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Diane Lourdes Dick

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ALLIANCE POLITICS IN CORPORATE DEBT RESTRUCTURINGS

*Diane Lourdes Dick**

ABSTRACT

Alliance politics have always been a complicating factor in corporate restructurings. Negotiations between and among large groups of corporate stakeholders naturally require that parties expend time and resources on building coalitions, overcoming holdouts, and fleshing out their collective action. But recent trends suggest that alliance politics—rather than sound financial and economic decisions—may be driving restructuring outcomes, introducing new risks and inefficiencies in the financial markets. For instance, restructuring proponents increasingly use wedge strategies and divide-and-conquer tactics to exacerbate the coordination problems that lenders in large syndicates already face, giving rise to hostile restructurings that have the potential to introduce dangerous ripple effects in the capital markets. These strategies succeed because they introduce new opportunities for lender defection from the syndicate, essentially recasting the high-stakes coordination game played by lenders and driving up strategic uncertainty. By design, these transactions siphon value away from senior creditors, ultimately causing capital market participants to behave in inefficient ways. They may also enable economically wasteful restructurings by overpowering senior lender groups that would have collectively (and rightfully) pushed a company to liquidate. These developments call for a renewed focus on the role of alliance politics in corporate debt restructuring. This Article contributes to these efforts, laying the conceptual groundwork for subsequent works that explore other dimensions of the complicated, high-stakes relationships that make up the modern firm's capital structure.

* Professor of Law, University of Iowa College of Law. For helpful comments and support, my thanks go to Kenneth Ayotte, Douglas Baird, Kara Bruce, Vincent Buccola, and Sean Sullivan. I am also grateful to Samuel Richardson for his outstanding research assistance.

TABLE OF CONTENTS

INTRODUCTION 287
I. BACKGROUND: A REVIEW OF THE LITERATURE ON DIVIDE-AND-CONQUER AND WEDGE STRATEGIES 292
A. *Political Theory Foundations of Alliance Politics and Wedge Strategies* 292
B. *Negotiation, Management, and Organizational Strategy Literature on Divide-and-Conquer Tactics in the Transactional Setting* 297
C. *Economic and Game Theoretic Analyses of Wedge Strategies and Divide-and-Conquer Tactics* 300
D. *Emerging Behavioral and Cognitive Psychology Insights* 305
II. ANALYSIS: A THEORY OF ALLIANCE POLITICS IN CORPORATE RESTRUCTURINGS 307
A. *Social Coordination Among Senior Lenders* 308
B. *Opportunities for Defection by Senior Lenders* 312
C. *Lender Vulnerability to Wedge Attacks* 314
D. *Debtor Wedge Strategies* 317
E. *Debtor Divide-and-Conquer Tactics* 319
III. DISCUSSION: THE NORMATIVE AND PRACTICAL CONSIDERATIONS OF ALLIANCE POLITICS IN CORPORATE DEBT RESTRUCTURINGS 320
CONCLUSION 327

INTRODUCTION

Commercial law scholars have recently shed light on the rise of highly aggressive bankruptcy and out-of-court private loan restructurings.[1] These transactions—which have been referred to in the literature as "hostile restructurings"[2] or as debtor companies playing "bankruptcy hardball"[3]—are distinguishable from normal debt restructurings by their use of aggressive tactics to overcome not only the traditional minority lender holdout problem,[4] but also exploit or exacerbate latent collective-action dynamics in the senior lender group.[5]

Traditionally, senior lenders wield enormous control over bankruptcy and out-of-court restructurings.[6] They usually hold liens on all or substantially all of the debtor's assets and enjoy payment priority over virtually all other claimants.[7] Meanwhile, modern debt instruments often contain covenants that give lenders control over the debtor's business and financial decisions.[8]

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1 *See, e.g.*, Kate Waldock, *Hedge Funds Versus Private Equity in Hostile Restructurings*, CLS BLUE SKY BLOG (May 6, 2022), https://clsbluesky.law.columbia.edu/2022/05/06/do-hostile-restructurings-mean-a-new-identity-for-the-official-committee-in-bankruptcies; Diane Lourdes Dick, *Hostile Restructurings*, 96 WASH. L. REV. 1333 (2021) [hereinafter Dick, *Hostile Restructurings*]; Kenneth Ayotte & Christina Scully, *J. Crew, Nine West, and the Complexities of Financial Distress*, 131 YALE L.J.F. 363 (2021); Jared A. Ellias & Robert J. Stark, *Bankruptcy Hardball*, 108 CAL. L. REV. 745 (2020); Robert K. Rasmussen & Michael Simkovic, *Bounties for Errors: Market Testing Contracts*, 10 HARV. BUS. L. REV. 117 (2020); *see also* Vincent S.J. Buccola & Greg Nini, *The Loan Market Response to Dropdown and Uptier Transactions*, SSRN.COM (June 22, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4143928.

2 *See, e.g.*, Dick, *Hostile Restructurings*, *supra* note 1.

3 *See, e.g.*, Ellias & Stark, *supra* note 1.

4 The holdout risk refers to the inefficiencies that arise when a small number of lenders refuse to consent to an otherwise economically sound restructuring. The holdout risk—and the outsized role it has played in financial laws and procedures—is considered more fully in Stephen J. Lubben, *Holdout Panic*, 96 AM. BANKR. L.J. 1 (2022). For a deeper look at the problem from a law and economics perspective, see LEE ANNE FENNELL, SLICES AND LUMPS: DIVISION AND AGGREGATION IN LAW AND LIFE 27–43 (2019) (challenging modern articulations of the "holdout" problem and advancing a more nuanced perspective on the various behaviors that are collectively characterized as holdouts); Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CAL. L. REV. 75 (2004) (using a case study to consider how holdouts and other manifestations of rational economic behavior may be influenced by other factors, such as community norms).

5 Dick, *Hostile Restructurings*, *supra* note 1, at 1333; *see also* Douglas G. Baird, *Financial Distress and Creditor Coalitions* (Oct. 4, 2022) (unpublished manuscript) (on file with author).

6 *See, e.g.*, Jonathan Lipson, *The Secret Life of Priority: Corporate Reorganization After* Jevic, 93 WASH. L. REV. 631, 685–87 (2018) (describing the ways in which senior secured creditors control modern bankruptcy restructurings).

7 *See, e.g.*, Douglas G. Baird & Randal C. Picker, *A Simple Noncooperative Bargaining Model of Corporate Reorganizations*, 20 J. LEGAL STUD. 311 (1991) (acknowledging this common state of affairs).

8 Frederick Tung, *Do Lenders Still Monitor? Leveraged Lending and the Search for Covenants*, 47 J. CORP. L. 153, 159–67 (2021) (describing the traditional commercial loan structure, which allows lenders to

Even in bankruptcy, where debtors can obtain court approval to cram down a plan on their creditors,[9] senior secured creditors still have tremendous power. They typically have liens that extend to all of the debtor's cash proceeds; this means that for the company to advance through bankruptcy and propose a plan, it must work closely with senior lenders from the very beginning of the case and either gain their consent to use cash collateral or obtain new debtor-in-possession financing.[10] Early agreements of this sort tend to lock up the entire restructuring by imposing stringent substantive and procedural limitations on subsequent decisions and negotiations.[11] These bankruptcy dynamics, in turn, have profound influence on out-of-court restructurings, which proceed against the backdrop of the threat of bankruptcy.[12]

In light of these practical realities, the conventional wisdom holds that senior lenders possess all of the power in bankruptcy and out-of-court restructurings.[13] But in the modern commercial lending market, large senior debt facilities are extended by syndicates of lenders that must coordinate their responses to the debtor's financial distress.[14] Hostile restructurings rely on certain strategies and tactics to exploit the potential for coordination problems within the syndicate. These dynamics allow debtors to achieve restructurings that advance the interests of some stakeholders, but that may not be in the interest of the senior creditors, collectively, or the firm as a whole. Envision Healthcare, for example,

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monitor the borrower's risk exposure and exercise control over many important decisions). For a rich discussion of corporate control rights within and outside of bankruptcy, see Robert K. Rasmussen, *Taking Control Rights Seriously*, 166 U. PA. L. REV. 1749 (2018).

[9] *See* 11 U.S.C. § 1129 (setting out plan confirmation procedures for consensual and cramdown restructurings under chapter 11 of the Bankruptcy Code). All references to the "Bankruptcy Code" are to Title 11 of the United States Code. Unless otherwise indicated, all references to chapters and sections are to the Bankruptcy Code.

[10] These common liquidity constraints are discussed in Kenneth M. Misken & Daniel F. Blanks, *Use of Cash Collateral: Guidelines and Rules Can Help the "Smaller" Business Debtor Negotiate Orders Without Giving Away the Store*, AM. BANKR. INST. J., Feb. 2008, at 34.

[11] I explore these dynamics in Diane Lourdes Dick, *The Bearish Bankruptcy*, 52 GA. L. REV. 437, 479–87 (2018).

[12] For a classic account of how parties bargain in the shadow of the law, see Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

[13] *E.g.*, Vincent S.J. Buccola, *Sponsor Control: A New Paradigm for Corporate Reorganization*, 90 U. CHI. L. REV. 1, 3 (forthcoming 2023) (challenging this paradigm and advancing a theory of sponsor control); *see also* Juliet M. Moringiello, *When Does Some Federal Interest Require a Different Result?: An Essay on the Use and Misuse of* Butner v. United States, 2015 U. ILL. L. REV. 657, 658–59 ("[B]y giving secured creditors excessive control over business reorganizations, Chapter 11 no longer effectively balances its two primary goals, the effective reorganization of businesses and the maximization of asset values for all creditors."); Melissa B. Jacoby, *Fast, Cheap, and Creditor-Controlled: Is Corporate Reorganization Failing?*, 54 BUFF. L. REV. 401, 429–30 (2006) (examining the historical roots of creditor control in chapter 11).

[14] *See* Lubben, *supra* note 4, at 10–12.

recently completed a hostile restructuring described by several commentators as "one of the most ambitious and complex financial maneuvers in corporate finance history."[15] Relying on questionable interpretations of loosely drafted provisions in its senior secured loan agreements, the company boldly transferred the most valuable collateral to a subsidiary beyond the reach of its existing lenders.[16] Then, it used threats of further subordination and impairment, on the one hand, and targeted offers to participate in a new superpriority debt facility,[17] on the other, to push a majority of lenders to consent to the transaction on behalf of the entire group.[18] Examples of similar conduct can be found across the capital markets. For instance, when mattress seller Serta restructured its senior debts in 2020, it negotiated with multiple lenders in tandem and in secret, requiring them to promise not to divulge information about the restructuring negotiations to their co-lenders.[19]

It is not always clear in these situations that the debtor is the one instigating the hostile restructuring. The debtor may simply be trying to restructure, and certain creditors use the occasion to extract value from their co-lenders. There are clearly incentives for lenders to anticipate potential fractures in the lender group and take steps to align themselves correctly: lenders that participate in a hostile restructuring receive some economic benefits in the form of new credit enhancements and new investment opportunities, while nonparticipating lenders pay the price by losing payment priority and lien rights.[20] But no matter who

[15] Eliza Ronalds-Hannon & Davide Scigliuzzo, *The Debt Deal That Shows How Ugly Things Are Getting for Lenders*, BLOOMBERG NEWS (Oct. 5, 2022) https://www.bnnbloomberg.ca/the-debt-deal-that-shows-how-ugly-things-are-getting-for-lenders-1.1828392.

[16] *See id.*

[17] *See id.* The relative position of various debt instruments becomes especially important if the company later enters bankruptcy. In bankruptcy, the absolute priority rule mandates that unless senior creditors agree otherwise, junior creditors and interest holders are not entitled to receive a bankruptcy distribution on account of their junior claims and interests unless and until senior creditors are paid in full. *See* 11 U.S.C. § 1129(b)(2). For a deeper dive into absolute priority and the distortions it can create in complex cases, see generally Anthony J. Casey & Joshua C. Macey, *The Hertz Maneuver (and the Limits of Bankruptcy Law)*, U. CHI. L. REV. ONLINE 1 (2020); Douglas G. Baird & Robert K. Rasmussen, *Control Rights, Priority Rights, and the Conceptual Foundations of Corporate Reorganizations*, 87 VA. L. REV. 921 (2001); Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862 (2014); Melissa B. Jacoby & Edward J. Janger, *Tracing Equity: Realizing and Allocating Value in Chapter 11*, 96 TEX. L. REV. 673 (2018).

[18] *See* Ronalds-Hannon & Scigliuzzo, *supra* note 15.

[19] *See* Dick, *Hostile Restructurings*, *supra* note 1, at 1354 (relating the story of Serta's recent hostile restructuring). In June 2020, Serta announced the terms of a hostile restructuring transaction that would restructure approximately $1.3 billion of existing senior indebtedness and make available a new $200 million superpriority credit facility. Certain lenders that were excluded from the restructuring continue to assert that the transaction constituted a breach of contract and a breach of the implied covenant of good faith and fair dealing.

[20] For case studies reflecting these outcomes, see Dick, *Hostile Restructurings*, *supra* note 1.

instigates a hostile restructuring, the lender group, as a whole, receives less than it would have received had it engaged in restructuring negotiations as a unified bloc.[21] In this way, the restructuring drives a wedge through the senior lenders, effectively dividing and conquering the entire group.

These developments have major implications for commercial law and for the capital markets. As I explored in a prior work, they challenge the prevailing view that out-of-court restructurings are largely consensual.[22] They also call into question the theoretical foundation of some of the most important creditor safeguards reflected in modern debt instruments and codified in bankruptcy law.[23] These and other protective mechanisms are considered necessary to prevent value-eroding hold-up behavior by minority lenders.[24] But hostile restructurings exploit these very same protective mechanisms in order to cram down a plan that the lender group, as a whole, would likely oppose.[25] More broadly, these transactions suggest that alliance politics—rather than sound financial and economic decisions—may be driving restructuring outcomes that have the potential to undermine investor confidence and threaten capital formation. Reflecting on these shifting sands in the market for corporate restructurings, Professor Douglas Baird recently highlighted the renewed importance of studying coalition-building tactics in chapter 11 bankruptcy and out-of-court restructurings.[26]

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[21] In Serta's recent hostile restructuring, the debtor admitted that it was motivated by this goal:

> Plaintiffs suggest that they should be permitted to participate in the Proposed Transaction, but Plaintiffs' participation would not accomplish the goal of deleveraging the Company. If every First Lien Loan lender was permitted to exchange their debt into the new facility, there would be no reduction in debt because the participating lenders would not be incentivized to sell their debt at a discount, whereas now, with the Defendant Lenders, the net reduction is nearly $400 million.

Dick, *Hostile Restructurings*, *supra* note 1, at 1358 (citing Serta Simmons Bedding, LLC's Memorandum of Law in Opposition to Plaintiffs' Application for a Temporary Restraining Order, a Preliminary Injunction, and Expedited Discovery at 9, N. Star Debt Holdings, L.P. v. Serta Simmons Bedding, LLC, No. 652243/2020, 2020 WL 3475182 (N.Y. Sup. Ct., June 16, 2020), NYSCEF No. 22); *see also* Affidavit of Roopesh K. Shah at 9, *Serta Simmons Bedding*, No. 652243/2020, 2020 N.Y. Misc. LEXIS 4222, NYSCEF No. 27 ("[T]he fewer holders that are offered the opportunity to participate in the debt-for-debt exchange, the more incentivized they will be to exchange the debt at a greater discount.").

[22] *See* Dick, *Hostile Restructurings*, *supra* note 1, at 1336–37.

[23] Many of these questions are thoughtfully explored in Lubben, *supra* note 4.

[24] *See id.* at 14–15.

[25] *See generally* Dick, *Hostile Restructurings*, *supra* note 1. For instance, a hostile restructuring may be orchestrated by an equity sponsor hoping to avoid or postpone a realization event with respect to losses on an underperforming portfolio investment. *See* Buccola, *supra* note 13, at 5.

[26] Baird, *supra* note 5.

To be sure, Professor Daniel Bussel,[27] Judge Michelle Harner,[28] Professor Stephen Lubben,[29] and other bankruptcy scholars have laid important groundwork. This Article builds on these prior studies and contributes to the conceptual refinement of a broader theory of alliance politics in corporate restructuring. Specifically, I explore the social science and game theoretic literature on wedge strategies and divide-and-conquer tactics. I then use these insights to describe and analyze techniques to prevent, break up, and weaken coalitions of senior lenders in order to achieve hostile restructurings.

The Article proceeds as follows. Part I engages with a rich body of literature on wedge strategies and divide-and-conquer tactics. Part II uses these multidisciplinary insights to develop a theory of wedge strategies and divide-and-conquer tactics that is specifically tailored to the unique world of corporate debt restructuring. Part III considers the normative implications and also shifts from theory to practice by providing specific ex ante and ex post recommendations to help restore balance and generate more efficient restructuring outcomes. Part IV concludes.

Through this analysis, I find that wedge strategies and divide-and-conquer tactics exacerbate the coordination problems that lenders in large syndicates already face. Wedge strategies succeed because they introduce new opportunities for lender defection from the syndicate, essentially recasting the high-stakes coordination game played by lenders and driving up strategic uncertainty. Then, divide-and-conquer tactics cause targeted lenders to value mutual agreement with the debtor over continued coordination with the lender group. By design, these transactions increase uncertainty and siphon value away from senior creditors, ultimately causing capital market participants to behave in inefficient ways. They may also enable economically wasteful restructurings by overpowering senior lender groups that would have collectively (and rightfully) pushed a company to liquidate.

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[27] *See generally* Daniel J. Bussel, *Coalition-Building Through Bankruptcy Creditors' Committees*, 43 UCLA L. REV. 1547 (1996) (examining coalition-building in chapter 11, with particular emphasis on statutory committees).

[28] *See generally* Michelle M. Harner & Jamie Marincic, *Committee Capture? An Empirical Analysis of the Role of Creditors' Committees in Business Reorganizations*, 64 VAND. L. REV. 747 (2011) (exploring the role and influence of creditors' committees in large chapter 11 cases). Judge Harner previously held a professorship at the University of Maryland School of Law.

[29] *See generally* Lubben, *supra* note 4.

I. BACKGROUND: A REVIEW OF THE LITERATURE ON DIVIDE-AND-CONQUER AND WEDGE STRATEGIES

A rich body of literature—spanning political science, economics, business management, law, and psychology—explores the use of wedge strategies and divide-and-conquer tactics in various conflict and bargaining situations. Although these and related theories have rarely been applied to the financial restructuring realm,[30] the rise of hostile restructurings suggests that the dynamics between and among corporate borrowers and their lender syndicates are an important source of power politics, reflecting similar alliance-forming and counterbalancing strategies. Moreover, the corporate restructuring academic and practitioner communities have much to gain from this line of inquiry. As Yasuhiro Izumikawa observed in his work on nation-states,[31] "[p]reventing or breaking up hostile alliances . . . may determine the fate of the state."[32] For better or worse, the same may be said of the fate of the distressed company in the modern capital markets.

The following subsections review the rich multidisciplinary literature on wedge strategies and divide-and-conquer tactics. We begin by examining the theoretical underpinnings of alliance politics and wedge strategies.

A. *Political Theory Foundations of Alliance Politics and Wedge Strategies*

Classic and contemporary work in the fields of political science and international relations places considerable importance on so-called "alliance politics."[33] These works detail how weaker states come together to attempt to counterbalance more powerful states,[34] who generally derive their power from their superior military capabilities.[35] In this way, the political science and international relations literature builds on sociological studies examining the nature of coalitions and the factors that lead to their formation, applying these insights to the relationships between and among states and multinational

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[30] A notable exception is Bussel, *supra* note 27, which engages with social science literature on coalition formation and bargaining dynamics.

[31] Unless the context suggests otherwise, references to "states" in this Article mean nation-states.

[32] Yasuhiro Izumikawa, *To Coerce or Reward? Theorizing Wedge Strategies in Alliance Politics*, 22 SEC. STUD. 498, 499 (2013).

[33] *See generally* GLENN H. SNYDER, ALLIANCE POLITICS (1997).

[34] *See* KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS 127 (1979).

[35] *See generally* HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 194–95 (3d ed. 1977).

organizations.[36] The natural corollary to this emphasis on external balancing and coalition building is that preventing or dismantling enemy coalitions is equally important to the balance of power.[37] Indeed, classical realists such as Hans Morgenthau[38] and neorealists including Kenneth Waltz[39] acknowledged this very point, laying the groundwork for future studies that analyze the use of divide-and-conquer techniques in international relations.[40]

Timothy Crawford has written some of the most influential modern work on alliance formation and coercive techniques. He uses the term "wedge strategies" to describe the approaches used by world powers to divide alliances in order to balance against threats.[41] As he defines it, a "wedge strategy" is any attempt by a state "to prevent, break up, or weaken a threatening or blocking alliance at an acceptable cost."[42] Wedge strategies are important to study because of their potential to produce "surprising power shifts with significant consequences for war and peace and the trajectory of international politics."[43]

According to Crawford, "[s]tates use wedge strategies to influence other states' alignments by manipulating promises and threats, rewards and punishments."[44] There are two main types of wedge strategies: "reinforcing" wedge strategies and "countervailing" wedge strategies.[45] The former refers to strategies that encourage targets to take actions that they likely would have taken anyway, while the latter refers to strategies that encourage targets to take actions

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[36] *See, e.g.*, William A. Gamson, *A Theory of Coalition Formation*, 26 AM. SOCIO. REV. 373, 374 (1961) (defining coalitions as "temporary, means oriented, alliances among individuals or groups which differ in goals."); W. Edgar Vinacke & Abe Arkoff, *An Experimental Study of Coalitions in the Triad*, 22 AM. SOCIO. REV. 406 (1957) (building an experimental model to test prevailing sociological theories of coalition building).

[37] *See, e.g.*, STEPHEN M. WALT, THE ORIGINS OF ALLIANCES (Robert Jervis et al. eds., 1990) (analyzing the role of threat balancing in alliance politics); Mark R. Brawley, *The Political Economy of Balance of Power*, *in* BALANCE OF POWER: THEORY AND PRACTICE IN THE 21ST CENTURY (T.V. Paul et al. eds., 2004).

[38] *See* HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 134 (Kenneth W. Thompson ed., 6th ed. 1985) (1948).

[39] WALTZ, *supra* note 34, at 126–27 (describing how "states balance power rather than maximize it" by joining coalitions and taking steps to disrupt enemy coalitions "before disparities widen").

[40] For instance, in a 2001 monograph, historian Sayuri Shimizu refers to the use of divide-and-conquer tactics and "economic wedge strategies" by a Japanese prime minister in the 1950s with respect to conflicts over trade with China. SAYURI SHIMIZU, CREATING PEOPLE OF PLENTY: THE UNITED STATES AND JAPAN'S ECONOMIC ALTERNATIVES, 1950–1960, at 74–75 (2001).

[41] Timothy W. Crawford, *Preventing Enemy Coalitions: How Wedge Strategies Shape Power Politics*, 35 INT'L SEC. 155, 155 (2011).

[42] *Id.* at 156.

[43] *Id.*

[44] *Id.* at 159.

[45] *Id.*

that they likely would not have taken on their own.[46] Crawford explains that countervailing strategies have lower success rates but tend to be more impactful when they succeed.[47] Crawford notes that a state's alliance relationships may constrain its wedge strategy choices, particularly when an ally also has interests in the target.[48]

Wedge strategies can be further categorized based on whether they primarily involve "selective accommodation" or "confrontation."[49] Selective accommodation wedge strategies blend "carrots and sticks to create divergent pressures on members or potential members of an opposing alliance."[50] A state may use "concessions and other inducements to lure a target away from other adversaries, which are dealt with more firmly."[51] These tactics not only encourage the target to place more distance between it and the other members of the opposing coalition; they are also likely to introduce or exacerbate divisions within the opposing coalition.[52] Confrontational wedge strategies, on the other hand, are rooted in the belief that "consistent toughness and intimidation will expose and exacerbate gaps in the adversaries' strategic interests, increasingly strain[ing] their ability to cooperate, and precipitat[ing] defections."[53] Confrontational strategies are more successful when there are "disintegrative tendencies" among the adversaries, such as differences in geographical position, strategic priorities, relative capabilities, or ideological beliefs.[54]

In choosing among various wedge strategies, states must evaluate the risk of "blowback," or the risk that the chosen strategies will cause the opposing coalition to unite.[55] In assessing the blowback risk, states should consider two factors: "the apparent strength of the adversaries' cohesion and the danger posed by their acting in concert."[56] Confrontational strategies, Crawford explains, carry a far greater blowback risk; in contrast, successful selective accommodation strategies "erode the bases of . . . alignment."[57] However, states

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[46] *Id.* at 159–60.
[47] *Id.*
[48] TIMOTHY W. CRAWFORD, THE POWER TO DIVIDE: WEDGE STRATEGIES IN GREAT POWER COMPETITION 17 (2021).
[49] Crawford, *supra* note 41, at 160.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.* at 161.
[54] *Id.* at 162.
[55] *Id.*
[56] *Id.*
[57] *Id.*

are not always able to choose selective accommodation; a state may lack the resources to offer adequate rewards and/or it may not have strong enough allies to support its attempt.[58] In these situations of profound scarcity, states are more likely to adopt confrontation strategies.[59]

Yasuhiro Izumikawa builds on Crawford's work, focusing on states' use of coercive wedge strategies.[60] According to Izumikawa, coercive wedging—which may include military threats or actions, economic sanctions, and/or diplomatic isolation—can be highly effective.[61] The choice, then, between coercive and reward-based selective accommodation wedge strategies comes down to relative scarcity:

> [W]hereas a state prefers reward wedging when it has sufficient reward power to outbid its competitor in influencing its target, it must rely on coercive wedging if it wants to divide an adversary coalition when it faces severe security threats but its weak reward power relative to its competitor makes its reward wedging ineffective.[62]

Additionally, coercive wedge strategies have important signaling and disincentivizing effects, particularly with respect to targets that have not yet formally joined the opposing alliance. This is because the target will likely interpret the coercive wedge strategy as a sign of the divider's "strong resolve to dissuade the target state . . . from joining a coalition against the divider."[63] It is also possible that the divider can use today's coercive action as the basis for a future "reward" when the coercive action is selectively relaxed.[64]

Although most of the international relations literature examines external state relations, some scholars have turned their attention to *internal* state relations. For example, Aaron Belkin explores the use of wedge strategies by political leaders attempting to protect themselves from their own militaries. Referring to these strategies as "counterbalancing,"[65] Belkin explains, "[o]nce they divide their forces, leaders must ensure that rival organizations refrain from conspiring, and they must promote jealousy and strife to prevent the

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58 *Id.* at 163–64.
59 *Id.*
60 Izumikawa, *supra* note 32, at 500.
61 *Id.* at 501.
62 *Id.*
63 *Id.*
64 *Id.* at 504.
65 AARON BELKIN, UNITED WE STAND?: DIVIDE-AND-CONQUER POLITICS AND THE LOGIC OF INTERNATIONAL HOSTILITY 17 (2005).

development of lateral networks among potential conspirators."[66] Belkin is particularly interested in the conditions that give rise to counterbalancing. He defines "regime vulnerability" as a "deep, structural attribute of the government, of society, of political culture, and of state-society relations" that, if unchecked, can manifest as a coup risk.[67] Regime vulnerability causes leaders to "create rival military organizations to check and balance each other and protect the regime as a byproduct of their independent coercive capacity."[68] He distinguishes between "background" causes of regime vulnerability, such as the absence of the rule of law and a weak civil society, and "triggering" or "immediate" causes, such as "officers' grievances, the size of the military, or military factionalism."[69] While immediate causes may "induce a specific attack[,]" the background causes create the long-term conditions that make coups possible.[70]

Belkin explores a variety of methods leaders use to reduce regime vulnerability, such as professionalizing the military, increasing military pay or pensions, strengthening civilian oversight, and promoting particular political and civic values in the military.[71] But in Belkin's view, no other strategy is as effective as counterbalancing.[72] Accordingly, "although regimes may draw on many different combinations of the alternative approaches listed above, the possibility of a coup is very likely to cause them to include counterbalancing among the domestic survival strategies that they pursue."[73]

Other scholars and commentators have used wedge theory to analyze domestic politics. Professors D. Sunshine Hillygus and Todd G. Shields's monograph on U.S. presidential elections develops a "wedge campaign strategy" theory of presidential campaigning in which "divisive issues are often used to appeal to persuadable voters, often from the opposing partisan camp."[74] In this context, a "wedge issue" is any "policy concern that is used to divide the opposition's potential winning coalition."[75] The authors posit that U.S. presidential campaigns are especially ripe for wedge strategies; this is because

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[66] *Id.* at vii.
[67] *Id.* at 19.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *See id.* at 22–29.
[72] *See id.* at 29–30.
[73] *Id.* at 30.
[74] D. SUNSHINE HILLYGUS & TODD G. SHIELDS, THE PERSUADABLE VOTER: WEDGE ISSUES IN PRESIDENTIAL CAMPAIGNS 3 (2009).
[75] *Id.* at 36.

"[t]he two-party system means that the parties will always be heterogenous coalitions, and the prominence of the contest means that voters are more likely to be informed about the policy positions of the candidates and that cross-pressured voters are still likely to show up on Election Day."[76] Legal scholars have examined a variety of other, less formal uses of wedge strategies to realign groups and impact civil discourse with respect to religious freedom, civil rights, race, and sexuality.[77] The following section looks beyond the political science and international relations literature, finding similar theoretical framing in business management and organizational behavior literature.

B. Negotiation, Management, and Organizational Strategy Literature on Divide-and-Conquer Tactics in the Transactional Setting

Outside of the political science and international relations literature, the phrase "wedge strategies" is used far less frequently; instead, the preferred term in many fields appears to be "divide and conquer." For example, a classic work by business management and negotiation scholar Larry Crump proffers a theory of "divide and conquer" negotiation strategies.[78] Crump begins with the observation that "'[d]ivide and conquer' is relevant to negotiations that are defined as contests that can have winners and losers."[79] He observes that these strategies will always be attractive for the simple reason that they force the other side to exhaust some of its time, energy, and other resources on internal conflicts rather than the negotiation at hand.[80]

[76] *Id.* at 193. More recently, Darrell West argues that President Donald Trump "followed a 'wedge' strategy designed to divide liberals from moderates and drive opponents in a more extreme direction so that it would be easier to attack them for being out of the mainstream." DARRELL M. WEST, POWER POLITICS: TRUMP AND THE ASSAULT ON AMERICAN DEMOCRACY 133 (2022).

[77] *See, e.g.*, Mary Ann Glendon, *The Harold J. Berman Lecture: Religious Freedom—A Second-Class Right?*, 61 EMORY L.J. 971, 980 (2012) (referring to a proposal as a "secularist divide-and-conquer strategy[,]" aiming to "destroy the religious right by driving a wedge between those who are more concerned about religion in public settings and those who are more concerned about protecting the existence and identity of religious institutions"); Adele M. Morrison, *It's (Not) a Black Thing: The Black/Gay Split over Same-Sex Marriage—A Critical (Race) Perspective*, 22 TUL. J.L. & SEXUALITY 1, 32–33 (2013) ("[T]he black/gay split on the issue of same-sex marriage persists primarily because both communities subject themselves to dominant group divide-and-conquer tactics that maintain both heterosexual and white supremacy . . . ."). Saul Levmore has used a similar framing to analyze the ways in which interest group politics contribute to incremental lawmaking. Saul Levmore, *Interest Groups and the Problem with Incrementalism*, 158 U. PA. L. REV. 815, 816 (2010).

[78] *See generally* Larry Crump, *For the Sake of the Team: Unity and Disunity in a Multiparty Major League Baseball Negotiation*, 21 NEGOT. J. 317 (2005).

[79] *Id.* at 318.

[80] *Id.*

Crump focuses on the interorganizational negotiation context, meaning that there are multiple organizations on one or more side of the discussions.[81] The author uses the terms "unity" and "disunity" to refer to the level of organizational affiliation and/or convergence on each side of the negotiation.[82] He explains that unity should be measured on an issue-by-issue basis, with the threshold met when "two or more entities are able to deliberately coordinate behavior so that they speak in a single voice or demonstrate consistently coherent behavior on one or more substantive issues over time."[83]

Additionally, Crump engages in a structural analysis of interorganizational unity, incorporating foundational concepts from management and organizational strategy literature.[84] These insights help to explain why unity or disunity may exist between organizations on the same side in a negotiation. He explains that organizations may be linked in a variety of ways: because they are tied via formal legal relationships; because one organization effectively controls another; because they have a pattern of collaboration and coordination; or because they derive economic benefits from the relationship.[85] Some of these linkages may be more durable than others; Crump hypothesizes that organizations linked by a pattern of collaboration and coordination would normally be expected to remain unified longer than organizations linked in other ways.[86]

Interorganizational unity is also influenced by "the relationship between each organization's intrinsic logic, which serves as a foundation for organizational culture."[87] Intrinsic logic is largely derived from the organization's broader network; for instance, in the financial markets, we might expect banks to have a shared intrinsic logic that is very different from that of hedge funds, on the one hand, or pension funds, on the other.[88] Collectively, these structural and organizational factors influence relations between and among organizations as they engage in negotiations.[89]

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[81] *Id.* at 319.
[82] *See id.*
[83] *Id.*
[84] *Id.* at 321–24.
[85] *Id.* at 321–22 (citing Christine Oliver, *Determinants of Interorganizational Relationships: Integration and Future Directions*, 15 ACAD. MGMT. REV. 241, 242 (1990)).
[86] *Id.* at 322.
[87] *Id.*
[88] *Id.*
[89] *Id.* at 324.

Explaining that one of the most powerful divide-and-conquer techniques is issue reframing, Crump writes that "attempts to reframe a significant issue in an interorganizational negotiation should be carefully scrutinized because *interorganizational unity is fundamentally issue-based*."[90] Issue reframing leads to disunity in the opposing party by:

> (1) Substantially modify[ing] the meaning of a specific issue for parties involved in a negotiation; (2) chang[ing] the perceived value that parties attach to a negotiation and the attractiveness of the desired goal; (3) . . . [causing] parties on the same side [to reevaluate] the utility they derive from maintaining cooperative relations with each other in the pursuit of such goals; and (4) affect[ing] the unity that exists between two or more cooperating parties on the same side in a negotiation.[91]

In other words, parties who use issue reframing to bring about a state of disunity in the opposing party are using powerful divide-and-conquer negotiation tactics.[92] To defend against divide-and-conquer attempts, Crump recommends that parties on the same side of a negotiation "seek to connect their interests and concerns through effective negotiation preparation combined with multiple levels of structural interdependency."[93] For instance, a "link-person" may be used to communicate effectively, manage the diversity of interests within the organization, and ensure that these internal differences can be overcome during the course of the negotiations.[94]

Recently, a Harvard negotiations law blog used Crump's research to develop additional recommendations for defending against divide-and-conquer tactics.[95] Summarizing Crump's observations, the authors explain that defending against divide-and-conquer attacks requires "visionary learnership—particularly, [the] ability to keep [the] team unified and harmonious."[96] The authors recommend that groups anticipate intragroup disagreements and develop contingency plans in advance to deal with such conflicts when they arise.[97] Meanwhile, strong

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[90] *Id.* at 336 (emphasis in original).
[91] *Id.* at 336–37.
[92] *Id.* at 337.
[93] *Id.*
[94] *Id.* at 338.
[95] *Negotiation Team Dynamics: The Divide-and-Conquer Strategy*, HARV. L. SCH.: PROGRAM ON NEGOT. DAILY BLOG (May 10, 2021), https://www.pon.harvard.edu/daily/international-negotiation-daily/in-team-negotiations-should-you-divide-and-conquer-nb/.
[96] *Id.*
[97] *Id.*

group leadership and internal procedures can help to bolster intergroup relations and fend off divide-and-conquer attacks.[98]

While Crump's work continues to have great influence in academic and practitioner communities, it is not the only examination of divide-and-conquer tactics in the business and transactional setting. Legal scholars have written on the use of divide-and-conquer techniques in the market for corporate control[99] and in the labor market.[100] These and other works highlight the pervasiveness of divide-and-conquer attacks in the business and transactional setting. To understand why these tactics are so commonly employed, the following section turns to the economic literature for deeper insights on the incentives and disincentives for social coordination.

C. *Economic and Game Theoretic Analyses of Wedge Strategies and Divide-and-Conquer Tactics*

One of the most useful contributions to the legal and economic literature on wedge strategies and divide-and-conquer tactics is a 2010 article by Professors Eric Posner, Kathryn Spier, and Adrian Vermeule. The authors develop a working definition of divide-and-conquer in the transactional setting and contextualize the concept in various areas of law and public policy.[101] As a starting point, they advance the economists' definition of divide-and-conquer as a "specific class of theoretical models whose main feature, roughly speaking, is that a single actor exploits coordination problems among a group by making discriminatory offers or discriminatory threats."[102]

Two conditions are required for a successful divide-and-conquer attack: first, that "[a] unitary actor bargains with or competes against a set of multiple actors[,]" and second that "[t]he unitary actor follows an intentional strategy of exploiting problems of coordination or collective action among the multiple actors."[103] By "unitary actor," the authors do not mean a natural individual;

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98 *Id.*

99 *See, e.g.*, Sanford J. Grossman & Oliver D. Hart, *One Share-One Vote and the Market for Corporate Control*, 20 J. FIN. ECON. 175, 176 (1988) (exploring the interaction between corporate security structures and strategies for obtaining corporate control).

100 *See, e.g.*, Paul Moreno, *Unions and Discrimination*, 30 CATO J. 67, 67 (2010) (exploring arguments that employers traditionally divide and conquer employees by instilling racial animus, and claiming that labor unions have themselves created racial divisions among workers).

101 *See* Eric A. Posner, Kathryn E. Spier & Adrian Vermeule, *Divide and Conquer*, 2 J. LEGAL ANALYSIS 417, 417 (2010).

102 *Id.* at 418.

103 *Id.* at 419.

rather, they mean "[a]ny group that has itself overcome its internal collective action problems, at least to the point where it is capable of pursuing a unified strategy vis-à-vis an external competitor."[104] And by "intentional strategy," the authors mean that the unitary actor must do more than "passively benefit[] from internal conflict within an opposing group."[105] Instead, the unitary actor must have taken steps to "intentionally foment[] that dissension."[106]

The authors describe two classic game theoretic models[107] that are intended to reflect the risks and benefits of social coordination.[108] The first of the two—known as the stag hunt[109] or assurance game[110]—involves two hunter-players who are faced with the choice of hunting rabbits or stags.[111] Stag hunting offers a greater payout for players but requires two hunters working together; rabbit hunting, in contrast, offers a lesser payout but can be accomplished by a solo hunter.[112] Both players would ideally choose to work together and hunt stag; but if one player abandons their post in pursuit of a rabbit, then the one who remains faithful to the stag hunt will go home emptyhanded.[113] Thus, in the absence of communication or other coordination to ensure that both are fully committed to hunting stag together, both players would likely choose rabbit hunting, leaving the pair of players worse off than if both had chosen stag hunting.[114] In this way, the authors explain, "the desire for safety can, in theory and practice, lead the players away from the socially desirable outcome."[115]

The stag hunt game is often compared to another classic coordination game known as the prisoner's dilemma.[116] The latter game involves two guilty co-

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[104] *Id.*

[105] *Id.*

[106] *Id.* at 420.

[107] For an overview of game theory and its applications to legal analyses, see DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, GAME THEORY AND THE LAW (1998).

[108] Posner, Spier & Vermeule, *supra* note 101, at 421–22.

[109] Some commentators have attributed the stag hunt game to the ideas that philosopher Jean-Jacques Rosseau explored in his 1755 essay, *Discourse on Inequality. See, e.g.*, JOSE LUIS BERMUDEZ, FRAME IT AGAIN: NEW TOOLS FOR RATIONAL DECISION-MAKING 186 n.14 (2020) (noting that Rosseau's comments laid the foundation for the modern game theoretic model).

[110] The latter title is used in Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209, 221 (2009). It is discussed more fully in Julia Y. Lee, *Gaining Assurances*, 2012 WIS. L. REV. 1137 (2012).

[111] Posner, Spier & Vermeule, *supra* note 101, at 421–22.

[112] *Id.*

[113] *Id.*

[114] *See* Russell Cooper et al., *Communication in Coordination Games*, 107 Q. J. ECON. 739 (1992).

[115] Posner, Spier & Vermeule, *supra* note 101, at 421–22.

[116] For a classic description, see JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (1953).

conspirators under interrogation by police.[117] The officers have enough evidence to charge both with a lesser crime, but not enough evidence to charge either or both with a more severe crime.[118] The police attempt to bargain with each prisoner separately, offering the same terms to each: if they both confess, each will receive a medium penalty; if one remains silent while the other implicates the other, then the one who speaks up will be set free while the one who remains silent will receive the stiffest penalty.[119] Finally, if both reject the offer and remain silent, both will receive a lesser penalty.[120]

Philosopher Brian Skyrms has contrasted the prisoner's dilemma with the stag hunt as follows: "[i]f two people cooperate in prisoner's dilemma, each is choosing less rather than more. In prisoner's dilemma, there is a conflict between individual rationality and mutual benefit."[121] Put another way, the Nash equilibrium[122] in the prisoner's dilemma occurs when both players confess; this is because no prisoner is better off by unilaterally changing their strategy.[123] In contrast, in the stag hunt, there are two Nash equilibria: one that is risk dominant, in which both players play it safe and hunt individually for rabbits, and one that is payoff dominant, in which the players collaborate and share the greater payoff of the stag.[124]

But when the prisoner's dilemma is infinitely played by the same two players, the same tension between risk and mutual benefit that Skyrms explores with respect to the stag hunt becomes a core feature of the prisoner's dilemma. Namely, each player has the ability to condition future actions on the observation of past behavior; this makes it rational for a player to relinquish the short-term gains from confessing in any given round in order to avoid the future pain of the

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[117] Posner, Spier & Vermeule, *supra* note 101, at 424.

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] BRIAN SKYRMS, THE STAG HUNT AND THE EVOLUTION OF SOCIAL STRUCTURE 3 (2004).

[122] A "Nash equilibrium" occurs when no other strategy would increase a player's payout, given the other player's choice. For instance, in a stag hunt, if a player chooses rabbit hunting, the other player will achieve a Nash equilibrium by choosing rabbit hunting as well; this is because if the player chooses stag hunting, they will go home empty-handed. *See generally* John F. Nash, *Non-Cooperating Games*, 54 ANNALS MATH. 286 (1951); John F. Nash, *Equilibrium Points in N-Person Games*, 36 PROC. NAT'L ACAD. SCI. 48 (1950).

[123] *See* Lee, *supra* note 110, at 1144 (Expressed another way, in the prisoner's dilemma, "the dominant strategy is to defect no matter what the other player chooses to do.").

[124] SKYRMS, *supra* note 121, at 3.

other party confessing in subsequent rounds.[125] These dynamics predictably cause both players to settle into a pattern of choosing to stay quiet.[126]

According to Posner, Spier, and Vermeule, divide-and-conquer tactics are used in situations where a unitary actor stands to benefit from lack of cooperation among players of the stag hunt and repeated prisoner's dilemma games, and can interfere with and influence game outcomes.[127] "If cooperation appears likely, the unitary actor will attempt to create and exploit divisions between the game's players."[128] The authors catalog a variety of divide-and-conquer tactics used by unitary actors, which may be employed alone or in tandem. The specific approaches used by the unitary actor will depend on practical realities, such as institutional constraints, legal parameters, and financial limitations.[129]

For instance, one technique involves "sabotaging the communication channels" between players; where the communication channel itself cannot be destroyed, "even preventing just one side from communicating with the other may be a successful strategy."[130] Another technique is "sowing the seeds of distrust" by signaling to one player that the other has preferences that make it unlikely that they will choose to cooperate.[131] For instance, if a player in a stag hunt is told that the other actually prefers to hunt rabbits, then it is highly unlikely they would choose stag hunting.[132]

Yet another method is to pay one or both players for non-cooperation[133] or threaten one or both with penalties for cooperating.[134] While non-discriminatory payments (meaning that they are offered to all players) may help the unitary actor achieve its goals, they are expensive.[135] Similarly, threats to all players may be risky, particularly to the extent they may bring about legal or reputational consequences. By discriminating and offering payment (or directing threats) to only one player, the unitary actor can achieve its goals in a more cost-effective

[125] *See* Posner, Spier & Vermeule, *supra* note 101, at 424–25.
[126] *Id.* at 425.
[127] *Id.* at 424–25.
[128] *Id.* at 426.
[129] *See id.* at 434.
[130] *Id.* at 426.
[131] *Id.* at 431–32.
[132] *Id.*
[133] *Id.* at 427.
[134] *Id.* at 430–31 (explaining that threats of penalties are the economic equivalent of promises to pay bribes).
[135] *See id.* at 427–28.

manner.[136] Indeed, the authors explain that the best strategy is often the conditional payment, where the unitary actor "credibly approach[es] the two players in sequence, making take-it-or-leave-it offers to each."[137]

This recommendation is consistent with conclusions drawn by Yeon-Koo Che and Kathryn Spier in their analysis of take-it-or-leave-it offers in class action litigation.[138] The authors examine situations in which the decision of one plaintiff to settle with the defendant has the potential to reduce the value of the remaining plaintiffs' claims, substantially weakening the plaintiffs' negotiating power and leaving them vulnerable to divide-and-conquer attacks. The authors develop a game theoretic model in which the defendant delivers simultaneous and discriminatory take-it-or-leave-it offers to the plaintiffs, finding that the "defendant easily exploited the plaintiffs through these strategies, coercing them into settling their claims for less than they were jointly worth at trial."[139] The losses were even greater when the number of plaintiffs was larger and when the defendant made its offers sequentially.[140]

Ultimately, Posner, Spier, and Vermeule conclude that the law should not necessarily sanction or prohibit divide-and-conquer tactics.[141] Rather, legal reforms should focus on reducing divide-and-conquer behavior that "reduce[s] total payoffs for society as a whole," while allowing it in situations where it "enhance[s] welfare."[142] Transactions, however, should not be analyzed in a vacuum. To this point, Che and Spier caution in their study on class action settlements that the plaintiffs' losses are not the only economic consequences that flow from the divide-and-conquer tactics they examined; there are other social costs that arise from the fact that defendants may not be sufficiently deterred from engaging in tortious conduct in the future, and there are social welfare benefits in the form of reduced litigation costs and increased settlement rates.[143] Policymakers must take into account all of these costs and benefits before determining whether and how to regulate divide-and-conquer behavior.

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[136] *Id.* at 428.

[137] *See id.*

[138] Yeon-Koo Che & Kathryn R. Spier, *Exploiting Plaintiffs Through Settlement: Divide and Conquer*, 164 J. INST'L & THEORETICAL ECON. 4, 21 (2008).

[139] *Id.*

[140] *Id.*

[141] *See* Posner, Spier & Vermeule, *supra* note 101, at 435.

[142] *Id.* at 435.

[143] Che & Spier, *supra* note 138, at 5.

Finally, Che and Spier recommend private ordering to help parties defend against divide-and-conquer attacks in the bargaining and transactional setting. For instance, persons vulnerable to divide-and-conquer tactics may contract with one another in advance to coordinate their negotiation strategies. They may decide to incorporate into their ex ante agreements explicit voting rules to coordinate consent, covenants not to accept discriminatory treatment, and mechanisms to fairly redistribute any discriminatory payments received.[144] The following section considers how emerging behavioral and psychological research helps to refine these insights on incentives and disincentives for social coordination.

D. Emerging Behavioral and Cognitive Psychology Insights

Cognitive psychologists and behavioral economists focus on the ways in which human behavior and decision-making impact the outcomes of various social interactions.[145] Although these subfields do not typically use the terms "divide-and-conquer" or "wedge strategies," scholars have contributed to our understanding of these and related phenomena through experimental studies focused on the social exchanges depicted in the stag hunt and repeated prisoner's dilemma game theoretic models.[146] These behavioral insights contribute to a deeper understanding of the factors that may lead to coordination, even in the face of attempts by an adversary to launch a divide-and-conquer attack against the group.

A substantial body of work focuses on understanding the dynamics that may cause players to choose the most optimal outcomes in repeated coordination games. For instance, a 2013 study of repeated stag hunt games found three distinct player attributes that are predictive of coordination.[147] The first studied

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[144] *Id.* at 13–14.

[145] These fields have much to offer legal scholarship and lawmaking:

> In economics, "behavioral" means adapting insights and methods from cognitive psychology to choices that economists had previously analyzed with a rational actor model. Traditional economics assumes that individuals are able to process information quickly and without mistakes. Behavioralists modify the traditional model with findings from cognitive psychology showing that individuals fall prey to common and predictable errors in information processing such as framing, over-confidence, and hindsight bias, to name only a few of our cognitive failings.

Anne C. Dailey & Peter Siegelman, *Predictions and Nudges: What Behavioral Economics Has to Offer the Humanities, and Vice-Versa*, 21 YALE J.L. & HUMAN. 341, 342 (2009) (reviewing RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008)).

[146] *See infra* notes 147–61 and accompanying text.

[147] Omar Al-Ubaydli et al., *Patience, Cognitive Skill, and Coordination in the Repeated Stag Hunt*, 6 J. NEUROSCIENCE, PSYCH. & ECON. 71, 71–72 (2013).

attribute is higher risk tolerance, which the authors explain is "a predictor of one-shot coordination," because risk-averse players should always choose rabbit hunting.[148] The second studied attribute is patience, which the authors believe ought to be significant because of "the repetition and the self-control required to remain with the same choice."[149] Finally, the authors examine the role of cognitive skill, which they believe is theoretically important "because cognitive skill usually predicts patience and risk tolerance . . . and also because understanding a game's rules typically helps in winning a game."[150]

The authors find that cognitive ability and risk tolerance do not seem to have an impact on player choices in repeated stag hunt games.[151] For one thing, the game is simple, placing relatively few demands on players' cognitive abilities. With respect to risk tolerance, the authors surmise that other incentives may impact player choices.[152] For instance, players in a repeated stag hunt game may be more inclined to choose stag hunting in order to obtain information about the other player's choices.[153] This is because a player who chooses rabbit hunting only learns that they have received the payout for rabbit hunting; they do not know if the other player has received the same payout or if they received no payout because they chose stag hunting. In contrast, a player who chooses stag hunting may infer from their own payout whether the other player chose to hunt rabbits or stag. Interestingly, only patience—which the authors define as having a lower rate of investment time preference[154]—is a significant attribute, and only when the *pair of players* is on average more patient.[155] The authors theorize that "[a]verage patience generates successful coordination in part because patient players are more persistent in their tendency to play stag, making it easier for the other player to coordinate."[156]

A recent article marshals the behavioral economics and cognitive psychology literature pertinent to the stag hunt and other coordination games and also conducts an original experiment examining repeated stag hunt games.[157] The authors find that strategic uncertainty—the uncertainty felt when

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[148] *See id.* at 72.
[149] *Id.*
[150] *Id.*
[151] *Id.* at 83.
[152] *Id.* at 74.
[153] *Id.*
[154] *Id.* at 86.
[155] *Id.*
[156] *Id.*
[157] *See generally* Pedro Dal Bó et al., *The Determinants of Efficient Behavior in Coordination Games*, 130 GAMES & ECON. BEHAV. 352 (2021).

a player does not know what choices the other player(s) will make—is a significant driver of outcomes in coordination games.[158] Other experimental research on coordination games has found that players in repeated games attempt to manage strategic uncertainty by "us[ing] their shared experience in past period games, the historical median, to inform their behavior in the current period game."[159] In other words, there is evidence that precedent is a salient factor in shaping players' strategic choices.[160] Similarly, researchers have found that coordination is more likely to occur when players are given more information about other players' choices in previous rounds.[161]

In sum, the behavioral literature enhances our understanding of the factors that contribute to coordination among players of stag hunt games and repeated prisoner's dilemma games. The following Part uses the collective insights from the wide-ranging literature on social coordination, wedge strategies, and divide-and-conquer tactics to contribute to the development of a broader theory of alliance politics in corporate restructurings.

II. ANALYSIS: A THEORY OF ALLIANCE POLITICS IN CORPORATE RESTRUCTURINGS

This Part uses the multidisciplinary insights on social coordination, wedge strategies, and divide-and-conquer tactics discussed in the previous Part to contribute to a broader theory of alliance politics that is specifically tailored to the unique world of corporate debt restructuring.[162] While this Article focuses specifically on wedge strategies and divide-and-conquer tactics, the field of corporate restructuring would benefit from a broader theory of alliance politics. Such a theory would consider how coalitions form within and among organizational parties to large and complex commercial restructurings, as well as on the steps taken by other parties to achieve unitary actor status and counterbalance other, more powerful actors who derive their power from their legal and contractual rights to control the firm and/or from their senior contractual rights and property interests in the firm. It would also examine the

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[158] *See id.* at 367.

[159] John B. Van Huyck et al., *Strategic Uncertainty, Equilibrium Selection, and Coordination Failure in Average Opinion Games*, 106 Q. J. ECON. 885, 897 (1991).

[160] *See id.*

[161] *See, e.g.*, Yang Huang et al., *The Full Information Feedback in Minimum-Effort Game: An Experiment*, 4 OPEN J. SOC. SCI. 15 (2016). *See generally* Jordi Brandts & David J. Cooper, *Observability and Overcoming Coordination Failure in Organizations: An Experimental Study*, 9 EXPERIMENTAL ECON. 407 (2006).

[162] Such a theory would build on the work of Glenn Snyder. *See generally* SNYDER, *supra* note 33.

features of the capital markets that may be setting the stage for challenging alliance politics.

One focus of this research—and the subject of this Article—is the use of wedge strategies and divide-and-conquer tactics to prevent, divide, and weaken senior lender coalitions in order to achieve hostile restructurings of senior debt.[163] For the typical large company, debt restructuring negotiations are an interorganizational negotiation context, as there are multiple lender organizations engaged in the discussions, organized into syndicates.[164] Restructuring proponents such as debtors—who are not natural persons but may function as "unitary actors" for these purposes[165]—deliberately pursue hostile restructurings in order to receive financial and other concessions from senior lenders who otherwise possess the legal right to control the restructuring and determine the fate of the company. Wedge strategies in this context are used to ensure that senior lender syndicates do not function as unitary actors for these purposes, even though their loan agreements reflect a collective design.[166] These wedge attacks are important to study because they have the potential to generate surprising restructuring outcomes that violate absolute priority,[167] reduce expected surplus, and send shock waves through the capital markets. The following section begins by exploring the legal and economic foundations of social coordination among senior lenders.

A. *Social Coordination Among Senior Lenders*

As a starting point, it is helpful to consider how simple coordination games may be used to model the risks and benefits of senior lenders negotiating as a group or breaking apart into a state of disunity.[168] The following description of

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163 The terminology is derived from Crawford. *See* Crawford, *supra* note 41, at 156.

164 For a description of the interorganizational negotiation context, see Crump, *supra* note 78, at 319.

165 *See* Posner, Spier & Vermeule, *supra* note 101, at 419.

166 For a classic case finding that corporate debt agreements support a collective design, see Beal Sav. Bank v. Sommer, 8 N.Y.3d 318 (N.Y. 2007).

167 Absolute priority is a foundational element of bankruptcy's distributional scheme. *See* 11 U.S.C. § 1129(b)(2) (providing that a plan may be confirmed over the objections of impaired parties if it is "fair and equitable," meaning that holders of claims and interests are either paid in full or that no junior stakeholders receive a distribution).

168 This is certainly not the first attempt to apply game theory to corporate debt restructuring transactions. *See e.g.*, Michelle J. White, *Corporate Bankruptcy as a Filtering Device: Chapter 11 Reorganizations and Out-of-Court Debt Restructurings*, 10 J. L. ECON. & ORG. 268 (1994); Baird & Picker, *supra* note 7 (using game theory to model certain aspects of bankruptcy restructurings); *see also* Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857 (1982) (using game theory as a model for a much broader theoretical paradigm for bankruptcy law).

the basic benefits of lender coordination versus self-help is heavily influenced by the creditors' bargain theoretical model, which is itself based on the classic prisoner's dilemma.[169]

Consider a simple game played by two senior lenders with equal payment priority. These lenders must respond to their debtor's financial distress in a world without a bankruptcy system superimposing new rules and incentives. Coordination in this context means that the two lenders work together, presenting a unified front in negotiations with the debtor, whether this means that they ultimately pursue a restructuring or collectively push the debtor to liquidate. Defection means that a lender independently exercises its state law remedies against the debtor, rushing to be the first to extract immediate repayment of outstanding obligations.

Assume that the debtor's balance sheet is in shambles, such that the company would be forced to liquidate in response to a foreclosure action or execution initiated by either lender. However, the debtor is committed to continuing its operations and promises to repay all of its lenders out of its future earnings. Each lender is able to conduct its own diligence; but there are no guarantees, as it would take a crystal ball to know whether the debtor's promises will materialize.

If one lender rushes to the proverbial courthouse to enforce remedies on its own behalf while the other stands still, then the latter may be left with little to no recovery. However, if both lenders stay the course and continue negotiating with the debtor as a unified front, then the coordinating lenders will either agree amongst themselves to push the debtor to liquidate or the coordinating lenders, on the one hand, and the debtor, on the other, will agree to restructure.[170]

Is this the setup for the stag hunt or for the prisoner's dilemma? The answer depends on what is at stake. Recall that in the stag hunt, coordination provides a greater payout; in the prisoner's dilemma, coordination means "choosing less

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[169] *See, e.g.*, Jackson, *supra* note 168; *see also* THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW (1986); Thomas H. Jackson, *Translating Assets and Liabilities to the Bankruptcy Forum*, 14 J. LEGAL STUD. 73 (1985). While the creditors' bargain continues to have tremendous influence in the field, it is not the only theoretical paradigm used to describe and analyze the field. For a thoughtful alternative model, see Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 COLUM. L. REV. 1709 (2020).

[170] In other words, for the debtor to continue as a going concern, two things must happen: the lenders must coordinate with each other, and they must believe that the debtor is worth restructuring because there is more value in preserving the company as a going concern. If the lenders do not believe that the debtor is worth more as a going concern, then there is still an opportunity for them to coordinate: they would jointly push the debtor into an immediate liquidation and share the proceeds.

rather than more."[171] But in the corporate restructuring context, lender payout is predicted based on complex valuation models that estimate and compare liquidation and going concern scenarios.[172] Valuation analyses necessarily take into account the time value of money, as well as various risks faced by the debtor, its industry, and all investors generally in the capital markets.[173] The necessary inputs are subject to varying levels of noise, making it difficult to gain a full and accurate picture. All of these uncertainties are further compounded by the fact that access to information may be asymmetric.[174]

If each lender believes that it would receive the highest and best payout by pursuing its immediate state law remedies and beating the other lender to the debtor's current assets, then the lender coordination game looks more like the prisoner's dilemma: the greatest payout comes to a player who defects to bring immediate state law remedies while the other sits back, awaits news of a coordinated plan, and ultimately receives nothing because the debtor's assets will have been used to repay the other lender. A lesser payout (but still better than nothing) comes to both players if they each defect and independently pursue their state law remedies at the same time, wasting some of the debtor's residual value to pay duplicate liquidation costs.

If there are any merits at all to the debtor's future business plan, then a medium payout comes to both players if they coordinate and proceed with a restructuring that forces both lenders to take a haircut but nonetheless delivers a premium over total liquidation value. Similarly, if the lenders coordinate with each other to push the debtor to liquidate, then they will also generate a medium payout: this is because a coordinated liquidation will at least offer cost savings compared to the simultaneous exercise of each lender's independent remedies. But coordination is risky because the other lender might defect at any time and

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[171] *See supra* notes 121–24 and accompanying text.

[172] Going concern value reflects an assumption that the value of an operating business is greater than the sum of its parts.

[173] For a discussion of the risks and uncertainties surrounding valuation estimates in the restructuring environment—both within and outside of bankruptcy—see, for example, Kenneth Ayotte & Edward R. Morrison, *Valuation Disputes in Corporate Bankruptcy*, 166 U. PA. L. REV. 1819 (2018); Diane Lourdes Dick, Brian Hulse & Kevin Badgley, *Reevaluating Risk and Return in Chapter 11 Secured Creditor Cramdowns: Interest Rates and Beyond*, 93 AM. BANKR. L.J. 175 (2019); Diane Lourdes Dick, *Valuation in Chapter 11 Bankruptcy: The Dangers of an Implicit Market Test*, 2017 U. ILL. L. REV. 1487 [hereinafter Dick, *Valuation in Chapter 11*].

[174] Much has been written about games with uncertain payouts. *See generally* Yuchen Li & Zaoli Yang, *Games with Incomplete Information and Uncertain Payoff: From the Perspective of Uncertainty Theory*, 23 SOFT COMPUTING 13669 (2019).

beat the other lender to the debtor's assets; accordingly, the two lenders would most likely each defect and pursue their state law remedies individually.[175]

If, in contrast, each lender believes that it is better off cooperating when the other lender is cooperating, then the game looks more like a stag hunt: the greatest payout comes to both players if they coordinate and proceed with a restructuring. The lenders collectively can use their overall leverage as senior creditors to capture as much of the debtor's future wealth and income as possible.[176]

Of course, each lender must make its own, highly personal assessment of risk and reward. A lender that perceives the risk of the restructuring to be low and the upside potential to be high will value the payout for cooperation much higher than the payout for defecting to pursue its own state law remedies.[177] In restructurings that involve generous debt-to-equity terms and a strong business plan, a lender may even prefer coordination over a defection that seems guaranteed to generate a full recovery.[178] However, a lender that has a different view of the risks and rewards of the restructuring—or who simply desires an immediate and more certain payout—might still defect and proceed with its state law remedies, impairing the interests of a lender choosing to coordinate.[179]

In essence, lenders face several layers of strategic uncertainty. For one thing, the payout is uncertain; as a result, lenders do not know for certain which game they are playing, and they do not know which coordination game the other lender believes that it is playing (let alone what choice it will eventually make). Thus, even if each lender has access to relevant precedent, such as the other lender's

[175] Of course, if the debtor files for bankruptcy, the automatic stay would prevent the enforcement of remedies. *See* 11 U.S.C. § 362(a). Moreover, as I discuss below, the lenders may have already agreed in their intercreditor agreements not to pursue their individual remedies. *See infra* text accompanying notes 181–83.

[176] While creditors are normally only entitled to be made whole, distressed debt restructurings often involve high rates of interest, fees, and transfers of liens and equity interests. These distributions are typically justified on the grounds that their present value—which necessarily takes into account the economic risk of the restructuring—reflects anything but a lender windfall. But valuation analyses have subjective components; moreover, lenders with greater appetites for risk may be significantly rewarded by the upside potential.

[177] For instance, perhaps the lender believes that the conditions giving rise to the financial distress are temporary and likely to resolve, and that the debtor's management is capable of executing a successful turnaround. In that event, restructuring would be more favorable than enforcing state law remedies, which have the effect of recognizing the losses at the firm's low point.

[178] This is because equity securities in the reorganized company are valued as of the date of the restructuring, taking into account present risks and uncertainty. This can lead to an overly discounted valuation with substantial upside potential.

[179] In essence, liquidation has the effect of locking in the amount of the recovery, making it a less risky and more certain outcome.

choices in prior distressed debt situations and information regarding specific attributes of the other lender, such as reputation, investment strategy, and investment horizon (a measure of patience, in this context),[180] it still has the broader challenge of trying to decipher what game it is playing, on the one hand, and what game the *other player believes it is playing*, on the other. In essence, these simple models confirm that lenders in distressed debt situations face overwhelming strategic uncertainty. The following section considers how modern debt contracts attempt to deal with this strategic uncertainty and limit opportunities for defection, thereby changing the playing field for lender coordination games.

B. Opportunities for Defection by Senior Lenders

In the modern commercial lending market, coordination among senior lenders is highly regulated via private ordering.[181] Groups of senior lenders may be co-lenders under a syndicated loan, or their separate loans may be coordinated by intercreditor agreements. To help facilitate out-of-court restructurings, many commercial loan facilities are subject to collective action clauses that prevent lenders from unilaterally exercising remedies or taking other actions in respect of the loan.[182] Instead, these clauses require collective action for the enforcement of remedies.[183]

Then, to facilitate efficient restructurings, commercial loan agreements typically allow for amendments or modifications with less-than-unanimous (majority or supermajority) consent. These provisions are designed to prevent opportunistic holdouts by lenders holding relatively small amounts of debt.[184] Because of provisions of this sort, the type of defection described above—independently exercising state law remedies—will be unavailable in most situations, leaving lender coordination (manifesting as the lenders agreeing to a

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[180] On interbank monitoring, see Kathryn Judge, *Interbank Discipline*, 60 UCLA L. REV. 1262 (2013).

[181] Private ordering is not the only way to encourage coordination. "[R]egulation and market standards can increase certainty and lower costs by mandating some actions and ruling out others." Charles K. Whitehead, *Destructive Coordination*, 96 CORNELL L. REV. 323, 331 (2011).

[182] *See generally* Beal Sav. Bank v. Sommer, 8 N.Y.3d 318 (N.Y. 2007) (discussing mechanisms of this sort).

[183] *See id.* at 324, 327.

[184] For an in-depth look at these provisions and their role in debt restructurings, see Howard J. Kashner, *Majority Clauses and Non-Bankruptcy Corporate Reorganizations—Contractual and Statutory Alternatives*, 44 BUS. LAW. 123 (1988).

restructuring or jointly pushing the debtor into liquidation) as the only viable strategy.[185]

Or *is* lender coordination the only viable strategy? The game scenarios described above assume that lenders are always individually and collectively opposed to the debtor, such that coordination involves negotiating against the debtor while defection involves taking independent actions that are hostile to the debtor—to the point that they force the debtor to liquidate. But another form of defection involves taking independent actions that achieve *mutual agreement with the debtor* at the expense of the other lender. For instance, the defecting lender might strike a side deal with the debtor to restructure in a way that offers generous concessions to the debtor while providing a handsome payout to the defecting lender and shutting out the other lender entirely.[186] In essence, hostile restructurings succeed because they restore the defection option in whatever coordination game the lenders are playing; and, in so doing, they reawaken the subtle but important difference between prisoner's dilemma games and stag hunt games, dramatically increasing uncertainty.

Translating these insights to the real world, where more than two lenders are making strategic choices with respect to a distressed debtor, defection does not necessarily involve rushing to the courthouse to exercise unilateral state law remedies; indeed, lenders that are part of a syndicate are normally prevented from taking such steps anyway. Rather, defection involves negotiating a side deal with the debtor at the expense of the excluded lenders. In these scenarios, the same strategic dimensions exist: a lender does not know with absolute certainty which game it is playing, let alone which game the other lenders believe they are playing, and it does not know what choice other lenders will make. And to the extent the game looks more like a stag hunt, the "fear of getting 'suckered' . . . being left in the lurch if the other person does not cooperate" has the potential to drive lenders to choose defection even when they believe it is the inferior choice.[187] No matter who instigates the hostile restructuring, the debtor and its other stakeholders are the beneficiaries of this race to the bottom among lenders.

[185] This state of affairs also renders moot the question of whether the lenders are playing the prisoner's dilemma or the stag hunt.

[186] This is essentially what happened in the NYDJ hostile restructuring, which I profile in Dick, *Hostile Restructurings*, *supra* note 1, at 1359–61.

[187] Lee, *supra* note 110, at 1145 (making a similar point in a different context).

Of course, in repeated coordination games—such as those played by lenders who are repeat players in capital market transactions—each lender must also grapple with the reputational consequences of its choices, which may drive other lenders' choices in future restructurings.[188] These dynamics should cause lenders to settle into a pattern of cooperating with each other and resisting hostile restructuring attempts.[189] This dynamic may help to explain historical cooperation among syndicated lenders.[190] But recent trends suggest that the tides have shifted. The following section considers the conditions that may make lender groups increasingly susceptible to wedge strategies by debtors seeking to disrupt cooperation patterns and tip the scale in favor of defecting to participate in hostile restructurings.

C. *Lender Vulnerability to Wedge Attacks*

The rise of hostile restructurings suggests that restructuring proponents have found ways to dilute the bargaining power traditionally enjoyed by large senior lender groups by disrupting the normal tendency for them to coordinate with one another in restructuring negotiations. Instigators of hostile restructurings do this by utilizing wedge strategies and divide-and-conquer tactics to prevent, divide, and weaken lender coalitions.[191]

As a preliminary matter, it is important to consider the conditions that make certain restructuring situations—and the capital markets more broadly—susceptible to wedge attacks. Here, Belkin's theory of "regime vulnerability" provides a useful corollary.[192] Just as Belkin differentiates between background and more immediate causes of regime vulnerability, so, too, should corporate restructuring scholars differentiate between broader, systemic causes and more immediate, "triggering" causes.[193] While immediate causes may give rise to a specific hostile restructuring, the background causes make the capital markets increasingly susceptible to this conduct.[194]

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[188] *See* Posner, Spier & Vermeule, *supra* note 101, at 424–25. For additional discussion of the relevance of reputation in bargaining games, see John Kennan & Robert Wilson, *Bargaining with Private Information*, 31 J. ECON. LIT. 45, 49 (1993).

[189] *See* Posner, Spier & Vermeule, *supra* note 101, at 425.

[190] There is some evidence that lender groups used to be better able to fend off coercive restructurings. *See* Alan Schwartz, *Bankruptcy Workouts and Debt Contracts*, 36 J.L. & ECON. 595, 598 (1993) (discussing empirical studies finding that most coercive out-of-court debt restructuring offers fail).

[191] *See infra* Parts II.D and E.

[192] *See generally* BELKIN, *supra* note 65, at 3–13.

[193] *Id.* at 19.

[194] *See id.*

The more immediate, triggering causes of regime vulnerability[195] in the lender syndicate include the debtor's financial distress, which creates a situation of economic scarcity and profound strategic uncertainty. The specific contract terms that govern the arrangement also make certain divide-and-conquer tactics more feasible.[196] Broadly speaking, the pendulum in commercial finance practice has probably swung too far in the direction of mitigating the holdout risk, such that under prevailing forms of commercial loan agreements "a debtor and a majority of its lenders can inflict serious harm on minority creditors."[197] Other possible triggering causes may include the size of the lender group, the lack of sufficient meaningful linkages between and among lenders, the presence of substantial disintegrative tendencies within the lender group, and the failure of the syndicate to provide a strong enough link person to coordinate responses. For instance, a large, heterogeneous lender group may be more inclined to experience disagreements and fractured trust.

Moreover, collective action clauses prevent individual lenders or small groups of lenders from pursuing their state law remedies against the debtor, meaning that the debtor can instigate lender defection without worrying that the lenders will do so in ways that are hostile to the debtor. Although the corresponding majority consent provisions are likely "based on an assumption that consent rights will be exercised by lenders organized around a common desire to advance the economic interests of all similarly situated lenders,"[198] this assumes that most lenders will value—and choose—coordination that benefits the lender cohort over defection to participate in a hostile restructuring. In essence, private ordering alone may not be enough to simultaneously mitigate the lender holdout risk, on the one hand, and enhance lender coordination, on the other.

The interaction between the size and composition of the lender group may also be significant. At first blush, it may seem that lenders within any given tranche of debt are similarly situated. But certain factors are likely to impact the strength and durability of the lender alliance. For instance, where the lender

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[195] Belkin defines "regime vulnerability" as a "deep, structural attribute of the government, of society, of political culture, and of state-society relations" that, if unchecked, can manifest as a coup risk. *Id.*

[196] Commercial loan agreements may be strengthened to include restrictive covenants that would prevent many of the divide-and-conquer tactics described in this Article. *See, e.g.*, Yoruk Bahceli, *The Devil's in the Detail for Junk Debt Investors Facing Coronavirus Defaults*, REUTERS (Apr. 30, 2020, 1:41 AM), https://www.reuters.com/article/idUSKBN22C0OK (describing the use of so-called "J. Crew blocker" provisions to prevent the sort of hostile restructuring that occurred in that case).

[197] Lubben, *supra* note 4, at 4.

[198] Dick, *Hostile Restructurings*, *supra* note 1, at 1344.

group includes one or more lenders with larger positions—and particularly where these concentrated holders share other commonalities, such as investor type and investment strategy—it may be easier for them to come together and advance a hostile restructuring. Smaller lenders, in contrast, probably face greater transaction costs in their attempts to form hostile alliances, as they must assemble a larger number of lenders to achieve the requisite majority and may not have as much experience and expertise in navigating complex debt restructurings. Recent cases suggest that dynamics of this sort favor hedge funds holding large positions, who are able to advance hostile restructurings at the expense of lenders holding much smaller positions, such as collateralized loan obligation (CLO) funds,[199] who may also face more institutional constraints on how they may respond to the debtor's financial distress. Of course, lenders holding smaller interests may, over time, cultivate strategic alliances with the larger players, allowing them to gain access to hostile restructurings.

Potential background causes of regime vulnerability include, among other things, major systemic stressors (such as economic and financial crises), the lack of any meaningful statutory, regulatory, and judicial supervision of the private debt markets,[200] the weakening of legal and equitable standards of good faith and fair dealing in commercial transactions,[201] the growing complexity of corporate assets and capital structures, which make valuation difficult and imprecise, and the ripple effects from debtors' increasing use of priority-violating transactions in bankruptcy cases.[202] These forces further exacerbate legal and strategic uncertainty, as lenders feel less secure in their payment priority and lien rights.

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[199] *See* Kristen Haunss, *CLOs Seek Flexibility for Distressed Assets amid Lender Competition*, REUTERS (Feb. 19, 2020), https://www.reuters.com/article/clo-rescuefinancing/clos-seek-flexibility-for-distressed-assets-amid-lender-competition-idUSL1N2AJ1NB ("US Collateralized Loan Obligations (CLOs) are increasingly seeking flexibility to provide rescue financing to distressed companies after other lenders have been able to swoop in and offer lifelines to borrowers and often obtain a senior claim on assets in the process.").

[200] *See generally* Diane Lourdes Dick, *Confronting the Certainty Imperative in Corporate Finance Jurisprudence*, 2011 UTAH L. REV. 1461 (2011).

[201] On the weakening of the implied covenant in contracts, see generally Paul MacMahon, *Good Faith and Fair Dealing as an Underenforced Legal Norm*, 99 MINN. L. REV. 2051 (2015); Edward J. Imwinkelried, *The Implied Obligation of Good Faith in Contract Law: Is It Time to Write Its Obituary?*, 42 TEX. TECH. L. REV. 1 (2009).

[202] *See, e.g.*, Mark J. Roe & Frederick Tung, *Breaking Bankruptcy Priority: How Rent-Seeking Upends the Creditors' Bargain*, 99 VA. L. REV. 1235 (2013) (discussing priority-violating transactions in bankruptcy as rent-seeking); Ralph Brubaker & Charles Jordan Tabb, *Bankruptcy Reorganizations and the Troubling Legacy of Chrysler and GM*, 2010 U. ILL. L. REV. 1375 (exploring the priority-violating ramifications of the quick sale processes used in many modern bankruptcies).

Another systemic cause of regime vulnerability may be the failure of modern syndicated loan agreements to foster and preserve unity within the syndicate, particularly when the group is comprised of lenders who have very distinct organizational cultures. Crump posits that unity is achieved when "two or more entities are able to deliberately coordinate behavior so that they speak in a single voice or demonstrate consistently coherent behavior on one or more substantive issues over time."[203] Lenders in a syndicate are typically linked by necessity (via contracts and other formal legal relationships), reciprocity (arising from a pattern of collaboration and coordination), and efficiency (because they each derive economic benefits from the relationship).[204] It may be that these linkages are not sufficiently durable; moreover, a vicious cycle emerges when lender defections in prior restructurings further erode linkages in future syndicates.[205] Over time, the more important linkages are the longer-term strategic relationships that may form among lenders who are repeat players in the capital markets and have worked to assemble hostile alliances in prior restructurings.

D. Debtor Wedge Strategies

Theory suggests that debtors are likely to use "selective accommodation" wedge strategies—such as offers to participate in exclusive restructuring transactions and threats of lower payment and lien priority for nonparticipating lenders—to entice factions of lenders to use their power to exercise consent rights under the loan agreement in ways that benefit the debtor and impair the interests of excluded lenders and the lender group.[206] Debtors are less likely to use confrontational wedge strategies because they lack any real power to display "consistent toughness and intimidation" to the lender group as a whole.[207] This is because senior lenders—particularly those that are secured—have a distinct upper hand: the right to exercise remedies that would effectively terminate the business.

Of course, to the extent the company's financial distress is believed to be temporary, the traditional creditor remedies of attachment, repossession, and

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[203] Crump, *supra* note 78, at 319.

[204] These linkages are derived from those discussed in Crump, *supra* note 78, at 321–22.

[205] Of course, any such information on lender defection/coordination precedent is likely to be anecdotal, as it does not appear that the capital markets have developed a formal or informal process for lenders to systematically obtain such information. Without access to precedential transaction data, it is difficult for lenders to manage their own strategic uncertainty; this, in turn, makes coordination even more difficult to achieve. On the role of precedent in managing strategic uncertainty, see *supra* notes 157–61 and accompanying text.

[206] The term "selective accommodation" is from Crawford, *supra* note 41, at 160.

[207] *Id.* at 161.

foreclosure may not be as attractive to lenders; in these cases, the most impactful confrontational wedge strategy would be to threaten to voluntarily liquidate the company if lenders do not grant concessions. Threats of this sort are likely to succeed in situations where the lender group is heterogeneous, such that there are multiple "disintegrative tendencies" to exploit.[208] For instance, lenders may have different investment philosophies and face varying decision constraints due to financial, regulatory, or institutional limitations.

The literature also reminds us that, in choosing among various wedge strategies, debtors must consider the risk of "blowback,"[209] or the risk that the chosen strategies will only strengthen lender unity.[210] In the debt restructuring market, confrontational strategies would likely carry a greater blowback risk; this is because they signal to the entire lender group that negotiations with the debtor will be difficult and time-consuming, and that they should coordinate early and often to defend their collective interests. When used sparingly by the debtor, however, coercive wedge strategies may have important signaling and disincentivizing effects. For instance, they may give lenders the impression that the debtor's financial distress is so severe that the payout for coordinating is speculative at best,[211] or that there are exceptionally high transaction costs to factor into payout calculations.[212] These signals may, in turn, serve an important "issue reframing" function.[213] Tactics of this sort can be highly impactful, as the most significant issue in any financial restructuring is the relative value of the company and the various restructuring options.

Selective accommodation strategies, in contrast, "erode the bases of . . . alignment" by providing economic rewards that may tip the scale in favor of defecting.[214] However, for selective accommodation to work in this context, the debtor must offer rewards that the targeted lenders will perceive as greater than the payout they would receive by cooperating with their co-lenders.[215] Otherwise, the wedge attempt would likely fail.[216] Naturally, in the situation of profound scarcity posed by the debtor's financial distress, the debtor does not have a large budget to offer rewards. The following section explores the various

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[208] *Id.* at 162.
[209] *Id.* (discussing the concept of blowback).
[210] *See id.* at 162–64.
[211] *See id.* at 162.
[212] *See generally* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).
[213] On issue reframing, see *supra* notes 90–92 and accompanying text.
[214] Crawford, *supra* note 41, at 162.
[215] *See* Izumikawa, *supra* note 32, at 501.
[216] *See id.*

divide-and-conquer tactics used by debtors to push enough lenders to defect and accept a restructuring that leaves the lender group as a whole worse off than if the majority of lenders coordinated with each other.

E. Debtor Divide-and-Conquer Tactics

A debtor that has chosen to take deliberate action and pursue a wedge strategy against a senior lender group may use a variety of divide-and-conquer tactics to prevent or break down unity between and among lenders. Given the significance of factors such as the size and composition of the lender group in determining the nature of the alliance, what holds it together, and its vulnerability to wedge attacks, the specific tactics employed are likely a function of these other dynamics.[217]

One of the most powerful divide-and-conquer strategies is "sabotaging the communication channels" between and among lenders, such as by commencing negotiations with subgroups of lenders and asking them to sign nondisclosure agreements.[218] In a recent hostile restructuring, mattress manufacturer Serta negotiated with several lender groups at the same time, binding them to "no-talk" provisions that would prevent them from disclosing the terms of a potential restructuring and potentially coordinating with other lenders to the detriment of Serta.[219] Yet another technique is to "sow[] the seeds of distrust" by signaling that a coordinated restructuring is unlikely to succeed.[220] Here again, the debtor may disclose information suggesting that there is insufficient going concern value to ensure that all of the lenders can enjoy a secure position in the firm's capital structure; for lenders who are prohibited from unilaterally exercising their state law remedies, the next best strategy would naturally be to defect by participating in a restructuring that concentrates the debtor's scarce value among a smaller number of lenders.

In terms of reward strategies, the debtor typically offers to pay defecting lenders (in the form of stronger lien rights and higher payment priority) for their non-cooperation with the lender syndicate,[221] while at the same time threatening them with penalties (in the form of weaker lien rights and lower payment

[217] These factors are discussed *supra* Part II.C.

[218] Techniques of this sort are broadly discussed in Posner, Spier & Vermeule, *supra* note 101, at 434.

[219] Serta Simmons Bedding, LLC's Memorandum of Law in Opposition to Plaintiffs' Application for a Temporary Restraining Order, a Preliminary Injunction, and Expedited Discovery, *supra* note 21, at 5.

[220] *See* Posner, Spier & Vermeule, *supra* note 101, at 431–32.

[221] *See id.* at 427.

priority) if they refuse the offer.[222] Given the scarcity they face, debtors are likely to make discriminatory, conditional, take-it-or-leave-it offers sequentially to small groups of lenders, with the goal of building a coalition large enough to exercise consent rights to modify the original loan agreement in ways that benefit the debtor.

For instance, in a recent hostile restructuring of apparel company NYDJ, the debtor made discriminatory restructuring offers to smaller groups of lenders, in sequence, until it assembled the majority coalition necessary to exercise consent on behalf of the entire lender group.[223] Similarly, TriMark USA's 2020 hostile restructuring featured a similar tactic; a recent writeup concluded that the transaction left excluded lenders "severely harmed as the first lien credit agreement was amended to strip out substantially all of the existing covenants."[224] Law and economics literature suggests that a strategy of this sort will tend to generate restructuring outcomes that provide a lower payout to the lenders, collectively, than they would have received had they continued to negotiate with the debtor as a unified bloc.[225] Evidence from recent transactions suggests that this is the case; commentators writing about Envision Healthcare's recent hostile restructuring noted that the company "explored a consensual debt exchange," but opted not to pursue the deal because it "would have raised less funding."[226]

III. DISCUSSION: THE NORMATIVE AND PRACTICAL CONSIDERATIONS OF ALLIANCE POLITICS IN CORPORATE DEBT RESTRUCTURINGS

This Part considers some of the normative and practical considerations of alliance politics in the capital markets. The focus shifts from the descriptive to the normative and considers whether and to what extent the law should approve or disapprove of wedge strategies and divide-and-conquer behavior in the debt restructuring context. Specifically, what is the role of law in helping to regulate and restrain the use of wedge strategies and divide-and-conquer tactics in corporate debt restructurings?

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[222] *See id.* at 430–31.

[223] *See* Complaint at 5, 11–14, Octagon Credit Invs., LLC v. NYDJ Apparel, LLC, No. 656677/2017 (N.Y. Sup. Ct. Nov. 1, 2017), NYSCEF No. 29.

[224] Marc S. Kirschner et al., *A Market Based Theory to Demonstrate Lack of Reasonably Equivalent Value for Abusive Debt Exchange Offers*, 2022 NORTON ANN. SURV. BANKR. L. 9 (quoted matter from text accompanying n.55).

[225] *See generally* Che & Spier, *supra* note 138.

[226] Ronalds-Hannon & Scigliuzzo, *supra* note 15.

Law and economics literature suggests that the law should only intervene where the conduct causes an overall loss of economic value.[227] In calculating the economic consequences of this conduct, the lenders' immediate financial losses are the obvious starting point. This wealth transfer, in turn, causes capital market participants to behave in inefficient ways. This is because other social costs flow from the fact that hostile restructurings impair trust and certainty in the capital markets, driving up costs for all parties. For instance, future lenders may find that they need to spend more aggressively on due diligence and contract drafting when considering whether to participate in a loan. As lender trust breaks down even more, lenders may become less willing to rely on shared resources during the term of the loan, meaning that each lender will need to retain its own advisors to collect and monitor information about the debtor's financial condition.[228] Lenders may even need to expend resources on monitoring other lenders in the syndicate to ensure that they are not defecting. Over time, lenders may be unwilling to participate in large, heterogenous syndicates that are more susceptible to wedge strategies; as a result, debtors will have fewer options in the capital markets for borrowing large sums and lenders will have fewer opportunities to diversify their loan portfolios.

At the same time, wedge strategies and divide-and-conquer tactics also give rise to social welfare benefits. For one thing, they may reduce litigation costs and increase the likelihood that debtors will achieve an out-of-court restructuring.[229] And, to the extent that modern debt instruments have given lenders outsized control over their corporate debtors, the rise of hostile restructurings may help restore balance in the capital markets, giving debtors more options to restructure without having to necessarily hand the keys over to senior lenders.

A far more concerning consequence of wedge strategies and divide-and-conquer tactics is that this conduct may cause companies to restructure against the lenders' collective better judgment. For a company to achieve a *consensual*, out-of-court restructuring, the senior lenders must believe that there is more value in preserving the company as a going concern. Hostile restructurings

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[227] *See* Posner, Spier & Vermeule, *supra* note 101, at 435.

[228] A prominent firm that provides administrative platforms and other support for complex financial transactions recently released a white paper recommending that individual lenders in a syndicate work to avoid "predatory priming" by "continually monitor[ing] credits looking for signs of distress." Renee Kuhl, *Predatory Priming: 3 Steps to Protect Your Lien Position*, SRS ACQUIOM, https://www.srsacquiom.com/resources/what-is-predatory-priming/ (last visited Feb. 18, 2023). Then, "if liquidity becomes an issue, [a lender should] be the first one to the table . . . [and try to s]tay connected with the company's sponsor." *Id.*

[229] *Cf.* Che & Spier, *supra* note 138, at 7 (discussing benefits of divide-and-conquer strategy).

disrupt this normal decision-making process, leading to a situation where lenders are pushed to consent to a restructuring that they would not have otherwise approved; this, in turn, has other significant economic consequences.

Wedge strategies and divide-and-conquer tactics exploit coordination problems to limit the bargaining options of lenders; in essence, they shift lender attention away from the question of whether there is greater value in preserving the company as a going concern. By participating in the hostile restructuring, the defecting lender obtains a more secure position in the firm's capital structure, shoring up its own liquidation preference in a future bankruptcy. This makes defection attractive whether or not the firm is worth more as a going concern. With the exception of truly dire situations where the firm is deteriorating in value and has little to no meaningful future revenue,[230] defecting lenders have no real incentive to focus on the threshold question of whether the firm is worth restructuring. In essence, the modern lender defection strategy is a liquidation strategy cloaked in the guise of restructuring.

In some cases, these dynamics allow the debtor to effectuate an otherwise economically rational restructuring that opportunistically redistributes value away from the senior lender group to other stakeholders.[231] But in other cases, they allow the debtor to effectuate an altogether *wasteful* restructuring by overpowering a lender group that would have collectively (and rightfully) pushed the company to liquidate.[232] This can happen because lender defection to shore up the defecting lender's own liquidation preference becomes even more attractive as the debtor's financial condition deteriorates. In other words, hostile restructurings may be most likely to occur when the debtor is severely distressed and there is relatively little hope of a meaningful turnaround.

This flies in the face of classic economic justifications for business reorganization. Bankruptcy and out-of-court restructurings are based on the notion that firms should be restructured when there is greater value in preserving the company as a going concern. And, to the extent the financial markets rely on

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[230] In a situation of this sort, immediate liquidation would still be the best option for all of the lenders. Of course, lenders who see the writing on the wall may still decide to gamble on a hostile restructuring as a way to gain an advantage over their peer lenders in the inevitable future liquidation.

[231] For instance, in drop-down transactions, valuable collateral may be removed from some or all of the existing lenders, making it available to give value to stakeholders (such as future lenders). Dick, *Hostile Restructurings*, *supra* note 1, at 1362–69.

[232] This appears to be what happened in Serta's hostile restructuring. *See supra* note 21. Indeed, the company has recently filed for chapter 11 bankruptcy, suggesting that the earlier restructuring was ultimately unsuccessful. Andrew Scurria, *Serta Simmons Files Chapter 11 as Lender Feud Drags On*, WALL ST. J., Jan. 24, 2023.

senior lenders to play an important monitoring and signaling role for the benefit of other investors,[233] these developments are even more troubling. For all these reasons, wedge strategies and divide-and-conquer tactics on balance probably cause an overall loss of economic value for companies and the capital markets more broadly.

Thankfully, legal mechanisms can be used to restrain undesirable conduct. For instance, private ordering can be used to help syndicated lenders defend against divide-and-conquer tactics and better coordinate negotiation strategies and prevent defection.[234] Lenders can include in their agreements more explicit voting mechanisms to coordinate consent, covenants not to accept discriminatory treatment, provisions to transfer payments to equalize treatment in the event that discriminatory payments are received, and even outright penalties for defection. Agreements can also restrain parties from engaging in certain transactions that may form the basis of a hostile restructuring.

Many of these provisions already appear in standard form agreements. The problem with provisions of this sort is that in most cases they are still susceptible to being overruled by a majority of defecting lenders. This is because, ex ante, lenders typically want their agreements to be flexible so that loans can be restructured quickly and efficiently, over the objections of self-interested holdouts. Even if provisions could be drafted in such a way that a majority of defecting lenders would be assessed penalties for taking actions that are contrary to the interests of the lender group, these costs would simply be factored into lenders' assessments of the risks and rewards of defection and coordination. When the stakes are high enough, even substantial penalties will have little actual deterrence effect.

Another possible solution would be to tie restructuring decisions to contemporaneous valuation analyses—by using techniques such as fairness opinions or comfort letters—to establish that a restructuring is, in fact, fair to the lender group as a whole and to each individual lender.[235]A mechanism of this

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[233] *See generally* Saul Levmore, *Monitors and Freeriders in Commercial and Corporate Settings*, 92 YALE L.J. 49 (1982) (exploring the role of secured creditors in monitoring the firm).

[234] Bahceli, *supra* note 196 (describing efforts by commercial lenders to prevent, through their private ordering, certain types of hostile restructuring transactions).

[235] Much has been written about the benefits and limitations of fairness opinions and comfort letters. *See, e.g.*, Joan MacLeod Heminway, *A More Critical Use of Fairness Opinions as a Practical Approach to the Behavioral Economics of Mergers and Acquisitions*, 12 TENN. J. BUS. L. 81 (2011); Steven M. Davidoff, *Fairness Opinions*, 55 AM. U. L. REV. 1557 (2006); Rene Sacasas & Don Wiesner, *Comfort Letters: The Legal and Business Implications*, 104 BANKING L.J. 313 (1987).

sort could be incorporated ex ante through provisions in the loan agreement, or ex post through judicial review of a contested restructuring transaction. For instance, in order to exercise consent on behalf of the lender group, lenders could be required to make a showing that the deal meets a predefined standard of fairness. In the absence of such an express provision, a similar standard could be applied by a court reading such a requirement into the implied covenant of good faith and fair dealing. Although mechanisms of this sort would (and should) fall far short of imposing fiduciary responsibilities on co-lenders, they can be used to establish some technical guardrails to protect lenders against severe lender betrayals. Essentially, devices of this sort would introduce some substantive protections beyond mere technical compliance with the loan agreement.

The question, then, is how to define "fair" for these purposes. A debtor that is severely distressed will be unable to promise a full recovery on terms that are satisfactory to all of the lenders. Nor should a debtor be expected to make every lender happy—particularly those self-interested or unreasonable lenders who threaten to hold up the entire restructuring.

One possibility would be to establish a baseline level of recovery for all lenders. Taking a page from bankruptcy law's "best interest of the creditors" test,[236] "fair" could be defined for these purposes to mean that all lenders receive money or other property in the hostile restructuring that is worth at least as much as they would have been entitled to receive in an immediate liquidation. If we assume that in most cases a debtor will need to offer rewards to entice lenders to participate, then we can rest assured that debtors pursuing a hostile restructuring will pay the lenders, collectively, some amount that is greater than liquidation value. This, in turn, would help to restore checks and balances on the restructuring market by ensuring that only those companies that are worth more as a going concern will restructure.

The problem is that the debtor's own assessment of going concern value is likely to be biased in favor of restructuring.[237] Thus, the debtor's desire to restructure cannot serve as a reliable indicator of the economic viability of the restructuring. Moreover, because valuation models rely on qualitative inputs from management, the debtor could manipulate these inputs and drive down

[236] *See* 11 U.S.C. § 1129(a)(7) (requiring a liquidation analysis to show that the creditor's treatment under the plan will not be worse than it would be under a hypothetical chapter 7 liquidation).

[237] Managerial overconfidence has been studied in many different contexts. *See, e.g.*, J. Edward R. Russo & Paul J.H. Schoemaker, *Managing Overconfidence*, 33 SLOAN MGMT. REV. 7 (1992).

liquidation value as well.[238] Meanwhile, debtors can easily exploit lenders' strategic uncertainty, using tactics such as signaling, issue reframing, rewards, and threats to instill confusion and cause lenders to believe that they are playing the prisoner's dilemma in which defection—even with a significantly lower payout—is the best strategy. Thus, by defining "fair" to mean liquidation value plus whatever small reward debtors can convince lenders to accept, the law would essentially provide debtors with a highly effective tool to repurchase their debt securities at any time at a steep discount. This would have a profound chilling effect on the capital markets, particularly with respect to deals involving collateral of highly uncertain or speculative value.

What is substantively fair in any given restructuring, then, is some amount between the lenders' liquidation preference and full recovery of the outstanding obligations. The precise figure is difficult to estimate, given the complexity of valuing corporate assets and financial securities in times of distress.[239] Different stakeholders will likely reach varying opinions on the question of substantive fairness. Perhaps the only thing that is certain is that the debtor who uses wedge strategies to divide and conquer a senior lender group will be able to impose restructuring terms that are less favorable to the lenders than those they would have bargained for as a unified bloc. In that sense, a hostile restructuring could never really be substantively fair to the lenders because the procedures used by the debtor are inherently extractive. And while there may be some cases in which the debtor's conduct merely counterbalances excessive and inefficient lender control, these benefits are far outweighed by the risks of relying on hostile restructurings to restore balance to the capital markets.

If lenders wish to prevent hostile restructurings ex ante, they should focus instead on bolstering the internal procedures set out in their loan agreements. By strengthening interlender relations, lenders will be better able to fend off wedge attacks. For instance, consent mechanisms can provide that no consent shall be effective under the agreement unless all lenders have been given copies of the proposal, the entire lender group has been able to meet and confer with advisors, and all lenders are given an opportunity to participate in any restructured facility on the same terms as other lenders.[240] To incentivize large and unwieldy groups

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[238] *See* Davidoff, *supra* note 235, at 1558–59.

[239] I explore these and related issues in Dick, *Valuation in Chapter 11*, *supra* note 173.

[240] Provisions of this sort may be modeled after the nonbinding Loan Syndications and Trading Association (LSTA) Procedures for Credit Agreement Modifications. *See, e.g.*, Exhibit H, Octagon Credit Invs., LLC v. NYDJ Apparel, LLC, No. 656677/2017 (N.Y. Sup. Ct. Nov. 1, 2017), NYSCEF No. 16 (providing a copy of the LSTA Procedures for Credit Agreement Modifications).

of lenders to make decisions quickly, opportunities to participate in future investments may be limited on a first-come, first-served basis. However, as a check on the substantive fairness of the restructuring, lenders should be required to vote on the proposal before they know whether they will participate in the restructured facility.[241]

Internal procedures of this sort would not only help to restore fairness; they would also naturally unify the lender group, helping to restore the collective power of the senior lender group. These procedures are flexible enough to allow lenders to overcome the minority holdout problem while preserving the opportunity to refocus on the most important question of whether the debtor should be restructured at all. Of course, there is always a risk that provisions of this sort may, in practice, cause loan agreements to become "hyperrigid," making it difficult for companies to achieve restructurings.[242] More broadly, there are limits to what private ordering can accomplish, as it is very difficult to predict the future and build mechanisms that promote flexibility while providing necessary protections. Other legal interventions or market standards may be needed to ensure that senior loan facilities simultaneously mitigate the lender holdout risk, on the one hand, and enhance lender coordination, on the other hand.

Future research should consider the role of other legal mechanisms, market standards, and customary practices in helping to bolster lender coordination. For instance, analyses should focus on the strength and durability of interlender linkages, as well as the role of the administrative agent and other representatives who serve as "link persons"[243] for groups of lenders. These investigations are important because there may be opportunities to enhance lender unity by strengthening group leadership. Research should also consider whether and to what extent the size and composition of lender syndicates impacts unity.

[241] Professor Melissa Jacoby provides a useful discussion of the importance of procedural fairness in corporate restructurings. *See* Melissa B. Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. PA. L. REV. 1715, 1739–43 (2018) (exploring the procedural justice implications of chapter 11); *see also* Lipson, *supra* note 6, at 682–684, 695; Pamela Foohey, Jevic*'s Promise: Procedural Justice in Chapter 11*, 93 WASH. L. REV. ONLINE 128 (2018).

[242] On hyperrigidity in contracts, see Anna Gelpern & Adam J. Levitin, *Rewriting Frankenstein Contracts: The Workout Prohibition in Residential Mortgage-Backed Securities*, 82 S. CAL. L. REV. 1075 (2009).

[243] For more on link persons, see Crump, *supra* note 78, at 338.

CONCLUSION

Recent trends in the corporate debt restructuring market suggest that alliance politics—rather than sound financial and economic decisions—may be driving restructuring outcomes, introducing new risks and inefficiencies in the financial markets. Of course, alliance politics have always been a complicating factor in corporate restructurings. Negotiations between and among large groups of corporate stakeholders naturally require that parties expend time and resources on building coalitions, overcoming holdouts, and fleshing out their collective action. But recent trends suggest that restructuring proponents have found new and inherently extractive ways to exploit or exacerbate latent senior lender collective-action dynamics, giving rise to hostile restructurings that have the potential to introduce dangerous ripple effects in the capital markets.

These developments call for a renewed focus on the role of alliance politics in corporate debt restructuring. This Article contributes to these efforts, laying the conceptual groundwork for subsequent works that explore other dimensions of the complicated, high-stakes relationships that make up the modern firm's capital structure.