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## Creating Space for Reservation Growth

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## Creating Space for Reservation Growth

*Ezra Rosser\**

*Reviewing* RESERVATION “CAPITALISM”: ECONOMIC DEVELOPMENT  
IN INDIAN COUNTRY, by Robert J. Miller. Praeger. 2012.

### INTRODUCTION

The news out of Indian Country continues to be mixed. Through assertions of sovereignty coupled with strong economic growth, many tribes have managed to improve the situation on their reservations. Jobs have been created, cultural programs supported, and an intangible sense of optimism can be felt. Rather than looking off-reservation for opportunities, members can see potential career paths on the reservation. Some tribes have taken on the role of economic driver for both their reservation and their surrounding community. On the other hand, many reservations remain underdeveloped, mired in poverty that has been a fact of reservation life for generations. Indians living on reservations are poorer than any other group in the United States, and this poverty is felt in everything from the prevalence of substandard housing and lack of basic infrastructure to shortened lifespans and high suicide rates. Robert J. Miller’s most recent book, RESERVATION “CAPITALISM”: ECONOMIC DEVELOPMENT IN INDIAN COUNTRY (2012), sheds light on this mixed picture, showing how tribal successes can be extended and how development roadblocks can be removed. The challenges of underdevelopment and poverty deserve to be attacked head-on, and Miller does just this, giving readers an understanding of both the many issues involved as well as some paths forward.

Reservation development traditionally is not the focus of Indian law scholars. The conversation in legal scholarship tends to revolve around questions of jurisdiction, with steering often provided by the certiorari choices of the United States Supreme Court. Economic development issues can, of course, be raised by jurisdiction-centered cases. For example, when the Court holds that a tribe does or does not have the power to tax businesses operating within reservation boundaries, the economic situation of the tribe and the services the tribe can offer are clearly impacted.<sup>1</sup> Although more indirect, the Court’s hostility toward tribes exercising

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\* Professor, American University Washington College of Law. I would like to thank Alex Pearl and the FIU Law Review for inviting me to participate in this symposium issue.

<sup>1</sup> Compare *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), with *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001).

criminal and, to a lesser yet still significant extent, civil authority over non-Indians also affects reservation economies. This was made painfully clear in the 2008 case of *Plains Commerce Bank v. Long Family Land & Cattle Co.*, in which the U.S. Supreme Court held that tribal courts did not have the jurisdiction to hear a case involving allegations of a bank discriminating against tribal members.<sup>2</sup> Jurisdiction and development are interconnected, but the heavy emphasis placed on jurisdictional issues—especially on critiquing the *Oliphant* line of cases—in Indian law scholarship amounts to an implicit message that economic development is of secondary concern.<sup>3</sup>

RESERVATION “CAPITALISM” suggests that the focus on jurisdiction is perhaps excessive and that scholars and advocates should turn their attention and efforts to tribal economic development. Miller explains:

Tribal governments and reservation communities desperately need to create functioning economies in Indian Country to increase economic activities and improve living conditions. The present-day development and the long-term existence and success of reservations and Indian communities and cultures are dependent on these factors. This is not an overstatement. If Indian families cannot find adequate housing and living wage jobs on or near their reservations, how are they going to support themselves and the development and continuation of their governments, homelands, and cultures?<sup>4</sup>

If the very survival of Indian communities is dependent on economic development as Miller claims, one might think that the topic would be a hotbed of scholarship and activism. Yet, while there are exceptions, reservation poverty and economic development are somewhat neglected topics.<sup>5</sup> This can perhaps be partly explained in terms of competency: legal scholars may rightly gravitate towards law and leave matters of economics to economists. Such humility ought to be applauded. But if instead it

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<sup>2</sup> *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008).

<sup>3</sup> In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the United States Supreme Court held that tribes do not have the inherent jurisdiction to criminally prosecute non-Indians. The holding draws the justifiable anger of virtually every Indian law scholar and has been the subject of countless critiques. See, e.g., Samuel E. Ennis, *Reaffirming Indian Tribal Court Criminal Jurisdiction Over Non-Indians: An Argument for a Statutory Abrogation of Oliphant*, 57 UCLA L. REV. 553, 556 n.18 (2009) (collecting sources).

<sup>4</sup> ROBERT J. MILLER, RESERVATION “CAPITALISM”: ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 135 (2012).

<sup>5</sup> There are, of course, examples of works that focus on economic development. See, e.g., Angeliqwe Townsend EagleWoman, *Tribal Nations and Tribal Economies: The Historical and Contemporary Impacts of Intergenerational Material Poverty and Cultural Wealth Within the United States*, 49 WASHBURN L.J. 805 (2010); Gavin Clarkson, *Accredited Indians: Increasing the Flow of Private Equity into Indian Country as a Domestic Emerging Market*, 80 U. COLO. L. REV. 285 (2009); Wenona T. Singel, *The Institutional Economics of Tribal Labor Relations*, 2008 MICH. ST. L. REV. 487 (2008).

suggests that legal scholars, by working almost exclusively on matters of jurisdiction, are glossing over the issues that most impact tribal communities and the lives of tribal members, then celebration may not be in order.

One of the more poignant moments in RESERVATION “CAPITALISM” comes in the book’s last paragraph. There, Miller expresses indifference about how reservation development occurs. He writes, “[t]oday, Indian Country remains poor. Indian people, communities, and tribal governments need economic development and operating economies. They need capitalism, socialism, free market entrepreneurship; whatever you want to call it, Indian Country needs it. And only Indian people and their governments and communities can make this happen.”<sup>6</sup> Miller’s claimed indifference regarding market types is a bit disingenuous because a considerable portion of the book is dedicated to showing that capitalism is compatible with Indian values and historical practices. But putting that aside, the general idea—that something has to be done and that positive change is possible—pervades the entire book. It also helps answer the question of what law professors can contribute when it comes to tribal economic development. Although economists like to imagine a single, perfect type of market, markets are messy. There are many market types, even within a general capitalist system, and governments play an important role in establishing and enforcing the underlying rules that shape each particular market. Indian reservations are subject to multiple overlapping authorities; tribal, federal, and state governments play roles in shaping, and at times hindering, economic development in Indian Country. In this context, there is a promise that improving the rules governing market participation, and the rights of market actors, will strengthen both tribal economies and Indian sovereignty.

#### MAJOR TAKEAWAYS

Though framed more generally, a major contribution of RESERVATION “CAPITALISM” is its emphasis on small-scale entrepreneurship and commercial development. As Miller shows, the dearth of formal businesses located on-reservation leads to a significant leakage problem as money earned on-reservation quickly “leaks” to neighboring off-reservation communities. The economies of border towns such as Gallup, New Mexico, next to the Navajo Reservation, and Whiteclay, Nebraska, next to the Pine Ridge Reservation, depend on serving the neighboring Indian tribe, capitalizing on the absence of similar commercial development more conveniently located on-reservation. With money so quickly moving off-

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<sup>6</sup> MILLER, *supra* note 4, at 164.

reservation, earnings such as the salaries of tribal employees do not circulate for long within the Indian community. Ordinarily, a paycheck may be used to buy gas or food, and such purchases support the wages of those who work at the gas station or the grocery store, who then make their own purchases supporting the jobs of others in the community, and so on. This is called the multiplier effect. But as Miller notes, if there are not “a sufficient number of businesses and services available locally,” tribes lose out on the multiplier effect.<sup>7</sup> Reservation money flows to off-reservation businesses immediately even though “it is considered optimal for money to circulate five to seven times in a local economy before it spins out or leaks away from the community.”<sup>8</sup>

Tribes pay a tremendous price for a lack of reservation commercial development. Limited on-reservation career opportunities make it hard for tribes to stop the outward migration of tribal members. Business underdevelopment contributes to the dismal employment and poverty figures found on many reservations. It also puts pressure on tribal governments to serve social functions through employment and direct services. In the case of large or rural reservations, the absence of basic commercial enterprises such as banks and grocery stores, as well as entertainment options like movie theaters and restaurants, can force tribal members to take long and expensive trips just to access such services. It is not as if tribal members are lazy or do not want these services. But for a variety of reasons, a robust commercial and/or light industrial sector is the exception, not the rule, in Indian Country. Indeed, one of the major strengths of RESERVATION “CAPITALISM” is that it embraces complexity in both its description of the causes of underdevelopment and in its prescriptive suggestions to tribes.

Miller’s embrace of complexity is perhaps best seen in the book’s bifurcated treatment of non-Indian responsibility for reservation poverty. Miller blames Euro-Americans for devastating tribal societies and economies but argues that the solutions and, hence, the responsibility for improving reservation economies, lies with the tribes. Although putting the onus on tribes risks being read as absolving non-Indians of fault, it instead is a realist’s take on how positive change occurs on reservations. At the start of Chapter Three, Miller notes, “today Indians and Indian communities are mired in poverty and do not possess functioning economies.”<sup>9</sup> How did tribal communities go from holding all the land and being relatively prosperous to being impoverished? “One obvious answer,” Miller argues,

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<sup>7</sup> *Id.* at 136.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 25.

“is that this was the express intention of Euro-American colonists and political leaders.”<sup>10</sup> He goes on to say, “[i]t should be no surprise that these losses [of land and assets], and 200 years of political, social, and economic domination by the United States contributed to poverty and problems for Indian communities.”<sup>11</sup> RESERVATION “CAPITALISM” goes on to give examples of subjugating policies, arranged chronologically from contact to the present day.<sup>12</sup> The examples range from inhumane land grabs, as exemplified by the case of removal, to the heavy hand of the federal and state governments in reservation development through such mechanisms as bureaucratic control of land by the Bureau of Indian Affairs (“BIA”). For readers who are familiar with the history of relations with Indian tribes, the examples are not necessarily new, but Miller does a great job tying these wrongs to poverty found in Indian Country.

Many scholars stop there; namely, they identify wrongs done to Indians but do not address how tribes can move forward given these (imposed) challenges. Miller goes on to argue for tribally-led development. A central tenet of RESERVATION “CAPITALISM” is that “tribal leaders and Indians have the greatest incentives and motivations possible to work towards creating reservation economies.”<sup>13</sup> As Miller highlights, economic growth matters not so much for its individual impacts but for its role in “building and preservation of tribal communities.”<sup>14</sup> Critically, economic development is also about tribal sovereignty and self-determination. Although law review pages are filled with discussion of how particular Supreme Court opinions are wrongly undercutting tribal jurisdiction and, hence, tribal sovereignty, the connection between functioning economies and sovereignty receives scant attention. Miller reminds us that “true self-determination will come when tribal governments and Indian people have created their own sustainable development.”<sup>15</sup>

Businesses with high margins and proven strengths do not need support, they can handle reservation hurdles. Accordingly, Miller does not spend much time discussing development tied to extractive industries or other natural resources. That is not to say that such activities are ignored. Indeed, as Miller observes, tribes that have assumed control of their timber resources have had better and more sustainable returns than they had under

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 27.

<sup>12</sup> *Id.* at 27-47.

<sup>13</sup> *See id.* at 155, 160. (“Who will work the hardest and the smartest to address and solve these [economic development] issues? The answers are obvious. Indians and tribal governments are the people and entities that will address and solve their issue.”).

<sup>14</sup> *See id.*

<sup>15</sup> *See generally id.*

federal management.<sup>16</sup> But the emphasis of RESERVATION “CAPITALISM” is on encouraging entrepreneurship and a robust tribal economy, not simply an economy dominated by a few players. Given the tremendous impact gaming has had on Indian nations, coverage of gaming is predictably a part of any discussion of tribal economic development. As Miller notes, “[t]he most successful economic endeavor in Indian Country in the modern day is tribal gaming.”<sup>17</sup> After presenting the case law and regulatory setting in which Indian gaming expanded and now operates, Miller emphasizes “the enormously positive economic, social, and cultural effect” of gaming for tribes.<sup>18</sup> Citing everything from increases in income and employment to better reservation housing and health care, RESERVATION “CAPITALISM” does a good job highlighting the significance of gaming without sugarcoating the nature of gaming and its limits. But despite its coverage of natural resource-tied development and the success of gaming, these high-margin and often large-scale enterprises are not the focus of the book; instead they serve as scene-setting.

A major challenge facing tribes interested in furthering reservation economic development is how to enable small-scale entrepreneurship. Miller suggests that part of the answer may be in leveraging gains tribes have made through the rise in gaming and tribal self-determination.<sup>19</sup> With tribes administering an increasing array of federal programs as part of the current self-determination era, the size of tribal governments has correspondingly expanded with the receipt of additional federal contracts and block grants.<sup>20</sup> Accordingly, tribal members have gained valuable employment and management experiences within their tribal governments, as well as in the gaming and hospitality industries; such experiences can provide a springboard for reservation entrepreneurship.<sup>21</sup> Another way to support tribal entrepreneurship, Miller suggests, is for tribal, state, and federal governments to give preference to Indian suppliers under “Buy Indian” programs.<sup>22</sup> The United States passed the federal Buy Indian Act in 1910<sup>23</sup> but has not, Miller argues, actively implemented the law.<sup>24</sup> If such a statutorily-sanctioned purchasing preference were actively pursued, at all levels of government, including tribal, it could help create and sustain tribal

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<sup>16</sup> *Id.* at 50-51.

<sup>17</sup> *Id.* at 71.

<sup>18</sup> *Id.* at 86.

<sup>19</sup> *See id.* at 139-40.

<sup>20</sup> *See id.* at 140.

<sup>21</sup> *Id.* at 139-40.

<sup>22</sup> *Id.* at 129-30, 132, 144-46.

<sup>23</sup> 25 U.S.C. § 47 (2012).

<sup>24</sup> MILLER, *supra* note 4, at 132.

entrepreneurship.<sup>25</sup>

More broadly, tribes need to establish the right sort of institutional framework to support investment and assure entrepreneurs that their work will not be thwarted by tribal governments. Miller's account of tribal best practices draws upon the work of the Harvard Project on American Indian Economic Development, which is appropriate given the Project's leading role in the academic work on tribal development. According to the Harvard Project, tribes can support growth by exercising *de facto* sovereignty, separating tribal politics from day-to-day business decisions, creating working tribal bureaucracies, and ensuring a match between the development path a tribe chooses and its cultural values.<sup>26</sup> Miller also cites the Harvard Project for the importance of an independent tribal judiciary.<sup>27</sup> But, responsibility for ensuring that investments go smoothly on Indian reservations does not lie solely with tribes; potential investors also must do their homework. As important as it is for tribes to create an environment conducive to development, instances where outside investors failed to protect their interests or account for tribal governance—for example, in the context of sovereign immunity—should not have a chilling effect on investment generally.<sup>28</sup> Put differently, the need for tribes to establish conditions that permit, and even support, business does not mean that tribes must abandon the prerogative to set their own courses, including establishing laws and norms that may deviate where appropriate from those found off-reservation.

One of the more refreshing aspects of RESERVATION “CAPITALISM” is Miller's positive tone. Miller explains:

My optimism for the future of Indian entrepreneurship comes . . . from an awareness of the abilities and toughness of Indian people and communities, the growing tribal governmental emphasis on developing economies and helping Indians to start their own businesses, and the crying need for more businesses and jobs on reservations. . . . American Indians and their governments have also survived hundreds of years of active political, social, and economic oppression, and even genocide. But they are still here and are growing in population and strength every day. . . . [T]he potential for Indian entrepreneurship and the improvement of Indian and tribal economic conditions is

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<sup>25</sup> *Id.* at 132, 144-46.

<sup>26</sup> *Id.* at 140-42; see also Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations*, in *WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT* (Stephen Cornell & Joseph P. Kalt eds., 1992).

<sup>27</sup> MILLER, *supra* note 4, at 130-31.

<sup>28</sup> *Id.* at 99.

unlimited.<sup>29</sup>

This optimism informs the entirety of RESERVATION “CAPITALISM” and the idea that things can, and are likely to, improve for tribes is the book’s biggest takeaway.

#### CONCLUSION

Scholarship about tribal economic development does not fit neatly into a single academic discipline and resists easy categorization. This is especially true for legal scholarship, where Supreme Court opinions loom large, and where the goal of changing tribal institutions seems too amorphous and uncertain. Thus, it is no wonder that tribal poverty is often treated only in passing, rather than as central to an accurate understanding of tribal communities and the meaning of tribal sovereignty. RESERVATION “CAPITALISM” shows that economic development is a rich area for study, but also raises a number of related questions. A painful one for academics relates to the efficacy of scholarly work: does Indian Country need more Harvard Project-type studies or does it need more Lance Morgans? For those who have been committed to tribal economic development issues for some time, the question needs no explanation. But for those newer to these issues, Lance Morgan is the founder, President, and CEO of Ho-Chunk Inc., the major driver of economic growth for the Winnebago Tribe of Nebraska.<sup>30</sup> Does scholarship about tribal economic development help tribes and have an impact on reservation poverty, or would it be better for those who care deeply about these issues to work on creating viable reservation businesses? I do not pretend to have an answer to that question, but it is one that can, and I think does, keep many of us awake at night, especially if we are teaching far from reservation communities.

A second question relates more directly to the coverage of poverty and economic development presented in RESERVATION “CAPITALISM”: why does the idea that Indians did not own property hold such sway in American popular mythology? Miller dedicates the book’s entire second chapter to destroying the idea that Indians did not understand the concept of property and that individual Indians did not have property holdings. It is a theme he returns to again and again as he explains that poverty is not a cultural value for Indians and economic growth is not antithetical to Indian values. I agree with all these points. Yet, the question remains: why must such points be made over and over? Miller is not the first academic to cover this

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<sup>29</sup> *Id.* at 124-25.

<sup>30</sup> See generally Julie Sloane & Lance Morgan, *Lance Morgan Ho-Chunk Inc.*, CNN MONEY-FORTUNE SMALL BUSINESS (Dec. 1, 2003), [http://money.cnn.com/magazines/fsb/fsb\\_archive/2003/12/01/359901/index.htm](http://money.cnn.com/magazines/fsb/fsb_archive/2003/12/01/359901/index.htm).

ground; in fact, academic literature on this point is both extensive and overwhelming. Indians did, and do, understand property; individual Indians did, and do, own property. Any assertion to the contrary is wrong. Nevertheless, even fairly educated Americans—and here I am thinking of first-year law students—often have the opposite belief. Where does it come from? One possible explanation is that the Eurocentrism of the non-Indians who first colonized the United States caused them to summarily ignore property systems different from their own. Miller offers another explanation: perhaps it was not the failure of the early non-Indian settlers to recognize property rights, but rather, their desire to take property rights that resulted in the non-recognition of the Indian property system. Miller explains, “[i]t was perhaps a purposeful strategy in which Euro-Americans chose to ignore Indian property rights and economic abilities because they wanted to justify taking those rights and assets for themselves.”<sup>31</sup> Whatever the originary reason, the idea that Indians do not understand property rights lingers in the American imagination even though “almost all Indian tribes and peoples were very well acquainted throughout history with using private property rights and private entrepreneurial economic activities to support their families, societies, and cultures.”<sup>32</sup> So I understand why RESERVATION “CAPITALISM” devotes so much space to saying that property and economic development is not antithetical to Indian traditions or values. I just hope that RESERVATION “CAPITALISM” helps lessen the need for such arguments to be made in the future.

The late Phil Frickey argued that Indian law scholars need to engage in more grounded scholarship.<sup>33</sup> There are numerous ways to understand Frickey’s call for a new realism. Work focused on particular tribes rather than on crafting a new theory of federal Indian law, for example, arguably would answer such a call. But another way to characterize Frickey’s invocation is as a plea for scholars to focus on what matters to Indian communities. And Miller’s RESERVATION “CAPITALISM” meets such an understanding of what should guide scholarship: it is practical, offers examples of what works and what does not work, and is less about broad theory than improving the situation of tribes. Most importantly, it presents a vision for strengthening tribal sovereignty and improving life on Indian reservations by addressing the ways in which poverty and a lack of economic opportunities impact reservation communities. For anyone who cares about tribal economic development, Robert Miller’s RESERVATION “CAPITALISM” is a must-read.

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<sup>31</sup> MILLER, *supra* note 4, at 10.

<sup>32</sup> *Id.* at 18.

<sup>33</sup> See Philip P. Frickey, *Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law*, 38 CONN. L. REV. 649, 660 (2006).