

Vote Buying and Ballot Stuffing

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ABSTRACT

The value of a debt contract depends in part on the parties' ability to alter its terms. In practice, alterability is a product of the interaction of two items. The trade-offs entailed by contractually specified "voting" thresholds—majority, supermajority, unanimity—which determine how much debtholder consent is needed for one or another type of change, are reasonably well understood. Recent upheavals in restructuring practice have exposed, by contrast, the lack of a workable grasp (among practitioners and academics alike) of the other and equally consequential dimension of change, namely what debtors can do to procure the acquiescence that the relevant voting threshold demands.

This article offers a comprehensive account of the techniques of consent solicitation broadly construed. Our account consists of three novel contributions. First, we identify the features of a solicitation that can produce a "coercive" result and analyze the kinds and degrees of coercion embedded in several notable solicitation methods. Second, we show that the failure of standard contractual and other legal constraints to prohibit coercive solicitation methods altogether poses a puzzle: does current practice reflect a market failure or are coercive techniques efficient or at least value maximizing for the contracting parties? We conclude that economic considerations can justify some coercion but not the most coercive prevailing techniques and propose an approach to construing debt contracts that would restrain the most value-destructive solicitation methods without condemning longstanding and plausibly value-enhancing techniques.