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**FOREWORD: ARTHUR E. WILMARTH, JR.,
A SCHOLAR OF UNCOMMON
CONVICTION, INTEGRITY, AND
BOLDNESS**

PATRICIA A. MCCOY*

The year 1992, when I entered academe, was a paradoxical time to become a banking law scholar. Even though the nation was emerging from a recession and the years-long savings-and-loan crisis of the 1980s, the mainstream banking-law field was in the thrall of neoclassical law and economics. The Chicago School reigned, and leading bank regulatory scholars regularly opposed government intervention based on theoretical assertions of market discipline with scant regard for empirical support. Scholars who aired concerns about market failures in banking were routinely ignored (especially women and people of color) or worse.

Still, a few of these dissenters labored on in solitude, powered by the strength of their concerns and undeterred by the mainstream's intellectual hegemony. No one was more dogged or fearless in that respect than Professor Arthur E. Wilmarth, Jr., the honoree of this Festschrift. In the process, Professor Wilmarth not only laid the intellectual groundwork for the reemergence of financial stability law, but he opened the door for successive waves of newer scholars who, by his side, reinvigorated the field.

After years of distinguished service as a partner at Jones Day's Washington, D.C., office, Professor Wilmarth launched his legal teaching career at George Washington University Law School in 1986, with the savings-and-loan crisis in full swing. At

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that time, lax state banking laws came under attack for allowing reckless lending practices by state-chartered banks and for bankrupting the federal deposit insurance funds in the process.¹ That criticism was justified, but one of the leading policy proposals to address it—broad-brush preemption of state banking law—was not. Swimming upstream from the start, Professor Wilmarth warned that wholesale federal preemption would be a mistake in periods when federal laws were weak and would further diminish the states as laboratories of experimentation. In a trio of early works, he defended the virtues of federalism, the dual-banking system, and the continued relevance of state banking laws.² Together, these three articles heralded several enduring traits of Professor Wilmarth’s scholarship: astute analysis, a balanced approach that is scrupulously nonpartisan in nature, and a keen recognition of unanticipated consequences—of the too-seldom asked “what if?” In a telling show of prescience, his early works foreshadowed the later war over the 2004 preemption rule by the Office of the Comptroller of the Currency³ and the ensuing Supreme Court litigation.⁴ In another signature theme, Professor Wilmarth’s early dual-banking pieces further anticipated how broad federal preemption would fuel momentum toward increased bank consolidation and the specter of too-big-to-fail (TBTF).

By the mid-1990s, the deregulatory campaign had developed strong bipartisan support and a baffling number of cross-currents and riptides. During the previous decade, crass rent-seeking had been one of the dominant reasons for loosening state activities restrictions and banking supervision. At the start of the 1990s, rent-seeking remained as alive as ever, but other, more nuanced arguments for deregulation had emerged. Supporters assiduously maintained, for instance, that banking laws

1. ARTHUR E. WILMARTH, JR., TAMING THE MEGABANKS: WHY WE NEED A NEW GLASS-STEAGALL ACT 152–53 (2020).

2. Arthur E. Wilmarth, Jr., *The Expansion of State Bank Powers, the Federal Response, and the Case for Preserving the Dual Banking System*, 58 FORDHAM L. REV. 1133 (1990); Arthur E. Wilmarth, Jr., *The Original Purpose of the Bill of Rights: James Madison and the Founders’ Search for a Workable Balance Between Federal and State Power*, 26 AM. CRIM. L. REV. 1261 (1989); Arthur E. Wilmarth, Jr., *The Case for the Validity of State Regional Banking Laws*, 18 LOY. L.A. L. REV. 1017 (1985).

3. Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904 (Jan. 13, 2004) (codified at 12 C.F.R. pts. 7, 34).

4. *Cuomo v. Clearing House Ass’n*, 557 U.S. 519 (2009); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007).

had fallen behind the times and required modernization in order to accommodate new business realities.

One example of the modernization drumbeat was in response to advances in air travel and electronic communications, which allowed banks to conduct business over state lines. With the forces in favor of dismantling geographic restrictions almost inexorable, it came as no surprise that the cry of modernization was used to justify the Riegle-Neal legislation authorizing interstate banking in 1994.⁵ Ever keen to the impetus for change, Professor Wilmarth anticipated the rise of nationwide banks before Riegle-Neal's passage. In a series of seminal works between 1992 and 1995, he predicted the dangers that bank consolidation posed in terms of concentrated power, influence, and risk to the larger financial system.⁶

The modernization campaign also derived leverage from the disintermediation of banking, hastened in part by securities innovations such as money market mutual funds and corporate bond offerings. In the late 1970s and early 1980s, traditional bank depositors had closed their deposit accounts in droves and transferred their balances to money market mutual funds at securities broker-dealers in search of higher yields.⁷ Around the same time, traditional corporate borrowers turned from banks to securities underwriters for their borrowing needs to lower their cost of debt. In both cases, customers left banks for the type of securities underwriting products that the Glass-Steagall Act of 1933 had nixed for commercial banks.⁸ Against the backdrop of these product innovations, banks and federal banking regulators—most notably the Federal Reserve Board and the Office of the Comptroller of the Currency—blamed the Glass-Steagall Act for forcing the commercial banking industry to compete with securities firms with one arm tied behind its back.

5. Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (codified at scattered sections of 12 U.S.C.).

6. Arthur E. Wilmarth, Jr., *Too Good to Be True? The Unfulfilled Promises Behind Big Bank Mergers*, 2 STAN. J.L. BUS. & FIN. 1 (1995); Arthur E. Wilmarth, Jr., *The Potential Risks of Nationwide Consolidation in the Banking Industry: A Reply to Professor Miller*, 77 IOWA L. REV. 1133 (1992); Arthur E. Wilmarth, Jr., *Too Big to Fail, Too Few to Serve? The Potential Risks of Nationwide Banks*, 77 IOWA L. REV. 957 (1992).

7. WILMARTH, *supra* note 1, at 153–55.

8. 12 U.S.C. §§ 24 (Seventh), 335, 378(a)(1). See generally Banking (Glass-Steagall) Act of 1933, Pub. L. No. 73-66, § 20, 48 Stat. 162, 188–89 (codified at 12 U.S.C. § 377) (repealed in part 1999).

The campaign to repeal Glass-Steagall in the name of modernization intersected with another rationale for deregulation, namely bank solvency. Proponents of repeal laid the disintermediation of deposits and commercial lending at Glass-Steagall's door and argued that it had destabilized banks.⁹ According to these proponents, competition from money market mutual funds had exerted further pressure on Congress to repeal interest caps on savings and NOW (negotiable order of withdrawal) accounts,¹⁰ which had then pushed depository institutions into riskier lending to pay higher yields on deposits. As Exhibit A, advocates pointed to the waves of thrift and bank failures in the 1980s and early 1990s.

While the supporters of repeal were correct in their concerns about the stability of the banking industry, their solution was debatable. The answer, in their view, was to knock down the wall between securities underwriting and commercial banking to allow the formation of universal banks that could expand into more profitable activities. As securities firms and insurance underwriters came to appreciate the benefits of merging with banks, support for repeal coalesced and the quest for modernization reached its apotheosis with the dismantling of Glass-Steagall in the Gramm-Leach-Bliley Act in 1999.¹¹

The lead-up to the passage of Gramm-Leach-Bliley was a time of industry might, and it abounded with rose-tinted glasses. Professor Wilmarth was one of the few observers around this time to point out the fallacy of equating short-term profits with solvency.¹² He forcefully argued that "the motivations for a

9. WILMARTH, *supra* note 1, at 150, 153–55, 180–82; Wilmarth, *The Expansion of State Bank Powers*, *supra* note 2, at 1141–43.

10. See sources cited *supra* note 9; Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (removing the Federal Reserve Board of Governors's power to set maximum interest rates for deposit accounts).

11. Gramm-Leach-Bliley Act of 1999, Pub. L. No. 106-102, § 101, 113 Stat. 1338, 1341 (codified as amended in scattered sections of 15 U.S.C.) (repealing 12 U.S.C. § 377 (1933)).

12. Arthur E. Wilmarth, Jr., *How Should We Respond to the Growing Risks of Financial Conglomerates?*, in *BANKING LAW: FINANCIAL MODERNIZATION AFTER GRAMM-LEACH-BLILEY* 65 (Patricia A. McCoy ed., 2002); Arthur E. Wilmarth, Jr., *The Transformation of the U.S. Financial Services Industry, 1975–2000: Competition, Consolidation, and Increased Risks*, 2002 U. ILL. L. REV. 215; Arthur E. Wilmarth, Jr., *Controlling the Risks of Expanded Bank Powers: Does the 'Narrow Bank' Concept Provide a Solution?*, 1 GEO. WASH. U. CORP. & BUS. L.J. 8 (1999).

probable outcome of financial conglomeration are very different.”¹³ Gramm-Leach-Bliley, in his view, had championed “the exclusive club of ‘too big to fail’ institutions.”¹⁴ As a result of the 1999 legislation, “major financial conglomerates [became] largely insulated from market discipline and regulatory oversight, and they [gained] perverse incentives to take excessive risks at the expense of the federal ‘safety net’” for financial institutions.¹⁵ Instead of solvency, the increased profit-making opportunities that Gramm-Leach-Bliley bestowed on financial holding companies went hand in hand with heightened risks, posing peril to TBTF banks and the financial system writ large.

During this point in the late 1990s and early 2000s, Professor Wilmarth was the lone voice in the wilderness calling for the dismantling of universal banks. While others quibbled about aspects of Gramm-Leach-Bliley, no one else had the conviction and foresight to warn of the seeds of destruction that the 1999 legislation had sown. To the extent he attracted mainstream attention, he was dismissed as a Cassandra. Mostly, though, he was ignored.

In the meantime, law schools had hired some newer banking law specialists in the wake of the 1980s savings-and-loan crisis, and a number of these junior faculty reached out to Professor Wilmarth after reading his critiques. These early encounters were the start of many rich professional relationships, made possible by his generosity as friend and mentor. I, for one, will be forever indebted to him for his unending support of my career. Professor Wilmarth’s scholarly largesse made itself known in countless ways. He was (and remains) always available to read drafts and to interact deeply with colleagues’ ideas. He met with banking law scholars over coffee or dinner where he held forth, with deep thought, on the under-appreciated intricacies and frailties of the financial system. At the same time, he was open to and intrigued by new ideas. He championed our works and provided detailed recommendations when we applied for jobs at other schools. He organized conferences and invited us to speak at them. As a colleague, he was a prince.

I doubt he thought of his mentorship this way, modest as he is, but in the process, Professor Wilmarth fostered a school of

13. Wilmarth, *The Transformation of the U.S. Financial Services Industry*, *supra* note 12, at 215.

14. *Id.*

15. *Id.*

new scholars who were attuned to, and warned of, mounting risks in the financial system. Before 2008, these scholars, including myself, experienced much of the same cold shoulder from the establishment that he had known throughout his career. But starting with the 2008 financial crisis, there was a small but growing circle of financial stability scholars to draw on for inspiration and mutual support. More importantly, this circle worked to spread word of burgeoning financial risks.

That's not to say that spreading the word was easy. As securities firms and commercial banks rushed to ink mergers in the wake of Gramm-Leach-Bliley, megabanks exploded in size. At the same time, the 2000 election of President George W. Bush ushered in a new phase of deregulation that was even more aggressive than its predecessor in the 1990s. The extent of this deregulation was especially noticeable with respect to subprime mortgage loans. During the Bush Administration, federal bank regulators touted the mantra "profits equal solvency" to blow open the door to subprime activities by insured banks and thrifts and to cripple safety and soundness regulation in the process.¹⁶

In this environment, prior to 2008, it was almost impossible for academics concerned about growing risk in the financial system to be heard. Industry critics belittled proposals to restore regulation, and federal regulators, who were in bed with industry, were obdurately deaf to calls for reform.

Undeterred, Professor Wilmarth took the long view and astutely used that period to document the unfolding regulatory fiasco and its historic antecedents. In one line of inquiry, he explored how the controversial 2004 rule by the Office of the Comptroller of the Currency preempting state antipredatory lending laws dangerously relaxed subprime lending standards and further fueled the growth of TBTF national banks.¹⁷ Another important line of publications during this time explored

16. KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS 187–205 (2011).

17. See Arthur E. Wilmarth, Jr., *OCC v. Spitzer: An Erroneous Application of Chevron that Should Be Reversed*, 86 BUREAU NAT'L AFFS. BANKING REP. 379 (2006); Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Threaten to Undermine the Dual Banking System, Consumer Protection, and the Federal Reserve Board's Role in Bank Supervision*, in PROCEEDINGS OF THE 42ND ANNUAL CONFERENCE ON BANK STRUCTURE AND COMPETITION 102 (2006); Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. L. 225 (2004).

the historic roots of systemic risk in the United States and their genesis in the mixing of commercial banking, investment banking, and commerce.¹⁸ Of particular concern to Professor Wilmarth was the unholy alliance between the largest U.S. commercial banks and their securities underwriting affiliates in underwriting subprime mortgages and securitizing them for sale to bondholders around the globe.

Tragically, Professor Wilmarth's predictions came to pass with the near collapse of the world's financial system in fall 2008.¹⁹ In the aftermath, even the fiercest holdouts against bank regulation admitted they had been wrong.²⁰ Meanwhile, Professor Wilmarth finally gained recognition for tirelessly flagging, years in advance, the Pandora's box of dangers that Gramm-Leach-Bliley and the larger deregulatory ethos had released. The newest generation of banking law scholars, hired after 2008, flocked to his writings for insights. Conference invitations came rolling in and the Financial Crisis Inquiry Commission recruited him for his lawyerly acumen and deep expertise.

Post-2008, Professor Wilmarth was prolific as ever. The Dodd-Frank Act of 2010 contained provisions inspired by many of his insights, most importantly its recognition of systemic risk, its reinvigoration of state consumer protection laws, and its strong federal measures for consumer financial protection. Some of his works after the crisis engaged with those provisions.²¹ But

18. Arthur E. Wilmarth, Jr., *Conflicts of Interest and Corporate Governance Failures at Universal Banks During the Stock Market Boom of the 1990s: The Cases of Enron and WorldCom*, in CORPORATE GOVERNANCE IN BANKING: A GLOBAL PERSPECTIVE 97 (Benton E. Gup ed., 2007); Arthur E. Wilmarth, Jr., *Wal-Mart and the Separation of Banking and Commerce*, 39 CONN. L. REV. 1539 (2007); Arthur E. Wilmarth, Jr., *Controlling Systemic Risk in an Era of Financial Consolidation*, in 3 CURRENT DEVELOPMENTS IN MONETARY AND FINANCIAL LAW 557 (2005); Arthur E. Wilmarth, Jr., *Did Universal Banks Play a Significant Role in the U.S. Economy's Boom-and-Bust Cycle of 1921-33?: A Preliminary Assessment*, in 4 CURRENT DEVELOPMENTS IN MONETARY AND FINANCIAL LAW 559 (2005); Arthur E. Wilmarth, Jr., *Does Financial Liberalization Increase the Likelihood of a Systemic Banking Crisis? Evidence from the Past Three Decades and the Great Depression*, in TOO BIG TO FAIL: POLICIES AND PRACTICES IN GOVERNMENT BAILOUTS 77 (Benton E. Gup ed., 2003).

19. ENGEL & MCCOY, *supra* note 16, at 99–121.

20. See, e.g., *id.* at 193–94 (quoting Alan Greenspan); RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION (2009).

21. Arthur E. Wilmarth, Jr., *The Financial Services Industry's Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31 REV. BANKING & FIN. L. 881 (2012); Arthur E. Wilmarth, Jr., *The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services*, 36 J. CORP. L. 893

the capstone of his life's work was his quest to solve TBTF once and for all.

Despite his support for many aspects of Dodd-Frank, Professor Wilmarth criticized the legislation in other major respects for settling for half measures. He faulted Congress, through Dodd-Frank, for designing a bank resolution system for the largest, systemically risky banks that would shift the costs of failed megabanks to ordinary citizens.²² His biggest complaint, however, concerned Dodd-Frank's failure to address the dangers of universal banks and their key role in the 2008 financial crisis.²³ In his trenchant critique, he maintained that Dodd-Frank's reliance on "hundreds of complex and technical reforms by regulators who were subject to constant lobbying from universal banks" did not "solve[] the TBTF problem" and did not "significantly reduce[] the systemic dangers posed by universal banks and large shadow banks."²⁴

In articles and chapters after 2008, Professor Wilmarth explored a number of solutions to the TBTF problem. Some of his works proposed limiting the federal financial safety net to "narrow banks" and moving all short-term money markets inside those banks.²⁵ Another important piece tackled the persistence

(2011). Another chapter in a related vein applauded the Supreme Court decision that accorded visitatorial powers to the states to enforce their fair lending laws against national banks. Arthur E. Wilmarth, Jr., *Cuomo v. Clearing House: The Supreme Court Responds to the Subprime Financial Crisis and Delivers a Major Victory for the Dual Banking System and Consumer Protection*, in *THE PANIC OF 2008: CAUSES, CONSEQUENCES AND IMPLICATIONS FOR REFORM* 295 (Lawrence E. Mitchell & Arthur E. Wilmarth, Jr. eds., 2010).

22. Stephen J. Lubben & Arthur E. Wilmarth, Jr., *Too Big and Unable to Fail*, 69 FLA. L. REV. 1205 (2017); Arthur E. Wilmarth, Jr., *SPOE + TLAC = More Bailouts for Wall Street*, 35 BANKING & FIN. SERVS. POL'Y REP. 1 (2016); Arthur E. Wilmarth, Jr., *The Financial Industry's Plan for Resolving Failed Megabanks Will Ensure Future Bailouts for Wall Street*, 50 GA. L. REV. 43 (2015).

23. Arthur E. Wilmarth, Jr., *The Road to Repeal of the Glass-Steagall Act*, 17 WAKE FOREST J. BUS. & INTELL. PROP. L. 441 (2017); Arthur E. Wilmarth, Jr., *Prelude to Glass-Steagall: Abusive Securities Practices by National City Bank and Chase National Bank During the "Roaring Twenties"*, 90 TUL. L. REV. 1285 (2016); Arthur E. Wilmarth, Jr., *Citigroup: A Case Study in Managerial and Regulatory Failures*, 47 IND. L. REV. 69 (2014); Arthur E. Wilmarth, Jr., *The Dodd-Frank Act: A Flawed and Inadequate Response to the Too-Big-to-Fail Problem*, 89 OR. L. REV. 951 (2011).

24. WILMARTH, *supra* note 1, at 353.

25. Arthur E. Wilmarth, Jr., *Narrow Banking as a Structural Remedy for the Problem of Systemic Risk: A Comment on Professor Schwarcz's Ring-Fencing*, 88 S. CAL. L. REV. POSTSCRIPT 1 (2014); Arthur E. Wilmarth, Jr., *Narrow Banking: An Overdue Reform that Could Solve the Too-Big-to-Fail Problem and Align US and UK Financial Regulation of Financial Conglomerates (Part I)*, 31 BANKING & FIN.

of agency capture and regulatory inaction.²⁶ But his most far-reaching proposal was (and is) to reinstate the Glass-Steagall Act.²⁷

Professor Wilmarth's decades-long work on universal banks and their dangers culminated in his magnum opus, *Taming the Megabanks: Why We Need a New Glass-Steagall Act*, published in 2020.²⁸ His scholarship had always been ambitious in its erudition and depth, but *Taming the Megabanks* exceeds the already impressive reach of his prior works. Part history, part policy prescription, Professor Wilmarth's book surveys the emergence, downfall, and reappearance of universal banks in the United States, starting in the late nineteenth century. One of the deepest rewards of his book consists of his deep dive into America's first experience with universal banks and the resulting devolution into disaster. His dissection of the events leading up to the stock market crash of 1929, when universal banks became entangled in securities underwriting and trading and supported those activities with reckless loans, reveals unnerving parallels to the catastrophic underwriting of private-label mortgage-backed securities by universal banks in the lead-up to 2008.

According to Professor Wilmarth, banking systems in the United Kingdom and Canada did not collapse in the 1930s, unlike in the United States, because both countries maintained a legal wall separating commercial banks from securities underwriting. Congress learned from that experience and erected such a wall in the United States with the Glass-Steagall Act in 1933. Glass-Steagall ushered in forty-plus years of stability in the U.S. banking system. Professor Wilmarth explained why Glass-

SERVS. POL'Y REP. 1 (2012); Arthur E. Wilmarth, Jr., *Narrow Banking: An Overdue Reform that Could Solve the Too-Big-to-Fail Problem and Align US and UK Financial Regulation of Financial Conglomerates (Part II)*, 31 BANKING & FIN. SERVS. POL'Y REP. 1 (2012). As Professor Wilmarth described: "Narrow banking would require deposit-taking banks owned by financial conglomerates to limit their assets to cash and marketable, short-term debt obligations, such as government securities, commercial paper, and other money market instruments eligible for investment by money market mutual funds. Narrow banks could not accept uninsured deposits or issue other uninsured liabilities." Wilmarth, *Narrow Banking as a Structural Remedy*, *supra*, at 8.

26. Arthur E. Wilmarth, Jr., *Turning a Blind Eye: Why Washington Keeps Giving In to Wall Street*, 81 U. CIN. L. REV. 1283 (2013).

27. WILMARTH, *supra* note 1, at 335–56.

28. *Id.*

Steagall produced that long spell of freedom from financial crises:

An important reason for that era's financial stability was that problems occurring in one sector of the financial system were much less likely to have contagious spillover effects on other sectors. Regulators could address financial disruptions with targeted responses that did not require massive bailouts of the entire financial system. In addition, regulators could mobilize financial institutions in one sector to help troubled institutions in another sector.²⁹

Eventually, technological innovations overtook Glass-Steagall, however, and enabled securities firms to out-compete banks in their traditional domains of corporate lending and deposits. *Taming the Megabanks* meticulously chronicles the response by banks and their federal regulators, which teamed up in the 1980s and 1990s to erode the walls between securities and banking by exploiting loopholes in the Glass-Steagall Act.³⁰ One of the most notable strengths of this discussion lies in its emphasis on dangers posed by the migration of short-term money markets to securities firms, outside of the deposit insurance perimeter. Prominent among these markets were overnight repo lending and money market mutual funds. The migration of both markets to securities firms exposed those firms to the same hazard of runs that commercial banks face from depositors and put pressure on the federal government to bail them out.³¹ Nevertheless, the push to dismantle Glass-Steagall overwhelmed such concerns about risk and led to Gramm-Leach-Bliley's enactment, which paved the way for the resurgence of universal banks in the United States.³²

With Gramm-Leach-Bliley having set the stage, Professor Wilmarth eerily shows how the history of universal banking in the interregnum between World War I and the Great Depression repeated itself in the years leading up to 2008. As he observes: "The subprime lending and securitization boom of the 2000s displayed many of the conflicts of interest and excessive risk-taking that characterized the credit boom and stock market bubble of

29. *Id.* at 3.

30. *Id.* at 148–69.

31. *Id.* at 153–57.

32. *Id.* at 170, 180–85, 192–95.

the 1920s.”³³ After the 2008 crisis, the United States had to bail out practically the entire financial system, from securities underwriters to insurers, “going far beyond [the] traditional practice of protecting banks and bank depositors.”³⁴

The bulk of academics who advocated major financial regulatory reforms post-2008 still believe that future systemic financial crises are inevitable, as are government bailouts. Professor Wilmarth does not. In *Taming the Megabanks*, he calls for a new Glass-Steagall Act to once again wall off investment banking from commercial banking.³⁵ Elements of his proposal echo the Glass-Steagall Act of 1933, particularly a ban on underwriting, dealing, and making markets by commercial banks and their affiliates in securities and insurance, except for government debt.³⁶

But Professor Wilmarth would go beyond the original Glass-Steagall in several important ways. He would close the loopholes in the original Glass-Steagall Act that allowed for private placements of securities.³⁷ He advocates additional measures to prevent exploitation of the financial safety net, including deposit insurance, discount window access, and implicit TBTF subsidies. One such measure would prohibit banks and their affiliates from entering into derivatives except in limited circumstances for purposes of hedging.³⁸ Another notable measure would proscribe nonbanks from funding their activities with deposit substitutes (i.e., short-term financial instruments that are payable in practice at par on demand or within ninety days of issuance).³⁹ Under his proposal, the only firms that could issue deposit substitutes would be chartered banks,⁴⁰ which presumably would pay to insure them through deposit insurance premiums.

These reforms, Professor Wilmarth argues, would help solve the TBTF problem by forcing the largest investment banks and commercial banks to shrink in size, reducing the threat they currently pose to the financial system.⁴¹ His reforms would address the political problem of regulatory inaction by imposing binding

33. *Id.* at 3.

34. *Id.* at 4.

35. *Id.* at 335–56.

36. *Id.* at 337.

37. *Id.*

38. *Id.* at 339.

39. *Id.* at 341–42.

40. *Id.* at 342–44.

41. *Id.* at 344.

reforms on financial companies and regulators. In the process, a new Glass-Steagall Act would enable regulators to curtail runs, improve the Federal Reserve's ability to conduct monetary policy, reduce the burden posed by bailouts on government debt, and ensure ex ante funding for future bank failures in the form of deposit insurance premiums.⁴² Beyond that, Professor Wilmarth predicts that renewed rivalries among securities firms, insurers, and commercial banks would tamp down the political influence of today's universal banks.⁴³

Ever the contrarian, Professor Wilmarth's proposal for a new Glass-Steagall is still too much for many to stomach. Numerous otherwise sympathetic readers (not to mention Wall Street and its lobbying forces on K Street) shrink away from his bold structural reforms. Yet, unlike in the 1990s, his ideas have recently gained traction in high quarters. In 2016, the platforms for the Democratic and Republican parties both supported restoring Glass-Steagall. The following year, U.S. Senators Elizabeth Warren (D-Mass.), John McCain (R-Ariz.), Maria Cantwell (D-Wash.), and Angus King (I-Maine), reached across the aisle to introduce the "21st Century Glass-Steagall Act."⁴⁴ While a new Glass-Steagall Act is not yet upon us, it has ascended to mainstream policy debate. I doubt that it would have reached this point but for Professor Wilmarth's powers of insight, vision, persuasion, and indefatigable persistence. Although he has retired from his faculty in name, Professor Wilmarth continues to fight for the enactment of a new Glass-Steagall Act. Our nation is better off for it.

42. *Id.* at 343–44, 354–55.

43. *Id.* at 348–49.

44. *Senators Warren, McCain, Cantwell and King Introduce 21st Century Glass-Steagall Act*, ELIZABETH WARREN (Apr. 6, 2017), <https://www.warren.senate.gov/newsroom/press-releases/senators-warren-mccain-cantwell-and-king-introduce-21st-century-glass-steagall-act> [<https://perma.cc/W3S6-GV8B>].