

1935

## Dedicatory Exercises of the Law Quadrangle

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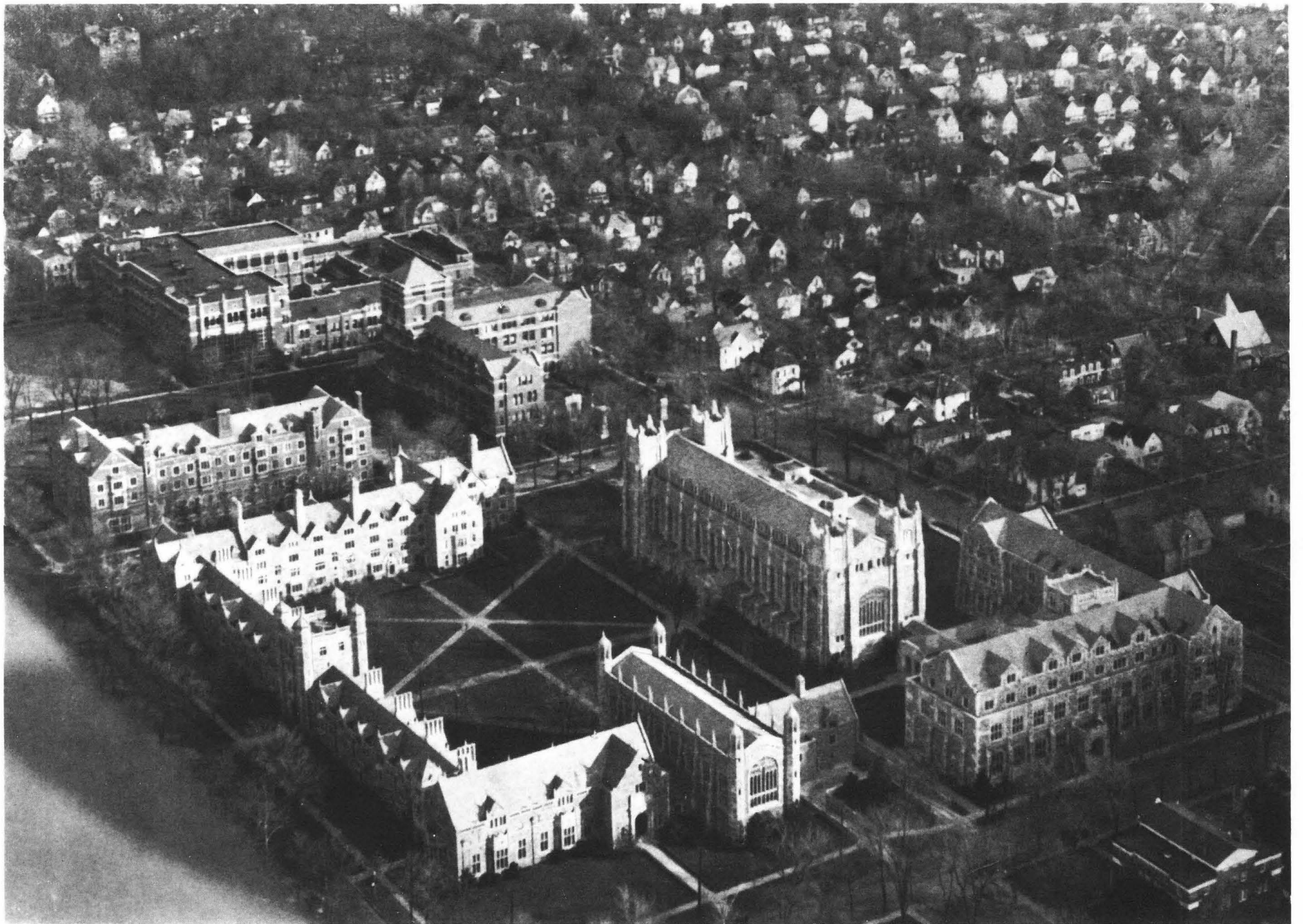
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DEDICATORY EXERCISES  
OF THE  
LAW QUADRANGLE



LAW QUADRANGLE, AERIAL VIEW

DEDICATORY EXERCISES OF THE  
**LAW QUADRANGLE**  
THE GIFT OF WILLIAM WILSON COOK

COMPRISING

THE LAWYERS CLUB, 1924

THE JOHN P. COOK BUILDING, 1931

THE LEGAL RESEARCH LIBRARY, 1931

HUTCHINS HALL, 1933



June 15, 1934

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LAW SCHOOL

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# ADDRESSES

ALEXANDER G. RUTHVEN

*President of the University of Michigan*

HENRY M. BATES

*Tappan Professor of Law and Dean of the Law School, University of Michigan*

ROSCOE POUND

*Carter Professor of Jurisprudence and Dean of the Faculty of Law in Harvard University*

HARLAN F. STONE

*Associate Justice of the Supreme Court of the United States*

JAMES O. MURFIN

*Regent of the University of Michigan*

MARVIN B. ROSENBERY

*Chief Justice of the Supreme Court of Wisconsin*

NEWTON D. BAKER

*of the Cleveland Bar  
Secretary of War 1916–1921*

# Address

By ALEXANDER G. RUTHVEN

*President of the University of Michigan*

WE HAVE met here today specifically to dedicate Hutchins Hall, the last unit to be erected of a splendid group of buildings presented to the University by Mr. W. W. Cook. The buildings are beautiful, useful, and enduring, but taken altogether, with all that they are in themselves and all that they signify, they represent only one part of a comprehensive contribution to the educational resources of the University of Michigan. It is, therefore, both fitting and imperative that we should on this occasion consider carefully the significance of our whole heritage.

Other persons today will speak of Mr. Cook's generosity, of his interest in education, of his loyalty to his University, of his public spirit, and of his regard and respect for the law. Undoubtedly these attributes were contributing factors in his decision to erect these buildings and to provide an endowment for Legal Research. But, it is my purpose to discuss the deeper significance of his splendid gift.

A benefaction to an educational institution is generally a joint one. The gift often bears the name of the partner who provides the capital, and the silent partners are those faculty members, past and present, whose ability and faithfulness have developed the school, department, or project to the point where it challenges the interest, and is worthy of the support, of the donor. It is eminently fitting that the University should, in part, recognize the faculty's contribution to the gift of Mr. Cook by giving to the classroom building the name of that honored alumnus,

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professor, dean, and president, Harry B. Hutchins, who dreamed with the benefactor the vision which has now materialized.

Benefactors and faculties alike understand that the recognition of such a partnership in giving to education in no way lessens the gratitude due to donors by a thoughtful public. On the whole, it should increase respect for the giver since it connotes intelligence and thought, rather than sentimentality or ignorance, in giving. We are correctly informed that "He gives not best who gives most; but he gives most who gives best."

The responsibility of the silent partners, present and future, in an enterprise of this kind is clear cut. Their duty is to carry on in the traditions of their predecessors. They must spare no pains to justify the investment by increasingly better results in teaching, research, and service. In this way, and in this way only, can they perpetuate the gift and properly immortalize the donor.

Mr. Cook did not care for notoriety; he was not moved to assist the University solely by a sentimental attachment to the institution; and he was not ambitious to establish a monument for himself. Clearly his was a deep and intelligent appreciation of the aims of education and of the results and needs of his school in its efforts to advance his beloved profession. Above all, he had faith in the wisdom and integrity of the Regents, in the ability and ideals of the faculty, and in the sincerity of the students of the University of Michigan. Knowing his principal partners in this enterprise,—the Law School faculty and the University staff,—without fear and without reservation I, as the official representative of the University, pledge to Mr. Cook's memory wholehearted support of his noble ambitions and fidelity to the trust which he has imposed upon his Alma Mater.



# The Law School Accepts the Responsibility

By HENRY M. BATES

*Tappan Professor of Law and Dean of the Law School, University of Michigan*

NINE years ago this week, with simple but appropriate exercises, the first buildings of the Law Quadrangle were formally declared devoted to the splendid purposes of our benefactor, William W. Cook. On that day the late James Parker Hall, then Dean of the University of Chicago Law School, said in his address:

“As we dedicate today the Lawyers’ Club, the initial realization of that beautiful quadrangle of law whose remaining buildings will soon take shape, we stand on the threshold of a fine and worthy adventure for the betterment of our ancient profession. The temple reared by human hands is before us. It remains for it to be possessed by the spirit of human service for which these cloisters are a fitting habitation. Into it will be poured the labors of devoted teachers and scholars, the efforts of students, the support of alumni, and the co-operation of the profession; and out of it will come, in the fullness of time, an influence that will work mightily for the improvement of our law and its administration in the state and in the nation. Its mission will be conceived in no narrow spirit. It will teach students. It will train scholars. It will hold up high ideals for the profession. It will inspire and help other schools to follow its example. And above all it will labor to simplify and clarify the law, to fashion it to our changing needs, and to keep it the flexible instrument of social progress that is the difficult and crowning achievement of human

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institutions. To no purpose less high and noble can this beautiful gift be dedicated.”

These words of a high-minded and generous-hearted friend are so eloquent of the aspirations and purposes of those of us who are especially charged with the task of breathing life and spirit into the noble housing of the School which Mr. Cook has made possible for us, that I can do no better than to quote them, as expressive of the thoughts and purposes which crowd upon us on this significant day in the history of our Law School.

A great gift creates obligation on the part of the beneficiaries. Rich opportunity has its inescapable correlative, the duty to strive for the richest and fullest realization of the opportunity. Conventional and trite though these reflections may be, I should fail to express the dominating thought and purpose of the University in general, and of the Law School especially, if I refrained from giving expression to them. For, in deep appreciation of the munificence of the gift, and recognizing the responsibility which it puts upon us, we have studied every possibility of utilizing this beautiful group of buildings, and the equally important endowment which accompanies it. We have been, and are, thinking and planning that we may do our share in attaining the purposes which motivated Mr. Cook in his great benefaction—purposes which we share fully and unreservedly with him.

What are the great objectives to which Mr. Cook hoped to contribute? Fortunately, in clear and forceful language, he has declared them in his deeds of gift and in his will, and some of these words are graven in the very structure of the beautiful buildings which he has given. In the letter from him which was read at the exercises held here nine years ago he said of the legal profession:

“There are few who tread its hot and dusty highway from end to end, but those few mould public opinion instead of following it. But as an



FROM LEFT TO RIGHT: HENRY M. BATES, TAPPAN PROFESSOR OF LAW AND DEAN OF THE LAW SCHOOL, UNIVERSITY OF MICHIGAN. MARVIN B. ROSENBERRY, CHIEF JUSTICE OF THE SUPREME COURT OF WISCONSIN. ROSCOE POUND, CARTER PROFESSOR OF JURISPRUDENCE AND DEAN OF THE FACULTY OF LAW IN HARVARD UNIVERSITY. HARLAN F. STONE, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES. NEWTON D. BAKER, OF THE CLEVELAND BAR, SECRETARY OF WAR 1916-1921.

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‘intellectual aristocracy’, it has not always led the way towards higher standards of living. It is competent to do so and hence I do not think I exaggerate when I say that the law schools are of supreme importance in this respect to the future institutions, beliefs and conduct of life in America.”

And he closed his dynamic message in these words:

“Can your Law School be made a great center of legal education and of jurisprudence for the good of the public? I believe it can and in that belief shall press on.”

In his will occurs this significant passage, which elaborates the epitomized statement just read and affords striking proof that his gift was inspired by no mere institutional pride or limited by parochial or provincial or class vision and aspiration:

“Believing as I do that American institutions are of more consequence than the wealth or power of the country; and believing that the preservation and development of these institutions have been, are, and will continue to be under the leadership of the legal profession; and believing also that the future of America depends largely on that profession; and believing that the character of the law schools determines the character of the legal profession, I wish to aid in enlarging the scope and improving the standards of the law schools by aiding the one from which I graduated, namely the Law School of the University of Michigan.” It was this breadth of view, this recognition that law is but a means to great ends, this generous desire to contribute to the welfare of all classes in the nation, that commanded the immediate, profound and enduring sympathy and determination of the law faculty.

It is possible to believe that Mr. Cook exaggerated the power and influence of the American Bar, but there are those of us who know, from intimate conversations with him, that he was deeply conscious of its defects and its failures, and it must be remembered that he was addressing

his words to lawyers and making his gift to them as at once a stimulus and an aid to the realization of the sound ideals of the profession. And he could not have made his gift at a more opportune time in American history, for who can doubt that today America is struggling desperately and confusedly in a period more critical than that of which John Fiske wrote. The years stretching from the winning of our national independence to the establishment of the national government, under the Constitution, though desperate indeed, were characterized by dangers and difficulties which seem relatively simple, if not superficial, as compared with the baffling and fundamental problems of our day. It was a question then as to whether government could command the financial and other support necessary for effective life, whether the states could be kept in union, whether they could be restrained from opposing and weakening each other, in their insensate industrial and trade rivalries. But after all, the true path was fairly clear to the leaders of that day, and the task was chiefly to surmount known difficulties and to harmonize differences of political and economic interests, which did not reach down into the depths or fundamentals of life.

We were beset then with the rivalries of the relatively small states of one nation, with a population which after all was homogeneous throughout and for the most part shared somewhat the same set of rather definite opinions and desires. Today we find ourselves engaged in the gigantic and bitter international conflicts of a world which seems to have lost its way, paralyzed by befogging doubts, and blinded by political and trade rivalries. More presaging of disaster than commercial or political antagonisms is the fact that we seem to have lost faith in those ideas of government, of religion and of ethics, which for centuries, whether right or wrong, have exercised a stabilizing influence and have given direction and some sense of security in our national life.

The uncertainties and clashing opinions concerning such important

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institutions and standards as these are characteristic of periods of acute transition. They are, in fact, an inevitable product of changing conditions. What these changes are is well known. Doubtless they are being recited upon a thousand Commencement platforms, this month. Suffice it to say here that they are fundamental, in some respects revolutionary, and far-reaching beyond anything in modern history. Law is a resultant of the industry, commerce and thinking—in short, of the life—of the community. It has, of course, its reciprocal influence upon that life, but it is no longer thought of as an unyielding mold to which life must be forced to conform. If this be so, one has only to compare the national industry, commerce, transportation and beliefs of 1789 with those of today, to realize that unless adjustments had been made in our legal order it could not have survived.

Furthermore, it follows that the process of modification must be continuous, and that in a period of acute transition like this, modification must take place with comparative rapidity. Without such modification the national life would be partially frustrated, if not disrupted. Fortunately, neither the temper nor the habit of the American people is conducive to violent and sudden change, in matters of fundamental importance. But reliance upon habit and a supposed temper, in these matters, must not be pressed too far. We must set about making necessary changes as intelligently and as scientifically as possible. It is this situation which makes Mr. Cook's gift so timely, and which offers to the law schools of the country extraordinary opportunity for service to our national life.

How great that opportunity is may be indicated by reference to a few American institutions which are undergoing great strain and stress, and which many fear are disintegrating to a degree menacing to the future of the republic. First, let us consider for a moment the unquestionably changed attitude among our people toward law in general and especially

toward what is sometimes called distributive justice, and the function of the courts in its administration. For approximately a century after the adoption of the Federal Constitution American law remained relatively static. It was assumed to be based upon fundamental and immutable principles, and that it was the duty of the courts only to declare the law in relation to cases pending before them. The country was blessed with a few masterful judges and legal scholars, such as Marshall, Kent, Story, Calhoun, Webster and Cooley. But courts, for the most part, applied precedent somewhat slavishly, and law was studied and taught dogmatically. Then toward the end of the last century dynamic changes in the life of the nation had begun to influence our thinking and treatment of law. Mr. Justice Holmes and Dean Pound were the influential leaders who aroused the country, and particularly the Bar, to a fresh and more philosophical, and at the same time a more realistic, attitude toward law and its administration. Generative seeds sown by these and other men have produced a most healthful ferment in the realm of legal scholarship. But contemporary scholars are by no means all moving along the same paths. At least two divergent, if not opposed, movements or tendencies are observable. One may be said to be *a priori* and conceptual in character, while the other has been dubbed realist or functional.

In some of the jurisprudential writing of the day the differences between these movements has been greatly exaggerated. In retrospect, at least, it will be seen that the divergencies are, for the most part, those of degree and emphasis. Law never has been and never should be based wholly upon *a priori* assumptions, on the one hand, or upon a merely pragmatic philosophy, on the other. Whether there be immutable principles of justice or not, every national society has its beliefs, its standards and traditions, which must and should have a large controlling influence. Principle cannot be thrown out of the window without ensuing anarchy. One has only to examine the earlier reported cases in early English

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jurisprudence to realize that in the days of the Year Books, as now, principle and fact, in the large sense, have combined to fashion our law. But there have been periods in which principle, embalmed and crystallized in authority and precedents, has become devitalized.

But in this year of grace, principle is being revitalized and made conformative to the life of our day. Facts are having their innings, and by facts, of course, are meant not the mere petty and particular details of litigated cases, but the whole factual background and environment. And so it is that legal scholars are investigating the actual functioning of the nation's industrial and commercial life, and are seeking pertinent information to be found in the various social sciences, particularly, in the hope of arriving at a just appraisal of our existing legal order and of modifying and improving it, if and when desirable. But the difficulties and pitfalls in these pursuits are great and numerous. Many a beautiful prospect of correcting the existing scheme of justice, already has been found to be but a delusion, issuing out of a quagmire of jumbled and uninterpreted facts.

Nevertheless, unquestionably our law, like all other human institutions, needs correction in many respects. Readjustment to the life and purposes of our time must be accomplished if we are to achieve a better life. Here is a great and unlimited field for the legal scholar. He, better than anyone else, is equipped to work toward that blend of principle, authority, and conformity to the constantly changing life of any vital people, necessary to an effective and prosperous society.

Other basic questions which offer great opportunities for study are the three fundamental features of our Constitution. These may be said to be, first, the division of governmental powers between the United States as a Federal Union, and the several states; second, the distribution of the powers of government, both Federal and state, into legislative, executive, and judicial departments; third, the exercise by our courts of



THE REGENTS OF THE UNIVERSITY  
OF MICHIGAN

AND

THE FACULTY OF THE LAW SCHOOL

HAVE THE HONOR TO INVITE

TO BE PRESENT

ON FRIDAY, THE FIFTEENTH OF JUNE,

NINETEEN HUNDRED AND THIRTY-FOUR,

AT THE

DEDICATION OF THE LAW QUADRANGLE

PRESENTED TO THE UNIVERSITY BY THE LATE

WILLIAM WILSON COOK

THE FAVOR OF A REPLY TO THE  
DEAN OF THE LAW SCHOOL IS REQUESTED

#### PROGRAM

REGISTRATION of guests and informal inspection of the  
Quadrangle during the morning.

INFORMAL LUNCHEON at the Michigan Union at 12:15.

DEDICATION EXERCISES at Hill Auditorium at 2:00.

President Alexander G. Ruthven, presiding.

Addresses by President Ruthven, Dean Henry M.  
Bates, Dean Roscoe Pound, Justice Harlan F.  
Stone.

DINNER in the dining room of the Lawyers Club at 6:30.

Addresses by Regent James O. Murfin, Chief  
Justice Marvin B. Rosenberry, Honorable New-  
ton D. Baker.

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the power of review of legislation for the purpose of determining its constitutionality. All three of these constitutional arrangements are being subjected to tremendous strain. Indeed, there are many who feel that the first two of those organic provisions have been undermined and partially nullified, and as to the third, organized and determined efforts are being made materially to restrict, or wholly to destroy, the power of judicial review of legislation.

It must be apparent that material alteration of those three fundamental arrangements of our constitutional law would vitally affect our entire national structure and life. It is equally apparent that, to the extent to which such changes are likely to be made, we should proceed with extreme care and should fashion the changes in the manner, and to the extent, indicated by comprehensive and scientific study of every aspect of the problems presented. Unfortunately, changes in the political and legal structure of the nation are seldom, if ever, made in a scientific fashion. Alterations come as the result of irresistible pressures of popular beliefs (too often fallacies), and the *coup d'etats* of political parties and of other organized pressure groups. But at least careful studies by legal scholars of the situations in which changes seem indicated may contribute to better results than otherwise would be obtained.

There is perhaps no greater field for fruitful study than that basic *desideratum*, a sound division of powers between the Federal Union and the several states. The Constitution itself affords no definite basis upon which the decision can be made. The reservation to the states, or to the people, of those powers not granted to the Federal government, nor prohibited to the states, is far from being a rule of thumb, by which it is possible to make the division of powers, under modern conditions. If the powers granted to the Federal government were definite and unchanging powers, the problem would not be so difficult; but the fact is that the grants are, in most respects, general in terms and capable of

expansion and contraction as conditions change. The powers reserved to the states are not specific or definite; they are residuary. Thus we find that the treaty-making power, the powers to regulate interstate commerce, to tax and to maintain the postoffice, may vitally affect matters which primarily fall within the range of state control.

Nor can limits to Federal power be set by declaring that the government of the United States possesses no police power. That assertion has often been made because of a restricted and erroneous theory as to the nature of the police power, which had an undeserved vogue, especially during our early history. Of course the Federal government possesses police power, —not in its complete range, —but all police power appertaining to its granted powers. And so the Supreme Court of the United States, in the case of *Brooks v. the United States*, 267 U. S. 432, in upholding a certain congressional act, says: "In doing this it (Congress) is merely exercising the police power for the benefit of the public, within the field of interstate commerce."

The doubts which exist today as to how far the "New Deal" legislation and the codes adopted thereunder may be validly applied to the industry and business of the country, are most perplexing. There are numerous Supreme Court decisions sustaining the exercise of Congressional power in relation to certain aspects of business, which, standing apart, would be held to be wholly local. But because of the reaction of these local businesses upon interstate commerce, and because the grant of interstate commerce power is plenary, the courts have held that it may be exerted upon these local businesses, if they vitally affect interstate commerce.

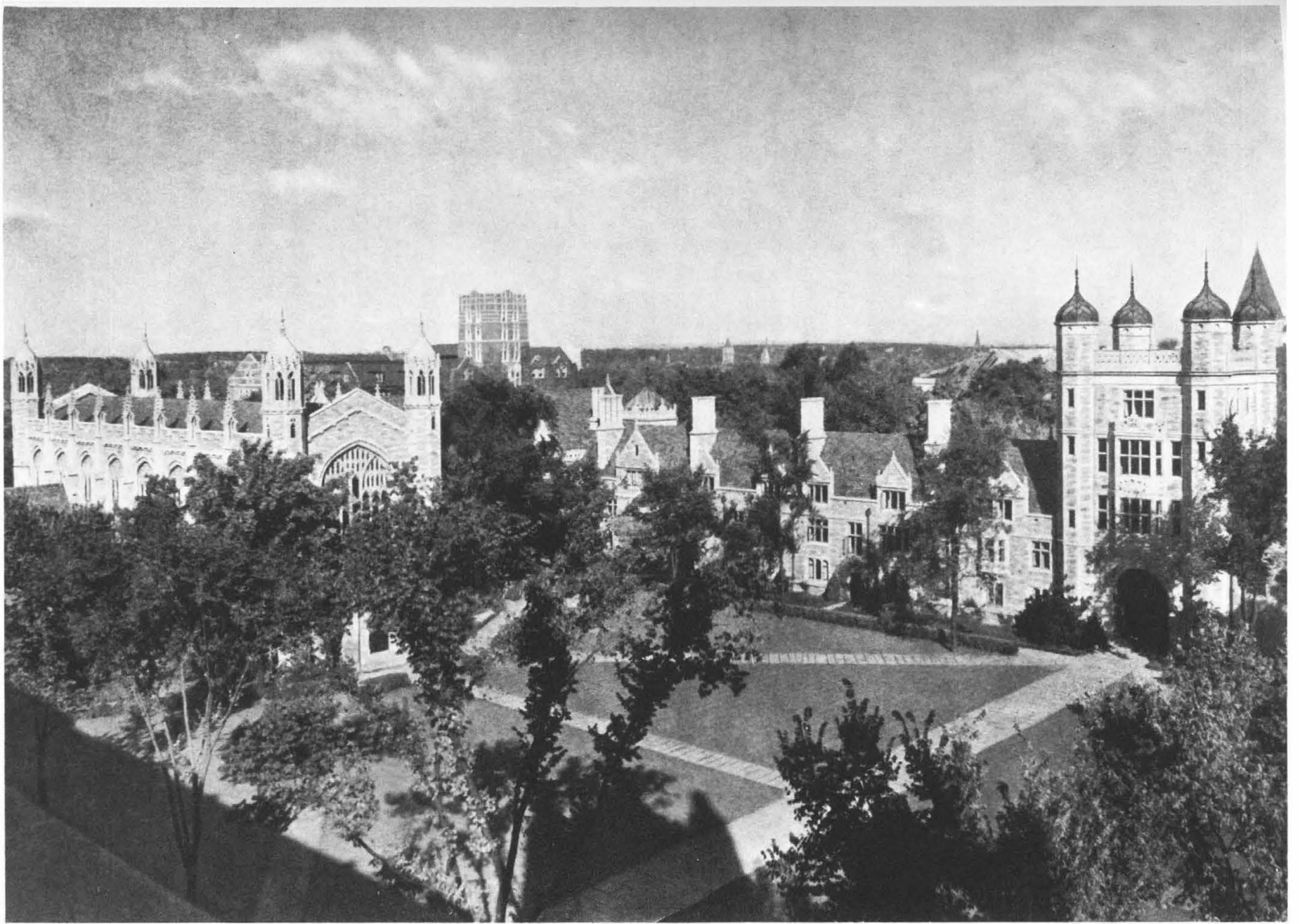
In last analysis, decisions as to whether the exercise of Congressional power in relation to such matters is valid or not will depend not upon precise expressions in the Constitution, nor upon any mere rules of law, but upon the application of broad principles and standards afforded by

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the Constitution, interpreted in the light of existing facts and applied thereto. Economic and general social considerations have exercised, and will continue to exercise, irresistible pressure for increase in the exertion of Federal powers. On the other hand, there is undeniable danger in the amassing of great powers in the Federal government and in the relative loss of power and prestige by the state and local governments. How can the clashing interests and principles involved be so reconciled as to secure the greatest possible good? Is it not clear that here is a precious opportunity for universities like this and others represented here today, with their specialists in the fields of law, economics, political theory, sociology and history, to examine this great governmental problem objectively and to furnish material for those charged with the responsibility of governmental action?

Another great opportunity is afforded by study of the problem of adjusting to the needs of contemporary society the basic requirement of our constitutional system—that the powers of government shall be separated and distributed to different arms of government.

Correct solutions of the basic political and legal problems thus inadequately touched upon would doubtless go far toward the solution of another perplexing controversy, which in a sense lies athwart our whole national life, namely—that of determining a scientifically sound balance and adjustment between individualism and collectivism. It is said that the American people are by temperament disposed to individualism. Probably this is true of a great majority of us, but we cannot close our eyes to the fact that the tremendous increase in our population, and the conditions of modern industrial society, have made anything like complete individualism impossible. Whether we like it or not, individualism in its extreme form has been largely crushed out of existence, not by government, but by the voluntary movements of society and the increased tendency toward the organization of great pressure groups. For



LAW QUADRANGLE, NORTHWEST CORNER. DINING HALL AT LEFT, DORMITORIES AT RIGHT

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example, how much play for individualism has the unskilled worker, and most skilled workers, in securing employment from the massed and organized industry, which is so characteristic of modern society? To attain some approximation toward equality in bargaining for employment, labor has organized itself into great unions, within which it permits practically no individualism whatever. So it is that in many industries today the energetic, able and intelligent worker must control his output of work and find his wages limited by the necessities of less capable and less conscientious workers. It is idle to rail against government for developing socialization of modern life, in view of the comprehensive and large-scale limitation of individualism by organized employers, organized workers, organized merchants and consolidated transportation agencies. The extreme individualism of the 18th century and the *laissez faire* policies of John Stuart Mill have little place in modern society.

The contemporary political and popular discussion of this subject is characterized very largely by prejudice, self-interest, and ignorance of fact, and it creates far more heat than light upon the subject. Here again, in perhaps the most fundamental and the most important of all problems to be settled by modern society, there is golden opportunity for calm, objective and scientific study of the matters involved.

I have surveyed all too sketchily a few of the outstanding legal problems of our time, and those few all in the domain of public law. But our entire legal order bristles with vexed questions and friction points which incite the scholar to renewed labor, to invigorated, imaginative, profound research, that he may contribute his mite to the amelioration and the sound prosperity of our national life. And I have said little that, in a superficial sense, would seem to relate to teaching, and teaching is after all a primary obligation of any school. But in a truer, more profound sense, all that has been said concerns the well-springs from which all

vital teaching must arise. In the eloquent words of Mr. Justice Holmes: "The aim of a law school should be . . . not to make men smart, but to make them wise in their calling—to start them on a road which will lead them to the abode of the masters. . . . Education, other than self-education, lies mainly in shaping men's interests and aims. If you convince a man that another way of looking at things is more profound, another form of pleasure more subtle than that to which he has been accustomed—if you make him really see it—the very nature of man is such that he will desire the profounder thought and the subtler joy. So I say the business of a law school is not sufficiently described when you merely say that it is to teach law, or to make lawyers. It is to teach law in the grand manner and to make great lawyers." And you cannot teach law in the grand manner upon an accumulation of stale information. The material of instruction must be kept fresh and vital by constant research.

Mr. Cook has accompanied his gift of buildings and endowment with a statement of his hopes and purposes, which are comprehensive and liberal. He has wisely refrained from hampering those who must administer his foundation by imposing upon them rigid conditions or meticulous details as to methods or materials. But his generating thought and his central plan are crystal-clear. Without denying to those working in other fields their part in the preservation of sound American institutions, he has declared his conviction that the American Bar and American Law Schools have had, and in the future should have, a great and influential part in shaping American life. Therefore, he has provided that his gift shall be used by the School of which he was a graduate, not only for the teaching of law and the training of superior lawyers, but for the scientific study of law, in its most comprehensive sense, that the School may make its contribution to a better Corpus Juris and a better American life.

Mr. President, the Faculty of our Law School are deeply grateful for the priceless opportunity which is theirs, through Mr. Cook's idealism

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and generosity. And equally, and with genuine humility of spirit, they recognize the great responsibility and obligation which rest upon them. They pledge themselves now, as we dedicate the superbly beautiful structures in which the work is to be carried on, to strive with all the strength and wisdom they may command for the realization of the lofty ideals of the brilliant American lawyer, to honor whose memory and ideals we have met here today.



# Law and Laws in the Twentieth Century

By ROSCOE POUND

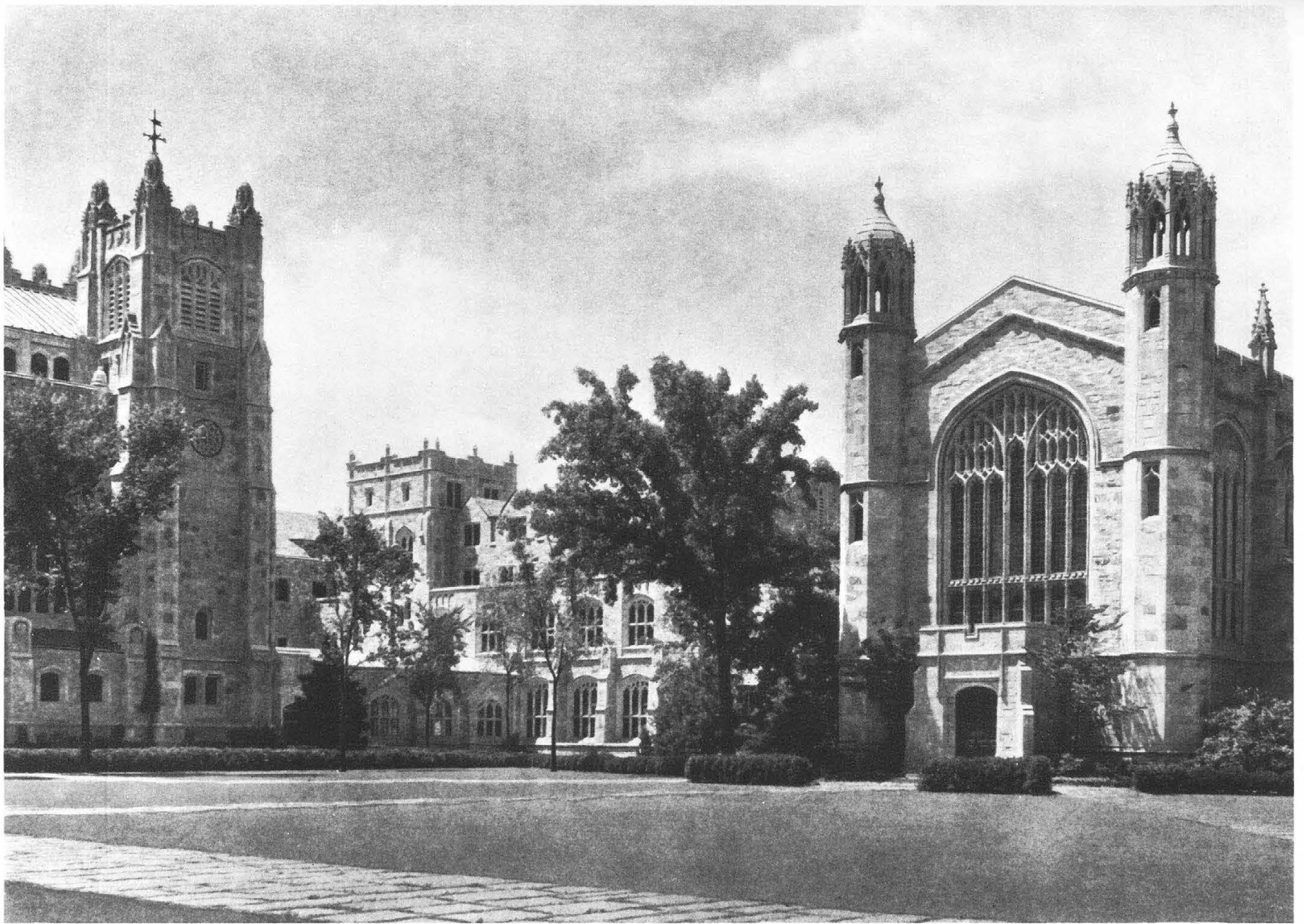
*Carter Professor of Jurisprudence and Dean of the Faculty of Law  
in Harvard University*

WE ARE here to dedicate a magnificent group of buildings built from the munificence of a lawyer to be devoted to the teaching of law and to research in law. For three quarters of a century, a great state has maintained here a notable law school. It has been a school in which law has been taught, not merely to the people of the state, but in such wise as to bring here a national student body to learn a national law. Its wise founders had, it may be, builded better than they knew. For in making of the law school of the state a school for the nation they had better provided for the needs of the state in the era of economic unification which has supervened. Also it has been a school from which have come great law books, used in every part of the land, which have helped to give shape and content to American law. Now to this work of the state there is added a great private endowment—outstanding in a land and a time of lavish endowment of education and scientific research—the first adequate endowment for the teaching and study of law and for the scientific investigation which in other fields has come to be our chief reliance for making human activities effective for their ends. What may we hope from these buildings? What may we hope from the work to be carried on here for generations to come which shall justify the founder as the work of the past had justified the state?

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We have been told recently that there are but two necessary callings. We have been told that two only will maintain themselves in the ideal state of society into which we are entering, namely, that of engineer and that of physician. In this ideal society, it seems that although through the development of psychology men will have reached such mental and moral power of voluntary control that no experts in organized social control will be needed, they will still have need of further mechanical devices and will still have grievous bodily ailments. We shall not reach mechanical perfection nor bodily perfection. But political and economic perfection are to do away with all experts and specialists other than those who have to do with the physical existence. Such pronouncements are characteristic of the era of machinery. If physics itself has been turning of late to logic, if not to metaphysics, the modes of thought of the time have been fashioned to the mold of the cocksure Victorian physics and look to it for a model for the social sciences. Physical science did such great things in the last and in the present century that its prophets are forgetful of the conquest of internal nature which had made the progress of physics possible—which has made possible division of labor and setting free of inventive genius to discover things—and would rest the whole of civilization upon man's mastery of external nature.

In all times of political optimism two ideas have had much currency with the lay public. One is that somehow a social order may be attained in which no administration of justice will be needed. The other is that so long as administration of justice is necessary, justice would be better administered if there were no authoritative body of legal precepts and no adherence to the course of decision in the past, but each case were determined by the common sense and sense of justice of a strong and upright judge unhampered by rules or technical principles or technical conceptions. Today this idea takes the form of belief in boards and commissions and administrative officials, adjusting human relations and



LAW QUADRANGLE, SOUTHWEST CORNER. LEFT: WEST END OF LEGAL RESEARCH LIBRARY.  
CENTER: HUTCHINS HALL. RIGHT: LAWYERS CLUB DINING HALL

## Dedicatory Exercises

directing individual conduct on a conception of each case as unique, to be disposed of without reference to any other, with a strong hand or on such considerations of fair play or sympathy for the oppressed or weaker party or of distribution of the economic surplus as appeal to them for the time being. The ideal is taken to be a society of just men who require no law and just judges who are equal to administering justice without law.

Things are not so simple as is assumed in the lay notion that if men were just there would be no need of law. Just men may and do differ justly as to many difficult questions of adjustment of human relations. For example, the law has continually to fix the incidence of loss as between persons wholly or equally blameless, or as between persons equally or alike culpable. Thus in cases of injury where there is contributory negligence, no less than five methods of imposing or distributing the loss are possible and any practicable solution of this problem of who shall bear it is at best a compromise.

Also it happens often that in order to maintain the general security the law must require a definite course of action as to matters which are morally indifferent. Take, for example, the questions which arise when one makes something new by using another's materials. The Roman jurists of the classical period were not agreed as to the principles of deciding with respect to ownership in such cases and Justinian adopted a conclusion of his own quite different from that of either of the second century schools. The modern codes do not agree with each other nor with the Roman law on these cases, and the French Civil Code adopts no rule but leaves the matter to be dealt with by the courts on the facts of each case. The common law does not agree with the Roman law in these situations nor do common-law jurisdictions agree with each other. The explanation is that the exigencies of the economic order demand that there be certain rules determining the ownership of property. But in these and other cases decisions have to be made upon questions which

have no clear moral import and upon which there are no received views in current morality. The just man has been provided by nature with no sufficient apparatus, merely because he is just, for dealing with such cases. An ideal justice without technicality will not uphold the economic order where maintenance of the security of transactions and security of acquisitions calls for rules as to matters morally indifferent.

Nor, if I may revert to my first example, is it possible to maintain the general security on the basis of the judgments of just men as to moral blameworthiness at the crisis of particular actions. Intentional aggressions and culpable carelessnesses are not the only things which menace the general security in the crowded, machine operating, complex social order of the time. Claims to security and claims to spontaneous free action have to be harmonized and the task of reaching a workable adjustment for each case would make impossible an adequate disposition of the thousands and tens of thousands of controversies upon the dockets of the courts of our large cities. Experience has shown abundantly the need of objective standards both for the guidance of judges and administrative officials and for measures of conduct for the individual. Indeed, in spite of the juristic theory of the last century, which sought to make liability absolutely dependent upon fault, there has been a steadily increasing development of standards to which the legal order requires men to conform at their peril. It is idle to speak of such things as "technical" and of the technique of applying them as "legalism." If one sees only the individual case and measures it by a conventional moral label applied with reference to but one of the conflicting or overlapping interests involved, it may seem that the legal solution leaves out elements which from a moral or economic or social standpoint should be decisive. It cannot be denied that this does sometimes happen. But in most cases it is rather the so-called common sense solution which overlooks elements that in the long run prove to be crucial for a practicable adjustment. The lay-

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man's method of valuing by affixing conventional moral labels is itself crudely technical. Every practical art has technicalities of the same sort as those of the legal order, expressing generations of experience and enabling all that men have learned in a long process of civilization to be applied intelligently to the problem of the moment. The most just of men will need an apparatus of technicalities and a technique of applying them, or in the alternative a technical adviser, if he is to act justly and effectively in the conduct of enterprises in a complex social and economic order.

A corollary of the idea that ideal justice would proceed without law is that an ideal administration of justice would go on without lawyers. But it may be said with entire truth that there is no systematic social control in a developed politically organized society without lawyers. Law, as we know it in a developed state, begins with lawyers. It begins when the tradition of conduct of transactions, decision of causes, and advising parties to controversies becomes secularized and passes into the hands of a specialized profession. At Rome a turning point is reached when the traditional formulae of actions are divulged and when, somewhat later, the first plebeian pontifex maximus begins to give consultations in public so that students may attend and take notes. Modern law has its beginnings when Roman law became the rival of the law of the church and presently set itself free from clerical control. In English legal history, the supremacy of the king's courts, which gave us the common law, might well be dated from the Constitutions of Clarendon which put definite and narrow limits to the jurisdiction of the ecclesiastical courts. Likewise, in colonial America, especially in New England, the history of law begins when the administration of justice begins to come into the hands of professional lawyers, after a regime of magisterial and legislative justice carried on chiefly by means of clerical and military magistrates. Justice according to law is justice administered by lawyer judges aided by lawyer advocates.

An example of the task of the legal order may be seen in the age long struggle to reach some workable adjustment between the claims of the general security and those of free individual life in the law as to associations. In all times and everywhere the activities of different forms of free association have driven lawmakers and jurists to seek practical means of limiting legally the individual interest in free association so that its exercise shall not be allowed, on the one hand, to tie down too tight each individual's claim to free self-assertion, nor, on the other hand, to threaten the supreme authority of the state and thus impair the social control on which civilization rests. Legislators and courts and jurists have had to find how the natural human power of combined action can be curtailed without taking from freedom much of its worth and yet how to leave it unchecked without taking away much of the freedom of others or destroying the power of government. The naïve view which sees a society without lawyer's law, in which natural justice is administered for each case by just men applying their ideas of justice for the time being, sees in such problems merely the selfish greediness of employers or the selfish grasp for power of labor leaders or the unreasonableness of workingmen. But the matter is not so simple. It is a phase of the task of reconciling the demands of the general security with those of the individual life which is fundamental for social engineering. Thus far, no one has been able to harmonize the two overlapping or conflicting interests—the interest in individual freedom and the interest in free association—otherwise than by some sort of compromise. This compromise, as in so many cases in the legal order, has to be worked out by experience of what will secure the most of human claims with the least friction and the least waste. When a working compromise is found, it will in a sense be “technical.” It will be expressed in a legal formula to be applied by a legal technique. Very likely doctrinal writers will develop it further and work out certain resulting legal conceptions. Without such



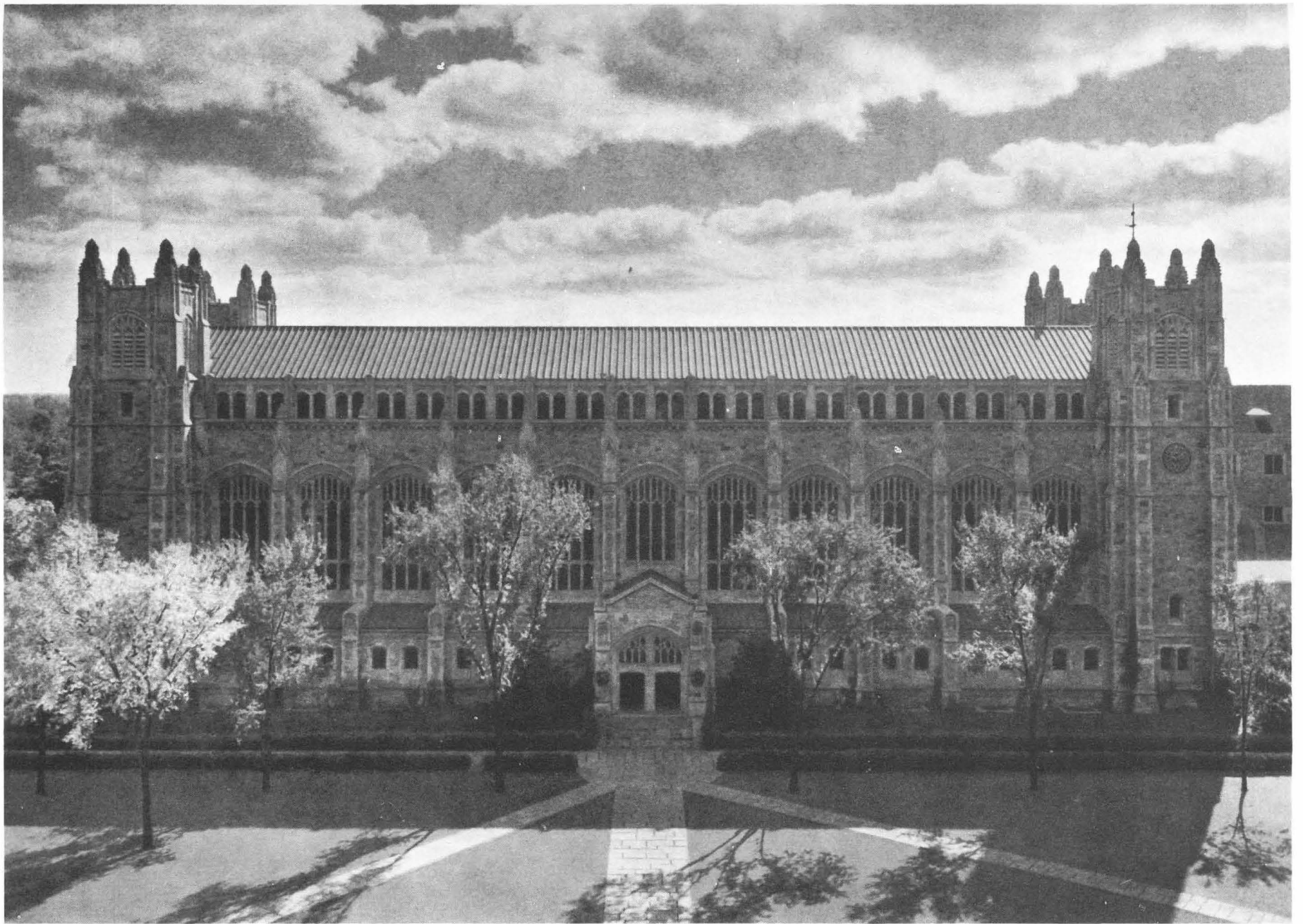
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an organization of experience by reason the task of adjusting these claims in any particular case of clash would be hopeless in any society of much economic development.

For another example consider the questions which arise in connection with defamation. A newspaper receives and publishes in good faith what on its face is an innocent item of news which, nevertheless, under circumstances not appearing on its face is grievously defamatory of an innocent person. Or, a man receives information under circumstances making it credible, which, if true, shows that an employee of a neighbor is so misconducting himself as to threaten serious loss to the neighbor. Under a conviction of moral duty he communicates the information to the employer and as a result an innocent employee is discharged. Here we must seek a compromise between claims of freedom of speaking and writing, claims to one's honor, reputation, and peace of mind, and claims not to be injured in one's substance. In general, in the United States in the practical workings of the established legal compromise it allows much freedom of publication but affords relatively little protection against defamation. In England, it protects against defamation but the press considers that it unduly curtails freedom of writing and publishing. It is largely because there are so many cases where no wholly satisfactory adjustment is possible, that so much of the law is apt to appear so technical. The party whose interests remain unrecognized or under-secured will regard the process as arbitrary or technical or legalistic, as the phrase may be at the moment.

Historically, and in particular in the matter of our political and legal institutions, we are an English people. Hence our political institutions are legal and our legal institutions are political. It is in our inheritance to govern according to law and to exact of all in authority that they exercise the authority reasonably and to the ordered measure of law. But we are also a new-world people and so an impatient people, with faith in





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doing things and expecting to do them rather than leaving them to do themselves. We are loth to await the slow processes of history whereby experience points out the practicable paths of progress. Thus we rely on the one hand upon law, and on the other hand upon laws. The balance between these two sides of our legal and political character has always been hard to maintain. The last century stressed reliance on law and ordered formulation of experience. The present inclines instead to laws and stresses creative legislation and administration. If it is to be the function of a science of law to make experience and creative genius effective for the ends of the legal order by wise appraisal and sound formulation of the one and intelligent direction of the other, Mr. Cook's foundation comes at the psychological moment.

Law is something more than an aggregate of laws. Laws are rules. But law is much more than a body of rules. Law gives life to rules. Law is needed to make laws instruments of justice. Rules are made in advance, sometimes to formulate experience, more usually on rationalist ideas of social advantage, not infrequently to meet the exigent self-interest of some vigorous, self-assertive group. Law arises from the application of these laws and the endeavor of lawyers to make of them a coherent system, operating according to an ideal, and furthering justice. Principles, conceptions, doctrines, a received technique of finding the grounds of decision of cases and of advice to clients in the body of laws and the principles, conceptions and doctrines built upon and around them, and a body of received ideals by which application of laws and development of rules are guided, are the work of courts and jurists and lawyers and constitute the law. Without law, laws are but empty formulas and law can attain no effective development without lawyers.

In the Middle Ages, in an age of authority men sought to attain justice through rules. In the seventeenth and eighteenth centuries, in an age of rationalism, they sought to bring about justice through reason. In the

maturity of the competitive individualist economic order in the nineteenth century they sought it through metaphysically demonstrated and legally guaranteed rights, whereby the fullest and freest self-assertion was assured to each man. Today they are seeking it through legislation on a social utilitarian theory of bringing about a maximum of social advantage, or through administrative individualization, without rules, without regard to logical requirements, and regarding rights not as ends to be safeguarded but as means toward scarcely apprehended social ends. We may recognize that no one of these methods will attain justice in every case and for every purpose. Traditional rules, reason, a logically organized system of recognized and secured interests, creative thought harnessed to the work of lawmaking, and intuition and discretion operating through administrative hierarchies and tribunals have each contributed to the legal order. Each has possibilities for the legal order of today and of tomorrow. We are not to cast out any of them. Rather we must seek to know how and when and where to use them and it may be to find how to supplement them by such new instruments as we can discover. If the watchword of the Middle Ages was authority, the watchword of the seventeenth and eighteenth centuries reason, and that of the nineteenth century freedom given effect by rights, the watchword of today must be research.

Much of what gives us trouble in the legal order in twentieth-century America is in the law, particularly in the ideal element in law, which needs to be organized, criticized, and reshaped to the urban, industrial society of the time. A gradual but well marked shift from the local to the national or even universal, in a unified economic order, a shift from a regime of individual acquisitive and competitive self-assertion to one of co-operation, call for creative work in law, and as things are now much research must go before that work. But much of what gives trouble is in laws, and here, too, the remedy is not to give over laws or make more laws, but to go forward in the development of law.

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There are those in our law schools who seem to deny that there is law in the sense I am suggesting; who know single legal propositions or single decisions or single instances, but deny the reality of principles and conceptions and doctrines, and *a fortiori* of ideals. But I submit that in such a connection “real” means “significant.” The technique of developing, interpreting and applying rules of law, the ideals by which the processes of developing, interpreting and applying them are directed, by which content is given to formulas and conceptions, by which choice between competing starting points for legal reasoning is determined, by which interests are valued in order to recognize, delimit, and secure them intelligently—these are the enduring and significant elements in the legal order. In the only sense in which the word “real” has any useful meaning in jurisprudence, they are the real law. The rise of administrative boards and commissions and tribunals seems to some to portend the end of law. One might as truly say that they portend a new beginning. The tribunals are called for by and in turn they call for more laws. More laws will inevitably demand more law. We might well amend the classical statement of the Massachusetts Bill of Rights and seek a government of laws applied and administered by men according to law.

In the economically unified America of today, the role of law in binding together and harmonizing the diverse laws or bodies of rules of forty-eight states goes far to make our system of separate local jurisdictions workable. Our received common-law technique has enabled the law in each locality to develop rapidly in a rapidly developing land by making it possible for the courts anywhere to avail themselves of the sum of judicial experience and juristic activity everywhere. More than this, law has made it possible for businesses and enterprises transcending state lines—as all of any consequence must today—to function effectively under a welter of conflicting local laws.

Indeed, law had already had a like task before it in the Middle Ages.

While the universities conceived of and taught a universal law, the actual bodies of laws of local feudal jurisdictions and of the city-states of medieval Italy were anything but universal. Each feudal jurisdiction had its own peculiar local customs. Each Italian city-state had its own statutes. With the growth of commerce and business enterprise questions continually arose as to what legal precept governed a particular transaction or situation as between different local customs or local statutes, where some of the parties lived or some part of the transaction took place or something was to be performed. To some extent such questions had arisen in the maturity of Roman law, as between diverse local customs recognized and allowed a local force by the Roman legal polity. But such questions arose on a large scale as between the Italian city-states of the Middle Ages, just as they have arisen on a large scale as between the states of the United States in the last half century. Obviously a workable solution had to be along universal lines. It had to be one which would be acceptable in all of the jurisdictions concerned. It had to be one appealing to jurists and judges everywhere. It would not have done to seek to impose the traditions or received precepts of any local system upon other localities. The universal ideal of the medieval academic jurists was, therefore, exceptionally well fitted to be the background of a solution. The Commentators, who were university teachers of law, drew a theory from the Roman texts, with the received technique of the civil law, and drew it so well on simple lines generally acceptable, that the great subject of conflict of laws has kept to those lines ever since. Here is one subject in the law governing private relations where common-law lawyers and civilians understand each other and use the same ideas and the same terms; where Story and Savigny are cited equally throughout the world. It is due chiefly to the universal ideal of the medieval jurists that a conflict of laws is not a conflict of law; that there can be an orderly adjustment of relations and claims involved in inter-

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state transactions and enterprises notwithstanding the multiplicity of divergent local laws. The conflict of laws is resolved and obviated by the unity of law.

Much is said today in disparagement of what is called "legalism." "Legalistic" is a current term of reproach. When these words have more behind them than a vague hankering for offhand justice administered to order by a strong man benevolently inclined, they refer to the reliance on laws rather than on law by which in the last century men sought to maintain the security of acquisitions and security of transactions; they refer to the measuring of claims and items of conduct and situations by *a* law rather than by *the* law.

This distinction between law and laws, between *the* law and *a* law, perceived by some jurists from the beginnings of a science of law, has given trouble to others from the beginning and has been denied by a succession of sceptics or positivists or realists, as they have called themselves at different times and in different places.

Men obey their rulers or conform to prescribed standards of social conduct partly because they are constrained to do so or know or fear they will be constrained to do so by the force of those who exercise authority under politically organized society. Partly, also, they do so because they and their forbears and their fellows have been in the habit of so doing. Partly, again, they do so because, for whatever of many reasons, they feel that they ought to do so. None of these conceptions of the basis of obedience to the legal order is the whole story. Yet, since the Greek philosophers of the fifth century before Christ, attempt has been made to explain the legal order, and the body of authoritative precepts for guidance of judicial and administrative action, and the judicial and administrative processes wholly in terms of the one or the other of them. Some Greek philosophers thought of laws getting their authority from enactment and rules of ethical custom resting on convention, but also, in





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contrast with these, a higher type of precept getting its authority from conformity with the nature of things or ideal of things. The realist of today is in the right line of juristic descent from the Cynics who denied that things were right with reference to an ideal and asserted that they could only be just when measured by convention or enactment.

Under one set of names or another this contrast between enacted or traditionally prescribed precepts, on the one hand, and ideals of what legal precepts should be and how they should be applied, on the other hand, has persisted into the present. The Romans distinguished the *ius civile*, the body of rules applicable to Roman citizens, on the one hand, and *ius naturale*, a speculative body of principles expressing the nature (i.e., the ideal) of things, on the other. The Middle Ages recognized the authority of the Roman texts, on the one hand, but a rationally demonstrated law of nature—the part of the eternal law or reason of the divine wisdom governing the universe addressing an “ought” to reasoning creatures—on the other hand. The seventeenth and eighteenth centuries thought of an ideal code of rules, a body of ideal precepts derived from reason. But in practice they assumed that the texts of the Roman law were as a general proposition declaratory of those ideal precepts. For the most part, the nineteenth-century jurists were in reaction from this over-emphasis on the ideal and so swung to the other extreme. They ignored the ideal as their immediate predecessors had ignored the actual. They sought to give the precepts which had actual (as distinguished from ideal) authority in the time and place a basis in the sovereignty of a politically organized society or in history. In one of these views law was no more than an aggregate of laws authoritatively established or received. In the other, it was no less than all social control. In each there was no place for ideals.

It is a commonplace that some kind of change has been taking place in the economic order and that it must be reflected in laws and in law.



Those who keep up the one tradition of juristic thought have preached the economic interpretation of law and legal history or economic determinism or economic realism or most recently psychological realism. They see primarily what takes place in the legal order and in the judicial process and take it that it is significant as it takes place. Those who keep up the other tradition have revived philosophical jurisprudence and see significance in the development of new ideals reflecting more accurately the economic order of the time. Very likely the adherents of the one tradition are doing a needed work of clearing away. At any rate, it seems to be the adherents of the other tradition who are doing and are to do the building.

There must be a balance of what is and of what ought to be. No one can study the history of precepts and conceptions and doctrines without seeing that in law what is is constantly reshaped to the model of juristic pictures of what ought to be. Yet we cannot ignore what is. It is just this which has to be reshaped. Ideals do not realize themselves. Men make them real by measuring and criticizing precepts, in their content and in their operation, by them and taking them as goals of creative thinking. A body of legal ideals not put to such use is wholly sterile. It is a difficult feat to reconcile and bring into one system of juristic thought stability and change, authority and reason, is and ought to be, rule and discretion, legislation and administration, statutes and doctrinal and judicial tradition. But such is the task of a science of law in a period of growth and adaptation. Because we have to do with what ought to be we are not to ignore what is. Yet our occupation with what is has its justification in enabling us to establish what ought to be.

I do not forget that a "pure science of law," resting on logic as the science of law of the eighteenth century rested on reason, is expected in some quarters to deliver us from subjectivity and uncertainty. In the same way the analytical jurisprudence of the nineteenth century achieved

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an illusory certainty by postulating a "pure fact of law," that is, by concerning itself with laws as distinguished from law. Such theories attain a superficial solution of the problems of the legal order by relegating them to other fields, where they will still await solution. It does not help us to turn the problem of a measure of values for human wants and claims and demands and the theory of selecting, recognizing, delimiting and securing of interests over to a science of legislation or to the "politics of law." Wherever we put them they remain fundamental questions of the first importance and of the first difficulty. A science of law that does not grapple with them is pedantic and jejune. If the law teachers do not take them up scientifically, we shall go on in blundering legislative and judicial and administrative quests for solutions for the purposes of particular situations, and in a time of change when such help is most needed laws will be without adequate help from law.

In the progressive movement of a generation ago new agencies of direct popular lawmaking and direct popular adjudication were expected to bring laws and the application of laws into accord with social advantage. After the lapse of a generation we may perceive that such methods have achieved little or nothing. Despite the backwardness of law because of received ideals out of touch with the social order of the time, the enduring progress has been in the course of judicial decision and in the adaptation of our legal tradition.

True, we lawyers must not flatter ourselves that even the most we can do toward making the law what it ought to be will do the whole or, of itself, perhaps the major part of making straight the paths of a coming social and economic order. On the other hand, the part of the law will not be a mean one. No new deals and no reforms and no social or economic programs which may be expected to take enduring shape in such time as we may foresee are likely to do away with the need of adjusting human relations and fixing lines for human conduct in a finite

world where all the demands of every one cannot be satisfied. Nor are we likely to find super-magistrates or super-officials or super-commissioners to whom the royal prerogative of doing justice without law—of adjusting conflicting claims and regulating relations and fixing lines of permissible conduct *pro hac vice* by the light of nature—may be entrusted with any reasonable assurance of a balance between the general security and the individual life. Our ambitious schemes of social reform call not for fewer laws but for more laws, and so for more and more effective law. Hence the call of the time is not for less training or less specialization on the part of those who will have to do with the administration of justice, but for more. Moreover, whatever other ends develop or become recognized, the administration of justice bids fair to remain a chief end of politically organized society and the legal order and law to remain the chief agencies by which it attains that end. Nothing short of anarchy at the one pole or the millennium at the other is likely to obviate the social need for law and lawyers.

Let me be understood. I do not for a moment hold to the legal and juristic pessimism of the last century. I should be the last to urge that the law teacher is to sit by and observe and note, while some intrinsic power of evolution develops a law for the twentieth century out of that of the nineteenth. Faith in the efficacy of effort is one of the articles in the creed of the jurist of today. But there are limits to what may be done by means of laws and law, as a recent large scale experiment has made us aware. The legal order is not equal to the whole task of social engineering. No amount of creative lawmaking, however wisely developed by law and applied by lawyers, can achieve all the purposes of social control, can do all the work of maintaining, furthering and transmitting civilization.

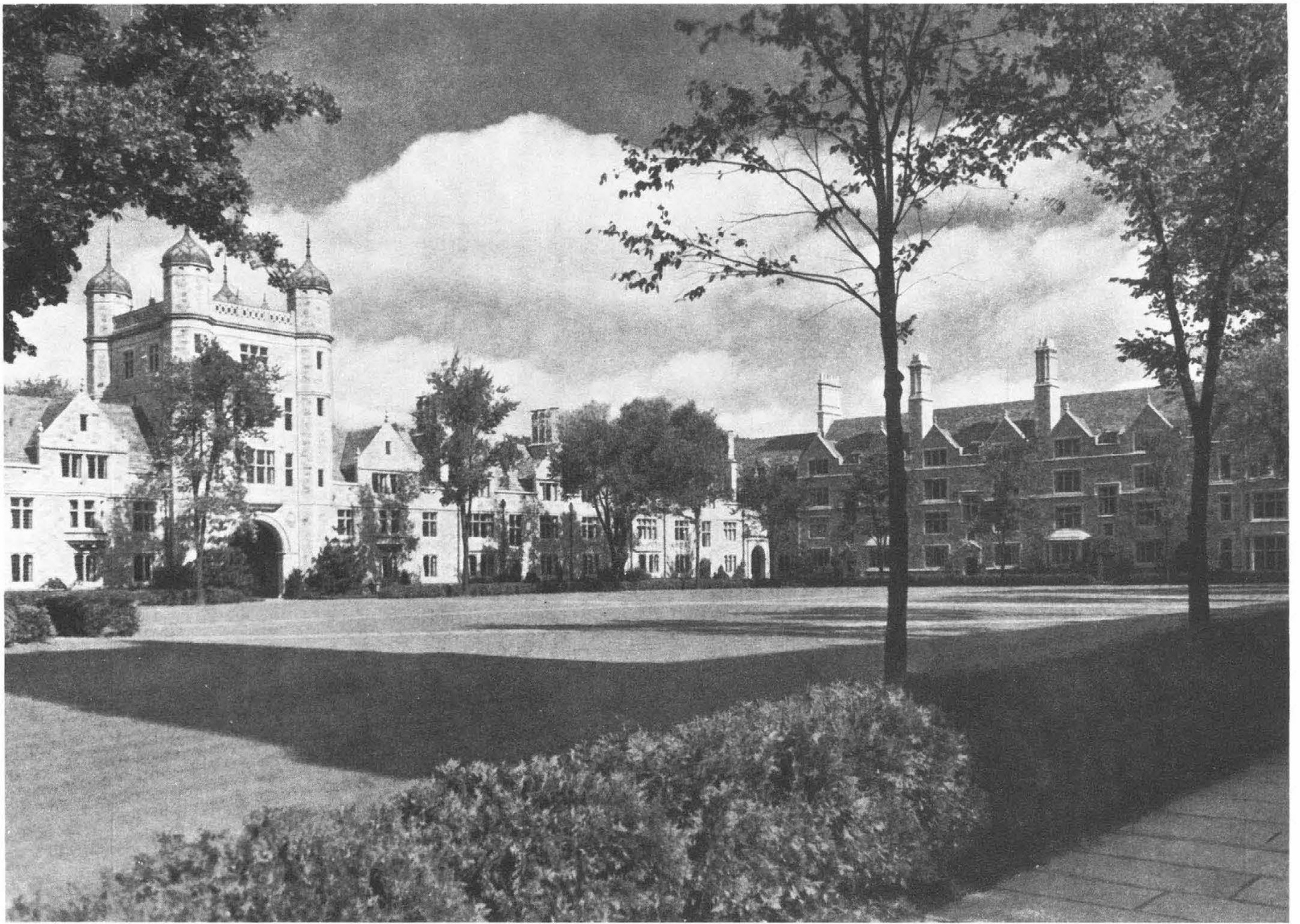
Moreover, in order to be effective, effort must be directed intelligently. It must take account of much which the rationalism of the last

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century failed to see. We cannot assume that social advantage is something which he who runs may read. It is not something to be discovered by a mere scrutiny of the phenomena of social life within the horizon of the particular observer as he looks about him. Study of the legal order in action, study of the social effects of legal precepts, study of how the legal order attains or fails to attain its ends in particular situations and why, must go on for a long time and in many places and must enlist the best energies of many well trained investigators before we may act with assurance upon many of the complex legal problems which are also social and economic and political problems in America of today.

On another occasion I urged four points in this connection which I venture to repeat. One is that the one-man research of the past, though I agree that it may still do much, will no longer suffice for our greater problems. Another is that the partisan made-to-order research which is carried on under the auspices and for the purposes of trades and businesses and organized interests, which has had so much to do with preparation for recent American legislation, will but aggravate an increasingly bad condition in our local lawmaking. Another is that research must be done upon subjects as a whole, from a nation-wide or even world-wide standpoint. Finally, it cannot be done fruitfully if under pressure to do it in a hurry. It must be done cooperatively by scholars of many types and in many subjects uniting their learning, their organized experience, and their trained energies in a joint effort. It must be done not upon single controversies as they arise, but upon the whole field out of which they arise.

In Continental Europe, such things are committed to ministries of justice. But such institutions are not in touch with the genius of English-speaking peoples and we may be long in setting them up. The alternative is organized, systematic legal research in our universities, where it can and will be carried on for its own sake in a purely scientific spirit. In the



LAWYERS CLUB DORMITORIES. LEFT: CENTRAL TOWER. RIGHT: JOHN P. COOK SECTION

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law schools of universities the conditions of effective quest for truth and the guarantees of public confidence are assured. In the law school of a state university there is already the foundation of a public ministry of justice, and every university law school may be made the nucleus of an effective American substitute.

A time of confident political enthusiasm is propitious for entering upon projects of research in the operations and problems and ends of the legal order. The present moment is not the first time in which we have been confident that we were entering upon a new era of political and legal perfection and that in a twinkling of an eye we should all be changed. The great seal of the United States, as originally adopted, bore the device *novus ordo saeculorum*—a new order of the ages. The political literature of the rise of Jeffersonian democracy is full of glowing prophecies of a new politics and a new law, governed by reason and in accord with a rationalist morals. If these anticipations were not realized, nevertheless we must not forget that because the men of that age believed they could do great things they were able to do great things—not the least of them the framing of the Constitution of the United States and the reshaping of the received English law of the seventeenth century and making of it a law for the new world in the nineteenth century. It is true, as we look back on the enthusiastic pronouncements of formative America we see that much less was newly made of whole cloth than men supposed. We see much continuity, legal and political, with seventeenth-century England. As legal historians look back hereafter they may very likely see much continuity of their time with ours and of both with the nineteenth century. But what will make it a continuity of living tissue will be, if I see aright, the work of teaching and research in our law schools, and not the least that which will have gone on upon this spot. May the lawyers of the future be able to date a new era in the effectiveness of the legal order in the United States from this endowment for law teaching and legal research.

# Address

By HARLAN F. STONE

*Associate Justice of the Supreme Court of the United States*

WE ARE met to commemorate an event, notable alike in the history of this University and of our profession. For the first time it has been given to an American university to establish a unit completely organized and equipped for the training of lawyers, for research in legal science, and for the intimate association at a common meeting place of students and teachers of law with the members of the Bench and Bar. By that magic which only the modern world has known, in a brief interval of time all the physical equipment which skill and ingenuity could devise to aid those engaged in the common enterprise of advancing the science of the law has been here assembled, clothed in architectural forms of enduring beauty, and richly endowed to insure its service in perpetuity. All this has come about through the far-seeing generosity of a graduate of this University. To him it was given to see a vision, as he in his own words has described it, of the legal profession of the nation, profoundly influenced by its law schools, taking its proper place in the development of American institutions. What we here see and dedicate to this useful service is the tangible evidence of his faith in that vision.

We meet at a time when, as never before in the history of the country, our most cherished ideals and traditions are being subjected to searching criticism. The towering edifice of business and industry, which had become the dominating feature of the American social structure, has been shaken to its foundations by forces, the full significance of which we



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still can see but dimly. What had seemed the impregnable fortress of a boasted civilization has developed unsuspected weakness and in consequence we are now engaged in the altogether wholesome task of critical re-examination of what our hands have reared.

From this inquiry the law and the lawyer may claim no immunity. It is true, if tradition and history are guides, that we may rightly look to the Bar for leadership in the preservation and development of American institutions. Specially trained in the field of law and government, invested with the special privileges of his office, experienced in the world of affairs, and versed in the problems of business organization and administration, to whom, if not to the lawyer, may we look for guidance in solving the problems of a sorely stricken social order.

No tradition of our profession is more cherished by lawyers than that of its leadership in public affairs. We dwell upon the part of lawyers in the creation of the Federal Constitution and in the organization of the national government and our federal and state judicial systems. The role they played in politics and government in the first half of the last century is a familiar part of our history. The records of the early Bar associations in the thirteen original states afford convincing evidence that the lawyers of the time took more than a perfunctory interest in the social obligations of the profession. We find their Bar organizations actively supervising and controlling membership in the Bar and setting standards of admission to it higher than those which prevail in most of those states today. In a very real sense they were guardians of the law, cherishing the legitimate influence of their guild as that of a profession charged with public duties and responsibilities. The great figures of the law stir the imagination and inspire our reverence according as they have used their special training and gifts for the advancement of the public interest. Coke, standing steadfast against the encroachment of the crown on the prerogatives of parliament; John Hampden, with his group of famous



counsel resisting in the courts the levy of ship money by the crown; James Otis, the stalwart defender of the right of free speech, throwing up his commission as Advocate General of Massachusetts to argue against writs of assistance; John Marshall, with prophetic vision, welding the clashing states into a united nation; all are names to which we recur as symbols of the power of public leadership of the Bar at its best.

All this is justly the subject of pride to lawyers. The records of almost any Bar Association meeting reveal our readiness to turn back to these pages of a glorious past, because they portray those ideals of our profession to which we would most willingly pay tribute. Yet candor would compel even those of us who have the most abiding faith in our profession, and the firmest belief in its capacity for future usefulness, to admit that in our time the Bar has not maintained its traditional position of public influence and leadership. Although it tends to prove the point, it is not of the first importance that there are fewer lawyers of standing serving in the halls of legislatures or in executive or administrative posts than in earlier days. Public office is not the only avenue to public influence. Representatives of other professions in public position have always been comparatively few, but wherever questions of professional concern to them touch the public interest, they are nevertheless profoundly influential. In matters of sanitation and public health, in great public undertakings involving engineering knowledge and skill, we place ourselves unreservedly in their hands. But it is not without its lesson for us that most laymen, at least, would deny that there is today a comparable leadership on the part of lawyers, or a disposition of the public to place reliance upon their leadership where the problems of government touch the law.

We cannot brush aside this lay dissatisfaction with lawyers with the comforting assurance that it is nothing more than the chronic distrust of the lawyer class which the literature of every age has portrayed. It is,

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I fear, the expression of a belief too general and too firmly held for us to shut our eyes to it. One might cite a hundred examples but it suffices that in the struggle, unique in our history, to determine whether the giant economic forces which our industrial and financial world have created shall be brought under some larger measure of control and, if so, what legal devices can and should be selected to accomplish that end, it is a matter of public comment that the practicing lawyer has been but a minor participant. It is unnecessary, and it would be unbecoming for me to express any opinion upon the merits of that controversy or the methods of its solution. It is enough for present purposes that in one of the most critical periods of our history, when a major public problem is the choice of remedies for our economic ills and the mutual adjustment and reconciliation of those remedies with legal doctrine, the practicing Bar of the nation has not attained its accustomed place of recognized leadership. Unless in this time of self-searching we are to abandon the lawyer's habit of facing the realities of the world in which we live and rest content to dwell on the happier recollections of another day, we cannot avoid asking ourselves how our past, and the ideals which claim our attachment, are to be reconciled with the disquieting circumstances of our present, or whether the donor of this beneficent gift for the public good was mistaken in his judgment that we may look to the legal profession more than to other groups in our society for future public leadership.

The coercive power of the state no doubt has its part to play in any civilization. We cannot do without the policeman, yet we cannot count his night stick as our most potent civilizing agency. In seeking solutions for our social and economic maladjustments we are too ready to place our reliance on what the state may command, rather than on what may be given to it as the free offering of good citizenship, forgetting that in doing so we give first place to the policeman's club. Yet we know that

unless the urge of individual advantage has other curbs, unless we may have recourse to other forces of social betterment, and unless the more influential elements in society conduct themselves with a disposition to promote the common good, society cannot function. This is the more so in a society which has largely measured its rewards in terms of material gains. For as our conception of what is reward is less related to the social welfare the problem of bringing individual conduct into harmony with the demands of society becomes more acute, and in the economy of today mere material gain to the individual may not in itself be the social good it was once conceived to be.

Throughout the history of Anglo-American civilization, the professional groups have been among the most significant of those non-governmental agencies which promote the public welfare. Although in smaller measure, during the rapid growth of our industrial system, their function has been not unlike that of the medieval guilds. They have exerted direct control over their members by training, by selection, by punishment, by reward. Among these groups the position of the Bar has been one of peculiar importance and significance. While it has not inherited the completely independent status of the English Bar, to no other group in this country has the state granted comparable privileges or permitted so much autonomy. No other is so closely related to the state, and no other has traditionally exerted so powerful an influence on public opinion and on public policy. That influence in the past has been wielded chiefly in the courts, in the forums of local communities, in legislative halls, in the councils of government. In all its varying aspects, it has been most potent when public questions have been closely associated with legal questions in whose discussion the lawyer was peculiarly at home, and when, with a developed consciousness of its social responsibility, it was inevitable that the Bar should draw upon all its special knowledge and skill and its resourcefulness for their solution.

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In appraising the present-day relationship of the lawyer to his community, we cannot leave out of account either the altered character of public questions or the change in the function which the lawyers, as a class, have been called upon to perform. It was in 1809 when Jefferson wrote: "We are a rural farming people; we have little business and few manufactures among us, and I pray God it will be a long time before we have much of either." Profound changes have come into American life since that sentence was penned. The first half of the nineteenth century saw the beginnings of a shift from that idyllic scene and in the second half the transformation was complete from a young nation made up of isolated groups of agricultural pioneer communities, scattered through the vast territory east of the Mississippi River, to an industrial state, in which, in our own day, we have witnessed the domination of law and politics by inexorable economic forces. Public problems are no longer exclusively questions of individual right. They involve an understanding of the new and complex economic forces we have created, their bearing upon and their relationship to the lives of individuals in widely separated communities engaged in widely differing activities, and the adaptation to those forces of old conceptions of law developed in a different environment to meet different needs.

The American Bar, like most other elements in the life of the nation, was ill prepared for a change so swift and sweeping. From the beginning of the commercial expansion in England to almost our own day, the problems of the law were those of an intensely individualistic society. An adequate technique, and skill in using it, engaged the attention of its practitioners. Its historical background and moral content, and more or less abortive attempts to reform its procedure, were the chief considerations of its philosophers. When the universities, but a little more than a generation ago, found place for its study, its expositors were at first mainly concerned with its precedents and its technique. There was a



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persistent delving into its past, an assiduous analysis of what courts had done and the manner of their doing it, but little reflection upon the relationship of the law to the social and economic forces which produce it or contemplation of its function as a means of social control rather than as an end in itself.

There was still less perception of the significance of the rise of new forces in American life which, with constantly accelerated speed, were reconstructing society upon an economic basis, with an ever-increasing interdependence of its every group and part upon every other.

The changed character of the lawyer's work has made it difficult for him to contemplate his function in its new setting, to see himself and his occupation in proper perspective. No longer does his list of clients represent a cross section of society; no longer do his contacts make him the typical representative and interpreter of his community. The demands of practice are more continuous and exacting. He has less time for reflection upon other than immediate professional undertakings. He is more the man of action, less the philosopher and less the student of history, economics and government.

The rise of big business has produced an inevitable specialization of the Bar. The successful lawyer of our day more often than not is the proprietor or general manager of a new type of factory, whose legal product is increasingly the result of mass production methods. More and more the amount of his income is the measure of professional success. More and more he must look for his rewards to the material satisfactions derived from profits, as from a successfully conducted business, rather than to the intangible and indubitably more durable satisfactions which are to be found in professional service more consciously directed toward the advancement of the public interest. Steadily the best skill and capacity of the profession has been drawn into the exacting and highly specialized service of business and finance. At its best the changed system

has brought to the command of the business world loyalty and a superb proficiency and technical skill. At its worst it has made the learned profession of an earlier day the obsequious servant of business, and tainted it with the morals and manners of the market place in its most anti-social manifestations. In any case we must concede that it has given us a Bar whose leaders, like its rank and file, are on the whole less likely to be well rounded professional men than their predecessors, whose energy and talent for public service and for bringing the law into harmony with changed conditions have been largely absorbed in the advancement of the interests of clients.

These changes have come upon us by imperceptible stages and almost unrecognized. There has been no concerted effort of lawyers to bring them about. Indeed, it cannot be said that they have been welcome to the Bar, though one may doubt whether it could have resisted them successfully, or whether it could have met the new demands upon it except by some form of specialization necessarily involving a more or less one-sided development of the profession as a whole.

I mention these changes now, not to condemn, but to describe them. We can hardly suppose that they have not come to stay in something like their present form, or that such evils as they have brought can be combatted without intelligent action, taken with full knowledge of the facts. Facts are stubborn but revealing things, and the first step toward any form of social improvement is frank recognition of them. When we know the significant facts in the professional life of the lawyers of the present generation and appraise them in the light of the altered world in which we live, we shall better understand how it is that a Bar which has done so much to develop and refine the technique of business organization, to provide skilfully devised methods for financing industry, which has guided a world wide commercial expansion, has relatively done so little to remedy the evils of the investment market; so little to adapt the



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fiduciary principle of nineteenth century equity to twentieth century business practices; so little to improve the functioning of the administrative mechanisms which modern government sets up to prevent abuses; so little to make law more readily available as an instrument of justice to the common man.

Notwithstanding all the pressures of modern economic life upon the lawyer, and his absorption with the demands of client-caretaking, we could make no greater mistake than to assume that ours has become a profession without ideals. Even the lawyer's devotion to the interests of his clients is a manifestation of a selfless loyalty to an ideal, though it may not always be seen in true perspective in relation to the public interests which it is also his duty to serve. No one familiar with the history of the Bar, knowing its life and personnel, can doubt that it has the idealism, the will to sacrifice, the capacity for leadership, which will continue to enable it to play well its part. No professional class has greater pride in its traditions or higher aspirations for its future. None will respond more willingly, with generous expenditure of time and effort, to the intelligent call for action. But none so much needs to know the facts which reveal, in clear relief, its altered position in the social structure and the manner in which under new conditions it is meeting its public responsibilities. None, unless it be the scientists, can be more profoundly moved by facts.

But like most other elements of the community we are in a sense the victims of changes, of whose nature and effect we are still not wholly aware. Hence it is that the Bar needs to know and to focus its attention upon the facts, not in the form of assumptions or generalizations, nor yet on the details of petty misconduct in its disreputable outer fringes, but upon data patiently assembled and organized so as to show with the powerful impact of revealed truth the extent to which devotion to private interests has obscured our vision of the public welfare. I pass over



more familiar criticisms, to an example even more significant though less well recognized and appreciated.

I venture to assert that when the history of the financial era which has just drawn to a close comes to be written, most of its mistakes and its major faults will be ascribed to the failure to observe the fiduciary principle, the precept as old as holy writ, that "a man cannot serve two masters." More than a century ago equity gave a hospitable reception to that principle and the common law was not slow to follow in giving it recognition. No thinking man can believe that an economy built upon a business foundation can permanently endure without some loyalty to that principle. The separation of ownership from management, the development of the corporate structure so as to vest in small groups control over the resources of great numbers of small and uninformed investors, make imperative a fresh and active devotion to that principle if the modern world of business is to perform its proper function. Yet those who serve nominally as trustees, but relieved by clever legal devices from the obligation to protect those whose interests they purport to represent, corporate officers and directors who award to themselves huge bonuses from corporate funds without the assent or even the knowledge of their stockholders, reorganization committees created to serve interests of others than those whose securities they control, financial institutions, which, in the infinite variety of their operations, consider only last, if at all, the interests of those whose funds they command, suggest how far we have ignored the necessary implications of that principle. The loss and suffering inflicted on individuals, the harm done to a social order reared upon a business base and dependent upon its integrity, are incalculable.

There is little to suggest that the Bar has yet recognized that it must bear some burden of responsibility for these evils. But when we know and face the facts, we shall have to acknowledge that such departures from

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the fiduciary principle do not usually occur without the active assistance of some member of our profession, and that their increasing recurrence would have been impossible but for the complaisance of a Bar too absorbed in the workaday care of private interests to take account of these events of profound import or to sound the warning that the profession looks askance upon these as things that "are not done."

We must remember, nevertheless, that the very conditions which have caused specialization, which have drawn so heavily upon the technical proficiency of the Bar, have likewise placed it in a position where the possibilities of its influence are almost beyond calculation. The intricacies of business organization are built upon a legal framework which the current growth of administrative law is still further elaborating. Without the constant advice and guidance of lawyers, business would come to an abrupt halt. And whatever standards of conduct in the performance of its function the Bar consciously adopts must at once be reflected in the character of the world of business and finance. Given a measure of self-conscious and cohesive professional unity, the Bar may exert a power more beneficent and far reaching than it or any other non-governmental group has wielded in the past.

If you think I have sketched too dark a picture of the difficulties which beset us, I hasten to assure you that it is not from any counsel of despair. I would only point out that in the new order which has been forced upon us, we cannot expect the Bar to function as it did in other days and under other conditions. Before it can function at all as the guardian of public interests committed to its care, there must be appraisal and comprehension of the new conditions and the changed relationship of the lawyer to his clients, to his professional brethren and to the public. That appraisal must pass beyond the petty details of form and manners which have been so largely the subject of our codes of ethics, to more fundamental consideration of the way in

which our professional activities affect the welfare of society as a whole. Our canons of ethics for the most part are generalizations designed for an earlier era. However undesirable the practices condemned, they do not profoundly affect the social order outside our own group. We must not permit our attention to the relatively inconsequential to divert us from preparing to set appropriate standards for those who design the legal patterns for business practices of far more consequence to society than any with which our grievance committees have been preoccupied.

Aside from the procedure of formulating new methods of discipline and new specifications of condemned practices, we must give more thoughtful consideration to squaring our own ethical conceptions with the traditional ethics and ideals of the community at large. The problems to which the machine and the corporation give rise have outstripped the ideology and values of an earlier day. The future demands that we undergo a corresponding moral readjustment. Just as the lawyers of 1790 to 1840 took a leading part in fashioning the country's ideals to suit political change, so we must now shoulder the task of relating them to business and economic change.

All this cannot be done in those occasional and brief intervals when the busy lawyer secures some respite from the pressing demands of clients to participate in the festivities of bar association meetings. It requires study and investigation, the painstaking gathering of data and their portrayal in such fashion that we may know the facts and, knowing them, develop a consciousness of their implications for our profession.

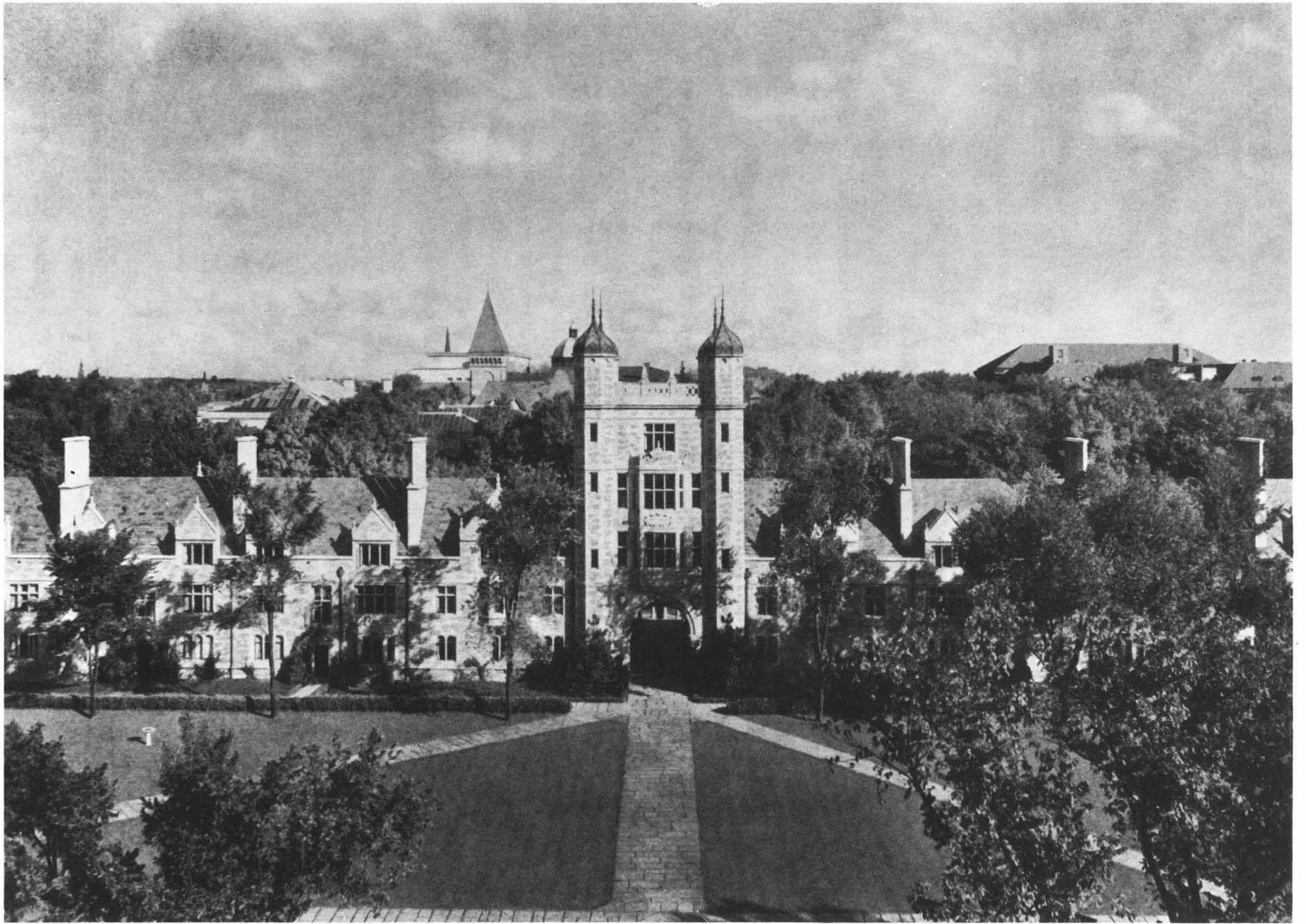
With so much to be done we must look to those elements in the profession best qualified for doing it. A generation ago that search must have begun and ended with practicing lawyers. But paralleling the development of the practicing bar has come, in the past fifty years, the steady growth in public esteem and influence of a new force in American

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legal life, that of the rapidly increasing group of university law teachers, devoting their lives to the task of advancing the cause of legal science for which they have been specially selected and trained.

Members of the Bar, they nevertheless make up a distinct professional group within the Bar. More detached than is the barrister from the absorbing demands of clients and from those pressures of the new economic order which have so profoundly affected their practicing brethren, their approach to legal problems has been that of the disinterested scientist. For a generation they contented themselves with the necessary work of analysis, clarification and statement of legal doctrine. More recently, with penetrating insight, they have expanded their inquiries to embrace the relation of law to the social forces which create it, and which in turn it is designed to control. Today they are beginning to turn their attention to the Bar as an institution, seeking to gain an informed understanding of its problems, to appraise the performance of its public functions and to find ways of stimulating a more adequate performance of them. In all this they have rendered and are rendering a public service of a high order.

With the ever increasing demands on the time and energy of the practicing lawyer, it was but natural that it should fall to the lot of the law school men to take the lead in discharging the public duties which rest on the profession as a whole. It is they who have taken the initiative in the most important reforms undertaken by the Bar in the past twenty years. They originated and have chiefly guided the movements espoused by the Bar for the enactment of uniform laws, the restatement of the law, the improvement in standards of admission to the Bar, and the reform of civil and criminal procedure. It is they who today represent the most cohesive, disinterested and potent single force operating within the profession to establish its public relationships on a higher plane. The donor of this great educational center, in formulating his forward-



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looking plan, was not unfamiliar with this recent history of our profession. He made no mistake in recognizing the law schools as an important factor in it. Neither was he mistaken, I am convinced, in the assumption, implicit in words, that the future would see the Bar increasingly influenced by the work of the schools.

And so I turn to the part which our university law schools may take in the study and promotion of the highest interests of the Bar. The functioning of the Bar as an essential institution in present day American life is worthy of research and exposition for the enlightenment of the Bar and the public, such as only they can make. Their detachment, their scholarly resources, their growing influence with the Bar, all indicate plainly enough that it is they who must take the more active part in solving the problems which weigh upon our profession perhaps as never before. They, as can no others, may assemble and portray the facts which reveal, so that all may see, the manner in which the Bar is performing its functions and, portraying them, stir the latent idealism of lawyers to carry on.

It is equally true that the Bar cannot sit by and leave the burden entirely upon the law schools. In the light of information which they may make available the Bar must assume the responsibility of consciously bringing its conduct to conform to new standards fitting the times in which we live. And unless history reverses itself the cooperation and support of leaders of the Bar will not be wanting. There could be no more reassuring example of the possibility of drawing upon the reserves of wisdom, patriotism and idealism of our profession in a cooperative effort to advance the public interest than that afforded by the Institute of Law. For more than ten years the judges, the leading practitioners of the country and the representatives of our great schools of law have united in the sustained, self-sacrificing, harmonious effort of the Institute to bring order out of the chaos of some six centuries' accumula-

tion of judicial precedent. One cannot doubt that a profession capable of such a demonstration of its capacity for united and disinterested public service can meet and solve these new and difficult problems.

Nor will such an effort want for public support. The lawyer in America has reached his highest position in public esteem when public questions have been in some degree identified with the forms of legal right with which he is most familiar. The historic controversies, which bore fruit in the bill of rights, the struggle against taxation without representation, for immunity from arbitrary searches and seizures and from writs of assistance, for the freedom of the press, for trial by jury, involved questions with which the lawyers of the time, by training, experience and inclination, were peculiarly fitted to deal. Public questions were those with which the lawyer was most familiar. Today anti-social business practices which have not yet met with our refusal to countenance them are equally in the public thought. It is true that the parallel to the earlier era is not precise, for many of these practices are still within the law, and to stand against them it is necessary that we do more than defend legal rights, and that we look beyond the club of the policeman as a civilizing agency to the sanctions of professional standards which condemn the doing of what the law has not yet forbidden. But in taking such a stand we may count upon the same support which the lawyers of that earlier era had from the lay world. It was no more vital to that day that free speech should be preserved than it is to our own that those who act as fiduciaries in the strategic positions of our business civilization should be held to those standards of scrupulous fidelity which society has the right to demand.

There is opportunity, too, for a new emphasis in the training of the young men who, thronging the lecture rooms of the law schools today, will give character and direction to our profession tomorrow. From the beginning the law schools have steadily raised their intellectual stand-



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ards. It is not too much to say that they have worshipped the proficiency which they have sought and attained to a remarkable degree. But there is grave danger to the public if this proficiency be directed wholly to private ends without thought of social consequences, and we may well pause to consider whether the professional school has done well to neglect so completely the inculcation of some knowledge of the social responsibility which rests upon public profession. I do not refer to the teaching of professional ethics. I have no thought that men are made moral by the mere formulation of rules of conduct, no matter how solemnly bar associations may pronounce them, or that they may be made good by mere exhortation. But men serve causes because of their devotion to them. The zeal of the student for proficiency in the law, like that of his elder brother at the Bar, comes from a higher source than selfishness. It is devotion to his conception of a useful and worthy institution. But that conception is a distorted one if it envisages only the cultivation of skill without thought of how and to what end it is to be used, and the question what the law schools have done and can do to make that conception truer is one to be pondered upon and answered. It is not beyond the power of institutions which have so successfully mastered the art of penetrating all the intricacies of legal doctrine to impart a truer understanding of the functions of those who are to be the servants of the law. That understanding will come, not from platitudinous exhortation, but from knowledge of the consequences of the failure of a profession to bear its social responsibilities, and what it is doing and may do to meet them.

And so I recur to the question which I raised a little time ago, whether William W. Cook, the donor of this legal center and the graduate and devoted friend of this University, was right in his belief that we can continue to look to the Bar for the preservation and development of American institutions, and I answer it confidently in the



affirmative. It will realize that expectation as he contemplated that it would, through the growing influence of the law schools, whose character, as he declared, determines the character of the legal profession and through closer association and cooperation of this and other schools of law in the worthy task of building up a new morale in the profession, fitted to the new conditions under which it must do its work. It is a happy augury for the future that the central idea around which this institution, so nobly conceived, has been built is that the continued capacity of the profession to guide the development of American institutions involves an educational process in which its schools rightly have their part.



## A MESSAGE FROM MR. JUSTICE HOLMES

**E**ACH stone plays its essential part in the total beauty of the buildings which you are today dedicating. In a similar way each legal institution, no matter how humble, contributes something to the structure of the law. But just as a planned grouping of certain stones imparts an especial dignity to these buildings, so we must appreciate the peculiar value to the law of such institutions as Michigan's Law School. May your new buildings for the years to come nobly serve their high purpose.

# Address

By JAMES O. MURFIN

*Regent of the University of Michigan*

BY THE University of Michigan this memorable day will long be cherished. For our Law School it is epoch making. We do not wish to be unduly boastful but are all supremely happy in the conscious realization of the fact that thanks to the benefaction of W. W. Cook we have a Law School equipment surpassed by none. Nor is it in stone and mortar that our pride is planted—not more than in the endowment which comes with this wonderful gift which, of course, in time will be of incalculable value in advancing the science of legal education and this is a science. Rather our pleasurable satisfaction should come to us because the Cook gift, its motive and its planned method of operation have already created that intangible, non-definable condition known as atmosphere.

There is already in and around our Law Quadrangle an atmosphere that makes for the best thought; it makes for zest; it makes for a desire to live up to the surroundings in which the student is located; and it gives the study of law a morale that is marvelously beneficial.

While we are happy that Mr. Cook chose his Alma Mater as the laboratory for his experiment our joy must not blind us to his motives and our obvious duty. This gift was not primarily to our Law School as such. It was not a gift backed by legal education as its primary thought. Instead it was a gift designed and planned to benefit his Country, our Country, the United States of America. It was his firm belief that the future welfare of America depended upon the legal profession. His

reading and his study led him to this conclusion. That was a fixed opinion in his mind. He had entertained that opinion for many years. It was therefore not primarily for his profession that this gift was made—it was for his Country. He believed the outstanding American institutions, peculiar to our genesis and development, which have made our country so outstanding, came into being and were largely preserved by lawyers. He expected and hoped that lawyers would continue to carry on in the future as he believed they had in the past. He fully believed in the necessity of the Bar continuing to be leaders in the affairs of our Country. Because of this belief he wanted to produce the best lawyers possible—lawyers with the best education, the best background; he wanted to aid and improve legal education; he wanted the law student to have the best surroundings possible; he wanted to encourage and develop the highest type of law study, but his primary motive in this benefaction was to produce better citizens and better servants for his Country.

With his high ideal before us should we not pause in the midst of our pleasure and contemplate our duty? Are we to stop with a day of celebration? Are we going to be content with mere contemplation? Rather, I think, the Bar of America, the Bar of his Country, the Bar whose banner we proudly carry, should individually here and now pause and in that pause think of the background of this magnificent gift. We should then and now dedicate part of our future action and part of our future lives to aid with all in our power in carrying out this magnificent ideal.

Our profession is still under public criticism. This is nothing new. Hamlet, soliloquizing three hundred years ago, about the slings and arrows of outrageous fortune, includes the bar as one of his major complaints. We all know there is some ground for complaint. There is ground for complaint because there is always room for improvement. Let us use this occasion—let us use the ideal of our donor as an opportunity to pledge ourselves that every day and every way we will strive to serve our Country better.

# A Research Problem Separation of Powers

By MARVIN B. ROSENBERRY

*Chief Justice of the Supreme Court of Wisconsin*

IN THE nature of things William W. Cook must have pondered many alternatives over the years which preceded his final determination to place his residuary estate in the hands of trustees for the purpose of advancing the study of law upon this Campus. He had devoted practically his entire life to the practice and study of the law. He had had most unusual opportunities to observe law in action. In the course of his professional career he had dealt almost exclusively with corporate organization and corporate finance. He had been a close-up observer of the development of the modern corporation, a device which has made possible the unprecedented economic development of this country and at the same time created social problems of the most difficult and complex character known to government. He had come in contact not only with the leaders of the bar but with leaders in the fields of industry, transportation and finance. His practice disclosed to him the fact that many men in positions of leadership were not trained to lead. Waiving the question of whether or not leaders can be discovered and developed in schools, there remains the undeniable fact that a trained leader is far better than one of equal natural ability, with approximately the same experience, who is untrained. Mr. Cook would have been the last to confine training to schooling. But the schools do something in the way of training which practical experience does not do. No doubt the converse is also true.

While by the terms of the trust created by his will Mr. Cook gave great latitude both to his trustees and to the beneficiary of the trust, it is quite apparent from his scanty writings dealing with the matter, that he had for many years sensed the fact that the law of this country would shortly undergo profound changes. In recognition of this fact he first determined to devote his fortune to the development of trained leaders who might assist in directing through the teaching, practice and study of the law, the operation of those social forces which he realized were acting with increasing pressure upon our fundamental law. Having made this basic decision, his second step was to decide that the leadership which he deemed essential to the continuity of our institutions could best be developed in connection with an established law school. When he had made these two decisions, he must have canvassed with great thoroughness the possibilities in connection with various established institutions. In his search for the most strategic position for his purposes, he naturally considered his Alma Mater. However, accustomed as he was to deal with facts and realities, it is probable that mere sentiment had little to do with his ultimate selection. It is noteworthy that he finally chose an institution, which was, first, in the great Middle West; second, tax-supported and administered by a state; third, closely associated with a great university; fourth, having a faculty with a long history of achievement in the field of legal education; and fifth, one with a great body of loyal alumni who came from many foreign countries as well as from every state in the Union.

More clearly than most lawyers engrossed in private practice, Mr. Cook realized the implications and possibilities of the co-ordination of the three great departments of the profession of the law,—teaching, practicing and adjudicating. He rightly believed that the first function of a law school is to train lawyers. But he also believed that in order to develop leadership individuals who show marked aptitude in the law

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should have an available opportunity to develop more fully this special talent, under circumstances where practical considerations would not so ruthlessly reject or obscure the social implications involved as would be the case in private practice.

In his practice the lawyer of necessity deals with controversies or situations involving doubt, relating to transactions which are being carried out to achieve definite ends. He therefore draws upon the law for that which will aid him in attaining the end sought by his client. He cannot weight the enterprise with considerations which in his judgment or in the judgment of his client may result in the loss of the objective sought. The judge, because he is required to decide controversies promptly, must deal very largely with the legal materials furnished him by lawyers. While a judge may and often does have a full appreciation of the social implications of the case before him, he is obliged to proceed within strictly defined limits. It is well that this is true, for social projects advanced today with great confidence and vigor are often rejected tomorrow because they do not work. The law can with safety accept only those social concepts which have withstood the test of experience. Moreover, time for consideration and reflection on the part of the judge is limited. The pressure of modern business creates a demand upon our courts for speedy decision which makes impossible except in rare cases a philosophical rationalization of the law of any particular case. The teacher on the other hand has a two-fold function. He not only instructs but he systematizes and correlates the material with which he deals. In doing this he criticizes not only the work of the lawyer but the work of the judge. He has also unusual opportunity for reflection, consideration and reconsideration. If he does not complete his investigation this year he may do it next year. Clients and parties are not knocking on his door demanding that he forthwith announce his conclusions. He may properly range the fields covered by



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the other social sciences. He may consult and debate with others without fear of disclosing professional secrets, which were he a practicing lawyer or a judge, might subject either a client or a party to the risk of harm. He may submit his deductions to students who are keen, discriminating and not inhibited by considerations of consequences or a fine sense of delicacy. While their judgment may not be tempered by experience, their range is wide and their viewpoint unclouded and varied. So over the years by a process of elimination and refinement the teacher works over his material and develops a systematic and accurate statement of the law. It is not too much to say that the work of the law school teachers in the last forty years has given direction to and an interpretation of the development of our law which is of the very greatest importance.

If in some way the skill and experience of the practitioner, the wisdom and poise of the judge, the scholarship, the ability to refine, and the power to impart knowledge of the teacher, could be focused upon a group of unusual, able and enthusiastic students, an important step would be taken in the realization of Mr. Cook's ideal. The study of the law *in vacuo* is likely to be sterile and so far detached from realities in the field of legislation and the administration of the law as to be almost without practical value. The output of the law schools in the way of articles and dissertations is in itself fragmentary and uncorrelated, and as one ponders some of these products of the cloister he may well wonder if they were not written to display the erudition of the writer and with very little knowledge of the practical working of the law in an every day world. One will make no reference to the work of the destructive and belligerent young critics who imagine themselves to be face to face with the beginning of a new era every time they look in the mirror. They will never agree and like the Kilkenny cats will shortly dispose of each other.

But there comes from the law schools a body of literature that is



immensely worth while. Any practicing lawyer or judge who ignores it makes a grave error whether he be most concerned with the interests of a client or with the justice and soundness of a decision. The difficulty with this material is that it is for the most part not available in usable form for the lawyer, the judge or the legislator. It is detached and not related to the present needs of the state nor is it immediately helpful to the bar or to the courts. It has value but the same effort might produce material of much greater usefulness. Much of it is speculative or so highly controversial as to require restatement to reduce it to a usable form. On the other hand that which deals with problems which are before courts and legislatures for solution often presents dispassionately and accurately the present state and trend of the law in a way that makes it very valuable.

It is not too much to hope that here upon this Campus there may be developed a method of co-ordinating the work of the teachers, the lawyers and the judges in such form that it may be understandable and usable not only by members of the bar but by legislators and those who deal with the content of the other social sciences. It is quite probable that Mr. Cook had something of this kind in mind. The endowment created by him offers to the faculty of the Law School of the University of Michigan a great opportunity for leadership as well as for the development of leaders.

To be more specific, the work already done under the direction of members of the faculty of the Law School of this University in proposing a revised code of procedure for the State of Michigan and in making available for legislative committees elsewhere the result of researches in the law of practice and procedure and the annotation of the restatement of the law of contracts, illustrates in a very striking way the possibilities of worthwhile achievement. Research which grows out of and is connected with the living stem of the law is of much greater

## Dedicatory Exercises

present value than if it be detached and floating so to speak in legal space.

Mr. Cook's plans are being realized at a time which is most opportune. He was undoubtedly a man of great foresight and must have had a very keen appreciation of the fact that a great change in the law was imminent; but we should be obliged to endow him with the attribute of truly prophetic insight if we were to say that he foresaw anything like the present shift in our legal order involving as it does not only the application of constitutional principles to new situations but also the relation of the states to the federal government and a redistribution of the police power between them. The questions of law raised by the proposals which have been put into operation during the last two years and by those now being put forward are of the most fundamental character. It is quite probable, judging by the past, that the extent of the shift will not be so great as many now suppose; it will nevertheless be significant. It is possible that what now currently passes for change is nothing more than an appreciation by the public of the fact that many changes have already been made, which have heretofore escaped notice.

The constitution of any state at best marks merely a beginning,—a time when fundamental principles are declared and direction given to the future development of law and government. The men who formulated the federal constitution well understood this fact. They recognized much more clearly than many of their successors the fact that law and government are growing and constantly developing institutions and are therefore subject to change and adaptation. Constitutional principles are analogous to the range lights which guide the mariner. They mark out a safe course but that does not mean that the first course laid out is and must always remain the best course.

It is well within the truth to say that since the period of the civil war, there has been a growing indifference to fundamental constitutional

principles. Such interest as there has been was the result of definite economic and social rather than purely political pressure. Because of this widespread lack of interest many actual changes have escaped popular notice. The great body of decision relating to the exercise of the police power by the federal government affords an excellent illustration of the situation. More than twenty years of experience at the bar and nearly as many on the bench have emphasized to my mind the necessity of re-establishing the validity and importance of constitutional principles in the mind of the general public.

Within the limited time available it would be impossible to sketch even in barest outline the changes and adaptations of the constitution other than by amendment which have taken place in the one hundred and forty years since its adoption. Without attempting in any way to discuss the merits or demerits of the doctrine, either in theory or practice, we may briefly, by way of illustration, consider that body of political and constitutional principles ordinarily associated under the title, "Separation of Powers."

The general notion that a citizen could not adequately be protected in the enjoyment of his liberties unless the legislative, executive and judicial powers were exercised by different persons or groups of persons, seems to have originated with Aristotle. Its greatest expositor, however, was Montesquieu. His treatise "The Spirit of Laws" became current in the English-speaking world in the earlier decades of the eighteenth century and had a profound influence upon the political thought of that day. It had a wide reading in the American colonies and its influence upon our political thinking has persisted down to our own time.

The English people including the colonists had been subjected in turn to the tyranny of the executive, to unlawful exactions by the legislative, and to usurpations by the judicial branch of the government.

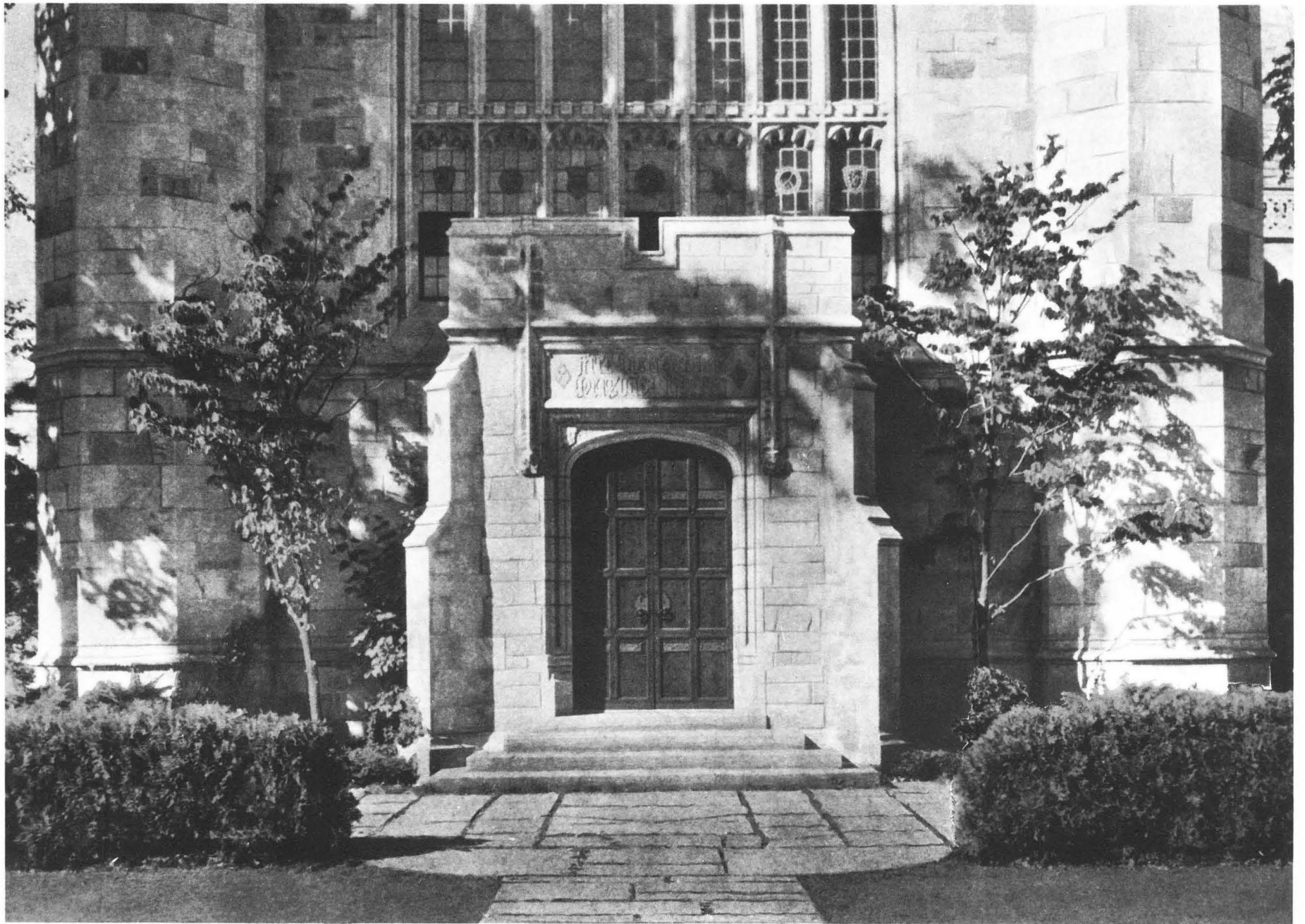
## Dedicatory Exercises

It was natural therefore that those who formulated the constitutions of the original thirteen states and of the United States should have regarded the separation of powers as of prime importance and in order firmly to establish it, should have adopted the theory as a working principle of constitutional law. In France and England the doctrine has always remained a matter of political theory, where it has guided and directed rather than controlled political action. But in the United States, when in 1787 the constitution was submitted to the people of the States for their rejection or approval, the principal objection made to it was that it did not declare in definite terms that the legislative, executive and judicial departments ought to be separate and distinct. In reply to this criticism, James Madison pointed out in *The Federalist* that while no political truth was of greater intrinsic value or was stamped with the authority of more enlightened patrons of liberty than that on which the objection was found, nevertheless neither in England nor in the constitutions adopted by the colonies were these departments totally separate and distinct from each other. He cited the constitution of the Commonwealth of Massachusetts, in which the doctrine was expressed as follows:

“In the government of this Commonwealth the legislative department shall never exercise the executive and judicial powers or either of them; the executive shall never exercise the legislative and judicial powers or either of them; the judicial shall never exercise the executive and legislative powers or either of them; to the end it may be a government of laws and not of men.”

He quoted from Jefferson’s “Notes on the State of Virginia,” as follows:

“All the powers of Government, Legislative, Executive, and Judiciary, result to the Legislative body. The concentrating of these in the same hands is precisely the definition of despotic Government. It will be no



LAWYERS CLUB, EAST DOOR DINING HALL

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alleviation, that these powers will be exercised by a plurality of hands, and not by a single one. One hundred seventy-three despots would surely be as oppressive as one. Let those who doubt it, turn their eyes to the Republic of Venice. As little will it avail us, that they are chosen by ourselves. An *elective despotism* was not the Government we fought for; but one which should not only be founded on free principles, but in which the powers of Government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others. For this reason, that Convention which passed the ordinance of Government, laid its foundation on this basis, that the Legislative, Executive, and Judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time.”

That the framers of the constitution as well as the people of the several states considered the exercise of the separate powers by distinct persons or groups as vitally necessary to the preservation of the rights guaranteed by the constitution admits of no doubt. The doctrine was indeed so generally accepted by the various departments of government that it was scarcely drawn in question down to the time of the civil war. John Marshall, the great expounder of the constitution, although he was a member of the Supreme Court of the United States for more than a third of a century, was never called upon to deal in concrete form with this question. Even in the states controversies involving the doctrine arose in rare instances and then only in connection with matters which were relatively unimportant.

But experience demonstrated not only that the legislative branch of the government could not deal effectively with all of the complex factual situations which confronted it; it also further appeared that the judicial branch of the government was not so organized as to deal with

matters which were really more administrative than judicial; and we began to move away step by step from our original position, although at first the line of cleavage was barely perceptible.

The creation of the Interstate Commerce Commission in 1887 may be taken as well as any other date for the point of departure from the accepted doctrine of the separation of powers. In the beginning the Interstate Commerce Commission was little more than an extra-legislative committee charged with the duty of inquiring into and finding the facts with reference to certain aspects of the transportation problem. It reported not to Congress but to the Secretary of the Interior and its findings were communicated to Congress by the executive. But in a short time it became clear that if the Interstate Commerce Commission was to be an effective agency in the solution of the problems presented to Congress, it must have powers much wider than those which had at first been granted to it.

Fifty years ago in order to kill any legislative measure which by its terms proposed to endow administrative agencies with rule-making or fact-finding powers, it was sufficient to point out that the proposed measure delegated legislative or judicial power and was therefore unconstitutional. The necessary first steps away from the accepted doctrine were frowned upon by the courts and taken in the face of many difficulties and with many misgivings. Gradually, however, the pressure became so great and the need of supplementing the legislative and judicial branches of the government so apparent that finally the attempt to evade or hurdle the constitutional barriers was successful.

How, if all governmental power was vested in the three great departments of government, were the new administrative tribunals to be given enough authority to make them effective? From what source was the power to be drawn? The doctrine was all-inclusive—no governmental power was lying around unappropriated. Many ingenious de-

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vices were evolved by means of which it was hoped the constitutional restraints might be avoided. Finally under the guise of conferring upon administrative tribunals the power to find facts, grants of power which passed the judicial test were made. Although the powers granted to such tribunals were in fact equivalent to judicial power, the grant was stated in terms which obscured the real nature of the power conferred. To these same administrative tribunals was also delegated the power to make so-called orders or rules principally in the form of safety codes, building codes, health codes, electrical codes and other similar bodies of rules, all of which have the force and effect of law. The power to promulgate a rule for a violation of which a citizen may be punished is in fact legislative power. There has thus in fact been a delegation of judicial and legislative power to administrative tribunals with the result that the same body which makes the law determines whether or not the law has been broken and also imposes the penalty therefor. The fact that these tribunals were in the beginning and to a large extent still are manned by trained lawyers and adopt so far as is practical court procedure, has up to the present time prevented most of the undesirable consequences which Jefferson and his contemporaries feared would flow from an exercise of judicial and legislative powers in combination. This was quite generally true down to March, 1933. That it is still true cannot be alleged with so much confidence.

One important consideration in this connection, however, seems to have escaped public notice. The fact is that judicial power when exercised by an administrative tribunal escapes the restraints imposed by the constitution upon the manner of its exercise. From the beginning it has been held that all courts exercising judicial power must as regards fundamentals exercise it according to the course of the common law so that no citizen may be deprived of his liberty or property except by due process of law. It is true that due process was not defined in the



constitution; but when a court was created by constitution or statute, it was held to be a court as that institution including its procedure was known to the common law. Many state constitutions in addition required that the writ of error should never be abolished, thereby securing to parties a right of review. But the procedure of the administrative tribunal is not according to the course of the common law; it is ordinarily prescribed by the tribunal itself. While in certain instances judicial power is exercised by administrative tribunals in conformity to the common law, in many other respects its procedure has necessarily been of a summary character. A significant and growing tendency to abuse appears in efforts which have been and are being made to prevent a review of findings of fact made by administrative tribunals, even though they may be clearly against the great weight of the evidence and supported only by a scintilla of proof. In the great majority of cases the rights of interested parties to a controversy are for all practical purposes ultimately determined when the facts are found so that parties are denied an effective right of review where findings of fact are made conclusive upon the courts.

When an administrative tribunal in the exercise of its so-called rule-making power prescribes a rule of conduct for a citizen which rule may be enforced in a court, it to all intents and purposes exercises legislative power. When a law in the form of a rule is established by the order of an administrative tribunal, the law-making power escapes all constitutional restraint as to the manner of its exercise. Practically every constitution in this country provides for two branches of the legislature; for the introduction and reading of bills which are then customarily referred to committees, reported back and debated. After a bill has been passed by one house it must be concurred in by the other house and when concurred in must be submitted to the executive for his approval. But the administrative tribunal may without a hearing, without sub-

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mitting proposals, without debate and of its own motion declare a rule which has the force of law. Thus the law-making power not only escapes constitutional restraint as to the manner of its exercise but it is exercised by a group over which the electorate has only a remote if any control. The exercise of the judicial and the legislative and the executive powers in combination and their exercise by persons other than those chosen at an election were the things most feared by Jefferson and his contemporaries for the fundamental reason that it was believed to be destructive of the actual democratic government which they were forming.

The abandonment of the doctrine of separation of powers and of its corollary that a power once delegated may not be redelegated, has not come about in response to a political movement or at the behest of a vocal and persistent minority. It has been the result rather of steady, irresistible, social pressure which has arisen from the fact that government in the last hundred years has been obliged to concern itself more and more with regulations designed to equalize economic opportunities and to bring under subjection the activities of the modern corporation. The forces that have operated here in the United States have operated along the same lines to a greater or less extent in all western countries. While social pressure has not resulted in similar action in each country some modification of previous political concepts has been necessary in nearly all. For very obvious reasons the situation in England most closely parallels that in this country. A brief statement of the situation there throws a great deal of light upon the situation here.

As has already been said, in England the doctrine of the separation of powers has remained a matter of political theory, though any departure from the doctrine in that country has met with more resistance than in this country. The reason is not difficult to discover. Most Americans apparently believe their constitutions when once established are eternal and immutable unless modified in the manner prescribed in the

instrument. The English people on the other hand are aware that their constitution depends for its preservation upon the constant vigilance of those who believe in its fundamental principles. Any departure therefore from established constitutional principles in England attracts much more popular attention than it does in the United States.

Lord Hewart, Lord Chief Justice of England, has dealt with the subject in his book "The New Despotism." He believes that by procuring the delegation of power to government departments a despotic and arbitrary rule is being established in England. While the book does not lend itself very well to quotation, his position may be summarized in his own language somewhat transposed, as follows: He says:

"What is meant by the 'rule of law' is the supremacy or the predominance of law, as distinguished from mere arbitrariness, or from some alternative mode, which is not law, of determining or disposing of the rights of individuals. But the supremacy of law, as we know it, means something more than the exclusion of arbitrary power, and something more also than the equality of all citizens before the ordinary law of the land administered by the ordinary courts. A little inquiry will serve to show that there is now, and for some years past has been, a persistent influence at work which, whatever the motives or the intentions that support it may be thought to be, undoubtedly has the effect of placing a large and increasing field of departmental authority and activity beyond the reach of the ordinary law. Much toil, and not a little blood, have been spent in bringing slowly into being a polity wherein the people make their laws, and independent judges administer them. If that edifice is to be overthrown, let the overthrow be accomplished openly. Never let it be said that liberty and justice, having with difficulty been won, were suffered to be abstracted or impaired in a fit of absence of mind. The exercise of arbitrary power is neither law nor justice, administrative or at all. The very conception of 'law' is a con-

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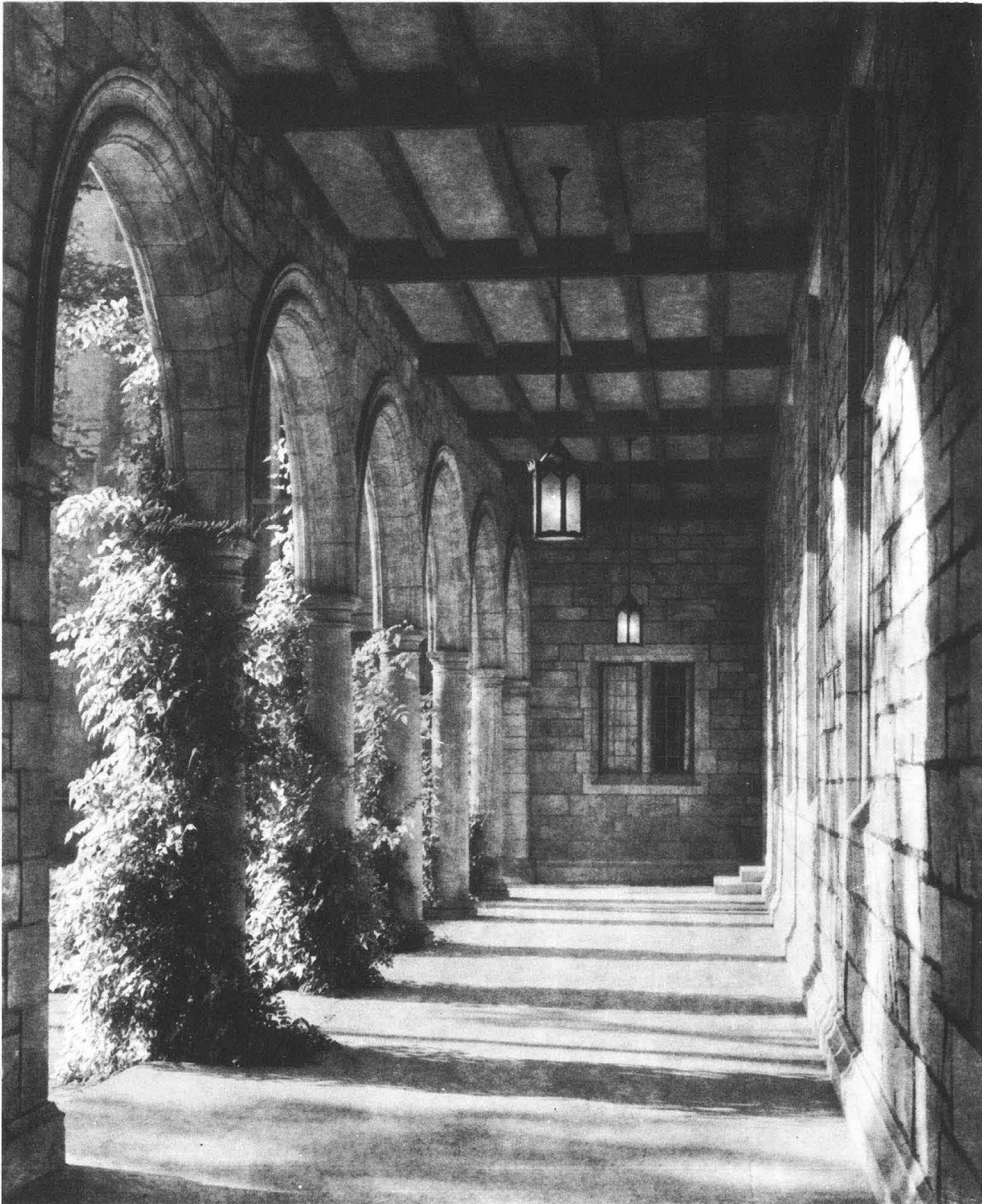
ception of something involving the application of known rules and principles and a regular course of procedure. There are no rules or principles which can be said to be rules or principles of this astonishing variety of administrative 'law', nor is there any regular course of procedure for its application."

Lord Hewart envisions a return not in form but in political effect to the time of the Stuarts when the promulgation of law was a prerogative of the crown. Despite his very vehement denunciation of the practice of delegation of the powers of parliament, Lord Hewart nevertheless says:

"It is tolerably obvious that the system of delegation by Parliament of powers of legislation is within certain limits necessary, at least as regards matters of detail, because it is impossible, if only for want of time, for Parliament to deal adequately and in detail with all the matters calling, or supposed to call, for legislation. Indeed, without a drastic alteration of its methods of procedure, it would be impossible for Parliament to deal adequately with even a comparatively small part of the present-day volume of departmental legislation. It may also be conceded that the system, if not abused, and subject to proper safeguards, may have its uses. It is the abuse of the system that calls for criticisms, and perhaps the greatest abuse, and the one most likely to lead to arbitrary and unreasonable legislation, is the ousting of the jurisdiction of the Courts."

The case for those who support the practice of delegating legislative power by parliament is stated by Mr. John Willis in his "Parliamentary Powers of English Government Departments" and may be very briefly quoted in shortened form as follows:

"Much is now expected of the State; it is no longer enough for it to keep the peace, it must watch over health, education, industry, transport, and many other social interests. With its vast reserves of coercive



LAWYERS CLUB CLOISTER, EARLY MORNING SHADOWS

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power and of wealth it can afford to disdain a short-sighted materialism, and with its far-reaching tentacles it can fasten upon sources of information which would be denied to private business operating for private gain. With the changing viewpoint of the State,—and it has so changed because the majority of voters so desired,—government naturally fell into the hands of officials whose function it is to build rather than to destroy.”

He continues: “One of the reasons for delegating power to make rules to the departments is, put shortly, to enable questions of detail to be removed from the consideration of Parliament. Right up to the middle of the nineteenth century Parliament not only took care to provide for every exceptional case within the purview of the Act, but appended schedules of forms or tables of fees. . . . Now it was not from choice that Parliament obscured the generality of its enactments by a cloud of petty details; the Civil Service as we know it today had not yet been born, and there were no departments upon which to rely. But if a mass of cumbersome detail was not then a burden it would be a burden today. . . . A glance at any volume of the Statutes will show that there is now a genuine attempt to state the intention of Parliament in plain language that shall be intelligible and unambiguous for lawyer and layman alike. Further, even though it were practicable for Parliament to give up its time to discussion of details, there is no guarantee that it would be competent.”

There would be no justification for these extended quotations on this occasion from the works of Lord Hewart and Mr. Willis were it not for the fact that what is true of the development of administrative law in England is equally true of its development in this country.

In both countries up to the present time criticism has been directed principally at the re-delegation of power vested in constitutional bodies. Little has as yet been said with respect to the consequences which may

be expected to flow from the exercise of the several powers by one and the same person or group.

Montesquieu said: "The political liberty of the subject is a tranquillity of mind, arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so continued as one man need not be afraid of another.

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehension may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

"Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.

"There would be an end of everything, were the same man, or the same body, whether of the nobles or of the people to exercise those three powers, that of enacting laws, that of executing the public resolutions, and that of judging the crimes or differences of individuals."

Here in concise and precise language is epitomized the whole philosophy of the doctrine of separation of powers. In the beginning of our constitutional history, it was thought that the people by the adoption of the constitution had not only provided for a government of laws and not of men, but that they had determined how the persons by whom the prescribed powers would be exercised, should be chosen. If we consider the importance of the matters dealt with by administrative agencies today we shall discover that they dispose of matters of the highest importance whether measured by the value of the subject-matter involved or by the effect of their determinations upon the social welfare of the

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state. We have but to observe the proceedings of the Interstate Commerce Commission and of the Public Service Commissions of the various states to realize that this is the case. The personnel of these agencies is appointed and not elected, yet they discharge functions of government much more important than those performed by many elected officers.

The fact that there could never be and never was in practice a complete separation of the powers which fully accorded with political theory accounts in part for the ready acceptance of the change by the people. By the constitution certain judicial powers were reserved to the legislature, for instance the power to determine the election and qualification of its own members. Historically certain administrative powers were vested in the courts, an example of which is the power to administer a trans-continental railway upon the theory that the administrator or the receiver is an arm of the court. As a matter of practical necessity of course every executive must in the first instance interpret and construe legislative enactments in order that he may take the first steps toward their enforcement. While this is not an exercise of a judicial power, such interpretations especially when long acquiesced in are given great weight in all branches of the government. The executive may also veto acts of the legislature. He may in effect set aside the judgment of a court by granting a pardon. No undesirable results were seen to flow from the exercise of these powers by the persons in whom they were vested. When the creation of administrative tribunals became necessary, if the government was to perform its functions in a changing order, it was but natural that in the interest of the public welfare the power should be lodged where it might be most conveniently and effectively exercised. The fears entertained by Montesquieu, Locke, Jefferson and those who accepted their ideas that tyranny and oppression would result from a combination of power, no longer existed in the public



mind. A century of experience under a written constitution had caused these fears to subside if not in fact to disappear. There was no longer an immediate background of political oppression such as the colonists had suffered. It is possible that the character of the men who exercise political power has so changed that the exercise of these powers in combination will now produce a different result from that produced in times gone by. It is quite generally believed, however, that human nature has not undergone a radical change in recent time. There are some indications that there exists a tendency in public officials of the present day as in public officials of two hundred years ago to act arbitrarily and sometimes oppressively, always of course for the purpose of achieving a worthy and desirable end. In this country we have had not only the creation of administrative agencies by legislative enactment and the promulgation of laws by executive proclamation but we have now a species of law-making by agreement of the representatives of the group which will be directly affected by the law when made.

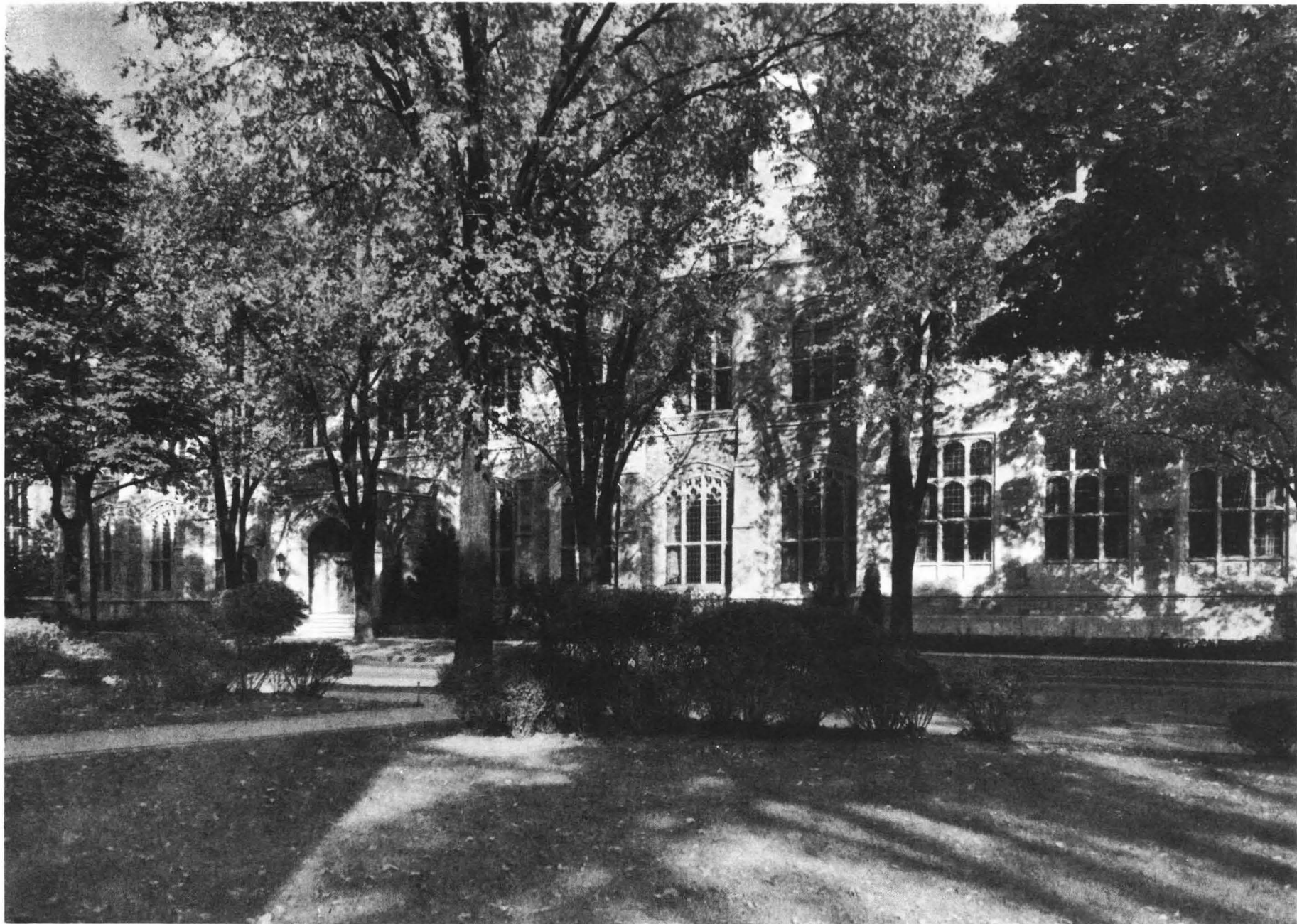
Enough has been said to indicate that there has been a very wide departure in practice from the political principles and concepts which guided our early legislators in the matter of the delegation and redistribution of governmental power, and of the exercise of some of the powers of the three great departments in combination. It may be thought that too much has been said as to the merits of the question but some discussion is necessary to establish the importance of the doctrine under present day conditions. It does not appear that there has been a careful analysis or appraisal of the extent of this departure, nor what effect if any it has had upon the liberties and personal rights of individuals. Admitting that it was necessary to abandon the *laissez faire* idea that that government governs best which governs least, it does not necessarily follow therefrom that the individual citizen no longer needs the protection of a constitution in order to preserve and enjoy his

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liberty. A great public service might be rendered if the whole subject were investigated in an impartial and scientific way. A good deal of the writing that we have had has been done in order to establish and sustain a specific thesis. One would have about as much difficulty in saying that Mr. Willis was an impartial observer as he would have in saying that Lord Hewart approached the whole question in a judicial manner.

I conceive it to be a part of Mr. Cook's plan that the school of research to be created upon this Campus should render just such a service to the country. I see no reason why a scientific and scholarly study of the whole subject may not be made although it must of necessity deal with a matter that is somewhat controversial and is even now in a transitional stage. The change, however, is not so rapid that it may not be observed and its trend established.

It is not my thought that such an investigation should be undertaken for the purpose of enabling us to retrace our steps and so form the basis of a regressive movement. My thought is rather that the investigation and appraisal should be made in order that we may determine how far we have proceeded, for what reason and with what effect. In dealing with matters concerning human relations whether legal or social, we are obliged to start from where we are. There does not appear to be, at least on the part of the public or even on the part of the legal profession as a whole, an awareness of the extent of the departure which has already been made from the body of doctrine known as the separation of powers. In order that we may be able to take the next necessary step intelligently and in the right direction, we must first know where we stand, otherwise we step in the dark. If it be assumed that the doctrine had validity in the beginning; that it was evolved as a matter of experience in government extending over millenniums; that it was intended to set limits to the universal tendency of human beings who have power to endeavor to acquire more power; that an observance of the doctrine



HUTCHINS HALL, STATE STREET VIEW

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in principle at least is necessary to a preservation of individual liberty; then it follows that such an investigation as is proposed would be of the highest value. It may be that such an appraisal might not be accepted or considered by the public at large. It would, however, be accepted and considered by those in positions of leadership and this, I take it, was at least a part of Mr. Cook's plan.

In practice written constitutions have one great defect so far as public opinion is concerned. People at large regard a political principle embodied in a constitution as self-sustaining and self-enforcing and for the most part so our constitutions were in the beginning. But we have gradually grown away from the conditions which produced the constitution and the experiences which prompted us to write these political principles into the constitution. As a people we forget that we once suffered all abuses of governmental power set forth in the declaration of independence and we therefore look with tolerance upon departures from constitutional principles. We have no immediate experience which emphasizes to the public mind the reasons for and the importance of a particular principle although we may be about to acquire some such experience. Thus a proposal at the present time to limit the right of trial by jury or of free speech is not met in the same spirit with which it would have been met a hundred years ago. While it is not fashionable at the present moment to do so, it would be helpful if we would more frequently recall the fact that what we have achieved in the way of personal liberty and self government has cost not only "much toil and not a little blood" but centuries of time. It may be as Mr. Cook said in his letter to the Lawyers Club that there has been infused into our population a large element of recent immigrants who have different standards, that they are without appreciation of Anglo-Saxon institutions and the concept of law as it has been developed on American soil, and that the influence of this group has resulted in a weakening of the

ideals of individual liberty held by the Anglo-Saxons from the time of King Alfred. If this observation be true it affords an additional reason for a revival of an interest in the fundamental political concepts which underlie our law. If the present generation is to preserve and maintain these ideals they must as a whole know what they are and must appreciate their present practical political value. It is as true today as in the days of Patrick Henry that the price of liberty is eternal vigilance. Unless we are vigilant to preserve our liberties, we may find as did Esau that we have parted with our birthright for a mess of pottage.

# Address

By NEWTON D. BAKER

*Of the Cleveland Bar, Secretary of War, 1916-1921*

DEAN Bates, Distinguished Guests, Ladies and Gentlemen: I doubt whether anybody outside of the immediate family felt so keen a sense of personal loss in the death of Queen Victoria as I. For a long time prior to that event, I had been of the persuasion that she and I were the last of the Victorians and when she died I felt isolated and alone.

I am well aware of the fact that it is the common custom nowadays to think of the Victorians and to judge that great queen with reference to the particular style of hat which she affected, but as a matter of fact, a great case can be made for the Victorian Era.

Surely no poetry written since Victoria's death can compare with that written during her reign. I know no English prose written since that time which is either nobler in content or more classically precise in form than that of Matthew Arnold and Cardinal Newman, or more rich in color and emotion than that of John Ruskin. The liberation of philosophical thinking which took place in that era, largely through Huxley's superb exposition of Darwin's theories and hypotheses, is as bold a departure and as brilliant a performance as the world has had since Newton elaborated his laws. In political theory and in the development of legal institutions, English history throughout Victoria's sixty years is full of outstanding achievements. It took Charles Dickens to paint the picture of the necrosis which had overtaken chancery procedure, but the great lawyers of Victoria's time reformed the Chancery

and other courts of England until English justice became, and has remained, the model of the modern world for integrity, learning, independence and the expeditious determination of human rights.

In a larger view it is also to be remembered that the Victorian Era put an end to the inanities of the four Georges, and that during that time, the genius of the English people made a world wide empire, governed with a higher degree of wisdom and success than has been seen since the Vandals and the Visigoths entered Rome. And their genius has persevered until, in our own day, in a quiet and orderly fashion, without revolution, indeed without apparent strain, we have seen the great British Empire converted into a commonwealth of independent democracies, each preserving for itself and for the aggregate of which it is a member, most of the ideals, political and personal, upon which the liberties of the Englishman have grown. It is the orderly progress of this development which tonight I select for emphasis. At every stage it has seemed to be the natural and normal expansion of existing ideas and institutions, and during all of it there has been tremendous loyalty to the great fundamental and underlying principles which the British have nowhere summed up, but which in their aggregate go by the name of the British Constitution. If there has been any tendency to depart from these underlying assumptions, it is chiefly in the matter on which Judge Rosenberry has so profoundly spoken tonight. Indeed, I had it in my mind to discuss somewhat the separation of powers, but he has done it with a degree of thoroughness which makes any addition from me on that subject unnecessary. I thank him for what he has done, both because of my deep sympathy with his view and because it frees me to take up something else which I equally want to say.

Judge Rosenberry has pointed out that when the Constitution was written, the two books which were consulted most by members of the Constitutional Convention and the great group of lawyers and politi-

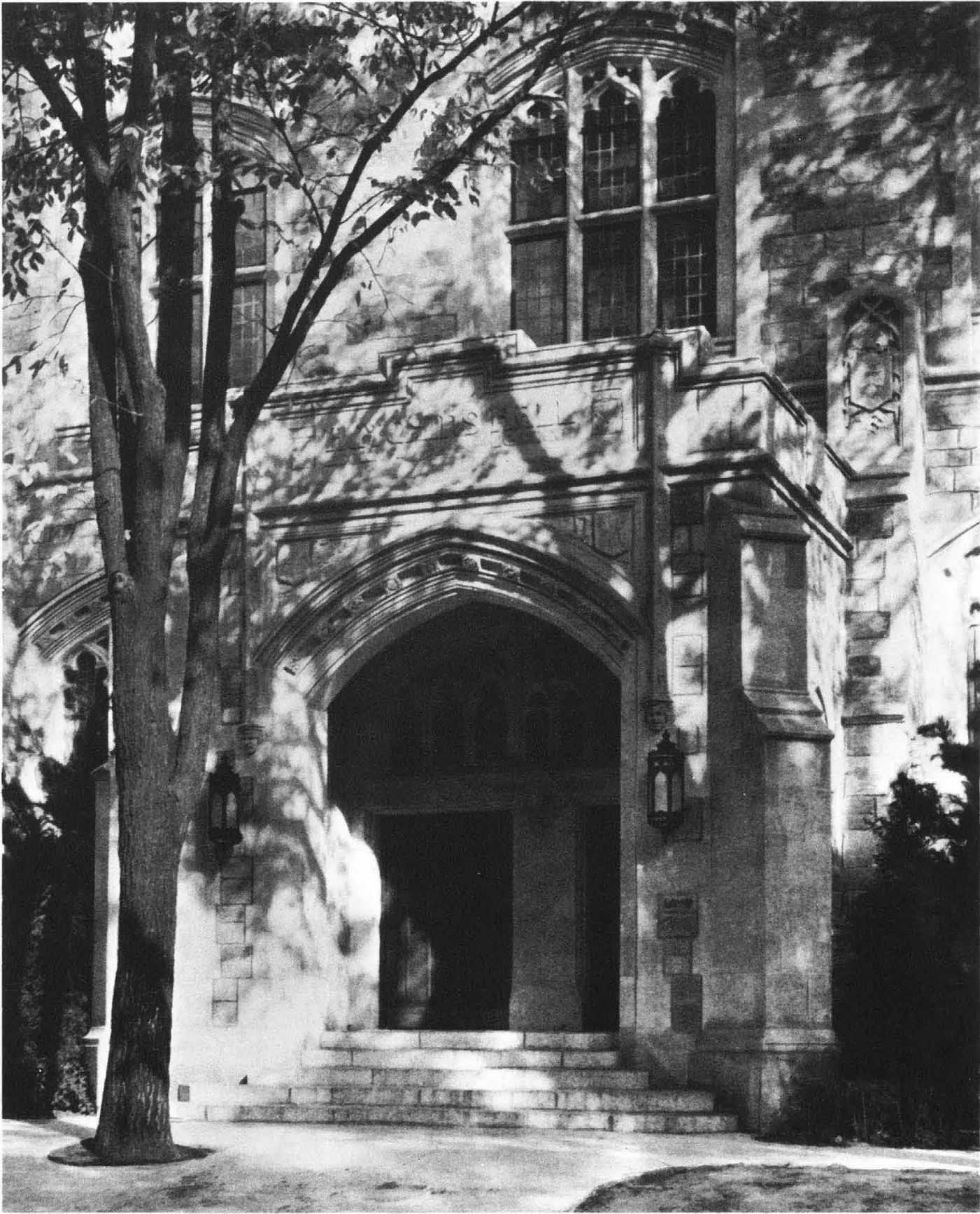
## Dedicatory Exercises

cians who surrounded it were Montesquieu and John Locke. Montesquieu was a young Frenchman of noble parentage. As a youth, he became a lawyer and a member of the Parliament of Bordeaux. He appears to have taken little interest in the practice of law, but he devoted his entire life to the study of legal institutions both as he saw them in operation about him and as he could read of them in history. He went to England and lived there three years, coming back to France with the idea which always after remained the cornerstone of his institutional philosophy—the necessity for separation of governmental powers. Some critics have said that Montesquieu found in England what was not there, that the English themselves had no such sense of the value of the idea, but Montesquieu thought he found it and he gave twenty years of continuous labor to it. Certainly the modern world regards his “Spirit of Laws” as the contribution of a new political idea, and that idea became one of the foundation stones of American constitutional theory and democratic belief.

The Constitution of the United States was, of course, written and started on its way years before the beginning of the Victorian Era in England, but during that era great things took place in this country and it does not stretch the historical perspective to regard the growth of British institutions during the reign of Victoria as analogous to and substantially contemporaneous with the development of our own constitutional theory. Certainly the non-revolutionary method of progress was the same in both.

The effort of the American Colonies to establish their independence was an indigenous democratic movement. In the pre-revolutionary literature, one does not find any sense of solidarity among the American Colonies or any desire to establish a new country. Each of the colonies was restless under some grievance or restraint which it desired to shake off, and about the only common cause the colonies were able to make





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was against alien and overseas rule, rather than in favor of a new American confederation on the basis of common interest. The people and their colonial governments were separatist and independent. Their local laws were frequently published in books entitled "Liberties and Laws." Indeed, there seemed to be a competition among the colonies to see which could state most alluringly the number of liberties and rights retained or vindicated by the members of their respective commonwealths. The political philosophers of the country, consisting of the lawyers, preachers, and the very extraordinary group of reading and thinking farmers, had each their several theories as to how the democratic spirit which surrounded them could be given institutional form. Plans to create a government were proportionately as many and as various as plans in recent years to end the depression. Out of this seething mass of suggestions, three principal theories emerged which can be described best by association with three great colonial names.

John Adams needs a biographer. To most school boys he appears as a bit of a fuss-budget, but he was in reality a very great man as well as a very great patriot, and in spite of the futility of the Committee on Correspondence, and the somewhat pathetic vanities of his presidency, he believed in democracy. Adams thought, however, that an enduring democracy could only be established by providing that the majority of the people should be the beneficiaries and that a cultured few at the top, filled with unselfish aims and noble ideas and having all the advantages of education and tested character, should look after the affairs of the people for them.

Alexander Hamilton, who came of different stock, probably did not believe in a democracy of any kind. Indeed he was not much interested in forms of government. His idea was that the country would and should be governed by its commercial interests. He foresaw expanding commerce and advancing industry, and believed that we should have

institutions which would advance the prosperity of the whole country by bringing the interests of business men into control in matters of policy.

Thomas Jefferson, by the way, also needs a biographer. He alone believed in a democracy in which all individuals participated in power and participated in the decisions of governmental policy. There is no more strange and variegated figure in our history. He had singular limitations and equally amazing grasp and prophetic instinct and faith. It is said that he had in a drawer in his desk at Monticello the constitutions of one hundred democracies established in times earlier than his own, all of which had failed. There was not then in the world an existing democracy, yet Jefferson dared believe that there could be a successful democracy in this country in which everyone would be a participant in political power. We heard this afternoon some quotations from Jefferson which showed, however, the limitations of his faith. He dreaded the intervention of commercial and industrial interests. One of our speakers this afternoon quoted him as describing America by saying, "We are an agricultural people. There is little commerce and almost no manufacturing among us, and I pray God it will be a long time before there is much of either." He believed that a society of the simple sort we then had could acquire enough general education and give enough attention to public affairs to make democracy work as a form of government, but the distortion caused by active commercial interests and the congested wage earning populations which he had seen in the industrial cities of the Old World introduced elements of danger which were beyond his faith.

No really deliberate choice was made among these different theories. Washington's administration was primarily Hamiltonian. Jefferson's administration was something less than Jeffersonian. The Constitution itself, with its checks and balances and its Venetian method of presi-

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dential election responded rather more to the theory of Adams than to either of the others.

In later periods emphasis has shifted sometimes in one direction and sometimes in another, but through it all, and in the Victorian Era in America, the Supreme Court of the United States, took the Constitution founded on Montesquieu and Locke, based upon the evolution of English institutions, and, in decision after decision, established great landmarks of liberty and freedom until in the end we have come to regard this as a flexible democracy so far as form is concerned, but in substance fixing certain rights and privileges which the humblest citizen in the land may with confidence assert no matter how haughty or how powerful the opposing powers may be.

You may recall that Gladstone, whom we delight to quote on the American Constitution, said that the American Constitution was the greatest document ever struck off at one time by the mind of man, but at the same time, and in a part of the same sentence which we rarely hear quoted, he said that the British was the greatest constitution that had ever grown and evolved out of the experience of the people. Both peoples really had the same idea. On our side of the water we deemed it better to write it down, perhaps fancying we might then more safely leave it to shift for itself, while the British have preferred to make watchfulness an assurance against encroachment or unauthorized change.

The point I want to bring out is that in both countries the genius of successful democracy has been to institutionalize the experience of the race—rather to make trial and error the guide and teacher than pure theory or emotional invention. Dr. Jacks, who was principal at Manchester College at Oxford, once said that the value of the study of history is that it keeps us from letting our buckets down into wells which have long since gone dry. That is the negative statement of it. The method of our growth is the demonstration of the fact that the

experience of the race is in the long view wiser than the spontaneous brilliance of any generation. It is in this light that both the Victorian Era in England and the Constitutional Era in the United States seem to plead for education as the preservative of our liberties—education which will enable us to be quite certain that we are neither attempting unremembered failures, nor, on the other hand, embarking upon fanciful courses which do not rest for their promise on the nature and the character of the people among whom they are to be applied.

When the World War was fought, we persuaded ourselves that it was fought for the purpose of making the world safe for democracy. Some people said it was fought to make democracy safe for the world. It does not seem to me to matter much which view is taken. The fact is that immediately the war was over, peoples everywhere with one accord cast out kings, emperors and oligarchies and joyously applied themselves to the creation of democratic forms of government. The air was filled with new constitutions. Conventions and constitutional assemblies met where only royal diets had met before, and constitutions appeared where once only imperial prescripts had been permitted. Practically all the countries in the western world announced themselves as democracies ready for business, elected their representatives, and expected the millennium.

In a pathetically short while, it began to appear that things were not going so well. All the woes of a devastating war, all the tensions of new international relations, all the pitfalls and perils of new-found emancipations began to assail them. One after another of these peoples have presented this spectacle to the world, that after having embarked on a democracy, they have sought out a Lenin, a Hitler, or a Mussolini and have said to them, "This is too complicated and difficult for us: you do it." Now why have they done this? It seems to me that the answer is clear. They have done it because they learned by bitter experience that

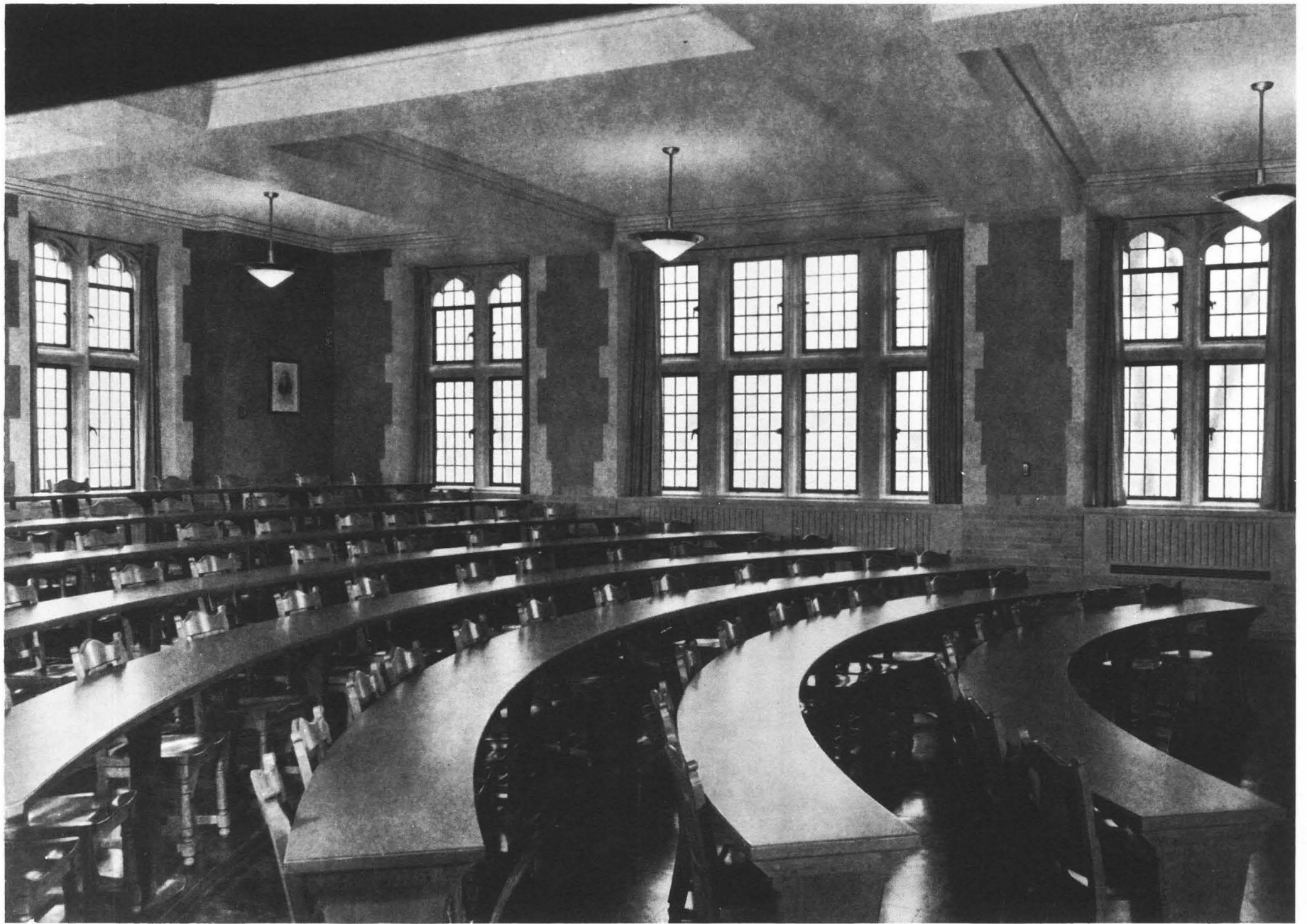
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though democracy is the best form of government in the world, it is altogether the most difficult form to operate. These peoples came suddenly to a realization that they had not been trained to operate a democracy; that they did not have the patience; that they did not have the knowledge; that they did not realize that successful democracy is a growth and not a gift. They wanted some instantaneous Alladin's lamp process to change from imperialism to democracy, only to find that democracies do not come that way. So we find all the world over that democracy as a form of government has come into dispraise. Mussolini, and I have no reason to doubt his sincerity, has spoken in withering contempt of it. The Russian and German experiments have discarded the whole theory in favor of regimentation, control, and coercion. Indeed it can be fairly said that democracy today survives only in the English speaking and certain Scandinavian countries where it has grown as a practice, while it has failed in every country which has sought to attempt the ready-made by imitating or aspiring to the success elsewhere achieved.

Now one or the other of two things is going to happen. Either democracy is going to regain its lost place in the affections of men, or it is going to lose out universally; and it is for this reason that it seems to me of tragic importance that we people of the United States and of England, who have learned the process by which democracy is created and preserved, shall persevere along the lines which experience has taught us is the true law of institutional growth.

I said a moment ago that democracy is the hardest of all forms of government to operate and it daily grows harder. The things which government has to do nowadays, as Judge Rosenberry has just said, are not so simple as they were in Jefferson's day. Science strides ahead with seven league boots, and invention carries research into practical application with increasing rapidity. Meantime, some of the atmos-





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phere of Jeffersonian democracy has become distinctly Hamiltonian. Both our domestic and our world relations are changing and all these things multiply the problems of government.

Jefferson's idea was that a democracy of his type was possible only because it required an amount of popular education which was within the reach of everybody. As he grew older, his thought dwelt more and more upon the University of Virginia and the institutions of higher learning then being established in the country. Plainly he already saw the need for more education than he had at one time assumed would be necessary if the verdict of the electorate was to be a safe reliance for liberty. If Jefferson were alive now, he would believe this even more intensely. It used to be, even in my lifetime, that when young men received college diplomas they remained educated men, but now the increase of knowledge and the increased complication of affairs comes so fast that to stop learning for a day is to begin to be an uneducated man, and we are coming more and more to see that continuous education, sometimes called adult education, is the only salvation of democratic institutions, and I think we are also quite clear now that there must be specialists among us. Nobody who tries to know everything, knows much of anything. A certain irreducible minimum of common education we can have and I, myself, place that minimum much above mere literacy, but there must be leadership and specialized training in selected groups and humility enough in the rest of us to be willing to be led and informed by those selected to be specialists in particular matters.

Having these views, it is natural that I should rejoice in Mr. Cook's benevolence to this institution which is not merely training lawyers, but producing scholarly research in the law. And I think history will record some day that there was a providential inspiration about the selection of this place for this great institution. This is the Middle West or the Near East as you may see fit to call it. In the spirit of the



Middle West that vital thing called "Americanism" has long found its stoutest defenders. Frederick Turner's epoch making contribution to the written history of America shows the influence of the frontier. Without that pioneer spirit which moved west with Daniel Boone, Kenton, and others, it may very well be that our country's history would have presented a totally different picture and our country's unity would have been impossible to maintain. I was not born in this Middle West and so I do not praise my ancestors when I say that a detached observer in Mars during the last hundred years would probably always have put his finger upon the Middle West as the spot that most thoroughly and truly exemplified America. Now again in the Middle West is established what bids fair to be the greatest law institution in the world. It is superbly equipped and has every incitement to scholarly research. The place and the thing it does are a call to patriotism and leadership, and in the future it will bring from all over the United States the ripest and most thoughtful scholars we have to take up such research as Judge Rosenberry called for tonight—research which tries to find out what we are really seeking and what we have to pay to get it.

If I have seemed to you tonight to stress unduly individual liberty and freedom, if I have appeared to you to be a rugged individualist, I shall not be abashed at the phrase. It is as clear to me as it is to you that as life becomes more complicated and congested, we must surrender more and more of our individual rights for the common good, but I do not want to surrender one jot or tittle of these rights without knowing what I am to get in return for it and that it is worth the sacrifice. We must know it, not guess at it. We must not be willing to make these surrenders because somebody speaks in a loud voice or arouses an emotional atmosphere. When the surrender is asked, those who ask it must have knowledge upon which to base their request.

One of the most brilliant and most delightful of the young gentlemen

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in Washington was reported in a newspaper the other day as saying that there are people in the United States who are unaccountably, even fanatically, devoted to the Constitution. I was not vain enough to think this was a personal reference, but I am very happy to be sure that there is at least one such person in the United States.

I believe in the Constitution. No doubt some part of my belief is my birthright, that controlling complex of emotions and traditions which surround us from our cradle to our maturity, but by far the larger part of the basis of my belief is what the Constitution has in fact done. It has made for the world for the first time in history a great and successful democracy. It does not assume to be unchangeable like the laws of the Medes and Persians. It provides how it is to be amended, and my prayer is that we may not see it amended while we are assembling the evidence. This was all that Mr. Cook had in his mind. He did not build this school to crystallize, but to study. He hoped that it would minister to the preservation of American institutions. That preservation will best come from the knowledge which this, as a research institution, can disseminate to inspire us to the possibility of our growth in the future as we have grown in the past and to dissuade us from the rash and heady experiments which the experience of the race has shown to be illusions.



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