

The Rule of Law:

Perspectives on Legal and Judicial Reform in West Virginia

Edited by:

Russell S. Sobel, Ph.D.

WEST VIRGINIA UNIVERSITY

Associate Editor:

Joshua C. Hall

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PREFACE

My first edited book, *Unleashing Capitalism: Why Prosperity Stops at the West Virginia Border and How to Fix It*, examined how West Virginia's policies could be reformed to better embrace the principles of free-market capitalism—creating a better business climate and a more prosperous future for West Virginia. The success of that book, which has sold over 5,000 copies and won the 2008 Sir Antony Fisher International Memorial Award, provides the foundation on which we launch this effort.

Like a three-legged stool, West Virginia's tax policy, regulatory climate, and legal system, must all be properly structured to create the right balance for economic growth. While all three of these areas were addressed in *Unleashing Capitalism*, only two of the book's 14 chapters were devoted to judicial and legal reform. With this now becoming a pressing political issue, *The Rule of Law* devotes itself entirely to that subject. The 'rule of law' is a broad concept that describes a society that is governed not by *people*, but instead by established, fair, and predictable *rules* of interaction.

Again, a team of scholars has contributed their expertise to this effort, and each chapter represents the viewpoint of the chapter's authors. We have made every effort possible to make this book readable by the average citizen, although some of the policy reforms are more complex by their very nature.

The first six chapters examine reform of West Virginia's method of selecting judges. As one of the few remaining states employing partisan political elections to select judges, there are calls for switching to either nonpartisan elections or some form of gubernatorial appointment. With the exception of Chapter 4, these chapters were based on a panel discussion held on September 7, 2008 for Judiciary Subcommittee C at the Legislative Interim Meetings in Bridgeport, West Virginia. Each of the panelists prepared written comments based on their presentation at that event for inclusion in this book. While retired U.S. Supreme Court Justice Sandra Day O'Connor could not attend the event, she was willing to write a letter specifically addressing her thoughts on West Virginia's judicial selection reform for the panel. That letter is included in this book along with the contributions from the other panelists. These chapters provide competing viewpoints, with some authors (O'Connor, Bryant, Tabarrok, and Hall/Sobel) being in favor of judicial selection reform and others (Bonneau and McLeod) not, and this is why we title this section a symposium.

The six chapters that make up part two of this book explore a host of other pressing issues in legal reform. Edward Lopez (Chapter 7) provides a discussion of why the rule of law is important for economic growth, and an overview of some of the major conclusions reached in the vast academic literature in the field of 'law and economics' regarding property and contract law. Among other conclusions, his chapter calls for restrictions on punitive damage awards in breach of contract actions, and restrictions on eminent domain to prohibit private to private transfers of property. Kristen Leddy and Matthew Yanni have updated their chapter on assorted legal reforms from *Unleashing Capitalism* for inclusion here (Chapter 9). This chapter calls for the elimination of the doctrine of joint and several liability in all civil tort claims, imposing meaningful venue requirements, imposing limits on (or changing the standard for awarding) punitive damages, and changes to medical monitoring to either eliminate lump sum awards or require the money actually be spent on medical monitoring. I

also join them in authoring a chapter that examines the economic impact of the recent decisions of the West Virginia Supreme Court of Appeals (Chapter 8), which is an updated version of a study originally done for The Federalist Society.

The chapter by Matthew Bowles and Mark Sadd (Chapter 10) argues that West Virginia should join the vast majority of other states that guarantee their citizens an appeal of right, and handle these cases through an intermediate court system. Ronda Harvey's chapter (Chapter 11) calls for changes to the standard used to decide deliberate intent in workers' compensation cases. Finally, for those skeptics who question whether judicial and legal reforms can have significant impacts on economic outcomes, the concluding chapter by Evan Jenkins and Juliet Terry (Chapter 12) shows the considerable evidence on the effectiveness of recent reforms to our state's medical malpractice laws. As you will see, the Medical Professional Liability Act has been highly effective and provides clear evidence that good legal reforms can, and do, have significant positive impacts on West Virginia's health and prosperity. They also express concern that future court decisions could strike down major provisions of this highly successful reform.

We hope that readers will come away with a better understanding of the need for, and issues involved with, changes to West Virginia's judicial and legal systems. Once again, our main goal is to provide the research that can inform state policy decisions, and to open a much needed dialogue on growth-oriented policy reform in West Virginia.

We owe thanks to more people than we could possibly list. We are indebted to the dozens of West Virginia citizens, business owners, and policy makers who have leant their comments and encouragement on our efforts. We thank our friends and family for their support. Most importantly, we would like to thank Ken and Randy Kendrick for providing the financial support necessary to fund such a major research project. Without their support this book would not have been possible.

RUSSELL S. SOBEL, PH.D.

Professor of Economics

James Clark Coffman Distinguished Chair

WEST VIRGINIA UNIVERSITY

