The Codes Under the Recovery Act

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Editor—Joseph Pokart

The Codes Under the Recovery Act.—The formative period of American industry under the National Recovery Act \(^1\) is well under way. The permanent features of the Act,\(^2\) and the presumption that a liberal Supreme Court will uphold the constitutionality thereof, find sufficient support in the evolution of American economics.\(^3\) The realism of an emergency has swung the pendulum from the hysterical anarchy of industrialism to a new laissez faire in which the Executive absorbs the powers of government and administers the economic affairs of the nation.\(^4\) There is nothing essentially radical or de novo in this scheme of things; moreover, as an industrial revolution devoid of terrorism and national calamity, it would appear to be ultra-conservative.\(^5\) The Act provides that the Codes, voluntary or prescribed, have the effect of law when approved by the President and apply to all members of the industry or industries affected.\(^6\) The President stressed the co-operative and guild-like nature of this rehabilitating program;\(^7\) rather than compulsion, one might say that exhortation to legislate under supervision was invoked. In the presence of an emergency threatening survival of the sovereign, there appears to be an inherent power of the federal government to adopt reasonable and necessary measures to ensure its preservation in perpetuo.\(^8\) Modes of enforcing the promulgated Codes are provided by the Recovery Act.\(^9\) The legal problems and implications resident in the Codes and arising out of their enforcement in the new era of commerce and industry necessitate concrete

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\(^1\) 48 Stat. —, approved June 16, 1933.
\(^2\) (1933) 8 St. John's L. Rev. 201.
\(^3\) Chase, Prosperity: Fact or Myth (1929); Allen, Only Yesterday (1931); Lowenthal, The Investor Pays (1933).
\(^4\) The adverse arguments of improper delegation of powers and dictatorial compulsion are fundamentally idle as shown by the efficient operation of commissions and the fact that law and equity are in themselves no more than ordained compulsion.
\(^5\) Limiting the present view to the implications of the Codes, the lawlessness of industry which culminated in the financial debacle of 1929, supra note 3, suggests that regulation of all industry is properly a sovereign right. It was so at the early common law, infra note 125, and perhaps we have been in error in presuming to guard jealously the absolute right to produce and dispose of commodities essential to civilized life. The Codes, then, would have no fundamental quarrel with Constitutional provisions.
\(^6\) Supra note 1, tit. 1, §3 (b), (d).
\(^7\) N. R. A. Bulletin No. 1 (June 16, 1933).
\(^8\) Southport Petroleum Co. v. Ickes, Supreme Court of the District of Columbia—United States News, August 12-19, 1933.
\(^9\) Supra note 1, tit. 1, §3 (b), (c), (f); §4 (b).
solutions which must come from the federal and state courts. It is therefore of practical value to determine what the Codes contain.

Limitation of Production.

Recognition of the staggering economic waste in over-production, dissipation of natural resources and uncurbed conditional selling justifies the appearance in the Codes of restrictions on manufacture. The modus operandi of regulation has territorial and personal phases. Zonal production limited to states or districts within states is sometimes prescribed; the allocation of production has already occasioned jural notice. The adjuvant to enforcing regional production in the oil industry is found in the President's power to prohibit transportation. Production of commodities is regulated by various personal restrictions. Thus, the Codes for the Lumber and Timber Products and the Petroleum Industries seem to exclude new enterprise from their ranks; registration of existing

20 NIRA was to mother but one healthy offspring—American economic stability; but the federal and state courts will be forced to take judicial notice of the fact that NIRA has had a heterogeneous litter. They must, moreover, close one or both eyes when considering the constitutional legitimacy of this progeny. The New York State Recovery Act, Unconsolidated Laws 1933, c. 781, renders the problem of local, intra-state enforcement less difficult in New York. Something must then be done about the flotsam and jetsam left by the tidal wave of the Recovery Act and its Codes. Employer and employee will take legal inventory and the struggle between the two will proceed along new and more vital channels. New causes of action, particularly in the provinces of unfair competition, collective bargaining and sales, will modify and enlarge the common law. See MODEL STATE RECOVERY ACT, Administrator's Letter to Governors, February 12, 1934. See also Purvis v. Razemore, U. S. Dist. Ct. for Southern Dist. of Florida, December 2, 1933. In the absence of a state act, Congress may not interfere with purely local enterprise; proceedings against a Code violator must be instituted by the U. S. District Attorney. See also Opinion of the Attorney General, December 2, 1933. The Recovery Act does not apply to the Philippine Islands. It is operative in Puerto Rico.
mechanical devices and the prohibition of new installing and additional machinery, except for necessary replacements, is effected in other industries. Further, there are express stipulations concerning production quota and withdrawal from storage; likewise, maximum plant activity is controlled. And yet: "It is hereby declared to be the policy of Congress * * * to promote the fullest possible utilization of the present productive capacity of industries, [and] to avoid undue restriction of production (except as may be temporarily required)"—which presents a patent ambiguity and paradox.

That conservation of natural resources and the cure of economic waste is within the legislative scope of the sovereign power needs no champion. Yet, every phase of the program and its application outlined above has previously been held to be in restraint of trade under the Sherman Act. Criticism of these narrow holdings, the needs of demoralized industry, and the obvious advantages of reasonably controlled monopoly forced a relaxation of the strict rule where industry, in the course of normal development, achieved incidental monopoly in a particular field. The Constitution would seem to validate the Code restrictions on industrial production; the State Recovery Act extends the control to local, intrastate enterprise. The Anti-Trust and Anti-Monopoly Laws are neither repealed nor

17 Code for the Cotton Textile Industry, art. 6 (3); Code for the Iron and Steel Industry, art. 5, §2; Code for the Lace Manufacturing Industry, art. 5, §3; Code for the Textile Bag Industry, art. §6 (c).
18 Code for the Petroleum Industry, art. 3, §§1, 2, 3.
19 Code for the Cotton Textile Industry, art. 3; Code for the Wool Textile Industry, art. 4.
20 Supra note 1, tit. 1, §1.
23 Constitution of the United States, Art. 1, §8, Clause 18. Under this clause and with the precedents of McCulloch v. Maryland, 4 Wheat. 316, 4 L. ed. 57 (U. S. 1819) v. Bank of the United States, 9 Wheat. 738, 6 L. ed. 204 (U. S. 1823); Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23 (U. S. 1823) and Farmers' and Mechanics' National Bank v. Dearing, 91 U. S. 29 (1875), it would appear that Congress might, in the face of dire necessity, incorporate national industries somewhat in the manner of public benefit corporations. Surely the Codes, in comparison, achieve industrial regulation with a modicum of governmental interference and minimize the omnipresent danger of bureaucracy. See Theodore Roosevelt's speech of August, 1905, concerning federal incorporation of corporations engaged in interstate commerce.
24 Supra note 10.
25 "The operation of the National Act is excluded, legally, from dealing with industries purely intrastate (and in no way in or affecting interstate or foreign) commerce, which refuse to sign the Codes. This refusal on the part of such industries is rendered largely ineffectual, however, by the provision of the New York State Recovery Act * * *" (1933) 8 St. John's L. Rev. 201, 202.
suspended, but exemption thereunder is granted under approved Codes while such affected industries avoid operating in restraint of trade.\textsuperscript{26} The term "monopoly" has never received a lucid and precise legal definition, and the difficulty seems to be that it has become more aloof and paradoxical than heretofore. Moreover, while subject to the control of past regulatory legislation, private enterprise no longer has sole discretion over the extent of equipment and productivity of manufacturing plants; nor over the number, age, labor hours, wages and collective bargaining rights of employees.\textsuperscript{27} Despite these apparently minute restrictive measures, there are certain glaring deficiencies in the Codes, outstanding among which may be cited the Code for the Bituminous Coal Industry; in the latter there is a failure to correct or even mention the notorious surplus capacity abuses.

\textit{Price Fixing.}

In accord with the policy of regulating production, increasing consumption, conserving natural resources and establishing a uniform national economy,\textsuperscript{28} price fixing looms as a most important factor in the Recovery Program. Direct and indirect methods are employed to establish reasonable prices. The indirect means are largely concerned with rectifying unfair trade practices.\textsuperscript{29} Direct price fixing is achieved by express Code provisions to that effect; some are explicit and definite;\textsuperscript{30} others are ambiguous and flexible.\textsuperscript{31} The adoption of a uniform plan of filing financial reports, based on standard methods of accounting and arbitral determination of "fair market value" and "cost production," establishes the basis for price regulation,\textsuperscript{32} which is binding upon all members of the industry affected.\textsuperscript{33}

\textsuperscript{26} Statement of the Attorney General, July 6, 1933; Executive Order, January 20, 1934; Statement of the General Counsel of the N. R. A., January 20, 1934.

\textsuperscript{27} See under special topics, \textit{infra}.

\textsuperscript{28} \textit{Supra} note 1, tit. 1, §1.

\textsuperscript{29} \textit{Infra}, Unfair Competition, at p. 9.

\textsuperscript{30} \textit{Code for the Corset and Brassiere Industry}, art. 9 (i); \textit{Code for the Petroleum Industry}, Appendix A.

\textsuperscript{31} \textit{Code for the Bituminous Coal Industry}, art. 6; \textit{Code for the Electrical Manufacturing Industry}, art. 10; \textit{Code for the Iron and Steel Industry}, art. 7 and Schedule E.

\textsuperscript{32} Code authorities are vested with the trust to prevent excessively high prices or destructive price-cutting; the Administration and Consumers Advisory Board act as a check upon the Code authorities to ensure this control. Administrator's Summary and Preliminary Report, Release No. 2706, January 15, 1934. See also Recommendations of the National Association of Cost Accountants, January 27, 1934.

\textsuperscript{33} \textit{Code for the Electrical Manufacturing Industry}, art. 8; \textit{Code for the Lumber and Timber Products Industry}, art. 9.
The regulation of prices is at the very root of constructive as opposed to destructive competition. There are Codes which provide for the issuing of price schedules that shall be binding upon members of the industry for definite periods of time. The courts will probably refuse to enforce code provisions against violators where the fixing of prices is ambiguous and indefinite. But the United States Supreme Court has sanctioned price fixing in the milk industry; and an alleged violator has been held and successfully prosecuted under the State Recovery Act. Enforced competition as a fundamental principle of industrial economics has been abandoned under the Codes. But similar price fixing has occurred during the New York emergency housing situation. The criticism of price fixing on the grounds of impairment of contract rights is impotent; the ineffectiveness of past attempts, and the claims that price fixing results in preservation of inefficient producers and a prohibitive cost of regulation to an inexperienced government resolve themselves, as do most of the Code problems, into measures of satisfactory enforcement.

34 Code for the Petroleum Industry, art. 5, rule 3; Code for the Salt-Producing Industry, art. 4.

35 Injunction restraining under-charging denied, on the ground that the Code for the Cleaning and Dyeing Industry fixes no minimum for the type of service rendered by the defendant. Cleaners and Dyers Board of Trade v. Spotless Dollar Cleaners, Inc., Supreme Court—New York County, January 26, 1934, 91 N. L. Y. J. 441 (1934).

36 Nebbia v. New York, Supreme Court of the United States, No. 531, October Term, 1933; N. Y. Times, March 6, 1934, at 18; see also (1933) 8 St. John's L. Rev. 82.

37 The manager of Spotless Dollar Cleaners, Inc., was held for trial before the Court of Special Sessions for a violation of the State Recovery Act in cleaning a garment for a price less than the minimum established by the Administrator under the Code for the Cleaning and Dyeing Industry. People v. Denberg, Magistrate's Court, 7th Dist., New York City. Demurrer overruled, defendant convicted and fined $500. People v. Spotless Dollar Cleaners et al., Court of Special Sessions, N. Y. County, February 6, 1933.


40 In United States v. Cohen Grocery Co., supra note 38, the Lever Act was held invalid, not as interfering with contractual rights, but on the ground of an arbitrary standard of guilt.

41 The problem of the Administration is not primarily to justify the existence of the Codes under the Constitution, but, rather, enforcement. Regu-
The enforcement of the Codes in effecting price fixing represents a plunge into the very centrum of social existence. An emergency has catapulted economic theory into the legislature and market place. The issue involves the equitable distribution of the national income, allocating a smaller share to profit-takers and distributing a greater per capita wealth. The difficulties confronting this endeavor are many and strike at deeply rooted traditions and prejudices. Herein lies the character of the Codes as a peaceful and legal revolution. The difficulties to be overcome are an attestation of the inherent rapaciousness of the species in matters of trade and finance; nor is the sovereign power to be excluded from this categorical statement. The steel industry, in further illustration, has artfully achieved sanction under its Code for multiple basing points, which establishes arbitrary price discrimination on a firmer basis than obtained under the previously condemned "Pittsburgh Plus Plan."
There is no express provision in the Code for the Bituminous Coal Industry against selling below cost. This is particularly significant in view of the enormous surplus capacity production in that industry and its intimate correlation with waste of natural resources, minimum wages and the economic status of miners. The relationship between employer and employee in the coal industry has long been a notorious, latent industrial war with intervals of patent blood-letting and repression. There would, however, appear to be no clear distinction between the immunity to price fixing achieved by the federal government and the powerful industries. In the process of levelling industrial prices and effecting recovery, these arbitrary exemptions may prove to be the hurdles which will nullify the entire, beneficent, paternal scheme. President Roosevelt has said: "All employers in each trade now band themselves faithfully in these modern guilds." It will be interesting and instructive to note the construction which the courts will put (or be forced to put) on the words "all" and "faithfully" when applying them to powerful industrial units.

Minimum Wage Regulation.

Before the present crisis, attempts to fix minimum wages for labor have generally been held to be violative of the due process clause. Exception has been noted when the Adamson Act, fixing the wages of employees of railroads engaged in interstate commerce, was upheld as a valid emergency measure. The Industrial Court Act was held violative of the due process clause in fixing wages, but solely because the packing industry was not affected with a public interest as regards the wages of its employees. In this day and age, when emergency has affected all industry with a public interest, the fixing of minimum wages by the Codes may be amply justified. It will be interesting and significant in its influence on the law to note whether a national recovery and return to robust economic health will leave all industry affected with a public interest.

The Codes generally contain specific minimum wage requirements. Examples of ambiguity and flexibility are encountered. Classification of employees may defeat the purpose of the Recovery

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66 Supra note 31.
67 N. R. A. Bulletin No. 1.
68 Adkins v. Children's Hospital, 261 U. S. 525, 43 Sup. Ct. 394 (1923).
70 The distinction drawn by the Court between industry affected with and not affected with a public interest, is theoretically lucid but practically nebulous. Wolff Packing Co. v. Industrial Court, 262 U. S. 522, 43 Sup. Ct. 630 (1923).
71 Infra notes 125 and 126.
72 Code for the Automobile Manufacturing Industry, art. 2; Code for the Lumber and Timber Products Industry, art. 7; Code for the Wool Textile Industry, art. 2.
73 Code for the Retail Trade Industry, art. 6.
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Act, and there are Codes which expressly frown upon such classification. The paper and pulp industry pays higher wages to men than to women in the Northern and Central Zone; identical wages are allowed by some Codes where women are performing the same work and duties as men.

The United States District Court has granted a temporary injunction restraining the N. R. A. Administration from enforcing a minimum wage scale in a certain locality on the ground that division of the country into minimum wage zones is arbitrary. Elsewhere, a justice court has held that an employee may have judgment for the difference between the minimum wage authorized by a Re-employment Agreement and the wage actually paid on the theory that the employee is the beneficiary of a contract between the President and the employer. The courts will, unquestionably, be forced to deal with a wide variety of causes arising under the regulation of minimum wages.

Hours of Labor.

A majority of the Codes prescribe maximum hours of labor for employees engaged in the particular industries. Evasion of this program is prevented in some instances by prohibiting an employee from working for more than one employer beyond the maximum number of hours prescribed in the aggregate. The purpose of such regulation is to establish recognized standards, limit production, increase employment and ensure fair employment contracts. The element of regulating hours of labor as a health measure is certainly not significant in this program.

Limitation of hours of labor has been previously sustained on the grounds of public welfare, public interest, public health and emergency. Moreover, the hours of labor of employees of the

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54 Code for the Cotton Garment Industry, art. 6 (F); Code for the Dress Manufacturing Industry, art. 5, §6; Code for the Paper and Pulp Industry, art. 6, §4.
56 Code for the Advertising Specialty Manufacturing Industry, art. 4; Code for the Farm Equipment Industry, art. 5, §3 (b).
57 Scappinati v. N. R. A. Administration, United States Dist. Court. for Connecticut (Equity No. 2328), January 2, 1934.
59 Infra under Private Enterprise, at 414.
60 Code for the Automobile Manufacturing Industry, art. 3; Code for the Coat and Suit Industry, art. 3.
federal, state and municipal governments may be validly regulated. But hitherto the doctrine prevailed that where no injury to the general public resulted, an adult man could not lawfully be prevented from working a given number of hours per day in an industry not harmful to health and longevity per se. There is no doubt but that the Thirty-Hour Work Week Bill had its origin as an emergency employment measure and presaged the Code provisions. Whereas emergency stimulated this program, it will be important to note what permanent effect this will have on governmental regulation of the right to contract for labor and services. Certainly, the hit-or-miss practice of capital and labor, punctuated by strikes, in arriving at schedules of working hours should be corrected and reasonably controlled by governmental supervision. The broader horizon of a national point of view in this matter will make for superior legislative and judicial remedies and submerge narrow community and factional aspects in the general public welfare.

Child Labor.

The principle that child labor is undesirable is self-evident. Where the abolition of child labor as a health measure may have failed to appeal, economic stress and unemployment of adults has revived the problem. The Codes are, with some exceptions, fairly uniform in abolishing labor by those under sixteen years of age. The industries in which children of fourteen or fifteen years are permitted to work provide in their Codes that (1) such labor is not to exceed three hours per day, six days a week, or, (2) one day per week, not to exceed eight hours. The minimum working age

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63 United States v. Martin, 94 U. S. 400 (1876); see also People v. Metz, 193 N. Y. 148, 85 N. E. 1070 (1908).
65 S. 158, 73rd Cong., 1st Sess. (The United States Daily, April 1-8, 1933 at 8.)
66 It would seem from a logical analysis of the Code principles that, not only in time of war or economic emergency, but also in normal periods, the right to barter labor and services is affected with a public interest and should be merged in the public welfare to ensure the avoidance of economic and sociologic imbalance.
67 "The end, to remove conditions leading to ill health, immorality and the deterioration of the race, no one would deny to be within the scope of constitutional legislation." Mr. Justice Holmes, dissenting in Adkins v. Children's Hospital, supra note 48. See also Sturges & Burn Manufacturing Co. v. Beauchamp, 231 U. S. 320, 34 Sup. Ct. 60 (1913); People v. Ewer, 141 N. Y. 129, 36 N. E. 4 (1894).
68 Code for the Cotton Garment Industry, art. 6 (A); Code for the Dress Manufacturing Industry, art. 5, 1; Code for the Stock Exchange Firms, art. 2, §2.
69 Code for the Retail Trade Industry, art. 4, §2; Code for the Retail Jewelry Trade Industry, art. 3, §2.
is sixteen years in the motion picture industry, except where child actors are required and local laws are observed. Concessions are made to tender years in some Codes where industry or phases of industry involve special hazards or danger to health. The minimum age for such occupations is usually eighteen years, although seventeen-year-old coal miners are sanctioned.

Collective Bargaining.

An important feature of the Recovery Act is the mandatory inclusion of the substance of §7 (a) in all Codes. Employees are granted the right to collective bargaining; compulsion to join or refrain from joining a union is prohibited; and the employer is required to comply with Code hours, minimum-wage and other provisions. The evolution of precise means, through the Codes, of adjusting disputes between capital and labor will go far toward favoring industrial tranquility. The prohibition of "yellow dog" contracts is a direct grant of power to labor, the indirect results of which may be useful in constituting an additional force to coerce recalcitrant industrialism.

The majority of industries adopted §7 (a) in their Codes unqualifiedly. Some, however, attempted to restrict the effect of the Act by reserving the right to interpret the section. Others have extended the meaning of the section. The Administration has

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70 Code for the Motion Picture Industry, art. 4.
71 Code for the Newsprint Industry, art. 5, §1; Code for the Southern Rice Milling Industry, art. 5, §1; Code for the Paper and Pulp Industry, art. 6; Code for the Pyrotechnic Manufacturing Industry, art. 5, §1.
72 Code for the Bituminous Coal Industry, art. 5 (G).
73 Supra note 1, tit. 1, §7 (a), "Every code of fair competition, agreement, and license approved, prescribed or issued under this title shall contain the following conditions: (1) that employees shall have the right to organize and bargain, collectively; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President."
75 Compare: Adair v. United States, 208 U. S. 161, 28 Sup. Ct. 277 (1908), which held that laws making it unlawful or a misdemeanor for an employer to discharge an employee because of the latter's membership in a labor union, or, to force an employee to enter into a "yellow dog" contract, are invalid.
76 Art. 5 (B) of the Code for the Bituminous Coal Industry, and art. 4 of the Code for the Boot and Shoe Industry were not approved by the President and deleted from the said Codes.
77 Code for the Bituminous Coal Industry, art. 5 (E), (F): Employees are not compelled to live in houses rented from the employer, nor required to trade at a company store.
denied the right to employers to interpret the section. The autonomy of labor is essential to arrive at industrial stability in a sociologic sense, and uniformity in the adoption of the guarantees of §7 (a) in the Codes will provide the first concrete basis for judicial solutions of disputes between capital and labor. A particularly favorable influence will obtain with reference to strikes. Whereas the Clayton Act recognized the rights of organized labor, the Codes enlarge and fortify such rights. There need be no undue fear of abuse of such vested power as a group of recent decisions indicate. The remedies made available on sound statutory authority will establish an equitable solution to disputes between employers and employees whether, in a given community, one or the other is more powerful.

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78 "The plain meaning of Section 7 (A) cannot be changed by any interpretation by any one * * *. The words 'open shop' and 'closed shop' are not used in the law and cannot be written into the law. These words have no agreed meaning and will be erased from the dictionary of the N. R. A." Joint statement of Administrator and Chief of the Legal Division, August 24, 1933. See also Decision of National Labor Board, Release No. 739; and Letter of the President to the Administrator, October 19, 1933: "While there is nothing in the provisions of Section 7 (a) to interfere with the bona fide exercise of the right of an employer to select, retain or advance employees on the basis of individual merit, Section 7 (a) does clearly prohibit the pretended exercise of this right by an employer simply as a device for compelling employees to refrain from exercising the rights of self-organization, designation of representatives and collective bargaining, which are guaranteed to all employees in Section 7 (a)."

79 38 Stat. 738: Strikes by trade unions are legalized, and agreements to bring about strikes for bona fide purposes are not within the Sherman Anti-Trust Law; however, malicious strikes and those attended by violence and intimidation are not within the letter of the Clayton Act.

80 Temporary injunction denied, on the ground that the Recovery Act fortifies employees' rights to unionize and picket the places of business of recalcitrant employers. Kings County Haberdashers Association v. Retail Hat & Furnishing Salesmen's Union, Supreme Court, Kings County, January 11, 1934, 91 N. Y. L. J. 175. Injunction pendente lite granted, restraining employers operating under a Code from violating the provisions of §7 (a) incorporated in said Code. Sherman v. Abeles, Supreme Court, New York County, January 2, 1934, 91 N. Y. L. J. 21. Injunction granted, restraining defendant-employer from imposing upon striking employees the condition of joining a particular union designated by the defendant before reinstatement. Floramon Fryns v. Fair Lawn Fur Dressing Co., 114 N. J. Eq. 462 (1933).

81 The right to cease work is not absolute; a conspiracy to obstruct interstate commerce may be enjoined. Western Union Telegraph Co. v. International Brotherhood of Electrical Workers, 2 F. (2d) 993 (1924).

82 A labor union is enjoined from exhibiting signs (during a strike against the plaintiff-employer, member of an industry operating under an approved Code) charging non-compliance with the N. R. A., as improper before determination of such alleged non-compliance by a proper tribunal. Rosenthal-Ettlinger Co. v. Schlossberg, Supreme Court, Dutchess County, October 12, 1933. Alleged violations by the employer of a Code labor provision is no defense to an action by the employer to enjoin the defendant labor union from prosecuting an irregular and malicious strike. The federal government is the party to whom a cause of action accrues for such violations. J. & T. Cousins Co. v. Shoe & Leather Workers Industrial Union, Supreme Court, Kings County, November 18, 1933.
The National Labor Board has been constituted to adjust industrial disputes arising out of the interpretation and operation of the Codes in matters of employment. It has the distinct powers (1) to settle differences between employers and employees by mediation, conciliation or arbitration, (2) to authorize local or regional Boards, (3) to review the findings of local or regional Boards, and (4) to promulgate rules and regulations governing its procedure. It is not inconceivable that such a body may, as in the instance of Chancery, evolve into a special system of industrial courts.

Unfair Competition.

One of the purposes of Congress in passing the Recovery Act was to eliminate unfair competitive practices in the industries. "Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition * * *." The response of industry with a recital of unfair competitive practices has probably surpassed the fondest hopes of Congress; their number and variety is legion. Whereas it may be true that many phases of the Recovery Act and the Codes thereunder will never receive judicial notice, there is a certainty that members of industry, having learned to point the finger, will be loath to kill the goose that laid the golden eggs when economic conditions are restablized. The legislative view of unfair competition and the jural requirement of the concurring elements of (1) harm to the public, and (2) harm to competitors, necessary to constitute the wrong of unfair competition, are shown to limit the concept too strictly, unless a harm to competitors is per se a harm to the public at all times. A host of civil actions will be engendered, if nothing more, by the expansive view of unfair competition as mirrored in the Codes; this reaction will begin when individual industries or members thereof find that the Administration means to enforce the Codes. The multitude of unfair practices listed renders it impossible to be exhaustive, but a comprehensive survey is essential to grasp the nature of conditions for which industry seeks relief.

Primarily, the importance of unfair competition to government and industry attaches to the fixing and maintenance of prices and profits. In this connection, the obvious and direct question of underselling has been dealt with in many Codes by express prohibition.

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Exec. Order, December 19, 1933. (Originally created August 5, 1933.)

Supra note 1, tit. 1, §1.

Id. tit. 1, §3 (a).


Code for the Electrical Manufacturing Industry, arts. 9 and 10; Code for the Legitimate Theatre Industry, art. 16, §5; Code for the
The indirect, but nevertheless significant, influence of a multitude of trade practices on prices and profits, raises the issue of what constitutes unfair competition. An examination of the Codes is necessary to learn what industry conceives unfair competition to be.

Price-cutting by subterfuge is considered unfair competition by many industries. Thus, the giving of refunds and rebates, arbitrary trade-in allowances, and the use of cut-rate scrip and coupon books are banned. More subtle are the injunctions against prolonged servicing, selling at prices reduced from fictitious prices, commercial bribery, substitution of superior materials for those ordered, excessive commissions, maximum credit and discount terms, acceptance by retailers of non-negotiable or company scrip, and exclusive outlets. The interdicted practices listed by the Codes are sometimes reiterations of accepted concepts, but there are also novel views hitherto untested in the courts. Thus, the restraint on rebates to employees or agents of a purchaser is not unknown to the law; nor the registration of union labels and the ban on counterfeiting the same; nor the express provisions against monopoly, discrimination and oppression of small enterprise. But unfair

Retail Trade Industry, art. 8, §1; Code for the Shipbuilding and Ship-repairing Industry, art. 7 (a).

The gist of the matter would seem to be that unfair competition is a mixed question of law and fact rather than a question of law only. Compare: Code for the Petroleum Industry, art. 5, rule 7, and the holding in Sinclair Refining Co. v. Federal Trade Commission, 276 F. (1st) 686 (C. C. A. 7th, 1921).

Code for the Bituminous Coal Industry, art. 6, §§7, 17, 18.

Code for the Gasoline Pump Industry, art. 7 (g); Code for the Motor Vehicle Retailing Trade, art. 4 (A), (B).

Code for the Retail Food and Grocery Trade, art. 9, §3 (a); Code for the Petroleum Industry, art. 5, rule 3.

The Recovery Act will not be construed to prohibit payment of patronage dividends to any member of a bona fide co-operative organization. Executive Order, October 23, 1933.

Code for the Oil Burner Industry, art. 6.

Code for the Marking Devices Industry, art. 8.

Code for the Corset and Brassiere Industry, art. 9 (c), (3); Code for the Ice Industry, art. 9; Commercial Bribery Interpreted, Executive Order, November 27, 1933. But compare: Kinney-Rome Co. v. Federal Trade Commission, 275 F. (1st) 665 (C. C. A. 7th, 1921).


Code for the Corset and Brassiere Industry, art. 9 (f).

Code for the Retail Trade Industry, art. 9, §4.

Code for the Brewing Industry, art. 4.

Code for the Retail Trade Industry, art. 9 (d); to the same effect, Donemar v. Molloy, 252 N. Y. 360, 169 N. E. 610 (1930); see also New York State Penal Law §439, making it a misdemeanor to give or receive money for the corrupt influencing of agents, employees or servants.


Code for the Cotton Garment Industry, art. 14; Code for the Dress Manufacturing Industry, art. 10; Code for the Hosiery Industry, art. 12;
practices either new to the law or in conflict with existing holdings are to be noted. These include the condemnation of harassing competitors with threats of litigation,\(^{104}\) enticing away employees,\(^{105}\) misbranding merchandise,\(^{106}\) espionage and defamation,\(^{107}\) hotels soliciting business through taxi-drivers\(^{108}\) and the elimination of work done in homes, tenement houses and sweat-shops;\(^{109}\) further, payment of unreasonably high salaries is interdicted.\(^{110}\) "It is a fundamental principle * * * that trust institutions should not engage in the practice of law."\(^{111}\) Merchandise sold at a discount must be so stamped,\(^{112}\) as must also "irregulars," "seconds" and "thirds."\(^{113}\) False advertising is vigorously denounced;\(^{114}\) and likewise design piracy.\(^{115}\) The dating of seasonal sales in clothing has been prescribed.\(^{116}\) Affecting the law of sales is the inclusion in a number of Codes of an absolute prohibition against selling on consignment.\(^{117}\)

It will be apparent from this brief résumé that the existing precedents of unfair competition are inadequate to deal with the problems presented by distressed private enterprise unless all industry is conceived to be affected with a public interest. The approval or disapproval of trade practices is not new,\(^{118}\) but if the criteria of unfair competition as set up in the Codes are to be sustained as a question of law,\(^{119}\) the courts must be ready to find the same elas-

\(^{104}\) Code for the Retail Trade Industry, art. 11, §3. To the same effect: Federal and State Anti-Monopoly and Anti-Trust Laws.

\(^{105}\) Code for the Scientific Apparatus Industry, art. 7.


\(^{107}\) Code for the Boot and Shoe Industry, art. 8, §1 (a).

\(^{108}\) Code for the Oil Burner Industry, art. 6.

\(^{109}\) Code for the Hotel Industry, art. 8.


\(^{111}\) Code for the Motion Picture Industry, art. 5.

\(^{112}\) Code for Banks, sched. A, art. 7, §2.

\(^{113}\) Code for the Hosiery Industry, art. 8, §4 (c).

\(^{114}\) Code for the Hosiery Industry, art. 8, §§; Code for the Underwear and Allied Products Manufacturing Industry, pt. 6.

\(^{115}\) Code for the Beauty and Barber Supply Industry, art. 9 (I); Code for the Boot and Shoe Industry, art. 8, §1 (b); Code for the legitimate Theatre Industry, art. 17; Code for the Retail Trade Industry, art. 9, §1 (a), (b), (c); see also Kallett and Schlink, 100,000,000 Guinea Pigs (1933). But compare: Federal Trade Commission v. Raladam Co., 283 U. S. 643, 51 Sup. Ct. 587 (1931).


\(^{117}\) Code for the Men's Clothing Industry, art. 10.

\(^{118}\) Code for the Bituminous Coal Industry, art. 6, §6; Code for the Corset and Brassiere Industry, art. 9 (g); Code for the Hosiery Industry, art. 8, §5; Code for the Iron and Steel Industry, sched. E, §8; Code for the Men's Clothing Industry, art. 12.

\(^{119}\) Shipping Act, 39 Stat. 733 (1916); and supra note 86.

\(^{110}\) Supra note 88.
ticity and tensile strength in the words "unfair competition" as they have been able to do with regard to "due process."

Private Enterprise.

The Codes profess to be a covenant or partnership between industry and government. These designations, however, are applicable only if loosely employed. Important elements of the contractual status are clearly lacking, and it would be a strange partnership indeed in which one member promulgated and prescribed modes of conduct and enforced penalties against the other. The creation of Codes, Agreements and licenses represents, in reality, governmental control of private enterprise.

The Codes are incomprehensible without recourse to the history of industrial regulation and economics. In this sense, the Recovery Act and the Codes are the natural products or vintage of sociological, legislative and judicial evolution. The express provisions of the Act, that monopolies are not to be fostered and small enterprise is not to be oppressed, pay tribute to the concepts of free competition and the natural right to engage in lawful private business. Successive and dismal failures characterize previous attempts to regulate industry in the best interests of the public welfare. This is explicable on the paradoxical ground that the courts enforced competition and nevertheless sought to restrain unfair and unsafe practices. There is irreconcilable conflict between industrial circumstantial automatism and intelligent governmental control. Factually, the Codes attempt regulation of private enterprise on an experimental basis over a period of two years. The theory under which they operate is neither novel nor inconsistent with the privileges granted to persons by the Constitution. The novelty of the Codes,

200 President's Address, May 7, 1933; New York Times, May 8, 1933, at 1.
201 Supra note 1, tit. 1, § 3 (a), (d).
202 Id. tit. 1, § 4 (a), (b).
203 Supra notes 3, 5 and 10; also infra note 125.
204 Supra note 1, tit. 1, § 3 (a), (2).
205 The terms free trade and free competition in their earliest connotation had a significance identical with free town, in so far as the use of the word free is concerned. Under early common law, governmental control of commerce and commodities was absolute and paramount; but free competition was fostered only in regard to articles dealt in at markets and fairs. Similarly, the continental fairs had their royal commissioners, tribunal of fairs, and Chamber of Accounts appeals. Daireste de la Chavanne, 2 Historians' History of the World 96 (1926). The successive Anti-Trust Laws are modern efforts to control huge market activities. The Federal Trade Commission is another phase of this regulatory mechanism. The Shipping Act of 1916 enunciates methods of approving standards of fair competition.
206 "Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business cannot be upheld," says Mr. Justice Sutherland in New State Ice Co. v. Liebmann, 285 U. S. 262, at 308, 53 Sup. Ct. 371, at 385 (1932). But economic emer-
as compared with previous legislation, will become apparent only by
dint of successful enforcement.\(^\text{127}\)

Monopoly is not inherently harmful, unlawful nor unconstitu-
tional.\(^\text{128}\) Governmental control of successful and efficient monopoly
in industry has, by a process of exclusion, come to be the recognized
salvation of national commercial integrity as expressed in the Codes.
The independence of small enterprise is incompatible with the ulti-
mate goal of industrial regulation.\(^\text{129}\) The curtailment of over-
production, economic waste, depletion of natural resources, unfair
competition, unconscionable profits, unbalanced sociological condi-
tions, and piratical commercial ventures which undermine govern-
ment—the problem undertaken by the Codes under the Recovery
Act—has far-reaching beneficial implications with reference to na-
tional and international finance, stability and peace. To hazard
predictions as to the permanence of the present Codes, in form or
in substance, would be futile and frivolous.

The importance of the Recovery Act and its Codes assumes a
special significance if we realize that the present depression is entirely
different in character from any we have had before in the United
States. Previous depressions have been relieved by the migration
of the financially insolvent to spreading frontiers, or the stimulus
of war on trade has been the saving grace. There are no longer
spreading American frontiers; the barbaric interpolation of war as a
remedy for industrial conditions is to be deprecated. The United
States Supreme Court is faced with issues vaster and more significant
than those presented by the negro slavery problem. Then, as now,
gency has been held to affect industry with a public interest. Wilson v. New,
\textit{supra} note 49. There is grave doubt whether the right to engage in industrial
enterprise (in such a manner as to threaten the survival of the sovereign and
industry) is to be sustained, historically and legally, as a natural right. Divested
of forms and flummery, the substance of the Recovery Act and the Codes
indicates that all industry is affected with a public interest. The right to
produce and dispose of commodities may be compared with the right to dispose
of property at death; the N. R. A. and its Codes are therefore analogous to
the Statute of Wills and the Decedent Estate Law. The successful regulation
of industry must rest on something more than a flimsy rule of emergency;
continuous rather than intermittent, flexible and ineffective control of industrial
enterprise for the public weal and as a prophylactic against economic calamities
depends upon a clear recognition of the statutory nature of industrial prop-
erty rights.

\(^{127}\) \textit{Supra} notes 41, 43, 44, 45.
\(^{128}\) Dissenting opinion of Mr. Justice Brandeis, \textit{New State Ice Co. v. Lieb-
mann, supra} note 126. Furthermore, government \textit{per se} is a monopoly; its
departments function as monopolies within a monopoly. The term \textit{monopoly}
does not connote a necessarily evil or undesirable intent or effect.

\(^{129}\) Independent small enterprise is wasteful, unorganized, inefficient and
chaotic, costly to the consumer of commodities and extremely difficult to
control. See N. R. A. Release No. 148, July 31, 1933; also N. R. A. Release
No. 3114, February 5, 1934. Licensing has been evolving for some time. The
effect on professional enterprise has not been oppressive in general but rather
beneficial.
the crisis demanded solution. Evasion and vacillation are impotent; for, "he who fights and runs away, will live to fight another day."

The National Recovery Act and its Codes are advanced industrial legislation and may be viewed as a current on which the Ship of State rides between the Scylla of imperial industrialism and the Charybdis of dictatorial communism. There is pressing need to distinguish the progressive and the radical, the constructive and the destructive in the gigantic program of economic rehabilitation. The history of American political and social crises engenders the confidence that necessity will call forth another John Marshall to pilot the Ship of State into the open sea; there are natural rights of civil and organic nature, inherent in the American Constitution and our common law, which transcend and must survive the enactment and enforcement of social and industrial legislation. It is to this problem that the judiciary of the nation is addressed; the society and industry of the future rest in the lap of the lawyers of the United States.

EMIL F. KOCH.

COLLECTIVE BARGAINING, AN INTERPRETATION.—When the present administration came into power the nation was in the throes of economic despair. Labor and industry called, from that deep morass of disorganization and self-destruction, for some hand which they might grasp, for some guide by which they could lift themselves from their desperate plight. The administration answered that call. It set up a system that would enable business to regulate itself and by which this ruthless and anti-social industrial warfare would cease; and so the N. R. A. was born.1

It was soon evident that this regulatory system was threatened by the tendency of one group to raise itself out of the mire by subjecting the other to oppression. To remove this threat a clause was inserted by which these two opposing factions could be placed upon a more equal footing, and by which it could be made evident that the aspirations of both were inextricably bound up, and that one must rise or fall with the other. This idea was embodied in a section of the National Industrial Recovery Act, now famous as §7A, and it is an interpretation of this feature that is here sought to be made.2

The clause as it was written into the N. R. A. is on its face unambiguous. It provides simply, that "Every code shall contain the following conditions:

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1 Levine, Red Smoke (1932); Wells, Kapoot (1933).