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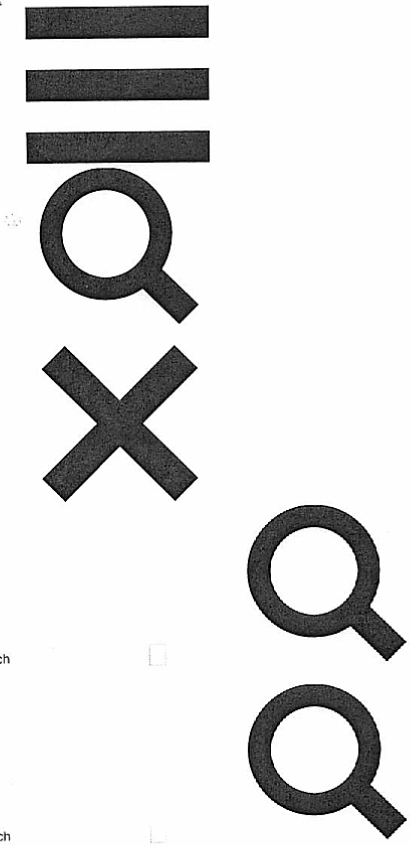

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Janus and the Law of Opt-Out Rights

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A great deal of time will be spent scrutinizing the core holding in *Janus v. AFSCME, Council 31*, that the First Amendment forbids public employers to require workers to financially support a union's costs of collective bargaining. Still more time will be spent debating state legislative approaches to soften *Janus*'s blow or neutralize it altogether. What I want to explore briefly here is how *Janus* adds to a mounting inequality in the way the Supreme Court conceives of the process by which persons and other entities opt out of their constitutional rights.

The starting point is the Court's unexpected decision to address a profoundly important question that was outside the scope of the question presented in *Janus*. That is, assuming a union's practice of collecting fair share fees from objecting workers violates the workers' First Amendment right (as the Supreme Court indeed held), how should objecting workers be entitled to exercise that right?

One approach would be to allow unions to collect fees from all workers as a default, but to give every worker a free choice to opt out from the payment. That was the longstanding practice before *Janus*, where unions would collect full member dues from all workers but give objectors a window in which to opt out of paying for the

union's political and ideological expenses. A second option would be to forbid unions to collect *any* fees from any worker unless and until she affirmatively opts *in* to the payment.

The difference between opt-out and opt-in approaches to a given transaction has received extensive attention in the behavioral economics literature. It is widely accepted that human behavior changes dramatically between the two regimes; consider, for example, how switching to an *automatic* 401(k) contribution system where workers are free to opt out drastically increases the rate at which individuals participate in retirement savings. So we should expect a big difference in worker behavior depending on whether they have to affirmatively opt out of supporting a union versus opting in.

The Court in *Janus* took the latter route, explaining that no "payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." In support, the Court cited to the general proposition that waivers of rights "must be freely given and shown by 'clear and compelling' evidence." For reasons I'll explain in a moment, it is notable that the Court cited to a sovereign immunity case, *College Savings Bank v. Florida Prepaid Postsecondary Educational Expense Board*, which announced a powerful clear statement rule that insulates states from suit in federal court absent an unequivocal expression that they've intended to waive their immunity.

The upshot is clear: Objecting workers not only have a First Amendment right to be free from compelled support of union collective bargaining; they also must affirmatively consent before any fees can be taken from their paychecks.

This may sound unremarkable. After all, it is the general rule that waiving a constitutional right requires the "intentional relinquishment or abandonment" of that right. So any person or entity—no matter how powerful or powerless—that has a constitutional right should be presumed to retain that right, subject to clear evidence that they've waived it.

Or so you would think. It turns out the Supreme Court has an unnerving practice of granting the more generous approach to constitutional rights—a presumption that the rights are retained absent affirmative consent to the contrary—to entities and persons with greater political influence and sophistication.

Take, for example, sovereign state and federal government defendants accused of wrongdoing. Such defendants are presumed to retain their sovereign immunity absent an unmistakable waiver. That presumption is actually dual-layered: even after a sovereign consents to being sued, the Supreme Court will hold them immune from a monetary judgment unless the sovereign also *explicitly consented* to being sued for money damages (though, of course, that's the obvious implication of consenting to suit in the first place).

But what about a rights-holder on the opposite end of the influence spectrum, such as a criminal suspect? Here the rule is often the opposite. Consider the Fifth Amendment right against self-incrimination. If the Court were to treat all constitutional rights and those exercising them equally, it would presume that all criminal suspects retain that right, subject only to clear and compelling evidence of a waiver. Instead, the rule is that "a waiver of *Miranda* rights may be implied through 'the defendant's silence.'" To repeat: a suspect's silence—the very exercise of the right she seeks to preserve—can actually be evidence used to find a waiver of that right. So a criminal suspect who wants to keep her rights must do much more than the sovereign defendant; she must "unambiguously invoke[]" *Miranda* and "end[] the interrogation."

A similar rule applies to the right to counsel during police interrogation. An Eleventh Circuit case thus held that a criminal suspect waived his right to have counsel present during a police interview even though the defendant refused to sign a form waiving his *Miranda* rights and asked police officers to "run the lawyers" before his questioning.

So *Janus* puts the constitutional rights of objecting workers firmly in the camp with sovereign defendants, as opposed to criminal suspects. Perhaps that's not a surprise to anyone who's paid attention to the conservative Court's jurisprudence these past years. But what's notable is the absence of any neutral principle that would justify why the Court gives some rights-holders a powerful presumption that they wish to exercise their rights, while others are left to beg and plead with the hope that they've said the magic words needed to trigger constitutional protection.

The only apparent explanation is that some rights (and rights-holders) may simply be held in higher esteem than others: sovereign defendants and now, after *Janus*, public sector workers who object to their unions (and who have long had the backing of influential conservative groups like the National Right to Work foundation). But if that is the real reason, one cannot help but to feel less than sanguine about the outcome. For as important as first-order arguments over the scope of constitutional rights may be, they may matter less than we think if we ignore second-order arguments over how those rights are exercised.

In other words, the Court's decision in *Janus* does more than merely recognize a constitutional right not to pay fees to support a union's collective bargaining-related activities. It also erects a buffer zone around the right by requiring workers to opt *in* to any such payment—a buffer zone it hasn't bothered to create for less influential persons raising less favored rights. That inequality is the proverbial insult added to the primary injury inflicted by *Janus*. It's now up to state lawmakers in progressive states to think of solutions to level the playing field.

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