Privacy of Association: A Burgeoning Privilege in Civil Discovery

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PRIVACY OF ASSOCIATION:
A BURGEONING PRIVILEGE IN CIVIL DISCOVERY

Joan Steinman*

Introduction

The United States Supreme Court repeatedly has held that individuals and organizations cannot legislatively be compelled to disclose membership information where such disclosure infringes on the freedom of association of the organizations or their members.¹ Now the fundamental rights to freedom and privacy of association are being challenged in a new manner. Civil discovery mechanisms² are, with increasing frequency and severe consequences, being used to compel the disclosure of information in violation of group and individual constitutional rights to associational privacy.³ Use of civil discovery to obtain such in-

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¹ As this Article will set out in detail, see infra text accompanying notes 18–78, these cases held that although interference with freedom of association is not absolutely prohibited, it must be justified by compelling interests. Courts have examined legislation authorizing an investigative body to make inquiries, e.g., Braden v. United States, 365 U.S. 431 (1961)(investigation of Communist infiltration by subcommittee of the House Committee on Un-American Activities (HUAC)), as well as legislation directly demanding the disclosure of information. E.g., Shelton v. Tucker, 364 U.S. 479 (1960)(Arkansas statute which required teachers to disclose their memberships and contributions struck down). For a brief discussion of this case see infra notes and text accompanying notes 51–53.


³ See infra text accompanying notes 18–78 for a discussion of these rights. The state court systems’ discovery provisions have been put to similar use. See, e.g., Britt v. Superior Ct., 20 Cal. 3d 844, 574 P.2d 766, 143 Cal. Rptr. 695 (1978)(San Diego Unified Port District sought to discover plaintiff homeowners’
formation is particularly insidious in that litigants' rights to a full and fair resolution of their legal disputes are being threatened. Moreover, the risk of having to comply with highly intrusive discovery inquiries may deter the commencement of meritorious litigation. This phenomenon requires a judicial response. Courts must recognize an associational privacy privilege in the discovery context in order to protect the first amendment rights of litigants.

Although efforts to use civil discovery to compel the disclosure of membership and related information are not entirely unprecedented, they have become increasingly frequent over the

and residents' membership in organizations opposed to the way defendant operated a nearby airport, identities of others who attended or who discussed meetings concerning the airport, and plaintiffs' financial contributions to opponent organizations; Bakman v. Superior Ct., 63 Cal. App. 3d 306, 133 Cal. Rptr. 703, 704-05, modified on denial of reh'g, (Ct. App. 1976)(city of Fresno sought to discover plaintiff homeowners' membership in organizations concerned with alleviating noise generated by operations of the Fresno Air Terminal, officers of said organizations, and identities of all persons attending meetings concerning airport operations); Consumer Alert v. Abalone Alliance, No. 55664 (Cal. Super. Ct. dismissal as to all but two named plaintiffs June 1, 1982)(on file with author). Consumer Alert was a suit against groups and individuals alleged to be members of Abalone Alliance or supporters of alleged blockade of Diablo Canyon Nuclear Power Plant. Plaintiffs' interrogatories in the case sought to discover, inter alia, identification of the officers, employees, spokespersons, members and supporters of the Alliance, persons who attended certain meetings with the Alliance, and groups of which Alliance officers and employees are also officers or employees. Plaintiffs' First Set of Interrogatories to Defendant The Abalone Alliance, at 3-4, 6 (on file with author).

4 No empirical data is known to the author which establishes the extent to which fear of such "reverse discovery" has deterred the pursuit of lawsuits. Informal research however, consisting of conversations with several lawyers in Chicago who represent politically active individuals and groups, suggested an interesting pattern. In the past five years, each of these lawyers had had four or five occasions to counsel clients who were considering litigation, concerning the risks of discovery. In some instances the decision reached was not to sue. In others, suit was brought by an individual instead of by a group, or the allegations of the complaint were limited in an effort thereby to reduce the risk of discovery requests seeking extensive information about associations.

5 NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958), the seminal case on associational privacy, involved the use of civil discovery. The judgment of civil contempt there challenged was the consequence of the NAACP's refusal to comply with a state demand for the production of documents containing the names and addresses of all Alabama members and agents, made in litigation to
last decade. This phenomenon can be attributed to a combination of factors. First, politically and socially active groups have increasingly resorted to the courts as part of the explosion in litigation generally. Concomitantly, the use of discovery has increased tremendously in recent years. As litigants have become better acquainted with the Federal Rules of Civil Procedure, they have recognized the Rules' tremendous potential as an information gathering device. Finally, because the degree of respect owed associational rights in the discovery context is not yet clear, inquiring parties have found the demand for confidential information promising both as a means for strengthening their position in the litigation through increased knowledge, and as a potent tactical weapon. Such discovery has been used to limit substantive rights. Defendants threatened with intrusive interrogatories will often prove amenable to settlement negotiations. Plaintiffs faced with such inquiries may feel constrained to dismiss their suits or limit their complaints. Many important substantive rights recognized in the last two decades are being endangered by the use of discovery to intrude on associational privacy.

enjoin the NAACP from conducting activities in the state. Id. at 451–53.

6 See infra cases discussed at text accompanying notes 174–316.

7 See infra note 134.

8 Throughout this Article all references to rules are to the Federal Rules of Civil Procedure unless explicitly stated otherwise.

9 E.g., Hastings v. North East Independent School District, 615 F.2d 628, 630, 632 (5th Cir. 1980); Familias Unidas v. Briscoe, 544 F.2d 182, 185 n.3, 186, 192 (5th Cir. 1976); Grinnell v. Hackett, 22 Fed. R. Serv. 2d 482, 483, 489 (D.R.I. 1976)(Grinnell II). These cases are discussed infra at text accompanying notes 251–87.

10 For example, in NOW v. Sperry Rand Corp., 88 F.R.D. 272, 273 (D. Conn. 1980), plaintiffs who had brought a Title VII race and sex discrimination case against an employer were faced with highly intrusive inquiries. See infra text accompanying notes 288–98. Similarly, in Black Panther Party v. Smith, 661 F.2d 1243 (D.C. Cir. 1981), vacated mem. sub nom. Moore v. Black Panther Party and Smith v. Black Panther Party, 102 S. Ct. 3505 (1982), plaintiffs who accused the government of illegal surveillance, burglaries, and other harassment, were asked to provide substantial information regarding their membership. See infra text accompanying note 209. The risk of having to respond to such inquiries, as well as the litigation cost of establishing an associational privacy privilege, cannot but deter parties from bringing these sorts of suits.
One particularly troublesome aspect of this phenomenon is that politically controversial and unpopular groups are often the subject of these intrusive inquiries. For example, names of Black Panther Party officers and members, and names and addresses of Minnesota Communist Party members and sympathizers, were sought by the United States government using civil discovery mechanisms.11 At least one public utility sought to discover the membership and mailing list of a defendant anti-nuclear group, the SHAD Alliance.12 Sperry Rand Corporation sought to discover the names, sex, race, address, occupation and present employer of every member of a Connecticut chapter of the National Organization for Women, which was pursing Title VII race and sex discrimination claims against the company.13 Finally, black residents of Chattanooga, Tennessee, sought through civil discovery to ascertain the names and addresses of the members and “officers” of Ku Klux Klan organizations and the identity of persons who attended their meetings.14

While courts are now experienced at weighing associational privacy interests against legislative concerns,15 they have not yet refined an analysis for protecting associational privacy in the discovery arena, where opposing litigants assert an entitlement to private information so they may fully defend or present their

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11 Black Panther Party, 661 F.2d at 1250; Savola v. Webster, 644 F.2d 743, 745 & n.4 (8th Cir. 1981).
12 See Long Island Lighting Co. v. SHAD, No. 80-CV-2647 (E.D.N.Y. remanded to state court March 19, 1981)(on file with author). SHAD is an acronym for Sound/Hudson Against Atomic Development. The utility also tried to obtain the names of those who attended SHAD meetings, who were present at certain demonstrations, or who were similarly affiliated with or contributed to various “affinity groups.” Affidavit of Richard F. Czaja accompanying Notice of Motion [for an order pursuant to Rule 37, Fed. R. Civ. P.] at 3–13 (on file with author).
14 Plaintiffs’ First Set of Interrogatories & Requests for Production of Documents at 2–5, 7–9, Crumsey v. Justice Knights of the Ku Klux Klan, No. 1–80–287 (E.D. Tenn. March 1, 1982)(on file with author). In an unpublished interim order the court held, without explanation, that defendant’s claim to a first amendment privilege not to answer 103 deposition questions and interrogatories was without merit in the context of the discovery sought. Crumsey, slip op. at 5–8 (E.D. Tenn. Nov. 17, 1981).
15 See infra text accompanying notes 18–78.
cases. The Supreme Court recently lost an opportunity to aid lower courts in developing such an analysis, when exhaustion of the threatened party's resources for the litigation caused the Court to vacate the lower court's holding without addressing the first amendment issues at stake. This Article argues that a qualified associational privacy privilege must be made available to litigants at the discovery stage in order to protect their first amendment associational rights. It seeks to provide courts with a detailed analytical approach to be used in determining when a privilege should be recognized. The Article also attempts to make the judiciary and the bar aware of the issues raised by assertion of the privilege. Section I derives a theoretical framework for the privilege from Supreme Court precedent involving the right of associational privacy generally. Section II addresses three potentially significant objections to recognizing a privacy of association privilege, and Section III outlines the proposed analytical approach. Section IV then illustrates this approach and explores its implications by comparing and evaluating the approaches taken in a number of actual cases. Finally, Section V discusses the ramifications of successful and unsuccessful assertions of the privilege, including the role of protective orders and the propriety of sanctions against unyielding litigants.

I. Source of the Privilege

Since compelled disclosure can severely infringe on first amendment rights of association, courts must recognize a

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16 See infra text accompanying notes 174–316 for a discussion of the courts' frequent failure to analyze these cases properly.

qualified associational privilege\(^{18}\) in the discovery context.\(^{19}\) Such a privilege is necessary to protect the privacy of association upon which freedom of association depends. As the Court has long recognized:

\[\text{C}ompelled \text{ disclosure of affiliation with groups engaged in advocacy may constitute [an] effective...restraint on freedom of association.... Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.}\(^{20}\)

Freedom of association has itself consistently been recognized as implicitly guaranteed by the first amendment to the Constitution.\(^{21}\) The Court has recognized that this right, and the

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\(^{18}\) Rule 26(b)(1) provides that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant...” (emphasis added). The concept and function of a “privilege” have been variously defined. Some definitions emphasize the rights that a privilege creates, describing a privilege as “a rule that gives a person a right to refuse to disclose information to a tribunal that would otherwise be entitled to demand and make use of that information in performing its assigned function.” 23 C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5422, at 667 (1980). Other definitions emphasize that privileges arise out of confidential relationships. E.g., 3 Jones, Evidence § 21:1, at 744 (6th ed. 1972). See also 8 Wigmore, Evidence, § 2197, at 113 (McNaughton rev. 1961).

\(^{19}\) There is no doubt that the federal discovery rules must yield to the Constitution. The privilege provisions of the Federal Rules of Evidence apply at all stages of civil actions, including discovery, (Rule 1101(c)), and state this proposition explicitly:

Except as otherwise required by the Constitution of the United States...the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.


\(^{20}\) NAACP v. Alabama ex rel. Patterson, 357 U.S. at 462. The Court’s concern that compelled disclosure will chill associational ties has been expressed repeatedly. See e.g., Buckley v. Valeo, 424 U.S. 1, 68–74 (1976).

\(^{21}\) The first amendment states in pertinent part: “Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people
right to privacy of association which it entails, are "fundamental," because they are "essential conditions basic to the preservation of our democracy" and are "indispensable to [the] effectuation of [the] explicit First Amendment guarantees" of speech, petition and assembly. Associations themselves, as well as individuals, have first amendment rights of association and privacy of association.

peaceably to assemble, and to petition the Government for a redress of grievances.” See also Doe v. Bolton, 410 U.S. 179, 212 n.4 (1973)(Douglas, J., concurring)(right of association and privacy of association are in the periphery of the first amendment); Healy v. James, 408 U.S. 169, 181 (1972)(freedom of association implicit in freedoms of speech, assembly, and petition).

The Court found, in NAACP v. Alabama ex rel. Patterson, that inviolability of privacy in group association may be indispensable to freedom of association. 357 U.S. at 462.

E.g., First Nat'l Bank v. Bellotti, 435 U.S. 765, 780 (1978)(fundamental components of liberty); Buckley v. Valeo, 424 U.S. 1, 25 (1976)("[S]ecret and privacy as to political preferences and convictions are fundamental in a free society").


The cases are easy from one perspective: anonymity has long been recognized as absolutely essential for the survival of dissident movements; the glare of public disclosure, so healthy in other settings, may operate in the context of protected but unpopular groups or beliefs as a clarion call to ostracism or worse. . . . But from another perspective the cases are hard: knowledge is highly valued in our society, and secrecy often seems the shield of dangerous and irresponsible designs. Perhaps because the tension between these two perspectives has been so constant, the decisions in this . . area have not produced a body of doctrine as cogent as in [others].

E.g., Cousins v. Wigoda, 419 U.S. 477, 487, 489 (1975); United Transp.
In cases where the government has been a party, the courts traditionally have engaged in a balancing analysis to determine whether disclosure may be compelled. The Supreme Court has stated that government "action which may...curtail[] the freedom to associate is subject to the closest scrutiny."\textsuperscript{27} The government must demonstrate that its interest is compelling\textsuperscript{28} and bears a substantial relation to the disclosure sought.\textsuperscript{29} It must also show that disclosure represents the "least restrictive means" for achieving its objectives and therefore will not unnecessarily abridge associational freedoms or "broadly stifle fundamental personal liberties when the end can be more narrowly achieved."\textsuperscript{30} Finally, the Court will weigh\textsuperscript{31} against the government's interest in disclosure the likelihood of harm to an association and its members if the information sought is released.\textsuperscript{32}

The Supreme Court applied these principles in \textit{NAACP v. Alabama ex rel Patterson},\textsuperscript{33} frequently cited as the first Supreme

\textsuperscript{27} NAACP v. Alabama \textit{ex rel.} Patterson, 357 U.S. at 460–61; \textit{Buckley}, 424 U.S. at 25, 64 & n.73.

In scrutinizing government action, the Court has proscribed both direct and indirect interference with parties' associational rights. \textit{E.g.}, \textit{Healy}, 408 U.S. at 183 (Constitution protects rights of association against even indirect government interference); Bates v. City of Little Rock, 361 U.S. 516, 523 (1960)(" Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stilled by more subtle governmental interference").

\textsuperscript{28} \textit{E.g.}, Democratic Party v. Wisconsin \textit{ex rel.} LaFollette, 450 U.S. 107, 124 (1981); \textit{Cousins}, 419 U.S. at 489.

\textsuperscript{29} \textit{E.g.}, \textit{Buckley}, 424 U.S. at 64 & nn.74–75 (requiring a "relevant correlation" or "substantial relation"); \textit{Gibson}, 372 U.S. at 546, 549 ("the State [must] convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest").


\textsuperscript{31} \textit{E.g.}, DeGregory v. Attorney General, 383 U.S. 825, 829 (1966)(government interest in protecting against subversive activities too remote and conjectural to outweigh right not to disclose past communist connections).

\textsuperscript{32} \textit{See NAACP v. Alabama ex rel. Patterson}, 357 U.S. at 462.

\textsuperscript{33} 357 U.S. 449 (1958).
Court decision to recognize freedom of association as a constitutional right.\textsuperscript{34} The National Association for the Advancement of Colored People (NAACP) had been adjudged in civil contempt for refusing to comply with a court order requiring the production of the names and addresses of all its Alabama members and agents.\textsuperscript{35} The order had been entered in a suit by the Attorney General of Alabama to enjoin the Association from conducting further activities in the state, in light of its failure to qualify to do business in Alabama. The state had maintained that it needed the NAACP’s membership and agent lists in order adequately to prepare for a hearing on the NAACP’s motion to dissolve the \textit{ex parte} restraining order entered against it.\textsuperscript{36}

Based upon the NAACP’s “uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility,” the Court found that the required disclosure was likely to entail a substantial restraint upon NAACP members’ exercise of their right to freedom of association.\textsuperscript{37} Such compelled disclosure might induce some members to withdraw and might dissuade other persons from joining, for fear of the consequences of exposure.\textsuperscript{38} The Court was unable to perceive how the disclosure sought had any substantial bearing upon the issues raised by the Attorney General’s suit,\textsuperscript{39} and consequently held that Alabama had not

\textsuperscript{34} Raggi, \textit{supra} note 25 at 2 & n.7. Raggi notes, however, that in such cases as Sweezy v. New Hampshire, 354 U.S. 234 (1957), the Court had already identified association as fundamental and had established that the first amendment protects one’s right not to divulge the associations of which one is a member. \textit{Id.} at 3, 4 n.16.

\textsuperscript{35} NAACP v. Alabama \textit{ex rel.} Patterson, 357 U.S. at 451. The NAACP was also ordered to divulge the identity of its employees, officers, and directors. It chose not to raise a constitutional challenge to this aspect of the production order, and furnished that information. \textit{Id.} at 464–65.

\textsuperscript{36} \textit{Id.} at 452–53.

\textsuperscript{37} \textit{Id.} at 462.

\textsuperscript{38} \textit{Id.} at 462–63.

\textsuperscript{39} \textit{Id.} at 465. The issues were whether the NAACP should be subjected to Alabama’s statute requiring certain foreign corporations to register, and whether its activities justified its permanent ouster from the state. \textit{Id.} at 464.
demonstrated an interest sufficient to justify the deterrent effect which disclosure might have. The judgment of contempt was reversed.\footnote{id:465-66.}

Two years later, in \textit{Bates v. City of Little Rock},\footnote{361 U.S. 516 (1960).} the Court applied the same principles to protect the associational privacy rights of NAACP members and contributors. It concluded that the disclosure of membership and contributor lists could not be compelled by certain municipal ordinances because such disclosure would significantly interfere with the freedom of association of the NAACP members.\footnote{id:523.} The Court relied upon evidence that persons who had been publicly identified as members of the local NAACP had been harassed by telephone calls, had had stones thrown at their houses, and had been threatened with bodily harm. It also relied upon evidence that fear of community hostility and economic reprisal had induced former members to withdraw and discouraged new members from joining.\footnote{id:521 & n.5, 522 & nn. 6-7, 524.} The Court found determinative the lack of a reasonable relationship between the need for disclosure and the power to tax, upon which the ordinances mandating disclosure were based.\footnote{id:524-27. Similarly, in \textit{Louisiana ex rel. Gremillion v. NAACP}, 366 U.S. 293 (1961), the Court upheld a temporary injunction restraining enforcement of two statutes requiring certain not-for-profit organizations to file lists of their officers and members, along with affidavits that no officers in their out-of-state affiliated organizations were members of any Communist or subversive organization. The Court cautioned that if it were shown that disclosure of membership lists would result in reprisals against and hostility to the NAACP members, then disclosure could not be required. \textit{Id.} at 296.}

The Court has continued to require that the government demonstrate a substantial relationship between the disclosure it seeks and some compelling state interest. For example, in \textit{Gibson v. Florida Legislative Investigation Committee}\footnote{372 U.S. 539 (1963).} the Court reviewed a contempt citation arising out of the refusal by the president of the NAACP's Miami branch to disclose to a Florida
legislative committee whether fourteen alleged Communists or fellow travelers were members of the NAACP branch. The Court reversed the contempt conviction on the grounds that the state had failed to establish a substantial connection between the NAACP branch and Communist activities and had therefore failed to show the necessary substantial relationship between the information sought and a compelling state interest. It stressed that

While . . . all legitimate organizations are the beneficiaries of these protections, they are all the more essential . . . where the challenged privacy is that of persons espousing beliefs already unpopular with their neighbors and the deterrent and "chilling" effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association is consequently the more immediate and substantial.

While the Court has been especially vigilant in protecting the privacy of "legitimate" dissidents, it has also required a strong showing of relevance by the government when protecting the associational privacy rights of groups generally in the mainstream or who have not clearly demonstrated that disclosure would harm them. In Pollard v. Roberts, the Court affirmed per curiam an

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46 Id. at 546, 551. In reaching its decision, the Court emphasized that the NAACP was a "legitimate" and "nonsubversive" organization, neither engaged in illegal or "improper" activities nor demonstrated to have any substantial connections with such activities. Id. at 548, 555–58. This relative lack of solicitude for organizations and members whom the Court deems not to be "legitimate" seriously endangers the exercise of first amendment rights. A more defensible distinction could be drawn between organizations and members whose activities are criminal and those whose are not, since associations for criminal ends are less protected by the first amendment. See infra notes 164–66 and accompanying text.

47 The Court's special concern that compelled disclosure will chill the associational ties of minority parties, independent candidates, and dissident groups has continued. E.g., Buckley, 424 U.S. at 70–74; Gibson, 372 U.S. at 556–57 (protections even more essential where the challenged privacy is that of persons espousing unpopular beliefs); Childers v. Dallas Police Dept', 513 F. Supp. 134, 141 (N.D. Tx. 1981); Aumiller v. University of Del., 434 F. Supp. 1273, 1301 (D. Del. 1977).

Arkansas district court's decision holding that compelled disclosure of the identities of contributors to the 1966 Republican campaign fund would violate the associational rights of both the Party and its contributors.\footnote{Id. at 257–58.} Although the record contained no evidence of reprisals against Republican contributors, the court noted that the Republican Party, as a long-time minority party in Arkansas, stood to suffer a particularly substantial loss of support if disclosure of its members and contributors was compelled. The court insisted that a far greater showing of the relevance of the contributors' names to the prosecuting attorney's investigation of alleged election law violations, and a far greater showing of public interest in the disclosure were necessary to outweigh the constitutionally protected interests in having the information remain private.\footnote{Id.} In Shelton v. Tucker,\footnote{Id. 364 U.S. 479 (1960).} where the Court emphasized the special need to safeguard the freedom of thought and association of teachers,\footnote{Id. at 486–87; see also Sweezy, 354 U.S. at 250. Emphasizing the essentiality of freedom in American universities, the Court upheld petitioner's refusal to answer questions concerning his lectures at the University of New Hampshire or regarding the Progressive Party and its adherents, since the legislature's desire for the information had not been demonstrated. Id. at 252–54.} it again required a strong showing of relevance. The Court struck down as overbroad and unsupported an Arkansas statute requiring public school teachers to disclose every organization to which they had belonged or regularly contributed for five years.\footnote{Shelton, 364 U.S. at 480. The Court found that "many such relationships could have no possible bearing upon the teachers' occupational competence or fitness . . . ." Id. at 488.}

When the Court has found a strong state interest in disclosure and a close connection between that interest and the information sought, however, it has sometimes upheld the state's right to elicit information concerning associational ties. In the 1950s and 1960s the Court frequently upheld legislative investigations and enactments requiring persons to reveal information as to their possible Communist Party affiliations. For example,
observing that the state’s interest in self-preservation outweighed the individuals’ rights to associational privacy, the Court upheld convictions for contempt of Congress issued against persons who refused to divulge to a subcommittee of the House of Representatives Committee on Un-American Activities whether they were or ever had been members of the Party. At the same time, the Court held constitutional as applied congressional legislation requiring the Communist Party to file registration statements listing the names, aliases and addresses of its officers and members. The Court recognized that severe harm would result to Party members from the loss of their associational privacy rights and that “the public opprobrium and obloquy which may attach to an individual listed...as a member of a Communist-action organization is no less considerable than that with which members of the National Association for the Advancement of Colored People were threatened in NAACP and Bates.” However, the Court distinguished those cases “in the magnitude of the public interests which the registration and disclosure provisions are designed to protect and in the pertinence which registration and disclosure bear to the protection of those interests.” Similarly, in Konigsberg v. State Bar and In re Anastaplo, both decided in 1961 by 5–4 votes, the Court upheld the right of states to deny admission to the bar predicated upon an applicant’s refusal to answer questions concerning his or her present or past affiliation with the Communist Party, thereby thwarting a full investigation into his or her qualifications. The

54 See Braden, 365 U.S. at 435 (upholding conviction for refusal to answer whether petitioner was once a Communist Party member); Wilkinson v. United States, 365 U.S. 399, 412–415 (1961)(same as to present membership); Barenblatt v. United States, 360 U.S. 109, 126–134 (1959)(same as to past or present membership).
55 These convictions were pursuant to 2 U.S.C. § 192 (1977), which made it a misdemeanor for any person summoned as a witness by either house of Congress or a committee thereof to refuse to answer any question pertinent to the inquiry.
57 Id. at 102.
58 Id. at 93.
61 Konigsberg v. State Bar of Cal., 366 U.S. 36, 39, 43–44; In re Anastaplo,
Court ruled that a state's interest in having only lawyers who are devoted to the law in its broadest sense, including its procedures for orderly change, outweighed what it deemed a minimal effect on the applicant's free association. Clearly, the Court regarded the Communist Party not as an ordinary or legitimate political party, but rather as an entity whose nature was such that membership was a permissible subject of scrutiny.

Although the Court has continued to employ the same analytic framework in associational privacy cases in recent years, its decisions reflect a different assessment of society's and the government's interests and priorities. By 1971, for example, the Court no longer appeared to regard mere membership in a subversive organization as totally incompatible with the practice of law. The Court reversed, as violative of the first amendment,

366 U.S. 82, 88–90. Professor Tribe places these cases arising out of the denial of bar membership at the "intersection" between cases in which the government is merely inquiring what organizations an individual has joined and cases in which associational ties are made the basis for denial of a governmental benefit or privilege. L. Tribe, supra note 25, at § 12–23, 705–09.

62 Konigsberg, 366 U.S. at 52–53; Anastaplo, 366 U.S. at 88–90. The Court decided against Konigsberg even though he had testified that he had never knowingly been a member of any organization advocating the violent overthrow of the government and did not himself believe in such overthrow. 366 U.S. at 39, 46.

George Anastaplo had graduated from the University of Chicago Law School, and was an instructor and research assistant at the University of Chicago at the time of his trial. 366 U.S. at 83. In January, 1979, as a result of initiatives taken by supporters of Anastaplo, the Committee on Character and Fitness of the First Judicial District (Cook County), Illinois, certified that he satisfied the requirements of good moral character and general fitness to practice law established by Illinois Supreme Court Rule 708. The Illinois Supreme Court declined to act on the certification, however, on the grounds that "it would be inappropriate to act on this matter in its present posture." Letter from Chief Justice Joseph H. Goldenhersh to Richard James Stevens (chairman of the Character and Fitness Committee), March 16, 1979, quoted in Neal, Court Rebuffs Bar Effort to Correct 29-Year-Old Mistake, Chicago Tribune, Apr. 15, 1979, § 3, at 10 (on file with author). Anastaplo continues not to be a member of the Illinois bar.

63 Cf. New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 75 (1928)(upholding state statute requiring the filing of the membership list and roster of officers of the Ku Klux Klan, when nature of organization made secrecy inimical to right of others).
two applicants' exclusions from the bar for refusing to answer questions as to their membership in organizations advocating overthrow of the government by force or violence. In *DeGregory v. Attorney General*, in 1966, the Court overturned a contempt conviction for refusing to answer questions concerning past Communist Party ties. It found that there was no evidence of a present Communist movement in the state of New Hampshire and therefore no state interest sufficient to override the witness' first amendment right to political, associational privacy.

The Court recently returned to its three-part associational privacy analysis in *Buckley v. Valeo*, when it evaluated whether the contribution and expenditure limitations and the disclosure requirements imposed by the Federal Election Campaign Act of 1971, as amended, violated individuals' and groups' rights of associational privacy. It acknowledged that the Act's contribution

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68 2 U.S.C. §§ 431–56 (1976 & Supp. 1980); 18 U.S.C., §§ 591–611 (1976 & Supp. 1980). The following sections have been repealed: 2 U.S.C. §§ 435–36, 439(b), 440–41, 456; 18 U.S.C. §§ 591, 608–11. The Act limited the amount that an individual, group, or political committee could contribute to all federal elections in a given year and to a particular candidate in a given election. Its disclosure provisions required candidates to disclose the sources of all contributions in excess of ten dollars and required individuals and groups who spent in excess of one hundred dollars on political candidates in any year to itemize their contributions. The Act also limited the aggregate expenditures by a candidate, on his or her behalf, and from the candidate's family resources.
and expenditure limitations impinging upon protected associational freedoms, finding that "[m]aking a contribution, like joining a political party, serves to affiliate a person with a candidate."\textsuperscript{69} However, the Court held compelling the state’s interest in restricting campaign contributions in order to reduce the risk of corruption and the appearance of corruption spawned by large financial contributions.\textsuperscript{70} It noted that the Act’s contribution ceilings limit only one means of associating with a candidate, while leaving open various other, non-monetary channels, and therefore held that the state interests in restricting contributions outweighed the limited effect on first amendment freedoms.\textsuperscript{71} By contrast, the Court held the Act’s expenditure ceilings unconstitutional under the first amendment. It found neither the government’s interest in preventing corruption and the appearance thereof, nor its asserted interest in equalizing relative ability to influence the outcome of elections, nor its interest in reducing the allegedly skyrocketing costs of political campaigns, adequate to justify the expenditure ceilings imposed.\textsuperscript{72}

In confronting plaintiffs’ argument that the disclosure provisions were unconstitutional as applied to minority parties and independent candidates, the Court acknowledged both that the government’s interest in disclosure\textsuperscript{73} was diminished\textsuperscript{74} and that disclosure might sometimes expose contributors to harassment or retaliation which would render disclosure unwarranted.\textsuperscript{75} The

\textsuperscript{69} Buckley, 424 U.S. at 22.
\textsuperscript{70} Id. at 25-26, 29.
\textsuperscript{71} Id. at 20-22, 26-29, 35-38; but see Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290 (1981) ($250 limit on contributions to committees formed to support or oppose a ballot measure contravenes both the right of association and the speech guarantees of the first amendment).
\textsuperscript{72} Id. at 44-59.
\textsuperscript{73} Id. at 66-68.
\textsuperscript{74} Id. at 70. By contrast, as to non-minority parties the Court found that, as a general matter, the disclosure requirements directly served compelling government interests. Id. at 68. It observed that most applications of disclosure provisions "appear to be the least restrictive means of curbing the evils and corruption that Congress found to exist." Id. Petitioners had conceded that narrowly drawn disclosure requirements were appropriate. Id. at 60.
\textsuperscript{75} Id. at 68, 71.
Court stressed the absence of evidence of any harassment or retaliation, however, and concluded that on the record presented the disclosure provisions were constitutional as applied to all the plaintiffs. In *Buckley v. Valeo*, as in the earlier cases, the Court recognized that courts may permit infringement on first amendment rights only when the least restrictive means of curbing the targeted evil is being employed.

II. Barriers to Establishing an Associational Privacy Privilege

In order for the right of associational privacy to be used as a basis for a full-fledged associational privacy privilege, three frequently raised objections must be overcome. First, it must be demonstrated that courts have a constitutional duty not to compel disclosure of private associational data, even in litigation wholly between non-governmental parties. Second, the reluctance of the Supreme Court to establish new testimonial privileges must be shown not to be controlling. Third, it must be shown that plaintiffs, as well as defendants, are entitled to the protections of such a privilege, even though they have “voluntarily” undertaken litigation.

A. The Duty of the Judiciary to Protect Rights of Associational Privacy

Although most of the cases discussed in Section I established

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76 Id. at 69–72.
77 Id. at 69–72. Several courts and administrative bodies have since recognized cases where the threat to the exercise of first amendment rights was so serious and the state interest so insubstantial that statutory disclosure laws could not constitutionally be applied. See, e.g., 1980 Illinois Socialist Workers Campaign v. Illinois Bd. of Elections (N.D. Ill. 1982); Brown v. Socialist Workers ’74 Campaign, No. 81–776, *prob. juris. noted*, 50 U.S.L.W. 3486 (U.S. Dec. 15, 1981); Wisconsin Socialist Workers 1976 Campaign Comm. v. McCann, 433 F. Supp. 540 (E.D. Wis. 1977)(three judge court).
78 Claims of associational privacy were also raised in another statutory record-keeping case, California Bankers Ass’n v. Schultz, 416 U.S. 21 (1974). While the majority rejected as premature the ACLU’s argument that required maintenance
a constitutional right of associational privacy assertable against legislative action, the courts are as much prohibited from abridging first amendment rights as are state legislatures and Congress. All courts should reject the argument, sometimes made by discovery-seeking litigants, that, as the first amendment never restricts private action, a privilege founded upon the first amendment's protection of privacy of association does not apply to civil litigation wholly between private parties. The district court in *Independent Productions Corp. v. Loew's, Inc.* stated the argument as follows:

The purpose of the First Amendment is to prevent oppression and censorship by the Government.... The essential purpose... is not violated by requiring the plaintiffs in private litigation to testify about political beliefs and activities....

... The First Amendment... is designed to safeguard Free Speech, not testimonial silence.\(^8^0\)

This argument is flawed in its failure to take into account the critical governmental role of the federal judiciary. When judicial action may have the effect of curtailing association, the judiciary

\[^{7^9}\text{E.g., Memorandum in Support of Plaintiffs' Motion to Compel Discovery at 4–6, Reply Memorandum in Support of Plaintiffs’ Motion to Compel Discovery at 9–12, Long Island Lighting Co. v. SHAD, 80–CV–2647 (E.D.N.Y., remanded March 19, 1981); Memorandum of Law in Support of Defendant's Motion to Compel an Answer to Interrogatories, NOW, 88 F.R.D. 272 (D. Conn. 1980)(all materials on file with author).}\]

\[^{8^0}\text{22 F.R.D. 266, 275 (S.D.N.Y. 1958)(emphasis added). The *Independent Productions* court hedged, however, in noting it was not required to decide that punishment could constitutionally be imposed on one who refused to answer in reliance on the first amendment, and in concluding that “in civil litigation—where criminal penalties, censorship or abridgement of speech are not involved—there is no testimonial privilege of silence based on the First Amendment.” *Id.* at 275–76 (emphasis added).}\]
must police itself in accordance with the Supreme Court precedents elaborated above.

These constitutional constraints upon the judiciary were recognized by the Court in *NAACP v. Alabama ex rel. Patterson.* The Supreme Court there explicitly noted that court orders compelling disclosures and punishing non-compliance can constitute an abridgment of parties' rights of associational privacy, and that the judiciary has a duty not to abridge such rights. In analyzing whether state action was involved which violated the NAACP's fourteenth amendment rights, the Court made clear that it was not focusing on the fact that the inquiring party was Alabama's Attorney General, stating:

It is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize.  

Other decisions also firmly support the principle that the judiciary, no less than the other branches of government, is bound by the Constitution and by the first amendment in particular. The Ninth Circuit reversed contempt convictions for refusal to answer grand jury questions which infringed witnesses' rights of associational privacy, explaining that "it would be anomalous for courts to protect first amendment rights from infringement by other branches of the Government, while providing no such protection against the acts of judicial agencies."  

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82 Id. at 463; accord Grinnell II, 22 Fed. R. Serv. 2d at 487–88 n.5; Britt, 20 Cal. 3d 844, 574 P.2d 766, 773–74 n.3, 143 Cal. Rptr. 695 (since judicial discovery orders inevitably involve state-compelled disclosure, associational privacy principles that apply where a governmental entity is the inquiring litigant are equally applicable in purely private litigation).

83 Bursey v. United States, 466 F.2d 1059, 1082 (9th Cir. 1972). The decision was based partly on the ground that the inquiries infringed upon the witnesses' rights of associational privacy. Accord Ealy v. Littlejohn, 569 F.2d 219, 226–31 (5th Cir. 1978)(first amendment limits grand jury's power to interfere with witness' freedoms of association and expression; several categories of questions held violative of associational and free speech rights).
Other courts have held violative of the first amendment judicial orders restricting communications by parties and their counsel with actual and potential class members\textsuperscript{84} or prohibiting parties and their counsel from publicly disclosing or commenting upon information produced through discovery.\textsuperscript{85}

Thus, it is clear that judicial enforcement of court-made rules, judicial imposition of penalties, and judicial deprivation of parties' substantive rights can constitute constitutionally prohibited state action.\textsuperscript{86} When a federal court construes Rule 26(b)(1),\textsuperscript{87} orders a litigant to disclose information in discovery,


\textsuperscript{85} In re Halkin, 598 F.2d 176, 183 (D.C. Cir. 1979); cf. In re San Juan Star Co., 662 F.2d 108, 114, 116–18 (1st Cir. 1981).

\textsuperscript{86} In Shelley v. Kraemer, 334 U.S. 1 (1948)(holding that state courts violate the equal protection clause of the fourteenth amendment by enforcing private restrictive covenants excluding persons of a designated race from the use or occupancy of real estate for residential purposes), the Supreme Court stated emphatically that "the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment." Id. at 14. "It has never been suggested that state court action is immunized from the operation of [the fourteenth amendment] simply because the act is that of the judicial branch of the state government." Id. at 18. Federal courts are as much prohibited as are state courts from acting at the urging of private litigants in ways which would abridge constitutional rights.

Other cases supporting this proposition include: Cuyler v. Sullivan, 446 U.S. 335, 343–344 (1980)(state criminal trial is an action of the state within the fourteenth amendment; thus, court procedures that restrict lawyer's decision to have defendant testify unconstitutionally abridge right to counsel); Lisenba v. California, 314 U.S. 219, 236–37 (1941)(application of rules of evidence can deny due process to criminal accused); Wainwright v. Torna, 50 U.S.L.W. 3759–60 (U.S. March 22, 1982)(Marshall, J., dissenting)(state action requirement for a federal writ of habeas corpus was met where state was responsible for structuring the procedure by which criminal convictions were reviewed).

and backs its order with the threat of sanctions available under Rule 37, the court's actions clearly constitute federal government action which may violate the first amendment rights of the subject litigants.\footnote{This has been recognized implicitly in the many decisions which have upheld, under the influence of the first amendment, a qualified newsman's privilege from discovery, even in the absence of any governmental party litigant. \textit{E.g.}, Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980), \textit{cert. denied}, 450 U.S. 1041 (1981); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977); Carey v. Hume, 492 F.2d 631 (D.C. Cir. 1974), \textit{cert. dismissed}, 417 U.S. 938 (1974); Baker v. F & F Investment, 470 F.2d 778 (2d Cir.), \textit{cert. denied}, 411 U.S. 966 (1972); Mize v. McGraw-Hill, Inc., 82 F.R.D. 475 (S.D. Tex. 1979); Gilbert v. Allied Chemical Corp., 411 F. Supp. 505 (E.D. Va. 1976).}

Moreover, the need to protect associational privacy is no less powerful in litigation, controlled by the judicial branch of the government, than it is when the legislative branch seeks to compel disclosures: the dangers of exposure are no less.

\[\text{[I]n some respects the threat to First Amendment rights may be more severe in a discovery context, since the party directing the inquiry is a litigation adversary who may well attempt to harass his opponent and gain strategic advantage by probing deeply into areas which an individual may prefer to keep confidential.}\footnote{\textit{Britt}, 20 Cal. 3d 844, 574 P.2d 766, 774, 143 Cal. Rptr. 695.}

Indeed, it is especially important that associational privacy be safeguarded in litigation discovery so that the right to sue for redress of grievances\footnote{The right to sue for redress of grievances is itself a first amendment right when the government is the defendant. \textit{See} U.S. Const. amend. I.} will not be chilled.

\textit{B. Resistance to Creating a New Privilege}

The Supreme Court and commentators historically have been reluctant to recognize new testimonial privileges, theorizing that
they obstruct the search for truth.\textsuperscript{91} Some scholars, however, have questioned the assumption that privileges threaten the fact-finding process,\textsuperscript{92} and have urged that privileges be evaluated primarily in light of their impact upon individual freedom, privacy, and other widely recognized ethical and moral values.\textsuperscript{93}

Contemporaneously, Congress has taken the view that the federal common law of privileges should continue to evolve. In disapproving a codified federal privilege law,\textsuperscript{94} and enacting the

\textsuperscript{91} Wigmore condemned such privileges as "so many derogations from a positive general rule [that everyone is obligated to testify when properly summoned]" and as obstacles to the administration of justice. 8 J. Wigmore, Evidence § 2192, at 70, 72 (McNaughton rev. 1961). Accord Morgan, Foreward, Model Code of Evidence 22-30 (1942); Report of ABA Comm. on Improvements in the Law of Evidence, 63 ABA Reports 595 (1938); C. McCormick, Evidence § 77, at 156-57, 159 (2d ed. 1972); Herbert v. Lando, 441 U.S. 153, 175 & n.24 (1979)(declining to construe the first amendment to grant to newsmen a testimonial privilege not to respond to inquiries into their editorial processes); United States v. Nixon, 418 U.S. 683, 710 & n.18 (1974)(rejecting President's claim to an absolute privilege against disclosure of materials subpoenaed for a judicial proceeding); Branzburg v. Hayes, 408 U.S. 665, 668, 690 n.29 (1972)(declining to interpret the first amendment to grant newsmen a testimonial privilege not to respond to grand jury subpoenas and inquiries); United States v. Bryan, 339 U.S. 323, 331 (1950)(noting "the presumption against the existence of an asserted testimonial privilege").

\textsuperscript{92} E.g., D. Louisell, Confidentiality, Conformity and Confusion: Privileges in Federal Court Today, 31 Tul. L. Rev. 101, 114-15 (1956)(privileges may promote truth-seeking by avoiding conflicts of conscience possibly conducive to perjury).

\textsuperscript{93} 2 D. Louisell and C. Mueller, Federal Evidence §§ 200-01 (1978). See In re Corrugated Container Antitrust Litigation, 655 F.2d 748, 757, 766 (7th Cir. 1981)(Sprecher, J., dissenting)(emphasizing the fundamental values and noble aspirations reflected in the fifth amendment and opining that defendants' privilege should not be sacrificed to plaintiffs' need for evidence in civil litigation).

\textsuperscript{94} Congress rejected the privilege rules in the Federal Rules of Evidence drafted by the Advisory Committee on Rules of Evidence and transmitted by the Supreme Court to Congress. They would have drastically reduced the common law evolution of federal privileges. Under the rejected approach, Rule 501 would have provided the basic rule that no person has a privilege to refuse to be a witness, refuse to disclose any matter, refuse to produce any object or writing, or prevent another from so doing, except as otherwise provided by the Constitution, Acts of Congress or rules adopted by the Supreme Court. Rules 502-10 would have codified nine specific privileges. Additional rules would have governed such matters as waiver of privilege by disclosure (Rules 511 and 512), and the permissibility of comments upon or inferences drawn from claims of privilege (Rule 513). Draft of November, 1972; see 56 F.R.D. 183, 230, 360 (1972).
proposition that testimonial privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience," Congress has adopted a philosophy of openness to the creation of new testimonial privileges.

Moreover, courts have recognized new privileges and expanded the frontiers of established ones when persuaded that good reasons exist for so doing. In 1974, the Supreme Court recognized a presumptive, although not absolute, Presidential privilege not to disclose confidential communications which were sought for purposes of a criminal prosecution. Prior to that, the Court had recognized a qualified "informer's privilege" to withhold the identity of persons furnishing to the authorities information concerning violations of the law, as well as a privilege against revealing military secrets. The Court also created the "work product" doctrine, which has often been

8 United States v. Nixon, 418 U.S. 683, 705–13 (1974). The Court held, however, that an absolute privilege would gravely impair the ability of the courts to do justice in criminal prosecutions. Id. at 707. See also In re Corrugated Container Antitrust Litigation, 655 F.2d at 756–57 (Sprecher, J. dissenting).
regarded as a privilege. Even in cases where the Court declined to hold that there existed a privilege of the contours sought, it has acknowledged that some constitutional protection is owed.

The lower federal courts have been still more receptive to arguments for new privileges. The following testimonial privileges have been enforced in civil litigation: a qualified journalist's privilege, a qualified fifth amendment privilege against self-incrimination assertable even by a plaintiff, a “speech and debate” privilege for state legislators, and a psychotherapist-patient privilege.

Thus, the strong reasons which exist for recognizing an associational privacy privilege should not be overridden by a supposed general hostility toward new testimonial privileges.

C. Availability of the Privilege to Plaintiffs

Defendants have frequently argued that even if there is a testimonial privilege based upon first amendment associational privacy precedents, it is not available to plaintiffs, since by init-

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103 E.g., Herbert v. Lando, 441 U.S. at 153 (editorial discussions merit first amendment protection); Branzburg v. Hayes, 408 U.S. 665 (1972)(news gathering is protected under the first amendment).

104 See infra notes 140, 144, & 151.

105 Wehling v. Columbia Broadcasting System, 608 F.2d 1084, 1088-89 (5th Cir. 1979); see Campbell v. Gerrans, 592 F.2d 1054, 1057-58 (9th Cir. 1979)(trial court abused its discretion in dismissing case due to plaintiffs' fifth amendment plea to interrogatories).

106 In re Grand Jury Proceedings, 563 F.2d 577, 583-85 (3d Cir. 1977)(recognizing, under federal common law, privilege of state legislators to bar evidence of legislative acts and speech from federal criminal prosecutions).

ating litigation plaintiffs automatically waive any such constitutional rights. See, e.g., Black Panther Party, 661 F.2d at 1265 (D.C. Cir. 1981); Brief of Appellee William H. Webster at 12–18, Savola v. Webster, 644 F.2d 743 (8th Cir. 1981); Brief of Appellee at 10, 24–25, Southern Methodist Univ. Ass’n of Women Law Students v. Wynne & Jaffe, 599 F.2d 707 (5th Cir. 1979)(on file with author).

Some courts agree:

It would be uneven justice to permit plaintiffs to invoke the powers of this court for the purpose of seeking redress and at the same time, to permit plaintiffs to fend off questions, the answers to which may constitute a valid defense or materially aid the defense. See, e.g., Hastings, 615 F.2d 628 (5th Cir. 1980), discussed infra at text accompanying notes 263–71; Familias Unidas, 544 F.2d 182 (5th Cir. 1976), discussed infra at text accompanying notes 253–62.

This argument portrays plaintiffs as voluntary litigants having a simple option—they can either persist in litigating their claims and submit to the rules of discovery, or they can dismiss their lawsuits in order to maintain the confidentiality of their associations. The argument asserts that since, as a matter of fundamental fairness, defendants are entitled to all information relevant to the lawsuit, plaintiffs should be held to have waived whatever associational privacy privilege they may have had.

The apparent force of this argument has caused plaintiffs in a number of cases “voluntarily” to dismiss counts of their complaint, eliminate claims for monetary relief, or strike allegations on behalf of a class, in an effort to render irrelevant the associational data sought, and thus to avoid the waiver argument. While such maneuvers and careful pleading may sometimes avoid the waiver problem in whole or in part, they will not always suffice. The weaknesses of the waiver argument must therefore be exposed.

The argument’s implication that plaintiffs are solely respon-
sible for lawsuits overlooks the facts that defendants share responsibility,\(^\text{111}\) and that, except in rare cases, plaintiffs initiate lawsuits only when they believe that defendants have violated their rights so grievously as to warrant the considerable expense and burden of litigation. \(^\text{112}\) Courts provide, at most, compensation for injuries done and orders for the cessation of defendants' injurious conduct, not advantages beyond plaintiffs' entitlement under the law.

The waiver argument should also be rejected because it renders too costly the exercise of the rights to sue and to enjoy associational privacy. \(^\text{113}\) Plaintiffs are given a poor choice of either asserting their substantive rights in court and forfeiting their associational privacy rights, or foregoing their substantive rights as a price for preserving associational privacy. This "either-or" approach\(^\text{114}\) interferes with plaintiffs' constitutional right to have their claims adjudicated by the courts,\(^\text{115}\) and minimizes the

\(^{111}\) See Black Panther Party, 661 F.2d at 1265–66 & n.142.

\(^{112}\) To maintain that the associational privacy privilege applies only to defendants also places great significance upon what may be a mere fortuity. A party who would "normally" be a defendant may take the initiative in seeking a judicial resolution of a controversy and thus become the plaintiff. E.g., Familias Unidas, 544 F.2d at 192 (Mexican-American organization filed suit challenging a statute's constitutionality to prevent criminal prosecution under it). Moreover, a rule requiring courts to determine whether a plaintiff's position is more analogous to that of a defendant or to that of a typical plaintiff would be difficult to apply. Black Panther Party, 661 F.2d at 1267, n.147. Rule 26(b)(1) itself makes no distinction between plaintiffs and defendants. See also Schlangenau v. Holder, 379 U.S. 104, 113 (1964) (rejecting contention that Rule 35 should not apply to defendants as "a doctrine favoring one class of litigants over another").

\(^{113}\) Black Panther Party, 661 F.2d at 1265–66 & nn. 142–43.


\(^{115}\) Individuals and groups have a constitutional right of access to the courts which encompasses a constitutional right to be heard on the merits of their claims. The precise constitutional origins and scope of the right of access to the courts are not clear. It may spring from the due process clauses of the fifth and fourteenth amendments. See, e.g., Wolff v. McDonnell, 418 U.S. 539, 579 (1974); Boddie v. Connecticut, 401 U.S. 371, 377 (1970).
practical value of substantive rights accorded by legislatures and courts to groups and individuals. The first amendment and the due process clauses of the fifth and fourteenth amendments forbid the courts to condition exercise of one fundamental right

In several early cases the Court held the right to sue to be among the "privileges and immunities" protected by article IV, section 2, paragraph 1, and by the fourteenth amendment, of the Constitution. E.g., Chambers v. Baltimore & Ohio Railroad Co., 207 U.S. 142, 148 (1907).

The right of access to the courts may also be grounded in the first amendment. United Transp. Union, 401 U.S. at 585 ("collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment"); see California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972)(right of access to the courts is one aspect of the right to petition).

Finally, some cases assert a right of access to the courts without identifying the specific provisions of the Constitution which give rise to the right. E.g., McCray v. Maryland, 456 F.2d 1, 6 (4th Cir. 1972)(negligence by court clerk, which impeded filing of prisoner's petition for post-conviction relief, violated his "constitutionally based" right of access to the courts); see also C. Wright & A. Miller, 8 Federal Practice and Procedure: Civil § 18, at 145 (1970), referring to "constitutional right to bring...an action").

Compare the judicial decisions which rely upon due process concerns in limiting the occasions on which a party may be subjected to the sanctions of dismissal or default for failure to comply with orders compelling discovery. E.g., Société Internationale pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197, 209–211 (1059); see infra text accompanying notes 354-66.

Frequently the objecting litigant, who seeks to keep confidential the membership and similar data sought, is an association, rather than an individual person. That fact poses no problem since the association may assert the rights to associational privacy of its members and has associational privacy rights of its own. See supra note 26. Moreover, the courts have recognized that litigation by associations is important. See, e.g., United Transp. Union, 401 U.S. at 585; UMv. Illinois State Bar Ass'n, 389 U.S. 217 (1967); NAACP v. Button, 371 U.S. 415 (1963). To deny associations the right to litigate often would nullify the right of their members to keep confidential their connection with the association. See NAACP v. Alabama ex rel. Patterson, 357 U.S. at 459. Discovery orders compelling associations to disclose their members and supporters threaten the ability of associations to litigate because they expose members and supporters to the very pressures they sought to avoid by using the association as their representative in litigation.
upon the waiver of the other.\footnote{See Black Panther Party, 661 F.2d at 1265–66; cf. Mitchell v. Roma, 265 F.2d 633, 637 (3d Cir. 1959)(“we cannot subscribe to the suggestion that by instituting . . . a suit a plaintiff automatically waives any privilege accorded by the Rules”); accord Wirtz v. Continental Finance & Loan Co., 326 F.2d 561, 563 (5th Cir. 1964).}

It is particularly unacceptable to so condition exercise of the right to an adjudication when plaintiffs sue to vindicate rights of associational privacy. In that situation plaintiffs would be re-

\footnote{Cf. Black Panther Party, 661 F.2d at 1271 n.160. Rejecting the rule that a plaintiff must choose between his fifth amendment privilege and his lawsuit, the court noted that if an automatic waiver rule were applied, the civil rights of individuals vulnerable to criminal prosecution would be routinely denied:}

For example, no one would be able to bring suit for police brutality if on deposition he were required to elect between incriminating himself with regard to the incident out of which the claims arose, and suffering dismissal.
required to yield their rights of associational privacy in discovery as the price of their effort to preserve those very rights through litigation. The waiver rule entails the particular danger that the civil rights of those most eager to maintain the confidentiality of their associations could be routinely denied, for such persons could not risk suing to complain of violation of their rights.\textsuperscript{119}

Insofar as the waiver argument automatically gives priority to defendants' claims of entitlement to information over plaintiffs' claims of entitlement to confidentiality, without examining the relative strengths and weaknesses of those claims, it is bound to produce unjust and undesirable results.

The waiver argument may also lead to serious intrusions upon the associational privacy of persons who are not parties and who have not waived their rights. Plaintiffs often seek to keep confidential the identity of non-litigants with whom plaintiffs have associated. Yet, disclosure of plaintiffs' associations would deprive those third parties of their associational privacy rights. In these cases, waiver is indefensible.\textsuperscript{120}

Finally, the waiver argument is not supported by the authorities usually cited as its foundation. In \textit{Independent Pro-

\textit{Id.} (quoting Note, \textit{Plaintiff as Deponent: Invoking the Fifth Amendment}, 48 U. Chi. L. Rev. 158, 163–64 (1981)).

In Savola v. Webster, 644 F.2d 743 (8th Cir. 1981), discussed \textit{infra} at text accompanying notes 235–50, plaintiffs argued to the court of appeals that "[D]issident political groups will be effectively barred from access to the courts if the government, in this case the FBI, can seek and obtain disclosure of membership lists and other sensitive information once a suit is filed." Brief for Plaintiffs-Appellants at addendum to table of contents/request for oral argument. In its opinion the court gave no explicit recognition to this argument, however.

\textsuperscript{119} In some instances this irony has not escaped the courts. \textit{See Black Panther Party}, 661 F.2d at 1265–66; \textit{Familias Unidas}, 544 F.12d at 192 ("[t]o require them to forfeit that which they seek to protect in order that they might receive federal assurance that they were indeed entitled to it initially would be an abdication by the federal court of not only its federal stature, but its judicial robes as well"); \textit{but see Savola}, 644 F.2d at 747; Memorandum Opinion and Order at 6, Stamler v. Willis, Nos. 65 C 800 and 65 C 2050 (N.D. Ill., Sept. 29, 1972)(on file with author).

\textsuperscript{120} \textit{See Britt}, 20 Cal. 3d 844, 574 P.2d 766, 775, 143 Cal. Rptr. 695 (discovery order compelling disclosure of names of all persons who had merely attended meetings of certain organizations, irrespective of whether such persons were parties-plaintiff, could not be justified on waiver theory).
uctions Corp. v. Loew's, Inc.,\textsuperscript{121} the district court purported to find a waiver\textsuperscript{122} only after concluding that the challenged questions “relate[d] directly” to defendants' intended defense\textsuperscript{123} and that the information sought bore directly upon the “primary issue[s]” raised by the complaint.\textsuperscript{124} Thus, the court in fact balanced plaintiffs’ first amendment rights against the defendants’ need for disclosure.\textsuperscript{125}

Similarly, Moore’s Federal Practice, whose predecessor was relied upon in the Independent Productions case,\textsuperscript{126} has often been read as advocating a waiver rule and actually speaks in terms of a “waiver” of privilege when a lawsuit is brought.\textsuperscript{127} Yet despite this use of “waiver” terminology, Moore advocates what amounts to a balancing of interests approach and would find a “waiver” only when the information sought is central to a plaintiff’s claim or a defendant’s affirmative defense.\textsuperscript{128} He argues

\textsuperscript{121} 22 F.R.D. 266 (S.D.N.Y. 1958).

\textsuperscript{122} Id. at 276–77.

\textsuperscript{123} Id. at 271. Plaintiffs had sued alleging that defendant members of the motion picture industry had conspired to interfere with the production and distribution of a film produced by plaintiffs. The court upheld deposition questions addressed by the defendants to the president of the plaintiff corporations concerning his association with the Communist Party and other subversive organizations on the grounds that they related directly to the defense that the defendants’ actions were individual and not conspiratorial and went to proving that genuine and proper business reasons motivated the defendants individually. Id. at 271.

\textsuperscript{124} Id. at 272. The court concluded that the information sought was relevant to the issues of causation and damages because it was probative of whether the box office rejection of plaintiffs’ film was attributable to the public’s distaste for the political views and associations of plaintiffs’ officers. Id. at 272.

\textsuperscript{125} This view is further confirmed by subsequent proceedings in the case, where the court refused to order plaintiffs’ managing agent to answer questions concerning his alleged Communist connections on the ground that alternative sources existed to prove that defendants’ refusals to deal with plaintiffs resulted from independent judgments based upon those alleged connections. Independent Productions Corp. v. Loew’s Inc., 27 F.R.D. 426, 429 (S.D.N.Y. 1961).


\textsuperscript{127} 4 J. Moore, Federal Practice ¶ 26.60(6) at 252–53 (1979). However, Moore does not distinguish between plaintiffs and defendants.

\textsuperscript{128} 4 J. Moore, Federal Practice at 252. In a recent instance of the same phenomenon, Anderson v. Nixon, 444 F. Supp. 1195 (D.D.C. 1978), the court
that if a plaintiff cannot make out a \textit{prima facie} case at trial without disclosing privileged information, it is proper to require discovery of that information prior to trial so that the defendant can properly shape his or her defense.\textsuperscript{129} Opponents of an associational privacy privilege frequently ignore Moore's additional valuable observation, that "[a]side from such materials as are basic to its claim," the public interest in confidentiality may predominate over a defendant's private interest in full disclosure.\textsuperscript{130}

Consequently, the waiver argument should be rejected; claims of privilege by plaintiffs and defendants should be treated equally. As the inquiring party, defendants, like plaintiffs, should have to demonstrate a compelling need for the information sought in order to overcome the interest of the opposing litigant and of society in maintaining the confidentiality of the subject associations.

\textsuperscript{129} \textit{Id.} at 252.

\textsuperscript{130} \textit{Id.} at 252. Although Moore is at this point addressing whether the government as a civil plaintiff must comply with discovery demands for allegedly privileged materials, his perceptions also pertain to a private plaintiff.

This Article's view of the purported precedents for waiver as actually involving unstated balancing is confirmed in the law surrounding other privileges as well. The physician-patient privilege frequently recognized under state law is sometimes said to be waived where a plaintiff, in a personal injury action, has put his or her physical condition directly in issue. It is typically lost only when the information sought goes to the heart of the plaintiff's case and he or she cannot prove the case without revealing communications germane to the claim. See, \textit{e.g.}, Mariner v. Great Lakes Dredge \& Dock Co., 202 F. Supp. 430, 434 (N.D. Oh. 1962); Awtry v. United States, 27 F.R.D. 399, 401–02 (S.D.N.Y. 1961); Annot., 21 A.L.R. 3d 912 (1968).

Similarly, while certain decisions put a civil plaintiff to the choice of "waiving" his or her fifth amendment privilege against self-incrimination or facing dismissal of the lawsuit, \textit{e.g.}, Sindora v. Tisch, 27 Fed. R. Serv. 2d 404, 406–07 (S.D.N.Y. 1979), aff'd mem., 610 F.2d 807 (2d Cir.), cert. denied, 446 U.S. 909 (1980); Church of Scientology v. Director, FBI, 27 Fed. R. Serv. 2d 601, 603 (D.D.C. 1979), these decisions do not reflect a true waiver of the privilege. Plaintiffs are not compelled on pain of contempt to testify about the matters in question, but rather are offered a choice between maintenance of the privilege and
III. The Associational Privacy Privilege

This Article proposes a two-step analysis for courts to use when parties assert an associational privacy privilege against discovery sought in civil litigation. First, courts must tighten control over discovery by undertaking close scrutiny of the alleged relevance of the information sought. This preliminary step is consistent with the design of the Federal Rules, and appropriate as a means of resolving discovery disputes without having to reach a constitutional question. Moreover, use of a strict standard of relevance is implicitly mandated by the many Supreme Court cases which permit infringement upon associational privacy only when a compelling interest has been shown to bear a substantial relation to the disclosure demanded.

Once the information sought is found to be vital to proper disposition of the case, a balancing test should be applied. The particular balancing test recommended is based on the principles established in associational privacy cases arising from legislative and investigative inquiries.131

A. Tighten Control Over Discovery
Through Close Scrutiny of Alleged Relevance

Under the guidance of the Supreme Court, the discovery rules132 have been accorded a broad and liberal treatment to ef-
fect their purpose of adequately informing the litigants.\textsuperscript{133} However, the widespread perception of discovery abuse in recent years, including the perception that, for tactical reasons, inquiry is often made into matters not relevant to the case, has led many lawyers, bar groups, scholars and jurists to favor restrictions on the scope of discovery.\textsuperscript{134} The Supreme Court itself has stressed that Rule 1 mandates that discovery provisions “be construed to secure the just, speedy, and inexpensive determination of every action,”\textsuperscript{135} and that under Rule 26(b)(1) district courts should restrict discovery where “justice requires [protection for] a party

Proposed Amendments to the Federal Rules of Civil Procedure, September, 1982, The Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure rejected an American Bar Association section recommendation to restrict the scope of discovery to the “issues raised by the claims or defenses of any party.” ABA Section of Litigation, Report of the Special Comm. for the Study of Discovery Abuse 3 (1977). The wording change was advocated to encourage courts not to err on the side of expansive discovery. Id., Committee Comments at 3.

Justices Powell, Rehnquist and Stewart dissented from the Court’s adoption of the amendments on the ground that they would not solve the problem of discovery abuse. 85 F.R.D. 521, 521–23 (1980).

\textsuperscript{133} See Herbert v. Lando, 441 U.S. 153, 176 (1979); Schlagenhaft v. Holder, 379 U.S. 104, 114–15 (1964); Hickman v. Taylor, 329 U.S. 495, 507 (1947) (“[T]he deposition-discovery rules are to be accorded a broad and liberal treatment…. Mutual knowledge of all the relevant facts…is essential to proper litigation”). At the same time, the Court in Hickman v. Taylor recognized:

“[D]iscovery…has ultimate and necessary boundaries…. [L]imitations inevitably arise when… the examination is being conducted in bad faith or… so as to annoy, embarrass or oppress the person subject to inquiry. And… further limitations come into existence when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege.”

Id. at 507–08.)


\textsuperscript{135} Herbert v. Lando, 441 U.S. 153, 177 (1977); accord id. at 180 (Powell, J., concurring)(1977).
or person from annoyance, embarrassment, oppression, or undue burden or expense..." \(^{136}\) Several Justices of the Court have intimated that when a discovery demand arguably impinges on first amendment rights, a district court should abandon the traditional, liberal philosophy toward the permissible scope of discovery and should measure such discovery requests against a strict standard of relevance. \(^{137}\)

Since the Supreme Court has traditionally permitted intrusions into associational privacy only when the party seeking disclosure has established a compelling interest bearing a substantial relation to the disclosure demanded, \(^{138}\) courts should apply a "strict" standard of relevance when a colorable constitutional privilege based upon the doctrine of associational privacy is asserted as a shield against civil discovery. Specifically, since the interest of the inquiring party in litigation is in receiving a fair trial of his or her claims or defenses and, to that end, receiving a fair opportunity to prepare for trial, a "strict" standard of relevance would disallow discovery concerning matters of marginal relevance and slight probative value. Litigants seeking to compel discovery intruding upon associational privacy should be required to describe the information they hope thereby to obtain and to show that the information sought is vital to the proper disposition of the case—for only if the information bears a

\(^{136}\) *Id.* at 177.

\(^{137}\) *Id.* at 205-06 (Marshall, J., dissenting)(1977). Justice Marshall stated that:

>[C]onstitutional concerns...mandate some restraints on roving discovery... [T]he broad discovery principles enunciated in *Hickman* and *Schlagenhauf* are inapposite in defamation cases... I would require that district courts superintend pretrial disclosure...so as to protect the press from unnecessarily protracted or tangential inquiry. To that end, discovery requests should be measured against a strict standard of relevance.

*See also id.* at 179 (Powell, J., concurring)("when a discovery demand arguably impinges on First Amendment rights a district court should measure the degree of relevance required in light of both the private needs of the parties and the public concerns implicated"). Justice Brennan argued in dissent that application of a stricter standard of relevance did not go far enough; recognition of a testimonial privilege was necessary. *Id.* at 195 & n.14.

\(^{138}\) See *supra* notes 18-78 and accompanying text.
substantial relation to some issue in the case can its disclosure meet the "substantial relation" test, and only if the issue affected is likely to be determinative of the outcome of the case can a "compelling interest" of the inquiring party be at stake.\footnote{Such a showing of relevance has already been required by some courts faced with a claim of a first amendment associational privacy privilege. See e.g., Alliance to End Repression v. City of Chicago, 91 F.R.D. 182 (N.D. Ill. 1981), discussed \textit{infra} at notes and text accompanying notes 299–316. In most cases the showing was required as part of an encompassing balancing of interests to determine whether a qualified privilege should prevail, however, rather than as an independent threshold analysis. \textit{See Black Panther Party}, 661 F.2d at 1268 ("The interest in disclosure will be relatively weak unless the information...is crucial to the party's case.... [L]itigants seeking to compel discovery must describe the information they hope to obtain and its importance to their case with a reasonable degree of specificity."); \textit{accord} International Union, UAW v. National Right to Work Legal Defense \\ & Educ. Found., Inc., 590 F.2d 1139, 1152, 1153 n.19 (D.C. Cir. 1978); \textit{Grinnell II}, 22 F.R. Serv. 2d at 486, 489 (membership lists not discoverable when amendment of complaint rendered them unnecessary to explore allegations at heart of claim); \textit{Britt}, 20 Cal. 3d 844, 574 P.2d 766, 775, 143 Cal. Rptr. 695 ("When... associational activities are directly relevant to the plaintiff's claim, and disclosure of the plaintiff's affiliations is essential to the fair resolution of the lawsuit, a trial court may properly compel such disclosure.") (emphasis in original).}

It is consistent with past practice, when confidential information is being sought, to place the burden on the party seeking discovery to establish that the information is sufficiently relevant and necessary to his case to outweigh the harm disclosure would cause. 8 C. Wright \\ & A. Miller, Federal Practice and Procedure: Civil § 2043, at 301–02 (1970).

\footnote{A strict standard of relevance has been adopted by most courts adjudicating claims of a journalist's privilege. Indeed, these cases were frequently relied upon in the associational privacy cases cited above. See, e.g., Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981)(information sought must be crucial to inquirer's case and to the success of the claim); Riley v. City of Chester, 612 F.2d 708, 716–18 (3d Cir. 1979)(requiring a demonstrated, specific need for crucial evidence); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 438 (10th Cir. 1977)(information must go to the heart of the matter and be of certain relevance); \textit{accord} Carey v. Hume, 492 F.2d 631, 636 (D.C. Cir.), \textit{cert. dismissed}, 417 U.S. 938 (1974).}
stitutional question of whether the claimed privilege should prevail.\textsuperscript{141}

**B. Balance the Interests Favoring Associational Privacy and the Interests Favoring Disclosure**

If the information demanded is sufficiently relevant to be a proper subject of discovery, the court must decide whether the claimed constitutional privilege should be recognized and should prevail. The court should employ a balancing test similar to that generally employed in associational privacy cases, which takes into consideration the rights and interests of each litigating party, the peculiar circumstances of each case, and the interests of the public.\textsuperscript{142}

Under the Supreme Court associational privacy decisions, it is plainly insufficient for the party seeking disclosure to establish that the interest in disclosure merely surpasses the interest in associational privacy. Rather, the party seeking disclosure must establish an overriding and compelling interest, bearing a substantial relation to the disclosure demanded, which overshadows

\textsuperscript{141} Similarly, Rule 26(c)'s authorization for a court to make orders which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including orders that certain matters not be inquired into, provides a mechanism for thwarting some unwarranted efforts to obtain discovery impinging upon rights of associational privacy, without the court engaging in a full balancing analysis as to whether the claimed privilege should prevail.

\textsuperscript{142} A balancing test has, in fact, been embraced by all courts recently confronting a claim of associational privacy privilege. See, e.g., Black Panther Party, 661 F.2d at 1266–70; Savola, 644 F.2d at 746–47; Hasting, 615 F.2d at 631–32. The only case holding absolutely that there is no testimonial privilege based on the first amendment, at least in civil litigation between private parties, is Independent Productions Corp. v. Loew's, Inc., 22 F.R.D. 266, 273–76 (S.D.N.Y. 1958). See supra note and text accompanying note 80.

A balancing test is also appropriate since the Court uses this approach in procedural due process cases, and the inquiring party claims an entitlement to the confidential information as a matter of basic procedural fairness. See, e.g., Ingraham v. Wright, 430 U.S. 651, 675 (1977)(interests must be balanced to determine whether rights of procedural due process have been violated); Matthews v. Eldridge, 424 U.S. 333, 334–35 (1976); Morrisey v. Brewer, 408 U.S. 471, 481 (1971).
the likelihood that such disclosure will deter association. In addition, the inquiring party must make the least inclusive demand for information which will satisfy its compelling needs.\footnote{See supra notes and text accompanying notes 18–78.}

1. Compelling Interest Bearing Substantial Relation to Demanded Disclosure

Under this prong of the analysis, the court should evaluate the magnitude of the inquiring party’s need for the information sought. To do so, it must determine:

(1) precisely what information is sought and what information the inquiring party hopes to obtain from the persons or organizations whose identities are sought;

(2) the specific issues in the case to which that information is relevant, and how relevant it is; and

(3) whether the issues affected are likely to determine the outcome of the case.\footnote{Cf. Zerilli v. Smith, 656 F.2d 705, 713 (D.C. Cir. 1981)(under qualified journalist’s privilege, if the information sought is crucial to litigant’s case the argument in favor of disclosure is relatively strong); Baker v. F & F Investment, 470 F.2d 778, 783–84 (2d Cir. 1972)(information sought must be necessary or critical to the action in order to overcome qualified journalist’s privilege).} Information marginally relevant to a legal issue which may only possibly be raised by the defense, even information marginally relevant to an issue clearly raised by a complaint, or directly relevant to a defense which is legally frivolous,\footnote{See, e.g., Britt, 20 Cal. 3d 844, 574 P.2d 766, 776–77 n.4, 143 Cal. Rptr. 695 (where defendant ostensibly needed to discover plaintiffs’ associations to establish frivolous statute of limitations and res judicata defenses and a speculative failure to mitigate damages, need was patently insufficient to overcome plaintiffs’ rights of associational privacy).} would not satisfy the requirements.\footnote{The information sought can range from being central to the case, International Union, UAW v. National Right to Work Legal Defense & Educ. Found., Inc., 590 F.2d 1139, discussed infra at notes 186–203; to relevant but not critical, Grinnell II, 22 F.R. Serv. 2d 482, discussed infra at notes 272–87; to marginal or irrelevant, Alliance to End Repression v. City of Chicago, 91 F.R.D. 182 (N.D. Ill. 1981), discussed infra at notes 299–316.} The burden is on the inquiring party to establish his or her compelling need.
evaluation of the case for disclosure. Rather than simply accept at face value an inquiring party’s contention that certain information is necessary, superscript 147 where the compelling need is not patent, the court should demand a brief from the inquiring party demonstrating that need. It should invite briefs from the objecting party as well to aid the court in seeing through fabrication or exaggeration of the relevance or significance of the information sought.

Where the inquiring party’s demand for disclosure would not fail on the basis of the foregoing factors, a court should also consider:

(4) the importance to the litigant and to society of an outcome in the case adverse to the inquiring party. Given a very strong interest in the maintenance of associational privacy, the asserted privilege properly could be held to prevail even where the inquiring party has a compelling need for the information, if there is little of value or importance at stake in the litigation. superscript 148 It may be more tolerable that a civil litigant suffer an adverse decision as a result of having been denied certain information under a claim of privilege when an individual seeks to recover a small money judgment for defamation, superscript 149 for example, than when a union seeks declaratory and injunctive relief and substantial money damages from an employer for alleged fomenting and financing of anti-union litigation, in violation of federal law effectuating strong federal policies. superscript 150 In general, courts can gauge

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superscript 147 See, e.g., Black Panther Party, 661 F.2d at 1269 & n.154; Britt, 20 Cal. 3d 844, 574 P.2d 766, 775-77 & n.4, 143 Cal. Rptr. 695.

superscript 148 The Proposed Amendments to the Federal Rules of Civil Procedure, September, 1982, Rule 26(b) and the Advisory Committee Note thereto provide, even when no privilege is asserted, that the court may limit discovery when it is unduly burdensome given, inter alia, the needs of the case, the amount in controversy, the importance of the issues in the case, and the significance of the substantive issues in philosophical, social, or institutional terms.


superscript 150 E.g., International Union, UAW, 590 F.2d 1139 (D.C. Cir. 1978), infra at 186–203. See Zerilli v. Smith, 656 F.2d 705, 711–12 (D.C. Cir. 1981) (contrasting the usual predominance of the journalist’s privilege over a civil litigant’s interest in disclosure with the balance struck when a public interest is also affected, as in criminal cases); ACLU v. Finch, 638 F.2d 1336, 1338, 1345 (5th Cir. 1981) (in
the objective importance of a lawsuit to a litigant and to the public by reference to the nature of the relief sought, the amount of money damages at stake, and the nature of the rights allegedly violated, including whether they are of constitutional, statutory or common law origin;

(5) whether there are, or might be, alternative sources who can furnish the information ultimately sought without imposing on associational privacy rights. If there are or may be such alternative sources, and the inquiring litigant has failed vigorously to seek the desired data from them, there is far less reason to find that his or her need warrants compelled disclosure than if no alternative sources exist. The inquiring party should bear the burden of establishing that alternative sources do not exist, although the objecting party may be required to—and typically does—come forward with argument specifying alternative sources who have not been tapped;\textsuperscript{151} and

(6) whether the inquiring party has improper ulterior motives for making the challenged discovery demands. To the extent that

rejecting claimed privilege for abolished state commission records sealed by state statute, court considered that plaintiffs were suing for violations of their first amendment and other federal constitutional rights); Miller v. Transamerican Press, Inc., 621 F.2d 721, 725 (5th Cir. 1980), \textit{cert. denied}, 450 U.S. 1041 (1981)(recognizing greater interest in protecting the confidentiality of journalists' sources in libel cases than in grand jury proceedings); Apicella v. McNeil Laboratories, Inc., 66 F.R.D. 78, 82 (E.D.N.Y. 1975)(considering public interest in determining whether to honor a newsman's claim of privilege in a suit against a drug manufacturer for alleged failure adequately to investigate and warn as to hazards of an anesthetic); Democratic National Committee v. McCord, 356 F. Supp. 1394, 1396–98 (D.D.C. 1973)(considering the "great public importance" of the case in recognizing a qualified journalists' privilege).

\textsuperscript{151} \textit{See}, e.g., \textit{Black Panther Party}, 661 F.2d at 1268; \textit{UAW}, 590 F.2d at 1152–53; \textit{Familias Unidas}, 544 F.2d at 192; \textit{Grinnell II}, 22 Fed. R. Serv. 2d at 489. It is now generally held that under the qualified journalist's privilege, a reporter must disclose his or her sources only after the opposition has exhausted every reasonable alternative source of information. Zerilli v. Smith, 656 F.2d 705, 713–14 (D.C. Cir. 1981); \textit{accord} Miller v. Transamerican Press, Inc., 621 F.2d 721, 726 (5th Cir. 1980); Riley v. City of Chester, 612 F.2d 708, 716–17 (3d Cir. 1979).

In the Proposed Amendments to the Federal Rules of Civil Procedure, September, 1982, Rule 26(b) provides, even when no privilege is asserted, that the court may limit discovery if the material sought is obtainable from some more convenient, less burdensome, or less expensive source.
the challenged discovery demands are motivated by a desire to harass the opposing party, to deter association, to force the opposing party to drop his or her lawsuit or defense in order to avoid disclosure, or for other improper ulterior motives, no cognizable need for the information exists.\footnote{See Alliance to End Repression v. Rochford, No. 74 C 3268, memorandum opinion and order at 2, 4 (N.D. Ill. March 30, 1976)("Defendants may not employ discovery...to further their alleged intelligence gathering activities"); cf. Branzburg v. Hayes, 408 U.S. 665, 707 (1972)("official harassment of the press undertaken not for the purposes of law enforcement but to disrupt a reporter's relationship with his news sources" has no justification); Alioto v. Holtzman, 320 F. Supp. 256, 257 (E.D. Wi. 1970)(denying motion to compel where discovery questions were intended to harass the plaintiff).}

2. **Degree of Interference with the Right of Associational Privacy**

In determining the "weight" on the privacy side of the scale, the court should evaluate the magnitude of the objecting party's need to keep confidential the associational information sought, and the public interest in his or her so doing. To make this appraisal the court must determine:

(1) the extent to which the objecting party has kept the sought after associational data confidential from the inquiring party. If the information has been freely available to the inquiring party, there may be little "privacy" to protect and claimed fears that disclosure would be likely to chill exercise of the right of association will be relatively incredible;\footnote{See Uphaus v. Wyman, 360 U.S. 72, 80–81 (1959)(claim to associational privacy was "tenuous at best" where disputed list was already a matter of public record); Britt, 20 Cal. 3d 844, 574 P.2d 766, 781–82, 143 Cal. Rptr. 695 (Richardson, J., dissenting)("Because...others present...could...have revealed...the names of the participants without offending any common sense notion of the bounds of privacy, the question...becomes whether state action in the form of a discovery order reaching the same information is an impermissible First Amendment violation. I think not.").}

(2) the bases upon which disclosure and the deterrence of association are feared and the substantiality of those bases. Any history of harassment and intimidation of persons with associations of the kind inquired about is relevant, as are any reasons to
believe that an association of the kind inquired about is, or is likely to become, unpopular.

Despite language in some decisions suggesting that NAACP v. Alabama ex rel. Patterson\textsuperscript{154} does not extend associational privacy protections to cases where “any serious infringement on First Amendment rights brought about by the compelled disclosure...is highly speculative,”\textsuperscript{155} most decisions make clear that no foundation of proof is required to trigger the balancing of one party's need to establish the maintenance of confidentiality against another party's interest in disclosure. A contention of infringement will do.\textsuperscript{156} The strength of the objecting party’s showing that freedom of association is threatened thus affects the outcome of the court’s balancing of interests, but not its analytical approach.

Courts have varied in their formulations of the strength of the factual showing necessary to outweigh the government’s interest in disclosure. In NAACP v. Alabama ex rel. Patterson the organization made “an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has

\textsuperscript{154} 357 U.S. 449, 462–63 (1958).

\textsuperscript{155} Buckley, 424 U.S. at 70; see Jones v. Unknown Agents of the Federal Election Comm., 613 F.2d 864, 877–78 n.30 (D.C. Cir. 1979), cert. denied, 444 U.S. 1074 (1980) (“[A] single allegation of harassment is insufficient to bring an entire case within the ambit of NAACP v. Alabama.”).

\textsuperscript{156} See, e.g., Buckley, 424 U.S. at 68–72 (although serious infringement of first amendment rights was “highly speculative,” and no appellant had tendered evidence of the sort proffered in NAACP v. Alabama ex rel. Patterson, Court used balancing test in evaluating constitutionality of statutory disclosure requirements); Jones v. Unknown Agents of the Federal Election Commission, 613 F.2d 864, 875–78 (D.C. Cir. 1979), cert. denied, 444 U.S. 1074 (1980)(even “absent a showing of the sort made in NAACP v. Alabama,” court performed balancing to determine constitutionality of field interviews); accord Organization of Masters v. NLRB, 575 F.2d 896, 905 (D.C. Cir. 1975).

There is some variation in the lower court cases as to whether the government must first demonstrate that it needs the information in order to impose on the objecting party the burden of going forward with evidence that its rights of associational privacy will be infringed, see United States v. Freedom Church, 613 F.2d 316, 320 (1st Cir. 1979); Grinnell II, 22 Fed. R. Serv. 2d at 489, or whether the order of these two burdens is reversed. See United States v. Citizens State Bank, 612 F.2d 1091, 1094 (8th Cir. 1980). However, there is no reason to believe that this subtle variation has affected the outcome of any balancing of interests.
exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.\footnote{157}{NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462 (1958).} Under these circumstances, the Court concluded that compelled disclosure of membership was “likely” to chill participation in the Association.\footnote{158}{Id. at 462–63; see id. at 463 (court looked to the deterrent effect the “disclosure may well have” in determining the magnitude of the first amendment injury claimed)(emphasis added).} 

Although the Court in \textit{NAACP v. Alabama ex rel. Patterson} may not have intended to set a standard for documentation of potential harm\footnote{159}{The Court simply described the showing made by the NAACP and found it sufficient to establish that disclosure was likely to adversely affect the Association. Id. at 462–63. This does not support an inference that a different or a lesser showing of potential harm or of the likelihood of harm would not also have been sufficient.} or for the requisite degree of probable harm in privacy of association cases, many courts have construed the case to do both. Some have insisted upon a showing of the sort made in that case, refusing to be persuaded by evidence of any different nature.\footnote{160}{See, e.g., \textit{NOW}, 88 F.R.D. at 274–75; see Southern Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe, 599 F.2d at 710.} Such an approach places unjustifiable obstacles in the path of new organizations, of groups which have successfully insulated themselves from past harm and harassment by keeping confidential the names of their members and supporters, and of groups which evoke retaliatory responses differing in kind from

\footnotesize\begin{verbatim}
\footnote{157}{NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462 (1958).}
\footnote{158}{Id. at 462–63; see id. at 463 (court looked to the deterrent effect the “disclosure may well have” in determining the magnitude of the first amendment injury claimed)(emphasis added).} Id.
\footnote{159}{The Court simply described the showing made by the NAACP and found it sufficient to establish that disclosure was likely to adversely affect the Association. Id. at 462–63. This does not support an inference that a different or a lesser showing of potential harm or of the likelihood of harm would not also have been sufficient.}
\footnote{160}{See, e.g., \textit{NOW}, 88 F.R.D. at 274–75; see Southern Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe, 599 F.2d at 710.}
\end{verbatim}
those shown in the seminal associational privacy cases. It makes
the generally difficult task of proving a first amendment "chill"
virtually impossible.\footnote{Proof of harassment or reprisal may be difficult because these acts are often
subtle, and because, if the deterrence is successful, individuals will avoid putting
themselves in a position where they are targets of harassment. \textit{Developments in
598 F.2d 176, 211 (D.C. Cir. 1979)} (Wilkey, J., dissenting). Judge Wilkey stated
that to obtain a Rule 26(c) protective order

the kind of showing needed...necessarily depends...upon the type of
harm...threatened. Some kinds of harm are...subtle and less amenable
to objective demonstration. Annoyance, embarrassment, and harass-
ment are proper grounds for protective orders but are relatively dif-
ficult to demonstrate with particularity. This does not mean that [they]
pose any less of a threat to the moving party.

In addition, proving that a disclosure was the sole cause of some sign of chill,
such as a decline in association membership, is very difficult. Other contributing
causes may be impossible to rule out and it may be hard to find witnesses willing
to testify to having been "chilled". Persons fearful of having their associations
publicized would not generally wish to publicly acknowledge their fears. \textit{See
Buckley}, 519 F.2d at 909–10 (Bazelon, C. J., concurring in part and dissenting
in part), \textit{aff’d in part and rev’d in part}, 424 U.S. 1 (1976). Finally, unpopular
organizations and minor parties may suffer great injury before the legal test can
As Judge Bazelon pointed out in \textit{Buckley}, the danger is that "minor parties would
wither and die on the vine awaiting the evidence required." 519 F.2d at 910.
\footnote{\textit{Buckley}, 424 U.S. at 74 (emphasis added).}
[U]nduly strict requirements of proof could impose a heavy burden.... Minor parties must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim.... The proof may include...specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient. New parties that have no history upon which to draw may be able to offer evidence of reprisals and threats against individuals or organizations holding similar views. 163

The frequent difficulty of proving chill to first amendment rights justifies a strong presumption that, where associational activity has been kept confidential, there is a reasonable probability that the loss of anonymity would chill the exercise of first amendment rights. In sum, while a history of harassment and intimidation is relevant, such evidence is not indispensable; and

(3) the magnitude of the public interest in maintaining the confidentiality of the associational data requested. Some types of association are more highly valued than others—political associations are more highly valued, as a constitutional matter, than associations for purely commercial purposes, for instance. 164 Thus, there are stronger "public" reasons to protect the privacy of some types of associations. 165 A court must be careful, however,

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163 Id.

164 Political speech, and thus political association, lie at the heart of the first amendment, and are deserving of greater protection than are, for example, commercial speech and associations. See Central Hudson Gas v. Public Service Comm'n, 447 U.S. 557, 562–63 & n.5 (1980); Friedman v. Rogers, 440 U.S. 1, 10–11 n.9 (1979) The Court stated that the "[F]irst Amendment affords such [commercial] speech 'a limited measure of protection'...‘allowing modes of regulation...that might be impermissible in the realm of noncommercial expression.'" Id. (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)); Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 771–72 n.24, 774, 779, 783 (1976). But cf. NAACP v. Alabama ex rel. Patterson, 357 U.S. at 460 ("it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters"; the due process clauses protect all such associations).

165 Depending upon whether the chambers of commerce involved in Grinnell
in distinguishing between types of associations, not to make im-
permissible distinctions among associations of the same type so as
to afford less protection to groups and individuals for whom the
court has less regard.\textsuperscript{166}

If the foregoing factors do not establish the objecting party’s
entitlement to keep confidential the information sought, a court
should also consider:

(4) the undesirability of an outcome in the case adverse to
the objecting party and attributable to his or her recalcitrance in
the face of an order compelling disclosure.\textsuperscript{167} If a civil litigant

\textit{II, II}, 22 Fed. R. Serv. 2d 482 (D.R.I. 1976), and Dow Chemical Co. v. Taylor, 20
Fed. R. Serv. 2d 673 (E.D. Mi. 1974), serve purely commercial purposes, those
associations might have a weaker claim to privacy of association than do the
political associations involved in the other cases discussed in Section IV below.
See infra notes and text accompanying notes 272–87.

\textsuperscript{166} The Court has given less protection to “unlawful” organizations than it
has to others. However, even when dealing with “unlawful” organizations, the
Court seems to have balanced the interests of the parties. The “lesser protection”
provided to the associational rights at issue seems to be a product of those rights
being outweighed, in the Court’s view, rather than a product of the Court den-
ying the existence of interests in associational privacy of members and groups
proven or alleged to have engaged in criminal activities or subversive advocacy.
See Bursey v. United States, 466 F.2d 1059, 1081 (9th Cir. 1972)(rejecting argu-
ment that activity of those who may be connected with allegedly unprotected speech
is activity unprotected by the first amendment and instead balancing the interests
of the parties in a grand jury proceeding). Recently, however, in dicta, the Court
stated: “Although agreements to engage in illegal conduct undoubtedly possess
some element of association, the State may ban such illegal agreements without
trenching on any right of association protected by the First Amendment.” Brown
is the Court’s treatment of radical groups as if they were “unlawful” when those
groups are perceived to pose a substantial threat to national security. See cases
involving the Communist Party, discussed supra at text accompanying notes 54–66.
See also infra text accompanying note 250, questioning whether the court was biased
against the Minnesota Communist Party in Savola, 644 F.2d 743.

\textsuperscript{167} Where the public, as well as the litigants, has a “stake” in the outcome of
the litigation, that properly may be considered. See Eggleston v. Chicago
Journeymen Plumbers’ Local Union No. 130, 657 F.2d 890, 904 (7th Cir. 1981),
cert denied sub nom. Plumbing Contractors Ass’n v. Plummer, 102 St. Ct. 1710
(1982)(reversing dismissal of civil rights suit for failure of plaintiffs to comply
with discovery, saying “[i]f there is any merit to the charges of discrimination against
minorities...the dismissal sanction rests too heavily upon the public”); Keller v.
Hilgendorf, 79 F.R.D. 687, 689 (E.D. Wis. 1978)(since dismissal of a § 1983 ac-
refuses to obey a court order to produce information or materials demanded in discovery, the court may impose sanctions upon the litigant. These sanctions include orders that designated facts shall be taken to be established as claimed by the inquiring party, orders refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibiting him or her from introducing designated matters into evidence, and orders striking pleadings, dismissing an action, in whole or part, or rendering a default judgment against the disobedient party. Consequently, to the extent that dispositions against the objecting party and predicated upon sanctions would not be in the public interest, and would be less desirable than permitting the inquiring party to suffer an adverse decision as a result of having been denied information under a privilege, there is greater reason for the court to recognize the privilege claimed; and

(5) whether the objecting party has illegitimate ulterior motives for challenging the discovery demands and seeking to keep the requested information secret. The objecting party may be balking and raising an associational privacy issue to delay the litigation, increase its costs, or render success on the merits more difficult for the inquiring party to attain. To the extent these are the motivations, no cognizable need for confidentiality exists.

C. Least Inclusive Demand Achieving Compelling Purposes

Finally, even if the requesting party can overcome the in-

cut § 1983, refusal to answer based upon fifth amendment privilege would not result in dismissal unless questions posed were central to the plaintiff's claims).

171 New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 73 (1928)(upholding statute requiring disclosure of Ku Klux Klan membership because the Klan used membership secrecy to cloak conduct inimical to the public welfare); cf. General Dynamics Corp. v. Selb Manufacturing Co., 481 F.2d 1204, 1212-14 (8th Cir. 1973)(affirming dismissal of counterclaim for failure to respond to discovery where court found refusal to answer to be an avoidance of discovery rather than a good faith claim of fifth amendment privilege).
terest in associational privacy, he or she must utilize the least inclusive, least intrusive, means for gathering information which will suffice. To this end, the court should determine whether all of the information sought bears a substantial relationship to a compelling interest of the inquiring party. If a narrower request would suffice, the court’s order compelling discovery should be tailored accordingly.\textsuperscript{172} Moreover, the objecting party or the court may be able to devise means to obtain discovery from individuals whose identity is kept confidential from the inquiring party. The court should also investigate whether the inquiring party can describe the individuals he or she seeks to interrogate in a way which will not reveal their confidential associations.\textsuperscript{173}

IV. Evaluation of Decided Cases

This portion of the Article will illustrate the analysis outlined above by examining in some detail several of the decisions addressing claims to an associational privacy privilege. It will compare the approaches taken in these cases with that advocated in this Article, focusing on those aspects of each decision which implement the proposed analysis and evaluating those aspects which deviate from this proposal.

The Supreme Court case which gave rise to the associational privacy doctrine upon which this Article’s balancing analysis is based, of course took an approach consistent with that advocated here. \textit{NAACP v. Alabama ex rel. Patterson}\textsuperscript{174} itself involved the issue whether the privacy of associations could be protected against discovery in civil litigation. In that case, the state sought the Association’s membership list to determine the character of the NAACP and whether it was conducting intrastate business in violation of Alabama’s foreign corporation registration statute.\textsuperscript{175} Employing a compelling needs analysis, the Court denied access to this information, being unable to see how

\textsuperscript{172} See, e.g., \textit{Savola}, 644 F.2d at 746–47 (8th Cir. 1981); \textit{Britt}, 20 Cal. 3d 844, 574 P.2d 766, 773, 775, 143 Cal. Rptr. 695.

\textsuperscript{173} See, e.g., \textit{NOW}, 88 F.R.D. 272, discussed \textit{infra} at text accompanying notes 288–98.

\textsuperscript{174} 357 U.S. 449 (1958).

\textsuperscript{175} 357 U.S. at 464.
disclosure of membership had a substantial bearing on the issues in the case.\textsuperscript{176} The absence of any need for the information was reinforced by the presence of a willing alternative source: the NAACP itself had admitted its activities, and had produced a variety of business records including its charter and statement of purposes and the names of its officers and directors.\textsuperscript{177} Because a threshold factor was dispositive of the state's "need" for the information, the Court did not need to consider such additional factors favoring disclosure as the importance to the outcome of the case of the issues to which the demanded discovery was relevant, the intolerability of a possible litigation loss by the state resulting from denial of the membership data, or the absence of ulterior purposes for the discovery request.

In a manner consistent with the proposed balancing approach, the Court evaluated the NAACP's need to keep confidential the membership data sought. It considered the Association's showing of economic reprisal, loss of employment, threat of physical coercion and other manifestations of public hostility.\textsuperscript{178} The Court was also well aware of the nature, purposes and activities of the NAACP\textsuperscript{179} and probably considered, in its balancing, the public interest in maintaining the confidentiality of the membership of such an organization.\textsuperscript{180} Explicitly the Court merely contrasted the "lawful" private interests which the NAACP sought to further with the "unlawful" activities of the Ku Klux Klan.\textsuperscript{181} However, from the Court's uncalled for observation of the purposes of the organization and its quotation of purposes from the NAACP's certificate of incorporation, one can infer that the Court sympathized with those purposes, and its sympathy may have influenced its decision. The Court's approach here is dangerous in that it reflects favoritism among associations of the same general type, rather than a nonpartisan preference for one type of group over another. Political associations may be

\textsuperscript{176} Id. at 464.
\textsuperscript{177} Id. at 464–65.
\textsuperscript{178} Id. at 462–63.
\textsuperscript{179} Id. at 451–52 & n\textsuperscript{*}, 453.
\textsuperscript{180} Id. at 460, 462–63.
\textsuperscript{181} Id. at 465–66.
more highly valued than commercial ones, for example.\textsuperscript{182} On this point then, \textit{NAACP v. Alabama ex rel. Patterson} should be read carefully, as dependent only on the distinction made explicitly by the Court, between "lawful" and "unlawful" associational activities, and not as dependent upon the Court's implicit sympathy for the laudable goals of the NAACP.

Finally, \textit{NAACP v. Alabama ex rel. Patterson} is consistent with this Article's suggestion that the objecting party's motives may be examined. The Court distinguished a case, \textit{New York ex rel. Bryant v. Zimmerman},\textsuperscript{183} in which it viewed the recalcitrant party, the Ku Klux Klan, as having had illegitimate ulterior motives for challenging the disclosure requirements imposed upon it.\textsuperscript{184}

All other civil cases in which a litigant has sought an associational privacy privilege have been decided by lower courts, some of which have generally followed the approach advocated in this Article, and some of which have not. The United States Court of Appeals for the District of Columbia has addressed claims to an associational privacy privilege on two occasions. Both times it embraced a balancing test entailing detailed scrutiny of the inquiring party's need for the associational information sought and of the challenging party's need for first amendment protection.\textsuperscript{185}

In \textit{International Union, UAW v. National Right to Work Legal Defense and Education Foundation, Inc.},\textsuperscript{186} several labor organizations sued the Foundation and the National Right to Work Committee alleging, among other things, that the Foundation was violating the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA)\textsuperscript{187} by using funds provided by interested employers to finance, encourage and participate in suits brought by members of labor organizations against those

\textsuperscript{182} See \textit{supra} notes 164–65 and accompanying text.
\textsuperscript{183} 278 U.S. 63 (1928).
\textsuperscript{185} \textit{Black Panther Party}, 661 F.2d at 1266–1268; \textit{International Union, UAW}, 590 F.2d at 1152–53.
\textsuperscript{186} 590 F.2d 1139.
organizations. In aid of union discovery demands, the district court ordered the Foundation to identify a number of donors to the Foundation and the contributing companies whose officers or employees were Foundation Advisory Council members. When the Foundation refused to comply, the district court used its Rule 37 (b)(2)(A) authority to enter findings of fact against the Foundation regarding matters which it would be unjust and unfair to require plaintiffs to prove without access to the data being withheld. Based upon these findings, the district court concluded that the Foundation was an “interested employer association” and had violated the LMRDA.

On appeal, the Court of Appeals for the District of Columbia held that the sanctions imposed did not eliminate all factual dispute as to whether the Foundation was an “interested employer association” and hence remanded for further proceedings. To facilitate a thorough and correct development of the facts, the court reviewed the Rule 37 orders previously entered, and the discovery orders upon which they were based. It was in this context that the court addressed the Foundation’s argument that its contributors’ names were protected from disclosure under the doctrine of associational privacy.

The court held that the Foundation had asserted a substantial claim of constitutional privilege. Embracing a balancing

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188 International Union, UAW, 590 F.2d at 1144. See id. at 1145 for a description of the additional claims and counterclaims filed in the litigation.
189 Id. at 1145.
190 Id. at 1145–47.
191 It also concluded, however, that the pertinent section of the LMRDA was unconstitutional as applied to the Foundation. Id. at 1147. The district court’s decision in this regard is discussed in 58 B.U.L. Rev. 296 (1978) and 16 Duq. L. Rev. 431 (1977–78).
192 The Court of Appeals construed the pertinent section of the LMRDA not to apply to legitimate activity of a bona fide, independent legal aid organization, thus avoiding the constitutional question. International Union, UAW, 590 F.2d at 1147–51.
193 Id. at 1151 & n.18.
194 Id. at 1152. Although the court cited no facts alleged by the Foundation in support of this conclusion, the record contained what defendants characterized as the requisite showing of union violence against dissidents and employers to ground a substantial claim of constitutional privilege. See Brief for Defendants-
test significantly resembling that advocated here, the court indicated that the contributors’ names could properly be ordered disclosed only if they went to the heart of establishing the statutory violation plaintiffs’ alleged, and only if the unions were unable to obtain the information they ultimately sought from other reasonably accessible sources. The court found that the unions had adequately explained their intended use of the contributor data, to show that some contributors were “interested employers,” and acknowledged that the identities of some contributors might be of central relevance. However, paralleling the analysis advocated in this Article, the appellate court determined that the Foundation could not properly be compelled to disclose its contributors until the unions had unsuccessfully attempted to obtain the information from alternative sources such as employers known to be connected with various Foundation supported lawsuits and publicly identified members of the Foundation’s Advisory Council. Because the district judge had failed sufficiently to consider whether the contributor names could be discovered through alternative sources, the appellate court vacated both the Rule 37 sanction orders and the underlying discovery orders.

This analysis parallels that adopted in this Article to a certain extent. The court of appeals did not, however, include in its balance some of the factors recommended here. For example, it did not respond to plaintiffs’ persuasive contention that because the 116 companies on the Foundation’s Advisory Council had long been identified publicly, the court should reject their claim that associational privacy precluded disclosure of their financial

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Appellees and in Support of Cross-Appeal at 51 n.72. The court seems to have been impressed by the showing, since it directed the district court to minimize the effect of disclosure on the first amendment rights of the Foundation and those whose names were being disclosed, by limiting disclosure to counsel for the unions. *International Union, UAW, 590 F.2d at 1153 n.19.*

195 590 F.2d at 1152–53.
196 *Id.* at 1152; *see Black Panther Party, 661 F.2d at 1269 n.154.*
197 *International Union, UAW, 590 F.2d at 1153 & n.19; see Black Panther Party, 661 F.2d at 1269 n.155.*
198 *International Union, UAW, 590 F.2d at 1152–53.*
199 *Id.* at 1152–53.
contributions to the Foundation. 200

Additionally, while the court, in other aspects of its decision, recognized the social interests at stake in the case, 201 it failed to include in the balance harm to the public interest which would flow from the unions' suffering an adverse decision on the central issue of the case, solely as a result of having been denied the contributor data under a claim of privilege. The public interest was affected because the section of the LMRDA which plaintiffs sought to enforce served public goals; it sought to prevent employers from leading union members into action contrary to the members' best interests but in the employers' interests, and to prevent sham or harassing suits against unions. 202 Similarly, while the court perceived a public interest in maintaining the confidentiality of the requested information insofar as the Foundation was engaged in political activity and in providing "legal aid," 203 it failed to indicate that the district court should consider this interest. Under the balancing analysis proposed here, a court would take this factor into account.

In a more recent case, Black Panther Party v. Smith, 204 the Court of Appeals for the District of Columbia performed a thorough balancing of appropriate factors in determining whether civil litigants may refuse to respond to discovery requests on the ground of a first amendment associational privacy privilege. While its judgment was vacated by the Supreme Court at the request of the plaintiffs-respondents, 205 its analysis remains useful as a guide to other courts and as an illustration of the approach taken here. The Supreme Court's disposition of the case in no way undermines the soundness of the approach and the

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200 Reply Brief for Plaintiffs-Appellants at 23 n.22.
201 International Union, UAW, 590 F.2d at 1148–50, 1152. The court said "Expression or association that would otherwise be protected may be regulated if necessary to protect substantial rights of employees or to preserve harmonious labor-management relations in the public interest." Id. at 1148.
202 Id. at 1149 & n.14, 1150.
203 Id. at 1147–48.
204 661 F.2d 1243.
205 This disposition was predicated upon the decision of respondents voluntarily to dismiss their claims for lack of resources to finance the litigation. See supra note 17 and accompanying text.
reasoning of the Court of Appeals for the District of Columbia.\(^{206}\)

The Black Panther Party, members, and supporters filed a complaint against the United States and various government officials,\(^{207}\) alleging that defendants had since 1968 engaged in a continuing conspiracy to destroy the Party in violation of the Constitution and various statutes.\(^{208}\) In particular, they alleged unlawful mail openings, warrantless wiretaps, burglaries, harassment, incitement of dissension within the Party, deterrence of contributions to the Party newspaper, discouragement of press coverage of Party activities, sabotage of the Party's public service programs, instigation of violent confrontations between the Party and other Black organizations, and even assassination of Party members and supporters.\(^{209}\) Plaintiffs stated that they hoped to obtain further details of the conspiracy through discovery.\(^{210}\)

After years of discovery battles and other pretrial disputes, the district court dismissed the entire action, on motion of the government.\(^{211}\) It did so in part on the ground that the Party, asserting a first amendment privilege, had unjustifiably refused to comply with an order to answer interrogatories seeking the names of Party leaders and members not already known to the

\(^{206}\) Where a case has abated or become moot following the decision of a lower federal court and pending application for a writ of certiorari, the Court typically grants the writ, vacates the judgment, and remands the case so that the proceedings may be dismissed by the trial court. R. Stern & E. Gressman, Supreme Court Practice §§ 5.13, 18.4 (5th ed. 1978). By so proceeding the Court assures that the lower court's judgment will not be given res judicata or collateral estoppel effect. United States v. Munsingwear, 340 U.S. 36, 39 (1950); Restatement (Second) of Judgments § 68.1 (Tent. Draft No. 4, 1977). In vacating a judgment in such circumstances the Court expresses no opinion on the merits of the issues sought to be presented by the petition for writ of certiorari. Petite v. United States, 361 U.S. 529, 531, 533 (1960); Duke Power Co. v. County of Greenwood, 299 U.S. 259, 267–68 (1936).

\(^{207}\) \textit{Black Panther Party}, 661 F. 2d at 1247–48. The other plaintiffs and defendants are identified at \textit{id.}, 1247–48 & nn. 9, 12.

\(^{208}\) \textit{Black Panther Party}, 661 F.2d at 1248 & n.14. Plaintiffs sought declaratory, injunctive, and in some instances, monetary damages.

\(^{209}\) \textit{Id.} at 1248.

\(^{210}\) \textit{Id.} at 1248.

\(^{211}\) \textit{Id.} at 1246–47, 1249–54.
public. In the view of the district judge, since the identity of the individuals inquired about was critical to the defendants, the Party had to choose between asserting its claim of constitutional privilege and proceeding with its lawsuit. In reversing the district court's decision and remanding for further proceedings, the appeals court emphatically rejected the argument that by filing suit the Party had waived any claim to a first amendment privilege. Rather, it embraced a balancing approach as necessary to protect the interests of both parties to the litigation. The appellate court implicitly adopted the compelling interest test advocated in this Article, and held that the inquiring party must show that all reasonable alternative sources have been exhausted to overcome the other party's first amendment claim. The court mandated a "detailed and painstaking" analysis of the inquiring party's need for disclosure, and directed litigants seeking to compel discovery to describe with reasonable specificity the information they hope to obtain and its importance to their case.

212 Id. at 1246, 1250, 1253-54. Specifically, the challenged sections of defendants' interrogatories asked for the names of Party Central Committee members not previously disclosed (Interrogatory 21), the identity of leaders of local Party affiliates except those published in the Black Panther newspaper (Interrogatory 33) and the names of individual Party members not already publicly known (Interrogatory 61). Black Panther Party v. Levi, 483 F. Supp. 251, 253 (D.D.C. 1980); Black Panther Party, 661 F.2d at 1264. The Party had responded to these interrogatories in part, providing the names of publicly known officers, local leaders, and members, and those portions of documents, also requested by the interrogatories, as to which the Party did not claim a privilege. Id. at 1264. The other grounds for the district court's dismissal are detailed in id. at 1246-47, 1254.


214 Black Panther Party, 661 F.2d at 1256, 1266-68. Judge MacKinnon, concurring in part and dissenting in part, agreed with the court's basic approach. He approved of balancing the parties' interests by assessing the substantiality of the claim of privilege, the relevance of the information sought, and the availability of alternative sources. Id. at 1283.

215 Id. at 1265-66 nn.141-43.

216 Id. at 1266.

217 Id. at 1265-66, & n.144.

218 Id. at 1267-68.

219 Id.

220 Id. at 1268.
precisely what information they hoped for nor suggested the specific issues to which the identities sought were important.\textsuperscript{221} The court of appeals found that the trial court had too willingly accepted at face value defendants' claims that the undisclosed names were crucial.\textsuperscript{222} The appeals court found, moreover, that the trial judge had improperly failed to consider the availability of alternative sources, including the many individuals whom the Party had named. It believed that the information ultimately desired could be obtained from these individuals; certainly the defendants had not demonstrated otherwise.\textsuperscript{223}

While the court did not expressly impugn the defendants' motivation in making the challenged discovery demands, there are indications that the court may have included such suspicions in its balancing test. It observed that the government has an incentive to suppress organizations critical of its actions, such as the Panthers.\textsuperscript{224} Defendants' failure to specify either the information they hoped to obtain from undisclosed Party members or its relevance was consistent with improper motives for requesting membership information.

On the other side of the balance, the court focused primarily on the importance of examining the need for first amendment protection, explaining that the argument in favor of the privilege grows as the danger to rights of expression and association

\textsuperscript{221} Id. at 1269 & n.154.
\textsuperscript{222} Id. at 1269 & n.154.
\textsuperscript{223} Id. at 1269 n.154, 1270 n.156. Judge MacKinnon asserted that defendants had made reasonable attempts to obtain from the Party the information they sought and, having failed to obtain it all, were entitled to recourse to the Party's officers and authorized spokesmen, including those not publicly known. Id. at 1284–85. However, he offered no support for his contention that these non-public persons might well be best able to reveal the sought-after facts and failed to explain why the government's failure to question the many named Party members and officers was not a failure to exhaust sources.
\textsuperscript{224} Id. at 1265 (citing First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 n.11 (1978)). The plaintiffs had certainly impugned the government's motives, arguing that the vagueness and over-breadth of defendants' discovery requests suggested that defendants hoped to force plaintiffs into asserting privilege claims in order to trigger dismissal of the case or hoped to use discovery to learn what they had not discovered illegally through covert actions against the Party. Brief For Appellants at 34.
increases. It noted that privacy is particularly important where a group's cause is unpopular, and acknowledged the particular public interest in maintaining the confidentiality of membership information of groups engaged in political speech. In this connection, it is noteworthy that the court properly did not regard the Black Panther Party as outside the protection of the first amendment despite the alleged violent and criminal activity of some of its members. Huey Newton, the Party's founder and a plaintiff in the case, had declined on fifth amendment grounds to answer a number of interrogatories relating to matters that were the subject of pending criminal investigations and prosecutions. In addition, defendants contended that the Party was committed to violence and other unlawful activities. Absent any outlawing of membership in the Party and absent proof that it was a criminal organization, however, the court properly afforded the Party the first amendment protections to which it deemed lawful political associations entitled.

Another important contribution by the court in this phase of its opinion was its emphasis that a litigant need not prove to a

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225 Black Panther Party, 661 F.2d at 1267.
226 Id. at 1265. See supra note 47 and accompanying text.
227 Id.
228 Id. at 1270.
229 Id. at 1263–64.
230 Judge MacKinnon argued that the names of undisclosed Party officers and spokesmen were relevant to support a governmental defense that its conduct was justified by the alleged nature of the Black Panther Party as an unlawful conspiracy engaged in violations of federal law. Id. at 1284. He contrasted this with the state government's efforts to force disclosure in NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958), where discovery would have infringed deeply upon the right of NAACP members freely to pursue their lawful private interests. Black Panther Party, 661 F.2d at 1284. Judge MacKinnon overlooked the fact that in NAACP v. Alabama ex rel. Patterson, too, the state had argued that the association was engaged in unlawful activities. The state there alleged that the NAACP had organized and financed an illegal boycott of the buslines in Montgomery, Alabama, had aided and abetted unlawful breaches of the peace in many cities in Alabama, and was generally "causing irreparable injury to the property and civil rights of the residents and citizens of the State of Alabama for which criminal prosecution and civil actions at law afford no adequate relief." NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 302–03 (1964); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 452 (1958).
certainty that its first amendment rights would be chilled by disclosure, positing instead that a showing of "some probability" of resultant reprisal or harrassment would suffice.\textsuperscript{231} The court criticized the trial judge's failure to address whether the Party's fears of harassment and interference with first amendment rights were substantial,\textsuperscript{232} and found on its own that the record reflected serious allegations of harassment and some evidence supporting them.\textsuperscript{233} While the law would be improved by an outright presumption that disclosure of secret membership will deter association, especially when disclosure would be directly to those parties alleged to be violating the rights of organization members, it is understandable that the court did not push that point where a showing of "some probability" of reprisal or

\textsuperscript{231} Black Panther Party, 661 F.2d at 1267–68.

\textsuperscript{232} Id. at 1269.

\textsuperscript{233} Id. at 1269 n.153. By contrast, in Judge MacKinnon's view, the Party had made no showing at all, when a substantial showing was necessary. Id. at 1283. However, as both the trial court and the appellate court knew, the alleged government harassment had been documented in the report "Intelligence Activities and the Rights of Americans," Senate Select Comm. to Study Government Operations with Respect to Intelligence Activities, S. Rep. No. 755, 94th Cong., 2d Sess., Books II and III (1976). Black Panther Party, 661 F.2d at 1248. Moreover, the government's violations of the rights of the Party and its members had been acknowledged in other litigation, see Hampton v. Hanrahan, 600 F.2d 600, 609 (7th Cir. 1979), modified on other grounds, 446 U.S. 754 (1980), rehearing denied, 448 U.S. 913 (1980), as was pointed out in the Party's Brief filed in the D.C. Circuit. Appellant's Brief at 14 n.1. Black Panther Party, 661 F.2d at 1243. Although the harassing activities of the defendants had not been proven at trial in this very cause, such proof is no prerequisite to judicial recognition of a claim of first amendment privilege. See supra note 189. Similarly, while the Party may not have made an evidentiary showing to rebut defendants' contention that investigation of the Party had ceased years before (Black Panther Party, 661 F.2d at 1283 (MacKinnon, J., concurring in part and dissenting in part)), as the court knew, the 1976 Senate Report, supra, had concluded that "COINTELPRO-type activities may continue today under the rubric of 'investigation.'" Appellant's Brief at 15 n.1, Black Panther Party, 661 F.2d at 1243. It is an unfair and unrealistic burden to require plaintiffs to show harassment up to the time they seek exemption from discovery on first amendment grounds. See 1980 Illinois Socialist Workers Campaign v. State of Illinois Board of Elections, 531 F. Supp. 915, 921 (N.D. Ill. 1981)(where much of the evidence of harassment of plaintiffs was culled from government documents, police files and discovery in other lawsuits, court rejected argument that record lacked "present" evidence of threats or harassment).
harassment seemed to be within the ability of plaintiffs.\textsuperscript{234} Standing in contrast to the decisions of the Court of Appeals for the District of Columbia is \textit{Savola v. Webster},\textsuperscript{235} decided by the Court of Appeals for the Eighth Circuit early in 1981, and noteworthy for the superficiality of its analysis, and for its lack of solicitude for first amendment rights.

Ms. Savola had sued individually and as organizer of the Minnesota Communist Party, along with the Party, alleging violations of plaintiffs' constitutional rights in that defendants, the Director of the FBI and the local deputy coroner, had illegally seized address books, tapes, documents, and other material concerning the Party. These materials were allegedly taken from the home of a recently deceased Party member, and used to harass Party members and sympathizers.\textsuperscript{236} Certain of the interrogatories propounded by the FBI sought much of the same information as plaintiffs, through their suit, sought to have the FBI enjoined from using. They requested the names and addresses of various members and sympathizers of the Minnesota Communist Party.\textsuperscript{237} Plaintiffs had failed to answer, claiming a first amendment associational privacy privilege,\textsuperscript{238} and had maintained their non-compliance after the trial court refused plaintiffs' request to review the information \textit{in camera} to determine whether disclosure was necessary or to provide other protective measures pursuant to Rule 26(c).\textsuperscript{239} Finally, when the district court dismissed plaintiffs'
suit as a sanction for having failed satisfactorily to respond to the interrogatories, plaintiffs appealed.

The court of appeals did recognize, in principle, that the disclosures being sought triggered first amendment considerations, and could be justified only by a compelling interest bearing a substantial relation to the demanded disclosure. However, the court's application of these principles left much to be desired. It employed a minimal "need" test and failed to consider many of the appropriate balancing factors.

The court recognized that interrogatories seeking the names and addresses of all members and sympathizers of the Party whose names appeared in certain documents were impermissibly overbroad, since the complaint contained no allegations requiring so broad a disclosure. By contrast, interrogatories which sought identification of documents containing those names and sought the names and addresses of Party members alleged to have been harassed and to have had their rights violated were found to relate to specific allegations in the complaint. The court

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240 *Savola*, 644 F.2d at 746-47.
241 *Id.* at 747. These said, respectively:

INTERROGATORY NO. 8: Identify by name and residence address all members of the Minnesota Communist Party whose names allegedly appeared in documents located in John Forichette's residence at the time of his death.

INTERROGATORY NO. 9: Identify by name and residence address all sympathizers of the Minnesota Communist Party whose names allegedly appeared in documents located in John Forichette's residence at the time of his death.

242 In Federal Appellee's Petition for Rehearing at 9-11, 12 n.12, the FBI argued that the court misconstrued Interrogatories 8 and 9, overlooking their limitation to persons whose names appeared in the documents allegedly seized by the FBI. It also contended that plaintiffs would have to introduce into evidence the information sought in order to prove their allegations. The petition for rehearing was denied without opinion. Order, *Savola*, 644 F.2d 743 (May 19, 1981).

243 These demanded:

INTERROGATORY NO. 10: Identify the documents, if any, containing the names of persons enumerated in Interrogatories Nos. 8 and 9 which you claim were not the property of John Forichette at the time
held that the defendant’s need for this information in preparing its defense provided a “controlling justification.” Consequently, the district court was instructed to reenter an order compelling discovery as to the latter interrogatories, and advised that if plaintiffs persisted in their refusal to comply, the district court might again dismiss the case. However, the eighth circuit failed to discuss why the FBI truly needed to have plaintiffs identify the Party members and sympathizers about whom it asked. The court failed to explain why the FBI could not proceed to prepare its defense without those names, and failed to address whether the FBI might already have those names in its own files, as plaintiffs contended. Nor did the court address the possibility that the FBI’s inquiries were prompted by ulterior motives, as plaintiffs had suggested, despite the court’s own conclusion that some of the FBI’s interrogatories sought information not conceivably necessary for defense of the action.

The court apparently gave little or no weight to those factors which might have defeated disclosure. It did not discuss the validity of plaintiffs’ fears of harassment and intimidation, and their consequent fear that the disclosures sought would chill association with the Party. Nor did the court give more than lip service to the public interest in maintenance of the confidentiality

of his death, and as to each such document state the owner thereof and the factual basis for claiming a proprietary interest therein.

INTERROGATORY NO. 14: Identify by name and residence address all members of the Minnesota Communist Party alleged to have been harassed as a result of the alleged seizure of documents located in John Forichette’s residence.

INTERROGATORY NO. 15: Identify by name and residence address all members of the Minnesota Communist Party whose rights are alleged to have been violated by the defendants and specify for each person so identified the particular right allegedly violated.

[244] 644 F.2d at 747.
[245] Id. at 747.
[246] This Article faults the opinion of the court of appeals not so much for its conclusions, although they are questionable, as for its failure adequately to support them.
[247] See supra note 238.
of the requested information. It evidenced no concern for the public interest in plaintiffs' obtaining a hearing on the merits of their serious allegations against the FBI, which would be sacrificed if the dismissal of plaintiffs' claims as a sanction for failure to comply with discovery were reinstated. Despite the good faith first amendment basis for their objections, the court deemed plaintiffs' failure to comply sufficiently "willful" to justify dismissal of their lawsuit, since they had been repeatedly warned of the likely consequence of their recalcitrance.\textsuperscript{248} Despite plaintiffs' express argument that the order to compel should not have issued without provision for\textit{ in camera} inspection or other appropriate protective measures,\textsuperscript{249} the appeals court did not suggest that the district court should accommodate a renewed request by plaintiffs for a protective order to prevent widespread dissemination and abuse of the information to be produced.

The court's insensitivity was so great that it raises the question whether the fact that the subject organization was the Communist Party may have biased the court.\textsuperscript{250}

Two fifth circuit cases,\textit{ Familias Unidas v. Briscoe}\textsuperscript{251} and\textit{ Hastings v. North East Independent School District},\textsuperscript{252} illustrate how plaintiffs may feel constrained to limit their initial complaints absent a reliable and strong associational privacy privilege. In both cases the appellate court was spared rigorous balancing by pleading amendments which made the information sought in interrogatories unnecessary to defendants' cases.\textit{ Familias Unidas} was a suit brought by a Mexican-American organization, formed to advance the educational status of Chicanos in the local Texas schools, and by the group's chairman. Plaintiffs sued individually and on behalf of the membership to challenge the constitutionality of a state statute which empowered

\textsuperscript{248} Savola, 644 F.2d at 745–46.
\textsuperscript{249} Brief for Plaintiffs-Appellants at 24–26.
\textsuperscript{250} On remand plaintiffs chose to dismiss the action rather than "name names" as required by the interrogatories which the Court of Appeals for the Eighth Circuit had approved. Letter from Helvi Savola to Karl Cambronne [attorney for plaintiffs] (June 17, 1981)(filed in Savola, No. 3–79–212)(D. Minn., dismissed June 18, 1981)(on file with author).
\textsuperscript{251} 544 F.2d 182 (5th Cir. 1976).
\textsuperscript{252} 615 F.2d 628 (5th Cir. 1980).
a judge to exact public disclosure of the membership, officers, employees, and representatives of any local organization he or she believed to be engaged in activities designed to interfere with the peaceful operation of the public schools.

They originally sought a declaratory judgment, injunctive relief, and money damages for all plaintiffs' injuries allegedly suffered as a result of the application of the statute.253 The defendants254 propounded three interrogatories to which plaintiffs objected on associational privacy grounds and also on the ground that they were an effort by defendants to do indirectly what plaintiffs were alleging they had no right to do directly: discover the membership of Familias Unidas.255 After the trial court granted defendants' motions to compel a response, plaintiffs filed an amended complaint eliminating all class action allegations, all requests for money damages for Familias and its members, and those paragraphs of the complaint which plaintiffs viewed as the referees for the contested interrogatories.256 The trial court refused to reconsider its prior discovery orders and dismissed the case for plaintiffs' "willful" failure to answer the three interrogatories.257

The appellate court reversed the dismissal as an abuse of discretion and remanded plaintiffs' claims for further proceedings. It found: "[A]ny interest appellees may have had with regard to the identity of the membership...was completely dissipated by the withdrawal of the class action."258 With, one senses, relief at the amendments, the court made explicit that it expressed no opinion on defendants' right to have the interrogatories answered if plaintiffs had persisted in their class

253 Familias Unidas, 544 F.2d at 183–84.
254 Defendants were the Governor of Texas, the judge who had applied the challenged statute to plaintiffs, the local superintendent of schools, and certain members of the board of trustees of the school district. Id. at 184.
255 Id. at 185. The contested interrogatories appear to have sought the names of the parent-organizers of Familias Unidas and of their children. Id. at 185. In accordance with plaintiffs' view, they were treated by the court as seeking the names of all Familias Unidas members. Id. at 192; see Brief of Plaintiffs-Appellants at 53.
256 Familias Unidas, 544 F.2d at 185-86; see Brief of Plaintiffs-Appellants at 15.
257 Familias Unidas, 544 F. 2d at 186.
258 Id. at 192.
claims, indicating that on the original state of the pleadings a very close issue would have been raised.\textsuperscript{259} The court did nonetheless recognize the right of association at risk,\textsuperscript{260} suggesting that this right was not waived by plaintiffs\textsuperscript{261} and that defendants should exhaust alternative sources before plaintiffs will be compelled to disclose confidential information.\textsuperscript{262}

In 1980, the Court of Appeals for the Fifth Circuit was able to dispose of \textit{Hastings v. North East Independent School District},\textsuperscript{263} in strikingly similar fashion. A local of the Northeast Federation of Teachers (the “NFT”) and its president sued, contending that the defendant District and its officials were denying the NFT privileges being accorded a rival teacher’s organization, so as to abridge free speech, due process, and equal protection rights of the plaintiffs.\textsuperscript{264} As an outgrowth of discovery sought by defendants, the district court had ordered plaintiffs to divulge the names of all union members.\textsuperscript{265} As to some of the members, including those who had not authorized release of their names, plaintiffs refused.\textsuperscript{266} In the interim, plaintiffs had waived their request for certification as a class action, dismissed their claim for money damages (leaving prayers for declaratory and injunctive relief), and limited their claims of harassment and intimidation to the members whose names they had furnished.\textsuperscript{267}

\textsuperscript{259} \textit{Id.} at 185 n.3.

\textsuperscript{260} The court commented that no public or judicial interest could outweigh plaintiffs’ right of association. \textit{Id.} at 185, 192. It was impressed with the irony that denying plaintiffs the privilege would require them to forfeit the very confidentiality they had sued to protect. \textit{Id.} at 192.

\textsuperscript{261} The court weakened its conclusion by characterizing plaintiffs’ position as being analogous to that of a defendant. \textit{Familias Unidas}, 544 F.2d at 185, 192.

\textsuperscript{262} By noting defendants’ opportunity to depose co-plaintiff Torrez, chief officer of Familias Unidas, the court obliquely suggested the importance of looking to alternative sources. \textit{Id.} at 192. Defendants had invited a clear retort from the court, arguing that “[W]ithout the information sought...defendants...had no means of ascertaining plaintiff[s]...version of the facts...except by attempting to depose Ms. Torrez.” Joint Brief for Appellees at 27.

\textsuperscript{263} 615 F.2d 628 (5th Cir. 1980).

\textsuperscript{264} \textit{Id.} at 628–29.

\textsuperscript{265} \textit{Id.} at 629–30.

\textsuperscript{266} \textit{Id.} at 631.

\textsuperscript{267} \textit{Id.} at 629–30, 632.
trial court nonetheless dismissed plaintiffs' suit as a sanction for failing to comply with its order to disclose all members' names.\textsuperscript{268}

As in \textit{Familias Unidas}, the Fifth Circuit here reversed the district court's dismissal as an abuse of discretion,\textsuperscript{269} holding that any substance which defendants' reasons for seeking membership data may once have possessed had evaporated by virtue of the amendments to, and limitations of, plaintiffs' complaint.\textsuperscript{270} The court also rejected defendants' contention that an insufficient factual predicate had been established to entitle plaintiffs to first amendment protection, citing plaintiffs' allegations that NFT members had been harassed.\textsuperscript{271}

The remaining cases addressing a claim to an associational privacy privilege were decided by district courts. Again, the quality and thoroughness of analysis run the gamut.

The two decisions issued by the district court in \textit{Grinnell Corp. v. Hackett},\textsuperscript{272} separated by an intervening amendment of

\begin{itemize}
  \item \textsuperscript{268} Id. at 631.
  \item \textsuperscript{269} Id. at 632.
  \item \textsuperscript{270} As stated by the court, the defendants justified their discovery request as necessary to enable them to defend against claims of dues loss, stifled growth, harassment, and intimidation. Id. at 630, 632. Once plaintiffs' prayer for money damages had been eliminated and their claims of harassment had been limited to claims on behalf of named members, the court believed that there was no longer any need for the other NFT members to be identified.
  \item \textsuperscript{271} Id. at 632. In a third case which went to the Court of Appeals for the Fifth Circuit, Southern Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe, 599 F.2d 707 (5th Cir. 1979), the plaintiff sought only a protective order to limit membership disclosure to defendant's counsel; this eliminated the need to find an associational privacy privilege. Brief for Appellants at 27, 30. On the appeal the defendants—law firms allegedly discriminating in hiring women summer law clerks and associates—seem to have made only a token effort to oppose the protective order. Brief of Appellee Wynne & Jaffe at 10, 27–28 (on file with author). The court of appeals recognized that without a protective order women would be reluctant to join or labor for the Association for fear of retaliatory discrimination, and the court prohibited defendant's counsel from communicating plaintiff's answers to any person other than two named partners of the defendant law firm, who in turn were forbidden to divulge plaintiff's responses to anyone, except upon order of the court. 599 F.2d at 714.
  \item \textsuperscript{272} 20 Fed. R. Serv. 2d 668 (D.R.I. 1974); 22 Fed. R. Serv. 2d 482 (D.R.I. 1976).
\end{itemize}
the complaint, may be faulted for having applied too low a standard of relevance. In the first decision, the district court also accepted the waiver argument, challenged in this Article, that civil plaintiffs must waive their rights of associational privacy to persevere in their lawsuits.\textsuperscript{273} In this case the Chamber of Commerce of the United States, claiming injury to its members, challenged the payment by Rhode Island of unemployment compensation benefits to striking employees.\textsuperscript{274} The defendant-intervenor United Steelworkers of America posed interrogatories to the Chamber, seeking identification of the Chamber members who had been subject to the statute challenged by the Chamber and identification of the members who had had strikes.\textsuperscript{275} The Chamber objected on grounds of irrelevance and of associational privacy.\textsuperscript{276}

The Chamber of Commerce argued that the requested data was irrelevant because it was the impact of the unemployment benefits on all employers, not just Chamber members, that was at issue.\textsuperscript{277} The district court initially overruled the Chamber's objections, opining that it would be unfair to permit the Chamber to withhold information relevant to its allegations of injury, and indicated that the Chamber had to choose between its allegations and its privilege.\textsuperscript{278}

The court's finding on relevance was erroneous. The membership list and other information sought were not essential

\textsuperscript{273} See supra text accompanying notes 108-30. In Dow Chemical v. Taylor, 20 Fed. R. Serv. 2d 673 (E.D. Mi. 1974), the district court accepted the waiver argument on an identical issue and indicated that the Chamber had to choose between its allegations and its privilege. Id. at 675-76. Since in Dow the Chamber did not amend its complaint, this initial ruling stood. This was not a case where, to prove its case, the Chamber would have to disclose at trial either its membership generally or the identity of those of its members who had suffered strikes. See infra note and text accompanying note 279.

\textsuperscript{274} Grinnell I, 20 Fed. R. Serv. 2d 668, 669-70 (D.R.I. 1974).

\textsuperscript{275} Id. at 669-70.

\textsuperscript{276} Id.

\textsuperscript{277} Id.

\textsuperscript{278} Id. Each, however, issued a protective order pursuant to which the Steelworkers were not to make use of the list of member business firms of the Chamber, or disclose the identity of such members, except for purposes of defending the respective lawsuits. Grinnell I, 20 Fed. R. Serv. 2d at 670-71; Dow, 20 Fed. R. Serv. 2d at 676, 679.
to the Steelworkers’ defense since the Chamber intended to establish the alleged contravention of federal labor policy by demonstrating the effect that payment of unemployment compensation to striking employees had on employers, collective bargaining, and work stoppages in general, and the Steelworkers had to make their defense at the same level of generality.\textsuperscript{279} Nor was the membership of so many businesses necessary to establish the Chamber’s standing to sue. Indeed, the Chamber contended that its standing already had been recognized by the district court.\textsuperscript{280} Under these circumstances, it appears that the requested membership information was not crucial to the case.

After an unsuccessful attempt to have the United States Court of Appeals for the First Circuit immediately review this decision,\textsuperscript{281} the Chamber of Commerce amended its complaint to eliminate all allegations pertaining to injuries to the Chamber’s members generally, instead premising its standing to sue on the injury allegedly sustained by only one of its members.\textsuperscript{282} On reconsideration, the Steelworkers’ motion to compel was denied.\textsuperscript{283} In this later decision the district court reversed itself on whether a civil plaintiff, by suing, waives its constitutional right of associational privacy. Stressing the significance of both

\textsuperscript{279} Brief for Appellants at 19–23 (on file with author).

\textsuperscript{280} Brief for Appellants at 23, citing order of the district court dated May 31, 1972.

\textsuperscript{281} Grinnell v. Hackett, 519 F.2d 595 (1st Cir.), cert. denied, 423 U.S. 1033 (1975) sub nom. Chamber of Commerce of the United States v. Steelworkers of America, AFL-CIO-CLC.

\textsuperscript{282} Grinnell v. Hackett, 22 Fed. R. Serv. 2d 482, 483, 483–84 n.2 (D.R.I. 1976).

\textsuperscript{283} Grinnell II, 22 Fed. F. Serv. at 489. The court did not take issue with the contention that the Chamber had made no showing that production of its membership list would expose its members to harm. In the court’s view, however, a showing of likely harm to members upon disclosure of their identity was not essential to justify first amendment protection when the inquiring party had not demonstrated a compelling need for the membership data. Grinnell II, 22 Fed. R. Serv. at 488–89; but see Dow, 20 Fed. R. Serv. at 676 n.1 (since the Chamber failed to document the dangers of disclosure, any reasonable interest in disclosure would overcome the speculative harm). The Chamber did contend, of course, that it had demonstrated that disclosure of members’ identities would chill the exercise of their first amendment rights. See Grinnell Brief for the Chamber of Commerce at 12–18; Dow Brief for the Chamber of Commerce at 18–24.
that right and the right to litigate seeking redress of grievances, the court rejected the waiver doctrine as creating an unacceptable forfeiture of one constitutional right in order to exercise another. 284 Moreover, although the trial court continued to regard the Chamber's membership roster as relevant in that it was reasonably calculated to lead to discovery of employers' reactions to the payment of unemployment benefits to strikers, it found that list no longer necessary to the defense of allegations at the very heart of the Chamber's claim. 285 Employing a balancing approach, 286 the court found that the Steelworkers had failed to demonstrate a compelling need for the membership list, because other and nonprivileged sources were available from whom they could obtain the information sought as to employers who had experienced a strike. 287

In National Organization for Women v. Sperry Rand Corp., 288 the court also analyzed the relevancy issue inadequately. The opinion exemplifies the confusion sometimes present in opinions concerning the associational privacy privilege. In this case NOW alleged employment discrimination, suing on behalf of all female and black persons who were past, present or prospective employees of the defendant corporation adversely affected by defendant's alleged practices. Sperry Rand moved to compel disclosure of the full membership list of the plaintiff NOW branch. 289

The court responded with a confused analysis. While it rejected the argument that NOW had "fully" waived its associa-

285 Id. at 486–87, 489.
286 The court held that the fact that the membership lists were sought by a private litigant rather than by the state did not distinguish this case from the typical associational privacy cases. It noted that the state, being a defendant, "presumably would have access" to documents produced in discovery, and indicated that, in any event, there was state action in the enforcement of a discovery order. Grinnell II, 22 Fed. R. Serv. at 487–88 n.5.
287 Grinnell II, 22 Fed. R. Serv. at 489.
289 Id. at 273–74; Memorandum in Opposition to Defendant's Motion to Compel an Answer to an Interrogatory, at 8–9 (on file with author).
tional privacy rights by suing, it opined that plaintiffs' acts of filing an action which might damage defendant's reputation and economic well-being, and seeking a substantial recovery, justified some infringement on the associational privacy rights of NOW's members. Elsewhere the court indicated that it was not embracing an attenuated waiver theory, but rather was weighing plaintiff's first amendment rights against defendant's need for the information sought ostensibly to prepare an adequate defense. At the same time, by arguing that the type of harassment alleged by NOW was substantially different from, and could not be equated with, that which was involved in the seminal associational privacy cases, the court's opinion leaves one in doubt as to whether the court believed NOW had any associational privacy rights to weigh.

The court's attempt to perform a close analysis of the relevance of the membership data sought to the matters put into issue by NOW and by the defendant was also unsatisfactory. It concluded that Sperry Rand was not entitled to information concerning members of NOW who were not alleged to be injured. As to NOW's allegedly injured members, however, it rejected plaintiff's arguments. The court concluded that NOW could go forward with the case only by establishing that some of its members

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290 Defendant had argued that by initiating a class action on behalf of its members, and not for an injury to the chapter as an entity, NOW and its members had waived any privilege. Memorandum of Law in Support of Defendant's Motion to Compel an Answer to Interrogatories at 5–8 (on file with author).

291 NOW, 88 F.R.D. at 275.

292 Id. at 275.

293 Id. at 274–75.

294 Defendant had argued that the only way it could verify and defend against NOW's allegations of discrimination against black and female members of NOW was by determining the identity of those members. Memorandum of Law in Support of Defendant's Motion to Compel an Answer to Interrogatories at 3. Plaintiffs argued to the contrary that the class on whose behalf NOW sued was distinct from (though overlapping with) NOW's membership, that if plaintiffs chose to present a statistical case even the names of class members would not be relevant until after a trial on liability, and that defendant had alternative sources of information in NOW's officers, whom defendant had not questioned. Memorandum in Opposition to Defendant's Motion to Compel an Answer to an Interrogatory at 8–11.
were injured, and therefore it granted defendant's motion to compel answers to an interrogatory seeking the name, sex, race, current address, and occupation of NOW's allegedly injured members.295

Assuming that NOW properly could be compelled to establish its standing prior to any certification of the proposed plaintiff class, the court's discovery order was nonetheless unjustifiably overbroad. At most, the court's reasoning entitled Sperry Rand to discover the identities of a minimal number of NOW members, sufficient to establish NOW's standing to sue. It did not justify wholesale disclosure of NOW's allegedly injured members. Moreover, if a plaintiff class later were certified and Sperry Rand needed to learn the names of blacks and females on whose behalf NOW had sued, those persons could be identified by means which would not also disclose their associational ties to NOW.

The court's analysis was also inadequate in its failure to direct defendant to identified officers of NOW as alternative sources, its failure to consider Sperry Rand's allegedly ulterior motives, and its evaluation of the public and private interests in confidentiality for NOW members.296 The court belittled the retaliation NOW members feared297 and failed to appreciate how

295 NOW, 88 F.R.D. at 274. The court did, however, prohibit defendant's counsel from communicating the information revealed to any other person, including members of the defendant corporation, except upon order of the court. Id. at 275. See infra text accompanying notes 321–40 for a discussion of protective orders. NOW complied with the court's order to produce. Letter from Susan R. Meredith to Joan Steinman (July 28, 1981)(on file with author).

296 There is a public interest both in maintaining the confidentiality of a controversial organization such as NOW, and in deciding discrimination suits on their merits. Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, 657 F.2d 890, 904 (7th Cir. 1981), cert. denied sub nom. Plumbing Contractors Ass'n v. Plummer, 102 S. Ct. 1710 (1982). As stated in NOW's Articles of Incorporation (Article III) and Bylaws (Section 2), its purpose is "to take action to bring women into full participation in the mainstream of society now, exercising all the privileges and responsibilities thereof in truly equal partnership with men." Memorandum of Amicus Curiae NOW in Opposition to Defendant's Motion to Compel at 1. NOW has found it necessary to adopt a firm policy to oppose any attempt to compel disclosure of the names and addresses of its members, because of feared abuse, harassment, and retaliation for their and its activities. Id. at 2.

297 NOW, 88 F.R.D. at 274–75. The alleged retaliation involved removal of
great the potential deterrence of association is when membership in an organization perceived to be hostile can be learned by an employer. 298

Judge Kirkland’s decision in *Alliance to End Repression v. City of Chicago*, 299 is noteworthy for the sensible and thoughtful approach it takes to the relevance issue, as well as for its sensitivity to the dangers which caused the plaintiffs before him to assert an associational privacy privilege against interrogatories propounded to them. In *Alliance* numerous organizations and individuals, including churches, political groups, civil liberties organizations, and community activists, on behalf of certain classes, 300 sued the Chicago Police Department and various city officials. 301 Plaintiffs alleged that defendants had conducted surveillance of, and compiled extensive files on, their lawful political and other activities; had gathered information about plaintiffs by means including unlawful electronic surveillance, unlawful entry and seizure, and unlawful use of infiltrators and

job duties, attempted sabotage of work, denigration of a plaintiff’s character and competence. Plaintiff’s Second Amended Complaint (on file with author).

298 *Cf.* Hickory Firefighters Ass’n v. City of Hickory, N.C., 656 F.2d 917, 924 n.8 (4th Cir. 1981) (“a governmental policy which threatens economic reprisal in the form of job loss has the potential to chill protected first amendment activity in much the same way as does the threat of criminal sanctions”).


300 Among the named plaintiff organizations in *Alliance* were the Chicago Area Unitarian-Universalist Council, the Chicago Committee to Defend the Bill of Rights, the Chicago Peace Council, and Clergy and Laity Concerned.

The classes certified in the *Alliance* case consisted of all residents of the City of Chicago, all organizations located or operating in the City of Chicago, and all other persons physically present within the City of Chicago for regular or irregular periods of time, who engage in or have engaged in lawful political, religious, educational or social activities and who, as a result of these activities, have been within the last five years, are now, or hereafter may be, subjected to or threatened by alleged infiltration, physical or verbal coercion, photographic, electronic, or physical surveillance, summary punishment, harassment, or dossier collection, maintenance, and dissemination by defendants or their agents.

301 Plaintiffs later added as defendants the city of Chicago, the Attorney General of the United States, the Director of the FBI, the Director of the CIA, the Secretary of Defense, other federal officials, the United States Department of Justice, the FBI and the CIA. *See* *Alliance to End Repression v. City of Chicago*, 91 F.R.D. 182, 186 (N.D. Ill. 1981).
informers; had disseminated derogatory information concerning plaintiffs, to their injury; and had harassed, disrupted and assaulted plaintiffs, all as part of a continuing pattern and practice of illegal conduct, the purpose and effect of which was to chill, harass, intimidate and disrupt plaintiffs' exercise of their rights under the first, fourth, fifth, sixth, eighth, ninth and fourteenth amendments to the Constitution and under federal statutes.302

The city defendants posed to the plaintiff organizations interrogatories seeking identification of their members, officers, directors, and employees over a period of years,303 also requesting information as to the dues and contributions paid by members and non-members over several years,304 and the roster of persons attending both open and closed organization meetings over a period of years.305 Defendants asked each individual plaintiff to identify every committee, organization, civic, religious, political or community group of which he or she had been a member over some years; to report any dues or contributions he or she had made to such organizations and any positions of authority held,306 and to disclose any funds plaintiffs had received from any governmental, private, religious, educational, charitable or political group over some years.307 Plaintiffs objected to all these interrogatories as irrelevant, as privileged under the associational privacy privilege, and as unduly burdensome, annoying and oppressive.308

In ruling upon defendants' motion to compel discovery, the district court rejected defendants' argument309 that by voluntarily

303 Interrogatories to Plaintiffs Nos. 1–3 at 1 (on file with author).
304 Interrogatories to Plaintiffs Nos. 7–8 at 2.
305 Interrogatories to Plaintiffs Nos. 9–10 at 2–3.
306 Interrogatories to Plaintiffs, Set. No. 2, Nos. 5–8 at 3–4.
307 Interrogatories to Plaintiffs, Set. No. 2, Nos. 9–11 at 4.
308 Plaintiffs' Objections to Interrogatories at 1–4; Plaintiffs' Objections to Interrogatories, Set No. 2, at 2–3 (on file with author).
309 Memorandum in Support of Defendants' Motion to Compel Discovery at 1–3, 5–6; Reply Brief in Support of Defendants' Motion to Compel Discovery at 2–3 (materials on file with author).
initiating the action plaintiffs had waived their associational privacy privilege, holding instead that *NAACP v. Alabama ex rel. Patterson* governed and protected against disclosure of membership lists absent a compelling state interest. As proposed in this Article, it viewed the question of the relevance of the information sought as logically prior to the associational privacy argument, and disposed of several of the issues raised on this basis. It first held to be irrelevant the identities of the plaintiff organizations’ officers, directors and employees. The court reasoned that in knowing the identity of the individuals and organizations suing, defendants knew the identity of those claiming against them, and that there was no necessity to know the identity of these other persons to explore the issues in the lawsuit or to respond to plaintiffs’ discovery demands. Similarly, names of the members would be irrelevant. The court observed, in particular, that the names were not needed to defend against plaintiffs’ claims of “chill” to their first amendment rights. Even if a rise in membership indicated a lack of “chill,” a proposition the court did not accept, statistical data would suffice. It questioned defendants’ motives, commenting that defendants might not employ civil discovery to further their allegedly unlawful intelligence activities.

The court similarly held the names of persons attending meetings of the plaintiff organizations and the funding information sought by defendants to be irrelevant, denying that such information would demonstrate a “chill” or its absence.

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310 Memorandum Opinion and Order at 1 (on file with author). The court opined that the qualified privilege created by *NAACP v. Alabama ex rel. Patterson* may protect officers, officials and employees as well as members. *See Louisiana ex rel. Gremlillion v. NAACP*, 366 U.S. 293 (1961). It concluded that, in any event, there was no necessity for defendants to know the identity of such persons to explore the issues in the lawsuit. Memorandum Opinion and Order at 1–2.

311 Memorandum Opinion and Order at 2; *see supra* notes and text accompanying notes 132–41.

312 Memorandum Opinion and Order at 2.

313 *Id.* at 2.

314 Memorandum in Support of Defendants’ Motion to Compel Discovery at 4; Memorandum Opinion and Order at 3. While funding information may be indicative of “chill,” the court recognized that an organization’s membership could rise in absolute numbers even while association with it was being chilled, and that
With respect to the interrogatories delivered to individual plaintiffs, the court denied defendants' motion to compel. It was unable to ascertain any relevance to the litigation of this detailed background information, which invaded plaintiffs' privacy. Once again, the court commented that the only end defendants might achieve would be to complete their alleged files on the plaintiffs.\textsuperscript{315}

As is the situation in many cases, the court in \textit{Alliance} did not need to reach every element in the analysis proposed in this Article. Since defendants had failed to show that the information they sought was relevant to specific and important issues in the case, disposition was easy. The court did not need to reach such matters as the possible existence of alternative sources of the information. While the court did not elaborate on the factual basis of plaintiffs' fear of disclosure and consequent infringement upon their freedom of association, the bases were manifest from plaintiffs' complaint.\textsuperscript{316}

V. Implementing the Court's Decision

A district court utilizing the approach outlined in this Article will decide either that the information sought is not sufficiently relevant to warrant an order to compel, or that although it is so relevant it ought not to be produced in deference to a litigant's claim to associational privacy, or that the claimed privilege should be denied. Whichever outcome is reached, corollary issues

\textsuperscript{315} Memorandum Opinion and Order at 4. Indeed, defendants themselves sought to justify these interrogatories, in part, as relevant to checking the accuracy and extent of their surveillance on plaintiffs. Memorandum in Support of Defendants' Motion to Compel Discovery at 5--6.

\textsuperscript{316} See \textit{supra} text accompanying note 302.
will remain. This section of the Article addresses what the consequences should be if the privilege succeeds, whether protections should be afforded to the disclosing party when the claim to a privilege has been rejected, and how courts should determine the appropriate sanctions for failure to respond to the challenged discovery demands after the court has ordered compliance.

A. Consequences of Upholding a Claim of Associational Privilege

When the trial court has upheld a claim of privilege the inquiring party's motion to compel a response obviously should be denied. In addition, the inquiring party should be cautioned against posing questions at a jury trial which the acknowledged privilege would render objectionable and which might give rise to an unwarranted inference adverse to the party invoking the privilege. Similarly, neither the trial judge nor the party who sought the information should be permitted to comment upon the claim of privilege. The party who invoked the privilege should be entitled, upon request, to a jury instruction forbidding any adverse inferences to be drawn against him or her based on the invocation of the privilege. Recognition of an associational

317 The discussion which follows, concerning the proper consequences of successful invocation of the privilege, also applies to defeat of the inquiring party's discovery request on the ground of insufficient relevance.

318 These precautions are espoused in D. Louisell & C. Mueller, 2 Federal Evidence § 239 (1978). They were also adopted in proposed but rejected Rule 513 of the Federal Rules of Evidence, 56 F.R.D. 183, 260–61 (1972); see also Rule 103(c) requiring proceedings to be conducted "to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means” and Rule 104(c) requiring hearings on preliminary matters concerning admissibility of evidence to be conducted outside the hearing of the jury “when the interests of justice require....” Cf. Griffin v. California, 380 U.S. 609, 614 (1965)(adverse comment on failure of defendant to testify violates privilege against self-incrimination); Black v. Sheraton Corp., 564 F.2d 550, 556 (D.C. Cir. 1977)(doubting constitutionality of drawing adverse inference from nondisclosure justified by informer's privilege). But cf. Baxter v. Palmigiano, 425 U.S. 308 (1976)(dictum indicating that the prevailing rule is that the fifth amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them).
privacy privilege should not, however, relieve a litigant of the burden of proof he or she normally must carry. If the decision to assert the privilege results in a litigant's failure to carry his or her burden of persuasion or of going forward with evidence, that failure should have its ordinary consequences. Moreover, because the opposing party would so likely be prejudiced if a last minute decision were made by the "protected" party to use the privileged information at trial, the trial court should disallow such action except in extraordinary circumstances.

B. Consequences of Denying a Claim of Associational Privilege

An objecting party whose claim to an associational privacy privilege has been denied may nonetheless be entitled to judicial protection in the form of a "protective order". Under Rule 26(c), upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect against annoyance, embarrassment, oppression, or undue burden or expense. Many of the considerations supporting a testimonial privilege also support issuance of a protective order. A lesser showing is however required to limit the dissemination of confidential information than to justify its total non-disclosure. A number of the courts

319 See Société Internationale v. Rogers, 357 U.S. 197, 212–13 (1958)(plaintiff may not profit from his inability to produce records, and must still carry ultimate burden of proof); Dellums v. Powell, 566 F.2d 231, 235 (D.C. Cir. 1977)("[H]owever innocent a failure to provide discovery may be, it is fundamental that a party that does not provide discovery cannot profit from its own failure"); Kropp v. Ziebarth, 557 F.2d 142, 147 (8th Cir. 1977); Dorsey v. Academy Moving & Storage, Inc., 423 F.2d 858, 861 (5th Cir. 1970).


321 Although Rule 26(c) lists eight kinds of protective orders that may be made, a court is not limited to the eight specified types of orders. A court may be inventive to achieve the purposes of the rule. 8 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2036, at 269 (1970).

322 See In re Halkin, 598 F.2d 176, 195 n.46, 210–11 (D.C. Cir. 1979). The most common such order limits the persons who may have access to the disclosed information and limits the uses to which these persons may put the information. 8 C. Wright & A. Miller, Federal Practice & Procedure: Civil § 2043, at 300–05
which have rejected claims to an associational privacy privilege have entered protective orders prohibiting the inquiring party from disclosing confidential information after obtaining it from the other party, except for the purpose of defending the lawsuit, and the courts sometimes have limited disclosure to counsel only.

Such protective orders are difficult to enforce and generally offer little solace to the objecting party. A disclosure of names to the inquiring party, even if for theoretically limited purposes, is likely to deter members and supporters of an organization from exercising their rights of association. While a protective order limiting access to attorneys for the inquiring party is preferable, it too is likely to leave those who seek anonymity feeling insecure. They may well not trust opposing counsel to keep the information from his or her clients, particularly since doing so might impede preparation of the opposition’s case or defense.

Protective orders are nonetheless better than nothing, and a litigant whose claim to a privilege has been rejected should seek one. In general a party must make “a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements” to establish that there is “good cause” for


324 NOW, 88 F.R.D. at 275; cf. Southern Methodist Univ. Ass’n of Women Law Students v. Wynne & Jaffe, 599 F.2d 707, 714 (5th Cir. 1979)(limiting information to counsel and two named partners of defendant law firm except by court order). See discussion of this case supra at note 271. In some circumstances, however, a court order prohibiting disclosure of discovered material by a counsel to his client may infringe the client’s right to a fair trial. See In re San Juan Star Co., 662 F.2d 108, 118 (1st Cir. 1981).

325 For example, defendants in UA W, 590 F.2d 1139, attacked the protective order issued there as “vague and inadequate” noting that “[o]nce contributors’ names were revealed under the illusory ‘protections’ provided by the District Court... no form of subsequent judicial vindication on the merits... could restore the contributors’ privacy or defendants’ ability to foster group association for defense of unpopular and dissident employees.” Brief for Defendants-Appellees and in Support of Cross-Appeal at 52 n.74, 54.
granting a protective order.\textsuperscript{326} It may however be difficult for parties to make such a showing of the bases for their fear of a first amendment chilling effect. Harassment and reprisals are often subtle, and it is frequently difficult to prove that a person’s membership or support of an organization was the cause of any mistreatment suffered. People able to testify to having been “chilled” may not be willing to testify; by hypothesis they are fearful of having their associations known.\textsuperscript{327}

In order to avoid imposing an unduly strict and thus unjust proof requirement on litigants asserting threats to associational privacy as the grounds for a protective order, courts should accept a different kind of showing of good cause than is required in cases where the harm sought to be avoided is susceptible of clear and objective proof.\textsuperscript{328} When the targets of specific manifestations of hostility are apparently unwilling to testify or chilling effects are, for other reasons, difficult firmly to establish, the “good cause” requirement should be satisfied by a presumption that the exercise of first amendment rights would likely be chilled if associations which had been kept secret were to be disclosed.

Some courts require more than a showing of “good cause” before they will issue protective orders restricting dissemination of information. The first amendment interests of a discovering party and of the public in obtaining information have in several cases been found to raise the barriers to obtaining such a protec-

\textsuperscript{326} 8 C. Wright & A. Miller, 8 Federal Practice and Procedure: Civil § 2035, at 264–65 and cases there cited (1970); see In re Halkin, 598 F.2d 176, 191 & n.41 (citing cases), 209 & n.38 (citing cases)(D.C. Cir. 1979) (Wilkey, J., dissenting).

\textsuperscript{327} See supra text accompanying notes 154–63.

\textsuperscript{328} Judge Wilkey, dissenting in In re Halkin, 598 F.2d 176, 210 (D.C. Cir. 1979) suggests that “moving parties under Rule 26(c) are not held to any invariable standard of particularity in demonstrating ‘good cause,’ ” but must only “provide the court with information sufficient to enable it meaningfully to balance” the interests of the parties in the litigation. He argues that the kind of showing required will depend upon the type of harm threatened, because some harms are easier to demonstrate than others. Id. at 211. Moreover, greater specificity will be necessary when the type of protective order sought is more burdensome to the opposing litigant. Id. at 210–11. Courts do consider hardship to the nonmoving party when deciding whether to grant a protective order. See generally United States v. Kordel, 397 U.S. 1, 4–5 (1970); accord General Dynamics v. Selb Mfg. Co., 481 F.2d 1204, 1212 (8th Cir. 1973), cert. denied, 414 U.S. 1162 (1974). These views of Judge Wilkey seem to refine but not to be inconsistent with Wright & Miller’s formulation.
tive order. In *In re Harkin* the Court of Appeals for the District of Columbia took the position that for such a protective order to be constitutional, the harm posed by dissemination must be substantial and serious, the restraining order must be narrowly drawn and precise, and there must be no alternative means of protecting the public interest which intrudes less directly on expression.

Even this strict constitutional test will often be met by the litigant asserting a first amendment right of associational privacy. The likely chill to rights of association generated by an unrestricted disclosure of confidential information would probably be deemed substantial and serious harm under *In Re Harkin*. In this context the courts should again recognize that the chilling

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329 598 F.2d 176 (D.C. Cir. 1979).

330 There must be a concrete threat to an important interest. *Id.* at 193. The court refused to further define the requisite likelihood of harm which would justify a protective order, indicating that different categories of discovery documents, in different types of litigation, might require different treatment. *Id.* at 193–94 n.42. In Note, *Rule 26(c) Protective Orders and the First Amendment*, 80 Colum. L. Rev. 1645, 1659–60 (1980), a “substantial likelihood” test is advocated.

of the exercise of first amendment rights is a harm often not susceptible of clear objective proof. A protective order should not be denied simply because a party cannot adduce specific evidence that intimidation or the like will follow disclosure. Furthermore, in balancing the competing first amendment rights at stake courts should recognize that while the public may have some first amendment interest in access to discovery materials, "a judicially-powered process compelling information that has not yet passed through the adversary-judicial filter for testing admissibility does not create communications that deserve full protection." The information revealed may be...prejudicial, or pose an undue invasion of an individual's privacy. Such undigested matter, forced from the mouth of an unwilling deponent, is hardly matter encompassed within a broad public 'right to know.' The strength of the public's interest will vary with the nature of the information and with the timing of the desired disclosure. Given the compelling need which ordinarily must be shown to justify disclosure of information concerning confidential associations, the public's general interest in the free flow of information will rarely outweigh the first amendment interest of the movant to restrict access to theretofore confidential information.

There should moreover be little difficulty in meeting the Halkin court's requirement that the order be drawn narrowly and precisely. Courts usually can determine and describe fairly easily what information needs to be kept from non-litigants and who needs access to information to conduct the litigation. Finally,

332 See infra text accompanying notes 154–63.
333 Cf. In re San Juan Star Co., 662 F.2d at 116 (as the potential harm grows more grave, the necessary likelihood of that harm occurring is reduced).
334 See American Tel. & Tel. Co. v. Grady, 594 F.2d 594, 596 (7th Cir. 1978)(per curiam)(pretrial discovery must be made available to public unless compelling reasons exist for denying access), cert. denied, 440 U.S. 971 (1979).
335 In re San Juan Star Co., 662 F.2d at 115.
336 Id.
337 In re Halkin, 598 F.2d at 187–88, 191; see In re San Juan Star Co., 662 F.2d at 114–15.
338 Indeed, the majority in In re Halkin expressed the opinion that, in general, courts should have no difficulty drafting a narrow order covering only specifically identified materials. 598 F.2d at 194.
in contrast to the situation in *In re Harkin*, where the threatened harm to the movant was prejudice to a fair trial, when the movant's basis for seeking a protective order is associational privacy, his or her interest rarely will be protectable by a less restrictive alternative than an order of non-disclosure. The dissemination of private data, or even its threat, is likely to chill association. Short of refusing to compel disclosure, issuance of a strong protective order is the most effective method of preventing the threatened harm.

C. Appropriate Sanctions

Courts should hesitate to impose the harshest sanctions available in disciplining a party who has failed to respond to a compliance order following the rejection of a claim to an associational privacy privilege. While Rule 37(b) authorizes trial courts to dismiss an action in whole or part, or render judgment by default against the disobedient party, it also makes available less drastic sanctions. Courts may, for example, order that designated facts shall be taken to be established for purposes of the action, refuse to allow the disobedient party to support or oppose designated claims or defenses, or prohibit him or her from introducing designated matters into evidence.

Although dismissal is the sanction courts have employed most frequently in the face of recalcitrance based on the associational privacy privilege, and although such dismissal may, in

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339 The court in *In re Harkin*, 598 F.2d at 195, suggested a number of means of permitting disclosure while still protecting movant's right to a fair trial, such as change of venue, postponement of the trial, searching questioning of prospective jurors, the use of emphatic and clear jury instructions, and sequestration of jurors.


the abstract, be both consistent with the requirements of due process and permissible under Rule 37(b),\footnote{See infra notes and text accompanying notes 354–57.} dismissal rarely will be an appropriate sanction. Rule 37(b)’s overriding prescription is to “make such orders in regard to the failure as are just.” To this end, dismissal and default, the most drastic sanctions authorized by Rule 37,\footnote{E.g., National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976)(per curiam)(referring to dismissal as the most severe sanction); see also Note, The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions, 91 Harv. L. Rev. 1033, 1039 n.44 (1978)(under certain circumstances, “lesser” sanctions can achieve equally harsh results; taking a fact as established or prohibiting a party from contesting or raising an issue may unavoidably lead to dismissal or default).} are to be imposed only in rare circumstances,\footnote{See, e.g., Black Panther Party, 661 F.2d at 1255 ; Edgar v. Slaughter, 548 F.2d 770, 773 (8th Cir. 1977).} not when less drastic measures would be adequate, nor when the prejudice to the discovering litigant from his or her opponent’s failure to respond is not great enough to warrant such a sanction.\footnote{E.g., Hastings, 615 F.2d at 632 (discretion abused in dismissing where that sanction far outstripped any burden attendant upon failure to comply). Cf. Denton v. Mr. Swiss of Missouri, Inc., 564 F.2d 236, 241 (8th Cir. 1977)(affirming dismissal where plaintiff’s noncompliance with discovery demands prevented defendants from adequately preparing for trial).} This cautious approach is dictated not only by the law governing sanctions generally,\footnote{E.g., Black Panther Party, 661 F.2d at 1255; Marshall v. Segona, 621 F.2d 763, 768 & n.10 (5th Cir. 1980)(dismissal should be used only where its deterrent value cannot be substantially achieved by less drastic sanctions); Margoles v. Johns, 587 F.2d 885, 887 (7th Cir. 1978); Wilson v. Volkswagen of America, Inc., 561 F.2d 494, 504–05 & n.25 (4th Cir. 1977). See Note, Standards for Imposition of Discovery Sanctions, 7 Me. L. Rev. 247, 271–72 (1975)(discussing relevance to sanctions of allocation of burden of proof).} but also by the principle of first amendment jurisprudence that the least onerous alternative must be employed when first amendment rights are to be restricted. As stated in Black Panther Party v. Smith: “[S]anctions should be carefully tailored to preserve to the greatest extent possible the First Amendment values at stake.... [D]ismissal should be used only as a last resort.”\footnote{Black Panther Party, 661 F.2d at 1270.}
Rule 37(b)(2) will suffice to cure the prejudice caused by non-disclosure of associational data. Appropriate findings or limited proof-preclusion orders will almost always obviate the need for dismissal. For example, in *International Union, UAW v. National Right to Work Legal Defense and Education Foundation, Inc.*, the district court entered findings of fact pursuant to Rule 37(b)(2)(A) as a sanction for the Foundation's failure to disclose contributor data, as ordered. The court of appeals in no way indicated that this sanction was inadequate.

*Savola v. Webster* is an example of a case in which the dismissal sanction was applied and was unwarranted. Assuming, *arguendo*, that the sought after Communist Party member names were critical to the government's defense and not already in its possession, a fully sufficient sanction would have been an order disallowing the plaintiff from introducing evidence bearing upon the claims of those members whom plaintiffs refused to identify but whom they alleged had been harassed and had had their rights violated.

In rare instances a court may conclude that no sanction less extreme than dismissal or default is adequate fully to cure the prejudice to the opposition. The court should then consider whether either of those sanctions is proper when the litigant's failure to obey derived from his reliance upon asserted first amendment rights. It might determine that imposition of such a sanction would be more unjust than the entry of a somewhat inadequate sanction.

Moreover, it is not clear that dismissal or default are permissible under Rule 37(b) in these circumstances. The Court in *Société Internationale pour Participations Industrielles et Commerciales v. Rogers* held that Rule 37 should be construed to authorize dismissal of a complaint only when failure to comply with a discovery order has been due to willfulness, bad faith or fault of the plaintiff, and not when due to inability to comply.

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351 590 F.2d 1139, 1145-47 (D.C. Cir. 1979).
352 See *supra* text accompanying notes 189-90.
353 644 F.2d 743 (8th Cir. 1981), discussed *supra* at text accompanying notes 235-50.
355 *Id.* at 212
The Court continues to require willful misconduct or bad faith, and lower courts also, of course, purport to require culpability on the part of a noncomplying litigant before they enter, or affirm, a dismissal or default judgment entered as a sanction. Unfortunately, the cases interpreting this standard provide no clear answer to the question whether one who refuses to comply with discovery orders based on good-faith assertion of a first amendment privilege has the requisite motivation, mental state or culpability to fall within the class of litigants vulnerable to dismissal or default. Arguably, at least until the substantive law of associational privacy privileges has been clarified, such a

356 E.g., Roadway Express, Inc. v. Piper, 447 U.S. 752, 765–67 (1980); 4A J. Moore's Federal Practice 37.03[2], at 37–62, 37–78, 37–80 (1981). But see National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 640–641, 643 (1976)(per curiam). The Court reinstated the district court’s dismissal of the plaintiffs’ action. It found that plaintiffs’ failure to answer crucial interrogatories for seventeen months and their consistent failure to file their own motions on time could legitimately be viewed by the district court as “flagrant bad faith” and “callous disregard” of their responsibilities. In light of the extenuating factors which lessened the egregiousness of plaintiffs’ conduct, In re Antitrust Litigation, 531 F.2d 1188, 1193–95 (3d Cir. 1976), National Hockey League has led some commentators to conclude that “dismissal and default are not exceptional sanctions to be reserved for extreme cases of willful non-compliance; rather, they are simply options available to trial judges who must respond to conduct which is culpable yet not so blatantly intentional or one sided as to constitute constructive abandonments.” Note, The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions, 91 Harv. L. Rev. 1033, 1047 (1978).


358 There is authority for the proposition that where the refusal to make discovery is based on a claim of privilege, dismissal should not be used as a sanction. Wehling v. CBS, 608 F.2d 1084, 1087 & n.6–1088 (5th Cir. 1979)(refusal on basis of fifth amendment to answer deposition questions did not justify automatic dismissal, although dismissal might be used as a “remedy” to prevent unfairness to the defendant); accord Campbell v. Gerrans, 592 F.2d 1054, 1057–58 (9th Cir. 1979)(plea based on fifth amendment privilege in discovery could not automatically be characterized a “willful default” justifying dismissal); Backos v. United States, 82 F.R.D. 743, 744–45 (E.D. Mi. 1979); see 4A J. Moore's Federal Practice 37.03[2], at 37–81 & n.8 (1981). However, since under Rule 26(b)(1), privileged matter is not subject to discovery, it follows, a fortiori, that no sanction should be imposed for a failure to produce information held to be privileged.
litigant should not be so drastically penalized for recalcitrance until an appellate court has affirmed the rejection of his or her constitutional claim and the recalcitrance has thereafter persisted.\textsuperscript{359}

\textit{Société Internationale} also suggests a second factor in determining whether dismissal or default is proper where recalcitrance is founded upon the first amendment. The Court there indicated that Rule 37 should be construed so as to avoid raising serious constitutional questions.\textsuperscript{360} Heeding that admonition, a proper construction of Rule 37 arguably should exclude the sanctions of dismissal and default because, in this context, such sanctions do raise serious constitutional questions.

Since dismissal and default are the most drastic sanctions authorized by Rule 37, the courts have long recognized, and still maintain, that due process limits their use.\textsuperscript{361} For example, the Supreme Court made clear early on that a default judgment entered as "mere punishment" is violative of due process.\textsuperscript{362}

\textsuperscript{359} See, e.g., \textit{Savola}, 644 F.2d at 747 (remanding where dismissal of complaint had been predicated in part upon plaintiffs' refusal to answer interrogatories held by the appellate court to be overbroad, and authorizing the district court to dismiss if plaintiffs persisted in their refusal to comply with the court's discovery orders).

\textsuperscript{360} \textit{Société Internationale}, 357 U.S. at 212.

\textsuperscript{361} In \textit{Hovey v. Elliott}, 167 U.S. 409 (1897), the Supreme Court held that due process was denied to a party whose answer was stricken and against whom a decree \textit{pro confesso} was entered, without a hearing on the merits, as punishment for failure to comply with an order to deposit money into the court's registry. \textit{Hammond Packing Co. v. Arkansas}, 212 U.S. 322, 380–81 (1909), while recognizing constitutional limitations upon the power of courts to dismiss actions without a hearing on the merits, distinguished \textit{Hovey}, and held that a default judgment did not violate due process when a defendant failed to comply with an order to produce documents, since the court legitimately presumed that his failure was an admission of a meritless defense.

The constitutional limitations upon sanctions other than default and dismissal remain unclear. It has been argued that the reasoning of the \textit{Hovey}, \textit{Hammond Packing}, and \textit{Société Internationale} cases extends to all sanctions which affect the merits, and that sanctions which foreclose issues not dependent upon the information being withheld are punitive and unconstitutional. 8 C. Wright & A. Miller, Federal Practice and Procedure: Civil \textsection{} 2283–84 (1970); 4A J. Moore's Federal Practice \textsection{} 37.03[2] (1981); \textit{but see Developments in the Law--Discovery}, 74 Harv. L. Rev. 940, 990 (1961).

More recently, in *Société Internationale*, the Court reiterated its view that due process requirements limit courts' authority to dismiss cases. The constitutionality of dismissal and default rests upon a presumption that the refusal to produce evidence demonstrates a lack of merit in the recalcitrant party's position. When non-compliance is predicated upon an asserted first amendment right, dismissal may be unconstitutional because the presumption falters in those circumstances: neither logic nor common experience justifies an inference of lack of merit in the claims or defenses of a party who refuses to comply with discovery orders believed seriously to infringe first amendment rights. Thus, to avoid serious constitutional questions, Rule


36 Id. at 209. The Court stated: “[T]here are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.” _Id._ Accord Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea, 50 U.S.L.W. 4553 (U.S. June 1, 1982); United States v. Sumitomo Marine & Fire Ins. Co., Ltd., 617 F.2d 1365, 1369 (9th Cir. 1980); _In re_ Attorney General, 596 F.2d 58, 66 (2d Cir.), _cert. denied sub nom._ Socialist Workers Party v. Attorney General, 444 U.S. 903 (1979); Wilson v. Volkswagen of America, Inc., 561 F.2d 494, 503–04 (4th Cir. 1977)(default judgment infringed upon party's right to trial by jury and deprived him of his “fair day in court”).

36 Id. at 209. The Court stated: “[T]here are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.” _Id._ Accord Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea, 50 U.S.L.W. 4553 (U.S. June 1, 1982)(“Due process is violated only if the behavior of the defendant will not support the _Hammond Packing_ presumptions.”); _but cf._ Note, *Standards for Imposition of Discovery Sanctions*, 27 Me. L. Rev. 247, 248, 250–59 (1975)(criticizing the use of _Hammond Packing_'s “presumption of lack of merit” test as the measure of a trial court’s constitutional power to enforce the discovery rules, because it is often difficult to ascertain whether a party's failure to comply supports the presumption).

36 See _Société Internationale_, 357 U.S. 197, 210 (1958)(discussing _Hammond Packing_, and indicating that its presumption “might well falter” where non-compliance is attributable to inability to comply, despite good-faith efforts).
37(b) should not be interpreted to authorize dismissal and default as sanctions when non-compliance has been predicated upon asserted first amendment rights.

As a practical matter, these arguments imply that an appellate court reviewing the dismissal or default judgment entered as a sanction\(^\text{367}\) ought never simply to affirm. If it holds that the claim of constitutional privilege was correctly rejected and that the underlying order to compel was properly entered, it should address whether the dismissal or default was warranted.\(^\text{368}\) If the court accepts the argument made immediately above it will

According to Tot v. United States, 319 U.S. 463, 467-68 (1943), in order to satisfy due process, a judicial presumption must be based on a rational connection between the proven fact and the presumed fact, and the connection must have a basis in common experience.

A litigant can obtain prompt appellate review of the trial court’s rejection of his or her associational privacy claim only when the trial court has ordered dismissal or default or held the non-complying party in criminal contempt for non-compliance. Those are appealable orders. Orders of other sanctions are interlocutory and will promptly be reviewed on appeal only in rare circumstances under the Interlocutory Appeals Act of 1958, 28 U.S.C. § 1292(b), or upon petition for writ of mandamus. See, e.g., Dow, 519 F.2d 352, 354-55 (order requiring plaintiff to answer interrogatory requesting names of Chamber of Commerce member firms was not appealable final decision); accord Grinnell Corp. v. Hackett, 519 F.2d 595 (1st Cir. 1975), cert. denied, 423 U.S. 1033 (1975). But see Southern Methodist Univ. Ass’n of Women Law Students v. Wynne & Jaffe, 599 F.2d 707, 711-12 (5th Cir. 1979)(order requiring disclosure of association membership was appealable under collateral order doctrine); In re Attorney General, 596 F.2d 58 (2d Cir. 1979)(contempt order against Attorney General not appealable, but was reviewable under mandamus). See generally 8 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2006 (1970); 4 J. Moore’s Federal Practice 26.83[7]-[9] (1981); Note, Standards for Imposition of Discovery Sanctions, 27 Me. L. Rev. 247, 275-76 (1975).

\(^368\) When a sanction for failure to comply with discovery orders is reviewed on appeal, the standard of review is abuse of discretion. National Hockey League, 427 U.S. 639, 642. Courts have interpreted this standard in a variety of ways, affecting the scope of review. Note, The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions, 91 Harv. L. Rev. 1033, 1046 n.82 (1978). Since the validity of the sanctions depends, in the first instance, on the validity of the discovery orders on which they were based, appellate courts also review the propriety of those underlying orders. See, e.g., Black Panther Party, 661 F.2d at 1255; Savola, 644 F.2d 743 (8th Cir. 1981); Hastings, 615 F.2d at 631; see generally 8 C. Wright & A. Miller, Federal Practice and Procedure: Civil §§ 2006, 2289 (1970).
necessarily reduce the sanction or remand for the trial court to fashion lesser sanctions. Otherwise, the court should consider such factors as the degree of prejudice to the inquiring party resulting from appellant’s failure to provide the information, and whether lesser sanctions would suffice. The court should also take into account the public interest in permitting a trial on the merits of the action to proceed. The degree of public interest would depend on such matters as the nature and importance of the cause of action,\textsuperscript{369} the time and resources invested in the litigation by the parties and the court,\textsuperscript{370} and the degree of culpable behavior by the discovering party in its conduct of, and responsiveness to, discovery.\textsuperscript{371} If the appellate court holds dismissal or default to be a proper sanction it should remand the case to permit the non-complying party a final opportunity to comply, now that he or she has received a more authoritative rejection of the claim to a constitutional privilege. If the objecting party continues to refuse compliance, a new order of dismissal or default judgment could be entered which would rarely, if ever, be disturbed by the appellate court.

Conclusion

Freedom of association is cherished as among our most precious freedoms because it enhances our ability effectively to exercise our freedoms of speech, assembly, and petition. While the right of associational privacy does sometimes yield to compelling interests, it is nonetheless a vital bulwark against governmental intrusion into political and other activities. To maintain

\textsuperscript{369} See e.g., Eggleston v. Chicago Journeymen Plumbers’ Local Union No. 130, 657 F.2d 890, 904 (7th Cir. 1981), cert. denied sub nom. Plumbing Contractors Ass’n v. Plummer, 102 S. Ct. 1710 (1982)(reversing dismissal of civil rights suit for failure of plaintiffs to comply with discovery, saying: “If there is any merit to the charges of discrimination against minorities... the dismissal sanction rests too heavily upon the public”).


\textsuperscript{371} Id.; see, e.g., Eggleston, 657 F.2d at 904 (“we are lifting the particular sanctions applied to plaintiffs because the general deterioration cannot be attributed solely to plaintiffs...we consider it an abuse of discretion to have tried to cure abuse on both sides by denying plaintiffs all opportunity for relief”).
that bulwark, the judiciary must subject disclosure demands to
exacting scrutiny whenever the loss of anonymity might deter the
exercise of associational rights.

The first amendment right of associational privacy is as
threatened by disclosure compelled through court-ordered civil
discovery as it is by other governmentally compelled disclosure.
Consequently, it is essential that courts recognize an associational
privacy privilege of the kind elaborated in this Article.

This Article has advocated recognition of a qualified
privilege available to plaintiffs as well as to defendants, and in
civil litigation wholly between private litigants as well as in litiga-
tion to which the government is a party. Whenever discovery is
sought which threatens associational rights, courts should make a
careful initial determination as to whether the information sought
is vital to proper disposition of the case. If it is, the courts should
engage in a painstaking balancing analysis to evaluate the inquir-
ing party’s need for the information sought as against the objec-
ting party’s need to keep the information confidential, also keep-
ing in view the public interest in confidentiality, and the public in-
terest in the litigation. Disclosure should be ordered only when
the inquiring party demonstrates a compelling interest in obtaining
the information sought, which outweighs both the public and
the private interests in confidentiality. Compelled disclosure
should be denied when the information ultimately sought can be
obtained from an alternative source, and it should be limited
when the inquiring party’s need can be met by a less intrusive re-
quest. When the privilege is asserted unsuccessfully, the first
amendment as well as due process and Rule 37 require that courts
impose the least burdensome sanction consistent with protection
of the inquiring litigant.

As discovery requests which threaten first amendment values
continue to confront the courts, this Article may help to guide
litigants and courts to a proper resolution of the issues posed.
Heightened sensitivity of the judiciary to the first amendment
values at stake should enable prospective litigants to assert their
claims and defenses less deterred by concern that surrender of
their privacy of association will be demanded as the price for
their day in court.