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Are Banks Irrelevant?

Timothy D. Naegele*

In this article (and its extensive footnotes), the author revisits briefly Wells Fargo's problems that have tarnished America's fourth largest and the world's thirteenth largest bank, with almost $2 trillion in assets—and created what some have characterized as a rogue and lawless financial institution, the largest in the United States if not the world. He asks whether Wells is an anachronism or dinosaur whose time has passed, along with that of its sister financial institutions. As branches and checks disappear, and as a "branchless" and "checkless" financial system emerges, what role will traditional banks play in American and global commerce?

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* Timothy D. Naegele served as counsel to the U.S. Senate Committee on Banking, Housing, and Urban Affairs (and as counsel to the late Senator Edward W. Brooke of Massachusetts), 1969–1971, where he authored a series of laws that remain in effect to this day. Mr. Naegele, currently managing partner of Timothy D. Naegele & Associates and a member of the Board of Editors of The Banking Law Journal, may be reached at tdnaegele.associates@gmail.com.

This article is the seventh in a series of recent articles by the author for The Banking Law Journal that examine important and timely subjects that are of interest to our readers. *See* (1) Timothy D. Naegele, *Wells Fargo: An American Banking Nightmare*, 136 Banking L. J. 493 (October 2019) (Naegele October 2019) (https://naegeleblog.files.wordpress.com/2019/09/timothy-d.-naegele.pdf); (2) Timothy D. Naegele, *The Brooke Amendment And Section 8 Housing: Revisited*, 136 Banking L. J. 245 (May 2019) (Naegele May 2019) (https://naegeleblog.files.wordpress.com/2019/05/timothy-d.-naegele.pdf); (3) Timothy D. Naegele, *Standby Letters Of Credit And Other Bank Guaranties: Revisited*, 136 Banking L. J. 198 (April 2019) (Naegele April 2019) (https://naegeleblog.files.wordpress.com/2019/04/timothy-d.-naegele-standby-letters-of-credit.pdf); (4) Timothy D. Naegele, *The Bank Holding Company Act's Anti-Tying Provision: Almost 50 Years Later—Part I*, 135 Banking L. J. 315 (June 2018) (Naegele 2018, Part I) and Timothy D. Naegele, *The Bank Holding Company Act's Anti-Tying Provision: Almost 50 Years Later—Part II*, 135 Banking L. J. 372 (July/August 2018) (Naegele 2018, Part II) [The combined article, Parts I and II, can be read at https://naegeleblog.files.wordpress.com/2018/08/timothy-d-naegele-banking-law-journal.pdf]; (5) Timothy D. Naegele, *The Bank Holding Company Act's Anti-Tying Provision: 35 Years Later*, 122 Banking L. J. 195 (Naegele 2005) (http://www.naegele.com/documents/antitying_3.pdf); and (6) Timothy D. Naegele, *The Anti-Tying Provision: Its Potential Is Still There*, 100 Banking L. J. 138 (1983) (Naegele 1983) (http://www.naegele.com/articles/antitying.pdf). *See also* Timothy D. Naegele, *Are All Bank Tie-Ins Illegal?* 154 Bankers Magazine 46 (1971) (Naegele 1971) (http://www.naegele.com/articles/banktieins.pdf); Timothy D. Naegele, *Fed Plan Would Simply Gut Enforcement Of Ban on Tying,* American Banker (January 21, 2005) [*see* https://naegeleblog.files.wordpress.com/2018/08/op-1158_56_1.pdf (letter sent by Timothy D. Naegele to each member of the Federal Reserve Board ("Fed") (March 16, 2005), and the American Banker article)]; Timothy D. Naegele Resume (https://naegeleblog.files.wordpress.com/2019/11/timothy-d.-naegele-resume-20-1-1.pdf).

Also, what roles will so-called "shadow banks" and "non-banks" play in the future, and how will Congress and America's financial institution regulators deal with these critical issues, or can they? In the final analysis, will we live in a world of "bankless" banking?

In a very short span of time, the Internet and smartphones have changed the world, just as electricity, the automobile and airborne vehicles—such as the airplane and rockets—changed the world dramatically too. What will banking look like in the years to come, or will we live in a world of "bankless" banking?[1] Will the banks of today be forgotten; or viewed as relics or dinosaurs of the past, and anachronisms that are unrecognizable in tomorrow's world? For the readers of The Banking Law Journal, which commenced publication in 1889, just think about how the world has changed since then; and envision what it might look like tomorrow . . . and in the next 130 years.

Any look into the future involves a certain amount of pure "stargazing." The future is unpredictable in so many ways. After all, what American would have

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[1] *See, e.g.*, https://www.finextra.com/newsarticle/32860/most-banks-will-be-made-irrelevant-by-2030---gartner ("Most banks will be made irrelevant by 2030"—"Within 12 years time, 80% of financial firms will either go out of business or be rendered irrelevant by new competition, changing customer behaviour and advancements in technology, according to forecasts by Gartner. Gartner bills the rump as 'heritage financial firms', existing only formally but not competing effectively, as global digital platforms, fintech companies and other nontraditional players gain greater market share, using technology to change the economics and business models of the industry. . . . According to Gartner, of the 20% of traditional firms that will remain as winners, three types will flourish: [1] Power-law firms: Companies that own a digital platform will use its scale, low-cost infrastructure and the customer information it generates to create new services and enter new markets. Very few (5 percent) of these winning heritage institutions have the ability to become power-law firms. [2] Fintechs: Individual companies or pure-play/neobank subsidiaries will disaggregate traditional financial services in discrete product areas. They will participate in digital platforms, but will not own them. Less than 15% of the winning group of traditional firms can convert themselves into or successfully spin off fintechs. [3] Long-tail firms: The dramatically lower costs enabled by digital platforms will allow some traditional providers to act as service brokers. This is likely for large populations of poor and working-class people around the world that were not profitable customers previously. Simultaneously, they can act as concierge providers of bundled offerings to high-net-worth individuals. Around 80% of winning traditional financial services providers can become long-tail firms. Pete Redshaw, practice vice president at Gartner, says: 'The future of the financial services industry is increasingly weightless, requiring few physical assets to establish or maintain a presence. That makes the industry especially vulnerable to disruption by digital competitors.' The speed of digital transformation in financial services partly depends on regulation, he says, as well as customer demographics and behaviors, which will vary from country to country. In some nations, conservative regulations will inhibit innovation, while other countries, such as Australia, Brazil, China, India and the UK, will use regulation to speed transformation"); *see also* https://en.wikipedia.org/wiki/Gartner ("Gartner") and *infra n*.22 and text.

predicted the attacks on Pearl Harbor, or the attacks of September 11, 2001 (or "9/11") in New York City, at the Pentagon and in Shanksville, Pennsylvania, where the hijacked United Airlines flight 93 and its passengers were brought to their final resting place, instead of slamming into the White House or our nation's Capitol. Similar history-changing events might involve nuclear electromagnetic pulse ("EMP") attacks or other weapons of mass destruction (or "WMDs"), targeted at the United States or elsewhere in the world.[2] Thus, any discussion of the future must, of necessity, be an image captured at a moment in time like a photograph, which can change in an instant—for better or worse. Domestic and global events can overtake any assessments, and send them reeling and scrambling for cover.

With those caveats in mind, and realizing that no one is clairvoyant or omniscient, a logical starting point in discussing the present and future roles of American and global banks and other financial institutions is to revisit one briefly, Wells Fargo, as an example and possible guidepost. It is one of the United States' "Big Four" banks; it is America's fourth largest and the world's thirteenth largest bank; and, once, it was a fabled financial institution, respected and admired worldwide. Its "fall from grace," and descent into "pariah" status, is illustrative of what can happen to a global financial behemoth when it spins out of control as a result of criminal mismanagement. In a very real sense, it is the largest *de facto* bank failure in U.S. history—where the financial institution itself still exists.[3]

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[2] *See, e.g.*, https://www.dailymail.co.uk/sciencetech/article-7473199/Horrific-simulation-shows-Earth-obliterated-carpet-atomic-bombs.html ("How a war between Russia and the US would kill 34MILLION in hours"); http://newsmax.com/Newsfront/gringrich-emp-weapon/2009/03/29/id/329110 ("Some studies estimate that 90 percent of all Americans might very well die in the year after . . . an [EMP] attack as our transportation, food distribution, communications, public safety, law enforcement, and medical infrastructures collapse"); http://www.empcommission.org/ ("Commission to Assess the Threat to the United States from Electromagnetic Pulse (EMP) Attack"); https://www.dailymail.co.uk/health/article-7474055/Outbreak-flu-like-illness-circulate-world-36-hours-kill-80million-people.html ("Outbreak of a flu-like illness could circulate the world in 36 hours and kill 80million people, warns report by former World Health Organization chief"); and https://www.thesun.co.uk/tech/10212865/world-war-3-space-gps-banking-tv/ ("World War 3 in SPACE would destroy 'GPS, banking systems and even TV', astro-physicists warn").

[3] *See* Timothy D. Naegele, *Wells Fargo: An American Banking Nightmare*, 136 Banking L. J. 493 (October 2019) (Naegele October 2019) (https://naegeleblog.files.wordpress.com/2019/09/timothy-d.-naegele.pdf).

By way of full disclosure, the author worked two summers during college as a relief teller for Citizens National Bank in Southern California, which by reason of mergers became the southern "half" of Wells in California many years later. Also, he served with the Defense Intelligence

Today, Wells has been moving away from its time-honored symbol—for advertising purposes and otherwise—the stagecoach, which was known and respected worldwide as synonymous with safety and soundness, security and stability. A few key observations about Wells are worth repeating from the author's recent article in THE BANKING LAW JOURNAL on this subject:

- A "nightmare" of unfathomable proportions descended on the venerable and storied financial institution, and seemingly rendered it helpless and impotent to shake off its newfound image of being incompetent, criminal and a pariah.[4]
- The number of Wells' fraudulent or fake accounts grew to an estimated total of 3.5 million; billions of dollars were lost; and vast numbers of Americans were hurt.
- The bank lost two CEOs in three years; and likely candidates were running away from the job.
- Wells fired more than 5,000 employees, or 1 percent of its workforce, even though none came from its senior executive ranks. As if this was not enough, Wells' branch-level bankers found that it was difficult if not impossible to obtain employment at other banks.[5]

Agency ("DIA") at the Pentagon, where he received the Joint Service Commendation Medal, before becoming counsel to the U.S. Senate Committee on Banking, Housing, and Urban Affairs. He has been a special consultant to the Federal Deposit Insurance Corporation ("FDIC"), and testified as an expert witness on its behalf in connection with litigation arising from the failure of a national bank, which at the time was the largest bank failure in U.S. history. He rewrote the banking laws of the State of Maine, and served as a special consultant to the State of California on matters pertaining to financial institutions. He has represented upwards of 200 banks, financial institutions and other entities. And he acquired seven failing savings and loans from the Federal Savings and Loan Insurance Corporation ("FSLIC")/FDIC in California, Colorado, Illinois, Kansas, Maryland and Ohio for clients in the United States and abroad. Yet, he has never seen banking misconduct like that relating to Wells. *See also* https://naegeleblog.files.wordpress.com/2019/11/timothy-d.-naegele-resume-20-1-1.pdf.

[4] *See id.*

[5] As stated previously:

> Banks issue U5 documents to departing employees, a record of any misbehavior or unethical conduct. Wells Fargo issued defamatory U5 documents to bankers who reported branch-level malfeasance, indicating that they had been complicit in the creation of unwanted accounts, a practice that received media attention as early as 2011. There is no regulatory process to appeal a defamatory U5, other than to file a lawsuit against the issuing corporation.

See Timothy D. Naegele, *Wells Fargo: An American Banking Nightmare*, 136 BANKING L. J. 493, 513 n.32 and text (October 2019) (Naegele October 2019) (https://naegeleblog.files.wordpress.com/2019/09/timothy-d.-naegele.pdf).

- Wells' former CEO Dick Kovacevich unleashed a "monster"—a culture of corruption *and* criminality, which like a cancer is difficult to root out, even years after it began. It is insidious, ravishing and all consuming.
- Wells' series of wrongdoings include but are not limited to the following categories:
    1. MAPS Embezzlement Scandal;
    2. African-American And Hispanic Discriminatory Lending;
    3. Failure To Monitor Suspected Money Laundering;
    4. Overdraft Fees;
    5. Settlement And Fines Regarding Mortgage Servicing Practices;
    6. SEC Fine Due To Inadequate Risk Disclosures;
    7. Lawsuit By FHA Over Loan Underwriting;
    8. Lawsuit Due To Premium Inflation On Forced Place Insurance;
    9. Violation Of New York Credit Card Laws;
    10. Executive Compensation;
    11. Tax Avoidance And Lobbying;
    12. Wells Fargo Account Fraud Scandal;
    13. Racketeering Lawsuit For Mortgage Appraisal Overcharges;
    14. Failure To Comply With Document Security Requirements;
    15. Lawsuit Due To Forced National General Auto Insurance; and
    16. Lawsuits Alleging Violations Of The Anti-Tying Provision Of The Bank Holding Company Act.
- Wells has paid out more than $9 billion to compensate aggrieved parties and their lawyers for the misconduct and criminality of its management and employees; and the impact on Wells' reputation is incalculable, both domestically and globally. However, the dollar payouts by Wells were and remain a *pittance*, and merely a slap on the wrist, if that much. For example, in one quarter alone, Wells had net income of $5.7 billion.
- In the American "court of public opinion" and globally, Wells may be tried over and over again—as *the* classic example of bank misconduct and criminality. This constitutes a stinging indictment of the criminal behavior that Kovacevich unleashed at Wells.

- There are reasons to believe that management and regulatory ineptitude continue, unabated. An estimated $33 billion payday for Wells' investors was approved by the Fed.[6]
- The cost of the Wells' debacle to its employees, account holders and other customers, to the integrity of the U.S. and global banking systems, and to the American public at large has been staggering. Trust has been destroyed. Wells became a rogue and lawless financial institution, the largest in the United States if not the world. Yet, *no one* has gone to prison. This is its legacy, which must not be tolerated ever again.[7]

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[6] *See* https://www.washingtonexaminer.com/business/wells-fargo-scandals-spur-doubts-about-33b-payday-for-investors ("Wells Fargo scandals spur doubts about $33B payday for investors"); *but see* https://www.businesswire.com/news/home/20190627005908/en/ ("Wells Fargo Receives No Objection to its 2019 Capital Plan") and https://finance.yahoo.com/news/wells-fargo-receives-no-objection-203900271.html ("Wells Fargo Receives No Objection to its 2019 Capital Plan").

Why should there be *any* "payday for investors," much less one of the magnitude of this one: an estimated $33 billion? What about Wells' employees, customers and others who have been hurt by Wells? This is a tragedy that seems to keep getting worse with each day that passes. *See also* Timothy D. Naegele, *Wells Fargo: An American Banking Nightmare*, 136 BANKING L. J. 493, 529–531 n.70 (October 2019) (Naegele October 2019) (https://naegeleblog.files.wordpress.com/2019/09/timothy-d.-naegele.pdf).

[7] *See* https://www.bankingdive.com/news/wells-fargo-earnings-legal-charge-Q3/565059/ ("Wells Fargo earnings suffer on $1.6B legal charge"); and https://www.americanbanker.com/news/costs-weigh-on-wells-fargo-as-new-ceo-prepares-to-take-reins ("Costs weigh on Wells Fargo as new CEO prepares to take reins") and https://www.marshallnewsmessenger.com/news/wells-fargo-to-pay-usaa-million-in-patent-infringement-case/article_fb847e9a-01ce-11ea-b9d6-8764a1349584.html ("Wells Fargo to pay USAA $200 million in patent infringement case") and https://www.cftc.gov/PressRoom/PressReleases/8077-19?utm_source=govdelivery ("CFTC Orders Wells Fargo to Pay Over $14 Million for Violating Swap Dealer Business Conduct Standards") and https://www.americanbanker.com/news/ghost-funding-and-sandbagging-wells-fargos-sales-tactics-on-trial ("Ghost funding and sandbagging: Wells Fargo's sales tactics on trial") and https://www.americanbanker.com/news/lawmaker-presses-wells-fargo-on-checking-account-refunds ("Lawmaker presses Wells Fargo on checking account refunds") and https://www.americanbanker.com/news/usaa-won-200m-from-wells-fargo-for-patent-infringement-will-it-stop-there ("USAA won $200M from Wells Fargo in patent fight. Will others be on the hook?") and https://www.autofinancenews.net/allposts/operations/comp-reg/wells-fargo-agrees-to-settle-auto-insurance-suit-for-432-million/ ("Wells Fargo settles auto insurance suit for $432M").

As stated previously, the author worked as a relief teller during his summers in college; he wrote important banking and housing legislation when he served as counsel to the U.S. Senate Banking Committee, which is still the law of the land today; and he testified as an expert witness for the FDIC in litigation stemming from the largest bank failure in the nation's history, at that

Clearly, Wells' financial institution regulators were derelict in their duties, when they allowed all of this to occur:

> What happened . . . was symptomatic of the failure of the entire regulatory system to apply the kind of proper governance and adequate risk management which would have prevented [it].[8]

This situation would be compounded *dramatically* in a credit crunch; for example, if more than a half-trillion dollars of standby letters of credit were a factor—which might produce runs on banks and other financial institutions that the Fed and other central banks and regulators could not stem globally.[9] And global stock and other markets are run by computers, algorithms and passive managers, which might magnify the risks exponentially.[10]

Banking is changing radically. Branches and checks are disappearing. Soon, America and the world may have a "branchless" and "checkless" financial system.[11] Also, "non-banks" and "shadow banks" are competing with America's

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time. However, what was allowed to happen at Wells is truly mindboggling—for *anyone*. *See also supra* n.3.

[8] *See* Timothy D. Naegele, *Wells Fargo: An American Banking Nightmare*, 136 Banking L. J. 493, 499 n.8, 529 n.68 (October 2019) (Naegele October 2019) (https://naegeleblog.files.wordpress.com/2019/09/timothy-d.-naegele.pdf).

[9] *See* Timothy D. Naegele, *Standby Letters Of Credit And Other Bank Guaranties: Revisited*, 136 Banking L. J. 198 (April 2019) (Naegele April 2019) (https://naegeleblog.files.wordpress.com/2019/04/timothy-d.-naegele-standby-letters-of-credit.pdf).

[10] *See, e.g.*, https://www.economist.com/briefing/2019/10/05/the-stockmarket-is-now-run-by-computers-algorithms-and-passive-managers ("The stockmarket is now run by computers, algorithms and passive managers"—"Fifty years ago investing was a distinctly human affair. . . . Since then the role humans play in trading has diminished rapidly. In their place have come computers, algorithms and passive managers—institutions which offer an index fund that holds a basket of shares to match the return of the stockmarket, or sectors of it, rather than trying to beat it").

[11] *See, e.g.*, https://bankinnovation.net/allposts/biz-lines/payments/will-the-branch-of-the-future-mean-no-branch-at-all/ ("Will the 'Branch of the Future' Mean No Branch at All?"—"Banks will say that their customers still visit bank branches for many transactions. Whether it's Bank of America or HSBC or Fifth Third, almost all banks believe branches will have a role to play for the foreseeable future. But FIs across the country are shutting down branches at a steady clip, and people who once visited a branch for daily transactions now 'visit' digitally. This is not to say branches will become totally obsolete, and they still serve their purpose—but what will the branch of the future look like? Bank Innovation polled its readers on the matter. Most of the respondents answered that branches will not exist in the future. At all. Of the 346 readers that took the poll, about 41% (141) said that branches will cease to exist in the future, while 37% (129) said the future bank branch will be an ATM with advanced functionality. About 15% said that robots will replace human beings in the bank branch. Whether that will happen, no one knows. But it could: HSBC this week unveiled that it would use SoftBank Robotics robot Pepper

federally-regulated banks on a global scale.[12] What will the Wells of the future look like, or will there even be a Wells? Perhaps what happened at Wells will be beneficial after all. Rather than attempt to rebuild a corrupt culture, why not begin again without the need for financial institutions like Wells? Presumably its stagecoach will go the way of the Pony Express and Ford's Model T: into the lore and dustbin of history.

Years from now, generations of Americans and those of other countries may be told what the bank of today looked like, and shake their heads in disbelief that such a creature ever existed.[13] Again, the Internet and smartphones have

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in its New York headquarters to improve a customer branch experience").

[12] *See, e.g.*, https://www.washingtonpost.com/business/economy/the-shadow-banks-are-back-with-another-big-bad-credit-bubble/2019/05/31/a05184de-817a-11e9-95a9-e2c830afe24f_story.html (Steven Pearlstein: "The shadow banks are back with another big bad credit bubble"—"Federal Reserve Chair Jerome Powell gave a speech a couple of weeks back that showed that financial regulators have learned many lessons from the 2008 financial crisis, but not the most important one, namely: If regulators wait to act until they can say with certainty that a credit bubble is about to burst, they've waited too long. That's particularly true when it comes to the opaque and unregulated 'shadow' banking system on Wall Street that has now supplanted regulated banks as the leading source of credit for businesses and consumers. This shadow system gets its money from big investors rather than depositors, and it revolves around hedge funds, investment banks and private equity funds rather than banks. These shadow banks have made borrowed money cheaper and easier to get, but they have also made the financial system and the U.S. economy more susceptible to booms and busts"); *see also infra* n.16–18 and accompanying text.

[13] It is useful to revisit one vision of the future, which was cited in the prior discussion of the law surrounding the Bank Holding Company Act's Anti-Tying Provision.

See Timothy D. Naegele, *The Bank Holding Company Act's Anti-Tying Provision: Almost 50 Years Later—Part I*, 135 BANKING L. J. 316–318, n.2 (June 2018) (Naegele 2018, Part I) [The combined article, Parts I and II, can be read at https://naegeleblog.files.wordpress.com/2018/08/timothy-d-naegele-banking-law-journal.pdf] (*citing* Eric Reed, "How to Make the Most Money From Your Bank in 2018," THE STREET (https://www.thestreet.com/story/14489253/1/how-to-make-the-most-money-from-your-bank-in-2018.html)) ("The way you bank is about to change. . . . Thanks to a combination of technological changes and consumer demand, the banking industry is on the edge of a revolution in how it does business. Consumers who pay attention to this shift will be in a position to get much better deals as a result. The first casualty in this process, say industry experts, will be the branches themselves. 'Consumers [will] gravitate more and more toward the digital arena for their banking needs both online and mobile,' said Greg McBride, chief financial analyst for Bankrate. 'There'll be continued consolidation of bank branches. They're not going to go away, but what they will be is optimized. The branch is going to look a lot different in the sense that it's going to be more of a consultation center and less of a transaction center,' McBride continued. 'In other words, it will be where people go to talk to their banker, or someone with the bank, about wealth management or their mortgage. Less and less will it be about cashing a check.' The truth is that technology can do most, if not all, of the job that a teller once did. With the ubiquity and security that modern apps and websites have changed the world, in a relatively short span of time. Ask small retailers what

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to offer, and with only one-third of transactions conducted in cash anymore, few consumers need a physical interaction. Websites can offer the kind of convenience that no teller could offer short of round-the-clock concierge service, allowing today's consumer to open and manage almost any kind of account from an online interface. The result will mean more than just convenience. It will open the doors to financial products across the country, allowing consumers to shop for better deals and accounts regardless of physical location. Consumers without a bank nearby, such as many rural or urban residents, will be able to open checking accounts without traveling for miles. Others will be able to comparison shop for better loan terms and deals than the ones offered by their local branch. Consumers demand the shift to an online model and banks have begun to respond. The . . . purpose of these increasingly consolidated branches will be to provide in-person consultations for loans, wealth management and financial products. . . . In the same way that Amazon tries to anticipate a shopper's needs based on past purchases, banks will begin trying to build financial profiles out of their new wealth of digital information. The result, according to members of the industry, will be an increasingly broad array of financial products customized to individual consumers. It will mean a more proactive (some might say *pushy*) *model of banking*, but it will also create opportunities for a savvy shopper to find financial products that fit their needs much better than a generic model ever could. . . . The success of this new model of banking will depend on how financiers navigate the regulatory landscape. Digital access has opened up an entirely [new] way of retail banking. Many institutions can contemplate a future completely free of physical locations, seeing no difference between a consumer in Southern California and one in the Michigan Upper Peninsula. Yet such a project would have to contend with the Riegle-Neal Interstate Banking and Branching Efficiency Act, which ties a bank's ability to collect deposits from around the country with its willingness to make credit available to those same communities. In essence, a consumer bank can't open online checking accounts in upstate Michigan unless it also has the infrastructure to help that population get a mortgage. Meanwhile, bankers looking at a wealth of new products have their eye on Section 106 of the Bank Holding Company Act Amendments of 1970, otherwise known as the Anti-Tying provision. This law bars a bank from providing or pricing one financial product on the condition that a customer commit to another, unrelated product. For example, a retail bank can't give someone a point off their mortgage on the condition that the borrower take out a credit card from that same institution. As banks learn more and more about their customers and begin to build new products and packaged offerings, anti-tying laws will become increasingly dangerous. Institutions that can successfully navigate this law will be able to offer new, data-driven services, making mortgage offers to consumers who've just begun looking, or offering financial advice to households that may not even realize they're in trouble yet. Banks which are not careful, however, can very easily find themselves offering packaged deals that will bring the SEC calling. Technology is about to change the way retail banking works, as long as they can stay on the right side of the law").

Again, this article is timely. However, it is not the SEC that will "come calling," but the bank regulatory agencies such as the primary regulators—the Fed and FDIC—along with private litigants who will sue for treble damages and other financial rewards. Also, foreign entities are likely to enter U.S. markets and engage full bore in the "pushy model of banking," and do everything imaginable to escape the reach of American laws such as the anti-tying provision. This has been happening already. And at least one prominent U.S. District Court has looked the other way, with respect to (1) a California plaintiff, (2) a bank incorporated under the laws of Australia

Amazon and Walmart have done to them—if they still exist. Will we live in a world of "bankless" banking? The hockey great Wayne Gretzky has been quoted as saying: "To be successful, you must skate to where the puck is going not where it is."[14]

The Failure Of The Entire Regulatory System To Apply The Kind Of Proper Governance And Adequate Risk Management That Would Have Prevented The Wells Debacle

The tragedy is that history often repeats itself, not in precisely the same forms but in ways that are "close enough." Be it wars, or a failure to be vigilant against the spread of diseases globally—which were seemingly conquered or eradicated in the past—Mankind seems ignorant of vital lessons. Obviously, this is never more evident than in the case of economic calamities, such as depressions, deep recessions and the like.[15]

One shining example involved a proposal by the Financial Stability Oversight Council[16] to *lessen* the supervision and scrutiny of large nonbank financial companies, which was roundly criticized as "[l]owering the bar on financial regulation":

> The Financial Stability Oversight Council's recent proposals to retreat

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that maintained representative offices in Houston, (3) where "decisions" were made ostensibly in London.

Query whether the so-called "pushy model of banking" is exactly what Wells' former CEO Richard Kovacevich envisioned and implemented, which cost the bank *more than* $9 billion, and essentially destroyed its reputation?

[14] *See infra n.*19.

[15] *See, e.g.*, https://en.wikipedia.org/wiki/Great_Depression ("Great Depression"); https://en.wikipedia.org/wiki/Wall_Street_Crash_of_1929 ("Wall Street Crash of 1929"); https://en.wikipedia.org/wiki/Panic_of_1893 ("Panic of 1893"); https://en.wikipedia.org/wiki/Black_Friday_(1869) ("Black Friday (1869"); https://en.wikipedia.org/wiki/List_of_stock_market_crashes_and_bear_markets ("List of stock market crashes and bear markets"); https://en.wikipedia.org/wiki/List_of_banking_crises ("List of banking crises").

[16] *See* https://en.wikipedia.org/wiki/Financial_Stability_Oversight_Council ("Financial Stability Oversight Council").

The Council has 10 voting members: (1) the Secretary of the Treasury, who chairs the Council; (2) the Chairman of the Fed; (3) the Comptroller of the Currency, which regulates national banks; (4) the Director of the Consumer Financial Protection Bureau; (5) the Chairman of the U.S. Securities and Exchange Commission ("SEC"); (6) the Chairman of the FDIC; (7) the Chairman of the Commodity Futures Trading Commission; (8) the Director of the Federal Housing Finance Agency; (9) the Chairman of the National Credit Union Administration Board; and (10) an independent member (with insurance expertise), appointed by the President. *See also infra* n.25.

from supervising certain large nonbank financial companies would unnecessarily expose Americans to damaging instability in the financial system and economy.

Former Federal Reserve Chairs Janet Yellen and Ben Bernanke, and former Treasury Secretaries Timothy Geithner and Jacob Lew—all former FSOC members—recently expressed similar warnings.

The financial crisis showed how a piecemeal approach to regulation allows risks to slip between the cracks. So the Dodd-Frank Act established the FSOC to take a broad view of the entire financial system, to assess risks in both banks and nonbanks, and the activities in which they engage. Doing so requires examination and oversight of both.

However, the FSOC now proposes to raise the hurdle for enhanced supervision of large, systemically important nonbank financial companies, or NBFCs, far too high. As a result, it would focus almost exclusively on the financial activities that could threaten financial stability.

We applaud identifying and examining such activities. But risk assessment should begin, not end there. A focus on both activities and entities—not one or the other—is needed. By neutering its authority to designate nonbanks as systemically important institutions, the FSOC would eliminate an important deterrent to excessive risk-taking.

Indeed, were the failure of a large, complex and interconnected nonbank again to threaten widespread financial collapse, a future government would almost surely renege on today's promise not to engage in bailouts. The appropriate oversight and supervision that would come with this designation is the FSOC and its members' only means to make sure such risky financial entities self-insure, rather than depend on taxpayers in a pinch.

Critics of NBFC supervision see adverse consequences of the FSOC's designation authority. They object to the Fed's supervising of NBFCs. They argue that the Fed Board lacks the knowledge and expertise of the NBFCs' primary regulators (e.g., the Securities and Exchange Commission or state insurance commissioners) to supervise broker-dealers or insurance companies. And the critics argue that the Fed will impose banklike regulatory measures that are inappropriate to mitigate risks in nonbank financial companies.

While the critics have legitimate points, sacrificing the designation

> authority is unwise. Instead, the FSOC should urge the Fed and other FSOC members to develop a framework for oversight and supervision that is effective, efficient and tailored for nonbanks. The existence of such a credible designation authority can deter firms from adopting risky business models or activities. And it will help the primary regulators of broker-dealers, insurance companies and other institutions to improve their monitoring of risky activities and of those firms that contribute most significantly to those risks. Ineffectiveness on either front could still lead to entity designation; credibility would require it.
>
> Importantly, even strong critics of a nonbank systemically important financial institution, or SIFI, designation don't object to designating Fannie Mae and Freddie Mac. The issue is not some doctrinal opposition to examining entity-based risks and vulnerabilities of nonbank institutions; it is about how high to set the hurdle. On that front, the financial crisis showed that there was then a small number of large, complex and interconnected nonbanks that belonged in the SIFI class. Without examination and oversight, one cannot know how many exist today.
>
> Finally, asserting that the FSOC will focus on activities is one thing, but implementing this focus is another. The FSOC's proposal offers no implementation plan. We urge the FSOC to swiftly articulate how it will identify and address activities that threaten financial stability. Market participants and the firms and markets in which they operate need to understand the governance and rules of the game for regulation. Otherwise, it will create either unneeded uncertainty or a cynical suspicion that officials are simply using an activities fig leaf to cover de facto deregulation.[17]

Also, it was announced:

> Federal Reserve Board members voted . . . to adjust key bank regulations put in place after the financial crisis, enacting a series of

[17] *See* https://www.americanbanker.com/opinion/lowering-the-bar-on-financial-regulation-is-fraught-with-risk ("Lowering the bar on financial regulation is fraught with risk"). The authors were Richard Berner, Executive-in-Residence at the Center for Global Economy and Business at the NYU Stern School of Business; Kim Schoenholtz, the Henry Kaufman professor of the history of financial institutions and markets and director of the Center for Global Economy and Business at the NYU Stern School of Business; and Lawrence J. White, the Robert Kavesh Professorship in Economics at New York University's Stern School of Business.

> changes that one board governor, Lael Brainard, warned could weaken "core safeguards."
>
> Regulators are tying rules more closely to bank size, reducing the necessary level of cash and government bond stockpiles at all but the largest and most complex institutions. Affected banks will also be allowed to submit "living wills"—documents detailing how a bank would wind itself down in the event of failure—less frequently.[18]

Having "blown it" with respect to Wells, Americans might think that their banking and other financial institution regulators would have learned valuable lessons, and would not repeat the mistakes of the past. However, this conclusion may be naïve, and far too kind and forgiving.

The Future

Any discussion regarding the future of banking involves at least five threads: (1) how technology such as artificial intelligence (or "AI"), including the use of wearable devices or medical implants to conduct transactions (which would be very difficult to steal or corrupt),[19] and competition[20] will change things; (2)

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[18] *See* https://www.nytimes.com/2019/10/10/business/economy/federal-reserve-bank-regulations.html ("Fed Votes to Lighten Regulations for All but the Largest Banks"—"Banks with $250 billion to $700 billion in total assets, including firms like Capital One and PNC Financial, will now have to submit a resolution plan every three years, alternating between full and partial filings. They are currently required to submit a full report annually, though in practice they have usually received extensions because the process is so complex. Foreign banks with operations in the United States, including Deutsche Bank, Barclays and HSBC, will also be allowed to file less often"—"Ms. Brainard . . . added, the changes go beyond what is mandated by a regulatory relief law 'in ways that may weaken the resolution planning process for very large banking firms and leave the system less safe. . . . It is premature to reduce core capital and liquidity requirements for large banking institutions, since they have not yet been tested through a full cycle,' she said. 'At this point late in the cycle, we should not give the green light to large banking organizations to reduce the buffers they worked so hard to build post-crisis' . . . This week, the Fed voted to simplify the so-called Volcker Rule, which prohibits banks from making risky bets with customer deposits. The updated rule is easier on banks than the initial version proposed in May 2018, dropping an accounting test that would have exposed a broader swath of trades to regulatory scrutiny. Ms. Brainard also voted against that change").

[19] *See* https://en.wikipedia.org/wiki/Artificial_intelligence ("Artificial intelligence"); *see also* https://thefinancialbrand.com/76040/retail-banks-relevant-artificial-intelligence-millennials/ (Fran Duggan, CEO of Payrailz: "Glimpse Into the Future: What Banking Looks Like 10 Years From Now"—"[T]he springboards for dramatic change already are in place. Two of these: the mobilization of almost everything, and the explosion of artificial intelligence. Those forces—operating in tandem with shifting consumer expectations—will have an unprecedented impact in the decade ahead, accelerating the transformation of the banking landscape. It's not too late for traditional banks and credit unions to thrive in this dynamic environment. But they must do three things: [1] Tune into the changing preferences and expectations of consumers[;] [2] Fully

how and whether regulators such as America's Fed will keep abreast and stay ahead of such developments, to avert nationwide and global economic problems and catastrophes; (3) how to maintain security (*e.g.*, vis-à-vis the Cloud), recognizing that the fear of data breaches increases the demand for services that keep users' data secure;[21] (4) if not at banks, where will people keep

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embrace the potential for artificial intelligence in personalization and other financial applications[; and] [3] Keep up with the what the mega brands are doing (in and out of banking) relating to consumer experience. . . . **In Ten Years, Will Traditional Retail Banks Still be Relevant?** Over the next decade, banking providers, their consumers, and the environment in which they all exist will likely be transformed. Physical cash will be used less and less as digital currency becomes the norm and true real-time money movement is adopted. Consumers might use a variety of wearable devices to conduct transactions, eliminating the need for physical debit or credit cards entirely. These wearables will evolve into medical implants, which would be very difficult to steal or corrupt. They will remove friction—and risk—from many transactions. Within the next ten years consumers will rely on their virtual assistants to send their smart-cars to pick up and pay for their dry cleaning and groceries, and even shuttle their children to after-school activities. Banks and credit unions should be looking for ways to integrate with these voice-based assistants to complete financial tasks and even offer personalized recommendations in real time. Specifically, financial institutions' contact centers can evolve to take advantage of artificial intelligence and chatbot-based technology, as these capabilities become more lifelike and intelligent. Banks and credit unions have a real, but limited opportunity to put into place plans to ensure they thrive in the next decade. They must not forget their advantage in this rapidly evolving environment, namely the trust consumers have in financial institutions because of strict industry regulations and the secure manner in which they treat the valuable data they hold. Leveraging this advantage and partnering with the right technology providers to overcome legacy challenges will allow those institutions to succeed. But traditional financial institutions must act now while the window is open if they are to transform ahead of the curve. As Wayne Gretzky said[:] 'To be successful, you must skate to where the puck is going not where it is'").

[20] *See, e.g.,* https://www.bankingdive.com/news/banks-lose-280-billion-payments-revenue-fintech/563172/ ("Banks stand to lose $280B in payments revenue to fintechs, report says"—"Payment fintechs such as Stripe, Square, PayPal and Venmo are gaining market share as they continue to provide fast and cheap money transfer services outside the traditional banking realm"—"'The digital boom will mean banks have to fundamentally change the way they think about their revenue composition,' said Alan McIntyre, Accenture's senior managing director for banking. 'Channels that once made the banks billions of dollars will cease to exist. To succeed in the future, banks will need to develop new digital business models at scale, with 'one-click' payments the new norm, and set their sights on delivering secure, convenient and frictionless customer experiences'") and https://www.americanbanker.com/news/belt-tightening-success-may-lead-banks-to-more-belt-tightening ("Belt-tightening success may lead banks to more . . . belt-tightening"); *see also* https://en.wikipedia.org/wiki/Financial_technology ("Financial technology"—"Financial technology, often shortened to fintech, is the technology and innovation that aims to compete with traditional financial methods in the delivery of financial services").

[21] *See, e.g.*, https://www.businessinsider.com/future-of-banking-technology ("The future of retail, mobile, online & digital-only banking technology"—"A top concern consumers have when choosing mobile banks is security. The fear of data breach increases the demand for services that

their money; and (5) how American and global banks and other financial institutions will respond, with marked differences involving how each is willing and *able* to respond.[22]

keep users' data secure—allowing consumers to place holds on credit or debit cards, schedule travel alerts, and file and review card transaction disputes are some successful security banking features. . . . According to Business Insider Intelligence, mobile banking is growing at five times the rate of online banking, and half of all online customers are also mobile banking users. . . . A common trend in banking technology is using an application programming interface (API) to make proprietary data available to anyone who has the consumer's permission to access it"); *see also supra* n.19.

[22] *See, e.g.*, https://www.bankingdive.com/news/community-banks-tech-innovation-fdic-chair-mcwilliams/564200/ ("Community banks won't survive without tech innovation, FDIC chair says"—"The survival of community banks hinges on their ability to successfully collaborate with fintechs, FDIC Chair Jelena McWilliams said . . . at a conference on the future of banking at the Federal Reserve Bank of St. Louis. . . . Community banks face challenges from consolidation, economies of scale and competition from larger banks, credit unions, fintechs and nonbank lenders, McWilliams said. . . . '[I]nnovation has been happening outside of [] banking primarily[,] and a very small percentage of it has happened within the community banks in particular that don't have the resources, nor are they able to enforce the compliance mechanisms in place that would be needed where the regulators would look positively at innovation,' she said. . . .") and https://newsroom.accenture.com/news/only-half-of-banks-globally-are-making-significant-advancements-in-digital-transformation-resulting-in-lower-market-valuations-accenture-report-finds.htm ("Only Half of Banks Globally Are Making Significant Advancements in Digital Transformation, Resulting in Lower Market Valuations, Accenture Report Finds"—"The report—'Caterpillars, Butterflies, and Unicorns: Does Digital Leadership in Banking Really Matter? (https://www.accenture.com/usen/insights/banking/doesdigitalbankingleadership-matter)'—analyzed more than 160 of the largest retail and commercial banks in 21 countries to assess their level of digital maturity and determine if digital leadership is driving superior financial performance, including market valuation, profitability, top-line revenue growth and efficiency. . . . [O]nly 12% appear to be fully committed to digital transformation and investing in a digital-first strategy; the other 38% are in the midst of transformation, but their digital strategies lack overall coherence. The remaining half (50%) have not made much visible progress in digital transformation at all and investors are showing a lack of confidence in their future prospects. . . . '[O]ur research shows that digital leadership drives superior economic performance, and that the gap between 'the best' and 'the rest' is widening at a pace that should concern banks struggling with digital transformation and overall competitiveness.' . . . Only about one in eight global banks (12%) appear to be fully committed to digital transformation and are investing toward becoming digital-first banks. This is the only group with a price-to-book ratio above 1x") and https://www.bain.com/insights/reimagining-the-digital-branch-of-the-future-lets-get-practical/ ("Reimagining the Digital Bank Branch of the Future: Let's Get Practical"—"Retail banks have been trying to automate consumer transactions for decades, usually for reasons of cost: Each mobile interaction incurs a variable cost of about 10 cents, vs. $4 for a teller or call-agent interaction. Mobile also has half the likelihood of annoying a customer, Bain & Company analysis shows. And in our experience, roughly 60% of branch volume remains bad or avoidable. In recent years, the opportunity has expanded beyond cost reduction to enhancement of customers' overall

Anita Hawser, Europe Editor of *Global Finance*, has noted:

> From the creation of the first banks during the Middle Ages through the late 20th century, the greatest virtues in finance included stability, security, wealth and trust. Those principles were visible in bank buildings: solid, hulking constructions of impassive stone that said to clients, "We've got lots of money, and yours will be safe here."
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> As finance modernized, bank architecture moved with it. Headquarters became more imaginative—like the airborne "boat" of ING Group headquarters in Amsterdam, completed in 2002; or the glossy, curvy towers of Qatar International Islamic Bank, completed in 2014. They denote not only financial power and security, but the very modern value of innovation.
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> The bank of the future probably won't look like this at all. Its critical architecture will be built on ones and zeros, quietly inhabiting technology tools, not "bricks and mortar." Those ones and zeros will be transmitted from machine to machine—no need for a vault in the basement.

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banking experience. A typical large bank in Europe with more than 1,000 branches could expect to see a 50% lift in per-branch economics (lower costs plus higher revenues) through smart digital migration and branch network restructuring. Yet the pace of change in many markets remains glacial, and banks should not expect customers to migrate to digital all on their own. . . . While banks benefited from the early adoption of digital tools by more tech-savvy customers, banks now will need greater investment and focus to shift behavior of other groups of customers. Why do banks need to accelerate the digital transition? Consider a future customer like Kate, a late-20-something working in the gig economy in 2025. She manages multiple income streams and several loans, and just received a substantial inheritance. She interacts with her bank and pays for things mainly through voice-assisted mobile devices, using many digital tools and alerts to manage her money. But she relies on the branch for deeper financial advice and coaching—and she wants these different channels to work together seamlessly. . . . To deliver an experience that Kate and others will value, while also taking cost out of the branch network, leading banks are far outpacing laggards—in the US, for instance, at four times the rate. They have been following a clear, proven playbook along three complementary paths: [1] Making digital easy for customers to use, and actively coaching them to migrate; [2] Reconfiguring the branch network and formats; and [3] Raising employees' skills, equipping them for digitally infused service and sales, and connecting them as teams dedicated to specific aspects of the experience. While no bank has completed a transition along all three paths, leading banks have taken significant strides in each area, and they are already reaping benefits from their interventions").

Query whether what Bain was advocating is essentially a mirror image of the tragedy that the former CEO Richard Kovacevich unleashed at Wells? A careful review of the author's article about Wells may suggest similarities. *See* Timothy D. Naegele, *Wells Fargo: An American Banking Nightmare*, 136 BANKING L. J. 493 (October 2019) (Naegele October 2019) (https://naegeleblog.files.wordpress.com/2019/09/timothy-d.-naegele.pdf).

Given the much-touted advances in artificial intelligence (AI) and robo-advisory, the bank of the future could even, conceivably, be led by a robot CEO. "[The bank of the future] will be AI-driven," says Sitoyo Lopokoiyit, director of financial services at Safaricom, which launched one of the first mobile money-transfer services in Africa, M-Pesa. "The key [technologies] will be the smartphone, machine learning, AI, Big Data, robotics and chatbots."

Today, M-Pesa is joined by plenty of other upstarts in finance, called "challenger banks" or "neobanks" (a subgroup that is digital only, with no legacy IT). They are seeking to woo business from traditional banks. And there is a rising challenge from mammoth interlopers from other sectors, like Apple, Google, Alibaba and Tencent.

This new generation of banks—platforms or ecosystems, whatever you call them—are making transactions easier, faster and more transparent. They are literally plugging in different financial products (investments, savings, mortgages, currencies, cards, payments and lending) from a range of different third-party providers, to build the bank of the future.

"You can now build a new bank in six months, using technology from fintechs [companies that specialize in financial technology]," says Raj Rajgopal, president of business consultancy firm Virtusa's Digital Strategy Group and head of Virtusa's China Insights Group.

This sea change in finance is driven by technology, which is both expanding service capabilities and reshaping client expectations. Additional pressure comes from governments, which are pressing for "open banking" through vehicles such as the EU's Payment Services Directives (1 and 2). UK regulators fully embraced the spirit of PSD1, which paved the way for nonbanks to enter the payments market traditionally owned by the incumbent banks; and PSD2, which was drafted into law in January. As a result, the UK has the largest number of challenger banks in Europe. . . .

A huge part of the story is the rise of fintechs, which are encroaching on space traditionally occupied by bankers. Yet most challenger banks can only dream of reaching a big-bank customer base. Starling has tens of thousands of customers; N26, a leading mobile bank in Europe, has 850,000; Revolut has 1.5 million. Traditional banks number their customers in the tens of millions: Deutsche Bank (30 million), HSBC (38 million), or Bank of America (57 million).

Another huge new competitive factor is the encroachment of tech firms into finance. In the US, many predict that the bank of the future will

> arise at one or more of its tech giants, such as Google, Apple, Facebook or Amazon (GAFA). They already offer payment solutions (e.g., Amazon Pay and Google Pay) with massive customer bases—Amazon claims an active user base of some 250 million around the world. ApplePay had 127 million users worldwide at the end of 2017, and has been cutting deals with banks—including Chase, Citi, and Wells Fargo—for a piece (reportedly 0.15%) of each purchase made with an ApplePay app. The company explicitly aims to make ApplePay its customers' primary payment system. . . .
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> At the same time, legacy banks are not resting on their laurels. Another part of the story is the adaptations of traditional banks, embracing innovation and partnerships. Challenger banks claim to have a better understanding of consumers, while established banks boast solid customer bases and plenty of financial muscle. "Incumbent banks will have to work hard to remain relevant," says Ewan Macleod, chief digital officer at Nordea Bank in Denmark, "but there are questions for the challenger banks around reliance and trust." The banks that win the future will combine the best of both worlds. . . .
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> **Mobile with the Customer**
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> The bank of the future, it is widely assumed, will be able to maximize customer insight and revenue via Big Data analytics. For a glimpse of that future, look to China.
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> In China, mobile payments dwarf cash. They reached a whopping $8.6 trillion in 2016, according to eMarketer; and more than 90% of these payments were made using either Alipay, the payment arm of Ant Financial, which is owned by China's largest ecommerce platform, Alibaba; or TenPay, an integrated payment platform launched by Chinese entertainment giant Tencent. Alibaba and Tencent also have banks: MyBank and WeBank, respectively. . . .[23]

It has been said:

> Becoming digital is a complete transformation that requires a change to the bank's DNA. . . . In a world where Chinese citizens with Chinese bank accounts can conduct their whole life on Alipay and WeChat super apps while outsiders pay cash; where 47% of American consumers are still writing checks; where people in Africa can pay and obtain microloans on their mobile phones in an instant—the answer to the

[23] *See* https://www.gfmag.com/magazine/june-2018/bank-future ("The Bank Of The Future").

> age-old question to the *promised land*: "Are we there yet?" is unfortunately "No, not yet."[24]

The UK's *Economist* has added:

> Switching banks is rare. According to Novantas, only 8% of American customers switch bank in a given year, even though moving state often means moving bank. In Britain, where bank licences are national, only 4% do. Low churn is often cited as evidence that customers are satisfied, but it would be more accurate to say that they cannot envisage anything better, says Jason Bates of 11:fs, a British banking-technology consultancy. "People would have said they were satisfied with taxis until Uber came along. Then all of a sudden they didn't want to stand on a street corner holding their hand out in the rain."[25]

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[24] *See* https://www.paymentsjournal.com/the-future-of-banking/ ("The Future of Banking"—"From Asia to Europe, U.S. to Africa, and Australia to the Middle East, consumers are not only increasingly adopting digital—most are demanding it. . . . While it might seem trivial, banks of the future will be increasingly run by technology. With more consumers adopting digital products and services from leading big tech companies such as Apple and Amazon, they have come to expect the same seamless experience with banking as well. In the new digital era where people are spending more time than ever on their mobile devices, where retail foot traffic has dropped, where customers no longer visit bank branches, consumers prefer to bank at the comfort of their home or as they go about their day, when they want it, and how they want it. Mobile banking quickly became a table stake instead of nice-to-have, and the financial experiences expected from our applications have moved from reporting the past to predicting the future. To compete, financial institutions must reimagine banking itself within the context of our daily lives, our routines, our needs, our desires, and their impact on our future. Looking at corporate technology budgets may help to shed some light on the direction where some of the banks are transforming—and whether they are spending to survive, or spending to evolve. For example, J.P. Morgan's technology budget will grow to US $11.5 billion, much of which is slated for strategic investments, such as exploring quantum computing and developing new retail products. They are also opening a FinTech campus in Palo Alto in 2020, which further demonstrates their commitment to learning from and leveraging the technology platforms that influence much of their customers['] activities. Meanwhile, Bank of America's technology budget is said to be US $10 billion, of which, a third will be slated for 'new initiative investment spend.' Banks are not taking threats to their business model lightly. Their spending habits demonstrate that").

[25] *See* https://www.economist.com/technology-quarterly/2019/05/02/the-banking-revolution-is-great-for-customers ("The banking revolution is great for customers").

It should be noted that in the United States, "banking licenses" are issued by both the federal and state governments. National banks are chartered by the Treasury Department's Comptroller of the Currency ("OCC")—which charters, regulates and supervises all national banks and thrift institutions, and the federally-licensed branches and agencies of foreign banks in the United States.

See https://en.wikipedia.org/wiki/Office_of_the_Comptroller_of_the_Currency ("Office of

The article continues:

> Outside Asia, few have yet woken up to the arrival of new banking options, but there are signs that more are starting to. Britain's neobanks have managed to sign up millions of customers largely through word of mouth. McKinsey's annual digital-payments surveys used to find that banks were more trusted than tech firms. Now, Amazon is running neck-and-neck with banks. And Raddon's research into Gen Z Americans finds that two-thirds expect tech firms will change the way financial services are provided.
>
> The rise of fintechs and neobanks that act as marketplaces for other institutions' products presents incumbents in developed markets with a choice: are they willing to leave customer acquisition and service to the newcomers, or do they want to compete head-on? White-label

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the Comptroller of the Currency"—"The OCC regulates and supervises about 1,400 national banks, federally-licensed savings associations, and federally-licensed branches of foreign banks in the United States, accounting for more than two-thirds of the total assets of all U.S. commercial banks (as of March 2017). Other financial regulatory agencies like the OCC include the Federal Deposit Insurance Corporation (of which the Comptroller serves as a director), the Federal Reserve, the Consumer Financial Protection Bureau, and the National Credit Union Administration. The OCC routinely interacts and cooperates with other government agencies, including the Consumer Financial Protection Bureau, Financial Crimes Enforcement Network, the Office of Foreign Asset Control, the Federal Bureau of Investigation, the Department of Justice, and the Department of Homeland Security").

State financial institution regulatory bodies exist as well, which issue charters to financial institutions. Thus, America has what is referred to as the "dual banking system."

See, e.g., https://en.wikipedia.org/wiki/Bank_regulation_in_the_United_States ("Bank regulation in the United States"—"A bank's primary federal regulator could be the Federal Deposit Insurance Corporation, the Federal Reserve Board, or the Office of the Comptroller of the Currency. . . . Credit unions are subject to most bank regulations and are supervised by the National Credit Union Administration. . . . State regulation of state-chartered banks and certain non-bank affiliates of federally chartered banks applies in addition to federal regulation. State-chartered banks are subject to the regulation of the state regulatory agency of the state in which they were chartered. For example, a California state bank that is not a member of the Federal Reserve System would be regulated by both the California Department of Financial Institutions and the FDIC. Likewise, a Nevada state bank that is a member of the Federal Reserve System would be jointly regulated by the Nevada Division of Financial Institutions and the Federal Reserve") and https://en.wikipedia.org/wiki/History_of_banking_in_the_United_States ("History of banking in the United States"—"[America's] 'dual banking system' [means that n]ew banks may choose either state or national charters (a bank also can convert its charter from one to the other)").

Some governmental entities in the United States may seek to create banks of their own. *See, e.g.*, https://www.bankingdive.com/news/los-angeles-create-california-first-public-bank/564569/ ("LA plans to create California's first public bank").

banks, which carry out regulated financial services for other companies, show that focusing on products can work. But the margins are low. In retail banking 70% of shareholder value is typically captured by the customer-relationship and distribution channel, and just 30% by product manufacture, says Jan Bellens of ey, a consultancy.

If the incumbents want to fight, the customer relationship is theirs to lose. Most people still open a high-street account in their teens at a bank chosen by their parents, and caution may make them stay put. Regulators are often pro-incumbent, whether because they have been captured by lobby groups or because they fear big changes could cause financial instability. But banks would be unwise to depend on customer inertia and regulatory caution. If the alternatives are attractive enough, both may evaporate.

Adapting will be hard on incumbents, but customers have a lot to look forward to. The newcomers have lower costs and can therefore offer better value. As China shows, they can offer loans to people and small businesses that could not previously have been profitably served. And their arrival will push down account charges and fees for extras such as overdrafts and foreign exchange.

As Alibaba demonstrates, online retailers may not start out intending to offer financial services, but the logic of online commerce leads them in that direction. McKinsey's analysis suggests that once an online marketplace selling direct to consumers offers products in several categories and has a market share of at least 15–20% in its main category, it tends to move into payments. This, says Philip Bruno, who co-leads the consultancy's global payment practice, is not necessarily because it is seeking to increase revenues from payments or to reduce costs (though having its own payment system does allow it to avoid the "interchange" fees charged by card issuers). Rather, it allows a retailer to control the shopping experience from start to finish.

Chinese platforms show how it can be worth providing frequently used financial functions such as payments without making much from them—even, potentially, at a loss—if they act as a hook for consumer lending and advertising for related non-financial services, says Brian Ledbetter of McKinsey. This is the logic behind speculation that a Western tech giant like Amazon might team up with a bank to offer current accounts. The benefit to the retailer would be increased customer loyalty. Or accounts might be offered for a monthly fee, suggests Brett King, the author of "Bank 4.0: Banking Everywhere,

> Never at a Bank" and founder of Moven, one of America's handful of neobanks. Perks could include a rolling line of credit, discounts on purchases, or a rewards programme—all of which would boost the retailer's sales.
>
> Financial services will increasingly become links in value chains that also contain non-financial services, predicts Mr King. Mortgages, for example, could sit in the "home-buying chain", offered on a platform that also displayed property listings and arranged viewings, surveys, conveyancing and home removals.
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> The biggest benefit for customers will come from a rethink of what banks are supposed to do. As traditionally conceived, says Ted Moynihan of Oliver Wyman, a financial consultancy, what a bank offers its retail customers is a way to store, spend and borrow money. It has not been a core part of its job to help them decide whether a purchase or loan will make them happier or wealthier. Often it will not. Research by the consultancy into credit for the American mass market shows that 30% of those who had taken out revolving credit regretted doing so; just 10% were glad they had.
>
> **The pursuit of happiness**
>
> Those loans may have been at market-beating rates. And they may have been "good", as defined by the industry—that is, repaid on time. But that is not how they look to customers who wish they had not borrowed. And it is not how a neobank or fintech firm seeking to act as a platform for third-party financial products can afford to view them, either. To convince customers that it is acting in their best interests, it must do more than sell products that are affordable, or even at the keenest rates: it must sell them what they actually need. The most formidable challenge the newcomers pose to the rich world's banking incumbents is not their lower costs or greater technological prowess. It is that their business model requires them to put customers' needs first.[26]

In the United States, vis-à-vis putting customers' needs first, three factors may be paramount: (1) younger Americans are conversant with and dependent on smartphones and other electronic devices, which many of them began using almost as infants; (2) many have incurred *massive* student loans and other

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[26] *See* https://www.economist.com/technology-quarterly/2019/05/02/the-banking-revolution-is-great-for-customers ("The banking revolution is great for customers").

debt—or their parents have—which may encumber them for years to come;[27] and (3) retail spending patterns have changed dramatically, making it increasingly difficult for banks and other traditional lenders to pick the winners and the losers.[28]

It has been said by Alan McIntyre, senior managing director and head of the global banking practice at Accenture, that "[s]ome markets . . . are already over the top of the digital disruption roller coaster and picking up speed on the downslope."[29] Whether this is true or not remains to be determined.[30] Also,

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[27] *See, e.g.*, https://www.forbes.com/sites/zackfriedman/2019/02/25/student-loan-debt-statistics-2019/ ("Student Loan Debt Statistics In 2019: A $1.5 Trillion Crisis"—"There are more than 44 million borrowers who collectively owe $1.5 trillion in student loan debt in the U.S. alone. Student loan debt is now the second highest consumer debt category—behind only mortgage debt—and higher than both credit cards and auto loans. Borrowers in the Class of 2017, on average, owe $28,650, according to the Institute for College Access and Success").

These massive student loans have kept many U.S. colleges afloat, and allowed them to keep raising tuitions and other costs, instead of letting the market weed them out, and allowing many to fail and disappear. Indeed, it can be argued that traditional "bricks-and-mortar" colleges are anachronisms like checks and bank branches, and should be replaced by online teaching, which is much more cost efficient and effective, and more easily accessed from anywhere. Lectures in certain subjects can be taught once, and posted on YouTube or other platforms, which would reduce the need for college professors dramatically, especially those who are tenured.

[28] *See, e.g.*, https://www.barrons.com/articles/investors-need-to-rethink-retail-amid-a-shakeout-in-stores-51564786976 ("The Retail Reckoning Has Only Just Begun"—"If Japan in the 1990s was home to zombie banks, the U.S. today is a nation of zombie stores").

[29] *See* https://www.forbes.com/sites/alanmcintyre/2019/01/07/10-major-trends-driving-banking-in-2019-bankings-evolution-accelerates/#58d3c7387050 ("10 Major Trends Driving Banking In 2019: Banking's Evolution Accelerates"—"Some markets . . . are already over the top of the digital disruption roller coaster and picking up speed on the downslope"—"**Banks will keep 'unbundling' their services. . . . Banks will be keen to justify a 'future premium.' . . . Banks will move to AI that won't nag. . . . The sun may begin setting on 'community banking.' . . . The Chinese will keep going mobile—pulling the rest of us along, too. . . . Fintechs are approaching a tipping point in the UK. . . . Banks will keep leaving legacy core systems behind. . . . Banks keep pushing into the computing cloud. . . . Tech companies may finally show their banking hand. . . . Banks will stop all the loose talk about 'platforms.'**) and https://www.weforum.org/agenda/2016/02/what-will-the-bank-of-the-future-look-like/ (Taavet Hinrikus, Co-founder TransferWise: "What will the bank of the future look like?"—"Lionel Barber, the editor of the FT, summed it up at Davos: 'Nobody wants to be in banking, everyone wants to be in fintech'. Fintech—or financial technology—has reached the mainstream, but what does this mean for the banks? The Fourth Industrial Revolution is taking hold in banking. The rise of fintech came about over the last five years primarily as the result of five key developments: **1. Loss of trust in the global financial crisis of 2008**[.] . . . **2. Higher expectations**[.] . . . **3. The rise of the millennials**[.] . . . **4. The rise of the mobile internet**[.] . . . **5. Regulation that truly looks after the rights of the consumer**[.] . . . These five developments laid the foundations for change, providing enough impetus for the first wave of

will détente be achieved between the major American and global banks, and their non-bank competitors that are nipping at their heels, or will a "War of the Roses" occur, *mano a mano*.[31] And will Wells Fargo's prediction come true that

disruption to gain traction and proving the concept of an alternative to banks. New entrants will now come to a market where millions of potential customers have already turned to a non-bank technology company for their banking needs—and will expect more. Even those customers who don't currently need or use a fintech service will consider them as an alternative equal to or better than a bank").

[30] *See* https://www.forbes.com/sites/manishmadhvani/2019/02/13/the-future-of-banking-requires-balancing-old-and-new/#6d2213f74eb5 (Manish Madhvani is Co-Founder and Managing Partner of GP Bullhound: "The Future of Banking Requires Balancing Old and New"—"Over recent years, fewer customers are popping into bank branches, and more are logging onto mobile banking apps. Many have dispensed with wallets completely, because their smartphones do the same job, but better. Innovative start-ups, offering alternative banking models, become the new must-have accessory for trendy millennials. According to GP Bullhound's most recent Technology Predictions report, 91% of people surveyed prefer using a mobile banking app to visiting a physical branch of a bank. Banks are closing at an alarming rate—the consumer charity Which? found that the UK has lost nearly two-thirds of its bank and building society branches over the past 30 years, from nearly 21,000 in 1988 to only 7,000 at the end of 2018. Just last week, Santander announced it was closing 140 branches, necessitated by 'changes in how customers are choosing to carry out their banking.' And it's no surprise—banks don't offer a 24/7 service, customers are tired of long queues and archaic paperwork, and they're left with a feeling that they don't really have any control over their money. Plus, technology has allowed customers to make simple transactions—from checking their balance to transferring money—without having to go into branch. Consumers want to be able to check their balance before they buy another round of drinks or freeze a misplaced card; they want a breakdown of spending at the click of a button and to be able to save as easily as they spend. This is where bright and innovative banking start-ups step in: the likes of Monzo, N26, Monese and Revolut hardly need an introduction. On top of the convenience and digital perks, they offer lower international exchange rates and have even incorporated cryptocurrency trading. Other start-ups are growing at rapid rates by capitalising on consumer needs that larger players haven't fulfilled") and https://www.libertarianism.org/building-tomorrow/future-banking (Pascal Hügli: "The Future of Banking"—"How open banking will transform the financial industry").

[31] *See* https://en.wikipedia.org/wiki/Wars_of_the_Roses ("Wars of the Roses") and https://de.wikipedia.org/wiki/Mano-a-Mano ("Mano-a-mano") and https://www.thefreelibrary.com/Mano+a+mano%3A+rivalries+in+Spain+and+America+Hemingway+vs.+Faulkner+in...-a0191011218 ("Mano a mano: rivalries in Spain and America Hemingway vs. Faulkner in The Dangerous Summer") and https://www.forbes.com/sites/jimmarous/2018/08/27/future-of-banking-fintech-or-techfin-technology/#4922595f2d5d (Jim Marous: "The Future Of Banking: Fintech Or Techfin?"—"The banking industry is experiencing disruption at an increasing pace. Over the past few years, traditional financial institutions and non-traditional fintech firms have begun to understand that collaboration may be the best path to long-term growth. At the same time, big tech firms are offering financial services, creating techfin solutions. The rationale for collaboration is the ability to bring strengths of both banks and fintech firms together to create [a] stronger entity than either unit could bring on their own. For most fintech organizations, the

(Text continued on page 28)

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primary advantages are an innovation mindset, agility (speed to adjust), consumer-centric perspective, and an infrastructure built for digital. These are advantages that most legacy financial institutions don't possess. Alternatively, most banking institutions have scale, a stronger brand recognition and established trust. They also have adequate capital, knowledge of regulatory compliance and an established distribution network. According to the World Fintech Report 2018 from CapGemini and LinkedIn, in collaboration with Efma, 'Most successful fintech firms have focused on narrow functions or segments with high friction levels or those underserved by traditional financial institutions, but have struggled to profitably scale on their own. Traditional financial institutions have a vast customer base and deep pockets, but with legacy systems holding them back.' The challenge will be the ability to establish an environment where collaboration can flourish as opposed to stifling the beneficiary attributes of either partner. **Fintech vs. Techfin**[.] The difference between fintech and techfin is based on the origin of the underlying organization. Fintech usually references an organization where financial services are delivered through a better experience using digital technologies to reduce costs, increase revenue and remove friction. A basic example of a fintech offering is the mobile banking services that most traditional banks offer. More commonly, fintech refers to non-traditional financial offerings such as PayPal, Zelle and Venmo in the U.S. and digital-only Starling Bank, Monzo and Revolut in the U.K. Alternatively, techfin usually references a technology firm that finds a better way to deliver financial products as part of a broader offering of services. Examples of techfin companies include Google, Amazon, Facebook and Apple (GAFA) in the U.S. and Baidu, Alibaba & Tencent (BAT) in China. A couple years ago, Jack Ma, technology visionary and co-founder and executive chairman of Alibaba Group, described the difference between Fintech and Techfin. '*There are two big opportunities in the future financial industry. One is online banking, where all the financial institutions go online; the other is internet finance, which is purely led by outsiders.*'—**Jack Ma**[.] In both instances, success of these organizations in finance will be based on the ability for the institution to collect and analyze massive data sets, learn from the insights to improve personalization and digital engagement in real-time, and expand offerings in response to consumer needs. **A New Competitive Landscape**[.] Even with the best collaboration, the ability for legacy financial institutions to compete in the future banking ecosystem will be challenged by the techfin powerhouses. Built on digital platforms, these huge technology organizations are efficient and have already found ways to reduce operational costs and monetize their business models. According to Bain, 'Many of the tech giants possess the ingredients of success: digital prowess, large customer bases, organizations well versed in improving the customer experience, and ample leeway to extend their corporate brands into banking.' More concerning may be that some of these firms are generating a level of trust previously reserved only for traditional banks and credit unions. As a result, an increasing percentage of consumers are willing to use financial products offered from these non-traditional firms—especially where the experience is superior to that offered by legacy organizations. A potential to shift revenues from other businesses (such as retail) to enhance banking offerings can completely change the competitive equilibrium. It is expected that demand for products and services from fintech firms and large tech companies will only increase as more consumers become familiar with new digital offerings. This is especially true for younger consumers, who have grown up with digital devices. '*Techfin firms start with technology and wonder how that can be used for commerce and trade. Alternatively, fintech firms start with existing trade structures and wonder how to make them cheaper and faster with technology. I liken it to fintech firms are making faster horses whereas techfin firms are working with airplanes.*'—**Chris Skinner**[.] More and more, people will get annoyed when they're forced by

AI or robots will steal 200,000 banking jobs within the next ten years, a figure that may be understated by a wide margin.[32]

Conclusion

Clearly Wells Fargo ran amok and engaged in massive misconduct *and criminality*. It was described aptly as "a rudderless ship lost at sea," and it was permitted to become—and did in fact become—an unmitigated disaster, and a rogue and lawless financial institution, the largest in the United States if not the world. This happened because America's banking and financial institution regulators were "asleep at the switch," and were not doing their jobs.

Nonetheless, it might have been much worse; and a banking and financial tragedy of epic proportions might have occurred, sending shock waves around the globe. Thankfully, this did not happen—because of the strength of the United States and its often-maligned regulatory system, even when not performing at its best. As America and other countries move into the "brave new world" of "bankless banking," query whether every conceivable financial problem of the past may surface again and again: runs on banks and their financial alter egos; panics around the globe; regulators who are helpless to "put out the fires" spreading everywhere; and a global loss of confidence in the "system"?

As discussed at the outset of this article, all of this may be set in motion—or at least exacerbated—by events over which *none* of us have any control. Indeed, a review of past events in economic history is eye-opening and shocking for those who are naïve about what can happen in the future.[33] Will we witness a replay of 2008, or *far far* worse? Time will tell.[34]

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bank policies and processes to use non-digital channels for everyday banking business. Traditional banking organizations cannot rely on providing checking accounts and loans only. Competitors are already eating away at significant parts of the banking value chain with the potential of limiting banks to becoming nothing more than utilities. The future of the banking industry will depend on its ability to leverage the power of customer insight, advanced analytics and digital technology to provide services that help today's tech-savvy customers manage their finances and better manage their daily lives. As financial and technology organizations embrace a broader view of banking, offering both banking and non-banking services, the ultimate winner will be the consumer regardless of which provider they select").

[32] *See* https://www.forbes.com/sites/jackkelly/2019/10/08/wells-fargo-predicts-that-robots-will-steal-200000-banking-jobs-within-the-next-10-years/ ("Wells Fargo Predicts That Robots Will Steal 200,000 Banking Jobs Within The Next 10 Years").

This is "rich" coming from the disgraced bank where 5,000 lost their jobs, and then were "blacklisted" and prevented from getting jobs elsewhere. *See supra* n.5.

[33] *See supra* n.15.

[34] *See, e.g., supra* n.13.