On the New Deal and the Law

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addressed to the committee in which he had listed a number of proposed titles. He quite appropriately and frankly enough appended a postscript reading "it really makes no difference which title you select as it will be the same speech at any event." I am sure that this applies to my remarks here today.

The members of this business and professional group—even those among you who are not lawyers, must be keenly aware of the many and varied important developments that have been taking place in the law during the recent years. I say that you must be aware of this development because certainly the law today is permeating itself into the affairs of business more intensively that it has at any other period in our history.

In many respects the law is like an automobile—it is capable of moving slowly or it
can generate a speed that will make one dizzy. As applied to the law this means that legal doctrines may develop slowly over a long period of legal history or a combination of circumstances may cause a more rapid development. We are living in such a period. This 1939 model of the law is a highly geared piece of machinery. It has all sorts of gadgets, some of which have been engrafted thereon by the courts and others supplied by the legislature or by the Congress. Some of these gadgets have been manufactured from finely spun theories that have not heretofore been tried in practice. It is not known, accordingly, whether they will work or whether they will have to be discarded. All of this chassis of the law is enclosed in a streamlined body called the Constitution. Lurking in the foreground there are all sorts of unknown obstacles that may
appear unexpectedly in the road to cause a collision or obstruction. In fact, the more one studies the law of 1939 and recent developments on the legal scene the more complex the legal problems become and the more sympathy one is inclined to have for the lawyer—that is, if it is possible for anyone to sympathize with a lawyer, and sympathy is also engendered for the business man and the public generally who must bear the brunt of any experiments with a new model of the law.

First of all, let us consider broadly a view of the most significant developments in the field of constitutional law. Recent events have catapulted us into a situation in which we now have a central government controlled and directed largely by Congress and the Chief Executive—with judicial restraint probably at a minimum in those fields where the people
desire through legislation to aid themselves with federal funds or to aid themselves through higher wages, shorter hours, price controls of all sorts, industrial output, unionization activities, and a myriad of other similar things in the social and economic spheres. I have said that judicial restraint in these matters is probably at a minimum. Doubtless the new blood now on the Supreme Court will cause the normal restraint of the judiciary in reviewing legislation of the type referred to to recede still further in the background. The Supreme Court, of course, has the final word and the attitude of the Supreme Court on these questions will be mighty affected by the outlook of the new appointees, particularly of the two most recent appointments, that of Frankfurter and Douglas, both of whom are men of outstanding legal ability but neither of whom has had any extensive
experience in the practice of law. Consequently both can be expected to bring to the Supreme bench the outlook of the classroom, the outlook of the law professor, rather than the outlook of the more conservative practicing lawyer. Perhaps it is not too much to say that we are almost standing on the threshold of the expression of new legal doctrines which are calculated to alter the very framework of the American government, particularly as applied to the problem of the division of authority between the state and federal governments. With the exception of the times when there existed a state of war, there has probably never been such a vast concentration of power in the federal government and particularly in the Chief Executive and administrative forces of the government than we have today. This is doubtless a tendency which can be expected to continue — especially when we consider that the power of
the federal government depends largely upon what definition the Supreme Court sees fit to place upon certain indefinite concepts used in the Constitution without definition. For example, what is interstate commerce? The validity of much of the so-called New Deal legislation which makes up the preponderant proportion of the 1939 model of the law depends largely upon the ultimate definition that is given to this illusive concept. Similarly, the power to legislate for the general welfare may be given a new meaning and a new potency by the Supreme Court so as to extend the power of the federal government. On the other hand, there is the due process clause. What is due process of law? Neither the state nor the federal government may deprive a person of his liberty or property without due process of law. But in reviewing state or congressional legislation
Another most complex legal problem which is very timely in view of the decision in the Streck case handed down last month, in which the Supreme Court refused to deport Streck because of his alleged membership in the Communist party—is the clash and conflict that this case suggests between the ideas of freedom of speech, freedom of the press and freedom of assembly (protected in our bill of rights) and the growing conviction on the part of millions of Americans that some restrictions should be placed upon activities that are believed by many to strike at the very vitals of American democracy.

Among other new problems on the legal scene is that of taxation. It appears that the current
doctrine on taxation in the 1939 model of the law means that one can be taxed and taxed plenty. In the recent decision of the United States Supreme Court holding that salaries of state employees may be taxed by the federal government under the federal income tax and that a similar power resides in the state to tax the income from salaries of federal officials, the Supreme Court overruled decisions which were thought to settle the law to the contrary for more than one hundred years past. Mr. Justice Frankfurter, in one of his first opinions on the supreme bench, referred to Chief Justice Marshall's earlier opinion to the effect that the power to tax is the power to destroy, and said that this is not so. According to Mr. Justice Frankfurter, Chief Justice Marshall was guilty of a rhetorical flourish and this it seems is no time for rhetoric. No one, I think, will quarrel with the result reached in this recent decision referred to.
There is no reason why a state employee should not pay a federal income tax, and likewise there is no reason why a federal employee should not pay a state income tax. But the facility with which the Supreme Court was able to overrule decisions of such long standing in this matter causes one to wonder what apparently well-settled doctrines will be the next to go. I venture to predict that the Supreme Court of the United States as presently constituted will in the course of the next decade probably overrule more previous decisions of the Court than the entire number that has been overruled during the whole preceding judicial history of the Court.

Let us consider briefly another case: A fellow named Tompkins, a citizen of Pennsylvania, filed suit against the Erie Railroad Company in the federal district court in New York,
seeking to recover damages for personal injuries. The Railroad Company asserted as a defense that the injuries complained of by Tompkins had been received by him while he was a trespasser on its right-of-way in Pennsylvania. The defendant railroad company further asserted that under the law of Pennsylvania—the state where the injury occurred—the Railroad Company was not liable for negligence cause injury to such a trespasser. Tompkins, the plaintiff, contended that the Pennsylvania law did not govern and that since the suit was filed in the federal court, the federal court might take its own view as to what the applicable law was. The United States Supreme Court, over-ruuling a previous decision that had stood for 96 years, held that henceforth the federal courts are bound to apply the substantive law of the state where the injury occurred. Now no one would quarrel with the result of this case. For almost a century
it might be possible to obtain a different ruling on the merits of a case depending upon whether the suit was brought in the state court or in the federal court. Such differences, although existing in many branches of the law for almost a century, were abruptly swept away by the Supreme Court's over-ruling this early case of 96 years' standing. It is almost impossible for any lawyer to calculate the far-reaching effect of this one decision. For almost a century litigants had been advised by attorneys that if they would conduct their business in a certain way by carefully choosing the state of incorporation so that they would have resort to the federal courts, certain advantages might be assured. This decision of the Supreme Court was universally applauded, but it can be expected to be a battleground of litigation in the future and will without doubt cause many a headache to lawyers and clients alike as a result of the sudden change.
Another matter which appears on the current scene which, it seems to me, has far reaching implications for us here in the deep south, is the attitude of the United States Supreme Court toward our negro problem. The recent decision of the Supreme Court ordering the University of Missouri to admit a negro law student, and the still more recent decision holding a Louisiana conviction of a negro invalid because of the systematic exclusion of negros from the grand juries in this state, have far reaching implications. If southern states are to be required to provide educational facilities, particularly in the learned professions, this is bound to impose a great financial burden to no great practical result in the South. It is possible that these two decisions are but the forerunners of more sweeping doctrines reinterpreting the Civil War
amendments. You will, of course, recall that it has been settled doctrine of constitutional law that discrimination against negroes in the South was unlawful only when it is prescribed definitely by state legislative action. Possibly this doctrine is now due for a restatement which, from the standpoint of us in the South, may be extremely objectionable.

But let us turn from a consideration of these constitutional issues to some of the problems that are raised by recent legislation all fitting into the 1939 model of the law. We find a great variety of legislation in business, in agriculture, with regard to social conditions, with regard to economic problems. Quite recently Congress has seen fit to rewrite the entire bankruptcy law. The Chandler Act of 1938 has effected profound and radical changes in the bankruptcy law, particularly in the field of corporate reorganization. At a
recent meeting in New Orleans one of the speakers, a nationally prominent referee in bankruptcy, pointed out that more than 350 important substantive law changes had been made in the Act, many of which were unknown to the great majority of the lawyers. An important commercial subject such as the Chandler Act, bristling with questions of interpretation, presents current ground for legal conflict which will be of far reaching import to bankrupt debtors and creditors alike.

Then we have the myriad of regulatory statutes: The Securities Exchange Commission, which is given sweeping administrative duties in the corporate and financial world; we have the Public Utilities Holding Company Act of 1935, which has been referred to as the most dynamic legislation of the New Deal affecting corporations. The Public Utilities Holding
Company Act is designed to protect investors and consumers and the public generally from certain abusive practices in corporate finance and management in the public utilities field. It is not too much to expect that similar legislation may, in the not too distant future, be extended into other fields of corporate activity.

There is the important Motor Carrier Act of 1935, providing for the regulation by the federal government of interstate motor carriers. This statute also raises numerous problems of what is interstate commerce and what is a carrier engaged in interstate commerce. I might give just one example of such a problem. A second-hand automobile dealer in Omaha, Nebraska, in order to avail himself of the better market for used cars existing in the states of Oregon and California, inserted a number of advertisements
in a newspaper in Omaha soliciting passengers for transportation to points in either Oregon or California. From those persons who answered the advertisements the used car dealer would enter into a contract or agreement whereby the person selected would undertake to deliver an automobile to a certain designated point. The person so selected sometimes bought his own gasoline while en route or in some instances he paid the entire cost of his gasoline in Omaha to the used car dealer before leaving. The used car dealer did not, of course, comply with the Motor Carrier Act of 1935. He concluded that he was engaged in the business of selling and delivering used cars. Hence, there was no necessity, he thought, for complying with the Motor Carrier Act of 1935, which requires a certificate of public convenience and necessity. On this statement of facts, however,
the Interstate Commerce Commission was held to be entitled to an injunction prohibiting such used car dealers from engaging in this practice unless they first obtained certificates of public convenience and necessity. The used car dealers were held to be common carriers within the meaning of the 1935 Act and hence were required to comply with its provisions.

We notice even in state legislation new policies developing. For example, at least 43 states have now enacted a statutory expansion of the idea of unfair competition so as to include within the definition the practice of selling below a resale price stipulated by the manufacturer or distributor. The legality of agreements designed to maintain retail prices presents an innovation in the law and these statutes are the battleground of many a
current legal controversy.

Another legislative tendency of note is that towards greater uniformity through the enactment of many statutes of the uniform type, particularly in the criminal law field as a result of the influence of the National Conference of Commissioners on Uniform State Laws. The recent congressional labor legislation, particularly the Wagner Labor Relations Act and the Fair Labor Standards Act--the wages and hours law--present important questions as to the rights of labor and the statutory policies in dealing with labor.

We have also a myriad of problems that are raised by the Social Security Act and the legal status of such government owned corporations as the R.F.C., the Home Owners Loan Corporation and the Tennessee Valley Authority.
The lawyer of 1939 has been compelled to learn an entirely new system of civil procedure through the recent adoption by the United States Supreme Court of a uniform Code of Civil Procedure for the Federal Courts. There are vast realms of the substantive law which are in an abnormally active state of growth and fluxation. In our own state might be mentioned, for example, the field of mineral rights, the law of oil and gas, which, by virtue of its recent extensive development has given rise to many legal problems which plague the lawyers and the courts. Also to be mentioned is the revived Trusts law that has just been enacted in Louisiana.

But the 1939 model of the law does not only contain problems from the standpoint of new legislation and new judicial interpretation of old doctrines. There has also been the growth of
administrative tribunals which unite within one body legislative, executive and judicial functions. The American lawyer, therefore, is faced with the necessity of acquainting himself with a great variety and number of administrative rulings all of which may affect the multifarious activities of industry, agriculture or commerce. There is an obviously tendency towards giving a new meaning and an expanded conception to the restraint of trade doctrine as expressed in the Sherman Anti-Trust Act. Under Mr. Thurman Arnold the

A recent proposal in Congress in the field of taxation may be of considerable interest to the business man who must pay the bills and who is plagued with the problem of taxation. It is of course a well known fact that the income
tax directly affects more taxpayers than any other tax. Paradoxically, the federal income tax is the most complicated and the most obtuse. In fact the income tax is so difficult to understand that the United States Supreme Court spends the major portion of its time dealing with tax litigation. The business man of today, even with the aid of a Certified Public Accountant and a battery of attorneys, can never be satisfied that he is given a correct interpretation of the income tax law. It has consequently been proposed in Congress that procedure be set up for declaratory tax rulings in the interest of those taxpayers who wish to know their tax liability which will arise from a contemplated transaction. This provision for a declaratory tax ruling, if adopted, would permit the Commissioner of Internal Revenue to make rulings which when
acted upon by the tax payer would be binding upon the federal government.

Now I feel certain, in concluding, that I should admit that I have not covered the subject that was assigned to me today. I feel certain that I have not covered one-half of one percent of the subject. But I do wish to say that it has been a great pleasure to be with you on this my second visit to the Co-
Operative Club and I have enjoyed it very much.