

DIRTY SECRETS: THE FIRST AMENDMENT IN PROTECTIVE-ORDER LITIGATION

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INTRODUCTION

Courts around the country routinely issue protective orders to prevent litigants from disseminating pretrial discovery information. These orders often keep the public from learning about grave dangers or information central to self-governance—pedophile priests, deadly tires, dangerous drugs, and the government’s role in spying on its own citizens have all been shielded, at one time or another, by protective orders.¹

Recent events showcase the protective-order problem. During the summer of 2013, a court finally vacated a longstanding protective order in a priest-sex-abuse case.² The now-public discovery information not only revealed heartbreaking details of the crimes but also revealed that a high-ranking church official attempted to shield church assets from victims’ abuse claims.³

But despite the fact that these orders restrict important speech, courts are split over whether the First Amendment significantly restricts a judge’s power to issue them. Some courts hold that the First Amendment is essentially irrelevant in the protective-order analysis.⁴ Others apply a significant level of First Amendment scrutiny to the same orders.⁵

But this is not the first time courts have been down this path. Thirty years ago, the Supreme Court corrected a similar split in *Seattle Times v. Rhinehart*.⁶

Unfortunately, the opinion was ambiguous and immediately caused confusion in the lower courts.⁷ That initial rift has deepened in

¹ See, e.g., Seymour Moskowitz, *Discovering Discovery: Non-Party Access to Pretrial Information in the Federal Courts 1938-2006*, 78 U. COLO. L. REV. 817, 818, 822 (2007).

² See Annysa Johnson & Ellen Gabler, *Archbishops Struggled with Vatican over Ousting Priests*, MILWAUKEE J. SENTINEL, July 2, 2013, at A1.

³ See *id.*

⁴ See, e.g., *Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1114 (3d Cir. 1986) (holding the Supreme Court “appears to exclude any first amendment analysis from the decision about whether a court should issue a protective order”).

⁵ See, e.g., *In re Requests for Investigation of Attorney E.*, 78 P.3d 300, 310 (Colo. 2003) (holding the First Amendment requires “intermediate” scrutiny of protective orders).

⁶ 467 U.S. 20, 35 (1984).

the past decade, and the Supreme Court recently commented on the meaning of *Seattle Times* when it decided a First Amendment case in a different context.⁸ Simultaneously, the courts have continued expanding the role of so-called “intermediate scrutiny” in First Amendment jurisprudence.⁹ This development has significant implications for pretrial procedure because at least some courts apply a version of intermediate scrutiny to protective orders.

Despite the widening divide on the issue among courts, substantial developments in free speech law, and technological advances that continue to change the face of pretrial discovery practice, academics have been conspicuously quiet. Indeed, in more than twenty years, virtually no significant scholarship has comprehensively explored litigants’ First Amendment right to disseminate discovery information.

This Article seeks to fill that void. Part I of the Article examines the history and current status of the controversy surrounding civil protective orders. Part II explores the development of the relationship between the First Amendment and protective orders, including the first in-depth reading of *Seattle Times* since the Supreme Court’s recent explanation of what the case means. Part III contends that the First Amendment does protect litigant speech, and does so via a form of intermediate scrutiny. Additionally, Part III examines the impact of this conclusion on existing protective-order standards and the balance of power between trial and appellate courts. Part IV evaluates the effect of expanded First Amendment protection on common litigation practices, like discovery sharing and so-called “umbrella” protective orders.

I. THE PROTECTIVE-ORDER CONTROVERSY

In pretrial litigation, absent a protective order, parties may distribute or use information exchanged in discovery for any legal purpose.¹⁰ This information may comprise deposition transcripts, documents (including electronic data), interrogatory responses, and other forms of discovery.¹¹ Often the information is mundane. But in some cases, the information may be interesting or valuable to the public, and in a few cases it may even be sensational—a revelation that a widely used product is deadly or that a government agency is violating the

⁷ See, e.g., *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 6–7 (1st Cir. 1986) (describing *Seattle Times*’ ambiguities and the rift it caused between the circuits).

⁸ See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2666 (2011).

⁹ See, e.g., Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 789, 796 (2007).

¹⁰ See, e.g., *Seattle Times Co.*, 467 U.S. at 35; see also Moskowitz, *supra* note 1, at 825.

¹¹ See, e.g., FED. R. CIV. P. 26, 27, 30, 33, 34.

law.¹² At the same time, releasing the information may threaten the parties' legitimate privacy and property interests. Facts learned through discovery may be especially private (medical records), or may be valuable only because they are secret (trade secrets).¹³

In these cases, assuming the information is legitimately discoverable, parties often seek a protective order under Rule 26(c) to keep the information secret.¹⁴ If "good cause" justifies the order, the rule allows the court to limit the uses of information exchanged in discovery.¹⁵ So, for example, a party and her attorneys might be allowed to use the information only to prepare for the case and not be allowed to share it with third parties.

Courts routinely issue these orders in cases involving mundane and sensational matters alike.¹⁶ In many cases, the parties on both sides of the case simply agree to the order.¹⁷ And even in cases where one side disputes the order, courts eager to streamline discovery and avoid future fights over confidentiality push stipulations and rubber-stamp proposed orders.¹⁸ As a result, much of pretrial discovery takes place beyond public view.

For those who view the courts' function as exclusively or primarily a system to resolve private disputes, this system is apropos.¹⁹ The reality and history of the American civil court system, however, indicate that courts play a substantial public interest role in addition to their role in resolving disputes.²⁰ Indeed, some of the most important public

¹² See, e.g., *In re Halkin*, 598 F.2d 176, 187–88 (D.C. Cir. 1979) (alleging illegal government surveillance of the anti-Vietnam movement).

¹³ Cf., e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 n.15 (1984).

¹⁴ See FED. R. CIV. P. 26(c)(1)(G).

¹⁵ See FED. R. CIV. P. 26(c)(1).

¹⁶ See, e.g., *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (observing that "stipulated 'blanket' protective orders are becoming standard practice in complex cases"). Indeed, the Northern District of California has a standard protective order so that parties may stipulate with ease. U.S. Dist. Court N. Dist. of Cal., *Stipulated Protective Orders*, <http://www.cand.uscourts.gov/stipprotectorder> (last visited Oct. 30, 2013). The court does note, however, that parties need not stipulate. See *id.*

¹⁷ See *United Nuclear Corp.*, 905 F.2d at 1427; see also Moskowitz, *supra* note 1, at 824–25.

¹⁸ See, e.g., Ashley A. Kutz, Note, *Rethinking the "Good Cause" Requirement: A New Federal Approach to Granting Protective Orders Under F.R.C.P. 26(c)*, 42 VAL. U. L. REV. 291, 303 (2007).

¹⁹ See, e.g., Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 470 (1991) (the primary purpose of courts is "to decide cases according to the substantive law" and this purpose should not be supplanted by the "collateral effects" of litigation). But see Richard Zitrin, *The Judicial Function: Justice Between the Parties, or a Broader Public Interest?*, 32 HOFSTRA L. REV. 1565, 1567 (2004) (arguing that courts have a substantial public role in addition to private dispute resolution).

²⁰ But see generally OSCAR G. CHASE ET AL., *CIVIL LITIGATION IN COMPARATIVE CONTEXT* 222–37 (2007) (recognizing that discovery in this country is unique, in many respects, among the world's litigation systems). Many countries have no meaningful pretrial discovery and others have a much more limited discovery mechanism than the United States. See *id.* But our litigation system exists as part of a government that imposes lighter regulatory restraints and

questions facing society have been decided as so-called “private” disputes between litigants.²¹ From ending segregation,²² to providing equality to married gay couples,²³ to policing the sexual assault of children,²⁴ to repudiating dangerous products that put profits ahead of safety,²⁵ the courts play a central role in expressing public values.

Protective orders undermine court transparency.²⁶ Though some dispute this proposition, recent history is replete with examples. The Catholic sex-abuse scandal continues to roil the country. Documents in a sex-abuse case involving the Archdiocese of Milwaukee that had been subject to a protective order were released in summer 2013.²⁷ After some resistance, the Church finally agreed to make the documents public.²⁸ The once-secreted documents reveal the details of decades of child abuse and the involvement of an archbishop in moving church money to avoid paying sex-assault victims. In other cases, documents were released after years of secret settlements with victims. In the meantime, priests victimized more children.²⁹ Information and documents in other cases are presumably still subject to protective orders.

Another example: The Ford/Firestone cases involved hundreds of deaths due to a combination of faulty tires and poor vehicle design. The first cases settled in the early 1990s.³⁰ Protective orders stymied the flow of discovery information to the outside world. The public waited almost

oversight than governments without pretrial discovery. The U.S. court system, including pretrial discovery, plays a unique role in regulating conduct in American society—a role that might not be necessary or effective other countries.

²¹ See, e.g., Moskowitz, *supra* note 1, at 817–18.

²² See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

²³ See *United States v. Windsor*, 133 S. Ct. 2675 (2013) (invalidating the portion of the Defense of Marriage Act that denied equal federal benefits to married gay couples).

²⁴ See, e.g., Moskowitz, *supra* note 1, at 822; see also Walter V. Robinson, *Hundreds Now Claim Priest Abuse, Lawyers Report Flood of Alleged New Victims*, BOSTON GLOBE, Feb. 24, 2002, at A1.

²⁵ See, e.g., ADAM L. PENENBERG, TRAGIC INDIFFERENCE: ONE MAN’S BATTLE WITH THE AUTO INDUSTRY OVER THE DANGERS OF SUVs 190–92 (2003) (describing Firestone’s efforts to seal depositions involving dangerous tires).

²⁶ But see Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 476 (1991) (“A well-drafted protective order that limits access to and the use and dissemination of . . . information is the most effective means of preserving an individual’s privacy or the commercial value of the data while making it available for legitimate litigation purposes.”).

²⁷ See Johnson & Gabler, *supra* note 2 (describing how a “broad protective order” kept information about pedophile priests and information about an archbishop’s attempts to shield church money from the public); Annysa Johnson, *Police Can Read Ex-Priest’s File: Victims Seek Release of Documents in Archdiocese Bankruptcy Case*, MILWAUKEE J. SENTINEL, Jan. 18, 2013, at B3.

²⁸ See Johnson & Gabler, *supra* note 2.

²⁹ See, e.g., Moskowitz, *supra* note 1, at 822.

³⁰ See, e.g., PENENBERG, *supra* note 25 (describing Firestone’s efforts to seal depositions involving dangerous tires); see also Moskowitz, *supra* note 1, at 822 n.23.

a decade to learn of the danger—the media finally published the once-secreted litigation information.³¹ In the interim, people lost their lives or were seriously injured.

The protective-order story began long ago. Based on a broad scope of discovery that many perceived as a threat to privacy,³² some defendants began to aggressively seek protective orders during the 1980s to protect sensitive or proprietary information.³³ This move occurred in tandem with what many described as a litigation boom, and with that, an attorney boom.³⁴

The 1980s were also the era that gave rise to the storied Rambo Litigator:³⁵ the attorney who would hold back nothing, savagely attacking adversaries in all phases of litigation to extract the best result for clients (and high hourly fees).³⁶ According to this view, discovery was another battlefield for the overzealous, allowing litigants to extract favorable settlements by harassing adversaries into submission.³⁷ The favored tool of harassment: the overbroad discovery request.

On the other side of the coin, the 1980s were the era that followed the Ford Pinto debacle.³⁸ Attorneys representing consumers and dangerous product victims began to complain that large companies were using protective orders as shields to suppress legitimate claims.³⁹ According to this version of the story, Rambo was the corporate-products-liability defense attorney, willing to subvert public safety in favor of a cheap settlement or isolating a plaintiff with a good claim from other similar victims.⁴⁰

³¹ See, e.g., Moskowitz, *supra* note 1, at 822 n.23.

³² See 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2002 (3d ed. 2013) (describing the development of the civil discovery rules).

³³ See, e.g., Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 6 (1983) (forecasting that the “tide may be turning against intrusive[]” discovery after the 1980 amendments to the rules).

³⁴ See *id.* at 1 (arguing that the litigation boom “threaten[ed] to undermine the central goal of the Federal Rules of Civil Procedure,” the resolution of disputes).

³⁵ Cf., e.g., Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPP. L. REV. 637 (1990).

³⁶ See Maurice Rosenberg & Warren R. King, *Curbing Discovery Abuse in Civil Litigation: Enough Is Enough*, 1981 BYU L. REV. 579, 582 (1981).

³⁷ See Hon. Milton Pollack, *Discovery—Its Abuse and Correction*, 80 F.R.D. 219, 222 (1979) (“[M]isdirected and unbridled discovery can become an engine of harassment, impeding the administration of justice and inflating tremendously and unfairly the costs of litigation. It tends to delay adjudication unduly, to coerce unfair and uncalled for involuntary settlements and to make of the legal tools a cynical mockery of justice.”).

³⁸ See, e.g., Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1015–16 (1991).

³⁹ FRANCIS HARE, JR., JAMES L. GILBERT & WILLIAM H. REMINE, CONFIDENTIALITY ORDERS 1–6 (1988); see also Marcus, *supra* note 19, at 463–64; cf. FRANCIS H. HARE, JR., JAMES L. GILBERT & STUART A. OLLANIK, FULL DISCLOSURE: COMBATING STONEWALLING AND OTHER DISCOVERY ABUSES 157–62 (1995).

⁴⁰ See, e.g., HARE, GILBERT & REMINE, *supra* note 39, at 60–64.

In reality, a few things are probably true about the environment. Both sides had their Rambos. Discovery, as a result of both so-called Rambo tactics and many other factors, was consuming a greater share of client resources and court dockets.⁴¹ And protective orders undoubtedly did begin to consume a greater share of litigation resources.⁴²

The response to this development was multi-faceted. Plaintiffs' attorneys and public interest advocates litigated aggressively against protective orders, and legislatures stepped into the fray with litigation-transparency legislation.⁴³ The litigation-based resistance to protective orders proceeded along three primary fronts. The first, a constitutional attack based on the argument that litigants had a First Amendment right to disseminate discovery materials, is the subject of the remainder of this Article and discussed in depth in Part III, *infra*.⁴⁴ In short, the First Amendment argument against protective orders had some early success but fizzled after the Supreme Court's seminal decision in *Seattle Times v. Rhinehart*.⁴⁵

The second strand of resistance was based on the contention that pretrial discovery materials were subject to a common law right of access, or that they were open to public view because the Rules of Civil Procedure required litigants to file them. This argument largely dissipated when Rule 5 was amended to specifically forbid the filing of discovery materials without leave of court.⁴⁶

The third strand of resistance to protective orders has occurred within Rule 26(c)'s good-cause framework. Parties resisting protective orders have aggressively litigated to give this standard at least some teeth. The results have varied. In some jurisdictions, protective orders are issued almost as a matter of course and on almost no evidentiary showing. In other jurisdictions, the good-cause showing is more onerous, requiring a party seeking a protective order to show a serious or clearly defined injury.⁴⁷ Much of the protective-order debate in this arena has focused on so-called "sharing" protective orders.⁴⁸ These

⁴¹ See, e.g., Jordan M. Singer, *Proportionality's Cultural Foundation*, 52 SANTA CLARA L. REV. 145, 147-48 (2012).

⁴² See Marcus, *supra* note 19, at 463 n.38 ("District courts are today being bombarded by an ever increasing number of requests for protective orders." (quoting *Ericson v. Ford Motor Co.*, 107 F.R.D. 92, 94 (E.D. Ark. 1985))).

⁴³ See generally Mary Elizabeth Keaney, Note, *Don't Steal My Sunshine: Deconstructing the Flawed Presumption of Privacy for Unfiled Documents Exchanged During Discovery*, 62 HASTINGS L.J. 795, 814-20 (2011).

⁴⁴ See, e.g., *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979).

⁴⁵ 467 U.S. 20 (1984). The Court's most-recent statements about the meaning of *Seattle Times* raise the possibility of a renewed role for the First Amendment in protective-order litigation. See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2666 (2011).

⁴⁶ See Keaney, *supra* note 43, at 810-11.

⁴⁷ See, e.g., *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995).

⁴⁸ See, e.g., *Idar v. Cooper Tire & Rubber Co.*, No. C-10-217, 2011 WL 688871, at *1-*4 (S.D. Tex. Feb. 17, 2011) (affirming sharing provision in protective order); *Long v. TRW*

orders allow litigants to share discovery information from one case with similar litigants in other cases.⁴⁹ Though these sharing provisions seem in line with the movement to make litigation more efficient and consistent with other litigation consolidation mechanisms (like Multi-District Litigation),⁵⁰ they have been met with a mixed reception. Some jurisdictions have held that it is an abuse of discretion to refuse a sharing protective order.⁵¹ Other jurisdictions have held that it is an abuse of discretion to enter one.⁵²

Legislatures also took up the protective-order fight. After hope for broad constitutional limitations on protective orders was dashed in *Seattle Times*, legislatures began to consider anti-secrecy “sunshine” litigation at the state and federal level.⁵³ These statutes would make discovery presumptively public (or public upon motion) in cases of public concern. The efforts succeeded in a few states⁵⁴ and failed in others. Still others have never formally considered the issue. At the federal level, the Sunshine in Litigation Act has been introduced many times but has never passed.⁵⁵ In sum, sunshine statutes have not had substantial momentum at the state or federal level.

The contours of the academic debate about protective orders have largely traced the development of the law. In the early 1980s, commentary focused on the First Amendment implications of protective orders.⁵⁶ Many commentators argued in favor of a broad right to disseminate discovery, while some advocated against it out of administrative and efficiency concerns.⁵⁷ After *Seattle Times*, the commentary largely focused on the common law and rule-based right of access, along with some discussion of sunshine legislation.⁵⁸ Again, opinions were split and the debate was largely quieted as the legislation passed or failed around the country. In recent years, continued efforts to

Vehicle Safety Sys., Inc., No. CV-09-2209 (PHX) (DGC), 2010 WL 1740831, at *1–*2 (D. Ariz. Apr. 29, 2010) (rejecting sharing provision).

⁴⁹ See *Garcia v. Peeples*, 734 S.W.2d 343, 346–47 (Tex. 1987).

⁵⁰ See *Marcus*, *supra* note 19, at 493–94.

⁵¹ See *Peeples*, 734 S.W.2d at 346–47.

⁵² See *Wal-Mart Stores E., L.P. v. Endicott*, 81 So. 3d 486 (Fla. Dist. Ct. App. 2011).

⁵³ See, e.g., *Miller*, *supra* note 26, at 441–45.

⁵⁴ See, e.g., Lloyd Doggett & Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643, 646 (1990) (discussing the adoption of Texas Rule of Civil Procedure 76(a)).

⁵⁵ See *Keaney*, *supra* note 43, at 814–20.

⁵⁶ See, e.g., *Marcus*, *supra* note 33, at 1–5.

⁵⁷ See, e.g., *id.* at 5 n.25; see also, e.g., *Miller*, *supra* note 26, at 480–81 (discounting the likelihood of public health and safety information being kept from the public because such claims are based on “anecdotal” evidence); cf. Richard P. Campbell, *The Protective Order in Products Liability Litigation: Safeguard or Misnomer?*, 31 B.C. L. REV. 771, 802 (1990) (“[T]he function of the judicial system is to resolve private disputes—not to generate information for public consumption.”).

⁵⁸ See, e.g., *Campbell*, *supra* note 57, at 772–74.

pass the federal Sunshine in Litigation Act have drawn renewed attention.

Undoubtedly, both sides of the debate have strayed into hyperbole at times. On the pro-protective-order side, some commentators have contended that no empirical evidence indicates that protective orders have concealed matters of public concern or safety.⁵⁹ In fairness, these commentators submitted their opinions before *Ford/Firestone* or the sex-abuse scandals.⁶⁰ These cases and others have provided at least some evidence that information important to the public discussion of these issues was, for a time, kept secret by court order.

And in over twenty years, virtually no articles have delved deeply into the First Amendment implications of protective orders. But the last twenty years have not been quiet. Questions that were not resolved by *Seattle Times* have caused continued conflict and uncertainty in the lower courts.⁶¹ And the Supreme Court has spoken recently about the meaning of *Seattle Times* and the role of the First Amendment in protective-order litigation.⁶² All the while, the academy has been quiet. This Article examines these developments and their impact on some of the most important litigation-secrecy questions facing courts and litigants.

II. THE RELATIONSHIP BETWEEN PROTECTIVE ORDERS AND THE FIRST AMENDMENT

The story of protective orders and the First Amendment began about sixty years ago and had its high-water mark in the early 1980s when the Supreme Court decided *Seattle Times*. That case was supposed to resolve a court split on the issue but has, instead, engendered more confusion.

A. *The First Amendment and Protective Orders Before Seattle Times*

Before *Seattle Times*, the First Amendment landscape surrounding protective orders was fractured. Some courts had minimized the First

⁵⁹ See, e.g., Miller, *supra* note 26, at 480–81.

⁶⁰ See, e.g., *id.*; cf. *Firestone Tire Recall: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 106th Cong. 89–103 (2000) (describing the timeline between first Ford/Firestone lawsuits and revelations about dangerous tires).

⁶¹ Compare, e.g., *In re Requests for Investigation of Attorney E.*, 78 P.3d 300, 310 (Colo. 2003) (reading *Seattle Times* to require “intermediate” First Amendment scrutiny of protective orders), with *Reyes v. Freebery*, 192 F. App’x 120, 124 (3d Cir. 2006) (rejecting a significant role for the First Amendment in assessing protective orders).

⁶² *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2666 (2011); *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

Amendment's role in protective-order litigation.⁶³ Other courts had struck down those same protective orders on First Amendment grounds.⁶⁴ Still others struck a middle ground, holding that litigants and attorneys had at least some First Amendment right, albeit reduced, to disseminate pretrial discovery.⁶⁵

In the early 1960s, the Second Circuit held that the First Amendment did not protect individual litigants' right to disseminate pretrial discovery materials.⁶⁶ This was the status quo for much of the following two decades.⁶⁷ But by 1979, the D.C. Circuit staked out a position that put the First Amendment in direct conflict with common protective-order practices.⁶⁸ It did so in *In re Halkin*, a case involving allegations that the CIA and NSA were illegally monitoring anti-war activists opposing the Vietnam War.⁶⁹ The court struck down a protective order on First Amendment grounds, applying strict scrutiny.

Two years later, the First Circuit took a comparable tack when deciding a similar issue and held that Rule 26(c) protective orders implicated the First Amendment.⁷⁰ In *San Juan Star*, a case involving allegations of a police-orchestrated assassination of political dissidents, the court applied a watered-down version of strict scrutiny.⁷¹ Based on this approach, the First Circuit sustained the trial court's pretrial protective order in the face of a media circus that threatened the defendants' right to a fair trial.

Thus, by the early 1980s, the First Amendment played a larger, perhaps even starring, role in the protective-order debate.⁷² Lower courts struggled to understand the implications.⁷³ And commentators weighed in on both sides of the issue—some heralding the pro-First

⁶³ See *Int'l Prods. Corp. v. Koons*, 325 F.2d 403, 407–08 (2d Cir. 1963).

⁶⁴ See, e.g., *In re Halkin*, 598 F.2d 176, 197 (D.C. Cir. 1979) (“Judged by the standards imposed by . . . the First Amendment, the district court's [protective] order is indisputably deficient.”).

⁶⁵ See, e.g., *In re San Juan Star Co.*, 662 F.2d 108, 115 (1st Cir. 1981) (holding that dissemination of pretrial discovery materials deserves some, but not full, First Amendment protection).

⁶⁶ *Koons*, 325 F.2d at 407. The district court relied on Fed. R. Civ. P. 30(b), one of the predecessors to Rule 26(c). See *id.*

⁶⁷ See, e.g., Robert C. Post, *The Management of Speech: Discretion and Rights*, 1984 SUP. CT. REV. 169, 172 (1984) (noting the “comfortable” system of trial court discretion that existed before First Amendment challenges came to the fore).

⁶⁸ See *In re Halkin*, 598 F.2d at 197.

⁶⁹ See *id.* at 179–80.

⁷⁰ See *In re San Juan Star*, 662 F.2d at 115.

⁷¹ See *id.* at 116–17.

⁷² See, e.g., Susan M. Angele, Note, *Rule 26(c) Protective Orders and the First Amendment*, 80 COLUM. L. REV. 1645 (1980); cf., e.g., Michael Dore, *Confidentiality Orders—The Proper Role of the Courts in Providing Confidential Treatment for Information Disclosed Through the Pre-Trial Discovery Process*, 14 NEW ENG. L. REV. 1 (1978).

⁷³ See, e.g., *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 912 (E.D. Pa. 1981).

Amendment decisions and others arguing persuasively that the developments had the potential to disrupt civil litigation and undermine Rule 1 concerns.⁷⁴ Just a few years after the row began, the Supreme Court would locate an unlikely vehicle to resolve the tension: a state-court case involving unforgettable facts and a holding at odds with both *In re Halkin* and *San Juan Star*.⁷⁵

B. *The Supreme Court Announces, and Muddles, a Limited Form of Protection*

Faced with an increasingly complex and contentious discovery atmosphere, the Supreme Court finally weighed in on litigants' First Amendment rights in the discovery context.⁷⁶ In *Seattle Times v. Rhinehart*, the Court held that a trial court's protective order did not violate the First Amendment.⁷⁷ The order prevented several litigant-newspapers from publishing discovery materials they obtained during litigation.⁷⁸ *Seattle Times* is an unusual case and arose from unusual facts.⁷⁹ Perhaps because of its oddity, mere inadvertence, or even judicial subterfuge, the case's holding was muddled, causing confusion for lower courts.⁸⁰

1. Competing Interests

The case involved competing First Amendment interests—the speech interests of a defamation-defendant newspaper and the religious interests of a defamation-plaintiff.⁸¹ That plaintiff, Keith Milton Rhinehart, was the spiritual leader of the Aquarian Foundation during

⁷⁴ Compare James P. Moon, Comment, *In re San Juan Star: Discovery and the First Amendment*, 34 BAYLOR L. REV. 229 (1982), with Marcus, *supra* note 33, at 427.

⁷⁵ See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984).

⁷⁶ See Marcus, *supra* note 19, at 463–64 (noting a more contentious atmosphere with respect to confidentiality issues and an increase in protective order fights in products liability cases during the 1980s).

⁷⁷ *Seattle Times Co.*, 467 U.S. at 37.

⁷⁸ *Id.* at 27.

⁷⁹ See *id.* at 22–23; cf. Post, *supra* note 67, at 175 (“*Rhinehart* was an eccentric case.”).

⁸⁰ Compare *Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1114 (3d Cir. 1986) (holding that *Seattle Times* “appears to exclude any first amendment analysis from the decision about whether a court should issue a protective order”), and *Reyes v. Freebery*, 192 F. App'x 120, 124 n.3 (3d Cir. 2006) (reiterating that First Amendment concerns are “not properly considered” when reviewing protective orders), with *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 6–7 (1st Cir. 1986) (holding that *Seattle Times* did not mean “that the first amendment was not implicated at all when a protective order is issued”), and *U.S. ex rel. Franklin v. Parke-Davis*, 210 F.R.D. 257, 260 (D. Mass. 2002) (noting that “*Seattle Times* does not eliminate the first amendment as a factor in the analysis of the proper scope of protective orders.”).

⁸¹ See *Seattle Times Co.*, 467 U.S. at 37–38 (Brennan, J., concurring).

the 1970s.⁸² The Aquarian Foundation (“Foundation”) was a religious order centered in Washington State. Its members believed in communication with the dead through a medium, primarily Rhinehart.⁸³ The Foundation and Rhinehart must have been particularly troubled when the Seattle Times and the Walla Walla Union-Bulletin began publishing a series of unfavorable articles about both of them.⁸⁴ The articles appeared throughout the ‘70s and reported on a wide range of unflattering conduct.⁸⁵

The newspapers recounted séances where “people paid [Rhinehart] to put them in touch with deceased relatives” and also reported on the alleged sale of magical stones expelled from Rhinehart’s body.⁸⁶ Making matters worse for Rhinehart, one of the papers mentioned his vacated conviction for sodomy.⁸⁷ A particularly sensational scene put on by the Aquarian Foundation at the Walla Walla state prison drew the papers’ repeated attention.⁸⁸ According to several articles, Rhinehart and the Aquarian Foundation threw a bash for 1100 inmates at the prison and “gave away between \$35,000 and \$50,000 in cash and prizes.”⁸⁹ The party included a “choir” or “chorus line” of girls who “shed their gowns and bikinis and sang.”⁹⁰

But when the newspapers alleged that Rhinehart was connected to “The Incredible Hulk” star Lou Ferrigno, Rhinehart had had enough.⁹¹ He sued both papers for defamation and invasion of privacy.⁹² Several of the chorus girls joined.⁹³ The newspapers answered and began extensive discovery aimed at Rhinehart and the Foundation.⁹⁴ The discovery fight that followed gave rise to a collision between competing First Amendment interests on all sides of the litigation.⁹⁵

In its complaint, the Foundation alleged that all of the negative press caused a plunge in its membership and donations.⁹⁶ In response, the newspapers sought information about the Foundation’s membership

⁸² See *id.* at 22 (majority opinion).

⁸³ See *id.*

⁸⁴ See *id.*

⁸⁵ See *id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See *id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 22–23.

⁹¹ See *id.* at 23.

⁹² *Id.*

⁹³ *Id.* Rhinehart, personally and on behalf of the Foundation, brought the action in Washington Superior Court. *Id.* Washington’s civil rules governing discovery closely resembled the federal rules in effect at the time. See *id.* at 29–30 nn.14–15.

⁹⁴ See *id.* at 24.

⁹⁵ See *id.* at 30–36.

⁹⁶ *Id.* at 23.

and donation history.⁹⁷ The newspapers' theory for seeking the information made sense: If Rhinehart claimed that negative press caused a decline in membership and donations, the newspapers were entitled to see records of the Foundation's financial condition.⁹⁸

Rhinehart and the other plaintiffs refused to produce the membership and financial information, and the newspapers moved to compel. The outcome of this motion had significant implications for Rhinehart and the Foundation, in large measure because of the newspapers' openly stated intention to publish information they obtained in discovery.

In response to the newspapers' motion to compel, Rhinehart and the Foundation moved for a protective order under Washington State Civil Rule 26(c) to protect the Foundation's finances and its membership from becoming front-page news.⁹⁹ The trial court granted the motion to compel, in part, and required the Foundation to turn over five years of donation information and "enough membership information to substantiate any claims of diminished membership."¹⁰⁰ To protect this sensitive information, the trial court ultimately granted a protective order.¹⁰¹

Its terms were simple but strict: The newspapers were only allowed to use the member and donation information to "prepare and try the case."¹⁰² The order also mandated that the information "may not be published by any of the defendants or made available to any news media for publication or dissemination."¹⁰³ So the newspapers could use the member and donation lists for litigation purposes but were forbidden from publishing the content.¹⁰⁴

The newspapers promptly appealed.¹⁰⁵ The Supreme Court of Washington affirmed, holding that the protective order did not violate the First Amendment.¹⁰⁶ The Washington high court recognized that its

⁹⁷ *Id.* at 24.

⁹⁸ *See id.* at 24–25.

⁹⁹ *See id.* at 25–26. State Rule 26(c) was substantially similar to the version of Federal Rule 26(c) in effect at the time. *See id.* at 26 n.7, 29.

¹⁰⁰ *Id.* at 25.

¹⁰¹ *Id.* at 27. Initially, the trial court denied the Foundation's motion for protective order and, in effect, allowed the newspapers to publish the member and donation lists. *See id.* at 25–27. But the Foundation and Rhinehart immediately re-filed their motion and attached additional evidence. *See id.* The additional evidence apparently swayed the trial court into reconsidering. *See id.* at 27.

¹⁰² *Id.* at 27 n.8.

¹⁰³ *Id.* The order specifically provided that it had "no application except to information gained by the defendants through the use of the discovery processes." *Id.* Thus, the protective order was limited to information the newspapers obtained solely through the litigation, not to independently sourced facts. *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 27. Rhinehart and the Foundation also appealed the court's order. *Id.*

¹⁰⁶ *Id.* at 28.

holding conflicted with two previous U.S. Courts of Appeals decisions—*In re Halkin* and *San Juan Star*.¹⁰⁷ To resolve this conflict, the Supreme Court granted certiorari.¹⁰⁸

2. The Supreme Court Steps into the Quagmire

The tension and stakes surrounding *Seattle Times* were high. On the one hand, the Court found court orders restraining speech to be particularly loathsome. Protective orders seemed, at first blush, to be similar to prior restraints the Court had previously struck down. On the other hand, the discovery system depended on the liberal exchange of information, an exchange made much more efficient by protective orders in some circumstances. Protective orders allowed wide latitude in pretrial discovery while simultaneously protecting litigants.

And as noted above, *Seattle Times* was decided during an outcry against a perceived litigation boom. Thus, it comes as no surprise that the unanimous opinion was authored by Justice Lewis Powell. Justice Powell was a champion of stricter discovery management. He had previously dissented from amendments to the discovery rules because they did not go far enough to quell what he viewed as unwieldy and unjustified discovery.¹⁰⁹ Against this backdrop, Justice Powell took an administrator's posture as he attempted to unravel the First Amendment from the complex issues posed by modern discovery.¹¹⁰

Seattle Times turned out to be an exercise in pragmatism. The Court appropriately expressed concern for the privacy of those engaged in litigation. Noting that “the Rules [of discovery] do not differentiate between information that is private or intimate and that to which no privacy interests attach,” the Court observed that the discovery system was subject to abuse.¹¹¹

As opposed to other sources of information, litigants obtained discovery information in a context where courts routinely compel its disclosure under threat of contempt.¹¹² In this unique context, the Court declined to apply strict scrutiny to the *Seattle Times* protective order. According to the Court, information obtained solely through discovery is a “matter of legislative grace” and the newspapers obtained

¹⁰⁷ See *id.* at 28–29; see also *In re San Juan Star Co.*, 662 F.2d 108, 115 (1st Cir. 1981); *In re Halkin*, 598 F.2d 176, 197 (D.C. Cir. 1979).

¹⁰⁸ *Seattle Times Co.*, 467 U.S. at 29.

¹⁰⁹ See *id.* at 34–35 (noting the real potential for discovery abuse because of the “liberality” of modern pretrial discovery).

¹¹⁰ Cf. Post, *supra* note 67, at 183–85.

¹¹¹ *Seattle Times Co.*, 467 U.S. at 30, 34–35.

¹¹² *Id.*

information about Rhinehart and the Foundation “only by virtue of the trial court’s discovery processes.”¹¹³

The Court went on to note that discovery was not a traditionally public affair. According to Justice Powell, modern discovery, in general, is conducted in private and was private at common law.¹¹⁴ Based on the unique context, and without much elaboration, the Court went on to hold that protective orders are not prior restraints—avoiding putting them in a category of government restrictions almost certainly doomed by the First Amendment.

Still, the Court hesitated to strip all First Amendment protection. Justice Powell recognized that information exchanged in discovery would “rarely, if ever, fall within the classes of unprotected speech identified by . . . [the] Court.”¹¹⁵ And the public had a legitimate interest in learning more about Rhinehart and the other plaintiffs.¹¹⁶ Perhaps searching for a middle ground, the Court evoked what has become known as the “intermediate” scrutiny test from *Procunier v. Martinez*.

3. Evoking Intermediate Scrutiny

Procunier was another speech case involving a special context—prisons. The California Department of Prisons implemented a mail censorship scheme to review and restrict inmate mail. Noting that “First Amendment guarantees must be applied in light of the special characteristics of the . . . environment,”¹¹⁷ the Court identified a reduced form of First Amendment scrutiny, inconsistently referred to as “heightened” or “intermediate” scrutiny:

[I]t is necessary to consider whether the “practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression” and whether “the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved.”¹¹⁸

Despite quoting the *Procunier* test, the Court’s First Amendment analysis in *Seattle Times* is ambiguous.¹¹⁹ After citing *Procunier* and

¹¹³ *Id.* at 32.

¹¹⁴ *Id.* at 33.

¹¹⁵ *Id.* at 31. But the Court did note that there is no First Amendment right of access to pretrial discovery materials, a distinct question from whether a First Amendment right to disseminate discovery materials exists.

¹¹⁶ *Id.*

¹¹⁷ *Procunier v. Martinez*, 416 U.S. 396, 409–10 (1974) (alteration in original) (internal quotation marks omitted), *overruled by* *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

¹¹⁸ *Seattle Times Co.*, 467 U.S. at 32 (second and third alterations in original).

¹¹⁹ “As we have noted, the district court identified an ambiguity in the *Seattle Times*

pointing to the uniqueness of the discovery context to minimize First Amendment scrutiny, the Court enigmatically applied, or perhaps did not apply, the test. First, the Court identified a substantial government interest supporting the entry of protective orders—preventing discovery abuse. In particular, the Court viewed the purpose of civil discovery as a trial preparation tool, not an information-gathering technique.¹²⁰

After identifying the substantial interest supporting protective orders, the Court's analysis becomes muddled, leading to several conflicting interpretations. The Court never discussed less restrictive alternatives to the protective order at issue in *Seattle Times*. Instead, after a cursory examination endorsing trial court discretion and the Washington Supreme Court's "good-cause" determination under Rule 26(c), the Court wrote:

We therefore hold that where, as in this case, a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.¹²¹

In an apparent response to the ambiguities in the majority opinion, Justice Brennan filed a concurrence.¹²² According to Brennan, the majority "recognize[d] that pretrial protective orders . . . are subject to scrutiny under the First Amendment."¹²³ But the concurrence went further than simply acknowledging the existence of some protection: "the Court acknowledges, before approving such protective orders, it is necessary" to apply the *Procurier* test mentioned in the majority.¹²⁴ After weighing in on the confusion in the majority opinion, Brennan went on to note the countervailing religious and privacy interests in the case—the newspapers sought highly sensitive religious information in discovery.¹²⁵ Because of the unique First Amendment interests in tension, Brennan tolerated the trial court's protective order.¹²⁶

The majority never mentioned the concurrence, leaving more questions than answers. Does a trial court's good-cause finding satisfy the First Amendment? Is the First Amendment a part of the analysis at all in light of the opinion's final sentence? Where does the *Procurier* test

opinion: it was unclear whether *Seattle Times* mandated a Rule 26(c) analysis without regard to the first amendment, or whether it required an analysis that included a strict least restrictive means test." *Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1118 (3d Cir. 1986).

¹²⁰ *Seattle Times Co.*, 467 U.S. at 37.

¹²¹ *Id.*

¹²² *Id.* at 37–38 (Brennan, J., concurring). Justice Brennan was joined in the concurrence by Justice Marshall. *Id.*

¹²³ *Id.* at 37.

¹²⁴ *Id.* at 37–38 (internal quotation mark omitted).

¹²⁵ *Id.* at 38.

¹²⁶ *Id.* at 37–38.

fit in to the framework? Did the Court scrutinize the general practice of issuing protective orders or the specific protective order at issue in the case?

4. Conflicting Interpretations

It is possible to read *Seattle Times* to mean many different things. But out of these possible interpretations, three have emerged as the most plausible and popular. The first holds that the First Amendment has no place in the protective-order discussion;¹²⁷ the second applies First Amendment scrutiny to Rule 26(c) but forbids significant scrutiny of individual protective orders;¹²⁸ the third applies intermediate scrutiny to individual protective orders.¹²⁹

About two years after *Seattle Times* was decided, the Third Circuit misread the case as forbidding consideration of the First Amendment in the protective-order context.¹³⁰ In *Cipollone*, a tobacco products liability case, the court held that *Seattle Times* removed First Amendment concerns from the protective-order context.¹³¹ Although the circuit court did acknowledge the ambiguity in the Supreme Court's opinion, it held that "*Seattle Times* prohibits a court considering a protective order from concerning itself with first amendment considerations," characterizing the Supreme Court's invocation of *Procurier* as "dictum."¹³² Other courts applied a similar approach.¹³³

Another way to read *Seattle Times* is that the Court applied heightened scrutiny to Rule 26(c) but declined to scrutinize the trial court's specific protective order. According to this reading, the Court

¹²⁷ See, e.g., *Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1114 (3d Cir. 1986) ("Despite the Supreme Court's apparent endorsement in the above passage of a least restrictive means analysis, its *holding*" requires only a good cause analysis.).

¹²⁸ See, e.g., *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 7 n.2 (1st Cir. 1986) (reading *Seattle Times* to apply "heightened" scrutiny to the practice of issuing protective orders but allowing for a more flexible inquiry with respect to particular protective orders).

¹²⁹ See, e.g., *In re Requests for Investigation of Attorney E.*, 78 P.3d 300, 310 (Colo. 2003) (applying *Procurier* intermediate scrutiny test to issuance of an individual protective order).

¹³⁰ *Cipollone*, 785 F.2d at 1118.

¹³¹ See *id.* at 1110–11, 1119.

¹³² *Id.* at 1119.

¹³³ See, e.g., *Reyes v. Freebery*, 192 F. App'x 120, 124 (3d Cir. 2006); *cf.*, e.g., *United States v. Bulger*, 283 F.R.D. 46, 51 (D. Mass. 2012) (citing *Cipollone v. Liggett* to support the proposition that in criminal cases, like civil, the First Amendment analysis is confined to a determination of good cause); *cf.*, see also *Cipollone*, 785 F.2d at 1119; *Worrell Newspapers of Ind., Inc. v. Westhafer*, 739 F.2d 1219, 1223–24 n.4 (7th Cir. 1984) (finding, in light of *Seattle Times*, that the court need only undertake a Rule 26(c) good cause analysis without consideration of First Amendment); *Tavoulaareas v. Wash. Post Co.*, 737 F.2d 1170, 1172–73 (D.C. Cir. 1984) (en banc) (same); *In re Agent Orange Prod. Liab. Litig.*, 104 F.R.D. 559, 566 (E.D.N.Y. 1985).

satisfied itself that Rule 26(c)¹³⁴ does not offend the First Amendment, under *Procurier* or some other test. Courts that engage in this interpretation of the case typically hold that the First Amendment plays some role, but that it is subsumed, in large part, by Rule 26(c)'s good-cause analysis.¹³⁵

The First Circuit embraced this reading of *Seattle Times*.¹³⁶ In *Anderson v. Cryovac, Inc.*, the court rejected the Third Circuit's First Amendment-less interpretation of *Seattle Times*, creating a circuit split that causes confusion to this day. In *Anderson*, the case that was the real-world basis of the popular book and Hollywood film *A Civil Action*, several residents of Woburn, Massachusetts alleged that Cryovac, a food manufacturer, poisoned the town's water supply.¹³⁷

On appeal, the First Circuit held that *Seattle Times* did not remove the First Amendment from the protective-order analysis. Instead, the court observed that the Supreme Court applied *Procurier* scrutiny to the *practice* of issuing protective orders.¹³⁸ With respect to the specific protective order at issue in *Seattle Times*, the First Circuit noted that "[t]he Supreme Court did not hold that the first amendment was not implicated at all when a protective order is issued. It held that the first amendment rights were implicated 'to a far lesser extent than would restraints on dissemination of information in a different context.'"¹³⁹

Another interpretation of *Seattle Times* holds that the case requires application of the *Procurier* intermediate scrutiny test, or something like it, to individual protective orders. For instance, the Colorado Supreme Court, applying an analogue of Rule 26(c) from the attorney-discipline context, held that the First Amendment requires just such an analysis.¹⁴⁰

In *In re Requests for Investigation of Attorney E.*, the Colorado attorney discipline commission was investigating an attorney for misconduct.¹⁴¹ The attorney allegedly made improper statements

¹³⁴ Because *Seattle Times* involved a Washington state court rule, it was not the best vehicle to assess the constitutionality of Federal Rule of Civil Procedure 26(c). Although the text of the Washington rule was substantially similar to its federal counterpart, any comment on the federal version was arguably dicta. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 26 n.7 (1984).

¹³⁵ See, e.g., *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 7 (1st Cir. 1986).

¹³⁶ See *id.*

¹³⁷ See *id.* at 2-3; Jerome P. Facher, *The View from the Bottomless Pit: Truth, Myth, and Irony in A Civil Action*, 23 SEATTLE U. L. REV. 243, 243-44 (1999) ("No one could have foreseen that there would be a book, *A Civil Action*, about the litigation, a movie of the same title, numerous television documentaries about the case, a textbook about the court materials, and widespread academic interest in using *A Civil Action* and the *Anderson* case as a tool for teaching civil procedure, or as the basis for a new law school course.").

¹³⁸ See *Cryovac, Inc.*, 805 F.2d at 7 n.2.

¹³⁹ *Id.* at 7 (quoting *Seattle Times Co.*, 467 U.S. at 34).

¹⁴⁰ See *In re Requests for Investigation of Attorney E.*, 78 P.3d 300, 310 (Colo. 2003).

¹⁴¹ *Id.* at 302-03.

against two sitting judges.¹⁴² As part of the investigation, the commission subpoenaed FBI records from a criminal investigation of the two judges.¹⁴³ Pursuant to Colorado attorney discipline rules, the commission provided the records to the attorney under investigation in the discipline matter.¹⁴⁴ He immediately distributed them to the public by filing them in various courts.¹⁴⁵ In response, the disciplinary judge issued a protective order, finding good cause under a protective-order rule that governed the attorney discipline process.¹⁴⁶

The commission and the attorney sought review of the order in the Supreme Court of Colorado.¹⁴⁷ The court found *Seattle Times* to be directly on point, analogizing the protective-order provision in the disciplinary rules to Rule 26(c).¹⁴⁸ The Colorado court accepted the disciplinary judge's good-cause finding.¹⁴⁹ This left the court to consider whether the order violated the First Amendment.

The Colorado high court acknowledged the existence of a First Amendment right to disseminate discovery materials, citing *Seattle Times* for the proposition that discovery material "would rarely fall within the classes of unprotected speech."¹⁵⁰ But the court went even further, reading *Seattle Times* to apply intermediate scrutiny (via *Procunier*) to individual protective orders, not just Rule 26(c) in general.¹⁵¹

According to the court, the *Seattle Times* Court "announced a two-part balancing test that weighs the free speech right of litigants against the governmental interest of prohibiting the dissemination of discovery material."¹⁵² The case undoubtedly involved matters of serious public interest—the criminal investigation of two sitting judges—and the court acknowledged that the protective order at issue should be "no greater than necessary and essential to the protection of the particular

¹⁴² See *id.* at 310.

¹⁴³ See *id.* at 303.

¹⁴⁴ *Id.*

¹⁴⁵ See *id.* at 303.

¹⁴⁶ *Id.* at 308–09. Colorado Civil Rule 251.31(e) provides that a disciplinary judge may "upon application of any person and for good cause shown, issue a protective order" to protect the interests or complainants, witnesses or third parties. COLO. R. CIV. P. 251.31(e). While some of the language of the rule varies from FED. R. CIV. P. 26(c), its core requirement—"good cause"—is identical to the federal counterpart. The court, appropriately, treated precedent interpreting the federal rule as instructive in the disciplinary context. See *In re Requests for Investigation of Attorney E.*, 78 P.3d at 307.

¹⁴⁷ See *In re Requests for Investigation of Attorney E.*, 78 P.3d at 304–05.

¹⁴⁸ See *supra* note 146 and accompanying text; see also *id.* at 309–10.

¹⁴⁹ *In re Requests for Investigation of Attorney E.*, 78 P.3d at 307. Neither the attorney nor the commission contended that the order was not supported by good cause. See *id.*

¹⁵⁰ *Id.* at 309.

¹⁵¹ *Id.* at 310.

¹⁵² *Id.*

governmental interest involved.”¹⁵³ Ultimately, the Colorado court found that the government had a substantial interest in protecting the privacy of the judges and preventing discovery abuse.¹⁵⁴ It also found that the order was no greater than necessary to protect that interest, in part because it did not prevent anyone from disseminating identical information gathered outside of the discovery process.¹⁵⁵

In re Requests for Investigation of Attorney E. is a significant development in several respects. At the outset, it plainly applies First Amendment scrutiny to an individual protective order, not just to the rule authorizing the restraint.¹⁵⁶ Moreover, the court unequivocally identified intermediate scrutiny as the appropriate test for the context. And it did so in a case where good cause for the protective order was beyond dispute, implicitly recognizing that the First Amendment requires something more than good cause.¹⁵⁷

C. *Protective Orders and the First Amendment Since Seattle Times*

In recent years this new split, stemming from ambiguities in the case, has grown more pronounced. And the Supreme Court recently revisited the meaning of the case, and indirectly, the role of the First Amendment in the protective-order clash, in *Sorrell v. IMS Health*.¹⁵⁸

1. Confusion and Conflict in the Lower Courts

The ambiguities in *Seattle Times* continue to cause confusion in the lower courts. On one end of the spectrum, some courts continue to hold that when protective orders only restrict discovery information during pretrial discovery, the First Amendment is irrelevant.¹⁵⁹ At the other

¹⁵³ See *id.*

¹⁵⁴ See *id.* at 310–11.

¹⁵⁵ *Id.* at 311.

¹⁵⁶ Compare *id.* at 310–11, with *Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1119 (3d Cir. 1986) (holding First Amendment is largely in the protective order analysis); cf. *Marcus, supra* note 19, at 462 (same).

¹⁵⁷ See *In re Requests for Investigation of Attorney E.*, 78 P.3d at 309–11. In an analogous context, the D.C. Circuit has also noted that *Seattle Times* applied intermediate First Amendment scrutiny to individual protective orders. See *Fed. Election Comm’n v. Int’l Funding Inst., Inc.*, 969 F.2d 1110, 1112–14 (D.C. Cir. 1992). Interestingly, in an earlier case, a panel of the D.C. Circuit read *Seattle Times* much differently than *FEC*. In *Tavoulares v. Washington Post Co.*, the court reviewed a trial judge’s decision to lift a protective order in litigation between Mobile Corporation and a newspaper. See *Tavoulares v. Wash. Post Co.*, 737 F.2d 1170, 1171 (D.C. Cir. 1984). The en banc D.C. Circuit never cited *Tavoulares* in *FEC*. See *Fed. Election Comm’n*, 969 F.2d at 1110. Confusion about *Seattle Times* is plentiful.

¹⁵⁸ See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2666 (2011).

¹⁵⁹ See, e.g., *Reyes v. Freebery*, 192 F. App’x 120, 124 n.3 (3d Cir. 2006) (“*Seattle Times* prohibits a court considering a protective order from concerning itself with first amendment

end, lower courts apply *Procurier*'s iteration of intermediate scrutiny to individual protective orders.¹⁶⁰

In the middle, two common approaches have emerged. One acknowledges that the First Amendment plays some amorphous role in protective-order litigation while failing to specify the role.¹⁶¹ The other makes good cause a factor in the good-cause analysis.¹⁶² Courts employing these middle-ground approaches fail to account for the precise role that the First Amendment plays in the analysis. And courts using the latter middle-ground approach do not account for the interaction between the deferential abuse-of-discretion standard of review applied to good-cause determinations and the constitutional questions posed by the First Amendment analysis.

Differences in courts' approaches to the First Amendment question also extend to who may bring a dissemination claim. Some courts have drawn a hard line between third-party access cases (involving third-party intervenors seeking to modify a protective order) and first-party discovery dissemination cases (involving a party to the litigation with a substantive claim who desires to share discovery information).¹⁶³ Other courts allow third parties to assert a dissemination claim on behalf of litigants.¹⁶⁴

Thus, after *Seattle Times*, we have a system featuring disparate approaches to the First Amendment in protective-order litigation. But

considerations."); *United States v. \$9,041,598.68*, 976 F. Supp. 654, 656 (S.D. Tex. 1997) (minimizing the First Amendment's role in the analysis and noting that "[u]nder the decision in *Seattle Times*, 'heightened scrutiny' under the First Amendment does not apply to discovery protective orders"); *In re Am. Bus. Fin. Servs., Inc.*, No. 05-10203 (MFW), 2008 WL 3906894, at *3 (Bankr. D. Del. Aug. 20, 2008) (holding that "protective orders entered in accordance with Rule 26(c) which preclude the dissemination of documents obtained in discovery do not offend the First Amendment").

¹⁶⁰ See, e.g., *Martinez v. City of Ogden*, No. 1:08CV00087 (TC) (DN), 2009 WL 424785, at *1 (D. Utah Feb. 18, 2009) (holding protective order only valid when it "[further]s an important or substantial governmental interest unrelated to the suppression of expression and [if] the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved" (alterations in original) (internal quotation marks omitted)); see also *In re Requests for Investigation of Attorney E.*, 78 P.3d 300, 310 (Colo. 2003) (same).

¹⁶¹ See, e.g., *Bond v. Utreras*, 585 F.3d 1061, 1077 (7th Cir. 2009) (finding that a "limited" First Amendment interest was not implicated in third-party access case).

¹⁶² See, e.g., *Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 788 (1st Cir. 1988) ("[T]he *Seattle Times* decision has not completely eliminated the first amendment as a relevant consideration in reviewing protective orders. [Rather,] *Seattle Times* . . . established that first amendment scrutiny of protective orders must be made within the framework of Rule 26(c)'s requirement of good cause." (internal quotation marks omitted)).

¹⁶³ See, e.g., *Bond*, 585 F.3d at 1077.

¹⁶⁴ See, e.g., *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 3-4 (1st Cir. 1986) (analyzing first-party right-to-disseminate claim raised by third-party media companies). But see Richard L. Marcus, *A Modest Proposal: Recognizing (At Last) That the Federal Rules Do Not Declare that Discovery Is Presumptively Public*, 81 CHI.-KENT L. REV. 331, 332 (2006) (noting that *Seattle Times* foreclosed a presumption that discovery is open to third-parties and the public at large).

the Supreme Court's comments on the case, though inexplicably ignored by lower courts, shed some light on the question.

2. The Supreme Court Speaks Again

Since it decided *Seattle Times*, the Court has not revisited its central question. But the Court has cited the case, and even described its holding, on multiple occasions.¹⁶⁵ These cases make a few things clear but leave many questions unanswered. Contrary to some lower court opinions, the Court has never suggested that its holding in *Seattle Times* foreclosed First Amendment protection in the discovery dissemination context.¹⁶⁶ Most of its references to *Seattle Times* suggest the opposite—that disseminating discovery information is protected speech. And a few of its opinions, including a recent one supported by six current justices, suggest that the Court applied intermediate scrutiny to the protective order in *Seattle Times*.¹⁶⁷

In both *Gentile v. State Bar of Nevada* and *Sorrell v. IMS*, the Court examined speech claims in non-protective-order contexts.¹⁶⁸ And in both cases the Court described a First Amendment analysis in *Seattle Times* more onerous than Rule 26(c)'s good-cause analysis.

Chief Justice Rehnquist, writing for the majority in *Gentile*, noted that in other contexts the Court “expressly contemplated that the speech of those participating before the courts could be limited.”¹⁶⁹ Litigation participants have limited First Amendment rights but “do not surrender” those rights “at the courthouse door.”¹⁷⁰ The Court then cited *Seattle Times* to establish a proper level of scrutiny to evaluate the Nevada attorney discipline rule in question: “When a state regulation implicates First Amendment rights, the Court must balance those

¹⁶⁵ The Supreme Court, in majority, concurring, and dissenting opinions has cited *Seattle Times* on eight occasions since it was decided. See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2666 (2011); *Bartnicki v. Vopper*, 532 U.S. 514, 545 (2001) (Rehnquist, C.J., dissenting); *United States v. Aguilar*, 515 U.S. 593, 606 (1995); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1033 (1991); *Butterworth v. Smith*, 494 U.S. 624, 631 (1990); *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 28 (1986); *Wayte v. United States*, 470 U.S. 598, 611 (1985); *Regan v. Time, Inc.*, 468 U.S. 641, 689–90 (1984) (Brennan, J., concurring in part and dissenting in part).

¹⁶⁶ Compare *Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1119 (3d Cir. 1986) (holding First Amendment is largely not a part of the protective order analysis after *Seattle Times*), with *Sorrell*, 131 S. Ct. at 2666 (stating that *Seattle Times* applied intermediate scrutiny before sustaining protective order).

¹⁶⁷ See, e.g., *Sorrell*, 131 S. Ct. at 2666.

¹⁶⁸ See *id.* (assessing constitutionality of statute restricting the dissemination and use of pharmaceutical prescriber data); *Gentile*, 501 U.S. at 1033 (determining constitutionality of attorney discipline action based on attorney's press conference).

¹⁶⁹ *Gentile*, 501 U.S. at 1072. Justice Kennedy also cited *Seattle Times* in his concurrence but the reference does not definitively speak to the *Seattle Times* Court's approach. See *id.* at 1052.

¹⁷⁰ *Id.* at 1073.

interests against the State's legitimate interest in regulating the activity in question."¹⁷¹

This use of *Seattle Times* in *Gentile* is both helpful to answering the protective-order question and simultaneously enigmatic. The Court undoubtedly characterized *Seattle Times* as a case applying First Amendment scrutiny; it did not, however, resolve whether the case applied that scrutiny to Rule 26(c) in general, or only narrowly to the trial court's specific protective order.

The Court's most recent pronouncement on *Seattle Times* comes closer to an outright statement that the case applied intermediate scrutiny to an individual protective order. In *Sorrell v. IMS Health, Inc.*, the Supreme Court examined the constitutionality of a Vermont statute restricting dissemination and use of prescriber-identifying information collected by pharmacies.¹⁷²

Referencing *Seattle Times*, Justice Kennedy wrote for the Court, "[a]n individual's right to speak is implicated when information he or she possesses is subjected to 'restraints on the way in which the information might be used' or disseminated."¹⁷³ The *Sorrell* Court then went even further: "In *Seattle Times*, this Court applied heightened judicial scrutiny before sustaining a trial court order prohibiting a newspaper's disclosure of information it learned through coercive discovery."¹⁷⁴

This version of *Seattle Times* served Justice Kennedy's opinion in *Sorrell* well. *Seattle Times* articulated the principle that the simple dissemination of information is speech. And it did so in a context where the person disseminating the information only possessed it because of "coercive" discovery processes, at least loosely analogous to federal law's requirement that prescribers provide and pharmacies collect prescriber information.¹⁷⁵

Perhaps the allure of supporting his own position in *Sorrell* with a heightened-scrutiny reading of *Seattle Times* tempted Justice Kennedy to inadvertently wade into the dispute over what *Seattle Times* means. Whatever Kennedy's motivation, five other justices agreed with his reading, raising questions about how the current Court reads the case.¹⁷⁶

¹⁷¹ *Id.* at 1075. The Court went on to hold that there was a "substantial state interest" in limiting extrajudicial statements in pending cases and that the restriction was "narrowly tailored" to serve that interest. *Id.* at 1076.

¹⁷² See *Sorrell*, 131 S. Ct. at 2659–60. Federal law required the pharmacies to collect the prescriber-identifying information when filling prescriptions. See *id.* at 2660.

¹⁷³ *Id.* at 2665–66 (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984)).

¹⁷⁴ *Id.* at 2666. The Court's reference to "heightened" scrutiny refers to the *Procurier* intermediate scrutiny analysis. See *id.*

¹⁷⁵ See *id.*

¹⁷⁶ See *id.* at 2658.

While some of what *Seattle Times* means is still in dispute after *Sorrell*, several propositions now seem beyond debate. First, the First Amendment plainly protects the dissemination of information obtained solely through discovery.¹⁷⁷ Second, the *Sorrell* court made clear that *Seattle Times* applies “heightened” scrutiny.¹⁷⁸ But *Sorrell* still did not address the thornier question of whether that level of scrutiny plays a role in examining individual protective orders.

The Court’s statement that it “applied heightened judicial scrutiny *before* sustaining a trial court order” in *Seattle Times* is consistent with two readings of the case.¹⁷⁹ The first reading provides that the Court applied “heightened judicial scrutiny” to the general practice of issuing protective orders “*before* sustaining a trial court order” and not to any specific protective order.¹⁸⁰ The second reading the passage supports is that the Court applied “heightened judicial scrutiny” in examining the specific protective order at issue “before sustaining” it.¹⁸¹

III. THE CURRENT STATE OF FIRST AMENDMENT PROTECTION

A fair reading of *Seattle Times* and an examination of the First Amendment’s role in other contexts make clear that the dissemination of discovery materials is protected speech. But beyond this minimal baseline, what is the appropriate level of First Amendment protection for discovery dissemination? The Supreme Court’s opinion in *Seattle Times*, recent Court statements, and an assessment of the nature of both protective orders and the speech that they restrict make clear that so-called intermediate scrutiny applies.

A. Baseline First Amendment Interests

Speech comprising information obtained in pretrial discovery rarely, if ever, falls into the traditional categories of unprotected speech. *Seattle Times* makes this much clear. Thus, the dissemination of this information is protected speech.¹⁸² Remarkably, some commentators

¹⁷⁷ *See id.* at 2666.

¹⁷⁸ *See id.*

¹⁷⁹ *See id.* (emphasis added).

¹⁸⁰ *See id.* (emphasis added).

¹⁸¹ *See id.*

¹⁸² *See id.* If disseminating discovery information is speech, an order compelling its production would seem to run afoul of the First Amendment’s broad prohibitions on compelled speech. *Cf. Ill., ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 617 (2003); *Riley v. Nat’l Fed. of the Blind*, 487 U.S. 781, 797–801 (1988). But compelled discovery, like other compelled activities is often aimed at correcting “market flaws” in the First Amendment’s marketplace of ideas and is likely tolerable within certain constraints. *See* David

and courts posit the opposite—they contend that the First Amendment does not apply to pretrial-discovery protective orders.¹⁸³ This idea stems from a myopic reading of *Seattle Times*' final sentence and a disregard for settled First Amendment principles.

With regard to the case's final sentence (if a protective order "is entered on a showing of good cause," among other things, "it does not offend the First Amendment"), *Seattle Times* never suggested that the First Amendment does not apply to protective orders.¹⁸⁴ At most, the case is ambiguous with regard to the *level* of First Amendment protection—perhaps requiring a First Amendment test equivalent to good cause or perhaps something greater.¹⁸⁵ But the Court's unequivocal statements that discovery dissemination is "lesser" protected speech that would "rarely if ever" fall into an unprotected category implies at least some protection.¹⁸⁶ This is consistent with longstanding First Amendment jurisprudence.

Categories of unprotected speech are narrow. Obscenity, fighting words, and child pornography have been traditionally categorized as "unprotected" by the First Amendment.¹⁸⁷ The Court has long

W. Ogden, *Is There A First Amendment "Right to Remain Silent"?*, 40 FED. B. NEWS & J. 368, 370 (1993). Thus, along with compelled discovery, grand jury subpoenas, compelled testimony in depositions and open court, compelled tax disclosures, and other information compelled for use by regulatory agencies does not usually raise free speech concerns. *See, e.g.*, *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972) ("Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence."). Still, one can imagine outside scenarios where misuse of the governments' power to compel testimony and other information might run afoul of the First Amendment.

¹⁸³ *See, e.g.*, Campbell, *supra* note 57, at 787–91; Miller, *supra* note 26, at 441; Note, *Trade Secrets in Discovery: From First Amendment Disclosure to Fifth Amendment Protection*, 104 HARV. L. REV. 1330, 1334 (1990) ("Litigants therefore have no constitutional right to disseminate information" obtained in discovery); *cf.* Marcus, *supra* note 19, at 461–62 (contending that the First Amendment is largely irrelevant in assessing propriety of protective orders); Patrick M. Livingston, Note, *Seattle Times v. Rhinehart: Making "Good Cause" a Good Standard for Limits on Dissemination of Discovered Information*, 47 U. PITT L. REV. 547 (1986) (same).

¹⁸⁴ *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984).

¹⁸⁵ *See* David L. Edwards, Note, *The First Amendment and Confidentiality Orders Since Seattle Times v. Rhinehart*, 13 AM J. TRIAL ADVOC. 681, 685 (1989) (noting uncertainty about whether good cause or a least restrictive means test is applicable after *Seattle Times*); *cf.* Diane L. Bratvold, *Protective Orders and the Use of Discovery Materials Following Seattle Times*, 71 MINN. L. REV. 171, 180 n.37 (1986); Marcus, *supra* note 19, at 461–62 (noting conflation of good cause and First Amendment review under *Seattle Times*).

¹⁸⁶ *Seattle Times Co.*, 467 U.S. at 31, 34; *see also* Anne Elizabeth Cohen, Note, *Access to Pretrial Documents Under the First Amendment*, 84 COLUM. L. REV. 1813, 1843 (1984).

¹⁸⁷ *See, e.g.*, *United States v. Stevens*, 559 U.S. 460, 467 (2010); *see also, e.g.*, ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1017 (4th ed. 2011). Although restrictions on categories of unprotected speech have traditionally received no, or minimal, scrutiny, the Court struck down an ordinance banning fighting words. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391–93 (1992). The Court held that because the ordinance made content-based distinctions within a traditionally unprotected category, it was subject to strict scrutiny. *See id.*

recognized the power of the government to proscribe unprotected speech with minimal justification.¹⁸⁸ The distinction between “protected” and “unprotected” speech represents a judgment that the value of the *content* of the speech is so low that the government has broad latitude to restrain it.¹⁸⁹ While one may question the wisdom of the Court’s content-based approach to the unprotected categories of speech, the approach is unquestionably part of First Amendment jurisprudence.¹⁹⁰ Importantly, the distinction between protected and unprotected speech is not based on its *source*.

Justice Powell’s observation that information exchanged in discovery usually comprises protected content is both analytically and empirically sound.¹⁹¹ Most civil lawsuits involve the exchange of mundane information related to a routine dispute: property records in a divorce, business records in a commercial dispute, police reports in an auto-accident case. A non-negligible number of lawsuits involve exceptional, or even sensational information: internal CIA memoranda regarding surveillance of citizens, product defect information impacting the health and safety of millions, clinic records implicating professional athletes in a doping case.¹⁹²

But only a scintilla of civil cases ever involves the exchange of what would be unprotected information. One can imagine a civil case involving obscenity or child pornography, but such cases would undoubtedly be outliers.

In virtually all other civil litigation, the question of whether litigation information is unprotected is simply not in play. The information exchanged simply does not fall within one of the narrow exceptions to the general rule that the First Amendment forbids content-based speech restrictions.¹⁹³ Indeed, the First Amendment protects the dissemination of both mundane and sensational litigation information.¹⁹⁴

Litigation itself is an important form of expression in the United States.¹⁹⁵ While some academics contend that the purpose or function of the judicial system is to resolve private disputes, few would deny the reality that many litigants hope to make a statement by filing a lawsuit.¹⁹⁶ Litigants often suggest that they are filing suit to send a

¹⁸⁸ See CHEMERINSKY, *supra* note 187.

¹⁸⁹ See, e.g., *id.*

¹⁹⁰ See, e.g., *Stevens*, 559 U.S. at 468–72.

¹⁹¹ Cf. *Seattle Times Co.*, 467 U.S. at 31.

¹⁹² See *In re Halkin*, 598 F.2d 176, 180 (D.C. Cir. 1979); see also Moskowitz, *supra* note 1, at 822.

¹⁹³ Cf., e.g., CHEMERINSKY, *supra* note 187.

¹⁹⁴ See, e.g., *id.* at 1017–18.

¹⁹⁵ See *In re Halkin*, 598 F.2d at 187.

¹⁹⁶ See, e.g., *Pearson Educ., Inc. v. Almgren*, 685 F.3d 691, 693 (8th Cir. 2012) (“[T]he publishers filed a copyright infringement suit in federal district court in the Southern District of

message to other victims of similar conduct, or to announce that the conduct of the defendant will not be tolerated in our society.¹⁹⁷ Indeed, the recording industry went on a multi-year campaign where it sued college students and others for copyright infringement stemming from music file sharing. The companies could hardly hope to recover six-figure judgments from students living in a dorm. Rather, they likely intended to send a message to others engaged in similar conduct. The message: Stop sharing music files or you will face legal action.

It follows that the information exchanged in these lawsuits, whether routine or sensational, would be a part of the speaker's message in the suit. Rightly or wrongly, discovery requests are sometimes tailored to both advance the substantive claims in the litigation and also to further a party's communicative goals. In at least some cases, the dissemination of discovery information is not an expressive byproduct of a non-expressive litigation process.¹⁹⁸ Rather, unearthing information is the process's purpose and function.

Indeed, even if the primary purpose of discovery is to enable litigants to resolve disputes, an incidental and valid function of discovery is revealing information.¹⁹⁹ A routine dispute between two parties in practice often reveals something of value to a larger audience. On the small scale, a routine dispute between business partners might reveal widespread fraud committed by one of them. This information would be available to the parties to the dispute but might also be made available, formally or informally, to other people involved in the business—employees, vendors, bankers, and other partners. On a larger scale, a civil rights suit between an aggrieved citizen and local police might reveal widespread racial profiling to a broader audience—the community, federal officials, and the national media.²⁰⁰ Whatever the *purpose* of the civil litigation system, one of its practical *functions* is often to reveal otherwise unknown truths to audiences large and

New York, served process on Almgren, and sought, as the bankruptcy court found, to 'make an example of him through litigation.');

Will Moseley, Note, *A New (Old) Solution for Online Copyright Enforcement After Thomas and Tenenbaum*, 25 BERKELEY TECH. L.J. 311, 315 (2010) (identifying the purpose of the lawsuits was "to 'send a strong message' about the consequences of distributing copyrighted music online").

¹⁹⁷ See, e.g., Moseley, *supra* note 196; see also *Sony BMG Music Entm't v. Tenenbaum*, 719 F.3d 67 (1st Cir. 2013) (involving record companies suing individual file-share users); *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899 (8th Cir. 2012) (same).

¹⁹⁸ Cf., e.g., Marcus, *supra* note 19, at 470 (describing the public function of courts as "side effects").

¹⁹⁹ Zitrin, *supra* note 19, at 1566–67 (arguing that litigation is a dispute in a public forum, open to the public despite the litigants' interest in privacy).

²⁰⁰ Moskowitz, *supra* note 1, at 818 n.5 (2007) (private attorneys-general suits authorized by Congress serve an important public role).

small.²⁰¹ That this truth-seeking function of litigation is *incidental* is not a comment on whether it is *valuable*.

Professor Marcus and others undervalue the truth-seeking function of civil discovery.²⁰² In his seminal first article, and later articles on protective orders and the First Amendment, Professor Marcus contends that the usual conduct of discovery is “consistent with the underlying assumption of the litigants and the courts that discovery compels the disclosure of information *solely* to assist preparation for trial.”²⁰³ Whether or not this statement was ever empirically true with regard to litigants’ assumptions about litigation, it is not so today.

Civil discovery is used by a wide variety of people for a wide variety of purposes. At one level, Professor Marcus’s position that discovery is primarily a means to prepare for trial is undeniably true.²⁰⁴ In the vast majority of lawsuits, discovery is a mechanical process to advance the ball in routine litigation. But in other suits, litigants view the system, rightfully, as a tool to uncover the truth. *In re Halkin* provides the classic example.²⁰⁵ In that case, individuals and organizations sued the CIA and the NSA “seek[ing] damages and equitable relief” for civil rights violations stemming from domestic surveillance.²⁰⁶ But no one could seriously contend that the litigants’ sole object, or even the primary function of the suit, was to recover damages or an injunction. Instead, the litigation, and its accompanying discovery, served dual functions—seeking relief and seeking information about the CIA’s activities. Using litigation to reveal the extent of government activities allows citizens to apply political pressure to obtain a result that they may not obtain through damages or an injunction.

Even in private litigation, parties openly use the system to obtain information. For example, some academics believe a recent suit by Major League Baseball against a Florida clinic was initiated solely so the league could obtain records of players who may have doped.²⁰⁷ Major League Baseball could hardly be said to have a financial interest in the litigation against a defunct clinic.²⁰⁸ Rather, the league has a financial

²⁰¹ See Zitrin, *supra* note 19, at 1579 (“A court, after all, is a publicly-funded institution; its main function should be to serve the broader interests of the public.”).

²⁰² See, e.g., Marcus, *supra* note 19, at 461, 470; Miller, *supra* note 26, at 429–30, 480.

²⁰³ Marcus, *supra* note 33, at 15 (emphasis added). Professor Marcus, in a later article, acknowledges that revealing information to the public is at least an incidental effect of litigation. See Marcus, *supra* note 19, at 470.

²⁰⁴ See Marcus, *supra* note 33, at 15.

²⁰⁵ See *In re Halkin*, 598 F.2d 176, 180–81 (D.C. Cir. 1979).

²⁰⁶ See *id.*

²⁰⁷ See, e.g., Joseph Ax, *Analysis: In Suing Clinic over Drugs, U.S. Baseball May Be Targeting Players*, CHI. TRIB., Mar. 24, 2013, http://articles.chicagotribune.com/2013-03-24/sports/sns-rt-us-baseball-lawsuitbre92n0mw-20130324_1_biogenesis-florida-clinic-miami-new-times.

²⁰⁸ See *id.* The League is steadfast that it has a “legitimate” legal claim against the clinic. See *id.* No doubt it does, but the actual financial value of that claim may be minimal. See *id.*

interest in knowing who doped and dealing with them appropriately. Civil discovery provided a vehicle to do so.

The critical feature of these cases is that parties sometimes enter the litigation system for the purpose, primary or collateral, of expression. *Seattle Times* foreclosed constitutional protection for use of the discovery system to *access* information.²⁰⁹ But, consistent with the expressive nature and value of participating in litigation, it did recognize that expressing information obtained in litigation—for any purpose—is protected.²¹⁰

Special contexts sometimes call for reduced free speech protection. For instance, in schools, prisons, public forums, government employment—and perhaps in litigation—the unique circumstances or context may call for more deference to government speech restrictions.²¹¹ But the question of how much deference special-context restrictions receive is distinct from the question of whether the content of the speech places it in a traditionally “unprotected” category.

Indeed, the First Amendment protects even the dissemination of stolen information.²¹² Thus, courts and commentators who have opined that *Seattle Times* excludes protective orders from First Amendment scrutiny take a curious position: The government may restrict the dissemination of information obtained lawfully in discovery but may not restrict the publication of the same information if it is stolen. In the paradigm case, *New York Times v. United States*, the United States asked a court to enjoin the publication of the “Pentagon Papers,” a classified and controversial study of the Vietnam War.²¹³ The documents had been stolen from the government and given to the *Times*.²¹⁴ The Supreme Court held that a lower court injunction forbidding the *Times* from publishing the information violated the First Amendment.²¹⁵ In another case involving illegally obtained information, the Court struck a content-neutral state statute that prohibited the knowing disclosure of illegal wiretaps, finding its application violated the First Amendment.²¹⁶ The source of the information in both cases was illicit; nonetheless the First Amendment limited the governments’ power to censor it.

And in contexts analogous to civil discovery, the First Amendment forbids government restraints on the dissemination of legally compelled

²⁰⁹ See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984).

²¹⁰ See *id.* at 32–33.

²¹¹ See *United States v. Grace*, 461 U.S. 171, 183 (1983); *Procunier v. Martinez*, 416 U.S. 396, 409–10 (1974), *overruled by* *Thornburgh v. Abbott*, 490 U.S. 401 (1989); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); see also *Bhagwat*, *supra* note 9, at 789, 796.

²¹² See *N.Y. Times, Co. v. United States*, 403 U.S. 713 (1971).

²¹³ *Id.*

²¹⁴ See *id.* at 750.

²¹⁵ *Id.* at 714.

²¹⁶ See *Bartnicki v. Vopper*, 532 U.S. 514, 534–35 (2001).

information. In a case discussed previously, *Sorrell v. IMS Health, Inc.*, the Court held that data miners and pharmacies had the right to sell pharmaceutical-prescriber information that the government ordered be provided to pharmacies.²¹⁷ Likewise, the D.C. Circuit has held that the First Amendment is implicated when political action committees gather and use contributor information obtained through government-compelled reports.²¹⁸ Both stolen information and government-compelled information in different contexts receive First Amendment protection; lawfully obtained discovery information should too.

Courts and commentators have also urged that *Seattle Times* held that First Amendment scrutiny applied to Rule 26(c) generally but did not apply to individual protective orders.²¹⁹ The Supreme Court's approach in other litigation-speech cases belies their position. As a general proposition, the First Amendment requires scrutiny of government actions restricting speech, not just the statutes that authorize them—particularly court orders restraining speech.²²⁰ For instance, the Court has used the First Amendment to examine a specific gag order issued to restrain publicity surrounding a trial.²²¹

Providing scrutiny to individual court orders, instead of just scrutinizing an authorizing statute or rule, allows courts to assess the particular interests at stake in each instance. Specific speech restraints, including protective orders, may be justified by very different government interests. For example, in *Seattle Times*, preventing abuse of the discovery process was cited as a substantial government interest.²²² In other cases, protecting a fair trial may be the relevant interest.²²³ Additionally, the breadth and nature of the specific court order may or

²¹⁷ See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2660 (2011).

²¹⁸ *Fed. Election Comm'n v. Int'l Funding Inst., Inc.*, 969 F.2d 1110, 1116 (D.C. Cir. 1992).

²¹⁹ See, e.g., *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 7 n.2 (1st Cir. 1986); B. Deidre Brennan, *Rule 26(c) Protective Orders: First Amendment Scrutiny and the Good Cause Standard*, 21 SUFFOLK U. L. REV. 909, 912–13 (1987); Katherine Wiesepe Pownell, Comment, *The First Amendment and Pretrial Discovery Hearings: When Should the Public and Press Have Access*, 36 UCLA L. REV. 609, 622 (1989); Thomas C. Bradley, Comment, *Some Limits on the Judicial Power to Restrict Dissemination of Discovery*, 44 ME. L. REV. 417, 430 (1992). Some courts have implied that First Amendment protection only attaches to information admitted at trial. See, e.g., *In re San Juan Star Co.*, 662 F.2d 108, 115 (1st Cir. 1981). The thrust of the argument is that much of the information turned over in discovery is unrelated to the issues in the case. This argument is fatally flawed on several levels. First, the Rules of Evidence often exclude evidence that is clearly connected to the case but inadmissible for some other reason (e.g., hearsay). Second, evidence is admitted or excluded, in practice, within the discretion of the trial judge. A discretionary standard, often misapplied, is unsuitable as a threshold for First Amendment protection. Third, excluded evidence often is as important—or more important—to the issues in the case as that which is admitted. For instance, a suppressed confession may bear more on the issues in the case than the evidence admitted, despite not satisfying the Rules of Evidence.

²²⁰ *Cf.*, e.g., *Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

²²¹ See, e.g., *id.*

²²² See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984).

²²³ See, e.g., *Stuart*, 427 U.S. at 542, 544.

may not serve the particular government interest involved in an individual case. Without examining the specific order, assessing its breadth and efficacy is impossible.

Disallowing challenges to particular protective orders would impermissibly hobble the operation of the First Amendment in discovery dissemination cases. Such a system makes the government's exercise of discretion under Rule 26(c) subject only to the bounds of the Rule itself, not the First Amendment.²²⁴ In short, endorsing such a framework is just another way of saying that the First Amendment does not protect discovery speech. This view is inconsistent with both *Seattle Times* and the First Amendment.

B. *Defining the Proper Level of Scrutiny*

Seattle Times and subsequent cases make clear that the First Amendment protects the dissemination of discovery information. What remains unclear is how much deference courts should pay to protective orders when considering a constitutional challenge.

For mostly pragmatic reasons, strict scrutiny cannot be the test for protective orders in most cases.²²⁵ Applying a test that, in practical application, would invalidate most protective orders would seriously inhibit the function of the civil justice system.²²⁶ Part of the carefully crafted balance between Rule 26(b)(1)'s broad scope of discovery and Rule 26(c)'s provisions for protecting parties from abusive discovery depends on "use" limitations like protective orders. If litigants could obtain a wide breadth of information in discovery, and courts did not have the power to limit the information's use, the scope of discovery could potentially narrow as a matter of rulemaking or practical application.

In a practice without protective orders (or with few protective orders), judges would inevitably grant a narrower scope of discovery by exercising their discretion to decide what is "reasonably calculated" to lead to admissible evidence.²²⁷ Alternatively, they could simply turn to

²²⁴ Cf. Post, *supra* note 67, at 170 (noting that a "a long line of precedents hold[] that discretion in the suppression of First Amendment rights is particularly suspect").

²²⁵ Cf. *id.* at 194 (observing the managerial role of trial judges in the discovery process). A limited class of cases might support application of the strict scrutiny standard depending on the nature of the restraint and speech at issue, but a full delineation of that category is beyond the scope of this Article.

²²⁶ Another problem with relying on strict scrutiny in the protective order context is that courts bound to apply it might be tempted to contort the test to approve protective orders and protect the routine function of litigation. This could potentially water down the test for other First Amendment contexts.

²²⁷ See FED. R. CIV. P. 26(b)(1). The Judicial Conference Committee on the Rules of Practice and Procedure recently proposed amendments to Rule 26 that could potentially narrow

Rule 26(c)(1) and issue a protective order “forbidding” the discovery in the first place.²²⁸ A Rule 26(c)(1) order is available to anyone who shows “good cause” for the order, can be issued for trifling matters like “embarrassment” or “annoyance,” and would not be subject to First Amendment challenge.²²⁹

On the other hand, protective orders are undoubtedly content-based restrictions on speech. They target specific speakers to prohibit speech comprising specific subject matter. For instance, a given protective order might prohibit a specific litigant or attorney from sharing anything about a dangerous drug that they learned in discovery. Restrictions of this type—targeting speech “because of its message, its ideas, its subject matter or its content”—would raise serious First Amendment concerns in most contexts.²³⁰

Because of the First Amendment’s sensitivity to content-based speech restrictions, the level of scrutiny paid to protective orders should be reduced with prudence. The regulation of specific subject matter raises the specter that the government will limit debate on topics that displease the government. This is a real concern when a protective order restricts speech in a case involving information about the government.²³¹ But it is also a concern in lawsuits involving powerful private interests, like product manufacturers, that may have undue influence on the government, particularly in state courts with elected judges. While strict scrutiny is too onerous in the protective-order context, it does not follow that a flimsy, overly deferential standard should be erected in its place.

Understood properly, reduced scrutiny of protective orders results from the practical demands of the context they function in, rather than the content they restrict.²³² The government’s role as litigation manager

discovery. COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE 289–99 (2013), available at <http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf>. While the Committee left the protective-order provisions of Rule 26 largely untouched, narrower discovery bodes in favor of more pretrial litigation transparency—a less-searching form of discovery does not pose the privacy concerns that a broader system does. *Id.* at 292–93. The purpose of the proposed amendments, however, is undoubtedly to streamline litigation and avoid burdensome satellite litigation. Without commenting on whether the proposal accomplishes this goal, the First Amendment, in most cases, would not have a substantial impact on resources beyond what Rule 26(c) already demands. *See infra* Part IV.

²²⁸ *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984) (discovery is a “legislative grace”); FED. R. CIV. P. 26(c)(1)(A).

²²⁹ FED. R. CIV. P. 26(c)(1)(A); *see also Seattle Times Co.*, 467 U.S. at 32 (“[N]o First Amendment right of access.”).

²³⁰ *E.g.*, CHEMERINSKY, *supra* note 187, at 960–61.

²³¹ *See, e.g.*, Moskowitz, *supra* note 1, at 818.

²³² *Cf. Post*, *supra* note 67, at 196 (“[T]he crux of [*Seattle Times*] is . . . the Court’s perception that discretionary authority to issue restraining orders is essential for the administration of pretrial discovery.”).

supports its special interest in policing the release of discovery.²³³ Thus it makes sense to look to other special speech contexts for an appropriate test. A middle-ground test that has come to be known as intermediate scrutiny (despite some criticism), increasingly serves as the “default” First Amendment test in several special contexts.²³⁴

The version of the test cited by *Seattle Times* traces its lineage to *United States v. O’Brien*, a case involving symbolic conduct—burning a draft card. In that case, the card burner was charged with a crime for “multilat[ing]” or “destroy[ing]” a government document.²³⁵ The Court held that, as applied to draft card burning, the statute would be upheld only:

if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.²³⁶

Building on *O’Brien*, *Procunier v. Martinez* involved regulation of prison speech, and Justice Powell, writing for the Court, referred to the earlier case to announce a slightly modified version of its test.²³⁷ To survive First Amendment review, the prison-speech restrictions had to satisfy a two-part test. First, the “regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression.” Second, “the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.”²³⁸ *Seattle Times* cited *Procunier* and included its reformulated version of the *O’Brien* test verbatim.

In the past few decades, some version of intermediate scrutiny has been consistently used in cases involving content-neutral time, manner, and place restrictions.²³⁹ In a parallel development, the Court began to subject commercial speech restrictions to a version of intermediate

²³³ *Id.* Professor Post is critical of the Court’s reliance on a managerial theory to justify the employment of discretionary theory. *See id.* at 170. While the criticism is well-founded, it turns out that the Court may have retreated from, or simply never intended, the type of sweeping discretion Professor Post read the case to imply. Recent pronouncements support this reading. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2666 (2011).

²³⁴ *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 792 (1994) (Scalia, J., dissenting in part); *see also Bhagwat, supra* note 9, at 785.

²³⁵ *United States v. O’Brien*, 391 U.S. 367, 370 (1968).

²³⁶ *Id.* at 376; *see also Bhagwat, supra* note 9, at 791.

²³⁷ *See Procunier v. Martinez*, 416 U.S. 396, 413 (1974), *overruled by Thornburgh v. Abbott*, 490 U.S. 401 (1989).

²³⁸ *Id.*

²³⁹ *See Bhagwat, supra* note 9, at 788–92 (“[T]he *O’Brien* test has become the definitive doctrinal statement in this area.”).

scrutiny.²⁴⁰ In each of these contexts—symbolic conduct, content-neutral time manner and place restrictions, and commercial speech—the Court’s step back from strict scrutiny was justified by different concerns.²⁴¹ For instance, the government’s administrative role with respect to its own property in public-forum cases, its obligation to protect citizens from harm in the conduct cases, and “economic liberty” in the commercial speech context all played a part in reducing the level of speech protection.²⁴²

While the impact of a more unified intermediate scrutiny test was not known at the time the Court decided *Seattle Times*, the intervening three decades have made clear that it is a deferential test. Indeed, in application, intermediate scrutiny is significantly less demanding than strict scrutiny, making the test an apt vehicle to provide flexibility to lower courts making pretrial discovery decisions.²⁴³ The courts have regularly upheld laws regulating symbolic conduct.²⁴⁴ Likewise, content-neutral time, manner, and place restrictions have fared well under intermediate scrutiny.²⁴⁵

The decisions stand in stark contrast to cases where the almost-always-fatal strict scrutiny standard is applied. The deferential approach in the intermediate scrutiny context is consistent with the rationales that justify the reduction of protection in the first place: The government ought to have more latitude to manage its own property; dangerous conduct deserves less protection than traditional speech, even when it conveys a message.²⁴⁶

Rule 26(c) protective orders are a natural fit in this framework. The rationale for not treating them as prior restraints (or even as traditional content-based restrictions meriting strict scrutiny) is justified by the unique context of discovery. As *Seattle Times* noted, information compelled through discovery is a “legislative grace.”²⁴⁷ Likewise, the government has a unique interest in the smooth operation of the civil justice system. Privacy concerns abound in discovery, and the government also has an interest in preserving its citizens’ privacy and intellectual property. And the unique posture of trial courts in the discovery process puts them in perhaps the best position to tailor an order that serves these interests. The intermediate scrutiny test thus

²⁴⁰ Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n, 447 U.S. 557 (1980).

²⁴¹ See, e.g., Bhagwat, *supra* note 9, at 800–01.

²⁴² See, e.g., *id.*

²⁴³ In many commercial speech cases, however, the Court has rejected a deferential approach, striking laws while embracing an “antipaternalis[ti]c” posture toward government regulation of advertising. *Id.* at 795.

²⁴⁴ See *id.* at 791–92 (“[T]he Court . . . essentially never upholds free speech claims” in the symbolic conduct context.).

²⁴⁵ See *id.* at 788–89.

²⁴⁶ See *id.* at 800–01.

²⁴⁷ *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984).

allows courts to do the kind of custom crafting necessary to expedite discovery.

On the other hand, the intermediate scrutiny test provides sufficient First Amendment teeth. Where a protective order does not serve a legitimate government interest, for instance by only preventing mere “annoyance” to a party, the speaker’s interest should trump. Likewise, where the government has a significant interest in restricting speech—like protecting the right to a fair trial—the order ought to actually protect the interest.²⁴⁸ And it ought to do so in a way that is no greater than necessary. For example, the court should ensure that other methods of protecting the fair-trial right are insufficient. Rather than squelching litigant speech as a knee-jerk reaction to publicity, a judge ought to consider whether *voir dire* or a change of venue would do the trick.

At the opposite end of the spectrum, Rule 26(c) “good cause” is deficient as a First Amendment standard.²⁴⁹ First, as a structural matter, the “good cause” standard is subject to redefinition, elimination, or abrogation by Congress or state legislatures. If speakers have a constitutional right to disseminate discovery, it should not be subordinate to legislation. Moreover, the “good-cause” standard is applied disparately both across jurisdictions and within them. Some courts have held that mere embarrassment is enough to justify entry of a protective order, while others require a “serious” injury to justify the same protection.²⁵⁰ Still others have applied something that approaches the rigor of a least restrictive means test.²⁵¹

This disparity is occasioned, in large part, by the wide discretion that trial courts have in applying the standard. In the final analysis, this level of discretion is simply insufficient for the adequate protection of First Amendment rights.²⁵² Courts need *flexibility* to fashion protective orders. But the intermediate scrutiny test allows for this needed flexibility without making free speech dependent on the virtually unfettered discretion of a trial court. In effect, a discretionary First Amendment standard makes the district court the suspect (issuing a potentially unconstitutional order) and policeman (assessing the constitutionality within a discretion that is subject only to minimal appellate oversight).

Despite ambiguities in the opinion, the Supreme Court has recently recognized that *Seattle Times* applied intermediate scrutiny.²⁵³ This

²⁴⁸ *Cf.*, e.g., *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 563–64 (1976).

²⁴⁹ See Post, *supra* note 67, at 235–36.

²⁵⁰ See, e.g., *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002); *Allen v. City of N.Y.*, 420 F. Supp. 2d 295, 302 (S.D.N.Y. 2006).

²⁵¹ See, e.g., *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995).

²⁵² See Post, *supra* note 67, at 235–36.

²⁵³ See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2666 (2011).

approach is consistent with a First Amendment that serves as a legal, rather than discretionary, limit on government conduct—still flexible for those trying to govern but with defined boundaries to protect against excess.

IV. FIRST AMENDMENT IMPLICATIONS FOR MODERN PROTECTIVE-ORDER LITIGATION

Justice Powell was particularly sensitive to the impact *Seattle Times* would have on trial court discretion and appellate court workloads. Enhancing the level of protective-order scrutiny will undoubtedly impact some jurisdictions that have ignored the First Amendment in this context. But an examination of current “good-cause” standards, the nature of trial court discretion, and the framework for interlocutory appeals all support the position that applying a healthy level of First Amendment scrutiny will not derail the civil litigation system.

A. *Interaction with Existing Standards*

Applying intermediate scrutiny to protective orders would not significantly disrupt discovery. This reality flows from the fact that many courts have already incorporated First Amendment-style considerations into the good-cause test. For, instance, the Third Circuit’s so-called *Pansy* factors expressly incorporate free speech concerns into the good-cause test—in a circuit that refuses to officially recognize the First Amendment’s role in protective-order litigation.²⁵⁴ To establish good cause in the Third Circuit, and other circuits mimicking its analysis, a litigant must establish that the following factors weigh in favor of the order:

- 1) whether disclosure will violate any privacy interests;
- 2) whether the information is being sought for a legitimate purpose or for an improper purpose;
- 3) whether disclosure of the information will cause a party embarrassment;
- 4) whether confidentiality is being sought over information important to public health and safety;
- 5) whether the sharing of information among litigants will promote fairness and efficiency;

²⁵⁴ See, e.g., *Glenmede Trust Co.*, 56 F.3d at 483.

- 6) whether a party benefitting from the order of confidentiality is a public entity or official; and
- 7) whether the case involves issues important to the public.²⁵⁵

Echoes of the First Amendment can be heard in the test—whether discovery is being sought for an illegitimate purpose (i.e. the government has a substantial interest in preventing discovery abuse). And the test considers countervailing privacy interests, implicitly invoking Justice Powell’s concern for protecting litigant privacy.²⁵⁶ The *Pansy* test also weighs the value of the discovery to the public, whether the order protects official misconduct, or whether public health and safety are implicated—all situations where the value of dissemination is more central to the First Amendment.

Furthermore, courts’ more general tests for “good cause” are already somewhat deferential to speakers. Courts have held that a party seeking a protective order must demonstrate that they will suffer a “*clearly defined* and *serious injury*” in the absence of an appropriate order.²⁵⁷ Without a showing of injury from dissemination, a protective order will not issue. As a corollary of this principle, a protective order should not be broader than is necessary to actually prevent the injury—an analogue to First Amendment scrutiny.²⁵⁸

The similarity between the good-cause analysis and intermediate scrutiny raises the question about whether applying one over the other actually matters. For the structural reasons noted above, to avoid disparity in First Amendment protection, and to provide doctrinal clarity and consistency in what has become a muddled strand of First Amendment law, it matters. But contrary to Justice Powell’s and some commentators’ concerns, it will not cause widespread disruption of civil

²⁵⁵ *Id.*

²⁵⁶ *Cf. Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31 (1984).

²⁵⁷ *Allen v. City of N.Y.*, 420 F. Supp. 2d 295, 302 (S.D.N.Y. 2006) (emphasis added).

²⁵⁸ Rule 26(c) has been interpreted to require a substantial evidentiary showing with respect to these requirements. Thus the “burdensome evidentiary findings” that concerned Justice Powell when considering the First Amendment’s role are, in large part, already a part of the system. *See Seattle Times Co.*, 467 U.S. at 36, n.23. Indeed, speculation and conclusory statements will not suffice to establish good cause. *See, e.g., Glenmede Trust Co.*, 56 F.3d at 483 (“‘Good cause’ is established when it is specifically demonstrated that disclosure will cause a clearly defined and serious injury. Broad allegations of harm, unsubstantiated by specific examples, however, will not suffice.” (citation omitted)). This requirement applies to both the requirement that a party establish that the information is not widely known and to the requirement that the party establish harm. *See Parsons v. Gen. Motors Corp.*, 85 F.R.D. 724, 726 (N.D. Ga. 1980) (denying protective order where allegations of confidentiality were not “particularized” and allegations of “competitive harm [were] vague and conclusory when specific examples are necessary”). Moreover, proof of good cause must be competent. *See, e.g., Reliance Ins. Co. v. Barron’s*, 428 F. Supp. 200, 203 (S.D.N.Y. 1977) (“[H]earsay allegations of an attorney’s affidavit are insufficient to warrant issuance of a protective order.”).

discovery practice.²⁵⁹ Rather, relying on intermediate scrutiny rather than lower court discretion would clarify practice.

B. *The Balance of Power Between Trial and Appellate Courts*

Affirming the First Amendment's role in these questions could also shift the balance of power within the court hierarchy. Perhaps more rigorous free speech analysis would increase appellate court power to review protective orders. Likewise, applying intermediate scrutiny would clarify the supervisory relationship that the Supreme Court has with respect to state court application of federal law. This Section considers these issues in turn.

The standard of review for constitutional questions is less deferential than the standard for discovery decisions.²⁶⁰ Appellate courts typically conduct de novo review of the former and abuse of discretion review for the latter.²⁶¹ This system of review is intended to maximize institutional competencies—trial courts are presumed to be in a better position to manage the conduct of litigation than appellate courts.

Thus, imposing First Amendment review on protective-order decisions would turn discovery decisions traditionally subject to abuse of discretion review into constitutional decisions entitled to no deference on appeal. This concern was on Justice Powell's mind when he wrote *Seattle Times*. Citing the trial court's "broad discretion" to determine when and what type of protective order is appropriate, the Court's opinion suggests trial courts should have discretion when conducting discovery.²⁶² But by holding that the First Amendment protects dissemination-of-discovery speech at all, the Court confused the proper level of deference.

The good-cause determination under Rule 26(c) should be reviewed under a different standard than the First Amendment inquiry. This poses yet another problem for those who might argue that the good-cause analysis subsumed the First Amendment analysis. Conflating the questions tangles the appropriate standard of review. If appellate courts apply abuse-of-discretion review to both the speech

²⁵⁹ Cf. *Seattle Times Co.*, 467 U.S. at 31; Marcus, *supra* note 19, at 500.

²⁶⁰ Compare *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505–11 (1984) (appellate courts exercise independent judgment in First Amendment cases), with *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1428 (10th Cir. 1990) (district court did not abuse its discretion in making protective order ruling); see also Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 229–30 (1985); cf., e.g., *Ornelas v. United States*, 517 U.S. 690 (1996) (observing the clarifying power of de novo review of constitutional questions).

²⁶¹ Compare *Bose Corp.*, 466 U.S. at 505, with *United Nuclear Corp.*, 905 F.2d at 1428; see also Monaghan, *supra* note 260, at 229–30.

²⁶² *Seattle Times Co.*, 467 U.S. at 36.

question and the good-cause question, the trial court's First Amendment determination would be shielded by an unduly deferential standard. On the other hand, applying de novo review to both findings would obviate deference to the good-cause determination.

Solving this problem is vexing. Indeed, pulling the inquiries apart solves one problem while creating another. The difficulty is especially pronounced if the First Amendment standard is stricter than good cause. Indeed, if the validity of a protective order is tested de novo against the First Amendment and the trial court's Rule 26(c) determination is simultaneously reviewed under an abuse of discretion standard, the lack of deference paid to the First Amendment question would still, in effect, obviate deference to the trial court. Such a system would, at first glance, seem inconsistent with *Seattle Times'* insistence that trial courts have broad flexibility to fashion protective orders.²⁶³ But trial court latitude flows from more sources than the standard for appellate review.

The flexibility in crafting protective orders that Justice Powell demanded is already accounted for in the intermediate scrutiny test.²⁶⁴ Indeed, the test recognizes a broad swath of government interests to support protective orders as opposed to the more limited interests recognized by strict scrutiny.²⁶⁵ Justice Powell's concerns about trial court latitude must be read in the context he wrote them in: a challenge to a protective order as a *prior restraint*, or at the least a strict scrutiny challenge.²⁶⁶ This categorization would have doomed virtually all protective orders and provided *minimal* latitude to trial courts. And the prior-restraint-based challenge was not a pipe dream—the D.C. Circuit agreed that protective orders were subject to strict scrutiny, sending the discovery system into turmoil.²⁶⁷ The flexibility Justice Powell demanded for trial courts was accounted for in the test he recited—now known as intermediate scrutiny. Providing only abuse of discretion review for a constitutional question would unnecessarily broaden a test that already provides wide latitude.

Imposing a constitutional standard on protective order rulings does raise some concerns about increased interlocutory appeals. Justice Powell expressed this concern, and so have some commentators.²⁶⁸ The contention does merit analysis, but the concern may have been overblown. At the outset, framing the protective order inquiry as a First

²⁶³ *Id.* at 34.

²⁶⁴ See Bhagwat, *supra* note 9, at 789, 792.

²⁶⁵ See, e.g., *In re Requests for Investigation of Attorney E.*, 78 P.3d 300, 311 (Colo. 2003) (finding that both privacy interests and preventing discovery abuse were “substantial” interests).

²⁶⁶ See *Seattle Times Co.*, 467 U.S. at 33–34.

²⁶⁷ See *In re Halkin*, 598 F.2d 176, 187 (D.C. Cir. 1979).

²⁶⁸ See *Seattle Times Co.*, 467 U.S. at 36 n.23.

Amendment issue does not open up a wider breadth of interlocutory avenues than are available for reviewing good-cause determinations.

Several paths allow appellate courts to review trial court decisions before entry of a final judgment. But two are the most likely routes in the protective-order context—the collateral order doctrine and mandamus.²⁶⁹

Both have been used to review First Amendment questions in the past, but the collateral order doctrine has become a less likely route to appellate review. The doctrine treats interlocutory orders as “final” under the pertinent jurisdictional statute, making them reviewable before entry of an actual final judgment.²⁷⁰ The Supreme Court has recently narrowed collateral order review to exclude most discovery rulings, making this avenue doubtful for protective orders.²⁷¹

Mandamus has also been used as a route to review First Amendment protective-order issues. Mandamus is an original proceeding in the courts of appeals that is available to correct serious legal errors that cannot be adequately remedied on appeal.²⁷² It is a discretionary remedy, and appellate courts that exercise discretion to reject some mandamus petitions without full briefing would act as a dam against unwanted appellate litigation. Still, clarifying the First Amendment test in the area will undoubtedly generate original proceedings, or at least attempts at them.

Fears about sustained, voluminous interlocutory appellate litigation, however, are probably overblown. First, in many cases, parties simply agree to protective orders.²⁷³ If courts clarified the role of the First Amendment in the protective-order process, some litigants would take notice and dispute otherwise agreed-to protective orders, but for pragmatic reasons in litigation (e.g., moving forward with discovery) the number would not be overwhelming. Second, any increase in appellate litigation would be short-lived. After courts set the initial parameters in the major classes of cases (e.g., products liability, civil rights, commercial litigation), most protective-order litigation would be constrained to the lower courts. The reasons are straightforward:

²⁶⁹ Mandatory interlocutory appeals under 28 U.S.C. § 1292 are almost certainly unavailable in the protective order context. *See, e.g., Int'l Prods. Corp. v. Koons*, 325 F.2d 403, 406 (2d Cir. 1963) (holding that protective orders are not “injunctions” under § 1292(a) and therefore not appealable). Likewise, permissive interlocutory appeals under § 1292(b) are not available unless both the district court and the appellate court exercise discretion to permit the appeal. *See* 28 U.S.C. § 1292(b) (2012).

²⁷⁰ *See, e.g., Cohen v. Beneficial Indust. Loan Corp.*, 337 U.S. 541, 545–47 (1949).

²⁷¹ *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 112 (2009); *see also* 8 WRIGHT ET AL., *supra* note 32, § 2006.

²⁷² *See, e.g., In re Halkin*, 598 F.2d at 187 (“The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations.” (internal quotation marks omitted)).

²⁷³ *See, e.g., United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (stipulated protective orders are standard practice in complex cases).

Interlocutory appeals require significant time and resources for litigants as well as courts. With the typical low success rate on convincing appellate courts to take interlocutory jurisdiction, the cost of interlocutory appeals is prohibitively high. Of course some litigants desire delay at any cost—if for no other reason than to delay payment of damages. Still, in many cases the cost of instigating interlocutory review would outweigh the potential benefits of delaying the litigation.

And concerns about increased First Amendment appeals are also offset, at least in part, by interlocutory appeals that are already available to challenge protective orders. Some litigants and attorneys will challenge protective order rulings under Rule 26(c) in an attempt to disseminate information, notwithstanding the availability of an expanded First Amendment claim.²⁷⁴ And some cases involve information so sensitive that parties will go to any length to protect it—with or without a clarified First Amendment standard. It may very well be impossible to quantify the impact that applying intermediate scrutiny to protective orders would have on appellate workloads. But concerns about an appellate tidal wave both oversimplify—and overstate—the problem.

C. *The Federalization of State-Court Discovery*

The *Seattle Times* Court was justifiably concerned about turning routine state discovery questions into federal questions. At oral argument in the case, Justice Stevens asked counsel for the newspapers, “isn’t it a virtual certainty that we are going to have a federal question” in which protective orders restrict discovery dissemination.²⁷⁵ The concern that the Supreme Court not become “the last court of resort for discovery all over the country” is a legitimate one.²⁷⁶

But the practical reality of the Supreme Court’s relationship to state courts diffuses the issue. First, the Supreme Court’s review of state court interlocutory orders is more limited than its review of similar orders in circuit courts.²⁷⁷ The statute authorizing the Supreme Court to review state court decisions of federal questions—28 U.S.C. § 1257— allows review of “final” judgments. Similar language is found in 28 U.S.C. § 1291, the statute that allows circuit courts to review only “final judgments” of district courts. The Court often cites the two statutes interchangeably but has noted that different concerns undergird the

²⁷⁴ See, e.g., *Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1113 (3d Cir. 1986).

²⁷⁵ Oral Argument at 24:05, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (No. 82-1721), available at http://www.oyez.org/cases/1980-1989/1983/1983_82_1721.

²⁷⁶ *Id.* at 24:12.

²⁷⁷ See 15A WRIGHT ET AL., *supra* note 32, § 3908.

language in each statute.²⁷⁸ The § 1257 version of the term “final,” used in reference to state court judgments and orders, ought to be less flexible than the federal version of “final.”

With respect to state court orders, the Court ought to consider comity and federalism when deciding to intervene in ongoing proceedings.²⁷⁹ Likewise, if the case can be resolved on an independent state law ground—like the resolution of a good-cause question—the Supreme Court should decline review. So interpreted, § 1257 provides a layer of deference for state courts deciding interlocutory discovery matters.

Additionally, the process for petitioning for certiorari provides ample discretion to allow for flexibility between the states. Certiorari review is discretionary. The Supreme Court may deny review for any reason, or no reason at all. In a contemporary case involving a state high court that applied intermediate scrutiny to review a protective order, the Supreme Court declined review.²⁸⁰ Doing so allowed the state court interpretation of the First Amendment to stand (without comment by the Court) and expended minimal resources at the Court.

Thus, concerns about federalizing discovery are likely overstated. And in the final analysis, correctly applying and interpreting the First Amendment trumps managerial concerns.²⁸¹ If the First Amendment is to play a role in the protective-order process, the Supreme Court should be the final, if reluctant, voice.

D. *The First Amendment and Routine Court Practices*

More than twenty years ago, Professor Marcus, in an article in his seminal series on protective orders, assessed the viability of two common litigation mechanisms: discovery sharing and umbrella protective orders. Based on his view that the First Amendment was irrelevant in the protective-order analysis, the discussion primarily turned on the wisdom and viability of these devices in the Rule 26(c) good-cause framework. An enhanced role for the First Amendment in the protective-order analysis merits a new look at both procedures and an assessment of whether one or both is required or forbidden.

²⁷⁸ See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 501–04 (1975) (Rehnquist, J., dissenting); see also 15A WRIGHT ET AL., *supra* note 32, § 3911.

²⁷⁹ See 15A WRIGHT ET AL., *supra* note 32, § 3908.

²⁸⁰ *In re Requests for Investigation of Attorney E.*, 78 P.3d 300, 310 (Colo. 2003), *cert. denied*, 540 U.S. 1104 (2004).

²⁸¹ See Post, *supra* note 67, at 170.

1. Sharing Protective Orders

Sharing protective orders allow litigants to collaborate between cases using common discovery.²⁸² In a given case, courts utilize sharing protective orders to expressly allow litigants to share discovery with litigants in similar cases. The degree and nature of similarity required is controlled by the terms of the protective order itself. Likewise, most sharing protective orders require litigants who receive the information (and anyone else who receives it under the order) to agree to be bound by the order, including its contempt provision. This allows litigants to access and use discovery without reinventing the wheel.²⁸³

Doing so increases the efficiency of the discovery system. Courts and commentators have noted that shared discovery is in line with a general trend of consolidating and streamlining litigation.²⁸⁴ Obtaining pertinent discovery in similar cases—like products liability cases involving the same product or toxic tort cases involving an identical chemical—without serving discovery requests, fighting over objections and ultimately consuming court time with motions to compel, saves litigants and courts time and money.²⁸⁵

Shared discovery also allows plaintiffs' attorneys to collaborate to understand the meaning of discovery information.²⁸⁶ Plaintiffs' attorneys frequently work alone or in small groups. In complex cases, the meaning of documents may be unclear in isolation. Defendants, on the other hand, have long collaborated through a network of in-house and outside counsel. Shared discovery allows consultation with knowledgeable attorneys for both sides of the docket and prevents some of the disparity of information created by protective orders.

Discovery sharing increases transparency and integrity in the civil discovery system.²⁸⁷ While litigation abuse and fraud are hopefully the

²⁸² See, e.g., *Garcia v. Peeples*, 734 S.W.2d 343 (Tex. 1987); cf. Bratvold, *supra* note 185, at 197 n.125; Gary L. Wilson, Note, *Seattle Times: What Effect on Discovery Sharing?*, 1985 WIS. L. REV. 1055, 1056–59 (1985).

²⁸³ See, e.g., *Miller v. Gen. Motors Corp.*, 192 F.R.D. 230, 231 (E.D. Tenn. 2000); *Raymond Handling Concepts Corp. v. Superior Court*, 45 Cal. Rptr. 2d 885 (1995); *Pincheira v. Allstate Ins. Co.*, 2008-NMSC-049, ¶ 68, 144 N.M. 601, 190 P.3d 322; *Peeples*, 734 S.W.2d at 347; see also *Idar v. Cooper Tire & Rubber Co.*, No. C-10-217, 2011 WL 688871, at *1–*4 (S.D. Tex. Feb. 17, 2011); *Duling v. Gristede's Operating Corp.*, 266 F.R.D. 66, 75–76 (S.D.N.Y. 2010); *Brownlow v. Gen. Motors Corp.*, No. 3:05CV-414-R, 2007 WL 2712925, at *6, *8 (W.D. Ky. Sept. 13, 2007); *Cowan v. Gen. Motors Corp.*, No. 06-1330 (MLB), 2007 WL 1796198, at *3–*5 (D. Kan. June 19, 2007); *In re Abbott Labs. Sec. Litig.*, No. 92 C 3869, 1993 WL 616693, *1–*11 (N.D. Ill. Nov. 15, 1993); *Kamp Implement Co. v. J.I. Case Co.*, 630 F. Supp. 218 (D. Mont. 1986); *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Colo. 1982).

²⁸⁴ See, e.g., Marcus, *supra* note 19, at 495–96.

²⁸⁵ See, e.g., *Peeples*, 734 S.W.2d at 347 (“In addition to making discovery more truthful, shared discovery makes the system itself more efficient.”).

²⁸⁶ See, e.g., Marcus, *supra* note 19, at 495.

²⁸⁷ See, e.g., *Miller*, 192 F.R.D. at 231 (observing that shared discovery would “encourage

exceptions and not the rule, serious misconduct has been documented. And in at least some cases, comparison of discovery responses, like deposition testimony, between two cases has revealed perjury and other inconsistent responses.²⁸⁸

As Professor Marcus correctly recognized, *Seattle Times* does not forbid discovery sharing between cases.²⁸⁹ The case simply did not answer the question about the propriety of discovery sharing. Rather, it addressed the question of whether the First Amendment required a court to allow discovery dissemination. And while Professor Marcus acknowledged the benefits of discovery sharing among cases, he implicitly rejects the idea that the First Amendment requires discovery sharing in any case.²⁹⁰

As a predicate matter, “good cause” probably limits the ability of courts to enter non-sharing protective orders, and some courts have so held.²⁹¹ For instance, when discovery sharing does not cause any identifiable harm to a defendant, good cause for a non-sharing protective order does not exist.

Stated in First Amendment terms, if a non-sharing protective order does not further the asserted government interest, it fails intermediate scrutiny.²⁹² The paradigm example of both scenarios arises in the products liability context. Imagine that a product manufacturer seeks a protective order to protect proprietary information. The information is valuable because the manufacturer’s competitors do not have access to it.²⁹³ Now imagine that the proposed non-sharing protective order forbids access to the information by anyone other than the parties to the instant litigation.

The order simultaneously fails the good-cause test (in jurisdictions where that test is meaningful), and intermediate scrutiny. The breadth of the order is not supported by good cause because sharing the information between litigants—non-competitors—would not harm the defendant manufacturer so long as everyone receiving the documents agreed to be bound by the protective order’s terms. The information

General Motors to be careful with regard to completeness and uniformity of its production of discovery in all similar cases”); *Peeples*, 734 S.W.2d at 347 (“Parties subject to a number of suits concerning the same subject matter are forced to be consistent in their responses by the knowledge that their opponents can compare those responses.”).

²⁸⁸ See Marcus, *supra* note 19, at 496 n.235 (citing *Harre v. A.H. Robins Co.*, 750 F.2d 1501 (11th Cir. 1985)).

²⁸⁹ See *id.* at 495.

²⁹⁰ See *id.* at 462.

²⁹¹ See, e.g., *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Colo. 1982).

²⁹² See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 798–99 (1989) (holding that restrictions on speech must “serve” asserted interest); David Timmins, Note, *Protective Orders in Products Liability Litigation: Striking the Proper Balance*, 48 WASH. & LEE L. REV. 1503, 1527 (1991).

²⁹³ See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011–12 n.15 (1984).

retains its competitive value because the competitor still does not have access to it.²⁹⁴ Perhaps this is overstating the lack of harm a bit because it theoretically does become more likely that competitors can gain access to the information as more non-competitors gain access to it. But this risk, in many cases, is negligible, and does not amount to the kind of “serious” harm required to establish good cause.²⁹⁵

At the same time, the non-sharing protective order would fail intermediate scrutiny because the order is greater than necessary to serve any plausible government interest. If the product manufacturer asserted the government’s interest in protecting the litigants’ property interests, the non-sharing order would fail because a sharing provision would provide virtually equal protection for the value of the information.²⁹⁶ Likewise, if the manufacturer asserted its right to a fair trial, free from pretrial prejudice generated from the release of the information, the order would still fail. It is hard to fathom that sharing with other similarly situated litigants would fatally taint a jury pool in any venue, much less the one in which the case is being tried.²⁹⁷

In other cases, a non-sharing order might pass both First Amendment and good-cause scrutiny. In an example cited by Professor Marcus and others, sharing the formula for Coca-Cola with anyone outside the litigation (and perhaps within the litigation) could cause the company irreparable harm.²⁹⁸ This premise flows from both the incredibly high value of the formula—making it more likely that non-competitor litigants would leak it—and the extreme secrecy measures that Coca-Cola has used to protect the formula. In such a case, protecting the value of information exchanged in discovery and preventing discovery abuse might not be well served by anything less than a non-sharing protective order.²⁹⁹

These examples highlight several important features of the First Amendment’s role in discovery. First, intermediate scrutiny is a flexible enough test to accommodate different scenarios without disrupting the discovery process. Second, in jurisdictions with a strong good-cause standard and no First Amendment scrutiny, the imposition of intermediate scrutiny will not cause many ripples. Thus, the main effect of the test on discovery sharing may be to create more uniformity across jurisdictions by raising the level of scrutiny in jurisdictions without a rigorous good-cause analysis. The test could also result in less appellate deference to non-sharing orders.

²⁹⁴ *See id.*

²⁹⁵ *Cf. Allen v. City of N.Y.*, 420 F. Supp. 2d 295, 302 (S.D.N.Y. 2006).

²⁹⁶ *See Ruckelshaus*, 467 U.S. at 1011 n.15.

²⁹⁷ *See, e.g., Neb. Press Ass’n v. Stuart*, 427 U.S. 539 (1976).

²⁹⁸ *See Marcus, supra* note 19, at 496.

²⁹⁹ *Id.*

2. Umbrella Protective Orders

For several decades, so-called umbrella protective orders have been issued as a matter of course in some courts, and protect all documents that any party deems “confidential.”³⁰⁰ A simple “confidential” stamp placed on the document will suffice to fully protect it under the order unless and until another party challenges the designation.³⁰¹ Courts and commentators alike have roundly praised these orders.³⁰² They allow courts to defer or eliminate fights about confidentiality. While the value of streamlining discovery cannot be understated, Rule 26(c) simply does not contemplate such a procedure. And umbrella orders would rarely, if ever, satisfy First Amendment scrutiny.

Professor Marcus, based on his rejection of the First Amendment’s role with respect to protective orders, argues that umbrella orders are both constitutional and desirable. As he accurately notes, “it is difficult to see how umbrella orders could pass [First Amendment] muster because, at the time the order is presented to the court, the identity of the documents to be designated confidential is not known.”³⁰³ The inability of umbrella orders to pass First Amendment “muster,” so the reasoning goes, is a reason that the First Amendment should play a minimal role.

Consistent with Professor Marcus’s understanding, umbrella orders, entered without any evidentiary showing, cannot pass even the flexible intermediate scrutiny test.³⁰⁴ But such an order cannot satisfy a meaningful application of Rule 26(c)’s good cause analysis either: Courts have long required the party seeking a protective order to make a showing of particularized, serious harm.

Likewise, a party seeking to justify such an order under the First Amendment would not be able to tie it to any legitimate government interest because, as Marcus notes, the nature of the information protected is unknown. Likewise, without knowing the nature of the information to be protected, the party seeking an order could not show that a less restrictive order would not suffice to protect it.

No doubt, like Professor Marcus, those who object to the First Amendment playing an expanded role in discovery will cite the impossibility of umbrella orders as a reason to reject the First Amendment. But courts seeking to enter umbrella orders with no evidentiary showing should never reach the First Amendment

³⁰⁰ See, e.g., *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990).

³⁰¹ See Marcus, *supra* note 19, at 500.

³⁰² See, e.g., *id.* But see Miller, *supra* note 26, at 476.

³⁰³ See Marcus, *supra* note 19, at 500.

³⁰⁴ See *id.*

question—without a specific showing of both confidentiality and harm, the orders are unsound under Rule 26(c).

In any event, even if the First Amendment precludes some umbrella orders, a massive disruption in the litigation system is unlikely. Parties often stipulate to umbrella orders, and a party generally may waive its First Amendment rights to enter an agreement with a private party.³⁰⁵ Significant incentives exist on both sides of the docket to avoid protracted discovery fights. And while some plaintiffs' attorneys will inevitably view information as a commodity to barter, making agreement to any protective order unlikely, many plaintiffs' attorneys will agree to a protective order with reasonable terms, even umbrella orders.

Moreover, even if a party objects to an umbrella order and demands an evidentiary showing by the proponent of the order, modern technology may expedite the review necessary to do so. Courts are already relying on algorithm-based “conceptual search” technology (e.g., “predictive coding”) to aid discovery in some cases.³⁰⁶ The process allows parties to identify documents within the scope of discovery, or within a privileged category, through largely automated computer processes.³⁰⁷

The efficacy and risk of error of computer assisted document review is of some concern.³⁰⁸ In its current state, the technology might not be effective in determining which documents, out of terabytes of data, are “confidential.” Additionally, mistakes about what information is and is not confidential have potentially more gravity than mistakes about what is responsive to a discovery request. It is feasible that parties can still successfully prosecute litigation even if responsive documents are omitted from a document production. Confidentiality, on the other

³⁰⁵ The unconstitutional conditions doctrine places some limitations on the ability to exchange or “bargain” First Amendment rights. See *Crosby v. Bradstreet Co.*, 312 F.2d 483, 484 (2d Cir. 1963); see also Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 805–06 (2003) (describing limits on ability to waive First Amendment rights). A full discussion of the unconstitutional conditions doctrine is beyond the scope of this Article. But several commentators have contended that a party who consents to a protective order has waived her First Amendment right to later challenge it. See, e.g., Campbell, *supra* note 57, at 825; Marcus, *supra* note 33, at 69.

³⁰⁶ See, e.g., Jacob Tingen, *Technologies-That-Must-Not-Be-Named: Understanding and Implementing Advanced Search Technologies in E-Discovery*, 19 RICH. J.L. & TECH. 2, 37 (2012) (“[C]onceptual searches find documents based on their relevance or similarity to the ideas expressed in the search query.”); Charles Yablon & Nick Landsman-Roos, *Predictive Coding: Emerging Questions and Concerns*, 64 S.C. L. REV. 633, 637–42 (2013). See generally *The Grossman-Cormack Glossary of Technology-Assisted Review*, 7 FED. CTS. L. REV. 1 (2013).

³⁰⁷ See, e.g., David J. Waxse & Brenda Yoakum-Kriz, *Experts on Computer-Assisted Review: Why Federal Rule of Evidence 702 Should Apply to Their Use*, 52 WASHBURN L.J. 207, 210–11 (2013) (describing computer-assisted review technologies' ability to identify unresponsive documents on a large scale based on a “seed” review of a much smaller set of documents).

³⁰⁸ Yablon & Landsman-Roos, *supra* note 306, at 668–69.

hand, could be squandered by the erroneous production of just a single document.

Computers, like humans, however, make mistakes. And at some point, predictive coding could be good enough to handle confidentiality determinations. Depending on the quality of the algorithm and the nature of the information, significant quantities of documents might be automatically coded to make sure that they were within the scope of a proposed protective order.

CONCLUSION

Seattle Times has caused continuous confusion for lower courts since it was decided almost thirty years ago. The confusion stems not only from the language of the case but also from the tensions between effectively managing litigation, protecting the public, fostering self-governance, and individual liberty. The equation is a complex one. While an efficient litigation system is a worthy goal, unfettered discretion to silence pretrial litigants vitiates any traditional notion of First Amendment “protection.” Jurisdictions that have given more full-bodied protection to discovery dissemination confirm this—the predicted flood of interlocutory appeals and cumbersome evidentiary findings has simply not happened. But many of the ills that critics of protective orders have long cited—information about dangerous products concealed in litigation, information about pedophiles secreted away, information about illicit government spying—have recurred since *Seattle Times* was decided.

Moreover, the world is very different than it was in 1983, when the Supreme Court began the term in which the case was decided. The past thirty years have brought rapid technological change, some of which would aid courts in sorting through document-by-document confidentiality challenges. And the First Amendment landscape has also changed, with intermediate scrutiny playing a larger role and fostering efficient administration in special contexts like litigation.

All of these developments call for a renewed look at the relationship between the First Amendment and protective orders. And most considerations weigh in favor of an expanded role for free speech in pretrial discovery. Ignoring hyperbole on both ends of the spectrum, it turns out that the prerogatives of courts, litigants, and society can all be accommodated through a more transparent and doctrinally consistent application of basic First Amendment principles. Doing less risks injury to both individuals and the reputation of the civil litigation system.