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COMMENTS

REGULATING FROM THE GROUND UP: CONTROLLING FINANCIAL INSTITUTIONS WITH BANK WORKERS' UNIONS

We would have conference calls with regional presidents and managers . . . on how to word our selling points so the customer can't say no. I felt like a cheat. I started losing sleep and got nauseous every Sunday night over the start of the next workweek.

—Ashlie S.

I had to tell [my bosses] why I didn't force [customers] into opening that third, fourth, fifth checking account . . . . I had to explain why I did not feel comfortable with pushing people into paying for something they did not need. I was so stressed out, I developed shingles.

—Dennise C.

There were numerous days where I would hide in the men's bathroom crying. It got so bad that one day I left work to go to the emergency room because I thought I was having a heart attack. It turns out it was an anxiety attack.

—Scott T.[1]

1. These are the words of three former Wells Fargo employees describing their experiences at various regional branches of the bank between 2005 and 2016. Stacy Cowley, *Voices from Wells Fargo: 'I Thought I Was Having a Heart Attack,'* N.Y. TIMES (Oct. 20, 2016), https://www.nytimes.com/2016/10/21/business/dealbook/voices-from-wells-fargo-i-thought-i-was-having-a-heart-attack.html [https://perma.cc/QRV7-AX33].

ABSTRACT

In the Wells Fargo accounts scandal, millions of banking accounts were created for customers without their consent. The scandal cost Wells Fargo customers millions of dollars in direct and indirect charges. Investigations revealed that employees were pressured into creating these false accounts through abusive banking practices promulgated from the top. These practices are not unique to Wells Fargo; instead, they are ubiquitous in the financial services industry.

Current financial regulations do not adequately address how to mitigate banks' harmful practices. This comment explores the premise that bank worker unionization could serve as a much-needed check on the power of financial institutions and the directors and officers who run them. The comment provides an overview of why large financial institutions are incentivized to engage in harmful and economically unsound banking practices. The comment then outlines the potential for unions to constrain abusive commercial banking interests and recounts current efforts to unionize bank workers. Finally, the comment argues that threats to dismantle current consumer protection enforcement and banking regulations call for a new, worker-centered approach to hold financial institutions accountable to the public.

INTRODUCTION

On September 8, 2016, Wells Fargo paid fines totaling $185 million to the city of Los Angeles and federal regulators to settle allegations that its employees used coercion, deception, and falsified information to open millions of unauthorized bank accounts for its customers.[2] By the bank's own estimates, these practices resulted in the opening of 3.5 million unauthorized accounts across the country, 190,000 of which incurred fees and charges.[3] The sham

2. Associated Press, *Wells Fargo Fined $185 Million on Phony Accounts, Fires 5,300 Staff*, NBC NEWS (Sept. 8, 2016, 3:45 PM EDT), https://www.nbcnews.com/business/business-news/wells-fargo-fined-185-million-improper-account-openings-n645031 [http://perma.cc/77XU-APRU]. Specifically, Wells Fargo paid $100 million to the Consumer Financial Protection Bureau, $35 million to the Officer of the Comptroller of the Currency, and $50 million to the City and County of Los Angeles. *Id.*

3. Associated Press, *Wells Fargo Now Says 3.5 Million Affected by Sales Scandal, Up from 2.1 Million*, CHI. TRIB. (Aug. 31, 2017, 10:05 AM), https://www.chicagotribune.com/business/ct-wells-fargo-fake-accounts-20170831-story.html [https://perma.cc/88CL-SE2D].

accounts cost Wells Fargo customers over $142 million in direct charges and damaged credit scores.[4] In April 2017, the bank admitted that its fraudulent tactics dated back to 2002.[5]

The longstanding and systemic nature of Wells Fargo's practices strongly suggests that the bank's executives not only tacitly condoned such nefarious behavior on the part of its sales associates, but also intentionally designed a recklessly aggressive sales culture to increase the bank's profits.[6] Nonetheless, several days after Wells Fargo paid its massive penalties, former CEO John Stumpf refused to take personal responsibility for the scandal.[7] Instead of laying the blame with the bank's executive policymakers, Stumpf blamed a few "bad apples."[8] Specifically, Stumpf pointed to the

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4. James Rufus Koren, *Wells Fargo's $142-Million Sham Accounts Settlement: What You Need to Know*, L.A. TIMES (July 11, 2017, 2:55 PM), https://www.latimes.com/business/la-fi-wells-fargo-settlement-20170710-htmlstory.html [https://perma.cc/HBP7-CGFK].

5. *Wells Fargo Admits Account Scandal Dates Back to 2002*, N.Y. POST (Apr. 21, 2017, 2:22 PM), https://nypost.com/2017/04/21/wells-fargo-admits-account-scandal-dates-back-to-2002/ [https://perma.cc/GN2M-L8EQ].

6. *See* Associated Press, *supra* note 2; Adam Davidson, *How Regulation Failed with Wells Fargo*, NEW YORKER (Sept. 12, 2016), https://www.newyorker.com/business/currency/the-record-fine-against-wells-fargo-points-to-the-failure-of-regulation [http://perma.cc/G25H-MZV7] ("[Opening fake accounts] was so widespread around the country that it would be a truly remarkable coincidence if each team member had come up with the strategy independently."). In April 2017, a board of independent directors at Wells Fargo found that former chairman and CEO, John Stumpf, along with the former head of community banking, Carrie Tolstedt, were primarily responsible for the "high-pressure sales culture" at the bank. Wilfred Frost & Dawn Giel, *Wells Fargo Board Slams Former CEO Stumpf and Tolstedt, Claws Back $75 Million*, CNBC (Apr. 10, 2017, 7:30 AM ET), https://www.cnbc.com/2017/04/10/wells-fargo-board-slams-stumpf-and-tolstedt-claws-back-millions.html [http://perma.cc/VLZ2-W8E9]; *see also* Peter Dreier, *The Feisty Group That Exposed Wells Fargo's Wrongdoing*, AM. PROSPECT (Apr. 13, 2017), http://prospect.org/article/feisty-group-exposed-wells-fargo%E2%80%99s-wrongdoing [https://perma.cc/AUC9-DLD7].

7. *See* Press Release, Commc'n Workers of Am., United States Senate Banking Committee Grills Wells Fargo CEO on Damaging Sales Practices (Sept. 22, 2016), https:// www.cwa-union.org/news/us-senate-banking-committee-grills-wells-fargo-ceo-on-damaging-sales-practices [https://perma.cc/9R9Q-TBUK]. Senator Elizabeth Warren's now-infamous grilling of Stumpf included such highlights as:

> You kept your job, you kept your multi-million dollar bonuses, and you went on television to blame thousands of $12-an-hour employees who were just trying to meet cross-sell quotas that made you rich. You should resign, you should give back the money that you took while this scam was going on, and you should be criminally investigated.

Id.

8. Lucinda Shen, *Former Wells Fargo Employees to CEO John Stumpf: It's Not Our Fault*, FORTUNE (Sept. 19, 2016), http://fortune.com/2016/09/19/former-wells-fargo-employees-to-ceo-john-stumpf-its-not-our-fault/ [https://perma.cc/3AFK-GYPP]; *see also* Riley McDermid, *Wells Fargo CEO Blames Bank's Recent Woe's on Rogue Employees, Not Systemic Problems*, S.F. BUS. TIMES (Sept. 14, 2016, 7:00 PDT), https://www.bizjournals.com/sanfrancisco/news/2016/09/14/wells-fargo-ceo-blames-rogue-employees-scandal-wfc.html [https://perma.cc/P3RW-X9XT].

5300 low-level employees that Wells Fargo fired in September 2016 for "engaging in [i]mproper [s]ales [p]ractices."[9] He insisted that these employees were anomalous bad actors, emphasizing that "[t]here was no incentive to do bad things" at Wells Fargo,[10] and that the bank "never directed nor wanted [its] team members to provide products and services to customers that they did not want."[11]

Former employees painted a starkly different picture of Wells Fargo's sales directives. Stumpf's mantra was "eight is great," which meant that sales associates and bankers should strive to sell eight products to each and every customer, an aggressive form of a common business practice known as "cross-selling."[12] Workers were pressured to report new sales to their supervisors every few hours and open as many as twenty accounts a day.[13] Desperate for sales, low-level managers instructed employees to sell accounts to their friends and family members.[14] Harried bankers convinced customers to open travel checking accounts by telling them that it was unsafe to travel without them.[15] Sales associates were also

9. Matt Levine, Opinion, *Wells Fargo Opened a Couple Million Fake Accounts*, BLOOMBERG (Sept. 9, 2016, 6:30 AM EDT), https://www.bloomberg.com/view/articles/2016-09-09/wells-fargo-opened-a-couple-million-fake-accounts [https://perma.cc/VPE4-ANW7].

10. Emily Glazer & Christina Rexrode, *Wells Fargo CEO Defends Bank Culture, Lays Blame with Bad Employees*, WALL ST. J. (Sept. 13, 2016, 7:27 PM ET), https://www.wsj.com/articles/wells-fargo-ceo-defends-bank-culture-lays-blame-with-bad-employees-1473784452 [http://perma.cc/ZR86-MSLU].

11. *An Examination of Wells Fargo's Unauthorized Accounts and the Regulatory Response: Hearing Before the Comm. on Banking, Hous. & Urban Affairs*, 114th Cong. 5 (2016) (statement of John G. Stumpf, Chairman and Chief Executive Officer, Wells Fargo & Co.).

12. Suzanne McGee, *Wells Fargo Banking Scandal a Financial Crisis We Can Finally Understand*, GUARDIAN (Oct. 7, 2016, 7:00 EDT), https://www.theguardian.com/business/us-money-blog/2016/oct/07/wells-fargo-banking-scandal-financial-crisis [http://perma.cc/Y3X4-MZKC]; Maggie McGrath, *How the Wells Fargo Phony Account Scandal Sunk John Stumpf*, FORBES (Sept. 23, 2016, 9:29 AM), https://www.forbes.com/sites/maggiemcgrath/2016/09/23/the-9-most-important-things-you-need-to-know-about-the-well-fargo-fiasco [https://perma.cc/3S6K-472P].

13. Robert Evans, *I Worked for Wells Fargo: They Made Us Do Some Shady Sh!t*, CRACKED (Sept. 22, 2016), http://www.cracked.com/personal-experiences-2390-i-worked-wells-fargo-they-made-us-do-some-shady-shit.html [http://perma.cc/28VC-VVEG]; *Episode 728: The Wells Fargo Hustle*, PLANET MONEY (Oct. 7, 2016, 9:55 PM ET), https://www.npr.org/sections/money/2016/10/07/497084491/episode-728-the-wells-fargo-hustle [https://perma.cc/254M-Z7L6].

14. Evans, *supra* note 13.

15. Cowley, *supra* note 1.

urged to promote "credit card accounts to use as overdraft protection . . . when [customers] were already struggling to keep their checking accounts balanced."[16]

The bank's sales quotas were impossible to meet, and employees became frantic. They targeted populations susceptible to cross-selling tactics, such as elderly adults, nonnative English speakers, college students opening their first bank accounts, and small business owners.[17] Bankers engaged in three fraudulent practices that became so routine they developed nicknames for them: "bundling," "sandbagging," and "pinning."[18] Employees falsely told customers that they could not get one service without signing up for another ("bundling"), waited to open up customers' requested accounts until the next reporting period ("sandbagging"), and impersonated customers in order to enroll them in online banking services ("pinning").[19] Wells Fargo associates developed anxiety disorders, physical illnesses, and insomnia in response to the stress.[20] One worker was so beleaguered, she became addicted to drinking the hand sanitizer kept around the bank.[21]

Would things have been different if Wells Fargo employees had been empowered to say "no" to their supervisors' unattainable demands without fear of reprisal or termination? What if they had been unionized? For one, thousands of employees might have avoided the panic attacks and stress-induced illnesses that resulted from Wells Fargo's "pressure-cooker culture."[22] Likewise, customers might have experienced the sense of security that comes from knowing their money is safely held at the bank. But beyond such benefits to employees and customers, would the unionization of bank workers have forced Wells Fargo to rethink its approach to

16. *Id.*

17. Stacy Cowley, *'Lions Hunting Zebras': Ex-Wells Fargo Bankers Describe Abuses*, N.Y. TIMES (Oct. 20, 2016), https://www.nytimes.com/2016/10/21/business/dealbook/lions-hunting-zebras-ex-wells-fargo-bankers-describe-abuses.html [https://perma.cc/CG44-NKDD].

18. Verified Stockholder Derivative Complaint & Demand for Jury Trial at 12, Shaev v. Baker, No. 3:16-cv-05541 (N.D. Cal. Sept. 29, 2016) (noting that "widespread practices even earned internal nicknames" from employees).

19. *Id*. "Pinning" gets its moniker from the act of assigning a personal identification number ("PIN") to a customer's debit card without their authorization. Levine, *supra* note 9.

20. *See* Cowley, *supra* note 1.

21. *Id*.

22. Verified Stockholder Derivative Complaint & Demand for Jury Trial, *supra* note 18, at 12.

increasing profits? In short, could a unionized sales force have prevented Wells Fargo from getting away with its scams?

This comment explores the premise that bank worker unionization could serve as a much-needed check on the power of financial institutions and the directors and officers who run them. Part I overviews the reasons why big banks like Wells Fargo are incentivized to routinely engage in harmful and economically unsound banking practices. It describes how a combination of inadequate regulation and entrenched corporate governance norms allow banks to ignore the interests of workers and consumers. Part II outlines the potential that unions hold for constraining abusive commercial banking interests. It recounts ongoing efforts to unionize bank workers, highlighting the Committee for Better Banks, an alternative labor organization founded in the wake of the Wells Fargo accounts scandal, and a recent organizing campaign by United States employees of Santander Bank. In conclusion, this comment argues that current threats to dismantle consumer protection enforcement and already minimal banking regulations urgently call for a new, worker-centered approach to holding financial institutions accountable to the public. Where the top-down approach to bank regulation has failed, workers may be able to regulate banks from the ground up.

I. THE TROUBLE WITH BANKS

How do banks like Wells Fargo get away with practices that harm employees and consumers, as well as threaten the stability of the global economy? This part examines two reasons for the abusive and economically unsound banking practices prevalent among big commercial banks. Part I.A discusses the need for banking regulation and the inadequacies of the current regulatory apparatus. Part I.B considers the lack of legal accountability for corporate directors and officers of banks.

A. *The Threat of Failure*

While perhaps exceptional in its degree of publicity, the Wells Fargo scandal revealed abusive banking behaviors that are ubiquitous in the financial services industry. These behaviors center on aggressive sales goals, which pressure banks' retail sales forces into deceptive profit making by peddling unwanted services to customers. Unfortunately, current United States financial regulations focus more on the types of assets banks are allowed to have than what banks may and may not do. As such, bank regulations do little to curb banks' harmful practices.

A quick scroll through the websites of the Office of the Comptroller of the Currency ("OCC") and the Consumer Financial Protection Bureau ("CFPB")—two federal law enforcement agencies tasked with regulating financial institutions—reveals enforcement actions alleging abusive and deceptive banking practices against nearly every major commercial bank.[23] These agencies bring actions against banks for practices that directly violate consumers' privacy and pocketbooks, practices that discriminate against certain consumers, as well as practices that skirt compliance with other regulations designed to ensure the stability of the global economy, such as data security programs and limitations on insider lending.[24]

Most CFPB actions have targeted banks for selling overdraft, credit card monitoring, identity protection, and insurance services without customers' consent. For example, between 2014 and 2016, the CFPB ordered First National Bank of Omaha, Fifth Third Bank, Citibank, and Bank of America to provide relief to their customers for illegal practices related to credit card add-on services, including charging customers for unwanted credit reporting and

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23. For an up-to-date list of the largest commercial banks in the United States, see *Federal Reserve Statistical Release: Large Commercial Banks*, FED. RES., https://www.federalreserve.gov/releases/lbr/current/ [https://permacc/Q94B-55AC] (last visited Dec. 1, 2018). To find out if a bank has been subject to an enforcement action by the OCC, see *Enforcement Actions Search Tool*, OFF. COMPTROLLER CURRENCY, http://apps.occ.gov/EASearch [https://perma.cc/M3N8-ZNBY] (last visited Dec. 1, 2018). To browse the CFPB's enforcement actions, see *Enforcement Actions*, CONSUMER FIN. PROTECTION BUREAU, https://www.consumerfinance.gov/policy-compliance/enforcement/actions/ [https://perma.cc/M3N8-ZNBY] (last visited Dec. 1, 2018).

24. *See, e.g.*, Press Release, Comm. for Better Banks, Santander Workers and Customers Unite Worldwide for Better Jobs, Trustworthy Banking (Feb. 21, 2017), https://betterbanks.org/press/santander-workers-and-customers-unite-worldwide-for-better-jobs-trustworthy-banking/ [https://perma.cc/MT5T-NDMJ] ("Santander Bank's home mortgage lending discriminates against thousands of low-income borrowers and borrowers of color in cities throughout the Northeast, including denying more than 26% [of] borrowers of color a mortgage loan."). For the full report of Santander Bank's discriminatory lending practices, see COMM. FOR BETTER BANKS, DENIED: AN ASSESSMENT OF RACIAL AND ECONOMIC DISPARITIES IN SANTANDER BANK'S MORTGAGE LENDING (2017), https://betterbanks.org/wp-content/uploads/2017/03/Denied-Santander-3.15.17-REVISED.pdf [https://perma.cc/Q4SA-NUP7]. For a complete list of OCC regulations, see 12 C.F.R. §§ 1–199 (2018). For a complete list of CFPB regulations, see 12 C.F.R. §§ 1000–99 (2018).

monitoring.[25] Bank of America was ordered to pay upwards of $2 million to customers and an additional $20 million civil penalty.[26] Likewise, the OCC polices financial institutions that engage in deceptive sales and billing practices. In 2012, the OCC ordered Capital One to pay $150 million in restitution for using "high-pressure sales tactics," "unfair billing practices," and making "materially false, deceptive, or otherwise misleading oral statements" in selling credit card add-ons to consumers.[27] Other banks that the CFPB and OCC have penalized include JPMorgan Chase Bank, TD Bank, and PNC Bank.[28]

All of these banks exploit their consumers by the same means: deceptive and high-pressure sales tactics by the retail salesforce. These sales practices can be found at banks around the world. Several global studies have found that bank workers "are overworked and suffer from high levels of stress due to unattainable sales goals."[29] Researchers in Brazil have reported chronic fatigue, repetitive stress disorders, minor psychiatric disorders, and high-risk drinking to be common among bank employees.[30] Other studies have found similar health problems in bank workers in Ghana, Nigeria, Kuwait, and the United Kingdom.[31] Bank workers' in-

25. First Nat'l Bank of Omaha, CFPB No. 2016-CFPB-0014 (Aug. 20, 2016); Fifth Third Bank, CFPB No. 2015-CFPB-0025 (Sept. 28, 2015); Citibank, CFPB No. 2015-CFPB-0015 (July 21, 2015); Bank of America, CFPB No. 2014-CFPB-0004 (Apr. 7, 2014).

26. Bank of America, CFPB No. 2014-CFPB-0004 (Apr.7, 2014). Citibank paid $700 million. Citibank, CFPB No. 2015-CFPB-0025 (Sept. 28, 2015). Fifth Third paid $3 million, Fifth Third Bank, CFPB No. 2015-CFPB-0025 (Sept. 28, 2015), and Omaha paid $27.75 million, First Nat'l Bank of Omaha, CFPB No. 2016-CFPB-0014 (Aug. 20, 2016).

27. Capital One Bank, Enforcement Action No. 2012-152 (Comptroller of the Currency July 17, 2012), https://www.occ.gov/static/enforcement-actions/ea2012-152.pdf [https://perma.cc/2EUQ-GTUB].

28. *See* JPMorgan Chase Bank, CFPB No. 2013-CFPB-0007 (Sept. 18, 2013); TD Bank, Enforcement Action No. 2013-142 (Comptroller of the Currency Sept. 20, 2013), https://www.occ.gov/static/enforcement-actions/ea2013-142.pdf [https://perma.cc/Y3F3-5LVW]; PNC Bank, Enforcement Action No. 2014-130 (Comptroller of the Currency Oct. 6, 2014), https://www.occ.gov/static/enforcement-actions/ea2014-130.pdf [https://perma.cc/9RNW-95VW].

29. Steven Payne, *National Unions, International Capital, and Bank Workers*, *in* UNCERTAIN TIMES: ANTHROPOLOGICAL APPROACHES IN A NEOLIBERAL WORLD 311, 325 (E. Paul Durrenberger ed., 2017).

30. *Id.* at 326.

31. *Id.* (providing an overview of ethnographic studies on the health effects of banking work).

creased risk of mental health issues has been linked to the introduction of aggressively high sales goals.[32] In the United States, impossible sales quotas seem to be the industry-wide norm.[33]

Why do banks around the world routinely take advantage of their employees and customers? The most obvious explanation is that greedy banking executives seek to increase their businesses' bottom lines by any means possible. One angry shareholder accused Wells Fargo executives of pushing its sales policies "in an effort to inflate and manipulate the market price for [the bank's] stock and, therefore, keep their lofty positions and increase their own compensation."[34] Such allegations are easily to believe, albeit difficult to prove.

However, there may be a deeper, more systemic reason that big banks resort to defrauding their customers. Counterintuitively, banks themselves operate on unstable financial ground. In fact, the widespread fear of bank failure drives much of the financial regulatory apparatus.[35] Common wisdom holds that because financial institutions are so interconnected, the failure of even one could lead to total economic collapse.[36] This has spurred the adage that large corporate banks are "too big to fail."[37]

For banks, the threat of failure is tied to leverage. Leverage is the use of debt as opposed to equity to finance a firm's operations

32. *See id.* at 325.

33. *Id.* at 326; *see also* Jimmy Tobias, *The Government Wouldn't Rein in the Banks' Predatory Practices—Until These Tellers Stepped In*, NATION (May 8, 2017), https://www.thenation.com/article/the-government-wouldnt-rein-in-the-banks-predatory-practices-until-these-tellers-stepped-in/ [https://perma.cc/YTQ9-JRFP] ("[P]redatory sales tactics and unfair treatment of low-wage employees are industry-wide problems."). Similarly, unattainable sales goals also contributed to the subprime mortgage crisis, often credited as the root of the 2008 Global Financial Crisis. *See* Payne, *supra* note 29, at 312.

34. Verified Stockholder Derivative Complaint & Demand for Jury Trial, *supra* note 18, at 2.

35. *See* RICHARD SCOTT CARNELL ET AL., THE LAW OF FINANCIAL INSTITUTIONS 430 (6th ed. 2017); *see also* Heidi Mandanis Schooner, *The Dogma of Capital Regulation as a Response to the Financial Crisis*, *in* THE CHANGING LANDSCAPE OF GLOBAL FINANCIAL GOVERNANCE AND THE ROLE OF SOFT LAW 59, 67–72 (Friedl Weiss & Armin J. Kammel eds., 2015).

36. See CARNELL ET AL., *supra* note 35, at 429–37, for a discussion of the systemic risk that bank failures poses.

37. United States Congressman Stewart McKinney popularized the phrase "too big to fail" to describe corporations, and, in particular, financial institutions, that are "so enormous and so intertwined in the fabric of the economy that their collapse would be catastrophic." Eric Dash, *If It's Too Big to Fail, Is It Too Big to Exist?*, N.Y. TIMES (June 20, 2009), https://www.nytimes.com/2009/06/21/weekinreview/21dash.html [https://perma.cc/NXK2-25YG].

and purchase assets.[38] Financial institutions are more highly leveraged than other firms.[39] The New York Federal Reserve Bank reported that "[a] typical non-financial firm has equity that exceeds 50% of its assets. By contrast, in mid-2010, the median capital ratio of commercial banks was about 8.5%."[40]

Banks use leverage to grow, but leverage comes with a large risk: insolvency, or the inability to pay back debts.[41] As such, leverage is "both the life blood and the death knell of large financial institutions."[42] Very high leverage, and highly leveraged banks in particular, were strong contributors to the Global Financial Crisis of 2008 ("GFC").[43] After the blow of the GFC, while other commercial banks were struggling, Wells Fargo was a "rare upbeat tale amid the banking wreckage."[44] One wonders whether Wells Fargo's success had anything to do with its aggressive sales policies.

Banks use leverage for the same reasons that all corporations leverage themselves, because debt enhances profits and provides favorable tax treatment.[45] Leverage allows banks to rapidly build their asset size beyond what would be possible through the direct investment of their own funds.[46] Moreover, interest on corporate debt is a tax-deductible expense.[47] Perversely, banks are further incentivized to use leverage because they can borrow money more cheaply than other firms.[48] This is because the government is particularly concerned with keeping banks solvent, either through

38. Schooner, *supra* note 35, at 61. There are different types of leverage, only some of which are evident from looking at a firm's balance sheet. *Id.* at 61–62.

39. *Id.* at 62–63.

40. *Id.* at 62 & n.8 (quoting Viral Acharya et al., *Robust Capital Regulation* 2 (Fed. Reserve Bank of N.Y., Staff Report No. 490, 2011), https://www.newyorkfed.org/media/research/staff_reports/sr490.pdf [https://perma.cc/4SY3-LCJU]).

41. *Id.* at 59, 62.

42. *Id.* at 59.

43. ROBERT J. RHEE, CORPORATE FINANCE 187 (2016); Schooner, *supra* note 35, at 63–64.

44. Adam Lashinsky, *Riders on the Storm*, FORTUNE (Nov. 21, 2012), http://fortune.com/2012/11/21/riders-on-the-storm/ [https://perma.cc/UK97-LKCA].

45. *See* RHEE, *supra* note 43, at 185.

46. *Id.*; KATIA D'HULSTER, WORLD BANK, THE LEVERAGE RATIO: A NEW BINDING LIMIT ON BANKS (2009), https://openknowledge.worldbank.org/bitstream/handle/10986/10224/530440BRI0Cris10Box345594B01PUBLIC1.pdf [https://perma.cc/KB2T-FQAW].

47. JASON J. FICHTER & HUNTER COX, MERCATUS ON POLICY: THE RULE OF INTEREST DEDUCTION IN THE CORPORATE TAX CODE (2018), https://www.mercatus.org/system/files/fichtner_and_cox_-_mop_-_the_role_of_the_interest_deduction_in_corporate_tax_code_reform_-_v1.pdf [https://perma.cc/3TS6-BLTH].

48. Schooner, *supra* note 35, at 62–63.

special forms of insurance or through government bailouts.[49] Creditors lend to banks for less because the government all but guarantees them a bailout should they borrow unwisely.[50]

In theory, financial regulation brings stability to this precarious picture by preventing banks from failure *before* they need to be bailed out.[51] But adequate regulation of large, economically important banks "remains an elusive goal" since the GFC.[52] While the regulation of leverage is now the primary focus of bank regulators, attempts to curb overleveraging have been largely confined to so-called "capital regulation."[53] Capital regulation "constrains the amount of a bank's debt in relation to its equity" by setting limits on how much debt a bank is allowed to take on.[54] However, despite its goal, capital regulation does little to constrain banks' addiction to debt. Although capital regulation is meant to ensure that banks have enough assets to keep them afloat, critics warn that trying to guess how much capital is enough—and how much debt is too much—is dangerously prone to error.[55] Existing capital regulations are widely believed to be "much too low," with regulators routinely using their authorized discretion to impose higher requirements than the established minimum capital ratios.[56]

Moreover, banks may be more than happy to comply with higher capital requirements in exchange for fewer rules of other kinds.[57]

49. *Id.* at 63; *see also* Peter P. Swire, *Bank Insolvency Law Now That It Matters Again*, 42 DUKE L.J. 469, 477–90 (1992) (describing Congress's "special bank insolvency regime").

50. *See* Schooner, *supra* note 35, at 63; *see also* Emilios Avgouleas & Jay Cullen, *Excessive Leverage and Bankers' Incentives: Refocusing the Debate*, 3 J. FIN. PERSP., Mar. 2015, at 6 (2015).

51. *See id.* at 64. For an in-depth discussion of the foundations of bank regulation, see Heidi Mandanis Schooner, *Top-Down Capital Regulation*, 55 WASHBURN L.J. 327, 330–33 (2016).

52. Schooner, *supra* note 51, at 327, 333.

53. *See* Schooner, *supra* note 35, at 64–67.

54. Schooner, *supra* note 51, at 327.

55. *Id.* at 327–28; *see also* Pedro Nicolaci da Costa, *Banking Reform Hasn't Fixed Perverse Incentives on Wall Street: Ex-FDIC Chair Bair*, PETERSON INST. INT'L ECON. (May 5, 2016, 2:00 PM), https://piie.com/blogs/realtime-economic-issues-watch/banking-reform-hasnt-fixed-perverse-incentives-wall-street-ex [http://perma.cc/DJB7-R5XT] ("Regulators through [the GFC] decided what was risky and what wasn't. And they were wrong, they were completely wrong.").

56. *See id.* at 328, 344–45.

57. Schooner, *supra* note 35, at 73–74 ("[W]e have capital regulation because the large, powerful banks are willing to tolerate capital regulation."); *see also* Jonathan B. Berk, *Incentives and the Financial Crisis*, INSIGHTS STAN. BUS. (Dec. 1, 2008), https://www.gsb.stanford.edu/insights/incentives-financial-crisis [https://perma.cc/ZM34-XUV9] (arguing that capital regulation will continue to fail in the absence of a realignment of bankers' incentives

As opposed to capital regulation, "prudential regulation" seeks to "protect banks from failure primarily by restricting entry into the banking business and by regulating banks' activities."[58] Where capital regulation simply caps the amount of debt banks may take on, prudential regulation dictates what banks may and may not do. As such, banks are willing to suffer capital regulation if it means avoiding prudential regulation. For example, if passed, a proposed bill in the United States House called the Financial CHOICE Act would overhaul the majority of the protective provisions put in place by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), President Obama's sweeping response to the GFC.[59] This would allow "large and small banks to escape many Dodd-Frank regulations in return for holding higher capital."[60] A similar bill in the Senate aims to raise the threshold for banks considered "systemically important" and thus subject to stricter regulations.[61]

B. *Corporate Culture and Executive Insulation*

Exacerbating the problem of inadequate banking regulation is the American culture of corporate governance, which centers exclusively on the interests of shareholders and insulates corporate directors and officers from legal liability. Bank executives act at the behest of corporate shareholders, which leads them to make profit-increasing risks that they may not otherwise implement. Moreover, shareholders and bank regulators are unlikely to be able to meet the legal standard necessary to effectively hold bank officers and directors accountable for their policies and actions.

A typical business law class teaches that shareholders are the "owners" of corporations, while the board of directors and executive

with the public interest).

58. Schooner, *supra* note 35, at 64.

59. Financial CHOICE Act of 2017, H.R. 10, 115th Cong. (2017); *see also Wall Street Reform: The Dodd-Frank Act*, WHITE HOUSE: PRESIDENT BARACK OBAMA, https://obamawhitehouse.archives.gov/economy/middle-class/dodd-frank-wall-street-reform [https://perma.cc/7J99-SKGR] (last visited Dec. 1, 2018).

60. Rob Blackwell, *No, the Senate Reg Relief Bill Isn't Destroying Dodd-Frank*, AM. BANKER (Jan. 17, 2018, 7:00 AM EST), https://www.americanbanker.com/opinion/no-the-senate-reg-relief-bill-isnt-destroying-dodd-frank [https://perma.cc/CX8S-LB22].

61. Economic Growth, Regulatory Relief and Consumer Protection Act, S. 2155, 115th Cong. (2017); *see also* Alan Rappeport, *Democrats Add Momentum to G.O.P. Push to Loosen Banking Rules*, N.Y. TIMES (Jan. 15, 2018), https://www.nytimes.com/2018/01/15/us/politics/democrats-banking-rules.html [https://perma.cc/X9D9-ULXQ]. *Contra* Blackwell, *supra* note 60.

officers are the managers.[62] All corporate directors and officers, including those of financial institutions, owe a fiduciary duty of care to their firms.[63] Fiduciary duties aim to minimize "agency costs" that arise from the unique relationship between shareholders, whose money fuels the corporate enterprise, and directors and officers, who control the corporation's operations.[64] Two common law principles, the "shareholder primacy norm" and the "business judgment rule," comprise the legal framework for corporate fiduciary duties under United States state law.[65] Taken together, these two rules ensure that, so long as directors and officers can demonstrate that their motives were to generate wealth for the company, their business decisions are largely immune from judicial review.

The shareholder primacy norm is an outgrowth of the American model of corporate governance.[66] The basic premise behind the

62. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(a) (2016). Delaware law is of particular importance to the legal analysis of corporations because more than 50% of United States publicly traded companies are incorporated there. Suzanne Raga, *Why Are the Majority of U.S. Corporations Incorporated in Delaware?*, MENTAL FLOSS (Mar. 11, 2016), https://mentalfloss.com/article/76951/why-are-so-many-us-companies-incorporated-delaware [https://perma.cc/VN2J-JJF3] (last visited Dec. 1, 2018); *see also About the Division of Corporations*, DELAWARE.GOV, https://corp.delaware.gov/aboutagency [https://perma.cc/7NXC-N62A] (last visited Dec. 1, 2018). However, South Dakota holds more bank assets than any other state in the country, attributable to its historically "lax approach to banking laws." Amy Sullivan, *How Citibank Made South Dakota the Top State in the U.S. for Business*, ATLANTIC (July 10, 2013), https://www.theatlantic.com/business/archive/2013/07/how-citibank-made-south-dakota-the-top-state-in-the-us-for-business/425661/ [https://perma.cc/7RGR-Y3YY].

63. Heidi Mandanis Schooner, *Fiduciary Duties' Demanding Cousin: Bank Director Liability for Unsafe or Unsound Banking Practices*, 63 GEO. WASH. L. REV. 175, 180 (1995).

64. *See* D. GORDON SMITH & CYNTHIA A. WILLIAMS, BUSINESS ORGANIZATIONS 307–09 (3d ed. 2012).

65. *See id.* at 384–85, 361–62. Federal and state law embody two different approaches to regulating corporate action. *See generally id.* at 309. Federal law focuses on directors' adequate disclosures of information to shareholders, while state law focuses on the soundness of directors' decision-making process. *Id.* at 323–25, 361–62. While the former puts the power to regulate corporations in shareholders' hands, the latter puts the power in the courts' hands.

66. *See* LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 15–23 (2012). There is debate over the extent to which the shareholder primacy norm is enshrined in the law. *See id.* at 24–32. The shareholder primacy norm can be more accurately classified as a deeply entrenched business principle. *See id.* at 24–25. Critics of the shareholder primacy norm argue that corporations would be better managed when held to consider the interests of all investors in the firm, not just shareholders. *See, e.g.*, Kent Greenfield, *Defending Stakeholder Governance*, 58 CASE WESTERN RES. L. REV. 1043, 1044 (2008). Employees, in particular, "may be the best proxy for the interests of the firm." Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283, 308 (1998). Similarly, many modern corporate theorists agree that shareholders do not "own" the corporation in any meaningful sense, given that a variety of stakeholders contribute to the corporate enterprise in specialized ways. *See id.* at 293–94.

shareholder primacy norm is that corporations exist for the benefit of shareholders, whose earnings and losses are tied to the company's performance. The norm dictates that corporate directors are obligated to make decisions that exclusively prioritize shareholders' earnings.[67] While other considerations may be taken into account, such as an action's impact on public welfare, all business decisions must ultimately be justified in terms of their potential benefit to shareholders.[68] This is particularly problematic for banks, which, "like utilities,[] operate not primarily to generate profit for their shareholders, but rather to provide necessary services to the public."[69]

The prioritization of shareholders' wishes also directly contributes to banks' leverage problem.[70] While governing a company with debt can theoretically reduce agency costs by encouraging corporate managers to perform under pressure,[71] evidence exists that highly leveraged banks take on excessive risk.[72] This is corroborated by the fact that banks dominated by shareholders' rather than managers' decision making favor higher leverage.[73] As such, high leverage creates "perverse incentives" for bank managers.[74]

67. *See* SMITH & WILLIAMS, *supra* note 64, at 384–85. The most frequently cited example of the shareholder primacy norm comes from *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919). Henry Ford wanted to increase wages and modernize the manufacturing plant for the benefits of Ford Motor Company workers. *Id.* at 671. The Michigan Supreme Court famously rebuked Ford, stating that a "corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end." *Id.* at 684. This remark, however, is likely dicta. STOUT, *supra* note 66, at 26.

68. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) ("A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders.").

69. Schooner, *supra* note 51, at 331–32.

70. *See supra* notes 38–50 and accompanying text.

71. RHEE, *supra* note 43, at 185.

72. *See, e.g.*, MARTIN KOUDSTAAL & SWEDER VAN WIJNBERGEN, ON RISK, LEVERAGE, AND BANKS: DO HIGHLY LEVERAGED BANKS TAKE ON EXCESSIVE RISK? 23 (2012), https://pure.uva.nl/ws/files/2253364/119729_391478.pdf [https://perma.cc/YJ6K-6FM8] ("Examining a large quarterly data set of U.S. banks between 1993 and 2010, we find that equity is valued higher when more risky portfolios are chosen . . . but only when leverage is high . . . .").

73. Avgouleas & Cullen, *supra* note 50, at 7; *see also* Greenfield, *supra* note 66, at 308 ("Diversified shareholders prefer that the management of any particular company they invest in makes decisions that maximize the expected value of the results, even if the results also are highly variable. That is, shareholders will tend to prefer risky decisions that may provide higher payoffs but risk bankruptcy over decisions that provide lower returns but have less risk of pushing the firm into liquidation." (footnotes omitted)).

74. *See* Avgouleas & Cullen, *supra* note 50, at 2. Paying executives in stock options also increases risk-taking behavior. *See* Martha C. White, *$41 Million Is Chicken Scratch Compared to What Stumpf Earned at Wells Fargo*, NBC NEWS (Sept. 29, 2016, 2:31 PM EDT),

Leverage inflates short-term profits, which can lead to increased performance-based compensation packages for directors and officers.[75] Interestingly, bank executives may not only be incentivized to use leverage to get a higher paycheck, but also to retain their positions.[76] Because shareholders overwhelmingly favor risk-taking, bank CEOs may "succumb[] to shareholder pressure" despite their misgivings.[77]

The complement to the shareholder primacy norm is the business judgment rule, which is "used by the courts to minimize the number of shareholder complaints that receive judicial review."[78] The rule, which varies from state to state, generally holds that substantial judicial deference is owed to corporate directors in evaluating their business decisions.[79] Delaware's business judgment rule creates a presumption that corporate directors have acted "on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company . . . . Absent an abuse of discretion, that judgment will be respected by the courts."[80] The rule thus "focuses a court's review . . . on the decisionmaking process rather than on the decisions' content or results."[81] Such deference is presumably warranted in order to encourage and protect directors' abilities to take risks on behalf of the company.[82]

https://www.nbcnews.com/business/business-news/41-million-chicken-scratch-compared-what-stumpf-earned-wells-fargo-n656901 [https://perma.cc/5NZJ-7Q69] (noting that giving CEOs the chance to buy stock at below-market prices means that "they don't actually lose money if the stock price goes down instead of up").

75. *See* Avgouleas & Cullen, *supra* note 50, at 4, 10–11 ("By assuming greater levels of debt relative to equity and by the use of stock options in remuneration systems, top executives may increase their compensation levels.").

76. *Id.* at 2–3.

77. *Id.* at 13–14 (noting that CEOs' ignorance regarding risk taking is also a likely factor driving excessive bank leverage).

78. Bernard S. Sharfman, *The Enduring Legacy of* Smith v. Van Gorkom, 33 DEL. J. CORP. L. 287, 297 (2008).

79. *See* Schooner, *supra* note 63, at 186.

80. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (citations omitted), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244, 253-54 (Del. 2000) (overruling *Aronson* only to the extent that it suggested an abuse of discretion standard of review for an appellate court reviewing the decision of a trial court on the business judgment rule; rather, the abuse of discretion standard applies to the trial court reviewing the decision of corporate directors).

81. Schooner, *supra* note 63, at 186.

82. *See id.* at 184.

The business judgment rule makes it very difficult to hold corporate directors legally accountable for irresponsible decision making.[83] Because directors owe no duty of care to the corporate workforce, collaborators, colleagues, or the public at large, it is largely up to shareholders to check corporate power.[84] Shareholders can enforce their rights by voting to remove problematic directors or through shareholder derivative actions.[85] Such lawsuits typically allege that corporate directors or officers breached their fiduciary duties to the company, thereby losing the company money and harming shareholders' investments.[86] Shareholder derivative lawsuits are notoriously difficult to win thanks largely to the deference the law affords directors' decision making. In order to overcome the business judgment rule, a board's decision-making process must be found to have been grossly negligent.[87] This gross negligence standard is exceedingly high, having been met only a few times in the history of Delaware law.[88] Moreover, corporations can write exculpation clauses into their charters, which entirely eliminates care liability for directors.[89]

83. SMITH & WILLIAMS, *supra* note 64, at 362 ("The potential liability risk from a breach of [directors' duty of care] is near zero in the corporate context . . . because of a powerful effect of the 'business judgment rule.'").

84. In addition to shareholders, the Federal Deposit Insurance Corporation ("FDIC"), another federal regulatory agency, has the power to sue former bank directors and officers in "professional liability lawsuits." 12 U.S.C. § 1821(k) (2012); *Professional Liability Lawsuits*, FDIC, https://www.fdic.gov/bank/individual/failed/pls/ [https://perma.cc/ZQ5H-63BN] (last updated May 5, 2018). However, FDIC lawsuits are only triggered by a bank's failure, and they are often settled, calling into question their deterrence power. Philip Shishkin, *Bankers Escape Big Penalties in FDIC Failed Bank Cases*, REUTERS (Feb. 23, 2012, 2:31 PM), https://www.reuters.com/article/us-bankers-fdic/bankers-escape-big-penalties-in-fdic-failed-bank-cases-idUSTRE81M1UH20120223 [https://perma.cc/L7V4-WPH5]; *see also Professional Liability Settlement Agreements*, FDIC, https://www.fdic.gov/ about/freedom/plsa/index.html [https://perma.cc/SP78-6UEM] (last updated Aug. 14, 2018) (providing a list of professional liability settlements by state since 2008).

85. *See* SMITH & WILLIAMS, *supra* note 64, at 307–08.

86. *Id.* at 463–64. One Wells Fargo shareholder brought such a suit against board members in response to the accounts scandal. *See* Verified Stockholder Derivative Complaint & Demand for Jury Trial, *supra* note 18. As of May 2017, the court denied the defendants' motion to dismiss the case. *Shaev v. Baker*, No. 16-cv-05541-JST, 2017 U.S. Dist. LEXIS 68523 (N.D. Cal. May 4, 2017).

87. Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985).

88. Julian Velasco, *A Defense of the Corporate Duty of Care*, 40 J. CORP. L. 647, 649–50 (2015). Since the development of the exculpation clause, Delaware courts have allowed duty of care claims to proceed "recast as duty of good faith claims." *Id.* at 701. However, gross negligence is not enough to establish a duty of good faith claim, making such cases even more difficult for shareholders to win. *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 65 (Del. 2006) ("Grossly negligent conduct, without more, does not and cannot constitute a breach of the fiduciary duty to act in good faith.").

89. DEL. CODE ANN. tit. 8, § 102(b)(7) (2015). Delaware's exculpation clause only covers

Law enforcement efforts also seem to have little effect on bank executives' behavior. Civil money penalties from the CFPB and the OCC barely register on banks' bottom lines, which vastly outweigh agency resources.[90] The fact that many banks are repeat offenders reflects this power imbalance. For example, between 2011 and 2014, JPMorgan Chase paid a staggering eight separate multimillion dollar penalties to the OCC, four of which were over $300 million.[91] Similarly, between 2011 and 2018, Wells Fargo paid five separate civil penalties to the OCC.[92] In 2015 and 2016, Wells Fargo was the subject of two CFPB enforcement actions that had nothing to do with the accounts scandal—one for illegal private student loan practices and one for a scheme involving kickbacks for marketing services.[93] In July 2017, it came to light that Wells Fargo had charged at least 570,000 customers for approximately $80 million in auto insurance that they did not sign up to receive, causing many customers to fall behind on their car loans and, in some cases, to have their vehicles repossessed.[94] In February 2018, the Federal Reserve froze Wells Fargo's growth until the bank could prove that it has adequate internal controls.[95]

directors (not officers) and only forecloses claims seeking monetary damages (not injunctive relief). *Id.* In other words, with an exculpation clause, shareholders may win a lawsuit, but receive no compensation.

90. *See* Davidson, *supra* note 6 ("The relative size of the two groups—the watchdogs and those they watch—is fundamentally lopsided. The entire budget of the C.F.P.B. is a little more than six hundred million dollars a year. Wells Fargo's revenues are more than eighty billion dollars. And Wells is just one of thousands of banks, insurance companies, and other institutions that the C.F.P.B. is mandated to monitor."). The FDIC also has the power to issue civil money penalties. 12 U.S.C. § 1833a(a) (2012 & Supp. V 2018).

91. *Enforcement Actions Search Tool*, *supra* note 23 (search "JPMorgan"; sort by action amount high to low).

92. *Id*. (search "Wells Fargo"; sort by action amount high to low).

93. Wells Fargo Bank, CFPB No. 2016-CFPB-0013 (Aug. 20, 2016); Wells Fargo Bank, CFPB No. 2015-CFPB-0002 (Jan. 22, 2015).

94. Gretchen Morgenson, *Regulator Blasts Wells Fargo for Deceptive Auto Insurance Program*, N.Y. TIMES (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/business/wells-fargo-auto-insurance-comptroller.html [https://perma.cc/S759-ZUWG]. The OCC is considering sanctions. Patrick Rucker, *Exclusive: Wells Fargo Faces Sanctions for Auto Insurance Payouts—Sources*, REUTERS (Mar. 15, 2018, 1:13 AM), https://www.reuters.com/article/us-wells-fargo-accounts-auto-exclusive/exclusive-wells-fargo-faces-sanctions-for-auto-insurance-payouts-sources-idUSKCN1GR0G3 [https://perma.cc/S9WW-CZ73]; Mike Snider, *Wells Fargo to Refund $80M to 570,000 Auto Loan Customers Charged for Insurance*, USA TODAY (July 28, 2017, 5:38 PM ET), https://www.usatoday.com/story/money/business/2017/07/28/wells-fargo-make-80-m-refunds-570-000-auto-loan-customers/519355001/ [https://perma.cc/25N5-XDTL].

95. This amounts to "restricting the bank's assets to the level where they stood at the end of last year." Associated Press, *Federal Reserve Imposes More Penalties on Wells Fargo*, N.Y. POST (Feb. 2, 2018, 10:58 PM), https://nypost.com/2018/02/02/federal-reserve-imposes-more-penalties-on-wells-fargo/ [https://perma.cc/HQP8-HVNS].

Law enforcement efforts are also likely on the decline. Between 2011 and 2017, the CFPB initiated approximately 200 enforcement actions against financial services firms and returned an estimated $12 million to more than thirty million consumers.[96] However, the 2016 election of Donald Trump put a crimp in the Bureau's plans. In November 2017, the Trump administration appointed Mick Mulvaney as the new director of the CFPB. Mulvaney recast the agency in a new light—one that exercises restraint and does not "push the envelope."[97] In Mulvaney's first year, the Bureau initiated only two enforcement actions.[98] Shortly after assuming the role, Mulvaney suspended a regulation affecting payday lenders, as well as inexplicably withdrew a lawsuit against four payday lenders that were charging up to 950% interest.[99] He also slowed down the agency's implementation of new rules.[100] Mulvaney, who was a strident critic of the agency he now heads, requested zero dollars in funding for the Bureau's second quarter of 2018, choosing instead to drain the CFPB's reserves.[101] Additionally, in June

96. *Enforcement Actions of the CFPB*, CONSUMER FIN. PROTECTION BUREAU, https://www.consumerfinance.gov/policy-compliance/enforcement/actions/ [https://perma.cc/XWF7-736B] (filter from January 1, 2012, to the present date); Kevin McCoy, *Trump Appointee Seeks $0 Funding for Consumer Financial Protection Bureau*, USA TODAY (Jan. 19, 2018, 1:18 PM), https://www.usatoday.com/story/money/business/2018/01/19/trump-appointee-seeks-0-funding-consumer-watchdog/1047642001/ [https://perma.cc/3QK4-Y4FP].

97. Alan Rappeport, *Mick Mulvaney Calls for 'Humility' from Consumer Financial Protection Bureau*, N.Y. TIMES (Jan. 23, 2018), https://www.nytimes.com/2018/01/23/us/politics/mick-mulvaney-consumer-financial-protection-bureau.html [https://perma.cc/EPK9-NMF8]; Gillian B. White, *The CFPB's New Mission*, ATLANTIC (Jan. 25, 2018), https://www.theatlantic.com/business/archive/2018/01/cfpb-trump-mulvaney/551504/ [https://perma.cc/8XM7-XYQ5].

98. *Enforcement Actions*, *supra* note 23 (showing one action on Nov. 20, 2017, and one on Nov. 21, 2017). Renae Merle, *Richard Cordray Is Stepping Down as Head of Consumer Financial Protection Bureau*, WASH. POST (Nov. 15, 2017), https://www.washingtonpost.com/news/business/wp/2017/11/15/richard-cordray-is-stepping-down-as-head-of-consumer-financial-protection-bureau [https://perma.cc/RH3E-JN49].

99. Michael Hiltzik, *CFPB Acting Director Mick Mulvaney Seems to Think His Job Includes Taking Potshots at Elizabeth Warren*, L.A. TIMES (Feb. 28, 2018, 10:50 AM), http://www.latimes.com/business/hiltzik/la-fi-hiltzik-mulvaney-warren-20180228-story.html (noting that Mulvaney closed an investigation into a payday lender that donated at least $4500 to one of his political campaigns); Catherine Rampell, Opinion, *How Mick Mulvaney Is Dismantling a Federal Agency*, WASH. POST. (Jan 25, 2018), https://www.washingtonpost.com/opinions/mick-mulvaney-cant-legally-kill-the-cfpb-so-hes-starving-it-instead/2018/01/25/4481d2ce-0216-11e8-8acf-ad2991367d9d_story.html [https://perma.cc/RWS3-4FZC].

100. Gillian B. White, *Mick Mulvaney Is Quickly Deregulating the Financial Industry*, ATLANTIC (Jan. 5, 2018), https://www.theatlantic.com/business/archive/2018/01/cfpb-gop-trump/549755/ [https://perma.cc/R5PY-VD4X].

101. McCoy, *supra* note 96; *see also* Hiltzik, *supra* note 99 (noting that Mulvaney "has been hostile to the bureau's very existence, first as a Republican congressman from South Carolina and subsequently as Trump's budget director, a position he still holds").

2017, the United States House passed a bill that, if enacted, would strip the CFPB of its ability to enforce laws.[102]

Taken together, the theoretical and practical limitations of capital regulation, the Trump administration's lackadaisical attitude toward CFPB leadership, and proposed federal legislation paint a discouraging picture for the future of bank regulation.[103] Likewise, the perverse incentives inherent in profit-driven banking combined with the judiciary's hands-off approach to bank directors' fiduciary duties signals little hope for holding bank executives personally accountable for their actions.[104] Indeed, some argue that the only way to achieve fair banking is to make banks public—in other words, to remove the profit motive entirely—an idea that is gaining increasing traction in cities across the country.[105]

II. UNIONIZING BANK WORKERS

In the absence of genuine legal accountability for bank executives or a suitable regulatory apparatus, what can be done to curb abusive behavior by hugely powerful banks? Borrowing ideas from the world of labor law, this part proposes a worker-driven approach to regulating financial institutions from the ground up. Part II.A discusses the ongoing internationally organized campaign to unionize United States bank workers. Part II.B describes why and how the unionization of bank employees would work to create a publicly accountable financial services industry.

102. Financial CHOICE Act of 2017, H.R. 10, 115th Cong. (2017); *see also* Economic Growth, Regulatory Relief and Consumer Protection Act, S. 2155, 115th Cong. (2018).

103. *See supra* notes 51–61, 96–102 and accompanying text.

104. *See supra* notes 62–95 and accompanying text.

105. *See, e.g.*, Meagan Day, *The Shark and Hound*, BAFFLER (Dec. 2017), https://thebaffler.com/salvos/the-shark-and-the-hound-day [https://perma.cc/5JFH-LYZK] ("The only way to fully take the predation out of lending practices is to remove the profit motive from financial services altogether."); *see also* Adele Peters, *The Growing Movement to Create City-Run Public Banks*, FAST CO. (Jan. 8, 2018), https://www.fastcompany.com/40512552/the-growing-movement-to-create-city-run-public-banks [https://perma.cc/4DRU-N6RA]; *FAQ*, PUB. BANKING INST., http://www.publicbankinginstitute.org/faq [https://perma.cc/W2PY-JDEV] (last visited Dec. 1, 2018) (arguing that publicly owned banks benefit taxpayers and help economically struggling states).

A. *Bank Workers' Unions*

Workers currently occupy a strange place in the American public eye. On the one hand, public sentiment acknowledges the continued suffering of United States workers at the hands of technological advances and an increasingly globalized economy.[106] No small part of the Trump campaign's success centered on its rhetorical appeal to the struggling American workforce.[107] At the same time, certain political and private forces are becoming increasingly hostile toward unions. Conservative think tanks, backed by billionaires such as the Koch brothers and the Bradley Foundation, have lead a decades-long campaign to undermine trade unions throughout the nation.[108] While there is some legitimate basis for popular concerns about union proliferation, such as corruption among union leadership,[109] internal documents from the Bradley Foundation reveal that the true goal of the anti-union push is to "enervate other progressive movements" by knocking down sources of the political left's funding.[110]

106. *See, e.g.*, Chris Weller, *President Obama Hints at Supporting Unconditional Free Money Because of a Looming Robot Takeover*, BUS. INSIDER (June 24, 2016, 3:01 PM), https://www.businessinsider.com/president-obama-support-basic-income-2016-6/ [https://perma.cc/8C2J-R6ZC].

107. *See* Noam Scheiber et al., *Trump's Inroads in Union Ranks Have Labor Leaders Scrambling*, N.Y. TIMES (Feb. 17, 2017), https://www.nytimes.com/2017/02/17/business/economy/trump-labor-unions.html [https://perma.cc/NW6J-WLR8].

108. Ed Pilkington, *Fears Grow as Rightwing Billionaires Battle to Erode U.S. Union Rights*, GUARDIAN (Feb. 24, 2018, 1:00 EST), https://www.theguardian.com/us-news/2018/feb/24/rightwing-billionaires-union-rights [https://perma.cc/2EPU-JSYU]. For example, in June 2018, the Supreme Court ruled that public sector employees who benefit from union representation may nonetheless decline to pay union dues. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 585 U.S. __, 138 S. Ct. 2448 (2018). The plaintiff in that case, Mark Janus, was represented by lawyers from wealthy rightwing groups the National Right to Work Legal Defense Foundation and the Liberty Justice Center. Moshe Z. Marvit, *For 60 Years, This Powerful Group Has Worked to Crush Labor*, NATION (July 5, 2018), https://www.thenation.com/article/group-turned-right-work-crusade-crush-labor/ [https://perma.cc/3FGA-YHCX]. Weeks after the Court's ruling, Janus took a position as "senior fellow" at the Illinois Policy Institute, a conservative think tank. Rick Pearson, *State Employee in Major Union-Undermining Supreme Court Case Will Join Conservative Think Tank, Tour the Country*, CHI. TRIB. (July 22, 2018, 4:50 PM), https://www.chicagotribune.com/news/local/politics/ct-met-janus-afscme-illinois-policy-institute-20180722-story.html [https://perma.cc/TR5A-2BRT].

109. David J. Pryzbylski, *Dirty Money: Report Shows Union Corruption Still Widespread*, NAT'L L. REV. (Jan. 10, 2018), https://www.natlawreview.com/article/dirty-money-report-shows-union-corruption-still-widespread [https://perma.cc/PG53-NNPS].

110. Pilkington, *supra* note 108. In both the United State and abroad, there is a weak relationship between public approval of unions and unionization rates. JAKE ROSENFELD, WHAT UNIONS NO LONGER DO 14–18 (2014). Rather, declining rates of unionization are linked to economic, institutional, and political changes with antiunion effects. *Id.* at 17–27.

Thus, it comes as no surprise that "[g]lobally, the United States is almost alone in its lack of bank workers' unions."[111] Only 1.2% of financial service employees belong to unions compared to 10.7% of workers across all industries in the United States.[112] Likewise, efforts to unionize bank workers are scarce in American history. In the 1940s, the communist-led United Office and Professional Workers ("UOPW") organized thousands of bank workers on Wall Street, including a 700-worker strike at the Brooklyn Trust Company.[113] The UOPW was later destroyed by "McCarthyist purges" led by the American Federation of Labor and the federal government.[114] In the wake of the UOPW, a more conservative union, called the United Financial Employees, attempted to organize Wall Street workers, but its strikes were unsuccessful.[115] Since then, there have been "virtually no" attempts to organize bank workers.[116] Today, one of the only unionized banks in the United States is Amalgamated Bank, owned by the Amalgamated Clothing Workers of America.[117]

Nonetheless, the American financial services industry is ripe for unionization. United States bank workers face consistently low pay rates.[118] According to a 2015 report, almost one in three retail banking employees earn below a living wage.[119] As of May 2017, the median hourly wage for bank tellers—the largest banking-related occupation in the United States—was $13.52.[120] By comparison, Wells Fargo's new CEO made $17.4 million last year, which is

111. Payne, *supra* note 29, at 323.

112. *Id.* (citing Press Release, U.S. Dep't of Labor, Bureau of Labor Statistics: Union Members—2017 (Jan. 19, 2018), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/A7D8-25R4]). For international union density statistics, visit ILOSTAT at www.ilo.org/ilostat, expand "Industrial Relations," and select "Trade union density rate."

113. Payne, *supra* note 29, at 323.

114. *Id.*

115. *Id.*

116. *Id.* Possible reasons for the failure of bank workers' unions include the fact that the United States labor movement has focused mainly on male-dominated industries, as well as the decentralization of the United States banking industry and lack of publicly owned banks. *Id.* at 323–24.

117. *Our Story: A Legacy of Access, Affordability, and Advocacy*, AMALGAMATED BANK, https://www.amalgamatedbank.com/our-story [https://perma.cc/XC7C-9JLL] (last visited Dec. 1, 2018); *Who We Are*, AMALGAMATED BANK, https://www.amalgamatedbank.com/unions [https://perma.cc/XFN4-XJQW] (last visited Dec. 1, 2018).

118. Payne, *supra* note 29, at 325.

119. NAT'L EMP'T LAW PROJECT, A $15 MINIMUM WAGE FOR BANK WORKERS (2015), https://www.nelp.org/wp-content/uploads/NELP-Data-Brief-15-Minimum-Wage-for-Bank-Workers.pdf. [https://perma.cc/TT37-RX6D]

120. *Occupational Employment and Wages, May 2017: 43-3071 Tellers*, U.S. DEP'T LAB.,

291 times the bank's median salary (and which, notably, ranked among the *lowest* pay packages for American bank CEOs in 2017).[121] One labor reporter noted that "the unionized janitors working for contractors that clean Sovereign Bank's headquarters . . . often make more than the bank tellers and personal bankers."[122] According to a 2014 report, 31% of the families of bank tellers are enrolled in one or more public assistance programs—such as Medicaid or food stamps—compared to 25% of the workforce as a whole.[123]

The United States lies in stark contrast to the rest of the world, where bank workers in most European and South American countries, as well as many African and Asian countries, are unionized.[124] For example, the Union Network International Finance Global Union ("UNI Finance") represents 3 million finance and insurance employees in 237 trade unions worldwide—from Sweden to Ghana to Lebanon—helping bank workers secure national sector-wide agreements that ensure members better wages and protection from unfair dismissal.[125] Brazilian bank workers, who are heavily unionized, earn "substantially higher salaries than their US counterparts."[126] In many of the countries where bank employees are unionized, workers have also managed to negotiate such

https://www.bls.gov/oes/current/oes433071.htm [https://perma.cc/2TSB-K86P] (last visited Dec. 1, 2018).

121. Emily Glazer, *Wells Fargo CEO Made $17.4 Million in 2017, 291 Times Company's Median Salary*, MARKETWATCH (Mar. 14, 2018, 5:55 PM ET), https://www.marketwatch.com/story/wells-fargo-ceo-made-174-million-in-2017-291-times-companys-median-salary-2018-03-14 [https://perma.cc/7U5R-8VDX]. For comparison, consider the worker-owned cooperative Mondragon Corporation, one of the largest business groups in Spain, where executives earn, on average, only five times more than low-level employees. David Herrera, *Mondragon: A For-Profit Organization That Embodies Catholic Social Thought*, 25 REV. BUS. 56, 61–62 (2004); *Corporate Profile 2017*, MONDRAGON, https://www.mondragon-corporation.com/en/about-us/economic-and-financial-indicators/corporate-profile/ [https://perma.cc/5WTR-CEHP].

122. Mike Elk, *Too Big Not to Organize: SEIU International Coalition Try to Unionize the Banks*, HUFF. POST (July 29, 2010, 2:18 PM ET), https://www.huffingtonpost.com/mike-elk/too-big-not-to-organize_b_663940.html [https://perma.cc/Q2D6-YSJT].

123. SYLVIA ALLEGRETTO ET AL., THE PUBLIC COST OF LOW-WAGE JOBS IN THE BANKING INDUSTRY (2014), http://laborcenter.berkeley.edu/pdf/2014/banking-industry.pdf [https://perma.cc/X6B4-M9MZ].

124. UNI GLOB. UNION, U.S. BANK WORKERS REPORT, http://uniglobalunion.org/sites/default/files/files/news/us_bank_report_full_version.pdf [https://perma.cc/57WZ-FPJ9]; Payne, *supra* note 29, at 327.

125. Payne, *supra* note 29, at 327 (surveying benefits to bank workers who are union members throughout the world).

126. *Id.*; UNI GLOB. UNION., *supra* note 124.

benefits as paid maternity and paternity leave, paid holidays, health insurance, and profit-sharing arrangements.[127]

Despite the lack of bank worker unions in the United States, a labor organization was instrumental in bringing the Wells Fargo accounts scandal to light: the Committee for Better Banks ("CBB").[128] Comprised of bank workers (including some former and current Wells Fargo employees), consumer advocacy groups, and labor organizations, the CBB is a self-described "coalition" fighting for "just wages, career paths and job security for front-line bank workers."[129] Recognizing the symbiotic relationship between workers and consumers, the CBB seeks not only to empower its members, but also the consumer public.[130] Since 2013, the organization has arranged protests, released research reports, "crashed" shareholder meetings, and organized in workplaces across the country.[131] These actions led the group to Washington, D.C., where group members lobbied high-profile politicians and CFPB representatives to take action against Wells Fargo for its abusive practices.[132] Less than three months later, the CFPB brought its first enforcement action against Wells Fargo.[133]

Amazingly, the CBB is only one small part of a much larger phenomenon. Recognizing that one-third of financial sector employees reside in the United States, bank workers' unions from around the world have spurred an international effort to organize United States bank employees.[134] Brazilian bank workers have been at the forefront of the international bank workers' movement.[135] In the United States, the Communication Workers of America ("CWA") and the Service Employees International Union Local 26 ("SEIU"),

127. Payne, *supra* note 29, at 327.

128. Tobias, *supra* note 33.

129. *FAQ,* COMMITTEE BETTER BANKS, https://betterbanks.org/faq/ [https://perma.cc/NG4Y-TNUG] (last visited Dec. 1, 2018); *see also* Elizabeth Winkler, *Some of the People Who Hate America's Big Banks the Most Work in Them Every Day*, QUARTZ (Nov. 13, 2015), https://qz.com/548315/some-of-the-people-who-hate-americas-big-banks-the-most-work-in-them-every-day/ [https://perma.cc/ 73 EP-R6ZM].

130. *See, e.g.*, *Bank Workers, Sign Your Name to the Bank Workers Bill of Rights*, COMMITTEE BETTER BANKS, https://actionnetwork.org/petitions/sign-the-bank-worker-bill-of-rights [https://perma.cc/Z6BM-QPHH] [hereinafter *Bank Workers Bill of Rights*] (last visited Dec. 1, 2018).

131. Tobias, *supra* note 33.

132. *Id.*

133. *Id.*

134. Payne, *supra* note 29, at 313; *see also* Elk, *supra* note 122.

135. Payne, *supra* note 29, at 312–13.

both CBB affiliates, have lead the organizing efforts.[136] The international emphasis on United States banks comes from labor organizers' recognition that antiunion opposition from the world of finance will be both strong and globally coordinated.[137] Moreover, powerful United States banks have international subsidiaries. CBB advocate Teresa Casertano explains that "when U.S. banks go into other countries, they want to act the way they act in the U.S.—in a nonunion environment."[138] Thus, United States banks that set up shop in other countries threaten to undermine years of regional labor organizing.[139]

One high-profile organizing effort in the United States revolves around Santander Bank, a Spanish-based bank that is one of the largest in the world.[140] Santander Group has locations in fifteen countries across Latin American and Europe, serving more than 100 million customers worldwide.[141] In the United States, Santander operates over 600 branches across nine states and employs more than 10,000 people.[142] Front-line bank workers at Santander have reported low wages and managerial pressure to make sales.[143] Call-center workers at Santander's United States automotive lending subsidiary describe a "high-stress environment" characterized by unfair performance reviews and rigid call scripts that

136. *Id.* at 313.

137. *See id.*

138. Jack Smith IV, *Bank Workers Will Protest to Form Their First US Union—and the Whole World Is Watching*, MIC (Feb. 17, 2017), https://mic.com/articles/168947/bank-workers-will-protest-to-form-their-first-us-union-and-the-whole-world-is-watching [https://perma.cc/ZZ34-E2NE].

139. This compounds with the fact that trade union density and collective bargaining coverage are on the decline around the world. *See Trade Unions, Employer Organizations, and Collective Bargaining in OECD Countries*, ORG. ECON. COOPERATION & DEV., https://www.oecd.org/els/emp/Flyer-Collective%20bargaining.pdf [https://perma.cc/3FX8-7CA5] (last visited Dec. 1, 2018).

140. Elk, *supra* note 122 (citing Santander as the world's fourth largest bank by profits); JahanZaib Mehmood, *The World's 100 Largest Banks*, S&P GLOBAL MKT. INTELL. (Apr. 11, 2017, 11:37 AM ET), http://www.snl.com/web/client?auth=inherit#news/article?id=40223698&cdid=A-40223698-11568 [https://perma.cc/V6JR-8B59] (ranking Santander eighteenth globally for total assets).

141. *Quick Facts*, SANTANDER BANK, https://jobs.santanderbank.com/quick-facts [https://perma.cc/TV3K-4YMD] (last visited Dec. 1, 2018).

142. *Id.*; *Santander Bank Locations*, SANTANDER BANK, https://locations.santanderbank.com/index.html [https://perma.cc/TV3K-4YMD] (last visited Dec. 1, 2018).

143. Press Release, Common Dreams, Workers Shut Down Santander Headquarters in Mass Protest (Mar. 17, 2017) [hereinafter Common Dreams Press Release], https://www.commondreams.org/newswire/2017/03/27/workers-shut-down-santander-headquarters-mass-protest [https://perma.cc/LD6R-KMFH].

prevent them from better assisting low-income borrowers.[144] One Santander worker explained, "We live in fear at Santander, and without a voice . . . . When we have a union, we will have a voice."[145] Labor advocates recognize that Santander "continually fail[s] to meet the same standards of worker and consumer protections as it does abroad."[146] Outside of the United States, Santander branches are, on average, 75% unionized.[147]

Like many of its peers, Santander has been on the receiving end of federal enforcement actions for using deceptive sales and billing tactics. In 2015 and 2016, the OCC ordered Santander to pay two multimillion dollar penalties, one of which was for charging customers for credit monitoring and reporting services that they had not signed up to receive.[148] Similarly, in July 2016, the CFPB ordered the institution to pay $10 million for "deceptively market[ing] . . . overdraft service[s] and sign[ing] some customers up [for overdraft services] without their consent."[149] Santander is the only bank in America that has failed the Federal Reserve stress test—a Dodd-Frank mandated measure of banks' capital[150]—three years in a row.[151] Additionally, the bank garnered criticism in 2018 for its role in Puerto Rico's debt crisis.[152]

144. William Hoffman, *Employees Claim Santander's 'Stressful' Workplace Harms Borrowers*, AUTO FIN. NEWS (July 26, 2017), https://www.autofinancenews.net/employees-claim-santanders-stressful-workplace-harms-borrowers/ [https://perma.cc/46ZA-E7F8].

145. Smith, *supra* note 138 (quoting a Santander employee who wished to remain anonymous).

146. *See* Common Dreams Press Release, *supra* note 143.

147. Elk, *supra* note 122.

148. Santander Bank, Enforcement Action No. 2016-007 (Comptroller of the Currency Feb. 8, 2016), https://www.occ.gov/static/enforcement-actions/ea2016-007.pdf [https://perma.cc/S6W3-RYMN]; Santander Bank, Enforcement Action No. 2015-024 (Comptroller of the Currency Mar. 24, 2015), https://www.occ.gov/static/enforcement-actions/ea2015-024.pdf [https://perma.cc/5NAG-S3H4].

149. Truman Lewis, *Santander Bank to Pay $10 Million for Overdraft Service Violations*, CONSUMER AFF. (July 14, 2016), https://www.consumeraffairs.com/news/santander-bank-to-pay-10-million-for-overdraft-service-violations-071416.html [https://perma.cc/V2TK-2GSG].

150. *Dodd-Frank Act Stress Test*, FED. DEPOSIT INS. CORP., https://www.fdic.gov/regulations/reform/dfast/ [https://perma.cc/D48Z-5SUN]; *see also supra* notes 52–56 and accompanying text (discussing the Dodd-Frank Act Stress Test).

151. David Henry, *Santander, Deutsche Bank: U.S. Stress Test Repeat Offenders*, REUTERS (June 30, 2016, 1:16 AM), https://www.reuters.com/article/us-usa-banks-stress-failure-idUSKCN0ZG0DM [https://perma.cc/DP3N-CBAB].

152. *See, e.g.*, *Local Protests Denounce Santander Bank*, LA VOZ LANCASTER (Jan. 26, 2018), https://www.lavozlancaster.com/news/local-protests-denounce-santander-bank/article_2b694296-02ba-11e8-916e-330e8dd60748.html [https://perma.cc/X8L8-96XR].

In 2010, SEIU and CWA began an organizing campaign in Santander's United States branches. As of 2017, over 15,000 United States Santander employees had joined the effort.[153] In February 2013, bank workers from around the world visited New York to stage protests at Santander branches.[154] In the following years, employees organized various protests and delivered letters to the bank's executives demanding that they respect workers' right to form a union.[155] Santander has hit back against the campaign. According to labor activists, Santander fired three employees at its Boston location for engaging in union-organizing activities.[156] The bank has also claimed that workers' protests are an attempt to "unfairly and inappropriately discredit" the company.[157] It is likely no coincidence that in October 2017, Santander's United States holding company rolled out a new "Inclusive Communities" plan, which recognizes that the bank's success is "directly linked to the prosperity of our communities' families, businesses and neighborhoods."[158] In early 2018, Santander raised its minimum wage to $15 per hour—an increase that the bank attributed to federal tax cuts.[159]

While the efforts of the CBB and Santander workers are nascent, they are remarkable given the lack of historical precedent for bank workers' unions in the United States. Although American union membership rates have been steadily declining for years,[160]

153. Smith, *supra* note 138.

154. Payne, *supra* note 29, at 324.

155. Smith, *supra* note 138; Tim Devaney, *Bank Workers Protest Outside Santander*, HILL (Mar. 27, 2017, 1:24 PM EDT), https://thehill.com/regulation/325932-bank-workers-protest-outside-santander [https://perma.cc/RK28-QANX]; Press Release, Commc'n Workers of Am., Bank Workers at Santander Demand a Voice in the Workplace (Feb. 23, 2017), https://www.cwa-union.org/news/bank-workers-santander-demand-voice-in-work place [https://perma.cc/ZN3Z-9JAY].

156. Elk, *supra* note 122.

157. Devaney, *supra* note 155.

158. Press Release, Nat'l Cmty. Reinvestment Coal., Santander and NCRC Announce $11 Billion "Inclusive Communities" Plan (Nov. 1, 2017), https://ncrc.org/santander-announces-inclusive-communities-plan-new-11-billion-five-year-community-commitment/ [https://perma.cc/D57B-YZY8].

159. Greg Ryan, *Santander to Raise Minimum Wage to $15 Per Hour*, N.Y. BUS. J. (Jan. 26, 2018, 10:41 AM), https://www.bizjournals.com/newyork/news/2018/01/26/santander-to-raise-minimum-wage-to-15-per-hour.html [https://perma.cc/B9RD-ARAF].

160. Jordan Yadoo, *Union Membership Rate in U.S. Held at Record Low of 10.7% in 2017*, BLOOMBERG (Jan. 19, 2018, 3:05 PM EST), https://www.bloomberg.com/news/articles/2018-01-19/union-membership-rate-in-u-s-held-at-record-low-of-10-7-in-17 [https://perma.cc/3JQ5-KW7W].

continued fervent and costly attempts by rightwing groups to publicly discredit unions and undermine their financial support speak to the power that labor unions hold for upending the status quo. Bank executives are afraid of unions, knowing full well that a unionized workforce could threaten their exorbitant profits.[161] Even though labor unions in the States face an uphill battle for financial resources, support from political parties, and legal protections,[162] popular support for unions is steadily on the rise. In 2018, labor unions faced their highest approval rating in the United States in fifteen years.[163] Recent high-profile victories and innovative organizing strategies have led some to cautiously declare the start of an American "labor renaissance."[164]

B. *The Case for Unionization*

In 2017, 16.4 million American workers were represented by a labor union.[165] Unions represent workers across a wide variety of industries, from healthcare to manufacturing to film production. Most labor unions in the United States are members of two larger umbrella organizations (also called "federations"), the AFL-CIO[166] and Change to Win.[167] These federations give charters to local union chapters, which include workers in the same workplace, region, or business sector. To ensure that unions function democratically,

161. *See, e.g.*, Financial Services: Industry Update, HUNTON ANDREWS KURTH, https://www.huntonak.com/images/content/2/8/v2/2893/why_is_organized_labor_suddenly_taking_an_interest_in_americas_b.pdf [https://perma.cc/7FYP-TPS2] (last visited Dec. 1, 2018) (warning financial services industry clients that "waiting to act until a union knocks on the front door could easily be too late").

162. *See generally* ROSENFELD, *supra* note 110, at 10–30.

163. Lydia Saad, *Labor Union Approval Steady at 15-Year High*, GALLUP, (Aug. 30, 2018), https://news.gallup.com/poll/241679/labor-union-approval-steady-year-high.aspx [https://perma.cc/D54L-YYG8]; *see also Who Wants to Join a Union? A Growing Number of Americans*, CONVERSATION (Aug. 30, 2018, 1:20 PM EDT), https://theconversation.com/who-wants-to-join-a-union-a-growing-number-of-americans-102374 [https://perma.cc/6BVS-UHT7] (noting that 48% of nonunionized workers reported that they would join a union if given the opportunity to do so).

164. *See* ROSENFELD, *supra* note 110, at 195; Lois Weiner, *Labor Renaissance in the Heartland*, JACOBIN (Apr. 6, 2018), https://jacobinmag.com/2018/04/red-state-teachers-strikes-walkouts-unions [https://perma.cc/N6NQ-NH9F].

165. News Release, U.S. Dep't of Labor, Bureau of Labor Statistics: Union Members—2017 (Jan. 19, 2018), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/C8RF-JNZF].

166. *About Us*, AFL-CIO, https://aflcio.org/about-us [https://perma.cc/78WT-2KL3] (last visited Dec. 1, 2018).

167. *About Us*, CHANGE TO WIN, http://www.changetowin.org/about-us/ [https://perma.cc/3B5C-N8XP] (last visited Dec. 1, 2018).

unions are required by law to allow members to elect their representatives.[168] While models of union leadership may differ,[169] most unions are governed by constitutions and bylaws that the membership votes on.[170]

Labor unions in the private sector are protected by the National Labor Relations Act ("NLRA"), which ensures workers' rights to form and join unions free from the discrimination of their employers.[171] The NLRA covers all private employees except independent contractors, agricultural and domestic workers, railway and airline workers, and most supervisors.[172] Workers need not be unionized to benefit from the statute's protections—the NLRA also protects employees working together (called "concerted activity") for the "mutual aid and protection" of their coworkers, even if those employees are not part of a union.[173] Workers who wish to join a union may seek to be voluntarily recognized by their employer or certified through a National Labor Relations Board ("NLRB") election, both of which require a certain showing of employee support for the union's representation.[174]

At the heart of the NLRA is collective bargaining, the process by which union representatives negotiate with employers to secure certain terms and conditions of employees' work. Collective bargaining results in a collective bargaining agreement ("CBA") that is binding on both the union and the employer, effectively becoming the "law" of the workplace. The NLRA establishes that it is an unfair labor practice to refuse to bargain about "rates of pay, wages, hours of employment, or other conditions of employment."[175] It is through the bargaining process that unions attain higher wages,

168. *See* 29 U.S.C. § 481 (2012).

169. *See* Bill Fletcher & Richard W. Hurd, *Beyond the Organizing Model*, *in* ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES 37, 38 (Kate Bronfenbrenner et al. eds., 1998).

170. *See, e.g.*, *SEIU Convention Documents 2016*, SEIU, http://conventiondocs.seiu.org [https://perma.cc/E357-YJZW] (last visited Dec. 1, 2018).

171. 29 U.S.C. §§ 151–69 (2012).

172. *Id.* § 152(3).

173. *Id.* § 157; *see also Protected Concerted Activity*, NAT'L LAB. REL. BD., https://www.nlrb.gov/rights-we-protect/protected-concerted-activity [https://perma.cc/2G6B-LSM5] (last visited Dec. 1, 2018).

174. *Your Right to Form a Union*, NAT'L LAB. REL. BD., https://www.nlrb.gov/ rights-we-protect/whats-law/employees/i-am-not-represented-union/your-right-form-union [https://perma.cc/8XEB-HC59] (last visited Dec. 1, 2018).

175. 29 U.S.C. §§ 158(a)(5), 159(a) (2012).

better benefits, and safer workplaces for employees.[176] CBAs last for a set period of time during which the employer may not make unilateral changes to the contract without union approval.[177]

The NLRA has been called "perhaps the most radical piece of legislation ever enacted by the United States Congress."[178] The statute is unusual in that it protects and empowers collective—as opposed to individual—rights. Its stated purpose is to encourage workers' "full freedom of association, self-organization, and designation of representatives of their own choosing."[179] Section 1 of the NLRA recognizes the basic inequality of bargaining power between employers, who are able to organize as corporations or other types of associations, and employees, "who do not possess full freedom of association or actual liberty of contract."[180] The statute notes that such inequality breeds economic unrest and "recurrent business depressions" by keeping wages down and discouraging competition between industries.[181] In making these observations, the NLRA tacitly acknowledges the eternal motivation that drives commercial banks to become too big to fail: "that those with capital seek to multiply it without laboring themselves."[182]

The Wells Fargo scandal perfectly exemplifies the power imbalance between capital and labor that the NLRA was designed to address. The Wells Fargo board of directors and upper management stood together as a corporation while lower level employees had no such organization amongst themselves.[183] While the bank's directors and officers were shielded from legal liability for their business decisions, frontline workers could and would be fired for failure to meet their sales quotas.[184] Employees' firsthand accounts

176. Importantly, unions may also bargain for a "union security clause," which helps to secure the union's position by making employment contingent on union membership. *See* LABOR UNION LAW AND REGULATION ch. 5.I. (William W. Osborne, Jr. ed., 2017).

177. NLRB v. Katz, 369 U.S. 736, 743 (1962). *But see* Raytheon Network Centric Sys., 365 NLRB No. 161 (Dec. 15, 2017) (holding that employers are permitted to make unilateral changes that are consistent with "past practices").

178. Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modem Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 265 (1978).

179. 29 U.S.C. § 151 (2012).

180. *Id.*

181. *Id.*

182. Day, *supra* note 105.

183. *Cf.* Frost & Giel, *supra* note 6 (describing former CEO Stumpf's unwillingness to criticize or terminate former head of community banking Carrie Tolstedt even upon the suggestion of the bank's Risk Committee).

184. Tobias, *supra* note 33.

from their time at Wells Fargo describe a dangerously stressful and unethical work environment that they were unable to change or challenge, despite their best efforts.[185] Finally, as forewarned by the NLRA, the uneven power wielded by Wells Fargo management eventually contributed to a global economic collapse.

Labor advocates have proposed that the dearth of bank workers' unions in the United States has contributed to financial institutions' widespread deceptive and harmful practices.[186] These organizers argue that unionized bank workers would be in a more secure position to act as whistleblowers in the face of ethically dubious directives from management.[187] Organized bank employees could also negotiate rules regarding sales goals, such as those forced upon the employees of Wells Fargo and Santander, in their union contracts.[188] Moreover, higher wages for workers may provide a check on executive bonuses that create perverse incentives for bank directors.[189] While the public waits for legislators to enact robust "top-down capital regulation," perhaps the employees of financial institutions, banding together, could regulate banks from the ground up.[190]

As the CBB has illustrated,[191] whistleblowing is becoming an increasingly important check on corporate power.[192] However, bank employees risk being terminated for reporting unethical behavior at work. For example, in 2017, the Department of Labor's Occupational Safety and Health Administration ("OSHA") found that two Wells Fargo managers had been improperly fired for reporting potential fraud to their supervisors and the company's in-house ethics hotline.[193] Other former employees have alleged that Wells

185. *See supra* notes 1, 12–21 and accompanying text; *see also, e.g.*, Tobias, *supra* note 33 (explaining that one Wells Fargo banker "reported fraudulent activity to his superiors on a number of occasions, but nothing ever came of it").

186. Payne, *supra* note 29, at 312.

187. *Id.*

188. *Id.*; *see supra* notes 12–21 and accompanying text.

189. Payne, *supra* note 29, at 312; *see supra* notes 70–77 and accompanying text.

190. Payne, *supra* note 29, at 331.

191. *See supra* notes 132–33 and accompanying text.

192. *See* Gretchen Morgenson, *Whistle-Blowers Spur Companies to Change Their Ways*, N.Y. TIMES (Dec. 16, 2016), https://www.nytimes.com/2016/12/16/business/whistle-blowers-corporate.html [https://perma.cc/EU6H-VAXD] (noting that federal and state whistleblower programs are "increasingly seen as a way to help understaffed regulators enhance their oversight of sprawling and complex corporations").

193. Press Release, U.S. Dep't of Labor, OSHA Orders Wells Fargo to Reinstate SoCal Whistleblower; Pay $577K in Back Wages, Damages, Attorneys' Fees (July 21, 2017), https://www.osha.gov/news/newsreleases/region9/07212017 [https://perma.cc/7JXQ-EBKD];

Fargo wrongfully terminated them for reporting unlawful and unethical business practices.[194] According to the Ethics and Compliance Initiative's 2018 Global Business Ethics Survey ("GBES"), American employer retaliation against employees for reporting wrongdoing has doubled since 2013.[195] Retaliation may take many forms, such as ostracism, demotion, reassignment, or relocation.[196] Employer retaliation often increases with each attempt that the employee makes to report wrongdoing.[197]

In theory, private-sector whistleblower protections, such as the Sarbanes-Oxley Act ("SOX"), make it illegal for employers to retaliate against employees who report misconduct.[198] However, whistleblower laws are often ineffective at facilitating reporting, protecting whistleblowers, and addressing underlying wrongdoing.[199] Whistleblower laws do not deter employers from retaliating against employees in the first place.[200] Moreover, many whistleblowers are unaware of the legal protections available to them at the time they act and face inadequate access to legal counsel, insufficient resources, and limited success in the courts.[201] For example, from the time SOX was enacted in 2002 until the end of

Press Release, U.S. Dep't of Labor OSHA orders Wells Fargo to Reinstate Whistleblower, Fully Restore Lost Earnings in Banking Industry (Apr. 3, 2017), https://www.osha.gov/news/newsreleases/national/04032017 [https://perma.cc/KB4T-M8VG].

194. *See, e.g.*, Guitron v. Wells Fargo Bank, No. C 10-3461 CW, 2012 WL 2708517 (N.D. Cal. July 6, 2012), *aff'd*, 619 F. App'x 590 (9th Cir. 2015) (dismissing former employees' whistleblower claims); Ann Marsh, *Wells Fargo Ends Fight with a Whistleblower in Fake-Accounts Scandal*, AM. BANKER (Jan. 20, 2018, 10:13 PM EST), https://www.financial-planning.com/news/wells-ends-fight-with-whistleblower-in-fake-accounts-scandal [https://perma.cc/7F7P-9ZSV] (reporting that Wells Fargo recently settled with former employee and whistleblower Claudia Ponce de Leon).

195. ETHICS AND COMPLIANCE INITIATIVE, THE STATE OF ETHICS & COMPLIANCE IN THE WORKPLACE 9 (2018) [hereinafter GBES 2018], www.boeingsuppliers.com/GBES2018-Final.pdf [https://perma.cc/4KXR-BU7L].

196. PUB. SERVS. INT'L, CHECKMATE TO CORRUPTION: MAKING THE CASE FOR A WIDE-RANGING INITIATIVE ON WHISTLEBLOWER PROTECTION 13 (2016) [hereinafter Checkmate to Corruption], https://www.world-psi.org/sites/default/files/documents/research/en_whistleblower_protection.pdf [https://perma.cc/4W8L-NL9G].

197. *Id.*

198. *See* 18 U.S.C. § 1514A (2012); ROBERT G. VAUGHN, THE SUCCESSES AND FAILURES OF WHISTLEBLOWER LAWS 149–50 (2012).

199. *See* Richard Moberly, *Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1, 21–38 (2012) (analyzing the shortcomings of the Sarbanes-Oxley Act in particular, but also acknowledging that empirical evidence on these points in the United States in lacking).

200. *See id.* at 27 (noting that whistleblower laws fail to protect employees from retaliation).

201. VAUGHN, *supra* note 198, at 125.

2011, employees won only 1.8% of 1260 SOX cases decided by OSHA.[202] Other whistleblowers' complaints are dismissed before the courts can rule against them. Six years before the accounts scandal broke, two Wells Fargo whistleblowers filed complaints with OSHA.[203] After speaking with the bank about the allegations, OSHA failed to investigate the terminated employees' claims.[204]

A bank workers' union could better protect whistleblowers and facilitate reporting. CBAs almost always stipulate that employees—who may otherwise be fired for almost any reason, or for no reason at all—cannot be discharged or disciplined without just cause.[205] These just-cause provisions may make employer retaliation less likely. Additionally, a union could help inform the whistleblowing process and assist employees in navigating whistleblowing procedures that may be unclear or difficult to access.[206] In the event that a unionized employee is terminated or otherwise retaliated against for blowing the whistle, the union provides a relatively efficient and affordable mechanism for employees to pursue remedial action. Most CBAs establish a grievance and arbitration process for unfair discipline or termination.[207] While nonunion employees must exercise their whistleblower rights alone—figuring out which enforcement agency to report to and personally shouldering the legal fees—union employees are represented by the union throughout the grievance and arbitration process.[208]

Beyond strengthening whistleblower protections, unionized bank workers could help prevent abusive banking practices from arising in the first place. The GBES found that American employ-

202. Moberly, *supra* note 199, at 29.

203. Ann March, *Unprotected: How the Fed Failed Two Wells Fargo Whistleblowers*, AM. BANKER (Aug. 14, 2017, 8:35 PM EDT), https://www.americanbanker.com/news/unprotected-how-the-feds-failed-two-wells-fargo-whistleblowers [https://perma.cc/L5E5-Z8V4].

204. *Id.*

205. *See* JOSH BIVENS ET AL., ECON. POLICY INST., HOW TODAY'S UNIONS HELP WORKING PEOPLE 15 (2017), https://www.epi.org/files/pdf/133275.pdf [https://perma.cc/K8KP-GWFE] (discussing union contract provisions); ELKOURI & ELKOURI, HOW ARBITRATION WORKS ch. 15.2.A.ii (Kenneth May et al. eds., 8th ed. 2016) (discussing collective bargaining agreement just-cause provisions).

206. *See* CHECKMATE TO CORRUPTION, *supra* note 196, at 12.

207. *See* ELKOURI, *supra* note 205, at ch. 15.3.F.ii.

208. *See* BIVENS ET AL., *supra* note 205, at 2 (noting that collective bargaining agreements provide employees with union representatives to protect employees' interests); ELKOURI, *supra* note 205, at ch. 18.3.H.i–ii (noting that each party in litigation generally bears his own attorney's fees and requests for arbitration reimbursement are typically denied).

ees are experiencing increasing pressure from supervisors to compromise their work standards.[209] Such pressure leads to employee misconduct and creates a workplace culture where "questionable business practices are almost twice as likely to be accepted."[210] This is precisely the dynamic that former Wells Fargo employees described: supervisors pushed untenable sales quotas and threatened reprisal if goals were not met. These high sales goals have become the norm in United States banks, as well as in banks around the world.[211] Because employee workload is a mandatory subject of collective bargaining, a bank workers' union would require managers to consult with frontline employees to establish reasonable sales quotas and policies.[212] Workers fighting for a union at Santander understand the importance of "[e]nding quotas that force workers to sell exploitative loans [to customers]."[213] Similarly, UNI Finance's platform includes limiting the use of sales pressure and targets, and ensuring that bank employees are "given adequate time and resources to be able to provide all relevant information to clients."[214]

Finally, unionizing bank workers could force managers to reorient their focus away from shareholders and toward workers and consumers.[215] The dominance of the shareholder primacy norm[216]

209. *See* GBES 2018, *supra* note 195, at 8.

210. *Id.*

211. *See supra* note 32 and accompanying text.

212. ELKOURI*, supra* note 205, at chs. 13.2.Ai.a, 13-10.

213. BIVENS ET AL., *supra* note 205, at 17.

214. *Regulation and Policies*, UNI GLOBAL UNION, http://www.uniglobalunion.org/sectors/finance/regulation-and-policies [https://perma.cc/28WC-98N7] (last visited Dec. 1, 2018).

215. Unionization is not the only way that worker involvement could check the power of big banks—workers could also help run them. Legal scholar Kent Greenfield argues for a stakeholder model of corporate governance in which workers have representation on the board of directors and directors' fiduciary obligations "run to the firm as a whole." Kent Greenfield, *The Third Way*, SEATTLE U. L. REV. 749, 751 (2014). European works councils offer a robust example of worker representation at the firm level. *See, e.g.*, L. Fulton, *Workplace Representation,* WORKER-PARTICIPATION.EU, https://www.worker-participation.eu/National-Industrial-Relations/Countries/Germany/Workplace-Representation [https://perma.cc/V8Q6-4P89] (last visited Dec. 1, 2018). Though, for a works council model to work under current United States law, it is likely that a workplace would already have to be unionized. *See* Electromation, Inc. v. NLRB, 35 F.3d 1148, 1170 (7th Cir. 1994) (holding that "action committees" involving workers cannot be wholly created and maintained by the employer under the NLRA). Moreover, alternative ownership structures for banks already exist, both in the United States and abroad. One unique model comes from the cooperative Rokin Labour Banks of Japan, whose membership is limited to labor unions and other workers' associations. *See* NAT'L ASSOC. OF LABOUR BANKS, A GUIDE TO LABOUR BANKS (2011), http://all.rokin.or.jp/english/documents/2011guide_E.pdf [https://perma.cc/BF3V-7T7Y].

216. *See supra* notes 66–77 and accompanying text.

has shifted public companies away from "investing corporate profits in the firm or [their] workers to instead sending corporate profits back to shareholders."[217] Before the 1970s, American firms paid out half of their profits to shareholders while retaining the remaining profits for investment in the company. "Now, shareholder payouts are over 100% of reported profits, because firms borrow in order to lift payouts even higher."[218] Besides encouraging excessive and economically unsafe managerial risk taking,[219] the shareholder primacy norm leads to a decline in worker bargaining power, lower wages, and higher income inequality.[220] Conversely, unionization leads to industry-wide income redistribution.[221] Higher wages for workers means more money to spend as consumers, thus bolstering the shrinking middle class and strengthening the economy.[222]

While labor laws in the United States are far from robust,[223] most private employees, including bank workers, have a federal right to form labor unions and collectively bargain. Organizing even a fraction of the hundreds of thousands of frontline bank workers in the United States could create meaningful changes in banks' sales practices and help to hold bank executives and managers accountable to the public interest. With an internationally backed bank workers' movement spearheaded by the grassroots Community for Better Banks, renewed national media attention directed toward labor actions, and steadily growing public support

217. Lenore Palladino, *How Shareholder Primacy Hurts Jobs and Wages*, LAW & POL. ECON. (Apr. 25, 2018), https://lpeblog.org/2018/04/25/how-shareholder-primacy-hurts-jobs-and-wages/ [https://perma.cc/T3DH-YSCS].

218. *Id.* (citation omitted).

219. *See supra* notes 66–77 and accompanying text.

220. *See* Palladino, *supra* note 217.

221. *See* BIVENS ET AL., *supra* note 205, at 8. For example, unions set a pay standard that nonunion employers follow, raising wages for union and nonunion workers alike. *Id.* Unions also lessen wage inequality across different skill levels and reduce wage inequality based on race and gender. *Cf. id.*

222. Paula B.Voos, *How Unions Can Help Restore the Middle Class*, ECON. POL'Y INST. (Mar. 10, 2009), https://www.epi.org/publication/how_unions_can_help_restore_the_middle_class/ [https://perma.cc/U3QB-J9CE].

223. For example, the NLRB has limited enforcement power and is forbidden from hiring its own economic analysts. *See* Investigate Charges, NAT'L LAB. REL. BD., https://www.nlrb.gov/what-we-do/investigate-charges [https://perma.cc/5PDX-PQEE]; Hiba Hafiz, *Economic Analysis of Labor Regulation*, 2018 WIS. L. REV. (forthcoming 2018). Likewise, numerous restrictions have long been placed on workers' ability to strike, such as the Supreme Court's 1938 ruling that allows employers to permanently replace workers who strike for better economic terms and conditions. NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938). For a historical overview of unsuccessful attempts to revise the NLRA, see ROSENFELD, *supra* note 110, at 23–27.

for labor unions, a unionized bank workforce may be closer than it appears.

CONCLUSION

The American people saved bank executives from the financial mess they engineered. Yet, these corporate chiefs continue to take our money in the form of tax subsidies. They hold our pensions. They are entrusted with our savings. The money Americans place collectively in banks should secure the well-being and advance the dreams of everyday Americans like you and me. We, the people who help you open your accounts, deposit your checks, select your best savings options and choose the right loans, are the bridge between everyday Americans and the bank CEOs who see you as little more than a dollar sign. We can play a critical role in ensuring fair banking practices and protecting our customers, and we're raising our voices to make sure we can serve precisely this role.

—*Bank Worker's Bill of Rights*[224]

Through deceptive billing and sales practices, financial institutions across the country are tricking their customers into opening accounts and signing up for services they never wanted and often cannot afford. In the fight for exorbitant profits, banks' weapons of choice are impossibly high sales quotas, coupled with the precarious vulnerability of low-wage bank workers. Knowing that sales representatives and tellers are relatively powerless to resist supervisors' demands, banks like Wells Fargo have instated sales goals that lead to widespread customer exploitation. These practices have resulted in the loss of hundreds of millions of consumers' dollars and have pushed banks to the brink of collapse. The current regulatory apparatus is unequipped to deal with the problem. Law enforcement efforts do little to prevent banks from repeating their bad actions. Holding bank directors personally liable is nearly impossible. Moreover, proposed legislation in the United States House and Senate, as well as new leadership in the CFPB, indicate a bleak future for more vigilant "top-down" banking regulation.

Where the traditional legal approaches are failing, the law should look to the current bank workers' movement for inspiration.

224. Bank Worker Bill of Rights, *supra* note 130.

While the financial services industry can seem hopelessly abstract, its nebulous intentions are carried out in the everyday transactions of bank workers across the country. Bringing bank workers together under the protections of a union could constrain the financial services industry in a variety of ways. For one, a unionized banking workforce would create more robustly protected, and thus more effective, whistleblowers. Effective whistleblowers would bolster law enforcement efforts by alerting agencies to unethical bank action. Unionization would also allow workers to directly shape the sales policies of banks by negotiating collective bargaining provisions related to workload. These provisions could, for example, prevent management from enforcing the kinds of reckless sales goals that led to widespread fraud in the Wells Fargo accounts scandal. Finally, unionizing bank workers would bring together two underrepresented and frequently exploited groups—low-wage workers and the consumer public—to create a powerful "ground-up" counterforce to the financial status quo.

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