Celebrating Markham’s Approach to Financial History: Getting at the Macro One Deal at a Time

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CELEBRATING MARKHAM’S APPROACH TO FINANCIAL HISTORY:
GETTING AT THE MACRO ONE DEAL AT A TIME

José Gabilondo*

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It is a privilege to comment on Jerry Markham’s latest book—From the Great Recession to the Covid-19 Pandemic: A Financial History of the United States 2010–2020 (“A Financial History”).¹ A founding faculty member of the FIU College of Law, Jerry has been a fantastic teacher-scholar and an encouraging mentor to junior colleagues for two decades. Throughout his distinguished career, he has developed a unique way of analyzing the regulatory history of U.S. financial markets. His approach—borne out in enviable output—has made him an internationally recognized scholar, as well as the legal academy’s foremost historian of the regulation of financial markets.

Ours is a period of great change in these markets. Traditional entities like banks, broker-dealers, and insurance companies now operate as sprawling financial holding companies, retooling their business models and competing with disruptive products like cryptocurrencies, another timely topic that Jerry has tackled in a separate volume.² The long-term implications of these changes are impossible to know, but the kind of approach to financial history that Jerry does serves as a history of the present, a first step towards considering what the future might hold. Three aspects of this book that are trademark Markham are particularly noteworthy: (i) the salience of the time interval under review in this volume; (ii) the transaction-rich approach to creating a macro view of financial markets; and (iii) the critical assessment of hubris in state action, in particular of overzealous federal regulation and prosecution.

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I. A Decade of Equilibrium

A natural historian, Jerry always draws attention to chronological periods in which financial markets undergo a transformation in market structure. The period that this book focuses on is the decade from the Dodd-Frank Act (2010), after the resolution of the Global Financial Crisis (“Crisis”), to the Covid-19 pandemic (2020). To a glacier, 10 years may not seem long, but this decade marked a turning point in financial markets because it resulted in an equilibrium, albeit one obtained at some cost. As regulators implemented the hundreds of rulemakings and reforms mandated by the Dodd-Frank Act, private firms adjusted their business practices, recapitalized their balance sheets, and pushed back against the most onerous reforms. In so doing, private capital reached a new détente with regulators that made possible a return to financial stability. The second defining feature of this decade is the dovish monetary policy that kept financial intermediaries liquid and mitigated their costs of complying with post-Crisis regulation. Cheap money also funded buybacks for corporations and helped consumers to recover from the losses of 2007 and 2008. To the extent that cheap money policies rather than productivity drove financial stability, the foundations of this equilibrium may not be solid. The book ends at the beginning of a new monetary cycle in which rising interest rates will change the rules of the game that have prevailed since the end of the Crisis.

II. Bridging the Macro and the Micro

Macroeconomic modeling of financial markets involves reducing their complexity to make it easier to generalize, for example by using a single consumer preference to estimate demand in the aggregate. Jerry’s approach to financial history—this volume is a prime example—captures the sweep and scope of the national economy in a different way. The book injects realism into the analysis by incorporating dozens of separate episodes that crisscrossed banking, capital, and money markets and—in the aggregate—created macroeconomic trends, avoiding the criticism about much financial theory that it avoids the grittiness of economic realities. I consider this methodological aspect the most original aspect of what Jerry brings to financial history because it honors the factual complexity of financial products and business models and puts a human face to institutional dynamics that can seem impersonal.
III. REGULATORY HUBRIS AND THE LIMITS OF STATE ACTION

Since the New Deal, our regulatory structure has distinguished between (i) a depository banking sector supervised by prudential regulators, (ii) securities markets overseen by the Securities and Exchange Commission, (iii) commodities markets under the purview of the Commodities and Exchange Commission, and (iv) everything else that does not fit neatly into one of these buckets. However, the material forces that shape financial markets tend not to respect the regulatory classifications that shape reality within the Capital Beltway. Instead, these forces show up as financial disruption, not contemplated nor provisioned for by the fiat regulatory order.

So, understanding what is going on in financial markets requires both detailed knowledge of the regulatory silos as well as their limitations, something in which *A Financial History* excels. The legal academy has many experts in niche areas of financial market regulation, but virtually no one has Jerry’s concurrent breadth and depth not only in banking, securities, commodities, and money markets but also beyond the silos where the wild things are. Like his work generally, *A Financial History* is a nuanced account of how financial innovation disrupts the tendency (common to both regulators and private actors) to think of financial markets in terms of pre-existing regulatory paradigms. The book takes to heart Ronald Coase’s advice to heed the model of reality rather than the reality of the model.3

Just as the endless tousling between bulls and bears establishes something’s value by juxtaposing rival views about the future, so too do opposing views about regulation make for better law by subjecting consensus views and sacred cows to critical review. In this spirit, *A Financial History* interrogates the key premises on which the decade’s expansion of regulatory power was predicated. Respectful of his audience, Jerry leaves the ultimate conclusion to the reader. However, he asks important questions about the extent to which regulation can really do what it sets out to do in a capitalist economy in which private capital enjoys the freedom of action to mitigate and, sometimes, redirect regulatory initiatives. What makes the book especially lively is the way that it integrates how financial innovation, regulators, and market actors form part of a recursive cycle of change based on rival assessments of risk and competing ideas about the role of regulation.

Part I takes up this issue, in particular through the first two chapters that examine how banking and capital markets adapted to the post-Crisis regulatory environment.4 All of the chapters in Part II develop this theme by

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4 See MARKHAM, *supra* note 1, at 5–46.
critiquing the federal government’s post-Crisis prosecution model and debates that bordered on “banker bashing.” In Part III, Chapters 9, 10, and 11 do an excellent job poking at the scientific and risk management assumptions that resulted in the government-mandated shut down of the national and global economies.