

Articles

The Great Schism: Federal Bicycle Safety Regulation and the Unraveling of American Bicycle Planning

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I. INTRODUCTION

A. OUR WHOLE WORLD CHANGED

Between 1971 and 1974, a great bike boom swept America. In just three years, over 40 million bicycles were sold, a volume so impressive that one bicycle executive called it “an unbelievable figure to those of us in the trade.”¹ At the peak of the boom, some seventy-three million Americans rode bicycles regularly, with about fifty million of those riders being adults.² Since World War II, bicycle makers have been trying to figure out how to turn adults into cyclists, and, by extension, customers. In the 1960’s, bicycle makers paid for a handful of new urban bicycle paths. Beginning in 1973, they pledged \$56,000 to the venerable League of American Wheelmen (“L.A.W.”) so the League could hire an executive director for three years.³ For the first time since William McKinley was president, the League could boast of a paid office staff. “The L.A.W. has been a do-nothing organization for 70 years,” said one of the organization’s directors, but “[t]he time has come for the L.A.W. finally [to] do something positive”⁴ The L.A.W. “must regain the leadership it has failed to provide.”⁵

But by 1980, everything seemed to have fallen apart. The incoming L.A.W. president was calling the bicycle makers “[c]ycling’s old ene-

1. Norman A. Clarke, *There Oughta Be a Law*, Remarks at the Am. Soc’y of Civil Eng’rs Conference (Dec. 12-14, 1973), in *PROCEEDINGS OF THE SEMINAR ON BICYCLE/PEDESTRIAN PLANNING & DESIGN* 550, 550 (1974).

2. See Trent Germano et al., *The Emerging Needs of Bicycle Transportation*, 436 *HIGHWAY RESEARCH RECORD* 8, 8-18 (1973) (defining “adult” as old enough to possess a regular driver’s license); Frank J. Berto, *The Great American Bicycle Boom*, in *CYCLE HISTORY 10: PROCEEDINGS OF THE 10TH INTERNATIONAL CYCLE HISTORY CONFERENCE* 133, 133-41 (Hans Erhard Lessing & Andrew Ritchie eds., 1999). The author thanks Mr. Berto, who provided many of the *BICYCLING* and *BIKE WORLD* articles from 1973-76 cited in this article. Mr. Berto does not necessarily agree with all conclusions or opinions in this article.

3. Interview with Norman A. Clarke, former President, Columbia Mfg. Co. (Apr. 5, 1998); Memorandum from H.M. Huffman, Jr. on BIA/BMA/Schwinn/Raleigh - Three Year L.A.W. Grant to Morgan Groves, Executive Dir., L.A.W. (Aug. 28, 1973) (on file with the Transportation Law Journal); Memorandum from H.M. Huffman, Jr. & F.C. Smith on The Need for a Strong Bike Consumer Lobby & Why We Believe a Strong L.A.W. is the Answer to that Need to the Am. Bicycle Mfrs. (undated, ca. Dec. 1972) (on file with the Transportation Law Journal).

4. Letter from Robert E. Bond, M.D., L.A.W. S. Cal. Area Dir., to Morgan Groves, L.A.W. Executive Dir. (Oct. 2, 1973) (on file with the Transportation Law Journal).

5. *Id.*

mies.”⁶ The industry responded by pulling its money out of the League. Dedicated federal funding for bicycle facilities dried up and stayed dry for the next fifteen years.⁷ How did this happen? This article will argue that the promulgation of a set of product safety standards by the then-new Consumer Product Safety Commission (“CPSC”) triggered an irrevocable ideological schism between experienced recreational cyclists, government, and the bicycle industry. Of course, there were adult cyclists well before the 1960s, but they amounted to a small number of hardy devotees. While most of these cyclists welcomed the popularity brought about by the great bike boom, a group of “club cyclists,” racers, and marathon-distance semi-competitive tourists (called “randonneurs”) devoted to featherweight precision-built European bicycles, wanted the new cycling populism nipped in the bud and the clock rolled back to what they saw as an idyllic pre-1967 insularity.⁸

Although never large in numbers, this group successfully challenged an emerging consensus of industry, government, and consumers by taking advantage of the industry’s fragmented and sometimes confused approach to the development of the new CPSC bicycle rules. In less than a decade, the ideology of a handful of elite, high-performance cyclists on exotic bicycles priced more than some used cars came to dominate the bicycling community. The consequences were enormous. The American industry, once home to thousands of well-paying, blue-collar jobs, simply disappeared. In 1973, eight domestic firms produced 8.7 million bicycles and employed 12,000 workers.⁹ By 1995, only three major firms were left, employing a total of about 6,500.¹⁰ A decade later, these three firms had

6. John Forester, *Toy Bike Syndrome*, *BIKE WORLD*, Oct. 1973, at 24.

7. Telephone interview with Tim Blumenthal, Dir. of the Bikes Belong Coalition (Oct. 6, 2009); Telephone interview with Morgan Groves, former Executive Dir., L.A.W. (Nov. 12, 2007); Telephone interview with William Wilkinson, former Executive Dir., Bicycle Inst. of Am. & Bicycle Fed’n (July 22, 2008). The Bicycle Manufacturers Association ceased operations in late 1984 or early 1985; the next support given to any membership organization was a grant from the Bikes Belong Coalition (a trade advocacy organization formed in 1999) to the League of American Bicyclists, a gender-neutral trade name adopted by the L.A.W. in the mid-1990s. Charles F. Floyd, *The Future of the Bicycle as a Mode of Transportation in the United States*, 31 *TRAFFIC QUARTERLY* 139, 147-53 (1977). After the expiration of bikeway funding under the Land and Water Conservation Fund in 1976, the next available source of dedicated funding was the Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991, with funding becoming available in fiscal year 1992. Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (codified as amended in scattered sections of 23 U.S.C.).

8. See Forester, *supra* note 6, at 25-26. The term “club cyclist” is Forester’s.

9. Arthur M. Lewis, *How the Customers Thrust Unexpected Prosperity on the Bicycle Industry*, *FORTUNE*, March 1974, at 119; BERTO, *supra* note 2, at 137; Valerie A. Personick, *The Outlook for Industry Output and Employment through 1990*, *MONTHLY LABOR REVIEW*, August 1981, at 35; Lynn M. Pearce ed., *ENCYCLOPEDIA OF AMERICAN INDUSTRIES* 1196 (4th ed. 2005).

10. Comments of the Bicycle Manufacturers Association of America Regarding “Made in the USA” Claims With Respect to Bicycles, Made in the USA Policy Comment, FTC File No.

moved their production overseas and only two smaller firms, suppliers to the specialty bike shop market, remained.¹¹ They produced fewer than 250,000 bicycles and employed about 2,100 employees.¹² The CPSC regulations not only proved ineffective in improving bicycle safety, but also opened a window of opportunity for those who sought the destruction of the domestic industry and wished to block the efforts of local, state, and federal agencies to improve bicycle safety and revitalize bicycling as a viable transport mode.¹³ Thirty years later, Jay Townley, former vice president of the Schwinn Bicycle Company recalled, “[o]ur whole world changed with [the] creation of the CPSC.”¹⁴

B. GLOSSARY

Because of the unusually frequent references in this article to industry organizations, government bureaus, and other entities known more by acronym than actual name, I have provided this glossary to define each acronym and explain, at least in a rudimentary way, its meaning.

ANSI	American National Standards Institute. This non profit organization develops and publishes industrial standards for a wide variety of products, including bicycles. It is the North American affiliate of the International Standards Organization. See ISO.
BIA	Bicycle Institute of America. Before 1974, this was the main industry trade group. For the time period covered in this article, the BIA and the BMA are virtually synonymous.
BMA	Bicycle Manufacturers’ Association. Prior to 1974, a subunit of BIA, afterwards, the primary bicycle industry trade group.

P894219, <http://www.ftc.gov/opp/jointvent/madeusa/ftp/usa/o45.txt>. The domestic content of their bicycles was as low as 50 percent. Comments of DynaCraft Industries Regarding “Made in the USA” Claims With Respect to Bicycles, Made in the USA Policy Comment, FTC File No. P894219,

11. These firms were Trek Bicycle and Cannondale. FRANK BERTO ET AL., *THE DANCING CHAIN: HISTORY AND DEVELOPMENT OF THE DERAILLEUR BICYCLE 195* (1st ed. 2000), at 303-305. Trek was established in 1976 and Cannondale began bicycle production in 1983. A third firm, Specialized Bicycle Imports, designs, but does not build, bicycles in the United States. *ENCYCLOPEDIA OF MAJOR MARKETING CAMPAIGNS 1540* (2007).

12. *World Players in the Bicycle Market*, BICYCLE RETAILER AND INDUSTRY NEWS, July 1, 2008, at 33. United States domestic production was 191,000 in 2005, 260,000 in 2006, and 260,000 in 2007. *Trek Bicycle Corporation*, in *HOOVER’S COMPANY RECORDS* (last updated April 2, 2010); Arsen J. Darnay and Joyce P. Simken eds., *MANUFACTURING AND DISTRIBUTION 2: 1603* (2006). Klein Bicycle Corp. employed 500 in 2002, but was absorbed by Trek in 2006. Berto, *supra* note 11, at 304.

13. Ross D. Petty, *The Consumer Product Safety Commission’s Promulgation of a Bicycle Safety Standard*, 10 J. PROD. LIAB. 25, 40-48 (1987).

14. Jason Norman, *First and Most Prominent Advocate John Auerbach Dies*, BICYCLE RETAILER & INDUS. NEWS, Apr. 15, 2007, at 20.

BMA/6	Safety Standards for Regular Bicycles. The voluntary design and manufacturing standards promulgated by the American bicycle industry in 1970, subsequently revised in 1972 and 1974.
CalTrans	California Department of Transportation.
CPSA	Consumer Product Safety Act. This was the 1973 enabling legislation authorizing the Consumer Product Safety Commission. It shifted responsibility for oversight of children's products from the Food and Drug Administration to the CPSC.
CPSC	Consumer Product Safety Commission. After 1973, the primary federal agency in charge of enforcing product safety laws.
CPSCIA	Consumer Product Safety Commission Improvements Act of 1976. It allowed "old" Food and Drug Administration banning orders to preempt state laws, a feature of the new CPSA, but not permitted in FDA orders issued before 1973.
CPTSA	Child Protection and Toy Safety Act Amendments of 1969. It amended the Federal Hazardous Substances Act, enabling the Food and Drug Administration to regulate toys and other products intended for children using an expedited promulgation process.
DOT	United States Department of Transportation.
FDA	Food and Drug Administration. Prior to the 1973 CPSA, this agency was responsible for enforcing safety laws for toys and other children's products under the CPTSAA and the Federal Hazardous Substances Act.
FHSA	Federal Hazardous Substances Act. Between 1969 and 1973, the CPTSAA, an amendment to this Act, tasked the FDA with the responsibility of enforcing the safety of toys and children's products. The original 1973 bicycle product safety laws were issued under this Act, only a few days before authority was transferred by the CPSA to the CPSC.
FHWA	Federal Highway Administration, a part of the United States Department of Transportation.
HSA	Hazardous Substances Act. See FHSA.
ISO	International Standards Organization. One of their technical committees, TC-149, develops and publishes standards for bicycles and bicycle components. The United States is represented on ISO by ANSI. See ANSI.
L.A.W.	A nationwide organization for bicycle enthusiasts. Originally formed in 1881, it expired about 1905, and was resurrected in 1965. From 1973 to 1976 it was financially supported by the bicycle industry.
LWCF	Land and Water Conservation Fund. Administered by the Bureau of Outdoor Recreation of the Department of Interior, this was the primary source of federal funding for bicycle facilities between 1965 and 1975.
MTC	Model Traffic Code. See NCUTLO.
NCPS	National Committee on Product Safety. It was under the aegis of this temporary predecessor to the CPSC that the early federal research on bicycle safety was published during 1972-74.

NCUTLO	National Committee for Uniform Traffic Laws and Ordinances. This nongovernmental organization manages the Model Traffic Code used by the states as the basis for their traffic laws. It reviews and amends the MTC through regular conferences.
NHTSA	National Highway Traffic Safety Administration, a part of the United States Department of Transportation.
TC-149	Technical Committee 149. ISO's Committee for the Development of Standards for Cycles. See ISO.
TRB	Transportation Research Board. A division of the National Academy of Sciences, this private non-profit organization is one of America's leading research organizations in the field of traffic and transportation engineering, planning, and management.

II. POST-WAR BICYCLE TARIFFS AND THE NEW ADULT MARKET

A. YOU ARE EXPENDABLE

The Second World War left Britain economically devastated. After years of anguish carefully hidden behind the closed doors of 10 Downing Street and Whitehall, the government was forced to devalue the pound in 1949 from \$4.03 to \$2.80, setting off a trans-Atlantic financial crisis.¹⁵ Gabriel Hauge, President Eisenhower's economic advisor, summoned the executives of the Bicycle Institute of America ("BIA") to Washington, including Norman Clarke, president of the Columbia Manufacturing Company, the nation's oldest bicycle maker.¹⁶ Hauge told the group that England needed hard currency, and needed it fast.¹⁷ To move dollars across the Atlantic, the Eisenhower administration wanted to immediately enact measures to stimulate British imports. Prior to the war, Britain's bicycle industry had been the world's largest, and their cycle factories had escaped damage. Developing a viable import market for British cars would take a decade and cost millions, but a thriving bicycle sector could be cobbled together in only a couple of months. "The Presi-

15. JAY PRIDMORE & JIM HURD, *THE AMERICAN BICYCLE*, 133 (1995).

16. Interview with Norman A. Clarke, *supra* note 3 (stating that before 1963 Clarke's firm was named the Westfield Manufacturing Company; prior to 1913 it had been the Pope Manufacturing Company). After World War II, the Bicycle Institute of America (BIA) served as the umbrella group for the bicycle trades. It was comprised of four subsidiaries: the Bicycle Manufacturers Association (BMA); the Bicycle Wholesale Dealers Association (BWDA); the Cycle Parts and Accessories Association (CPAA); and the Merchant Bicycle Dealers Association (MBDA). In 1975, the BIA (but not its subsidiaries) was dissolved amid restraint of trade concerns raised by the Federal Trade Commission. The BMA then became the most visible group, representing the entire industry in matters of overall advocacy and promotion. For the purposes of this article, the BIA and the BMA are virtually synonymous, and both terms are used to retain consistency with contemporary documents. In the 1960s, Schwinn left the BMA over a policy disagreement regarding mass-market retailers such as Sears, but continued to work closely with it. Telephone Interview with William Wilkinson, *supra* note 7; Telephone Interview with Jay Townley, Former vice-president, Schwinn Bicycle Co. (May 23, 2009).

17. Interview with Norman A. Clarke, *supra* note 3.

dent believes you can do other things,” Hauge told the assembled executives.¹⁸ He finished with a chillingly blunt summation: “you are expendable.”¹⁹

The tariff on bicycles was cut from 30 to 7.5 percent.²⁰ Imports jumped from 67,000 units in 1950 to 595,000 in 1953, while the sale of American-made bicycles fell almost 50 percent.²¹ The BIA bitterly fought back, and after a bruising round of hearings in 1954, the federal tariff commission voted to raise duties back to 15 percent.²² Eisenhower was required to accept or reject the commission’s action within sixty days. Sixty-four days later, he knocked the tariff down from 15 to 11.25 percent. “We asked the attorneys in Washington, can he do that?” Clarke recalled. “They said no, but nobody sues the President.”²³

The industry soon decided the only way to offset its shrinking slice of the market was to expand the entire pie by cultivating adult riders. Clarke had no illusions about why the industry needed adults: “Volume! Good God!” In addition to sheer numbers, increasing the proportion of adults allowed firms to escape the intensely seasonal production cycle that had plagued them since 1910. “Christmas became just another day,” said Clarke, “it wasn’t the same – we didn’t do 40 percent of our business for Christmas anymore.”²⁴ Columbia had always, throughout its ninety-three years, made a lightweight adult bicycle, and in the early 1960s, Clarke was approached by one of his young engineers, Harold Maschin, who asked if he could look into some new technology coming out of Europe. Maschin subscribed to several European cycling magazines and through them learned about a “10-speed gear, actually an 8-speed, which Huret was making in France.”²⁵ Derailleurs had been around for many years, but the new Huret was an early entry in the market for a simple, rugged, relatively inexpensive alternative to Sturmey-Archer’s 3- and 5-speed internal hub gears.²⁶ Columbia bought several sets, which Maschin rebuilt into 10-speeds. The factory made up prototype bicycles and Clarke “kept them in my garage and let the neighbors ride them to see

18. *Id.*

19. *Id.*

20. *Id.*

21. James J. Nagle, *Bicycle Makers Seek Tariff Help; ‘Impossibly Low’ Prices of the Foreign Makes Given as One Reason for Relief Action*, N.Y. TIMES, Aug. 22, 1954, at F1.

22. *Id.*

23. Clarke, *supra* note 3. The tariff rate was 11.25% on bicycles up to thirty-six pounds and 22.5% on heavier models. These rates remained in place until 1968. See generally, *Two Wheel Drive*, BARRON’S NAT’L BUS. & FIN. WEEKLY, Dec. 11, 1973, at 11; Roger Lloyd-Jones & M.J. Lewis, *Culture as Metaphor: Company Culture and Business Strategy at Raleigh Industries, 1945-60*, BUS. HISTORY 93 (July, 1999).

24. Clarke, *supra* note 3.

25. *Id.*

26. Clarke, *supra* note 3; BERTO ET AL., *supra* note 11, at 195.

what happened.”²⁷ Unfamiliar with the new gears, the neighbors blew up several sets. But, by using this simple but effective testing system Clarke’s firm “found certain shortcomings we had to fix,” which Maschin fitted into a new 10-speed the factory introduced in 1963.²⁸

To build up the adult market, the BIA wanted to encourage government efforts to promote bicycle safety, but chose a conservative approach. John Auerbach, the BIA’s executive director, cautioned industry executives that “unless safer bike riding facilities are developed, adults could become disenchanted with the bicycle if the hazards of bike riding increase . . . we need state legislation . . . [and] local ordinances.”²⁹ On the other hand, Auerbach warned that “the BIA and each of us as individual manufacturers have to keep a low profile in all of these efforts . . . [t]rade associations and manufacturers frequently carry only a negative influence on legislators.”³⁰

B. WE DIDN’T KNOW WHAT TO CALL THEM

The first effort at some sort of bicycle planning in the United States appears to have been in the village of Homestead, Florida, about twenty-five miles south of Miami. Between 1961 and 1963, Homestead designated and signed a network of “secondary, [lightly] traveled roads” to connect residential areas with “schools, playgrounds, shopping centers, ball parks, and other centers of activities.”³¹ “We didn’t know what to call them,” recounted Auerbach, “so [we] coined the word ‘Bikeway.’”³² They were not intended to divert “the experienced cyclist, capable of riding long distances,” but were instead meant for “the newcomer, the weekend cyclist, [or] the family with children.”³³ City planners admitted that the Homestead experiment worked largely because of the town’s unique demographics. It had more bikes per capita than comparable towns, many quiet untracked streets, and a small, tightly knit population centered near an adjacent air base. When Chicago, which had a disconnected set of lakeside trails left over from the 1950s, tried to copy the idea, it found that it would have to build separate facilities if it wanted to close all the gaps in the network. A sixty-four mile system installed in 1965 to 1967 in the affluent Milwaukee suburb of Waukesha was entirely

27. Clarke, *supra* note 3.

28. *Id.*; BERTO ET AL., *supra* note 11, at 195. Schwinn introduced an 8-speed in 1963, followed by a 10-speed the following year. Townley, *supra* note 16.

29. Huffman, *supra* note 3.

30. *Id.*

31. E. PETER HOFFMAN ET AL., THE BEST OF BICYCLING 200,000 MILES OF BIKEWAYS (Harley M. Leete ed., Pocket Books 1972) (1970).

32. John Auerbach, *Public and Legislative Support for Bikeways*, BICYCLE/PEDESTRIAN PLANNING AND DESIGN, 20, 20-29 (1974).

33. HOFFMAN, *supra* note 31, at 317.

comprised of paved, off-road paths.³⁴

The Waukesha facility was typical of many built during this era: separated from the roadway system, usually running through a park or along a waterway with little transportation potential.³⁵ However, this was less the result of any theoretical or ideological presumption than a matter of money. In 1965, Congress created the Land and Water Conservation Fund (“LWCF”), which quickly became a prolific source of money for municipal bicycle engineering activities.³⁶ However, its purpose was to promote recreational resources, and the Bureau of Outdoor Recreation rejected many funding requests because they overly emphasized transportation uses.³⁷ Many in the bicycle industry hoped the Federal Highway Act of 1973, which for the first time allowed (but did not require) states to use a portion of their roadway funds for pedestrian and bicycle facilities, would rectify this.³⁸ It did not because states were loath to divert funds from roadway projects unless they were specifically earmarked for alternative transportation projects, which didn’t occur until the Intermodal Surface Transportation Efficiency Act (“ISTEA”) of 1991.³⁹ The expiration of the LWCF led to the cessation of most new large-scale bike path projects after 1975.⁴⁰

The BIA responded to the LWCF initiative by surveying local parks and recreation departments about their recommended best practices for construction and maintenance, then issuing these in 1969, as *Bike Trails and Facilities – A Guide to their Design, Construction, and Operation*, probably the first bicycle planning document published in significant numbers in the United States.⁴¹ The Metropolitan Association of Urban Designers and Environmental Planners (“MAUDEP”) held their first MAUDEP bicycle/pedestrian conference in San Francisco in December 1972, followed by annual meetings in Orlando and San Diego.⁴² In May 1973, the BIA hosted the first of its own “Bicycles USA” conferences, a descendent of which, Pro-Bike/Pro-Walk, is still held biennially.⁴³ By

34. *Id.* at 319.

35. *Id.* at 320.

36. Land and Water Conservation Fund Act of 1965, Pub. L. No. 88-578, 78 Stat. 897 (codified as amended in scattered sections of 16 U.S.C. § 4601).

37. John B. Corgel & Charles F. Floyd, *Toward a New Direction in Bicycle Transportation Policy*, 33 *TRAFFIC QUARTERLY* 297, 297-310 (1979).

38. Federal Aid Highway Act of 1973, Pub. L. No. 93-87, 87 Stat. 262 (codified as amended in scattered sections of 23 U.S.C. § 324).

39. Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (codified as amended in scattered sections of 23 U.S.C.).

40. Corgel, *supra* note 37, at 301.

41. WALTER L. COOK, *BIKE TRAILS AND FACILITIES - A GUIDE TO THEIR DESIGN, CONSTRUCTION, AND OPERATION* (1965).

42. Auerbach, *supra* note 32, at 22.

43. *Id.*

1974, Auerbach was disclaiming any unique leadership role for the BIA, saying that “the bikeway movement has grown so big and so fast that it is no longer possible to say who is leading it; it no longer matters.”⁴⁴

C. A DARWINIAN PERSPECTIVE

Meanwhile, the small city of Davis, California was investigating the potential and problems of roadway bicycle facilities. Davis, about fifty miles east of the San Francisco Bay Area, had long been the site of the University of California’s agricultural research station, but the crush of post-war G.I. Bill students in 1947 started to overwhelm the main campus in Berkeley.⁴⁵ California upgraded Davis to a separate UC campus and put it on a crash construction program.⁴⁶ Unusually spread out, a legacy of its farm school days, and lacking an adequate campus transportation system, the school’s first chancellor, Emil Marak, paved campus roads to be a little wider than usual, restricted cars to peripheral lots, and urged everyone to use bicycles.⁴⁷ The city’s bikeway movement began in 1963 when faculty members Frank and Eve Child returned from a sabbatical in the Netherlands at almost exactly the same time the city police were implementing a crackdown on errant cyclists and the city council was enacting several new get-tough laws on riders.⁴⁸ Assisted by Dale and Donna Lott, who arrived from Seattle in 1965, the Childs made bicycle use an important quality-of-life issue in municipal elections in 1964 and 1966, with an openly sympathetic slate of candidates elected in 1966.⁴⁹ A supportive city public works director, Dave Pelz, turned to the University for advice on implementing the new commission’s mandate. The Lotts, Robert Sommer, Melvin Ramey, William Adams, and graduate students Bonnie Kroll and Wes Lum, among others, created an informal research group to evaluate bicycle use and the design of facilities. Their work was highly experimental, placing an emphasis on modifying the street system to facilitate utilitarian bicycle trips, often by cyclists of modest ability. “The city streets became our laboratory,” recalled Sommer many years

44. *Id.*

45. BLAKE GUMPRECHT, *THE AMERICAN COLLEGE TOWN* 149 (2008).

46. *Id.* at 146.

47. Robert Sommer, *Bikeway Research at the University of California-Davis in the 1960's*, in *CYCLE HISTORY 16: PROCEEDINGS OF THE 16TH ANNUAL CYCLE HISTORY CONFERENCE* 47-50 (Andrew Ritchie ed., 2005) [hereinafter *Bikeway Research*]; Telephone Interview with Donna Lott (Nov. 19, 2007).

48. GUMPRECHT, *supra* note 45, at 150; Ted Buehler & Susan Handy, Presentation at the 2008 Annual Meeting of the Transportation Research Board: Fifty Years of Bicycle Policy, *available at* http://www.des.ucdavis.edu/faculty/handy/Davis_bike_history.pdf (last visited Apr. 14, 2010).

49. GUMPRECHT, *supra* note 45, at 151.

later.⁵⁰ Donna Lott agrees: “Much of what we did was trial-and-error . . . we put things down . . . we took them up . . . we improved it and tried again.”⁵¹

Nevertheless, it is clear that the university study group looked to European, particularly Dutch, techniques as a template. These techniques stressed the complete separation of bicycles and motor vehicles, even to the point of placing bicycle lanes behind parked cars or grassed median strips. While such designs improved most cyclists’ perceived comfort in mid-block, they frequently created visibility problems and added conflict points at intersections.⁵² The practicing engineers at the city’s public work department, who had to live with such innovations, were not always as enthusiastic as the researchers. “[T]o a man they commented about the intersection problems,” noted Dale Lott and Robert Sommer.⁵³ The research group believed that most of these could be addressed by placing additional restrictions on motorized traffic, eliminating on-street parking, converting streets to one-way operation, or installing separate traffic-signal phases just for bicycles.⁵⁴

On the other hand, CalTrans engineer Harold Munn believed design treatments to accommodate bicycle use relying on new automobile restrictions were wildly impractical:

Just about everyone seems to believe that an arrangement that will physically separate bicycles from motor vehicles is absolutely necessary . . . [but] the pressure to provide additional capacity for motor vehicles has been unrelenting . . . until very recently, reserving space on the roadway for bicycles was the last thing on anyone’s mind . . . [will] the motoring public accept some minimum provision for bicycle use of the public roads? The possibilities at present are very limited.⁵⁵

The problem is that Munn himself had no real alternative to offer: “There is an inherent risk to the bicyclist when he competes with the motor vehicle for space on the road.” All he could suggest was urging cyclists to become more proficient in riding with traffic and stepping up law enforcement efforts to force cyclists to “operate their bicycles as they do their automobiles,” a principle he called “vehicular integration of cycling,”⁵⁶ although he admitted that “observation will reveal that club rid-

50. *Bikeway Research*, *supra* note 47, at 48-49.

51. Telephone Interview with Donna Lott, *supra* note 47.

52. David Takemoto-Weerts, *Evolution of a Cyclist-Friendly Community*, in *CYCLE HISTORY 16: PROCEEDINGS OF THE 16TH ANNUAL CYCLE HISTORY CONFERENCE* 47-50 (Andrew Ritchie ed., 2005).

53. *Bikeways in Action: The Davis Experience*, 117 CONG. REC. H10830 (daily ed. Apr. 19, 1971) (by Robert Sommer and Dale F. Lott).

54. *Id.*

55. Harold Munn, *Bicycles and Traffic*, 101 *TRANSP. ENGINEERING J.* 753, 753-62 (1975).

56. *Id.* at 757.

ers behave no better than the organized majority.”⁵⁷

Bob Sommer dismissed Munn’s “vehicular cycling” philosophy as “a Darwinian perspective, with the road as a test of survival for the fittest.”⁵⁸ The Lotts were even more disdainful of vehicular cycling, asserting, among other things, that it was blatantly sexist, with adherents deluding themselves that “the rare sight of a doughty rider challenging taxis, trucks and tornados on a featherweight 15-speed bicycle will inspire a murmured or silent, ‘there goes a real man,’ from every passerby.”⁵⁹ To some extent, they were right: the best systematic study to that point indicated that proficient women cyclists had a higher accident rate than their male counterparts (the opposite was true among the general cycling population by a wide margin), suggesting that a total reliance on cyclist proficiency to master the intricacies of urban traffic presumed a level of brute physical strength that not every potential cyclist could muster.⁶⁰

The work at UC-Davis resulted in a stridently pro-bikeway report published in the Congressional Record in April 1971.⁶¹ Its findings were as rosy-eyed as Munn’s had been gloomy. “Just as one cannot have a railroad without tracks, or a bus system without highways,” it concluded, “so one needs special facilities and regulations for bicycle traffic . . . *no bicycle paths, no bicycles.*”⁶² Despite later claims by some ardently pro-bikeway advocates that the Congressional Record report formed the bedrock of American bicycle planning, the evidence points to a continuing evolution away from such a categorical approach during the early 1970’s.⁶³

In the summer of 1971, the California legislature asked CalTrans to

57. *Id.* at 758.

58. *Bikeway Research*, *supra* note 47, at 50.

59. Dale F. Lott et al., *Evaluation by Experienced Riders of a New Bicycle Lane in an Established Bikeway System*, 683 TRANSP. RES. REC. 40, 46 (1978).

60. Jerrold A. Kaplan, *Characteristics of the Regular Adult Bicycle User 67* (1975) (unpublished M.S. thesis, University of Maryland) (on file with the University of Maryland, College Park). In 1997, William Moritz reproduced Kaplan’s survey methodology as closely as possible. He got the same results. William A. Moritz, *Adult Bicyclists in the United States: Characteristics and Riding Experience in 1996* (1998) (Unpublished manuscript, available from the online Transportation Research Information Service (<http://tris.trb.org>) as TRB Paper No. 98-0009)).

61. See 117 CONG. REC. H10830-33 (daily ed. Apr. 19, 1971) (statement of Rep. Pirnie).

62. Sommer & Lott, *supra* note 53, at H10831, H10833.

63. For example, Davis historian Ted Buehler asserts that “the bike lane standards established by Davis were adopted as part of the state highway code and in 1974 by the Federal Highway Administration” despite clear evidence that after 1971 it was the City of Davis that was moving towards the adoption of state and national standards, not the other way around. Ted Buehler & Susan Handy, *Fifty Years of Bicycle Policy in Davis, California*, 2074 TRANSP. RES. REC. 52, 52-57 (2008); Takemoto-Weerts, *supra* note 52, at 12-14; Letter from Brian DeSousa, Vice President, California Association of Bicycling Organizations, to Devinder Singh, Secretary, CalTrans Traffic Control Devices Committee on Item 09-21 on 9/24/09 CTCDC Agenda (Sept. 21, 2009), available at <http://www.cabobike.org/2009/09/21> (last visited Apr. 14, 2010).

“study the most feasible and least expensive methods by which existing and future public streets and thoroughfares can more safely accommodate bicycle riders”⁶⁴ By the time the project was awarded to UCLA’s Institute of Transportation and Traffic Engineering, it had somehow morphed into “A Study of Bicycle Path Effectiveness,” which among other options, addressed how to incorporate bikeways on existing street rights-of-way, that is, on bike lanes and sidewalk-style bike paths.⁶⁵ Its final report, *Bikeway Planning Criteria and Guidelines*, retained several of the more controversial Davis designs such as their sandwich bike lane, which placed the lane between the curb and a row of parallel-parked cars.⁶⁶ This probably shouldn’t be surprising, as much of the work was done in Davis, and UC-Davis’s Mel Ramey was a co-author. The UCLA report was briefly influential, but was quickly eclipsed by more advanced work coming out of the Federal Highway Administration (“FHWA”). In 1974, *Bikeways – State of the Art*, the first report of a three-year five-volume project, had identified the sandwich lane as a “problem,” and by 1976, when the final two volumes, *Safety & Locational Criteria for Bicycle Facilities*, were issued, it had been relegated to the category of “not recommended.”⁶⁷ By now, even the Davis public works staff had written the sandwich lane off as a “well-intentioned, but ill-fated design,” and had moved to the FHWA standards.⁶⁸ It was *Safety & Locational Criteria for Bicycle Facilities* that proved to be the template for the next two decades of American bicycle planning, not the more exotic of the Davis designs.⁶⁹ Of the UC-Davis group, only Donna Lott, who later joined CalTrans, stayed active in the field of bicycle planning. The others eventually returned to what she describes as “more or less traditional areas of academic research.”⁷⁰

Norman Clarke estimated that in 1965, a third of his firm’s production of 650,000 was in some form of multi-gear bicycles: “3-speeds and 5-speeds, some 10-speeds.”⁷¹ Between 1970 and 1972, during the great American bicycle boom, domestic production increased from 4.9 million units to 8.7 million, and total sales – domestics and imports – shot up

64. S. Con. Res. 26, Reg. Sess. (Cal. 1971) (enacted).

65. See GARY FISHER ET AL., SCHOOL OF ENGINEERING AND APPLIED SCIENCE, UNIV. OF CAL. LOS ANGELES, *BIKEWAY PLANNING CRITERIA AND GUIDELINES* (1972) (prepared for Cal. Dep’t of Pub. Works).

66. *Id.* at 70.

67. DAN SMITH, FEDERAL HIGHWAY ADMINISTRATION, *BIKEWAYS – STATE OF THE ART* 17-18 (1974); DAN SMITH, FEDERAL HIGHWAY ADMINISTRATION, *SAFETY & LOCATIONAL CRITERIA FOR BICYCLE FACILITIES USER MANUAL VOL. II DESIGN AND SAFETY CRITERIA* 14 (1976).

68. Takemoto-Weerts, *supra* note 52, at 12.

69. *Id.*

70. Lott, *supra* note 47.

71. Clarke, *supra* note 3.

from 6.9 million to 13.9 million.⁷² Clarke insists that the boom was not just something that happened: “Oh, no – we worked like hell for it.”⁷³ But the decision to simultaneously fight imports and aggressively cultivate adult riders was one that would have enormous unintended consequences.

III. THE EARLY REGULATIONS

A. TOO MUCH TIMIDITY AND INORDINATE DELAY

In 1970, the BMA issued a set of voluntary industry standards called BMA/6 to standardize the design and construction of all bicycles with wheels twenty inches or greater in diameter, or bicycles intended for riders over 100 pounds.⁷⁴ BMA/6 was issued in anticipation of a federal government report under preparation by the National Committee on Product Safety (“NCPS”). The outcome of a large-scale three-year study, it was believed that the report would be sharply critical of the bicycle industry for not developing product safety standards in general, and particularly, for failing to adopt minimum rules for lights and reflectors.⁷⁵ Fred DeLong, technical editor of *Bicycling* magazine, noted that “[b]ikes have been designed to attract the fancies of children, and sound engineering has often been disregarded.”⁷⁶ He applauded BMA/6’s prohibition of dangerous fads, such as steering wheel-shaped handlebars and extended chopper forks.⁷⁷ Echoing a recent French regulation, BMA/6 also mandated the addition of pedal reflectors and a white front reflector to the traditional red rear reflector.⁷⁸

72. Berto, *supra* note 2, at 133-41.

73. Clarke, *supra* note 3.

74. BICYCLE MANUFACTURERS ASSOCIATION OF AMERICA, BICYCLE STANDARD BMA/6: SAFETY STANDARDS FOR REGULAR BICYCLES (1970) (revised in 1972, second revision in 1974). The definition of a “sidewalk” bike (those excluded from BMA/6) was changed in 1974 to eliminate the 100 pounds specification. After this, all bicycles with wheels less than twenty inches in diameter were considered sidewalk bicycles (including some high-quality adult portable and folding bicycles).

75. NATIONAL COMM’N ON PRODUCT SAFETY, FINAL REPORT PRESENTED TO THE PRESIDENT AND CONGRESS, 18-20 (1970); Petty, *supra* note 13, at 27-28. The author thanks Mr. Petty, who supplied much of the background material on the CPSC bicycle safety standards used here. For more background, consult his article, Ross D. Petty, *The Impact of the Sport of Bicycle Riding on Safety Law*, 35 AM. BUS. L.J. 185, 185-224 (1998) [hereinafter Petty, *Sport of Bicycle Riding*], and his paper, Ross D. Petty, *The Bicycle’s Role in the Development of Safety Law*, in CYCLE HISTORY 4: PROCEEDINGS OF THE 4TH INTERNATIONAL CYCLE HISTORY CONFERENCE 137-43 (Rob van der Plas ed., 1994) [hereinafter Petty, *Bicycle’s Role*]. Mr. Petty does not necessarily agree with all opinions and conclusions expressed in this article.

76. A. Fred DeLong, *New Bicycle Safety and Performance Standards*, BICYCLING Dec. 1970, at 26.

77. *Id.* at 26-27. Chopper forks and the like were prohibited after July 1, 1971.

78. *Id.*

In March 1972, the U.S. Food and Drug Administration (“FDA”), which had regulatory jurisdiction over children’s toys under the 1969 Child Protection and Toy Safety Act amendments (“CPTSAA”)⁷⁹ to the Federal Hazardous Substances Act (“FHSA”), issued its own report on bicycle accidents, including a review of BMA/6.⁸⁰ Among other things, the report recommended strengthening standards for nighttime conspicuity, suggesting that reflective systems should not only make a bicycle visible at night, but should also make a readily identifiable outline of a bicycle.⁸¹

In May 1973, the FDA issued a draft “banning order” under the FHSA including any bicycle intended for use by children under age sixteen.⁸² Based loosely on BMA/6, the regulation in effect prohibited all “hazardous” bicycles and established the minimum criteria a bicycle must meet to avoid being considered hazardous.⁸³ It did not specify how a bicycle “intended for use by children” would be differentiated from one meant for adults, but the order did contain sections covering quick-release wheel hubs and derailleur gear systems, strongly suggesting the FDA may have had more than sidewalk bikes in mind.⁸⁴ Four days later, all authority over the regulations were transferred to a new agency, the Consumer Product Safety Commission (“CPSC”), a commission created by Congress a year earlier under legislation drafted in response to the 1970 NCPS final report.⁸⁵ The staff of the Senate Commerce Committee, which drafted the enabling legislation, had been highly critical of the FDA’s existing rulemaking procedures, finding the procedures “marked by too much timidity and inordinate delay.”⁸⁶ However, due to a quirk in the old 1969 CPTSAA, the new CPSC legislation actually had more *stringent* rulemaking provisions when it came to toys and other children’s products, a fact that would not come to light for years.⁸⁷

79. Child Protection and Toy Safety Act of 1969, Pub. L. No. 91-113, § 2(c), 83 Stat. 187 (1969).

80. FOOD & DRUG ADMIN., STAFF ANALYSIS OF BICYCLE ACCIDENTS AND INJURIES, NTIS Pub. No. PB-207-665 (1972).

81. *Id.*

82. Bicycles: Proposed Classification as Banned Hazardous Substance, 38 Fed. Reg. 12,300, 12,300-06 (May 10, 1973) (to be codified at 21 C.F.R pts. 191, 191c.).

83. *Id.*

84. *Id.* at 12300-12301.

85. Petty, *supra* note 13, at 31.

86. Teresa M. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32, 38 (1982).

87. *Forester v. Consumer Prod. Safety Comm’n*, 559 F.2d 774, 784 n.11, 789 n.22 (D.C. Cir. 1977). Under the Child Protection Act, 15 U.S.C. § 1262(e), rulemaking for toys presenting a mechanical hazard were subject to the informal procedures of 5 U.S.C. § 553. However, rules issued under the CPSA were governed by the procedural requirements of 15 U.S.C. §§ 2058, 2060, which mandated public hearings and express findings of need. Thus, while most regulations issued under the old FHSA had to follow procedures that were equal to or more stringent

The first major article on the new regulations appeared in the July 1973 issue of *Bicycling* magazine.⁸⁸ Based on interviews with Paul Hallman, a CPSC attorney, and BIA staffer James Haynes, the article predicted that the banning order would soon be expanded to include adult bicycles, and claimed that the BIA favored this change.⁸⁹ “[W]e have found no biker as yet who supports it,” they wrote, “[o]nly the Bicycling Institute of America has stood out in favor of it.”⁹⁰ The Stockards quoted the BIA’s Haynes as saying, “It is fine, as far as it goes, but it doesn’t go far enough”⁹¹

The article was wrong on both counts. It was true that the CPSC staff was debating whether it was feasible to distinguish between a bicycle intended for children from one intended for adults, but ends up being used by a child. However, there was no way Attorney Hallman could have known of any CPSC decision since none had yet been made. In February 1974, seven months after the article came out, CPSC Assistant General Counsel David Schmeltzer wrote the Commission chairman that it was “questionable . . . whether a regulation applicable to all bicycles, without any distinction made between children and adult bicycles, could sustain a court challenge,” and added that he personally believed “a court would rule that a regulation issued under the [FHSA] covering all bicycles is illegal.”⁹²

Moreover, the BIA was clearly *not* in favor of changing the banning order to include adult bicycles because they did not support *any* banning order. A month before the *Bicycling* article appeared, the BMA had petitioned the CPSC to junk the original FDA-based proposal.⁹³ Instead, it wanted the CPSC to start over again under its own enabling act, the CPSA.⁹⁴ True, the CPSA allowed the Commission to continue down the FHSA procedural road for rules already started by the FDA, (the bike rules had been issued four days before the transfer) but whether it was *required* to do so would later become a source of contention.⁹⁵

than those required under the new act, the old requirements were actually *less* stringent in the case of toys. Moreover, the new legislation did not eliminate 15 U.S.C. § 1262(e), creating a conflict of laws.

88. April Stockard & Don Stockard, *Bike Law: Our Rights and Reasons*, BICYCLING, July 1973, at 18, 42.

89. *Id.*

90. *Id.* at 42.

91. *Id.*

92. *Consumer Product Safety Act Amendments: Hearing on H.R. 5361 and H.R. 6107 Before the Subcomm. on Consumer Protection and Finance of the Comm. on Interstate and Foreign Commerce, 94th Cong. 36-37 (1975)* (comments and recommendations of Schwinn Bicycle Co.).

93. Banning of Hazardous Bicycles and Establishment of Safety Requirements, 39 Fed. Reg. 26100 (July 16, 1974) (codified at 16 C.F.R. 1500.18(a)(12) and pt. 1512).

94. *Id.*

95. See *Forester*, 559 F.2d at 784, 789.

Regardless, the BIA wanted the banning order dropped for three reasons. First, it had invested a lot of time, effort, and money in BMA/6 and didn't want to walk away from the industry standard. But, depending on how the CPSC drew the line between a child's bicycle and an adult bicycle, BMA/6 threatened to create a regulatory nightmare. Recall that BMA/6 covered all bicycles with wheels twenty inches or larger, and those intended for riders over 100 pounds, so-called "regular" bicycles. The smaller and lighter bicycles not included in BMA/6 were called "sidewalk" bicycles. However, BMA/6 made no pretense of considering this a child/adult distinction, as many bicycles in the "regular" category with twenty and twenty-two inch wheels were clearly designed with children in mind.

The BMA firmly believed the CPSC lacked the power to regulate adult bicycles under the FHSA. Their lawyer, Thomas Shannon, told a Congressional subcommittee that the act "only governs toys or other articles *intended* for use by children."⁹⁶ But even if the CPSC had acquiesced to the industry, unless it used a definition of "child's bicycle" matching the BMA/6 definition of a "sidewalk bicycle," its banning order would leave a conflicting hash of BMA/6 and CPSC rules. There would be *three* different regulatory classifications: no BMA/6, but the banning order, for very small sidewalk bicycles; both BMA/6 and the banning order covering regular bicycles that were still small enough to be considered by the CPSC as intended for children; and BMA/6, but no CPSC, for large, expensive bicycles meant only for adults.

Moreover, firms like Schwinn, which both imported and manufactured bicycles, faced additional problems because their European and Japanese suppliers preferred the standards being promulgated by the Geneva-based International Standards Organization ("ISO").⁹⁷ ISO had created a task group ("TC-149") in 1973 dedicated to the development of bicycle standards.⁹⁸ ISO's representative in North America, the American National Standards Institute ("ANSI"), soon followed suit with its own group.⁹⁹ "The European nations wanted to use the ISO standards being developed by TC-149," recalled Schwinn's Townley, "anyone who both imported and built domestically had a great interest in maximizing compatibility between the ISO-ANSI standards and government regulations."¹⁰⁰ The best thing for all manufacturers, both foreign and domes-

96. *Consumer Product Safety Commission Oversight: Hearings on S. 644 and S. 1000 Before the Subcomm. for Consumers of the S. Comm. on Commerce, 94th Cong. 146 (1975)* (statement of Thomas F. Shannon, Bicycle Mfrs. Ass'n).

97. See FRED DELONG, *DELONG'S GUIDE TO BICYCLES & BICYCLING* 40 (1974).

98. *Id.*

99. *Id.*

100. Townley, *supra* note 16.

tic, was simply to ignore the concept of “child’s bike/adult’s bike” and simply come up with one set of workable specifications that all bicycles, except for small, cheap toy bikes could meet.¹⁰¹ While domestic-only makers ideally preferred a set of rules based on BMA/6, Townley stated, “compatibility was the real issue.”¹⁰²

A second reason the BIA wanted the proposed FDA regulations scrapped was because banning orders were not product safety standards – they only defined a “hazardous bicycle,” and the industry wanted a full set of safety specifications for protection from products liability lawsuits. “[I]t is, at best, legally questionable whether the [FHSA] enables the promulgation of complex, highly technical product standards,” cautioned BIA/BMA counsel Shannon, “nowhere in the act or in the legislative history did Congress indicate any intention to grant authority to set prescriptive standards such as those now proposed for the bicycle industry.”¹⁰³ Shannon did not, of course, admit that lawsuits were the concern. Instead, he maintained that the banning order could create an “all-or-nothing” situation where flexible mitigation measures such as repairs, upgrades or partial replacements were not permitted.¹⁰⁴ However, the industry had rarely resorted to such measures in the past, and their use was highly speculative.

Third, and most importantly, the bicycle industry wanted preemption. To prevent a manufacturer from having to meet one set of product safety standards in one state, and another in a second state, Congress determined that once the CPSC issued its standards, those rules took precedence over state law.¹⁰⁵ The old FDA banning orders did not have preemptive effect. Norman Clarke noted that during just one year, 1973, over 400 bicycle-related laws and ordinances were introduced in state legislatures, and the BIA eventually had to dedicate a staff person, administrative assistant, and fax machine full time to support local lobbying efforts.¹⁰⁶ The BIA was especially concerned about rules for nighttime conspicuity. After the original 1972 FDA report calling for enhanced reflectivity standards, the 3M Company developed a reflective tire sidewall for bicycles.¹⁰⁷ It wanted the BMA to include these as mandatory equipment in BMA/6, but the industry refused because they were too expensive, costing about five dollars per bicycle at the factory.¹⁰⁸ Instead, the

101. *Id.*

102. *Id.*

103. *Consumer Product Safety Commission Oversight: Hearings on S. 644 and S. 1000, supra* note 96, at 146-147 (statement of Thomas F. Shannon).

104. *Id.* at 147.

105. *Id.* at 148.

106. Clarke, *supra* note 1, at 550-51.

107. *Id.*

108. *Id.*

BMA came up with a “10-reflector system” with front, rear, wheel and pedal reflectors costing about a dollar per bicycle, and this was very near to what the FDA subsequently put in its banning order.¹⁰⁹ 3M and tire companies tried to do an end-around the federal rules by going to the states. At one point in the spring of 1974, thirty-eight separate bills in twenty-three states were pending dealing with some aspect of bicycle lighting or reflectorization requirements.¹¹⁰ Jay Townley explained the problem to a federal congressional committee:

We have three demonstration bicycles to illustrate the conflict we face . . . [this] bicycle cannot be sold in Rhode Island now; in New York after May and in Nebraska after January . . . The second bicycle, we will call our Rhode Island unit . . . cannot be sold in California now; New York after May, Nebraska after January, and Illinois now . . . This third bike, we call our New York unit because it complies with the current regulation there for reflectorized tires, but it cannot be sold in California . . . All three of these bicycles do meet the federal regulations.¹¹¹

B. SARCASTIC WORDS ABOUT SUPPOSED SNEAKY TRICKS

The BIA’s July 1973 petition to the CPSC caught the attention of a San Francisco-area production analyst named John Forester.¹¹² A devotee of Harold Munn’s “vehicular cycling” theory, he had become a local cycling advocate in the fall of 1972 when the City of Palo Alto enacted a mandatory sidepath law along his favorite commuting route.¹¹³ The ordinance was soon repealed, but instigated his campaign for the universal elimination of bike paths and bike lanes.¹¹⁴ He had not gained many adherents, and an anti-bike path article he wrote for the February 1973 issue of a regional magazine, *Bike World*, had gone largely unnoticed.¹¹⁵ “He was an arcane technical kind of guy without much in the way of persuasive skills,” explained Morgan Groves.¹¹⁶ But a second *Bike World* article, “Toy Bike Syndrome,” published the following October, did get attention.¹¹⁷ Forester alleged a vast conspiracy between the government

109. *Consumer Product Safety Act Amendments: Hearings on H.R. 5361 and H.R. 6107*, *supra* note 92, at 26 (comments and recommendations of the Schwinn Bicycle Co.).

110. *A Quick Digest of Laws to Watch*, BICYCLING, Apr. 1974, at 8.

111. *Consumer Product Safety Commission Oversight: Hearings on S. 644 and S. 1000*, *supra* note 96, at 128 (statement of Jay Townley).

112. Telephone Interview with Dorris Taylor, former partner of John Forester (Nov. 5, 2007).

113. Letter from John Forester, League of Am. Wheelmen, Inc., to Carroll Quimby, President, L.A.W. (Feb. 6, 1973) (on file with the Transportation Law Journal); Palo Alto, Cal., Resolution 4441 (Apr. 19, 1971); Palo Alto, Cal., Ordinance 2652 (Apr. 24, 1972).

114. Palo Alto, Cal., Ordinance 2771 (Feb. 11, 1974) (repealing the provision after twenty-two months).

115. John Forester, *What about Bikeways?*, BIKE WORLD, Feb. 1973, at 36-37.

116. Groves, *supra* note 7.

117. Forester, *supra* note 6, at 25-26.

and American bicycle manufacturers to use bike paths and safety regulations to shut out high-quality imported European racing bicycles, force proficient cyclists off the roads, and create a monopoly for cheap, department-store bikes. Claiming that he spoke for the “true cyclist,” Forester cried, “We are driven off the roads, forced to drive dangerously, and will soon be compelled to ride toy bicycles.”¹¹⁸ He called the CPSC “ignorant bureaucrats,” the BIA-BMA member firms “cycling’s old enemies, the American manufacturers of toy bicycles,” and the new bike-boom era cyclists “the intellectually dissatisfied middle classes,” who “have a basic aversion to machines.”¹¹⁹

Forester’s article reflected a polemical style that frequently alienated potential friends and allies. “He was prone to inflammatory comments,” notes Townley.¹²⁰ Dorris Taylor, Forester’s partner at the time, admits that “style-wise, there were things that could have been different . . . he knew he was always right.”¹²¹ At a national bicycle planning conference later that year, Forester told the audience that when the chairman of his city’s bikeway committee had been struck by a car “we all laughed uproariously. We’d have laughed harder had he been injured seriously,” and described his own cycling technique as “outrunning all those police cars.”¹²² Morgan Groves cautioned him “you run the risk of a kind of pointless martyrdom unless you can join forces with people with similar concerns, develop a consensus, some realistic strategies, and workable tactics.”¹²³ Even the *Bike World* editors felt it necessary to distance themselves from Forester’s overwrought article, stating that “we have no right to accuse the government of collusion with the Bicycle Manufacturer’s Association . . . it is no use writing sarcastic words about supposed sneaky tricks between the BMA and the Federal government.”¹²⁴

It was the idea that the BMA would try to shut out the high-priced foreign racing bicycles prized by enthusiasts that club cyclists really latched onto. “What they plan to enforce will wreck havoc on the sophisticated and expensive bikes that many of us ride,” wrote one worried L.A.W director to Morgan Groves.¹²⁵ Not only cyclists were taken in.

118. *Id.* at 25.

119. *Id.* at 24-25.

120. Townley, *supra* note 16.

121. Taylor, *supra* note 112.

122. John Forester, *Planning for Cyclists as They See Themselves*, PROCEEDINGS OF THE SEMINAR ON BICYCLE/PEDESTRIAN PLANNING & DESIGN, at 315-27 (1974). The conference was held in Florida in December, 1973, although the title page of the proceedings erroneously provides a 1974 date. The 1974 conference was held in New Orleans.

123. Letter from Morgan Groves, Executive Dir., League of Am. Wheelman, Inc., to John Forester (Nov. 20, 1973) (on file with the Transportation Law Journal).

124. *The F.D.A. Versus You*, BIKE WORLD, Oct. 1973, at 3.

125. Letter from William Hoffman, N.Y. Area Dir., League of Am. Wheelman, Inc., to Mor-

Brookings Institution researchers Nina Cornell, Roger Noll, and Barry Weingast asserted in 1976 that bicycle regulations were an “egregious example” of a trade association’s attempt to restrict foreign competition.¹²⁶ The only source they cited was “Toy Bike Syndrome.” Ross Petty, a lawyer and professor at Boston’s Babson College, looked into Forester’s “protectionist theory” in the 1980s.¹²⁷ He recalls Forester “calling me and sending me a pile of papers,” trying to persuade him of an industry-CPSC conspiracy.¹²⁸ Petty’s conclusion? There was “little evidence to support the allegation,”¹²⁹ because most foreign-made bicycles, whether from Europe or Asia, “readily could be modified to satisfy the standard.”¹³⁰ A decade later, Petty was even more blunt, stating, “commentators have criticized [the CPSC] rule as being a blatant attempt to restrict foreign competition. This criticism is misplaced.”¹³¹ While there was, about this time, some concern with “cheap, imported bicycles that were unsafe and giving the industry a bad name,” this was not an important factor, because firms knew that “Japan could easily make a bike to satisfy the CPSC standard, so if the goal was to exclude imported bicycles, this goal would necessarily fail.”¹³² In fact, many, if not most, European manufacturers supported the idea of product safety standards, but as noted previously, they preferred an ISO-ANSI framework.¹³³ Like the BMA, their primary motivation was state law preemption.

Raleigh of America, a wholly-owned subsidiary of British Raleigh, the *Chambre Syndicale du Cycle*, the French cyclemakers’ association, and the *Syndicate des Fabricants d’Equipments et de Pieces Pour Cycle et Motocycles*, the association of French cycle parts manufacturers, all wrote Congress supporting the Schwinn-BMA petition to re-start the rulemaking process under the CPSA.¹³⁴ Raleigh stated that it “specifically sup-

gan Groves, Executive Dir., League of Am. Wheelman, Inc. (Aug. 1, 1973) (on file with the Transportation Law Journal).

126. Nina Cornell, Roger Noll & Barry Weingast, *Safety Regulation*, SETTING NATIONAL PRIORITIES: THE NEXT TEN YEARS, 457-508 (Henry Owen & Charles L. Schultze, eds.) (1976).

127. Petty, *supra* note 13, at 36-39; Petty, *Sport of Bicycle Riding*, *supra* note 75, at 219.

128. E-mail from Ross Petty to author (Sept. 17, 2007) (on file with the Transportation Law Journal).

129. Petty, *supra* note 13, at 37.

130. *Id.*

131. Petty, *supra* note 75, at 219. Petty cites several variations on the “CPSC rules as protectionism” myth. I reviewed them, and found that all either relied on Forester’s *Toy Bike Syndrome* article as its source, or on a secondary work derived from it.

132. *Id.* Petty’s conclusions are outlined in greater detail in several articles, *supra* note 75. John Forester privately acknowledged the CPSC engineers’ concerns about poorly made Taiwanese bicycles: Letter from John Forester to “Cliff,” [probably Dr. Clifford Graves], with copy to Morgan Groves (Oct. 3, 1973) (on file with the Transportation Law Journal).

133. Fred DeLong, *Editor’s Notes: CPSC Standards*, BICYCLING, April 1974.

134. *Consumer Product Safety Act Amendments: Hearings on H.R. 5361 and H.R. 6107*, *supra* note 92, at 266 (letter from William H. Lucking, attorney for Raleigh of America).

ports Schwinn's primary recommendation that the [FHSA] be repealed in its entirety and that concurrently all existing regulations issued under that Act be transferred to the authority of the [CPSC]."¹³⁵ The French associations echoed the BMA concerns that "accurately portray the difficulties presently encountered by bicycle manufacturers as a consequence of state regulations."¹³⁶ They added, "the difficulties are compounded for foreign manufacturers that confront language, communication and transportation problems beyond those borne by domestic manufacturers."¹³⁷

Forester's "Toy Bike Syndrome" became a seminal article. Coming immediately after Ralph Nader's expose of corporate greed and rapacity in the auto industry, and the increasingly lurid theories spun around the death of President Kennedy by Mark Lane and Harold Weisburg, his article successfully turned the "bikeway issue" from a rather arcane municipal engineering spat into American cycling's version of the Dreyfus Affair. Three months after "Toy Bike Syndrome," a nationwide survey of cyclists in the *Journal of the American Institute of Planners* found that only three percent of arterial street cyclists, mostly commuters, considered bike lanes undesirable or inappropriate, although several complained that some of the very early, non-standard designs should be brought up to current configurations.¹³⁸ "You have shown that as presently executed, they [bikeways] are more dangerous," Morgan Groves cautioned Forester, "but I do not think it is logical to jump from the fact you have proven to a rigid anti-bikeways position . . . if cycling enthusiasts neglect the interests of beginners, we all lose."¹³⁹ Forester could not disagree more: "the only persons who have ever demonstrated the viability of cycling in America are schoolchildren and expert cyclists," he said, "a program to encourage cycling can be successful only if it encompasses all those features that expert cyclists have already found necessary."¹⁴⁰

C. WE HAD THE AUTHORITY TO DO SOMETHING

In July 1974, the CPSC promulgated what it hoped would be the final version of the bicycle regulations.¹⁴¹ Rejecting the BIA petition to scrap

135. *Id.*

136. *Id.* at 267-69 (letter from the Chambre Syndicale du Cycle, and the Syndicate des Fabricants d'Equipments et de Pieces Pour Cycle et Motocycles).

137. *Id.*

138. Bonnie Kroll & Robert Sommer, *Bicyclist's Response to Urban Bikeways*, AIP JOURNAL, Jan. 1976, at 42.

139. Letter from Morgan Groves, L.A.W. Executive Dir., to John Forester (Nov. 20, 1973) (on file with the Transportation Law Journal).

140. Forester, *supra* note 122, at 324.

141. 39 Fed. Reg. 26,100 (1974); Darryl Skrabak, *Bike Law: The CPSC Regulations Go to Court*, BIKE WORLD, Apr. 1976, at 56.

the banning order and start over, it announced it would continue under the FHSA. However, arguing that any product that could foreseeably be regularly *used* by children was a product *intended* for children, it extended the banning order to all bicycles.¹⁴² The Commission opened a comment period lasting until August 1974, later extended until March 1975.¹⁴³ Reviewing the latest rules, *Bicycling's* Fred DeLong determined that “a standard Fuji, Raleigh Professional, Schwinn Paramount or Peugeot PX-10 with reflectors added would pass the specifications.”¹⁴⁴ Forester didn't even wait for the revision. By October 1973, he had already decided to sue.¹⁴⁵

The CPSC claimed they couldn't scrap the old FDA procedure because section 30(d) of the CPSA required them to use the FHSA unless they could prove it was inadequate to eliminate or reduce the risk of injury.¹⁴⁶ The BMA countered that a lack of state law preemption hamstringing the effectiveness of the banning order so badly that it could never work, but the CPSC responded that this couldn't be used as a factor in making its evaluation. “Congress said ‘you must first look to the [FHSA] and you must regulate under that act unless you lack sufficient authority to get the job done,’” explained CPSC Chairman Richard Simpson, “well, we had authority to ban, to write a standard. We had authority to enforce. We had authority to do something.”¹⁴⁷ However, as always, there were hidden agendas.

The CPSC, supposedly the model for a new generation of fast, cheap, and efficient federal rulemaking, was getting politically killed. New regulations on swimming pool slides required 570 days, matchbooks, 974; and lawnmowers, 1,670.¹⁴⁸ The CPSC was under great pressure to promulgate standards quickly and inexpensively without having to water them down. Chairman Simpson complained to Congress that:

We have encountered what we believe, at least many believe, to be undue delay. There is due process and then there is “never.” Some of those procedures seem like they end up being “never.” We are not suggesting you should remove the due process procedures, but we have some that we are following on bicycles and fireworks that look like they might never be

142. 39 Fed. Reg. 26,100-111 (July 16, 1974).

143. Skrabak, *supra* note 141, at 56.

144. DeLong, *supra* note 133, at 6.

145. Letter from John Forester to “Cliff” (Oct. 3, 1973) (on file with the Transportation Law Journal).

146. *Forester*, 559 F.2d at 784 n.11.

147. *Consumer Product Safety Act Amendments: Hearings on H.R. 5361 and H.R. 6107*, *supra* note 92, at 181 (testimony of Richard O. Simpson, Chairman, Consumer Prod. Safety Comm'n).

148. Schwartz, *supra* note 86, at 63 n.213.

ended.¹⁴⁹

The procedure did sometimes seem endless. In August 1974, Schwinn, the BMA, Bendix, and Raleigh and Shimano submitted formal, written objections to the July final rules, invoking their right to a public hearing.¹⁵⁰ The CPSC, citing the highly streamlined procedures available under the FHSA exclusively for children's toys, denied the request.¹⁵¹ Explaining to a congressional committee why the bicycle makers thought they should have had a hearing, Chairman Simpson pointed to "differing provisions, rulemaking provisions, that we must follow under HSA if a product is other than a toy which are very, very long and cumbersome."¹⁵² Unfortunately, Simpson and his staff had misread the CPSA's "toy exception" clause, and as a result, the denial of the public hearing was a statutory violation. It is unclear whether the CPSC staff knew at this point whether they had made a mistake. Later actions suggest that they may have known of the mistake.¹⁵³

The following December, the CPSC again postponed the effective date of the rules, but this time, indefinitely.¹⁵⁴ Throughout the first half of 1975, Commission staff met with industry representatives and toured bicycle and component factories in an attempt to iron out differences. "They made many visits," recalled Townley, "Schwinn was the most frequent, but there were also visits to and from China, Japan, Europe, and with ISO and ANSI . . . we ended up in a position where we could determine our own best way to meet the CPSC mandates - using performance specifications, not design restrictions."¹⁵⁵ Ironically, Townley believes that it was this high level of cooperation that helped fuel the conspiracy theories.¹⁵⁶

In response to the Commission's June 1975 request for comments, John Forester was the only private citizen who filed a comment.¹⁵⁷ Consumers no longer cared. The proposals had been so heavily reworked

149. *Consumer Product Safety Act Amendments: Hearings on H.R. 5361 and H.R. 6107*, *supra* note 92, at 181 (testimony of Richard O. Simpson, Chairman, Consumer Prod. Safety Comm'n).

150. 39 Fed. Reg. 31,943-44 (Sept. 3, 1974).

151. *Id.*

152. *Consumer Product Safety Act Amendments: Hearings on H.R. 5361 and H.R. 6107*, *supra* note 92, at 181 (testimony of Richard O. Simpson, Chairman, Consumer Prod. Safety Comm'n).

153. *Forester*, 559 F.2d at 789 n.22. The CPSC did hold a fully noticed meeting on September 9-10, 1974, but it was not a hearing, and the objections submitted were considered petitions (i.e. requests) for changes, not legal challenges. 39 Fed. Reg. 31,943-44 (Sept. 3, 1974); 40 Fed. Reg. 25,480-85 (June 16, 1975).

154. 39 Fed. Reg. 43,536 (Dec. 16, 1974).

155. Townley, *supra* note 16.

156. *Id.*

157. Skrabak, *supra* note 141, at 60; 40 Fed. Reg. 52,815-35 (Nov. 13, 1975).

that for virtually all performance cyclists, they were now irrelevant. DeLong had hit the nail on the head: if a standard European racing bicycle was only affected to the extent that it had to be delivered with ten cheap, quickly removable reflectors, the rules were a dead issue.¹⁵⁸

IV. THE LAWSUIT

A. FROM THE FAT LADY TO FAST EDDY

The final CPSC regulations were issued in November 1975, and were scheduled to take effect the following May.¹⁵⁹ Looking to keep litigation in his own backyard, Forester first filed in San Francisco.¹⁶⁰ James Berryhill and the Atlanta-based Southern Bicycle League (who filed jointly)¹⁶¹ filed next, along with eight industry plaintiffs, including the BMA; Schwinn; Hedstrom (a maker of sidewalk bikes); Raleigh; Bendix; Union (a German parts maker); Shimano (a Japanese parts maker); and the *Chambre Syndicale* of French parts makers.¹⁶² At the time, Schwinn's Jay Townley said his firm filed only to meet evidentiary and procedural requirements. When asked if the firm actually planned to challenge the regulations, he responded with a flat "no."¹⁶³

Others were still trying to salvage the process, but they were increasingly becoming voices in the wilderness. Fred DeLong, *Bicycling's* technical editor, sat on ANSI's technical advisory group and was the American liaison to TC-149, the bicycle committee of ISO.¹⁶⁴ He had been working, with travel grants from Schwinn, as a technical liaison between foreign and domestic manufacturers to find a mutually acceptable set of rules.¹⁶⁵ Similarly, L.A.W. executive director Morgan Groves warned his organization's president that the FDA "proposal needs serious study, as there are both good and bad points in it."¹⁶⁶ He recommended the League "make some input before the regulations are fully adopted."¹⁶⁷ He acknowledged that "L.A.W. is in a precarious position

158. DeLong, *supra* note 133, at 6.

159. 40 Fed. Reg. 52,815-835 (Nov. 13, 1975) (Rules for coaster brakes and chain guards were not effective until November, 1976).

160. John Forester, *History of the CPSC's Requirements in its Bicycle Safety Standard*, www.johnforester.com/Articles/lights/cpschist.htm (last visited Sep. 3, 2009).

161. For this reason, I shall refer to Mr. Berryhill and the Southern Bicycle League collectively as "Berryhill".

162. *Forester*, 559 F.2d at 781.

163. *Consumer Product Safety Commission Oversight: Hearings on S. 644 and S. 1000*, *supra* note 96, at 132-33 (statement of Jay Townley and John R. F. Baer).

164. DeLong, *supra* note 133.

165. Townley, *supra* note 16.

166. Letter from Morgan Groves, Executive Dir., L.A.W., to Carroll Quimby, President, L.A.W. (Aug. 2, 1973) (on file with the Transportation Law Journal).

167. *Id.*

in that the industry has put up some money to establish the central office,"¹⁶⁸ but insisted that the League "needs to be able to maintain its independence and opportunity to oppose, where appropriate, the desire of the industry . . . the industry has done a great deal for the League, and it's time now to show what we can do for ourselves."¹⁶⁹

Groves's solution was to form an expert policy committee to deal with technical matters such as product safety rules and bikeway specifications, and in November 1973, he wrote Forester inviting "you, Fred DeLong, Dr. Bond, Floyd Frazine, Jim Konski and any others with the background and interest to work on an official position for adoption by the League. Fred is interested, and the need is critical. I think the platform should represent the whole range of cyclists, from the fat lady to fast Eddy."¹⁷⁰ Forester agreed, writing to Groves, "I'll be very glad to work with others."¹⁷¹ Groves later thanked Forester for his contribution, telling him, "[y]our work [sic], along with Fred DeLong, Dr. Bond, Carroll Quimby, and many others, has been invaluable to bicycling as a whole."¹⁷² But by this time, the "Toy Bike Syndrome" article had come out, and he went on to advise Forester:

I think the battle has to be fought rationally, and it does no good to write off as enemies the people and institutions who disagree on specific points. Even the BIA and the BMA (which have some grievous faults) can and should be our allies on particular points. We should give them hell, but we should pat them on the back where possible, too.¹⁷³

Forester could not accept such advice, and the two broke off contact.

Fred DeLong became one of those "written off as an enemy." Forester later accused him of being bought off by government and the industry. "The CPSC obtained the services of Fred DeLong to advise it about changes that would get the cyclists off its back," he later wrote.¹⁷⁴ "DeLong [was] a well-known cyclist with a long history of friendship with the

168. Letter from Morgan Groves, Executive Dir., L.A.W., to John Forester (Nov. 6, 1973) (on file with the Transportation Law Journal).

169. Memorandum from Morgan Groves, Executive Dir., L.A.W., to Carroll Quimby, Robert Reid and Phil Menninger, Executive Comm., L.A.W. (Aug. 7, 1974) (on file with the Transportation Law Journal).

170. Letter from Morgan Groves, L.A.W. Executive Dir., to John Forester (Nov. 6, 1973) (on file with the Transportation Law Journal). Robert Bond, Floyd Franzine, Jim Konski were members of the L.A.W. board.

171. Letter from John Forester to Morgan Groves, L.A.W. Executive Dir. (Nov. 14, 1973) (on file with the Transportation Law Journal).

172. Letter from Morgan Groves, L.A.W. Executive Dir., to John Forester (Nov. 20, 1973) (on file with the Transportation Law Journal).

173. *Id.*

174. JOHN FORESTER, BICYCLE TRANSPORTATION: A HANDBOOK FOR CYCLING TRANSPORTATION ENGINEERS 366 (2d ed. 1983) (1977).

bicycle manufacturers.”¹⁷⁵ According to Forester, only DeLong’s unique technical knowledge made it possible for the CPSC to secretly modify the original FDA banning order to the point where it could feasibly cover adult bicycles. “Fred should have told the CPSC . . . [that] he would have nothing to do with it,” he wrote, “[i]nstead, Fred jumped right in.”¹⁷⁶ However, he is refuted by his own correspondence from that period, expressing no concern about working with DeLong on CPSC issues through Groves’s L.A.W committee. Jay Townley denies that DeLong was paid by the CPSC, explaining that “Fred didn’t have the breath of contacts to do all the coordination between the manufacturers, standards institutes, and the government, but he was important on the consumer end.”¹⁷⁷ Townley does acknowledge that Schwinn underwrote part of DeLong’s expenses for participating in ANSI committee meetings in California (DeLong lived in Pennsylvania) and in an ISO TC-149 committee meeting in Paris in April, 1974, but these dealt with coordinating BMA/6 and ISO’s new international bicycle standards, not the CPSC rules.¹⁷⁸ Finally, the CPSC was not dependent on DeLong: it had its own engineering staff. “The CPSC engineer was a man named O’Connor,” Townley recalls.¹⁷⁹ Forester knew this, and he mentions O’Connor and DeLong discussing efforts to make CPSC and ISO brake block standards more compatible in a letter he wrote in October 1973, shortly before he and DeLong started working together on the League’s committee.¹⁸⁰

Relations between the two men were further strained over a bicycle safety education program that DeLong had developed in 1972, and was now updating for a Pennsylvania non-profit organization, the Bicycle and Pedestrian Transportation Research Center and its director, Ralph Hirsch. Hirsch described the education program as combining “the Fred DeLong approach to cycling proficiency training”¹⁸¹ with a “hazard record approach” resulting from research work that Dr. Ken Cross had done for the California Office of Traffic Safety.¹⁸² In the end, the Pennsylvania group never found the money to widely distribute it. Forester appropriated the program, incorporated Harold Munn’s “vehicular cy-

175. JOHN FORESTER, *EFFECTIVE CYCLING* 523 (6th Ed. 1993) (1976).

176. *Id.*

177. Townley, *supra* note 16.

178. *Id.*

179. *Id.*

180. Letter from John Forester to “Cliff” (Oct. 3, 1973) (on file with the Transportation Law Journal).

181. Letter from Ralph B. Hirsch, Executive Dir., Bicycle and Pedestrian Transp. Research Ctr., to Morgan Groves, L.A.W. Executive Dir., and one page attachment “The Bicycle and Pedestrian Transportation Research Center: What it is and What it Does” (Nov. 12, 1975) (on file with the Transportation Law Journal).

182. *Id.*

cling” ideas, jazzed it up with some of his *Bike World* polemics on “aggressively defensive cycling,” and tried to sell the resulting concoction to the L.A.W. under the trade name “Effective Cycling.”¹⁸³ In the end, as Jay Townley recalls, “DeLong and Forester disliked each other intensely.”¹⁸⁴

Meanwhile, illness had forced Morgan Groves to step away from his position as L.A.W. executive director in the summer of 1975.¹⁸⁵ He resigned in November, although he remained active on the National Committee on Uniform Traffic Laws and Ordinances (“NCUTLO”), an organization that maintains the model Uniform Vehicle Code (“UVC”), used by most states for their traffic laws.¹⁸⁶ As L.A.W. executive director, he had been invited to serve on the committee in 1974, and when the League’s board decided not to immediately hire another executive director, he was asked to stay on.¹⁸⁷

Forester seemed especially piqued by the CPSC’s brake regulations. In this, he was on the same side as most of the industry, which preferred ISO’s international standards.¹⁸⁸ Forester, however, couldn’t have cared less about ISO. The CPSC rules required caliper brake pads to survive a 250-degree Fahrenheit heat soak (typically in an oven) for thirty minutes without damage.¹⁸⁹ Forester wanted coaster brakes subject to a “similar” heat test. By “similar,” he didn’t mean baking them at 250 degrees (meaningless, as their performance would be unaffected), but rather subjecting them to the same calorific load that a bicycle with front-and-rear handbrakes would have to generate to heat four caliper brake pads to 250 degrees for thirty minutes.¹⁹⁰ This meant heating coaster brakes to over 900 degrees Fahrenheit. Since he knew no coaster brake could take that,

183. Harold C Munn, *Bicycles & Traffic*, TRANSPORTATION ENGINEERING JOURNAL 753-62 (1975) (discussing vehicular cycling); John Forester, *Toy Bike Syndrome*, BIKE WORLD 24-27 (Oct. 1973).

184. Townley, *supra* note 16.

185. Letter from Morgan Groves, former Executive Dir., League of Am. Wheelman, Inc., to John S. Allen (October 31, 2009) (on file with the Transportation Law Journal).

186. *Id.*; see also NAT’L TRANSP. SAFETY BD., SAFETY RECOMMENDATION H-02-07 (2002) (explaining that the NCUTLO “maintains the Uniform Vehicle Code”).

187. Groves, *supra* note 7.

188. Bicycle Safety Regulations, 40 Fed. Reg. 52,815, 52,817-18 (Nov. 13, 1975).

189. *Forester*, 559 F.2d at 792; 16 C.F.R. § 1512.5(c) (1976), *referencing* the Footbrake and Performance Test codified in 16 C.F.R. § 1512.18(e) (1976).

190. John Forester, *Safe Brakes that Burn Up*, http://www.johnforester.com/Articles/Bicycle-Eng/safe_brakes_that_burn_up.htm (last visited March 28, 2010) (Originally in BIKE WORLD, Mar. 1974). Forester applied a load of 1.09 horsepower for 9.7 minutes using a steep downhill. That is the horsepower equivalent of riding a bicycle a little over 31 mph. FRED DELONG, *DE-LONG’S GUIDE TO BICYCLES AND BICYCLING* 187 (Chilton Book Co. 1974). The pioneer Marin County mountain bikers of the 70’s raced down a Mt. Tamalpais fire road that was 2.1 miles long, descended 1,300 feet and had about a dozen switchbacks and sharp curves using only a coaster brake. Although the brakes had to be repacked with grease after one or two trips, they survived

he was essentially demanding that coaster brakes be banned. Neither the CPSC or ISO standards were meant to measure maximum energy absorption or dissipation. They were merely intended to ensure that a brake pad would not melt under normal conditions.¹⁹¹

He argued his case in a lengthy March 1974 *Bike World* article in which he gleefully burned up several coaster brakes while denigrating the CPSC, but admitted in passing that “[t]he government formula is approximately right” and, on a series of test runs, measured caliper-brake pad temperatures within fifteen percent of CPSC estimates.¹⁹² While again claiming that the only reason for the brake standards was “to favor domestic over superior foreign bicycles,”¹⁹³ he forgot to mention that he had his own conflict of interest: at the time, he was being paid as an expert witness to testify in litigation against the Bendix Corporation, the nation’s largest supplier of coaster brakes.¹⁹⁴ “There is no ideological basis to anything Forester does” complains James Green, a North Carolina engineer, competitive cyclist, and author on bicycle design, “[h]e will sway in the wind depending on who is paying him.”¹⁹⁵

B. TULLIO WAS NOT HAPPY

Throughout the first half of 1975, the bicycle regulations plodded simultaneously through the administrative, judicial, and legislative processes. In April, the eight separate lawsuits were combined in Washington, D.C. and Congress held hearings on various facets of bicycle safety, with the industry pleading their case for scrapping the banning order and moving everything to the CPSA.¹⁹⁶ Preemption was still a primary reason. “Why do [we] want to be regulated by a Federal agency?” responded Schwinn’s Townley to one Senator’s question, “[t]he answer clearly, as he [Chairman Simpson] pointed out in his testimony, is the problem of preemption and conflicting State regulations. If we don’t

scores of runs. FRANK BERTO, *THE BIRTH OF DIRT: THE ORIGINS OF MOUNTAIN BIKING* 41 (Van der Plas Publ’ns 1999).

191. *Forester*, 559 F.2d at 792-93.

192. *Forester*, *supra* note 190. “[T]he front rim exceeded 175 deg. F., but did not exceed reach 200 . . . the rear rim did not reach 150 . . . the government formula . . . predicts 160.”

193. *Forester*, 559 F.2d at 792 n.24; *see generally* *Forester*, *supra* note 190.

194. *See* *Bendix Corp. v. United States*, 79 Cust. Ct. 108, 117 (Cust. Ct. 1977); *see also* www.johnforester.com, Completed Cases with Deposition or Testimony, <http://www.johnforester.com/Consult/cases1.htm> (last visited March 27, 2010) (indicating that Mr. Forester assisted the prosecution against Bendix).

195. Letter from James M. Green to author (Sept. 7, 2007) (on file with the Transportation Law Journal); *see also* *Bendix*, 79 Cust. Ct. at 117.

196. *See generally* S. Rep. No. 94-251, at 4 (1975) (explaining that Congress held “5 days of hearings” and “received testimony from a variety of interested parties including trade associations, consumer groups, lobbying organizations, manufacturers, national retailers, independent testing laboratories, and the Consumer Product Safety Commission itself.”).

have one good national standard, quite honestly in these times there are manufacturers that will go out of business. . .”¹⁹⁷ As a substitute, the CPSC proposed adding a preemption clause to the FHSA so that banning orders would preempt state laws, but even Chairman Simpson acknowledged that this could be too little, too late: “they [the bicycle industry] still would be faced with another problem, that the standard itself or the regulation may be stricken,” he told the Senate committee, “there are some suits currently pending which challenge the legality of the regulation as covering all bicycles. . . [s]o I think they had two problems.”¹⁹⁸ Ultimately, Congress settled on the compromise: it granted state law preemption power to banning orders.¹⁹⁹ Congress also gave the CPSC greater discretion to discontinue FHSA carry-over rulemaking and start anew under the CPSA,²⁰⁰ but the Commission, under heat from consumer advocacy groups for dragging its feet and mired in the *Forester* case, soldiered on.

The last final version of the bicycle rules was published in November 1975,²⁰¹ about eighteen months later than the original rules proposed in 1973.²⁰² The final version of the rules had an effective date of May 1975.²⁰³ In December, Schwinn, the last of the industry plaintiffs, withdrew from the lawsuit, leaving only *Forester* and *Berryhill*.²⁰⁴ David Schmeltzer, of the CPSC legal staff, explained that the industry plaintiffs had either been seeking extensions to the effective date or refinements to the standards, and these had been “granted or ironed out.”²⁰⁵ Jay Townley agreed: “we ended up in a position where we could determine our own way to meet the regulation . . . [so] we backed off.”²⁰⁶ He recalled a meeting he attended in Milan in May 1976. “Tullio [Campagnolo, the famous bicycle component-maker,] was not happy - he was quite upset - but by the end we had assured him, showing him plans and specifications,

197. *Consumer Product Safety Commission Oversight: Hearings on S. 644 and S. 1000, supra* note 96, at 133 (statement of Jay Townley, Schwinn Bicycle Co. and John R.F. Baer, Counsel, Price, Cushman, Keck, Majom & Cate).

198. *Id.* at 303 (statement by Richard O. Simpson, Chairman, Consumer Prod. Safety Comm’n).

199. Consumer Product Safety Commission Improvement Act of 1976, Pub. L. No. 94-284 § 17(b), 90 Stat. 503 (codified as amended at 15 U.S.C. § 1203 (2006)).

200. *Id.* § 16 (repealed 2008).

201. Requirements for Bicycles, 40 Fed. Reg. 52,815, 52,815-28 (Nov. 13, 1975) (to be codified at 16 C.F.R. pt. 1512); Requirements for Bicycles, 40 Fed. Reg. 52,828, 52,828-35 (Nov. 13, 1975) (to be codified at 16 C.F.R. pts. 1500.18(a)(12), 1512).

202. Bicycles: Proposed Classification as Banned Hazardous Substance, 38 Fed. Reg. 12,300, 12,300-06 (May 10, 1973) (to be codified at 21 C.F.R. pts. 191, 191c.).

203. Requirements for Bicycles, 40 Fed. Reg. 52,815, 52,816 (Nov. 13, 1975); Requirements for Bicycles, 40 Fed. Reg. 52,828, 52,828 (Nov. 13, 1975).

204. Skrabak, *supra* note 141, at 59.

205. *Id.*

206. Townley, *supra* note 16.

that it could be done with minor changes. This was true throughout the industry - Shimano, Huret, SunTour, all of them.”²⁰⁷ Bicycle makers, both foreign and domestic, withdrew, leaving the field to the advocates for whom they no longer had much empathy.

Looking for an objective point of view, Bike World asked Paul Hill, a lawyer, researcher at Omaha’s Creighton University Law School, avid cyclist, and later a widely published author in bicycle law, to review the case.²⁰⁸ He concluded, “as far as the average rider is concerned, the only rule of consequence to him apparently will be the reflectors requirement,” and recommended, “we stop quibbling over it.”²⁰⁹ He warned, “we may be past the point of CPSC rules or nothing. We may instead have CPSC rules or bizarre and conflicting state and local laws.”²¹⁰ After examining the oft-repeated claim that a banning order could not be applied to adult bicycles, Hill cautioned that “I do not think the CPSC is as vulnerable on this point as some cyclists feel.”²¹¹

Many dealers and distributors focused on the meaning of “one of a kind” bicycles, which were exempt from regulation.²¹² Forester attended a May 1976 CPSC meeting, after which he complained that staff members refused to precisely define what a “one-of-a-kind” bicycle was.²¹³ In fact, the Commission had already issued *two* advisory opinions *in writing* clarifying the matter.²¹⁴ Keep in mind that all bicycles are shipped to retailers in various degrees of disassembly, but some high-end bicycles are assembled on a made-to-order basis from a frame and components individually selected by the customer. Although neither the frame nor parts are individually tailor-made, the resulting bicycle is, as a whole, a unique creation. The CPSC was concerned that some firms would attempt to circumvent the regulations by simply shipping stock bicycles lacking a few components in one box and the missing parts in another, so they based the definition on what they labeled an “individuality” requirement. Unless “the assembly process is unique by individual order and substantially involves non-stock components,” a bicycle was considered stock.²¹⁵ For-

207. *Id.*

208. Paul Hill, *Bicycle Laws and Regulations*, BIKE WORLD, Feb. 1976, at 28-31; see PAUL F. HILL & DOUGLAS HAYDUNK, *BICYCLE ACCIDENT RECONSTRUCTION AND LITIGATION* (4th ed. 1996).

209. *Id.* at 28-31.

210. *Id.* at 28.

211. *Id.* at 29.

212. The exemption is in 16 C.F.R. § 1512.1 (2009). The definition of “one-of a kind” is contained 16 C.F.R. § 1512.2(e) (2009): “One-of-a kind bicycle means a bicycle that is uniquely constructed to the order of an individual consumer other than by assembly of stock or production parts.”

213. Forester, *Logic Lost in CPSC Ruling*, BIKE WORLD, July 1976, at 7.

214. CPSC Adv. Op. No. 140 (Oct. 11, 1974); CPSC Adv. Op. No. 186 (Mar. 10, 1975).

215. Letter from C. Smith, Gen. Manager, Mel Pinto Imp., Inc., to Consumer Prod. Safety

ester claimed this meant the CPSC would exempt only utterly unique bicycles made completely from scratch.²¹⁶

However, his assertion ignored a second written advisory opinion issued almost two years earlier explaining that “imported frames . . . are not covered by our regulation because they are not fully assembled or ready-for-assembling bicycles but merely parts of bicycles . . . [and] the finished bicycles you build on those frames are not covered because . . . they are classified as ‘one-of-a-kind bicycles.’”²¹⁷ Thus, there was no need to agonize about whether components were “stock” if the frame they were going on was individually made or imported and the assembly process was “unique by individual order.”²¹⁸ *Bicycling’s* Don and April Stockard, never fans of the CPSC, had explained this to the cycling community back in September 1974. “The best explanation” they wrote, could be given through an example familiar to most readers. “If you order a bicycle and it must be built to your specifications, the bicycle would be exempt. If, on the other hand, it is not necessary to construct the bicycle specifically for you, no matter how expensive . . . it would be subject.”²¹⁹ Forester tried to use the San Francisco meeting to bully the CPSC into a verbal interpretation that would open a new “two-box” loophole, but by now the CPSC staff knew him well enough not to give him a straight answer.²²⁰

Oral arguments were heard in October 1976. Ironically, most of the plaintiffs’ arguments were those originally raised by the BMA: 1) the FHSA allowed only outright product bans, not product specifications (Forester and Berryhill); 2) the FHSA permitted only the specification of prohibited features; it could not create positive rules defining a good bicycle (Forester); 3) the FHSA was limited to items intended for use by children and could not be used to regulate adult products (Forester); 4) the rulemaking process violated the plaintiffs’ Constitutional due process protections (Berryhill); 5) the sixteen rules actually promulgated were so

Comm. (Feb. 5, 1975), available at <http://www.cpsc.gov/library/foia/advisory/186.pdf>; Letter from Michael A. Brown, Gen. Counsel, Consumer Prod. Safety Comm., to C. Smith, Gen. Manager, Mel Pinto Imp., Inc. (Mar. 10 1975), available at <http://www.cpsc.gov/library/foia/advisory/186.pdf>.

216. Forester, *supra* note 213, at 7.

217. Letter from James Pickering, Pickering Cycles, to Consumer Prod. Safety Comm. (Aug. 21, 1974) available at <http://www.cpsc.gov/library/foia/advisory/140.pdf>; Letter from Michael A. Brown, Gen. Counsel, Consumer Prod. Safety Comm., to James Pickering, Pickering Cycles (Oct. 11, 1974) available at <http://www.cpsc.gov/library/foia/advisory/140.pdf>.

218. Letter from Michael A. Brown, Gen. Counsel, Consumer Prod. Safety Comm., to C. Smith, Gen. Manager, Mel Pinto Imp., Inc. (Mar. 10, 1975) available at <http://www.cpsc.gov/library/foia/advisory/186.pdf>.

219. Don Stockard & April Stockard, *Bike Law: The CPSC (no FDA) Regulations for Bicycles*, *BIKE WORLD*, Sept. 1974, at 18.

220. Forester, *supra* note 213, at 7.

technically flawed that they were ineffective in eliminating cycling injuries (Forester).²²¹

None of these arguments were as strong as they could have been. Berryhill argued against the tortured procedural history of the rules on Constitutional grounds, not as mere statutory violations.²²² This proved to be a strategic decision that even the court itself eventually called into question.²²³ Forester's strongest argument was that the FHSA's "products intended for children" language couldn't be stretched to cover bicycles clearly meant for adults, and thus the CPSC could only regulate small, cheap, toy bicycles. However, he dissipated most of his time, effort, and brief pages on what were essentially pointless digressions.

For obscure reasons, the 10-reflector rule became his *bête noire*. His position on nighttime conspicuity changed repeatedly over the course of the litigation. Back in 1973, he had demanded no federal conspicuity standards at all, claiming that "we'd be better off neglected,"²²⁴ a position he still held a year later when he told *Bike World* readers that he was suing the CPSC "to have the whole sorry mess set aside as incompetent and illegal."²²⁵ However, in his opening brief, he admitted that the Commission did have the authority to regulate children's bicycles, but argued that the standard should have mandated a front headlight requirement instead of reflectors.²²⁶ Apparently, he believed it was more likely the court would restrict the Commission's jurisdiction to children's products than void the rules completely.²²⁷ Following his hunch, he hoped he could convince the court to change the conspicuity requirement from reflectors to lights.²²⁸ If successful, children's bicycles would need to be equipped with a headlight, while adult bicycles would go unregulated. He may have come closest to revealing his strategy in a 2002 memoir of the case, when he wrote that "the manufacturers were terrified that they might be required to provide lighting systems," and that "for the kind of bicycles that the BMA sold, provision of a lighting system that would

221. *Forester*, 559 F.2d at 774 (other issues pertaining to product labeling have been omitted for brevity).

222. Probably to try to recover attorney's fees and costs. See 42 U.S.C. § 1983 (2006).

223. "It is unclear why these petitioners chose to rely upon the Constitution rather than upon specific provisions of the Administrative Procedure Act." *Forester*, 559 F.2d, at 787.

224. *Forester*, *supra* note 6, at 27.

225. John Forester, *Hand me Down Standard*, *BIKE WORLD*, Sept. 1974, at 4.

226. *Forester*, 559 F.2d at 797.

227. *Agenda for NUTCLO Subcommittee on Operations Meeting*, CPSC Adv. Op. No. 269 (1978), available at <http://www.cpsc.gov/library/foia/advisory/269.pdf>.

228. Also at this time, Forester started a bicycle accessories firm, which sold a proprietary front headlight system. Forester claimed that the only two worthwhile headlight systems were his and acetylene lamps, which hadn't been made for 50 years because of their propensity to explode. JOHN FORESTER, *EFFECTIVE CYCLING* 344-55 (MIT Press 6th ed. 1993) (1976) (illustrating his headlight systems).

continue to function under childish use would probably double the cost of the bicycle.”²²⁹

Forester seemed to be aiming for some type of domestic bicycle tariff, one that would serve the dual purpose of driving American cycle makers out of business while making bicycles too expensive for the casual, occasional, or indifferent cyclists he loathed so much. “The bicycle didn’t exist from around 1920 to 1965,” he wrote, “adult cyclists were generally respected [because] there were too few to be a nuisance to auto drivers. Now we have 10 to 50 times as many cyclists - enough to be uncomfortably visible.”²³⁰ Forester hoped to use the CPSC ruling to turn the clock back to an idyllic, pre-bike boom era. “Before 1970, cyclists were able to operate on the road,” his former partner, Dorris Taylor, explains.²³¹ “Government started making rules and regulations . . . John saw [it as] catering to the least common denominator.”²³² However, in his last reply brief, Forester returned to his original position that the bicycle rules should contain no nighttime conspicuity standards at all, probably as a result of his belief that the BMA was trying to outflank him through the UVC.²³³

V. THE NCUTLO AFFAIR

A. A REAL TIRADE

The *Forester* case was extraordinarily drawn out. Although oral arguments were heard in October 1976, the court didn’t hand down a ruling for another eight months. In the spring of 1977, while everyone waited, Schwinn and the BMA submitted a proposal to NCUTLO requesting a change to the UVC to eliminate the requirements for reflectors and brakes on small sidewalk bikes.²³⁴ Ostensibly, this would make the UVC more consistent with CPSC rules. “Any state mandating equipment which is not identical to the [CPSC] requirements will be preempted,” they explained, “[if approved] no state can establish a requirement applicable to bicycle equipment regulated by the CPSC unless it is identical to the CPSC requirement.”²³⁵ The specific amendment language was limited to sidewalk bikes, but the supporting documentation seemed to make no distinction between sidewalk and regular bicycles.²³⁶

229. John Forester, *American Cycling From the 1940's as I Remember It*, <http://www.johnforester.com/Articles/Social/My%20History.htm> (last visited Oct. 21, 2008).

230. Forester, *supra* note 115, at 36.

231. Taylor, *supra* note 112.

232. *Id.*

233. *Forester*, 559 F.2d at 797.

234. *Agenda for NUTCLO Subcommittee on Operations Meeting*, *supra* note 227.

235. *Id.*

236. The proposal amended four sections of the UVC. Sections 12-703 (rear reflectivity), 12-

Previously, 3M had approached the NCUTLO with a proposal inserting reflective sidewalls as mandatory equipment into the UVC, or at least permit them as an alternative to the 10-reflector system. “3M wanted reflective sidewalls on all bicycles and Schwinn and the others didn’t want it,” recalls Morgan Groves who, though no longer with the L.A.W., still sat on NCUTLO.²³⁷ The firm was the world’s largest maker of reflective materials, and Groves said they “had a heavy hand in its [NCUTLO] rulemaking.”²³⁸

The industry believed that there was a functional difference between federal regulations that required makers to equip their products with mandatory safety equipment, and state laws directing the owners of those products to use optional safety devices for certain types or methods of operation. The former was an “equipment” regulation, while the later was a “use” regulation. In 1972, Schwinn’s southern distributor had been sued in Georgia by the parents of a twelve-year-old boy struck while riding his Stingray on a state highway at night.²³⁹ The parents argued that Schwinn and its dealer had committed various product liability torts because they did not equip the bicycle with a headlight.²⁴⁰ Schwinn countered that a bicycle without a headlight is adequate for the ordinary uses of a bicycle, and that a headlight is an accessory device the user must add to mitigate the obvious peril of nighttime riding.²⁴¹ Schwinn prevailed, and the industry was now trying to codify the idea that if a bicycle met the CPSC standards it met all “equipment” mandates, and while states were free to impose other “use” requirements, these obligated only the owner/operator, not those in the chain of commerce.²⁴²

At best, the rationale for the amendment was nebulous, and just the idea of affirmatively blocking states from adopting their own conspicuity or brake requirements for sidewalk bicycles that may yet find their way on to the road – if that’s what was intended – was fairly cynical. Townley denies that this was, in fact, the case: “we did not attempt to use

704 (side reflectivity), and 12-706 (requirement for brakes) received almost identical language exempting bicycles with maximum seat heights of less than 25 inches. A new subparagraph (b) was proposed for Section 12-701 (equipment on bicycles) explicitly stating that “nothing herein is intended to be, nor shall be construed as being in conflict with the requirements of the Federal Bicycle Safety Standard” *Id.* at 77-83.

237. Groves, *supra* note 7. Not all bicycle makers opposed reflective sidewalls. Ross bicycle (Chain Bicycle Corp.) supported the idea, but agreed to remain silent so as not to oppose the BMA position. Townley, *supra* note 16.

238. Groves, *supra* note 7.

239. Poppell v. Waters, 190 S.E.2d 815, 815-17 (Ga. Ct. App. 1972).

240. *Id.* at 816.

241. *Id.*

242. Poppell was a somewhat thin reed to lean on, as the court’s decision suggested that had the parents simply told the dealer the boy planned on nighttime use, selling a bicycle unequipped with a headlight may have amounted to selling an unfit product. *Id.*

NCUTLO and the CPSC to preempt local highway laws . . . these were use-oriented laws, not equipment requirements.”²⁴³ On the other hand, the supporting arguments submitted by the industry gave the impression that, even if this wasn’t the intent, it could become the result, as a clear use/equipment distinction did not always appear in the written arguments.²⁴⁴ While the motives involved are murky, it was clear that the proposal didn’t do the one thing Forester claimed it did: prevent states from adopting headlight laws.²⁴⁵

Both Forester and Morgan Groves attended the Chicago meeting. Afterward, Forester claimed that the BMA lawyers warned the Committee that the 10-reflector rule *already* preempted state headlight laws.²⁴⁶ However, Groves says that the BMA lawyers insisted only that the 10-reflector standard prohibited the mandatory imposition of 3M’s reflectorized sidewalls.²⁴⁷ Groves characterized the meeting as “a real tirade,” and both left angry with the other.²⁴⁸ Groves became the latest Forester ally to now be “written off as the enemy.” Forester later claimed Groves had snubbed him when he asked the L.A.W. to join him as a plaintiff in the CPSC litigation because Groves was an industry plant who “made damn sure that the L.A.W.’s directors did not hear about the proposed bicycle standard”²⁴⁹ This is simply not true. On August 2, 1973, Groves sent L.A.W. president Carroll Quimby a copy of the original FDA draft rule, warning him, “[t]he proposal needs serious study.”²⁵⁰ As previously discussed, Groves asked Forester to work with a committee consisting of Fred DeLong and League board members Robert Bond, Floyd Frazine, and Jim Konski to develop policy responses to federal bikeway and product safety initiatives.²⁵¹ Forming a standing technical committee to “represent L.A.W. in the development of safety and performance standards for bicycles” was identified as a “Board Involvement

243. Townley, *supra* note 16.

244. See *Agenda for NUTCLO Subcommittee on Operations Meeting*, *supra* note 227, at 79.

245. See *id.* at 84. Although he later denied making such a categorical statement, Forester did say this in his agenda comments to the NUCTLO: “When the CPSC regulations came into effect in May 1976 all requirements in state vehicle codes for bicycle brakes and nighttime protective equipment became theoretically null and void.” *But see id.* at 78. However, the proposed amendment did not change Section 12-701 of the Uniform Vehicle Code, requiring that “[e]very bicycle when in use [during darkness] shall be equipped with . . . a lighted lamp. . . .” Thus, it is very unlikely that the proposed amendment, had it been adopted, would have been preemptive.

246. Forester, *supra* note 229.

247. Groves, *supra* note 7.

248. *Id.*

249. Forester, *supra* note 160 (claiming that Groves deliberately refrained from commenting on the CPSC’s proposed rules in order to deny the organization standing to sue).

250. Letter from Morgan Groves, Executive Dir., L.A.W., to Carroll Quimby, President, L.A.W. (Aug. 2, 1973) (on file with the Transportation Law Journal).

251. Letter from Morgan Groves, Executive Dir., L.A.W., to John Forester (Nov. 6, 1973).

Goal” in the 1974 Draft Work Plan submitted by Groves to the L.A.W. board in October 1973, although it is not known if the board acted on this recommendation.²⁵² Finally, Groves opposed a suggestion by outgoing president Carroll Quimby and incoming president Phil Menninger in the fall of 1974 that the League attempt to fix its long-standing financial problems by selling high-priced corporate memberships, explaining that his “reason for not wanting to pursue major dues contributions from the industry is that L.A.W. needs to be able to maintain its independence and opportunity to oppose, where appropriate, the desires of the industry.”²⁵³

There is no record that Forester asked the L.A.W. to join the CPSC suit as a co-plaintiff, but Forester did write a friend in October 1973, informing him he was going to sue the CPSC and asking him to spread the word that “I am trying to get some philanthropic foundation money to finance my support while I undertake this in the public interest.”²⁵⁴ He then forwarded a copy of the letter to Groves at the L.A.W. offices.²⁵⁵ Forester had been out of work since 1972, and when he started his bicycle advocacy work, he promised his partner, Dorris Taylor, that she would have to support him for only two years.²⁵⁶ With the imminent end to his court appeal in the Palo Alto bikeways case, (it was decided against him in November 1973),²⁵⁷ the clock was running out. What he probably wanted from the L.A.W. wasn’t a co-plaintiff, it was a subsidy, and Groves wouldn’t give him one.

A year after the NCUTLO meeting, Forester joined the L.A.W.’s board and immediately started pitching his “Effective Cycling” education course to the organization. The board subsequently adopted it,²⁵⁸ and Forester set up a company to act as the sole-source provider of the textbook. Some parts of the book were highly critical of the BMA and American firms, and the industry withdrew its financial support from the League, not to return for over a decade.²⁵⁹ Tim Blumenthal, who directs the bicycle industry promotion group that has provided some financial support since 1999 to the L.A.W., believes that the League was very for-

252. Morgan Groves, *Draft Work Plans-1974 1* (League of Am. Wheelmen).

253. Memorandum from Morgan Groves, Executive Dir., L.A.W., to Carroll Quimby, Robert Reid and Phil Menninger, Executive Comm., L.A.W. (Aug. 7, 1974) (on file with the Transportation Law Journal).

254. Letter from John Forester, to “Cliff” (probably Dr. Clifford Graves) with copy to Morgan Groves (Oct. 3, 1973).

255. *Id.* (carrying an L.A.W. office date stamp of October 11).

256. JOHN FORESTER, *NOVELIST & STORYTELLER: THE LIFE OF C.S. FORESTER* 783 (2000).

257. Letter from John Forester to Morgan Groves, Executive Dir., League of Am. Wheelmen, Inc. (Nov. 14, 1973) (on file with the Transportation Law Journal).

258. Bill Hoffman, *A Brief History of the League* (May 26, 2007), <http://www.labreform.org/history.html>.

259. Blumenthal, *supra* note 7.

tunate to survive the decade after the retirement of Morgan Groves: “had the old-line cycling organizations continued to act the same way they acted in the late 70’s and early 80’s, they’d be out of business now.”²⁶⁰

B. OBSTACLES IN THE ROAD

The reflector question itself was finally resolved a year after the *Forster* decision was handed down, when Fred DeLong sought an advisory opinion from the CPSC.²⁶¹ “There appears to be a great question in many minds about the pre-emption position of the CPSC regulations,” he wrote.²⁶² “The statement has been made that since lighting isn’t included in the CPSC specs, that the pre-emption makes the State Laws that call for bicycle lighting at night are over-ruled,” he continued.²⁶³ “In my initial discussions with CPSC personnel . . . it was flatly stated to me that this [omission] was not meant in any manner to preclude lighting [regulations].”²⁶⁴ The CPSC’s response, Advisory Opinion 270, relied heavily upon section 17 of the Consumer Product Safety Commission Improvements Act (“CPSCIA”) of 1976 - the legislation that retroactively incorporated preemption into the FHSA.²⁶⁵ This was the provision the bicycle makers had to settle for when the CPSC would not scrap the bicycle banning order and start over under the CPSA. It became effective on May 11, 1976,²⁶⁶ by no coincidence, also the effective day of the bicycle rules.

Section 18 of the CPSCIA prohibited states from imposing regulations “designed to protect against the same risk of illness or injury” as any CPSC rule.²⁶⁷ However, a state law did not fall within this prohibition if it was designed to protect users from *a different* risk or injury.²⁶⁸ Because the CPSC reflector regulations were meant to reduce the risk of injury from inadequate cyclist visibility to cars, but were not meant to reduce the risk from “obstacles in the road that may not be visible to a cyclist at night,” the Commission “believe[d] that a state lighting requirement for

260. *Id.*

261. Letter from Fred DeLong, Technical Editor, *Bicycling Magazine*, to Joseph Fandey, Consumer Prod. Safety Comm’n (July 4, 1978), available at <http://www.cpsc.gov/library/foia/advisory/270.pdf>.

262. *Id.*

263. *Id.*

264. *Id.*

265. Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, 90 Stat. 503, 510 (1976).

266. Consumer Product Safety Commission Improvements Act, 90 Stat. at 503, 40 Fed. Reg. 52828-52835 (Nov. 13, 1975).

267. An exception allowed the states to implement a law if the language was identical to its federal counterpart, but that was not the case here. Consumer Product Safety Commission Improvements Act, 90 Stat. at 510.

268. Consumer Product Safety Commission Improvements Act, 90 Stat. at 510.

bicycles ridden at night would not be preempted.”²⁶⁹

Schwinn and the BMA objected to that part of the advisory opinion, asserting that the “Commission inexplicably responded by discussing a hypothetical proposition, namely whether the state provision dealt with a risk of injury associated with an obstacle in the road.”²⁷⁰ They were clearly concerned that the Commission’s “two risks” argument gave them Poppell-type product liability protection only when it came to nighttime auto-bike collisions, leaving them exposed for injuries an unlit cyclist may suffer upon hitting, say, a pothole on a dark street. However, the CPSC’s letter clearly stated that the Commission staff *itself* had come to the conclusion that bicycle lights protect cyclists against the two separate risks of injury.²⁷¹

The BMA-Schwinn letter also complained that the CPSC should have clearly stated that preemption would not pertain to any “use” requirements, but only to “equipment” provisions.²⁷² Townley argues that the industry was not after a ruling that would block local government headlight laws, but was “still worried about 3M trying to push reflectorized tires to the states.”²⁷³

On January 16, 1979, the CPSC issued a revised Advisory Opinion 270-A.²⁷⁴ “While we are not withdrawing that opinion,” the Commission’s general counsel wrote, “we believe that further discussion of the question you raised is needed.”²⁷⁵ It followed with an even broader finding than that in the original Advisory Opinion 270: “Because the Commission’s regulation does not define how a consumer may or may not use a bicycle, the Commission believes that the [FHSA] does not prohibit states or localities from issuing or enforcing a requirement that lighting

269. Letter from Margaret A. Freeston, Acting Gen. Counsel, U.S. Consumer Prod. Safety Comm’n, to A. Fred DeLong, Technical Editor, *Bicycling Magazine* (Sept. 12, 1978), available at <http://www.cpsc.gov/library/foia/advisory/270.pdf>.

270. Letter from Ronald K. Kolins, attorney representing Bicycle Mfrs. Ass’n of Am., and John R.F. Baer, attorney representing Schwinn Bicycle Co., to Susan B. King, Chairperson, Consumer Prod. Safety Comm’n (Oct. 19, 1978), available at <http://www.cpsc.gov/library/foia/advisory/270.pdf>.

271. Letter from Margaret A. Freeston, Acting Gen. Counsel, U.S. Consumer Prod. Safety Comm’n, to A. Fred DeLong, Technical Editor, *Bicycling Magazine* (Sept. 12, 1978), available at <http://www.cpsc.gov/library/foia/advisory/270.pdf>.

272. Letter from Ronald K. Kolins, attorney representing Bicycle Mfrs. Ass’n of Am., and John R.F. Baer, attorney representing Schwinn Bicycle Co., to Susan B. King, Chairperson, Consumer Prod. Safety Comm’n (Oct. 19, 1978), available at <http://www.cpsc.gov/library/foia/advisory/270.pdf>.

273. Townley, *supra* note 16.

274. Letter from Andrew S. Kulwich, Gen. Counsel, U.S. Consumer Prod. Safety Comm’n, to A. Fred DeLong, Technical Editor, *Bicycling Magazine* (Jan. 16, 1979), available at <http://www.cpsc.gov/library/foia/advisory/270.pdf>.

275. *Id.*

be used on bicycles ridden at night.”²⁷⁶ Bicycle makers should have quit while they were ahead.

In any case, it was a moot argument, one that had, for all intents and purposes, already been decided in the *Forester* decision. There, the Court noted that “most states require use of headlights and rear reflectors when actually riding at night . . . the [CPSC] regulation is not inconsistent with these state statutes.”²⁷⁷ Thus, even if the CPSC did admit that the industry was right about its “same risk” argument, it could point to the court’s reasoning, which assumed *a priori* that the CPSC 10-reflector rule was meant to be applied in coordination with state nighttime headlight codes, as proof that it lacked the power to make its reflector rules preemptive of any state headlamp laws.

VI. LAWN DARTS AND BODY COUNTS: THE COURT DECIDES

The D.C. Circuit Court of Appeals rendered its opinion in June 1977.²⁷⁸ As seemed to be true for everything else in this controversy, the stated issues weren’t the real issues and the outcome may, in fact, have been negotiated months before. On paper, the CPSC came out ahead. The bicycle regulations were legal, they could be applied to both children’s and adult bicycles, and twelve of the sixteen rules were valid, although four were found to be arbitrary and capricious and were remanded back to the CPSC for further consideration.²⁷⁹ Both sides declared victory.

When the industry plaintiffs settled and withdrew in the fall of 1975, their lawyers and experts went with them. They knew where the real Achilles’ heel of the CPSC’s case was, but because their clients no longer had a stake in the matter, it wasn’t their place to meddle.²⁸⁰ However, Washington is a small town and soon the word got around. There were two real issues, neither directly argued by the plaintiffs, and both related.²⁸¹ The first had to do with the correct procedure for promulgating the bicycle regulations. Berryhill had argued that the CPSC’s procedures had violated his Constitutional due process rights. While they had not, they had, however, broken the law. As discussed earlier, the rulemaking procedures under the old FHSA were more demanding than those under

276. *Id.*

277. *Forester*, 559 F.2d at 797-98.

278. *Id.* at 774.

279. *Id.* at 789-98.

280. Townley, *supra* note 16.

281. See generally *Forester*, 559 F.2d at 784-90 nn.11 & 22 (discussing the overlap between the scope of the Federal Hazardous Substances Act and the Consumer Product Safety Act and mentioning that the parties did not raise the issue of the proper procedures and standard of review of the Consumer Product Safety Act).

the superseding CPSA, with one exception: toys. The so-called “1262(e) exception” allowed toy safety rules to be promulgated under the old FHSA under informal rulemaking protocols without formal public hearings, and required rule challengers to meet an “arbitrary, capricious and an abuse of discretion” standard.²⁸² On the other hand, rules for toys and other children’s products issued under the new CPSA had to meet the same requirements as any other product: a public hearing, mandated express findings of need, and court challenges based on a lower “substantial evidence on the record” standard.²⁸³

The CPSC asserted that they only had to meet the less restrictive 1262(e) requirements because they were carrying over FHSA rulemaking, not promulgating rules first released under the CPSA (recall that the bicycle rules were initially published four days before the FDA-CPSC changeover). They were wrong. Transfer language in the CPSA overrode the 1262(e) exemption for carryovers. The Commission held a public meeting on the bicycle rules in September 1974, but asserted at that time that it was not a public hearing, and that the objections lodged by the manufacturers did not constitute a rule challenge requiring administrative adjudication.²⁸⁴ Instead, it considered them using the same informal petition process under which the BMA had sought to have the original May 1973 banning order scuttled.²⁸⁵ Also, the technical challenges Forester raised in his lawsuit did not have to meet an arbitrary and capricious standard. He only had to show that based on a preponderance of evidence in the record that each rule would not carry out its intended function. However, Forester didn’t raise this argument and framed his technical arguments assuming an “arbitrary and capricious” standard.

The second issue dealt with the showing of need that the CPSC had to document. Under the 1262(e) exception, the FDA did not have to

282. 15 U.S.C. § 1262(e) (2008); 5 U.S.C § 706(2)(A) (1970); *see also Forester*, 559 F.2d at 784-90 nn.11 & 22 (elaborating on the decision to carry out judicial review as if the rules had been promulgated under informal APA rulemaking and thus were subject to the “arbitrary and capricious” standard of review in 5 U.S.C § 553).

283. *Forester*, 559 F.2d at 789 n.22.

284. “The regulations establishing safety requirements for bicycles were issued in accordance with section 3(e) of the Federal Hazardous Substances Act . . . the procedures for issuing certain regulations which are set forth elsewhere in section 2(q) of the Act are not applicable to and were not used in the proceedings by which the bicycle regulations were issued. Because the bicycle safety regulations were not issued in accordance with the procedures of sections 3(a) or 2(q) of the Act . . . provisions of 16 C.F.R. 1500.201, relating to the filing of objections and requests for public hearings are not applicable in this matter.” Meeting Notice, 39 Fed. Reg. 31,943 (Sept. 3, 1974).

285. “[Petitioners] objected to various provisions of the regulations and requested a public hearing under 16 C.F.R. 1500.201. After consideration of these communications, the Commission concluded that 16 C.F.R. 1500.201 was not applicable to the bicycle regulations.” 40 Fed. Reg. 25,481 (July 16, 1975).

identify the risk that each rule sought to reduce, but the CPSC did. Forester asserted that the Commission was hiding behind 1262(e) because it couldn't meet this "identify the risk" requirement.²⁸⁶ That was irrelevant as the CPSC could easily meet this requirement if it tried to, at least facially. However, because 1262(e) was overridden, the CPSC also had to meet another standard, a requirement that it make a "concise general statement of purpose," which, legal niceties aside, was pretty close to an "identify the risk" requirement. Just like "identifying the risk," jumping the "concise general statement" hurdle was not a problem, except that the CPSC did not do it.²⁸⁷ Again, Forester argued the Commission had continued under the FHSA because it couldn't meet the "concise general statement" requirement, and again, he made the same error—it wasn't that the CPSC *couldn't* meet the standard, but that they *did not* do it.²⁸⁸ However, he was close enough to the truth that his arguments should have been rebutted by the CPSC, who merely fluffed him off on the basis of 1262(e) - a mistake, and a bad mistake. Either the CPSC lawyers were blissfully unaware their client had made serious procedural errors, which is unlikely, or more probable, they did know, but didn't want to admit it for fear of opening a Pandora's box. The CPSC's lawyers were dancing around the truth, and believed they could get away with it because the heavy-hitters had pulled out and all they faced were a bunch of amateurs—especially Forester, who unwisely believed he was competent to act as his own lawyer.²⁸⁹ Unfortunately, the court caught on, and was not

286. *Forester*, 559 F.2d at 784 n.11.

287. "The Commission is required to hold public hearing and prepare a transcript, and to make express findings concerning the need for and effect of the proposed regulations . . . The parties have not raised or argued the issue. While the administrative record and findings would not satisfy the procedural requirements [of the CPSA], . . . the Commission has held hearings, compiled an extensive record, and otherwise substantially complied . . . We therefore assume that the present case is controlled by the provisions of 5 U.S.C. §§553 and 706(2)(A)." *Id.* at 789 n.22.

288. *Id.* at 784 n.11.

289. "I figure that I am the best qualified combination of cyclist, engineer, and amateur lawyer around." Letter from John Forester to "Cliff" (Oct. 3, 1973) (on file with the Transportation Law Journal). Ironically, there has also been some question as to Forester's credentials as an engineer, as he has no degree in that discipline. Forester was originally a physics major, but he failed a crucial mid-term examination and switched his undergraduate major to English, graduating in 1951. FORESTER, NOVELIST AND STORYTELLER, *supra* note 256, at 563-67; 576-78; Curriculum Vitae of John Forester, MS, PE, *available at* <http://www.johnforester.com/Consult/currvita.htm>. His professional engineering license is in industrial engineering. Database of California license holders: California Department of Consumers Affairs, *available at* [http://www2.dca.ca.gov/pls/wllpub/wllquery\\$.startup.action](http://www2.dca.ca.gov/pls/wllpub/wllquery$.startup.action). Prior to 1973, the State of California granted "professional engineer" certificates to many types of para-professionals, such as "boiler engineer," "agricultural engineer," "quality engineer," and the like. CAL. GOV'T. CODE § 6732 *et. seq.* (West 2009). Forester received a certificate in industrial engineering in 1951 and a master's degree in production management in 1964. In California, a professional engineer's license in industrial engineering is a business management specialty consisting of "systems of per-

happy.

At this point, things get murky. It appears that the court did not want to throw out the bicycle rules entirely. It also wasn't inclined to consider the plaintiffs' core argument that the CPSC could not regulate adult bicycles under a law meant only to cover products intended for children because the court believed this issue had been adequately addressed in a previous case, *R. B. Jarts Inc. v. Richardson* (concerning lawn darts), and it didn't want to revisit the issue.²⁹⁰ On the other hand, it did very much want to clarify what the phrase "unreasonable risk of personal injury or illness" meant, not because it was terribly central to this case, but because several lower courts were waiting for guidance on this point.²⁹¹ In short, the *Forester* court didn't want the CPSC to get away with its disingenuous 1262(e) arguments, but on the other hand, it didn't want to throw out the CPSC entirely because it needed this ruling to clear up several other cases that were backed up in its lower courts.

So, it appears likely that the court told the CPSC to go back to the bicycle makers and forge a consensus as to how many of the sixteen rules, based upon a lower "preponderance of evidence in the formal record" standard they could all live with. Townley is circumspect in regards to acknowledging the extent to which Schwinn and the other firms were involved in the case after their complaints were dismissed, noting only "Schwinn was ready in 1975 to meet all the CPSC requirements - including the ones that were thrown out."²⁹² It is probably no coincidence that all four of the rules remanded back to the CPSC were generally of greater concern to foreign firms, and were still the subject of active discussions by ISO's technical committee, TC-149. The caliper brake rules, which the BMA had argued from the start should be covered by ISO standards, were struck, as was the protrusion rule (the one that had angered Tullio Campagnolo so much), the handlebar width rule (it had the potential to block some models of Italian Cinelli and Japanese SR drop bars), and the pedal tread rule (which could have outlawed the replaceable aluminum bodies of high-end racing pedals).²⁹³ Once it had this information, the court reviewed the technical merit of all sixteen CPSC rules, ostensibly

sons, materials and facilities for the purpose of economical and efficient production." CAL. CODE. REGS. tit. 16, § 467 (2009). Industrial engineers are specifically prohibited from "the practice of civil, electrical, or mechanical engineering," which are the only engineering licenses the State of California now issues. CAL. GOV'T. CODE § 6787 (2009).

290. Lawn darts were oversized plastic and metal darts about a foot long that players attempted to arc over a distance of 50 to 100 feet into a 3-foot plastic hoop laid on the ground. The CPSC completely banned them. *R. B. Jarts, Inc. v. Richardson*, 438 F.2d 846 (2d Cir. 1971).

291. In the five years after the *Forester* decision, the head notes referencing various facets of the "body count" ruling were cited almost a hundred times.

292. Townley, *supra* note 16.

293. *Forester*, 559 F.2d at 784-94.

using an “arbitrary and capricious” standard, and remanded the sacrificial lambs back to the Commission.²⁹⁴

The court upheld the *R. B. Jarts* holding which states that a product nominally intended by the manufacturer for adult use can be regulated by the toy act if it is reasonably foreseeable that the product would be subject to more than incidental or exceptional use by children.²⁹⁵ As to the issue the court needed to rule on, whether a precise statistical showing of the positive impact of any given rule was required, it said that the CPSC was under no obligation to develop a “body count” of the injuries reduced by each individual rule. Forester had argued that the CPSC was required to show each standard would eliminate *entirely* a specific hazard, a contention the court swept away with the admonition that “he has misread both the requirements of the FHSA and the relevant standard of review.”²⁹⁶ *Forester* became known forevermore as the “body count” case.

VII. WE WILL HAVE TO GO THROUGH ALL OF THIS AGAIN

The CPSC never reissued any of the four standards remanded back to it, and the rest of the bicycle rules have gone unrevised, falling into obsolescence over the years. Ross Petty, who has closely examined their safety impact, twice concluded that they have been ineffective in reducing bicycle accidents and injuries.²⁹⁷ The BMA disbanded in 1984, and the last of its former member firms, the Murray-Ohio Company, went out of business in 1998.²⁹⁸ In 1991, the Schwinn Bicycle Company fell into bankruptcy and was purchased by the Scott Sports Group, who acquired it only for name. Scott itself disbanded in 2001, and Schwinn was sold to a Wisconsin bicycle distributor, Pacific Cycle Corporation.²⁹⁹ The last American mass-production bicycle factory closed in 1999, and only very expensive racing, touring and off-road machines are made in America.³⁰⁰

294. *Id.* at 789-98.

295. *Id.* at 786 & n.14.

296. *Id.* at 788.

297. Petty, *supra* note 75, at 220-21; Ross Petty, *Regulation vs. the Market: The Case of Bicycle Safety* (Part I), 2 RISK 82-83 (1991); Ross Petty, *Regulation vs. the Market: The Case of Bicycle Safety* (Part II), 2 RISK 150 (1991).

298. The BMA was briefly (and unsuccessfully) resurrected in the mid-1990's to deal with “made in the USA” labeling issues under the Latham Act. It was replaced in 1999 by a combination of the Bikes Belong Coalition, which handles bicycling advocacy matters, and the Bicycle Product Suppliers' Association, which concerns itself with issues of trade, tariffs, and product regulation. “Made in the USA” issues: FTC File Number P894219, available at <http://www.ftc.gov/opp/jointvent/madeusa/ftp/usa/045.txt> (last visited Oct. 2, 2009); Blumenthal, *supra* note 7; Wilkinson, *supra* note 7.

299. Schwinn's Corporate Heritage, available at <http://www.schwinnbike.com/usa/eng/timeline> (last visited on Mar. 29, 2010).

300. Griffe Witte, *A Rough Ride For Schwinn Bicycle*, WASH. POST, Dec. 3, 2004, at A-01.

In 1974, the American industry made 10.1 million bicycles and employed about 12,000 workers.³⁰¹ By 1995, this was down to about 5.5 million units and 6,500 employees, with another 1,300 working for suppliers.³⁰² Today, fewer than 2,100 workers remain; making around 250,000 bicycles annually.³⁰³ In early 2009, one of the two remaining American bicycle manufacturers, Cannondale, announced that it would discontinue all domestic production after 2010.³⁰⁴

Jay Townley, who now spends most of his time advising American bicycle importers on doing business in Asia, worries that we are on the verge of another bicycle regulation war:

The new [Obama] administration will, after a very long time, finally fund the CPSC and have it do the job it should have done, and they will update the [bicycle product safety] regulations, which are obsolete. Because of the attitudes of people like Forester, we will have to go through all of this again, because there has been no industry education about product liability.³⁰⁵

Bicycle planning has also suffered. By the mid-1990s, it was apparent to most that it was in deep trouble. Ronald Engle of the National Highway Traffic Safety Administration (“NHTSA”) told an audience in 1994:

[Congress wants] to increase the amount of commuting, so forth, so on, trips by walking and bicycling. They also wanted to decrease the casualties by 10 percent. But at the same time Congress did that, they also took 70 percent of the funds that would go to pedestrians and bicycling safety and drew them away. So I think there’s a message there from Congress . . . So many of the things we would like to have available, and we planned to do this coming year, they’re not going to happen. As a matter of fact we don’t have any bicycle safety program for the next couple of years. . . .³⁰⁶

As state and local transportation budgets continued to shrink throughout the 80s and 90s, many agencies turned to the type of skill-

301. Production figures: Berto, *supra* note 2, at 137. Employment: author’s estimate, based on per worker output ratios adapted from *infra* notes 302 and 303.

302. MICHAEL R. KERSHAW ET AL., BICYCLE MFRS. ASS’N OF AM., COMMENTS OF THE BMA REGARDING “MADE IN THE USA” CLAIMS WITH RESPECT TO BICYCLES 1 (1996), available at, <http://www.ftc.gov/opp/jointvent/madeusa/ftp/usa/086.txt> (last visited Oct. 2, 2009).

303. This does not count 9,690 local bicycle mechanics earning an average of \$23,300 per year in 2008. Bureau of Labor Statistics, Occupational Employment and Wages, May 2008: 49-3091 Bicycle Repairers 1 (2008). Production: *World Players in the Bicycle Market*, *supra* note 12. Employment: Hoover’s Company Records, *supra* note 12; NAICS 336991, *Motorcycle, Bicycle, and Parts Manufacturing*, *supra* note 12.

304. Jason Norman, *Cannondale Closes Curtain on Lengthy American-made Era*, BICYCLE RETAILER AND INDUSTRY NEWS, Apr. 15, 2009, at 1.

305. Townley, *supra* note 16.

306. U.S. CONSUMER PRODUCTS SAFETY COMMISSION, CHAIRMAN’S CONFERENCE ON NIGHTTIME BICYCLE SAFETY 99 (1994), available at <http://www.cpsc.gov/LIBRARY/FOIA/meetings/mtg95/NighttimeBike.pdf> (Comments of Ronald Engle (NHTSA)).

based, anti-facilities program Forester advocated, not necessarily because it was the best approach, but because it was the cheapest. “Politicians latch onto his books and kill funding,” says James Green, the cycling civil engineer, “this puts the public at risk and is deplorable.”³⁰⁷ Local governments who wanted to continue developing bicycle facilities increasingly shifted the cost burden to real estate developers through impact fees or mandatory dedication ordinances.³⁰⁸ Not surprisingly, developers grew increasingly strident in their opposition to bikeways and other “quality of life” mandates that increased their costs, banding together to form new political action groups such as the Portland-based “Building the American Dream Coalition,” run by former staff of the ultra-conservative Cato Institute. Forester, these days an author and speaker for the American Dream Coalition, now grudgingly concurs with his former opponents on the impact of bicycle facilities: “Yes, there is a correlation between the amount of bicycle transportation and the presence of bikeways,” he said in 2005.³⁰⁹

Predictably, however, he still parts ways with planners in conceding that this is a benefit: “those who cycle for transportation to any significant extent can be divided into the voluntary and involuntary cyclists. The involuntary cyclists . . . are those under driving age . . . those attending universities . . . those unable to obtain or retain a motoring license . . . these are all niches with little significance.”³¹⁰ Government, he argues, should focus on voluntary cyclists, tourists, and racers. Such cyclists are “more likely to be found among professors, scientists, engineers, technicians, attorneys, doctors,” and others who comprise the “respected and conservative portion of society.”³¹¹ At this, Jay Townley merely sighs, ruling that “if it hadn’t been for the CPSC case, Forester would have ended up some obscure bike club president somewhere.”³¹²

307. Letter from James M. Green to author (Sept. 7, 2007) (on file with the Transportation Law Journal).

308. Bruce Epperson, *Using Developer Dedications for Bike Facilities*, BICYCLE FORUM, June 1991, at 10, 14.

309. JOHN FORESTER, THE PLACE OF BICYCLE TRANSPORTATION IN MODERN INDUSTRIALIZED SOCIETIES: A PRESENTATION TO THE PRESERVING THE AMERICAN DREAM CONFERENCE 3 (2005), available at <http://americandreamcoalition.org/forester.pdf> (last visited July 2, 2009).

310. *Id.*

311. *Id.* at 4, 9.

312. Townley, *supra* note 16.