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## Nonmarket Values in Family Businesses

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## NONMARKET VALUES IN FAMILY BUSINESSES

BENJAMIN MEANS\*

### ABSTRACT

*Despite the economic importance of family businesses, legal scholarship has often overlooked their distinctive character. Instead, scholars focus on the chosen form of business organization—partnership, corporation, LLC—and assume that the participants are economically rational actors who seek to maximize their individual preferences. This Article contends that family businesses are extensions of family relationships and that nonmarket values affect their goals and governance choices.*

*Just as family law scholars have shown that contract principles can be applied to regulate intimate relationships, corporate law scholars should recognize that the intimacy of family life often substitutes for arm's length bargaining in family businesses. Notably, although relationships of trust and loyalty can lower transaction costs, the strength of family ties offers an intrinsic benefit for family business participants apart from any economic return they may achieve.*

*When disputes arise in family businesses, courts have an indispensable role to play because the parties cannot anticipate and resolve all potential conflicts in advance. Like other business ventures, family businesses are long-term relational contracts. However, rather than seeking to supply the terms that would have been chosen by individuals who are disconnected from one another and economi-*

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*cally rational in their pursuit of their own advantage, the law should recognize the importance of shared family values relevant to the parties' expectations. Put differently, to respect private ordering, the law must respond to the ways that individuals actually choose to order their affairs.*

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## INTRODUCTION

Countless *New Yorker* cartoons trade on the incongruity of family life and the workplace. A husband looks across the kitchen table and says to his wife and four children, “I’ve called the family together to announce that, because of inflation, I’m going to have to let two of you go.”<sup>1</sup> A corporate executive asks an older employee, “How long have you been with our firm, Dad?”<sup>2</sup> At a board meeting, a man and woman announce to a stunned group of executives, “We’re not your real parent corporation.”<sup>3</sup>

In each cartoon, the humor depends on our awareness of a distinction between family relationships and business relationships.<sup>4</sup> Most families aspire to distribute roughly equal resources to their children,<sup>5</sup> to offer special protection to their most vulnerable members,<sup>6</sup> and to preserve their identity over time.<sup>7</sup> Although families engage in economic production, consumption, and exchange,<sup>8</sup>

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1. Joseph Farris, Cartoon, *NEW YORKER*, Dec. 2, 1974, at 42.

2. Gahan Wilson, Cartoon, *NEW YORKER*, Oct. 25, 2010, at 73.

3. Leo Cullum, Cartoon, *NEW YORKER*, July 5, 2004, at 78.

4. See Ivan Lansberg S., *Managing Human Resources in Family Firms: The Problem of Institutional Overlap*, *ORGANIZATIONAL DYNAMICS*, Summer 1983, at 39, 40 (describing families and businesses as “two qualitatively different social institutions”). However, the sharp segregation of working life and family life is culturally specific and relatively recent. See Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *HARV. L. REV.* 1497, 1499 (1983) (“In the early nineteenth century, as men’s work was largely removed to the factory while women’s work remained primarily in the home, there came to be a sharp dichotomy between ‘the home’ and ‘the [workaday] world.’” (alteration in original) (footnotes omitted)).

5. See Lansberg, *supra* note 4, at 42 (“In horizontal family relationships, such as the relationships among siblings, equality is the dominant fairness norm.”).

6. See *id.* at 40 (“[S]ocial relations in the family are structured to satisfy family members’ various developmental needs.”). Thus, “[t]he exchange of resources in the family is guided by implicit affective principles that focus ... on the needs and long-term well-being of the other, rather than on the specific value of the goods and services.” *Id.* at 42. The assumption that families respond to vulnerability may explain why legal theorists often focus on formal conceptions of equality that fail to account for “human dependency and vulnerability.” Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 *EMORY L.J.* 251, 263 (2010) (“The family is the mechanism by which we privatize, and thus hide dependency and its implications.”).

7. See Teresa J. Rothausen, *Management Work—Family Research and Work—Family Fit: Implications for Building Family Capital in Family Business*, 22 *FAM. BUS. REV.* 220, 226 (2009) (stating that “shared vision” is part of what constitutes a family).

8. See VIVIANA A. ZELIZER, *THE PURCHASE OF INTIMACY* 1-2 (2005).

family relationships are considered valuable for their own sake and not principally for their economic or other instrumental advantages.<sup>9</sup> By contrast, a traditional business relies on contracts negotiated at arm's length, aims to make a profit, and must identify and reward merit.<sup>10</sup> In a competitive market environment, businesses adapt to take advantage of new opportunities.<sup>11</sup> For investors, the business serves as a means to an end.<sup>12</sup>

In a family business,<sup>13</sup> however, the values associated with family life must coexist with the values of the marketplace.<sup>14</sup> For instance, when the junior employees in a business venture are also the children of the founders, family concerns become work concerns and vice versa.<sup>15</sup> Individuals cannot negotiate the distinct expectations associated with each environment simply by adopting one social identity when in the workplace with colleagues and another when at home with family.<sup>16</sup> Thus, a successful family business must find ways to mediate the tension between expectations rooted in family life and expectations inherent to the marketplace.<sup>17</sup>

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9. See ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 157 (1993).

10. Lansberg, *supra* note 4, at 42 (“[T]he norm of fairness that operates in the firm is based on the concept of merit.”).

11. See, e.g., Darian M. Ibrahim & D. Gordon Smith, *Entrepreneurs on Horseback: Reflections on the Organization of Law*, 50 ARIZ. L. REV. 71, 84 (2008) (defining entrepreneurship in terms of “new products or services, new ways of organizing, or new geographic markets”); Avishalom Tor, *The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy*, 101 MICH. L. REV. 482, 489 (2002) (“[C]urrent theories of entry assume that entrants are rational decisionmakers who will attempt entry only if it is profit maximizing.” (emphasis omitted)).

12. See Daniel J.H. Greenwood, *Fictional Shareholders: For Whom Are Corporate Managers Trustees, Revisited*, 69 S. CAL. L. REV. 1021, 1023 (1996) (“[W]hatever else shareholders may or may not want, every shareholder wants to make a profit and that is all that is really important for the operation of corporate law and, indeed, the corporation itself.”).

13. For an analysis of the boundaries of the family business, see *infra* Part II.A.

14. See, e.g., MANFRED F.R. KETS DE VRIES & RANDEL S. CARLOCK WITH ELIZABETH FLORENT-TREACY, *FAMILY BUSINESS ON THE COUCH: A PSYCHOLOGICAL PERSPECTIVE* 9 (2007) (“[I]n a business family, normal family goals may come into conflict with the business’s economic goals because an important theme within the family system is to meet the human and psychological needs of its members rather than to arrive at the best economic return.”).

15. See, e.g., *Orchard v. Covelli*, 590 F. Supp. 1548 (W.D. Pa. 1984); *Keating v. Keating*, No. 00749, 2003 WL 23213143 (Mass. Super. Ct. Oct. 3, 2003).

16. KELIN E. GERSICK ET AL., *GENERATION TO GENERATION: LIFE CYCLES OF THE FAMILY BUSINESS* 5 (1997) (“Problems arise because the same individuals have to fulfill obligations ... as parents and as professional managers.”).

17. See *id.*; TORSTEN M. PIEPER, *MECHANISMS TO ASSURE LONG-TERM FAMILY BUSINESS*

As long as these expectations align, the business and family both stand to benefit.<sup>18</sup> The strength and durability of family relationships can be harnessed to solve business problems.<sup>19</sup> For instance, family members might create or modify business roles without formal contracts and managers generally have the flexibility to pursue long-term opportunities at the expense of short-term profits.<sup>20</sup> In a pinch, family members will sometimes loan money to the business or agree to work without compensation.<sup>21</sup> Moreover, business ownership can provide nonmonetary benefits to family members such as stable employment, status in the community, and agreeable

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SURVIVAL 7 (2007); Lansberg, *supra* note 4, at 39-40.

18. For a discussion of value creation in family firms, see Michael Carney, *Corporate Governance and Competitive Advantage in Family-Controlled Firms*, 29 ENTREPRENEURSHIP THEORY & PRAC. 249 (2005). Until recently, scholars had been “skeptical, suggesting that factors such as altruism, nepotism, and weak risk-bearing attributes tend to harm the longevity and efficiency of the family enterprise.” *Id.* at 249. However, some studies indicate that higher levels of trust may permit more efficient management. *See id.* at 257-59.

19. In reciprocal social networks of trust and loyalty, the accumulated social capital “reduces transaction costs: ‘There is no need to spend time and money making sure that others will uphold their end of the arrangement or penalizing them if they don’t.’” Angela Harris, *Reforming Alone?*, 54 STAN. L. REV. 1449, 1458 (2002) (quoting ROBERT D. PUTNAM, BOWLING ALONE 288 (2000)) (reviewing DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION (2002)).

20. *See* AMY SCHUMAN ET AL., FAMILY BUSINESS AS PARADOX 2 (2010) (“[F]amily businesses ... have a longer time horizon than most nonfamily firms, as they view the business as crucial to perpetuating the family into future generations.”); *see also* Andrew Martin, *In Company Town, Cuts but No Layoffs*, N.Y. TIMES, Sept. 25, 2011, at BU10 (describing efforts by a family business to retain employees despite lower product demand and quoting the company’s president, a granddaughter of the founder: “You can’t cut your way to prosperity. You can’t grow if you are cutting your lifeblood—and that’s the skills and experience your work force delivers”).

21. *See, e.g.*, Emily Chamlee-Wright & Virgil Henry Storr, *Community Resilience in New Orleans East: Deploying the Cultural Toolkit Within a Vietnamese American Community*, in COMMUNITY DISASTER RECOVERY AND RESILIENCY 101, 115-16 (DeMond Shondell Miller & Jason David Rivera eds., 2011) (describing how a woman was able to restore her seafood processing business after Hurricane Katrina by living with her daughter and obtaining a “\$300,000 loan from another of her daughters and son-in-law, which was enough to buy cooling and freezing equipment to store the seafood”).

working conditions.<sup>22</sup> Indeed, some commentators celebrate family business as a model for creative, humane capitalism.<sup>23</sup>

However, the strengths of a family business are also potential weaknesses.<sup>24</sup> Over time, “conflicts manifest themselves in the form of normative contradictions whereby what is expected from individuals in terms of family principles often violates what is expected from them according to business principles.”<sup>25</sup> For example, the transfer of control from one generation to the next invites tension between the family norm of equal treatment and the business norm of meritocracy.<sup>26</sup> In a crisis, the close emotional bonds that once supported a family business can become obstacles to rational action.<sup>27</sup>

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22. If nonmonetary benefits can be valued in economic terms, a rational actor would pursue a family business venture if the total aggregate expected value exceeded the closest nonfamily substitute opportunity. Yet, as argued in Part II, family values and business values are sometimes incommensurable. See Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 796 (1994) (“Incommensurability occurs when the relevant goods cannot be aligned along a single metric without doing violence to our considered judgments about how these goods are best characterized.” (emphasis omitted)).

23. See Steven H. Hobbs & Fay Wilson Hobbs, *Family Businesses and the Business of Families: A Consideration of the Role of the Lawyer*, 4 TEX. WESLEYAN L. REV. 153, 158 (1998) (“Socially and culturally, the family business offers the opportunity to unify work and family concerns for the benefit of succeeding generations.”); see also ANDREA COLLI, *THE HISTORY OF FAMILY BUSINESS 1850-2000*, at 23 (2003) (describing without endorsing the view that the family firm “held out the prospect of a new production model—one much more creative and less impersonal, moulded by elements like friendship and kinship”).

24. See SCHUMAN ET AL., *supra* note 20, at 26 (“The family system and business system, by their very nature, are filled with potential conflicts.”).

25. Lansberg, *supra* note 4, at 40; see also SCHUMAN ET AL., *supra* note 20, at 21.

26. KETS DE VRIES ET AL., *supra* note 14, at 25 (“Unresolved personal conflicts, lack of trust, difficult interpersonal relationships, sibling rivalry, generational issues, the family’s demands on the business—any or all of these issues can affect a family firm’s success.”).

27. See, e.g., Lansberg, *supra* note 4, at 41 (“Founders often find themselves in the difficult situation of having to choose between either hiring (or firing) an incompetent relative or breaking up their relationship with some part of the family.”).



Siblings sue siblings;<sup>28</sup> children sue parents;<sup>29</sup> spouses divorce;<sup>30</sup> families and businesses fall apart.<sup>31</sup>

If family businesses in the United States were relatively rare or economically unimportant, a lack of attention to their distinctive features might be understandable. However, family businesses are a vital part of the economy: they are the clear majority of all businesses, employ about half the nation's workforce, and contribute a substantial amount to the nation's gross domestic product.<sup>32</sup> Small businesses often begin as entrepreneurial family ventures, and some of the nation's largest corporations are family controlled.<sup>33</sup>

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28. *Meiselman v. Meiselman*, 307 S.E.2d 551 (N.C. 1983) (finding possible shareholder oppression where one brother, the majority shareholder, had excluded his brother from participation in the business venture); *Morrison v. Gugle*, 755 N.E.2d 404 (Ohio Ct. App. 2001) (shareholder oppression dispute between twin sisters).

29. *Keating v. Keating*, No. 00749, 2003 WL 23213143, at \*1 (Mass. Super. Ct. Oct. 3, 2003) (noting that the dispute "pits father and daughter against son and vice versa in a lengthy internecine struggle for control of the administration of the family-run closely held food distribution business").

30. *Thrasher v. Thrasher*, 103 Cal. Rptr. 618, 620-21 (Ct. App. 1972) (withholding of dividends motivated by marital dispute).

31. Consider, for instance, the Haft family. See David J. Morrow, *Denouement of a Family Feud?*, N.Y. TIMES, June 20, 1999, at BU2. The father, Herbert H. Haft, founded Dart Drugs, a successful discount drugstore chain. *Id.* His children, Linda, Ronald, and Robert, joined the business, and Robert soon founded Crown Books, a chain of discount bookstores. *Id.* The combined business enterprises were highly profitable. *Id.* Yet, after a *Wall Street Journal* article reported that Robert was to assume command, Herbert saw a threat to his leadership, became "enraged," and used his controlling stake to oust Robert and install Ronald. *Id.* Robert sued for wrongful termination and eventually prevailed. *Id.* However, "[t]he rift didn't end with Robert's lawsuit. His parents divorced, and Herbert and Ronald soon parted ways over control of the company." *Id.*

32. See Dwight Drake, *Transitioning the Family Business*, 83 WASH. L. REV. 123, 125-26 (2008). The numbers vary, of course, depending on how we define family business. See *infra* Part II.A. Also, although the typical family business operates on a small scale, some of the largest enterprises in the nation and the world are family dominated. See, e.g., Lansberg, *supra* note 4, at 39 (noting that 35 percent of Fortune 500 companies are family owned or controlled); Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 IOWA L. REV. 1011, 1088-89 (2005) (discussing size and growth of Wal-Mart).

33. See Eric A. Chiappinelli, *Stories from Camp Automotive: Communicating the Importance of Family Dynamics to Corporate Law Students*, 34 GA. L. REV. 699, 700 (2000). Internationally, family businesses are even more prevalent. See, e.g., Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599 (2000).

Yet, the “study of family business is still relatively new.”<sup>34</sup> As one legal commentator has observed, “corporate law casebooks are astonishingly devoid of any systematic consideration of family dynamics.”<sup>35</sup> More broadly, “the family owned and controlled firm is either absent or treated as an exception ... [i]n prominent theories of the firm.”<sup>36</sup> The most straightforward explanation for the oversight is doctrinal: as a matter of business enterprise law, affective ties among shareholders are irrelevant; a family business, after all, may be closely held or publicly traded and may be organized as a partnership, corporation, or limited liability company (LLC).<sup>37</sup> Thus, despite extensive ongoing research in other disciplines, the study of family business for U.S. legal scholars has remained in large part the specialized province of estate planners and tax lawyers.<sup>38</sup>

The dearth of legal scholarship concerning family business governance may also reflect deeper methodological limitations. Corporate law scholars do not often pause to consider the influence of social relationships on governance choices; instead they ask how economically rational, autonomous investors would select appropriate default governance rules and bargain to protect their individual interests.<sup>39</sup> From this perspective, business entities are

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34. GERSICK ET AL., *supra* note 16, at 4; *see also* Susan Clark Muntean, *Analyzing the Dearth in Family Enterprise Research*, in THEORETICAL DEVELOPMENTS AND FUTURE RESEARCH IN FAMILY BUSINESS 3, 4 (Phillip H. Phan & John E. Butler eds., 2008) (“Given the dominance of family business enterprise, it is a puzzle that the study of family is rare in theoretical and empirical studies of corporations.”).

35. Chiappinelli, *supra* note 33, at 710. Chiappinelli found this neglect “surprising, in that many small businesses, and a few (though atypical) large ones, are owned and managed by a single family.” *Id.* at 700.

36. Muntean, *supra* note 34, at 4.

37. *See infra* Part I. Indeed family status makes only a single appearance in the Model Business Corporation Act as part of a broad definition of self-dealing transactions. *See* MODEL BUS. CORP. ACT ANN. § 8.60(1) (2011). The Model Act’s definition of an interested party includes “the director’s spouse[,] ... child, step child, grandchild, parent, step parent, grandparent, sibling, step sibling, half sibling, aunt, uncle, niece or nephew (or spouse of any thereof) of the director or of the director’s spouse.” *Id.* § 8.60(5)(i)-(ii). The definition also includes any “individual living in the same home as the director.” *Id.* § 8.60(5)(iii).

38. *See, e.g.*, Drake, *supra* note 32. For an argument that family businesses need more holistic advice, *see* Hobbs & Hobbs, *supra* note 23, at 154 (“[F]amily business law [is] a unique specialty with emerging practice parameters.”). For a recent article focusing on the “dual-role fiduciary” in the family business context, in which a family trustee is also a business manager, *see* Karen E. Boxx, *Too Many Tiaras: Conflicting Fiduciary Duties in the Family-Owned Business Context*, 49 HOUS. L. REV. 233 (2012).

39. *See* FRANK H. EASTERBROOK & DANIEL R. FISCHER, THE ECONOMIC STRUCTURE OF

fundamentally contractual.<sup>40</sup> To the extent that family relationships intrude upon the rational actor's solipsistic domain, they are perceived in economic terms as a trust mechanism that may substitute for ex ante bargaining, lowering the transaction costs of investment.<sup>41</sup>

To be sure, family relationships can lower transaction costs, but this is not the whole story; the rational-actor model of standard law and economics lacks the conceptual resources necessary to fully appreciate the nature of private ordering within a family business. This Article contends that family businesses are an extension of family relationships, in which the participants find intrinsic and not merely instrumental value.<sup>42</sup> Whether organized as partnerships, corporations, or LLCs, family firms are economic institutions embedded in a context of family social roles and values.<sup>43</sup> In interpret-

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CORPORATE LAW 232 (1991) ("Investors in any venture are concerned about the possibility that the actions of others will reduce their return. Those who attempt to attract other people's money have incentives to adopt governance mechanisms that respond to potential investors' concerns."). Even when standard economic analysis examines social phenomena, it posits individually rational, utility-maximizing explanations. *See, e.g.*, GARY S. BECKER & KEVIN M. MURPHY, SOCIAL ECONOMICS 5 (2000) (contending that "social forces" can be incorporated into "rational choice analysis").

40. *See* Michael D. Klausner, *The Contractarian Theory of Corporate Law: A Generation Later*, 31 J. CORP. L. 779, 780 (2006) ("The corporate contract consists of the terms of a corporation's charter and the corporate law the firm selects by virtue of incorporating in a particular state."). Further, as Professor Klausner explains, the contractarian theory "implies a theory of the role of corporate law: corporate law should merely provide a set of default rules." *Id.* Thus, contractarian scholars are those who "view corporate law as simply a modest extension of contract law." John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1619 (1989).

41. *See* EASTERBROOK & FISCHER, *supra* note 39 ("[I]f family-owned ventures reduce the agency costs of management, there will be gains for all to share.").

42. The family is, among other things, a system that connects individuals and structures their experiences. *See, e.g.*, DAVID BORK, FAMILY BUSINESS, RISKY BUSINESS 26 (1986) ("A systems concept sees what is going on in the individual as inseparable from the family network of relationships in which the individual is embedded, the emotional processes in that system, and the way the system was balanced before symptoms appeared.").

43. For a general discussion of how economic institutions are embedded in social context, see NEIL FLIGSTEIN, THE ARCHITECTURE OF MARKETS: AN ECONOMIC SOCIOLOGY OF TWENTY-FIRST-CENTURY CAPITALIST SOCIETIES (2001). Of course, families are themselves a way of structuring the use of economic resources. *See* Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 493 (2005) ("Economic exchange is not foreign to intimate relations, either as a matter of first principles or as a positive matter of legal regulation. One of the primary ways that the law constitutes intimate relations *as intimate* is by regulating how economic resources are exchanged within them.").

ing the parties' business contract, social context has explanatory power and deserves normative weight. In short, family status matters.<sup>44</sup>

The Article's argument has four parts. Part I summarizes the widely accepted view that corporate law is fundamentally contractual and the application of that view to typical governance conflicts in close corporations and LLCs. Part II argues that the standard contractual theory fails to adequately address potential conflicts in family businesses because it relies upon an impoverished theory of human behavior. Part III contends that if contract principles can regulate intimate relationships,<sup>45</sup> as some family law scholars have asserted, corporate law scholars should likewise recognize that intimacy can substitute for arm's length contracting in family businesses, affecting the goals family businesses set and the methods they adopt to achieve them. Part IV asserts that when conflicts arise in a family business, courts should give weight to shared family values relevant to the parties' expectations. Although some might object that recognizing overlapping value systems creates indeterminacy and thus undermines the effectiveness of private ordering, the opposite is true—a clearer appreciation of the family and business values at stake would help courts respect the parties' actual choices.

### I. CORPORATE LAW'S CONTRACTARIAN FRAMEWORK

Modern corporate law scholarship reflects the profound influence of law and economics.<sup>46</sup> Among its advantages, economic analysis offers a sophisticated model for analyzing and predicting behavior,

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44. Other scholars have recently begun to explore the relevance of family relationships across traditional legal categories. See, e.g., Alafair S. Burke, *When Family Matters*, 119 YALE L.J. 1210, 1212-13 (2010) (reviewing DAN MARKEL ET AL., *PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES* (2009)); Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2 (2006).

45. See, e.g., Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 82 (2001) ("Business models are free of the antiquated notions of status, morality, and biological relation that have hampered family law's ability to adapt with the times."); Neil G. Williams, *What to Do When There's No "I Do": A Model for Awarding Damages Under Promissory Estoppel*, 70 WASH. L. REV. 1019, 1047 (1995) ("Modern marriages are ... tantamount to contractual relationships.").

46. See generally STEPHEN M. BAINBRIDGE, *CORPORATION LAW AND ECONOMICS* (2002).

and can inform the design of legal rules and institutions.<sup>47</sup> Some legal scholars further use economics to explore normative goals.<sup>48</sup> Part I.A summarizes the law and economics view that business organization laws provide coherent sets of default rules that economically rational individuals can choose among and modify or supplement as necessary to advance specific goals. Using this framework, Part I.B describes minority shareholder oppression, the classic governance problem in closely held businesses, as an issue of contractual interpretation and enforcement.

### A. *The Corporate Contract*

From the standpoint of law and economics, corporations and other forms of business organization are best understood as a nexus of contracts organizing production within the firm, as well as with external suppliers and customers.<sup>49</sup> The arrangements are presumed to be voluntary and, at least in an economic sense, contractual.<sup>50</sup> First, state laws provide a variety of different entity choices, each with its own coherent set of default rules.<sup>51</sup> Second, rational

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47. See, e.g., Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 13 (1960) (“Judges have to decide on legal liability but this should not confuse economists about the nature of the economic problem involved.”).

48. See, e.g., LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713 (1996).

49. See BAINBRIDGE, *supra* note 46, at 8; Steven N.S. Cheung, *The Contractual Nature of the Firm*, 26 J.L. & ECON. 1, 10 (1983); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310-11 (1976); Lewis A. Kornhauser, *The Nexus of Contracts Approach to Corporations: A Comment on Easterbrook and Fischel*, 89 COLUM. L. REV. 1449, 1457 (1989); Jonathan R. Macey, *Fiduciary Duties as Residual Claims: Obligations to Nonshareholder Constituencies from a Theory of the Firm Perspective*, 84 CORNELL L. REV. 1266, 1266 (1999) (“[A]ccording to the law and economics perspective that the nexus-of-contracts approach to corporate law exemplifies, one should view the corporation as a ‘complex set of explicit and implicit contracts.’” (quoting Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1418 (1989))). The newer LLC form may prove especially conducive to contractual modification. See, e.g., DEL. CODE ANN. tit. 6, § 18-1101(b) (West 2012) (“It is the policy of this chapter to give the maximum effect to the principle of freedom of contract.”).

50. See Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697, 698 (1990) (“[D]ifficulty is presented by the fact that contractarian theorists to some extent use the idea of contract metaphorically.”).

51. See Larry E. Ribstein, *Why Corporations?*, 1 BERKELEY BUS. L.J. 183, 232 (2004) (contending that choice of entity form is part of contractual freedom in business law).

individuals seeking to maximize the value of their investment may negotiate modifications to the default rules.<sup>52</sup> Corporate law rules, then, are mostly “trivial” because they either track what the parties would have negotiated or are discarded in favor of the parties’ actual preferences.<sup>53</sup>

If business organizations are contracts entered into by economically rational individuals seeking to maximize their own advantage, it follows that family relationships among investors are not relevant to the corporate contract unless made an explicit part of the bargain. That is to say, the law largely ignores social connections among investors because, as in a classic economic market, “[t]he parties have no pre-contractual obligations to provide each other with the goods they exchange.”<sup>54</sup> The impersonal nature of “market relations ... defines a sphere of freedom from personal ties and obligations.”<sup>55</sup> As such, “[t]he market leaves its participants free to

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52. See EASTERBROOK & FISCHER, *supra* note 39, at 229 (“[I]t is essential to use contractual devices to keep people in a position to receive the return on their investment.”); David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1871 (1991) (“[I]t is generally feasible for the small number of shareholders in a close corporation to bargain among themselves.”). Of course, not all corporate law rules can be modified. See Melvin Aron Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461, 1487 (1989) (criticizing the contractarian view).

53. See Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542, 551-62 (1990). However, in some cases, entity rules are not merely a convenient substitute for private bargaining but a necessity in light of steep transaction costs. See, e.g., Henry Hansman et al., *Law and the Rise of the Firm*, 119 HARV. L. REV. 1335, 1340-41 (2006) (contending that laws shielding entity assets from the creditors of individual investors efficiently supplant private contracts that would otherwise have to be negotiated with each such creditor, not to mention the need to monitor fellow investors for opportunistic neglect of this obligation).

54. ANDERSON, *supra* note 9, at 145 (identifying the moral values associated with market exchange). To be clear, family members may choose to enter into a business together rather than with strangers, but this is simply one market choice among others, reflecting a preference that receives no more and no less weight than any other preference. The family relationship does not create any legal obligation to enter the business venture, and it does not change the nature of the rights and obligations assumed.

55. *Id.* Although the prototypical market exchange “can be completed so as to leave no unpaid debts on either side [and] leave the parties free to switch trading partners at any time,” *id.*, shareholders in close corporations typically lock in their capital and cannot automatically “exit” the transaction. See Edward B. Rock & Michael L. Wachter, *Waiting for the Omelet to Set: Match-Specific Assets and Minority Oppression in Close Corporations*, 24 J. CORP. L. 913, 916 (1999) (“[Absence of public markets] causes the parties to be locked into their investments to a much greater extent than in either the partnership or the publicly traded corporation.”). However, this too is the result of a voluntary agreement, the choice of

pursue their individual interests without considering others' interests. Each party to a market transaction is expected to take care of herself."<sup>56</sup>

The value of the contractarian model depends on its underlying assumption that individuals are economically rational in that they consult only their own preferences and pick the best strategy to advance those preferences.<sup>57</sup> Therefore, according to standard law and economics, "[r]ational individuals invest their human and money capital with a view to maximizing the value of such resources."<sup>58</sup> In selecting an investment, a rational actor "engages in an ongoing comparative search for the ... investments that promise the most attractive return on invested capital given the investor's taste for risk."<sup>59</sup>

Although presented as a single concept, the two elements of rational choice can be disaggregated. First, there is the proposition that individuals are capable of perfectly gathering and processing information so that their market interactions are the best evidence of their preferences and also the best avenue for securing the things that they value. Individuals neither overestimate nor underestimate risk, and they avoid mental shortcuts in favor of full analysis of each decision. Call this the "calculating machine" hypothesis. Perhaps

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form if nothing else, and serves as a valuable precommitment device. *See id.* It remains true that exit is the dominant mechanism. *See* ANDERSON, *supra* note 9, at 145 ("[Markets are] oriented to 'exit' rather than 'voice.'").

56. ANDERSON, *supra* note 9, at 145. Thus, if higher fiduciary obligations come with certain forms of business organization, they are voluntarily assumed and logically a part of the bargain rather than an external constraint upon it.

57. *See* BAINBRIDGE, *supra* note 46, at 23 ("[N]eoclassical economics is premised on rational choice theory, which posits an autonomous individual who makes rational choices that maximize his satisfactions."). A perfectly rational actor would gather the optimal amount of information and pick the course of action best designed to achieve the ends that she has selected. *See* JON ELSTER, EXPLAINING SOCIAL BEHAVIOR: MORE NUTS AND BOLTS FOR THE SOCIAL SCIENCES 191 (2007) ("[Rational choice theory requires that an] action must be optimal, given the beliefs; the beliefs must be as well supported as possible, given the evidence; and the evidence must result from an optimal investment in information gathering."); Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 865 (2003) ("The economic scholarship on contract law purports to assume that individuals are rational in the sense of neoclassical economics. Their preferences obey certain consistency requirements, and their cognitive capacity is infinite.").

58. Charles R. O'Kelley, Jr., *Filling Gaps in the Close Corporation Contract: A Transaction Cost Analysis*, 87 NW. U. L. REV. 216, 220 (1992).

59. *Id.* at 220 n.18.

because the claim is vulnerable to refutation, many criticisms of rational-choice economics involve the presentation of evidence that human beings are not rational in the same way that a thinking machine would be and, in fact, are systematically irrational.<sup>60</sup>

A second, distinct assumption is that individuals evaluate information and proceed to the best of their ability to maximize their own advantage.<sup>61</sup> Call this the “self-interested actor” hypothesis. The claim that individuals always act to further their own interests is the more broadly influential and largely nonfalsifiable aspect of rational-choice theory.<sup>62</sup> Even if individuals make predictable mistakes in the calculation of their own advantage, it could still be the case that they are motivated to pursue their own interests.<sup>63</sup> If so, the market’s normative framework still applies and family relationships have significance only if a rational individual can use them to lower contracting costs.<sup>64</sup>

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60. See CHOICES, VALUES, AND FRAMES (Daniel Kahneman & Amos Tversky eds., 2000); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 216 (1995); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 673 (1999).

61. See John Ferejohn, *Rationality and Interpretation: Parliamentary Elections in Early Stuart England*, in THE ECONOMIC APPROACH TO POLITICS 279, 281 (Kristin Renwick Monroe ed., 1991) (“[R]ational choice theorists are committed to a principle of universality: (all) agents act always to maximize their well-being as they understand it.”).

62. The proposition is tautological and therefore nonfalsifiable in the sense that any goal can be described in self-interested terms, however badly that mischaracterizes the subjective understanding of the individual. A soldier who sacrifices his life to save fellow soldiers could be said to have a preference for heroism, self-sacrifice, or the well-being of his fellow soldiers that exceeds the marginal utility of his continued existence. However, to describe the sacrifice as the end product of an internal cost-benefit analysis is to betray very little understanding of the particular deed and of human motivation in general. Consider, for instance, an account of First Lieutenant Jonathan Brostrom’s bravery: “[H]e had chosen to leave a place of relative safety, braving intense fire, and had run ... uphill toward the most perilous point of the fight. A man does such a thing out of loyalty so consuming that it entirely crowds out consideration of self.” Mark Bowden, *Echoes from a Distant Battlefield*, VANITY FAIR, Dec. 2011, at 214.

63. See OLIVER E. WILLIAMSON, THE MECHANISMS OF GOVERNANCE 8 (1996) (“[T]ransaction cost economics subscribes to and works out of what I see to be the core commitments of orthodoxy, namely, the combination of a ‘rational spirit’ with a ‘systems’ perspective.”). For instance, with respect to “bounded rationality,” in which intentions of rationality fall short, the key insight is that parties can take incompleteness into account. *Id.* at 9.

64. See EASTERBROOK & FISCHER, *supra* note 39, at 229 (“Participants in closely held corporations frequently have familial or other personal relations in addition to their business dealings. The continuous and nonpecuniary nature of these relationships reduces agency problems.”). For instance, “[t]he bond between parents and children ... constrains conflicts of interest.” *Id.* Accordingly, “some of the famous cases dealing with closely held corporations



### *B. The Role of Judicial Monitoring*

If corporations are contractual, then the role of the courts is to resolve business disputes by identifying and enforcing the parties' bargain.<sup>65</sup> According to this view, courts provide an oversight mechanism but should not adjust the parties' rights in the name of fairness, fiduciary duty, or any other concept external to the parties' contractual relationship. Thus, a key question is whether a court can go beyond the literal terms of the parties' agreement as memorialized in various corporate documents, and, if so, what additional evidence or arguments might sway the court.

For instance, minority shareholders in close corporations are vulnerable to the risk that the majority owners will abuse their control to take disproportionate value from the business, sometimes freezing out minority shareholders from any economic benefit.<sup>66</sup> The economic structure of the problem is clear: in a close corporation, there are relatively few shareholders, no publicly traded shares, and typically direct shareholder management.<sup>67</sup> Although many close corporations operate by consensus, majority owners retain the formal power to appoint the board of directors. Mistreated minority shareholders cannot exit and recover the value of their investment because the shares are not publicly traded and no rational investor would pay for the shares of a frozen-out minority.<sup>68</sup> With no market

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involve situations where these informal bonds have broken down as a result of death, divorce, or retirement of the patriarch." *Id.* at 229-30.

65. See Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 395 (2003) ("[So long as the parties involved] are motivated to act in their own interests, bargain freely, and internalize the costs and benefits of the deal, enforcing contractual choice produces 'Pareto' wealth maximization."). This bargain-enforcement approach applies even in the absence of a bargain in fact as to a disputed issue. See EASTERBROOK & FISCHER, *supra* note 39, at 245 ("If a court is unavoidably entwined in a dispute, it must decide what the parties would have agreed to had they written a contract resolving all contingencies."); see also Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 89-90 (1989).

66. Similar control problems arise in the LLC. See Sandra K. Miller, *The Role of the Court in Balancing Contractual Freedom with the Need for Mandatory Constraints on Opportunistic and Abusive Conduct in the LLC*, 152 U. PA. L. REV. 1609, 1629 (2004).

67. See 1 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL AND THOMPSON'S CLOSE CORPORATIONS AND LLCs § 1:2, at 1-6, 1-9 (rev. 3d ed. 2012).

68. See *Nixon v. Blackwell*, 626 A.2d 1366, 1379 (Del. 1993) ("[T]here is no market and no market valuation."); *Donahue v. Rodd Electrotyping Co. of New Eng.*, 328 N.E.2d 505, 514 (Mass. 1975) ("In a large public corporation, the oppressed or dissident minority stockholder

protections readily available, minority investors who have not negotiated employment agreements, buy-sell provisions, or other contractual alternatives must depend on the willingness of courts to intervene and remedy oppression.

Yet, in cases of shareholder oppression, courts are asked to protect minority shareholders who failed to negotiate adequately to protect their own interests. At first blush, intervention to provide special relief for minority shareholders who could have bargained for protection against majority opportunism appears inconsistent with a rational-choice, economic model of corporate governance, and some courts and scholars reject it on precisely this ground.<sup>69</sup> Nevertheless, the judicial role may be reconcilable with a thoroughly economic approach to contract. In particular, negotiating a long-term business contract involves significant costs. Therefore, the right question to ask is not whether private bargaining could have anticipated and resolved a dispute but whether the cost of such bargaining would have exceeded its likely benefit.

Rational actors take transaction costs into account and will proceed without a fully specified bargain when the anticipated length and complexity of the relationship make a complete contract unrealistic.<sup>70</sup> At the same time, rational actors expect others to act

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could sell his stock in order to extricate some of his invested capital. By definition, this market is not available for shares in the close corporation.”)

69. See *Nixon*, 626 A.2d at 1380 (“It would do violence to normal corporate practice ... to fashion an ad hoc ruling which would result in a court-imposed stockholder buy-out for which the parties had not contracted.”); Rock & Wachter, *supra* note 55, at 915 (asking “what, if anything, the courts should do for the minority shareholders in cases where the parties have not provided for the problem by contract” and stating as a “basic answer ... that courts should not do anything except enforce the participants’ contracts and vigorously prevent non pro rata distributions to shareholders”).

70. Even strict defenders of law and economics admit that complete bargains are often impossible. See EASTERBROOK & FISCHER, *supra* note 39, at 34 (“Even when they work through all the issues they expect to arise, [venturers] are apt to miss something. All sorts of complexities will arise later.”); George G. Triantis, *Financial Contract Design in the World of Venture Capital*, 68 U. CHI. L. REV. 305, 307 (2001) (reviewing PAUL GOMPERS & JOSH LERNER, *THE VENTURE CAPITAL CYCLE* (1999)) (identifying information and agency problems that prevent parties from reaching complete financial contracts). One difficulty with this argument, if extended to support a robust doctrine of shareholder oppression, is that certain protections—such as buy-sell agreements—ought not to be cost prohibitive. Yet, they are not used as often as might be expected given the lack of exit rights in a close corporation. See Paul G. Mahoney, *Trust and Opportunism in Close Corporations*, in CONCENTRATED CORPORATE OWNERSHIP 177, 189 (Randall K. Morck ed., 2000) (noting that although “[t]here is no large-

opportunistically and will not invest in a venture at all unless some alternative form of protection exists.<sup>71</sup> Thus, corporate law rules that constrain opportunism may be economically efficient apart from any equitable goals they serve.<sup>72</sup> Judicial monitoring is not necessarily an exception to principles of contractual ordering but only a further recognition that in a market, “[e]ach party values the other only instrumentally, not intrinsically.”<sup>73</sup>

As one scholar explains, judicial monitoring may actually further the parties’ own intentions even though it involves intervention in the governance rules that would otherwise apply by default:

The strategy is consistent with courts’ behavior faced with long-term contracts in which it is prohibitively costly to specify the parties’ required actions in all states. Legal scholars often call these transactions relational contracts. Close corporations fit the paradigm because the parties’ failure to build in specific protections against the majority appropriating wealth from the minority is plausibly a result, not of their desire to permit such appropriation, but rather of the prohibitive cost of writing a contract to achieve that result. To the extent that courts can supply implicit contract terms that are consistent with the parties’ preferences, they can reduce the cost of forming close corporations.<sup>74</sup>

This is not, however, an open-ended invitation to courts to rewrite the parties’ bargain—after all, most matters not specifically addressed in shareholder agreements are committed to the default majoritarian rules of corporate law.<sup>75</sup> Only in an exceptional case

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sample evidence on the extent to which shareholders in closely held corporations bargain for buyout rights[,] [i]t is widely believed ... that they do so rarely”).

71. See GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 14 (1976) (“[Individuals] maximize their utility from a stable set of preferences and accumulate an optimal amount of information and other inputs in a variety of markets.”).

72. See JONATHAN R. MACEY, *CORPORATE GOVERNANCE* 22 (2008) (“Fiduciary duties are part of the contractual nature of the corporation and exist to fill in the blanks and inevitable oversights in the actual contracts used by business organizations.”).

73. ANDERSON, *supra* note 9, at 154 (distinguishing intimate sexual relationships from prostitution on the basis of reciprocity, a norm that cannot be fully commodified).

74. Mahoney, *supra* note 70, at 193 (emphasis omitted) (internal citation omitted).

75. See O’Kelley, *supra* note 58, at 220.

involving apparent abuse of control will a court supply a term that the parties chose not to include.<sup>76</sup>

Whether one accepts the transaction-cost story as a satisfactory justification for minority shareholder oppression doctrine or takes a harder line and advocates letting minority shareholders lie in the bed that they have made for themselves, family businesses do not require separate attention under a law and economics approach. Contracts can concern economic or noneconomic objectives, but the contractarian model assumes that investors are rational actors who pursue individual preferences rather than collective goals.<sup>77</sup> Further, even though noneconomic goals can be the subject of contract, the overriding focus is generally assumed to be a maximum return on investment, so that family businesses are just one possible choice among others, all of which can be measured and compared along the same economic metric.<sup>78</sup>

## II. FAMILY BUSINESS AS EMBEDDED ECONOMIC INSTITUTION

This Part contends that the rational-actor model effectively excludes an entire dimension of moral concern—family values—that is integral to many family businesses and no less important than wealth maximization for the long-term health of society. Part II.A

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76. It is important to appreciate that minority shareholder oppression almost always involves extreme facts, in which the minority investor's stake has been reduced effectively to nothing. Such cases are very different than ordinary disagreements about business strategy that are committed to management discretion.

77. See *supra* Part I.A. Of course, even when family businesses are not at issue, business decision making may fall well short of the rational-choice model. See Donald C. Langevoort, *The SEC, Retail Investors, and the Institutionalization of the Securities Markets*, 95 VA. L. REV. 1025, 1045 (2009) (“As a general matter, ... studies support the idea that investors act less than fully rationally with enough frequency to cause concern.”); Tor, *supra* note 11, at 489-90.

78. See EASTERBROOK & FISCHER, *supra* note 39, at 231 (“[I]t is a mistake to conclude that shareholders in closely held corporations face unique risks of oppression, just as it is wrong to argue that shareholders in publicly held corporations face unique risks of exploitation because of the separation of ownership and control. Each organizational form presents its own problems, for which people have designed different mechanisms of control. At the margin the problems must be equally severe, the mechanisms equally effective—were it otherwise, investors would transfer their money from one form to the other until the marginal equality condition was satisfied. Because the world contains so many different investment vehicles, none will offer distinctively better chances of return when people can select and shift among them.”).

defines family businesses as entities in which a single family has the power to appoint key managers and at least two family members actively participate in management or oversight.<sup>79</sup> Part II.B argues that families and businesses have distinct value systems and uses a three-circle model to specify the overlapping values and social identities that follow from the possibilities of family membership, ownership, and active management of the business venture. Part II.C develops a typology of conflict in family businesses.

### *A. Defining Family Business*

The traditional corporate model assumes diffuse share ownership with centralized management,<sup>80</sup> and yet “[f]amily dominated businesses comprise more than 80 percent of U.S. enterprises, employ more than 50 percent of the nation’s workforce, and account for the bulk ... of America’s gross domestic product.”<sup>81</sup> Of course, the precise economic impact of family business depends on what we mean by family business, and no single definition has been established.<sup>82</sup> Even assuming the narrowest plausible definition, however, the absence of legal scholarship concerning the governance needs of family businesses cannot be explained by their lack of economic importance.<sup>83</sup>

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79. Although multifamily businesses likely share many similar features, they are beyond the scope of this Article. Nor do I attempt to ascertain the point at which different branches of a single family might diverge to the point where it would be more accurate to characterize a business as multifamily.

80. See generally ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 66 (rev. ed. 1967); Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 *STAN. L. REV.* 127, 149-50 (1999).

81. DWIGHT DRAKE, *BUSINESS PLANNING: CLOSELY HELD ENTERPRISES* 274 (2d ed. 2008); see also ERNESTO J. POZA, *FAMILY BUSINESS* 1 (3d ed. 2004).

82. See COLLI, *supra* note 23, at 8 (“Contrary to the relatively easy definition of big business and of the modern managerial corporation, it is not as simple to delineate the boundaries and features of the family business, even from a ‘residual’ perspective.”); Melissa Carey Shanker & Joseph H. Astrachan, *Myths and Realities: Family Businesses’ Contribution to the US Economy—A Framework for Assessing Family Business Statistics*, 9 *FAM. BUS. REV.* 107, 107 (1996).

83. See Muntean, *supra* note 34, at 5 (“Published scholarly work that significantly understates the dominance of family firms in this country aggravates the perception that large family controlled firms are a rare exception in the United States, albeit prominent elsewhere.”).

This Article adopts a relatively broad definition of family business that contains two elements. First, the family must have the ability to control or substantially influence business decisions. Typically, this would mean the ability to appoint top management. Depending on the governance structure, a family might have control even without a majority ownership stake. For instance, through the use of different classes of stock, a family could retain control of a business while allowing public investment.<sup>84</sup> Further, while direct participation of family in management or on the board of directors is the more usual situation, a family business could retain professional managers without losing its distinctive status—those managers still need to account for the special requirements of family owners and, ultimately, serve at the pleasure of family owners.

Second, there must be at least two family members who own a stake in the business or participate in its operation. Without this qualification, all sole proprietorships would count as family businesses. Yet, any reasonable understanding of family business requires something more than the fact that a business owner is also a member of a family. For instance, governance conflicts in family businesses often turn on a tension between family and work values—when what is owed depends on whether one stands in a family or business relation. If only one family member were involved in the business, other family members would have no greater or lesser an expectancy in the business than in any other valuable asset held by that family member.<sup>85</sup>

Stricter definitions of family business sometimes require either the involvement of more than one generation or an intention to pass the business on to succeeding generations.<sup>86</sup> These factors can cement the identification of a family business but are not essential.

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84. For a recent article addressing issues of family control in the context of publicly held corporations, see Deborah A. DeMott, *Guests at the Table?: Independent Directors in Family-Influenced Public Companies*, 33 J. CORP. L. 819 (2008).

85. Notably, a family member may be involved in a family business without any formal ownership stake. For instance, a spouse or child may assist in the development of a business venture without receiving any shares. For discussion of standing problems that informal share ownership records can create, see *infra* Part IV.C.1.

86. See Danny Miller & Isabelle Le Breton-Miller, *Challenge Versus Advantage in Family Business*, STRATEGIC ORG., Feb. 2003, at 127 (defining family firm as “one in which a family has enough ownership to determine the composition of the board, where the CEO and at least one other top executive is a family member, and where the intent is to pass the firm on to the next generation”).

For instance, if multiple generations were deemed necessary, a business owned and operated jointly by a married couple would not qualify as a family business, even though the co-owners have overlapping business and family obligations to one another. The definition, based on an intention to maintain family ownership, captures something important but could be difficult to assess. Also, even assuming perfect information, the test seems too restrictive—a business might be run with substantial family involvement, consistent with family values, and for the benefit of family, and yet the founder might reserve judgment as to whether it would best serve the interests of the family to sell the business or pass it down to a next generation of family owners.

Finally, any definition of family business presupposes a definition of family.<sup>87</sup> The scope of recognized kinship ties varies across cultures.<sup>88</sup> However, for purposes of this Article's focus on family business governance, what matters is not so much a formal definition of family but whether the business participants understand themselves to be members of a family.<sup>89</sup> In the first generation, the key individuals will usually be part of the same immediate family. If the business survives to a second generation, there will often be an association of siblings. By the third generation, many family businesses are owned by a consortium of cousins. Thus, for present purposes, there is no need to consider the boundaries of family life,

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87. According to one scholar, a family is a "patterned system to distribute the obligations for dependent individuals (children and the elderly)." Steven L. Nock, *Time and Gender in Marriage*, 86 VA. L. REV. 1971, 1972 (2000). However, the boundaries of family life can be difficult to ascertain. See generally Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269 (1991); Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833 (2007).

88. See MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH* 63 (2004) ("[I]f the family is constructed through interaction with the state and society, the family cannot be posited as a 'natural' entity with a form that is constant over time and culture.>").

89. In other words, it is not so much a literal test of kinship; rather, it is a measurement of the boundaries of reciprocal obligations to cooperate and to provide mutual support. One scholar observes that there may be at least a rough analogy between boundaries of cooperation in a family and the make-or-buy decision that forms the boundary between firms and markets. See Saul Levmore, *Competition and Cooperation*, 97 MICH. L. REV. 216, 219-20 (1998). Although beyond the scope of this Article, it might be interesting to develop a conception of boundaries that could shed light on family businesses as a locus of market and nonmarket cooperation.

and we may assume that it is possible to identify a distinct group of family businesses.<sup>90</sup>

### *B. Overlapping Values*

Family businesses present distinctive challenges because they combine the values and expectations of the workplace with more intimate family bonds. Before industrialization, when many people lived and worked on family farms, there was little distance between home and work, both literally and figuratively.<sup>91</sup> The modern workplace, however, refers not only to a physical location, but also a distinct culture with its own language, expected behavior, and value system.<sup>92</sup> In the context of family businesses, workplace values and family values interact in complex ways, and an analysis of the law's application to such businesses should take this interaction into account.

#### *1. Social Identity Theory*

According to social identity theory, people use social roles to “categorize themselves and others as a means of ordering the social environment and locating themselves and others within it.”<sup>93</sup> Thus,

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90. Professor Muntean concludes that many definitions of family business seem to be “unnecessarily strict.” Muntean, *supra* note 34, at 13. For instance, one survey of family businesses only lists “those firms in which a single family has members actively engaged in the management of operations and are at least in the second generation of management.” *Id.* at 14. But the definition leaves out “corporations in which more than one family owns and controls the firm[,] ... family businesses in the first generation[, and] ... family owned and controlled firms in which family members are no longer managing the daily operations of the firm.” *Id.* Further, it may be that some of the same concerns would apply to fiduciary-like bonds among friends. See generally ETHAN J. LIEB, FRIEND V. FRIEND: THE TRANSFORMATION OF FRIENDSHIP—AND WHAT THE LAW HAS TO DO WITH IT (2011); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 (2007). This Article does not seek to extend the analysis to nonfamily businesses and, to the contrary, assumes that families are normatively distinct in ways that the law should recognize.

91. See NANCY F. COTT, THE BONDS OF WOMANHOOD 1780-1835, at 22 (2d ed. 1997).

92. See BLAKE E. ASHFORTH, ROLE TRANSITIONS IN ORGANIZATIONAL LIFE 1 (2001) (stating that “individuals must often enter organizations and adopt more or less formal roles” in order to accomplish tasks that were once handled more informally at home or in the community). For instance, exercise may take place in the formal setting of a health club. *Id.*

93. *Id.* at 24. Additionally, the theory contends that “[b]y identifying, individuals perceive themselves as psychologically intertwined with the fate of the social category or role, sharing its common destiny, and experiencing its successes and failures.” *Id.* at 25.



“[s]ocial role differentiation, in enabling people to occupy different roles at different times and places, enables them to establish different priorities in different parts of their lives.”<sup>94</sup> These roles are not casually adopted: “Experiences are constrained and filtered through institutionalized structures such that the very sense of self in many situations is derived largely from the role one is enacting.”<sup>95</sup> For instance, “when individuals are asked ‘Who are you?’, they typically respond in terms of social categories (e.g., female, wife, French, lawyer).”<sup>96</sup> Each of these social identities contains certain “core or central features and peripheral features.”<sup>97</sup>

A role, taken by itself, may be clear and well-defined. Family roles, for instance, follow a script that most people know by heart:

The most obvious and well-established examples of standardized relationships in western culture are those that exist within the family. It is a fair assumption that most people share a generalized understanding of the various duties and obligations that attach to each particular familial role, although there is a wide variety of behavior within specific relationships. To be sure, the specific understanding of particular roles has changed drastically in the last thirty years. But it is safe to say that it is generally assumed that parents will provide their children with love, financial support, and some degree of education[;] ... that children will strive to be respectful to their parents and act in a way that pleases them; that older children will care for aging parents; that husbands and wives will be each other’s primary source of emotional support; and that family members will act to benefit the whole—or at least refrain from causing harm to other members.<sup>98</sup>

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94. ANDERSON, *supra* note 9, at 25.

95. See ASHFORTH, *supra* note 92, at 1. This is not to say that people lack distinct psychological features or that social roles completely determine identity: “The personal identity often emerges in juxtaposition to valued social/role identities as the individual seeks some distinctiveness within the homogenizing context of the collectivity.” *Id.* at 34 (citing M.B. Brewer, *The Social Self: On Being the Same and Different at the Same Time*, 17 PERSONALITY & SOC. PSYCHOL. BULL. 475 (1991)).

96. *Id.* at 27.

97. *Id.*

98. Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551, 581 (1999) (footnote omitted).

Social roles, however, pose two related challenges for participants in family businesses. First, although “roles are typically associated with differentiated social domains” and “differentiated audiences,”<sup>99</sup> family businesses conflate family and workplace categories. An employer-employee relationship may also be a parent-child relationship. Thus, it may be unclear which role should take precedence in any given situation.<sup>100</sup> The expectations that we have of members of our family—that we will put the family’s interests first, that we will take care of each other—may conflict with the goal of maximizing economic return in a business.<sup>101</sup> To the extent the social roles are incompatible, family business has a built-in conflict.

Second, individuals must be able to transition effectively between roles. When role identities make different demands, transitions may be difficult to accomplish on a daily basis.<sup>102</sup> Role transitions over longer periods of time can also be difficult. Most important, it can be very hard for one generation to cede control to the next because work and family are linked—stepping down as CEO may feel like a surrender of status as a family patriarch or matriarch.<sup>103</sup> Or, alternatively, the power structure of the family system may work at odds with any changes of control contemplated in the business.<sup>104</sup> Tension associated with role transitions helps explain why family businesses

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99. ASHFORTH, *supra* note 92, at 27; *see also id.* at 26 (“When interacting with another person, one necessarily occupies a particular role such as friend, spouse, or coworker.”). As Professor Ashforth observes, even when the domains are distinct, the various social roles may create “interrole conflict and the fragmentation of self.” *Id.* at 2 (citing K.J. GERGEN, *THE SATURATED SELF* (1991); L.A. ZURCHER, JR., *THE MUTABLE SELF* (1977)).

100. *See* ANDERSON, *supra* note 9, at 25 (observing that a parent’s choice of whether to focus on a “child’s demands for attention” or a “client’s needs” may depend on whether the parent is “at home or at work”). Professor Anderson further observes that these decision frames are not typically gender neutral because society “assigns different meanings to mothers and fathers making the same tradeoffs of work and parental responsibilities.” *Id.*

101. *See, e.g.*, LANSBERG, *supra* note 4, at 42 (noting that, regardless of merit, “it is assumed that in allocations among siblings, each individual is entitled to an equal share of resources and opportunities”).

102. *See* ASHFORTH, *supra* note 92, at 7.

103. *Id.* at 3 (“How does a newly retired chief executive officer (CEO) cope with the loss of identity and status?”).

104. *See* F. HODGE O’NEAL & ROBERT B. THOMPSON, *O’NEAL AND THOMPSON’S OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS* § 3:1, at 3-2 (rev. 2d ed. 2012) (explaining squeeze-out techniques, which can be used during generational transfers); LANSBERG, *supra* note 4, at 43. It may also be difficult for a parent to appreciate that a child has grown and is ready to assume full adult responsibilities.

are often most vulnerable to internal dissension when control must be transferred across generations.<sup>105</sup>

Social identity theory explains why the interconnection of family and business value systems can create conflict in family businesses; individuals may find themselves torn between advancing the interests of the business and upholding their obligations as members of a family. Even if these social identities seem to align, or can be made to do so, the possibility of conflict always exists, especially during periods of business transition. Thus, “[a] better understanding of how family relationships influence behavior more generally promises to improve our understanding of the organizational and strategic choices made in the family-controlled firm.”<sup>106</sup>

## 2. *The Three-Circle Model*

Role conflicts aside, certain fundamental issues cause problems at the institutional level in family businesses: Should the family business guarantee employment for family members, even if more qualified workers can be found elsewhere? Should managerial control be vested in an outsider? Should distributions of dividends be increased to meet family needs if the business also needs the resources to grow?<sup>107</sup> Families and businesses may have different institutional goals and values.<sup>108</sup>

Further complications ensue when some family members participate in the management of the business while others become passive investors.<sup>109</sup> The management literature represents these dynamics visually with a Venn diagram.<sup>110</sup> The three-circle model

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105. See *supra* note 26 and accompanying text; *infra* notes 128-34 and accompanying text.

106. Muntean, *supra* note 34, at 18.

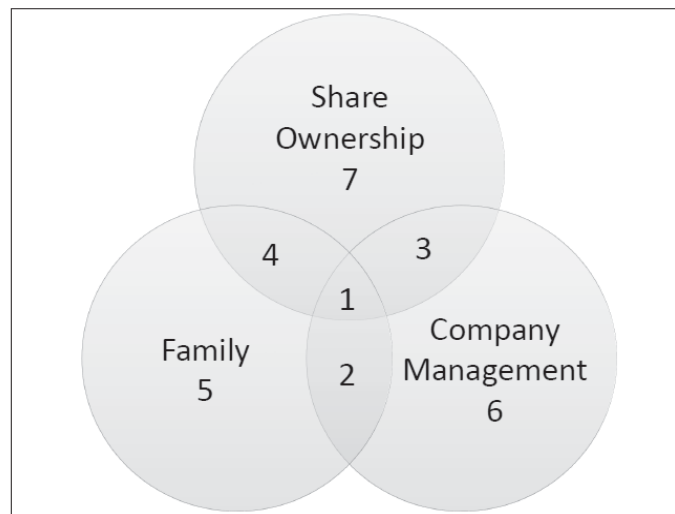
107. One way to reduce institutional conflict is to encourage business-owning families to establish written goals. As one business advisor recounts, “In my work with family business owners, I ask the question: ‘Do you have goals or business plans in which the specifics are described in writing?’ Usually fewer than 10 percent have such a document.” BORK, *supra* note 42, at 142. The advisor claims that “[t]he value of agreed-upon goals should be obvious. They focus the energy of all people on specific objectives. Also, written goals can be referenced.” *Id.*

108. See SCHUMAN ET AL., *supra* note 20, at 76 (“A fundamentally paradoxical feature of family business is that families tend to be socialistic, while businesses are firmly capitalistic.”).

109. See *id.* at 77.

110. See GERSICK ET AL., *supra* note 16, at 6 fig.I-I; SCHUMAN ET AL., *supra* note 20, at 77 fig.4.1. The three-circle model was first developed by Renato Tagiuri and John Davis. See

includes family business conflict and extends the analysis to include “a critical distinction between the ownership and management subsystems within the business circle.”<sup>111</sup> The three-circle model is as follows:



According to the model, individuals can be placed into one of seven possible positions: (1) family membership with share ownership and active participation in company management; (2) family membership with active participation in management but no share ownership; (3) share ownership and management but no family membership; (4) family membership with share ownership but no management participation; (5) family membership only; (6) management only; and (7) share ownership only. The three-circle model illustrates the variety of distinct roles in a family business, each with its own set of expectations and responsibilities.<sup>112</sup>

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*Bivalent Attributes of the Family Firm*, 9 FAM. BUS. REV. 199, 200 fig.1 (1996).

111. GERSICK ET AL., *supra* note 16, at 5 (“That is, some individuals are owners but not involved in the operation of the business; others are managers but do not control shares.”).

112. *See id.* at 6-7 & fig.I-I. Consider what happens when a nonfamily member marries someone in the family and is brought into the business and given an ownership stake but then

### *C. A Conflict Typology*

Most shareholder oppression claims in family businesses appear to fit one of two general patterns: either a “spillover” family dispute in which the intersection of work and family is not itself a causal factor, or a problem concerning the prioritization of family and business values. In the latter case, it helps to identify whether family-management, family-ownership, or management-ownership intersections are at issue.<sup>113</sup> In any area of overlap, dissension may result either when family values are given precedence or when a refusal to credit family obligations stirs resentment.<sup>114</sup>

#### *1. “Spillover” Oppression*

A family business creates a feedback mechanism in which the strength of family bonds can provide support for the business and a successful business can help the family thrive.<sup>115</sup> However, feedback loops can be negative as well as positive. Breakdowns in family relationships can cause havoc in the workplace.<sup>116</sup> Marital dissolution represents one clear example, but damaged families come in all varieties.<sup>117</sup> However they start, family problems can

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gets divorced. If the marital separation also ends any further affiliation with the family, we would say that the individual has moved from position one to position three. By inviting comparison with other individuals in the same category, the three-circle model can be used to ask whether later difficulties result from the divorce or the fact of share ownership by a nonfamily member in a family business.

113. *Id.* at 7.

114. Although beyond the scope of this Article, the categories set forth in the three-circle model might be useful as a foundation for empirical research into the causes of legal conflict in closely held businesses.

115. Feedback denotes “the return to the input of a part of the output of a machine, system, or process.” *Definition of Feedback*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/feedback> (last visited Feb. 9, 2013). Family relationships drive business dealings, which in turn affect family relationships.

116. See O’NEAL & THOMPSON, *supra* note 104, § 2:2, at 2-5 (“[B]usiness relationships often overlap family relationships so that a squeeze often reflects dysfunctional family relations or is exacerbated by family relations.”).

117. See LEO TOLSTOY, ANNA KARENINA 1 (Richard Pevear & Larissa Volokhonsky trans., Viking Penguin 2001) (1877) (“All happy families are alike; each unhappy family is unhappy in its own way.”). There is some irony in citing Tolstoy’s dictum on the infinite varieties of family misery in a section that purports to enumerate, if only in a general fashion, certain representative types of family business disputes. Still, there may be reasons to categorize for legal purposes that which art keeps separate.

become business problems, and business disagreements can further sour family relations.<sup>118</sup>

Many examples support this contention. In one case, the court observed that the minority shareholder was excluded from the business possibly as “retaliation for the problems occurring between the siblings.”<sup>119</sup> In another case, the plaintiff’s marriage “resulted in problems with the relationship with his parents [that] ... affected the family’s operation of its business and resulted in ... litigation.”<sup>120</sup> Or consider the total breakdown in relations among the members of the Shoen family that controlled U-Haul: adult children alienated by their father’s hasty remarriage after their mother’s death, false insinuations that a family member who served as CEO had murdered his wife, fistfights among brothers, and other assorted mayhem all contributed to an atmosphere of dissension and distrust that led to protracted shareholder litigation.<sup>121</sup>

Spillover disputes do not fall within any plausible model of rational behavior, let alone the refined assumptions of rational-choice theory.<sup>122</sup> If corporate law scholars proceed as though business participants are unfailingly rational and that businesses can be analyzed without any appreciation of their social context, then corporate scholars can offer little insight or guidance in disputes that stem from family grievances. A narrow focus on how economically rational actors would allocate risk in an ongoing business venture illuminates neither the potential sources of conflict for a venture situated within family relationships nor the potential methods for resolving such conflict.<sup>123</sup>

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118. See O’NEAL & THOMPSON, *supra* note 104, § 2:2, at 2-5.

119. *Mueller v. Cedar Shore Resort, Inc.*, 643 N.W.2d 56, 65 (S.D. 2002).

120. *Berger v. Berger*, 592 A.2d 321, 322 (N.J. Super. Ct. Ch. Div. 1991).

121. See GRANT GORDON & NIGEL NICHOLSON, *FAMILY WARS: STORIES AND INSIGHTS FROM FAMOUS FAMILY BUSINESS FEUDS* 192-208 (2008). The authors conclude: “In short, the Shoen family dynamic was totally dysfunctional.” *Id.* at 199.

122. See *supra* note 57 and accompanying text.

123. Exit, the standard answer to business conflict, assumes that the damage to relationships is irreparable. See Z. CHRISTOPHER MERCER, *BUY-SELL AGREEMENTS FOR CLOSELY HELD AND FAMILY BUSINESS OWNERS* (2010).

## 2. *Incompatible Values*

Conflicts can also arise at the intersection of business and family values rather than from a rupture within either of those two systems. The three-circle model illustrates the main areas of overlap, in which family values affect share ownership and business management. Many shareholder disputes stem from a prioritization of family needs over business interests, for instance, by dividing control equally among siblings, regardless of ability,<sup>124</sup> or expropriating business assets and distributing them to members of the family to the exclusion of nonfamily or more distantly related minority shareholders. Hard feelings can also be created when business values take precedence and those in control of a family business give no consideration to family allegiances. For instance, if a family member's competence as a member of the business is judged without regard to family status, that individual may feel that she has been singled out for mistreatment.<sup>125</sup> Likewise, decisions to withhold dividends can cause turmoil, especially if not all family members receive a salary.<sup>126</sup>

Tensions between business goals and family values are likely to be exacerbated if only some family members work for the business. According to one commentator, the key to avoiding ownership-management conflict and aligning interests is making sure that all family shareholders are also active participants in the business: "As a general principle, countless problems can be avoided if family

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124. See GERSICK ET AL., *supra* note 16, at 206. Professor Lansberg notes that these situations arise when a founder cannot reconcile the competing value systems and tries to split the difference. Lansberg, *supra* note 4, at 44 ("These compromises, however, often lead to decisions that are suboptimal from a management point of view."). Lansberg gives an example of how a coping strategy based on compromise can go awry:

[O]ne founder who was unable to choose between his son and a professional manager as his successor decided to split the office of chief executive into two distinct offices, giving one to his son and one to the professional manager. In this case the founder's "solution" led to a power struggle between the two that threatened the firm's long-term survival.

*Id.*

125. See Lansberg, *supra* note 4, at 43 ("It is not surprising ... that a founder faced with having to assess the managerial competence of his or her own offspring experiences a great deal of stress because it is not possible simultaneously to do justice to the norms and prescriptions that operate in the family and in the business systems.")

126. *Cf.* Mahoney, *supra* note 70, at 189 (providing examples of turmoil and showing judges' difficulties in attempting to reach fair outcomes).

members who do not intend to be active in the business are not left stock in it. The interests of inactive members are antithetical to those of active family members. Simply stated, inactive owners usually want cash.”<sup>127</sup>

Nowhere are the difficulties of balancing family and business values more formidable than in the transfer of control from one generation to the next.<sup>128</sup> The transition may be difficult psychologically for an individual who has devoted her full energies to the business and now faces decline and eventual death.<sup>129</sup> Yet, “[i]nvariably, individual and company life cycles must diverge.”<sup>130</sup> To effect a transition, many considerations are involved:

The owners must formulate a vision of a future governance structure and decide how to divide ownership to conform with that structure. They must develop and train potential management successors and set up a process for selecting the most qualified leaders. They must overcome any resistance to letting go that the seniors may have and help the new leadership establish its authority with various stakeholders.<sup>131</sup>

One of the most important decisions is whether to transfer ownership control to a single person or divide it equally among heirs.<sup>132</sup> The choice may be affected by the pull of family and business ownership values. For instance, strong family values concerning equal treatment of children may lead to a variety of strategies for shared management and ownership in succeeding generations. In some cases, however, co-ownership may not be a successful business strategy, even if it affirms important family values concerning the equal worth of each child.<sup>133</sup> As the number of owners expands,

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127. BORK, *supra* note 42, at 129.

128. GERSICK ET AL., *supra* note 16, at 193 (“Succession is the ultimate test of a family business.”).

129. ASHFORTH, *supra* note 92, at 13 (“[T]he more the individual is involved in and identifies with work, the more consequential and potentially taxing the transition process tends to be for the individual.”).

130. GERSICK ET AL., *supra* note 16, at 193.

131. *Id.* at 194.

132. *See id.* at 206.

133. *See id.* On the other hand, “[t]he idea that one and only one individual should be the leader is steeped in the rich imagery of the hero in Western culture.” *Id.* at 204. In fact, “[f]amilies that choose a Controlling Owner structure for the next generation are betting the



the prospects for consensus-based decision making decline. Yet, selecting a single leader while treating other family members fairly becomes more difficult with each generation the business survives.<sup>134</sup>

In sum, family relationships are central to our understanding of family businesses—a person’s rights and responsibilities depend on where she is in the family and business hierarchies.<sup>135</sup> Although business relationships turn on productivity and merit, “[t]he standing of an individual in a family is determined more by who the individual ‘is’ than by what the individual ‘does.’”<sup>136</sup> In order to design effective legal principles for evaluating and remedying business conflict, it is important to first understand the institutional context to which they will be applied. For family businesses, that means appreciating the overlapping demands of family and business values and the ways that individuals—depending on their position within the family, ownership, and management structure—may interpret their competing obligations.

### III. CONTRACT AND STATUS IN PRIVATE ORDERING

Progress in modern life, whether economic or social, has sometimes been described as a move from preordained status relations

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store and the family fortune on the leadership talent, business acumen, and emotional maturity of one person.” *Id.* at 205. This risk must be weighed against the management benefit that follows from clear control—“[i]t permits decisive action, often critical when a company must move quickly to capture markets or beat competitors.” *Id.* at 204.

134. To be effective, the choice of leadership must be combined with “a mechanism for concentrating the stock in the single successor’s hands.” *Id.* at 205. However, if “the business is the primary asset, this raises fundamental questions of fairness in distribution of the family’s wealth.” *Id.* Splitting the difference by designating a successor but “dividing ownership among the sibling group, and instructing them ... to support the business leader” is a recipe for disaster. *Id.* at 206.

135. Indeed, economic action is always “embedded” in social context and “takes place within the networks of social relations that make up the social structure.” Neil J. Smelser & Richard Swedberg, *The Sociological Perspective on the Economy*, in *THE HANDBOOK OF ECONOMIC SOCIOLOGY* 3, 18 (Neil J. Smelser & Richard Swedberg eds., 1994). In the case of family businesses, the interaction of social networks and business objectives may be complex, because family values are sometimes in tension with ordinary business objectives. ASHFORTH, *supra* note 92, at 139 (“Work and home are often stereotypically perceived as opposites on many dimensions.”).

136. Lansberg, *supra* note 4, at 43 (“Applying a set of objectively derived criteria to evaluate a family member’s performance goes against the very principles that regulate and define social behavior in the family.”).

to voluntary contract.<sup>137</sup> Over time, restrictive castes tend to give way to flexible private ordering based on consent. In its teleological account of the development of human societies,<sup>138</sup> however, the status-to-contract thesis overstates its case. First, although markets enable individuals to make choices consistent with their preferences, there are “certain *kinds* of valuations that can be expressed only in nonmarket social relations.”<sup>139</sup> Second, the thesis assumes a radical distinction between “status” and “contract” that ignores the larger sense in which both are culturally constructed and deeply interrelated: the traditional rights and duties of marriage, for instance, are cast in the form of a contractual covenant.

This Part contends that contract and status are complementary mechanisms in family businesses. Social norms derived from family status are not extraneous to contractual analysis; rather, they provide a common cultural context in which specific bargains and background legal principles operate.<sup>140</sup> Part III.A examines a corollary argument advanced by family law scholars who advocate the use of contract principles, sometimes explicitly derived from business organization law, to diminish status-based constraints in family law that reflect outdated norms and entrenched inequality. Part III.B contends that if contractual mechanisms are underappreciated in family life, social status and hierarchy have not received their due as precepts that may be relied upon to structure

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137. See SIR HENRY SUMNER MAINE, *ANCIENT LAW* 140 (Dorset Press 1986) (1861) (“Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract.”); Lawrence E. Mitchell, *The Age of Aquarius or, How I (Almost) Learned to Stop Worrying and Love Free Markets*, 88 MINN. L. REV. 921, 944 (2004) (reviewing RAGHURAM G. RAJAN & LUIGI ZINGALES, *SAVING CAPITALISM FROM THE CAPITALISTS* (2003)) (“In little more than a generation, the structure of American society has changed, as an age of hierarchy has given way to an age of markets.”).

138. MAINE, *supra* note 137, at 140-41 (“Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals.... [W]e may say that the movement of the progressive societies has hitherto been a movement from Status to Contract.” (emphasis omitted)).

139. ANDERSON, *supra* note 9, at 211.

140. See generally Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997).

voluntary business relationships.<sup>141</sup> Connections between family and business law run in both directions.

### A. *Family Law Contractualism*

The laws governing marriage and other family institutions reflect strong intuitions about what our shared lives should look like.<sup>142</sup> By entering a marriage contract, a couple agrees to be bound together in a relationship of mutual support—a voluntary assumption of status obligations.<sup>143</sup> Indeed, legally enforceable private ordering within a marriage was once thought to be a conceptual impossibility:

By marriage, the husband and wife are one person in law....  
For this reason, a man cannot grant any thing to his wife, or  
enter into covenant with her: for the grant would be to suppose

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141. By status and hierarchy, I mean preexisting social facts rather than hierarchies that are, themselves, established contractually. Cf. BAINBRIDGE, *supra* note 46, at 200 (contending that hierarchy in corporations does not refute the nexus-of-contracts theory); R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 388 (1937) (distinguishing arm's-length market transactions from hierarchical ordering in a firm: the make-or-buy decision). Recently, some scholars have argued that hierarchies within firms cannot fully be understood within a nexus-of-contracts framework. See, e.g., Matthew T. Bodie, *Employees and the Boundaries of the Corporation*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW 85, 92 (Claire A. Hill & Brett H. McDonnell eds., 2012) ("The nexus of contract theory is thus not really a theory of the firm at all, but rather a theory of agency costs within a certain type of firm." (citing Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619, 1624 (2001))).

142. See, e.g., Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 775-76 (2007) (describing previous mandatory regime that imposed name change on women after marriage and contending that current default rules are incomplete in that they focus solely on a woman's decision to keep or change her last name); Shahar Lifshitz, *Married Against Their Will? Toward a Pluralist Regulation of Spousal Relationships*, 66 WASH. & LEE L. REV. 1565, 1597 (2009) ("Traditionally, legal regulation of marriage expressed and supported shared moral principles and interests of society as a whole, sometimes even at the cost of limiting the couple's freedoms." (citation omitted)). Professor Emens observes that "the social meanings surrounding names, and marital names in particular, make any change of name at marriage a very costly decision for men." Emens, *supra*, at 776.

143. Viewed economically, "marriage" has been defined as "a written, oral, or customary long-term contract between a man and a woman to produce children, food, and other commodities in a common household." GARY S. BECKER, *A TREATISE ON THE FAMILY* 43 (enlarged ed. 1991).

her separate existence; and to covenant with her, would be only to covenant with himself.<sup>144</sup>

The terms of the marriage contract—which purported to dissolve the individual identities the contract itself presupposed—were set by law and not subject to alteration.<sup>145</sup> As a matter of public policy, bargains that affected the parties' rights during the life of the marriage were unenforceable.<sup>146</sup> The hostility to private ordering within a marital relationship has not dissipated altogether<sup>147</sup> and seems to reflect an idealized conception in which “the family is at least in theory the last surviving haven from the relentless spread of markets and commodification.”<sup>148</sup>

However, negotiated contractual bargains have become more common in intimate relationships and “[f]amily law doctrine increasingly favors private ordering in matters such as entry into marriage, contractual ordering of marriage, nonmarital relationships, divorce, adoption, the use of reproductive technologies, and the privatization of domestic relations dispute resolution.”<sup>149</sup> For instance, the Uniform Premarital Agreement Act contemplates that couples may contract regarding “any ... matter, including their personal rights and obligations, not in violation of public policy.”<sup>150</sup> Courts have also enforced agreements between nonmarried couples.<sup>151</sup>

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144. 1 WILLIAM BLACKSTONE, COMMENTARIES \*430 (footnote omitted).

145. See FINEMAN, *supra* note 88, at 60. The mandatory status relations set by statute reflected a cultural norm of male dominance. See Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2122-23 (1996).

146. See, e.g., *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953).

147. See *Mary Anne Case*, *Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J.L. & POL'Y 225, 225 (2011) (contending that “even as the laws governing marriage in the United States have moved farther along the spectrum from status to contract,” courts remain reluctant to enforce contracts during the life of a marriage); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1303 (1998) (same).

148. Teemu Ruskola, *Home Economics: What Is the Difference Between a Family and a Corporation?*, in RETHINKING COMMERCIALIZATION 324, 324 (Martha M. Ertman & Joan C. Williams eds., 2005); see also Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 371 (1978) (contending that in a marriage “successful human association depends upon spontaneous and informal collaboration” and that courts therefore “refuse[] to enforce agreements between husband and wife affecting the internal organization of family life”).

149. Ertman, *supra* note 45, at 81-82.

150. UNIF. PREMARITAL AGREEMENT ACT § 3(a)(8), 9C U.L.A. 43 (2001).

151. See, e.g., *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976).

Even if doubts remain concerning the introduction of contractual principles into supposedly nonmarket family institutions, expanding the range of available choices in the domestic sphere is not the same thing as treating family relationships as fungible, market commodities. For instance, family law scholars have explored contract as a potential mechanism for enhancing individual autonomy and for counteracting issues of gender or other social inequality.<sup>152</sup> Depending on their situation, individuals might “use private agreements to reinforce their marital commitment”<sup>153</sup> or to create structures for intimate relationships that fall outside of existing recognized categories.<sup>154</sup>

In some respects, the gradual recognition of contractual bargaining within domestic relationships resembles the process by which courts became willing to enforce shareholder agreements in close corporations, even when those agreements altered central features of corporate law such as the authority of the board of directors.<sup>155</sup> For example, in *McQuade v. Stoneham*, the New York Court of Appeals refused to enforce an intrashareholder contract that infringed upon the board of directors’ ability to manage the corporation according to its sole judgment.<sup>156</sup> Yet, in *Clark v. Dodge*, decided only two years later, the same court concluded that a shareholder arrangement that protected the investment interest of

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152. See Ertman, *supra* note 45, at 82 (“Business models are free of the antiquated notions of status, morality, and biological relation that have hampered family law’s ability to adapt with the times.”). I do not mean to suggest that all contracts should be enforceable, regardless of their terms. See, e.g., *Spires v. Spires*, 743 A.2d 186, 187-88 (D.C. 1999) (rejecting marital contract that purported to effectively enslave the wife). As Professor Case points out, courts are “an appropriate forum, far better than many alternatives, to deal with bargains such as the Spires’ Marital Agreement.” Case, *supra* note 147, at 247.

153. See Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1903 (2000) (stating additionally that such agreements face “continuing reluctance” and that “[f]ew courts, for example, would enforce a premarital agreement incorporating covenant marriage terms” (citing Theodore F. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 N.C. L. REV. 879, 901-04 (1988))).

154. See Elizabeth I. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 364 (2004).

155. The enforceability of shareholder agreements in closely held corporations is now codified, but it evolved through a process of common law interpretation of existing, apparently mandatory, corporate law rules. See BAINBRIDGE, *supra* note 46, at 808.

156. 189 N.E. 234, 237 (N.Y. 1934). The court nevertheless recognized that “such agreements, tacitly or openly arrived at, are not uncommon, especially in close corporations where the stockholders are doing business for convenience under a corporate organization.” *Id.* at 236.

the minority shareholder only “impinge[d] slightly” upon the board’s statutory authority and would be upheld.<sup>157</sup> State corporate law statutes now generally recognize the value of tailored investment agreements and permit shareholders in close corporations to contract with each other, even if those contracts remove certain decisions from the board.<sup>158</sup>

Families, like businesses, are entities composed of individuals who seek to achieve joint purposes, and it seems logical to look to business law to find helpful models for contractual ordering in the family context.<sup>159</sup> As one family law scholar has observed:

The law governing intimate relationships would benefit from exploring the metaphorical and doctrinal analogies between business and intimate affiliations. These analogies bridge the ... distinction by drawing connections between private business law and private family law. They also improve upon conventional family law’s understanding of family. The exploration remedies long-standing inequities within current family law discourse that are fossilized artifacts of the naturalized construction of intimate relationships.<sup>160</sup>

There are a number of specific, structural similarities between close corporations and marriages. First, “close corporations and marriages are intended to be ‘long-term, ongoing entities’ that require ‘stability and predictability to function properly.’”<sup>161</sup> Second, each form of social organization requires formal state recognition.<sup>162</sup>

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157. 199 N.E. 641, 642-43 (N.Y. 1936).

158. See Ian Ayres, *Judging Close Corporations in the Age of Statutes*, 70 WASH. U. L.Q. 365, 370 (1992) (“The nullification of certain Procrustean, immutable provisions by a few individual state courts not only initiated a dialogue with the legislatures of those states, but also conveyed information that motivated action by other state legislatures.”).

159. Mary Anne Case, Lecture, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1779 (2005) (noting reduction in mandatory regulation of marriages and business entities); Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 1998-2032 (2010) (proposing a partnership framework for intimate relationships among multiple partners); Ertman, *supra* note 45, at 79-80; Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1445.

160. Ertman, *supra* note 45, at 79-80 (footnote omitted).

161. *Id.* at 112 (quoting Note, *In Sickness and in Health, in Hawaii and Where Else?: Conflict of Laws and Recognition of Same-Sex Marriages*, 109 HARV. L. REV. 2038, 2053 (1998)).

162. See *id.* at 112-13.

Third, the dissolution of a business “parallels divorce.”<sup>163</sup> Moreover, “a close corporation often is a hybrid of family and business that bridges the ... divide by its very existence.”<sup>164</sup> Thus, families and businesses can be described as long-term, relational contracts; an analogy that extends to matters of formation, governance, distribution, and dissolution.<sup>165</sup>

### *B. From Contract to Context*

According to current orthodoxy in corporate law, cogently summarized by the Chief Justice of the Delaware Supreme Court, “[C]ourts need to be mindful of the distinction between status relationships and contractual relationships.”<sup>166</sup> In the event of a dispute, “the contractual relationship between parties ... should be the analytical focus[,] ... not the status relationship of the parties.”<sup>167</sup> Chief Justice Steele’s recommended approach assumes that status and contract are defined in opposition to one another and lack legally relevant intersections.<sup>168</sup> The premise of his argument is flawed, at least when applied to family businesses, because it fails

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163. *Id.* at 118. Professor Ertman explains that “[l]ike a minority shareholder, a disadvantaged spouse (often a woman) takes a serious financial risk when exiting marriage.” *Id.* at 115.

164. *Id.*

165. The analogy does not require us to ignore substantial differences that remain between family and business institutions. See MARGARET F. BRINIG, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY 77-79 (2000) (identifying the limits of commodification-based analysis). As a consequence, we should not expect existing forms of business organization to provide an adequate template for all matters now covered by domestic relations law. See Larry E. Ribstein, *Incorporating the Hendricksons*, 35 WASH. U. J.L. & POL’Y 273, 276 (2011) (“[E]ven if a contractual model of the family is appropriate on policy grounds, the differences between business associations and domestic relationships likely would continue to demand qualitatively different standard forms.”).

166. Myron T. Steele, *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 32 DEL. J. CORP. L. 1, 9 (2007).

167. *Id.* at 25.

168. Chief Justice Steele’s conclusion that individuals’ intimate relationships are distinct from their contractual choices is reminiscent of the “hostile worlds” view identified by Professor Viviana Zelizer, according to which intimate relations and market relations should be kept in separate spheres to avoid mutual contamination. See ZELIZER, *supra* note 8, at 23 (“[A]ccording to the hostile worlds view, intimacy can ... contaminate rational economic behavior.”). For a recent version of the argument, see MICHAEL J. SANDEL, WHAT MONEY CAN’T BUY: THE MORAL LIMITS OF MARKETS 110-13 (2012).

to appreciate the extent to which stable status relationships provide the context for a relational business contract.

### 1. *Relational Values*

As an alternative to imposing an artificial barrier between status and contract, the “metaphorical and doctrinal analogies between business and intimate affiliations”<sup>169</sup> developed by family law scholars promise to inform our understanding of businesses as well as families. In particular, an appreciation of the role of status relationships would help to address a deficiency in standard contractual theory—that the classic, arm’s length exchange of discrete goods or services bears little resemblance to most real world contracts. Indeed, “as relationalists have demonstrated since the 1960s, contracts involve thicker relationships than those among strangers.”<sup>170</sup> Family businesses, where the relationships among shareholders are as thick as blood, are a prime example.<sup>171</sup>

Of course, as long as one includes transaction costs in the model, the concept of relational contract is, itself, perfectly consistent with law and economics. The effort to anticipate all possible future states of the world and to negotiate appropriate contract provisions can become prohibitively expensive: “A contract is relational to the extent that the parties are incapable of reducing important terms of the arrangement to well-defined obligations.”<sup>172</sup> In longer term ventures with open-ended goals, contractual incompleteness is unavoid-

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169. Ertman, *supra* note 45, at 79.

170. Ethan J. Leib, *Contracts and Friendships*, 59 EMORY L.J. 649, 652 (2009); see Ian R. Macneil, *Contracts: Adjustments of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 886-900 (1978).

171. See Ertman, *supra* note 45, at 82. In part, this may be because contractual relationships are, among family members, suffused with moral as well as legal obligations. See, e.g., Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1806 (1985) (“No morality is learned so early and in so compelling a situation as the morality of family life, and thus no other morality seems as axiomatic, is felt as passionately, so fixes the behavior we exact of ourselves and expect of others.”).

172. Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1091 (1981).



able.<sup>173</sup> Thus, as a matter of transaction cost analysis, close corporations of all stripes can be described as relational contracts.<sup>174</sup>

However, reducing relational contracting to a question of transaction costs is misleading. First, this approach would limit relational contracts to those in which a complete bargain is cost prohibitive.<sup>175</sup> Yet, businesses involve social relationships, and trust may sometimes substitute even for otherwise attainable negotiations.<sup>176</sup> In particular, social connections among investors are a central feature of family businesses. Just as prenuptial agreements are less common in marriages than a rational-actor theory might suggest given the statistical likelihood of an eventual divorce,<sup>177</sup> business contracts among family members may be impeded by similar considerations.

Second, the law and economics version of relational contracting assumes that missing terms should be supplied to further the wealth maximization goals of the business.<sup>178</sup> This assumption can badly mistake the parties' understood bargain. Family businesses are market institutions that aim to make a profit, but they can also provide intrinsic value for family members who find meaning in

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173. *Id.*

174. Douglas K. Moll, *Shareholder Oppression & Reasonable Expectations: Of Change, Gifts, and Inheritances in Close Corporation Disputes*, 86 MINN. L. REV. 717, 756 (2002) (“[T]he investment bargains entered into by close corporation shareholders reflect the characteristics of relational contracts.”). Taken to its logical conclusion, a transaction-cost approach would account for all supposedly noneconomic aspects of family businesses and show that they, too, have a price. See ZELIZER, *supra* note 8, at 29 (“[C]ritics have sometimes countered separate spheres and hostile worlds accounts with reductionist nothing but arguments: the ostensibly separate world of intimate social relations, they argue, is nothing-but a special case of some general principle.”). Professor Zelizer observes that law and economics follows this line of reasoning: “Take away any cultural camouflage, such nothing-but theorists maintain, and we will find that intimate transfers—be they of sex, babies, or blood—operate according to identical principles governing transfers of stock shares or used cars.” *Id.* at 30.

175. See Moll, *supra* note 174, at 780 n.203.

176. See Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1805 (2001) (“The phenomenon of trust behavior suggests ... that sometimes participants in closely held corporations may deliberately choose not to draft formal contracts, even when they could do so.”). For instance, “[s]uppose a potential business partner shows up armed with a lawyer and a ten-page contract loaded with fine print. What does that behavior suggest?” *Id.* at 1806.

177. See Allison A. Martson, Note, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 889-91 (1997) (noting a divorce rate of 54 percent and prenuptial agreement rate for first-time newlyweds of 5 percent).

178. Goetz & Scott, *supra* note 172, at 1091.

shared effort, mutual support, and the preservation of family traditions across generations. The norms of family life, as well as economic considerations, shape the choice of investment and the structure of internal governance.<sup>179</sup> When individual investment choices reflect a range of market and nonmarket values and motivations, they cannot be appropriately represented by a simple, utility-maximizing formula. Accordingly, the characterization of family businesses as nothing more than one investment among many that a rational investor may choose, depending upon the expected economic return,<sup>180</sup> fails to account for noneconomic, intrinsic motivations.<sup>181</sup> Much of what the parties care about, and have reason to care about, in a family business is either invisible to economic analysis or, like dark matter, can only be detected through its impact on the price mechanisms economists choose to study.

The broader point should be unremarkable: economic analysis produces many useful insights but has inherent limitations based on the questions it chooses to ask. As the Nobel laureate Ronald Coase explains, economic analysis involves “comparisons of the value of production, as measured by the market.”<sup>182</sup> Yet, for broader policy determinations, he acknowledges that “it is, of course, desirable that the choice between different social arrangements for the solution of economic problems should be carried out in broader terms than this and that the total effect of these arrangements in all

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179. See MACEY, *supra* note 72, at 8 (“The term ‘corporate governance’ includes law, policy, and social norms, as well as contracts that regulate and motivate behavior within the corporation.”). Jon Elster explains that “[a] sociological alternative to the economic approach is the theory of social norms.” Jon Elster, *When Rationality Fails*, in REASONING: STUDIES OF HUMAN INFERENCE AND ITS FOUNDATIONS 94, 107 (Jonathan E. Adler & Lance J. Rips eds., 2008). In particular, social norms can be identified “mainly by their non-outcome-oriented character. Whereas rationality tells people, ‘If you want Y, do X,’ many social norms simply say, ‘Do X.’” *Id.*

180. See EASTERBROOK & FISCHER, *supra* note 39, at 232.

181. ANDERSON, *supra* note 9, at 212 (“People care about the meanings embodied in the social relations in which risks are imposed and controlled, not just about the raw magnitudes.”). In theory, the pleasures of family life could be characterized in terms of individual utility, and even family loyalty could be described as an intersubjective utility function. A broadening of economic analysis to include more realistic accounts of preferences would seem to be a worthwhile endeavor.

182. Coase, *supra* note 47, at 43.

spheres of life should be taken into account.”<sup>183</sup> In other words, we should not confuse formal analytic rigor with true insight.<sup>184</sup>

Even economic analysis that considers the impact of trust on transaction costs retains the assumption that individuals join collective associations to advance their own ends.<sup>185</sup> On this view, trust is nothing more than a “subclass of ... risk ... in which the risk one takes depends on the performance of another actor.”<sup>186</sup> Thus, there is little reason to expect that a more fine-tuned approach to transaction costs will produce an optimal solution to problems of shareholder oppression or other conflicts in family businesses. To understand conflict in family firms, we need to consider the influence of family life and the role identifications that can motivate participation in a family business.<sup>187</sup>

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183. *Id.*

184. Professor Coase has remarked upon the influence of the “Coase Theorem” in legal scholarship, which some use to reach policy conclusions without reflecting adequately on the discrepancy between the model and real-world transaction costs. See R.H. COASE, *The Institutional Structure of Production*, in *ESSAYS ON ECONOMICS AND ECONOMISTS* 3, 11 (1994) (“I tend to regard the Coase Theorem as a stepping stone on the way to an analysis of an economy with positive transaction costs.”).

185. Methodological individualism may go unnoticed because it is analogous to the construction of the individual that forms the basis for the modern liberal state. As communitarian scholars have observed, however, a vulnerable assumption of liberal theory is that “[w]e are distinct individuals first, and *then* we form relationships and engage in cooperative arrangements with others.” MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 133 (2d ed. 1998); CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 193 (1989) (tracing modern notion of the disengaged self back to “the new political atomism which arises in the seventeenth century, most notably with the theories of social contract of Grotius, Pufendorf, Locke, and others”). Yet, where a

sense of participation in the achievements and endeavors of (certain) others engages the reflective self-understandings of the participants, we may come to regard ourselves ... less as individuated subjects with certain things in common, and more ... as participants in a common identity, be it a family or community or class or people or nation.

SANDEL, *supra*, at 143; see also MICHAEL WALZER, *SPHERES OF JUSTICE* 126 (1983) (arguing that family obligations are “collectively, not individually, determined; and the determination reflects our collective understanding of what a family is”).

186. WILLIAMSON, *supra* note 63, at 257 (quoting JAMES COLEMAN, *THE FOUNDATIONS OF SOCIAL THEORY* 91 (1990)). Thus, “trust” is just a form of calculation and not a separate emotional category. *Id.* at 257, 263.

187. Note that this analysis does not assume that “family” is itself a stable category, unaffected by business ventures undertaken by family members. Rather, the point is that family and business institutions interact. See FINEMAN, *supra* note 88, at 61 (“Because of the interactive relationship between the family and other institutions within society, it is much more accurate to view the family not as existing in or constituting a separate sphere, but

## 2. Practical Implications

If courts fail to appreciate the structural importance of family relationships, those blinders can affect the outcome in a variety of civil, and even criminal, legal disputes involving family businesses. Consider, for instance, the majority and dissenting opinions in *United States v. Chestman*, in which a stockbroker appealed his conviction for aiding and abetting the misappropriation of inside information.<sup>188</sup> The central issue on appeal was whether fiduciary duties of nondisclosure could be extended to a family member in a family-owned business who was not an active participant and held no formal position.<sup>189</sup> According to the majority, “[k]inship alone does not create the necessary relationship” and the disclosure did not serve any business purpose.<sup>190</sup> Absent “an express agreement of confidentiality,” the husband “did not defraud [his wife or her family] by disclosing news of the pending tender offer to [the stock broker].”<sup>191</sup>

In his dissent, Judge Winter argued that the scope of a fiduciary obligation of nondisclosure should include “family members who have benefitted from the family’s control of the corporation.”<sup>192</sup> Application of a narrower theory of the corporation would ignore the reality of overlapping relationships:

In the case of family-controlled corporations, family and business affairs are necessarily intertwined, and it is inevitable that from time to time normal familial interactions will lead to the revelation of confidential corporate matters to various family members. Indeed, the very nature of familial relationships may cause the disclosure of corporate matters to avoid misunderstanding among family members or suggestions that a family member is unworthy of trust.<sup>193</sup>

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rather, as being a constructed institution contained within the larger society.”).

188. 947 F.2d 551, 555-56 (2d Cir. 1991).

189. *See id.* at 564. The individual in question “was an extended member of the ... family, specifically the family patriarch’s ... ‘nephew-in-law.’” *Id.* at 570.

190. *Id.* at 570.

191. *Id.* at 571. As the court explained, “Absent a predicate act of fraud by [the husband], the alleged misappropriator[s] stockbroker] could not be derivatively liable as [the husband’s] tippee or as an aider and abettor.” *Id.* Other securities fraud convictions were affirmed. *Id.*

192. *Id.* at 579 (Winter, J., dissenting).

193. *Id.*

Although sympathetic to the majority's concerns about line drawing, Judge Winter pointed out that the majority's approach would mean that "the disclosure of family corporate information can be avoided only by family members extracting formal, express promises of confidentiality or by elderly mothers in poor health refusing to tell their daughters about mysterious travels."<sup>194</sup> Such a position "seems very unrealistic in that it expects family members to behave like strangers toward each other."<sup>195</sup> Family members do not expect to deal with one another at arm's length, let alone as the rational actors posited by economic theory.

Thus, even assuming that it would be advisable to keep personal affairs separate from business dealings,<sup>196</sup> legal institutions should acknowledge the extent to which "[m]oney cohabits regularly with intimacy."<sup>197</sup> The contractual relationships that constitute family businesses are rooted in family values and reflect them.

### *3. Beyond Value Distinctions*

Finally, the observation that family businesses harness the shared commitment of family members to achieve both economic success and personal fulfillment calls into question the dichotomy between market and nonmarket values in family and nonfamily businesses alike:

We expect the market to achieve the efficient production of goods and services; it is not the arena in which we are supposed to develop our personalities or satisfy human relational wants.... The expression of the desires to develop personality and to interact with others is relegated to the family and simultaneously glorified and devalued. We see the market as a means to an end, whereas we see the family as an end in itself.... Dividing life between market and family compartmentalizes

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194. *Id.* at 580. The trip referenced by Judge Winter was to collect stock certificates necessary to effectuate a merger transaction. The mother told her daughter but instructed her to keep quiet. *Id.* at 579.

195. *Id.* at 580.

196. See ZELIZER, *supra* note 8, at 22 ("In a normative version, the hostile worlds view places rigid moral boundaries between market and intimate domains. It condemns any intersection of money and intimacy as dangerously corrupting.")

197. *Id.* at 28.

human experience in a way that prevents us from realizing the range of choices actually available to us.<sup>198</sup>

In this vein, developing a more nuanced understanding of family business could help us consider a fuller range of options for the collective pursuit of shared purposes.<sup>199</sup> Families are themselves a locus of economic activity as well as intimacy, and the workplace can be a source of deep friendship and social networks of mutual support.<sup>200</sup> A reductionist schema in which markets and families are diametrically opposed is inaccurate and unhelpful.<sup>201</sup>

As one scholar observes, “most intimacy at work is neither simply an instrument of workplace success nor irrelevant to that success.”<sup>202</sup> Thus, from the outset, the filtering of experience through separate legal and institutional structures implies a category difference that does not exist:

[T]he economic and intimate spheres are simply not as distinct as the two models would suggest.... Neither model represents a truth about social and economic organization. While one biologizes the organization of a socioeconomic unit by explaining its internal stratification as a function of the *natural* sexual division of labor, the other voluntarizes a socioeconomic unit by

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198. Olsen, *supra* note 4, at 1564. However, to the extent that our more intimate choices routinely discriminate on the basis of gender and race, see Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1339-66 (2009), blending the neutral values of the workplace with closer affective ties may lead to discrimination, whether intentional or unintentional. See Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893 (2009).

199. See Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2069-70, 2072 (2003).

200. Laura A. Rosenbury, *Working Relationships*, 35 WASH. U. J.L. & POL'Y 117, 118 (2011) (“The legal assignment of intimacy to the home and production to the workplace masks various dynamics within the home, the workplace, and spaces in between.”); cf. Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 5-7 (1996) (criticizing the judiciary’s reluctance “to treat housework as work because of the affectionate familial context in which the work is performed”).

201. See, e.g., Steven L. Winter, *Foreword: On Building Houses*, 69 TEX. L. REV. 1595, 1614 (1991) (“[O]nce the sophisticated liberal acknowledges that neither the market nor the family exist in a purely ‘natural’ state—that is, once she affirms that the purpose of the legal system is to contain and shape both—liberalism and its critique become one and the same.”).

202. Rosenbury, *supra* note 200, at 131-32.

explaining its unequal functional differentiation in terms of *consensual* agreements.<sup>203</sup>

Intimacy and markets are neither strictly segregated nor reducible to a common metric; rather, they are connected, fluid, and always subject to negotiation: “[E]conomic activities of production, consumption, distribution, and asset transfers play significant parts in most [social] relations.”<sup>204</sup> We can, therefore, recognize the usefulness of maintaining different distributional principles in different contexts without essentializing the family or the corporation. Family businesses seek to advance collective goals, economic and noneconomic; they are contractual, but also reflect status-based family relationships.

To be clear, the argument is not that business relationships should be preordained by kinship, birth order, or gender. Voluntary contractual relationships create opportunities for individuals that they might not find within the constraints of traditional family life. However, family businesses also rely upon and reinforce family ties that are status based rather than contractual. Individual economic motivation is only part of the story and should not be viewed in isolation. Although not as easy to quantify as individual wealth, broader issues of distribution in a family business implicate the collective health of the family; further, the continuation of the family business can provide a mechanism for cross-generational security. Indeed, a successful family business depends on the efforts of the family over time, not just current managers. Business values and family values are connected.

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203. Ruskola, *supra* note 148, at 335; *see also* Janet Halley, *What Is Family Law?: A Genealogy, Part I*, 23 *YALE J.L. & HUMAN.* 1, 1 (2011) (contending that “family law” emerged as a separate field of legal study as a consequence of a “categorical distinction from the law of contract and, more broadly, the law of the market” that was “invented”). Professor Halley argues that “family law should be restructured to connect it for the first time to domains of law more readily understood to relate directly to the market.” *Id.*

204. ZELIZER, *supra* note 8, at 33. As Professor Zelizer explains, “[i]n the broadest terms, people create connected lives by differentiating their multiple social ties from each other, marking boundaries between those different ties ..., sustaining those ties through joint activities (including economic activities), but constantly negotiating the exact content of important social ties.” *Id.* at 32.

#### IV. REVISITING FAMILY AND BUSINESS VALUES

Effective planning can reduce the likelihood of conflict in a family business and provide nondestructive solutions for conflicts that do arise. However, family businesses often fail to consider issues of succession and other potential flash points. Nor, in any event, is it possible to identify in advance all sources of conflict. Consequently, courts have an important role to play in resolving disputes that cannot be settled amicably by the parties. This Part contends that the distinctive features of family businesses should be included at the planning stage, when litigation is avoidable. Further, consideration of context can help courts adjudicate shareholder disputes consistent with the parties' own expectations.

Part IV.A examines legislative solutions to the problem of family business conflict and concludes that neither existing business entity forms nor plausible variants can supply default terms sufficient to dissolve the potential for serious work-family conflict. Part IV.B contends that although legal advisors to family businesses should address business concerns in the context of broader family interests and values, the current model of law practice is not well suited to provide the kind of multidisciplinary counseling that would benefit clients most. Part IV.C argues that when courts are called upon to adjudicate shareholder disputes, they should be open to relevant evidence concerning family relationships in order to understand the parties' true bargain in proper context.

##### A. *Choice of Entity*

The best way to avoid crippling dissension in a family business, or any other venture, is to anticipate potential problems and plan around them. Investors should pick the most suitable jurisdiction and business entity form to take advantage of default rules that will structure the parties' business relationships in at least rough accord with their intentions.<sup>205</sup> However, no available form of business

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205. See MACEY, *supra* note 72, at 23 (“[B]y incorporating their businesses in a jurisdiction that contains statutory provisions that are to their liking, people organizing new business (or reorganizing existing businesses) can select or ‘opt into’ the set of ‘off-the-rack’ legal rules that best fit their needs.... [E]ven within a single jurisdiction, people organizing a business can



entity can resolve in advance the various potential conflicts that loom when family interests substantially overlap with business ownership and management interests.

For many family businesses, the flexibility of the LLC makes it the best choice among existing options. Before the advent of the LLC, investors once had to choose either desirable flow-through taxation rules or limited liability and could not achieve both without following cumbersome procedures.<sup>206</sup> The great advantage of the LLC is that investors have limited liability and can simply elect flow-through or entity taxation while also tailoring governance rules in an operating agreement.<sup>207</sup> LLC statutes typically have standard default options that provide either a partnership or corporation governance structure; by choosing member management, family businesses can adopt a form of governance in keeping with their relative informality.

However, the flexibility of the LLC form does not solve the problem of shareholder oppression, because abuse of control is an inherent structural feature of closely held businesses with limited exit rights and majority rule as the basic gap-filling mechanism.<sup>208</sup> Closely held businesses of all stripes tend to use informal governance structures, but this does not change the raw allocation of real decision-making power once informal cooperation has come to an end. Moreover, general default rules cannot hope to cover more than a fraction of the possible disputes that could occur over the course

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select among a variety of different forms of business organization, such as the traditional corporate form, as well as the limited partnership, the limited liability company, and the limited liability partnership.”).

206. See Susan Pace Hamill, *The Story of LLCs: Combining the Best Features of a Flawed Business Structure*, in BUSINESS TAX STORIES 295, 295-96 (Steven A. Bank & Kirk J. Stark eds., 2005). For instance, a corporation could choose flow-through taxation by selecting “S” status only if it met a number of rigid requirements concerning the number of shareholders, principal place of business, and the like. *Id.* at 295 & n.2. Alternatively, in more recent years, a business venture might use the limited partnership form to shield the investors from liability while preserving flow-through taxation and to establish a corporation to serve as the general partner and hold the liability. The same individuals would serve as the directors and officers of the corporation and as the limited partners. *Id.* at 298, 309-10.

207. For analysis of the LLC and a discussion of its evolution, see *id.*

208. See Robert B. Thompson, *The Shareholder's Cause of Action for Oppression*, 48 BUS. LAW. 699, 699 (1993) (“The statutory norms of centralized control and majority rule, when combined with the lack of a public market for shares in a close corporation, leave a minority shareholder vulnerable in a way that is distinct from the risk faced by investors in public corporations.”).

of a long-term business relationship.<sup>209</sup> Therefore, minority investors must either depend on specific bargaining<sup>210</sup> or judicial intervention to enforce standards of conduct among shareholders.<sup>211</sup>

Nor is it clear that a special statute would better suit family businesses. Here, the history of LLCs may be instructive. Although many LLC statutes once had provisions that enabled easy, partnership-like exit, the default rules were later changed to mirror corporate law rules that do not guarantee liquidity.<sup>212</sup> This was done to accommodate tax planning in family businesses.<sup>213</sup> In order to qualify for a lack-of-marketability deduction in shares transferred through inheritance, the holder cannot also have the right to exchange them for fair value.<sup>214</sup> An automatic exit right provided by statute, in any case, would have other undesirable features, including exposing the business to risk of minority opportunism.<sup>215</sup> Also, strong exit rights could be destabilizing and creditors might worry about the possibility of “a relatively trivial falling out among the equity investors ... thus raising the cost of capital.”<sup>216</sup>

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209. See MACEY, *supra* note 72, at 29 (“[B]y definition, shareholders and other parties to corporate governance disputes that wind up in litigation have not actually specified a preferred outcome *ex ante*.”). Professor Macey observes that, as a consequence, “a court’s hypothesis that a particular result is the one that the shareholders would have preferred cannot be refuted.” *Id.*

210. See *infra* Part IV.B.

211. See *infra* Part IV.C.

212. See LARRY E. RIBSTEIN, THE RISE OF THE UNINCORPORATION 179-80 (2010).

213. See *id.* For this reason, some families use limited partnership structures to transfer wealth between generations: the lack of control and marketability of the limited shares is a tax-planning advantage. See Kenneth P. Brier & Joseph B. Darby, III, *Family Limited Partnerships: Decanting Family Investment Assets into New Bottles*, 49 TAX LAW. 127, 127-28 (1995).

214. See RIBSTEIN, *supra* note 212, at 179-80. For the same reason, even if the default rule were otherwise, well-advised family businesses might still modify it in order to preserve the tax benefit. The lack-of-marketability discount also causes some families to use the otherwise moribund limited partnership form. See *id.* at 180.

215. For instance, minority investors could threaten to exercise the exit right at a time when the business lacked cash and extract a greater percentage of the value of the business in exchange for not exiting. For further discussion of the problems associated with automatic exit rights, see Benjamin Means, *A Voice-Based Framework for Evaluating Claims of Minority Shareholder Oppression in the Close Corporation*, 97 GEO. L.J. 1207, 1252-53 & n.222 (2009).

216. BAINBRIDGE, *supra* note 46, at 831; see also MACEY, *supra* note 72, at 24 (“[B]uy-sell arrangements are very costly for companies. In particular, creditors understandably view such arrangements as a significant source of risk, since the exercise of a buy-sell agreement by a shareholder reduces the ‘equity cushion’ available to creditors whose loans have not been repaid when the shareholder’s stock is purchased by the company.”).

In theory, the law could take the opposite approach and provide stronger default lock-in rules for family businesses. However, further narrowing the exit option could exacerbate family disputes. First, family business participants already face a double exit problem in that ending a business relationship may cause or coincide with damage to family relationships.<sup>217</sup> Heightening the fault requirement for exit would only invite more hostility, making it less likely that the parties would be able to preserve their kinship ties while working through the end of the business relationship.<sup>218</sup> Second, extensive bargaining among family members can signal distrust detrimental to the business, and an unmodified, no exit position would encourage majority opportunism against vulnerable minority investors.<sup>219</sup>

In sum, even though there could be room for a distinct “F” Corporation entity with default rules designed for family businesses, proponents of broad changes to the existing default rules would have to demonstrate that the benefits outweigh the costs. In the meantime, and as a rough compromise position, the existing framework of shareholder protections—whether couched in terms of fiduciary duty or reasonable expectations—limits the grounds for exit but preserves an important role for courts in resolving end-of-life issues that the parties have not explicitly negotiated. Though imperfect, current corporate and LLC forms may offer the best mix of default governance, tax, and liability rules.

### *B. Multidisciplinary Practice*

Even if default rules are mostly suitable, no standard business form can substitute for the vital role lawyers play in helping parties

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217. See *supra* notes 116-17 and accompanying text.

218. Although a liberal, nonfault approach could jeopardize the favorable tax treatment of inherited shares and destabilize the business entity, those costs might be compared to the benefits of easy exit as a kind of insurance policy against future family litigation. Lawyers sensitive to the needs of family business, see *infra* Part IV.B, would approach the negotiation of a buy-sell agreement with these competing considerations in mind.

219. See Mahoney, *supra* note 70, at 178. Without overstating the analogy, the rarity of prenuptial agreements, see Martson, *supra* note 177, at 889-91, may be explained by similar considerations—in both cases, the absence of such an agreement does not necessarily indicate an endorsement of the default distributional rules, even if lack of evidence of an alternative arrangement limits a court’s options.

identify and negotiate appropriate solutions to a variety of business planning issues, including external regulatory requirements, financing needs, and desired tax treatment.<sup>220</sup> Family members may resist opportunities for planning, whether to preserve trust or simply to avoid incurring seemingly unnecessary legal fees, but default rules need tailoring to fit the parties' particular circumstances:

Within each form of business, the lawyer must help the client create a working structure that accommodates the participants' interests and abilities.... It will establish who has what authority to legally bind the enterprise and lay out how business decision making will be accomplished. The structure should further define the financial relationships of the participants and how to parcel out the fruits of the endeavor. The structure will provide the means for accepting new participants and allow[] an exit mechanism for those who wish to leave.<sup>221</sup>

In order to craft provisions that meet a client's needs, a lawyer must first appreciate what the client seeks to accomplish: "For example, an estate planning attorney may be puzzled by a client's reluctance to implement the most rational distribution plan, until she considers the client's conflict between his desires as a parent (to treat each offspring equally) and as a business owner (to consolidate control in one successor)."<sup>222</sup> Lawyers advising family businesses should take special care to explore questions, such as succession and estate planning, that are critical to the success of the venture.<sup>223</sup>

Experienced business lawyers learn to work effectively with family businesses, but methodological training in legal analysis and issue spotting does not provide lawyers with the tools they need to appreciate the influence of family dynamics. To supplement their skill set, lawyers may find that other professionals, such as business counselors and psychologists, are invaluable in helping families to avoid conflict. For instance, helping the parties negotiate a buy-sell agreement requires that a lawyer respect the importance of trust

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220. See Hobbs & Hobbs, *supra* note 23, at 164.

221. Steven H. Hobbs, *Toward a Theory of Law and Entrepreneurship*, 26 CAP. U. L. REV. 241, 257-58 (1997) (footnotes omitted).

222. GERSICK ET AL., *supra* note 16, at 5.

223. See Hobbs & Hobbs, *supra* note 23, at 165-66.

and take care to avoid the possibility that an arm's length agreement could undermine broader family dynamics.<sup>224</sup>

Lawyers who advise family businesses might also collaborate with or learn from well-established counseling firms: Cambridge Advisors to Family Enterprise;<sup>225</sup> the Family Firm Institute;<sup>226</sup> the Center for Family Enterprises, Kellogg School of Management;<sup>227</sup> and the Family Business Network.<sup>228</sup> At least one organization, the International Association of Attorneys for Family-Held Enterprises, seeks to bring together legal professionals who specialize in representing family businesses.<sup>229</sup> At present, with the possible exception

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224. The buy-sell agreement bears some structural similarity to a marital prenuptial agreement; an absence of bargaining in both contexts may be explained by a need to preserve trust and a perceived inconsistency of trust and contractual protection. See Blair & Stout, *supra* note 176, at 1805 ("The phenomenon of trust behavior suggests ... that sometimes participants in closely held corporations may deliberately choose not to draft formal contracts, even when they could do so.").

225. CAMBRIDGE ADVISORS TO FAM. ENTERPRISE, <http://www.cambridge-afe.com> (last visited Feb. 9, 2013). According to their website:

Cambridge Advisors to Family Enterprise ... help[s] business families and the leaders of family enterprises effectively manage the important, and often complicated and sensitive family, business, ownership, and financial issues they face. Working closely with our clients, we help build united, industrious families that create impressive legacies; loyal, capable ownership groups; and high performance, sustainable enterprises.

*Id.* Led by senior faculty at the Harvard University Business School, the Cambridge Advisors to Family Enterprise takes an interdisciplinary approach to problem solving: "Our advisors form a complementary team, blending disciplines, such as management, psychology, organizational behavior, law, and finance." *Our People*, CAMBRIDGE ADVISORS TO FAM. ENTERPRISE, <http://www.cambridge-afe.com/people.html> (last visited Feb. 9, 2013).

226. *History*, FAM. FIRM INST., INC., <https://ffi.site-ym.com/?page=History> (last visited Feb. 9, 2013) ("For more than 25 years, FFI has globalized its membership, broadened and deepened its educational and professional programs, and continually enhanced its activities and services.... [FFI] continues to lead in the area of family enterprise work.").

227. *Center for Family Enterprises*, KELLOGG SCH. MGMT., <http://www.kellogg.northwestern.edu/research/family> (last visited Feb. 9, 2013) ("Established in 1999, the Center's focus is on teaching, research and case writing about family business strategy, family business governance, family business succession, entrepreneurship in the family business, family foundations, family offices and family business culture.").

228. *Who Are We*, FAM. BUS. NETWORK, <http://www.fbn-i.org/fbn/web.nsf/doclu/network?OpenDocument> (last visited Feb. 9, 2013) ("The Family Business network is a not-for-profit international network that is run by family businesses, for family businesses, with the aim of strengthening success over generations.").

229. INT'L ASS'N FOR ATT'YS FOR FAM.-HELD ENTERPRISES, <http://www.afhe.com> (last visited Feb. 9, 2013). The website lists 100 members and states that "[t]he international association of Attorneys for Family-Held Enterprises (AFHE) is an independent, non-profit association of attorneys, practicing in the areas of corporate, litigation, taxation, and trusts and estates

of trust and estate lawyers, the legal profession does not seem to be well represented in the mix of counselors who advise family businesses on a regular basis.<sup>230</sup> For instance, a newsmagazine recently reported that the Ochs-Sulzberger family, which controls *The New York Times*, has been “working with a company called Relative Solutions, which specializes in brokering disputes inside wealthy families.”<sup>231</sup> According to its website, Relative Solutions employs individuals with degrees in clinical psychology, social work, and accounting, but no lawyers.<sup>232</sup>

Although this is not the place for a comprehensive analysis of possible changes to the structure of the legal profession, two considerations seem particularly relevant to a possible underrepresentation of lawyers in family business counseling. First, legal representation assumes positional conflict rather than cooperation;<sup>233</sup> even in transactional practice, lawyers may help clients garner a higher percentage of existing value rather than find creative ways to enhance value for all parties.<sup>234</sup> Consequently, professional ethics rules prohibit conflicts of interest to ensure that clients receive independent advice.<sup>235</sup> The agency cost concerns

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who provide multi-disciplinary legal counsel and advice to privately-held enterprises, their owner-managers, and family members.” *Overview*, INT’L ASS’N FOR ATT’YS FOR FAM.-HELD ENTERPRISES, [http://www.afhe.com/index.php?option=com\\_content&view=article&id=19&Itemid=27](http://www.afhe.com/index.php?option=com_content&view=article&id=19&Itemid=27) (last visited Feb. 9, 2013); *see also Member Directory*, INT’L ASS’N FOR ATT’YS FOR FAM.-HELD ENTERPRISES, [http://www.afhe.com/index.php?option=com\\_sobi2](http://www.afhe.com/index.php?option=com_sobi2) (last visited Feb. 9, 2013).

230. Further empirical work would be needed to get a clearer picture, but the question arises whether the relative absence of legal professionals—at least after business formation and before end-stage issues—reflects low market demand or whether something structural has limited the ability of lawyers to meet an existing demand.

231. *See* Joe Hagan, *A New York Times Whodunit*, N.Y. MAG., June 4, 2012, at 30, 34.

232. *See Our People*, RELATIVE SOLUTIONS, <http://www.relative-solutions.com/people> (last visited Feb. 9, 2013); *see also* RELATIVE SOLUTIONS, <http://www.relative-solutions.com> (last visited Feb. 9, 2013) (“Relative Solutions is a firm that manages change with families as they look to transition their wealth from generation to generation.”).

233. *See* Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 323 (2004) (describing courts as “function[ing] in an adversarial model”).

234. Obviously, a single negotiation can include value-claiming and value-creating elements, *see* Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 264 (1984), but a party that focuses only on creating value could be in serious jeopardy of coming away with a disadvantageous bargain.

235. *See* MODEL RULES OF PROF’L CONDUCT R. 1.7 (2011); *id.* R. 1.8.

behind these prophylactic rules are real,<sup>236</sup> but they may also inhibit creative problem solving.

Second, the desire to make effective use of psychologists, social workers, accountants, financial planners, and other professionals can conflict with the rules of professional responsibility that police the boundaries of the practice of law and the ability of lawyers to partner with nonlawyers.<sup>237</sup> For lawyers who advise family businesses, the value of collaborating with professionals from other disciplines is both obvious and consistent with broader calls for reform to the structure of the legal profession.<sup>238</sup> As a number of legal commentators have observed, lawyers can no longer afford to insulate themselves from competition when other professionals can combine to meet client needs in a less adversarial and more cost-effective way.<sup>239</sup> In the United States, slumping demand for traditional legal services<sup>240</sup> suggests that change may be inevitable.<sup>241</sup>

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236. See Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1709-10 (1998).

237. See MODEL RULES OF PROF'L CONDUCT R. 5.4 (2011) (prohibiting fee sharing and partnerships with nonlawyers); Tanina Rostain, *The Emergence of "Law Consultants,"* 75 FORDHAM L. REV. 1397, 1409 (2006); see also Janet Weinstein, *Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice*, 74 WASH. L. REV. 319, 328-51 (1999) (describing professional norms that prevent interdisciplinary work).

238. See, e.g., Larry E. Ribstein, *Practicing Theory: Legal Education for the Twenty-First Century*, 96 IOWA L. REV. 1649, 1664 (2011).

239. See Paul D. Paton, *Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America*, 78 FORDHAM L. REV. 2193, 2198 (2010) (noting that "[t]he changed economic reality for law firms in the United States" may prompt reconsideration of multidisciplinary law practices).

240. See Press Release, NALP, *Law School Grads Face Worst Job Market Yet—Less Than Half Find Jobs in Private Practice* (June 7, 2012), available at <http://www.nalp.org/2011selectedfindingsrelease>.

241. Some universities have already taken advantage of the need for a more interdisciplinary and collaborative approach: "Often family businesses reach for help at university-based family business centers, where they have access to the expertise of scholars and practitioners and can learn how to address succession issues in a holistic manner." Steven H. Hobbs, Foreword, *Entrepreneurship and Law: Accessing the Power of the Creative Impulse*, 4 ENTREPRENEURIAL BUS. L.J. 1, 17 (2009). In universities, it is possible to "create an environment which provides a learning opportunity for the students (who may be members of that family business), a process for various advisors to collaborate in crafting solutions, and a fertile source of experiential research." *Id.* Universities may in some cases garner substantial revenues from the provision of counseling and general education services to family businesses. For instance, the Harvard Business School charges \$38,000 for a six-day program. See *Executive Education: Families in Business from Generation to Generation*, HARV. BUS. SCH., <http://www.exed.hbs.edu/programs/fib/Pages/default.aspx> (last visited Feb. 9, 2013).

There are a variety of ways that lawyers might approach these challenges within the confines of existing rules of professional ethics. For instance, lawyers who regularly advise family businesses might seek additional training in order to incorporate a broader, multidisciplinary perspective. Also, family business lawyers could make a practice of consulting with other professionals, though such arrangements could run afoul of existing rules concerning fee sharing.<sup>242</sup> However, the client's willingness to pay a premium for additional advisors could be an impediment. Indeed, to the extent that smaller-scale family businesses retain a single outside advisor on an ongoing basis, the most likely candidate would seem to be the accountant who assists with books, records, and tax preparation.

If nowhere else, lawyers do get involved when the parties anticipate a lawsuit. In appropriate circumstances, the lawyers could borrow aspects of the collaborative model developed for dispute resolution in the context of divorce.<sup>243</sup> Lawyers who practice collaborative law seek to minimize the adversarial nature of the process and avoid litigating matters that can be resolved through open dialogue and reasonable negotiation.<sup>244</sup> To incentivize cooperation, the parties agree that "the lawyers may act as settlement counsel but not as litigation counsel."<sup>245</sup> A collaborative model, if cleared by the state courts or bar ethics committees, could be extended to family business counseling and dispute resolution.<sup>246</sup>

Even if multidisciplinary advice or creative collaborations are not realistic for a particular representation, lawyers counseling clients

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242. See Steven H. Hobbs, *The Ethics and Professional Norms of Family Business Centers*, in *THE HOLISTIC MODEL* 9, 17 (Greg McCann & Nancy B. Upton eds., 2000).

243. See Elizabeth K. Strickland, Comment, *Putting "Counselor" Back in the Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N.C. L. REV. 979 (2006).

244. See Hobbs, *supra* note 241, at 19 ("The clients and each of their lawyers meet together and may call in experts such as counselors or financial experts to handle any issues that may arise during the divorce.").

245. E. WENDY TRACHTE-HUBER & STEPHEN K. HUBER, *MEDIATION AND NEGOTIATION* 516 (2d ed. 2007).

246. See *id.* ("Collaborative law has arisen largely in the family dissolution context, but the same principles could be applied to many other types of disputes."). In 2009, the National Conference of Commissioners on Uniform State Laws (NCCUSL) drafted a Model Collaborative Law Act, which has been adopted in four states, and eight state bar ethics committees have approved the use of collaborative law. See *Collaborative Law Act Summary*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/ActSummary.aspx?title=Collaborative%20Law%20Act> (last visited Feb. 9, 2013).



involved in a family business should appreciate that their clients are unlikely to approach the investment from a rational actor's perspective.<sup>247</sup> In the first instance, this means that lawyers need to take special care to safeguard their clients from opportunism that they may be inclined to overlook. Lawyers should also be proactive in raising questions about business succession and estate planning that can cause problems if left unaddressed. However, lawyers should not view their role as forcing clients to adopt a "rational" market orientation; clients' goals, whether market or nonmarket, are equally entitled to respect.

### *C. Adjudicating Plural Values*

Although higher levels of trust and loyalty benefit family businesses, the intersection of family and business values can also spark conflict. When adjudicating such disputes, often in the context of a petition for dissolution, courts might seek to apply a single set of values: either privileging family values or deferring to business norms. Neither course is desirable because a family business is both a market institution and an extension of a broader family system.<sup>248</sup> Market and nonmarket values cannot be evaluated along a single dimension.<sup>249</sup> A more comprehensive legal approach to governance problems in family businesses should address both sides of the equation.

On the one hand, the parties have chosen to participate in a business venture formed pursuant to statute and modified by any further contractual understandings. A refusal to apply the law in favor of an ungrounded, equitable vision of family fairness would violate the parties' own expectations and reduce the value of family

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247. See *supra* note 27 and accompanying text.

248. See *supra* Part II.

249. ANDERSON, *supra* note 9, at 70 ("Two goods are incomparable in intrinsic worth if they are not candidates for the same mode of valuation."). Isaiah Berlin, an Oxford philosopher and historian of ideas, offered a defense of value pluralism that remains, in many respects, the strongest articulation of the theory. In his essay, *Two Concepts of Liberty*, Berlin argued that the things we have the most reason to value in life cannot be reduced to one another—liberty is not the same thing as equality—and that no supervening value can be identified that would allow us to trade off plural values with any certainty that we are doing so correctly. ISAIAH BERLIN, *Two Concepts of Liberty*, in LIBERTY 166, 213 (Henry Hardy ed., 2002). Moreover, belief in a single organizing principle can be dangerous if it causes us to discount the complexity of human motivations. *Id.* at 208.

businesses as vehicles for profit-seeking activity. But neither will it do to simply ignore the role that family relationships play in structuring business activity. This, too, would violate the parties' own expectations and could damage the systemic trust that market relations presuppose. Therefore, as with any other relational contract, courts should seek to understand and enforce the parties' mutual understandings and expectations, and the family context can sometimes provide helpful interpretive guidance.<sup>250</sup>

### 1. *Standing*

In a family business dispute, the court's first task may be to determine whether the plaintiff has an ownership interest that would give her standing to sue. In some cases, there will be no formal evidence of ownership or the evidence may be inconsistent. This is particularly true when the allegation is that the parties were in a general partnership, a form of business organization that requires no formal registration and exists if the parties agree to co-own a business for profit.<sup>251</sup> Professors Alan Bromberg and Larry Ribstein describe the evidentiary problem:

[A]spects of the relationship that would otherwise resemble partnership take on a different coloration in the family setting. The exercise of control by a spouse may be simply that of a helpmate in marriage rather than that of a partner; one spouse may share proceeds of the business in order to satisfy a support obligation.<sup>252</sup>

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250. It is important to note, however, that the range of appropriate issues for judicial resolution remains small. Most disputes during the course of a business relationship are resolved according to the corporate mechanisms of control and cannot be second guessed in court. *See, e.g.*, *Stuparich v. Harbor Furniture Mfg.*, 100 Cal. Rptr. 2d 313 (Ct. App. 2000). Only business decisions that have a severe impact on minority shareholders are likely to be litigated and to present a viable cause of action for common law oppression or statutory dissolution. *See, e.g.*, *Alaska Plastics, Inc. v. Coppock*, 621 P.2d 270 (Alaska 1980).

251. *See* REVISED UNIF. P'SHIP ACT § 101(6) (1997).

252. 1 ALAN R. BROMBERG & LARRY E. RIBSTEIN, *BROMBERG AND RIBSTEIN ON PARTNERSHIP* § 2.10, at 2:147 (2012); *see also In re Lampe*, 331 F.3d 750, 756-57 (10th Cir. 2003) (rejecting the argument that a business partnership existed when traditional indicia could not be distinguished from the context of a marriage); *McGregor v. Crumley*, 775 N.W.2d 91, 99 (S.D. 2009) (same).

Even in a registered form of business organization, such as a corporation or LLC, it is possible that the parties will not have allocated shares or recorded them. Not surprisingly, the parties may take very different views of the situation once a dispute arises.<sup>253</sup> In adjudicating such disputes, courts should attempt to parse the meaning of legal documentation, if it exists, in the full context of family relationships that may guide the interpretation.<sup>254</sup>

Consider, for example, the contrasting views in *Reichman v. Reichman*, in which a New York appellate court overturned the trial court's finding that the son lacked an ownership stake in the LLC and remanded without deciding what percentage interest the son actually held.<sup>255</sup> The father, Paul, exercised effective day-to-day control over the business, an online retail supplier of bed and bath products.<sup>256</sup> In an injunction action alleging oppression and seeking an accounting and the imposition of a constructive trust, the son, Michael, claimed that he had an 80 percent ownership interest.<sup>257</sup> The father's response, which the trial court accepted, was that he held a majority interest and that the son was merely an employee of the business.<sup>258</sup>

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253. See, e.g., Ng v. Ng, No. 114291/2010E, at \*2-4 (N.Y. Sup. Ct. Apr. 18, 2012) (decision and order), available at <http://www.nybusinessdivorce.com/uploads/file/NgDecision.pdf>.

254. For instance, in *Berger v. Berger*, the court had to decide whether a plaintiff who held no shares of stock could petition for dissolution based on his beneficial interest in a voting trust controlled by his father. 592 A.2d 321, 323 (N.J. Super. Ct. Ch. Div. 1991). The court held that, despite the lack of legal ownership, the son had standing to sue. *Id.* at 325-26 (relying on precedent concerning dissenters' rights in mergers in which multiple stockholders leave legal title in the "street name" of a brokerage house); see also Chiu v. Chiu, 832 N.Y.S.2d 89, 91-92 (App. Div. 2007) (holding that "the trial court's determination that the defendant Winston Chiu 'was never a member of the ... LLC' was against the weight of the documentary and testimonial evidence" including tax returns that listed Chiu as a 25 percent owner).

255. 930 N.Y.S.2d 262, 263-64 (App. Div. 2011); see also Peter A. Mahler, *Father May Not Know Best: Appeals Court Grants Injunction in Son's Bid to Establish Majority Ownership of LLC*, N.Y. BUS. DIVORCE (Oct. 17, 2011, 5:00 AM), <http://www.nybusinessdivorce.com/2011/10/articles/llcs/father-may-not-know-best-appeals-court-grants-injunction-in-sons-bid-to-establish-majority-ownership-of-llc> (explaining the appellate court's decision to overturn the trial court).

256. The online bedbathstore.com LLC business was the successor to a retail establishment, Mildred's For Fine Linens, in Borough Park, Brooklyn. See *Reichman v. Reichman*, No. 000158-11, at \*4 (N.Y. Sup. Ct. Mar. 11, 2011) (decision and order), available at <http://www.nybusinessdivorce.com/uploads/file/ReichmanTrialCt.pdf>.

257. *Id.* at \*1, \*4.

258. *Id.* at \*5, \*10.

The trial court noted that when the domain name was registered, the plaintiff “was still in college,”<sup>259</sup> and the court credited the father’s explanation of the initial business dealings:

Paul Reichman met with counsel to determine the ownership of the LLC.<sup>260</sup> Originally, Paul planned for a total of 100 shares to be issued, with Michael to own 80 shares. Paul explained credibly that, in sum and substance, he wanted Michael to feel like he had some ownership in a company, particularly given that Michael had had some difficulties during college. Paul wanted to have some ownership, nevertheless, because he put his life savings into the LLC.

Almost immediately after forming the initial plan, Paul thought better of it given his extensive financial contribution, and determined that Michael should receive 15 shares, and Paul should receive the other 85. Paul also admitted that part of his motivation in granting shares to Michael was to shield assets from Paul’s wife, as Paul and his wife had marital difficulties at that time.<sup>261</sup>

The documentation concerning the parties’ respective ownership interests indicated that there were further alterations over time.<sup>262</sup> The parties signed an LLC operating agreement that stipulated that Paul would have sixty shares and Michael would have the remaining forty shares.<sup>263</sup> Finally, when the business applied for a loan from the Small Business Administration, it learned that the loan would be denied if Michael, who was arrested in college, held an ownership stake in the LLC.<sup>264</sup> The trial court accepted Paul’s testimony that Michael had agreed to transfer his ownership stake to Paul, stating, “[w]hatever it takes, Dad.”<sup>265</sup>

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259. *Id.* at \*4.

260. That the initial allocation of ownership interests was devised with the assistance of counsel should give the reader pause and, albeit anecdotal, suggests that lawyers will not always find drafting solutions to potential governance problems in closely held family businesses, even if they are consulted in advance.

261. *Reichman*, at \*4-5 (N.Y. Sup. Ct. Mar. 11, 2011).

262. *See id.* at \*5.

263. *Id.*

264. *Id.*

265. *Id.* (“The Court credits this testimony, as it is consistent with Michael’s age, relative inexperience in the industry compared to Paul, and Paul’s capital contribution to the LLC which dwarfs any contribution by Michael.”).

The trial court observed that the documentation of ownership was “far from atypical in a small, family-run business” and concluded that “the actions of the parties ... are most telling as to their intent regarding ownership of the LLC.”<sup>266</sup> Reviewing the evidence, the court found that Paul had “acted in a manner consistent” with ownership whereas Michael acted like an employee.<sup>267</sup> Moreover, Michael never received tax documents indicating an ownership interest, he received tax-free health care, typical for an employee, and he had no familiarity with many of the important aspects of business ownership.<sup>268</sup> In sum, the trial court viewed the evidence through the perspective of the family relationship, giving significant weight to the son’s relative youth and inexperience, and citing background context to discount the import of documentation that seemed to indicate the son held a controlling stake.<sup>269</sup>

In a summary order reversing the trial court and awarding temporary injunctive relief to prevent dissipation of assets, the appellate court held that the son established a likelihood of success on the merits “by submitting evidence tending to show that he is a member of the LLC, including a copy of the LLC operating agreement, which states that he owns a 40% share of the LLC.”<sup>270</sup> One commentator summarized the trial court’s job going forward:

While the appellate court clearly views Michael as having some ownership interest, it left open what percentage he owns and gives little or no clue how the lower court is supposed to weigh and resolve the conflicting documentary evidence and testimony in reaching a determination whether Michael owns 15%, 40% or 80%.<sup>271</sup>

Although the appellate court did not fully explain its reasoning, it rejected the trial court’s use of family context to trump properly

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266. *Id.*

267. *Id.*

268. *Id.* at \*5-6. Although the ruling was not a final disposition on the merits, the court held that any damages Michael might establish, either as an employee or possibly as a “limited shareholder,” could be addressed through money damages. *Id.* at \*6. The court also took note of the fact that the business provided employment for approximately twenty people and that a transfer of control could jeopardize the financial health of the company. *Id.*

269. *See id.* at \*5-6.

270. *Reichman v. Reichman*, 930 N.Y.S.2d 262, 263-64 (App. Div. 2011).

271. *Mahler*, *supra* note 255.

executed business documents.<sup>272</sup> It is not clear from the appellate court's opinion whether analysis of the family relationships would be relevant to determining the status and proper interpretation of the relevant legal documents. According to this Article's recommended approach, family context does not give a court license to ignore the entity form selected or any other formalities followed by the parties; but evidence that family relationships have created mutually understood expectations among the parties should guide the interpretation of formal legal materials concerning the business.

## 2. Reasonable Expectations

Assuming that the plaintiff has standing to pursue an action, the court should next determine if family interests are actually "at stake."<sup>273</sup> In a spillover dispute, for instance, the business justification for challenged conduct would merely disguise what is in reality a family grievance, rather than an independent decision concerning the best deployment of economic resources.<sup>274</sup> When the source of conflict seems unrelated to the business operations, the courts should scrutinize the challenged transactions closely for the possibility of abuse of control.

For example, in *Meiselman v. Meiselman*, the complaining shareholder sought dissolution and alleged that he had been excluded from the business by his brother, who was the controlling shareholder.<sup>275</sup> The court concluded that the controlling shareholder's defense—that his brother suffered from mental illness—was not well supported and reflected family tensions stemming from "an argument [plaintiff] had with his father which took place about 20 years ago during which Mr. Meiselman castigated [plaintiff] for

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272. See *Reichman*, 930 N.Y.S.2d at 263-64.

273. For instance, as Professor Anderson observes, freedom of movement may be a basic right but it "is not really at stake in a town's decision to enforce traffic laws for safety; that is, enforcing this tradeoff between effective freedom of movement and safety does not throw into question one's commitment to valuing persons as free." ANDERSON, *supra* note 9, at 71 (noting by comparison that "[p]rohibiting all overseas travel in the name of citizens' safety" would likely violate the higher value of respecting individual liberty).

274. See *supra* Part II.C.1.

275. 307 S.E.2d 551, 555 (N.C. 1983). The relevant statute authorized courts "to order dissolution or another more appropriate remedy when 'reasonably necessary' for the protection of the 'rights or interests' of the complaining shareholder." *Id.* at 553 (citing N.C. GEN. STAT. § 55-125(a)(4) (currently located at § 55-14-30(2)(ii) (2012))).

having a non-Jewish woman at a family function.”<sup>276</sup> Nor was the court persuaded by testimony concerning “another fight which occurred between [the brothers] after [the controlling shareholder] had failed to invite [plaintiff] to a football game to which all of the males in the family traditionally had been invited.”<sup>277</sup> Although family relationships may properly inform a court’s understanding of the business arrangements that have been agreed upon, family grievances do not create a business justification for oppressive conduct against a minority shareholder.<sup>278</sup>

On the other hand, family ties do not trump business norms; the mere fact that a family member’s interest conflicts with a business norm does not call into question an ordinary business decision, whether from a practical, moral, or legal standpoint:

In private life, one may of course give the interests of the beloved priority over those of strangers. But in public life, as in assigning jobs, one may not weight the interests of the beloved more heavily than the interests of a random applicant. Nepotism is prohibited by the demands of respect, and it is not required by the forms of love compatible with life in modern liberal societies. No single weighted preference ranking can explain a person’s choices across all of her social roles.<sup>279</sup>

For a family value to be implicated by a business decision, it must be part of the parties’ understood business relationship.<sup>280</sup> Somewhat akin to the statutory framework that authorizes the establishment of the business entity and sets its default rules, a family’s value system also provides background principles against which the parties can order their affairs. A broad contractual approach to interpreting and enforcing the parties’ bargain advances the parties’ purposes as to matters that—for reasons of transaction costs, social costs, or sheer inadvertence—they have left

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276. *Id.* at 556.

277. *Id.*

278. *See id.* at 559-60.

279. ANDERSON, *supra* note 9, at 72. Although the antinepotism norm would not apply, at least as rigorously, in a family business setup, in part because it provides an employment vehicle for family members, neither would higher family obligations trump neutral consideration of merit.

280. *See Meiselman*, 307 S.E.2d at 563.

unspecified.<sup>281</sup> This approach is consistent with the reasonable expectations analysis for resolving shareholder oppression claims adopted in an increasing number of states.<sup>282</sup>

Some may object that judicial analysis cannot go beyond the formalized business arrangements without losing its objective character and becoming a vehicle for a court to impose its own values on the parties. Although this objection identifies a real concern, it is one that applies with equal force to the traditional economic approach to gap filling. When the parties have not bargained over a term, contract is always a “metaphor.”<sup>283</sup> Courts seek to fill the gap with the term that, hypothetically, the parties would have chosen.<sup>284</sup> In traditional economic analysis, efficiency serves as a guiding principle, both predictive and normative, clarifying the role of the courts.<sup>285</sup> Thus, courts assume that the parties would have selected the rule best designed to maximize the economic value of their investment.<sup>286</sup>

Yet, the efficiency hypothesis may ignore the parties’ actual intentions when entering the business relationship and supply a term that they would not likely have chosen for themselves. The gap between reality and the hypothetical, economically rational actor looms particularly large in a family business. If courts consult only economic values in completing the parties’ contract, they will ignore an important dimension of the actual business arrangement, setting

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281. See *supra* Part III.B. For instance, if family relationships suggest disparate bargaining power and the existence of strong nonmarket norms, courts would pay closer attention to modifications of the default rules that undermine family values. This approach would be analogous to that recommended by the American Law Institute for review of private bargains concerning marital dissolution: “In certain contexts, law may legitimately regulate and at times even strictly scrutinize such opt-outs in order to guarantee procedural and substantive fairness.” Hanoch Dagan, *Pluralism and Perfectionism in Private Law* 22 (June 20, 2011) (unpublished manuscript) (citing AM. LAW INST., *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* 945-1032 (2000)), available at <http://ssrn.com/abstract=1868198>.

282. See John H. Matheson & R. Kevin Maler, *A Simple Statutory Solution to Minority Oppression in the Closely Held Business*, 91 MINN. L. REV. 657, 679 (2007).

283. See MACEY, *supra* note 72, at 28.

284. See *id.* (“In other words, the provision of non-contractual corporate law rules is a creative exercise that only uses the contractual paradigm as a metaphor.”).

285. See Ribstein, *supra* note 65, at 366.

286. See EASTERBROOK & FISCHER, *supra* note 39, at 34 (contending that courts should assume that the parties are rational, economic actors and choose the term that the parties “would have bargained for had they anticipated the problems and been able to transact costlessly in advance”).



aside the parties' own understanding of their bargain. Admittedly, when family values and business values point in different directions, it may be hard to ascertain which rule the parties would have chosen. However, this is a feature of long-term, relational contracts in general, and the lack of a perfect interpretive approach should not counsel in favor of retreating to a reductionist account of the parties' bargain. Without an appreciation of context, a court cannot hope to identify the parties' true bargain. To ignore enmeshed family values is to disregard the nature of a family business.

Finally, if the contract metaphor cannot always be sustained given competing values at stake in a family business, family relationships might also give content to the concept of fiduciary duty that underlies the law of shareholder oppression in many jurisdictions.<sup>287</sup> Because there is something to fiduciary obligation that cannot be fully captured by contractual analysis, fiduciary duties could be a way of valuing family expectations that fall outside of even a broad understanding of the parties' bargain.<sup>288</sup> For instance, the parties litigating may be descendants of the individuals who established the business. Although, as a matter of strict contract doctrine this is not a relevant point—the current owners must live with the original bargain, or change it if they can—the disconnect between what the founders may have intended and the interests and understandings of the current participants can be immense.<sup>289</sup>

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287. See, e.g., Douglas K. Moll, *Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective*, 53 VAND. L. REV. 749, 760-61 (2000).

288. See, e.g., Sandra K. Miller, *The Role of the Court in Balancing Contractual Freedom with the Need for Mandatory Constraints on Opportunistic and Abusive Conduct in the LLC*, 152 U. PA. L. REV. 1609, 1634-45 (2004) (arguing that fiduciary duties offer more protection than contractual obligations of good faith and fair dealing). For a more comprehensive account, see D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1482 (2002) (arguing that “the purpose of fiduciary duty is to combat opportunism in such relationships”).

289. However, the desirability of fiduciary analysis as a supplement to a more contractual approach must be balanced against the increased costs of transactional uncertainty. As I noted in previous work, “[p]erhaps fiduciary duty in Justice Cardozo’s grand style is too lofty and we should fix our gaze on something closer to home and more attainable, like an understanding of the parties’ bargain rooted in relational contract theory.” Benjamin Means, *The Vacuity of Wilkes*, 33 W. NEW ENG. L. REV. 433, 470 (2011). On the other hand, and as I further observed, “perhaps a non-reductive approach to minority-shareholder oppression will necessarily include a number of values that are in tension with one another, that cannot be arranged into a final framework, and that can only be adjusted case by case.” *Id.*

## CONCLUSION

Despite their economic importance, the distinctive character of family businesses has been overlooked. Instead, legal analysis turns on the form of business organization—partnership, corporation, or LLC—and generally assumes that the participants are rational actors who seek to maximize their individual preferences.<sup>290</sup> Yet, just as family law scholars have argued that contracts can regulate intimate relationships, corporate law scholars should recognize that the intimacy of family life often substitutes for arm's length bargaining in family businesses.

Describing family business as an extension of family relationships offers two principal advantages. First, a fuller understanding of the sources and consequences of conflict in family business is necessary for the development of appropriate judicial, legislative, or counseling solutions. The rational-actor model of autonomous individual choice structures much contemporary corporate law scholarship, but leaves out relationships premised on trust, valued for their own sake, and aimed at communal rather than individual benefit. In a family business, mutual expectations may be based in substantial part on intimacy and trust.

Second, by integrating economic and social factors, we can revisit the artificial dichotomy between economic and noneconomic institutions, perceiving status, trust, bargaining, and background legal rules as alternative and potentially complementary mechanisms that can organize groups to accomplish shared purposes.<sup>291</sup> In this regard, corporate law scholars can learn from the work of family law scholars who have already drawn upon contract theory to advocate an expansion of the boundaries of private ordering in domestic relationships. This exchange should be a two-way street: the contracts that structure business relationships may build upon and presuppose the existence of shared family values.<sup>292</sup>

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290. See *supra* notes 34-41 and accompanying text.

291. See MACEY, *supra* note 72, at 8-9 (contending that corporate governance depends upon “[a] large and diverse array of mechanisms and institutions” including “contract, law, and societal norms and customs”).

292. Ertman, *supra* note 45, at 82.

This Article focuses on the management of conflicting social roles, but the study of family business also invites a bolder question: whether it makes sense to stand family life in opposition to the workplace and to accept the dichotomy between economic and noneconomic values.<sup>293</sup> If social roles were more broadly defined and inclusive, our relationships at home and at work might be richer and more varied. The normative goal for some businesses is driven by market efficiency, but this is neither always the case nor always appropriate. Family businesses can combine entrepreneurial vision with mutual concern and respect among members of the family, strengthening the nation's economy and its social fabric.

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293. Olsen, *supra* note 4, at 1564 (“Dividing life between market and family compartmentalizes human experience in a way that prevents us from realizing the range of choices actually available to us.”).