Judge Posner’s A Failure of Capitalism: The Crisis of ’08 and the Descent into Depression: A Review

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I. Preface: A Question of Semantics

A reader of Judge Richard Allen Posner’s latest book, A Failure of Capitalism: The Crisis of ’08 and the Descent into Depression, should take guidance from Roland Barthes’s’ famous essay, “The Death of the Author”: “The reader is the space on which all the quotations that make up writing are inscribed without any of them being lost; a text’s unity lies not in its origin but in its destination.”

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


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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 book critical of capitalism (perhaps because the damage this time is so far-reaching), but it is not as forceful as it needs to be considering Posner’s reputation and expertise.

The best explanation for the semantics in the title choice by Posner is that *capitalism* in *A Failure of Capitalism* refers to the activities of the economic system and not to the economic system itself. Posner is not explaining “a” system but is seeking to analyze activity of that system. Thus, the use of the word *the* could be problematic under such an approach because it would strongly suggest that 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 Posner is, indeed, describing the organized system of economic activity known as capitalism that has failed. Pondering the economic crisis, Posner asks early on, “What can we learn from it about capitalism, government and the economics profession?”

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 world population by most estimates), and that is the system. This is precisely why Posner has written a book that is essentially about a crisis with clear ties to consumers; yet, detailed discussions about consumers and their vantage point in the housing crisis and recession are missing in significant detail from the text.

With that important point 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 his central theme 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.

Third, the review will briefly draw a comparison between the use of the consumer perspective in *A Failure of Capitalism* and in a similar, yet smaller, book from 1989, *The Trouble with Money* by *Nation* magazine correspondent William Greider.

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4. Posner, supra note 1, at xiii.
5. Id. at xiii–xiv.
Finally, this review will take a final look at the book overall and the future of capitalism.

II. Framing the Failure: Is This a Depression?

A. Judge Richard Posner

There isn’t any doubt that Posner is uniquely qualified and positioned to write a book of this nature. Over the years, Posner has demonstrated a very robust understanding of the topics addressed in the book. A sitting judge on the U.S. Court of Appeals for the Seventh Circuit since 1991, he is a prolific author and scholar with impeccable credentials and experience and, most notably in his writings, a champion of free market capitalism. He has written over 300 articles and more than thirty books, many of which have advanced these ideas. The Huffington Post recently described Posner as “one of the most prominent proponents of free market capitalism,” and the magazine The Economist refers to him as “a bold thinker.”

B. Posner’s Depression

From the beginning, the use of the word depression in A Failure of Capitalism is an important decision by Posner. The decision to describe the current economic crisis as a depression sets up the overall discussion because the choice of the word immediately suggests that the financial climate we all live in is much worse than many of us currently believe. 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 regard 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 worst “economic crisis since the Great Depression.” In fact, in the preface, Posner repeatedly makes reference to the Great Depression while also using the term depression. The Great De-

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8. Id.
9. Id.
12. POSNER, supra note 1, at xiv.
13. Id. at vii.
14. Id.
pression, due to its historical importance, is now a term unto itself, much like the Middle Passage”\textsuperscript{15} or the Holocaust.\textsuperscript{16} This is also why Posner’s choice is effective.

Although some would dismiss Posner’s assertions that the current crisis is a depression because of some recent positive economic developments, this would be a mistake.\textsuperscript{17} The Great Depression began as an economic crisis in 1929 that showed some initial signs of recovery.\textsuperscript{18} It was not until 1933 that it was clear that the nation was in the midst of an economic depression even though the economic turmoil of that period began with the stock market crash in 1929.\textsuperscript{19} This is precisely why the recent economic data supporting a recovery does not necessarily mean that the economic crisis we have experienced since last year is not an economic depression.

“Some conservatives believe that the depression is the result of unwise government policies,” Posner writes.\textsuperscript{20} He adds later that “government’s myopia, passivity, and blunders played a critical role in allowing the recession to balloon into a depression.”\textsuperscript{21} Again, the free use of this terminology is far more foreboding than the daily media references to a “recession”\textsuperscript{22} or “economic downturn,”\textsuperscript{23} notwithstanding any validity to the decision to use the reference.

It should be stressed that aggressive government intervention by President Obama is believed to be directly responsible for addressing the problems of the economic crisis. Obama’s actions are vastly different than the rather modest actions taken by the Bush administration to stimulate and

\begin{footnote}{15. The Middle Passage refers to the transportation of Africans sold into slavery from the continent of Africa to the Western Hemisphere, namely, North America and the Caribbean Islands.}

\begin{footnote}{16. According to Jack R. Fischel, The Holocaust, at xiii (Greenwood Press 1998), “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.”}


\begin{footnote}{19. Id.}

\begin{footnote}{20. Posner, supra note 1, at xii.}

\begin{footnote}{21. Id.}


\begin{footnote}{23. Jeffrey Lynott, Area Fares Well During Recession, Times Leader (Wilkes-Barre, Pa.) (June 20, 2009), available at 2009 WLNR 11830922.}
stabilize the economy as the depression began. Posner’s text is fairly honest regarding these assertions:

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.24

Posner, like many, did not see a depression coming.25 Posner’s conclusions are therefore based on an honest assessment of events. He considered the reality of the crisis but did not rush to quick judgment. Yet, the context in which the term depression is used is even more important.

Posner is quick to identify the reasons why this crisis is so serious. The federal government’s response to the crisis and the anticipated elevation of national debt are described as “long term costs” of “recovery.”26 The implication here is that this recession is very serious, 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.” It is here that Posner’s discussion of depressions begins as he explains how all of them begin with “some shock to the economy.”27 This shock involves a reduction in the “value of personal savings,” causing people to “spend less,”28 according to Posner. Of course, if consumers spend less, demand for “goods and services”29 will “fall.”30 This, in turn, according to Posner, will have an effect on the supply of goods and services and on the supply of labor as well.31

Eventually, Posner’s event, the shock, will lead employers to seek to reduce costs because demand for their products and services has fallen in the midst of the shock.32 Although the solution to this problem could be to reduce wages, the typical action by employers is to reduce their workforce.

However, according to Posner, this is not necessarily a solution to prevent an economic depression because laid-off workers will reduce spend-

25. Id.
26. Id.
27. Id. at 1–2.
28. Id.
29. Id.
30. Id.
31. Id.
32. Id.
ing, and those still employed will reduce spending as well in anticipation of possibly being laid off in the near future. Along with other factors, such a scenario leads to what Posner deems a “downward spiral”:

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). 33

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. In addition, the shock that Posner describes in this instance, the bursting of the housing bubble, 35 as we all know, has already occurred.

This discussion sets up Posner’s explanation of an economic depression and, in effect, the current depression. Posner accomplishes this by describing three kinds of depressions in careful detail and with ordinary facts in order to provide the context for the overall discussion of today’s situation. 36 Posner’s singular focus is on the type of depression event that occurred with the Great Depression of the 1930s, the same kind of depression the country is experiencing now:

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 illustrated by both the depression of the 1930s and the current one, though by other depressions and recessions as well, including the global recession of the early 1990s. 37

The Great Depression of the 1930s, 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.” 38 The current crisis is linked to the bursting of an investment bubble with direct ties to the housing industry. 39

Although one might expect discussion of the housing industry to dominate Posner’s deliberations, strangely it does not. Posner is more inclined to frame the discussion through the prism of the financial institutions and financial market actors who were and are far removed from the millions of consumer mortgage transactions that are at the heart of the crisis. This approach suggests a certain level of detachment on Posner’s part.
But Posner’s detachment is not much different from that of 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.  

Although Lindsey, as Posner does many times in *A Failure of Capitalism*, references the housing market, the consumer is invisible. By chapter two, “The Crisis in Banking,” Posner continues to build a strong case for his contention that this is a depression. Posner notes that it was “risky lending” by banks that brought on the Great Depression. Today’s recession, according to Posner, is also based upon a high level of risk but is exacerbated by a fairly new product in the world of financial markets: securitized debt.

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.” Posner discusses these products briefly and explains their critical place in the crisis. 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 like shares of stock.

Posner also includes a testimonial from an unnamed Wall Street financier who paints a grim picture of banking at the present time. This provides support for Posner’s assertions. The financier explains that banks are in survival mode even with the assistance from the government. The tactics are dramatically altering the banking system and causing the crisis to linger.

For the most part, Posner does not deviate from an initial approach in the book that focuses upon the crisis and not the reactions to the crisis and attempts to repair the problem. He also elects to frame the discussion around

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41. POSNER, *supra* note 1, at 53.
42. Id. at 49–54.
43. Id. at 54.
45. POSNER, *supra* note 1, at 51–52.
46. Id.
47. Id. at 72–74.
48. Id.
economic terminology to advance his arguments and misses opportunities to incorporate the consumer perspective in a much more significant manner. He explores everything from irrational conduct to emotion in seeking to understand how this financial crisis evolved but does not venture to include the consumer for the most part:49 “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).”50

Here, Posner is avoiding the obvious: capitalism, the object of his book and a system that, as currently configured, encourages greedy conduct. The fact that Posner mentions the Madoff51 scandal suggests that he is aware that capitalism has become synonymous with not only this kind of greedy behavior but also with the personal excesses of the few at the expense of the many.52

Posner’s discussion of “cheap credit”53 is another important section despite the fact that it cannot compensate for the other shortcomings in the book. But Posner does describe in excellent detail the current scenario where borrowers now owe mortgages on property whose value has dropped significantly and where the homeowners are what the media are now describing as “underwater.”54 “[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.”55

Posner concludes that the “culprit” for this problem is cheap credit because it “stimulates economic activity.”56 This causes an increase in the price of assets, including residential real estate, leading to the conduct of the past few years, according to Posner, where borrowers sought loans for homes that they probably could not afford and lenders sold loans that never should have been sold.57

49. Id. at 82.
50. Id. at 76.
51. Bernard 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. See DEBORAH STOBER & GERARD STOBER, CATASTROPHE: THE STORY OF BERNARD L. MADOFF, THE MAN WHO SWINDLED THE WORLD (Phoenix Books 2009); Robert Frank & Emir Efrati, Evil Madoff Gets 150 Years in Epic Fraud, WALL ST J., June 30, 2009, at A-1.
52. Posner, supra note 1, at 76.
53. Id. at 105.
55. Posner, supra note 1, at 104–05.
56. Id.
57. Id. at 105–07.
Although 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 is not necessarily, as Posner asserts, "the rational behavior of law-abiding financiers and consumers." All lenders did not behave the same; but some lenders did take advantage of consumers intentionally, and greed was the driving force. Cheap credit simply made these transactions more favorable; it is not the reason why bad mortgage products were sold so widely.

The government’s reaction to the crisis also supports Posner’s basic premise that the current recession is a depression. Government efforts include assistance to banks and the 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. These discussions include 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.

Posner is very critical of the tax cuts that were passed (under both 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 to save more of their money. Posner describes the tax cut of February 2008 under President George W. Bush as a “damp squib so far as stimulating consumption.” This assessment 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 as part of the Obama stimulus package, according to Posner, is only “two-thirds greater” and was received at a much more problematic moment.

The public works projects, discussed by Posner, recall the Great Depression and efforts by President Franklin Roosevelt to address the economic problems of that period. Posner is less critical of these efforts but still is critical of public works projects for a variety of reasons: delays, prioritiza-

58. Id. at 107.
60. POSNER, supra note 1, at 168.
61. Id.
62. Upon taking the oath of office in March 1933 and becoming president of the United States, Franklin Roosevelt implemented an aggressive government program to stabilize the banking system, provide citizens with employment, and restore confidence 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 United States. See ERIC RAUCHWAY, THE GREAT DEPRESSION AND THE NEW DEAL: A VERY SHORT INTRODUCTION 1–2 (Oxford Univ. Press 2008).
tion, and dependency. But the choice by the Obama administration to use public works in the stimulus package reinforces Posner’s position that the current moment is a depression. This crisis has to be serious—judging by the magnitude and the specific nature of the government’s response.

But even with the discussions on the serious nature of the crisis and Posner’s analysis of the government response, it is apparent that he is opposed to significant government intervention to fix the economy. Posner is still in favor of privatization of government functions in the conservative tradition. His recommendations for enduring the crisis make this abundantly clear.

Posner’s way forward (his recommendations for solving the crisis) in the future is also lacking 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.” With respect to excessive deregulation, Posner is quick to stress that the United States has plenty of agencies devoted to regulating the financial industry (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.”

This is followed by a detailed discussion of re-regulation that eventually concludes that “re-regulation . . . should wait.” One wonders, now that the economy is functioning better as a result of the stimulus package, whether there will be any regulation at all. This argument seems strange. If deregulation is part of the problem, as Posner admits, how can the status quo solve the problem in the future? The alternatives to re-regulation of the financial services industry as discussed by Posner are, indeed, shortsighted.

“Maybe,” Posner writes, “the government should stop talking up homeownership.” This resembles the accusation from some commentators that the recession is the fault of low- to moderate-income homeowner-

63. POSNER, supra note 1, at 171–79.
64. Id. at 224.
65. This is not necessarily a statement meaning that Posner favors a conservative approach as an 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.
66. POSNER, supra note 1, at 289.
67. Id.
68. Id. at 295–96.
69. Id. at 296.
ers who should have known that they could not afford the loans they received. Posner does not blame the crisis on homeowners as the Wall Street Journal famously did, but his suggestion could encourage such a sentiment.

There are also discussions regarding more disclosures, executive compensation, increased taxes on “persons with very high incomes,” and a requirement that compensation “be back-loaded and tied to a corporation’s future performance.” 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.” This might actually be good advice, but it is inconsistent with his own conclusion that this is a depression.

President Roosevelt acted aggressively in his first 100 days in 1933 because the economy was in very poor condition and had been allowed to deteriorate. Posner does not have the benefit of hindsight. However, if conditions are very grave, as he postulates repeatedly throughout the book, bold action is necessary; and, as we know, some steps have been taken. Only the future holds the answer. Posner does not avoid the issue or the problem, but he takes a conservative tack in contemplating solutions.

III. Posner’s Consumers: Where Are They?

Considering 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 discussed below, this is the main flaw in the book.

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” in his lifetime, the limited discussion devoted to the consumer vantage point and human conduct diminishes the book. This is not only an unfortunate choice by Posner,

71. Posner, supra note 1, at 301.
72. Id. at 299.
73. Id. at 302.
75. Posner, supra note 1, at xiv.
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 is 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 behave 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 of the 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.76

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”77 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 toward consumers.

Woo Bai Kim, a recent graduate of Indiana University Maurer School of Law, also wrote tactfully regarding the roots of the financial crisis by tracing the problem back to 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*,”78 Kim’s conclusions consider consumers but also the failure to protect consumers:

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77. Id. at 215.

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 disappeared, but it does suggest that 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.

For example, one of the major financial bad actors at the consumer level in the housing crisis was Countrywide Mortgage of California. Countrywide, as has been widely reported, was responsible for many of the risky loan products on the market that caused numerous defaults on mortgages. In fact, the Center for Public Integrity stated in its recent report, Who’s Behind the Financial Meltdown?, that Countrywide sold over $96 billion worth of subprime loan products, more than any other mortgage company in the nation.

79. Id. at 288.
80. 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 consumers 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.
83. Id.
85. Id.
Angelo Mozillo cofounded 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 in passing. 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 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 sale of high-risk loans to consumers, indicating that the conduct is not isolated. Indictments in Pennsylvania and New York have already been announced. But the conduct, Posner asserts, is tied to cheap credit.

But, as the 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 subprime 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 neighbors. This factor contributed to the loan defaults as well.

In several places throughout the book, Posner missed an opportunity to provide a deeper understanding of the consumer vantage point in the crisis.

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, he 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:

1. Was it bank policy to sell loans that were default-prone intentionally?
2. Were more default-prone loans sold to minorities than to other population groups?
3. Did the wealth disparity between whites and blacks play any role in the development of the crisis?


88. Id.
4. What role did predatory lending play in the development of the housing crisis?

5. Did stagnant wages 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 homeowners?

This final question is especially important because there is substantial evidence that stagnant wages did, in fact, contribute to the crisis. The housing bubble in the United States rose and burst from the late 1990s to 2006. Wages were stagnant in the United States back then as they are now. The Center for Housing Policy reports as far back as 2002 the effect of stagnant wages on housing.

Posner also could have devoted some time to the issue of the consumer transactions in chapter seven, “What We Are Learning About Capitalism and Government.” Posner mentions a key factor in the crisis at the grassroots level, i.e., the “aggressive marketing of mortgages,” but does not elaborate much at all on what this means. According to USA Today, it was the “aggressive marketing of mortgages” that led to the recession, at least in part. Harvard University Joint Center for Housing Studies also concluded that the marketing of mortgages to certain members of the population was a problem as far back as April of 2007.

Later in the same chapter, Posner writes that “banks wanted to make risky loans.” This is another instance in which 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?

90. Posner, supra note 1, at 75–90.
91. See infra note 101.
93. Posner, supra note 1, at 238.
96. Posner, supra note 1, at 242.
97. 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 the recession with a focus upon the consumers. However, he does not believe that the consumer issue is particularly relevant to the discussion, especially not any idea that consumers were at a disadvantage in the transactions. In fact, in the conclusion, he 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.”

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 demonstrating that most of the consumers with mortgages that they could not afford understood the transactions. More importantly, data supporting the notion that most consumers were treated 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 of which has already been referenced above, that indicates that there are other factors that contributed to this crisis; and Posner hardly discusses these issues at all.

IV. Comparing Greider’s The Trouble with Money

In 1989, Nation magazine national correspondent William Greider\(^98\) published The Trouble with Money: A Prescription for America’s Financial Fever,\(^99\) which has long since been forgotten by the public. With the appearance of A Failure of Capitalism, Greider’s book is important to reexamine, especially in light of the Posner’s positions. The books are, in fact, very similar although The Trouble with Money is much shorter.

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. Although 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 twenty years ago.\(^100\) These savings and loan associations, an important component of the American financial system in 1989, were failing all across the country.\(^101\) Moreover, consumers were subject to abuses by the mortgage market

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98. Greider is a national affairs correspondent for the magazine Nation. A writer for more than forty 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 The Education of David Stockman and Other Americans. See www.williamgreider.com.


100. Id. at 11.

101. Id.
that were raising the costs of their mortgages, just as they are now. The economy was not performing well.

There was, of course, a taxpayer bailout of the savings and loan associations (bad assets were purchased by the government); and politicians stressed that a rescue of the financial industry was of paramount importance. The similarities between then and now, with deregulation and discussions of structural flaws in capitalism are, in other words, abundant. Here is one account of that financial crisis from the *New York Times*, also lost to memory:

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.

That crisis, in 1989, strangely enough, was described as the worst economic crisis since the Great Depression. Greider explains that crisis even better, although 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 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.

Greider’s conclusion that this pattern of conduct by capitalism in the United States would not endure has proven wrong. The political establishment rushed to assist the financial markets again as the crisis of 2008 grew larger. But Greider’s book is more exacting than Posner’s book toward 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 by the

103. GREIDER, supra note 6.
104. *Id.* at 11.
106. GREIDER, supra note 6, at 83.
same situation in 1989: risky investments, deregulation, dubious conduct by the mortgage industry, and economic collapse—followed by a massive government bailout.

V. Conclusion

“Capitalism will survive the current depression as it did the Great Depression of the 1930s,” says Posner.108 He is correct with this prediction. The people of the United States, and the world for that matter, are not so disenchanted with capitalism that they will now embrace Marxism or Maoism and sacrifice the right to acquire property and earn a living for their families.

However, capitalism’s record is problematic as well, despite 400 years of development and huge technological advances for humanity as a result of its growth. 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.109

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.”110 Sanbonmatsu also mentions capitalism’s poor record on the environment, noting the effect that capitalism is having upon the world’s climate,111 the historical and continuing sins of capitalism; and the fact that it is an economic system that allows “a small minority of individuals” to control “the wealth, labor, production, political power, and cultural expression of the whole of society.”112

The late John Kenneth Galbraith, the legendary economist, is less emotional about capitalism. In his book *The Great Crash of 1929*,113 Galbraith writes that “in the nineteenth century there was a speculative splurge every twenty or thirty years.”114 Galbraith then identifies financial collapses in

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110. *Id*.
111. *Id*.
112. *Id*.
114. *Id* at xii.
1837; the 1850s; 1873; 1907; and then, of course, 1929.\textsuperscript{115} Each period is the same: wild speculation, high risk, greedy conduct, and then huge losses.\textsuperscript{116}

Strangely enough, it is doubtful that Richard Posner would argue with Sanbonmatsu or Galbraith. In fact, throughout \textit{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 is not likely to change for the foreseeable future absent the development of some alternative economic options for humanity.

Posner is simply reporting the facts of that system as he finds it today. The viability and morality of that system are issues that are secondary to his discussion. His statement in the conclusion that “[w]e are in a depression”\textsuperscript{117} is what is important.

Unlike John Kenneth Galbraith, who published his great book \textit{The Great Crash of 1929} on the Great Depression long after the period was over in 1955, Posner is living and recording the events rather than examining them years later. Regardless of its shortcomings, \textit{A Failure of Capitalism} is enormously important to the discussion and the future of economic activity.

\textsuperscript{115} \textit{Id.} at xiii.

\textsuperscript{116} \textit{Id.}

\textsuperscript{117} \textit{Posner, supra} note 1, at 315.