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The Role of Rival Litigation in Wilmarth's New Glass-Steagall

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INTRODUCTION

Art Wilmarth quips that he's like "your crazy uncle."[1] Rather than an uncle (crazy or otherwise), most scholars of financial regulation think of him as the "father" of banking law. No one knows more about banking law, its history and policy, than Art Wilmarth. I was fortunate enough to spend two years in an office directly below Art's at the George Washington University Law School. Despite the heft of Art's knowledge, his presence above my office felt less like a weight and more like a portal. Often, I would climb the back stairs to knock on Art's door in search of his wit and wisdom. During such chats, I couldn't help

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1. This remark typically precedes one of Art's prescient observations regarding the financial system.

but scan Art's office and observe the two- and three-foot stacks of paper that covered every surface. One might dismiss the stacks as clutter, but that couldn't be further from the truth. Mid-conversation, Art would reference a relevant article or paper while deftly plucking it out of one of those neat stacks and handing it to me for my edification. For me, those stacks of paper have come to represent the encyclopedic extent of Art's knowledge and understanding; it seems that everything he's ever seen, read, said, or written is at his fingertips, awaiting his retrieval. That Art shared his knowledge and mentored me for almost three decades comprises a highlight of my career.

In addition to the breadth and depth of Art Wilmarth's knowledge, his foresight is uncanny—he is always a step ahead of conventional wisdom. For example, Wilmarth's criticism of financial conglomerates[2] and warnings regarding their access to government subsidies[3] significantly predated the 2009 Financial Crisis, at which point such observations became common. Wilmarth's knack for foresight is second only to his skill in formulating proposals for reform. From preserving the dual banking system[4] to designing narrow bank proposals,[5] Wilmarth's recommendations for enhancements to the financial regulatory system span almost four decades.

Taming the Megabanks,[6] Wilmarth's recent book and the subject of this Article, is not the first time Wilmarth has suggested a separation of deposit-taking banking from the capital markets.[7] In this book, Wilmarth constructs a new Glass-Steagall Act[8] (hereinafter "new Glass-Steagall"), which is his

2. As early as 1992, Wilmarth warned of the adverse effects of consolidation of the banking industry. *See* Arthur E. Wilmarth, Jr., *Too Big to Fail, Too Few to Serve? The Potential Risks of Nationwide Banks*, 77 IOWA L. REV. 957, 983 (1992).

3. *See, e.g.*, 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 (2002).

4. 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, 1255–56 (1990).

5. 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, 7–10 (2014).

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

7. *See* Arthur E. Wilmarth, Jr., *The Road to Repeal of the Glass-Steagall Act*, 17 WAKE FOREST J. BUS. & INTELL. PROP. L. 441, 548 (2017).

8. *See* WILMARTH, *supra* note 6, at 335–36 (discussing the details of the proposal).

most comprehensive and detailed version of this proposal.[9] This Article amplifies one feature of the new Glass-Steagall proposal—the role of private litigation as a means of enforcement of the statute and, in particular, the question of standing of private petitioners in such suits. The role of private litigation under the new Glass-Steagall has been overlooked and I believe could have important implications for other proposals seeking to reform our system of financial regulation.[10]

Article II of the U.S. Constitution assigns the executive branch with the responsibility for enforcing[11] federal law.[12] Generally, the executive branch fulfills this responsibility through the work of the various federal agencies—the financial regulators[13] being relevant to this discussion. While this system of public enforcement of law may be an ideal manifestation of principles of separation of powers,[14] in reality, public enforcement is supplemented by private action.

The merits of public and private enforcement are the subject of considerable scholarly debate.[15] This Article focuses on private enforcement as a mechanism for addressing the problem of

9. *See* Kevin Wack, *A Renewed Call to Break Up Big Banks*, AM. BANKER (Feb. 16, 2021, 2:06 PM), https://www.americanbanker.com/news/a-renewed-call-to-break-up-big-banks [https://perma.cc/AT32-DHLG] (an interview with Arthur Wilmarth, Jr., regarding the forty years of thinking that led up to the new Glass-Steagall proposal).

10. In 2017, Senator Elizabeth Warren introduced the 21st Century Glass-Steagall Act of 2017, S. 881, 115th Cong. (2017) (a legislative proposal similar to the new Glass-Steagall). That bill did not include the standing features included in the new Glass-Steagall. For a discussion of various proposals to break up large banks, see Jeremy C. Kress, *Solving Banking's "Too Big to Manage" Problem*, 104 MINN. L. REV. 171, 175 (2019).

11. In this Article, I use the term "enforcement" in a general sense—that is, to refer to any agency action that fulfills an agency's mandate. Thus, enforcement in this general sense includes not only formal administrative enforcement, but also rulemaking and supervisory activities.

12. Article II provides that the president "shall take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3, cl. 5.

13. The list of financial regulators is a long one. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-175, FINANCIAL REGULATION: COMPLEX AND FRAGMENTED STRUCTURE COULD BE STREAMLINED TO IMPROVE EFFECTIVENESS 12 (2016). This Article focuses on the subcategory of agencies that serve as primary federal regulators for depository institutions. This includes the Office of the Comptroller of the Currency (OCC), the Board of Governors for the Federal Reserve System (the Federal Reserve), Federal Deposit Insurance Corporation (FDIC), and the National Credit Union Administration.

14. *See* Megan M. La Belle, *Public Enforcement of Patent Law*, 96 B.U. L. REV. 1865, 1874–75 (2016) (discussing the benefits of public enforcement).

15. For a survey of such literature, see *id.* at 1873–80.

underenforcement, or forbearance, by federal agencies.[16] Agencies exercise forbearance in enforcing the laws within their mandate, and such forbearance may not always be in the public interest. Various forces can lead federal agencies to fail to adequately enforce the law. Examples include lack of sufficient resources, industry or ideological capture, and partisan pressure, to name but a few.[17] Since public enforcement is imperfect, mechanisms for private enforcement of law can serve as an important gap filler.

The role of private enforcement of public law is an uneven one among financial regulators. Private litigation has played an important role in the enforcement of the federal securities laws since the Supreme Court recognized an implied private cause of action for violations of the anti-fraud provisions.[18] In contrast, courts have been unwilling to establish an implied private right of action under the federal banking laws.[19] Private litigation, however, played a significant role in the enforcement of the Glass-Steagall Act, the New-Deal-era restrictions that separated the financial industry into its three traditional roles: commercial banking, investment banking, and insurance underwriting. That private litigation—what I am calling "rival litigation"—targeted bank regulators with claims that they allowed banks to engage in activities that were ultra vires. Those suits, brought by the securities and insurance industries, slowed the unraveling of Glass-Steagall.[20] The regulatory regime that replaced Glass-Steagall has not produced similar rival litigation challenging agency action. Wilmarth's new Glass-Steagall seeks to lay the foundation for rival litigation, which would serve as a

16. Overly zealous enforcement presents a different but equally important problem that is beyond the scope of this discussion.

17. For further discussion of agency forbearance, see Heidi Mandanis Schooner, *Private Enforcement of Systemic Risk Regulation*, 43 CREIGHTON L. REV. 993, 1000–04 (2010).

18. *See* Kardon v. Nat'l Gypsum Co., 69 F. Supp. 512, 513–14 (E.D. Pa. 1946) (finding that the Securities Exchange Act of 1934 provided an implied private cause of action).

19. *See, e.g.*, Miller v. GE Capital Mortg. Servs., Inc. (*In re* Miller), 124 F. App'x. 152 (4th Cir. 2005) (finding no implied cause of action under 12 U.S.C. § 1715u(a), which was intended to regulate mortgagees, not to protect mortgagers); Smith v. Dearborn Fin. Servs., 982 F.2d 976 (6th Cir. 1993) (finding no private cause of action under the Federal Credit Union Act). *But see* Vega v. First Fed. Sav. & Loan Ass'n, 622 F.2d 918 (6th Cir. 1980) (finding an implied private cause of action under the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2609–10).

20. See *infra* Part I.

check on administrative agency power and better serve congressional intent.

Wilmarth's new Glass-Steagall would authorize firms from each financial sector to file lawsuits challenging regulatory actions that undermine the statutory boundaries between each sector. This aspect of the proposal derives from Wilmarth's observations regarding the courts' role in the unraveling of the original Glass-Steagall as described in Part I. That litigation history is one of a fierce battle between the banks who fought to break down statutory limitations on their activities and the securities and insurance firms who sought to maintain the balkanized system of finance. Part II describes how the new Glass-Steagall incorporates the lessons learned from that litigation history: turning industry competitors into private attorneys general.[21] Part III outlines the problem of agency forbearance, identifies rival litigation as a partial solution, and establishes the standing requirements for rival petitioners. The constitutional and statutory standing discussed in Part III sets the stage for Part IV, which examines how the new Glass-Steagall's standing language would impact future litigation. Not only is standing critical to the new Glass-Steagall, but standing is a key, often underappreciated, design feature of any financial regulatory regime. Part IV compares the new Glass-Steagall to the existing system and discusses how changes in the industry and differences in statutory drafting have weakened the private enforcement benefits that derive from rivalry between and among interest groups. This Article concludes by marveling at the elegant thoroughness of Wilmarth's new Glass-Steagall proposal. All in a day's work for the remarkable Art Wilmarth.

I. COURTS AND THE UNRAVELING OF GLASS-STEAGALL

The Glass-Steagall Act,[22] perhaps the most notorious banking law, was passed in the wake of the 1929 stock market crash.

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21. The reference to the "private attorney general" here is meant in a very general sense to amplify the potential for private litigation to advance public interests. An examination of the nature and effectiveness of the private attorney general function is beyond the scope of this discussion. For a comprehensive discussion, see William B. Rubenstein, *On What A "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129 (2004).

22. Banking Act of 1933 (Glass-Steagall Act), ch. 89, 48 Stat. 162 (codified as amended in scattered sections of 12 U.S.C.). For a brief overview of the provisions of Glass-Steagall, see Heidi Mandanis Schooner & Michael Taylor, *United Kingdom*

Congress was motivated to prevent commercial banks from engaging in underwriting and trading activities that were implicated in the crash.[23] Therefore, the provisions of Glass-Steagall prohibited commercial banks from engaging in most securities activities. The Gramm-Leach-Bliley Act of 1999 (GLBA) repealed key parts of Glass-Steagall, but Congress's role in the dismantling of Glass-Steagall was preceded by initiatives of the Federal Reserve and the Office of the Comptroller of the Currency (OCC) that significantly loosened the restrictions on banks' activities.[24] In 1987, the Federal Reserve allowed nonbank subsidiaries of bank holding companies to engage in securities activities.[25] In 1996, the OCC adopted a rule allowing national banks to acquire or establish a subsidiary that could engage in financial activities not permitted for a bank.[26] These agency actions set the stage for the merger of Citicorp, a commercial bank, and Travelers, an insurance and investment banking firm. The merger created Citigroup, the first universal bank in the United States since the 1930s.[27] The Federal Reserve approved the creation of Citigroup prior to the passage of GLBA,[28] which placed pressure on Congress to repeal Glass-Steagall.[29]

Taming the Megabanks recounts the decades of courtroom battles that predated the Citigroup denouement. That history has important implications for the new Glass-Steagall and other financial reform proposals. The litigation history is also vitally

and United States Responses to the Regulatory Challenges of Modern Financial Markets, 38 TEX. INT'L L.J. 317, 319 (2003).

23. The intent of Congress in passing Glass-Steagall has been the subject of much debate. For an overview of that debate, see Heidi Mandanis Schooner & Michael Taylor, *Convergence and Competition: The Case of Bank Regulation in Britain and the United States*, 20 MICH. J. INT'L L. 595, 619–20 (1999).

24. *See generally* Schooner & Taylor, *supra* note 22, at 324–25.

25. Order Approving Applications to Engage in Limited Underwriting and Dealing in Certain Securities: Citicorp, J.P. Morgan, Inc., Bankers Trust N.Y. Corp., 73 Fed. Res. Bull. 473 (1987), https://fcic-static.law.stanford.edu/cdn_media/fcic-docs/1987-07-00%20FRB%20Bulletin%2073%20no6.pdf [https://perma.cc/3Q5Q-WFQH].

26. Rules, Policies, and Procedures for Corporate Activities, 61 Fed. Reg. 60,342 (Nov. 27, 1996) (to be codified at 12 C.F.R. pts. 3, 5, 7, 16, 28).

27. *See* WILMARTH, *supra* note 6, at 181 (discussing the details of the merger).

28. Order Approving Formation of a Bank Holding Company and Notice to Engage in Nonbanking Activities: Travelers Group Inc., Citicorp, 84 Fed. Res. Bull. 985 (1998), https://fraser.stlouisfed.org/files/docs/publications/FRB/1990s/frb_111998.pdf [https://perma.cc/MN39-S7AH].

29. *See* WILMARTH, *supra* note 6, at 181–82 (discussing the impact of the Federal Reserve's approval of the Citigroup merger on Congress's legislative choices).

important to Wilmarth's proposal given that he traces the origins of his new Glass-Steagall proposal back to *Investment Company Institute v. Camp*, 401 U.S. 617 (1971).[30] In the acknowledgments to *Taming the Megabanks*, Wilmarth writes:

> I first became interested in the Glass-Steagall Act as a young banking lawyer in the early 1980s. Big banks had recently launched a legislative campaign to repeal Glass-Steagall . . . . To find out more about Glass-Steagall, I read the U.S. Supreme Court's landmark decision in [*Camp*]. That decision . . . struck down a federal agency's attempt to open a loophole in the Glass-Steagall Act. The Supreme Court's detailed analysis of Glass-Steagall's historical background and underlying purposes made a great deal of sense to me. I concluded that the big banks' campaign to repeal Glass-Steagall was contrary to prudent banking standards and sound economic policies. My study of the financial industry and its regulation over the past four decades has affirmed and strengthened that conclusion.[31]

Chapter seven of *Taming the Megabanks* traces the court battles that shaped the demise of Glass-Steagall.[32] During the 1960s and 1970s, courts rejected attempts to loosen the New Deal restrictions on banks' powers. For example, the Fifth Circuit struck down an OCC rule allowing national banks to operate insurance agencies nationwide.[33] Similarly, the D.C. Circuit invalidated an OCC regulation permitting banks to underwrite municipal revenue bonds.[34]

In *Camp*, the Supreme Court overruled an OCC rule permitting banks to offer mutual-fund-like investment products.[35]

30. *See id.* at vii.
31. *Id.*
32. *Id.* at 148–69.
33. Saxon v. Ga. Ass'n of Indep. Ins. Agents, 399 F.2d 1010 (5th Cir. 1968) (relying on 12 U.S.C. §§ 24(7), 92 in reaching its decision).
34. Port of N.Y. Auth. v. Baker, Watts & Co., 392 F.2d 497 (D.C. Cir. 1968). This case concerned a part of Glass-Steagall that remains the law today. *See* 12 U.S.C. § 24(7). Under 12 U.S.C. § 24(7), banks are prohibited from underwriting or dealing in investment securities with certain exceptions. The exception relevant in this case was the banks' ability to underwrite and deal in "general obligation" bonds. *Id.*
35. *See* Inv. Co. Inst. v. Camp, 401 U.S. 617, 625 (1971). For further discussion of *Camp*, see *infra* Section III.B. The Supreme Court later upheld a Federal Reserve regulation allowing bank holding company subsidiaries to provide investment

The opinion in *Camp* is central to any debate regarding the separation of commercial banking from investment banking because the Court made sure to detail the risks that Congress sought to address in mandating that separation.[36] The Court noted that "[t]he hazards that Congress had in mind were not limited to the obvious danger that a bank might invest its own assets in . . . imprudent stock or security investments."[37] The Court went on to find that Congress also had in mind more "subtle hazards" that could arise out of the conflicts of interest inherent when a bank is selling securities that it is underwriting. Subtle hazards also include the loss of bank reputation and goodwill if the bank becomes associated with unsound investments.[38]

In 1984, the Supreme Court continued to hold the line against the Federal Reserve's attempts to loosen Glass-Steagall restrictions in *Bankers Trust I*.[39] Yet, as detailed in *Taming the Megabanks*, the tide shifted in favor of the Federal Reserve's deregulatory effort with the D.C. Circuit's decision in *Bankers Trust II*.[40] Wilmarth notes that no small part of the difference in the two cases was the deference afforded to the Federal Reserve in *Bankers Trust II* based on the Supreme Court's 1984 decision in *Chevron v. Natural Resources Defense Council, Inc.* 468 U.S. 137 (1984).[41] In *Bankers Trust II,* the D.C. Circuit deferred to the Federal Reserve's interpretation of the statute. Wilmarth writes that:

> Bankers Trust II provided a blueprint for subsequent federal court decisions, which upheld agency rulings opening numerous additional loopholes in the structural barriers

advice to closed-end investment companies. Bd. of Governors of the Fed. Rsrv. Sys. v. Inv. Co. Inst., 450 U.S. 46 (1981).

36. *Camp*, 401 U.S. at 630–31.

37. *Id.* at 630.

38. *Id*.

39. Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys. (*Bankers Trust I*), 468 U.S. 137 (1984) (rejecting the Federal Reserve's position that commercial paper was not a "security" under Glass-Steagall).

40. WILMARTH, *supra* note 6, at 159–63; *see* Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys. (*Bankers Trust II*), 807 F.2d 1052 (D.C. Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987).

41. WILMARTH, *supra* note 6, at 159–60; *Chevron* and *Bankers Trust I* were decided within days of each other (June 25, 1984, and June 28, 1984, respectively). The dissenters in *Bankers Trust I* (Justices O'Connor, Brennan, and Stevens) cite to *Chevron* and base their dissent on the issue of deference to the Federal Reserve's construction of the statute. *Bankers Trust I*, 468 U.S. at 161 (O'Connor, J., dissenting).

> established by the Glass-Steagall and [Bank Holding Company] Acts. The courts repeatedly invoked Chevron deference as a rationale for affirming agency rulings that relied on highly creative interpretations of ambiguous statutory provisions to circumvent barriers.[42]

Indeed, the trend of deference to the agency's interpretation of the statute is clear in the cases from the 1980s forward. In a 1988 challenge to the Federal Reserve's authority to approve applications by Citicorp and several other bank holding companies to engage in limited securities activities through subsidiaries, the Second Circuit explained that if the Federal Reserve's interpretation of Glass-Steagall was reasonable, it must be upheld.[43] The following year, the Second Circuit reaffirmed that "courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute."[44] The court thus affirmed the OCC's approval of a bank's securitization of mortgages.

The passage of GLBA completed the unravelling of Glass-Steagall as charted by the Federal Reserve and the OCC.[45] Under GLBA, financial holding companies (i.e., bank holding companies that are well-capitalized, well-managed, and whose banks have a satisfactory Community Reinvestment Act rating)[46] may engage in any activity that is "financial in nature or incidental to such financial activity; or is complementary to a financial activity and does not pose a substantial risk to the safety or soundness of depository institutions or the financial system generally."[47] GLBA lists various activities as financial in nature, including insurance and securities underwriting.[48] GLBA does provide potentially harsh consequences for failure to

42. WILMARTH, *supra* note 6, at 160 (footnote omitted).

43. Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys., 839 F.2d 47, 52 (2nd Cir. 1988). As authority for this deferential standard, the court cited an earlier Second Circuit decision in which the court found that the Federal Reserve had acted within its discretion in approving a bank holding company's acquisition of a retail brokerage firm. *See* Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys., 716 F.2d 92 (2nd Cir. 1983). The Supreme Court granted certiorari and affirmed the Federal Reserve's interpretation of the statute as reasonable. Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys., 468 U.S. 207 (1984).

44. Sec. Indus. Ass'n. v. Clark, 885 F.2d 1034, 1042 (2nd Cir. 1989).

45. *See supra* notes 25–26.

46. 12 U.S.C. §§ 1843(l)(1)–(2).

47. *Id.* § 1843(k)(1).

48. *Id.*

maintain status as a financial holding company. If, for example, a financial holding company fails at any point to maintain the necessary capitalization or management status, the Federal Reserve could force a sale of any subsidiary bank or order the financial holding company to cease activities that are impermissible to bank holding companies (e.g., securities underwriting).[49] The Federal Reserve has never exercised its authority to force a divestiture.[50] This is despite the fact that ample opportunities have existed to do so.[51] As will be discussed in Part IV, this sort of agency forbearance underscores the usefulness of statutes designed to counterbalance agency underenforcement through private litigation, as illustrated by the new Glass-Steagall.

II. WILMARTH'S NEW GLASS-STEAGALL

Taming the Megabanks makes the case for a return to the separation of the financial industry into three distinct sectors: banking, securities, and insurance. *Taming the Megabanks* provides plenty of detail addressing the exact parameters of the separation, and it is important to note that the proposal is not only a resurrection of the provisions of Glass-Steagall that were repealed by GLBA.[52] This Article focuses not on the nature or propriety of the boundaries that would be instituted by the new Glass-Steagall proposal. Rather, this Article focuses on Wilmarth's inclusion of a mechanism of private enforcement of the proposed boundaries.

With the new Glass-Steagall, Wilmarth seeks an enhanced political liberty—invoking the warnings of Louis Brandeis over the threats posed by Wall Street's financial oligarchy.[53] Breaking up the megabanks, along with their political and economic power, is the goal. Yet, Wilmarth recognizes that the strength of Glass-Steagall came not only from the legal rules that separated the financial industry into its three traditional camps, but also

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49. 12 U.S.C. § 1843(m)(4).

50. Kress, *supra* note 10, at 178.

51. *Id.* at 178–79.

52. For example, Wilmarth notes that section 21 of Glass-Steagall did not define "deposits" adequately and proposed a definition that would "prohibit nonbanks from issuing short-term financial instruments that function as case equivalents or deposit substitutes." This would include, among other instruments, "money market mutual funds with fixed net asset value of $1 per share." WILMARTH, *supra* note 6, at 341–42.

53. *See* WILMARTH, *supra* note 6, at 18–19 (citing LOUIS BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT (1914)).

derived from the private incentives to police the separation.[54] Wilmarth argues that the separation of the industry into its three traditional camps would likely "rekindle the heated political rivalries that existed among banks, securities firms, and insurance companies until the late 1990s."[55] This point is not a simple "viva la competition" sentiment. Rather, Wilmarth sees that the industry turf-protecting instincts are an innate strength of his substantive proposal: the opportunities for private party enforcement are inextricably tied to the policy goal.

The new Glass-Steagall casts industry competitors as private attorneys general with sufficient incentives to seek robust enforcement of the law. Unleashing those private incentives, however, requires forethought. Thereby, the new Glass-Steagall anticipates two limitations on the private attorney general role. First, Wilmarth proposes that agency interpretations of the new Glass-Steagall would not qualify for *Chevron* deference, which can undermine the statute's purpose. Instead, agency interpretations of the new Glass-Steagall would be subject to de novo review.[56] Second, Wilmarth proposes that a new Glass-Steagall "should expressly authorize firms from each financial sector to file lawsuits challenging regulatory actions that threaten to weaken those barriers."[57] It is this second feature that is the focus of this Article. It implicates important issues of standing that strengthen the new Glass-Steagall in ways that could be overlooked by anyone who does not have Wilmarth's panoramic vision.

54. WILMARTH, *supra* note 6, at 348–49 (describing the rivalry as providing the incentive to "police the boundaries established by a new Glass-Steagall Act and to oppose regulatory or legislative efforts that could undermine those boundaries").

55. *Id.* at 348.

56. *Id.* at 349. Congress has rejected *Chevron* deference in financial regulation before. In the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), Congress included a standard of deference based on *Skidmore v. Swift*, 323 U.S. 134 (1944), instead of *Chevron* in provisions that relate to federal preemption of state law. *See* 12 U.S.C. § 25b(b)(5)(A). That provision provides that a court reviewing the OCC's determination regarding state preemption "shall assess the validity of such determinations, depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision." *Id.* In *Skidmore*, the Court wrote that deference to the agency would depend on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140.

57. WILMARTH, *supra* note 6, at 349.

III. THE PROBLEM OF AGENCY FORBEARANCE AND THE CHALLENGES OF THE PRIVATE ENFORCEMENT SOLUTION

Both over- and underenforcement by responsible agencies undermine a statutory scheme's effectiveness. In financial regulation, these behaviors often correlate to market and economic fluctuations. Agencies tend to loosen their supervision and enforcement when the economy is growing and healthy. Agencies are prone to stricter supervision and enforcement when the economy is contracting and stressed.[58] Seen as such, agency behavior is procyclical—it feeds expanding markets and starves contracting ones.[59] This is hardly ideal.

This Part begins with an overview of some of the mechanisms that can counteract an agency's procyclical inclinations, with a particular focus on the problem of underenforcement, or forbearance. Agency design, most notably independence, is often the centerpiece of such discussions. Yet, courts also can play an important oversight role. Key to unleashing the power of the judiciary to serve as a check on agency forbearance is the ability of private parties to bring suit. At the risk of stating the obvious, standing is a vital concern since the judiciary can hardly serve as a check on agencies' under- (or over-) enforcement if the courts lack the power to hear cases. Thus, the second half of this Part reviews both the constitutional and statutory standing requirements in private suits brought against the depository institution regulators claiming that the regulators permitted ultra vires activities. This will lay the foundation for Part IV, which considers how standing rules may have impacted rival litigation under GLBA (the statute that repealed most of Glass-Steagall) and evaluates the standing features of the new Glass-Steagall.

A. *Agency Forbearance*

Naturally, when Congress creates a regulatory framework, that framework is not self-executing. Congressional intent can only be achieved through the implementation and/or enforcement activities of the federal agencies. In the case of financial regulation, the agencies are generally considered "independent"

58. For a discussion of the cycles of supervision and enforcement, see ERIK K. GERDING, LAW, BUBBLES, AND FINANCIAL REGULATION (2016).

59. For a general discussion of agency discretion, see Schooner, *supra* note 17, at 1000–04.

in the sense that they are not represented in the president's cabinet and are thereby not formally accountable to political figures.[60] Such independence can certainly enhance an agency's effectiveness. In addition to independence, many design features can contribute to an agency's success in fulfilling Congress's intent. Long-standing debates persist regarding the best ways to structure agencies in terms of their jurisdiction, statutory mandate, and source of funding.[61] Unfortunately, even an agency that is completely insulated from partisan pressures and has access to bountiful resources may operate in ways that are inconsistent with congressional intent or the public interest. Agencies may be susceptible to many forms of industry capture.[62] In a similar vein, an agency may be corrupt or incompetent. Perhaps more problematic, an agency's failings may be the result of less contemptable human behaviors such as ignorance, fear, overconfidence, or cynicism. Moreover, as discussed above, agencies' procyclical tendencies also undermine agency effectiveness.[63]

Congress can restrain agencies' tendencies toward both under- and overenforcement by constructing a carefully drafted statutory scheme that leaves little room for interpretation or

60. Of course, this is a generalization that does not capture the many features that can impact independence. Moreover, the extent of independence varies from agency to agency. For a full examination of the independence of the federal financial regulators, see HENRY B. HUGUE ET AL., CONG. RSCH. SERV., 7-5700, INDEPENDENCE OF FEDERAL FINANCIAL REGULATORS: STRUCTURE, FUNDING, AND OTHER ISSUES (2017).

61. *See* Heidi Mandanis Schooner, *U.S. Financial Regulatory Structure: Beneath the Surface of Twin Peaks*, *in* THE CAMBRIDGE HANDBOOK OF TWIN PEAKS FINANCIAL REGULATION 270 (Andrew Godwin & Andrew Schmulow eds., 2021).

62. The OCC, for example, is dependent on fees from the industry to fund its operations, which means the OCC's funding is dependent on banks choosing a national over a state bank charter. *See* Heidi Mandanis Schooner, *Recent Challenges to the Persistent Dual Banking System*, 41 ST. LOUIS U. L.J. 263, 272–73 (1996) (discussing the importance of examination fees in the choice between national and state bank charters). Revolving door dynamics may create conflicts, although some recent research suggests that worker moves from agencies to the private sector may enhance agency effectiveness. DAVID LUCCA ET AL., FED. RSRV. BANK OF N.Y., STAFF REP. NO. 678, THE REVOLVING DOOR AND WORKER FLOWS IN BANKING REGULATION (2014), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr678.pdf [https://perma.cc/6FSN-YQRR]. Professor Kwak has examined the impact of cultural capture in providing an advantage to the industry. *See* James Kwak, *Cultural Capture and the Financial Crisis*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 71 (Daniel Carpenter & David A. Moss eds., 2014).

63. *See supra* notes 58–59 and accompanying text.

discretion.[64] To be sure, this is no small task.[65] Congress can also avoid over- or underenforcement by limiting an agency's discretionary power as part of the statutory design. In fact, some statutory regimes are constructed to eliminate discretion. In financial regulation, a common (but hardly perfect) example of this approach is the "prompt corrective action" provisions enacted as part of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA).[66] Prompt corrective action *requires* the federal banking agencies to impose remedial actions on banks that fail to meet certain defined capital[67] and safety and soundness standards.[68] In this way, the system of prompt corrective action was designed to counteract the agency's discretionary forbearance.

While statutory drafting alone cannot solve the deficiencies of public enforcement, private litigation can serve as a counterbalance. *Taming the Megabanks* details how such litigation initially thwarted agency efforts to loosen Glass-Steagall restrictions.[69] And even in the later cases in which agencies prevailed in court (likely due to the deference afforded to the agency's interpretation of the statute), the potential for litigation served as a check against agency overreach. In an attempt to reclaim the role that rival litigation played during the Glass-Steagall era, the new Glass-Steagall would expressly authorize private litigation by rival firms challenging agency forbearance,[70] thereby implicitly calling for a consideration of standing doctrine. Standing is implicit in the proposal because while an agency's interpretation of the statute may be subject to judicial

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64. Of course, clarity may not be a high priority for legislative drafters. Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 594–97 (2002).

65. Then-Judge Ruth Bader Ginsburg and Peter Huber wrote: "Detecting the will of the legislature, however, time and again perplexes even the most restrained judicial mind. Imprecision and ambiguity mar too many federal statutes." Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1417 (1987).

66. *See* Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 131, 105 Stat. 2236, 2253 (1991) (codified as amended at 12 U.S.C § 1831o). "Although PCA was intended to prevent or minimize losses to the DIF when banks failed, this goal was not achieved during the recent financial crisis." U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-612, BANK REGULATION: MODIFIED PROMPT CORRECTIVE ACTION FRAMEWORK WOULD IMPROVE EFFECTIVENESS 19 (2011).

67. 12 U.S.C. § 1831o.

68. 12 U.S.C. § 1831p-1(e)(1).

69. *See supra* Part I.

70. *See supra* note 57 and accompanying text.

review, judicial review is available only in a case brought by a party with standing. Thus, standing is an important feature of a system with appropriate checks and balances.

B. Constitutional and Statutory Standing

Private-party enforcement is one, partial solution to the problem of agency forbearance. Certainly, the ultimate effectiveness of private litigation in achieving congressional intent is not a given. This discussion considers only the instigation of this solution, that is, the standing of private parties. Standing doctrine informs the role of courts and thereby is rooted in the separation of powers. As discussed further below, the "cases or controversies" requirement ensures that the plaintiff has a personal stake in the outcome of the litigation.[71] And yet, scholars have observed that standing can be used to serve less laudable purposes. Professor Sapna Kumar writes that "standing can serve a more malicious purpose."[72] She explains that New Deal era liberal Supreme Court Justices "developed the doctrine to shield agencies from scrutiny."[73] Similarly, research by Professor Richard Pierce suggests that judges might invoke standing limitations based on their political ideology.[74] No less problematic is the possible use of standing as a mechanism for a court to manage its caseload.[75] With these important caveats as a backdrop, the following Section overviews the contours of constitutional and statutory standing.

71. Warth v. Seldin, 422 U.S. 490, 498–99 (1975).

72. Sapna Kumar, *Standing Against Bad Patents*, 32 BERKELEY TECH. L.J. 87, 89 (2017).

73. *Id.* (citing Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006*, 62 STAN. L. REV. 591, 640 (2010); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 458–59 (1996)).

74. Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1744 (1999). Professor Pierce's study of five Supreme Court standing decisions between 1991 and 1998 found: "Liberals voted to grant access to the courts to environmentalists, employees, and prisoners, but not to banks. Conservatives voted to grant access to banks, but not to environmentalists, employees, or prisoners." *Id.* at 1743.

75. Kumar, *supra* note 72, at 89.

1. Constitutional Standing

Article III of the Constitution limits the jurisdiction of federal courts to deciding "cases or controversies."[76] Article III standing requires the plaintiff to establish three elements: injury in fact, "a causal connection between the injury and the conduct," and a likelihood "that the injury will be 'redressed by a favorable decision.'"[77] As will be discussed in Part IV, the injury-in-fact requirement is an important limitation. To establish an injury in fact, the petitioner "must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'"[78] Below is a discussion of relatively recent cases brought against the OCC and the Federal Reserve claiming that the agencies allowed activities, through rulemaking or otherwise, exceeding statutory boundaries. In each of the cases discussed below, constitutional standing requirements prevented the suit from moving forward.

While the battle against federal regulators over Glass-Steagall raged among the traditional sectors of finance (banking, securities, and insurance), today's wars center on new entrants into the financial industry in the form of fintech[79] firms. Recent suits have challenged the OCC's "fintech charter" rule[80] which

76. U.S. CONST. art. III, § 2, cl. 1.

77. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

78. Spokeo, Inc. v. Robins, 578 U.S. 330, 339 (2016) (quoting *Lujan*, 504 U.S. at 560). In *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2220 (2021), the Supreme Court recently emphasized the requirement that the plaintiff show a concrete harm to establish standing. In *TransUnion*, plaintiffs sued the credit reporting agency regarding misleading credit reports. *Id.* Regarding many plaintiffs in the class (6,332 out of 8,185), TransUnion had not disseminated the misinformation to third parties. *Id.* The Court found that those plaintiffs had not suffered a concrete harm and, therefore, lacked standing. *Id.* The decision has been criticized for undermining congressional intent. *See* Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of* TransUnion v. Ramirez, 101 B.U.L. REV. ONLINE 62, 71 (2021) (criticizing the decision for using standing to "nullif[y] Congress's power to protect consumers"); *Article III Standing—Separation of Powers—Class Actions*—TransUnion v. Ramirez, 135 HARV. L. REV. 333, 333 (2021) (criticizing the holding as a result that "undermines congressional efforts to keep class actions in federal courts and out of state courts").

79. "Fintech" generally refers to innovative technology in financial services. For a discussion of both fintech and fintech firms, see Megan M. La Belle & Heidi Mandanis Schooner, *Fintech: New Battle Lines in the Patent Wars?*, 42 CARDOZO L. REV. 277, 312–17 (2020).

80. 12 C.F.R. § 5.20(e)(1)(i) (2021). The rule states that a special purpose bank "must conduct at least one of the following three core banking functions: receiving deposits, paying checks, or lending money." *Id.* This means, of course, that a special

provides that the OCC may charter not only traditional deposit-ing-taking banks but may also charter "special purpose" non-depository banks. In contrast to the Glass-Steagall-era rival litigation, these suits have not been brought by rival firms but, instead, by other regulators: the Superintendent of the New York State Department of Financial Services (DFS) and the Conference of State Bank Supervisors (CSBS).[81]

In *Lacewell v. OCC*,[82] DFS challenged the OCC's fintech rule and asserted two types of injury to establish standing. First, DFS argued that the issuance of a fintech charter would lead to a preemption of state law and thereby reduce DFS's ability to protect consumers. Second, DFS asserted that DFS would lose the revenue that it derives from state-chartered, non-depository fintechs, which could become federally chartered instead.[83] The Second Circuit held that DFS lacked standing to sue the OCC for failure to establish injury in fact, given that the OCC had not made a final determination that it would issue any fintech charters. Even when and if the OCC grants a fintech charter, it remains unclear whether a plaintiff like the DFS will be able to meet the injury element of the standing requirement. The court wrote: "Moreover, even if the OCC grants [a special purpose non-depository] charter to *some* non-depository fintech, it is not

purpose bank may conduct business without receiving deposits. The OCC's authority to charter fintech companies as special purpose, non-depository banks under the National Bank Act is at the heart of the merits of the fintech charter litigation.

81. CSBS is an association of state financial institution supervisors. Its mission is to support "state regulators in advancing the system of state financial supervision by ensuring safety, soundness, and consumer protection; promoting economic growth; and fostering innovative, responsive supervision." *About CSBS*, CSBS, https://www.csbs.org/about [https://perma.cc/GD9J-ZD8J]. Associations initiate many of the cases challenging laws or regulations limiting a bank's activities. CSBS is an association of regulators. The Investement Company Institute (ICI) and Securities Industry Association (SIA), in the cases discussed in Part I, are industry associations. When the plaintiff is an association, an additional inquiry is added to the standing question discussed in this Part: "An association has standing to bring suit on behalf of its members when its members would have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires individual members' participation in the lawsuit." Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), 528 U.S. 167, 169 (2000).

82. Lacewell v. Off. of the Comptroller of the Currency, 999 F.3d 130, 148 (2d Cir. 2021). For "substantially the same reasons," the court found that the claim lacked constitutional ripeness. *Id.* at 149–50.

83. *Id.* at 142.

entirely clear that the regulatory disruption that DFS fears will actually occur."[84]

CSBS has sued the OCC three times over the fintech charter issue.[85] In the first two cases, the U.S. District Court for the District of Columbia employed reasoning similar to the Second Circuit in *Lacewell*, finding that CSBS lacked standing for failure to plead an injury in fact because the OCC had not yet approved a fintech charter.[86] The court also found that CSBS had not alleged which of its members faced imminent injury.[87] In the most recent case, filed in December 2020, CSBS included in its allegations the OCC's impending approval of a charter application by Figure Technologies.[88] While Figure Technologies' bank ("Figure Bank, N.A.") would be chartered as a full-service national bank and not as a fintech, it did not plan to apply for federal deposit insurance.[89] For this reason, CSBS claimed that Figure Bank, N.A. is, de facto, applying for a nonbank charter and that nonbank charters harm CSBS's member regulators and CSBS.[90] Soon after CSBS's suit was filed, Figure Technologies amended its charter application to include a request for federal deposit insurance.[91] Thus, CSBS withdrew its complaint.[92]

The fintech cases are an interesting and recent example of a challenge to agency rulemaking that expands permissible activities. Not surprisingly, constitutional standing has also

84. *Id.* at 143. The Supreme Court, however, has articulated special consideration in finding standing in a state, as opposed to private, actor. Massachusetts v. EPA, 549 U.S. 497, 518 (2007) ("We stress here . . . the special position and interest of Massachusetts. It is of considerable relevance that the party seeking review here is a sovereign State and not . . . a private individual.").

85. Conf. of State Bank Supervisors v. Off. of the Comptroller of the Currency (*CSBS I*), 313 F. Supp. 3d 285 (D.D.C. 2018); Conf. of State Bank Supervisors v. Off. of the Comptroller of the Currency (*CSBS II*), No. 18-CV-2449 (DLF), 2019 WL 4194541 (D.D.C. Sept. 3, 2019); *CSBS Files New Complaint Against OCC*, CSBS (Dec. 22, 2020), https://www.csbs.org/newsroom/csbs-files-new-complaint-against-occ [https://perma.cc/7CW5-VJ7H].

86. *CSBS I*, 313 F. Supp. 3d at 295–99; *CSBS II*, 2019 WL 4194541, at *1–2.

87. *CSBS I*, 313 F. Supp. 3d at 295–99; *CSBS II*, 2019 WL 4194541, at *1–2; *see supra* note 78 and accompanying text (discussing the special standing requirements that apply when the plaintiff is an association).

88. *CSBS Files New Complaint Against OCC*, *supra* note 85.

89. *Id.*

90. *Id.*

91. Press Release, Conf. of State Bank Supervisors, State Regulators Withdraw OCC Litigation After Applicant Amends Bank Charter Application (Jan. 13, 2022), https://www.csbs.org/newsroom/state-regulators-withdraw-occ-litigation-after-applicant-amends-bank-charter-application [https://perma.cc/B5PU-E5M5].

92. *Id.*

served as a barrier to claims regarding the failure to issue a rule that would restrict permissible activities. In *Taylor v. Bernanke*, the plaintiffs challenged the Federal Reserve's delay in issuing final regulations pursuant to the Volcker Rule.[93] The plaintiffs held deposits at banks and were members of "Occupy the SEC" (a subpart of Occupy Wallstreet).[94] To establish standing, the plaintiffs claimed that their deposits could be lost because of the failure to implement the Volcker Rule.[95] They also claimed that, as activist members of Occupy the SEC, the failure to issue a final rule was frustrating their advocacy efforts.[96] The Eastern District of New York found that the plaintiffs had failed to establish injury sufficient to meet the standing requirement because the claims of losses to the plaintiffs' deposit accounts were speculative.[97] In addition, the court found that the plaintiffs' inability to advocate "in the precise manner they desire" was not a sufficient injury for standing purposes.[98]

2. Statutory Standing

In addition to the Constitutional requirements, Congress plays a significant role in determining whether a plaintiff has standing. Most importantly, perhaps, Congress may create legal rights that confer standing even though the relevant injury would not exist in the absence of such legal rights.[99] Congress cannot, however, avoid Article III's standing requirement by

93. Taylor v. Bernanke, No. 13-CV-1013, 2013 WL 4811222, at *1 (E.D.N.Y. Sept. 9, 2013). Congress enacted the Volcker Rule under section 619 of the Dodd-Frank Act, Pub. L. No. 111–203, § 619, 124 Stat. 1376, 1620–31 (2010) (codified at 12 U.S.C. § 1851). The Volcker Rule prohibits banking entities from engaging in proprietary trading and from maintaining certain relationships with hedge funds and private equity funds. 12 U.S.C. § 1851(a)(1). The purpose of the Volcker Rule, among other things, is to restrict banks from engaging in highly profitable and yet highly risky activities while at the same time enjoying access to the federal safety net. A Senate Report found: "The prohibitions in section 619 therefore will reduce potential taxpayer losses at institutions protected by the federal safety net, and reduce threats to financial stability, by lowering their exposure to risk." S. REP. NO. 111-176, at 8 (2010).

94. *Taylor*, 2013 WL 4811222, at *3.

95. *Id.* at *4.

96. *Id.*

97. *Id.* at *9.

98. *Id.* at *13.

99. Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1991) ("Nothing in this contradicts the principle that '[t]he . . . injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975))).

enacting a statute that grants the right to sue to a party that has not suffered an injury in fact.[100] At the same time, as will be discussed in Part IV, the Supreme Court has recognized Congress's important role in identifying an injury in fact—intangible injuries in particular.[101]

While Congress cannot grant Article III standing to a party who has not suffered an injury in fact, Congress can limit standing to a subset of those who may have suffered such injury. Congress may also be silent on the issue of standing. The federal banking statutes do not include any express provision authorizing suits by private parties. Rather, the right to sue is found in the Administrative Procedure Act (APA). Section 10 of the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review."[102] Standing under section 10 of the APA is clear when the petitioner is the subject of the agency action in dispute. For example, a plaintiff that sues the OCC claiming the wrongful denial of a bank charter is a "person suffering legal wrong because of agency action."[103]

In the cases discussed below, the standing question is less obvious since the petitioner is not the subject of the regulatory action but, instead, is the competitor of a bank that has been permitted to engage in an activity that is arguably impermissible under federal statutes. In such cases, as discussed below, the Supreme Court has defined the standing issue as whether the plaintiff's claim falls within the "zone of interest." The zone-of-interest inquiry is an important potential limitation on a plaintiff's standing (although not a constitutional limitation) and considers whether the plaintiff's interests are covered by the statute

100. Spokeo, Inc. v. Robins, 578 U.S. 330, 339 (2016).

101. *Id.* at 341. The Court explained that "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important." *Id.*

102. 5 U.S.C. § 702. This provision allows for suits to be brought against agencies but does not authorize suits against other parties. *Id.* This is significant because plaintiffs have attempted, unsuccessfully, to bring suits against financial institutions for violation of federal financial institution laws. *See* cases cited *supra* note 19.

103. In a Supreme Court case involving such facts, the Court did not mention standing and simply concluded that "[u]nquestionably, the Comptroller's action is subject to judicial review under the Administrative Procedure Act." Camp v. Pitts, 411 U.S. 138, 140 (1973).

that serves as a basis for the plaintiff's claim.[104] To the extent that the zone-of-interest question is a matter of statutory interpretation, consideration of this issue is not only important to disputes under current laws (as the following discussion illustrates) but is also important to the drafting of new laws such as the new Glass-Steagall (as discussed in Section IV.B).

In 1970, the Supreme Court first formulated the zone-of-interest inquiry in *Association of Data Processing Service Organizations, Inc. v. Camp* ("*ADAPSO*").[105] The petitioners were ADAPSO, whose members were engaged in data processing services, and a member of ADAPSO, Date Systems, Inc. The action was brought against the OCC and American National Bank and Trust Company (American National Bank), a national bank. At the time of the litigation, American National Bank was providing data processing services to firms that Date Systems had previously served or agreed to serve.[106] The petitioners alleged that the OCC's ruling allowing American National Bank to perform such services violated section 24 of the National Bank Act and that they suffered harm as a result.[107] The district court dismissed the case for lack of standing, and the Eighth Circuit affirmed.[108] The Supreme Court concluded that section 10(a) of the APA required only that "the interest sought to be protected by the complainant [be] arguably within the zone of interests to be protected or regulated by the statute . . . in question."[109] The Court reversed and remanded, holding that the petitioners' interests as a bank competitor were within the zone of interest established by Congress "even though the competition may not be the precise kind Congress legislated against."[110]

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104. Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 127 (2014).

105. Ass'n of Data Processing Serv. Orgs. V. Camp, 397 U.S. 150, 153 (1970).

106. Brief for the Petitioners, *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. 150 (1970) (No. 85), 1969 WL 119869, at *4.

107. *Id.*

108. Ass'n of Data Processing Serv. Orgs. v. Camp, 406 F.2d 837, 838, 844 (8th Cir. 1969), *rev'd*, 397 U.S. 150 (1970).

109. *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 153.

110. *Id.* at 155. On the heels of its decision in *ADAPSO*, the Supreme Court found that the petitioners' claim was within the zone of interest in a similar case arising out of the National Bank Act. In *Arnold Tours, Inc. v. Camp*, forty-two independent travel agents sued the Comptroller and South Shore National Bank for engaging in travel services in violation of the National Bank Act. Arnold Tours, Inc. v. Camp, 400 U.S. 45, 45 (1970). The Supreme Court found that national banks competing with travel agents were comparable to national banks competing with

The Court's decision in *Camp* not only serves as the underpinning to the new Glass-Steagall,[111] but the case also engaged both a constitutional standing and a statutory zone-of-interest analysis.[112] As discussed in Part I, the petitioners in *Camp* were investment companies complaining that the OCC had issued a rule allowing national banks to establish and operate collective investment funds in violation of section 16 of Glass-Steagall.[113] The Court found that the petitioners were injured by the competition from banks in the same way as the data processing companies in *ADAPSO*.[114] Therefore, the Court found that the petitioners had established a case or controversy—that is, Article III standing.[115] Also relying on *ADAPSO*, the Court found that Congress did not intend "to preclude judicial review of administrative rulings by the Comptroller as to the legitimate scope of activities available to national banks under [the National Bank Act]."[116]

Recently, the Supreme Court has clarified the Court's role in questions of statutory standing by emphasizing that the zone-of-interest inquiry is a matter of statutory interpretation.[117] *Clarke v. Securities Industry Ass'n* illustrates that approach in the Court's description of the interplay between section 10 of the APA and the statute relevant to the dispute.[118] The Court wrote:

> It was thought, however, that Congress, in enacting [section 10 of the APA], had not intended to allow suit by every person suffering injury in fact. What was needed was a gloss on the meaning of [section 10 of the APA]. The Court supplied this

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data processing companies. *Id.* At 46. Thus, the petitioners' claim was within the zone of interest protected by the statute. *Id.*

111. *See supra* notes 30–38 and accompanying text (discussing how Wilmarth drew inspiration from the Court's opinion in *Camp* in formulating his new Glass-Steagall proposal).

112. Inv. Co. Inst. v. Camp, 401 U.S. 617 (1971).

113. *Id.* at 618–19. Section 16 of Glass-Steagall provides that the "business of dealing in securities and stock by [a national bank] shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the [national bank] shall not underwrite any issue of securities or stock." 12 U.S.C. § 24 (Seventh). Gramm-Leach-Bliley did not repeal section 16 of Glass-Steagall. *Id.* That provision remains in the National Bank Act today. *Id.*

114. *Camp*, 401 U.S. at 620.

115. *Id.* at 621.

116. *Id.* at 620.

117. Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 126 (2014).

118. Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 395–96 (1987).

> gloss by adding to the requirement that the complainant be "adversely affected or aggrieved," i.e., injured in fact, the additional requirement that "the interest sought to be protected by the complainant [be] arguably within the zone of interest to be protected or regulated by the statute or the constitutional guarantee in question."[119]

The Court in *Clarke* explained that when the plaintiff is not the subject of the regulatory action, the zone-of-interest test "denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."[120] And yet, the Court also wrote that the zone-of-interest test is "not meant to be especially demanding" and that there was no requirement to show that Congress intended to benefit the plaintiff.[121] Therefore, it is not surprising that suits by complainants seeking to enforce statutory limitations on the activities of their competitors would meet the zone-of-interest test.[122]

Finally, a case decided almost thirty years after *ADAPSO* upheld and clarified its zone-of-interest analysis, but the objection of four dissenters suggests that this standard may become more challenging for plaintiffs if revisited by the Supreme Court. In *National Credit Union Administration v. First National Bank*

119. *Id.* at 395–96 (quoting Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970)).

120. *Id.* at 399.

121. *Id.* at 399–400. As with *ADAPSO* and *Camp*, the Court in *Clarke* found that the plaintiff, a trade association of securities brokers and underwriters, was within the zone of interest in its suit against the OCC for approving applications permitting banks to open discount brokerage services at their branches. *Id.* at 403. "There is sound reason to infer that Congress 'intended [petitioner's] class [of plaintiffs] to be relied upon to challenge agency disregard of the law.'" *Id.* (quoting Block v. Cmty. Nutrition Inst., 467 U.S. 340, 347 (1984)).

122. For examples of cases in which the plaintiff did not meet the zone-of-interest test, see *Block*, 467 U.S. at 347 (finding that consumers of dairy products lacked standing to review milk market orders by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937); Dist. 2, Marine Eng'r Beneficial Ass'n v. Burnley, 936 F.2d 284, 285–86 (6th Cir. 1991) (finding that a maritime union's interests were not within the zone of interest under the Jones Act); Hazardous Waste Treatment Council v. Thomas, 885 F.2d 918, 926–27 (D.C. Cir. 1989) (finding that the interests of a national trade association of treatment firms was not within the zone of interest Congress intended under the Resource Conservation and Recovery Act); Fed'n for Am. Immigr. Reform v. Reno, 93 F.3d 897, 901 (D.C. Cir. 1996) (finding that the interests of a federation for immigration reform did not fall within the zone of interest under the relevant statutes).

& Trust ("NCUA"), the Supreme Court held that the plaintiff banks had standing to sue the NCUA for allowing credit unions to expand their membership.[123] The Court reiterated that establishing that the plaintiffs' interests were within the zone of interest did not require a showing that Congress intended to benefit the plaintiffs.[124] Instead, the Court wrote, "[W]e first discern the interests 'arguably . . . to be protected' by the statutory provision at issue; we then inquire whether the plaintiff's interests affected by the agency action in question are among them."[125] Applying this standard, the Court found that even if there were no indication that Congress intended to benefit the plaintiff banks in establishing limits on credit union membership, the interest to be protected under the statute was limiting the markets that credit unions can serve.[126] Thus, the interest reflected in the statute was "precisely" the interest of the banks, as competitors of credit unions.[127]

Four justices joined in a dissent in *NCUA*. The dissenting justices concluded that the banks' interests were not within the zone of interest given the lack of evidence that Congress intended to protect banks from credit union competition. The dissenters asserted that the majority's reasoning "eviscerated the zone of interest requirement."[128] The dissent objected to the majority's analysis for conflating the zone-of-interest inquiry with a finding of injury in fact.[129] The injury to the banks was the loss of customers to competing credit unions.[130] The dissent argued that the "relevant question under the zone-of-interest test, then is whether injury to respondents' commercial interest as a competitor 'falls within the zone of interest sought to be protected'" under the statute.[131] The dissent complained that the majority adopted a different approach.[132] Instead of inquiring as to whether the statute was intended to protect the complaining banks' commercial interest, the Court found that, because the

123. Nat'l Credit Union Admin. v. First Nat'l Bank & Tr. Co., 522 U.S. 479, 488–89 (1998).

124. *Id.* at 491.

125. *Id.* at 492.

126. *Id.*

127. *Id.* at 494.

128. *Id.* at 503 (O'Connor, J., dissenting).

129. *Id.* at 505.

130. *Id.* at 504.

131. *Id.* at 504 (quoting Air Courier Conf. v. Am. Postal Workers Union, 498 U.S. 517, 523–24 (1991)).

132. *Id.* at 505.

statute protects the banks' commercial interest, the banks' interest is within the zone of interest.[133] The dissent reasoned that this approach allows any litigant who establishes constitutional standing by showing an injury in fact to automatically meet the zone-of-interest requirement, "rendering the zone-of-interest test ineffectual."[134]

This survey of cases paints a picture of a loose zone-of-interest standard that is easily met by petitioners in rival litigation. Certainly, the Court has said that the zone-of-interest standard is not meant to be especially demanding.[135] The success of petitioners in cases like *ADAPSO*, *Camp*, *Clarke*, and *NCUA* on both the issues of constitutional and statutory standing is also linked to the nature of the substantive statute in dispute. Statutes that prohibit banks from engaging in certain activities create legal boundaries between rival firms. A breach of those boundaries is almost a per se injury to a rival firm. With these cases in mind, Part IV will consider whether both constitutional and statutory standing are as easily met under GLBA and under the new Glass-Steagall.

IV. RIVAL LITIGATION POST GLASS-STEAGALL AND UNDER A NEW GLASS-STEAGALL

When Congress repealed most of Glass-Steagall, litigation brought by rivals seeking to enforce activities restrictions ceased. To be sure, GLBA eliminated many claims on the merits, but GLBA also allowed for the formation of financial conglomerates (also known as "megabanks"), which has meant that many former competitors became commonly owned.[136] Certainly, industry consolidation may be an explanation for the lack of rival litigation post-GLBA, but this Part considers whether standing is part of the cause. With the history of rival litigation discussed in Part III as a backdrop, this Part begins with a consideration of the role (or lack thereof) of rival suits in the regime that

133. *Id.* at 505–06.

134. *Id.* at 505.

135. *See supra* note 121 and accompanying text.

136. Similarly, in Professor Omarova's examination of the OCC's decisions allowing national banks to trade and deal in derivatives, she posited that the industry structure could explain the lack of rival litigation challenging the OCC's interpretation of the National Bank Act. Saule T. Omarova, *The Quiet Metamorphosis: How Derivatives Changed the "Business of Banking,"* 63 U. MIAMI L. REV. 1041, 1105–06 (2009).

replaced the original Glass-Steagall (i.e., the GLBA regime). This Part will then consider the potential for rival litigation under the new Glass-Steagall.

A. *Rival Litigation Post-GLBA*

Once major parts of Glass-Steagall were repealed, litigation initiated by the securities industry against bank regulators disappeared. A useful thought experiment is to consider why the regime that replaced those major parts of Glass-Steagall—that is, GLBA—did not produce rival litigation. As discussed in Part I, GLBA established a process that allows certain bank holding companies to apply to the Federal Reserve for authorization to engage in expanded financial activities and thereby become financial holding companies. To obtain approval for expanded activities, the financial holding company must be, among other things, "well managed."[137] Under GLBA, a financial holding company is well managed if it has a CAMELS composite supervisory rating of one or two (on a scale of one to five, where one is the highest rating) and at least a satisfactory rating for management (i.e., either a one or two rating).[138]

This thought experiment considers whether a rival bank holding company could sue the Federal Reserve for its failure to direct a financial holding company, such as Wells Fargo, to divest its investment banking operations.[139] I chose Wells Fargo

137. 12 U.S.C. § 1843(l)(1)(B)–(C).

138. 12 U.S.C. § 1841(o)(9). The composite supervisory rating system is called CAMELS. A paper written by senior officials at the OCC and Federal Reserve explains the basic outlines of the CAMELS system as follows: "The CAMELS rating system is intended to classify the quality of a bank's financial condition, risk profile, and overall performance. The CAMELS name is an acronym for the six types of risk components assessed in the rating, which are (C) capital adequacy risk, (A) asset quality risk, (M) management risk, (E) earnings risk, (L) liquidity risk, and (S) sensitivity to market risk. The CAMELS ratings range from 1, the lowest risk classification to 5, the highest risk classification. Most banks have ratings of 1 or 2 and are considered to be in satisfactory condition. Banks with a rating of 3, 4, or 5 are generally considered to be in unsatisfactory condition and are required to take actions to improve their conditions." Lewis Gaul et al., *Forecasting High-Risk Composite CAMELS Ratings* 1 (Bd. of Governors of the Fed. Rsrv. Sys, Int'l Finance Discussion Paper No. 1252, 2019) (footnote omitted).

139. Senator Elizabeth Warren has urged the Federal Reserve to separate Wells Fargo's commercial banking activities from its other financial activities. Emily Flitter, *Elizabeth Warren Asks the Fed to Break Up Wells Fargo*, N.Y. TIMES (Oct. 14, 2021), https://www.nytimes.com/2021/09/14/business/wells-fargo-elizabeth-warren.html [https://perma.cc/4X3Y-9EH2]. Professor Jeremy Kress has also urged divestiture. *See* Jeremy Kress, *Fed Should Force Wells Fargo into Being a*

for this hypothetical for several reasons. First, Wells Fargo is notorious for its management failures, particularly its account-opening scandal.[140] Of course, this does not mean that Wells Fargo's management is necessarily worse than that of other financial holding companies.[141] Second, while CAMELS ratings are nonpublic, a few years ago news spread of a downgrade in Wells Fargo's management rating from a two to a three following Wells Fargo's account-opening scandal.[142] If this rumor were true, Wells Fargo would have no longer been considered "well managed" and could have been subject to the Federal Reserve's divestiture power.

In this imagined scenario, a rival bank holding company would be required to establish both constitutional and statutory standing in the suit against the Federal Reserve. A rival bank holding company could allege that it suffered the constitutionally required injury in fact because it will be forced to engage in risky behavior (lax management practices) to compete with Wells Fargo.[143] A rival bank holding company might also be able to establish injury in fact by highlighting the well-established interconnectedness of the financial system in which the

Simpler Bank, AM. BANKER: BANKTHINK (Oct. 26, 2018, 10:10 AM), https://www.americanbanker.com/opinion/fed-should-force-wells-fargo-into-being-a-simpler-bank [https://perma.cc/XRG2-YY66].

140. For one of many reports of that scandal, see Emily Flitter, *The Price of Wells Fargo's Fake Account Scandal Grows by $3 Billion*, N.Y. TIMES (Feb. 21, 2020), https://www.nytimes.com/2020/02/21/business/wells-fargo-settlement.html [https://perma.cc/ZX6J-GAHY]. The OCC very recently imposed a $250 million civil money penalty on Wells Fargo for, among other things, violating the terms of a 2018 consent order which sought to remedy deficiencies in the bank's risk management systems. Press Release, Off. of the Comptroller of the Currency, OCC Assesses $250 Million Civil Money Penalty, Issues Cease and Desist Order Against Wells Fargo (Sept. 9, 2021), https://www.ots.treas.gov/news-issuances/news-releases/2021/nr-occ-2021-95.html [https://perma.cc/U4X6-JMTD].

141. Another high-profile example of management failure is JP Morgan's London Whale debacle. For a discussion, see Heidi Mandanis Schooner, *Big Bank Boards: The Case for Heightened Administrative Enforcement*, 68 ALA. L. REV. 1011 (2017).

142. Kate Berry, *More Questions for Wells Fargo After Exam Rating Leak*, AM. BANKER (Jan. 11, 2018, 4:02 PM), https://www.americanbanker.com/news/more-questions-for-wells-fargo-after-exam-rating-leak [https://perma.cc/8V2P-5DVQ] ("[T]he management component of Wells' Camels rating – one of the most subjective parts of the test – had been downgraded to 3 in mid-2017, a warning shot to management indicating ongoing supervisory concerns or weakness."). It is important to note that unauthorized disclosure of CAMELS ratings could result in criminal penalties. 18 U.S.C. § 641.

143. If the competitor bank holding company was also not well managed, and therefore not granted financial holding company status, it could establish that Wells Fargo was able to enjoy advantages that had been denied to the competitor.

weaknesses in one institution can cause failure in another.[144] These same arguments could be used to satisfy the zone-of-interest standard. A competitor bank holding company would argue that it was "aggrieved" by the Federal Reserve's failure to order divestiture and that this was within the zone of interest contemplated by Congress in passing GLBA because GLBA protects against the operation of poorly managed firms within an interconnected financial system. While these claims of injury appear plausible, they are not as obvious as the claims to injury of rivals in the Glass-Steagall cases. Because Glass-Steagall created absolute boundaries between the sectors of finance, the breach of that boundary presented a clear case of injury to a rival institution.

In addition to standing obstacles, rivals may lack the incentive, post-Glass-Steagall, to bring suit based on a weakness of the merits of the claim. In contrast to the absolute restrictions of Glass-Steagall, GLBA granted discretion to the Federal Reserve in determining whether to impose limitations on a financial holding company that is not well managed, including the utilization of its divestiture power.[145] A claim of abuse of discretion may be difficult to sustain. A competitor is, naturally, most interested in a limitation that would eliminate competition, such as divestiture. And yet, many other limitations could serve the congressional purpose, including those often imposed by regulators—for example, measures that seek to improve the management of the financial holding company in question.[146]

Thus, unlike Glass-Steagall, GLBA did not foster rival litigation as a means of enforcing the boundaries in the financial industry. Perhaps, instead, the suits challenging the OCC's fintech charter are the post-GLBA equivalent to the Glass-Steagall rival litigation. And yet, as discussed in Section III.B, those suits have been brought by state regulators and not by

144. HEIDI MANDANIS SCHOONER & MICHAEL W. TAYLOR, GLOBAL BANK REGULATION: PRINCIPLES AND POLICIES 27–29 (2010).

145. While the Federal Reserve must notify a financial holding company if it fails to be, among other things, well managed, 12 U.S.C. § 1843(m)(1), and the financial holding company must execute an agreement to comply, 12 U.S.C. § 1843(m)(2), the Federal Reserve is given discretion regarding the remedies available if the financial holding company does not comply. 12 U.S.C. § 1843(m)(3)–(4).

146. One might wonder whether agencies abuse their discretion by relying on remedial measures that prove ineffective. For example, the OCC's recent assessment of civil money penalties against Wells Fargo suggests that the bank's management systems remain inadequate despite earlier agency demands for improvement. *See supra* note 140 and accompanying text.

industry competitors or their representatives. The fact that a bank[147] or nonbank competitor has not brought suit against the OCC for its fintech charter rule could be explained by the lack of ripeness—the OCC has yet to approve a charter. The lack of competitor suits regarding the OCC's fintech charter rule might also be explained by the desire of industry rivals to maintain their own options for a fintech charter. In other words, the potential benefits of such a charter to any one firm may also benefit its rivals who also choose to apply.

B. Rival Litigation Under the New Glass-Steagall

As discussed above, GLBA did not retain a similar incentive or ability to challenge agency actions that might undermine the statutory scheme. To channel Wilmarth on this point, with the passage of GLBA, Congress not only created a weaker regulatory regime but also created a regime without the strong private enforcement incentives that existed in the balkanized financial industry established by the New Deal. Given this, the discussion below considers how the new Glass-Steagall would restore and enhance private enforcement incentives and opportunities through competitor litigation. It begins with a consideration of constitutional standing and ends with a discussion of the zone of interest.

First, a key advantage of the litigation described in Section III.B.1 is that competitors can often establish constitutional standing based on the injury they suffer from the alleged failure of an agency to uphold legislatively created boundaries between industries. It is worth noting, however, that not all types of regulatory limitations imposed on banks allow for the possibility of enforcement through competitor claims. While activities restrictions make up an important part of the regulation of banks,[148] prudential rules are central to the existing regulatory landscape. For example, the regulation of a bank's capital is central to the work of financial regulators, and, while capital

147. National banks in particular might be reluctant to sue the OCC because the OCC is their regulator.

148. The primary categories of activities restrictions include the ability of a bank to engage in "the business of banking" and not other activities pursuant to the National Bank Act. 12 U.S.C. § 24. Also, activities restrictions include the Bank Holding Company Act's limitation on a bank's ability to affiliate with another entity unless that entity is engaged solely in activities that are "closely related to banking," 12 U.S.C. § 1843(c)(8), or "financial in nature," 12 U.S.C. § 1843(k)(1).

regulation can impact a bank's activities, it is not an actual restriction or prohibition on activities.[149] Unlike in the activities restrictions cases discussed in Part III, it is difficult for a bank competitor to claim injury if another bank fails to meet its capital requirements. The injury in such a case is born by the public generally—an injury to the stability of the financial system.[150] Thus, it is hard to imagine a court recognizing a private party's injury as sufficient for standing.[151] To reiterate, however, a regulatory regime that creates value for competitors has the advantage of incentivizing competitors to police the boundaries. Wilmarth's new Glass-Steagall seeks to maximize that private enforcement incentive, particularly with regard to the zone-of-interest inquiry.

Recall that the zone-of-interest inquiry is a matter of statutory interpretation.[152] Therefore, Congress can, as the new Glass-Steagall recommends, enact a statute that explicitly provides that competitors are within the statute's zone of interest. More commonly, Congress has been silent on this specific issue. This is the outcome that the new Glass-Steagall avoids. One might posit that this detail in the new Glass-Steagall is insignificant because competitors have usually been successful in establishing that they are within the zone of interest in financial activities restrictions cases. Recall, however, the strong dissent in *NCUA* discussed in Part III in which the arguably loose interpretation of the zone-of-interest inquiry was criticized as requiring nothing more than establishing an injury in fact, thus conflating statutory standing with constitutional standing.[153] The new Glass-Steagall proposal addresses the dissenters' concerns by recommending statutory language that would, in effect, eliminate the zone-of-interest inquiry by explicitly identifying members of the financial services industry as authorized to bring suit.[154] In other words, a member of the financial services industry would have to establish an injury to satisfy the constitutional

149. Other rules include limits on loans to one borrower, to insiders, or to affiliates. *See generally* MICHAEL S. BARR ET. AL., FINANCIAL REGULATION: LAW AND POLICY § 2.3 (3d ed. 2021).

150. While the injury to a private party might be difficult to establish, the injury to the government is the loss sustained in bailing out insolvent financial institutions.

151. I have proposed a *qui tam* model as a way around this problem. For a discussion, see Schooner, *supra* note 17.

152. S*ee supra* Section III.B.2.

153. *See supra* notes 128–134 and accompanying text.

154. *See supra* Part II (discussing this aspect of Wilmarth's proposal).

case and controversy requirement, but the plaintiff would not have to prove anything to establish statutory standing.[155]

The new Glass-Steagall could go one step further. The proposal could include a broad citizen suit provision that would authorize "any person" to file lawsuits challenging possible efforts by the financial regulators to weaken industry boundaries.[156] Broader citizen suit statutory language would avoid statutory standing barriers to cases brought, for example, by state regulators. Again, constitutional standing can still serve as a barrier to such suits, but this would eliminate the addition of a statutory standing barrier. In addition, recall that Congress maintains a role in determining constitutional standing as well as statutory standing. The Court has emphasized the role of Congress in identifying the constitutional injury in fact.[157] Therefore, in adopting a citizen suit provision, Congress could also identify the injuries that it seeks to avoid by enacting the statute. Such findings would likely be highly persuasive in a court's determination of private party standing.

CONCLUSION

I chose to highlight a narrow aspect of Wilmarth's grand proposal in which he demonstrates that the private party standing is inextricably tied to his ultimate policy goal. In doing so, I hope to have illustrated the depth, nuance, and enduring value of Wilmarth's scholarship. Every sentence of his work is packed with important insights. Much like the stacks of paper in Art's office that intimidated me years ago, Art's scholarship constitutes layer upon layer of carefully researched and considered analysis. And, atop those stacks, Art stands as a generous mentor, kind spirit, and genuine friend. Art's work and character serve as a model for all who hope to make a difference in the world through ideas that are both big and small.

155. *See, e.g.*, Bennett v. Spear, 520 U.S. 154, 164 (1997) (the citizen suit provision of the Endangered Species Act "negates the zone of interest test"); Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209 (1972) (finding Congressional intent to define standing under a provision of the Fair Housing Act as broadly as permitted by Article III of the Constitution).

156. The Clean Air Act, for example, authorizes "any person" to enforce the provisions of the act. 42 U.S.C. § 7604(a). Moreover, section 11 of the Bank Merger Review Modernization Act of 2019 included a citizen standing provision. H.R. 5318, 116th Cong. § 11 (2019).

157. *See supra* note 101 and accompanying text.