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## Redistricting and the Public Interest: Developing a Value-Explicit Dialogue

Amy B. Uden

Illinois Wesleyan University, [auden@iwu.edu](mailto:auden@iwu.edu)

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## **Redistricting and the Public Interest: Developing a Value-Explicit Dialogue**

Amy Uden  
Illinois Wesleyan University  
Honors Research  
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### *Abstract*

Throughout the coming year, legislators will take up the decennial responsibility of drawing new boundaries for legislative districts. Political scientists and practitioners often emphasize the profound impact of redistricting on political careers, process, and policy. However, the ultimate goals of redistricting remain controversial. Redistricting plays a large role in establishing the framework for American politics, and is thus directly linked to representation and the “public interest,” a contested theoretical concept. Using the lens of previous public interest theory, this study examines the historical redistricting dialogue through a content analysis of redistricting-related Supreme Court cases. By applying an analysis of Brian Barry’s ideal- or want-regarding classifications of the public interest, this research finds that methods of legislative redistricting have trended toward want-regarding concepts of the public interest. Bolstered by an analysis of contrasting redistricting policy in the neighboring states of Illinois and Iowa, this paper concludes with a call for a more value-explicit theoretical dialogue surrounding the process of legislative redistricting.

## *Introduction*

“The longstanding joke—although it’s based on an actual scenario—is that Springfield residents can play a game of golf on a course that runs through three different congressional districts.”<sup>1</sup> Perhaps it is a joke, but this news article’s statement is one that may not keep Illinois residents laughing in the upcoming redistricting cycle. At a time of severe partisan gridlock in Illinois, redistricting has huge stakes for the outcome of Illinois government. For the next year, redistricting in response to population shifts in the 2010 Census will be an important element of political conversations across the United States. As these conversations take place, policymakers will set forth expectations and principles pursuing differing schemes of redistricting. With this in mind, this research attempts to question redistricting principles regarding their relationship with several of the existing theories of the “public interest.” Using a scheme of public interest classification offered by Brian Barry, I discuss the theoretical framework for Illinois’ and other states’ redistricting processes. This study suggests that want-regarding or value-neutral theories of public interest have become dominant in the redistricting process. Since the public interest has multiple value-laden meanings, a more value-explicit and balanced dialogue between conflicting theories of public interest may help in creating improvements in this sharply contested process.

## *Background and Theoretical Framework*

Political scientists and practitioners emphasize redistricting because of its profound impact on both political careers and political process. One author comments, “because politics is a game of margins, changing the partisan outcomes of a few districts can sometimes have significant effects, at both the national and state levels.”<sup>2</sup> Redistricting is, by this logic, an important part of the political process, even if its goals are still widely controversial.<sup>3</sup> Mooney acknowledges that one fundamental issue with redistricting comes from there often being “No consensus on the criteria for assessing legislative maps.”<sup>4</sup> Since redistricting plays a large role in establishing the framework for the political game, it can be viewed as directly linked to the idea of “public interest.” Policy analyst Brian J. Gaines offers the beginning of a list detailing the

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<sup>1</sup> Jaeger 2009.

<sup>2</sup> Mooney 2011, “Legislative,” 120.

<sup>3</sup> Though some political scientists may disregard redistricting’s significance (see for example Thomas Mann), its potential contributions to incumbency advantage, which in turn may contribute to partisan polarization and weaken mechanisms of representation, make it a vitally important issue.

<sup>4</sup> Mooney 2011, “Legislative,” 122.

many normative questions raised by redistricting. “What is fairness in this context? Fairness to whom? Is it the process, the outcome, or both that should be held to some standards?”<sup>5</sup> If, indeed, these normative questions matter in redistricting, it may be considered one practical lens through which to examine the theoretical idea of public interest.

I propose that the public interest, a demonstrably elusive concept in redistricting, meets the criteria for being what W.B. Gallie calls an “essentially contested concept.” A large body of theoretical scholarship attempts to define public interest. Gallie offers four standards necessary to consider a concept essentially contested. He defines such concepts as appraisive, internally complex, variously describable or having various parts, and admitting of modification.<sup>6</sup> He demonstrates these qualities in such examples as “art,” “democracy,” and “social justice.” The difficulty with such contested concepts is that rational people can interpret them differently. This complicates applying principles derived from such concepts. When multiple ideals are the model for a single concept, its contested nature comes to the forefront. Many theorists link theories of justice with the concept of public interest, so extending Gallie’s criteria to public interest is not challenging.

Because many theorists link theories of justice with the concept of public interest, extending Gallie’s criteria to public interest is not challenging. The previously mentioned questions about redistricting and representation offered by Gaines suggest the appraisive quality of principles of public interest immediately. The “public interest” suggests an ultimate good or quality that is deemed worth pursuing. Its complexity comes from the competing standards held by those involved in defining it. The public interest has been taken to mean many things, be it the sheer aggregation of individual interests, or an abstraction separate from common interests of individuals. Although representative and public administrators often define their rationale in scenarios like redistricting as “public interest,” the term remains highly ambiguous. Paralleling public interest, redistricting also has a complexity that stems from the competing considerations practitioners must hold, including geography, party, race, and incumbency, among others. I intend in this research to demonstrate that the contested nature of redistricting may be derived from ambiguous understandings of the public interest which those engaged in redistricting

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<sup>5</sup> Gaines 2001, 6.

<sup>6</sup> Gallie 1956, 170-171.

pursue. My second aim is to use the strengths and weaknesses of the theoretical dialogue surrounding public interest to suggest potential guiding principles for legislative redistricting.

### *Research Design*

Within this framework, my method of theoretical research will be to engage the practice of redistricting through a theoretical structure designed by Brian Barry, which attempts to classify concepts of public interest. Barry's over-arching categorization of concepts of interest suggests that theories of public interest can be either "ideal-regarding" or "want-regarding."<sup>7</sup> Although his structure has limitations, it parallels other over-arching classifications provided in the literature, and is therefore useful. Barry's classification structure will serve as a tool throughout this research to order the discussion. For Barry, want-regarding classifications use individual preferences as the goal of public interest, and focus on the means to fulfilling those preferences, rather than the ends themselves. Alternatively, ideal-regarding classifications define an end goal or ideal associated with the public interest, and set out to pursue it in a value-oriented fashion. These classifications each have nuance which will be developed throughout the research. Upon demonstrating the public interest's contestation in legal and practical applications, this research will demonstrate how want- and ideal-regarding classifications give insight into the organization of public interest theory, and ultimately its applications in redistricting practice.

The materials for constructing this argument come from the opinions of Supreme Court justices, the statements of practitioners, and state constitutions and codes concerning legislative redistricting. I perform a content analysis to uncover the principled statements made in these different political settings. The Supreme Court opinions do have limitations because their language and decision-making are clouded with competing considerations of justiciability and questions of federalism. However, they still provide a unique representation not only of the principles prioritized by those deeply concerned with America's constitutional framework, but also of the shape of the public interest dialogue in the sphere of redistricting controversy over time. In *Baker v. Carr*, the foundational case for establishing redistricting justiciability, Justice Frankfurter espouses the perspective that "What is actually asked of the Court in this case is to choose among competing bases of representation--ultimately, really, among competing theories

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<sup>7</sup> Barry 1965, 38-39.

of political philosophy.”<sup>8</sup> David Ortiz’s paper “Got Theory?” similarly analyzes the statements of Supreme Court justices to uncover the theoretical bases of the positions.<sup>9</sup> My essay takes the same approach.

Finally, I focus particularly on the cases of Illinois and Iowa in examining content of practitioners’ ideas and state constitutional or legal frameworks, because they are neighbors that represent two of the extremes in distinct redistricting practices. Pragmatically, the choice of Illinois and Iowa is justifiable because of their obvious and distinct differences in the redistricting process. The two states embody very different principles, with Iowa aiming for the value of partisan fairness and Illinois leaving its partisan gridlock in the hands of chance. Illinois is one of the worst of states in terms of clear-cut criteria for redistricting. Iowa, in contrast, pioneered certain ideals of partisan fairness as early as the 1970s, and often plays the role of a benchmark for other states within the literature. Furthermore, Illinois and Iowa both experience partisan division, an important issue at hand which would not receive scrutiny with more single-party dominant states like Idaho. Finally, though different states may have different public interest standards, causing the case selection to limit what the principles of public interest discussed in redistricting, I intend the theoretical discussion here to be applicable in the context of any state.<sup>10</sup>

#### *Want-Regarding Principles of Public Interest*

As Barry defines want-regarding principles, they are “principles which take as given the wants which people happen to have and concentrate attention entirely on the extent to which a certain policy will alter the overall amount of want-satisfaction or on the way in which the policy will affect the distribution among people of opportunities for satisfying wants.”<sup>11</sup> Though Barry acknowledges utilitarianism as the ultimate example of want-regarding principles, his system provides opportunity for other classifications. Preference fulfillment becomes the ultimate in public interest. From this basic definition, one can derive the idea that want-regarding systems emphasize mechanisms for preference aggregation. When fulfillment of the most preferences for

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<sup>8</sup> 369 U.S. 186 (1962).

<sup>9</sup> Ortiz 2004.

<sup>10</sup> Redistricting reforms have also occurred in both Texas and California, following very different principles from those in Iowa. See Mooney 2011, “The good, the bad, the ugly.”

<sup>11</sup> Barry 1965, 38-39.

the most people guides public interest, processes used for aggregating these preferences also become important. Majoritarianism, by this estimation, also falls in line with Barry's want-regarding principles.<sup>12</sup> Strict majoritarianism sacrifices other ideals and preferences for the sake of a process which accumulates the preferences of the group. Although utilitarianism and majoritarianism provide two simple and well-known examples of different types of want-regarding conceptions of public interest, all theory that deals primarily with means, not ends, falls under this classification.

To apply want-regarding principles to redistricting, the "policy" in question is the formation of legislative district boundaries, and "want-satisfaction" would equate to the ability of voting individuals to contribute to a system that places their candidate of preference in a legislative seat, presumably allowing them to have a share in the policy benefits through representation.

#### *Evidence for Want-Regarding Redistricting Principles*

Because of this, preference-aggregating principles apply most basically to the redistricting dialogue of "one person, one vote." *Baker v. Carr* represents one of the foundational cases for the build-up of Supreme Court's holdings on redistricting.<sup>13</sup> In *Baker*, the Court went to new lengths of establishing the justiciability of redistricting cases. Significantly, at one point in his concurrence, Justice Douglas sets forth a logic about redistricting protections that speaks directly to the "one person, one vote" principle, using the Equal Protection Clause of the Fourteenth Amendment as his constitutional basis. He writes, "may a State weight the vote of one county or one district more heavily than it weights the vote in another? ... We are told that a single vote in Moore County, Tennessee, is worth 19 votes in Hamilton County... The opportunity to prove that an 'invidious discrimination' exists should therefore be given the appellants."<sup>14</sup> In acknowledging Equal Protection as a justification for justiciability, Douglas takes a step toward defining representation's intent. By establishing this principle, Douglas acknowledges a strand of American constitutional democracy, institutionally signified by the House of Representatives, which intends to protect preference by providing fair representation on an individual-by-individual basis. Although this reading of representation's purpose only

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<sup>12</sup> Barry 1965, 58.

<sup>13</sup> 369 U.S. 186 (1962).

<sup>14</sup> 369 U.S. 186 (1962)..

includes the House of Representatives, redistricting is here intended to give weight to the preference of all citizens, as a means to any ends.

A similar recognition of the roots of America's representation principles occurs in the case of *Wesberry v. Sanders*, in which the Court overturned a ruling that disproportionate population in legislative districts is acceptable. Justice Black, voicing the majority opinion, states "[i]t would defeat the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people—for us to hold that, within the States, legislatures may draw the lines of Congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others."<sup>15</sup> Black thereby describes a fundamental goal of the American constitution as equipopulousness for the districts involved in representation. The equal weighting of individuals implies a premium on simple aggregation of preferences in pursuit of public interest; this emphasis links Black's statements to Barry's want-regarding principles.

Justice Black argues that the difficulty of precise line drawing is "no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us."<sup>16</sup> Black's statement describes simply what he perceives to be the goal of the House as set forth by the Constitution. However, his statement that equipopulousness in representation is a "high standard of justice" reveals the consideration of principle he draws upon here. By recognizing the principles embedded in the Constitution, Black claims to find a mandate about representation. Black therefore theoretically emphasizes numerical representation above other normative considerations, and implies a focus on preference-aggregation as the primary principle at hand.

Justice Harlan's dissent in *Wesberry v. Sanders* also sheds a distinct light on the matter. Examining the constitutional framework, he writes, "All that there is is a provision which bases representation in the House, generally but not entirely, on the population of the States."<sup>17</sup> Harlan brings into the discussion the importance of level of aggregation, regarding states as the unit for federal preference aggregation. Again, however, the significance of population remains

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<sup>15</sup> 376 U.S. 1 (1964).

<sup>16</sup> *Ibid.*

<sup>17</sup> 376 U.S. 1 (1964).



undiminished. It appears that, by emphasizing “one person, one vote” principles, these justices suggest that representation in the House is intended to provide an unfiltered expression of the public’s preferences, aggregated on a one-to-one weight ratio.

In *Reynolds v. Sims*, a case in which the Court corrected severe malapportionment in the Alabama legislature, Chief Justice Warren reiterates the principle of vote weight in apportionment. Expressing the court’s opinion, he writes "if, even as a result of a clearly rational state policy of according some legislative representation to political subdivisions, population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all of the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired."<sup>18</sup> The Court here suggests that rights are impaired when population principles are submerged. It is assumed that the Court pursues the constitutional interpretation of such considerations as in line with the public interest. Under these circumstances, then, the Court prioritizes equality of representation, and therefore aggregation of preference, as the principle most at stake in pursuit of public interest through redistricting.

The dialogue about racial representation in Supreme Court cases began with the case of *Gomillion v. Lightfoot* in 1960, in which the Court struck down racial discrimination in Alabama urban districts.<sup>19</sup> The grounds for this decision came from the issue of race as a suspect category, rather than strictly redistricting-oriented concerns. However, the case worked to establish equipopulousness by preventing the dilution of votes based on race. Later race-based cases gave a different angle for want-regarding principle expression. For example, *Shaw v. Reno* continued to build upon the idea of race as a suspect category in redistricting. As race came more to the forefront, a family of cases reexamined racial discrimination in redistricting, of the variety that the Voting Rights Act of 1965 attempted to prevent, but was, instead, sparking. The creation of majority-minority districts had come into practice, which certain justices saw as allowing for potential vote dilution in the opposite manner. Justice O’Connor, in particular, espouses the opinion that strict scrutiny intended to uphold the ideal of racial equality can actually be detrimental to the pursuit of public interest. “Strict scrutiny would not be appropriate if race-neutral, traditional districting considerations predominated over racial ones," she comments in

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<sup>18</sup> 377 U.S. 533 (1964).

<sup>19</sup> 364 U.S. 339 (1960).

*Bush v. Vera*.<sup>20</sup> Furthermore, she suggests that "we must strive to eliminate un-necessary race-based state action that appears to endorse the disease..."<sup>21</sup> Redistricting considerations that go so far as to posit racial identity as a primary consideration, rather than simply preventing racial discrimination, seem to go too far, according to Justice O'Connor's analysis. From this "color-blind" perspective, population, rather than group voice, receives emphasis. Both the equipopulousness and racial neutrality cases thereby fall in line with an even preference-aggregating principle. In this manner, the rulings of the Court contain instances in which want-regarding or preference-aggregating principles serve as the primary source for public interest considerations in the redistricting process.

### *Problems with Want-Regarding Theory*

Given this evidence for want-regarding principles in practice, Barry's theoretical issues with want-regarding principles must also be addressed. As mentioned previously, Barry points out that different want-regarding theories can have different distributive methods, but are want-regarding ultimately because they prioritize want-satisfaction. Their distinctive feature is that they hold no want as more desirable to be satisfied than others, though they may have different distributive functions.<sup>22</sup> Satisfaction or happiness, rather than excellence, are the objective.<sup>23</sup> Barry takes issue with the question, however, of *whose* pleasure is to be attained. Interpersonal comparisons and the concept of need each point to an exterior standard for judgment. Additionally, as in the case of Pareto optimality, want-regarding principles often treat "wins" and "losses" inconsistently, since preference fulfillment is only desirable when it is a "win" for all, rather than a "win" for some and a "loss" for others.<sup>24</sup> Barry's basic point in the logic of each of his critiques is that want-regarding theory does not suffice in deciding whose gain should be pursued.

To add to these problems, Connolly brings to the table the suggestion of appraisive, or normative, concepts in political discourse. He picks up the thread of Gallie's "contested concepts" and names several concepts that do not acquire full meaning when used only as

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<sup>20</sup> 517 U.S. 952 (1996).

<sup>21</sup> 517 U.S. 952 (1996).

<sup>22</sup> Barry 1965, 39.

<sup>23</sup> *Ibid.*, 41.

<sup>24</sup> *Ibid.*, 43-52

descriptors.<sup>25</sup> Moral concepts include those such as “grievance” and “lie.”<sup>26</sup> The key to this argument comes in the statement, “If we subtracted the moral point of view from any of these concepts, we would subtract as well the rationale for grouping the ingredients of each together within the rubric of the concept.”<sup>27</sup> The self-contained concept of “public interest” arguably has these key elements of what Connolly calls a moral concept, because it is strongly tied to common good, and through distributive mechanism issues, to justice.

Up to this point, I have closely linked the concepts of public interest and justice with little explanation. To clarify, I see these concepts as interrelated for the following reasons. When pursuing public interest, the well-being and preference of more than one individual is at stake. Some standard for determining which well-being ought to be pursued in instances of conflict is necessary. It is this standard that theorists discuss as justice, and conflicting definitions for it are many. At minimum, we often discuss the importance of transparency, consistency, and desert as part of this standard. Each of these concepts therefore belongs to a cluster formed around the idea of justice. In this cluster concept, we link a more descriptive concept like “consistency,” or uniform application of a standard, with the idea of “desert,” a much more value-laden term that hints at righteousness. This definitional process would not make sense if the normative aspect of justice were to be removed. Since justice is implicit in the idea that a single “public interest” may be determined when conflicting well-beings exist, public interest takes on these normative characteristics as well.

Following a similar vein of logic, Barry himself acknowledges that “interest” may not simply be a want-regarding concept.<sup>28</sup> Upon carefully defining his terms, he suggests that “want” and “interest” are not necessarily the same, based on the idea that humans often desire that which will not ultimately benefit them. Distinguishing between wants and interests gives “interest” a more principled flavor. Barry also returns to difficulties of social aggregation during this portion of his argument. “Whose need (welfare being the end) is the greatest?”<sup>29</sup> In this way, even when material welfare (or the ability to pursue it) serves as the end goal, in a seemingly want-regarding fashion, Barry suggests that a higher principle is at stake. This mindset can be

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<sup>25</sup> Connolly 1974, 26.

<sup>26</sup> Ibid., 26-27.

<sup>27</sup> Ibid., 27-28.

<sup>28</sup> Barry 1965, 178.

<sup>29</sup> Ibid., 47.

identified throughout political science literature. Even in the work of a giant in rational choice theory such as William Riker, principles for engaging in want-aggregation prove important. At one point, Riker acknowledges that, when choosing among aggregating mechanisms such as majoritarianism, populism, and utilitarianism, an ethical decision is at stake.<sup>30</sup>

Another case which highlights want-regarding difficulties is Sandel's analysis in *Justice*. Sandel similarly questions the lack of ranking of preference distinguishing in the want-regarding principles behind Mill's utilitarian theory of justice. He explains one of the chief objections to utilitarianism, that is, that some pleasures seem of higher worth or value in our perception. He notes that Mill distinguishes "between higher and lower pleasures—to assess the quality, not just the quantity or intensity, of our desires" through the principle of the greater preference being preferred by the most people.<sup>31</sup> Sandel finds, though, that perhaps this rule does not match up with the way we perceive pleasures as higher than others, exemplified in common perceptions of sitcoms versus the opera.<sup>32</sup> Most basically, Sandel's analysis suggests the importance of weighting in preference aggregation.

Evidence of the inadequacy of pure preference-aggregating principles also surfaces in the wording of Supreme Court opinions. For instance, at the same moment in which Justice Douglas supports the importance of individual vote weight in representation, he tempers his opinion with the following statement: "Universal equality is not the test, there is room for weighting."<sup>33</sup> In this comment, he allows that equipopulousness or majoritarianism, perhaps the purest preference-aggregators may require further principles for prioritization or preference weighting, depending upon the values at stake. This initial example suffices to suggest that concerns also exist in the legal framework regarding a standard or value for preference aggregation. A simplistic want-regarding principle alone seems to create potential for an inadequate and indeterminate framework for the consideration of the public interest.<sup>34</sup> In this way, Barry's classification helps organize the discussion of public interest principles and their flaws, which may shed light on the redistricting dialogue and its potential successes in pursuing public interest.

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<sup>30</sup> Riker 1982.

<sup>31</sup> Sandel 2009, 53.

<sup>32</sup> Sandel 2009, 54.

<sup>33</sup> 369 U.S. 186 (1962).

<sup>34</sup> Elster 1989.

### *Ideal-Regarding Principles of Public Interest*

In contrast to want-regarding principles, some theorists point to other concepts of the public interest that Barry groups together under the classification of “ideal-regarding.” For Barry, ideal-regarding principles are those which aspire to a standard aside from individual preference. Preference aggregation is not the only goal of policy, but instead preferences may even be laid aside in pursuit of a common standard. Barry acknowledges the existence of public interest as distinguishable from strictly individual preferences. He suggests that his purpose is “examining some examples of contexts in which ‘the public interest’ is often used and trying to show that in these contexts to say ‘x is in the public interest’ has a fairly clear meaning and is by no means equivalent to nothing more precise than ‘I favour x.’”<sup>35</sup> This framework suggests first, that Barry sees the public interest as a real and distinct concept, and second, that it has a meaning outside of “want,” or even “collective want.” Barry defines *want* and *interest* as separate, but also feels that interest can be considered in the aggregate, based on common interests of a community.<sup>36</sup> Ideal-regarding principles, according to Barry, are the “contradictory of the want-regarding theory.”<sup>37</sup> Barry provides examples of several deviations from want-regarding, such as altering the preference ranking of an individual’s wants, or decreeing certain want satisfactions to be of no value at all.<sup>38</sup> When engaging in these deviations, Barry suggests that a value is at stake. An interesting example Barry gives is that of humane treatment of animals. Because animals’ wants can not necessarily be determined, when societies hold this principle, it seems to be based on a value or ideal, not simply an aggregation of wants.<sup>39</sup>

Sandel gives a more detailed description of such contestation when he says that the pursuit of justice can aim for one of three ends: “maximizing welfare, respecting freedom, and promoting virtue.”<sup>40</sup> As discussed, welfare-maximization is linked to want-regarding theory. Barry summarizes this point in the words, “A person’s interests are (roughly) advanced when his opportunities to get what he wants are increased.”<sup>41</sup> Material welfare opens up opportunity

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<sup>35</sup> Barry 1965, 207.

<sup>36</sup> Ibid., 178-186, 202.

<sup>37</sup> Ibid., 39.

<sup>38</sup> Ibid., 40.

<sup>39</sup> Ibid. Of course the humane treatment of animals case can be redescribed, as Kant did, as want regarding in that it provides evidence for humane treatment of humans, but this redescription is not universal.

<sup>40</sup> Sandel 2009, 6.

<sup>41</sup> Barry 1965, 216.

structures, and thereby falls into the want-regarding camp. On the other hand, Sandel's discussion demonstrates the other two principles at stake in the question of justice are ideal-regarding. Respect for individual freedom as an end in itself, exemplified by the libertarian line of reasoning, as well as promotion of virtue in the Aristotelian manner, both pursue ideal standards. Both suggest that the pursuit of public interest requires some definition of a normative goal as a standard for just decision making. Exterior value-related standards imply a principle beyond want-regarding or preference-aggregating principles, and therefore serve as a response to the inadequacies of want-regarding theory.

Since ideal-regarding theory brings public interest into the normative realm, which will have implications for concepts such as "fairness" in the redistricting process, it becomes important to define a benchmark for the theoretical conception of fairness here in use. In this research, I tend toward a concept of fairness that emphasizes transparency as a minimum standard. Though I find theorists such as Kant and Rawls somewhat unsatisfying in terms of a complete and universal theory, it seems that transparency, while it is an ideal that allows strategic behavior, gives a minimum starting point for just action.<sup>42</sup>

A final important difference between ideal-regarding theory and want-regarding theory exists. Ideal-regarding theory cultivates a very different mentality from want-regarding theory. Elster points this out with the suggestion that values can be treated instrumentally or non-instrumentally. For instance, Elster comments on the concept of "equality," which can be held up as either a means or an end.<sup>43</sup> Want-regarding principles, if they acknowledge equality, might do so for the purpose of allowing maximum want-satisfaction. Ideal-regarding principles instead suggest that equality ought to be pursued as an end in itself. Because of this distinction, they provide a separate classification that may also assist in developing the relationship between redistricting and the public interest.

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<sup>42</sup> This research, of course, will not be able to encompass the depths of the concept of fairness or of justice theory. However, this minimum standard is a starting point. Transparency has appreciable qualities as a defining characteristic of fairness because it allows variety and nuance, yet gives parties the opportunity to reach balance in conflicts. Michael Sandel voices another interesting theory of justice with thick and nuanced characteristics in his idea of taking individuals' complete stories of association into account while engaging in decision-making.

<sup>43</sup> Elster 1989.

### *Evidence for Ideal-Regarding Principles*

With this definition in mind, I turn to evidence for ideal-regarding perspectives in the judicial and administrative spheres. First, an essay by Carol W. Lewis, written for public administrators, suggests principles which must be sought after to attain the public interest or public good. She sees “democracy, mutability, sustainability, and legacy” as the principles at stake.<sup>44</sup> These values deal with normative concepts such as individual liberty and “self-evident truths,” along with more descriptive and want-regarding ideas such as preference balancing. This hierarchy of principles guides public administrators’ preference pursuit. Lewis’s article is fraught with language of “duty,” somewhat typical of a form of public service. She suggests that “It is in the mutual-interest realm of public interest...that *ethical* norms, especially justice and benevolence, are added to democratic obligations.”<sup>45</sup> Such a frame of thinking in the public administration literature suggests that the public interest can certainly be seen through a value- or ideal- oriented perspective.

Moving from this to the evidence of Supreme Court opinions, we again enter the redistricting conversation. Ortiz points out that beginning with the early case of *Colgrove v. Green*, Justice Frankfurter recognized that for the Court to rule on malapportionment cases would indeed be to make a statement about theoretical bases of representation.<sup>46</sup> After this, the Court progresses to the principle of racial equality in representation. Starting with *Gomillion v. Lightfoot* and Justice Frankfurter’s opinion, redistricting plans were not permitted to engage in racial discrimination, which can be considered an ideal. As Frankfurter notes, “[i]n no case involving unequal weight in voting distribution that has come before the Court did the decision sanction a differentiation on racial line whereby approval was given to unequivocal withdrawal of the vote solely from colored citizens.”<sup>47</sup>

As established, racial lines were deemed suspect from early on in the legal dialogue on redistricting. Because the ideal of racial equality may also be simply traced back to want-regarding principles, racial equality may or may not fall under ideal-regarding classification. An additional complication stems from the fact that race is suspect under constitutional grounds not necessarily linked to redistricting and representation, as Frankfurter points out in later in *Baker v.*

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<sup>44</sup> Lewis 2006, 694.

<sup>45</sup> Lewis 2006, 697.

<sup>46</sup> Ortiz 2004, 465.

<sup>47</sup> 364 U.S. 339 (1960).

*Carr*. He expresses the opinion “rulings...thus cast aside reflected the equally uniform course of our political history regarding the relationship between population and legislative representation—a wholly different matter from the denial of franchise to individuals because of race, color, religion, or sex.”<sup>48</sup> Again, however, preventing disenfranchisement along racial lines is a different matter from the Court’s later cases addressing minority-majority districts, in which some justices supported giving extra weight in the electoral process to certain racial groups by allowing minority-strong districts. Proactively bolstering racial minorities’ representation pursues a value beyond that of simple preference aggregation.

While race may therefore have ambiguous strength as evidence for ideal-regarding principles in the redistricting dialogues, the contested nature of public interest does continue to surface. Recall Justice Frankfurter’s theory-based rationale in *Baker*: “[w]hat is actually asked of the Court in this case is to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy.”<sup>49</sup> Although *Baker* is remembered because it established the justiciability of redistricting, Justice Harlan’s dissent adds other standards, those geography and chance, to the mix. “[S]urely it lies within the province of a state legislature to conclude that an existing allocation of senators and representative constitutes a desirable balance of geographical and demographical representation, or that in the interest of stability of government it would be best to defer for some future time...”<sup>50</sup> Geographical and demographical considerations in redistricting could produce a result where redistricting’s impact on representation does not simply allow for simple aggregation.

As court cases move forward in time, the dialogue continues to add acceptable considerations of ideal-regarding principles. *Davis v. Bandemer*, for example, upholds both the ideals of political fairness and eliminating minority advantage.<sup>51</sup> White writes, “attempts to distinguish this political gerrymandering claim from the racial gerrymandering claims that we have consistently adjudicated demonstrates the futility of such an effort.”<sup>52</sup> In doing so, he extends the dialogue past “suspect” characteristics and equipopulousness, into more explicitly value-regarding questions. Having extended the basis of public interest toward political fairness

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<sup>48</sup> 369 U.S. 186 (1962).

<sup>49</sup> 369 U.S. 186 (1962).

<sup>50</sup> 369 U.S. 186 (1962).

<sup>51</sup> 478 U.S. 109 (1986).

<sup>52</sup> *Ibid.*



adds more evidence of ideals to the redistricting debates in Court decisions. Occupation and urban-rural considerations are listed in Justice Harlan's dissent in *Reynolds v. Sims* as principles of theoretical and practical politics that must be available for consideration in redistricting.<sup>53</sup> In *Gaffney v. Cummings*, Justice White solidifies the validity of political considerations in redistricting. He expresses the opinion, "It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it."<sup>54</sup>

To bring the legal debate up to the contemporary realm, in *Veith v. Jubelirer* in 2004, the Court dismissed a political gerrymandering claim based on the Equal Protection Clause. Significantly, Justice Kennedy allows that principles defining fairness should exist in redistricting, but are indefinite. He comments, "When presented with a claim of injury from partisan gerrymandering, courts confront two obstacles. First is the lack of comprehensive and neutral principles for drawing electoral boundaries. No substantive definition of fairness in districting seems to command general assent."<sup>55</sup> From equipopulousness, to racial equality, to partisan fairness, ideals and normative principles surface throughout the rhetoric of redistricting in this sampling of Court opinions.

### *Problems with Ideal-Regarding Principles*

As with want-regarding principles, Barry and other theorists acknowledge important problems with the ideal-regarding perspective. Although critics of want-regarding theory point to the ideals that lurk behind aggregation, in an opposing vein, want-regarding theory can also be perceived as capable of subsuming ideal-regarding theory. Want-regarding theorists would counter the ideal-regarding by noting that maintenance of an ideal is simply another individual preference, which can be aggregated with all others. Statements such as those of Justice Black in *Wesberry v. Sanders* show how fine a line exists between want-regarding and ideal-regarding theory. "No right is more precious in a free country than that of having a voice in the election of those who make laws..."<sup>56</sup> Just as "a voice" can be construed as a precious right, it can also be

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<sup>53</sup> 377 U.S. 533 (1964).

<sup>54</sup> 412 U.S. 735 (1973).

<sup>55</sup> 541 U.S. 267 (2004).

<sup>56</sup> 376 U.S. 1 (1964).

simply a mechanism of preference expression through the medium of elections. Citizenship may be an ideal or a mechanism, depending on one's view of instrumentality as.

Barry exposes further arguments against the use of ideal-regarding principles in politics. He suggests that a state's greater means of power can be used coercively or manipulatively, and therefore pursuit of specific values through the state should be treated cautiously.<sup>57</sup> On the other hand, want-regarding principles may use value inculcation as an acceptable means for increasing want satisfaction, which also has dangerous implications. "On the want-regarding theory, then," he writes, "the only bad manipulation is unsuccessful manipulation."<sup>58</sup> Some ideal may be required to prevent this attitude toward values in politics. Though Barry continues to acknowledge that some feel ideals are irrelevant in politics, he prefers not to reduce them to a special case of "publicly-oriented wants," instead suggesting that values have their own merits.<sup>59</sup> Barry goes on to point out further difficulties with the use of the state in enforcing ideals. To some extent, Barry sees a problem with effectively defining and conveying ideals through the mechanism of the state.<sup>60</sup> However, he also acknowledges states' possible inability to do otherwise, that is, to be value-neutral. He examines the cases of effective aggregative and distributive mechanisms and finds that ideal-regarding rules tend to mesh with our perception of "fairness" more frequently.<sup>61</sup>

In each of these acknowledgements, issues with ideal-regarding principles surface. These can be summarized as a) the fact that ideals may be considered only one specific variety of want and thereby subsumed into want-regarding theory, b) that ideals are difficult to define and distinguish in politics, and c) that state-enforced ideals may not be desirable. However, Barry effectively counters each of these claims at some point. The tension this creates in his ideas has also been suggested by Supreme Court redistricting cases. Both of Barry's classifications seem to contain logical issues that suggest a muddy line between the two.<sup>62</sup> Why, then, is such a dichotomy useful?

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<sup>57</sup> Barry 1965, 70.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid., 72.

<sup>60</sup> Ibid., 74.

<sup>61</sup> Ibid., 81-82.

<sup>62</sup> Some theorists capture this difficulty with the terminology of first- and second-order preference. First order preferences are the ends, and second-order preferences the means, that are referred to in this discussion. Alternatively, first-order preferences may be associated with the "standard" or "value" in ideal-regarding theory,

### *Stages of Representation*

Perhaps the most helpful way of applying Barry's classifications of public interest is to look to the structure of the American Constitution itself, as far as representation is concerned. In Justice Black's opinion, *Wesberry v. Sanders* links the discussion to the foundational structure of the American Constitution. Black legitimizes a split concept of democracy. In the fabric of America's distinct House and Senate, the Constitution provides for the equality-based concept of justice, which can be equated to want-regarding conceptions, as well as a more value-laden concept, epitomized by the Senate.<sup>63</sup> The insights of the founders in setting up representation in this way were intended to balance different theories regarding public interest. Both of these theories seem present in the question of redistricting. I acknowledge Barry's dichotomy in an effort to energize the discussion by "calling for a politics of multiple constitutive stories..."<sup>64</sup> For this reason, upholding both sides of Barry's dichotomy of want- and ideal-regarding, though thereby strengthening the "essentially contested" nature of the term public interest, may be important to understanding the redistricting dialogue in a way that echoes the representation scheme implicit in American institutions.

To the complexities of American representation, redistricting adds the difficulty of being both a "rules of the game" stage in the political process, the fought-for prize of partisan contestation, and an important issue both for who gets elected and who gets a voice. In other words, redistricting's particular role in public interest theory is a difficult one, because redistricting can be seen as both constitutive and mechanistic in its influence on how representation works. By constitutive, I mean essential to the defining of the political arena. By mechanistic, I mean a phenomenon with a role in that political process once it is established. The stage of the redistricting process being considered may change application of theories of public interest. For instance, Brian J. Gaines discusses the idea of partisan fairness both in terms of process and outcomes of redistricting.<sup>65</sup>

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toward which second-order preferences work. Utilitarian theory, for instance, would call these first-order preferences the prior commitments on the basis of which aggregation takes place. This vocabulary again reinforces the way that want-regarding theory can subsume the category of ideal-regarding principles.

<sup>63</sup> 376 U.S. 1 (1964).

<sup>64</sup> Smith 2003, 15; This idea echoes Rogers M. Smith's commentary on the very different topic of nationalism versus universalism, but the multiple stories idea seems relevant to contestation.

<sup>65</sup> Gaines 2001, 6-8.

Similarly, Guinier develops the complexity of representation in her examination of racial-majority districts' ineffectiveness in providing real representation for minorities. Simply getting representatives of a certain race into a legislative body, by her analysis, does not suffice for having their wants and interests represented in that body. In fact, minority stacking districts may dilute minority power by assuming that one or two representatives in a legislature will have real influence, where in reality, they can easily be removed from the decision-making process.<sup>66</sup> Guinier notes that representatives are meant to be a voice for those they represent at the second and even third stages of the decision-making process.<sup>67</sup> Representation's importance goes beyond dispute during election time. Justice White picks up this strand of reasoning in *Davis v. Bandemer* by stating that "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."<sup>68</sup> Although redistricting's real influence on political process brings up many additional layers of complexity beyond the scope of this research, it serves to suggest the complexity of relating public interest to representation.

### *Revisiting Want-Regarding Principles*

Because of these complexities, critics may suggest that I do not give fair definition to Barry's concept of want-regarding principles. Want-regarding theory has been deemed coherent and served as the basis for many empirical strains of political science. Even when suggesting that want-regarding theory fails to produce rationality, Elster acknowledges that it has a certain coherence.<sup>69</sup> The various steps in the redistricting process may assist in explaining Barry's want-regarding principles with more nuance.

Want-regarding theory, though I have previously associated it most explicitly with utilitarianism, also satisfies as a classification for a more Hobbesian perspective. Hobbes states that agreement to a legitimate political order does not require substantive agreement on principles, but rather sees the state as a mechanism simply for the coordination of getting out of the state of nature. Definition of end principles does not necessarily matter. Similarly, rational

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<sup>66</sup> Guinier 1994.

<sup>67</sup> Guinier 1994.

<sup>68</sup> 478 U.S. 109 (1986).

<sup>69</sup> Elster 1989.

choice theory does not necessitate having an end goal in mind, but seeks to explain only how decisions are made. For instance, Anthony Downs notes that the term rational is “never applied to an agent’s ends, but only to his means.”<sup>70</sup> Majoritarians and game theorists alike advocate examining only the preferences of individuals and how they determine decision-making, rather than looking at the end they achieve. To add to this strange mix of want-regarding theorists, American pluralists of the 1960s and 1970s, though they look at different mechanisms, had similar ideas about the lack of need to define an end goal in politics. Dahl, a pluralist early in his career, believed that groups would form naturally to engage in preference expression, and the only matter of concern is that enough of a proliferation of factions comes into account that no preference will be suppressed by another majority group’s voice. This exploration of less obvious proponents of want-regarding theory thus captures several very divergent groups of theory.

An interesting application of game theory to redistricting comes from the work of Gilligan and Matsuka in “Public Choice Principles of Redistricting.”<sup>71</sup> When Gilligan and Matsuka attempt to apply rational choice theory to districting scenarios, they assume that the function of districting is to provide a mechanism for the appointment of a representative who expresses the mean voter’s preference. They note that majority rule is “a central value of democracy.”<sup>72</sup> Reducing gerrymandering bias and the accompanying bias in policy is, for them, the chief concern of the districting process. The goal throughout their work is not, however, expressly to negate “harmful” gerrymandering bias. They write, “We believe our theory provides the first justification for traditional districting principles that is not essentially negative in nature, namely that it tends to deliver majority outcomes.”<sup>73</sup> Here we see that game theory’s goal for the redistricting process is to find an unbiased means for preference aggregation. Although Gilligan and Matsuka examine policy outcomes, not only partisan electoral results accompanying gerrymandering, they still work under a want-regarding framework of assumptions.

Critics of want-regarding theory have surfaced in several theoretical camps in the epistemological dialogue of political theory. To begin with, institutionalists critique pluralists’ principles of interest group want-aggregation. E.E. Schattschneider, for example, recognizes the

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<sup>70</sup> Downs 1957, 7.

<sup>71</sup> Gilligan and Matsuka 2006.

<sup>72</sup> *Ibid.*, 382.

<sup>73</sup> *Ibid.*, 383.

difficulty of mobilization for those groups with less capability to form alliances and expand the scope of conflict, indicating that institutions are required because of pluralism's inadequacies.<sup>74</sup> Theodore Lowi, on the other hand, argues that institutional structures have developed in the modern era to allow agencies to be captured by interest groups in the administrative process. Because of this, he suggests that more explicit definition of standards is necessary.<sup>75</sup>

In contrast to this variety of critiques, the normativist side of ideal-regarding theory, including those with an Aristotelian perspective, call for teleological, value-based definitions of public interest and principles of representation associated.<sup>76</sup> This manner of thought goes against the prevailing theoretical perspectives of our era because of the perceived difficulty of agreeing on values that Barry suggests, but is also worth noting. While strong motivations for desiring value-neutrality exist so that majority preference will not be stifled, game theory and other such want-regarding principles ignore ideals implicit in the assumptions surrounding their analyses.

A compelling articulation of a critique of want-regarding theory that varies slightly from each of these camps comes from Eugene Bardach in "On Representing the Public Interest." Bardach argues that, in fact, the relationship between interest groups and policy is reversed, in that policy drives the formation of interest groups and where they spring up.<sup>77</sup> The base line for Bardach's definition of interest is "a phrase that certainly can and should be used to describe policy outcomes (1) which everyone would agree were desirable, and (2) which were available at a price that all interests were willing to pay if only they could coordinate their moves."<sup>78</sup> In light of this basic definition, want-regarding theory seems to fit with Bardach's understanding. However, Bardach feels that a commonly held understanding is that interest is more than this. He refers to the way in which "we so often feel disgruntled at the unwillingness or the inability of particularistic interests to make sacrifices for the common good."<sup>79</sup> Bardach suggests that, implicit in this sentiment is the idea that some "interest" separate a simple aggregation of individuals or groups.

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<sup>74</sup> Schattschneider 1960.

<sup>75</sup> Lowi 1979.

<sup>76</sup> Sandel 2009.

<sup>77</sup> Bardach 1981, 487.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

The difficulty here lies in reconciling the priorities involved in different groups' conceptions, and also in discovering an effective way to actually represent different partisan points of view. Though he lays out that "Any theory of how best to represent the public interest, therefore, must accommodate a scheme of multiple and conflicting interests pressing for the victory of their own particular conceptions of what is *more* in the public interest than rival conceptions."<sup>80</sup> Bardach points to redistricting as one approach among many for achieving representation, but leaves us with the ambiguous idea of a "fairness criterion" for representation. I would argue that the important points to take away from Bardach's analysis of the public interest is that even subtle want-regarding theories may have hidden ideal-regarding assumptions. Bardach supports this with the idea that an abstract ideal of interest apart from preference exists, and we as a society often call for interests to be put aside for this end. He further states that that some ideal of fairness is a part of this concept and that since preferences can be shaped by policies, predetermined assumptions and rules of the game ought not to be ignored in the pursuit of the public interest. Evidently, depending on the assumptions and institutions involved, various concepts of the public interest can be developed. While a thicker understanding of want-regarding principles adds strength to its argument, it also adds nuance to the opportunities for its critics.

#### *A Dialogue that Admits Modification*

The previous sections provide further justification that principles behind the public interest in redistricting fit Gallie's standards of being appraisive, internally complex and variously describable. This next section demonstrates that the concept of public interest is also one that admits modification, the fourth of Gallie's conditions. In the matter of redistricting, questions that have come before the Court concerning redistricting and public interest all seem to track into one of several dialogues. For the Supreme Court, the redistricting dialogue passes from the Court declining to acknowledge justiciability and refusal to stake out a theoretical stance, as in *Colgroves v. Green*, to its decision to enter the political thicket and the more complex theoretical statements by the Court in later cases.<sup>81</sup> Once *Baker v. Carr* established the

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<sup>80</sup> Ibid., 489.

<sup>81</sup> Ortiz 2004.

justiciability of redistricting cases, the ability to define principles surrounding the public interest passed from the hands of the legislature alone to those of the Court as well.

At this point, a contribution by John Rawls may assist in clarifying the fluid dialogue about redistricting. As Rawls discusses different ideas of justice, he distinguishes between overall concepts of justice and specific conceptions of justice which prioritize one or more concepts. For Rawls, a concept of justice is an overall balance between competing claims, whereas conceptions of justice are related principles for identifying considerations relevant to this balance.<sup>82</sup> Similarly, many of the ideas used as examples of different principles of public interest can be considered “conceptions,” or principles relevant to determining the balance of public interest. With this language of “conceptions” of the public interest, we can more readily engage the different points of this modifiable discussion.

The first conception of redistricting cases address is that of equipopulousness. *Wesberry v. Sanders* overturned disproportionality in congressional districts based on political grounds. A series of cases following this attempted to tighten the standards of population ratios for various types of districts. Key cases for this development included *Baker v. Carr*, *Reynolds v. Sims*, and *Lucas v. 44<sup>th</sup> General Assembly of Colorado*, the combination of which resulted in the firm establishment of the principle of “one person, one vote” through the Equal Protection Clause of the 14<sup>th</sup> Amendment.<sup>83</sup> In these cases, the language of vote “dilution” was prominent.<sup>84</sup> Although in *Karcher v. Daggett*, the Supreme Court indicated that a consistently applied policy such as compactness or respecting municipal boundaries might outweigh equipopulousness, in practice it has become the benchmark for a redistricting plan’s overall approval.<sup>85</sup>

Following the establishment of the equipopulousness principle, the redistricting legal dialogue underwent a reframing. The question of racial representation having been deemed an important component of the pursuit of public interest at the time, redistricting issues arose out of the legislation meant to pursue this goal. At this point, due to the Voting Rights Act of 1965, race became the predominant issue. Initially, in cases like *Gomillion v. Lightfoot* race was a category requiring strict scrutiny for its use in redistricting, especially in the South, because minority groups were being disadvantaged in gerrymandering claims. Constitutional rights here

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<sup>82</sup> Rawls 1971, 10.

<sup>83</sup> Mooney 2011, “Legislative,” 121.

<sup>84</sup> 376 U.S. 1 (1964).

<sup>85</sup> 462 U.S. 725 (1983), in Cook 2007.



were shown to supercede states' redistricting rights. The lack of validity of districting schemes disadvantaging racial minorities became a norm. Later, as demonstrated above, race was used instead to privilege minority districts, and thus affirmative redistricting, or unfairly advantages minorities, became an issue. . Cases such as *Shaw v. Reno*, *Miller v. Johnson*, and *Bush v. Vera* clustered around this issue. At that point, the reverse discrimination of minority-majority districts came into question, and O'Connor's previously mentioned concerns about racial blindness come into play. The dialogue is solidified in this trend, coming to the other end of the spectrum, by O'Connor's questioning statements like the following: "we must strive to eliminate un-necessary race-based state action that appears to endorse the disease..."<sup>86</sup> This statement implies a fading desire to use racial representation as a protection for racial minorities, and a new variant on public interest coming to the forefront.

White says in *Davis v. Bandemer* that "attempts to distinguish this political gerrymandering claim from the racial gerrymandering claims that we have consistently adjudicated demonstrates the futility of such an effort."<sup>87</sup> In this statement, we see that *Davis v. Bandemer* links the race-based redistricting dialogue to another concept within the idea of public interest—partisan fairness. Partisan gerrymanders that do not produce unequal district populations, yet still may disadvantage members of one party or another, were here called into question in the context of the Indiana legislature. Partisan competition's role in pursuit of the public interest still remains a substantially unanswered question. Most recently, in *Vieth v. Jubelirer* in 2004, the Supreme Court affirmed a district court's decision to dismiss an Equal Protection claim based on partisan gerrymandering.<sup>88</sup> Justice Kennedy's concurring opinion in the case also included the statement, "I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases."<sup>89</sup>

Conversely, in announcing the opinion of the Court in *Veith*, Justice Scalia differentiated between race-based cases and partisan districting. He stated, "Moreover, the fact that partisan districting is a lawful and common practice means that there is almost *always* room for an election-impeding lawsuit contending that partisan advantage was the predominant motivation;

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<sup>86</sup> 517 U.S. 952 (1996).

<sup>87</sup> 478 U.S. 109 (1986).

<sup>88</sup> 541 U.S. 267 (2004).

<sup>89</sup> *Ibid.*

not so for claims of racial gerrymandering.”<sup>90</sup> In this statement Scalia again distinguishes the suspect category of race from that of partisanship. Being constitutionally bound, the Court cannot articulate a concept of the public interest that goes beyond textual support. In this issue, while race can be considered as suspect, party is fundamentally a part of the political process, leaving its appropriate role in redistricting much more ambiguous. Overall, it would seem that a principle of justice that is better-suited to deal with partisan gerrymandering is still lacking, but desired.

As evidenced by this brief survey of Court issues regarding redistricting over time, different conceptions of the pursuit of public interest have played in and out of the question of redistricting. Looking at the complete Court conversation enables us to synthesize instances of ideal- and want-regarding principles into a cohesive picture of how the Court has viewed redistricting.<sup>91</sup> Certain conflicts, such as equipopulousness and race, have passed out of currency throughout the history of redistricting controversy. These conflicts have taken on both want-regarding and ideal-regarding characteristics. From this discussion, we see that partisan fairness seems to be the conflict currently at stake, as the number of states with limitations on redistricting partisanship increases slowly. Based on the Court’s own limitations in staking out ideological claims, partisan fairness claims prove much more difficult to adjudicate, because they represent an ideal not stated in the Constitution. Accordingly, though the Court has gone far too make certain principles into Constitutional norms, the Court has moved into a position of difficulty between want- and ideal-regarding principles, since current issues like partisan fairness are much less agreed upon. Regardless, the intriguing shift the Court takes in making

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<sup>90</sup> Ibid.

<sup>91</sup> A brief caveat regarding the constrictions placed on the Supreme Court: The Court is bound by judicial restraint, considerations of federalism, and limitations of allowing legislative control over the representative process. Ortiz emphasizes this point, summarizing the Court’s difficulty in *Baker v. Carr* in the words that “No matter how certain the Court is that a particular theory of equality, representation, or political behavior is right, the argument goes, it should nonetheless refrain from striking down conflicting arrangements, because doing so would displace the state’s own choice among competing and acceptable political theories.” It is therefore not difficult to see the motivation behind the conflicting tendencies of want and ideal-regarding principles on the Court. As Bardach might suggest, the Court engages in negating practices that interfere with want-regarding aggregation, as in *Shaw v. Reno* or other cases of racial gerrymandering. Even in cases where an ideal such as racial equality guides the Court’s pursuit of public interest, in redistricting questions, the Court only acts to ensure that policy bias will not be inflicted by gerrymandering or by the creation of districts that do not follow the “one person, one vote” principle. Ideals, if they are at stake, are seen as ends, and in redistricting law, the Court only has the capability to correct means. Even though the Court alludes to value based concepts, the desire for value-neutrality has led to the Court pursuing more mechanistic, instrumental, want-regarding principles of public interest.

equipopulousness an assumed norm demonstrates the strength of want-regarding principles is the Court's dialogue, and the difficulties with ideal-regarding principles.

### *Drifting Toward Want-Regarding Representation*

Paralleling this shift by the Court, I would argue that American representation mechanisms have also been subject to a drift toward emphasis on want-regarding principles. This can be found first in its institutions of legislative representation. Originally, want- and ideal-regarding theory could be construed as depicted evenly in the American legislature, through the bicameral Great Compromise of a House of Representatives oriented toward the populace, alongside the more elite, removed Senate. Yet since the implementation of the Seventeenth Amendment, United States Senators are chosen on the basis of individual preferences aggregated by state. Tied to public wants, the Senate may now be less of a majority-tempering body than initially intended when they were selected by state elites. This also provides institutional support for the acknowledgment of America's primary focus in the debate over theoretical dialogues.<sup>92</sup> Two other examples cast want-regarding's increasing prominence in a more positive light. At the outset of American constitutional representation, the ideal-regarding principle of representing wealth or class exited, leading to property restrictions on voting that have since declined. Moreover, the "three-fifths compromise" in Article 1, Section 2 of the Constitution mires representation based on the biased principles of Southern slaveholders at the time.<sup>93</sup> In these instances, want-regarding principles have allowed for more equality-based representation to take hold over time. Though the federal system allowed for these group ideal-based concerns, they would later be deemed out of line with desirable principles of representation.

Given the evidence of the shape of the redistricting dialogue, and the different concerns of representation that have fallen under the Court's scrutiny in the past century, it would seem that the primary focus concerning redistricting and public interest has been on want-regarding principles. Significantly, the Court dwells on the House of Representative's function as the standard for representation, generally ignoring its place in the context of a bicameral compromise

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<sup>92</sup> The strength of the want-regarding position also seems to have captured much of the field of political science, through the prominence of rational choice theory in the late twentieth century. Jonathon Cohn notes in "Irrational Exuberance" the trend toward idealization of methodological means, not ends. Cf. Habermas, *The Structural Transformation of the Public Sphere*.

<sup>93</sup> *United States Constitution*, Article 1, sec. 2, par. 3.

between equipopulousness and principle. This makes a fundamental statement about the ends representation intends to achieve.<sup>94</sup> Now that the dialogue around redistricting has brought partisan fairness into question—an issue that cannot be clearly defined as vote-minimizing in the way that race can—adept ideal-regarding principles may need to play a greater role in our primary focus on questions of representation, the public interest, and redistricting.

### *Illinois versus Iowa*

For a comparative analysis of different states' attempts to do this, I turn to neighboring states of Iowa and Illinois. Iowa's blue-ribbon panel redistricting process, in place after 1971, attempts to use population and other traditional redistricting standards to create districts that are fair in a partisan sense, intentionally removing the ability to gerrymander politically. Section 42.4 of Iowa Code requires that population be the primary standard of redistricting for legislative and congressional districts, followed by principles including preexisting political subdivisions, contiguous territory, reasonable compactness (by length-width and perimeter considerations), partisan blindness, and consistency among plans for differing levels of government. Prohibited data include addresses of incumbents, political affiliations of registered voters, and previous election results.<sup>95</sup> According to an Iowan presentation on these legislative standards, such redistricting is “designed to enact a redistricting plan in an efficient and timely manner without political gridlock and to prevent political gerrymandering.”<sup>96</sup> By attempting in this way to eliminate partisan bias in redistricting, Iowa pursues an idea of neutrality that goes beyond simple preference aggregation.

In contrast, Illinois' redistricting has none of the guidelines that Iowa uses to expand constraints beyond federally required practices. Of six additional “best practices” (beyond standard redistricting criteria) applied across the states and identified by Mooney, Illinois uses only that of compactness, and this only in the creation of state legislative districts.<sup>97</sup> Illinois offers both parties opportunity to create their favored redistricting scheme, and when one party does not have sufficient majorities to pass their plan apart from the other party's approval,

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<sup>94</sup> We also seem to be in an era when the subject matter brought into the legislative arena is particularly ideal-based. A dialogue about representation and the public interest that provides more of a framework for values in the districting step of the political process may be appropriate.

<sup>95</sup> *Iowa Code* §42.4.

<sup>96</sup> Cook 2007.

<sup>97</sup> Mooney 2011, “Legislative,” 124.

chance determines which group will get an extra vote. Brian J. Gaines notes that “For all its complexity, the current Illinois process can be succinctly described as a 50-50 lottery over rival partisan gerrymander, held whenever bipartisan compromise fails and neither party is in a position to pass its plan unilaterally.”<sup>98</sup> Those encouraging reform in Illinois suggest more codification of criteria, or perhaps a set of agreed-upon standards to assist Illinois legislators.<sup>99</sup> A culture in which partisan interests could not cause gridlock through partisan gerrymandering seems to have some popularity in Illinois. For instance, of Illinoisans asked, 47.5% preferred that redistricting lines be drawn by “an independent, non-partisan commission whose members do not directly participate in politics.”<sup>100</sup> Illinoisans also ranked “relatively simple shapes” and following “existing county and city lines as much as possible” most often as first among their priorities in redistricting principles, followed closely by “As many districts as possible should be about equally balanced between Democratic and Republican voters.”<sup>101</sup> Perhaps Illinois’s lack of defined criteria is a matter of frustration to its voters.

#### *Instrumental and Non-instrumental Ideals*

What, then, are the theoretical implications of these two states’ approaches to redistricting? For Illinois, it would seem that partisan interests are the primary mechanism determining the structure of legislative districts. In keeping with what has become the norm, Illinois does not have equipopulousness quibbles,<sup>102</sup> and because of its state history, has avoided many concerns surrounding the Voting Rights Act. Aside from this and geographic contiguity, few expressed standards exist. In Iowa, matters are different. The ideal of partisan fairness has been imposed upon the state districts in an extension of the principles of equality and avoiding vote dilution.

Although to some extent these principles can be perceived as want-regarding because they deal with the aggregation of interests, Iowa seems not to see them that way. In explaining its use of “traditional redistricting principles” aside from population, Iowa’s Legislative Services

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<sup>98</sup> Gaines 2001, 8.

<sup>99</sup> Mooney 2011, “Legislative,” 129.

<sup>100</sup> “IGPA 2010 Survey.”

<sup>101</sup> *Ibid.*; 31.3%, 26.4%, and 23.6%, respectively.

<sup>102</sup> Illinois is bound to follow federal regulations requiring at most a 10% spread in district population. At the time of redistricting using Census 2000 data, Illinois congressional districts were of equal population, an estimated 653,647 each.

Agency notes that “mere reliance on strict population equality is no guarantee that a particular redistricting plan will withstand a court challenge if the court determines that the particular plan was drawn for an improper purpose.”<sup>103</sup> Iowa extends this in the case of race, saying “no district shall be drawn for the purpose of augmenting or diluting the voting strength of a language or racial minority group,” and also rejects majority-minority districting.<sup>104</sup> Most significantly, prior to the creation of Iowa’s current Code 42, “the Iowa Supreme Court found that protecting incumbents, preserving present districts, avoiding joining part of a rural county with an urban county, and ensuring the passage of the redistricting plan to be improper grounds” for justifying population variance.<sup>105</sup> Clearly, Iowa prioritizes population in its redistricting considerations. Yet Iowa’s concern, though its priorities may not be well-defined, goes beyond simple equipopulousness and vote dilution, and into the realm of separate principles.

In this ambiguity, we return to the question of distinguishing between ideal- and want-regarding principles. Though Iowa’s standards seem much more principle-oriented than Illinois’, if Iowa intends them all for the purpose of preventing vote dilution in the expression of preference through representation, they still fit the nuanced constraints of want-regarding principles that Barry expresses. The question of want- and ideal-regarding principles’ foggy boundaries remains. The final chapter of Elster’s *Solomonic Judgments* reveals two key insights for this issue. The first concerns self-defeating policies, the second the instrumentality and non-instrumentality of principles.

Elster deems self-defeating certain policies that prize ideal values only for the benefits that they produce (as instruments).<sup>106</sup> He provides the example of freedom, stating that “For freedom to be instrumentally valuable it must be known to have a noninstrumental base, because otherwise it will not induce the security and peace of mind by which its good consequences arise. The knowledge that the freedoms have been granted for merely instrumental purposes detracts from their instrumental efficacy, because the citizens can never be confident that the government will not curtail the freedoms if it appears expedient in the short run to do so.”<sup>107</sup> On the other hand, in some policies an ideal is the end, but cannot be acknowledged, as this will be

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<sup>103</sup> Cook 2007, 8.

<sup>104</sup> Ibid., 9.

<sup>105</sup> Ibid., 12-13.

<sup>106</sup> Elster 1989, 200.

<sup>107</sup> Ibid.

detrimental to attaining it. For example, high political participation will not normally be easy to foster as an end in itself, without attaching an instrumental benefit. Another example is explicitly attempting to produce self-respect through work programs, as opposed to achieving self-respect through a decent job.<sup>108</sup> Perhaps in the context of redistricting, part of the confusion comes from a self-defeating acceptance of certain types of standards. For instance, if equality in redistricting only receives consideration for the sake of want-regarding representation, its importance may be easier to ignore.

Elster's idea does not necessarily fit neatly with want-regarding and ideal-regarding principles. In some circumstances, ideal-regarding principles ought to be considered instrumental, and in others, non-instrumental. Iowa's partisan fairness may be an example of a non-instrumental value around which people can unite, in which case it would mesh with Barry's ideal-regarding classification. However, it may also be considered an instrumental means to good representation. Barry's organizing classification of want- and ideal-regarding was confusing for this reason. Most importantly, Elster's ideas point out the need for carefully expressing the values at stake in an issue, and why they are a matter of concern.

The outgrowth of this logic for Elster is an understanding of universal suffrage as a basic non-instrumental value. By tracing the growth of this type of political equality, he sees that initially, "The extension of the suffrage and the welfare state was carried out against many instrumentally minded objections."<sup>109</sup> After following the historical genealogy of difficulties accompanying an instrumental mentality toward equality, he finds that "By contrast, the norm of equality is transparent and compelling."<sup>110</sup> Elster finds that the appeal of non-instrumental equality speaks for itself, an argument bolstered by its ability to spread and incorporate new groups and hence convey legitimacy to the system. Elster's example of equality is only one among many that could provide consensus within which public interest principles could be applied.

As discussed within want-regarding theory's flaws, looking carefully at the want-regarding opinions of those like Justice Black, it seems that they work within such a general assumption, perhaps based on their reading of American constitutional identity. It seems that

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<sup>108</sup> Ibid., 201.

<sup>109</sup> Ibid., 213.

<sup>110</sup> Ibid.

implicit ideals exist in how political scientists, policymakers, and justices understand the process of drawing districts. Equipopulousness and equal universal suffrage, which were once ideals under question, have become background norms to the modifiable dialogue of redistricting and the public interest. As an accepted ideal, equipopulousness serves now as a better means to attaining the end of improved representation. Given the ability of ideal- and want-regarding principles of public interest to blend together, redistricting policies can become self-defeating. Therefore, a different understanding of these concepts may be beneficial. To make an implicit ideal explicit would strengthen our understanding of what is at stake in redistricting and prevent misuse of implicit values. Rather than being motivated by policy and representation outcomes alone, in a way that treats values as instrumental, I suggest using the contested nature of public interest to the advantage of those engaging in the redistricting process.

An ideal-explicit dialogue about both the process and outcomes of redistricting would be beneficial for multiple reasons. First, it would equip policymakers to recognize the value-charged nature of the principles being applied to redistricting. This would be of benefit because it would allow for recognition of values for what they are, and accordingly for preventing imbalance in these values. For example, in its efforts to promote the values of fairness and equality as non-instrumental, Iowa may move away from freedom on the freedom-equality spectrum more than some would desire. Explicitly detailing the theory of public interest and the values at stake in redistricting would prevent the “philosopher king” mentality that modern theorists find so unappealing. Secondly, an ideal-explicit dialogue would allow important values a greater role in the public discourse, possibly even to the extent of expanding such values’ role. This could equip more states with a different way to pursue public interest, as Iowa has. Illinois could benefit, for example, from discussions about compactness, fairness, or nonpartisan processes as ideals, in hopes that subsequently, less gridlock would muddle redistricting outcomes and frustrate representation.<sup>111</sup> Furthermore, extending this discussion to the states would strengthen federalism by giving states opportunity to acknowledge the values implicit in their own attitudes toward redistricting. This would be additionally beneficial by allowing the difficulty of public interest theory and redistricting to move into theoretical arenas that the Supreme Court cannot address because of its constitutional limits and judicial restraint. Given the confusion of want-

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<sup>111</sup> Gaines 2001.



and ideal-regarding theories of public interest, and Elster's point that confusing their instrumentality and non-instrumentality can lead to self-defeating policies, acknowledging ideals as ideals may benefit the pursuit of public interest through the lens of redistricting. In this way, Elster's ideas about consensus may ironically contribute a piece of a greater dialogue around a contested topic.

### *Conclusions*

This research has attempted to forge new connections between many varieties of classification and bodies of theory, using the policy issue of redistricting. Want-regarding theory has trended toward being the primary mode of discussing redistricting and the public interest. Since explicitly examining the way we ideally model public interest has met with some redistricting successes in Iowa, I propose a shift in thinking about public interest and redistricting.

The public interest, or perhaps the public's interests, allows for a set of principles beyond those of want-regarding theory, which may be more equipped to deal with Americans' twenty-first century ideological polarization and the recent trend of emphasizing a broader range of redistricting principles. By stepping back and expanding the primary focus of redistricting conversations to a discussion that gives more equal weight to ideal-regarding and want-regarding concepts of the public interest, doorways to useful redistricting reforms could become evident. The tool of Barry's want- and ideal-regarding classifications can help order both the theoretical framework and its practical application.

This theory-based research also lays a foundation for interesting empirical work regarding the link between policy, polarization, and more ideal-based redistricting principles. Testing the empirical relationship with such redistricting policy options as compactness or preservation of existing political borders, correlated with decreased political conflict or gridlock in redistricting, would be beneficial. Furthermore, the empirical tracing of redistricting ideals and their eventual influence on policy and representation would be an important step in strengthening the linkages this theoretical paper suggests.

By acknowledging the essentially contested nature of public interest, and working to balance conflicting principles in its pursuit, policy outcomes may be strengthened. At minimum, this research opens doors to a different variety of theorizing about public interest, one which

attempts to balance classifications of public interest theories and implement them in the thinking of a specific area of policy. Since redistricting influences many elements of policy and representation, any attempts to elaborate on the guiding principles of public interest involved in the future of the redistricting discussion would certainly not be amiss.

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