THE SUBJECT WAS STANDARDS:
THE FEDERAL GOVERNMENT AND SAFETY IN THE
1940's—AND 1970's

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INTRODUCTION

Standards as the "Law" of the Hazardous Products Jungle—1976

The May, 1976 issue of *Trial* magazine has emblazoned across its cover "The Hazardous Products Jungle". The cover shows a bicycle, chainsaw, stove, vacuum cleaner, TV set, football helmet and other consumer products engulfed in Henri Rousseau-like jungle foliage.

Such a cover, with its implication that many consumer products presenting unreasonable risks remain on the market over three years after passage of the Consumer Product Safety Act of 1972 (CPSA),\(^1\) epitomizes the general disappointment with the performance of the U.S. Consumer Product Safety Commission (CPSC), the independent regulatory agency created by the 1972 Act to protect the public against "unreasonable risks associated with consumer products."\(^2\)

In the articles inside the May *Trial*, the five authors evaluating the Commission's performance, though representing differing viewpoints,\(^3\) all

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2 The CPSA sets forth its purposes as follows:

   (1) to protect the public against unreasonable risks of injury associated with consumer products;
   (2) to assist consumers in evaluating the comparative safety of consumer products;
   (3) to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and
   (4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries. 15 U.S.C. §2051(b) (Supp. IV, 1974).

3 The five authors were Edward M. Swartz, a Boston trial lawyer; the author, presenting a consumer advocacy viewpoint; John W. Locke, former acting Executive Director of the CPSC and now Director of Technical Services for Can Manufacturers Institute; CPSC Commissioner R. David Pittle, and John Hayward, a Cambridge, Massachusetts trial lawyer and former Director of ATLA's Products Liability Exchange.

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generally focus their criticism on the safety standards process, and in particular on a January 30, 1976 statement made by then CPSC Chairman Richard Simpson before the Subcommittee on Oversight and Investigation of the House Committee on Interstate and Foreign Commerce. Chairman Simpson’s statement set forth a plan to establish 100 mandatory safety standards in the next six years which he claimed would eliminate “approximately 75% of the correctible risk attributable to unsafe consumer products.” Upon completion of such a goal, Simpson stated, the Commission could either be restructured into a maintenance and enforcement function, be given a new mission, or be abolished.

In the same January 30, 1976 statement, Mr. Simpson, almost in passing, revealed another implication of the “100 mandatory standards” plan. In the middle of his description of the Commission’s compliance program, he stated:

On the more positive side, I believe it would add another dimension to our compliance effort if affected companies, who are complying with existing standards, were not foreclosed from citing that demonstrated compliance in the course of product liability actions. At present this is specifically foreclosed by the language of Section 25 (a) of the Consumer Product Safety Act. I recommend that this language be repealed.

4 The CPSA provides:

A consumer product safety standard shall consist of one or more of any of the following types of requirements:

1. Requirements as to performance, composition, contents, design construction, finish, or packaging of a consumer product.
2. Requirements that a consumer product be marked with or accompanied by clear and adequate warnings or instructions, or requirements respecting the form of warnings or instructions.

Any requirement of such a standard shall be reasonably necessary to prevent or reduce an unreasonable risk of injury associated with such product. The requirements of such a standard (other than requirements relating to labeling, warnings, or instructions) shall, whenever feasible, be expressed in terms of performance requirements. 15 U.S.C. §2056(a) (Supp. IV, 1974).

5 Chairman Simpson submitted his resignation on December 3, 1975, but served until his successor was confirmed by the Senate on May 26, 1976.

6 Mandatory standards are standards required by federal law, such as the standards promulgated under the CPSA. Voluntary standards are standards developed by private industrial entities. While a voluntary standard could be proclaimed by a single manufacturer, generally voluntary standards are proclaimed by a voluntary standards organization, such as the American National Standards Institute or the American Society for Testing and Materials. Voluntary standards are essentially a means of so-called industry self-regulation. For further explanation, see NCPS, FINAL REPORT OF THE NATIONAL COMMISSION ON PRODUCT SAFETY, ch.4 (June 1970) [hereinafter cited as FINAL REPORT].

7 Statement of Richard O. Simpson, former Chairman, U.S. Consumer Product Safety Comm’n, in Hearings on Regulatory Reform Before the Subcomm. on Oversight and Investigation of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess. 30. (1976). Chairman Simpson’s reference to the “correctable risk attributable to unsafe consumer products” refers to the commonly accepted assumption among safety experts that the “products-caused” or “standards-preventable” portion of product associated injuries is 15-25%. Id. at 29.
Section 25(a) of the Consumer Product Safety Act provides that "Compliance with consumer product safety rules or other rules or orders under this act shall not relieve any person from liability at common law or under State statutory law to any other person."9 The legislative history of this provision, while sparse, suggests that Section 25(a) would be interpreted by the courts not to make evidence of compliance inadmissible, but simply not conclusive, so as not to "relieve any person from liability."10 If the import of Mr. Simpson's statement is that Congress should change "what is specifically foreclosed" by Section 25(a), what is apparently being suggested is that a manufacturer's compliance with Commission consumer product safety rules should "relieve him of liability" in private litigation.

The author has described elsewhere11 a possible 1982 scenario implicit in the 100 standards by 1982—repeal Section 25(a) plan. In brief, that scenario would find the 100 standards written by industry under Section 7 offeror process,12 with little upgrading by the Commission through the informal rulemaking process. The standards would do little more than ratify existing manufacturer safety practices, and industry would have little problem complying with the standards. Products in compliance would continue to injure users, but the manufacturer would have a statutory defense in a products liability action.

The juxtaposition of these two ideas—a standards approach to product safety regulation and the use of such safety standards as conclusory in private litigation—is neither new nor accidental. It is an industry dream begun as long ago as 1947 which began to become reality in the summer of 1976, when, in the wake of over 20 thus far unexplained deaths in Philadelphia of "Legionnaire's disease", Congress enacted the "National Swine Flu Immunization Program of 1976" Act13 (Swine Flu Act). This Act protects vaccine manufacturers, physicians and other health personnel "against liability for other than their own negligence"14 in administration of the swine flu vaccination program, and therefore provides an exclusive remedy against the United States to persons alleging injury from vaccine inoculation "because of the

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11 Id. at 13, 16.
12 Sections 7 & 9 of the CPSA, 15 U.S.C. §§2056 and 2058, the so-called "offeror" provision, allows a private group to develop a recommended safety standard and submit it to the Commission for evaluation, revision, and promulgation as a federal safety standard through the informal rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. §§553 (1970).
14 Id. §2.
unique role of the United States in the initiation, planning, and administration of the program."

While the rapid passage\textsuperscript{16} of the Swine Flu Act can be considered as a unique governmental response to a perceived public health crisis, the original precipitating factor—the vaccine manufacturers' alleged inability to obtain private liability insurance—reflects a more general emerging problem: the reports of manufacturers in a number of industries that they are experiencing difficulty in obtaining products liability insurance.\textsuperscript{17}

Such manufacturers can be expected to argue in the future that their products are also so comprehensively regulated by such governmental agencies as the Food and Drug Administration, Consumer Product Safety Commission, Department of Transportation and other federal agencies that they too should be protected by the federal government against liability except for negligence. Drug industry spokesmen made this argument as long ago as 1968 in the wake of the 1962 Kefauver amendments to the Food, Drug and Cosmetic Act of 1938,\textsuperscript{18} and, as several Senators noted\textsuperscript{19} in the floor debate on the

\textsuperscript{15} Id.

\textsuperscript{16} Both the Senate and House considered and passed the National Swine Flu Immunization Program of 1976 Act on August 10, 1976. 122 CONG. REC. S14107-22 H8642-55 (daily ed. Aug. 10, 1976). The only Senate committee to file a report on the bill was the Appropriations Committee, to which the bill was referred on August 10. The Appropriations Committee held no hearings, and reported the bill without recommendation. S. REP. No. 1147, 94th Cong., 2d Sess. (1976). The Senate voted on August 6, 1976 to discharge the Committee on Labor and Public Welfare, which had held hearings on August 6, from further consideration of the bill. 122 CONG. REC. S13871 (daily ed. Aug. 6, 1976). Neither the Senate Judiciary Committee nor the Budget Committee considered the bill, although it involved amendments to the Federal Tort Claims Act, 28 U.S.C.A. §1346 (1976), and, as noted in a Budget Committee staff memorandum, was subject to a technical point of order under the Congressional Budget and Impoundment Act of 1974, 31 U.S.C. §1351 (The staff memorandum appears at 122 CONG. REC. S14118-119 [daily ed. Aug. 6, 1976]). The only House Committee to file a report on the bill was the House Rules Committee, which reported a privileged resolution, H.Res. 1473, H.R. REP. No. 94-1421 on August 10, whose adoption by the House on August 10 allowed the bill to be taken from the Speaker's desk for immediate consideration by the House. The only House Committee other than Rules to consider the bill was the Subcommittee on Health and Environment of the House Committee on Interstate and Foreign Commerce, which held hearings on June 28 and July 20, 1976, and on August 3, 1976 reported a bill described by Subcommittee Chairman Paul Rogers (D-Fla.) as "very similar to the one before the House at this time." 122 CONG. REC. H8648 (daily ed. Aug. 10, 1976). The House Judiciary Committee never considered the bill, although its Staff did review it, and Committee Chairman Peter Rodino (D-N.J.) did send a letter to House Interstate and Foreign Commerce Committee Chairman Harley Staggers (D-W.Va.) stating that "the bill makes no changes in the Tort Claims Act, and has no impact on it, except that in the narrow circumstances of suits under the bill, the Government would waive the discretionary act exemption of the Tort Claims Act and would open itself to liability in the absence of negligence." Id. at H8650. The House Budget Committee did not consider the bill.

\textsuperscript{17} Compare U.S. DEPT. OF COMMERCE BUREAU OF DOMESTIC COMMERCE STAFF STUDY ON PRODUCT LIABILITY INSURANCE (1976), with Massery, The Regulated Cry Wolf About Insurance Rates, TRIAL. May, 1976, at 31.

Swine Flu Act, have already argued for similar protection in all public inoculation programs such as polio, measles, and mumps.

Industry attempts to use federal regulation and particularly federal safety standards to insulate themselves from private liability long precede 1976 and 1968, however. Indeed, the juxtaposition of a standards approach to product safety regulation and the use of such standards as conclusory in private litigation appears in the first Congressional hearings on product safety regulation, the 1947 Hearings on Inflammable Fabrics before the House Committee on Interstate and Foreign Commerce. Before considering, however, the 1947 Hearings for what they reveal about the limitations and implications of the standards approach to product safety regulation, the operation of the “standards consensus” in the 1960’s must be reviewed.

I. The Standards Consensus 1966-1970

Chairman Simpson's assumption in his Congressional testimony that the primary function of the CPSC is to issue safety standards reflects an approach to product safety regulation which has a long history. To cite one relatively recent statement of this approach, Mrs. Virginia Knauer, two weeks after her appointment by President Richard M. Nixon as Special Assistant to the President for Consumer Affairs, testified before the National Commission on Product Safety on May 1, 1969, that she believed that “the development of comprehensive safety standards is the key to this problem of product safety.” Her statement was widely quoted in both the industry and the public press. Indeed, perhaps the most widely shared assumption by government, industry, and consumer advocates in the middle 1960's


20 HEARINGS BEFORE THE NATIONAL COMM’N ON PRODUCT SAFETY, vol. 4, at 373 (1969) [hereinafter cited as NCPS HEARINGS]. The creation of the National Commission on Product Safety (NCPS) was mandated by Congress to “conduct a comprehensive study and investigation of the scope and adequacy of measures now employed to protect consumers against unreasonable risks of injuries which may be caused by hazardous household products.” Act of Nov. 20, 1967, Pub. L. No. 90-146, §2(a), 81 Stat. 467. The NCPS issued its final report on June 30, 1970, which recommended “that the federal government both to protect consumers and to strengthen manufacturers’ efforts, should enact comprehensive legal measures to reduce hazards” and that “Broad responsibility for the safety of consumer products should be vested in a conspicuously independent federal regulatory agency, a Consumer Product Safety Commission (CPSC) appointed by the President and confirmed by the Senate.” FINAL REPORT, supra note 6, at 4, 5. The Final Report also contained a draft of a “proposed Consumer Product Safety Act” which, together with certain proposals for alternative legislation introduced by the Nixon Administration, became the basis for Pub. L. No. 92-573, the Consumer Product Safety Act of 1972, 15 U.S.C. §§2051-81 (Supp. IV, 1974).


22 E.g., S. REP. No. 1301 to accompany S. 3005, the National Traffic and Motor Vehicle Safety Act of 1966, 89th Cong., 2d Sess. at 4 (“The promotion of motor vehicle safety though voluntary standards has largely failed. The unconditional imposition of mandatory standards at the earliest practicable date is the only course commensurate with the highway death and injury toll”); Testimony of Gordon A. Christenson, Former Assistant General
was that “standards” were the sine qua non for federal consumer legislation in general. This “standardsitis” is vividly reflected by A. Q. Mowbray, when he wrote:

What the consumer needs in order to make rational choices among competing products is standards for these products—standards of performance, standards of durability, and standards of safety.  

Mowbray stated that “the paucity of standards for consumer protection is at the heart of most of the consumer questions that have found their way to Washington during the past several years.” He cited federal auto standards

Counsel for Science and Technology, Department of Commerce, NCPS HEARINGS, supra note 20, vol. 3A, at 361 (“So let me propose what I think are essential requirements for a national product safety policy . . . it is nonsense to . . . call it to the public’s attention every time there is an incident and have hearings such as this . . . before the Commerce Committees of both houses on particular things. It is time that we should set a national policy for standards-making, and a process by which it can be pulled out of the voluntary mechanism and abuses corrected by the public.”). Arnold Elkind, Chairman, National Commission on Product Safety, presents a contrasting viewpoint, which, while recognizing the importance of standards, sees a more modest federal role.

Underlying the entire problem is the voluntary standards system of setting safety standards for products . . . . I personally don’t think it is possible or practicable for the government to set safety standards for all products, but there must be some kind of federal presence—a body similar to the Commission should remain in existence to conduct investigations, hold hearings and make public statements about specific products. Quoted in NEWSDAY, Aug. 8, 1969.

E.g., Testimony of Aaron Locker on behalf of Toy Manufacturers of America, NCPS HEARINGS, supra note 20, vol. 2, at 265-66:

In recent years, however, the industry has been aware of the fact that something more than an after-the-fact approach was necessary. So, in 1950 we began . . . to develop the first of what we hope will be a very broad scale program of safety standards with the American Academy of Pediatrics and the American Standards Association, as it was then known . . . . We are now in the process of breaking down the . . . several hundreds of categories [for toys] with a view towards developing safety standards for each of these categories . . . .

See also testimony of Baron Whitaker, Underwriters Laboratory, NCPS HEARINGS, supra note 20, vol. 3B, at 489:

An important aspect of product safety is the ability to determine when the design and use concepts of a new product have stabilized to the point that standardization in the area of safety requirements is practicable . . . . If standardization occurs too quickly in a new product area, there is a restrictive effect which tends to limit the ingenuity of the designer and the potential benefits to the user. If standardization is delayed too long, on the other hand, there will be tremendous problems in achieving a product standard because of the economic sacrifices which must be made in unifying the safety aspects of products which have been developed to appeal to somewhat differently weighted desires of the user.

E.g., Testimony of Margaret Dana, NCPS HEARINGS, supra note 20, vol. 3A, at 324 (“I say a standard is needed, for even so simple a thing as a wooden match, when its lack of standard creates a hazard”); testimony of Ralph Nader, Id., vol. 3B, at 531, 532 (“However they are written, safety codes place a certain general value on human life and limb by making a judgment on the level and coverage of the technology or technique to be employed. It is indisputably clear that these standards affect the most vital interest of the society—its health and safety—and that such an interest is probably the most primordial function of government to pursue.”)

under the National Traffic and Motor Vehicle Safety Act of 1966, truth in packaging standards under the Fair Packaging and Labeling Act of 1966, truth in lending legislation as requiring "standard methods of stating the cost of borrowing", and federal meat inspection standards under the Federal Meat Inspection Act. Mowbray contrasted the consumer marketplace, where the seller and the consumer do not have equal bargaining power or technical expertise, with the commercial market, where buyers and sellers deal with each other in terms of specifications, and agreed-on standards specifications and standard testing methods. He stated that "[T]he plea now from consumer advocates is for a nation-wide systematic program to develop standards for consumer products . . . . the key question is, will such a program be organized by industry, by government, or by a cooperative effort of the two."

Given this widespread equation of "standards" with consumer protection, it is not surprising that the debate in product safety in the late 1960's centered primarily around the question of who would develop and write the necessary standards rather than on the question of whether standards setting should be the primary approach to products safety regulation. Consumer advocates such as Ralph Nader argued that safety standards should be written by the government. Industry groups generally described their participation in voluntary standards organizations such as the American National Standards Institute, and argued that such voluntary self regulation should be supplemented by government financing and other support. The Final Report of the National Commission on Product Safety, issued in June, 1970, reflected both these views in its recommendation that the proposed Consumer Product Safety Commission "be invested with authority to develop and set mandatory consumer product safety standards where industry's own

30 Mowbray, supra note 25, at 246. Mowbray was not alone in the middle 1960's in looking at standards as a communications device between the mass seller and the consumer. For example, Margaret Dana, a self-styled consumer advocate, testified before the National Commission on Product Safety as follows:

But what I think this Commission is beginning to see . . . is that standards today are the mutually understood language, the same words to describe the same things from producer, distributor to consumer and, of course, through Government. We desperately need this kind of standard to use as measuring sticks to replace the old traditional know-how which we lost in our product explosion.

NCPS Hearings, supra note 20, vol. 3A, at 313.
31 NCPS Hearings, supra note 20, vol. 3B, at 531. (Testimony of Ralph Nader).
efforts are not sufficient to protect consumers from unreasonable risks of death or injury.”

In retrospect, it is perhaps surprising that no one seriously questioned the assumption that product safety standards were the answer to product safety. At the time of the National Commission on Product Safety Final Report in June 1970, probably the most comprehensive and thoughtful analysis of federal consumer product safety legislation was a study directed by Howard Heffron commissioned by the NCPS itself.

Heffron’s study was concerned with how three major consumer safety programs—auto safety, flammable fabrics, and hazardous substances—had worked in practice. Heffron devoted a significant part of his report to a detailed analysis of what he described as “constraints on standard setting.” He described the auto safety regulation program as “a disappointment to many” and noted that “[T]here is no radical new ‘safety’ car even close to production, the traffic toll has not declined, and the safety standards which have been issued reflect in great measure safety features which originated within the industry and had already been incorporated in many vehicles.”

Heffron noted that in formulating a safety standard to protect the public against “unreasonable risks of accidents” as required by Section 102(1)

33 Final Report, supra note 6, at 114. The Report expressed the “standards consensus” when it stated:
Consumers are best protected when manufacturers build into their products safeguards against all predictable forms of abuse or misuse. Toward this end, safety standards, effectively enforced, are one of the important means of reducing unreasonable hazards in consumer products. Id.


A risk of injury which is associated with consumer products and which could be eliminated or reduced to a sufficient extent by action taken under the Federal Hazardous Substances Act, the Poison Prevention Packaging Act of 1970, or the Flammable Fabrics Act may be regulated by the Commission only in accordance with the provisions of those Acts.

For a discussion of how the Commission has administered Section 30(d), see Note, Section 30(d) Determinations: The CPSC’s Choice of Law in Product Safety Regulation, 43 Geo. Wash. L. Rev. 1211 (1975). Section 16 of the Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284 §16 (May 11, 1976) amends Section 30(d) by providing greater flexibility to the CPSC by permitting regulation under the CPSA “if the Commission by rule finds that it is in the public interest to regulate such risk of injury under this Act.”

38 Heffron Study, supra note 34, at 21.

39 Id. at 22-23.
of the National Motor Vehicle and Traffic Safety Act of 1966, the Secretary of Transportation was required by the Act to consider whether the standard was "reasonable, [and] practicable." He concluded that these and other statutory criteria tended to ensure that standards would not exceed existing industry practices. He added that standards could never be written for the approximately 15,000 parts of a modern automobile, most of which have some relation to safety, and that therefore auto safety regulators would have to rely on defect enforcement and consumer information programs. "Standard setting", Heffron concluded, "alone cannot do the full job."

Heffron, however, never really questioned that the standards process was a major part of the product safety regulation. His report focused on the means of "improving" the standards process by decreasing delay. Thus he argued that informal rulemaking under Section 4(b) of the Administrative Procedure Act (APA) was more desirable than formal rulemaking under Section 7 and 8 of the APA "where questions of public health and safety are involved."

Heffron's discussion of possible methods of assessing the effectiveness of safety standards, while unusual in even questioning the necessity for such an assessment, ironically also reflects the degree to which standards were an element of faith rather than proof in the middle 1960's. He cited four possible methods of assessing the effectiveness of standards:

(1) A reduction in injuries attributable to a standard or group of standards;
(2) The extent to which vehicles have had to be altered to incorporate requirements imposed by the statute;
(3) Internal changes in a manufacturer's organization to improve vehicle safety; and,
(4) The level of safety achieved by a given standard within the constraints of the existing state of the art and technology.

He described a "preliminary effort to examine the safety standards issued to date in terms of the extent to which they have compelled manufacturers to modify vehicles" and also cited "some data bearing upon injury reduction." He concluded that as to the first, the requirement in Section 40

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41 Id. §1392(f)(3).
42 HEFFRON STUDY, supra note 34, at 30.
44 Id. §§557-58.
45 HEFFRON STUDY, supra note 34, at 33-34.
46 Id. at 53.
47 Id. at 53-54.
102(h) of the National Motor Vehicle and Traffic Safety Act of 1966 to base initial standards on existing standards made it "not surprising" that the impact of the initial standards on the auto industry was "relatively minimal". He added, however, that "with few exceptions, later standards forced no greater change upon the manufacturers than had the initial standards, although they were not subject to the same statutory and factual limitations." Of the 32 standards charted in Heffron's study, only five were characterized as requiring manufacturers, accounting for a significant share of the market, to make some significant engineering effort to comply.

When Heffron turned to consideration of the impact of standards on reduction of death and injuries, however, he admitted that "it is difficult to attribute reduction of injuries or accidents to a specific standard . . . . it does not seem possible to say of any standard, 'but for the issuance of this safety requirement by the Government, a particular reduction in injuries and accidents would not have occurred.'" He then described several efforts to "assess the payoffs of particular standards", but concluded that "the evaluation of these studies is beyond the scope of this report. It will be years before safety improvements approach their full impact. Approximately five years is required before a particular vehicle improvement required by a standard will be on 50 percent of the passenger vehicles on the highway."

What is striking about this attempt to develop criteria to assess the effectiveness of standards is that despite Heffron's finding that standards generally simply ratify the industry's state of the art and technology, and the difficulty in attributing injury reduction to standards, neither finding led him to question the standards process as the most important approach to product safety. Implicit is Heffron's faith that standards need not necessarily simply ratify the state of the art, and that eventually there would be data showing the "payoffs" of particular standards.

The degree of faith required is shown even more graphically in Heffron's

49 HEFFRON STUDY, supra note 34, at 54.
50 Id. at 56-59. Heffron did note the limitations of his chart as follows:
Lack of reliable data prevents [the chart] from showing the extent to which the automobile manufacturers adopted safety features in anticipation of or, as some claim, in an effort to forestall enactment of Federal legislation. Nor does it indicate the extent to which manufacturers had been impelled to adopt safety features to provide grist for the standard-setting process to foreclose or limit the possibility that other less obstrusive requirements might be adopted. If the Federal program has succeeded in drawing safety advances from industry for any of the foregoing reasons, these advances are genuine accomplishments of credit to the program. Even so, by showing that the Bureau's standards have up to now been predominantly adoptions of preexisting industry safety features, the chart shows that the Bureau has not had a strong innovative role. Id. at 55.
51 Id. at 61.
52 Id.
review of standards under the Flammable Fabrics Act,\textsuperscript{53} since he found that standards under that Act were even less effective by any criteria than the auto safety standards issued under the National Motor Vehicle Safety Act of 1966. Heffron states that "study after study showed that clothing involved in burns had consistently passed the CS 191-53 standard,"\textsuperscript{54} i.e. the standard statutorily specified in the Flammable Fabrics Act of 1953, Section 4.\textsuperscript{55} That the statutory standard was written not to eliminate unreasonable risks from burns but to preserve the textile industry's markets nearly intact became clear in the industry's opposition to proposals in 1967 to amend the 1953 Act by authorizing administrative issuance of new standards, which could, as Heffron noted, "potentially go so far as to ban all flammable fabrics or textile products and require nonflammable products in their place."\textsuperscript{56} The 1967 amendments to the Flammable Fabrics Act ultimately adopted by Congress, did, despite the industry opposition noted by Heffron, provide for administrative issuance by the Secretary of Commerce\textsuperscript{57} of new or amended flammability standards. Writing in 1970, however, Heffron found that administrative issuance had not resulted in stronger standards that would eliminate unreasonable risks from flammable fabrics. He observed that "[T]he lack of any meaningful action should come as no surprise, [because of] cumbersome administrative procedures."\textsuperscript{58} Thus once again, Heffron did not analyze the problem as anything inherent in the standards approach itself.

Since the 1953 Flammable Fabrics Act is generally recognized as the first\textsuperscript{59} modern federal product safety legislation, and since it established safety standards as the federal government's primary approach to product safety, it is instructive to reconsider the legislative background of that Act for what it shows about the limitations of the standards approach.

\textsuperscript{54} HEFFRON STUDY, supra note 34, at 117.
\textsuperscript{55} PUB. L. NO. 88 §4(a), 67 Stat. 112.
\textsuperscript{56} HEFFRON STUDY, supra note 34, at 118.
\textsuperscript{58} HEFFRON STUDY, supra note 34, at 125.
Heffron's statement that industry groups supported the 1953 Act with its statutory flammability standard\textsuperscript{60} while true, fails to state an important fact about the 1953 Act. The industry support referred to came only after over seven years of development by the textile industry of what became the "statutory" flammability standard. Also, this development was spurred by a 1945 California statute giving the California state fire marshal regulatory power to "prescribe general and uniform regulations which will reduce the risk of fire and hazard of injury to persons and property and at the same time prevent serious and unnecessary economic injury to many California citizens."\textsuperscript{61}

To fully appreciate the process by which industry came to support the 1953 Flammable Fabrics Act, it is necessary to consider in detail the hearings on "Inflammable Textiles" held by the House Interstate and Foreign Commerce Committee on March 4 and 5, 1947.

II. THE FIRST CONGRESSIONAL HEARINGS ON FLAMMABLE FABRICS, 1947


While the two major bills, the Johnson and Arnold Bills, both illustrate the post-World War II climate of industry-government cooperation in the name of public safety that has been at the heart of the standards approach to product safety ever since, the Bills differed in several significant respects. The Johnson Bill was a fairly simple but broad bill defining flammable textile fabrics as burning at a stated rate, with testing to be in accordance with National Bureau of Standards (NBS) procedures, and with enforcement by criminal penalties and injunctions. The Arnold Bill, while narrower in its application only to wearing apparel, in contrast set up an elaborate scheme whereby the retail industry, which according to Johnson "wrote and sponsored"\textsuperscript{62} the Arnold Bill, would in effect write the testing requirements. Johnson also criticized the Arnold Bill for permitting the marketing of dangerously flammable fabrics intended for wearing apparel provided it was marked "flammable—dangerous when worn", and noted that such a warning label could provide the retailer with a products liability defense.\textsuperscript{63}

\textsuperscript{60} Heffron Study, supra note 34, at 118.
\textsuperscript{61} 1945 Cal. Stats. ch. 728, §10.
\textsuperscript{62} See text accompanying note 72 infra.
\textsuperscript{63} See text accompanying note 74 infra.
Also evident in the 1947 Hearings is the importance of regulatory activity at the state level (the California statute, passed at least partially in response to public outcry and concern over the rash of fires in 1945 thought to be connected with the new synthetic fibers which flooded the market at the end of World War II) as a catalyst for industry to seek weaker federal legislation as a means of preserving national markets for new synthetics.

The testimony also reflects very well the conflicts within the textile industry, particularly between cotton and the new synthetics, which delayed the passage of the Flammable Fabrics Act for 6 years, i.e. until the industry had developed a standard and testing method to determine compliance which all segments of the industry could live with, and until another consumer product disaster—exploding torch sweaters burning children—occurred in 1953, and legislation was needed to reassure the public.

The 1947 Hearings are also important because they illustrate several characteristics of a standards product safety regulatory approach which suggest that such an approach has little to do with consumer protection against unreasonable risks. First, the standards approach lends itself to attempts by certain segments of an industry to shift testing and liability costs either to

64 See, e.g., Fire Destroys the Big Top, LIFE, July 17, 1944, at 30 (the Hartford, Connecticut Circus Fire); You'd Better be Panic Proof: Essential Points to Remember in Today's Jam-Packed Theaters, Restaurants, Dance Halls and Night Clubs, READER'S DIGEST, Dec. 1944, at 35-36 (citing the Coconut Grove fire in Boston in 1943 where 500 died; a fire in a one room Oklahoma schoolhouse where a candle ignited the whiskers of a Santa Claus). During the 1947 hearings on Inflammable Fabrics, infra note 66, Congressman William J. Miller (Conn.) asked Congressman Leroy Johnson (Calif.) whether the California Flammable Fabrics Act of 1945 was "written in part because of the Coconut Grove fire in Boston", and mentioned that the Coconut Grove fire had a great deal of national publicity." Johnson replied that he did not know what precipitated the writing of the 1945 California Law and that "I never heard any connection between that fire and the passage of the Act." 1947 Hearings, infra note 66, at 15.

The years 1946 and early 1947, the period just prior to the 1947 Hearings on Inflammable Fabrics, also saw a rash of hotel fires, which were fully covered by the national press. See, e.g., Atlanta: the Inferno, NEWSWEEK, Dec. 16, 1946, at 34 (the Atlanta, Georgia Winecoff Hotel fire on Dec. 7, 1947: the story begins, "Her nightgown shone white against the flames behind her as she stood on the window ledge, high above the street. Then it, too, caught fire. She jumped. But she missed the net stretched by firemen. She landed astride overhead wires. There she hung in flames. Finally her body broke loose and tumbled to the ground."); Chicago Hotel Fire Kills 60 People, LIFE, June 17, 1946, at 29-33 (the LaSalle Hotel fire); Firetrap U.S.A., COlliERS, Sept. 21, 1946, at 16 (citing the Hartford circus fire, the Chicago LaSalle Hotel fire and the Dubuque, Iowa Hotel Canfield fire which killed a total of 80 within a one week period in the early summer of 1946, citing fire damage to U.S. homes in 1945 of $120 million, and stating that the "death rate in homes right now is 15 a day" Id. at 52); Germany: Costly Clothing, TIME, Feb. 17, 1947, at 34 (Berlin Germany fancy-dress dance hall fire killing 84; witness quoted as saying, "for some reason, . . . most people seemed more concerned about their clothes than their lives."); Hotel Fires: Experts Work to Prevent Repetition of Conflagrations of Last Year, the Worst in Recent U.S. History, LIFE, Jan. 13, 1947, at 33 (citing 30 major hotel fires killing 272 persons).

65 It should be noted that the first federal bill introduced to regulate flammable fabrics was aimed at synthetics. See testimony of Rep. Johnson of California, referred to in text accompanying note 66, infra.
other parts of the industry or to consumers. Second, standards setting is inherently technologically retrogressive in that it tends to prohibit incorporation into the standard a requirement that would stretch existing technology. Finally, a standards approach may distract federal policymakers from other approaches to product safety more directly concerned with eliminating unreasonable risks, such as public hearings, defects notification, or requiring companies to reform internal procedures to prevent and detect safety hazards.

**The Johnson and Arnold Bills**

Representative Johnson of California was apparently the first Congressman to become involved in federal regulation of flammable fabrics. He testified before the House Commerce Committee on March 4, 1947 that his interest in flammable fabrics legislation was "aroused by a California editor whose suggestions resulted in a law being passed by the California legislature in 1945 curtailing the sale of dangerous fabrics." Representative Johnson noted that he had first introduced in the first session of the 79th Congress a bill, H.R. 2496, regulating the safety of synthetic fibers, and then in the second session of the 79th Congress added another bill, H.R. 5445, to prohibit movement in interstate commerce of dangerous flammable fabrics, both synthetic and natural. While this latter bill was pending he held informal meetings in his office with various manufacturing, retailing and testing organization representatives. He testified:

I asked the gentlemen present if they would be kind enough to furnish me a yardstick or standard or formula which they thought appropriate to place in the statute defining what was dangerous and the test to be applied to determine what fabrics were dangerous . . . .

The group of technical men that I mentioned did not get around to furnishing me a formula and consequently I turned to Mr. Ingberg of the Bureau of Standards to furnish me what he thought was the appropriate phrasing of the yardstick to be placed in the statute.\(^6\)

Rep. Johnson then described his new bill, H.R. 601, introduced in the First Session of the 80th Congress, which he characterized as a "simple, effective and economical bill" which would make unlawful the use of means of instrumentalities of communication or transportation in interstate commerce for the purpose of selling, offering for sale, or for delivery after sale, of any inflammable textile fabric. The bill provided criminal penalties, authorized the Attorney General or U.S. attorneys to seek injunctions against threatened violations, and most important, defined "flammable textile fabric" as:


\(^6\) *Id.*
any textile fabric of combustible fibers which flashes or burns in horizontal position, with any nap or pile on the upper face, at greater average rate than one inch per second, the size and condition of samples and method of testing to be in accordance with the procedure prescribed in National Bureau of Standards Circular Numbered C455, entitled "Flame-proofing of Textiles": Provided, That if flameproofing is applied to meet the requirements it shall be permanent for the life of the textile.68

Johnson stressed that "in this matter you have a disinterested and well-trained Federal agency determining what fabrics are dangerous. This Bureau is an old well-established Bureau . . . . The cost of administration of this act would be nominal." Johnson also emphasized the progressiveness of the injunction remedy, and noted that his bill recognized that flameproofing is or may become effective and mentioned that "we had some informal tests performed to determine the permanency of the flameproofed fabrics."69

It is in his discussion of the other two bills, however, that the split within the industry begins to become apparent. Johnson quickly dismissed the Canfield Bill, H.R. 505 as "the same as my former bill, H.R. 5445, Seventy-Ninth Congress."70

Representative Johnson then turned to H.R. 1111, the Arnold Bill, and described its standard setting mechanism as follows:

68 H.R. 601, 80th Cong., 1st Sess. §3(b) (1947).
69 1947 Hearings, supra note 66, at 10.
70 Id. Rep. Canfield in his testimony generally stressed the injuries to children from inflammable cowboy suits and "recent hotel fires causing hundreds of deaths, in which flammable fabrics may have played a large part" as his motivation for introducing H.R. 505. Id. at 7. He also stated his opposition to limiting regulation to wearing apparel. He introduced into the record a telegram from a constituent whose child had been burned to death by one of the cowboy suits, and also an article from Life magazine which devoted three pages to "describing experiments on dummy manikins dressed in flammable fabrics." He quoted from Life as follows:

Every year dozens of United States women manage to get themselves into much the same predicament as the flaming dummy pictured herein. At gay dances and dinner parties pretty girls in flimsy frocks brush against glowing cigarettes, or lighted candles and suddenly discover that their most cherished party gowns have become firetraps. In New York last December Debutante Virginia Black narrowly escaped death when she ignited her flowing tulle dress by merely dancing over a cigarette carelessly tossed on the floor. All this has caused a great stir among the Nation’s dress manufacturers and retailers, who consider it bad for business when their customers catch fire. Already California has passed a law which makes it illegal to sell any fabric which burns faster than 5 inches in 6 seconds. Similar Federal legislation now being pushed hard by retail dry-goods organizations would ban such sales all over the country. To show what happens when a girl’s party dress is set afire, a manikin was carefully dressed in yards of gauzy rayon net, long a favorite party-dress fabric. Then a burning match was touched to the skirt. Instantly the dress exploded into flames and in 14 seconds the dummy was reduced to a smoking, sizzling ruin.
Id. at 7-8.
In Section 4 of H.R. 1111 is a sort of NRA set-up\(^{71}\) for the handling of this problem. The section provides that the testing prescribed shall be the "then effective commercial standards." But the Department of Commerce has not promulgated any such standard, although one has been submitted by the National Retail Dry Goods Association, which group wrote and sponsored H.R. 1111. (emphasis added.)

How do we know that the industry can agree upon a standard method of testing? In 1933, I was the head of an NRA board, and I got a good view of what a part of an industry could do to the rest of it under NRA methods. Our bill simply applies the standards provided by the Bureau of Standards which works closely with industry, but whose sole object is to meet the danger, uninfluenced by either industry, consumers or anyone else.\(^{72}\) (emphasis added.)

Johnson's general skepticism about the retailer-written Arnold Bill, with its provisions for standards to be written by the "regulated" party, extended one important step further to a recognition that an important aspect

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\(^{71}\) Rep. Johnson's characterization of Section 4 of the Arnold Bill as a "sort of NRA set-up for the handling of this problem" suggests that the origins of the standards approach to product safety regulation may be traceable to the NRA Codes. The author is conducting preliminary research into the NRA Codes to ascertain whether the Code writers during the New Deal concerned themselves with safety as well as the more generally known attempts to write Codes of "fair competition" which were the primary focus of the NRA.

The writer thus far has found that some of the Codes had consumer advisory boards and that one of the interests of these boards was safety. Safety concerns of such boards are reflected in Consumer Notes, Nos. 1-8, and The Consumer, (the successor to Consumer Notes), which were the official organs of the Consumer Division of the National Emergency Council published for the County Consumer Councils. These Councils which functioned under the direction of the Consumer Advisory Board of the NIRA and the Consumers Counsel of the Agricultural Assistance Administration, were "grass roots" organizations in counties throughout the United States whose primary functions were adjusting of price complaints, serving as channels for dissemination of information about the situation of the consumer and ways of improving his position, acting as an agency through which consumers could be heard on questions of national economic recovery and public policy, and aiding in the development of a more efficient and economical system of distributing goods and services to consumers. Douglas. The Role of the Consumer in the New Deal: Toward National Recovery, 172 Annals of Am. Acad. of Pol. & Social Sci. 98, 105 (1934). For a general discussion of activities of the NIRA Consumer Advisory Board, see Keezer, The Consumer Under the National Recovery Administration, id. at 88, 89. Further evidence that the standards approach to safety regulation has its roots in NRA type administrative structures and thinking can be found in the 1950 hearings on the Accident Prevention Act of 1950, a proposal which would have created in the Department of Labor a Bureau of Accident Prevention for the purpose of promoting and maintaining safe and healthful conditions of employment in hazardous industries affecting commerce. The administrative structure proposed was a tripartite joint board (4 management representatives, 4 labor representatives, and 1 public member) which would be empowered to set industrial safety standards for industries whose injury rate exceeded the general industrial injury average. This structure was denounced by industry opponents as a "pattern of Federal Code making and regulation very similar to that under the National Industrial Recovery Act and found objectionable and invalid by the Supreme Court." Letter of L. R. Sanford, President, Shipbuilders Council of America, Hearings of H.R. 4997 Before a Special Subcomm. of the House Comm. on Educ. and Labor, 81st Cong., 2d Sess. 70-71 (1950).

\(^{72}\) 1947 Hearings, supra note 66, at 11.
of the Arnold Bill was the continued marketing of dangerously flammable fabrics, combined with a products liability defense against injured users. Johnson testified:

A curious provision of H.R. 1111 is Section 3 which permits the manufacture, sale and transportation in interstate commerce of any article or fabric intended as wearing apparel providing it is marked "flammable—dangerous when worn." Certainly this is a questionable provision.

It would be no comfort to have your wife or daughter buy some dangerously flammable material, make it into a dress or coat and then after getting burned badly or fatally burned be confronted with the defense that the material which had been bought was marked "flammable—dangerous, etc." You know that buyers would frequently not see the marking and in many cases sellers would probably not go out of their way to emphasize the marking on the material, as it might stop sales.

Thus Johnson introduces two themes that pervade the 1947 Hearings—NBS standards versus commercial standards, and the attempt by different parts of the textile industry to shift liability burdens via "safety" legislation based on standards. Both themes in turn are related to attempts by different segments of the industry to preserve or increase market shares.

The testimony of S. H. Ingberg, Chief, Fire Resistance Section, Bureau of Standards, illustrates very well the intertwining of the above themes. Ingberg tested the various types of textiles (cotton chenilles, brushed rayons, fleeced cotton fabrics, lightweight nets, and coated fabrics) under both the testing methods prescribed in NBS Circular 455 (incorporated by reference in the Johnson Bill) on the one hand, and in the retailer proposed commercial standard TS-4315 (referenced into the Arnold Bill) on the other. Ingberg stated that the NBS test, in which the testing equipment was placed in a horizontal position and the ignition of the sample was on the edge rather than the face of the sample, gave the most consistent and definite determination of the rate of flame travel. Applying the NBS test to the different types of textiles proposed to be regulated under the Johnson and Arnold Bills, the results were as follows:

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73 Rep. Johnson slightly misinterprets the Arnold Bill, since only fabrics, i.e. piece goods, had to carry the warning label if they failed the flammability test. H.R. 1111, 80th Cong., 1st Sess. §3(a) (1947). If wearing apparel failed the flammability test, Section 3(b) of H.R. 1111 prohibited its manufacture or sale in interstate commerce. See further discussion in note 93 infra.

74 1947 Hearings, supra note 66, at 11.

75 Id. at 19.

76 Id. at 23-24.
Ingberg then compared these test results with the injury data that NBS had received, and concluded, "the test and limit of flame spread proposed appear to segregate fairly faithfully the general types of textiles involved in the accidents of which reports were received." He then related the "standards" theme to the "products liability" theme as follows:

<table>
<thead>
<tr>
<th>Textile Type</th>
<th>Samples</th>
<th>Failed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cotton chenilles</td>
<td>6 of 30</td>
<td></td>
</tr>
<tr>
<td>Tufted textiles</td>
<td>0 of 10</td>
<td></td>
</tr>
<tr>
<td>Brushed rayons</td>
<td>1 of 12</td>
<td></td>
</tr>
<tr>
<td>Long napped rayons</td>
<td>0 of 2</td>
<td></td>
</tr>
<tr>
<td>Fleeced cotton fabrics</td>
<td>0 of 8</td>
<td></td>
</tr>
<tr>
<td>(2 flannels, 6 flannelettes)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lightweight nets</td>
<td>3 of 5</td>
<td></td>
</tr>
<tr>
<td>Coated fabrics</td>
<td>1 of 3</td>
<td></td>
</tr>
</tbody>
</table>

77 Id. at 21.

78 Id. Ingberg's hope that federal safety standards would conclusively establish the standard of care in products liability litigation has not been realized since, as stated in the Final Report, supra note 6, at 76:

The effect of safety standards on common-law liability has never been uniformly resolved. Proof that the defendant failed to meet mandatory Federal, State, or local standards will, in many jurisdictions, be conclusive evidence of negligence or of a defect under strict tort principles. Other courts treat such proof simply as "some evidence" of lack of due care.

The manufacturer's evidence that he complied with a statutory standard does not prove he used due care or that his product had no defect, since the standard is usually minimal. While compliance should be evidence, the court must still decide whether common-law requirements are in fact higher than a standard of uncertain merit. Judge Learned Hand observed, "A whole calling may have unduly lagged in the adoption of new and available devices . . . . There are precautions so imperative that even their universal disregard will not excuse their omission" (citing The T. J. Hooper, 60 F.2d 737, 740 [2d Cir. 1932]). Thus a manufacturer was recently found liable despite his compliance with the Flammable Fabrics Act standard because the standard was insufficient (citing LaGorga v. Kroger Co., 275 F. Supp. 373, 378 [W.D. Pa. 1967], aff'd., 407 F.2d 671 [3d Cir. 1969]).

Cases decided since 1970 do not materially alter the above conclusions of the Final Report, although a recent article cites the LaGorga case, noted above, and Raymond v. Riegel Textile Corp., 484 F.2d 1025 (1st Cir. 1973) as support for the statement that "defendants in strict liability actions recently have asserted the defense that compliance with federal fabrics standards negates the 'unreasonably dangerous' or 'defects' requirement of Section 402A of the RESTATEMENT (SECOND) OF TORTS". Campbell & Vargo, The Flammable Fabrics Act and Strict Liability in Tort, 9 IND. L. REV. 395, 396 (1976). The Raymond case is particularly important for its rejection of defendant's argument that the 1967 amendments to the Flammable Fabrics Act, providing that "this chapter is intended to supercede any law of any state . . . inconsistent with its provisions," 15 U.S.C. §1203 (1970), prevent an action based upon Section 402A or upon any other theory of recovery. The First Circuit analyzed the history of the 1967 amendments as follows:

The legislative history indicates that the 1967 amendments which included the "supremacy clause" were, as a group, intended to increase the protection of consumers. The amendments were designed to permit the Secretary of Commerce "to continually update flammability standards to keep pace with new technological processes developed by the industry." 1967 U.S. CODE CONG. & AD. NEWS 2134. Up until that time,
The need of the legislation is apparent not only as a forward step in the slow progress of achieving greater safety, but also in setting up a standard that will indicate the respective rights of those suffering injury and those held responsible therefor. (emphasis added.)

It is perhaps known to you that there are pending cases aggregating large sums, or have been settled, due to injuries as a result of the burning of these fabrics and this legislation will be of material assistance in that the parties concerned have a standard to which they can refer. It is quite likely that the courts will regard a standard recommended by this committee and passed by the Congress as being authoritative in the field. (emphasis added.)

It should also be noted that the legislation would be in large measure educational as concerns both the producer and consumer. It is perhaps apparent that if the present information had been extant some years past some of the lines of textiles involved in accidents here indicated would not have been produced. A statute in this field, even if it is found necessary to invoke it only infrequently, would serve to hold the rather costly ground that has been gained.79 (emphasis added.)

It is with the presentation of the test results on the various textile fabrics because legislative action was required, no new standards had been promulgated for fourteen years. By creating a means for the Secretary of Commerce to make revision through administrative process, the Congress hoped to facilitate an improvement of the applicable standards which were then thought to be deficient. We note that at the time of this case the standards had not as yet been updated. 484 F.2d 1025, 1027 (1st Cir. 1973).

See also Jonescue v. Jewel Home Shopping Service, 16 Ill. App. 3d 339, 306 N.E.2d 312 (1973), rejecting defendant's argument that its cleaner had not been shown to be toxic since its report submitted to the U.S. Poison Control Center stated the cleaner was non-toxic under the Federal Hazardous Substances Labeling Act, 15 U.S.C. §1261-74 (1970). The court stated:

Although compliance with a relevant statutory scheme declaring whether defendant must warn of the dangers of its product is some evidence that the Jetco cleaner is not harmful or toxic, such compliance is not conclusive or controlling in defining defendant's common law liability for failure to warn. 16 Ill. App. 3d at 345, 306 N.E.2d at 316.

As for the defendant's failure to meet mandatory standards as negligence per se, this still apparently is the majority American rule. At least one state, Arkansas, which since 1915 had followed the minority rule that violation of a safety statute is only evidence of negligence, has in the case of Smith v. Aaron, 256 Ark. 414, 508 S.W.2d 320 (1974) apparently moved closer to the majority rule by holding that "when a legislative enactment . . . prescribes the minimum standards for the safety of an employee in mandatory language, then such requirements supersede and render irrelevant any evidence as to custom and usage." Id. at 416, 508 S.W.2d at 321. For a student note interpreting Smith more narrowly as restricting a negligence per se rule to cases involving violations of statutes which set out safety precautions for the protection of employees, see Note, Torts-Negligence: Effect of Violation of Safety Statutes on the Admissibility of Evidence of Custom and Industry Standards, 28 Ark. L. Rev. 399 (1974).

79 The final paragraph of Ingberg's statement is an unusual early statement of a theory that the mere existence of a federal standard acts as a deterrent to manufacture of dangerous products. Empirical verification of such a theory, however, is lacking. Also, Ingberg's recognition of the symbolic value of standards may indicate the use of federal legislation as a means of legitimizing the concerns and work of safety professionals.
using the testing method in the retailer sponsored proposed commercial standard referenced in by the Arnold Bill, however, that the interests of the retailers can be seen diverging from the interests of those manufacturers who backed the Johnson Bill.\(^{80}\)

Ingberg described the commercial standard test method as follows:

A sample of the cloth, conditioned for 15 minutes at 220 degrees Fahrenheit and after cooling for not less than 5 minutes in a desiccator, is mounted on a grid at 45 degrees and a butane flame from a micro-burner applied to the upper surface near the lower end for one second.

In case of ignition, the time is taken for the flame to burn a thread across the upper end of the sample, about 5 inches from the point of flame application. A fabric is indicated as highly hazardous if the average time for 5 or 10 samples is less than 6 seconds, or for an individual specimen less than 5 seconds.\(^{81}\)

The results of applying the 45 degree testing method to the various fabric were as follows:\(^{82}\)

<table>
<thead>
<tr>
<th>No.</th>
<th>Classified as Highly Hazardous under CS 4315</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cotton chenilles</td>
<td>29 of 30 samples</td>
</tr>
<tr>
<td>Tufted textiles</td>
<td>10 of 10</td>
</tr>
<tr>
<td>Brushed rayons</td>
<td>6 of 12</td>
</tr>
<tr>
<td>Long napped rayons</td>
<td>2 of 2</td>
</tr>
<tr>
<td>Fleeced cotton fabrics</td>
<td>3 of 3</td>
</tr>
<tr>
<td>Lightweight nets</td>
<td>4 of 5</td>
</tr>
<tr>
<td>Coated fabrics</td>
<td>1 of 3</td>
</tr>
</tbody>
</table>

When these results are compared with the results under the NBS horizontal test method (the Johnson Bill), it is obvious that the retailer sponsored commercial standard is more severe. At first blush it may appear anomalous that retailers would be proposing a test that would eliminate many fabrics

\(^{80}\) The Johnson Bill was particularly protective of the interests of plastics manufacturers, as shown by its failure to regulate “articles of wearing apparel” in addition to “textile fabrics.” (In contrast, the Arnold Bill regulated both articles of wearing apparel and fabrics). Thus buttons, for example, were excluded from the Johnson Bill. Rep. Johnson testified that “no important or dangerous burns have been reported—as far as I can ascertain—as being due to the burning of buttons, brooches, etc.” 1947 Hearings, supra note 66, at 10. Plastics industry spokesmen similarly testified that buttons, bracelets and other articles of personal adornment should not be regulated since “those items are not considered to be hazardous because of their small size. Moreover, they are difficult to ignite.” Statement of Dr. Foster D. Snell, Society of the Plastics Industry, Inc., Id. at 109. In contrast, retailer spokesmen gave examples of individual instances of buttons or other clothing accessories made from plastics exploding. See, e.g., Testimony of Charles Dorn, National Retail Dry Goods Association, cited in note 92 infra; statement of Dr. Frederic Bonnet, National Retail Dry Goods Ass’n, 1947 Hearings, supra note 66, at 82.

\(^{81}\) 1947 Hearings, supra note 66, at 22.

\(^{82}\) Id. at 23.
and hence reduce retail sales of textiles. While an altruistic explanation is possible, \textit{i.e.} the retailers were the consumer protectors of their day,\textsuperscript{83} close examination of the provisions of the Arnold Bill show that the retailers' primary purpose was to continue selling the fabrics that failed the 45 degree test with a warning, and then use the warning as a products liability defense in the event of injury. Thus, the "piece goods" market would be preserved, except to the extent the warning reduced demand;\textsuperscript{84} and the retailers would be shielded by the warning from liability. As for wearing apparel made of fabrics which failed the 45 degree test, it is true that the Arnold Bill in Section 3(a) appears to prohibit manufacture or sale, rather than simply requiring a warning label. The primary economic impact of this section, however, falls on the manufacturer, since it is he who must test. Thus, the overall impact of the Arnold Bill is to shift products liability and testing costs away from retailers, while at the same time limiting marketability as little as possible (\textit{i.e.} only wearing apparel which fails manufacturer run tests.)

However, the Arnold Bill was not the only bill which had market preservation aspects for its sponsors. The Johnson Bill, while superficially stricter than the Arnold Bill in that it prohibited sale of fabrics failing the NBS horizontal test, rather than merely requiring labeling as in the Arnold Bill, in turn has little market impact since very few fabrics fail the horizontal test. Congressman Virgil Chapman (Ky.) therefore questioned whether the horizontal testing method in the Johnson Bill was "rigid enough for the protection of the public." Ingberg's reply shows very clearly the thrust of the Johnson Bill to preserve markets:

We have made tests of the range of ordinary napped or fleeced textiles that have been in the trade for a matter of 50, perhaps 100 years. There have been fires with them, yes; but they have been accepted with whatever hazards are associated with them.

It is a question at this time whether we can go so far as to impose restrictions on these types of textiles that are produced in very large volume, relatively low cost, and for which at this time we have no full assurance that permanent flameproofing processes can be practically applied in course of manufacture, at least perhaps not without increasing

\textsuperscript{83} Testimony by retailer spokesmen at the 1947 Hearings did attempt to depict their industry in strongly consumer protectionist terms. See text accompanying note 88 infra.

\textsuperscript{84} Ingberg testified that "[o]f course, any labeling as to 'highly hazardous' is going to affect the demand for the fabric. Whether or not it will affect the demand to the extent that the fabric will be automatically eliminated would be a matter of experience." 1947 Hearings, supra note 66, at 27. Compare Johnson's statement, cited in the text accompanying note 73 supra, that buyers would frequently not see the marking and sellers would not go out of their way to emphasize the marking. The total silence of the retailer spokesmen on any impact of the warning on demand for piece goods probably indicates that they were not too worried, and that Johnson rather than Ingberg was correct.
costs beyond the point where it would put them out of the picture from the standpoint of demand. 85

The implication in Ingberg's statement that a standard has to wait on new technology 86 (flameproofing) that will preserve markets is an early recognition of a significant limitation on the standards approach to product safety—its dependence on existing technology.

Congressional anxiety about imposing standards too far in advance of technology in turn prompted questions in the 1947 Hearings about whether regulation by standard setting could ever provide the certainty thought necessary in private litigation, particularly in the light of unceasing efforts by different segments of the industry involved to use the proposed legislation to place economic loss from dangerous fabrics either on other segments of the industry or on the consumer—in short, anywhere but on themselves.

The following colloquy between Congressman Henderson H. Carson (Ohio) and Ingberg sounds all the themes mentioned in the preceding paragraph:

Carson: . . . . Do you think we could enact any legislation with such certainty that the courts could take judicial notice as to whether or not there had been a violation?

Ingberg: A violation would be based on the tests of the textile involved under the provisions of any legislation that you would adopt.

Carson: Are we not flirting with considerable trouble, particularly in this type of legislation, where we attempt to regulate anything? We

85 1947 Hearings, supra note 66, at 27.
86 The issue of whether flameproofing methods were presently available at a reasonable price raged throughout the hearings. Compare the statement of Dr. H. E. Hager cited in text accompanying note 99 infra, that "the chemical companies have developed (such flame resistant compounds)" with the testimony of the cotton converters spokesmen cited in text accompanying note 96 infra, that permanent flameproofing still presented "technical problems" to solve. See also Testimony of Charles Dorn, National Retail Dry Goods Association, cited in note 93 infra, that the Johnson Bill requirement that the fire protective treatment last the life of the fabric is "not possible under today's conditions"; testimony of Leonard Smith and Robert Jackson, National Cotton Council of America, 1947 Hearings, supra note 66, at 69 ("Much of the support for this legislation is based on the belief that adequate flameproofing techniques are available for use. On the contrary, however, there is at the present time no finishing treatment available for cotton or rayon which will render these articles permanently flameproof and still leave the material in a suitable state for use as wearing apparel. There is one process which is reputed to be effective and permanent, but to date it has not been produced or applied on a commercial scale."); testimony of Dr. Frederic Bonnet, Technical Committee of the National Dry Goods Association and American Viscose Corp., Id. at 85 ("When you take some of this material which has been treated—and it is a commercial treatment, and a very large scale operation has been tried in Georgia just within the past week or so—you will notice here that when I put this candle on this material it just will not burn. Nothing happens, except that it chars. I do not think I am telling any state secrets when I say at this time that some of the larger companies like the duPont Co., the Cyanimid Co., are developing materials which are coming into the market, which should certainly go a long way toward eliminating the hazard.")
find always that perhaps we have not gone far enough in many instances, and we come back to this one conclusion, that regardless of how the fire occurs, there is always going to be a question of fact for determination by a jury as to whether the garment was manufactured or processed according to the standards that you set down?

We are going to get into considerable difficulties along that line, just along the line you say, as to whether it is going to be the liability of a common carrier, contract carrier, or the manufacturer in the first instance, the jobber, or the seller . . . .

Of course, I am very much concerned with safety . . . But unless we can get down to some basic principle that we can establish a law with such certainty, or such definiteness that a court is going to take judicial notice when that case appears in there, that there has been or has not been a violation, we are going to have considerable difficulty especially when you say here, the $64 question, in my mind, "is there any process that can be practically adopted?" There is still a question in your mind, is there not?

Ingberg: Yes. Any legislation on this will run undoubtedly into difficulties. But it will also resolve some difficulties.

Carson: Definitely, it will.

Ingberg: Today there are pending any number of suits on which there is a very great difficulty for the court, or for the jury, to find a basis for a determination.

Now, I expressed the hope that the provisions of any statute that meets the approval of this committee, and meets the approval of Congress, will have sufficient standing so that it will serve as a basis of adjudicating such cases. It will serve as a protection for the party injured as well as for the one that is being held responsible for the injury.87

The rest of the 1947 Hearings were concerned with the "difficulties" Rep. Carson mentioned, rather than any attempt to realize Ingberg's hopes that a legislative safety standard would provide certainty in adjudicating private litigation.

Some of the "difficulties" alluded to by Rep. Carson surfaced immediately in the 1947 Hearings with the testimony of Charles Dorn, Chairman of the Technical Committee of the National Retail Dry Goods Association. Dorn began his testimony by describing the Arnold Bill as representing "the ultimate in public service on the part of the manufacturing and distributive trades."88 He stated that all of the individuals and organizations involved89

87 1947 Hearings, supra note 66, at 38.
88 Id. at 40.
“have interested themselves in this subject solely for the purpose of stopping the useless waste of human life caused by flammable wearing apparel and fabrics.”

Having set forth this “consumer protection-public service” theme, however, Dorn quickly revealed that the fear of state legislation was the real reason the retailers were seeking federal regulation of flammable fabrics:

I know that most of you men, as well as most members of the business fraternity, strongly support the principle of states rights. The National Retail Dry Goods Association has always felt that America grew strong because of the sovereignty of the individual states, and has opposed in the past efforts that would have placed in the hands of the federal government jurisdiction over matters that could have been and were handled with greater efficiency and less cost at the state level. However, in this instance, it is our firm belief that the opposite is the case.

As an example, we have been reliably informed that no less than 23 state legislatures have been studying the subject of flammable fabrics with a view toward enacting legislation on the subject. One state, California, has already passed and has placed in operation legislation directed toward this problem.

Can you conceive of the confusion that would exist if the several states were to legislate on this important subject? There would be no guarantee of uniformity and the chances are that each of the states would place different provisions in their acts. If such a condition were to exist, it would probably bring about not only mass confusion, but mass unemployment in the textile, cutting up, and manufacturing trades.

Dorn then briefly described the Arnold Bill as prohibiting the introduction into commerce of wearing apparel and articles of personal adornment and articles of personal adornment

80 The “individuals and organizations involved” were listed by Dorn as “the technical committee of the National Retail Dry Goods Association, with the support, advice and counsel of the American Association of Textile Chemists and Colorists, weavers and finishers of textiles, manufacturers of synthetic yarns, manufacturers and fabricators of plastics, and retailers both large and small.” The cotton industry is conspicuously absent. Id.

81 Id. at 40-41.

90 The following exchange between Dorn and Congressman Carl Hinshaw of California illustrates very well the contrast between the retailer desire to narrowly define a safety problem to the particular goods they are dealing with (i.e. wearing apparel and piece goods) and their resultant products liability exposure, on the one hand, and a more epidemiologically oriented approach such as Hinshaw's which would seek broad safety legislation protecting users against fire risks from multiple sources:

Mr. Hinshaw: I notice that... your bill apparently covers only articles that will be worn. What about other items of household equipment that are highly flammable?

Mr. Dorn: For example, you are referring to curtains?

Mr. Hinshaw: Curtains and rugs and fabrics that are used for furniture covering, bedspreads and such.

Mr. Dorn: Our primary interest in this bill was to save human life where a person
such as buttons that were highly flammable,92 and as providing for warning
labels on piece goods which did not pass the test established in the referenced-
commercial standard.93 He then immediately set forth another important
aspect of the Arnold Bill—shifting the testing burden from retailers to manu-
facturers—by arguing

The hundreds and thousands of retail outlets in the country could not
be called upon to test each garment that they receive from their res-
sources, so this bill accomplishes our purpose in not only the most
effective, but the easiest way—it prohibits the manufacture and intro-
duction into commerce of dangerously flammable garments.94

Thus, despite the consumer protection facade, it is apparent that the retailers'

is in a garment and cannot get out of it, if it catches on fire.
If a lace curtain catches on fire a person can walk away from it. If, for
instance, a blanket can catch on fire in a bed, and while there are many
people burned to death through smoking in bed they can easily throw the
cover back and get away from it. But if they are in a garment there is
no chance of getting out if it burns rapidly.

Mr. Hinshaw: There are likely to be short circuits in houses through faulty wiring, that can
cause similar difficulty. If articles that come in contact with it are not highly
flame resistant the flame will progress . . . .
Is it not advisable to consider that, also?

Mr. Dorn: Yes, sir. But we have not considered those things in . . . this particular
piece of legislation.

Mr. Hinshaw: Is there anything about the manufacture of those items that they cannot
be readily flameproofed?

Mr. Dorn: No, I believe that they can be treated just as well as the wearing apparel.

Mr. Hinshaw: Should they not be so treated?

Mr. Dorn: That is a question I would rather refer to some of our technical people
that are going to follow.

Mr. Hinshaw: Very well.
1947 Hearings, supra note 66, at 46-47.

92 Dorn's testimony generally stressed the flammability hazards connected with buttons. For
example, he testified, "To realize that an innocent appearing button may be the cause of
death or of the horrible maiming of an individual is hard to comprehend, but my associates
will show you shortly just how dangerous an innocent appearing button can be." 1947
Hearings, supra note 66, at 41. He later stated, "I can tell you, however, that there was a
very serious accident in Minnesota from pyroxylin buttons where a woman was terribly
disfigured." Id. at 43. Compare testimony by Rep. Johnson and plastics manufacturers on
the lack of injury data on buttons, cited in note 80 supra.

93 Dorn's testimony makes clear that the purpose of the Arnold Bill is to shift all economic
burdens connected with flammable fabrics away from retailers. Thus under the Arnold
Bill, manufacturers have to test finished goods, i.e. wearing apparel; on piece goods, the
burden is shifted to consumers to read the warning label. Even more important, the Arnold
Bill would shift such burdens without eliminating significant types and numbers of textiles
from the market. Dorn estimated that only 1-2 percent of textiles by poundage of fiber
would be covered by the Arnold Bill. 1947 Hearings, supra note 66, at 46. On the latter
point, he contrasted the Johnson Bill provision that for fabrics treated with fire protective
treatment, the treatments last for the life of the fabric. Such a requirement, he testified,
is not possible under today's conditions. We do have treatments available that are
relatively permanent, but no one knows that they will last the life of the fabric. That
bill, as worded, would automatically take out of the market today all cotton blankets,
all rayon blankets, and many of our lace curtain materials that are hung in the windows.
Id. at 45.

94 1947 Hearings, supra note 66, at 41.
support for the Arnold Bill rested primarily on the fact that it preserved their economic interests at every point.

In contrast, opposition to the Arnold Bill, and indeed to any federal regulation, immediately surfaced at the 1947 Hearings from the segments of the textile industry which would have had to bear the economic burdens of the legislation. The Textile Fabrics Association, a trade association composed primarily of converters of cotton textiles, opposed all legislation on the grounds that such legislation was "premature" because there was not yet "an accurate, reliable and accepted method of testing" in existence. The Association's spokesman stressed that permanent flameproofing still presented "technical problems" to solve, and besides, "a particularly cogent reason for deferring this legislation is that only a very small percentage of all textiles are flammable." He concluded that "hasty, ill-advised legislation, imposing restrictions which may cause irreparable damage to the many thousands of large, medium and small firms engaged in the textile and apparel industries, should not be approved."

The converters' argument that flammable fabrics legislation was "premature" because of lack of a reliable testing method seems weak in the light of the testimony of Dr. H. E. Hagar of the American Association of Textile Chemists and Colorists. Dr. Hagar described the tests underlying the proposed commercial standard (i.e., the standard referenced into the Arnold Bill) as follows:

In conducting these tests we employed an automatic testing device which we developed in the course of our research and a carefully worked out method by which it is now possible to accurately evaluate not only the rate of burning of a fabric but also the ignition rate to which it is subject when exposed to flame.

Thereby, it is now entirely feasible not only from a scientific standpoint but from a commercial standpoint to differentiate between dangerous and safe textiles and textile commodities. The automatic testing machine to which I have adverted has been accepted as a proposed commercial standard having been approved by many hundreds of leading textile interests.

The Textile Fabrics Association spokesmen described converters as follows:

'The converter purchases grey goods from the mill, determines how the goods should be finished and designed, has them finished in accordance with his specifications, and sells and distributes the finished goods to various end users. Id. at 48.'

1947 Hearings, supra note 66, at 48-49.

Id.

Id. at 57. Later in his testimony, Dr. Hager gave the following evidence of the reliability of the testing method used in the proposed commercial standard:

'This tester . . . which the United States Testing Co. constructed for us according to our specifications, is not just a fly-by-night affair which has given us some indication of flammability; but when we had the first series of correlations in this original tester,
Dr. Hagar estimated that the “area of dangerously flammable textiles appears to be confined to fabrics of certain construction, which represent approximately 1 1/2% of the total production of textile fabrics . . . . and even these can now be rendered satisfactorily flame resistant if treated with certain chemical compounds which the chemical companies have developed since the inception of our work.” He then concluded that “the Bill will not constitute a hardship on the manufacturer outside of a minor increase in cost.”

That the manufacturers, particularly of cotton textiles, were unwilling to absorb such costs became clear with the testimony of Leonard Smith and Robert Jackson of the National Cotton Council of America, representing cotton farmers, cotton ginners, cotton warehousemen, cottonseed crushers, cotton merchants and cotton spinners. Smith and Jackson opposed any flam-mability legislation on three grounds: (1) the measures would accomplish nothing in practice since adequate flameproof finishes were not available; (2) lack of an adequate standard of flameproofness and an adequate method of testing, and (3) “the extreme difficulty of administering the proposed measures.” On the latter point, they observed that none of the three bills specified “which of the firms along the route from raw fiber to final consumer shall bear the responsibility for the flameproofness of the article.” Nor was the Council concerned only about placement of responsibility for flame-proofing. Jackson and Smith stated:

Any flameproofing treatments which show promise of having perma-nency at all will probably cost on the average of 10 cents a yard for the finishing alone on the average type of fabric used in clothing. When this cost goes through the usual mark-ups customary in the marketing of textile goods, the increase in cost to the consumer is likely to amount to as much as several dollars per garment.

Other considerations of cost reverberate throughout the Council’s testi-mony. For example, Jackson and Smith cited the Arnold Bill requirement that persons engaged in producing, manufacturing, converting or finishing of regulated articles maintain necessary records as “placing an undue hardship on all involved and would add much unnecessary expense.”

we had seven more built and sent them out to seven laboratories in different parts of the country, and we were very much elated when on the same fabric the same results were obtained on all of these seven machines. Id. at 67.

99 Id. at 57-58.
100 Id. at 58.
101 Id. at 69-70.
102 Id. at 70.
103 Id. at 71.
104 Id. at 72.
Perhaps the most striking cost analysis was the Council's observation that enforcement of the Arnold Bill:

can only be accomplished by setting up extensive laboratories for testing, and by training and maintaining large groups of technologists throughout the country to make sure that all fabrics covered by the law will pass the required specifications . . . . Without adequate laboratories and extensive policing, enforcement would be out of the question. On the other hand, adequate laboratories and policing would mean a real expense to the taxpayer and a drain upon needed technical personnel.\(^{5}\)

In the final analysis, however, cotton industry opposition to flammable fabrics legislation boiled down to the liability question, expressed as "who is going to do the marking or labeling."\(^{6}\) This comes out most clearly in the testimony of Dr. Frederic Bonnet of the American Viscose Co. and a member of the technical committee of the National Dry Goods Association. Bonnet was asked by Rep. Carl Hinshaw (Calif.) whether any members of the cotton industry had been involved in the development of the proposed commercial flammability standard and testing method. Bonnet replied generally that while some cotton industry representatives were at some of the meetings, he did not think they "went along with some of the work as far as the bill went." The following exchange then occurred:\(^{7}\)

Mr. Hinshaw: I wondered if the standards that you intended to promulgate were such that the cotton people could not quite agree with them, and if that is why they were opposing them.

Dr. Bonnet: Dr. Hagar and I went around to a meeting of the finishers and thought we were going to be taken to task on the thing. They said no, 'No, we think the test is a fine test, and the machine you worked out is a fine machine. But what we want to do is know who is going to do the labeling'...

Mr. Fishbach:\(^{8}\) Now where is the responsibility for marking, so as to qualify this merchandise to move in commerce? The responsibility lies upon the individual who causes them to move in commerce for the purpose of sale.

If the owner of the merchandise turns the goods loose to a processor for processing, and the result of the application

\(^{5}\) Id.

\(^{6}\) The cotton industry was not the only segment of the textile industry which opposed legislation which put the labeling responsibility upon it. The Pyroxylin and Resin Coaters Institute, a trade association representing manufacturers of coated fabrics, opposed the Arnold Bill because it would "make it necessary for the coating industry to label a great deal of material which could not, because of its very nature, be used for garment purposes, or because of its use could not be considered a fire hazard." 1947 Hearings, supra note 66, at 117.

\(^{7}\) 1947 Hearings, supra note 66, at 89-90.

\(^{8}\) Mr. Fischbach was the general counsel for the National Retail Dry Goods Association.
of the process is to render them unsafe, and then the owner of the merchandise causes them to move in commerce for sale or delivery after sale without being marked "Flammable-dangerous when worn" he is guilty of a violation of this law.

On the other hand, if he causes them to move in commerce without labeling for the purpose of rendering them safe, by further processing such as flameproofing, then he is not guilty of a violation of the law because he is not moving them in commerce for purpose of sale, he is moving them for the purpose of further treatment.

That is the concept that underlies the legislative standard here.

Rep. Carson: That clears it up. I did not know where the responsibility was going to be on this. We had to have somebody responsible before we could go in and make this applicable and effective.

The final major industry group to testify on the proposed legislation was the Cotton Textile Institute, representing the manufacturing end of the cotton textile industry. The Institute's President, Dr. Claudius Murchison, perhaps put most succinctly the "we don't want to bear the economic costs" reason for opposing all of the bills:

And, we feel that upon our group, under any one of the three bills, would fall the responsibility of carrying out the provisions of the act and upon us would be the major liability in the event liabilities develop and upon us would fall the major incidence of punishment in the event that punishment evolves.109

Dr. Murchison generally stressed the user negligence factor in fabric burns injuries, belittled burns in general as "relatively low in importance" and ridiculed the consumer protection pretensions of the retailers as follows:

It is my belief that far more people die from falling off stepladders, in the home, or falling down the cellar stairs, or slipping in the bathtub, than from apparel burns which are due primarily to the inherent flammability of the fabric. Yet so far as I know, not even the National Retail Dry Goods Association has pressed for laws protecting their customs (sic) who shuffle off the mortal coil in these undignified ways. Can it be that those who die in this fashion have no basis for damage suits?110

Dr. Murchison then described the complexity of the textile industry, and concluded with the following description of the retailers' role:

109 1947 Hearings, supra note 66, at 123.
110 Id. at 126.
Under modern methods of merchandising a very large percentage of the final finishing operation and the final fabrication of the garment is on specifications contained in the order from the retailers, and many great retail establishments take particular pride in the fact that their goods are distinctive, in that they themselves had determined the fixed characteristics of the fabrics and the fashion characteristics of the garment.

That relationship between the processing division of the industry and the retailer is becoming more and more important, so that the retailer himself has finally reached the stage where he must, of necessity have a very high degree of responsibility of the goods which he sells. In many cases, he is the author of those goods, in the sense of their character and their quality.

Yet the retailers in H.R. 1111 are not even referred to. The word does not appear in the entire bill.

The sum total of all of the obligations and of all of the liabilities are imposed upon those tens of thousands of processors in connection with whom no enforcement agency that could conceivably be set up could follow through with the proper identification and placement of responsibility.

And it would mean hundreds of thousands of testing machines at every level of the industry. It would mean testing operations at every new stage in the forward movement of the goods, with those occurring so numerous and under such unlike conditions, that for the end result to be a result exactly measurable in terms of statutory requirements, it would be totally impossible.111

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111 Id. at 128. Murchison also gave the following graphic example of the effect of the Arnold Bill in shielding retailers from liability claims:

I am going to assume a hypothetical lady, we will just call her Mrs. Montague, for the purpose of identification.

She walks into a department store and we will assume that this legislation has been passed, H.R. 1111. She buys some outing flannel . . . takes it home, makes it up into a garment. Then an accident happens and she goes back to the retailer and says, "Mr. Kline, this cloth which I bought from you caught fire and I am going to sue you. I am going to ask you for a settlement or I am going to sue you for damages, or have you indicted under the law."

Mr. Kline would say, "Well, Madam, these fabrics are under Federal legislation. This piece of goods was sold to you marked 'flammable, dangerous when worn'; you bought it with that notice. You bought it at your own risk. If you have been burned, you have been legally burned. You have no recourse under the law." And, would she have?

But, Mrs. Montague is an aggressive person. She refuses to give up, and so goes back to the store . . . and she buys a fabric which is not marked and she takes it home and the accident occurs. She could go back to the store, to Mr. Kline and say, "Mr. Kline, that fabric caught fire. I was severely burned. I will seek my rights under the law." And gentlemen, would she have?

Now, take the third case of a garment. Mrs. Montague this time buys a sweater; a brushed rayon sweater, and a spark flies from the open fireplace, and it catches on
Dr. Murchison estimated the economic impact of the proposed legislation on the cotton industry at 500,000 bales/year, or 12 percent of the total yearly use for apparel purposes of four million bales.\textsuperscript{112} He hinted darkly that the effect of the legislation would be to replace cotton fabrics with synthetics.\textsuperscript{113} He also noted that “under this law, one of the crazy things about it we object to, we might be producing a million yards of a particular fabric, 25 yards might go into apparel, but the whole business would have to be marked. It has to be inspected and marked, and its marketability is affected.”\textsuperscript{114}

Another Cotton Textile Institute representative, George Whalen, criticized the retailers as “never giving an indication of a willingness to cooperate with the rest of the industry to find any solution to the problem than legislation.”\textsuperscript{115} A number of the final witnesses at the hearing similarly argued that the industry would solve the flammability problem by voluntary efforts if Congress abstained from passing “restrictive” legislation.\textsuperscript{116}

III. POLICY IMPLICATIONS OF STANDARDS APPROACH TO PRODUCT SAFETY REGULATION

The 1947 Hearings did not result in federal flammable fabrics legislation. The House Commerce Committee never reported out a bill and the Senate Commerce Committee did not even hold hearings on flammable fabrics legislation until 1952. While the reasons for the House Commerce Committee’s inaction can only be speculated upon 28 years later, the writer believes it likely that the cotton industry’s opposition to legislation, together with the factual disputes over the reliability of the various proposed testing methods and the availability of flameproofing probably doomed legislation in 1947. A contributing factor may have been that the textile fire, and she has great difficulty in pulling it over her head. She is severely burned. But again she is told that she bought it with due warning. \textit{Id.} at 128-29.

Later in his testimony, Murchison gave his solution—put liability on the retailer. He stated: [T]he flammability characteristic of the fabrics is changing and if it is the wish of the committee to make this inspection and enforcement of the law simple, there is only one way it can be done and that is to put the responsibility on the final handler of the product; the retailer is the only one who has in his possession the net composite and sum total results of everything that has happened before. \textit{Id.} at 139.

\textsuperscript{112} Cotton consumption for all purposes per year was estimated by Murchison at 10 million bales. 1947 \textit{Hearings}, supra note 66, at 143. He later submitted for the record a supplementary statement that cited one million bales in four categories (chenille tufted fabrics, napped fabrics, net fabrics and fine goods, and pyroxylin coated fabrics) as the “principal ones affected.” \textit{Id.} at 145-46.

\textsuperscript{113} 1947 \textit{Hearings}, supra note 66, at 137.

\textsuperscript{114} \textit{Id.} at 143.

\textsuperscript{115} \textit{Id.} at 173.

industry took quick steps to cease marketing of the cowboy suits that had led to newspaper headlines, public outcry over burning children, and letters to congressmen such as Representative Canfield. The issue thus lost the attention of Congress.

But the reasons why no flammable fabrics legislation resulted in 1947 are not nearly as important for present public policy in federal product safety regulation as the implications the 1947 Hearings hold for the present day “standards consensus” reflected in CPSC Chairman Simpson’s “100 mandatory standards by 1982” plan.

The 1947 Hearings illustrate three characteristics which suggest that a standards approach to product safety regulation has little to do with protection of the public against unreasonable risks.

A. *The Products Liability Connection*

Perhaps the most unusual characteristic of the 1947 Hearings was the search for a federal flammability standard which would be given judicial notice as the conclusive standard of care in products liability litigation. Hearings in the 1950’s, 1960’s, and early 1970’s on legislative proposals for federal product safety regulation would generally not deal with this issue, with its obvious anti-injured user overtones, as openly.¹¹⁷

In contrast, 1976 thus far has seen two noteworthy open confrontations of

¹¹⁷ The “products liability connection” though less visible, is generally just below the surface. For example, one of the first petitions filed with the CPSC under Section 10 of the CPSA, 15 U.S.C. 2060(a) (Supp. IV, 1974), which generally permits “any person” to petition the CPSC to develop a consumer product safety standard, requested development of a swimming pool slide safety standard. The petition, filed by the National Swimming Pool Institute (NSPI), a trade association representing swimming pool manufacturers, alleged that several product liability claims relating to the use of swimming pool slides had been filed against slide manufacturers in the past two years and that these claims demonstrated the need of both producers and consumers for an industry wide standard for swimming pool slides. *See Proposal of a Consumer Product Safety Standard for Swimming Pool Slides*, Dissenting Opinion of Commissioner R. David Pittle, December 9, 1975.

The Commission eventually accepted an offer from NSPI to develop a recommended standard under Section 7 of the CPSA, the so-called offeror provision of the act which invites private groups to develop a proposed federal standard and submit it to the Commission for evaluation, revision and promulgation through the informal rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. 553 (1970). *See text accompanying note 12 supra.* On December 23, 1975, the CPSC, by a 3-2 vote, approved a final mandatory standard for swimming pool slides which in the author’s opinion is little more than a ratification of the swimming pool slide industry’s present technology, and which in its federal encouragement of “safe belly-first slides” may actually increase risks to children. For a legal analysis of the Commission’s proposed swimming pool slide standard, which differed little from the final standard, see a comment filed by the author on December 9, 1975, with the Commission. The author is presently preparing a law review article on the development of the swimming pool slide standard, which became effective July 17, 1976. The Fifth Circuit on July 20, 1976, denied a motion by a slide manufacturer to stay the standard pending judicial review, but granted the manufacturer’s request for expedited review of the rule. *Aqua Slide ‘N’ Dive Corp. v. CPSC, [1973] 4 Prod. Safety & Liability Rep. (BNA) 547.*
this issue in Chairman Simpson's January 1976 Congressional testimony, and in Congressional consideration of the swine flu legislation in the summer of 1976.

Had industry in the 1940's and 1950's ever been able to sell Congress, and later the courts, on giving conclusive effect to federal safety standards in products liability litigation, the products liability explosion of the 1960's with its development of theories of strict tort liability might never have occurred. That the limitation of an injured user's right to recover in tort so dominated the first Congressional hearings which established standard setting as the federal government's approach to product safety strongly suggests that standards setting as a regulatory procedure has little if anything to do with consumer protection.

B. Standards as the Battleground for Industry Cost Shifting

The 1947 Hearings illustrate very well another characteristic of the standards process that has little to do with consumer protection against unreasonable risks. Standards setting is little more than an arena in which segments of the affected industry attempt to shift the safety costs connected with the products from which they draw profits to another part of the distribution chain. Thus the retailer written Arnold Bill imposed liabilities for fabric fire losses and testing costs on everyone but retailers; Dr. Murchison suggested that the retailers should bear the liabilities rather than the manufacturing end of the cotton textile industry which he represented. Rep. Johnson's statement\(^{118}\) that in 1933 as head of an NRA Board he had seen what a part of the industry could do to the rest of it under NRA methods could well be recast as follows: in the 1947 Hearings, Congress got a good view of what one part of the textile industry would try to do to another under a standards setting approach to product safety regulation.

Such open industry warfare, of course, was probably one of the major reasons no flammable fabrics legislation emerged from the House Commerce Committee in 1947, since major federal safety legislation generally cannot be passed when any important regulated party totally opposes it as the cotton textile industry opposed the 1947 flammable fabrics proposals.

In the future, industry would learn to use the voluntary standards process to make its market compromises in private and reach a consensus on a safety standard before approaching the federal government for legislative ratification of its consensus. Thus by 1953, when the Flammable Fabrics Act was passed, as Heffron notes, the industry had developed a commercial standard which it simply got Congress to incorporate in the

\(^{118}\) See text accompanying 72 supra.
statute. To a reader of the 1947 Hearings, Heffron's statement that 99 percent of fabrics passed the 1953 legislative standard and that "study after study showed that clothing involved in burns consistently passed the test" is not surprising, since the 1947 Hearings show that standards establishment is primarily a mechanism for industry division of markets and allocation of costs, and has little to do with protecting consumers from flammable fabrics.

C. Standards Setting is Inherently Technologically Regressive

The 1947 Hearings illustrate very well a third limitation on standard setting as the primary approach to product safety regulation. Something inherent in the standards setting process prohibits incorporation into the standard a requirement that will stretch existing technology.

In the shadows surrounding the 1947 Hearings was an important new technology which had great promise for consumer protection - chemical flameproofing and flame retardant processes which were on the verge of being marketed. Rep. Hinshaw's exchange with Mr. Dorn\textsuperscript{\textcolor{red}{119}} in which Hinshaw suggests broadening the legislation to protect consumers from multiple source fire hazards by flameproofing fabrics used in the home as well as worn, and Mr. Dorn's answer that curtains, rugs and furniture coverings could be flameproofed just as well as wearing apparel indicates that an important new safety technology was imminent. The provisions in the Johnson Bill that any flameproofing last the life of the fabric is further evidence of the imminence of this new safety technology. A requirement in federal flammable fabrics standards legislation to require flameproofing would not have been so far in advance of current technology as to be unrealistic; indeed it would probably have given such technology the national market it needed to become economically feasible.

That no such result occurred illustrates an important characteristic of the standard setting process. Far from being a process which consistently sets realistic safety goals for industry to strive to meet, it does little more than ratify the lowest common denominator in existing technology. To the extent consumer protection against unreasonable product risks rests on new technological development, a standards approach by its nature is regressive.

Federal product safety policymakers might well ask whether there are alternative regulatory approaches to product safety. The writer would suggest three.

\textsuperscript{\textcolor{red}{119}} See note 93 supra.
1. The Public Hearing-Industry Energization Model

Former National Commission on Product Safety Chairman Arnold Elkind's idea that a "body similar to the NCPS should remain in existence to conduct investigations, hold hearings and make public statements about specific products,"\textsuperscript{120} provides an alternative model for governmental action aimed at eliminating unreasonable risks associated with consumer products. Elkind's idea undoubtedly arises from the success the NCPS enjoyed between 1968 and 1970 in using the public hearing as a mechanism to spur industry into action to eliminate product risks before the federal government moved in with regulations. The Final Report of the NCPS describes the accomplishments of the NCPS, which was merely a Congressionally created study commission with no regulatory powers whatsoever:

In the course of our mission, we scheduled a series of hearings, conducted studies of product hazards and their prevention, arranged for testing of some products, contracted for studies, and prepared reports for the public and for Congress on the means of reducing unreasonable hazards in consumer products. The effect of these activities took form in legislative action, improved safety programs in certain industries and voluntary organizations, and in a positive response from the consuming public.\textsuperscript{121}

After citing the NCPS' influence on voluntary industry standards involving safety glass, floor furnaces, power mowers, glass bottles, and TV sets, and federal, state, and local governmental responses to NCPS activities, the report continued:

The interest of the press and the audio-visual media in reporting our philosophy, accomplishments and goals made a strong public impression. All hearings were well covered by reporters from national as well as local media. Editors were surprisingly receptive to the naming of products and model numbers listed as hazardous by us. The public responded to news of the hearings with letters and telephone calls about product hazards.

Undeniably, the considerable interest shown by the majority of the news media had a subtle influence on many industries.\textsuperscript{122}

One problem with public hearings as a major approach is that over a period of time the public may become blase about the latest expose. Also, certain minimal sanctions—perhaps injunctive power and provision for civil penalties—would probably have to be provided and utilized to maintain credibility with industry over the long run. The Elkind model also is

\textsuperscript{120} See note 22 supra.
\textsuperscript{121} Final Report, supra note 6, at 128.
\textsuperscript{122} Id. at 128-29.
dependent on continued interest and willingness to react by Congress and state legislatures, who have traditionally given product safety a rather low priority. With all these limitations, however, the writer believes that for the Consumer Product Safety Commission to hold a few NCPS style public hearings under Section 27(a) of the Consumer Product Safety Act\(^\text{123}\) might well do more to eliminate unreasonable consumer product risks and at much less cost.\(^\text{124}\)

2. The Defects Notification Model

A second possible non-standards approach to product safety is epitomized in Section 15 of the CPSA, which requires manufacturers who "obtain information" that their product "contains a defect which could create a substantial product hazard"\(^\text{125}\) to immediately inform the Commission of such defect. Section 15 then establishes a legal framework within which the Commission can order the manufacturer to notify consumers and/or repair, replace or refund the purchase price. The Commission has implemented Section 15 with an elaborate regulation which establishes a series of extra-legal voluntary corrective action plans and consent agreements.\(^\text{126}\) Such a system, if it received a large share of the resources allocated to standard setting, could be monitored vigorously by the Commission, be supported by publicity in conducting recalls, and could thereby provide important economic incentives to manufacturers to improve their quality control and product safety design.

The Commission's administration of Section 15 has been curious. On the one hand, Chairman Simpson has referred to implementation of Section 15 as the Commission's biggest success story. In Congressional testimony, he has stated that under Section 15, "more than 350 reports have been acted upon to date, involving more than 24 million items, and resulting in the correction of almost four million of these items. An indication of the impact and importance of the section can also be found in the fact that almost 4,000 technical inquiries have been received by the Commission.

\(^\text{123}\) Section 27(a), 15 U.S.C. §2076(a) (Supp. IV, 1974) provides as follows:

The commission may, by one or more of its members or by such agents or agency as it may designate, conduct any hearing or other inquiry necessary or appropriate to its functions anywhere in the United States.


\(^\text{125}\) Section 15(b)(2), 15 U.S.C. §2064(b)(2) (Supp. IV, 1974) defines "substantial product hazard" as "a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk or otherwise) creates a substantial risk of injury to the public."

requesting advice about Section 15 - many raising questions of design and manufacturing practices."

On the other hand, in the same Congressional testimony, Chairman Simpson revealed that, far from shifting Commission resources in Section 15 enforcement, he instead had "ordered a freeze on recruitment or hiring by the field, with a corresponding transfer of positions to headquarters to support the required standard development program and related activities". Thus does the Section 15 "biggest success story" take second place to the "standards faith."

3. A Manufacturer Internal Organization Model

A third possible non-product safety standards approach would be for the CPSC to require companies whose products are determined at a hearing to present either an "unreasonable risk" under Section 7 or a "substantial product hazard" under Section 15 to adopt a federally mandated management organization of the product safety design and quality control function.

The Commission has already issued a "Handbook" which contains a systems standard which "provides guidelines to executive industrial management for establishing systems to prevent and detect safety hazards in consumer products." While the Handbook states that "the provisions of this Standard are intended for voluntary implementation by industry", the Commission could indirectly enforce such a "systems standard" in the following way:

a. The CPSC could hold a public hearing under Section 27(a) of the CPSA to determine which consumer products within a product category present either an "unreasonable risk" under Section 7 or a "substantial product hazard" under Section 15.

b. The CPSC could then, under Section 27(b)(1) require, by special order, the manufacturers of such products to submit in writing a report and answers to questions concerning their product safety design and quality control functions. For example, such manufacturers could be asked to

128 Id. at 17.
130 Id. §2064. See note 126 supra.
131 CPSC, HANDBOOK & STANDARD FOR MANUFACTURING SAFER CONSUMER PRODUCTS (1975).
133 Section 27(b)(1), 15 U.S.C. §2076(b)(1) (Supp. IV, 1974) provides:
   The Commission shall also have the power—
   (1) to require, by special or general orders, any person to submit in writing such reports and answers to questions as the Commission may prescribe; and such submission shall be made within such reasonable period and under oath or otherwise as the Commission may determine.
explain how they were implementing the Handbook guidelines. Further, a company's refusal to implement the guidelines could be indirectly enforced by the CPSC taking regulatory and enforcement action against the product, for example by beginning standard setting procedures under Section 7, substantial product hazard procedures under Section 15, or even imminent hazard proceedings under Section 12. \(^{134}\) If a manufacturer failed to file a report, or arguably even if he filed a report failing to give information on implementation of the Handbook guidelines, he would appear to have committed an unlawful act under Section 19(a)(3), \(^{135}\) as a “failure or refusal to make reports or provide information”, and would therefore be subject to an injunction under Section 22, \(^{136}\) which gives the U.S. District Courts jurisdiction to restrain any violation of Section 19.

In any event, if the CPSC were faced with widespread manufacturer refusal to implement the Handbook guidelines, it would have created the basis for turning to Congress to provide a clear statement for its power to mandate management organization of the product safety design or control functions.

**CONCLUSION**

Whether the above three proposals are workable and would operate in practice to better accomplish the primary purpose of the CPSA of eliminating unreasonable risks can of course only be determined if the CPSC were to conduct small scale pilot studies to test their effectiveness. One way this could be done would be to select three broad product categories, and try out each proposal on one category, *i.e.* have an NCPS style public hearing on one product category, shift a large percentage of CPSC resources in another product category from standards development to substantial product hazard enforcement, and hold a Section 27(a) hearing in another product category with particular attention directed to manufacturers' quality control procedures.

Evaluation of the effectiveness of such pilot studies would be a refreshing change from the “standards faith” which has mesmerized product safety regulation since World War II at least, and which, in the context of inflationary rises in the cost of products liability insurance, could be converted into a means of denying persons compensation for product related injuries.

\(^{134}\) Section 12 of the CPSA, 15 U.S.C. §2061(a) (Supp. IV, 1974), authorizes the Commission to: file in a United States district court an action (1) against an imminently hazardous consumer product for seizure of such product under sub-section (b)(2) of this Section, or (2) against any person who is a manufacturer, distributor or retailer of such product, or (3) against both . . . . As used in this section, and hereinafter in this chapter the term "imminently hazardous consumer product" means a consumer product which presents imminent and unreasonable risk of death, serious illness, or severe personal injury. \(^{135}\) 15 U.S.C. §2068(a)(3) (Supp. IV, 1974). \(^{136}\) Id. §2071.