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ARTICLES

Industrial Standards, Antitrust, and the Logic of Public Action: An Historical Search for a Rational Public Policy

William J. Curran*

I. INTRODUCTION

The proper relationship between this nation's government and its private free enterprise economic system has become a subject of heated public debate. As government's sphere of interest expands ineluctably, this debate has intensified to the point that rational discourse and analysis has become increasingly difficult. Unfortunately, lost in the tumult of this consuming public colloquy has been the quieter debate over the private versus the governmental development of industrial standards, a subject of significance to industry but virtually unknown to most citizens. Recently, a Congressional

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3. The term "industrial standards" must be carefully defined to avoid confusion with other types of standards, such as mandatory safety standards. Generally, the term will be used generically in this article to include three other terms, "standardization," "simplification," and "certification." Standardization merely refers to the act of using a standard by different manufacturers who wish to produce a uniform or identical product or utilize a common design so their products will be interchangeable. Certification is the testing of uniform products to determine whether they conform to a standard. Simplification is the elimination of product types of varieties resulting in a standardized product. In sum, an industrial standard would be used for a variety of purposes including the establishment of (1) a common definition of an industrial term, (2) quality specifications for materials or equipment, (3) procedures for the use or operation of a product or machinery, and (4) means for rating product durability or performance. As used here, industrial standards are those devised voluntarily, not under governmental compulsion or statutory fiat.
4. A recent report prepared for the United States Senate has commented on the full impact of standards in particularly dramatic terms:

[Why does Superman always win in the end? The answer, surprisingly, can be found at least in part in a trade product standard. The standard, voluntarily set and
committee studied the topic, and a bill was introduced by a Committee member which for the first time provided for governmental participation in the formulation and promulgation of industrial standards. Although the bill languishes in committee, the time remains

enforced by the Comics Magazine Association of America, forbids comic books from depicting criminals as ultimately victorious.

Trade product standards (which essentially are written specifications of product features) also help explain: Why most comic books have no nudity, but plenty of violence; why our Nation’s schools and offices are lit far more brightly than a generation ago, even though energy is now scarcer; why a machine bolt purchased in Albuquerque will fit a nut in Ypsilanti; why typewriter keyboards are arranged inefficiently, so weak pinkies must type the letter “a” while stronger forefingers type the seldom used letter “v”; why consumers can’t buy an energy-saving device that keeps heat from escaping up the flue when their gas furnaces are off.

If you’ve never thought about these questions, or even about trade product standards in general, don’t worry. You’re not alone. Trade product standards are an area of our economy familiar to few consumers. Yet, as is often the case with such backwaters of corporate activity, trade standards have an enormous impact on our lives. Some 20,000 trade standards at least partly determine the safety, availability, and price of products ranging from household gas stoves to nuclear reactors. For consumers, trade product standards determine such things as the length of shoelaces; width of auto tires; ingredients of house paint; specifications of lawn mowers; sizes of door frames; and design of child car seats.

CENTER FOR THE STUDY OF RESPONSIVE LAW, QUESTIONS AND ANSWERS ABOUT TRADE PRODUCT STANDARDS: A PRIMER FOR CONSUMERS PREPARED FOR THE SUBCOMMITTEE ON ANTITRUST AND MONOPOLY, 95th Cong., 1st Sess. 1 (1977) [hereinafter cited as CENTER FOR THE STUDY OF RESPONSIVE LAW].


6. S. 825, 95th Cong., 2d Sess. (1977). This omnibus legislation, introduced by Senator Abourezk and others, provides for a national policy for the development of product standards and the testing and certification of product. Upon introducing the bill, Senator Abourezk remarked:

[T]oday I am introducing a bill which will insure that private standards developers, product testers, and certifiers conduct their activities in a manner consistent with our antitrust laws and consumer protection policies. . . .

There are over 400 standards-developing organizations and several testing/certification laboratories which are, in every respect, private regulatory agencies. These groups, who operate with very little Federal or State oversight, determine what products you and I will be able to purchase and which manufacturers will or will not enter the marketplace.

. . . .

I do not quarrel with these groups getting together for this purpose, because standards . . . play an important role in a highly technical industrial society . . . But, all too often our procedures for setting standards yield precisely the opposite results. Product standards . . . are unquestionably [among] today’s most convenient modes for restraining trade and deceiving customers.

CONG. REC. S3156 (daily ed. March 1, 1977).

In recent months, the Federal Trade Commission has also studied the standards process
eminently appropriate for an examination of America's present policies toward standards, for an evaluation of the adequacy of the present standards system, and for a consideration of fresh policy prescriptions for the future.

As the examination in this article reveals, there are failures on the part of the nation to understand the exact nature of industrial standards, to grasp their industrial and technical importance, and to appreciate the pervasiveness of their impact on all of economic society. Not surprisingly, these failures have lead to inconsistent economic and legal policies, and have generated untold economic costs and losses from impaired commercial and consumer judgments. If Congress is to come to grips with these failures, it must recognize that they are symptomatic of a larger organizational malaise, and it must decide between continued private development or future governmental action. Congress should not base its decision on traditional ad hoc political principles, but on the superior strength of an objective analytical method—such as the logic of economic science known as "public choice analysis." The purpose of this article is to determine whether this type of analysis can be fruitfully applied to the question of privately or publicly developed standards.

II. PUBLIC CHOICE ANALYSIS

The logic of public choice analysis suggests the circumstances under which governmental intervention may be more appropriate than private initiative. Under this analysis, government would assume an industrial function which is "public" in nature, while firms in an industry would individually or interdependently fulfill all "private" functions. To better understand these "private/public" distinctions, consider an industrial market economy with few firms.

seriously and proposed a Trade Regulation Rule governing the internal operations of private standards organizations. 16 C.F.R. § 457 (1978). Additional federal interest in standards has been shown lately by the Office of Management and Budget (Circular on Standardization (December 22, 1977)) and the Department of Commerce (A Recommended National Standards Policy for the United States (February 8, 1978)).


In this type of basic economy, firms would perform all industrial functions, and government intervention would be limited to the enforcement of fundamental personal and property rights. Government need not intrude more, since the firms themselves, by fulfilling and satisfying their collective needs, would establish an orderly and complete economic process. This basic economic system uses the collective self-interests of firms to establish socially desirable goals, and would be essentially private in nature. Of course, not all industrial interrelationships are reducible to a few firms. Some will involve the simultaneous interaction of many firms in a considerably more complex economy. In such multi-firm systems, transaction costs would not be negligible as each firm would find it advantageous to engage in strategic conduct with its rivals resulting in delay, confusion, and other competitive difficulties. The substantial problem of securing voluntary interaction among firms in this more complex economy is referred to as the "free-rider" problem and is the principal reason for remedial governmental action.

It should now be easy to see the logic of public choice analysis. If an industrial activity involves most of an industry's firms in a complex economy, transaction costs become prohibitive, and governmental action may be necessary to reduce costs and secure tolerable results even when balanced against the costs of an enlarged bureaucracy. Governmental intercession may also be needed if significant "externalities" exist. Since externality is by definition present whenever a cost is incurred or a benefit is received by some as a result of the activities of others, any function having an impact outside the industry involved, or having free-rider complications, may be best performed directly through governmental means.

Is there a logical basis for making a choice between either the private or public development of industrial standards based on these public choice principles? By examining the current private system first, it is seen that standards are developed interdependently through the efforts of industry in conjunction with technical

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9. *Id.* at 3-4.
10. *Id.* at 5-6.
11. *Id.* at 6. See also *Public Goods*, *supra* note 7, at 77-100 for an excellent theoretical discussion of the free-rider problem.
and engineering societies and trade associations, but rarely engaging any interests apart from these narrow private concerns. This system has developed some 20,000 standards which largely determine the quality, availability, and safety of the nation's entire economic output as well as the techniques of production used to manufacture and distribute these goods. Logic suggests that private development, engaging only narrow competitive interests with limited private perspectives, could not be expected to generate essential, impartial, and non-discriminatory standards and would not be mindful of their probable impact on society. Failure to involve all potentially affected, and to consider their full external impact, raises grave questions about continued private development. Governmental action might reduce the "free-rider" problem by engaging all groups likely to be affected, but might jeopardize the private freedoms of the present voluntary process. Thus, conceptual analysis reduces to a comparison of two second-best alternatives both with some inherent disadvantages. Unfortunately, no logical choice between the two can be made.

This pure a priori analysis does not yield a conclusive choice. However, this article will demonstrate that a rational selection can be made on more practical grounds, still within a public choice framework. This can be done since the government itself has assisted industry in developing standards in the past and its performance can be compared with private industry's. Comparative study of the relevant economic, political, and legal factors will reveal a uniquely superior standards organization processing both public and private features as well as highlighting a historical conflict between standards and the antitrust laws.

III. COMPARATIVE HISTORICAL STUDY OF PRIVATE AND PUBLIC INDUSTRIAL STANDARDS

This comparative study of industrial standards encompasses three distinct historical stages. The first commences with several early standards efforts during the Industrial Revolution, continuing through the adoption of the Sherman Act and the Supreme Court's initial attempts to develop a coherent competition policy, and concludes with the First World War and government's first big stan-

15. CENTER FOR THE STUDY OF RESPONSIVE LAW, supra note 4, at 1.
A. First Historical Stage From the Industrial Revolution Through the First World War

The modern history of industrial standards\textsuperscript{16} commences with that creative genius, Eli Whitney, imploiring President Jefferson to adopt uniform musket parts for the nation's defense.\textsuperscript{17} On the strength of such individual creativity,\textsuperscript{18} the history of standards proceeds well into the 19th century before the scientific revolution\textsuperscript{19}


\textsuperscript{17} J. Mirsky & A. Nevins, \textit{The World of Eli Whitney} 201 (1952).

\textsuperscript{18} Reck, \textit{supra note 16}, at 13-17. Some examples of early standardization would be the first use of mass production by the grain milling industry. Milling had been a slow laborious hand process, but was revolutionized with the introduction of continuously operating conveyors, elevators, and other mechanical devices. Reck, \textit{supra note 16}, at 14-15.

Other examples were the standardization of shoe sizes, paper and bottle top sizes, and matching of laces with shoes. Perry, \textit{supra note 16}, at 127.

\textsuperscript{19} An economist of the day in 1889 catalogued the scientific and technological developments of this remarkable era:

\textit{[M]echnical reapers, mowing and seeding machines, the steam-plow and most other eminently labor-saving agricultural devices; the Bessemer process and the steel rail (1857); the submarine and transoceanic telegraph cables (1866); photography and all its adjuncts; electroplating and the electrotype; the steamhammer, repeating and breech-loading firearms, and rifled and steel cannon; gun-cotton and dynamite; the}
stimulated private collectivization along with voluntary interaction and free rider problems. With each new discovery and innova-

industrial use of India-rubber and gutta-percha; the steam excavator and steam drill; the sewing machine; the practical use of the electric light; the application of dynamic electricity as a motor for machinery; the steam fire-engine; the telephone, microphone, spectroscope, and the process of spectral analysis; the polariscope; the compound steam engine; the centrifugal process of refining sugar, the rotary printing press; hydraulic lifts, cranes and elevators; the 'regenerative' furnace, iron and steel ships, pressed glass, wire rope, petroleum and its derivatives, and aniline dyes; the industrial use of the metal nickel, cotton-seed oil, artificial butter, stearine-candles, natural gas, cheap postage, and the postage stamp. Electricity which a very few years ago was regarded as something wholly immaterial, has now acquired a sufficiently objective existence to admit of being manufacturing and sold the same as pig iron or leather.

D. Wells, Recent Economic Changes (1889) (as quoted in H. Thorelli, The Federal Antitrust Policy 63-64 (1955)).

Other technological advances of the American Industrial Revolution are surveyed in detail in H. Thompson, The Age of Inventions (1921); Popular History of American Inventions (W. Kempttft ed. 1924); A. Usher, A History of Mechanical Invention (1929); J. Oliver, History of American Technology (1956); and R. Kirby, Engineering in History (1956).

20. In 1884 electrical manufacturers established standard size light bulbs for electric lamps after enduring 175 different socket sizes. Perry, supra note 16, at 127. Both the automobile and tire industries worked on uniform tire sizes, and, with the Society of Automobile Engineers, automobile producers developed standard dimensions, materials, and nomenclature. C. Pearce, Trade Association Survey 309-11 (TNEC Monograph No. 18, 1941) and J. Gaillard, Industrial Standardization: Its Principles and Application (1934). Also, between 1909 and 1911 the tire industry standardized and stabilized the design, fabrics, and construction of tires and by 1911 had increased total annual production to over six million tires. V. Clark, III History of Manufacturers in the United States 1893-1928, 236-37 (1929). Collaboration with engineering and technical societies, as well as trade associations, further facilitated the collective process. In 1904 the nation's Portland cement producers formed an association for developing standards, id. at 254-56; the Glass Blower's Association took an active political posture for its members against standardized and cheaper mass bottle production, M. Watkins, Industrial Combinations and Public Policy 144-46 (1927); the Association of American Steel Manufacturers in 1895 formulated standard specifications for steel castings, axles, forgings, rails and structural steel, Clark, supra at 80, and in 1898 the National Association of Wool Manufacturers advocated specialized plants for production of standardized wool products. Id.

21. As the collective process expands, there is clear evidence of voluntary interaction difficulties and free-rider manifestations. The interminable screw thread controversy is an apt example. For years, industry had produced different sizes of thread, and attempted without success at an 1864 conference to agree collectively on a standard size. In 1919 Congress finally stepped in and appointed a national commission authorized to establish a standard size — after industry failed on its own for over fifty years. Reck, supra note 16, at 15-17; Leggett, supra note 16, at 55-60; and Melnitsky, supra note 16, at 36-37. Another early example is the usage by railroads of different couplings, track sizes, and sizes and shapes of rolling stock. National Industrial Conference Board, supra note 16, at 10; and Melnitsky, supra note 16, at 36-37. Only after the government intervened in 1862 did the railroads become interchangeable and standardized, and the east finally merged the westward frontier through an interconnecting transportation system. Reck, supra note 16, at 19. Impressive as they were, the remarkable material gains of the Industrial Revolution were completely vulnerable to
an inevitable struggle erupted between existing commercial realities and emerging technological imperatives. This struggle led to increased incentives to protect investments in outmoded capital and to use the standardization process to retard the implementation of new technology and the development of new and varied products. In time the whole process would be employed by industry to establish a consensus as to product types, productive methods, competitive strategies, and prices. And, through the infamous destruction by fire until fire fighting equipment was standardized uniformly by local governments across the country. Unfortunately, the decisive impetus for standardization was the almost total destruction of the city of Baltimore. Letter Circular 1947 of the Department of Commerce, National Bureau of Standards, entitled The Development and Use of Voluntary Standards (rev. February 1973). The Baltimore fire incident is also retold in an earlier Bureau of Standard's Publication entitled Standards for Progress 703 (1966). The Bureau estimated that the holocaust required fire fighting units from as far as New York City, Philadelphia, Annapolis and Wilmington, and that many arrived only to find that few of their hoses matched or fitted the local hydrants. Destroyed in the inferno were 1,526 buildings and all utility and power facilities in a radius of 70 city blocks. LEGGERT, supra note 16, at 59.

The pace of scientific and technological discovery is exemplified by Patent Office reports of an average of 77 inventions made annually each year over a 20-year period from 1790 to 1811, and the significant increase in the year 1830 to 544 patents. Even more astonishing were later Patent Office reports that it issued 6,460 patents from 1841 to 1850, and that patents increased to 25,250 over the next decade. H. FAULKNER, AMERICAN ECONOMIC HISTORY 248 (1960).

See also THORELLI, supra note 19, at 63-64.

A factually rich discussion of the historic failure of corporations to embrace each new technological discovery eagerly is in J. BLAIR, ECONOMIC CONCENTRATION 228-36 (1972). Blair claims that corporations may eschew technological process for a variety of reasons, including the "desire to protect the investment in an older technology." Id. at 228.

Such intra-industry cooperation was apparently one of America's distinctive and unique characteristics as was first observed and commented upon by America's foremost social observer of the 19th century, Alexis de Tocqueville. In his remarkably insightful treatise, DEMOCRACY IN AMERICA (1935), Tocqueville observed that:

Americans of all ages, all conditions and all dispositions, constantly form associations...

... The most democratic country on the face of the earth is that in which men in our times have carried to the highest perfection the art of pursuing in common the objects of their common desire, and have applied this new science to the greatest number of purposes.

Quoted in Melnitsky, supra note 16, at 37.

Victor S. Clark, an important observer of this period in history, has summarized the inter-play of these dynamic forces:

Great manufacturing combinations in addition to regulating production and stabilizing prices, have standardized goods and services, without which price control is impossible, and created habits of consumption. In other words they have standardized not only the wares they made but also the tastes of those who use them. They have thus strengthened their hold upon their market, economized production costs, and widened their circle of consumers. On the other hand, dangers unknown in the slower
“combination and trust” device,\textsuperscript{26} significant economic power was consolidated,\textsuperscript{27} with the public’s distrust of concentrated power, provoking Congress in 1890 to adopt the Sherman Act.\textsuperscript{28}

days of old threaten their posterity. A growing share of our manufacturing product now consists of unessentials . . . determined largely by fashion and caprice . . . Furthermore, new inventions have displaced what had come to be considered staple necessities. The incandescent bulb supplanted the kerosene lamp; the furnace, the stove; the Ford car, the light buggy; the radio set, the Victrola. So new disturbances have interrupted the market rhythm just when manufacturers seem to have discovered a way to govern its pulsations.

Clark, supra note 20, at 354.

26. There are few contemporaneous treatments of the problems and consequences of the combination and trust movement of the late 19th and early 20th centuries. These include the notable J. Moody, The Truth About Trusts: A Description and Analysis of the American Trust Movement (1904), which describes various trust groups around 1900 and evaluates their significance; W. Ripley, Trusts, Pools and Corporations (1916); J. Jenkins & W. Clarke, The Trust Problem (1917); J. Hendricks, The Age of Big Business (1919); and M. Josephson, The Robber Barons: The Great American Capitalists, 1865-1901 (1935).

27. The total aggregation of economic power captured by the trusts was calculated in impressive numbers in 1904:

\textsuperscript{[A]ggregate capitalization [in] the 318 important and active Industrial Trusts in this country is at the present time no less that $7,246,342,533, representing in all consolidations of nearly 5,300 distinct plants, and covering practically every line of productive industry in the United States . . .

In the matter of control of their respective industries or markets . . . these percentages range all the way from 10\% to 95\%, and there are many cases in which the Trust does not control more than 40\%. Of the total . . . [industrial trusts], however, 78 control 50\% or more of their product, and 57 control 60\% or more. Twenty-six control 80\% or over.

Thus, it will be seen that including Industrial, Franchise, Transportation and miscellaneous, about 445 active Trusts . . . [have] a total capitalization of $20,379,162,551. They embrace in all about 8,664 original companies.


Within the Sherman Act is embodied the fundamental competitive character of the nation's free enterprise system. The Act promotes the public's welfare through the impersonal allocation of resources by proscribing every contract, combination, and conspiracy in restraint of trade among competing enterprises. However, this objective proved elusive because of the Act's broad and all encompassing language. Conceivably, every contract and agreement, including the collective development of standards, could be illegal under a literal interpretation of the Act. Clearly, if the Act were to be interpreted and enforced rationally, a statutory rule of construction would have to be adopted. It was twenty years before an attempt was made.

In the beginning of these twenty years, the Justice Department instituted only a few cases and did not directly challenge standards, possibly as agreements to eliminate product types, but did bring one monumental case which upon review by the Supreme Court resulted in that long awaited rule of construction. From the time of this decision, United States v. Standard Oil, industrial arrangements not directly and immediately impinging on prices would be lawful, if passing a full competitive evaluation for "unreasonable" effects. But, since standards can affect prices, it remained for the Court to determine whether they would pass such an analysis. The next year the Court in United States v. Standard Sanitary Manufacturing Company articulated some economic circumstances which could render a standard illegal. In this decision the Court ruled that an agreement to manufacture a preferred product grade at a fixed price, and the discontinuance of an inferior grade, was "unreasonable" and hence illegal under Section 1. But, having decided that the concerted elimination of "seconds" was unlawful to help fix the price of a standardized grade, the Court impliedly raised the larger question of whether any product elimina-

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32. Neale, supra note 28, at 28-29. See also Posner, A Statistical Study of Antitrust Enforcement, 13 J. Law & Econ. 365, 366 (1970). Posner in his article has many interesting charts and graphs depicting the historical levels of Sherman Act enforcement, both federal and private, as well as enforcement of other antitrust statutes.
33. 221 U.S. 1 (1911).
34. 226 U.S. 20 (1912).
tion would be lawful since it affects the price of the remaining product. Even the broader Chicago Board of Trade\textsuperscript{35} test of 1918 did not satisfactorily resolve this question. In the language of this decision, standards do not “merely” regulate, but can “suppress or even destroy” competition among competitors in product types and varieties—much less enhance the price of a standardized product. Thus, since standards can be so inimical to competition, this very general test would not establish their legality.

During these early years, the Sherman Act’s broad and imprecise proscription against collective business agreements and the Supreme Court’s uncertain judicial interpretations did not retard the development of standards.\textsuperscript{36} In fact, with the advent of the 20th century,\textsuperscript{37} the formulation of standards continued, but with a criti-
cal difference. Standards were no longer randomly formulated through the private action of individuals, corporations, and regional industries. They now arose through their combined efforts along with engineering and scientific societies and trade associations. In order to buttress their efforts, they asked Congress to create a governmental organization which, with their consultation, would establish the National Bureau of Standards to provide technical standards advice and assistance as a supplement to industry’s efforts.

With collectivization reaching national proportions at the close of the last century, standards had already achieved significant “externality” potential and demonstrated some of the “free-rider” symptomotology of what is in economic logic a public rather than a private function. Standardization by private interests did not portend well, were it not for the spill-over benefits from the nation’s approaching all out collective defense effort.

Upon entering World War I, America marshalled resources with a vengeance. A War Industries Board was promptly organized to increase productive capacity and conserve necessary resources. It temporarily nationalized industries, controlled their procurements, and monitored prices. The Board eventually regulated the manufacture of some 30,000 products and reduced costs in over 260 industries by standardizing product styles, varieties, sizes, and colors.

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41. The monumental mobilization task facing America assumed awesome dimensions: The magnitude of the task of war supply may be portrayed to some degree in quantitative terms. During the course of the war the government is estimated to have spent for military purposes some 22 billion dollars, a sum larger than the total cost of the federal government during the entire period from 1791 to the outbreak of the war. Affected by these expenditures of government were some 30,000 different types of commodities relating to all of the 344 census categories of industries. Many of these products were wholly or partly new in design and required new types of equipment for their manufacture. A large number were required in quantities greater than had ever before been produced in our country.
42. A definitive and recent historical analysis of the War Industries Board is found in R. Cuff, The War Industries Board (1973).
44. Everyone was touched closely and intimately by government’s efforts to simplify and
Further coordination was achieved directly through Presidential implementation of joint industrial practices. Although Congressionally mandated, the Congress did not immunize the participants, and no one, even the Justice Department, voiced antitrust objections. In fact, the Attorney General tacitly recognized the vital importance of wartime industrial cooperation rather than competition, and later remarked publicly that the antitrust laws were "somewhat narrowed during the War by the direct intervention of the Government itself in industry, trade, and transportation." One standardize in order to aid the War effort. The degree to which these efforts affected everyone's lives and the nation's industrial production is depicted in G. Clarkson, Industrial America in the World War 210-225 (1923).

Bernard Baruch, the venerable head of the Board, in his 1921 final report commented on the sheer magnitude of this governmental standardization effort:

The War Industries Board, by means of its system of priorities, worked out a program for the operation of industrial plants on the balanced basis. It controlled the awarding of contracts, the fixing of prices, the allotments of raw materials, power and labor. Non-essential industries, such as super luxuries, were discouraged, essential industries were encouraged. Its economies through standardization and simplification of industrial products were very great. It saved 50,000,000 yards of wool, 260,000 tons of tinplate; cut the styles of stoves and heaters 75 per cent, eliminated 5,500 styles in rubber footwear, cut tire varieties from 287 to 32, cut shoe colors from 81 to 6, cut trunks to 6 sizes, reduced washing machine styles from 446 to 18, and eliminated 90 per cent of household wringer styles, cut pocket knives from 300 styles to 45, plows from 312 to 76, harrows from 589 to 38, and saved 600,000 barrels of flour by improved bread marketing methods . . .


45. The Lever Act, 40 Stat. L. 276 (1917). Section two thereof provided:

That in carrying out the purposes of this Act the President is authorized to enter into any voluntary arrangements or agreements, to create and use any agency or agencies, to accept the services of any person without compensation, to cooperate with any agency or person, to utilize any department or agency of the Government, and to coordinate their activities so as to avoid any preventable loss or duplication of effort of funds.

See also Cuff, supra note 42, at 310-12.

During the War, the Department did institute one action with standards implications. United States v. George H. Mead, Cr. No. 9-371 (S.D.N.Y. April 12, 1917) (indictment returned), civil complaint filed November 26, 1917, Eq. No. 14-384, S.D.N.Y., consent decree entered November 26, 1917. In this Section 1 indictment it was charged that several newsprint manufacturers unlawfully conspired to increase the price of newsprint, to discourage the erection of new mills and the installation of new machinery, and to restrain competition in the quality of papers, thus, in effect, conspiring to maintain as a standard for the industry the then current quality of paper. Unfortunately, the district court did not have an opportunity to rule on the reasonableness of these practices, since the manufacturers entered with the Department into a consent judgment enjoining the continuation of this conspiracy. See Comment, The Sherman Act and the War, 18 Colum. L. Rev. 137 (1918).

47. Id. at 995.
astute observer did see a difficulty, and prophesized a conflict after the War between the dictates of the antitrust laws and the industrial practices necessitated by the exigencies of the times. All in all, however, the nation's ultimate victory was accomplished in part through this major governmentally sponsored standardization effort achieved through the close cooperation of industry, trade associations, and technical societies. Unfortunately, America's historical antipathy toward governmental intervention plus industry's assumed credit for the War's standardization successes meant continued private development and further problems with this inherently defective collective process.

B. Second Historical Stage From the 1920s Through the Second World War

Commencing with a landmark engineering study, which claimed a twenty-five percent cost reduction for standardized production,

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A historical review of the period suggests that the standards experiences of the War provided a major impetus for increased productivity gains in following years:

Another influence that facilitated gains in efficiency in this period was a delayed effect of measures inaugurated during the war itself, the full benefit of which could not be enjoyed while they were still unfamiliar . . . mass production methods in building ships, airplane motors, and many other goods proved themselves on a large scale at the end of the war and were later extended where volume of output was adequate to justify them and the product could be sufficiently standardized. The great addition to plant and machinery — much of it of new design — installed for war purposes now took effect in economies of peacetime production. Standardization of parts and processes, reduction of the number of styles and designs, and the method of modern engineering management . . . had been made familiar to many during the war and now were adopted on a wider scale.

Quoted from G. Soule, Prosperity Decade 128 (1947).

50. It has been suggested that some businessmen used the occasion of the War as a very convenient excuse to standardize, and that there were no legitimate requirements to "rationalize . . . [an] industry and end the confusion of a multiple of competing styles, sizes and so on." On the other hand, some business interests felt that standardization "is in reality [in] the best interests of the trade . . . The number of shapes that have been produced and the number of decorations brought out and specifically made and carried in open stock have been little short of reckless." Some questions regarding the standards concept would be hardly surprising in light of such diverse opinions. See Cuff, supra note 42, at 203-04.

51. American Engineering Council, Waste in Industry (1921). The Waste in Industry report claimed that savings from standardization in six typical industries could amount to $10 billion annually, and that wasteful practices in these industries accounted for almost 50%
and with the appointment of Herbert Hoover, who authored the study, as Secretary of Commerce, the nation entered its supreme industrial standards epoch. Immediately, Hoover instituted a far ranging standardization program which only motivated industry further to try once again for mandatory standards legislation. Hoover balked, believing fervently that standards must be voluntarily established, but authorized his Department to work directly with industry in resolving standards problems. His programs for industry and trade associations were famously successful, but unbek-

of all materials and labor. The six industries and the rather astonishing percentage savings were: metal trades — 29%; shoe manufacturers — 41%; textile manufacturers — 49%; building trades — 54% printing industry — 58%; and men's clothing manufacturers — 64%. Quoted from Science Policy Research Division, supra note 16, at 12.

52. Id. at 12-13. The new division in the Bureau of Standards was very active. For example, recommendations issued by the division resulted in reductions in

[H]otel chinaware from 700 to 160 varieties, files and rasps from 1,351 to 496 types, milk bottles from 49 to 9 different designs, and book and magazine papers from 267 to 11 sizes. Recommendations on the verge of acceptance ranged from warehouse and invoice forms to paintbrushes and paper bag sizes. Totting up the rewards as leaders in the crusade, representatives in nine important industries cooperating with the division estimated that their annual savings through simplification already exceeded $293 million.

Id. at 14.

53. Id.

54. It has been reported that in 1926 trade associations were engaged in standards work, and that by 1938 the number increased to 725. The nation's first standards-making engineering society, the American Society for Testing Materials, had formulated by the late 1930's about 800 standards for its 4,000 members. The nation's other principal standards society, the American Standards Association, had a membership of more than 60 national trade associations and technical societies, several federal governmental departments, and approximately 2,000 private firms. Over these years, the Bureau of Standards worked with hundreds of national and local associations and promulgated over 100 commercial standards. Lyon, supra note 2, at 274-84; A. Burns, Decline of Competition 43-103 (1936); and Science Policy Research Division, supra note 16, at 14.

As to the type of diverse standards work conducted by these trade associations and technical societies in the later 1930's, the American Zinc Institute licensed steel manufacturers without charge to use the Institute's "Seal of Quality" trademark on galvanized sheets meeting Institute specifications; the Bureau of Explosives, a cooperative agency of the Interstate Commerce Commission and the Association of American Railroads, studied dangerous explosives to insure compliance with ICC regulations; the National Electrical Manufacturers Association and the American Standards Association promoted standards affecting the rating, construction, performance and durability of electrical apparatus and equipment; and the Tire and Rim Association developed standards affecting sizes and shapes for tires, rims, wheels and related parts. Additional work was also conducted by the Rail Steel Bar Association, The Sanitary Institute of America, The Tanners' Council of America, and the National Door Manufacturers Association. Pearce, supra note 20, at 316-17.

Further encouragement for industries to engage in cooperative action was provided by the Federal Trade Commission. Shortly after the War, the Commission was persuaded to identify
nownst to the standards community a massive retaliatory antitrust campaign loomed ominously ahead in future years.

The Department could not launch a vigorous standards assault in the wake of *Standard Oil* and *Chicago Board of Trade*. It had to devise a way around the "reasonableness" criteria if any collective industrial practice were to be condemned by the Supreme Court. The Department’s first strategy was to re-vitalize *Standard Sanitary* by filing a price-fixing action against several tile manufacturers for conspiring to "standardize the shapes of tile made, eliminating many now sold, and establish[ing] the use of standardized catalogues." The defendants agreed to stop fixing prices in a consent decree, but were specifically allowed, through their trade association, to engage in the "standardization of quality and of technical and scientific terms, and elimination of non-essential type, sizes, or grades of products." The Department may have re-established the clear illegality of price fixing, but by sanctioning standardization it returned to a philosophical quandry over the "reasonableness" of collective private interests, rather than the impersonal market

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the trade practices which should be included in the category of "unfair methods of competition" (the operative language of Section 5a of the Commission’s Statutory mandate of 1914 from Congress). 15 U.S.C. § 45 (Supp. V, 1975). Out of this interest grew the Commission’s trade practice conference procedure through which industrial representatives could meet with the Commission’s staff and urge them to adopt standards of fair and proper trade practices. The number of trade practices increased steadily from 1919 as industry became aware of the advantages of "cooperative" planning. By 1929 the Commission decided to revise its trade practice rules since some were believed to induce behavior in violation of the Sherman Act. The Commission’s trade practice procedure became superfluous and ceased having importance with Congress’s adoption in 1933 of the National Industrial Recovery Act (Act of June 16, 1933, ch. 90, 48 Stat. 195, as amended and modified by Act of June 14, 1935, ch. 246, 49 Stat. 375) which contained explicit trade practice procedures. For more details see the following references from which the above facts were drawn: M. Watkins, *Public Regulation of Competitive Practices in Business Enterprise* 241-49 (1940), T. Blaisdell, *The Federal Trade Commission* 92-94 (1932). *Burns*, supra at 69-73 and J. Clark, *supra* note 32, at 228.


57. A consent decree was entered on November 26, 1923, dissolving the association and perpetually enjoining a further operation of the combination. On April 23, 1928, a supplemental decree permitting the exchange of certain information was entered.

forces of the Sherman Act, being the final arbiter of product variations.

The Department's next strategy was to convince the Supreme Court that every price fixing agreement was per se illegal. In a 1927 case, *United States v. Trenton Potteries,* several manufacturers of bathroom pottery fixtures were charged with eliminating a second-grade of pottery in aid of their agreement to fix the price of a more preferred grade. Consistent with its holding in *Standard Sanitary,* the Court rejected the manufacturers' contention that the price was lawfully fixed at a "reasonable" level, and held that a fixed price can never, irrespective of the circumstances, be "reasonable" under the *Standard Oil* doctrine. It took several years, but the Department finally managed to return the Court to its position before *Standard Oil.* But, with only the limited teachings of *Standard Sanitary,* *Trenton Potteries,* and the 1923 tile manufacturers' decree, the legality of collective standards, if not collective price fixing, was still problematic. Additionally, the Supreme Court articulated advanced antitrust doctrine in two cases which circumscribed the internal operations of a collective standardization pro-

60. Id. at 395-402.
61. Although the internal position of the Department regarding the legality of standards is not known, some astute students of industry were aware in 1925 of potential illegality in certain aggravating circumstances. During an October, 1925 conference sponsored by the Academy of Political Science, one participant reported that some practices of trade associations fall on the borderline . . . [namely those] which have a tendency to stabilize business and to make prices uniform . . . [The] standardization of products, of trade practices and of cost accounting methods fall within the class and the legality . . . will depend upon the absence or presence of some agreement, expressed or implied, to fix prices, limit production or divide territory.

J. Clark, supra note 32, at 246.
62. Eastern States Retail Lumber Dealers Ass'n v. United States, 234 U.S. 600 (1914); United States v. Terminal Railroad Ass'n of St. Louis, 224 U.S. 383 (1912). In *Eastern States* the Justice Department alleged that a trade association of retail lumber dealers conspired to blacklist and boycott wholesale lumber dealers which had taken consumer sales from members. The Supreme Court found that the "black list" resulted in retailers withholding their patronage from the wholesalers, and concluded that this amounted to a boycott in unreasonable restraint of trade in violation of the Sherman Act.

In *Terminal Ass'n,* the Supreme Court was confronted with the Association's requirement that other railroads could not use its terminal without permission. Although use of this extremely important railroad terminal had never been foreclosed, the Court found the potential to limit railroad entry into St. Louis to be inconsistent with freedom of competition. 224 U.S. at 400-01.
gram, not necessarily found to fix prices covertly, but run in conjunction with a trade association or the Bureau of Standards. In accordance with these new principles, standards benefits can neither be withheld or bestowed selectively nor manipulated to boycott or exclude recalcitrant firms from an industry.

The consequences of these early decisions were beginning to have an impact on the industrial community. Legal risks were associated with the elimination of competition in product quality and with the exclusion of “seconds” in order to fix prices or exclude competitors. Whether a standard in and of itself would violate Section 1 remained largely unknown. The 1923 consent decree and Chicago Board of Trade suggest more questions than they resolve in this regard. A definitive answer could only be provided by a Supreme Court squarely faced with the question.

The Court did allude to a possible sympathetic position toward a type of standard in its 1925 Maple Flooring decision. In this case, the Court was called upon to review the Department’s allegation that an association illegally exchanged among its members certain cost data in order to fix prices. The Court held the exchange lawful, and noted that “The defendants have engaged in many activities to which no exception is taken by the Government and which are admittedly beneficial to the industry and to consumers; such as cooperative advertising and the standardization and improvement of the product.” Here, for the very first time, the Court commented on standards, and did so approvingly at least for those with “product improvement” benefits—but, then again, standards as such were

63. General discussions of the early development of the antitrust law of standards can be found in the following: F. Jones, Trade Association Activities and the Law (1922); Department of Commerce, Trade Association Activities (1927); B. Kirsh, Trade Associations: The Legal Aspects (1928); Federal Trade Commission, Open-Price Trade Associations, S. Doc. No. 226, 70th Cong., 2d Sess. (1929); B. Kirsh and A. Shapiro, Trade Associations in Law and Business (1938) and Lyons, note 2 supra.

64. Regarding the elimination of “seconds,” a contemporaneous treatise noted:

The arbitrary elimination of cheaper grades, because they are less profitable than higher grade products or because they interfere with the sale of goods the production of which is rendered exceptionally remunerative by parents or a skilled labor monopoly or some other supply curtailing factor, would seem hard to justify under the rule of reason. Similarly, agreements not to market ‘seconds’ which are sometimes made in certain industries, may be eventually brought under attack.

Trade Associations, supra note 55, at 186.


66. Id. at 566.
not really under attack. If they were, would the Court have failed to recognize their implicit price effects and their inevitable exclusionary impact on the firms and all the others left out of the private collective process?

These theoretical questions still defy easy answers, but some industrialists of the day at least started a search for some practical solutions. They contacted Secretary Hoover who in turn asked the Attorney General for his opinion of trade associations standardizing their members products.\textsuperscript{67} The Attorney General found the practice lawful unless trade was restrained, prices fixed, or production curtailed.\textsuperscript{68} They remained concerned and at their urging counsel for the Commerce Department reviewed the 1923 consent decree and the \textit{Maple Flooring} case\textsuperscript{69} and based on this meager authority concluded that “standardization and simplification programs as carried out by the [Commerce] Department do not involve any agreement on the part of those interested to restrict production. They comprehend that the standards, sizes, types or styles agreed upon shall be recognized by the industry as the standards and that anyone a party thereto is free to manufacture other styles, sizes or types than those which it is agreed shall be recognized as the standards.”\textsuperscript{70}

Of course, since the collective process, itself, is a form of agreement, such legal reasoning would not be very reassuring to the industrial community. The Federal Trade Commission was not of much assistance either. In 1920 its Chairman unqualifiedly endorsed standards without noting that they may be illegal if they unreasonably restrain trade. He stated that “while standardization and elimination (of superfluous or little-used farm equipment) did not involve any questionable legal issue, the necessity for standard specifications in order that costs and prices may be compared is apparent.”\textsuperscript{71} Several years later another Chairman commented to the Secretary of Commerce that “In no matter has the Commission ever held standardization of commodities by members of an industry to be violative of any of the statutes it has the duty of enforcing.”\textsuperscript{72} He neglected to warn of the relatively uncertain state of the law and the potentially

\begin{itemize}
\item \textsuperscript{67} TIMERLAKE, \textit{supra} note 56, at 308.
\item \textsuperscript{68} \textit{Id.} at 309.
\item \textsuperscript{69} \textit{Id.} at 309 n.27.
\item \textsuperscript{70} \textit{Id.} at 310.
\item \textsuperscript{71} \textit{Id.}
\item \textsuperscript{72} \textit{Id.} at 313.
\end{itemize}
grave legal implications of an improperly formulated and administered standards program.

The law's rational evolution and development was further deterred by the cataclysmic economic events of the 1930's. The Supreme Court in Appalachian Coals, Inc. v. United States,\textsuperscript{73} recognizing these perilous circumstances, approved a cooperative sales agency which fixed prices and standardized grades for coal producers. Congress, likewise, reordered national policies\textsuperscript{74} by encouraging industrial cooperatives and fostering "codes" of joint antitrust immunized practices.\textsuperscript{75} But only after two years, the Court declared Congress' social experiment unconstitutional\textsuperscript{76} and restored the nation's functional competitive policy.\textsuperscript{77} These conflicting and

\begin{itemize}
\item \textsuperscript{73} 288 U.S. 344 (1933).
\item \textsuperscript{75} These codes covered a multitude of commercial practices including quality and service competition. In some codes, the products of all sellers were standardized, and forty-eight codes authorized the regulation of the marketing of second-grade products. Burns, supra note 54, at 508. In some industries, additions to and deductions from the prices of standard products because of departures from basic specifications were standardized in Codes. Moreover, the conditions under which allowances could be made for goods returned were standardized in 112 codes. \textit{id.}
\item \textsuperscript{76} Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
\item \textsuperscript{77} Within a few years of the Schechter decision, cooperative industrial activities originally formulated under governmental aegis were found to be illegal with the immunities of the National Industrial Recovery Act providing no protection. See United States v. Socony-Vacuum Oil Company, 310 U.S. 150 (1940).
\end{itemize}

Even if standards were developed under the auspices of the Bureau of Standards, they also would not be immune from penetrating judicial analysis. The defense of immunity arising from intervention by the Bureau of Standards was asserted in Federal Trade Commission v. Algoma Lumber Co., 291 U.S. 67 (1934). In this decision the Supreme Court upheld the Federal Trade Commission's finding that a group of lumber dealers unfairly competed in violation of Section 5 of the Federal Trade Commission Act (38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(a)(1)(Supp. I, 1975)) by using the trade name "California White Pine" when in fact the lumber was "Western Yellow Pine." The Court was not at all impressed with the fact that "California White Pine" was earlier listed as a trade equivalent of "Western Yellow Pine" by the National Bureau of Standards in its attempt to help establish standard commercial names for lumber. The Court noted that the Bureau's recommendations for simplified lumber nomenclature were wholly advisory, and the lumber dealers were free to ignore them. The Court ruled that the Bureau was merely attempting to eliminate superfluous variety through the voluntary action of industrial groups, and that its function of simplifying busi-
swiftly changing events did nothing to alleviate the existing uncertainties over collective standards processed and the institution by the Federal Trade Commission of its first standards action only added grievously to these deteriorating circumstances. But as difficult as times were, they would soon be eclipsed by the titanic struggle of World War II, which propelled this nation into its greatest collective productive effort.

There were serious initial problems in conserving resources and raw materials, converting from civilian to wartime production, constructing arms and munitions factories, and establishing priorities, allocations, and rations. To accomplish these goals, the President created a War Production Board which like its World War I predecessor standardized products, processes, and eliminated unessentials. This shift from a free enterprise economy troubled many

ness by substituting uniformity of methods for wasteful diversity through cooperative action was far different from the Commission's goal of making the process of competition fair. The Court seemed to be tacitly approving the "cooperative" approach to standards without sensing the basic antitrust issue.

78. A strong feeling of apprehensiveness resulting from the law's vagueness has been attributed by one commentator to two additional factors, the comprehensive investigation of business practices conducted by the Temporary National Economic Committee and a new and far stricter position by the Supreme Court toward joint or cooperative action by competitors in Interstate Circuit v. United States, 306 U.S. 208, 227 (1939), and its holding that:

It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequences of which, if carried out, in restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.


81. *Science Policy Research Division*, supra note 16, at 17 n.41, reports that the War Production Board:

limited the sizes and weights of tubular radiators . . . [which] saved 23,000 tons of cast iron. Builder's hardware was reduced from about 27,000 to 3,500 items. Sixty-five percent of all types and sizes of brass and bronze pipe fittings were eliminated and the variety of brass and bronze valves was reduced from 4,079 to 2,504 types, saving thousands of tons of carbon steel, cooper, and alloy steel.

82. The American Standards Association had this to say about the role of standards during the War:

Never before has the country been so standards-conscious. The President—his Director of Economic Stabilization—the Army—the Navy—WPB—OPA—industry—are all using standards as a means of carrying out the tasks imposed upon
industrialists fearing antitrust reprisals. But, except for the limited immunities during the Depression, enforcement had not previously been suspended completely and it would not be now. The Justice Department refrained from opposing collectively mobilized resources, but reserved the right to proceed civilly against public interest abuses. Congress, on the other hand, took a more affirmative step by including an antitrust immunity for businesses combined at the behest of the War Production Board with approval of the Attorney General. Mobilization then resumed without fear of enforcement, that is until it was disrupted by a massive antitrust effort growing out of the organized standards programs of the 1900’s.

Both the Justice Department and the Federal Trade Commission filed multitudinous cases against standards. The Department obtained comprehensive indictments, and filed complementary civil injunctive suits, against a score of organizations for price fixing and employing standards in order to boycott competitors from the mar-

them by the war.

Standards are being debated on the floor of Congress, which has set up a committee to study their use. The WPB is using them to conserve materials, man-power, and production facilities. They are basic in government procurement. They are basic in subcontracting. OPA has found that price cannot be controlled without standards to define the product.

**Science Policy Research Division, supra note 16, at 17.**


84. See Fisher I and II, discussed in notes 46 and 74 *supra*.


Another wartime control, which partially affected antitrust enforcement, was an understanding that the Department would postpone investigations and trials. If the Secretary of War or Navy believed that any investigation or prosecution would seriously interfere with the war effort, the Attorney General either would abide by the decision and defer activity, or, would appeal the decision to the President. Before any matter could be deferred it would have to be clear that the war effort was being impeded. In each case, action finally taken would be public and the investigation or prosecution would commence as soon as it appeared that it would no longer interfere with war production. Berge, *supra* note 83, at 382-83.


Efforts to extend the immunities of the Small Business Mobilization Act beyond the appropriate statutory limits were met with stern resistance by the courts. The Supreme Court held in Georgia v. Pennsylvania Railroad, 324 U.S. 439 (1945), that a certificate of immunity issued by the Chairman of the War Production Board did not authorize rate-fixing by the defendant railroads outside the approved rate bureau framework. See also United States v. Association of American Railroads, 4 F.R.D. 510 (D. Neb. 1945); United States v. General Instrument Corp., 87 F. Supp. 157 (D.N.J. 1949).
ketplace. It successfully achieved open grade-making and certification services for interested parties at reasonable fees and made trademarks available to all qualifiers. As a result, standards organizations would now be operated more fairly, more equitably, and with far less discrimination. Also, some organizations were forced to divest their standards function or establish independent and autonomous bureaus for all grading, standardizing, and inspecting services. This assuredly opened some standards programs, but did provoke considerable outrage against the Department.

Industry and the press firmly believed that the Department was resolutely opposed to standards usage. Part of the confusion can be attributed to the fact that a number of standards were implemented after painstaking adherence to Commerce Department procedures which normally take several years and engage the creative efforts of industrial and governmental officials. In fact, some of the programs were originally sponsored by the Bureau of Standards and perpetuated by it over the years. Thus, in spite of these laborious efforts by one governmental branch, another was seemingly frustrating the entire effort. To stem the rising tide of adverse public criticism, Thurman Arnold of the Antitrust Division in an open newspaper letter defended the suits as “desirable for the general benefit of both . . . industry . . . and the . . . public, the defendant . . . unrea-

87. These antitrust cases most surely rank among the most massive in Justice Department history. The number of defendants consisted of 34 trade associations, 270 companies and 110 individuals. The defendants comprised a large segment of the softwood lumber industry, and included lumber manufacturers, wholesalers, retailers, and commission salesmen.

88. United States v. Western Pine Ass’n., indictment returned September 18, 1940, Cr. 14522, (S.D. Cal.), civil complaint filed Feb. 6, 1941, Civ. 1389-RJ, consent decree entered Feb. 6, 1941, 1940-1943 TRADE CAS. ¶ 56,197, at 419.

89. United States v. Southern Pine Ass’n, indictment returned February 21, 1940, Civ. 275, (E.D. La.), consent decree entered Feb. 21, 1940, 1940-1943 TRADE CAS. ¶ 56,007, at 27.


91. NATIONAL INDUSTRIAL CONFERENCE BOARD, supra note 16, at 89.
reasonably . . . misused the standardization program . . . . [which] in and out of themselves are not condemned by the department. It is the wrongful use to which such programs have been put that has been questioned."

He later repeated these sentiments in a letter to the Commerce Department, which passed word along to industry but failed to warn of the dire legal consequences of operating a mandatory program outside of the war effort.

The public obloquy failed to deter the Department and, along with the Federal Trade Commission, it continued to assail indus-

92. PEARCE, supra note 20, at 318-19.
93. TIMBERLAKE, supra note 56, at 317 n.45.
94. The Department's price-fixing actions were against an association of carpet manufacturers (for illegally limiting merchandise lines), United States v. Institute of Carpet Mfrs., civil complaint filed January 28, 1941, Civil 12-416, (S.D.N.Y.), consent decree entered February 6, 1941, 1940-1943 TRADE CAS. ¶ 56,097, at 384; a manufacturer of synthetic nitrogen products and other unidentified producers and distributors of nitrogen fertilizers (for illegally determining the kind and amount of fertilizer to be sold and the amount of nitrogen to be included in fertilizer), United States v. Synthetic Nitrogen Products Corp., civil complaint filed September 5, 1941, Civil 15-365, (S.D.N.Y.), consent decree entered on September 5, 1941, 1940-1943 TRADE CAS. ¶ 56,170, at 628; an association of manufacturers of flexible metal hose and tubing (for illegally inducing consumers and governmental agencies to accept recommendations and specifications of the association for particular types of hose and tubing and for forcing non-members to join the association or be excluded from the market), United States v. American Brass Co., Criminal No. 112-154, indictment returned May 27, 1942, (S.D.N.Y.); large electrical manufacturers of fluorescent lamps (for unlawfully reducing or eliminating the kinds, quantities, sizes and styles of fluorescent lamps), United States v. General Electric Co., civil complaint filed December 9, 1942, Civil 2590, (D.N.J.), consent decree entered March 26, 1954, 1954 TRADE CAS. ¶ 67,714 at 69,294; and manufacturers of fire extinguishers (for illegally producing only extinguishers of a particular size and color).
95. During the 1940's the Federal Trade Commission was also very active, and filed several standards proceedings alleging unfair trade practices in violation of Section 5 of the Federal Trade Commission Act. The Commission, like the Department, alleged in most of these that a particular trade association unlawfully conspired to fix prices, and that it standardized certain products in order to facilitate the conspiracy. The Commission instituted proceedings against producers of hardwood charcoal (for unlawfully establishing the sizes of packages in which charcoal was packaged for retail sales), The Tennessee Products Corporation, complaint issued July 9, 1941, F.T.C. Docket No. 4535, order entered March 23, 1948, 44 F.T.C. 1193; an association of manufacturers of electrical alloy resistance wire (for illegally adopting and maintaining uniform resistance standards and other uniform standards for manufacturing wire), Electrical Alloy Section of National Electrical Manufactureres Association, complaint issued August 7, 1941, F.T.C. Docket No. 4558, order entered March 16, 1943, 36 F.T.C. 335; and manufacturers of traffic signal and traffic signal equipment (for illegally standardizing signals), Crouse-Hinds Co., complaint issued October 9, 1941, F.T.C. Docket No. 4610, order entered January 23, 1950, 46 F.T.C. 1114. In Crouse-Hinds the Federal Trade Commission found for the defendants, and noted in its opinion the absence of any conspiratorial conduct. The Commission further observed that "[w]hile the products of the industry are highly standardized, the greater weight of the evidence shows that this is due to the efforts of the Institute of Traffic Engineers, a professional society whose chief officers and most of
try. The Commission even filed the most ambitious action to date which, unlike the others, presented several novel issues. It did not merely attack another classic hard-core pricing conspiracy, but in *Tag Manufacturers Institute,* challenged the reporting by competitors of their prices which deviated from their respective published list prices. The court of appeals found the practice lawful and, once dismissing the price stabilization charge, easily disposed of the standards allegation by stressing their salutory economic benefits. With this one stunning defeat, history's most concentrated enforcement effort came to an abrupt conclusion. Surprisingly, not one of the standards charges was reviewed by the Supreme Court; however, in other decisions, it did somewhat ratify and amplify the existing antitrust doctrine mandating open and non-discriminatory standards programs. And, during the War years, serious debate as

its members are employed in the electric light divisions of municipalities." *Id.* at 1120. Commissioner Mead, who wrote the opinion, later stated publicly that he holds firmly "to the belief that no suggestion of wrongdoing arises from joint action taken in an effort to solve mutual problems or to improve the well-being of any group so long as those who participate do not act in such a manner as to injure those who do not participate, including competitors, suppliers, and customers." *2 American Trade Association Executive Journal* 49, 53 (1950).

The FTC brought further actions against an association of manufacturers of steel and other metallic chain and chain parts (for unlawfully establishing simplifying standards for chains), Chain Institute, Inc., complaint issued December 12, 1942, F.T.C. Docket No. 4878, order entered February 16, 1953, 49 FTC 1041; an association of manufacturers of cylindrical liquid tight paper containers (for unlawfully fixing standard uniform sizes and colors for such containers), Liquid Tight Paper Container Ass'n., complaint issued January 22, 1942, F.T.C. Docket No. 4675, order entered May 29, 1945, 40 F.T.C. 630; an association of milk and ice cream can manufacturers (for unlawfully standardizing milk and ice cream cans), The Milk and Ice Cream Can Institute, complaint issued July 31, 1941, F.T.C. Docket No. 4551, order entered Sept. 18, 1943, 37 FTC 419, aff'd, 152 F.2d 478 (7th Cir. 1946); an association of manufacturers of coupon books (for unlawfully standardizing the size, style and color of coupon books and the weight and quality of paper and cardboard used in coupon books), Association of Coupon Book Manufacturers, complaint issued April 1, 1948, F.T.C. Docket No. 5532, order entered Sept. 3, 1948, 45 F.T.C. 219; an association of manufacturers of malleable iron chain (for unlawfully setting specifications for iron chain), Malleable Chain Manufacturers Institute, complaint issued May 18, 1949, F.T.C. Docket No. 5657, order entered May 23, 1952, 48 F.T.C. 1163; and an association of manufacturers of crown bottle caps (for unlawfully standardizing the coloring, lettering and decorations of crown bottle caps), Bond Crown & Cork Co. v. FTC, complaint issued September 30, 1941, F.T.C. Docket No. 4602, order entered August 4, 1948, 45 FTC 89, *modified and aff'd*, 176 F.2d 974 (4th Cir. 1949).


97. 174 F.2d at 461.

98. In Fashion Originators Guild v. FTC, 312 U.S. 457 (1941), the Court held that a trade association could not refuse on a collective basis to sell to manufacturers and retailers who
to the advisability of privately or governmentally determined standards raged on. In 1943 the Secretary of Commerce reviewed a report advocating the governmental formulation of consumer goods standards, but not the collateral establishment of industrial standards. The report's findings were underscored in another Commerce study in 1945 which likewise called for private industrial standards only, with subsidiary governmental testing and research by the Bureau of Standards.

What was discernible about collective standardization and the antitrust laws at the close of this tumultuous period? One observer commented on the obvious conflict between the "benign" attitude of the Commerce Department and the Justice Department's aggressive enforcement. The government was, it seemed to him, encouraging private development, on the one hand, but frustrating the entire effort, on the other. This so-called "schizophrenia" was completely predictable from a public choice point of view. From this perspective, Commerce and Justice will remain in this historic conflict until Congress recognizes the true public nature of standards and understands the basic incompatibility of collective standardization and the individualistic dictates of the Sherman Act. It will be dealt in copies of its members' stolen designs on the grounds that this amounted to a per se illegal boycott under Section 1. Henceforth, any industry trade organization, including by implication any standard-making group, may not under any circumstances foreclose important avenues of commerce to competitors through boycotts or other such concerted means.

The Court supported this holding in American Medical Association v. United States, 317 U.S. 519 (1943), in which it was faced with another boycott question. The Court concluded that any trade association, even an august medical association, exercises economic power, and must be extremely careful not to use such economic power collectively in order to drive non-group members out of business or coerce them into abandoning economic decisions which no law forbids them from making. In the last important decision of the 1940's, Associated Press v. United States, 326 U.S. 1 (1945), the Court ruled that two by-laws, one which prohibited the dissemination to non-members of news developed by either the Associated Press or its members, and another which empowered members to block membership applications of non-members, unlawfully foreclosed non-members from the Associated Press. Under these decisions, a standards program must be operated fairly and impartially and must be available to members and non-members alike.

100. Id. at 18-19.
102. Id. at 85.
103. For a full statement of Thurman Arnold's antitrust enforcement views during the War period, reference should be made to Arnold & Livingston, Antitrust War Policy and Full Production, 20 HARV. BUS. REV. 265 (1942).
104. Mason, supra note 101, at 85.
interesting to compare this prediction with the observer's prophecy that the forthcoming Eisenhower Administration will reverse the "schizophrenia" of the 40's and the return to the governmental cooperativeness of the Hoover era.105

**G. Third Historical Stage From the 1950's to the Present**

The observer was remarkably prophetic. During all of the 50's, the Justice Department instituted only four actions (but only one after the Eisenhower Administration was firmly in command) and the Federal Trade Commission not a single one. Of course, this attenuated enforcement effort could be attributed to a renewed cooperative attitude, but more likely was due to the Korean War.106 Business was voluntarily mobilized by the President under Congressional authorization,107 and granted a limited antitrust exemption.108 Whatever the reason for decreased enforcement, the observer failed to foresee that the antitrust laws would nonetheless be pursued by private citizens beginning in the late 1950's and increasing in recent years. Without question, the decade of the 40's will remain unparalleled for the intensity of the governmental enforcement effort, but the private actions of the coming decades will prove to be just as significant for reasons which will become clear.

Although the four Departmental actions of the 1950's109 were con-

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105. Id. at 89-90.
109. In 1954 the Department proceeded against machine tool manufacturers. United States v. Cincinnati Milling Machine Co., No. 13401, (E.D. Mich. April 19, 1954). The action terminated with a consent judgment (consent decree entered April 19, 1954, 1954 Trade Cas. ¶ 67,733 at 69,361) prohibiting the manufacturers from agreeing not to manufacture or sell any particular type of milling machine. In the same year, the Department obtained a consent judgment enjoining the Association of Vertical Turbine Pump Manufacturers and their members from fixing prices and establishing uniform products and specifications. United States v. National Ass'n. of Vertical Turbine Pump Mfrs, civil complaint No. 29446 (N.D. Cal. January 26, 1950), consent decree entered June 30, 1954, 1954 Trade Cas. ¶ 67,803 at 69,587. However, the defendants were not prohibited from individually recommending to the indus-
ceptually identical to those of the 40's, private parties attacked boldly along a much broader front. Standards, themselves, were challenged directly for their implicit discriminatory and exclusionary effects and not merely as devices for facilitating pricing coordination. In the most important of the private suits, *Structural Laminates, Inc. v. Douglas Fir Plywood Association*, plaintiff plywood producer charged an association with unreasonably maintaining a standard which he admittedly could not meet. On review, the court ruled in favor of the association on the grounds that the standard was neither formulated with evil intent nor unreasonably narrow, and that his plywood had a poor technical reputation. Although sufficient discriminatory and exclusionary evidence was heard in these private suits, a violation was not formed until two other plaintiffs advanced traditional per se conspiratorial theories. In one, a manufacturer alleged a conspiracy between the American Medical Association and the General Electric Company to promote GE's lamps under an AMA seal exclusively. The Court, in denying a preliminary motion to dismiss, held that the alleged conspirators engaged in conduct approximating a boycott which would be illegal under the Sherman Act. In the second, the Supreme Court was presented with its first opportunity to review a standards program in *Radiant Burners, Inc. v. People’s Gas Light & Coke Co.* The Court ruled that the Sherman Act forbids an association of gas burner manufacturers and public utilities from denying the plaintiff try certain uniform practices advocated by the American Water Works Association. The Department the following year obtained a consent judgment which prohibited the Roll Manufacturers Institute and its members from price fixing and agreeing to limit the manufacture of cast iron and cast iron steel rolls in accordance with agreed upon standards, grades, or qualities. United States v. Roll Manufacturers Institute, No. 96-57 (W.D. Pa. June 20, 1951)(complaint filed), consent decree entered August 4, 1955, 1955 TRADE CAS. ¶ 68,110 at 70,604. The most significant was against railroad car coupler manufacturers which the Department lost with the district court ruling that standardized couplers were in the public interest.


manufacturer a seal of approval which is necessary before the utilities would provide gas. The Court easily found an antitrust violation based on well established anti-boycott principles.

Although challenging directly the legality of standards, the government did not in response file any cases to settle this important policy issue. In fact, the Department of Justice did not bring a single action with standards implications from 1954 to 1962, and only brought two piece fixing cases with standards allegations in the 1960's and one in the 70's. The Federal Trade Commission was

114. This decision has been interpreted as protecting the right of consumers to obtain the degree of product quality as they might choose rather than having their judgment usurped through the unilateral agreement of producers outside the market. This interpretation was made by a Congressional subcommittee which was of the opinion that: The case of Radiant Burners, Inc. v. Peoples Gaslight and Coke Company held that a standard may not properly be used to exclude a serviceable but nondeluxe product from the marketplace by requiring that all the manufacturers of a given product conform to needlessly high standards. The right of the consumer to obtain less by paying less is basic.

115. A plaintiff manufacturer in another antitrust action charged a similar offense in two actions, Watts Regulator Company v. American Gas Ass'n., Civil No. 66-228 (W.D. Mass.) and Watts Regulator Company v. Western Plumbing Officials Association, Civil No. 66-1124 (S.D. Cal.) In both actions the manufacturer alleged that competing manufacturers, an association, and utilities conspired to develop and maintain a standard which could not be met by the plaintiff manufacturer. Both suits were ultimately settled when the associations agreed to acknowledge the plaintiff's product. See G. LAMP & C. SHIELDS, TRADE ASSOCIATION LAW AND PRACTICE, 32 n.122 (1971).

116. Again, as were the Sherman Act cases of the early 1950's, the two Department standards challenges during the 1960's were actually price fixing actions accompanied by standards allegations. In 1962, the Department charged two asbestos-cement pipe manufacturers with fixing prices and attempting to eliminate the importation and sale of foreign-made asbestos pipe into the United States. United States v. Johns-Manville Corp., Cr. No. 21-118 (E.D. Pa. June 1, 1962) civil complaint No. 31791 filed July 25, 1962, (E.D.Pa.). However, the case prior to trial was reduced to the standards allegations, see 259 F.Supp. 440 (E.D. Pa. 1966), with the Department seeking to enjoin one of the defendants from a standards-making organization which adopted specifications allegedly designed to restrict the use of foreign-made asbestos-cement pipe. In granting summary judgment for the defendant, 1967 TRADE CAS. ¶ 72,184 at 84,249, the district court considered scientific justifications for the specifications and found ample evidence to support their reasonableness. The court was persuaded that this type of pipe, which was transported on ships, was more likely to be damaged than pipe transported by other means, that any damaged pipe would often be undetected by visual inspection, and that the ultimate consumer cost of reexcavating and reinstalling new pipe was prohibitive. Of particular importance to the court was the evidence that many municipalities and consulting engineers, and at least one federal agency, had already on their own adopted requirements that all pipe must be tested in the United States. Again, as with the private actions of the 1950's, standards withstood scrutiny under a rule of reason analysis impervious to implicit exclusionary and discriminatory implications.
even less active. It only initiated one in recent years, but ironically it coincidentally brought into question again the issue of standards legality. In this 1962 complaint, the Commission asserted that the setting of a product's composition by a trade association constituted illegal price-fixing. Faced with a shortage of wheat, members of the association approved a resolution that their product should consist of a scarce wheat equally blended with a more common wheat. The Commission held the resolution to be an attempt to lower the total industry demand for the scarce wheat, and thus to ward off price competition for the available supply. Arguably, the resolution is not a product standard in the usual sense, except both the Commission and the Seventh Circuit at this late date disclaimed that "all efforts at product standardization" are illegal under the antitrust laws—thereby raising once more the perennial question of which are lawful.

After some seventy years of Sherman Act enforcement, the fact that the law was unsettled and remained unclear was further reflected by the number of public appearances by enforcement officials to explain the antitrust law of standards. In almost all of these public speeches, they extolled the economic virtues of standards,

The only other standards action of the 1960's brought by the Department was against several plumbing fixtures manufacturers for fixing prices and agreeing to discontinue the manufacture of a less expensive grade of fixtures in favor of a more expensive grade. United States v. American Radiator & Standard Sanitary Corp., Cr. No. 296 (E.D. Pa. October 6, 1966) (indictment returned), civil complaint No. 1921 filed October 6, 1966. The manufacturers entered into a consent decree, which prohibited them from limiting, restricting, or discontinuing the manufacture of any plumbing fixtures. 1971 TRADE CAS. ¶ 73,579 at 90,409.

117. The most recent Department action was in 1970. The American Society of Mechanical Engineers, United States v. The American Society of Mechanical Engineers, Inc. and The National Board of Boiler and Pressure Vessel Inspectors, complaint filed July 22, 1970, Civil No. 3141, S.D.N.Y., was charged with refusing to inspect and certify foreign-manufactured boilers. The Society discontinued this practice, and agreed in a consent judgment, 1972 TRADE CAS. ¶ 74,028 at 92,256, to inspect all boilers regardless of origin.


119. 65 F.T.C. at 612 and 345 F.2d at 427.

120. Speeches by Officials from the Justice Department include Statistical Standardization and Research Activities, delivered by Ephraim Jacobs, Chief, Legislative Section, Antitrust Division, before Antitrust Section, American Bar Association, on April 1, 1955; Antitrust Problems of Industry Codes of Advertising, Standardization, and Seals of Approval, delivered by Robert B. Hummel, Deputy Director of Operations, Antitrust Division, before the 1968 Antitrust Symposium of the Bar Association of the District of Columbia, reprinted in 13 ANTITRUST BULL. 607 (1968); Antitrust Questions in Voluntary Industry Standards, delivered by Lionel Kestenbaum, Antitrust Division, before The National Association of

121. In addition to public pronouncements, the two enforcement agencies issued several advisory opinions over the last few years. The Federal Trade Commission during the 1960's issued three advisory opinions relating to standards. In one of these opinions it advised a trade association that it had no objections to the publishing of a product standard as an "industry goal" as long as seals of approval would not be given only to industry members meeting the standard. Advisory Opinion Digest No. 4 [1963-1965 Transfer Binder] Trade Reg. Rep. ¶ 17,345 at 22,510 (FTC 1965). In another opinion it refused to approve a trade association's product standards program that made association membership conditioned upon using the association's quality certification mark. Advisory Opinion Digest No. 96 [1965-1967 Transfer Binder] Trade Reg. Rep. ¶ 17,723, at 23,007 (FTC 1966). However, it did say that non-members could be charged a higher fee for the use of the mark, provided the differential merely insured that non-members "pay an equal share of the cost necessary to support the program." Id. And most recently it approved a plan by the construction industry to implement an accreditation program. Advisory Opinion Digest No. 350 [1967-1970 Transfer Binder] Trade Reg. Rep. ¶ 18,826 at 21,165 (FTC 1969). The enforcement officials also offered advice in letters to government agencies. A letter of June 17, 1969 was sent from Richard L. McLaren, Assistant Attorney General, Antitrust Division, to the National Commission on Product Safety and a letter of March 28, 1973 from his successor, Thomas E. Kauper, to the Bureau of Product Safety (Trade Reg. Rep. ¶ 50,182, at 55,334). Generally, both letters contain the usual advice regarding a lawfully formulated and implemented standards program.

Of more significance was a Federal Trade Commission Staff study of April 22, 1972 entitled Self-Regulation-Product Standardization, Certificate and Seals of Approval, which recommends that the Federal Trade Commission, itself, conduct a study in order to help develop a national policy on standardization and certification and emphasizes that standardization and certification have a large potential for public benefit and for public injury.
thoughtful analyses of the sometimes incompatible world of standards and the antitrust laws. In his view, standards almost amount to a specific exemption to the antitrust laws, and therefore would be better handledgovernmentally rather than through private voluntary action. He has remained the lone antitrust proponent of this position, with all other enforcers generally advocating standards while emphasizing the legal risks.

Precisely what is Turner's position? In 1966 he asked rhetorically whether there could be any possible justifications for voluntary standards. He answered that any plausible justification must be quite limited and pass careful examination. He thought, for example, that a product standard, designed to preserve the health and safety consumers, would not be attacked as long as there were no less restrictive methods of making the product safer. He doubted that private standards would be a suitable substitute for legislation in those instances in which health and safety were not clear cut. Thus, he comes close to arguing that standards, since they reduce product alternatives and can make prices rigid and uniform, should only be adopted through specific governmental intervention and not by the private interests.

122. Cooperation Among Competitors, delivered by Donald F. Turner, Assistant Attorney General, Antitrust Division, before the Fifth Annual Corporate Counsel Institute, on October 13, 1966; Antitrust Aspects of Industry Cooperation and Product Standardization, delivered by Donald F. Turner, Assistant Attorney General, Antitrust Division, before the Briefing Conference on Fair Packaging and Labeling Act of 1966, on May 26, 1967; Consumer Protection by Private Joint Action, delivered by Donald F. Turner, Assistant Attorney General, Antitrust Division, before the Annual Meeting of the Antitrust Law Section of the New York State Bar, on January 26, 1967, reprinted in CCH 1967 ANTITRUST LAW SYMPOSIUM N.Y. STATE BAR ASSN. at 36-46.

For a criticism of Turner's position regarding the governmental formulation of standards, see Wachtel, Product Standards and Certification Programs, 13 Antitrust Bull. 1 (1968).

123. Cooperation Among Competitors, supra note 122, at 10-11.

124. Id. at 11-12.

125. Turner was similarly cautious a few years earlier with Carl Kaysen of their treatise, ANTITRUST POLICY (1959). Their circumspect attitude towards standards was that [A]greements to standardize products . . . [are] troublesome . . . inasmuch as standardization in most cases is likely to have desirable consequences and at the same time reduce the uncertainties that play a competitive role in a small-numbers market. We are inclined to conclude that standardization of sizes, grades, qualities, and the like should be treated as presumptively lawful in itself; that further evidence of intent to eliminate competition, as appeared in connection with the agreement to eliminate sales of "Seconds" in Standard Sanitary, must be shown in order to identify the standardization as being a part of a price-fixing scheme.

Id. at 151.
Turner was not alone in his cautious approach toward private standardization. Both the Commerce Department, which commissioned its third and fourth studies since the 40's, and the Congress, which at last instituted its own hearings, seriously considered private and public standardization and the precise role of the Bureau of Standards. Commerce in 1958 appointed a committee which noted the confusion over standards and cited the absence of a national program as the cause. The committee recommended a strengthened research and scientific capability for the Bureau, but no positive remedial policy except the formation of another committee possibly leading to a unified and coordinated national approach. Such a committee was formed in 1963. For the first time, it was proposed that standards should be developed through a national coordinating institute of industry, end users, and consumer interests governed by Justice Department antitrust guidelines. Unfortunately, the committee's findings were ignored by Commerce, but the proposed institute captured the imagination of several concerned congressmen and served as a workable paradigm for their proposed remedial legislation.

Although standards' broad external impact was apparent since last century's era of industrial consolidation, it was not until Congressional hearings by the House in 1968 and by the Senate in 1976-77 that these "externalities" were correctly analyzed, their public impact accurately perceived, and corrective legislation proposed. The 1968 hearings into standards' impact on the nation's small businesses concluded with the important finding that "[p]rivate bodies . . . promulgating standards . . . are performing what is essentially a governmental function." From a public choice perspective this is the only logical conclusion. Since it was based on the accumulated evidence of actual wrongs and injustices

127. Id. at 21.
128. Id.
129. Id. at 23-24.
131. Id. at 75. Also expressing his view that standards making is a public rather than private function was Ralph Nader. During an appearance before the Senate Committee on Commerce in 1971, Nader made the point that the public standards setting process should be public governmental function, rather than a private function, and added that "Government should refrain from giving any support to so-called 'voluntary' standards setting processes . . . ." SCIENCE POLICY RESEARCH DIVISION, supra note 16, at 81.
perpetrated by discriminatory standards, it is a doubly convincing indictment of the private collective process. Also, in the report of the 1968 hearings it was recommended that Congress give serious consideration to legislation which would require that standards be submitted to the Commerce Department for a public interest evaluation and a technical appraisal, and to the Federal Trade Commission for an antitrust evaluation.\textsuperscript{132} Congress disregarded the recommendation, but the chairman of the 1968 hearings introduced in 1969 the Federal Approval of Voluntary Industrial Standards Act\textsuperscript{133} which provided that standards could not be established unless initial approval was received from the Commerce Department, the Federal Trade Commission, and the Bureau of Standards.\textsuperscript{134} No committee action was ever taken on this bill.

Although these congressional proposals did not expressly call for a national institute, it was clear that legislative sentiment was turning away from exclusive private development in the market and toward a type of extra-market mechanism preserving some private initiative under federal control.\textsuperscript{135} The boldest proposal in this direction is contained in the Voluntary Standards and Accreditation Act of 1977.\textsuperscript{136} This bill provides for a national institute for the accreditation of private standards organizations. The bill does not provide for the actual development of standards nor antitrust immunities against prosecution. The objective of the bill is the federal coordination, management, and promulgation of standards developed through existing private standards organizations in order to achieve a single set of national standards recognized by both government and industry.

IV. Choosing the Ideal Standards Organization

With this most perceptive proposal, this comparative history reaches its conclusion without a congressional solution to the present standards problem. Currently, there are approximately 400 different private standards organizations.\textsuperscript{137} This large number of di-

\begin{itemize}
\item \textsuperscript{132} H.R. Rep. No. 1981, supra note 114, at 79.
\item \textsuperscript{133} H.R. 10123. See also Science Policy Research Division, supra note 16, at 75.
\item \textsuperscript{134} Science Policy Research Division, supra note 16, at 75.
\item \textsuperscript{135} Hearings on Voluntary Industrial Standards, note 5 supra.
\item \textsuperscript{136} S. 285, 95th Cong., 2d Sess. (1977), note 4 supra.
\item \textsuperscript{137} Hearings on Voluntary Industrial Standards, supra note 5, at 1-2.
\end{itemize}
verse and uncoordinated organizations, as well as the historical confusion, legal conflict, and organizational failure, are all consistent with the previously noted unfavorable public choice judgment accorded a private organizational structure. Moreover, this history further substantiates the theoretical public choice judgment that a public structure can only out-perform a private one if industrial standards are mandatory in nature—a clearly intolerable alternative for a free market economy. However, based on the already assembled historical data, an ideal organizational entity can be fashioned out of the most palatable features of both private and public arrangements.

Examining this “ideal organizational entity” closer, it would have to perform three basic functions: an allocative function, (development of technically proficient and non-discriminatory standards); a financial function, (cover its costs); and a distributive function, (promulgation of standards). Public choice theory teaches that a private organization of separate firms will not promulgate standards in a manner which will promote broad economic welfare. Characteristically, private firms will engage in strategic conduct calculated to grant or deny standards to a rival based on their assessment of immediate competitive impact. In contrast, a public organization, not beset by competitive complications, can be structured so as to promulgate standards universally. Historical experience confirms these negative theoretical features of private standards, and history has witnessed a greater sensitivity to more universal standards distribution by the public sector.

Turning to the financial function, it would obviously be fulfilled by a private organization if standards were offered for a price. Interestingly, economic theory holds that the allocative function would be simultaneously fulfilled by the normal operation of a pricing

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138. Regarding the absence of a coordinated national standardization policy, a president of a private standards organization said:

"There is a real danger that American industry will find itself producing and purchasing to a host of mandatory standards that vary widely both in technical soundness and in their acceptability to the broad spectrum of producers, users, and public interests involved. As never before we need a strong consistent national standards policy that will, so to speak, set standards for standards." 

SCIENCE POLICY RESEARCH DIVISION, supra note 16, at 87.

139. See text accompanying notes 7-15 supra.

140. Id.

141. PUBLIC GOODS, supra note 7, at 178.
mechanism. Extracting a price may theoretically satisfy both functions, but in the revealing light of historical events private organizations have consistently failed to develop essential and non-discriminatory standards. Recall the manifold attempts of private interests to stymie the introduction and development of advanced machines, innovative production techniques, and new products by formulating discriminatory standards designed to protect their investments in outmoded products and processes. Included are the many products which were eliminated through non-essential standards merely to enhance the remaining standardized product's price. In comparison, the government's massive standards program administered by the War Industries Board, the efforts during World War II, and the Great Depression effectively reduced truly non-essential production costs and preserved vital national resources. In the final analysis, only a public entity would develop vital standards promulgated universally, although needing to depend partially on moderate financial assessment of the private concerns.

In structuring such an ideal organization Congress could establish an independent agency, which would formulate standards essentially free of private interference. This is not to say that private interests should be totally excluded. Since private organizations have been able to formulate some technically sound and sophisticated standards, they should be encouraged to petition for a particular standard when necessary. The formulation of a standard has such great external public ramifications, only the government, acting independently of outside parties, should decide what constitutes a proper and equitable standard. Certainly, one of the significant lessons of history is that private interests become vested and that vesting causes conflict which could hamper later product improvement. As for the other functions, Congress could provide for completely open distribution through public notice in the Federal Register and could partially finance the organization by assessing petitioners.

It is imperative that this proposed entity preserve as many freedoms of the current private system as possible. As noted, individual private interests will be encouraged to petition for the adoption of a particular standard, but should they also be encouraged to petition collectively or engage in any other collective standards

142. Id. at 182-83.
activities? Under current law, legitimate joint petitioning without more is lawful. The more difficult issue is whether collective agreements involving a standard should be permitted. Unfortunately, this issue is all the more difficult to resolve in light of the historical inconsistency surrounding the antitrust law of standards. Conflicting views have emerged. One, advocated by enforcement officials, is that collectively devised private standards are lawful as a concept under the Maple Flooring and Tag Manufacturers decisions. Any standards practice is lawful if not used collectively to fix prices, eliminate products, or boycott competitors, and is otherwise permissible under the rule of reason test of Standard Oil and Chicago Board of Trade. This view hardly resolves the issue since a violation was found in the only Supreme Court standards decision, Radiant Burners, and virtually every private standards practice results in impaired prices, eliminated products, and disadvantaged competitors. A more realistic view is that of Professor Turner who recognizes the pernicious effects of collective private standards, and proposes legislatively developed standards rather than private joint standards regulated under the antitrust law.

In light of these conflicts, Congress would do well to authorize joint petitioning through the creation of a clear and unequivocal antitrust immunity; and by expressly prohibiting all other joint private conduct, indeed, abolishing all private standards development and promulgation. To do anything less would be to invite the same kind of private action which the proposed legislation is designed to eliminate. Under no circumstances should Congress merely reiterate its general commitment to a competitive economic system and vigorous antitrust enforcement. It must specifically remove standards development and promulgation from the market and take it out from under the antitrust laws.

A national standards policy is within the grasp of Congress. The Voluntary Standards and Accreditation Act of 1977 attempts to remedy the past inequities and failures of the current standards system. The bill does not contemplate radical abolition of the system or the National Bureau of Standards, and its failure in this

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144. See note 6 supra. See U.S. DEPARTMENT OF COMMERCE, VOLUNTARY STANDARDS AND TESTING LABORATORY ACCREDITATION (1977) for a review of Senate Bill 825.
145. The so-called “horror stories” of private standardization are catalogued in note 5 supra. See also note 158 supra.
regard makes it less than a satisfactory proposal. Hopefully, Congress in time will come to realize that the only complete solution rests in an independent national agency, responsible for all standards development, and essentially free of conflicting private interests and antitrust concerns.

V. CONCLUSION

This historical and theoretical study of the nation's economic and legal policies toward industrial standards has isolated a fundamental misconception about their intrinsic nature and questions the advisability of continuing with their development in the private sector. The theories of public choice analysis suggest that standards are basically "public" in nature (not a "private" matter as commonly believed), and their collective market development by private interests will fail. History confirms this theoretical judgment, and suggests an ideal standards organization involving only minimal private participation. The antitrust laws are perceived to be in basic philosophic conflict with standards, and are therefore excluded from the proposed organizational scheme.

This has been an impressionistic study designed to apply a system of logic to history and then examine the results. A much more detailed study of the relevant costs and benefits associated with private and public approaches would have to be undertaken before a definitive judgment could be made. Nonetheless, this study should illustrate that application of logical analysis helps to focus the inquiry and formulate the issues. The analysis suggests some profound ways of locating answers to economic problems which suggest greater governmental participation as a plausible solution.