Early Years. Representative government in the United States has been an important goal since the early days of the colonies that were established in what would become known as British North America; important, at least, to the colonials.

The first royal charter for Virginia provided for a thirteen member council in the colony, though the members were appointed by the crown and there was a complementary council in Great Britain. Yet, just over a decade into the settlement of Virginia proper, the first General Assembly convened on July 30, 1619.

By 1700 there was an assembly in 20 colonies in British North America, a number which included several in some current states and several island colonies. Historian Michael Kammen found that “about twenty years were required at the outset for representative institutions to materialize.”

The degree to which these assemblies resemble today’s legislatures varies but they did share important commonalities. “Deprived as the colonists were of a voice in the deliberations of the home government, the people of very province, whether royal, proprietary, or chartered, exercised a partial check on the arbitrary rule of the governor and his council, by means of a legislative assembly, whose members were chosen on the basis of a limited popular suffrage.”

Foundational Documents. It should thus come as no surprise to observers of the legislative process that the very concept of representation of the people in government

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1 Clark H. Bensen, B.A., J.D., consulting data analyst and attorney doing business as POLIDATA ® Polidata Data Analysis, a demographic and political research firm with locations outside Washington, DC and VT, www.polidata.org
2 The charter addressed “that part of America commonly called VIRGINIA, and other parts and Territories in America” which encompassed “all along the Sea Coasts” of what is now the U.S. It ran from the 34th parallel (near Atlanta) to the 45th parallel (the upper border of Vermont and New York). The First Charter of Virginia; April 10, 1606; from the 1906 Thorpe edition of Colonial Charters. See http://avalon.law.yale.edu/17th_century/va01.asp
3 “The oldest continuous law-making body in the western hemisphere”. See https://historicjamestowne.org/history/the-first-general-assembly/
5 Bishop, Cortlandt Field; HISTORY OF ELECTIONS IN THE AMERICAN COLONIES; Columbia College, New York, 1893; at 1.
has long been a topic of intense debate and discussion. In the foundational document of our nation, the Declaration of Independence, the lack of or abuse of representation was a core subject in the long list of “repeated injuries and usurpations” by King George III.6

One of the acts of the Continental Congress was the Northwest Ordinance.7 This act was adopted July 13, 1787 in New York City just before the Constitutional Convention in Philadelphia had recessed while their Committee of Detail worked on a first draft of the constitution.

The Ordinance addressed the nature of the government for the territories that would eventually become states: a) in section 5 of the preamble: “which laws should be in force...until the organization of the general assembly therein, unless disapproved of by Congress; but afterwards the legislature shall have authority”; b) in section 13: “And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions and governments, which forever hereafter shall be formed in the said territory.”; and c) in Article V: “the constitution and government so to be formed, shall be republican, and in conformity to the principles contained in these articles…”

Correspondingly, the operational document for the United States, the federal Constitution, made legislative representation foremost by placing it in the first and the longest article of the document, Article I. Article I addresses several concepts relevant to our discussion: a) Section 1: “All legislative powers herein granted shall be vested in a Congress”; b) Section 4: “The Times, Places and manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof”; and c) Section 5: “Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members”.

While the above language is specifically for the federal legislature, these basic premises have been typically applied to state legislative bodies. They focus on the role of the legislative body as being the exclusive body to perform legislative functions and to address how its members are elected and their qualifications.

Section 4, the “Elections Clause” was the subject of recent litigation that reached the Supreme Court of the United States.8 The critical element in that case for the 5-4

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6 The king, born in London in 1738, had acceded to the throne following the death of his grandfather George II in 1760. In 1776 he was 38 years old and thus generally a contemporary of a few notables of the revolutionary period: Thomas Jefferson (33); Ethan Allen (38); John Hancock (39); Patrick Henry (40); John Adams (40); or George Washington (44). The king had not made friends early into his reign with the Royal Proclamation of 1763 which prohibited settlement west of the Appalachian Mountains by denoting it as the Indian Reserve. See https://en.wikipedia.org/wiki/Royal_Proclamation_of_1763.


Comments on the Legislative Responsibility for Redistricting
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majority was that Arizona had transferred the responsibility for redrawing the boundaries for congressional districts from ‘the legislature thereof’ to a commission via a statewide referendum in 2000. The essence of the minority was that the majority simply “interpret[ed] the constitutional term ‘the legislature’ to mean ‘the people’”.

Representative Bodies. Numerous historians, philosophers, and political scientists have contributed to the discussion on the role of representation in America. Such writings have addressed all manner of the multiple aspects of representation.

“Throughout the period of colonial British rule, local American leaders sought to strengthen local government, not only by cementing the loyalties of the people, but also by increasing the weight of the representative assembly vis-à-vis the governor appointed by the crown.”

Even today the legislatures, be they federal or state bodies, need to be robust and have experienced members to offset the inherent power of a permanent executive branch through vigorous oversight. This is especially true in ‘part-time’ legislatures.

James Mill in his 1821 article Government, presented a positive perspective on representative bodies: “In the grand discovery of modern times, the system of representation, the solution of all the difficulties, both speculative and practical, will perhaps be found.”

Historian and politician Thomas Babington Macaulay was quite critical of the underlying logic of James Mill. “Our objection to the essay of Mr. Mill is fundamental. We believe that it is utterly impossible to deduce the science of government from the principles of human nature.”

James Mill’s son, John Stuart Mill considered many aspects of our subject topic in his 1861 treatise Considerations on Representative Government. Historian Henry Jones Ford indicated that the younger Mill’s contribution would “probably be correctly discerned if it be regarded as a rejoinder to Macaulay.”

As Ford saw it Macaulay’s criticism was effective “since he was himself an advocate of reform...Macaulay was quite ready to admit that these institutions had to be mended from time to time, but any proposal to scrap them in whole or in part, he

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9 Ibid. at 1 of the Roberts dissent. Note that Justice Kennedy, who recently announced his retirement, was the fifth vote for the majority.
10 Reid, John Phillip; The Concept of Representation in the Age of the American Revolution; The University Press of Chicago; Chicago, 1989; at 31.
13 Macaulay, Thomas Babington; Miscellaneous Works of Lord Macaulay: Edited by his sister Lady Trevelyan in five volumes; Harper & Brothers, New York; undated but post 1880 at volume 1-139.
regarded as the height of folly…” 15 In another essay written by Macaulay in 1833 he opined: “The effects of a change from good government to bad government is not fully felt for some time after the change has taken place.” 16

A recent example of such ‘buyers regret’ is evident in California as supporters of the ‘top-two’ primary, adopted in 2010, voice frustration: “what’s concerning me is how it’s practiced, because now it’s being manipulated all over the place”. 17 “Election reforms that might sound good in a political science class produce, as often as not, unintended consequences.” 18

Alexander Hamilton in FEDERALIST no. 11 noted: “Every institution will grow and flourish in proportion to the quantity and extent of the means centered towards its formation and support.” 19 The U.S. House of Representatives has been the recipient of ‘means centered’ for much of its life span but most importantly in the most recent decades.

Political scientist Garrison Nelson observed: “The United States Congress is the most powerful legislative body in the world. Much of its power derives from its highly developed standing committee system.” 20 Concomitant with the committee system is the seniority principle, i.e., that members with the longest (generally unbroken) service in the chamber or on a committee, will climb the ladder to eventually reap some of the perks of committee power: committee chair or ranking member, or subcommittee chair or ranking member.

While selection of the chairs of committees has been changed over the past few decades, seniority still maintains an influential role in which member might eventually get their hand on a brass ring. While the committee system in the Senate, an ongoing body, is somewhat different than that of the House, both rely upon the expertise of members who have been students, voluntarily or not, of the subject matters of the often complex issues of the day that confront them.

Legislatures and Reform. Even with representative government as the means by which the consent of the governed is translated into political action, there will be times when some changes in the election system are promoted and should be considered. 21 Just as the legislative bodies are the arbiters of their membership, they also establish their own rules and procedures. Of course, this does not always function as some would

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15 Ibid. at 133.
16 Macaulay, op cit. at volume 2-131.
17 See BALLOT ACCESS NEWS: Volume 34, number 1, June, 1, 2018; Richard Winger, ballot-access.org; San Francisco, CA; at 2.
21 For example, the 1842 Reapportionment Act; direct election of U.S. Senators (the 17th amendment); the direct primary; or reapportionment following the 1960s Reapportionment Revolution.
wish for several reasons, not the least of which is the potential disruption that any change could cause to the legislative status quo and/or a redistribution of political power.

In today’s environment the call for action has returned, as it has before, to replace the role of the legislature with that of some form of non-legislatively based alternative, e.g., a commission. As can be readily understood, such proposals are frequently offered by groups who oppose the group currently in control of the process.

Nevertheless, if reform is needed to address the concerns of a wide group of voters with respect to a perceived inequality or inadequate representation, the proper place to have these discussions is the legislature. As stated by John Stuart Mill: “When it is necessary, or important, to secure hearing and consideration to many conflicting opinions, a deliberative body is indispensable.”

Legislative bodies have a long tradition of dealing with complex and controversial issues: redistricting is clearly one of these. Ideally, as any redistricting bill can adversely affect any member, every member should be solicited for their individual perspective on their own geographic area. Yet, as with many bills, this sometimes just does not happen but, every member should be encouraged to voice their perspective on a redistricting bill just as they might on any other bill introduced for discussion.

The legislative process allows for such member contact informally or formally at various stages of the law-making process: in committee, whether it be the member’s committee or not; and on the floor, usually during two different periods of time when amendments are offered; and in some situations, after the other chamber has agreed and disagreed enough to require a conference. Members of the public frequently attend committee meetings; appear at public hearings; and offer up their concerns on important bills, even if they do not live in the member’s district.

The deliberators, i.e., the members, are uniquely situated in any state as they have the best collective view of the interests, situations, needs, and desires of their constituents. Members are a cross-section of the entire polity and thus are not just familiar with every community of interest but also knowledgeable about every region and community in the state.

As with many issues today, redistricting has become a more complicated undertaking than in the past but legislatures generally have a history of either members or professional staff who have been through the process before. Moreover, a lot of the preparatory work for the drafting process occurs years before the actual boundary adjustment.

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22 Mill, John Stuart; CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT; 2nd Edition; Parker, Son, and Bourn, West Strand, London; undated but post 1861; at 90.

23 This part of the legislative process has a long history. See De Lolme, Jean-Louis; THE CONSTITUTION OF ENGLAND: A New Edition; Baldwin and Co., London, 1817; at 263.
An option available to the legislature is to establish criteria for the redistricting process. Having the rules and procedures being discussed and adopted before the numbers are released following the census can promote reasoned discussion and deliberation to establish the rules of the ‘game’ before it begins.

As to criteria, some of these are easier to understand than others but any one of them could prove to be a two-edged sword. Some concepts are very general, some very specific. Some specific concepts lend themselves to a clear numerical criteria such as the degree to which the population factor used for the equalization between districts is allowed to vary from zero. Others, such as the degree to which competitive districts should be sought24, or the degree to which any partisan effect is acceptable do not. It might prove useful to have a legislative record of such considerations.

Another option for the legislature is to revise the process by which redistricting bills are considered or adopted. For example, topics for consideration include: special requirements for hearings; timing for introduction of bills, consideration or passage; or a super-majority vote or some other evidence of substantial bi-partisan support.25

One area of conflict is the impact of incumbency on the redistricting process. Many incumbents view the reapportionment process as just something that must be lived through in order to address the obvious inequities that may occur from a decade of population shifts by adjusting the boundaries of the current map. Incumbents understand that their own district may change dramatically for several population-based reasons. Many reformers view the process as their only chance for a decade to upset the apple cart by promoting an entirely new map without regard to incumbents.

Some reformers do not actually want wholesale change but want a recognition of a better degree of equality of a characteristic. Other reformers promote a process that ignores the political reality of the incumbent’s residence or the political makeup of districts. Such processes are likely to create sufficient disruption so that the decision of which members have the opportunity to return is transferred from the voters to the line drawers.

Of course, another area of conflict is partisan control of the chamber which is, as they say, “where the rubber meets the road”. Assuming the legislature did want to focus on creating a plan that had an acceptable level of bias, how is that level determined? Part of the problem in this regard is that the data are not robust and that

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24 See Brunell, Thomas L.; REDISTRICTING AND REPRESENTATION: Why Competitive Elections are Bad for America; Routledge, New York, 2006, esp. Chapter 5.
some of the analytics for measuring partisan bias are still in flux and may have issues themselves.

To date, the only time the partisan symmetry\textsuperscript{26} analysis has worked in limiting a generic partisan advantage is in impasse situations, i.e., when no plan exists for the upcoming elections. It works, to the extent possible, in such situations because the litigants aim to get as close to zero bias as possible and the court informs them of this.\textsuperscript{27} Legislative stakeholders are loathe to guess how much partisanship is ‘just enough’ and surely do not want to end up below the level which might eventually prove acceptable to a court. On the other hand, if partisan bias metrics were used as a negotiating model one would think that this might avoid costly litigation. Alas, one would probably be wrong.

Because the legislative branch considers itself a coequal branch of government, legislators take umbrage at any suggestion of a commission. By definition a commission that does not include or is not controlled by legislators would usurp the constitutionally designated legislative power and create a fourth branch of the government unaccountable by means of elections and unchecked in the normal course of events.

Commissions that are denominated as bi-partisan or non-partisan are often offered as alternatives to the political polarization in America today\textsuperscript{28}. These two types are quite different in reality. A bi-partisan commission would have an equal number of members from the two major political parties and perhaps a tie-breaker. Whether these work or not depends upon the personalities involved. A non-partisan commission general has either members with no overt partisan affiliation or an equal number of members from the two major parties plus some independent or non-partisan voters.

But for a non-partisan commission the question is the independents, who as a group, have increased over the decades. Whereas they have generally, on a national level, typically been about the same size as the two parties, for the past few years they have increased to be larger than either party. This raises several caveats.

a) Only about half of the states require registration by party and even in the states that do, independents vary from being a small proportion (e.g., PA or KY) to a plurality of the electorate (e.g., MA or NJ). In some states this depends upon the rules for registration and the status of independents being able to vote in semi-open primaries: being an independent may just be a strategic choice made by the voter.

b) The final choice made by independents at the polls will vary by state and by year but in reality most of them are not independents in the sense of not preferring

\textsuperscript{26}See King, Gary M.; The concept of partisan symmetry; https://gking.harvard.edu/publications/term/1586.

\textsuperscript{27}An example of how this did not work was the recent state court litigation involving the Pennsylvania congressional districts. The Supreme Court of Pennsylvania was unclear to the litigants about the parameters it would use to evaluate any plans submitted for their consideration. Therefore, the litigants could not compete with the Special Master’s plan.

either major party. In fact at least one polling organization has begun to combine the independents with the partisans for purposes of analysis: “Overall, it would have been possible to combine these two groups of ‘leaners’ into a single ‘independent’ category to contrast with Republicans and Democrats. But combining these two dramatically different groups would be misleading; these are two groups that have little in common with each other, and far more in common with self-identified partisans.” 29 Similarly, there continue to be more Democrats than Republicans amongst the independents: The balance of leaned partisan affiliation has changed little in recent years: 48% identify with the Democratic Party or lean Democratic, while 39% identify as Republicans or lean toward the GOP. Democrats have led in leaned party identification among the public for most of the past two decades. 30

Summary. Legislatures have historically been designated as the exclusive representative body to legislate on behalf of the people. Legislatures are organized to address complex and controversial topics through the deliberative process of legislation. The redistricting phase of reapportionment is such a topic. Legislators are the most knowledgeable persons in any state about the needs of all residents in all areas. If reform is needed the best long-term approach is to alter the rules and procedures of the legislative body and not to usurp this clear legislative function by creating an unaccountable fourth branch of government.

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