

Standardization and Markets: Just Exactly Who Is the Government, and Why Should Antitrust Care?

I.	Background and Perspective	789
A.	What Are Standards?.....	790
B.	How Are Standards Made?	794
C.	Antitrust Treatment	798
II.	The Ubiquity of Private Coordination and Isomorphic Markets	800
III.	The Antitrust Model of “Government” and the Causation Issue.....	804
IV.	Is There Some Alternative as a Matter of Policy?.....	808
V.	Conclusions and This Symposium’s Theme	810

My assignment at the symposium at which this Article was presented was to relate private standard setting to the symposium theme: the “public and the private,” and the possibility that whatever “boundaries” they may have are in “transition.” I am very glad to have done it. The antitrust relevance of standard-setting organizations (SSOs) is obvious enough. In the ordinary case, at least a few of an SSO’s participants will have some pecuniary stake in the organization’s work, and they might be able to use its influence for anticompetitive ends. SSOs have made appearances off and on in antitrust matters for many years, and the antitrust community has

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always had them in more or less conscious awareness as matters of concern. But I believe that in some respects a larger aspect of their significance has been overlooked.¹ I believe they uniquely implicate certain deep and not very visible theoretical issues in our competition policy. Those deeper issues have led us to develop a complicated, shared system of responsibility for resource allocation.

Among lawyers, standard setting occasioned a brief flurry of academic interest about ten to fifteen years ago,² apparently because it sat nicely at the juncture of three trends of then growing interest: the procompetitive potential of some horizontal collaborations, the relationship between antitrust and the evolving high-tech sector, and the emerging economics of “network” effects.³ A bit more recently, SSOs have been a fairly hot topic again, owing to a spate of high-profile Federal Trade Commission (FTC) challenges to alleged

¹ I have also written about these matters in a few prior articles. See Christopher L. Sagers, *Antitrust Immunity and Standard Setting Organizations: A Case Study in the Public-Private Distinction*, 25 CARDOZO L. REV. 1393 (2004) [hereinafter *Case Study*]; Chris Sagers, Commentary, *Raising the Price of Pork in Texas: A Few Thoughts on Ghosh, Bush, and the Future of the Antitrust Immunities*, 45 HOUS. L. REV. 395 (2008) [hereinafter *Pork in Texas*]. I address the larger issues in Christopher L. Sagers, *The Legal Structure of American Freedom and the Provenance of the Antitrust Immunities*, 2002 UTAH L. REV. 927 (2002), Chris Sagers, *Monism, Nominalism, and Public-Private in the Work of Margaret Jane Radin*, 54 CLEV. ST. L. REV. 219 (2006) [hereinafter *Monism*], and Chris Sagers, *The Myth of “Privatization,”* 59 ADMIN. L. REV. 37 (2007) [hereinafter *Myth*].

² See, e.g., James J. Anton & Dennis A. Yao, *Standard-Setting Consortia, Antitrust, and High-Technology Industries*, 64 ANTITRUST L.J. 247 (1995); David A. Balto, *Standard Setting in the 21st Century Network Economy*, COMPUTER & INTERNET LAW., June 2001, at 5; Jack E. Brown, *Technology Joint Ventures to Set Standards or Define Interfaces*, 61 ANTITRUST L.J. 921 (1993); Sean P. Gates, *Standards, Innovation, and Antitrust: Integrating Innovation Concerns into the Analysis of Collaborative Standard Setting*, 47 EMORY L.J. 583 (1998); Harry S. Gerla, *Federal Antitrust Law and Trade and Professional Association Standards and Certification*, 19 U. DAYTON L. REV. 471 (1994); Daniel J. Gifford, *Developing Models for a Coherent Treatment of Standard-Setting Issues Under the Patent, Copyright, and Antitrust Laws*, 43 IDEA 331 (2003); Douglas D. Leeds, Essay, *Raising the Standard: Antitrust Scrutiny of Standard-Setting Consortia in High Technology Industries*, 7 FORDHAM INT. PROP., MEDIA & ENT. L.J. 641 (1997); Mark A. Lemley, *Antitrust and the Internet Standardization Problem*, 28 CONN. L. REV. 1041 (1996); Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CALIF. L. REV. 1889 (2002) [hereinafter *Intellectual Property Rights*]; Philip J. Weiser, *Internet Governance, Standard Setting, and Self-Regulation*, 28 N. KY. L. REV. 822 (2001). Standard setting was also the focus of several symposia. See, e.g., Symposium, *The Interface Between Intellectual Property Law and Antitrust Law*, 87 MINN. L. REV. 1695 (2003); Symposium, *Private Accreditation in the Regulatory State*, L. & CONTEMP. PROBS., Autumn 1994, at 1.

³ This is nicely explained in Gates, *supra* note 2, at 585–97.

“patent hold-ups.”⁴ Of course SSOs were also involved in a smattering of very well-known matters going back several decades,⁵

⁴ While the specifics of the patent hold-up cases turn out not to be especially relevant to the concerns of this Article, several of them—especially the FTC’s recent and much-discussed *Rambus, Inc. v. Fed. Trade Comm’n*, 522 F.3d 456 (D.C. Cir. 2008), *cert. denied*, 129 S.Ct. 1318 (2009), and *Negotiated Data Solutions LLC (N-Data)*, No. C-4234 (F.T.C. Sept. 22, 2008)—are big and important cases in their own right and deserve at least some discussion here.

A patent hold-up occurs when an SSO participant fails to disclose that it owns patents that would be infringed by the adoption of a standard under consideration before the SSO. If patent rights are incorporated into a standard, and the standard then becomes significant in the industry, that participant may acquire a significant degree of market power it otherwise would not have. The first of the FTC’s patent hold-up cases resulted in a fairly broad consent order constraining the computer manufacturer, Dell, Inc., from enforcing patents that it managed to include in an influential standard, allegedly by lying about them. *Dell Computer Corp.*, 121 F.T.C. 616 (1996). Another very interesting matter was the long-running *Union Oil Co. of Cal. (Unocal)*, 140 F.T.C. 123 (2005), which raised the arguably distinct circumstance of a patentee misleading a quasi-public regulatory body to include patented technology in a state-mandated standard. Importantly, had the *Unocal* litigation proceeded any further, it surely would have raised legal issues central to points made in this Article, but those issues were mooted when Unocal was acquired by Chevron, and a consent order followed.

A case that is now probably much more significant, based on facts like those in *Dell*, is the FTC’s ultimately unsuccessful monopolization action against the computer memory maker, Rambus. The case is much bigger because of the FTC’s loss before the D.C. Circuit and the reasoning on which that court rejected liability. *See Rambus*, 522 F.3d 456. The FTC has also received a lot of attention for its decision in *N-Data*, in which the majority upheld liability solely on the basis of the FTC’s unfair competition authority, with no separate finding of a Sherman Act violation. *N-Data*, No. C-4234 (F.T.C. Sept. 22, 2008). Among other things, the final consent order was approved over then Commissioner Kovacic’s dissent, and when the complaint was first issued, then Chairman Majoras and Commissioner Kovacic both issued lengthy, analytical dissents challenging the free-standing Section 5 liability theory.

The FTC first began initiating these matters at a time when the agency took high-tech standard setting as a special policy focus. *See, e.g.*, David A. Balto, Assistant Dir. Office of Policy & Evaluation, Fed. Trade Comm’n, Standard Setting in a Network Economy, Speech Before Cutting Edge Antitrust Law Seminar (Feb. 17, 2000), *available at* <http://www.ftc.gov/speeches/other/standardsetting.htm>; Christine A. Varney, Comm’r, Fed. Trade Comm’n, Antitrust Implications in Standard Setting, Remarks at the District of Columbia Bar Annual Seminar on Antitrust and Trade Associations (Feb. 22, 1995), *available at* 1995 WL 232950. However, the special interest the Commission took at that time may also have reflected a longer-standing interest in standard setting generally. *See* BUREAU OF CONSUMER PROTECTION, FED. TRADE COMM’N, STANDARDS AND CERTIFICATION: FINAL STAFF REPORT (1983) (reporting staff’s findings, made during a long investigation in support of a contemplated rule making, after an uncommonly surgical statutory change to the Commission’s organic statute removed its rule-making power as to standards).

⁵ Two well-known cases are *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), and *Am. Soc’y of Mech. Eng’rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982). In both, the Court upheld antitrust liability where manufacturers that were SSO members used SSO procedures to injure competitors. Going back a bit further, in *Radiant*

but to most antitrust observers, the topic now feels familiar and probably a little passé. It seems mainly like an intellectual property issue of especial interest to counselors of high-tech clients.

I believe that impression is incorrect. When the standard-setting phenomenon is considered in a bigger picture, it tends to cast doubt on one particular idea, which I believe is central to our politics but is not thought about much. The idea is that the basic choice in public policy is between regulation by public bureaucracies on the one hand and by markets on the other. In prior work, I have suggested theoretical reasons to doubt that that is the case.⁶ This symposium is a nice opportunity to marshal some qualitative empirical evidence against it as well.

This Article is basically a sociological exercise. It will make two basic arguments about how the role of standard setting in our economy is at odds with the commonly assumed dichotomy between bureaucracy and markets. First, I stress the great ubiquity and influence of standard-setting activity in the United States. A large proportion of the standards we adopt have more or less binding force, and they exert influence far beyond high technology and manufacturing. *They are everywhere.* Moreover, most matters governed by standards are *not* subject to any government oversight. They are formulated outside the government purview, and they get their influence not from the formal force of law but from independent forces. And yet, as I argue, those standards cannot easily be explained as merely the results of market-driven influences. That is to say, even though most standards are formulated outside any government purview—and, therefore, under the bureaucracy-markets dichotomy, should be explainable in some way as the product of competitive markets—they are in fact not subject to price-competitive pressures. In the discussion below, I relate this phenomenon to theoretical developments in the social sciences concerning “isomorphism” or “institutionalism” in markets.⁷ Second, the nature of standards activities also tends to suggest that much of the social decision making that occurs outside of markets is not actually

Burners, Inc. v. Peoples Light & Coke Co., 364 U.S. 656 (1961), the Court permitted an antitrust action to proceed against an SSO itself where there were allegations that its repeated refusals to approve a new technology were fueled by anticompetitive motivations. Several important but less well-known cases are discussed *infra* notes 40–48 and accompanying text.

⁶ See *Myth*, *supra* note 1.

⁷ See *infra* Part II.

overseen by government—contrary to the impression given by the bureaucracy-markets dichotomy. This second issue is the flip side of the first. The ubiquity of SSOs not only casts some doubt on the prominence of markets as resource allocators but also casts some doubt on government as markets' chief alternative.

This evidence also sheds some light on the question specifically posed as the theme of this symposium. I believe that the “boundaries” between “public” and “private,” such as they are, are not actually changing that much. At least so far as private regulatory conduct goes, things have been more or less the same for a long time. Instead, I believe the problem is simply the imagery by which we imagine those boundaries. I believe that imagery has long been inaccurate.

I

BACKGROUND AND PERSPECTIVE

It is central to this Article to capture the standards sector in a bigger picture. I believe that, when seen in the bigger picture, it is clearer how private regulatory conduct usurps some of the control we ordinarily assume is held by either markets or state entities. Fortunately, though, extensive digression will not be needed here. The history and work of the SSOs is exhaustively recounted in dozens of significant federal policy reports;⁸ an extensive historical literature, which now includes a number of book-length histories;⁹ and a rich

⁸ See 1 STAFF, FED. TRADE COMM'N, ANTICIPATING THE 21ST CENTURY: COMPETITION POLICY IN THE NEW HIGH-TECH, GLOBAL MARKETPLACE, 1 FTC REP. 234–63 (1996), available at http://www.ftc.gov/opp/global/report/gc_v1.pdf; BUREAU OF COMPETITION, *supra* note 4; OFFICE OF TECH. ASSESSMENT, U.S. CONG., GLOBAL STANDARDS: BUILDING BLOCKS FOR THE FUTURE (1992), available at <http://www.strategicstandards.com/files/GlobalStandards.pdf>; MAUREEN A. BREITENBERG, NAT'L BUREAU OF STANDARDS, U.S. DEP'T OF COMMERCE, THE ABC'S OF STANDARDS-RELATED ACTIVITIES IN THE UNITED STATES (1987). Also, the federal agency most engaged in the standards sector, the National Institute of Standards and Technology, is now required by statute to deliver an annual report to Congress concerning the standards sector and the government's role in it. See National Technology Transfer and Advancement Act, Pub. L. No. 104-113, 110 Stat. 775 (1996) (implemented by Office of Management and Budget, Circular No. A-119, at § 9(c) (1998), available at http://www.whitehouse.gov/omb/circulars_a119/#13).

⁹ See, e.g., SAMUEL KRISLOV, HOW NATIONS CHOOSE PRODUCT STANDARDS AND STANDARDS CHANGE NATIONS (1997); DOUGLAS J. PUFFERT, TRACKS ACROSS CONTINENTS, PATHS THROUGH HISTORY: THE ECONOMIC DYNAMICS OF STANDARDIZATION IN RAILWAY GAUGE (2009); ANDREW LAWRENCE RUSSELL, “INDUSTRIAL LEGISLATURES”: CONSENSUS STANDARDIZATION IN THE SECOND AND THIRD INDUSTRIAL REVOLUTIONS (Aug. 2007) (Ph.D dissertation, Johns Hopkins Univ.),

body of theory detailing what are thought to be the economic costs and benefits.¹⁰

In the remainder of this Part, I highlight only three especially useful points: what standards *are*, as a matter of definition; the nature of the world in which standards are made, including the important matter of the relationships that most influential SSOs enjoy with federal, state, and local governments; and a summary of the legal treatment of SSO conduct in antitrust law.

A. *What Are Standards?*

Discussion of standards activities is sometimes a bit clouded by confusion of two distinct questions: (1) what a standard *is* and (2) how a standard is *made*. In much of the policy debate, especially among lawyers, the first question is answered not directly, but by reference to the second question—by a description of the institutions or processes that produce standards. Definitions often describe a standard as the product of one of the traditional, formal SSOs—like

available at <https://jscholarship.library.jhu.edu/bitstream/handle/1774.2/32576/alr-diss-08012007-CBO-opt.pdf>; HARM SCHEPEL, *THE CONSTITUTION OF PRIVATE GOVERNANCE: PRODUCT STANDARDS IN THE REGULATION OF INTEGRATING MARKETS* (2005); Nils Brunsson & Bengt Jacobsson, *The Contemporary Expansion of Standardization*, in *A WORLD OF STANDARDS I* (Nils Brunsson & Bengt Jacobsson eds., 2000); Paul A. David & Mark Shurmer, *Formal Standards-Setting for Global Telecommunications and Information Services*, 20 *TELECOMM. POL'Y* 789, 790–93 (1996); Robert W. Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 *TEX. L. REV.* 1329 (1978); Marc A. Olshan, *Standards-Making Organizations and the Rationalization of American Life*, 34 *SOC. Q.* 319 (1993); Marian P. Opala, *The Anatomy of Private Standards-Making Process: The Operating Procedures of the USA Standards Institute*, 22 *OKLA. L. REV.* 45 (1969).

¹⁰ See, e.g., Paul A. David, *Some New Standards for the Economics of Standardization in the Information Age*, in *ECONOMIC POLICY AND TECHNOLOGICAL PERFORMANCE* 206 (Partha Dasgupta & Paul Stoneman eds., 1987); Paul A. David & Shane Greenstein, *The Economics of Compatibility Standards: An Introduction to the Recent Scholarship*, 1 *ECON. OF INNOVATION & NEW TECH.* 3 (1990); Joseph Farrell & Michael L. Katz, *Innovation, Rent Extraction, and Integration in System Markets*, 48 *J. INDUS. ECON.* 413 (2000); Joseph Farrell & Garth Saloner, *Coordination Through Committees and Markets*, 19 *RAND J. ECON.* 235 (1988); Joseph Farrell & Garth Saloner, *Standardization, Compatibility, and Innovation*, 16 *RAND J. ECON.* 70 (1985); Thomas M. Jorde & David J. Teece, *Innovation and Cooperation: Implications for Competition and Antitrust*, *J. ECON. PERSP.*, Summer 1990, at 75; Charles P. Kindleberger, *Standards as Public, Collective and Private Goods*, 36 *KYKLOS* 377 (1983); Michael L. Katz & Carl Shapiro, *Technology Adoption in the Presence of Network Externalities*, 94 *J. POL. ECON.* 822 (1986); Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 *AM. ECON. REV.* 424 (1985); Martin B. H. Weiss, *The Standards Development Process: A View from Political Theory*, *STANDARDVIEW*, Dec. 1993, at 35.

the familiar American National Standards Institute (ANSI) or American Society of Testing and Materials—or of one of the more ad hoc industry consortia that have become common in high-tech sectors in the past few decades—like VESA, the group at issue in the FTC’s recent *Dell* action.¹¹ But defining “standard” only as the product of the familiar, formal standard-setters that produce some of them is significantly underinclusive.

Finding a better answer for the first question is very difficult because “standard” turns out to be hard to define in any way except with so much generality that it loses its meaning.¹² Thinkers tend to wax fairly philosophical about this idea’s great generality; one commentator, paraphrasing Walt Whitman no less, defined it as “vast similitude of symbols, numbers, alphabets, currency, weights, measurement systems, navigational elements and communications systems.”¹³ Some other, more homely definitions are no less expansive, so much that one wonders what there could be that would *not* be a standard. For example, “A standard is a formulation [for] specifying certain features of a unit or basis of measurement, a physical object, an action, a process, a method, a practice, a capacity, a function, . . . a duty, a right, a responsibility, a behavior, an attitude, a concept, or a conception.”¹⁴ It is also clear that, by any realistic definition, “standards” are very old and are fundamental to much of

¹¹ *Dell Computer Corp.*, 121 F.T.C. 616 (1996). The *Dell* matter is discussed *supra* note 4.

¹² Many definitions have been offered. See, e.g., C. BONGERS, *STANDARDIZATION: MATHEMATICAL METHODS IN ASSORTMENT DETERMINATION* 2 (1980) (adopting a product-specific notion of “standard” but noting that “the word product must be interpreted in its broadest sense” and that “a product is any good or service . . . includ[ing] services like education and jurisdiction”); DAVID HEMENWAY, *INDUSTRYWIDE VOLUNTARY PRODUCT STANDARDS* 4 (1975) (A standard is “something taken for a basis of comparison, or that which is accepted for current use through authority, custom or general consent.”); 1 INT’L ORG. FOR STANDARDIZATION, *STANDARDIZATION VOCABULARY: BASIC TERMS AND DEFINITIONS* 5 (1971) (“Standardization is the process of formulating and applying rules for an orderly approach to a specific activity for the benefit and with the cooperation of all concerned, and in particular for the promotion of optimum overall economy, taking due account of functional conditions and safety requirements.”); cf. Gerla, *supra* note 2, at 472 (noting that “[n]o exact definition exists for the term ‘standard’”).

¹³ Ken Krechmer, *Standards Mark the Course of Economic Progress* (2000) (unpublished manuscript), available at <http://www.csrstds.com/fundeco.html>.

¹⁴ JOHN GAILLARD, *INDUSTRIAL STANDARDIZATION: ITS PRINCIPLES AND APPLICATION* 33 (1934).

the working of societies.¹⁵ Money, for example, and its inextricably entwined partner concepts of weight and measurement, are primordial standardizations that arose very early in most economies and developed in very similar ways in cultures that had little interaction with one another.¹⁶ A need for standardization is fundamental enough that the U.S. Constitution explicitly empowers Congress to regulate weights and measures,¹⁷ and standardization was the subject of concerted action in the United States very early in the country's history. Routinization or regularization seems to ease interaction among individuals, groups, and peoples, and acts as an interface between individuals and the physical world they inhabit. It is perhaps a solution to problems posed by human epistemic incapacity, bounded rationality, and constraints on resources.¹⁸ To borrow a phrase, it seems that this human penchant for regularization is an effort to use the world's own redundancies to utilize the world more simply,¹⁹ and it seems to run very deeply in our nature.

In any case, the definitional problem nicely illustrates the two public-private aspects of standardization that I discuss below. First,

¹⁵ Evidence of conscious standardization exists from as early as 7000 BCE, when uniform cubic or cylindrical stones were used in Egypt as measures of weight. Both standard weights and other measurement exemplars were later used in Babylon and India. Hundreds of other examples can be found from various bygone times. In 1120, Henry I of England mandated a uniform measure of length based on the length of his own arm; medieval European market rules widely regulated products, weights, and measures; and the leaders of Massachusetts Bay Colony standardized a number of products long before the Revolution, including beer, bread, nails, and bricks. The most significant gestures to give rise to what might be thought the "modern" era of standardization occurred primarily in the late eighteenth century. They included the adoption of the metric system by the newly empowered French Academy of Sciences and the design of interchangeable musket components by Eli Whitney in 1780. Whitney's innovation is commonly said to have introduced mass production to the United States. See generally Edward Eugene Gallahue, *Some Factors in the Development of Market Standards* 20–31 (1942) (Ph.D. dissertation, published at 9 CATH. U. AM. STUD. ECON. (1943)); KRISLOV, *supra* note 9, at 26–28 (discussing historical trends of standardization); LAL C. VERMAN, *STANDARDIZATION: A NEW DISCIPLINE* 2–8 (1973); BREITENBERG, *supra* note 8, at 3–4; Olshan, *supra* note 9, at 320–21 (summarizing the history of standards-making organizations).

¹⁶ See Kindleberger, *supra* note 10, at 383–84 (exploring the standardization of money as a medium of exchange); see also JAMES WILLARD HURST, *A LEGAL HISTORY OF MONEY IN THE UNITED STATES, 1774–1970* (1973); KRISLOV, *supra* note 9, at 9–11.

¹⁷ U.S. CONST. art. I, § 8, cl. 5 (empowering Congress "[t]o coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures").

¹⁸ Other reasons can drive routinization. It sometimes serves as a tool for serving personal ends, for example, as when a sovereign mints currency as a route to prestige, power, and wealth. See KRISLOV, *supra* note 9, at 9.

¹⁹ See generally Herbert A. Simon, *The Architecture of Complexity*, 106 PROC. AM. PHIL. SOC'Y 467 (1962).

standard setting is ubiquitous. Activity not clearly distinguishable from traditional “standard setting” occurs not just in technology or manufacturing sectors, but everywhere.²⁰ Standard setting often appears in code-like form, which resembles the work of legislatures.²¹ But it can also appear as a statement of authoritative opinion;²² as a “rule,” like a professional ethical rule or union “work rule”;²³ and as private adjudication.²⁴

Second, when conceived so broadly, “standard setting” plainly includes some conduct that seems less like private collaboration and more like some sort of participation in policy or government. On the one hand, it turns out to be pretty difficult to define “standard” in a way that robustly distinguishes it from “law.” One might think the difference is that standards are made by “private” entities, but that distinction just restates the question and makes it no less difficult—it just begs the basically hopeless question of whether there is some line between “public” and “private.”²⁵ On the other hand, standard-setting

²⁰ I have offered the following in a previous article and think it is appropriate here as well:

“Standard,” for present purposes, means a normative rule or opinion issued by a group qua group and intended to change or regulate some area of human endeavor. This is plainly not the only possible definition, and theoretical consideration of the idea seems potentially very interesting and important. But for present purposes it is really only important to cast the definitional net widely, because the range of conduct that raises the concerns discussed here is very broad.

Case Study, *supra* note 1, at 1402–03 (footnote omitted).

²¹ *See, e.g.*, *Am. Soc’y of Mech. Eng’rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982) (considering one such legislation-like code).

²² *Cf. Schachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397, 399–400 (7th Cir. 1989); *see also infra* note 63 (discussing the unique problems presented by *Schachar*).

²³ *See, e.g.*, *Cal. Dental Ass’n v. Fed. Trade Comm’n*, 526 U.S. 756 (1999) (considering ethical rules of a voluntary professional association that limited some forms of advertising); *Fed. Trade Comm’n v. Ind. Fed’n of Dentists*, 476 U.S. 447 (1986) (holding illegal a “work rule” issued by a self-styled “union” of dentists that no member shall release certain patient information to dental insurers); *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975) (holding illegal a minimum fee schedule imposed by local bar associations).

²⁴ ABA accreditation, for example, superficially resembles an adjudicatory function but is in fact an application of the ABA’s own standards for law school quality and, therefore, seems substantively indistinguishable from other standard-setting conduct. Similarly, SSOs that issue product safety and quality standards frequently maintain product certification programs to verify that particular products comply with the relevant standard. For example, ANSI oversees a number of accreditation and certification bodies that issue opinions as to whether a particular product or process complies with the appropriate ANSI standard.

²⁵ *Monism*, *supra* note 1, at 240–47; *Myth*, *supra* note 1, at 57–63.

conduct can be made to look a lot like mere lobbying or petitioning of government, as SSOs frequently adopt their standards explicitly in the hope that they will be incorporated by governments into official law. As will be seen, the courts have struggled with problems like these quite a bit.²⁶

One other topic is relevant. A question closely related to what standards *are* is from where they derive their *power*. Some standards are literally law; thousands of them have been incorporated into federal, state, and local law. But those that are not can still be extremely influential. Commonly, standards are incorporated by reference in private procurement and other contracting. They can also be of huge influence merely as a matter of product differentiation. Affixing the seal of a given SSO may come to connote quality or safety, and when that ability to indicate quality comes about, the SSO tends to accrue influence over manufacturers of an essentially regulatory kind. Finally, in the presence of network effects, the adoption of a standard by some number of users will have the effect of “tipping” or “locking in” the standard.

B. How Are Standards Made?

The history and present circumstances of the U.S. standards sector are fascinating and bound up with basic themes in American history. But for present purposes, only a few things are really important to know. First, at the risk of redundancy, the standards sector is large. Though an exact measurement would be very labor intensive to come by, a reasonable prediction is that the amount of “private” law in the United States, made in more or less legislative fashion by private bureaucracies, now exceeds the amount that is “public.” Moreover, the consequences of this fact are aggravated by diminished public resources and the government “downsizing” mania of the past few decades. The relative importance of the standards sector as a regulator of our economy is exaggerated by the fact that government downsizing has devastated the government’s own ability to administer those laws that it does oversee.²⁷

²⁶ See *infra* Part III.

²⁷ See Dan Guttman, *Governance by Contract: Constitutional Visions; Time for Reflection and Choice*, 33 PUB. CONT. L.J. 321, 330–37 (2004); Steven L. Schooner, *Competitive Sourcing Policy: More Sail Than Rudder?*, 33 PUB. CONT. L.J. 263, 278–84 (2004).

Second, the standards sector as we now know it has evolved over a long period of time, and a central theme of that evolution is the close relations between SSOs and government at all levels. As for state and local governments, parties on all sides have carefully nurtured relations for mutual benefit.²⁸ The benefit to SSOs includes, perhaps in addition to other things, influence—thousands of private standards are now routinely adopted directly into state and local law. The advantage to state and local governments includes at least the saving in legislative resources. It may also include the opportunity to favor influential lobbies, as for example when state bar authorities adopt ethical rules and law school accreditation decisions of the American Bar Association. An important aspect of relationships like these—which is relevant in Part III below—is that, when state and local governments adopt standards, they often do so through either incorporation by reference or verbatim adoption. While this is obviously not true of all standards—such as the adoption of lawyer ethics rules, for example—the evidence is that, when private standards are adopted, they are given very little substantive consideration by formal government representatives. When that happens, substantive policy is formulated within the SSOs and not by government.

The federal government's relationship with SSOs has been more complex. Like state and local governments, the federal government is a large consumer of private standards, but the federal government has also participated in the very creation of the standards sector. Still, the federal government's role mainly has been reactive, supportive, and, ultimately, passive. Its role has been to nurture or comply in the creation of a regulatory system that, for reasons of politics—not, fundamentally, reasons of practical or logical necessity—has remained “private” and that effectively handles a very large portion of this country's regulatory work. Over the long history of the growth of this apparatus, the federal government's relationship to SSOs has been highly deferential, and, above all, the relationship has been ad hoc. That is hardly to say, however, that this relationship has been unimportant.

The bulk of U.S. policy toward private regulation resides in the symbiosis between two entities, one public and one nominally private. They are the National Institute of Standards and Technology (NIST), a federal agency within the Department of Commerce, and ANSI, a

²⁸ See *Case Study*, *supra* note 1.

privately organized body that, as the political scientist Samuel Krislov put it, acts as a “holding company” to oversee other private entities.²⁹ NIST and ANSI have partnered in varying ways to oversee U.S. standards activity for roughly one hundred years. A chief theme of this relationship has been NIST’s almost unwavering deference to the private sector and ANSI’s generally leading role. Thus, while ANSI often claims not to produce any standards of its own,³⁰ it sits atop a more or less formal hierarchy that produces the vast bulk of America’s private regulation. ANSI does so chiefly through its stewardship over the American National Standards (ANS), a large collection of standards made by ANSI’s SSO members according to ANSI’s prescribed procedural framework.³¹ While it is not entirely accurate to imagine U.S. standard setting as a neat pyramid with ANSI at the top,³² the bulk of the work is undertaken within the ANSI family of organizations and is subject to ANSI procedural oversight.

²⁹ See KRISLOV, *supra* note 9, at 101. Organized as a non-profit corporation composed of about one hundred thousand company, organization, and government members, ANSI was created in 1918 as an umbrella organization to coordinate the efforts of the several independent SSOs that had sprung up during the late nineteenth and early twentieth centuries. *About ANSI Overview*, ANSI, http://www.ansi.org/about_ansi/overview/overview.aspx?menuid=1 (last visited Mar. 9, 2011).

³⁰ *Standards Development Organization Advancement Act of 2003: Hearing on H.R. 1086 Before the Task Force on Antitrust of the H. Comm on the Judiciary*, 108th Cong. 11 (2003) (statement of David L. Karmol, Vice President of Public Policy and Government Affairs, American National Standards Institute) (“ANSI does not write standards; it serves as a catalyst for standards development by its diverse membership.”).

The claim seems false in two senses. First, through its effective control of the loose system of U.S. standard setting, ANSI has standardized the process by which the vast bulk of standards are adopted (mainly by setting standards for what ANSI describes as “due process”). Hamilton, *supra* note 9, at 1343–47. Second, about twenty-five percent of the standards included in ANSI’s American National Standards are developed by the American National Standards Committees. *Id.* at 1343. These committees are created under ANSI auspices and are normally managed by one of ANSI’s own organizational members, which ANSI appoints as the committee’s “secretariat.” *Id.* Thus, though functionally separate, it is somewhat hard to see any distinction in substance between ANSI itself and the development of these standards.

³¹ The actual process by which ANSI’s subsidiary SSOs do their work and seek approval of their standards as American National Standards is quite complex. A very nice summary can be found in Hamilton, *supra* note 9, at 1341–68.

³² ANSI’s own members are not required to submit their standards for inclusion in the American National Standards, and with some frequency they do not. Likewise, there are any number of U.S. SSOs that are not ANSI members at all and do not submit their standards to it. Some such outside organizations are quite influential and often they promulgate standards that overlap and conflict with American National Standards. See Hamilton, *supra* note 9, at 1342–43. Likewise, industry consortia, now a significant feature of private regulation, are outside the ANSI framework.

Beyond the NIST-ANSI partnership, the world of private regulation in the United States is fairly divorced from traditional government. This world remains dominated by a handful of very large SSOs, most of which are within the family overseen by ANSI.³³ Most of these entities arose during the late nineteenth or early twentieth centuries, at a time when ANSI itself had not yet been formed to coordinate their activities, and they seem mainly to have reflected the then booming American Industrial Revolution. They served societal concerns about growing risks to labor and consumers and the growing need to coordinate manufacturing for interoperability among products.³⁴ Other major organizations arose during the same period and have played lasting roles but have served interests other than the needs of industry or professional groups. For example, the well-known Underwriters Laboratories, initially created by a group of insurers to reduce liability for fire damage, evolved into a fully independent testing laboratory primarily concerned with promoting the safety of consumer products. Likewise, Consumers Union, publisher of the familiar *Consumer Reports* magazine, began as an offshoot of a NIST predecessor and was led by officials of the predecessor agency who were frustrated by its refusal to champion consumer protection objectives.³⁵

The federal government's fondness for the private standards sector, and its eagerness neither to regulate nor usurp it, has now grown so great that it has made itself their largest consumer. Through statute and elaborate implementation rules, the government has required itself to use privately adopted standards in both federal procurement

³³ By far the most significant of these is the American Society of Testing and Materials, which is both the largest producer of standards in the United States and the source of about half of ANSI's American National Standards. *See id.* at 1342. Other such entities are the American Society of Mechanical Engineers, the Institute of Electrical and Electronics Engineers, and the American Gas Association.

³⁴ *Id.* at 1368. Often cited examples of the need for standardization perceived at the turn of the century include a major fire in the City of Baltimore, at which firefighters from other cities had to stand by helplessly because their hose couplings would not fit the city's water supply; a boiler explosion at a shoe factory in Brockton, Massachusetts, that killed fifty-eight people and wounded 117 others; and the need for efficiency and conservation in the government's manufacturing effort during World War I. *See KRISLOV, supra* note 9, at 27, 90–91; Hamilton, *supra* note 9, at 1368.

³⁵ *See KRISLOV, supra* note 9, at 94–95. Strictly speaking, Consumers Union does not promulgate "standards" or any sort of regulatory guidance but rather tests products and reports on their safety and quality. However, the organization grew out of the standards movement of the turn of the twentieth century and serves its basic agenda.

and regulation wherever they exist and meet certain minimum criteria.³⁶

C. Antitrust Treatment

Again, courts have not been insensitive to the antitrust risks that SSOs might pose, and notwithstanding the fact that SSOs recently earned a large measure of statutory protection,³⁷ most of their conduct is nominally subject to some antitrust scrutiny. In an earlier day, the courts took quite a firm stance, most prominently in the famous *Radiant Burners* opinion of 1961—a very terse per curiam reversal of a dismissal in which the Court, relying almost exclusively on its then recent *Klors* decision, seemed to hold any arbitrary refusal to certify a given product to be per se illegal.³⁸ However, despite some more recent indications that the Court still meant business,³⁹ the more

³⁶ See National Technology Transfer and Advancement Act of 1995, Pub. L. 104-113, 110 Stat. 775 (1996) (codified at 15 U.S.C. § 272 (2006)) (mandating the use by federal agencies of any “voluntary consensus” standard that exists in their procurement and regulation). The “voluntary consensus” provision is implemented by the Office of Management and Budget, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, Circular No. A-119, Rev., 63 Fed. Reg. 8546 (Feb. 19, 1998).

³⁷ Standards Development Organization Advancement (SDO) Act of 2004, Pub. L. No. 108-237, 118 Stat. 661 (2004) (codified as amended at 15 U.S.C. §§ 4301–4305 (2006)). The SDO Act modified the National Cooperative Research and Production Act of 1993 to provide that traditional voluntary consensus SSOs could enjoy the same protections as joint ventures enjoy under that Act. 15 U.S.C. § 4302 (2006). That is to say that (1) so long as the SSO engages only in “developing, promulgating, revising, amending, reissuing, interpreting, or otherwise maintaining a voluntary consensus standard, or using such standard in conformity assessment,” *id.* § 4301(a)(7), it can be challenged only under the rule of reason, *id.* § 4302; (2) the SSO may enjoy an award of attorney’s fees if it “substantially prevail[s]” in an antitrust suit on that conduct, *id.* § 4304; and (3) if the SSO makes a proper filing with the enforcement agencies, it can be liable only in actual damages for that conduct, *id.* § 4303.

³⁸ *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 659–60 (1961) (citing *Klors, Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959)).

³⁹ First, during the eighties the U.S. Supreme Court decided two important cases upholding antitrust liability for SSOs or their members. See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988) (upholding liability for an SSO member that abused the SSO’s procedures to procure a standard unfavorable to a competitor’s product); *Am. Soc’y Mech. Eng’rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982) (upholding liability for an SSO where one of its agents, who was the plaintiff’s competitor, manipulated the organization’s procedures to deny the plaintiff’s product a certification).

Second, as Gates’s article nicely explains, the *Northwest Wholesale Stationers* Court gave one laconic, apparently approving indication that some SSO behavior could still be per se illegal. See *Gates, supra* note 2, at 625–27. The Court’s famous discussion of forms of boycott that are still per se—those that “involve[] joint efforts by a firm or firms to disadvantage competitors by . . . directly [depriving them of] relationships the[y] . . .

recent trend has been much more deferential.⁴⁰ In the course of making these rulings, the courts frequently make a point of stressing the social benefits that standardization may bring.⁴¹

But beyond that, all that can really be said is that the courts' current approach to SSO cases is a makeshift one that leaves much uncertainty. The courts have said little more than that, absent nakedly anticompetitive side agreements among members or some other blatant abuse, standard-setting conduct is subject to some unelaborated degree of rule of reason scrutiny.⁴² Among the major issues is whether the procedural propriety of an SSO's decision making can matter. "No" might seem a reasonable guess, given the uncompromising explanation Justice Brennan gave in the analytically similar *Northwest Wholesale Stationers* case:

[T]he absence of procedural safeguards [within a private organization] can in no sense determine . . . antitrust analysis. If the challenged concerted activity of [the organization's] members would amount to a *per se* violation of § 1 of the Sherman Act, no amount of procedural protection would save it. If the challenged action would not amount to a violation of § 1, no lack of procedural protections would convert it into a *per se* violation because the

need in the competitive struggle"—included a citation to *Radiant Burners, Inc. v. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 294 (1985) (internal quotation marks omitted). The citation included in a parenthetical that the case involved "denial of necessary certification of [a] product." *Id.*; see Gates, *supra* note 2, at 625–27 (discussing *Radiant Burners*). Later courts have distinguished this citation by pointing out that, in *Radiant Burners*, the only supplier of natural gas in Chicago agreed with a manufacturer's association to supply gas only to homes that used the association members' products. In other words, refusal of the certification actually meant total exclusion from the market. See, e.g., *Consol. Metal Prods. Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 291 n.21 (5th Cir. 1988).

⁴⁰ See, e.g., *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397, 399 (7th Cir. 1989) (physician's association could not violate antitrust, as a matter of law, by publicly asserting that a new medical procedure was "experimental"); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 489–91 (1st Cir. 1988) (SSO did not violate antitrust by refusing to certify manufacturer's product as compliant with SSO's product standard); *Consol. Metal Prods.*, 846 F.2d 284 (denial of certification of a product as compliant with defendant SSO's standard, even where SSO includes horizontal competitors whose products would compete with plaintiff's new, cheaper technology, and the evidence suggested that denial was "unjustified," could not violate antitrust); *Eliason Corp. v. Nat'l Sanitation Found.*, 614 F.2d 126 (6th Cir. 1980) (SSO's testing and certification program could not violate antitrust even though it tended to exclude non-approved products from the market).

⁴¹ See, e.g., *Consol. Metal Prods.*, 846 F.2d at 296; *Eliason*, 614 F.2d at 129.

⁴² See generally Gates, *supra* note 2, at 643–47 (summarizing the case law and making a similar criticism).

antitrust laws do not themselves impose on joint ventures a requirement of process.⁴³

That one passage, after all, put to rest some decades of lower court case law on SSOs that had said quite the opposite.⁴⁴ But at least in the SSO context, Justice Brennan's broad language cannot mean what it says. Rule of reason treatment of SSO conduct almost inevitably invites consideration of the process by which the challenged decision was reached. *Radiant Burners*, which is still nominally good law,⁴⁵ appears to have based its theory of liability on the SSO's failure to apply "objective standards" to its certification decisions, instead making them "arbitrarily and capriciously." It also mattered that the exclusion of plaintiff's products was effected regardless of "what[] may [have] be[en] their virtues."⁴⁶ *Allied Tube* and *Hydrolevel* even more plainly found anticompetitive effects on abuses or evasions of procedural norms.

Likewise, it is unclear to what if any extent rule of reason analysis is permitted as to the *substance* of an SSO's decision. A few courts seem to have implied that the technical grounds for the SSO's decision *cannot* be considered in antitrust litigation,⁴⁷ but that has been unpopular with commentators and appears not to be uniformly the law.⁴⁸ Indeed, it is hard to imagine that it really could be the law. If in a given case a standard was clearly baseless or manifestly contrary to the scientific evidence, it seems likely that courts would consider that fact relevant to anticompetitive purpose and effects.

II

THE UBIQUITY OF PRIVATE COORDINATION AND ISOMORPHIC MARKETS

No one can presently say how many SSOs there are or how many standards they issue. One estimate puts the number of private

⁴³ *Nw. Wholesale Stationers*, 472 U.S. at 293 (1985).

⁴⁴ *See* Gates, *supra* note 2, at 616–17.

⁴⁵ *See* *Am. Needle, Inc. v. Nat'l Football League*, 130 S.Ct. 2201, 2210 (2010) (citing *Radiant Burners* as authority for treatment of legally single entities as subject to section 1 of the Sherman Antitrust Act in some cases).

⁴⁶ *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 658–59 (1961).

⁴⁷ *See, e.g., Consol. Metal Prods.*, 846 F.2d at 292.

⁴⁸ *See* Anton & Yao, *supra* note 2, at 248; Gates, *supra* note 2, at 644–47.

standards in operation at something over one million,⁴⁹ but that estimate is probably conservative. Regardless of whether a full estimate is even really theoretically feasible, it likely will never be undertaken.⁵⁰ At least for the time being, it is thought that the majority of U.S. standards are made by only about twenty of the largest, traditional voluntary consensus SSOs,⁵¹ but the remaining minority is undertaken by a very large number of other entities. The range of products and services they regulate is mind-boggling, even within the more traditional technology and manufacturing sectors.⁵² The very substance of matters such as education, international business transactions, medical procedures, accounting rules, regulation of the professions, and human safety are simply no longer

⁴⁹ This is the current estimate at one of the most comprehensive repositories of standards-related information, CONSORTIUMINFO.ORG, <http://www.consortiuminfo.org> (last visited Mar. 9, 2011). That site is maintained in part by a private law firm, Gesmer Updegrove, LLC, and was initially created with financial support from Sun Microsystems. *Id.*

⁵⁰ There are two things wrong with all current attempts to keep track of active SSOs. First, those lists that exist tend to include only technical product or process organizations. They exclude the large range of other private regulatory bodies that ought to be included, at least for my purposes here. For example, they usually exclude the American Bar Association, even though its function as the accreditor of U.S. law schools could not be any more like “standard setting.” See *Case Study, supra* note 1, at 1411–12. Second, following the rise of the contemporary high-tech economy, and the advantages in high-tech industries for private standardization, the creation, life, and death of new SSOs has accelerated to a tremendous pace. See *Intellectual Property Rights, supra* note 2, at 1896–98 (explaining the nature and current circumstances of SSOs in high-tech industries).

⁵¹ As of about 2006, ANSI estimated that the twenty largest SSOs produce about ninety percent of U.S. standards, but it has not since revised that estimate. See *Introduction to ANSI*, ANSI, http://www.ansi.org/about_ansi/introduction/introduction.aspx?menuid=1 (last visited Mar. 9, 2011).

⁵² These include, for example, the Air Conditioning Contractors of America, the Building Performance Institute, the Cemented Carbide Producers Association, the Door and Access Systems Manufacturers Association, the Electrical Apparatus Service Association, the Fluid Controls Institute, the Glazing Industry Secretariat Committee, the Hardwood Plywood & Veneer Association, the International Association of Plumbing & Mechanical Officials, the Joint Committee on Standards for Educational Evaluation, the Kitchen Cabinet Manufacturers Association, the Laser Institute of America, Mobility Golf, the National Air Duct Cleaners Association, the Outdoor Power Equipment Institute, the Portable Sanitation Association International, the Rubber Manufacturers Association, the Society for Protective Coatings, the Truss Plate Institute, the Unified Abrasives Manufacturers Association, the Vinyl Institute, and the Window and Door Manufacturers Association. ANSI, ACCREDITED STANDARDS DEVELOPERS (2011), available at http://publicaa.ansi.org/sites/apdl/Documents/Standards_Activities/American_National_Standards/ANSI_Accredited_Standards_Developers/FEB11ASD-basicinfo-1.pdf.

Appropriately enough, there is an SSO known as the Porcelain Enamel Institute. See PORCELAIN ENAMEL INST., <http://www.porcelainenamel.com> (last visited Mar. 9, 2011). Presumably, it represents the interests of manufacturers of the kitchen sink.

in the hands of the “government” as we have traditionally known it.⁵³ Groups with characteristics that are essentially similar to the SSOs with which we are familiar—that is, essentially similar traits, memberships, and procedures—are engaged in similar conduct *throughout the U.S. economy*.

To claim that these groups seem “essentially similar” is not superficial or aesthetic. It has an important theoretical purpose. All such groups (1) “regulate,” in the sense that their standardizing acts have some source of influence, and therefore constrain the choices that individuals and firms might otherwise make on a price basis, and (2) the substance of those “regulatory” actions cannot be assumed simply to reflect or incorporate the influences of price competition.

The second of those claims is the more important one, and it is the claim that I offer as my first critique of the bureaucracy-markets dichotomy. One might try to argue that price theory remains essentially unaffected by the profusion of standard setting, if we could assume that so many SSOs have come into being only to do more efficiently what markets might otherwise do. That would imply a theory of market ordering that resembles the “make-or-buy” decision modeled in the work of Oliver Williamson and other neo-institutionalist or “transaction cost” economists.⁵⁴ That is, we might argue that SSO members collaborate only to save on some costs that would occur if they tried to achieve similar results independently.⁵⁵

⁵³ In some sense this may be a misleading way to phrase the problem. It is often not the case that private groups have taken over regulatory work that previously was done by government. Many of the problems now handled by private SSOs, even to the extent that they existed or were perceived as matters of social concern before the SSOs tried to solve them, were never governmentally regulated except through the common law of tort, property, and contract. See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986) (describing a continuum of regulatory approaches from tort law at one end to fully invasive regulation at the other and noting that, prior to the twentieth century, most “regulation” tended far toward the tort law end of the spectrum).

⁵⁴ See, e.g., FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991); OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* (1983); R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 398–401 (1937).

⁵⁵ There have been efforts to model private regulatory conduct—which can be thought of as a “privatization” of a government regulatory function—as merely a make-or-buy decision. See JOHN D. DONAHUE, *THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS* (1989); Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389 (2003); Oliver E. Williamson, *Public and Private Bureaucracies: A Transaction Cost Economics Perspective*, 15 J.L. ECON. & ORG. 306 (1999); see also Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 758–66 (1984) (charting the then nascent rise of transaction-cost applications to politics and public bureaucracy, while being cautiously optimistic about the movement’s promise, despite concerns that important

If so, even markets pervasively overseen by SSOs could still lead to equilibria very similar to those that markets themselves would produce in the absence of transaction costs. That would seriously undercut my criticism of the bureaucracy-markets dichotomy; it could be the case that sectors not directly overseen by governments are effectively still market-regulated. We might hypothesize that standards would tend to minimize production cost—just the way markets do. Or they might optimize dynamic efficiency or lead to ethical conduct among professionals that is optimal given the costs to clients. But we would need to multiply the minimum number of assumptions rather dramatically to reach this result—to argue that private standards simply produce the same, allocationally efficient equilibria that cost-free markets would otherwise produce. The argument would imply that the individual SSO participants take each of their specific actions as opportunities to maximize their own or their employers' gains from sales of goods or services. This seems exceedingly unlikely, especially in formal consensus SSOs, where participants include many members from government and academia. Moreover, even in the seemingly more profit-motivated industry consortia, engineering staff ordinarily represents member firms. Those employees pose not only the agency cost problems that occur in all organizations but also the special problem that engineers are influenced by a professional culture, and as a group, they have been shown to be frequently hostile to the profit-maximizing interests of individual firms.⁵⁶ These points are borne out by the theoretical and empirical evidence suggesting that SSO technical committees ordinarily do not reach decisions that would maximize the member-firms' self-interest.⁵⁷

Thus, I believe that SSOs are an important example of the mediating buffer that some social scientists perceive between price pressures and individual or firm decision making. Among the leading exponents are sociologists Paul DiMaggio and Walter Powell, who argue that “the engine of organizational rationalization has shifted”

differences exist between political organizations and the profit-motivated firms that were the traditional subject of transaction-cost models).

⁵⁶ See sources cited *supra* note 10.

⁵⁷ See Weiss, *supra* note 10, at 37–41 (modeling technical committee voting behavior, using both public choice theory and game theory, to suggest that voting equilibria will be unstable and subject to strategic behavior); Martin B.H. Weiss & Marvin A. Sirbu, *Technological Choice in Voluntary Standards Committees: An Empirical Analysis*, 1 *ECON. INNOVATION & NEW TECH.* 111 (1990).

from the desire for efficient markets to “individual efforts to deal rationally with uncertainty and constraint,” efforts that take place within organizations of “key suppliers, resource and product consumers, regulatory agencies, and other organizations that produce similar services or products.”⁵⁸ Moreover, they argue that these social institutions—these “efforts to deal rationally” with circumstances—seem to grow more similar over time, which reflects something important about society. Admitting that some of this “isomorphism” among organizations could be explained by competitive forces, as of course would be the traditional explanation,⁵⁹ DiMaggio and Powell argue that much institutional isomorphism has become shielded from the rationalizing influence of market competition. A larger implication of their work is that as institutions themselves come to have greater independent rationalizing force—as they grow in their bilateral power asymmetry vis-à-vis natural persons and other organizations—they increasingly displace the regulatory importance either of traditional government institutions or market pressures.

III

THE ANTITRUST MODEL OF “GOVERNMENT” AND THE CAUSATION ISSUE

In Part II, I argue that the work of SSOs, even when they are not overseen by government, cannot be assumed to be simply some market-driven phenomenon explainable by price theory. In this Part, I argue that SSOs also illuminate a different problem, which I have said is a flip-side problem. They cast doubt on the idea that activity removed from market constraints is thereby, ipso facto, overseen by the publicly accountable institutions of our traditional democratic theory. This will be seen in the federal case law in which courts have been asked for a remedy against SSOs for plaintiffs harmed when a formal government body adopts an SSO’s standard. Most of these cases have considered only the availability of antitrust relief, but there clearly is no remedy of any kind against an SSO in such a case. And, of course, SSOs are not subject to the democratic constraints of

⁵⁸ See Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 147–48 (1983); see also Olshan, *supra* note 9.

⁵⁹ See, e.g., ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (1977).

formal government because none of their members are elected. In other words, SSOs are to some extent exempt from market oversight (as I argue in Part II), but they are also removed from those very judicial and democratic constraints that define our ordinary notion of government.

Whether they like to admit it or not, when courts apply antitrust, they necessarily imply a model of government in some cases. Inevitably, given certain deep commitments in our political philosophy, some antitrust cases will seem to pose the risk that a private person or firm will be held personally liable even though the real “cause” of the harm was something that the government did. The Supreme Court has never directly addressed whether a private person could be liable for harm caused by government, despite some arguments to the contrary.⁶⁰ The issue has arisen quite prominently in a line of lower court decisions involving SSOs that are privately organized but have become influential with state and local governments. Again, when government adopts private standards, the act of adoption frequently involves little or no substantive deliberation about the standards themselves. These adoptions are rubber stamps. State and local governments have even occasionally incorporated by reference *future amendments* to a private standard. Moreover, relations between powerful SSOs and their state government clients have often developed over long periods, with mutual benefits, and often with the SSOs’ careful nurturing. Nevertheless, in a series of lower court decisions that now appear firmly established, the courts have held that SSOs in such circumstances enjoy *Noerr-Pennington* immunity for any harm that flows from the government-adopted standards.⁶¹ The idea is that the

⁶⁰ See *infra* note 69 and accompanying text.

⁶¹ See *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass’n*, 107 F.3d 1026, 1037 (3d Cir. 1997) (holding the ABA immune from antitrust action for law school accreditation activities); *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 17 F.3d 295, 301 (9th Cir. 1994) (immunizing deliberate misrepresentations to an SSO because alleged harm was caused by government regulation, not lobbying efforts); *Lawline v. Am. Bar Ass’n*, 956 F.2d 1378, 1383 (7th Cir. 1992) (holding the ABA immune for promulgation of model ethical rules); *Sherman Coll. of Straight Chiropractic v. Am. Chiropractic Ass’n*, 654 F. Supp. 716, 728 (N.D. Ga. 1986) (holding chiropractic trade association immune for school accreditation activities), *aff’d without opinion* 813 F.2d 349 (11th Cir. 1987); *Zavaletta v. Am. Bar Ass’n*, 721 F. Supp. 96 (E.D. Va. 1989) (holding the ABA immune for accreditation activities); *cf. Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 250 (7th Cir. 1994) (holding that, while a psychiatric certification board’s decisions were the basis of granting certain state benefits, the board was not a “state actor”).

SSO is simply a private entity petitioning its government, asking that a particular model code it has drafted be made law.

The Seventh Circuit, in a somewhat notorious opinion, also suggested that standardization really is only the expression of opinion, even when there is no government involvement whatsoever. The court held that, because an SSO's certification ruling is no more than the "provi[sion] [of] information," it *cannot* violate antitrust so long as it "does not constrain others to follow its recommendations."⁶² That characterization would seem incorrect in light of the previously decided *Allied Tube*,⁶³ but more important for the present topic was the opinion's metaphysical characterization of what standardization *is*. Writing for the majority, Judge Easterbrook came perilously close to calling it constitutionally protected speech. He wrote that an SSO's

The issue would have come up again in the FTC's *Unocal* action had that matter not been resolved by consent decree, and it would have been raised there in a novel posture. Rather than a nominally private SSO defendant asserting immunity, Unocal would have been a private defendant asserting immunity for engaging in a patent hold-up before a quasi-public SSO. Unocal successfully raised that *Noerr-Pennington* theory before an administrative law judge, but the Commission reversed, finding both that there was a "fraud" exception to the immunity and that some of Unocal's illegal conduct had occurred before nongovernment entities. *Union Oil Co. of Cal.*, 138 F.T.C. 1, 72 (2004). The issue was mooted, however, when Unocal merged with Chevron, and Chevron entered a consent decree with the Commission. Under the decree Chevron agreed not to assert any of Unocal's rights under patents included in the CARB standard. *Chevron Corp.*, 140 F.T.C. 100 (2005).

⁶² *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397, 399 (7th Cir. 1989).

⁶³ *Schachar* attempted to distinguish *Allied Tube* as having involved more than a mere adoption of a standard—that it involved some "enforcement device[]." *Id.* But that distinction seems utterly incorrect. See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 498 n.2 (1988) (noting that the only theory of harm on which the verdict for plaintiff had been based—a verdict that the Court upheld—was "the stigma of not obtaining [an SSO's] approval of [plaintiff's] products and [the defendant SSO member's] 'marketing' of that stigma," which "caused independent marketplace harm to [plaintiff] in those jurisdictions *permitting* use of" plaintiff's product); see also *id.* at 500 ("In this case, the restraint of trade on which liability was predicated was the [SSO's] exclusion of [plaintiff's] product" from its standard.); Mark R. Patterson, *Antitrust Liability for Collective Speech: Medical Society Practice Standards*, 27 IND. L. REV. 51, 63–78 (1993) (criticizing *Schachar* and its disregard for the anticompetitive potential of some information).

Consolidated Metal Products is a similar decision, and it contains dicta that might seem to support the reasoning in *Schachar*, but the resemblance is superficial only. *Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284 (5th Cir. 1988). In that case, plaintiff's product was certified as compliant with the SSO's standard. *Id.* at 288. Plaintiff's entire theory of harm was that the SSO's certification process took longer than plaintiff thought appropriate (two years—perfectly ordinary in the context of voluntary consensus standard setting), and plaintiff failed to plead any facts relevant to either conspiracy or anticompetitive effect. *Id.* at 293–97.

“towering reputation does not reduce its freedom to speak out,” and that when it does so, “the remedy is not antitrust litigation but more speech—the marketplace of ideas.”⁶⁴

In any case, that all might actually be fine if the courts gave some consideration to whether, having removed SSOs from antitrust review, they have preserved some other alternative for affected parties to challenge the substantive policy adopted as law. For example, it might not be so bad if, by holding an SSO exempt from antitrust when it plays some role in making public policy, the courts meant to imply that they will then hold the SSO subject to the rules of process, representativeness, and transparency to which we hold our government institutions. (E.g., they might make available some redress to plaintiffs under notions of due process or open government from constitutional or administrative law.) Or the courts might reason that, where the state rubber stamps an SSO standard, the state itself could be subject to constitutional or administrative challenges for process failures that occurred within the SSO’s standard-setting work.

But of course the courts intend no such thing. Privately organized SSOs not acting pursuant to any formal delegation of government authority are subject to no obligations of constitutional or administrative law, either directly or indirectly through review of the state actors who adopt their standards.⁶⁵ And there is little likelihood of judicial challenge to government adoption of a previously formulated private standard, no matter how flawed the SSO’s process may have been, particularly if the adoption is made by a state legislature or Congress. Also, obviously enough, SSOs are not subject to the other major constraint that democracies are thought to place on their governments—the ballot box.

Moreover, a little-noticed problem is that, having inadvertently created this class of odd, intermediary organizations, which live between but are subject to neither public nor private law, the courts have at least in some cases devised an ideal vehicle for the distribution of state and local government pork-barrel largesse. It is agreed by wide consensus that, in the pursuit of monopoly, there is no better accomplice than government. These SSO immunity decisions have created a way to seek government assistance—through the adoption of privately arranged standards—that are triply impenetrable to challenge. First, the work of SSOs will ordinarily be substantively

⁶⁴ *Schachar*, 870 F.2d at 399–400.

⁶⁵ *See Case Study*, *supra* note 1.

inscrutable to the politicians who adopt them. Because state and local officials typically will have little ability to second-guess the substantive work that SSOs do, they will have no way to know whether some unscrupulous party was able to manipulate an SSO. Second, because SSOs are subject to no public law rules, interference in their work by unscrupulous parties will not be subject to public scrutiny through transparency or process obligations. And finally, so long as a monopoly-granting standard is adopted as law, it cannot be reviewed by courts for anticompetitiveness. In such a case, SSOs appear to be truly impervious to all the legal tools that we have.⁶⁶

IV

IS THERE SOME ALTERNATIVE AS A MATTER OF POLICY?

While this Article is not meant to offer doctrinal solutions, it is worth considering whether there are problems here that could be better handled by our law. I think the short answer is, probably, no, at least not with any short-term political feasibility. Elsewhere I have written about the occasional doctrinal suggestions for better handling the problem of entities in between the public and the private.⁶⁷ I believe those other attempts, including my own, have been at best incomplete.⁶⁸ While I am not yet sure I can now offer any better solution, I believe the fundamental, root issue underlying the problem is the murky concept of government as the “cause” of antitrust injury. The courts in these cases are repelled by the idea of private liability for government conduct. Though the reasons remain largely unexpressed, it is no doubt from a commitment to our traditional

⁶⁶ It has apparently been suggested on occasion that this all might be tolerable nonetheless, given that much standard setting is done by voluntary consensus procedures. See, e.g., Errol Meidinger, *Law and Constitutionalism in the Mirror of Non-Governmental Standards: Comments on Harm Schepel*, in *TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM* 189, 195–96 (Christian Joerges et al. eds., 2004). I am not comforted.

⁶⁷ *Pork in Texas*, *supra* note 1, at 414–16.

⁶⁸ My own effort was in *Case Study*, *supra* note 1. The problem with that approach was that, while it would allow antitrust to check some abuses in overly close relationships between governments and SSOs, it would pose a substantial risk to more traditional lobbying. The other effort of which I am aware is the work of Einer Elhauge. See Einer Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 *CALIF. L. REV.* 1177 (1992); Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 *HARV. L. REV.* 667 (1991). I believe the problem in Elhauge’s otherwise exhaustive and perceptive synthesis to be that, though he seems to deny it, his approach would still require that, if injury is “caused” in some ill-defined sense by “government,” no private defendant could be liable for it. See generally *Pork in Texas*, *supra* note 1.

liberal individualism that courts find any alternative unthinkable. But in fact, they are quite wrong.

At least in the abstract, if not in any politically plausible actual outcome, this problem could be overcome. Scrutiny as to state or local government “causation” is not relevant to *any* policy of the antitrust laws, and protection from liability for harm “caused” by government is not actually required by the First Amendment.⁶⁹ Moreover, I believe that *Allied Tube*—the opinion in which the Supreme Court came closest to addressing the question of private liability for harm caused by government action—did not actually hold otherwise. The Court carefully reserved the question and did not reach it.⁷⁰ There is also this point: *Allied Tube* was written by Justice Brennan, a jurist personally concerned with the place of voluntary associations in our political order.⁷¹ *Northwest Wholesale Stationers* (which he also wrote) plainly showed his concern that voluntary associations not be too easily turned into “government” in the traditional sense, refusing to let antitrust review evolve into an administrative law that would render those associations subject to duties of process and transparency. But a Justice who also believed in the mission of the antitrust laws could not thereby have intended to create this ambiguous third category of institutions in between the public and private, subject neither to the government’s process constraints nor private law. All the reasoning in *Allied Tube* is flatly against such a result.

Moreover, for what it may be worth, there remain at least two government enforcement actions, the results of which have not been overturned, in which a private entity was forced to submit to injunctive relief for harms “caused” by government. This was true in the FTC’s *Unocal* consent decree of 2005, mentioned above.⁷² There,

⁶⁹ See *Case Study*, *supra* note 1, at 1397.

⁷⁰ See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 498 n.2 (1988) (declining to consider an award for injuries against private parties stemming from the adoption of a government ethics code).

⁷¹ Cf. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–19 (1984). First Amendment freedom of association recognizes

that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State. . . . [The freedom] safeguards the ability independently to define one’s identity that is central to any concept of liberty.

Id.

⁷² See *supra* note 4.

a patentee of environmentally superior gasoline technology was found by the FTC to have violated antitrust when it misled a California regulatory authority into incorporating its patented technology into a state-mandated standard. Likewise, in the consent order reached in *American Society of Sanitary Engineering* in 1985,⁷³ the FTC frankly acknowledged that its theory of harm was based on adoption by state and local governments of the defendant SSO's standards. Indeed the FTC apparently asserted no other basis for liability. The FTC, at least, believes that government as "cause" of the asserted harm is not a bar to liability.

V

CONCLUSIONS AND THIS SYMPOSIUM'S THEME

The question posed by the American Antitrust Institute's symposium was whether the boundaries between what is public and what is private might be in transition. I am not sure just how broadly I can answer that question on the basis of the SSO evidence alone. After all, there is a whole world of discussion now of "privatizing" or "contracting out" arrangements, and much of our economy is governed or affected by our dozens of quasi-public federal corporations and "government sponsored entities." But in one sense at least I believe I can say that the character of our resource allocation has not actually changed that much in some time. So in a crude sense, my answer is no, the boundaries are not in transition. Throughout much of the twentieth century, important policy choices have been made by entities that make "standards," broadly defined. Those entities are not formal government entities, and they are not very similar to our traditional democratic institutions. But their work is also not easily explained as the result of any market forces. So at the very least, I think our imagery for understanding the "boundaries" between government and the private sector leaves a lot of detail unaccounted for. But on the other hand, I do not believe that that state of affairs has really changed very much for many decades.

⁷³ Am. Soc'y of Sanitary Eng'rs, 106 F.T.C. 324 (1985).