TRACING THE DIVERSE HISTORY OF CORPORATE RESIDUAL CLAIMANTS

SUNG EUN ("SUMMER") KIM*

The conventional understanding in corporate law is that shareholders are the residual claimants of corporations because they own the residual right to profits. Based on this understanding, shareholders are entitled to a host of corporate law rights and protections—including the right to vote and fiduciary duty protections. However, a review of the origin and history of residual claimant theory shows that the theory originally envisaged a broad conception of the residual claim that goes beyond profits, leading to a diverse array of stakeholders being the residual claimants of corporations over time. Depending on which of the theories of rent, interest, wages, or profit was adopted, each of the landlord, capitalist, laborer, and entrepreneur has been considered the residual claimant of the corporation. This history shows that the prevailing view of shareholders as the exclusive residual claimants of the corporation is a relatively recent understanding and that the historical record supports a more diverse conception of the residual claimant. In that sense, residual claimant analysis is better understood as a theory for the stakeholder model of the firm than the shareholder primacy model, as it is presently understood.

INTRODUCTION

Residual claimant status carries with it an important economic and legal function in corporations and in corporate law. The residual claimants of corporations are the parties who suffer increasing injury as the corporation

* Professor of Law, University of California, Irvine School of Law. I am grateful to Mehrsa Baradaran, Joshua Blank, Jill Fisch, Vic Fleischer, Jonathan Glater, Alex Lee, Jennifer Koh Lee, Stephen Lee, Christopher Leslie, Omri Marian, L. Song Richardson, and Arden Rowell for reading prior versions of this Article and providing helpful comments. I also benefitted from the opportunity to present and receive feedback on this project at the Trans-Pacific Business Law Dialogue (September 2020) and the University of Florida Business Law Conference (November 2020). Tianmei Ann Huang and Nick Nikols provided extraordinary research assistance, and Vivian Liu, Mindy Vo, Elizabeth Bell, and Jessica Block of the *Southern California Law Review* Postscript team, Deborah Choi, and Matthew Perez provided superb editorial assistance. Any errors are my own.

does progressively worse and who likewise enjoy increasing gains as the corporation does progressively better. Drawing on this alignment between the residual claimant's interest and the corporation's collective interest, many aspects of corporate law and contracts are structured to protect the interests of the residual claimant.[1] Chief among these legal protections is the fiduciary duty imposed on corporate directors to strive to maximize value for the residual claimant.[2]

The modern conception of residual claimants in corporate law has been foundationally shaped by a law and economics analysis articulated in the 1980s by Frank Easterbrook and Daniel Fischel, which defines the residual claim as the right to receive residual profits.[3] Accordingly, the residual claimant theory has been used to defend "shareholder primacy" in contemporary legal scholarship based on the understanding that shareholders are generally the only parties who receive the residual profits of corporations.[4]

1. *See* Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 303 (1983) ("Contracts that direct decisions toward the interests of residual claimants also add to the survival value of organizations.").

2. *See, e.g.*, Frederic Hsu Living Tr. v. ODN Holding Corp., No. 12108, 2017 Del. Ch. LEXIS 67, at *50 (Del. Ch. Apr. 14, 2017) (referring to directors' fiduciary duty to "strive to maximize value for the benefit of the residual claimants").

3. *See* Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 403–06 (1983) (arguing that "shareholders are the residual claimants to the firm's income" and thus have the best economic incentives to vote in the best interests of the collective).

4. *Id.*; *see also* ROBERT CHARLES CLARK, CORPORATE LAW 18 (1986) ("[I]t is the shareholders who have the claim on the residual value of the enterprise . . . . "); Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 917 (1988) (assuming that the interests of a corporation are generally identical to the interests of its shareholders); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 63, 69 (1991); Jonathan R. Macey, *Fiduciary Duties as Residual Claims: Obligations to Nonshareholder Constituencies from a Theory of the Firm Perspective*, 84 CORNELL L. REV. 1266, 1267–68 (1999); Thomas A. Smith, *The Efficient Norm for Corporate Law: A Neotraditional Interpretation of Fiduciary Duty*, 98 MICH. L. REV. 214, 223–25 (1999); Alan J. Meese, *The Team Production Theory of Corporate Law: A Critical Assessment*, 43 WM. & MARY L. REV. 1629, 1631 (2002) ("Because [shareholders] hold an exclusive property right in the firm's residual, it is said, shareholders will internalize the costs and benefits of the firm's actions . . . . "); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance,* 97 NW. U. L. REV. 547, 565 (2003) ("To be sure, most theories of the firm agree, shareholders own the residual claim on the corporation's assets and earnings."); Amir N. Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style*, 29 DEL. J. CORP. L. 649, 652 (2004) (describing the traditional law and economics perspective as holding the view that "there can only be a single residual claimant—shareholders in the regular course of business and creditors during insolvency"); Martin Gelter, *The Dark Side of Shareholder Influence: Managerial Autonomy and Stakeholder Orientation in Comparative Corporate Governance*, 50 HARV. INT'L L.J. 129, 142 (2009) ("Of course, shareholders are the residual risk bearers in the traditional sense as the group whose financial claims are satisfied with what remains when everyone else has gotten his due."); Julian Velasco, *Shareholder Ownership and Primacy*, 2010 U. ILL. L. REV. 897, 903 (2010) ("[M]ost theories of the firm

Although the modern conception of the shareholder as the sole residual claimant of corporations has been shaped almost entirely by the law and economics approach, a forgotten history of residual claimant theory reveals that the theory originally contemplated a broad array of stakeholders being the residual claimants of firms.[5] As Jacob Hollander observed in 1903, "[l]andlord, capitalist, laborer, and entrepreneur have each in turn been elevated to the position of residuary legatee; and landlord, capitalist, and laborer have in turn been reduced to the status of co-ordinate claimant."[6]

This history of residual claimant analysis has been largely ignored in the literature[7] and recently, the view of shareholders as exclusive residual claimants has been used as the primary rationale for the shareholder primacy norm. Embedded in this view is the presumption that shareholders' status as residual claimants is exclusive and permanent.

This Article questions this presumption by providing a historical perspective on corporate residual claimants. In this Article, I trace the history of the residual claimant theory to demonstrate that the conventional view of shareholders as the exclusive residual claimants of the corporation is a relatively recent understanding. A review of the origins and history of the

agree, shareholders own the residual claim on the corporation's assets and earnings . . . . " (quoting Bainbridge, *supra*, at 564–65 (footnote omitted))); George S. Geis, *Shareholder Derivative Litigation and the Preclusion Problem*, 100 VA. L. REV. 261, 262 (2014) ("Shareholders are the residual owners of a company . . . . "); Kelli A. Alces, *Balance and Team Production*, 38 SEATTLE U. L. REV. 187, 202 (2015) ("The shareholder primacy norm is more properly stated as a 'residual claim primacy' norm."); Kathryn Judge, *The Federal Reserve: A Study in Soft Constraints*, 78 L. & CONTEMP. PROBS. 65, 88–89 (2015) ("One rationale for making boards of directors primarily accountable to shareholders, for example, is that, as residual claimants, they should incent[ivize] the board to maximize firm value."); Elisabeth de Fontenay, *Individual Autonomy in Corporate Law*, 8 HARV. BUS. L. REV. 183, 184 (2018) (referring to "stockholders" as "individuals or entities having a residual claim on the entity's profits"); Asaf Raz, Comment, *Share Law: Toward a New Understanding of Corporate Law*, 40 U. PA. J. INT'L L. 255, 275 (2018) ("In modern corporations, residual claimants are mostly known as 'shareholders'—persons who own a 'share.' "); Andrew Verstein, *Insider Trading: Are Insolvent Firms Different?*, 13 BROOK. J. CORP. FIN. & COM. L. 53, 53 (2018) ("In solvent firms, the residual claims are equity securities . . . .").

5. *See* Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 290 (1977) (stating that "[t]he economic theory of the firm" indicates that corporate management is best performed by shareholders, the "persons who receive a share of the profits"). *But cf.* Lynn A. Stout, *The Mythical Benefits of Shareholder Control*, 93 VA. L. REV. 789, 789, 804–05 (2007) (identifying potential residual claimants other than shareholders, specifically "employees, creditors, and other stakeholders").

6. Jacob H. Hollander, *The Residual Claimant Theory of Distribution*, 17 Q.J. ECON. 261, 279 (1903).

7. Although recognized by a number of authors in economic scholarship, to my knowledge, only one other legal scholar has cited to Hollander's 1903 paper, *The Residual Claimant Theory of Distribution*. *See* Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993, 1009 n.83 (1990); Herbert Hovenkamp, *The Progressives: Racism and Public Law*, 59 ARIZ. L. REV. 947, 980 n.200, 981 n.205, 982 n.212 (2017).

residual claimant theory reveals that residual claimant analysis has envisaged a broad array of stakeholders as the residual claimants of the corporation. Depending on which of the theories of rent, interest, wages, or profit was adopted, each of the landlord, capitalist, laborer, and entrepreneur has been the residual claimant of the corporation at different points in time.

Residual claimancy is a concept that has changed with prevailing economic conditions, relative bargaining power, and policy choices. Therefore, an attempt to fix legal policy based on one understanding of who the residual claimant is will be difficult to sustain as underlying conditions change. Instead, we should consider adopting a more fluid understanding of residual claimancy that accounts for the changing nature of the residual claimant. The reality is that there are multiple residual claimants with different degrees of residual claims at different times. Accordingly, residual claimant analysis is more consistent with the stakeholder model of the firm than the shareholder primacy model, as it is presently understood.

In a companion paper, I identify and construct a multicriteria assessment that brings together the multiple identities of residual claimants of corporations appearing in the history and development of our understanding of the corporation's residual claimants.[8] This reconceptualization of the residual claimant paves the way for a broader understanding of corporations and their purpose that transcends the maximization of shareholder profit.

I. RESIDUAL CLAIMANTS IN CORPORATE LAW—A HISTORICAL PERSPECTIVE

The prevailing perception of shareholders as exclusive residual claimants of firms is a relatively new understanding. As outlined in the Sections that follow, depending upon which of the theories of rent, interest, wages, or profit was adopted, each of the landlord, capitalist, laborer, entrepreneur, and central employer was, at varying times, considered to be the residual claimant of firms. Even though shareholders may be the residual claimants of many present-day firms, this history suggests that they are unlikely to be the residual claimants of many firms in the future.[9]

8. Sung Eun (Summer) Kim, *A Multi-Criteria Assessment of Corporate Residual Claimants* 25 CHAP. L. REV. (forthcoming 2022).

9. *See* A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931).

A. LANDLORDS AS RESIDUAL CLAIMANTS

When the residual claimant theory was first developed, rent was viewed as the essential factor in distribution. Under this view, residual claimant theory was essentially a rent residual theory which viewed landlords as the residual claimants as they remained in possession of the residual.[10]

Using the enterprise of agriculture as an example, the landowner leases the land to a capitalist-employer who hires the labor necessary for production. The first deduction from production is the wages to the laborers (reward to labor), which is fixed. The second deduction from production goes to the capitalist-employer (reward to capital) as compensation for the employer's risk, which is also a determinate sum. All that remains after these deductions reverts to the land, and the landowner is thus the residual claimant.

Adam Smith's theory of distribution in *The Wealth of Nations* is one representative example of the rent residual theory of residual claimancy.[11] Smith's general contention is that the rewards to labor and capital (unlike rewards to land) tend to be definite and predetermined and that this is a consequence of the dominant position that the landlord enjoys in the economic process.[12] Under the rent residual theory, the variability of reward and bargaining power of landlords in the production process are the primary factors entitling the landlord to residual claimant status in these early firms.

To summarize, there are two economic conditions underlying the rent residual theory: one is that the landowner is not paid a fixed sum, but a share (for example, one-half or one-third) of the production; the second is that the landlords hold the dominant position in the economic process.[13] Hollander was critical of the rent residual theory for its circularity.[14] He criticized the theory for not being a theory, but rather an empirical process that was presented as a theoretical principle by those who believed that land is the

10. Hollander, *supra* note 6, at 264 ("[M]uch the greater part of the lands of France are not let at a money-rent, but at one-half or one-third produce. . . . Such a tenantry, contributing so little beyond the labour of their hands, are much more at the landlord's mercy than would be the case of wealthier farmers." (quoting ARTHUR YOUNG, TRAVELS DURING THE YEARS 1787, 1788, & 1789; UNDERTAKEN MORE PARTICULARLY WITH A VIEW OF ASCERTAINING THE CULTIVATION, WEALTH, RESOURCES, AND NATIONAL PROSPERITY OF THE KINGDOM OF FRANCE 353, 355 (2d ed. 1794)).

11. *Id*. at 264.

12. *Id*. (citing ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776)).

13. *Id*. at 278 (explaining how a "dominant land-owning class . . . found theoretical expression in a rent-residual formula").

14. *Id*. at 263.

source of wealth.[15] He also criticized the definition of rent as circular, since rent was defined as the surplus over wages and gross profit, but interest paid to the capitalist was defined in terms of rent.[16]

B. CAPITALISTS AS RESIDUAL CLAIMANTS

As capital displaced land as the dominant factor in economic production, gross profit came to be viewed as the essential factor in distribution.[17] Under this view, residual claimant theory was essentially a capital residual theory which viewed the capitalist-employer was the residual claimant as they remained in possession of the residual.

Returning to the enterprise of agriculture as an example, under the capital residual theory, the first deduction from agricultural production went to the landowner as a fixed rent and the second deduction from production to the workers as fixed wages. Any and all of the residual that remained after these deductions reverted to the capitalist-employer, who thus became the residual claimant of the enterprise.

A representative example of the capital residual theory is articulated by Ricardian economists, who view profits as "the leavings of Wages."[18] As James Mill writes in the *Elements of Political Economy*:

> When it is established that the whole of the annual produce is distributed as rent, wages of labour, and profits of stock; and when it is ascertained what regulates the portion which goes to rent, and what the portion which goes to wages, the question is also determined with regard to *profits of stock*; for it is evident that *all which remains is included under that denomination*.[19]

Under the capital residual theory, the capitalist being paid last and their superior bargaining power (stemming from capital's dominance in the production process) were the primary factors entitling the capitalist to residual claimant status in these firms.

Capital residual theory also faced similar criticisms as did rent residual

15. *Id*.

16. *Id*. at 263–64.

17. *See* DONALD J. HARRIS, CAPITAL ACCUMULATION AND INCOME DISTRIBUTION 8 (1978) (explaining the crucial nature of profits in connection to not only the accumulation of value, but also future investments across classes); *see also* Alfred Marshall, *Distribution and Exchange*, 8 ECON. J. 37, 55–59 (1898) (analogizing labor to capital given that "the earnings of each [are] defined by the last profitable application of each at the margin").

18. Hollander, *supra* note 6, at 267 n.† (referring to "De Quincey's dictum that 'Profits are the leavings of Wages' " (citing FRANCIS A. WALKER, POLITICAL ECONOMY 267 (1883)).

19. JAMES MILL, ELEMENTS OF POLITICAL ECONOMY 54 (1821) (emphasis added).

theory, in that some viewed it as an empirical phenomenon that was presented as a theory, proof of not much else besides capital's dominance in the production process.[20] The capital residual theory also relied on a circular definition of wages, as wages are not fixed but instead depend upon a market rate, which in turn depends on capital.[21]

C. WORKERS AS RESIDUAL CLAIMANTS

Under the wage residual theory, wages are the essential factor in production and workers are viewed to be the residual claimants.[22] Under this view, the first deduction of production is rent to the landlord, the next is interest to the capitalist, and then profit to the entrepreneur. It is only after these claimants are satisfied that the residual reverts to the laborers as wages. Under this distribution, the ultimate level of wages is not fixed, but is instead determined by the workers' productivity.[23]

Under the wage residual theory, the fact that workers were paid last and that their take-home pay was determined by their own productivity were the primary factors entitling the laborers to residual claimant status in these firms.

The limit of the wage residual theory is that the status of the laborer is fixed by a contractual wage relation. Even so, wage fund theorists argued that wages were paid out of the "product of present industry," leaving the residue or surplus within the grasp of the wage earner.[24]

Unconvinced by this argument, others have criticized the wage fund theory as the "shifting sand" of residual theory, suggesting that its proponents are driven by their desire to show that the laborer should be the

20. Hollander, *supra* note 6, at 267–68 ("With capital so visibly dominant in the industrial process there seemed no occasion to inquire what was its real service in production and what its real title to a share in distribution.").

21. *Id*. at 266–67 ("[T]he rate of wages depends on the proportion between Population, and Employment, in other words, Capital." (quoting MILL, *supra* note 20, at 25)).

22. The residual claimant theory of wages, originated by Francis A. Walker, merely refers to the order in which wages are paid (that is, after rent, interest, and profit) and is to be distinguished from Karl Marx's theory of wages which views profit as the extraction of surplus value from workers. *Wage Theory*, BRITANNICA, https://www.britannica.com/topic/wage-theory [https://perma.cc/4B8N-63XM].

23. Francis A. Walker, *The Source of Business Profits*, 1 Q.J. ECON. 265, 281–82 (1887) (arguing that wages equal anticipated gross receipts, less the sum of rents, interest, and profits).

24. FRANCIS A. WALKER, THE WAGES QUESTION: A TREATISE ON WAGES AND THE WAGES CLASS 128 (1888). Walker is credited with updating the antiquated wages fund theory by clearly describing the factors of production according to their rewards (wages, rent, and profits). Lauren F. Landsburg, *The Wages Question: A Treatise on Wages and the Wages Class*, ECONLIB (2004), https://www.econlib.org/library/YPDBooks/Walker/wlkWQ.html [https://perma.cc/P7CM-M89Z].

ultimate beneficiary of economic production.[25]

D. ENTREPRENEURS-MERCHANTS AS RESIDUAL CLAIMANTS

The profit residual theory originates in *The Modern Distributive Process* (1888) by John Clark and Franklin Giddings, who regard the entrepreneur's profit as the essential factor in distribution.[26] The profit residual theory makes a distinction between the capitalist and the entrepreneur. The former receives interest for the use of their capital, while the latter receives rewards for the exertion of their labor.[27] Under the profit residual theory, it is not the capitalists but the entrepreneurs who are viewed as the residual claimants of firms.[28]

Clark and Giddings further bifurcate the entrepreneur's function into the dual roles of industrial organizer and merchant.[29] The industrial organizer works on dividing, coordinating, assigning, and incentivizing labor and guarding against waste.[30] The compensation for the industrial organizer is fixed. On the other hand, the merchant function refers to the entrepreneur in their role as a merchant who has bought out other partners so as to become the sole owner of the operation.[31] Unlike the industrial organizer function, the merchant function is compensated by the difference between what is paid and what is made. It is this merchant function of the entrepreneur that entitles the entrepreneur to the status of residual claimant under Clark and Giddings's analysis.

As the bearer of risk and ultimate beneficiary of the residual, the entrepreneur is therefore motivated to make distinctive contributions that will entitle them to the "prize of the social contest."[32] The underlying

25. Hollander, *supra* note 6, at 272 ("[I]ntent upon showing that the laborer could not be deprived, if he so willed, of the product of his own increased efficiency, Walker, in expanding 'a philosophy of the labor question' into a rounded theory of distribution, undertook the unnecessary task of proving that the whole surplus of industry was within the grasp of the wage-earner, and—alighted upon the shifting sand of a residual theory.").

26. JOHN B. CLARK & FRANKLIN H. GIDDINGS, THE MODERN DISTRIBUTIVE PROCESS 35 (1888).

27. One dominant conception of the entrepreneur used in law and economics is Joseph Schumpeter's. Schumpeter enlarged the scope and breath of the entrepreneur's function to mean one who innovates and who makes new combinations in production. JOSEPH A. SCHUMPETER, THE THEORY OF ECONOMIC DEVELOPMENT 62 (Routledge 2021) (1934). In Ronald Coase's theory of the firm, the entrepreneur's function is to internalize various stages of functions to economize on transaction costs. R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 392–94 (1937).

28. CLARK & GIDDINGS, *supra* note 27, at 35.

29. *Id*. at 36.

30. *Id.*

31. *Id.* at 37.

32. *Id*. at 35.

presumption is that they would not make such distinctive contributions, or at least with as much vigor, if they were paid sooner.[33] In other words, it is precisely because their share is the residue that they strive to provide this positive service.[34] In the event they are not paid, they have no one but themselves to look to for recourse.[35] Under the capital residual theory, the entrepreneur-merchant being paid a variable amount, that amount being determined by their own contributions, and them having no recourse in the event of nonpayment were the primary factors entitling the entrepreneur-merchant to residual claimant status in these firms.

E. Central Employers as Residual Claimants

The profit residual theory was brought to prominence by Armen A. Alchian and Harold Demsetz in their 1972 paper, "Production, Information Costs, and Economic Organization."[36] According to Alchian and Demsetz, the primary function of the residual claim is a monitoring function.[37] They characterize the residual claimant as one who "earns his residual through the reduction in shirking that he brings about, not only by the prices that he agrees to pay the owners of the inputs, but also by observing and directing the actions or uses of these inputs."[38]

According to Alchian and Demsetz, the key function of the residual claim is to reward the monitor and incentivize them not to shirk.[39] The residual claimant's monitoring function becomes more important and difficult with increasing team production, team organization, difficulty in metering outputs, and problems of shirking. Through this inquiry, it becomes clear to Alchian and Demsetz that the employer-owner is the residual claimant of most large corporations.[40] Implicit in this analysis is the view

33. Hollander, *supra* note 6, at 277–78 ("It is residual only in the same sense as is every other claimant's, namely, that it may be estimated as that part of the product left after the assignment of all of the other shares by positive determination.")

34. John Bates Clark, The Distribution of Wealth: A Theory of Wages, Interest and Profits 204 (1908) ("*Entrepreneurs*' profit and residual income are synonymous terms.").

35. Clark & Giddings, *supra* note 27, at 40 ("He [the entrepreneur in his capacity as owner of a product] must accept what comes into his treasury, and submit to what goes out of it; the difference, which is pure profit or loss, is fixed without appeal.").

36. Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 Am. Econ. Rev. 777 (1972).

37. *Id.* at 782 ("The specialist *who receives the residual rewards* will be the monitor of the members of the team (i.e., will manage the use of cooperative inputs).").

38. *Id*.

39. *Id*. ("Specialization in monitoring plus reliance on a residual claimant status will reduce shirking . . . . ").

40. *Id*. at 794 ("The central agent is called the firm's owner and the employer.").

that a residual claimant has the capacity to reduce agency costs by monitoring the business.[41] Under this analysis, the employer-owner is the residual claimant because they are the *monitor* of the business and they are compensated on the basis of their monitoring capacity.

CONCLUSION

Two overarching themes emerge from this historical overview of corporate residual claimants. The first is that one's status as a firm's residual claimant is not absolute. Residual claimancy is a concept that has changed with prevailing economic conditions, relative bargaining power, and policy choices. Therefore, any attempt to fix legal policy based on a fixed understanding of who the residual claimant is—as the shareholder primacy norm does based upon its understanding of shareholders as exclusive residual claimants—will be difficult to sustain as underlying conditions change. Instead, we should consider adopting a more fluid understanding of the residual claimancy that accounts for the changing nature of the residual claimant. The reality is that there have been multiple residual claimants with different degrees of residual claims at different moments in history. The only thing that has remained consistent has been the corporation and its various stakeholders collectively holding title to all of the corporation's claims. As such, it can be said that a stakeholder model, rather than a shareholder model, is more clearly compatible with residual claimant analysis when viewed over time.

The second theme that emerges from this historical overview is that residual claimant analysis is closely linked to the analyst's beliefs about who is and should be the dominant group among the various corporate constituents. In a companion paper, I outline a multicriteria analysis of residual claimants that seeks to acknowledge and address this subjective aspect of the residual claimant analysis by forcing an analyst to be deliberate and transparent about the criteria being used and to be open to the possibility that the group that meets those particular criteria may (and will likely) change over time.[42]

While orientating corporate law toward shareholder interests based on a profit residual view of residual claimants may have been a useful approximation of collective interest in a society driven primarily by investment capital, such a view neglects important inputs and contributions made by the corporation's other stakeholders. These other inputs and

41. *Id*. at 782.
42. Kim, *supra* note 8.

contributions are likely to become more significant as emerging technologies transform the way value is created and distributed in our society, and as intellectual and information capital, rather than investment capital, emerge as drivers of core value.