3-1-1993

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Morales v. Trans World Airlines, Inc.: Federal Preemption
Provision Clips States' Wings on Regulation
of Air Fare Advertising

Surrounded by congressional leaders and members of his administration, President Jimmy Carter on October 24, 1978, signed into law the Airline Deregulation Act (ADA or Act) and predicted that the measure would help "lift the heavy hand of Government regulation" from the back of the airline industry. This historic White House signing marked the first time in decades that a major industry in the United States had been deregulated. It was also illustrative of a sweeping philosophical change in this country concerning the role of the federal government in oversight of business. Proponents of deregulation were not able to predict, however, the extent to which states would attempt to fill the gap left by the federal government's exit from the regulatory playing field. The legislation that President Carter in 1978 boasted had "few enemies" is today part of a larger fundamental debate about federalism and the sharing of power between the federal and state governments.

In Morales v. Trans World Airlines, Inc., the United States Supreme Court was called upon to referee a regulatory tug of war over the ADA. Morales addressed whether the ADA preempts states from using their general consumer protection statutes to regulate the content of air fare advertising. In concluding that the ADA prevents a state from bringing an action against airlines for violating state deceptive advertising standards, the Court broadly interpreted a preemption clause in the federal statute that prohibits states from enforcing laws "relating to rates, routes,


3. Id.


5. See id. at 250-56 (noting a considerable increase in state regulations while the federal government deregulated industries).

6. Remarks by President Jimmy Carter, supra note 2, at 1837.


This Note explores the circumstances that gave rise to the dispute in *Morales* and the reasoning behind the Court's decision. It examines prior case law in order to assess whether the Court was justified in concluding that federal law preempts state law in this instance. This Note considers *Morales*'s potential impact on a state's power to control the content of airline advertising and concludes that the decision constrains states to a degree beyond that envisioned by Congress. Although the Court attempted to limit the scope of its decision, this Note cautions that *Morales* could be used to tie states' hands in other areas traditionally within their regulatory reach.

Congress viewed its adoption of the ADA as "overhaul[ing] the aviation regulatory system." Prior to enactment of the ADA, the federal Civil Aeronautics Board (CAB) possessed broad authority to regulate the airline industry, including the power to set interstate rates and to take administrative actions against airlines for deceptive trade practices. Under the pre-deregulation scheme, states also exercised industry oversight by regulating intrastate fares and prosecuting violations of state laws against deceptive practices. Congress included a "savings clause" in prior aviation statutes that guaranteed the states a shared regulatory role by maintaining existing common law and statutory remedies.

10. See infra notes 22-76 and accompanying text.
11. See infra notes 77-143 and accompanying text.
12. See infra notes 144-85 and accompanying text.
13. See infra notes 174-85 and accompanying text.
16. Id. Section 411 of the FAA specifically empowered the CAB to "investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof." Federal Aviation Act of 1958, Pub. L. No. 85-726, § 411, 72 Stat. 731, 769 (codified as amended at 49 U.S.C. app. § 1381(a) (1988)). The CAB's predecessor, the Civil Aeronautics Authority (CAA), possessed similar power dating back to 1938. Civil Aeronautics Act of 1938, ch. 601, § 411, 52 Stat. 973, 1003. The Court has held that the expression "unfair or deceptive practices or unfair methods of competition" as used in the statutes should be given a broader reading than the common-law meaning. American Airlines, Inc. v. North American Airlines, Inc., 351 U.S. 79, 85 (1956). The Court said the focus of the provision is on protecting "the public interest" rather than on punishing wrongdoers or protecting injured competitors. Id.
19. 49 U.S.C. app. § 1506 (1988). This "savings clause" stipulates that "[n]othing con-
Although this "savings clause" was not repealed when Congress passed the ADA, the new statute did contain a specific federal preemption provision.\(^2\) That provision, § 1305(a)(1) of the United States Code, mandates:

[N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.\(^2\)

With airline deregulation just shy of its tenth birthday, the National Association of Attorneys General (NAAG)\(^2\) in 1988 adopted guidelines on advertising and marketing practices in the industry.\(^2\) NAAG specified that the Guidelines did not create new laws or regulations, but rather explained "how existing state laws apply to air fare advertising and frequent flyer programs."\(^2\) The Guidelines themselves did not have the force of law; instead they provided standards against which airlines could assess whether a practice violated current state consumer protection statutes.\(^2\)

Perhaps instilled with a renewed sense of mission by the NAAG Guidelines, the attorneys general of seven states\(^2\) sent an advisory memorandum to major airlines in February 1988 cautioning that failure to

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20. Id. § 1305(a)(1); Morales, 112 S. Ct. at 2034.

21. 49 U.S.C. app. § 1305(a)(1) (1988) (emphasis added). The meaning of the "relating to" clause was the focus of the Court’s analysis in Morales. See infra notes 46-53 and accompanying text.

22. NAAG was founded in 1907, and its membership includes the attorneys general from all 50 states and U.S. territories. Note, To Form A More Perfect Union?: Federalism And Informal Interstate Cooperation, 102 Harv. L. Rev. 842, 842 n.2 (1989). The primary purpose of NAAG is the exchange of information among the organization’s members. Id. at 842.


24. NAAG Guidelines, supra note 22, at 2041. For example, § 2.0 of the Guidelines is a general provision requiring any air fare advertisement to be clear and nondeceptive. Id. at 2044. In its comments, the NAAG explained that this "restate[s] individual states' false advertising and deceptive practices statutes as they apply to air fare and price advertising." Id.


26. The seven states were Colorado, Kansas, Massachusetts, Missouri, New York, Texas, and Wisconsin. Morales, 112 S. Ct. at 2035.
disclose all fare surcharges conflicted with the Guidelines and represented a violation of state laws on deceptive advertising and unfair trade practices. The attorneys general described the memorandum as a precursor to possible initiation of an enforcement action, and they urged the airlines to comply with the disclosure requirement immediately. Nine months later, the Texas attorney general sent a letter to several airlines, including Trans World Airlines (TWA), announcing an intent to sue.

The airlines sued first, however, claiming in federal district court that the states were precluded from regulating air fare advertising by the preemption provision of the ADA. The airlines requested a declaratory judgment that federal law preempted the surcharge-disclosure requirement in the Guidelines and sought to enjoin Texas from taking any action regulating airline rates, routes, services, or advertising. The district court complied, granting plaintiffs a preliminary injunction, and the Court of Appeals for the Fifth Circuit affirmed. The court of appeals found that "the history of federal legislation regulating airlines demonstrates the intent of Congress to expressly preempt state regulation of airline fare advertising, leaving no right of action that arises under state law only."

The Supreme Court granted certiorari to address whether the preemption provision of the ADA prohibits the states from utilizing their general consumer protection statutes to prevent allegedly deceptive air fare advertising practices.

27. Id. at 2034. Section 2.5 of the Guidelines provides that "[a]ny fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare." NAAG Guidelines, supra note 23, at 2048.
29. Id. at 2035.
30. Id.
31. Three airlines, TWA, Continental, and British Airways, brought an action in United States District Court for the Western District of Texas, "seeking to enjoin the Attorney General of Texas from enforcing the NAAG Guidelines under cover of the Texas Deceptive Trade Practices Act." Brief for the Respondent Airlines at 13, Morales (No. 90-1604).
32. Morales, 112 S. Ct. at 2035.
33. Id.
36. Mattox, 897 F.2d at 782.
37. Morales, 112 S. Ct. at 2034.
The Texas attorney general argued before the Supreme Court that Texas law and federal law on deceptive airline activities are "complementary and square with the principles of federalism." In addition, Texas argued that courts consistently had opposed federal preemption of state oversight of deceptive airline practices. TWA and the other respondent airlines maintained that the NAAG "Guidelines . . . represent the states' concerted effort to micromanage the advertising of air fares on a nationwide basis," and that this effort "cannot be squared with the [ADA]."

In a five-to-three decision, the Supreme Court held that "the fare advertising provisions of the NAAG Guidelines are pre-empted by the ADA," and it affirmed the award of injunctive relief. The majority opinion, written by Justice Scalia, featured two basic steps of analysis: (1) establishing the scope of the "relating to" clause in the ADA, and (2)

38. Attorneys general from 33 other states were also parties to the proceeding because they were defendants in the lower court proceedings. Brief of Petitioner at ii, Morales (No. 90-1604).
39. Id. at 11.
40. Id. The Texas attorney general cited several cases in which state laws having only indirect impacts on airline rates or services were not preempted. Id. at 28-32 (citing, among other cases, West v. Northwest Airlines, Inc., 923 F.2d 657 (9th Cir. 1990), vacated and remanded, 112 S. Ct. 2932 (1992) (for further consideration in light of Morales); People v. Western Airlines, Inc., 155 Cal. App. 3d 597, 202 Cal. Rptr. 237 (1984), cert denied, 469 U.S. 1132 (1985)). For a detailed discussion of these and other cases supporting the attorney general's argument, see infra notes 123-43 and accompanying text.
42. Id. at 16.
43. Justices Scalia, White, O'Connor, Kennedy, and Thomas constituted the majority, with Justice Stevens, joined by Chief Justice Rehnquist and Justice Blackmun, dissenting. Morales, 112 S. Ct. at 2033. Justice Souter elected not to take part in the decision. The New York Times suggested that as a former New Hampshire attorney general Justice Souter may have felt that it would have been inappropriate for him to participate. Linda Greenhouse, High Court Gives Airline Industry Victory Over States on Fare Ads, N.Y. TIMES, June 2, 1992, at A1, D14.
44. Morales, 112 S. Ct. at 2041.
45. Id. The Court did rule, however, that the district court erred in granting the airlines injunctive relief beyond simply enjoining Texas from enforcing the fare advertising provisions of the Guidelines. Id. at 2036. Justice Scalia said that in granting a "blunderbuss injunction" the district court exceeded its injunctive power. Id. He added that because "petitioner has threatened to enforce only the obligations described in the guidelines regarding fare advertising, the injunction must be vacated insofar as it restrains the operation of state laws with respect to other matters." Id.
46. Id. at 2036-38; see supra notes 20-21 and accompanying text.
assessing whether the *NAAG Guidelines* fell within that scope and therefore should be preempted.\footnote{Morales, 112 S. Ct. at 2038-40.}

To determine the proper breadth of the "relating to" clause, the majority looked to a line of cases in which the Court had interpreted a similarly worded clause in a preemption provision of the Employee Retirement Income Security Act of 1974 (ERISA).\footnote{Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1988).} ERISA's preemption language stipulates that the provisions of the law "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."\footnote{Id. § 1144(a) (emphasis added).} The Court's ERISA holdings established that a state is preempted from regulating an employee benefit plan where state law "has a connection with or reference to such a plan."\footnote{Id. § 1144(a) (emphasis added).} Because of the similarity in language between the preemption provisions of ERISA and the ADA,\footnote{Id. § 1144(a) (emphasis added).} Justice Scalia reasoned, "the same standard" should be adopted in *Morales*.\footnote{Morales, 112 S. Ct. at 2037 (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983)).} Consequently, Justice Scalia concluded that "[s]tate enforcement actions having a connection with or reference to airline 'rates, routes, or services' are preempted" by the ADA.\footnote{Id. at 2038-40.}

In the second step of its analysis, the Court determined that the *NAAG Guidelines* relate to routes, rates, and services both by virtue of their express language and the potential impact on the airlines caused by their enforcement.\footnote{Id. at 2038-40.} The Court reviewed several sections of the *Guide-
lines and noted specific references to fares. For example, the Court noted that Section 2.1 requires disclosure in print advertisements of "[v]ariations in fares to or from two or more airports serving the same metropolitan area," as well as "[a]ny other material restriction on the fare." Justice Scalia thus found it impossible to "avoid the conclusion that these aspects of the Guidelines 'relate to' airline rates."

Beyond simply making express references to fares, the majority said, the NAAG Guidelines significantly affect them. The Court advanced what is essentially an economic policy argument: Because the costs of operating a flight are largely fixed, airlines need to sell as many seats as possible at higher prices to consumers whose demand is not price sensitive. Airlines must then attempt to fill the remaining seats by offering lower prices to price-sensitive fliers. For this system to work successfully, the Court reasoned, airlines "must be able to place substantial restrictions on the availability of the lower priced seats (so as to sell as many seats as possible at the higher rate), and must be able to advertise the lower fares." In particular, the Court said the Guidelines' requirement that advertised fares be available in sufficient quantity to meet reasonably foreseeable demand could jeopardize the airlines' use of their marketing system altogether. Justice Scalia concluded that "[a]ll in all, the obligations imposed by the Guidelines would have a significant impact upon the airlines' ability to market their product, and hence a significant impact upon the fares they charge."

The majority attempted to limit its decision by stating that the holding does not address whether state regulation of non-price aspects of fare advertising, such as laws against obscene content in advertisements, would be preempted because such regulation also relates to fares. In addition, perhaps anticipating criticism that the decision would leave airlines free to engage in deceptive practices, the Court noted that the U.S.

55. Id. at 2039; NAAG Guidelines, supra note 23, at 2044-45.
56. Morales, 112 S. Ct. at 2039.
57. Id. at 2040.
58. Id.
59. Id. The majority contended that the Guidelines have the effect of interfering with this system by making it impossible to place shorter advertisements, by hampering airlines' abilities to call attention to differences in normal and sale prices, and by forcing airlines to create different advertisements for different markets. Id.
60. Id. Section 2.4 of the Guidelines, the Court noted, requires that "[a]ny advertised fare . . . be available in sufficient quantity so as to meet reasonably foreseeable demand on every flight each day for the market in which the advertisement appears." NAAG Guidelines, supra note 23, at 2047.
61. Morales, 112 S. Ct. at 2040.
62. Id.
63. After the decision was reported, a representative of Public Citizen, a Washington-
Department of Transportation could still regulate advertisements that in the Department's judgment do not further competitive pricing in the industry.\textsuperscript{64}

Justice Stevens, in dissent, faulted the majority for overemphasizing the narrow "relating to" language of the ADA while ignoring congressional intent ascertainable through careful examination of the Act's language, history, and structure.\textsuperscript{65} Justice Stevens wrote: "[T]he Court disregards established canons of statutory construction, and gives the ADA preemption provision a construction that is neither compelled by its text nor supported by its legislative history."\textsuperscript{66}

Justice Stevens pointed to the doctrinal presumption that Congress does not intend to preempt areas traditionally within the states' regulatory purview.\textsuperscript{67} Although acknowledging that prohibitions on air fare advertising relate \textit{indirectly} to fares, routes, and services, Justice Stevens maintained that they relate directly and primarily only to advertising.\textsuperscript{68} He reasoned that the prohibitions are "designed to affect the nature of the advertising, not the nature of the product."\textsuperscript{69}

Justice Stevens stated that, unless congressional intent is clearly displayed, the Court should not find that Congress precluded state action indirectly affecting rates.\textsuperscript{70} In support of his conclusion that no such congressional intent to displace state law existed here, Justice Stevens reasoned:

Because Congress did not eliminate federal regulation of unfair or deceptive practices, and because state and federal prohibitions of unfair or deceptive practices had coexisted during the period of federal regulation, there is no reason to believe that Congress intended [the preemption provision] to immunize the airlines from state liability for engaging in deceptive or misleading advertising.\textsuperscript{71}

\textsuperscript{64} Morales, 112 S. Ct. at 2040.
\textsuperscript{65} Id. at 2055 (Stevens, J., dissenting).
\textsuperscript{66} Id. (Stevens, J., dissenting).
\textsuperscript{67} Id. (Stevens, J., dissenting). Justice Stevens said this presumption against preemption stems from the fact that the Court's preemption analysis "must be guided by respect for the separate spheres of governmental authority preserved in our federalist system." Id. (Stevens, J., dissenting) (quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 522 (1981)).
\textsuperscript{68} Id. (Stevens, J., dissenting).
\textsuperscript{69} Id. (Stevens, J., dissenting).
\textsuperscript{70} Id. at 2055-56 (Stevens, J., dissenting).
\textsuperscript{71} Id. at 2057 (Stevens, J., dissenting). The dissent's conclusion is based on the fact that, when Congress amended the aviation code by adopting the ADA, it retained both the provi-
Furthermore, the dissent argued, the legislative history of the ADA does not reflect congressional intent to exercise broad preemptive power over state action. In particular, Justice Stevens noted that in congressional hearings on the Act, the CAB testified that the preemption provision of the bill represented a codification of existing law, leaving intact the state's historical role in intrastate matters.

The dissent was unpersuaded by the airlines' economic argument, adopted by the majority, that compliance with the Guidelines ultimately would affect the airlines' rates. First, Justice Stevens indicated that he disagreed with the majority that a significant fare impact by state law would warrant a finding of preemption. Second, because the airlines had not proved that the effect of compliance with the Guidelines, in fact, would be significant, Justice Stevens stated that he would have dissented even if he agreed with the majority's standard.

The preemption doctrine traces its beginnings to Article VI of the Constitution, which provides that "the Laws of the United States... shall be the supreme Law of the Land." Under this supremacy clause, Congress may preempt state law in a particular field expressly or by implication. In the absence of an explicit declaration of preemption in the language of a federal statute, congressional intent to preempt state law "may be clear from the pervasiveness of the federal scheme, the need for uniformity, or the danger of conflict between the enforcement of state

sion allowing the CAB to investigate unfair trade practices and the "savings clause" preserving common-law and statutory remedies. See Morales, 112 S. Ct. at 2058-59 (Stevens, J., dissenting).

72. Id. at 2057-58 (Stevens, J., dissenting).

73. Id. at 2058 (Stevens, J., dissenting) (citing Airline Deregulation Act of 1978: Hearings on H.R. 8813 Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation, 95th Cong, 1st Sess. 200 (1977)). Under the pre-ADA scheme, states were free to apply their own laws on deceptive trade practices to the airline industry. Id. at 2034 (citing Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 300 (1976)). For a discussion of Nader, see infra notes 84-93 and accompanying text.

74. See Morales, 112 S. Ct. at 2058-59 (Stevens, J., dissenting).

75. Id. at 2058 (Stevens, J., dissenting).

76. Id. at 2059 (Stevens, J., dissenting). Justice Stevens added: "Surely Congress could not have intended to pre-empt every state and local law and regulation that similarly increases the airlines' costs of doing business and, consequently, has a similar 'significant impact' upon their rates." Id. (Stevens, J., dissenting).


78. U.S. CONST. art. VI, cl. 2.

laws and the administration of federal programs.”

In assessing its role in reviewing preemption matters, the Court has said that its task “is to ascertain Congress’s intent in enacting the federal statute at issue.” Consequently, preemption analysis centers on statutory interpretation. At the same time, the Court has recognized the limited utility of prior cases on preemption in that “each case turns on the peculiarities and special features of the federal regulatory scheme in question.”

Prior to the beginnings of airline deregulation in the late 1970s, the states and the federal government both played roles in industry oversight. The division between their spheres of authority was not always clearly marked, however. In Nader v. Allegheny Airlines, Inc., the Court attempted to define and clarify the division between federal and state responsibility.

The action in Nader was initiated by an airline passenger who arrived at the boarding and check-in area five minutes before takeoff only to be denied a seat because the carrier had overbooked the flight. The passenger sought compensatory and punitive damages based on the common-law cause of action for fraudulent misrepresentation. At issue in Nader was whether the passenger could maintain his common-law action even though the Federal Aviation Act (FAA) provided for administrative action by the CAB. The district court awarded judgment for the

80. NOWAK & ROTUNDA, supra note 77, § 9.4; see also Richard J. Pierce, Jr., Regulation, Deregulation, Federalism, and Administrative Law: Agency Power to Preempt State Regulation, 46 U. Pitt. L. Rev. 607, 630 (1985) (analyzing three categories of preemption: occupation by Congress of the entire field of regulation, direct conflicts between the regulatory schemes of the federal and state governments, and existence of state actions that frustrate federal regulatory goals).
81. Shaw, 463 U.S. at 95.
82. Pierce, supra note 80, at 629.
84. See supra notes 14-19 and accompanying text.
86. Id. at 292-93.
87. Id. at 295. Fraudulent misrepresentation is
[a] false statement as to material fact, made with intent that another rely thereon, which is believed by other party and on which he relies and by which he is induced to act and does act to his injury, and statement is fraudulent if speaker knows statement to be false or if it is made with utter disregard of its truth or falsity. BLACK'S LAW DICTIONARY 662 (6th ed. 1990).
88. Nader, 426 U.S. at 296. Section 411 of the FAA provided that the CAB could issue a cease-and-desist order if it determined after investigation that a carrier was engaged in unfair or deceptive practices. Federal Aviation Act of 1958, Pub. L. No. 85-726, § 411, 72 Stat. 731, 769 (codified as amended at 49 U.S.C. app. § 1381(a) (1988)).
plaintiff on his common-law action.\textsuperscript{89} The court of appeals, however, stayed the action pending a determination by the CAB of whether failure to reveal the practice of overbooking fell within the agency's purview under the FAA. The court further concluded that a finding by the CAB that the practice was not deceptive would preclude the plaintiff's common-law action.\textsuperscript{90}

The Supreme Court disagreed, holding that the FAA could not be read to confer on the agency the power to "immunize [airline] carriers from common-law liability."\textsuperscript{91} The common-law action and the statute could "coexist," according to the Court, by virtue of the FAA's savings clause, which provided that nothing in the Act precluded remedies available at common law or under statute.\textsuperscript{92} The \textit{Nader} decision thus illustrates that in the regulated airline environment existing before the ADA, states could enforce their own laws against deceptive trade practices.\textsuperscript{93}

Passage of the Airline Deregulation Act of 1978 arguably confused the distinction between state and federal roles, because, while Congress included a specific provision preempting states from enforcing laws relating to rates, routes, or services,\textsuperscript{94} it did not repeal the savings clause.\textsuperscript{95} What then formed the basis for the \textit{Morales} majority's opinion that the states were preempted by the ADA from enforcing the air fare advertising \textit{Guidelines} through their consumer protection statutes? Because it based its decision on an analogy between the "relating to" clause of the ADA and a similarly worded clause in \textit{ERISA},\textsuperscript{96} the Court drew primarily upon a line of cases interpreting \textit{ERISA}'s preemption provision.

The first of these cases, \textit{Alessi v. Raybestos-Manhattan, Inc.},\textsuperscript{97} involved a New Jersey statute prohibiting employers from offsetting the amount of pension benefits to which an employee was entitled by the amount of workers' compensation awards for which that employee was eligible.\textsuperscript{98} The Supreme Court addressed whether \textit{ERISA} preempted the state statute because the statute related to an employee benefit plan.\textsuperscript{99}

\begin{itemize}
  \item \textsuperscript{89} \textit{Nader}, 426 U.S. at 295.
  \item \textsuperscript{90} \textit{Id.} at 296.
  \item \textsuperscript{91} \textit{Id.} at 300-01.
  \item \textsuperscript{92} \textit{Id.} at 300.
  \item \textsuperscript{93} \textit{See Morales}, 112 S. Ct. at 2034.
  \item \textsuperscript{94} 49 U.S.C. app. \textsection{} 1305(a)(1) (1988).
  \item \textsuperscript{95} \textit{Id.} \textsection{} 1506; \textit{see supra} notes 14-21 and accompanying text.
  \item \textsuperscript{96} \textit{See supra} notes 49-53 and accompanying text.
  \item \textsuperscript{97} 451 U.S. 504 (1981).
  \item \textsuperscript{98} \textit{Id.} at 507-08.
  \item \textsuperscript{99} \textit{See id.} at 507.
\end{itemize}
a unanimous decision by eight justices, the Court found federal preemption to be contingent upon a clear display of congressional intent or upon an indisputable conclusion that the "nature of the regulated subject" allows for nothing but preemption. The Court determined first that the preemption provision in ERISA provided an "explicit congressional statement" and then focused on the remaining issue—whether the state statute related to employee benefit plans and therefore fell within Congress’s intended scheme. Because the state law eliminated one of the permissible federal methods of calculating pension benefits, the Court held that the law related to benefit plans and thus was preempted. The decision assumes particular significance because of the Court’s statement that it did not matter that the state "intrude[d] indirectly, through a workers’ compensation law, rather than directly through a statute called ‘pension regulation.'" Alessi’s preemption message, therefore, is that "even indirect state action . . . may encroach upon the area of exclusive federal concern."

The Court further defined the scope of ERISA’s “relate to” preemption provision in Shaw v. Delta Air Lines, Inc. At issue in Shaw were two state laws prohibiting discrimination in employee benefit plans on the basis of pregnancy and requiring employers to pay sick-leave benefits to pregnant employees who were unable to work. The Court held that ERISA preempted these statutes. Writing for a unanimous Court, Justice Blackmun explained that a "law ‘relates to’ an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan."
Two years later, the Supreme Court in *Metropolitan Life Insurance Co. v. Massachusetts* validated the broad preemption standard articulated in *Shaw*. *Metropolitan* involved possible ERISA preemption of a Massachusetts law requiring employee plans to guarantee state residents certain minimum benefits for mental health care. Writing once again for the Court, Justice Blackmun stated that "[t]he [ERISA] preemption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements." Despite affirming *Shaw*'s broad interpretation of ERISA's preemption provision, however, the *Metropolitan* Court concluded that the state's mandated benefits law was protected from preemption by ERISA's savings clause.

In *Mackey v. Lanier Collection Agency & Service, Inc.*, the Court acknowledged its own record of supporting a broad interpretation of ERISA's preemption clause, but it also recognized limitations on ERISA preemption. The Court held in *Mackey* that a Georgia statutory provision specifically exempting ERISA employee benefit plans from state gar-

plain language of ERISA's preemption clause, the structure of the Act, and the Act's legislative history. *Id.* at 96-100. On the latter issue, Justice Blackmun noted that the original bill contained a preemption provision that applied only to state laws relating to the specific subject matter in ERISA, such as "reporting, disclosure, fiduciary responsibility, and the like." *Id.* at 98. During conference committee work on the legislation, this limited approach was rejected by the lawmakers in favor of a preemption provision that they indicated should be interpreted broadly. *Id.* (citing H.R. CONF. REP. No. 1280, 93d Cong., 2d Sess. 383 (1974); S. CONF. REP. No. 1090, 93d Cong., 2d Sess. 383 (1974)).

112. *Id.* at 739.
113. *Id.* at 727.
114. *Id.* at 739 (emphasis added).
115. *Id.* at 740-45. ERISA contains a provision similar to that found in the ADA, stipulating that with certain exceptions, nothing in the statute "shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities." 29 U.S.C. § 1144(b)(2)(A) (1988). The ERISA savings clause shielded the mandated benefits statute in *Metropolitan* from preemption because the applicable state law regulated insurance and thus fell within the savings clause, even though the law also related to pension plans and might have been preempted in the absence of the savings clause. *Metropolitan*, 471 U.S. at 744.

The Court seemed frustrated that Congress would include in ERISA a broad provision preempting state law, while at the same time including a broad savings clause apparently "preserv[ing] the States' lawmaking power over much of the same regulation." *Id.* at 740. Although commenting that the statute was "not a model of legislative drafting," the Court nevertheless proceeded to analyze it under two basic assumptions: (1) that the ordinary meaning of the statutory language reflects legislative purpose, and (2) that Congress did not intend to preempt areas in which states traditionally have been free to regulate. *Id.* Based on these assumptions, and on legislative history, the Court decided that the Massachusetts law regulated insurance and therefore was "saved from pre-emption by the operation of the savings clause." *Id.* at 743-44.

nishment proceedings fell within the "federal law's preemptive reach." The Court stopped short, however, of preempting Georgia's entire garnishment procedure, despite petitioner's contention that welfare benefit plans subject to garnishment would likely incur substantial costs.

In *FMC Corporation v. Holliday*, the Court again applied its broad test (that a state law "relate[s] to" an ERISA benefit plan if it makes reference to or bears a connection to such a plan) to preempt a state antisubrogation statute. At issue was whether ERISA preempted a Pennsylvania statute "precluding employee welfare benefit plans from exercising subrogation rights on a claimant's tort recovery." The Court held that the Pennsylvania law both made reference to and bore a connection to benefit plans covered by the federal statute. In a 7-1 ruling, Justice O'Connor, writing for the majority, provided some insight into the Court's philosophy behind federal preemption in the ERISA context:

To require plan providers to design their programs in an environment of differing State regulations would complicate the administration of nationwide plans, producing inefficiencies that employers might offset with decreased benefits. Thus, where a "patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation," we have applied the preemption clause to ensure that benefit plans will be governed by only a single set of regulations.

At roughly the same time the Supreme Court was broadly interpreting the ERISA preemption clause, several state courts and lower federal courts were adopting a more limited view of the ADA's "relating to" preemption clause. In *People v. Western Airlines, Inc.*, for example, California brought a civil action against an airline for allegedly making

117. *Id.* at 830.
118. *Id.* at 831-32. The majority recognized that ERISA plans are exposed to a variety of state civil law claims that are not preempted even though they may affect the plans and their trustees. *Id.* at 833.
120. *Id.* at 405. The case involved a plan beneficiary who settled a negligence action against the driver of the automobile in which she was injured. While the negligence action was pending, the operator of the benefit plan, FMC Corporation, notified the beneficiary that it would seek reimbursement for medical expenses the plan had covered. The beneficiary asserted that the Pennsylvania statute did not permit subrogation by FMC. *Id.* at 406.
121. *Id.* at 408.
122. *Id.* (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987)) (citation omitted).
false and misleading statements in an advertising promotion. The trial court agreed with the defendant’s argument that the state cause of action was precluded by § 1305. The California appellate court reversed, holding that nothing in the federal airline regulatory scheme suggested that Congress intended to preclude states from regulating deceptive advertising or that enforcement of the state’s false advertising statutes would thwart congressional objectives. In addition, the court stated that, in light of the Act’s savings clause preserving common-law and statutory remedies, the state cause of action can be precluded only “where the federal and state regulatory schemes conflict irreconcilably.”

Another example of a court’s narrower view of preemption under the ADA is West v. Northwest Airlines, Inc., a case that arose out of a context factually similar to the pre-deregulation case of Nader. In West a ticket holder who arrived at the gate only to be told that his flight was overbooked filed a claim in state court, alleging a breach of the covenant of good faith and fair dealing under Montana law. The federal district court granted the defendant airline’s summary judgment motion, resting its decision in part on the preemption of the plaintiff’s state law claim by federal law.

The court of appeals reversed, noting initially that “when Congress legislates in a field traditionally occupied by the states, . . . there is a

125. Id. at 599, 202 Cal. Rptr. at 238.
126. Id. Section 1305 prohibits states from enacting or enforcing laws “relating to [air carriers’] rates, routes, or services.” 49 U.S.C. app. § 1305(a)(1) (1988); see supra notes 20-21 and accompanying text.
127. Western Airlines, 155 Cal. App. 3d at 600, 202 Cal. Rptr. at 238-39.
128. The ADA includes a clause providing that its protections are supplementary to, and not an abridgment of, existing state remedies. See supra note 19.
130. 923 F.2d 657 (9th Cir. 1990), vacated and remanded, 112 S. Ct. 2932 (1992) (for further consideration in light of Morales, 112 S. Ct. 2031 (1992)).
131. 426 U.S. 290 (1976); see supra notes 84-93 and accompanying text.
132. West, 923 F.2d at 658-59. After the plaintiff purchased his ticket, the airline reduced the size of the aircraft for the flight without informing the plaintiff or airline sales agents. Id. at 658. The airline requested volunteers to give up their seats “in exchange for certain payments,” but not enough seated passengers deplaned to make room for the plaintiff. Id.
133. Northwest Airlines petitioned to have the case removed to federal court because of diversity of citizenship. Id. at 659.
134. Id.
presumption against finding preemption of state law."135 The court, although agreeing that boarding policies constitute "services" within the meaning of the ADA's preemption provision, maintained that the provision's "relating to" clause did not necessarily apply to "all state laws that affect airline services, however tangentially."136 Instead, the court concluded that the provision "preempts claims only when the underlying statute or regulation itself relates to airline services, regardless of whether the claim arises from a factual setting involving airline services. Thus, state laws that merely have an effect on airline services are not preempted."137

A similarly narrow approach to ADA preemption was taken by a federal district court in New York v. Trans World Airlines,138 a case factually related to the dispute in Morales. While aspects of the airlines' suit against the Texas attorney general over the NAAG Guidelines were still being litigated in the district court in Texas, New York initiated actions against TWA and Pan Am in state court,139 alleging violations of New York's false advertising statute.140 In an opinion involving issues of jurisdiction and removal as well as preemption, the district court concluded that federal law did not preempt New York's regulation of air fare advertising.141 The court cautioned that a conclusion that the "relating to" clause of the ADA is so broad as to preempt New York's laws against false advertising "conceivably could doom every state regulation affecting airlines."142 The court added:

135. Id.
136. Id. at 660.
137. Id. This conclusion was directed at situations where Congress has used explicitly preemptive language in the federal statute. Id. at 659-60.

The court noted, however, that preemption can also exist (1) by implication, when there is evidence Congress intended to occupy an entire field, and (2) by virtue of a conflict between federal and state law. Id. at 659; see supra notes 77-80 and accompanying text. Congress's retention of the savings clause when it adopted the ADA is evidence that it did not intend for federal law to occupy the entire field covered by the state law; consequently, the court found no implied preemption. West, 923 F.2d at 661. The court also saw no reason to conclude that requiring the airline to comply with a duty of good faith and fair dealing under state law would prevent the airline from also complying with federal regulations. Id. For this reason, it found no conflict preemption with respect to plaintiff's claim for compensatory damages. The court did, however, preempt plaintiff's claim for punitive damages because overbooking is an acceptable practice under federal regulations, and "any scheme that punishes the practice would be inconsistent with applicable federal law." Id.

139. The airlines were successful in having the state court cases removed to federal court. Id. at 164-66.
140. Id. at 165-66.
141. Id. at 176. Nor did the court find that New York's false advertising actions were precluded by implied preemption or conflict preemption. Id. at 177-80.
142. Id. at 176.
[A]ny relationship between New York's enforcement of its laws against deceptive advertising and Pan Am's rates, routes, and services is remote and indirect. In challenging Pan Am's advertising, New York does not care about how much Pan Am charges, where it flies, or what amenities it provides its passengers. Its sole concern is with the manner in which Pan Am advertises those matters to New York consumers.\(^1\) Thus, these lower federal and state court decisions adopting a narrow view of the ADA's preemption provision stand in stark contrast to the line of Supreme Court cases favoring a broad interpretation of ERISA's similarly worded preemption provision.

Ironically, what makes the Morales decision puzzling is the fact that the majority opinion on its face reflects a logical application of the preemption precedent — or at least a particular part of that precedent. Analyzed solely in light of the cases interpreting the preemption provision in ERISA,\(^4\) Morales reaches a sensible conclusion. Morales involved an explicit preemption by Congress, as reflected in the "relating to" clause of § 1305(a)(1); the issue confronting the Court was the appropriate scope of that preemption. The Court's ERISA jurisprudence established that the "relate to" clause of ERISA is broad in scope and that state actions making reference to or having a connection with employee benefit plans will be preempted by the federal law.\(^1\) Morales adopts the ERISA analogy, plugs the facts into the model developed from the ERISA cases,\(^1\) and reaches the same result.\(^1\)

After drawing upon the analogous aspects of ERISA and the ADA, Justice Scalia argued convincingly that both in terms of the language of the ADA and by virtue of the possible impact of the state action on the airlines, Texas should be preempted from enforcing the NAAG Guidelines through its general consumer protection statutes.\(^4\) The "relating to" language in the ADA preemption clause is very similar to the wording in ERISA;\(^1\) the airline advertising Guidelines that Texas wanted to en-

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143. Id.
144. See supra notes 97-122 and accompanying text.
145. See supra notes 107-10 and accompanying text.
146. The ERISA cases seem to establish a two-step analysis for resolution of preemption questions under the statute: (1) What was Congress's intent? (In other words, what did Congress mean by the "relate to" clause?) (2) Does the state action in contention fall within Congress's preemptive intent? (In other words, does the state action make reference to or have a connection with the subject matter?)
147. See supra notes 48-53 and accompanying text.
148. See supra notes 54-61 and accompanying text.
149. See supra note 51.
force make specific references to fares;\textsuperscript{150} and compliance with the disclosure requirements of the \textit{Guidelines} could increase airlines' marketing costs and ultimately result in an increase in fares.\textsuperscript{151} Arguably, under the model provided by the ERISA cases, the state laws "relate to" fares and should be preempted.

Despite its apparently rational reasoning, the \textit{Morales} decision raises many questions: What weight should the Court give to the legislative history of the ADA and other aviation statutes in assessing congressional intent with respect to preemption? Is ERISA an appropriate analogy for determining the scope of the "relating to" preemption provision in the ADA? What is the impact of the Court's decision that the advertising \textit{Guidelines} fall within the scope of the ADA provision, and how will \textit{Morales} be interpreted in future cases on preemption affecting the airline industry or other industries?

If there is a universally accepted principle in the law on federal preemption, it is that the controlling consideration is Congress's intent in enacting the federal statute.\textsuperscript{152} Both the majority and the dissenting opinions in \textit{Morales} acknowledged this principle.\textsuperscript{153} What distinguishes the opinions in large part is the different directions in which they travel from this common starting point.

For the majority, Justice Scalia addressed the language of the statute and opined that "'the ordinary meaning of that language accurately expresses the legislative purpose.'"\textsuperscript{154} This path led Justice Scalia to ERISA as an analogue and primary basis (in conjunction with his economic policy argument)\textsuperscript{155} for the holding.\textsuperscript{156} The dissent, however, traced the regulatory developments leading to passage of the ADA and examined the legislative history of the statute itself to ascertain congressional intent.\textsuperscript{157} This divergence in approaches taken by the majority

\begin{itemize}
\item \textsuperscript{150} \textit{See supra} notes 54-56 and accompanying text.
\item \textsuperscript{151} \textit{See supra} notes 57-61 and accompanying text.
\item \textsuperscript{153} The Supreme Court, for example, stated in \textit{Shaw} that "[i]n deciding whether a federal law pre-empts a state statute, [the] task is to ascertain Congress's intent in enacting the federal statute at issue." \textit{Shaw}, 463 U.S. at 95.
\item \textsuperscript{154} \textit{Id.} at 2036 (quoting FMC Corp. v. Holliday, 111 S. Ct. 403, 407 (1990)).
\item \textsuperscript{155} \textit{See supra} notes 57-61 and accompanying text.
\item \textsuperscript{156} \textit{See supra} notes 48-53 and accompanying text.
\item \textsuperscript{157} \textit{See supra} notes 65-73 and accompanying text.
\end{itemize}
and the dissent in *Morales* highlights fundamental differences on the Court concerning how legislative intent is evaluated.

The majority's reliance on the express language of the statute is illustrative of Justice Scalia's general distrust of legislative history as a tool in statutory interpretation. Justice Scalia is a proponent of textualism, or the "venerable principle that if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity." Consequently, his analysis in *Morales* turns to the "relating to" phrase in the ADA preemption provision and concludes it should be given an ordinary, broad meaning.

Within the legislative history of the ADA, however, exists support for the dissent's approach that the language should be interpreted narrowly because Congress never intended to prevent states from regulating airlines' advertising practices. During the development of the legislation that eventually became the ADA, the House of Representatives and the Senate expressed generally similar understandings of Congress's legislative mission: the gradual introduction of increased competition within the airline industry. Not surprisingly, however, the two chambers adopted bills with different specific provisions on how to accomplish that mission. The House bill proposed the "relating to" preemption lan-

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Ironically, many of the ERISA cases cited by the *Morales* majority were themselves resolved based upon the kind of examination of legislative history that Scalia rejects. *See* Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 745-47 (1985); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 98-99 (1983). It is also ironic that on one hand the majority utilizes a narrow, focused examination of essentially one phrase in the federal statute, but on the other hand adopts the respondents' rather broad and circuitous policy argument that compliance with the *NAAG Guidelines* may lead to increased fares. *See supra* notes 57-61 and accompanying text.

159. INS v. Cardoza-Fonseca, 480 U.S. 421, 452 (1987) (Scalia, J., concurring); Eskridge, *supra* note 158, at 623 & n.11 (discussing *Cardoza-Fonseca* and labeling Scalia's textualism "new" because it is inspired by "public choice theory, strict separation of powers, and ideological conservatism").


161. *See supra* notes 65-73 and accompanying text.

162. *See* H.R. REP. No. 1211, 95th Cong., 2d Sess. 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3737, 3740. The House described its bill as "a moderate reform bill which introduces more competition and less regulation of the airline industry on a gradual, controlled basis." *Id.* The Senate stated that its bill was "intended to provide the domestic air transportation industry with the same competitive incentives which face most other American industries." *S. REP. No. 631, 95th Cong., 2d Sess. 5* (1978).
language that ultimately was included in the ADA and was at issue in *Morales.* A House report interpreted the representatives' approach in narrow terms, explaining that under the House's preemption provision a state may not regulate a carrier's routes, rates, or services. The Senate bill, however, stipulated that "[n]o State shall enact any law, establish any standard determining routes, schedules, or rates, fares, or charges in tariffs of, or otherwise promulgate economic regulations for, any air carrier" covered by the legislation.

As the dissent in *Morales* noted, the House Conference Report, which states that the conferees adopted the House bill, describes the bill in the same narrow terms used in the House Report. This piece of legislative history of the "relating to" clause lends support to the dissent's argument that the clause should be given a narrow interpretation.

Although Justice Scalia's textualism approach may explain what led him to ignore the ADA's legislative history, it does not explain completely the relevance of the ERISA analogy. Under the tenets of textualism, "[g]uidance may be obtained not only from the text of the disputed provision, but from the text of other related statutes." Justice Scalia and the *Morales* majority, however, do not clearly explain why ERISA, a statute governing employee benefit plans, was chosen as the best analogy for resolving a dispute over preemption in an airline deregulation statute. If the lesson from *Morales* is that the answers to questions about preemption are to be found in the specific language of the contested statute and its analogues, the Court could have improved the utility of the decision significantly by providing a standard for determining when preemption wording is too dissimilar for the ERISA analogy to apply.

The *Morales* Court's heavy reliance on ERISA is especially unusual in light of the fact that preemption decisions often are case specific—based on the particular relationship between the federal and state statutes

163. *Morales,* 112 S. Ct. at 2058 (Stevens, J., dissenting).
166. *Morales,* 112 S. Ct. at 2058 (Stevens, J., dissenting). Justice Stevens argued that "[t]here is, therefore, no indication that the Conferees thought the House's 'relating to' language would have a broader pre-emptive scope than the Senate's 'determining ... or otherwise promulgate economic regulation' language." *Id.* (Stevens, J., dissenting).
168. The only reason provided by the majority is that the preemption provisions in the ADA and ERISA are "similarly worded." *Morales,* 112 S. Ct. at 2037. The Court simply said it had "repeatedly recognized" the broad preemptive reach of the "relate to" clause in addressing ERISA's preemption provision. *Id.*
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and the regulatory scheme to which they apply. 169 Morales illustrates that a majority of the Justices are willing to assume that if Congress used similar preemption language in different statutes, it must have intended for the statutes to be interpreted in the same way, despite other unique features that each statutory scheme may have.

After using ERISA to give the ADA’s “relating to” preemption provision a broad scope, the Court decided the NAAG Guidelines fell within that scope, in part because they made specific references to fares. 170 Interestingly, the Court focused on the language of the Guidelines even though it framed the issue in the case in terms of whether states were preempted from using their general consumer protection statutes to influence advertising content. 171 Reliance on the Guidelines, which address the airline industry specifically, rather than on the Texas statute, which does not, 172 arguably simplified the Court’s job of finding grounds for preemption. 173

Although the route traveled by the majority offers lessons on the current Court’s preemption philosophy, the road not taken also provides insight into the significance of Morales. The majority makes no mention of the federal and state court cases, such as West v. Northwest Airlines, Inc. 174 or People v. Western Airlines, Inc., 175 which interpreted the ADA’s preemption language more narrowly and held that state statutes related only tangentially to airline rates, routes, or services are not preempted by the ADA. 176 By failing to acknowledge these decisions, the majority makes it clear that state statutes that do not specifically address the preempted subject matter but that nonetheless affect it indirectly are likely to be preempted. 177

In addition, Morales leaves unanswered questions about the deci-

169. See City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 638 (1973); NOWAK & ROTUNDA, supra note 77, § 9.1. As a result, “it is difficult to apply the rationale underlying a decision in one field to the problem in another context.” Id.

170. See supra notes 54-56 and accompanying text.


172. See TEXAS BUS. & COM. CODE ANN. §§ 17.41, 17.46 (West 1987).

173. It is significant that in the ERISA cases cited by the majority, the Court focused on state statutes that themselves interfered with the federally preempted field. See supra notes 97-122 and accompanying text.

174. 923 F.2d 657 (9th Cir. 1990), vacated and remanded, 112 S. Ct. 2932 (1992) (for further consideration in light of Morales).


176. See supra notes 123-43 and accompanying text.

177. The Supreme Court already has vacated and remanded West to the court of appeals; it reached this decision only a few days after filing its Morales opinion. See Northwest Airlines, Inc. v. West, 112 S. Ct. 2932 (1992).
sion’s future application to state regulatory involvement in the content of air fare advertising. Drawing an analogy to Shaw v. Delta Air Lines, Inc., the Court explained that certain state actions or rules may affect air fares too tenuously or peripherally for preemption to apply. The Court admitted, however, that it provided no guidance on where the line should be drawn. In addition, the majority opted not to address the extent to which the “nonprice aspects of fare advertising” might relate to rates, routes, or services.

This lack of guidance from the Court is troubling. It is conceivable under Morales that almost any state action in the airline sector could be deemed ultimately and circuitously to impact air fares and therefore would be preempted. Without some standard for determining the outer parameters of when conduct by the state does or does not “relate to” airline rates, routes, or services, Morales leaves open the possibility that lower courts will preempt a wide variety of state activities whose impact on rates, routes, or services in the airline industry is very tenuous.

After Morales, it is clear that the Court is ever more likely to center its analysis of legislative intent exclusively on the specific statutory language. Additionally, given the broad scope that Morales gives to federal preemption provisions precluding activity “relating to” a subject area, one can predict that almost all state laws, rules, or actions that concern the subject area, directly or indirectly, are likely to be preempted.

If the only responsibility facing the Court when considering the preemption question was to dissect the particular preclusive wording in the federal statute, the Morales decision could not be faulted. There are, however, other principles of preemption that render the Court’s approach in this case too restrictive. A key component of preemption, one that forms the underlying justification for the doctrine, is congressional intent. Whether the Court chooses to rely on it or not, it is undeniable that evidence of congressional intent can be found in more places than

179. Morales, 112 S. Ct. at 2040. In Shaw, the Court acknowledged that ERISA’s preemption provision may not reach state actions that impact employee benefit plans so remotely that it is impossible to conclude that underlying statutes relate to the plans. Shaw, 463 U.S. at 100 n.21.
180. Morales, 112 S. Ct. at 2040. The Court stated that because Morales did not pose a borderline question the Court would “express no views about where it would be appropriate to draw the line.” Id. (quoting Shaw, 463 U.S. at 100 n.21).
181. Id. at 2040.
182. See supra notes 158-60 and accompanying text.
183. See supra notes 48-53 and accompanying text.
the language of the statute alone. Further, as the dissent in Morales noted, the Court must be guided by the principle that there is a presumption against preemption in areas traditionally occupied by the states.

By focusing almost exclusively on the "relating to" language of the preemption clause in the Airline Deregulation Act, the Morales Court effectively locked the states out of a regulatory arena in which they traditionally have operated. Although Congress explicitly stated its desire to preempt states from thwarting federal attempts at airline deregulation, the legislative history of the ADA does not reveal an intent to make the scope of preemption so broad that every state action with even a tangential or remote effect on rates, routes, or services is nullified.

Morales sends the signal that preemption language in one statute may be used to afford an equally exhaustive reach to another federal statute without full weight being given to potential differences in legislative histories or in regulatory subjects and goals. Using this limited approach to discover congressional intent risks undermining federalism's strategy of shared power between the states and the federal government. Given that the touchstone of preemption analysis is the congressional intent behind the federal enactment, the Supreme Court has an obligation to avail itself of more than one method of discerning that intent.

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184. See supra notes 158-66 and accompanying text.
185. See supra note 67 and accompanying text.