1

Introduction

Of Governments and Laws

For a Common-wealth without lawes is like a Ship without rigging and steeradge. *The Lawes and Libertyes of Massachusetts* (1648)

People rely on governments to order their collective affairs. Governments govern using laws. Good governments are democratically chosen and adopt laws to promote justice and the common good. In states with good governments, people voluntarily apply laws to themselves.

A. AMERICANS' LONGING FOR A GOVERNMENT OF LAWS

Americans have a glorious history of uniting government and laws. The Pilgrims on the *Mayflower* in 1620, while at anchor offshore of the new land but before disembarking, agreed in the *Mayflower Compact* to "combine ourselves together into a Civil Body Politic, for our better ordering and preservation." They pledged that they would "enact, constitute and frame such just and equal Laws, Ordinances, Acts, Constitutions and Offices, from

time to time, as shall be thought most meet and convenient for the general good of the Colony, unto which we promise all due submission and obedience."

The Colony of Massachusetts Bay carried through the pledge of the Pilgrims. Its *Lawes and Libertyes of Massachusetts* of 1648, one of America's first law books, colorfully explains why the colony adopted laws: as "rigging and steeradge" are to sailing ships, laws are the means that drive and steer the state and its people into the future. Good laws make good government possible.[1]

Good laws guide people in how to act. When laws speak to the people, most people follow them. So the 1648 *Lawes and Libertyes* was an "indeavor to satisfie your longing expectation, and frequent complaints for want of such a volume to be published in print: wherein (upon every occasion) you might readily see the rule by which you ought to walke by."

Good laws protect people when they act. So the *Lawes and Libertyes* eschewed general, unspecific clauses: "It is very unsafe & injurious to the body of the people to put them to learn their duty and liberty from general rules." Good laws are clear about what they require.

Good laws are organized. So the *Lawes and Libertyes* were organized "so they might more readily be found, & that the diverse lawes concerning one matter being placed together the scope and the intent of the whole and of every one of them might more easily be apprehended."

Good laws are general rules for all for the welfare and justice of all. Thus they claim the obedience of all. So the *Lawes and Libertyes* provide that "lawes are made with respect to the whole people, and not to each particular person; and obediance to them must be yielded with respect to the common welfare, and not to thy private advantage. . . . Nor is it enough to have laws except they be also just."

Good laws rely on faithful execution. So the *Lawes and Libertyes* provide that "The execution of the law is the life of the law." Good laws look to future change and are an ongoing project. So the *Lawes and Libertyes* provide "we have not published it as a perfect body of laws sufficient to carry on the Government established for future times, nor could it bee . . . expected that we should promise such a thing. . . . the Civilian gives you a satisfactory reason of such continuall alterations, additions &c: *crescit in orbe dolus*."[2]

[1] The Book of the General Lawes and Libertyes Concerning the Inhabitants of the Massachusetts, Reprinted from the copy of the 1648 edition in the Huntington Library preface (Thomas G. Barnes, ed., 1982).

[2] The phrase is part of a longer Latin maxim that explains the multitude of laws by an ever-changing world.

Laws that people follow voluntarily make civil society possible. For every instance of application of law in a lawsuit, there are millions of instances of people applying law to themselves.[3] For people to follow laws, laws must be made for them.

The Colony of Connecticut literally gave its laws to the people: it printed, delivered and collected payment for them. In 1672, when it printed its Code of 1650,[4] it required that "every family in the several plantations in this Colony shall purchase one of our Law books, to keep for their use." Constables delivered the books and collected payment on delivery of twelve pence in silver or a peck and half of wheat, or failing in that, in two-thirds of a bushel of peas.[5]

The 1780 *Constitution or Frame of Government of the State of Massachusetts-Bay*, drafted principally by John Adams and still in force, brings these ideas of laws for the people together in the concept of "a government of laws, not men." The Constitution's preamble explains:

> The body politic ... is a social compact by which the whole people covenants with each citizen and each citizen with the whole people that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation and a faithful execution of them; that every man may, at all times, find his security in them.

I discuss in historical and comparative perspectives principally three elements of governments of laws:

1. *Laws are made for common good and justice*: Are laws made "for the common good" in an "equitable mode"?
2. *Laws are known to those to whom they apply*: Are laws clear, publicized and stable, i.e., capable of being followed? (Are laws "certain"?)

[3] *Cf.* H.L.A. Hart, The Concept of Law 40 (2d ed., 1997) (asking why should law not be concerned "with the 'puzzled man' or 'ignorant man' who is willing to do what is required, if only he can be told what it is? Or with the 'man who wishes to arrange his affairs' his if only he can be told how to do it?" and concluding "The principal function of the law as means of social control ... is to be seen in the diverse ways in which the law is used to control, to guide, and to plan life out of court.")

[4] *Code of Laws, Established by the General Court, May, 1650, in* J. Hammond Trumbull, The Public Records of the Colony of Connecticut, Prior to the Union with New Haven Colony, May, 1665, 509 (1850).

[5] J. Hammond Trumbull, The Public Records of the Colony of Connecticut, from 1665 to 1678, 190 (1852).

3. *Laws are applied to realize law and justice*: Are laws interpreted and applied justly as written? (May every man "at all times, find his security in them"?)

Americans have not wavered from the ideals of a government of laws[6] although today they are more likely to speak of the ideals as a "rule of law."[7] Their exceptional ideal is now shared around the world.[8] It is universal.[9] The German-language analogue is the *Rechtsstaat*, the "law state," or "right state" or "rule-of-law state." The German term keeps the focus on governing. The "rule of law" of America's legal professions, on the other hand, shifts the focus to process and resolving disputes.

B. MAKING GOOD LAWS IS HARD

The public assumes that it is easy to make and apply[10] good laws. Many lawyers, judges and academics share that false assumption, especially scholars outside law. They dismiss decisions not to write new laws on political grounds when, in fact, technical reasons such as lack of manpower may stand in the way.

Lawmaking is more demanding than is litigating. It is harder for lawmakers to make good laws than it is for lawyers and judges to decide individual cases, for in lawmaking one is deciding classes of cases for the future. Lawyers work with one case at a time. In counseling, they advise how they see the law in one or in a handful of fact situations. In litigating, they argue for one view that they

[6] *Cf.*, Boddie v. Connecticut, 401 U.S. 371, 374 (1971) ("Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner.")

[7] Or used together. *See, e.g.*, ABA Division for Public Education, Part I, What Is the Rule of Law?, http://www.americanbar.org/advocacy/ruleoflaw/what-is-the-rule-of-law.html, last visited July 20, 2016.

[8] Volker Bouffier (Minister President of the German state of Hessen and former President of the German Bundesrat), in "Gesetzgeber" und Rechtsanwendung viii (Christian Baldus, *et al.*, eds., 2013) (making and applying law are the basis of every democratic rule-of-law state).

[9] *See, e.g.*, World Justice Project, Rule of Law Index 2015, Box 1: Four Universal Principles of the Rule of Law; Organisation for Economic Cooperation and Development (OECD), Recommendation of the Council on Regulatory Policy and Governance (2012).

[10] Applying laws to facts well is not easy, either. *See generally* James R. Maxeiner with Gyooho Lee and Armin Weber, Failures of American Civil Justice in International Perspective (2011); Remme Verkerk, Fact-Finding in Civil Litigation: A Comparative Perspective (2010).

see as benefiting their client. Judges focus on one set of facts and the laws that might apply to it.

Good laws, on the other hand, make provision for not one case, but for all cases, even though lawmakers know that they cannot anticipate all cases. Good laws capture in a few understandable words what people are compelled to do. Good laws are consistent internally and consistent with other laws. John Austin, the famous English legal philosopher of the 19th century saw that "the technical part of legislation, is incomparably more difficult than what may be styled the ethical."[11]

Systematizing is necessary to a government of laws. In a government of laws, law must be accessible to people. Without a system, laws become unknowable, inconsistent and incoherent. Tyrants, not laws, govern. In the 19th century, proponents of systemization likened its absence to the reign of the Roman Emperor Caligula, who "published" laws in such ways that no one could read them.

C. AMERICA'S BROKEN GOVERNMENT OF LAWS

The United States falls short in realizing a government of laws. This is not controversial. Congress is dysfunctional. Thousands of articles and books document how America's legal system doesn't deliver a government of laws. It's broken.[12] Looking only to the three elements of the government of laws just discussed, it is accepted wisdom that:

- Only the gullible believe that America's legislatures make laws for the common good and justice. Those in the know realize that laws are made for those who show up.[13]
- Only the inexperienced believe that America's laws are knowable by those to whom they apply. The experienced know that America's laws are incoherent.[14]

[11] John Austin, *Codification and Law Reform*, *in* 2 John Austin, Lectures on Jurisprudence or the Philosophy of Positive Law 1092, 1099 (5th ed., Robert Campbell, ed., 1885).

[12] Congressional consideration in 2017 of "repair and replacement" of the Affordable Care Act must have convinced even the most optimistic of skeptics.

[13] Jack Davies, Legislative Law and Process in a Nutshell xi (3d ed., 2007). Experts teach novice Congressmen this. Judy Schneider & Michael Koempel, Congressional Deskbook: The Practical and Comprehensive Guide to Congress (6th ed., 2012).

[14] Organisation for Economic Co-operation and Development, Regulatory Reform in the United States 48–49 (1999). Professors of legal research and writing teach first year law students this.

- Only the innocent believe that America's laws are applied in order to realize law and justice. The realists know that the law may be changed in any case from what it was when the case began to suit those involved in the process.[15]

What will the United States do about its unfulfilled longing for a government of laws? Unless the people rise up and insist that legislators and legal professionals, i.e., judges, lawyers and law professors, provide one, most likely, nothing.

The United States does not have a government of laws, not because it is incapable of creating one, but because its legal professionals have given up on the project. They deny that it can be done or that it is even worth doing. They avert their eyes from their own history and from successes elsewhere in the world. They pretend that the United States has a "common law" system that obviates the need for a government of laws.

D. GERMANY'S WORKING GOVERNMENT OF LAWS

Germany substantially achieves a government of laws, or, as it is called in German, a *Rechtsstaat*. In Germany, America's goals of a government of laws are recognized and pursued: laws are known to those to whom they apply; lawmaking is for common good and justice; and laws are applied to realize law and justice.

This book examines Germany as a successful example of a government of laws, not men. Most modern countries aspire to governments of law and comparison with any of them would be useful. I have chosen to examine that of Germany because, among larger countries, that of Germany is among the most admired and most successful.

Governments and laws in Germany have provided positive models to the world.[16] The development of government and of laws in Germany and the United States have had many parallels. Each country sought a government of laws and modern legal methods. Each sought to integrate many small states into one larger entity, before, and after, civil wars in the 1860s. Each sought

[15] Geoffrey C. Hazard, Jr., *Rule of Legal Rhetoric*, 67 SMU L. Rev. 801, 803 (2014). Professor Hazard was Director of the American Law Institute for fifteen years. Professors of first-year law classes, *e.g.*, torts, contracts, property, criminal law, constitutional law, teach this to first-year law students.

[16] *See, e.g.*, the detailed 770-page study published by the Brookings Institution only five years before the Nazi takeover: Frederick F. Blachley & Miriam E. Oatman, The Government and Administration of Germany (1928).

modern governments and modern legal methods to deal with economic and social needs of that larger entity. German successes are worthy of note in America.

E. THE THESES OF THIS BOOK

Part III, the Comparative Part, compares the attempt at a government of laws in America today with that of Germany. It shows how Germany's methods work well and how America's methods by comparison work less well.

Part II, the Historical Part, refutes the idea of common law exclusivity in American legal history. It shows that outside the legal professions – and even within them – Americans through the 19th century expected a government of statutes and not of case law.

Part I, Chapter 2 shows that at the Centennial in 1876 Americans still expected a government of statutes. Chapter 3 shows common law is not an option now, nor was it then.

F. HOW TO READ THIS BOOK

I have written this book for sophisticated laymen, but I hope that members of the legal professions will read it too. That means there are parts that not all readers need to read. Here are my suggestions.

Pragmatists, who believe that America's legal system is broken and needs fixing, who are looking for ideas that work and who carry no baggage, can skip to Part III. It compares contemporary failures of America's methods and reports what I see as successes of Germany's methods.

Skeptics and ***Exceptionalists*** can skip to Part II. It will make them proud. No longer need they defend a broken system simply because it is America's. After reading Part II they can work whole-heartedly to bring to America the government of laws longed for but not gotten. No longer must they accept the lame excuses of America's legal professionals that it may be a lousy government of laws, but it is "our" system.

Lawyers, judges and law professors should continue with Part I. Chapters 2 and 3 give reasons that may allow them to suspend belief in myths they were taught in law school long enough to entertain the heretical idea that America's legal system just may not be best in the world.

2

America's Exceptionalism in 1876

Systematizing Laws

Philadelphia Centennial Exhibition, *Frank Leslie's Historical Register of the United States Centennial Exposition*, 1876 at 239 (1877)

PHILADELPHIA CENTENNIAL EXHIBITION[1]

In 1876, a century after Americans met in Philadelphia to declare independence, they returned to celebrate the anniversary with "a competitive display of industrial resources, constructions, fabric, and works of use and beauty, distributed through a hundred departments of classified variety."[2] Americans invited the world to participate. France sent the Torch of Liberty that a decade later would adorn the Statue of Liberty in New York Harbor that today greets the world.

For the legal professions, participation in the Centennial Exposition of 1876 was problematic. What would be their "works of use and beauty?" Long-serving federal judge and later chancellor of the State University of Iowa Law School, James H. Love, wryly related to the Iowa bar:

> If we could exhibit at the Centennial, the burning of a witch or a heretic, at the stake; or the putting of a prisoner to the question on the rack; or the disemboweling of a traitor while yet alive; . . . the progress and amelioration of the law would be made manifest to all men. If we had any means of making a visible exhibition of what the common law, which forms the basis of our jurisprudence was even a century ago, in contrast with what it is to-day, we might venture to challenge a comparison of progress with any calling, art or profession which is displaying the evidences of its progress at the great exposition.[3]

Love presented an indictment of common law consisting of about a dozen "atrocities." He added, "if time allowed, I could give a thousand illustrations and proofs to maintain it as a 'true bill.'"

Although America's legal professions provided no exhibit at the Centennial Exposition, they did contribute to commemorative volumes published by two of the nation's leading journals, *The North American Review* and *Harper's New Monthly Magazine*. Each volume reported on American progress in the century just past. *The North American Review* presented a special issue that included an essay on "Law in America, 1776–1876."[4] *The North American*

[1] Frank Leslie's Historical Register of the United States Centennial Exposition, 1876 at 239 (1877).
[2] *History and the Centennial*, 8 Popular Science Monthly 630 (Mar. 1876).
[3] James H. Love, *Address of the Hon. J. M. Love, Delivered at the Third Annual Meeting of the Iowa State Bar Association, in* Proceedings of the Third Annual Meeting of the Iowa State Bar Association Held at Des Moines, May 11 and 12, 1876, 7, at 17, *reprinted in* 10 Western Jurist 399, 409 (1876).
[4] G.T. Bispham, *Law in America, 1776–1876*, 122 N. Am. Rev. 154 (1876) [hereinafter *Law in America, 1776–1876*, 122 N. Am. Rev.].

Review, then under the editorship of Henry Adams, was the premier intellectual journal of the day. Harper's *New Monthly Magazine* was a part of one of the most successful publishing enterprises of the day, Harper & Brothers. It offered a series of articles that it then combined into a Centennial volume, *The First Century of the Republic: A Review of American Progress*. The Centennial volume included a new essay on "American Jurisprudence"[5]

The editors recorded their goals for their commemorations.

Henry Adams of the *North American Review* wrote to one potential contributor that "the ultimate aim of the article should be to settle the question whether on the whole the movement of American Law has been such as ought to satisfy our wishes and reasonable expectations, or has fallen short of them, and whether we are justified in feeling confidence in its future healthy progress."[6]

Harper's, in *The First Century of the Republic's* foreword ("Publishers' Advertisement"), stated goals that, if anything, were more ambitious for its "Review of American Progress." The volume was "an indispensable supplement" to the Philadelphia exposition's display of "the material symbols of progress." The papers taken together suggested a comparison of progress in the United States with that of other countries "such as to awaken a feeling of just pride in every American citizen."[7]

The two volumes are similar. Both display a century of American progress in many fields. Their two essays on law are likewise similar. Both measure progress in law in terms of replacing feudal English law with modern American statutes: property law, criminal law, and procedure.

Such improvements were for *The North American Review* "but passing illustrations of the originality of American thought in jurisprudence." They were instances where "[t]he American mind, practical as well as liberal, brought down [an idea] from the region of speculation and applied it, through the machinery of *statute law*, to the direct and practical amelioration of mankind."[8] That is what made American law exceptional.

The North American Review elaborated: "The *great* fact in the progress of American jurisprudence which deserves special notice and reflection is its

[5] Benjamin Vaughn Abbott, *American Jurispudence*, The First Century of the Republic: A Review of American Progress (Harper and Brothers, 1876) [hereinafter, The First Century of the Republic].

[6] Letter of August 28, 1875 from Henry Adams to Thomas M. Cooley, Benton Historical Library, Cooley Collection, Box 1, Folder August to September. Judge Cooley, one of the century's most renowned jurists, apparently declined the invitation.

[7] The First Century of the Republic at 437.

[8] *Law in America, 1776–1876*, 122 N. Am. Rev. at 174 [emphasis added].