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Matthew T. Bodie

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MOTHER JONES MEETS GORDON GEKKO: THE COMPLICATED RELATIONSHIP BETWEEN LABOR AND PRIVATE EQUITY

MATTHEW T. BODIE*

In 2007, private equity firms came under increasing scrutiny for the favorable tax treatment accorded to their fund managers' compensation. Labor, particularly the Service Workers International Union ("SEIU"), was instrumental in bringing this issue to the attention of the media and the public. However, SEIU's private equity campaign is just one way in which the union is pursuing its primary concern: increasing the ranks of its members. This Article examines the role that the SEIU private equity campaign plays both in the overall debate about private equity taxation as well as in the union's negotiations with private equity firms. It argues that SEIU is using the campaign not only to promote changes in public policy, but also to pressure private equity firms to work with the union on issues such as card-check agreements. Unions, like other businesses, should be free to pursue their political agendas—agendas that serve their interests as businesses. Efforts to restrict union political activity are based on an outdated vision of union representation and would cause (if enacted) further distortions to the market for political influence.

INTRODUCTION

Last year marked the twentieth anniversary of the movie *Wall Street*.¹ The movie provided a brilliant encapsulation of the financial markets in the 1980s.² Private equity funds, hostile takeovers, insider trading—all are colorfully and sharply

* Associate Professor, Saint Louis University School of Law. A.B., Princeton University; J.D., Harvard Law School; LL.M., New York University School of Law. Thanks to the participants at the Second Annual Colloquium on Current Scholarship in Labor and Employment Law for their comments and questions. Thanks as well to the University of Colorado Law School, the University of Denver Sturm College of Law, and the *Colorado Law Review* for hosting the conference. Sarah Leberstein and Victor Fleischer contributed much-appreciated thoughts and assistance on this project.

1. *WALL STREET* (Amercent Films 1987).

2. For a discussion of the film's depiction of business, see Larry Ribstein, *Imagining Wall Street*, 1 VA. L. & BUS. REV. 165 (2006).

depicted. The most iconic figure is of course Gordon Gekko, the takeover artist who seduces the protagonist, Bud Black, into betraying his ideals and his father in the pursuit of great wealth.³ Although twenty years have passed, Gekko himself might be forgiven for being even more at home in this era. Private equity firms have made big splashes throughout all sectors of the economy. These funds have bought out some of this country's largest companies, including Clear Channel Communications,⁴ Bausch & Lomb,⁵ and Chrysler Automotive (now Chrysler LLC).⁶ Several private equity funds raised substantial investment funds through the public markets through lucrative initial public offerings. Fund executives have ensconced themselves at the top of the wealth pyramid.⁷ Stephen Schwarzman, CEO of the Blackstone Group, took his company public at the same time he threw himself a \$4 million birthday party.⁸ Schwarzman, whose wealth and style have invited comparisons to Gekko,⁹ recently fueled the comparison by investing \$600 million in a Chinese company called BlueStar—a

3. Gekko's speech to the Teldar Paper shareholders remains an oft-cited paean to the virtues of self-interest. *See, e.g., id.* at 186–87.

4. Associated Press, *Clear Channel Shareholders Approve Buyout*, N.Y. TIMES, Sept. 26, 2007, <http://www.nytimes.com/2007/09/26/business/media/26clear.html?ref=business>. At the time of this writing, however, the banks that were funding the deal were threatening not to go through with it. *See* Michael J. de la Merced & Andrew Ross Sorkin, *Six Banks are Sued in Clear Channel Deal*, N.Y. TIMES, March 27, 2008, <http://www.nytimes.com/2008/03/27/business/media/27radio-web.html?scp=5&sq=%22Clear%20Channel%20Deal%22&st=cse>.

5. *Bausch & Lomb Holders Approve Warburg Pincus Buyout*, INT'L BUS. TIMES, Sept. 21, 2007, *available at* <http://www.ibtimes.com/articles/20070921/bausch-amp-lomb-warburg-pincus-buyout-approve.htm>.

6. Nick Bunkley, *With Sale, Chrysler's Identity is Simplified*, N.Y. TIMES, Aug. 4, 2007, at C9, *available at* <http://www.nytimes.com/2007/08/04/business/04auto.html>.

7. It is now a matter of pop culture wisdom that the richest of the rich are hedge fund and private equity managers. *See, e.g.,* Duff McDonald, *The Running of the Hedgehogs*, N.Y. MAG., Apr. 9, 2007, *available at* <http://nymag.com/news/features/2007/hedgefunds/30341/> (noting that “[t]hree out of ten of us think the average hedge-fund pro makes more than \$10 million a year”).

8. Liz Smith, *Bash Makes History*, N.Y. POST, Feb. 16, 2007, http://www.nypost.com/seven/02162007/gossip/liz_bash_makes_history_liz_smith.htm (estimating that the party—feting 600 guests with entertainers Patti LaBelle, Martin Short, and Rod Stewart—cost between \$3 and \$4 million).

9. *See, e.g.,* Kurt Andersen, *Greed is Good and Ugly*, N.Y. MAG., July 23, 2007, *available at* <http://nymag.com/news/imperialcity/34990> (“Steve Schwarzman is a perfect poster boy for this age of greed, sharklike, perpetually grinning, a tiny Gordon Gekko without the hair product.”).

company with the same name as the airline in *Wall Street* that provides the critical denouement.¹⁰

All this conspicuous wealth generation and dissipation raises concern and even outrage over private equity's increasing wealth and power. The media has indulged in breathless coverage of the parties, the art purchases, the bonuses, the annual compensation, and the occasional meltdown—often with a blend of disgust and envy.¹¹ Not unexpectedly, private equity's resurgent wealth and power attracted the attention of Congress. The summer of 2007 saw multiple Congressional hearings¹² and proposed legislation. There were bills specifically targeted at the Blackstone IPO,¹³ as well as Representative Rangel's "mother of all tax reforms" that would raise taxes on private equity, hedge funds, and venture capital firms.¹⁴ Media reports indicate a pitched battle between the private equity industry and a variety of other interest groups.¹⁵

It should not be surprising to find labor unions involved in this fight. The taxation of private equity cuts to the heart of

10. Jessica Winter, *Greed is Bad. Bad!*, SLATE, Sept. 25, 2007, <http://www.slate.com/id/2174672/>.

11. See McDonald, *supra* note 7; Smith, *supra* note 8; John Carney, *Amaranth Meltdown Roundup*, DEALBREAKER, Sept. 20, 2006, http://www.dealbreaker.com/2006/09/amaranth_meltdown_roundup.php; see also Daisy Ku & Kate Holton, *Blackstone Defends Private Equity Role in Business*, REUTERS, Nov. 26, 2007, <http://www.reuters.com/article/innovation/News/idUSL266319520071126?pageNumber=1&virtualBrandChannel=10000> (discussing Schwarzman's view that private equity is "a destructive force with a short-term perspective, leveraging companies and stripping their assets to enrich a few nasty people like me").

12. See, e.g., *Carried Interest, Part I: Hearing before the S. Comm. on Fin.*, 110th Cong. (July 11, 2007), available at <http://www.senate.gov/~finance/sitepages/hearing071107.htm>; *Carried Interest, Part II: Hearing Before the S. Comm. on Fin.*, 110th Cong. (July 31, 2007), available at <http://www.senate.gov/~finance/sitepages/hearing073107.htm>; *Carried Interest Part III: Pension Issues: Hearing Before the S. Comm. on Fin.*, 110th Cong. (Sept. 6, 2007), available at <http://www.senate.gov/~finance/sitepages/hearing090607.htm>.

13. S. 1624, 110th Cong. (1st Sess. 2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s1624is.txt.pdf; H.R. 2834, 110th Cong. (1st Sess. 2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h2834ih.txt.pdf. For an overview of the Blackstone IPO and its tax engineering, see Victor Fleischer, *Taxing Blackstone*, TAX L. REV. (forthcoming 2008), available at <http://ssrn.com/abstract=1012472>.

14. Lisa Lerer, *Professor's Proposal Angers Wall Street*, POLITICO.COM, Oct. 30, 2007, <http://dyn.politico.com/printstory.cfm?uuid=ED41ADCB-3048-5C12-006DB3713DD44940>.

15. *Big Day in Washington for Carried Interest Debate*, N.Y. TIMES DEALBOOK (Andrew Ross Sorkin ed.), Sept. 6, 2007, <http://dealbook.blogs.nytimes.com/2007/09/06/big-day-in-washington-for-carried-interest-debate>.

labor's political agenda: namely, ensuring fair treatment for working men and women. Taxing the wealthiest at a rate less than half that of the average worker is a perfect example of the political "stacked deck" that unions rail against. Without a doubt, unions have worked hard, both publicly and behind the scenes, to reform the existing tax rates for private equity. One union, the Service Employees International Union (SEIU), has been out front on this issue. It established an initiative called "Behind the Buyouts" designed to inform the public about the role of private equity—an initiative that has included a lengthy policy paper, street theater, and political action.¹⁶

It may seem obvious that SEIU, along with other unions, would fight tooth-and-nail against private equity and would push hard for legislation raising taxes on the fund managers. And indeed, much of their activity has fallen into this predictable vein. The reality, however, is more complicated. Yes, SEIU is involved in the current Congressional activity on the carried-interest issue. And yes, SEIU has promoted concerns about private equity through its websites, its reports, and even through political theater.¹⁷ At the same time, however, in 2007 SEIU did not officially take a position on any of the pending private-equity-oriented legislation.¹⁸ As its materials make clear, SEIU is not opposed to private equity as long as private

16. Nathan Vardi, *Hill to Hear Union Concerns*, FORBES.COM, May 14, 2007, http://www.forbes.com/leadership/2007/05/14/chrysler-buyout-congress-lead-manage-cx_nv_0514unions.html (noting that SEIU "recently started a private equity campaign featuring a Web site, behindthebuyouts.org").

17. See, e.g., *Buyout Tax Debate Hits the Hamptons*, N.Y. TIMES DEALBOOK (Andrew Ross Sorkin ed.), Aug. 30, 2007, <http://dealbook.blogs.nytimes.com/2007/08/30/buyout-tax-debate-hits-the-hamptons>.

18. Since the initial draft of this article in fall 2007, SEIU has grown more aggressive in its approach to private equity. There are signs that the union has moved away from its silence on the tax bills and is now supporting those bills. For example, the union recently placed an ad in Roll Call which states plainly, "Close the carried tax loophole. Support HR 6275." (HR 6275 refers to the Alternative Minimum Tax Relief Act of 2008. See H.R. 6275, 110th Cong. (2d Sess. 2008), available at <http://www.thomas.gov/> ("Search Bill Text" for Number "H.R. 6275"; select a version of the bill to view). Section 710 of the Act provides that income from investment services partnership interests shall be treated as ordinary income for tax purposes. *Id.* However, this movement does not change the paper's thesis: namely, that the private equity initiative is a combination of ideological commitment and savvy negotiating tactics. As time has passed, the union has stepped up its pressure on private equity firms. See Thomas Heath, *Ambushing Private Equity*, WASH. POST, April 17, 2008, at D1 ("[SEIU's Stephen] Lerner and [Andy] Stern began meeting with the heads of the big private-equity firms about a year ago, asking them to be more generous with health care, salaries and other employee benefits. . . . When the union didn't get the response it wanted, it turned up the heat.").

equity is sufficiently worker-friendly. In other words, the union's ultimate stance on private equity taxation may depend on the industry's willingness to work with labor.

Labor's complicated relationship with private equity should prompt reconsideration of two standard narratives that inform our traditional approach to labor law. First, SEIU's campaign illustrates that a binary, labor-against-capital system of labor law ignores a much more complicated twenty-first century reality. Although unions and employers may have competing interests, they also have complimentary interests that savvy unions are exploring. Instead of seeing unions simply as public service organizations that protect worker rights, unions should be recognized as members of a service industry that pursue better terms for their members and growth for their organizations. Rather than being surprised when unions act like sophisticated businesses, we should welcome this new development.

Second, there is the longstanding narrative about the distinction between union spending on politics and spending on collective bargaining. The Supreme Court has repeatedly held that unions must differentiate their spending between collective bargaining representation expenses and non-representation expenses such as spending on political causes.¹⁹ All represented employees must pay representation expenses, but they may opt out of paying for non-representation activities.²⁰ The SEIU's political campaign on the private-equity taxation issue provides yet another example of the illogic of this distinction. Like any other industry, unions must use their resources to protect their interests in the halls of government. The notion of a separation between politics and collective bargaining rests on a flawed vision of the union's role in both arenas.

This Article describes a new vision for the relationship between labor unions and capitalists. Part I provides background

19. See *Comm'n Workers of Am. v. Beck*, 487 U.S. 735 (1988); *Ellis v. Bhd. of Ry. Clerks*, 466 U.S. 435 (1984); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961).

20. Employees who are represented by a union have the choice whether or not to become members of that union. However, unions may still charge non-members for the cost of representation expenses. See *NLRB v. General Motors Corp.*, 373 U.S. 734, 744–45 (1963) (permitting “agency shop” agreements whereby unions charge non-members for the costs of collective representation). However, states are permitted under § 14(b) of the NLRA to outlaw agency shop agreements. 29 U.S.C. § 164(b) (2000). Twenty-two states currently have “right to work” provisions outlawing such agreements. MICHAEL C. HARPER ET AL., *LABOR LAW: CASES, MATERIALS, AND PROBLEMS* 982–83 (5th ed. 2003).

on the resurgence of private equity and discusses the traditional labor response to this growth. Part II discusses SEIU's innovative approaches to workplace representation, from the "Change to Win" coalition to the focus on card-check representation agreements. In Part III, this Article focuses on the complicated interactions between labor (particularly SEIU) and private equity funds. Finally, Part IV addresses how SEIU's private equity campaign should influence our conceptions of unions as political actors.

I. THE GROWTH OF PRIVATE EQUITY AND LABOR'S TRADITIONAL RESPONSE

Private equity firms serve a unique role within the world of high finance. They specialize in targeted takeovers of whole companies with a limited period of ownership. Private equity firms generally manage separate funds—pools of money in which sophisticated investors place significant chunks of money for an extended period of time (usually ten years).²¹ The firm manages the fund with an eye towards making large returns before the end of the fund's life span. The modus operandi of most private equity firms is to use their funds to take control of companies and then resell the company by the end of the fund's term. These big-ticket investments are the primary difference between private equity and other funds, such as hedge funds or mutual funds. While most other funds have a wide range of different investments on any particular day, private equity managers place a few large investments over the course of the ten-year fund.²²

Private equity firms thus have a unique blend of long-term and short-term incentives when managing their funds. On the one hand, private equity firms must take great care in making their investments; they do not leap in and out of positions on the value of the Thai baht, for example.²³ Because of this care, private equity firms have been characterized as shareholders

21. Brian Cheffins & John Armour, *The Eclipse of Private Equity* (ECGI – Law Working Paper No. 082/2007, 2007), available at <http://ssrn.com/abstract=982114>.

22. Steven E. Hurdle, Jr., Comment, *A Blow to Public Investing: Reforming the System of Private Equity Fund Disclosures*, 53 UCLA L. REV. 239, 242 (2005) (noting that most investments have a time horizon of seven to thirteen years).

23. See Phillip L. Zweig, *The Hedge Funds: The Rich Get a Little Richer*, BUSINESSWEEK, Aug. 25, 1997, <http://www.businessweek.com/1997/34/b3541191.htm> (discussing various hedge fund positions in the Thai currency).

with uniquely low agency costs: they have the combination of financial stake, attentiveness, and control that can allow them to oversee management effectively.²⁴ However, private equity firms also have some significant pressures to make a fast profit. First, the fund's life span is ticking from its beginning; the funds must all be returned (with profits) at the end of the span. Second, and more significantly, most private equity deals rely on debt in order to finance the control transaction. Private equity firms generally borrow in the range of fifty to seventy-five percent to finance the transaction,²⁵ and the debt service begins immediately. Thus, private equity firms must often find quick savings in order to make interest payments.

Because private equity firms are (1) solely focused on their returns as shareholders, and (2) interested in finding fast ways of saving money, their interests often conflict with the interests of workers at the newly-acquired company. In seeking to cut costs, the first place to look is often the workforce. In the 1980s, private equity funds frequently made their money by simply taking over a company, putting in new management, terminating a percentage of the workforce, selling off or closing underperforming divisions, and then reselling the remaining company for a profit.²⁶ Sometimes management became involved in such takeovers through a leveraged buyout. But in other cases, the private equity firm pursued a hostile takeover such as the Teldar Paper tender offer in *Wall Street*.²⁷

In contrast, the 1980s were a difficult time for unions and their members. Many of the manufacturing jobs that were the unions' bread and butter were leaving the country for cheaper overseas labor. Companies that had implicitly given their workers a lifetime employment contract began reneging on those contracts and firing workers with significant seniority. President Reagan's firing of illegally-striking air-traffic controllers legitimized efforts to replace striking employees as well as

24. For a discussion of the agency cost advantages to private equity, see Michael Jensen, *The Eclipse of the Public Corporation*, 67 HARV. BUS. REV. 61 (1989).

25. See Robert Bartlett, *Taking Finance Seriously: How Debt Financing Distorts Bidding Outcomes in Corporate Takeovers*, 76 FORDHAM L. REV. 1975, 2004 (2008) (discussing studies that show an average of sixty percent debt-to-equity ratios for 2006 buyouts, and an almost ninety percent ratio for completed buyouts between 1980 and 1989).

26. See generally Jensen, *supra* note 24.

27. See Ribstein, *supra* note 2.

tougher labor negotiations.²⁸ At the same time, hostile takeovers fueled by private equity and their ilk became the apotheosis of the cold-blooded capitalism that had seemingly taken over the country.

The response of unions to private equity was predictable and economically justified. Unions lobbied to give management greater protection against hostile takeovers—reasoning, perhaps, that the devil you know is better than the one you don't.²⁹ The most significant tangible results of this lobbying were the many "corporate constituency" statutes that sprang up in late 1980s and early 1990s.³⁰ These constituency statutes provided that a company's board of directors could take all of the stakeholders of a corporation into account when considering a transformative transaction.³¹ Thus, rather than simply looking at the deal from the perspective of the shareholders, the board could look to the interests of employees, bondholders, customers, and even the local community in making its strategic decisions. The purpose of these statutes was to provide a statutory excuse for boards' efforts to block takeover attempts that may have been beneficial to shareholders but harmful to management and employees. Private equity deals were the quintessential target for this legislation. However, constituency statutes had no real independent power in preventing hostile takeovers and other worker-unfriendly transactions; at best, they simply gave directors more discretion.³²

28. Michael H. LeRoy & John H. Johnson IV, *Death by Lethal Injection: National Emergency Strikes under the Taft-Hartley Act and the Moribund Right to Strike*, 43 ARIZ. L. REV. 63, 66 (2001) ("President Reagan's firing of nearly 12,000 air traffic controllers in response to a 1981 strike is also identified as a pivotal event in the decline of strikes. Some observers argue that this strike-response encouraged private employers to break, rather than settle, strikes.")

29. See Randall S. Thomas & Kenneth J. Martin, *Should Labor Be Allowed to Make Shareholder Proposals?*, 73 WASH. L. REV. 41, 47 (1998) ("During [the 1980s], unions generally supported corporate management in resisting hostile acquisitions by, among other things, pushing for stronger state antitakeover laws and accepting defensive employee stock ownership plans. Employee shareholders also supported a host of other antitakeover devices that insulated management from the consequences of poor performance.")

30. Thirty-one states currently have such statutes on their books. See Roberta Romano, *The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. ON REG. 209, 215 tbl.1 (2006).

31. For an example of a corporate constituency statute, see N.Y. BUS. CORP. LAW § 717(b) (McKinney 2006).

32. Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 580 n.4 (1992) (citing a letter from Joseph Grundfest, Commissioner, Securities Exchange Commission, to Mario Cuomo, Governor for New York (June 6, 1989)). See *id.* at 581 ("The prin-

As the recession hit in the late 1980s and the stock market cooled off, private equity receded somewhat from public view. At the same time, unions and their affiliated pension funds took a more active role as players in the markets and in corporate governance.³³ In some situations, labor was just bringing traditional battles to a new forum.³⁴ However, in other cases, unions began to form new alliances with other institutional investors in a renewed effort to police management. These efforts often cut against the labor-management alliances that had been formed in the 1980s. For example, union pension funds proposed shareholder resolutions asking that companies eliminate certain antitakeover defenses, such as the poison pill.³⁵ These resolutions sought to dismantle the protections that unions helped to erect in an earlier decade. They demonstrated the possibility of a new union and pension-fund mindset that was more comfortable with other shareholders than it was with management.

This mindset carried over into the new century—in fact, it is probably now even stronger. Scandals such as Enron and WorldCom provided further fuel to an already growing fire of resentment and concern from the putative “owners” of the corporation, the stockholders.³⁶ A new wave of shareholder activ-

cial criticism of rejecting this traditional relationship is that authorizing the board to consider constituencies that have no monitoring or enforcement powers would leave the board accountable to nobody.”); Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2065 (2001) (“[A] stakeholder measure of managerial accountability could leave managers so much discretion that managers could easily pursue their own agenda, one that might maximize neither shareholder, employee, consumer, nor national wealth, but only their own.”).

33. Stewart J. Schwab & Randall S. Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, 96 MICH. L. REV. 1018, 1019 (1998) (“In the 1990s, however, unions have become the most aggressive of all institutional shareholders.”).

34. See *id.* at 1025–27 (discussing “new union tactics in pursuit of old union goals,” such as one union’s corporate campaign against Albertson’s grocery stores).

35. *Id.* at 1027–29 (discussing one such proposal). “Poison pill” is the terminology used for certain defensive strategies that target companies employ to defeat a hostile takeover. The most common example of a poison pill involves the distribution of a new class of stock to the common shareholders. This stock contains certain provisions that will dilute the equity holdings of a hostile bidder should the bidder endeavor to go forward without the target board’s approval. The target board distributes this stock to shareholders in order to prevent a hostile bid from going forward. However, the board also retains the option to cancel these provisions, in order to allow the board to approve a bid at its discretion. See, e.g., Jonathan R. Macey, *The Legality and Utility of the Shareholder Rights Bylaw*, 26 HOFSTRA L. REV. 835, 839 (1998).

36. It is a misnomer to call shareholders the owners. See Stephen M. Bain-

ism has pushed for greater control and power for shareholders in their relationship with the incumbent management. Shareholder activists have been sharply critical of excessive executive compensation;³⁷ have fought against conflicts of interest between the board and the executives they oversee;³⁸ and have sought greater power over the corporation's leaders and governance structure.³⁹ These concerns were met with concrete changes in policy, such as the Sarbanes-Oxley independent director requirements,⁴⁰ the SEC's new required disclosure for executive pay,⁴¹ and the Second Circuit's recent ruling that shareholders could use existing resolution procedures to nominate directors.⁴²

bridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 604 (2006) (calling this view "deeply erroneous"); Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1192 (2002) ("From both a legal and an economic perspective, the claim that shareholders own the public corporation simply is empirically incorrect."). However, shareholders are entitled to the residual profits of the corporation, and thus they have particular incentives to make sure management maximizes this residual.

37. See, e.g., LUCIAN A. BEBCHUK & JESSE FRIED, *PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION* (2004) (arguing that the high levels of executive compensation are explained better by power relationships, rather than executive performance).

38. In one well-known example, Disney shareholders pursued a derivative suit blaming the board for failing to oversee the compensation package of one-time president Michael Ovitz. In re Walt Disney Co. Derivative Litig., 907 A.2d 693 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006).

39. See *Am. Fed'n of State, County & Mun. Employees v. Am. Int'l Group, Inc.*, 462 F.3d 121, 129–30 (2d Cir. 2006) (permitting shareholders to propose easier shareholder access for board nominations); Lucien A. Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 862–65 (2005) (arguing that shareholders should be able to initiate changes to the corporation's charter or place of incorporation). For an overview of Bebchuk's role in pushing for shareholders' rights, see Dan Slater, *The Activist Professor*, THE DEAL, June 4–10, 2007, at 40.

40. See Sarbanes-Oxley Act of 2002, § 301, 15 U.S.C. § 78j-1(m)(3) (Supp. IV 2004) (requiring independence for all audit committee members).

41. Executive Compensation and Related Person Disclosure, Securities Act Release No. 8732A, Exchange Act Release No. 54302A, Investment Company Act Release No. 27444A, 71 Fed. Reg. 53,158 (Sept. 8, 2006), available at <http://www.sec.gov/rules/final/2006/33-8732afr.pdf>.

42. *Am. Fed'n of State, County & Mun. Employees*, 462 F.3d at 123. The case involved a shareholder proposal under Securities Exchange Act Rule 14a-8 that would have amended the company's bylaws to allow shareholders to nominate directors for election on the company's proxy ballot. The court held that under then-existing regulations, the SEC could not permit companies to exclude such proposals on the grounds that they are related to an election. However, the SEC has since clarified its rules to permit the exclusion of such proposals. See SEC Release No. 34-56914, Dec. 6, 2007, available at: <http://www.sec.gov/rules/final/2007/34-56914.pdf>.

Labor has been deeply involved in this new movement. Unions and their affiliated pension funds are some of the largest institutional shareholders.⁴³ The unions have continued their efforts to work with other shareholders to oversee management and increase shareholder returns. In the shareholder-nomination proposal case, it was a union, after all, that submitted the shareholder proposal and brought the subsequent litigation.⁴⁴ Critics of the new "shareholder democracy" movement often single out unions as the type of shareholders that will unduly benefit from pro-democracy reforms.⁴⁵

As unions become more likely to ally with shareholders, one might expect a warmer relationship between labor and private equity. Indeed, there are undoubtedly greater financial ties. Although the precise holdings of private equity firms are kept secret, pension funds are among their investors.⁴⁶ However, there has been less evidence of the type of mutual alliances that labor has formed with other investor groups. Private equity seems less concerned with the greater transparency, lower executive compensation, and democracy-facilitating reforms of the shareholder democracy movement. Indeed, private equity continues to work in the rip-tide of the movement. Some have argued that reportedly pro-shareholder

43. State and local pension funds alone control approximately ten percent of the U.S. equity market. David Hess, *Public Pension Funds and the Promise of Shareholder Activism for the Next Frontier of Corporate Governance: Sustainable Economic Development*, 2 VA. L. & BUS. REV. 221, 225 (2007).

44. *Am. Fed'n of State, County & Mun. Employees*, 462 F.3d at 123–24.

45. See, e.g., Stephen Bainbridge, Commentary, *Unions Abusing Pension Funds for Politics*, EXAMINER.COM, Sept. 6, 2007, http://www.examiner.com/a-919085~Stephen_Bainbridge_Unions_abusing_pension_funds_for_politics.html (arguing that the SEC should "consider carefully" the investors it empowers, since union pension funds have interests that are counter to other shareholders); John Carney, *Against Shareholder Democracy*, DEALBREAKER, Sept. 27, 2007, http://www.dealbreaker.com/2007/09/against_shareholder_democracy.php (noting the "even grimmer scenario" of unions using shareholder initiatives to procure better pay for their members); Larry E. Ribstein, *The "Shareholder Democracy" Scam*, IDEOBLOG, http://busmovie.typepad.com/ideoblog/2006/10/the_shareholder.html (Oct. 27, 2006, 07:35) ("Corporate elections are unions' last opportunity to shore up their declining clout.").

46. *Pension Funds Moving Asset Allocation to Alternative Investments, Study Finds*, DAILY LABOR REPORT, March 15, 2005 (citing report that pensions had invested three to four percent of their funds in private equity, but that they also planned to invest more in the upcoming year); Robert Reich, Commentary, *Corporate, Public Pensions Roll the Dice* (MARKETPLACE podcast July 18, 2007), http://marketplace.publicradio.org/display/web/2007/07/18/corporate_public_pensions_roll_the_dice (noting that state pension plans have as much as twenty percent of their investments in private equity and hedge funds, and that some corporate plans have as much as forty percent in such funds).

reforms such as Sarbanes-Oxley have increased the costs of being a public company and thus have heightened the incentives to go private.⁴⁷ Private equity firms are happy to participate in the process; in addition, they have reportedly been willing to reward their management handsomely, in ways that are less acceptable in the public realm.⁴⁸

And there are still the traditional conflicts that arise when private equity looks to take over a unionized company. The recent buyout of Chrysler Automotive by Cerberus Capital Management is instructive. Chrysler merged with the German company Daimler Benz in 1998 and subsequently become a division of the larger company. Although the merger received significant criticism for its treatment of Chrysler shareholders,⁴⁹ Chrysler's unionized workers had less to fear from the German takeover, given Germany's employee-oriented "code-termination" policies.⁵⁰ For example, the president of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) sat on the DaimlerChrysler supervisory board pursuant to these policies.⁵¹

In 2007, DaimlerChrysler indicated an interest in selling off the Chrysler division. The announcement came after a series of poor financial results, including the downgrading of its bonds and a 2006 operating loss of \$1.5 billion.⁵² The company laid off over 13,000 workers and closed one plant.⁵³ Despite the

47. See Ehud Kamar, Pinar Karaca-Mandic & Eric L. Talley, *Going-Private Decisions and the Sarbanes-Oxley Act of 2002: A Cross-Country Analysis*, 25 J. L. ECON. & ORG. (forthcoming 2009), available at <http://ssrn.com/abstract=901769>; Ellen Engel, Rachel M. Hayes, & Xue Wang, *The Sarbanes-Oxley Act and Firms' Going-Private Decisions* (May 6, 2004) (working paper), available at <http://ssrn.com/abstract=546626>.

48. Cheffins & Armour, *supra* note 21.

49. Chrysler's largest shareholder prior to the merger sued DaimlerChrysler afterwards claiming that the assertions concerning a "merger of equals" were fraudulent misrepresentations. *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 216 (3d Cir. 2007). However, the suit was not successful. See *id.* at 232–33 (finding no misrepresentations).

50. See BILL VLASIC & BRADLEY A. STERTZ, *TAKEN FOR A RIDE: HOW DAIMLER-BENZ DROVE OFF WITH CHRYSLER* 249 (2000) (noting that "[e]ven labor's champions could hardly find fault with [the merger]").

51. Mark Landler & Micheline Maynard, *Chrysler Group to be Sold for \$7.4 Billion*, N.Y. TIMES, May 14, 2007, http://www.nytimes.com/2007/05/15/automobiles/15chrysler-web.html?_r=1&scp=2&sq=Landler%20%20Maynard&st=cse&oref=slogin.

52. Eric Weiner, *Q&A: Under the Hood of the Chrysler Deal*, NPR, May 14, 2007, <http://www.npr.org/templates/story/story.php?storyId=10184023>.

53. *Id.*

company's poor showing, union leaders were adamant against the sale of the company to a private equity firm. In April, UAW president Ron Gettelfinger characterized private equity bidders as "strip and flip artists" who were out to make a quick buck off the company.⁵⁴ He likened them to vultures "hovering overhead right now."⁵⁵ The media tended to echo Gettelfinger's fears.⁵⁶

A month later, however, Chrysler was sold to the private equity firm Cerberus Capital Management. Cerberus is an unusually secretive firm, even for private equity.⁵⁷ It has a reputation for bringing its own group of executive talent into play as part of its takeover strategy.⁵⁸ Cerberus had been involved in large deals before, but nothing as large or as prominent as Chrysler. Perhaps in light of Cerberus's reputation, current chairman John Snow was careful to indicate a willingness to work with labor as part of the deal.⁵⁹ More surprising was the UAW's eventual blessing. After the announcement of the merger, Gettelfinger said it was "in the best interest of [the] membership."⁶⁰ He further conceded that "once that decision's been made, then you've got to deal with the cards that you're dealt,"⁶¹ and the "vulture" rhetoric disappeared. Many workers remained suspicious of the merger, particularly because of the

54. Dale Russakoff & David Cho, *New Labor Strikes Deals With "Private Equity Guys,"* WASH. POST, June 10, 2007, at A1.

55. *Id.*

56. See, e.g., Frank Langfitt, *United Auto Workers Support Chrysler Sale* (NPR broadcast May 15, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=10184023> ("While private equity is generally looking to cut costs by cutting jobs and benefits, unions are busy trying to protect them.").

57. Andrew Ross Sorkin, *A Savior For Chrysler? Read On,* N.Y. TIMES, Feb. 19, 2008, at C1 (quoting Cerberus founder Stephen Feinberg as saying "[w]e despise all the public attention we are getting"), available at <http://www.nytimes.com/2008/02/19/business/19sorkin.html?scp=1&sq=%22A%20Savior%20for%20Chrysler%22&st=cse>; Emily Thornton, *What's Bigger Than Cisco, Coke, or McDonald's?*, BUSINESSWEEK, Oct. 3, 2005, http://www.businessweek.com/magazine/content/05_40/b3953110.htm (discussing how Cerberus's founder has a more "well-developed" penchant for secrecy than most private equity fund managers).

58. *Id.*

59. Nick Bunkley, *Workers Surprised as Union Backs Sale to Private Equity Firm,* INT'L HERALD TRIB., May 14, 2007, <http://www.iht.com/articles/2007/05/14/business/14unions.php> (quoting John Snow: "Cerberus has a good record of working successfully with companies that are organized. . . . We respect the role of organized labor. We appreciate the support the UAW has given.").

60. *Id.*

61. *Chrysler Workers Worried,* OAK. TRIB., May 15, 2007, at 1, available at http://findarticles.com/p/articles/mi_qn4176/is_20070515/ai_n19111684.

union's earlier fears.⁶² As one worker expressed: "Are they buying us to help us out or to suck the blood? It's kind of scary."⁶³ The announcement that no layoffs were currently planned did little to quell fears. As one automotive analyst noted, the UAW thought private equity "would be the end of the world, and in some ways it probably would be."⁶⁴

Although it is too early to tell how the deal will ultimately shake out for its participants, it has thus far shown signs of the traditional private-equity-meets-unionized-industry narrative. Cerberus hired Robert Nardelli to be Chrysler's CEO; Nardelli had been forced out at Home Depot after having notoriously bad relationships with institutional investors.⁶⁵ The big concern prior to the merger was the negotiation of a new labor deal after the prior deal's expiration in September.⁶⁶ After striking GM for two days to get a new collective bargaining agreement, the UAW needed to strike Chrysler for only six hours to get a similar deal.⁶⁷ However, despite the deal's blessing by UAW leadership, Chrysler workers only narrowly approved the new agreement.⁶⁸ Soon after the approval, the new owners instituted massive layoffs—layoffs that were double what many had expected.⁶⁹ Commentary on the layoffs included the notion

62. Bunkley, *supra* note 59 ("Chrysler workers were warned a few weeks ago by union officials that a private equity owner would be the worst thing that could happen to them. So many were as surprised as anyone on Monday to learn that the sale of Chrysler to Cerberus Capital Management had their leaders' support.").

63. *Chrysler Workers Worried*, *supra* note 61.

64. Landler & Maynard, *supra* note 51.

65. Alex Taylor III, *Nardelli is Strike One for Chrysler*, FORTUNE, Aug. 6, 2007, available at http://money.cnn.com/2007/08/06/news/companies/chrysler_nardelli.fortune/index.htm?section=money_topstories (noting that Nardelli "arrives on the heels of an enormous fiasco at Home Depot").

66. Indeed, prior to the sale it was thought that these labor talks would doom any potential for a deal. *Union Negotiations May Hold Up Chrysler Sale*, N.Y. TIMES DEALBOOK (Andrew Ross Sorkin ed.), April 24, 2007, <http://dealbook.blogs.nytimes.com/2007/04/24/union-negotiations-may-hold-up-chrysler-sale>.

67. Micheline Maynard, *A 6-Hour Strike by Auto Workers Against Chrysler*, N.Y. TIMES, Oct. 11, 2007, at A1, available at <http://www.nytimes.com/2007/10/11/business/11auto.html>.

68. Micheline Maynard, *Workers at Chrysler Narrowly Approve 4-Year Contract*, N.Y. TIMES, Oct. 28, 2007, at A18, available at <http://www.nytimes.com/2007/10/28/business/28auto.html> (noting concerns that "the contract did not provide as many guarantees of future work as a similar contract approved by workers at General Motors earlier this month, after a two-day strike").

69. Micheline Maynard, *Job Cuts at Chrysler Go Even Deeper Than Expected*, N.Y. TIMES, Nov. 2, 2007, at C1, available at <http://www.nytimes.com/2007/11/02/business/02auto.html?scp=1&sq=%22Job%20cuts%20at%20Chrysler%22&st=cse>.

that “[p]rivate equity is much better equipped to take the Draconian cuts” than public companies and that the layoffs constituted “stripping,” a reference to Gettelfinger’s “strip and flip” comment.⁷⁰ Chrysler also announced a two-week shutdown in July—a vacation shutdown in which employees would have to use their vacation time.⁷¹ In February, Cerberus came under fire for a letter it sent to its investors. The letter noted that the firm did “not need to be heroes” to do well on its Chrysler investment, perhaps indicating that the firm would staunch its losses rather than trying to save the firm.⁷² Most recently, the company has had to fend off rumors of impending bankruptcy.⁷³

The uncertain and suspicious relationship between Cerberus and the UAW is characteristic of the usual relations between labor and private equity. Private equity takes over a compromised but still surviving industry; labor protests but is ultimately powerless to do anything; massive layoffs ensue. However, there are indications that in other arenas, these often antagonistic players may find themselves in increasingly complicated relationships.

II. SEIU’S NEW APPROACH

SEIU is the largest and fastest-growing union in the country.⁷⁴ The union currently has almost two million members, having grown from 600,000 members twenty years ago.⁷⁵ Its remarkable growth is even more impressive given the workers that the union seeks to serve. SEIU focuses on health-care and other service workers, particularly property services such as janitorial and maintenance workers.⁷⁶ Many of these workers

70. *Id.* at C8.

71. Posting of Gordon Smith to The Conglomerate Blog, *Chrysler’s Closure*, <http://www.theconglomerate.org/2008/03/chryslers-closu.html> (March 13, 2008). In his email to employees, Nardelli said that “[a]s a private company, we all need to think like owners and do our part to accelerate Chrysler’s recovery and transformation.” *Id.*

72. Sorkin, *supra* note 57.

73. David N. Goodman, *Chrysler Denies Bankruptcy Talk, Welcomes Iacocca*, ASSOCIATED PRESS, June 26, 2008, available at <http://biz.yahoo.com/ap/080626/chrysler.html>.

74. Matt Bai, *The New Boss*, N.Y. TIMES, Jan. 30, 2005, (Magazine), at 38.

75. See ANDY STERN, A COUNTRY THAT WORKS: GETTING AMERICA BACK ON TRACK 55–56 (2006); Service Employees International Union (SEIU), *What Is SEIU?*, http://www.seiu.org/faqs/faq_whatisseiu.cfm (last visited May 24, 2008).

76. *Id.*

receive low wages and have few skills that the market values highly. SEIU has taken these workers and formed a powerful presence in economic and corporate life.

Much of the credit for SEIU's recent success has been attributed to its colorful and charismatic leader, Andy Stern. Stern started his career as an organizer for an SEIU local in the 1970s and a decade later rose to be the national organizing and field services director.⁷⁷ Working with then-SEIU president John Sweeney, Stern helped develop a plan for growth that almost doubled the union's size in eight years.⁷⁸ Sweeney rode the union's success to the presidency of the AFL-CIO in 1994.⁷⁹ After Sweeney chose another union officer as his interim replacement at SEIU, two years later Stern ran against the replacement and won the presidency.⁸⁰

Stern's words and actions since taking office have made him perhaps the most prominent union leader since Jimmy Hoffa. Most controversially, Stern is regarded as the catalyst behind the coalition of unions who broke from the AFL-CIO. In 2005, seven of the largest and most prominent unions left the AFL-CIO to form the Change to Win Coalition.⁸¹ The move followed an effort by the Coalition unions to change certain AFL-CIO practices. The Coalition had proposed greater union consolidation (in order to promote industry concentration), greater coordination between unions in bargaining and organizing, and a fifty percent rebate of AFL-CIO dues to those unions who implemented a strategic plan for organizing and growth.⁸² However, the AFL-CIO executive committee rejected the fifty percent rebate in favor of a smaller one, and the Coalition members left the AFL-CIO three months later.⁸³

The Coalition members' decision to leave the established conglomeration of mainline unions caused surprise and consternation among outside observers and union supporters.⁸⁴

77. Bai, *supra* note 74, at 41; STERN, *supra* note 75, at 44–51.

78. STERN, *supra* note 75, at 56.

79. *Id.* at 61.

80. *Id.* at 61–63.

81. The seven unions are SEIU, the Teamsters, the United Farm Workers, United Food and Commercial Workers International Union, the Laborers, the Carpenters, and UNITE HERE (the needletrades, hotel, and restaurant workers). Change to Win: The American Dream for American Workers, About Us, <http://www.changetowin.org/about-us.html> (last visited July 31, 2008).

82. STERN, *supra* note 75, at 88; David Moberg, *Chips Fall in Vegas*, NATION, March 3, 2005, <http://www.thenation.com/doc/20050321/moberg>.

83. STERN, *supra* note 75, at 92–98.

84. See, e.g., Howard Fineman, *A Democratic House Divided*, NEWSWEEK,

The move was initially characterized as a dispute over the level of political spending, with the AFL-CIO allegedly wanting more and the Coalition members wanting less.⁸⁵ Stern has characterized this as a misrepresentation.⁸⁶ In fact, the move is better characterized as a step towards Stern's broader vision for a renewed labor movement. It is a vision that, in many ways, sees the union movement not as a political endeavor but rather as a humanitarian business enterprise.

Stern certainly recognizes the difficulties that unions face from increasing globalization and employer hostility.⁸⁷ However, Stern is more willing than most union leaders to place some of the blame at the feet of unions themselves.⁸⁸ As his position was once characterized: "if any other \$6.5 billion corporation had insisted on clinging to the same decades-old business plan despite losing customers every year, its executives would have been fired long ago."⁸⁹ Stern believes that union leaders have been too content with the status quo and have not done enough to staunch the continued declining rates of unionization.

How does SEIU attack declining rates of unionization? Part of the answer is simply increased funding: SEIU has funneled resources into organizing ever since Stern became national organizing director in the 1980s.⁹⁰ Stern believes all unions should adopt a similar focus.⁹¹ A critical component of the Coalition's agenda for change was the "50 percent rebate" for organizing proposal, which would funnel money back to growth-oriented unions.⁹² However, the answer has not simply been money. SEIU has used its resources in a multi-pronged approach designed to maximize leverage over the widest possible spectrum. Although any categorization risks oversimplification, it is possible to specify five components of SEIU's approach: (1) industry concentration, (2) organizing an entire area, (3) neutrality and card-check agreements, (4) multi-

June 27, 2005, at 34.

85. *Id.* at 34 (noting that Coalition members would be "more focused on organizing drives than on electoral politics").

86. STERN, *supra* note 75, at 93.

87. *Id.* at 32–36 (discussing globalization); *id.* at 49–50 (discussing employer hostility); *id.* at 71 (discussing Wal-Mart Watch).

88. Bai, *supra* note 74, at 40 (noting that Stern was "pointing the finger back at his fellow union leaders").

89. *Id.*

90. STERN, *supra* note 75, at 55–56, 63–64.

91. Bai, *supra* note 74, at 43.

92. STERN, *supra* note 75, at 88.

faceted political and economic pressure, and (5) "added value" to the employer.

First, SEIU has focused on organizing only those types of employees within its ambit of expertise. When he became president of SEIU, Stern worked to move members who worked in areas outside of the health or building-service industries into relationships with other unions.⁹³ Although this reallocation hurt SEIU's rolls in the short-term, Stern believes it was important to reorient the union towards its core members. He contends that as a result, other unaffiliated unions in the janitorial and health-care industries decided to affiliate with SEIU.⁹⁴ This concentration on certain sets of employees is critical to Stern's overall plan for union success. Concentration not only provides the union with a better knowledge base, but it also allows the union to flex its muscles more powerfully, since it does not have to compete against other organizations. Indeed, Stern believes his calls for significant consolidations within the AFL-CIO were critical to that organization's success.⁹⁵ One union has more market leverage within an industry than three unions representing the same set of employees.

The importance of concentration is related to a second factor in SEIU's organizing success: focus on whole regions rather than individual employers. The traditional union drive seeks to organize employees at a particular employer and then move on to other employers. However, such an approach is problematic in the service industries, where companies compete to keep their labor costs low.⁹⁶ If SEIU successfully organized one employer, that employer's costs could potentially cripple the company's business. Thus, SEIU has focused on organizing all of the employees in a particular region. In campaigns to organize janitors in Los Angeles, Houston, and New Jersey, SEIU has implemented a strategy of seeking to get all of the major companies on board, rather than pursuing them seriatim.

In New Jersey, for example, SEIU struck a deal with companies who provided janitorial services: for those companies whose employees joined SEIU, the union would not seek to install a contract with new wage increases unless more than half

93. *Id.* at 65-66.

94. *Id.* at 66.

95. Bai, *supra* note 74, at 43.

96. In the health care and building services industries, labor costs represent a significant portion of overall expenses.

of the companies in the area signed up as well.⁹⁷ In Los Angeles, SEIU mounted campaigns city-wide to organize workers as part of the "Justice for Janitors" campaign.⁹⁸ The concentration of workers into a relatively small number of firms made such a campaign easier.⁹⁹ And in Houston, SEIU pressed the city's five major building maintenance companies to sign an agreement making it easier for the union to recruit workers at all five companies at the same time.¹⁰⁰ The union successfully organized four of the companies and reached a common collective bargaining agreement with them a year later.¹⁰¹

Third, SEIU has worked hard to implement neutrality and card-check agreements with companies at the start of the organizing process. Although such agreements can vary in their provisions,¹⁰² they essentially ask the employer to agree to two things: (1) remain neutral as to the union's organizing campaign ("neutrality"), and (2) recognize the union if a majority of employees sign cards asking to be represented by the union ("card-check").¹⁰³ These agreements are a mainstay of the SEIU campaign strategy, as they allow for a simpler and more expeditious organizing process.¹⁰⁴ In fact, in some instances SEIU must stage a ferocious campaign not for the first contract, but rather to get the employer to agree to a neutrality and card-check agreement.¹⁰⁵

97. Bai, *supra* note 74, at 42.

98. Christopher L. Erickson et al., *Justice for Janitors in Los Angeles and Beyond*, in *THE CHANGING ROLE OF UNIONS: NEW FORMS OF REPRESENTATION* 22, 28–29 (Phanindra V. Wunnavu ed., 2004).

99. *Id.*

100. Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL'Y REV. 375, 379 (2007).

101. See Steven Greenhouse, *Cleaning Companies in Accord with Striking Houston Janitors*, N.Y. TIMES, Nov. 21, 2006, at A18.

102. See Sachs, *supra* note 100, at 378.

103. For a general discussion of these agreements, see James Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 829–30 (2005).

104. The card-check certification process would have become law under the proposed Employee Free Choice Act. This past summer, the bill was passed by the House but failed to reach cloture in the Senate. See Roll Call Vote on H.R. 800, available at http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=1&vote=00227. No Democratic Senator voted against cloture.

105. Kenneth M. Casebeer, *Of Service Workers, Contracting Out, Joint Employment, Legal Consciousness, and the University of Miami* (Univ. Miami Legal Stud. Working Paper No. 2007–06, 2007), available at <http://ssrn.com/abstract=1020623> (discussing SEIU strike at the University of Miami).

As part of their regional strategy, SEIU organizing drives usually share a fourth factor: bringing political and economic pressure on the employers from as many points as possible. The notion of applying outside pressure is not a new one, but SEIU's multi-faceted and creative approaches have taken these tactics in a new direction. One facet is the use of public pressure. By seeking to organize an entire region at a time, SEIU can seek to bring the issue to the public's attention. Rallies, marches, and even hunger strikes have been employed to bring attention to the low wages of janitorial employees.¹⁰⁶ The visible nature of these actions gives negative publicity to companies who usually seek to avoid the spotlight.

However, the pressure does not stop there. Since building maintenance contractors are generally supplying their services to residential or commercial building owners or management companies, SEIU has sought to apply pressure to these firms as well. In the Los Angeles Justice for Janitors campaign in 2000, SEIU's strike was accompanied by creative political and community action, and it pressured the building owners into working out a solution.¹⁰⁷ And in Miami, the union sought the support of local and national politicians, professors, and students in its dealings with the University of Miami. Even though the janitors were employed by an outside contractor, the university controlled the dynamics of the negotiations between the union and the contractor. When the employees ultimately organized the contractor, the university chose not to replace the contractor, and it adopted wage and benefit requirements that helped cement the employees' newfound level of remuneration.¹⁰⁸

Finally, a fifth factor in the SEIU organizing campaigns has been seeking to bring some additional value to the table for the employers. Along with the pressures from the multi-faceted organizing drives, SEIU seeks to make itself a partner with the companies they are organizing, rather than solely an adversary. Stern has been upfront about his willingness to work with employers to bring "added value" to the equation.¹⁰⁹ Some have criticized SEIU for being too willing to work with

106. See, e.g., Erickson et al., *supra* note 98; Casebeer, *supra* note 105.

107. Erickson et al., *supra* note 98, at 49 (noting that one of the area real estate magnates "threatened to make his own arrangement with the union if the contractors did not agree to settle the dispute").

108. Casebeer, *supra* note 105.

109. STERN, *supra* note 75, at 70-71; Bai, *supra* note 77, at 42.

employers at the expense of employee interests.¹¹⁰ But SEIU sees its methods as creative ways to help both manager and worker achieve economic success.

One way to bring additional value to the table is through politics. SEIU has used its political clout to bring additional revenues into the health care industry, helping both employers and employees. A common SEIU tactic has been to work with employer groups to procure more government health care funding. For example, Stern described the SEIU New York Local 1199 and its relationship with local hospital groups in the following way:

The hospital industry's own efforts to increase its reimbursement rates were viewed as self-serving, just another interest group trying to feed at the trough of taxpayer dollars. But when SEIU 1199's nurse aides, social workers, and nurses lobbied for increased state funding for the hospital, their more sympathetic faces reframed the discussion. While the hospitals were minimally politically active, SEIU 1199 was a political powerhouse, a fixture in Albany. SEIU 1199's record-setting political contributions and members, who could flood the legislative corridor when needed, gave them the clout to be the legislators' best friend or worst nightmare. [Union leader] Dennis [Rivera] and the industry leaders used their coordinated efforts in Albany to win billions of dollars of reimbursements for the hospitals, which translated into stable balance sheets for the employers and excellent wages and the gold standard of benefits for hospital workers, including multi-million dollar training and upgrading funds for workers.¹¹¹

One controversial example of such a quid pro quo was the recently-terminated California nursing homes agreement.¹¹² Under the agreement, SEIU was to help the nursing home companies achieve more funding and better regulation, and in return SEIU could organize under a card-check and neutrality agreement. Thanks to SEIU's political support, California increased funding for nursing home providers and secured almost

110. See Matt Smith, *Union Disunity*, SF WEEKLY.COM, April 11, 2007, <http://www.sfweekly.com/2007-04-11/news/union-disunity> [hereinafter Smith, *Union Disunity*] (complaining of a "sweetheart deal" between SEIU and California nursing home companies).

111. STERN, *supra* note 75, at 72.

112. Mark Brenner, *SEIU Ends Nursing Home Partnership: California Deal Left Members out of Organizing and Bargaining*, COUNTERPUNCH, June 25, 2007, <http://www.counterpunch.org/brenner06252007.html>.

\$1 billion in federal matching funds for its reimbursement system.¹¹³

However, critics lambasted several aspects of this deal. First, SEIU allegedly agreed to lobby for limitations on the litigation rights of patients against the homes.¹¹⁴ Second, employees who signed up with the union under these agreements were allegedly restricted in their ability to report problems with the quality of safety of the care.¹¹⁵ Third, employees who signed up were given a provisional contract under a template agreement that purportedly did not give them much say in their contract.¹¹⁶ Although SEIU was able to sign up several thousand nursing home employees through the agreement, it recently terminated the deal.¹¹⁷

It would be wrong to characterize any of the five SEIU factors—concentration, geographic organizing, card-check campaigns, multi-faceted pressure, and “added value” to the employer—as completely novel. The novelty is the combination of these factors, together with the level of success SEIU has enjoyed in the current era. This multi-pronged approach is also at play in SEIU’s effort to work with the scions of capitalism in the private equity campaign.

III. SEIU’S PRIVATE EQUITY CAMPAIGN

SEIU’s private equity campaign took place on a turf that is familiar to the union but unfamiliar to many private equity players. Although private equity firms have been plying their trade for many years, the industry had little presence in Washington, D.C. circles. In fact, private equity did not even have a lobbying group until February 2007.¹¹⁸ Although the firms had

113. Michelle Amber, *SEIU Terminates Controversial Agreement With Nursing Home Chains in California*, Daily Lab. Rep. (BNA), No. 114, at C-1 (June 14, 2007).

114. Matt Smith, *Partners in Slime*, SF WEEKLY.COM, June 30, 2004, <http://www.sfweekly.com/2004-06-30/news/partners-in-slime/full>. These efforts were said to have been put on hold after the story. Smith, *Union Disunity*, *supra* note 110.

115. Smith, *Union Disunity*, *supra* note 110.

116. *Id.* (arguing that the agreements “prohibit the workers from having a say in their job conditions”).

117. Amber, *supra* note 113. See also Kris Maher, *Unions Forge Secret Pacts with Major Employers*, WALL ST. J., May 10, 2008, at A1 (discussing secret agreements between large companies and SEIU which provide certain benefits for and restrictions on union organizing at those companies).

118. Private Equity Council, About the Private Equity Council,

substantial financial power, their lack of political presence made them vulnerable when the taxation of private equity became a major issue in the last year.

To understand the issue, a brief discussion of private equity compensation is in order. Private equity managers are generally paid fees based on a small percentage of the overall investment they manage as well as a larger percentage of the profits they generate.¹¹⁹ These fees are usually a two percent “value of the fund” fee in addition to twenty percent of the profits that the fund makes.¹²⁰ The twenty percent of profits is taxed at the fifteen percent capital gains rate, as compared with the thirty-five percent tax rate on income.¹²¹ This percentage of profits, known as “carried interest,” is taxed not at the income rate, but rather at the significantly lower capital gains rate.¹²²

Although this tax structure has long been in existence, it did not attract attention until last spring. Several private equity firms called attention to the unique tax advantages of such firms when they made initial public offerings earlier in the year. Beginning with Fortress Investment Group in February and continuing through the Blackstone Group, these firms managed to tap into the public equity markets and retain their tax-advantaged partnership status.¹²³ Their complicated structure—a blend of limited partnerships and LLCs—belied any purpose other than managing this beneficial tax status. One senator complained that the deals treated taxes not as the fair share owed to society, but rather as “an obstacle course to be gamed and gotten around.”¹²⁴ The prominent tax gamesmanship of these IPOs, particularly the Blackstone IPO, called attention to the underlying benefits that all private equity firms enjoy.¹²⁵ Thanks in part to a scholarly paper,¹²⁶ Congress has

<http://www.privateequitycouncil.org/about/>.

119. This pay structure is referred to as “two and twenty”: the managers get two percent of the overall investment as well as twenty percent of the future profits of the fund. See Victor Fleischer, *Two and Twenty: Taxing Partnership Profits in Private Equity Funds*, 83 N.Y.U. L. REV. 1, 8 (2008).

120. See *id.*

121. See *id.* at 14.

122. *Id.*

123. Fleischer, *Taxing Blackstone*, *supra* note 13, at 9–10.

124. Alan Zibel, *Blackstone's Tax Strategy Comes Under Scrutiny in Washington*, AP WIRE, July 13, 2007 (quoting Senator Baucus).

125. John E. Morris, *First-Mover Disadvantage*, THE DEAL, June 25–July 8, 2007, at 24 (noting that the publicity from the Blackstone IPO “may have blown up on it”).

taken up the taxing disparity in earnest. Over the summer of 2007 Congressional committees held several hearings on the issue, and several bills were introduced to change the tax treatment of private equity firms.¹²⁷

Given the nature of the debate, one might expect unions to be in the thick of it over private equity's favorable tax treatment. And indeed, labor has been supportive of efforts to raise taxes on these firms. The AFL-CIO supports legislation that would raise the taxation rates on private equity carried interest and would close the loophole allowing Blackstone and other publicly-traded partnerships to avoid corporate taxation.¹²⁸ SEIU is notable, however, because it pursued a much more intensive approach.

The centerpiece of SEIU's private-equity engagement is a forty-two page policy paper entitled "Behind the Buyouts."¹²⁹ The purpose of the report, according to its introduction, is to provide "a snapshot for everyday investors, workers, community members, and the public about the private equity buyout industry and its practices."¹³⁰ The report focuses on the top five private equity firms and describes their principals (the "moneymakers"), their investors ("money sources"), and their

126. See Fleischer, *Two and Twenty*, *supra* note 119. For a discussion of the influence of Fleischer's paper on the private equity taxation debate, see John Carney, *Private Equity Taxes: The Capitol Hill Tax Clash Heats Up*, DEALBREAKER, Sept. 6, 2007, http://www.dealbreaker.com/2007/09/private_equity_taxes_the_capit.php (calling Fleischer "the intellectual godfather of the private equity tax hikes"); Lerer, *supra* note 14 (quoting a tax policy expert as saying that Fleischer's paper "really did ignite this debate over private equity taxation"); Andrew Ross Sorkin, *A Professor's Word on the Buyout Battle*, N.Y. TIMES DEALBOOK (Andrew Ross Sorkin ed.), Oct. 3, 2007, <http://dealbook.blogs.nytimes.com/2007/10/03/a-professors-word-on-the-buyout-battle> (discussing the "whirlwind" the paper has caused).

127. The bills range in their coverage. Some bills would only cover publicly-traded partnerships such as Blackstone. See S. 1624, 110th Cong. (1st Sess. 2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s1624is.txt.pdf (also known as the "Blackstone Bill"). Other bills would cover private investment management partnerships, such as private equity firms, and real estate partnerships. See H.R. 2834, 110th Cong. (1st Sess. 2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h2834ih.txt.pdf.

128. See AFL-CIO Executive Council Statement, Private Equity and Hedge Funds, August 8, 2007, <http://www.aflcio.org/aboutus/thisistheafclcio/ecouncil/ec08082007b.cfm> (supporting H.R. 2834 and S. 1624).

129. Service Employees International Union, *Behind the Buyouts*, April 2007, [http://www.behindthebuyouts.org/storage/documents/5433-](http://www.behindthebuyouts.org/storage/documents/5433-300H_whitepaper_revise8-20.pdf)

300H_whitepaper_revise8-20.pdf [hereinafter *Behind the Buyouts*].

130. *Id.* at 11.

deals (“printing money”).¹³¹ It also provides brief narratives of five private equity deals: four that can be characterized as “bad” deals and one that is a “good” deal.¹³² The four bad deals involve poor decision-making, crushing debt burdens, laid-off workers, and failed companies, yet the buyout firms still pay themselves oversized (and premature) returns.¹³³ The fifth example shares many similarities: a buyout firm purchases a set of ailing manufacturing plants, lays off workers, and engages in hard bargaining with the primarily union workforce. However, this story has a substantially happier ending, as the company provided workers with shares in the company in exchange for concessions. As a result, when the company’s fortunes boomed and the private equity firm cashed in, the workers were able to share in profits.¹³⁴

As part of its program of reforms, “Behind the Buyouts” suggests that private equity firms “should play by the same set of rules as everyone else.”¹³⁵ The report has a sophisticated explication of the tax treatment that private equity receives.¹³⁶ It discusses the tax advantages of debt over equity, the taxing of carried interest as capital gains rather than income, and the uniquely favorable tax treatment of private equity firms that have gone public.¹³⁷ In its final recommendations, the report says that private equity should “invest in the health, security, and long-term prosperity of America by supporting equitable tax rates and the elimination of loopholes that increase the tax burden on working Americans.”¹³⁸

The “Behind the Buyouts” report provides a centerpiece to SEIU’s ongoing campaign on private equity, which includes political activity, street demonstrations, and a blog.¹³⁹ Other tactics have been used as well. For instance, in a creative bit of street theater, SEIU performers staged a mock protest in the Hamptons.¹⁴⁰ The performers, caricatures of wealthy snobs,

131. *Id.* at 22–27.

132. *Id.* at 28–32.

133. *Id.* at 28–31.

134. *Id.* at 31–32.

135. *Id.* at 35.

136. *Id.* at 15–16.

137. *Id.*

138. *Id.* at 35.

139. SEIU also has had specific blogs for certain firms, such as a blog about Blackstone prior to the IPO. Julie Creswell, *A Union Takes Cautious Aim at Blackstone’s Public Offering Plan*, N.Y. TIMES, March 30, 2007, at C6. At first, the blog did not identify itself as SEIU-related. *Id.*

140. Andrew Ross Sorkin, *Buyout Tax Debate Hits the Hamptons*, N.Y. TIMES

complained about the possibility of higher taxation on private equity with slogans such as “protect the emerging plutocracy.”¹⁴¹ As the director of SEIU’s private equity project stated, “[t]he idea that people who have so much money need to have a more privileged tax status than other people is so absurd.”¹⁴²

On the surface, much of the SEIU private equity campaign follows the traditional path of labor against capital. The “Behind the Buyouts” report is designed to convey a sense of fear and concern about the powerful and secretive buyout firms who can wreak havoc on productive industries. And yet the picture is not so clear-cut. Despite this rhetoric, throughout 2007 SEIU did not take an official position on the taxation bills in the Senate.¹⁴³ This did not appear to be due to a concern that the legislation fails to go far enough. Instead, staying on the sidelines appeared to be a conscious strategy, designed to extract as much leverage as possible from the politics of the situation.

The ongoing “Behind the Buyouts” campaign is part of a complicated effort to engage with private equity on many levels. Certain elements of the campaign are consistent with traditional unionism: creative attacks on wealth and privilege, efforts to make the tax system more progressive, and publicity campaigns designed to put pressure on private equity as employers of union members. However, there also appears to be another subtext: namely, an effort to engage with private equity on a nationwide level in order to expand the union’s membership across a new set of companies. In this sense, the private equity campaign is at various times either a carrot or a stick designed to make SEIU an attractive working partner with private equity firms.

SEIU’s relationship with private equity extends beyond the traditional Washington interest-group lobbying. As the “Behind the Buyouts” report acknowledges, SEIU and its members have a direct financial relationship with private equity.¹⁴⁴ SEIU members invest in pension funds, and these funds gener-

DEALBOOK (Andrew Ross Sorkin ed.), Aug. 30, 2007, <http://dealbook.blogs.nytimes.com/2007/08/30/buyout-tax-debate-hits-the-hamptons>.

141. *Id.*

142. *Id.*

143. There was no indication, in the report or on the website, that SEIU has officially endorsed the two proposed bills that would raise private equity tax rates.

144. *Behind the Buyouts*, *supra* note 129, at 11.

ally invest between five and ten percent of their holdings with private equity firms.¹⁴⁵ Thus, union pension funds are partially responsible for the high fees collected by private equity managers, since they are willing to pay them. SEIU is no exception.

Moreover, the tone of the “Buyouts” report is more equivocal than one might expect, particularly on a close reading. As the report makes clear, it is not against private equity when private equity works to include employees in its wealth generation. As the report states in its conclusion:

[T]he incredible wealth that exists in the private equity buyout industry presents a historic opportunity to help create real opportunities for the millions of working people who are being shut out of the American Dream. There is more than enough wealth in the buyout business for the buyout firms to continue to prosper while also adapting their existing business model to expand opportunities to benefit workers, communities, and the nation.¹⁴⁶

The report seems to be saying that private equity is not inevitably anti-worker; rather, private equity has simply failed to follow a more equitable model up to this point.

What, exactly, would be a more equitable model? The report contends that private equity firms should give workers and communities a voice in the buyout process and a stake in the returns they generate.¹⁴⁷ In particular, workers should have a seat at the table during deals, as well as good paychecks and benefits. In addition, workers should have the ability to choose a union through “majority sign-up without interference from any party”—in other words, a neutrality and card-check certification agreement.¹⁴⁸

SEIU has specific reasons for wanting such accommodations from private equity. The Carlyle Group—one of the five biggest private equity firms in the United States—recently purchased Manor Care nursing homes.¹⁴⁹ The Toledo-based Manor Care Inc. has about 500 nursing and assisted living care

145. *Id.*

146. *Id.* at 34.

147. *Id.* at 35.

148. *Id.*

149. See *Manor Care Shareholders Approve Buyout*, BOSTON.COM, Oct. 18, 2007, http://www.boston.com/business/healthcare/articles/2007/10/18/manor_care_shareholders_approve_buyout/.

centers staffed by 60,000 employees.¹⁵⁰ SEIU is trying to organize these employees, and its multi-pronged approach is in evidence. The union is seeking a neutrality and card-check agreement from Manor Care, and it is applying tremendous political and public pressure on Carlyle in support of its negotiations. Since the purchase, SEIU has staged public demonstrations raising concerns that Carlyle will seek to cut costs and reduce care in order to make a quick profit.¹⁵¹ These concerns were reinforced by a New York Times article discussing the problems of for-profit nursing home care.¹⁵² Two Congressional committees will begin investigations into business practices at nursing homes owned by private investment groups.¹⁵³ Moreover, Senators Baucus and Grassley, who lead the Senate Finance Committee, sent letters to Carlyle and four other private-equity firms asking for information related to their ownership and management of nursing homes.¹⁵⁴ Baucus and Grassley are the same Senators who have proposed the “publicly-traded partnership” taxation bill.¹⁵⁵ All of this scrutiny prompted Carlyle to take the unusual step of issuing a state-

150. *Id.*

151. Thomas Heath, *Union Protests Carlyle's Bid for Manor Care*, WASH. POST, Sept. 20, 2007, at D4, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/19/AR2007091902055.html>. SEIU has created a website on this issue. See Carlyle Fix Manor Care Now, <http://carlylefixmanorcarenow.org> (last visited May 22, 2008); see also Dan Primack, *Human Rights & Private Equity*, PRIVATE EQUITY WEEK WIRE, Dec. 11, 2007, <http://www.pewnews.com/story.asp?sectioncode=44&storycode=43512> (discussing SEIU's criticism of Carlyle Group for selling a percentage on the firm to an Abu Dhabi sovereign wealth fund); Andrew Ross Sorkin, *Union Protest Roils Private Equity Conference*, N.Y. TIMES DEALBOOK (Andrew Ross Sorkin ed.), Jan. 18, 2008, <http://dealbook.blogs.nytimes.com/2008/01/18/union-protest-roils-private-equity-conference> (discussing SEIU's protest of a speech by Carlyle managing director David Rubenstein at an academic private equity conference).

152. Charles Duhigg, *At Many Homes, More Profit and Less Nursing*, N.Y. TIMES, Sept. 23, 2007, at 1.1, available at <http://www.nytimes.com/2007/09/23/business/23nursing.html>.

153. Charles Duhigg, *Nursing Homes Owned by Private Equity Face U.S. Inquiries*, INT'L HERALD TRIB., Oct. 24, 2007, <http://www.ihf.com/articles/2007/10/24/business/nursing.php>.

154. Thomas Heath, *Under Pressure, Carlyle Issues Patient Promise*, WASH. POST., Oct. 22, 2007, at D1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/21/AR2007102101034.html>.

155. See S. 1624, 110th Cong. (1st Sess. 2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s1624is.txt.pdf; H.R. 2834, 110th Cong. (1st Sess. 2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h2834ih.txt.pdf.

ment promising to provide adequate staffing and resources to Manor Care patients.¹⁵⁶

SEIU was also behind another piece of legislation that would have put pressure on Carlyle. The California state legislature considered a bill that would bar its state pension funds from investing in any private equity fund which is partially owned by countries with human rights concerns.¹⁵⁷ Carlyle is one such firm, having sold a 7.5% stake to the sovereign wealth fund of Abu Dhabi.¹⁵⁸ Although the bill ostensibly was concerned about the influence of foreign governments, many commentators saw it as an effort by SEIU to put pressure on Carlyle.¹⁵⁹ Critics pointed out that the bill targeted investments from Abu Dhabi but not China. The *Wall Street Journal* claimed that: "China got a pass because its sovereign wealth fund invests with the Blackstone Group private equity firm, and the SEIU has negotiated janitorial agreements with Blackstone real-estate companies."¹⁶⁰ State-employee funds such as the California Public Employees' Retirement System (CalPERS) and the California State Teachers' Retirement System (CalSTRS) were believed to oppose the bill, fearing that it will hurt their ability to invest effectively.¹⁶¹ Although the bill

156. Heath, *supra* note 154.

157. The countries invested in the private equity funds through their sovereign wealth funds. The Responsible Private Equity Investment Act of 2008, California A.B. 1967, available at http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_1951-2000/ab_1967_bill_20080214_introduced.html (describing countries' investments as part of the legislative counsel's digest of a proposed California bill). The countries targeted were those that had not signed on to certain human rights treaties.

158. The Associated Press, *Abu Dhabi Lays Out Investment Principles for its Government-Run Wealth Funds*, INT'L HERALD TRIB., March 18, 2008, <http://www.iht.com/articles/ap/2008/03/18/business/NA-FIN-US-Abu-Dhabi-Sovereign-Wealth.php>.

159. Editorial, *CalPERS Board Must Keep Its Priorities Straight*, SACRAMENTO BEE, March 17, 2008, at B4, available at <http://www.sacbee.com/110/story/790480.html> (noting that "[t]he Service Employees International Union is the driving force behind Torricco's bill" and that "SEIU's real target appears to be the Carlyle Group"). But see Stephen Lerner, Letter to the Editor, *SEIU Seeks Ethics, Good Returns*, WALL ST. J., April 26, 2008, at A8 ("The Service Employees International Union supported California's Responsible Private Equity Investment Act because it was in the best interest of global human rights and long-term responsible investing.").

160. Editorial, *California's Stern Rebuke*, WALL ST. J., April 21, 2008, at A16 [hereinafter WSJ California Editorial]. But see Behind the Buyouts, *SEIU Responds to the Wall Street Journal*, <http://www.behindthebuyouts.org/seiu-responds-to-wsj> (last visited May 21, 2008) (stating that "AB 1967 looked to whether countries had signed certain 'core' human rights treaties (as identified by the United Nations)," and that "China has signed onto the treaties in question").

161. The CalSTRS board voted to oppose the legislation. The CalPERS board

was initially given a fair chance of passage,¹⁶² it was ultimately tabled.¹⁶³

This campaign directed at Carlyle has the hallmark elements of a comprehensive SEIU organizing drive. It focuses on a concentrated set of employees. It seeks to get a neutrality and card-check certification agreement that will expedite the organizing drive for these employees. It is using pressure from a variety of sources: public and client concern, media coverage, Congressional investigations, related legislation, and worker protests. But where is the added value? SEIU's public campaign against Carlyle has shown the "stick" side of its negotiating strategy. The carrots may not exist, or they may only be discussed behind closed doors. But it is possible to see the potential for "added value" in several places. SEIU has demonstrated its willingness and ability to secure government resources in support of its affiliated industries. In fact, SEIU made its pact with California nursing homes that led to increased governmental funding to these industries, benefiting both management and workers. And there may even be a higher level of negotiations going on here. SEIU not only has its political power to throw behind increased health care funding; it can also support higher "carried interest" taxation as well. SEIU's decision to hold off on endorsing a bill may have been an implicit offer to private equity: work with us, and we will back off from supporting higher taxes. Even though SEIU has come out with more explicit support for reform, that support can always been tamped down, or quietly withdrawn.

SEIU has been masterful at marshalling a variety of pressures on its negotiating opposites. The private equity campaign might be just another pressure that can be applied or laid off as part of the grand scheme of union growth. Rather than being a separate political project, it may be part of an overall plan to work with private equity as partners instead of supplicants. Such negotiations are secret, if they have happened or are happening at all. But they would explain much about the exact nature of SEIU's private equity campaign.

did not hold a vote, but its chief investment officer told state lawmakers that the bill would have a negative impact on the fund. WSJ California Editorial, *supra* note 160.

162. Matthew Wurtzel, *Could CalPERS, CalSTRS Exit Private Equity?*, DEALSCAPE, April 1, 2008, http://www.thedeal.com/dealscape/2008/04/could_calpers_calstrs_exit_pri.php.

163. WSJ California Editorial, *supra* note 160.

IV. LABOR AND THE BUSINESS OF POLITICS

"Interest-group politics" is a term with unfavorable connotations. The many economic interest groups that lobby Congress for favorable treatment, along with the money they shovel into the process, are often derided as the root of our political failures. Measures such as the McCain-Feingold campaign finance legislation have endeavored to remove some of the effects of money on the process.¹⁶⁴ Although the Supreme Court upheld the constitutionality of most of the Act,¹⁶⁵ critics contend it has only forced special interest lobbying into new channels.¹⁶⁶ Many believe that any true reform is impossible.

Labor unions are restricted in their ability to participate in the political process. In 1947, the Labor-Management Relations Act prohibited unions from contributing to federal election campaigns.¹⁶⁷ The provision was construed narrowly by the Supreme Court, allowing unions to donate to campaigns as long as the monies were paid out of voluntary, separately-administered political funds.¹⁶⁸ The prohibition has been fleshed out in subsequent legislation.¹⁶⁹ Most recently, the McCain-Feingold Act extended the restrictions on political advocacy to include all "electioneering communications."¹⁷⁰ The Supreme Court upheld this extension.¹⁷¹

Under these campaign finance provisions, unions must generally play by the same rules as corporations. However,

164. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as part of FECA, in scattered sections of 2 U.S.C. and 36 U.S.C.).

165. *McConnell v. Fed. Election Comm.*, 540 U.S. 93, 114 (2003).

166. Miriam Galston, *Emerging Constitutional Paradigms and Justifications for Campaign Finance Regulation: The Case of 527 Groups*, 95 GEO. L.J. 1181, 1182-84 (2007) (discussing the criticisms of so-called "527 Groups" for their "creative ways to evade campaign finance laws, through legal 'loopholes' or arguably illegal ones").

167. Labor-Management Relations Act, ch. 120, § 304, 61 Stat. 136, 159-60 (1947).

168. See *Pipefitters Local 562 v. United States*, 407 U.S. 385 (1972); *United States v. CIO*, 335 U.S. 106 (1948).

169. Section 304 was repealed by § 201(a) of the Federal Election Campaign Act Amendments, Pub. L. No. 94-283, 90 Stat. 475, 496 (1976), and replaced by Section 112(2) of the Federal Election Campaign Act Amendments, Pub. L. No. 94-283, 90 Stat. 475, 486-490 (1976) (codified as amended at 2 U.S.C. § 441b (1982)). Section 441b prohibits the use of agency fees by unions in connection with federal elections. See 2 U.S.C. § 441b (1982). This provision was further modified by McCain-Feingold. See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, Title II, §§ 203, 204, 214(d), 116 Stat. 91, 92, 95.

170. 2 U.S.C. § 441b(b)(2) (Supp. II 2007).

171. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 204 (2003).

they face a separate hurdle to their political spending. In a series of cases interpreting both the Railway Labor Act (RLA) and the National Labor Relations Act (NLRA), the Supreme Court has determined that unions do not have the right to require objecting nonmembers to pay for costs outside those incurred in collective bargaining.¹⁷² Outside of states with "right to work" provisions, unions may require both members and nonmembers to pay for the union's costs of representing the bargaining unit.¹⁷³ However, there are limitations on the types of expenses that can be charged to nonmembers. According to the Court, objectors must only pay their portion of those expenses that were "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues."¹⁷⁴ Political spending is the quintessential type of expenditure than cannot be charged to objectors.¹⁷⁵

Although the basic principle of separation has been established, there is still controversy over the mechanisms unions must follow in implementing this principle. The NLRB and the courts have wrestled with questions such as the notice that unions need to provide about their expenditures,¹⁷⁶ the information unions must provide to objectors about expenditures,¹⁷⁷ and the process unions must provide for objectors to contest the nature of different types of spending.¹⁷⁸ Most recently, the Supreme Court upheld the right of states to require that public-sector unions receive affirmative authorization from a non-

172. See *Comm'n Workers of Am. v. Beck*, 487 U.S. 735 (1988); *Ellis v. Bhd. of Ry., Airline & Steamship Clerks, Freight Handlers, Express & Station*, 466 U.S. 435 (1984); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961).

173. *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 744-45 (1963) (permitting "agency shop" agreements whereby unions charge non-members for the costs of collective representation).

174. *Ellis*, 466 U.S. at 448.

175. *Machinists*, 367 U.S. at 766-69; *Beck*, 487 U.S. at 740 (finding that objectors need not participate in "the union's expenditure of their fees on activities such as . . . lobbying for labor legislation, and participating in social, charitable, and political events").

176. See, e.g., *California Saw & Knife Works*, 320 N.L.R.B. 224 (1995) *enforced sub nom.* *International Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012 (7th Cir. 1998).

177. *Id.* at 239-41; see also *Ferriso v. NLRB*, 125 F.3d 865 (D.C. Cir. 1997); *Television & Radio Artists (KGW Radio)*, 327 N.L.R.B. 474, 477 (1999).

178. *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998); *California Saw*, 320 N.L.R.B. at 242.

member before spending that nonmember's agency-shop fees for election-related purposes.¹⁷⁹

This line of jurisprudence requiring a separation between collective-bargaining expenses and "unrelated" expenses has been oft criticized in the law review literature.¹⁸⁰ Much of the commentary has focused on statutory interpretation and Congressional intent, arguing that Congress did not mean to curtail the union's political activity.¹⁸¹ However, the SEIU private equity campaign demonstrates the inherent flaw in the foundational premise that political spending is not collective-bargaining spending.

Political activity forms an integral part of almost all SEIU's organizing campaigns. The support of local politicians puts additional pressure on employers.¹⁸² Good relations with these politicians help ensure their presence on the picket lines when needed. Perhaps more importantly than such face time, however, is the behind-the-scenes support that politicians can provide. Some support is in the form of governmental spending; state and local authorities may place certain union-oriented requirements on employers if they want to do government projects.¹⁸³ However, state and federal regulation also shapes the process of the organizing drive itself. In 1999 changes in California state law made it harder to obtain injunctions against street demonstrations and other public gatherings. SEIU was thus much freer to conduct these demonstra-

179. *Davenport v. Wash. Educ. Ass'n*, 127 S. Ct. 2372 (2007).

180. For a sampling of commentary, see Kenneth G. Dau-Schmidt, *Union Security Agreements under the National Labor Relations Act: The Statute, the Constitution, and the Court's Opinion in Beck*, 27 HARV. J. ON LEGIS. 51 (1990); George Feldman, *Unions, Solidarity, and Class: The Limits of Liberal Labor Law*, 15 BERKELEY J. EMP. & LAB. L. 187, 230-41 (1994); Martin H. Malin, *The Supreme Court and the Duty of Fair Representation*, 27 HARV. C.R.-C.L. L. REV. 127 (1992); Charles R. Virginia, Comment, *Communications Workers v. Beck: Supreme Court Throws Unions Out on Street*, 57 FORDHAM L. REV. 665 (1989).

181. See, e.g., *Comm'n Workers of Am. v. Beck*, 487 U.S. 735, 768 (1988) (Blackmun, J., dissenting) (arguing that the Court's holding "simply cannot be derived from the plain language of the statute"); Dau-Schmidt, *supra* note 180.

182. See Erickson et al., *supra* note 98, at 48 (discussing support from California state and local representatives in the 2000 L.A. Justice for Janitors strike); Casebeer, *supra* note 105, at 17 (discussing support of local Miami politicians, as well as presidential candidate John Edwards).

183. For example, New York and California have enacted legislation prohibiting the use of state funds or property to assist, promote, or deter union organizing. N.Y. LABOR LAW § 211-a (McKinney 2003)); CAL. GOV'T CODE § 16645 (West 2000)). However, the Supreme Court recently found the California provision to be preempted by the NLRA. *Chamber of Commerce of U.S. v. Brown*, 128 S. Ct. 2408 (June 19, 2008).

tions in its 2000 Justice for Janitors campaign.¹⁸⁴ On the federal level, the Employee Free Choice Act would require employers to accept the card-check certification that SEIU now works so hard to implement through employer consent.¹⁸⁵

Moreover, SEIU's political power is often the "added value" that the union can bring to the table in negotiations. As discussed earlier, SEIU has worked with potential employers to develop ways of helping all of the company's stakeholders.¹⁸⁶ For example, SEIU has pushed for greater state funding and reimbursement for health care providers whose employees are SEIU members. In the private equity context, SEIU has heightened its leverage with the Carlyle Group by pushing for greater oversight of the company's level of patient care. On a broader level, the union may also be dangling its support (or opposition) to private equity tax hikes as part of the overall deal.¹⁸⁷

None of this makes SEIU different than any other organization that is seeking to serve its membership. In particular, SEIU is acting like all savvy businesses do by protecting its interests in the political arena. Such interest-group politics may seem crass. But as one commentator has argued, "corporate demand for political activity is a natural response to the effect of legal rules on business operations."¹⁸⁸ Corporations engage in extensive lobbying all the time in order to further their corporate objectives through the political system.¹⁸⁹ Given the

184. Erickson et al., *supra* note 98, at 38–42.

185. See Employee Free Choice Act of 2007, H.R. 800, 110th Cong. § 2 (2007).

186. See Part II *supra*.

187. Congress has yet to act on these bills, heightening the possibility that they are being used as political capital. In October 2007, Senate Majority Leader Harry Reid told private equity groups that the proposed tax hikes on private equity would not be enacted that year. Jeffrey H. Birnbaum, *Buyout Firms to Avoid Tax Hike; Reid Passes Word Senate Won't Act*, WASH. POST, Oct. 9, 2007, at A1. As Stephen Bainbridge has pointed out, such bills are useful bargaining chips only when they have not yet been passed. Posting of Stephen Bainbridge to Punditry, On the Democrats Not Taxing Hedge Fund Millionaires, http://www.stephenbainbridge.com/index.php/punditry/on_the_democrats_not_taxing_hedge_fund_millionaires (Nov. 5, 2007) ("Where the interest group is fixed on avoiding a change in the status quo, however, the balance of power shifts to the politicians who can use threats to the status quo as a way of extracting funds from the threatened group on an ongoing basis.").

188. Jill E. Fisch, *How Do Corporations Play Politics?: The FedEx Story*, 58 VAND. L. REV. 1495, 1500 (2005).

189. *Id.* at 1502; *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 147–48 n.46 (2003) ("Labor and business leaders believe—based on experience and with good reason—that such access gives them an opportunity to shape and affect governmental decisions and that their ability to do so derives from the fact that they

pervasive and fluctuating schemes of government regulation, it would be foolhardy for companies *not* to be engaged in the political process.¹⁹⁰

The notion of businesses seeking to protect and enhance their regulatory environment is even more compelling in the union context. The product that unions are “selling”—namely collective representation services—is a creature of federal law.¹⁹¹ It is law that determines the conditions under which union can look for new members and serve their current ones. State and local law plays a role by regulating public strikes and demonstrations as well as access to the employer’s private property. In these arenas, unions must compete against management groups to tilt the playing fields in their favor. However, unions can also work with companies and management to improve the regulatory climate for that industry. A union’s political activity is generally not an extracurricular activity unrelated to collective bargaining. As the SEIU experience shows, politics is always in the service of the core business. SEIU has amassed significant political power, through its financial resources and the voting power of its members.¹⁹² It uses this power to secure better terms for its members and offer its services to an ever-expanding pool of health and building-maintenance workers. In other words, it uses politics to better its product and grow its market share—just like any other business.¹⁹³

This recognition is something of a double-edged sword. On the one hand, it exposes the illogic of any attempt to separate

have given large sums of money to the parties.” (quoting *McConnell v. Fed. Election Comm’n*, 251 F. Supp. 2d 176, 498 (D.C. Cir. 2003) (statement of a former airline executive))).

190. Fisch, *supra* note 188, at 1570 (“Regulation has become an important factor for U.S. businesses. As a result, corporate political activity must be integrated within a corporation’s overall business strategy, and corporations need to develop and manage their political capital in the same way that they manage other business assets.”).

191. See Matthew T. Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV. 1, 35–45 (2008) (discussing unions as a producers of a service).

192. See Steven Greenhouse, *A Union with Clout Stakes Its Claim on Politics*, N.Y. TIMES, Oct. 30, 2007, at A20, available at <http://www.nytimes.com/2007/10/30/us/politics/30unions.htm>.

193. Businesses have also recognized the connection between politics and the business of unions. See Ann Zimmerman & Kris Maher, *Wal-Mart Warns of Democratic Win*, WALL ST. J., Aug. 1, 2008, at A1 (“Wal-Mart Stores Inc. is mobilizing its store managers and department supervisors around the country to warn that if Democrats win power in November, they’ll likely change federal law to make it easier for workers to unionize companies—including Wal-Mart.”).

political funding from the expenses devoted to the "core" business. On the other hand, it shows how SEIU and other unions are not altruistic charitable organizations, thinking only of the common good.¹⁹⁴ Rather, they are businesses that provide services. As such, their lobbying can be lumped in with the lobbying that goes on from every other business in every other industry. Perhaps the services provided are more beneficial to human progress than, say, cigarettes.¹⁹⁵ But it would be a mistake to assume that unions lobby solely for the good of workers. They are organizations that provide services to workers, and there are potential conflicts of interests between the providers and customers.¹⁹⁶

Political influence is critical to the survival of unions. Currently, the procedures and standards surrounding the exclusion of political expenses from objectors' dues are sufficiently muddled that there is only a minor effect on union political power or spending.¹⁹⁷ However, even small regulatory changes based on these principles could hamper labor's political effectiveness down the road. It is time for the NLRB and the courts to recognize that unions, like businesses, must operate in the political arena in order to cultivate a favorable regulatory environment.

194. Unions often benefit from the notion that they are non-profit advocacy groups who focus only on the public interest. For example, see this exchange between a reporter and SEIU president Andy Stern:

Q: Why does the SEIU criticize private-equity firms for lobbying when the SEIU itself spent \$1,845,000 in federal lobbying in 2007?

A: SEIU members' money -- and we are talking about voluntary contributions of about \$3 a paycheck -- goes to lobby Congress to reform our health-care system, to fix broken immigration laws, to provide health care for children through SCHIP. These issues will improve the lives of millions of people in this country. Carlyle lobbies to protect indefensible tax loopholes that benefit a handful of billionaires. Big difference.

Thomas Heath, *Taking on the Buyout Industry*, WASH. POST, March 10, 2008, at D3, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/09/AR2008030901559.html>.

195. See, e.g., THANK YOU FOR SMOKING (Room 9 Entertainment 2005).

196. For more discussion of unions as service providers, see Bodie, *supra* note 191; Samuel Estreicher, *Deregulating Union Democracy*, 2000 COLUM. BUS. L. REV. 501 (2000); Kye D. Pawlenko, *Reevaluating Inter-Union Competition: A Proposal to Resurrect Rival Unionism*, 8 U. PA. J. LAB. & EMP. L. 651 (2006).

197. See, e.g., Jeff Canfield, Comment, *What a Sham(e): The Broken Beck Rights System in the Real World Workplace*, 47 WAYNE L. REV. 1049 (2001) (discussing the difficulty of enforcing Beck rights).

CONCLUSION

The recent credit shock may put a damper on the growth that private equity has experienced over the past few years.¹⁹⁸ Traditionally, that would have been good news for unions and their members. But a new approach to organizing and bargaining, spearheaded by SEIU, may change that equation. Private equity funds are tough negotiating partners, because of their economic savvy and their focus on the bottom line. But fund managers may also prove to have more concern about future (at least, five to ten years in the future), as well as a greater willingness to negotiate and a more sensitive response to political and economic pressure. Creative unions will craft their campaigns to address these strengths and weaknesses.

It would be a shame, however, if the law prevented the market from working. Current regulations create difficulties for unions in exercising their political power, and further “pay-check protection” reforms could make the situation significantly worse. We need to recognize that unions, like their negotiating counterparts, are in business. As such, they should be free to pursue their political objectives as any other business. In the meantime, labor’s political foes will fight to restrict and constrict union political activity. It would be an ironic end to the story if unions no longer participate in politics because they lacked the political power to protect their rights in the first place.

198. For a taste of the gloomy rhetoric, see Andrew Ross Sorkin, *The Ranks of the Comfortable Are Still Thinning*, N.Y. TIMES, Sept. 9, 2007, available at <http://www.nytimes.com/2007/09/09/business/09deal.html> (“[A]ll of Wall Street understands that the private-equity gravy train has jumped the tracks.”). See also Michael J. de la Merced, *Buyout Industry Staggers under Weight of Debt*, N.Y. TIMES, March 11, 2008, available at <http://www.nytimes.com/2008/03/11/business/11equity.html> (contending that private equity’s fortunes were “plummeting”).

