

# COLLECTIVE COERCION

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**Abstract:** When a collective-choice situation places coercive pressure on individual participants, the law's traditional protection of individual autonomy against coercion must be reconciled with its necessary role in resolving problems of collective action. On the one hand, the law might seek to remove coercion from the equation so that individuals are free to make their own decisions. On the other hand, the law might empower a central authority to decide, thereby solving a problem of collective action in order to maximize the group's shared interests. The tension between these two approaches creates deep uncertainty for the regulation of collective-choice situations. It is palpable in the law's conflicted response to corporate takeover bids in that applicable federal and state laws simultaneously enhance and diminish shareholder choice. Elsewhere—for example, the structure of government buyout programs, or the imposition of mandatory fees for nonunion employees—the intersection of coercion and collective choice may be overlooked altogether. By situating the literature on coercion in the context of offers that exploit collective-action problems, this Article proposes a unifying framework for identifying and remedying problems of collective coercion.

## INTRODUCTION

When groups act against their own perceived best interests, the culprit may be internal collective-action difficulties or external coercion. Either type of defect in the decision-making process can undermine the legitimacy of collective choice. However, an appropriate legal response to impaired collective choice depends on the source of the problem; bolstering individual choice may do nothing to resolve a problem of collective action. Yet, collective-choice problems are sometimes difficult to diagnose.

For example, although lawmakers agree that corporate raiders should be prevented from using tender offers to effectuate takeovers at unfairly low prices, they have taken almost diametrically opposed approaches to regulation. At the federal level, the Williams Act treats tender offers primarily as a problem

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of external coercion.<sup>1</sup> Accordingly, in order to safeguard shareholder autonomy, the Williams Act regulates the form of tender offers, mandating extensive disclosures; prohibiting time-pressured, first-come-first-served offers; and requiring that all shareholders be permitted to participate in a tender offer on a pro rata basis.<sup>2</sup> These provisions reflect “Congress’ concern that individual investors be given sufficient information so that they [can] make an informed choice on whether to tender their stock in response to a tender offer.”<sup>3</sup>

By contrast, state regulation generally treats tender offers as a potential collective action problem; individual shareholder choices can produce a collectively irrational result.<sup>4</sup> To facilitate more effective collective action, most states have enacted antitakeover statutes that give the target corporation’s board of directors a strong voice in deciding whether an offer is in the best interests of the corporation and its shareholders.<sup>5</sup> For example, antitakeover stat-

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<sup>1</sup> See The Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (2012) (amending The Securities Exchange Act of 1934, 15 U.S.C. § 78 (1964)).

<sup>2</sup> See Lucian A. Bebchuk & Robert J. Jackson, Jr., *Toward a Constitutional Review of the Poison Pill*, 114 COLUM. L. REV. 1549, 1559 (2014) (“The Williams Act, and the rules that the Securities and Exchange Commission has promulgated under the Act’s authority, extensively regulate the terms of tender offers. They mandate, for example, that tender offers remain open for at least twenty business days, and that tender offerors open their offers to all shareholders and pay all who tender the ‘best’ price.”); Dale A. Oesterle, *The Rise and Fall of Street Sweep Takeovers*, 1989 DUKE L.J. 202, 217–18 (summarizing key provisions of the Williams Act).

<sup>3</sup> *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 97 (1987) (White, J., dissenting). Citing the Act’s sponsor, Senator Harrison Williams, the Supreme Court stated that the legislation “was specifically designed to reduce pressures on target shareholders to deposit their shares hastily when the takeover bidder makes its tender offer on a first-come, first-served basis.” *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 23 (1977) (citing 113 CONG. REC. 856 (1967)). In its disclosure requirements, federal regulation of tender offers is consistent with the broader approach taken by national securities laws. As Senator Williams explained, federal securities laws “provide protection for millions of American investors by requiring full disclosure of information in connection with the public offering and trading of securities.” 113 CONG. REC. 24,664 (1967).

<sup>4</sup> Shareholders who refuse to participate in a successful takeover may have missed their only opportunity to cash out for a premium in a change-of-control transaction. Thus, a rational shareholder might agree to a takeover bid while hoping others will oppose it. If each shareholder follows the same logic, however, a takeover will occur despite widespread opposition. See, e.g., Lucian Arye Bebchuk, *The Case Against Board Veto in Corporate Takeovers*, 69 U. CHI. L. REV. 973, 975 (2002) (noting that “arguments for board veto could be based on collective-action problems that could lead shareholders to tender even if they view remaining independent (at least for the time being) as best”). Professor Bebchuk argues that a better approach is to ensure that takeover bids are not coercive in the first place. *Id.* at 976 (“In my view, once a mechanism that ensures an undistorted choice by shareholders is in place, the board should not be able to veto an acquisition beyond the period necessary for preparing alternatives for shareholder consideration.”).

<sup>5</sup> See Guhan Subramanian, *The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the “Race” Debate and Antitakeover Overreaching*, 150 U. PA. L. REV. 1795, 1854 (2002) (observing that only seven states lack antitakeover laws). Although the mechanisms vary, “[s]tate antitakeover legislation attaches harsh consequences to any large-scale acquisition that a preexisting board of directors does not in some fashion approve.” Oesterle, *supra* note 2, at 234. For a state-by-state breakdown of the overlapping statutory provisions that authorize corporations to resist unwanted

utes often empower the target corporation's board of directors to use takeover defenses including so-called poison pills as leverage to negotiate better deals and to deter inadequate offers.<sup>6</sup>

State laws and judicial decisions that reinforce the authority of the board of directors make it difficult for shareholders to replace management by selling their stock to an outside acquirer *en masse*.<sup>7</sup> Thus, unlike the Williams Act, the apparent goal of state regulation of corporate takeovers is not to bolster the autonomy of shareholders.<sup>8</sup> Rather, to protect the long-term economic interests of shareholders, state law substitutes a collective decision for individual choice.<sup>9</sup> Consequently, tender offers no longer represent a significant exception

takeovers, see Lucian Arye Bebchuk & Allen Ferrell, *On Takeover Law and Regulatory Competition*, 57 BUS. LAW. 1047, 1057 tbl.4 (2002).

<sup>6</sup> See, e.g., *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1348 (Del. 1985) (upholding poison pill as "legitimate exercise of business judgment"); *Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1083 (Del. Ch. 2004) (noting that a poison pill "has no other purpose than to give the board issuing the rights the leverage to prevent transactions it does not favor by diluting the buying proponent's interests"); see also Bebchuk & Ferrell, *supra* note 5, at 1057 tbl.4 (listing states that allow poison pills).

<sup>7</sup> Judicial monitoring can help to ensure that the board's decisions are well informed and unconflicted. See *Air Prod. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 94 (Del. Ch. 2011) ("The idea that boards may be acting in their own self-interest to perpetuate themselves in office is, in and of itself, the 'omnipresent specter' justifying enhanced judicial scrutiny."). As a practical matter, however, if the board's judgment is exercised in good faith, courts will permit antitakeover defenses that make the acquisition "prohibitively more difficult" for the would-be acquirer. *Id.* at 129.

<sup>8</sup> The more paternalistic attitude of state regulators in this regard is consistent with their general approach to securities regulation. See Roberta S. Karmel, *Reconciling Federal and State Interests in Securities Regulation in the United States and Europe*, 28 BROOK. J. INT'L L. 495, 498 (2003) ("As a general matter, the federal laws covering the flotation of public offerings were based on a full disclosure philosophy, whereas much of the state system was merit based, allowing a blue-sky commissioner to judge whether an issuer's capital structure was fair, just and equitable.").

<sup>9</sup> Even though shareholders can replace directors through the mechanisms of corporate democracy, that cumbersome and time-consuming process does not meaningfully reduce the power of the board to resist a takeover attempt. See *Air Prod. & Chems. Inc.*, 16 A.3d at 102. A more detailed discussion of corporate governance is beyond the scope of this Article, but some commentators have argued that boards properly represent all stakeholders in the corporate enterprise, not just shareholders. See, e.g., Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 253 (1999) (arguing that "boards exist not to protect shareholders *per se*, but to protect the enterprise-specific investments of *all* the members of the corporate 'team,' including shareholders, managers, rank and file employees, and possibly other groups, such as creditors"); Martin Lipton & Steven A. Rosenblum, *A New System of Corporate Governance: The Quinquennial Election of Directors*, 58 U. CHI. L. REV. 187, 189 (1991) (rejecting assumption "that conformity to stockholder wishes and protection of hostile takeovers are the primary goals of corporate governance"). Other scholars argue that state law bends to the political power of managerial interests. See, e.g., Lucian Arye Bebchuk & Allen Ferrell, *Federalism and Corporate Law: The Race to Protect Managers from Takeovers*, 99 COLUM. L. REV. 1168, 1168 (1999) (arguing that "states have incentives to produce rules that excessively protect incumbent managers"). Thus, according to this view, "[s]tates have imposed antitakeover protections that have little policy basis and have provided managers with wider and more open-ended latitude to engage in defensive tactics than endorsed even by the commentators most favorable to the use of such tactics." *Id.*

to an otherwise defining feature of corporate law: the allocation of decision-making power to the board of directors.<sup>10</sup>

So who is right? Are tender offers potentially coercive, or do they expose the inherent difficulties of collective action? This Article contends that the answer is both—in situations involving collective choice, an offeror can sometimes bring coercive pressure to bear by creating a problem of collective action. Unregulated tender offers represent a clear example of the phenomenon. In effect, collective coercion is a hybrid category and involves an offer made to multiple recipients simultaneously when (1) each recipient's choice depends to a non-trivial extent on what other recipients decide and (2) impediments to collective decision-making prevent the recipients from coordinating a response.<sup>11</sup>

Identifying collective coercion as a distinctive phenomenon offers two principal advantages. First, the concept provides a basis for evaluating collective-choice situations across doctrinal categories. For example, this Article argues that government buyout programs designed to adjust coastal land use bear more than a passing similarity to corporate tender offers and can coerce homeowner compliance in ways that have not been adequately appreciated.<sup>12</sup> Just as shareholders must consider how other shareholders may respond to a tender offer and how those decisions would impact the value of their own stock, homeowners must weigh the impact of neighbors' choices on their own property values. In each case, the collective context of the offer has important ramifications that each individual offeree cannot afford to ignore.<sup>13</sup>

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<sup>10</sup> See, e.g., *In re Pure Res. Inc., S'holders Litig.*, 808 A.2d 421, 441 (Del. Ch. 2002) ("Delaware law has seen directors as well-positioned to understand the value of the target company, to compensate for the disaggregated nature of stockholders by acting as a negotiating and auctioning proxy for them, and as a bulwark against structural coercion."). Although the role of the board is broad, it is not unlimited; within certain prescribed areas, Delaware courts insist upon the importance of preserving shareholder democracy. See *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 661 (Del. Ch. 1988) (holding that defensive tactics employed by management that obstruct shareholder voting will receive heightened scrutiny).

<sup>11</sup> See *infra* notes 106–171 and accompanying text. Treated as distinct concepts, collective action and coercion have been thoroughly examined. There is a vast literature regarding collective action problems in general, much of it focused upon the special case of the prisoner's dilemma. See Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209, 211–12 (2009) (arguing that legal scholars should use a wider array of game-theoretic models). Countless articles and books address the problem of coercion. For a particularly thoughtful analysis, see ALAN WERTHEIMER, *COERCION* (1987).

<sup>12</sup> See *infra* notes 79–103 and accompanying text.

<sup>13</sup> Although this Article largely focuses on corporate law and disaster law, we appreciate Cathy Hwang's suggestion that collective coercion might also explain why so many people agree to waive privacy protections in order to access Internet services such as e-mail and social media. See, e.g., Claire Cain Miller, *Americans Say They Want Privacy, but Act as if They Don't*, N.Y. TIMES (Nov. 12, 2014), <http://www.nytimes.com/2014/11/13/upshot/americans-say-they-want-privacy-but-act-as-if-they-dont.html> [<https://perma.cc/KF7T-3GKZ>] (reporting Pew Research Study finding that "55 per-

Second, an appreciation of collective coercion can help guide the resolution of specific collective-choice situations. Although there is no one-size-fits-all solution, this Article proposes several factors that can provide needed guidance in addressing instances of collective coercion: (1) whether there is a single, uncontested value that unites the interests of each affected individual; (2) whether the choice involves matters central to individual dignity; and (3) whether it is possible to structure a market to price the matter at issue. In some respects, the third factor—the plausibility of a market solution—restates the preceding two factors. A market solution will depend on whether the choice can be reduced to a price and whether the internal logic of market allocation produces results that are, for other reasons, unacceptable.<sup>14</sup>

To be clear, this Article does not claim that coercion is always undesirable.<sup>15</sup> This Article separates the analytic question—*is something coercive*—from its possible normative justification.<sup>16</sup> Coercive tactics further goals that may be of overriding importance, especially when the state is involved: protecting communities from crime; reducing unsafe and economically unsustainable land use choices; and, perhaps, facilitating collective bargaining strategies in the workplace.<sup>17</sup> Even a “prisoner’s dilemma” may not be troubling when it

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cent of people say they are willing to share information about themselves with web companies in order to use their services free”). Internet companies would surely argue that they are providing valuable services, often without charge, and that each user can decide whether the tradeoff of privacy for access is worthwhile. Yet, each individual’s choice is deeply affected by the wider context. To turn down Internet access is to be excluded from much of modern life. Someone who chooses to remain “off the grid” cannot find information that now exists only online and cannot communicate with friends who have replaced letters and holiday cards with e-mails and Facebook posts. Accordingly, companies that offer Internet access and services have effectively altered the baseline for choice. For examples of Internet policies that describe the massive amounts of data collected and the use of that data, among other things, to sell advertising targeted to specific users, see Data Policy, FACEBOOK, <https://www.facebook.com/policy.php> [<https://perma.cc/9D78-X447>] and Privacy & Terms, GOOGLE, <https://www.google.com/policies/privacy/> [<https://perma.cc/C3BL-RA5P>].

<sup>14</sup> Ultimately, the choice of remedy turns on policy considerations. Thus, collective coercion is a useful reminder that the value of individual autonomy cannot be separated from what social justice demands: that the benefits and burdens of society be allocated fairly.

<sup>15</sup> See Peter Westen, “Freedom” and “Coercion”—*Virtue Words and Vice Words*, 1985 DUKE L.J. 541, 548 (“There is nothing contradictory about the notion of justified or legitimate coercion.”).

<sup>16</sup> Notably, this Article does not seek to address whether coercive pressure in any particular context affords a legal justification or excuse for the party subject to the coercive pressure. As other scholars have stated, such an inquiry would be inescapably normative. See, e.g., Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1443–44 (1989) (analyzing the doctrine of duress).

<sup>17</sup> See Westen, *supra* note 15, at 547–48 (noting that “[l]ike freedom, coercion is a single concept that is sufficiently open-textured to encompass a range of diverse and mutually inconsistent norms. Thus, both sides to the dispute in America over concerted union activity stated their positions in the language of ‘coercion’”).

takes place in the situation for which it was named.<sup>18</sup> Regardless of justification, however, the use of coercion to achieve policy objectives should be transparent and subject to democratic deliberation, not obscured by a disingenuous language of individual choice.

Part I of this Article reviews the separate literatures concerning coercion and collective action. Part II collapses the distinction, showing that an offeror can structure a collective-action problem to coerce a desired outcome. Part III defends a flexible framework for responding to collective coercion, either by protecting individual choice or by empowering a single decision maker to act in the best interests of all affected individuals.

## I. COERCION AND COLLECTIVE ACTION

There are two distinct threats to voluntary, individual choice in a collective context. Individuals may be coerced into compliance if they are threatened with negative consequences. Alternatively, even if individuals are ostensibly free to choose in their own self-interest, the perverse logic of collective action may make it difficult or impossible for them to achieve shared goals.<sup>19</sup>

### A. Offers, Threats, and Baselines

One of the law's most basic functions is to safeguard individuals from coercion.<sup>20</sup> For example, duress can vitiate the consent necessary to form a contract.<sup>21</sup> Likewise, because of the perceived danger of forced confessions, statements elicited during a custodial interrogation cannot be used in court un-

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<sup>18</sup> Within constitutional boundaries, the investigation and prosecution of criminal offenses is not supposed to be a fair contest in which the suspect has a sporting chance of getting away with it.

<sup>19</sup> This Article does not claim that individual choice must be divorced from social context to be voluntary. Not only would such a standard be unrealistic, but also we do not wish to suggest that human beings should aspire to make decisions without regard to the judgment of those whose values and interests they have reason to care about. Rather, we assume that individuals will form preferences with due regard for the interests of others, and we focus more narrowly on collective-choice situations that obstruct the ability of individuals to choose in accordance with those preferences.

<sup>20</sup> Oren Bar-Gill & Omri Ben-Shahar, *Credible Coercion*, 83 TEX. L. REV. 717, 718 (2005) (“To achieve the ideal of individual freedom and autonomy, society must provide relief against coercion.”).

<sup>21</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (AM. LAW INST. 1981) (stating that contract is voidable if “induced by an improper threat . . . that leaves the victim no reasonable alternative”); John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 254–56 (1947) (describing expansion of duress doctrine to include economic as well as physical threats). Contractual modifications are also generally voidable if coerced “by a wrongful threat to breach. 7 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 28.6 (Joseph M. Perillo ed., rev. ed. 2002); see Robert A. Hillman, *Policing Contract Modifications Under the UCC: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849, 880–81 (1979) (noting that the concept of duress encompasses economic threats).

less the suspect received *Miranda* warnings.<sup>22</sup> Heavy-handed tactics that constitute blackmail or extortion may even be subject to criminal prosecution.<sup>23</sup> In order to establish coercion, the law generally requires “that the plaintiff show that the other party by wrongful acts or threats, intentionally caused him to involuntarily enter into a particular transaction.”<sup>24</sup>

When a proposal does not involve “force or fraud,”<sup>25</sup> the issue of coercion turns on the existence of a threat. Thus, the law must distinguish neutral offers and coercive threats. As the philosopher Robert Nozick observed, both involve contingent proposals; if the recipient does (or refrains from doing) something, a consequence follows.<sup>26</sup> Depending on the significance of the consequence, the recipient of the proposal may have little choice but to comply.<sup>27</sup> Moreover, threats can be rephrased as offers, and vice versa. For example, “your money or your life” is still a threat even if phrased as an offer to preserve your life in exchange for your money.<sup>28</sup>

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<sup>22</sup> See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); Yale Kamisar, *On the “Fruits” of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 944 (1995).

<sup>23</sup> See Paul H. Robinson et al., *Competing Theories of Blackmail: An Empirical Research Critique of Criminal Law Theory*, 89 TEX. L. REV. 291, 293 (2010). For similar reasons, duress can be a defense to criminal prosecution. See, e.g., *Dixon v. United States*, 548 U.S. 1, 6–7 (2006).

<sup>24</sup> *Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Serv. Co.*, 584 P.2d 15, 22 (Alaska 1978); see also Bar-Gill & Ben-Shahar, *supra* note 20, at 718 (“Coercion occurs when an individual is placed under a threat: ‘Commit a requested act (or refrain from an act), or else an undesirable outcome will be inflicted upon you.’”); Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283, 1292 (2013) (“To a first approximation, coercion is the wrong of exerting *wrongful* pressure on a subject to do as the coercer wishes.”). Coercion does not require physical compulsion or the total absence of alternatives; a choice can be involuntary even if the coerced party had, in theory, the power to refuse. See *Union Pac. R.R. Co. v. Pub. Serv. Comm’n of Mo.*, 248 U.S. 67, 70 (1918) (stating that “[w]ere it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary”). The degree of compulsion may affect the law’s willingness to accept coercion as a justification or excuse for some obligation of the coerced party, but the specific legal implications of coercion in various legal contexts are beyond the scope of this Article.

<sup>25</sup> Sullivan, *supra* note 16, at 1443 (“In a wide variety of private and criminal settings, the law condemns offers as coercive even in the absence of force or fraud.”).

<sup>26</sup> Robert Nozick, *Coercion, in PHILOSOPHY, SCIENCE, AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL* 440, 464 (Sidney Morgenbesser et al. eds., 1969) (“[I]f P coerces Q into not doing A then (part of) Q’s reason for not doing A is to avoid or lessen the likelihood of P’s threatened consequence.”).

<sup>27</sup> It is important to note, however, that the concept of coercion does not require a complete absence of choice in the face of a threat. Cf. Berman, *supra* note 24, at 1292 (noting that, unlike coercion, “one is compelled to do such-and-such, or is subject to compulsion, when there is some coherent sense in which one could not have done otherwise”). An individual may, of course, be both coerced and compelled. *Id.*

<sup>28</sup> See RUSSELL HARDIN, *COLLECTIVE ACTION* 51 (1982) (“[O]ne may often invert goods and bads, just as, with a bit of creaking in his logic, a robber with a gun might claim to be offering continued life rather than threatening quick death.”); Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1337 (1989) (“The

Rather than focusing on the form of an offer, the standard method for identifying coercion is to ask whether the offer alters the recipient's baseline for choice.<sup>29</sup> Regardless of whether a proposal is framed as a threat or an offer, it is coercive if it leaves the recipient in a worse position—most crudely, “do what I say, or else.” By contrast, a non-coercive proposal may improve the recipient's position by offering an opportunity. In any case, whether or not the offer is accepted, what is important is that the recipient of the offer will be left no worse off than before.

For an offer to be coercive, the offeror must also have causal, if not moral responsibility for any adverse, contingent consequences.<sup>30</sup> “Your money or your life” is a threat because it indicates that the offeror intends to kill the offeree unless the money is paid. However, a superficially similar catchphrase from the Terminator movies—“Come with me if you want to live”—is not coercive so long as the offeror's terms are independent of the killer cyborg's programming.<sup>31</sup> Thus, even though it would be foolish to turn down, an offer of assistance under those circumstances does not diminish the recipient's baseline for choice.<sup>32</sup>

The definition of coercion adopted here does not encompass all colloquial uses of the term. For example, this Article sets aside cases in which some vulnerability in the offeree precludes autonomous choice. Someone who is starv-

typical coercer ‘tempts’ her victim with his life.” (citing LEO KATZ, *BAD ACTS AND GUILTY MINDS: CONUNDRUMS OF THE CRIMINAL LAW* 70 (1987)).

<sup>29</sup> See Sullivan, *supra* note 16, at 1448 n.142 (“[C]ommentators writing in Nozick's wake agree with the basic premise of his article: that coercive proposals (‘threats,’ in Nozick's terminology), unlike noncoercive proposals (‘offers,’ in Nozick's terminology), involve a departure from some baseline of ‘the normal or natural or expected course of events’ that makes the recipient worse off.”).

<sup>30</sup> Scholars have engaged in protracted debate regarding the nature of baselines for purposes of coercion analysis and whether it is possible to identify a “nonmoral” baseline. See, e.g., WERTHEIMER, *supra* note 11, at 207 (noting that in the case of someone who offers to rescue another person who is drowning for \$10,000, “whether A is making an offer or a threat will depend on what is ‘normal’ in their society”). One scholar contends that the concept of a baseline should be disaggregated into three different baselines. See Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1352 (1984).

<sup>31</sup> This familiar phrase is employed throughout the Terminator movie franchise. See *THE TERMINATOR* (Orion Pictures 1984) (said by Kyle Reese to Sarah Connor); *TERMINATOR 2: JUDGMENT DAY* (TriStar Pictures 1991) (said by T-800 to Sarah Connor); *TERMINATOR GENISYS* (Paramount Pictures 2015) (said by Sarah Connor to Kyle Reese); *TERMINATOR SALVATION* (Warner Bros. 2009) (said by Kyle Reese to Marcus Wright). On one occasion a variant, “Do you want to live? Come on!” was used. See *TERMINATOR 3: RISE OF THE MACHINES* (Warner Bros. 2003) (said by John Connor to Kate Brewster). The phrase has also been used in a Terminator television series. See *Terminator: The Sarah Connor Chronicles* (Warner Bros. Television & C2 Pictures 2008–09).

<sup>32</sup> How one might reduce the baseline for choice of a person already being pursued by a killer robot from the future is difficult to imagine. However, if the proposal were, “Give me all your money, if you want to live,” then the rescuer would be guilty of extortion. See Sullivan, *supra* note 16, at 1444–45 (discussing blackmail, extortion, and other “example[s] of how a threat to do what one has a right to do can be treated as coercive”).

ing cannot afford to refuse an offer of employment, however paltry the terms, but this sort of positional coercion based on external circumstances is beyond the scope of our argument. Thus, we do not claim that transactions in a market economy are involuntary simply because the market is characterized by high levels of economic inequality. Beyond a certain level of inequality, that may be true. We assume without arguing the point that a minimum level of resources and opportunities is a necessary part of liberty.<sup>33</sup> In distinguishing offers and threats, however, we take it as a given that the recipients of an offer are not unduly constrained by their individual circumstances, though, as discussed in the next section, they may be enmeshed by collective-action difficulties.

### B. *The Logic of Collective Action*

A system of ordered liberty requires constraint as well as license.<sup>34</sup> Although the law generally empowers individuals to make their own choices, recognizing the intrinsic value of autonomy and its ability to produce more social welfare than centralized planning could achieve,<sup>35</sup> individual choices do not always produce sensible outcomes from a collective standpoint.<sup>36</sup> For example, all members of society benefit from roads, national security, and other public goods,<sup>37</sup> but they may be tempted to free ride, enjoying those benefits without paying for them. If others contribute, a citizen might reason, “my own efforts will not matter; if others do not pay their share, why should I contribute to a lost cause?” Yet, if each citizen adopts the same rational stance, society will under-produce collective goods to the disadvantage of all citizens.<sup>38</sup>

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<sup>33</sup> See ISIAH BERLIN, *Two Concepts of Liberty*, in LIBERTY 171 (Henry Hardy ed., 2002) (citing with approval the argument “that there ought to exist a certain minimum area of personal freedom which must on no account be violated; for if it is overstepped, the individual will find himself in an area too narrow for even that minimum development of his natural faculties”).

<sup>34</sup> See, e.g., KENNETH J. ARROW, THE LIMITS OF ORGANIZATION 15 (1974) (postulating that “the demands of society and the needs of the individual, expressed indeed only within that society, require that he be for others as well as for himself, that the others appear as ends to him as well as means”).

<sup>35</sup> See, e.g., F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 526 (1945) (arguing that markets provide an efficient mechanism for gathering information that is widely distributed among members of a society and impounding it in the price of goods and services).

<sup>36</sup> See MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 2 (1965) (arguing that “unless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their common interest, *rational, self-interested individuals will not act to achieve their common or group interests*”).

<sup>37</sup> See HARDIN, *supra* note 28, at 17 (“Public goods are defined by two properties: *jointness of supply* and *impossibility of exclusion*.”). Notably, problems involving collective action need not involve “pure” public goods. See *id.* at 19 (observing that when unions “seek better pay for their members,” the individual worker’s wages are distinct but the new rate “benefits all the relevant workers so that one worker’s receipt of the higher rate does not reduce the rate available to others”).

<sup>38</sup> See Susan S. Kuo, *Speaking in Tongues: Mandating Multilingual Disaster Warnings in the Public Interest*, 14 WASH. & LEE J.C.R. & SOC. JUST. 3, 42–43 (2007) (“[P]ublic safety services are a

In this regard, it is important to recognize that collective action is not a threat to individual liberty. Quite the opposite, “[c]ollective action is a means of power, a means by which individuals can more fully realize their individual values.”<sup>39</sup> Collective-action problems leave individuals less free because they cannot coordinate their choices in order to achieve shared goals. Even though all individuals choose rationally and in their own self-interest, they end up with a result that none would have wanted.

*The Tragedy of the Commons* provides a classic example.<sup>40</sup> There is a single pasture open to all for the grazing of cattle and the shepherds that use the pasture have an individual incentive to maximize the size of their herd.<sup>41</sup> Unfortunately, the pasture has reached its capacity for cattle and will be destroyed unless the shepherds control the size of their herds.<sup>42</sup> If the shepherds have no way of coordinating their activities, then “the inherent logic of the commons remorselessly generates tragedy.”<sup>43</sup> Despite the collective consequences, the shepherds have reason to add cattle to their herds. Each shepherd captures individually the full value of additional cattle but shares the “effects of overgrazing.”<sup>44</sup> Consequently, the absence of a coercive mechanism leaves the shepherds unable to preserve the pasture upon which they all depend.

By making contributions mandatory, however, the state can break the destructive, self-defeating logic that threatens to stymie collective action.<sup>45</sup> If

noteworthy example of a public good that is typically under-produced in the marketplace.”). Free riding becomes more likely as the individual benefit of contributing to a collective good is reduced. The “ratio of benefits to costs” matters because if “that ratio is very large, then a relatively small fraction of the whole group would already stand to benefit, even if that fractional subgroup alone paid the full cost of the group good.” HARDIN, *supra* note 28, at 40–41.

<sup>39</sup> ARROW, *supra* note 34, at 16 (arguing that “collective action can extend the domain of individual rationality”).

<sup>40</sup> See Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1243 (1968).

<sup>41</sup> See *id.* at 1244. For a more contemporary example, “[e]xcessive electrical demand threatening to bring down the supply system and black out a metropolitan area is an elegant, all-too-real instance of an almost perfectly voluntaristic problem in the creation of a collective bad.” HARDIN, *supra* note 28, at 65; see also Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1722 (2002) (“Asbestos plaintiffs—both present and future—while acting quite rationally, are arguably “overgrazing” the accessible financial assets to the detriment of the total value of those assets.”).

<sup>42</sup> See Hardin, *supra* note 40, at 1244.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* (“Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited.”). Perverse results can ensue in any system in which actions reap personal rewards when they pay off, but public losses when they backfire. See, e.g., Paul Krugman, Opinion, *Fannie, Freddie and You*, N.Y. TIMES (July 14, 2008), <http://www.nytimes.com/2008/07/14/opinion/14krugman.html> [https://perma.cc/REK9-N9TP] (stating that “one-way bets can encourage the taking of bad risks, because the downside is someone else’s problem”).

<sup>45</sup> Not all tax-funded causes are equally worthy, and we recognize that coercive means can be used to provide citizens not only what they want, but what they supposedly *would* want if only they were more rational. See BERLIN, *supra* note 33, at 180. For present purposes, though, it is enough to

“[f]reedom in a commons brings ruin to all,”<sup>46</sup> then the case for government intervention is clear.<sup>47</sup> Thus, although the law often intervenes to protect individual autonomy against coercion, in other contexts the law overrides individual choice to achieve important group objectives through coercive mechanisms that compel compliance.<sup>48</sup>

## II. COLLECTIVE COERCION

This Part contends that there is an overlooked, hybrid category of coercion and collective action.<sup>49</sup> Specifically, what we call collective coercion involves an offer made to multiple recipients simultaneously when (1) each recipient’s choice depends to a non-trivial extent on what other recipients decide and (2) impediments to collective decision-making prevent the recipients from coordinating a response. If both conditions are satisfied, an offer can create a problem of collective action that may induce recipients to accept a mediocre option for fear of worse consequences. The following sections provide examples of collective coercion.

### A. *The Prisoner’s Dilemma*

The prisoner’s dilemma is the best known example of a collective-action problem that also involves coercion.<sup>50</sup> In the usual formulation, two suspects have been arrested on suspicion of having committed armed robbery and are held in isolation from one another and interrogated. At this point, the police lack enough evidence to obtain convictions.<sup>51</sup> Without a confession, the state

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show that the state has a role in making collective action possible. Indeed, John Rawls suggests that the collective action problem may explain Jean-Jacques Rousseau’s paradoxical insistence in *The Social Contract* that individuals can (and should) be “forced to be free.” See JOHN RAWLS, LECTURES ON THE HISTORY OF POLITICAL PHILOSOPHY 243 (Samuel Freeman ed., 2007) (“It is clear that Rousseau has in mind a case of what today we call free-riding on collectively advantageous schemes of cooperation.”).

<sup>46</sup> Hardin, *supra* note 40, at 1244.

<sup>47</sup> For certain goods in common, the institution of private property rights may avoid the problem by giving certain individuals a vested interest in the maintenance of the good. Hardin, *supra* note 40, at 1245.

<sup>48</sup> Although beyond the scope of this Article, there are many other logical and instrumental difficulties to surmount if group choice is to reliably reflect the preferences and values of individual members. See generally AMARTYA SEN, RATIONALITY & FREEDOM (2002) (exploring in great detail the related concepts of rationality and freedom).

<sup>49</sup> See *infra* notes 50–103 and accompanying text.

<sup>50</sup> See HARDIN, *supra* note 28, at 23 (“On the evidence of sheer volume of publications, the most interesting of all strategic structures is that of Prisoner’s Dilemma.”).

<sup>51</sup> *Id.* at 2.

can only prosecute the prisoners for a misdemeanor offense, which would carry a sentence of a year's imprisonment.<sup>52</sup>

In order to obtain confessions from the prisoners, the police make a loaded offer along the following lines:

[Y]ou can turn state's witness to help us put your partner away for ten years, and we'll let you off free. The only hitch is that, if both of you confess, we'll convict both of you of armed robbery and ask the judge for a lenient sentence of only six years for each of you. To confess or not to confess—that is your dilemma.<sup>53</sup>

Even though the two prisoners are better off remaining silent, each individual prisoner's best strategy is to confess no matter what the other prisoner chooses to do.<sup>54</sup> The prisoner's dilemma is a collective-action problem because individually rational choice produces a collectively irrational result.<sup>55</sup>

To see why individual logic dictates a suboptimal outcome, imagine that you are one of the two prisoners. You know that the other prisoner will either stay silent or confess. Those are the only two options. If the other prisoner stays silent and you confess, you win your freedom. This is the best outcome for you and the worst outcome for the other prisoner, who will be imprisoned for a decade. The other possibility is that your counterpart will confess. If so, you face a decade in prison unless you have also confessed, in which case your sentence will be six years. Thus, no matter what the other prisoner does, your rational choice is to confess. If both prisoners behave rationally, the optimal solution—a year's imprisonment for each—will be unavailable.<sup>56</sup> Maddeningly, from your perspective, you will spend an extra five years in prison because there is no way to coordinate your response to achieve the best joint outcome.<sup>57</sup>

Although it is usually offered as an example of a collective-action problem, the prisoner's dilemma is also a story of coercion. Just as a plea bargain offer gives a suspect a loaded choice—take the deal, or else<sup>58</sup>—the prisoner's

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<sup>52</sup> See *id.*

<sup>53</sup> *Id.*

<sup>54</sup> In the language of game theory, "defection is a 'dominant strategy' for each player." *Id.* at 24.

<sup>55</sup> *Id.* at 25.

<sup>56</sup> From an economic standpoint, "this equilibrium solution is not Pareto-optimal because some (indeed all) players could be made better off without making any worse off." *Id.* at 28. Instead of going to jail for six years, the prisoners could have gone to jail for one year.

<sup>57</sup> In the real world, it is possible that you would avoid this conundrum. For example, although it is a cliché that there is no honor among thieves, you and the other prisoner may come from a community with certain shared values and expectations. Also, and perhaps more to the point, you may be aware of possible repercussions if you confess and implicate the other prisoner.

<sup>58</sup> See John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 165 (2014) (describing evolution of "plea bargaining

dilemma involves a threat of worse consequences for the prisoner who chooses to stay silent. That the trigger for some of those consequences depends upon the decision of the other prisoner does not make the consequences any less real.

Admittedly, the dilemma the suspects face as a consequence of a cleverly designed set of contingent offers is unlikely to elicit much sympathy. After all, society wants the police to solve crimes and to bring perpetrators to justice. Regardless of whether coercion may be justified in such cases, though, the prisoner's dilemma is significant for this Article's purposes because it satisfies the definition of collective coercion: the police make a collective offer that requires each recipient to consider what other recipients will do and prevents the recipients from coordinating a response.<sup>59</sup>

### B. Tender Offers

Corporate tender offers have been described as a kind of prisoner's dilemma.<sup>60</sup> This section argues that it would be more accurate to say that the prisoner's dilemma and tender offers are both collective-coercion problems. In a tender offer, a hostile acquirer announces a proposal to buy a controlling position in a corporation from its current shareholders, typically at a significant premium to the trading price.<sup>61</sup> Before Congress first regulated tender offers, hostile bidders devised various stratagems to exploit the fact that each individual stockholder had to consider what other stockholders might do.

For example, a tender offer could be for something less than all the target company's stock and available only on a first-come, first-served basis. Those who waited too long might miss out on the chance to tender stock in exchange for the deal premium. Sometimes, the window of opportunity was made quite short, as in a so-called "Saturday night special," in order to increase the pres-

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system whereby extremely coercive 'deals' were offered to defendants both in terms of incentives to forego trial and avoidance of much harsher punishment").

<sup>59</sup> To ensure the lack of coordination, the two prisoners are interrogated in different cells and kept separated.

<sup>60</sup> See *In re Pure Res. Inc., S'holders Litig.*, 808 A.2d 421, 442 (Del. Ch. 2002) ("[S]ome view tender offers as creating a prisoner's dilemma—distorting choice and creating incentives for stockholders to tender into offers that they believe are inadequate in order to avoid a worse fate.").

<sup>61</sup> See Oesterle, *supra* note 2, at 217 (stating that "tender offers . . . are public announcements that a bidder will buy stock tendered to a deposit agent at a set price (or in exchange for the set value of an offeror's securities), usually in excess of the current market price"). A tender offer is only one possible form of acquisition. For example, an acquirer could negotiate a merger or purchase all the assets of the target corporation. Unlike those approaches, a tender offer does not require the participation or assent of the target's management.

sure and preclude a competing offer.<sup>62</sup> By regulating many aspects of the tender offer process, the Williams Act curbed the worst of these abuses.<sup>63</sup>

Nevertheless, even with significant procedural and substantive protections against coercion in place, individual shareholders may still find it difficult to rely solely on their own estimate of value in deciding whether the price offered is adequate. As one court observed,

In a tender offer, . . . a non-tendering shareholder individually faces an uncertain fate. That stockholder could be one of the few who holds out, leaving herself in an even more thinly traded stock with little hope of liquidity and subject to a [short-form] merger at a lower price or at the same price but at a later (and, given the time value of money, a less valuable) time.<sup>64</sup>

Thus, before deciding to reject a tender offer, each shareholder must consider the possibility that the takeover will succeed, in which case stragglers risk lower consideration in a later back-end merger,<sup>65</sup> possibly at a lower valuation,<sup>66</sup> or else risk being locked in place as minority shareholders with no

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<sup>62</sup> See *id.* (“[B]idders used short-lived public offers, known as ‘Saturday night specials,’ to buy limited amounts of target stock without full disclosure and on a first-come, first-served basis. Such offers generated maximum selling pressure on a dispersed and inadequately informed group of shareholders.”).

<sup>63</sup> See *Hanson Tr. PLC v. SCM Corp.*, 774 F.2d 47, 55 (2d Cir. 1985) (stating that the Williams Act provides shareholders with information and time to make a reasoned choice); *SEC v. Carter Hawley Hale Stores, Inc.*, 760 F.2d 945, 948 (9th Cir. 1985) (observing that “[p]rior to the passage of the Act, shareholders of target companies were often forced to act hastily on offers without the benefit of full disclosure”); Martin C. McWilliams, Jr., *Thoughts on Borrowing Federal Securities Jurisprudence Under the Uniform Securities Act*, 38 S.C. L. REV. 243, 248 (1987) (noting, more generally, that “[t]he nature of the federal scheme of securities regulation, borrowed from the English pattern, is informational”).

<sup>64</sup> *In re Pure Res. Inc.*, 808 A.2d at 441–42.

<sup>65</sup> A back-end (or short-form) merger does not require voting approval of remaining shareholders once a controlling shareholder has achieved the requisite percentage of ownership, usually ninety percent. See, e.g., *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 465 (1977) (noting that Delaware law “permits a parent corporation owning at least 90% of the stock of a subsidiary to merge with that subsidiary, upon approval by the parent’s board of directors . . . . The statute does not require the consent of, or advance notice to, the minority stockholders.”). Thus, a hostile bidder might use a tender offer to achieve control and then, as the controlling shareholder, employ a back-end merger to squeeze out the minority shareholders. See Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. PA. L. REV. 785, 817–19 (2003). This is sometimes referred to as a two-step acquisition. *Id.* at 818.

<sup>66</sup> See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 83 (1987) (noting that “[i]f . . . shareholders believe that a successful tender offer will be followed by a purchase of nontendering shares at a depressed price, individual shareholders may tender their shares—even if they doubt the tender offer is in the corporation’s best interest”).

prospect for a comparable return on the investment.<sup>67</sup> In light of these concerns, a rational shareholder might decide to avoid the risk of taking a dissenting position.<sup>68</sup> The likelihood of coercion may be even higher when a controlling shareholder makes the tender offer as part of a freeze-out transaction because the corporation's management no longer provides an effective check against overreaching.<sup>69</sup>

In other words, a takeover bid is coercive not because of threats made by the would-be acquirer but because the takeover bid alters the target corporation's shareholders' baseline for choice. An individual shareholder might agree to participate, hoping the takeover bid would fail but not wanting to be left behind if it were to succeed. Of course, if other shareholders also act in their own self-interest, the takeover is bound to occur even if it is not in the best interest of the shareholders collectively.<sup>70</sup> Once a takeover bid has been made, each shareholder cannot depend upon solidarity with other shareholders and must do what is individually rational.

By contrast, a corporate proposal submitted for ratification by shareholder vote is less likely to be coercive because shareholders receive identical treatment regardless of the vote's outcome—there is no prisoner's dilemma. For example, if the requisite majority approves a merger, all shareholders receive the negotiated consideration.<sup>71</sup> Consequently, although shareholder voting and tendering stock are both mechanisms for registering the preferences of stock-

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<sup>67</sup> Lucian Arye Bebchuk, *Toward Undistorted Choice and Equal Treatment in Corporate Takeovers*, 98 HARV. L. REV. 1693, 1696 (1985) (positing that “in the face of a takeover bid . . . the shareholder might tender out of fear that, if he does not tender, the bidder might still gain control, in which case the shareholder would be left with low-value minority shares in the acquired target”).

<sup>68</sup> Indeed, a likely outcome in this sort of scenario is that the corporation's existing shareholders will sell to arbitrageurs (or “arbs” for short) at a discount below the tender price, and those arbs will then seek to capture the difference between the price they paid for the stock and the price they hope to receive if the tender offer succeeds. See Oesterle, *supra* note 2, at 205. The arbs take on the risk that a tender offer will fail and that they will have paid an above-market price for a minority position in an ongoing corporate enterprise. Thus, the intervention of arbs further tilts the playing field in the direction of the takeover by removing ordinary shareholders with potentially longer investment horizons from the process. Although arbs might be open to an even better deal, their principal concern is ensuring that there is a change of control transaction. See *id.* (“Arbitrageurs must liquidate quickly in order to realize a profit on their investments, which are speculative and usually financed with short-term, high-interest debt.”).

<sup>69</sup> See Guhan Subramanian, *Fixing Freezeouts*, 115 YALE L.J. 2, 31 (2005) (“The ability to freeze out the minority at some increment over the market price in a tender offer freezeout, as opposed to ‘fair value’ in a merger freezeout, introduces the possibility of opportunistic behavior by the controller.”).

<sup>70</sup> Indeed, each shareholder's understanding of the logical choice facing all other shareholders only reinforces the pressure to participate.

<sup>71</sup> Depending on the circumstances, the opposing shareholders may have the right to seek judicial appraisal of the value of their shares, but they are not required to pursue this remedy and can simply accept the same merger consideration as the shareholders who voted in favor of the deal.

holders, they should be distinguished. In a recent law review article, one Delaware jurist appears to have conflated the two, arguing that “[i]f the first-step tender offer in a two-step transaction is conditioned on tenders of a majority of the outstanding shares, and if sufficient stockholders tender to satisfy the condition, then it should have the same effect as an affirmative stockholder vote.”<sup>72</sup> The issue, however, is not just whether shareholders have decided a question but whether they have done so in accordance with their own preferences.<sup>73</sup>

Although tender offers resemble the prisoner’s dilemma in certain respects, they demonstrate that collective coercion can arise in a wider range of circumstances. For example, an offeror need not have the power to set punishments in order to coerce compliance. Taken as a prototypical case, the prisoner’s dilemma might seem to suggest that collective coercion exists only in situations involving overwhelming power disparities and offeror-controlled payouts. Yet, in tender offers coercive pressure can result from the mere fact that the offeror has proposed to buy a majority of stock at some premium over the market price.<sup>74</sup>

Also, unlike the prisoner’s dilemma, collective-coercion problems need not involve a dominant strategy whereby each individual’s rational incentive is to defect no matter what anyone else does.<sup>75</sup> In other words, the problem of

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<sup>72</sup> J. Travis Laster, *The Effect of Stockholder Approval on Enhanced Scrutiny*, 40 WM. MITCHELL L. REV. 1443, 1459 n.57 (2014). It is true that stockholders cannot seek judicial appraisal without first having opposed a transaction, whether by vote or refusal to tender stock. See Peter V. Letsou, *The Role of Appraisal in Corporate Law*, 39 B.C. L. REV. 1121, 1121 (1998). Yet, it does not follow that voting and tendering stock are equivalent mechanisms for supporting a proposed transaction. Unlike voting, the tender of stock may not always be voluntary.

<sup>73</sup> Again, what matters is whether shareholders have the practical ability to say “no.” For example, Delaware’s General Corporation Law was amended in 2013 to authorize a two-step merger process that does not require a stockholder vote to approve a merger but provides essentially identical protections. DEL. CODE ANN. tit. 8, § 251(h) (2016); 79 Del. Laws ch. 72, § 6 (2013), *as amended by* 79 Del. Laws ch. 327, § 7 (2014) *and* 80 Del. Laws ch. 265, § 7 (2016). The provision only applies to tender offers for all shares approved by the target corporation’s board of directors, and it requires that the acquirer, if successful in obtaining a majority of stock through the tender process, commit to a speedy back-end merger that provides non-tendering shares the “same amount and kind of cash, property, rights or securities to be paid” to the tendering shares. DEL. CODE ANN. tit. 8, § 251(h)(5). Shareholders can choose whether to tender with the knowledge that they will be fully protected either way. Consequently, “Section 251(h) appears to eliminate the policy bases on which a first-step tender offer in a two-step merger may be distinguished from a statutorily required stockholder vote.” See *In re Volcano Corp. Stockholder Litig.*, 143 A.3d 727, 743 (Del. Ch. 2016).

<sup>74</sup> See Subramanian, *supra* note 69, at 31 (citing *In re Siliconix Inc. S’holders Litig.*, No. Civ. A. 18700, 2001 WL 716787, at \*2 (Del. Ch. June 19, 2001)).

<sup>75</sup> The prisoner’s dilemma is a stark example of a collective-action problem because each suspect’s dominant strategy is to defect (by confessing) no matter what the other suspect does. The payoff is always better. In other coordination problems, defecting may lead to a worse outcome than cooperation—nevertheless, cooperation does not follow automatically, because the best outcome for an individual may be to defect while hoping that others cooperate.

collective coercion can be more nuanced than the prisoner's dilemma scenario because each individual's choice in response to a collective offer is not rationally antagonistic to the choices made by other recipients. When shareholders receive a plainly inadequate tender offer, none benefit by accepting it.<sup>76</sup> In such cases, it may well be that all recipients of an offer would be better off rejecting it, individually as well as in the aggregate.<sup>77</sup> If so, the problem is one of coordination; in the language of game theory, it is an assurance game because all players can win by cooperating.<sup>78</sup>

### C. Disaster Buyouts

The dynamics that coerce shareholders into participating in corporate takeovers can also affect the voluntariness of buyout programs targeting landowners. In recent years, voluntary buyouts have emerged as an effective tool for reforming land use without the conflict engendered by physical or regulatory takings.<sup>79</sup> Buyouts complement policies for protecting coastal areas and can be used to remove older, flood-prone properties, thereby creating green space to absorb water that might otherwise flood nearby developments.<sup>80</sup> Yet, buyouts differ from takings in that participation is ostensibly voluntary. Indeed, because buyouts are calculated at pre-disaster levels that are often higher than the current market value, residents may welcome the opportunity to relocate.<sup>81</sup>

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<sup>76</sup> Given the variety of investment time horizons, this point cannot be stated categorically at the time a tender offer is made. For some shareholders, the opportunity to achieve an immediate return at some level above the market price will be more important than whether a higher premium might be available in the future. All shareholders, however, benefit *ex ante* from a system that protects against unfairly low tender offers.

<sup>77</sup> In the prisoner's dilemma, a prisoner reaps even greater benefits from confessing if the other prisoner stays silent. This dynamic, in turn, makes it even less likely that either prisoner will choose not to confess.

<sup>78</sup> See McAdams, *supra* note 11, at 218–19 (distinguishing prisoner's dilemma and assurance games).

<sup>79</sup> See, e.g., Matthew Schuerman, *Some on Staten Island Opt for Buyout of "Houses That Don't Belong,"* NPR (Sept. 19, 2014, 4:13 AM), <http://www.npr.org/2014/09/19/349559031/some-on-staten-island-opt-for-buyout-of-houses-that-dont-belong> [<https://perma.cc/7M9F-X7KM>] ("The idea of buyouts, or retreating from flood-prone areas, took root about 20 years ago.").

<sup>80</sup> Properties acquired using federal funds must be converted permanently to open space. See Press Release, Fed. Emergency Mgmt. Agency, For Communities Plagued by Repeated Flooding, Property Acquisition May Be the Answer (May 28, 2014), <http://www.fema.gov/news-release/2014/05/28/communities-plagued-repeated-flooding-property-acquisition-may-be-answer> [<https://perma.cc/3J7M-AW7Z>] [hereinafter FEMA Press Release] ("Once purchased by the municipality, the homes are demolished and the property is designated as open space.").

<sup>81</sup> See *id.* ("Homes that are determined to be eligible for buyouts are purchased by the town at the fair market value of the property prior to the flood."); see also Franklyn Cater, *N.J. Braces for Future Disasters by Fleeing, and Fortifying, the Coast*, NPR (Sept. 26, 2014, 5:51 PM), <http://www.npr.org/2014/09/26/351737514/n-j-braces-for-future-disasters-by-fleeing-and-fortifying-the>

The federal government typically provides the lion's share of funding, pursuant to Federal Emergency Management Agency ("FEMA") programs created for areas subject to repetitive flooding.<sup>82</sup>

For example, after Hurricane Sandy ravaged the East Coast, concern regarding the possibility of future floods tempered talk of rebuilding. New York Governor Andrew Cuomo offered to buyout landowners in flood-prone areas, bluntly stating that "[t]here are some parcels that Mother Nature owns. She may only visit once every few years. But she owns the parcel and when she comes to visit, she visits."<sup>83</sup> New Jersey followed suit and announced a \$300 million buyout program designed to aid homeowners in areas damaged by Hurricane Sandy.<sup>84</sup> FEMA grants supported both programs.<sup>85</sup>

Given the political sensitivity of a policy of relocation and FEMA requirements for funding, the buyout offers were designed to be, or at least appear, voluntary.<sup>86</sup> Consider the careful wording of New Jersey's official press release:

Governor Chris Christie today announced a plan to use \$300 million in federal funding that would give homeowners the option of selling their properties damaged by Superstorm Sandy in tidal areas of New Jersey. The buyout plan involves approximately 1,000 homes impacted by Sandy, in addition to another 300 repetitively flood-damaged homes located in the Passaic River Basin. The program is

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coast?sc=17&f=1001&utm\_source=iosnewsapp&utm\_medium=Email&utm\_campaign=app [https://perma.cc/KD6X-UC5D] (discussing one family's decision to accept buyout after Hurricane Sandy).

<sup>82</sup> FEMA operates several programs that offer money to "States, Territories, Indian Tribal governments, local governments, and eligible private non-profits" for hazard mitigation activities designed "to reduce the risk to individuals and property from natural hazards while simultaneously reducing reliance on Federal disaster funds." DEP'T OF HOMELAND SEC., FED. EMERGENCY MGMT. AGENCY, HAZARD MITIGATION ASSISTANCE UNIFIED GUIDANCE: HAZARD MITIGATION GRANT PROGRAM, PRE-DISASTER MITIGATION PROGRAM, AND FLOOD MITIGATION ASSISTANCE PROGRAM 1 (2013), [https://www.fema.gov/media-library-data/15463cb34a2267a900bde4774c3f42e4/FINAL\\_Guidance\\_081213\\_508.pdf](https://www.fema.gov/media-library-data/15463cb34a2267a900bde4774c3f42e4/FINAL_Guidance_081213_508.pdf) [https://perma.cc/KY3Q-2EPG]. Those programs include funds for repetitive flood claims and severe repetitive loss and cover as much as 90% of the mitigation costs. *Id.* at 19 tbl.2.

<sup>83</sup> Matt Hickman, *Cuomo: Don't Rebuild, Let Mother Nature Take Back Sandy-Damaged Areas*, MOTHER NATURE NETWORK (Feb. 5, 2013, 6:18 PM) (quoting Governor Cuomo), <http://www.mnn.com/your-home/at-home/blogs/cuomo-dont-rebuild-let-mother-nature-take-back-sandy-damaged-areas> [https://perma.cc/84XZ-FPD9].

<sup>84</sup> See State of N.J., Dep't of Env'tl. Prot., *Superstorm Sandy Information*, NJ.GOV, <http://www.nj.gov/dep/special/hurricane-sandy/> [https://perma.cc/QV87-7PWS].

<sup>85</sup> See FEMA Press Release, *supra* note 80 ("In the case of Hurricane Sandy, FEMA and the state of New Jersey agreed that FEMA will cover one hundred percent of the costs of property acquisition as permitted under federal regulations.").

<sup>86</sup> See *id.* ("The program is completely voluntary; no homeowner is required to sell their property or is forced to move because their home is located in an area subject to repetitive flooding.").

designed to give homeowners the ability to choose the best option for their individual situation.<sup>87</sup>

Buyout programs appear voluntary because the state offers a benefit—money in exchange for property—that the owner is free to accept or reject.<sup>88</sup> In addition, federal regulations require local public officials to obtain each property owner’s signature on an acknowledgment form stating that the local government handling the transaction “has notified the Seller that neither the State nor the Local Government will use its eminent domain authority to acquire the property for open-space purpose if the Seller chooses not to participate, or if negotiations fail.”<sup>89</sup> In short, so long as the state does not exercise its power of eminent domain and instead simply offers to buy the property, a property owner is under no compulsion to accept the buyout.

Yet, buyout offers can be highly coercive. The structure, if not intent, of such offers exploits problems of collective action. Much like individual stockholders contemplating a tender offer, each homeowner must take into account what other homeowners are likely to do, especially when there is an advantage to being first. For example, buyout offers can divide neighbors by making a limited pool of resources available.<sup>90</sup> If others sell, the holdouts could find themselves stuck in a desolate, unsafe neighborhood with drastically reduced property values.<sup>91</sup>

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<sup>87</sup> Press Release, State of N.J., Governor Chris Christie, Governor Christie Announces \$300 Million Buyout Plan to Give Homeowners the Option to Sell Sandy-Damaged (May 16, 2013), <http://www.nj.gov/governor/news/news/552013/approved/20130516a.html> [<https://perma.cc/E693-9E8U>] [hereinafter New Jersey Press Release]. Governor Christie reiterated, “The process is a way to help people and property get out of harm’s way, but as I have always said, we will not force any of these residents to sell their homes or force any towns to participate in buyouts. This is a willing seller program . . .” *Id.*

<sup>88</sup> A buyout initiative in Oakwood Beach, New York, offered “homeowners the pre-storm market value for their properties” and “an extra 10 percent, as well as an additional 5 percent to those who relocate within the five boroughs.” Kia Gregory, *Deciding Whether It’s Lights Out*, N.Y. TIMES (Oct. 25, 2013), <http://www.nytimes.com/2013/10/27/nyregion/deciding-whether-its-lights-out.html?page-wanted=all> [<https://perma.cc/9VAE-XL6C>].

<sup>89</sup> *Statement of Voluntary Participation for Acquisition of Property for Purpose of Open Space*, DEP’T OF HOMELAND SEC., FED. EMERGENCY MGMT. AGENCY (last updated Apr. 20, 2009), [https://www.fema.gov/media-library-data/20130726-1630-20490-9770/voluntaray\\_participation\\_form\\_for\\_acquisition\\_of\\_open\\_space.pdf](https://www.fema.gov/media-library-data/20130726-1630-20490-9770/voluntaray_participation_form_for_acquisition_of_open_space.pdf) [<https://perma.cc/4TWX-GY4V>]; see DEP’T OF HOMELAND SEC., FED. EMERGENCY MGMT. AGENCY, HAZARD MITIGATION ASSISTANCE GUIDANCE ADDENDUM: HAZARD MITIGATION GRANT PROGRAM, PRE-DISASTER MITIGATION PROGRAM, AND FLOOD MITIGATION ASSISTANCE PROGRAM 17 (2015), [https://www.fema.gov/media-library-data/1424983165449-38f5dfc69c0bd4ea8a161e8bb7b79553/HMA\\_Addendum\\_022715\\_508.pdf](https://www.fema.gov/media-library-data/1424983165449-38f5dfc69c0bd4ea8a161e8bb7b79553/HMA_Addendum_022715_508.pdf) [<https://perma.cc/SMK9-5S3N>] [hereinafter GUIDANCE ADDENDUM].

<sup>90</sup> See Daniel P. Aldrich, *Fixing Recovery: Social Capital in Post-Crisis Resilience*, 6 J. HOMELAND SEC. 1, 6 (2010).

<sup>91</sup> See *id.*

In communities with high levels of social capital, individuals are more likely to invest in recovery because they believe their neighbors will too.<sup>92</sup> Buyouts send the opposite signal—that the neighbors will not return—and so buyout programs could be understood to create a kind of “antisocial capital.” When a buyout is commenced in the wake of disaster, its disruptive message makes recovery much less likely to occur.<sup>93</sup> Although buyout offers may be couched in nonthreatening terms, they nevertheless change the baseline for choice, leaving those who reject the buyout offer worse off than they would have been otherwise.<sup>94</sup> Also, just as corporate raiders used time pressure to achieve their ends, government buyouts may enforce a tight timetable.<sup>95</sup>

Moreover, the government’s commitment never to exercise the power of eminent domain can be used to apply coercive pressure.<sup>96</sup> Property owners

<sup>92</sup> See Susan S. Kuo & Benjamin Means, *Corporate Social Responsibility After Disaster*, 89 WASH. U. L. REV. 973, 979 (2012); Aldrich, *supra* note 90, at 7–8.

<sup>93</sup> See, e.g., Gregory, *supra* note 88 (noting that many families that initially pledged to return to a devastated Staten Island neighborhood after Hurricane Sandy ultimately accepted buyout offers).

<sup>94</sup> To be clear, identifying coercion in buyout programs says nothing about whether rebuilding should occur. Rather, the point is that buyout offers color the social context in which individual choices take place. See *id.* (“[I]n the aftermath of the storm, it seemed that people in the buyout zone no longer belonged.”).

<sup>95</sup> For instance, one commentator observed that a buyout program implemented in the Wapello Levee District along the Iowa River after severe flooding in 1993 succeeded in part because the government provided a very short timeframe for the decision:

The total buyout time was 16 months from start to finish, which was extremely rapid considering the number of agencies involved and the extent of the land. This was in some ways expedited because the Corps of Engineers was going to start work on the levee soon and if they started, the whole project would be called off, so landowners had a short decision time.

ANNE SIDERS, COLUMBIA LAW SCH. CTR. FOR CLIMATE CHANGE LAW, *MANAGED COASTAL RETREAT: A LEGAL HANDBOOK ON SHIFTING DEVELOPMENT AWAY FROM VULNERABLE AREAS* 124 (2013), [https://web.law.columbia.edu/sites/default/files/microsites/climate-change/files/Publications/Fellows/ManagedCoastalRetreat\\_FINAL\\_Oct%2030.pdf](https://web.law.columbia.edu/sites/default/files/microsites/climate-change/files/Publications/Fellows/ManagedCoastalRetreat_FINAL_Oct%2030.pdf) [<https://perma.cc/26MY-QKC3>]. The property owners also lost leverage because the “purchasers of the land used a formulaic approach in setting the price to be paid, applying the same formula to all landowners . . . [which] got rid of the incentive for landowners to hold out for a better deal.” *Id.* In other words, it was a take-it-or-leave-it offer, with no room to negotiate. *Id.*

<sup>96</sup> The buyout manager for a San Antonio, Texas initiative made sure that property owners understood the consequences of turning down the buyout offer:

And eventually I guess we also convinced folks there won’t be another buyout out there . . . there had been enough notice to the neighbors, to the communities about the flooding in these areas that there probably wouldn’t be anyone else interested in buying their houses, so if they stayed they’re taking a risk. Number one, there won’t be any money a year from now or two years from now to buy your house. Then there might not be any buyers because if your house is in a flood plain it’s going to be a negative for people coming along later. So some of them understood that ultimately and went ahead and sold. We didn’t try to use that as a threat, but that was just kind of to tell them reality about these kinds of real estate matters.

who fail to participate in a buyout cannot hope for the public-law equivalent of a back-end merger. Instead, they know that they will be stuck with an essentially unsaleable investment.<sup>97</sup> The inherent coerciveness of the property owner's situation is exacerbated by the fact that the counterparty is the state rather than a private party, and the property owner will be dependent upon the state to continue to provide utilities, fire, and policing, as well as assistance in preparing for and responding to disasters. Homeowners must apply to the state for permission to rebuild in the wake of disaster and delays in that process can further damage property values.<sup>98</sup> If, contrary to its promises, the government does exercise its power of eminent domain sometime after paying other homeowners for their property, homeowners have reason to suspect that the valuation will be lower.<sup>99</sup> For instance, it may be that the property value will be as-

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Daniel H. de Vries & James C. Fraser, *Citizenship Rights and Voluntary Decision Making in Post-Disaster U.S. Floodplain Buyout Mitigation Programs*, 30 INT'L J. MASS EMERGENCIES & DISASTERS 1, 19–20 (2012) (ellipses in original), <http://dare.uva.nl/document/2/117341> [<https://perma.cc/VL5R-HLDE>].

<sup>97</sup> In a laudatory interview published on FEMA's own website, an emergency manager in Barnes County, North Dakota described how she forced homeowners to take less than full value for their homes:

[She] presented the homeowners with a proposal. Although the buyouts were voluntary, those who participated would have to give up 15 percent of the final payout on their property to cover the local share of the cost. Seven homeowners said yes. Only two said no. "They really didn't have a choice," [the emergency manager] said. "They couldn't sell their houses because no one would buy them. They couldn't stand to live in flooding conditions anymore. But they did benefit because they got 85 percent of their house (pre-disaster value) when most of the houses, where they were, would be worth nothing."

FED. EMERGENCY MGMT. AGENCY & N.D. DIV. OF EMERGENCY MGMT., *Waste Not, Want Not: Barnes County Makes the Most of Flood-Prone Properties*, in JOURNEYS: NORTH DAKOTA'S TRAIL TOWARDS DISASTER RESISTANCE 37, 38–39 (2001), <https://www.fema.gov/pdf/about/regions/regionviii/jurnys.pdf> [<https://perma.cc/3KR4-7UKH>]. To be clear, we do not mean to suggest that the deal was unfair to the property owners or that a cash-strapped municipality should have devoted its resources to buying out the owners at full value. Rather, the interview simply reflects the reality of the situation—that disaster buyouts take place under difficult circumstances and to call them voluntary is, at best, a generous fiction.

<sup>98</sup> That is, buyout managers can pressure homeowners by blocking rebuilding efforts. See de Vries & Fraser, *supra* note 96, at 17 ("Moratoria are temporary holds on building permits; land-use applications or other permits; and entitlements related to the use, development, redevelopment, repair, and occupancy of private property in the interest of protection of life and property."). In the wake of disaster, "such moratoria are explicitly used to support the prevailing sentiment that it is wise to prevent people from 'acting quickly' and replicating inappropriate pre-disaster building patterns." *Id.* Instead of using the pause to evaluate options in dialogue with the community, some buyout managers believe that a moratorium is important to "increase the odds of property owners accepting buyout offers for a preconceived mitigation strategy." *Id.*

<sup>99</sup> See Gregory, *supra* note 88 (noting that some homeowners "worry that if they do not take the buyout, the state or the city might eventually take their properties through eminent domain, leaving them worse off"). To avoid the promise not to use eminent domain, local public officials might find an alternate rationale for condemnation. See de Vries & Fraser, *supra* note 96, at 18 ("Although not a

sessed based on current conditions, including diminished property value, lack of basic services, and overall decline of the neighborhood. In light of these problems, it should not come as a surprise that more than a third of participants in a survey of four buyout programs reported that they felt coerced into accepting the terms of the buyout.<sup>100</sup>

By identifying coercive aspects of disaster buyout programs, we do not contend that such programs are unjustified. If a community cannot be rebuilt safely, public intervention may be warranted to ensure that community solidarity does not reinforce untenable patterns of land use.<sup>101</sup> In such situations, many members of the community will welcome the opportunity to leave.<sup>102</sup> For those who do not, given the overriding need to shift land use patterns, it may be the case that some level of coercion should be accepted as an essential aspect of a successful buyout program.<sup>103</sup> This Article's goal at present, though, is descriptive; the justifications for coercion cannot be evaluated until they have been uncovered.

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common strategy, buyout managers remarked occasionally that properties belonging to holdouts could still be acquired through eminent domain, simply by using state funds unrelated to the [federal mitigation grant]."). Also, even though FEMA's buyout regulations theoretically prohibit the use of eminent domain, "a close approximation of this tool of force" can be achieved via a declaration of substantial damage that would make rebuilding ruinously expensive:

Based on this economic calculation, property owners whose house had been deemed substantially damaged were not legally allowed to rebuild *unless* they could flood-proof their home (e.g., elevation) or relocate their house out of the flood plain. Although not forcing participation—property owners could still chose to stay under those conditions—the substantially damaged declaration essentially closed off alternative mitigation options or discussions.

*Id.* at 16. The use of substantial damage declarations was influential in the buyout programs studied. *See id.* at 17 ("Where applied, the declaration proved highly effective . . . as only few homeowners decided not to participate despite the declaration.").

<sup>100</sup> de Vries & Fraser, *supra* note 96, at 21 ("[A] sizable 35% of the homeowners (108 out of 312) across the four buyout programs indicated in the telephone survey that their participation was *not* voluntary.")

<sup>101</sup> *See* RICHARD A. RANOUS, HAZARDOUS MATERIALS COOP. RESEARCH PROGRAM, A COMPENDIUM OF BEST PRACTICES AND LESSONS LEARNED FOR IMPROVING LOCAL COMMUNITY RECOVERY FROM DISASTROUS HAZARDOUS MATERIALS TRANSPORTATION INCIDENTS 10 (2012) (noting that long-term recovery may involve "rebuilding or relocating damaged or destroyed social, economic, natural, and built environments").

<sup>102</sup> *See* Gregory, *supra* note 88 ("Some in the neighborhood grabbed the offer without hesitation.").

<sup>103</sup> Indeed, to the extent shifts in land use are required by natural hazards, some would count property owners lucky to receive any compensation from the state. It cannot be the case that landowners have a permanent claim to a disproportionate share of government resources in order to subsidize the private benefits of coastal living.

### III. CHOICE-ENHANCING AND CHOICE-SUBSTITUTING APPROACHES

This Part argues that a lack of appreciation for the intersections of coercion and collective action can cause considerable confusion as well as create avenues for opportunistic exploitation.<sup>104</sup> It further contends that judges and legislators seeking to provide a remedy for collective coercion must decide whether to restore the possibility of autonomous individual choice or to identify and empower a centralized decision maker.<sup>105</sup> In other words, should the problem be characterized as coercion or collective action? Although both approaches may be plausible in a given circumstance, this Part identifies factors that can help to guide the analysis.<sup>106</sup>

#### *A. Defining the Objective*

Collective coercion involves aspects of two well-understood problems: collective action and coercion. Perhaps because of this overlap, lawmakers have sometimes aimed at the wrong target. For example, lawmakers may display solicitude for individual choice when the collective context of an offer has already fatally undermined that choice, or they may propose to resolve a problem of coercion when the real issue is collective action. At best, this lack of clarity creates uncertainty. At worst, it can undermine the effectiveness of well-intentioned legal measures and leave room for opportunistic actors to change the law to suit their own purposes.

#### 1. Coercion-Enhancing Regulation

Laws that seek to prevent coercion by focusing on individual choice may fail to identify the mechanisms that facilitate collective coercion. A law that misdiagnoses the problem it is designed to address is unlikely to be effective. Moreover, the law may insist upon supposed protections that only make matters worse.

For example, although the federal government conditions its participation in the purchase of flood-endangered properties on the voluntariness of the transactions, the federal government mandates a process that all but guarantees that homeowners will feel coercive pressure to participate in a buyout program. Specifically, each eligible homeowner must be told that no eminent domain proceeding will ever be launched if the homeowner declines to partici-

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<sup>104</sup> See *infra* notes 107–171 and accompanying text.

<sup>105</sup> Cf. YOGI BERRA & DAVE KAPLAN, *WHEN YOU COME TO A FORK IN THE ROAD, TAKE IT!: INSPIRATION AND WISDOM FROM ONE OF BASEBALL'S GREATEST HEROES 2–5* (2001) (discussing the difficulty of choosing between two good options in a given situation).

<sup>106</sup> In some instances, a mixed strategy may be appropriate even though there will be inevitable tension between remedies that bolster individual choice and those that supplant it.

pate in the buyout, and the homeowner must sign a written acknowledgement to the same effect.<sup>107</sup>

Yet, as discussed above, the unequivocal statement that there will not be a regulatory taking increases coercive pressure on homeowners because they worry about the consequences of declining a buyout if their neighbors choose to accept it.<sup>108</sup> Put differently, the source of the coercive pressure is not the terms of the individual offer but the context in which it is made. If the only issue were individual choice, the federal government's regulations would be appropriate. Homeowners, however, are concerned instead about changes to the value of their property resulting from other homeowners' decisions.<sup>109</sup> Only by reassuring the homeowner against that indirect threat can the state restore a modicum of voluntariness to the process.

In that regard, instead of promising not to use the power of eminent domain, non-coercive buyout offers might contain a guarantee that the power of eminent domain will be used to acquire all properties within the buyout plan if the plan achieves a specified threshold level of overall participation. The buyout offers might also promise that the value of the property for purposes of eminent domain valuation will be identical to the appraised value for the buyout offer. By providing an exit strategy, the government would make it easier for homeowners to decide whether to take the buyout offer without hedging against their neighbors' choices.

Notably, an approach to the formulation of buyout offers that included the later use of eminent domain would be consistent with state law that defines structurally non-coercive tender offers as those that promise a back-end merger at the same price as the tender offer.<sup>110</sup> Including a mandatory back-end exit conditioned upon a high overall level of voluntary participation would reduce the coercion of the initial offer because there would be no reason to worry about being left out of what could be the last opportunity to achieve a reasonable return on the property investment.<sup>111</sup>

Also, by setting a target for participation, a threshold requirement could spur greater community coordination and perhaps encourage collective choices

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<sup>107</sup> See GUIDANCE ADDENDUM, *supra* note 89, at 17.

<sup>108</sup> See *supra* notes 78–102 and accompanying text; see also Gregory, *supra* note 88 (interviewing homeowners worried about the aftermath of a government buyout and feeling pressure to move).

<sup>109</sup> See Kuo & Means, *supra* note 92, at 989 (discussing the importance of social capital in disaster recovery).

<sup>110</sup> *Air Prod. & Chems., Inc. v. Airgas*, 16 A.3d 48, 106–07 (Del. Ch. 2011).

<sup>111</sup> The most significant difference might be the timetable for getting paid. Those who accept the buyout would receive their funds upfront whereas the properties subject to eminent domain would go through a different legal process.

regarding relocation.<sup>112</sup> Democratic participation involving neighborhood associations, city councils, and state environmental agencies could help vulnerable communities to advocate on behalf of their constituents.<sup>113</sup> Finally, making buyouts conditional on robust participation could save the federal government money when participation levels are low, because a gap-toothed pattern of property acquisitions might not achieve broader cost-saving goals.

Nor does the requirement that property owners sign a statement of voluntary participation remove coercive pressures or guarantee that their participation is truly voluntary. If a homeowner feels no choice but to go along with a buyout, it is hard to see how signing a piece of paper will make a difference. Arguably, the requirement only reinforces the power of the state by forcing the homeowner to affirm that the transaction is voluntary, whatever the homeowner might really feel.<sup>114</sup> The problem of collective coercion is not one of total compulsion or naked threat—if it were, the need for a written acknowledgment might be useful in identifying quasi-hostage situations—but inheres instead in the simple fact that a rational homeowner must consider whether the decisions of other homeowners will create potentially adverse consequences.

In sum, the current approach to ensuring that disaster buyouts are voluntary is almost the opposite of what would be effective and fair if the goal were to make disaster buyouts non-coercive. Stripped of the guise of fully voluntary participation, disaster buyouts are in large part an exercise of the power of the state and should be evaluated as such. Perhaps, rather than seeking to make disaster buyouts more voluntary, the question instead should be whether the payments made to individual landowners are consistent with the demands of social justice.

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<sup>112</sup> On the other hand, there could be a danger of intimidation among neighbors that would need to be monitored.

<sup>113</sup> See de Vries & Fraser, *supra* note 96, at 3 (“A true voluntary mitigation program is a process in which a population—including marginal groups—meets with authorities to share, negotiate and control decisions in the development of a project affecting their livelihood and in its subsequent implementation.”). Notably, the law regulating buyouts already envisions a scheme of cooperative federalism and so giving greater voice to local communities would be consistent with existing law. Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 461 (2012) (defining cooperative federalism as a process by which “states are charged by Congress with administering federal law”). According to one commentator, cooperative federalism should be understood to include “all federal schemes that furnish a role for the states.” *Id.* at 461–62 n.8. Obtaining a rough consensus for a buyout plan would reduce the likelihood of scenarios in which many residents oppose a buyout but feel that they have little choice but to sell.

<sup>114</sup> As anyone who has witnessed a plea bargain can attest, the awesome power of the state is rarely more evident than when a person dressed in a prison jumpsuit agrees to knowingly and voluntarily waive rights before sentencing.

## 2. Substantive Coercion

Sometimes, courts and lawmakers appear to confuse problems of coercion with problems of collective action. In Delaware, for example, there has been considerable confusion regarding the proper role of the board in responding to hostile takeovers because courts use the language of coercion to include problems of collective action.

As an initial matter, Delaware courts refuse to give boards *carte blanche* authority to shut down hostile takeover bids because board members have a vested interest in the perquisites of board membership.<sup>115</sup> In light of the “omnipresent specter of entrenchment,” courts undertake a searching proportionality review that asks whether the board has identified a “legitimate threat” and whether its response is proportionate to the threat.<sup>116</sup>

A coercive takeover bid clearly counts as a legitimate threat and warrants a board response. For example, Delaware courts recognize “the threat of coercion that results from a two-tier offer promising unequal treatment for nontendering shareholders.”<sup>117</sup> As the Delaware Supreme Court has explained, “In such a case, the threat is obvious: shareholders may be compelled to tender to avoid being treated adversely in the second stage of the transaction.”<sup>118</sup> This kind of coercion is sometimes labeled “structural coercion,” and the board’s role in addressing it should be relatively uncontroversial.

Yet, the concept of coercion has been stretched to include tender offers that are not coercive in any ordinary sense of the word. In particular, Delaware’s Supreme Court accepts “substantive coercion” as a legitimate threat—

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<sup>115</sup> See *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) (stating that “officers and directors are not permitted to use their position of trust and confidence to further their private interests” (quoting *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939))). Ordinarily, the business judgment rule limits judicial review of board decisions. See *id.* (“The rule posits a powerful presumption in favor of actions taken by the directors in that a decision made by a loyal and informed board will not be overturned by the courts unless it cannot be ‘attributed to any rational business purpose.’” (quoting *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971))).

<sup>116</sup> *Air Prod. & Chems. Inc.*, 16 A.3d at 91–93 (stating that due to the threat of a board acting in its own interests “there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred” (quoting *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985))).

<sup>117</sup> *Paramount Comm’n, Inc. v. Time*, 571 A.2d 1140, 1152 (Del. 1989); see also Ronald J. Gilson & Reinier Kraakman, *Delaware’s Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 BUS. LAW. 247, 258 (1989) (noting consensus that unequal treatment for non-tendering shareholders justifies defensive action by corporate officers).

<sup>118</sup> *Paramount*, 571 A.2d at 1152; see also *Unocal Corp.*, 493 A.2d at 956 (holding that two-tier “offers are a classic coercive measure designed to stampede shareholders into tendering at the first tier, even if the price is inadequate, out of fear of what they will receive at the back end of the transaction”); Victor Brudney & Marvin A. Chirelstein, *Fair Shares in Corporate Mergers and Takeovers*, 88 HARV. L. REV. 297, 337 (1974) (“[T]he presence of an announced differential is plainly coercive.”).

the danger that shareholders might make the wrong decision and tender their shares out of “ignorance or a mistaken belief.”<sup>119</sup> Baffled lower courts have sometimes treated the concept of substantive coercion as an absurdity and have been inclined to interpret it narrowly. As one court stated, the “law should . . . hesitate to ascribe rube-like qualities to stockholders. If stockholders are presumed competent to buy stock in the first place, why are they not presumed competent to decide when to sell in a tender offer after an adequate time for deliberation has been afforded them?”<sup>120</sup>

However, Delaware’s recognition of substantive coercion as grounds for board intervention becomes clearer once it is recognized that Delaware courts view boards of directors as the solution to a broader problem of collective action. Thus, properly understood, the issue is not so much whether shareholders have been threatened but whether the board is in a superior position to act on their behalf:

Even in a competitive acquisitions market, disaggregated shareholders may require a bargaining agent to obtain top dollar for target assets. Without a coordinated response from shareholders, any offer can succeed that exceeds the expected value of the firm in the hands of existing management or other competing bidders. By contrast, target managers who have the power to preclude hostile offers by deploying defensive tactics may be able to compel acquirers to pay out the bulk of their transaction gains.<sup>121</sup>

In 2011, in *Air Products & Chemicals, Inc. v. Airgas, Inc.*, the Delaware Chancery Court upheld management’s decision to block a tender offer that was

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<sup>119</sup> *Paramount*, 571 A.2d at 1153 (holding that board’s decision to resist takeover was appropriate in light of conclusion that shareholders might agree to tender their stock “in ignorance or a mistaken belief of the strategic benefit which a business combination with Warner might produce”); see *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1384 (Del. 1995) (reaffirming holding in *Paramount* that Time’s board of directors “was also reasonably concerned that the Time stockholders might tender to Paramount in ignorance or based upon a mistaken belief, i.e., yield to substantive coercion”). Professors Ronald J. Gilson and Reinier Kraakman first proposed the concept of substantive coercion and cautioned that “[f]rom the perspective of shareholders, substantive coercion is possible only if management plausibly expects to better the terms of a hostile offer—whether by bargaining with the offeror, by securing a competitive bid, or by managing the company better than the market expects.” Gilson & Kraakman, *supra* note 117, at 268.

<sup>120</sup> *Chesapeake Corp. v. Shore*, 771 A.2d 293, 328 (Del. Ch. 2000).

<sup>121</sup> Gilson & Kraakman, *supra* note 117, at 261. Also, “defensive tactics might . . . benefit target shareholders by providing time for managers to ‘shop’ the firm. In this case, managers who assert that an offer is too low must claim private knowledge about either the acquisition market or the value of the firm.” *Id.* Finally, and most controversially, management might assert substantive coercion based on its view that the firm is underpriced because it does not account for management’s own plan to produce value. *Id.* at 262.

allegedly inadequate even though there was no hint of structural coercion.<sup>122</sup> The court stated that Air Products' offer was not structurally coercive because even stockholders who refused to tender on the front end could receive equal consideration on the back end.<sup>123</sup> Despite misgivings about management's claim of substantive coercion,<sup>124</sup> the court felt that it was bound to follow precedent that "directors of a Delaware corporation have the prerogative to determine that the market undervalues its stock and to protect its stockholders from offers that do not reflect the long-term value of the corporation under its present management plan."<sup>125</sup>

Framed solely in terms of the risk of shareholder coercion, Delaware's deference to management does not make sense. By allowing boards to block well-informed shareholders from making their own choices, Delaware law thwarts shareholder autonomy.<sup>126</sup> A more plausible explanation, however, is that Delaware has mischaracterized its approach to what it perceives as a collective-action problem. To the extent Delaware has chosen to limit shareholder choice in favor of board decision-making even when a proposed takeover involves no coercion, that policy choice should be acknowledged more directly so that its wisdom can be evaluated.<sup>127</sup>

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<sup>122</sup> *Air Prod. & Chems. Inc.*, 16 A.3d at 106, 129.

<sup>123</sup> *Id.* at 106–07.

<sup>124</sup> Management's principal argument in favor of its position was that a majority of the target corporation's stock had been acquired by arbitrageurs who stood to profit if the tender offer were successful and disregarded the possible long-term value of the corporation. *Id.* at 108. These arbitrageurs would, according to management, coerce the minority shareholders by causing the tender offer to succeed, at which point the minority shareholders would be forced to exchange their stock for inadequate consideration. *Id.* at 109 ("The argument is premised on the fact that a large percentage (almost half) of Airgas's stockholders are merger arbitrageurs . . . who would be willing to tender into an inadequate offer because they stand to make a significant return on their investment even if the offer grossly undervalues Airgas . . ."). The flaw in this argument, as the court observed, is that "defendants do not appear to have come to grips with the fact that the arbs bought their shares from long-term stockholders who viewed the increased market price generated by Air Products' offer as a good time to sell." *Id.* However, "Air Products' own expert testified that a large number—if not all—of the arbitrageurs who bought into Airgas's stock at prices significantly below the \$70 offer price would be happy to tender their shares at that price regardless of the potential long-term value of the company." *Id.* at 111.

<sup>125</sup> *Id.* at 112 (quoting *Unitrin*, 651 A.2d at 1376) (internal quotation marks and additional citations omitted).

<sup>126</sup> As a practical matter, a corporation with a staggered board can take defensive measures to block a tender offer and force a would-be acquirer to either negotiate terms with the board or desist. *See id.* A determined bidder would have to use the proxy-solicitation process to replace the target corporation's board, and obtaining a majority position on a staggered board could take two years or more even if successful. Few bidders can afford to wait so long.

<sup>127</sup> *See Gilson & Kraakman, supra* note 117, at 265 ("For the game to be worth the candle, courts applying the proportionality test must be able to improve on the market's efforts to distinguish when management is right and when it is wrong.").

### 3. Opportunism

In situations that involve both coercion and collective action, a motivated party may seek to obscure one of the two issues at stake. For example, in *Friedrichs v. California Teachers Ass'n*,<sup>128</sup> decided by the Supreme Court in 2016, the plaintiffs were California teachers who objected to paying non-membership fees to support the collective bargaining activities of a union that represents the interests of all California teachers.<sup>129</sup> After oral argument but before the case could be decided, Justice Scalia died, and the Court ultimately affirmed the lower court's ruling per curiam by a divided 4-4 vote.<sup>130</sup>

At oral argument, Justice Kennedy, who has often provided the swing vote in politically charged cases, appeared sympathetic to plaintiffs' argument and suggested that, far from being free riders, they were "compelled riders" who had been coerced into supporting expression that they opposed.<sup>131</sup> Justice Kennedy's terminology implies a binary distinction between coercion and collective action such that one might attend to the needs of compelled riders without, at the same time, creating free riders. If interest alignment were sufficient to avoid problems of collective action, however, the tragedy of the commons would just be speculative fiction.

In fact, addressing large-scale problems of collective action typically requires coercion of individuals. In this context, without the ability to collect mandatory fees, the union's ability to raise funds for its activities would be hindered by a collective-action problem. To that end, existing law concerning public-sector unions endorses a compromise between competing concerns that allows employees to pay an agency fee that applies only to certain union activities, such as wage and hour negotiations that do not involve political advocacy.<sup>132</sup>

We have no reason to believe that the named plaintiffs were insincere in their personal objection to any involvement with the teachers' union, but it

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<sup>128</sup> 136 S. Ct. 1083 (2016) (per curiam).

<sup>129</sup> Brief for the Petitioners at 1, *Friedrichs v. Cali. Teachers Ass'n*, 136 S. Ct. 1083 (2016) (No. 14-915), 2015 WL 5261564, at \*1. Petitioners argued that a scheme whereby "a state compels its public-school teachers to subsidize a particular viewpoint on political issues . . . cannot satisfy exacting scrutiny (or, indeed, any level of First Amendment review)." *Id.* at 10–11.

<sup>130</sup> *Friedrichs*, 136 S. Ct. at 1083.

<sup>131</sup> Transcript of Oral Argument at 43, *Friedrichs v. Cali. Teachers Ass'n*, 136 S. Ct. 1083 (2016) (No. 14-915), <http://www.scotusblog.com/case-files/cases/friedrichs-v-california-teachers-association/> [<https://perma.cc/9CR4-353Z>].

<sup>132</sup> See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234–36 (1977). The petitioners sought to overrule *Abood* and argued that there is effectively no such thing as non-political union activity. See Amy Howe, *Union Fees in Jeopardy: In Plain English*, SCOTUSBLOG (Jan. 11, 2016, 5:08 pm), <http://www.scotusblog.com/2016/01/union-fees-in-jeopardy-in-plain-english/> [<https://perma.cc/7R6F-BF6L>].

seems evident that the litigation was designed to inflict damage on public-sector unions, restricting their ability to achieve their objectives by hobbling them with a severe collective-action problem. At least until a new Justice is appointed to the Court, the legal status of non-membership fees will remain uncertain.<sup>133</sup> At bottom, the question is whether to preserve an existing tradeoff between the First Amendment interests of individual employees and the collective-action problems that bedevil public-sector unions whose activities benefit all employees regardless of whether they contribute. If the Court wishes to revisit the compromise position it endorsed almost forty years ago, it should begin by acknowledging that coercion and collective action are interrelated phenomena.

### B. *Picking a Path*

Collective coercion presents a choice between protecting individual autonomy and overriding it, and lawmakers need a reasoned basis for deciding which path to follow. This section argues that lawmakers should consider the nature of the values at stake—in particular, whether there is a single, agreed-upon objective and whether the choice implicates matters central to individual dignity and autonomy.<sup>134</sup> This section also argues that lawmakers should ask whether it is feasible to create a market to price the matter at issue.<sup>135</sup> These are related inquiries because the availability of a market solution will depend on the nature of the values at stake. In addition, a market analysis should take into account relevant externalities; if the recipients of an offer do not internalize important benefits or costs, there will be less reason to defer to their individual preferences.

#### 1. Values

To inquire into the values at stake in a case of collective coercion is to ask how much individual autonomy should matter. The more idiosyncratic and personal the issue, the more important it becomes to ensure that each affected individual has the freedom to make an uncoerced choice. By contrast, if what is at issue is how best to maximize some uncontroversial collective good, then selecting a decision maker becomes more of an empirical question: will indi-

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<sup>133</sup> *Supreme Court News: Supreme Court Deadlocks 4–4 on Agency Fees*, UNION CONT. L. BULL., (Quinlan Publ'g Grp., Bos., Mass.), May 2016 (“The National Right to Work Foundation said that it is litigating five other cases to eliminate requirements that nonmembers pay fees to unions. The Center for Individual Rights said that it would seek rehearing of the case after the Supreme Court once again has nine justices.”).

<sup>134</sup> See *infra* notes 136–145 and accompanying text.

<sup>135</sup> See *infra* notes 146–171 and accompanying text.

viduals do a better job of protecting their own interests or is a centralized, substitute decision maker well suited to help the members of a group achieve their joint objectives?

Plotted along a continuum, disaster buyouts appear closer to the paradigmatic case for individual choice whereas corporate tender offers seem to present a stronger case for a substituted decision maker. In other words, the issue of coercion seems more salient in the former case, and the difficulties of collective action seem more salient in the latter.

### *a. Buyouts*

In disaster buyouts, multiple values are likely to be implicated. Although some homeowners will view their property solely in economic terms as an investment, others are likely to have significant emotional attachments to the property, especially if it is used as their primary residence. In some cases, land may have been in the same family for generations and may be worth far more to that family than it would be to a neutral appraiser.

Given the strong and idiosyncratic values associated with home ownership, the response to a disaster buyout initiative seems necessarily to turn on individual choices that cannot easily be aggregated. For this reason, to the extent possible, it would seem preferable to respond to collective coercion by bolstering individual autonomy rather than by finding a sympathetic decision maker to solve the problem of collective action on behalf of all homeowners.

In addition, one could argue that it is not necessary for all homeowners to reach the same conclusion. Rather, each piece of property acquired for conversion to green space advances the goal of coastal protection by absorbing flood waters and by removing vulnerable property from harm's way. Thus, a few holdouts will not defeat the purpose of a buyout program.<sup>136</sup> By contrast, when the state seeks easements from property owners to protect sand dunes along a beachfront, even a single gap can render the entire program unworkable.<sup>137</sup>

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<sup>136</sup> On the other hand, as noted previously, a guaranteed back-end eminent domain proceeding would reduce the coerciveness of the offer. Perhaps a compromise position would give homeowners a continuing right to initiate a buyout proceeding for an extended but not indefinite period of time.

<sup>137</sup> In New Jersey, efforts along these lines in the wake of Superstorm Sandy have been contentious. See Tracey Samuelson, *Long Beach Posts Names of N.J. Shore Holdouts on Dune Easements*, NEWSWORKS (May 7, 2013), <http://www.newsworks.org/index.php/local/new-jersey/54476-long-beach-township-posts-names-of-dune-easement-holdouts> [<https://perma.cc/5G6B-L9RJ>].

### *b. Tender Offers*

For most shareholders, the value of a stock position in a public corporation is purely economic.<sup>138</sup> Shareholders do not ordinarily form emotional attachments to their equity position in a corporation.<sup>139</sup> Rather, they should be indifferent to company-specific risk and interested solely in maximizing the value of their investment. Although shareholders may have different time horizons for investment and it is sometimes said that there is pressure for managers to seek short-term gains over longer-term performance, these differences in perspective can be overstated as the current market price for stock is nothing more than the market's estimate of future earnings discounted to present value. In any case, regardless of time horizon, all investors share the goal of making money.

When shareholders invest in a corporation, they know that the board of directors has almost exclusive managerial authority.<sup>140</sup> Shareholders have very little voice in the management of corporate affairs.<sup>141</sup> Although they vote for directors and can sue derivatively on behalf of the corporation under limited circumstances, shareholders ordinarily express their disagreement with corporate policy by selling their stock.<sup>142</sup> Only in certain transactions involving the sale or restructuring of the corporation can shareholders dissent and demand

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<sup>138</sup> See Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 413 (2006) ("Shareholders invest in corporations primarily for economic gain."). In some cases, individuals with a social agenda have purchased stock in order to seek access to the corporation's proxy machinery. See *State ex rel. Pillsbury v. Honeywell, Inc.*, 191 N.W.2d 406, 408–09 (1971) (denying shareholder's request for corporate records in furtherance of plan to alert other shareholders to corporation's manufacture of fragmentation land mines). The courts' response to activist shareholders has reaffirmed the central purpose for investing: making money. See *id.* at 411 (holding that a stockholder is only permitted to inspect a company's stockholder ledger if she has a "proper purpose germane to [her] economic interest as a shareholder").

<sup>139</sup> The situation is very different in closely held, family-owned businesses. See Benjamin Means, *Nonmarket Values in Family Businesses*, 54 WM. & MARY L. REV. 1185, 1190–91 (2013) (observing that "business ownership can provide nonmonetary benefits to family members such as stable employment, status in the community, and agreeable working conditions"). In that context, though, hostile tender offers are practically unheard of. For one thing, the managers of the corporation are likely to be the shareholders themselves. Also, most closely held businesses put share-transfer restrictions in place that would prevent minority shareholders from selling to an unrelated third party without the permission of the other shareholders.

<sup>140</sup> See MODEL BUS. CORP. ACT § 8.01(b) (AM. BAR FOUND. 2003) ("All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed by or under the direction of, its board of directors . . .").

<sup>141</sup> See George S. Geis, *Shareholder Derivative Litigation and the Preclusion Problem*, 100 VA. L. REV. 261, 262 (2014) ("Shareholders are the residual owners of a company, but they do not collectively vote on every firm decision. Rather, they cede power to a small group of representatives who are entrusted to call most of the shots.").

<sup>142</sup> See *id.*

that their shares be appraised for fair value.<sup>143</sup> In appraisal proceedings, the sole question is the economic value of the stock.

Accordingly, there is reason to believe that shareholders would prefer the approach to regulating tender offers best calculated to maximize the economic return on their investment. Whether that means giving shareholders greater flexibility to tender their stock or allowing boards of directors to intervene may be debatable,<sup>144</sup> but it is not a question of leaving space for the idiosyncratic expression of shareholder values.<sup>145</sup>

## 2. Markets

Markets offer another perspective on the problem of collective coercion. To the extent it is possible to structure a well-functioning market in which individuals can make informed, voluntary decisions and assuming that the matter at issue can be priced,<sup>146</sup> then the appropriate role for law is to regulate the market. For example, we might investigate whether it would ameliorate coercion if market participants were given more time and information to make a decision or if barriers to entry were lowered to enable competing bids and so on. If, however, a market solution is not suitable because of intractable differences in power, information, or timing or because there are external costs and benefits for society that the market will ignore, then a more centralized decision-making mechanism may be preferable.

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<sup>143</sup> See Barry M. Wertheimer, *The Shareholders' Appraisal Remedy and How Courts Determine Fair Value*, 47 DUKE L.J. 613, 614 (1998) ("Every state corporate statute contains at least some form of appraisal remedy, yet the proper role the appraisal remedy should play in corporate law remains elusive." (citation omitted)).

<sup>144</sup> See, e.g., Kevin W. Barrett, Note, *Federal Limitations on Target Defensive Tactics: Applying Edgar v. Mite Corp. to the "Private Conduct" of Target Directors*, 64 WASH. U. L.Q. 1187, 1191 (1986) ("Takeover attempts implicate a fundamental issue of corporate governance—the distribution of power between the owners and managers of corporations. By allowing shareholders to oust corporate management through extra-corporate procedures, tender offers represent shareholders' most effective method of combating ineffective management. Target defensive tactics, however, often enable incumbent management to prevent the shareholders from considering a takeover bid altogether. Thus, the rules governing target defensive tactics play a critical role in regulating takeovers." (citations omitted)).

<sup>145</sup> Given the power of the board and the possibility that the board will not maximize value for shareholders but will instead entrench itself, tender offers may provide a valuable alternative. For this reason, courts and legislators hesitate to disable the mechanism and the market for corporate control entirely. Delaware's proportional review represents one influential approach to addressing these competing concerns. See *supra* notes 115–127 and accompanying text.

<sup>146</sup> Whether something should be traded on a market may include normative issues of commodification. See, e.g., MICHAEL J. SANDEL, *WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS* 6 (2012) ("Today, the logic of buying and selling no longer applies to material goods alone but increasingly governs the whole of life. It is time to ask whether we want to live this way.").

As applied to disaster buyouts and tender offers, a market-oriented analysis suggests a different answer to the problem of collective coercion than the values analysis in the preceding section.<sup>147</sup> In the case of disaster buyouts, it turns out that it is very difficult to create a true market and there are large externalities involved. By contrast, there is no reason in principle to believe that a robust market for corporate control cannot be created, though the centralized power of the board of directors might in some circumstances allow for greater bargaining leverage than shareholders could achieve on their own.

### a. Buyouts

An initial difficulty in creating a market for disaster buyouts is that the government is the sole player on the buyer side of the equation.<sup>148</sup> Compounding that problem, the government has an inescapable and pervasive role in defining and protecting the property rights that would be purchased. For example, property owners must comply with insurance requirements, building codes, and myriad other zoning rules that affect the cost of ownership and the extent of development rights.<sup>149</sup> These regulations will, of course, impact the economic value of the property at issue.<sup>150</sup>

Also, to the extent homeowners rely upon public protection, enjoying the private benefits of coastal living while socializing some of the costs, their use of property involves externalities that a market transaction would fail to capture. Therefore, without significant public intervention, unsafe, ecologically untenable development will go uncorrected.<sup>151</sup> Market signals are unlikely to

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<sup>147</sup> See *supra* notes 136–144 and accompanying text.

<sup>148</sup> By contrast, if a corporation receives a takeover offer that management believes is too low, management can seek to find another bidder who would be willing to pay more. Indeed, it would often violate the fiduciary obligations of management for them to pursue an acquisition with one buyer without testing the market.

<sup>149</sup> If the government were to substantially change the permitted uses for property, violating settled expectations, a property owner might bring a takings claim for compensation. See Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345, 350 (2014).

<sup>150</sup> Because the government plays a large role in establishing the baseline for individual choice, it will be very difficult to ascertain whether a government buyout offer has affected the baseline for choice in a manner that should be considered coercive. Cf. Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 918–19 (1987) (arguing that existing analyses of the baseline for state action have not adequately appreciated “whether there is a constitutional requirement of neutrality that commands preservation of the status quo as reflected in market outcomes, or instead whether the Constitution, recognizing the artifactual quality of the market allocation, permits and sometimes demands change”).

<sup>151</sup> Notably, “on average, the 11 coastline counties that were hit by 11 or more hurricanes between 1960 and 2008 increased in population by nearly 179 percent and had a housing unit increase of 255 percent.” STEVEN G. WILSON & THOMAS R. FISCHETTI, U.S. CENSUS BUREAU, COASTLINE POPULATION TRENDS IN THE UNITED STATES: 1960 TO 2008, at 20 (2010), <http://www.census.gov/prod/2010>

help, because, notwithstanding the risk of disaster, “[s]ocial, economic, and environmental factors continue to draw residents to coastline destinations.”<sup>152</sup>

Rather than retreat from the risk of disastrous flooding, landowners may seek to protect their investment with revetments, seawalls, bulwarks, dredged sand, and other forms of coastal armoring, regardless of the longer-term consequences.<sup>153</sup> In this regard, there is a problem of incentives: much of the cost of coastal protection and disaster response is effectively socialized.<sup>154</sup> Moreover, as a matter of basic moral and political obligation, society cannot ignore the plight of communities once they are affected by disaster; accordingly, those who live in vulnerable areas have reason to expect that the costs of disaster will be borne in part by taxpayers.<sup>155</sup>

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pubs/p25-1139.pdf [https://perma.cc/E35B-VXB9]. Thus, even repeated, serious disasters have not been enough to discourage development.

<sup>152</sup> ROBERT R.M. VERCHICK, *FACING CATASTROPHE: ENVIRONMENTAL ACTION FOR A POST-KATRINA WORLD* 28 (2010) (observing that people may choose to live near volcanoes or in floodplains because of the rich soil and other benefits: “There is always flood and pestilence, too, but for millennia the bargain has seemed worth it. That might be changing.”); WILSON & FISCHETTI, *supra* note 151, at 22.

<sup>153</sup> Coastal armoring endangers beaches that otherwise would drift inland. Instead, the sea scours everything behind the seawall, eventually eliminating the beach altogether. For a recent exception, see Jess Bidgood, *At a Cape Cod Landmark, a Strategic Retreat from the Ocean*, N.Y. TIMES (July 6, 2016), <http://www.nytimes.com/2016/07/07/us/at-a-cape-cod-landmark-a-strategic-retreat-from-the-ocean.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=second-column-region&region=top-news&WT.nav=top-news> [https://perma.cc/32DC-JHPS] (“‘We’re retreating,’ said George E. Price Jr., the superintendent of the Cape Cod National Seashore, which is run by the National Park Service. Other facilities at the beach have already been rebuilt farther back from the water.”).

<sup>154</sup> For instance, Reuters reports that a prominent politician was able to circumvent zoning restrictions in order to construct a beachfront vacation home in an area subject to significant erosion; then, given the value of his house and others along the same strand, the government’s cost-benefit analysis supported the expenditure of millions of dollars to artificially pump sand onto the beach, a temporary solution at best. Deborah J. Nelson et al., *Against the Tide: Why Americans Are Flocking to Their Sinking Shores Even as the Risks Mount in WATER’S EDGE: THE CRISIS OF RISING SEA LEVELS*, REUTERS (Sept. 17, 2014), <http://www.reuters.com/investigates/special-report/waters-edge-the-crisis-of-rising-sea-levels/#article-2-against-the-tide> [https://perma.cc/ZA2D-SVQE]; see also Sammy Fretwell, *Resort’s Troubles Threaten to Erode SC Beach Law*, THE STATE (Columbia, S.C.) (Mar. 28, 2014, 9:12 PM), <http://www.thestate.com/news/politics-government/article13844657.html> [https://perma.cc/9K29-CLB8] (describing lobbying efforts of wealthy homeowners).

<sup>155</sup> Unfortunately, society’s commitment to provide aid seems strongest when those affected by disaster are already privileged. See VERCHICK, *supra* note 152, at 107 (“Across time and across borders, naturally triggered disasters are nearly always accompanied by patterns of unfair social distribution.”); see also Susan S. Kuo, *Disaster Tradeoffs: The Doubtful Case for Public Necessity*, 54 B.C. L. REV. 127, 181 (2013) (observing that there were proposals to protect Manhattan at the expense of less affluent boroughs in the aftermath of Hurricane Sandy). Nevertheless, the broader point holds true, especially because those who are privileged are more likely to have had a choice about where to live in the first place. Moreover, the nation’s horrified reaction to Hurricane Katrina suggests that leaving people to their fate is not considered an acceptable response to disaster. *But see* VERCHICK, *supra* note

Nor has the national flood insurance program succeeded in aligning local and national interests.<sup>156</sup> The policy rationale seemed inspired: the federal government would supply flood insurance at affordable rates no longer available from private insurers;<sup>157</sup> in exchange, individuals and communities would be required to undertake a variety of disaster mitigation steps.<sup>158</sup> By exceeding the minimum requirements, communities could lower the cost of their insurance.<sup>159</sup> Yet, although well intentioned, the mitigation requirements have not been met in many cases.<sup>160</sup> Also, because the insurance program is not actuarially sound—indeed, it exists precisely because no private insurer would cover the relevant risks—the principal effect seems to have been an increase in the moral hazard that arises when an individual can keep the benefits while outsourcing some of the costs of his or her activity.<sup>161</sup>

Thus, because the government is so pervasively involved in protecting coastal property and, in some cases, insuring it against loss, it is hard to imagine how disaster buyouts could be better assimilated to a market model. Also, because coastal land use creates externalities for society, some level of coercion may be appropriate. If, however, the goal of achieving sensible land use

152, at 151 (noting that some prominent commentators have argued that the federal government should have no role in disaster response).

<sup>156</sup> See National Flood Insurance Act of 1968, Pub. L. 90-448, 82 Stat. 572 (codified as amended at 42 U.S.C. §§ 4001–4131 (2012)).

<sup>157</sup> See 42 U.S.C. § 4001(b) (“[M]any factors have made it uneconomic for the private insurance industry alone to make flood insurance available to those in need . . . but [ ] a program of flood insurance with large-scale participation of the Federal Government . . . is feasible and can be initiated.”); MARK S. DORFMAN & DAVID A. CATHER, INTRODUCTION TO RISK MANAGEMENT & INSURANCE 43 (10th ed. 2012) (stating that insurers have difficulty calculating risks for extreme and undiversifiable events such as floods).

<sup>158</sup> See 42 U.S.C. § 4001(e) (“It is the further purpose of this chapter to . . . encourage State and local governments to make appropriate land use adjustments to constrict the development of land which is exposed to flood damage and minimize damage caused by flood losses . . .”).

<sup>159</sup> Sarah Fox, *This Is Adaptation: The Elimination of Subsidies Under the National Flood Insurance Program*, 39 COLUM. J. ENVTL. L. 205, 215–16 (2014) (describing “voluntary incentive system that offers community-wide discounts on insurance premiums in exchange for additional flood mitigation measures”).

<sup>160</sup> See, e.g., Beth Davidson, *How Quickly We Forget: The National Flood Insurance Program and Floodplain Development in Missouri*, 19 WASH. U. J.L. & POL’Y 365, 366 (2005) (discussing Missouri’s failure to generate sound land use under the National Flood Insurance Program).

<sup>161</sup> See Justin Gillis & Felicity Barringer, *As Coasts Rebuild and U.S. Pays, Repeatedly, the Critics Ask Why*, N.Y. TIMES (Nov. 18, 2012), [http://www.nytimes.com/2012/11/19/science/earth/as-coasts-rebuild-and-us-pays-again-critics-stop-to-ask-why.html?\\_r=0](http://www.nytimes.com/2012/11/19/science/earth/as-coasts-rebuild-and-us-pays-again-critics-stop-to-ask-why.html?_r=0) [<https://perma.cc/99YQ-KD8V>] (discussing the correlation between the availability of federal subsidies to rebuild disaster prone areas and “repetitive risk taking” in those areas). Recently, interest-group pressure caused Congress to back pedal on changes that would have taken costs into account in setting flood-insurance rates. See Alexander B. McDonnell, Note, *The Biggert-Waters Flood Insurance Reform Act of 2012: Temporarily Curtailed by the Homeowner Flood Insurance Act of 2014—a Respite to Forge an Enduring Correction to the National Flood Insurance Program Built on Virtuous Economic and Environmental Incentives*, 49 WASH. U. J.L. & POL’Y 235, 239–240 (2015).

overrides the individual preferences of property owners, society ought to be willing to acknowledge that policy choice rather than pretending that buyouts are “designed to give homeowners the ability to choose the best option for their individual situation.”<sup>162</sup>

### *b. Tender Offers*

When Congress sought to protect shareholders from coercive tender offers, it “relied primarily on disclosure to implement the purpose.”<sup>163</sup> Although the Williams Act does not preclude more intrusive state regulation of tender offers, the federal approach assumes that it is possible to create a functioning market for corporate control. To facilitate the market, the Williams Act requires offerors to disclose their intentions and to leave their bids open for at least twenty business days so that shareholders can proceed on an informed basis and so that another bidder can emerge.<sup>164</sup> The goal of the Williams Act is not to encourage or discourage takeovers but to enable shareholders to make that decision for themselves.<sup>165</sup>

State laws and judicial decisions that empower boards of directors to act as gatekeepers embody a more skeptical view of the operation of unimpeded markets. For example, New York’s business combination statute was “designed to discourage hostile corporate takeovers by limiting the ability of an individual or corporation acquiring shares in a New York corporation to ‘engage in any business combination’ with the target corporation for a period of five years unless the Board of Directors of the target corporation approves of the stock acquisition.”<sup>166</sup> According to this skeptical perspective, even a fully informed shareholder might make an unintelligent choice to sell—in which case, managers can protect value by blocking that choice.<sup>167</sup> The difference between shareholders and managers is not a matter of native intelligence but one of rational motivation. To the extent shareholders lack the incentive to acquire and pro-

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<sup>162</sup> New Jersey Press Release, *supra* note 87.

<sup>163</sup> *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 8 (1985).

<sup>164</sup> *See Oesterle, supra* note 2, at 217–18.

<sup>165</sup> *See* STEPHEN M. BAINBRIDGE, *CORPORATION LAW AND ECONOMICS* 654 (2002) (noting that the law was “focused primarily on disclosure and antifraud”). Professor Bainbridge observes that the disclosure rules work to the advantage of shareholders in particular takeover bids but, by raising the cost for potential acquirers, may reduce the overall level of takeover activity. *Id.* at 667–68 (noting uncertainty as to “whether diversified investors are better off with a rule that maximizes the control premium in a given case or a rule that maximizes the number of takeovers”).

<sup>166</sup> *Long Island Lighting Co. v. Cuomo*, 666 F. Supp. 370, 408 (N.D.N.Y. 1987) (citing N.Y. BUS. CORP. LAW § 912(b) (McKinney 1986)), *aff’d in part, vacated in part on other grounds*, 888 F.2d 230 (2d Cir. 1989).

<sup>167</sup> *See supra* notes 115–127 and accompanying text (critiquing Delaware’s doctrine of substantive coercion).

cess information, a corporation's managers may be better able to assess value.<sup>168</sup> Ultimately, the question is "who decides? The shareholders or, as with all other important policy questions, is it initially a decision for the board?"<sup>169</sup>

Whether or not the intervention of a corporation's managers can produce more value for shareholders than the unfettered operation of a market for corporate control is a difficult question. Among other things, it implicates the fundamental tension in corporate law between "authority and accountability."<sup>170</sup> If the question is whether the problem of collective coercion in tender offers requires a choice-substituting approach, however, the answer appears to be "no." As Delaware courts have acknowledged, an all-cash tender offer for all shares of a corporation that also promises to execute a back-end merger at the same price is not coercive.<sup>171</sup> From a market perspective, therefore, the choice-enhancing provisions of the Williams Act provide an adequate solution to the problem.

### CONCLUSION

When a collective-choice situation places coercive pressure on individual participants, the law's traditional protection of individual autonomy against coercion must be reconciled with its necessary role in resolving problems of collective action. On the one hand, the law might seek to remove coercion from the equation so that individuals are free to make their own decisions. On the other hand, the law might empower a central authority to decide the question, thereby solving a problem of collective action in order to maximize the group's shared interests.

The tension between these two approaches creates deep uncertainty for the regulation of collective-choice situations. It is palpable in the law's conflicted response to corporate takeover bids in that applicable federal and state laws simultaneously enhance and diminish shareholder choice. Elsewhere—for

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<sup>168</sup> See, e.g., Stephen M. Bainbridge, Responses, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1745 (2006) (arguing that many "corporate shareholders are rationally apathetic"). When large institutional investors take sizeable positions in a corporation, however, they may find reason to gather information and to seek to influence corporate decisions. See Lynn A. Stout, *The Mythical Benefits of Shareholder Control*, 93 VA. L. REV. 789, 807 (2007) (noting that present day "shareholders have much greater ability to act in concert and to influence boards as a result of a variety of developments that include the increasing clout of institutional investors like pension funds and mutual funds").

<sup>169</sup> BAINBRIDGE, *supra* note 165, at 693 ("Virtually all academic commentators insist on the former answer, while the Delaware courts persistently adhere to the latter.").

<sup>170</sup> *Id.* at 694; E. Norman Veasey, *The Defining Tension in Corporate Governance in America*, 52 BUS. LAW. 393, 394 (1997) (stating that "ownership issues . . . put corporate governance sternly to the test").

<sup>171</sup> *Air Prod. & Chems., Inc.*, 16 A.3d at 106–07.

example, the structure of government buyout programs, or the imposition of mandatory fees for nonunion employees—the intersection of coercion and collective choice may be overlooked altogether. By situating the literature on coercion in the context of offers that exploit collective-action problems, this Article proposes a unifying framework for identifying and remedying problems of collective coercion.

