THE LAST MALE BASTION: IN SEARCH OF A TROJAN HORSE

Joan MacLeod Heminway[1]

Numerous legal scholars and commentators (this author included) have written about the paucity of women in the boardroom at influence-wielding U.S. public companies.[2] Fewer have written about the scarcity of female Chief Executive Officers ("CEOs"), and fewer yet have written about the relatively low numbers of female executive officers, at U.S. public companies.[3] Yet Professor Douglas M. Branson has written about all of these things, to some degree or another, in his last two books: *No Seat at*

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[1] College of Law Distinguished Professor of Law, The University of Tennessee College of Law. New York University School of Law, J.D. 1985; Brown University, A.B. 1982. I owe a debt of gratitude to Kelly Bechard (The University of Tennessee College of Law, J.D. expected 2012) for assisting me in converting my remarks offered at the University of Dayton School of Law's Symposium on *Perspectives on Gender and Business Ethics: Women in Corporate Governance*, into this essay. Work on this essay was supported by a summer research grant from The University of Tennessee College of Law.

[2] *See, e.g.*, DOUGLAS M. BRANSON, NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM (2007) [hereinafter NO SEAT]; Jayne W. Barnard, *More Women On Corporate Boards? Not So Fast*, 13 WM. & MARY J. WOMEN & L. 703 (2007); Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 855 (2011); Lisa M. Fairfax, *Clogs in the Pipeline: The Mixed Data on Women Directors and Continued Barriers to Their Advancement*, 65 MD. L. REV. 579 (2006); Lisa M. Fairfax, *Some Reflections on the Diversity of Corporate Boards: Women, People of Color, and the Unique Issues Associated with Women of Color*, 79 ST. JOHN'S L. REV. 1105 (2005); Lissa Lamkin Broome, *The Corporate Boardroom: Still a Male Club*, 33 J. CORP. L. 665 (2008); Lissa Lamkin Broome & Kimberly D. Krawiec, *Signaling Through Board Diversity: Is Anyone Listening?*, 77 U. CIN. L. REV. 431 (2008); Joan MacLeod Heminway & Sarah White, *Wanted: Female Corporate Directors*, 29 PACE L. REV. 249 (2009); Elizabeth A. Nowicki, *Economic Concerns, Beleaguered Corporations, and Women in Corporate Boardrooms*, 30 HAMLINE J. PUB. L. & POL'Y 549 (2009); Darren Rosenblum, *Feminizing Capital: A Corporate Imperative*, 6 BERKELEY BUS. L.J. 55 (2009).

[3] *See, e.g.*, DOUGLAS M. BRANSON, THE LAST MALE BASTION: GENDER AND THE CEO SUITE IN AMERICA'S PUBLIC COMPANIES (2010) [hereinafter LAST MALE BASTION]; Marleen A. O'Connor, *Women Executives in Gladiator Corporate Cultures: The Behavioral Dynamics of Gender, Ego, and Power*, 65 MD. L. REV. 465 (2006); Cindy A. Schipani et al., *Women and the New Corporate Governance: Pathways for Obtaining Positions of Corporate Leadership*, 65 MD. L. REV. 504 (2006); Rebecca Heller & Pamela Stepp, *Reexamining the Female Path to Leadership Positions in Business* (May 16, 2011), *available at* http://www.ilr.cornell.edu/cahrs/research/whitepapers/upload/2010WomeninLeadership_WhitePaper.pdf.

the Table: How Corporate Governance and Law Keep Women Out of the Boardroom[4] and *The Last Male Bastion: Gender and the CEO Suite in America's Public Companies*.[5]

In his books, Professor Branson observes explicitly and implicitly that the female talent pipeline to corporate leadership positions is leaky.[6] He shares both his thoughts on the reasons for the leaky pipeline and his ideas on how to increase flow in the pipeline.[7] His books enrich our knowledge of both problems, and this essay—together with the symposium at which the ideas in this essay were first presented—celebrates this work.

This essay does not endeavor to add to this collective understanding of observed gender disparities in boardrooms and the C-suite—the senior executive team in the firm.[8] Rather, it suggests a different approach to thinking about the issue of gender disparities at the executive-level ranks of U.S. corporations. Specifically, this essay reflects on the ways that different corporate governance theories may inform the way that we frame women's roles in the corporate executive leadership structure. My objectives are limited: to heighten consciousness and suggest a different lens. But my hope is that, if I successfully achieve those objectives, I will encourage new and creative solutions. Ultimately, the way we frame a problem may have an effect on its resolution.

With the foregoing in mind, this essay proceeds in three brief substantive parts after making a dedication and confession and establishing a predicate assumption. First, the essay reminds the reader of the story of the Trojan Horse and shows its relevance to questions relating to women in corporate leadership. Specifically, the Trojan Horse may be seen as a symbol for the means of achieving greater numbers of women in the C-suite. Second, the essay describes and characterizes existing approaches to the creation of greater gender diversity in corporate executive ranks, drawing largely (but not exclusively) from Professor Branson's work. Third, the essay suggests a new way of looking at the gender composition of the C-suite, linked to dominant corporate governance theory, and a related re-

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4 BRANSON, NO SEAT, *supra* note 2.

5 BRANSON, LAST MALE BASTION, *supra* note 3.

6 *Id*. at xi; BRANSON, NO SEAT, *supra* note 2, at 39; *see also* Heminway & White, *supra* note 2 at 250–51; Lisa H. Nicholson, *Making In-Roads To Corporate General Counsel Positions: It's Only A Matter Of Time?*, 65 MD. L. REV. 625, 645–54 (2006); Deborah L. Rhode, *The Subtle Side of Sexism*, 16 COLUM. J. GENDER & L. 613, 614 (2007); Heller & Stepp, *supra* note 3, at 4.

7 BRANSON, LAST MALE BASTION, *supra* note 3, at 140, 152; BRANSON, NO SEAT, *supra* note 2, at 40–52; *see also* Heminway & White, *supra* note 2, at 250–51; Judith G. Oakley, *Gender-based Barriers to Senior Management Positions: Understanding the Scarcity of Female CEOs*, 27 J. BUS. ETHICS 321, 322 (2000).

8 C-Suite definition, INVESTOPEDIA, http://www.investopedia.com/terms/c/c-suite.asp#axzz1WusuN3rh (last visited Sept. 8, 2011) ("A widely-used slang term used to collectively refer to a corporation's most important senior executives. C-Suite gets its name because top senior executives' titles tend to start with the letter *C*, for chief, as in chief executive officer, chief operating officer and chief information officer.").

focusing of efforts to address gender disparities in corporate management. The essay then ends with a brief conclusion.

I. A DEDICATION AND A CONFESSION

It is relevant to begin with a dedication and confession. The two are related.

In Professor Branson's book, he relates the stories of a number of female CEOs and derives lessons from these stories. This essay is dedicated to one of the executive women he profiles, Jill Barad, formerly the CEO of Mattel, Inc. This is because I am complicit (albeit in a very small and indirect way) in deposing her as a female CEO. As Professor Branson accurately describes things, Ms. Barad's reign as Mattel's CEO ended rather abruptly in large part as a result of a "big dumb acquisition"—Mattel's acquisition of The Learning Company, Inc.[9] I cannot take the blame for the "big dumb acquisition." However, I can admit to having been part of the team of lawyers that brought Mattel that "big dumb acquisition." My colleagues and I in the Boston office of Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates, represented The Learning Company (and its predecessor corporation, SoftKey International, Inc.) in a series of merger and acquisition transactions culminating with that transaction.

II. AN ASSUMPTION

Having made this dedication and confession, I continue by staking a limited claim that, while contestable, is not (in my view) controversial.

That claim: there is no reason why we should not have women represented in greater numbers and proportions as CEOs and senior executives of U.S. public companies. Better yet, as Professor Branson highlights in his books, there are a number of reasons why women should be represented in greater numbers and proportions in key corporate management roles.[10] As Professor Branson notes, women constitute a major untapped labor pool, and they apparently bring, by their nature, different skills and attributes to the C-suite.[11] I have written before about the fact that

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[9] BRANSON, LAST MALE BASTION, *supra* note 3, at 3–12 (relating the story of Jill Barad's ascendance to the CEO role at Mattel and her fall from grace and making observations about that story).

[10] *Id.* at 124–27; BRANSON, NO SEAT, *supra* note 2, at 177–79.

[11] *See* BRANSON, LAST MALE BASTION, *supra* note 3, at 123; *see also* Edward S. Adams, *Using Evaluations to Break Down the Male Corporate Hierarchy: A Full Circle Approach*, 73 U. COLO. L. REV. 117, 151–58 (2002) (outlining differing attributes of male and female managers); Jayne W. Barnard, *At the Top of the Pyramid: Lessons from the Alpha Women and the Elite Eight*, 65 MD. L. REV. 315, 325 (2006) ("[W]omen are more likely than men to be attentive to process values and . . . effecting meaningful changes in corporate governance requires listening, diplomacy, and effective coalition-building, skills at which women executives are thought to excel." (footnote omitted)); O'Connor, *supra* note 3, at 473–74 (outlining attributes of female managers as part of the business case for promoting female executives). *But see* Schipani et al., *supra* note 3, at 509–510 (identifying "[t]he myth of female supremacy in management" and noting that "studies have shown that '[w]hen matched by age, education

women trust and are trusted in different ways than men.[12] I have also written about the differences between women and men as investors.[13] There is a wealth of literature on ways in which men and women are different from each other in more than a mere biological sense.[14]

So, women may add something new to the mix.[15] The "something" that women may add could be a net positive in corporate governance and shareholder value.[16] Women in executive positions have a capacity to enhance the decision-making and profitability of corporations in various circumstances and in a variety of ways, and Professor Branson's book and other works cover this territory well.[17] In squandering this important resource, public companies in the United States may be negatively impacting the firm's total return to investors.[18]

III. THE METAPHOR, IN BASIC TERMS

Now, I turn to pursuing the theme of this essay by way of a well-known metaphor.

> Everyone knows the story. The Greeks are said to have packed up their men, horses, weapons, and booty, set fire to their huts, and departed at night for the nearby island of Tenedos, where they hid their ships. All that they left behind was the Trojan Horse and a spy, Sinon, pretending to be a deserter.
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> The Trojans were amazed to discover that after all these years, the enemy had slunk home. But what were they

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level, and experience, female and male executives are more alike than different. In fact, executive women are more similar to their male peers than to females in occupations historically dominated by women, such as nursing.'" (footnote omitted)).

[12] Joan MacLeod Heminway, *Sex, Trust, and Corporate Boards*, 18 HASTINGS WOMEN'S L.J. 173 (2007).

[13] Joan MacLeod Heminway, *Female Investors and Securities Fraud: Is the Reasonable Investor a Woman?*, 15 WM. & MARY J. WOMEN & L. 291 (2009).

[14] RENEE ADAMS & PATRICIA FUNK, BEYOND THE GLASS CEILING: DOES GENDER MATTER? 43–45 (2011), www.econ.upf.edu/~funk/papers/GlassCeiling_March2011.pdf; MICHAEL GURIAN & BARBARA ANNIS, LEADERSHIP AND THE SEXES: USING GENDER SCIENCE TO CREATE SUCCESS IN BUSINESS 8–9 (2008); Linda C. McClain, *What's so hard about sex equality?: Nature, culture, and social engineering, in* TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY 66–82 (Martha Albertson Fineman, ed., 2011).

[15] There is, however, a debate about the extent to which women and men have different management or leadership styles. *See, e.g.*, Madeline E. Heilman, *Sex Discrimination and the Affirmative Action Remedy: The Role of Sex Stereotypes*, 16 J. BUS. ETHICS 877, 878 (1997); Anna-Maija Lämsä & Teppo Sintonen, *A Discursive Approach to Understanding Women Leaders in Working Life*, 34 J. BUS. ETHICS 255, 257 (2001); Schipani et al., *supra* note 3, at 509–12.

[16] *See* BRANSON, LAST MALE BASTION, *supra* note 3, at 125; ALICE H. EAGLY & LINDA L. CARLI, THROUGH THE LABYRINTH 192 (2007); GURIAN & ANNIS, *supra* note 14, at 127.

[17] *See, e.g.*, BRANSON, LAST MALE BASTION, *supra* note 3, at 124; GURIAN & ANNIS, *supra* note 14, at 65–66; SALLY HELGESEN & JULIE JOHNSON, THE FEMALE VISION: WOMEN'S REAL POWER AT WORK 114, 117 (2010).

[18] *See* BRANSON, LAST MALE BASTION, *supra* note 3, at 124; EAGLY & CARLI, *supra* note 16, at 192; GURIAN & ANNIS, *supra* note 14, at 126–27.

> to do with the Horse? After a fierce debate, they brought it into the city as an offering to Athena. There were wild celebrations. The Trojans underestimated the cunning of their adversaries. That night, the men inside the horse sneaked out and opened the city's gates to the men of the Greek fleet, who had taken advantage of Troy's drunken distraction to sail back from Tenedos. They proceeded to sack the city and win the war.[19]

The Trojan Horse metaphor is not a perfect fit for the history (or should I say *herstory*[20]) and current position of women in the corporate executive ranks, but the plot of the legend of the Trojan Horse is analogous to the tale of executive women in certain respects. This may be why the narrative relating to gender progress in the C-suite sounds familiar to some of us.

Professor Branson's *The Last Male Bastion* does tell us about something many of us already know that seems to parallel the Trojan Horse story in important ways. Aspiring female CEOs, like the Greeks before them, are having trouble getting into a well-fortified structure: the C-suite and its prized component CEO position.[21] They have fought to gain entry for many years and have achieved only limited success.[22] The cost-benefit analysis of some women has led to their abandonment of the quest for what seems to be an elusive senior management position; women and their allies may appear to have given up the fight.[23] Women are undeniably leaking from the management pipeline, if not the workplace altogether.[24]

How can women—at least those who remain interested in the fight—gain entry into the male stronghold at the pinnacle of the corporation? Many supporters of female executives are looking for a Trojan Horse—a simple way for women to effectively slip unnoticed into the male

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19 BARRY STRAUSS, THE TROJAN WAR: A NEW HISTORY 171–72 (2007).

20 *See* SISTERHOOD IS POWERFUL: AN ANTHOLOGY OF WRITINGS FROM THE WOMEN'S LIBERATION MOVEMENT xxi, xxii, 5 (Robin Morgan ed., 1970) (representing early uses of the term in context). Oxford English Dictionary (3rd ed. 2011), www.oed.com/view/Entry/243412?redirectedFrom=herstory#eid credits this source with coining the term. *Id.* (on file with the University of Dayton Law Review).

21 BRANSON, LAST MALE BASTION, *supra* note 3, at 139; BRANSON, NO SEAT, *supra* note 2, at 91; EAGLY & CARLI, *supra* note 16, at 5–8.

22 Women currently constitute approximately 15% of executive officers in the Fortune 500, a number that has not increased consistently or significantly over the past eight years. *See* Catalyst Inc., Women in U.S. Management 1–2 (2011), *available at* http://www.catalyst.org/file/452/qt_women_in_us_management.pdf (showing percentages of "Fortune 500 Corporate Officer Positions Held by Women" from 1995–2008 and the "Percent of Executive Officer Positions Held by Women, 2009 and 2010"). Results are similarly disappointing for increases in the number of female corporate directors. *See id.*, at 1. *See also* Heller & Stepp, *supra* note 3, at 2–3 (citing to data on both female executives and female directors).

23 BRANSON, LAST MALE BASTION, *supra* note 3, at 112, 145–47; BRANSON, NO SEAT, *supra* note 2, at 42; EAGLY & CARLI, *supra* note 16, at 56, 198.

24 *See* EAGLY & CARLI, *supra* note 16, at 56, 198.

bastion that is the C-suite. These advocates believe that what women need is a compelling cover, so that the male supermajority in control of the C-suite will open the doors of the fortification to allow women to enter and assume positions in the management of corporate America. Is there a Trojan Horse of this kind that will enable female talent to enter the corporate bastion? If so, what is it?

IV. THE TROJAN HORSE: STANDARD CONCEPTIONS

The Last Male Bastion and Professor Branson's predecessor work, *No Seat at the Table*, summarize many actions corporations can take to enhance the prospects for women who desire to assume roles as CEOs and upper management leaders in U.S public companies. For example, corporations can do a better job of making upper management open and friendly to all, including changing the way they search for and choose CEOs.[25] They also can focus more closely on ways in which women might enhance the corporation's market position and decision-making.[26]

These are valuable, practical suggestions for business firms. But Professor Branson does not stop there. He spends much of the book focusing on elements of individual leadership and, in particular, the women in and aspiring to positions in upper management in public companies. Some of the suggestions for women described (even if not advocated) in the book include: changing employers, sectors, or careers to enhance professional progress; prioritizing careers over those of life partners; keeping egos in check; learning to partner in order to add complimentary skill sets to an executive team; knowing when to duck, when to admit error, and when to apologize; avoiding being greedy; and bringing a global experience or attitude.[27] In addition, women can qualify themselves with education, mentoring, and networking.[28] They can cultivate attributes or adopt behaviors that experts recommend based on research involving successful female executives, including:

- preparing oneself for the accounting and financial sides of business;
- avoiding becoming a "tall poppy" or diva/prima donna, etc.; and
- developing a "can do" reputation.[29]

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[25] *See* BRANSON, LAST MALE BASTION, *supra* note 3, at 129–33.
[26] *See supra* note 10 and accompanying text.
[27] BRANSON, LAST MALE BASTION, *supra* note 3, at 31, 210–13.
[28] BRANSON, LAST MALE BASTION, *supra* note 3, at 195, 200, 202; BRANSON, NO SEAT, *supra* note 2, at 78–79, 180.
[29] BRANSON, LAST MALE BASTION, *supra* note 3, at 11, 28, 40.

In addition, on an individual level, women can pattern their professional advancement on recognized stages of leadership development (like those described by Jim Collins in his seminal book, *Good to Great: Why Some Companies Make the Leap . . . and Others Don't*).[30] Firms can support women in these efforts, but they historically have not done so on a consistent or pervasive basis.[31] In *The Last Male Bastion* and *No Seat at the Table*, Professor Branson identifies four paradigms through which women may shift in advancing their careers toward roles on a corporation's board of directors or executive team.[32]

These suggestions for corporations and for women seeking executive positions are, for the most part, well-taken. Most, if not all, of them are among the standard-bearers in the box of tools acknowledged to be useful in the quest for better gender diversity in the executive ranks (and, as desired, the board of directors).[33] The ideas Professor Branson shares are founded in research conducted by academics in a wide variety of disciplines and, on their face, have some prospect of helping to move more women all the way through the management pipeline to its very end. But these institutional and individual strategies and tactics are seemingly rooted in conventional, accepted conceptions of women—and overall diversity—in the C-suite. I cannot help but feel that a lot of the ground Professor Branson and others cover in this important area has been trod many times before, with few new insights. I fear that if we continue to envision the issue the same way, there will be little new to say as time continues to pass.[34] This would be an unfortunate and unproductive path for scholarly commentary and for gender diversity in public companies.

V. THE TROJAN HORSE: NEW CONCEPTIONS

So, what can this essay add that may be helpful? Perhaps a new conceptualization is in order. Although strategies and tactics involving both corporations and women in the management pipeline may be helpful in advancing women to key executive positions, the true Trojan Horse in this

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[30] JIM COLLINS, GOOD TO GREAT: WHY SOME COMPANIES MAKE THE LEAP . . . AND OTHERS DON'T (2001); *see also* KEVIN EIKENBERRY, REMARKABLE LEADERSHIP: UNLEASHING YOUR LEADERSHIP POTENTIAL ONE SKILL AT A TIME (2007); JOHN HAMM, UNUSUALLY EXCELLENT: THE NECESSARY NINE SKILLS REQUIRED FOR THE PRACTICE OF GREAT LEADERSHIP (2011); Susanne R. Cook-Greuter, *Making the case for a developmental perspective*, 36 INDUS. & COM. TRAINING 275 (2004); Daniel Goleman, *Leadership that Gets Results*, 78 HARV. BUS. REV. 82–87 (2000).

[31] Schipani, *supra* note 3, at 509. Current data suggests that corporations continue to forego investment in gender diversity initiatives targeted at management leadership. *See* Heller & Stepp, *supra* note 3, at 4.

[32] BRANSON, LAST MALE BASTION, *supra* note 3, at 215–18; BRANSON, NO SEAT, *supra* note 2, at 161–66.

[33] *See, e.g.*, Broome, *supra* note 2, at 674–79 (summarizing some of Professor Branson's ideas and adding a few of Broome's own).

[34] My observation here is an obvious variant of the definition of insanity often attributed to Albert Einstein: "Insanity: doing the same thing over and over again and expecting different results."

narrative may be the way that we think about the issue of women in the C-suite.

The typical response to gender inequities in the executive ranks of public companies is a microcosm of the standard principal-agent theory of the corporation—founded in the separation of control from ownership and the embedded idea of managerialism as part of that theory.[35] Managers of the corporation—directors and officers—rule the corporate roost. Agency cost theory casts doubt on the ability of individual managers to behave in a manner that allows them to be optimal fiduciaries for the corporation (including its shareholders, as primary beneficiaries).[36] Managerial interests are compared and contrasted with those of the corporation and its shareholders.

Under my gendered version of this oft-told law and economics story, actual and aspiring female CEOs, as wealth-maximizing executives, are juxtaposed with the wealth-maximizing corporation and its shareholders. As economic agents, female executives are charged with doing the corporation's bidding (from a corporate law standpoint, at the behest of the board of directors) for the financial benefit of, in principal part, its shareholders. When the women executives shirk or otherwise fall short in accomplishing this mission, corporations and shareholders suffer detriment (in the form of so-called agency costs).[37]

This typical, two-sided description of executive officers in the corporate form of business association is accurate in various contexts. But it has a tendency to focus the observer on individuals versus individuals (or structural groups of like individuals) in an agency-driven system. It represents an us-versus-them approach to structural and functional issues involving key corporate constituents. And the gendered version of the agency story also may subconsciously drive how we look at female CEOs—as individuals in the corporate structure often pitted against other individuals—historically and predominantly males—in the corporate

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[35] *See* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 5–7 (Harcourt, Brace & World, Inc. revised ed. 1968); *see also* William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1476 (1989). Professor Bratton describes managerialism in simple terms:

> The managerialist picture put corporate management groups at the large corporation's strategic center. Management possessed hierarchical power. This structural power, stemming from their expertise in organizing resources, had three aspects. First, management determined the processes of production and distribution. Second, management dominated enormous bureaucracies and exercised authority over the lives of all those lower down on the ladder. Third, management-dominated firms imposed externalities.

Id. (footnotes omitted).

[36] *See* Michael C. Jensen & William H. Meckling, *Theory of the firm: Managerial behavior, agency costs and ownership structure*, 3 J. FIN. ECON. 305 (1976).

[37] *See, e.g.*, *id.* at 5–6; Eugene F. Fama & Michael C. Jensen, *Agency Problems and Residual Claims*, 26 J.L. & ECON. 2–6 (1983); Eric W. Orts, *Shirking and Sharking: A Legal Theory of the Firm*, 16 YALE L. & POL'Y REV. 268, 315–16 (1998).

structure.[38] The solutions posited in Professor Branson's book and elsewhere build off this notion by talking about, in turn, what corporations (including their directors and other managers) and women can do to generate greater numbers of women in the C-suite.

Agency can be a powerful descriptive approach as a theory of the firm and provides a meaningful explanation for the relationships between and among the firm's constituents. But, just as looking at corporations through the lens of only one theory provides a limited view of the overall corporate governance puzzle, looking at gender inequity in the senior executive ranks at public companies through only one lens provides a limited perspective on the female executive puzzle. By focusing on female executives as agents—single control persons—in the corporate structure, we may be missing something.

Accordingly, to enhance our scope of vision in addressing the under-representation of women in the executive ranks at public companies, we may benefit from reframing the issue as a microcosm of the team production (or another communitarian-oriented) theory of the corporation.[39] The team production theory describes the corporation as a mediating hierarchy consisting of a collection of constituents, with each supplying firm-specific inputs.[40] The board of directors acts as the coordinator of these efforts and a buffer against the possibility of shareholder opportunism.[41] Team production theory takes a more (and more expansive) collaborative and cooperative view of the firm than that provided by agency theory.[42]

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[38] Certain gender-based research reinforces or exposes this competitive approach. *See, e.g.*, Heilman, *supra* note 15, at 879–83 (summarizing research on sex stereotypes and sex discrimination that highlights different conceptions of male and female managers); Lämsä & Sintonen, *supra* note 15, at 257 ("[L]eadership style research emphasizing the 'new' qualities of women managers results in the idea that women and men are competitors to each other instead of being collaborators.").

[39] *See* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 247–48 (1999) [hereinafter *TPCL*]; Margaret M. Blair & Lynn A. Stout, *Team Production in Business Organizations: An Introduction*, 24 J. CORP. L. 743 (1999) [hereinafter *TPBO*]; Paul N. Cox, *The Public, The Private and the Corporation*, 80 MARQ. L. REV. 391, 470 (1997); Michael E. Debow & Dwight R. Lee, *Shareholders, Nonshareholders and Corporate Law: Communitarianism and Resource Allocation*, 18 DEL. J. CORP. L. 393, 395 (1993); David Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1378–79 (1993).

[40] *See* Blair & Stout, *TPBO*, *supra* note 39, at 745–46; Blair & Stout, *TPCL*, *supra* note 39, at 249–51.

[41] *See* Blair & Stout, *TPBO*, *supra* note 39, at 746; Blair & Stout, *TPCL*, *supra* note 39, at 253–54, 286, 290–92; *see also* Margaret M. Blair & Lynn A. Stout, *Corporate Accountability: Director Accountability and the Mediating Role of the Corporate Board*, 79 WASH. U. L. Q. 403, 433, 446 (2001).

[42] *See* Blair & Stout, *TPCL*, *supra* note 39, at 250.

> While team production problems are less well studied than principal-agent problems, we believe the former may represent a more appropriate basis for understanding the unique economic and legal functions served by the public corporation. Our analysis rests on the observation--generally accepted even by corporate scholars who adhere to the principal-agent model--that shareholders are not the only group that may provide specialized inputs into corporate production. Executives, rank-and-file employees, and even creditors or the local community

To the point of this essay, as a descriptor of the corporation, team production is a group-oriented rather than individual-oriented theory. Under this team-oriented approach, we can situate executives in the group of constituents that make up the corporation, and we can further situate CEOs within that executive group. Female CEOs make sense, in this conceptualization of the corporation, if they add desired firm-specific investments to the executive team and the corporate team as a whole. It is the job of the board of directors, as the mediating hierarch, to ensure that occurs.

The standard story told in Professor Branson's book and elsewhere enables the board to assess individual and certain sex-or-gender-based attributes. But to best meet its obligations under the duties of care and loyalty (especially the subsidiary duty of good faith), the board must endeavor to understand how women may—not merely individually, but also as a group and as part of a group—add value to the executive team and overall corporate team in that firm. To gain this knowledge, the board must be familiar with, among other things, the results of relevant research studies. Fortunately, the burgeoning literature on the characteristics of women in decision-making capacities is now broadening away from merely looking at women as individuals. Gender-based studies of actual and perceived group behavior and performance are becoming more common. This branch of academic literature deserves more attention from researchers, theorists, policy makers, and boards of directors.

For example, women and men may behave differently in team-production environments. A recent study on forecasting ability done on a team-production basis (where benefits are doled out based on the group's aggregate performance) and on an individual-production, piece-rate basis (where each participant receives a benefit based on his or her own performance) demonstrated, among other things, that

- men in a team-production environment outperform men in a piece-rate environment;
- women in a piece-rate environment outperform women in a team-production environment; and
- overall, men outperform women in a team-

may also make essential contributions and have an interest in an enterprise's success.

Id.; *see also id.* at 253 ("[O]ur analysis appears to parallel many of the arguments raised in recent years by the 'communitarian' or 'progressive' school of corporate scholars who believe that corporate law ought to require directors to serve not only the shareholders' interests, but also those of employees, consumers, creditors, and other corporate 'stakeholders.'").

> production environment.[43]

These results indicate the possibility of discernible relationships between performance and gender in a team production environment.

The relationship between performance and gender may, however, be more complex than is indicated by this study and others like it. For example, the gender composition of a team may affect the performance of men and women on that team. In a 2008 laboratory study on teamwork conducted by two German scholars, there was some evidence that men and women performed differently in different gendered teams. Specifically, the study found

> that the gender composition of the team accounts for gender differences in performance, both with team work and with team competition. In particular, the data reveal that the performance of men is significantly higher than the performance of women in revenue sharing with mixed teams and in team competition with male vs. male compared to female vs. female teams.[44]

Why would the performance of men and women differ in these different teamwork settings? The study's co-authors hypothesize a difference between individual decision-making and decision-making in a teamwork environment:

> From the perspective of economic theory, the gender of the decision maker should not affect performance. And neither the gender of the other team members nor the gender of the competitors should matter. We hypothesize that in team work, however, a person's performance can be affected, for example, by the expectations he or she holds about the performance of the others in the team, whereby these expectations are correlated with gender. In addition, team work suffers from free-riding incentives which can be mitigated by competition, peer pressure and social norms, altruism, or loyalty among group members. It is an open question how these motives are affected by the gender of the decision makers.[45]

We cannot prudently rely on the results of a single study in decision-making, and we must be careful about generalizing the results of

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[43] Donald Vandegrift & Abdullah Yavas, *An Experimental Test of Behavior under Team Production*, 32 MANAGERIAL & DECISION ECON. 35, 48–49 (2011).

[44] RADOSVETA IVANOVA-STENZEL & DOROTHEA KÜBLER, GENDER DIFFERENCES IN TEAM WORK AND TEAM COMPETITION 21–22 (July 9, 2009), *available at* http://www2.wiwi.hu-berlin.de/wt1/research/2007/IK090702.pdf.

[45] *Id.* at 2–3 (footnote omitted) (discussing results in light of gender roles and stereotypes).

laboratory studies to workplace situations.[46] However, if results like these were obtained in multiple studies in the laboratory and in the field, one possible take-away would be that certain gender-based teams have a greater capacity to optimize the competitive value of firms than others. While much more work would need to be done before a board of directors could rely on results and conclusions like these, at some point, boards of directors should be in a position to take empirical results identifying gender differences in group decision-making studies into account in establishing management teams.

A more recent field study looked at the relationship between the gender diversity of teams and team productivity, finding that the performance of a team is optimized when the team comprises between 50% and 60% women.[47] Specifically, the study results indicate that

> the business performance of teams first increases when the share of women in the team increases and then decreases in the share of women in a team. The precise share of women at which a team's performance peaks, varies a bit across performance measures, but in all specifications the optimum is around 0.55. Gender diverse teams perform better than male dominated or female dominated teams.[48]

Again, while the results of this study cannot, taken alone, be generalized, it offers support for the view that the gender composition of a management team may be an important component of optimal team production.

A team-oriented perspective on female executives may yield other relevant observations that impact women's ability to make incursions on the C-suite. For example, there may be a potential positive collateral effect in rhetorically positioning female executives as part of a group (rather than as underrepresented individuals). This type of positioning, both internally (within the firm) and in the firm's interactions with external constituents, may help normalize the existence of women in the C-suite.

For example, there is evidence that investors react differently to press announcements of male and female executive appointments. A study published in 2007 shows that shareholders respond:

> 1) more negatively to the announcement of female CEO appointments than to male CEO appointments;

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[46] *See id.* at 17–18.

[47] Sander Hoogendoorn et al., *The Impact of Gender Diversity on the Performance of Business Teams: Evidence from a Field Experiment* 4 (Tinbergen Inst. Discussion Paper, Paper No. 2011-074/3, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1826024. The study also found "that mutual monitoring occurs more often in mixed gender teams than in more homogeneous teams and that more intense monitoring has a positive impact on company performance." *Id.*

[48] *Id.* at 18.

> 2) more negatively to female CEO appointments than to female appointments in top management appointments other than CEO; and
>
> 3) less negatively to women who are promoted to the CEO position from within the firm than to those who are promoted externally.[49]

Although this study does not expressly invoke or evaluate a group treatment of publicity surrounding additions to the C-suite, it does indicate that there may be perils or potential advantages derived from certain types of press reports focusing on the advancement of individual women to executive positions.[50] Given that the study indicates greater shareholder acceptance of female executives as part of, rather than as the leader of, executive teams, contextualizing women as part of a team—even when they hold the CEO position—may result in more positive reactions to women in the corporate executive suite. In general, studies like this may constructively inform the way in which boards of directors position public communications surrounding the appointment of a female executive.[51]

VI. CONCLUSION

The studies described and cited in Part V of this essay are inconclusive taken alone. More research is needed on the relationship among team production, gender, and performance, and on gender and group decision-making generally. Studies like these contribute to a new way of looking at the puzzle of CEO and senior management gender inequities in U.S. public companies. Those of us who are concerned about solving that puzzle should encourage additional research on the role that women can play as leaders of and participants in corporate management teams. By

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[49] Peggy M. Lee & Erika Hayes James, *She'-E-Os: Gender Effects and Investor Reactions to the Announcements of Top Executive Appointments*, 28 STRAT. MGMT. J. 227, 237 (2007). A recently released study extends and enhancing the work of Professors Lee and James. *See* Alison Cook & Christy Glass, *Leadership Change and Shareholder Value: How Markets React to the Appointments of Women*, 50 HUM. RES. MGMT. 501 (2011). Interestingly, Professors Cook and Glass "find evidence that investors respond positively to the appointment of women into powerful positions, particularly in female-dominated industries." *Id.* at 513. These results contrast with those of Professors Lee and James:

> [C]ontrary to previous findings (Lee & James, 2007), we find that overall, investors react more positively to the naming of a woman leader compared with the naming of a male leader. To avoid overstating this impact, we should note that the explained variance in our models is low. Nevertheless, we do not find evidence that the value of a firm's share price suffers in the wake of female appointments to top leadership positions.

Id.

[50] The market effects of CEO appointments may be transient, however. *See* James M. Citrin, *When Naming a CEO, Ignore the Market Reaction*, HARV. BUS. REV., Jan.–Feb. 2012, at 30 ("According to our research, there is no positive correlation between how a company's stock fares upon the announcement of a new CEO and the share price over that CEO's tenure. In fact, we sometimes found an inverse correlation . . . .").

[51] The authors of both studies offer relevant observations. *See* Cook & Glass, *supra* note 49, at 514–15; Lee & James, *supra* note 49, at 237–39.

focusing on female executives in a working group context, we may alter, or enhance, the image of the Trojan Horse that will allow women to gain entrance to the last male bastion—the public company C-suite.

There is much more that can (and, no doubt, will) be said about gender imbalances in C-suite positions in U.S. public companies. This essay is designed to contribute to the ongoing conversation by introducing a different, additional group-oriented perspective to the discussion. The process of thinking about female executives as part of a team—in addition to considering them as individuals—is not meant to dilute the importance of introducing more women to corporate management positions. Rather, in supplementing the standard, more individualized story of gender in the C-suite with a different, team-oriented positioning of the issue, this essay endeavors to highlight more clearly the role of women in corporate governance in a way that productively advances the continuing dialogue and the number and position of women in the C-suite.