

## SPEECHES & TESTIMONY

### Remarks of Chairman J. Christopher Giancarlo for the Jacobson Global Lecture at Concordia College, Bronxville, New York

“Financial Market Regulation: A Moral Framework”<sup>[1]</sup>

**April 9, 2018**

Thank you and good evening. It is an honor to come here, to Concordia. This is a great school with sound scholarship, a spiritual tradition, and passionate, outstanding students. Your emphasis on individual responsibility, the liberal arts, science and public service makes Concordia an exciting, inspirational seat of learning.

It is also a privilege to be the latest lecturer in this distinguished series named for the late David Jacobson, provost and legendary professor of philosophy.<sup>[2]</sup> His memory remains; his influence lingers.

Tonight, in honor of Dr. Jacobson, we turn to a philosopher he knew well: John Stuart Mill, the proponent of act utilitarianism, which is to do that act which will create the greatest amount of happiness for the greatest number.<sup>[3]</sup> Dr. Jacobson had much to say about Mill and utilitarianism ... more about that later.

Mill had a virtually unknown side: his employment by the East India Company. Two hundred years ago, one of the most extensive and profitable concerns was the East India Company, headquartered in London.<sup>[4]</sup> The company was involved in commerce, trade, developing markets, and territorial acquisition throughout the world, with most of its trade focused on the Indian sub-continent. The company was multinational, powerful and global - long before globalization was even a concept.<sup>[5]</sup>

The East India Company was a closed private corporation, controlled by a small, select few, selling stock only to its own chartered members. Yet, the company also advanced official British interests, to the point where the interests of Britain and company shareholders were often one and the same. The British government followed the East India Company into India. Not coincidentally, the East India Company was granted exclusivity (monopoly) to its markets, and control and oversight. They were labeled by one historian as “both regulatory body and sole operator,”<sup>[6]</sup> overseeing markets for their trade, and having a virtual monopoly over them.

Their corporate structure was, in the words of that same historian (John Keay), “a half-way stage in the evolution of the medieval guild into today’s public limited company.”<sup>[7]</sup>

In short, because of its profitability and contribution to the economy through trade and taxation, the East India Company was both private and public, a business and quasi-governmental, and often unaccountable to anyone other than itself. You may know some of its infamous history, which included some of the worst excesses of imperialism and conquest. And, I repeat, it was self-regulating over its own empire. It is of interest to me because the trade involved commodities and the use of futures, long before we used that name.

In 1823, John Stuart Mill joined the company and was employed there until 1858, 35 years. While much has been written about his work on utilitarianism developing the ideas of his father, James Mill, and Jeremy Bentham, almost nothing has been written about John Stuart Mill’s time at the East Indian Company. While there, he became one of the foremost voices for

economic and judicial reform, women's rights, and universal suffrage. But, Mill the businessman, Mill the market regulator, Mill the man of empire, remains virtually unknown.

Think of the possibilities. What if philosophers ran Fortune 500 companies, regulatory agencies, or central banks? Imagine if Socrates had conducted internal audit at Goldman Sachs or Simone de Beauvoir was a governor of the Federal Reserve. What if St. Thomas Aquinas had my job at the CFTC?

Well, the philosopher John Stuart Mill had a job like that. He handled external communications for one of the 19th Century's most powerful business enterprises, allowing him the opportunity to influence decisions through the utilitarian calculation in his writing.

I mention Mill for two reasons: he brought philosophy to his work and that philosophy was an inconsistent check on the exploitation of native populations, and sometimes surprisingly consistent, with market needs, profitability, wealth creation, trade, and other actions that brought the greatest good to the greatest number of people.

Philosophy matters, and as Dr. Jacobson reminded us, there are more than one theory of ethics, such as Platonic forms, ethics in the Old Testament, Stoicism, Christian ethics, the Categorical Imperative, Moore's goodness as self-evident simples, Marxism, social justice, justice as fairness, liberation theology, community norms, and relativism, among others. Especially in government.<sup>[8]</sup> And, Dr. Jacobson asked to apply those ethics, to make the world better through our decisions and actions. Or, as another philosopher much read on this campus, Reinhold Niebuhr, called it: "political wisdom."<sup>[9]</sup>

As a lawyer, former business executive and, now a regulator, I find fascinating the scope of activities of the East India Company. A business should not serve the role of government in the way it did. The work of the East India Company will always be haunted by secrecy, greed, unseemly enrichment, and, ultimately, failure, closing its doors in 1874. We have also learned over time that regulators should not run the very businesses they are regulating nor be captured by them. It is appropriate that there be a proper zone of separation between business and government.<sup>[10]</sup>

Speaking of government, in the United States, we often concentrate on the President, the Congress, and the courts. There is more to government. For example, we have administrative agencies to regulate commercial activity, starting in the late 1800s with the creation of the Interstate Commerce Commission. The agencies prescribe what may or may not be done, determine whether the law has been violated in particular cases, and proceed against violators, to impose fines, or other actions. These types of agencies are called regulatory agencies because they deal with the private rights of individuals and regulate the manner in which those rights may be exercised. These agencies have been delegated both legislative and judicial powers. They often have power over licensing, ratemaking, business practices, and other activities.<sup>[11]</sup>

And then there are those agencies that exist outside the federal executive departments and are considered independent agencies because the president's power to dismiss the agency head or commissioners is limited. The independent structure is designed to insulate the agency from the political winds that sweep over Washington. The most well-known independent agencies are the Federal Reserve Board, the Securities and Exchange Commission, and the Federal Communications Commission.

In my case, I am Chairman of a less well known independent Federal agency, the Commodity Futures Trading Commission (known as the CFTC). The CFTC was established to be a legal and moral authority over markets that would counter expediency or short-sighted politics. We operate under the Commodity Exchange Act (CEA)[\[12\]](#) that was originally passed in 1936. The law has been amended several times since then. The CEA establishes the statutory framework under which the CFTC operates, both judicial and legislative.

The CFTC is composed of 5 commissioners, chosen by the President and confirmed by the Senate. No more than three of the five Commissioners can be of the same political party as the President. The Commission is a creation of Congress, which has delegated power to us. The delegation was necessary because the markets are so large, vast, and ever-changing that close scrutiny is necessary. Congress does not have the time for daily oversight of these markets. So, authority was delegated to us.

The CFTC has close to seven hundred career staff. It regulates markets for derivatives trading, such as exchange traded futures and options on wheat, corn, gold, silver, oil, natural gas and other commodities. It also oversees some of the world's largest financial markets in listed futures and over-the-counter swaps on rates of interest, credit default and foreign exchange. The CFTC has been in the news lately because of its regulation of new futures contracts on Bitcoin. You may have read about that.

Tonight, I have been asked to talk about a moral approach to market regulation. Like Mill, market regulators bring moral frameworks to our work. Of course, that work must proceed within the limits set by the Constitution, our governing statute, US administrative law, the Congress and the Courts. But within those foundation stones, there is scope for regulator discretion and judgment. That is the terrain that I want to explore with you this evening.

I am not unique in being a great grandchild of humble Europeans who immigrated to the United States in search of economic opportunity. They prospered in America's private sector-driven market economy with its free market economic incentives and emphasis on fiscal responsibility. They embraced and contributed to America's pluralist culture, representative democracy and rule of law. They absorbed and instilled in me these enlightened economic, social and political values.

Together, these values make up what is known as democratic capitalism, a system that is a proven success. It is not a matter of opinion, but a matter of economic fact, that everywhere there are free and competitive markets, combined with free enterprise, personal choice, voluntary exchange and legal protection of person and property, you will find the underpinnings of broad and sustained prosperity and human advancement.[\[13\]](#)

I have on my desk a valuable volume titled "The Spirit of Democratic Capitalism" by the theologian Michal Novak.[\[14\]](#) He argues that "Of all the systems of political economy which have shaped our history, none has so revolutionized ordinary expectations of human life – lengthen the life span, made the elimination of poverty and famine thinkable, enlarged the range of human choice – as democratic capitalism."[\[15\]](#)

Let's borrow Novak's title to examine an ethical approach to regulatory power over financial markets based on these advanced economic, social and political values. Let's think in terms of that spirit. Let's think of market regulation as something more than an approach to economics,

but a set of moral injunctions. In other words, there is a moral content – moral necessity -- to democratic capitalism.

The first is the Golden Rule. There is a reason that C.S. Lewis said that the Golden Rule appears in every great civilization...it is the foundation for civilization.[16]

We should treat each other in the marketplace with the respect and regard we want for ourselves, with business practices that we want for ourselves. It is also how market regulators must treat market participants. It is how market participants must respond to regulation.

Second, market regulation in the spirit of democratic capitalism respects the exercise of civil freedom, the foundation of our constitutional republic. We each have inalienable rights. Life, liberty, and the pursuit of happiness are about the freedom of the individual – not just his or her moral and political freedom, but economic freedom, as well. This is the “freedom of creative choice”[17] that allows the individual to live a life and pursue work of his or her choosing, not chosen by government.

Accordingly, market regulators must not limit economic freedom without serious justification. In fact, regulators swear an oath to support and defend the US Constitution and its limited powers in the Bill of Rights, including the Tenth Amendment’s reservation of rights to the states and the people.[18] Accordingly, market regulators are duty bound to protect Constitutional freedoms and civil liberty including economic and market activity.

Third, free markets provide exercise for our civil freedoms. Free markets encourage innovation, productivity, job creation, better health and progress. But this freedom is not unlimited. It cannot be used to create monopoly, defraud others, manipulate markets or engage in other actions that ultimately undermine free markets. Free markets must not be exploited in ways that can destroy those same free markets.

That is where market regulators come in. Their mission in the spirit of democratic capitalism is to prevent such exploitation. They do so by placing reasonable limits on market activity. Yet, any limitation on free markets must be carefully calibrated to apply to those activities that degrade free markets, without constraining those that enhance them. Distinguishing the two must be based on careful, data driven econometric analysis and not anecdote and political expediency.

As a general approach, good regulation must solve for demonstrable problems, not mere incidents of bad behavior; rely on solid evidence, not assumptions; represent an optimal approach among alternative courses of action; measure success through rigorous econometric analysis; and advance innovation and competition through flexible and technology-neutral rule frameworks.

Fourth, market regulation in the spirit of democratic capitalism also encourages professionalism. Qualifications matter. Job-holders must be prepared for their jobs. Accordingly, market regulation should encourage high standards of market conduct and behavior. At the same time, regulatory agencies must have funding adequate to fulfill their missions. It is a matter of public trust. It is the essence of a politics of trust.

I have to share something with you...I work with some very brilliant, talented people in the Federal government. They are a credit to the nation. It is too easy today to mock government employees as underworked and overpaid and out of touch with the concerns of ordinary Americans. Well, I spent 30 years in the private sector and the past four in the Federal

government. Let me tell you, my CFTC colleagues serve this nation earnestly and well. They are professionals. They bring expertise, intelligence and commitment to complex markets in the global economy. They are proof that American public service remains a noble calling, worth a young person's consideration.

Fifth, democratic capitalism treats individuals as important, by themselves and for themselves. I want to add something from Mill. In several places he talks about human "dignity."<sup>[19]</sup> I think he may have been the first to bring attention to this topic. Markets should not exploit a worker or trader or participant. Human dignity must be protected, not forgotten, in our regulatory efforts. In other words, people matter and, are not a number, a category, a file or a social media account. Far too much of today's media saturated, on-line world dehumanizes us, takes away our dignity. In a world of seven billion people, each one is a unique, singular person, and must be treated that way.

And, human dignity encourages thinking and education, not propaganda or dogma. This campus stands up for individual freedom precisely because Concordia is pledged to the true concept of education: exploration of ideas and free thought. Sadly, few American campuses honor that pledge any more. Conformity, rather than intellectual diversity, is the tenor of our pedagogical times. Intellectual conformity is equally anathema to democratic capitalism, healthy and dynamic markets and the type of sound market regulation on which they depend.<sup>[20]</sup>

Sixth, democratic capitalism requires that regulators vigorously protect market integrity by enforcing the laws that ensure it. There must be no tolerance for fraud, deception or manipulation in financial markets. Criminality takes away our freedom for the personal gain of the few. Market regulators must maintain bulwarks against such misbehavior, protecting the markets and the American people from those who would do harm. As an agency head, the mission of legal enforcement is especially clear to me. I know from first-hand experience as a former marketplace operator that market integrity is essential to fostering robust trading and responsible risk taking. Enforcing the law is intimately tied to our freedom. Enforcement is necessary to preserving it.

Seventh, there must be fairness. Regulators must not take sides, nor favor one set of market actors over another. We must operate within the limits set by Congress. We are not free agents or rogue actors. We must follow the law. We must be perceived as fair and just agents. Our personal and institutional character matters. I always feel we have done our job if people welcome adjudication or agency action because they know we will be fair. Regulators must have what has been called "moral capital."

Eighth, and last, the markets must make us better as family members, colleagues, citizens, businesspeople, market participants and regulators. Aristotle felt that the polity, if moral, should ennoble us, make us better.<sup>[21]</sup> I feel that way about free and well-ordered financial markets. They must make us more virtuous and better people. Financial markets must be a source for human good, not exploitation.

This brings us full circle, back to the Golden Rule. We must see ourselves in each other, finding a mirror that reflects the soul. There must be honesty, integrity, and reliability in our dealings with others. And, we must live without fear. For those who seek it, there must be the freedom to find God in our work. Freedom is God's gift to us.

I would like to leave time for questions. But, before ending this lecture, I would like to recall Mill. At one point, Mill's friend and neighbor, was John Austin, that lion of jurisprudence. Austin advocated that we find, in his words, the "moral sense" in things.<sup>[22]</sup> Like Mill, Austin, and others, I encourage you to continue your own search for a moral sense in life. Mill felt that such a search was part of a larger inheritance in our civilization, what we give to each other and to those who follow.

I am delighted to have been part of your search for moral sense. And, through our discussion tonight, you have been part of mine.

All of this would have made Dr. Jacobson proud, and justified his belief in the goodness of a philosophical and religious education.

Thank you.

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<sup>[1]</sup> Dedicated to Jack O'Grady, who wordlessly teaches the Golden Rule every day in business and in life by his actions. De Colores.

<sup>[2]</sup> Dr. David Jacobson, for whom the lecture series is named, was a beloved philosophy professor at Concordia College known for his wide-ranging and global interests. He was also Provost, among other positions. He died in 2004 at age 59

<sup>[3]</sup> See John Stuart Mill, On Utilitarianism (1861) in UTILITARIANISM, (Mary Warnock ed., 1962). That volume also contains many other important works by Mill, including On Liberty (1859), Jeremy Bentham, and John Austin. For background, see John Skorupski, JOHN STUART MILL (1989). Skorupski focuses primarily on Mill's philosophy, analysis, and inductive arguments

<sup>[4]</sup> See Richard Reeves, JOHN STUART MILL: VICTORIAN FIREBRAND (2007). This volume is an extensive biography of Mill, with less of a deep dive into his philosophical arguments than the Skorupski volume mentioned in note 2.

<sup>[5]</sup> See John Keay's THE HONORABLE COMPANY: A HISTORY OF THE ENGLISH EAST INDIA COMPANY (1991).

<sup>[6]</sup> Id, at 27.

<sup>[7]</sup> Id.

<sup>[8]</sup> An extremely valuable examination is by Dennis F. Thompson, POLITICAL ETHICS AND PUBLIC OFFICE (1987).

<sup>[9]</sup> This is a phrase that is associated with Niebuhr in his writings from 1938-1940, as shown by Michael Novak, THE SPIRIT OF DEMOCRATIC CAPITALISM, 318-324 (1991). For those who would like an introduction to Niebuhr, see his Gifford Lectures, THE NATURE AND DESTINY OF MAN: Vol I and II (1943).

<sup>[10]</sup> Self-regulation has an important role to play in developing and embracing industry best practices, but that role is different from and not a substitute for government regulation.

[11] One good source for the history and legal power of regulatory agencies is a treatise by Bernard Schwartz, *ADMINISTRATIVE LAW* (1991). A helpful casebook is Ronald Cass, Colin Diver, and Jack Beermann, *ADMINISTRATIVE LAW: CASES AND MATERIALS* (1994). They boldly begin the book with this statement: “We live in an administrative state...the hallmark of the administrative state is the immense number, variety, and power of administrative agencies.” (1) Also, an on-point discussion is in *Commodity Futures Trading Commission v. Schor* 478 U.S. 833 (1986).

[12] 7 U.S.C. §1.

[13] J. Christopher Giancarlo, *American Prosperity Requires Capitalist Freedom*, *CATO JOURNAL* Vol. 35 No. 2, 669-681 (Fall 2015).

[14] Michael Novak, *THE SPIRIT OF DEMOCRATIC CAPITALISM* (1991). *Supra*, note 8.

[15] Socialism, on the other hand, has produced far less salutatory results. That is because socialism limits individual freedom in service to, what it claims to be, the greater good. But that is a misrepresentation of Mill, who says that freedom produces the greater good. “Socialism is an insurance policy bought by all the members of a national economy to shield them from risk. But the result is to shield them from knowledge of the real dangers and opportunities in any economic environment. Rather than benefiting from a multiplicity of gifts and experiments, the entire economy absorbs the much greater risk of remaining static in a dynamic world.” George Gilder, *KNOWLEDGE AND POWER* p. 282 (2013).

[16] C. S. Lewis, *THE ABOLITION OF MAN* (1943). Mill also endorses the Golden Rule in *On Utilitarianism* at 268.

[17] *Supra*, *Knowledge and Power* at 32

[18] U.S. CONST. amend. X (amended 1791). In the words of James Madison, “The powers delegated by the proposed Constitution to the federal government are few and defined.” *The Federalist Papers* No. 45.

[19] *Supra*, *On Utilitarianism* at 260.

[20] Apparently, intellectual conformity is even antithetical to college humor, with comedians avoiding campus comedy gigs. *Boston Herald Editorial: U.S. culture clash plays out on college campuses*, *BOSTON HERALD*, Mar. 26, 2018, available at: [http://www.bostonherald.com/opinion/editorials/2018/03/editorial\\_us\\_culture\\_clash\\_plays\\_out\\_on\\_collegecampuses](http://www.bostonherald.com/opinion/editorials/2018/03/editorial_us_culture_clash_plays_out_on_collegecampuses)

[21] See Aristotle, *The Politics*. A recent version is edited by Johnathan Barnes, *THE POLITICS* (introduction by Melissa Lane, translated originally by Benjamin Jowett) (2016).

[22] John Austin *UTILITARIANISM* *supra* note 2, at 323. This volume includes his famous *The Province of Jurisprudence Determined: Lecture II*, from which I have taken this phrase. Early in his life Mill studied under Austin.