

THE BEGINNING OF THE END?
*THE LEGACY OF 21st CENTURY PARTISANSHIP
ON THE PRACTICE OF U.S. DEMOCRACY*

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Abstract

The first years of the 21st century have been marked by an increasingly extreme hyperpartisan environment, gripping the federal government and its legislative representatives. The result has been an increasingly ineffectual U.S. Congress, for which public approval ratings are at record lows and frustrations seemingly at all-time highs. The following chapters will examine how this hyperpartisan environment has either hastened or enabled fundamental changes/shifts in the practice of U.S. democracy. Each chapter will examine a change or challenge through the lens of a high-priority issue (gun control, immigration, and marijuana prohibition), issues for which there is intense public pressure for a policy response. In each case, policy that Congress has been unwilling, or unable, to produce. As the people's branch, Congress should represent and reflect the will of their constituents. Despite growing (and in some cases overwhelming) bipartisan public support of particular policy reforms, Congress remains stalemated. However, the conclusions of this portfolio prove more complex than anticipated. Ultimately, although hyperpartisanship is now a factor in policy stalemate, it appears it is as much a symptom of broader issues as it is a cause. Certain aspects of, and evolutions in, the system's design have exacerbated a problem that has always existed - people just don't always agree. As the "People's Branch," Congress is also both representative and reflective of this phenomenon.

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Introduction

“Stark partisan polarization is arguably the defining characteristic of our current political moment. While other periods in American history have also featured incivility and deep divides... today the divide between parties not only encumbers coalition-building and policy-making, but also even how regular people work and shop.” Gregory Eady, Justin S. Vaughn, and Brandon Rottinghaus, Brookings Institution¹

On the heels of one of the century’s most extreme displays of partisan politics, many Americans were left feeling frustrated and weary from what has felt a long and protracted partisan battle of us versus them. Despite hours of impassioned arguments, the impeachment trial of President Trump did little to sway Senators, or voters, on either side of the aisle. Both Democrats and Republicans remained steadfast in their presuppositions, no matter how articulately or convincingly an argument to the contrary was made. The eventual, and expected, acquittal of the President on both counts was a (nearly) perfect display of party lines. The trial had the potential to put the best of U.S. democracy on display, a representative elected body transformed into a room of impartial jurors, presided by the highest member of the highest court, prepared to listen, absorb, and cast a crucial vote arrived at through much deliberation and critical thinking. The trial could have been an exercise intended to protect the sanctity of the democratic institution, one which could have made the Founders proud. The trial had the potential to renew public faith in the system. Instead, throughout the trial, the debate “remain[ed] highly polarized and rancorous and seem[ed] unlikely to convince many observers that a new era of political civility and compromise [was] upon us.” Americans emerged from the trial with their worst fears cemented, “dysfunctional government, and dysfunctional elected leaders, constitute the country's biggest problems.”²

This is certainly not a new phenomenon. The public’s dissatisfaction with government has steadily grown since the beginning of the 21st century, “[a]mid House Democrats' impeachment inquiry into President Donald Trump's dealings with Ukraine, a near-record-high 34% of Americans cite the government, poor leadership or politicians as the most important problem currently facing the U.S.”³ This high was only one percentage point shy of the record high which occurred earlier in 2019, following the longest government shutdown in history. Americans have grown increasingly frustrated and distrustful of their government and their representative body, Congress.

¹ Gregory Eady, Justin S. Vaughn, and Brandon Rottinghaus, “Comparing Trump to the greatest—and the most polarizing—presidents in US history,” *brookings.edu*, March 20, 2018, <https://www.brookings.edu/blog/fixgov/2018/03/20/comparing-trump-to-the-greatest-and-the-most-polarizing-presidents-in-u-s-history/>.

² Frank Newport, “Impeachment From the American Public's Perspective,” *gallup.com*, January 24, 2020, <https://news.gallup.com/opinion/polling-matters/284030/impeachment-american-public-perspective.aspx>.

³ Megan Brennan, “Mentions of Government as Top U.S. Problem Near Record High,” *gallup.com*, October 21, 2019, <https://news.gallup.com/poll/267581/mentions-government-top-problem-near-record-high.aspx>.

Congress, the people's branch, should be the arm of government most intimate with the will of the people. However, the perception that Congress is unable to fulfill this will continues to grow. Americans are suffering a "crisis of confidence"⁴ in democracy, increasingly convinced that the system is broken, "dissatisfaction with democracy is rooted in the belief that democracy is not working – that it is unable or unwilling to deal with citizens' demands and concerns. And there is evidence the dissatisfied are right: over time, politicians, parties and governments have become less responsive to a broad cross-section of citizens."⁵ As the impeachment trial demonstrated to an extreme, partisanship has so firmly gripped Congressional representatives in Washington D.C. that the bipartisan cooperation and coalition required to find policy solutions to the country's most pressing issues seems a thing of the distant past. American citizens are left to believe that Congress simply can't "get things done" anymore.

This begs an important and consequential question. How have the extreme polarization and hyperpartisanship of the 21st century fundamentally changed critical and primary features of U.S. democracy and what does this mean for the future of the same? Do the worst and most hyperbolic headlines of the day (i.e. "Democracy is Fighting for its Life", "Is US Politics Beyond the Point of Repair?", or "American Democracy is Broken") portend something accurate?

As is further explored in chapter one, partisanship is a necessary and important part of American democracy. At the time of the country's founding, James Madison cautioned how certain aspects of human nature have "divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good."⁶ In a representative democracy, political parties play an important role in representing individual constituent beliefs about consequential and controversial issues. The debates, and policy efforts, surrounding these issues are, and should be, rigorous, challenging, and heated. However, increasingly since the start of the 21st century, political conversations have become polarized and uncivil.

Public perception and polling data show that "the dominant incentive in politics right now is to capitalize on animosity to the opposition party... hatred, anger and animosity have proven the most effective tools to mobilize

⁴ "The Democracy Project: Reversing a Crisis of Confidence," *The Democracy Project*, 2018, <https://www.democracyprojectreport.org/report> (accessed February 7, 2020).

⁵ Sheri Berman, "Why are we so dissatisfied with democracy? The reasons are many," *The Guardian*, December 22, 2018, <https://www.theguardian.com/commentisfree/2018/dec/22/why-are-we-so-dissatisfied-with-democracy-the-reasons-are-many>.

⁶ Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*.

support.”⁷ According to a Pew Research Center poll, “demonization — vilification — of political opponents has become entrenched.”⁸ A 2019 Pew Research Center Poll indicated that although the 2016 presidential campaign marked a time of “intense partisan division and animosity,” levels of division and animosity between members of opposing parties have continued to deepen.⁹ Further, the poll found that “partisan hostility extends beyond politics... [m]ajorities in both parties say those in the opposing party do not share their nonpolitical values and goals.”¹⁰ Thus, in the context of this thesis, the hyperpartisanship of the 21st century should be understood to be the intense, hostile, and insurmountable partisanship that has permeated not only Congress but nearly every facet of American life. In fact, another recent survey indicated that with political polarization and antipathy at historic highs, “many single people looking for a relationship wouldn’t want to date someone who voted for the candidate of the opposing party in the 2016 presidential election.”¹¹

According to Madison, in the face of this “mutual animosity,” public views should be “refine[d] and enlarge[d]... by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”¹² Despite partisanship and polarization amongst the American public holding at modern highs, there are some issues on which there is agreement regarding their priority for policy reform or for which there is growing bipartisan support. However, as previously discussed, Congress has not been immune to the extraordinary partisanship that has overcome the U.S. in recent years. As Americans struggle to engage in civil conversations at the dinner table, Congress has seemingly lost its ability to engage in constructive, collaborative, and productive partisanship on Capitol Hill.

It is worth acknowledging, at this point, that despite the hyperbolic headlines and tone of this introduction, Congress has passed some legislation, even over the last 3-4 years when partisanship has been on its most extreme

⁷ Thomas B. Edsall. “What Motivates Voters More Than Loyalty? Loathing.” *New York Times*. March 1, 2018. https://www.nytimes.com/2018/03/01/opinion/negative-partisanship-democrats-republicans.html?utm_source=link_news9&utm_campaign=item_268982&utm_medium=copy.

⁸ *Ibid*.

⁹ “Partisan Antipathy: More Intense, More Personal,” Pew Research Center, “October 10, 2019, https://www.people-press.org/2019/10/10/partisan-antipathy-more-intense-more-personal/?utm_source=link_news9&utm_campaign=item_268982&utm_medium=copy.

¹⁰ *Ibid*.

¹¹ Anna Brown, “Most Democrats who are looking for a relationship would not consider dating a Trump voter,” Pew Research Center, April 24, 2020, <https://www.pewresearch.org/fact-tank/2020/04/24/most-democrats-who-are-looking-for-a-relationship-would-not-consider-dating-a-trump-voter/>.

¹² Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*.

display. In 2019, legislators introduced an impressive (by 21st century standards) 8,820 bills and joint resolutions, more than at any other point in the last four decades.¹³ However, only 105 laws were enacted, which is “among the lowest in this millennium, exceeding only the 72 new laws of 2013 and 81 of 2011. Given the large number of bills introduced, this Congress is on track to enact a lower percentage of bills than any in modern times.”¹⁴ The rate of legislative progress as it relates to major policy issues and reforms is even more glum.

The research contained in the following three chapters aims to address this very idea. The hyperpartisanship and extreme polarization gripping our country, and most importantly Congress, has fundamentally changed the way policy is made. Congress, so consumed with party lines and assigned narratives, has been rendered inept in addressing the issues most important to the American public. The bipartisan collaboration and cooperation that is needed to address these issues of real consequence is a distant memory. As national and global landscapes shift, Congress must be prepared not only to address and legislate issues of administrative significance (budgets and the like), but also to design and reform policy that helps define what it means to be an American, both at home and in the world. This type of policy-making and reform requires the ability to set aside party differences to do the work of the American public. If Congress has lost the ability to overcome this challenge the consequences to the health of democracy are severe.

Through the lens of mass shootings, chapter one assesses whether or not hyperpartisanship is responsible for the lack of meaningful policy reform and if it has fundamentally shifted the conditions previously believed to be required for the mechanisms of the U.S.’s democratic policy machine to engage. Over the last two decades, several events have resulted in mass casualties and have prompted immediate and continued public demand for a policy response. These events generally elicit bipartisan concern and require a focus on broader issues. Why did these events not prompt real and significant policy change and what does this mean for American democracy?

By examining the democratic function of policy making, the theory behind agenda setting in the policy making process, the hyperpartisan political environment, and finally, mass casualty events as focusing events, chapter one proposed that a hyperpartisan Washington D.C. is responsible for policy deadlock. And further, that a sustained partisan environment shifted the conditions previously believed to be sufficient to open a window of opportunity in which meaningful policy change can occur. Several case studies are examined to explore these dynamics and

¹³Michael Teitelbaum, “Congress saw more bills introduced in 2019 than it has in 40 years, but few passed,” *rollcall.com*, January 22, 2010, <https://www.rollcall.com/2020/01/22/congress-saw-more-bills-introduced-in-2019-than-it-has-in-40-years-but-few-passed/>.

¹⁴Ibid.

illuminate a potential shift in the democratic processes. In a political system that is dependent on cooperation and responsiveness to the electorate, the broader consequences to U.S. democracy would be significant.

Ultimately, with the exception of a few and limited examples, chapter one found that there did appear to be a problem of some significance at the Congressional level. More specifically, in the context of Kingdon's theory on public policy, Congress appeared to generally be incapable of capitalizing on policy windows, although it did not appear that the conditions required to open the window themselves had changed.

An examination of the issue through the lens of mass shootings as focusing events revealed that the issue is about more than just partisanship, polarization, and rhetoric. However, in the case of mass shootings and gun control, the hyperpartisanship that has emerged over the last 20 years appears to be the factor that makes it impossible to overcome the others (e.g., such as strong opposing lobbies, thinner margins of power, concerns about self-preservation, the 24-hour news cycle, and the polarized nature of the issue itself).

Ultimately, the conclusions of chapter one were not nearly as straightforward as anticipated, but in the case of mass shootings, and in particular the Parkland shooting, an encouraging and promising trend emerged. The inaction at the federal legislative level inspired states to intervene and enact laws in instances when Congress remained unwilling and unable. Perhaps a signal of a new and more tenable trend in U.S. democracy, one in which federal law takes a back seat to state legislation.

Traditionally certain issues and rights have been reserved for the federal government. However, as was identified in chapter one, states were effectively able to legislate more restrictive gun control measures following several mass shootings, when Congress was not. In the face of an ineffectual and paralyzingly polarized Congress, is a possible and viable alternative for states to localize and legislate traditionally federal issues?

Chapter two attempts to address this very question through the lens of immigration. Immigration is an issue which has traditionally been within the purview of the federal government and has become one of the most divisive and highest priority issues facing Congress, and the administration. By examining the foundations of American federalism and division of power between state and federal, historical precedents for adoption of national issues on the state level, and utilizing immigration as a test case, chapter two proposed that in the face of a hyperpartisan Washington D.C., states will be challenged to creatively endeavor to take on policy projects far beyond their envisioned scope. Would these enterprising states effectively bridge the gap, bringing much needed policy relief to a desperate public?

The conclusions of chapter two showed some of the presuppositions held true, hyperpartisanship has a hold on Congress and a real effect on policy (or the lack thereof), for immigration reform. Federal inaction on immigration was a familiar refrain amongst those pursuing both permissive and restrictive sub-federal legislation. Immigration federalism was also bolstered by a number of court decisions which denied that sub-federal legislation ran afoul of federal supremacy and/or preemption. However, there also appeared to be limited empirical evidence supporting the success of the sub-federal efforts, which left the strong rhetoric that inspired and supported the efforts largely unsubstantiated and raised big questions about the advisability of piecemeal/patchwork efforts in a nation that is built on the unification of diverse parts. Additionally, many of the sub-federal efforts themselves appeared to have partisan origins. Despite this, a trend emerged. Generally permissive efforts fared much better as compared to restrictive efforts. Efforts that aimed for inclusiveness and integration withstood legal challenges at a much better rate than did those that were exclusionary and created environments inhospitable to immigrants (both legal and illegal alike).

One additional trend that emerged from the research supporting chapter two was the outsized influence “issue entrepreneurs” played in the immigration debate, “[i]ssue entrepreneurs took advantage of circumstances, such as extreme political polarization after the contested 2000 presidential election and the rise of border security concerns after 9/11, to spread attrition through enforcement, or self-deportation, laws throughout the country. These issue entrepreneurs first blocked immigration reform at the national level and then simultaneously used federal inaction as an excuse to push the attrition-through-enforcement agenda at the state and local levels.”¹⁵

Has hyperpartisanship created an environment in which enterprising individuals are better able to seize emotionally charged issues, rooted in discussions of morality, during times of political opportunity to push a particular policy agenda. Is this phenomenon of issue “influencers” and their capacity to drive policy direction in the hyperpartisan 21st century unique? And has it left U.S. democracy more vulnerable?

Chapter three turns to the evolution of the prohibition of marijuana over the years as a case study of the issue, to examine the possibility that the prohibition of marijuana has persisted not for reasons rooted in science and logic, but due to the influence of some underlying interest, motivated by profit or power, emboldened by the political opportunity presented by a hyperpartisan environment. Has the issue of marijuana legalization, like other issues and

¹⁵ Karthick Ramakrishnan and Pratheepan Gulasekaram, “Understanding Immigration Federalism in the United States,” Center for American Progress (March 2014): 2, <https://www.americanprogress.org/wp-content/uploads/2014/03/StateImmigration-reportv2.pdf>.

failed efforts at moral legislation through prohibition, been hijacked and exploited by some other underlying interest to a far greater cost than benefit?

Calls for reform of the war on drugs, and in particular the decriminalization of marijuana, have gotten louder and louder. As of the writing of chapter three, medicinal marijuana was legal in 33 states and recreational marijuana legal in eleven states and Washington D.C. Clearly, there is a movement amongst the states away from prohibition and toward legalization or decriminalization and this movement is widely supported (according to a recent poll, 62% of Americans state they support legalizing marijuana).¹⁶

By examining the existing literature on prohibition in the historical context, the role “issue entrepreneurs” or representatives of special interests have played, as well as the theory behind the legislation of moral issues, chapter three examined whether or not issues rooted in morality suffer a particular vulnerability to the agendas of special interests, particularly during times of social upheaval and partisan divisions.

The final chapter in this portfolio confirmed many of the evolving concerns, specifically the intractability of the current political environment, and more exactly the forces that have prevented policy successes on the issues Americans care about and demand action on the most. The chapter also examined the potential for an issue to become representative and mythological, how an incredibly powerful narrative is capable of supporting years, decades, perhaps even a century, of public policy, even if its results are found to be destructive. As previous chapters explored, both gun policy and immigration policy are also similarly rooted. These roots make it more difficult to stray from the narrative than it is on other issues which are less tied to existential fears.

As it relates to issue entrepreneurs, the issue of marijuana legalization also highlighted how controversial issues can be exploited to promote an individual’s ends. Chapter two and three revealed that issue entrepreneurs need not be individuals who are themselves in positions of great power, or even particularly swayed by the issue itself. Rather, the issue became a means to a more personal end - as was the case of Henry Anslinger, who conspired to develop a narrative that would support his failing Bureau of Narcotics. Each of the individuals profiled in chapter three had an outsized influence on both marijuana policy and the public’s perception of the same, due in part to a confluence of circumstances and happenstance - being in the right place (position) at the right (critical and/or culturally vulnerable) time in history. But motivations were more difficult to unpack. In each instance, personal gain appeared

¹⁶ Hannah Hartig and A.W. Geiger, “About six-in-ten Americans support marijuana legalization,” *Pew Research Center*, October 8, 2019, <https://www.pewresearch.org/fact-tank/2018/10/08/americans-support-marijuana-legalization/>.

at least as important as any moral or scientifically supported commitment to further demonization or continued prohibition.

Additionally, as public support for legalization has grown, so has the hyperpartisan environment in Washington. Although Congress too has seen an increase in support for tackling the issue, the greater issue, related to partisanship, seems to be the distraction the hyperpartisan environment has created. With Congress busy tackling highly partisan debates ranging from immigration, war, and impeachment, there is little time and/or energy to devote to an issue of seemingly less urgency.

The topic at hand is certainly, and obviously, too ambitious to sufficiently cover in the next three chapters alone. However, in the pages that follow, this paper endeavors to tease out whether there are the features of a real and consequential shift in certain fundamental aspects of American democracy and whether or not hyperpartisanship is to blame. In turn, the research and findings suggest areas of future focus and potential solutions to one of the most significant problems plaguing U.S. politics in the 21st century.

Chapter One
The Long Road: From Public Problem to Public Policy
The Effects of Extreme Partisanship on the Policy Making Process

INTRODUCTION:

The 2016 election resulted in what many might describe as a partisan fever pitch.¹⁷ Civility, social tolerance, constructive discourse, cooperation, and the ability to simply agree to disagree seem qualities of a distant democratic past. One only needs to peruse the daily feed on their Facebook or Twitter account to sense the general malaise that has come to rest on the American electorate. A sense of frustration has permeated not only politics but more recently, nearly every aspect and relationship in one's life: friends, family, and co-workers alike. This general sense of the degradation of common ground also seems to have origins at the top, with the nation's highest lawmakers engaging in the same partisan bickering one might find at the Thanksgiving table. This begs an obvious question. Does it matter?

Due to its design (simple majority, single ballot system), U.S. democracy has always been a virtually two-party system, with little room for third parties and independents.¹⁸ Thus, bipartisanship has become a necessary feature of this system, both sides coming together on national issues of major import. However, the current climate in American politics appears to be undeniably partisan and divided.¹⁹

It is not the first time, the U.S. has overcome periods of incredible divisiveness before, including during the Civil War and desegregation.^{20 21} However, there appears to be something unique about the current period. There is not a singular issue on which there is little consensus or extreme disagreement. Rather the divisiveness appears to have permeated nearly every topic or issue, including those that would have previously presented little controversy.

Over the last two decades, as the American public has grown increasingly frustrated with lawmakers in Washington D.C.²², a spotlight has been cast on numerous issues of national importance. Issues for which the American public appears anxious to see a public policy response, but Congress has been unable, or unwilling, to find

¹⁷ Clare Foran, "America's Political Divide Intensified During Trump's First Year as President," *The Atlantic*. October 5, 2017, <https://www.theatlantic.com/politics/archive/2017/10/trump-partisan-divide-republicans-democrats/541917/>.

¹⁸ M Duverger, "Political parties: their organization and activity in the modern state," North, B. and North R., tr. New York: Wiley, Science Ed. pg. 217. as cited in Riker, William H. "The Two-Party System and Duverger's Law: An Essay on the History of Political Science," *American Political Science Review*, 76, no. 4 (1982): 753–66.

¹⁹ Frances E. Lee, *Insecure Majorities: Congress and the Perpetual Campaign*. Chicago: The University of Chicago Press, 2016, 1-2.

²⁰ Aaron Astor, "Partisanship is an American tradition — and good for democracy," *Washington Post*, July 12, 2017, https://www.washingtonpost.com/news/made-by-history/wp/2017/07/12/partisanship-is-an-american-tradition-and-good-for-democracy/?utm_term=.ba115a5b3231.

²¹ Julia Azari "Politics Is More Partisan Now, But It's Not More Divisive," *FiveThirtyEight.com*, January 18, 2018, <https://fivethirtyeight.com/features/politics-is-more-partisan-now-but-its-not-more-divisive/>.

²² Pew Research Center, "Views on Congress," <http://www.people-press.org/2017/04/17/3-views-of-congress/> (accessed 10/31/2018).

a bipartisan policy solution. One could imagine that some issues should be less controversial than others and would be more likely to prompt bipartisan support and generate policy change. Terrorist attacks, a mental health crisis, response to natural disasters, mass shootings, the opioid crisis, and the war on drugs are all examples of recent events or issues that have generated significant attention and for which a significant segment of the public has demanded a response. Each of these examples also represent a condition in which human lives were at stake or lost in significant numbers.

In the last two decades, numerous events have resulted in mass casualties and have prompted immediate and continued public demand for response. These events generally elicit bipartisan concern and require a focus on broader issues. A classroom full of kindergartners in Newtown, a crowd of several thousand victims enjoying a country music festival in Las Vegas, and an island woefully lacking in the infrastructure and preparedness to respond to a hurricane of unprecedented power, all prompted significant and persistent debate about what could and should be done but none resulted in policy adoption. Why did these events not prompt real and significant policy change and what does this mean for American democracy? Is the hyperpartisan environment responsible for the lack of meaningful change and has it fundamentally shifted the conditions previously believed to be required for the mechanisms of the U.S.'s democratic policy machine to engage?

By examining the democratic function of policy making, the theory behind agenda setting in the policy making process, the hyperpartisan political environment, and finally, mass casualty events as focusing events, this paper proposes that a hyperpartisan Washington D.C. is responsible for policy deadlock. Further, a sustained partisan environment has shifted the conditions previously believed to be sufficient to open a window of opportunity in which meaningful policy change can occur. Several case studies are examined to explore these dynamics and illuminate a potential shift in the democratic processes. In a political system that is dependent on cooperation and responsiveness to the electorate, the broader consequences to U.S. democracy may be significant.

LITERATURE REVIEW:

Previous research has provided a framework focused on these very issues, including the democratic function of policy making, the theory behind agenda setting in the policy making process, the hyperpartisan political environment, and finally, mass casualty events as focusing events.

Bipartisan Policy Making as a Fundamental Democratic Function

Fundamentally, Congress responds to public pressure and citizens needs in shaping public policy. When drafting the Constitution, the Founding Fathers viewed Congress as a representative entity created to serve and respond to the people. In *Federalist 49*, James Madison argued that members of Congress “embrace a great proportion of the most influential part of the society” and that the “nature of their public trust implies a personal influence among the people, and that they are more immediately the confidential guardians of the rights and liberties of the people.”²³ In light of these ideas, partisanship has long played an outsized role. In this space, partisanship can be both good and bad, as “(f)riktion creates light as well as heat.”²⁴ Additionally, “[o]ur Constitution invites constructive partisanship, including often cantankerous, cacophonous, contentious partisanship. The principal differences between our two great parties, whether over the war on terrorism, health care reform, or global warming, matter, and they are often principled differences.”²⁵

In *Federalist 10*, Madison states that a “zeal for different opinions” among other things, has “divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good.”²⁶ It is due to the very nature of the U.S. federal system that parties both “constitut[e] and ... corrup[t] our politics. [The] Constitution checks and balances special interests and political parties, but the Constitution also embraces and empowers special interests and political parties.”²⁷ It seems then, by design, that the U.S. federal system requires political parties (and therefore the resultant partisanship), due to both the freedoms provided by the First Amendment but also as a check and balance to competing interests. Partisanship, therefore, is both desirable in a political system like the U.S.’ and a necessary part of the policy making process.

If then, it is assumed that the lawmaking process in the U.S. system is unique and that its reliance on the two-parties is, albeit frustrating, necessary, it is then worthwhile to look at the theory behind the functional aspects of the policy making process. How do the parties overcome their “cantankerous” nature to affect meaningful change? Can theory predict the conditions necessary to bridge partisan gaps and encourage, if not demand, cooperation toward policy implementation?

²³ Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, <https://www.congress.gov/resources/display/content/The+Federalist+Papers> (accessed 10/29/2018).

²⁴ Cato Institute, “James Madison and the Origins of Partisanship,” *Cato Policy Report*, January/February 2011, <https://www.cato.org/policy-report/januaryfebruary-2011/james-madison-origins-partisanship>.

²⁵ *Ibid.*

²⁶ Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*.

²⁷ Cato Institute, “James Madison and the Origins of Partisanship,” *Cato Policy Report*, January/February 2011.

Agenda Setting and Policy Windows

In John Kingdon's seminal work, *Agendas, Alternatives, and Public Policies*, he examines both how "issues get decided" but also how "they got to be issues in the first place."²⁸ Kingdon is principally focused on defining the conditions or prerequisites required to "make an idea's time come"²⁹ or in other words, the process through which an issue becomes part of the government agenda, alternatives are discarded, and actualization is achieved through the "final enactment of legislation."³⁰

To formalize his theory, Kingdon presents a four-step process as defining public policy making. These steps include: (1) agenda setting; (2) specification of alternatives from which a choice will be made; (3) an authoritative choice from among the alternatives (i.e. legislative vote); and (4) implementation of the decision.³¹ Overall, however, the decision and implementation phases are less important than the conditions necessary to elevate particular issues into these phases. This leads to the development of three streams of processes that function to elevate an issue onto the governmental agenda: "problems, policies, and politics."³²

Kingdon also highlights the importance of the "participant" or the individuals who support the issue (higher profile participants increase the likelihood an issue will find itself on the agenda). Kingdon explains that an issue becomes a "problem" when there is a combination of the following: indicators (sign that a particular condition/issue exists), focusing events (i.e. disaster, major crisis, personal experience, etc., which draws additional attention to a condition), and finally, a feedback loop that informs decision makers (legislators) about the problem. Kingdon also notes the importance of "developments in the political sphere as powerful agenda setters."³³ These developments include changes in the national mood, elections, and influence of special interest groups.

Notably, Kingdon recognizes that in the political stream, "[c]onsensus is built...by bargaining more than by persuasion."³⁴ Whereas persuasion is typically the method of choice within the policy stream (the process of selecting amongst alternatives). This has interesting implications for the thesis of this paper which looks to understand the lack of political progress on issues of national import. Does the hyperpartisan environment mean that participants are both immune to persuasion on issues and also perceive little benefit to bargaining with the perceived

²⁸ John W Kingdon, *Agendas, Alternatives, and Public Policies*, 2nd ed. New York: HarperCollins College Publishers, 1995, xi.

²⁹ *Ibid.*, 1.

³⁰ *Ibid.*

³¹ *Ibid.*, 2-3.

³² *Ibid.*, 197.

³³ *Ibid.*, 198.

³⁴ *Ibid.*, 199.

“enemy”? Critically, according to Kingdon, there comes a time when the three streams converge and a “small and scarce”³⁵ window of opportunity opens to “change, expand, or abolish certain programs.”³⁶

Although this paper utilizes Kingdon’s theory of public policy as its primary lens, other studies provided additional clarification on the public policy process. For example, viewing the public policy process as a five “stage” process (agenda, formulation, adoption, implementation, evaluation).³⁷ The five-stage process emphasizes process participation in a sequential way. This process, however, is arguably more “dynamic and developmental” and “flexible” than Kingdon’s streams theory³⁸ and can “produce variations in the style, techniques, and politics of policymaking”.³⁹

Another study presents a similar policy process framework, identifying 11 “activities”⁴⁰ that define the policy process in a similar, yet less concise way. Ultimately the activities can be broken into 5 general categories, which help to conceptualize how an idea transitions to policy: (1) Problem to Government, (2) Action in Government, (3) Government to Problem, (4) Policy to Government, and (5) Problem Resolution or Change.⁴¹ The study also recognizes that, “[p]roblems result from events affecting people differently. Not all problems become public; not all public problems become issues; and not all issues are acted on in government.”⁴² Also useful is the study’s definition of a “public problem,” as a “human need, however identified, that cannot be met privately.”⁴³

The author submits that although nuanced in their approaches and language, the two additional referenced studies are extremely similar to Kingdon’s theory. Both offer substantial support for the theory put forth by Kingdon as well as the hypothesis of this paper and little contradiction. All three referenced works find that there are identifiable conditions/processes through which one can view major events to predict which should rise to governmental agendas and ultimately transform into policy.

For example, in looking at the establishment of the Rhode Island Arts Learning Network (ALN), Ann Galligan and Chris Burgess attempted to address whether the ALN was able to capitalize on a “policy window” as defined by Kingdon. The study’s authors make an important and relevant distinction between the “policy window”

³⁵ Ibid, 204.

³⁶ Ibid, 203.

³⁷ James E. Anderson, *Public Policymaking: An Introduction*, 8th ed., Stamford, CT: Cengage Learning, 2015, 4.

³⁸ Ibid, 6.

³⁹ Ibid, 2.

⁴⁰ Charles O. Jones, *An Introduction to the Study of Public Policy*, 3rd ed. Monterey, CA: Brooks/Cole Pub. Co., 1984, 9.

⁴¹ Ibid, 10.

⁴² Ibid, 15.

⁴³ Ibid, 15.

as defined by Kingdon and what they term a “pre-window.” At the core of the study is whether or not there is a relevant difference between a “true policy window”⁴⁴ and the so-called “pre-window,” otherwise defined as “a foreshadowing...in beginning the public stage of the definition of an issue in an effort to create their own opening and to begin building a broad-based political constituency to support the solutions that they would eventually prescribe...”⁴⁵ As this paper shifts to addressing several more contemporary case studies, it will be important to keep this distinction in mind. Can some of the legislative malaise be attributed to a lack of a true window of opportunity?

Although one may be able to define whether or not the prerequisite conditions exist to open a policy window, the question of how much partisanship affects the ability to capitalize on that window still remains. Do differences in party composition matter to the formation of public policy in constitutional democracies? According to previous research, they do. “[D]ifferences in the party composition of government are causally related to differences in public policy.”⁴⁶

Partisan Effects on Policy Making

With a clearer understanding of the theory behind the prerequisite conditions necessary to elevate issues to the governmental agenda and ultimately push them toward resolution, it is important to turn to the other element of the question at the heart of this paper’s thesis: the hyperpartisan environment. It is certainly possible that the hyperpartisan environment is the stick in the proverbial spokes of the policy process and that this environment is the (if not a major) reason why Kingdon’s theory regarding agenda setting and policy making appears to be stymied. However, for that to be true, there would need to be sufficient evidence that the environment is in fact hyperpartisan. This would imply the environment is more partisan than it has been during other periods of recent history, for a more prolonged period, and across a more diverse set of issues.

According to a 2017 Pew Research Center poll, “[f]or more than two decades, partisan polarization has been a powerful force in American politics.⁴⁷ Party affiliation has replaced other previously important differences (e.g. demographic, education, religion) as the most defining factor in where a voter stands on fundamental issues. The Pew study points to several findings as evidence of the growing partisanship within the two major parties,

⁴⁴ Ann M. Galligan & Chris N. Burgess, “Moving Rivers, Shifting Streams: Perspectives on the Existence of a Policy Window,” *Arts Education Policy Review*, 2005, 107:2., <https://doi.org/10.3200/AEPR.107.2.3-11>, 6.

⁴⁵ *Ibid*, 6.

⁴⁶ M.G. Schmidt, “When parties matter: A review of the possibilities and limits of partisan influence on public policy,” *European Journal of Political Research*, 1996, 30: 155-183. doi:[10.1111/j.1475-6765.1996.tb00673.x](https://doi.org/10.1111/j.1475-6765.1996.tb00673.x), 2.

⁴⁷ Pew Research Center, “The Partisan Divide on Political Values Grows Even Wider,” <http://www.people-press.org/2017/10/05/the-partisan-divide-on-political-values-grows-even-wider/>.

including, an average 36-percentage-point gap between Republicans and Republican-leaning independents and Democrats and Democratic leaners (in 1994, it was only 15 points) and Donald Trump’s job approval ratings, which are the most polarized of any first-year president dating back to the early 1950s.⁴⁸ Earlier research also showed a notable shift was already beginning at the start of the century. By 2001, “greater partisan polarization in Congress ha[d] clarified the parties’ ideological positions for ordinary Americans, which in turn ha[d] increased party importance and salience on the mass level.”⁴⁹ At the start of the 21st century, something unique was going on, as it relates to the partisan divide, “[a]lthough parties in the 1990s [were] not as central to Americans as they were in the 1950s, they are far more important today than in the 1970s and 1980s.”⁵⁰

Coupled with the more recent survey data produced by Pew, it seems evident that these trends persevered over the last 20 years. In fact, a 2005 study showed that there have been important and recent changes to partisanship amongst political elites in the U.S., “[s]pecifically, the effect of partisanship on politicians’ vote choice and other political behavior has risen, and the number of issue areas where partisan conflict is present has increased.”⁵¹

A natural secondary question follows: if it can be generally agreed upon that the political environment is more partisan now than it has been in the past, does that mean something significant to the policy process? The answer appears to be yes. Several studies suggest that there is a correlation between heightened partisanship and (lack of) progress in the policy realm. Concerning the issue of climate change, multiple studies have shown there is actually very little difference in Democrat and Republican opinions regarding climate change, both overwhelmingly believe in it. Yet climate change has become an extremely polarized and partisan issue, “Democrats and Republicans—both ordinary citizens and policymakers—support policies from their own party and reactively devalue policies from the opposing party.”⁵²

Other research has found that “[s]cientists are in near-universal agreement that human activity is a primary cause of climate change. Yet, despite this scientific consensus, the American public remains divided when it comes

⁴⁸ Ibid.

⁴⁹ Marc J. Hetherington, “Resurgent Mass Partisanship: The Role of Elite Polarization,” *American Political Science Review*, vol. 95, no. 3, 2001, doi:10.1017/S0003055401003045, 619.

⁵⁰ Mark D. Brewer, “The Rise of Partisanship and the Expansion of Partisan Conflict within the American Electorate,” *Political Research Quarterly*, vol. 58, no. 2, June 2005, doi:10.1177/106591290505800203, 219.

⁵¹ Ibid, 219.

⁵² Leaf Van Boven, et al, “Psychological Barriers to Bipartisan Public Support for Climate Policy,” *Perspectives on Psychological Science*, vol. 13, no. 4, July 2018, doi:10.1177/1745691617748966, 492.

to beliefs about human-induced climate change.”⁵³ The results of a national survey found that partisan group identity leads to the politicization of science and ultimately undermines a message for which there is otherwise overwhelming consensus, “[w]hen it comes to the American public, it seems as if partisan group identity reigns supreme.”⁵⁴

On a separate issue, terrorism, partisan identity even affects the attributes individuals assign to the underlying motives of violent attackers (terrorists).⁵⁵ Ultimately demonstrating that partisan bias is a factor in individual’s understandings of the motivations of violent actors. These biases are consequential and predict levels of punishment as well as general attitudes toward the group to which the violent actor is perceived to belong.⁵⁶ The significance to the public policy realm is obvious. If partisanship defines one’s understanding of motivations and suggests a particular form of punishment, it would also likely sway opinions towards (or reluctance toward) enactment of policy, “[a]s partisan polarization continues to increase, better understanding the nature, flexibility, and limits of partisan bias—and how to combat it—is ever-more important.”⁵⁷

Crises as Focusing Events

Finally, through case studies, this paper endeavors to show that the extreme partisanship of the last two decades has fundamentally changed the conditions necessary to create policy windows, even in political environments that were ripe for change. Before looking at the specific examples that were alluded to in the introduction to this paper, it is worthwhile to address what the existing literature says about focusing events in general. Specifically, what the existing literature says about crises and mass casualty events as being uniquely dynamic in the policy process. Should these events be more predictive of momentum within the policy process than others which are not as effective and efficient at capturing the public and government focus?

Addressing this first from a broad perspective, this paper seeks to ascertain under what conditions democratic governments are able to launch reform programs, or rather “what conjunctural factors generally serve to open the ‘window’ for reform.”⁵⁸ Previous research argues that there is, in fact, a regularity to the “window-opening

⁵³ Toby Bolsen and James N. Druckman, “Do Partisanship and Politicization Undermine the Impact of a Scientific Consensus Message about Climate Change?” *Group Processes & Intergroup Relations*, vol. 21, no. 3 (April 2018), doi:10.1177/1368430217737855, 389.

⁵⁴ *Ibid.*, 390.

⁵⁵ Masi Noor, et al., “‘Terrorist’ or ‘Mentally Ill’: Motivated Biases Rooted in Partisanship Shape Attributions About Violent Actors,” *Social Psychological and Personality Science*, Apr. 2018, doi:10.1177/1948550618764808.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, 7.

⁵⁸ John T.S. Keeler, “Opening the Window for Reform: Mandates, Crises, and Extraordinary Policy-Making,” *Comparative Political Studies*, vol. 25, no. 4, Jan. 1993, doi:10.1177/0010414093025004002, 434.

process” which can help one to understand “the achievements and problems of the past but also the possibilities of future cases.”⁵⁹ Studies reference crises, further defined as a “situation of large-scale public dissatisfaction or even fear stemming from wide-ranging economic problems and/or an unusual degree of social unrest and/or threats to national security,”⁶⁰ as major factors in the opening of these windows. Political leaders also use partisan rhetoric to create the perception of a crisis in order to advance their policy goals. Once a “problem” becomes severe enough to be perceived a “crisis” it is likely to have a “significant impact on the policy making process.”⁶¹

Major natural disasters represent an important category of crises (or mass casualty events) that often become focusing events. It is important to note that the perceived size of the disaster is critical to whether or not a natural disaster becomes a focusing event, prior research finding although small disasters do not seem to induce significant change, a major disaster has “the potential to change dominant ways of thinking and acting.”⁶² Relevant specifically to the U.S., Hurricane Katrina is an example of a major natural disaster for which the application of Kingdon’s framework is useful. A 2007 study assessed whether or not the event assisted in the opening of a policy window for ecological economics (finding that it did).⁶³ Of course, whether or not policymakers were able (or willing) to capitalize on the policy window toward the implementation of policy change is another question entirely.

Mass shootings and the subsequent debate around gun control also represent an important example of crises/mass casualty events as potential catalysts for policy change.⁶⁴ Interestingly, and perhaps not uniquely, mass shootings can elevate not one, but several issues to the public policy agenda (i.e. gun control, race, and mental health).⁶⁵ This raises a salient point, the more special interest an event inspires, the less attention any one particular issue receives. This also has interesting implications for the thesis of this paper. Perhaps this is also a major factor in the lack of conversions of opportunities to policies over the last two decades?

Additionally, although focusing events may lead to an increase in the number of bills introduced in the House and Senate but they do not address the success rate of the passage of these bills, some prior research

⁵⁹ Ibid, 434.

⁶⁰ Ibid, 440.

⁶¹ Ibid, 440.

⁶² J. Birkmann, P. Buckle, J. Jaeger, et al., “Extreme events and disasters: a window of opportunity for change? Analysis of organizational, institutional and political changes, formal and informal responses after mega-disasters,” *Natural Hazards*, vol. 55, no 3 (December 2010), <https://doi.org/10.1007/s11069-008-9319-2>, 637.

⁶³ Joshua Farley, “Opening the Policy Window for Ecological Economics: Katrina as a Focusing Event,” *Ecological Economics* 63, no. 2-3 (August 2007).

⁶⁴ Melvin Gupton, “Mass Shootings as Issue Management Exigencies and Focusing Events for Public Policy Debates,” (Ph.D. dissertation, Wayne State University, 2017), https://digitalcommons.wayne.edu/oa_dissertations/1805/.

⁶⁵ Ibid, 229.

addresses this phenomena but does little to explain the lack of actual policy change, arguing that although there is an identifiable increase in attention following the focusing event, attention does not equate to legislation.⁶⁶

In summary, a review of the existing literature substantially supports many elements of the thesis of this paper. The referenced research and analysis address the role of a bipartisan legislative body in the U.S. political system, the growth in partisanship over the last two decades, the theory behind the policy making process, and the role crises and mass casualty events can play as focusing events for the governmental policy agenda. What appears to be missing and what this paper will examine, by way of the following case studies, is why certain well-positioned (contextually and temporally) events have not produced the policy change the existing policy process theory should predict.

METHODOLOGY: Case Studies

In order to examine the continued relevance of Kingdon's theory, in the context of a hyperpartisan environment, this paper introduces several case studies that should function to demonstrate whether or not there has been a fundamental change to how public policy is (or isn't) made. As indicated above, the case studies will be selected from a subset of mass casualty events: mass shootings. Although there are several categories of mass casualty events that would be appropriate, mass shootings have been selected for their particularly powerful effects on the American public and the national agenda. Through the examination of three case studies, patterns in legislative (in)action should emerge. These patterns should promote a better understanding of how Kingdon's theory applies in the current political environment. As this paper endeavors to answer a complex question of "why" a particular phenomenon has developed, it will be important to consider the temporal and contextual settings in which the events occurred. Kingdon's theory of agenda setting and the policy process cannot be reduced to mere statistics. It is a theory that is dependent on less tangible and definite factors such as people, mood, and emotion. Case studies, which can be rich in emotive and evocative detail (in a way statistical analysis might be lacking) permit the author the flexibility to analyze how these factors had the power to influence (or not), within the frame of Kingdon's theory.

This paper briefly examines the following mass shootings: Sandy Hook Elementary School, Route 91 Harvest Festival, and Marjory Stoneman Douglas High School. These shootings have been chosen from a bevy of

⁶⁶ Anthony K. Fleming et al., "When the Smoke Clears: Focusing Events, Issue Definition, Strategic Framing, and the Politics of Gun Control," *Social Science Quarterly* 97, no. 5 (2016): 1155, doi:<http://onlinelibrary.wiley.com/proxy1.library.jhu.edu/journal/10.1111/%28ISSN%291540-6237/issues>.

possible examples, as the last 20 years has been tragically, and unfortunately, rife with mass shootings. However, even against the backdrop of hundreds of examples and thousands of deaths, these examples stand apart. The three profiled shootings represent extremes within the genre, for the following respective reasons: choice of victim, lack of motive, legality of gun ownership, number of casualties, and public response. These factors are relevant because they represent aspects of the issue that promote legislative action. For example, if the shooting was based on a clear motive or a targeted victim (for personal/domestic reasons) that might discourage large scale response. An event such as this could be written off as a unique example (as opposed to a trend or public problem). Additionally, if the guns used in the attacks were obtained illegally, there might be less of an argument to be made to change policy to reduce access to firearms (since further regulating access to firearms would not stop people from obtaining them illegally). In each case, and for each of these reasons, these case studies represent focusing events which should have been best suited to prompt a policy window to open. The case studies will also be preceded by a brief examination of the events that followed the terror attacks on September 11, 2001. This paper hypothesizes that September 11 was a watershed moment. In the context of a hyperpartisan environment, September 11 appears to have reset the (extreme) conditions necessary to overcome partisanship and open a policy window. The three mass shootings profiled represent extremes in their own right and a better understanding of the policy (in)action following these events should help to determine how the policy process has been affected by growing partisanship.

September 11 as a Watershed Event

September 11, 2001 is an important day in the American collective memory. On that day, at the direction of al-Qa'ida, 19 men of foreign origin hijacked four planes and crashed them into the World Trade Center, the Pentagon, and a field in Pennsylvania. In total, nearly 3,000 people died on the planes, at the Pentagon, and in New York City. September 11 represented the single most deadly terror attack in American history.⁶⁷

The effects of the attack on the American psyche were indelible. Horrifying, disturbing, and shattering are all adjectives that describe the immediate emotional response to the attacks,⁶⁸ which forever changed the sense of security and isolation from foreign enemies Americans felt. Suddenly Osama Bin Laden and al-Qa'ida were at the proverbial front door of every American home. However, the events of September 11, and the days that followed,

⁶⁷ "September 11 Attacks," history.com, September 11, 2019, <https://www.history.com/topics/21st-century/9-11-attacks>.

⁶⁸ Peter Roff, "The 'Common Man' Response to 9/11 Shows American Exceptionalism," *US News*, September 11, 2011, U.S. News and World Report L.P. <https://www.usnews.com/opinion/blogs/peter-roff/2011/09/15/the-common-man-response-to-9-11-shows-american-exceptionalism>.

produced another, rather incredible, reaction, “a remarkable cohesion evolved, one that brought people of all colors and creeds and political orientation together into a force of one mind, confident and hopeful that, as Americans all, this was a crisis that would be overcome.”⁶⁹

In response to a 2016 Pew survey that asked Americans to name the times or events during their lifetimes they felt most proud of, respondents commonly cited the national response to the September 11 attacks.⁷⁰ Respondents cited, among other things, “the way the nation united in the event’s aftermath” as a primary reason for their feelings of pride. In the aftermath, even Republican President George W. Bush received overwhelming bipartisan support, his approval rating hitting a near record high of 86%.⁷¹

This cohesion and bipartisan cooperation also found its way into the legislature. As a result of the September 11 attacks, an incredibly ambitious bipartisan effort was undertaken by way of the 9/11 Commission.⁷² At the end, the 9/11 Commission issued a 585 page, best-selling, report making numerous legislative recommendations to ensure the U.S. would never suffer another attack of the same scale again and that those responsible would be held accountable.⁷³

Arguably no other event, save Pearl Harbor, has had the same effect on Congress as did September 11.⁷⁴ In fact, perhaps the bipartisan cooperation post-9/11 is even more extraordinary given the generally polarized and partisan environment of the early 21st century legislature.⁷⁵ Notably, at the time there was not a strong Republican majority to support the initiatives of a Republican President.^{76 77} However, in light of the crisis, this did little to impede progress.

In the aftermath of the terror attacks, Congress cast aside more controversial domestic issues and focused on speedy enactment of legislation to address the major concerns raised by the attacks. These were supported

⁶⁹ Ibid.

⁷⁰ John Gramlich, “About a fifth of Americans cite 9/11 response as event that made them most proud of U.S.,” *pewresearch.org*, September 11, 2017, <http://www.pewresearch.org/fact-tank/2017/09/11/about-a-fifth-of-americans-cite-911-response-as-event-that-made-them-most-proud-of-u-s/>.

⁷¹ Ibid.

⁷² U.S. Senate Commission on Homeland Security and Governmental Affairs, “9-11 Commission, Homeland Security, and Intelligence Reform,” U.S. Senate Commission on Homeland Security and Governmental Affairs, <https://www.hsgac.senate.gov/issues/9-11-commission>.

⁷³ National Commission on Terrorist Attacks upon the United States, Thomas H. Kean, and Lee Hamilton. 2004. *The 9/11 Commission report: final report of the National Commission on Terrorist Attacks upon the United States*. [Washington, D.C.]: National Commission on Terrorist Attacks upon the United States.

⁷⁴ Sarah Binder and Bill Frenzel, “The Business of Congress After September 11,” *brookings.edu*, February 2002, The Brookings Institute, Washington D.C., <https://www.brookings.edu/wp-content/uploads/2016/06/pd01.pdf>, 1.

⁷⁵ Ibid.

⁷⁶ United States House of Representatives, “Congress Profile - 107th Congress 2001-2003,” Office of the Historian, <https://history.house.gov/Congressional-Overview/Profiles/107th/>.

⁷⁷ United States Senate, “The Unforgettable 107th Congress,” United States Senate, November 22, 2002, https://www.senate.gov/artandhistory/history/minute/unforgettable_107th_congress.htm.

virtually unanimously and with “no domestic political opposition.”⁷⁸ Legislation included disaster relief, an airline bailout, airport security, intelligence reform, agency consolidation, and homeland security enforcement powers,^{79 80} “[t]he normal diversions that add so much time to the legislative process—including budget restrictions, partisanship, parochialism, and members’ philosophical leanings—were not ignored, but they were reduced. The emergency issues were generally given low-decibel, modest debate, and dispatched promptly.”⁸¹

It seems immediately clear that the circumstances surrounding the events of September 11 and the policy that followed fit within the framework proposed by Kingdon. In this case, the issue, terrorism, became a national (if not global) “problem” in an instant on the morning of September 11, 2001. The attacks of September 11 were clearly a focusing event, elevating the issue to the government agenda instantly and uncontroversially. As was noted above, the issue (combating terrorism post 9/11, both domestically and abroad), faced virtually no domestic political opposition and was universally promoted and supported by the American public.

September 11 opened an extraordinarily large window of opportunity for legislative action that, due to its uncontroversial nature, simultaneously presented no risk to legislators to pursue it. Despite not having the political circumstances one might expect necessary (large partisan majorities that matched the sitting President), this was overcome by the nature and scale of the event. In regard to participants, this was also largely irrelevant since virtually all Americans (e.g., irrespective of position, status, party, power) supported any and all efforts to remedy the damage that was done, to revenge the attack, and to prevent one from ever happening again. Bargaining and persuasion were also largely absent since there was little debate about what should be done, “[w]hen little domestic opposition exists, legislators have considerable leeway to defer to the president's wartime agenda, even if they differ over the ways and means of responding to the crisis itself. Other big issues on the agenda, as a consequence, get sidetracked, many even evaporating from legislators' active agendas.”⁸²

As evidenced by September 11, in the aftermath of a large-scale crisis, Congress, “which is both representative and highly sensitive,”⁸³ is able to put aside partisan differences to affect meaningful change in the policy realm that responds to citizen demands. However, to Kingdon’s point, even the window opened by September

⁷⁸ Sarah Binder and Bill Frenzel, “The Business of Congress After September 11,” 2.

⁷⁹ *Ibid.*

⁸⁰ U.S. Senate Commission on Homeland Security and Governmental Affairs, “9-11 Commission, Homeland Security, and Intelligence Reform.”

⁸¹ Sarah Binder and Bill Frenzel, “The Business of Congress After September 11,” 2.

⁸² *Ibid.*, 3.

⁸³ *Ibid.*, 4.

11 did not persist forever. Although September 11 represented the single most deadly terror attack in recorded history, even it did not open a persistent and long-lasting window for the “public problem” it represented. By 2002, “bipartisanship and the general feeling of unity in Congress began to wane.”⁸⁴ The further into history the attack fell, the more the pressure on Congress also declined. Even though Bush’s Iraq War kept the specter of 9/11 alive and well, by the time the “dust of 9/11 settled, bipartisanship had vanished.”⁸⁵ By the fifth anniversary of the attacks, “the two political parties couldn’t be farther apart.”⁸⁶

The implications for U.S. democracy are grave. Although in some ways September 11 represents an excellent success story and example (fitting within Kingdon’s framework), it is also an extraordinary example, and is difficult to imagine another event of similar magnitude. One wonders, given the extraordinary partisanship of the current U.S. political environment, if an event like September 11 reset the bar by which a crisis is judged. In less than a year following the event, Congress had already returned to its “cantankerous” nature, with thin margins of power, finding it “harder to reach bipartisan accord on anything.”⁸⁷

Turning to mass shootings as focusing events, this paper will examine if events, such as these, have seen similar success as catalysts for bipartisan cooperation and policy change. Or has there been a fundamental shift in the policy making process in the hyperpartisan post-9/11 world?

Public Problem: Mass Shootings and Gun Control

Since the start of the 21st century, a new phenomenon has emerged that weighs heavily on the American conscience—mass shootings. These shootings have become an increasingly frequent and unrelenting mainstay of American life.^{88 89} The shootings are not necessarily terrorism in the conventional sense (i.e. perpetrated by individuals inspired or directed by a foreign terrorist organization, as in the case of 9/11), but they certainly inspire terror in those who are targeted and the American people in general. However, unlike with terror attacks, clear motives are often absent, leaving those left behind to wonder why and how, in the absence of a clear understanding, these incidents could be prevented.

⁸⁴ Ibid.

⁸⁵ The Associated Press, “When dust of 9/11 settled, bipartisanship had vanished,” *Denver Post*, September 11, 2006, <https://www.denverpost.com/2006/09/11/when-dust-of-911-settled-bipartisanship-had-vanished/>.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Michael Schmidt, “F.B.I. Confirms a Sharp Rise in Mass Shootings Since 2000,” *New York Times*, September 24, 2014, <https://www.nytimes.com/2014/09/25/us/25shooters.html>.

⁸⁹ Bonnie Berkowitz, Denise Lu and Chris Alcantara, “The terrible numbers that grow with each mass shooting,” *Washington Post*, November 9, 2018, https://www.washingtonpost.com/graphics/2018/national/mass-shootings-in-america/?noredirect=on&utm_term=.53c961267ec8.

Mass shootings are defined as attacks in which more than four people are killed and in reality, mass shootings account for a very small percentage of people who are killed by gun violence in the United States.⁹⁰ However, as was previously suggested, a single incident of violence (for which the motive is clearly understood (i.e., gang violence, domestic violence, suicide by gun, accidental deaths, violence occurs during the commission of other crimes (robbery))) is not enough to inspire a focusing event nor ignite a national discussion. One could imagine that at some point the cumulative review of all the individual deaths by guns might elevate the public's perception of the problem (since the year 2000, approximately 30,000 people are killed by guns in the U.S. every year⁹¹) and arguably it has.

A 2018 Gallup survey, following mass shootings in Parkland, Florida, and Las Vegas, Nevada, revealed that guns now rank second as the most important problem in the country, falling behind only (and perhaps notably) dissatisfaction with the government.⁹² Additionally, support for stricter gun laws is the highest it has been since 1993 and although, on the whole, Democrats are far more likely than Republicans to support gun control, both parties have seen increases in support for stricter gun laws.⁹³

The public's preferences for action are clear -- more Americans are calling for stricter gun laws than at any point in the last 25 years. Concerns about gun laws, as measured by the percentage wanting stricter laws and the percentage mentioning it as the most important problem facing the country, now exceed the levels seen after the Columbine and Sandy Hook school shootings.⁹⁴

Despite all of these factors and an ever growing, tragic, list of mass shootings, little has been achieved on the public policy front. Also, despite respective increases in support, gun regulation still represents an issue for which there is stark partisan division⁹⁵ and little policy momentum, with more than 100 attempts at federal reform failing (including those written by authors from both parties).⁹⁶

It is worth briefly noting that in less partisan years past, Congress was able to pass an assault weapons ban. The 1994 assault weapons ban “illustrates just how perfectly the legislative stars must align for contentious gun

⁹⁰ Ibid.

⁹¹ Niall McCarthy, “The Steady Rise Of U.S. Gun Deaths,” *statista.com*, Dec 13, 2018, <https://www.statista.com/chart/16421/the-number-of-us-gun-deaths-due-to-firearms/>.

⁹² Jeffrey Jones, “U.S. Preference for Stricter Gun Laws Highest Since 1993,” *Gallup.com*, March 14, 2018, https://news.gallup.com/poll/229562/preference-stricter-gun-laws-highest-1993.aspx?g_source=link_NEWSV9&g_medium=TOPIC&g_campaign=item_&g_content=U.S.%2520Preference%2520for%2520Stricter%2520Gun%2520Laws%2520Highest%2520Since%25201993.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Baxter Oliphant, “Bipartisan support for some gun proposals, stark partisan divisions on many others,” Pew Research Center, June 23, 2017, <http://www.pewresearch.org/fact-tank/2017/06/23/bipartisan-support-for-some-gun-proposals-stark-partisan-divisions-on-many-others/>.

⁹⁶ Melina Delkic, “Sandy Hook Anniversary: These are the gun control laws that have failed since the Newtown shooting,” *Newsweek*, December 14, 2017, <https://www.newsweek.com/sandy-hook-anniversary-gun-control-laws-failed-747415>.

measures to become law. It also shows what such an effort entails — true bipartisanship, a committed White House, a readiness on all sides to compromise and a willingness by some lawmakers to take a significant political risk.”⁹⁷ However, this effort did not come without significant cost, “[t]he consequences of the vote were so severe — Democrats lost the House after four decades of control, with the assault weapons ban ranking high among the reasons — that Congress has been unable to advance major gun safety legislation since.”⁹⁸ The rash of mass shootings in recent history appear to have opened the door again to political reform, with members of both parties willing to tackle the issue in response to growing demand and even in the face of significant political risk. Despite this willingness, even some more modest reforms (with public support), such as those to background checks, have met obstacles and opposition. In contrast to the sentiment of 1994 and in a show of partisan loyalty, Senate Majority Leader Mitch McConnell has stated he would only put on the floor "a measure the president supports.”⁹⁹

Kingdon argues that the public policy process is dependent on a complex coming together of multiple factors and circumstances (streams) at the most opportune time. When this happens, a window of opportunity opens, and policy change can be implemented. This paper argues that in the case of gun control regulation, all of the necessary circumstances are present, yet, no progress has been made. By looking at several examples through the lens of Kingdon’s theory, perhaps a pattern will emerge suggesting an explanation for why Congress has been unable to fulfil its most sacred and important duty.

Sandy Hook Elementary School: Newtown, CT

On December 14, 2004, a 20-year-old man (Adam Lanza) shot and killed his mother at their home. Lanza, armed with three guns from the residence, then proceeded to the Sandy Hook Elementary School in Newtown, Connecticut where he forced entry and killed 26 people— 20 young children and six adults.¹⁰⁰ Little is known about Lanza’s motive.

Of course, Sandy Hook was not the first, the last, or most deadly mass shooting in U.S. history. However, in regard to crises as focusing events, it is difficult to imagine an event that is more tragic, image more shocking and frightening, or better catalyst for action than a mass shooting occurring at an elementary school, the victims’

⁹⁷ Carl Hulse, ” How Congress Passed an Assault Weapons Ban in 1994,” New York Times, September 7, 2019, <https://www.nytimes.com/2019/09/07/us/politics/congress-assault-weapons-ban.html>.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ “Sandy Hook shooting: What happened?” cnn.com, December 12, 2012, <http://www.cnn.com/interactive/2012/12/us/sandy-hook-timeline/index.htm>. 1

classrooms full of kindergarteners and first graders. After the shooting at Sandy Hook, the public response was predictably visceral.

The shooting at Sandy Hook also occurred months after another mass shooting at a movie theater in Aurora, Colorado during which 12 people were killed and 70 injured.¹⁰¹ Thus, the topic of mass shootings (and gun control) were already fresh in the minds of the American people when the shooting occurred at Sandy Hook. A study conducted by the Pew Research Center's Project for Excellence in Journalism of the online conversation about Newtown found far more discussion of gun policy on Twitter and blogs conducted following Sandy Hook than after the 2011 Tucson shooting targeting U.S. Representative Gabrielle Giffords, confirming the salience of the issue, "[i]n the social media conversation, calls for stricter gun control measures exceed[ed] defenses of current gun laws by more than two-to-one" (After Newtown 2012). As a focusing event and in the context of the problem stream, it is clear that the events at Sandy Hook elevated the topic to the governmental agenda and, with bipartisan support at nearly every level, a window of opportunity was opened.

In fact, in 2013, two bills were introduced in response to Sandy Hook: The Manchin-Toomey Bill (an amendment to the Safe Communities, Safe Schools Act of 2013) and the Assault Weapons Ban.¹⁰² The Manchin-Toomey Bill, which proposed changes to the background check process for the purchasing of a firearm was co-authored by a Republican and Democrat. The Assault Weapons Ban was largely an effort by Democrats but did have the support of one Republican Senator. Both bills ultimately failed.¹⁰³

In the case of Sandy Hook, the shooting should have been a focusing event that gave the topic of gun control a prominent place on the governmental agenda, as an issue clearly defined as a public problem. Following Sandy Hook, efforts *were* made to introduce legislation and bipartisan policy alternatives *were* presented. There was also a political environment which should have been conducive to the passage of the bills (i.e. Democratic Senate, Democratic President, national mood). So why was Congress unable to capitalize on these conditions? There appear to be prominent three trends.

¹⁰¹ "Colorado Theater Shooting Fast Fact,." cnn.com, July 16, 2018, <https://www.cnn.com/2013/07/19/us/colorado-theater-shooting-fast-facts/index.html>.

¹⁰² Melina Delkic, "Sandy Hook Anniversary: These are the gun control laws that have failed since the Newtown shooting," *Newsweek*, December 14, 2017, <https://www.newsweek.com/sandy-hook-anniversary-gun-control-laws-failed-747415>.

¹⁰³ *Ibid.*

First, the political environment in 2012 was partisan and polarized and gun control was an issue clearly divided on party lines.¹⁰⁴ Gun control represents one of the most partisan issues facing the American public, each poll examined showing a clear preference within each party for gun control (Democrats) and gun rights (Republicans). This fact makes compromise and cooperation at the Congressional level difficult as the issue is seen as representing a core value of each politician's base, in quite the same way abortion divides (and conversely, terrorism does not).

Second, the margins of power were relatively thin between Republicans and Democrats in the 113th Congress (Senate: D- 53, R-45; House: D-200, R-233).¹⁰⁵ Presumably, in a Congress in which the ruling party maintains control by only the slimmest of margins, appearing to concede, compromise, or acquiesce to the other party on an issue so clearly divided by the party bases, could be seen as political suicide. With an election cycle always on the near horizon, politicians in this environment may think more about self-preservation and the next election cycle than the issue at hand.

Third, there was an extremely powerful lobby (NRA) which actively sought to kill the bills and any/all gun control efforts.¹⁰⁶ The NRA is an extremely powerful voice in the gun control / gun rights debate and spends millions of dollars and thousands of man hours to ensure that no ground is lost in the fight to preserve gun rights, much of which is directed at ensuring their agendas are promoted at the Congressional level.¹⁰⁷

It seems clear that based on Kingdon's theory of the policy process, all the necessary conditions to open a policy window were present. Additionally, it seems clear that a window did indeed open. However, as predicted by Kingdon, the window that opened, not capitalized on, closed nearly as quickly. In the case of Sandy Hook, it seems apparent that rather than whether a window was present, a better question is how hyperpartisanship, in conjunction with other (aforementioned) factors, exacerbated or contributed to legislative impotency.

In the intervening years, there would be numerous other examples of mass shootings in the same vein as the Newtown shooting (numerous casualties, victims seemingly chosen at random, unknown or incomplete understanding of motives, etc.). As examples, some of the more well-known shootings include: the 2016 Pulse

¹⁰⁴ Pew Research Center, "After Newtown, Modest Change in Opinion about Gun Control," *people-press.org*, December 20, 2012, <http://www.people-press.org/2012/12/20/after-newtown-modest-change-in-opinion-about-gun-control/>.

¹⁰⁵ Sarah Blackwill, "113th Congress: By the Numbers," *MSNBC.com*, January 3, 2013, <http://www.msnbc.com/the-daily-rundown/113th-congress-the-numbers>.

¹⁰⁶ Melina Delkic, "Sandy Hook Anniversary: These are the gun control laws that have failed since the Newtown shooting," *Newsweek*, December 14, 2017, <https://www.newsweek.com/sandy-hook-anniversary-gun-control-laws-failed-747415>.

¹⁰⁷ Amber Phillips, "The NRA-ification of the Republican Party," *The Washington Post*, August 14, 2015, https://www.washingtonpost.com/news/the-fix/wp/2015/08/14/the-nra-ification-of-the-republican-party/?utm_term=.64157d19786d.

Nightclub shooting (49 killed, 53 injured), the 2015 Inland Regional Center shooting (14 killed, 21 injured), the 2017 Fort Lauderdale-Hollywood International Airport shooting (5 dead, 6 injured), the 2018 Marjory Stoneman Douglas High School shooting (17 killed, 17 injured), the 2017 First Baptist Church shooting (26 dead, 20 injured), the 2018 Sante Fe High School Shooting (10 dead, 10 injured), and most recently the 2018 Borderline Bar and Grill shooting (12 killed, 11 injured).¹⁰⁸ One could imagine the power each one of these incidents could (and perhaps should) have to incite public ire aimed at demanding policy action on the issue of gun control to attempt to prevent or at least reduce the deadliness of these attacks.

However, in recent history, no mass shooting was more deadly or less understood than the Route 91 Harvest Festival shooting in Las Vegas.

Route 91 Harvest Festival: Las Vegas, NV

On October 1, 2017, from a suite on the 32nd floor at a high-rise hotel in Las Vegas, Stephen Paddock fired thousands of rounds into a crowd of thousands of people who had gathered at the Route 91 Harvest Festival. At the end, 58 people were killed and over 800 injured (422 from gunfire).¹⁰⁹¹¹⁰ This would become the single deadliest mass shooting in U.S. history. Again, no clear motive for Paddock's actions was ever uncovered.

In the days following the Route 91 Harvest Festival shooting, a poll showed that most voters supported stricter gun control laws. Regarding specific proposals, "including background checks, restrictions on where Americans can carry firearms and prohibitions against accessories like the "bump fire" stocks used by the Las Vegas gunman — large majorities express[ed] support in the poll."¹¹¹

In response, Senator Dianne Feinstein (D-Ca) and Representative Carlos Curbelo (R-Fla.) introduced bills aimed at banning bump stocks, a firearm accessory employed by Paddock that in part made his attack so deadly, so quickly. The bills gained bipartisan support, "with Congress members on both sides of the aisle promising change."¹¹² However, following intervention by the NRA, the bills stalled.

¹⁰⁸ Chris Wilson, "37 Years of Mass Shootings in the U.S. in One Chart," *Time*, October 2, 2017, <https://time.com/4965022/deadliest-mass-shooting-us-history/>.

¹⁰⁹ Bonnie Berkowitz, Denise Lu and Chris Alcantara, "The terrible numbers that grow with each mass shooting," *The Washington Post*, November 9, 2018, https://www.washingtonpost.com/graphics/2018/national/mass-shootings-in-america/?noredirect=on&utm_term=.53c961267ec8.

¹¹⁰ Lyn Bui, Matt Zapotosky, Devlin Barrett, and Mark Berman, "At least 59 killed in Las Vegas shooting rampage, more than 500 others injured," *The Washington Post*, October 2, 2017, <https://www.washingtonpost.com/news/morning-mix/wp/2017/10/02/police-shut-down-part-of-las-vegas-strip-due-to-shooting/>.

¹¹¹ Steven Shepard, "Gun control support surges in polls," *Politico.com*, February 28, 2018, <https://www.politico.com/story/2018/02/28/gun-control-polling-parkland-430099>.

¹¹² Melina Delkic, "Sandy Hook Anniversary: These are the gun control laws that have failed since the Newtown shooting," *Newsweek*, December 14, 2017, <https://www.newsweek.com/sandy-hook-anniversary-gun-control-laws-failed-747415>.

Like Sandy Hook, all conditions were necessary for the window of opportunity to open and for Congress to pursue policy change on an issue that was of utmost concern to the electorate. Mass shootings clearly represented a public problem to voters and the Route 91 Harvest Festival shooting placed the issue of gun control again front and center on the minds of Americans and on the government's agenda. Policy alternatives were proposed by way of the Automatic Gunfire Prevention Act, which, from the political side, enjoyed bipartisan support.

However, also like Sandy Hook, the circumstances and events following the Route 91 shooting revealed similar trends. First, despite growing public and bipartisan support for gun control, gun control remained an extremely polarizing and partisan issue. Second, the 115th Congress saw power distributed by more or less the same margins (although with shifts in control).¹¹³ And third, the NRA again voiced their opposition, which had an immediate chilling effect on bipartisan efforts, "calling for a regulatory assessment of bump stocks as opposed to a legislative one."¹¹⁴

A fourth factor was also raised by Senator Chris Murphy. Murphy, a Connecticut Democrat and strong proponent of increased gun control, stated "it's difficult with a 24-hour news cycle to keep attention on the policy solutions in the aftermath of these murders."¹¹⁵ Adding that "what it boils down to is a lack of regular order and an ability to work in a bipartisan fashion in Congress, which prevents anything from even having a debate."¹¹⁶

The Route 91 Festival represents another mass shooting example in the vein of Sandy Hook: a focusing event which was successful, as prescribed by Kingdon, in opening a wide and sufficiently persistent policy window. However, no legislation was successfully enacted at the federal level as a result. The reasons why appear to be increasingly complex and multifaceted, each factor compounding on the other. However, in the case of Route 91, there remained low-risk, widely supported measures that Congress could have pursued, but did not. Allowing, to the growing frustration of the electorate, the window of opportunity to close on the issue of gun control once again. That is, until the next mass shooting.

Marjory Stoneman Douglas High School: Parkland, Florida

A mere 4 months following the shooting at the Route 91 Harvest Festival, one of the most recent, and troubling, mass shootings occurred at the Marjory Stoneman Douglas High School in Parkland, Florida.

¹¹³ "115th Congress (2017–2019)," United States House of Representatives, <https://history.house.gov/Congressional-Overview/Profiles/115th/>.

¹¹⁴ Joe Perticone, "Just weeks after the deadliest mass shooting in modern history, a bipartisan gun control measure has fallen to the wayside," *Businessinsider.com*, October 24, 2017, <https://www.businessinsider.com/republicans-bump-stock-ban-2017-10>.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

Representing a frightening sub-set of mass shootings (school shootings), the Parkland shooting also carries the unfortunate status as the deadliest high school shooting in U.S. history, with 17 killed and 14 additional wounded.¹¹⁷ Amongst the dead were teachers and high school students, some as young as 14 years old, gunned down on Valentine's Day 2018 by a 19 year old former student, Nikolas Cruz, using an AR-15 he had purchased legally a year prior.^{118 119}

In many ways, Parkland echoed the familiar themes and trends following the shootings that came before. Immediately following the attack, there was a significant and observable shift in support for gun control, with support for stricter gun laws spiking in polls conducted after the fatal South Florida school shooting. "Hitting its highest level in at least a quarter-century" immediately following the Parkland shooting, stricter gun control laws were supported by roughly 2 in 3 registered voters (68 percent), compared with just 25 percent who opposed stricter gun laws.¹²⁰ Parkland demonstrated a significant shift in the mood of the nation:

Americans who want more restrictive gun laws is greater now than after any other recent shooting...support for stricter gun laws was at 58 percent following the 2016 Pulse nightclub shooting that killed 49 people, 64 percent following the 2017 mass shooting that resulted in 58 deaths at a country-music festival in Las Vegas and 60 percent last November, after a shooter killed 26 people inside a church in Sutherland Springs, Texas.¹²¹

The polls also showed a marked increase in support from Republicans, who are generally predisposed to oppose stricter gun control, accordingly "'53 percent of Republicans indicated they supported stricter gun laws, compared to 37 percent [of Republicans] who said the same following the Pulse nightclub shooting in June 2016.'"¹²²

Further, polling showed most gun control proposals such as background checks, raising age limits, national database tracking, waiting periods, and banning bump stocks, all enjoyed support by an overwhelming majority (in many cases 80+%). Despite this near consensus, these measures continued to be opposed by a large share of Republicans in Congress.¹²³

¹¹⁷ Charles Rabin, Martin Vassolo, and Daniel Chang, "Latest on the Parkland school shooting: A search for answers; the shooter confesses," *Miami Herald*, February 15, 2018, <https://www.miamiherald.com/news/local/community/broward/article200223414.html>.

¹¹⁸ Jonathan Sperling, "Florida school shooting: These are the 17 victims," *NBCnews.com*, February 16, 2018, <https://www.nbcnews.com/news/us-news/florida-school-shooting-these-are-17-victims-n848706>.

¹¹⁹ Charles Rabin, Martin Vassolo, and Daniel Chang, "Latest on the Parkland school shooting: A search for answers; the shooter confesses," *Miami Herald*, February 15, 2018, <https://www.miamiherald.com/news/local/community/broward/article200223414.html>.

¹²⁰ Steven Shepard, "Gun control support surges in polls," *Politico.com*, February 28, 2018, <https://www.politico.com/story/2018/02/28/gun-control-polling-parkland-430099>.

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.*

However, although gun control has seen a steady increase in support since the time of Sandy Hook, the immediate and substantial rush that followed Parkland appeared to have dissipated within months. By May 2018, “69 percent of American adults supported strong or moderate regulations or restrictions for firearms, down from 75 percent in late March.”¹²⁴ It is worth noting here that this trend perhaps belies a bigger trend in American media consumption, which is the relatively short shelf life of any given crisis in the age of the 24-hour news cycle and social media. In conjunction with partisanship at the federal level, the inability of any crisis to hold the national attention for long also implies significant consequences to the health of U.S. democracy, given the speed at which the bureaucratic wheels turn.

In the case of the Parkland shooting, the NRA remained an active and powerful foe. In the month following the shooting, it appeared that the pro-gun control activism following the shooting may have “deepened the resolve of its supporters.”¹²⁵ In March, the NRA Political Victory Fund raised \$2.35 million “the highest monthly amount raised for the fund in records dating back to 2003.”¹²⁶

Legislative attempts at the federal level also continued to stall following the Parkland shooting, despite national pressure.^{127 128} However, Parkland inspired a rush of legislative wins at the state level, which may herald a new way forward as Congress remains ineffective at transforming public pressure and opinion into policy.^{129 130} Following Parkland, “[g]un-control advocates had their best year in state legislatures in recent history.”¹³¹

*Since the Florida shooting, the Giffords Law Center to Prevent Gun Violence counts 55 new gun-control laws passing in 26 states. That is far more success than they normally see, any way you measure it: in the number of laws, the variety of the laws passed and the bipartisan support a number of them had. Republican governors in 15 states signed bills gun-control advocates supported.*¹³²

¹²⁴ Daniel Trotta, “Gun control support fades three months after Florida massacre: Reuters/Ipsos poll,” *reuters.com*, May 23, 2018, <https://www.reuters.com/article/us-usa-guns-poll/gun-control-support-fades-three-months-after-florida-massacre-reuters-ipsos-poll-idUSKCN1JO19P>.

¹²⁵ Jess Bidgood and Sabrina Tavernise, “Do Gun Owners Want Gun Control? Yes, Some Say, Post-Parkland,” *The New York Times*, April 24, 2018, <https://www.nytimes.com/2018/04/24/us/gun-owners-laws-parkland.html>.

¹²⁶ *Ibid.*

¹²⁷ Amanda Holpuch, “Six victories for the gun control movement since the Parkland massacre,” *The Guardian*, March 26, 2018, <https://www.theguardian.com/us-news/2018/mar/26/gun-control-movement-march-for-our-lives-stoneman-douglas-parkland-builds-momentum>.

¹²⁸ Anthony Brooks, “After Parkland, And With No Action By Congress, Advocates Say Look To Connecticut,” *wbur.org*, March 8, 2018, <http://www.wbur.org/news/2018/03/08/connecticut-gun-laws>.

¹²⁹ Amanda Holpuch, “Six victories for the gun control movement since the Parkland massacre,” *The Guardian*, March 26, 2018, <https://www.theguardian.com/us-news/2018/mar/26/gun-control-movement-march-for-our-lives-stoneman-douglas-parkland-builds-momentum>.

¹³⁰ Amber Phillips, “After Parkland, gun-control advocates see a turning point for new state laws,” *The Washington Post*, July 21, 2018, https://www.washingtonpost.com/news/the-fix/wp/2018/07/21/after-parkland-gun-control-advocates-see-a-turning-point-for-new-state-gun-control-laws/?utm_term=.c6257ce81125.

¹³¹ *Ibid.*

¹³² *Ibid.*

Leading the movement of public pressure was a group of student survivors from the Parkland shooting who thus far brought about unrivaled success for the gun-control movement in the United States, 50+ new state laws restricting access to guns, ranging from banning bump stocks to allowing authorities to temporarily disarm potentially violent people.¹³³

The Parkland shooting may also herald yet another change that could pull the reality of gun control legislation closer yet, the downfall of the NRA. According to polls conducted prior to the U.S. 2018 midterm elections, the NRA may have suffered lasting and irreversible damage following the Parkland shooting. Inspired by the student protesters, corporate partners of the NRA began to cut ties, “[h]otel chains, car rental firms and home insurance businesses had offered discounts to members of the NRA but cancelled them in droves after the shooting.”¹³⁴ Although every mass shooting usually brings about a dip in the popularity of the NRA, the organization has been able to rebound via lobbying in the past. This power appears to have weakened following Parkland, with indications that the organization is ““now underwater and shows no signs of bouncing back.””¹³⁵

Whether or not the progress the Parkland shooting has inspired truly heralds a new way forward remains to be seen. Ultimately, even following the tragedy at Parkland, familiar themes persist: Congress suffers thin margins of power, hyperpartisanship, and deadlock; the NRA continued to aggressively lobby against gun control measures; gun control remained a primarily partisan and divisive issue; and the 24-hour news cycle showed its power to both help and hurt a cause through its style of coverage. As of the writing of this paper, gun control after Parkland suffers the same fate as all the others at the federal and Congressional level. And although a frustration, it is not a surprise to American voters. Although 7 in 10 favor stricter gun control measures, 51 percent expected elected officials to tighten gun laws, while 42 percent expected no changes.¹³⁶

Congress was provided yet another opportunity following Parkland to initiate and actualize meaningful change on the matter of gun control, a window of opportunity that was perhaps the most conducive to policy change yet. And still, efforts failed, stalled, or were neglected to be raised at all.

Policy Windows in the Wake of Mass Shootings

¹³³ Matt Vasilogambros, "After Parkland, States Pass 50 New Gun-Control Laws," *pewtrusts.org*, August 2, 2018,

<https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/08/02/after-parkland-states-pass-50-new-gun-control-laws>.

¹³⁴ Amanda Holpuch, "Six victories for the gun control movement since the Parkland massacre," *The Guardian*, March 26, 2018, <https://www.theguardian.com/us-news/2018/mar/26/gun-control-movement-march-for-our-lives-stoneman-douglas-parkland-builds-momentum>.

¹³⁵ John Bonazzo, "NRA Slipping With Voters, Though Many Have Moved on From Gun Control," *The Observer*, September 10, 2018, <https://observer.com/2018/09/nra-gun-control-polling-parkland/>.

¹³⁶ Steve Peoples and Emily Swanson, "AP-NORC Poll: Support soars for stricter gun control laws," *Associated Press*, March 23, 2018, <https://www.apnews.com/6bf3d106aa245d3b774868503e81289>.

In the case of mass shootings, it appears clear that the issue is not, as previously assumed, that the events are not significant or serious enough to be elevated to the government's agenda. In the examples given above, the conditions prescribed by Kingdon were met: the public expressed their concern, the political conditions were right, and policy alternatives were offered. Mass shootings were defined by the public as crises, clearly of large enough scale and not within the "pre-window" phase as described by other studies. Congress also enjoyed a strong feedback loop, most notably the March for Our Lives, a nationwide protest following the Parkland shooting.¹³⁷ It also seems that the question is not whether the events were significant enough to open the windows, the windows were opened wide. Rather the question is why did Congress continuously fail to capitalize on the opportunities that were available and for which they appeared to have strong positive inclinations toward? In the case of the mass shootings profiled above, several common trends emerged, most of which are related to partisanship.

First, the issue remained, at each juncture, highly polarized and partisan (e.g., gun control is largely supported by Democrats, gun rights are largely supported by Republicans). Although over time and with each additional shooting, the number of people from both parties supporting gun control, in general, increased, the margins of support (at all levels) remained thin.

Second, the margins of power in Congress have been relatively thin over the last two decades. Thin margins of power may mean that the perception of a legislator's risk (i.e. reelection) to bargaining or compromising with the other side is higher, this may dissuade legislators from compromising on issues that are controversial or generally polarized to begin with and during a period of extreme partisanship. According to Frances Lee, these thin margins and highly competitive reelection campaigns further contribute to the intractability of the current environment and the inability to find common ground on issues with bipartisan support, "toxic partisanship is in great part fueled by close competition for power, not just different opinions over the role and scope of government."¹³⁸

Third, in the case of gun control, there was a highly influential and powerful lobby intervening at every policy attempt, the NRA. To Kingdon's point regarding participants, interest groups (lobbies) can represent an incredibly persuasive factor in the policy process and in the case of gun control, they certainly did. Many legislators

¹³⁷ Sarah Gray, "The March For Our Lives Protest Is This Saturday. Here's Everything to Know," *Time*, March 23, 2018, <https://time.com/5167102/march-for-our-lives-parkland-school-shooting-protest/>.

¹³⁸ Andy Fitch, "Partisan Conflict Separate from the Policy: Talking to Frances Lee," *Los Angeles Review of Books*, August 31, 2018, <https://blog.lareviewofbooks.org/interviews/partisan-conflict-separate-policy-talking-frances-lee/>.

are beholden to these groups who represent the opinions of many of their constituents, a source of financial support, and the perception of their likely success at the next election. Additionally, coinciding with the increased polarization and partisanship, the NRA itself has become inherently political and partisan. Beginning in 1994, following the assault weapons ban, the NRA has continuously aligned itself closer to the Republican party. Despite having bipartisan origins, by 2016, the NRA was essentially a Republican organization, with 99% of its campaign contributions going to party candidates.¹³⁹

The question remains, with a number of other factors at play, how much does the hyperpartisan environment really matter? Ultimately, the author believes that hyperpartisanship (while not the only factor) plays a large role in Congress' inability to arrive at compromise. Per Kingdon's theory, all the necessary conditions were met in the examples given, in order for the windows of opportunity to open. September 11, therefore, did not represent a watershed moment in the sense that it raised the bar on how extreme or catastrophic an event must be in order to open the proverbial window. As evidenced, many mass shootings over the last two decades opened these windows.

Rather, September 11 appears to represent the conditions necessary to allow Congress to capitalize on the open window during a time of extreme polarization and partisanship. September 11, 2001 was not a day otherwise unburdened by polarizing and partisan forces in D.C., and as was noted, shortly after the dust from the attacks settled, Congress set right back into their partisan ways. In contrast to the mass shootings profiled, September 11 represented an event with such extreme loss, it was impossible to not respond. In the aftermath of September 11, one could regard each legislator's bipartisan efforts as themselves efforts in self-preservation. As a public problem, terrorism is also uncontroversial, no legislator is "pro"-terrorism.

In the case of mass shootings, the Route 91 Harvest Festival shooting was the closest in scale, but still unsuccessful in inspiring cooperation. The policy alternatives presented following the Route 91 shooting were both workable and enjoyed bipartisan support (the ban of bump stocks). However, arguably, by 2017 the hyperpartisan environment during the Trump administration, which casts Democrats and Republicans as virtual enemies, more or less guaranteed that legislators would be unwilling to risk cooperating with the opposing side. Additionally, the event, arguably, did not reach the perceived scale to necessitate response. Polls demonstrated time and again that

¹³⁹ Kurtis Lee and Maloy Moore, "The NRA used to be a bipartisan campaign contributor, but that changed in 1994. Here's why," LA Times, March 3, 2018, <https://www.latimes.com/nation/la-na-pol-nra-spending-20180303-story.html>.

there are certain gun control measures that receive much higher levels of support and are much less controversial than others (background checks, banning bump stocks, etc.), no matter one's party. It is in regard to these particular measures, which do enjoy bipartisan support, that hyperpartisanship likely played a role. In this environment, bargaining and compromising is seen as risky. In years prior, it was expected that legislators would work together, compromise, and cross the aisle when necessary to move the policy agenda forward. Only in an environment which is so polarized and negatively charged is such action deemed risky or detrimental to one's political career.

A Contemporary Success Story?

As an aside, as this paper was being written, a highly unusual and promising effort was unrolling at the congressional level. Just prior to the midterm elections in November 2018, Congress emphatically proved it still had the capacity to come together, compromise and find solutions to controversial issues in response to public demand and in order to stave off a national crisis: the opioid crisis.

Since the early 1990s, the number of prescribed opioid painkillers has steadily increased, from 112 million in 1992 to a peak of 282 million in 2012.¹⁴⁰ Concurrently, as a result of the complex legal history of pharmaceutical pain management, including the scheduling of certain drugs and the aggressive marketing of others, an addiction crisis developed in the United States.¹⁴¹ Subsequently, many individuals who became addicted to prescribed pain medication (the addictive nature of which was mis/underrepresented) ultimately turned to less expensive and more accessible options, such as heroin. As a result, from 2002 to 2016, the number of heroin overdose deaths increased 533%. In 2017 alone, nearly 50,000 people died in the U.S. from an overdose that included the use of opioids.¹⁴² On October 26, 2017, President Trump officially declared the opioid crisis a national Public Health Emergency under federal law.¹⁴³ Following this declaration, Congress responded.

In what represented a rare bipartisan effort, both the Senate and the House of Representatives overwhelmingly approved the "SUPPORT for Patients and Communities Act," a bill intended to "address a national health crisis that has devastated communities all over the country."¹⁴⁴ By October 24, 2018, approximately a year to the day from his declaration, President Trump signed the bill into law.¹⁴⁵

¹⁴⁰ "Opioid Crisis Fast Facts," *cnn.com*, December 4, 2019, <https://www.cnn.com/2017/09/18/health/opioid-crisis-fast-facts/index.html>.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ "The Opioid Crisis," *whitehouse.gov*. <https://www.whitehouse.gov/opioids/> (accessed 12/7/2018).

¹⁴⁴ Abby Vesoulis, "Opioid Bill Shows Congress Can Still Work Together," *Time*, October 6, 2018, <http://time.com/5416380/opioid-bill-congress/>.

¹⁴⁵ Allan Coukell, "President Trump Signs Bipartisan Bill to Fight Opioid Crisis," *pewtrusts.org*, October 24, 2018, <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/10/24/president-trump-signs-bipartisan-bill-to-fight-opioid-crisis>.

Although the nature of the crises is different, the opioid crisis resembles the mass shooting/gun control issue in many relevant and important ways. Although the opioid crisis represents hundreds of thousands of deaths, the victims each stand alone. There was no one, large scale, unavoidable, or high-profile focusing event that elevated the crisis to the governmental agenda. Also similar to the issue of mass shootings/gun control, historically the issue of how to handle drugs and addiction is also a partisan issue (stronger enforcement vs. decriminalization/legalization.)¹⁴⁶ ¹⁴⁷ The opioid crisis also faced a strong opposing lobby in the pharmaceutical industry.¹⁴⁸ And yet, Congress was able to overcome these factors to push through legislation to respond to the issue which had become a national crisis, “the sweeping bipartisan support for the opioids package was a reminder that Congress can still find ways to work together on pressing issues.”¹⁴⁹

The opioid crisis and the resultant legislation bears mentioning as it represents another public problem that was elevated to the government agenda, and per Kingdon, a window of opportunity to act presented itself and Congress successfully responded. Although this paper will not dive deep into a comparative analysis, it seemed worthwhile to acknowledge this recent success story, in the context of a broader frustration with a hyperpartisan Congress and its’ ineffectiveness. Perhaps there are lessons and strategies that can be taken from the opioid crisis that can be applied to other issues of national importance which have struggled to find similar success at the legislative level.

CONCLUSIONS:

In closing, with the exception of few and limited examples, there does appear to be a problem of some significance at the Congressional level. More specifically, in the context of Kingdon’s theory on public policy, Congress appears to generally be incapable of capitalizing on policy windows. This phenomenon has left Congress largely unresponsive to many public demands and problems over the last two decades, to include the issue of gun control.

An examination of the issue through the lens of mass shootings as focusing events reveals that the issue is about more than just partisanship, polarization, and rhetoric. However, in the case of mass shootings and gun

¹⁴⁶ “Republican Views on Drugs,” *republicanviews.org*, October 19, 2015, <https://www.republicanviews.org/republican-views-on-drugs/>.

¹⁴⁷ “The quick guide to America political parties stances on drug policy,” *isidewith.com*, <https://www.isidewith.com/political-parties/issues/domestic-policy/drug-policy> (accessed 12/7/2018).

¹⁴⁸ Chris McGreal, “How big pharma’s money – and its politicians – feed the US opioid crisis,” *The Guardian*, October 19, 2017, <https://www.theguardian.com/us-news/2017/oct/19/big-pharma-money-lobbying-us-opioid-crisis>.

¹⁴⁹ Abby Vesoulis, “Opioid Bill Shows Congress Can Still Work Together,” *Time*, October 6, 2018, <http://time.com/5416380/opioid-bill-congress/>.

control, the hyperpartisanship that has emerged over the last 20 years appears to be the factor that makes it impossible to overcome the others (e.g., such as strong opposing lobbies, thin margins of power, concerns about self-preservation, the 24-hour news cycle, and the polarized nature of the issue itself).

The potential significance to the health of the U.S. democratic system is obvious, Congress should be the institution most representative and responsive to the American public. If it has become ineffective, unresponsive, and deadlocked, it has become unable to perform its most essential and sacred duty. This begs the question, what can be done?

Perhaps a deeper look at the circumstances surrounding the legislative response to the opioid crisis would provide insight. Or perhaps the cooperation and results that emerged from this issue will herald a new way forward. Perhaps a reframing of the mass shooting crisis, in similar ways to how the opioid crisis was framed, would make the issue more palatable and less controversial for legislative action.

Perhaps a more party-diverse Congress would ease the perceived personal and professional costs associated to Democrats and Republicans engaging in across the aisle compromise. Perhaps a more parliamentary style of government, ranked choice voting, or term limits could provide ways for more moderate politicians, third parties and independent candidates to break the traditionally bipartisan hold the Democrats and Republicans maintain.¹⁵⁰

Perhaps removing money from politics and reducing the influence, power, and effectiveness of professional lobbies would allow politicians to approach issues based on merit and public need rather than out of concern for self-preservation and financing. Perhaps corporate America will continue to play a stronger role in expressing the public need and forcing action by hitting lobbies where it hurts the most (financially).

Perhaps a different media strategy would promote a better understanding of the issues, allowing consumers to fully absorb information and process it through a broader lens. A media that is less focused on the sensationalization of issues and quantity over quality might increase the longevity of issues both on the national consciousness as well as on the government's agenda.

Finally, perhaps, the inaction at the federal legislative level will continue a trend observed following the Parkland shooting; states intervening and enacting law in instances when Congress appears unable. This may signal a new and more tenable trend in U.S. democracy, one in which federal law takes a back seat to state legislation.

¹⁵⁰ Russell Berman, "Maine's Fitful Experiment With a New Way of Voting," *The Atlantic*, April 11, 2018, <https://www.theatlantic.com/politics/archive/2018/04/ranked-choice-voting-maine/557669/>.

Ultimately, the health of the American democratic experiment depends on the continued relationship between the people and the government. The partisan and polarizing nature of the current American political climate has not just made for a weary public but evidently for an ineffectual Congress. In a government of the people, by the people, for the people, when the people demand, the government must respond. If Congress no longer serves the interests and concerns of the public, either expectations must change, or the government must.

Chapter Two
The Immigration Impasse: Unique Solutions for Partisan Problems
Sub-federal Legislation as an Alternative to Federal Inaction

INTRODUCTION:

American federalism is a unique and rare blend, it “conveys something of our high regard for regional, local, and individual diversity, widely varied yet capable of achieving a simultaneous national unity.”¹⁵¹ A supreme federal government providing centralized organization and ensuring the provision of citizens most basic rights stands in juxtaposition and harmony to individual semi-sovereign states. This system designed to endow all of the benefits and securities of a centralized authority with all the diversity and liberty of a more localized and parochial representative.

Since the turn of the century and more relevantly, since the 2016 election, the American political system has faced new and unprecedented challenges. The election of Donald Trump in 2016 demonstrated a partisan atmosphere and domestic divisions unlike ever before.¹⁵²

As the American public has grown increasingly frustrated with lawmakers in Washington D.C.¹⁵³, a spotlight has been cast on numerous issues for which the American public appears anxious to see a public policy response, but Congress has been unable, or unwilling, to find a bipartisan policy solution.

Chapter one, utilizing mass shootings as focusing events, examined whether or not a hyperpartisan environment is responsible for the lack of a meaningful and effective response from Congress and whether or not hyperpartisanship has also fundamentally shifted the conditions previously believed to be required for the mechanisms of the U.S.’ democratic policy machine to engage.

Ultimately, the conclusions of chapter one were not nearly as straightforward as anticipated but in the case of mass shootings, and in particular the Parkland shooting, an encouraging and promising trend emerged. The inaction at the federal legislative level inspired states to intervene and enact laws in instances when Congress remained unwilling and unable. Does this signal a new and more tenable trend in U.S. democracy, one in which federal law takes a back seat to state legislation?

¹⁵¹ George Charles Roche III, “American Federalism: Origins,” *Foundation for Economic Education*, December 1, 1966, <https://fee.org/articles/american-federalism-origins/>.

¹⁵² Jeremy Peters, “If you think the political divide is worse than ever, you may be right.” *The Seattle Times*, August 17, 2018, <https://www.seattletimes.com/nation-world/if-you-think-the-political-divide-is-worse-than-ever-you-may-be-right/>.

¹⁵³ “Views on Congress,” *Pew Research Center*, April 17, 2017, <http://www.people-press.org/2017/04/17/3-views-of-congress/>.

Traditionally certain issues and rights have been reserved for the federal government. However, as was identified in chapter one, states were effectively able to legislate more restrictive gun control measures following several mass shootings, when Congress was not. Gun control is an issue firmly rooted in a discussion of constitutional rights, more specifically the Second Amendment and thus would be an issue expected to be dealt with at the federal level. However, in the face of an ineffectual and paralyzingly polarized Congress, is a possible and viable alternative for states to localize and legislate traditionally federal issues? Or are some issues simply too big, too broad, and too consequential to be delegated?

With the ideas of liberty and freedom from persecution at the core of her national identity, the United States is a country founded by and for immigrants. Immigration is an issue which has traditionally, and perhaps rightfully, been within the purview of the federal government and has become one of the most divisive and highest priority issues facing Congress, and the administration.¹⁵⁴ Controversy over immigration policy is not itself new, nor is its' place on the list of priorities. However, American's exasperation at Congress' inability to fix a broken system may be.

Congress has, in less partisan times, also been able to find common ground on immigration reform. Both the 1986 Immigration Reform and Control Act (IRCA) as well as a series of reforms in the 1990s (to include the Immigration Act and the Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA)) proved that Congress was capable of coming together on the controversial issue.¹⁵⁵ Each of these efforts displayed significant support from both parties. In the case of the IIRIRA, the House passed the legislation with the support of 76 democrats¹⁵⁶ – a significant portion willing to engage in the bipartisan effort. In the Senate, the IIRIRA passed with near unanimous support, only 3 democrats dissenting.¹⁵⁷ However, since 2000, continued efforts at reforming immigration, even those with bipartisan support and promise, have stalled.

By examining the foundations of American federalism and division of power between state and federal, historical precedents for adoption of national issues on the state level, and utilizing immigration as a test case, this paper proposes that in the face of a hyperpartisan Washington D.C. in perpetual policy deadlock, states will be

¹⁵⁴ "State of the Union 2019: How Americans see major national issues," *pewresearch.org*, February 4, 2019, <https://www.pewresearch.org/fact-tank/2019/02/04/state-of-the-union-2019-how-americans-see-major-national-issues/>.

¹⁵⁵ "Historical Overview of Immigration Policy," Center for Immigration Studies, <https://cis.org/Historical-Overview-Immigration-Policy> (accessed 4/25/2020).

¹⁵⁶ "H.R. 2202 (104th): Immigration Control and Financial Responsibility Act of 1996," *govtrack.us*, September 25, 1996, <https://www.govtrack.us/congress/votes/104-1996/h432>.

¹⁵⁷ "H.R. 2202 (104th): Immigration Control and Financial Responsibility Act of 1996," *govtrack.us*, May 2, 1996, <https://www.govtrack.us/congress/votes/104-1996/s108>.

challenged to creatively endeavor to take on policy projects far beyond their envisioned scope. Are these efforts, which must contend with national policy and competing state policies, doomed to fail? Is this effort contrary to the very core of American federalism? Or will enterprising states effectively bridge the gap, bringing much needed policy relief to a desperate public.

LITERATURE REVIEW:

Previous scholarship has provided a framework that provides context to the issue, including the historical legacy of the federal and state dichotomy, the concept of preemption, and the legacy of the immigration issue as a national priority, all within the context of the hyperpartisan political environment.

Immigration as a Federal Issue: Federal Foundations

The tension between the federal government and state governments is an enduring and important feature of the American federal system. As the Founding Fathers argued for the ratification of the U.S. Constitution, James Madison wrote, “[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”¹⁵⁸

The federal system was designed to thwart tyranny and the state, and its’ relative power, was an important mechanism in this effort. However, the Tenth Amendment of the Constitution which describes the enumeration of powers is perhaps a bit nebulous, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”¹⁵⁹ As events unfolded in the years that followed, debates raged on as the federal government increasingly usurped jurisdiction over issue after issue.

According to some, the period following the mid-1960s marked a time of “revolutionary changes in the American federal system” which made the system “considerably more malleable” and “raised important questions about the future role of states.”¹⁶⁰ During this period, an explosion of preemptive statutes based on Congress’ delegated and implied powers fundamentally (at least for the time) shifted the perception of the nation-state relationship.¹⁶¹

In the latter part of the twentieth century, the number of federal preemptive statutes burgeoned further, raising questions about the future role of the state and the dynamic between the two planes of government. However,

¹⁵⁸ James Madison, “The Alleged Danger From the Powers of the Union to the State Governments Considered For the Independent Journal,” *The Federalist Papers, No. 45*, https://avalon.law.yale.edu/18th_century/fed45.asp (accessed June 14, 2019).

¹⁵⁹ U.S. Const. art. X

¹⁶⁰ Joseph Zimmerman, *Federal Preemption: The Silent Revolution*, (Iowa State University Press, 1991), vii.

¹⁶¹ Joseph Zimmerman, *Federal Preemption: The Silent Revolution*, vii.

this increase also grew out of a recognition that many problems have interstate implications that are not easily solved at the state level. This increase in federal preemptive statutes led to a “modified” and more dynamic theory of federalism.¹⁶² In a system that is dependent on checks and balances and respect for state sovereignty, some see the doctrine of preemption as an enormous threat. With few incentives in place, Congress is free to preempt state law, “even when the state interests Congress displaces far exceed its own.”¹⁶³

In a traditional structural preemption view of immigration authority, it is understood that the national government has been endowed jurisdiction over immigration directly from the Constitution.¹⁶⁴ However, in regards to the jurisdictional boundaries which have practically encompassed immigration, it turns out the story is more complicated than expected and presents a topic up for considerable debate.¹⁶⁵

Immigration as a Federal Issue: Supremacy and Preemption Prevail

Much has been said by contemporary scholars on the topic of immigration authority. For some, jurisdictional authority has been cemented in the favor of the national government. Those in support of federal ownership of the regulation of immigration point broadly to the Constitution, enumerated powers, the presumption of preemption and the supremacy of federal law. Scholars in the pro-federal camp also point to the practicality of a national policy to address an issue that crosses state and international boundaries and has foreign policy implications. Constitutionally based arguments are lacking in specificity as the Constitution does not address immigration directly or at great length. Historical arguments must also contend with the legacy of state and local purview of immigration.

Prior to the Civil War, immigration was very much a state and local matter, with five broad categories of immigration policy living at the state level, including regulation of public health, movement of the poor and criminals, slavery and racial subordination.¹⁶⁶ Contemporary critics minimize the importance of historical state immigration legislation relying on two general arguments, the legislation was ineffective and unconstitutional, supporting the current doctrine that regulation of immigration is an “exclusive power of the federal government.”¹⁶⁷

¹⁶² Joseph Zimmerman, *Federal Preemption: The Silent Revolution*, 17.

¹⁶³ Robert A. Mikos, “Making Preemption Less Palatable: State Poison Pill Legislation,” *George Washington Law Review* 85, no. 1 (2017): 1. <http://search.ebscohost.com/login.aspx?direct=true&db=bsu&AN=121065031&site=ehost-live&scope=site>.

¹⁶⁴ Clare Huntington, “The Constitutional Dimension of Immigration Federalism,” *Vanderbilt Law Review* 61, no. 3 (2008): 791, <http://search.ebscohost.com.proxy1.library.jhu.edu/login.aspx?direct=true&db=bsu&AN=32747277&site=ehost-live&scope=site>.

¹⁶⁵ *Ibid*, 791.

¹⁶⁶ Gerald L. Neuman, “The Lost Century of American Immigration Law (1776-1875),” *Columbia Law Review* 93, no. 8 (1993): 1841, www.jstor.org/stable/1123006.

¹⁶⁷ *Ibid*, 1886.

Following the abolishment of slavery and passage of the 14th Amendment, the tides began to turn and reflect this broader belief, “the states were by judicial action soon ousted from immigration lawmaking, at least with respect to core decisions regarding the admission and exclusion of aliens.”¹⁶⁸

The jurisdictional place of immigration, was even more firmly cemented in the late 1800s when the Supreme Court, via their decision in *Chae Chan Ping v. United States*, established, through structural reasoning, that despite not having explicitly enumerated powers in the constitution, the federal government has the authority to regulate migration.¹⁶⁹ Although often the subject of controversy, it is argued by some that this decision was based on “the close linkage between foreign affairs and immigration control decisions,”¹⁷⁰ rather than an automatic deference to the federal government and its branches. This decision is considered the source of the plenary power from which the federal government (Congress) derives its absolute authority on immigration. According to Peter Schuck in his 2007 article, “*Taking Immigration Federalism Seriously*”, despite many academic arguments to the contrary, it’s likely that “no principle in immigration law is more firmly established, or of greater antiquity, than the plenary power of the federal government to regulate immigration.”¹⁷¹ And arguably, the plenary power doctrine may continue to grow in strength as pressures from an increasingly chaotic world increase.¹⁷²

Arguments in support of the plenary power doctrine, and federal ownership of the immigration issue identify immigration as an issue rooted in foreign relations or foreign affairs.¹⁷³ In fact, “modern immigration law is permeated with the assumption that regulating immigration is inherently a federal activity with close links to foreign relations.”¹⁷⁴

It is also argued that the power to “exclude or deport aliens is inherent in sovereignty, and that Congress’s exercise of that power is therefore immune from substantive constitutional constraints.”¹⁷⁵ It is thus suggested that

¹⁶⁸ Peter J. Spiro, "Learning to Live with Immigration Federalism," Connecticut Law Review 29, no. 4 (1997): 1628, <https://heinonline-org.proxy1.library.jhu.edu/HOL/P?h=hein.journals/conlr29&i=1638>.

¹⁶⁹ David A. Martin, "Why Immigration's Plenary Power Doctrine Endures," *Oklahoma Law Review* 68, no. 1 (2015): 31, <https://heinonline-org.proxy1.library.jhu.edu/HOL/P?h=hein.journals/oklr68&i=39>.

¹⁷⁰ *Ibid.*, 29.

¹⁷¹ Peter H. Schuck, "Taking Immigration Federalism Seriously." *University of Chicago Legal Forum* 2007, no. 1 (2007): 57. <https://heinonline-org.proxy1.library.jhu.edu/HOL/P?h=hein.journals/uchclf2007&i=59>.

¹⁷² David A. Martin, "Why Immigration's Plenary Power Doctrine Endures," 32.

¹⁷³ Stephen H. Legomsky, "Immigration Law and the Principle of Plenary Congressional Power," *The Supreme Court Review* (1984): 261, www.jstor.org/stable/353694.

¹⁷⁴ Gerald L. Neuman, "The Lost Century of American Immigration Law (1776-1875)," 1839.

¹⁷⁵ Stephen H. Legomsky, "Immigration Law and the Principle of Plenary Congressional Power," 273.

Congressional power over immigration also derives from enumerated powers, albeit not explicitly, such as powers over commerce, naturalization, and war.¹⁷⁶

Although immigration enforcement and law-making were previously a nearly exclusively federal endeavor, over the last several decades, a devolution of federal power to local governments has unfolded. In some ways, this was voluntary, by design (via the Illegal Immigration Reform and Immigrant Responsibility Act), and inspired by necessity (rapidly increasing flow of illegal immigrants in the 1990s and early 2000s), focused mainly on enforcement.¹⁷⁷ At this time, the federal government willingly delegated a significant amount of enforcement activity to the states. However, the sub-federal role has continued to expand far beyond this scope. Although a real and intensifying phenomenon, this expansion brought with it an intense debate about the constitutionality and suitability of such policies, with many contemporary scholars criticizing the movement.¹⁷⁸ Immigration is not the only issue which has seen crossover, but another critical argument in favor of federal ownership focuses on specific features of the issue which suggest it is better managed at the national level. According to these theories, states should only serve as “laboratories of democracy”¹⁷⁹ for certain issues, and immigration is not one. In order for experimentation to be viable at the local level, states must both internalize costs and the results must be replicable. According to some, both aspects are lacking in sub-federal legislation of immigration.¹⁸⁰

Immigration as a Federal Issue: Shared Authority as an Alternative

In contrast, the scholarship on immigration federalism is equally as deep and broad. Over the course of the last two decades, a plethora of state and local laws and resolutions have emerged which have shifted the perception surrounding the issue. Proponents of sub-federal activity cite federal inaction, economic models, and recent legal decisions as supporting the argument that state and local governments can and should become major players in the immigration regulation game.

Immigration federalism is broadly defined as the role sub-federal governments (state and local) play in making and implementing immigration law and policy.¹⁸¹ The recent increase in the salience of immigration

¹⁷⁶ Ibid, 274.

¹⁷⁷ Monica Varsanyi, et. al, “Immigration Federalism: Which Policy Prevails?” *Migration Policy Institute*, October 9, 2012 , <https://www.migrationpolicy.org/article/immigration-federalism-which-policy-prevails>.

¹⁷⁸ Clare Huntington, "The Constitutional Dimension of Immigration Federalism," 789.

¹⁷⁹ Keith Cunningham-Parmeter, “Forced Federalism: States as Laboratories of Immigration Reform,” *Hastings Law Journal* 62, no. 6 (2010-2011): 1673. https://heinonline-org.proxy1.library.jhu.edu/HOL/P?h-hein_journals/hastlj62&i=1688.

¹⁸⁰ Ibid, 1673.

¹⁸¹ Monica Varsanyi, et. al, “Immigration Federalism: Which Policy Prevails?”

federalism and flurry of sub-federal activity is seen as one of the most important developments in immigration regulation.¹⁸²

“To those who view immigration policy as solely within the province of the federal government, state and local involvement seems anathema”¹⁸³ but recent history has normalized this approach. Since the turn of the century, Congress has remained incapable of passing comprehensive reform despite several (failed) attempts.¹⁸⁴ In response, there has been a marked change, with sub-federal governments making a significant foray into immigration law and legislation.¹⁸⁵ According to some, this shift, in which states are emerging as “major players in immigration law- and policy making” eschews a “century of judicially protected exclusive federal authority.”¹⁸⁶

*“The conventional explanation for the recent spate of state and local laws should be familiar to anyone paying attention to immigration policy. It holds that policy stalemate at the federal level, combined with the pressure created by the public policy challenges of recent and rapid demographic changes, compel states and localities to legislate in a field they have no choice but to enter.”*¹⁸⁷

Building on this, state and local authorities themselves offer two explanations. First and most importantly, they cite “recent federal legislative inaction on immigration” which has created “a policy vacuum that invites sub-federal participation.”¹⁸⁸ These arguments are centrally focused on a “policy” or “legislative void” which has been pervasive since approximately the mid 1990s, after which point all Congressional efforts have met their demise. These jurisdictions also claim that the negative consequences of the “legislative void”¹⁸⁹, including economic depression and overcrowding due to migrants, have forced state and local governments to respond. Officials and those who are supportive of restrictive sub-federal immigration efforts “have paired these demographic claims with a complaint that the federal government has forsaken its constitutional and statutory responsibility to control unwanted immigration.”¹⁹⁰

It is worth noting that this appears to be a complicated explanation. Although the “narrative of federal failure” may be pervasive, to some it is problematic, and in the context of this paper it is worth highlighting recent

¹⁸² Clare Huntington, “The Constitutional Dimension of Immigration Federalism,” 788.

¹⁸³ Pratheepan Gulasekaram, “Immigration Federalism,” in *Controversies in American Federalism and Public Policy*, ed. C. Banks, (London: Routledge, 2018): 151.

¹⁸⁴ *Ibid*, 151.

¹⁸⁵ Pratheepan Gulasekaram and S. Karthick Ramakrishnan, “Immigration Federalism: A Reappraisal,” *New York University Law Review* 88, no. 6 (2013): 2075.

¹⁸⁶ Peter J. Spiro, “Learning to Live with Immigration Federalism,” 1627.

¹⁸⁷ Karthick Ramakrishnan and Pratheepan Gulasekaram, “The Importance of the Political in Immigration Federalism,” *Arizona State Law Journal* 44, no. 4 (2012):1435. <https://ssrn.com/abstract=2209311>.

¹⁸⁸ Pratheepan Gulasekaram and S. Karthick Ramakrishnan, “Immigration Federalism: A Reappraisal,” 2076.

¹⁸⁹ *Ibid*, 2076.

¹⁹⁰ Karthick Ramakrishnan and Pratheepan Gulasekaram, “The Importance of the Political in Immigration Federalism,” 1433.

findings that relate to this argument. In the 2013 article, *Immigration Federalism: A Reappraisal*, Gulasekaram and Ramakrishnan argue that “this explanation for the current era of immigration federalism is theoretically, legally, and descriptively flawed.”¹⁹¹ Gulasekaram and Ramakrishnan do not argue against the suitability or legality of sub-federal efforts, in fact, they offer a bevy of evidence supporting state and local legislation. However, in order to understand the phenomena in the broader context, it is important to note that the situation at the federal level is at least more complicated than some of the sub-federal-level arguments suggest and a better understanding of the complexities of resource constraints and enforcement priorities is necessary. Gulasekaram et. al also question the legitimacy of arguments that focus on critical necessity and suggest they should require “empirical verification.”¹⁹² Federal inactivity and sub-federal activity are undoubtedly “linked and interdependent”¹⁹³ but in many of these cases, necessity and demographic arguments fell short on facts. Ultimately, the more consistent motivation appeared to be “partisan opportunities and political entrepreneurship.”¹⁹⁴ According to their analysis, which included review of over 25,000 municipalities and all 50 states, Ramakrishnan and Gulasekaram concluded that local partisanship emerged as the most important factor in explaining the spread of sub-federal immigration laws, noting that Republican-heavy areas were much more likely to pass restrictive legislation than Democrat-heavy areas.¹⁹⁵

Others point to the development of immigration federalism as an important display of some of federalism’s most important and positive features. Peter Spiro highlights the “steam valve” virtue of federalism in the context of immigration. Spiro’s theory invokes a more capitalist image of the process, one state’s preference (be it more restrictive or more permissive) can be borne out without being forced on the entire population by way of Washington. This allows individual states to conduct a cost-benefit analysis based on their policies. This, Spiro argues, may ultimately benefit the immigrant, as more restrictive policies may “provoke opprobrium”¹⁹⁶ from disapproving states and hurt interstate commerce. Decentralizing the decision making in immigration policy also protects against extreme views at the national level, ensuring a more diverse, representative, and varied patchwork model of regulation and enforcement.¹⁹⁷

¹⁹¹ Pratheepan Gulasekaram and S. Karthick Ramakrishnan, “Immigration Federalism: A Reappraisal,” 2076.

¹⁹² Ibid, 2079.

¹⁹³ Karthick Ramakrishnan and Pratheepan Gulasekaram, “The Importance of the Political in Immigration Federalism,” 1435.

¹⁹⁴ Pratheepan Gulasekaram and S. Karthick Ramakrishnan, “Immigration Federalism: A Reappraisal,” 2080.

¹⁹⁵ Karthick Ramakrishnan and Pratheepan Gulasekaram, “The Importance of the Political in Immigration Federalism,” 1440.

¹⁹⁶ Peter J. Spiro, “Learning to Live with Immigration Federalism,” 1627.

¹⁹⁷ Clare Huntington, “The Constitutional Dimension of Immigration Federalism,” 832.

Courts and academics have also been important champions of many sub-federal efforts to creatively approach particularly intractable national issues.¹⁹⁸ Recently, Courts have further bolstered this in a series of decisions which have ceded more to state and local governments in the realm of immigration.

“As a result of the spate of litigation over sub-federal immigration ordinances, the jurisprudence of immigration federalism in the United States is becoming more nuanced—with increasing space created for state and local participation in immigration regulation. Courts still generally take the position that the federal government has primacy in regulating immigration laws, but recent decisions have shown an increasing tolerance for state or local regulations that do not contravene the federal regulatory scheme.”¹⁹⁹

Many portended cases like *Arizona v. United States* in 2011 would “signal the end of state and local engagement of immigration regulation.”²⁰⁰ On the contrary, scholars such as Stella Burch Elias argue that these cases simply imply a new direction for immigration federalism, with an increased emphasis on inclusionary efforts (as opposed to restrictive). Inclusionary sub-federal efforts have the potential to “inform, complement, and occasionally contradict federal efforts at comprehensive immigration reform.”²⁰¹

Immigration is also not the first, last, nor most controversial issue which has met unsatisfactory resolution at the federal level. The question of whether the issue of immigration could find legislative relief at the state level may be supported by some of these other contemporary examples. In these other examples, it has been argued that courts should read the preemption clause more narrowly, aspire to reconcile multiple jurisdictional interests and should consider information outside the letter of the law. These arguments recognize that there are occasions in which there should be some remedy for inaction at the federal level, and further “such a heightened deference would still allow Congress to preempt but would otherwise prevent laws adopted in other eras and other times from ending modern social experiments.”²⁰² In the case of immigration specifically, the federal government should have a real interest in allowing states to play a significant role, as in many ways, the states have “an even greater stake in the effective administration and enforcement of immigration law than the federal government does.”²⁰³

METHODOLOGY: Case Studies

¹⁹⁸ Keith Cunningham-Parmeter, “Forced Federalism: States as Laboratories of Immigration Reform,” 1673.

¹⁹⁹ Jennifer Chacón, “The Transformation of U.S. Immigration Federalism: A Critical Reading of *Arizona v. United States*,” in *Immigration Regulation in Federal States: Challenges and Responses in Comparative Perspective*, ed. S. Baglay and D. Nakache, (New York and Heidelberg: Springer, 2014): 199.

²⁰⁰ Stella Burch Elias, “The New Immigration Federalism,” *Ohio State Law Journal* 74, no. 5 (2013): 1, <https://ssrn.com/abstract=2337662>.

²⁰¹ *Ibid.*, 1.

²⁰² K. K. DuVivier, “State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study,” *Wake Forest Law Review* 40, no. 1 (2005): 22.

²⁰³ Peter H. Schuck, “Taking Immigration Federalism Seriously,” 92.

In order to examine whether sub-federal legislation of traditionally federal issues presents a viable alternative in the context of a hyperpartisan and deadlocked Congressional environment, this paper introduces several case studies that should function to demonstrate whether or not there has been a fundamental change to how (and at what level) public policy is made.

The following section will take a closer look at both restrictive and permissive efforts, the origins of the sub-federal program/legislation, the structure of the sub-federal programs/legislation, the challenges mounted against the effort, and the persistence and or successes of the effort. Through this examination answers to the following questions should emerge: Was the sub-federal program inspired by Congressional inaction? Was the sub-federal program/law specifically designed to replace or preempt federal action? Have there been compelling preemption arguments contradicting the efforts? And finally, does the sub-federal effort represent a viable alternative? Ultimately shedding light on the larger question, do these efforts imply a larger and more consequential shift in U.S. democratic functions?

Immigration as a States Rights Issue: Restrictive Efforts

Over the last decade, there have been thousands of sub-federal laws and resolutions passed, aimed at further regulating immigration.²⁰⁴ Many of these efforts, especially in the earlier years of the past decade, were restrictive in nature. These efforts aimed to make it “more difficult for immigrants to reside in communities, work, and live their daily lives.”²⁰⁵

The early part of this period of heightened restrictive effort was characterized by the omnibus bill, and Arizona stood at the forefront, playing a prominent role in the push to aggressively combat illegal immigration within its borders. Arizona’s 2010 law, Senate Bill 1070, *formally* named, *Support [Our] Law Enforcement and Safe Neighborhoods Act*, aimed to do what Arizona perceived the federal government had not. On the signing of the bill, Governor Jan Brewer stated, “we work to solve a crisis that we did not create and the federal government has refused to fix: the crisis caused by illegal immigration and Arizona’s porous border.”²⁰⁶ In arguments leading up to the bill’s signing, Arizona Senator Thayer Verschoor painted an even bleaker and more dire picture, “We’ve had an

²⁰⁴ “State Laws Related to Immigration and Immigrants,” *National Conference of State Legislatures*, January 16, 2019, <http://www.ncsl.org/research/immigration/state-laws-related-to-immigration-and-immigrants.aspx>.

²⁰⁵ Karthick Ramakrishnan and Pratheepan Gulasekaram, “Understanding Immigration Federalism in the United States,” *Center for American Progress* (March 2014): 1. <https://www.americanprogress.org/wp-content/uploads/2014/03/StateImmigration-reportv2.pdf>.

²⁰⁶ Jan Brewer, “Address Upon Signing Arizona Senate Bill 1070,” April 23, 2010, <https://www.americanrhetoric.com/speeches/janbrewersenatebill1070speech.htm>.

abdication of our federal government's responsibility to enforce immigration laws here, protect our borders, protect us from the criminals that are crossing our borders, who are killing our citizens, who are robbing their homes, invading their homes."²⁰⁷

However, although federal inaction was certainly a relevant theme on the immigration front, there appears to be little information of evidentiary value supporting the broad and vague references to the border crisis.

The bill itself was in large part a mirror of federal enforcement of immigration efforts and focused largely on increasing state requirements, crimes and penalties aimed at reducing illegal aliens in Arizona through attrition and further discourage and deter future entries via the southern border. More specifically, SB 1070 prohibited local and municipal governments from adopting policies less restrictive than federal law, the employment of unauthorized aliens, the harboring of illegal aliens, the transportation of illegal aliens, and required employers to verify all employee status via e-verify programs, amongst other provisions. S.B. 1070 also indemnified local law enforcement officers in these efforts and most controversially, included the “papers, please” provision which required sub-federal law enforcement officers to request proof of immigration status and detain individuals based on reasonable suspicion and lack of substantive proof.²⁰⁸ These efforts both further criminalized unauthorized status and increased the pace and scope of enforcement efforts.

Before S.B. 1070 was signed, it was met with immediate and substantial rebuke, both from within Arizona and throughout the U.S. Critics described the law as racist, unjust, and discriminatory. The law even divided law enforcement. Although the Fraternal Order of Police endorsed the bill, other national law enforcement organizations condemned the effort with concerns that it would encourage racial and ethnic profiling and discourage victim cooperation and reporting of crimes. The Arizona Association of Chiefs of Police called the law “burdensome and an intrusion into a federal matter.”²⁰⁹ And the federal government agreed. Before the law could take effect in July of 2010, the U.S. Justice Department filed suit for an injunction, barring the law based on its unconstitutionality. According to the Justice Department, S.B. 1070 was preempted by federal law, by U.S. foreign policy, and violated

²⁰⁷ Thayer Verschoor, “Quotes from the debate on SB 1070 and others on the legislation,” *Arizona Daily Sun*, April 20, 2010, https://azdailysun.com/quotes-from-the-debate-on-sb-and-others-on-the/article_b19e44b7-6484-5e60-97a5-062d3c47297b.html.

²⁰⁸ “SENATE BILL 1070,” *State of Arizona Senate, Forty-Ninth Legislature, Second Regular Session*, (2010): 1-16., <https://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf>.

²⁰⁹ Randal C. Archibald, “Arizona’s Effort to Bolster Local Immigration Authority Divides Law Enforcement,” *The New York Times*, April 21, 2010, <https://www.nytimes.com/2010/04/22/us/22immig.html>.

the Supremacy Clause and the Commerce Clause of the U.S. Constitution.^{210 211} In 2012, the Supreme Court, with its ultimate authority, sided generally with the federal government, striking down 3 of the laws 4 provisions on the basis of their interference with and/or encroachment on federal efforts in *Arizona v. United States*. The Supreme Court left the controversial “papers, please” provision intact but the story did not end there. In 2016, following years of lawsuits targeting the law (or what was left of it), the state of Arizona, conceded, settled, and the state Attorney General issued an instruction to police officers to ignore this most controversial feature.²¹²

As to whether or not S.B. 1070 had a positive effect on the perceived crisis for the period it was in effect? The results are murky at best. Some proponents of S.B. 1070 claimed highly inflated crime reduction numbers following (and causally related) to S.B. 1070. However, according to FBI and Department of Safety (DPS) statistics, there was an approximately 9-13 percent decline in the state’s crime index between 2010 and 2014. This is hardly a proof of a causal relationship as crime had already begun to steadily decline prior to S.B. 1070’s passage (beginning in 2002).²¹³ Analysis also showed that the effect S.B. 1070 had on the reduction of the number of unauthorized individuals to be extremely limited raising additional concerns/questions, “[t]he fact that SB1070 appears to have had a minimal to null impact on the share of likely unauthorized immigrants in the state questions the merit of the law and, more broadly, a piece-meal approach to immigration enforcement.”²¹⁴

In 2011, South Carolina endeavored to introduce similar legislation, Act No. 69 (also known as S.B. 20).²¹⁵ Although not as restrictive as Arizona’s, the law raised immediate discrimination and preemption concerns amongst advocates and the federal government alike.

In the case of South Carolina, the law included provisions such as e-verification of status prior to employment, felony charges for production of fake IDs for illegal residents and transportation of illegal immigrants, as well as the creation of a new state immigration law enforcement unit. In defense of the law, South Carolina officials invoked familiar arguments about federal inaction, “[i]f the feds were doing their job, we wouldn't have

²¹⁰ Ann Morse, “Arizona’s Immigration Enforcement Laws,” *National Conference of State Legislatures*, July 28, 2011, <http://www.ncsl.org/research/immigration/analysis-of-arizonas-immigration-law.aspx>.

²¹¹ “Citing Conflict with Federal Law, Department of Justice Challenges Arizona Immigration Law,” *U.S. Department of Justice*, July 6, 2010, <https://www.justice.gov/opa/pr/citing-conflict-federal-law-department-justice-challenges-arizona-immigration-law>.

²¹² Paige Newman, “Arizona’s Anti-Immigration Law and the Pervasiveness of Racial Profiling,” *Georgetown Immigration Law Journal* 31, no. 3 (2017): 611.

²¹³ Kelcie Grega, “Fact Check: Did SB 1070 reduce crime in Arizona?” *Arizona Republic*, May 20, 2016, <https://www.azcentral.com/story/news/politics/fact-check/2016/04/20/fact-check-did-sb-1070-reduce-crime-arizona/82826066/>.

²¹⁴ Catalina Amuedo-Dorantes and Fernando Lozano. “On the Effectiveness of SB1070 in Arizona.” *Economic Inquiry* 53, no. 1, (2015): 349. <http://onlinelibrary.wiley.com/proxy1.library.jhu.edu/journal/10.1111/%28ISSN%291465-7295/issues>.

²¹⁵ “A69, R103, S20,” *South Carolina General Assembly, 119th Session*, (2011-2012), https://www.scstatehouse.gov/sess119_2011-2012/bills/20.htm.

had to address illegal immigration reform at the state level," Rob Godfrey said. "But, until they do, we're going to keep fighting in South Carolina to be able to enforce our laws."²¹⁶ Less clear, as Gulasekaram and Ramakrishnan aptly noted, is what empirical evidence, or even anecdotal evidence, South Carolina provided to support the measures. Whereas Arizona could point to a porous border to its south, South Carolina's geography does not put it in nearly the geographically compromised position as its ideological cousin, Arizona.

Before South Carolina's law could be implemented, it too was subjected to federal lawsuit, with the Justice Department questioning the constitutionality of the law. Certain provisions of Act No. 69 were found to be "unconstitutional" and interfering with the federal government's "authority to set and enforce immigration policy."²¹⁷ By 2014, South Carolina had entered into a settlement which rendered the most controversial aspects of the bill inert, specifically those that criminalized daily interactions with undocumented immigrants and imposed criminal penalties on those who failed to carry immigration documents.²¹⁸

Similarly, Alabama's 2011 H.B. 56 was enacted by a Republican governor and Republican legislature. The law, entitled the "Alabama Taxpayer and Citizen Protection Act," was one of the most restrictive and controversial efforts of the 21st century. Within days of its signing, H.B. 56 found rebuke not just from the Department of Justice, but also the Departments of Homeland Security, State, and Education (in addition to public reproach) "on the basis of preemption and violation of the Supremacy Clause of the U.S. Constitution."²¹⁹ Ten of the bill's provisions were challenged and ultimately 7 were enjoined.

The three remaining provisions still rendered Alabama one of the most restrictive and inhospitable states to illegal immigrants. Alabama may, in this case, be able to argue that the law achieved its end, to reduce the number of illegal immigrants residing in Alabama, pushing them out and toward other states. Perhaps less predictable was the cooling effect that the law had on legal immigration alike.²²⁰ As the 2020 census approaches, Alabama stands to lose a Congressional seat due to stagnant population growth. Although Alabama has sued the Department of Commerce and U.S. Census Bureau to stop them from counting undocumented individuals in the upcoming census,

²¹⁶ "Justice Department Sues South Carolina Over State's Strict Immigration Law," *Fox News*, November 1, 2011,

<https://www.foxnews.com/politics/justice-department-sues-south-carolina-over-states-strict-immigration-law>.

²¹⁷ "Department of Justice Challenges South Carolina's Immigration Law," U.S. Department of Justice, October 31, 2011,

<https://www.justice.gov/opa/pr/departments-justice-challenges-south-carolina-s-immigration-law>.

²¹⁸ Adela de la Torre, "Civil Rights Coalition Achieves Important Protections Against South Carolina's Anti-Immigrant Law," *National Immigration Law Center*, March 3, 2014, <https://www.nilc.org/2014/03/03/nr030314/>.

²¹⁹ Ann Morse, et. al, "State Omnibus Immigration Legislation and Legal Challenges," *National Conference of State Legislatures*, August 27, 2012, <http://www.ncsl.org/research/immigration/omnibus-immigration-legislation.aspx>.

²²⁰ Alabama is paying price for HB 56," *The Times Daily*, March 23, 2018, https://www.timesdaily.com/opinion/editorials/alabama-is-paying-price-for-hb/article_359e6ec9-ace4-5ded-b2d8-f72ba327abc0.html.

it has been argued that it isn't just the undocumented immigrants who hurt Alabama's population count, "according to U.S. Census estimates, Alabama ranks No. 46 in the nation when it comes to attracting new residents from abroad."²²¹

A cross-section of the most notable restrictive immigration efforts since the start of the 21st century reveals several common themes. Federal inaction was invoked as a primary reason for action in each of the states examined. Each of the sub-federal laws was focused on illegal immigration, rather than immigration in the broader sense. Empirical evidence of the deleterious effects of illegal immigration seemed to be lacking in each of the cases, as was evidence of the immediate and long-term benefits of the programs (in the instances where laws persisted). Secondary and negative consequences of the efforts appeared in several instances (i.e. in Alabama the law created an environment perceived to be inhospitable to legal immigrants, and in both Alabama and Georgia, the laws had a negative effect on the agriculture industry which is supported in large part by migrant labor, and was not easily replaced by American labor²²²). At the height of the restrictive efforts, there was a notable juxtaposition of ruling parties (sub-federal level was Republican-run (Governor and/or legislature), while the federal government was led by Democrats.) Of the five states that drafted restrictive omnibus bills following Arizona's lead in 2011, including the two listed above as well as Georgia, Indiana and Utah, all were challenged on the basis of preemption and the laws have been "wholly or partially barred from taking effect."²²³

Immigration as a States Rights Issue: Permissive Efforts

In contrast to restrictive efforts, the first two decades of the 21st century also saw a bevy of permissive efforts. These efforts had contradictory aims to those outlined above and attempted to integrate and welcome immigrants into local communities by providing services and limiting local law enforcement cooperation with federal immigration enforcement. As in the case of the restrictive efforts, permissive efforts were not only about responding to a real-world need but also intended to "change the tenor of national discourse on immigration policy."²²⁴ The rash of permissive efforts also has had a standout contributor, with California at the forefront.

²²¹ Ibid.

²²² Joseph Erbentraut, "We've Already Learned That Losing Immigrant Farm Workers Is A Disaster," *Huffington Post*, March 10, 2017, https://www.huffpost.com/entry/alabama-immigration-law-farms_n_58c1d07fe4b0ed71826b55e0?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xILmNvbS8&guce_referrer_sig=AQAAAHCqo1r6YXUB7FBYotCaEBsxXwOYHHH0BnB215zRtWkHHwPEjkGa94Ce9CzoCztutmS-wN3ngBcsMUMPEFfSnn2ftQrvbboWkZgDZ1kwQpRuW120ljyxmMQ_KV1xb-Tc8a1EDdzcEC60u-2hvWp6Tyotjg3vtfMHxIKvn5xIFx4.

²²³ Ann Morse, et. al, "State Omnibus Immigration Legislation and Legal Challenges." *National Conference of State Legislatures*, August 27, 2012, <http://www.ncsl.org/research/immigration/omnibus-immigration-legislation.aspx>.

²²⁴ Karthick Ramakrishnan and Pratheepan Gulasekaram, "Understanding Immigration Federalism in the United States," 25.

The so-called “California package” of integrative immigration policy²²⁵ included evidence of nearly all of the most notable pro-immigration/immigrant policies of the 21st century. California has passed laws which place limits on detainees (sharing information with federal law enforcement) and e-Verify, provide identification (driver’s licenses) to recipients of DACA as well as unauthorized immigrants, and permit unauthorized immigrants to apply for in-state tuition as well as financial aid.

California’s 2018 law, S.B. 54, otherwise known as the “California Values Act,” promoted sanctuary policies to the state level by limiting cooperation by local law enforcement with federal authorities. Senator Kevin de Leon, the author of the bill, stated ““I wanted to make sure that our local police officers, our sheriffs, were not a cog in the Trump deportation machine, separating innocent mothers from their children and children from their fathers.”²²⁶

In the case of A.B. 450, the “Immigrant Worker Protection Act”, California employers were prohibited from allowing immigration agents access to a non-public area of a workplace or to private employee records without legal process.²²⁷ In response to federal challenges to the law, its author, State Assemblyman David Chiu, D-San Francisco, described federal efforts as “racist immigration policies” further stating, “[i]t is up to all of us, in our individual ways, to resist the war on immigrants in the United States.”²²⁸

In 2016 and 2017, with Assembly Bill (A.B) 103, state budget legislation, and S.B. 29 (Dignity Not Detention Act) the state of California also took aim at federal immigration detention facilities and policy, putting a moratorium on new facilities as well as giving the state Attorney General the power to inspect private, federal, immigration detention facilities, following a slew of complaints.²²⁹ According to Sen. Ricardo Lara, D-Bell Gardens, the laws attempted to “ensure the human rights and dignity of those immigrants detained in [California].”²³⁰

And the Trump Administration’s Justice Department’s response was equally as swift. In March 2018, the U.S. Department of Justice filed suit against California officials, “seeking both declaratory and injunctive relief

²²⁵ Ibid, 25.

²²⁶ Samantha Raphelson, “California Sanctuary Law Divides State In Fierce Immigration Debate,” *NPR Online*, October 17, 2018, <https://www.npr.org/2018/10/17/657951176/california-sanctuary-law-divides-state-in-fierce-immigration-debate>.

²²⁷ “Attorney General Becerra Issues Advisory Providing Guidance on the Privacy Requirements of the Immigrant Worker Protection Act,” *State of California Department of Justice*, February 13, 2018, <https://oag.ca.gov/news/press-releases/attorney-general-becerra-issues-advisory%C2%A0providing-guidance-privacy-requirements>.

²²⁸ “Judge Rules Mostly for California Over Trump in 'Sanctuary State' Fight,” *KQED.com*, July 5, 2018, <https://www.kqed.org/news/11679106/federal-judge-upholds-californias-sanctuary-state-law-at-early-stage-in-trump-administrations-lawsuit>.

²²⁹ Lisa Pickoff-White and Julie Small, “Report: Immigration Detainees Get Inadequate Medical Care in California Facilities,” *KQED Online*, February 26, 2019, <https://www.kqed.org/news/11728992/attorney-general-releases-first-report-on-immigration-detention-facilities-in-californi>.

²³⁰ Angela Hart, “AM Alert: Immigration advocates push California to limit ICE holds,” *The Sacramento Bee*, October 5, 2017, <https://www.sacbee.com/news/politics-government/capitol-alert/article177092736.html>.

based upon the enactment and implementation of certain provisions of three California laws.”²³¹ On the basis of preemption, the Justice Department sought to “permanently enjoin these state statutes, which are contrary to federal law and interfere with federal immigration authorities’ ability to carry out their lawful duties.”²³² However, the Trump administration found less success in its challenges. In March 2018, U.S. District Court Judge John Mendez rejected the administration’s request to block S.B. 54 and A.B. 103. Mendez did block a portion of S.B. 450, which prohibited employers from voluntarily providing federal immigration authorities from access to facilities but left other provisions of S.B. 450 intact. In his decision, Mendez argued that sanctuary laws “are permissible exercises of California’s sovereign power.”²³³ In April 2019, the U.S. Court of Appeals for the Ninth Circuit agreed with Mendez, upholding his ruling that the sanctuary laws did not conflict with federal immigration law, finding that although there is “no doubt that S.B. 54 makes the jobs of federal immigration authorities more difficult...California has the right ... to refrain from assisting with federal efforts.”²³⁴

However, Mendez’s ruling did not come without criticism of the perceived partisan origins of the debate, “[T]his Court joins the ever-growing chorus of Federal Judges in urging our elected officials to set aside the partisan and polarizing politics dominating the current immigration debate. ... Our Nation deserves it. Our Constitution demands it.”²³⁵ Mendez further argued that a solution would not come through “piecemeal opinions issued by the judicial branch.”²³⁶

As to whether the laws were successful? California would argue yes. Although some of the laws aims are hard to quantify (i.e. creating a more inclusive environment) others can arguably be defined (i.e. in February 2019, the California Attorney General released its first report on immigration detention facilities in an attempt to increase transparency and improve standards of care).²³⁷

As was the case with restrictive efforts, numerous states followed California’s suit, enacting a bevy of permissive state and local laws and resolutions aimed at creating an environment welcoming and friendly to

²³¹ “Justice Department Files Preemption Lawsuit Against the State of California to Stop Interference with Federal Immigration Authorities,” *U.S. Department of Justice*, March 7, 2018, <https://www.justice.gov/opa/pr/justice-department-files-preemption-lawsuit-against-state-california-stop-interference>.

²³² *Ibid.*

²³³ “Judge Rules Mostly for California Over Trump in 'Sanctuary State' Fight,” *KQED.com*.

²³⁴ Richard Gonzales, “Federal Appeals Panel Upholds California 'Sanctuary State' Law,” *NPR Online*, April 18, 2019, <https://www.npr.org/2019/04/18/714882333/federal-appeals-panel-upholds-california-sanctuary-state-law>.

²³⁵ “Judge Rules Mostly for California Over Trump in 'Sanctuary State' Fight,” *KQED.com*.

²³⁶ *Ibid.*

²³⁷ “Attorney General Becerra Releases First Report on Immigration Detention Facilities in California,” *State of California Department of Justice*, February 26, 2019, <https://oag.ca.gov/news/press-releases/attorney-general-becerra-releases-first-report-immigration-detention-facilities>.

immigrants. In 2019, over 300 jurisdictions, including at least 8 states, were considered “immigration sanctuaries” (more generally jurisdictions which limit cooperation on federal detainees).²³⁸ Although the current administration has undertaken efforts to penalize states and cities with so-called “sanctuary” policies by withholding federal funding, but courts have thus far blocked these efforts.²³⁹ However, “sanctuary” policies were not the only form permissive efforts were modeled after.

In 2019, Colorado undertook efforts to remove immigration and citizenship status as requirements to apply for a state occupational license. Occupational licensing is seen as a potential major barrier to the successful integration and support of the sizeable immigrant population in the U.S.²⁴⁰ Foreign-trained workers and U.S.-trained immigrants are able to help alleviate shortages in many professional fields, however, often face difficulty in obtaining the professional licenses and/or credential required in their field. This leaves a substantial part of the potential workforce underemployed.²⁴¹ Colorado’s bill, A.B. 275, went into effect July 1, 2019 and although it passed, divisions over the bill were generally party-centric (Republicans dissenting and Democrats unanimously supporting). The author of the bill, Las Vegas Democratic Assemblywoman Selena Torres, stated that the bill “completely coincide[d] with the federal statutes that already exist”²⁴² which lead to the bipartisan support required to narrowly pass it. The bill, although not a work authorization, provided greater career opportunities for a number of classes of immigrants (to include DACA recipients as well as green card holders, asylum seekers, and refugees). Lalo Montoya, the political director for Make the Road Nevada and member of the coalition supporting the bill through its passage, indicated “[t]he state legislature knows these sort of laws are needed because we’re working under a broken immigration system. This gives everyone an opportunity to contribute economically.”²⁴³ A number of states have enacted and/or are pursuing similar legislation and results seem to be positive, “[i]mmigrant professionals are filling labor shortages and helping local businesses grow.”²⁴⁴

²³⁸ Deirdre Shesgreen and Alan Gomez, “Sanctuary cities for illegal immigrants? Here's what you need to know,” *USA Today*, April 12, 2019, <https://www.usatoday.com/story/news/world/2019/04/12/sanctuary-cities-illegal-immigrants-can-carry-many-definitions/3449063002/>.

²³⁹ *Ibid.*

²⁴⁰ Ann Morse and Ishanee Chanda, “Barriers to Work:Improving Access to Licensed Occupations for Immigrants with Work Authorization,” *National Conference of State Legislatures*, July 17, 2018, <http://www.ncsl.org/research/labor-and-employment/barriers-to-work-immigrants-with-work-authorization.aspx>.

²⁴¹ *Ibid.*

²⁴² Jeniffer Solis, “State opens up occupational licensing to non-citizens,” *The Nevada Current*, June 14, 2019 (accessed August 7, 2019), <https://www.nevadacurrent.com/2019/06/14/state-opens-up-occupational-licensing-to-non-citizens/>.

²⁴³ *Ibid.*

²⁴⁴ Ann Morse and Ishanee Chanda, “Barriers to Work:Improving Access to Licensed Occupations for Immigrants with Work Authorization.”

Providing driver's licenses for DACA recipients and unauthorized immigrants has been another controversial permissive effort that a number of states have undertaken in recent years. In 2019, New York state joined 12 other states, as well as Washington D.C., by approving a bill granting driver's licenses to undocumented immigrants. This thrust New York into "the center of the explosive national debate over immigration" and "revers[ed] a nearly 20-year-old ban and end[ed] years of political paralysis on the issue."²⁴⁵ Debate surrounding the bill was largely partisan in nature, with Republicans (in particular) concerned that the bill would ultimately reward those breaking the law by being in the country illegally and expressing worries about potential risks these individuals pose to national security. However, Democrats in support of the bill emphasized its potential for not only inclusiveness but also public safety and economic benefit. Ultimately, in this case, federal inaction also remained a common theme. According to Andrea Stewart-Cousins, the leader of the Senate Democratic majority, the bill represented "the right step forward for New York State as we continue to advocate for comprehensive immigration reform on the federal level."²⁴⁶

A cross-section of the most notable permissive immigration efforts since the start of the 21st century also revealed a number of common themes. Federal inaction and/or the lack of comprehensive immigration reform remained a primary talking point. In contrast to restrictive efforts, permissive efforts focused on immigration in the broader sense, not only addressing unauthorized (illegal) immigrants. Empirical evidence supporting the passage of the bills as well as their resultant achievements was also sparse, due in part to the difficulty in tracking and quantifying the results of some of these efforts as well as their recency. However, there also did not appear to be substantial evidence of the secondary and negative consequences that many of the law's opponents feared (i.e. exploitation of the driver's license provision by would-be terrorists.) Conversely to the restrictive efforts, permissive efforts have not endured nearly the same legal challenge and those challenges that have been undertaken have been largely unsuccessful. The most consistent theme across efforts was the partisan nature of the efforts support and the relevance of the majority/ruling party to the nature of the effort (sub-federal level was Democrat-run (Governor and/or legislature), while the federal government was Republican-led.)

CONCLUSIONS:

²⁴⁵ Vivian Wang, "Driver's Licenses for the Undocumented Are Approved in Win for Progressives," *New York Times*, June 17, 2019, <https://www.nytimes.com/2019/06/17/nyregion/undocumented-immigrants-drivers-licenses-ny.html>.

²⁴⁶Ibid.

The hyperpartisan environment which has developed since the turn of the century, and at a heightened rate since the 2016 election, has brought new and unprecedented challenges to the American political system. Congress has progressed to near deadlock, finding itself unable, or unwilling, to find bipartisan policy solutions to some of the U.S.' most urgent policy issues. Using immigration as a case study, this paper attempted to determine if sub-federal legislation on traditionally federal issues represented a viable alternative.

Indeed, some of the presuppositions held true, hyperpartisanship has a hold on Congress and a real effect on policy (or the lack thereof), in particular immigration reform. Federal inaction on immigration was a familiar refrain amongst those pursuing both permissive and restrictive sub-federal legislation. Immigration federalism was also bolstered by a number of court decisions which denied that sub-federal legislation ran afoul of federal supremacy and/or preemption. However, there also appeared to be limited empirical evidence supporting the real-world crisis rhetoric and ultimate success of the sub-federal efforts. For those efforts with definable and calculable ends (i.e. reduction in crime, increased employment opportunities for citizens, decrease in drug activity, etc.) there was little literature available that proved the success of the state level effort. Conversely, many of the permissive effort's successes were similarly hard to calculate (albeit for different reasons, these generally had less definable ends). There was also limited evidence to show that more permissive efforts led to the negative effects their opponents feared (i.e. increase in crime, drug activity, etc.) Instead, the strong rhetoric of both sides was left unsubstantiated in many cases. Rather than finding real solutions to what is perceived as a top national priority/problem, the sub-federal legislation appeared to be as much about affirming a particular view as it was overcoming Congressional deadlock to find legitimate alternatives that are feasible in a country with porous borders and full faith and credit. This raised into question the advisability of these piecemeal/patchwork efforts in a nation that is built on the unification of diverse parts. Ultimately, it appeared that the juxtaposition of party leadership (sub-federal vs. federal) was a relatively good indicator of a state or local jurisdictions pursuit of sub-federal immigration legislation. In fact, an overlay of a map of sub-federal immigration legislation with a map of state party affiliation shows the intense correlation between red states and restrictive legislation and blue states and permissive

legislation.²⁴⁷ ²⁴⁸ This begs an important question, is sub-federal legislation of immigration really a solution to hyperpartisanship or is it also a symptom?

Despite the seemingly obvious partisan origins of many of the sub-federal efforts, one noticeable trend was how permissive efforts fared as compared to restrictive efforts. Efforts that aimed for inclusiveness and integration withstood legal challenges at a much better rate than did those that were exclusionary and created environments inhospitable to immigrants (both legal and illegal alike). Perhaps this signals something about American values, despite the partisan rhetoric that is most often featured. At the core, the U.S. is still a country that holds true to the values on which it was founded, values which will endure despite frequent and persistent challenges to the contrary.

²⁴⁷ Bryan Griffith and Jessica M. Vaughan, "Maps: Sanctuary Cities, Counties, and States," *Center for Immigration Studies*, April 16, 2019, <https://cis.org/Map-Sanctuary-Cities-Counties-and-States>.

²⁴⁸ Kyle Kondik, "Governors 2019-2020: Democrats Try to Hold the Line in Red-State Battles," *rasmussenreports.com*, December 06, 2018, http://www.rasmussenreports.com/public_content/political_commentary/commentary_by_kyle_kondik/governors_2019_2020_democrats_try_to_hold_the_line_in_red_state_battles.

Chapter Three

Smoke and Mirrors: The Persistence of Marijuana Prohibition *The Power of Cultural Frames in Overcoming Partisan Politics*

INTRODUCTION:

The war on drugs began during the Nixon administration, when “many Americans felt that drug use had become a serious threat to the country and its moral standing.”²⁴⁹ However, more than 30 years later, the calls for reform of the war on drugs have gotten louder and louder. As of the writing of this chapter, medicinal marijuana is legal in 33 states and recreational marijuana is legal in eleven states and Washington D.C.²⁵⁰ Clearly, there is a movement amongst the states away from prohibition and toward legalization or decriminalization and this movement is widely supported (according to a recent poll, 62% of Americans state they support legalizing marijuana).²⁵¹ And yet the laws at the federal level persist. As recently as 2018, then Attorney General Jeff Sessions removed the barrier that had held back federal prosecutors from pursuing marijuana cases in states that had made pot legal,²⁵² doubling down on the federal government’s support of prohibition, despite public pressure to the contrary.

The prohibition of alcohol, occurring nationwide from 1920-1933, was undertaken as an attempt to “reduce crime and corruption, solve social problems, reduce the tax burden created by prisons and poorhouses, and improve health and hygiene in America.”²⁵³ History, and the 21st amendment, show that prohibition of alcohol was a miserable failure, and as such, rightfully abandoned. So why then has the prohibition of marijuana persisted? Is there a legitimate belief that the prohibition of marijuana will produce substantially different results or are there other elements and interests at play?

Chapters one and two of this portfolio examined, through the lens of controversial issues, current dynamics at play in the U.S. democracy (to include hyperpartisanship) and their significance to the future health of the same.

²⁴⁹ German Lopez, “What is the War on Drugs?” *Vox*, <https://www.vox.com/cards/war-on-drugs-marijuana-cocaine-heroin-meth/war-on-drugs-goals> (accessed 2/16/2018).

²⁵⁰ Skye Gould and Jeremy Berke, “Illinois just became the first state to legalize marijuana sales through the legislature — here are all the states where marijuana is legal,” *Business Insider*, June 25, 2019, <https://www.businessinsider.com/legal-marijuana-states-2018-1>.

²⁵¹ Hannah Hartig and A.W. Geiger, “About six-in-ten Americans support marijuana legalization,” *Pew Research Center*, October 8, 2019, <https://www.pewresearch.org/fact-tank/2018/10/08/americans-support-marijuana-legalization/>.

²⁵² James Higdon, “Did Jeff Sessions Just Increase the Odds Congress Will Make Marijuana Legal?” *Politico*, January 06, 2018, <https://www.politico.com/magazine/story/2018/01/06/jeff-sessions-marijuana-legalization-congress-216251>.

²⁵³ Mark Thornton, “Alcohol Prohibition Was a Failure”. *Cato Institute*. <https://www.cato.org/publications/policy-analysis/alcohol-prohibition-was-failure> (accessed 2/16/2018).

Chapter two, through the lens of the issue of immigration, examined whether state-led legislation of traditionally federal issues represented a potential solution to the perceived hyperpartisan deadlock that has plagued Congress. In the process of this examination, a separate but related theme emerged, the phenomenon of “issue entrepreneurs.”²⁵⁴ In the case of immigration, it was noted that the rash of restrictive immigration efforts that the U.S. experienced were not inevitable, but rather it took “the work of a handful of dedicated policy activists to capitalize on these political opportunities to block immigration reform at the national level and then proliferate restrictive legislation at the local level.”²⁵⁵ Is it possible that the prohibition of marijuana has suffered the same influence? Enterprising individuals seize emotionally charged issues, rooted in discussions of morality, during times of political opportunity to push a particular policy agenda. Is there anything unique about the phenomenon of issue “influencers” and their capacity to drive policy direction in the hyperpartisan 21st century? And what does this mean for the future of American democracy?

Not unlike the lessons of alcohol prohibition in the 1920s-30s, the war on drugs has not been successful in eradicating drug abuse. Further, many of the same negative effects are present as they were during the prohibition years – consumption ultimately increased, alcohol, unregulated, became dangerous to consume, crime increased, courts and prisons were stretched to the breaking point, etc.²⁵⁶ If it took only 13 years to determine alcohol prohibition was a failure, why spend over 30 on the war against drugs, and in particular, marijuana?

By examining the existing literature on prohibition in the historical context, the role “issue entrepreneurs” or representatives of special interests have played, as well as the theory behind the legislation of moral issues and narrative framing, this paper will examine whether or not issues rooted in morality suffer a particular vulnerability to the agendas of special interests, particularly during times of social upheaval and partisan divisions.

This paper will then turn to the evolution of the prohibition of marijuana over the years as a case study of the issue, to examine the possibility that the prohibition of marijuana has persisted due to the influence of some underlying interest, motivated by profit or power, emboldened by the political opportunity presented by a hyperpartisan environment. Is the prohibition of marijuana, which has far outlasted the prohibition of alcohol,

²⁵⁴ Karthick Ramakrishnan and Pratheepan Gulasekaram, “Understanding Immigration Federalism in the United States,” Center for American Progress (March 2014): 11. <https://www.americanprogress.org/wp-content/uploads/2014/03/StateImmigration-reportv2.pdf>.

²⁵⁵ Ibid.

²⁵⁶ Mark Thornton, “Alcohol Prohibition Was a Failure”. *Cato Institute*. <https://www.cato.org/publications/policy-analysis/alcohol-prohibition-was-failure> (accessed 2/16/2018).

substantially different than the much shorter-lived prohibition of alcohol in either substance or success? If so, there would be little need for a paper addressing this issue. However, if not, and marijuana prohibition is not rightfully seated in a discussion of what is “best” for this country from either an ethical or scientific (medical) perspective then why does it persist? Or, like other issues, and failed efforts at moral legislation through prohibition has the issue been hijacked and exploited by some other underlying interest to a far greater cost than benefit?

LITERATURE REVIEW:

Previous scholarship has provided a framework that provides context to the issue, including the historical legacy of prohibition, issues and challenges regarding the legislation of morality in the United States, the role of special interests in public policy, and the power of framing and narrative development in driving policy action, particularly on controversial, partisan issues.

Understanding Prohibition in Historical Context:

Before addressing the prohibition of marijuana particularly, it is important to devote sufficient attention to the U.S.’ past experience with prohibition efforts. The United States has a controversial history with various forms of prohibition, but perhaps no better known and more spectacularly abandoned than alcohol. Through the lens of alcohol, answers to questions relevant to the continued prohibition of marijuana will hopefully emerge: What factors motivated the prohibition of alcohol? Did prohibition of alcohol achieve any of its ends? Did the government rightfully assert its authority in legislating an issue of moral consequence? And what led to its ultimate failure?

Much scholarship has been devoted to the historical context in which the prohibition of alcohol emerged, in particular the context of temperance reform. It is argued that temperance reformers were responding to real, not imagined, problems that were largely attributed to alcohol.²⁵⁷ However, despite “real” problems, ultimately the question of temperance reform boiled down to “whose cultural standards should be sanctioned in the public life of the nation”²⁵⁸ and that concerns pointed to basic issues such as “power, culture, and authority.”²⁵⁹ With a tenuous balance between liberty and order, the efforts undertaken by the temperance movement (i.e. the prohibition of alcohol) meant that Americans needed to accept the expansion of government rule over individual behavior (a

²⁵⁷ Thomas R. Pegram, *Battling Demon Rum: The Struggle for a Dry America, 1800-1933*, (Chicago: Ivan R. Dee, 1998), xii.

²⁵⁸ *Ibid*, xii.

²⁵⁹ *Ibid*, xii.

significant shift toward the modern state of government.) However, prohibition was ultimately a failure, in large part due to the inability to enforce it. And its failure is an important reminder of “the limitations and dangers of government intervention in general and moral regulation in particular.”²⁶⁰ In Thomas Pegram’s 1998 book, *Battling Demon Rum*, Pegram suggests that the ultimate argument against alcohol prohibition was that the U.S. government, and its legacy to protect liberty, had no business legislating behavior that represented a personal choice. The continued success and legitimacy of the U.S. democracy is dependent on a commitment to protecting this. According to Pegram, legislation of “moral” issues will always be failures in this country.

Other analyses analogize alcohol prohibition in the early-mid 1900s to more contemporary examples, the failure of which represents a lesson applicable to the war on drugs, and other efforts at legislating morality such as censorship, abortion and even gambling. Prohibition, which was intended to “solve social problems, reduce the tax burden created by prisons and poorhouses, and improve health and hygiene in America” was a “miserable failure on all accounts.”²⁶¹ From an economic perspective, “prohibition of mutually beneficial exchanges is doomed to failure.”²⁶² Amongst the evidence of the failure of alcohol prohibition were the facts that although consumption initially fell, it subsequently increased; without regulation, alcohol became more dangerous to consume; crime increased; prison systems were stretched to the breaking point; corruption became rampant; and ultimately prohibition cost the government dearly financially, removing a significant source of revenue and increasing spending in the effort to fight consumption and production.²⁶³ Although the effort brought about an initial decrease in consumption, the initial decrease was not nearly significant enough to stand in defense in prohibition, since the decrease in supply and increase in price would logically lead to some decrease in consumption. Additionally, after the initial decrease, consumption increased. As people were forced to spend more to consume (as the black market for alcohol grew) so was the government forced to spend more toward enforcement.

Out of these analyses grew the concept of the “Iron Law of Prohibition,” one of the most notable of the consequences prohibition caused. This “law” predicts that “the more intense the law enforcement, the more potent

²⁶⁰ Ibid, xiii.

²⁶¹ Mark Thornton, “Alcohol Prohibition Was a Failure”, *Cato Institute*, <https://www.cato.org/publications/policy-analysis/alcohol-prohibition-was-failure>, 1.

²⁶² Ibid. 1.

²⁶³ Ibid. 1.

the prohibited substance becomes.”²⁶⁴ In turn, the more dangerous the substance becomes. According to scholars, the Iron Law undermines any potential benefit that one could see from a nominal decrease in consumption.

Ultimately, prohibition of alcohol was a complete failure in all of its efforts to improve health and virtue in America.²⁶⁵ The benefits of the repeal of Prohibition (reduction in crime, creation of jobs, voluntary efforts to help alcoholics) were much greater than any possible, and certainly any realized, benefits from the Prohibition experiment.

American Efforts in Morality Legislation

A primary, and important, component in understanding morality legislation is to examine how an issue is defined as having a basis in “morality.” This is important to the broader question of how that issue is understood, what the relevant influences are, and what particular outcome policy should attempt to achieve as a result. Moral Foundations Theory (MFT) assists in this effort by helping to define core values (psychological foundations) that identify moral components to a particular issue. These foundations include: Care/Harm, Fairness/Reciprocity, In-group/Loyalty, Authority/Respect, and Purity/Sanctity.²⁶⁶ Although an issue may be multi-faceted, “[a] policy is classified as a morality policy based on the perceptions of the actors involved and the terms of the debate among them.”²⁶⁷

Although alcohol represented one of the U.S. most well-known experiments and failures in the legislation of morality, it certainly wasn’t the only one. Moral legislation occurs when “a social majority objects morally to the specific conduct, value-system, or culture of others and imposes regulation upon them.”²⁶⁸ Scholars point to three major prohibition movements in the twentieth century which were considerable failures: alcohol, prostitution, and drugs.²⁶⁹ In each case, the common and “misconceived foundation” on which they were based was the “legal enforcement of morality.”²⁷⁰ As further described below, each also has foundations in questions of purity/sanctity

²⁶⁴ Ibid. 2.

²⁶⁵ Ibid. 8.

²⁶⁶ Raymond Tatalovich and Dane G. Wendell, “Expanding the Scope and Content of Morality Policy Research: Lessons from Moral Foundations Theory,” *Policy Sciences* 51, no. 4 (2018).

²⁶⁷ C. Z. Mooney, *The public clash of private values*, In C. Z. Mooney (Ed.), *The public clash of private values: The politics of morality policy* (pp. 4). New York: Chatham House Publishers.

²⁶⁸ Charles H. Whitebread, “Freeing Ourselves from the Prohibition Idea in the Twenty-First Century,” *Suffolk University Law Review* vol. 33, no. 2 (2000): 235.

²⁶⁹ Ibid. 236.

²⁷⁰ Ibid. 236.

and in-group/loyalty as defined by MFT. All of the prohibitions (including drug) have been ineffective in achieving their stated goals, and have many unintended social costs.²⁷¹ In the case of alcohol prohibition, it is argued that the motivation for prohibition stemmed not only from the temperance movement but also in response to the “immigrant throngs that threatened to undermine the cultural dominance of the established Anglo-Saxon population.”²⁷² It is easy to see the correlation with the current prohibition of marijuana (and more broadly drugs in general), which is often argued in the broader context of race, border, and migrant issues. In regards to the war on drugs specifically, despite extraordinary government spending, the number of drug users has remained constant.²⁷³ In addition to financial costs (related to enforcement and incarceration), there are also extreme social costs, including lost wages, stigma, personal costs, loss of job, violence, and social disintegration.²⁷⁴

In the case of prostitution, some scholars have drawn attention to prostitution’s origins (on the North American continent) in colonialism and dominance of the immigrant population over the indigenous.²⁷⁵ As is the case for drug enforcement, in which there is a decidedly racial component (with people of color disproportionately represented),²⁷⁶ “predominant paths of enforcement” developed “that often traced racial lines.”²⁷⁷ Issues (and discomforts) regarding race and gender are intrinsically intertwined with the ultimate policy, the aim of which was (is) to combat issues prostitution was perceived to have created such as “public-health problems...a plethora of other crimes, including robbery and murder; and ...moral and societal decadence.”²⁷⁸ But the reality of which is a consistent and exacerbated marginalization of some of society's most vulnerable populations. The moral legislation was rooted in broader societal issues related to, again, cultural dominance.

Abortion, same-sex marriage, euthanasia, and even marijuana prohibition have generally been issues which display a stark partisan divide on support for and against, each sides argument rooted in their unique understanding of both individual and collective morality, indicating that there is something concrete and persistent about the role

²⁷¹ Ibid. 237.

²⁷² Ibid. 238.

²⁷³ Ibid. 236.

²⁷⁴ Ibid. 251-252.

²⁷⁵ Robyn Bourgeois, “Race, Space, and Prostitution: The Making of Settler Colonial Canada,” *Canadian Journal of Women & the Law* 30, no. 3 (2018), doi:10.3138/cjwl.30.3.002.

²⁷⁶ Charles H. Whitebread, “Freeing Ourselves from the Prohibition Idea in the Twenty-First Century,” *Suffolk University Law Review* vol. 33, no. 2 (2000): 253.

²⁷⁷ Benjamin Hoy, “Policing Morality: Regulating Sexuality across the Canada-United States Border,” *Canadian Historical Review* 99, no. 1 (2018): 61, doi:10.3138/chr.99.1.30.

²⁷⁸ Madeleine Kearns, “Don’t Legalize Prostitution. (Cover Story),” *National Review* 71, no. 15 (2019): 24.

partisanship plays in morality policy. Can these issues and the resultant policy output be simply understood through a general understanding of a particular party's moral stance(es)? Some argue no, it isn't that simple. Generally speaking, moral issues can represent a minefield for political parties, "unlike in many other policy areas, political parties and their constituencies are often internally split on morality issues, implying that parties usually have only little to gain and much to lose from politicising morality policies."²⁷⁹ However, there is a recognizable partisan divide in related policy output (or the lack thereof). Therefore, partisanship should be understood to be much more nuanced and evolving than it might seem when it comes to morality legislation. In this context, morality policy must be understood by focusing on a number of "cleavages," not simply left and right, but also "secular-religious dimensions...between materialism and postmaterialism, green-alternative-libertarian and traditional-authoritarian-nationalist..."²⁸⁰ Outcomes and parties must also be looked at over time and the unit of analysis must be well defined.²⁸¹

As a final thought, some argue that legislative focus on issues that have foundations in morality (as defined by MFT) such as terrorism and drugs, provide a form of relief to legislators. As an example, some argue that the war on drugs ultimately represents a war on lifestyle, one that legislators continue to support primarily in order to avoid discussions about more difficult, truly controversial, topics such as schools, housing, and employment.²⁸² These arguments, and analogous examples, have universal applicability and these final thoughts shed interesting and thought provoking light on possible motivations for the continued pursuit of marijuana prohibition in this context, perhaps the topic of the evils of drugs had (until recently) become so universally uncontroversial that focusing on it enabled legislators to avoid harder topics.

Issue Frames and Narrative Development

During a review of the literature relevant to the topic, it quickly became apparent that a discussion of controversial issues and issue entrepreneurs would not be complete without a discussion of the power of frames in politics. Framing, in this context, is well-defined by Robert Entman as "selecting and highlighting some facets of

²⁷⁹ Emma Budde, Stephan Heichel, Steffen Hurka, and Christoph Knill, "Partisan Effects in Morality Policy Making." *European Journal of Political Research* 57, no. 2 (2018): 428, doi:10.1111/1475-6765.12233.

²⁸⁰ Ibid, 427.

²⁸¹ Ibid, 427.

²⁸² Charles H. Whitebread, "Freeing Ourselves from the Prohibition Idea in the Twenty-First Century," *Suffolk University Law Review* vol. 33, no. 2 (2000): 257.

events or issues, and making connections among them so as to promote a particular interpretation, evaluation, and/or solution.”²⁸³ Entman invokes framing as a powerful tool used by the media and politicians alike to affect (wittingly or otherwise) the public view on certain issues and recognizes the potential challenges (“unsettling implications”²⁸⁴) frames present to democracy, “[s]ometimes frames are so deeply ingrained or institutionalized that they are for all intents and purposes unassailable (even if they should be assailed).”²⁸⁵

On the foreign policy front, it has been argued that in the post-Cold War world, that the media has infinitely more power to frame issues than those who traditionally delivered and sculpted the narrative - the President. In particular, in the case of the war in Iraq, the Bush administration argued that the media focused far too much on the negative aspects than the positive progress that was being made, “[t]he real problem was that the administration’s rhetorical framing of the occupation - that of spreading freedom and democracy - clashed with the pictures, stories and death tolls that appeared on the nightly news.”²⁸⁶ Frames, according to Entman, are important because “they not only influence public opinion, they suggest an appropriate policy response.”²⁸⁷ Entman also posits a “cascading activation” model for understanding how frames are developed and spread. In this model, frame activation is spread through four mechanisms (motivations, cultural congruence, power, and strategy) through administration officials, opinion elites, journalists, and ultimately the general public. Of particular interest in Entman’s model is the cultural congruence factor, which states that in, “in order to be accepted, a foreign policy frame must be congruent with dominant schemas in our political culture, and be cognitively easy to process.”²⁸⁸ Entman also indicated that there is the potential for so-called “splash back,” when a counter frame adopted by the public influences the discussion of the issue at the elite level. However, this is dependent on the media’s use of public opinion as a source (over the administration), which for the purpose of Entman’s discussion of foreign policy is less likely (but perhaps has more applicability to the topic at hand).²⁸⁹

²⁸³ Robert Entman, *Projections of Power: Framing News, Public Opinion, and U.S. Foreign Policy* (University of Chicago Press, 2004) quoted in Karen Callaghan and Frauke Schnell, eds. *Framing American Politics*, (Pittsburgh, PA: University of Pittsburgh Press, 2005),viii.

²⁸⁴ Ibid.

²⁸⁵ Ibid.

²⁸⁶ Todd L. Belt, “Projections of Power: Framing News, Public Opinion, and U.S. Foreign Policy,” *Congress & the Presidency* 34, no 1 (2007): 101.

²⁸⁷ Ibid.

²⁸⁸ Ibid.

²⁸⁹ Ibid, 102.

Others have examined the power of framing relative specifically to the gun control debate, namely how marked differences in how the gun control debate is framed explains (in part) why an “antigun coalition” has found success in Canada but not in the U.S.²⁹⁰ The media, political parties, and political executives, have all played a major role with respect to the salience of the issue of gun control. In the case of Canada, the 1989 Montreal Massacre was a turning point that correlated gun control with women’s safety in a way it had not previously been. This shift in public understanding (reframing) of the issue meant that a strong antigun lobby developed. The media was found to have focused on a “gun control” frame in Canada far more than in the United States, where a “gun rights frame predominated.”²⁹¹ Partisan polarization on the issue was also much more extreme in the U.S. than in Canada, attributed in part to a stronger antigun lobby in Canada. However, these frames and developments don’t exist in a political vacuum. The political culture in Canada, which leans more toward “communitarian” is also a major contributing factor, as opposed to the “individualistic” nature of her neighbor.²⁹²

In the case of the NRA, a strategic decision to frame litigation against handgun bans as “infringements on the right to self-defense,”²⁹³ represented an extremely successful “alignment of legal and cultural frames.”²⁹⁴ By the late 1990s, the NRA realized that support for military-style weapons had become “politically and culturally untenable.”²⁹⁵ Although the NRA has not totally abandoned support for military style weapons “its litigation team steered clear of an outright challenge, indicating that the lobby had learned the value of cultural frame alignment.”²⁹⁶ The NRA even capitalized on the frame of “black rights” and the origins of the Fourteenth Amendment in the post-Civil War era (ensuring protection for freed slaves), aligning the legal frame of private gun ownership with a compelling (and progressive) cultural frame.²⁹⁷ Ultimately, to be successful, activists (or lobbies) need to construct their own frame by diagnosing a social problem, identifying a clear prognosis for that problem, and then mobilizing the public to solve the problem.²⁹⁸ The more this attempt aligns with beliefs already held by the public, the more likely it is to be successful.²⁹⁹

²⁹⁰ Anthony Fleming,, Dylan S. McLean, and Raymond Tatalovich, “Debating Gun Control in Canada and the United States: Divergent Policy Frames and Political Cultures,” *World Affairs* 181, no. 4 (2018): 348. doi:10.1177/0043820018812609.

²⁹¹ *Ibid.*, 366.

²⁹² *Ibid.*, 371.

²⁹³ Anders Walker, “Fundamental Frames: How Cultural Frames Inform the Fourteenth Amendment,” *St. Louis University Law Journal* 62, no. 3 (2018): 580.

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*, 570.

²⁹⁹ *Ibid.*

The Role and Power of Special Interests and Lobbies

Although teased out above in both Canada's experience with the success of the antigun lobby and in chapter one (which explored the power of the NRA in countering some of the very same antigun movements that emerged after focusing events, as detailed above), it is worth briefly returning to the role of special interests in the context at hand.

As was previously explored, politics in the U.S. is heavily influenced by special interests and lobbying groups. It is argued that these small but moneyed groups have "far too much power over policymakers, blocking people from receiving fair representation and responsive, accountable governance."³⁰⁰ Lobbying, in theory, can play an important role in expanding a politician's understanding of issues, however the benefit of this is counteracted by the money that flows through the process. Lobbyists can "buy" support for their clients through fundraising for and contributing to Congressional campaigns. Members of Congress have also become overly dependent on lobbyists to inform their policy strategy, in part due to the limited staff available to them to conduct more independent research.³⁰¹ The result, it is argued, is that corporate interests have an outsized influence on the development of U.S. domestic and foreign policy.

Special interests significantly grew in influence throughout the '60s and '70s but saw a decline throughout the Reagan and Bush administrations.³⁰² Reagan in particular, warned of the power of special interests, which both subvert and distract the public interest and throw off the "constitutional balance."³⁰³ Here, special interests are defined as a "fairly small number of intense supporters who cannot expect that their cause will receive strong support from the general public except under unusual circumstances."³⁰⁴ Special interests work by leveraging relationships with strategically chosen congressmen and women, those for whom the particular "interest" is of constituent interest or concern.

³⁰⁰ "Fighting Special Interest Lobbyist Power Over Public Policy," *Center for American Progress*, September 27, 2017, <https://cdn.americanprogress.org/content/uploads/2017/09/26125400/LobbyingSpecialInt-factsheet1.pdf>, 1.

³⁰¹ Lee Drutman, "Senators vote to keep themselves dependent on lobbyists," *Vox*, May 27, 2016, <https://www.vox.com/polyarchy/2016/5/27/11796292/senate-staffing>.

³⁰² Paul E. Peterson, "The Rise and Fall of Special Interest Politics," *Political Science Quarterly* 105, no. 4 (1990): 540.

³⁰³ *Ibid.*, 539.

³⁰⁴ *Ibid.*, 541.

However, despite certain representations that decry the outsized influence of special interests and lobbies, it has also been argued that since the 1980s, special interests have declined in their influence.³⁰⁵ It has also been argued that the rise and diversification of media informing the public has helped to counterbalance special interests.³⁰⁶ Media, by transforming “real events and issues - including public policy issues - into entertaining stories” has been able to make “elected representatives more sensitive to the interests of their constituencies and less prone to excessive influence or capture by special interests.”³⁰⁷

A series of essential themes emerged from a review of the relevant literature. Broadly, moral legislation (and prohibition) originates from an existential fear of the “other”, a perceived war on culture, or an infringement on one's understanding of what American life “should be.” In this, there is a very strong correlation with race and ethnicity. This fear may be based on some true societal ills (based on one's perspective) but legislation of personal/moral behavior will never be effective in removing that fear from society. Special interests and “issue entrepreneurs” may also play a role in framing the issue in such a way that it builds on and caters to these fears, despite lacking in real-world evidence supporting the social ills prohibition claims to prevent and the benefits it promises to deliver. This fallacy was well-demonstrated through the alcohol prohibition experiment. The power of framing is evident in the “anti-drug” and “anti-marijuana” front and certainly within the pro-gun, but Entman's (and others) work show that there is great opportunity for a reframing of the issue, if the right players (administration, elites, media, and/or public) can capitalize on a particular event or harness the power of a more democratic media.

A compelling argument that it isn't in the best interest of American society or democracy to even attempt to legislate moral issues also emerged, that this runs counter to the principles on which this country was built. Which begs the question if this process of prohibiting behavior one believes to be threatening to a way of life isn't going to be a constant feature in the U.S., which is based on immigrant populations and is a melting pot of cultures and norms. Or at least if this fact won't continue to be exploited by enterprising individuals who see a (often partisan) personal benefit. Clearly the U.S. continues to wrestle with this legacy today and there will likely always be an “other” encroaching on the standard of living that Americans believe to be right. Is prohibition simply the legislative manifestation of this fear? One that will never solve the problem (or even the more mundane elements it claims to

³⁰⁵ Ibid, 556.

³⁰⁶ Alexander, Dyck, David Moss, and Luigi Zingales, "Media versus Special Interests." *The Journal of Law & Economics* 56, no. 3 (2013). doi:10.1086/673216.

³⁰⁷ Ibid, 550.

address?) Ultimately the concept of “cultural congruence” was present in virtually every aspect of the literature review, both generally and specifically. In order to understand why certain issues find public support and/or policy resolve and others do not, it is necessary to understand elemental aspects of what it means to be an American.

Arguably, the American public has moved on from this fear, at least as it relates to marijuana. The criminalization of marijuana has become one of the least, publicly, controversial issues, enjoying greater and more bipartisan, support than ever before. The following section will attempt to discern to what extent the marijuana experiment has mirrored the alcohol experiment. Although the two may share origins, they have clearly diverged in their longevity. State decriminalization and legalization efforts are at an all-time high as is public support. However, significantly increased public support for marijuana legalization has shared a temporal trajectory with the increasingly partisan environment in Washington D.C. To what extent does this correlation explain the issue’s persistence? What holds back Congress from pushing forward on at least one issue that seems to, uncontroversially, not just require but demand its attention? Has the hyperpartisanship of the 21st century exposed a vulnerability exploited by enterprising individuals?

METHODOLOGY: Case Study

As was briefly examined, alcohol prohibition was born during a period of social disquiet and in part, in response to concerns about perceived threats to cultural norms. However, alcohol prohibition also lived a relatively short life, the shortcomings and failures of the effort recognized and abandoned. The prohibition of marijuana seems to share many of the same characteristics with the prohibition of alcohol, yet has persisted far longer. In the face of overwhelming public support for the legalization and/or decriminalization of marijuana, why has this been the case? What role have special interests played in making its prohibition a partisan/political issue? What role, if any, have “issue entrepreneurs” played in capitalizing on the particularly partisan environment to extend the life of this issue past its natural course? Over the years, marijuana has begun to enjoy increasingly bipartisan support amongst the American public, yet there remains continued hesitation at the federal level to decriminalize its use. Has it simply become a sign of a broken system?

Marijuana Through the Years: A War on Culture

In John Kaplan's book "Marijuana: The New Prohibition," Kaplan approached the question of marijuana prohibition after having been asked to participate in the Joint Legislative Committee to Revise the Penal Code of the State of California. Kaplan, a former AUSA in San Francisco and professor of criminal law knew little about drugs³⁰⁸ but ultimately reached the conclusion that "the many persons... who have up to now regarded marijuana as so dangerous that it must be suppressed in order to maintain our society, were somehow actuated by improper motives, or were irresponsible or blind."³⁰⁹ The prohibition of marijuana has been the U.S.' most "ambitious effort at drug control"³¹⁰ and which was, at the same time, a spectacular failure.

The passage of the Prohibition Amendment resulted from pressure by "white rural Protestants to have made illegal a practice that they associated primarily with urban Roman Catholics."³¹¹ It was a question of life-style, and alcohol was an easy feature of that perceived "immoral" lifestyle that could be corrected through the law. Similarly, it has been argued that marijuana prohibition is rooted in the "symbolic meaning of marijuana,"³¹² which is to say prohibition is not based on the effects of the drug but rather disapproval with the perceived (and oversimplified) lifestyle of the user. According to Kaplan, strong puritanical influences are one source of these views and as well as perceptions such as radicalism, permissiveness, lack of respect for authority and two major societal problems, first, fear of violent crime, and second, the "conflict between the struggle of the Negro for equality and the conservative restraint of the law."³¹³

Others point to the fact that marijuana enjoyed a relatively stigma-free and positive reputation, throughout time and geography, until abruptly meeting the early-20th century U.S., which also saw an "upsurge of nativism, scapegoating, and political repression."³¹⁴ Importantly, this period also brought about the Mexican Revolution, which "caused hundreds of thousands of brown-skinned migrants to flee to the U.S. Southwest in search of safety and work." This migration sparked the initial impetus of marijuana prohibition which was rooted in fear of "an alien intrusion into American life."³¹⁵ These migrants brought with them a tradition of smoking marijuana and along with

³⁰⁸ John Kaplan, *Marijuana: The New Prohibition*, (Cleveland, Ohio: The World Publishing Company, 1970). Ix.

³⁰⁹ *Ibid.*, x.

³¹⁰ *Ibid.*, 1.

³¹¹ *Ibid.*, 4.

³¹² *Ibid.*

³¹³ *Ibid.*, 10.

³¹⁴ Martin Lee, *Smoke Signals: A Social History of Marijuana – Medical, Recreational, and Scientific*, (New York: Scribner, 2010), 37.

³¹⁵ *Ibid.*

that came fear and hostility, “early marijuana legislation was a handy instrument to keep the newcomers in their place.”³¹⁶ Again, the key element of the U.S. drug policy being its selective nature, targeting a “feared or disparaged group within society.”³¹⁷

Framing the issue in the context of the influx of immigrants from Mexico provides useful information for understanding the historical context of marijuana prohibition, marijuana became a symbol of generational and cultural conflict, therefore situated in a moral debate and not in a pragmatic one.

By the early 1930s, marijuana prohibition found its first issue entrepreneur, Harry Anslinger, the head of the Federal Bureau of Narcotics. Anslinger used marijuana to save the failing narcotics bureau, demanding immediate action and additional funding to fight the “scourge of marijuana.”³¹⁸ At more or less the same time, New Orleans District Attorney Eugene Stanley had also “found a convenient scapegoat”³¹⁹ in marijuana, a reason to explain the wave of crime that had overcome New Orleans. The confluence of several events created a hysteria of sorts, the dangers of marijuana became a feature of national headlines. Even though little scientific effort had been put into confirming or denying the claims, Anslinger capitalized on this hysteria to ensure support and funding for his agency. And Anslinger’s campaign against marijuana became a “self-perpetuating machine.”³²⁰ Over the decade that followed, studies were performed that largely disproved Anslinger’s claims about the drug, however, they were largely overshadowed by the events of the day, to include WWII. Anslinger has also been credited with the idea of marijuana as a gateway drug (in anticipation that other more dangerous drugs could become the priority Anslinger sealed the relevance of marijuana by claiming it was the gateway to these other more potent drugs).³²¹ It was out of this seemingly misguided stance on marijuana that led it to become the drug of choice of the “counterculture” in the 1960s and ultimately brought it fully into mainstream discussions.

In the early 1970s, Nixon appointed the Shafer Commission to study marijuana and present its findings. Ultimately their report, *Marihuana: A Signal of Misunderstanding* “debunked nearly everything the federal government had been claiming about marijuana for 40 years.”³²² However, Nixon ultimately buried the report and

³¹⁶Ibid, 41.

³¹⁷ Ibid, 42.

³¹⁸ Bruce Barcott, *Weed the People: The Future of Legal Marijuana in America*. (New York: Time Books, 2015.) 20-21.

³¹⁹ Ibid, 21.

³²⁰ Ibid, 22.

³²¹ Ibid.

³²² Ibid, 40.

doubled down on his anti-marijuana/drug rhetoric, a key point that will be further explored. The later 1970s saw lackluster support from Carter and Congress, but the biggest issue marijuana faced was the lumping together of it with other “drugs.” In other words, there was no differentiation, which may have prompted marijuana to otherwise have redress. In the 1980s, faced with high disapproval ratings, Nancy Reagan adopted drugs as her *raison d’être* and turned the fight against drugs into a war. This continued into the 1990s, and although laws didn’t change, enforcement did, becoming much more brutal and unforgiving. It wasn’t until the early 2000s, that the tides began to turn, and decriminalization and legalization of marijuana became a reality.

Bruce Barcott introduces the idea that prohibition of marijuana has not persisted due to some large-scale conspiracy based in power or greed, but rather, has endured due to a series of compounding events that more or less amounted to the right person, paying the right amount attention, at the right time. A number of factors including historical (WWII), job security (Anslinger), popularity (Nancy Regan) led to the continuation of a narrative that had become uncontroversial, and not because the facts supporting it were uncontroversial, but rather, for a period of time, the public simply stopped questioning it.

Marijuana the Myth: Placing Marijuana in Cultural Context

Looking back through the histories of the prohibition of alcohol and marijuana, it is easy to spot the similarities. Both movements initially began as attempts to combat large scale use (and morphed into attempts to combat all use), both were accused of producing “crime, pauperism, and insanity,”³²³ and both started at a local level and ultimately found support at the federal level. In the case of alcohol, there was also blatant disregard for the abstinence laws, but for twelve years, millions were spent by state and federal governments to attempt to ensure compliance.³²⁴ The general public has shown similar disregard and disinterest in the laws prohibiting marijuana as well, the “widespread violation of the marijuana laws is itself proof...the users and many nonusers see no possible societal objection to an individual’s use of an apparently harmless euphoriant.”³²⁵ Given this, what is harder to understand is their differences, namely that one ended shortly after it began. Some have predicted (since at least the 1970s) that the marijuana laws would “not long exist in the current climate of changing values and increased use

³²³ Richard J. Bonnie and Charles H. Whitebread II, “The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition,” *Virginia Law Review*, (1970): 976.

³²⁴ *Ibid.* 980.

³²⁵ *Ibid.* 1175.

among a sizeable segment of the ‘respectable’ public.”³²⁶ This “respectable” public has also been buoyed by the fact that when comparing the negative effects (to include criminality, physical damage to the user, psychological harm, and driving impairment) of marijuana versus those of alcohol, the effects of alcohol are arguably more deleterious than those of marijuana.³²⁷ However, the relatively lower risks that are associated with marijuana use haven’t seemed to play a prominent role in evaluations of the substance’s prohibition. Rather, the criminalization of marijuana was “rooted in fiction as well as fact. Indeed, a public policy conceived in ignorance may be continuously reaffirmed, ever more vehemently, so long as its origins remain obscure or its fallacy unexposed.”³²⁸

The general “flagrant disregard” by the public of marijuana laws speaks to a disenchantment with the law and the ability of the legal system to order society. Additionally, and importantly, the conjoining of the issue of marijuana with large social conflicts has “cosigned the debate to the public viscera instead of the public mind.”³²⁹ However, the arguably lesser effects aren’t the only point on which the story of marijuana prohibition diverges from alcohol prohibition. The temperance movement, which gave rise to alcohol prohibition, was the matter of great public debate, whereas the anti-drug movement was not. Additionally, the temperance movement was undertaken to “eradicate known evils resulting from alcohol abuse,”³³⁰ whereas drug legislation was anticipatory in nature. Perhaps both of these facts, and more generally how the issue of marijuana prohibition has been framed (and by whom), provide a potential window into understanding the issues persistence.

It appears that the “symbology” of the issue is more important to the policy basis than the science. It is argued that drug, and specifically marijuana, prohibition relies upon “myth” and a “reductionist discourse” to obscure the debate around drug policy.³³¹ As an example, the 1961 UN Convention on narcotics developed a list of controlled drugs that “reflect[ed] social and cultural practices of the mid-20th century, rather than any pharmacological or scientific evidence.”³³² Rather an ideological propaganda war was undertaken against “drugs” that conflates drug use with drug misuse.³³³ These representations present “drugs” as casual factors in the increase in

³²⁶ Ibid. 1176.

³²⁷ Bruce Barcott, *Weed the People: The Future of Legal Marijuana in America* (New York: Time Books, 2015), 304.

³²⁸ Richard J. Bonnie and Charles H. Whitebread II, “The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition,” *Virginia Law Review*, (1970): 974.

³²⁹ Ibid. 975.

³³⁰ Ibid. 976.

³³¹ Stuart Taylor, Julian Buchanan, Tammy Ayres. “Prohibition, privilege and the drug apartheid: The failure of drug policy reform to address the underlying fallacies of drug prohibition.” *Criminology & Criminal Justice* 16, no.4, (2016), 453.

³³² Ibid. 454.

³³³ Ibid. 456.

societal and criminal problems. However, it has been argued that most drug use is non-problematic. Rather, it is argued, the specter of drugs, which has led to prohibition, is a social and political construction, not a scientific based fact.³³⁴ Again, the U.S. war on drugs can be best understood as a war which has “much to do with who uses the drugs and little to do with the risks posed by the drugs.”³³⁵ Prohibition creates more harm (societally) through the stigma that is generated by a drug conviction as well as the fact that prohibition prevents any regulation which would protect users from the content, strength, and purity of the drugs.³³⁶

Legislation of both alcohol and marijuana is rooted very deeply in social and cultural anxiety, the fear of the “other”. The labelling of marijuana as a “drug” early on helped to prolong the narrative, as marijuana was assumed comparable to other narcotics it shares the Schedule I label with. The series of events that led to present day explains (at least in part) why marijuana prohibition has lasted much longer than alcohol.

Outside and Outsized Influences: The Role of Special Interests

At this stage, the original impetus, political context, and motivations behind prohibition and in particular the prohibition of marijuana seem clear, albeit varied. However, why it has persisted to the present day and became a generally partisan issue still seems murky at best. Is there an underlying lobby/group that is perpetuating the prohibition of marijuana in the face of such significant political, social, and scientific evidence to the contrary? Like in the case of immigration, did marijuana suffer from enterprising “issue entrepreneurs” who capitalized on the degrading relationship between parties and social anxieties to propel marijuana prohibition into the 21st century? It seems that without some influential, powerful lobby with deep pockets, the prohibition of marijuana could not have persisted as long as it has. Particularly not in the context of an already failed attempt of the prohibition of a recreational substance that is at least analogous to marijuana. As previously alluded to, recent years have seen a spate of state and local laws aimed at legalizing and/or decriminalization marijuana and its use, public support for the legalization of marijuana is at its highest³³⁷ (making that support bipartisan in nature), and many law enforcement agencies have deprioritized enforcement of related laws, in particular possession, as state governments

³³⁴ Ibid. 456.

³³⁵ Ibid. 459.

³³⁶ Ibid. 460.

³³⁷ Andrew Daniller, “Two-thirds of Americans support marijuana legalization,” Pew Research Center, November 14, 2019, <https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/>.

have worked to expunge the records of those previously convicted under the same laws.³³⁸ Despite the fact that “overturning prohibition is one of the few hot-button topics with widespread support,”³³⁹ and that marijuana use and cultivation had been legalized in a growing number of states, the federal government has remained at a stalemate, unable and/or unwilling to act on what might otherwise be a universally uncontroversial and well-received policy effort. In fact, as recently as 2018, then Attorney General Jeff Sessions overturned the Obama-era effort to discourage federal prosecutors from interfering with state-cannabis laws, calling it a “return to the rule of law” as well as “a return of trust and local control to federal prosecutors who know where and how to deploy Justice Department resources most effectively to reduce violent crime, stem the tide of the drug crisis, and dismantle criminal gangs.”³⁴⁰ A not-so-subtle hint at marijuana’s role as a “gateway” drug, both to harder drugs and the criminal organizations that push them. What forces prompted this about-face in the trend towards legalization?

A first, perhaps obvious, place to look for the potential influences behind the continued prohibition is by the special interests/industries who stand to suffer financially from increased competition in the market. Following Arizona’s 2016 passage of Proposition 205, which endeavored to legalize possession of an ounce of marijuana and growth of up to six plants for recreational use for Arizona adults aged 21 and over,³⁴¹ a rash of opposition to the legalization of marijuana by pharma and alcohol companies was observed. In the lead up to the vote, a number of advertisements aired, “paint[ing] a bleak future for Arizona’s children if voters approve[d] Proposition 205.”³⁴² These ads were backed, in large part by a pharmaceutical company (Insys Therapeutics) which manufactures prescription painkillers.

Although concerns for child safety, related to the legalization of recreational marijuana, are not unwarranted, many more children are affected by the accidental ingestion of pharmaceuticals than have been by intoxication from marijuana in states like Colorado, where recreational marijuana use was legalized in 2014.³⁴³ There was a clear connection between the ad campaign, donations, and anti-legalization rhetoric to a concern for

³³⁸ Skye Gould and Jeremy Berke, “Illinois just became the first state to legalize marijuana sales through the legislature — here are all the states where marijuana is legal,” *Business Insider*, January 1, 2020, <https://www.businessinsider.com/legal-marijuana-states-2018-1> (accessed 1/21/2020).

³³⁹ *Ibid.*

³⁴⁰ “Justice Department Issues Memo on Marijuana Enforcement,” *justice.gov*, January 4, 2018, <https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement>.

³⁴¹ Alfonso Serrano, “Inside big pharma’s fight to block recreational marijuana,” *The Guardian*, October 2, 2016, <https://www.theguardian.com/sustainable-business/2016/oct/22/recreational-marijuana-legalization-big-business>.

³⁴² *Ibid.*

³⁴³ *Ibid.*

market share by pharmaceutical and alcohol companies who saw marijuana as an up-and-coming competitor. In both Arizona and Massachusetts, alcohol related associations and PACs represent some of the largest backers of the opposition to recreational marijuana.³⁴⁴ In regards to alcohol, these fears were generally unwarranted, as states like Colorado, which have legalized recreational marijuana for several years, have not seen significant declines in the use of alcohol (relative to legalization). However, the same does not extend to the pharmaceutical companies, who, it is argued, are likely to see a loss of market share due to the legalization of recreational/medical marijuana (to the rate of roughly 25%).³⁴⁵ Some have also drawn attention to the significant amount of money Medicare stands to save should medical marijuana be legalized nationally, due to subsidies provided to cover the cost of (extremely expensive) prescription drugs.³⁴⁶ Big pharma, which is rightfully concerned that the introduction of medical and recreational marijuana will cut into their revenue, has leveraged their deep pockets to fund an argument based in morality to prevent loss of market share for their shareholders.

In addition to big pharma's efforts in Arizona, the alcohol industry also played a role in the marijuana legalization initiative in Massachusetts in 2016. A political action committee (PAC) representing 16 of the state's beer distributors was one of the top three donors to an anti-legalization group.³⁴⁷ Large beer companies, such as Boston Beer Company (parent company of Sam Adams), were concerned that marijuana legalization would negatively impact the demand for alcoholic products. However, in other instances, alcohol distributors were actively engaged in the conversation about marijuana legalization including in California, which was also facing a ballot initiative in 2016. In these cases, distributors saw the economic potential of utilizing the existing supply chain to accommodate a new and in demand product (legal marijuana).³⁴⁸ Time has also shown the reality of legalization in Colorado, where beer and alcohol sales have seen no adverse effect. Although industry interests may be a partial driver of the persistence of marijuana prohibition, the available literature does not paint a picture of large-scale coordination or conspiracy, but rather smaller pockets of funding that push the narrative forward in relatively ineffective and inconsistent ways.

³⁴⁴ Ibid.

³⁴⁵ Ibid.

³⁴⁶ Ibid.

³⁴⁷ Ben Gilbert, "Marijuana legalization is facing a major challenge from the alcohol industry," *Business Insider*, September 16, 2016, <https://finance.yahoo.com/news/marijuana-legalization-facing-major-challenge-162500414.html>.

³⁴⁸ Ibid.

Although big business, and special interests, with a profit-driven interest in the continuation of prohibition may exist, review of the available literature did not appear to reveal a large scale, coordinated conspiracy. Profit driven motivations driven by industry-backed lobbies contribute to driving the anti-legalization narrative forward. However, they are lacking in building a substantial case that these factors account for the near century long prohibition of marijuana. Additionally, supportive evidence seems to focus on the much more recent time frame, suggesting that these lobbies and interests are reactive, responding to the much more recent and significant legalization efforts rather than representative of a long-term strategy or conspiracy against marijuana. Ultimately, the best evidence against the strength and influence of these interests is the status of the ballot initiatives and laws they attempted to combat. In the case of Massachusetts, despite efforts to the contrary, in 2016, voters passed the initiative marking the first important step towards legalization.³⁴⁹ By 2018, Massachusetts residents were able to legally purchase marijuana for recreational use. According to the state, few of the opponents' worst fears came to fruition, rather legalization brought hundreds of millions of dollars in revenue and created thousands of jobs.³⁵⁰ Arizona's journey has been slightly different, as Prop 205 was rejected in 2017, however, by an incredibly slim margin (less than 1%).³⁵¹ And as recently as this year, Arizona is gearing up toward reintroducing the initiative on the 2020 ballot. Supporters indicating that they anticipate the initiative to pass as the results of the intervening years (and other state's experiments in legalization) will likely have allayed many of the fears of those who rejected the bill in its first iteration.³⁵²

Marijuana Policy (in)Action: Toward Federal Decriminalization and Legalization

Historical context and outside influences help to answer some of the questions behind the persistence of prohibition at the federal level but certainly do not answer all of them. In fact, despite not achieving policy success, the federal government has made efforts over the years toward decriminalization and legalization of marijuana. Given this, to what does Congress owe its inability to properly respond to popular demand and effectively reform

³⁴⁹ "MARIJUANA LEGALIZATION AND THE CITY OF BOSTON," boston.gov, January 8, 2020,

<https://www.boston.gov/departments/311/marijuana-legalization-and-city-boston>.

³⁵⁰ Dan Adams and Naomi Martin, "It's been a year since Mass. started selling recreational marijuana. Some frustrations remain," *Boston Globe*, November 20, 2019, <https://www.bostonglobe.com/news/marijuana/2019/11/20/one-year-into-recreational-marijuana-sales-mass-some-hiccups-and-challenges-remain/0xI8f9ve5Ke1ZI5PHk5a1I/story.html>.

³⁵¹ Sonu Wasu, "Supporters preparing push for marijuana legalization initiative on 2020 ballot," abc15.com, July 3, 2019,

<https://www.abc15.com/news/state/supporters-preparing-push-for-marijuana-legalization-initiative-on-2020-ballot>.

³⁵² Ibid.

the legal status of marijuana? Two examples, one historical, and one much more recent, provide some insight into this very question.

One of the most important and ambitious federal efforts related to the prohibition of marijuana occurred as early as 1972, when then-President Richard M. Nixon commissioned a study on marijuana and drug abuse. It wasn't the first effort, the 1944 La Guardia Committee report from the New York Academy of Medicine also raised questions about prohibition finding "marijuana not physically addictive, not a gateway drug and that it did not lead to crime."³⁵³ However, the report was labelled unscientific by Harry Anslinger and "prohibition rolled on."³⁵⁴

In 1972, at Nixon's request, the Shafer Commission (so-called after its Chairman Raymond P. Shafer) produced an extremely well-researched and comprehensive report, "Marihuana: A Signal of Misunderstanding." The report was written with a mind to public policy and the realities of marijuana "the drug" and marijuana "the problem."³⁵⁵ The report highlighted three factors in how marijuana became defined as a major national problem (even while alcohol remains socially and legally acceptable, despite known personal and societal dangers). The Commission highlighted in particular: the visible nature of the illegal behavior, the perceived threat to health and morality, and the evolution of marijuana as a symbol for wider social conflicts and public issues. The Commission attempted to place marijuana rightfully and logically within context, in an attempt to "deflate"³⁵⁶ marijuana as a problem and invoked the cultural history in America surrounding the temperance movement and alcohol. The Commission also pointed to social changes occurring that may have encouraged people to seek meaning, relevance, and certainty through drug use. The Commission aptly concluded that:

"[A] major impediment to rational decision-making in this area is oversimplification. As suggested earlier, many ingredients are included in the marihuana mix-medical, legal, social, philosophical, and moral. Many observers have tended to isolate one element, highlight it and then extrapolate social policy from that one premise. In an area where law, science and morality are so intertwined, we must beware of the tendency toward such selectivity."³⁵⁷

³⁵³ David Downs, "The Science behind the DEA's Long War on Marijuana," *Scientific American*, April 19, 2016, <https://www.scientificamerican.com/article/the-science-behind-the-dea-s-long-war-on-marijuana/>.

³⁵⁴ *Ibid.*

³⁵⁵ National Commission On Marihuana and Drug Abuse & Raymond P. Shafer. "The Report of the National Commission on Marihuana and Drug Abuse Marihuana: A Signal of Misunderstanding." (Washington. 1972). <http://www.druglibrary.org/schaffer/library/studies/nc/ncmenu.htm> (accessed April 5, 2018.)

³⁵⁶ *Ibid.*

³⁵⁷ *Ibid.*

The Commission recommended against assessing the "relative dangers" of particular drugs, which are only meaningful "in a wider context which weighs the possible benefits of the drugs, the comparative scope of their use, and their relative impact on society at large."³⁵⁸ As it relates specifically to marijuana, the Commission found there was "little proven danger of physical or psychological harm from the experimental or intermittent use of the natural preparations of cannabis, including the resinous mixtures commonly used in this country."³⁵⁹ Ultimately, the Commission concluded that "society should seek to discourage use, while concentrating its attention on the prevention and treatment of heavy and very heavy use."³⁶⁰ Criminalization of possession for personal use was "socially self-defeating as a means of achieving this objective."³⁶¹ In the end, the Commission's report strove to "demythologize" marijuana and place marijuana, the problem, in its rightful place in the range of social concerns (which, in the Commission's judgment, was not very high on the list). The Commission deemphasized marijuana as a problem calling the existing social and legal policy "out of proportion to the individual and social harm engendered by the use of the drug."³⁶² The Commission's report, non-partisan in nature and commissioned by a Republican President, represented an incredibly comprehensive look at the "problem" of marijuana. The report ambitiously aimed to define where marijuana belongs in a moral or social argument and further, what the government's role should be in legislating such issues. Despite this, nearly 40 years later, the Commission's report had little to no effect. The reason why provides important insight into one of the main reasons prohibition has continued to persist so many decades later, the motivations of the individual who commissioned the report. Nixon did not seek to answer a global question about the status of marijuana by commissioning the report, however, saw it as an opportunity to push his personal agenda which included one of a partisan nature, against the "antiwar left" and "black people."³⁶³ The purpose of the Commission was not to find unbiased and independent answers about a national problem, but was intended to assist in one man's personal agenda, "Nixon saw pot prohibition as a way to destroy the anti-war left, according to clandestine recordings made by Nixon in the White House as well as statements from his staff to the press. Nixon convened The National Commission on Marijuana and Drug Abuse (what became known as the Shafer Commission) to engineer scientific support for cannabis's Schedule I

³⁵⁸ Ibid.

³⁵⁹ Ibid.

³⁶⁰ Ibid.

³⁶¹ Ibid.

³⁶² Ibid.

³⁶³ David Downs, "The Science behind the DEA's Long War on Marijuana," Scientific American, April 19, 2016, <https://www.scientificamerican.com/article/the-science-behind-the-dea-s-long-war-on-marijuana/>.

placement.”³⁶⁴ Despite finding overwhelming evidence to the contrary, Nixon successfully continued his efforts by effectively burying the results and placing the matter in the hands of his ally, Attorney General John Mitchell, who “placed cannabis in Schedule I in 1972; that same year he resigned to head Nixon’s re-election committee.”³⁶⁵

Nearly 40 years later, another ambitious effort to tackle the marijuana prohibition problem would occur at the federal level, sharing many of the same ideas as the conclusions of the Shafer Commission but with entirely different motivations. In 2017, Senator Cory Booker of New Jersey introduced the Marijuana Justice Act of 2017, a bill that endeavored to legalize marijuana at the federal level and attempted to address disparities that prohibition and incremental legalization have brought to the U.S. Senator Booker addressed the stark difference between the communities in which a strong law enforcement approach to marijuana has had drastic economic and social consequences for its population, especially low-income and minorities versus communities which have legalized marijuana and seen drastic increase in profitability.³⁶⁶ Senator Booker's efforts were unique in that they addressed not only the federal classification of marijuana but also the social issues and inequities that have been created and worsened by marijuana prohibition.³⁶⁷ As such, Senator Booker's efforts were qualified as "reparatory legalization."³⁶⁸ Booker addressed the disproportionate effects on minorities and low-income individuals as the most serious of consequences of prohibition, to include long-term effects associated with re-introduction into society after incarceration (the most egregious examples being crimes which are non-violent in nature). Senator Booker highlighted the national arrest rate for black Americans for marijuana possession versus white Americans (3.73 times higher) despite the rates of marijuana usage being relatively the same.³⁶⁹ In an attempt to seize on a drastic increase in national public support for legalization (60%), Senator Booker introduced what was considered to be the most ambitious of all recent legalization efforts, which prescribed five policy fixes aimed at repairing past harms and preventing future ones.³⁷⁰ These include removing marijuana from the list of controlled substances, reducing federal funding for prison construction and law enforcement activities for states that show racial or class bias in marijuana arrest rates, the money saved from the previous effort redirected to a "Community Reinvestment Fund,"

³⁶⁴ Ibid.

³⁶⁵ Ibid.

³⁶⁶ *DRUG POLICY — MARIJUANA JUSTICE ACT OF 2017 — SENATOR CORY BOOKER INTRODUCES ACT TO REPAIR THE HARMS EXACTED BY MARIJUANA PROHIBITION*. (Harvard Law Review; Jan 2018). 926.

³⁶⁷ Ibid. 926.

³⁶⁸ Ibid. 927.

³⁶⁹ Ibid. 928.

³⁷⁰ Ibid. 928-929.

directing federal courts to expunge all convictions for marijuana use or possession offenses entered prior to the acts enactment, as well as making those currently serving time eligible for sentence reductions. The bill also granted a "cause of action in federal court to individuals 'aggrieved by a disproportionate arrest [or incarceration] rate.'"³⁷¹

However, nearly three years later, with public support for legalization at an all-time high, the bill has seen virtually no progress. In 2019, Booker (along with his (only) Democratic co-sponsors) reintroduced the bill.³⁷²

As the stalemate over the issue, and Booker's bill, remains on Capitol Hill, it is important to examine what forces continue to encourage the inaction. With over two-thirds of Americans supporting legalization, more than half of the States having passed legislation legalizing marijuana to some extent, and the most pro-marijuana Congress on record,³⁷³ it is difficult to understand why now isn't the time for Congress to capitalize on an opportunity that would appear to be a win for all.

In this case, it also appeared that partisanship plays a role, in both direct and indirect ways. First, there does still appear to be some partisan trend (Republicans generally against national/federal legalization and Democrats for), however, this has been challenged by recent changes in state laws and a number of Republicans finding themselves representing a constituency that includes a legal cannabis market.³⁷⁴ This is further complicated by the fact that public opinion has rapidly shifted to support for legalization and the fact that marijuana has become a "burgeoning industry" on the state level, bringing in "roughly \$10 billion in sales last year."³⁷⁵

However, Booker's was not the only bill to be introduced in recent years. The SAFE Banking Act, sponsored by Colorado Democrat Rep. Ed Perlmutter was cleared through a key house committee in 2019 with an "overwhelming bipartisan vote." The bill, "which would allow banks to do business with cannabis companies without fear of federal punishment" was passed with an overwhelming majority in the House in late September. Perlmutter's bill is decidedly more narrow and less controversial than Booker's, which attempts to both legalize marijuana and perhaps more controversially, acknowledge the racial and ethnic inequalities created by its

³⁷¹ Ibid,929-930.

³⁷² "Booker, Lee, Khanna Introduce Landmark Marijuana Justice Bill," booker.senate.gov, February 28, 2019, https://www.booker.senate.gov/?p=press_release&id=892.

³⁷³ Paul Demko and Natalie Fertig, "Why the most pro-marijuana Congress ever won't deal with weed," Politico.com, September 9, 2019, <https://www.politico.com/story/2019/09/09/marijuana-congress-1712973>.

³⁷⁴ Ibid.

³⁷⁵ Ibid.

prohibition. Despite being a more palatable compromise, the bill faces increased challenges in the Republican controlled Senate, where there remains a negative view on marijuana reform.³⁷⁶

Marijuana prohibition has also been affected by partisanship in a less direct way. As was previously alluded to, the increase in public support for marijuana prohibition has, inconveniently, coincided with the increasingly hyperpartisan environment in D.C. It doesn't appear that this has led to an increased and more intractable divide amongst Republicans and Democrats on the issue, as support for legalization continues to grow at the Congressional level too. However, the hyperpartisan environment has created a number of distractions that perhaps have prevented Congress from tackling this issue. Although important and clearly supported by public opinion, in the context of debates regarding border security, war powers, and even the impeachment of a sitting President, it just doesn't rise to the top of the list of priorities. It doesn't appear that many continue to argue the social ills of marijuana, rather, the debate centers on how narrow or broad to make the legislation.

CONCLUSIONS:

In closing, through a thorough examination of marijuana prohibition in social and historical context, several themes about the legislation of moral issues during times of partisan upheaval became evident. In the case of issues rooted in morality, historical and social context is as important to understanding policy (in) action as is partisanship. There are important similarities between alcohol prohibition and that of marijuana— race, culture, social norms, and fear of change. One cannot examine issues of “moral” consequence without understanding them in historical and social context. Inevitably, in the case of marijuana prohibition, the existential fear that one group feels toward another must be understood as a major catalyst.

Additionally, although outside influences (special interests and lobbies) have played a role, they don't alone (or significantly) account for the continued prohibition of marijuana. There did not appear to be literature to support the theory that prohibition was underwritten by some far-reaching conspiracy of interests. As such, it is difficult to ascertain if a lack of literature on a feature of the issue (for instance, funding of the anti-legalization lobby) is a function of the non-existence of such activity or simply a lack of research into the matter.

³⁷⁶ Sean Williams, “The SAFE Banking Act Passes the House in a Landslide -- Here's What Happens Next,” The Motley Fool, September 28, 2019, <https://www.fool.com/investing/2019/09/28/the-safe-banking-act-passes-the-house-in-a-landslide.aspx>.

The partisan nature of the debate also appears to be more complex than initially presumed. Although there is certainly a partisan divide on the issue, it has never been weaker or more narrow. The American public has made clear that there is bipartisan support for marijuana legalization and the states continue to support this by passing bills decriminalizing and/or legalizing the substance. However, as public support has grown, so has the hyperpartisan environment in Washington. Although Congress too has seen an increase in support for tackling the issue, the greater issue, related to partisanship, seems to be the distraction the hyperpartisan environment has created. With Congress busy tackling highly partisan debates ranging from immigration, war, and impeachment, there is little time and/or energy to devote to an issue of seemingly less urgency.

Unlike the issue of immigration, in the case of marijuana prohibition, “issue entrepreneurs” might be better understood as “issue influencers.” These individuals utilized strategic and influential positions to push personal (and self-serving) agendas. In the face of majority support for legalization, Attorney General Jeff Sessions’ 2018 statement regarding the federal commitment to marijuana prohibition can also be seen in a new light, perhaps one similar to the likes of Anslinger, Nixon, and Regan. It’s doubtful any of these individuals saw themselves as “issue entrepreneurs” in some of the ways described above and in chapter two, however, in each of these cases, marijuana was exploited to promote these individual’s ends, the will and wants of the individual taking precedence over the will of the people. Each of these individuals happened to be in positions that afforded them incredible power to shape the future of marijuana prohibition at critical times in history.

Finally, perhaps the most important takeaway is the critical role culture plays in understanding why certain narratives stick and others struggle to gain support, and further, what propels certain issues to become highly controversial and/or partisan. The NRA provided an excellent example of how strategic consideration of narrative and framing within cultural context could successfully push a particular agenda. The NRA is probably not often thought of as a progressive group, but by recognizing the futility of certain arguments and embracing (in part) a progressive narrative, the group was able to pivot, reframe, and find continued legal support for their agenda. Much like for the case of gun control, the most powerful and successful narratives concerning the prohibition of marijuana have been strategically entrenched in overarching cultural frames that supported its continuance. It has been well established that the prohibition of marijuana arose from the question of what it means to be an American, or perhaps more accurately, *who* is defined as American. If decriminalization is indeed the will of the people and way of the

future, enterprising politicians and members of the public should consider how a strategic rethinking and reframing of the narrative could further sway those who have stalled efforts to bring federal law in line with the state and local.

These themes not only support a better understanding of the issue of marijuana prohibition, but more broadly the intractability of the current political environment, and more specifically the forces that have prevented policy successes on the issues Americans care about and demand action on the most. In a representative democracy, like the U.S., the system should respond to the will of the people, particularly when that will represents a majority.

The persistence of marijuana prohibition shows the complexity of issues like those explored in depth in this thesis. The forces at play are many and varied, each on its own likely insufficient to support the decades long prohibition and continued congressional inaction. Each individual contributor to the problem has led to a confluence of influences that have pushed marijuana prohibition into a future unforeseen by many and in contrast to the will of the American public. Only time will tell if the wave of hyperpartisanship in Washington will subside enough to permit for the passage of legislation on an issue which appears to have surpassed its lifetime.

Conclusion

“American politics has arrived at a remarkable place. The country and its leaders are growing more partisan, fewer people are persuadable in elections, and Republicans and Democrats view each other with an increasingly nastier edge. Americans are surrounding themselves with people who look like, agree with and even pray like them — a sorting that’s changing the country and ripping at the fabric of what it means to be American.” Domenico Montanaro, NPR³⁷⁷

“Human progress never rolls in on wheels of inevitability.” Martin Luther King Jr.³⁷⁸

Reeling from the partisan fervor of the conclusion of the impeachment trial of Donald Trump, a weary American public is bracing itself for what is likely to be an equally, if not increasingly, partisan effort: the 2020 Presidential election. With impeachment now in its rearview mirror, Congress has an opportunity to set divisions aside and do the work bestowed upon it by the people. However, with the 2020 presidential election looming, it seems unlikely that the divide that has grown so large over the last two decades will close at all in this narrow window of time or that Congress will capitalize on this brief interlude. In fact, as the election draws nearer, it is likely that that gap will grow, and full focus will be dedicated to the most important task at hand, party majorities. It is likely that little that occurs over the election cycle will do much to quell the concerns of the public that Washington D.C. (and the U.S.) is gripped by an uncivil, untenable, and disturbing level of partisanship. However, in looking past this election cycle and back through the conclusions of this thesis, hope remains.

At the outset, this effort endeavored to examine whether or not the hyperpartisanship that appears to have a hold on the nation, and more importantly its representative body, has changed some of the most fundamental functions of U.S. democracy, namely how Congress responds to public demand and how public policy is made. American’s perceptions of Congress are at all-time lows as the stalemate over a number of policies has grown. American democracy, by design, requires not just checks and balances, but collaboration, cooperation, and compromise in order to address issues of real consequence. As previously noted, as the national and global landscapes shift, Congress must be prepared not only to address and legislate issues of administrative significance (budgets and the like), but also to design and reform policy that helps define what it means to be an American, both at home and in the world. This type of policy making and reform requires the ability to set aside party differences to do the work of the American public. If Congress has lost the ability to overcome this challenge. the consequences to the health of U.S. democracy are severe.

³⁷⁷ Domenico Montanaro, “Tracing The Roots Of A Partisan Impeachment,” npr.com, December 19, 2019, <https://www.npr.org/2019/12/19/789033023/tracing-the-roots-of-a-partisan-impeachment>.

³⁷⁸ Martin Luther King. "Letter from a Birmingham jail." [Atlanta, Ga.]: Martin Luther King Jr. 1968.

The three preceding chapters attempted to look at aspects of these factors in the context of some of these very issues - controversial, complex, and defining matters. Some may argue that the choice of issues (gun control, immigration and the prohibition of marijuana) precipitated a necessary conclusion. That by choosing three issues that were naturally more controversial and partisan, this presented an unfair test of Congressional function. However, these three issues were chosen not due to their controversial nature (in order to support the overarching thesis), but because public demand for policy action on each issue has grown exponentially over the years. Federal reform of each of the three issues remains among the top priorities for a majority of Americans across party lines. In addition to its more mundane tasks and duties, Congress must also be able to tackle the big issues the public demands of it, as it has during other periods in history. Certainly there is not bipartisan public consensus about exactly the shape these reforms should take, but that is the work of Congress, to pull up the proverbial chair, roll up the sleeves, and do the hard work, negotiating toward a policy end that reflects the will of the people and the essence of American democracy.

In each instance, and in each chapter, the conclusions were more complex than anticipated. However, one overarching theme appeared throughout. **Although hyperpartisanship is now a factor in policy stalemate, it is as much a symptom of broader issues as it is a cause. Certain aspects of, and evolutions in, the system's design have exacerbated a problem that has always existed - people just don't always agree. As the "People's Branch," Congress is both representative and reflective of this phenomenon.**

Chapter one assessed whether hyperpartisanship was responsible for the lack of meaningful policy reform following several mass shootings in the U.S. (and growing bipartisan) demand for reform. In this context, chapter one also questioned whether the conditions previously believed to be required for the mechanisms of the nation's democratic policy machine to engage had fundamentally shifted.

An examination of the issue through the lens of mass shootings as focusing events revealed that the issue is about more than just partisanship, polarization, and rhetoric. However, in the case of mass shootings and gun control, the hyperpartisanship that has emerged over the last 20 years appears to be the factor that makes it impossible to overcome the others (e.g., such as strong opposing lobbies, thinner margins of power, concerns about self-preservation, the 24-hour news cycle, and the polarized nature of the issue itself).

Dovetailing on the findings of chapter one, chapter two attempted to address whether the phenomenon of state-led action in response to federal inaction (on gun control) represented a new and tenable alternative. Through

the lens of immigration, an issue which has traditionally been firmly within the purview of the federal government and has become one of the most divisive and highest priority issues facing Congress and the administration, chapter two examined the foundations of American federalism and the division of power between the states and federal government, historical precedents for adoption of national issues on the state level, and utilized immigration as a test case. The chapter found that in the face of a hyperpartisan Washington D.C., states will be challenged to creatively take on policymaking far beyond their usual scope. This could prove both a sustainable alternative to a deadlocked D.C., but also may indicate a more significant long-term trend of a shift away from the perceived supremacy of the federal government.

The conclusions of chapter two showed that some of the presuppositions held true, hyperpartisanship has a hold on Congress and a real effect on policy (or the lack thereof), in particular: immigration reform. Federal inaction on immigration was a familiar refrain amongst those states pursuing both permissive and restrictive sub-federal legislation. In addition, immigration federalism was bolstered by a number of court decisions which denied that sub-federal legislation ran afoul of federal supremacy and/or preemption. However, there also appeared to be limited empirical evidence supporting the successes of sub-federal efforts, leaving the strong rhetoric inspiring and supporting the policy initiatives largely unsubstantiated in many cases and raising big questions about the advisability of piecemeal/patchwork efforts in a nation that is built on the unification of diverse parts. Additionally, many of the sub-federal efforts themselves appeared to have partisan origins. Generally speaking, the sub-federal efforts were more a symptom of hyperpartisanship than they were a solution to it.

The importance of the phenomenon of issue entrepreneurs also emerged in the examination of immigration federalism. Issue entrepreneurs were understood to be a “handful of dedicated policy activists” who capitalized on “political opportunities to block immigration reform at the national level and then proliferate restrictive legislation at the local level.”³⁷⁹ In the case of immigration, by leveraging powerful narratives and an opportune (read partisan) political climate, these individuals had a relatively outsized influence on both public opinion and the resultant policy action. It seemed logical that other similar issues may have suffered a similar fate.

Chapter three turned to the evolution of the prohibition of marijuana over the years as a case study of how outside influences (and influencers) might stall necessary and desired policy action, as well as exacerbate partisan

³⁷⁹ Karthick Ramakrishnan and Pratheepan Gulasekaram, “Understanding Immigration Federalism in the United States,” Center for American Progress (March 2014): 11. <https://www.americanprogress.org/wp-content/uploads/2014/03/StateImmigration-reportv2.pdf>.

tensions over the issue. Specifically, the chapter examined the possibility that the prohibition of marijuana has persisted not for reasons rooted in science and logic, but due to the influence of some underlying interests, motivated by profit or power, emboldened by the political opportunity presented by a hyperpartisan environment. Of the three issues profiled, marijuana enjoys some of the broadest, most diverse, and longest support. There is also far greater bipartisan consensus on how to approach legalization of marijuana than there is for gun control and immigration.

It was certainly evident that particular individuals had capitalized on the emotional component of marijuana prohibition. Morality issues, which attempt to legislate what and who is right and wrong, have deep emotional cores embedded with society's deepest fears and insecurities. These issues, including marijuana, are generally reflective of these insecurities. The strong emotional connection means that policy measures that attempt to counteract the behavior/substance/activity can be wildly unsuccessful (by any measure) at achieving their ends and still find public support. Enterprising and influential individuals have understood this, and over the years have used that fear to push their own personal agendas through the continued prohibition of marijuana. Anslinger, Nixon, and even Nancy Reagan, each examples of how the mythology of marijuana could be exploited to promote these individual ends. Each of these individuals happened to be in positions that afforded them incredible power to shape the future of marijuana prohibition at critical times in history.

Although, hyperpartisanship also plays a role in why prohibition has not ended, the partisan divide on the issue has never been weaker or more narrow. The American public has made clear that there is bipartisan support for marijuana legalization and the states continue to support this by passing bills decriminalizing and/or legalizing the substance. However, as public support has grown, so has the hyperpartisan environment in Washington. Although Congress too has seen an increase in support for tackling the issue, the greater issue, related to partisanship, seems to be the distraction the hyperpartisan environment has created. With Congress busy tackling highly partisan debates ranging from immigration, war, and impeachment, there is little time and/or energy to devote to an issue of seemingly less urgency. The challenge then, if the issue is a priority for the American people, is how to elevate it.

Perhaps the most interesting conclusion from chapter three concerned how to overcome the policy deadlock and build a consensus and a compelling narrative of support. The "anti" lobbies seem to be more powerful, visible, and influential than the "pro" lobbies. Perhaps this is because it is much easier to cater to fears than hopes. But to develop a compelling narrative that is "pro-marijuana" (or gun control, or immigration for that matter) it is critical to understand the cultural context in which that issue exists. The NRA's efforts demonstrated how to successfully push

a particular agenda through strategic consideration of narrative and framing within cultural context. By recognizing the futility of certain arguments and embracing (in part) a progressive narrative, the group was able to pivot, reframe, and find continued legal support for their agenda. As chapter one explored, the reframing of the opioid crisis as a health crisis achieved similarly successful ends and, perhaps, broadly shifted the public's (and Congress') opinion on understanding accountability and drug addiction. Much like for the case of gun control, the most powerful and successful narratives concerning the prohibition of marijuana have been strategically entrenched in overarching cultural frames that supported its continuance. If decriminalization is indeed the will of the people, and way of the future, enterprising politicians and members of the public should consider this carefully when drafting a narrative that will have broad appeal to a divisive Congress.

Although framing emerged as an interesting and important component for how to overcome the hyperpartisan divide, build consensus, and end policy deadlock on particular issues, it wasn't the only alternative that emerged that could help to shape the future of democracy. As were briefly mentioned, a more party-diverse Congress might ease the perceived personal and professional costs associated with Democrats and Republicans engaging in across the aisle compromise. It seems unlikely that the U.S. will undergo a drastic change to its fundamental design, so perhaps less drastic measures such as ranked choice voting, or term limits could provide a path for more moderate politicians, third parties and independent candidates to break the traditionally bipartisan hold. It will be important and interesting to watch the State of Maine as they employ ranked choice voting in the 2020 election.³⁸⁰

Removing money from politics and reducing the influence, power, and effectiveness of professional lobbies would allow politicians to approach issues based on merit and public need rather than out of concern for self-preservation and financing. Bernie Sanders is running his 2020 presidential campaign in part on the platform of campaign finance reform finding that that the "influence of wealthy individuals and corporations in elections has led to the passage of laws that have widened the chasm between the rich and the poor."³⁸¹ But the refrain isn't uniquely Sander's, or even liberal/progressive, candidates from both parties have argued about the negative effects money has had on elections and the candidates who become members of Congress. Solutions could include publicly funded elections, overturning *Citizens United*, passing an act to increase disclosure and transparency, matching funds from

³⁸⁰ Sam Levine, "Maine Poised To Be First State To Use Ranked Choice Voting In A Presidential Election," huffpost.com, September 6, 2019, https://www.huffpost.com/entry/maine-ranked-choice-voting-2020_n_5d72ca74e4b06451356df0f3.

³⁸¹ Russell Berman, "How Can the U.S. Shrink the Influence of Money in Politics?" *The Atlantic*, March 16, 2016, <https://www.theatlantic.com/politics/archive/2016/03/fix-money-in-politics/473214/>.

the federal government and incentivizing individual contributions (through tax credits.)³⁸² Not only could these efforts make elections more fair and diverse but they may also free up politicians who are otherwise, “spending hours each day dialing for dollars rather than working on legislation or helping their constituents.”³⁸³

The conclusions of chapter three also made clear that the role “hyperpartisanship” itself plays in the deadlock is complex. Hyperpartisanship is not simply a cause of deadlock, but is also a symptom of other exacerbating factors, two of which bear brief mention here but are themselves deserving of a thesis of their own: the role of new media and the partisan nature of gerrymandering.

Over the last several decades, and certainly since the advent of the 24/7 news cycle, the media has transformed political news into a form of entertainment. This has had several deleterious effects. First, it has heightened and exaggerated divisions, both at the Congressional and local level. Media coverage has itself become highly partisan, a person’s news broadcast of choice a veritable thermometer of political leanings. Therefore, the “news” one selects mainly provides a constant loop of already subscribed-to beliefs and agendas, rather than providing an unbiased representation of fact. Compounded with the advent of social media, which has proven to provide a haven for disinformation operations for foreign adversaries, it has become harder and harder to find a source of news that does little more than stoke existing partisan fires. Additionally, the 24/7 nature of both the traditional news and social media platforms have drastically sharpened the microscope under which members of Congress find themselves. Although this may have positive aspects (increased transparency), it also means that many of the conversations and collaborations that might have previously required closed door meetings are likely to be exposed. This has increased the cost of cooperation to members of Congress to cross party lines. As politicians eye the upcoming election cycle, decisions about policy and collaboration must be made with sensitivity to how they will be publicly represented and perceived, rather than on their general merits.

Gerrymandering represents another phenomenon that has served to both increase partisan divides and decrease competition and diversity of parties and opinions in D.C. Seen by some as one of “democracy’s worst problems,” the process through which districts are reshaped to reflect demographic shifts “often has more to do with politics than demographic and geographic correctness.”³⁸⁴ The justification for gerrymandering is to attempt to ensure

³⁸² Ibid.

³⁸³ Ibid.

³⁸⁴ Mark Sullivan, “This radically simple tool could solve one of our democracy’s worst problems,” fastcompany.org, March 5, 2020, <https://www.fastcompany.com/90467795/why-ai-alone-cant-solve-the-scourge-of-gerrymandering>.

adequate representation, however, this has been exploited by enterprising legislatures to ensure reelection. In recent years, the Supreme Court has declined to weigh in on the issue (even in the face of discriminatory claims) leaving the issue of gerrymandering to Congress and the states.³⁸⁵ One possible solution, suggested by political scientists from Harvard and Boston University, has been to turn the process into a “Define and Combine” procedure, giving the majority party the power to define the subdistricts but the minority the power to combine them, “[b]oth sides are very aware that their opponent will use its move to get to as advantageous a map as possible. When drawing the original group of subdistricts, the majority party will be thinking about how the minority is likely to combine them. The minority party must anticipate how the majority is likely to draw the subdistricts and have a corresponding strategy for recombining them. By giving each party one move, the Define and Combine strategy reduces parties’ ability to pack or crack.”³⁸⁶ Ultimately, the process was found to produce more moderate districts, representing a potential counterbalance to the negative, and partisan, influences the process has grown to inflict.

Although chapter two also examined the delegation of some powers to the states as well as the states’ efforts to legislate federal issues, neither really seemed to suggest a viable way forward for the issue at hand (immigration) but did highlight the tension inherent in the U.S.’ democracy, to be both individual and united. The U.S., as long as it remains united, will remain in this constant struggle. Certainly, this era of hyperpartisanship, although extreme, is not unique. The U.S., and its democratic institutions, have survived a Civil War, McCarthyism, and the civil rights movement, each time emerging from the bitter, and hateful, battle having grown, evolved, and with a better understanding of what exactly it means to be American, rooted in the founding and most enduring principles - freedom, justice, and equality.

This portfolio itself was perhaps also rooted in the writer’s own existential fears about the U.S. the future holds, but it is the devotion to those founding principles, over any individual gain, that have made the U.S. democratic experiment the most successful and long lasting. Even in the most divisive and partisan moments, there is reason for hope. As this thesis explored, Americans, despite their differences, consistently move the bar toward a more fair, equal, just, and inclusive society.

In addition, despite the vicious and partisan nature of the recent impeachment trial and the anticipated similar nature of the upcoming presidential campaign, it is worth noting that in the face of another public health crisis,

³⁸⁵ Tim Henderson, “Supreme Court Says States, Congress Must Handle Gerrymandering,” June 27, 2019, [pew.org, https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/06/27/supreme-court-says-states-congress-must-handle-gerrymandering](https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/06/27/supreme-court-says-states-congress-must-handle-gerrymandering).

³⁸⁶ Mark Sullivan, “This radically simple tool could solve one of our democracy’s worst problems,” [fastcompany.org](https://www.fastcompany.com/90467795/why-ai-alone-cant-solve-the-scourge-of-gerrymandering), March 5, 2020, <https://www.fastcompany.com/90467795/why-ai-alone-cant-solve-the-scourge-of-gerrymandering>.

Congress *has* been able to coalesce. Much like in the case of the opioid crisis (as detailed in chapter one), in January of this year, Congress passed the Coronavirus Preparedness and Response Supplemental Appropriations Act. In the most recent days, with *unanimous* support, the House passed a revised coronavirus emergency bill, intended to inject billions of dollars into the U.S. economy.³⁸⁷ Despite “imperfections,” the bill was expected to clear the Senate with bipartisan majorities.³⁸⁸ In the face of a national crisis, Senate Majority Leader Mitch McConnell stated, “It is a well-intentioned bipartisan product assembled by House Democrats and President Trump’s team that tries to stand up and expand some new relief measures for American workers.”³⁸⁹ Expectations proved to be accurate. Within days, the Senate passed the House legislation with no changes and again, with bipartisan majorities. The legislation was then immediately signed into law by the President. Most importantly, the legislation itself was negotiated between House Speaker Nancy Pelosi (D) and administration representative, Treasury Secretary Steven Mnuchin. Despite intense animosity between Pelosi and the administration, the “two parties ‘are putting aside partisanship to get things done.’”³⁹⁰ Not unlike the days following 9/11, the current crisis facing all Americans may very well provide an opportunity and cause around which Americans, no matter their color or creed, can unite.

Although the hyperpartisanship that has plagued the start of the 21st century may be seen as not only a root of policy deadlock but a symptom of broken systems, it may also be a sign of a coming societal shift. Hyperpartisanship itself is not necessarily as determinative as originally thought, but rather is reflective of a general social context. If history repeats itself, the U.S. may emerge bruised and battered but a stronger, more evolved version of itself. Through a variety of efforts, including those mentioned above (multi-party system, redistricting reform, civic education, removing money from politics, responsible journalism, etc.) the U.S. may be able to work to curb the grip partisanship has on both the people and Congress alike. In a political system dependent on cooperation, negotiation, fair representation, and equality and justice, this is not just preferred, it is necessary.

As the U.S. hurdles into uncharted territory, the current crisis may also give the U.S. the proverbial push it needs. In order to overcome the worst possibilities of the coronavirus threat, Americans must overcome differences, put personal preferences aside, and work together to ensure a better future. So far, the outlook is promising. In the

³⁸⁷ John Bresnahan and Marianne Levine, “Senate to take up coronavirus package after House passes revised bill” *politico.com*, March 16, 2020, <https://www.politico.com/news/2020/03/16/senate-coronavirus-emergency-package-131465>.

³⁸⁸ Marianne Levine and Andrew Desiderio, “Senate readies vote on House-passed emergency coronavirus package,” *politico.com*, March 18, 2020, <https://www.politico.com/news/2020/03/18/congress-emergency-coronavirus-stimulus-package-135444>.

³⁸⁹ *Ibid.*

³⁹⁰ Alan Rappeport, “With Echoes of 2008, Mnuchin and Pelosi Hammer Out a Rescue Deal,” *New York Times*, March 13, 2020, <https://www.nytimes.com/2020/03/13/us/politics/mnuchin-pelosi-coronavirus-stimulus-rescue.html>.

face of catastrophe, the partisan has taken a back seat to the essential. The worst of the crisis is certainly yet to come, but hopefully Americans will continue their efforts to work together, staving off the worst-case scenario. The challenge will be to resist the urge to fall back into the divisions that have plagued the country and put unprecedented pressure on America's democratic institutions. Through a sustained collective and collaborative effort, the U.S., its people and its institutions, can move, united, toward a more just, equal, fair and *civil* society for all.

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