Constitutional Law - Protective Orders Prohibiting Publication of Information Obtained through Discovery

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CONSTITUTIONAL LAW—PROTECTIVE ORDERS PROHIBITING PUBLICATION OF INFORMATION OBTAINED THROUGH DISCOVERY

Cipollone v. Liggett Group, Inc. (1986)

Discovery under the Federal Rules of Civil Procedure is a permissive mechanism of pre-trial inquiry designed to permit an expansive inquiry into the subject matter relevant to an impending action. The liberal scope of discovery, however, leaves open the opportunity to:

1. See Fed. R. Civ. P. 26-37. The goals of discovery are threefold: (1) to narrow the issues, in order that at the trial it may be necessary to produce evidence only on a residue of matters that are found to be actually disputed and controverted; (2) to obtain evidence for use at the trial; and (3) to secure information about the existence of evidence that may be used at the trial and to ascertain how and from whom it may be procured. 8 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 2001 at 15 (1970).

2. See Hickman v. Taylor, 329 U.S. 495, 501 (1947) (discovery rules enable litigants "to realize the fullest possible knowledge of the issues and facts before trial."). The issue in Hickman involved the extent to which discovery could be had of information secured in anticipation of litigation. Id. at 487. In deciding the issue, the Court prefaced its argument with a discussion of the purpose and scope of discovery under the federal rules. Id. at 500-01. According to Mr. Justice Murphy who authored the majority opinion, "the deposition-discovery rules [were] to be accorded a broad and liberal treatment" so that "[n]o longer [could] the time-honored cry of 'fishing expedition' . . . preclude a party from inquiring into the facts underlying his opponent's case." Id. at 507. Disclosure of the mutual knowledge of relevant facts essential to proper litigation was the goal which motivated the federal rules. Id.

The purpose of the discovery rules comports with the overall purpose of the Federal Rules of Civil Procedure "to secure the just, speedy and inexpensive determination of every action." Fed. R. Civ. P. 1; see also Herbert v. Lando, 441 U.S. 153, 177 (1979) ("[T]he discovery provisions [of the Federal Rules] are subject to the injunction of Rule 1"). Under prior practice the means of narrowing issues and of obtaining information for trial preparation were very limited. See C. Wright, supra note 1, at 14. Under a battle of wits philosophy, each party was protected against discovery of its case. Id. Federal Rules of Civil Procedure 26-37, which set forth rules governing discovery, provide a significant liberalization of the prior practice. Under prior procedure, the philosophy that a judicial proceeding was a battle of wits prevailed, and litigants would protect against disclosure of their case rather than cooperate in a search for the truth. Id. The present Federal Rules are a significant improvement over prior practice, at least to the extent that they facilitate the information gathering function of civil discovery. Id.


(b) Scope of Discovery. Unless otherwise limited by the order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not
abuse the permissive discovery mechanism.\textsuperscript{4} As a countervailing measure to this potential abuse,\textsuperscript{5} the Federal Rules have established protective orders\textsuperscript{6} which issue for good cause shown under Rule 26(c).\textsuperscript{7}

privileged, which is relevant to the subject matter involved in the pending action . . . .

\textit{Id.} Relevance defines the scope of discovery and is broadly and liberally construed. \textsuperscript{4} J. Moore, J.D. Lucas, G. Grotheer, \textit{Federal Practice \ ¶ 26.56, at 26-94} (1986) (citing Hickman v. Taylor, 329 U.S. 495 (1947)). Information is relevant so long as it is reasonably calculated to lead to the discovery of admissible evidence. \textit{Id.} at 26-97. The term "subject matter" is likewise broadly construed and extends to information beyond the merits. \textit{Id.} at 26-101. For example, facts relevant to the following issues have been held to be discoverable: jurisdiction, proper venue, credibility of a deponent, whether certain persons are necessary or indispensable parties, and even knowledge that might lead to a settlement. \textit{Id.} at 26-101 to 103. The liberal construction of the scope of discovery satisfied a "long-felt need" for a legal machinery to provide disclosure of the real points of dispute between the litigants to afford an adequate factual basis in preparation for trial. \textit{Id.} \ ¶ 26.02, at 26-57 (citing Carlson Cos., Inc. v. Sperry & Hutchinson Co., 374 F. Supp. 1080 (D. Minn. 1973) (discovery rules should clarify issues to be litigated and reveal existence of relevant facts); Dillon v. Bay City Const. Co., 512 F.2d 801 (5th Cir. 1975) (consolidation of hearing on merits was in error as it inhibited extensive discovery necessitated by action based on discrimination)).

4. \textit{J. Moore, supra} note 3, \ ¶ 26.67, at 26-425. The need to limit the broad discovery process is created in part by the liberal scope of discovery itself. \textit{Id.} Thus, the very broad statement as to the scope of discovery is preceded by the phrase, "unless otherwise limited by order of court in accordance with these rules." \textit{Fed. R. Civ. P. 26(b).} This phrase refers to Rules 26(c) and 30(d); therefore Rule 26(b) and 26(c) should be read as a whole where rule 26(c) establishes the power of the court to protect litigants by limiting the freedom inherent in a liberal discovery process. \textit{J. Moore, supra} note 3, \ ¶ 26.67, at 26-426. In this light, Rule 26(c) has been referred to as a corollary to Rule 26(b). \textit{See, e.g., In re Halkin, 598 F.2d 176, 207} (D.C. Cir. 1979) (Wilkey, J., dissenting).

5. The courts have recognized the potential abuse inherent in a liberal discovery process, and have exercised broad discretion under Rule 26(c) to afford participants in the discovery process the maximum protection against harmful side effects. \textit{See J. Moore, supra} note 3, \ ¶ 26.67, at 26-427; \textit{see, e.g., Herbert v. Lando, 441 U.S. 153} (1977) (court noted that district courts should freely exercise power to control and restrict discovery, where necessary to protect party from abuse); \textit{In re Coordinated Pretrial Proceedings, Etc., 669 F.2d 620} (10th Cir. 1982) (protective order entered was not abuse of discretion unless entered pursuant to error of law; burden imposed on responding party if order not granted is relevant concern); \textit{Soobzokov v. CBS, Inc., Quadrangle/N.Y. Times Book Co., 642 F.2d 28} (2d Cir. 1981) (motions relative to discovery are addressed to discretion of court); \textit{Laverett v. Continental Briar Pipe Co., 25 F. Supp. 80} (E.D.N.Y. 1938) (powers given to court under rule 30(b) [now 26(c)] to limit discovery are for protection of parties); \textit{see also} 8 C. Wright & A. Miller, \textit{Federal Practice and Procedure \ ¶ 2001} (Supp. 1986) (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975) (prospect of extensive deposition of corporate officers has potential for substantial abuse, but also potential for producing relevant evidence; liberal discovery is both "social cost" and "social benefit").

6. \textit{J. Moore, supra} note 3, \ ¶ 26.67, at 26-427. Courts and litigants have come to rely on the court's power to issue protective orders to accomplish the purpose embodied in Rule 1 of the Federal Rules, namely, to speed up discovery and to minimize discovery disputes, especially in complex litigation situations.
Courts employing protective orders under this rule have sometimes done so to prohibit the dissemination of information obtained through the discovery process. Such orders, however, impede the free flow of

For a sampling of the kinds of situations in which protective orders are sought, see Anderson v. Cryovac, Inc., 805 F.2d 1 (1st Cir. 1986) (protective order entered to prohibit publication of discovery materials to protect publicity over toxic substance pollution from impeding fair trial). See also McNear v. Coughlin, 643 F. Supp. 566 (W.D.N.Y. 1986) (protective order requested by prisoner who brought action against Commissioner of Correction under 42 U.S.C. § 1983 regarding items requested in defendant’s Request for Production of Documents); Porter v. ARCO Metals Co., 642 F. Supp. 1116 (D. Mo. 1986) (protective order sought in wrongful dismissal action to prohibit defendant from interviewing former employees); Puerto Rico Aqueduct & Sewer Auth. v. Clow Corp., 111 F.R.D. 65 (D.P.R. 1986) (protective order issued to defendants in pending action in another district court set up as defense to plaintiff’s Request for Production of Documents); N.O. v. Callahan, 110 F.R.D. 637 (D. Mass. 1986) (in action by mental patients against mental health facility based on inadequate care, defendant sought protective order to limit use of videotaping of non-party patients); John Does I-VI v. Yogi, 110 F.R.D. 629 (D.D.C. 1986) (in suit where plaintiffs claim they were defrauded by defendant-Yogi, protective order issued to defendant to protect access to business records and meditational trade secrets as some of plaintiffs were members of competing spiritual leader’s group); Marcus, Myth and Reality in Protective Order Litigation, 69 CORNELL L. REV. 1 at 1 (1969) (discovery provisions subject to directives of Federal Rule of Civil Procedure 1, to secure the “just, speedy, and inexpensive determination of every action”).

7. The text of Rule 26(c) provides:
   (c) Protective Orders. Upon a motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions including a designation of the time or place; (3) that discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

FED. R. CIV. P. 26(c).

information, and have thereby given rise to certain constitutional concerns. Indeed, the federal courts have disagreed over the precise contours of their power to issue such orders in light of first amendment doctrine.9

The first court to fully confront this issue was the United States Court of Appeals for the District of Columbia in \textit{In re Halkin}.10 The \textit{Halkin} court decided that protective orders which prohibited the release of discovery information implicated serious first amendment concerns.11

entered prohibiting Washington Post from publishing depositions in libel action; remanded to be reconsidered in light of \textit{Seattle Times}; Krause v. Rhodes, 671 F.2d 212 (6th Cir. 1982) (protective order entered barring publication of documents obtained through discovery in underlying civil cases surrounding unrest on campus of Kent State University in 1970; reviewed as to first amendment implications); \textit{In re San Juan Star Co.}, 662 F.2d 108 (1st Cir. 1981) (protective order prohibiting attorneys from disclosing any information obtained through depositions in criminal action surrounding highly publicized shootout between police and terrorists; reviewed as to first amendment implications); National Polymer Products v. Borg-Warner Corp., 641 F.2d 418 (6th Cir. 1981) (protective order prohibiting disclosure of quality control reports produced by Borg-Warner in discovery to personnel of National Polymer Products in action arising out of products sold by Borg-Warner; reviewed as to first amendment implications); \textit{In re Halkin}, 598 F.2d 176 (D.C. Cir. 1979) (protective order prohibiting counsel and parties from disclosing discovered information rising out of action surrounding CIA surveillance of Vietnam War activists; reviewed under strict first amendment standards); \textit{In re Alexander Grant & Co. Litigation}, 629 F. Supp. 593 (S.D. Fla. 1986) (protective order limiting disclosure of documents marked confidential); \textit{In re Korean Air Line Disaster of Sept. 1, 1983}, 597 F. Supp. 621 (D.D.C. 1984) (protective order prohibiting pre-trial discovery information from being published in press; challenged by Washington Post on first amendment grounds); Cipollone v. Liggett Group, Inc., 106 F.R.D. 573 (D.N.J. 1985) (protective order prohibiting publication of documents labeled confidential by tobacco company defendants in products liability action); Koster v. Chase Manhattan Bank, 93 F.R.D. 471 (S.D.N.Y. 1982) (protective order prohibiting disclosure of discovery information surrounding forced sexual relations case not evaluated by stringent constitutional standards).

9. \textit{U.S. CONST.} amend. 1. The amendment provides in pertinent part: “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .” \textit{Id.} For a list of cases discussing the power of a court to issue Rule 26(c) protective orders in light of the first amendment, see \textit{supra} note 8.

10. 598 F.2d 176 (D.C. Cir. 1979). The plaintiffs in \textit{Halkin} were a number of individuals who brought suit against the Central Intelligence Agency and other governmental agencies for conducting unlawful surveillance of certain United States citizens opposing the war in Vietnam. \textit{Id.} at 180. Plaintiffs requested discovery of certain governmental documents, relating to the governmental surveillance operation. \textit{Id.} Having obtained the information, the plaintiffs gave notice that they intended to release the information to the press. \textit{Id.} at 181. In response, the government moved that the court issue a protective order under Rule 26(c), prohibiting the publication of the documents, and the court entered the appropriate order. \textit{Id.} at 182. Plaintiffs opposed the order arguing that such a restriction on publication violated their first amendment rights. \textit{Id.}

11. \textit{Id.} at 186. The District of Columbia Circuit believed that the discovery rules contemplated the unlimited use of discovery information once obtained. \textit{Id.} at 189. The court further likened protective orders to judicial prior restraints

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That court, therefore, required such orders to pass muster under a strict constitutional test.12 Prior to Halkin, the United States Court of Appeals for the Second Circuit in International Products Corp. v. Koons13 had decided that prohibiting the dissemination of discovery information by on speech which traditionally have raised serious first amendment concerns. Id. at 183-86. Reasoning in part from these assumptions, the Halkin court concluded that prohibitive protective orders required strict constitutional scrutiny. Id. at 186.

The Halkin analysis has been noted both critically and with approval by several commentators. See Comment, Protective Orders Prohibiting Dissemination of Discovery Information: The First Amendment and Good Cause, 1980 DUKE L.J. 766 (approving of first amendment right to disseminate information obtained through discovery; Halkin test incorporated into good cause standard of Rule 26(c) provides useful constitutional standard); Comment, First Amendment—Federal Procedure—Dissemination of Discovery Material Is Constitutionally Protected, 55 NOTRE DAME L. REV. 424 (1980) [hereinafter Notre Dame Comment] (first amendment rights are not diminished within context of civil discovery; Halkin's constitutional test is consistent with constitutional standards for evaluating prior restraints); Note, Rule 26(c) Protective Orders and the First Amendment, 80 COLUM. L. REV. 1645 (1980) (Halkin court did not adequately justify its decision not to treat protective orders as prior restraints; expanded version of Halkin test is appropriate which would add probability of harm as factor in analysis if protective order not issued); Case Comment, The First Amendment Right to Disseminate Discovery Materials: In re Halkin, 92 HARV. L. REV. 1550 (1979) (strict constitutional analysis of protective orders which limit dissemination of discovery material is both illogical and in derogation of standard established in Rule 26(c)); Recent Decisions, Constitutional Law—Fair Trial/Free Speech—If the Issuance of a Protective Order Pursuant to Federal Rule 26(c) Would Restrain Expression, The District Court Must Determine the Order's Constitutional Adequacy Under the First Amendment—In re Halkin, 598 F.2d 176 (D.C. Cir. 1979), 48 GEO. WASH. L. REV. 486 (1979) (Halkin test is appropriate, but should have taken into account degree of likelihood that dissemination would cause injury); cf. Note, Seattle Times v. Rhinehart: Making “Good Cause” a Good Standard for Limits on Dissemination of Disclosed Information, 47 U. PRR. L. REV. 547 (1986) (disapproving diminution of first amendment rights in Seattle Times and approving Halkin's approach by implication).

12. Halkin, 598 F.2d at 191. The result of the Halkin analysis is a three-pronged constitutional test. Id. Prohibitive protective orders must meet each prong of the test in order to be constitutional. Id. The test is as follows: (1) the harm posed by dissemination must be substantial and serious; (2) the restraining order must be narrowly drawn and precise; and (3) there must be no alternative means of protecting the public interest which intrudes less directly on expression. Id. The court envisioned this standard as part of the “good cause” test of Rule 26(c). Id. at 192. For a discussion of the relevant first amendment analysis, see supra note 8.

13. 325 F.2d 403 (2d Cir. 1963). In Koons, International Products Corporation (IPC), brought an action against Koons, its former president, for usurpation of business opportunities belonging to the corporation. See International Prod. Corp. v. Koons, 33 F.R.D. 21, 23 (S.D.N.Y. 1963). During the pre-trial phase of this litigation, the defendant took the deposition of Jose Seldes, then current president of IPC, concerning certain payments by IPC officers to officials of a South American government, Koons, 325 F.2d at 404. A protective order was entered at the request of IPC and upon a “Suggestion of Interest” filed by the United States prohibiting the dissemination of the deposition of Seldes to third parties and restricting the use thereof to trial preparation. Id. at 405. IPC appealed the order pendente lite pursuant to 28 U.S.C. § 1292(1). Id. at 407.
protective order was "plainly authorized [under] the Federal Rules of Civil Procedure," and that there was "no doubt as to the constitutionality of [such a] rule." In a third opinion that fell between Halkin and Koons, the United States Court of Appeals for the First Circuit required only limited scrutiny of restrictive protective orders. In In re San Juan Star Co. the court decided that protective orders which curtailed a litigant's right to publish information obtained through discovery gave rise to first amendment concerns of only a limited nature. Accordingly,

14. Id. at 407-08. The court in Koons was speaking of Federal Rule of Civil Procedure 30(b) which covered protective orders prior to the reorganization of the discovery rules in 1970. See J. Moore, supra note 3, at 26-43. Under the 1970 reorganization, the subject matter of Rule 30(b) was shifted to Rule 26(c). Id. The text of current Rule 26(c) is substantially similar to that of former Rule 30(b), also requiring "good cause shown" for the issuance of protective orders. Id. For the text of former Rule 30(b), see J. Moore, supra note 3, at 26-44. For the text of current Rule 26(c), see supra note 7. The issue before Judge Friendly in Koons was whether an order prohibiting the publication of information in the possession of litigants before discovery was unconstitutional. Koons, 325 F.2d at 408. The judge noted that such an order offended the constitution more readily than a protective order curtailing the use of information obtained through the court's own discovery process. Id. Although he did not need to resolve the issue, Judge Friendly nonetheless stated in dicta that protective protective orders entered under Rule 26(c) did not offend the constitution. Id. at 407-08.

Although not explicitly stated, the clear implication of the court's remarks is that the good cause standard for protective orders required by the rules of discovery is by itself an appropriate and sufficient standard with no need of amplification by additional constitutional analysis. See id.; see also Notre Dame Comment, supra note 11, at 431, 432 n.44 (noting that this view of Koons was taken by Judge Wilkey dissenting in both Halkin and Reliance Ins. Co. v. Barron's) (citing Reliance Ins. Co. v. Barron's, 428 F. Supp. 200, 204-05 (S.D.N.Y. 1977)). This interpretation of Koons is consistent with Judge Wilkey's argument in his dissenting opinion in Halkin:

Thus Koons, Rodgers, and inferentially, Parker all recognize a distinction between, on the one hand, restraining orders prohibiting the communication of other kinds of information, and, on the other hand, protective orders solely directed at information and documents obtained in discovery through the court's own process. The distinction is this: Although each is a form of "prior restraint," the constitutional permissibility of the first order is determined by application of a rigorous "clear-and-present-danger" type standard, whereas the constitutional permissibility of the latter order is governed by the less stringent standards embodied in the discovery laws.

Halkin, 598 F.2d at 204 (Wilkey, J., dissenting) (emphasis added).

15. 662 F.2d 108 (1st Cir. 1981). In San Juan Star, the relatives of two terrorists slain in a police shootout brought a civil rights action against the government alleging that the law enforcement and government officials conspired to arrange the killings. Id. at 111. The case received wide publicity and the court thus issued a protective order prohibiting the publication of any material obtained through discovery in the case. Id. The San Juan Star challenged the order as a violation of first amendment freedoms of press and of speech. Id. at 112.

16. Id. at 114. The San Juan Star court agreed with the Halkin majority inasmuch as it saw restrictive protective orders as a kind of judicial prior restraint on speech. Id. at 113. However, the San Juan Star court held that such orders raised only limited first amendment concerns because the information was a product of judicial compulsion as it was obtained through discovery. Id.
that court subjected such orders to a limited constitutional test.\textsuperscript{17}

To settle the dispute among these circuits, the United States Supreme Court granted certiorari in \textit{Seattle Times v. Rhinehart}.\textsuperscript{18} The Court held that protective orders which prohibited the dissemination of

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\item obtained through judicial compulsion did not, according to the court, give rise to the same spectre of first amendment rights. \textit{Id}. at 115.
\item 17. \textit{Id}. The \textit{San Juan Star} court began with the premise that "the products of discovery . . . embody significant but somewhat limited First Amendment interests." \textit{Id}. From this premise it deduced the appropriateness of a "less severe standard" of first amendment analysis than ordinarily applied in prior restraint situations and less severe than the \textit{Halkin} standard. \textit{Id}. In analyzing the possible infringement on first amendment rights caused by protective orders prohibiting dissemination of discovery materials, the court looked first to the magnitude and imminence of the harm which the order attempts to prevent. \textit{Id}. It then considered the effectiveness of the order in the context of the availability of means less restrictive of first amendment rights. \textit{Id}. at 116. The court envisioned the consideration of the degree and imminence of the harm to be caused by unrestricted dissemination as measurements to be made on a sliding scale. \textit{Id}. As the potential harm grows more serious, the imminence of harm necessarily is reduced. \textit{Id}. The appropriate analytic context within which to evaluate the magnitude and imminence of potential harm is the "good cause" standard of Rule 26(c), but with a "heightened sensitivity" to first amendment concerns. \textit{Id}. After a consideration of potential harm, the least restrictive means standard is applied with no countervailing interests juxtaposed, "[b]ecause no competing interests can serve to justify any restraint on expression more than that minimally necessary to its own protection." \textit{Id}. The \textit{San Juan Star} court saw itself taking a position midway between those taken in the majority and dissenting opinions in \textit{Halkin}. \textit{Id}. In applying this standard, the court found the imposition of the protective order justifiable. \textit{Id}. at 117. The potential harm of publishing pre-trial discovery of an already highly publicized and emotionally charged proceeding would hinder the defendant's right to a fair trial. \textit{Id}. The order was sufficiently tailored to meet the least restrictive prong of the test as it did not restrain the press from publishing any information to which it had access, nor did it restrain parties or counsel from discussing the proceedings with the press. \textit{Id}.\textit{.}
\item 18. 467 U.S. 20, 28 (1985). The issue in this case was whether parties to a civil litigation had a first amendment right to disseminate information obtained through discovery in advance of trial. \textit{Id}. at 22-23. Rhinehart was the spiritual leader for the Aquarian Foundation, a religious organization involved in communicating with the dead through the use of a medium. \textit{Id}. \textit{The Seattle Times} published several articles about Rhinehart and certain activities of the Aquarian Foundation. \textit{See} Rhinehart v. \textit{Seattle Times}, 98 Wash. 2d 226, 227, 654 P.2d 673, 675 (1982). After the appearance of articles describing the Foundation's "bizarre performances" at a "religious presentation" staged for inmates at the Washington state penitentiary, Rhinehart, on behalf of himself and the Foundation, filed suit against the newspaper, seeking damages for defamation and invasion of privacy. \textit{Id}. During discovery, the \textit{Seattle Times} obtained information concerning the Foundation's financial affairs, their membership and their donor contribution. \textit{Id}. at 228, 654 P.2d at 675. The plaintiff successfully sought a protective order which, \textit{inter alia}, prohibited the dissemination of any information obtained through discovery. \textit{Id}. \textit{The Seattle Times} attacked the protective order on the ground that it violated its first amendment rights of freedom of press and speech. \textit{Id}. The protective order was issued under Washington State's Civil Rule 26(c) which is substantially similar to Federal Rule 26(c). \textit{See Wash. Super. Ct. C.R}. 26(c). For the text of Federal Rule 26(c), \textit{see supra} note 7.
\end{itemize}
discovery information were properly issued, if issued on good cause shown as provided by Rule 26(c). The Court held that no additional first amendment analysis was warranted. However, the Court’s opinion contained contrary dicta suggesting that a “least restrictive means” constitutional test was the appropriate one because these protective orders did curtail the free flow of information.

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20. Id.

21. Id. at 34. In Cipollone v. Liggett Group, Inc., the district court for the District of New Jersey described the Seattle Times opinion as imprecise as to whether prohibitive protective orders were to be analyzed under strict constitutional scrutiny. 106 F.R.D. 573, 582 (D.N.J. 1985). In light of this imprecision, the district court did not feel compelled to follow the Court’s holding that no constitutional analysis was necessary for prohibitive protective orders. Id. The Third Circuit in Cipollone, however, stated that the weight of the Court’s holding in Seattle Times overcame the ambiguity of any dicta in the opinion. 785 F.2d 1108, 1119 (3d Cir. 1986). Because of the imprecision in the Seattle Times decision, it remains unclear whether Seattle Times is dispositive of the legitimacy of prohibitive orders issued under Rule 26(c) on a showing of good cause without further constitutional scrutiny.

The following cases indicate the ambiguous posture of Seattle Times on whether a least restrictive analysis is appropriate or not for protective orders prohibiting the dissemination of discovery material. See Seattle Times, 467 U.S. at 31-32 (stating that restrictive protective orders implicate first amendment concerns and should be subject to least restrictive means analysis); id. at 37-38 (Justice Brennan concurring in judgment, reading majority opinion to require least restrictive means analysis) (Brennan, J., concurring). Contra id. at 37 (protective orders prohibiting dissemination entered on only showing of good cause under Rule 26(c) do not offend Constitution).

See also Wayte v. United States, 470 U.S. 598, 611 (1985) (Seattle Times cited by its author Justice Powell as in accord with proposition that regulation of speech is justified if it “is no greater than is essential to the furtherance of [governmental interest advanced]”); Regan v. Time, Inc., 468 U.S. 641, 690 (1984) (citing Seattle Times for proposition that “ban imposed . . . on a wide variety of expression” is greater than necessary to protect government interest involved); Anderson v. Cryovac, Inc., 805 F.2d 1, 7 (1st Cir. 1986) (interpreting Seattle Times to mean “protective discovery orders are subject to first amendment scrutiny, but scrutiny must be made within the framework of Rule 26(c)”); United States v. Caparros, 800 F.2d 23, 25 (2d Cir. 1986) (citing Seattle Times for proposition that “an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny.”); Tavoulareas v. Washington Post Co., 737 F.2d 1170 (D.C. Cir. 1984) (interpreting Seattle Times as requiring no constitutional analysis of restrictive protective orders in addition to good cause standard; suggesting that Halkin is no longer good law); BCI Comm. Sys., Inc. v. Bell Atlanticcom Sys., 112 F.R.D. 154 (D. Ala. 1986) (“a careful analysis of Seattle Times . . . produces the conclusion that . . . it is for the trial court to provide the exception [to public access to discovery] for ‘good cause shown.’” (citation omitted)); In re Agent Orange Prods. Litig., 104 F.R.D. 559, 567 (E.D.N.Y. 1985) (reading Seattle Times to stand for proposition that on showing of good cause with no additional constitutional analysis, public access to discovery materials may be limited); In re Korean Air Lines Disaster of Sept. 1, 597 F. Supp. 621, 623 (D.D.C. 1984) (Seattle Times does not require exacting first amendment scrutiny); Michelson v. Daily, 590 F. Supp. 261, 266 (N.D.N.Y. 1984) (Seattle Times requires least restrictive means constitutional analysis).
Against this background, the United States Court of Appeals for the Third Circuit in *Cipollone v. Liggett Group* addressed the constitutionality of protective orders that restricted the release of discovery information. The court held that "the first amendment is simply irrelevant to protective orders in pretrial discovery." In reaching this conclusion the Third Circuit relied primarily on the Supreme Court's ruling in *Seattle Times*, that restrictive protective orders were properly tested by the good cause standard of rule 26(c). Although the Third Circuit recognized the ambiguous dicta in *Seattle Times*, the court stated that the Supreme Court's unequivocal holding superseded subordinate inconsistent dicta which, as such, was "insufficient to overcome the weight of the Court's holding." To corroborate its position, the Third Circuit further invoked its own precedent together with the precedent of other jurisdictions.

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22. 785 F.2d 1108 (3d Cir. 1986). The case was heard before Circuit Judges Higginbotham, Becker, and Stapleton. Id. at 1110. Judge Becker wrote the opinion for a unanimous panel. Id.

23. Id. at 1119. The Third Circuit reached this conclusion after ruling that in *Seattle Times* the Supreme Court's holding was "peremptory: "a protective order... entered on a showing of good cause as required by Rule 26(c) ... does not offend the First Amendment." Id. (citing *Seattle Times* v. Rhinehart, 467 U.S. 20, 37 (1984). The Third Circuit also supported its conclusion by pointing out that the *Seattle Times* Court emphasized that discovery was not a public forum. Id. (citing *Seattle Times* v. Rhinehart, 467 U.S. 20, 33 (1984)).

The district court had amended the protective order entered by the United States magistrate in charge of discovery in *Cipollone*. 785 F.2d at 1118-19. The district court ordered discovery to proceed under the supervision of a United States magistrate pursuant to 28 U.S.C. § 636(b)(1)(A) (1982). See id. at 1111. The magistrate entered an "umbrella" protective order which provided that all documents marked confidential by the defendants would come within the order unless the confidentiality was challenged by the plaintiffs. Id. at 1112. "Umbrella" protective orders cover a group of documents and provide an alternative to orders issued on a document-by-document basis. See MANUAL FOR COMPLEX LITIGATION 2d § 21.431 (1985). "Umbrella" orders are recommended as advantageous in complex litigation situations. Id. The district court reviewed the order under a Halkin-esque standard. See *Cipollone* v. Liggett Group, Inc., 106 F.R.D. 578, 586-88 (D. N.J. 1985). For a further discussion of the magistrate's order, see infra note 30. The court altered the order in such a way that disclosure of confidential information would have followed as a matter of course. *Cipollone*, 785 F.2d at 1110. The Third Circuit's adoption of the Koons standard, however, ran contrary to the district court's application of constitutional scrutiny. Id. at 1120.

24. *Cipollone*, 785 F.2d at 1119.

25. Id. The Third Circuit cited no authority for this method of interpretation. See id. An equally reasonable canon of interpretation is to evaluate ambiguity as rendering precedent unreliable. See *McDaniel v. Sanchez*, 448 U.S. 1318, 1322 (1980) (in granting an order for stay pending consideration of petition for *certiorari*, ambiguity of precedent made it difficult to predict whether lower court would be reversed); *North Carolina v. Pearce*, 395 U.S. 711, 749 (1969) (implying that reliance on ambiguous precedent is insufficient basis on which to rest decision). For further discussion of the Third Circuit's approach in interpreting ambiguous dicta, see infra note 64 and accompanying text.

26. *Cipollone*, 785 F.2d at 1119 (citing *New York v. United States Metal Re-
In *Cipollone*, the plaintiffs, Rose and Antonio Cipollone initiated a lawsuit against several large tobacco companies in the district court for the District of New Jersey.\(^27\) While predating their action on theories of negligence, misrepresentation, and products liability,\(^28\) the Cipollones filed a complaint against the Liggett Group, Inc. to recover damages for injuries caused by smoking cigarettes.\(^29\) The plaintiffs averred that as a result of over forty years of smoking, Rose Cipollone acquired bronchogenic carcinoma and other personal injuries.\(^30\) The Cipollones sought compensation for past and future pain caused by the illnesses.\(^31\) Antonio Cipollone also sought compensation for loss of consortium.\(^32\) Shortly after the Cipollones filed their suit, the Liggett Group, Inc. moved to dismiss the complaint.\(^33\) The defendants argued that the complaint failed to state a claim upon which relief could be granted and that the causes of action were granted by the plaintiffs' state law.\(^34\) The court granted the defendant's motion to dismiss the complaint.\(^35\) The plaintiffs appealed the decision to the Third Circuit.\(^36\) The Third Circuit affirmed the decision of the district court and remanded the case to the district court for further proceedings.\(^37\)

27. *Cipollone*, 785 F.2d at 111. The Cipollones initiated their suit on August 1, 1983 against the Liggett Group, Inc. and Phillip Morris, Inc., two well-known manufacturers of cigarettes.\(^38\) They also sued Loew's Theatres, Inc. originally an entertainment corporation, but now a cigarette manufacturer as well.\(^39\) Id. at 111 n.2. The Cipollones averred that as a result of over forty years of smoking the defendants' cigarettes, Rose Cipollone acquired bronchogenic carcinoma and other personal injuries.\(^40\) Id. The Cipollones sought compensation for past and future pain caused by the illnesses.\(^41\) Antonio Cipollone also sought compensation for loss of consortium.\(^42\) Id. Haines' claim was based on theories of strict liability, negligence, and misrepresentation.\(^43\) Id.
lones alleged serious, long-term injuries caused by forty years of cigarette smoking. After extensive discovery, including the production of numerous confidential documents, the magistrate, upon the defendants' motion, issued an "umbrella" protective order, prohibiting, inter alia, the disclosure of all documents which had been marked confidential by the defendants.

The Cipollones appealed to the district court arguing that the magistrate's order violated their first amendment right to publish material which was in their possession, notwithstanding that the source of the possession was pre-trial discovery. Relying on the "least restrictive means" language in Seattle Times the district court amended the magistrate's order, making it consistent with its belief that "[u]nder the first amendment the public has a right to know what the tobacco industry knew about the risks of cigarette smoking." Although the district court noted the ambiguity in Seattle Times, it nevertheless interpreted

29. Id. at 1111.
30. Id. at 1110. The magistrate entered the order upon the motion of the defendant tobacco companies; although the record is not clear on the details, it appears that the tobacco companies sought the protective order when they learned that the plaintiffs intended to use the confidential documents in some way outside the ordinary purposes of litigation. Id. at 1110 n.1. The Third Circuit noted that confidentiality during the initial phase of the litigation was maintained by a tacit mutual understanding that the information obtained through discovery would not be published. Id.

The magistrate's order provided in pertinent part that all discovery information would be used only for the purpose of litigation, that information would in good faith be marked as confidential by the defendants, and that no information which was marked as confidential would be disclosed or communicated to outside counsel without twenty days' notice to defendants to give them the opportunity to obtain a specific protective order. Id. at 1112. It also required that all documents be returned or destroyed at the close of litigation. Id.

For the text of the magistrate's protective order, see id. at 1112 n.4.
31. Id. at 1113. In their appeal to the district court, plaintiffs relied upon Seattle Times for their contention that the protective order violated their first amendment rights. Id. They argued that the defendants and the magistrate misconstrued the Supreme Court's holding as it related to first amendment protections in the context of civil discovery. Id. For a discussion of the Seattle Times opinion and the ambiguities therein, see infra notes 34, 73-78 and accompanying text.

32. 467 U.S. 20 (1984). For a discussion of Seattle Times and the ambiguous nature of the "least restrictive means" dictum, see infra notes 34, 73-78 and accompanying text.
33. Cipollone v. Liggett Group, Inc., 106 F.R.D. 573, 577, 581-82 (D.N.J. 1985) (citing Seattle Times v. Rhinehart, 467 U.S. 20 (1984)). The district court modified the magistrate's order requiring the defendants to demonstrate the confidentiality of their documents on a document-by-document basis. Cipollone, 785 F.2d at 1115-16. The court further permitted plaintiffs' counsel to use discovery material in future cases in which he was a participant. Id. Finally, it did not require that all documents be returned or destroyed at the close of the case. Id. For a discussion of the magistrate's protective order, see supra note 30 and accompanying text.
Justice Powell's opinion to mandate a "least restrictive means" analysis of protective orders which impinging upon first amendment freedoms.\(^{35}\)

(district court found Seattle Times "imprecise" on first amendment issue). The conflicting passages from Seattle Times are as follows. The first is what the Third Circuit called dictum:

The critical question that this case presents is whether a litigant’s freedom comprehends the right to disseminate information that he has obtained pursuant to a court order that both granted him access to that information and placed restraints on the way in which the information might be used. In addressing the question it is necessary to consider whether the “practice in question [furthers] an important or substantial governmental interest” 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.”

467 U.S. 32 (cited as dictum, Cipollone, 785 F.2d at 1113-14). The second passage is the court's holding:

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.

Id. at 37. The district court did note the ambiguity and realized that the least restrictive means dictum was not included within the Court's holding. Cipollone, 106 F.R.D. at 582. It remarked that this exclusion had one of two meanings: "[T]hat the 'good cause' standard enunciated by Rule 26(c) of necessity takes into account that protective orders are to be narrowly drawn, or one looks to 'good cause' in the first instance, and, only if present, to the first amendment . . . ." Id. The first alternative equates the good cause standard with a least restrictive means analysis. The second means that restrictive protective orders must pass both the good cause test and an additional constitutional test. This latter alternative is close to what the District of Columbia Circuit required in Halkin. See 598 F.2d at 191-96. For a discussion of Halkin, see supra notes 10-12 and accompanying text.

35. Cipollone v. Liggett Group, Inc., 106 F.R.D. 573, 581-82 (D.N.J. 1985). After reviewing the conflicting history of the first amendment validity of protective orders in Halkin, Koons, and San Juan Star, the district court remarked that the court's decision in Seattle Times clarified the applicability of the first amendment to protective orders issued in the context of civil discovery. Cipollone, 106 F.R.D. at 581. According to the district court, Seattle Times found the first amendment clearly implicated because of the public interest surrounding the case. Id. For a discussion of the facts of Seattle Times, see supra note 19. The district court found the public interest surrounding the suit against the cigarette manufacturers much more suggestive of first amendment concerns. Cipollone, 106 F.R.D. at 581. Hence the district court concluded that some constitutional analysis was required. Id.

Under the district court's reading, Seattle Times required restrictive protective orders to further important governmental interests and to impose limitations no greater than necessary on first amendment freedoms to the protection of the interests involved. Id. (quoting Seattle Times v. Rhinehart, 467 U.S. 20, 32 (1984)). The court noted that the least restrictive means prong of the above analysis was omitted from the language of the Court's holding and referred to Justice Brennan's concurring opinion stating that the Court should require a least restrictive means analysis in addition to the good cause test of Rule 26(c).

Id. at 582 (citing Seattle Times v. Rhinehart, 467 U.S. 20, 37-38 (1984) (Brennan, J., concurring)). The district court noted further that courts have split over the meaning of the omission of the "least restrictive means" language from the
Threatened, therefore, with the exposure of numerous confidential documents, the Liggett Group appealed to the Third Circuit and, alternatively, applied for a writ of mandamus against the district court.\(^\text{36}\)

holding in *Seattle Times*. *Id.* For a discussion of the split over the meaning of *Seattle Times*, see supra note 21.

The omission was interpreted by the district court to mean either (1) that the good cause standard of Rule 26(c) incorporates the requirement that protective orders are to be narrowly tailored or (2) that an inquiry into good cause is the threshold consideration, and if found, then a least restrictive means analysis would be required. *Cipollone*, 104 F.R.D. at 502.

As the district court applied the least restrictive means test it looked to whether the magistrate’s protective order limited first amendment freedoms more than necessary or essential to protect the governmental interests purported by Rule 26(c). *Id.; accord* Shelton v. Tucker, 364 U.S. 479, 488 (1960) ("[Legitimate purpose] cannot be pursued by means that broadly stifle fundamental personal liberties when that end can be more narrowly achieved."); *see also* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978) (under traditional “least restrictive means” analysis court considers whether remedy of issuing protective order was means least in derogation of first amendment among alternative means available to achieve protection contemplated by Rule 26(c)).

In *Cipollone*, the district court began its review of the magistrate’s protective order by acknowledging that the acquisition of information through discovery was a matter of judicial compulsion for one party and of judicial grace for the other. *Cipollone*, 106 F.R.D. at 576. The court asserted that discovery was never intended to procure information for purposes unrelated to litigation. *Id.* The district court did indeed recognize the unique character of information obtained through the processes of pre-trial discovery. *Id.* In agreeing with the principles that discovery is a matter of judicial grace, that access to such information is limited by the courts and that discovery information is to be used for trial preparation, the court was in line with those courts which did not require a constitutional analysis of prohibitive protective orders. *See, e.g., Halkin*, 598 F.2d at 205 ("[A]s long as protective order meets the ‘good cause shown’ standard embodied in Rule 26(c), it abridges no First Amendment rights.") (Wilkey, J., dissenting); *Koons*, 325 F.2d at 407 (protective orders entered under Rule 30(b) [now 26(c)] do not violate Constitution). However, the court found that when the information discovered is of significant public interest, prohibitions on the publication of such information raise serious first amendment problems. *Cipollone*, 106 F.R.D. at 576-77. The district court noted that documents involved contained scientific data concerning the hazards of cigarette smoking. *Id.* The district court emphasized the significance of the wide public interest in such information to the first amendment issues involved in limiting the public disclosure of these documents. *Id.* Therefore, based on its interpretation of *Seattle Times*, the district court required prohibitive protective orders to pass muster under a “least restrictive means” analysis as a part of the good cause test of Rule 26(c). *Id.* at 581. In addition, the district court required that the burden of proving the need for restricting the release of information obtained during discovery and satisfying the least restrictive means test be on the party seeking the protective order. *Id.* at 577, 587.

36. *Cipollone*, 785 F.2d at 1111. Procedurally, the obligation of the Third Circuit in hearing the tobacco companies’ appeal was to decide whether the court had appellate jurisdiction to review the protective order entered by the district court. *Id.* at 1111.

Discovery orders, being interlocutory, are not normally appealable. 785 F.2d at 1116. The defendant tobacco companies, however, urged the Third Circuit to apply the doctrine of “collateral appealability” set forth in *Cohen v. Beneficial Industrial Loan Corp.* 785 F.2d at 1117 (citing *Cohen v. Beneficial Indus. Loan...*
Although the Third Circuit found that it did not have appellate jurisdiction over the district court’s interlocutory order, it decided that the writ of mandamus was appropriate because the district court misread Seattle Times and this misreading constituted an error of law.\textsuperscript{37} In reviewing the district court’s decision, the Third Circuit focused upon the ambiguity in Seattle Times.\textsuperscript{38} Although Judge Becker, writing for the court, agreed that the district court was correct in characterizing Seattle Times as ambigu-

Corps., 357 U.S. 541 (1949)). The doctrine of collateral appealability established a narrow exception to the general rule of the finality of interlocutory orders. \textit{Id.} (citing Cohen v. Beneficial, 387 U.S. 541 (1941)). To qualify for review under collateral appealability “an order must ‘(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from final judgment.’” \textit{Id.} at 1117 (citing Cooper & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)).

In applying the Cohen test, the court determined that defendants failed the second prong because their claim “touched[d] on the merits of the underlying action.” \textit{Id.} The defendants argued that dissemination of the information in possession of the plaintiffs would present a distorted and unfair picture of what defendants knew about the health effects of cigarette smoking. \textit{Id.} The Third Circuit found that a determination of this point would take them into the merits of the case inasmuch as one of the theories of liability was misrepresentation. \textit{Id.}

In the alternative, the Third Circuit was asked to decide whether it had mandamus jurisdiction under the “All Writs Act,” 28 U.S.C. § 1651(a) (1982). \textit{Cipollone}, 785 F.2d at 1111. Section 1651(c) provides that “[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the judges and principles of law.” 28 U.S.C. § 1651(a) (1982). Mandamus is an extraordinary remedy and will only issue when the party seeking the writ has “no other adequate means to attain the relief he desires and upon a clear error of law.” \textit{Cipollone}, 785 F.2d at 1118 (citing Sporck v. Peril, 750 F.2d 312, 314 (3d Cir. 1985)).

The Third Circuit granted defendant’s request for mandamus because no other path to appellate review was available to them and because it found the district court’s reading of Seattle Times a clear error of law. \textit{Id.} The defendants sought the protective order to avoid embarrassment and prejudice to the community at large. \textit{Id.} Moreover, the district court’s amended order was a result of their erroneous reading of Seattle Times. \textit{Id.}

\textsuperscript{37} \textit{Cipollone}, 785 F.2d at 1118, 1120. For a discussion of the reasoning of the Third Circuit in resolving the issues of appealability of the district court’s order and whether a writ of mandamus should be granted, see supra note 36.

\textsuperscript{38} \textit{Cipollone}, 785 F.2d at 1118-20. The central legal issue before the Court was whether prohibitive orders violated a litigant’s first amendment rights of free speech. \textit{See id.} at 1119. Due to the procedural posture of this case, however, several other related but logically subordinate issues emanated: whether the court had appellate jurisdiction and whether it had mandamus jurisdiction. \textit{Id.} at 1116-18. In order to decide these issues it was necessary to determine whether the district court’s reading of Seattle Times was correct. \textit{Id.} at 1113. Once the Third Circuit determined that the district court erred in reading Seattle Times, it could decide the subordinate issues. \textit{Id.} at 1113, 1120. For a discussion of how the court decided these subordinate issues, see supra note 36. Since the district court may have been misguided in its application of the good cause standard of rule 26(c) due to its misreading of Seattle Times, the Third Circuit felt obliged to discuss the application of the standard to guide the district court on remand. \textit{Cipollone}, 785 F.2d at 1111, 1121.
ous, he stated that under the Supreme Court's analysis a lower court was prohibited from considering the first amendment when it was deciding upon a Rule 26(c) protective order.

Judge Becker set forth three reasons to support the Third Circuit's interpretation of *Seattle Times*. First, there was clear precedent within the Third Circuit itself for the court's reading of *Seattle Times*. In a recent case, *State of New York v. United States Metals Refining Co.* ("USMR"), the Third Circuit applied *Seattle Times* to dispose of a similar issue involving a restrictive protective order. The court in *USMR* held that a mere showing of good cause justified such an order and that no first amendment interests were thereby violated.

Despite the existence of this "clear precedent," Judge Becker advanced a second and third reason for the court's interpretation of *Seattle Times*. Judge Becker stated that the unequivocal nature of the Supreme Court's holding in *Seattle Times* left "[n]o room for lower courts to consider first amendment factors in fashioning or reviewing Rule 26(c) orders." Furthermore, Judge Becker emphasized that in *Seattle Times*, 785 F.2d at 1119. For a discussion of the ambiguous language in the *Seattle Times* opinion, see supra note 34.

41. Id. at 1119-20.

42. Id. (citing New York v. United States Metal Refining Co., 771 F.2d 796, 802 (3d Cir. 1985)). Judge Becker also noted that the Third Circuit had decided a case prior to the Supreme Court's opinion in *Seattle Times* in which it accurately predicted what he felt was the Supreme Court's holding in *Seattle Times*. Id. (citing Rodgers v. United States Steel Corp., 536 F.2d 1001, 1006 (3d Cir. 1976)). For a discussion of Rodgers, see supra note 26.

43. 771 F.2d 796 (3d Cir. 1985).

44. *Cipollone*, 785 F.2d 1119 (citing New York v. United Metal Refining Co., 771 F.2d 796, 802). Judge Becker stated that "*New York v. United States Metal Refining Co. [USMR]* is clear precedent for the interpretation eschewed by the district court." Id. (citation omitted). However, Judge Becker noted that the decision in *USMR* was handed down two months after the district court's decision in *Cipollone* so that the court did not have the advantage of that opinion.

785 F.2d at 1119, n.15.


46. *See Cipollone*, 785 F.2d at 1119.

47. *See id.* at 1119. The court cited no authority to support its notion that an unequivocal holding supersedes inconsistent dicta. *See id.* The court merely proceeded to discuss the Supreme Court's suggestion that information obtained through discovery was a matter of judicial grace. *Id.* Judge Becker took no no-
Times, the Supreme Court’s focus upon the non-public nature of discovery and the fact that information obtained through the discovery process was the result of judicial grace, was consistent with its own position that “the first amendment [was] simply irrelevant to protective orders in civil discovery.” Judge Becker concluded by stating that although the “good cause” test “[was] by no means toothless,” it was significantly less stringent than the “least restrictive means” test applied by the district court under its misinterpretation of Seattle Times. In light of the legal error involved, the possibility of prejudice to the defendants was sufficient to justify mandamus.

The Third Circuit’s decision in Cipollone stands clearly for the proposition that pre-trial protective orders need pass muster only under the good cause standard of Rule 26(c), even when such orders prohibit the dissemination of information obtained through discovery. Thus, the concurring opinion in Seattle Times where Justices Brennan and Marshall read the majority opinion in Seattle Times as requiring a first amendment analysis of prohibitive protective orders. Seattle Times, 467 U.S. at 97-98 (Brennan, J., concurring). The imprecision of the Supreme Court’s opinion was quite noticeable to the district court. 106 F.R.D. at 582. Moreover, the district court cited Justice Brennan’s concurrence as support for its own reading of Seattle Times, namely, that it required a least restrictive means analysis of prohibitive protective orders. Id. at 582.

Furthermore, the Third Circuit took no notice of Wayte v. U.S. in which Justice Powell, the author of Seattle Times, cited the Seattle Times opinion to support the application of a least restrictive means analysis to a protective order not related to discovery. Wayte v. U.S., 470 U.S. 598, 607 (1984). Wayte was noted by the district court in Cipollone. 106 F.R.D. at 582 (citing Wayte v. United States, 470 U.S. 598, 607 (1984)).

48. Cipollone, 785 F.2d at 1119. Judge Becker stated that “the rest of the Supreme Court’s opinion, which emphasized that the discovery was not a forum traditionally open to the public, and that the process was a ‘matter of legislative grace,’ to which no first amendment rights attached, is consistent with the position that the first amendment is simply irrelevant to protective orders in civil discovery.” Id. (citations omitted). For a more detailed discussion of this reasoning, see infra notes 76-79 and accompanying text.

49. Cipollone, 785 F.2d 1119. The opinion that the first amendment is “irrelevant” to prohibitive protective orders in civil discovery is unique among courts that have considered the issue. See, e.g., Seattle Times, 467 U.S. at 33-34, (recognizing that protective orders were not classic prior restraint but yet restrictive of speech); San Juan Star Co., 662 F.2d at 114 (noting that prohibitive protective orders raised first amendment concerns to lesser degree than other prior restraints); Halkin, 598 F.2d at 183 (protective order restraining petitioners from communicating matters of public importance must be carefully scrutinized under first amendment); Halkin, 598 F.2d at 186, 206 (Wilkey, J., dissenting) (dissent also recognized that protective orders restraining speech raised first amendment concerns); Koons, 325 F.2d at 409, (affirming constitutionality of protective orders entered on good cause standard, implying therefore, that Constitution was not irrelevant to issue).

50. Cipollone, 785 F.2d at 1118-19.

51. Id. at 1118. For a discussion of when a writ of mandamus should issue and how the district court’s misreading of Seattle Times required that the writ issue in this case, see supra note 36.

52. Cipollone, 785 F.2d at 1118-19. The Cipollone court reached this conclu-
court concluded that “protective orders in civil discovery [do] not require first amendment analysis,” and moreover, that “the first amendment is simply irrelevant” to such orders within the context of civil discovery. It is submitted that the general import of this conclusion, that restrictive protective orders do not require first amendment analysis, is correct. There are two aspects of the court’s decision, however, that are problematic: namely, the methodology of the court’s analysis and its categorical statement that the first amendment is irrelevant to restrictive protective orders.

First, regarding its method of analysis, the court relied, without more, on a simple application of its own precedent, corroborated by an uncritical application of *Seattle Times*. It failed to identify and resolve the core conflicting theories that divided the circuits on the issue before it. Moreover, the court uncritically accepted *Seattle Times* as control-

in order to decide whether it had mandamus jurisdiction to review the district court’s protective order. *Id.* at 1111. Specifically, in order to decide whether the writ of mandamus should be issued, the court first had to determine whether the district court’s analysis of *Seattle Times* was erroneous. *Id.* at 1113. The Third Circuit interpreted *Seattle Times* to mean that a protective order issued pursuant to Rule 26(c) “does not run afoul of the first amendment.” *Id.* at 1119 (quoting *USMR*, 771 F.2d at 802). The Third Circuit’s analysis was contrary to that of the district court. *Id.* at 1123. For a discussion of the court’s reasoning, see *supra* notes 38-44 and accompanying text.

53. *Cipollone*, 785 F.2d at 1119.

54. *Id.*

55. *Id.* The court relied upon its precedent in *Rodgers v. United States Steel Corp.* and *New York v. United States Metal Refining Co.* *Id.* (citing Rodgers v. United States Steel Corp., 536 F.2d 1001, 1006 (3d Cir. 1976); New York v. United States Metal Refining Co., 771 F.2d 796, 802 (3d Cir. 1985)). For a discussion of *Rodgers* and *USMR* and the court’s reliance upon these cases, see *supra* note 26, *infra* notes 61-72 and accompanying text.

56. *Cipollone*, 785 F.2d at 1119. For a discussion of the court’s analysis of *Seattle Times*, see *supra* notes 73-79 and accompanying text.

57. For a discussion of the factual context within which restrictive protective orders have come in conflict with assertions of first amendment rights, see *supra* note 8. The resolution of this conflict has produced diverse results. See, e.g., *Seattle Times*, 467 U.S. 20 (restrictive protective orders entered for good cause shown not unconstitutional); Anderson v. Cryovac, 805 F.2d 1 (1st Cir. 1986) (interpreting *Seattle Times* as consistent with requirement that restrictive protective orders undergo “heightened” rather than strict scrutiny); New York v. United States Metal Refining Co., 771 F.2d 796 (3d Cir. 1985) (interpreting *Seattle Times* as requiring restrictive protective orders to pass muster only under good cause standard of Federal Rule of Civil Procedure 26(c)); Tavoulares v. Washington Post Co., 737 F.2d 1170 (D.C. Cir. 1984) (accepting sufficiency of good cause standard for restrictive protective orders after *Seattle Times*); Krause v. Rhodes, 671 F.2d 212 (6th Cir. 1982) (balancing privacy rights against dissemination rights of litigants on opposite sides of restricted protective orders, district court judge correct in subjecting order to strict scrutiny); *San Juan Star Co.*, 662 F.2d 108 (restricted protective orders must be subjected to quasi-strict constitutional scrutiny); National Polymer Prods. v. Borg-Warner Corp., 641 F.2d 418 (6th Cir. 1981) (litigant does not waive first amendment rights by entering discovery process) (citing *In re Halkin*, 598 F.2d 176, 212 (D.C. Cir. 1979) (Wilkey, J., dissenting)); *Halkin*, 598 F.2d 176 (restrictive protective orders sub-
ling, even though it recognized the ambiguity of that opinion on the applicability of constitutional standards to restrictive protective orders. In short, the court reached its conclusion in *Cipollone* without any theoretical analysis of the critical and conflicting legal principles underlyi\-\ng the controversy. Against this background, then, the unequivocal formulation of its conclusion regarding the irrelevance of the first amendment appears gratuitous.

In reaching its decision in *Cipollone*, the Third Circuit relied upon its own dictum in *Rodgers v. United States Steel Corp.* and upon its holding in *USMR*. In *Rodgers*, the court cited Judge Friendly's analysis in *Koons*.

ject to strict constitutional scrutiny); *In re Alexander Grant & Co. Litig.*, 629 F. Supp. 593 (S.D. Fla. 1986) (restrictive protective orders not prior restraint; they are proper exercise of court's control over discovery process); *Cipollone v. Ligg\-\nt Group Inc.*, 106 F.R.D. 573 (D.N.J. 1985) (restrictive protective order implicates first amendment; must undergo constitutional scrutiny); *In re Korean Air Line Disaster of Sept. 1, 1983*, 597 F. Supp. 621 (D.D.C. 1984) (restrictive protective order not classic prior restraint does not raise same spectre of government censorship as classic prior restraint); *Koster v. Chase Manhatten Bank*, 93 F.R.D. 471 (S.D.N.Y. 1982) (litigants have first amendment interest in disseminating information procurred through discovery, but special nature of discovery justifies reduced level of scrutiny) (citing *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981)).

58. For a discussion of the *Cipollone* court's uncritical utilization of *Seattle Times*, see infra notes 73-79 and accompanying text.

59. For a discussion of the *Cipollone* court's treatment of the ambiguity in *Seattle Times*, see supra note 34, infra notes 70-78 and accompanying text.

60. 785 F.2d at 1118-20. The Third Circuit framed its issue with an eye to the district court's interpretation of *Seattle Times*, noting that the court found it 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." *Id.* at 1118 (citing *The Management of Speech: Discretion and Right*, 1984 Sup. Ct. Rev. 169, 181-82 (noting same point)). The remainder of the Third Circuit's analysis is devoted to settling this issue by the selection, interpretation, and application of precedent. *Id.* at 1118-20. For a discussion of the problematic nature of the Third Circuit's utilization of *Seattle Times*, see infra notes 73-79 and accompanying text.

The Third Circuit did not approach the first amendment problem from an analytical standpoint. *Cipollone*, 785 F.2d at 1118-20. For example, the court did not examine the applicability or nonapplicability of first amendment jurisprudence to the restrictive protective order situation. Compare *id.* (settling restrictive protective order problem through application of conclusory precedent) with *Halkin*, 598 F.2d at 186, 187 & 189 (restrictive protective orders analogized to prior restraints; discussing source of information as relevant first amendment factor; rejecting opposing view that restrictive protective orders do not implicate first amendment if issued under Rule 26(c)).

61. 536 F.2d 1001 (3d Cir. 1976). The *Cipollone* court cited *Rodgers* as suggesting that an order prohibiting disclosure of information obtained in discovery does not run afoul of the first amendment. *Cipollone*, 785 F.2d at 1119 (citing *Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1006 (3d Cir. 1976)). The *Rodgers* court suggested that a party which takes advantage of the discovery proc\-\-ess might be found to impliedly waive its first amendment rights. *Rodgers*, 536 F.2d at 1006 (citing *International Products Corp. v. Koons*, 925 F.2d 403, 407 (2d Cir. 1991)).

62. 785 F.2d at 1119 (citing *New York v. United States Metal Refining Co.*,...
and upon that authority, suggested without further analysis, that a resolution to the conflict between restrictive protective orders and first amendment dissemination rights might be found in the doctrine of implied waiver.\textsuperscript{64} No such suggestion, however, is found in \textit{Koons}\.\textsuperscript{65} Upon this assumption, nevertheless, the \textit{Rodgers} court concluded arguendo that restrictive protective orders did not violate the Constitution.\textsuperscript{66} The

771 F.2d 796 (3d Cir. 1985)). The Third Circuit cited \textit{USMR} as authority for its holding that protective orders issued under Rule 26(c) do not run afool of the first amendment. \textit{Id.} (citing New York v. United States Metal Refining Co., 771 F.2d 796, 802 (3d Cir. 1985)). The \textit{Cipollone} court stated that the Supreme Court’s opinion in \textit{Seattle Times} proved the “soundness” of its \textit{USMR} decision. \textit{Id.} (citing \textit{Seattle Times} v. Rhinehart, 467 U.S. 20, 34 (1984)).

63. \textit{See Rodgers}, 536 F.2d at 1006 (citing International Prods. Corp. v. Koons, 325 F.2d 403, 407 (2d Cir. 1963)). For the text of the \textit{Rodgers} court’s statement, see \textit{infra} note 64.

64. \textit{Rodgers}, 536 F.2d at 1006. The \textit{Rodgers} court stated:

At the outset, we emphasize that we need not and do not consider here whether a protective order which prohibits parties or their counsel from disclosing information or matters obtained solely as a result of the discovery process is ever subject to the First Amendment’s prohibitions against the establishment of laws that abridge freedom of speech. It may well be, for instance, that the parties and counsel, by taking advantage of or a part in the discovery processes, implicitly waive their First Amendment rights freely to disclose or disseminate the information obtained through those processes. \textit{Cf. International Products Corp. v. Koons}, \textit{supra} at 407. Thus, for purposes of this appeal, we assume arguendo that if the district court had prohibited disclosure only of information derived from the discovery processes, its order would have been constitutional. \textit{See id.}

536 F.2d at 1006 (citing International Prods. Corp. v. Koons, 325 F.2d 403, 407 (2d Cir. 1963)).

65. \textit{See Koons}, 325 F.2d at 407; \textit{see also} Note, Rule 26(c) Protective Orders and the First Amendment, 80 COLUM. L. REV. 1645, 1647 (1980) (citing \textit{Rodgers} citing \textit{Koons} as authority for waiver proposition). The passage cited by the \textit{Rodgers} court is as follows:

The portion of the order which seals the deposition of Seldes and limits defendants and others in there use of information obtained therefrom was plainly authorized by F.R. Civ. Proc. 30(b) [now 26(c)], and we entertain no doubt as to the constitutionality of a rule allowing a federal court to forbid the publicizing, in advance of trial, of information obtained by one party from another by use of the court’s processes.

536 F.2d at 1006 (citing \textit{Koons}, 325 F.2d 403, 407 (2d Cir. 1963)). The \textit{Koons} court went on to state that there is “no question as to the court’s jurisdiction to do this under the inherent ‘equitable powers of the courts of law over their own process, to prevent abuses, oppression, and injustice.’” \textit{Koons}, 325 F.2d at 407-08 (citing Gumbel v. Pitkin, 124 U.S. 131, 141 (1888); Parker v. Columbia Broadcasting Systems, 320 F.2d 937, 938 (2d Cir. 1963)).

66. 536 F.2d at 1006. The precise issue concerning the constitutionality of restrictive orders was not before the \textit{Rodgers} court. \textit{Id.} The protective order being reviewed reached information obtained otherwise than through discovery. \textit{Id.} The court stated: “[W]e assume arguendo that if the district court had prohibited disclosure only of information derived from the discovery process, its order would have been constitutional.” \textit{Id.} (citing \textit{International Prods. Corp. v. Koons}, 325 F.2d 403, 407 (2d Cir. 1963)). For a discussion of the facts of \textit{Rodgers}, see \textit{supra} note 26.
court in *USMR* quoted this dictum as the source of its own holding that restrictive protective orders "did not run a foul of the first amendment." The *USMR* court then applied *Seattle Times* to corroborate the *Rodgers* court's "point of view" without noting the ambiguous nature of the Supreme Court's opinion or commenting further on the concept of implied waiver. Moreover, neither the *Rodgers* court nor the *USMR* court addressed the constitutional issues involved.

In *Cipollone* the Third Circuit added another layer to the *Rodgers/USMR* line of cases by applying *USMR* to resolve the first amendment issue. As mentioned, it cited *USMR* as controlling precedent and buttressed the application by relying on *Seattle Times.* The court quoted *USMR* citing *Rodgers,* yet made no comment about the possible merits of a resolution of the first amendment issue based on a theory of waiver. Unlike the court in *USMR,* however, the *Cipollone* court did note the ambiguous nature of *Seattle Times,* but continued to rely on it nonetheless.

As stated above, *Seattle Times* is ambiguous on whether restrictive protective orders must be examined under a "least restrictive means" analysis or under a "good cause" standard without more. This is the

67. *USMR,* 771 F.2d at 802 (citing *Rodgers* v. United States Steel Corp., 536 F.2d 1001, 1006 (3d Cir. 1976)).

68. *Id.* The *USMR* court quoted the "waiver section" of *Rodgers* in full and then stated: "The Supreme Court confirmed our point of view in the *Seattle Times* case." *Id.* (citing *Seattle Times* v. Rhinehart, 467 U.S. 20, 37 (1984)) (restrictive protective orders entered on showing of good cause under Rule 26(c) do not offend first amendment)). The *USMR* court quoted the waiver passage for the proposition that restrictive protective orders are not unconstitutional without commenting on either the hypothetical posture of the *Rodgers* court's dictum or its suggestion that parties to discovery might implicitly waive their first amendment rights. *See id.* Moreover, the *USMR* court never noted the ambiguity in *Seattle Times.* *See id.* For the text of the waiver passage in *Rodgers,* see *supra* note 64. For a discussion of the ambiguity in *Seattle Times,* see *supra* note 34 and accompanying text. It is also curious to note that there is no mention in *Seattle Times* of the possible success of a waiver analysis for sustaining restrictive orders against a first amendment challenge. *See generally* 467 U.S. 20 (1984).

69. *See Rodgers,* 536 F.2d at 1006. The *Rodgers* court's only statement on the constitutionality of restrictive protective orders is its statement, *arguingo,* that such orders are constitutional and its undeveloped suggestion of a waiver of first amendment rights supporting that statement of constitutionality. *Id.* For a discussion of *Rodgers,* see *supra* note 63 and accompanying text. For the relevant text in *Rodgers,* see *supra* note 64.

70. *See 785 F.2d* at 1119. For a discussion of the *Cipollone* court's analysis of *Seattle Times,* see *infra* notes 73-79 and accompanying text.

71. *See Cipollone,* 785 F.2d at 1119 (quoting *New York v. United States Metal Refining Co.,* 771 F.2d 796, 802 (3d Cir. 1985) (citing *Rodgers* v. United States Steel Corp., 536 F.2d 1001, 1006 (3d Cir. 1976) (litigants might implicitly waive first amendment rights by participating in discovery processes)).

72. *Id.* For a discussion of this portion of Judge Becker's opinion, see *supra* note 34, *infra* notes 73-79 and accompanying text.

73. For a discussion of the ambiguity in *Seattle Times,* see *supra* note 34 and accompanying text.
precise issue before the Third Circuit in *Cipollone*, so that the application of *Seattle Times* for the purpose of resolving *Cipollone* is a precarious logical step. Recognizing this, Judge Becker asserted that the “unequivocal nature of the *Seattle Times* holding supersedes any ambiguity” in the opinion.\(^{74}\) This canon of interpretation seems less than self-evident, and even if its validity were accepted *arguendo*, it achieves a resolution of the ambiguity in *Seattle Times* by a kind of judicial *fiat* and not by a resolution, in theory, of the conflicting principles that generated it.\(^{75}\)

Furthermore, because Judge Becker noted that the “district court’s interpretation of *Seattle Times* raised questions not raised in [USMR],”\(^{76}\) he went beyond his *fiat* and argued that certain language in *Seattle Times* was “consistent with [the court’s] position that the first amendment [was] . . . irrelevant to protective orders in civil discovery.”\(^{77}\) He chiefly focused on the Supreme Court’s statements that discovery was not “a forum traditionally open to the public” and that the process of discovery was a “matter of legislative grace” to which no first amendment rights attached.\(^{78}\) If one recognizes the ambiguity in *Seattle Times*, as the Third

\(^{74}\) *Cipollone*, 785 F.2d at 1119. Judge Becker quoted the holding of *Seattle Times* and then stated: “This statement leaves no room for lower courts to consider first amendment factors in fashioning or reviewing Rule 26(c) orders. The unequivocal nature of the Court’s holding supersedes any ambiguity in its earlier discussion.” *Id.*

\(^{75}\) *Id.* The Third Circuit cited no authority for such a canon of interpretation. *See id.* Other courts have invoked a similar line of reasoning when confronting inconsistent dicta in cases other than their principle case. *See United States v. Price*, 617 F.2d 455, 457 (7th Cir. 1980) (contrary dicta from other cases are not controlling over holding of principal case); *accord* *Brookhart v. Illinois State Bd. of Ed.*, 534 F. Supp. 725, 731 (D.C. Ill. 1982) (same, adding that factual differences among distinct cases make inconsistent dicta less apposite). No authority is found, however, on the relative weight of inconsistent dicta and holding within the same case.

\(^{76}\) *Cipollone*, 785 F.2d at 1119. For a discussion of the district court’s interpretation of *Seattle Times*, see *supra* notes 31-35 and accompanying text.

\(^{77}\) *Cipollone*, 785 F.2d at 1119. The Third Circuit remarked further that the language of *Seattle Times* “[did] not comport with the district court’s insistence on a less restrictive means test in protective order determinations.” *Id.* The court also said that “the Supreme Court’s dictum about less restrictive means analysis [was] . . . insufficient to overcome . . . the evident direction of the Court’s reasoning.” *Id.* (citing *Seattle Times v. Rhinehart*, 467 U.S. 20, 32 (1984)). For a discussion of how other courts have interpreted *Seattle Times* in light of its ambiguous posture, see *supra* note 21.

\(^{78}\) *Cipollone*, 785 F.2d at 1119. The language quoted by Judge Becker was taken from the portion of *Seattle Times* which leads to the enunciation of the Court’s holding that protective orders entered for good cause shown are not unconstitutional. *See Seattle Times*, 467 U.S. at 32-33. The pertinent text is as follows:

> At the outset, it is important to recognize the extent of the impairment of First Amendment rights that a protective order . . . may cause. As in all civil litigation, petitioners gained the information they wish to disseminate only by virtue of the trial court’s discovery processes. As the rules authorizing discovery were adopted by the state legislature, the processes thereunder are a matter of legislative grace. A litigant has no First Amendment
Circuit did in *Cipollone*, Judge Becker's line of argument then appears to beg the question. By re-emphasizing arguments on one side of the ambiguity, without delineating a principled method of choosing between the conflicting principles that gave rise to it, the court leaves the ambiguity unresolved. It is submitted, therefore, that although *Cipollone* is clear and precise in its holding, because of its method of analysis, it represents a void in the theoretical foundations of the Third Circuit's first amendment tradition.

Because of this theoretical void, it is difficult to be confident in the validity of the court's general conclusion, and more difficult to understand what the court meant by its statement concerning the first amendment's irrelevance. In addition, this statement is clearly contrary to the case law on point; even those cases which agree with the general conclusion of *Cipollone* concede that restrictive protective orders raise at least limited first amendment concerns.

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right of access to information made available only for purposes of trying his suit. Thus, continued court control over the discovered information does not raise the same specter of government censorship that such control might suggest in other situations.

Moreover, pretrial deposition and interrogatories are not public components of a civil trial. *Such proceedings were not open to the public at common law, and, in general, they are conducted in private as a matter of modern practice.*

*Id.* (emphasis added) (citations omitted). Before concluding, the Court added further that restrictive protective orders were not classic prior restraints and that Rule 26(c) was necessary as a check on the potential abuse in an expressive discovery mechanism. *Id.* at 33-34.

79. 785 F.2d at 1113-14, 1118.

80. *Id.* at 1119. Judge Becker stated that *Seattle Times* "is consistent with the position that the first amendment is simply irrelevant to protective orders in civil discovery." *Id.* (citing *Seattle Times* v. Rhinehart, 467 U.S. 20, 32-33 (1984)). Contrary to what Judge Becker suggests, *Seattle Times* seems to concede the relevance of the first amendment to the restrictive protective order situation. See *Seattle Times*, 467 U.S. at 34 ("In sum, judicial limitations on a party's ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in a different context.").

81. See, e.g., *Seattle Times*, 467 U.S. at 31, 32 (holding consistent with *Cipollone* yet recognizing "public interest" in discovered information; noting that relevant question is the extent to which first amendment is impaired by restrictive protective order); *Anderson v. Cryovac*, 805 F.2d 1, 6, 7 (1st Cir. 1986) (rejecting Third Circuit's interpretation of *Seattle Times* and its holding in *Cipollone* recognizing potential first amendment concerns any time government restraints speech); *San Juan Star Co.*, 662 F.2d at 113 (holding inconsistent with *Cipollone*, recognizing that restrictive protective orders implicate first amendment concerns similarly as do prior restraints); *Harkin*, 598 F.2d at 183 (holding inconsistent with *Cipollone*, recognizing strong first amendment right in discovery material); *Koons*, 325 F.2d at 407-08 (restrictive protective orders held not unconstitutional, but court does not base ruling on irrelevance of first amendment concerns). Moreover, the Rodgers opinion, an indirect precedent invoked in *Cipollone*, suggested a waiver of first amendment rights, implying that first amendment concerns were in fact implicated by restrictive protective orders. See Rodgers, 536 F.2d at 1006. The USMR opinion, a direct precedent for *Cipollone*,

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In order, therefore, to establish a theoretical foundation for the proposition that restrictive protective orders issued under Rule 26(c) are constitutional, it is necessary to isolate the conflicting legal principles that gave rise to the problem, establish a principled method of choosing between them, and pursue the deductions from the ascertained principle to the Third Circuit's conclusion. There are two conflicting principles at the heart of this issue. One is that the prior restraint of speech, whether effected by protective order or otherwise, gives rise to serious first amendment concerns. The second is that the acquisition of information through the discovery process is a privilege conferred by judicial grace, to which there is no access as a matter of right. A consideration of the legal nature of discovery as a source of information [source analysis] indicates the priority of the second principle in determining the applicability of the first amendment to restrictive protective orders. It is submitted that the following considerations incorporated the Rodgers point of view into its own holding, but made no comments of its own regarding the first amendment. See USMR, 771 F.2d at 802.

82. In order to explore further the court's notion of the first amendment's irrelevance to protective orders, it becomes advantageous to pursue the idea of waiver embedded in the history of the Third Circuit's treatment of restrictive protective orders. For a discussion of this history, see supra notes 42-55 and accompanying text. For a discussion of waiver analysis applied to restrictive protective orders, see infra notes 105-56 and accompanying text.

83. See Halkin, 598 F.2d at 187-91. The court proceeded to note that restrictive protective orders were in the nature of judicial prior restraints, which have traditionally raised first amendment concerns. Id. at 186. The court also took the position that the Federal Rules of Civil Procedure contemplated the use of discovery material for any legal purpose. Id. at 188; see also San Juan Star Co., 662 F.2d 108 (prohibitive order is prior restraint implicating first amendment concerns); Cipollone, 106 F.R.D. at 576 (prohibitive protective order restraining dissemination of information of significant public interest raises first amendment concerns). The Halkin majority focused mainly on this principle and deduced that restrictive protective orders should be subject to strict constitutional scrutiny. See 598 F.2d at 187.

84. See Halkin, 598 F.2d at 206 (Wilkey, J., dissenting); Koons, 325 F.2d at 407-08. The Koons opinion and the dissenting opinion of Judge Wilkey in Halkin focused mainly on this second principle and determined that the good cause test alone was sufficient. See Halkin, 598 F.2d at 203 (Wilkey, J., dissenting) (citing Koons 325 F.2d 403, 407-08 (2d Cir. 1963)). Judge Wilkey emphasized that discovery information is obtained through a statutory system that reserves the court's power to attach restrictions on the use of such information. Id. at 206 (Wilkey, J., dissenting); see also Seattle Times, 467 U.S. at 32 (important considerations in determining whether protective order violates Constitution is recognition that discovery information is obtained through legislative grace); J. Moore, supra note 3, § 26.67, at 26-427; C. Wright & A. Miller, supra note 1 at, § 2001 (Supp. 1986). Judge Wilkey relied on Koons to derive support for the foregoing ideas. 598 F.2d at 205 (Wilkey, J., dissenting); see also Koons, 325 F.2d at 407-08 (Judge Friendly expresses no doubt that discovery rules confer jurisdiction on courts to enter protective orders without violating Constitution).

85. See generally Halkin, 598 F.2d at 203-09 (Wilkey, J., dissenting). Judge Wilkey began his dissenting argument by indicating that the majority's analogy between restrictive protective orders and prior restraints was wrongheaded because it ignored the critical difference that a protective order "concerns only
establish the analytic basis for the Third Circuit's general conclusion in *Cipollone.*

This Note concedes that protective orders which prohibit the dissemination of discovered information implicate first amendment concerns, because such orders operate in the manner of prior restraints on speech,86 and such restraints bear a heavy presumption of unconstitutionality.87 Restrictive protective orders curtail extra-judicial comment on pending litigation to the extent that they restrict communication of discovery information.88 Although prior restraints give rise to serious

information obtained through the court's own processes.” *Id.* at 203 (Wilkey, J., dissenting). Access to and capacity to obtain possession of discovery material is granted by statute. *Fed. R. Civ. P.* 26(b). No such access or capacity exists but for the statutory grant. *See Zemel v. Rusk,* 381 U.S. 1, 16-17 (1965) (“The right to speak . . . does not carry with it the unrestrained right to gather information.”); *see also Seattle Times,* 467 U.S. at 32 (no first amendment right of access to information for purposes of trying suit); *Halkin,* 598 F.2d at 206 (Wilkey, J., dissenting) (no ordinary access to discovery materials; access only through statutory grant).

The purpose of the rules of discovery is to grant access to information to facilitate preparation for trial. Hickman v. Taylor, 328 U.S. 496, 507 (1947) (goal of discovery is to facilitate inquiry into facts essential to litigation); *see also J. Moore, supra* note 3, ¶ 26.67, at 26-427 (discovery animated by philosophy of full disclosure of information relevant to pending litigation); C. WRIGHT & A. MILLER, *supra* note 1, § 2001, at 15 (parties entitled to discovery of all facts relevant to use at trial). The rules of discovery do not contemplate the use of discovery materials beyond their purpose. *See Marcus, supra* note 6, at 53 (rejecting idea that discovery can be used as tool to gather information outside purpose of preparation for trial). But *see Halkin,* 598 F.2d at 188 (when discovery is obtained the material may be used in any way law permits) (citing Leonia Amusement Corp. v. Loew's, Inc. 18 F.R.D. 503, 508 (S.D.N.Y. 1955)).

In his article, Marcus supports his position by noting that courts have denied plaintiffs access to discovery material for the purpose of gathering evidence for trial unless they first demonstrate that there is a good basis for a suit. Marcus, *supra* note 6, at 53-54; *e.g.*, Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 352-53 n.17 (1978) (discovery properly denied when purpose is to gather information other than for pending suit). Furthermore, the court has the inherent equitable power to control its own processes, including the discovery process, to prevent abuses thereof. *Koons,* 325 F.2d at 407-08 (citing Gumbel v. Pitkin, 124 U.S. 131, 144 (1888)).

Finally, the source from which information is obtained in discovery is markedly distinct from the source of information in more ordinary prior restraint situations. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (source of information subject to prior restraint was testimony gathered by reporters during public criminal proceedings); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (prior restraint banning showing of movie "Hair"); *Near v. Minnesota,* 283 U.S. 697 (1931) (allegedly scandalous article obtained through ordinary newspaper reporting subjected to prior restraint).

86. *See Halkin,* 598 F.2d at 186 (restrictive protective order "poses many of the dangers of a prior restraint"); they require close first amendment scrutiny.

87. *See New York Times Co. v. United States,* 403 U.S. 713, 714 (1971) ("Any system of prior restraints of expression comes to the Court bearing a heavy presumption against its constitutional validity.").

88. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976). The prohibition of publication or broadcast of facts "strongly implicative" of the ac-
first amendment concerns, there is a critical difference between protective orders directed solely at information obtained in discovery through the court's own process and more paradigmatic prior restraints. Restrictive protective orders curtail the communication of information to which access would have been foreclosed but for the operation of the rules of discovery. Because of this difference the first amendment rights implicated by restrictive protective orders are likewise different, both in character and in magnitude, than those rights implicated by more typical prior restraints.

Cused pending trial was seen as a prior restraint on speech. Id. at 541. For a discussion of the terms of the protective order at issue in Cipollone and how it prohibits dissemination of discovered material, see supra note 35. This order does not restrict the disclosure of information other than discovery information and is thus not precisely equivalent to the restraint in Nebraska Press Ass'n v. Stuart. Cf. Rodgers, 536 F.2d at 1006 (insofar as protective order also restricted disclosure of information obtained otherwise than through discovery it was unconstitutional); Koons, 325 F.2d at 408 (order prohibiting disclosure of information equivalent to that contained in deposition but obtained otherwise, implicated first amendment concerns).

89. See Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) (prior restraints are most serious, least tolerable infringement of first amendment rights); New York Times v. United States, 403 U.S. 713, 714 (1971) (prior restraints bear strong presumption against constitutionality). The rationale behind this strong disfavor of prior restraints is that "as in overbreadth cases, . . . the prior restraint is viewed as excessively and unnecessarily stifling, as a more restrictive alternative to subsequent punishment." Barnett, The Puzzle of Prior Restraints, 29 Stan. L. Rev. 539, 543 (1977) (citing Barnett, The First Amendment Protection of Information Against Governmental Interference: The Democratic Dilemma, 206 U.S. 546, 559 (1975)).

90. For a discussion of factors indicating this difference, see supra note 85.

91. See Seattle Times, 467 U.S. at 32 (discovery is legislative grace); Halkin, 598 F.2d at 206 (Wilkey, J., dissenting) (rules of discovery grant litigants access to information which they would not ordinarily have). Moreover, the rules of discovery were seen as a "striking and imaginative departure from tradition" where the access to pretrial information was very limited. See Fed. R. Civ. P. 26 (advisory committee's explanatory statement concerning 1970 Amendments of the Discovery Rules); C. Wright & A. Miller, supra note 1, § 2001, at 14. For a more general comparison between prior and current goals of discovery, see supra notes 1-5.

92. See Halkin, 598 F.2d at 206 (Wilkey, J., dissenting) ("quantitative and qualitative difference between First Amendment interests of person seeking to disseminate discovery materials and one seeking to disseminate other kinds of information.").

The general argument made here that a given kind of information is deserving of lesser first amendment protection than other information finds support within first amendment jurisprudence. See, e.g., Central Hudson Gas v. Public Serv. Comm'n, 447 U.S. 557 (1980) (commercial speech is accorded less first amendment protection than other forms of expression); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (Justice Stevens advocating theory of varying degrees of first amendment protection depending upon the content of the speech); Miller v. California, 413 U.S. 15 (1973) ("obscenity" categorically unprotected by first amendment); Chiplinsky v. New Hampshire, 315 U.S. 568 (1942) ("fighting words" excluded from first amendment protection).

Moreover, the so-called "track two" framework for first amendment analysis indicates that restraints on speech may be subjected to less severe standards in
The character of a litigant's first amendment rights within the context of pre-trial discovery is qualified by the legal nature of discovery as a source of information.93 Possession of information obtained through the discovery mechanism is acquired by a statutory grant which expressly reserves to the court the discretionary power to attach restrictions to the use of such information.94 The magnitude of the court's power extends to the capacity to deny discovery completely for good cause shown.95 Hence, the first amendment rights which attach to discovered information are also qualified by the possibility that limitations will be imposed on its use.96 Therefore, these rights are necessarily less

situations where the restraint is incidental. See United States v. O'Brien, 391 U.S. 367, 376 (1968). In O'Brien, the Court stated:

We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea . . . [w]hen 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms.

Id. Because of the context in which the first amendment restriction originates, the limitation is not considered as serious as if it had been a direct limitation. See id. In the restrictive protective orders situation, the governmental purpose behind the protective order is to prevent abuse of the discovered information by utilization beyond the scope of trial preparation. See C. Wright & A. Miller, supra note 1, § 2001, at 15. The restriction on dissemination would be incidental to the governmental regulation of the party's actions, namely, the use of discovered information. See id. This type of analysis would perhaps be useful in examining restrictive protective orders if it were not quite so undeveloped and uncertain in Supreme Court jurisprudence. See G. Gunther, Constitutional Law (11th ed. 1985) (symbolic speech decisions suggest not only uncertainty of results but also instability of doctrinal foundations).

93. See Koster v. Chase Manhattan Bank, 93 F.R.D. 471, 477 (S.D.N.Y. 1982) (referring to "the special nature of discovery as a source of information justifies a reduced level of scrutiny") (emphasis added) (citing In re San Juan Star Co., 662 F.2d 108, 115 (1st Cir. 1982); Halkin, 598 F.2d at 206-08 (Wikey, J., dissenting)).

94. See J. Moore, supra note 3, ¶ 26.67, at 26-425. The provision in Rule 26(c) establishes that the broad scope of discovery must be read in conjunction with the preceding phrase "unless otherwise limited by order of the court in accordance with these rules." Fed. R. Civ. P. 26(b); see J. Moore, supra note 3, ¶ 26.67, at 26-425. Thus, Rule 26(b) read together with 26(c) contemplates a broad discovery subject to the power of the court to restrict discovery for good cause shown. Moore, supra note 3, ¶ 26.67, at 26-426; see also Fed. R. Civ. P. 26(b) (advisory committee note) ("All provisions as to the scope of discovery are subject to the initial qualification that the court may limit discovery in accordance with these rules."). Rule 26(c) providing for protective orders confers broad power on the court to limit or even prevent discovery, although the materials sought are within 26(b).


96. See id. 26(b) (advisory committee note) ("All provisions as to the scope of discovery are subject to the initial qualification that the court may limit discovery in accordance with these rules."). The Federal Rules contemplate a liberal acquisition with a controlled use of discovered information. See C. Wright & A. Miller, supra note 1, § 2001, at 15 (scope of discovery broad with restrictions on use rather than acquisition of information).
integral and more limited than first amendment rights appendant to information obtained otherwise than through discovery.\textsuperscript{97} The magnitude of a litigant's first amendment rights must therefore also be determined in reference to the limitations imposed by the statutory scheme of the rules of discovery.\textsuperscript{98} The single and circumscribed purpose of discovery is to facilitate trial preparation, so that the litigant's interest in information obtained through discovery is conditioned and limited by this statutory purpose.\textsuperscript{99} Therefore, the litigant's first amendment rights in discovered information are not full-blown, but limited by potential restrictions under Rule 26(c).\textsuperscript{100} It is submitted that the limitations imposed by restrictive protective orders are not arbitrary, but are themselves circumscribed by the good cause standard incorporated in the statutory scheme. Since the first amendment interests in discovered information are limited, the good cause standard is less stringent than the stricter standard applied to more paradigmatic prior restraints.\textsuperscript{101} Thus, although restrictive pro-

\textsuperscript{97} See Seattle Times, 467 U.S. at 32 ("continued court control over the discovered information does not raise the same specter of governmental censorship that such control might suggest in other situations.") (citing In re Halkin, 598 F.2d 189, 206-07 (1979) (Wilkey, J., dissenting)); cf. San Juan Star Co., 662 F.2d at 114 (restrictive protective orders raise significant but limited first amendment concerns).

\textsuperscript{98} See Halkin, 598 F.2d at 206 (Wilkey, J., dissenting) ("quantitative . . . differences between First Amendment rights of a person seeking to disseminate discovery materials and one seeking to disseminate other kinds of information."). For a more extensive development of this idea, see infra notes 99-103 and accompanying text.

\textsuperscript{99} For a discussion of the goals of discovery and its relation to the court's power to restrict the use of information discovered, see supra notes 1-5, 85 & 94 and accompanying text. For a discussion of how the court's power to restrict discovered information under the statutory plan of Rule 26 affects the character of first amendment interests in discovery materials, see supra notes 85 & 91 and accompanying text.

\textsuperscript{100} It should be noted that because this argument uses terms like "conditioned first amendment interests," it has been objected to as a form of the discredited benefits-privilege line of argument. See Halkin, 598 F.2d at 190 & 190 n.28. The benefit-privilege argument is often associated with a waiver of constitutional rights and so the argument is also objected to as an implied waiver of constitutional rights. See Van Alstyne, The Demise of the Right/Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439, 1447 (1968) (benefit-privilege described as benefit granted and conditioned on waiver of constitutional right). This argument has nothing to do with the waiver of first amendment rights or a benefit-privilege rationale, but with a recognition that those rights are of a limited character. See Seattle Times, 467 U.S. at 32; Halkin, 598 F.2d at 208-09 (Wilkey, J., dissenting). For a further discussion of constitutional cases in which first amendment interests have been considered more limited than in a paradigmatic political speech context, see supra note 81.

\textsuperscript{101} Compare Koons 325 F.2d at 405, 405 n.2, 408 (to meet good cause it may be enough to show that harm is reasonably likely to occur) and Essex Wire Corp. v. Eastern Elec. Sales Co., 48 F.R.D. 308 (E.D. Pa. 1969) (less serious harm may suffice under good cause than classic prior restraint standards like protection of business information) and Nichols v. Philadelphia Tribune Co., 22
tective orders do implicate a litigant’s first amendment rights, so long as they are imposed for “good cause shown” they do not contravene the first amendment.\footnote{See Seattle Times, 467 U.S. at 37 (protective order entered on showing of good cause under Rule 26(c), not restricting dissemination of information from other sources, does not offend first amendment); USMR, 771 F.2d at 802 (restrictive order, limited to information procured in pretrial civil discovery and entered upon showing of good cause, does not violate first amendment (citing Rodgers v. United States Steel Corp., 536 F.2d 1001, 1006 (3d Cir. 1976)); Halkin, 598 F.2d at 205 (Wikey, J., dissenting) (if protective order meets good cause standard it abridges no first amendment rights). But see Anderson v. Crayovac, 805 F.2d 1, 7 (1st Cir. 1986) (reconsidering San Juan Star in light of Seattle Times, first amendment scrutiny may still be applied to protective orders within framework of Rule 26(c) good cause requirement).} Therefore, restrictive protective orders are a constitutionally permissible form of prior restraint emanating from the court’s discretionary power to control its own processes.\footnote{See Halkin, 598 F.2d at 208 (Wilkey, J., dissenting) ("protective order[s] requiring a litigant to use the products of discovery in a manner consistent with the purposes of discovery is a permissible 'prior restraint' if it meets the standards set forth in Rule 26(c).") Cf. Koons, 325 F.2d at 407-08 ("no doubt as to constitutionality of a rule allowing a federal court to forbid the publicizing, in advance of trial, of information obtained . . . by use of the court's process . . . we have no question as to the court's jurisdiction to do this under the inherent 'equitable powers of courts of law over their own process, to prevent abuses, oppression, and injustice' (citing Gumbel v. Pitkin, 124 U.S. 131, 144 (1888)). But see Halkin, 598 F.2d at 189 (at most Koons established that properly drawn restraining orders supported by good cause are compatible with first amendment).} This outcome is equivalent to the general conclusion of Cipollone that restrictive protective orders do not require first amendment analysis. That is, restrictive protective orders need not pass muster under traditional constitutional standards but only under the good cause standard of Rule 26(c).\footnote{See Cipollone, 785 F.2d at 1119 ("protective orders in civil discovery did not require first amendment analysis"). The above argument does not elucidate the Third Circuit’s strong and categorical statement that the first amendment is irrelevant to discovery, since it acknowledges the relevance of first amendment rights as a premise of the argument, although maintaining that such rights are of a limited nature. Id.}

Although the foregoing analysis establishes a theoretical basis for the Third Circuit’s general conclusion in Cipollone, it sheds no light on the court’s statement concerning the first amendment’s irrelevance within the context of civil discovery. From this perspective it becomes instructive to consider the Rodgers court’s suggestion of a waiver analysis

F.R.D. 89 (E.D. Pa. 1958) (personal embarrassment may be cognizable as sufficient harm under good cause) with Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 563 (1976) (clear and present danger type standard may be necessary to justify prior restraint) and id. at 571 (Powell, J., concurring) (harm may need to be irreparable to justify prior restraint and restraint order must be least restrictive). For a discussion of the limited nature of first amendment interests in discovered material, see supra notes 92-99 and accompanying text.
for the partial elucidation it provides of the Third Circuit’s statement.105

For purposes of discussing the applicability of a waiver analysis to restrictive protective orders, it is convenient to divide such orders into two categories: negotiated orders106 and orders imposed by the court upon the motion of an opposing party.107 Traditional concepts of waiver apply readily to negotiated protective orders, but, as will be developed below, begin to break down when applied to orders within the second category. In that situation, waiver must be implied from the factual circumstances and this implication gives rise to definitional difficulties.108

The traditional definition of waiver in the area of constitutional

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105. See Rodgers, 536 F.2d at 1006 (citing International Prods. Corp. v. Koons, 325 F.2d 403, 407-08 (2d Cir. 1963)). The waiver suggestion first appeared in Rodgers. Id. The waiver passage from Rodgers was quoted in full by USMR for the proposition that restrictive protective orders were not unconstitutional. USMR, 771 F.2d at 802 (quoting Rodgers v. United States Steel Corp., 536 F.2d 1001, 1006 (3d Cir. 1976)). The Cipollone court then cited USMR as dispositive precedent on the issue of the constitutionality of restrictive orders. 785 F.2d at 1119 (quoting New York v. United States Steel Metal Refining Co., 771 F.2d 793, 802 (3d Cir. 1985) (citing Rodgers v. United States Steel Corp., 536 F.2d 1001, 1006 (3d Cir. 1976) (for the proposition that restrictive protective orders do not run afoul of first amendment))). The waiver suggestion has remained undeveloped and was not noted, let alone relied upon, in Cipollone, perhaps because of its posture as collateral dictum in the precedential history. See Cipollone, 785 F.2d at 1119.

The following discussion of waiver produces three interesting results. It reveals one category of protective orders in which the first amendment is in fact irrelevant; it indicates, contrary to the Third Circuit’s statement, that the amendment is relevant to other protective orders not within this first category; and it confirms that the above analysis based on discovery as a source of information (“source analysis”) was “rightheaded” in its approach to the first amendment issue.

106. See, e.g., In re Film Recovery Sys., Inc., 804 F.2d 386, 387 (7th Cir. 1985) (stipulated protective order that only trustee could have access to documents produced by debtor); Oklahoma Hosp. Ass’n v. Oklahoma Pub. Co., 748 F.2d 1421, 1425 (10th Cir. 1984) (stipulation that access to confidential documents limited to only management level employees incorporated into protective order issued by district court), cert. denied, 473 U.S. 905 (1985); Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, 773 (9th Cir. 1983) (parties stipulated to protective order against disclosure of discovery materials).

107. See C. WRIGHT & A. MILLER, supra note 1, § 2035, at 261-62. A protective order may be obtained by motion made by any party. Id. at 261. Protective orders in this category may be issued before or after the acquisition of discovery material. See id. at 262. Under Rule 26(c), the norm is for the issuance of protective orders before acquisition because the motion must be made in a timely fashion. Id. Orders can issue after the acquisition of information because courts will look to the totality of the circumstances to determine what is timely, as was the case in Cipollone. Id.; see also Cipollone, 785 F.2d at 1110 (defendants had already produced large number of confidential documents before moving for protective order).

108. Due to the problematic posture of an implied waiver, the contours of that discussion will be shaped by analogy. The discussion will draw from the doctrine of the forfeiture of constitutional rights in the criminal law. This analogous argument, as it turns out, corroborates the correctness of the source analy-
rights requires the intentional relinquishment of a known right.\textsuperscript{109} The literal terms of this definition require deliberate and informed consent in the abandonment of a constitutional right.\textsuperscript{110} Therefore, the traditional definition applies neatly to negotiated protective orders. The party who, pursuant to a negotiated agreement, consents to a protective order prohibiting dissemination of the material to be discovered, archetypically waives any first amendment right to disclose such information.\textsuperscript{111} As a result, restrictions on the free flow of information

sis established above. For a discussion of this analogy, see infra notes 102-40 and accompanying text.

\textsuperscript{109} See Johnson v. Zerbst, 304 U.S. 458 (1938). In Johnson, the Court stated that ""courts indulge every reasonable presumption against waiver' of fundamental constitutional rights." Id. at 464 (citing Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937)). Petitioner was before the Court on appeal from a denial of habeas corpus. Id. at 459. He was charged with possession of counterfeit money, arrested and kept in jail bound over awaiting action of the United States Grand Jury. Id. at 460. The accused was unable to employ counsel, but was nonetheless tried, convicted and sentenced without the assistance of counsel. Id. In the petition for habeas corpus, the petitioner collaterally challenged the constitutionality of his conviction based upon the sixth amendment right to counsel. See id. at 462. The petition was challenged on the theory that petitioner had waived his constitutional right. See id. at 464. The Court held that "'[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.'" Id. (emphasis added). It stated further that "'[i]f the accused ... is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction. ...'" Id. at 468. On the record presented, the Court found it necessary to remand the case to allow petitioner a chance to prove absence of intelligent waiver. Id. at 468. One dissenting Justice would have found a waiver on the record presented and would have affirmed the judgment of the lower court. Id. at 469 (Butler, J., dissenting).


\textsuperscript{110} See Culombe v. Connecticut, 367 U.S. 568, 602 (1961) (to be voluntary waiver must be "product of an essentially free and unrestrained choice by its maker").

\textsuperscript{111} See generally Marcus, supra note 7, at 68-75. The negotiated protective order is an archetypical waiver. See id. at 69. The expansion of the argument follows. First, non-disclosure is one of the negotiated terms of the order so that a party can not claim unawareness in relinquishing the right to disclose. See id. Second, the negotiated order is intelligent because it is formulated pursuant to consultation between the parties and their counsel. Id. In addition, where the information sought is confidential, as in Cipollone, the acquisition of the information is consideration for the agreement not to disclose. Id. at 70. Since the party in possession could motion for a complete denial of discovery based upon confidentiality, granting access in exchange for non-disclosure saves the acquiring party the time and expense of litigating the discoverability of the information. See id. Although consideration is not a necessary element in the waiver of a constitutional right, it nonetheless solidifies the claim of the waiver in this situation. Id. at 69. Finally, courts have no problem with the waiver of a first amendment right so long as the waiver is intelligent and knowing, as it is in the
within the context of discovery create less tension on the communicative strand of first amendment protection than would otherwise be created in a more typical prior restraint situation.\textsuperscript{112}

The situation is different, however, when a party becomes subject to a restrictive protective order imposed by the court upon the motion of an opposing party. In this situation the party subject to the order does not consent to its imposition and, therefore, does not freely abandon any first amendment interests in the discovery information.\textsuperscript{113} Any finding of waiver in such a situation would necessarily be implied from the factual context.\textsuperscript{114} The concept of an implied waiver, however, presents significant definitional difficulties, because it is impossible to attribute meaning to the requirements of intentionality and knowledge when the attribution of waiver is a constructive abstraction imposed by a judicial observer uninvolved in the actual situation.\textsuperscript{115} In other words the attri-

\begin{footnotesize}
\textsuperscript{112} See Rubin, supra note 109, at 479 \& n.16. Compare Rose v. Mitchell, 443 U.S. 545, 551 (1979) (exclusion of racial groups from grand jury invalidates conviction) with Tollett v. Henderson, 411 U.S. 258, 266 (1973) (guilty plea constitutes waiver of right to trial and is conclusive even where racial groups were excluded from grand jury).

\textsuperscript{113} See, C. Wright \& A. Miller, supra note 1, § 2035, at 262. The procedure for obtaining an order is by motion where the party against whom the order is sought has opportunity to object. Id. This process is adversarial and contention over some protective orders reach the appellate level. See J. Moore, supra note 9, ¶ 26.78, at 26-505; see, e.g., Cipollone, 785 F.2d at 1110. The protective order involved was contested from the magistrate to the court of appeals. Id.

\textsuperscript{114} See, e.g., Halkin, 598 F.2d at 189 (refusing to find implied waiver in protective order situation); Rodgers, 536 F.2d at 1006 (suggesting that implied waiver might be found).

\textsuperscript{115} See generally Rubin, supra note 109, at 481. Courts have had considerable difficulties in applying the traditional definition of waiver found in Johnson v. Zerbst. Id. They have had difficulty in reconciling the requirements of intentionality and knowledge with the well recognized rule that a waiver could be inferred from action. Id. (citing Johnson v. Zerbst, 304 U.S. 458 (1958)); see also Lefkowitz v. Newsome, 420 U.S. 283, 294 (1975) (White, J., dissenting). In Lefkowitz, Justice White was commenting on the Brady trilogy. Lefkowitz v. Newsome, 420 U.S. 283, 294 (1975) (White, J., dissenting). The Brady trilogy is a group of cases in which the Court first approved the abandonment of constitutional defenses upon entering a guilty plea. See Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Parker v. North Carolina, 397 U.S. 790 (1970). For a scholarly criticism of this trilogy, see Alschuler, The Supreme Court, the Defense Attorney, and the Guilty Plea, 47 U. COLO. L. REV. 1 (1975).
\end{footnotesize}
bution is a legal fiction.116

To avoid the analytical sloppiness of a legal fiction, commentators developed the doctrine of forfeiture as an alternative to the concept of implied waiver.117 The doctrine has developed in the criminal law context regarding the loss of a defendant's right to assert constitutional defenses because of certain actions like failure to raise defenses in a timely manner or entrance of a guilty plea.118 The forfeiture analysis begins with the recognition that an implied waiver is a legal fiction119 which is,

Justice White indicates the difficulty in utilizing the terminology of waiver where there is no clear and deliberate abandonment of rights: [T]he [majority] conten- tions assume that the Brady trilogy was based upon notions of waiver. In other words, it assumes that the Court has in the past refused to set aside “guilty pleas” on the basis of antecedent violations of constitutional rights only because the plea was deemed to have “waived” those rights. This assumption finds some support in the language of those cases, but waiver was not their basic ingredient.


116. Cf. Rubin, supra note 109, at 529. “In the criminal area, the present [waiver-like rationales for the loss of constitutional rights] is inherently unclear because of its reliance on the notion of voluntariness. Any general principle has its uncertainties, but voluntariness achieves a unique level of obscurity.” Id.

117. See Rubin, supra note 109, at 482. For a discussion of the analytical problems with the notion of implied waiver, see supra note 108 and accompanying text. Commentators have responded to the definitional problems associated with the idea of an implied waiver by holding the Johnson v. Zerbst definition constant and varying the situations in which it will be applied. Id. Thus, the loss of constitutional rights upon entering a guilty plea is described as a “preclusion” or a “forfeiture.” See, e.g., Dix, Waiver in Criminal Procedure: A Brief for More Careful Analysis, 55 Tex. L. Rev. 193, 205 & 209 (1977) (limit waiver to “conscious choice” situations, distinguish waiver from loss of rights due to procedural violations so that the latter may receive specific and distinct analysis); Tigar, The Supreme Court, 1969 Term Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel, 84 Harv. L. Rev. 1, 9 (1970) (application of Johnson has “robbed its words of whatever cognitive . . . significance they possess.”); Westen, Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure, 75 Mich. L. Rev. 1213, 1238 (1977) (developing doctrine of forfeiture as balancing test between state and individual interests does explain Court’s decisions on loss of constitutional rights in criminal procedures); see also A. Corbin, A Comprehensive Treatise on the Rules of Contract Law, § 752, at 479-80 (1960) (rela- egation of waiver to relinquishment of conditions to duties under contract, leaving other discharge of rights for consideration under alternative terminology, e.g., discharge of rights).

118. See Westen, supra note 117, at 1214 (“The significant difference between waiver and forfeiture is that a defendant can forfeit his defenses without ever having made a deliberate, informed decision to relinquish them.”). Westen examines this difference in the context of forfeiture of constitutional rights upon entering a guilty plea and upon procedural violations in raising defenses following from such constitutional rights. See id. at 1215-54. For a discussion of Westen’s conclusion, see supra note 112.

119. Cf. Westen, supra note 117, at 1214. Beginning his analysis Westen distinguishes waiver from forfeiture. Id. “Unlike waiver, forfeiture occurs by operation of law without regard to defendant’s state of mind.” Id. After reviewing the results of various Supreme Court decisions, he submits the following analysis to explain them:
in reality, tantamount to a judicial finding that under certain circumstances certain actions will legally result in the loss of rights. Forfeiture analysis defines the contours of those factual circumstances in which rights will be lost by operation of law. Because the doctrine has received attention in the criminal law context regarding the loss of constitutional rights, and is undeveloped regarding first amendment rights in discovery, this Note will draw from the terms of forfeiture analysis to construct a model to test the Rodgers court's statement that "parties . . . ,

First the forfeiture of constitutional defenses is justified not by the deliberate and voluntary consent of the defendant (as is said to be true of waiver), but by the overriding interests of the state. Secondly, constitutional defenses in criminal procedure, like other constitutional rights, are defined by a balance between interest of the individual and the interest of the state. . . .

. . . . In sum, the analysis of forfeiture in criminal procedure is no different from constitutional analysis of constitutional rights in other contexts: it requires one to identify the nature of the defendant's interests, to identify a balance between the nature and the magnitude of the state's interests, and to strike a balance between the two in light of alternatives for achieving their respective goals.

Id. at 1238-39 (emphasis added). For a parallel between Westen's emphasis on ascertaining the "nature and magnitude" of states interest and the role of ascertaining the "character and magnitude" of first amendment rights within the context of discovery, see supra notes 86-97 and accompanying text. See also Murray v. Carrier, 106 S. Ct. 2639, 2653 (1986) (in petition for habeas corpus filed by state petitioner, Justice Stevens advocated balancing analysis to weigh strength of individual constitutional claim against importance of state procedural rule by which right is forfeited).

120. See, e.g., Dix, supra note 117 (limiting "waiver" to deliberate relinquishment and attempt to define its contours in relation to other "procedural defaults"); Hill, The Forfeiture of Constitutional Rights in Criminal Cases, 78 COLUM. L. REV. 1050 (1978) (examination of procedural forfeiture in light of direct Supreme Court review and collateral habeas corpus proceedings); Westen, supra note 117 (attempt to explain waiver decisions on basis of balancing between state and individual interests); Meltzer, State Court Forfeitures of Federal Rights, 99 HARV. L. REV. 1128 (1986) (examination of federal doctrines which limit state court forfeiture of federal rights); Rubin, supra note 109 (attempting to develop logically consistent definition of waiver to explain various decisions in both criminal and civil law); Spritzer, Criminal Waiver, Procedural Defendant and the Burger Court, 126 U. Pa. L. REV. 473 (1978) (examination of loss of constitutional rights in criminal prosecution under terminology of "waiver" and "procedural default"); Tigar, supra note 117 (pointing out confused state of waiver analysis regarding constitutional rights in criminal law as developed in Court decisions).

121. See Marcus, supra note 7, at 68. Waiver of first amendment rights are not easily found. Id. The discussion regarding the implied "waiver" of first amendment rights has largely been conducted in the area of public employment. See G. GUNTHER, CONSTITUTIONAL LAW, ch. 13, § 4 at 1361 ("Much of the law in this area [of first amendment rights conditional on government benefits] was developed in the context of government concern with internal security and may not be conditioned on waiver of first amendment rights"). The discussion of first amendment rights in discovered information, however, was addressed for the first time in Halkin. See Anderson v. Cryovac, 805 F.2d 1, 5 (1st Cir. 1986) (Halkin was first court to seriously consider first amendment implications of restrictive protective orders).
by taking . . . part in the discovery processes, implicitly waive their First Amendment rights . . . to disseminate information.”

A familiar example of forfeiture within this area is the loss of the right to raise certain constitutional defenses by entering a guilty plea in criminal proceedings. In such situations the Supreme Court sometimes utilizes the terminology of waiver in determining whether the constitutional right will be lost or not, but the Court recognizes that it is not referring to a deliberate decision to abandon a constitutional right. Thus, for the sake of theoretical clarity, commentators analyze these situations in terms of forfeiture rather than waiver. In certain situations the Court will find that a guilty plea works a forfeiture, but in others it will permit the defendant to invoke his constitutional right, the guilty plea notwithstanding.

In Tollett v. Henderson, for example, a black defendant was charged

122. Rodgers, 536 F.2d at 1006.


124. For a discussion of the Court’s decisions relating to forfeiture of constitutional rights in criminal proceedings and their relation to waiver, see supra note 115.

125. See generally Westen, supra, note 117, at 1215-39. For a collection of commentators’ work on forfeiture of constitutional rights in the criminal law, see supra note 120.


127. 411 U.S. 258 (1973). Henderson was sentenced to a term of 99 years in prison for the crime of first degree murder. Id. He twice sought and was denied habeas corpus on the grounds of a coerced confession and denial of effective assistance of counsel. Id. When Henderson challenged his conviction a third time based upon the racial composition of the grand jury which indicted him, the Tennessee Court of Criminal Appeals ultimately concluded that he had waived his constitutional challenge by not raising it before pleading guilty. Id. Henderson then filed a petition for habeas corpus in the district court which decided that he had not waived his constitutional right to raise the grand jury defense under the Johnson v. Zerbst definition of a knowing and intentional waiver. Id. at 260. The Court of Appeals for the Sixth Circuit affirmed. Id. The Court reversed, holding that the issue in Henderson was not “cast solely in terms of ‘waiver,’ ” but under the notion that defendant’s “guilty plea here forecloses independent inquiry into the claim of discrimination in the selection of the grand jury.” Id. at 266. But see id. at 269 (Marshall, J., dissenting). Justice Marshall would have decided the case under traditional concepts of waiver and
with and pleaded guilty to first degree murder.\textsuperscript{128} Twenty years after being convicted and sentenced to prison, he petitioned to have the conviction set aside because of a constitutional defect in the racial composition of the grand jury.\textsuperscript{129} The Supreme Court in this instance held that the defendant had forfeited his right to raise the defense by having entered a guilty plea.\textsuperscript{130} In \textit{Perry v. Blackledge},\textsuperscript{131} however, a defendant was tried, convicted and sentenced for perpetration of a misdemeanor.\textsuperscript{132} The defendant took a \textit{de novo} appeal from his conviction as provided by statute.\textsuperscript{133} In response to the appeal the government charged the defendant with a felony based upon the same conduct for which he was already tried and convicted.\textsuperscript{134} The defendant pleaded guilty to the felony, was convicted and sentenced to prison.\textsuperscript{135} Several months later he petitioned to have his conviction set aside based upon the defense that, by charging him with a felony while his appeal was pending, the prosecution had deprived him of due process.\textsuperscript{136} The Court in this instance held that the defendant had not forfeited the due process defense by having entered a guilty plea.\textsuperscript{137}

The difference between these results is not explainable on any theory of deliberate abandonment,\textsuperscript{138} but on the basis of a balancing test would have affirmed the decisions of the Court of Appeals. \textit{Id.} (Marshall, J., dissenting).

\textsuperscript{128} \textit{Id.} at 258.

\textsuperscript{129} \textit{Id.}

\textsuperscript{130} \textit{Id.} at 266.

\textsuperscript{131} 417 U.S. 21 (1974). While in prison, Perry became involved in an altercation and was charged and convicted of assault with a deadly weapon, a misdemeanor under the North Carolina statute. \textit{Id.} at 22. Perry claimed his absolute right to a trial \textit{de novo} provided for under North Carolina law. \textit{Id.} The statute provided that when an appeal was taken the slate was wiped clean. \textit{Id.} Prior to Perry's appearance for trial \textit{de novo} the prosecutor obtained an indictment from a grand jury charging Perry with the felony of assault with a deadly weapon with intent to kill provided for under North Carolina statute to which Perry pleaded guilty. \textit{Id.} at 23. Some months later Perry applied for a writ of habeas corpus on the ground that the indictment for felony constituted double jeopardy and denial of due process. \textit{Id.} at 23. Relying on \textit{Tolet}, the state argued that Perry was "precluded" from raising his constitutional defense because of his guilty plea. \textit{Id.} at 29. The Court distinguished this case from \textit{Tolet} based on the observation that the constitutional dimensions of this case went "to the very power of the State to bring the defendant into court to answer the charge brought against him." \textit{Id.} at 30. On this ground the Court permitted Perry to litigate the grand jury defense. \textit{Id.} at 31. \textit{But see id.} at 32 (Rehnquist, J., dissenting) (author of \textit{Tolet}). Justice Rehnquist would have followed \textit{Tolet} and ruled that the constitutional defense was foreclosed by the guilty plea. \textit{Id.}

\textsuperscript{132} \textit{Id.} at 22.

\textsuperscript{133} \textit{Id.}

\textsuperscript{134} \textit{Id.} at 23.

\textsuperscript{135} \textit{Id.}

\textsuperscript{136} \textit{Id.}

\textsuperscript{137} \textit{Id.} at 31.

\textsuperscript{138} For a discussion of the Court's utilization of the waiver terminology in guilty plea cases and its simultaneous recognition of its analytic shortcomings,
between the interests of the defendant in asserting his constitutional right and the interest of the state in maintaining the finality of the conviction.\textsuperscript{139} This sort of balancing is useful to describe the contours of the law of forfeiture.\textsuperscript{140} The interest of the defendants in both examples is the same. There is a difference, however, in the interest of the state. In the first example, if no forfeiture were found, the state would have been in a worse position with respect to its ability to obtain a valid conviction than it occupied before the defendant’s guilty plea.\textsuperscript{141} Since

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see Justice White’s comments in Lefkowitz v. Newsome, 420 U.S. 283, 299 (1975). See also Westen, supra note 117, at 1217 n.4. Westen states: “If… the [Lefkowitz] Court is correct in stating that its guilty plea cases can be explained on grounds other than waiver, then it is almost irrelevant that the decisions cannot also be squared on traditional notions of waiver.” \textit{Id.}

139. See generally Westen, supra note 117. Justice Rehnquist states in \textit{Toilet} that the decision does not rest on waiver. 411 U.S. at 266. The \textit{Toilet} Court based its decision on the rather conclusory statement that the guilty plea foreclosed the defendant from raising the constitutional defense. \textit{Id.} To reconcile \textit{Toilet} with \textit{Blackledge}, the Court distinguished the prior decision “on the ground that the constitutional claim there was one that could have been ‘cured,’ while the claim in \textit{Blackledge} ‘went to the very power of the state to bring the defendant to court’. ….” See Westen, supra note 117, at 1220 (quoting Perry v. Blackledge, 417 U.S. 21, 30-31 (1974)). Unsatisfied with the Court’s own perception of the difference between \textit{Toilet} and \textit{Blackledge}, Westen attempts to formulate a general theory of forfeiture that will explain in a principled manner why a guilty plea in some circumstances forecloses constitutional defenses and why in others it does not. See Westen, supra note 117, at 1226-37. For a discussion of Westen’s ultimate conclusion, see supra note 119. For a discussion of Westen’s reasoning, see infra notes 140-49 and accompanying text. For examples of cases recognizing the finality of convictions as a legitimate state interest, see Kuhlmann v. Wilson, 106 S. Ct. 2616, 2626 (1986); Rose v. Lundy, 455 U.S. 509, 525 (1982); McMann v. Richardson, 397 U.S. 759, 774 (1970).

140. See Westen, supra note 117, at 1239. Westen’s analysis is similar to the sort of balancing test that is familiar in other constitutional contexts. See, e.g., Murray v. Carrier, 106 S. Ct. 2639, 2653 (1986) (balancing of individual interest of constitutional claim and state interest in importance of procedural rule in context of petition for habeas corpus); Kuhlmann v. Wilson, 106 S. Ct. 2616, 2626 (1986) (state interest in finality of prior judgment weighed against individual’s interest in relitigating constitutional claim). For a balancing test in another constitutional context, see Hunt v. Washington Advertising Comm’n, 432 U.S. 133, 348-58 (1977) (in dormant commerce clause case, balancing ill effects on interstate commerce against state regulatory interest); Barenblatt v. United States, 360 U.S. 109, 126 (1959) (when first amendment is asserted to bar governmental action resolution of issue involves balancing of private and public interest); Slochower v. Board of Higher Educ., 350 U.S. 551, 555 (1956) (“The problem of balancing the State’s interest in the loyalty of those in its service with the traditional safeguards of individual rights is a continuing one.”).

141. See Westen, supra note 117, at 1226-39. This statement is the central conclusion of a long analysis attempting to ascertain a principled rationale for the Court’s forfeiture decisions in the guilty plea cases. \textit{Id.} First, descriptively, “a plea of guilty may operate as a forfeiture of all defenses except those that, once raised, cannot be ‘cured.’” \textit{Id.} at 1226. A constitutional challenge to the racial composition of a grand jury is “curable” because the state can reconstitute the jury. \textit{Id.} (citing \textit{Toilet} v. Henderson, 411 U.S. 258 (1973) (guilty plea foreclosed grand jury defense)). A double jeopardy defense is incurable because the state cannot “reconstitute evidence or reinitiate charges” to retry a defendant.
there was no previous trial as in the second example, the state lost the opportunity to gather evidence and present a successful case. It therefore relied to its detriment on the defendant’s plea. In the second example, however, the interest of the state in the finality of the conviction is mitigated by the existence of the records from the first trial. These records put the state in a better position than in the first example to prosecute a second conviction, if the first were set aside. In this example, the defendant’s interest in asserting the defense outweighed the state’s interest in the conviction.

The foregoing analysis indicates certain points prefatory to an analogous analysis of category two restrictive protective orders. Forfeiture is not based on notions of intentionality or knowledge. Rather, the analysis of constitutional forfeiture is based upon a balancing test between state and individual interests. In this balancing, the individual constitutional rights are ascertained in relation to the condition over his objections. Id. at 1226 (citing Menna v. New York, 423 U.S. 61 (1975) (defendant held in contempt for refusing to testify for grand jury on several occasions, indicted thereafter for failure to testify in one of those past occasions). For evidence that the rule is in fact descriptive, see Blackledge, 417 U.S. 21 (constitutional double jeopardy defense not forfeited by guilty plea; incurable because impossible to reinstitute proceedings over defendant’s objection); Taut, 411 U.S. 308 (constitutional challenge to constitution of grand jury forfeited by guilty plea; curable by reconstitution); Brady v. United States, 397 U.S. 742 (1970) (challenge to constitutionality of death penalty statute forfeited by guilty plea; statute curable by construing it to permit both judge and jury to impose death penalty); McMann v. Richardson, 397 U.S. 759 (1970) (constitutional challenge to confession procedure precluding hearing of voluntariness forfeited by guilty plea; procedure curable by requiring trial judge to review validity of confession before admission to evidence); Parker v. North Carolina, 397 U.S. 780 (1970) (constitutional challenge relating to coerced confession forfeited by guilty plea; curable by excluding confession from evidence).

The argument explaining the different effect of curable and incurable defenses is based on a balancing of state versus individual interests. See generally Westen, supra note 117, at 1255-39. The state has a particularly strong interest in the finality of the convictions based on guilty pleas because it relied on the plea to ascertain the judgment and is in a disadvantageous position with respect to reprosecution because, as it relied on the plea, it did not prepare a case. Id. The state is actually prejudiced in this interest by the assertion of an error which could have been cured at the time of trial. Id. at 1237. With respect to incurable errors the state is in exactly the same position whether the constitutional defense is raised before or after the guilty plea, because at either instance it is equally incurable. Id. The state’s interest in maintaining the opportunity to obtain a valid conviction is balanced against the defendant’s interest in raising the constitutional defense. Id. at 1238. For a similar line of analysis in other areas of criminal procedure, see Illinois v. Allen, 397 U.S. 937 (1970) (defendant’s disruptions at trial were hostile to state’s interest in proceeding with trial so that defendant forfeited right to be present at trial).

142. For a discussion of the division of protective orders into the categories of negotiated protective orders and orders imposed by the court, see supra notes 106, 107 and accompanying text.

143. For a discussion of general definitional difficulties of implied waiver, see supra notes 115-24 and accompanying text.

144. For a discussion of the terms of this balancing test, see supra note 141.
tions under which the state interests outweigh individual interests.\footnote{145}

In translating the forfeiture framework onto the restrictive protective order situation, the pertinent starting point is to identify the state and individual interests. There is, of course, the individual’s first amendment dissemination interest\footnote{146} and the court’s interest in maintaining the orderly and just administration of pre-trial procedure\footnote{147} which includes preventing the abuse of the discovery process.\footnote{148} In considering the relative weight of these interests it becomes necessary to focus upon the character and magnitude of first amendment rights within the context of discovery.\footnote{149} This is precisely the question that the source analysis purported to answer.\footnote{150}

In carrying the analogy one step further, this analysis becomes nearly indistinguishable from the source analysis. The next step is to ascertain a balancing principle which would define the area in which

\footnote{145. See Westen, supra note 117, at 1261. Waiver in reality is a doctrine that defines the outer limits of constitutional rights. \textit{Id.} “The controlling factor in the area of waiver is not the defendant’s state of mind, but the effect the decision has on the interests of the state.” \textit{Id.} at 1260. This idea of waiver is in line with the modern notion of “rights” as a “means of regulating relationships between individuals . . . and the state.” See Rubin, \textit{supra} note 109, at 529 (citing H.L.A. Hart, \textit{The Concept of Law} 49-60 (1961); L. Tribe, \textit{American Constitutional Law} 532-39 (1978)). “Both [forfeiture and waiver] are doctrines of limitation that define areas in which the state’s interests outweigh those of the individual.” Westen, \textit{supra} note 117, at 1261.}


\footnote{147. See C. Wright & A. Miller, \textit{supra} note 1, § 2036, at 267. Rule 26(c) emphasizes the control that the court has over discovery. \textit{Id.; see also} Hill v. Lockhart, 106 S. Ct. 366, 370 (1985) (undermining integrity of Court’s procedure and impairing orderly administration of justice is undesirable); United States \textit{ex rel.} Kern v. Maroney, 275 F. Supp. 435, 442 (W.D. Pa. 1967) (procedure serving orderly administration of trial serves legitimate state interest).}

\footnote{148. For a discussion of the propriety of utilizing Rule 26(c) to prevent the abuse of discovery contrary to the interests of other litigants, see \textit{supra} notes 5, 6 and accompanying text.}

\footnote{149. For a discussion of the character and magnitude of first amendment interests in discovered material, see \textit{supra} notes 91-100 and accompanying text.}

\footnote{150. For a discussion of the terms of the source analysis, see \textit{supra} notes 81-100 and accompanying text. At this point, it is submitted that the parameters of this analysis borrowed from the law of forfeiture begins to resemble those of the source analysis, because a determination of the “quality and quantity” of first amendment rights involved would necessarily take into consideration the nature of discovery as a source of information. \textit{Cf.} Haltkin, 598 F.2d at 206 (Wilkey, J., dissenting). For a discussion of the quality and quantity of first amendment rights involved in discovery, see \textit{supra} notes 91-99 and accompanying text.}
such that the court’s interest in orderly administration and protecting litigants from the potential abuse of liberal discovery outweighs the individual’s interest in disseminating the information.\textsuperscript{153} In the absence of good cause the court’s interest is insufficient to support the imposition of a protective order.

\textsuperscript{151} For the good cause standard as a balancing test, see, e.g., Farnsworth v. Procter & Gamble Co., 758 F.2d 1545, 1547 (11th Cir. 1985) (balancing interests of competing parties: “While Rule 26(c) articulates a single standard for ruling on a protective order motion, that of ‘good cause,’ the federal courts have superimposed a somewhat more demanding balancing of interests approach’”); Halkin, 598 F.2d 176 (balancing interest of state and party; evaluating protective order under Rule 26(c) involves balancing “general judicial interest in broad and open discovery” and “interests raised by the moving party as grounds for protective intervention”); Palomba v. Barish, Civ. A. No. 85-1278 (E.D. Pa. 1986) (good cause requires balancing interest of competing parties). Cf. Seattle Times, 467 U.S. at 34 (“Rule 26(c) furthers a substantial government interest unrelated to suppression of expression.”).

\textsuperscript{152} The interests to be balanced according to the forfeiture framework are those of the state and those of the individual raising the constitutional challenge. Cf. Westen, supra note 117, at 1238. In the more typical situation where the imposition of a protective order has no constitutional implications, and where there is no question of abuse of discovery, the appropriate interests to balance are those of the competing litigants. See Farnsworth v. Procter & Gamble Co., 758 F.2d 1545, 1547 (11th Cir. 1985) (federal courts superimpose onto “good cause” standard an ad hoc balancing of interests of competing parties); Koster v. Manhattan Bank Co., 93 F.R.D. 471, 478 (S.D.N.Y. 1982) (striking balance between first amendment interest and litigant’s and society’s interest in effective operation of discovery). In this situation the court still has an interest in the orderly administration of justice, but this interest is not put at issue, because neither of the parties is challenging the very power of the court to issue the order. See, e.g., Koster v. Manhattan Bank Co., 93 F.R.D. 471, 478 (S.D.N.Y. 1982) (plaintiff challenged court’s discretion in foreclosing discovery of names and addresses of women who gave personal information to Center for Disease Control regarding Toxic Shock Syndrome, but did not challenge court’s power to prohibit discovery); Lincoln American Corp. v. Bryden, 375 F. Supp. 109, 111 (D. Kan. 1973) (court has discretionary protective power to strike fair balance between competing interests of parties to prevent annoyance, undue expense, embarrassment or oppression). A challenge to the constitutionality of a protective order, however, is tantamount to a challenge to the court’s jurisdictional power to issue the order. Westen, supra note 117, at 1253 (first amendment may preclude state from making certain conduct criminal); see also Johnson v. Zerbst, 304 U.S. 458, 468 (1937) (violation of sixth amendment stands as jurisdictional bar to conviction). In such a case the state has an interest in maintaining control over its own processes and this interest is properly included in the balancing test. Cf. Seattle Times, 467 U.S. at 34 (state has substantial interest in preventing abuse of discovery process); Koons, 325 F.2d at 408 (court has interest in maintaining control over its own processes to prevent abuse thereof).

\textsuperscript{153} Cf. Seattle Times, 467 U.S. at 36 (good cause standard of Rule 26(c) furthers substantial governmental interests); Halkin, 598 F.2d at 192 (balancing interests of state and party; evaluating protective order under Rule 26(c) involves balancing judicial interest in broad and open discovery and interests raised by moving party). Each of the circuit courts that have dealt with the issue of the impingement of restrictive protective orders and first amendment inter-
cient. The appropriateness of the good cause standard is based upon the limited character of the individual's first amendment rights.\textsuperscript{154} Thus, at this point the terms of the analogous forfeiture analysis are essentially the same as those of the source analysis. The result of this analysis as applied to the second category of restrictive protective orders in lieu of concepts of implied waiver, corroborates the correctness of the approach taken by the source analysis.\textsuperscript{155} However, even under this analogical analysis, the first amendment is not irrelevant to restrictive pro-

ests have focused upon the dissemination interests of the party challenging the order. \textit{See}, e.g., \textit{Seattle Times}, 467 U.S. at 32 ("litigant's freedom . . . to disseminate information that he has obtained" through discovery); \textit{San Juan Star Co.}, 662 F.2d at 116 (no compelling interest can justify restraint of expression); \textit{Halkin}, 598 F.2d at 187 (focusing on value of speech for informing public). The district court in \textit{Cipollone}, however, also focused upon the first amendment rights to privacy of the party seeking the protective order. \textit{Cipollone}, 106 F.R.D. at 576. The court hinted at an approach to the problem that would balance competing first amendment interests but never followed up with that line of argument. \textit{Id.} ("[T]he court would not be appropriate to permit the release of private matters whose existence and content were disclosed only as a result of litigation."); see also Humphreys, Hutcheson & Moselen v. Donvan, 568 F. Supp. 161 (M.D. Tenn. 1983) (noting individual's right to privacy as factor when government compels disclosure). Under this scenario one party's first amendment interest in dissemination could conceivably be balanced against the other party's first amendment interest in privacy and the state's interest in preventing abuse of its process, although none of the cases seem to have followed this path.

In proving good cause, the party moving for the protective order has the burden of proof. \textit{See Cipollone}, 106 F.R.D. at 583. Discharging such burden in cases involving the dissemination of information usually requires showing both that the information sought "requires protection under the Rule, and that disclosure will result in clearly defined and serious injury." \textit{Id.} (citing Centurion Indus., Inc. v. Warren Steurer and Assocs., 665 F.2d 323, 325-26 (10th Cir. 1981)). Once the burden is discharged in this manner, it shifts back to the party opposing the order to show why such an order ought not to be entered. \textit{See generally} C. Wright & A. Miller, \textit{supra} note 1, § 2043, at 301-02.

\textsuperscript{154}. For a discussion of the role of good cause in the source analysis, see \textit{supra} notes 101-04 and accompanying text. For a discussion of the limited nature of first amendment dissemination rights within the context of discovery, see \textit{supra} notes 91-102 and accompanying text.

\textsuperscript{155}. \textit{See} Aldisert, \textit{Third Circuit Review: Introduction}, 30 Vill. L. Rev. 828, 830 (1985). In discussing a formula for proper judicial criticism, Chief Judge Aldisert said: "Where several principles command the identical conclusion, the judicial opinion is strengthened." \textit{Id.} The intent here is to indicate that the line of analysis originating from the \textit{Rodgers} court's suggestion of an implied waiver of first amendment rights within the context of discovery, adapted and applied through the framework of a forfeiture analysis, has ended at essentially the same place as the source analysis based on considerations of the legal nature of discovery as a source of information. This outcome corroborates the Third Circuit's general conclusion in \textit{Cipollone} that restrictive protective orders are constitutional. \textit{See Cipollone}, 785 F.2d at 1119. It also confirms that the Third Circuit's idea of the first amendment's irrelevance in the context of discovery is untenable. \textit{See id.} Finally, it confirms the propriety of the principle that protective orders are not a form of prior restraint, but permissible limitations on the use of information discovered within the context of discovery as provided for under Rule 26(c). \textit{Cf. Halkin}, 598 F.2d at 205 (Wilkey, J., dissenting).
tective orders within the context of discovery. Contrary to the Third Circuit's suggestion, it is submitted that the litigant's first amendment interests in discovered information is an essential term in the analysis.

Two lines of argument lead to the same central thesis, that, although first amendment rights are implicated by restrictive protective orders, they are of a limited nature. This conclusion approbates the priority of the principle that discovery is a judicially granted privilege over the principle that all prior restraints are constitutionally insurmountable.\(^{156}\) It therefore clears the way to focus on the nature of discovery as a statutory grant which includes statutory restrictions on the use of discovery material in analyzing the permissibility of restrictive protective orders. Hence, it is submitted that, the \textit{Cipollone} court\(^{157}\) was correct in holding that restrictive protective orders are sufficiently justified under the good cause standard of Rule 26(c), but overstated its conclusion by suggesting that the first amendment was an irrelevant factor in the analysis of restrictive protective orders. Finally, it is submitted that, although constitutional concerns are implicated by such orders, they are fairly accounted for and given effect under Rule 26(c).

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\(^{156}\) Cf. Aldisert, \textit{supra} note 155, at 830 (where several beginning principles lead to same conclusion, analysis is strengthened).

\(^{157}\) The Third Circuit reversed the district court's order in part, issued the writ of mandamus and remanded the case for consideration consistent with its opinion. 785 F.2d at 1110. On remand, the district court eschewed all constitutional discussion, and proceeded immediately to determine whether defendants demonstrated good cause. \textit{Cipollone} v. \textit{Liggett Group, Inc.}, 113 F.R.D. 86 (D. N.J. 1986). In attempting to prove good cause the defendants argued, \textit{inter alia}, that dissemination would constitute an abuse of discovery. \textit{Id.} at 93. The district court responded to this as follows:

Thus, the mere fact that plaintiffs intend to use these materials outside of this litigation is not 'good cause' to support the protective order, unless defendants can establish that the discovery was not procured in good faith for the purposes of this litigation. No such showing is made or claimed.

\textit{Id.} It is noteworthy that the district court did not comment upon whether dissemination to the public at large would be an abuse of discovery. \textit{Id.} The district court did reinstate the portion of the magistrate's order which it amended, because the Third Circuit held that the district court reasoned improperly by not employing a clearly erroneous standard when reviewing the magistrate's order. \textit{Id.} at 93-94.