SUPREME COURT OF THE UNITED STATES

No. 99–1038

EASTERN ASSOCIATED COAL CORPORATION, PETITIONER *v.* UNITED MINE WORKERS OF AMERICA, DISTRICT 17 ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[November 28, 2000]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

I concur in the Court's judgment, because I agree that no public policy prevents the reinstatement of James Smith to his position as a truck driver, so long as he complies with the arbitrator's decision, and with those requirements set out in the Department of Transportation's regulations. I do not endorse, however, the Court's statement that "[w]e agree, in principle, that courts' authority to invoke the public policy exception is not limited solely to instances where the arbitration award itself violates positive law." *Ante*, at 5. No case is cited to support that proposition, and none could be. There is not a single decision, since this Court washed its hands of general common-lawmaking authority, see *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), in which we have refused to enforce on "public policy" grounds an agreement that did not violate, or provide for the violation of, some positive law. See, *e.g., Hurd* v. *Hodge*, 334 U. S. 24 (1948) (refusing to enforce under the public policy doctrine a restrictive covenant that violated Rev.Stat. §1978, at 42 U. S. C. §1982).

After its dictum opening the door to flaccid public policy arguments of the sort presented by petitioner here, the

Court immediately posts a giant "Do Not Enter" sign. "[T]he public policy exception," it says, "is narrow and must satisfy the principles set forth in *W. R. Grace*," *ante*, at 5, which require that the applicable public policy be "explicit," "well defined," "dominant," and "ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *W. R. Grace & Co.* v. *Rubber Workers*, 461 U. S. 757, 766 (1983) (quoting *Muschany* v. *United States*, 324 U. S. 49, 66 (1945)). It is hard to imagine how an arbitration award could violate a public policy, identified in this fashion, without actually conflicting with positive law. If such an award could ever exist, it would surely be so rare that the benefit of preserving the courts' ability to deal with it is far outweighed by the confusion and uncertainty, and hence the obstructive litigation, that the Court's Delphic "agree[ment] in principle" will engender.

The problem with judicial intuition of a public policy that goes beyond the actual prohibitions of the law is that there is no way of knowing whether the apparent gaps in the law are intentional or inadvertent. The final form of a statute or regulation, especially in the regulated fields where the public policy doctrine is likely to rear its head, is often the result of compromise among various interest groups, resulting in a decision to go so far and no farther. One can, of course, summon up a parade of horribles, such as an arbitration award ordering an airline to reinstate an alcoholic pilot who somehow escapes being grounded by force of law. But it seems to me we set our face against judicial correction of the omissions of the political branches when we declined the power to define common-law offenses. See *United States* v. *Hudson,* 7 Cranch 32 (1812). Surely the power to invalidate a contract providing for actions that are not contrary to law (but "ought" to be) is less important to the public welfare than the power to prohibit harmful acts that are not contrary to law (but

"ought" to be). And it is also less efficacious, since it depends upon the willingness of one of the parties to the contract to *assert* the public policy interest. (If the airline is not terribly concerned about reinstating an alcoholic pilot, the courts will have no opportunity to prevent the reinstatement.) The horribles that can be imagined— if they are really so horrible and ever come to pass— can readily be corrected by Congress or the agency, with no problem of retroactivity. Supervening law is always grounds for the dissolution of a contractual obligation. See Restatement (Second) of Contracts §264 (1979).

In sum, it seems to me that the game set in play by the Court's dictum endorsing "in principle" the power of federal courts to enunciate public policy is not worth the candle. Agreeing with the reasoning of the Court except insofar as this principle is concerned, I concur only in the judgment.