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Existing in a Legal Limbo: The Precarious Legal Position of Standards-Development Organizations

Tyler R.T. Wolf

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Existing in a Legal Limbo: The Precarious Legal Position of Standards-Development Organizations

Tyler R.T. Wolf*

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* Candidate for J.D., Washington and Lee University School of Law, May 2008; B.A., Washington and Lee University, June 2005. Thanks to Professor David Zaring for pointing me toward the NTTAA and for his insights throughout the writing process, to Charles Capito and Donald Houser for their invaluable help and for keeping me on track, and finally to my wife, Katie, for keeping me smiling.

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I. Introduction

At 11:40 on the morning of February 7, 1904, Chief Belt of the Washington, D.C., Fire Department received a telegram from Baltimore.¹ The telegram read, "Big fire here. Must have help at once."² At 12:06, a train loaded with fire equipment pulled out of Washington and began the forty-mile trip to Baltimore.³ The train arrived in Baltimore just thirty-one minutes later, "probably the record for time between the two cities."⁴ When the Washington fire brigades went to work, however, they found that the couplings on their hoses did not match the Baltimore hydrants, rendering the Washington equipment useless.⁵ Help arrived from New York, Philadelphia, Annapolis, Wilmington, and other towns, but the threads on their hoses also failed to match the Baltimore hydrants.⁶ The fire burned for thirty hours and destroyed more than seventy blocks of downtown Baltimore,⁷ while the assembled

1. See *Made Record Run*, WASH. POST, Feb. 8, 1904, at 2 (describing Washington's response to the Baltimore fire).

2. *Id.*

3. See *id.* ("The fire apparatus was hastily loaded on the train, consisting of an engine, a box car for the horses, and four flat cars, and at 12:06 it pulled out on its furious trip of forty miles.").

4. *Id.*

5. See *Compared with Chicago*, WASH. POST, Feb. 9, 1904, at 9 ("I notice[d] that when the Washington engines arrived it was found that the [Baltimore] hydrant threads would not fit the Washington apparatus.") (quoting Chief Musham of the Chicago Fire department); *Notes of Insurance Interests*, N.Y. TIMES, Mar. 6, 1904, at 32 ("Many of the outside engines sent to Baltimore were of no use because their couplings would not fit.").

6. Kenneth Turan, *They've Got Their Standards*, WASH. POST, July 20, 1975, at 11 ("[F]ire units from Washington, New York, Philadelphia, Annapolis, Wilmington, Chester, York, Harrisburg, and even Altoona all stood around looking silly . . .").

7. *Id.* at 11 ("The end result was a thirty-hour fire in which 1,526 buildings, more than

firefighters "stood around looking silly."⁸ "The glare of the conflagration forty miles away was plainly visible in Washington."⁹

At the time of the blaze, fire protection groups had been advocating for the installation of a standard size hose coupling. Chief Musham of the Chicago Fire Department stated in the wake of the fire:

I notice[d] that when the Washington engines arrived it was found that the [Baltimore] hydrant threads would not fit the Washington apparatus. It has long been agitated that all cities should have threads the same size and style, but each city insists that it has the best equipment and no progress is made.¹⁰

The disaster in Baltimore convinced American cities to standardize the size of hydrant threads so that the hoses of one city would match the hydrants of another.¹¹ Today, standardization is everywhere. We take for granted that an electrical plug will fit in a standardized outlet, that a new radio will receive signals broadcast in a standardized format, or that a garden hose will fit the spigot on the side of a house.¹² It is only when standards are absent, as in the Baltimore fire, that we become aware of how vital they are.

This Note will explore Congress's response to the continuing need for standardization—the National Technology Transfer and Advancement Act of 1995 (NTTAA).¹³ As of 1995, private standards-development organizations (SDOs) set almost half of the standards in the United States.¹⁴ The NTTAA requires all federal agencies to "use technical standards that are developed or adopted by voluntary consensus standards bodies . . . as a means to carry out policy objectives or activities."¹⁵ It also requires that agencies "participate with

70 city blocks, were destroyed.").

8. *Id.* at 11.

9. *Made Record Run*, *supra* note 1, at 2.

10. *See Compared with Chicago*, *supra* note 5, at 9 (comparing the Baltimore fire of 1904 to the Chicago fire of 1871).

11. *See For National Fire System*, WASH. POST, Apr. 11, 1908, at 16 (describing how the Baltimore fire convinced the Commissioner of Washington to consider the plan of the National Fire Protection Association to obtain a uniform hose coupling).

12. *See ABA SECTION OF ANTITRUST LAW, HANDBOOK ON THE ANTITRUST ASPECTS OF STANDARDS SETTING I (2004)* [hereinafter *ABA HANDBOOK ON STANDARDS SETTING*] (describing the abundance of standards).

13. National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, 110 Stat. 775 (codified as amended at 15 U.S.C. § 272 (2000)) (encouraging cooperation in research and development between the federal government and the private sector).

14. *See ABA HANDBOOK ON STANDARDS SETTING*, *supra* note 12, at 4 ("[T]he estimated number of standards imposed by U.S. federal government agencies was approximately 52,000 in 1995, while the number of standards set by private entities was approximately 41,500.").

15. 15 U.S.C. § 272 (2000).

such bodies in the development of technical standards" when "such participation is in the public interest and is compatible with agency and departmental missions, authorities, priorities, and budget resources."¹⁶ Congress's scheme, however, has created organizations that can persist, on the one hand, unfettered by the constitutional restraints on state actors and, on the other hand, with immunity from the laws that punish the anticompetitive behavior of private actors. This Note argues that the NTTAA, by closely allying agencies with SDOs, has placed SDOs in a legal no-man's-land, drifting between the law controlling private organizations and the law controlling government agencies. This situation cannot continue.

This Note examines the reasons behind the NTTAA's passage, its susceptibility to abuse, and its position in a legal limbo. Part II begins by laying out the processes employed by several of the most influential SDOs.¹⁷ It concludes by discussing the legislative history of the NTTAA and the policy decisions that spawned it. Part III evaluates whether the NTTAA's program is susceptible to abuse. It addresses three arguments against government use of private standards: first, the possibility that the government will exert too much control over SDOs and thereby cancel out the benefits of private industry participation; second, the fear that larger members of an industry will dominate an SDO and prevent smaller members from fully participating in standards development; and third, that industry members will ignore the public interest in favor of industry interests. Part III concludes that, while the NTTAA and OMB Circular A-119¹⁸ attempt to ensure that SDOs will employ proper due process, powerful groups—both private and governmental—can find ways to use SDOs to their advantage.

Part IV discusses the potential constitutional and statutory issues with the NTTAA: first, the possibility that an SDO may qualify as a state actor for constitutional law purposes; second, that Congress has improperly delegated power to private parties by adopting private standards for public use; and third, that an SDO might be liable under antitrust law. This Part concludes that, under current statutory and case law, SDOs fit neatly into a legal no-man's-land, one favored and encouraged by Congress. SDOs exist in a murky limbo between the public and private sectors. Although Congress employs SDOs for public purposes, SDOs do not qualify as state actors and Congress did not wrongfully delegate authority to them as semi-private, semi-public entities.

16. National Technology Transfer and Advancement Act § 12(d)(2), 110 Stat. at 783.

17. This Note will use the term standards development organization (SDO). SDO is the term employed by the OMB Circular A-119. *Infra* note 31 and accompanying text. Some of the literature on this subject will refer to SDOs as SSOs, or standards-setting organizations.

18. See *supra* note 31 and accompanying text (explaining OMB Circular A-119).

Under antitrust law, however, SDOs reside on a higher plane than ordinary commercial bodies. This elevated status limits an SDO's liability in antitrust suits.

This Note concludes that the NTTAA has created a dangerous situation. By pulling SDOs further away from the private sphere but refusing to pull them completely into the public sphere, Congress has left SDOs floating in a void. Here, the rules governing private actors have less effect, and the rules governing public bodies have no effect. This situation cannot persist. Consumers, workers, and the public deserve some way to oversee and second-guess this public function.

II. *The Modern Standards-Setting Process and the NTTAA*

This Part discusses the history of standards-setting in America, provides a brief description of three of the most influential SDOs, and describes the legislative history of the NTTAA. One cannot understand the NTTAA without some knowledge of the historical and political forces that spawned it.

A. *A Brief History of Standards-Setting in the United States*

With the explosion of mass production during the Industrial Revolution, standardization became necessary to maintain efficiency.¹⁹ "Railroad owners, for example, had to choose between at least twenty different gauges of track."²⁰ In response, members of industry formed groups like the American Society for Testing and Materials (ASTM), founded in 1898, and the American National Standards Institute (ANSI), founded in 1918.²¹ Another influential organization established in this era was the National Fire Protection Association (NFPA).²² The NFPA, organized in 1896 to reduce fire risk, was the organization that pushed for the development of a standardized hydrant coupling after the Baltimore fire.²³

19. Felicity Barringer, *Setting Some Standards: Reagan Revisions Awaited*, WASH. POST, Sept. 9, 1981, at A25 ("The concept of standardization was born late in the Industrial Revolution as an efficiency measure.").

20. *Id.*

21. *See id.* (stating that these groups were organized to ensure efficiency in the late Industrial Revolution); *see also* ROSS E. CHEIT, *SETTING SAFETY STANDARDS: REGULATION IN THE PUBLIC AND PRIVATE SECTORS* 25 (1990) (listing the founding dates of different standards organizations).

22. *See* CHEIT, *supra* note 21, at 25 (stating the founding date of the NFPA).

23. *See For National Fire System, supra* note 11, at 16 ("To obtain a uniform hose

Today, the United States has over 600 organizations developing standards²⁴ and about 93,000 active standards.²⁵ Although the standards set by these organizations are voluntary, governments at the local, state, and federal levels incorporate the standards into law.²⁶ Because of the private origin of standards organizations in this country, the United States, unlike most foreign governments, "did not feel the need to develop a centralized, government-run standards system."²⁷ The federal government, however, participates in the standards-setting process, both as a purchaser of private standards and as a creator of its own standards.²⁸

Federal agencies employ standards to perform their vast array of duties.²⁹ A turning point in the way agencies employ standards occurred when the Reagan administration encouraged agencies to rely on private standards in lieu of spending the time and money developing their own.³⁰ In 1982, the Office of Management and Budget (OMB) promulgated Circular A-119,³¹ requiring federal agencies to adopt and use standards developed by voluntary consensus

coupling by fire departments of large cities, Commissioner Macfarland has under consideration the plans of the National Fire Protection Association; the aims of which are to have installed a standard size coupling . . .").

24. See KRISTA JOHNSEN & NEVILLE PUGH, NAT'L INST. OF STANDARDS & TECH., GUIDELINES FOR NIST STAFF PARTICIPATING IN VOLUNTARY STANDARDS DEVELOPING ORGANIZATIONS' ACTIVITIES, app. C, at 14 (2002), available at <http://ts.nist.gov/Standards/Conformity/upload/ir6778.pdf> ("There are more than 600 organizations . . . in the United States that develop voluntary standards.").

25. See *id.* ("At the national level, the United States currently maintains about 93,000 standards in an active status.").

26. See Barringer, *supra* note 19, at A25 ("While the standards are voluntary, many become incorporated in state and local laws, such as building safety codes. ANSI's Bill Rockwell estimates 75 percent of that group's safety standards have become mandatory somewhere.").

27. JOHNSEN & PUGH, *supra* note 24, at 13.

28. See *id.* at 16 ("The Federal Government itself is directly concerned with setting and implementing standards through legislation, regulation, or contractual obligations for sales to government purchasers.").

29. For a helpful discussion of agency use of standards, see CHEIT, *supra* note 21, at 29–31.

30. See *id.* at 8 (noting President Reagan's "effort to increase public use of private standards").

31. Office of Management and Budget Circular A-119, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, 63 Fed. Reg. 8546 (Feb. 19, 1998) [hereinafter OMB Circular A-119] (requiring federal agencies to adopt and use standards developed by voluntary consensus standards bodies and to work closely with those organizations to ensure that the developed standards are consistent with agency needs).

standards bodies.³² On the advice of the Vice-President of the United States and the general counsel of the American National Standards Institute (ANSI),³³ Congress passed the National Technology Transfer and Advancement Act (NTTAA)³⁴—the subject of this Note. In brief, the NTTAA instructs federal agencies to incorporate privately created standards into public law.

B. The Standards-Setting Process

Because of the large number of SDOs,³⁵ there are a variety of ways that SDOs develop standards.³⁶ To show how SDOs create standards, this Note describes the processes of three of the most influential SDOs: the American National Standards Institute (ANSI), the American Society for Testing and Materials (ASTM), and the National Fire Protection Associations (NFPA). Together, these three organizations have developed approximately 11,712 active standards.³⁷

1. American National Standards Institute

ANSI is unique among SDOs because it does not actually write standards.³⁸ It acts as "an overall coordinator and certifier of the . . . voluntary national standards system."³⁹ Other SDOs, which are accredited by ANSI,

32. H.R. REP. NO. 104-390, at 25 (1995), *reprinted in* 1996 U.S.C.C.A.N. 493, 511 ("OMB Circular A-119 was originally promulgated in 1982 and revised in 1993. It requires federal agencies to adopt and use standards, developed by voluntary consensus standards bodies, and to work closely with these organizations to ensure that developed standards are consistent with agency needs.").

33. *Id.* at 31, *reprinted in* 1996 U.S.C.C.A.N. at 518 (summarizing the words of the Vice President and General Counsel of ANSI suggesting that OMB Circular A-119 needs congressional backing to be effective).

34. 15 U.S.C. § 272 (2000) (encouraging cooperation in research and development between the Federal Government and the private sector).

35. See JOHNSEN & PUGH, *supra* note 24, at 14 ("There are more than 600 organizations . . . in the United States that develop voluntary standards.").

36. See CHEIT, *supra* note 21, at 25–28 (profiling ten SDOs).

37. See JOHNSEN & PUGH, *supra* note 24, at 15 tbl.1 (listing the twenty American SDOs that developed approximately 80% of American standards and explaining how many standards each SDO has developed).

38. See CHEIT, *supra* note 21, at 26 (stating that ANSI is unique among SDOs because it does not write standards).

39. *Id.*

submit their standards to ANSI for approval as American National Standards.⁴⁰ To achieve accreditation from ANSI, organizations must meet certain procedural requirements.⁴¹ Anyone who objects to the approval of a standard may appeal to ANSI's Board of Standards Review.⁴² ANSI's members are principally industry representatives and other standards-setting organizations.⁴³

2. American Society for Testing and Materials

ASTM is more representative of most SDOs than ANSI because ASTM relies on volunteer committees to write its standards.⁴⁴ The committees then submit these standards for approval by ASTM's approximately thirty thousand members.⁴⁵ ASTM's mission statement is "[t]o be the foremost developer and provider of voluntary consensus standards, related technical information, and services having globally recognized quality and applicability."⁴⁶ It develops standards "on characteristics and performance of materials, products, systems, and services."⁴⁷ With a desire to be the "foremost developer" of standards, it is

40. See *id.* ("Other organizations, including ANSI committees—groups 'accredited' by ANSI—submit their standards for approval as American National Standards.").

41. See *id.* ("The requirements for ANSI certification . . . are essentially procedural, not substantive.").

42. See *id.* at 26 ("The Board of Standards Review hears complaints from anyone who objects to certification of a 'national consensus standard.' Appeals are infrequent, except in the area of 'health and safety.'").

43. See *id.* ("ANSI's membership consists of industry representatives and standards-setting organizations . . .").

44. *Id.* at 27.

45. *Id.*

46. Mission Statement of the American Society for Testing and Materials, <http://www.astm.org/cgi-bin/SoftCart.exe/NEWS/Mission2.html?L+mystore+svkv3724+1194931128> (last visited Nov. 12, 2007) (on file with the Washington and Lee Law Review). The full Mission Statement reads:

To be the foremost developer and provider of voluntary consensus standards, related technical information, and services having globally recognized quality and applicability that: promote public health and safety, and the overall quality of life; contribute to the reliability of materials, products, systems and services; and facilitate international, regional, and national commerce.

Id.

47. CHEIT, *supra* note 21, at 27.

no surprise to find that ASTM is the rival organization of ANSI.⁴⁸ In fact, "ASTM no longer submits its standards for certification [by ANSI]."⁴⁹

3. National Fire Protection Associations

The NFPA is the most influential fire safety SDO in the United States. The NFPA publishes its standards as codes, several of which have been adopted directly into law in many local jurisdictions.⁵⁰ Several federal agencies also reference NFPA standards.⁵¹ The NFPA's structure is similar to that of the ASTM. Volunteer technical committees write the organization's codes and standards, and the membership then votes on those standards at semi-annual conventions.⁵² The NFPA has over thirty-two thousand members, including firefighters, engineers, manufacturers, insurance representatives, laborers, and government workers.⁵³

C. Legislative History

Congress passed the NTTAA in 1995.⁵⁴ While the bulk of the NTTAA focuses on the relationship between federal and private laboratories,⁵⁵ Section 12 focuses on voluntary consensus technical standards, the kind set by SDOs.⁵⁶

48. *See id.* ("ANSI has long been an organizational rival of ASTM's. The organizations trade allegations of 'turf grabbing,' . . .").

49. *Id.*

50. *See id.* at 28 (describing the influence of the NFPA's codes). The NFPA's best-known code is the National Electric Code. *Id.*

51. *See id.* ("Various NFPA standards are referenced by [the Occupational Safety and Health Act] OSHA, the Coast Guard, the Veterans Administration, and the Department of Housing and Urban Development.").

52. *See id.* at 28 (describing the organization of the NFPA).

53. *See id.* (describing the membership of the NFPA); Nat'l Fire Prot. Ass'n, Technical Committee List (2007), <http://www.nfpa.org/assets/files/PDF/CodesStandards/NFPATCList0707.pdf> (last visited Nov. 12, 2007) (listing the name and organization affiliation of each member of the NFPA's technical committees) (on file with the Washington and Lee Law Review).

54. National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, 110 Stat. 775 (codified as amended at 15 U.S.C. § 272 (2000)) (encouraging cooperation in research and development between the federal government and the private sector).

55. *See id.* §§ 2-9, 110 Stat. at 775-79 (allowing employees of federal laboratories to receive patent licenses for inventions produced as a result of collaboration between federal and private laboratories, while allowing the federal government to retain the right to use the invention free of charge).

56. *See id.* § 12, 110 Stat. at 782-83 (requiring federal agencies to consult private

Section 12 requires all federal agencies to "use technical standards that are developed or adopted by voluntary consensus standards bodies . . . as a means to carry out policy objectives or activities."⁵⁷ The NTTAA also instructs agencies to "participate with such bodies in the development of technical standards" when "such participation is in the public interest and is compatible with agency and departmental missions, authorities, priorities, and budget resources."⁵⁸ If an agency elects not to use a standard created by an SDO, the head of the agency must submit to the OMB the agency's reasons for choosing the government-developed standard over the SDO's standard.⁵⁹

Section 12 of the NTTAA codifies the OMB Circular A-119,⁶⁰ which the OMB originally promulgated in 1982.⁶¹ In many places, the language of the Circular is nearly identical to that of the NTTAA's Section 12.⁶² The House of Representatives felt that OMB Circular A-119 needed this congressional backing because, up to 1995, "the federal record with regard to the use of voluntary consensus standards [was] mixed, at best."⁶³

voluntary consensus standards and, when use of such standards is compatible with agency goals and budgets, to use them in lieu of government-created standards).

57. *Id.* § 12(d)(1), 110 Stat. at 783.

58. *Id.* § 12(d)(2), 110 Stat. at 783.

59. *See id.* § 12(d)(3), 110 Stat. at 783 ("[A] federal agency or department may elect to use technical standards that are not developed or adopted by voluntary consensus standards bodies if the head of each such agency or department transmits to the Office of Management and Budget an explanation of the reasons for using such standards."). For examples of agencies' reasons for adopting government-unique standards in place of voluntary consensus standards, see generally KEVIN L. MCINTYRE & MICHAEL B. MOORE, NAT'L INST. OF STANDARDS & TECH., EIGHTH ANNUAL REPORT ON FEDERAL AGENCY USE OF VOLUNTARY CONSENSUS STANDARDS AND CONFORMITY ASSESSMENT, app. C (2005), available at http://standards.gov/NTTAA/resources/nttaa_ar_2004.pdf.

60. OMB Circular A-119, *supra* note 31.

61. *See* H.R. REP. NO. 104-390, at 24–25 (1995), as reprinted in 1996 U.S.C.C.A.N. 493, 511 (stating that the NTTAA codifies OMB Circular A-119).

62. *Compare* OMB Circular A-119, *supra* note 31, at 8553 (directing agencies "to use voluntary consensus standards in lieu of government-unique standards except where inconsistent with law or otherwise impractical"), with National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, § 12(d), 110 Stat. 775, 783 (codified as amended at 15 U.S.C. § 272 (2000)) (stating that "all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives," unless doing so "is inconsistent with applicable law or otherwise impractical").

63. H.R. REP. NO. 104-390, at 25; *see also id.* at 30–31 (stating that, during a hearing before the Subcommittee on Technology held in June of 1995, Amy Marasco, the Vice President and General Counsel of the American National Standards Institute, reinforced the position that the Circular needed statutory backing to be effective).

In the House Report accompanying the NTTAA, the House of Representatives' Committee on Science announced its intent to "make private sector-developed consensus standards the rule, rather than the exception."⁶⁴ The Committee's goal was to "reduce duplication and waste by effectively integrating the federal government and private sector resources in the voluntary consensus standards system, while protecting its industry-driven nature and the public good."⁶⁵ The Committee hoped that Section 12 of the NTTAA would help the government accomplish this end by "phasing out the use of federally-developed standards wherever possible, in favor of standards developed by private sector, consensus standards organizations."⁶⁶

Congress and the Executive Branch have many reasons to favor standards developed by SDOs over government-produced standards. Obviously, it is generally cheaper for the government to buy a private standard than to dedicate the time, money, and labor necessary to develop its own.⁶⁷ Also, by participating in the SDOs as directed by the NTTAA⁶⁸ and OMB Circular A-119,⁶⁹ agencies help ensure that the standards developed by SDOs fit each agency's needs.⁷⁰ In addition, using an SDO to develop a standard allows agencies to "benefit from the expertise of the private sector."⁷¹

64. *Id.* at 25.

65. *Id.* at 24.

66. *Id.*

67. *See, e.g.,* William P. Boswell & James P. Cargas, *North American Energy Standards Board: Legal and Administrative Underpinnings of a Consensus Based Organization*, 27 ENERGY L.J. 147, 165 (2006) (stating that the utilization of private standards favored by OMB Circular A-119 would eliminate the cost to the government of developing its own standards). *But see* Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389, 406–11 (2003) (arguing that because of transaction costs such as opportunistic behavior, incompleteness, and hold-up, it is often cheaper for the government to develop a standard itself than to outsource standards-setting to private SDOs).

68. National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, § 12(d)(2), 110 Stat. 775, 783 (codified as amended at 15 U.S.C. § 272 (2000)) ("Federal agencies and departments shall consult with voluntary, private sector, consensus standards bodies and shall, when such participation is in the public interest and is compatible with agency and departmental missions, authorities, priorities, and budget resources, participate with such bodies in the development of technical standards.").

69. OMB Circular A-119, *supra* note 31, at 8555–56.

70. *See id.* at 8546 (announcing that the policies of OMB Circular A-119 are intended to, among other things, promote federal agency participation in SDOs to ensure creation of standards that are usable by the agencies). *But see* Shapiro, *supra* note 67, at 406–07 (arguing that industry representatives tend to produce standards that reflect the self-interest of the corporations for which they work, while neglecting the public interest).

71. OMB Circular A-119, *supra* note 31, at 8546.

During Senate deliberations on the NTTAA, some senators focused on a more precise definition of "voluntary consensus standards bodies" found in the OMB Circular A-119.⁷² Today, for an SDO to qualify as a voluntary consensus standards body under the Circular, it must have the following attributes: openness, balance of interest, due process, an appeals process, and consensus (which the Circular defines as general agreement).⁷³ In other words, "a legitimate consensus standards organization provides [an] open process in which all parties and experts have ample opportunity to participate in developing the consensus."⁷⁴ This definition requires any private consensus standard adopted by an agency to be the product of equal participation by all members of an industry. While the system outlined by the NTTAA sounds useful and its emphasis on due process and consensus is noble, the NTTAA contains serious flaws.

III. The NTTAA's Scheme Is Susceptible to Abuse

This Part establishes that, under the NTTAA's scheme, members of SDOs can abuse the organizations to further their own interests. With this potential for abuse, the lack of outside controls pointed out in Part IV is even more troubling. Administrative law scholars who have examined privatization of legislative functions seem to agree on three concerns that arise in situations such as the one implemented under the NTTAA. First, the government might

72. See, e.g., 142 CONG. REC. S1078, S1081 (daily ed. Feb. 7, 1996) (statement of Sen. Rockefeller) (commenting on the standards-setting process). Senator Rockefeller explained:

[Voluntary consensus standard bodies] are established explicitly for the purpose of developing such standards through a process having three characteristics—First, openness, defined as meaning that participation in the standards development process shall be open to all persons who are directly and materially affected by the activity in question; second, balance of interest, which means that the consensus body responsible for the development of a standard shall be comprised of representatives of all categories or interest that relate to the subject . . . and third, due process, which means a procedure by which any individual or organization who believes that an action or inaction of a third party causes unreasonable hardship or potential harm is provided the opportunity to have a fair hearing of their concerns.

Id. The current version of the OMB Circular A-119 adds two more characteristics to this definition: an appeals process and consensus. OMB Circular A-119, *supra* note 31, at 8554.

73. See OMB Circular A-119, *supra* note 31, at 8554 ("A voluntary consensus standards body is defined by the following attributes: (i) Openness. (ii) Balance of interest. (iii) Due Process. (iv) An appeals process. (v) Consensus, which is defined as general agreement, but not necessarily unanimity, and includes a process for attempting to resolve objections by interested parties . . .").

74. 142 CONG. REC. at S1081 (statement of Sen. Rockefeller).

exert too much control over the SDOs and, by doing so, cancel out the benefits of private industry participation.⁷⁵ Second, larger members of the industry could dominate SDOs and prevent smaller segments of the industry from participating in standards development.⁷⁶ Third, industry representatives in SDOs could ignore the public interest in favor of industry interests when setting standards.⁷⁷

A. Fear of Government Domination

When the revised version of OMB Circular A-119 (the version that incorporates the NTTAA) underwent notice and comment, some commentators were concerned that federal government participants would dominate SDOs.⁷⁸ The OMB noted that commentators

urged additional limitations on agency participation in voluntary consensus standards bodies, including: Prohibiting federal agency representatives from chairing committees or voting . . . ; having only an advisory role; participating only if directly related to an agency's mission or statutory authority; and participating only if there is an opportunity for a third party challenge to the participation through a public hearing.⁷⁹

In response, the OMB pointed out safeguards in the text of the Circular intended to prevent such domination.⁸⁰ For example, Section 7(g) directs agency employees to avoid the appearance of undue influence within SDOs.⁸¹ The same section also instructs that "[a]gency representatives must not

75. See Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1288–89 (2003) (expressing concern that "administrative law would try to squelch" the potential benefits of using private actors to serve public goals).

76. See, e.g., Robert W. Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEX. L. REV. 1329, 1380–81 (1978) (concluding that small businesses are not adequately represented in the voluntary standards organizations that write nongovernmental standards affecting safety and health).

77. See *id.* at 1382–83 (discussing the sparse representation of labor and consumer interests in the standards-setting process).

78. See OMB Circular A-119, *supra* note 31, at 8548 ("Several commentators . . . remain concerned that an agency member might dominate a voluntary consensus standards body, . . . thus making the process not truly consensus.").

79. *Id.*

80. See *id.* at 8549 (describing the language in the final circular that clarifies the role of agency representatives in SDOs).

81. See *id.* at 8556 ("[A]gency employees must avoid the practice or the appearance of undue influence relating to their agency representation and activities in voluntary consensus standards bodies.").

dominate such bodies, and in any case are bound by voluntary consensus standards bodies' rules and procedures, including those regarding domination of proceedings by an individual."⁸²

The OMB refrained from imposing specific limitations on agency participation in SDOs that would result in "unequal participation relative to other members" because it "decided that such limitations would (1) not further the purposes of the [NTTAA] and (2) could interfere with the internal operations of [SDOs]."⁸³ The intent of the NTTAA, according to the OMB, was to encourage agencies to participate fully and equally in SDOs.⁸⁴ The OMB chose to leave the internal management of the SDOs to the SDOs themselves because "it would be inappropriate for the federal government to direct the internal operations of private sector [SDOs] by proscribing the activities of any of its members," including the activities of agency representatives.⁸⁵ An SDO is free to elect an agency representative as chair, to establish its own voting procedures, and to accept federal funding as it deems appropriate.⁸⁶ The OMB expects an SDO to police itself and protect its credibility by ensuring that its proceedings are fair.⁸⁷

Although the OMB's reasons for declining to regulate an agency's level of participation in an SDO have merit, the allure of attracting federal funds and the fear of losing them is likely to influence an SDO's decisions. The OMB Circular allows agencies to increase agency funding to SDOs when "it is in the direct and predominant interest of the Government to develop or revise a standard, and its timely development or revisions appears [sic] unlikely in the absence of such support."⁸⁸ Just as the federal government induces states to conform to federal goals through its spending power,⁸⁹ federal agencies have

82. *Id.*

83. *Id.* at 8549.

84. *See id.* ("[T]he Act was intended to promote full and equal participation in [SDOs] by federal agencies.").

85. *Id.*

86. *See id.* ("The membership of an SDO is free to choose a chair, to establish voting procedures, and to accept funding as deemed appropriate.").

87. *See id.* ("We expect that the SDO itself or a related parent or accrediting organization would act to ensure that the organization's proceedings remain fair and balanced. An SDO has a vested interest in ensuring that its consensus procedures and policies are followed in order to maintain its credibility.").

88. *Id.* at 8556.

89. *See Freeman, supra* note 75, at 1285 (comparing the use of the federal government's spending power to induce state conformity to federal goals with the use of government funds to induce adherence to public norms in private firms); *see also* STEVEN RATHGEB SMITH & MICHAEL LIPSKY, *NONPROFITS FOR HIRE* 173 (1993) ("[N]onprofits all too often have had their programming priorities dictated by funding agencies.").

the ability, authorized and encouraged by the NTTAA, to influence the actions of SDOs. The NTTAA gives SDOs an incentive to create standards that meet the political goals of agency officials. Whether the loss of this independence is ultimately good for the public will be discussed later, but with the power of the purse, agencies are able to influence the behavior and decision-making process within SDOs.

B. Fear of Large Businesses Dominating the Standards-Setting Process

As the discussion of antitrust implications in Part IV.C of this Note will reveal, larger, more powerful members of an industry can dominate SDO proceedings at the expense of smaller and weaker participants. During one of the hearings before the Subcommittee on Technology, which preceded the NTTAA's passage, members of the business community testified that the standards development process discriminated against small business.⁹⁰ Small businesses often lack the time, money, and workforce necessary to send representatives across the country to participate in various SDO meetings.⁹¹ The National Fire Protection Association (NFPA), for example, held thirteen committee meetings in February 2007.⁹² The meetings took place in twelve different cities, including Phoenix, San Antonio, Las Vegas, Little Rock, Kansas City, Orlando, Atlanta, and Romulus, Michigan.⁹³ In 2006, the Boiler Combustion System Hazards Committee of the NFPA, a committee of twenty-seven members from across the country responsible for "documents on the reduction of combustion system hazards in single- and multiple-burner boilers,"⁹⁴ had an especially busy four months. The committee had one

90. See H.R. REP. NO. 104-390, at 31 (1995), as reprinted in 1996 U.S.C.A.N. 493, 518 (summarizing the testimony of Walter Poggi, President of Retlif Testing Laboratories and representative of the American Council of Independent Laboratories).

91. See Hamilton, *supra* note 76, at 1380 (stating that the cost of traveling to SDO meetings across the country, which was "a necessary incident to active participation in the standards development process," kept small businesses from actively participating in the major SDOs).

92. See *Coming Events, Committee Calendar*, NFPA NEWS (Nat'l Fire Prot. Ass'n, Quincy, Mass.), Jan. 2007, at 6, available at <http://www.nfpa.org/assets/files/PDF/NFPA%20News/nfanews0107.pdf> (listing the committee meetings planned for February 2007).

93. See *id.* (listing the location of each of the meetings planned for February 2007).

94. See Nat'l Fire Prot. Ass'n, *Technical Committee Members 40-41* (2007), <http://www.nfpa.org/assets/files/PDF/CodesStandards/NFPATCList1005.pdf> (last visited Feb. 18, 2007) (listing the name and organization affiliation of each member of the Boiler Combustion System Hazards Committee and the scope of the Committee's duties).

conference in Orlando, Florida, on March 9–10, a second in Tampa, Florida, on March 20–24, and a third in Norwood, Massachusetts, on June 14–15.⁹⁵ During the same period, the NFPA held its biggest event, the World Safety Conference and Exposition, in Orlando, Florida on June 4–8.⁹⁶ It would be difficult for a small businessperson, especially one from the West Coast, to spend the time and money necessary to attend each of these meetings. These financial barriers against small businesses increase opportunities for the interests of large corporations to dominate SDOs, especially at the technical committee level where the standards are actually written.⁹⁷

If a powerful business has close ties to an SDO, it can use its position to injure less influential competitors. In *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*,⁹⁸ the Supreme Court addressed such a situation. The American Society of Mechanical Engineers (ASME) sets a "Boiler and Pressure Vessel Code," which, at the time of the case, was adopted by forty-six states and all but one of the Canadian provinces.⁹⁹ One part of this code sets standards for "low-water fuel cutoffs."¹⁰⁰ "If the water in a boiler drops below a level sufficient to moderate the boiler's temperature, the boiler can 'dry fire' or even explode."¹⁰¹ Low-water fuel cutoffs automatically block the fuel supply to the boiler when the water reaches a certain level.¹⁰² McDonnell & Miller, Inc. (M&M) had dominated the market for low-water fuel cutoffs, but Hydrolevel Corp. attempted to break into the market with a slightly different version of the device.¹⁰³ Unlike M&M's cutoff, Hydrolevel's

95. See *Coming Events, Committee Calendar*, NFPA NEWS (Nat'l Fire Prot. Ass'n, Quincy, Mass.), Mar. 2006, at 9–10, available at <http://nfpa.org/assets/files/1PDF/NFPA%20News/nfpanews0306.pdf> (listing the committee meetings planned for 2006).

96. See *id.* at 10 (listing the date and location of the NFPA World Safety Conference and Exposition).

97. See *supra* notes 50–53 and accompanying text (describing the organization of the NFPA and its technical committee system).

98. See *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 577 (1982) (holding the American Society of Mechanical Engineers (ASME) liable for antitrust violations of its agents committed with apparent authority).

99. *Id.* at 559.

100. See *id.* ("Section IV of the code sets forth standards for components of heating boilers, including 'low-water fuel cutoffs.'").

101. *Id.*

102. See *id.* ("A low-water fuel cutoff does what its name implies: when the water in the boiler falls below a certain level, the device blocks the flow of fuel to the boiler before the water level reaches a dangerously low point.").

103. *Id.* at 560.

included a time delay.¹⁰⁴ When one of M&M's long-time customers switched to Hydrolevel's product, M&M looked for a way to protect itself from further losses to Hydrolevel.¹⁰⁵ Luckily for M&M, one of its vice presidents served as vice chairman of the subcommittee that drafted, revised, and interpreted the section of the Boiler and Pressure Vessel Code governing low-water cutoffs.¹⁰⁶ This vice president and other M&M officials met with the chairman of the subcommittee and came up with a scheme, which resulted in the subcommittee announcing that Hydrolevel's time delay device was unsafe.¹⁰⁷ M&M quickly used this announcement to discourage potential customers from buying Hydrolevel's product by telling them the device failed to satisfy ASME's code.¹⁰⁸ Hydrolevel suffered market resistance for several years before discovering the scheme.¹⁰⁹ Although SDOs hold dear the ideals of balance and consensus,¹¹⁰ stories like the *Hydrolevel* case and others¹¹¹ demonstrate that abuse of the SDO system by powerful members of an industry is a reality.

C. Fear of Industry Representatives Ignoring the Public Interest in Favor of Industry Interests

Part III.B established that large businesses can dominate SDOs to the detriment of smaller companies. This subpart discusses the potential for an industry to exploit its position within an SDO to the detriment of the public interest. The fear of private parties entrusted with public duties ignoring the public interest in pursuit of selfish goals fascinates privatization scholars.¹¹²

104. See *id.* ("The relevant distinction, for the purposes of this case, was that Hydrolevel's fuel cutoff, unlike M&M's, included a time delay.")

105. See *id.* ("In early 1971, Hydrolevel secured an important customer. Brooklyn Union Gas Company, which had purchased M&M's product for several years, decided to switch to Hydrolevel's probe. Not surprisingly, M&M was concerned.")

106. See *id.* (describing the organization of ASME and M&M's advantageous position within ASME).

107. See *id.* at 561–62 (describing M&M's plan to discredit Hydrolevel's product).

108. See *id.* at 562 ("As anticipated, M&M seized upon this interpretation of Section IV to discourage customers from buying Hydrolevel's product. It instructed its salesmen to tell potential customers that Hydrolevel's fuel cutoff failed to satisfy ASME's code.")

109. See *id.* at 563–64 (describing Hydrolevel's troubles, ASME's failure to discover any wrongdoing, and the Senate subcommittee that uncovered the scheme).

110. See Robert W. Hamilton, *Prospects for the Nongovernmental Development of Regulatory Standards*, 32 AM. U. L. REV. 455, 462–63 (1983) (describing the fundamental concepts of balance and consensus required by SDOs in their standards development process).

111. See, e.g., *infra* notes 231–43 and accompanying text (describing the facts of *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988)).

112. See, e.g., Paul R. Verkuil, *Public Law Limitations on Privatization of Government*

Professor Sydney A. Shapiro has concluded that allowing SDOs to write standards "invites opportunistic behavior by the [SDO], which can seek to exploit its superior access to the information to serve its own self-interest."¹¹³ When an industry has the power to set its own rules, those rules will likely benefit the industry. One anonymous government standards expert told a *Washington Post* reporter in 1981: "[SDOs] generally develop standards that address the needs of their members rather than the needs of consumers."¹¹⁴ Shapiro similarly argues that "industry representatives tend to dominate decisionmaking in many nonprofit organizations, and the standards that are produced tend to reflect the self-interest of the corporations for whom the participants work."¹¹⁵ He notes that some of the SDO-produced standards adopted by the Occupational Safety and Health Act (OSHA) "provide limited protection for workers in many cases, because industry-dominated committees are more reluctant than OSHA to characterize a substance as a carcinogen, and less likely to rely on published scientific data instead of industry-supplied information."¹¹⁶

Professor Robert W. Hamilton suggests that labor and consumers lack appropriate representation on SDO committees.¹¹⁷ In some areas, unionized labor participates fully on SDO committees,¹¹⁸ but in others, unions have chosen to remain outside SDOs for ideological and financial reasons.¹¹⁹ The wide spectrum of consumer viewpoints makes effective representation within SDOs difficult. "The consumer view is really a whole panoply of viewpoints

Functions, 84 N.C. L. REV. 397, 405 (2006) (discussing whether "public law controls, such as oversight and accountability," come with delegations to private parties).

113. Shapiro, *supra* note 67, at 408.

114. See Barringer, *supra* note 19, at A25 (quoting a government standards expert who asked not to be identified).

115. Shapiro, *supra* note 67, at 407.

116. *Id.* at 408.

117. See Hamilton, *supra* note 76, at 1380–83 (concluding that small businesses, labor, and the consumer are not adequately represented in the voluntary standards organizations).

118. See *id.* at 1382 (citing full participation by the International Brotherhood of Electrical Workers on each of the panels of the NFPA National Electrical Code Committee).

119. See *id.* (giving four reasons that unions have chosen not to participate in SDOs). Hamilton suggests that, first, unions have "traditionally concentrated on bread-and-butter economic issues and handled noneconomic issues through the political process." *Id.* Second, "most unions lack the technical resources to engage in widespread voluntary standards setting." *Id.* Third, "unions view the resolution of controversies within [SDOs] as completely controlled by 'management.' To submit to a process in which they can be outvoted is anathema to the labor movement in whose eyes labor's vote should balance management's." *Id.* Fourth and finally, "some union officials fear that participation by labor under these circumstances gives a legitimacy to the voluntary standards process to which it is not entitled." *Id.* at 1382–83. Hamilton argues that organized labor prefers to rely on OSHA for protection. *Id.* at 1383.

on a specific issue; for example, one consumer wants inexpensive products, another wants safe products, and a third wants a particular mixture of the two."¹²⁰ Additionally, "few public interest, environmental, or consumer groups possess either the technical capacity or the resources to participate [in the standards development process]."¹²¹ It is cost prohibitive for a small-scale consumer to participate directly in the standards-setting process.¹²² SDOs have made efforts to incorporate consumers, including creating "Consumer Sounding Boards" and utilizing consumer representatives on technical committees.¹²³ When government agencies participate in SDOs as instructed by the NTTAA,¹²⁴ agency representatives should try to protect the public interest. Whether those representatives do so, however, is not clear.

The financial structure of most SDOs also raises concerns. Other than the money they may receive from agencies, SDOs derive most of their income from the sale of their publications, while a smaller portion comes from member dues.¹²⁵ This system of funding is similar to the system that the Financial Accounting Standards Board (FASB)—an SDO—used prior to the Sarbanes-Oxley Act of 2002.¹²⁶ "The FASB received its funding from the FAF [a nonprofit organization that was responsible for selecting the members of the FASB and ensuring adequate funding of their activities], which derived more than two-thirds of its monies from subscriptions and sales of FASB publications and about one-third from voluntary contributions."¹²⁷ During the Enron hearings, congressional witnesses sharply criticized this funding

120. *Id.*

121. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 647 (2000).

122. *See supra* notes 90–97 and accompanying text (describing the financial barriers that prevent small businesses from fully participating in the standards-setting process).

123. *See* Hamilton, *supra* note 76, at 1384–85 (describing the efforts of SDOs to include consumer interests in their standards development processes).

124. *See* National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, § 12(d)(2), 110 Stat. 775, 783 (codified as amended at 15 U.S.C. § 272 (2000)) ("Federal agencies and departments shall consult with voluntary, private sector, consensus standards bodies and shall, when such participation is in the public interest and is compatible with agency and departmental missions, authorities, priorities, and budget resources, participate with such bodies in the development of technical standards.").

125. *See* Hamilton, *supra* note 110, at 461 ("The major source of ASTM's income is the sale of its publications; dues provide only about one-fifth of its annual income . . .").

126. *See* Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 NOTRE DAME L. REV. 975, 988 (2005) ("The FASB received its funding from the FAF, which derived more than two-thirds of its monies from subscriptions and sales of FASB publications and about one-third from voluntary contributions.").

127. *Id.*

structure.¹²⁸ This criticism described the FASB as "less than optimally independent or objective' because 'it constantly place[d] FASB and FAF in the role of a hat-in-hand supplicant soliciting the industry for charity.'"¹²⁹ Although FASB is not identical to all SDOs, the fact that Congress denounced FASB's funding system and completely reorganized it in 2002¹³⁰ should cast some doubt on the way similarly structured SDOs receive funds.

This Part has attempted to establish that there is significant room for abuse within SDOs despite all of the discussion of openness, balance of interests, due process, appeals, and consensus found in the OMB Circular¹³¹ and in the internal rules of SDOs themselves.¹³² The OMB hoped that the internal regulations of SDOs would be sufficient to ensure due process: "We expect that the SDO itself or a related parent or accrediting organization would act to ensure that the organization's proceedings remain fair and balanced. An SDO has a vested interest in ensuring that its consensus procedures and policies are followed in order to maintain its credibility."¹³³ However, professionalism of this kind, as "an informal accountability mechanism, . . . is invisible from a traditional administrative law perspective."¹³⁴ Additionally, this Part has demonstrated that professionalism has failed in the past to guarantee fairness within SDOs. There must be an external check on the internal procedure of SDOs. Part IV will conclude that no adequate check currently exists.

128. See *id.* ("This funding mechanism drew sharp criticism from congressional witnesses during the Enron hearings . . .").

129. See *id.* ("This funding mechanism drew sharp criticism from congressional witnesses during the Enron hearings, who testified that it caused FASB to be 'less than optimally independent or objective' because 'it constantly place[d] FASB and FAF in the role of a hat-in-hand supplicant soliciting the industry for charity.'" (quoting *The Financial Accounting Standards Board Act: Hearing Before the House Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy & Commerce*, 107th Cong. 52 (2002) (prepared statement of John C. Coffee, Jr., Adolf A. Berle Professor of Law, Columbia University Law School))).

130. See *id.* at 988–89 ("The Sarbanes-Oxley Act . . . provid[ed] the FASB with the same source of guaranteed funding it accorded to the PCAOB: public companies are required to pay 'annual accounting support fees' to fund both boards' operations.").

131. See OMB Circular A-119, *supra* note 31, at 8554 ("A voluntary consensus standards body is defined by the following attributes: (i) Openness. (ii) Balance of interest. (iii) Due process. (vi) An appeals process. (v) Consensus, which is defined as general agreement . . .").

132. See Hamilton, *supra* note 110, at 461 (describing the process that American Society for Testing and Materials (ASTM) uses in its standards-development). ASTM employs balanced committees and subcommittees comprised of representatives with different interests, a central staff to monitor the work of the committees, and an appeals process to ensure compliance with procedures. *Id.*

133. OMB Circular A-119, *supra* note 31, at 8549.

134. Freeman, *supra* note 121, at 643.

IV. SDOs' Position in a Legal Limbo

Part III concluded that professionalism alone is insufficient to ensure that SDOs will employ due process in their standards-setting. There must be some outside check on SDOs, therefore, to make certain that the organizations actually utilize procedures through which all interested parties have a voice. This Part establishes that, because of a combination of constitutional law principles, judicial interpretation, and congressional action, no adequate outside check exists. Such an external check could come from three sources. This Note considers each in turn. First, increased government participation and public funding of SDOs raises the possibility that an SDO can qualify as a state actor and become subject to the due process and equal protection requirements of the Constitution.¹³⁵ Second, because the NTTAA delegates governmental functions to private organizations, it may violate the nondelegation doctrine and therefore be unconstitutional.¹³⁶ Third, because members of SDOs have "economic incentives to restrain competition,"¹³⁷ SDOs are subject to liability under antitrust laws.¹³⁸ However, recent statutes and increased federal participation in SDOs, as mandated by the NTTAA, may alter the extent of that antitrust liability. This Part concludes that none of these possible mechanisms provides an adequate external check on SDOs.

A. Is an SDO, Under the NTTAA, a State Actor?

Under the NTTAA and OMB Circular A-119, federal agencies are to participate as members of SDOs in the standards-making process.¹³⁹ OMB

135. See, e.g., *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) ("[S]tate action may be found if . . . there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974))).

136. See, e.g., Verkuil, *supra* note 112, at 433–36 (discussing the nondelegation issues raised by private standards-setting).

137. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988).

138. The Supreme Court has twice found SDOs in violation of antitrust laws. See *Allied Tube*, 486 U.S. at 495 (affirming jury damages to the plaintiff upon finding that antitrust laws applied to the NFPA and that the actions of several steel conduit manufacturers violated those antitrust laws when they recruited over 200 people to vote against a standard the manufacturers did not want passed at an Association meeting); *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 558–59 (1982) (affirming jury damages to the plaintiff because the SDO was liable under the antitrust laws for antitrust violations committed by its agents).

139. See National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, § 12(d)(2), 110 Stat. 775, 783 (codified as amended at 15 U.S.C. § 272 (2000)) (instructing

Circular A-119 allows agencies to assist SDOs by giving financial and administrative support, by cooperating in joint planning, and by allowing the participation of agency personnel.¹⁴⁰ In 2004, there were 3,208 agency employees participating in SDOs.¹⁴¹ With this level of government participation in SDO standards-making, one wonders if SDOs have become so entwined with agency funds and personnel that they are more similar to state actors than the private organizations they were founded to be.

1. State Actor Implications

If SDOs qualified as state actors, courts would hold them to the high constitutional standard applicable to federal and state governments.¹⁴² State actors are required to respect First Amendment rights to free speech and the Fifth and Fourteenth Amendment guarantees of due process.¹⁴³ The Constitution grants federal courts jurisdiction over "all Cases . . . arising under this Constitution."¹⁴⁴ If SDOs qualified as state actors, then a person who felt that an SDO denied him due process or improperly set a standard that wrongfully excluded his product could bring a claim against the SDO. Although such vulnerability would inevitably slow the standards-making process, it would allow for an outside check on the inner-workings of SDOs.

agencies to participate in the development of technical standards); OMB Circular A-119, *supra* note 31, at 8555–56 (requiring agencies to participate with SDOs when participation is in the public interest and compatible with agency missions and budget resources, and setting out guidelines for such participation).

140. See OMB Circular A-119, *supra* note 31, at 8556 (stating that agency support may include direct financial support in the form of grants or memberships; administrative support in the form of travel costs or hosting meetings; technical support, including participation of agency personnel in the activities of SDOs; and joint planning with SDOs to identify needed standards).

141. See MCINTYRE & MOORE, *supra* note 59, at 7 fig.4.2 (charting the number of agency employees participating in private sector standards activities from 1997 through 2004).

142. See, e.g., *Marsh v. Alabama*, 326 U.S. 501, 507–10 (1946) (determining that a company-owned town may be treated as a state actor for purposes of the First and Fourteenth Amendments, and therefore, that the town must allow a Jehovah's Witness to distribute religious pamphlets on the sidewalks of the town).

143. See *id.* (determining that a company-owned town may be treated as a state actor for purposes of the First and Fourteenth Amendments); see also *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 291 (2001) (finding that a private association incorporated to regulate interscholastic athletic competition among public and private secondary schools can be considered a state actor for First and Fourteenth Amendment purposes); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995) (finding Amtrak, a private corporation formed by federal statute, to be a state actor for First Amendment purposes).

144. U.S. CONST. art. III, § 2.

2. The State Actor Test

Since the Civil Rights Cases of 1883,¹⁴⁵ courts have held that an "[i]ndividual invasion of individual rights is not the subject-matter of the [Fourteenth] [A]mendment."¹⁴⁶ The general rule, then, is that a private actor is not limited by the protections guaranteed in the Fourteenth Amendment. The Supreme Court, however, has occasionally treated private actors as state actors and held them liable for violations of the Fourteenth Amendment.¹⁴⁷ For example, in *Marsh v. Alabama*,¹⁴⁸ the Supreme Court found that a company owned town had to respect the First and Fourteenth Amendment rights of a Jehovah's Witness to distribute religious pamphlets because "the town . . . does not function differently from any other town."¹⁴⁹ The Court focused on the overwhelming similarity between the company town and a public town in coming to its conclusion.¹⁵⁰ The Supreme Court later summarized the rule of *Marsh*: If a private party is "performing the full spectrum of municipal powers and [stands] in the shoes of the State," that private party will be liable for violations of the First and Fourteenth Amendments.¹⁵¹

Recently, however, the Supreme Court has relaxed this "full spectrum" test. In *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*,¹⁵²

145. Civil Rights Cases of 1883, 109 U.S. 3, 11 (1883) (finding that the Fourteenth Amendment does not apply to private action).

146. *Id.*

147. See, e.g., *Brentwood Acad.*, 531 U.S. at 291 (finding that a private association incorporated to regulate interscholastic athletic competition among public and private secondary schools can be considered a state actor for First and Fourteenth Amendment purposes); *West v. Atkins*, 487 U.S. 42, 54 (1988) (holding that a physician hired as a private contractor in a prison can be a state actor for purposes of 42 U.S.C. § 1983, which grants a right of action against any person who, under color of state law, deprives the plaintiff of any constitutional right). *But see* *Corr. Serv. Corp. v. Malesko*, 534 U.S. 61, 63 (2001) (declining to extend the right of action first recognized in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), to allow recovery against a private corporation).

148. See *Marsh v. Alabama*, 326 U.S. 501, 507–10 (1946) (finding that a company-owned town, because it functioned no differently from any other town, had to allow a Jehovah's Witness to freely distribute pamphlets in accordance with the Fourteenth Amendment).

149. *Id.* at 508.

150. See *id.* at 502–03 (discussing the similarities between the company town and "any other American town").

151. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972).

152. See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 290 (2001) (finding that a private association incorporated to regulate interscholastic athletic competition among public and private secondary schools can be considered a state actor for First Amendment purposes). In *Brentwood*, the Court addressed the issue of whether the Tennessee Secondary School Athletic Association (Association) was a state actor for purposes of the Fourteenth Amendment. *Id.* at 290. The Association was a not-for-profit corporation

the Court found sufficient "entwinement of public institutions and public officials" in the composition and workings of the private athletic association to treat the association as a state actor.¹⁵³ In *Brentwood*, almost every public high school in Tennessee was a member of the Tennessee Secondary School Athletic Association (the Association), and public high school principals made up 84% of the Association's membership.¹⁵⁴ The Association received the majority of its funding from ticket receipts at athletic events in which the member schools competed, often in public arenas rented by the Association, and from membership dues.¹⁵⁵ The entwining of SDOs and government agencies normally does not rise to the level found in *Brentwood*, but in this "necessarily fact-bound inquiry,"¹⁵⁶ a court could treat an SDO as a state actor, especially if the SDO has a large percentage of agency participants and is receiving a large amount of federal money.¹⁵⁷

3. Do SDOs Qualify As State Actors?

Although the OMB Circular instructs agencies generally to give no more money and have no more representation on an SDO than any other participant, the Circular also permits an agency to ignore this limit "when it is in the direct and predominant interest of the Government to develop or revise a standard,

organized to regulate interscholastic sports among Tennessee public and private high schools. *Id.* at 291. Almost all of Tennessee's public high schools were Association members, making up 84% of the Association's voting membership. *Id.* Public and private school principals, assistant principals, and superintendents made up the voting membership of the Association. *Id.* The Association received the bulk of its funding from gate receipts, but also collected dues from member schools. *Id.* It set membership standards and student eligibility rules and had the power to penalize any violations of its rules. *Id.* at 292. The Association punished member Brentwood Academy, a private parochial high school, for violating a recruiting rule, and Brentwood responded by suing the association under 42 U.S.C. § 1983, claiming a violation of the First and Fourteenth Amendments. *Id.* at 293. The Supreme Court stated that state action could be found if "there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Id.* at 295 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974)). The Court found that the Association was a public actor because the public school officials "overwhelmingly perform all but the purely ministerial acts by which the Association exists and functions in practical terms." *Id.* at 300.

153. *Id.* at 298.

154. *Id.* at 291.

155. *Id.*

156. *Id.* at 298 (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 939 (1982)).

157. *But see Freeman, supra* note 75, at 1304-05 ("Though the Supreme Court occasionally treats private actors as state actors for constitutional purposes, these instances are few.").

and its timely development or revision appears unlikely in the absence of such support."¹⁵⁸ The Circular also does not prohibit agency representatives from serving as chairpersons of SDOs.¹⁵⁹ The Circular, therefore, sets no hard limits on the ability of a government agency to participate and influence an SDO. To date, no court has been tasked with deciding whether an SDO qualifies as a state actor. One can conceive, however, of an SDO so reliant on an agency's money and so entwined with agency personnel that it resembles *Brentwood's* Association more than the private, not-for-profit organization envisioned in the NTTAA.¹⁶⁰

B. Does the NTTAA Violate Nondelegation Principles?

The NTTAA encourages government agencies to use standards developed by private SDOs.¹⁶¹ The Act thus delegates a public function—creating standards for public use—to private parties.¹⁶² Courts fear such a delegation for several reasons. When an agency delegates power to a private party, "lines of accountability may blur, undermining an important democratic check on government decision-making."¹⁶³ Additionally, delegation to a private party "increases the risk that these parties will not share the agency's 'national vision and perspective.'"¹⁶⁴ Scholars and courts fear that the private party, whose motivations and goals are inherently selfish, will not work to achieve the federal government's public-minded agenda.

158. See OMB Circular A-119, *supra* note 31, at 8556 (addressing the general principles that apply to agency support of SDOs).

159. See *id.* ("Active participation includes full involvement in discussions and technical debates, registering of opinions and, if selected, serving as chairpersons or in other official capacities.").

160. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001). For another case in which the Supreme Court found a nominally private organization to be a public actor for constitutional issues, see *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 400 (1995).

161. National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, § 12(d)(1), 110 Stat. 775, 783 (codified as amended at 15 U.S.C. § 272 (2000)) ("[A]ll Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies . . .").

162. See Verkuil, *supra* note 112, at 433 ("Both state legislatures and Congress delegate authority to these groups to formulate standards. These privately produced standards are then incorporated directly into law.").

163. *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004).

164. *Id.* at 565–66 (quoting *Nat'l Park & Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 20 (D.D.C. 1999)).

1. Implications of Violating Nondelegation Principles

Nondelegation principles "seek[] to cure the unchecked transfer of legislative power to the executive."¹⁶⁵ The Supreme Court has called improper delegation of legislative power to a private party "legislative delegation in its most obnoxious form."¹⁶⁶ If a court found that Congress, through the NTTAA, improperly delegated legislative power to an SDO, it could hold the NTTAA in violation of Article I of the Constitution.¹⁶⁷

2. The Nondelegation Test

A delegation of power from a government body to a private party must have two characteristics to avoid violating nondelegation principles: an intelligible principle and ultimate federal control. Generally, "Congress has wide discretion to delegate functions to both public and private actors."¹⁶⁸ While "case law strongly suggests that subdelegations to [nongovernmental] parties are assumed to be improper absent an affirmative showing of congressional authorization,"¹⁶⁹ the Nondelegation Doctrine will not limit Congress as long as Congress provides an "intelligible principle" that the private actor must follow.¹⁷⁰

165. Verkuil, *supra* note 112, at 433.

166. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) ("This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.").

167. See *id.* at 297, 311 (finding that the Bituminous Coal Conservation Act, which gave a private coal board the ability to set wages binding on all coal operators, violated Article I of the Constitution and the Due Process Clause of the Fifth Amendment).

168. Freeman, *supra* note 75, at 1304.

169. See *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) ("The presumption that subdelegations are valid absent a showing of contrary congressional intent applies only to [subordinate federal agencies]. There is no such presumption covering subdelegations to outside parties.").

170. See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

Additionally, in *Sunshine Anthracite Coal Co. v. Adkins*,¹⁷¹ the Supreme Court held that Congress does not unconstitutionally delegate its lawmaking authority to a private party as long as the federal government retains authority, in the end, to create the law.¹⁷² The *Sunshine Anthracite* Court addressed the constitutionality of the Bituminous Coal Conservation Act of 1937. The Act set up a Coal Commission, a federal agency, to regulate the sale and distribution of bituminous coal across the country. The agency was to work with coal producers, whom the act organized into the Bituminous Coal Code. The Code was to help the Commission set prices for bituminous coal. The plaintiff claimed that the Act unconstitutionally delegated price-setting authority to a private party. The court disagreed, finding no improper delegation of legislative authority:

The members of the code function subordinately to the Commission. It, not the code authorities, determines the prices. And [the Commission] has authority and surveillance over the activities of these authorities. Since law-making is not entrusted to the industry, this statutory scheme is unquestionably valid.¹⁷³

For the NTTAA to avoid the nondelegation problems, Congress must have given an intelligible principle for agencies to follow and agencies must retain ultimate control over the final form of the standard.

3. *Application of the Nondelegation Test to the NTTAA*

The NTTAA appears to pass both prongs of the nondelegation test. The NTTAA provides a sufficient intelligible principle and gives congressional authorization by demanding that "all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies."¹⁷⁴ Also, under the NTTAA, a government agency has the option to reject an SDO's standard and instead create its own.¹⁷⁵ This ultimate

171. See *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398–400 (1940) (upholding the constitutionality of the Bituminous Coal Conservation Act of 1937 by finding that Congress did not improperly delegate its lawmaking authority to the National Bituminous Coal Commission).

172. See *id.* at 398–99 (finding that Congress may delegate authority for setting prices for coal to the National Bituminous Coal Commission as long as the Commission, and not representatives of the coal industry advising the Commission, determined the prices).

173. *Id.* at 399.

174. National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, § 12(d)(1), 110 Stat. 775, 783 (codified as amended at 15 U.S.C. § 272 (2000)).

175. *Id.* § 12(d)(3), 110 Stat. at 783 ("If compliance with paragraph (1) of this subsection is

control demonstrates that the NTTAA's scheme is not an improper delegation of legislative authority under the *Sunshine Anthracite* test because an SDO does not legislate. Instead, federal bodies adopt SDOs' standards. There is little danger, then, that under the current nondelegation tests a court would find the structure laid out by the NTTAA to violate the Nondelegation Doctrine. Some scholars, however, have questioned how free an agency is to reject an SDO's standard.¹⁷⁶

4. *Analysis of the NTTAA and Nondelegation Principles: How Free Are Agencies to Create Their Own Standards in Lieu of SDOs' Standards?*

Although the NTTAA's language gives an agency the power to create its own standard in lieu of an SDO's,¹⁷⁷ the political pressures to cut costs and employ SDO standards are significant. The OMB Circular emphasizes that it is the federal government's policy to rely on voluntary standards,¹⁷⁸ and if an agency chooses to create its own standard rather than using an SDO's standard, the head of that agency must explain the agency's reasons for doing so in writing to the OMB.¹⁷⁹ In addition, an industry may exert political pressure on agencies to adopt certain standards: "The more financially valuable it is for an industry . . . to defend the standards that they write, the more money they will invest in political donations, lobbying, and legal strategies to protect their interests."¹⁸⁰

As agencies become increasingly reliant upon SDOs for standards, developing their own standards will become more burdensome and costly.¹⁸¹

inconsistent with applicable law or otherwise impractical, a Federal agency or department may elect to use technical standards that are not developed or adopted by voluntary consensus standards bodies").

176. See, e.g., Shapiro, *supra* note 67, at 411 (arguing that reliance on privately generated standards hinders an agency's freedom to reject an SDO's standard and its ability to develop a standard for itself).

177. National Technology Transfer and Advancement Act § 12(d)(3), 110 Stat. at 783 ("If compliance with paragraph (1) of this subsection is inconsistent with applicable law or otherwise impractical, a Federal agency or department may elect to use technical standards that are not developed or adopted by voluntary consensus standards bodies").

178. See OMB Circular A-119, *supra* note 31, at 8546 ("[T]he policy of the federal government . . . [is to] rely on voluntary standards.").

179. National Technology Transfer and Advancement Act § 12(d)(3), 110 Stat. at 783 (stating that, if an agency chooses not to use an SDO standard, the head of that agency must explain in writing to the OMB the agency's reasons for not using the voluntary standard).

180. Shapiro, *supra* note 67, at 411.

181. See *id.* (arguing that reliance on privately generated standards hinders an agency's ability to develop a standard for itself).

One of the main purposes of the NTTAA was to decrease costs.¹⁸² Unfortunately, one result of the slashed budget may be a dependence on private standards. As agencies create fewer standards, they will employ fewer technical experts, and the experts they do employ will have less experience creating standards than experts in the private sector.¹⁸³ An agency that has successfully cut its costs by turning to SDOs, therefore, may have cut its budget to the point that it is unable to turn away from the SDOs and produce its own useful technical standards.¹⁸⁴

5. *Consequences of Congress Delegating Standards-Setting Duties to SDOs*

Congress, by enacting the NTTAA, acknowledged the efficiency and expertise of industry.¹⁸⁵ This preference for private standards over agency-developed standards is an implicit acknowledgement by Congress of the inefficiency and lack of expertise of government agencies.¹⁸⁶ Such an acknowledgment is ironic because Congress's original reason for delegating legislative power to agencies was its hope that agencies would be efficient and expert bodies.¹⁸⁷ Congress wants to employ SDOs because they can produce standards quicker and cheaper than agencies. Agencies are slow-acting, bureaucratic machines because of choices made by judges, Congress, and the

182. See H.R. REP. NO. 104-390, at 24 (1995), as reprinted in 1996 U.S.C.C.A.N. 493, 511 ("The key challenge is to update domestic standards activities, . . . and to reduce duplication and waste by effectively integrating the federal government and private sector resources in the voluntary consensus standards system . . .").

183. See Shapiro, *supra* note 67, at 411 ("[T]he reliance on privately generated standards frees an agency from developing the extensive expertise that is necessary to write standards itself. At the same time, this may mean that the agency lacks the expertise to oversee the standards-writing process in an effective manner.").

184. See SMITH & LIPSKY, *supra* note 89, at 173-75 (describing the "dependence of government officials on nonprofit agencies").

185. See H.R. REP. NO. 104-390, at 24, as reprinted in 1996 U.S.C.C.A.N. at 511 ("Playing an important role in maintaining a future competitiveness edge is the ability to develop standards which match the speed of the rapidly changing technology of the marketplace."); *id.* at 31-32, as reprinted in 1996 U.S.C.C.A.N. at 518-19 ("[M]ove the standards and conformity assessment infrastructures from the public to the private sector, and let the federal government concentrate on supporting that process through participation, recognition, and harmonization." (quoting the testimony of Stephen Oksala, Director of Corporate Standards at Unisys Corp.)).

186. See *id.* at 24 (stating that protecting the industry-driven nature of domestic standards activities is an integral part of maintaining the United States's competitive edge).

187. See, e.g., Hamilton, *supra* note 110, at 456 (explaining that Congress delegates some legislative function to agencies because "it usually has recognized that it does not have the time, the detailed information, or the ability to legislate effectively and knowledgeably on detailed matters").

Executive.¹⁸⁸ "Judicial review, mandatory procedures imposed by statute or judicial order, the executive branch's internal review, and Congress's formal and informal review have impeded significantly the efficiency of the rulemaking process."¹⁸⁹

Through the NTTAA's delegation of standards-setting to SDOs, Congress is effectively bypassing administrative agencies and all of the government control that comes with them, in an effort to accelerate and improve the standards-making process. Congress has strongly encouraged agencies to put SDOs to work for the federal government, stating "all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities."¹⁹⁰ Under the NTTAA, agencies are to go beyond simply adopting SDOs' standards.¹⁹¹ They are to participate in the decisionmaking of these private entities and use federal funds to help produce standards for government use.¹⁹² Though Part IV.A of this Note suggests that SDOs may qualify as state actors,¹⁹³ to date no court has reached that conclusion. As a result, SDOs are not subject to the same rules and constitutional constraints as agencies,¹⁹⁴ making them an attractive instrument for Congress.

188. *See id.* at 458 (stating that all three branches of government have acted to impede the efficiency of the rulemaking process within agencies).

189. *Id.*

190. National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, § 12(d)(1), 110 Stat. 775, 783 (codified as amended at 15 U.S.C. § 272 (2000)).

191. *Id.*

192. *Id.* § 12(d)(2), 110 Stat. at 783 ("In carrying out paragraph (1) . . . , Federal agencies . . . shall consult with voluntary, private sector, consensus standards bodies and shall, when such participation is in the public interest and is compatible with agency and departmental missions, authorities, priorities, and budget resources, participate with such bodies in the development of technical standards.").

193. *See supra* Part IV.B (suggesting that SDOs might qualify as state actors for constitutional law purposes).

194. *See, e.g., Freeman, supra* note 75, at 1305 (describing the extent to which private contractors may be exempt from the statutory limits on agencies). Freeman notes:

Beyond constitutional limitations lie statutory imperatives designed to promote public law norms. Private actors may effectively escape these as well. First, the APA specifically excludes both grants and contracts from the demands of notice-and-comment rulemaking normally applicable to federal agencies. Moreover, the APA subjects only agency action to potential judicial review. As part of their inherent power, agencies may further delegate powers entrusted to them to other actors with virtually no constitutional limitation, provided that Congress does not prohibit them from doing so.

Id.

Although the OMB has declared that agencies should only adopt standards produced by SDOs that utilize "due process" in their standards-setting procedure,¹⁹⁵ it is unclear whether any judicial check on an agency exists that could ensure every standard adopted by an agency came from an SDO utilizing due process. OMB Circular A-119 mentions "due process," and at least one member of the Senate focused on the process an SDO should use while making a standard,¹⁹⁶ but the NTTAA itself does not set any requirements as to the process required of an SDO in producing a standard adopted by a government agency.¹⁹⁷ So far, no case law has questioned the process provided by an SDO for a standard adopted by an agency under the NTTAA's. However, *Noblecraft Industries, Inc. v. Secretary of Labor*,¹⁹⁸ a pre-NTTAA case,

195. See *supra* note 131 and accompanying text (making due process a definitional attribute of voluntary consensus standard bodies); see also 142 CONG. REC. S1078, S1081 (daily ed. Feb. 7, 1996) (statement of Sen. Rockefeller) ("This provision is not intended to direct agencies and departments to consider standards from organizations that do not meet the criteria of openness, balance of interest, and due process."); Hamilton, *supra* note 110, at 462-64 (describing and praising the process employed by SDOs).

196. See *supra* note 72 and accompanying text (discussing the Senate deliberations of the NTTAA).

197. National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, 110 Stat. 775 (codified as amended at 15 U.S.C. § 272 (2000)).

198. See *Noblecraft Indus., Inc. v. Sec'y of Labor*, 614 F.2d 199 (9th Cir. 1980) (holding that OSHA properly adopted a national consensus standard for the use of radial saws in woodworking despite the fact that the sawmill and plywood industries were not represented on the American National Standards Institute Committee, which formulated the standard). In *Noblecraft*, the Ninth Circuit addressed a claim by petitioners, Pacific Northwest sawmill and plywood industries, that an OSHA standard governing radial saws that was created by the American National Standards Institute (ANSI) was not a valid "national consensus standard" as required by OSHA. *Id.* at 201. The petitioners claimed that the regulation was invalid because "the sawmill and plywood industries were not represented on the ANSI committee which formulated the standard." *Id.* at 202. The court disagreed, however, pointing out that OSHA authorized the OSHA Secretary to promulgate any "national consensus standard" as an occupational safety or health standard without complying with the notice and hearing provisions of the Administrative Procedure Act. *Id.* OSHA defined "national consensus standard" as

any occupational safety and health standard or modification thereof which (1) has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption, (2) was formulated in a manner which afforded an opportunity for diverse views to be considered and (3) has been designated as such a standard by the Secretary, after consultation with other appropriate Federal agencies.

Id. The court also pointed out that ANSI's procedures were sufficient to qualify ANSI standards as consensus standards. *Id.* It concluded that "Congress . . . was aware of ANSI's procedures, and approved the adoption of ANSI standards as national consensus standards." *Id.* at 202-03. The standard, even without petitioners' participation, was valid. *Id.* at 204. The

suggests that a court will look closely at the language of the NTTAA if the issue ever arises.¹⁹⁹

In *Noblecraft*, the Third Circuit held that OSHA properly adopted a consensus standard for radial saws even though the sawmill and plywood industries were not represented on the American National Standards Institute (ANSI) committee that formulated the standard.²⁰⁰ The court examined OSHA²⁰¹ and found a detailed description of the term "national consensus standard,"²⁰² which is similar to the definition found today in OMB Circular A-119.²⁰³ The court then looked at the Senate discussion of OSHA and found that senators stated that any standard developed by ANSI automatically met the definition of "national consensus standard" under the Act.²⁰⁴ The court concluded that, as long as ANSI developed a standard and the Secretary of OSHA approved of it, the standard qualified as a proper national consensus standard for OSHA's purposes.²⁰⁵

The *Noblecraft* case sheds some light on how a court might treat a standard adopted under the NTTAA. While OSHA provided a detailed definition of "consensus standard,"²⁰⁶ the NTTAA fails to define the term. The NTTAA simply states that agencies should adopt SDO standards unless doing so is "inconsistent with applicable law or otherwise impractical."²⁰⁷ This

court also quickly dismissed petitioners' claim that Congress improperly delegated legislative and administrative power to a private organization by stating, "OSHA in practice did not surrender to ANSI all its standard-making function. As was the case here, it selected among the ANSI standards with apparent discrimination." *Id.* at 203.

199. *See id.* at 202 (quoting extensively from OSHA).

200. *See id.* at 204 (holding that the standard is properly serves as a national consensus standard).

201. Occupational Safety and Health Act, 29 U.S.C. § 655 (2000).

202. *See id.* § 652(9) (defining "national consensus standard" as a consensus standard promulgated by a nationally-recognized SDO which was formulated to voice diverse views, and which the Secretary of OSHA deems to be a "national consensus standard").

203. *See supra* note 73 (quoting the OMB Circular's definition of "voluntary consensus standards bod[ies]" as bodies that rely on openness, balance of interest, due process, an appeals process, and consensus in promulgating their standards).

204. *See Noblecraft Indus., Inc. v. Sec'y of Labor*, 614 F.2d 199, 202-03 (9th Cir. 1980) (quoting the language of the Senators and concluding, "Congress . . . was aware of ANSI's procedures, and approved the adoption of ANSI standards as national consensus standards").

205. *See id.* at 203 ("The resort by Congress to consensus standards was to meet the pressing need for adoption of OSHA standards on an exceedingly broad industrial front without undue delay. The procedures by which consensus standards were formulated were felt to provide sufficient assurance as to industry-wide consensus . . .").

206. *See supra* note 202 (citing OSHA's definition of "national consensus standard").

207. National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, § 12(d)(3), 110 Stat. 775, 783 (codified as amended at 15 U.S.C. § 272 (2000)).

language seems to give agencies complete discretion in their decision to use or to refrain from using an SDO's standard. As in *Noblecraft*,²⁰⁸ a court reviewing an NTTAA standard may look at the OMB Circular's definition of "consensus standard" or examine the legislative history of the statute to find certain senators' definitions of "consensus standard."²⁰⁹ Despite providing a definition of consensus standard, however, the OMB Circular goes on to explicitly deny a private right of action,²¹⁰ meaning that a plaintiff probably could not rely on the Circular's definition in court. In addition to this lack of a right of action, the language of the NTTAA is much broader than the detailed language of OSHA.²¹¹ With this broad language, a court may choose to treat the adoption of an SDO standard as an exercise of agency discretion and decline to find that action reviewable.²¹² If courts refuse to consider SDOs as state actors, and if a private party cannot sue an agency to ensure that due process exists within an SDO, the only available judicial check on SDOs is antitrust law.

C. *The Antitrust Issues of Standards-Setting*

Thus far, this Part has discussed how the NTTAA has positioned SDOs in a slightly less powerful position than the law regulating public bodies. This subpart will describe how SDOs also exist above the laws regulating private industry behavior. A complete examination of the complex body of law that surrounds the antitrust implications of standards-setting is beyond the scope of this Note.²¹³ To ignore the issue completely, however, is irresponsible. The

208. See *supra* note 198 and accompanying text (describing how the *Noblecraft* court examined the legislative history of OSHA).

209. See *supra* note 72 (quoting Senator Rockefeller's definition of "consensus standard").

210. See OMB Circular A-119, *supra* note 31, at 8558 ("This Circular is not intended to . . . provide new grounds for judicial review, or create new rights or benefits, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, or its officers or employees.").

211. Compare National Technology Transfer and Advancement Act § 12, 110 Stat. at 783 (generally stating that federal agencies shall use SDO standards unless doing so is impractical), with Occupational Safety and Health Act, 29 U.S.C. § 652(9) (2000) (giving a precise definition for "national consensus standards").

212. See 5 U.S.C. § 701(a) (2000) ("This chapter [of the Administrative Procedure Act] applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (declaring an issue is committed to agency discretion where the applicable statute is so broad that there is no law to apply).

213. For an overview of the implications of antitrust law on standards-setting, see ABA HANDBOOK ON STANDARDS SETTING, *supra* note 12, at 14–21. This Note is only concerned with

Supreme Court has found SDOs liable for antitrust violations on at least two occasions.²¹⁴ Because industry participants collaborate in SDOs, standards have the potential to "create anticompetitive barriers to market entry, retard innovation, raise rivals' costs, facilitate collusion, and protect market position."²¹⁵ As the Supreme Court noted, "[t]here is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm."²¹⁶

Although standards-setting raises many antitrust issues,²¹⁷ the implication of government-adopted standards is the core antitrust issue of this Note. In *Parker v. Brown*,²¹⁸ the Supreme Court first outlined the state actor doctrine, which grants antitrust immunity for actions taken by the state as sovereign.²¹⁹ In *Parker*, a California raisin producer claimed that the state of California violated the Sherman Antitrust Act²²⁰ when it imposed an anticompetitive program on its raisin producers designed to control prices.²²¹ The Court determined that Congress did not intend the Sherman Act to apply to a state actor.²²² Instead, the purpose of the Sherman Act was to "suppress

standards set by SDOs and adopted by government agencies—a topic that accounts for only one of the five chapters in the ABA handbook.

214. See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 495 (1988) (affirming jury damages to the plaintiff upon finding that antitrust laws applied to the National Fire Protection Association and several steel conduit manufacturers violated those antitrust laws when they recruited over two hundred people to vote against a standard passed at an Association meeting); *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 558–59 (1982) (affirming jury damages to the plaintiff because the SDO was liable under the antitrust laws for antitrust violations committed by its agents).

215. ABA HANDBOOK ON STANDARDS SETTING, *supra* note 12, at 2.

216. *Allied Tube*, 486 U.S. at 500.

217. See ABA HANDBOOK ON STANDARDS SETTING, *supra* note 12, at 15 (categorizing the antitrust analysis of standards by their origins: (1) standards set through industry cooperation, (2) standards set by a firm through unilateral conduct, and (3) standards endorsed by government action).

218. See *Parker v. Brown*, 317 U.S. 341, 352 (1943) (finding activities of the state immune from antitrust liability).

219. See *id.* at 352 ("The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.").

220. Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2000) (prohibiting combinations in restraint of trade).

221. *Parker*, 317 U.S. at 344–49.

222. See *id.* at 351 ("The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action of official action directed by a state.").

combinations to restrain competition and attempts to monopolize by individuals and corporations."²²³ In conclusion, the Court stated: "The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government, which the Sherman Act did not undertake to prohibit."²²⁴ Since *Parker*, standards-setting activities undertaken by state legislatures and state supreme courts have been immune from Sherman Act liability.²²⁵

The relevant question in an examination of the NTTAA is whether the *Parker* doctrine immunizes standards-setting by SDOs when a government body adopts the standard. Such immunity would allow members of the SDO more leeway in the means they use to promote or oppose a standard and in the content of the standards they set. Examining four cases will establish a framework that will be a useful starting point in determining whether an SDO has antitrust immunity.

In the first case, *Bates v. State Bar of Arizona*,²²⁶ the Supreme Court addressed a Sherman Act challenge against the State Bar of Arizona brought by two lawyers.²²⁷ The lawyers violated an Arizona law that prohibited lawyer advertising. The ABA originally formulated the rule, and the Arizona Supreme Court later adopted it.²²⁸ The ABA and the Arizona Bar Association are SDOs—they are organizations made up of members of an industry that set standards for that industry. The Court determined that the attorneys' true claim was against the state itself, the Supreme Court of Arizona as law-maker, not against the State Bar of Arizona, and therefore concluded that the *Parker* doctrine barred the Sherman Act claim.²²⁹ The Arizona State Bar, in other

223. *Id.*

224. *Id.* at 352.

225. *See, e.g.,* Hoover v. Ronwin, 466 U.S. 558, 569 (1984) (stating that the *Parker* doctrine immunizes a state supreme court's actions from Sherman Act liability).

226. *See* Bates v. State Bar of Ariz., 433 U.S. 350, 363 (1977) (finding that the Arizona State Bar was immune from Sherman Act claims under the *Parker* doctrine for its enforcement of a disciplinary rule imposed by the Arizona Supreme Court). The two attorneys violated an Arizona Supreme Court rule against advertising by placing an advertisement in a local newspaper. *Id.* at 355.

227. *Id.* at 356.

228. *See id.* at 355, 360 (stating that the disciplinary rule was a rule of the Arizona Supreme Court and was derived from the Code of Professional Responsibility of the American Bar Association).

229. *See id.* at 363 (stating that *Parker v. Brown* bars the Sherman Act claim).

words, was immune from antitrust liability because the state, not the Bar, had caused the attorneys' harm.²³⁰

In the second case, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*,²³¹ the Supreme Court addressed the issue of whether economically interested businesses enjoyed antitrust immunity for their actions meant to influence the adoption of a standard by an SDO.²³² In *Allied Tube*, the Court examined the actions of a producer of steel electrical conduit, Allied Tube, within the National Fire Protection Association (NFPA), a private SDO.²³³ The NFPA writes the National Electric Code, which state and local governments routinely adopt with few or no changes, making it the most influential electric code in the nation.²³⁴ Allied Tube, fearing competition from Indian Head, a producer of new plastic conduit, put together a group of steel interests to vote against including plastic conduit in the National Electric Code.²³⁵ The steel group "recruited 230 persons to join the [NFPA] and to attend the annual meeting to vote against the proposal."²³⁶ The majority of these 230 had little to no technical knowledge.²³⁷ This packing plan worked, and NFPA excluded the plastic conduit from the National Electric Code by a four-vote margin.²³⁸

After Indian Head filed suit, Allied Tube claimed immunity from antitrust liability, citing the Supreme Court's decision in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*²³⁹ In *Noerr*, the Supreme Court

230. See *id.* at 359–60 (categorizing the claim as one against the state).

231. See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 509–10 (1988) (holding that "where, as here, an economically interested party exercises decision-making authority in formulating a product standard for a private association that comprises market participants, that party enjoys no . . . immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace").

232. *Id.* at 499 ("We granted certiorari to address important issues regarding the application of . . . immunity to private standards-setting associations.").

233. *Id.* at 495–97.

234. See *id.* at 495 (describing the importance of the code to the electric industry).

235. See *id.* at 495–96 (outlining the steel conduit producer's plan to exclude plastic conduit from the National Electric Code).

236. *Id.* at 496–97.

237. *Id.* at 497.

238. See *id.* ("[T]he proposal was rejected and returned to committee by a vote of 394 to 390.").

239. See *id.* at 489 ("The District Court then granted a judgment n.o.v. for petitioner, reasoning that *Noerr* immunity applied because the Association was 'akin to a legislature.'"); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961) (holding that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action," those urging the government to take that action enjoy absolute immunity from antitrust liability). In *Noerr*, the Supreme Court addressed a claim by long-distance trucking companies that twenty-four major railroads and others violated the Sherman

granted immunity to private parties advocating government action that eventually results in a restraint on trade, reasoning that the decision to pass the law ultimately rests with the government, not the private party.²⁴⁰ The Supreme Court in *Allied Tube* first concluded that, even though government bodies routinely adopted the NFPA's standard, the NFPA was not a "quasi-legislative" body as *Allied Tube* had argued.²⁴¹ The Court then refused to extend *Noerr* immunity to *Allied Tube*'s actions upon finding that, despite its political impact, the context and nature of *Allied Tube*'s activity made the activity commercial rather than political.²⁴² As a result of this case, the actions of a member of an SDO engaged in standards-setting may be subject to antitrust liability if a court finds that the member's actions within the SDO were commercial and not political.²⁴³

Attempting to follow *Allied Tube*, lower courts evaluating antitrust challenges in standards-setting cases have tried to distinguish between situations where the anticompetitive harm has resulted from petitioning government authorities (subject to *Noerr* immunity) and situations where the

Act. *Id.* at 129. The trucking companies claimed that the railroads had conspired to conduct a publicity campaign against the truckers designed to encourage the adoption of laws destructive of the trucking industry and creating an attitude of distaste against truckers among the general public. *Id.* The Court began by acknowledging that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws," because, "under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law itself does not violate some provision of the Constitution." *Id.* at 135–36. The Court then recognized that any time a party attempts to influence legislation through a publicity campaign, there will be an incidental effect of the campaign that may injure the interests of the party against whom the campaign is directed. *Id.* at 143. To hold that this injury makes the campaign itself illegal, the Court reasoned, "would thus be tantamount to outlawing all such campaigns." *Id.* at 143–44. The Court concluded that the railroad did not violate the Sherman Act, even though its campaign had deceived the public and public officials. *Id.* at 145.

240. *See id.* at 136 (granting antitrust immunity to those who attempt to influence the passage of laws, even if those laws will result in a restraint of trade and arguing that it is the responsibility of the legislative or of the executive branch to pass laws).

241. *See id.* at 505 ("We agree with the Court of Appeals that the [NFPA] cannot be treated as a 'quasi-legislative' body simply because legislatures routinely adopt the Code the [NFPA] publishes.").

242. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 505 (1988) ("What distinguishes this case from *Noerr* and its progeny is that the context and nature of petitioner's activity make it the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves.").

243. *See id.* at 509–10 ("[W]here, as here, an economically interested party exercises decision-making authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace.").

harm is the result of independent commercial conduct (not immune from antitrust claims).²⁴⁴ For example, in the third antitrust case this Note discusses, *Massachusetts School of Law at Andover, Inc. v. ABA*,²⁴⁵ the Third Circuit addressed an issue that combined both state action and *Noerr* immunity.²⁴⁶ The Massachusetts School of Law at Andover (MSL), a law school not accredited by the ABA, claimed that the ABA violated antitrust laws by denying the school accreditation, causing the school direct economic damage.²⁴⁷ Although MSL relied on the Supreme Court's decision in *Allied Tube*,²⁴⁸ the Third Circuit distinguished this case from *Allied Tube* and likened it to *Bates v. State Bar of Arizona* by pointing out that, while "states consider the accreditation decisions of the ABA in their legal education requirement . . . every state retains the final authority to set all the bar admission rules, and individual applicants or law schools can petition the states for waivers or changes."²⁴⁹ States, the court recognized, are "immune from antitrust action under the

244. See ABA HANDBOOK ON STANDARDS SETTING, *supra* note 12, at 133 ("Following *Allied Tube*, lower courts evaluating antitrust challenges to standards-setting activities have distinguished between situations where the alleged anticompetitive harm flows from the petitioning of government authorities and situations where the harm results from independent commercial conduct. Courts generally immunize the former and not the latter.").

245. See *Mass. Sch. of Law at Andover, Inc. v. ABA*, 107 F.3d 1026, 1036, 1038 (3d Cir. 1997) (determining that "[t]o the extent that MSL's alleged injury arises from the inability of its graduates to take the bar examination in most states, the injury is the result of state action and thus is immune from antitrust action under the doctrine of *Parker v. Brown*"). In *Massachusetts School of Law, Massachusetts School of Law at Andover (MSL)*, a law school unaccredited by the ABA, sued the ABA for antitrust violations, claiming that the denial of accreditation caused a loss of prestige and a decline in admissions. *Id.* at 1031–32. In most states, a law student must have graduated from an ABA-accredited law school in order to sit for the state's bar exam. *Id.* at 1035. The court reasoned that MSL's injury was the result of each state's decision, not the result of the ABA setting accreditation standards. *Id.* at 1036. The state, the court noted, was immune from antitrust violations under the *Parker* doctrine. *Id.* The court went on to state that MSL claimed that the ABA injured the school by conducting "a campaign to convey the idea that ABA accreditation is the *sine qua non* of quality and that the ABA is the most, or only, competent organization to judge law schools." *Id.* at 1037. The court then reasoned that "[t]he conduct of which MSL complains here is basically the ABA's justification of its accreditation decisions and MSL is asserting a loss of prestige resulting from it." *Id.* The court concluded that "*Noerr* immunity is proper in this case because the ABA engaged in petitioning activity, and the stigma injury which MSL suffered was incidental to that activity." *Id.* at 1038.

246. See *id.* at 1031–32 (stating MSL's claims).

247. See *id.* at 1032 ("MSL alleged that enforcement of these anticompetitive criteria led to the denial of its application for provisional accreditation and caused MSL to suffer a 'loss of prestige' and direct economic damage in the form of declining enrollments and tuition revenue.").

248. See *supra* notes 231–244 and accompanying text (discussing *Allied Tube*).

249. *Mass. Sch. of Law*, 107 F.3d at 1035.

doctrine of *Parker v. Brown*.²⁵⁰ The court then turned to MSL's claim that the ABA's denial of accreditation stigmatized the school.²⁵¹ The court concluded that, because the ABA had spent decades petitioning state governments to prohibit graduates from unaccredited schools from taking bar examinations, *Noerr* immunity was proper in the case because "the stigma injury which MSL suffered was incidental to that [petitioning] activity."²⁵²

Similarly, the Ninth Circuit gave *Noerr* immunity to a defendant's deliberate misrepresentation to an SDO in the final antitrust case this Note considers, *Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc.*²⁵³ In *Joor*, the defendant, Joor Manufacturing, produced underground storage tanks for hazardous fluids, while the plaintiff, Sessions Tank Liners, was in the business of repairing such underground tanks.²⁵⁴ Repairing a leaking tank was cheaper for a customer than buying a replacement tank.²⁵⁵ Joor's president, Howard Robbins, feared that Sessions's competition could hurt his business, so he approached the Western Fire Chiefs Association (WFCA), a body of public officials that publishes the Uniform Fire Code (UFC), which several local governments adopt into law.²⁵⁶ Robbins participated in a UFC subcommittee made up of industry representatives and members of the public.²⁵⁷ By using false and misleading statements, Robbins convinced the subcommittee to ban the practice of tank repair in the newest edition of the UFC.²⁵⁸ Sessions's

250. *Id.* at 1036.

251. *See id.* at 1037 (describing the MSL claim that the ABA has "conducted a campaign to convey the idea that ABA accreditation is the *sine qua non* of quality and that the ABA is the most, or only, competent organization to judge law schools").

252. *See id.* at 1038 (stating that the ABA had conducted a campaign to keep states from allowing graduates from unaccredited schools from sitting for the bar and concluding that *Noerr* immunity was proper in the case because the stigma injury to MSL was incidental to that activity).

253. *See Sessions Tank Liners, Inc. v. Joor Mfg.*, 17 F.3d 295, 299 (9th Cir. 1994) ("Because the injuries Sessions complains of are the result of governmental action, Joor is shielded by petitioning immunity from liability under the antitrust laws.").

254. *Id.* at 296.

255. *See id.* at 296–97 (stating that, although the price of replacing a tank and the cost of repairing one are equal, a customer can avoid incidental costs such as interruption of business by simply repairing a leaky tank).

256. *Id.*

257. *See id.* at 297 ("Unlike the UFC Committee and the WFCA, whose memberships were limited to public officials, UFC subcommittees included industry representatives and members of the public.").

258. *See id.* at 297–98 (stating that Robbins "rallied the subcommittee to amend Article 79 to include a provision requiring that leaking storage tanks be removed from the ground" and that he "knowingly made false statements to the subcommittee").

business suffered greatly as a result of being excluded from the code.²⁵⁹ The court, like the Third Circuit in *Massachusetts School of Law*, distinguished this case from *Allied Tube*.²⁶⁰

The plaintiff in *Allied [Tube]* was awarded damages only on the theory that the stigma of banning the plaintiff's product from a uniform code caused independent marketplace harm to the plaintiff in jurisdictions that permitted the use of the plaintiff's products. . . . In contrast, Sessions has never proved that it sustained injuries from anything other than the actions of municipal authorities.²⁶¹

The injuries that Sessions complained of were all within jurisdictions that had adopted the UFC.²⁶² The court then concluded that "[b]ecause the injuries Sessions complains of are the result of governmental action, Joor is shielded by petitioning immunity from liability under the antitrust laws."²⁶³

Unless a plaintiff can prove that his harm resulted directly from the SDO's or its members' actions, these four cases establish that a court will tend to conclude that the injury occurred as a result of government action and therefore that the plaintiff cannot recover. Exactly how the NTTAA could affect the decisions in *Allied Tube* and its progeny is unclear. The line between commercial and government action is already difficult to define,²⁶⁴ and as government agencies begin to play a more active role within SDOs, that line becomes even harder to pinpoint. Would the Supreme Court still have found *Allied Tube*'s actions to be commercial if a government agency had been participating with the NFPA to produce a standard for agency use, as the NTTAA requires,²⁶⁵ or would it have found *Allied Tube* to be petitioning in a

259. See *id.* at 297 ("Fire officials in many localities began denying Sessions's requests for permits and Sessions's business declined sharply.").

260. See *supra* notes 231–43 and accompanying text (discussing *Allied Tube*).

261. *Sessions Tank Liners, Inc. v. Joor Mfg.*, 17 F.3d 295, 299 (9th Cir. 1999).

262. See *id.* ("Sessions has not shown that any potential tank lining customer in jurisdictions that were not enforcing the WFCAs tank removal provision decided not to engage Sessions's services because of the WFCAs adoption of [the UFC].").

263. *Id.*

264. See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501–02 (1988) ("The dividing line between restraints resulting from governmental action and those resulting from private action may not always be obvious.").

265. See National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, § 12(d)(2), 110 Stat. 775, 783 (codified as amended at 15 U.S.C. § 272) (instructing federal agencies to participate with private standards bodies in developing standards for use by the agencies). The Act states:

In carrying out paragraph (1) of this subsection, Federal agencies and departments shall consult with voluntary, private sector, consensus standards bodies and shall, when such participation is in the public interest and is compatible with agency and

political manner similar to *Joor*? What if the NFPA in *Allied Tube* had been working to craft a standard that was "in the direct and predominant interest of the Government," and the "timely development or revision" of the standard was "unlikely in the absence of such support?"²⁶⁶ In such a situation, OMB Circular A-119 authorizes agencies to deviate from restrictions on agency support and to participate more actively, including giving more financial support, than any other member of an SDO.²⁶⁷ If an agency was participating in an SDO in such a way, a court could conclude that the SDO was a "quasi-legislature" and that the restraints on trade resulting from a participant's actions "were incidental to a valid effort to influence governmental action" and therefore that the participant enjoyed *Noerr* immunity.²⁶⁸

Massachusetts School of Law and *Joor* demonstrate a judicial trend toward finding SDOs immune from antitrust liability. Congress has mirrored this trend of favoring SDOs by enacting the Standards Development Organization Advancement Act of 2004 (the SDO Act).²⁶⁹ The SDO Act limits the liability of SDOs in antitrust suits to the actual damages sustained by the plaintiff.²⁷⁰ To qualify for this special treatment, an SDO must have registered with the Federal Trade Commission and the Department of Justice,²⁷¹ and must be setting voluntary consensus standards "that incorporate

departmental missions, authorities, priorities, and budget resources, participate with such bodies in the development of technical standards.

Id.

266. See OMB Circular A-119, *supra* note 31, at 8556 (answering the question, "What are the general principles that apply to agency support?"). The Circular states:

Normally, the total amount of federal support should be no greater than that of other participants in that activity, except when it is in the direct and predominant interest of the Government to develop or revise a standard, and its timely development or revision appears unlikely in the absence of such support.

Id.

267. See *id.* (authorizing agencies to deviate from restrictions on agency support of SDOs if it is in the government's interest).

268. *Allied Tube*, 486 U.S. at 502 ("*Noerr* immunity might still apply, however, if, as petitioner argues, the exclusion of [plastic conduit] from the Code, and the effect that exclusion had of its own force in the marketplace, were incidental to a valid effort to influence governmental action.>").

269. See Standards Development Organization Advancement Act of 2004, 15 U.S.C. §§ 4301–4305 (Supp. V 2005) (limiting the liability of SDOs that incorporate due process to actual damages).

270. See *id.* § 213 ("[I]n any civil action alleging a violation of section 1 or 3 of the Sherman Act, or alleging a violation of any similar State law . . . the amount of damages recovered by or on behalf of a claimant . . . shall not exceed that portion of the actual damages sustained by such claimant . . .").

271. See *id.* § 107 (stating that an SDO may notify the Federal Trade Commission and the

the attributes of openness, balance of interests, due process, an appeals process, and consensus in a manner consistent with the Office of Management and Budget Circular Number A-119.²⁷² The SDO Act specifically offers this leniency only to the organizations, not to their members.²⁷³ When the House Committee on the Judiciary Antitrust Task Force first discussed the Act, Chairman J. Randy Forbes remarked: "The frequency in which standards developing organizations are named in lawsuits hampers their efficiency and effectiveness."²⁷⁴

With less vulnerability to antitrust litigation, SDOs are an even more attractive instrument for Congress to employ. The traditional legal process burdened SDOs with liability to antitrust charges, but Congress has relieved that burden by giving the organizations an elevated status. Judges in the above cases, and Congress through the SDO Act, have placed SDOs above ordinary commercial organizations by encouraging limited liability in antitrust cases. As this Note pointed out in Part IV.A, under existing case law SDOs fall below the level of state actors and are therefore not subject to the limitations imposed by the Constitution.²⁷⁵ This limbo, above ordinary organizations but below state actors, cannot endure.

V. Conclusion

SDOs may in fact employ processes that appropriately take into account conflicting interests²⁷⁶ and respect the ideals of "openness, balance of interests, due process, an appeals process, and consensus,"²⁷⁷ mentioned in the OMB Circular A-119.²⁷⁸ Part III demonstrated, however, that these internal checks

Attorney General of its standard development activity).

272. *Id.* § 103.

273. *See id.* ("[T]he term 'standards development organization' shall not, for purposes of this Act, include the parties participating in the standards development organization.").

274. *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. 1 (2003) (statement of J. Randy Forbes, Chairman of the Task Force on Antitrust).

275. *See supra* Part IV.A (discussing the possibility that SDOs could be state actors but concluding that, to date, they do not rise to that level).

276. *See* Hamilton, *supra* note 110, at 468 ("[T]here is in existence a complex system that operates effectively in developing regulatory standards through interest participation. This process often, although not universally, produces acceptable compromises among the conflicting values that underlie regulatory standards.").

277. Standards Development Organization Advancement Act of 2004, 15 U.S.C. § 4301(a)(8) (Supp. V 2005).

278. *Supra* 131 and accompanying text.

sometimes fail. Reliance upon professionalism alone is inadequate. An external, formal check is necessary to ensure that SDOs live up to the ideals of due process they claim to espouse. Unfortunately, Part IV concluded that currently there is no sufficient third-party check on an SDO's internal procedure. No court has declared an SDO to be a state actor, and SDOs pass the nondelegation test. Meanwhile, Congress has taken affirmative steps to decrease the effectiveness of the only remaining external check on SDOs, antitrust laws, by passing the Standards Development Organization Advancement Act of 2004. SDOs cannot continue to exist in this legal no-man's-land: below the legal controls on government bodies and above the laws that regulate the behavior of private organizations.

