Michigan State University

From the SelectedWorks of Brian G Gilmore

Summer 2010

A Failure of Capitalism (Book review)

Brian G Gilmore

Available at: https://works.bepress.com/brian_gilmore/1/
Judge Posner’s *A Failure of Capitalism: The Crisis of ’08 and the Descent into Depression*: A Review

Brian Gilmore¹

I. Preface: a question of semantics

In reading Judge Richard Allen Posner’s latest book, “A Failure of Capitalism: The Crisis of ’08 and the Descent into Depression,” Roland Barthes,² the French master of semiotics, can provide prudent guidance from his famous essay, “The Death of the Author” as you begin:

The reader is the space on which all the quotations that make up a writing are inscribed without any of them being lost; a text’s unity lies not in its origin but in its destination.³

This advice, and especially the idea of “destination” is important because of Posner’s decision to use “A” in the title as opposed to “The.” In other words, “A Failure of Capitalism,” is not a book about “a failure” despite Posner’s characterization. This is a book about a fairly predictable event in the life of capitalism, as currently configured, where the world’s dominant economic system has behaved as it is prone to behave: recklessly and not in the interests of most people. Barthes, if he could, would advise the

---

¹ Clinical Professor and Supervising Attorney, Howard University School of Law, Fair Housing Clinic

² Roland Barthes, cultural and literary critic, was born November 12, 1915 in Cherbourg, France, to Louis and Henriette Barthes. His father Louis, a naval officer, was killed in World War I before Barthes turned a year old. Barthes was raised by his paternal grandmother and aunt in Bayonne before going to reside with his mother in Paris in 1924. Despite a long and difficult struggle with tuberculosis from 1934-1947, Barthes was able to obtain many teaching posts including posts in Egypt and Romania, and eventually became a well-respected scholar and writer in the field of semiology, and literary theory. He eventually became Chair of the Department of Literary Semiology at the College of France, although by this point in his academic career, he already held a pre-eminent position of respect in French academic circles. Barthes is the author of several groundbreaking books on cultural, literary theory, and semiology including “Mythologies,” “The Pleasure of the Text,” and “Image, Music-Text.” He died in 1980. Source: Graham Allen, “Roland Barthes,” (Routledge Press 2003) p 1-3

reader to not be swayed by implications suggested in Posner’s title that this book is not
evidence of capitalism’s inherent shortcomings.

Thus, “A Failure of Capitalism,” is intriguing for many reasons but initially
because of the choice of title. It suggests apprehension on Posner’s part and a protective
approach. It is a critical book on capitalism (perhaps because the damage this time is so
far reaching) but it is not as strident as it needs to be considering Posner’s reputation and
expertise.

The best explanation for the semantic title choice by Posner is that capitalism in
“A Failure of Capitalism” is a verb and not a noun (or at least in many parts of the book).
Mr. Posner is not explaining “a” system but is seeking to analyze activity of that system.
The use of “the” would have condemned the system to failure and Mr. Posner, by his own
admission, has no “axe to grind,” no agenda.⁴ Thus, the use of the word “the” could be
problematic under such an approach because it would strongly suggest that Mr. Posner is
referring to the actual economic system and not the activities of that system.

However, that too creates a problem with perception for readers because from the
very beginning, it is apparent that Mr. Posner is, indeed, describing the organized system
of economic activity known as capitalism that has failed. Early on when pondering the
economic crisis, Posner asks: “What can we learn from it about capitalism, government
and the economics profession?”⁵

Those who do have agendas would argue that Posner is avoiding the obvious:
capitalism is always in a state of failure for huge numbers of the population (most of the

⁵ Id. at xiii
world population by most estimates)\textsuperscript{6} and that is the system. This is precisely why Mr. Posner has written a book that is essentially about a crisis with clear ties to consumers; yet, detailed discussions about consumers and their place in the housing crisis and recession are lacking.

With that important note about perception and semantics noted, this review will proceed as follows:

First, the discussion will focus upon how well Posner makes out the case that the country is currently suffering from a depression as opposed to a recession. This is the central theme of the book and a critically important element to his overall discussion and is one of the strengths of the book.

Second, this review will address an issue that is difficult to comprehend: Posner’s limited discussion devoted to consumers and their place in the depression and the limited discussion devoted to irrational human conduct (greed) in the book.

Thirdly, the review will draw a comparison between “A Failure of Capitalism” and a similar yet smaller book from 1989, “The Trouble with Money” by Nation Magazine correspondent, William Greider.

Finally, this review will take a final look at the book overall and the future of capitalism.

I begin how with a brief look at Judge Richard Posner and how that is important for this particular topic.

\textsuperscript{6} Id. at xiii - xiv
II. Framing the failure: Is this a depression?

a. Judge Richard Posner

There isn’t any doubt that Richard Allen Posner is uniquely qualified and positioned to write a book of this nature. “A Failure of Capitalism” is a book about a complex and seemingly very unlikely event that has occurred in society and the world, for that matter, and a book that analyzes the reason or reasons for the occurrence of that event requires an individual of singular expertise. It is also a book about the most dominant economic system in the world today and Mr. Posner, over the years, has demonstrated a very robust understanding of this system in all of his work.7

Posner, a sitting judge on the United States Court of Appeals for the Seventh Circuit since 1991, provides credibility for this book but also the temperament of a judge in his writing.8 His credentials, however, also include an undergraduate degree and law degree from Yale, and honorary degrees from Harvard, Syracuse, and Georgetown to name a few of the distinguished institutions that have recognized his talent and intellect.9

Posner’s post-law school career prior to his elevation to the bench is impressive as well. He served as a law clerk to Justice William Brennan on the United States Supreme Court following law school, and additionally worked for Commissioner Phillip Elman at the Federal Trade Commission from 1963 to 1965.10 He became a law professor at Stanford Law School in 1968 as an associate professor and began teaching at the University of Chicago School of Law in 1969 where he remained until 1981 when he was

7 http://home.uchicago.edu/~rposner/biography
8 Id.
9 Id.
10 Id.
appointed to the U.S. Court of Appeals for the Seventh Circuit.\textsuperscript{11} He served as Chief Judge of that court from 1993 to 2000.\textsuperscript{12}

But Mr. Posner’s steady and extremely impressive work as a writer-scholar for the past 30 years is probably what demonstrates more than any other characteristic his capability and unique ability to write “A Failure of Capitalism.” Mr. Posner’s books over the years have addressed various topics. He has written over 300 articles and more than 30 books. His books include “The Economics of Justice,” “Law, Pragmatism and Democracy,” “Overcoming Law,” “Natural Monopoly and Its Regulation,” “Economic Analysis of Law,” and “How Judges Think,” among many others.\textsuperscript{13}

The book requires knowledge of a variety of subjects and a broader understanding of capitalism, economics, management, law, and policy. Mr. Posner possesses all of these attributes as demonstrated by his record of scholarship, legal educator, and member of the bench for nearly 30 years. The Huffington Post only recently described Mr. Posner as “one of the most prominent proponents of free market capitalism”\textsuperscript{14} while the magazine, The Economist refers to him as “a bold thinker.”\textsuperscript{15} In addition, the Maryland Bar Journal describes Mr. Posner as “prolific” as a writer.”\textsuperscript{16}

Judging by the range of Mr. Posner’s work and his accomplishments, this publication is an important discussion item for many individuals with a variety of interests and ideological positions.

\textsuperscript{11} Id.
\textsuperscript{12} Id.
\textsuperscript{13} Id.
\textsuperscript{14} Marcus Baram, “Judge Posner Questions his Free Market Faith in ‘A Failure of Capitalism,'” The Huffington Post, April 20, 2009 (last accessed June 20, 2009)
\textsuperscript{15} “Seven Questions for Richard Posner,” The Economist, June 6, 2009 (online version – last accessed June 20, 2009)
\textsuperscript{16} The Honorable Albert Matricianni, “Defamation by Fiction,” Maryland Law Journal, May/June 2009 -p. 52
b. Posner’s Depression

From the beginning, the use of the word “depression”\textsuperscript{17} in “A Failure of Capitalism” is an important decision by Mr. Posner. The decision to describe the current economic crisis as a “depression” sets up the overall discussion because immediately the financial climate we all live in is much worse than many of us currently believe as a result of this choice. Depression is the central theme throughout for Posner; he wants the reading public and those most interested in this kind of discourse to alter their thinking in regards to the crisis and begin looking at it more seriously.

As Posner asserts throughout, available information regarding the current financial crisis indicates that the current crisis is a depression. Posner, as others have done including President Barack Obama (though in different words), describes the crisis as the worse “economic crisis since the Great Depression.”\textsuperscript{18} In fact, in the preface, Posner repeatedly refers to the “‘Great Depression’\textsuperscript{19} while also using the term “depression” freely as well. “The Great Depression,” due to its historical importance, is now a term onto itself much like “The Middle Passage”\textsuperscript{20} or “The Holocaust.”\textsuperscript{21} This is also why Posner’s choice is effective.


\textsuperscript{18} Id. at vii

\textsuperscript{19} Id.

\textsuperscript{20} “The Middle Passage” refers to the transportation of Africans sold into chattel slavery from the continent of Africa to the Western Hemisphere, namely North America and the Caribbean Islands.

\textsuperscript{21} According to Jack R. Fischel in his book, “The Holocaust” (Greenwood Press 1998) p. xiii: “The form of genocide known as ‘The Holocaust’ marked Hitler’s ‘final solution’ to the ‘Jewish problem.’ ‘From the outbreak of the war in September 1939 to Germany’s surrender in 1945, almost a third of the world’s Jewish population were murdered by the Nazis and their collaborators.” Fischel adds that ‘The Holocaust’ is “generally associated with the intentions of the Germans and their collaborators to rid the earth of the Jewish population.”
“Some conservatives believe that the depression is the result of unwise government policies,” Posner writes. He adds later that “government’s myopia, passivity, and blunders played a critical role in allowing the recession to balloon into a depression….” Again, the free use of this terminology is far more foreboding than the daily media references to a “recession” or “economic downturn” notwithstanding any validity to the decision to use the reference.

Posner again refers to our economic situation as a “depression” immediately following his summary of what his book will discuss. This is again very important not only because of the honesty but because Mr. Posner uses it as an opportunity to again stress the seriousness of the moment and to set up his broader arguments about economic activity. The following passage is a good example of Posner’s tone through the book:

Some might think it premature to write about a depression before it ends and indeed before it has reached bottom. But when it ends, hindsight will rewrite history. With the passage of the American Recovery and Reinvestment Act of 2009, expected within weeks, virtually all the imaginable weapons that can be used against a depression will have been deployed (though innumerable changes of courses and emphasis can be expected), and it may takes years to determine their efficacy and to experience any aftershocks of the depression, such as runaway inflation.

Posner’s use of the term depression is matter of fact, in nature; he states it so many times, it becomes valid, arguable, and ultimately acceptable as fact (though it is an opinion clearly). By his own admission, Posner did not see a depression occurring. This

---

23 Id.
25 Jeffrey Lynott, “Area fares well during recession,” Wilkes Barre Times-Leader, June 20, 2009 (online version – last accessed June 20, 2009)
27 Id.
again supports the notion that Posner’s conclusion is based on an honest assessment of events. He considered the crisis to be a crisis but did not rush to quick judgment despite the gravity of the problem.

Yet, the context in which the term is used is even more important. The use of the term is justified with evidence and historical comparisons and this drives the discussion. This evidence is set forth in the first few chapters.

Posner is also quick to identify the reasons why this crisis is so serious. The federal government response to the crisis, and the anticipated elevation of national debt are described as “long term costs” of “recovery.” The implication here is, this recession is very serious, and much more serious than a typical recession caused by the normal activities of capitalism.

In maintaining this theme that this is an economic depression of historical proportions, the first chapter of “A Failure of Capitalism” is aptly titled “The Depression and its Proximate Causes.” The legalistic nature of the title is again very important because it suggests negligence. There is ample data offered by Posner to support his idea of negligent conduct by various parties even though the discussion isn’t about tortuous behavior. This is the first of four chapters that describes the crisis and how it occurred.

Unfortunately, Posner does not devote one chapter to the origin of the crisis: consumers and the housing market. There are passages and discussions that appear in “A Failure of Capitalism” occasionally regarding consumer activity but nothing in extensive detail. Five chapters that describe the response to the depression follow these four initial

\[^{28}\text{Id.}\]
chapters, followed by two chapters that provide conclusions and closing thoughts consistent with Posner’s ideological positions.

But the chapter on economic depression, “The Depression and its Proximate Causes,” commences Posner’s discussion and is delivered to the reader like a lecture. Posner, a long time law professor, offers his depression lecture by way of a careful examination of economic institutions and activity demonstrating an expert’s command of the current economic system at work in the U.S. and much of the world.

For Posner, a recession, or in his manner of thinking, a depression, commences with “some shock to the economy.” This shock involves a reduction in the “value of personal savings” causing people to “spend less.” Of course, if consumers spend less, demand for “goods and services” will “fall.” This, in turn, according to Posner will have an effect on supply of goods and services and on the supply of labor as well.

Eventually Posner’s event, the “shock,” will lead employers to seek to reduce costs because demand for their products and services have fallen in the midst of the shock. While the solution to this problem could be to reduce wages, the typical action by employers is to reduce their workforce.

But according to Posner, this is not necessarily a solution to preventing an economic depression because laid off workers will reduce spending and those still employed will reduce spending as well in anticipation of possibly being laid off in the

---

30 Id.
31 Id.
32 Id.
33 Id.
34 Id.
near future. In other words, fear will have a demonstrative effect upon the economy and will lead to more recessionary conditions. If a person thinks they are about to become unemployed, chances are they will act accordingly. Along with other factors, such a scenario leads to what Posner deems a “downward spiral”:36

The less savings, especially safe savings, people have, the more they will reduce their personal consumption expenditures in order to increase their savings, and therefore the more that output will fall. Interest rates will fall too, but many people will be afraid to borrow (which would increase economic activity by giving them more money to spend).37

“A Failure of Capitalism” is filled with passages of this nature that explain the economic crisis in language easily understood by not only lawyers and economists but the general reading public as well. The scenario that Posner explains above, the shock, has already occurred. The shock to the system was the bursting of the “housing bubble”38 which had a direct impact upon the stock market and the overall economy though these connections are explained later by Posner.

The first task, and a task which Posner accomplishes, is to explain a depression, and in effect, the current depression. Posner accomplishes this by describing three kinds of depressions in careful detail and ordinary facts in order to provide the context for the overall discussion of today’s situation.39 However, Posner’s singular focus is on the type of depression event that occurred with the Great Depression of the 1930’s. This is same kind of depression the country is experiencing now, according Posner:

The third and most dangerous type of recession/depression is caused by the bursting of an investment bubble. It is depression from within, as it were, and is

35 Id.
36 Id. at 5
37 Id. at 4-5
38 Id.
39 Id. at 9-10
illustrated by both the depression of the 1930’s and the current one, though by other depressions and recessions as well, including the global recession of the early 1990’s.\footnote{Id. at 10}

This section, where Posner explains “bubbles” provides good evidence that this recession is a depression. The Great Depression of the 1930’s, according to Posner, was the direct result of the bursting of a “stock market bubble” that developed as a result of “plausible optimism” and “unprecedented economic growth.”\footnote{Id. at 11} Likewise, the current crisis is linked to the bursting of an investment bubble with direct ties to the housing industry.\footnote{Id.}

While one might expect discussion of the housing industry to dominate Posner’s deliberations, it does not. Posner is more inclined to frame the discussion through the prism of the financial institutions and financial market actors who were far removed from the millions of mortgage transactions that are at the heart of the crisis. He devotes an extraordinary amount of space explaining the economic forces and institutions at work in the economy. It is doubtful that this extensive examination of these forces is necessary in order to conclude that this might be a depression. For economists and other financial sector actors, activity of the Federal Reserve is second nature and vitally important to reaching such a conclusion. However, for nearly anyone else interested in this topic, it is a suggestion of detachment even though Posner might be completely attuned to the problem from a variety of vantage points.

\footnote{Id. at 10} 
\footnote{Id. at 11} 
\footnote{Id.}
Posner’s detachment is not much different from many commentators on the issue. Lawrence B. Lindsey, former aide to President George W. Bush, recently explained the issue in a similar detached fashion:

The current downturn, by contrast, is due almost exclusively to a change in the housing credit cycle from excessively easy to modestly restrictive. Housing turned down before the economy, and even now, nearly eighteen months into the housing recession, the national unemployment rate is still at what economists consider full employment.43

While Lindsey, as Posner does many times in “A Failure of Capitalism,” references the housing market, the consumer is still fairly invisible to the process and the crisis. Posner explores the issue in a similar manner throughout the initial chapters and does not venture deep enough beyond the areas of discussion that concern the larger institutions of the financial market.

Posner’s second chapter, “The Crisis in Banking” continues to build a strong case for his contention that this is a depression. Posner, a scholar of financial history, notes that it was “risky lending” by banks that brought on the “Great Depression.”44 Today’s recession, according to Posner is also based upon a high level of risk45 but is exacerbated by a fairly new product in the world of financial markets: securitized debt.46

The new securitized debt has come to the world in various forms; the most commonly mentioned types are “credit default swaps” and “collateralized debt obligations.”47 Posner discusses these products briefly but does explain their critical place

45 Id at 49-54
46 Id at 54
47 Janet Morrissey, “Credit Default Swaps: The Next Crisis?,” Time Magazine (online version), March 17, 2008;
These new products are at the heart of the collapse of the financial market because these entities transformed the mortgages of everyday consumers into products bought and sold on the financial market just like shares of stock.\textsuperscript{49}

The end of the chapter contains a testimonial from a “Wall Street financier” who paints a grim picture of banking at the present time. This provides support for Posner’s positions. The financier explains that banks are in survival mode even with the assistance from the government.\textsuperscript{50} The tactics are dramatically altering the banking system and causing the crisis to linger.\textsuperscript{51}

The chapter, “The Underlying Causes” (Chapter 3) is perhaps the most important section in the book. Along with the chapter that follows it, “Why a Depression Was Not Anticipated,” (Chapter 4) Posner completes his initial argument that focuses upon the crisis and not the reactions to the crisis and attempts to repair the problem. However, if there are any two chapters where Posner could have devoted detailed discussion of the depression and the consumer vantage point, it is here in these two chapters. However, again, Posner elects to frame the discussion around economic terminology to advance his arguments.

“The Underlying Causes” is a methodical and probative chapter. To his credit, Posner seeks understanding in this section so that “future depressions” can be avoided and a “prompt recovery” from the current depression can be realized.\textsuperscript{52}

\begin{itemize}
\item \textsuperscript{49} Id.
\item \textsuperscript{50} Id. at 72-74
\item \textsuperscript{51} Id.
\item \textsuperscript{52} Id. at 76
\end{itemize}
everything from irrational conduct to emotional reasons in seeking to understand how the
financial crisis evolved.\textsuperscript{53} Posner tries desperately to keep the actions in perspective:

> Among the deep causes of a depression might be human errors – maybe errors of
> a kind which people are predisposed by quirks of human cognitive psychology –
> or character flaws, such as greed (whatever that means).\textsuperscript{54}

The problem with this tact is Posner is avoiding the obvious: that capitalism, the
object of his book and as currently configured, encourages greedy conduct. This theme is
explored minimally in the book despite evidence to the contrary. The fact that Posner
mentions the Bernie Madoff\textsuperscript{55} scandal in “A Failure of Capitalism” is a suggestion that
Posner is aware of this kind of behavior and is aware that capitalism is sometimes
synonymous with personal excess at the expense of others.\textsuperscript{56} The decision to use the
phrase “whatever that means” in the book is cynical in tone and dismissive.

The chapter, “The Underlying Causes” also contains one moment where these
concepts seem to be on the verge of being discussed. This is the discussion on what
Posner refers to as “cheap credit.”\textsuperscript{57} The discussion is impressive; however, it is hardly
enough to provide “A Failure of Capitalism” with a broader discussion.

Posner describes, in detail, the current scenario where borrowers now owe
mortgages where the value of the property has dropped significantly, where the

\textsuperscript{53} Id. at 82
\textsuperscript{54} Id. at 76
\textsuperscript{55} Bernie Madoff, former chairman of NASDAQ, was arrested on December 11, 2008 for running the
largest Ponzi scheme in history, a $50 billion scam constructed over decades. Madoff was sentenced in
June 2009 to 150 years in prison. In addition, the federal government obtained a judgment against him for
$170 billion. Sources: Deborah and Gerald Stober, “Catastrophe: The Story of Bernie Madoff, The Man
Who Swindled the World (Phoenix Books 2009); Robert Frank and Emir Efrati, “Evil Madoff Gets 150
Years in Epic Fraud.” The Wall Street Journal, June 30, 2009 A-1
\textsuperscript{56} Id.
\textsuperscript{57} Richard A. Posner, “A Failure of Capitalism: The Crisis of ’08 and the Descent Into Depression
(Harvard University Press 2009) p. 105
Homeowners are what the media is now describing as “underwater.” “[H]omes will no longer have a positive value for their owners” resulting in “many defaults” and subsequently a “housing glut that pushes down housing prices.” Posner concludes that the “culprit” for this problem is “cheap credit” because it “stimulates economic activity.” This causes an increase in the price of assets including residential real estate. This leads to the conduct of the past few years, according to Posner, where borrowers sought loans for homes they probably could not afford and lenders sold loans that never should have been sold.

While Posner frames the discussion around cheap credit, cheap credit is simply a technical explanation for concluding that actors from the financial markets identified an opportunity, began to take advantage of that opportunity, but then reached the point of exploitation. It isn’t necessarily, as Posner asserts, “the rational behavior of law abiding financiers and consumers…” All lenders didn’t behave the same but some lenders, in fact, took advantage of consumers intentionally and greed was the driving force. Cheap credit simply made these transactions more favorable; it isn’t the reason why bad mortgage products were sold so widely.

In Chapter 4, “Why a Depression Was Not Anticipated,” Posner focuses in on the educated class who had a role in the crisis seeking to again understand how so many could have gotten it wrong from the beginning. Why did these highly educated, very

---

60 Id.
61 Id. at 105-107
62 Id. at 107
experienced, and well-engaged group of individuals not recognize the problems and take
the necessary steps to prevent the depression? Federal Reserve Chairman, Ben Bernacke,
is an early target of Posner:

But it seems unlikely that such experts on the business cycle as the Federal
Reserve’s Chairman Ben Bernacke, are constrained to have their predictions on
naïve extrapolations. This makes his neglect, and that of other experts both inside
and outside the government of warning signs of a coming crash extremely
puzzling.63

Posner recites a multitude of data that Bernacke and others missed or ignored as
the housing bubble continue to swell and disaster loomed over the markets.64 To highlight
their failure, Posner cites the Pearl Harbor attack of 194165 as an example of another
disaster that should have been identified by experts.

Posner described that event as “logical” and one with “many warning signs” just
like the current economic crisis. Of course, the experts, in 1941 ignored the obvious
according to Posner:

Among the many factors that caused the warnings to be disregarded were prior
beliefs (preconception), the cost and difficulty of taking effective defensive
measures against an uncertain danger, and the absence of a mechanism for
aggregating, sifting, and analyzing warning information flowing in from many
sources and for pushing it up to the decision making level of government.66

Today’s unlikely financial crisis (this is debatable) contains some of the same
characteristics as “Pearl Harbor.” Preconceptions influenced everyone in the financial
markets to disregard the facts. Private actors failed to notify government officials in order
to motivate them to act but these actors also did not have any means to notify the

63 Id. at 117-118
64 Id. at 118-119
65 The nation of Japan attacked the U.S. naval base, Pearl Harbor, in Honolulu, on December 7, 1941; 2,400 Americans were killed; 1,178 were wounded. Source: http://www.time.com/time/photoessays/pearlharbor/
appropriate government officials. While it is apparent that the actors in the financial markets were aware of a problem, it is quite another matter for them to be able to obtain an audience at the highest level of government without causing panic.

In the next five chapters (Chapters 5-9), Posner is concerned more with the reaction to the crisis and the possible recovery from the economic peril. These chapters again provide support for Posner’s vision of a depression. Some of the discussions are repetitive in nature but still add to Posner’s overall argument.

“The Government Responds,” Chapter 5, is significant because of the gravity of the response from the government to correct the problem. The efforts include assistance to banks, and auto industry (though the connection to the crisis is elusive), tax cuts, and public works projects. The best discussions by Posner are devoted to tax cuts and public works programs. This discussion includes what is now commonly known as the “stimulus,” the massive spending program proposed by President Obama that has been passed since the completion of the book and that is slowly being implemented.67

Posner is very critical of the tax cuts that were passed (by Presidents Bush and Obama) to try to increase economic activity. Posner contends that the tax reductions will not spur economic activity or increase consumption because consumers, already worried about the future, will attempt save more of their money.

Posner describes the tax cut of February 2008 under President George W. Bush as a “damp squid so far as stimulating consumption.”68 This is perhaps a bit kind considering that the financial infusion did not spur any real spending into the economy.

The tax cut passed by Congress and President Obama in the stimulus package, according

67 http://www.recovery.gov/
to Posner, is only “two-thirds greater”\(^{69}\) and was received at a much more problematic moment.

The tax cuts, Posner asserts, will also not assist the states with their own revenue problems.\(^{70}\) Obviously, the state of California, which is experiencing grave economic problems at this writing is an example of a state experiencing the kinds of problems alluded to by Posner.\(^{71}\)

The public works projects, commented upon by Posner recall “the Great Depression” and efforts by President Franklin Roosevelt’s efforts to address the economic problems of that period.\(^{72}\) Posner is less critical of these efforts but still is critical of public works projects for a variety of reasons: delays, prioritization, and dependency.\(^{73}\) But the choice by the Obama administration to use public works in the stimulus package is again supportive of Posner’s position that the current moment is a depression. The suggestion here is if it isn’t so bad, why is the government taking such serious and comprehensive steps to address the crisis?

The final chapter where Posner really states the case that this is a depression directly is Chapter 6 - “A Silver Lining.” The remaining chapters are used to comment on some of the lesser known nuances of the depression and to clarify many points and issues.

\(^{69}\) Id.
\(^{70}\) Id. at 169
\(^{71}\) Conor Dougherty, Rhonda L. Rundle, & Justin La Hart, “First in Recession, California Shows Possible Future for U.S., Wall Street Journal (online) – October 9, 2008 (last accessed June 28, 2009)
\(^{72}\) Upon taking the oath office in March 1933 and becoming President of the U.S., Franklin Roosevelt implemented an aggressive government program to stabilize the banking system, provide citizens with employment, and to restore confident in the public as the depression deepened. The plan known now as the New Deal proved to be highly successfully over the long haul and changed history forever in the U.S. Source: Eric Rauchway, “The Great Depression and the New Deal: A Very Short Introduction” (Oxford University Press 2008) p. 1-2
Posner has previously mentioned. These chapters are important but not as important as the other portions of the book already discussed.

These chapters include discussion on the relationship between the market and the state in the crisis (Chapter 7 – “What we are learning about Capitalism and the Government”), what happened amongst economists prior to the collapse (Chapter 8 – “The Economics Profession Asleep at the Switch”), whose to blame for the crisis (Chapter 9 – “Apportioning Blame”), what to do (Chapter 10 – “The Way Forward”), is economic conservatism viable anymore (Chapter 11 – “The Future of Conservatism”) and then his conclusions (“Conclusion.”)

“A Silver Lining” takes the same matter of fact approach to the crisis as Posner does at the very beginning of the book. Posner also links the crisis to the rise of Barack Obama and the Democratic Party to unprecedented political power in the U.S. There is some numerical support offered as well as Posner mentions the famous collapse of the investment bank, Bear Stearns as proof of a depression because of how deeply leveraged the firm had become at the time of its collapse. The Bear Stearns story also recalls the reckless conduct of the Great Depression and how that conduct brought down the markets and the banks. However, for the most part, Posner avoids financial data to support his conclusions.


75 Bear Stearns is an 85-year-old investment bank purchased by J.P. Morgan in the summer, 2008 for $2 per share. At the time, the bank was facing certain failure and imminent insolvency. The bank’s failure and then sale was an early indication of the impending economic crisis. Its demise is documented in the PBS Frontline documentary, “Inside the Meltdown.” See footnote 44.

But Posner probably reveals too much of own economic philosophy in “A Silver Lining.” It is apparent that he is opposed to significant government intervention and is more in favor of privatization of government functions in the conservative tradition. He is also fairly harsh on the role of unions in the workplace especially the powerful automotive industry union, the United Auto Workers. These are two core conservative beliefs, good times and bad: unions are bad for business and limited government is good for business.

This chapter also contains a very interesting discussion on executives at financial firms that should be circulated widely. In the passage, Posner believes that the depression will have the net effect of encouraging or forcing highly educated individuals who would normally work for financial firms and earn millions to accept less lucrative employment in fields where they might make a larger contribution to the nation.

“The depression will reduce the recruitment of brilliant people to work for financial firms,” Posner writes. He adds that this is good because of the difference between “private and social returns on labor.” Teachers, scientists, and inventors are “examples of workers who provide benefits to others that exceed, on average, the providers’ monetary incomes.”

On the other hand, individuals with PhDs’, whom will work in the financial industry, do not necessary provide the same such return, in Posner’s opinion. The solution to this problem and the likely outcome, as a result of the crisis, is some of these

77 Id. at 224
78 Id. at 224-225
79 Id. at 230
80 Id. at 231
81 Id.
82 Id.
individuals, seemingly destined for work in the financial markets, will work in less lucrative fields, but will provide a much higher benefit to the public.\textsuperscript{83}

Throughout the reading of “A Failure of Capitalism,” one will be tempted to read ahead to the chapter, “The Way Forward” in order to find out what Posner believes is the way forward. This is because Posner does an excellent job throughout convincing the reader that this is a depression and something must be done quickly. In addition, Posner explains the crisis as such a multilayered problem that it is intriguing to try to predict what he might propose in order for the global market to be repaired.

At this writing, unemployment in the U.S. is almost 10 percent.\textsuperscript{84} States are reporting unemployment in excess of 10 percent,\textsuperscript{85} the public is increasingly anxious. The public wants to know from someone with credibility what to do about the crisis. Posner has credibility and though he is a sitting judge with relevant intellect and experience, he is not part of the Obama administration and the daily struggle to correct the economy. He is also not an advisor to a bank or investment entity (that I know or that he discloses) with a direct interest in attempting to steer the recovery in a specific direction.

However, if the public is waiting for Posner to provide bold ideas for change or reform or to suggest some structure or foundation for addressing the problems presented by this crisis, it is not offered in “A Failure of Capitalism.” Mr. Posner’s way forward is

\textsuperscript{83} Id.
\textsuperscript{84} \url{http://www.bls.gov/news.release/empsit.nr0.htm} - last accessed in July 2009 following release of June 2009 unemployment statistics.
\textsuperscript{85} According to the Associated Press, as reported by National Public Radio on June 19, 2009, the unemployment rate exceeded 10 percent in 13 states.
lacking\textsuperscript{86} and this is surprising considering the very engaging discussion he offers throughout this book.

Posner’s way forward discussion begins by noting three fundamental factors that caused the crisis: “excessive deregulation,” “neglect of warning signs,” and “insouciance about the decline in the rate of personal savings and the safety of such savings.”\textsuperscript{87} With respect to “excessive deregulation,” Posner is quick to stress that the U.S. has plenty of agencies devoted to regulating the financial industry (there are too many to list here) and is courageous and insightful enough to note that this has led to a “fragmentation of regulatory authority, a lack of coordination, turf wars, yawning regulatory gaps with respect to hedge funds, bank substitutes, and novel financial instruments, and an inability to aggregate and analyze information about emerging problems in the financial markets.”\textsuperscript{88}

This is followed by a detailed discussion of re-regulation that eventually concludes that “re-regulation” “should wait.”\textsuperscript{89} One wonders if the economy begins to function much better soon as a result of the stimulus package whether there will be any regulation at all under Posner’s philosophy. In other words, Posner really is urging President Obama to wait and see if the economy will begin to stabilize. It is not that Posner’s arguments in this subject area are not logical either. They are. However, if deregulation is part of the problem, as Posner admits, how can that status quo solve the problem in the future?

\textsuperscript{86} This is not necessarily a statement meaning Posner favors a conservative approach as in ideology but that he is not for aggressive intervention beyond what President Obama has already proposed. In other words, Posner is cautious though he is aware that something should be done.


\textsuperscript{88} Id.

\textsuperscript{89} Id. at 295-296
The alternatives to re-regulation of the financial services industry as discussed by Posner are shortsighted.

“Maybe,” Posner writes, “the government should stop talking up homeownership.”\(^\text{90}\) This resembles the accusation from some commentators that the recession is the fault of low to moderate-income homeowners who should have known they could not afford the loans they received.\(^\text{91}\) Posner does not blame the crisis on homeowners as the Wall Street Journal famously did, but this suggestion by Posner could encourage such a sentiment.

There are also discussions regarding more disclosures regarding executive compensation, increased taxes on “persons with very high incomes,”\(^\text{92}\) and a requirement that compensation “be backloaded and tied to a corporation’s future performance.”\(^\text{93}\) Posner does not feel strongly about any of these proposals and actually believes that the Obama administration should avoid any effort to “emulate Franklin Roosevelt’s one hundred days.”\(^\text{94}\) This might be actually good advice; however it is inconsistent with his own conclusion that this is a depression and a desperate situation.

President Roosevelt acted aggressively in his first 100 days in 1933 because the economy was in a very poor condition.\(^\text{95}\) We are either living in a depression period or not. Posner does not have the benefit of hindsight but if conditions are very grave as he suggests over and over throughout the book, bold action is necessary and as we know,

\(^{90}\) Id. at 296
\(^{91}\) Among the commentators who have written about this issue include Joel Kotkin, writing in Forbes Magazine, June 30, 2009 (online version) and Charles Krauthammer writing in The Washington Post on September 26, 2008 (A-23)
\(^{92}\) Id. at 301
\(^{93}\) Id. at 299
\(^{94}\) Id. at 302
some has been taken. The future only holds the answer. Posner, however, in the end, does not deliver a way forward for the country despite a very comprehensive and encompassing view of the economic environment we are living each day. Posner doesn’t avoid the issue or the problem but he takes a conservative tact in contemplating solutions.

III. Posner’s consumers: where are they?

Despite the very careful discussion of key economic terminology, it is difficult to understand how “A Failure of Capitalism” could fail to include consumers and their position in the current depression in a much more meaningful way. As expressed earlier, this is the main flaw in the book and one in which further elaboration will be presented now.

In addition, and probably by default, the failure to provide a broader perspective of the consumer role results in the “greed” factor also being diminished in the book. Even with Posner’s disclaimer that he is concerned with the “course, causes, and offered cures for the depression,” and that there is “a need for a concise, constructive, jargon and acronym free, non-technical, unsensational, light on anecdote, analytical examination of the major facets of the biggest U.S. economic disaster”96 in his lifetime, the limited discussions devoted to the consumer vantage point and human conduct diminishes the book. This is not only a poor choice by Posner but it supports the notion that judges are out of touch with the ordinary struggles of people.

Granted, “A Failure of Capitalism” is a book about a topic and an event; it not a book of advocacy for consumers rights. However, consumers are central to understanding the depression that Posner writes about in these pages. In addition, the

conduct of the mortgage brokers and everyone associated with the millions of mortgage transactions is essential to understanding the chaotic financial state of the U.S. economic system. There were and are weaknesses in the system that Posner identifies and discusses very well; however, those weaknesses have little if any meaning if individual actors in the financial services industry had behaved more responsibly.

As support for the notion that consumers do matter in the development of this crisis, the consumer vantage point has been widely written about by legal scholars. A Mechele Dickerson, Fulbright and Jaworski Professor of Law, University of Texas School of Law cites many contributing factors to the housing crisis but does not ignore the consumer transaction element and the accompanying conduct:

Housing advocates and consumer advocacy groups typically place most of the blame for the foreclosure crisis on the “mortgage industrial complex,” which includes mortgage originators, lenders (especially subprime), and underwriters. Many have suggested that the lending community engaged in fraudulent conduct and this conduct caused the current housing crisis. Some initially assumed that most of the fraudulent conduct, including mortgage originator and foreclosure rescue operator fraud, involved small independent brokers or companies. Some large financial institutions likely avoided engaging in mortgage fraud because of a desire to preserve the value of their good reputation.97

Professor Dickerson does discuss the fact that consumers might have also been dishonest in obtaining loans and that some might have been “naïve and unsophisticated”98 in pursuit of the dream of homeownership but at no point does Dickerson discount the possibility that the marketplace was more than accidental in its conduct towards consumers.

Woo Bai Kim, 2009 graduate of Indiana University Maurer Law School, also wrote tactfully regarding the roots of the financial crisis by tracing the problem back to

98 Id. at 215
the level of the consumer. In his recent article, “Challenging the Roots of the Sub-Prime Lending Crisis: The OCC’s Operating Subsidiaries Regulations and Watters v. Wachovia Bank,” Woo Bai Kim’s conclusions consider consumers but also the failure to protect consumers:

By the mid-2000s, there were warning signs that the subprime mortgage market would deteriorate and, thus, banking regulators would have to take strong consumer protection measures. The capital market’s increasing appetite for securitized subprime mortgages and intensified competition among mortgage lenders resulted in widespread predatory lending practices, characterized by reckless or loosened reviews on the borrower’s repay ability, deceptive and unfair terms, exorbitant interest rates or combinations thereof.

Kim’s passage above is most interesting because of the mention of “predatory lending.” Prior to the foreclosure crisis and the depression, predatory lending was a huge concern and had been legislatively addressed in several states. However, focus upon predatory lending faded as the housing bubble exploded, the financial crisis became more obvious, and the housing market collapsed. This does not mean that predatory lending stopped being a problem but is a strong suggestion that the conduct of the financial service actors at the bottom of the industry were engaged in very questionable conduct. Due to Posner’s unwillingness to focus attention upon consumers, “A Failure of Capitalism” is lacking in its discussion of this part of the story. Recent events involving some of the bad actors support this as well.

100 Id. at 288
101 According to the Department of Housing and Urban Development, predatory lending is a term that has come to represent a wide variety of shady financial practices including those associated with mortgage lending. Oftentimes, these practices involve pressuring a consumer into purchasing a loan that they otherwise did not want to purchase. The loans might target specific racial or ethnic groups or the elderly and might involve hidden fees and costs that drive up the costs of the loan and increase the risk of default in the future.
For example, one of the major financial bad actors at the consumer level in the housing crisis was Countrywide Mortgage of California.\textsuperscript{103} Countrywide, as has been widely reported, was responsible for many of the risky loan products on the market that caused numerous defaults on mortgages.\textsuperscript{104} In fact, the Center for Public Integrity stated in its recent report: “Who’s Responsible for the Financial Meltdown?”\textsuperscript{105} that Countrywide sold over $96 billion worth of subprime loan products, more than any other mortgage company in the nation.\textsuperscript{106}

Angelo Mozillo co-founded Countrywide Mortgage and operated the company through much of the housing bubble. Mozillo is not discussed at all in Posner’s book and Countrywide is mentioned only once and not discussed at all. This is surprising considering that the Securities and Exchange Commission sued Mozillo recently for securities fraud relating to many of the subprime lending deals completed by his company, Countrywide. This is evidence that conduct by individuals was not just the normal economic activity brought about by capitalism but something slightly more sinister in nature.

In addition to Mozillo and Countrywide, smaller mortgage industry players are being indicted for criminal conduct in the selling of high-risk loans to consumers indicating the conduct is not isolated. Indictments in Pennsylvania and New York have already been announced.\textsuperscript{107} The conduct, Posner asserts, is tied to cheap credit. But as the

\textsuperscript{104} Id.
\textsuperscript{105} http://www.publicintegrity.org/investigations/economic_meltdown/articles/entry/1286/
\textsuperscript{106} Id.
indictments suggest, the transactions also involved greed. Some of the transactions were also motivated by discriminatory conduct.

Specifically, African-Americans were much more likely to be sold a toxic, default prone sub-prime loan than other racial groups regardless of income during the boom period prior to the recession. Even in affluent Prince George’s County, Maryland, African-American consumers, with good credit, and high incomes, were much more likely to be sold a default prone, high-risk mortgage loan than their white counterparts. This factor contributed to the loan defaults as well.

With these points in mind, are there specific places in “A Failure of Capitalism” where Posner missed an opportunity to provide a deeper understanding of the consumer vantage point in the crisis? The answer is Yes.

In the chapter entitled “The Underlying Causes,” Posner could have included a much more extensive section on the consumer vantage point in the crisis. As noted earlier, Posner actually begins to discuss the consumer vantage point but does not extend the discussion. The focus is still upon financial actors later in the process, at banks and other financial institutions. The questions that are unanswered as a result of this approach are numerous.

Was it policy within banks to intentionally sell loans that were default prone?

Were the default prone loans sold to minorities more than other members of the population?

---


109 Id.
Does the wealth disparity between whites and blacks play any role in the development of the crisis?

What role did predatory pending play in the development of the housing crisis?

Did stagnant wages (income) play any part in the housing crisis? In other words, did stagnant wages make homes less affordable and also motivate individuals to attempt to build wealth into the future by becoming a homeowner?

This final question is especially important because there is substantial evidence that stagnant wages did, in fact, contribute to the crisis.110 The housing bubble, in the U.S., rose and burst from the late 1990’s to 2006.111 Wages were stagnant in the U.S. back then and they are now.112 The Center for Housing Policy reports as far back as 2002 the effect of stagnant wages on housing.113

Posner also could have devoted some time to the issue of the consumer transactions in Chapter 7 – “What we are Learning about Capitalism and Government.” Posner mentions a key factor in the crisis at the grassroots level - the “aggressive marketing of mortgages”114 but does not elaborate much at all on what this means. According the USA Today, it was the “aggressive marketing of mortgages,” that led to the recession, at least in part.115 Harvard University Joint Center for Housing Studies also

---

110 Peter Drier, “What is a Housing Crisis?” Rooflines, an online publication of the Harvard Joint Center for Housing Studies,” posted June 26, 2008 (last accessed – July 3, 2009)
112 See footnote 101
113 http://epi.3cdn.net/d3c-44170bf3b741a0_s2m6bxw05.pdf (Economic Policy Institute press release – November 2002)
concluded that the marketing or mortgages to certain members of the population was a problem as far back as April 2007.\footnote{Angela Flynn & Ren Essene, “Press Release – Harvard Joint Center for Housing Studies,” April 27, 2007 (online version – last accessed June 27, 2009)}

Later in the same chapter, Posner writes: “Banks wanted to make risky loans.”\footnote{Richard A. Posner, “A Failure of Capitalism: The Crisis of ’08 and the Descent Into Depression (Harvard University Press 2009) p. 242} This is another instance where the consumer position in the housing crisis, ground zero for this recession, would have informed the discussion more. In fact, it immediately follows a brief mention of another key point and question: did the government pressure or strongly suggest to banks to lend more money to low to moderate income families attempting to purchase homes?\footnote{Id.}

Considering the comprehensive nature of the book, it would have been better if Posner had simply included a chapter that explained to the reader the role that the mortgage transactions played in the development of recession with a focus upon the consumers. But, Mr. Posner does not believe that the consumer issue is particularly relevant to the discussion and especially not any idea that consumers were at a disadvantage in the transactions. In fact, in the final section – “Conclusion,” Posner says as much.

“I think that even most of the consumers who bought homes with mortgages they could not afford knew what they were doing – “ he asserts.

There is, of course, nothing wrong with this belief; however, a belief this exacting and encompassing eventually has to be supported with data. Posner does not provide data that demonstrates that “most of the consumers” with mortgages they could not afford understood the transactions. More importantly, data that supports the notion that most
consumers were treated fairly without any “disparate treatment” in the transactional experience is also lacking. Without this hard evidence, Posner’s belief is that and only that: a belief. The facts, on the other hand, are something entirely different. In fact, there is ample evidence, a small portion that is already referenced above, that indicates that there are other factors that contributed to this crisis and Posner hardly discusses these issues at all.

III. Comparing Greider’s “The Trouble with Money”

In 1989, the Nation Magazine national correspondent, William Greider\(^\text{119}\) published a book called “The Trouble with Money: A Prescription for America’s Financial Fever”\(^\text{120}\) that is long since forgotten by the public. With the appearance of “A Failure of Capitalism,” by Mr. Posner, Greider’s book is an important book to re-examine, especially in light of the positions taken by Mr. Posner in his book. The books are, in fact, very similar though “The Trouble With Money” is much smaller.

The period described in “The Trouble With Money” is also very similar to the period that is the subject of Posner’s “A Failure of Capitalism.” While there is no banking crisis in “The Trouble with Money,” there is a savings and loan crisis that stunned the financial markets and the nation just 20 years ago.\(^\text{121}\) These savings and loan associations, an important component of the American financial system in 1989, were failing all across the country.\(^\text{122}\) In addition to terribly performing savings and loan associations,

\(^{119}\) William Greider is national affairs correspondent for The Nation Magazine. A writer for more than 40 years, he has written extensively for Rolling Stone Magazine and is the author of several highly acclaimed best selling books on politics and culture, including “Secrets of the Temple: How the Federal Reserve Runs the Country” and “The Education of David Stockman and Other Americans.” Source: [www.williamgreider.com](http://www.williamgreider.com)

\(^{120}\) Published 1989 – Whittle Direct Books

\(^{121}\) William Gredier, “The Trouble With Money” (Whittle Direct Books 1989) p. 11

\(^{122}\) Id.
consumers were subject to abuses by the mortgage market that were raising the costs of their mortgages just as now. The economy was not performing well either.  

There was, of course, a taxpayer bailout of the savings and loan associations (bad assets were purchased by the government), and the politicians, loyal to the executives in the financial industry, stressed that a rescue of the financial industry was of paramount importance. The similarities between then as now, with deregulation and discussions of structural flaws in capitalism are, in other words, abundant. Greider didn’t create these events either; he simply reported the events to the public.  

Here is one account of that financial crisis from the New York Times also lost in the memory of the nation:

It is easily the biggest disaster in public finance since the Depression. Yet even though billions of dollars in precious resources were squandered in the last decade and even though the money required to undo the damage will make less available for schools, drug control and other services, the political cost of the savings crisis seems to be slight. So many politicians are to blame that few are left to point fingers.  

The most striking observation about this description is just 20 years ago the same situation faced the country. That crisis, in 1989, was described as the worse economic crisis since the Great Depression. Greider explains that crisis even better, though he too, is mistaken in his own conclusions regarding the future:

The trouble with the laissez-faire creed in its contemporary version is that it is only a sentiment, not a serious idea. The last thing that American banking and financial markets would tolerate now would be for government to withdraw from their territory and leave them alone to face the brutal consequences of genuine freedom. They desperately need government to protect them from the harsh realities of the marketplace. The users of credit are subjected to the bracing

---

125 Id. at 11
discipline of failure. The dispensers of credit are shielded from market forces by their government. This arrangement is so illogical, not to mention unjust, that it cannot endure. And it won’t.127

Greider’s conclusion that this pattern of conduct by capitalism in the U.S. would not endure has proven wrong. The political establishment rushed to assist the financial markets again as the crisis of 2008 grew larger.128 In fact, the pattern of conduct has endured despite Greider’s harsh indictment of the system back in 1989 amidst what was described as the worse recession since the Great Depression. Nothing fundamental changed regarding the financial markets and capitalism.

But Greider’s book is more exacting than Posner towards the system and reveals a weakness in Posner’s book. Posner’s book lacks any sweeping criticism of the system in the face of strong evidence. Today’s economic collapse was foreshadowed in 1989 and it was the same: risky investments, deregulation, dubious conduct by the mortgage industry, economic collapse, and then, a huge, historic government bailout. The public, Posner included, ignored that moment (and likely others unspoken of) and it is likely that this moment will be ignored as well once some version of recovery is realized.

IV. Conclusion

“Capitalism will survive the current depression as it did the Great Depression of the 1930’s.”129

Posner reaches this conclusion in his chapter, “What we are learning about Capitalism and Government.”130 Overall, this is accurate. No one, at least right now,

130 Id.
believes that capitalism is over though most will admit there are problems. This chapter also provides one of Posner’s primary reasons for defending capitalism in the first place: the other economic systems have been “discredited.” These economic systems include socialism, communism, and corporatism just to name a few.

Posner is correct on this point as well. The population of the U.S. and the world for that matter is not that disenchanted with capitalism that they will now embrace Marxism or Maoism and sacrifice the right to acquire property and earn a living for their family.

However, capitalism’s record is problematic as well despite 400 years of development and growth throughout the world and huge technological advances for humanity as a result of capitalism. Philosophy Professor John Sanbonmatsu pondered the ultimate question regarding capitalism in a recent issue of Tikkun Magazine:

From Zurich and Washington to Frankfurt, London, and Tokyo, all the king’s horses and all the king’s men-bankers, economists, policy analysts, and government leaders-are trying to put capitalism back together again. But none of them has stopped to ask whether capitalism is worth saving in the first place.

Sanbonmatsu notes that despite the great success of capitalism in bringing development to many parts of the world serious problems persist. “One out of two human beings lives on $2 per day or less,” Sanbonmatsu writes, “and more than one in three still lacks access to a toilet. Most children in the world never complete their education, and most will live out their lives without dependable medical care.” While this might be accurate, it is difficult to blame these problems just on capitalism.

---

131 Id.
132 Id.
133 John Sanbonmatsu, “Why Capitalism Shouldn’t be Saved?” Tikkun Magazine – May/June 2009 (online version, last accessed June 28, 2009)
134 Id.
Sanbonmatsu also mentions capitalism’s poor record on the environment noting the effect capitalism is having upon the world’s “climate” and the role it is playing in destroying various species or making it more and more difficult for these species to survive. In addition, the historical and continuing sins of capitalism are numerous, according to Sanbonmatsu (there are too many to list here).

He also mentions “wars and civil conflicts” as destructive by-products of capitalism and describes capitalism as anti-democratic, and a system that allows “a small minority of individuals” to control “the wealth, labor, production, political power, and cultural expression of the whole of society.” This is harsh treatment even by anti-capitalist standards.

The late John Kenneth Galbraith, the legendary economist, is less emotional about capitalism but has reported on its history frequently. In his book, “The Great Crash of 1929,” he reports on the repeated shortcomings of capitalism well.

“In the United States,” Galbraith writes, “in the nineteenth century there was a speculative splurge every twenty or thirty years.” Galbraith then notes financial collapse events in 1837, in the 1850’s, 1873, 1907, and then, of course, 1929. Each period is the same: wild speculation, high risk, greedy conduct, and then huge losses.

Strangely enough, it is doubtful that Richard Posner would argue with Sanbonmatsu regarding the merits of capitalism. He probably would also cite Galbraith

135 Id.
136 Id.
138 Id. at xii
139 Id. at xiii
140 Id.
as evidence that his premise is correct: capitalism is just being capitalism right now; it is just a little more severe than usual.

In fact, throughout “A Failure of Capitalism,” it is not Posner’s focus to pretend that capitalism does not have problems. Capitalism is the economic system that the world lives under at the present time and that isn’t likely to change for the foreseeable future absent the development of some alternative economic options for humanity. Even Sanbonmatsu fails to provide an alternative despite his indictment of capitalism as not worthy of being saved. In fact, at the present time, there isn’t an alternative except for a more humane version of capitalism.

Posner, on the other hand, has made a strong case that we are living in an economic depression in “A Failure of Capitalism” and that was at least one of his goals in writing this book. His statement in the “Conclusion” – “We are in a depression”141 should not be taken lightly.

He states a good case for a depression even though he is writing as that alleged depression is happening. Unlike John Kenneth Galbraith, who published his great book “The Great Crash of 1929” on the Great Depression in 1955, well after the period was over, Posner is living and recording the events rather than examining them years later. Regardless of his motives or accuracy, his book is enormously important to the discussion and the future of economic activity.