SUPREME COURT OF THE UNITED STATES

No. 93–1286

AMERICAN AIRLINES, INC., PETITIONER *v.* MYRON WOLENS ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

[January 18, 1995]

JUSTICE O'CONNOR, with whom JUSTICE THOMAS joins as to all but Part I-B, concurring in the judgment in part and dissenting in part.

In permitting respondents' contract action to go forward, the Court arrives at what might be a reasonable policy judgment as to when state law actions against airlines should be preempted if we were free to legislate it. It is not, however, consistent with our controlling precedents, and it requires some questionable assumptions about the nature of contract law. I would hold that none of respondents' actions may proceed.

The Airline Deregulation Act of 1978 (ADA) says that "no State . . . 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." 49 U. S. C. App. §1305(a)(1).[1] We considered the scope of that provision in

[1]Congress has recently amended this statute to read: "[A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U. S. C. A. §41713(b)(1). Congress intended this amendment to be "without substantive

Morales v. *Trans World Airlines, Inc.*, 504 U. S. ___ (1992). We noted the similarity of §1305's language to the preemption provision in ERISA, 29 U. S. C. §1144(a), and said that, like ERISA's §1144, §1305's words "express a broad pre-emptive purpose." *Id.,* at ___ (slip op., at 7). We concluded that "State enforcement actions having a connection with or reference to airline `rates, routes, or services' are pre-empted." *Ibid.*

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change." See Pub. L. 103–272, §1(a), 108 Stat. 745.

Applying *Morales* to this case, I agree with the Court that respondents' consumer fraud and contract claims are "related to" airline "rates" and "services." See *ante*, at 6. The Court says, however, that judicial enforcement of a contract's terms, in accordance with state contract law, does not amount to a "State . . . enforc[ing] any law," §1305, but instead is simply a State "hold[ing] parties to their agreemen[t]." See *ante*, at 8–9, and n. 5. It therefore concludes that §1305 does not apply to respondents' contract actions. I cannot agree with that conclusion.

I do not understand the Court to say that a State only "enforces" its "law" when some state employee (*e. g.*, an attorney general, or a judge) orders someone to do something. If that were the meaning of "enforce" in this context, then a diversity action brought by a private party under state law in federal court would never be subject to §1305 preemption, because no state employee is involved, whereas the same action might be pre-empted in state court. That would make little sense, and federal courts have routinely considered §1305 in determining whether a particular state law claim is preempted. *E. g.*, *Statland* v. *American Airlines, Inc.*, 998 F. 2d 539, 541–542 (CA7 1993) (contract claim preempted), cert. denied, 510 U. S. ___ (1993); *West* v. *Northwest Airlines, Inc.*, 995 F. 2d 148, 151 (CA9 1993) (tort claim for punitive damages preempted), cert. denied, 510 U. S. ___ (1994); *Cannava* v. *USAir, Inc.*, No. 91–30003–F, 1993 WL 565341, at *6 (D. Mass., Jan. 7, 1993) (tort and contract claims preempted). Consequently, one must read "no State . . . shall . . . enforce any law" to mean that *no one* may enforce state law against an airline when the "enforcement actio[n] ha[s] a connection with or reference to airline `rates, routes, or services.'" *Morales*, *supra*, at ___ (slip op., at 7). This explains the Court's conclusion, with which I agree, that private parties such as respondents may not enforce the Illinois consumer

fraud law against petitioner in an action whose subject matter relates to airline rates and services. *Ante*, at 8.

As I read §1305 and *Morales*, however, respondents' contract claims also must be preempted. The Court recognizes, *ante*, at 7, that the "guidelines" at issue in *Morales* did not "`create any new laws or regulations' applying to the airline industry; rather, they claim[ed] to `explain in detail how existing state laws apply to air fare advertising and frequent flyer programs.'" *Morales*, *supra*, at ___ (slip op., at 2). Nonetheless, we stated our holding quite clearly: "We hold that the fare advertising provisions of the NAAG guidelines are preempted by [§1305]." *Id.*, at ___ (slip op., at 14). How can it be that the guidelines, which did not themselves constitute "law," were nonetheless preempted by a statute whose coverage is limited to "laws" or other "provision[s] having the force and effect of law"? The answer is that in *Morales* we held that an action to invoke the State's coercive power against an airline, by means of a generally applicable law, when the subject matter of the action related to airline rates, would constitute "State . . . enforce[ment]" of a "law . . . relating to rates, routes, or services." Accordingly, we held that §1305 preempted the action. It is not the case, as JUSTICE STEVENS urges, that *Morales* was limited to "airline-specific advertising standards." *Ante*, at 2. We examined the content of those standards—which had no binding force on their own—only to ascertain whether they "related to" airline rates (and we thought they "quite obviously" did). *Morales*, *supra*, at ___ (slip op., at 10). The only "laws" at issue in *Morales* were generally applicable consumer fraud statutes, not facially related to airlines, much like the law at issue in respondents' consumer fraud claims here.

The Court concludes, however, that §1305 does *not* preempt enforcement, by means of generally

applicable state law, of a private agreement relating to airline rates and services. I cannot distinguish this case from *Morales*. In both, the subject matter of the action (the guidelines in *Morales*, the contract here) relates to airline rates and services. In both, that subject matter has no legal force, except insofar as a generally applicable state law (a consumer fraud law in *Morales*, state contract law here[2]) permits an aggrieved party to invoke the State's coercive power against someone refusing to comply with the subject matter's terms (the requirements of the guidelines in *Morales*, the terms of the contract here). *Morales*' conclusion that §1305 preempts such an invocation is dispositive here, both of respondents' consumer fraud claims, and of their contract claims. The lower courts seem to agree; as far as I know, no court to have considered ADA preemption since we decided *Morales* has suggested that enforcement of state contract law does not fall within §1305 if the necessary relation to airline rates, routes, or services exists. See, *e. g.*, *Statland* v. *American Airlines*, *supra*, at 541–542 (contract claims preempted); *West* v. *Northwest Airlines*, *supra*, at 151–152 (contract claims not preempted because "too tenuously connected" to airline rates or services); *Cannava*, *supra*, at *6 (contract claims preempted); *Schaefer* v. *Delta Airlines*, No. 92–1170–E(LSP), 1992 WL 558954, at *2 (SD Cal., Sept. 18, 1992) (same); *Vail* v. *Pan Am Corp.*, 260 N. J. Super. 292, 299–300, 616 A. 2d 523, 526–527 (App. Div. 1992) (same); *El-Menshawy* v. *Egypt Air*, 276 N. J. Super. 121, 126, 647 A. 2d 491, 493 (Law Div. 1994) (same).

The Court argues that the words "law, rule, regulation, standard, or other provision" in §1305 refer only

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[2]See *Norfolk & Western R. Co.* v. *Train Dispatchers*, 499 U. S. 117, 130 (1991) ("A contract has no legal force apart from the law that acknowledges its binding character"), discussed *infra*, at 6–7.

to "`official, government-imposed policies, not the terms of a private contract.'" *Ante*, at 9, n. 5 (quoting Brief for United States as *Amicus Curiae* 17). To be sure, the terms of private contracts are not "laws," any more than the guidelines at issue in *Morales* were "laws." But contract law, and generally applicable consumer fraud statutes, *are* laws, and *Morales* held that §1305 prevents enforcement of "any [state] law" against the airlines when the subject matter of the action "relates" to airline rates, routes, or services. Thus, where the terms of a private contract relate to airline rates and services, and those terms can only be enforced *through state law*, *Morales* is indistinguishable. As JUSTICE STEVENS persuasively argues, there is "no reason why a state law requiring an airline to honor its contractual commitments is any less a law relating to its rates and services than is a state law imposing a `duty not to make false statements of material fact or to conceal such facts,'" *ante*, at 2.

As the Court recognizes, *ante*, at 15, n. 9, my view of *Morales* does not mean that personal injury claims against airlines are always preempted. Many cases decided since *Morales* have allowed personal injury claims to proceed, even though none has said that a State is not "enforcing" its "law" when it imposes tort liability on an airline. In those cases, courts have found the particular tort claims at issue not to "relate" to airline "services," much as we suggested in *Morales* that state laws against gambling and prostitution would be too tenuously related to airline services to be preempted, see *Morales*, *supra*, at ___ (slip op., at 13–14). *E. g.*, *Hodges* v. *Delta Airlines, Inc.*, 4 F. 3d 350, 353–356 (CA5 1993) (arguing that "`services' is not coextensive with airline `safety,'" so safety-related tort claim should not be preempted; urging en banc review to bring circuit precedent into conformity with that view), rehearing en banc granted, 12 F. 3d 426 (1994); *Public Health Trust* v.

Lake Aircraft, Inc., 992 F. 2d 291, 294–295 (CA11 1993) (tort claim for defective aircraft design not preempted because not related to airline services); *Cleveland* v. *Piper Aircraft Corp.*, 985 F. 2d 1438, 1443, and n. 11, 1444, n. 13 (CA10) (same), cert. denied, ___ U. S. ___ (1993); *Stagl* v. *Delta Air Lines*, 849 F. Supp. 179, 182 (EDNY 1994) (tort claim against airline for personal injury not preempted because not related to airline "services" within the meaing of §1305); *Curley* v. *American Airlines*, 846 F. Supp. 280, 284 (SDNY 1994) (same); *Bayne* v. *Adventure Tours USA, Inc.*, 841 F. Supp. 206 (ND Tex. 1994) (same); *Fenn* v. *American Airlines*, 839 F. Supp. 1218, 1222–1223 (SD Miss. 1993) (same); *Chouest* v. *American Airlines*, 839 F. Supp. 412, 416–417 (ED La. 1993) (same); *O'Hern* v. *Delta Airlines*, 838 F. Supp. 1264, 1267 (ND Ill. 1993) (same); *In re Air Disaster*, 819 F. Supp. 1352, 1363 (ED Mich. 1993) (same); *Butcher* v. *City of Houston*, 813 F. Supp. 515, 518 (SD Tex. 1993) (same).

Our recent decision in *Norfolk & Western R. Co.* v. *Train Dispatchers*, 499 U. S. 117 (1991), is relevant. The question in that case was whether a rail carrier's statutory exemption from "all other law," which we read to mean "*all law* as necessary to carry out an ICC-approved transaction," *id.*, at 129, exempted the carrier from contractually-imposed obligations. We held that it did. We noted that "[a] contract depends on a regime of common and statutory law for its effectiveness and enforcement," *id.*, at 129–130, that "[a] contract has no legal force apart from the law that acknowledges its binding character," *id.*, at 130, and that "`[l]aws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms," *ibid.* (quoting *Farmers and Merchants Bank of Monroe* v. *Federal Reserve Bank of Richmond*, 262 U. S. 649, 660 (1923)). Accordingly, we

concluded that "the exemption . . . from `all other law' effects an override of contractual obligations . . . by suspending application of the law that makes the contract binding." *Ibid.* In so concluding, we specifically rejected the Court of Appeals' views that the "all other law" exemption "[n]owhere . . . sa[id] that the ICC may also override contracts," and that it did not exempt the carrier from "`all legal obstacles.'" *Brotherhood of R. Carmen* v. *ICC*, 880 F. 2d 562, 567 (CADC 1989); see *Norfolk & Western*, *supra*, at 133–134.

The Court does not dispute this reading of *Norfolk & Western*, which in my view makes clear that a State is enforcing its "law" when it brings its coercive power to bear on a party who has violated a contractual obligation. We reiterated in *Norfolk & Western* that "[t]he obligation of a contract is the law which binds the parties to perform their agreement." *Id.*, at 129 (internal quotation marks omitted); see also *Sturges* v. *Crowninshield*, 4 Wheat. 122, 197 (1819) (Marshall, C. J.) ("A contract is an agreement, in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract"). We therefore read the words "all other law" in the statutory exemption broadly enough to "suspen[d] application of the law that makes the contract binding." *Norfolk & Western*, *supra*, at 130. I would give the words "any law" in §1305 a similar reading.

As support for its theory, the Court cites only a statement in the plurality opinion in *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. ___ (1992); see *ante*, at 8–9. The *Cipollone* plurality said that "a common law remedy for a contractual commitment voluntarily undertaken should not be regarded as a `requirement . . . *imposed under State law*' within the meaning of §5(b)." *Cipollone*, *supra*, at ___ (slip op., at 20). But the plurality elaborated on this point in a footnote. In rejecting the argument that specific warranty

obligations are "imposed under State law," the plurality agreed that preemption might be required "if the Act pre-empted `*liability*' imposed under state law . . . ; but instead the Act expressly pre-empts only a `*requirement or prohibition*' imposed under state law." *Id.*, at ___, n. 24 (slip op., at 20, n. 24). It agreed that contractual requirements are "only enforceable under state law," but argued that those requirements are "`imposed' by the contracting party upon itself." *Ibid.* The plurality thus distinguished the situation where substantive requirements contained in a contract are enforceable only under state law from the situation where state law *itself* imposes substantive requirements, and concluded that the statute before it preempted only the latter kind of state law. Here, as in *Cipollone*, the requirements at issue are contained in a contract, and have no legal force except insofar as state law makes them enforceable. But we concluded in *Morales* that §1305 *does* preempt state law in those circumstances, unlike the statute in *Cipollone*. The difference between this case and *Cipollone* is the very different language in the two preemption statutes.

The Court also concludes that §1305 only "stops States from imposing their own substantive standards with respect to rates, routes, or services," *ante*, at 13. In *Morales*, however, we specifically rejected an interpretation of §1305 that would have rewritten it to read "No State shall *regulate* rates, routes, and services." See *Morales*, *supra*, at ___ (slip op., at 8–9). There is little distinction between "regulating rates, routes, and services," and "imposing substantive standards with respect to rates, routes, and services," and the Court does not explain how *Morales*' rejection of the former allows it now to adopt the latter. The Court relies on the statute's "saving clause," 49 U. S. C. App. §1506, see *ante*, at 12, but we said in *Morales* that "[a] general `remedies' saving clause cannot be allowed to supersede the

specific substantive pre-emption provision," particularly where, as here, "the `saving' clause is a relic of the pre-ADA/no pre-emption regime." *Morales*, *supra*, at ___ (slip op., at 8).

Without question, *Morales* gave §1305 a broad preemptive sweep. The dissent in that case argued that such a broad interpretation went too far by preempting areas of traditional state regulation without a clear expression of congressional intent to do so. *Id.*, at ___ (slip op., at 1–3) (STEVENS, J., dissenting); see also *ante*, at 1, 3–4 (STEVENS, J., concurring in part and dissenting in part). But the Court rejected the dissent's reading, holding instead that §1305's language demonstrated a clear "statutory intent" to expressly preempt generally applicable state law as long as the "particularized application" of that law relates to airline rates, routes or services. *Morales*, *supra*, at ___, ___, and n. 2 (slip op., at 6, 8–9, and n. 2).

Congress has recently revisited §1305, and said that it "d[id] not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales*," H. R. Conf. Rep. No. 103–677, at 83 (1994). If the Court nonetheless believes that *Morales* misread §1305, the proper course of action would be to overrule that case, despite Congress' apparent approval of it. The Court's reading of §1305 is not, in my view, a "`closer working out'" of ADA preemption, see *ante*, at 15; rather, it is a new approach that does not square with our decisions in *Morales* and *Norfolk & Western*.

Stare decisis has "special force" in the area of statutory interpretation, see *Allied-Bruce Terminix Cos.* v. *Dobson*, ___ U. S. ___, ___ (1995) (slip op., at 3) (O'CONNOR, J., concurring) (internal quotation marks omitted). It sometimes requires adherence to a wrongly-decided precedent. *Ibid*. Here, however,

Congress apparently does not think that our decision in *Morales* was wrong, nor do I. In the absence of any "`special justification,'" *ibid.* (quoting *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984)), for departing from *Morales*, I would recognize the import of *Morales* and *Norfolk & Western* here, and render the decision that the language of §1305, in light of those cases, compels. If, at the end of the day, Congress believes we have erred in interpreting §1305, it remains free to correct our mistake.

Our decisions in *Morales* and *Norfolk & Western* suffice to decide this case along the lines I have described. In addition, however, I disagree with the Court's view that courts can realistically be confined, "in breach of contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." *Ante*, at 13. When they are so confined, the Court says, courts are "simply hold[ing] parties to their agreements," and are not "enforcing" any "law," *id.*, at 8–9. The Court also says that "`[s]ome state-law principles of contract law . . . might well be preempted to the extent they seek to effectuate the State's public policies, rather than the intent of the parties.'" *Ante*, at 13, n. 8 (quoting Brief for United States as *Amicus Curiae* 28).

The doctrinal underpinnings of the notion that judicial enforcement of the "intent of the parties" can be divorced from a State's "public policy" have been in serious question for many years. As one author wrote some time ago:

> "A contract, therefore, between two or more individuals cannot be said to be generally devoid of all public interest. If it be of no interest, why enforce it? For note that in enforcing contracts, the government does not merely allow two individuals to do what they have found pleasant

> in their eyes. Enforcement, in fact, puts the machinery of the law in the service of one party against the other. When that is worthwhile and how that should be done are important questions of public policy. . . . [T]he notion that in enforcing contracts the state is only giving effect to the will of the parties rests upon an . . . untenable theory as to what the enforcement of contracts involves." Cohen, The Basis of Contract, 46 Harv. L. Rev. 553, 562 (1933).

More recent authors have expressed similar views. See, *e. g.*, Braucher, Contract Versus Contractarianism: The Regulatory Role of Contract Law, 47 Wash. & Lee L. Rev. 697, 699 (1990) ("Mediating between private ordering and social concerns, contract is a socioeconomic institution that requires an array of normative choices. . . . The questions addressed by contract law concern *what* social norms to use in the enforcement of contracts, not whether social norms will be used at all"). Contract law is a set of policy judgments concerning how to decide the meaning of private agreements, which private agreements should be legally enforceable, and what remedy to afford for their breach. The Court fails to recognize that when a State decides to force parties to comply with a contract, it does so only because it is satisfied that state policy, as expressed in its contract law, will be advanced by that decision.

Thus, the Court's allowance that "`[s]ome state-law principles of contract law . . . might well be preempted to the extent they seek to effectuate the State's public policies, rather than the intent of the parties,'" *ante*, at 13, n. 8 (quoting Brief for United States as *Amicus Curiae* 28), threatens to swallow all of contract law. For example, the Court observes that on remand, the state court will be required to decide whether petitioner reserved the right to alter the terms of its frequent flyer program retroactively, or

instead only prospec-
tively. *Ante*, at 14. The court will presumably decide that question by looking to the usual "rules" of contract interpretation to decide what the contract's language means. If the court finds the language to be ambiguous, it might invoke the familiar rule that the contract should be construed against its drafter, and thus that respondents should receive the benefit of the doubt. See 2 E. A. Farnsworth, Farnsworth on Contracts §7.11, at 265–268 (1990). That rule of contract construction is not essential to a functional contract system. It is a policy choice that *our* contract system has made. Other such policy choices are that courts should not enforce agreements unsupported by consideration, see 1 Farnsworth, *supra*, §2.5; but cf. J. Barton, J. Gibbs, V. Li, & J. Merryman, Law in Radically Different Cultures 579 (1983) (other legal systems enforce certain agreements not supported by consideration); that courts should supply "reasonable" terms to fill "gaps" in incomplete contracts, see 2 Farnsworth, *supra*, §§7.15–7.17; the method by which courts should decide what terms to supply, see C. Fried, Contract as Promise 60, 69–73 (1981); Charny, Hypothetical Bargains: The Normative Structure of Contract Interpretation, 89 Mich. L. Rev. 1815, 1816, 1820–1823 (1991); Ayres & Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale L. J. 87, 91 (1989) (all suggesting different policy considerations that should inform how courts fill contractual gaps); and that a breach of contract entitles the aggrieved party to expectation damages most of the time, but specific performance only rarely, see 3 Farnsworth, *supra*, ch. 12; but cf. R. David & J. Brierley, Major Legal Systems in the World Today 302 (1985) (former Soviet Union routinely awarded specific performance). If courts are not permitted to look to these aspects of contract law in airline-related actions, they will find the cases difficult

to decide.

Even the doctrine of unconscionability, which the United States suggests as an aspect of contract law that "might well be preempted" because it "seek[s] to effectuate the State's public policies, rather than the intent of the parties," Brief for United States as *Amicus Curiae* 28, cannot be so neatly categorized. On the one hand, refusing to enforce a contract because it is "unfair" seems quintessentially policy-oriented. But on the other, "[p]rocedural unconscionability is broadly conceived to encompass not only the employment of sharp practices and the use of fine print and convoluted language, but a lack of understanding and an inequality of bargaining power." 1 Farnsworth, *supra*, §4.28, at 506–507 (footnotes omitted). In other words, a determination that a contract is "unconscionable" may in fact be a determination that one party did not intend to agree to the terms of the contract. Thus, the unconscionability doctrine, far from being a purely "policy-oriented" doctrine that courts impose over the will of the parties, instead demonstrates that state public policy cannot easily be separated from the methods by which courts are to decide what the parties "intended."

"[T]he law itself imposes contractual liability on the basis of a complex of moral, political, and social judgments." Fried, *supra*, at 69. The rules laid down by contract law for determining what the parties intended an agreement to mean, whether that agreement is legally enforceable, and what relief an aggrieved party should receive, are the end result of those judgments. Our legal system has decided to allow private parties to invoke the coercive power of the State in the effort to enforce those (and only those) private agreements that conform to rules set by those state policies known collectively as "contract law." Courts cannot enforce private agreements without reference to those policies,

because those policies define the role of courts in deciding disputes concerning private agreements.

For these reasons, I would reverse the judgment of the Illinois Supreme Court.