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Amtrak [4]

**AMTRAK BRIEFING**  
**MAY 17, 1995**

**STATUS**

- o Administration bill introduced April 6
- o House Rail Subcommittee has drafted bill (details below); draft now being revised in consultation with labor; new draft unlikely to be ready until close to mark-up
- o Mark-up date unclear: may take place as early as May 25
- o Senate Minority (Exon) has introduced bill
- o Roth, Moynihan, other eastern Senators back permitting states to use highway funds for Amtrak

**BUDGET**

- o Administration bill maintains AMTRAK capital and op assistance, NEC for 2 yrs
- o President's budget phases down operating assistance after FY '97
- o Kasich budget resolution at similar levels for FY '96-'97, but anticipates phase out of capital, as well as operating assistance; also eliminates Farley building
- o Senate proposal's draconian reductions could mean much bigger short-term cuts

**MAJOR ISSUES**

1. Labor Protection (LP)
  - o Administration proposal would make LP negotiable, without time limit
  - o House subcommittee draft would cut LP from 6 yrs to 6 mos
  - o Rail labor proposes transferring LP from statute to contract;
  - o Rail labor working with majority in House, subcommittee staff
  - o Freight RR's have dropped effort to piggy-back on AMTRAK LP changes
2. Contracting Out (CO)
  - o Administration & House subcommittee drafts would make CO negotiable
  - o Rail labor proposes transferring CO from statute to contract
  - o Rail labor working with House majority, subcommittee staff

3. Privatization/Corporate Structure

- o Administration proposal would preserve status quo
- o House subcommittee draft calls for Federal gov't to surrender all stock in Amtrak and to relinquish lien on Northeast Corridor immediately; new corporation to be formed with ownership and capitalization unclear

4. Board Structure

- o Administration proposal would preserve status quo
- o Questions about impact of Lebron decision unresolved
- o House subcommittee draft would repeal process for appointing Amtrak directors, but leave existing Board in place to *reconstitute itself* in manner consistent with D.C. corporations law
- o As drafted, House scheme appears unworkable and politically unviable

↙ no change?

OTHER ISSUES

1. Impact on Commuter Railroads
2. Route Structure
3. Eligibility for Highway Funds
4. Liability Limitation
5. ADA

HOUSE WORKING DRAFT  
MAKUP PUT ON HOLD 7/25  
H.L.C.

[DISCUSSION DRAFT]

JULY 21, 1995

AMENDMENT IN THE NATURE OF A SUBSTITUTE  
TO H.R. 1788  
OFFERED BY MR. SHUSTER

Strike all after the enacting clause and insert in lieu thereof the following:

1 SECTION 1. SHORT TITLE.

2 This Act may be cited as the "Amtrak Reform and  
3 Privatization Act of 1995".

4 TITLE I—PROCUREMENT  
5 REFORMS

6 SEC. 101. CONTRACTING OUT.

7 (a) AMENDMENT.—Section 24312(b) of title 49,  
8 United States Code, is amended to read as follows—

9 "(b) CONTRACTING OUT.—(1) When Amtrak con-  
10 tracts out work normally performed by an employee in a  
11 bargaining unit covered by a contract between a labor or-  
12 ganization and Amtrak, Amtrak is encouraged to use  
13 other rail carriers for performing such work.

14 "(2)(A) Amtrak may not enter into a contract for the  
15 operation of trains with any entity other than a State or  
16 State authority.

1       “(B) If Amtrak enters into a contract as described  
2 in subparagraph (A)—

3               “(i) such contract shall not relieve Amtrak of  
4 any obligation in connection with the use of facilities  
5 of another entity for the operation covered by such  
6 contract; and

7               “(ii) such operation shall be subject to any op-  
8 erating or safety restrictions and conditions required  
9 by the agreement providing for the use of such fa-  
10 cilities.”.

11       (b) **EFFECTIVE DATE.**—Subsection (a) shall take ef-  
12 fect 254 days after the date of the enactment of this Act.

13 **SEC. 102. CONTRACTING PRACTICES.**

14       (a) **BELOW-COST COMPETITION.**—Section 24305(b)  
15 of title 49, United States Code, is amended to read as  
16 follows:

17               “(b) **BELOW-COST COMPETITION.**—(1) Amtrak shall  
18 not submit any bid for the performance of services under  
19 a contract for an amount less than the cost to Amtrak  
20 of performing such services, with respect to any activity  
21 other than the provision of intercity rail passenger trans-  
22 portation, commuter rail passenger transportation, or mail  
23 or express transportation. For purposes of this subsection,  
24 the cost to Amtrak of performing services shall be deter-

1 mined using generally accepted accounting principles for  
2 contracting.

3       “(2) Any aggrieved individual may commence a civil  
4 action for violation of paragraph (1). The United States  
5 district courts shall have jurisdiction, without regard to  
6 the amount in controversy or the citizenship of the parties,  
7 to enforce paragraph (1). The court, in issuing any final  
8 order in any action brought pursuant to this paragraph,  
9 may award bid preparation costs, anticipated profits, and  
10 litigation costs, including reasonable attorney and expert  
11 witness fees, to any prevailing or substantially prevailing  
12 party. The court may, if a temporary restraining order  
13 or preliminary injunction is sought, require the filing of  
14 a bond or equivalent security in accordance with the Fed-  
15 eral Rules of Civil Procedure.”

16       (b) THROUGH SERVICE IN CONJUNCTION WITH  
17 INTERCITY BUS OPERATIONS.—(1) Section 24305(a) of  
18 title 49, United States Code, is amended by adding at the  
19 end the following new paragraph:

20       “(3)(A) Except as provided in subsection (d)(2), Am-  
21 trak may enter into a contract with a motor carrier of  
22 passengers for the intercity transportation of passengers  
23 by motor carrier over regular routes only—

24       “(i) if the motor carrier is not a public recipient  
25 of governmental assistance, as such term is defined

1 in section 10922(d)(1)(F)(i) of this title, other than  
2 a recipient of funds under section 18 of the Federal  
3 Transit Act:

4 “(ii) for passengers who have had prior move-  
5 ment by rail or will have subsequent movement by  
6 rail; and

7 “(iii) if the buses, when used in the provision  
8 of such transportation, are used exclusively for the  
9 transportation of passengers described in clause (ii).

10 “(B) Subparagraph (A) shall not apply to transpor-  
11 tation funded predominantly by a State or local govern-  
12 ment, or to ticket selling agreements.”

13 (2) Section 24305(d) of title 49, United States Code,  
14 is amended by adding at the end the following new para-  
15 graph:

16 “(3) Congress encourages Amtrak and motor com-  
17 mon carriers of passengers to use the authority conferred  
18 in section 11342(a) of this title for the purpose of provid-  
19 ing improved service to the public and economy of oper-  
20 ation.”

21 **SEC. 103. FREEDOM OF INFORMATION ACT.**

22 Section 24301(e) of title 49, United States Code, is  
23 amended by striking “Section 552 of title 5, this part,”  
24 and inserting in lieu thereof “This part”.

1 TITLE II—OPERATIONAL  
2 REFORMS

3 SEC. 201. BASIC SYSTEM.

4 (a) OPERATION OF BASIC SYSTEM.—Section 24701  
5 of title 49, United States Code, and the item relating  
6 thereto in the table of sections of chapter 247 of such title,  
7 are repealed.

8 (b) IMPROVING RAIL PASSENGER TRANSPOR-  
9 TATION.—Section 24702 of title 49, United States Code,  
10 and the item relating thereto in the table of sections of  
11 chapter 247 of such title, are repealed.

12 (c) DISCONTINUANCE.—Section 24706 of title 49,  
13 United States Code, is amended—

14 (1) in subsection (a)(1)—

15 (A) by striking “90 days” and inserting in  
16 lieu thereof “180 days”;

17 (B) by striking “a discontinuance under  
18 section 24704 or 24707(a) or (b) of this title”  
19 and inserting in lieu thereof “discontinuing  
20 service over a route”; and

21 (C) by inserting “or assume” after “agree  
22 to share”;

23 (2) in subsection (a)(2), by striking “section  
24 24704 or 24707(a) or (b) of this title” and inserting  
25 in lieu thereof “paragraph (1)”; and

1 (3) by striking subsection (b).

2 (d) COST AND PERFORMANCE REVIEW.—Section  
3 24707 of title 49, United States Code, and the item relat-  
4 ing thereto in the table of sections of chapter 247 of such  
5 title, are repealed.

6 (e) SPECIAL COMMUTER TRANSPORTATION.—Section  
7 24708 of title 49, United States Code, and the item relat-  
8 ing thereto in the table of sections of chapter 247 of such  
9 title, are repealed.

10 (f) CONFORMING AMENDMENT.—Section  
11 24312(a)(1) of title 49, United States Code, is amended  
12 by striking “, 24701(a),”.

13 **SEC. 202. MAIL, EXPRESS, AND AUTO-FERRY TRANSPOR-**  
14 **TATION.**

15 (a) REPEAL.—Section 24306 of title 49, United  
16 States Code, and the item relating thereto in the table of  
17 sections of chapter 243 of such title, are repealed.

18 (b) CONFORMING AMENDMENT.—Section 24301 of  
19 title 49, United States Code, is amended by adding at the  
20 end the following new subsection:

21 “(o) NONAPPLICATION OF CERTAIN OTHER LAWS.—  
22 State and local laws and regulations that impair the provi-  
23 sion of mail, express, and auto-ferry transportation do not  
24 apply to Amtrak or a rail carrier providing mail, express,  
25 or auto-ferry transportation.”

1 SEC. 203. ROUTE AND SERVICE CRITERIA.

2 Section 24703 of title 49, United States Code, and  
3 the item relating thereto in the table of sections of chapter  
4 247 of such title, are repealed.

5 SEC. 204. ADDITIONAL QUALIFYING ROUTES.

6 Section 24705 of title 49, United States Code, and  
7 the item relating thereto in the table of sections of chapter  
8 247 of such title, are repealed.

9 SEC. 205. TRANSPORTATION REQUESTED BY STATES, AU-  
10 THORITIES, AND OTHER PERSONS.

11 (a) REPEAL.—Section 24704 of title 49, United  
12 States Code, and the item relating thereto in the table of  
13 sections of chapter 247 of such title, are repealed.

14 (b) EXISTING AGREEMENTS.—Amtrak shall not,  
15 after the date of the enactment of this Act, be required  
16 to provide transportation services pursuant to an agree-  
17 ment entered into before such date of enactment under  
18 the section repealed by subsection (a) of this section.

19 (c) STATE, REGIONAL, AND LOCAL COOPERATION.—  
20 Section 24101(c)(2) of title 49, United States Code, is  
21 amended by inserting “, separately or in combination,”  
22 after “and the private sector”.

23 (d) CONFORMING AMENDMENT.—Section  
24 24312(a)(1) of title 49, United States Code, is amended  
25 by striking “or 24704(b)(2)”.

1 SEC. 206. AMTRAK COMMUTER.

2 (a) REPEAL OF CHAPTER 245.—Chapter 245 of title  
3 49, United States Code, and the item relating thereto in  
4 the table of chapters of subtitle V of such title, are re-  
5 pealed.

6 (b) CONFORMING AMENDMENTS.—(1) Section  
7 24301(f) of title 49, United States Code, is amended to  
8 read as follows:

9 “(f) TAX EXEMPTION FOR CERTAIN COMMUTER AU-  
10 THORITIES.—A commuter authority that was eligible to  
11 make a contract with Amtrak Commuter to provide com-  
12 muter rail passenger transportation but which decided to  
13 provide its own rail passenger transportation beginning  
14 January 1, 1983, is exempt, effective October 1, 1981,  
15 from paying a tax or fee to the same extent Amtrak is  
16 exempt.”

*Who is  
this?*

17 (2) Subsection (a) of this section shall not affect any  
18 trackage rights held by Amtrak or the Consolidated Rail  
19 Corporation.

20 SEC. 207. COMMUTER COST SHARING ON THE NORTHEAST  
21 CORRIDOR.

22 (a) DETERMINATION OF COMPENSATION.—Section  
23 24904 of title 49, United States Code, is amended—

24 (1) by striking subsections (b) and (c); and

25 (2) by inserting after subsection (a) the follow-  
26 ing new subsection:

1       “(b) BINDING ARBITRATION.—(1) If the parties to  
2 an agreement described in subsection (a)(6) cannot agree  
3 to the terms of such agreement, such parties shall submit  
4 the issues in dispute to binding arbitration.

5       “(2) The parties to a dispute described in paragraph  
6 (1) may agree to use the Interstate Commerce Commis-  
7 sion to arbitrate such dispute, and if requested the Inter-  
8 state Commerce Commission shall perform such func-  
9 tion.”.

10       (b) PRIVATIZATION.—Section 24101(d) of title 49,  
11 United States Code, is amended to read as follows:

12       “(d) MINIMIZING GOVERNMENT SUBSIDIES.—To  
13 carry out this part, Amtrak is encouraged to make agree-  
14 ments with the private sector and undertake initiatives  
15 that are consistent with good business judgment, that  
16 produce income to minimize Government subsidies, and  
17 that promote the potential privatization of Amtrak’s oper-  
18 ations.”.

19 **SEC. 208. ACCESS TO RECORDS AND ACCOUNTS.**

20       Section 24315 of title 49, United States Code, is  
21 amended—

22               (1) in subsection (e), by inserting “financial or”  
23 after “Comptroller General may conduct”; and

24               (2) by adding at the end the following new sub-  
25 section:

1       “(h) ACCESS TO RECORDS AND ACCOUNTS.—A State  
2 shall have access to Amtrak’s records, accounts, and other  
3 necessary documents used to determine the amount of any  
4 payment to Amtrak required of the State.”.

## 5                   **TITLE III—COLLECTIVE** 6                   **BARGAINING REFORMS**

### 7       SEC. 301. RAILWAY LABOR ACT PROCEDURES.

8       (a) NOTICES.—Notwithstanding any arrangement in  
9 effect before the date of the enactment of this Act, notices  
10 under section 6 of the Railway Labor Act (45 U.S.C. 156)  
11 with respect to all issues relating to—

12               (1) employee protective arrangements and sev-  
13 erance benefits, including all provisions of Appendix  
14 C-2 to the National Railroad Passenger Corporation  
15 Agreement, signed July 5, 1973; and

16               (2) contracts entered into by Amtrak for the  
17 performance of work normally performed by an em-  
18 ployee in a bargaining unit covered by a contract be-  
19 tween a labor organization and Amtrak,  
20 applicable to employees of Amtrak shall be deemed served  
21 and effective on the date which is 90 days after the date  
22 of the enactment of this Act. Each affected labor organiza-  
23 tion representing Amtrak employees, and Amtrak, shall  
24 promptly supply specific information and proposals with  
25 respect to each such notice.

1 (b) NATIONAL MEDIATION BOARD EFFORTS.—Ex-  
2 cept as provided in subsection (c), the National Mediation  
3 Board shall complete all efforts, with respect to each dis-  
4 pute described in subsection (a), under section 5 of the  
5 Railway Labor Act (45 U.S.C. 155) not later than 180  
6 days after the date of the enactment of this Act.

7 (c) RAILWAY LABOR ACT ARBITRATION.—The par-  
8 ties to any dispute described in subsection (a) may agree  
9 to submit the dispute to arbitration under section 7 of the  
10 Railway Labor Act (45 U.S.C. 157), and any award re-  
11 sulting therefrom shall be retroactive to the date which  
12 is 180 days after the date of the enactment of this Act.

13 (d) FURTHER ARBITRATION.—(1) With respect to  
14 any dispute described in subsection (a) which—

15 (A) is unresolved as of the date which is 180  
16 days after the date of the enactment of this Act; and

17 (B) is not submitted to arbitration as described  
18 in subsection (c),

19 Amtrak and the labor organization parties to such dispute  
20 shall, within 187 days after the date of the enactment of  
21 this Act, each select an individual from the entire roster  
22 of arbitrators maintained by the National Mediation  
23 Board. Within 194 days after the date of the enactment  
24 of this Act, the individuals selected under the preceding  
25 sentence shall jointly select an individual from such roster

1 to make recommendations with respect to such dispute  
2 under this subsection.

3 (2) No individual shall be selected under paragraph  
4 (1) who is pecuniarily or otherwise interested in any orga-  
5 nization of employees or any railroad. Nothing in this sub-  
6 section shall preclude an individual from being selected for  
7 more than 1 dispute described in subsection (a).

8 (3) The compensation of individuals selected under  
9 paragraph (1) shall be fixed by the National Mediation  
10 Board. The second paragraph of section 10 of the Railway  
11 Labor Act shall apply to the expenses of such individuals  
12 as if such individuals were members of a board created  
13 under such section 10.

14 (4) If the parties to a dispute described in subsection  
15 (a) fail to reach agreement within 224 days after the date  
16 of the enactment of this Act, the individual selected under  
17 paragraph (1) with respect to such dispute shall make rec-  
18 ommendations to the parties proposing contract terms to  
19 resolve the dispute.

20 (5) If the parties to a dispute described in subsection  
21 (a) fail to reach agreement, no change shall be made by  
22 either of the parties in the conditions out of which the  
23 dispute arose for 30 days after recommendations are made  
24 under paragraph (4).

HOW DOES  
UNRESOLVED  
DISPUTE  
GET RESOLVED  
NOW?

## 1 SEC. 302. SERVICE DISCONTINUANCE.

2 (a) REPEAL.—(1) Section 24706(c) of title 49, Unit-  
3 ed States Code, is repealed.

4 (2) Any provision of a contract, entered into before  
5 the date of the enactment of this Act between Amtrak and  
6 a labor organization representing Amtrak employees, re-  
7 lating to—

8 (A) employee protective arrangements and sev-  
9 erance benefits, including all provisions of Appendix  
10 C-2 to the National Railroad Passenger Corporation  
11 Agreement, signed July 5, 1973; or

12 (B) contracts entered into by Amtrak for the  
13 performance of work normally performed by an em-  
14 ployee in a bargaining unit covered by a contract be-  
15 tween a labor organization and Amtrak,  
16 applicable to employees of Amtrak is extinguished.

17 (3) Section 1172(c) of title 11, United States Code.  
18 shall not apply to Amtrak and its employees.

19 (4) This subsection shall take effect 254 days after  
20 the date of the enactment of this Act.

21 (b) INTERCITY PASSENGER SERVICE EMPLOYEES.—  
22 Section 1165(a) of the Northeast Rail Service Act of 1981  
23 (45 U.S.C. 1113(a)) is amended—

24 (1) by inserting “(1)” before “After January 1,  
25 1983”;

1 (2) by striking "Amtrak, Amtrak Commuter,  
 2 and Conrail" and inserting in lieu thereof "Amtrak  
 3 and Conrail":

4 (3) by striking "Such agreement shall ensure"  
 5 and all that follows through "submitted to binding  
 6 arbitration.": and

7 (4) by adding at the end the following new  
 8 paragraph:

9 "(2) Notwithstanding any other provision of law,  
 10 agreement, or arrangement, with respect to employees in  
 11 any class or craft in train or engine service, Conrail shall  
 12 have the right to furlough one such employee for each em-  
 13 ployee in train or engine service who moves from Amtrak  
 14 to Conrail in excess of the cumulative number of such em-  
 15 ployees who move from Conrail to Amtrak. Conrail shall  
 16 not be obligated to fill any position governed by an agree-  
 17 ment concerning crew consist, attrition arrangements, re-  
 18 serve boards, or reserve engine service positions, where an  
 19 increase in positions is the result of the return of an Am-  
 20 trak employee pursuant to an agreement entered into  
 21 under paragraph (1). Conrail's collective bargaining agree-  
 22 ments with organizations representing its train and engine  
 23 service employees shall be deemed to have been amended  
 24 to conform to this paragraph. Any dispute or controversy  
 25 with respect to the interpretation, application, or enforce-

*Flowback  
 INTRAC*

1 ment of this paragraph which has not been resolved within  
 2 90 days after the date of the enactment of this paragraph  
 3 may be submitted by either party to an adjustment board  
 4 for a final and binding decision under section 3 of the  
 5 Railway Labor Act.”.

6 (c) TECHNICAL AMENDMENT.—Section 11347 of  
 7 title 49, United States Code, is amended by striking “sec-  
 8 tions 24307(c), 24312, and” and inserting in lieu thereof  
 9 “section”.

## 10 TITLE IV—USE OF RAILROAD 11 FACILITIES

### 12 SEC. 401. LIABILITY LIMITATION.

13 (a) AMENDMENT.—Chapter 281 of title 49, United  
 14 States Code, is amended by adding at the end the follow-  
 15 ing new section:

16 “§28103. Limitations on rail passenger transpor-  
 17 tation liability

18 “(a) LIMITATIONS.—(1) Notwithstanding any other  
 19 statutory or common law or public policy, or the nature  
 20 of the conduct giving rise to damages or liability, in a  
 21 claim for personal injury, death, or damage to property  
 22 arising from or in connection with the provision of rail  
 23 passenger transportation, or from or in connection with  
 24 any operations over or use of right-of-way or facilities  
 25 owned, leased, or maintained by Amtrak, or from or in

APPEALS  
 TO  
 BUDGETARY  
 FREIGHTS

1 connection with any rail passenger transportation oper-  
2 ations over or rail passenger transportation use of right-  
3 of-way or facilities owned, leased, or maintained by any  
4 high-speed railroad authority or operator, any commuter  
5 authority or operator, or any rail carrier—

6 “(A) punitive damages shall not exceed the  
7 greater of—

8 “(i) \$250,000; or

9 “(ii) three times the amount of economic  
10 damages; and

11 “(B) damages awarded to any claimant for each  
12 accident or incident shall not exceed the claimant’s  
13 economic losses, if any, by more than \$250,000.

14 “(2) For purposes of this subsection, the term ‘claim’  
15 means a claim made, directly or indirectly—

16 “(A) against Amtrak, any high-speed railroad  
17 authority or operator, any commuter authority or  
18 operator, or any rail carrier; or

19 “(B) against an affiliate engaged in railroad op-  
20 erations, officer, employee, or agent of, Amtrak, any  
21 high-speed railroad authority or operator, any com-  
22 muter authority or operator, or any rail carrier.

23 “(3) Notwithstanding paragraph (1)(A) of this sub-  
24 section, if, in any case wherein death was caused, the law  
25 of the place where the act or omission complained of oc-

1 curred provides. or has been construed to provide. for  
2 damages only punitive in nature, the claimant may recover  
3 in a claim limited by this subsection for actual or compen-  
4 satory damages measured by the pecuniary injuries, re-  
5 sulting from such death, to the persons for whose benefit  
6 the action was brought, subject to paragraph (1)(B).

7       “(b) INDEMNIFICATION OBLIGATIONS.—Obligations  
8 of any party, however arising, including obligations arising  
9 under leases or contracts or pursuant to orders of an ad-  
10 ministrative agency, to indemnify against damages or li-  
11 ability for personal injury, death, or damage to property  
12 described in subsection (a), incurred after the date of the  
13 enactment of the Amtrak Reform and Privatization Act  
14 of 1995, shall be enforceable, notwithstanding any other  
15 statutory or common law or public policy, or the nature  
16 or the conduct giving rise to the damages or liability.

17       “(c) EFFECT ON OTHER LAWS.—This section shall  
18 not affect the damages that may be recovered under the  
19 Act of April 27, 1908 (45 U.S.C. 51 et seq.; popularly  
20 known as the ‘Federal Employers’ Liability Act’) or under  
21 any workers compensation act.”.

22       (b) CONFORMING AMENDMENT.—The table of sec-  
23 tions of chapter 281 of title 49, United States Code, is  
24 amended by adding at the end the following new item:

“28103. Limitations on rail passenger transportation liability.”.

1 TITLE V—FINANCIAL REFORMS

2 SEC. 501. FINANCIAL POWERS.

3 (a) CAPITALIZATION.—(1) Section 24304 of title 49.

4 United States Code, is amended to read as follows:

5 “§ 24304. Employee stock ownership plans

6 “In issuing stock pursuant to applicable corporate  
7 law, Amtrak is encouraged to include employee stock own-  
8 ership plans.”.

9 (2) The item relating to section 24304 of title 49,  
10 United States Code, in the table of sections of chapter 243  
11 of such title is amended to read as follows:

“24304. Employee stock ownership plans.”.

12 (b) REDEMPTION OF COMMON STOCK.—(1) Amtrak  
13 shall, within 2 months after the date of the enactment of  
14 this Act, redeem all common stock previously issued, for  
15 the fair market value of such stock as of the day before  
16 the date of the enactment of this Act.

17 (2) Section 28103 of title 49, United States Code,  
18 shall not apply to any rail carrier holding common stock  
19 of Amtrak after the expiration of 2 months after the date  
20 of the enactment of this Act.

21 (3) Amtrak shall redeem any such common stock held  
22 after the expiration of the 2-month period described in  
23 paragraph (1), using procedures set forth in section  
24 24311(a) and (b).

STILL UNDER  
LIMB  
MAY NOT  
DETACH  
ALL  
COMMON  
STOCK  
HOLDERS

1 (c) ELIMINATION OF LIQUIDATION PREFERENCE  
2 AND VOTING RIGHTS OF PREFERRED STOCK.—Preferred  
3 stock of Amtrak held by the Secretary of Transportation  
4 shall confer no liquidation preference or voting rights.

5 (d) NOTE AND MORTGAGE.—(1) Section 24907 of  
6 title 49, United States Code, and the item relating thereto  
7 in the table of sections of chapter 249 of such title, are  
8 repealed.

9 (2) The United States hereby relinquishes all rights  
10 held in connection with any note obtained or mortgage  
11 made under such section 24907, or in connection with the  
12 note, security agreement, and terms and conditions related  
13 thereto entered into with Amtrak dated October 5, 1983.

RELINQUISH  
MORTGAGE

14 (3) No amount shall be includible in Amtrak's gross  
15 income for Federal tax purposes as a result of the applica-  
16 tion of this subsection or subsection (c).

17 (e) STATUS AND APPLICABLE LAWS.—(1) Section  
18 24301(a)(3) of title 49, United States Code, is amended  
19 by inserting “, and shall not be subject to title 31, United  
20 States Code” after “United States Government”.

21 (2) Section 9101(2) of title 31, United States Code,  
22 relating to Government corporations, is amended by strik-  
23 ing subparagraph (A) and redesignating subparagraphs  
24 (B) through (M) as subparagraphs (A) through (L), re-  
25 spectively.

1 SEC. 502. DISBURSEMENT OF FEDERAL FUNDS.

2 Section 24104(d) of title 49, United States Code, is  
3 amended to read as follows:

4 "(d) ADMINISTRATION OF APPROPRIATIONS.—Fed-  
5 eral funds appropriated to Amtrak shall be provided to  
6 Amtrak upon appropriation when requested by Amtrak.  
7 and shall not be includible in Amtrak's gross income for  
8 Federal tax purposes."

9 SEC. 503. BOARD OF DIRECTORS.

10 Section 24302 of title 49, United States Code, is  
11 amended to read as follows:

12 "§ 24302. Board of Directors

13 "(a) EMERGENCY REFORM BOARD.—

14 "(1) ESTABLISHMENT AND DUTIES.—Thirty  
15 days after the date of the enactment of the Amtrak  
16 Reform and Privatization Act of 1995, the Emer-  
17 gency Reform Board described in paragraph (2)  
18 shall assume the responsibilities of the Board of Di-  
19 rectors of Amtrak. Such Board shall adopt new by-  
20 laws, including procedures for the selection of mem-  
21 bers of the Board of Directors under subsection (b)  
22 which provide for employee representation.

23 "(2) MEMBERSHIP.—(A) The Emergency Re-  
24 form Board shall consist of 7 members appointed as  
25 follows:

1           “(i) Two individuals to be appointed by the  
2           Speaker of the House of Representatives.

3           “(ii) One individual to be appointed by the  
4           minority leader of the House of Representa-  
5           tives.

6           “(iii) Two individuals to be appointed by  
7           the majority leader of the Senate.

8           “(iv) One individual to be appointed by the  
9           minority leader of the Senate.

10          “(v) One individual to be appointed by the  
11          President.

12          “(B) Appointments under subparagraph (A)  
13          shall be made from among individuals who—

14               “(i) have technical qualification, profes-  
15               sional standing, and demonstrated expertise in  
16               the fields of transportation and corporate man-  
17               agement; and

18               “(ii) are not employees of Amtrak, employ-  
19               ees of the United States, or representatives of  
20               rail labor or rail management.

21          “(C) Within 40 days after the date of the en-  
22          actment of the Amtrak Reform and Privatization  
23          Act of 1995, a majority of the members of the  
24          Emergency Reform Board shall elect a chairman  
25          from among such members.

1       “(b) BOARD OF DIRECTORS.—Four years after the  
2 establishment of the Emergency Reform Board under sub-  
3 section (a), a Board of Directors shall be selected pursu-  
4 ant to bylaws adopted by the Emergency Reform Board,  
5 and the Emergency Reform Board shall be dissolved.”.

6 **SEC. 504. REPORTS AND AUDITS.**

7       Section 24315 of title 49, United States Code, is  
8 amended—

9           (1) by striking subsections (a) and (c);

10           (2) by redesignating subsections (b), (d), (e),  
11 (f), and (g) as subsections (a), (b), (c), (d), and (e),  
12 respectively; and

13           (3) in subsection (d), as so redesignated by  
14 paragraph (2) of this section, by striking “(d) or  
15 (e)” and inserting in lieu thereof “(b) or (c)”.

16 **SEC. 505. OFFICERS' PAY.**

17       Section 24303(b) of title 49, United States Code, is  
18 amended by inserting “The preceding sentence shall cease  
19 to be effective on the expiration of a fiscal year during  
20 which no Federal operating assistance is provided to Am-  
21 trak.” after “with comparable responsibility.”.

22 **SEC. 506. EXEMPTION FROM TAXES.**

23       Section 24301(l)(1) of title 49, United States Code,  
24 is amended—

1 (1) by inserting “, and any passenger or other  
2 customer of Amtrak or such subsidiary,” after “sub-  
3 sidiary of Amtrak”;

4 (2) by striking “or fee imposed” and all that  
5 follows through “levied on it” and inserting in lieu  
6 thereof “, fee, head charge, or other charge, imposed  
7 or levied by a State, political subdivision, or local  
8 taxing authority, directly or indirectly on Amtrak or  
9 on persons traveling in intercity rail passenger  
10 transportation or on mail or express transportation  
11 provided by Amtrak or a rail carrier subsidiary of  
12 Amtrak, or on the carriage of such persons, mail, or  
13 express, or on the sale of any such transportation,  
14 or on the gross receipts derived therefrom”; and

15 (3) by amending the last sentence thereof to  
16 read as follows: “In the case of a tax or fee that  
17 Amtrak was required to pay as of September 10,  
18 1982, Amtrak is not exempt from such tax or fee if  
19 it was assessed before April 1, 1995.”.

## 20 **TITLE VI—MISCELLANEOUS**

### 21 **SEC. 601. TEMPORARY RAIL ADVISORY COUNCIL.**

22 (a) **APPOINTMENT.**—Within 30 days after the date  
23 of the enactment of this Act, a Temporary Rail Advisory  
24 Council (in this section referred to as the “Council”) shall  
25 be appointed under this section.

1 (b) DUTIES.—The Council shall—

2 (1) evaluate Amtrak's performance;

3 (2) prepare an analysis and critique of Am-  
4 trak's business plan;

5 (3) suggest strategies for further cost contain-  
6 ment and productivity improvements, including  
7 strategies with the potential for further reduction in  
8 Federal operating subsidies and the eventual partial  
9 or complete privatization of Amtrak's operations;

10 and

11 (4) recommend appropriate methods for adop-  
12 tion of uniform cost and accounting procedures  
13 throughout the Amtrak system, based on generally  
14 accepted accounting principles.

15 (c) MEMBERSHIP.—(1) The Council shall consist of  
16 7 members appointed as follows:

17 (A) Two individuals to be appointed by the  
18 Speaker of the House of Representatives.

19 (B) One individual to be appointed by the mi-  
20 nority leader of the House of Representatives.

21 (C) Two individuals to be appointed by the ma-  
22 jority leader of the Senate.

23 (D) One individual to be appointed by the mi-  
24 nority leader of the Senate.

1 (E) One individual to be appointed by the  
2 President.

3 (2) Appointments under paragraph (1) shall be made  
4 from among individuals who—

5 (A) have technical qualification, professional  
6 standing, and demonstrated expertise in the fields of  
7 transportation and corporate management; and

8 (B) are not employees of Amtrak, employees of  
9 the United States, or representatives of rail labor or  
10 rail management.

11 (3) Within 40 days after the date of the enactment  
12 of this Act, a majority of the members of the Council shall  
13 elect a chairman from among such members.

14 (d) TRAVEL EXPENSES.—Each member of the Coun-  
15 cil shall serve without pay, but shall receive travel ex-  
16 penses, including per diem in lieu of subsistence, in ac-  
17 cordance with sections 5702 and 5703 of title 5, United  
18 States Code.

19 (e) ADMINISTRATIVE SUPPORT.—The Secretary of  
20 Transportation shall provide to the Council such adminis-  
21 trative support as the Council requires to carry out this  
22 section.

23 (f) ACCESS TO INFORMATION.—Amtrak shall make  
24 available to the Council all information the Council re-  
25 quires to carry out this section. The Council shall establish

1 appropriate procedures to ensure against the public disclo-  
2 sure of any information obtained under this subsection  
3 which is a trade secret or commercial or financial informa-  
4 tion that is privileged or confidential.

5 (g) REPORTS.—(1) Within 120 days after the date  
6 of the enactment of this Act, the Council shall transmit  
7 to the Amtrak board of directors and the Congress an in-  
8 terim report on its findings and recommendations.

9 (2) Within 270 days after the date of the enactment  
10 of this Act, the Council shall transmit to the Amtrak  
11 board of directors and the Congress a final report on its  
12 findings and recommendations.

13 (h) STATUS.—The Council shall not be subject to the  
14 Federal Advisory Committee Act (5 U.S.C. App.) or sec-  
15 tion 552 of title 5, United States Code (commonly referred  
16 to as the Freedom of Information Act).

17 **SEC. 602. PRINCIPAL OFFICE AND PLACE OF BUSINESS.**

18 Section 24301(b) of title 49, United States Code, is  
19 amended—

20 (1) by striking the first sentence;

21 (2) by striking "District of Columbia" and in-  
22 serting in lieu thereof "State in which its principal  
23 office and place of business is located"; and

24 (3) by inserting "For purposes of this sub-  
25 section, the term 'State' includes the District of Co-

1       olumbia. Notwithstanding section 3 of the District of  
2       Columbia Business Corporation Act. Amtrak, if its  
3       principal office and place of business is located in  
4       the District of Columbia, shall be considered orga-  
5       nized under the provisions of such Act." after "in a  
6       civil action."

7       SEC. 603. STATUS AND APPLICABLE LAWS.

8       Section 24301 of title 49, United States Code, is  
9       amended—

10       (1) in subsection (a)(1), by striking "rail car-  
11       rier under section 10102" and inserting in lieu  
12       thereof "railroad carrier under section 20102(2) and  
13       chapters 261 and 281"; and

14       (2) by amending subsection (c) to read as fol-  
15       lows:

16       “(c) APPLICATION OF SUBTITLE IV.—Subtitle IV of  
17       this title shall not apply to Amtrak, except for sections  
18       11303, 11342(a), 11504(a) and (d), and 11707. Notwith-  
19       standing the preceding sentence, Amtrak shall continue to  
20       be considered an employer under the Railroad Retirement  
21       Act of 1974, the Railroad Unemployment Insurance Act,  
22       and the Railroad Retirement Tax Act.”

1 SEC. 604. WASTE DISPOSAL.

2 Section 24301(m)(1)(A) of title 49, United States  
3 Code, is amended by striking "1996" and inserting in lieu  
4 thereof "2001".

5 SEC. 605. ASSISTANCE FOR UPGRADING FACILITIES.

6 Section 24310 of title 49, United States Code, and  
7 the item relating thereto in the table of sections of chapter  
8 243 of such title, are repealed.

9 SEC. 606. RAIL SAFETY SYSTEM PROGRAM.

10 Section 24313 of title 49, United States Code, and  
11 the item relating thereto in the table of sections of chapter  
12 243 of such title, are repealed.

13 SEC. 607. DEMONSTRATION OF NEW TECHNOLOGY.

14 Section 24314 of title 49, United States Code, and  
15 the item relating thereto in the table of sections of chapter  
16 243 of such title, are repealed.

17 SEC. 608. PROGRAM MASTER PLAN FOR BOSTON-NEW YORK

18 MAIN LINE.

19 (a) REPEAL.—Section 24903 of title 49, United  
20 States Code, and the item relating thereto in the table of  
21 sections of chapter 249 of such title, are repealed.

22 (b) CONFORMING AMENDMENT.—Section  
23 24902(a)(1)(A) of title 49, United States Code, is amend-  
24 ed by striking "and 40 minutes".

1 SEC. 609. BOSTON-NEW HAVEN ELECTRIFICATION  
2 PROJECT.

3 Section 24902(f) of title 49, United States Code, is  
4 amended—

5 (1) by inserting “(1)” before “Improvements  
6 under”; and

7 (2) by adding at the end the following new  
8 paragraph:

9 “(2) Amtrak shall design and construct the elec-  
10 trification system between Boston, Massachusetts, and  
11 New Haven, Connecticut, to accommodate the installation  
12 of a third mainline track between Davisville and Central  
13 Falls, Rhode Island, to be used for double-stack freight  
14 service to and from the Port of Davisville. Amtrak shall  
15 also make clearance improvements on the existing main  
16 line tracks to permit double stack service on this line, if  
17 funds to defray the costs of clearance improvements be-  
18 yond Amtrak’s own requirements for electrified passenger  
19 service are provided by public or private entities other  
20 than Amtrak. Wherever practicable, Amtrak shall use por-  
21 tal structures and realign existing tracks on undergrade  
22 and overgrade bridges to minimize the width of the right-  
23 of-way required to add the third track. Amtrak shall take  
24 such other steps as may be required to coordinate and fa-  
25 cilitate design and construction work. The Secretary of

1 Transportation may provide appropriate support to Am-  
2 trak for carrying out this paragraph.”

3 SEC. 610. AMERICANS WITH DISABILITIES ACT OF 1990.

4 (a) APPLICATION TO AMTRAK.—Amtrak shall not be  
5 subject to any requirement under section 242(a)(1) and  
6 (3) and (e)(2) of the Americans With Disabilities Act of  
7 1990 (42 U.S.C. 12162(a)(1) and (3) and (e)(2)) until  
8 January 1, 1998.

9 (b) CONFORMING AMENDMENT.—Section 24307 of  
10 title 49, United States Code, is amended—

11 (1) by striking subsection (b); and

12 (2) by redesignating subsection (c) as sub-  
13 section (b).

14 SEC. 611. DEFINITIONS.

15 Section 24102 of title 49, United States Code, is  
16 amended—

17 (1) by striking paragraphs (2), (3), and (11);

18 (2) by redesignating paragraphs (4) through  
19 (8) as paragraphs (2) through (6), respectively;

20 (3) by inserting after paragraph (6), as so re-  
21 designated by paragraph (2) of this section, the fol-  
22 lowing new paragraph:

23 “(7) ‘rail passenger transportation’ means the  
24 interstate, intrastate, or international transportation  
25 of passengers by rail.”;

1           (4) in paragraph (6), as so redesignated by  
2           paragraph (2) of this section, by inserting “, includ-  
3           ing a unit of State or local government,” after  
4           “means a person”: and

5           (5) by redesignating paragraphs (9) and (10)  
6           as paragraphs (8) and (9), respectively.

7   **SEC. 612. NORTHEAST CORRIDOR COST DISPUTE.**

8           Section 1163 of the Northeast Rail Service Act of  
9           1981 (45 U.S.C. 1111) is repealed.

10   **SEC. 613. INSPECTOR GENERAL ACT OF 1978 AMENDMENT.**

11           (a) **AMENDMENT.**—Section 8G(a)(2) of the Inspector  
12           General Act of 1978 (5 U.S.C. App.) is amended by strik-  
13           ing “Amtrak,”

14           (b) **AMTRAK NOT FEDERAL ENTITY.**—Amtrak shall  
15           not be considered a Federal entity for purposes of the In-  
16           spector General Act of 1978.

17   **SEC. 614. CONSOLIDATED RAIL CORPORATION.**

18           Section 4023 of the Conrail Privatization Act (45  
19           U.S.C. 1323), and the item relating thereto in the table  
20           of contents of such Act, are repealed.

21   **SEC. 615. INTERSTATE RAIL COMPACTS.**

22           (a) **CONSENT TO COMPACTS.**—Congress grants con-  
23           sent to States with an interest in a specific form, route,  
24           or corridor of intercity passenger rail service (including

1 high speed rail service) to enter into interstate compacts  
2 to promote the provision of the service, including—

3 (1) retaining an existing service or commencing  
4 a new service:

5 (2) assembling rights-of-way; and

6 (3) performing capital improvements, includ-  
7 ing—

8 (A) the construction and rehabilitation of  
9 maintenance facilities;

10 (B) the purchase of locomotives; and

11 (C) operational improvements, including  
12 communications, signals, and other systems.

13 (b) FINANCING.—An interstate compact established  
14 by States under subsection (a) may provide that, in order  
15 to carry out the compact, the States may—

16 (1) accept contributions from a unit of State or  
17 local government or a person:

18 (2) use any Federal or State funds made avail-  
19 able for intercity passenger rail service (except funds  
20 made available for the National Railroad Passenger  
21 Corporation);

22 (3) on such terms and conditions as the States  
23 consider advisable—

24 (A) borrow money on a short-term basis  
25 and issue notes for the borrowing; and

1 (B) issue bonds: and  
2 (4) obtain financing by other means permitted  
3 under Federal or State law.

4 **SEC. 616. CONFORMING AMENDMENT.**

5 Section 10362(b) of title 49, United States Code, is  
6 amended by striking paragraph (5) and redesignating  
7 paragraphs (6) through (8) as paragraphs (5) through  
8 (7), respectively.

9 **TITLE VII—AUTHORIZATION OF**  
10 **APPROPRIATIONS**

11 **SEC. 701. AUTHORIZATION OF APPROPRIATIONS.**

12 (a) **IN GENERAL.**—Section 24104(a) of title 49,  
13 United States Code, is amended to read as follows:

14 “(a) **IN GENERAL.**—There are authorized to be ap-  
15 propriated to the Secretary of Transportation—

16 “(1) \$772,000,000 for fiscal year 1995;

17 “(2) \$712,000,000 for fiscal year 1996;

18 “(3) \$712,000,000 for fiscal year 1997;

19 “(4) \$712,000,000 for fiscal year 1998; and

20 “(5) \$403,000,000 for fiscal year 1999.

21 for the benefit of Amtrak for capital expenditures under  
22 chapters 243 and 247 of this title, operating expenses, and  
23 payments described in subsection (c)(1)(A) through (C).”.

1 (b) ADDITIONAL AUTHORIZATIONS.—Section  
 2 24104(b) of title 49, United States Code, is amended to  
 3 read as follows:

4 “(b) ADDITIONAL AUTHORIZATIONS.—(1) In addi-  
 5 tion to amounts appropriated under subsection (a), there  
 6 are authorized to be appropriated to the Secretary of  
 7 Transportation—

8 “(A) \$200,000,000 for fiscal year 1995;

9 “(B) \$200,000,000 for fiscal year 1996;

10 “(C) \$200,000,000 for fiscal year 1997;

11 “(D) \$200,000,000 for fiscal year 1998; and

12 “(E) \$200,000,000 for fiscal year 1999,

13 for the benefit of Amtrak to make capital expenditures  
 14 under chapter 249 of this title.

15 “(2) In addition to amounts appropriated under sub-  
 16 section (a), there are authorized to be appropriated to the  
 17 Secretary of Transportation—

18 “(A) \$21,500,000 for fiscal year 1995;

19 “(B) \$10,000,000 for fiscal year 1996;

20 “(C) \$10,000,000 for fiscal year 1997;

21 “(D) \$10,000,000 for fiscal year 1998; and

22 “(E) \$10,000,000 for fiscal year 1999,

23 for the benefit of Amtrak to be used for engineering, de-  
 24 sign, and construction activities to enable the James A.  
 25 Farley Post Office in New York, New York, to be used

1 as a train station and commercial center and for necessary  
2 improvements and redevelopment of the existing Penn-  
3 sylvania Station and associated service building in New  
4 York, New York.”

5 (c) CONFORMING AMENDMENTS.—Section 24909 of  
6 title 49, United States Code, and the item relating thereto  
7 in the table of sections of chapter 249 of such title, are  
8 repealed.

9 (d) GUARANTEE OF OBLIGATIONS.—There are au-  
10 thorized to be appropriated to the Secretary of Transpor-  
11 tation—

12 (1) \$50,000,000 for fiscal year 1996;

13 (2) \$50,000,000 for fiscal year 1997;

14 (3) \$50,000,000 for fiscal year 1998; and

15 (4) \$50,000,000 for fiscal year 1999,

16 for guaranteeing obligations of Amtrak under section 511  
17 of the Railroad Revitalization and Regulatory Reform Act  
18 of 1976 (45 U.S.C. 831).

19 (e) CONDITIONS FOR GUARANTEE OF OBLIGA-  
20 TIONS.—Section 511(i) of the Railroad Revitalization and  
21 Regulatory Reform Act of 1976 (45 U.S.C. 831(i)) is  
22 amended by adding at the end the following new para-  
23 graph:

24 “(4) The Secretary shall not require, as a condition  
25 for guarantee of an obligation under this section, that all

1 preexisting secured obligations of an obligor be subordi-  
2 nated to the rights of the Secretary in the event of a de-  
3 fault.”

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

RYDER v. UNITED STATES

certiorari to the united states court of appeals for the armed forces

No. 94-431. Argued April 18, 1995-Decided June 12, 1995

Petitioner, an enlisted member of the Coast Guard, was convicted by a court-martial of drug offenses, and the Coast Guard Court of Military Review affirmed. On rehearing, that court rejected petitioner's claim that its composition violated the Appointments Clause, U. S. Const., Art. II, 2, cl. 2, because two of the judges on petitioner's three-judge panel were civilians appointed by the General Counsel of the Department of Transportation. The Court of Military Appeals agreed with petitioner that the appointments violated the Clause under its previous decision in *United States v. Carpenter*, 37 M. J. 291, that appellate military judges are inferior officers who must be appointed by a President, a court of law, or a head of a department. The court nonetheless affirmed petitioner's conviction on the ground that the actions of the two civilian judges were valid *de facto*, citing *Buckley v. Valeo*, 424 U. S. 1 (1976) (*per curiam*). Held: The Court of Military Appeals erred in according *de facto* validity to the actions of the civilian judges of the Coast Guard Court of Military Review. Pp. 3-11.

(a) The *de facto* officer doctrine—which confers validity upon acts performed under the color of official title even though it is later discovered that the legality of the actor's appointment or election to office is deficient—cannot be invoked to authorize the actions of the judges in question. Those cases in which this Court relied upon the doctrine in deciding criminal defendants' challenges to the authority of a judge who participated in the proceedings leading to their conviction and sentence, see, e.g., *Ball v. United States*, 140 U. S. 118, are distinguishable here because, *inter alia*, petitioner's claim is that there has been a trespass upon the constitutional power of appointment, not merely a misapplication of a statute providing for the assignment of already appointed judges. One who makes a timely challenge to the constitutionality of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred. Cf. *Glidden Co. v. Zdanok*, 370 U. S. 530, 536. Any other rule would create a disincentive to raise Appointments Clause challenges with respect to questionable judicial appointments. *Buckley v. Valeo* and *Connor v. Williams*, 404 U. S. 549, which *Buckley* cited as authority, were civil cases that did not explicitly rely on the *de facto* officer doctrine in validating the past acts of public officials against constitutional challenges, and this Court is not inclined to extend those cases beyond their facts. Pp. 2-6.

(b) The Court rejects the Government's several alternative defenses of the Court of Military Appeals' decision to give its *Carpenter* holding prospective application only. First, the argument that the latter court exercised remedial discretion pursuant to *Chevron Oil Co. v. Huson*, 404 U. S. 97, is unavailing because there is not the sort of grave disruption or inequity involved in awarding retrospec-

tive relief to this petitioner that would bring the Chevron Oil doctrine into play. Nor is it persuasively argued that qualified immunity, which specially protects public officials from damages liability for judgment calls made in a legally uncertain environment, should be extended to protect such officials from Appointments Clause attacks, which do not involve personal damages, but can only invalidate actions taken pursuant to defective title. Similarly, the practice of denying criminal defendants an exclusionary remedy from Fourth Amendment violations when those errors occur despite the government actors' good faith, *United States v. Leon*, 468 U. S. 897, does not require the affirmance of petitioner's conviction, since no collateral consequence arises from rectifying an Appointments Clause violation, see *id.*, at 907, and such rectification provides a suitable incentive to make challenges under the Clause, see *id.*, at 918-921. Finally, the Government's harmless-error argument need not be considered, since it was not raised below and there is no indication that the Court of Military Appeals determined that no harm occurred in this case. The related argument that any defect in the Court of Military Review proceedings was in effect cured by review in the Court of Military Appeals must be rejected because of the difference in function and authority between the two courts. Petitioner is therefore entitled to a hearing before a properly appointed panel of the Coast Guard Court of Military Review. Pp. 6-10. 39 M. J. 454, reversed and remanded.

Rehnquist, C. J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

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No. 94-431  
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JAMES D. RYDER, PETITIONER v.  
UNITED STATES

on writ of certiorari to the united states court  
of appeals for the armed forces  
[June 12, 1995]

Chief Justice Rehnquist delivered the opinion of the Court.

Petitioner, an enlisted member of the United States Coast Guard, challenges his conviction by a court-martial. His conviction was affirmed first by the Coast Guard Court of Military Review, and then by the United States Court of Military Appeals. The latter court agreed with petitioner that the two civilian judges who served on the Court of Military Review had not been appointed in accordance with the dictates of the Appointments Clause, U. S. Const., Art. II, 2, cl. 2, but nonetheless held that the actions of those judges were valid de facto. We hold that the judges' actions were not valid de facto.

Petitioner was convicted of several drug offenses, and was sentenced by a general court-martial to five years' confinement (later reduced to three years), forfeiture in pay, reduction in grade, and a dishonorable discharge. He appealed to the Coast Guard Court of Military Review, which, except in one minor aspect, affirmed his conviction. 34 M. J. 1077 (1992). On request for rehearing, petitioner challenged the composition of that court as violative of the Appointments Clause of the Constitution because two of the judges on the three-judge panel were civilians appointed by the General Counsel of the Department of Transportation. The court granted rehearing and rejected this challenge. 34 M. J. 1259 (1992).

The Court of Military Appeals likewise affirmed petitioner's conviction, 39 M. J. 454 (1994), although it agreed with petitioner that the appellate judges on the Coast Guard Court of Military Review had been appointed in violation of the Appointments Clause. The court relied for this conclusion on its previous decision in *United States v. Carpenter*, 37 M. J. 291 (1993), where it had decided that appellate military judges are inferior officers whose service requires appointment by a President, a court of law, or a head of a department. U. S. Const., Art. II, 2, cl. 2. Despite finding a constitutional violation in the appointment of two judges on petitioner's three-judge appellate panel, the Court of Military Appeals affirmed his conviction on the ground that the actions of these judges were valid de facto, citing *Buckley v. Valeo*, 424 U. S. 1 (1976) (per curiam). We granted certiorari. 513 U. S. - (1995).

The de facto officer doctrine confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is

deficient. Norton v. Shelby County, 118 U. S. 425, 440 (1886). -The de facto doctrine springs from the fear of the chaos that would result from multiple and repetitious suits challenging every action taken by every official whose claim to office could be open to question, and seeks to protect the public by insuring the orderly functioning of the government despite technical defects in title to office.- 63A Am. Jur. 2d, Public Officers and Employees 578, pp. 1080-1081 (1984) (footnote omitted). The doctrine has been relied upon by this Court in several cases involving challenges by criminal defendants to the authority of a judge who participated in some part of the proceedings leading to their conviction and sentence.

In Ball v. United States, 140 U. S. 118 (1891), a Circuit Judge assigned a District Judge from the Western District of Louisiana to sit in the Eastern District of Texas as a replacement for the resident judge who had fallen ill and who later died. The assigned judge continued to sit until the successor to the deceased judge was duly appointed. The assigned judge had sentenced Ball after the resident judge had died, and Ball made no objection at that time. Ball later moved in arrest of judgment challenging the sentence imposed upon him by the assigned judge after the death of the resident judge, but this Court held that the assigned judge -was judge de facto if not de jure, and his acts as such are not open to collateral attack.- Id., at 128-129.

Similarly, in McDowell v. United States, 159 U. S. 596 (1895), a Circuit Judge assigned a Judge from the Eastern District of North Carolina to sit as a District Judge in the District of South Carolina until a vacancy in the latter district was filled. McDowell was indicted and convicted during the term in which the assigned judge served, but made no objection at the time of his indictment or trial. He later challenged the validity of his conviction because of a claimed error in the assigned judge's designation. This Court decided that the assigned judge was a -judge de facto,- and that -his actions as such, so far as they affect third persons, are not open to question.- Id., at 601. The Court further observed that McDowell's claim -presents a mere matter of statutory construction . . . . It involves no trespass upon the executive power of appointment.- Id., at 598. In a later case, Ex parte Ward, 173 U. S. 452 (1899), petitioner sought an original writ of habeas corpus to challenge the authority of the District Judge who had sentenced him on the grounds that the appointment of the judge during a Senate recess was improper. This Court held that -the title of a person acting with color of authority, even if he be not a good officer in point of law, cannot be collaterally attacked.- Id., at 456.

In the case before us, petitioner challenged the composition of the Coast Guard Court of Military Review while his case was pending before that court on direct review. Unlike the defendants in Ball, McDowell, and Ward, petitioner raised his objection to the judges' titles before those very judges and prior to their action on his case. And his claim is based on the Appointments Clause of Article II of the Constitution-a claim that there has been a -trespass upon the executive power of appointment,- McDowell, supra, at 598, rather than a misapplication of a statute providing for the assignment of already appointed judges to serve in other districts.

In Buckley v. Valeo, supra, at 125, we said -(t)he

ARE ALL APPOINT. CLAUSE  
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OFFICER DOCTRINE?

Appointments Clause could, of course, be read as merely dealing with etiquette or protocol in describing 'Officers of the United States' but the drafters had a less frivolous purpose in mind.- The Clause is a bulwark against one branch aggrandizing its power at the expense of another branch, but it is more: it -preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.- Freytag v. Commissioner, 501 U. S. 868, 878 (1991). In Glidden Co. v. Zdanok, 370 U. S. 530 (1962), we declined to invoke the de facto officer doctrine in order to avoid deciding a question arising under Article III of the Constitution, saying that the cases in which we had relied on that doctrine did not involve -basic constitutional protections designed in part for the benefit of litigants.- Id., at 536 (plurality). We think that one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred. Any other rule would create a disincentive to raise Appointments Clause challenges with respect to questionable judicial appointments.

The Court of Military Appeals relied, not without reason, on our decision in Buckley v. Valeo, 424 U. S. 1 (1976). There, plaintiffs challenged the appointment of the Federal Election Commission members on separation of powers grounds. The Court agreed with them and held that the appointment of four members of the Commission by Congress, rather than the President, violated the Appointments Clause. It nonetheless quite summarily held that the -past acts of the Commission are therefore accorded de facto validity.- Id., at 142. We cited as authority for this determination Connor v. Williams, 404 U. S. 549, 550-551 (1972), in which we held that legislative acts performed by legislators held to have been elected in accordance with an unconstitutional apportionment were not therefore void.

Neither Buckley nor Connor explicitly relied on the de facto officer doctrine, though the result reached in each case validated the past acts of public officials. But in Buckley, the constitutional challenge raised by the plaintiffs was decided in their favor, and the declaratory and injunctive relief they sought was awarded to them. And Connor, like other voting rights cases, see Allen v. State Board of Elections, 393 U. S. 544, 572 (1969); Cipriano v. City of Houma, 395 U. S. 701 (1969) (per curiam), did not involve a defect in a specific officer's title, but rather a challenge to the composition of an entire legislative body. The Court assumed, arguendo, that an equal protection violation infected the District Court's reapportionment plan, declined to invalidate the elections that had already occurred, and reserved judgment on the propriety of the prospective relief requested by petitioners pending completion of further District Court proceedings that could rectify any constitutional violation present in the court-ordered redistricting plan. Connor, supra, at 550-551. To the extent these civil cases may be thought to have implicitly applied a form of the de facto officer doctrine, we are not inclined to extend them beyond their facts.

The Government alternatively defends the decision of the Court of Military Appeals on the grounds that it was, for several reasons, proper for that court to give its decision in Carpenter-holding that the appointment of

the civilian judges to the Coast Guard Court of Military Appeals violated the Appointments Clause-prospective application only. It first argues that the Court of Military Appeals exercised remedial discretion pursuant to *Chevron Oil Co. v. Huson*, 404 U. S. 97 (1971). But whatever the continuing validity of *Chevron Oil* after *Harper v. Virginia Dept. of Taxation*, 509 U. S. - (1993), and *Reynoldsville Casket Co. v. Hyde*, 514 U. S. - (1995), there is not the sort of grave disruption or inequity involved in awarding retrospective relief to this petitioner that would bring that doctrine into play. The parties agree that the defective appointments of the civilian judges affect only between 7 to 10 cases pending on direct review. As for the Government's concern that a flood of habeas corpus petitions will ensue, precedent provides little basis for such fears. *Ex parte Ward*, 173 U. S. 452 (1899).

Nor does the Government persuade us that the inquiry into clearly established law as it pertains to qualified immunity counsels in favor of discretion to deny a remedy in this case. Qualified immunity specially protects public officials from the specter of damages liability for judgment calls made in a legally uncertain environment. *Harlow v. Fitzgerald*, 457 U. S. 800, 806 (1982) (-[O]ur decisions consistently have held that government officials are entitled to some form of immunity from suits for damages- (emphasis added)). Providing relief to a claimant raising an Appointments Clause challenge does not subject public officials to personal damages that represent a -potentially disabling threa[t] of liability,- but only invalidates actions taken pursuant to defective title. The qualified immunity doctrine need not be extended to protect public officials from such attacks.

Similarly, the practice of denying criminal defendants an exclusionary remedy from Fourth Amendment violations when those errors occur despite the good faith of the Government actors, *United States v. Leon*, 468 U. S. 897 (1984), does not require the affirmance of petitioner's conviction in this case. Finding the deterrent remedy of suppression not compelled by the Fourth Amendment, *id.*, at 910, that case specifically relied on the -objectionable collateral consequence of [the] interference with the criminal justice system's truth-finding function- in requiring a blanket exclusionary remedy for all violations, *id.*, at 907, and the relative ineffectiveness of such remedy to deter future Fourth Amendment violations in particular cases. *Id.*, at 918-921. No similar collateral consequence arises from rectifying an Appointments Clause violation, and correcting Appointments Clause violations in cases such as this one provides a suitable incentive to make such challenges.

The Government finally suggests that the Court of Military Appeals applied something akin to a harmless-error doctrine in affirming petitioner's conviction, refusing to redress the violation because petitioner suffered no adverse consequences from the composition of the Court. Brief for United States 33. The Government did not argue below that the error, assuming it occurred, was harmless, and there is no indication from the Court of Military Appeals' summary disposition of this issue that it determined that no harm occurred in this case. We therefore need not address whether the alleged defects in the composition of petitioner's appellate panel are susceptible to harmless error review.

The Government also argues, at least obliquely, that whatever defect there may have been in the proceedings before the Coast Guard Court of Military Review was in effect cured by the review available to petitioner in the Court of Military Appeals. Brief for United States 24, n. 16. Again, because of the hierarchical nature of sentence review in the system of military courts, we need not address whether this defect is susceptible to the cure envisioned by the Government.

Congress has established three tiers of military courts pursuant to its power -[t]o make Rules for the Government and Regulation of the land and naval Forces.- U. S. Const., Art. I, 8, cl. 14. Cases such as the present one are tried before a general court-martial consisting of a military judge and not less than five service members or by a military judge alone. Art. 16(1), UCMJ, 10 U. S. C. 816(1). Four Courts of Military Review (one each for the Army, Air Force, Coast Guard, and Navy-Marine Corps) hear appeals from courts-martial in cases where the approved sentence involves death, dismissal of a commissioned officer, punitive discharge, or confinement of one year or more. Art. 66, UCMJ, 10 U. S. C. 866(b)(1). These courts, which sit in panels of three or more, exercise de novo review over the factual findings and legal conclusions of the court-martial. Art. 66(c), UCMJ, 10 U. S. C. 866(c).

The court of last resort in the military justice system is the Court of Military Appeals. Five civilian judges appointed by the President and confirmed by the Senate comprise the court. Art. 142, UCMJ, 10 U. S. C. 942 (1988 ed., Supp V). The court grants review in cases decided by the Courts of Military Review -upon petition of the accused and on good cause shown.- Art. 67, UCMJ, 10 U. S. C. 867(a) (1988 ed., Supp. V). The scope of review is narrower than the review exercised by the Court of Military Review; so long as there is some competent evidence in the record to establish the elements of an offense beyond a reasonable doubt, the Court of Military Appeals will not reevaluate the facts. *United States v. Wilson*, 6 M. J. 214 (1979).

Examining the difference in function and authority between the Coast Guard Court of Military Review, and the Court of Military Appeals, it is quite clear that the former had broader discretion to review claims of error, revise factual determinations, and revise sentences than did the latter. It simply cannot be said, therefore, that review by the properly constituted Court of Military Appeals gave petitioner all the possibility for relief that review by a properly constituted Coast Guard Court of Military Appeals would have given him. We therefore hold that the Court of Military Appeals erred in according de facto validity to the actions of the civilian judges of the Coast Guard Court of Military Review. Petitioner is entitled to a hearing before a properly appointed panel of that court. The judgment is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

Michael A. LEBRON, Petitioner

v.

NATIONAL RAILROAD PASSENGER CORPORATION.

No. 93-1525.

Argued Nov. 7, 1994.

Decided Feb. 21, 1995.

Artist sued National Railroad Passenger Corporation (Amtrak) based on allegation that Amtrak's rejection of artist's lease of billboard space on ground that display was "political" violated the First Amendment. The United States District Court for the Southern District of New York, Pierre N. Leval, J., 811 F.Supp. 993, entered judgment for artist, and Amtrak appealed. The Court of Appeals for the Second Circuit, 12 F.3d 388, reversed and remanded with instructions. Certiorari was granted. The Supreme Court, Justice Scalia, held that: (1) court could consider argument that Amtrak was part of government, even though artist had disavowed that argument in lower courts, where both lower courts considered argument and it was fairly embraced both within questions presented and argument set forth in petition; (2) statute under which Amtrak was created, while dispositive of governmental status for purposes of matters within Congress' control, was not dispositive for determining constitutional rights of affected citizens; and (3) Amtrak was agency or instrumentality of United States for purpose of individual constitutional rights.

Reversed and remanded.

Justice O'Connor filed dissenting opinion.

#### 1. Federal Courts ⇌461

Once federal claim is properly presented, party can make any argument in support of that claim and is not limited to precise arguments made below.

#### 2. Federal Courts ⇌461

Supreme Court could consider argument that National Railroad Passenger Corpora-

tion (Amtrak) was part of government, even though artist who claimed that Amtrak violated his First Amendment rights had disavowed that argument in lower courts and did not explicitly raise it until his brief on merits in Supreme Court, where both lower courts considered argument and it was fairly embraced both within questions presented and argument set forth in petition. U.S.C.A. Const.Amend. 1; U.S.Sup.Ct.Rule 14.1(a), 28 U.S.C.A.

#### 3. Railroads ⇌5.51

Rail Passenger Service Act of 1970 created National Railroad Passenger Corporation (Amtrak) for purpose of averting threatened extinction of passenger trains in the interest of public convenience and necessity. Rail Passenger Service Act, § 101 et seq., as amended, 45 U.S.C.(1988 Ed.) § 501 et seq.; 49 U.S.C.A. §§ 10901, 10903, 10922.

#### 4. Railroads ⇌5.51

Under its authorizing statute, National Railroad Passenger Corporation (Amtrak) is not agency or establishment of United States Government. Rail Passenger Service Act, § 301, as amended, 45 U.S.C.(1988 Ed.) § 541.

#### 5. Railroads ⇌5.51

Congress does not have authority to make final determination of National Railroad Passenger Corporation's (Amtrak) status as government entity for purposes of constitutional rights of citizens affected by its actions, even though statute under which Amtrak was created disclaims agency status. Rail Passenger Service Act, § 101 et seq., as amended, 45 U.S.C.(1988 Ed.) § 501 et seq.

#### 6. Railroads ⇌5.51

Although statute under which National Railroad Passenger Corporation (Amtrak) was created is dispositive of Amtrak's governmental status for purposes of matters within Congress' control, it is not dispositive for purposes of status as government entity in determining constitutional rights of citizens affected by its actions. Rail Passenger Service Act, § 101 et seq., as amended, 45 U.S.C.(1988 Ed.) § 501 et seq.

## 7. Constitutional Law ⇔82(1)

## Railroads ⇔5.51

National Railroad Passenger Corporation (Amtrak) is agency or instrumentality of United States for purpose of individual rights guaranteed against Government by the Constitution. Rail Passenger Service Act, § 101 et seq., as amended, 45 U.S.C.(1988 Ed.) § 501 et seq.

## 8. Constitutional Law ⇔82(1)

Government, whether state or federal, may not evade constitutional requirements simply by calling government-created and controlled corporation an independent entity.

## 9. Constitutional Law ⇔82(1)

Corporation is agency of government, for purposes of constitutional obligations of government rather than privileges of government, when state has specifically created that corporation for furtherance of governmental objective and does not merely hold some shares but rather controls operation of corporation through its appointees.

## 10. Constitutional Law ⇔82(3)

Where government creates corporation by special law, for furtherance of governmental objectives, and retains for itself permanent authority to appoint majority of directors of that corporation, corporation is part of government for purposes of First Amendment. U.S.C.A. Const.Amend. 1.

*Syllabus* \*

Petitioner Lebron, who creates billboard displays that comment on public issues, filed suit claiming, *inter alia*, that respondent National Railroad Passenger Corporation (Amtrak) had violated his First Amendment rights by rejecting a display for an Amtrak billboard because of its political nature. The District Court ruled that Amtrak, because of its close ties to the Federal Government, was a Government actor for First Amendment purposes, and that its rejection of the display was unconstitutional. The Court of Appeals reversed, noting that Amtrak was, by the terms of the legislation that created it, not a Government entity, and concluding that the

\* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.

Government was not so involved with Amtrak that the latter's decisions could be considered federal action.

*Held:* Where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of that corporation's directors, the corporation is part of the Government for purposes of the First Amendment. Pp. 964-975.

(a) It is proper for this Court to consider the argument that Amtrak is part of the Government, even though Lebron disavowed it in both lower courts and did not explicitly raise it until his brief on the merits here. It is not a new claim, but a new argument to support his First Amendment claim, see, *e.g.*, *Yee v. Escondido*, 503 U.S. 519, —, 112 S.Ct. 1522, —, 118 L.Ed.2d 153; it was passed upon below, see, *e.g.*, *United States v. Williams*, 504 U.S. 36, —, 112 S.Ct. 1735, —, 118 L.Ed.2d 352; and it was fairly embraced within both the question presented and the argument set forth in the petition. Pp. 964-966.

(b) Amtrak was created by the Rail Passenger Service Act of 1970 (RPSA) to avert the threatened extinction of passenger trains in the interest of "the public convenience and necessity." The legislation establishes detailed goals for Amtrak, sets forth its structure and powers, and assigns the appointment of a majority of its board of directors to the President. Pp. 967-968.

(c) There is a long history of corporations created and participated in by the United States for the achievement of governmental objectives. Like some other Government corporations, Amtrak's authorizing statute provides that it "will not be an agency or establishment of the United States Government," 84 Stat., at 1330; see also 45 U.S.C. § 541. Pp. 968-970.

(d) Although § 541 is assuredly dispositive of Amtrak's governmental status for purposes of matters within Congress's control—*e.g.*, whether it is subject to statutes like the

See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Administrative Procedure Act—and can even suffice to deprive it of all those inherent governmental powers and immunities that Congress has the power to eliminate—e.g., sovereign immunity from suit—it is not for Congress to make the final determination of Amtrak's status as a government entity for purposes of determining the constitutional rights of citizens affected by its actions. The Constitution constrains governmental action by whatever instruments or in whatever modes that action may be taken, *Ex parte Virginia*, 100 U.S. 339, 346–347, 25 L.Ed. 676, and under whatever congressional label, *Cherry Cotton Mills, Inc. v. United States*, 327 U.S. 536, 539, 66 S.Ct. 729, 730, 90 L.Ed. 835; *National Railroad Passenger Corporation v. Boston & Maine Corp.*, 503 U.S. 407, —, 112 S.Ct. 1394, —, 118 L.Ed.2d 52, and *National Railroad Passenger Corporation v. Atchison, T. & S.F.R. Co.*, 470 U.S. 451, 470, 105 S.Ct. 1441, 1453, 84 L.Ed.2d 432, distinguished. Pp. 971–972.

(e) Amtrak is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution. This conclusion accords with the public, judicial, and congressional understanding over the years that Government-created and -controlled corporations are part of the Government itself. See, e.g., *Reconstruction Finance Corp. v. J.G. Menihan Corp.*, 312 U.S. 81, 83, 61 S.Ct. 485, 486, 85 L.Ed. 595; Government Corporation Control Act, § 304(a), 59 Stat., at 602. A contrary holding would allow government to evade its most solemn constitutional obligations by simply resorting to the corporate form, cf. *Pennsylvania v. Board of Directors of City Trusts of Philadelphia*, 353 U.S. 230, 231, 77 S.Ct. 806, 806, 1 L.Ed.2d 792. *Bank of United States v. Planters' Bank of Georgia*, 9 Wheat. 904, 907, 908, 6 L.Ed. 244, and *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 152, 95 S.Ct. 335, 363, 42 L.Ed.2d 320, distinguished. Pp. 972–975.

12 F.3d 388 (CA 2 1993), reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and STEVENS, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ.,

joined. O'CONNOR, J., filed a dissenting opinion.

David Cole, for petitioner.

Kevin T. Baine, for respondent.

For U.S. Supreme Court briefs, see:

1994 WL 388059 (Pet.Brief)

1994 WL 488299 (Resp.Brief)

1994 WL 558138 (Reply.Brief)

Justice SCALIA delivered the opinion of the Court.

In this case we consider whether actions of the National Railroad Passenger Corporation, commonly known as Amtrak, are subject to the constraints of the Constitution.

## I

Petitioner, Michael A. Lebron, creates billboard displays that involve commentary on public issues, and that seemingly propel him into litigation. See, e.g., *Lebron v. Washington Metropolitan Area Transit Authority*, 749 F.2d 893 (CA DC 1984). In August 1991, he contacted Transportation Displays, Incorporated (TDI), which manages the leasing of the billboards in Amtrak's Pennsylvania Station in New York City, seeking to display an advertisement on a billboard of colossal proportions, known to New Yorkers (or at least to the more Damon Runyonesque among them) as "the Spectacular." The Spectacular is a curved, illuminated billboard, approximately 103 feet long and 10 feet high, which dominates the main entrance to Penn Station's waiting room and ticket area.

On November 30, 1992, Lebron signed a contract with TDI to display an advertisement on the Spectacular for two months beginning in January 1993. The contract provided that "[a]ll advertising copy is subject to approval of TDI and [Amtrak] as to character, text, illustration, design and operation." App. 671. Lebron declined to disclose the specific content of his advertisement throughout his negotiations with TDI, although he did explain to TDI that it was generally political. On December 2 he submitted to TDI (and TDI later forwarded to

Amtrak) an advertisement described by the District Court as follows:

"The work is a photomontage, accompanied by considerable text. Taking off on a widely circulated Coors beer advertisement which proclaims Coors to be the 'Right Beer,' Lebron's piece is captioned 'Is it the Right's Beer Now?' It includes photographic images of convivial drinkers of Coors beer, juxtaposed with a Nicaraguan village scene in which peasants are menaced by a can of Coors that hurtles towards them, leaving behind a trail of fire, as if it were a missile. The accompanying text, appearing on either end of the montage, criticizes the Coors family for its support of right-wing causes, particularly the contras in Nicaragua. Again taking off on Coors' advertising which uses the slogan of 'Silver Bullet' for its beer cans, the text proclaims that Coors is 'The Silver Bullet that aims The Far Right's political agenda at the heart of America.'" 811 F.Supp. 993, 995 (SDNY 1993).

Amtrak's vice president disapproved the advertisement, invoking Amtrak's policy, inherited from its predecessor as landlord of Penn Station, the Pennsylvania Railroad Company, "that it will not allow political advertising on the [S]pectacular advertising sign." App. 285.

Lebron then filed suit against Amtrak and TDI, claiming, *inter alia*, that the refusal to place his advertisement on the Spectacular had violated his First and Fifth Amendment rights. After expedited discovery, the District Court ruled that Amtrak, because of its close ties to the Federal Government, was a Government actor, at least for First Amendment purposes, and that its rejection of Lebron's proposed advertisement as unsuitable for display in Penn Station had violated the First Amendment. The court granted Lebron an injunction and ordered Amtrak and TDI to display Lebron's advertisement on the Spectacular.

The United States Court of Appeals for the Second Circuit reversed. 12 F.3d 388 (1993). The panel's opinion first noted that Amtrak was, by the terms of the legislation that created it, not a Government entity, *id.*, at 390; and then concluded that the Federal

Government was not so involved with Amtrak that the latter's decisions could be considered federal action, *id.*, at 391-392. Chief Judge Newman dissented. We granted certiorari. 511 U.S. —, 114 S.Ct. 2098, 128 L.Ed.2d 661 (1994).

## II

We have held once, *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961), and said many times, that actions of private entities can sometimes be regarded as governmental action for constitutional purposes. See, *e.g.*, *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 546, 107 S.Ct. 2971, 2986, 97 L.Ed.2d 427 (1987); *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 2785, 73 L.Ed.2d 534 (1982); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172, 92 S.Ct. 1965, 1971, 32 L.Ed.2d 627 (1972). It is fair to say that "our cases deciding when private action might be deemed that of the state have not been a model of consistency." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632, 111 S.Ct. 2077, 2089, 114 L.Ed.2d 660 (1991) (O'CONNOR, J., dissenting). It may be unnecessary to traverse that difficult terrain in the present case, since Lebron's first argument is that Amtrak is not a private entity but Government itself. Before turning to the merits of this argument, however, it is necessary to discuss the propriety of reaching it. Lebron did not raise this point below; indeed, he expressly disavowed it in both the District Court and the Court of Appeals. See Plaintiff's Pre-Trial Proposed Conclusions of Law in No. 92-CIV-9411 (SDNY), p. 12, n. 1, reprinted in App. in No. 93-7127 (CA2), p. 1297; Brief for Appellee in No. 93-7127 (CA2), p. 30, n. 39. In those courts Lebron argued that Amtrak's actions were subject to constitutional requirements "because Amtrak, although a private entity, was closely connected with federal entities." It was not until after we granted certiorari that Lebron first explicitly presented—in his brief on the merits—the alternative argument that Amtrak was itself a federal entity.

[1,2] Our traditional rule is that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, —, 112 S.Ct. 1522, 1532, 118 L.Ed.2d 153 (1992); see also *Dewey v. Des Moines*, 173 U.S. 193, 198, 19 S.Ct. 379, 380, 43 L.Ed. 665 (1899). Lebron's contention that Amtrak is part of the Government is in our view not a new claim within the meaning of that rule, but a new argument to support what has been his consistent claim: that Amtrak did not accord him the rights it was obliged to provide by the First Amendment. Cf. *Yee, supra*, 503 U.S., at —, 112 S.Ct., at 1532. In fact, even if this were a claim not raised by petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below. Our practice "permit[s] review of an issue not pressed so long as it has been passed upon. . . ." *United States v. Williams*, 504 U.S. 36, —, —, 112 S.Ct. 1735, 1738-1739, 118 L.Ed.2d 352 (1992). See *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099, n. 8, 111 S.Ct. 2749, 2761, n. 8, 115 L.Ed.2d 929 (1991); *Stevens v. Department of Treasury*, 500 U.S. 1, 8, 111 S.Ct. 1562, 1567, 114 L.Ed.2d 1 (1991).

Respondent asserts that, in addition to not having been raised below, the issue of whether Amtrak is a Government entity was not presented in the petition for certiorari. As this Court's Rule 14.1(a) and simple prudence dictate, we will not reach questions not fairly included in the petition. "The Court decides which questions to consider through well-established procedures; allowing the able counsel who argue before us to alter these questions or to devise additional questions at the last minute would thwart this system."

1. Certiorari was sought and granted in this case on the following question:

"Whether the court of appeals erred in holding that Amtrak's asserted policy barring the display of political advertising messages in Pennsylvania Station, New York, was not state action, where:

"(a) the United States created Amtrak, endowed it with governmental powers, owns all its voting stock, and appoints all members of its Board;

"(b) the United States-appointed Board approved the advertising policy challenged here;

*Taylor v. Freeland & Kronz*, 503 U.S. 638, —, 112 S.Ct. 1644, 1649, 118 L.Ed.2d 280 (1992). Here, however, we are satisfied that the argument that Amtrak is a Government entity is fairly embraced within the question set forth in the petition for certiorari<sup>1</sup>— which explicitly presents *neither* the "Government entity" theory *nor* the "closely connected to Government" theory of First Amendment application, but rather the facts that would support both. The argument in the petition, moreover, though couched in terms of a different but closely related theory, fairly embraced the argument that Lebron now advances. See Pet. for Cert. 16-18.

The dissent contends that the "Government entity" question in the present case occupies the same status, insofar as Rule 14.1(a) is concerned, as the "physical taking" question which we deemed excluded in *Yee v. Escondido*, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992). It gives two reasons for that equivalence: First, the fact that Lebron prefaced his question presented by the phrase, "Whether the court of appeals erred in holding." The dissent asserts that this is similar to the preface in *Yee*, which had the effect of limiting the question to the precise ground relied upon by the Court of Appeal. *Post*, at 975-976. But the preface in *Yee* was not at all similar. What we said caused the question presented to be limited to the physical-taking issue was *not* the fact that that was the only ground addressed by the lower-court-said-to-be-in-error; but rather the fact that that was the only ground of decision in two previous Court of Appeals cases, *departure from which was said by the question presented to be the issue in the appeal.*<sup>2</sup> 503 U.S., at —, 112 S.Ct., at 1533.

"(c) the United States keeps Amtrak afloat every year by subsidizing its losses; and

"(d) Pennsylvania Station was purchased for Amtrak by the United States and is shared with several other governmental entities."

2. The question presented in *Yee* read as follows:

"Two federal courts of appeal have held that the transfer of a premium value to a departing mobilehome tenant, representing the value of the right to occupy at a reduced rate under local mobilehome rent control ordinances, constitute[s] an

The dissent's second reason for believing that *Yee* governs the Rule 14.1(a) issue here is that the structural relationship between the clearly presented question and the assertedly included question in the two cases is the same. As the dissent correctly analyzes *Yee*, it involved one "umbrella claim" (government taking of property without just compensation) and "two distinct questions" that were "[s]ubsidiary to that claim" (whether a physical taking had occurred, and whether a regulatory taking had occurred). *Post*, at 975. But the questions in *Yee* were "distinct" in two important ways that the claims here are not. First of all, it was possible to consider the existence of a physical taking without *assuming* (as one of the premises of the inquiry) the *nonexistence* of a regulatory taking; whereas here it is quite impossible to consider whether the Government connections are sufficient to convert private-entity Amtrak into a Government actor without first assuming that Amtrak is a private entity. The opinion in *Yee* did not have to begin: "Assuming that no regulatory taking has occurred, . . ." But the portion of today's dissent addressing the merits of this case must begin: "Accepting Lebron's concession that Amtrak is a private entity . . ." *Post*, at 978. The question of private-entity status is, in other words, a *prior* question. The second respect in which the issues here are less "distinct" than in *Yee* is that the factors relevant to their resolution overlap. In *Yee*, what would go to show a regulatory taking and what would go to show a physical taking were quite different. Here, however, those very elements that we would be considering in determining whether Amtrak-the-private-entity is so closely connected with the Government as to be a Government actor (for example, the constitution of its Board) also bear upon whether it is *in fact* a private

impermissible taking. Was it error for the state appellate court to disregard the rulings and hold that there was no taking under the fifth and fourteenth amendments?" 503 U.S., at —, 112 S.Ct., at 1533.

3. The dissent sees no more in *Independent Insurance Agents* than a narrow holding that the Court of Appeals' decision to reach the statutory repeal issue was not so imprudent as to be reversible for abuse of discretion. Even that is a damaging concession, given the dissent's apparent position

entity at all. When a question is, like this one, both prior to the clearly presented question and dependent upon many of the same factual inquiries, refusing to regard it as embraced within the petition may force us to assume what the facts will show to be ridiculous, a risk which ought to be avoided.

The recent decision of ours that invites comparison with the dissent's insistence that the "Government entity" question is "precluded," *post*, at 975, is not *Yee*, but *United States Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc.*, 508 U.S. —, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993). There, in a case raising the question of the proper interpretation of 12 U.S.C. § 92 (1926 ed.), we upheld the propriety of the Court of Appeals' considering the prior question whether 12 U.S.C. § 92 had been inadvertently repealed—even though the parties themselves had failed to raise that question, not only (as here) in the court below, but even in the initial briefs and oral arguments before the Court of Appeals itself. That is to say, the situation there, at the court of appeals level, was what the situation *would be* before us here, if (1) the dissent were correct that Rule 14.1(a) was not complied with, and (2) in addition, even the petitioner's *principal brief and oral argument* had failed to raise the "Government entity" issue. Even so, we held in *Independent Insurance Agents* that it was proper for the Court of Appeals to request supplemental briefing upon, and to decide, the statutory repeal question, and we then went on to inquire into that question ourselves. Our opinion was unanimous, not a single Justice protesting that the judges of the Court of Appeals, or of this Court, had constituted themselves "as [a] self-directed board of legal inquiry," or had "exhibit[ed] little patience," *post*, at 978.<sup>3</sup>

that allowing a litigant "to resuscitate [a] claim that he himself put to rest" always violates "prudential" rules. *Post*, at 977. But in fact the language of the *Independent Insurance Agents* opinion is much more approving of the Court of Appeals' action than that. It declines even to brush aside the Court of Appeals' (questionable) contention that there was "a 'duty' to address section 92," saying only that "[w]e need not decide" that question. 508 U.S., at —, 113 S.Ct., at 2179. And it goes on to state that the

## III

Before proceeding to consider Lebron's contention that Amtrak, though nominally a private corporation, must be regarded as a Government entity for First Amendment purposes, we examine the nature and history of Amtrak and of Government-created corporations in general.

## A

[3] Congress established Amtrak in order to avert the threatened extinction of passenger trains in the United States. The statute that created it begins with the congressional finding, redolent of provisions of the Interstate Commerce Act, see, e.g., 49 U.S.C. §§ 10901, 10903, 10922 (1988 ed. and Supp. V), that "the *public convenience and necessity* require the continuance and improvement" of railroad passenger service. Rail Passenger Service Act of 1970 (RPSA), § 101, 84 Stat. 1328 (emphasis added). In the current version of the RPSA, 45 U.S.C. § 501 *et seq.* (1988 ed. and Supp. V), the congressional findings are followed by a section entitled "Goals," which begins "The Congress hereby establishes the following goals for Amtrak," and includes items of such detail as the following:

"(3) Improvement of the number of passenger miles generated systemwide per dollar of Federal funding by at least 30 percent within the two-year period beginning on October 1, 1981.

"(4) Elimination of the deficit associated with food and beverage services by September 30, 1982.

"(6) Operation of Amtrak trains, to the maximum extent feasible, to all station stops within 15 minutes of the time estab-

lished in public timetables for such operation.

"(8) Implementation of schedules which provide a systemwide average speed of at least 60 miles per hour . . ." § 501a

Later sections of the statute authorize Amtrak's incorporation, §§ 541-542, set forth its structure and powers, §§ 543-545, and outline procedures under which Amtrak will relieve private railroads of their passenger-service obligations and provide intercity and commuter rail passenger service itself, §§ 561-566. See generally *National Railroad Passenger Corporation v. Atchison T. & S.F.R. Co.*, 470 U.S. 451, 453-456, 105 S.Ct. 1441, 1445-1447, 84 L.Ed.2d 432 (1985). As initially conceived, Amtrak was to be "a for profit corporation," 84 Stat., at 1330, but Congress later modified this language to provide, less optimistically perhaps, that Amtrak "shall be operated and managed as a for profit corporation," § 541.

Amtrak is incorporated under the District of Columbia Business Corporation Act, D.C.Code § 29-301 *et seq.* (1981 and Supp. 1994), but is subject to the provisions of that Act only insofar as the RPSA does not provide to the contrary, see § 541. It does provide to the contrary with respect to many matters of structure and power, including the manner of selecting the company's board of directors. The RPSA provides for a board of nine members, six of whom are appointed directly by the President of the United States. The Secretary of Transportation, or his designee, sits *ex officio*. § 543(a)(1)(A). The President appoints three more directors with the advice and consent of the Senate, § 543(a)(1)(C), selecting one from a list of individuals recommended by the Railway La-

Court of Appeals acted "without any impropriety," and that its decision to consider the issue was "certainly no abuse of its discretion." *Ibid.* (emphasis added). If we had not thought that the Court of Appeals' entertainment of the statutory repeal question was, not merely unreversible, but appropriate, we would not have rendered ourselves complicit in the enterprise by exercising our own discretion to grant certiorari on that question. (There was no particular need to intervene, since the Court of Appeals had upheld the law.)

The dissent also seeks to characterize *Independent Insurance Agents* as no more than an application of "the traditional principle that there can be no estoppel in the way of ascertaining the existence of a law." *Post*, at 977 (internal quotation marks omitted). It was indeed an application of that principle insofar as concerned the claim that the appellants' right to assert repeal of the statute had been forfeited. But forfeit was not the only point decided in the case: not every nonforfeited claim merits consideration on appeal.

bor Executives Association, § 543(a)(1)(C)(i), one "from among the Governors of States with an interest in rail transportation," § 543(a)(1)(C)(ii), and one as a "representative of business with an interest in rail transportation," § 543(a)(1)(C)(iii). These directors serve 4-year terms. § 543(a)(2)(A). The President appoints two additional directors without the involvement of the Senate, choosing them from a list of names submitted by various commuter rail authorities. § 543(a)(1)(D). These directors serve 2-year terms. § 543(a)(2)(B). The holders of Amtrak's preferred stock select two more directors, who serve 1-year terms. § 543(a)(1)(E). Since the United States presently holds all of Amtrak's preferred stock, which it received (and still receives) in exchange for its subsidization of Amtrak's perennial losses, see § 544(c), the Secretary of Transportation selects these two directors. The ninth member of the board is Amtrak's president, § 543(a)(1)(B), who serves as the chairman of the board, § 543(a)(4), is selected by the other eight directors, and serves at their pleasure, § 543(d). Amtrak's four private shareholders have not been entitled to vote in selecting the board of directors since 1981.<sup>4</sup>

By § 548 of the RPSA, Amtrak is required to submit three different annual reports to the President and Congress. One of these, a "report on the effectiveness of this chapter in meeting the requirements for a balanced national transportation system, together with any legislative recommendations," is made part of the Department of Transportation's annual report to Congress. § 548(c).

#### B

Amtrak is not a unique, or indeed even a particularly unusual, phenomenon. In considering the question before us, it is useful to place Amtrak within its proper context in the

4. Originally, Amtrak's board comprised 15 directors: 7 selected by the shareholders and 8 (one of whom had to be the Secretary of Transportation) appointed by the President of the United States. See RPSA §§ 303(a) and (c), 84 Stat., at 1330-1331. In 1973, Congress increased the number of directors to 17, the number of Presidential appointees to 9, and made the Secretary of Transportation a director ex officio. See Am-

long history of corporations created and participated in by the United States for the achievement of governmental objectives.

The first was the Bank of the United States, created by the Act of Feb. 25, 1791, ch. 10, 1 Stat. 191, which authorized the United States to subscribe 20 percent of the corporation's stock, *id.*, at 196. That Bank expired pursuant to the terms of its authorizing Act 20 years later. A second Bank of the United States, the bank of *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819), and *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L.Ed. 204 (1824), was incorporated by the Act of April 10, 1816, 3 Stat. 266, which provided that the United States would subscribe 20 percent of the Bank's capital stock, *ibid.*, and in addition that the President would appoint, by and with the advice and consent of the Senate, 5 of the Bank's 25 directors, the rest to be elected annually by shareholders other than the United States, *id.*, at 269.

The second Bank's charter expired of its own force, despite fierce efforts by the Bank's supporters to renew it, in 1836. See generally R. Remini, *Andrew Jackson and the Bank War 155-175* (1967). During the remainder of the 19th century, the Federal Government continued to charter private corporations, see, e.g., Act of July 2, 1864, 13 Stat. 365 (Northern Pacific Railroad Company), but only once participated in such a venture itself: the Union Pacific Railroad, chartered in 1862 with the specification that two of its directors would be appointed by the President of the United States. Act of July 1, 1862, § 1, 12 Stat. 491. See F. Leazes, Jr., *Accountability and the Business State* 117, n. 8 (1987) (hereinafter Leazes).

The Federal Government's first participation in a corporate enterprise in which (as with Amtrak) it appointed a majority of the directors did not occur until the present cen-

trak Improvement Act of 1973, § 3(a), 87 Stat. 548. In 1976, the number of Presidential appointees (apart from the Secretary of Transportation) was reduced to eight and Amtrak's President made a director ex officio. See Rail Transportation Improvement Act § 103, 90 Stat. 2615. Amtrak's board was given its current size and membership in 1981. See Omnibus Budget Reconciliation Act of 1981, § 1174, 95 Stat. 689.

ture. In 1902, to facilitate construction of the Panama Canal, Congress authorized the President to purchase the assets of the New Panama Canal Company of France, including that company's stock holdings in the Panama Railroad Company, a private corporation chartered in 1849 by the State of New York. See Act of June 28, 1902, 32 Stat. 481; see also General Accounting Office, Reference Manual of Government Corporations, S. Doc. No. 86, 79th Cong., 1st Sess., 176 (1945) (hereinafter GAO Corporation Manual). The United States became the sole shareholder of the Panama Railroad, and continued to operate it under its original charter, with the Secretary of War, as the holder of the stock, electing the Railroad's 13 directors. *Id.*, at 177; Joint Committee on Reduction of Non-essential Federal Expenditures, Reduction of Nonessential Federal Expenditures, S.Doc. No. 227, 78th Cong., 2d Sess., 20 (1944) (hereinafter Reduction of Expenditures).

The first large-scale use of Government-controlled corporations came with the First World War. In 1917 and 1918 Congress created, among others, the United States Grain Corporation, the United States Emergency Fleet Corporation, the United States Spruce Production Corporation, and the War Finance Corporation. See Leazes 20. These entities were dissolved after the war ended. See Reduction of Expenditures 1.

The Great Depression brought the next major group of Government corporations, which proved to be more enduring. These were primarily directed to stabilizing the economy and to making distress loans to farms, homeowners, banks, and other enterprises. See R. Moe, CRS Report for Congress, Administering Public Functions at the Margins of Government: The Case of Federal Corporations 6-7 (1983). The Reconstruction Finance Corporation (RFC), to take the premier example, was initially authorized to make loans to banks, insurance companies, railroads, land banks, and agricultural credit organizations, including loans secured by the assets of failed banks. See Act of Jan. 22, 1932, § 5, 47 Stat. 6-7. The Federal Deposit Insurance Corporation (FDIC), was established to hold and liquidate the assets of failed banks, and to insure bank deposits.

See Act of June 16, 1933, ch. 89, § 8, 48 Stat. 168, as amended, 12 U.S.C. § 1811 *et seq.* (1988 ed. and Supp. V). And a few corporations, such as the Tennessee Valley Authority (TVA), brought the Government into the commercial sale of goods and services. See Act of May 18, 1933, ch. 32, 48 Stat. 58, as amended, 16 U.S.C. § 831 *et seq.* (1988 ed. and Supp. V).

The growth of federal corporations during the Depression and the World War II era was not limited to the numerous entities specifically approved by Congress. In 1940, Congress empowered the RFC to create corporations without specific congressional authorization. See Act of June 25, 1940, § 5, 54 Stat. 573-574. The RFC proceeded to do so with gusto, incorporating on its own the Defense Plant Corporation, the Defense Supplies Corporation, the Metals Reserve Company (which itself created several subsidiaries), the Petroleum Reserves Corporation, the Rubber Development Corporation, and the War Damage Corporation, among others. See GAO Corporation Manual 32, 38, 169, 182, 219, 279. Other corporations were formed, sometimes under state law, without even the general congressional authorization granted the RFC. For example, the Defense Homes Corporation was organized under Maryland law by the Secretary of the Treasury, using emergency funds allocated to the President, *id.*, at 28 ("[i]t is not clear what, if any, specific Federal statutory authority was relied upon for the creation of the Defense Homes Corporation"); and the Tennessee Valley Associated Cooperatives, Inc., was chartered under Tennessee law by the TVA, *id.*, at 244 ("[t]here has been found no Federal statute specifically authorizing the Board of Directors of the Tennessee Valley Authority to organize a corporation"). By 1945, the General Accounting Office's Reference Manual of Government Corporations listed 58 government corporations, with total assets (in 1945 dollars) of 29.6 billion dollars. See *id.*, at iii, v-vi.

By the end of World War II, Government-created and -controlled corporations had gotten out of hand, in both their number and their lack of accountability. Congress moved to reestablish order in the Government Cor-

poration Control Act (GCCA), 59 Stat. 597 (1945), as amended, 31 U.S.C. § 9101 *et seq.* (1988 ed. and Supp. V). See Pritchett, *The Government Corporation Control Act of 1945*, 40 *Am.Pol.Sci.Rev.* 495 (1946). The GCCA required that specified corporations, both wholly owned and partially owned by the Government, be audited by the Comptroller General. See 59 Stat., at 599, 600. Additionally, the wholly owned corporations were required, for the first time, to submit budgets which would be included in the budget submitted annually to Congress by the President. *Id.*, at 598; see also Leazes 22-23. The Act also ordered the dissolution or liquidation of all government corporations created under state law, except for those that Congress should act to reincorporate; and prohibited creation of new Government corporations without specific congressional authorization. 59 Stat., at 602; cf. 31 U.S.C. § 9102.

Thus, in the years immediately following World War II, many Government corporations were dissolved, and to our knowledge only one, the Saint Lawrence Seaway Development Corporation, was created. See Leazes 25, 27. In the 1960's, however, the allure of the corporate form was felt again, and new entities proliferated. Many of them followed the traditional model, often explicitly designated as Government agencies and located within the existing Government structure. See, e.g., Foreign Assistance Act of 1969, § 105, 83 Stat. 809 (creating the Overseas Private Investment Corporation as "an agency of the United States under the policy guidance of the Secretary of State"), as amended, 22 U.S.C. § 2191 *et seq.* (1988 ed. and Supp. V). Beginning in 1962, however, the Government turned to sponsoring corporations which it specifically designated *not* to be agencies or establishments of the United States Government, and declined to subject to the control mechanisms of the GCCA. The first of these, the Communications Satellite Corporation (Comsat), was incorporated under the District of Columbia Business Corporation Act, D.C.Code § 29-301 *et seq.* (1981 and Supp.1994), see 47 U.S.C. § 731 *et seq.*, with the purpose of entering the private sector, but doing so with Government-con-

ferred advantages, see Moe, *supra*, at 22. Comsat was capitalized entirely with private funds. See Seidman, *Government-sponsored Enterprise in the United States*, in *The New Political Economy: The Public Use of the Private Sector* 92 (B. Smith ed. 1975). In contrast to the corporations that had in the past been deemed part of the Government, Comsat's board was to be controlled by its private shareholders; only 3 of its 15 directors were appointed by the President, § 733(a).

The Comsat model, which was seen as allowing the Government to act unhindered by the restraints of bureaucracy and politics, see Moe, *supra*, at 22, 24, was soon followed in creating other corporations. But some of these new "private" corporations, though said by their charters not to be agencies or instrumentalities of the Government, see, e.g., 47 U.S.C. § 396(b) (Corporation for Public Broadcasting (CPB)); 42 U.S.C. § 2996d(e)(1) (Legal Services Corporation (LSC)), and though not subjected to the restrictions of the GCCA, were (unlike Comsat) managed by boards of directors on which Government appointees had not just a few votes but voting control. See Public Broadcasting Act of 1967, § 201, 81 Stat. 369 (CPB's entire board appointed by President); Legal Services Corporation Act of 1974, § 2, 88 Stat. 379 (same for LSC).

[4] Amtrak is yet another variation upon the Comsat theme. Like Comsat, CPB and LSC, its authorizing statute declares that it "will not be an agency or establishment of the United States Government." 84 Stat., at 1330; see 45 U.S.C. § 541. Unlike Comsat, but like CPB and LSC, its board of directors is controlled by Government appointees. And unlike all three of those "private" corporations, it *has* been added to the list of corporations covered by the GCCA, see 31 U.S.C. § 9101 (1988 ed. and Supp. V). As one perceptive observer has concluded with regard to the post-Comsat Government-sponsored "private" enterprises:

"There is no valid basis for distinguishing between many government-sponsored enterprises and other types of government activities, except for the fact that they are designed [designated?] by law as 'not an

agency and instrumentality of the United States Government.' Comparable powers and immunities could be granted to such agencies without characterizing them as non-government." Seidman, *supra*, at 93.

## IV

[5, 6] Amtrak claims that, whatever its relationship with the Federal Government, its charter's disclaimer of agency status prevents it from being considered a Government entity in the present case. This reliance on the statute is misplaced. Section 541 is assuredly dispositive of Amtrak's status as a Government entity for purposes of matters that are within Congress' control—for example, whether it is subject to statutes that impose obligations or confer powers upon Government entities, such as the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1988 ed. and Supp. V), the Federal Advisory Committee Act, 5 U.S.C.App. § 1 *et seq.*, and the laws governing Government procurement, see 41 U.S.C. § 5 *et seq.* (1988 ed. and Supp. V). And even beyond that, we think § 541 can suffice to deprive Amtrak of all those inherent powers and immunities of Government agencies that it is within the power of Congress to eliminate. We have no doubt, for example, that the statutory disavowal of Amtrak's agency status deprives Amtrak of sovereign immunity from suit, see *Sentner v. Amtrak*, 540 F.Supp. 557, 560 (NJ 1982), and of the ordinarily presumed power of Government agencies authorized to incur obligations to pledge the credit of the United States, see, e.g., *Debt Obligations of Nat. Credit Union Admin.*, 6 Op.Off. Legal Counsel 262, 264 (1982). But it is not for Congress to make the final determination of Amtrak's status as a government entity for purposes of determining the constitutional rights of citizens affected by its actions. If Amtrak is, by its very nature, what the Constitution regards as the Government, congressional pronouncement that it is not such can no more relieve it of its First Amendment restrictions than a similar pronouncement could exempt the Federal Bureau of Investigation from the Fourth Amendment. The Constitution constrains governmental action "by whatever instruments or in whatever

modes that action may be taken." *Ex parte Virginia*, 100 U.S. 339, 346-347, 25 L.Ed. 676 (1880). And under whatever congressional label. As we said of the Reconstruction Finance Corporation in deciding whether debts owed it were owed the United States Government: "That the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is . . ." *Cherry Cotton Mills, Inc. v. United States*, 327 U.S. 536, 539, 66 S.Ct. 729, 730, 90 L.Ed. 835 (1946).

Amtrak points to two of our opinions that characterize Amtrak as a nongovernmental entity. The first is *National Railroad Passenger Corporation v. Boston & Maine Corp.*, 503 U.S. 407, —, 112 S.Ct. 1394, 1398, 118 L.Ed.2d 52 (1992), which describes the corporation as "not an agency or instrumentality of the United States Government." But the governmental or nongovernmental nature of Amtrak had no conceivable relevance to the issues before the Court in *Boston & Maine*. The quoted characterization, similar to that contained in the statute, was merely set forth at the beginning of the opinion, in describing the factual background of the case. It is hard to imagine weaker dictum.

The second case is *National Railroad Passenger Corporation v. Atchison, T. & S.F.R. Co.*, 470 U.S. 451, 105 S.Ct. 1441, 84 L.Ed.2d 432 (1985). There the governmental character of Amtrak was marginally relevant. The railroads opposing Amtrak in the case argued that a subsequent statute reneging on the Government's *own* obligations was subject to a "more rigorous standard of review" under the Due Process Clause than a statute impairing private contractual obligations. *Id.*, at 471, 105 S.Ct., at 1454. The Court said it did not have to consider that question because the contracts in question were "not between the railroads and the United States but simply between the railroads and the nongovernmental corporation, Amtrak." *Id.*, at 470, 105 S.Ct., at 1454. But it develops, later in the opinion, that the Court would not have had to consider that question anyway, since it concluded that the contracts (whether those of the United States or not) did not incur the obligation alleged. The effect of

the apparent reliance upon Amtrak's nongovernmental character was *at most* to enable the Court to make, later in the opinion, without applying the "more rigorous standard" urged by the railroads, the superfluous argument that "[e]ven were the Court of Appeals correct that the railroads have a private contractual right . . . we disagree with the Court of Appeals' conclusion that the Due Process Clause limited Congress' power to [affect that right as it did]." *Id.*, at 476, 105 S.Ct., at 1457. Moreover, for the purpose at hand in *Atchison* it was quite proper for the Court to treat Congress' assertion of Amtrak's nongovernmental status in § 541 as conclusive. As we have suggested above, even if Amtrak is a Government entity, § 541's disavowal of that status certainly suffices to disable that agency from incurring contractual obligations on behalf of the United States. For these reasons, we think that *Atchison's* assumption of Amtrak's nongovernmental status (a point uncontested by the parties in the case, since it was not Amtrak's governmental character which the railroads relied upon to establish an obligation of the United States) does not bind us here.

#### V

[7] The question before us today is unanswered, therefore, by governing statutory text or by binding precedent of this Court. Facing the question of Amtrak's status for the first time, we conclude that it is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution.

This conclusion seems to us in accord with public and judicial understanding of the nature of Government-created and -controlled corporations over the years. A remarkable feature of the heyday of those corporations, in the 1930's and 1940's, was that, even while they were praised for their status "as agencies separate and distinct, administratively and financially and legally, from the government itself, [which] has facilitated their adoption of commercial methods of accounting and financing, avoidance of political controls, and utilization of regular procedures of business management," it was fully acknowl-

edged that they were a "device" of "government," and constituted "federal corporate agencies" apart from "regular government departments." Pritchett, 40 *Am.Pol.Sci.Rev.*, at 495. The Reference Manual of Government Corporations, prepared in 1945 by the Comptroller General, contains as one of its Tables "Corporations arranged according to supervising or interested Government department or agency," see GAO Corporation Manual x-xi. This lists the 58 then-extant Government corporations under the various departments and agencies, from the Agriculture Department to the War Department, and then concludes the list with five "Independent corporations"—analogous, one supposes, to the "independent agencies" of the Executive Branch proper. The whole tenor of the Manual is that these corporations are part of the Government.

This Court has shared that view. For example, in *Reconstruction Finance Corp. v. J.G. Menihan Corp.*, 312 U.S. 81, 61 S.Ct. 485, 85 L.Ed. 595 (1941), Chief Justice Hughes, writing for the Court, described the RFC, whose organic statute did not state it to be a Government instrumentality, as, nonetheless, "a corporate agency of the government," and said that "it acts as a governmental agency in performing its functions." *Id.*, at 83, 61 S.Ct., at 486. In *Cherry Cotton Mills, Inc. v. United States*, 327 U.S. 536, 66 S.Ct. 729, 90 L.Ed. 835 (1946), we had little difficulty finding that the RFC was "an agency selected by Government to accomplish purely governmental purposes," *id.*, at 539, 66 S.Ct., at 730, and was thus entitled to the benefit of a statute giving the Court of Claims jurisdiction over "counterclaims . . . on the part of the Government of the United States," 28 U.S.C. § 250(2) (1940 ed.). Likewise in *Inland Waterways Corp. v. Young*, 309 U.S. 517, 60 S.Ct. 646, 84 L.Ed. 901 (1940), we found that the Inland Waterways Corporation, which similarly was not specifically designated in its charter as an instrumentality of the United States, see Act of June 3, 1924, 43 Stat. 360, was an agency of the United States, so that its funds were "public moneys" for which national banks could give security under § 45 of the National Banking Act of 1864, 13 Stat. 113, 309

U.S., at 523-524. Justice Frankfurter wrote for the Court:

"So far as the powers of a national bank to pledge its assets are concerned, the form which Government takes—whether it appears as the Secretary of the Treasury, the Secretary of War, or the Inland Waterways Corporation—is wholly immaterial. The motives which lead Government to clothe its activities in corporate form are entirely unrelated to the problem of safeguarding governmental deposits. . . ." *Id.*, at 523, 60 S.Ct., at 650.

Even Congress itself appeared to acknowledge, at least until recent years, that Government-created and -controlled corporations were part of the Government. The Government Corporation Control Act of 1945, discussed above, which brought to an end the era of uncontrolled growth of Government corporations, provided that, without explicit congressional authorization, no corporation should be acquired or created by "any officer or agency of the Federal Government or by any Government corporation for the purpose of acting as an agency or instrumentality of the United States. . . ." § 304(a), 59 Stat., at 602 (emphasis added). That was evidently intended to restrict the creation of all Government-controlled policy-implementing corporations, and not just some of them. And the companion provision that swept away many of the extant corporations said that no wholly owned government corporation created under state law could continue "as an agency or instrumentality of the United States," § 304(b), 59 Stat., at 602. Once again, that was evidently meant to eliminate policy-implementing government ownership of all state corporations, and not just some of them. From the 1930's onward, many of the statutes creating Government-controlled corporations said explicitly that they were agencies or instrumentalities of the United States, see, e.g., Act of June 9, 1947, § 1, 61 Stat. 130, as amended, 12 U.S.C. § 635 (creating the Export-Import Bank of Washington as "an agency of the United States of America"); Federal Crop Insurance Act, § 503, 52 Stat. 72 (1938), 7 U.S.C. § 1503 (creating Federal Crop Insurance Corporation as "an agency of and within the Department of

Agriculture"), and until 1962 none said otherwise. As we have described above, moreover, those later statutes, relatively few in number, took that statement, perhaps too uncritically, from an earlier statute pertaining to a corporation (Comsat) that was *genuinely* private and *not* Government controlled.

[8] That Government-created and -controlled corporations are (for many purposes at least) part of the Government itself has a strong basis, not merely in past practice and understanding, but in reason itself. It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form. On that thesis, *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), can be resurrected by the simple device of having the State of Louisiana operate segregated trains through a state-owned Amtrak. In *Pennsylvania v. Board of Directors of City Trusts of Philadelphia*, 353 U.S. 230, 77 S.Ct. 806, 1 L.Ed.2d 792 (1957) (*per curiam*), we held that Girard College, which had been built and maintained pursuant to a privately erected trust, was nevertheless a governmental actor for constitutional purposes because it was operated and controlled by a board of state appointees, which was itself a state agency. *Id.*, at 231, 77 S.Ct., at 806. Amtrak seems to us an *a fortiori* case.

Amtrak was created by a special statute, explicitly for the furtherance of federal governmental goals. As we have described, six of the corporation's eight externally named directors (the ninth is named by a majority of the board itself) are appointed directly by the President of the United States—four of them (including the Secretary of Transportation) with the advice and consent of the Senate. See §§ 543(a)(1)(A), (C)–(D). Although the statute restricts most of the President's choices to persons suggested by certain organizations or persons having certain qualifications, those restrictions have been tailor-made by Congress for this entity alone. They do not in our view establish an absence of control by the Government as a whole, but rather constitute a restriction imposed by one of the political branches upon the other. Moreover, Amtrak is not merely in the tem-

porary control of the Government (as a private corporation whose stock comes into federal ownership might be); it is established and organized under federal law for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees. It is in that respect no different from the so-called independent regulatory agencies such as the Federal Communications Commission or the Securities Exchange Commission, which are run by Presidential appointees with fixed terms. It is true that the directors of Amtrak, unlike commissioners of independent regulatory agencies, are not, by the explicit terms of the statute, removable by the President for cause, and are not impeachable by Congress. But any reduction in the immediacy of accountability for Amtrak directors vis-a-vis regulatory commissioners seems to us of minor consequence for present purposes—especially since, by the very terms of the chartering Act, Congress's "right to repeal, alter, or amend this chapter at any time is expressly reserved." 45 U.S.C. § 541.

[9] Respondent appeals to statements this Court made in a case involving the second Bank of the United States, *Bank of United States v. Planters' Bank of Georgia*, 9 Wheat. 904, 6 L.Ed. 244 (1824). There we allowed the Planters' Bank, in which the State of Georgia held a noncontrolling interest, see Act of Dec. 19, 1810, § 1, reprinted in Digest of Laws of State of Georgia 34-35 (O. Prince ed. 1822); Act of Dec. 3, 1811, § 1, *id.*, at 35, to be sued in federal court despite the Eleventh Amendment, reasoning that "[t]he State does not, by becoming a corporation, identify itself with the corporation," *id.*, at 907. "The government of the Union," we said, "held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the Bank. The United States was not a party to suits brought by or against the Bank in the sense of the constitution." *Id.*, at 908. But it does not contradict those statements to hold that a corporation is an

5. Section 543(c) purports to divide the authority to select seven directors between the common stockholders and the preferred stockholders upon conversion of one-fourth or more of Amtrak's outstanding preferred stock to common

agency of the Government, for purposes of the constitutional obligations of Government rather than the "privileges of the government," when the state has specifically created that corporation for the furtherance of governmental objectives, and not merely holds some shares but controls the operation of the corporation through its appointees.

Respondent also invokes our decision in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974), which found the Consolidated Rail Corporation, or Conrail, not to be a federal instrumentality, despite the President's power to appoint, directly or indirectly, 8 of its 15 directors. See *id.*, at 152, n. 40, 95 S.Ct., at 363, n. 40; *Regional Rail Reorganization Act of 1973* § 301, 87 Stat. 1004. But we specifically observed in that case that the directors were placed on the board to protect the United States' interest "in assuring payment of the obligations guaranteed by the United States," and that "[f]ull voting control . . . will shift to the shareholders if federal obligations fall below 50% of Conrail's indebtedness." 419 U.S., at 152, 95 S.Ct., at 363. Moreover, we noted, "[t]he responsibilities of the federal directors are not different from those of the other directors—to operate Conrail at a profit for the benefit of its shareholders," *ibid.*—which contrasts with the public-interest "goals" set forth in Amtrak's charter, see 45 U.S.C. § 501a. Amtrak is worlds apart from Conrail: the Government exerts its control not as a creditor but as a policymaker, and no provision exists that will automatically terminate control upon termination of a temporary financial interest.<sup>5</sup>

\* \* \*

[10] We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First

stock. This subsection was originally enacted in 1970, and has not since been amended. It is irreconcilable with the revised provision for nine-member board, § 543(a)(1).

Amendment. We express no opinion as to whether Amtrak's refusal to display Lebron's advertisement violated that Amendment, but leave it to the Court of Appeals to decide that. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

Justice O'CONNOR, dissenting.

The Court holds that Amtrak is a Government entity and therefore all of its actions are subject to constitutional challenge. Lebron, however, expressly disavowed this argument below, and consideration of this broad and unexpected question is precluded because it was not presented in the petition for certiorari. The question on which we granted certiorari is narrower: Whether the alleged suppression of Lebron's speech by Amtrak, as a concededly private entity, should be imputed to the Government. Because Amtrak's decision to reject Lebron's billboard proposal was a matter of private business judgment and not of Government coercion, I would affirm the judgment below.

#### I

This Court's Rule 14.1(a) provides: "Only the questions set forth in the petition, or fairly included therein, will be considered by the Court." While "[t]he statement of any question presented will be deemed to comprise every subsidiary question," *ibid.*, questions that are merely "related" or "complementary" to the question presented are not "fairly included therein." *Yee v. Escondido*, 503 U.S. 519, ———, 112 S.Ct. 1522, 1532-1534, 118 L.Ed.2d 153 (1992). In *Yee*, we held that a regulatory taking argument, while subsidiary to the umbrella question whether a taking had occurred, was only complementary to the physical taking inquiry set forth in the petition and thus was barred under Rule 14.1(a). See *id.*, at ———, 112 S.Ct., at 1532. Here, state action is the umbrella claim. Subsidiary to that claim, but complementary to each other, are two distinct questions: whether Amtrak is a Government entity, and whether Amtrak's con-

duct as a private actor is nevertheless attributable to the Government.

We granted certiorari on the following question, set forth in the petition:

"Whether the court of appeals erred in holding that Amtrak's asserted policy barring the display of political advertising messages in Pennsylvania Station, New York, was not state action, where:

(a) the United States created Amtrak, endowed it with governmental powers, owns all its voting stock, and appoints all the members of its Board;

(b) the United States-appointed Board approved the advertising policy challenged here;

(c) the United States keeps Amtrak afloat every year by subsidizing its losses; and

(d) Pennsylvania Station was purchased for Amtrak by the United States and is shared with several other governmental entities." Pet. for Cert. i.

The question asks whether the challenged policy "was not state action" and therefore may, at first blush, appear to present the umbrella inquiry. *Yee* suggests otherwise. The petition there recited two decisions by the Courts of Appeals and asked: "Was it error for the state appellate court to disregard the rulings and hold that there was no taking under the fifth and fourteenth amendments?" Instead of focusing on whether "there was no taking," we read the question as a whole. Since the decisions by the Courts of Appeals and the lower court opinion involved only physical takings, we concluded, "Fairly construed, then, petitioners' question presented is the equivalent of the question, 'Did the court below err in finding no physical taking?'" 503 U.S., at ———, 112 S.Ct., at 1533.

Just so here. The question asks whether the lower court erred and thus directs our attention to the decisions below. The District Court, in its thorough order, explicitly noted Lebron's theory of the case: "Plaintiff does not contend that Amtrak is a governmental agency. What plaintiff contends is that the federal government is sufficiently intertwined in Amtrak's operations and au-

thority that the particular actions at issue must be deemed governmental action." 811 F.Supp. 993, 999 (SDNY 1993). Before the Court of Appeals, in order to distinguish a long line of cases which held that Amtrak is not a Government agency, Lebron stated: "Since Lebron does not contend that Amtrak is a governmental entity per se, but rather is so interrelated to state entities that it should be treated as a state actor here, these cases are inapposite." Brief for Michael A. Lebron in No. 93-7127 (CA2), p. 30, n. 39.

The Court of Appeals, like the District Court, substantively discussed only the second question that Lebron argues here—whether Amtrak's conduct in this case implicates "the presence of government action in the activities of private entities." 12 F.3d 388, 390 (CA2 1993). To introduce its analysis, the Court of Appeals did state that "[t]he Rail Passenger Service Act of 1970 . . . created Amtrak as a private, for-profit corporation under the District of Columbia Business Corporation Act," *ibid.*, relying on Congress' characterization of the corporation in 45 U.S.C. § 541. In so asserting, the Court of Appeals did not "pas[s] upon" the question such that it is now a proper basis for reversal, *ante*, at 965, but rather merely identified the question that the court had to address and focused the inquiry on the precise argument presented by Lebron. This observation by the Court of Appeals is much like—indeed, much less extensive than—our discussion of Amtrak's status as a private corporation in *National Railroad Passenger Corporation v. Atchison, T. & S.F.R. Co.*, 470 U.S. 451, 453-456, 105 S.Ct. 1441, 1445-1447, 84 L.Ed.2d 432 (1985). I agree with the Court that *Atchison* does not bind us, *ante*, at 971-972, but by the same token I do not see how the court below could be said to have addressed the issue. A passing observation could not constitute binding precedent; so too it could not serve as the basis for reversal.

The question set forth in the petition focused on the specific action by Amtrak, not on the general nature of the corporation as a

\*The Court would read more into the decision, because we "declin[e] even to brush aside the Court of Appeals' (questionable) contention that

private or public entity. Lebron asked whether "Amtrak's asserted policy barring the display of political advertising messages in Pennsylvania Station, New York, was not state action." The list that follows this question, while partially concerning Amtrak's nature as an entity, went to support the thrust of the query, which is whether these enumerated attributes render Amtrak's advertising policy state action. Lebron's emphasis on the specific action challenged is the crucial difference between his alternative arguments for state action. The first inquiry—whether Amtrak is a Government entity—focuses on whether Amtrak is so controlled by the Government that it should be treated as a Government agency, and all of its decisions considered state action. The second inquiry takes Lebron at his word that Amtrak is *not* a Government entity and instead focuses on the State's influence on particular actions by Amtrak as a private actor.

Fairly construed, the question presented is whether the Court of Appeals erred in holding that the advertising policy of Amtrak, as a private entity, is not attributable to the Federal Government despite the corporation's links thereto. This question is closely related and complementary to, but certainly not inclusive of, the question answered by the Court today, which is whether those links render Amtrak the functional equivalent of a Government agency. In my view, the latter question is barred by Rule 14.1(a).

Relying on *United States Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc.*, 508 U.S. —, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993), the Court argues that it properly addresses whether Amtrak is a Government entity because that inquiry is "prior to the clearly presented question," namely, whether Amtrak's decision is attributable to the Government. *Ante*, at 966. *Independent Insurance Agents*, however, held only that the Court of Appeals had authority to consider a waived claim *sua sponte* and did not abuse its discretion in doing so.\* That is quite different from the

there was 'a "duty" to address section 92,' saying only that '[w]e need not decide' that question." *Ante*, at 966, n. 3. But by (prudently) reserving

purpose for which the Court now marshals the case, which is to justify its consideration of a waived question in the first instance. As explained below, I do not question the Court's authority, only its prudence. In any event, the dispute in *Independent Insurance Agents* centered on the interpretation of a statute that may not have existed, and, as the Court recognizes, *ante*, at 966, n. 3, the decision simply applied the traditional principle that "[t]here can be no estoppel in the way of ascertaining the existence of a law." *Town of South Ottawa v. Perkins*, 94 U.S. 260, 267, 24 L.Ed. 154 (1877). Here, one need not assume the existence of any predicate legal rule to accept Lebron's word that Amtrak is a private entity.

The mere fact that one question must be answered before another does not insulate the former from Rule 14.1(a) and other waiver rules. In *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), we held that Fourth Amendment claims are not ordinarily cognizable in federal habeas proceedings and distinguished several cases by noting that "the issue of the substantive scope of the writ was not presented in the petition[s] for certiorari." *Id.*, at 481, n. 15, 96 S.Ct., at 3046, n. 15. We thus recognized that those decisions properly avoided the question of cognizability, which question, of course, is logically anterior to the merits of the Fourth Amendment claims presented. In *Steagald v. United States*, 451 U.S. 204, 211, 101 S.Ct. 1642, 1647, 68 L.Ed.2d 38 (1981), we held that the Government had conceded that the petitioner had a Fourth Amendment interest in the searched home, an inquiry that precedes the question that was preserved, whether the search was reasonable. In *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 97, n. 4, 111 S.Ct. 1711, 1716, n. 4, 114 L.Ed.2d 152 (1991), because the question was neither litigated below nor included in the petition, we assumed the existence of a cause of action under § 20(a) of the Investment Company Act of 1940 before addressing the requirements of such an action. See also *Burks v. Lasker*, 441 U.S. 471, 476, 99 S.Ct.

the question, the Court could not have implied its answer. And our "complicity" in the [Court of Appeals] enterprise," *ibid.*, exists only if one

1831, 1836, 60 L.Ed.2d 404 (1979) (assuming same). Finally, in *McCormick v. United States*, 500 U.S. 257, 111 S.Ct. 1807, 114 L.Ed.2d 307 (1991), the Court held that a state legislator did not violate the anti-extortion Hobbs Act, 18 U.S.C. § 1951, by accepting campaign contributions without an explicit exchange of improper promises. The Court reached this question only after declining to consider whether the Act applies to local officials at all, because that question was neither argued below nor included in the petition for certiorari. *McCormick*, 500 U.S., at 268, n. 6, 111 S.Ct., at 1814, n. 6; see also *id.*, at 280, 111 S.Ct., at 1820 (SCALIA, J., concurring) (accepting the assumption, because the argument was waived, that the Hobbs Act is a "federal 'payment for official action' statute" even though "I think it well to bear in mind that the statute may not exist").

The Court does not take issue with these cases but argues further that, because the question whether Amtrak is a government entity is "dependent upon many of the same factual inquiries [as the clearly presented question], refusing to regard it as embraced within the petition may force us to assume what the facts will show to be ridiculous, a risk which ought to be avoided." *Ante*, at 966. A certain circularity inheres in this logic, because the Court must first answer the omitted question in order to determine whether its answer turns on "the same factual inquiries" as the clearly presented question. As for the facts, the record is shaped by the parties' arguments below. Perhaps serendipity has given the Court a factual record adequate to decide a question other than that advanced below, but there is no guarantee of such convergence. It is rather unfair to hold a party to a record that it may have developed differently in response to a different theory of the case. It is this risk of unfairness, rather than the fear of seeming "ridiculous," that we should avoid.

Rule 14.1(a), of course, imposes only a prudential limitation, but one that we disregard "only in the most exceptional cases."

indulges in the unlikely inference that we held more than what we said we did.

*Stone v. Powell*, 428 U.S., at 481, n. 15, 96 S.Ct., at 3046, n. 15; see also *United States v. Mendenhall*, 446 U.S. 544, 551, n. 5, 100 S.Ct. 1870, 1875, n. 5, 64 L.Ed.2d 497 (1980). This is not one of them. As noted before, not only did Lebron disavow the argument that Amtrak is a Government entity below, he did so in order to distinguish troublesome cases. Lebron's post-petition attempt to resuscitate the claim that he himself put to rest is precisely the kind of bait-and-switch strategy that waiver rules, prudential or otherwise, are supposed to protect against. In *Steagald*, 451 U.S., at 211, 101 S.Ct., at 1647, for example, we stated unequivocally that "the Government, through its assertions, concessions, and acquiescence, has lost its right to challenge petitioner's assertion that he possessed a legitimate expectation of privacy in the searched home." I see no difference here.

The Rule's prudential limitation on our power of review serves two important purposes, both of which the Court disserves by deciding that Amtrak is a Government entity. First, the Rule provides notice and enables the respondent to sharpen its arguments in opposition to certiorari. "By forcing the petitioner to choose his question at the outset, Rule 14.1(a) relieves the respondent of the expense of unnecessary litigation on the merits and the burden of opposing certiorari on unpresented questions." *Yee*, 503 U.S., at —, 112 S.Ct., at 1533. Lebron argues that Amtrak has waived its Rule 14.1(a) argument by failing to object in the brief in opposition to certiorari. But that is exactly the point: The question set forth did not fairly include an argument that Amtrak is a Government agency, and, indeed, the petition was devoted to whether Amtrak's private decision should be imputed to the State. Even at pages 16-18, the petition did not "fairly embrace[ ] the argument that Lebron now advances," *ante*, at 965, but rather argued that the composition of Amtrak's board "renders an otherwise private entity a state actor," Pet. for Cert. 16 (emphasis added)—thus specifically repeating the concession he now wishes to withdraw. Amtrak could not respond to a point not argued and did not waive an argument that was not at issue. Not until the merits

brief did Amtrak have notice that Lebron would contradict his persistent assertion that the corporation was a private entity.

Second, the Rule assists the management of our cases. "Rule 14.1(a) forces the parties to focus on the questions the Court has viewed as particularly important, thus enabling us to make efficient use of our resources." *Yee*, 503 U.S., at —, 112 S.Ct., at 1533. We normally grant only petitions that present an important question of law on which the lower courts are in conflict. Here, the lower courts have generally held that Amtrak is not a Government entity, see, e.g., *Anderson v. National Railroad Passenger Corporation*, 754 F.2d 202, 204 (CA7 1985); *Ehm v. National Railroad Passenger Corporation*, 732 F.2d 1250, 1255 (CA5), cert. denied, 469 U.S. 982, 105 S.Ct. 387, 83 L.Ed.2d 322 (1984), and none of our cases suggests otherwise. Even where the lower courts are in clear conflict, we often defer consideration of novel questions of law to permit further development. Despite the prevalence of publicly owned corporations, whether they are Government agencies is a question seldom answered, and then only for limited purposes. See *Cherry Cotton Mills v. United States*, 327 U.S. 536, 539, 66 S.Ct. 729, 730, 90 L.Ed. 835 (1946); *National Railroad Passenger Corporation v. Atchison, T. & S.F.R. Co.*, 470 U.S., at 471, 105 S.Ct., at 1454. Answering this question today merely opens the back door to premature adjudication of similarly broad and novel theories in the future.

Weeding out such endeavors, Rule 14.1(a), like other waiver rules, rests firmly upon a limited view of our judicial power. See, e.g., *Carducci v. Regan*, 714 F.2d 171, 177 (CA DC 1983) (Scalia, J.) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them"). "The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result." Stevens, *Some Thoughts on Judicial Restraint*, 66 *Judicature* 177, 183 (1982). Whether the result of today's decision is desirable I do not de-

cide." But I think it clear that the Court has exhibited little patience in reaching that result.

## II

Accepting Lebron's concession that Amtrak is a private entity, I must "traverse th[e] difficult terrain," *ante*, at 964, that the Court sees fit to avoid, and answer the question that is properly presented to us: whether Amtrak's decision to ban Lebron's speech, although made by a concededly private entity, is nevertheless attributable to the Government and therefore considered state action for constitutional purposes. Reflecting the discontinuity that marks the law in this area, we have variously characterized the inquiry as whether "there is a sufficiently close nexus between the State and the challenged action," *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974); whether the state, by encouraging the challenged conduct, could be thought "responsible for those actions," *Blum v. Yaretsky*, 457 U.S. 991, 1005, 102 S.Ct. 2777, 2786, 73 L.Ed.2d 534 (1982); and whether "the alleged infringement of federal rights [is] 'fairly attributable to the State,'" *Rendell-Baker v. Kohn*, 457 U.S. 830, 838, 102 S.Ct. 2764, 2769, 73 L.Ed.2d 418 (1982), quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2753, 73 L.Ed.2d 482 (1982). Whatever the semantic formulation, I remain of the view that the conduct of a private actor is not subject to constitutional challenge if such conduct is "fundamentally a matter of private choice and not state action." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632, 111 S.Ct. 2077, 2089, 114 L.Ed.2d 660 (1991) (O'CONNOR, J., dissenting).

Lebron relies heavily on *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). There, the Court perceived a symbiotic relationship between a racially segregated restaurant and a state agency from which the restaurant leased public space. Noting that the State stood to profit from the discrimination, the Court held that the Government had "so far insinuated itself into a position of interdependence with" the private restaurant that it

was in effect "a joint participant in the challenged activity." *Id.*, at 725, 81 S.Ct., at 861. Focusing on this language, Lebron argues that various features of Amtrak's structure and management—its statutory genesis, the heavy reliance on federal subsidies, and a board appointed by the President—places it in a symbiotic relationship with the Government such that the decision to ban Lebron's speech should be imputed to the State.

Our decision in *Burton*, however, was quite narrow. We recognized "the limits of our inquiry" and emphasized that our decision depended on the "peculiar facts [and] circumstances present." *Id.*, at 726, 81 S.Ct., at 862. We have since noted that *Burton* limited its "actual holding to lessees of public property," *Jackson v. Metropolitan Edison Co.*, 419 U.S., at 358, 95 S.Ct., at 457, and our recent decisions in this area have led commentators to doubt its continuing vitality, see, e.g., L. Tribe, *American Constitutional Law* § 18-3, p. 1701, n. 13 (2d ed. 1988) ("The only surviving explanation of the result in *Burton* may be that found in Justice Stewart's concurrence").

In *Jackson*, we held that a private utility's termination of service to a customer is not subject to due process challenge, even though the termination was made pursuant to a state law. In doing so, we made clear that the question turns on whether the challenged conduct results from private choice: "Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for the purposes of the Fourteenth Amendment." 419 U.S., at 357, 95 S.Ct., at 456 (footnote omitted). The rule applies even where the private entity makes its decision in an environment heavily regulated by the Government. *Rendell-Baker, supra*, involved a private school for troubled students who were transferred there by authority of a state law, and for whose education the state paid the school. Public funds comprised 90% to 99% of the school budget. The school fired petitioners, and a state grievance board reviewed that personnel action. Despite the school's pervasive ties to the State, we held that the discharge decisions were not subject to constitu-

tional challenge because those actions "were not compelled or even influenced by any state regulation." *Id.*, 457 U.S., at 841, 102 S.Ct., at 2771. We noted that "in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school's personnel matters." *Ibid.* Likewise, in *Blum v. Yaretsky*, *supra*, we held that the decisions of a regulated hospital to discharge its patients were not subject to constitutional challenge. Although various Medicaid regulations and benefit adjustment procedures may have encouraged the hospital's decisions to discharge its patients early, we held that the State was not "responsible for those actions" because such actions "ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State." *Id.*, 457 U.S., at 1005, 1008, 102 S.Ct., at 2786, 2787. See also *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 547, 107 S.Ct. 2971, 2986, 97 L.Ed.2d 427 (1987) ("There is no evidence that the Federal Government coerced or encouraged the USOC in the exercise of its right [to deny use of its copyright]").

These cases differ markedly from the "interdependence" or "joint participation" analysis of *Burton* and stand for the principle that, unless the Government affirmatively influenced or coerced the private party to undertake the challenged action, such conduct is not state action for constitutional purposes. *Edmonson v. Leesville Concrete Co.*, *supra*, is not to the contrary. In that case, the Court held that a private attorney's exercise of a peremptory challenge is attributable to the Government and therefore subject to constitutional inquiry. Although the opinion cited *Burton*, see 500 U.S., at 621, 624, 111 S.Ct., at 2083, 2084, it emphasized that a private party exercising a peremptory challenge enjoys the "overt, significant assistance of the court," *id.*, at 624, 111 S.Ct., at 2084. The decision therefore is an application of *Shelley v. Kraemer*, 334 U.S. 1, 19, 68 S.Ct. 836, 845, 92 L.Ed. 1161 (1948), which focused on the use of the State's coercive power, through its courts, to effect the litigant's allegedly unconstitutional choice. Moreover,

*Edmonson* stressed that a litigant exercising a peremptory challenge performs a "traditional function of government," 500 U.S., at 624, 111 S.Ct., at 2084, a theory of state action established by *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946), that is independent from *Burton* and not relevant to this case.

Relying thus on *Shelley* and *Marsh*, *Edmonson* did not necessarily extend the "interdependence" rationale of *Burton* beyond the limited facts of that case. Given the pervasive role of Government in our society, a test of state action predicated upon public and private "interdependence" sweeps much too broadly and would subject to constitutional challenge the most pedestrian of everyday activities, a problem that the Court recognized in *Burton* itself, see 365 U.S., at 725-726, 81 S.Ct., at 861-862. A more refined inquiry is that established by *Jackson, Rendell-Baker, Blum*, and *San Francisco Arts & Athletics*: The conduct of a private entity is not subject to constitutional scrutiny if the challenged action results from the exercise of private choice and not from state influence or coercion.

Applying this principle to the facts before us, I see no basis to impute to the Government Amtrak's decision to disapprove Lebron's advertisement. Although a number of factors indicate the Government's pervasive influence in Amtrak's management and operation, none suggest that the Government had any effect on Amtrak's decision to turn down Lebron's proposal. The advertising policy that allegedly violates the First Amendment originated with a predecessor to Amtrak, the wholly private Pennsylvania Railroad Company. A 1967 lease by that company, for example, prohibited "any advertisement which in the judgement of Licensor is or might be deemed to be slanderous, libelous, unlawful, immoral, [or] offensive to good taste..." App. 326, ¶ 19. Amtrak simply continued this policy after it took over. The specific decision to disapprove Lebron's advertising was made by Amtrak's Vice President of Real Estate and Operations Development, who, as a corporate officer, was neither appointed by the President nor directed by the President-appointed board to disapprove Lebron's proposal.

Lebron nevertheless contends that the board, through its approval of the advertising policy, controlled the adverse action against him. This contention rests on the faulty premise that Amtrak's directors are state actors simply because they were appointed by the President; it assumes that the board members sit as public officials and not as business directors, thus begging the question whether Amtrak is a Government agency or a private entity. In any event, even accepting Lebron's premise that the board's approval has constitutional significance, the factual record belies his contention. The particular lease which permitted Amtrak to disallow Lebron's billboard was neither reviewed nor approved directly by the board. In fact, minutes of meetings dating back to 1985 showed that the board approved only one contract between Amtrak and Transportation Displays, Incorporated, the billboard leasing company that served as Amtrak's agent, and even then it is not clear whether the board approved the contract or merely delegated authority to execute the licensing agreement. App. 402. In short, nothing in this case suggests that the Government controlled, coerced, or even influenced Amtrak's decision, made pursuant to corporate policy and private business judgment, to disapprove the advertisement proposed by Lebron.

Presented with this question, the Court of Appeals properly applied our precedents and did not impute Amtrak's decision to the Government. I would affirm on this basis and not reverse the Court of Appeals based on a theory that is foreign to this case. Respectfully, I dissent.



**MILWAUKEE BREWERY WORKERS'  
PENSION PLAN, Petitioner**

v.

**JOS. SCHLITZ BREWING COMPANY  
and Stroh Brewery Company et al.**

No. 93-768.

Argued Dec. 5, 1994.

Decided Feb. 21, 1995.

Multiemployer pension plan petitioned for review of arbitrator's decision that interest began to accrue on brewer's amortized charge for withdrawal from plan on first day of plan year following withdrawal, rather than on last day of plan year preceding withdrawal. The United States District Court for the Eastern District of Wisconsin, Robert W. Warren, Senior District Judge, reversed. Both parties appealed. The Court of Appeals for the Seventh Circuit, Easterbrook, Circuit Judge, 3 F.3d 994, reversed. Certiorari was granted. The Supreme Court, Justice Breyer, held that interest began to accrue on first day of plan year following withdrawal, rather than last day of plan year preceding withdrawal, under Multiemployer Pension Plan Amendments Act (MPPAA), since, *inter alia*, employer's liability was more like tax or purchase-money installment, for which interest does not accrue before first payment, than loan installment, for which interest accrues before first payment, abrogating *Huber*.

Affirmed.

**1. Pensions ¶21**

ERISA helped assure private-sector workers that they would receive pensions that their employers had promised them, by requiring, among other things, that employers make contributions that would produce pension-plan assets sufficient to meet future vested pension liabilities, that termination insurance protect workers against plan's bankruptcy, and that, if plan became insolvent, employer who had withdrawn from plan during previous five years be held liable for fair share of plan's underfunding. 26 U.S.C.A.

Tell  
Neil Kinkopf

Telcom T. Lieber 10/2/85

House committee reported out bill  
w/ same basic structure bill

Not yet scheduled on floor  
but will be soon

Issue of  
buying

Nothing in Senate side  
~~Not~~ Not voted in committee  
No report