Labor & Employment Law

Making Windows into Litigants' Souls: The Pernicious Potential of Gilpin v. AFSCME

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I. Introduction—*Hudson* and Its Significance

Since 1968, the National Right to Work Legal Defense Foundation ("Foundation") has provided free legal aid to the plaintiffs in almost every case litigated about workers' rights not to subsidize union political and other nonbargaining activities. The best known such case is *Communications Workers v. Beck*,[1] which involved private-sector employees. For public-sector employees, the most important of these cases is *Teachers Local 1 v. Hudson*.[2]

Labor unions are not entitled to act as collective bargaining agents for public employees absent monopoly bargaining power granted by statute.[3] Likewise, the state-granted monopoly bargaining privilege does not by itself carry authority to force nonmembers financially to support the representative's bargaining activities. That, too, is a statutorily-granted privilege. Thus, certain well-defined conditions must be satisfied before a public employee union may compel nonmembers to subsidize even its bargaining activities.

First, the legislature must authorize so-called "union-security," *i.e.*, forced-unionism, agreements.[4] Second, under most statutory schemes, a union and employer must agree to impose such a requirement in their monopoly bargaining agreement.[5] *Hudson* imposes a third requirement: that the union and employer must comply with "the constitutional requirements for the . . . collection of agency fees."[6] Absent satisfaction of any of these three prerequisites, unions lack lawful authority to exact monies from nonmembers.[7]

The third set of requirements is imposed by the Constitution itself, because forced-unionism schemes clearly impinge on nonmembers' First-Amendment rights:

> To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests. . . . To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit.[8]

Nonunion public employees can be compelled, consistent with the Constitution, to bear only their *pro rata* share of the costs of collective bargaining, contract administration, and grievance adjustment.[9] However, *before* a union and/or a public employer are entitled to enforce such an obligation, they must comply fully with "the constitutional requirements for the . . . *collection* of agency fees."[10] The First and Fourteenth Amendments require that certain procedural protections be provided to public employees—"potential objectors"[11]—who have exercised their right to refrain from membership in employee organizations, but are subjected to a forced-unionism agreement by their public employer.[12]

The four procedural safeguards that "the government and union have a responsibility to provide"[13] to all nonmembers are: (1) a good-faith advance reduction of the fee to no more than that portion of the union's expenditures required to perform its duties as the nonmembers' exclusive bargaining representative; (2) financial disclosure adequate to allow nonmembers to gauge the propriety of the union's fee and to decide intelligently whether to challenge the fee calculation; (3) an opportunity to challenge the calculation before an impartial decisionmaker; and (4) an escrow of the amounts reasonably in dispute during such challenges.[14]

Procedural safeguards serve two goals. First, they insure that the fees demanded and/or collected include only the employee's *pro rata* share of constitutionally chargeable costs. *Hudson*'s holding—setting forth "the constitutional requirements for the Union's *collection* of agency fees"[15]—insures against both misuse of collected funds and excessive collections.[16] Second, procedural safeguards "facilitate a nonunion employee's ability to protect his rights."[17]

Like most Supreme Court decisions, however, *Hudson* is not self-enforcing. Moreover, as the Court recognized in *Hudson* itself, there is a danger that labor unions will "keep employees in the dark."[18] Thus, a significant portion of the Foundation's litigation program in the seventeen years since *Hudson* was decided has been devoted to insuring that public-sector labor unions have complied with *Hudson*'s requirements.

II. The Class Action as a Tool for *Hudson* Enforcement

The class action device is an important weapon in enforcing *Hudson* for workers. As in other contexts, its "major advantage to the courts, attorneys, and litigants is the judicial economy and efficiency [it] can achieve."[19] This "uniquely American procedural device . . . allows plaintiffs to sue not only for injury done to themselves but also on behalf of other persons similarly situated for injury done to them."[20]

Like good intelligence on the battlefield, the class device is a "combat multiplier." It permits a successful litigant to obtain relief for dozens, hundreds, or possibly thousands of similarly-situated injured individuals, while reducing the costs per individual aided and, thus, the economic barriers to obtaining relief, particularly in mass-tort and civil-rights contexts.[21]

Hudson cases fall into both categories, because the collection of agency fees as a condition of employment is, absent *Hudson* compliance, a "constitutional tort"[22] under the Civil Rights Act of 1871.[23] In enforcing *Hudson*'s requirements, Foundation attorneys have pursued class actions, mostly successfully, to give classes of identically-situated workers the benefits of Foundation-supported litigation, thus expanding the scope of relief provided by the expenditure of limited Foundation resources.[24] Without class actions, few workers would obtain relief, given the relatively small amount at stake for each individual nonmember.[25]

But neither labor unions nor their advocates and partisans (including government officials acting in concert with them) are fools. Recognizing that class actions "greatly compound[] the defendant's risk of loss,"[26] they have usually vigorously opposed class certification to limit the damages for their constitutional torts.

A. Early Class Action Litigation under Hudson

Federal Rule of Civil Procedure 23 establishes the standards for class actions in the federal courts.[27] For a plaintiff class to be certified, there are four predicate requirements: (1) a sufficiently numerous class; (2) questions of law or fact common to the class; (3) representatives whose claims are typical of the class; and (4) representatives who will fairly and adequately protect the class' interests.[28] Additionally, the court must find that at least one of the three further requirements contained in Rule 23(b) have been met. In *Hudson* cases, certification is typically sought under Rule 23(b)(1)(A) and 23(b)(2).[29]

Litigants seeking class-wide relief for claims under *Hudson* faced a significant initial problem: class-wide claims had been rejected in early forced-unionism litigation. In *Railway Clerks v. Allen*, a challenge to a requirement under the Railway Labor Act[30] that workers pay full union dues, including portions expended for political and ideological activities, the Supreme Court held that:

> This is not and cannot be a class action. . . . "The union receiving money exacted from an employee under a union-shop agreement should not in fairness be subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities."[31]

This initial hurdle was overcome by the courts' recognition that, "unlike *Allen*, which addressed substantive safeguards for [objecting] nonunion employees, [a *Hudson*-enforcement] case focuses on procedural rights of nonunion employees" that "'apply to all non-union employees . . . and . . . any violation of these constitutional requirements . . . affect[s] all non-members. . . .'"[32]

In *Hudson* itself, the Supreme Court intimated that it contemplated application of its decision to large classes of nonunion employees subject to forced-unionism agreements:

> Basic considerations of fairness, as well as concern for the First Amendment rights at stake, also dictate that the *potential objectors* be given sufficient information to gauge the propriety of the union's fee. Leaving the *nonunion employees* in the dark about the source of the figure for the agency fee—and requiring them to object in order to receive information—does not adequately protect the careful distinctions drawn in *Abood*.[33]

Because all nonmembers are "potential objectors," the federal courts initially had no difficulty in certifying large classes of public employees in *Hudson*-enforcement cases. As the first district court certifying such a class action recognized, it "is clear that the constitutional mandates of *Hudson* apply to all non-union employees . . . and that any violation of these constitutional requirements by [the public employer and union] affect[s] all nonmembers. . . ."[34] In the first five years after *Hudson* was decided, a number of cases brought to enforce *Hudson* were quickly certified as class actions.[35]

Virtually from the beginning of post-*Hudson* class action litigation, unions[36] argued that the typicality and adequacy of representation prongs of Rule 23(a)(3) and (4) could not be met where named plaintiffs are represented by attorneys provided by the National Right to Work Legal Defense Foundation. For instance, in *George v. Baltimore City Schools*, the Baltimore affiliate of the American Federation of Teachers argued that:

> plaintiffs are unable to fulfill either requirement because they are represented by staff counsel from the National Right to Work Legal Defense Foundation. . . . Defendants suggest several conflicts of interest between plaintiffs and other members of the proposed class, namely that the Foundation is paying plaintiffs' legal costs, that plaintiffs have signed a "Retainer Authorization" in which they have agreed not to waive any legitimate attorneys' fee claim as part of settlement, and that plaintiffs have signed a "Disclosure Agreement" in which they have agreed not to accept a settlement which forbids the Foundation from disclosing the case history and settlement terms. Accordingly, defendants ar-

> gue that, in reality, the Foundation controls this litigation to the detriment of the proposed class.[37]

In rejecting this argument, the district court relied upon a decision of the United States Court of Appeals for the District of Columbia that "the Foundation is a 'bona fide, independent legal aid organization,'"[38] and the fact that the Foundation had "successfully sponsored class action litigation in the Supreme Court."[39]

The *George* court explicitly rejected the notion that "the Foundation's 'Retainer Authorization' and 'Disclosure Agreement' . . . demonstrate how this organization controls plaintiffs' case":

> The "Retainer Authorization" insures that plaintiffs do not waive an attorney's fees claim in settlement. This provides the Foundation with an opportunity to regain the money it has given out for use with future causes. The "Disclosure Agreement" insures that plaintiff[s] will not forfeit in settlement the right to disclose the case history and settlement terms. This enables the Foundation to publicize its recent legal aid advances. *Neither document allows the Foundation to control plaintiffs' case.*[40]

B. The Gilpin *Decision*

Most courts have certified classes in *Hudson*-enforcement cases.[41] However, a small minority have either evaded the issue[42] or rejected certification outright. The most frequent—and pernicious—basis for the latter course was first enunciated, *sua sponte*, by the United States Court of Appeals for the Seventh Circuit in *Gilpin v. AFSCME*.[43]

The district court denied class certification in *Gilpin* on the ground that it was unnecessary, because any injunctive relief would protect all nonmembers in the bargaining unit.[44] On the merits, however, the court entered judgment for the nonmembers, holding that the union had failed to satisfy all of *Hudson*'s requirements.[45] On appeal, the nonmembers challenged several of the district court's determinations that other features of the union procedures did not violate *Hudson*, the district court's remedial scheme, and the denial of class certification. The Seventh Circuit affirmed the district court in all particulars.

Gilpin's greatest significance has been as the basis for opposition to class certification in *Hudson* litigation. The *Gilpin* panel affirmed the denial of class certification based on Rule 23(a)(4)'s requirement of adequate representation. The panel speculated that a "potentially serious conflict of interest within the class precluded the named plaintiffs from representing the entire class adequately."[46] Citing no record evidence, the panel declared:

> Two distinct types of employee will decline to join the union representing their bargaining unit. The first is the employee who is hostile to unions on political or ideological grounds. The second is the employee who is happy to be represented by a union but won't pay any more for that representation than he is forced to. The two types have potentially divergent aims. The first wants to weaken and if possible destroy the union; the second, a free rider, wants merely to shift as much of the cost of representation as possible to other workers, i.e., union members. The "restitution" remedy sought by the National Right to Work Legal Defense Foundation, which represents the nine named plaintiffs, is consistent with—and only with—the aims of the first type of employee.[47]

The court then criticized the remedy sought:[48]

> Not only would the "restitution" that the Foundation seeks confer a windfall on the nonunion employees but it might embarrass the union financially. Yet those nonunion employees who, while not wanting to pay more (and perhaps even wanting to pay less) than their "fair share" fees, have no desire to ruin the union or impair its ability to represent them effectively might not want so punitive a remedy. The National Right to Work Foundation is not an adequate litigation representative of those employees.[49]

Ironically, *Gilpin* was not brought initially with Foundation legal aid.[50] The plaintiff employees of the Illinois Department of Public Aid were initially represented only by a local attorney.[51] It was not until the appeal that a Foundation attorney represented the nonmembers.[52]

Gilpin is notable, not for the rigor of its legal reasoning, but rather, for its indifference to a broad range of controlling legal principles and its flawed economic analysis. The leading treatise on class actions has dismissed *Gilpin* as an aberrant, "logically unsound" approach to class certification, one not stating the general rule.[53] Subsequent class action litigation in its wake has demonstrated its deficiencies as a framework for analysis in *Hudson* enforcement litigation.

Moreover, were its reasoning to be applied more broadly than just in *Hudson* enforcement cases, *Gilpin* could destroy the class action as an effective litigation tool for actions pursued in the public interest seeking relief for mass injuries. *Gilpin*'s analysis of the "adequacy of representation" prong of the class-action rule would defeat certification of virtually any class when there is judicial hostility to particular claims, classes of litigants, their counsel, or the charitable legal aid organization rendering assistance.

C. Gilpin*'s Legal Errors*

The *Gilpin* panel's first legal error was its reliance on speculation about absent class members. Mere "speculation as to conflicts that may develop . . . is insufficient to support denial of initial class certification."[54] There must be *evidence* of an actual conflict of interests within the class.[55] *Gilpin*'s ruminations about absent class members were entirely speculative. One searches the decision in vain for even the remotest reference to evidence confirming the presumed views of either the prospective class representatives or absent class members, probably because the case's record contains no such evidence.

Moreover, even where "a real possibility of antagonism exists," class certification should be granted where "the possibility of collusion is virtually nil, and we can rely on the defendant to present to the court the arguments supporting the contention of any dissident absentees."[56] That is clearly the situation where nonmembers bring suit against a union challenging its seizure of compulsory fees from them.

Another prevailing principle is that "[n]either the personality nor the motives of the plaintiffs is determinative of whether they will provide vigorous advocacy for the members of the class."[57] Nowhere does *Gilpin* even reference this rule. Neither does it explain how its application of the Federal Rules of Civil Procedure to deny class certification because of the presumed goals of the National Right to Work Legal Defense Foundation's legal advocacy program[58] can be squared with "strict scrutiny" under the First Amendment.[59] To disqualify Foundation-assisted litigants as class representatives because of their presumed political and ideological views, or because they have associated with the Foundation, would impermissibly impair their First-Amendment rights of freedom of belief and association.

That an organization with an ideological point of view is not disqualified as a legal aid organization is long established. In *NAACP v. Button*, the record showed that the activities of the National Association for the Advancement of Colored People ("NAACP") included both "extensive educational and lobbying activities" and funding of litigation "consistent with the NAACP's policies."[60] Its litigation program included "advising Negroes of their constitutional rights, urging them to institute litigation of a particular kind, recommending particular lawyers and financing such litigation."[61] Because the NAACP's litigation program was "a form of political expression" protected by the First Amendment, the Court held that there was nothing unprofessional about "the NAACP activities disclosed by this record."[62]

Similarly, the record in *In re Primus* showed that the activities of the American Civil Liberties Union ("ACLU") "range[d] from litigation and lobbying to educational campaigns in support of its avowed goals."[63] Again, precisely because the "ACLU engages in litigation as a vehicle for effective political expression and association," an ACLU attorney's solicitation of a prospective plaintiff was constitutionally protected under the First Amendment.[64]

That an organization has a *particular* ideological point of view—such as the Foundation's opposition to compulsory unionism—does not disqualify it as a legal aid organization, either. That, too, was settled in *Button*: "the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered."[65]

The only relevant question in determining the ethical *bona fides* of a legal aid organization is whether there is "a 'serious danger' of conflict of interest" or "organizational interference with the *actual* conduct of the litigation."[66] That the NAACP's attorneys were required to "agree to abide by the policies of the NAACP" and "would derive personal satisfaction from participation in litigation on behalf of Negro rights" was insufficient to show either in *Button*.[67]

The same principles apply in determining whether attorneys are adequate class counsel, because an allegation of conflicts posits that they have violated (or will violate) their ethical responsibility to exercise "independence of professional judgment" on behalf of a client.[68] In *McGlothlin v. Connors*, three beneficiaries of a miners' benefit plan brought a class action against the plan's trustees and a multiemployer bargaining group; the United Mine Workers ("UMW") intervened as a plaintiff. The multiemployer group and UMW contended that the plaintiffs' attorneys were not adequate class counsel because another group of coal companies, that had legislative interests conflicting with those of the beneficiaries, was funding the litigation. The court held that the attorneys nonetheless were adequate class counsel, because there was no evidence that contradicted the attorneys' affirmation that they were representing only their clients' interests or that showed that third parties actually controlled the litigation, and because the attorneys had "diligently and forcefully argued the beneficiaries' position at every stage."[69]

Of course, the Foundation's *bona fides* as a charitable legal aid organization have been judicially recognized when challenged on a factual record.[70]

Next, *Gilpin* failed even to address the fact that each class member could opt-out by voluntarily returning any refund obtained as a result of the litigation. This would fully—but in a manner depriving the union and state of the coercion previously enjoyed—avoid the "conflict" that the *Gilpin* court presumed.

Finally, the *Gilpin* panel was indifferent to the Seventh Circuit's prior decisionmaking. With another union before it, that court had observed that:

> [I]t is often the defendant, preferring not to be successfully sued by anyone, who supposedly undertakes to assist the court in determining whether a putative class should be certified. When it comes, for instance, to determining whether "the representative parties will fairly and adequately protect the interests of the class," . . . it is a bit like permitting a fox, although with pious countenance, to take charge of the chicken house.[71]

However, when it rejected the efforts of nonmembers seeking certification of a class of "potential objectors" under *Hudson*,[72] the Seventh Circuit found the union's countenance positively angelic.

D. Gilpin*'s Economic Errors*

Perhaps the most glaring of *Gilpin*'s errors is its seriously flawed economic analysis.

The heart of *Gilpin*'s reasoning is its false distinction between the nonmember seeking restitution of all fees (who purportedly "wants to weaken and if possible destroy the union")[73] and the so-called "free rider" (who "wants merely to shift as much of the cost of representation as possible to other workers").[74] That analysis ignores that the "union hater" seeking restitution and the mere "free rider" seeking to minimize his own costs are economically indistinguishable. The ultimate cost-minimization for the "free rider" is to zero, which is precisely the result if a court awards the full restitution the "union hater" seeks.

Equally faulty is *Gilpin*'s presumption that catastrophic results would flow from the restitution remedy sought by the prospective class representatives, *i.e.*, restitution of all monies seized in violation of *Hudson*. *Gilpin* does not explain how such "restitution"—even awarded to the entire class of nonmembers—is commensurate with the goal of "weakening or if possible destroying the union."

Because imposition of *any* damage award against a defendant can be described as "weakening" it, that element of the court's analysis was mere rhetorical flourish. Thus, *Gilpin*'s only substantial charge is that the "union hater" seeks to destroy the union.

But how is this possible if all that he would deny the union are the monies involuntarily (and illegally) seized from nonmembers? Does not the union possess voluntary members whose contributions are not the subject of the litigation and would remain untouched?

Actual experience demonstrates that *Gilpin*'s presumptions protect not the so-called "free rider" from anti-union fanatics, but rather labor unions and public employers from bearing the cost for the full measure of their wrongs. No groundswell of opposition from any proposed class has ever manifested itself in any case in which National Right to Work Foundation attorneys have represented plaintiffs. At most, a few unions have secured affidavits or declarations from a tiny percentage of the class, a rather meager result given the unions' virtual monopoly over communications with class members.[75]

In cases in which class-wide relief was sought, one finds little support for *Gilpin*'s theory that there exists some "free rider" who, while not joining the union, is nevertheless content to have money for it involuntarily seized from his wages and opposes the efforts of others to recover that money for him. Typical is *Cummings v. Connell*, in which no evidence was submitted that *any* of the 37,000 State of California employees in the class opposed the named plaintiffs' efforts to recover full restitution.[76]

Even where there is suspicion that there might be such persons, the rules enable the courts to protect their interests through notice to the class and opt-out procedures.[77] For example, in a case involving a class of nearly five hundred schoolteachers in Anchorage, Alaska,[78] notice was ordered, giving class members the opportunity to opt-out of any relief obtained.[79] Only five individuals opted out of the relief sought, which included full restitution of all fees seized.[80]

In another class action, the named plaintiffs negotiated a settlement that returned more than 80% of their previously seized fees to a class of ninety-three city employees and stopped all deductions until the union complied with *Hudson* in the future. In approving the proposed settlement, after notice and opportunity to object was given to the class members, Judge Stewart Dalzell of the Eastern District of Pennsylvania implicitly rejected the *Gilpin* panel's assumption that some nonmembers want to pay union "representation" fees. Judge Dalzell noted that, because "the settlement is so positive for the class," it was "not surprising that no class member has objected to this settlement."[81]

Thus, both logic and experience teach that *Gilpin*'s economic analysis was erroneous.

E. The Record After Gilpin

While *Gilpin* provides a weapon to unions seeking to avoid the full measure of damages for their defiance of the Supreme Court's *Hudson* mandate, it has proven to be a weapon of only limited utility, not followed in most cases. The three early decisions, issued more than a decade ago, that cited *Gilpin* favorably did so without critical analysis and actually denied certification on other grounds.

In *Kidwell v. Trasportation Communications International Union*, the Fourth Circuit affirmed denial of class certification, but not due to a perceived conflict of interest. Rather, the court did so on the grounds that typicality and commonality were lacking, because the named

plaintiffs' claims, but not all class members', had all been either already rejected, fully remedied, or waived by failure to appeal a district court ruling.[82] The court then gratuitously quoted *Gilpin* in *dicta*, "with absolutely no reasoning."[83]

In *Weaver v. University of Cincinnati*, when the Sixth Circuit affirmed the denial of class certification, it did not merely parrot *Gilpin*'s speculation about class members' desire to fund union activities and pronounce it as gospel. Rather, the Sixth Circuit relied on record evidence of an *actual* conflict of interest, *i.e.*, the fact that some nonmembers (presumably named plaintiffs) were trying to oust the union from the bargaining unit, and on the plaintiffs' refusal to answer deposition questions about their reasons for not joining the union and filing the lawsuit.[84]

Similarly, while the Tenth Circuit cited *Gilpin* in a case where it affirmed the denial of class certification, it did so only for the general proposition that a district court does not abuse its discretion by denying certification where the plaintiffs "have not demonstrated that they met" their "burden of showing the adequacy of representation."[85] Moreover, certification was denied there because of actual evidence, the fact that "one of the plaintiffs sent out a misleading letter to potential class members."[86]

Since 1992, no court has denied class certification based on *Gilpin*, and many have declined to follow its reasoning.[87]

In *Murray v. AFSCME Local 2620*, Chief Judge Patel of the Northern District of California gave two reasons for finding *Gilpin* and its progeny unpersuasive. "First, the factual scenarios in all four cases differ substantially from this case and many cases in which similar classes were certified." Judge Patel distinguished *Gilpin* because the court there "found no harm after fees had been returned to all non-members and the [union's] policies changed" to comply with *Hudson*.[88] She distinguished *Gilpin*'s progeny essentially for the reasons discussed above.[89]

Judge Patel's second reason for finding *Gilpin* unpersuasive was that "the Ninth Circuit has not denied class certification based on the types of reasoning and arguments used in *Gilpin*," and "several district courts and the D.C. Circuit have explicitly rejected the *Gilpin* line of cases."[90] Judge Patel cited the reasoning of the D.C. Circuit in *Abrams v. Communications Workers*[91] and "two district courts within the Ninth Circuit" "that all members of the proposed class had a common interest in ensuring compliance with *Hudson*."[92] The two Ninth Circuit district court decisions that Judge Patel cited are cases in which the court also "concluded that because punitive remedies were not available, divergent goals within the class did not exist and certification was proper."[93] Judge Patel went further and certified a class of all nonmembers even though the plaintiff sought punitive damages, because at the "early phase" of class certification, "the common issues of law and fact outweigh speculation about a possible conflict during the damages portion of the trial."[94] Judge Patel also suggested that she might "certify a subclass of employees seeking punitive damages if there appears to be a conflict of interest between members of the larger class" of all nonmembers at the damages stage.[95]

Since *Murray*, the Ninth Circuit itself has rejected *Gilpin*'s notion that speculative potential conflicts can form the basis for a valid denial of class certification in a *Hudson* enforcement case. The Ninth Circuit "does not favor denial of class certification on the basis of speculative conflicts."[96] Therefore, in *Cummings v. Connell*, that court held that "the district court did not abuse its discretion by granting class certification," because the "Union produced no evidence that class members actually possess opposing views regarding the [named plaintiffs'] pursuit of the punitive remedy" of full restitution of all fees paid before the union complied with *Hudson*.[97] Later, the Ninth Circuit again declined to follow *Gilpin* in *Harik v. California Teachers Ass'n*, this time because no conflict within the class was possible there, "where the plaintiffs seek only injunctive relief requiring the unions to comply with their constitutional duties as set forth in *Hudson*."[98]

The more recent cases also have rejected *Gilpin*'s hostility to National Right to Work Legal Defense Foundation attorneys as class counsel. Foundation attorneys were certified as adequate class counsel in all of the many post-*Gilpin* cases that declined to follow *Gilpin*.[99]

In *Bromley v. Michigan Education Ass'n*, the court explained why "the motivation[s] of plaintiffs' counsel or the National Right to Work Foundation . . . are irrelevant" to class certification:

> As long as the Foundation has no [e]ffect on the litigation of this matter, its doctrine and goals do not disqualify it from funding plaintiffs' assertion and protection of their First Amendment rights. Likewise, plaintiffs' counsel are bound by the same rules of procedure and conduct as are all counsel in federal court actions. Counsels' personal beliefs are irrelevant so long as they do not result in conduct violative of the applicable court rules. Should any party discover or suffer from any improper conduct, there are appropriate means for challenging and, if necessary, sanctioning such activity.[100]

In *Murray*, the court similarly rejected a union's opposition to class certification based upon the Foundation's purported goals:

> Defendants attack plaintiffs' counsel as inadequate because the Right to Work Legal Defense Foundation . . . represents people who are hostile to unions. . . .
>
> . . . . [P]laintiff's counsel are bound by the same ethical and procedural rules as defense counsel. The Foundation's political activities are wholly divorced from this case. This court does not find this to be a sufficient basis for disqualification of the Foundation [attorneys] as counsel.[101]

III. *Gilpin*'s Pernicious Potential

It is not surprising that *Gilpin*'s analysis has been quickly disregarded. First, the opinion cannot be sustained of its own weight, because of its many legal and economic errors. Moreover, it places in the hands of mass tortfeasors a weapon of enormous potential for mischief, independent of the merits of any particular class action.

Gilpin was not the first effort by a party opposing class certification to avoid liability for the full measure of damages by citing possible ideological conflicts among the class that were irrelevant to the claim pursued and the relief sought. Even assuming that pursuit of the complete relief sought in *Gilpin* evidences "hostility," similar arguments were made and rejected in a class action brought by taxpayers seeking refunds of allegedly excess charges against an electric utility ("LILCO") that the plaintiffs claimed had made misrepresentations about its nuclear power projects to get rate increases approved. The court rejected an argument that litigants could not adequately represent the class because they had "political motivations that conflict with the predominately economic interests of the class" of all ratepayers:

> that various of the ratepayer plaintiffs may oppose the commercial operation of the [nuclear] plant, favor the takeover of LILCO by a public authority or take any other positions with regard to LILCO and the other defendants is not by itself an indication that the economic interests of the class will or might be sacrificed in order to realize purely political objectives.[102]

The court also rejected an argument that litigants were not adequate class representatives because they were "unduly antagonistic toward the defendants":

> To expect these plaintiffs to be completely neutral when they allege that the defendants have defrauded them and others . . . is to expect too much. Here there is nothing to suggest that whatever antagonism the ratepayer plaintiffs might bear towards the defendants will interfere with their duty to fairly and adequately represent the interests of the class.[103]

In almost any context, it would be almost impossible to find plaintiffs who are not "hostile" to their litigation opponents. After all, litigation exists to right wrongs. In *Hudson* cases, the effort is to insure that unions comply with "the constitutional requirements for the . . . collection of agency fees."[104] As one court said, "principle, coupled with the hope of rectifying a claimed loss . . ., may be as strong a spur to vigorous prosecution as many other motivations."[105]

One can only imagine the potential for discovery of class litigants and their beliefs under the regime *Gilpin* proposed. Will prospective class representatives in litigation against tobacco companies by examined for their views as to that vile weed? Will prospective class representatives in litigation against automobile manufacturers have to produce evidence regarding their contributions to environmental organizations, to root out those prospective class representatives who are actually Luddites seeking to "weaken and if possible destroy"[106] automobile manufacturers? In mass tort litigation, will prospective class representatives and their counsel be disqualified because the actual purpose of their litigation—no matter the remedial scheme proposed—is to "embarrass" or "ruin"[107] chemical companies, or asbestos manufacturers, or producers of miracle drugs?

One of *Gilpin*'s delicious ironies is that, once discovered by attorneys defending against class certification in other contexts, it will be a vital weapon against the political and ideological allies of the very labor organizations that now use it to defend against being held accountable for the full measure of their misdeeds. And once that happens, it is not unreasonable to assume that those on the ideological left will promptly disparage and disavow *Gilpin*. But until and unless *Gilpin*'s reasoning becomes a weapon not only for labor unions defending their constitutional torts, but also for business and commercial interests resisting class litigation either purposefully or coincidentally filed to "weaken and if possible destroy" them, *Gilpin* will remain a labor union exception to normal principles of class action law.

IV. Conclusion

In the fourteen years since it was issued, *Gilpin* has enjoyed more popularity among the union bar than it has among the federal courts. Moreover, its flawed reasoning has been virtually ignored in litigation other than *Hudson* cases, despite its potential applications in many contexts.[108] That may explain why *Gilpin* has not been generally attacked and, so far, remains available for union attorneys to use against the victims of forced-unionism abuses who bring class actions.

Gilpin critically speculated about the motives of litigants against forced-unionism schemes and their advocates, generally considered to be political conservatives and libertarians. Yet, it is easy to foresee the results were similar charges leveled against legal-aid or advocacy organizations generally viewed as liberal. Were ju-

rists to express similar sentiments about the American Civil Liberties Union (ACLU), the National Association for the Advancement of Colored People (NAACP) Legal Defense and Education Fund, the American Trial Lawyers Association, or the Sierra Club, there is little doubt that a legal and media firestorm would ensue. It is not unrealistic to expect that epithets such as "racist" or "right-wing extremist" would be applied to jurists accusing the NAACP Legal Defense Fund or ACLU of motives like those that *Gilpin* attributed to the National Right to Work Legal Defense Foundation and its attorneys' clients. Almost certainly, such judges would be immediately disqualified from consideration for appointment to higher courts; one need not look beyond the recent treatment of well-qualified conservative judicial nominees in the United States Senate to recognize that danger.

Hopefully, *Gilpin*'s lack of principled legal reasoning, its unsound economic logic, and its potential for mischief in many contexts, will eventually doom it to oblivion.

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Footnotes

[1] 487 U.S. 735 (1988). In *Beck*, the Supreme Court held that the National Labor Relations Act "authorizes the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'" *Id.* at 762-63 (quoting Ellis v. Railway Clerks, 466 U.S. 435, 448 (1984)).

[2] 475 U.S. 292 (1986). Other cases litigated by Foundation attorneys before the Supreme Court include Abood v. Detroit Board of Education, 431 U.S. 209 (1977), Minnesota State Board for Community Colleges v. Knight, 465 U.S. 271 (1984), Ellis, Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991), Air Line Pilots Ass'n v. Miller, 523 U.S. 866 (1998), and Marquez v. Screen Actors Guild, 525 U.S. 33 (1998).

[3] City of Charlotte v. Local 660, International Ass'n of Firefighters, 426 U.S. 283, 286-88 (1976).

[4] Wessel v. City of Albuquerque, 299 F.3d 1186, 1190 (10th Cir. 2002). Examples of such legislative authorizations are 29 U.S.C. § 158(a)(3) (National Labor Relations Act); 45 U.S.C. § 152, Eleventh (Railway Labor Act). *See also Abood*, 431 U.S. at 223-25 (explaining governmental interests held to justify allowance of agency shop).

[5] Three states impose forced unionism upon public employees represented by an exclusive bargaining agent without the necessity of the employer's agreement. Haw. Rev. Stat. § 89-4(a) (all public employees); N.Y. Civ. Serv. Law § 208.3(b) (McKinney) (same); Cal. Govt. Code §§ 3543(a) (school employees), 3563.5 (university employees).

[6] 475 U.S. at 310. The Court explicitly recognized that this a joint responsibility. "Since the agency shop itself is 'a significant impingement on First Amendment rights,' *Ellis*, 466 U.S. at 455, *the government and the union* have a responsibility to provide procedures that minimize that impingement and that facilitate a nonunion employee's ability to protect his rights." *Hudson*, 475 U.S. at 307 n.20 (emphasis added).

[7] *See* Knight v. Kenai Peninsula Borough Sch. Dist., 131 F.3d 807, 815 (9th Cir. 1997) ("Because it provided inadequate notice, [the union] failed to satisfy *Hudson*'s requirements and was not entitled to the fees that it collected"); Weaver v. University of Cincinnati, 942 F.2d 1039, 1045 (6th Cir. 1991) ("*no* fees may be collected in the absence of constitutionally adequate notice and procedures"); *cf.* Dean v. Trans World Airlines, Inc., 924 F.2d 805, 809 (9th Cir. 1991) (nonmember under Railway Labor Act is privileged to withhold dues from union failing to comply with *Hudson*'s requirements); *but see* Prescott v. County of El Dorado, 177 F.2d 1102, 1109-10 (9th Cir. 1999) (full restitution inappropriate in that circumstance), *vacated & remanded on other grounds*, 528 U.S. 1111, *reinstated in pertinent part*, 204 F.3d 893 (9th Cir. 2000), *further proceedings*, 298 F.3d 844 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 1251 (2003); Weaver v. University of Cincinnati, 970 F.2d 1523, 1534 (6th Cir. 1992) (same, absent "willful or malicious constitutional violations of *Hudson*'s procedures").

[8] *Abood*, 431 U.S. at 222.

[9] *Id.* at 232-37.

[10] *Hudson*, 475 U.S. at 310 (emphasis added).

[11] *Id.* at 306.

[12] Tierney v. City of Toledo, 824 F.2d 1497, 1502 (6th Cir. 1987); *see Hudson*, 475 U.S. at 306, 310; *see also id*. at 304 n.13 ("in this context, the procedures required by the First Amendment also provide the protections necessary for any deprivation of property").

[13] *Hudson*, 475 U.S. at 307 n.20.

[14] *Id*. at 306-10. Escrow alone is insufficient to render collection of fees constitutional. *Id*. at 309.

[15] *Id.* at 310 (emphasis added).

[16] *See* Air Line Pilots Ass'n v. Miller, 523 U.S. 866, 876 n.4 (1998); *Prescott*, 177 F.3d at 1108.

[17] *Hudson*, 475 U.S. at 307 n.20; *see id.* at 303.

[18] *Hudson*, 475 U.S. at 306.

[19] Alba Conte & Herbert Newberg, 1 Newberg on Class Actions § 1.1 (4th ed. 2002) (footnote omitted). This treatise is probably the most comprehensive secondary source on the history, theory, and practice of class actions.

[20] Edward F. Sherman, *Class Actions*, *in* Oxford Companion to American Law 118 (2002).

[21] The interests class action litigation serves are numerous, for both litigants and society. "It serves the interests of economy by avoiding trying the same issues again and again in separate cases. It serves the interests of consistency and finality by avoiding the possible inconsistent outcomes in separate jury trials and by resolving the claims in a single case that is binding on all class members." *Id*. However, because "class suits can have far-reaching effects to bring about institutional or governmental change, to internalize substantial environmental costs that the public would otherwise pay, or to disgorge significant profits arising from unlawful or tortuous [*sic*] conduct, class actions are controversial." 1 Alba Conte & Herbert Newberg, Newberg on Class Actions, § 1.1, at 3 (4th ed. 2002).

[22] See Memphis Community School Dist. v. Stachura, 477 U.S.

299, 307 & n.10 (1986); *Monell v. Dep't of Social Services*, 436 U.S. 658, 691 (1978).

[23] 42 U.S.C. § 1983.

[24] Courts have certified class actions in nearly a score of *Hudson*-enforcement cases in which the Foundation has provided workers free legal aid. *E.g.*, Harik v. California Teachers Ass'n, 326 F.3d 1042, 1047 (9th Cir.) (statewide class of teachers), *cert denied*, 124 S.Ct. 429 (2003)*;* Abrams v. Communications Workers, 59 F.3d 1373, 1378 (D.C. Cir. 1995) (directing certification of nationwide nonmember class); Swanson v. University of Haw. Prof'l Assembly, 212 F.R.D. 574 (D. Haw. 2003) (600 university faculty); Wagner v. Professional Eng'rs, 2002 WL 398818 (E.D. Cal. Feb. 22, 2002) (statewide class of 1700 public engineers); Lutz v. Machinists, 196 F.R.D. 447 (E.D. Va. 2000) (1,000 airline employees); Murray v. AFSCME Local 2620, 192 F.R.D. 629 (N.D. Cal. 2000) (1,000 state employees); Baird v. California Faculty Ass'n, 166 L.R.R.M. (BNA) 2491 (E.D. Cal. 2000) (18,000 higher education employees); Friedman v. California State Employees Ass'n, 163 L.R.R.M. (BNA) 2924 (E.D. Cal. 2000) (10,000 school employees); Cummings v. Connell, 163 L.R.R.M. (BNA) 2086 (E.D. Cal. 1999) (37,000 state employees), *aff'd in pertinent part*, 316 F.3d 886 (9th Cir.), *cert. denied*, 123 S. Ct. 2577 (2003); Hunter v. City of Philadelphia, 161 L.R.R.M. (BNA) 2664, 2667 (E.D. Pa. 1999) (200 firefighters); Leer v. Washington Educ. Ass'n, 172 F.R.D. 439, 453 (W.D. Wash. 1997) (nonmember teachers); Mitchell v. Los Angeles Unified Sch. Dist., 744 F. Supp. 938 (C.D. Cal. 1990) (8,000 nonunion school teachers), *rev'd on other grounds*, 963 F.2d 258 (9th Cir. 1992); Hohe v. Casey, 128 F.R.D. 68 (M.D. Pa. 1989) (18,000 state employees); George v. Baltimore City Pub. Schs., 117 F.R.D. 368 (D. Md. 1987) (1,000 teachers); Damiano v. Matish, 644 F. Supp. 1058, 1059 (W.D. Mich. 1986)(200 state employees), *rev'd on other grounds*, 830 F.2d 1363 (6th Cir. 1987). *See also* Bromley v. Michigan Educ. Ass'n, 178 F.R.D. 148, 161-63 (E.D. Mich. 1998) (235 objecting nonmembers certified in case challenging amount of agency fees).

[25] Union dues are typically only several hundred dollars a year per person. *See*, *e.g.*, Carlson v. United Academics, 265 F.3d 778, 780 (9th Cir. 2001) ($720 per year).

[26] Sherman, *supra* note 20, at 118.

[27] Rule 23 favors the maintenance of class actions. *E.g.*, Blackie v. Barrack, 524 F.2d 891, 903 (9th Cir. 1975); King v. Kansas City Southern Indus., 519 F.2d 20, 26 (7th Cir. 1975); Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968); *see also* Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 487 (5th Cir. 1982) (mere existence of class device suggests policy in favor of making it available to litigants when possible).

[28] Fed. R. Civ. P. 23(a).

[29] Rule 23(b)(1)(A) authorizes class actions where "the prosecution of separate actions . . . would create a risk of . . . inconsistent or varying adjudications . . . which would establish incompatible standards of conduct for the party opposing the class. . . ." Rule 23(b)(2) authorizes class actions where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . ."

[30] 45 U.S.C. § 151 *et seq*.

[31] 373 U.S. 113, 119 (1963) (quoting *Machinists v. Street*, 367 U.S. 740, 774 (1961)).

[32] George v. Baltimore City Pub. Schs., 117 F.R.D. 368, 371-72 (D. Md. 1987) (quoting Damiano v. Matish, 644 F. Supp. 1058, 1060 (W.D. Mich. 1986), *rev'd on other grounds*, 830 F.2d 1363 (6th Cir. 1987)); *see* Abrams v. Communications Workers, 59 F.3d 1373, 1378 (D.C. Cir. 1995) ("the district court committed reversible error" by " misapplying the holdings in *Street* and *Allen*" to deny class certification for *Hudson* claims); *see also Hohe v. Casey*, 128 F.R.D. 68, 70 (M.D. Pa. 1989) (rejecting a "union's claim that the plaintiffs' interests parallel those of only about 500 nonunion employees who have challenged the *amount* of the fee").

[33] 475 U.S. at 306 (emphasis added) (referring to *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)).

[34] *Damiano*, 644 F. Supp. at 1060.

[35] Mitchell v. Los Angeles Unified Sch. Dist., 744 F. Supp. 938, 939-40 (C.D. Cal. 1990), *rev'd on other grounds*, 963 F.2d 258 (9th Cir. 1992); *Hohe*, 128 F.R.D. at 70-72; *George*, 117 F.R.D. at 369-72; *Damiano*, 644 F. Supp. at 1059-60.

[36] Although public employers and/or officials also are sued in most of these cases, they invariably merely adopt the unions' arguments.

[37] *George*, 117 F.R.D. at 370 (footnote omitted).

[38] *Id.* at 371 (quoting Auto Workers v. National Right to Work Legal Def. & Educ. Found., 781 F.2d 928, 932-34 (D.C. Cir.1986)).

[39] *Id.* (citing *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), and *Abood*).

[40] *Id.* (emphasis added).

[41] *See supra* note 24.

[42] *See*, *e.g.*, Carlson v. United Academics, 265 F.3d 778 (9th Cir. 2001). In *Carlson*, the Ninth Circuit declared that review of the denial of class certification would "serve no purpose," because it had "affirm[ed] the district court judgment for the Union on the merits." *Id*. at 787. The court ignored that class members should have received the nominal damages the district court awarded to the named plaintiffs, *see* Carlson v. United Academics, 171 L.R.R.M. (BNA) 2305, 2306 (D. Alaska 2002) (awarding plaintiffs attorneys' fees). *See also* Jibson v. Michigan Educ. Ass'n, 30 F.3d 723, 734 (6th Cir. 1994) (declining to reverse denial of class certification as moot while affirming district court's grant of summary judgment for union).

[43] 875 F.2d 1310 (7th Cir. 1989).

[44] Transcript of Excerpts of Proceedings at 50-53, Gilpin v. AFSCME, No. 85-3479 (C.D. Ill. Oct 18, 1985), *aff'd*, 875 F.2d 1310 (7th Cir. 1989).

[45] Gilpin v. AFSCME, 643 F. Supp. 733, 737-38 (C.D. Ill. 1986), *aff'd*, 875 F.2d 1310 (7th Cir. 1989).

[46] *Gilpin*, 875 F.2d at 1313.

[47] *Id*.

[48] The remedy sought was "repayment to *all* the bargaining unit's nonunion employees of the *entire* agency fees collected by the union in the 1985 and 1986 school years (with interest)." The court declared this inappropriate because "the Foundation has not challenged the arbitrator's determination that the union was entitled to *more* than the amount it actually collected in 1985 and to 99 percent of the amount it collected in 1986." *Id*.

[49] *Id*.

[50] Obviously, the Foundation does not hold a monopoly on bringing *Hudson*-enforcement cases. However, given the costs involved and the expertise necessary to litigate such cases effectively, the vast majority of such cases have been brought with the Foundation's support.

[51] *See Gilpin*, 643 F. Supp. at 734.

[52] *See Gilpin*, 875 F.2d at 1311.

[53] 1 Herbert Newberg & Alba Conte, Newberg on Class Actions § 3.30, at 3-151 (3d ed. 1992).

[54] Service Employees Local 535 v. County of Santa Clara, 609 F.2d 944, 948 (9th Cir. 1979).

[55] *See, e.g.*, Chisholm v. United States Postal Serv., 665 F.2d 482, 493 n.12 (4th Cir. 1981); *Blackie v. Barrack*, 524 F.2d 891, 909 (9th Cir. 1975).

[56] Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 485-88 (5th Cir. 1982).

[57] Dorfman v. First Boston Corp., 62 F.R.D. 466, 473 (E.D. Pa. 1974). This is the "prevailing" rule. 1 Alba Conte & Herbert Newberg, Newberg on Class Actions, § 3.38, at 515 (4th ed. 2002).

[58] *See Gilpin*, 875 F.2d at 1313.

[59] The Federal Rules of Civil Procedure, like any statute or government regulation, must be construed consistently with the First Amendment if at all possible. In one case, an employer and some of its employees brought a class action against a union pension fund. The fund argued that the class was improperly certified, because the employer had solicited the employees' suit. That argument was rejected. Decertification of the class on that ground "would impair the associational rights of employers and employees and meaningful access to the courts." Fentron Indus. v. National Shopmen Pension Fund, 674 F.2d 1300, 1305 (9th Cir. 1982) (citation omitted).

[60] 371 U.S. 415, 419-21 (1963).

[61] *Id*. at 447 (White, J., concurring in part); *see id.* at 419-22.

[62] *See id.* at 429-31, 438-44.

[63] 436 U.S. 412, 414 n.2 (1978).

[64] *See id*., at 431, 434-38.

[65] 371 U.S. at 444-45.

[66] *In re Primus*, 436 U.S. at 436 (emphasis added) (quoting *Button*, 371 U.S. at 443).

[67] 371 U.S. at 420, 442-44.

[68] ABA Model R. Prof'l Conduct 1.8(f)(2).

[69] 142 F.R.D. 626, 637-39 (W.D. Va. 1992); *see also* Fox v. Massey-Ferguson, Inc., 172 F.R.D. 653, 663-64 (E.D. Mich. 1995) (that an attorney's fees were paid by a union with which he had "a long-standing relationship" did not by itself disqualify him as class counsel in a suit against an employer).

[70] Auto Workers v. National Right to Work Legal Defense & Educ. Found., 781 F.2d 928, 932-34 (D.C. Cir. 1986); National Right to Work Legal Defense & Educ. Found. v. United States, 487 F. Supp. 801, 803 (E.D.N.C. 1979).

[71] Eggleston v. Plumbers' Local *130*, 657 F.2d 890, 895 (7th Cir. 1981).

[72] 475 U.S. at 306.

[73] For shorthand purposes, let us call this individual "the union hater." However, like the euphemism "union security" or "agency shop" used for forced-unionism schemes, this is a value-laden term that disparages the employee who may neither want nor need union representation and may, indeed, be able to negotiate more favorable terms and conditions of employment for himself or herself.

[74] 875 F.2d at 1313.

[75] E.g., Wagner v. Professional Eng'rs, 2002 WL 398818, at *1 (E.D. Cal. Feb. 22, 2002) (union's evidence "indicates that about 44 potential class members (out of a potential class estimated to exceed 1,700 individuals) are not interested in pursuing the 'fair share fees' at issue").

[76] 316 F.3d 886, 896 (9th Cir.), *cert. denied*, 123 S. Ct. 2577, *on remand*, 281 F. Supp. 2d 1187, 1191 (E.D. Cal. 2003).

[77] *See*, *e.g.*, Friedman v. California State Employees Ass'n, 163 L.R.R.M. (BNA) 2924, 2930 (E.D. Cal. 2000); Fed. R. Civ. P. 23(d)(2).

[78] Patterson v. Anchorage Sch. Dist., No. A93-0189-CV (HRH), Docket No. 157 (D. Alaska Nov. 30, 1998).

[79] *Id.*, Docket Nos. 160, 167, & 172 (Jan. 12, Apr. 1, May 19, 1999, respectively).

[80] *Id.*, Docket Nos. 174 & 179 (July 23 & Aug. 9, 1999, respectively).

[81] Hunter v. City of Philadelphia, 161 L.R.R.M. (BNA) 2667, 2669 (E.D. Pa. 1999).

[82] *See* Kidwell v. Transportation Communications Int'l, 136 L.R.R.M. (BNA) 2434, 2436-37 (D. Md. 1990), *aff'd in pertinent part*, 946 F.2d 283, 305 (4th Cir. 1991); *see also* Murray v. AFSCME Local 2620, 192 F.R.D. 629, 633 (N.D. Cal. 2000) ("[i]n *Kidwell*, the court . . . denied the expansion of the class certification because some objectors had received refunds and some had not").

[83] *Murray*, 192 F.R.D. at 635; *see Kidwell*, 946 F.2d at 305-06. *Kidwell*'s quotation of *Gilpin*'s speculation about conflicts was inconsistent with the Fourth Circuit's earlier rejection of the notion that class certification may be denied on the basis of speculative conflicts. *See* Chisholm v. United States Postal Serv., 665 F.2d 482, 493 n.12 (4th Cir. 1981).

[84] 970 F.2d 1523, 1530-31 (6th Cir. 1992).

[85] Pilots Against Illegal Dues v. Airline Pilots Ass'n, 938 F.2d 1123, 1134 (10th Cir. 1991).

[86] *Id*.

[87] The courts have declined to follow *Gilpin* (or union arguments based on it) in: Harik v. California Teachers Ass'n, 326 F.3d 1042, 1052 (9th Cir.), *cert. denied* 124 S. Ct. 429 (2003); Swanson v. University of Haw. Prof'l Assembly, 212 F.R.D. 574, 577 (D. Haw. 2003); Wagner v. Professional Eng'rs, 2002 WL 398818, at *1-*2 (E.D. Cal. Feb. 22, 2002); Lutz v. Machinists, 196 F.R.D. 447, 453 (E.D. Va. 2000); Murray v. AFSCME Local 2620, 192 F.R.D. 629, 633-36 (N.D. Cal. 2000); Baird v. California Faculty Ass'n, 166 L.R.R.M. (BNA) 2491, 2494-95 (E.D. Cal. 2000); Friedman v. California State Employees Ass'n, 163 L.R.R.M. (BNA) 2924, 2928-29 (E.D. Cal. 2000); Cummings v. Connell, 163 L.R.R.M. (BNA) 2086, 2091 (E.D. Cal. 1999), *aff'd in pertinent part*, 316 F.3d 886, 895-96 (9th Cir.), *cert. denied*, 123 S. Ct. 2577 (2003); Bromley v. Michigan Educ. Ass'n, 178 F.R.D. 148, 162 (E.D. Mich. 1998); Leer v. Washington Educ. Ass'n, 172 F.R.D. 439, 444-47 (W.D. Wash. 1997).

[88] 192 F.R.D. 629, 633 (N.D. Cal. 2000). Judge Patel also reasoned that *Gilpin*'s "language distinguishing the two groups [of 'union haters' and 'free riders'] was pure dicta." *Id.*

[89] *See id*.

[90] *Id*. at 633-34.

[91] 59 F.3d 1373, 1378 (D.C. Cir. 1995).

[92] *Murray*, 192 F.R.D. at 634.

[93] *Id*.

[94] *Id*. at 634-35.

[95] *Id*. at 634.

[96] Cummings v. Connell, 316 F.3d 886, 896 (9th Cir. 2003), *cert. denied*, 123 S. Ct. 2577 (2003); *see* Service Employees Local 535 v. County of Santa Clara, 609 F.2d 944, 948 (9th Cir. 1979); Blackie v. Barrack, 524 F.2d 891, 909 (9th Cir. 1975).

[97] *Cummings*, 316 F.3d at 895-96.

[98] 326 F.3d 1042, 1052 (9th Cir.), *cert. denied*, 124 S. Ct. 429 (2003).

[99] *See* cases cited *supra* note 87.

[100] 178 F.R.D. 148, 162 (E.D. Mich. 1998).

[101] 192 F.R.D. at 635-36 (citation omitted).

[102] County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407, 1416 (E.D.N.Y. 1989)

[103] *Id.* at 1415-16.

[104] *Hudson*, 475 U.S. at 310.

[105] Dorfman v. First Boston Corp., 62 F.R.D. 466, 473 (E.D. Pa. 1974); *see also* Haroco v. American Nat'l Bank & Trust, 121 F.R.D. 664, 670 (N.D. Ill. 1988) ("If bad blood between the litigants has fueled this lawsuit, it does not detract from the fortitude required for class action litigation").

[106] *Gilpin*, 875 F.2d at 1313.

[107] *Id*.

[108] *But see* Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 338-39 (4th Cir. 1998) (citing *Gilpin* in finding conflicts precluding class certification in a non-labor law context); Clay v. American Tobacco Co., 188 F.R.D. 483, 493 (S.D. Ill. 1999) (same).