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### High Tech Hunks of Steel: Fixed-Site Amusement Rides and Safety Under State Regulation

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#### Introduction

Tomorrow is the big day! Little Bobby Missoula is going to turn ten tomorrow and his parents have promised to take him to Outlandish Adventures, an amusement park that Bobby has seen advertised on television. As Bobby drifts off to sleep, he begins to dream about the fun that he will have on his birthday. He dreams about the smell of cotton candy and the yells of carnies soliciting people in to play their games, but most of all, he dreams about the Lightning Bolt - the tallest, fastest, and scariest roller coaster that little Bobby has ever seen. In his dream, the Lightning Bolt whips Bobby around sharp angles, through upside down loops so close to water that Bobby's hair and face get wet, down vertical descents at speeds over 100 miles per hour, and finally to an abrupt stop where Bobby rushes to the end of the line to do it all over again.

As Bobby walks into the kitchen the next morning, he sees his parents watching a news report on the television. He hears the reporter say, "This just in! A new statistical report suggests that 1 in 25 million people are seriously injured while riding roller coasters. Legislative initiatives blame state regulation for what at least one representative considers a dangerously high risk of injury and call for the federal government to take control." Bobby's parents consider the report, but realize that many activities, like riding in a car or on a bicycle, present some risk of injury. As long as they could make sure the rides have undergone recent inspections and Bobby knows how to ride responsibly, a 1 in 25 million chance of injury would not be enough to deter them from taking Bobby to Outlandish Adventures for a ride on the Lightning Bolt.

The statistics weren't enough to deter Bobby's parents from taking their child to enjoy the immense speed and scary maneuvers of the Lightning Bolt, but are they enough to deter you?

Injuries do occur, but keep in mind that this is an industry that sees over 320 million visitors per year and estimates that only 1 in 25 million people have a chance of being seriously injured on an amusement park ride.[1] Do these statistics show that safety is a huge concern, or does a 1 in 25 million chance of getting hurt sound like a pretty good risk to take?

Since 1981, fixed site amusement rides have been the subject of state and local regulation.[2] The federal government only exercises jurisdiction over mobile amusements, but there have been initiatives to return fixed-site amusement ride regulation to the federal government. Some argue that reports show that injuries have risen in recent years and if the federal government were to resume regulation, injuries might decrease. Amusement park industry representatives claim, however, that there are sufficient incentives to keep safety as a top priority without federal regulation, and that the federal government lacks the industry knowledge and the resources to provide a greater level of safety. If the federal government regains the right to regulate fixed-site amusements, will the chance of getting hurt actually decrease or will it just decrease funds in the taxpayers' pockets? Tragic accidents do occur, but can they be avoided by handing regulatory power to the federal government?

The purpose of this note is to examine whether fixed-site amusement rides should remain under state and local regulation, as they have since 1981, and to suggest reasons why federal intervention is not necessary in an industry where new and evolving technologies and stricter standards make rides increasingly safe for parkgoers, even though the Commerce Clause would permit federal regulation of fixed-site amusement rides. Part II of this note examines how the amusement park industry has evolved over the years and specifically focuses on roller coasters, and the technologies that draw thrill seekers. The next section examines amusement ride safety, especially when compared to other activities. The following section considers the history of amusement park ride regulation, specifically explaining how the Consumer Product Safety Commission was involved in the industry and why both early and current tests under the Commerce Clause would probably allow federal regulation of both mobile and fixed-site amusement rides. The subsequent section demonstrates how a few states, including California and Pennsylvania, handle regulation of amusement park rides. The final section explores why federal intervention in the fixed-site amusement park industry is not necessary. This note concludes by arguing that, although the Commerce Clause probably allows federal regulation of both mobile and fixed-site amusement rides, such regulation is not the best approach for three reasons, including the fact that no federal agency, such as the Consumer Product Safety Commission, has the resources or the staff to add such massive responsibilities to its current tasks.

## **I. Amusement Park History and Ride Technology**

### **Amusement Park History**

The amusement park industry got its start in medieval Europe, but did not emerge in America until the late 1800's.[3] When the American Civil War ended, electric traction (trolley) companies developed. To encourage people to ride on the weekends, transportation companies formed what became amusement parks at the end of their trolley line.[4] The parks initially consisted of picnic facilities, dance halls, restaurants, and a few rides. In the late 1800's, the Ferris Wheel was introduced at the Chicago Columbian Exposition and soon after, the world's first modern amusement park - Paul Boyton's Water Chutes - opened in Chicago.[5]

The industry grew impressively until in 1910, approximately 2,000 amusement parks were in operation in the United States.[6] The effects of the Great Depression, however, were felt by the industry, and many parks were forced to shut down.[7] A resurgence in amusement park popularity occurred at the end of World War II, and with the opening of Disneyland in the 1950's, the theme park era was off and running.[8]

### **The Evolution of Roller Coasters: The Most Popular Amusement Park Ride**

Roller coasters, the biggest attraction of most amusement parks, got their start about 600 years ago in Russia.[9] It was not until 1826, though, that the idea caught on in America. The Mauch Chunk Railroad in Pennsylvania was initially built to carry coal from a mine on Summit Hill eighteen miles down to Lehigh canal.[10] The journey downhill was simple and quick, but mules had to haul the cars back up the mountain and this was a difficult and lengthy process. In 1844, a second track was built with steam engines instead of mules to haul the cars back up the mountain and the two parts of the track were connected, enabling the cars to complete a circuit.[11]

In 1872, however, the railroad was forced to close and it was turned into a tourist attraction.[12] Visitors would ride to the top to enjoy assorted activities and then speed down eighteen miles of steep track. One of the passengers on the Mauch Chunk Railroad, La Marcus Adna Thompson, knew the ride had great potential and built his own, which opened in 1884 at Coney Island in New York as a switchback railway.[13] Although Thompson charged five cents to ride his switchback railway, it was an immediate success, and it showed that people were willing to pay for the experience. The railway, however, required employees to push the cars to the top of the track once a ride was completed.[14]

Consumer demands for bigger and better thrills led to other ride developments, such as the first coaster with a loop, the Flip Flap railway at Coney Island. However, the ride was closed rather quickly because the high G-forces experienced by the riders when traveling through the loop caused riders to experience black outs and whiplash injuries. Despite these problems, rides continued to evolve into faster and more impressive machines, including the wooden roller coaster popular in the 1920's. Another major step in the evolution of the coaster occurred with the opening of the Matterhorn in 1959, which used steel for the track instead of wood. Inversions occurred in the late 1970's, and the first suspended coaster was seen in 1981.[15] The most recent advancement in amusement ride technology has generated rides that are capable of reaching speeds of up to 100 mph that simulate the G-forces felt by astronauts at lift-off.[16]

### **The Latest Roller Coaster Technologies**

Roller coasters use gravity and inertia to pull off many of their stunts, but advances in technology, or perhaps a better understanding of existing technology, have allowed roller coasters to achieve much more astonishing feats. In the mid-1990's, the linear induction motor ("LIM") was adapted from its use in transportation and put to work by roller coaster

designers.[17] The LIM allows speed to remain constant unless fixed parameters within the motor design are altered.[18] These motors placed along the track rotate at varying speeds to allow the acceleration of a roller coaster car and are responsible for pushing the cars forward.[19]

Laser sensors are another technology used to ensure that coasters are launched at the proper times and to prevent collisions. Sensors and specialized software monitor the position and speed of the coasters from start to finish.[20] Light from a laser source is used to calculate the train's speed by measuring the amount of elapsed time between the release of the pulse of light and receipt by the sensor of the rebounding light waves and changes in the nature of the returning light wave allow calculation of the distance to the coaster.[21] The significance of such technology is especially important for dark rides like Outer Limits: Flight of Fear, which do not allow ride operators to monitor the movement of the train with the naked eye.[22]

The linear synchronous motor ("LSM") is the latest technology responsible for allowing coasters to reach 100 miles per hour in only a few short seconds.[23] As with LIMs, these motors are placed along the length of the track. Computer software controls their timing so that the coaster rides the magnetic wave and is able to reach incredibly high speeds.[24] The LSM provides a smooth ride due to its high resistance to vibration, and may be used as both an accelerating and braking system.[25]

Hydraulic restraints are another important technology designed not only to keep passengers in the cars but also to keep them comfortable.[26] The system is controlled by a closed hydraulic circuit and is used in the seat, the lap bar, and shoulder harnesses, which are attached to cylinders containing fluid.[27] When a passenger moves to position the restraints, fluid movement in the cylinders, which provides resistance for proper adjustment of the restraints, begins.[28] When restraints are in position and passengers are ready, the operator closes the valves so that no more fluid can pass through and the restraints are hydraulically locked into place until the end of the ride when the fluid is again released.[29]

## **II. Safety**

Amusement park rides have changed dramatically since the late 1800's. Riders today are no longer speeding down eighteen miles of steep track with nothing but the slope of the land to stop them. New technologies have helped to transform the industry over the years by providing greater thrills and arguably greater safety for amusement park patrons. Although the amusement park industry has made great advances, rider injuries may still occur. However, in an industry that makes a conservative estimate that 320 million patrons each year participate on amusement rides, some injuries are inevitable.[30]

The Consumer Product Safety Commission ("CPSC"), which now exercises jurisdiction over the mobile amusement ride industry, estimated that 6,594 injuries occurred in the year 2000 at fixed site amusement parks in the United States, an estimate down fourteen

percent from 1999.[31] The small risk of injury becomes apparent when compared to other recreational activities. In 1997, for example, injuries in swimming pools and on trampolines reached over 60,000 and 80,000 respectively.[32] Bicycle riding accounted for injuries far in excess of those caused from the activities mentioned above - totaling 544,561 injuries.[33] Even when compared to non-recreational activities, amusement rides appear to be comparatively safe. For example, the International Association of Amusement Parks and Attractions compared the 43 deaths that occurred between 1987-2000 to the 141 people killed by air bags in cars between 1990-2000.[34]

To many, it seems that amusement park accidents are on the rise, but this can be explained by the fact that accidents have been generating more attention from the media in recent years and making headlines in national news. For example, a highly publicized accident occurred on August 28, 1999 on a Wild Wonder roller coaster at Gillian's Wonderland Pier in Ocean City, New Jersey.[35] A mother and her 8-year-old daughter were killed when their car slid backward down a 40-foot ascent and crashed into another car.[36] Another more recent example made headlines on February 3, 2001 when a lap bar on a Ferris wheel ride at Pharaoh's Lost Kingdom Amusement Park in Redlands, California flew open and sent one man falling 35 feet to the ground.[37] The man sustained traumatic crush injuries to his left foot and left lower leg, and was recently awarded almost five million dollars in a binding arbitration.[38]

The chief of Florida's Bureau of Fair Rides Inspection said, "There's been such a huge amount of publicity over these [recent accidents] that people think more are happening." [39] Baltimore attorney R. Wayne Pierce, who has been representing the amusement park industry for 30 years and has thousands of active injury defense cases, is also concerned about the effect of the media's sensationalism of accidents occurring on amusement park rides and says, "I'm afraid if it [referring to the possible link between brain injuries and amusement rides] gets a disproportionate amount of attention beyond what is warranted and hysteria takes effect, it's going to have the effect of shutting down operations, and that would be gravely unfortunate for everyone." [40]

This publicity hides evidence that ride accidents have actually decreased in 2002. Some states do not track ride accidents, but those who do find the numbers declining. Florida's Bureau of Fair Ride Inspections recorded seventy accidents (one in which a rider was taken to a hospital) on rides during its fiscal year ending June 30, 2002. This is down 28% from the year before. As of July 15, New Jersey's Department of Community Affairs had recorded 458 incidents on amusement rides in 2002, down 18% from 557 in 2001. New Jersey's numbers are higher than Florida's, because the state's data include minor injuries like dizziness and scraped knees that do not require a trip to a hospital. The roller coaster accident that occurred in August at Six Flags in Massachusetts was the first in 2002 in which a rider was injured, according to the Department of Public Safety records. At the same time in 2001, records showed there had been three accidents.[41]

The number of deaths on rides nationwide has also decreased in 2002. The only fatality occurred when a 28-year-old woman whose pre-existing brain aneurysm burst during a ride on the Goliath roller coaster at Six Flags Magic Mountain in California.[42] Only one parkgoer out of an estimated 320 million has died on a ride in 2002 and it was caused by a pre-existing condition! Tragic accidents can occur on amusement park rides, but statistics show that only 1 in 25 million riders are severely injured.[43] Thus, it seems highly unlikely that one will be severely injured on an amusement park ride.

### **III. History of Regulation CPSC Jurisdiction**

Prior to 1981, there was uncertainty as to whether existing legislation empowered the federal government to regulate amusement park rides. The organization thought to be responsible for this regulation was the CPSC, which was created by the Consumer Product Safety Act (“Act”)[44] and given broad regulatory authority for over 15,000 types of consumer products.[45] The Act was promulgated in response to congressional findings that “an unacceptable number of consumer products which present unreasonable risks of injury are distributed in commerce,” and that “the public should be protected against unreasonable risks of injury associated with consumer products . . . .”[46] Members of CPSC believed that the Act granted authority over amusement rides because, in their view, amusement rides could be considered consumer products. Park industry organizations and owners and manufacturers of amusement park rides, however, claimed that the CPSC had no such jurisdiction because amusement park rides were not consumer products within the meaning of the Act.[47]

This uncertainty over who was responsible for the regulation of amusement park rides was also visible in the courts. The first case to address this issue was decided on November 23, 1977 in the United States District Court for the District of Columbia. In *Consumer Product Safety Commission v. Chance Manufacturing Co.*, the CPSC sued the manufacturer of the Zipper ride.[48] The CPSC argued that the ride was an “imminently hazardous consumer product,”[49] and asked the court to discontinue its operation until the “hazard” was remedied.[50]

Chance Manufacturing Company (“Company”) defended against the CPSC’s position by arguing that the Zipper ride is not a consumer product under the Act and therefore, that the CPSC could not question whether corrective measures needed to be taken.[51] To support their argument, the Company pointed to section 15(d) of the Act in arguing that a “consumer product” must come into a consumer’s hands or otherwise be subject to his control.[52] The Company also relied on a report of the National Commission on Product Safety, which formed the basis of the 1972 Act. This report “focused on products, which clearly are ‘consumer products’ in the sense that each can be, and likely is, possessed, controlled, and otherwise used by a single individual or family.”[53] Amusement park rides do not fall into this category.

The court disagreed with the Company, and concluded that the Zipper ride was a ‘consumer product’ within the meaning of the Act. To reach this conclusion, the court focused on the definition of consumer product and legislative history of the Act, which provided that “the definition of consumer product be construed broadly to advance the Act’s articulated purpose of protecting consumers from hazardous products.”[54] Because the ride was manufactured for “personal use, consumption or enjoyment . . . in recreation or otherwise,” and thus satisfied a necessary prerequisite under the definition of “consumer product,” the CPSC could exercise authority over rides like the Zipper and advance the Act’s articulated purpose.[55]

The uncertainty was plainly visible in 1981 when conflicting decisions were issued in two separate circuits. The United States Court of Appeals for the Fifth Circuit issued a decision in *State Fair of Texas v. Consumer Product Safety Commission*, which held that amusement rides fall within the definition of consumer product.[56] This case concerned an aerial tramway ride (the “Swiss Skyride”), which was used mainly for transportation. The court rejected an argument that the ride was not used for recreation and found that “[n]ot only do passengers literally occupy the Skyride, but they also enjoy it for sightseeing and benefit from being transported.[57] Therefore, the court found the ride to fit within the Act’s definition of “consumer product.”

The United States Court of Appeals for the Tenth Circuit reached an opposite conclusion in *Bell v. Consumer Product Safety Commission*.<sup>[58]</sup> This case involved the ability of the CPSC to investigate an accident on an amusement park tramway in Texas. The court disagreed with the CPSC and held that amusement rides were not “consumer products” as defined under the Act. Among other reasons, the court found that because riders do not maintain control and possession of amusement rides and because these rides were not used “in or around a . . . household, or residence,” the CPSC may not exercise authority over such rides.<sup>[59]</sup>

The uncertainty was finally resolved when amendments to the Act were passed as part of the Omnibus Budget Reconciliation Act of 1981.<sup>[60]</sup> The amendments added language to the definition of “consumer product,” specifically excluding fixed-site amusement rides from the CPSC’s jurisdiction, and leaving traveling carnival rides under the CPSC’s jurisdiction.<sup>[61]</sup> Although attempts were made during the 1980’s to restore jurisdiction over fixed-site amusement rides to the CPSC, bills that were introduced in Congress for this purpose were rejected.<sup>[62]</sup>

Representative Edward Markey from Massachusetts reintroduced the issue in October of 1999 with House Resolution 3032.<sup>[63]</sup> This legislation, titled the National Amusement Park Ride Safety Act (“Safety Act”), seeks to repeal the 1981 exemption (dubbed the “roller coaster loophole”), and allow the CPSC to exercise the same authority over fixed-site amusement rides that they currently exercise over mobile amusement rides.<sup>[64]</sup> With the reintroduction of the Safety Act in the 107th Congress, Congressman Markey seems committed to closing this loophole.

To support his position, however, Congressman Markey has relied on the CPSC's 2000 report showing a 12% increase in ride-related injuries - a report argued by many to be flawed.[65] The 2000 report prompted the International Association of Amusement Parks and Attractions to hire an independent statistician to evaluate the report's numbers due to what the CPSC claimed was a margin of error of about 54% in the report and a very small sample of only 101 hospitals.[66] The CPSC admitted that had it not included one hospital in its sample, which accounted for approximately 44% of its projected national total for fixed-site amusement ride injuries, there would not have been even a "marginally significant" increase.[67] One industry representative noted that the increase could also be explained by the fact that the liability factor is so high today that more parks are sending more people to hospitals to be examined, even if no injury is apparent.[68]

Little Republican support[69], and huge lobbying efforts by the park industry have managed to put Congressman Markey's Safety Act on hold. Therefore, pursuant to the 1981 amendments still in effect, federal law currently regulates only mobile amusement rides such as those at county fairs and carnivals. Safety regulation over permanent, fixed-site rides is left to the states, the amusement park industry, and the insurers.

### **The Clause Argument**

Those in support of restoring the CPSC's jurisdiction over both fixed-site and mobile amusement park rides often argue that the roller coaster loophole creates a distinction that is unsupported by application of the authority granted under the Commerce Clause.[70] Current Commerce Clause tests, specifically including whether the activity in question substantially affects interstate commerce, seem to bolster this argument. For reasons discussed below, CPSC jurisdiction of fixed-site amusement park rides is probably justified under the Commerce Clause. Nonetheless, although this power is granted, Congress may choose not to regulate fixed-site rides, even if it is within their constitutional power to do so.

Chief Justice Marshall in *Gibbons v. Ogden* defined commerce as "every species of commercial intercourse . . . which concerns more states than one" and included within the concept virtually every form of activity involving or affecting two or more states.[71] Under this broad view of the commerce power, fixed-site amusement rides would almost certainly fall under federal regulation by virtue of the Commerce Clause because of the number of amusement park visitors traveling between states to visit the parks, and because of the fact that ride equipment is often manufactured in a state other than where the park is located. Marshall posited three limits which, if found to be untrue, would give Congress the power to regulate. The activity must be completely internal to one state, it must not affect another state, and there must be no national need for Congress to regulate the activity. One could argue that fixed-site amusement rides violate each of these limits. The parks which contain these rides advertise to potential out-of-state visitors, attract out-of-state visitors, and receive ride components most likely manufactured in other states.[72] Concern for the safety of the millions of people who visit amusement parks each year may be used to argue that a national



need for federal regulation exists, an argument that is currently on the table as a result of Congressman Markey's efforts.[73]

The cumulative effect theory, established by the Supreme Court in *Wickard v. Filburn*, also lends support to those who argue that fixed-site rides should be under federal regulation.[74] Under this theory, Congress may regulate, not only acts which would have a substantial economic effect on interstate commerce, but also an entire class of acts, if the class has a substantial economic effect (even though one act within it might have virtually no interstate impact at all). Therefore, even if one obscure amusement park seems to have no interstate effect, the interstate effect of all such amusement parks might be substantial enough to allow Congress to regulate the fixed-site rides in even those parks that, individually, have virtually no connection with interstate commerce.

These early interpretations of the Commerce Clause have, however, been altered somewhat by more recent Supreme Court decisions. In *United States v. Lopez*, the current Commerce Clause test was formulated.[75] The Court invalidated a federal statute barring possession of a gun in a school zone on the grounds that it was beyond Congress' Commerce power.[76] The Court held that the activity being regulated must substantially affect interstate commerce,[77] and emphasis was placed on the fact that the particular activity being regulated - possession of guns in schools - was not itself a commercial activity.[78]

Commerce Clause boundaries were once again reaffirmed in *United States v. Morrison*.<sup>[79]</sup> This case addressed the Violence Against Women Act ("VAWA"), which provided for a civil remedy for those who have suffered from gender-motivated violence.<sup>[80]</sup> The Commerce Clause argument, struck down by the Court, was based on the substantial effect of gender-motivated violence on interstate commerce.<sup>[81]</sup> Reaching back to its emphasis in *Lopez* on the fact that possession of guns in schools is not itself a commercial activity, the Court found in *Morrison* that "gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."<sup>[82]</sup> This case reinforced Commerce Clause limits that were discovered in *Lopez*, and highlighted the importance of considering whether the specific activity is economic in nature, and whether it substantially affects interstate commerce.

Early interpretations of the Commerce Clause under cases like *Gibbons* and *Wickard* seem to foreclose the possibility of providing an explanation for the roller coaster loophole, and recent Supreme Court decisions interpreting the Commerce Clause also seem to foreclose the same possibility. Like possession of guns in a school zone and gender-motivated violence, fixed-site amusement rides can be considered non-economic intrastate activity. If this is the case, having an indirect effect on commerce will not be enough to push fixed-site amusement rides into the realm of federal control.<sup>[83]</sup>

The question then, is whether fixed-site amusement rides do, in fact, exert only an indirect effect on commerce. This possibility is questionable when one considers amusement parks such as Walt Disney World and Busch Gardens. These parks draw visitors not just

from other states, but also from around the world. Substantial revenue is generated at such parks, and used to advertise nationally and internationally, and to purchase food, supplies, equipment, and rides from other states and maybe even from other countries. Arguably, these parks have a direct and substantial effect on interstate commerce. Therefore, the existence of the roller coaster loophole cannot be a legitimate result of the application of the Commerce Clause due to the substantial economic effect of fixed-site amusement rides on interstate commerce.

#### **IV. Sample of State Regulation**

Although federal jurisdiction of fixed-site amusement park rides would probably be permissible under the Commerce Clause, the 1981 exemption creating the roller coaster loophole has left regulation of fixed-site amusement park rides up to the states. As a result, approaches to regulation vary from state to state. Data from the CPSC shows that a majority of the states provide some type of regulation in the form of licensing, inspections, and/or insurance requirements. Alabama, Arizona, and the District of Columbia are three of the ten jurisdictions that have no regulatory laws governing permanent amusement rides.[84] The states containing the largest number of amusement parks do, however, have regulation in place.

California, with 72 permanent theme parks and 48 roller coasters,[85] has enacted the Permanent Amusement Ride Safety Inspection Program (Inspection Program).[86] Qualified safety inspectors, who must meet certain certification requirements, inspect California rides annually.[87] Under the Inspection Program, ride operators must report ride-related accidents to state officials immediately if the accident “results in a death or serious injury to any person unless the injury does not require medical service other than ordinary first aid.”[88] Ride owners must insure against liability for injury or death by obtaining an insurance policy for at least one million dollars per occurrence.[89]

Florida has a unique approach to regulation of amusement park rides. In Florida, if a park employs more than 1000 people, it is exempt from the state’s regulatory program.[90] Therefore, state officials may not inspect rides or investigate accidents at large theme parks like Disney World, Universal Studios Orlando, or Busch Gardens. Those parks which employ less than 1000 people, however, must be inspected by a state official semiannually.[91] Ride owners must maintain an insurance policy for at least one million dollars per occurrence[92], and any ride-related accident requiring a hospital visit must be reported within 24 hours after it occurs.[93]

Ohio, with Cedar Point and Six Flags’ Worlds of Adventure, has one of the strictest regulatory programs in place, and has even created an advisory council on amusement ride safety to make findings and recommendations regarding safety to the director of agriculture.[94] Ohio requires state officials to inspect permanent amusement rides twice annually (an annual inspection to obtain a permit and a midseason operational inspection[95]), and these officials, like those in California, have the authority to shut down unsafe rides.[96]

Before the required permit is issued, the owner of the ride must file a certificate of insurance showing that there is liability insurance of at least five hundred thousand dollars in the event of bodily injury to or death of one person.[97] If a ride-related accident does occur, it must be reported as soon as possible within 24 hours after the accident occurs.[98]

Pennsylvania has adopted the Amusement Ride Inspection Act,[99] which grants the Department of Agriculture authority to “prescribe safety standards relating to the operation and maintenance of amusement rides or attractions. . . .”[100] Like Ohio, Pennsylvania has created an advisory board to make recommendations “necessary for the protection and safety of the public.”[101] Inspections of any amusement park ride and attraction must be conducted by a qualified inspector on a monthly basis.[102] In the event of serious injury, death, or fire, the operator must immediately close the ride until it has been “inspected, repaired and declared safe for operation by a qualified inspector,”[103] and the owner or operator must maintain liability insurance in the event of such an occurrence.[104]

## **V. Industry Regulation**

Although many states have statutes and regulations in place to maintain specific park standards, the amusement park industry itself has incentives and mechanisms to guarantee safety in the operation of its rides. Amusement parks make money by attracting people to their gates for a day of thrills on roller coasters, water rides, and other forms of entertainment. If an amusement park experiences a decrease in attendance over a period of time, a decrease in profits is sure to follow. Amusement park attendance would surely decrease if the park developed a reputation for having rides that cause injuries and/or fatalities. Therefore, a desire on the part of park owners and operators to keep attendance up would translate into a desire to keep the park and its rides safe for its visitors to enjoy. This provides a strong incentive to park owners and operators to do their utmost to promote a level of safety that will encourage continued park attendance and popularity among visitors.

Aside from the built-in incentives to keep amusement rides safe, trade associations also exist to further this goal. The Outdoor Amusement Business Association (“OABA”) is the largest trade association for the carnival industry.[105] For more than 35 years, the OABA has been active in establishing safety guidelines and regulations and establishing a code of ethics for the industry.[106] The OABA is also involved in lobbying efforts for the industry and in promoting a positive carnival industry image.[107]

The International Association of Fairs and Expositions (“IAFE”), and the Amusement Industry Manufacturers and Suppliers (“AIMS”) are also active in policing the safety of amusement rides. The IAFE is a voluntary, non-profit corporation that exists to promote and encourage the development and improvement of fairs and expositions.[108] The joint efforts of the IAFE and the OABA have produced opening inspection checklists for each ride and a daily inspection checklist for everyday follow-ups.[109] The AIMS works to promote communication between trade associations and government entities, holds annual safety seminars, and participates in the development of safety standards.[110]

The International Association of Amusement Parks and Attractions (“IAAPA”) furthers many of the same goals as the associations discussed above, and works to emphasize safety as the industry’s number one priority.[111] Its safety and maintenance committee serves to educate the industry on safety matters and represents the Association on various safety related groups.[112] In conjunction with other associations, the IAAPA was instrumental in developing the ASTM International (formerly known as American Society of Testing Materials) standards for the amusement park industry.[113]

ASTM International is a non-profit organization that develops and publishes voluntary standards for materials, products, systems, and services in over 130 industry areas.[114] The standards set forth are highly detailed and include information about testing performance and operating procedures.[115] Although compliance with these standards is voluntary, trade associations and state legislatures have adopted and incorporated these standards into rules and regulations.[116]

Although there are built-in incentives to maintain the highest level of safety, these and other trade associations exist to help further this goal. Safety guidelines, inspection checklists and safety seminars are just a few of the myriad ways that these associations work to keep the risk of injury low at amusement parks. In combination with state statutes and regulations, industry associations help to adequately regulate amusement parks.

## **VI. Problems with Federal Regulation of Fixed-Site Amusement Rides**

Although the Commerce Clause, due to Supreme Court decisions in *Lopez* and *Morrison*, would probably allow federal regulation of fixed-site amusement rides, and therefore cannot be used to explain why fixed-site amusement rides are distinguished from mobile amusement rides, there are legitimate reasons for allowing fixed-site amusement rides to remain under state and local regulation. First, what federal agency should be responsible for the regulation of the fixed-site rides? As previously discussed, the CPSC has traditionally been the agency responsible for the regulation of amusement parks. To do a proper job, however, the CPSC would need to add a number of staff to cover the huge amount of fixed-site rides in the United States today. It would also need a much larger annual budget to pay its added staff, to train them to do their job, and to equip them with the materials that would be needed to adequately inspect the rides.[117] The CPSC estimates that the Commission would require at least five million dollars.[118] The 2003 proposed budget, however, allows only about \$57 million for the CPSC’s budget, an amount that falls \$1.05 million short of inflation; it also reduces the staff to 471 (the smallest number of full-time staff it has ever employed).[119] These numbers suggest that it will be hard enough to carry out the agency’s existing functions without accepting any further responsibilities. These numbers suggest that many obstacles must be overcome in order to prepare the CPSC to take on the massive responsibilities associated with the regulation of all fixed-site amusement rides.

Second, regulation should be left to the states by virtue of the Tenth Amendment of the Bill of Rights, which clarifies that “the powers not delegated to the United States by the

Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”[120] Increasing federal oversight in areas traditionally left to the states gives rise to federalism arguments. Where should the line be drawn between the federal government and the states? One argument advanced by federalists is that federal regulation leads to a slower response time to public demands regarding safety due to red tape in the lengthy bureaucratic process of getting something done.[121] State administrative law is less complex, and results in swifter decision making.[122] If inspections need to be beefed up or new operator qualifications need to be adopted because of new information that comes to light, state law would provide the most rapid response.

The doctrine of enumerated powers, explicitly provided for in the Constitution,[123] gives content to the Tenth Amendment by specifying the powers constitutionally delegated to the United States. Although the Commerce Clause expresses one of these enumerated powers (that Congress has the authority to regulate commerce among the several states), and may grant the federal government authority to regulate fixed-site amusement park rides as discussed above, this authority need not be exercised. The power to regulate commerce in all respects is not a mandatory power; Congress may pick and choose whether it will become involved in certain areas. President Reagan's Domestic Policy Council Working Group on Federalism described federalism as a “constitutionally based structural theory of government designed to ensure political freedom and responsive, democratic government in a large and diverse society. Federalism has long been considered by many to be the ultimate guardian of liberty in a large and diverse society.”[124] This description highlights the important purposes that federalism serves. To allow states to continue their regulation of fixed-site amusement rides would further federalism and its quest to be the “ultimate guardian of liberty.”

Third, many argue that consumer behavior is the cause of a significant amount of the injuries reported at amusement parks each year. An official of the IAAPA claims that 65%-85% of ride-related accidents are brought on by riders who intentionally or inadvertently break the rules.[125] An OABA representative says the most unpredictable element of an amusement ride - and potentially the most dangerous - is the rider. The representative stated, "We have had many incidents where people have jumped out of rides. We have had instances where people stood up on Ferris wheels, and the bucket tipped and they fell out.”[126] In 2000, the Oklahoma Department of Labor Safety Standards Division conducted 1,412 amusement ride inspections and out of 25 reported incidents, all were attributed to patron error.[127]

If consumer behavior is, in fact, responsible for many of the injuries and/or fatalities, it is hard to see how putting fixed-site rides under federal control would change the situation. As it stands, trade associations are active in promoting rider safety and states have begun to enact rider responsibility laws. Pennsylvania has adopted the Amusement Rider Safety and Liability Act, which requires riders to refrain from doing such things as throwing or expelling any object from an amusement ride, boarding or dismounting an amusement ride except at a designated area, and engaging in any reckless act or activity which may tend to injure himself

or others.[128] Ohio is also among the states that have enacted rider-responsibility laws. Ohio's rider responsibility law allows prosecutors to charge unruly amusement park patrons with a misdemeanor if their actions result in an injury.[129] Trade associations and parks are also addressing this problem by increasing the amount of warning signs and by posting signs around the parks explaining how to ride responsibly. Officials and representative have also done safety programs in schools. The unruly parkgoer problem has been addressed by many. It doesn't seem likely that the CPSC could do more to curtail this problem.

## **VII. Conclusion**

Since 1981, the roller coaster loophole has given states responsibility for regulating fixed-site amusement rides. Current Commerce Clause tests fail to explain why the loophole exists since it appears that fixed-site amusement rides have a substantial effect on interstate commerce. Early interpretations of the Commerce Clause also seem to rule out an explanation for the loophole. It seems that Congress decided in 1981 that allowing the federal government the ability to regulate fixed-site rides would be a redundant waste of government resources, since some states already had extensive regulation in place and sufficient incentives existed for the industry to self-regulate.

States that have regulation in place are continuously improving existing regulation and adding further rules to enhance the safety of these rides. The trade associations involved in the amusement park industry and the industry itself are also dedicated to constantly enhancing safety. For example, in an attempt to stop accidents resulting from children being admitted onto rides for which they were too small, the Walt Disney Company began testing in 2002 a system that standardizes height measurement of children instead of employees making the call by sight.[130] Advancements in technology, like this height measurement device, are making it easier to detect problems in ride equipment and to maintain safety at all times.

If the few states that still have no fixed-site amusement ride regulations enact laws mandating proper inspection of rides and take action to promote the utmost in safety for amusement park visitors, there appears to be no sufficient reason why the federal government should be given control of fixed-site rides. Although federal oversight of all amusement rides would probably be permissible under the Commerce Clause, this would not be the best approach. Tragic accidents have occurred under the existing approach, but they would likely continue under an approach where fixed-site rides were under federal control. Nonetheless, risk of injury on an amusement park ride is small and if proper precautions are taken and riders act responsibly, parkgoers should not be concerned about the safety of themselves or their loved ones while fixed-site amusement rides remain under state control. Regulation of fixed-site amusement park rides should remain the province of the states.

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[FN9] Andrew Rathe, *World Coaster History*, <<http://www.coaster-world.com/worldhistory.shtml>> (last visited Oct. 27, 2002).

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[FN32] *Id.*

[FN33] *Id.*; *see also* Tim O'Brien & Natasha Emmons, *CPSC Ride Accident Report: How Accurate?*, AMUSEMENT BUSINESS, Aug. 14, 2000, at 1.

[FN34] Patricia Ziminski, Note, *Are We Being Taken for a Ride? - The Need for Uniform Federal Regulation in the Recreational Industry*, 51 SYRACUSE L. REV. 883, 899 (2001).

[FN35] *See* Jeffrey S. Downs, Note, *New Jersey and You Perfect Together? A Fatal End to the 1999 Summer Tourism Season Raises the Question Whether New Jersey's Regulation of Fixed-Site Amusements Is Perfect Enough*, 32 RUTGERS L.J. 307 (2000).

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[FN47] *Consumer Prod. Safety Comm'n v. Chance Mfg. Co.*, 441 F. Supp. 228, 230 (D.D.C. 1977) (citing 15 U.S.C. § 2052(a)(1) (1972)). Before the 1981 amendments, the Act defined "consumer product" as: Any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise.

[FN48] *See Chance Mfg. Co.*, 441 F. Supp. at 229.

[FN49] 15 U.S.C. § 2061(a) (1972).

[FN50] 441 F. Supp. at 231.

[FN51] *Id.*

[FN52] *Id.* at 232.

[FN53] *Id.*

[FN54] *Id.* at 231.

[FN55] 15 U.S.C. § 2052(a)(1)(ii) (2002).

[FN56] *See State Fair of Texas v. Consumer Prod. Safety Comm'n*, 650 F.2d 1324 (5th Cir. 1981).

[FN57] *Id.* at 1330.

[FN58] *Bell v. Consumer Prod. Safety Comm'n*, 645 F.2d 26 (10th Cir. 1981).

[FN59] *Id.* at 29.

[FN60] Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 724 (1981).

[FN61] 15 U.S.C. § 2052(a)(1) (2002). The amendments state: Such term [consumer product] includes any mechanical device which carries or conveys passengers along, around, or over a fixed or restricted route or course or within a defined area for the purpose of giving its passengers amusement, which is customarily controlled or directed by an individual who is employed for that purpose and who is not a consumer with respect to such device, and which is not permanently fixed to a site. Such term does not include such a device which is permanently fixed to a site.

[FN62] *See Susan Reiss, Note, Amusement Park Safety: Who Should Regulate?*, 5 CARDOZO ARTS & ENT. L.J. 195, 212-219 (1986).

[FN63] H.R. 3032, 106th Cong. (1999).

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[FN68] *See* O'Brien & Emmons, *supra* note 66.

[FN69] The 52 total co-sponsors of the National Amusement Park Ride Safety Act of 1999 include 48 Democrats and only 4 Republicans. H.R. 3032, 106th Cong. (1999).

[FN70] The Commerce Clause grants Congress the authority “to regulate Commerce . . . among the several States . . .” U.S. CONST. art. I, § 8, cl. 3.

[FN71] *Gibbons v. Ogden*, 22 U.S. 1, 193 (1824).

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[FN75] *United States v. Lopez*, 514 U.S. 549 (1995).

[FN76] *Id.*

[FN77] *Id.* at 559.

[FN78] *Id.* at 560.

[FN79] *United States v. Morrison*, 529 U.S. 598 (2000).

[FN80] 42 U.S.C. § 13981(c) (1999).

[FN81] See *Morrison*, 529 U.S. at 615.

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[FN83] See generally *supra* note 63.

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[FN95] OHIO REV. CODE ANN. § 1711.53(H) (Anderson 2002).

[FN96] OHIO REV. CODE ANN. § 1711.55(F) (Anderson 2002).

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[FN101] 4 PA. CONS. STAT. § 406(a) (2002).

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