitude” to regulate their employees’ speech, especially about terms of employment, so that they can operate their workplaces effectively. Overruling *Abood* will “require an extensive legislative response” and “dislodge settled rights and expectations” (*Janus v. AFSCME*, 2018). Twenty-two states have enacted statutes authorizing fair-share provisions. Agency shop agreements enabled the government to advance important managerial interests by ensuring exclusive employee representatives to bargain with. Agency shop agreements are a *paradigmatic necessity*. Overruling *Abood* will have great consequences. Unions will lose a secure source of financial support. Each state will now have to come up with new solutions and enact new laws to find a way to manage their workforce. The relationship between government workers and employees will alter in predictable and unexpected ways. Kagan was disappointed with the majority when they responded to this concern by stating, in a footnote, that the implementation of their case is of no concern to the Court (*Janus v. AFSCME*, 2018). The paradigmatic concerns and the fact that *Abood* resolved these concerns for over 40 years was most persuasive to Kagan. Agency shop agreements need agency fees so the union has the funds to be the sole representative of all the employees. The government needs the union to gain the benefits from exclusive representation. This relationship helps facilitate stable labor relations. It is too hard to negotiate and implement different contracts with different terms as well as attempting to settle grievances from multiple contracts. There was a strong practical reason to keep the case through stare decisis, especially since there may be no better way to manage public sector relationships. It is self-evident to Kagan that these are compelling concerns. She is not analyzing the state’s concern through rational basis.

Kagan concluded that the decision weaponized the First Amendment and will allow judges in the future to intervene in economic and regulatory policy. The Court overruled *Abood* for no exceptional or special reason. The Court simply wanted to pick winners and losers in this policy debate. This reader believes she might be arguing that the majority is actually using a preferred freedoms approach to Freedoms of Speech and Association. When the preferred freedom approach is used, rights are placed on a pedestal and no state interests are allowed to interfere with those rights, even if interests are compelling. The majority uses the words “compelling need,” but actually may not be open to any government infringement of these rights, no matter what need is articulated by the state. Worse, the use of the preferred freedoms approach may not be uniformly applied to all rights. Only rights particular justices want to protect are put on a pedestal and given the preferred freedom approach. Other rights are given the direct scrutiny approach. The Court might actually be using the stricter standard (preferred freedoms) when the Court simply dislikes the state’s law. This is picking winners and losers in disputes by “weaponizing” speech and press rights. Some states and local governments think that unions promote healthy labor relations. Other states think strong unions increase costs and impair the delivery of other government services. Twenty-two states wanted strong unions and fair-share fees and twenty-eight did not. The country was closely divided. Kagan argues that the states should be free to decide for themselves what they wanted for their workers. In this case, the Court has forced all states to adopt one model when it was not constitutionally required. Almost all economic and regulatory policy affects speech. Now judges can intervene to make policy when that is more appropriately left to legislative bodies.

***Uradnik v. Inter Faculty Association, et al***

Political Science Professor Kathleen Uradnik is suing St. Cloud State, the Inter Faculty Organization (IFO), and the Minnesota State Colleges and Universities System’s Board of Trustees (Uradnik, 2018). The IFO represents faculty in negotiations with the State of Minnesota. It has been designated as the exclusive representative to negotiate with the state for faculty contracts. Uradnik has no choice but to use the union to negotiate her contract. Until the *Janus* decision, she paid fair-share union dues. After *Janus*, she is not a paying union member. She is represented by Robert Alt, The Buckeye Institute’s president and chief executive officer. The Institute is a non-partisan research and education organization, a think

tank, that advocates in favor of the free market. The Institute was the first organization in the country to file lawsuits after *Janus*, asking courts to end compelled exclusive representation. The organization represents Professor Uradnik in Minnesota, Jade Thompson in Ohio, and Professor Jonathan Reisman in Maine. She argues that she did not ask for nor wants union representation. This violates her free speech rights because she has no choice but to support the union's actions, even if she disagrees with them (Marohn, 2018). Her lawsuit alleges that this forced representation deprives her of the right to petition the government on her own behalf. Uradnik also claims that the union undermined her ability to advance her career and routinely interfered with her professional opportunities and relationships. She claims that the IFO discriminates against non-union faculty members by "barring them from serving on any faculty search, service, or governance committees, and even bars them from joining the Faculty Senate" (Buckeye Institute, 2018). The IFO has the exclusive right to appoint faculty members to "system-level" committees, which "oversee tenure, workload expectations for faculty, establishes endowed chairs, awards funds for professional development, establishes departments and department chairs, and more" (Gottschling, 2018). She claims that this treatment "impaired her ability to obtain tenure, to advance her career, and to participate in the academic life and governance of her institution." This makes non-union faculty members second class faculty members and gives special preferences to union members (Gottschling, 2018). Alt said that the *Janus* decision "strongly hinted that exclusive representation, from a First Amendment standpoint, rests on very shaky ground" (Associated Press, 2018). Alt further said that the Court stated, "In no other context would we permit an individual to be forced to speak or associate with someone with whom they disagreed" (Marohn, 2018).

Brent Jeffers, the president of the IFO, said that the lawsuit "is part of a nationally coordinated strategy by powerful forces aimed to destroy collective bargaining" (Associated Press, 2018). He went on to say, "It is a direct attack on our shared values and collective voice. United, we are powerful advocates – and our solidarity threatens the national anti-labor organizations behind these attacks. Our members know that a strong faculty union is vital to the success of our students and communities. In the face of these attacks, we stand united and will continue our mission of providing an extraordinary education that is accessible and affordable for all" (Marohn, 2018). Adam Hammer, a spokesman for St. Cloud, said that whatever happens in the case, "[It] will have no impact on the constructive relationship we have with our faculty and staff, the labor unions that represent them, or our shared commitment to the success of our students" (Gottschling, 2018).

Uradnik's case was filed on July 6, 2018, in the United States District Court for the District of Minnesota. A preliminary injunction motion was filed on July 31. She requested a temporary order to block the union from acting as a non-member's sole bargaining agent. On September 27, 2018, Minnesota Federal District Court Judge Paul A. Magnuson denied the motion for a preliminary injunction in the case. The Buckeye Institute filed its notice of appeal with the U.S. Court of Appeals for the Eighth Circuit (Uradnik, 2018). A ruling in her favor could put her and her university in uncharted territory. She may be left on her own to negotiate wages and benefits and her university may be free from its obligation to bargain with the IFO (Iafolla, 2018).

#### **Possible Resolution of Uradnik**

Professor Uradnik will probably have standing to bring her lawsuit. While she is not now being forced to pay fair-share fees, she claims that she is barred from joint committees. Those committees are reserved for union members and consist of faculty and the school's administration. She claims this hurts a non-union faculty member's chances for promotion. This is possible, although ad hoc joint committees are open to all faculty regardless of union membership because they are created to handle one-time issues. These committees contain administration as well as faculty. Certainly, a faculty member that is known by the school's administration and a faculty member whose work on committees was observed first hand by administrators would have an edge for promotion as the faculty member's promotion file moves through the administration.

Faculty members must compete for special grants and monetary rewards distributed by various committees. This money can be used to lessen a faculty member's work load. Fewer teaching duties can create options for more research, which is crucial for promotion. This is additional income. Under

Minnesota's employment contract, a faculty member is given money equivalent to one conference each year in professional development funds. If a faculty member never wins such monetary rewards, they still can attend one conference.

Uradnik is not barred from all committees. Department committees, unlike ad hoc joint committees, are long-term committees. They are open to all department faculty regardless of union membership. Examples of the type of committees at the department level are hiring committees, personnel committees, curriculum committees and others. It is also not a requirement to be a union member to be a department chair. She mentions not being able to be on a faculty senate, but not all Minnesota schools, like Minnesota State University, Mankato, have a faculty senate. This writer, while also in the Minnesota system, has not had any experiences with faculty senate and cannot comment on its membership.

If her sole argument for standing to bring a lawsuit was simply that she is represented by a union she does not agree with, she might not have standing. In agency shop agreements, the workers are supposed to vote for the union that will represent them. If this were the case and the union won the election to be the sole union representing the workers, then she would not have standing. She would simply look more like a disgruntled worker who did not get her way in an election and who is now trying to overturn that election through the courts. However, this writer has been in the same system for 30 years and does not remember an election over which union is supposed to represent the workers in the system. This is a problem that needs to be remedied with more frequent elections to recertify the union or vote in a different union. This way workers are actually able to make a choice and have input. Then the argument that the democratic process should not be challenged has more legitimacy.

Strict Scrutiny should be the standard that is used to decide if a state has a compelling need to have an agency shop arrangement. State law that interferes with a fundamental right can be upheld if the state shows a compelling need for the law. States should have the right to negotiate with their employees as they see fit. Schools should not be forced to follow federal dictates on relationships with their workers. The state may not be able to present a compelling need for the use of agency fees. However, they may be able to show a compelling need for the use of agency shop agreements for collective bargaining. All states and the federal government may not require agency fees, but they all use unions to negotiate contracts. Workers should not be on their own to negotiate wages and benefits. It is hard to imagine a system where every employee hired their own attorney or tried to negotiate on their own. Workers could lose their ability to make important choices about workplace governance as well as effectively negotiate contracts. It would take the state tremendous resources in terms of the numbers of negotiators and time it would take to settle contracts individually. Certifying an elected union to conduct the contract process is the most practical way to conduct this business. Also, it is the only way to make sure there is only one contract and only one pay scale. Multiple contracts will only raise challenges and potential discrimination claims. Individuals would also be too burdened with an individual system. With the average attorney charging \$300 an hour, workers would find they need to contract in groups or find any pay raise going to attorney fees to negotiate the contract.

The IFO countered Uradnik's arguments by pointing to two court cases. In *Minnesota State Board for Community Colleges v. Knight*, (1984), the IFO says the Court already rejected a First Amendment challenge to a union's exclusive representation of faculty in the Minnesota Community College system. This case could be used to appeal to Kagan and others who still give more than lip service to stare decisis. Uradnik counters the *Knight* decision by pointing out that the case does not support a union's exclusive representation of nonmembers because there was no issue or discussion of compelled speech. Also, on August 14, 2018, the IFO tried to use the fact that the U.S. Court of Appeals for the Eighth Circuit reaffirmed the constitutionality of exclusive representation in certain bargaining activities under Minnesota law (*Bierman v. Dayton*, 2018). The Circuit Court said *Janus* did not mention *Knight* nor supersede it (Iafolla, 2018). However, the U.S. Supreme Court is not bound by what an appellate court decides.

While this writer sees many practical arguments that could rise to the level of a state being able to argue for a compelling need to negotiate through unions. Alito, in *Janus*, wrote that a union, as the exclusive bargaining unit, is a "significant impingement on associational freedoms that would not be

tolerated in another context” (*Janus v. AFSCME*, 2018). The Court, as in *Janus*, may not see unions as the solution. The resolution of *Janus* and now *Uradnik* could have wide reaching effects. If the Court abolishes exclusive representation in the public sector, this decision could spill over to the private sector. This could still happen with *Janus* and agency shop fees. Maybe a different end result for *Uradnik* could be multiple members-only unions representing different fractions of employees working alongside each other. But, just as with every employee negotiating their own contract, this could result in an unworkable and overly complex system. It does not lessen problems. Worse, the arrangement could cause worker strife and a loss of cohesion through a loss of solidarity to one union and feelings of competition between unions.

### **Is There Still a Future for Unions?**

If *Uradnik* wins her case, the future for unions will be very bleak. Unions lost stable funding in the *Janus* case. If unions cannot be designated as the sole negotiator for groups of workers, collective bargaining, and therefore unions, will die.

There are things unions can do about the loss of funding from *Janus*. Alito suggested unions could charge nonmembers for representation in disciplinary actions or refuse to represent nonmembers. However, this does not mean that all state laws currently allow for this. Also, this would divide workers and undermine solidarity. Only united are unions powerful. Despite Alito’s suggestion, unions should avoid the temptation to divide workers and treat workers differently (*AFSCME*, 2018). Anti-labor groups are hoping workers will quit the union to give themselves some extra pay (Kamper, 2018). This writer expects anti-labor groups to go worker by worker to convince people to end their union membership and give themselves a pay raise by saving union dues. These groups will be successful with some workers. It is human nature to try to get something for free. Why stay in a union when one can get the same benefits for free?

What should unions do? First, unions need to increase communication with their members. Only if workers are aware of what is happening, can workers inoculate themselves from tactics to abandon their union (Semuels, 2018). Second, unions need to investigate their history and teach that history. People do not know, through concrete examples, how unions have helped workers in the past. Union solidarity and benefits are just not taught in schools anymore, even in what used to be pro-union states (Bruno, 2018). They were taught in Minnesota history classes because of the strong influence of the steel mines in Northern Minnesota. Third, unions have been given the exclusive right to represent all workers in the workplace. Unions need to take this task seriously. Unions need to show self-restraint and avoid becoming political on topics beyond their workplace needs. They were put on notice in 1977 in *Abood* that too much involvement in one political party or too much involvement with politicians from just one party would not be tolerated with forced dues. Unions serve workers who are Republicans as well as Democrats. Unions need to focus on contracts and salaries. Workers who want to enter the political arena can do so on their own. Unions should not get in front of their legislatures, governors, or courts. Laws should not be made or changed through union contracts. Policies should be pursued through lawmaking branches of government instead. Fourth, unions should have more listening sessions (Berkovitz, 2018). When everything comes to people from a mass meeting in an auditorium, it is hard to build individual communication with members and demonstrate that the union cares about individual members. Fifth, unions need to stand as a rallying point for worker solidarity. They should not fall into the trap of degrading people who are not members of the union through sharp verbal cuts or degrading words. Better to encourage workers to join unions than have unions ignore or at worse degrade workers who are not members. The focus needs to be on building solidarity through inclusion and collective support. Support, through help when most needed such as in contract disputes. Finally, there are some additional things unions can offer. Professional development training in seminars and workshops, or classroom support, could be offered so workers can better do their jobs. These activities are always appreciated (Hertel-Fernandez & Porter, 2018). The union definitely would appear inclusive and caring. Unions could emphasize more in-person socialization so genuine concerns are not tossed aside as junk email. Actual social activities that build comradery would go a long way toward attracting and keeping members.

In states that are more pro-union, an effort should be made to get the names of new employees so they can be contacted in the early days of starting a new job. Some states allow access to personal contact information and work space for meetings with new members. Some states also do not release new employees addresses and phone numbers to others. This slows down the ability of anti-union organizations to contact new workers before the union gets an opportunity to contact the new employee (Barrett & Greene, 2018). Finally, while union dues cannot be deducted on taxes, maybe the state could pay people who join unions less. If someone makes \$50,000 and union dues are \$1,000, maybe union members could be paid \$49,000. That would lessen the union member's tax bill a little while still providing unions with money to operate (Hemel & Louk, 2018). Finally, for the states most tolerant of more forceful activity, unions should remember the First Amendment is not just a weapon that can be used against the union. As Carney (2014) suggested maintaining the solidarity of workers is a small price to pay for workers to collectively influence their workplace.

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## **Rank Choice Vote: An idea whose time has come**

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Rank choice vote (RCV) sometimes called, Instant Runoff Voting (IRV) is an electoral reform effort currently used in several U.S. municipalities those being Basalt and Telluride, CO; Berkley, San Leandro, Oakland, and San Francisco, CA; Cambridge, MA; Minneapolis and St. Paul, MN; Portland, ME; Takoma Park, MD; and Burlington, VT. RCV has long been used in the countries of Australia, New Zealand, Canada, Czech Republic, Hong Kong, India, Ireland, Papua, New Guinea and the United Kingdom as well. In RCV, voters rank candidates in order of preference (first choice, second choice, and so on) rather than voting for just one candidate. If any candidate garners more than 50 percent of all the first-choice votes, that candidate wins. If no one receives a majority in the first round, the candidate with the lowest number of first place votes is defeated, as there is no mathematical possibility of winning. The second place choices on those ballots are then tallied for the remaining candidates and the votes re-counted. If that round produces a majority winner, the counting stops. The process continues until someone receives a majority of the votes and that candidate wins.

If RCV was used in the 2016 presidential elections, voters could vote for Bernie Sanders in the first place and Hillary Clinton second, or vice versa. There wouldn't be this back-and-forth animosity or this question of whether Bernie Sanders people are actually going to vote for Hillary. They would be able to vote for the person they want and then vote for the other person for second place. It is possible for a candidate who was not one of the top two in the first round to receive majority support in the end. This makes it much more likely that the winner will be someone open to moderation and compromise as successful candidates would need to appeal to a majority of voters. Voters who don't like the established party choices would not 'waste' their votes, instead voting their conscience or heart with a first preference, and rank their "less bad" option second.

The use of RCV is likely to invigorate our politics, reduce polarization and increase civility in campaigns (Donovan et al., 2016) as candidates may not be a voters' first choice, but could be their second or third choice and it may happen that the first choice does not win the election. This also allows for the viability of third party candidates winning, lessening rancor among candidates, promoting an election of candidates backed by a majority and not merely a plurality of voters, helping minorities gain representation and saving money longer term as RCV replaces runoff primaries. RCV has serious drawbacks as well. For instance if there are three or more serious contenders, a candidate who would have won can be defeated over each of the other candidates in a 2-person race, or a situation where A is deprived of a victory because several voters changed their first-place votes from B to A. Other disadvantages stem from the complexity of counting votes, in providing quick and efficient results, the affordability and standardization of software and hardware in election machines across cities. There are variations to the basic RCV systems described here when there are multiple levels of election administration. This study analyzes each of the processes leading to the implementation of RCV in Minneapolis followed by its uses and lessons learnt after each of the RCV elections to date, in 2009 and 2013. This research is significant for several reasons. First, lessons learnt from Minneapolis can be used by the several cities currently considering RCV use and those about to implement it uses in the U.S. Second, this is the first electoral reform effort in the U.S. that has been implemented with great success. Third, hardly any research exists on RCV.

### **Literature Review**

**RCV passage in Minneapolis.** After the passage of RCV in Minneapolis a RCV workgroup was assembled comprised of several Minneapolis residents, elected officials and policy makers, representing various viewpoints. A Technical Advisory Committee reviewed MN Statutes and Rules to identify statutes inconsistent with procedures needed to conduct a RCV (MN, 2009b). A Legislation and Rules Committee formulated rules, procedures, and provided guidance relevant to a RCV election (MN, 2009b). The number of rankings permissible on a ballot such that it would integrate with the voting equipment, acquiring the equipment, the speed and method of results, the ability to use it concurrently with other elections, and in providing voters with sufficient choices, error notifications, and that of voter education of RCV and its affiliated processes were discussed. Voters would be notified of the four main errors that occur with RCV elections. First these are ‘over votes’ which occur when a voter ranks more than one candidate at the same ranking. Second, ‘skipped rankings’ occur when a voter leaves a ranking blank and ranks a candidate at subsequent rankings. Third are ‘repeat rankings’ occurring when a voter ranks the same candidate at multiple rankings for the office being counted, and finally, ‘under’ votes occurring when a voter ranks more than one candidate at the same ranking (MN, 2009d). Budgetary limits along with a timeline for certification requirements and voter education were considered (MN, 2009d; MN, 2009f).

Based on MN Statutes the RCV Ballot Workgroup reviewed design formats with the existing election hardware, software, and firmware equipment. Three possible options for ballot design resulted. These included a 3-column ballot design, 3-column “stacked” design; and a “grid” design, sometimes referred to as a “Cambridge style” ballot. The primary goal was to support an option that would increase the number of choices in each race on the ballot, ease of voter use while remaining compatible with available systems and existing legal limits. The recommendation was for the City to continue using the existing three-column ballot design (MN, 2009g) (INSERT FIGURE ONE) which allowed voters to indicate up to three rankings.

In line with an election Ordinance (MN, 2009d) an election technology committee, reviewed equipment options which included purchasing new equipment, modifying existing equipment, and the use of supplemental central scanner systems (MN, 2009a). Providing voter error notification, tallying all votes of the rankings, precinct summary statements along with MN law requiring hand counting of ballots were discussed as well. The equipment alternatives, cost and MN law hand count requirements led to inter-governmental cooperation between the City, County and the State in using an existing county system. No modifications would be needed as it could run RCV and non-RCV elections concurrently on one ballot while being relatively inexpensive and it did provide the needed error notifications of over votes within each ranking. The County leased to the City of Minneapolis tabulators, voter assist terminals and accompanying memory cards with the agreement that the city could not make any repairs, changes, modifications or alterations to this equipment without authorization by Hennepin County (MN, 2009b; MN, 2009e; MN, 2009f). The hand count process prescribed by MN law was developed as well as the processes for counting, scanning and storing of RCV data files (MN, 2009e).

Materials for voter education were developed (MN, 2009f). One page brochures and general interest flyers created for distribution by candidates or neighborhood groups explaining how to vote and how votes are counted. Presentations were created and available in Spanish, Hmong, and Somali. Stickers, posters, handouts, videos, door hangers, direct mail, speakers were lined up and metro transit spots were determined for information canvassing. Updates to the election site, door-to-door volunteers, posters, data entry and hand-count methods and voter error accounting were determined as well. Individuals could “play the RCV data analysis game” at home using the “xls” documents that are the ballot summaries from each precinct for each office (MN, 2009c; 2009f). Instructions were provided to voters prior to the election as shown in table 1. Insert table.

**RCV 2009 Election** The first RCV ‘test election’ was held in 2009 which tested each component of the electoral process, the ballot design, equipment, error notification process, the draft materials to be used by election judges, the hand count process, voter outreach efforts inviting feedback from voters about their experiences using RCV for the first time and of the ballot itself (MN, 2009g). Post-election 2009 analysis revealed pros and cons. The pros were that in the race with a large number of candidates a



small margin of vote spread resulted. The cons were that in order to increase the number of ballot rankings, newer equipment, a newer ballot design and software were needed (MN, 2016).

With the current voting system unable to support more ranking options for voters a traditional portrait ballot was recommended so that the city could increase the number of rankings. However, more rankings using a newer ballot layout would require additional ballot pages to display all races causing confusion for voters, judges and pollsters. Additional problems regarding time consuming training on this new software and the export functionality in the software, Minneapolis would have to hand count the municipal election which would require more people, time and additional cost in paper, postage, and processing. Ripple effects would be felt with the additional time needed to vote on more options and additional time to scan multiple page ballots on Election Day along with the longer wait lines (MN, 2009b). These would increase voter drop off and voter confusion as this would be the second time the city used RCV along with the additional checks to ensure accuracy which translated to more time to announce winners needed discussing. For example, in 2009 there were 11 candidates for mayor, for a possibility of over 900 three-candidate combinations to process. Increasing to six rankings would increase the possible candidate combinations to over 300,000 (MN, 2009). The City decided to continue using the existing three-column ballot design (MN, 2009g).

The “Minneapolis Method” (MM) a hand counting process developed during the 2009 election, was to be refined for greater effectiveness. The MM method involved judges from differing parties with color-coded nametags sorting and counting ballots and entering data into the computer (MN, 2009e). The data analysis team verified results, while another team cross performed the same calculations cross checking them (MN, 2009e).

Post evaluation from the 2009 RCV election showed that voters chose to rank fewer candidates on the ballot than permitted. There were only 624 of these ballots where voters ranked only 3 candidates (MN, 2010; (2009a). Post evaluation of rankings were compared to Portland, Burlington, and San Francisco, cities having used RCV and were found to be comparable. A survey of voters, candidates and election judges concerning the implementation or RCV found that neither gender nor income made no difference in how respondents voted. Younger, less educated and voters of color voted absentee. 80% of voters knew they would be asked to rank their vote choices prior to the election, of these were older, white, wealthier and more educated voters. While a wide variety of means were used to educate voters, voters learned about RCV, most often through newspapers and television news (Frank, S. et. al. 2009). Gender, age, better education, persons of color and higher income families had better understanding than those with lesser. Ultimately, women were more likely to rank candidates, as were older, white, wealthier and better educated voters. For those voters choosing not to rank candidates they claimed to make sophisticated decisions as they did not know enough about the candidates or that they did not find candidates acceptable to rank, therefore not wanting to give an advantage to favorite candidates (Frank et. al., 2009).

A plurality of voters (41%) preferred RCV, approximately 25% preferred the traditional system of voting and the rest did not have a preference. Older voters, those with greater education and income, both men and women, as well as white voters preferred RCV compared to the younger, less educated and persons of color. (Frank, et. al., 2009).

When polled 92% of election judges felt that their training for working a RCV was excellent. 70% of judges felt that voters were knowledgeable about RCV and the same percentage were confident that the votes would be counted accurately. Judges approximated that 40% of the voters took more time voting, asking them how to fill out ballots or how votes were to be counted. When polled 60% of candidates wanted to use RCV in future elections. Half of them viewed RCV as an advantage to their candidacy similarly adjusted their campaign strategy.

The ultimate goal for Minneapolis was to be the Gold Standard for RCV. They strived to administer an election that was voter friendly, “...one that engages the citizens of Minneapolis in the democratic process with a clear understandable ballot...and one that provides a positive and efficient experience for voters at...ending with accurate election results announced in a timely fashion” (Election, 2010). Post-election review by the city itself found that 95% of the voters said that RCV was easy to use and 90% said that they understand RCV perfectly or fairly well. 65% said they believed RCV should be used in the

future. Only 3% of the people voting said they didn't understand RCV without an indication of their reasons (Fair Vote, 2010).

Five clarifications and amendments for the process were made prior to the next election. First, a contractor hired for voter education scheduled four mock election events. After the mock elections a survey showed that 67% of voters highly rated their understanding of how to complete a RCV ballot. 64% said it was easy to understand. 67% rated that the educational materials available were easy to understand and that they did receive clear, understandable instructions from staff. 50% said that their participation in the mock election increased their comfort and confidence around voting on Election Day. 63% felt that they had been provided with enough resources including the city website preparing them for Election Day. 69% said that the voting equipment was easy to use and 55% highly rated the effectiveness of the staff and volunteers at the election (MN, 2013d).

Second, an ordinance was issued to avoid wasted time and paper of counting frivolous write-ins. Third, separate managers were tasked for data analysis and data entry. Fourth, different colors would be used for sorting and counting. Fifth, recommendations to update ward boundaries, compensation of Election Judges and Sergeants at Arms pay at forty percent greater than the prevailing minimum wage, and stream lining the process to provide timely results made. The RCV election in 2013 followed.

**RCV 2013 Election** The 2013 RCV election was an overwhelming success with turnout over 80,000, the highest for a municipal election in 12 years (MN, 2013a). In the city's most ethnically diverse ward, voters understood and appreciated RCV. Turnout in the council race was 3,622 (24%) which was the highest since 2005. 75% of voters ranked 2 choices, and 63% ranked all 3 available choices in the council race. In the mayoral race, 84% ranked two candidates and 76% ranked three candidates. Less than 1% of ballots had errors with no defective ballots (MN, 2013a; MN, 2013b). A diversified and gender-balanced city council were elected with the second female mayor in Minneapolis history as well as the first Somali-American, Latina, and Hmong city council candidates elected resulting in the city's most diversely represented city council. 99.94% cast a valid ballot, just 0.6% of all ballots had the over-vote or skipped rankings (MN, 2013a).

Voters across color, gender and age demonstrated a thorough understanding of RCV. 88% ranked a second choice, and 78% ranked all three of their available choices in the mayoral race (MN, 2013a). Mayor-elect Betsy Hodges, won by 63% building a broad coalition of first, second and third choice support (MN, 2013a). High rates of ranking consistently occurred across the competitive, multi-candidate City Council and Park Board races as well, including in the lower-income and highly diverse.

Post-election results indicated that while younger voters aged 18-34 (91%) found RCV simplest to use, 81% of voters aged 65 and older found it simple as well. Income and education did not significantly impact ease of RCV use. 88% of voters with a college education and 81% of voters without found RCV to be simple. 82% of voters of color found RCV to be simple, easing the concern that communities of color would find RCV difficult (MN, 1013a; MN 2013f). Similar to the 2009 election, 67% to 80% of polled voters across all age, income, education and ethnic groups said they were familiar with RCV before going to the polls, demonstrating the importance and success of the outreach and education efforts undertaken by Fair Vote and the City of Minneapolis in preparing voters for Election Day. Not only did voters understand RCV but they liked using RCV. More than two-thirds (68%) of all voters want to continue to use RCV in future municipal elections and 61 percent would like to see it used for state elections (MN, 2013a). High levels of support for RCV in Minneapolis existed among older, nonwhite, lower income and less educated voters, an interesting finding as critics thought they would not understand or like RCV: 62% of those aged 65 and older, 59% of people of color, 63% of those without a college degree and 68% of those earning under \$50,000 all want to see RCV continue in future city elections (MN, 2013a). An exit poll found that 85% of polled voters found RCV simple to use (Edison, 2013).

Pursuant to the city's goal of providing voters opportunity to express more than three preferences, the city continues its efforts in re-evaluating alternative ballot styles along with equipment and voter education issues. The City will continue to use the existing three-column ballot design for the next election (MN, 2013f).

## Conclusion

RCV is a complex voting process that is costly in time and monetarily expensive from purchasing software, hardware, as well as in educating voters, judges and politicians. What we do know is that RCV process require diligence, patience and commitment by the city, the voters, candidates and election judges. The lessons learnt from the successful implementation of both Minneapolis RCV elections are that they are a long term committed process with involvement by the various stakeholders, the voters, candidates, election judges, and the city. All of these stakeholders define and re-defining the various voting processes following a systematic process of adhering to state prescribed ballot styles, equipment purchase, voter involvement and education as well as a test election further refined and produced successful RCV elections (MN, 2009a; MN, 2013a; MN, 2013f). In addition, providing voter education through test and mock elections along with out-of-the-box voter educational methods, produced an educated electorate able to appreciate and desire to use RCV for each election in their city. Minneapolis's strategies towards implementation of RCV were effective and are key towards the longevity of this electoral reform. Electoral reformers should take note that electoral reform, in itself is a long term strategy and a consistent, continuing effort is necessary to sustain and support the new system after the initial implementation.

RCV Proponents claim that it upholds the principle of majority rule, eliminates "wasted" votes, Solves the "spoiler" problem and gives voters more choice, Increases voter participation, promotes more diverse representation, increases opportunities for racial minorities, while reducing a partisan, ideological divide. It reduces negative campaigning and makes politics more civil with issue oriented campaigns (Donovan et al., 2016), mitigating political polarization. It does combines two elections in one so that voters only make one trip to the polls and pay for only one election. Opponents claim that RCV complicates an electoral system that is not easy for voters, candidates or judges. Election judges note that elections should not be as complex.

What we do know is that RCV process require diligence, patience and commitment for each stakeholder and continuous effort in sustaining and supporting the new system after the initial implementation. Although the jury is out on RCV, the future horizons or RCV are bright. Especially this past year, 2016, where we have seen so much partisan vitriol on the national level, and with the upcoming implementation and the future implications as Maine (2016) statewide adoption with a history of multi-candidate races for governor, the expectation is that the state will have a vigorous debate about the best way to promote majority winners and a governor who effectively reaches out to voters across the state. Three major cities, Boston, Washington D.C. and New York City are considering the use of RCV. It has been successfully used in the 2016 Emmys such that others outside election systems can use as well (Canfield, 2016).

With RCV gaining momentum, the future is indeed here. The outcomes so far show that RCV is not just a math exercise, it is an effective means to handle more than two choices, and can provide electoral reform relief, one central to our democratic process. In 2016, in addition to Maine, four bay area cities will use RCV that are expected to be highly competitive. Meanwhile, many new jurisdictions are turning to RCV with a growing awareness by equipment vendors and strategists' providing inroads towards making RCV reform easier to implement. The future of electoral reform with RCV is promising and will invigorate electoral reform in tune with our evolving democracy.

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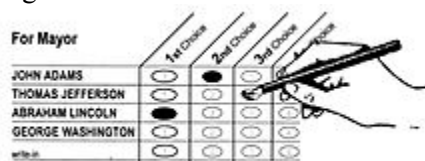
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Figure 1



| Table 1: Instructions to voters (MN,2009a)   |  |
|--|--|
| 1. They could choose up to 3 candidates for each office in order of your preference: 1 <sup>st</sup> , 2 <sup>nd</sup> , 3 <sup>rd</sup> .   |  |
| 2. They needed to completely fill in the oval(s) next to your choice(s). Marking their first choice by filling in the oval in the First Choice column next to your first choice candidate, filling in the oval in the Second Choice column next to your second choice candidate selecting a different candidate. And, filling in the oval in the Third Choice column next to your third choice candidate. Your third choice must be different from your first and second choices. If you do not wish to make a third choice, leave the column blank. |  |
| 3. Rank candidates in order of your preference or ranking as few candidates as they wished. Ranking additional candidates will not hurt your higher ranked favorite candidates, but will increase your chances of your vote helping elect a candidate you support.   |  |

| Table 2: Consideration for future:           |  |
|--|--|
| 1. Ballot layout and presentation            | Increase the number of choice possibilities to 6. Presentation order dependent on the contests (MN, 2013d; MN, 2013e).   |
| 2. Ballot Tabulation                         | Tabulations for over votes and transmission of results similar to 2013. For over votes, the ballot would be returned to the voter allowing them the choice to accept the ballot or revote (MN, 2013d).   |
| 3. Tabulating results                        | Ballots scanned, images archived on the DS200 memory stick, and uploaded similar to 2013. Write-in selections were extracted from a ballot image (MN, 2013c).  |
| 4. Challenges: equipment and absentee voters | Equipment challenges remained as there was no federally certified paper-ballot voting system available (MN, 2013c; MN, 2013f). Absentee voters' challenges remained as they could not be informed of voter error as they do not feed their ballots into a tabulator (MN, 2013e). |

## **Video-Based Field Experiences: An Investigation of Elementary Social Studies Teacher Candidates' Perceptions of a New Approach**

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### **Abstract**

Field experiences are essential components of teacher preparation programs. They are necessary to allow teacher candidates to understand the importance of developing and delivering quality instruction as well as classroom management skills. However, the absence of quality field experiences, especially in the area of social studies, is problematic. Field experiences provide teacher candidates with the experience, knowledge, and understanding of how the classroom operates, and the skills that are necessary to be an effective teacher. There are difficulties at times because the coursework may be offered during semesters that host school is not in session, or placing the teacher candidates in an appropriate setting becomes a challenge due to circumstances. Incorporating virtual field experiences allows the students to reflect on their observations of what took place on the video and adapt what they have learned to their own classrooms. Technology now associated with accountability and assessment has changed the way some teachers and administrators view field experiences. Thus, an alternative to traditional field experiences for elementary teacher candidates enrolled in social studies methods was sought and resulted in the use of video-based field experiences (VFEs) with an emphasis on the use of carefully selected video segments. Fifteen positively-worded statements were crafted and associated with a 1-to-5 “Likert-type” scale where candidates rated their VFEs from strong agreement (5) to strong disagreement (1). Candidates’ perceptions of VFEs indicated that VFEs can be as much or as more relevant and informative for candidates than actually being in “live” classrooms.

Field experiences are essential components of teacher preparation programs (Darling-Hammond, Hammerness, Grossman, Rust, & Shulman, 2005; Darling-Hammond & Bransford, 2007; Guyton & McIntyre, 1990; Wasburn-Moses, Kopp, & Hetttersimer, 2012; Wilson, Floden, & Ferrini-Mundy, 2001). The way the field experience is organized in various teacher preparation programs differs, but ultimately, each program has two goals, providing: (a) meaningful learning opportunities; and (b) opportunities to use theory with practice (National Council for Accreditation of Teacher Education, 2010; Rabe, 2012; Santagata, Zannoni, & Stigler, 2007). As Ball and Cohen (1999) explained, “Teaching occurs in particulars—particular students interacting with particular teachers over particular ideas in particular circumstances” (p. 10). These particulars enable teacher candidates to learn “in and from practice” (p. 10). However, when the “learning in and from practice” (p. 10) does not occur, the particular experience will not have the desired effects on

students (Darling-Hammond & Bransford, 2007). The absence of quality field experiences is problematic.

Nonetheless, by completing field experiences, candidates should have their career choice affirmed and reaffirmed, begin to view themselves as teachers, develop pedagogical skills, and learn to reflect on their practice (Brookfield, 1995; McIntyre, 1983). Use of video-based field experiences (VFEs) can support these learning goals (Hixon & So, 2009). It offer a controlled environment to examine candidates' thinking and help develop their understanding of learning processes about classroom practices and content. Video-based environments are chosen with purpose, and unlike traditional field placements, it offers all candidates the opportunity to observe and reflect about a multitude of teaching practices, strategies, and assessments. Whereas, traditional placements only allow a single candidate to observe and reflect about the specific room he/she was placed (Santagata et al., 2004). It allows for a learning environment that creates a floor for critical deep discussions and apply what they are learning in their methods courses to what they are observing in the VFE. It also allows opportunities where candidates may connect what they have learned in the classroom to real life and see theory align with practice (Darling-Hammond et al., 2005; Darling-Hammond & Bransford, 2007; Mueller & Hindin, 2011; Santagata et al, 2004). Additionally, candidates are often lack opportunities to observe in varied contexts, therefore they do not have the option to reflect critically on their experiences in the field, however if they are given the ability to have a common experience that they can observe, discuss, and analyze it can be a benefit over traditional field experiences because it promotes deeper reflections and focused observations (Hixon and So, 2009). VFEs can also alleviate frustrations sometimes identified with participating in field experiences, e.g., expenses associated with travel, time investments, and lack of quality social studies instruction and effective classroom interactions experienced by instructors and candidates related to field experience misalignment.

The age of accountability and assessment, however, has changed the way some teachers and administrators view field experiences and candidates (Wasburn-Moses et al., 2012). Thus, candidates' experiences in the field can vary significantly due to the lack of quality classroom placements and/or teachers, the lack of opportunities to apply theory to practice, the lack of guidance, and/or the lack of student diversity (Darling-Hammond et al., 2005; Darling- Hammond & Bransford, 2007; Santagata et al., 2004; Shields et al, 2001). For instance, candidates may become stagnant gaining little hands-on experience and practice because they are traditionally placed in one or two classrooms effectively restricting their experience due to only observing and/or interacting in these environments. Candidates need to be provided better opportunities to ensure growth through practice and reflection (Ball & Cohen, 1999).

Federal mandates have required states and school systems to measure adequate yearly progress to determine student achievement. In 2002, the federal mandate of No Child Left Behind (NCLB) was passed in order to attempt to increase student knowledge and to hold school districts and teachers accountable. According to Smilowitz & Byford, this mandate required schools to ensure that students succeeded due to the requirement of teachers becoming highly qualified in the content areas which would in turn increase test scores. While school systems have been measuring student knowledge for many years, public schools have had to completely restructure in some instances due pressures because of low test scores and educational funding (2015). This has drastically shifted the paradigm in the elementary classroom.

Social studies education has remained subsidiary because there has been a greater attention to mathematics and language arts. Due to this, high-stakes testing has impacted social studies education in elementary schools severely which causes teacher education programs to struggle for placements where pre-service candidates can observe or participate in social studies instruction. According to the National Council for Social Studies, (NCSS), the goal of social studies is to provide students with a rich, authentic, deep understanding of the subject. According to Hixon and So, field experiences are the building blocks for teacher education programs and have “found value in learning by doing” (2009; Cruickshank & Annaline, 1986). The struggle of placing pre-service teacher candidates in content-rich classrooms where they can experience ways to deepen student understanding and linking prior learning to new learning of social studies content continues to challenge teacher education programs. For instance, in most classrooms where these candidates are placed, social studies instruction—as a separate or integrated subject area - is not taught on a

daily basis due to the demands of tested subjects taking precedence over the other subjects areas due to the demands of No Child Left Behind (NCLB), Value-Added Modeling, and Race to the Top (RTTT) Initiatives. Since the 2002 NCLB law has been into effect, it requires that all students be tested in the areas of mathematics and reading in grades three through eight. The states were also required to develop objectives in order to report their progress each year on those subjects. (Chakrabarti, 2014). As a result, the major focus of the instructional day is devoted to mathematics and English/language arts, needed to meet annual yearly progress (Imig, Wiseman, & Imig, 2011; Rabe, 2012; Wasburn-Moses et al., 2012; Wiseman 2012). Therefore, the social studies curriculum is often met by integrating it with other content areas and often omitting the disciplinary specific content or skills.

### **Context**

At the metropolitan university in the southeastern United States where this study took place, as is likely in many other institutions, it has become increasingly difficult to provide elementary social studies candidates enrolled in methods courses with suitable field experiences. The university increasingly is challenged to find mentor teachers willing to accept candidates in the classroom, and if they do, the mentors, like is reported in the *Survey on the Status of Social Studies (S4)* (Schertz & McCormick, 2013), are not devoting significant time to social studies education, especially that focused on disciplinary rather than content literacy based activities. This may bring frustration to candidates because they are not able to observe effective social studies instruction. Therefore, elementary candidates at this university rarely have opportunities to: (a) observe social studies being taught, (b) observe the interactions with students who are engaging in this content, or (c) develop hands-on pedagogical skills necessary to teach social studies with K-6 students.

As such, an alternative to traditional field experiences for these undergraduate elementary education candidates enrolled in social studies methods was sought. As Ball and Cohen (1999) explained, learning “centered in practice” does not necessarily imply situations in school classrooms in real time” (p. 14-emphasis added by authors). They further explained that “although the bustle of immediacy lends authenticity, it also interferes with opportunities to learn” (p. 14). Essentially, the use of alternate field experience formats, e.g., virtual field experiences, can be beneficial to candidates’ learning even though candidates are not present when instruction occurs. By viewing specific instructional situations, candidates experience quality instruction rather than what was available on a specific day and time. Therefore, candidates were asked to complete video-based field experiences instead of being in the classroom for traditional field placement for social studies. They did, however, complete traditional field placements in the other core content areas.

To complete the video-based field experience requirements, candidates viewed six hours of specific Annenberg Teaching Videos (<http://www.learner.org/>) that focused on four main elementary K-5 social studies content: history, civics and global education, geography, and economics and behavioral sciences (see Appendix A). By watching the videos, candidates were more likely to see high-quality teachers, a variety of teaching strategies, students from a variety of backgrounds and socio-economic levels, and creative methods for implementing student- centered teaching than in a given local field placement (Wasburn-Moses et al., 2012) which according to Hixon and So (2009) are benefits when using “technology-enhanced/Virtual” field experiences (p. 300). After viewing sessions, candidates were required to respond to accompanying reflection questions on the Annenberg site (The Annenberg Foundation, 2013a) and engaged in reflective discussions in the subsequent class sessions. For this study, this reflection and discussion making the reflection questions and classroom follow-up crucial in the video-based field experience process.

### **Theoretical Framework**

Constructivist learning theory undergirds this study. More specifically, Dewey’s (1938) work influenced this study because constructivism focuses on learners constructing their own knowledge (Barkaway, 2001; Charmaz, 2003; Crotty, 1998; Hosman, 2013). Dewey advocated for educators to provide students with experiences that are immediately valuable and better enable students to contribute to society. Dewey also acknowledged that “any experience is mis-educative that has the effect of arresting or distorting



the growth of further experience” (p. 25). As it is, teacher education programs often have the challenge of addressing the “apprenticeship of observation” (Lortie, 1975). Candidates often enter their preparation programs with misconceptions about the nature of teaching and learning that need to be unlearned via intentional learning opportunities, including field experiences.

Field experiences should be educative, but, in reality, can have an undesired influence on candidates’ development because during this time, they may witness instruction of various degrees of quality, may reinforce negative aspects of the apprenticeship of observation, or they may not understand what they are observing (Bandura, 1971). Therefore, field experience is the most crucial and effective form of learning for candidates (Darling-Hammond & Bransford, 2007; Wasburn-Moses et al., 2012; Wilson et al., 2001). At this stage in candidates’ development, they need explicit modeling and guidance on best practices so that they can learn what is best for their future classrooms and students. According to Bandura (1971), “social learning theory assumes that modeling influences produce learning principally through their informative functions” (p. 6); to rephrase, a learner must be actively engaged as he/she consumes new knowledge (Hosman, 2013). Therefore, it is imperative that candidates receive high quality field experiences where they observe, engage, and are provided opportunities to discuss and reflect on what they observed and experienced (Bandura, 1971; Darling-Hammond & Bransford, 2007; Wasburn-Moses et al., 2012; Wilson et al., 2001). This type of learning is often referred to as situated learning or cognitive apprenticeship where the learner is placed in a situation and is to learn from a master practitioner (Brown, Collins, & Duguid, 1989; Hosman, 2013; Lave & Wenger, 1991).

### **The Present Study**

Determining the best learning outcomes for teacher candidates should be a top priority of education faculty. When the instructors/researchers realized that the traditional field experiences were no longer effective for candidates enrolled in the social studies methods courses, they knew something had to change (Darling-Hammond & Bransford, 2007). Candidates repeatedly reported that social studies were not being taught as in classrooms as an individual or distinct subject. As a result, social studies lesson plans developed in the university classroom by preparing teachers were not developed with the intent that the plans would be used in the public-school classroom or otherwise useful to preparing teachers in the future. They had to develop a lesson to demonstrate knowledge of social studies content and strategies that are critical in the elementary classroom. In turn, this was then taught to their peers in the university classroom. Essentially, candidates were neither witnessing social studies instruction nor were there opportunities available for them to apply pedagogical principles learned in their courses. In our effort to remedy this situation, alternative social studies field experiences were sought.

Video-based field experiences in the form of teaching, reflection questions, and classroom discussion were and remain to be the current solution to this issue. However, the researchers/instructors wanted to gauge the effectiveness of the video-based format by surveying candidates regarding their perspectives of video-based and traditional field experiences. Given that candidates were formally admitted into the teacher education program, participation in field experience was common practice. The use of videos was not as common, however. As a result, the purpose of this study was to gauge undergraduate teacher candidates’ perceptions of video-based field experiences.

### **Methodology**

Survey research was used to gather responses for evaluation. The survey included 15 questions, positively worded. Responders chose a response from a graduated Likert scale of one to five where one was the least agreement and five represented the greatest agreement. Elementary teacher candidates enrolled in a social studies methods course served as survey subjects.

No instrument for video based field experiences were available, so researchers designed one and vetted it through an expert in instructional design and preservice teacher education in order to increase face validity. Item analysis of each of the 15 items provided measures of perceptions. Independent sample t-tests were conducted comparing four demographic characteristics provided results for evaluation.

The research questions forming this study include:

1. What are the perceptions of virtual field experiences on teacher candidates' pedagogical development in an undergraduate elementary education social studies methods course?
2. What are the pre-service teachers' perceptions of virtual field experiences versus traditional field experiences in an elementary social studies methods course?

### **Participants**

Six classes of undergraduate elementary education teacher candidates enrolled in a social studies methods course (N = 117) completed the survey. Participants were purposefully selected (Merriam, 1998) based on the following criteria: (a) be admitted to the teacher education program; (b) be enrolled in the elementary social studies method course in the 2012-2013 or 2013-2014 academic years; and (c) complete the entire virtual field experiences assignment which consisted of watching videos, completing reflection questions about the videos, and participating in class discussions. Nearly three quarters (73.6%) of candidates were exposed to this type of field experience for the first time during this course. With regards to ethnicity, 69% of candidates identified as White, 15% as Black, and approximately 5% identified as American Indian, Alaskan Native, or Hispanic/Latino, 5% multiracial, 5% other, and 1% did not answer. The majority of candidates were between the ages 20 to 21 (43%), 25% were aged 22 to 24, 10% were between 25 and 29, and 22% were 30 years of age or over. Only 10.7% of the sample identified as male, leaving insufficient numbers for comparisons between genders. The median number of previous traditional field experiences the candidates had was five.

### **Measures**

When no instrument could be located concerning candidates' perceptions of the value of video-based field experiences (VFEs) relative to traditional placements, such an instrument was developed from a summary of the advantages and disadvantages was compiled by Hixon and So (2009). Questions were vetted by an expert in instructional design and preservice teacher education in order to increase face validity. The survey consisted of 15 positively-worded statements placed on a 1 to 5 "Likert-type" scale, wherein lower values denoted strong disagreement and higher values denoted stronger agreement (Carifio & Perla, 2007). Sample questions included "Outside of class, my fellow students and I are more likely to talk about our virtual field experiences than those we have had in traditional settings," and "I am more likely to see 'best practices' demonstrated in a video-based field experience setting, as opposed to a more traditional one." Along with demographic questions, the 15-item instrument was created on Survey Monkey and administered online at the end of each semester. Of the 121 candidates, 117 met the eligibility requirements and completed all 15 items, which, when treated as a single scale, was observed to have high internal consistency ( $\alpha = .94$ ).

### **Results**

#### **Item-level Responses**

Item-level responses were examined to show differences between respondents who were in agreement (responses "4" or "5") or non-agreement (responses "1" or "2") with each item on the scale. As shown in Tables 1 and 2, candidates responded most positively to items concerning the greater convenience of video-based field experiences compared to traditional placements and to items pertinent to the unvarying high quality of the teaching to which the video-based field experience exposed them. With respect to the convenience of having a video-based field experience, 94.0% (M = 4.76, SD = 0.71) of the candidates questioned either agreed or strongly agreed that "reduced time and travel expenses, along with more scheduling flexibility", are major advantages of this type of experience. With respect to the quality of teaching demonstrated, candidates in similar numbers indicated that "the teacher role models ... tend to be generally better [in VFEs] than those I have experienced in more traditional field experiences" (73.5% agreement, M= 4.03, SD = 1.05); that they were likely to see "best practices" demonstrated in a video-based field experience setting, as opposed to a more traditional one" (82.1% agreement, M = 4.24, SD = 0.81); and that the assessment techniques that they observed were comparatively "more diverse than those observed in other settings" (82.1% agreement, M = 4.14, SD = 0.83).

For a few candidates, certain advantages claimed for field experiences that are video-based over traditional placements seemed to be somewhat overstated. For example, a constraint of traditional field placements is they are limited to nearby schools, the enrollments of which may be overly homogeneous. Specifically, 35.9% of respondents either disagreed or remained neutral regarding whether video-based field experiences were more helpful than traditional placements in showing them how to work with diverse learners (12.8% non-agreement, 23.1% neutral, 64.1% agreement,  $M = 3.82$ ,  $SD = 1.06$ ).

Furthermore, because the experiences provided by the traditional model are idiosyncratic, instructors anticipated that candidates would be “more likely to talk about . . . video-based field experiences than those . . . had in traditional settings” as they provided identical experiences. Despite academic interaction, most of the candidates responding to this question did not agree that discussions of video-based field experiences were more likely to occur than discussions of traditional field placements (22.2% non-agreement, 39.3% neutral, 38.5% agreement,  $M = 3.30$ ,  $SD = 1.07$ ).

Additionally, many candidates indicated that VFEs alone might influence their efficacy as teachers in some way. When asked if “the lack of interaction with real students and teachers detracted from the overall usefulness,” the candidates did not deem this to be a significant shortcoming of them, 70.1% agreed it was not, but 17.9% did not agree, with 21.0% remaining neutral ( $M = 3.79$ ,  $SD = 1.11$ ). With respect to being “more of an observer than a participant” in video-based field experiences, the sample was even more strongly divided, with 72.6% of respondents feeling that this was not a major disadvantage ( $M = 3.99$ ,  $SD = 0.97$ ).

#### **Independent t-test comparisons**

Independent sample t-tests were conducted comparing four dichotomously-coded demographic characteristics in order to test whether the following groups differed in their perceived value of alternative field experiences that are video-based. Race/ethnicity was coded as Minority vs. White due to the large relative number of white candidates. Similarly, age was recoded as 20 to 21 years or 22 years and older due to the researchers questioning whether the traditional students versus nontraditional students’ perceptions would be different, number of virtual field experiences was recoded as one vs. more than one, and number of traditional field experiences was recoded as five or fewer vs. more than five. As indicated in Table 3, none of these comparisons were shown to differ significantly. No significant difference was found between race/ethnicity, age, number of field experiences that are video-based, or number of traditional field experiences and the benefit of the learning experience of VFEs compared to traditional field experiments.

#### **Discussion and Implications**

This study examined the perceptions of video-based field experiences on teacher candidates’ pedagogical development in an undergraduate elementary education social studies methods course. This study identified aspects of this alternative experience that were of great value to the development of candidates’ knowledge base. This research indicates that this experience can be an effective approach in lieu of live classroom experiences because VFEs could be deemed efficient, and able to support “best practices” (Santagata et al., 2004). As candidates will have multiple opportunities to observe classrooms in other courses (Ball & Cohen, 1999), the video-based field experience for the social studies methods course in this metropolitan area provided better, more relevant experiences for candidates in the social studies context. Even though the synchronous and social interaction that Bandura’s (1971) social learning theory, Lave and Wenger’s (1991) situated learning, and Brown, et al.’s (1989) cognitive apprenticeship stressed was missing, controlling for quality and ensuring beneficial learning experiences outweighed the lack of actual interaction in a live setting (Santagata et al., 2004) especially when the subject at hand is rarely taught as a separate content area in our local elementary public school classrooms. Candidates illustrated this perspective in the results of this survey. They perceived that this experience demonstrated best practices (82.1% agreement), provided more diversity in instructional strategies (80.3% agreement) and assessment techniques (82.1% agreement), and were helpful, despite no direct teaching practice (88.9% agreement).

As another positive, video-based field experiences are digital tools; therefore, candidates were able to view videos multiple times. As an instructional tool, repeated exposure to educational videos could be useful

in applying observed practices in current and subsequent field placements in other course and in future classroom discussions (Bandura, 1971; Dewey, 1938). Repeated exposure may benefit some candidates as they may not understand what they are observing after one viewing session or the relevance to their development and future practice. This benefits the candidates in multiple ways because they are able to view the video again to watch a strategy, capture a teachable moment, or a way that a classroom management technique was followed through. This gives them time to reflect on how they would implement these skills in their own classrooms.

Candidates reported having a positive attitude towards the teaching witnessed and helpfulness of videos, but they also seemed to recognize the limitations of this type of alternate experience when compared to traditional field experiences. The primary concern from candidates was the need for more university-based course discussion. Based on classroom conversations, the candidates wanted more discourse around the experiences of the teachers and students in the videos which according to Bandura (1971) is critical because “a person cannot learn much by observation if he does not attend to, or recognize, the essential features of the model’s behavior” (p. 6). Due to this, candidates wanted more instructor-led analysis to better develop their pedagogical content knowledge. To address this concern, course activities have been revised to include purposeful and focused discussion and analysis of these experiences.

Merging the video-based field experience with more intentional classroom-based discussion and reflective activities may help candidates as they learn from each other and their more experienced instructor, and perhaps observe what they may not have missed when they viewed the video originally (Bandura, 1971; Santagata et al., 2004). Demonstrating innovative approaches to teaching and learning, such as using VFEs, shows candidates that thinking outside the norm makes a difference—for policy and practice. After all, as Dewey (1944) stated, “If we teach today’s students as we taught yesterday’s, we rob them of tomorrow” (p. 167).

### **Future Questions and Research**

The goal of this study was to provide K-5 pre-service teacher candidates an alternative way to observe elementary social studies classrooms in order to allow them to observe effective instructional strategies, high leverage practices, and authentic and rich experiences that they may not get in traditional field experiences due to the push to increase test scores in mathematics and language arts. The researchers hope to understand if providing pre-service teacher candidates with virtual field experiences enhances their ability to apply theory to practice in elementary social studies classrooms. Additional research is also needed to determine in what ways virtual field experiences can enrich classroom discussions about how to effectively implement high leverage practices, in what ways is technology is an effective way to provide pre-service teacher candidates with rich, authentic experiences versus being in a traditional classroom, and how does technology impact the next innovative methodologies of field experiences in the midst of the mentor teachers’ struggling to mentor a teacher candidate and increase academic achievement in the required content areas. As teacher education programs continue to strive for preparing exemplary teacher candidates for the next generations, they also continue to seek out new innovative ways to incorporate all modes of learning into real life experiences.

### **Conclusions**

Field experiences, which provide experience in classroom management while allowing teachers to utilize the theories and methods of their preparation courses, are essential components to a teacher preparation program. Often, however, opportunities to gain live classrooms experience are not available. Video-based field experiences are supported largely from the constructivist learning approach because it allows pre-service teacher candidates to gain an experience that they may not have had. The advantages of these experiential learning experiences can assist students in making deeper content connections that they may not have had in a traditional field experience, and it allows the candidates to apply the theory that they have learned throughout their program to practice by being able to watch the video-based field experiences repeatedly (Procter, 2012). This research study offered an alternative approach to traditional field experiences that would regularly be required as field service hours in an elementary social studies

elementary methods course.

The model tested by this research effort utilized video technology to provide the needed field experience that they may not have had in traditional placements. Teacher candidates responded to carefully-selected video sequences gaining insight into the teaching of social studies while also practicing classroom management. The research results showed perceptions of the teacher candidates indicated the field experiences as or more relevant and informative for candidates than actually being in traditional face-to face classrooms. More than 70% of the participants indicated that the inability to interact with actual students was not a negative, but in fact a positive as many candidates appreciated the opportunity to view the video multiple times. As the demand for teachers continues to increase, the need for field experiences in all content areas will also increase. The ability to make field experiences meaningful early on could be critical to the success of the pre-service teacher candidate.

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Table 1

| Item  | Non-Agreement | Neutral | Agreement |
|---|---------------|---------|-----------|
| 01. Greater efficiency, more flexibility of VFEs            | 2.6%          | 3.4%    | 94.0%     |
| 02. More discussion of VFEs outside of class.               | 22.2%         | 39.3%   | 38.5%     |
| 03. Greater student reflection on VFEs                      | 6.8%          | 27.4%   | 65.8%     |
| 04. Teacher role models better in VFEs                      | 11.1%         | 15.4%   | 73.5%     |
| 05. VFEs more often demonstrate "best practices"            | 2.6%          | 15.4%   | 82.1%     |
| 06. Instructional strategies more diverse in VFE            | 6.8%          | 12.8%   | 80.3%     |
| 07. VFE helpful, despite no direct teaching practice.       | 4.3%          | 6.8%    | 88.9%     |
| 08. More varied learning environments seen in VFEs          | 2.6%          | 18.8%   | 78.6%     |
| 09. VFE better at showing work with diverse learners        | 12.8%         | 23.1%   | 64.1%     |
| 10. Differentiated instruction better demonstrated in VFEs. | 6.0%          | 17.9%   | 76.1%     |
| 11. More varied assessment techniques exhibited in VFEs.    | 5.1%          | 12.8%   | 82.1%     |
| 12. More varied working conditions/locales shown in VFEs    | 6.8%          | 18.8%   | 74.4%     |
| 13. "Virtual" interaction not a major drawback of VFEs.     | 17.9%         | 12.0%   | 70.1%     |
| 14. VFEs valuable, despite emphasis on observation.         | 6.0%          | 21.4%   | 72.6%     |
| 15. VFEs improved attitudes re: teaching.                   | 4.3%          | 13.7%   | 82.1%     |

*Percentages of student agreement by item (N = 117)*



Table 2

*Item-level means and confidence intervals (N = 117)*

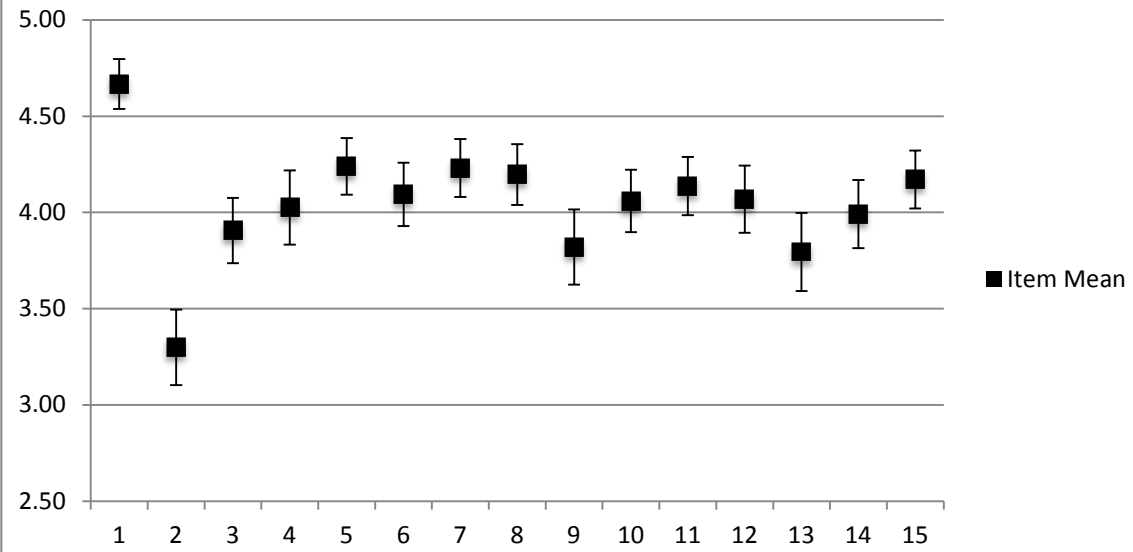
| Item  | <i>M</i> | <i>SD</i> | 95% CI (+/-) |
|---|----------|-----------|--------------|
| 01. Greater efficiency, more flexibility of VFES.           | 4.67     | 0.71      | 0.13         |
| 02. More discussion of VFES outside of class.               | 3.30     | 1.07      | 0.20         |
| 03. Greater student reflection on VFES.                     | 3.91     | 0.93      | 0.17         |
| 04. Teacher role models better in VFES.                     | 4.03     | 1.05      | 0.19         |
| 05. VFES more often demonstrate "best practices."           | 4.24     | 0.81      | 0.15         |
| 06. Instructional strategies more diverse in VFE.           | 4.09     | 0.90      | 0.16         |
| 07. VFE helpful, despite no direct teaching practice.       | 4.23     | 0.82      | 0.15         |
| 08. More varied learning environments seen in VFES.         | 4.20     | 0.86      | 0.16         |
| 09. VFE better at showing work with diverse learners.       | 3.82     | 1.06      | 0.19         |
| 10. Differentiated instruction better demonstrated in VFES. | 4.06     | 0.88      | 0.16         |
| 11. More varied assessment techniques exhibited in VFES.    | 4.14     | 0.83      | 0.15         |
| 12. More varied working conditions/locales shown in VFES    | 4.07     | 0.95      | 0.17         |
| 13. "Virtual" interaction not a major drawback of VFES.     | 3.79     | 1.11      | 0.20         |
| 14. VFES valuable, despite emphasis on observation.         | 3.99     | 0.97      | 0.18         |
| 15. VFES improved attitudes re: teaching.                   | 4.17     | 0.82      | 0.15         |

Table 3

*Independent t-test comparisons by student demographic characteristics (N = 117)*

| Category    | Group 1  |                           |           | Group 3  |                            |           | <i>t</i> | <i>p</i> |
|-------------|----------|---------------------------|-----------|----------|----------------------------|-----------|----------|----------|
|             | <i>n</i> | <i>M</i>                  | <i>SD</i> | <i>n</i> | <i>M</i>                   | <i>SD</i> |          |          |
|             |          | <u>Minority</u>           |           |          | <u>White</u>               |           |          |          |
| Race        | 34       | 4.15                      | 0.68      | 82       | 4.01                       | 0.67      | -1.07    | 0.29     |
|             |          | 20 to 21 Years            |           |          | Older than 21 Years        |           |          |          |
| Age         | 51       | 4.11                      | 0.64      | 66       | 4.00                       | 0.69      | 0.93     | 0.35     |
|             |          | One Experience            |           |          | More than One Experience   |           |          |          |
| Virtual     | 86       | 4.06                      | 0.67      | 31       | 4.02                       | 0.67      | 0.29     | 0.78     |
|             |          | Four or Fewer Experiences |           |          | More than Five Experiences |           |          |          |
| Traditional | 61       | 3.99                      | 0.67      | 56       | 4.10                       | 0.67      | -0.9     | 0.37     |

## Mean Item Scores with 95% Confidence Intervals



Appendix A: Virtual Field Experience Annenberg Videos

|  |  |
|--|--|
| <p><u>Video One: Historical Change Grade 1</u><br/>(The Annenberg Foundation, 2013f)</p>             | <p><a href="http://www.learner.org/libraries/socialstudies/k_2/kitts/video.html">http://www.learner.org/libraries/socialstudies/k_2/kitts/video.html</a></p>     |
| <p><u>Video Two: China Through Mapping Grade 2</u><br/>(The Annenberg Foundation, 2013d)</p>         | <p><a href="http://www.learner.org/libraries/socialstudies/k_2/norton/video.html">http://www.learner.org/libraries/socialstudies/k_2/norton/video.html</a></p>   |
| <p><u>Video Three: Caring for the Community Grades 1-3</u><br/>(The Annenberg Foundation, 2013c)</p> | <p><a href="http://www.learner.org/libraries/socialstudies/k_2/learner/video.html">http://www.learner.org/libraries/socialstudies/k_2/learner/video.html</a></p> |
| <p><u>Video Four: California Missions Grade 4</u><br/>(The Annenberg Foundation, 2013b)</p>          | <p><a href="http://www.learner.org/libraries/socialstudies/3_5/rubio/video.html">http://www.learner.org/libraries/socialstudies/3_5/rubio/video.html</a></p>     |
| <p><u>Video Five: Explorers in North America Grade 5</u><br/>(The Annenberg Foundation, 2013e)</p>   | <p><a href="http://www.learner.org/libraries/socialstudies/3_5/cuddi/video.html">http://www.learner.org/libraries/socialstudies/3_5/cuddi/video.html</a></p>     |
| <p>Video 6: Using Primary Sources Grade 5<br/>(The Annenberg Foundation, 2013g)</p>                  | <p><a href="http://www.learner.org/libraries/socialstudies/3_5/waffle/video.html">http://www.learner.org/libraries/socialstudies/3_5/waffle/video.html</a></p>   |

## 5 Tips from Research on Brain-Based Learning for Increasing Student Engagement, Enthusiasm, and Academic Achievement

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"Understanding and applying relevant research about the brain is the single most powerful choice you can make to improve learning" (Jensen, XI, 2005).

Researchers in the field of brain-based learning insist that students of all backgrounds and characteristics (and history of failure) can experience academic success with a brain-based approach to teaching and learning. Here are some fundamental facts: (1) Students in the K-12 environment spend more than 13,000 hours of their developing brain time with teachers; (2) Students' brains are strongly affected by environmental factors. Their brains are altered by school experiences (Jensen, 2005). When students in your classroom are engaged and enthusiastic about their learning, your own attitudes toward the importance of your efforts are affected. What do some teachers do that generate this kind of positive energy? One approach to increasing student and teacher success is based on "Brain-based learning" research.

Brain-based learning refers to teaching methods, lesson designs, and school programs that are based on the latest scientific research about how the brain learns, including such factors as cognitive development—how students learn differently as they age, grow, and mature socially, emotionally, and cognitively. (Brain-Based Learning, 2013, August 29)

There are a number of books and articles on this topic, but here are five tips for increasing student engagement and learning that you can implement easily this week! It isn't a matter of working harder and longer; rather, it's a matter of working "differently."

### **Tip 1: Get Moving!!**

Did you know that 30 minutes of exercise three times a week contributes to brain mass, enhances mood, and improves cognition? Schools that eliminate PE are not advancing student well-being or academic growth. The part of the brain that processes movement also processes learning (Jensen, 2005). The loss of study time for PE, for example, did not result in lower academic scores in recent studies. In one 1999 study, aerobic exercise was added to the junior high school curriculum. The assessment results showed a significant increase in students' test scores at the end of the year (Doyle, Zakrajsek, & Loeb, 2013).

#### **Actions you can take:**

- Give opportunities for students to get out of their seats and move to other areas of the classroom
- Try moving a lesson outside now and then.
- Include a game in the classroom or outside that connects with facts taught in a lesson or that help review for a test.
- If a student feels drowsy, allow him to stand up a couple of minutes at the back of the room.
- Use role-playing, pantomimes, quick games, or a ball toss to review for a test.

Taking a walk increases blood flow. Even standing up raises heart rate and blood flow by as much as 5-8 percent within seconds (Krock & Hartung, 1992). Exercise fuels the brain with oxygen. It literally can help grow a better brain. Exercise supports success in school and improves classroom behavior as well (Dwyer, et.al (2001).

## **Tip 2: Give "Brain Breaks"**

Students need time to absorb and process information. Plan short breaks after presenting new material. I saw an example of a teacher implementing this strategy many years ago. She was an 8<sup>th</sup> grader English teacher who taught five 45 minute periods a day. She would teach a lesson for 20 minutes, then students would enjoy a five minute "mini-break" before resuming the lesson. Students were able to chat with a friend, get a drink of water, or just walk around or stretch a minute. Researchers have found that scheduling such brain breaks results in an increase in productivity, engagement, and learning.

### **Actions you can take:**

- Teach for ten minutes. Break with one minute of sharing with a partner, jumping jacks, singing a song, moving to a chart on the wall to add thoughts and illustrations, or give an opportunity for students to use their iPad to read a scan code showing visuals of animals, people, or historical events that augment the lesson.
- Present a quick game or quiz to review new information. Use clickers or respond on Chromebooks or iPads to check for understanding.
- Share new information with a partner. One great source of this concept is called "Power Teaching" in which students are actively involved and engaged in their learning. See the list of resources below.

The bottom line is that repetition strengthens the brain's connections. Students need time to absorb information.

## **Tip 3: Allow choice when possible.**

When possible, give choice for types of assessment, for seating preferences, and for work group preferences. Let's say that your students are required to read one book every three weeks and they are to provide some kind of "book report" for each one. Try this. Hand out a list of "choices" for demonstrating their new understanding about a book. The following is a list of "choices" you might consider. The rule would be that no option can be used more than once.

### **Actions you can take:**

- Create a diorama of your favorite scene. Attach a summary of the book's plot, title, author, and main characters.
- Create a PowerPoint presentation that includes title, author, theme, characters and summary of the plot along with appropriate design and illustrations. You might ask students to record their presentation.
- Write a script of one chapter to be performed for the class. The script must be in correct form and be submitted. This script might be performed in Reader's Theater style for the class as part of the grade.
- Create a poster that demonstrates the plot in the form of a diagram or a mind map.
- With a partner or small group, create a story board with narration using an online website.
- Write the story from the viewpoint of one of the characters. Include illustrations or a model or dress up as a character and tell your story.
- Write a script for a TV interview that includes the TV "host" and one of the main characters in the book. Perform the interview for the class.

When possible, give choice also on seating arrangements. Some students really do learn better sitting on the floor, on an exercise ball, or standing up against the back wall. Researchers have concluded that groups of 3-4 work best in most situations. Students can be asked to list 3-4 other students they would like to work with for a particular project. In arranging these groups, you would try to make sure that every student had one of their choices in the work group.

## **Tip 4: Be aware that lowering stress levels, getting enough sleep, and eating healthy food is good for the brain.**

"If kids are feeling anxious or stressed, the neuroscience tells us quite clearly that learning doesn't occur because they go into fight-or-flight mode" (Willis, 2017). Brain research scientists have

noted that emotion and cognition are interconnected (McCall, 2012) and that “environmental stressors increase anxiety and decrease the ability to learn.”

Getting enough quality sleep is also a critical factor to learning. More than 50% of students over the age of 13 are sleep deprived (Jensen, 2005). Many students walk in the door with low blood sugar. They may feel tired and inattentive.

*One of the most important new insights into how the human brain learns is that it needs to be prepped for learning if it is to work at its best. Showing up to class without proper sleep and exercise and without eating or hydrating your brain will cause your brain to operate inefficiently and make learning much more difficult.* (Doyle, Zakrajsek, & Loeb. 2013)

#### **Actions you can take:**

- Allow students to bring a snack and water for hydration.
- Use exercise, drama, and celebrations to help decrease stress and increase learning (Jensen, 2008).
- Learning through the arts, construction activities and experiences like going on a field trip are positive activities that reduce students’ stress and enhance learning.
- Use music as a part of your classroom ritual. On the Eric Jensen website, (jensenlearning.com), he describes the value of using music as follows: “Music is a powerful classroom tool that enhances cognition, improves memory, energizes sluggish learners, and makes lessons fun for students of all ages” (Jensen, 2018).
- Show entertaining videos or read books on the importance of getting enough sleep and on healthy eating.
- Let students see you bringing healthy snacks to school. Include healthy food into lessons (like science or math).

#### **Tip 5: Connect learning with real life.**

Students don’t always find it easy to connect school learning with real life. How many times have you heard students say, “I’ll never use algebra in real life. Why do I need to learn it?” Many years ago, I took my 150 sixth graders to the L.A. Art Museum at the end of the semester. They had read about the Sumerians, Ancient Egyptians, and early Indian and Chinese cultures. They saw videos, they created artifacts, and they did presentations. But when they actually saw the Sumerian cuneiforms, the jewelry worn by the Pharaohs, and the actual statues that were illustrated in their textbooks, they were really excited!! A powerful connection was made. Here are some ways to connect learning to real life.

#### **Actions you can take**

- Interview a family member about an experience similar to something read in class.
- Present a real problem in your community and task students to come up with a solution.
- Present a real problem in your school (like bullying, cheating, gangs, etc.) Assign groups to come up with ideas for solving the problem.
- Create a food item related to a culture students are reading about.
- Include music and/or art that connects with a theme, story plot, or historical event. Example: find pictures, art, clothing style, means of transportation or music that was part of the American culture during the World War II era.

Your attitude and excitement toward learning is everything. Learning is a process rather than a one time event. We need to teach students to value “error-correction” or trial and error learning because that is an attitude that will help them in real life. The brain rarely gets it right the first time. Researchers have found that “making mistakes is key to developing intelligence” (Jensen, 2005, p. 52). The idea you want to stress to students is that making mistakes help us learn.

*We all learn throughout our lives. We learn how to tie our shoes, the best route to get to the mall, which friends we can trust, how to find the area of a circle, and how to write a research paper. Surprisingly, very few people are taught how to learn.* (Doyle, Zakrajsek, & Loeb. 2013)

## Conclusion

These 5 tips for implementing ideas from Brain-based learning research are just a few of many ideas available. Just trying out one or two of these suggestions will likely encourage more student enthusiasm and engagement and will increase your sense of enjoyment and satisfaction as a teacher as well. We are teaching students who are often adept with technology, yet that technology savvy will not guarantee a successful future for them. We must always be cognizant of connecting with the Whole Child: physical, cognitive, and emotional. Doing what we can to use the findings from Brain-based learning research can help us achieve that goal.

### Helpful Resources to Explore:

“Power Teaching.” Here is one example of many on a Brain-based approach to teaching:  
<https://youtu.be/XroJtR9gQc8>

Powtoons <http://www.powtoon.com/> *Make your own animated videos and animated presentations for free. PowToon is a free tool that allows you to develop cool animated clips and animated presentations.*

**Mindmeister.** <https://www.mindmeister.com/>

This is a free site that lets you create mindmaps for any topic. There are lots of tutorials and examples on the site.

Education 2020. This is a site that focuses on “Connectivism” and offers a huge array of making lessons more engaging using technology.

<http://education-2020.wikispaces.com/Connectivism>

Motivating Students | Center for Teaching | Vanderbilt University. This is a great site that gives information on learning styles, flipping classrooms, and many other pertinent ideas.

<https://cft.vanderbilt.edu/guides-sub-pages/motivating-students/#intrinsic>

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## ***Make It Real! Integrating Culture into the Language Classroom***

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In recent decades the teaching of culture has assumed an increasingly important role in the foreign language classroom. In conjunction with other language associations in the nation, the standards task force of the American Council on the Teaching of Foreign Languages (ACTFL) <sup>1</sup> has identified five goal areas that compass the diverse purposes of foreign language acquisition. ACTFL advocates that United States must educate students to be linguistically and culturally equipped to communicate successfully in a pluralistic American society and abroad. For the purpose, ACTFL has set forth standards which re-affirm that through the study of other languages students can gain knowledge and understanding of the cultures of the target language. Furthermore, ACTFL emphasizes that students cannot truly master the language until they have mastered the cultural contexts in which the language occurs. As the increasing role of culture in language instruction has reached common consensus, many instructors have faced subsequently the issues of how much culture should be integrated into a language curriculum and how to teach it. Whatever the priority, cultural instruction should be guided by two basic instructional principles. First, cultural learning activities should be planned as carefully as language learning activities. Second, culture components should be tested as rigorously as language components, lest students assume that cultural knowledge has little or no impact on grades and consequently is not worthy of their attention in or out of the classroom.

The integration of cultural materials may range from supplying students with identifiable cognitive facts about a culture to bringing about changes in their desire or ability to value people who think, dress or act differently from them. Cultural instruction may range from teaching students to recognize and/or interpret major geographical features, historical events, aesthetic components of the target culture, including architecture, literature, and the arts to interpret everyday cultural patterns such as greetings, eating, shopping in order to act appropriately in everyday situations. The most frequently suggested approach to the teaching of culture in American foreign language programs calls for a maximum degree of integration of linguistic and cultural topics, that is, the text is based primarily on language features, and a variety of cultural information and activities are added. The overwhelming majority of language textbooks, especially at the introductory level, integrate cultural components in vocabulary, sentence structures, and the language skills. Well planned, culture can be easily integrated in the reading, writing, listening, and speaking activities and should be presented in conjunction with related thematic units and/or closely related vocabulary and grammar content. For example, shopping in a country of the target language might be discussed following a unit that introduces clothing vocabulary while the metric system can be examined following a unit in which numbers are taught. Unit on foods and drinks can be easily taught through students' participation using restaurant menus and authentic ethnic foods and drinks and/or asking students to create a recipient for an ethnic dish or generate a grocery list for a special occasion.

ACTFL advocates furthermore that interactive reading and listening comprehension task should be designed and carried out using authentic cultural texts of various kinds which provide real-life examples of language used in everyday situations. Authentic texts are defined as "written by members of a language and culture group for members of the same language and culture group" (Galloway, 1998, p. 133, as cited in Glisan). Guariento & Morley (2001, 347) state that authentic materials are significant since they increase students' motivation for learning, making the learner be exposed to the 'real' language, and Chavez (1998) affirms that students enjoy dealing with authentic materials since they enable them to

interact with the real language and its use. Instructors can enhance students' cultural competence through effective usage of authentic materials which may include real newspaper reports, magazine articles, advertisements, cooking recipes, restaurant menus, horoscopes, films, radio programs, music videos, maps, brochures, speeches, literary texts, etc. Among the most frequently used authentic materials are audiovisual aids, including films, recordings, photographs, and library collections, etc. A good example is *Like Water for Chocolate*, a critical acclaimed film (1992) based on the novel of the same title (1989) by the Mexican screenwriter Laura Esquivel.<sup>2</sup> Instructors may assign the viewing of the film as homework or watch clips or the entire film in the classroom based on the time allocated. A variety of activities can be designed for this unit to enhance different language skills: viewing of the film (listening skill), discussion of the topics given by the instructor (speaking skill), and turn in answers of the questions posted (writing skills). Themes related to the film may include: Mexican Revolution, the role of the *soldaderas*<sup>3</sup>, magic realism<sup>4</sup> on the contradictory forces of indigenous myth and religion versus the powerful of Catholic Church, and the themes of masculinity and gender identity, etc. As post-viewing activity, students are then asked to express their personal opinions through oral communication or writing, enhancing at the same time their critical thinking ability about Mexico during the revolution period from socioeconomic, political, cultural, and religious perspectives as reflected in the film.

It is essential for instructors to know that culture should not be treated exclusively in English, and cultural presentations should not be limited to the lecture method since many cultural topics lend themselves readily to role playing and/or simulating real life environment. Dramatization can provide students with more opportunities for active participation and high productivity during a stress-free learning process. The following factors should be taken into consideration while designing cultural activities through dramatization: Time allocated, students' language proficiency, interest, and resources. Levels of proficiency for dramatization can vary from Novice-High to Advanced, depending on the topics and scope. In addition, an evaluation rubric should be generated which may include, but not limited to: originality/creativity, preparedness, cultural connections, language usage, and audience appeal/comprehensibility. A good example for cultural dramatization is the theme of *La familia extendida*<sup>5</sup>. As pre-dramatization activity, instructor should set the cultural Connection explaining the concept of *la familia extendida* in the Hispanic society, pointing out that, in spite of the fact that *la familia extendida* is generally valued and practiced in Hispanic society, having an extended family member living in the same household may create stress and tension to the nuclear family.

Following the contextualization, students then will create a dialog between a husband, who is complaining about his mother-in-law who lives with the nuclear family, and his wife, who is defending her mother saying the contrary. Continuing the same stream of thought, instructors may also assign another dramatization indicating that nowadays it is common in many Spanish speaking countries to see male family members doing the household chores traditionally assigned to women, such as shopping for groceries, cooking, cleaning, and taking care of the children. Students can act out the reaction of a traditional Hispanic mother who is visiting her son's nuclear family in the U.S. where the young couple shares house chores.

Another cultural theme suited for dramatization is the *la quinceañera*<sup>6</sup>, a cultural event in Mexico, Central America, and the Caribbean to celebrate the transition of teen-age girls from girlhood to womanhood with a very traditional party. First the girl dressed very elegantly accompanied by her family, her female friends (known as *damas de honor*) and her male friends (known as *chambelanes*) to church to receive blessing for her transformation; after the religious celebration then a grand party is given and exquisite meal is served. Students can be asked to create a dialogue between a mother and a teen planning her fifteenth birthday. After the dramatization of the cultural activities, instructors then can invite students to discuss the concept and importance of *la familia extendida* as reflected in the dramatization and the linguistic and cultural differences between different generations.

In the early years, literacy learning is a major focus of instruction, and literature often serves as the primary vehicle for that instruction (Isom 1997, 98). By selecting appropriate literary texts rich in cultural details, instructors not only offers an opportunity to extend children's general cultural knowledge as they become more literate, but also allows readers to appreciate the uniqueness of different groups since these

texts are unique to a particular culture, portray a culture's customs, characteristics, language, values and history. Cultural readings also offer meaningful entry into the study of content topics, especially geography, history and the other social studies, and provides excellent opportunities to develop critical thinking through analyzing themes, values and beliefs, as well as for evaluating the authenticity of the setting, conflicts and characterization (Norton, 1990). By using reading and writing activities to analyze, classify, apply and evaluate literature themes and concepts students can develop and extend their critical thinking abilities.

Since the 1990s, the study of Latino literature and culture has become an indispensable area of studies in American school. Instructors often find cultural information embedded in the texts of Latino literature in the United States. It is a literature that is transitional in nature, marked by bilingualism and multiculturalism, and emerged from and remains related to the crossing of political, geographic, cultural, linguistic and racial boundaries. Through the reading of Latino literature, students not only improve their language skills but also become familiarized with the recent history of the Spanish speaking countries. They can also be acquainted with some of the most significant authors of Hispanic origin, and understand the particular reasons behind each country's massive migratory movements to the United States. It is important for the instructors to contextualize the literary texts by pointing out that Hispanic population in the United States has shown a dramatic increase as a result of birth rates and increased immigration.<sup>7</sup> In recent decades the presence of Hispanics/Latinos has become more visible in the American public scene. On popular culture, mass-media, politics, sports, arts, and other spectrums, Hispanics/Latinos have achieved essential roles. Through the reading of Hispanic immigration experience one can learn the socio-historical development of the Latino community within the United States as well as the pursuit of their identity within the cultural and geographic borders of a multicultural nation. Further, the artistic productions of immigrant writers have occupied a multicultural space where different and dissimilar cultural markers intertwined each other, presenting a complexity of the Hispanic migration experiences.

The theme of immigrating to America makes for an interesting pathway for discussing and researching how Hispanics' experiences compare to those of other ethnic and cultural groups in the U.S. Literary activities connected to this theme might include the use of texts that show some of the political and economic reasons why people come to the U.S. Two appealing stories about immigrants from Cuba are *How Many Days to America? A Thanksgiving Story* (Bunting, 1992), which is about a family's journey by boat to Miami in order to escape political oppression, and *The Children of Flight Pedro Pan* (Acierno, 1994), a story with a similar theme, except that all the travelers are children on a Miami-bound flight. While *The Children of Flight Pedro Pan* begins in Cuba, it explores the experiences of a brother and sister during their first year in Miami and reveals some of the emotional trials of being in a new land, often without the comforts of their parents and their familiar culture. *Lupita Mañana* (Beatty, 1992) is about a 13-year-old girl and her brother who, after the accidental death of their father, must immigrate illegally to California to find work to support their mother and young siblings at home. By contrast, Dorros' *Abuela* (1991) illustrates the joy of a New York City child whose grandmother emigrated from Puerto Rico many years earlier. The grandmother uses many Spanish words in her conversation with her granddaughter as they enjoy an imaginary flight throughout New York City. Such stories offer substantial knowledge and understanding about immigration and the process of assimilating into a new country. As students involve in conversation and argue about characters' actions, they share about thoughts and feelings the books stimulates discovering at the same time literature's potential to illuminate life lessons (Roser & Martinez, 1995).

Since the 1990s, Latina authors have emerged in the North American literary scene. Many of their works have been listed among the bestsellers, gaining ample national and international readership. Many of the Latina writers share their personal experience growing up in the United States as teen-agers, having to deal with their coming-of-age as a minority-woman and Latina-in a world often filled with prejudices and intolerance. Among the best-selling readers is *The House on Mango Street* (1984) by Sandra Cisneros, a high school mandatory reader in many states which deals with the early years of a Mexican-American teen growing up in a Chicano/Latino neighborhood in the 1960s in Chicago. The award-winning *How the Garcia Girls Lost Their Accent* (1991) by Julia Alvarez chronicles a Dominican family

escaping the Rafael L. Trujillo dictatorship and striving to integrate into the American mainstream society while *When I was Puerto Rican* (1993) by Esmeralda Santiago offers another perspective on the Puerto Rican diaspora. As Latino literary texts come in various themes and styles, students can be encouraged to design research questions or explore subtopics. For a research report on immigrants, students can answer questions such as: “What are the major immigration ports to the United States?”; “How many immigrants enter the United States each year and where do they mostly come from?”; “What are some reasons people immigrate to other countries?”; “What are the impacts of immigration in American society?”; “How would the immigrants deal with the issue of acculturation?”; “How have immigration laws in the U.S. changed during the 20<sup>th</sup> and the 21<sup>st</sup> centuries?”; and “What is your family’s immigration history?” etc.

Culture is multi-faceted and dynamic and students are encouraged to take an active part in the search for meaning with the aid of authentic materials. Instructor may facilitate the learning process by creating a non-threatening and fun learning environment where contextualization, research, analysis, critical-thinking, peer-learning, discussion and technology are paramount. Educators can honor students of a cultural group by sharing books about their culture in the classroom. Such books also help those not of the culture learn more about others. It is always a pleasure to learn that students have learned more than the vocabulary and sentence structures in the curriculum and are able to appreciate diversity and the “otherness” beyond the classroom.

## Notes

1. ACTFL is The American Council on the Teaching of Foreign Languages, an individual membership organization of more than 12,500 language educators and administrators from elementary through graduate education. Since its founding in 1967, ACTFL has been accredited for its innovation, quality, and reliability in meeting the changing needs of language educators and their students. From the development of Proficiency Guidelines, which are highly regarded as instrumental resources to assess language proficiency by institutions nationwide, to its leadership role in the creation of national standards, ACTFL focuses on issues that are critical to the growth of both the profession and the individual teacher.
2. *Like Water for Chocolate* was a novel written by the Mexican screenwriter Laura Esquivel in 1989. The novel has been translated from the original Spanish into numerous languages. The enthusiasm about the book led to a film in Spanish of the same title in 1992 which was also immensely popular. It was one of the most popular foreign language films in American film history.
3. *Las Soldaderas*, often called *Adelitas*, were women fighters who participated in the Mexican Revolution (1911-1921) and made significant contributions to both the federal and rebel armies of the revolution. Although few actually were engaged in combat, their assistance to the males in fighting the combat was monumental.
4. Magic realism is a style of fiction that portrays a realistic view of the modern world while also adding magical elements. It is associated especially with Latin America that incorporates fantastic or mythical elements into otherwise realistic fiction. Renowned Latin American authors include Jorge Luis Borges, Miguel Angel Asturias, Gabriel García Márquez, Juan Rulfo, and Isabel Allende.
5. Traditional Hispanic culture places a high value on family as the most important social unit within the society. The nuclear family consisting of parents and children is extended to include the extended family of grandparents, uncles, aunts, cousins, godparents, godchildren, and intimate friends of the family, thus the so called, *La familia extendida*.
6. *La quinceañera*, also known as *fiesta de quinceañera*, *quince años*, *quinceañero* or simply *quince*, is a celebration of a girl's fifteenth birthday with cultural roots in Latin America but celebrated throughout the Americas.

7. According to the 2010 U.S. Census, there are a total of 50,477,594 Hispanics in the country, constituting 16.3% of national population.

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# How the Example of History's Greatest Teachers Can Benefit Today's Teachers

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## **The Impact of Great Teaching on the World**

Great teaching has literally changed the world. At the time of Jesus' death in approximately 33 AD, there were likely less than 100 Christians. Within one hundred years, this miniscule number had grown to approximately 500,000 and was becoming an influential religious force throughout the Roman Empire. Within 1000 years, it had become the world's dominant religion, impacting all facets of life for over 60,000,000 people (Number of Christians Through History, 2017). By two thousand years after Jesus' death, Christianity had spread to every country and had become a primary influence in the arts, politics, economics, and other disciplines throughout the history of that period. Today approximately 2.412 billion people claim to be Christian, a number equaling approximately 1/3 of the world's total population (Janssen, 2017).

In his day, Jesus was commonly called, "Rabbi." The gospels, a series of biographies written around the time of his life, record well over a dozen instances where Jesus was referred to by this title (New International Version Concordance, 2017). Rabbi, of course, is the Aramaic word for teacher.

Of course, Siddhartha Gautama, also known as Buddha, gathered around him a substantial number of followers during his lifetime. Today, the world's Buddhist population is greater than 520 million, or about 7% of the world's population (Janssen, 2017). Of course, Buddhists can be found all around the globe but are most concentrated in China, Thailand, and Vietnam (Pew Research Center, 2011), and as before, this great leader was seen by those around him primarily as a teacher.

Similarly, during his lifetime, Confucius was certainly very influential and had a large number of student-followers. Today, though, Confucian thought guides the thinking of over one billion individuals, primarily among the Chinese and Korean peoples. Even in 2017, almost 2,500 years after Confucius' death, Koreans often describe their society as Confucian-based, seeing in his teachings their continued emphasis on family, education, and hard work – three values that transformed tiny and war-ravaged South Korea from a poor and thoroughly destroyed country after the Korean War (1950-1953) into the world's 12<sup>th</sup> most powerful economy (Seth, 2016). Again, throughout his life, Confucius was seen by others foremost as a teacher.

Yes, great teaching changes lives. Modern educational research reflects this powerful truth. Table 1, taken from Marzano (2003), shows the impact of effective teaching on student performance over a two year period.

**[See Table 1]**

Clearly, a variable that makes a significant difference in the learning of a student is the effectiveness of his or her teacher. Is there anything, though, from the example of history's most influential teachers that can positively impact and benefit today's teachers? Is there anything

within their pedagogy that can serve as a model for working with modern students? If so, are these beneficial instructional approaches research-based best practices? Can they be defended with what educational experts know today about effective teaching? The answer is a resounding, “Yes.” This brief survey will review five of the most obvious connections between history’s great teachers and the support for their approaches found in current educational research: ① the use of imagery, ② the emphasis on comparisons, ③ the inclusion of clear objectives, ④ the posing of provocative questions, and most importantly, ⑤ the development of strong relationships.

### **Great Teachers & Great Imagery**

Great teachers have instinctively understood the power of strong imagery in their teaching, and this emphasis is well placed given the brain’s thorough wiring for visualization. Jensen (2008) highlights several physiological features that make teaching through imagery especially appropriate. The brain, for example, weighs only three pounds but consumes 20 to 25% of the body’s energy. A person weighing 150 pounds has a brain accounting for only 2% of the body’s mass but using a quarter of the body’s energy, and 90% of all the information received by that brain is visual. Similarly, 40% of the nerves connected to the brain are connected to the retina, enabling the brain to process the 36,000 visual messages it registers every hour (Jensen, 2008). The eye can process 1.5 million bits of information per hour and provides 80% of the sense information received by the brain. The eye receives light travelling at 186,000 miles per second on the retina, which is only one square inch in area but contains 130 million rod cells for seeing in black and white and another 7 million cone cells for seeing in color. This image then travels to the brain at over 300 miles an hour (Kleiss & Kleiss, 2011).

As current classroom teachers know well, students use this brain-wired need for visuals in countless ways. Children ages 2 to 5 watch over 30 hours of television each week. In addition to over 25 hours of TV watching a week, teenaged males play over ten hours of video games. Over 50% of children surveyed express a preference for television over their own fathers, spending only 3.5 minutes each week with dad (Boyce, 2010).

While this information is disconcerting on the surface, Marzano (2007) establishes the potential educational benefit of student’s incredible visual power, finding that teachers who implement non-linguistic representations into their instruction correctly help their students yield an increase in academic achievement by 27 percentile points. Naturally and understandably, teachers bemoan their students’ dependence on visual displays and devices, rightly commenting that attention spans in this technological era are seemingly diminished; however, there is a silver lining to this cloud as teaching with visuals is easier today than it has ever been. A teacher presenting a lesson on almost any subject can find tens of thousands of pictures or videos about that subject in less than a second using any popular internet search engine.

Great teachers of the past instinctively understood this learning phenomenon. Jesus’ teaching is replete with imagery that communicates as powerfully today as it did two thousand years ago. To teach them a valuable lesson about worry, he pointed to nearby wildflowers, commenting that their most wealthy king was not dressed as splendidly (Luke 12:27, New International Version). Driving this lesson home, he then pointed to simple and common birds flying nearby (Matthew 6:26), reminding his students that they ate well every day, fed for by a caring heavenly provider. Perhaps his most well-known visual lesson, though, might be the broken bread and wine taken at his Last Supper with his disciples (Mark 14:12-26), a lesson still reviewed in countless Christian churches around the world today, teaching his students to reflect upon his sacrificial love for them all.



Buddha also used powerful visual imagery in his instruction. He once told a powerful story about children playing with sandcastles near a river. One child kicked over his friend's sandcastle and received a terrible beating for his offense. Later that day, as the sun went down, all the children kicked over their own sandcastles and wandered away, no longer caring about their once treasured creations (Kornfield, 1996). He once told a woman that she could make medicine to heal her dead son by gathering mustard seeds from every home that had never experienced death. She set about to collect the mustard seeds but could only find homes touched by death. She realized that the teacher was helping her to understand that her tragedy was common to all (Kornfield, 1996). Finally, among scores of other nonlinguistic representations, he taught his followers to see inhaled air as white, held air as red, and exhaled air as blue in order to control their breathing during meditation (Kornfield, 1996).

Confucius often painted interesting word pictures for his students. When asked who were the best soldiers, he replied that he did not want tiger wrestlers or river swimmers in his army, preferring those instead who approached situations cautiously and were always planning for success (Confucius, 1998). In his teaching, he was said to fish with a line, but not with a net. He found archery to be an excellent example for the superior man; when an archer misses the bullseye, he looks for the cause of the failure in himself (Confucius, *The Wisdom of Confucius*, 1963).

### **Great Teachers & Great Comparisons**

In addition to an emphasis on visual imagery, great teachers of the past also frequently used meaningful comparisons to enhance the point of a vital lesson. Modern educational research confirms this instructional choice. Marzano (2007) found that the effective use of comparison and contrast resulted in student achievement gains of an astounding 39 percentile points. Simply by regularly and correctly using such easily taught techniques as Venn diagrams, charts, and web or cluster diagrams, teachers can help students organize and reflect in an orderly way on their content.

Jesus' parables provide excellent examples of how this comparisons can be used effectively in instruction. His teaching on the wise and foolish virgins (Matthew 25:1-13), the wheat and the tares (Matthew 13:24-30), and the sheep and the goats (Matthew 25:31-46) are all very clear comparisons to help his students understand some important truth. His greatest and most well-remembered lessons – the Prodigal Son (Luke 15:11-32) and the Good Samaritan (Luke 10:25-37) – establish strong contrasts between the kind of moral behavior he seeks in his students and the kind of selfish behavior more commonly seen.

Buddha once compared a man who refused to follow him until all his questions were first answered to a man who refused medical treatment for an arrow wound until he knew all of the details about the person who shot him (Kornfield, 1996). He compared inner peace to the sea, stating, "As in the ocean's midmost depth no wave is born, but all is still, so let the practitioners be still, be motionless, and nowhere should they swell" (qtd. in Kornfield, 1996, p. 79). He compared the transient nature of life – the fleeting world – to "a star at dawn, a bubble in a stream, a flash of lightning in a summer cloud, a flickering lamp, a phantom, and a dream" (qtd. in Kornfield, 1996, p. 141). Other comparisons used by the Buddha are charted below in Table 2.

### **[See Table 2]**

Confucius was similarly adept at comparisons. He once compared a man's word to the pin that connected a large carriage to its yoke. It seemed small, but without it, no benefit could be gotten from the carriage; he found dishonest men to be just as worthless. When a student

asked him to rebuke a sleeping peer, Confucius compared the task to carving rotten wood or sculpting with manure, a wasted effort (Confucius, 1998). While standing by a river, he once stated, “Isn’t life’s passing just like this, never ceasing day or night” (qtd. in Confucius, 1998, p. 130).

## **Great Teachers & Great Objectives**

Once again, modern educational research provides support for the great teachers of the past and their use of clearly stated objectives. One meta-analysis found student academic achievement increases of 18 percentile points on standardized assessments when their teachers implemented learning objectives correctly. Educational experts identify the correct implementation of objectives as being appropriately focused, applicable to a variety of settings, and applicable in individualized ways (Marzano, 2007).

In his great discourse on blessings, the Buddha provided his followers with several clear life objectives. Among these included the avoidance of intoxicants, care for one's parents, and diligence in virtuous tasks. He further recommended avoiding the foolish, living in a suitable location, being highly disciplined, and living austerely (Kornfield, 1996). Similarly, the great teacher set the following objectives for his followers in the form of a beautiful poem.

Live in joy,  
In love  
Even among those who hate.  
Live in joy,  
In health,  
Even among the afflicted.  
Live in joy,  
In peace,  
Even among the troubled (qtd. in Kornfield, 1996, p. 21).

Confucius also relied on strong objectives to teach his students. His well-known aphorisms often state very clear objectives for adherents to pursue. Several examples are provided below.

- “Don’t worry about not being acknowledged by others; worry about failing to acknowledge them” (qtd. in Confucius, 1998, p. 75).
- “Give your mother and father nothing to worry about beyond your physical well-being” (qtd. in Confucius, 1998, p. 77).
- “Do not plan the policies of an office you do not hold” (qtd. in Confucius, 1998, p. 123).

## **Great Teachers & Great Questions**

In addition to recognizing the educational benefit of using images, comparisons, and objectives, modern research also strongly supports the effectiveness of good teacher questioning. The increase in student achievement is 23 percentile points on standardized tests when teachers employ this approach correctly; asking questions that emphasize important course content, that focus on higher order thinking, that allow for several seconds of wait time, and that occur throughout a lesson (Marzano, 2007).

The gospels record that Jesus was seemingly constantly asking questions, almost always with the point of directing or challenging his listeners' thinking. The list below – from just one of the gospels - provides a selection of these often life-altering questions by the master teacher.

1. If you love those who love you, what reward will you get? (Matthew 5:46)
2. Who of you by worrying can add a single hour to his life? (Matthew 6:27)
3. Why do you look at the speck of sawdust in your brother's eye and pay no attention to the plank in your own eye? (Matthew 7:3)
4. Which is easier: to say, ‘Your sins are forgiven,’ or to say, ‘Get up and walk’? (Matthew 9:5)

5. How can the guests of the bridegroom mourn while he is with them? (Matthew 9:15)
6. If any of you has a sheep and it falls into a pit on the Sabbath, will you not take hold of it and lift it out? (Matthew 12:11)
7. How can anyone enter a strong man's house and carry off his possessions unless he first ties up the strong man? (Matthew 12:29)
8. Why do you break the command of God for the sake of your tradition? (Matthew 15:3)

The Buddha was known for his use of provocative and instructive questions. He once asked a group of monks what a person using a raft to cross a stream should do with the raft once the water has been traversed. Should the man carry the raft in case he encounters another river or leave it behind for another traveler? The Buddha recommended leaving the raft behind, commenting that one should never cling to anything – even treasured new knowledge (Kornfield, 1996). He once asked his disciple Ananda whether they should leave a town that treated them with scorn and abuse. Ananda, of course, answered that they should leave, but the Buddha corrected him, commenting that they should never be controlled by external things that come and go quickly (Kornfield, 1996).

### **Great Teachers & Great Relationships**

Perhaps no teaching attitude or approach, though is as crucial to ultimate effectiveness as the development of a strong and meaningful student-teacher relationship. Cornelius-White (2007) concluded that positive student-teacher relationships show an above average effect when compared to other educational innovations. He further clarified that these relationships are best established on five foundational dispositions: sincerity, personalization, encouragement, warmth, and empathy. For a teacher, the issue is not “being best friends” with one’s students; rather, it is consistently treating them with compassion and fairness. Shepherd (2016) found that students care very little about what a teacher tells them about caring for them; to be respected by students, this stated care must be shown practically and consistently.

Of course, the great teachers of the past knew and lived this truth. In the gospel accounts, examples of Jesus’ relational encounters are numerous. After the apostle Peter has denied Jesus three times just outside the court where Jesus was being tried for capital crimes, Jesus approaches him with great tenderness and draws him back into relationship by getting the broken man to focus on their shared love instead of the recent failure (John 21:15-19). Earlier, Jesus dealt with the skeptical Thomas by asking the doubter to place his fingers into Jesus’ crucifixion wounds (John 20:24-29); he used his knowledge of Thomas’s personality to provide the lesson Thomas most needed to overcome his faithlessness.

In the Samyutta Nikaya, the following anecdote is provided. Ananda, a follower of the Buddha, commented to his guru, “Half of this holy life, Lord, is good and noble friends.” His teacher replied, “Do not say that, Ananda.... It is the whole of this holy life, this friendship companionship, and association with the good (qtd. in Kornfield, 1996, p. 13).”

Confucius was well known for his compassionate manner with others. While helping his old friend Yuan Zang prepare the coffin for Zang’s mother, Zang embarrassed him by singing while standing on the wooden lid. His students were mortified and asked him, “Can’t you be rid of him?” The master replied that one should never forget a friendship (Confucius, *The Wisdom of Confucius*, 1963).

### **Conclusion**

Clearly, history’s greatest teachers were instinctively aware of the findings of modern educational research. Jesus, Buddha, and Confucius all taught using the best instructional

practices of today. Each taught emphasizing the power of nonlinguistic representations in their world-changing lessons. Each instructed others with a heavy emphasis on comparison and contrast to develop memorable instruction. All three set research-supported objectives for their students and asked those students provocative and appropriate questions. Finally – and most importantly, history’s greatest teachers were relational teachers; they developed close friendships with their most influential followers and used those relationships to drive their crucial lessons home, forever changing the lives of those they taught. Today’s teachers would do well to pay close attention to the example of these great teachers of the past, learning from their examples of how to apply most effectively the best results of modern educational result. This approach will, as proven by both research and history, have the greatest effect on student growth and achievement.

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Table 1

*Impact of School and Teaching on Student Performance over Two Years*

|   | Percentile       |
|---|------------------|
| Average School with an Average Teacher          | 50 <sup>th</sup> |
| Below Average School with Below Average Teacher | 3 <sup>rd</sup>  |
| Above Average School with Below Average Teacher | 37 <sup>th</sup> |
| Below Average School with Above Average Teacher | 63 <sup>rd</sup> |
| Above Average School with Above Average Teacher | 96 <sup>th</sup> |

Table 2

*Comparisons used by Buddha (Kornfield, 1996)*

|                                     |                             |
|-------------------------------------|-----------------------------|
| Sharpest sword                      | A word spoken in wrath      |
| Deadliest poison                    | Covetousness                |
| Fiercest fire or most violent fever | Hatred                      |
| Darkest night                       | Ignorance                   |
| Greatest gain                       | Giving to others            |
| Greatest loss                       | Receiving without gratitude |
| Best weapon                         | Wisdom                      |
| Most dangerous thief                | Unwholesome thought         |
| Most precious treasure              | Virtue                      |
| Most horrible pain                  | A bad conscience            |

# Assessing the Financial Viability of the California State University in a post GASB 67-75 Environment

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## **Abstract**

*The California State University system is the largest public university system within the United States. The purpose of this study is to assess the financial condition and viability of the system after controlling for the effects of notable changes in the public pension reporting standards of the Government Accounting Standards Board (GASB). Five years of independently audited financial statements presented in a standardized format by campus is examined. Using metrics appropriate for publicly funded universities, this study identifies financial trends, benchmarks, and areas of concern.*

## **I. Introduction**

As the largest public university system within the United States, the California State University (CSU) system manages over \$5.1 billion dollars in revenue, employs nearly 50,000 individuals, and educates approximately 475,000 students across 23 campuses statewide (CSU facts, 2015, pp. 17-30). While many campuses originated as independent teacher colleges, CSU campuses of today are coordinated through a state office in Long Beach, CA, a similar model to the State Universities of New York (SUNY) system. The Donahue Higher Education Act of 1960 not only centralized these campuses, but also clearly delineated the mission of the CSU system from that of the California Community College and University of California system. The focus of CSU campuses is to build instructional activities around the applied fields and professions (Gerth, 2010). Today, the CSU system is governed by a 25-member Board of Trustees, Chancellor and his executive staff. However, each campus has also appointed a President who serves as a liaison between the system-wide office, the campus, and the greater community. As such, each campus exercises significant discretion in the development and execution of its campus budget, but oversight and ultimate control resides within the central offices at Long Beach (CSU About Us, 2017).

The CSU system is heavily dependent upon taxpayer resources. In fact, nearly 57% of the system's operating budget comes from State of California general fund appropriations (CSU facts, 2015, pp. 17-30). The remaining gap is closed by tuition and other fee revenue. As such, the overall fiscal condition is highly dependent on the general economy. The system was hit hard by the U.S. economic recession and ensuing State of California budget crisis of 2009-2010 which amounted to over a \$40-billion-dollar budget deficit. To close the budget deficit, the state imposed significant education budget cuts which forced the board to enact personnel layoffs, as well as raise tuition and other fees on students (CSU About Us, 2017). With current economic conditions improving within the state, funding has correspondingly grown within the CSU system. For the first time in nearly a decade, the state recently fully funded the Chancellor's budget request.

Under the 2025 graduation initiative, state leadership has prioritized increasing graduation rates. However, this mandate is being carried out within an environment of increased fiscal pressure. In an

effort to avert a massive employee strike, CSU administrators recently agreed to a 10.5% pay increase in 2016 to be paid out to faculty over the next three years. This agreement adds nearly \$200 million to the existing budget. More troubling, the system has approximately \$2 billion dollars in deferred maintenance needs and a \$6 billion dollar net pension liabilities. With the implementation of GASB Statement No. 79<sup>1</sup>, the system is expected to add another \$1 to \$2 billion dollars of post-retirement benefit liabilities to the balance sheet in fiscal year 2017. Given this reality, evaluating the long-term fiscal sustainability of the system is of elevated research significance.

## **II. Literature Review**

Within the public sector there is no single underlying measure of financial success that would be equivalent to the “net income” performance indicator of the private sector. To address this limitation, scholars typically apply multiple measures to assess fiscal capacity. Several studies highlight these various techniques, which are commonly applied to state and municipal governments. Since the New York City financial crisis of the early 1970s, the term financial condition has been used synonymously with financial health or financial position in relation to a government’s ability to finance its public services without interruption for the citizenry and/or stakeholders (Ladd and Yinger, 1991; Mead, 2001; ICMA 2003; McKinney, 2004; and Deal, 2007). Financial condition assessment procedures are commonly referred to as financial indicators, ratios or trends conducted over a period of time (Dougherty, et. al, 2000; Miller, 2001; Hendrick, 2004; and Hevesi, 2006). Brown (1993), International City/County Management Association (2003), and Kloha, Weissert and Kleine (2005) Financial Trend Monitoring System (FTMS) has typically been the basis for many states’ financial condition assessment procedures, including North Carolina, Ohio, and New York. According to a recent study conducted by Pew Charitable Trusts (2016), California does not presently have legislation in place defining “fiscal stress” and/or annual fiscal monitoring in place for local governments. Many investors and government entities rely upon Moody’s, Fitch, and Standards and Poor credit rating agencies that have also been lauded for their development of financial condition ratios and trends which have been used consistently in ratings of public sector debt issuances over the last thirty years.

With the knowledge that several states and local governments had already developed financial condition assessments that were available to the public, one goal of this study was to determine if there were any publicly-available datasets or research studies benchmarking the financial condition and capacity of public universities in the United States. Some scholars have focused on research techniques that need to be applied to evaluate efficiency, effectiveness, and accountability in higher education, such as financial ratio analysis (Jenny & Minter, 1993; Cirtin & Lightfoot, 1996; Lupton, Augenblick, & Heyison, 1976; Petro, 1998). However, our findings indicate that the research of a particular system or set of universities, such as the top research universities, is scarce. The researchers acknowledge that the lack of research studies might be attributable to the work from the National Association of College and University Business Officials (NACUBO) who promotes the use of ratios to benchmark an institution to the national norms and makes that tool available to members from the 2,100 universities on a subscription basis. While this tool proves useful in day-to-day management purposes, higher order policy questions cannot be addressed without further analysis.

To illustrate the deficit in singular system research, our literature review yields only a few studies conducted by academics or practitioners on this topic with most of the research either from American Association of University Professors (AAUP) or singular college systems to demonstrate need for additional funding. To illustrate, Bunsis (2010) conducted a financial condition analysis of the University of Illinois system, made up of three universities, using the audited financial statements for 2008 – 2010. The study considered trends in revenues and expenditures for the purpose of contesting furloughs. Bunsis did not conduct a financial ratio analysis. Buddy (1999) studied six universities under the authority of the Board of Regents for Oklahoma Colleges to determine the financial ratios that best indicate financial condition and to evaluate and compare the financial condition among the six institutions. Her findings showed that the typical ratios employed by other levels of government as well as corporate ratios were meaningful for an analysis of either a singular institution in comparison with the national norms or a



sample of homogeneous institutions for inter-institutional comparison. Cheslock and Hughes (2011) contrasted tuition growth rates in states with low tuition thresholds versus states with higher thresholds. They find that low tuition states are being forced to raise rates and fees more rapidly.

### **III. Research Methodology**

The literature defines financial sustainability as a lack of volatility in an entity's position over a period. If a financial system is sound, one would expect to observe stability and equity across the network all other factors held constant. Several relevant research questions stem from the primary research question including: Are there any immediate threats to the going concern of individual CSU campuses? Are campuses experiencing cash flow problems? Are campuses maintaining sufficient liquid resources to meet growth in liabilities? Are there any alarming revenue or expense trends? To what extent can the system leverage existing revenues to pay current and long-term obligations?

This study addresses the research hypothesis by using a mixed quantitative methods approach. Using a combination of trend, financial ratio and value-added analysis, we evaluate the financial performance of the entire system, as well as each individual campus. Benchmarking using common-size analysis is among the most popular methods used to evaluate public finances. Financial benchmarking, it has been suggested, brings performance information to the table where resource allocation decisions are being made (Lu, 2008, p. 3). "It is a piece of the process—not a panacea. Merely, one of many analytical activities" (Snell, 2000). Although there are plenty of rules of thumb to which one might choose to compare and contrast public universities, these approaches should be handled prudently because the circumstances of universities can vary greatly depending on local conditions. To address these concerns, we stratify our sample into three groups based on the size of the institution as measured by enrollment, assets, and revenue levels.

Using the CSU system's standardized annual financial statements that have been subject to an independent audit, we analyzed five years of data, between the years 2012 through 2016. Only "campus-level" activities were examined due to significant differences in the activities and structures of discretionary component units (DCUs) from campus to campus. Foundations represent roughly 80% of discretely presented unit activities (CAFR, 2016, p. 26). GASB employs a concept that describes a broad measurement of financial health, encompassing both financial position and condition (Mead, 2012, p. 286). As such, this general criterion was applied when selecting core measures to evaluate financial performance of CSU campuses. We use key financial ratios highlighted within the literature, commonly leveraged by major credit rating agencies, and feasible to obtain given the available dataset. In similar manner to Brown's ten-point test, our focus is on keeping the number of ratios deployed to a minimum, but ensuring a representative number of liquidity, solvency, and condition measures are utilized (see Table 1).

### **IV. Results**

Before reviewing the performance of individual campus, we evaluate the entire system collectively. Among the many advantages of taking a broad view of the University system is the ability to identify systematic trends that may be affecting local management efforts. Additionally, a meta-analysis offers insight into state policy priorities, as well as the system's capacity to support distressed campuses. The next section highlights several challenges and opportunities confronting the University system, including the following key trends:

- Significant declines in the net position of the system due to the recognition of pension liabilities;
- Growing deferred maintenance needs;
- Chronic operational deficits occurring at select campuses;
- More spending on support activities at the expense of instructional activities; and,
- Increased reliance on state appropriations to meet college affordability mandates.

As reflected in Table 2, total liabilities have doubled and net position of the system has nearly evaporated in the past five years. Rahman (2015) finds the trend of declining equity ratios occurring

across all academic institutions, but the issue appears to be more acute within the CSU system. The decline in financial position is predominately driven by changes in accounting principle, but this does not make the threat less formidable. In 2015, the CSU system implemented GASB 68, *Accounting and Financial Reporting for Pensions*. This statement revised existing standards for measuring and reporting pension liabilities for pension plans provided by the University to its employees. The recognition of long-term liabilities will continue to grow once the system adopts GASB Statement No. 75, *Financial Reporting for Postemployment Benefit Plans Other than Pensions*, as well as GASB 79, *Certain External Investment Pools and Pool Participants*, in the FY 2017 period. In many respects, the restated financial statements reflect a more accurate account of the financial health of the enterprise.

Table 3 offers some more detail into the University's net position. Net position overall was a negative \$175 in 2015 and unrestricted net position has been running a \$4 billion deficit for the past two years. Net position, at a theoretical level, represents the resources a university has left over for use to provide services after the campus's debts have been settled. In essence, the residual equity of the entity. From both perspectives, these definitions can be misleading and complicated by the fact that many resources are not always available in a spendable form. Many CSU campuses are running negative net position figures as well. Negative net position occurs when campus finance long-term obligations and pay on a year-to-year basis as obligations come due, rather than setting aside resources as the liabilities are incurred. Consequently, liabilities outpace asset growth.

The equivalent of net income in the public sector is the performance indicator called "change in net position," defined as the difference between operating/non-operating revenues and expenses. As reflected in Table 4, operating revenue has grown modestly the past five years at approximately 2% each year. Meanwhile, operating expenses have grown at an annual rate of 4%, which has led to significant operating deficits. These deficits have been offset by a significant increase in non-operating revenues, most notably state appropriations. In fact, non-operating revenues have grown at an average annual rate of 8%.

According to the National Center for Education Statistics (2016), the percentage distribution of total revenues nationally for public institutions was 42% in government grants, contracts, and appropriations; 32% auxiliary enterprise and/or other revenues; 20% in tuition and fees; and 6% in investments. Further research shows that state appropriations (in unadjusted dollars) to U.S. public postsecondary institutions has risen by approximately 100 percent since 1990; however, when measured in constant dollars, the increase is four percent over the 1990 appropriation amount (State Higher Education Executive Officers Association, 2015). Research universities receive the larger portion of appropriations.

From a historical perspective, California's public universities have faced declining appropriations, an 18% decline on average per full-time enrolled student (measured in constant dollars) from 2002 to 2015. This trend is consistent with national trends. For instance, McPherson and Shulenburger (2010) note state appropriations are in decline while tuition and fees are increasing for students. However, the State of California deliberately made a significant policy departure from this approach starting in 2013 under Governor Brown's leadership. For the past four years, state appropriations into the system have been growing annually. In addition to increasing reliance on financial aid like other institutions (Kennamer, et. al.), the University system has focused on diversifying revenue sources, such as broadening international program offerings and enhancing auxiliary support revenues (Hegarty, 2014; Parker, 2012). The system has become less dependent on federal operating grants as the Recovery Act program ended. This loss of revenue has been largely been offset by increases in non-operating gifts and investment income. Moreover, student loan activity at both the federal and state level has increased substantially, 25% and 70% respectively (see Table 5).

While total revenues have increased by 26% since the 2012 and revenue diversification has increased, revenue growth has been primarily driven by a 50% increase in state appropriations. The bottom section of the table highlights each revenue item as a percentage of the total. In 2012, the system's primary source of revenue was tuition and fees. Today, state appropriations represent the most important source of revenue for the system which according to a special audit report, 2016-122,

conducted by the California State Auditor, the CSU system's revenue from state funds, including grants and contracts, amounts to 47% of total revenues in FY 2016 (CSU audit, 2017, p. 9). In 2017, Governor Brown has proposed on-going increases in the State of California's general fund spending for the CSU system. The University is also considering up to 5% increases in the tuition rate.

In 2014, postsecondary institutions in the United States spent approximately \$517 billion with approximately 63% of that attributable to public institutions, 33% at private nonprofit institutions, and the remaining 4% at private, for-profit institutions (NCES, 2014). In 2016, total operating expenses of the CSU system exceeded \$7.3 billion dollars, over 1% of the entire market. This represents a 21% increase in spending since 2012. The fastest growing areas of spending include administrative activities, such as academic support, student services, and institutional support. As highlighted in a recent state audit, staffing levels and compensation of CSU management personnel have increased at a much faster rate than other employee groups (CSU audit, 2017, p. 7). Auditors have also been critical of the campus efforts to monitor their budgets adequately. The lower section highlights each expense account as a percentage of the total. The primary academically related expenses are instruction and research, which represent only 35% of the total spending of the system. An analysis of operating expenses finds that administrative costs are rising at a higher rate than core academic expenses.

When examining the cash flows of the system, we find that operating activities represent the most significant cash outflow and noncapital financing activities are the largest cash inflow. Capital and related financing activities have declined, while investing activities have increased. In 2016, the CSU system realized a positive increase in cash and cash equivalents for the first time in five years. Overall, the liquidity position of the system has improved over the past five years.

Nationally, enrollments have grown from 7.8 million full-time students in 1990 to 11.1 million in 2015 for public institutions in the United States (State Higher Education Executive Officers Association, 2015). As reflected in Table 7, enrollment within the CSU system has also increased nearly 10% in the past five years. The increase in enrollment points to the state's commitment to educate first generation students and keep tuition affordable for low and middle-income families. Enrollment has been steadily increasing on an annual basis, which runs contrary to the common belief that levels would only increase during periods of high unemployment. State efforts to create a seamless transition from the community college to the four-year system appear to be paying off.

## **Conclusion**

Despite the challenges of widespread fiscal stress within the higher education environment, our study of the CSU system finances for FY 2011 - 2015 indicates that CSU is financially healthy. Enrollment continues to grow steadily and the system continues to experience dedicated support from state legislature. Outside of the observations expressed in this report, it is important to note that each campus is subject to an annual audit in which external and independent professionals carry out similar analytical techniques used in this study. As part of this process, both management<sup>ii</sup>, in the Management Discussion and Analysis of the annual report, and auditors, in the annual audit, are required to assess whether there is a substantial doubt about an organizations ability to continue as a going concern for at least one year beyond the fiscal year end. We have confidence that campuses unmodified (unqualified or clean) audit report serves as one of the best sources of evidence that the current financial condition of the entity is sound.

While the financial health of CSU appears to be sound given the study analysis and results, there are some potential threats that should be considered for strategic planning purposes. Left unchecked, these items may result in adverse consequences in the future, particularly in the event of an economic recession. Future research could focus on risks that should be actively monitored and mitigated which include extensive reliance on state appropriations, caps on the ability to the student population to bear future tuition hikes, significant unfunded pension and deferred maintenance needs, and chronic operating fund deficits at select campuses.

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## VI. Appendix

**Table 1: Core Financial Indicators for this Research Study**

| Indicator                                   | Formula  |
|---|--|
| <b>Fund Balance</b>                         | Net Position / Total Expenses                            |
| <b>Equity Ratio</b>                         | Unrestricted Net Position / Total Expenses               |
| <b>Intergovernmental Revenue</b>            | Total Intergovernmental Revenue / Total Revenue          |
| <b>Quick Ratio</b>                          | (Cash and Investments) / Current Liabilities             |
| <b>Current Ratio</b>                        | Current Assets / Current Liabilities                     |
| <b>Debt to Net Position</b>                 | (Total Liabilities – Def. Outflows) / Total Net Position |
| <b>Debt to Total Assets</b>                 | (Total Liabilities – Def. Outflows) / Total Assets       |
| <b>Times Interest Earned</b>                | (CF- Oper. + Interest Expense) / Interest Expense        |
| <b>Unrestricted Net Position</b>            | Unrestricted Net Position / Total Assets                 |
| <b>Tuition Revenue as % of core revenue</b> | Tuition Revenues as a Percentage of Total Revenue        |

**Table 2: Statement of Net Position**

|                                       | 2012             | 2013             | 2014             | 2015             | 2016           | % Change (2012-2016) |
|---------------------------------------|------------------|------------------|------------------|------------------|----------------|----------------------|
| <b>Total Assets</b>                   | 12,178,619,000   | 12,120,661,000   | 12,380,938,000   | 12,774,075,000   | 13,475,322,000 | 11%                  |
| <b>Deferred Outflows of Resources</b> | -                | 32,020,000       | 45,426,000       | 648,757,000      | 922,449,000    |                      |
| <b>Total Liabilities</b>              | 6,359,842,000    | 6,469,679,000    | 6,683,319,000    | 12,511,808,000   | 14,213,379,000 | 123%                 |
| <b>Deferred Inflows of Resources</b>  | -                | -                | -                | 1,086,744,000    | 143,167,000    |                      |
| <b>Total Net Position</b>             | \$ 5,818,777,000 | \$ 5,683,002,000 | \$ 5,743,044,000 | \$ (175,720,000) | \$ 41,225,000  | -99%                 |

**Table 3: Analysis of Net Position**

|   | 2012             | 2013             | 2014             | 2015             | 2016             | % Change (2012-2016) |
|---|------------------|------------------|------------------|------------------|------------------|----------------------|
| <b>Net investment in capital assets</b> | \$ 3,809,170,000 | \$ 3,693,066,000 | \$ 3,625,543,000 | \$ 3,614,410,000 | \$ 3,522,905,000 | -8%                  |
| <i>Nonexpendable- endowments</i>        | 21,584,000       | 20,627,000       | 16,218,000       | 13,448,000       | 8,653,000        | -60%                 |
| <i>Expendable:</i>                      |                  |                  |                  |                  |                  |                      |
| <i>Scholarships</i>                     | 13,280,000       | 14,099,000       | 14,671,000       | 14,523,000       | 13,600,000       | 2%                   |
| <i>Research</i>                         | 270,000          | 420,000          | 35,000           | 37,000           | 4,000            | -99%                 |
| <i>Loans</i>                            | 14,097,000       | 14,403,000       | 14,310,000       | 14,072,000       | 15,857,000       | 12%                  |
| <i>Capital Projects</i>                 | 29,761,000       | 39,557,000       | 64,778,000       | 25,883,000       | 23,025,000       | -23%                 |
| <i>Debt Service</i>                     | 3,846,000        | 3,819,000        | 139,000          | 6,102,000        | 46,769,000       | 1116%                |
| <i>Other</i>                            | 13,713,000       | 15,212,000       | 20,552,000       | 21,663,000       | 20,641,000       | 51%                  |
| <b>Unrestricted</b>                     | 1,913,056,000    | 1,881,799,000    | 1,986,798,000    | (3,885,858,000)  | (3,610,229,000)  | -289%                |
| <b>Total Net Position</b>               | \$ 5,818,777,000 | \$ 5,683,002,000 | \$ 5,743,044,000 | \$ (175,720,000) | \$ 41,225,000    | -99%                 |

**Table 4: Change in Net Position and Investment Performance**

|                           | 2012          | 2013          | 2014          | 2015          | 2016          | % Change (2012-2016) |
|---------------------------|---------------|---------------|---------------|---------------|---------------|----------------------|
| Operating Revenues        | 2,759,819,000 | 2,797,748,000 | 2,833,739,000 | 2,937,337,000 | 3,012,557,000 | 9%                   |
| Operating Expenses        | 6,040,493,000 | 6,208,408,000 | 6,534,506,000 | 6,868,506,000 | 7,328,256,000 | 21%                  |
| Net Nonoperating Revenues | 3,149,633,000 | 3,276,004,000 | 3,715,068,000 | 4,139,813,000 | 4,447,831,000 | 41%                  |
| Change in Net Position    | -88,079,000   | -77,417,000   | 60,042,000    | 262,906,000   | 216,945,000   |                      |
| % of Total Revenues       | -1%           | -1%           | 1%            | 4%            | 3%            |                      |
| Endowment Investments     | 21,584,000    | 20,657,000    | 16,218,000    | 13,448,000    | 8,653,000     | -60%                 |

**Table 5: Analysis of Revenue Accounts**

|  | 2012             | 2013             | 2014             | 2015             | 2016             | % Change<br>(2012-2016) |
|--|------------------|------------------|------------------|------------------|------------------|-------------------------|
| <b>Revenues:</b>   |                  |                  |                  |                  |                  |                         |
| Operating revenues:  |                  |                  |                  |                  |                  |                         |
| Student tuition and fees (net of scholarship allowance)                    | 2,065,126,000    | 2,081,251,000    | 2,123,212,000    | 2,149,786,000    | 2,204,940,000    | 7%                      |
| Grants and contracts, noncapital   |                  |                  |                  |                  |                  |                         |
| Federal  | 65,239,000       | 62,108,000       | 42,917,000       | 41,571,000       | 38,187,000       | -41%                    |
| State  | 15,297,000       | 14,002,000       | 15,360,000       | 34,406,000       | 16,854,000       | 10%                     |
| Local  | 5,085,000        | 6,667,000        | 7,109,000        | 5,655,000        | 4,569,000        | -10%                    |
| Nongovernmental  | 7,294,000        | 8,584,000        | 7,957,000        | 17,913,000       | 13,551,000       | 86%                     |
| Sales and services of educational activities                               | 35,406,000       | 35,355,000       | 42,227,000       | 41,797,000       | 48,869,000       | 38%                     |
| Sales and services of auxiliary enterprises (net of scholarship allowance) | 389,246,000      | 402,626,000      | 416,300,000      | 451,993,000      | 485,090,000      | 25%                     |
| Other operating revenues   | 177,126,000      | 187,155,000      | 178,657,000      | 194,216,000      | 200,497,000      | 13%                     |
| Total operating revenues   | \$ 2,759,819,000 | \$ 2,797,748,000 | \$ 2,833,739,000 | \$ 2,937,337,000 | \$ 3,012,557,000 | 9%                      |
| Nonoperating revenues (expenses)   |                  |                  |                  |                  |                  |                         |
| State appropriations, noncapital   | 1,996,421,000    | 2,068,465,000    | 2,345,755,000    | 2,762,018,000    | 3,007,533,000    | 51%                     |
| Federal financial aid grants, noncapital                                   | 795,097,000      | 810,838,000      | 885,327,000      | 953,931,000      | 994,954,000      | 25%                     |
| State financial aid grants, noncapital                                     | 394,367,000      | 437,517,000      | 521,796,000      | 627,321,000      | 668,871,000      | 70%                     |
| Local financial aid grants, noncapital                                     |                  |                  |                  |                  |                  |                         |
| Nongovernmental and other financial aid grants, noncapital                 | 20,356,000       | 30,831,000       | 34,784,000       | 30,605,000       | 35,826,000       | 76%                     |
| Other federal nonoperating grants, noncapital                              | 4,197,000        | 3,326,000        | 3,925,000        | 3,944,000        | 4,304,000        | 3%                      |
| Gifts, noncapital  | 39,835,000       | 47,861,000       | 39,636,000       | 48,060,000       | 68,010,000       | 71%                     |
| Investment income, net   | 59,067,000       | 41,522,000       | 43,610,000       | 42,851,000       | 65,962,000       | 12%                     |
| Endowment income, net  | 85,000           | 129,000          | 86,000           | 61,000           | 58,000           | -32%                    |
| Interest expense   | (213,138,000)    | (244,187,000)    | (226,268,000)    | (223,034,000)    | (229,573,000)    | 8%                      |
| Other nonoperating revenues (expenses)                                     | 53,346,000       | 79,702,000       | 66,417,000       | (105,944,000)    | (168,114,000)    | -415%                   |
| Net nonoperating revenues  | \$ 3,149,633,000 | \$ 3,276,004,000 | \$ 3,715,068,000 | \$ 4,139,813,000 | \$ 4,447,831,000 | 41%                     |
| Total Revenues   | \$ 5,909,452,000 | \$ 6,073,752,000 | \$ 6,548,807,000 | \$ 7,077,150,000 | \$ 7,460,388,000 | 26%                     |

| Revenues:  | 2012             | 2013             | 2014             | 2015             | 2016             |
|--|------------------|------------------|------------------|------------------|------------------|
| State appropriations, noncapital   | 34%              | 34%              | 36%              | 39%              | 40%              |
| Student tuition and fees (net of scholarship allowance)                    | 35%              | 34%              | 32%              | 30%              | 30%              |
| Federal financial aid grants, noncapital                                   | 13%              | 13%              | 14%              | 13%              | 13%              |
| State financial aid grants, noncapital                                     | 7%               | 7%               | 8%               | 9%               | 9%               |
| Sales and services of auxiliary enterprises (net of scholarship allowance) | 7%               | 7%               | 6%               | 6%               | 7%               |
| Other operating revenues   | 5%               | 5%               | 4%               | 5%               | 4%               |
| Other (non-operating revenue & expenses)                                   | -1%              | -1%              | -1%              | -3%              | -3%              |
| State Appropriations   | \$ 1,996,421,000 | \$ 2,068,465,000 | \$ 2,345,755,000 | \$ 2,762,018,000 | \$ 3,007,533,000 |
| State appropriations, expressed as a percentage                            | 34%              | 34%              | 36%              | 39%              | 40%              |
| <i>Annual percentage increase</i>  |                  | 4%               | 13%              | 18%              | 9%               |
| Student tuition and fees   | \$ 2,065,126,000 | \$ 2,081,251,000 | \$ 2,123,212,000 | \$ 2,149,786,000 | \$ 2,204,940,000 |
| Student tuition and fees, expressed as a percentage                        | 35%              | 34%              | 32%              | 30%              | 30%              |
| <i>Annual percentage increase</i>  |                  | 1%               | 2%               | 1%               | 3%               |

**Table 6: Analysis of Expense Accounts**

|                                    | 2012             | 2013             | 2014             | 2015             | 2016             | % Change (2012-2016) |
|------------------------------------|------------------|------------------|------------------|------------------|------------------|----------------------|
| Operating expenses:                |                  |                  |                  |                  |                  |                      |
| Instruction                        | 2,097,430,000    | 2,133,286,000    | 2,250,218,000    | 2,348,698,000    | 2,503,564,000    | 19%                  |
| Research                           | 42,797,000       | 42,503,000       | 45,306,000       | 47,467,000       | 51,691,000       | 21%                  |
| Public service                     | 67,417,000       | 65,304,000       | 53,834,000       | 55,436,000       | 57,376,000       | -15%                 |
| Academic support                   | 576,899,000      | 601,204,000      | 632,081,000      | 709,642,000      | 762,920,000      | 32%                  |
| Student services                   | 622,592,000      | 653,141,000      | 697,481,000      | 731,830,000      | 812,010,000      | 30%                  |
| Institutional support              | 612,560,000      | 640,419,000      | 686,059,000      | 727,274,000      | 795,550,000      | 30%                  |
| Operation and maintenance of plant | 509,016,000      | 528,776,000      | 580,449,000      | 594,999,000      | 648,618,000      | 27%                  |
| Student grants and scholarships    | 833,400,000      | 826,933,000      | 857,856,000      | 888,558,000      | 881,578,000      | 6%                   |
| Auxiliary enterprise expenses      | 264,863,000      | 281,312,000      | 307,425,000      | 326,271,000      | 357,030,000      | 35%                  |
| Depreciation and amortization      | 413,519,000      | 435,530,000      | 423,797,000      | 438,331,000      | 457,919,000      | 11%                  |
| Total operating expenses           | \$ 6,040,493,000 | \$ 6,208,408,000 | \$ 6,534,506,000 | \$ 6,868,506,000 | \$ 7,328,256,000 | 21%                  |

|                                    | 2012 | 2013 | 2014 | 2015 | 2016 |
|------------------------------------|------|------|------|------|------|
| Instruction                        | 35%  | 34%  | 34%  | 34%  | 34%  |
| Research                           | 1%   | 1%   | 1%   | 1%   | 1%   |
| Public service                     | 1%   | 1%   | 1%   | 1%   | 1%   |
| Academic support                   | 10%  | 10%  | 10%  | 10%  | 10%  |
| Student services                   | 10%  | 11%  | 11%  | 11%  | 11%  |
| Institutional support              | 10%  | 10%  | 10%  | 11%  | 11%  |
| Operation and maintenance of plant | 8%   | 9%   | 9%   | 9%   | 9%   |
| Student grants and scholarships    | 14%  | 13%  | 13%  | 13%  | 12%  |
| Auxiliary enterprise expenses      | 4%   | 5%   | 5%   | 5%   | 5%   |
| Depreciation and amortization      | 7%   | 7%   | 6%   | 6%   | 6%   |
| Total operating expenses           | 100% | 100% | 100% | 100% | 100% |

**Table 7: Cash Flow Analysis**

|   | 2012              | 2013              | 2014              | 2015              | 2016              |
|---|-------------------|-------------------|-------------------|-------------------|-------------------|
| Net cash used in operating activities                     | (\$2,819,592,000) | (\$2,942,366,000) | (\$3,168,957,000) | (\$3,581,946,000) | (\$3,831,463,000) |
| Net cash provided by noncapital financing activities      | \$3,299,146,000   | \$3,477,174,000   | \$3,900,006,000   | \$4,359,707,000   | \$4,635,199,000   |
| Net cash used in capital and related financing activities | (\$354,880,000)   | (\$507,069,000)   | (\$592,879,000)   | (\$470,592,000)   | (\$316,681,000)   |
| Net cash used in investing activities                     | (\$131,686,000)   | (\$28,685,000)    | (\$142,381,000)   | (\$307,656,000)   | (\$481,543,000)   |
| Net increase in cash and cash equivalents                 | (\$7,012,000)     | (\$946,000)       | (\$4,211,000)     | (\$487,000)       | \$5,512,000       |
|   |                   |                   |                   |                   |                   |
| Net cash used in operating activities                     |                   | 4%                | 8%                | 13%               | 7%                |
| Net cash provided by noncapital financing activities      |                   | 5%                | 12%               | 12%               | 6%                |
| Net cash used in capital and related financing activities |                   | 43%               | 17%               | -21%              | -33%              |
| Net cash used in investing activities                     |                   | -78%              | 396%              | 116%              | 57%               |



**Table 8: Campus Data (FY2016)**

| Institution      | Enrollment | Balance Sheet |                   |                    | Revenues, Expenses, & Changes in Net Position |                          |                        |                          |
|------------------|------------|---------------|-------------------|--------------------|---|--------------------------|------------------------|--------------------------|
|                  |            | Total assets  | Total liabilities | Total net position | Total operating revenues                      | Total operating expenses | Net operating revenues | Increase in net position |
| Northridge       | 31,339     | 7,956         | 7,404             | 1,006              | 2,269   | 5,517                    | 3,415                  | 183                      |
| Fullerton        | 30,176     | 7,305         | 8,568             | (622)              | 2,267   | 5,138                    | 2,888                  | 33                       |
| San Diego        | 29,877     | 11,654        | 10,529            | 1,629              | 3,082   | 5,465                    | 2,924                  | 653                      |
| Long Beach       | 29,729     | 7,025         | 7,216             | 384                | 1,936   | 5,094                    | 3,216                  | 103                      |
| San Jose         | 25,270     | 9,917         | 10,034            | 201                | 2,665   | 4,469                    | 2,388                  | 631                      |
| San Francisco    | 23,759     | 7,979         | 8,594             | (262)              | 2,209   | 4,599                    | 2,566                  | 193                      |
| Sacramento       | 23,389     | 6,386         | 7,110             | (236)              | 1,738   | 4,322                    | 2,646                  | 81                       |
| Pomona           | 19,896     | 7,460         | 6,563             | 1,334              | 1,267   | 3,343                    | 2,048                  | 300                      |
| Los Angeles      | 19,849     | 4,714         | 4,248             | 822                | 1,199   | 3,588                    | 2,538                  | 161                      |
| Fresno           | 19,746     | 4,322         | 4,445             | 174                | 937   | 3,515                    | 2,469                  | 59                       |
| San Luis Obispo  | 18,825     | 11,385        | 11,117            | 819                | 2,451   | 4,064                    | 1,731                  | 200                      |
| San Bernardino   | 16,127     | 4,176         | 4,085             | 342                | 868   | 2,775                    | 1,934                  | 40                       |
| Chico            | 15,803     | 4,633         | 4,532             | 440                | 1,021   | 2,670                    | 1,662                  | 26                       |
| East Bay         | 12,683     | 3,591         | 3,859             | 88                 | 1,094   | 2,498                    | 1,421                  | 49                       |
| Dominguez Hills  | 10,479     | 2,338         | 2,387             | 170                | 662   | 2,100                    | 1,386                  | (43)                     |
| San Marcos       | 9,716      | 3,158         | 3,452             | 9                  | 813   | 2,108                    | 1,193                  | (98)                     |
| Bakersfield      | 8,171      | 2,307         | 2,197             | 263                | 401   | 1,471                    | 1,117                  | 61                       |
| Sonoma           | 8,133      | 4,499         | 4,282             | 447                | 1,006   | 1,843                    | 844                    | 52                       |
| Humboldt         | 7,725      | 2,478         | 2,480             | 166                | 513   | 1,595                    | 1,140                  | 70                       |
| Stanislaus       | 7,511      | 2,202         | 2,048             | 316                | 522   | 1,547                    | 1,104                  | 92                       |
| Monterey Bay     | 6,214      | 3,691         | 2,048             | 1,844              | 408   | 1,633                    | 1,109                  | (92)                     |
| Channel Islands  | 5,069      | 6,622         | 4,925             | 1,913              | 507   | 1,413                    | 956                    | 79                       |
| Maritime Academy | 1,108      | 1,380         | 903               | 558                | 253   | 614                      | 315                    | (41)                     |

**Table 9: System-wide Enrollment Trends**

|            | 2012    | 2013    | 2014    | 2015    | 2016    | % Change (2012-2016) |
|------------|---------|---------|---------|---------|---------|----------------------|
| Enrollment | 435,498 | 445,365 | 458,897 | 473,238 | 477,163 | 9.57%                |

<sup>i</sup> Government Accounting Standards Board (GASB) Statement No. 79 pertains to accounting and financial reporting for certain external investment pools and pools participants. It is effective for reporting periods beginning after December 15, 2015 which will affect the CSU financial reports in the current FY 2017 (July 1, 2016 – June 30, 2017).

<sup>ii</sup> GASB Statement No. 56 establishes requirements related to management’s responsibilities for assessing going concern for state and local government entities