Regulating from the Ground Up: Controlling Financial Institutions with Bank Workers’ Unions

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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. 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. The sham


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

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. Nonetheless, several days after Wells Fargo paid its massive penalties, former CEO John Stumpf refused to take personal responsibility for the scandal. Instead of laying the blame with the bank’s executive policymakers, Stumpf blamed a few “bad apples.”


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.

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

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

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. Bankers engaged in three fraudulent practices that became so routine they developed nicknames for them: “bundling,” “sandbagging,” and “pinning.” 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”). Wells Fargo associates developed anxiety disorders, physical illnesses, and insomnia in response to the stress. One worker was so beleaguered, she became addicted to drinking the hand sanitizer kept around the bank.

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.” 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.
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.
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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monitoring.\textsuperscript{25} Bank of America was ordered to pay upwards of $2 million to customers and an additional $20 million civil penalty.\textsuperscript{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.\textsuperscript{27} Other banks that the CFPB and OCC have penalized include JPMorgan Chase Bank, TD Bank, and PNC Bank.\textsuperscript{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.”\textsuperscript{29} Researchers in Brazil have reported chronic fatigue, repetitive stress disorders, minor psychiatric disorders, and high-risk drinking to be common among bank employees.\textsuperscript{30} Other studies have found similar health problems in bank workers in Ghana, Nigeria, Kuwait, and the United Kingdom.\textsuperscript{31} Bank workers’ in-


\textsuperscript{30} Id. at 326.

\textsuperscript{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.\textsuperscript{32} In the United States, impossible sales quotas seem to be the industry-wide norm.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{35} Common wisdom holds that because financial institutions are so interconnected, the failure of even one could lead to total economic collapse.\textsuperscript{36} This has spurred the adage that large corporate banks are “too big to fail.”\textsuperscript{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

\textsuperscript{32} See id. at 325.


36. See \textit{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, \textit{If It’s Too Big to Fail, Is It Too Big to Exist?}, \textit{N.Y. Times} (June 20, 2009), https://www.nytimes.com/2009/06/21/weekinreview/21dash.html [https://perma.cc/NXK2-25YG].
and purchase assets. Financial institutions are more highly leveraged than other firms. 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%.”

Banks use leverage to grow, but leverage comes with a large risk: insolvency, or the inability to pay back debts. As such, leverage is “both the life blood and the death knell of large financial institutions.” Very high leverage, and highly leveraged banks in particular, were strong contributors to the Global Financial Crisis of 2008 (“GFC”). After the blow of the GFC, while other commercial banks were struggling, Wells Fargo was a “rare upbeat tale amid the banking wreckage.” 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. Leverage allows banks to rapidly build their asset size beyond what would be possible through the direct investment of their own funds. Moreover, interest on corporate debt is a tax-deductible expense. Perversely, banks are further incentivized to use leverage because they can borrow money more cheaply than other firms. 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/re search/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.
45. See RHEE, supra note 43, at 185.
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

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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.
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-hasn’t-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

58. Schooner, supra note 35, at 64.
officers are the managers.\textsuperscript{62} All corporate directors and officers, including those of financial institutions, owe a fiduciary duty of care to their firms.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{66} The basic premise behind the


\textsuperscript{64} See D. GORDON SMITH & CYNTHIA A. WILLIAMS, \textbf{BUSINESS ORGANIZATIONS} 307–09 (3d ed. 2012).

\textsuperscript{65} See id. at 384–85, 361–62. Federal and state law embody two different approaches to regulating corporate action. See \textit{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. \textit{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.

\textsuperscript{66} See LYNN STOUT, \textit{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 \textit{id.} at 24–32. The shareholder primacy norm can be more accurately classified as a deeply entrenched business principle. See \textit{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, \textit{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, \textit{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 \textit{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. 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. 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.”

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

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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 KOUSTAAL & 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 “succe...[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).
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

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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.’”).


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).


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.”).

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).


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/HQ8P-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. 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.” In Mulvaney’s first year, the Bureau initiated only two enforcement actions. 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. He also slowed down the agency’s implementation of new rules. 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. Additionally, in June

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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.  

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. 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. 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.

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.

103. See supra notes 51–61, 96–102 and accompanying text.
104. See supra notes 62–95 and accompanying text.
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].


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 ROSENFIELD, 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.” Only 1.2% of financial service employees belong to unions compared to 10.7% of workers across all industries in the United States. 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. The UOPW was later destroyed by “McCarthyist purges” led by the American Federation of Labor and the federal government. 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. Since then, there have been “virtually no” attempts to organize bank workers. Today, one of the only unionized banks in the United States is Amalgamated Bank, owned by the Amalgamated Clothing Workers of America.

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

111. Payne, supra note 29, at 323.
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.
118. Payne, supra note 29, at 325.
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).\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{125} Brazilian bank workers, who are heavily unionized, earn “substantially higher salaries than their US counterparts.”\textsuperscript{126} In many of the countries where bank employees are unionized, workers have also managed to negotiate such


\textsuperscript{122} Mike Elk, \textit{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].


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

\textsuperscript{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.
131. Tobias, supra note 33.
132. Id.
133. Id.
134. Payne, supra note 29, at 313; see also Elk, supra note 122.
both CBB affiliates, have lead the organizing efforts. 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. 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.” Thus, United States banks that set up shop in other countries threaten to undermine years of regional labor organizing.

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. Santander Group has locations in fifteen countries across Latin American and Europe, serving more than 100 million customers worldwide. In the United States, Santander operates over 600 branches across nine states and employs more than 10,000 people. Front-line bank workers at Santander have reported low wages and managerial pressure to make sales. 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

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136. Id. at 313.
137. See id.
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’ capital150—three years in a row.151 Additionally, the bank garnered criticism in 2018 for its role in Puerto Rico’s debt crisis.152

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.
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. In February 2013, bank workers from around the world visited New York to stage protests at Santander branches. 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. 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. The bank has also claimed that workers’ protests are an attempt to “unfairly and inappropriately discredit” the company. 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.” In early 2018, Santander raised its minimum wage to $15 per hour—an increase that the bank attributed to federal tax cuts.

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,
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.\textsuperscript{161} Even though labor unions in the States face an uphill battle for financial resources, support from political parties, and legal protections,\textsuperscript{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.\textsuperscript{163} Recent high-profile victories and innovative organizing strategies have led some to cautiously declare the start of an American “labor renaissance.”\textsuperscript{164}

B. The Case for Unionization

In 2017, 16.4 million American workers were represented by a labor union.\textsuperscript{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\textsuperscript{166} and Change to Win.\textsuperscript{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,
unions are required by law to allow members to elect their representatives.\textsuperscript{168} While models of union leadership may differ,\textsuperscript{169} most unions are governed by constitutions and bylaws that the membership votes on.\textsuperscript{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.\textsuperscript{171} The NLRA covers all private employees except independent contractors, agricultural and domestic workers, railway and airline workers, and most supervisors.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{175} It is through the bargaining process that unions attain higher wages,

\textsuperscript{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).
\textsuperscript{172} Id. § 152(3).
\textsuperscript{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).
\textsuperscript{175} 29 U.S.C. §§ 158(a)(5), 159(a) (2012).
better benefits, and safer workplaces for employees. CBAs last for a set period of time during which the employer may not make unilateral changes to the contract without union approval.

The NLRA has been called “perhaps the most radical piece of legislation ever enacted by the United States Congress.” 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.” 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.” The statute notes that such inequality breeds economic unrest and “recurrent business depressions” by keeping wages down and discouraging competition between industries. 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.”

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. 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. 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”).


180. Id.

181. Id.


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. 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. 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. 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. Moreover, higher wages for workers may provide a check on executive bonuses that create perverse incentives for bank directors. 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.

As the CBB has illustrated, whistleblowing is becoming an increasingly important check on corporate power. 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. 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.
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


\(^{197}\) Id.


\(^{199}\) 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-
ees are experiencing increasing pressure from supervisors to compromise their work standards. Such pressure leads to employee misconduct and creates a workplace culture where “questionable business practices are almost twice as likely to be accepted.”

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.

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. Workers fighting for a union at Santander understand the importance of “[e]nding quotas that force workers to sell exploitative loans [to customers].” 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.”

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

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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.
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.” 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.” Besides encouraging excessive and economically unsafe managerial risk taking, the shareholder primacy norm leads to a decline in worker bargaining power, lower wages, and higher income inequality. Conversely, unionization leads to industry-wide income redistribution. Higher wages for workers means more money to spend as consumers, thus bolstering the shrinking middle class and strengthening the economy.

While labor laws in the United States are far from robust, 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

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.
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 Rights224

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.

*Emma Cusumano*