

Incorporating the Hendricksons

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ABSTRACT

The family is evolving rapidly, but not fast enough for some people. Several commentators suggest freeing family law of its traditional constraints by applying the contractual business association model. Business models, though superficially similar to domestic relationships, ultimately are unhelpful or counter-productive to defining the family. This Article discusses the essential differences between business and domestic partnerships and the potential havoc from trying to merge the two.

TABLE OF CONTENTS

I. DOMESTIC AND BUSINESS ASSOCIATIONS	277
A. <i>The Role of Standard Forms</i>	277
1. Transaction Costs.....	278
2. Interpretation.....	278
3. Framing and Norms	279
4. Signaling	279
B. <i>Problems Addressed by Standard Form Rules</i>	280
1. Opportunism.....	280
2. Agency Costs	282
3. Non-financial Considerations.....	283
II. DOMESTIC VS. BUSINESS ASSOCIATIONS	284
A. <i>General Considerations</i>	284
1. Separate Entities.....	285

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2. Trust	286
3. Externalities and Mandatory Rules	286
B. <i>Specific Differences</i>	287
1. Formation	287
2. Management	289
3. Agency	289
4. Property	290
5. Fiduciary Duties	291
6. Transfer	293
7. Exit	293
C. <i>Family Businesses</i>	296
III. EVOLUTION OF DOMESTIC ASSOCIATION FORMS	297
IV. CONCLUSION	300

The concept of the family is evolving faster than the legal structures necessary to accommodate it. The need for additional legal structures for domestic relationships has been highlighted by stories about the legal problems of same-sex couples and the portrayal of the polygamous Hendrickson family on the television show *Big Love*, who try to cope with daily domestic life without an accepted legal framework.¹

Since states have not fully recognized or developed legal forms for alternative domestic relationships, it is tempting for several reasons to fill the gap with existing business association standard forms, including the limited liability company (LLC), the limited and general partnership, and the corporation. Business associations offer the flexibility that family law currently lacks, as well as a choice-of-law rule—the internal affairs doctrine—which could facilitate rapid legal acceptance and evolution of alternatives to standard-form marriage. Business association statutes also provide convenient off-the-rack rules regarding such issues as formation, governance, and exit that also exist in domestic relationships. Furthermore, the agency and opportunism problems that business association statutes deal with resemble those that arise in domestic relationships. Thus, it is not

1. *Big Love* premiered on HBO in March 2006 and ran for five seasons, ending in March 2011.

surprising that commentators have turned to business association law as the relief from the existing legal constraints on same-sex marriage and other non-traditional domestic relationships.² Scholars have also embraced a general analogy between marriage and partnership in tax, estate, and divorce law, particularly because it furthers women's autonomy.³

This Article analyzes the issues concerning the use of business associations for domestic relationships. States would have to amend current partnership law to accommodate non-business family relationships,⁴ but LLCs already may be used for a non-business purpose.⁵ The critical question is whether the law should move in this direction.

Some might object that using business associations for domestic relationships could cause social harm by commodifying personal relationships. However, there is no clear dividing line between "love" relationships and "money" relationships. Business relationships, like marriage, may be founded significantly on trust and altruism. Spouses may be business partners whose business and personal lives are intertwined. Even purely domestic relationships may have features that can be explained by the same economic theories that apply to businesses. The hazy boundary between love and money invites the analogies drawn between business associations and domestic relationships.

2. See, e.g., Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1779 (2005) (arguing that marriage law, like business association law, is evolving away from state control); Jennifer A. Drobac & Antony Page, *A Uniform Domestic Partnership Act: Marrying Business Partnership and Family Law*, 41 GA. L. REV. 349, 353 (2007) (suggesting a domestic partnership model based on business partnership law for family relationships); Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 84 (2001) (suggesting "importing elements of business law to improve domestic relations law"); Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955 (2010) (arguing for partnership model for polygamous relationships).

3. See sources cited *supra* note 2.

4. See REV. UNIF. PARTNERSHIP ACT § 202, 6 U.L.A. 27 (1997) (permitting use of partnership only by an "association of two or more persons to carry on as co-owners a business for profit").

5. See LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN & KEATINGE ON LIMITED LIABILITY COMPANIES § 4:10, nn.5-6 (2d ed. 2004) (discussing purpose limitations in LLC statutes).

A significant problem with using business associations for families is that it is essentially an exercise in rhetoric or wishful thinking rather than a robust policy analysis that can support major changes in family law. Although advocates of the business association model of family law may have legitimate policy reasons for wanting to loosen the legal ties that constrain the development of families, the business association analogy adds little to these arguments. As proponents of the business association model recognize, domestic relationships differ in many respects from business associations.⁶ These differences go to the heart of the policy debates on family law. If it were not for policy considerations relating to such issues as the need to preserve intimacy and protect children, families *might be* like business associations and therefore should be treated under the same standard forms. However, merely applying the business association model cannot settle the underlying issues about whether the model should be applied.

To be sure, the business association model can constructively identify a mechanism for creating a contractual model of domestic association and thereby contribute to the resolution of policy issues concerning this model. However, the basic point of this Article is that, even 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. In other words, although business associations may be a useful device for loosening the constraints on families, their use in this context would leave domestic relationships with a heavy burden of inappropriate law.

The need for different standard forms arises from general considerations that apply to all relationships, business or domestic. Standard forms provide significant guidance for courts and the parties in ordering relationships. Indeed, advocates of the business association model have recognized the need for different domestic

6. See, e.g., Case, *supra* note 2, at 1778–79 (observing that the “law of marriage has not yet finished evolving” away from state control to the extent that corporate law had done); Drobac & Page, *supra* note 2 (proposing partnership-based laws for domestic relationships that differ in several respects from partnership because of differences between families and domestic relationships); Ertman, *supra* note 2 (discussing similarities and differences between various domestic relationships and their business association counterparts).

standard forms.⁷ The same reasoning justifying differences among domestic relationships should raise questions about appropriate analogies between business and domestic relationships. For example, issues concerning children and intimacy will likely demand different default rules than those applying to business relationships, even in a more contractual version of the family than the law recognizes today. These differences mean that using the same types of standard forms for both types of relationships may cause the forms to lose much of their coherence and, therefore, their value as standard forms. This would impair both marriage and business law.

Part I of this Article discusses the general functional similarities between business associations and domestic standard forms that make the application of business association model to domestic relationships at least superficially attractive. Part II discusses the fundamental differences between the two types of relationships that make this strategy ultimately unworkable. Part III discusses how alternative standard forms might evolve for domestic associations to provide the same benefits in this area of law that they do for business associations. Part IV concludes.

I. DOMESTIC AND BUSINESS ASSOCIATIONS

The analogy between business and domestic associations rests on these standard forms' similar functions and the fact that they address similar considerations.⁸ The following subparts discuss the analogy's two prongs.

A. *The Role of Standard Forms*

For both domestic and business associations, the availability of multiple standard forms helps clarify the parties' relationships and thereby increases contracting opportunities.⁹ The following sections describe these functions of standard forms.

7. See Drobac & Page, *supra* note 2, at 402–06 (proposing different types of domestic partnerships); Ertman, *supra* note 2, at 99–131 (suggesting different business association analogies for different types of domestic relationships).

8. See *supra* note 2 and accompanying text.

9. See LARRY E. RIBSTEIN, *THE RISE OF THE UNCORPORATION* 24–38 (2010) [hereinafter

1. Transaction Costs

Marriage law, like business association law, can economize on contracting costs, which can be significant in a long-term relationship. The parties to both types of relationships know they cannot predict the future and therefore make flexible arrangements to deal with problems as they arise. Standard forms save the parties the costs of specifying management, dissolution, and fiduciary rights of partners or spouses. This is particularly helpful to the extent the relationship calls for detailed rules covering rare and distant events. The costs of customized drafting and planning for divorce may be high. The parties also may unreasonably discount the probability of divorce while in the happy throes of wedding plans,¹⁰ or may not want to contaminate their relationship with negotiations over breakup. Parties therefore may not plan for divorce even if this planning has significant benefits in enhancing the stability of the relationship and reducing the likelihood of opportunistic conduct.

The cost savings from standard forms depend on how well the forms are designed for the types of relationships to which they are likely to apply. A single standard form may not fit diverse relationships. An ill-fitting standard form might actually increase transaction costs by forcing parties to incur higher drafting costs than they would under more suitable forms or even in the absence of a form.¹¹ For example, as discussed in more detail below, relationships between two working domestic partners may require different default rules than those between a working spouse and a homemaker.

2. Interpretation

Standard forms assist interpretation of the parties' contracts.¹² A statute designed for domestic relationships may be construed

RIBSTEIN, UNINCORPORATION]; Larry E. Ribstein, *A Standard Form Approach to Same-Sex Marriage*, 38 CREIGHTON L. REV. 309, 317–21 (2005) [hereinafter Ribstein, *Standard Form*].

10. See Lynn A. Baker & Robert E. Emery, *When Every Relationship is Above Average*, 17 LAW & HUM. BEHAV. 439, 443–44 (1993) (showing evidence indicating that people are unrealistically optimistic about whether their marriages will succeed).

11. Cf. RIBSTEIN, UNINCORPORATION, *supra* note 9, at 24, 31–32.

12. See Ribstein, *Standard Form*, *supra* note 9, at 319.

differently than one for business partnerships, just as the fact that a business is a partnership might lead to a different interpretation than if it is a corporation. Parties adopting a standard form implicitly agree to have the form's background rules govern situations not covered by their customized contract. A standard form gives rise to an interpretive network of cases that can reduce uncertainty about the applicable rules and thereby aid both *ex ante* in planning and *ex post* in litigation.¹³ The cases are less useful for this purpose if they deal with disparate relationships. It follows that standard forms need to be designed for categories of transactions that are large enough to generate a useful interpretive network but small and coherent enough that cases can guide future transactions and litigation.

3. Framing and Norms

Standard forms can be useful in “framing” conduct and thereby assisting in the formation of norms.¹⁴ As discussed below, the norms associated with being married may differ from those associated with being in a business relationship, particularly because of the parties' mutual trust in the former setting. Differences may exist not only between marriage and business associations, but also between two-person and multiple-person marriages, with weaker trust in the latter situation.¹⁵ Weaker trust settings may need stronger duties to deter opportunistic conduct than would be needed in settings with stronger trust.¹⁶

4. Signaling

Standard forms can enable parties to signal their conduct. For example, marriage is generally understood as a long-term commitment to a single partner, while business associations facilitate

13. See generally Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 826–34 (1995) (discussing the benefits of default rules in corporate contract).

14. See Ribstein, *Standard Form*, *supra* note 9, at 320.

15. See Davis, *supra* note 2, at 2004–13 (discussing how plural marriages compare to corporate partnerships and two-person marriages and the need for different default rules in different types of marriages).

16. Various types of trust are discussed *infra* text accompanying notes 26–29.

exit through buyout or transfer of shares in order to enable business people to move on to other opportunities. Parties' willingness to enter into some types of domestic associations accordingly may signal more commitment than forming a business partnership.¹⁷ Relationships such as domestic partnership could occupy the middle ground between marriage and business associations, with implications for the signals parties send when they enter the relationships.

B. Problems Addressed by Standard Form Rules

Standard forms not only serve similar functions in the domestic and business contexts, but also address similar types of problems in these two contexts. Both domestic and business associations attempt to add value by facilitating cooperation toward achieving common goals. To accomplish this purpose, standard form rules must provide a legal framework for dealing with problems associated with self-seeking behavior, most importantly, opportunism and agency costs.

1. Opportunism

Contracts attempt to constrain the parties from self-seeking that can undermine a cooperative relationship. No contract does this perfectly because of enforcement costs, including the time, expense, and uncertainty of a judicial proceeding. These costs can be particularly high in close-knit relationships, such as small partnerships and marriages, which depend on the parties working together rather than fighting in courtrooms or depositions.

Consider the comparable situations that can arise in both domestic and business arrangements. A party to a domestic relationship might invest labor in maintaining the home and raising children in order to allow the other party to go to work and build the family's wealth. The stay-at-home party reasonably expects a payoff in sharing in the

17. See Antonio Nicolo & Piero Tedeschi, *Missing Contracts: On the Rationality of Not Signing a Prenuptial Agreement* 3–4 (Univ. of Padua Econ. Discussion, Working Paper No. 39-2003, 2004), available at http://papers.ssrn.com/paper.taf?abstract_id=555261 (noting that couples also can send a commitment signal by choosing not to make pre-nuptial agreements that would reduce the cost of divorce).

wealth the other spouse has created. A working spouse who seeks a divorce prior to this payoff may be able to appropriate the home spouse's intangible and hard-to-value investment.¹⁸

The classic California case of *Page v. Page*¹⁹ illustrates the analogous situation in a business association. Two brothers built a linen supply business in California, one providing some of the money and the other managerial expertise.²⁰ The business went nowhere for years until it started to get a boost from the expansion of a nearby military base. The manager-brother chose that point in time to dissolve the partnership.²¹ As with the wife's investment in the marriage, the payoff from the non-managing brother's investment was impossible to value at the time of dissolution, in this case because the firm's future at the moment of the base expansion was unclear. This effectively enabled the manager to appropriate the value of the business by dissolving it and buying the assets.

Parties to both domestic and business may suffer a loss of investment that can frustrate their expectations. Opportunism may take many other forms in modern and more complex business and domestic relationships such as those portrayed in *Big Love*, where husband Bill's and his three wives' ambitions and objectives often compete. Perhaps more importantly, similarly situated parties might be reluctant to make such investments in the future if they see they have no effective remedy for opportunism. The problem with designing the remedy is that exit from the association or exercise of voting or other powers can both give rise to and protect the members from opportunism. For example, increasing exit costs can force spouses and partners to suffer cheating or abuse by their mates or partners but also encourage them to cooperate.²²

18. See Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; or, "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267, 267-68 (1987) (comparing a marriage to a contract, with investments and expectations by both parties, and discussing how women lose their "value" in the marriage market more rapidly than men and are therefore at greater risk of having their investments expropriated in a divorce).

19. 359 P.2d 41 (Cal. 1961).

20. See *id.* at 42, 44.

21. *Id.* at 44.

22. See Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 50-54 (1990) (arguing that precommitment strategies that increase the costs of

The parties might mitigate counterproductive self-seeking through detailed partnership or ante-nuptial agreements. However, as discussed above, these agreements are costly and necessarily incomplete, and the parties may unreasonably discount their benefits. The parties also can use an off-the-shelf standard form to provide rules and remedies for situations in which opportunism is most likely to occur. For example, partnership law has traditionally provided for penalties for dissolving a partnership prior to an agreed term or undertaking.²³ This reflects an assumption that premature dissolution is most likely to involve appropriation of a partner's investment before it can be accurately valued and apportioned to the non-dissolving partner.

2. Agency Costs

The members of a firm or spouses in a marriage typically agree to make disparate types and amounts of contributions, with one partner or spouse providing services or capital and delegating management power to the other partner or spouse. This reflects the uneven distribution of management and service talents across the participants. A potential cost of delegation and specialization is that the party holding the power to act on behalf of the others (husband Bill Hendrickson in the *Big Love* scenario, for example) may be tempted to use that power for individual rather than joint benefit. The resulting "agency costs" include the principal's costs of monitoring the agent, the agent's cost of furnishing a bond to secure the principal against agency costs, and the residual costs of cheating that cannot be eliminated by monitoring and bonding.²⁴ In a business association, the main constraints on agency costs include members' rights to vote on managers' actions, fiduciary duties, and the members' ability to exit the firm and be paid based on the value of the firm's assets

dissolution may actually increase cooperation during the marriage, thereby decreasing behavior that may lead to divorce).

23. See UNIF. PARTNERSHIP ACT §§ 31(2), 38(2) (1914).

24. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976). It should be noted that agency costs arise in any relationship where there is cooperative effort, and they are not limited to where there is a clear principal-agent relationship. *Id.* at 309.

without any discount for mismanagement. As discussed below, these constraints may differ in domestic and business associations because the former have other trust-inducing mechanisms.

3. Non-financial Considerations

Business and domestic associations might seem to differ in that the former are intended primarily to earn and distribute financial gains while the latter produce primarily non-financial goods such as love, mutual support, and children. This may be significant to the extent that non-financial behavior connotes more altruism than purely commercial behavior.²⁵ On the other hand, both types of associations involve a mix of financial and non-financial concerns that could affect the roles of trust and norms.

Trust can be divided into weak and strong forms.²⁶ Weak-form trust refers to the “beneficiary’s” decision to rely on the “trustee” because the legal and extra-legal constraints on the trustee’s conduct make that reliance reasonable.²⁷ In other words, the probability-adjusted gain from relying exceeds the probability-adjusted loss from the trustee’s breach ($PG \times G > PL \times L$). Strong-form trust is the particular type of reliance on another who is *not* subject to costly constraints. This form of trust creates social value because it enables reliance without costly enforcement.

Strong-form trust is particularly important to social welfare. Although the law cannot create strong-form trust,²⁸ the existence of this trust reduces the need for legal constraints. An important difference between business associations and domestic relations is

25. The significance of the distinction is, however, far from clear in the business context. Compare Usha Rodrigues, *Entity and Identity*, EMORY L.J. (forthcoming 2011), with Anup Malani & Albert Choi, Are Non-Profit Firms Simply For-Profits in Disguise? Evidence from Executive Compensation in the Nursing Home Industry (Sept. 26, 2004), available at <http://ssrn.com/abstract=617362> (comparison of for-profit and non-profit executive compensation supports the hypothesis that non-profit firm managers at least seem to care about profits as much as those in for-profit firms), and Anup Malani & Guy David, *Does Nonprofit Status Signal Auality?*, 37 J. LEGAL STUD. 551 (2008) (finding little evidence that non-profit hospitals and day-care providers advertised their status).

26. See Larry E. Ribstein, *Law v. Trust*, 81 B.U. L. REV. 553, 557 (2001) [hereinafter Ribstein, *Trust*].

27. *Id.*

28. *Id.*

that strong-form trust is more likely to arise in the latter situation than in the former because of the love and intimacy between domestic partners.²⁹

Social norms are potentially significant in both domestic and business associations. Because the parties may expect different standards of behavior to apply in the two types of relationships, it is useful to frame behavior in the two contexts by providing different standard forms. By the same token, two-person marriages may differ from less intimate multiple-person relationships. In both business and domestic associations strong fiduciary duties help establish norms of trustworthy behavior.³⁰

II. DOMESTIC VS. BUSINESS ASSOCIATIONS

Part I showed that domestic and business association standard forms perform similar functions and deal with similar underlying problems in long-term relationships.³¹ These similarities support analogies between business and domestic standard forms. This Part highlights the dangers that lurk in these analogies. Fundamental differences between the two categories of standard forms reflect the different social functions of business and domestic relationships. These differences support maintaining distinctions between standard forms within the domestic and business categories as well as across the domestic/business divide.

A. General Considerations

This Subpart discusses general considerations that drive the specific differences discussed in Subpart B. These involve separation between the organization and the individuals, trust and confidence

29. *Id.* at 563.

30. See Edward B. Rock & Michael L. Wachter, *Norms & Corporate Law: Introduction*, 149 U. PA. L. REV. 1607 (2001) (discussing norms in corporate law); Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1021–63 (1997) (discussing the emergence of norms governing large corporate buyouts in Delaware); David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811 (2001) (discussing the use of shaming as punishment in corporate law).

31. See discussion *supra* Part I.

between the members, and the broader social effects of governing the organizations.

1. Separate Entities

The separation of a business's assets and liabilities from those of its members or contributors is a basic function of business association law.³² This separation enables entrepreneurs to take risks without endangering their personal capital and to associate with others without concern that their co-owners' activities will threaten the firm.³³ Hansmann, Kraakman, and Squire see the separation of firms from families as an important thread in the history of business law.³⁴ They show how the development of information and other technologies enabled creditors and investors to access reliable information about the assets of business entities, which in turn encouraged investments outside of personal and family circles.³⁵ Separate business entities also facilitate investments through tradable shares in firms that outlive their owners and compensation mechanisms that align managers' incentives with the firm's goals.³⁶

Domestic association activities, by contrast, inherently are those of the individual participants. The family might be conceptualized as a distinct entity in the sense of producing outputs such as children from inputs such as cash, food, and shelter.³⁷ However, the family's goals are inseparable from those of the individual family members.³⁸ As discussed below, the distinction between business entities as

32. See Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 393 (2000).

33. *Id.* at 398–99.

34. Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333 (2006) (describing the historical evolution of entity shielding and its importance to the development of business law).

35. *Id.* at 1355.

36. See DANIEL F. SPULBER, *THE THEORY OF THE FIRM: MICROECONOMICS WITH ENDOGENOUS ENTREPRENEURS, FIRMS, MARKETS, AND ORGANIZATIONS* 67–76 (2009).

37. See generally GARY S. BECKER, *A TREATISE ON THE FAMILY* (enlarged ed. 1991) (applying economic theory and analysis to the family).

38. Professor Ertman argues that marriages, like corporations, are organizations. However, even if domestic associations might be considered organizations in some sense, they are not separate from their members in the important sense of having objectives different from those of their members. Ertman, *supra* note 2, at 112–20.

discrete mechanisms for risk-taking and domestic associations as ways of carrying on the individuals' personal lives has important ramifications for structuring the default and mandatory rules of the two types of associations.

2. Trust

As discussed above, "strong-form" trust is socially valuable in that it reduces the need for other mechanisms to induce weak-form trust, or reliance. Indeed, constraints may be counterproductive in reducing or "crowding out" strong-form trust. It follows that strong-form trust's presence in families and comparative absence in business associations is an important basis for distinguishing the two contexts. For example, duties and other devices for inducing reliance may be less necessary or desirable in families than in business associations. Also, as noted above, two-person marriages may differ from those among multiple persons.

This difference between domestic and business standard forms is comparable to that between various business association standard forms. Close-knit, family-like partnerships generally have a higher level of strong-form trust than do publicly held corporations. Contrary to the implications of Justice Cardozo's famously strong view of partners' duties in *Meinhard v. Salmon*,³⁹ this suggests less rather than more need for fiduciary duties in partnerships than in corporations. The strong fiduciary rhetoric in *Meinhard* arguably was intended to reinforce the norms appropriate to the parties' close-knit relationship.⁴⁰

3. Externalities and Mandatory Rules

Both business and domestic associations entail potential social costs and benefits that their owners do not internalize. The internal rules of these organizations depend on society's views of potential externalities in each category.

39. 164 N.E. 545, 546 (N.Y. 1928) (holding that partners owe a duty of "[n]ot honesty alone, but the punctilio of an honor the most sensitive").

40. See Ribstein, *Standard Form*, *supra* note 9, at 320.

With respect to business associations, markets play an important role. In order to earn profits, firms must convince others to buy their goods on open markets. Firms that fail to earn financial profits do not survive in the long run. Specific regulation can address specific problems with markets.

Market constraints on domestic associations are less robust. Women may need protection because of their economic subordination in marriage and society, and the spouses' conduct can profoundly affect children. Moreover, because of the family's important role as a personal support structure, society arguably has a stronger interest in shaping the prevailing types of domestic associations than it does for business associations in encouraging experimentation.

As with the other considerations discussed above, differences between business and domestic relationships regarding the role of externalities and regulation may be comparable to those among different business associations. In publicly held firms, laws protect investors who lack any bargaining interface with the firm and protect society from firms whose power rivals that of government. The law can use a lighter hand with closely held firms, whose owners bargain face-to-face and which have less impact on society.

B. Specific Differences

This Subpart shows how the general considerations discussed in Subpart A shape rules in the business and domestic association contexts.

1. Formation

Domestic and business standard forms clarify how relationships to which the standard forms' rules apply are created. Marriage in this respect is treated like a corporation (resting on a formal state process) rather than like a partnership (applying to relationships that meet a statutory definition even in the absence of formalities).⁴¹

41. See Ertman, *supra* note 2, at 112–20 (analogizing marriage to corporation partly because of formalities in both contexts).

It may seem strange that marriage follows the corporate rather than the partnership model regarding the need for formality, since the more intimate partnership seems to fit marriage better than partnership in other respects. One explanation is that marriage seeks to channel relationships toward a specific type of commitment.⁴² This requires the state to define favored and disfavored relationships. This reflects a view that society has a greater interest in who is married than it does in who are business partners.

Using marriage to channel domestic relationships could be accomplished without formalities simply by defining the relationships the state deems to be marriages, just as partnership law determines which informal relationships constitute partnerships.⁴³ The requirement of formal state certification reflects the precise level of importance the state (as distinguished from the married couple) attaches to the particular relationship of marriage. For example, in *Big Love*, Barb Hendrickson (one of the wives) thought her daughter Sarah's vows in her family's backyard were more important than the mere "contract with the state" Sarah was planning to enter into at the courthouse.⁴⁴ Margene (another wife) explains her legal marriage to Anna's boyfriend as less important than her religious marriage to the Hendricksons.⁴⁵ First wife Barb's divorce from and second wife Nicky's marriage to Bill are portrayed as having legal implications that differ from their personal and religious importance.⁴⁶

The marriage license serves other functions that highlight marriage's differences from partnership. It notifies the world that a couple is married, which is important given the significant consequences of marriage. It also certifies the validity of the marriage, reflecting the need for state approval. This contrasts with the "statement of partnership authority" that partners can file in some

42. See Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 507 (1992) ("[M]arriage offers people a kind of relationship with social and legal advantages which are primarily available precisely because the law gives marriage a special status.").

43. See REV. UNIF. PARTNERSHIP ACT § 101(6) (1997) (defining partnership as co-ownership of a business for profit); ALAN R. BROMBERG & LARRY E. RIBSTEIN, 1 BROMBERG & RIBSTEIN ON PARTNERSHIP § 2.01(a) (discussing definition of partnership).

44. *Big Love: The Greater Good* (HBO television broadcast Jan. 17, 2010).

45. *Big Love: Blood Atonement* (HBO television broadcast Feb. 21, 2010).

46. *Big Love: 'Til Death Do Us Part* (HBO television broadcast Feb. 27, 2010).

states which serves notice but requires no special state permission.⁴⁷ And the requirement of obtaining a marriage license also helps ensure that the parties have considered the seriousness of the commitment the state is having them make through marriage.⁴⁸

2. Management

Spouses may delegate authority to each other to act alone on behalf of the household in particular areas, such as the wife running the house day-to-day and the husband making important financial decisions and big-ticket purchases. A domestic association does not, however, lend itself to the sort of clear separation of management and ownership that partnerships and LLCs may accomplish by designating a managing partner or managing members. Because domestic associations are closely identified with the individual participants, formal delegation of control could cause an undesirable loss of personal autonomy. It is one thing to facilitate risk-taking and entrepreneurial activity by delegating control over a business, and another to allow people to delegate control over their personal lives.

3. Agency

Even if spouses would be unwilling to completely relinquish management power over aspects of the relationship, they might be willing to delegate power to contract with third parties in order to reduce the transaction costs of running a household. The spouses could then sort out between themselves the consequences of unauthorized action. Indeed, spouses can be agents for each other even if they do not carry on a business.⁴⁹ However, consistent with

47. See REV. UNIF. PARTNERSHIP ACT § 303 (1997).

48. Indeed, given this commitment, some commentators have suggested going further and mandating more planning and counseling as a prerequisite to marriage. See Drobac & Page, *supra* note 2, at 407–08 (suggesting mandatory ex ante agreements for domestic partnerships and full disclosure of assets); see also Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453 (1998) (suggesting ex ante contracting in marriage). Some states have “covenant marriage” laws making marriage more difficult to exit and requiring ex ante counseling. See, e.g., ARIZ. REV. STAT. ANN. §§ 25-901 to -906 (2007); LA. REV. STAT. § 9:272 (2008).

49. See, e.g., *Daggett v. Neiman-Marcus Co.*, 348 S.W.2d 796 (Tex. Civ. App. 1961) (husband liable as principal for wife’s department store bill).

the considerations discussed above supporting limits on delegating management power, marriage law constrains spouses' ability to bind each other outside of standard partnership or agency relationships.⁵⁰ The courts recognize that spouses' control over each other is inherently limited by the high costs the law places on exit in the form of alimony, equitable distribution, and child support.⁵¹ The law therefore has to protect spouses from their mates' profligacy, subject to the need to protect third party creditors from deliberate abuse of these limitations on authority for asset protection purposes.⁵² Thus, one suggestion for a so-called "partnership" model of marriage would limit domestic partners' authority to bind other partners to situations when the non-acting partner is incapacitated.⁵³

4. Property

As discussed above, an important objective of business association law is separating business from personal property. This enables business association owners to decide how much of their personal property to commit to each of their business ventures. Domestic association law also allows for some separation in the sense that the marital partners can agree to keep some of their property separate both during the relationship and on exit, even in community property jurisdictions.

A key difference between business and domestic relationships regarding property rules concerns partners' obligation to contribute to their co-partners' welfare. Business owners can form limited liability firms that insulate all of their personal property from business creditors. Although general partnership law provides a default rule of owner personal liability to creditors for debts the firm incurs, even general partners have no obligation to contribute capital to or incur debts for the enterprise.⁵⁴ By contrast, domestic associations provide

50. See Marie T. Reilly, *In Good Times and In Debt: The Evolution of Marital Agency and the Meaning of Marriage*, 87 NEB. L. REV. 373 (2008).

51. *Id.* at 417–18.

52. *Id.* at 418–19.

53. See Drobac & Page, *supra* note 2, at 408 (suggesting limiting partners' authority to bind other partners the situation when a partner is incapacitated).

54. See REV. UNIF. PARTNERSHIP ACT § 307 (1997).

for spousal support obligations by requiring spouses to commit some property to their spouses' and children's needs during the marriage and on marital dissolution.⁵⁵ These rules reflect families' fundamental social role of providing a first level of support for individuals.

5. Fiduciary Duties

Courts define fiduciary duties very broadly to include a wide range of obligations intended to protect vulnerable parties from opportunistic conduct.⁵⁶ However, a more precise and accurate view of the fiduciary duty is that it is a duty of unselfishness that arises when one party delegates open-ended control over her property to another.⁵⁷ Open-ended delegation of control defines situations in which agency costs are likely to be significant and not adequately controlled by monitoring mechanisms. In this situation, a strong duty of unselfishness is needed to adequately discipline fiduciary conduct. The duty of unselfishness is also easier for courts to police than a duty that involves judicial evaluation of the fiduciary's decisions.⁵⁸

Fiduciary duties may not play the same role in domestic as in business associations. Strong-form trust arising out of the spouses' love and affection enforces reliance in these relationships. Indeed, legally enforced duties may erode this trust because the legal discipline and damages for cheating can overshadow stronger bonds of love and affection.⁵⁹ Also, family relationships do not involve the sort of open-ended delegation of power for which fiduciary duties are appropriate. The spouses presumably will monitor each other rather than delegate open-ended control over aspects of their lives that intimately affect them.

55. This approach has been reflected even in a business association model of domestic partnership law. See Drobac & Page, *supra* note 2, at 410–12 (suggesting a community property model for all income earned during partnership and compelling joint spousal responsibility for children).

56. For a comprehensive review of fiduciary duties, see TAMAR FRANKEL, *FIDUCIARY LAW* (2010).

57. See Larry E. Ribstein, *Are Partners Fiduciaries?*, 2005 U. ILL. L. REV. 209, 215 [hereinafter Ribstein, *Partners*]; Larry E. Ribstein, *Fencing Fiduciary Duties*, B.U. L. REV. (forthcoming 2011).

58. *Id.* at 215–17.

59. See Ribstein, *Trust*, *supra* note 26, at 580–84.

Most domestic cases dealing with what courts call fiduciary relationships actually involve a party's abuse of confidential information.⁶⁰ An important example is *United States v. Chestman*,⁶¹ which held that a husband did not misappropriate information from his wife concerning the family business because family members had not indicated through sharing of business secrets that they were depending on each other to maintain confidentiality.⁶² A dissent reasoned that there was misappropriation because the insider expected benefits from the family's corporation, emphasizing the need for a legal duty to encourage open communications among the family in this situation.⁶³ But this relationship did not involve the sort of open-ended control that usually supports a strict duty of unselfishness. Rather, it only extended the corporation's rights to its information to the firm's controlling family.⁶⁴

As with the other differences between business and domestic relationships discussed above, the domestic-business difference regarding fiduciary duties is analogous to that between business forms. Given the nature and function of fiduciary duties based on the complete delegation of control, fiduciary duties are as inappropriate for horizontal or co-equal relationships between business partners as they are between domestic partners. Both small business and intimate domestic relationships may deal better with fiduciary breach through exit and dissolution than by inviting litigation in ongoing relationships.⁶⁵

60. See Ribstein, *Partners*, *supra* note 57, at 228–30. Ertman notes that “husbands and wives both have the right to manage community property, and each spouse is a fiduciary in relation to the other regarding property management.” Ertman, *supra* note 2, at 121. This appears to refer to duties arising out of joint management of property rather than conventional fiduciary duties arising from delegation of control.

61. 947 F.2d 551 (2d Cir. 1991).

62. *Id.* at 568–70.

63. *Id.* at 577–80 (Winter, J., concurring in part and dissenting in part).

64. See Ribstein, *Partners*, *supra* note 57, at 230.

65. See Saul Levmore, *Love It or Leave It: Property Rules, Liability Rules, and Exclusivity of Remedies in Partnership and Marriage*, 58 J.L. & CONTEMP. PROBS. 221, 248 (1995) (concluding that this approach is best explained “by the disinclination of courts to deal with the enforcement of liability rules in the family setting”).

6. Transfer

Unlike business association owners, spouses cannot transfer either management or financial rights in their relationships. This contrasts with even very small and close-knit partnerships in which members can convey their financial rights in the business to non-members or each other by taking out loans backed by their economic interests in the partnership or by outright sale.⁶⁶ This difference reflects the fundamental distinction between domestic and business associations regarding separation of the association from the individual members. Business associations provide a mechanism for capitalizing the owners' interests in the separate venture while domestic associations are inextricably tied to their members. The extent of transferability, in turn, relates to other rules, including exit. Barring even a limited form of exit through financial transfer binds the members of a domestic association closely and makes their ability to dissolve the relationship more important than in a partnership.

7. Exit

Apparent similarities between domestic and business associations mask fundamental differences. This is clearest in connection with exit. Fifty years ago marriage had a no-exit rule stricter than the one in corporations. Under this marriage rule, even spouses' unanimous agreement was not necessarily enough to dissolve the relationship. This rule reflected the assumption that spouses make a significant commitment to the relationship, so that enabling easy exit facilitates opportunism. This rule is somewhat analogous to "capital lock-in" in corporations, where the permanence of the relationship also facilitates and encourages long-term investment.⁶⁷ The no-exit rule in

66. For provisions in the Uniform Partnership Act dealing with the transferability of financial interests, see UNIF. PARTNERSHIP ACT §§ 27–28 (1914); REV. UNIF. PARTNERSHIP ACT §§ 503–504 (1997).

67. The concept of "capital lock-in" refers to when shareholders in a closely held corporation are unable to sell their shares, and they cannot compel the corporation to pay out income or sell assets. See Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 388–89 (2003) (arguing that the concept of capital lock-in allowed modern corporations to grow because it encourages long-term investment).

domestic relationships also reflected third parties' (particularly children's) interest in the stability of domestic associations.⁶⁸

Marriage has evolved from a no-exit rule to no-fault divorce.⁶⁹ In this respect, marriage draws closer to partnership, another intimate relationship in which dissolution seems to be the best way of resolving disagreement. However, the parties often must pay to leave a domestic association. As discussed above, this reflects society's general demand that family members commit to the family's welfare. Domestic associations have mandatory rules to provide socially important domestic stability and to cover the support needs of women and children.⁷⁰

Commentators and policymakers recently have emphasized a "partnership" model for marriage stressing equal division of property adopted by several states.⁷¹ However, the partnership model of marriage differs fundamentally from actual partnership because of the mandatory nature of marriage rules. Since partnerships are unnecessary for social support, partnership dissolution rules need not be mandatory. Although partnership has an equal division default rule that looks somewhat like the marital partnership model, this rule holds only in the most primitive default partnerships where equality reflects the multiplicity of human capital, financial, and credit contributions owners typically make to a very small firm.⁷² This is intended merely as a starting point for customized agreements. Rather than reflecting the parties' usual expectations, it often functions as a "penalty" default to force the parties to bargain explicitly for variations to reflect complexity in contributions.⁷³ Partnership law enforces these customized contracts in order to avoid unduly penalizing partners who want to exit and thereby to facilitate risk-

68. See Scott, *supra* note 22, at 11.

69. *Id.* at 10.

70. See Helene S. Shapo, "A Tale Of Two Systems": *Anglo-American Problems in the Modernization of Inheritance Legislation*, 60 TENN. L. REV. 707, 724 (1993) (discussing provisions for the continued support of the deceased's family).

71. See sources cited *supra* note 2.

72. See Marjorie E. Kornhauser, *Theory Versus Reality: The Partnership Model of Marriage in Family and Income Tax Law*, 69 TEMP. L. REV. 1413, 1421-23 (1996) (critiquing the marriage as a partnership model, specifically with dissolution).

73. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 95-97 (1989).

taking and entrepreneurship. Contracts can balance the need for exit against the need for stability to facilitate long-term investments.

This is not to suggest that the present distinction between partnership and marriage dissolution rules is necessarily optimal. A potential problem with attaching heavy costs to marital dissolution is that this leaves the parties with no easy way to resolve tension in the marriage, given the spouses' inability to litigate during marriage.⁷⁴ Although domestic ties of love and affection and the spouses' commitment to a long-term relationship provide powerful incentives to resolve disputes, a marriage, like a business partnership, might become unproductive when these ties dissipate. This suggests that domestic associations may need to develop alternative dispute resolution mechanisms.

Although domestic relationships ultimately may evolve toward the contractual business association model of dissolution, the rules governing the two types of relationships are likely to continue to diverge because of the fundamental differences between domestic and business relationships. The social and emotional costs of a business breakup necessarily are moderated by the parties' ability to find new partners who can help them maximize joint profits. Moreover, partnership law provides for exit rules based on the parties' *ex ante* expectations about how long the relationship will last.⁷⁵ By contrast, the parties to a domestic relationship are much less likely to have such expectations. Furthermore, the social and emotional costs of breakup are likely to remain higher for domestic than for business associations, and therefore are likely to continue to demand different rules.

74. For an argument favoring partnership and marriage rules that force the parties to dissolve the relationship rather than litigate while it is ongoing, see Levmore, *supra* note 65 (discussing the "love-it-or-leave-it" rules that require dissolution of partnerships prior to taking judicial action).

75. The partnership laws provide for wrongful dissolution, with damages and penalties, where a partner dissolves the partnership before the expiration of an agreed term. *See* UNIF. PARTNERSHIP ACT §§ 31(2), 38(2) (1914); REV. UNIF. PARTNERSHIP ACT §§ 602(b), 801(2) (1997).

C. Family Businesses

The *Chestman* case is interesting not only for its specific holding on fiduciary duties, but also for its general approach to the relationship between a domestic association and the business the family controls. The majority essentially viewed the family as separate from the business,⁷⁶ while the dissent was willing to connect the two and find that, in effect, that the family had opted into at least one aspect of the corporate standard form.⁷⁷

This type of situation often arises in the informal partnership setting, where the court must decide whether a spouse operated a small business in partnership with the other spouse. Although the relationship may seem to have the usual partnership indicia of control and profit-sharing, these may actually be domestic arrangements. Thus, determining household partnerships is complicated by the fact that

aspects 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.⁷⁸

Courts accordingly have occasionally refused to find partnerships in the family setting, including both marriage and non-marital cohabitation, despite the presence of partnership indicia.⁷⁹

76. 947 F.2d 551, 568–71 (2d Cir. 1991).

77. *Id.* at 577–80 (Winter, J., concurring in part and dissenting in part).

78. BROMBERG & RIBSTEIN, *supra* note 43, § 2.10.

79. *See, e.g., In re Lampe*, 331 F.3d 750, 756–57 (10th Cir. 2003) (holding that under New York law there was no partnership despite maintenance of joint account, noting that usual partnership indicia, including here joint ownership, profit sharing, and co-mingling of funds in a joint account, are “blurred” by marital relationship); *LaRoque v. LaHood*, 613 A.2d 1033, 1042 (Md. Ct. Spec. App. 1992) (finding that although wife participated in management and worked without salary or other direct compensation, services of a spouse, rendered while assisting the other spouse in the other spouse’s business, do not per se establish a partnership); *Cleland v. Thirion*, 268 A.D.2d 842. (N.Y. App. Div. 2000) (holding that there was no partnership as a matter of law, despite agreement providing that parties who are living as domestic partners have agreed to become business partners, where parties did not do business under partnership name or file partnership tax returns and alleged partner did not contribute capital and sought wages

Courts' decisions in close cases may depend on changing norms regarding women's role in the workplace. For example, in *Gosman v. Gosman*,⁸⁰ the trial court found a spousal partnership based on the facts that the wife worked in the business and had the power to sign checks on the business's joint account, although her husband made all the management decisions.⁸¹ The intermediate appellate court reversed, observing that the husband was "entitled to" the wife's services.⁸² The state's highest court upheld the trial court.⁸³ This case signals a judicial willingness to bridge differences between business and domestic associations.⁸⁴

While the family business opens the way to domestic relationships' use of a conventional business association, it also increases the potential dangers of this approach. Under current law, a spousal business partnership is subject to separate rules for its business and domestic elements. However, this appropriate separation may be harder for courts and the parties to maintain if spouses can use either form, particularly given the family business's usual informality.

III. EVOLUTION OF DOMESTIC ASSOCIATION FORMS

Part II emphasizes the distinctions between marriage, the primary existing domestic standard form, and business associations. But domestic associations could evolve in a manner similar to the recent history of business associations. Until relatively recently, the corporate form clearly dominated business associations. General partnerships were significant mainly for small, "default" businesses and professional firms, while limited partnership was a niche form for tax shelters. The close corporation developed from approximately

for her services); *Cooper v. Knox*, 90 S.E.2d 844 (Va. 1956) (no partnership when wife handled all funds and books for contracting business, accepted a job for it, instructed workers, and read blueprints).

80. 309 A.2d 34 (Md. Ct. Spec. App. 1973), *rev'd.*, 318 A.2d 821 (Md. 1974).

81. 309 A.2d at 69–70.

82. *Id.* at 77–78.

83. 318 A.2d at 823–24.

84. However, traditional attitudes persist in the cases. *See, e.g.*, *McGregor v. Crumley*, 775 N.W.2d 91, 99 (S.D. 2009) (holding that "admittedly weak" evidence failed to establish partnership, "given their status as husband and wife").

1950 to become the leading form for closely held firms.⁸⁵ The reason for the corporation's dominance was similar to that for marriage: the corporation was the officially sanctioned business association, and therefore the exclusive way to obtain public benefits conferred on business, particularly including limited liability.

This situation has changed significantly for business associations over the last generation. Changing business conditions, new tax law, and increased jurisdictional competition caused the corporate form to yield much of its dominance for closely held firms to new flexible limited liability entities, particularly including the LLC.⁸⁶

Domestic associations might evolve in a similar way and for analogous reasons. Indeed, one commentator suggests the LLC as the vehicle for new forms of plural marriage.⁸⁷ Just as new business conditions triggered the evolution of business associations, so new social conditions, particularly including same-sex marriage, changing women's roles, the shrinking importance of traditional marriage, and the rising opportunity costs of child rearing, and new reproductive technologies, may lead to changes in domestic associations. The mechanisms of legal change are also similar in the two contexts, as each state in the United States and jurisdictions elsewhere in the world can experiment with new rules and relationship, forcing other jurisdictions to continually evaluate which relationships to recognize. These developments could erode the privileged status of marriage, just as the corporation's once entrenched status was eroded.

This process could result in the development and refinement of domestic association standard forms that differ from each other as well as from business forms. Indeed, jurisdictions already have adopted several variations on marriage, including domestic partnership laws that approach marriage in all but name.⁸⁸ The new

85. See RIBSTEIN, *UNCORPORATION*, *supra* note 9, at 95–118 (discussing the history of the close corporation).

86. *Id.* at 119–23.

87. See Ertman, *supra* note 2, at 127–31 (exploring the similarities between LLCs and plural marriage).

88. See, e.g., CAL. FAM. CODE § 297.5 (West 2011) (providing that “registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law . . . as are granted to and imposed upon spouses”).

forms might suit specific relationships, including not only gay families, but older adults, extended combinations of men and women, polygamous relationships, and so forth.⁸⁹ These new forms then would have to seek recognition outside their enacting states. Courts and legislatures might confer that recognition, at least as to the most contractual aspects of domestic relationships.

There are several important questions regarding this evolutionary process. First, what is the optimal number of domestic association templates? For example, might they include friendships as a distinct form of relationship?⁹⁰ At some point the potential transaction costs of forcing people to learn about many different standard forms can outweigh the benefits of providing optimal standard forms.⁹¹

Second, at what point might the perceived social externalities of new types of domestic relationships inhibit interstate recognition of new standard forms? Most states and the federal government already have enacted “defense of marriage” statutes that attempt to preserve the privileged status of marriage over other types of domestic relationships.⁹² It is not clear whether and how long this rigidity can survive the demand for new standard forms to accommodate diverse relationships.

Third, will domestic associations eventually evolve to embrace the business analogy suggested by recent commentators despite the reasons discussed in this paper for separating the two models? As the privileging of traditional marriage law subsides, the attraction of more flexible and contract-friendly business forms may erode more nuanced objections concerning the inappropriateness of business

89. For suggestions along these lines, see Drobac & Page, *supra* note 2, at 402–06 (suggesting various domestic partnership standard forms modeled on partnership law); Ertman, *supra* note 2 (suggesting standard forms modeled on the partnership, LLC, and corporation).

90. See generally ETHAN J. LEIB, *FRIEND V. FRIEND: THE TRANSFORMATION OF FRIENDSHIP—AND WHAT THE LAW HAS TO DO WITH IT* (2010) (proposing special legal treatment of friendship). *But see* Eric A. Posner, *Huck and Jim and Law*, THE NEW REPUBLIC (Feb. 21, 2011, 12:00 AM), <http://www.tnr.com/book/review/friend-transformation-ethan-leib> (criticizing Leib’s suggestion of such special legal treatment and noting that “[t]he law treats friendships differently from marriages because they really are different”).

91. See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 47 (2000).

92. Christine Vestal, *Gay Marriage Legal in Six States*, STATELINE, <http://www.stateline.org/live/details/story?contentId=347390> (last updated June 4, 2009, 4:40 PM) (providing a chart of state policies detailing a list of enacted state statutes).

forms in domestic relationships. This is especially true if domestic relations come to more closely resemble business associations through the spread of more open and polygamous relationships. Legally recognizing a contractual model could sweep away constitutional restrictions on jurisdictional choice and the enforcement of marriage that are based on public policy concerns. If families are simply business associations, states would no longer have a basis for refusing to enforce their choice of law contracts.

IV. CONCLUSION

Business associations and marriage are similar in their basic functions because they need to deal with analogous long-term human relationships and the agency, opportunism, and other foibles that arise in these relationships. But the need for separate standard forms suggests that there are important differences in how these standard forms should be structured. This Article emphasizes that the law should provide for multiple standard forms in each category while recognizing the appropriate similarities and differences. Understanding these issues could prevent experiments with business forms in domestic settings from threatening the integrity of both business and family law. However, careful evolution of business forms would not necessarily preclude ultimate convergence of business and domestic standard forms. Distinct standard forms should facilitate but not drive these social judgments.