

# **Comparative Administrative Law (CAL)**

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# Addendum GALA

“Where in various chapters one can read that administrative law is concrete constitutional law, this is not the frame in the Netherlands. Even insofar as constitutional norms do underpin certain sections of the GALA, these cannot be invoked directly to ground a cause of action – in the Dutch context, judicial review of the constitutionality of legislation and treaties is prohibited. This design of the legal system has resulted into a study of administrative law and constitutional law as two rather separated disciplines. Consequently, there are quite a few themes that might be considered part of administrative law in other legal systems, but that are regarded primarily as being of a constitutional nature in the Netherlands. These include the rules governing the election and appointment of specific officials and the organization of referenda. In general, the rules concerning the structure and operation of administrative authorities are part of constitutional law, such as the voting system used within administrative authorities of municipalities, provinces and regional water authorities.”

Source: *Schuermans, Barkhuysen and den Ouden, 'Codification of Administrative Law in the Netherlands' in F Uhlmann (ed), Codification of Administrative Law: A Comparative Study on The Legal Basis of Administrative Law* (in publication)



# Public – Private

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# Public – Private



## General questions

- 1. What do we qualify** (legal sources, governmental entities, activities, contracts etc.)?
- 2. What are the criteria for qualification** (legal basis, public interest or mandate, ownership and control, special powers, interests of the parties etc.)?
- 3. What are the consequences of a qualification** (procedure and legal remedies, application of administrative or private law, state liability, constitutional restraints etc.)?
4. (To what extent may government act through private entities, by private law contracts etc.?)

# Public – Private: Amtrak

(Slip Opinion)

OCTOBER TERM, 2014

1

## Syllabus

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 Timber & Lumber Co.*, 200 U. S. 321, 337.

## **SUPREME COURT OF THE UNITED STATES**

## Syllabus

DEPARTMENT OF TRANSPORTATION ET AL. *v.*  
ASSOCIATION OF AMERICAN RAILROADS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT

No. 13–1080. Argued December 8, 2014—Decided March 9, 2015



# Public – Private: Amtrak

## Questions to the Decision

- 1. Which criteria did the Supreme Court use to assess whether Amtrak is private or public?** Do you agree with the criteria they used?
- 2. What other criteria could also have been used?** Would you use other criteria in your country?
- 3. How does the separation of powers relate to the assessment of the Supreme Court of whether Amtrak is private or public?** Do you know of other constitutional principles that have different consequences depending on whether something is private or public law?



# Public – Private: Amtrak

In holding that Congress may not delegate to Amtrak the joint authority to issue the metrics and standards—authority it described as “regulatory power,” *ibid.*—the Court of Appeals concluded Amtrak is a private entity for purposes of determining its status when considering the constitutionality of its actions in the instant dispute. That court’s analysis treated as controlling Congress’ statutory command that Amtrak “is not a department, agency, or instrumentality of the United States Government.” *Id.*, at 675 (quoting 49 U. S. C. §24301(a)(3)). The Court of Appeals also relied on Congress’ pronouncement that Amtrak “shall be operated and managed as a for-profit corporation.” 721 F. 3d, at 675 (quoting §24301(a)(2)); see also *id.*, at 677 (“Though the federal government’s involvement in Amtrak is considerable, Congress has both designated it a private corporation and instructed that it be managed so as to maximize profit. In deciding Amtrak’s status for purposes of congressional delegations, these declarations are dispositive”). Proceeding from this premise, the Court of Appeals concluded it was impermissible for Congress to “delegate regulatory authority to a private entity.” *Id.*, at 670; see also *ibid.* (holding *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), prohibits any such delegation of authority).





# Public – Private: Amtrak

It is appropriate to begin the analysis with Amtrak's **ownership** and corporate structure. The Secretary of Transportation holds all of Amtrak's preferred stock and most of its common stock. Amtrak's Board of Directors is composed of nine members, one of whom is the Secretary of Transportation. Seven other Board members are appointed by the President and confirmed by the Senate. 49 U. S. C. §24302(a)(1). These eight Board members, in turn, select Amtrak's president. §24302(a)(1)(B); §24303(a). Amtrak's Board members are subject to salary limits set by Congress, §24303(b); and the Executive Branch has concluded that all appointed **Board members** are removable by the President without cause, see 27 Op. Atty. Gen. 163 (2003).

In addition to controlling Amtrak's stock and Board of Directors the political branches exercise substantial, statutorily mandated **supervision** over Amtrak's priorities and operations. Amtrak must submit numerous annual



# Public – Private: Amtrak

It is significant that, rather than advancing its own private economic interests, Amtrak is required to pursue numerous, additional goals defined by statute. To take a few examples: Amtrak must “provide efficient and effective **intercity passenger rail mobility,**” 49 U.S.C. §24101(b); “minimize Government subsidies,” §24101(d); provide reduced fares to the disabled and elderly, §24307(a); and ensure mobility in times of national disaster, §24101(c)(9).

Finally, Amtrak is also dependent on federal financial support. In its first 43 years of operation, Amtrak has received more than \$41 billion in federal **subsidies.** In recent years these subsidies have exceeded \$1 billion annually. See Brief for Petitioners 5, and n. 2, 46.



# Public – Private: Amtrak

On that point this Court’s decision in *Lebron v. National Railroad Passenger Corp.*, 513 U. S. 374 (1995), provides necessary instruction. In *Lebron*, Amtrak prohibited an artist from installing a politically controversial display in New York City’s Penn Station. The artist sued Amtrak, alleging a violation of his **First Amendment rights**. In response Amtrak asserted that it was not a governmental entity, explaining that “its charter’s disclaimer of agency status prevent[ed] it from being considered a Government entity.” *Id.*, at 392. The Court rejected this contention, holding “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.” *Ibid.* To hold otherwise



# Public – Private: Amtrak

JUSTICE THOMAS, concurring in the judgment.

In this case, Congress has permitted a corporation subject only to limited control by the President to create legally binding rules. These rules give content to private railroads' statutory duty to share their private infrastructure with Amtrak. This arrangement raises serious constitutional questions to which the majority's holding that Amtrak is a governmental entity is all but a non sequitur. These concerns merit close consideration by the courts below and by this Court if the case reaches us again. We have too long abrogated our duty to enforce the separation of powers required by our Constitution. We have overseen and sanctioned the growth of an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus that finds no comfortable home in our constitutional structure. The end result may be trains that run on time (although I doubt it), but the cost is to our Constitution and the individual liberty it protects.



# Public – Private: Queensland Rail

## HIGH COURT OF AUSTRALIA

FRENCH CJ,  
HAYNE, KIEFEL, BELL, GAGELER, KEANE AND NETTLE JJ

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COMMUNICATIONS, ELECTRICAL,  
ELECTRONIC, ENERGY, INFORMATION,  
POSTAL, PLUMBING AND ALLIED SERVICES  
UNION OF AUSTRALIA & ORS

PLAINTIFFS

AND

QUEENSLAND RAIL & ANOR

DEFENDANTS

*Communications, Electrical, Electronic, Energy, Information, Postal,  
Plumbing and Allied Services Union of Australia v Queensland Rail*

[2015] HCA 11

8 April 2015

B63/2013



# Public – Private: Queensland Rail

## Questions to the Decision

- 1. What was decisive for the Supreme Court to qualify Queensland Rail? Do you agree?**
- 2. What significance did the court attach to the asserted “intention of the Parliament” or the labelling “is not a body corporate”? Do you agree with the argumentation?**
- 3. What role did profit play in the assessment?**



# Public – Private: Queensland Rail

23

Accepting, then, that the Authority was right to disclaim an argument that a "corporation" must be an entity of a kind known in 1900, what is it that marks an artificially created legal entity as a "trading or financial corporation formed within the limits of the Commonwealth"? As has been noted, the Authority sought to answer this question by reference only to whether the Parliament providing for the creation of the entity "intended" to create a "corporation". But this answer gave no fixed content to what is a "corporation". The Authority's submissions proffered no description, let alone definition, of what it means to say that the entity created is or is not a "corporation". Hence the "intention" to which the Authority referred, and upon which it relied as providing the sole criterion for determining what is or is not within the legislative power of the Commonwealth, was an intention of no fixed content. Rather, it was an intention to apply, or in this case not to apply, a particular label. A labelling intention of this kind provides no satisfactory criterion for determining the content of federal legislative power.





# Public – Private: Queensland Rail

41           The QRTA Act established the Authority as an entity having functions which included "managing railways"<sup>46</sup>, "controlling rolling stock on railways"<sup>47</sup>, "providing rail transport services, including passenger services"<sup>48</sup> and "providing services relating to rail transport services"<sup>49</sup>. The QRTA Act provides<sup>50</sup> that the Authority is to "carry out its functions as a commercial enterprise". Provision is made<sup>51</sup> for the Authority to pay **dividends to the State** and, to that end, the Authority is obliged<sup>52</sup> to give the responsible Ministers in May each year an estimate of its profit for the financial year. Not only that, the Authority is liable<sup>53</sup> to pay to the Treasurer, for payment into the consolidated fund of the State, amounts equivalent to the amounts for which the Authority would have been liable if it had been liable to pay tax imposed under a Commonwealth Act. In light of these provisions, the conclusions that the Authority was constituted with a view to engaging in trading and doing so with a view to profit are irresistible.