

DEMOCRACY, CIVIL SOCIETY, AND PUBLIC INTEREST LAW

CATHERINE ALBISTON*

Introduction	187
I. Theories of Democracy and Civil Society	190
II. Public Interest Law Organizations as Civil Society	
Organizations.	194
A. How do PILOs Give Voice to Citizen Interests and Encourage Civic Engagement?.....	197
B. To What Extent do PILOs Attract Media Coverage to Issues Affecting Marginalized Constituencies?.....	199
C. To What Extent are PILOs a Counterweight to the State and Other Powerful Interests?.....	207
Conclusion.....	211

INTRODUCTION

Public interest law organizations (PILOs) play a significant role in democracy and American society. Historically, they have enabled underrepresented voices to be heard in the political process and have vindicated public values by enforcing civil rights laws.¹ They also have shaped and expanded the public sphere through litigation, media coverage, and their association with social movements seeking social

* University of California, Berkeley School of Law. The author thanks the participants in the *Public Interest Mobilization and Access to Justice Movements in the New Democratic State* conference in Madison, Wisconsin, the 2012–13 class of fellows at Center for Advanced Study in the Behavioral Sciences at Stanford University, Kathryn Abrams, Leti Volpp, Sarah Song, Taeku Lee, Irene Bloemraad, Kim Voss, Kinch Hoekstra, Myra Marx Ferree, Rachel Stern, and Anne Bloom for their helpful comments and suggestions on this project. The author is very grateful for the generous support for this research from the Center for Advanced Study in the Behavioral Sciences, the National Science Foundation, and Berkeley Law. Many thanks to Gwendolyn Leachman who contributed significant time and labor to collecting the media coverage data, and to Laura Beth Nielsen, who collaborated with the author on the prior study of public interest law organizations that is discussed in this article. Thanks also to Mark Leinauer and Matthew Cannon for their invaluable research assistance on this project. This material is based upon work supported by the National Science Foundation under Grant No. SES-1125498. Any opinions, findings, and conclusions or recommendations expressed in this material are those of the author and do not necessarily reflect the views of the National Science Foundation.

1. Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087 (2007); Frances Kahn Zemans, *Legal Mobilization: The Neglected Role of the Law in the Political System*, 77 AM. POL. SCI. REV. 690 (1983).

change.² As public interest law expanded dramatically in the 1960s and 1970s, it came to mean much more than pro bono representation of the poor.³ Courts and lawyers recognized public interest litigation as a legitimate form of political expression and civic participation.⁴

Public interest law organizations historically have been classified as part of civil society, or “the aggregate of non-governmental organizations and institutions that manifest interests and will of citizens.”⁵ A strong civil society independent of the government is thought by some to be essential for a healthy democracy.⁶ The argument is that social movement organizations that try to shape public opinion or influence legislation also expand grassroots participation and empower citizens in democratic debate. Participation by empowered citizens helps maintain the autonomy of civil society from government and market and strengthens citizens’ ability to shape their world.⁷ Public interest law organizations are thus part of a tripartite social structure in which civil society is in critical dialog with the state and the market.⁸

2. JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 22–26 (1978); MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994); Kenneth T. Andrews & Neal Caren, *Making the News: Movement Organizations, Media Attention, and the Public Agenda*, 75 AM. SOC. REV. 841 (2010); Daniel Chomsky & Scott Barclay, *The Mass Media, Public Opinion, and Lesbian and Gay Rights*, 6 ANN. REV. L. & SOC. SCI. 387 (2010).

3. For a review of the history of public interest law organizations, see Catherine R. Albiston & Laura Beth Nielsen, *Funding the Cause: How Public Interest Law Organizations Fund Their Activities and Why it Matters for Social Change*, 39 L. & SOC. INQUIRY 62 (2014) [hereinafter *Funding the Cause*]; Catherine Albiston, Su Li & Laura Beth Nielsen, *Public Interest Law Organizations and the Two-Tier System of Access to Justice in the United States*, 42 L. & SOC. INQUIRY 990 (2017) [hereinafter *Two Tier System of Access to Justice*].

4. *In re Primus*, 436 U.S. 412, 422–25 (1978); *NAACP v. Button*, 371 U.S. 415, 431 (1963).

5. *Civil Society*, [DICTIONARY.COM](https://web.archive.org/web/20180310221808/http://www.dictionary.com/browse/civil-society?r=66), [https://web.archive.org/web/20180310221808/http://www.dictionary.com/browse/civil-society?r=66]. The Oxford Handbook of Political Theory defines civil society as “uncoerced associational life distinct from the family and institutions of the state. Civil society is also often thought to be distinct from the economy.” Simone Chambers & Jeffrey Kopstein, *Civil Society and the State*, in THE OXFORD HANDBOOK OF POLITICAL THEORY 363 (John S. Dryzek et al. eds., 2006).

6. Chambers & Kopstein, *supra* note 5, at 368–70.

7. *Id.* at 370.

8. Perhaps the most well-known, recent exposition of this tripartite structure is JEAN L. COHEN & ANDREW ARATO, CIVIL SOCIETY AND POLITICAL THEORY ix (1992): “We understand ‘civil society’ as a sphere of social interaction between economy and state, composed above all of the intimate sphere (especially the family), the sphere of associations (especially voluntary associations), social movements, and forms of public

The role public interest law organizations do and should play in democratic debate and policy formation is not without controversy, however. Some argue that public interest law organizations further democratic values because litigation is a form of political participation for marginalized groups.⁹ Public interest organizations provide a check on government excess, capture, and overreaching.¹⁰ In addition, public interest law organizations use legal strategies to put important but neglected issues on the public agenda.¹¹ They also help prevent majoritarian oppression of disfavored and disadvantaged groups, such as welfare recipients, LGBT individuals, and religious and ethnic minorities.¹²

Others argue, however, that public interest organizations undermine democratic values because public interest litigation allows minority interests that lack electoral accountability to obtain their desired policy outcomes through democratically unaccountable courts.¹³ Critics also contend that public interest law organizations have no objective definition of the public interest apart from their specific group’s goals.¹⁴ Some also claim that public interest litigation stirs up

communication.” *See also* JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 370 (1996).

9. Archon Fung, *Associations and Democracy: Between Theories, Hopes, and Realities*, 29 *ANN. REV. SOC.* 515, 516 (2003); Zemans, *supra* note 1.

10. Fung, *supra* note 9, at 516, 522–23.

11. Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 *STAN. L. REV.* 2027, 2046–48 (2008). A widely cited definition of “public interest” includes “non profit, tax-exempt groups that devote a large share of their programs to providing legal representation to otherwise unrepresented interests in court or administrative agency proceedings involving questions of important public policy.” *COUNCIL FOR PUBLIC INTEREST LAW, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA* 81 (1976); *see also* Debra C. Minkoff, *Producing Social Capital: National Social Movements and Civil Society*, 40 *AM. BEHAV. SCI.* 606, 614–15 (1997).

12. Ann Southworth, *What is Public Interest Law? Empirical Perspectives on an Old Question*, 62 *DEPAUL L. REV.* 493 (2013); *see* Minkoff, *supra* note 11, at 607.

13. MICHAEL J. HOROWITZ ET AL., *INST. FOR EDUC. AFFAIRS, FOUNDATION OFFICERS FORUM OCCASIONAL PAPERS, NO. 2, PERSPECTIVES ON PUBLIC INTEREST LAW* (1981); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008); Jefferson Decker, *Lawyers for Reagan: The Conservative Litigation Movement and American Government, 1971–87* (2009) (unpublished Ph.D. dissertation, Columbia University).

14. In some instances, public interest law organizations have grown up around private rights of action created through legislative action to encourage private enforcement of public law. In these instances, Congressional action specifying the rights to be enforced, not private interests, define the public interest. *See* Albiston & Nielsen, *supra* note 1.

unnecessary strife and contention to serve political ends that should be pursued through the normal political process.¹⁵

These disagreements about the legitimacy of public interest law reflect unspoken assumptions about how political differences should be expressed in a democracy, and the appropriate roles of civil society given those assumptions. To speak to this debate, in this article, I bring theories of civil society and democracy into dialog with empirical evidence about what public interest law organizations actually do. In Section I, I situate debates about public interest law organizations within broader theories of democracy and civil society to show how critiques of public interest law organizations rely on a very limited conception of democratic participation. Section I then discusses how public interest law organizations can be understood through participatory theories of democracy. Section II reviews research and empirical data on how public interest law organizations act as civil society organizations. I conclude by discussing the broader implications of these findings for democracy and civil society.

I. THEORIES OF DEMOCRACY AND CIVIL SOCIETY

To appreciate what is at stake, it is useful to understand the unspoken assumptions about democracy and civil society that underlie the debate about public interest law organizations. There are many varieties of democratic theory and reviewing and discussing the far ranging debates among them is beyond the scope of this article. Here I focus on the conflict between participatory theories of democracy and classical liberal approaches that emphasize representative or pluralist views of democracy.¹⁶ As I will explain, these two conceptions of democracy and the normative claims they entail implicitly drive much of the debate about the appropriate role of public interest law organizations in civil society.

Objections to public interest litigation as undemocratic are most consistent with representative or pluralist views of liberal democracy. These theories see the task of democracy as instrumental: coordinating and aggregating competing interests in a way that reflects aggregate citizen interests in a collective decision and majority rule.¹⁷ Some

15. See *supra* note 13 and accompanying text.

16. See generally Myra Marx Ferree et al., *Four Models of the Public Sphere in Modern Democracies*, 31 *THEORY & SOC'Y* 289 (2002). Debates over theories of democracy fill several volumes, and canvassing these debates is beyond the scope of this article. Instead, the purpose here is to reveal the underlying assumptions about democracy in the debates about civil society and public interest law.

17. See Robert Talisse, *Deliberation*, in *THE OXFORD HANDBOOK OF POLITICAL PHILOSOPHY* 206 (David Estlund ed., 2012).

strands focus on electoral politics as the means for aggregation. In this view, public participation in democracy is best expressed by voting for elite representatives who carry out actual governance. Normatively, citizens do not need to participate in public discourse on policy issues. In fact, because citizens are less informed than the elites who represent them, it is desirable to limit ordinary citizen’s political participation to voting, and rely on elected elites to govern.¹⁸ Other strands, such as pluralist theory, introduce a role for interest groups by viewing power as distributed throughout society and democracy as a constant negotiation among multiple interest groups. Government then mediates among citizen interests represented by these interest groups, again aggregating interests into policy.¹⁹

Legal representation, in this view, should be limited to a traditional lawyer-client relationship, focused on individual claims and redress, rather than more systemic concerns.²⁰ By contrast, litigation as a means of systemic reform is seen as an illegitimate foray into the political system that should be channeled instead into electoral or interest group politics. Indeed, some scholars argue that recent Supreme Court decisions that limit access to courts for civil rights suits against the state reflect this view that the appropriate remedy for citizens’ grievances against their government is through the electoral process rather than the courts.²¹

These classical liberal views have obvious majoritarian tendencies. Even in a form that allows for organized interest groups in politics, this perspective assumes that the political process is effective and accessible for all aggrieved citizens. This view becomes problematic when some citizens are politically excluded from the franchise,²² or the assumptions of pluralism break down under conditions of gross distributional inequalities in power, resources, and influence that leave some

18. See Marx Ferree et al., *supra* note 16, at 290.

19. See Talisse, *supra* note 17, at 207 (discussing ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY (1956)).

20. See Sameer M. Ashar, *Deep Critique and Democratic Lawyering in Clinical Practice*, 104 CALIF. L. REV. 201, 228 (2016) (describing neo-liberal approaches to clinical education as focused on a preference for individual service provision over advocacy projects); David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 224 (2003) (arguing that Legal Services Corporation (LSC) restrictions were designed to remove any form of advocacy from public interest representation of LSC clients).

21. Erwin Chemerinsky, *Closing the Courthouse Doors to Civil Rights Litigants*, 5 U. PA. J. CONST. L. 537, 541 (2003).

22. See, e.g., *Smith v. Allwright*, 321 U.S. 649 (1944).

aggrieved citizens with little voice.²³ This view does little to consider how marginalized and resource-poor constituencies can have a voice in the political process. It thus clashes with participatory theories of democracy that value robust deliberation and meaningful influence for minority constituencies.²⁴

By contrast, civil society organizations are key for participatory theories of democracy that value strong civic participation from citizens. These organizations encourage citizen engagement and voice by providing an infrastructure for collective action beyond the individualistic act of voting.²⁵ They guard against majoritarian oppression of marginalized and disenfranchised minority groups, and they provide a check on government excess, capture, and secrecy.²⁶ They also allow for innovation by providing a context for policy formation outside the state.²⁷ Public interest law organizations are thought to serve these roles when they provide access to justice for marginalized constituencies.²⁸

Scholarship about the concept of civil society has exploded in recent years,²⁹ and much of it is consistent with this broader view of public interest law organizations and democracy. Some civil society scholars, such as Debra Minkoff, focus on how civil society operates as an organized counterweight to the state and powerful actors in the market.³⁰ Civil society organizations provide an infrastructure for collective action, facilitate the development of collective identities, and

23. See E.E. SCHATTSCHEIDER, *THE SEMI-SOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 34–35 (1975) (“[T]he flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent.”).

24. See Marx Ferree et al., *supra* note 16, at 295–99.

25. Fung, *supra* note 9, at 523.

26. *Id.* at 522–24.

27. See Marx Ferree et al., *supra* note 16, at 299.

28. Zemans, *supra* note 1, at 695.

29. See, e.g., COHEN & ARATO, *supra* note 8; THEDA SKOCPOL, *DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE* (2003); Kenneth T. Andrews & Bob Edwards, *Advocacy Organizations in the U.S. Political Process*, 30 ANN. REV. SOC. 479 (2004); Jeffrey M. Berry, *Nonprofits and Civic Engagement*, 65 PUB. ADMIN. REV. 568 (2005); Beth Schaefer Caniglia & JoAnn Carmin, *Scholarship on Social Movement Organizations: Classic Views and Emerging Trends*, 10 MOBILIZATION 201 (2005); Mark Chaves et al., *Does Government Funding Suppress Nonprofits' Political Activity?*, 69 AM. SOC. REV. 292 (2004); Fung, *supra* note 9; Shannon Gleeson, *From Rights to Claims: The Role of Civil Society in Making Rights Real for Vulnerable Workers*, 43 L. & SOC'Y REV. 669 (2009); Minkoff, *supra* note 11; Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65 (1995); Theda Skocpol, *Associations Without Members*, 45 AM. PROSPECT 66 (1999) [hereinafter *Associations Without Members*].

30. See Minkoff, *supra* note 11, at 610–11.

shape public discourse and debate.³¹ In this view, civil society is civic action independent of the state. This independence fosters the ability to resist tyranny and overreaching by the state, as well as the ability to resist unrestricted market power.³²

Other scholars, such as sociologists Kenneth Andrews and Bob Edwards, view civil society organizations as important for collective action in pursuit of social and political change.³³ These organizations play significant roles in agenda setting, access to policy making, monitoring the activities of political organizations, and shifting the priorities of political institutions.³⁴ In this view, civil society organizations include social movement organizations seeking social reform.

Law and society scholars, such as Shannon Gleeson, argue that civil society organizations are key in the legal mobilization process.³⁵ These organizations make important links between rights and claims making for disadvantaged communities, such as undocumented workers, who are otherwise unwilling to engage in formal legal processes.³⁶ In this view, focusing on electoral politics for redress misses how the law on the ground can differ substantially from the law on the books, and thus undermine the penetration and reach of democratically enacted policies. Rights claims supported by civil society organizations, including public interest law organizations, are an essential link between these policies and meaningful change on the ground.³⁷

What emerges from this growing field of interdisciplinary scholarship is a much more robust role for civil society organizations in democracy. Civil society organizations help aggregate citizen interests, set the public agenda, shape public discourse and debate through the media, monitor the activities of government, and ensure that legal rights become meaningful on the ground. This view contrasts sharply with the thin view of civil society as electoral politics and interest group competition. Thus, when critics disagree about the role and legitimacy of public interest law organizations, they are fundamentally disagreeing on their theory of democracy and how the political process functions, especially for marginalized and minority groups. Those who favor the classical liberal democratic view see little utility in more robust

31. *See generally id.*

32. *See id.* at 611; Fung, *supra* note 9.

33. Andrews & Edwards, *supra* note 29.

34. *Id.*

35. Gleeson, *supra* note 29.

36. *Id.*

37. *See id.*

participation from civil society, whereas those who favor participatory theories see an important role for public interest law organizations to provide an infrastructure for citizens to balance the power of the state and market.

II. PUBLIC INTEREST LAW ORGANIZATIONS AS CIVIL SOCIETY ORGANIZATIONS.

I turn now to discuss how public interest law organizations fit within the more expansive participatory democracy concept of democracy and civil society. Over time, the institutional means for providing access to justice in the United States has moved steadily toward a conception of public interest law organizations as an important component of civil society. What began slowly as a small population of legal aid offices focused on individual representation rapidly expanded beginning around 1965, along with the well-documented explosion of civil society organizations around the same time.³⁸ With that expansion came more sophisticated forms of legal representation engaged not only in direct representation, but also community organizing and impact litigation with an eye toward social change.

The earliest public interest law organizations focused on providing access to justice through individual pro bono representation of indigent clients.³⁹ These legal aid organizations sprang up in larger American cities prior to the 1960s.⁴⁰ Some organizations were supported by local bar associations to legitimize the legal profession as more than merely hired guns for powerful interests.⁴¹ Although there were exceptions, such as the ACLU and the NAACP Inc. Fund, pro bono representation was largely individualized and looked very different than the more systemic legal advocacy that came in the 1960s.⁴²

The well-documented advocacy explosion that followed the wave of protests in the 1960s changed the face of public interest law in the United States.⁴³ Aided by significant foundation and government support, public interest law organizations expanded rapidly from about

38. Andrews & Edwards, *supra* note 29, at 486–87; Minkoff, *supra* note 11, at 607–08.

39. *Two Tier System of Access to Justice*, *supra* note 3 at 992–93; *Funding the Cause*, *supra* note 3, at 63–64.

40. *See, e.g., Funding the Cause*, *supra* note 3, at 63–64.

41. *See id.* at 69.

42. *Id.* at 64, 69; *Two-Tier System of Access to Justice*, *supra* note 3, at 993.

43. JEFFREY M. BERRY, *THE INTEREST GROUP SOCIETY* 17–43 (3d ed. 1997); JACK L. WALKER, JR., *MOBILIZING INTEREST GROUPS IN AMERICA: PATRONS, PROFESSIONS, AND SOCIAL MOVEMENTS* 35–36 (1991); Andrews & Edwards, *supra* note 29, at 486–87; *Associations Without Members*, *supra* note 29, at 66–68.

1965 through 1980.⁴⁴ During the rise of public interest law in the 1960s and 1970s there was compelling evidence that public interest law organizations were an important part of civil society. These organizations won major legal victories on behalf of welfare recipients, racial minorities, and people with disabilities.⁴⁵ They challenged government overreaching and excess.⁴⁶ In addition, they were the source of new conceptions of the meaning of equality and liberty. The most famous examples over time include racial equality and marriage equality on the left, and equal treatment of religious views on the right.⁴⁷

In the heyday of public interest law organizations, the normative concerns of civic engagement and political access shaped legal conceptions of access to justice through public interest representation. For example, the Supreme Court referenced the democratic values of equality, political expression, and political access to stop the Southern bar from using professional rules against improper solicitation to shut down the NAACP’s school desegregation litigation campaign.⁴⁸ The Court stated:

In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. . . . [U]nder the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.⁴⁹

In this way, the Court referenced principles of participatory democracy in interpreting what it means to be a legal professional in organizations like the NAACP Inc. Fund. Legal representation meant

44. *Two-Tier System of Access to Justice*, *supra* note 3, at 993–95.

45. *Id.* at 990–91.

46. See, e.g., SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 289–92 (2d ed. 1999) (discussing the Pentagon Papers cases).

47. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (GLBTQ Legal Advocates and Defenders, discussing marriage equality); *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (American Center for Law and Justice, discussing equal treatment of religious views); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (NAACP Inc. Fund, discussing racial equality).

48. *NAACP v. Button*, 371 U.S. 415 (1963).

49. *Id.* at 429–30.

not only professionally competent representation of private interests, but also a broader role in protecting democratic participation and political access for less powerful members of the polity. Indeed, the connection between legal representation and protecting democratic principles has long been recognized.⁵⁰

The field of public interest law has changed since the early days of these organizations. The success of public interest law organizations brought backlash and political attacks, as well as counter-mobilization by more conservative organizations.⁵¹ In addition, the organizational environment has changed in terms of funding sources, the courts, and political opportunity structures for social change litigation.⁵² The field of public interest law today is also much more diverse than it was in 1965 in terms of organizational form, strategy, and mission.⁵³

In light of these developments, I now turn to empirical data on how public interest law organizations operate as civil society organizations providing access to justice. My discussion focuses on three questions regarding access to justice, democracy, and civil society: How do public interest law organizations give voice to citizen interests and encourage civic engagement? To what extent do public interest law organizations attract media coverage to their clients and their causes? To what extent are public interest law organizations a counterweight to government and market power?

The data for the following analysis is drawn from media coverage of 221 public interest law organizations that were surveyed for a prior study.⁵⁴ I systematically collected media coverage of these public interest law organizations by identifying articles in three national papers (*NY Times*, *Washington Post*, *LA Times*) and four regional papers (*Boston Globe*, *Atlanta Journal*, *Chicago Tribune*, *San Francisco Chronicle*) that mentioned these organizations.⁵⁵ Articles were selected

50. *Legal Servs. Corp. v. Velasquez*, 531 U.S. 533, 536–38, 541–49 (2001) (prohibitions on LSC attorneys representing clients attempting to challenge existing welfare law violate First Amendment free speech rights); *In re Primus*, 436 U.S. 412, 426–39 (1978) (solicitation of prospective litigants by nonprofit organizations that engage in litigation as a form of political expression and political association constitutes expressive and associational conduct entitled to First Amendment protection).

51. *Two-Tier System of Access to Justice*, *supra* note 3, at 990–96.

52. *Funding the Cause*, *supra* note 3, at 70–71, 74–77, 80–89.

53. *Id.* at 63–66.

54. For a discussion of the methodology of the earlier study, see *id.* at 71–74.

55. For efficiency, for two organizations with significant numbers of articles, I randomly sampled from the total number of news stories covering their activities. Their counts were then weighted to reflect the sampling strategy. Undergraduate research assistants read all of the news articles to screen out duplicates, letters to the editor, and obituaries that were unlikely to include substantive news coverage of the organizations' activities.

from the Nexis archives⁵⁶ beginning in 1991, the year comprehensive coverage became available, through 2004, the year that the organizational survey was conducted. This resulted in a database of 23,694 articles covering public interest law organizations on which the following analysis is based.

A. How do PILOs Give Voice to Citizen Interests and Encourage Civic Engagement?

Public interest law organizations may contribute to civil society by giving voice to citizen interests and encouraging citizens to engage in democratic debate. There is disagreement about how well civil society organizations perform this function, however. Some scholars argue that advocacy organizations provide an opportunity structure to link otherwise marginalized members of society and help aggregate the interests of citizens who cannot otherwise overcome collective action challenges.⁵⁷ Other scholars argue, however, that as social movement organizations mature, they become more professionalized and less connected to their base constituencies.⁵⁸ Theda Skocpol argues, for example, that advocacy organizations represent checkbook activism rather than meaningful civic engagement.⁵⁹ Similarly, Sandy Levitsky and Derrick Bell have argued that in legal advocacy organizations, professional lawyers set and pursue the agenda without sufficient input from their clients or from social movement constituents.⁶⁰

One approach to this debate is to evaluate how many of the public interest organizations in this study were membership organizations. Membership in organizations may signal public support for an organization and its goals.⁶¹ Historically, membership organizations represented significant citizen constituencies and helped mobilize their

56. Nexis is a popular fee-based, computer-assisted research service offering news and business information. See *Nexis*, LEXISNEXIS, [<https://perma.cc/CMP6-RFWY>].

57. See Andrews & Edwards, *supra* note 29, at 481–82; Minkoff, *supra* note 11, at 607, 611–12.

58. Suzanne Staggenborg, *The Consequences of Professionalization and Formalization in the Pro-Choice Movement*, 53 AM. SOC. REV. 585 (1988); *Without Members*, *supra* note 29, at 67–69, 71.

59. *Associations Without Members*, *supra* note 29, at 66; see generally SKOCPOL, *supra* note 29, at 127–74.

60. Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 478–92 (1976); Sandra R. Levitsky, *To Lead with Law: Reassessing the Influence of Legal Advocacy Organizations in Social Movements*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 157–58 (Austin Sarat & Stuart A. Scheingold eds., 2006).

61. Andrews & Caren, *supra* note 2, at 845.

membership to have a voice in democratic governance and debate.⁶² Although legal advocacy membership organizations such as the ACLU and the NAACP may easily come to mind, somewhat surprisingly, only about twenty-five percent of the organizations in this study were membership organizations, with a median membership size of 2,000.⁶³ Thus, the majority of these organizations have no members at all.⁶⁴

Nevertheless, public interest law organizations, and especially Legal Services Corporation (LSC) organizations funded by the federal government, have a second direct connection to citizens in the form of clients. It may be clients that better represent the citizen interests being promoted here. Moreover, legal clients may have more at stake than mere association members because clients have viable legal claims or defenses they seek to vindicate. In addition, there are strong professional values around providing pro bono legal representation for individuals who cannot otherwise afford a lawyer.⁶⁵ Accordingly, I examine what factors these organizations consider in identifying and selecting clients.

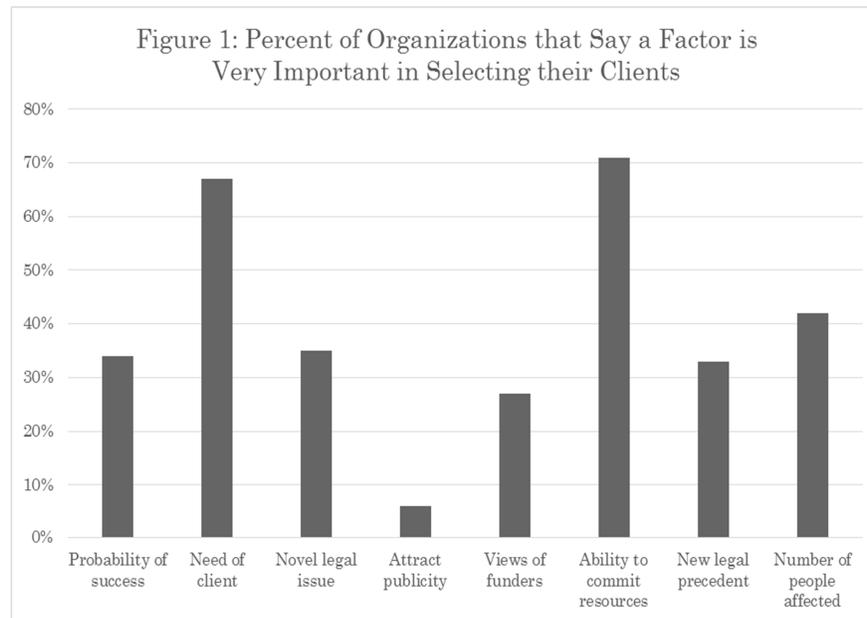
Figure 1 indicates the proportion of organizations in this study that indicated a given factor was very important to their choice of client. Among these organizations, forty percent report that the number of people affected was very important in their choice of client. Similarly, client need was very important to about sixty-five percent of these organizations. Both these factors are consistent with public interest law organizations' role in aggregating the interests of citizens and serving otherwise marginalized constituencies. Seeking media publicity for particular issues was not a driving force behind client selection, however. The ability of litigation to attract media attention was a very important factor for only about five percent of these organizations, the least frequently cited factor in choosing clients among these organizations.

62. *Associations Without Members*, *supra* note 29, at 66. For a review of the small but informative literature on advocacy organizations and membership, see Andrews & Edwards, *supra* note 29, at 488.

63. Because there were some large outliers in terms of membership numbers, the median membership offers a better estimate of typical size. This finding was first reported in *Funding the Cause*, *supra* note 3, at 75.

64. It is important to remember, however, that a significant proportion of public interest law organizations are LSC funded organizations. It is not surprising that these organizations lack members given government support and their service mission. *Two-Tier System of Access to Justice*, *supra* note 3, at 1003.

65. For example, ABA Model Rule of Professional Conduct 6.1 states that “[e]very lawyer has a professional responsibility to provide legal services to those unable to pay.” MODEL RULES OF PROFESSIONAL CONDUCT r. 6.1 (AM. BAR ASS’N 2016).



The majority of organizations in this study were not membership organizations, and they may be primarily run by legal professional elites, relatively distant from direct citizen engagement.⁶⁶ Nevertheless, when selecting clients, these organizations do emphasize the number of people affected and client need. Those who criticize the evils of checkbook advocacy may not have sufficiently considered how legal advocacy organizations serve citizens in need by ensuring their rights are represented in court.⁶⁷ To the extent that most organizations do not consider attracting media attention when choosing clients, however, legal representation may do little to influence the public agenda and discourse. I turn to that question in the section below.

B. To What Extent do PILOs Attract Media Coverage to Issues Affecting Marginalized Constituencies?

A second claim is that civil society organizations not only aggregate citizen interests, but also provide a voice to marginalized interests in the legal and political process.⁶⁸ As Michael McCann has

66. See Staggenborg, *supra* note 58, at 603 (noting that professionalization of a social movement organization can make it more difficult to connect with grassroots constituencies and can move the organization toward narrower, institutional strategies).

67. See Gleeson, *supra* note 29, at 669–70.

68. Fung, *supra* note 9, at 523–24.

argued, litigation can be an important mechanism for attracting media coverage to a cause.⁶⁹ To the extent that public interest organizations put new issues on the public agenda and shape the public debate, they also serve the classic civil society function of helping to constitute the public sphere in which social problems and priorities are articulated.⁷⁰

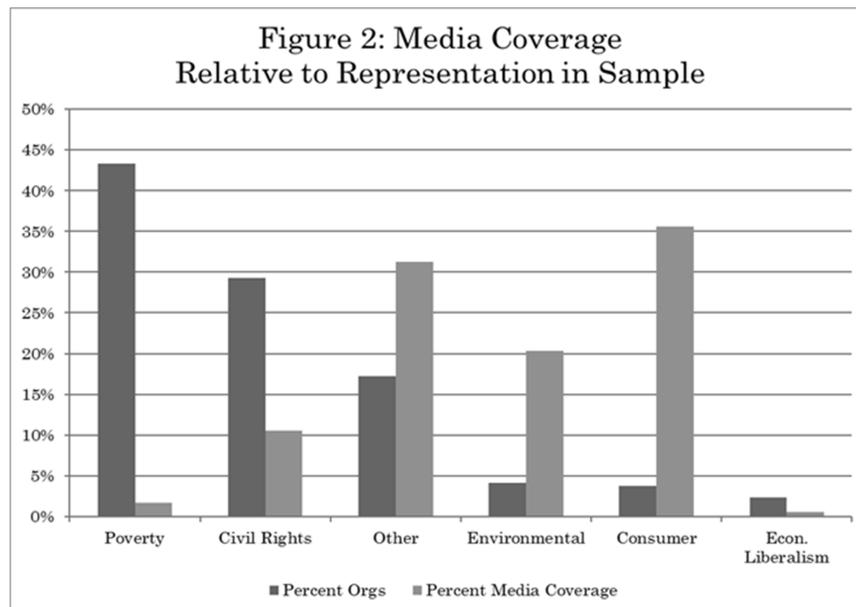
Accordingly, this article examines to what degree public interest organizations were able to attract media coverage, thus focusing public attention on their causes and clients. It seems reasonable to expect some variation in organizations' ability to attract media. This variation is likely related to what strategies organizations use for pursuing social change. For example, some research suggests that professional and formalized groups that engage in routine advocacy, especially around perceived mainstream causes, tend to attract media coverage.⁷¹ Also, one might expect that more legal advocacy organizations working in an area would result in more media coverage of those issues.

Figure 2, on the following page, charts the relative proportion of media coverage across practice areas compared to the relative proportion of organizations in each practice area. Note that the proportion of media coverage (measured here by the number of articles over a fifteen year period) does not follow the proportional share of organizations in our representative sample. Consumer and environmental organizations receive disproportionate coverage compared to their representation among organizations in the sample. By contrast, even though poverty organizations were the most numerous in this sample, they garnered the smallest proportion of coverage.

69. See MCCANN, *supra* note 2, at 48–91.

70. Fung, *supra* note 9, at 525.

71. TODD GITLIN, *THE WHOLE WORLD IS WATCHING: MASS MEDIA IN THE MAKING AND UNMAKING OF THE NEW LEFT* 284 (2d ed. 2003); Andrews & Caren, *supra* note 2.



One explanation for this disparity is that media coverage is filtered through the norms of journalism and the organizational imperatives of the industry. Sociologist Todd Gitlin notes, for example, that public interest lawyers in the environmental and consumer movement succeeded in attracting media coverage because they appeared “in suits and ties . . . sitting squarely behind desks or in front of bookshelves,” and thus seemed to embody expertise and mainstream reliability.⁷² In contrast, organizations that represented more marginalized constituencies or more radical positions were less likely to draw media attention.⁷³ Gitlin argues that “[t]he more closely the concerns and values of social movements coincide with the concerns and values of elites in politics and media, the more likely they are to become incorporated in the prevailing news frames.”⁷⁴

Social movement scholars contend, however, that media coverage may depend on which strategies public interest organizations deploy. That is, it may depend as much on what they do as on what position they take or what issue they promote. These scholars debate whether *insider strategies*, like lobbying, or *outsider strategies*, like protest, are better at drawing media coverage.⁷⁵ Law and society scholars theorize

72. GITLIN, *supra* note 71, at 284.

73. *See id.*

74. *Id.*

75. *See* Verta Taylor & Nella Van Dyke, “Get up, Stand up”: *Tactical Repertoires of Social Movements*, in *THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS* 267 (David A. Snow et al. eds., 2004); Andrews & Caren, *supra* note 2,

that litigation is a prime method for attracting media attention.⁷⁶ By contrast, social movement scholars argue that the disruptive and performative aspects of protest are more likely to garner media attention than more staid insider tactics such as litigation.⁷⁷ Indeed, protest events that mobilize large numbers of people attract significant media coverage, particularly if they are sponsored by national social movement organizations or involve conflict over legislation.⁷⁸ Gwendolyn Leachman argues, however, that litigation also provides narrative and drama,⁷⁹ and litigation is arguably a more confrontational tactic than legislative lobbying or policy advocacy. Accordingly, litigation may be a nominally insider tactic that also brings some of the dramatic advantages of protest tactics.

To speak to this debate, this paper evaluates claims that legal strategies, especially litigation, are more effective at attracting media coverage than other strategies. Although all the organizations in this study engaged in at least one legal tactic, most used a range of tactics, including: talking with the media; running ads; sending letters to supporters; organizing grassroots efforts; engaging in protests or demonstrations; testifying in hearings; drafting regulations, rules or guidelines; training others in legal issues; presenting research; talking directly with government officials; entering coalitions with other organizations; filing amicus briefs; directly representing clients; engaging in outreach and education; coordinating activities with other organizations; providing informal legal advice and assistance; and intervening in suits brought by others. Organizations were asked how often they participated in each of these activities.

at 846. Some scholars argue that outsider strategies attract more attention because they involve drama, conflict, and novelty, and therefore make good copy. GITLIN, *supra* note 71, at 24–30. Other scholars argue that the media prefer authoritative sources and rely on established relationships, and this favors organizations that use less confrontational insider strategies. Pamela E. Oliver & Daniel J. Myers, *How Events Enter the Public Sphere: Conflict, Location, and Sponsorship in Local Newspaper Coverage of Public Events*, 105 AM. J. SOC. 38 (1999).

76. McCANN, *supra* note 2; HELENA SILVERSTEIN, UNLEASHING RIGHTS: LAW, MEANING, AND THE ANIMAL RIGHTS MOVEMENT (1996); Steven E. Barkan, *Political Trials and Resource Mobilization: Towards an Understanding of Social Movement Litigation*, 58 SOC. FORCES 944, 945 (1980); Gwendolyn M. Leachman, *From Protest to Perry: How Litigation Shaped the LGBT Movement's Agenda*, 47 U.C. DAVIS L. REV. 1667, 1688 (2014).

77. See *supra* note 75.

78. See Andrews & Caren, *supra* note 2, at 844, 846, 854; Pamela E. Oliver & Gregory M. Maney, *Political Processes and Local Newspaper Coverage of Protest Events: From Selection Bias to Triadic Interactions*, 106 AM. J. SOC. 463 (2000); Oliver & Myers, *supra* note 75, at 38, 40, 42.

79. Leachman, *supra* note 76, at 1689.

Initial analysis of these data indicated that these organizational activities are correlated with one another, presenting problems of multicollinearity for analysis.⁸⁰ Multicollinearity can affect the reliability of estimates of the effects of the independent variables on the dependent variable, which here is the extent of media coverage. To address correlation among the independent measures of organizational tactics I used factor analysis to reduce the number of independent measures.⁸¹ This analysis yielded five clusters of strategies, or factors, all of which were theoretically coherent (see description below). These factors provide measures of tactical groupings that are no longer correlated with each other, so that their relative contribution to media coverage can be tested accurately using multivariate analysis. The five factors yielded by this solution are:

Public Advocacy: testify to the legislature, draft rules, present research, talk to government officials directly, and train others. This set of strategies is, for the most part, directed at government in a traditional interest group politics approach.

Mobilizing Movement Participants: run ads, mount grassroots efforts, and participate in protests or demonstrations. This set of strategies is directed more generally at the public sphere and raising awareness of issues, consistent with participatory democracy arguments.

Coalition and Outreach: send letters to supporters, coordinate with other organizations, join coalitions with other organizations, and engage in outreach and education. This set of strategies is oriented toward traditional community organizing approaches. They thus speak to the role of public interest organizations in building capacity in civil society more generally.

Client Representation: represent clients in court and provide informal legal advice and assistance. This set of strategies is most closely related to the narrow view of pro bono representation as individual client services rather than strategic efforts at change.

80. “Multicollinearity” means high levels of correlation among the independent variables in the model. See *Multicollinearity*, MERRIAM WEBSTER, [<https://web.archive.org/web/20180311194359/https://www.merriam-webster.com/dictionary/multicollinearity>].

81. Factor analysis is a statistical technique used to reduce the number of variables needed to explain variance and create variables (factors) that are not correlated for use in regression analysis. In this analysis, I used Principal Axis Factoring with Varimax rotation. Only factors with an Eigenvalue of 1 or greater were retained.

Table 1: Regression Estimating Media Coverage of Public Interest Law Organizations

	Model 1				Model 2					
	Unstandardize d Coefficients	Std. Error	β	t	Sig.	Unstandardize d Coefficients	Std. Error	β	t	Sig.
Constant	2.384	0.121		19.74	0.00	2.000	0.168		11.93	0.00
<i>Policy Advocacy</i>										
<i>Mobilizing Movement</i>	0.481	0.143	0.186	3.358	0.00	0.324	0.155	0.131	2.099	0.03
<i>Participants</i>	1.058	0.146	0.397	7.233	0.00	0.927	0.167	0.341	5.560	0.00
<i>Coalition and Outreach</i>	0.319	0.151	0.116	2.110	0.03	0.374	0.152	0.151	2.469	0.01
<i>Client Representation</i>	-	0.150	-0.269	-4.928	0.00	-	0.200	-0.201	-3.054	0.00
<i>Amicus Intervention</i>	0.738	0.150	0.257	4.703	0.00	0.611	0.165	0.192	2.924	0.00
<i>Impact Litigation</i>	0.707	0.150	0.257	4.703	0.00	0.481	0.165	0.192	2.924	0.00
N										
R squared										
						1.116	0.335	0.238	3.330	0.00
	205					177				
	0.417					0.398				

Amicus Intervention: file amicus briefs, intervene in cases and talk with the press. This set of strategies focuses on litigation and courts as the location of change, but piggybacks on existing litigation by intervening or filing amicus briefs rather than bringing the case itself. Talking with the press is also most closely associated with this strategy, suggesting that intervention and amicus participation are targeted toward publicizing a policy change goal or position, but with the courts rather than elected officials as the target.

Multiple linear regression was used to estimate the association of each of these factors with media coverage. This analysis revealed that all of these factors have significant relationships to media coverage, but not in the same direction or with the same magnitude (see Table 1).⁸² Examining the standardized coefficients in Model 1, Table 1, allows meaningful comparisons of the relative effects of these factors. Model 1 indicates that mobilizing movement participants ($\beta = .397$, $p < .001$) and amicus intervention ($\beta = .257$, $p < .001$) have the largest estimated positive effects on media coverage. By contrast, client representation strategies have a similarly large but *negative* relationship with media coverage ($\beta = -.269$, $p < .001$). In other words, organizations that engaged in more direct client representation had less media coverage of their activities. Policy advocacy and coalition and outreach activities also were significantly positively related to media coverage, but had smaller effect sizes than mobilization and amicus strategies (see Table 1).

Given the emphasis in law and society literature on the utility of litigation for gaining media coverage for a cause, the negative relationship between client representation strategies and media coverage was surprising. It may be, however, that impact litigation and direct client representation do not have the same relationship to media coverage. Impact litigation often seeks to change policy or challenge existing social relations, and therefore may seem particularly newsworthy to the media. Although direct client representation has the potential to do the same, often direct legal services are limited to individual representation of clients on relatively routine matters.⁸³

82. Media coverage (i.e., number of articles mentioning an organization) was not normally distributed, but instead had a long right tail, which is not uncommon for count measures such as this. To adjust for this non-normal distribution, I log transformed the dependent measure of media coverage. Thus, the regression results reported have as their dependent measure the log transformation of media coverage. This approach does not affect the interpretation of the relative effect sizes of the independent variables.

83. This difference is the product of political backlash against the early success of poverty organizations in changing policies that adversely affect the poor, not

To address this potential difference, Model 2 includes an additional variable indicating whether half or more of the organization's legal activities involve impact litigation (see Table 1).⁸⁴ When this variable is introduced in Model 2, impact litigation has a significant positive relationship with media coverage ($\beta = .238, p < .01$), in contrast to the continued significant negative relationships between client representation and media coverage ($\beta = -.201, p < .01$).⁸⁵ Thus some kinds of legal representation, particularly impact litigation and amicus or intervention strategies, do seem to attract media coverage. We also know from prior research that these strategies tend to be concentrated among national public interest law organizations that are not funded by the Legal Services Corporation.⁸⁶ By contrast, a focus on direct client representation, typical of LSC-funded organizations, results in less attention from the media. These findings thus suggest one possible reason why media coverage of poverty organizations was not proportionally distributed: they are more likely to be engaged in direct client representation rather than impact litigation or amicus intervention strategies.

More broadly, the relative contributions of these strategies toward media coverage suggest some interesting conclusions about public interest law organizations as civil society organizations. First, these organizations seem to have the greatest effect on media coverage when they engage in participatory democracy strategies associated with protests and social movement mobilization. This is consistent with the argument of social movement scholars that protest activities produce the most attention from media. Second, however, certain forms of court directed activities seem almost as effective in terms of media coverage, in particular, impact litigation and amicus intervention strategies. This finding is consistent with law and society scholars who argue that litigation is a way to attract attention to a cause or put an issue on the public agenda.⁸⁷ It is also consistent with the argument that litigation

a naturalized aspect of these kinds of legal problems, however. See *Two-Tier System of Access to Justice*, *supra* note 3, at 998.

84. The survey asked organizations what percentage of their total legal activities were devoted to impact litigation. Inspecting the frequency distribution of answers to this question revealed a bimodal distribution with a clear split at fifty percent. Accordingly, for this analysis, the continuous measure of percent impact litigation was converted to a binary variable indicating whether the organization devoted half or more of its activities to impact litigation.

85. Note that the explained variance (R squared) decreases somewhat in Model 2 compared to Model 1. This is likely the result of the reduction in the number of observations in Model 2 because of missing data on the impact litigation measure.

86. *Two-Tier System of Access to Justice*, *supra* note 3, at 1013.

87. MCCANN, *supra* note 2, at 58–60, 71–72; Leachman, *supra* note 76, at 1697–1705, 1713–44.

2018:187 *Democracy, Civ. Soc’y, and Pub. Int. Law* 207

can be a form of participation in democratic governance.⁸⁸ Yet it also indicates that only confrontational impact litigation, the strategy that is most akin to protest activity, draws media attention.

By contrast, the time-consuming work of policy advocacy and coalition building, while perhaps critical to the role of civil society organizations in expanding grassroots participation and empowering citizens, does less to attract media attention. To be sure, these activities do not have clearly defined action or outcome points like protests or litigation, and that may explain the difference in coverage. Nevertheless, this difference suggests that not all public interest law organization activities have the same impact on dialog and civic engagement in the public sphere. Organizations particularly concerned about shaping the public agenda and ensuring marginalized voices are heard should take note of the variation across strategies in this regard.

Finally, the evidence that greater investment in client representation produces less attention from the media is sobering. It supports arguments that pushing public interest representation toward the individual client model will defang public interest law organizations as vibrant actors in civil society.⁸⁹ This finding also may reflect efforts to suppress the law reform activities of poverty organizations, and LSC-funded poverty organizations in particular, which date back to the Reagan era and continue even today.⁹⁰ These results raise concern about maintaining the independence, financial and otherwise, of public interest law organizations from political control, an issue I turn to below.

C. To What Extent are PILOs a Counterweight to the State and Other Powerful Interests?

“Autonomy from the state has been considered a core feature of American civil society, and understanding the consequences of perceived threats to that autonomy has been a central theme in social

88. Zemans, *supra* note 1.

89. See BRENNAN CTR. FOR JUSTICE, RESTRICTING LEGAL SERVICES: HOW CONGRESS LEFT THE POOR WITH ONLY HALF A LAWYER 9–13 (2000) (discussing how LSC restrictions on class actions make it difficult for lawyers for the poor to challenge government and market power effectively because they must do so one client at a time); Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 379 (2004) (noting legal aid programs face a difficult choice between forgoing federal funds and helping fewer clients but in a more effective fashion, or handling more individual cases but only in the ways least likely to promote social reform).

90. See *Funding the Cause*, *supra* note 3, at 66–68, 81–83; Debra Cassens Weiss, *Trump Budget Eliminates Legal Services Corp. Funding*, ABA J. (Mar. 16, 2017, 8:45 AM CDT), [<https://perma.cc/YLS4-E9JN>].

and political theory.”⁹¹ The independence of public interest law organizations is no exception. For example, political interests that oppose the law reform activities of LSC-funded organizations succeeded in passing legislative limits on their activities, limits that were later found to be unconstitutional limits on free speech.⁹² Other research indicates that even when the private bar funds public interest organizations, the private bar can discourage these organizations from engaging in activities that are counter to the interests of their well-heeled clients.⁹³ Thus, funding can be a tool of control, and following this line of reasoning, here I discuss the reliance of public interest law organizations on public funding in particular.

Comparing funding data from the organizations in this sample to data from prior studies shows that over time PILOs have shifted toward greater reliance on federal and state grants relative to other sources of funds such as attorney’s fees or foundation grants.⁹⁴ Albiston and Nielsen compared data on the funding sources for the organizations in this study to similar data from earlier studies done by Joel Handler and colleagues, and by Nan Aron.⁹⁵ Handler found that on average, public interest law organizations depended on federal funds for eight percent of their budget, and on state funds for one percent of their budget.⁹⁶ A much larger percent of organizational budgets came from foundation grants (forty-two percent), membership dues (nineteen percent), and contributions or gifts (twenty-five percent).⁹⁷ Nan Aron’s survey, conducted approximately ten years later, found that public interest organizations, on average, received eighteen percent of funding from the federal government and three percent from state and local funds.⁹⁸ Other sources were still important, but were shrinking in terms of their relative proportion in the average budget.⁹⁹ In comparison, by 2004, federal and state funds contributed almost forty percent of the budgets

91. See Chaves et al., *supra* note 29, at 292.

92. *Legal Servs. Corp. v. Velasquez*, 531 U.S. 533 (2001); William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960's to the 1990's*, 17 ST. LOUIS U. PUB. L. REV. 241 (1998).

93. Mark Kessler, *Legal Mobilization for Social Reform: Power and the Politics of Agenda Setting*, 24 L. & SOC’Y REV. 121, 132–39 (1990).

94. See *Funding the Cause*, *supra* note 3, at 75–78.

95. *Id.*

96. Joel F. Handler et al., *The Public Interest Law Industry*, in PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 42, 54 (Burton A. Weisbrod et al. eds., 1978).

97. *Id.*

98. NAN ARON, LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND 39 (1989).

99. *Id.* at 39–41.

of public interest law organizations, whereas funding from non-governmental sources such as private foundations, membership dues, and gifts were smaller as a proportion of budgets than the 1980s estimates.¹⁰⁰

These trends show a growing reliance on governmental funding that could potentially compromise the independence of public interest law organizations as civil society organizations. Indeed, government grants increasingly come with restrictions on PILOs’ activities, clients, and legal strategies.¹⁰¹ Moreover, not all organizations are affected in the same way by these developments. Prior research shows that conservative organizations are less dependent on government money and less subject to restrictions, although even conservative firms are not completely free from restrictions.¹⁰²

What are the normative implications of these shifts toward government funding for PILOs’ ability to provide a check on government power? Theoretical perspectives that emphasize electoral politics as the main mechanism of accountability may not see government support as a problem because it does not undermine the primary form of democratic participation—voting. By contrast, those who emphasize how civil society organizations matter for ensuring state accountability may argue that increasing dependence on public funds undermines the independence necessary to operate as effective advocates against the state. To the extent that public funding restricts the voice and advocacy of organizations representing poor and marginalized constituencies, these developments also threaten to exacerbate power inequalities in the political system and to silence participation in democratic debate by these constituencies.¹⁰³

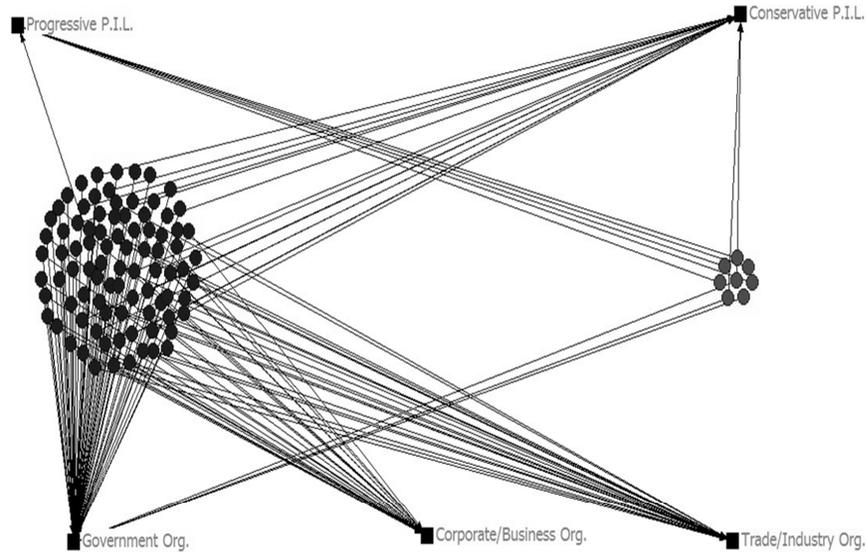
One final question is to what extent do public interest law organizations act as a counterweight to the government or the market? If public interest law organizations operate as a counterweight to government and powerful market actors, one would expect them to report government or business as their primary opponents.

100. *Funding the Cause*, *supra* note 3, at 76 fig.2.

101. *Id.* at 81–88.

102. *Id.* at 83–85, 84 fig.5.

103. See BRENNAN CTR. FOR JUSTICE, *supra* note 89, at 6–7 (noting that the 1996 legislative restrictions on LSC fund recipients prohibit, inter alia, representing clients in matters related to redistricting (e.g. the Voting Rights Act), LSC oversight, or welfare reform activities); Luban, *supra* note 20, at 220–36 (discussing “silencing doctrines” designed to leverage public funding to take voices for low-income constituencies out of the legal system and policy debate).

Figure 3: Who do public interest law organization oppose?

Liberal Organizations

Conservative & Libertarian
Organizations

Figure 3 charts graphically the answers of conservative and progressive public interest law organizations to the question “who do you typically oppose,” using descriptive mapping of their answers conceptualized as network connections. Progressive organizations listed government, business, and trade organizations as their most frequent opponents. Conservative organizations listed government organizations as their opponent frequently as well, but none of the conservative organizations listed business or trade organizations as their opponents. Interestingly, both conservative and progressive public interest law organizations listed each other as opponents fairly frequently, and sometimes listed organizations within their own group as well.

These data suggest that progressive and conservative public interest law organizations may share some libertarian values that drive their opposition to government entities, although likely on different issues. In this sense, both types of organizations may operate as civil society counterweights to government power. But the stark difference between these groups is their orientation toward business or market organizations, which conservative public interest law organizations in this study rarely oppose.

CONCLUSION

In this article, I have argued that public interest law organizations should be understood as civil society organizations, part of the tripartite structure of market, state, and civil society that underlies healthy democracy. In doing so, I argue for a vision of civil society that rests on participatory democracy theories that emphasize voice and inclusion rather than classical theories that emphasize voting and interest group politics. Indeed, now more than ever, skepticism seems warranted about whether electoral politics and organized private interests are sufficient checks on government and market power. Growing support for organizations such as the ACLU,¹⁰⁴ front page pictures of lawyers composing emergency petitions on laptops while sitting on airport floors,¹⁰⁵ and strong opposition to renewed attacks on the Legal Services Corporation¹⁰⁶ show the central role public interest law plays in both access to justice and civic engagement. Public interest law organizations matter because they can provide an infrastructure for citizen action, a voice for marginalized constituencies, a means to shape the public agenda, and a bulwark against government overreaching.

But how well do they fill these roles in practice? The findings presented in this article provide some insight on this question. First, these data indicate that most public interest law organizations are not membership organizations, but this does not necessarily mean the rise of “associations without members” critiqued by political scientist Theda Skocpol.¹⁰⁷ Not only members, but also disempowered and marginalized client groups affected by legislative lobbying and litigation are the citizens represented by these organizations. The variety of organizational forms found here is an important reminder of the diversity within the advocacy organization field and that advocacy organizations use multiple tactics to pursue their goals.¹⁰⁸ Indeed,

104. Katie Mettler, *The ACLU Says it got \$24 Million in Online Donations this Weekend, Six Times its Yearly Average*, WASH. POST (Jan. 30, 2017), [https://web.archive.org/web/20180311203939/https://www.washingtonpost.com/news/morning-mix/wp/2017/01/30/the-aclu-says-it-got-24-million-in-donations-this-weekend-six-times-its-yearly-average/?utm_term=.8caadb64d79e].

105. Jonah Engel Bromwich, *Lawyers Mobilize at Nation’s Airports After Trump’s Order*, N.Y. TIMES (Jan. 29, 2017), [<https://www.nytimes.com/2017/01/29/us/lawyers-trump-muslim-ban-immigration.html>] (last visited Apr. 2, 2018).

106. Casey C. Sullivan, *ABA, Law Firms Speak Out Against Cuts to Legal Aid*, FINDLAW (Mar. 21, 2017, 3:12 PM), [<https://perma.cc/84QJ-VBMS>]; Weiss, *supra* note 90.

107. See Skocpol, *supra* note 29.

108. See, e.g., Leachman, *supra* note 76 at 1715–19 (discussing protest, advocacy, and litigation organizations); John D. McCarthy, *Persistence and Change*

membership organizations are not the only form of civil society organizations, nor are they necessarily the only form that promotes democratic engagement.

Second, while PILOs may provide support and legal representation to many marginalized constituencies, media coverage of PILOs tracks existing inequalities in democratic access and civic engagement. Mainstream causes such as environmental and consumer issues predominate over poverty and civil rights in media coverage even though poverty and civil rights organizations are far more numerous. Nevertheless, to the extent that these organizations engage in a variety of tactics, but especially protest activities and impact litigation, they do influence the media and thus contribute to the public agenda. These findings also reveal that it is the most confrontational activities of these organizations that have the largest effects on media coverage and debate in the public sphere.

Third, this research suggests that as public interest law organizations are currently constituted and funded, they may lack sufficient independence to function as effective civil society organizations. That is, their independence may be compromised by increasing dependence on government funding and the restrictions that come with that dependence. Nevertheless, the reported advocacy efforts of these organizations indicate they do act as a counterweight to market and state power, although there were some differences in this regard between progressive and conservative organizations.

Why should we care whether public interest law organizations are effective components of civil society? In the age of *Citizens United*,¹⁰⁹ when market actors loom large on the political stage, and concern grows about government overreaching, perhaps we should be especially concerned about shoring up civil society. Building bridges among civil society organizations, and sharing their tactical expertise and knowledge, may make all these organizations more effective. From the perspective of participatory democracy, this outcome is democratic because it helps ensure even marginalized constituencies are heard. Along the same lines, tactical diversity rather than a single-minded focus on litigation may ensure more public attention to the causes and clients of public interest law organizations. And it is here that professional values that focus on professional decorum and detachment

Among Nationally Federated Social Movements, in SOCIAL MOVEMENTS AND ORGANIZATIONAL THEORY 193, 193–225 (Gerald F. Davis et al. eds., 2005); Debra Minkoff et al., *Organizational Diversity in the U.S. Advocacy Sector*, 55 SOC. PROBS. 525 (2008).

109. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

may come into conflict with tactics such as protest that serve civil society goals.¹¹⁰

The results discussed in this article raise some concerns about how effective public interest law organizations are as civil society organizations. One must also consider, however, the comparative institutional question of how well these organizations perform relative to the alternatives. Public interest law organizations may not amplify the voices of poor constituents as well as they do other constituents, but mobilizing low-income communities and sustaining that mobilization are well-established challenges.¹¹¹ Public interest law organizations may still amplify the concerns of low-income communities relative to the absence of these organizations, even if that improvement leaves something to be desired. More generally, as a question of institutional design, we might ask whether public interest law organizations might serve civil society goals more effectively if civil society values and goals were more explicit and central to their mission. Acknowledging and foregrounding the values of participatory democracy help frame confrontational tactics such as litigation and protest as supportive of, rather than contrary to, democracy, much as the Supreme Court did in *NAACP v. Button*.¹¹²

Finally, these findings highlight that access to justice and public interest law are not merely problems of providing services to meet unmet legal needs. To be sure, providing service to those in need is a time-honored role of civil society, and this article finds it is central to how these organizations select their clients. Nevertheless, I have argued that participatory democratic approaches as applied to public interest law organizations reveal how legal representation and democratic values are not opposed, but instead intertwined and complementary. Understanding access to justice as central to, rather than illegitimate in, civil society and democracy changes the debate about the meaning and legitimacy of public interest law. It makes clear that constraints on citizen access to representation and the courts are also threats to a vibrant civil society. If so, we must be attentive to threats to the

110. See Nancy D. Polikoff, *Am I My Client?: The Role Confusion of a Lawyer Activist*, 31 HARV. C.R.-C.L. L. REV. 443, 449–54 (1996) (discussing the conflict between the need to maintain professional credibility and the ways in which professional decorum can undermine relationships with clients engaged in civil disobedience and protest).

111. See generally FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE’S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* (1979). Piven and Cloward might argue, however, that formal organization itself caused the demobilization (and resulting lack of media coverage) of poor peoples’ movements.

112. See *NAACP v. Button*, 371 U.S. 415 (1963) (holding that the NAACP’s choices of litigation tactics are “modes of expression” and protected by the First and Fourteenth Amendments).

organizations that provide public interest representation in the interest of preserving democracy.