SECRECY BY CONSENT: THE USE AND LIMITS OF CONFIDENTIALITY IN THE PURSUIT OF SETTLEMENT

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Introduction
Consensual secrecy pervades virtually every phase of modern civil litigation. At
the inception of many civil lawsuits, parties stipulate to "umbrella" protective
orders that restrict the dissemination of confidential discovery and require its
return or destruction upon resolution of the controversy. [FN1] Litigants
sometimes further agree that documents, exhibits, pleadings, and even court
transcripts be filed under seal with the court. [FN2] Settlements are often
conditioned upon confidentiality agreements and orders that prohibit disclosure of
the terms and amount of the compromise or the facts upon which they are
Premised. [FN3] Even court decisions and jury verdicts have been erased from the public record by stipulation of parties who belatedly resolve their dispute after trial, often during the pendency of an appeal. [FN4]

*286 Courts sanction these confidentiality agreements in order to promote the private settlement of disputes—a long-established public policy aimed at preserving the autonomy of litigants to resolve their own disputes as they wish and at conserving both public and private resources by avoiding trial. [FN5] Shifts in the American procedural landscape and in our overall vision of civil litigation, however, have called these rationales into question and have suggested that, at least in some cases, party autonomy and the preference for settlement should yield to some greater interest supporting public access.

In this Article, I explore these issues by examining the appropriate uses and limits of confidentiality in the pursuit of the settlement in civil litigation. [FN6] I reject the "one size fits all" approach to litigation confidentiality that has been adopted by many courts and commentators and analyze instead the distinct issues of public access that surround stipulated protective orders governing discovery, the sealing of judicial records, and confidential settlements. To address these issues, I suggest a balancing approach that uses as its measure the principal objectives of the right of public access to judicial proceedings. Under this approach, the importance of party autonomy and the strong preference for settlement both vary according to the role that the confidential materials play in the principal adjudicative function of the courts.

*287 Part I of the Article surveys the shift in our procedural landscape and examines the conflicting visions of civil litigation that have resulted from that movement. Trial on the merits no longer holds center stage for lawyers who currently spend the great majority of their time engaging in pretrial activities such as discovery and motion practice. The norm of a public trial is giving way to the norm of private settlement, with almost two-thirds of all filed federal civil cases terminating by pretrial agreement of the parties. [FN7] These changes in orientation—from trial to litigation; from adjudication to settlement—have heightened the existing tension between the traditional party-centered view of civil litigation as a public service for private dispute resolution and the often conflicting perception of courts as "institutions expressive of and accountable to the public." [FN8]

Part II then assesses how this broad systemic tension contributes to the more particular controversy over secrecy agreements and agreed confidentiality orders. In that section, I examine the increasingly heated debate over whether there is an "excess of court secrecy in civil litigation" that undercuts the tradition of public access to judicial proceedings or jeopardizes public health and safety. [FN9] In that connection, I canvass various judicial and legislative proposals aimed at limiting the discretion of judges and parties alike to enter into or approve secrecy agreements at virtually every phase of the litigation process.

The Article then studies the public access issues that particularly arise at the various stages of litigation where agreed confidentiality is frequently utilized. Part III sets the stage by inspecting the rationales that traditionally support public access to judicial proceedings and *288 records. Part IV critiques the applicability
of these rationales to unfiled confidential discovery and analyzes the private and public considerations relevant to the entry and modification of stipulated protective orders. Part V examines how public access analysis might vary with the filing of confidential discovery and suggests a functional approach to the sealing of judicial records. Finally, Part VI explores judicial oversight of confidential settlements—an arena in which stipulated protective orders and sealing orders frequently converge.

I. A Shifting Procedural Landscape and Conflicting Visions of Civil Litigation

A. From Trial to Litigation; From Adjudication to Settlement

Although popular perception views the public trial as the centerpiece of our justice system, trial-on-the-merits increasingly represents a rare and atypical resolution of the majority of civil lawsuits filed in this country. [FN10] In federal court alone, the proportion of filed to tried cases has declined by four-fifths over the last fifty years, with only approximately four percent of all filed civil cases now resulting in a trial. [FN11] Indeed, a civil litigator today devotes less than ten percent of her time to trials, hearings, appeals, and judgment enforcement. [FN12] As recently noted by Professor Stephen Yeazell, lawyers and courts alike now focus on "events that occur instead of trial and which typically head off trial," [FN13] including discovery, pretrial motions, and settlement negotiations. The last half century, Professor Yeazell concludes, has witnessed "the displacement of trial as the culmination of civil litigation" *289 and the investiture of pretrial activities as "a fundamental characteristic of modern process." [FN14] This shift from trial to pretrial litigation has brought about a corresponding decline in adjudications on the merits and a dramatic rise in settlement. [FN15] Only one-third of all federal civil cases end after some form of merits determination—eleven percent by trial and the remainder by pretrial adjudication such as motions to dismiss or motions for summary judgment. [FN16] The remaining two-thirds of all filed cases settle without any "definitive judicial ruling." [FN17] These figures represent more than a doubling of the settlement rate over the last half decade. [FN18] In short, civil process in this country is increasingly diverting time and resources away from trial and adjudication toward pretrial activities and settlement.

B. Conflicting Visions

This evolution in modern process has created some wrenching tensions in our vision of the civil justice system, tensions which contribute to and inform the current debate over litigation confidentiality. For instance, the value one places upon settlement as opposed to adjudication directly correlates with one's willingness to sanction secrecy as a method of achieving compromise. How one views the primary role of the courts further fuels the secrecy debate, for if the primary function of the judiciary is dispute resolution, then courts should readily accede to the parties' mutual desire for confidentiality if it serves that purpose. On the other hand, one would expect a certain amount of suspicion toward stipulated secrecy if one conceives of courts as accountable to and guardians of a broader public interest. Finally, the question of who owns a lawsuit and its
resolution--the parties or the public--significantly influences one's stance toward *290 stipulated secrecy. In order to fully understand (and potentially resolve) the confidentiality controversy, then, one must have a broader understanding of these competing systemic visions.

1. Settlement Versus Adjudication

a. Public Policy Favoring and Judicial Promotion of Settlement

The expense, risk, and delay that frequently attend formal adjudication in the American legal system explain, at least in part, the party preference for and rising incidence of settlement. [FN19] A strong and well-established public policy favoring the private settlement of disputes, however, also contributes to the decline of trial and the ascendancy of settlement. [FN20] This public policy appears deeply embedded in, and actively encouraged by, our civil justice system, which has, as its primary objective, "the just, speedy, and inexpensive determination of every action." [FN21] Our procedural rules thus promote private settlement from the outset of a civil lawsuit through its appeal. Federal Rule of Civil Procedure 16, for example, recognizes facilitation of settlement as an objective of the pretrial conference, [FN22] and expressly authorizes a trial court to convene a settlement conference at any appropriate time and "at as early a stage of the litigation as possible." [FN23] Federal Rule of Civil Procedure 26(f) further directs the parties to meet "as soon as practicable" to discuss, among other *291 things, "the possibilities for a prompt settlement or resolution of the case." [FN24] Up until ten days before trial, a defending party can make an offer of judgment under Federal Rule of Civil Procedure 68, the "plain purpose" of which "is to encourage settlement and avoid litigation." [FN25] Our procedural rules even facilitate post-trial settlement by now authorizing appellate courts to order the parties to address the "possibility of settlement" at appeal conferences and to enter any order necessary for "implementing any settlement agreement." [FN26] The push for settlement similarly manifests itself in our evidentiary rules, [FN27] in federal legislation like the Civil Justice Reform Act, [FN28] and in *292 Supreme Court decisions. [FN29] These procedural rules and innovations, together with a court's inherent authority to manage its own affairs, [FN30] have intensified judicial efforts to actively promote the private settlement of disputes. [FN31]

b. The Current Debate and the Push to Regulate Settlement

Over the last decade, legal scholars have vigorously debated the value of settlement in lieu of adjudication [FN32] and the propriety of judicial promotion of settlement. [FN33] Defenders of settlement argue that it *293 produces significant institutional benefits in addition to benefiting the immediate parties. [FN34] Settlement, it is contended, conserves scarce judicial resources and relieves a court's crowded dockets--weighty objectives in a world characterized by too few judges, too many lawyers, and an overflow of disputes. [FN35] Settlement arguably spares the litigants the time, expense, and, perhaps most importantly, the risk of an unpredictable adjudication. [FN36] Moreover, many view settlement as qualitatively better than adjudication because settlement
permits a more satisfying and lasting resolution of a controversy. [FN37] Others strongly criticize the current celebration of settlement and the resulting decline in adjudication. [FN38] In his seminal article Against Settlement, for example, Professor Owen Fiss rails against settlement as an inadequate substitute for adjudication and "a capitulation to the conditions of mass society [that] . . . should be neither encouraged nor praised." [FN39] More recent critics of the settlement movement question the supposed benefits of settlement over adjudication, *294 pointing to the lack of empirical evidence demonstrating either that settlement reduces the cost, time, and aggravation of litigation or that settlement produces any superior outcome. [FN40] Of particular relevance to the confidentiality controversy is the more fundamental criticism that settlement fails to produce the "public goods" created by adjudication. [FN41] According to Professor David Luban, these public goods include the development of precedent that binds nonparties and guides future conduct, [FN42] the honing of advocacy and case assessment skills, [FN43] the discovery and dissemination of facts, [FN44] and the enhancement of a court's adjudicative authority. [FN45] At the same time, he insists that adjudication avoids the "public bads" of settlement by making it impossible or very difficult to pass on the burdens of a compromise to unrepresented third parties. [FN46] Even the staunchest defenders of adjudication, however, today grudgingly acknowledge that settlement will remain a permanent fixture of the litigation landscape. [FN47] Instead of advocating the abandonment or curtailment of settlement, then, they seek to police or regulate the settlement process to promote settlements that achieve at least some of the public goods created by adjudication and to avoid settlements that defeat those public values. [FN48] In short, the argument has shifted away from one either "for" or "against" settlement to one *295 focused upon the appropriate regulation, if any, of settlements--"when, how, and under what circumstances should cases be settled?" [FN49] As discussed below, the controversy over litigation confidentiality figures prominently in this developing "jurisprudence of settlement." [FN50]

2. The Judicial Function

Whether one values settlement over adjudication or vice versa ultimately reflects how one imagines the role of the courts and our legal system. Professor Luban characterizes the current competition as one between a "problem solving" and a "public life" conception of the judicial role. [FN51] The first regards dispute resolution as the primary mission of the courts, which exist in order to resolve the particular dispute before them according to the substantive law. [FN52] Under that traditional viewpoint, courts function as neutral and authoritative arbiters to assist litigants in resolving their private disputes. [FN53] *296 In contrast, proponents of a public life conception regard courts as playing a role beyond the resolution of the immediate dispute and independent of the particular litigants before them. Adjudication, the traditional charge of the courts, functions as a vehicle for public discourse, for the explication of public values, and for the refinement or improvement of the law. [FN54] Moreover, as publicly funded institutions, courts are accountable to and guardians of a broader public interest. [FN55] As described by Professor Judith Resnik, this alternative vision
thus regards courts as instruments of the public, of judges as guardians of the public, and of the public as having an interest in adjudication beyond its function of concluding disputes of the parties or across a series of disputes over time. Courts are not "servants" of the parties; courts have an independence from the parties, not only as the voices of other parties' interests, but as institutions expressive of and accountable to the public. [FN56]

This tension concerning the appropriate judicial role informs the controversy concerning public access and litigation secrecy. As discussed further below, proponents of a problem-solving conception of litigation, like Professors Arthur Miller and Richard Marcus, oppose any attempt to supplant the primary dispute-resolving role of the courts with what traditionally have been mere "collateral effects" of litigation such as information generation and dissemination. [FN57] In contrast, and as Professor Marcus has acknowledged, a public life conception of our judicial process inevitably points to an "expansive attitude toward the publicness of all aspects of litigation." [FN58]

3. Party Autonomy, Court Control, and the Public Interest--Whose Settlement Is It?

Both the controversy concerning the value of settlement and the friction concerning the judicial function create the almost schizophrenic "public versus private" character of civil litigation today. Indeed, many of the current conflicts in modern process, including litigation confidentiality, turn on a sense of ultimate ownership of a civil dispute and all its accouterments--its pleadings, its discovery, its precedent, and, of importance to this Article, its settlement. [FN59] This inquiry pits the value our system traditionally places upon party autonomy against the trend toward active judicial management and the recognition that some disputes reach beyond the particular litigants.

The importance our procedural system traditionally places upon party autonomy explains, in large part, the preference for settlement over adjudication. [FN60] As designed, the civil justice system purports to resolve disputes with the minimum possible amount of judicial involvement or interference. [FN61] To the extent possible, the parties themselves are responsible for the investigation, initiation, conduct, and resolution of their lawsuit, a significant portion of which now takes place outside the purview of judicial review. [FN62] The parties are the persons *298 who will bear the risk and expense of adjudication and who will most keenly feel the effect of any judgment if compromise cannot be reached. Such a party-initiated, party-centered, and party-controlled [FN63] system regards litigant autonomy as a value in itself and "installs preferences of the parties as the best measure of fairness available." [FN64] Under this viewpoint, the parties "own" their dispute and should be permitted to dispose of it in any mutually agreeable manner. [FN65]

Several procedural innovations, however, have begun to erode our traditional commitment to party autonomy and the proprietary nature of a lawsuit. As Professor Resnik points out, the increase in "managerial judging" and the trend toward case aggregation subordinate individual interests in and control over a lawsuit in favor of some broader public interest. [FN66] Thus, while some recent
amendments of the Federal Rules reinforce litigant autonomy, others encourage judges to assume tighter control over their dockets at a much earlier stage in the process. [FN67] Burgeoning multidistrict litigation and consolidation of related cases further reflect a desire to consistently and efficiently address related problems in one lawsuit, often at the expense of litigant autonomy. [FN68] *299 This erosion of party autonomy contributes to a contrasting vision of civil litigation as a public good. From this perspective, all adjudication has public significance and a dispute will lose its private character once a litigant resorts to the publicly subsidized court system for its resolution. [FN69] The focus in settlement accordingly shifts away from the individual litigants to "actors who are not parties to the dispute at hand." [FN70] Because a case or controversy may have profound ramifications beyond the immediate parties or a particular court, the quality of its resolution should be gauged according to its effect upon others. [FN71] Thus, third parties and even the general public might have "ownership" interests in a particular lawsuit, as well as its resolution. The lingering dilemma is determining when these nonparty interests exist, how they can be raised, and how, if at all, they can be balanced against our traditional preference for litigant autonomy. [FN72] Nowhere is the need to accommodate these competing interests more pressing than in the current debate concerning litigation confidentiality.

II. The Confidentiality Debate

The conflicting visions of our civil justice system described in Part I fuel the current controversy concerning the appropriate use and limits of confidentiality in conducting and settling civil lawsuits. That often heated debate, [FN73] while previously focused upon protective orders governing discovery, now extends to the sealing of judicial records and proceedings, as well as to the entry into and judicial approval of confidential settlements. [FN74] The current controversy germinates with a dispute over the very existence of any improper excess of court secrecy, grows into a disagreement regarding the propriety of confidentiality and the need for public access to civil litigation, and eventually blooms into a quarrel over the most effective method of curbing perceived confidentiality abuses.

A. Is There An Excess of Secrecy in Our Courts?

Many judges, legislators, and lawyers decry what they perceive as a worrisome excess of confidentiality orders and secrecy agreements in civil litigation. [FN75] Often citing high profile product liability or toxic tort cases, these proponents of increased public access argue that protective, sealing, and confidentiality orders prevent dissemination of vital information relevant to public health and safety. Stipulated protective orders and settlement gag orders in cases involving silicone *301 breast implants, the Shiley heart valve, the antidepression drug Prozac, toxic shock syndrome, and the fungicide Benlate, to name just a few, have spurred attempts to restrict such orders and facilitate public access to the often voluminous discovery and pleadings underlying the confidential settlement of these cases. [FN76]
These efforts to increase public access to virtually all phases of civil litigation (at least in some cases) have been met with strident opposition. Defenders of the status quo accuse "reformers" of making empirically unsubstantiated and exaggerated claims concerning the incidence and dangers of secrecy orders. Professor Arthur Miller, for example, dismisses the claim that sealing orders endanger the public as based upon anecdotal evidence of "questionable content" and "nonexistent" research and statistical data. [FN77] Professor Miller and others further criticize as myopic the reform movement's focus upon product liability cases, which arguably overlooks the number of non-personal injury suits in which secrecy orders are legitimately entered to protect confidential trade secrets or individual privacy. [FN78]

The paucity of empirical evidence in this area makes it difficult to assess the existence or extent of any secrecy crisis that may be plaguing our courts. The Federal Judicial Center (FJC), however, recently conducted a study concerning the extent of protective order activity during a three year period in three judicial districts. [FN79] That study does not support claims that federal district courts have perfunctorily acceded to a plethora of stipulated requests for discovery protective orders or that such orders create significant hazards to public health and safety. Instead, stipulated protective orders accounted for only twenty-six percent of the protective orders entered in the districts studied, and approximately one-half of all motions for protective orders were contested. [FN80] Moreover, protective orders were sought in only about five to ten percent of all civil cases, [FN81] most of which were civil rights and contract cases, [FN82] and approximately sixty percent of the orders were partially or wholly denied. [FN83]

The limited scope of the FJC study should make one cautious in drawing any firm conclusions from its data, however. [FN84] One could further question whether an empirical study of federal protective order activity presents a complete portrait of the extent of such activity in state courts. [FN85] Moreover, the FJC study carefully limited its parameters to protective orders governing the use or dissemination of materials generated through discovery. It thus did not encompass the filing of such discovery with the court, the sealing of judicial records, or confidentiality orders regarding settlements. [FN86]

In short, the few and limited empirical studies in this area make it difficult to confirm or deny the existence of any excess of secrecy in civil litigation today. As judicial attention increasingly focuses upon pretrial activity and settlement, however, and as the public trial gives way to private compromise, the debate concerning litigation confidentiality will likely continue and intensify. [FN87]

B. Conflicting Visions: Confidentiality Debate

At the risk of over-generalizing the various positions involved in this multifaceted discussion, the debate over litigation confidentiality can generally be divided into two camps. On one side are those who oppose any attempt to increase public access to litigation-generated information or to further restrict trial court discretion in this area. These "confidentiality proponents," as I will call them, highly value the use of confidentiality in the settlement of civil litigation and believe that trial
court discretion, as it currently exists, can adequately accommodate the competing interests that arise when secrecy issues emerge during the course of a lawsuit. [FN88] On the other side of the debate are those who advocate increased public access to materials generated by the litigation process. These "public access advocates" seek to restrict trial courts' discretion to enter secrecy orders, and some even argue for restricting the ability of the parties themselves to privately negotiate confidentiality agreements. [FN89] As discussed below, the various arguments made by both confidentiality proponents and public access advocates reflect the broader systemic debates concerning the value of settlement, the proper judicial function, and the importance of party autonomy.

1. The Value of Settlement
Confidentiality proponents generally choose settlement over adjudication in the "settlement versus adjudication" debate. Confidentiality, they argue, conserves scarce party and judicial resources by fostering the cooperative exchange of discovery and by minimizing judicial involvement. [FN90] Confidentiality likewise facilitates, and indeed makes possible, the final compromise of many disputes. [FN91] Any reduction in the availability or reliability of secrecy orders, it is argued, will jeopardize these savings by making litigants reluctant to voluntarily disclose confidential or private information through discovery, to settle high profile cases where the chances of liability are slim or non-existent, or to establish any sort of benchmark for the settlement of future related claims. [FN92] In sum, confidentiality proponents believe that restrictions on litigation secrecy will significantly impede the settlement process and unduly burden an already oversubscribed judicial system.

Public access advocates, in contrast, question how critical confidentiality really is to the compromise of most cases when trial represents a lengthy, expensive, and risky alternative. [FN93] They dismiss cost and delay arguments as mere "housekeeping" or efficiency concerns that should not overshadow the public benefits that flow from open judicial proceedings. Increased public access to settlements and their underlying information, it is said, fosters the public debate previously associated with adjudication and that is altogether lacking when cases are secretly settled. [FN94] Moreover, restricting secrecy orders promotes the efficient resolution of related litigation by permitting collaboration among litigants and the sharing of discovery--fostering systemic efficiency. [FN95] Arguments for increased public access, then, rest on a vision of the judicial system that is broader than the individual lawsuit and that seeks to import the values of adjudication into settlement.

2. The Judicial Function
Confidentiality proponents tend to regard dispute resolution as the principal function of the civil courts, with the judge acting as neutral arbiter or adjudicator who decides cases according to the substantive law. Unlike the executive or legislative branches of government, civil courts should not primarily aim to represent the general public interest, to formulate major social policy, or to protect public health and safety. [FN96] Instead, confidentiality proponents like Professors Marcus and Miller deem these "collateral" or "side" effects of
litigation that should not override the fundamental problem-solving role of the courts. [FN97]
Confidentiality proponents thus criticize efforts to enhance public access to pretrial discovery and civil settlements as improper attempts to transform the court into an advocate (either of the general public interest or of existing or future plaintiffs) or an information clearinghouse. [FN98] Such a transformation arguably motivates litigants to utilize the court system for purposes other than resolution of the case at hand—whether to exploit discovery for use in other cases, to force a settlement, to circumvent the regulatory process, or to drum up publicity and foment future litigation. [FN99] In so doing, confidentiality proponents contend, mere "side effects" of litigation take precedence over the primary judicial function—the tail wags the dog, so to speak.
Not surprisingly, public access advocates rely heavily upon a contrasting public life conception of the judicial system to support reforms aimed at reducing the level of secrecy in the courts. They argue that courts are publicly funded government institutions that serve interests broader than those of the immediate parties. Courts thus play a role beyond the resolution of the case at hand by explicating public values and protecting public interests. [FN100] As representatives and guardians of the general public, courts should thus oppose even consensual attempts by litigants to shield information or documents that are of public interest or that are relevant to public health and safety. [FN101] According to public access advocates, however, courts currently do not adequately consider the public interest in approving stipulated protective orders, sealing orders, or confidential settlements. [FN102] They thus support reforms aimed at restricting the issuance or facilitating the modification or vacatur of such secrecy orders. In such a way, similarly situated plaintiffs, future consumers and victims, regulatory agencies, and the media might gain timely access to otherwise unavailable information concerning a defendant's wrongdoing, a product defect, or any other type of public hazard. [FN103]

*308 3. Party Autonomy
Perhaps the least controversial use of confidentiality to preserve party autonomy occurs when courts issue secrecy orders in order to protect a litigant's privacy or property interests. Stipulated secrecy orders thus engender little debate when used to protect intimate personal information, trade secrets, or proprietary confidential business information. Controversy does occur, however, in determining when those interests exist, what interests other than privacy or property merit confidentiality, and how those arguably lesser interests in secrecy should be balanced when pitted against the public's interest or desire for increased public access. Positions frequently divide on these more difficult questions based upon the value given to litigant autonomy and the parties' mutual desire for settlement.
Confidentiality proponents highly value litigant autonomy and the ability of parties to dispose of "their" private dispute in any manner as long as they consent. This includes utilizing as much secrecy as they mutually deem necessary to achieve settlement. [FN104] Confidentiality proponents express the fear that unless parties can rely upon stipulated secrecy agreements and orders, they may opt
out of the public court system in favor of private dispute resolution or abandon
the litigation altogether. [FN105]
In contrast, public access advocates often assume a public ownership stance
toward civil litigation. Once a matter has been brought before the courts for
resolution, it is argued, it no longer belongs solely to the parties. Instead, the
public, which creates and heavily subsidizes the courts, [FN106] has an interest
in observing their operation to *309 ensure their proper functioning. Increased
public access to pretrial matters and settlements, the bread and butter of civil
courts today, enhances the opportunity to view the courts in action and to hold
them publicly accountable. In the process, public confidence in its court system is
couraged. [FN107]

C. Fallout from the Debate
The confidentiality debate has prompted varying responses from commentators,
courts, and legislatures. One reaction argues for the continued maintenance of
the status quo, which deposits confidentiality issues in the discretionary and
largely unreviewable hands of the trial court. A counter-response presumes that
courts are ill-equipped, over-worked, or too self-interested to perform the
necessary balancing of public and private interests, and thus supports legislative
curbs on litigation confidentiality. Finally, some courts, disturbed by their
previously cavalier approach to confidentiality, have self-imposed flexible, but
articulated, limits on the issuance or modification of secrecy orders. [FN108]

*310 1. Status Quo: Judicial Flexibility and Discretion
Most confidentiality proponents place great stock in a trial court’s discretion to
flexibly fashion secrecy orders on a case-by-case and issue-by-issue basis.
[FN109] They would thus leave the issue of discovery confidentiality to the
flexible and undefined "good cause" rubric of Federal Rule 26(c). [FN110] permit
sealing of judicial records if the interests in confidentiality outweigh a rebuttable
presumption of public access, [FN111] and leave settlements, at least to the
extent that they are consummated without the prodding or imprimatur of the trial
court, largely to the private dictates of the parties. [FN112] Existing practice, it is
argued, already allows a trial court to consider potential public and nonparty
interests when deciding to issue or modify a secrecy order. Any attempt to limit
further or to channel judicial discretion would jeopardize the intricate balancing of
interests that judges evaluate best and would restrict the necessary flexibility to
fashion appropriate secrecy orders in individual cases. [FN113]

2. Sunshine Statutes and Rules
In contrast, advocates of legislative reform question whether courts do or can
undertake the necessary balancing of public interests and policy that should
come into play in resolving confidentiality issues. [FN114] A court’s self-interest in
clearing its docket, its reluctance to *311 disturb the parties’ mutual resolution of
a controversy, and the current emphasis on settlement arguably reduce the
likelihood that a court will actually consider nonparty interests or the benefits of
public access in deciding whether to issue or modify a secrecy order. [FN115]
This distrust of unbridled judicial discretion motivated a push for legislative
"sunshine" reforms that began sweeping federal and state legislatures in the early to mid-1990's. [FN116] While all federal and most state attempts to enact such antisecrecy legislation ultimately failed, [FN117] a handful of states have enacted some type of open records law governing their courts. Texas, which has enacted the broadest of these sunshine reforms, illustrates the legislative approach to the secrecy crisis. [FN118] Texas Rule of Civil Procedure 76(a) creates a presumption of public access to "court records," which, in addition to documents filed of record, are defined to include unfiled settlement agreements and unfiled pretrial discovery that "have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government." [FN119] These broadly defined court records may not be sealed unless the party seeking the secrecy order establishes (1) a "specific, serious, and substantial interest which clearly outweighs" a presumption of public access and any adverse impact on public health or safety, and (2) the absence of any less restrictive alternative than sealing. [FN120] The Texas Rule thus covers the gamut of secrecy orders, from discovery, to judicial records, to settlements. It further squarely places the burden of establishing the need for confidentiality on the party seeking secrecy and reigns in judicial discretion by specifying a substantive balancing test to be undertaken pursuant to numerous procedural safeguards. [FN121] *314 Other states undertaking sunshine reform have been less ambitious than Texas. Their narrower legislation is generally limited in scope to the sealing of judicial records, [FN122] to confidential settlements with a government entity, [FN123] to particular types of public hazards, [FN124] or to the sharing of information in related litigation. [FN125] Although much controversy surrounded the initial enactment of these sunshine reforms, there has been little subsequent appellate discussion or empirical review of them. Assessment of their actual effect upon the judicial system itself, the parties, or the public in general thus remains speculative at best. [FN126] *315 3. Common Law Sunshine

The common law approach taken by the United States Court of Appeals for the Third Circuit in Pansy v. Borough of Stroudsburg [FN127] illustrates yet another response to the perceived secrecy crisis in our courts. Faced with what it saw as the "current trend of increasing judicial secrecy," [FN128] the Third Circuit in Pansy executed a later-described surprising "shift from the previous practice" of routine judicial endorsement of confidentiality agreements. [FN129] The court criticized stipulated confidentiality orders, whether sought "at the discovery stage or any other stage of litigation, including settlement," as potential abdications of judicial discretion to private judgment: Disturbingly, some courts routinely sign orders which contain confidentiality clauses without considering the propriety of such orders, or the countervailing public interests which are sacrificed by the orders. Because defendants request orders of confidentiality as a condition of settlement, courts are willing to grant these requests in an effort to facilitate settlement without sufficiently inquiring into the potential public interest in obtaining information concerning the settlement agreement. [FN130]
Dubious that confidentiality is, in fact, essential to most settlements, the Third Circuit held the general interest in encouraging settlements (so often cited in support of stipulated confidentiality orders) insufficient to support entry of such orders. [FN131] Instead, before issuing or deciding to modify any confidentiality order, a district court in the Third Circuit must balance both public and private interests to determine whether "good cause" exists to justify its entry or continued maintenance. [FN132] To that end, and to further circumscribe trial court discretion, the Third Circuit has identified a set of nonexhaustive and nonmandatory factors that a court should consider in determining the existence of "good cause." [FN133] While party reliance upon confidentiality and its "particularized" importance in effecting settlement remain proper considerations, they are not dispositive, and must instead be weighed against a number of equally (if not more) important nonparty and public interests. [FN134] In effect, then, a common law sunshine regime governs the Third Circuit, whose courts appear increasingly reluctant to approve the parties' mutual request for confidentiality. [FN135]

*317 III. A Functional Touchstone: The Right of Public Access

A. The Need for an Individual and Functional Analysis

As the Third Circuit's decision in Pansy illustrates, participants in the confidentiality debate often broadly frame the debate to encompass secrecy orders that govern functionally dissimilar information and materials. For example, in expansively defining "confidence order" to include "any court order which in any way restricts access to or disclosure of any form of information or proceeding," the Third Circuit commingles "protective orders" concerning information exchanged during discovery, "sealing orders" concerning judicial records and proceedings, and "secrecy orders" concerning settlement terms. [FN136] Sunshine statutes and rules likewise tend to mix the different types of secrecy orders, regulating not only filed documents and pleadings, but also unfiled discovery and settlement agreements. [FN137] Sometimes even academics treat these varying uses of litigation confidentiality as interchangeable. [FN138] Stipulated protective, sealing, and confidentiality orders do share common attributes and, in many respects, are functionally similar. As recognized by the Third Circuit:

Protective orders over discovery materials and orders of confidentiality over matters relating to other stages of litigation have comparable features and raise similar public policy concerns. All such orders are intended to offer litigants a measure of privacy, while balancing against this privacy interest the public's right to obtain information concerning judicial proceedings. [Both protective orders and secrecy orders] are often used by courts as a means to aid the progression of litigation and facilitate settlements. [FN139] *318 This functional similarity requires that a court balance common public and private concerns before issuing these orders and that some level of "good cause" support them. [FN140] As the remainder of this Article demonstrates, however, the necessary mix of balancing factors, as well as the requisite showing of good
cause, do and should fluctuate with each of these arguably discrete uses of confidentiality.
Complex but distinct issues of public access surround stipulated protective orders governing discovery, the sealing of judicial records, and confidential settlements. This Article presents a functional approach that assesses stipulated confidentiality in light of the various rationales that traditionally support the often-amorphous "right" of public access to judicial proceedings. Under this approach, the value given to party autonomy and the systemic benefits of settlement will hinge upon the nature of the confidentiality order, the materials or information it seeks to protect, and the role those materials play in the civil courts' principal adjudicative function.

Before addressing the individualized and shifting inquiry applicable to these diverse secrecy issues, this section will examine the touchstone to any functional analysis--the right of public access to judicial proceedings and records. After briefly discussing the source and existence of any such right, the section will probe its underlying rationales and their applicability to civil litigation.

B. Potential Sources of a Right of Public Access
Three potential sources arguably give rise to a right of public access to civil judicial proceedings and the information and documents generated in their wake. The sunshine statutes and rules previously discussed represent one such source. As with the Freedom of Information Act applicable to federal agencies, a legislature may statutorily provide a right of public access to particular information generated by the litigation process or deposited with the courts. [FN141] A future or existing *319 rule of civil procedure might similarly support increased public access to the civil judiciary. [FN142] As previously discussed, however, federal efforts to provide this type of statutory access have been largely unsuccessful. [FN143] The other two potential sources of public access, the First Amendment to the United States Constitution and the common law, derive from United States Supreme Court precedent exploring the right of public access in criminal cases. The Supreme Court has found a First Amendment right of public access to criminal trials and certain criminal pretrial proceedings. [FN144] The Court has also recognized an admittedly ill-defined federal common law right to inspect and copy judicial records. [FN145] In the civil context, however, the Supreme Court has never established either a First Amendment or a common law right of public access. *320 [FN146] Nor do the lower courts that have addressed this issue agree which, if any, of these two independent sources apply to civil litigation. [FN147] Fortunately, the differences in the two sources do not appear to affect either the content of any right of public access or its articulated rationales. Instead, a court's decision to rely upon the Constitution as opposed to the common law apparently influences only the strength of any presumption of public access and the showing of confidentiality necessary to rebut that presumption. [FN148] Moreover, while the more rigorous First Amendment standard might offer more "substantive protection to . . . the press and public," [FN149] it is generally
regarded as more limited in scope than the common law, applying only to certain judicial proceedings and records. Accordingly, while some courts base their decisions concerning public access to litigation-generated documents and information on the First Amendment, most are rightly reluctant to constitutionalize the issue and, to the extent that they find any right of public access, rely upon the more readily rebuttable common law presumption.

*321 It makes little sense to fret over the precise origin of any access requirement concerning civil litigation. As discussed below, courts appear to utilize the same two-pronged analysis in determining whether the press or public have any right to access particular litigation materials or judicial proceedings. More importantly, analogous rationales support access under both the First Amendment and the common law.

C. When Does a Right of Public Access Exist?
In determining whether there is a presumption of public access to materials created in connection with civil trial and pretrial proceedings, courts frequently utilize a two-pronged analysis established by the Supreme Court in evaluating claims of access to criminal proceedings. The Supreme Court has indicated that a right of public access hinges upon two complementary considerations. The first, involving a tradition of accessibility, asks whether the place and judicial process at issue have been historically open to the press and the general public. The second, assessing functional utility, inquires whether public access plays a significant positive role in the functioning of the particular process in question. If the proceeding passes muster under these two tests, a qualified right of public access attaches.

Although the Supreme Court developed this two-tiered test in evaluating First Amendment access claims in criminal cases, lower courts continue to extrapolate from it in determining whether a presumption of access exists in civil litigation as well. Unlike criminal proceedings that are deeply rooted in constitutional tradition, however, civil process--largely a product of legislative grace--is continually evolving. Given the changing face of civil litigation today, particularly the move away from trial and adjudication toward pretrial proceedings and settlement, courts should not place too heavy an emphasis upon the "tradition and history" prong of this test in evaluating civil access claims. While tradition should play some role in the access decision, functional utility remains the primary consideration. Assessment of functional utility, in turn, requires examination of the various rationales that arguably support public access to judicial proceedings and documents.

D. The Rationales for Public Access
Although one could question whether a test devised for assessing public access to criminal proceedings properly translates to the civil context, most of the rationales supporting public access in criminal cases apply to private disputes as well. Public access arguably (1) facilitates public monitoring of the judicial system; (2) enhances public confidence in and respect for the legal process; (3) educates the public about the justice system; and (4) ensures fair
and accurate fact-finding and decision-making. Our democratic government often depends upon public participation in and access to the judicial process. In the criminal context, public access assures the fairness of the proceedings by serving as a check upon an overzealous or corrupt prosecutor or a biased or incompetent judge. [FN157] While our adversary system of civil litigation counters the one-sided nature of criminal proceedings, public access to, at the very least, civil trials, would likewise help to guard against any judicial incompetence or misconduct. [FN158]

Moreover, observation of fair and open decision-making inspires public respect for the administration of justice. Indeed, even if the public does not generally take advantage of its right to observe civil proceedings, knowledge of its opportunity to do so fosters the appearance of fairness essential to public confidence. [FN159] The desire to deter vigilantism and to channel the public concern and outrage often provoked by criminal acts make it particularly important to foster public confidence in the administration of criminal justice. [FN160] While similar communal emotions may not accompany civil misdeeds, our civil justice system likewise depends upon public support and confidence. Party-borne court costs do not begin to defray the expense of civil courts, which depend upon public subsidies for their existence. The voluntary nature of the civil justice system, where parties self-select the civil courts as one of several dispute resolution alternatives, likewise requires public confidence if it is to prevent parties from opting out of the system entirely. Our system of self-government further depends upon effective public participation in and free, informed discussion of governmental affairs. [FN161] A public trial offers citizens, often through media representatives, an "opportunity both for understanding the system in general and its workings in a particular case." [FN162] Public access to at least some civil proceedings would similarly promote this informed discussion and educate the public concerning its civil justice system. [FN163] Finally, public access also arguably enhances the quality and safeguards the integrity of the fact-finding process by discouraging perjury and encouraging witnesses to come forward. [FN164] This rationale might similarly apply with equal force to civil cases. [FN165] Ironically, however, a frequent rationale for sealing civil discovery and judicial documents is the belief that valuable testimony or information will be withheld absent a guarantee of confidentiality. [FN166]

Thus, many of the rationales that support public access to pretrial criminal proceedings arguably transfer to the civil arena as well. Certainly, those justifications carry significant weight in the decision of most courts to presumptively open civil trials to the press and public. [FN167] As previously discussed, however, most civil lawsuits settle before trial and without any definitive judicial determination of their merits. The more difficult question then becomes whether any of these traditional rationales (or any additional nontraditional ones) trigger access to the larger category of suits that terminate during the pretrial phase of civil litigation.

IV. Discovery and Stipulated Protective Orders
Discovery continues to attract the lion’s share of the confidentiality debate, a frequent subject of which concerns protective orders and public access to confidential discovery materials. [FN168] Recently, that discussion *325 has focused upon the extent to which a court should, or indeed, may accede to the parties' mutual desire for confidentiality in an effort to facilitate the progression of discovery and the ultimate settlement of the case. Stipulated protective orders that endorse the litigants' private confidentiality agreements have become a lightning rod for current debate. [FN169] This section examines the existing use of and continuing controversy surrounding confidentiality agreements and stipulated protective orders governing discovery materials that have not yet been filed with the court in support of a request for judicial action. [FN170] Such discovery includes documents produced in response to requests for production, interrogatory answers, and deposition testimony. As a prelude, the section first explains the general need for confidentiality and protective orders under our exceedingly liberal discovery regime. It then specifically turns to stipulated protective orders and demonstrates how their current operation, characteristics, and rationales fuel the current discovery debate. Using the functional approach to public access outlined in Part III, this section urges that the preference for settlement and the essentially private character of discovery both call for selective judicial endorsement, rather than knee-jerk rejection, of stipulated protective orders. The decision whether to enter or later *326 modify such agreed confidentiality orders, however, rests ultimately in the trial court's extensive discretion. The section thus concludes by examining some of the private and public considerations that are relevant to the exercise of this discretion, not only with respect to stipulated protective orders, but also with respect to sealing and confidentiality orders that are subsequently discussed.

A. The Scope of Discovery and the Need for Protective Orders
The extraordinarily broad scope of discovery necessitates the availability of confidentiality agreements and discovery protective orders. As currently framed, [FN171] the discovery regime often requires production of voluminous amounts of arguably private or sensitive information concerning parties and nonparties alike that would not otherwise be subject to compelled public disclosure and that might ultimately prove inadmissible. [FN172] Unless prohibited by court order, a *327 party may disclose discovered information to whom it wishes or use the materials for any purpose. [FN173] To counter the potential for abuse of arguably confidential discovery, Rule 26(c) authorizes a district court, upon "good cause shown," to issue "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." [FN174] This provision vests a district court with wide discretion to fashion appropriate protective orders concerning confidential information obtained through discovery. [FN175] Courts, for example, may restrict the disclosure of such discovery to designated persons or forbid its use for purposes unrelated to the preparation and settlement of the case at hand. [FN176]
In Seattle Times Co. v. Rhinehart, the United States Supreme Court upheld just such a protective order against a First Amendment challenge. In so doing, the Court shed valuable light on the "unique character of the discovery process" and the importance of discovery protective orders in that process. In Seattle Times, a religious group, the Aquarian Foundation, and its head "median," Rhinehart, sued the Seattle Times for defamation and invasion of privacy over a series of exposés the newspaper had published regarding Rhinehart and the Foundation. The newspaper then sought wide-ranging discovery concerning the Foundation's membership, donors, and financial affairs. At the Foundation's request, and over the newspaper's objection, the trial court issued a protective order that confined the use and dissemination of this information to the defamation lawsuit and forbade the newspaper from using it in future articles concerning Rhinehart. The newspaper objected to the protective order, claiming it was a prior restraint violative of the First Amendment.

In rejecting that challenge and upholding a trial court's discretion to issue protective orders, the Court noted its concern with the breadth and intrusiveness of pretrial discovery, the "sole purpose" of which is to assist "in the preparation and trial, or the settlement, of litigated disputes." The significant potential for abuse of information gained "only by virtue of the trial court's discovery processes" and "made available only for purposes of trying [a litigant's] suit," required that a trial court retain "substantial latitude" to "weigh fairly the competing needs and interests of parties affected by discovery" and to fashion appropriate protective orders. Moreover, restrictions on "discovered, but not yet admitted, information are not a restriction on a traditionally public source of information," given that discovery is not conducted in public and "pretrial depositions and interrogatories are not public components of a civil trial." The Court thus held that a protective order will not offend the First Amendment if it "is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources . . . ." [FN185]

B. The Controversy Concerning Stipulated Protective Orders

1. Contested and Stipulated Protective Orders
The protective order at issue in Seattle Times likely typifies the preponderance of protective orders entered by federal courts. The order shielded specific "confidential" materials that implicated the personal privacy, reputation, and safety of individual members and donors of the Foundation. The newspaper contested the protective order, which the district court issued only after weighing the competing interests affected and finding good cause. This arguably contrasts with stipulated protective orders that are commonly agreed to at the inception of discovery, generally involve wholesale categories of confidential commercial information, and are frequently issued by courts with little, if any, particularized review.

a. Contested Protective Orders
Absent party agreement, discovery confidentiality is generally litigated document-by-document or request-by-request. [FN188] The party seeking to limit dissemination of discovery bears the ultimate burden of making a factually particularized showing of "good cause." [FN189] This entails establishing that the information implicates a cognizable property or privacy interest entitled to protection and that disclosure of such information would work a clearly defined and serious injury. [FN191]

A business entity, for example, may have difficulty making this particularized showing. Although trade secrets and other confidential commercial information trigger Rule 26(c) protection, [FN192] much information exchanged in discovery will resist classification under these inherently ambiguous categories. [FN193] And even if the requested discovery is sufficiently confidential, the movant for a protective order must still establish that cognizable harm would result from its disclosure. While embarrassment to an individual might justify issuance of a protective order, courts generally frown upon claims of commercial embarrassment or damaged corporate reputation. [FN194] To successfully support such a claim, a business must specifically demonstrate that divulgence of embarrassing information would significantly harm the company's competitive or financial position. [FN195] A company might find it difficult to quantify this type of bottom line damage caused by adverse publicity surrounding the disclosure of unsubstantiated discovery. [FN196]

Nor will a prima facie showing of good cause, in itself, guarantee issuance of a protective order. Rather, such a showing simply shifts the burden to the party seeking discovery and contesting the protective order. That requesting party must establish the relevance of and need for the requested information. [FN197] If both parties can satisfy these initial burdens, the court will balance the competing interests of persons affected by the discovery to determine if the harm from disclosure outweighs the asserted need. If so, assuming that some discovery is warranted, the court will craft an appropriate protective order restricting disclosure. [FN198]

b. Stipulated Protective Orders

i. Procedure

Litigating confidentiality document-by-document through narrow protective orders covering specific information and documents can be time-consuming and costly to parties and courts alike, particularly in cases involving large-scale discovery. To expedite discovery and avoid repeated motions for a protective order regarding every document believed to be confidential, parties will frequently agree to, and courts will regularly issue, umbrella protective orders. [FN200] Umbrella protective orders are generally entered early in a lawsuit and, to reap the potential benefits of such an order, are put in place before discovery even commences. [FN201] As described by the Manual of Complex Litigation, umbrella orders "provide that all assertedly confidential material disclosed (and appropriately identified usually by stamp) is presumptively protected unless challenged. The orders are made without a particularized showing to support the claim for protection, but such a showing must be made whenever a claim under
an order is challenged." [FN202]

*333 Unlike contested protective orders, then, stipulated umbrella orders postpone, perhaps indefinitely, the obligation to make a particularized showing regarding the need for confidentiality. The order will generally define categories of materials that presumptively qualify as "confidential." [FN203] The producing party bears responsibility for designating documents that it, in good faith, believes merit such confidential treatment. [FN204] Documents and information produced under this designation will be automatically subject to the order's confidentiality restrictions unless the requesting party contests their confidential status. [FN205] If no one disputes the confidentiality stamp, the conditions on disclosure and use will apply without any particularized showing of need or judicial review of the discovery. If the requesting party contests a confidentiality designation, however, the designating party must demonstrate a specific need for confidential protection. [FN206] Only *334 then will the court determine the confidential status of the challenged materials and balance affected interests.


Trial courts possess extensive latitude in designing stipulated protective orders. [FN207] Because umbrella orders are frequently the product of the parties' agreement, however, courts will often treat them as they do any other agreed order and defer to the parties' own resolution of its terms. [FN208] As such, the particular confidentiality provisions of a stipulated protective order can be as varied as the parties' imaginations. [FN209] Most stipulated umbrella orders will, at the very least, identify the persons entitled to access confidential discovery materials and will prohibit disclosure of such information to any other persons. [FN210] To *335 the extent that the order authorizes use of confidential discovery by experts or other witnesses preparing for testimony, it will typically require that the witness review and consent to its confidentiality provisions. [FN211] The parties might further stipulate to the permissible use and disclosure of confidential information obtained through discovery. [FN212] For example, the parties would not want confidential material to automatically forfeit its protection if filed with the court or introduced into evidence. Stipulated orders thus typically require that designated information be filed under seal and often provide for an in camera procedure by which the designating party can move for continued postfiling protection. [FN213] Parties to agreed protective orders also frequently anticipate the potential relevance of the discovery to related litigation involving the producing party and either expressly permit or prohibit the sharing of discovery in these collateral lawsuits. [FN214] Finally, litigants often desire to ensure that confidential discovery remains confidential following the termination or settlement of the lawsuit. [FN215] To some extent, litigants are unable to completely accomplish such an objective, as stipulated protective orders, like other injunctions, remain subject to modification or termination by the court at any time during or after a lawsuit. [FN216] Subject to that caveat, however, the parties can stipulate to the order's continued validity after resolution of their dispute, [FN217] provide for liquidated damages upon breach of the confidentiality provisions, [FN218] and expressly recognize *337
the trial court's ongoing enforcement jurisdiction. [FN219] An order will further typically mandate that once a dispute is over, the requesting party will timely return all confidential materials to the producing party or destroy the materials. [FN220]

iii. Benefits of Stipulated Protective Orders
Stipulated protective orders undoubtedly enhance the efficiency of discovery in individual cases, to the benefit of both the court and the litigants. [FN221] Protracted litigation over confidentiality delays the ultimate resolution of the lawsuit by diverting the attention of the courts and the litigants away from issues that, unlike confidentiality, are central to the merits of the case. [FN222] Absent a stipulated umbrella order, confidentiality would be litigated on a time-consuming and costly document-by-document basis and courts would be forced to resolve discovery objections that would not otherwise be made. [FN223] The self-regulating nature of agreed protective orders, in contrast, encourages parties to work out confidentiality issues among and between themselves and to conduct discovery with a minimum of judicial involvement. [FN224] Moreover, stipulated protective orders minimize discovery disputes altogether by encouraging disclosure of sensitive information that might otherwise be protected by the court or withheld by a party. [FN225] Persons with arguable grounds for resisting discovery are more likely to produce such information to a litigation or business adversary if the confidentiality of sensitive materials is assured and its disclosure is restricted. [FN226] Indeed, a stipulated protective order might encourage voluntary production of a broader range of even tangentially relevant information in response to expansive discovery requests. [FN227] In addition to receiving information that might otherwise be withheld as nonresponsive, then, the requesting party avoids any risk that a district court might deny discovery of certain confidential or irrelevant information altogether. [FN228] Further, as long as the requesting party can use the confidential materials in the preparation, *339 settlement, or trial of his case, he need not undertake the burden of challenging their confidential status. [FN229] Stipulated protective orders thus extricate both the court and the litigants from the need to litigate confidentiality when neither party desires to do so. In so doing, such orders expedite discovery, conserve judicial and litigant resources, and encourage fuller participation in discovery. Further, by facilitating the cooperative exchange of information (information that might not otherwise be produced), stipulated protective orders pave the way toward the ultimate settlement or resolution of the lawsuit. In short, stipulated umbrella protective orders assist in fulfilling the "just, speedy, and inexpensive determination of every action"--the mantra of our civil justice system.

2. The Continuing Controversy: Stipulated Protective Orders and "Good Cause Shown"
Until fairly recently, this interest in facilitating settlement or expediting discovery was thought to provide "good cause" sufficient to justify issuance of a stipulated protective order. [FN230] A number of courts and commentators, however, have begun to challenge this assumption and, in the process, question the propriety of
The current controversy over agreed protective orders recently came to a head over the ill-fated effort to amend Rule 26(c) to authorize issuance of protective orders either "for good cause shown or on "stipulation of the parties." Proponents of that amendment, including the Advisory Committee on Civil Rules, argued that it simply mirrored existing practice, under which courts routinely issue agreed protective orders without any independent or rigorous determination of "good cause." Stipulated protective orders arguably exist in order to avoid the particularized scrutiny and complex interest balancing associated with contested orders. Moreover, if stipulated protective orders are to achieve their maximum potential, they should be entered at the inception of the discovery process, a point at which it is very difficult to make any more than a threshold showing of good cause concerning general categories of as-yet-to-be requested or produced materials. Under this view, then, party consent to the terms of a protective order should suspend, at least temporarily, the litigant's obligation to make a particularized showing regarding the propriety of or need for confidentiality, as well as the court's need to convene a full-blown good cause hearing. That showing and judicial determination can be more accurately and efficiently made later when either the requesting party challenges the confidential designation of particular materials or an intervening third party seeks to modify the confidentiality order. It is unrealistic, however, to regard stipulated protective orders as merely a temporary dispensation of good cause. As long as the party seeking disclosure can freely use the protected discovery in the trial or settlement of his case, he has little incentive to contest a confidentiality designation. Unless a third party moves to intervene in order to contest issuance or modification of the agreed order, a large amount of discovery designated by the parties as confidential will indefinitely remain subject to the order's restrictions on dissemination and use without any judicial review whatsoever. In most cases, then, a court will never make a good cause determination concerning the discovery materials subject to stipulated protective orders.

Many regard any such dispensation or even suspension of the good cause requirement as a departure from existing practice and a blatant violation of the express terms of Rule 26(c). Under this literal stance, Rule 26(c) authorizes a district court to issue a protective order only for "good cause shown." It does not carve out any exception, temporary or otherwise, for stipulated orders. Even if the parties agree to the terms of a protective order, then, they must still demonstrate good cause to justify its issuance. Nor should the litigants be permitted to stipulate to the existence of good cause, given that they may not, indeed probably will not, consider or protect nonparty interests in their discovery, the public interest in information relevant to public health or safety, or the increased costs of litigating related lawsuits. Instead, under this view, the court retains a duty to conduct an independent inquiry into the existence of good cause, an inquiry which entails evaluation and balancing of both private and public, party and nonparty interests. If good cause is not so established, the discovery should not merit judicial
Thus, to the extent that they dispense with or dilute the "good cause" standard, stipulated protective orders arguably abdicate judicial responsibility for supervising discovery and improperly permit the litigants themselves to control public access to discovery based upon self-, not public, interest. Accordingly, a growing number of courts regard stipulated protective orders with increasing suspicion and almost knee-jerk rejection. To these courts, a generalized interest in encouraging settlement will not, in itself, constitute good cause. Nor will broad, unsubstantiated stipulations regarding the existence of good cause or the need for protection suffice. Instead, these courts require a particularized showing that specific documents or, at the very least, categories of documents, constitute trade secrets or other confidential information entitled to protection and that the unrestricted disclosure of those materials would cause specific cognizable harm.

Thus, while the parties remain free to negotiate confidentiality restrictions, many judges, out of fear of having their hands tied by the litigants' wishes, refuse to convert the parties' private agreement into a court order subject to enforcement by judicial contempt.

C. Functional Utility and Public Access to Discovery

The changing face of civil litigation impacts the above-described controversy concerning stipulated protective orders. The central importance of discovery in our civil justice system and the increasing judicial involvement in that process arguably call for presumptive public access to and expanded public scrutiny of even unfiled discovery. Before examining the considerations that can guide a court in deciding whether to enter or modify a stipulated protective order, then, one must determine whether party autonomy and the importance of settlement--values that underlie agreed confidentiality orders--should contend with any presumption of public access to discovery. Under the Supreme Court's two-pronged test for public access, the existence of any such presumption hinges upon whether a tradition of privacy still surrounds the discovery process and, more importantly, whether a presumption of openness would further any of the rationales that support a right of access.

1. Tradition of Accessibility: Private Versus Public Nature

Tradition views discovery as a private affair between the litigants that takes place outside of public view. Under this conception, discovery is not intended to function as a source or clearinghouse of public information. Instead, the "sole function" of discovery is to "assist in the preparation and trial, or the settlement of litigated disputes." Accordingly, a court can restrict the dissemination of discovered information in an effort to eliminate or reduce any nonlitigation consequences, such as invasions of privacy, competitive injury, or damaged reputation, that would not otherwise exist but for the compelled disclosure. Under this litigation-oriented, dispute resolution model, discovery is a traditionally private activity to which the public has no presumptive right of access.

*Juxtaposed against this view are the growing number of courts and
commentators that regard discovery as a public, presumptively open activity that is imbued with a public interest and that generates public goods. [FN257] Although most acknowledge the absence of any First Amendment or common law right of access, [FN258] these authorities find a statutory presumption of public access to discovery created by Federal Rules 5(d) or 26(c). [FN259] Moreover, while the litigants admittedly drive *347 discovery, it is the governmental authority that backs the publicly funded process that actually compels the production of information that would not otherwise be revealed. [FN260] Under this increasingly popular view, discovery should take place in and be available to the public, except insofar as limited by a protective order. Accordingly, any restriction on public access can only be justified for "good cause shown," a determination that encompasses interests beyond those of the immediate litigants. [FN261]

While this contemporary public conception of discovery may presage a crack in our traditional view of the process as private, discovery remains a largely cloistered activity that should not be considered subject to any statutory presumption of access. Federal Rule 5(d) expressly excuses the filing of discovery with the court and most judicial districts in this country prohibit such filing by local rule. [FN262] Discovery requests, responses, and depositions thus generally are not publicly available and, for the most part, are never considered or utilized by the court. Although the filing of discovery might be appropriate in some cases of public interest, [FN263] Rule 5(d) merely gives the trial court *348 discretion to control this potential source of public information; it does not create any statutory right of access. [FN264] Nor does Rule 26(c), authorizing protective orders for "good cause shown," create any such presumption. Denying a protective order will not guarantee public access to discovery materials. Although the parties may freely disseminate the information that they obtain through discovery and that is not subject to any protective order, they certainly are not required to do so. As courts have recognized, the public has no right of access to discovery in the hands of private litigants, and a court cannot compel parties to a confidentiality agreement to disseminate unfiled discovery. [FN265] By stipulating to a protective order, then, litigants simply choose to exercise their right not to publicly distribute their discovery. Thus, neither current practice nor the discovery Rules themselves establish any presumption of access to unfiled discovery or alter the traditionally private nature of those materials.

2. Functional Utility: Party Autonomy Versus Judicial Involvement
The tradition of accessibility forms only one part of the access inquiry, however. The more pertinent and difficult question concerns whether increased public disclosure of pretrial discovery would significantly advance any of the fundamental values served by the right of public access. The inherent tension between our commitment to party autonomy, on one hand, and the increased judicial involvement in discovery, on the other, complicates this inquiry. Discovery is a self-executing process that takes place outside of the public view with a minimum of judicial involvement and oversight. [FN266] Its self-regulating nature affords litigants significant flexibility *349 to modify discovery procedures
and to stipulate to less expensive and time-consuming methods of acquiring information and documents. [FN267] Indeed, the most recent amendments to the discovery Rules encourage such self-regulation by mandating that the parties formulate discovery plans [FN268] and attempt to privately resolve discovery disputes before seeking court intervention. [FN269] In short, our discovery system continues to emphasize and highly value party autonomy. At the same time, however, the trial court shoulders the ultimate duty and discretion to oversee the discovery process. [FN270] To the extent that party control can actually impede or delay discovery, the Rules expressly charge the court with streamlining and, when necessary, propelling the process. [FN271] The liberal scope of discovery and the potential for its abuse further intensify the need for early and vigorous judicial involvement in discovery, including tighter supervision to curb, and more stringent sanctions to deter, such abuse. [FN272] Although discovery remains an essentially party-driven activity, then, it operates against a background of earlier, intensified and ongoing judicial oversight, management, and control.

Because the courts today play an increasingly active role in the management and supervision of discovery, expanded access to the discovery process would arguably aid the public in monitoring and understanding this judicial function. Such enhanced public understanding, however, would come, if at all, from access to the court's discovery decisions and the materials on which they are based. Unfiled discovery that is never presented to or utilized by the court would not advance even this purpose. That is, while access to the raw fruits of discovery might educate the public about the litigants themselves or the subject matter of their dispute, [FN273] it sheds little light on the court's determination of the parties' substantive rights for the simple reason that there has been no such determination. Nor does such access facilitate the fairness or accuracy of judicial fact-finding or decision-making, again because no such fact-finding or decision-making has occurred.

Moreover, when a court schedules a discovery deadline or imposes discovery sanctions, or limits the number or length of interrogatories or depositions, it acts in the capacity of a referee, oftentimes an absentee referee, who gets involved on an as-needed and when-requested basis. The litigants are the players who continue to self-execute and self-police the process. Although public access might inspire confidence in the court's managerial competence or impartial umpiring, the primary purpose of an access presumption--to ensure fair, accurate, and unbiased decision-making--would not be served. [FN274] Finally, functional utility gauges whether public access confers a significant positive benefit on the particular process at issue. Discovery primarily facilitates the trial or settlement of litigated disputes. Presumptive public access to unfiled discovery would arguably impede this objective.

The discovery Rules compel litigants to produce information and documents not otherwise available or subject to disclosure in order to ensure fair and accurate decision-making if the case is to be resolved on its merits or, as more typically happens, to afford the parties a realistic appraisal of their case from which they can assess settlement. [FN275] Altering these prime objectives to include public
warning or debate ignores the exceedingly liberal scope of discovery that can require disclosure of a vast amount of private, irrelevant, and potentially unreliable information. [FN276] To the extent that discovery forms the basis of judicial decision-making, it will be filtered through relevance and admissibility standards and be subject to the common law presumption of access to judicial records. [FN277] To the extent that unfiled discovery facilitates the litigants' decision to settle their dispute, however, it contributes 352 to an equally private process--settlement--to which the public has no similar right of access. [FN278] In sum, no tradition of accessibility surrounds the discovery process. More importantly, access to discovery that is never filed with or considered by the court does not materially advance the purposes of public access. Because no presumption of access should attach to such discovery, litigant autonomy and the efficient resolution of the particular dispute should continue to guide a court in considering whether to enter a stipulated protective order. [FN279]

D. Considerations in Issuing or Modifying Stipulated Protective Orders
Because the court retains responsibility for monitoring the discovery process, [FN280] and has the discretion, under Rule 5(d), to order that discovery be filed, the court should not feel hamstrung by party stipulations concerning confidentiality. In order to safeguard the integrity of the discovery process, a court can and should exert some preliminary control over the terms of the agreed order. Such control would balance the desire to expedite discovery and respect litigant autonomy against the recognition that there are some instances in which other litigants or the public in general might have a need to access some, if not all, of the discovery. Moreover, even if the stipulated protective order is granted, the court retains the authority to later vacate or modify its terms in light of numerous case-specific factors.

1. "Good Cause"
Rule 26(c) expressly requires that "good cause" support a court's issuance of a protective order. Existing practice notwithstanding, the Rule does not distinguish between contested and stipulated orders and thus does not except agreed protective orders from this prerequisite. The parties' stipulation accordingly cannot dispense with or substitute for the court's independent determination of good cause. At the same time, however, a court issuing a stipulated protective order should not be required to engage in the kind of particularized *353 review or complex interest balancing associated with contested protective orders. Such an approach would negate the many benefits gleaned by early entry of agreed umbrella orders, particularly in the increasingly typical case that involves a significant amount of discovery. Indeed, at the advent of the process when most stipulated protective orders are entered, parties may find it virtually impossible to make a factually particularized showing concerning anticipated, but as yet unrequested, discovery. A court may likewise find it infeasible to balance hypothetical, potentially applicable interests yet to be identified through adversarial development. Further, a court should not refuse to enter an agreed order simply because the
litigants remain free to negotiate privately a confidentiality agreement concerning their discovery. Aside from the difficulty of computing damages attributable to breach of such an agreement, contractual penalties will not likely deter such breach as effectively as court-ordered restrictions that are subject to judicial sanction or the pain of contempt. [FN281] Moreover, litigants may hesitate to produce sensitive personal or commercial information to an adversary without an advance, albeit preliminary, indication as to whether the court will protect that material if the agreement is breached. In other words, a private confidentiality agreement will not expedite the free-flow of discovery to the same extent as a confidentiality order.

The court can accommodate these competing concerns by insisting on a threshold showing of good cause prior to entering a stipulated protective order. [FN282] Although a particularized document-by-document showing cannot be made, unsubstantiated, abstract claims *354 about a general need for confidentiality concerning unspecified discovery should not suffice. For example, a stipulation that baldly asserts that "discovery will likely involve the disclosure of confidential information, whose confidentiality there is good cause to preserve," should probably fail to establish good cause even for the entry of a stipulated protective order. [FN283] At the very least, parties should define "confidential information" with a reasonable degree of specificity [FN284] and then identify specific categories or types of materials that discovery will likely generate and that arguably satisfy that definition. [FN285] Given the heightened emphasis upon party autonomy in discovery, the fact that Rule 26(c) implicitly protects a wide spectrum of unspecified privacy interests, [FN286] and the inherently private nature of the discovery process, a court should afford the litigants significant latitude in devising these confidential categories. [FN287]

Additionally, our current procedural system places a significant premium on the expeditious resolution of disputes and the efficient administration of justice. That interest, which motivates so many current judicial reform efforts, cannot be lightly dismissed or entirely discounted *355 in assessing good cause. [FN288] The lubricating effect of a stipulated protective order in a given case, in other words, should rightly factor into a trial court's independent determination of good cause. As part of its duty to safeguard the integrity of the discovery process, however, the trial court retains broad discretion concerning even stipulated protective orders and thus need not feel irrevocably bound by the parties' agreed terms. For instance, although the parties can rightly insist that confidential discovery be filed under seal to retain its confidential status, they should not be permitted to use such a provision to circumvent the stricter standards that govern the sealing of judicial records. [FN289] Moreover, if the court can anticipate the possible need for or relevance of the protected discovery in pending or future related litigation, the court can veto any provision that prohibits outright the sharing of the materials in collateral litigation. [FN290] Finally, and as discussed below, a court always retains the inherent power to modify or dissolve its protective orders, either sua sponte or on motion of a party or interested nonparty. This power extends to stipulated orders, which, to prevent undue and unwarranted reliance
on the permanence of the confidentiality restrictions, should explicitly recognize both the power and possibility of such modification. [FN291]

*356 2. Modification of Stipulated Protective Orders
A court retains the inherent authority to modify or terminate its protective orders at any time, even after judgment on the merits or settlement. [FN292] Such modification can occur sua sponte or via motion by a party to the protective order, a person bound by its terms, [FN293] or a nonparty intervenor. [FN294] The power to modify acts as a safety valve that permits a court to tighten, relax, or terminate confidentiality restrictions in light of changed circumstances, public interest concerns, or nonparty interests. [FN295] This safety valve assumes particular importance in the context of stipulated umbrella orders, which, by definition, are generally entered without extensive, if any, balancing of affected interests. Indeed, the uncontested nature of stipulated protective orders and the absence of any judicial determination of good cause with respect to specific documents arguably make such confidentiality orders particularly vulnerable to subsequent modification. [FN296]

*357 Courts divide over who bears what burden concerning a motion to modify or dissolve a protective order. [FN297] Some, relying upon the presumptive correctness of trial court action or the court's and parties' reliance upon agreed restrictions, require that the party seeking modification demonstrate "extraordinary circumstances" or "compelling need" to justify access to protected discovery. [FN298] Such a standard effectively insulates the protective order from subsequent alteration. In contrast, a greater and growing number of authorities place the burden of demonstrating "good cause" for continued confidentiality upon the party or parties opposing modification. [FN299] According to *358 many of these courts, because the parties never made any showing of "good cause" to support issuance of a stipulated protective order, continued maintenance of confidentiality depends upon a particularized and present demonstration that cognizable harm will result from modification. [FN300] Ultimately, the appropriate standard for modification of a stipulated protective order lies between these two extremes. Because discovery protective orders derive from Rule 26(c), the "good cause" touchstone should continue to guide trial courts in their determination of whether to continue, modify, or terminate their confidentiality provisions. That is, in determining whether to modify a stipulated protective order, a trial court must make a present determination of good cause, and the burden should remain on the party seeking continued protection under that order. That burden, however, should be tempered by the essentially private nature of the discovery process and the absence of any presumption of public access thereto. [FN301] Moreover, stipulated protective orders should rest upon at least a threshold showing of good cause and thus should not perfunctorily be lifted upon any "reasonable request" or "minimal" showing of need. [FN302] Instead, whether good cause continues to support confidentiality requires the court to balance the original parties' reliance upon the protective order and their need for continued secrecy against the movant's need for disclosure of the protected discovery and any broader public interests favoring or disfavoring
A discussion of some of the factors potentially involved in such a balancing follows.

*a. Modification by Party to Stipulated Order*

While the placement of the burden of proof on modification should not vary with the identity of the person seeking modification, that factor should weigh in the court's determination of good cause. For example, because of the injunctive nature of a stipulated protective order, even a party to such an order can subsequently move to modify it in light of changed circumstances. That party may not appreciate the public interest or safety implications of confidential discovery until after it has been produced and viewed in context with other discovered information. By the same token, however, a party who agrees to confidentiality restrictions, and thereby induces broad discovery thereunder, should not lightly be permitted to subsequently avoid those limitations and disseminate that discovery, particularly when that party could have foreseen the need to modify at the time it negotiated the stipulation. A party's previous consent to a stipulated protective order tacitly acknowledges the existence of good cause and the assumption that discovery was for use in that case alone. That initial consent, together with the party's failure to exercise its contractual right to challenge its opponent's specific designations, should weigh against modification.

*b. Party Reliance*

Courts differ regarding the importance of party reliance as a factor in modification of stipulated protective orders. Obviously, parties would be unwarranted in regarding such an order as an absolute shield against further disclosure of their discovery. A confidentiality designation does not bind the court and is subject to challenge by the opposing party. Materials produced pursuant to such a designation have not received particularized judicial (or likely even party) scrutiny and one can never know how a court would rule if a designation were put to the test. Moreover, confidential discovery may be needed for, or made the basis of, judicial decisions--thereby subjecting that discovery to the more stringent standards applicable to the sealing of judicial records. Finally, and as previously stated, courts always retain the inherent, often explicit, authority to modify or terminate their protective orders. For these reasons, a growing number of courts discount party reliance significantly, if not completely, in deciding whether to modify a stipulated protective order. Party reliance, however, should remain a central concern of courts in the modification decision. Aside from the resulting unfairness to the litigants, failure to accord reliance at least some weight in the modification decision would, in the long run, undercut the systemic benefits of stipulated protective orders by reducing future litigants' confidence in them. To guard against routine, unsubstantiated claims of reliance, courts can insist upon a showing of actual and reasonable reliance, both at the time of entering the stipulation and at the time of disclosure. The mere production of discovery pursuant to the protective order, then, is not, in itself, dispositive. Instead, the court must determine whether the stipulation reasonably induced such production. In
making this determination, the foreseeability of modification at the time of discovery, rather than 20/20 hindsight, should guide the court. A number of factors can inform this assessment of reasonable reliance. A primary consideration negating reasonableness, for example, is the prospect or pendency of related litigation involving one or more of the parties at the time they negotiate and enter a confidentiality stipulation. Thus, repeat players, like products liability defendants or governmental agencies, arguably cannot reasonably expect their discovery to be exclusively contained in one lawsuit. Disclosure of the discovered information to governmental agencies, who may well be subject to freedom of information requirements, also undercuts a party's reliance. Likewise, and as discussed below, the presence of the government as a party to the litigation might, in itself, imbue the case with a "public interest" that belies reliance on continued confidentiality. Another consideration is whether the parties' behavior during discovery was consistent with reliance on the stipulated order. For example, did the protective order, in fact, expedite the free flow of information that might not otherwise have been voluntarily produced--one of the principal benefits of stipulated orders? Or, did the parties, in spite of the umbrella order, continue to object to the production of information in response to legitimate discovery requests? A parallel consideration concerns the nature of the discovery produced pursuant to the confidential designation. Although the parties should be afforded significant latitude in devising the categories of materials subject to designation, they cannot legitimately expect that a court will, when asked to modify that order, preserve the confidentiality of discovery that would not likely merit the protection of a contested protective order. On the other hand, a party that produces, without objection, privileged or irrelevant materials that fall outside the scope of discovery or information that would likely be deemed inadmissible, demonstrates cognizable reliance that should support continued protection. 

c. Discovery Sharing
As previously discussed, the parties to an agreed protective order might anticipate the potential relevance of their discovery to pending or future litigation and will often, via that order, prohibit its disclosure in these collateral cases. The desire to shield oneself from other potential claims, however, does not alone justify issuance of a protective order, and such a provision will not necessarily protect against limited divulgence of discovery relevant to other lawsuits. Indeed, one of the most compelling reasons to modify a stipulated protective order is to permit the sharing of discovery in related litigation. Discovery sharing, while arguably undermining the efficiency of discovery in the immediate lawsuit, potentially avoids the wasteful duplication of discovery in collateral litigation, thereby ultimately advancing the efficient resolution of disputes. Moreover, a court generally can accommodate the confidentiality interests of the litigants before it by conditioning discovery sharing upon the intervenors' consent to the terms of the original protective order and to the court's enforcement jurisdiction. For these reasons, courts appear especially willing to relax restrictions on the dissemination of discovery to permit
The feasibility of discovery sharing, however, should not automatically merit modification. A court must still balance the litigants' mutual desire and need for confidentiality, the interests of the persons who seek information arguably relevant to other cases, and the costs and benefits in efficiency to both the case at hand and the collateral litigation. For instance, parties stand a better chance of successfully opposing discovery sharing if they can demonstrate that it would cause them to suffer some tangible injury to a cognizable privacy or property interest. Additionally, the parties manifest greater reliance on the protective order if they could not reasonably anticipate any need to share their discovery at the time they negotiated the stipulation or produced discovery thereunder. Finally, because a court's primary task is to resolve the dispute of the litigants before it, the extent to which modification would impair the discovery process in that case must factor into its balancing. A stipulated protective order will not necessarily preclude other litigants from obtaining equivalent information through independent discovery in the collateral lawsuits. Modification should essentially aim to place the collateral litigants in the position that they would otherwise occupy only after duplicating the parties' discovery requests. Thus, the relevance and discoverability of the protected discovery in the collateral proceedings bears greatly on the decision to modify, as there is no right of access to privileged or irrelevant materials. Such relevance, in turn, hinges upon the degree of overlap in facts, parties, and issues between the suit covered by the protective order and the collateral proceedings. Moreover, modification should favor only bona fide litigants able to demonstrate a legitimate need for the protected discovery in pending litigation. Discovery sharing should not fuel fishing expeditions by prospective litigants contemplating future lawsuits. Nor should courts sanction backdoor attempts to circumvent discovery limits in other cases. Finally, discovery sharing should not justify modification unless it will result in a significant saving of time and expense in the collateral proceedings. If sharing will avoid needless duplication of discovery that would otherwise take place in sufficiently related cases, however, and if the intervenors submit to the terms of the protective order and agree to use the shared discovery only in the preparation, settlement, or trial of the collateral litigation, fairness and efficiency weigh heavily in favor of modification.

d. Public Interest
An argument frequently advanced in favor of modification is the claim that the protected discovery concerns issues of communal importance and that its disclosure would thus serve the "public interest." Because the public interest in disclosure probably does not factor heavily into the threshold showing that can justify issuance of a stipulated protective order, a court should balance that factor against competing privacy interests in deciding whether to lift the order's restrictions. Discerning those cases where discovery legitimately implicates this rather amorphous "public interest," and gauging the appropriate
weight to accord it, however, can be daunting, if not insurmountable, tasks that implicate the very tensions that underlie the confidentiality debate itself. [FN339]

In answering these questions, a court must divine a very fine line between idle public curiosity (an illegitimate concern) and licit public interest. [FN340] Two discrete public interests, interests that seem to dominate recent sunshine reforms, can inform a court's discretion in this regard, however. Discovery is most commonly said to implicate a public interest in disclosure where it concerns either public health and safety or the administration of public office and the operation of government.

Some lawsuits potentially implicate public health and safety more than others. For example, product liability lawsuits involve allegedly *369 defective products distributed to consumers at large. Likewise, toxic torts involving damage to the environment or hazardous substances affect a class of individuals broader than the immediate litigants. At the same time, the duty of protecting the public from both these dangers rests principally in other branches of government (which are presumably better qualified than the courts to evaluate such risks) and there may be no need to release confidential discovery, at least to the degree requested, as additional protection. [FN341] Moreover, the impact of discovery upon public safety can be especially difficult to assess without prejudging the merits of a case, or after a case has been settled and dismissed. [FN342] Despite these difficulties, a court should determine whether continued confidentiality of particular discovery will have a probable (not merely possible) and significant adverse effect upon public health and safety that cannot otherwise be averted without modifying or terminating the protective order. [FN343]

Discovery that bears upon the administration of public office or the functioning of government can likewise justify vacating or relaxing confidentiality restrictions. Thus, the presence of a public official or government entity as a party to a case, while not dispositive, might signal a situation where public interest outweighs the litigants' need for secrecy. [FN344] Governments and government officials stand apart from private litigants in that they represent and serve a public constituency, even in litigation. [FN345] To the extent that discovery in such a case would educate the public or inform societal debate concerning the government as official actor, a public interest may well be served by its disclosure. [FN346]

For much the same reason, a court should hesitate to *370 continue a confidentiality order that would block disclosure of information that would otherwise be publicly available under federal or state freedom of information laws. [FN347]

Of course, the instances in which the public interest in disclosure can appropriately override the litigants' interest in secrecy are ultimately case-sensitive and thus too varied to enumerate here. [FN348] In making the modification decision, however, a court should be mindful of its principal function of resolving concrete disputes of the litigants before it. While this goal can be stretched to permit discovery sharing among other litigants, it might not justify modification on behalf of the public at large aimed at remedying all manner of societal woes.

E. Conclusion Regarding Discovery
Stipulated protective orders governing unfiled discovery serve valuable public, as well as private, interests. These orders guard against abuse of the very liberal scope of discovery, while facilitating the efficient resolution of disputes. Because discovery concerns a traditionally (perhaps even presumptively) private phase of litigation, the importance of party autonomy and the significant public interest in *371 settlement should occupy center stage in a court's threshold decision to enter an agreed protective order. The court's ongoing duty to supervise discovery, however, in tandem with its independent obligation to determine good cause, require that the court exercise its discretion in initially issuing the order and that it later balance affected private and public factors in deciding whether to maintain confidential protection. In some instances, broader public interests may well override the litigants' mutual desire for secrecy.

V. Sealing of Judicial Records
As previously described, stipulated protective orders routinely provide that if discovery stamped "confidential" must be filed with the court in connection with a motion or other court application, it shall be filed under seal and will remain sealed pending contrary order of the court. [FN349] Likewise, and as discussed further in Part VI, the parties might ultimately settle their lawsuit contingent upon the sealing of all or part of the court's file in the case. [FN350] When a confidentiality agreement dictates closure of the judicial record, however, the interests in party autonomy and the efficient administration of justice may need to yield to the often greater public interest in fair and open judicial proceedings. [FN351]

Unlike discovery, a trial is a presumptively public phase of a civil lawsuit to which a common law, if not a constitutional, right of access *372 attaches. [FN352] Moreover, and again unlike the raw fruits of discovery, a judicial officer has presumably screened evidence prior to its introduction at trial to determine its relevance and admissibility. [FN353] Notwithstanding the existence of a stipulated protective order, then, if confidential documents or deposition testimony are admitted into evidence during trial, without any objection or request that they be sealed, the designating party likely waives their confidential status. [FN354] Even with such a request, and notwithstanding the litigants' agreement, the exceptionally strong presumption of public access to civil trials dictates that "only the most compelling showing" of a need for closure will justify the sealing of testimony or documents introduced at trial. [FN355]

*373 As discussed in Part I, however, trial no longer holds center stage in our civil justice system, which instead focuses increasingly and predominantly upon events that occur instead of or before trial. Confidential discovery thus more often enters the public record in support of or in opposition to a pretrial motion to the court. The extent to which the parties' confidentiality agreement and the court's discovery protective order support the sealing of these pretrial motions and their attachments has generated much debate, but no consensus of opinion. Most courts recognize a strong presumption of public access to "judicial records" that can be rebutted only by significant countervailing interests favoring nondisclosure. [FN356] Courts widely diverge, however, in defining what constitutes a "judicial record" and in applying that definition to the multitude of
various pleadings, motions, and requests that come before a court for consideration. Courts further divide concerning the appropriate weight to accord the presumption of public access and in identifying the competing interests sufficient to rebut the presumption and warrant sealing of judicial records. This Part of the Article offers a sliding scale functional approach to help resolve these lingering dilemmas.

*374 A. What Constitutes a Judicial Record?
In the United States Court of Appeals for the Third Circuit, a document's status as a "judicial record" hinges upon the "technical question of whether [[[it] is physically on file with the court." [FN357] In the majority of other circuits that have wrestled with the issue, however, "the mere filing of a document with a court does not render the document judicial." [FN358] Instead, these other courts tie the definition of a judicial record to the purpose underlying the presumption of public access--public monitoring or oversight of the judicial system. [FN359] They accordingly utilize a functional, albeit more ambiguous, approach that turns upon a document's use and the role it plays in the adjudicative process. [FN360]

*375 Under such a functional approach, materials used by a court in granting summary judgment, a dispositive motion that adjudicates the legal merits of a case and that essentially substitutes for trial, present the clearest example of judicial records presumptively subject to public scrutiny. [FN361] At the opposite end of the spectrum lie discovery motions and documents submitted for in camera review as part of a discovery dispute. Requests for a court to compel, prohibit, or circumscribe disclosure do not seek disposition of any substantive rights and are "actually one step further removed in public concern from the trial process" than the raw fruits of discovery themselves. [FN362] As such, courts generally do not classify discovery motions and their attachments as judicial records or recognize any presumption of public access applicable thereto. [FN363]

Beyond these two extremes, however, matters become decidedly uncertain. [FN364] Motions less central to merits determinations, such as *376 documents that a court examines, but does not rely upon in making a decision, or materials submitted to, but never considered by a court, all continue to perplex courts in their quest to categorize judicial records. For example, how should courts treat materials submitted in support of or in opposition to a motion for summary judgment that is ultimately denied? Do such documents "play a useful and relevant role in the adjudicative process" even though the court, in denying summary judgment, essentially declines to decide the case's merits? [FN365] Should a presumption of public access attach to confidential discovery filed in connection with a motion to dismiss for failure to state a claim--a motion that, unlike one for summary judgment, looks no farther than the factual allegations in a complaint to assess whether they invoke a legal claim for relief? [FN366] What about motions for a preliminary *377 injunction that, while prefatory to any final determination of substantive rights, nevertheless judge a party's probable success on the merits? [FN367] Is an evidentiary ruling upon the admissibility of confidential discovery sufficiently "relevant to the performance of the judicial
function" to justify a presumption of public access to that discovery? The en vogue analysis yields varying answers to these questions due, in part, to the vagueness of its principal component--the "judicial function" to which it is indexed. A definition limited to dispositive merits determinations takes too narrow a view of the adjudicatory process, which in modern process frequently consists of a host of preliminary or nondispositive determinations. [FN368] At the same time, an interpretation that effectively encompasses everything submitted to the court would include matters never subject to any judicial review whatsoever. A proper definition of "judicial records" must avoid putting definitional blinders upon the public's right to observe and oversee its court system, while limiting that right to materials that bear sufficiently upon a judicial function. "Judicial records" should include materials submitted for the court's consideration that are "relevant and useful" to the multifaceted, decision-making role of courts today. This means that documents or testimony can qualify as "judicial records" even if they do not form the basis of a court's decision on the merits, and even if the court ultimately determines not to consider or rely upon them. Otherwise, a judge could censor the public record, and thereby shield herself from public scrutiny, simply by ruling documents or testimony inadmissible or by declining to consider or rely upon them. If the right of public access is to serve as a check upon *378 the judiciary, it cannot be contingent solely upon the judge's view of the significance, relevance, or admissibility of any given document. [FN369] For similar reasons, the "judicial" status of a particular record should not necessarily depend upon the outcome of the motion or request to which it is attached. The presumptive right of access is "immediate and contemporaneous" and attaches the moment the evidence becomes a part of the judicial record. [FN370]

B. The Weight of the Resulting Presumption
One hazard of broadly defining "judicial records" to comprise anything relevant or useful to a court's decision-making is that a court might regard all such records as generating the same near-irrebuttable presumption of public access. Under the prevailing all-or-nothing approach, if material qualifies as a judicial record, the resulting presumption of public access is "strong," the rebuttal burden "heavy," and the competing interests required to justify sealing "exceptional" or "compelling." In contrast, if something does not rise to the level of a judicial record, no presumption of access whatsoever will attach. Courts would be better served by focusing instead on the weight that should be accorded the presumption of public access. That is, a preferable alternative would broadly define judicial records, but then calibrate the weight of the resulting presumption to the core judicial *379 function of determining a litigant's substantive rights. [FN371] The strength of the presumption would hinge upon the role the disputed materials play in that central function and the extent to which access would facilitate its public oversight. Indeed, the Second Circuit recently adopted such a sliding scale approach, stating:
We believe that the weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial
power and the resultant value of such information to those monitoring the federal courts. Generally, the information will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance. [FN372]

Rather than nitpicking the definition of judicial records, a definition which, if erroneously applied, can further insulate the courts from public scrutiny, [FN373] this approach varies the weight of the presumption of public access. The greater a role the disputed materials play in the determination of the litigants' substantive rights, the stronger the resulting presumption. The farther removed from a merits determination that documents and testimony fall, the weaker the ensuing presumption. [FN374]

*380 Thus, documents or testimony introduced at trial or that form the basis of a summary judgment or other merits determination carry an exceptionally strong presumption of public access that can be overcome only by the most compelling of competing considerations. In contrast, procedural matters unrelated or only tangentially related to a decision on the merits would call for a much lower and more readily rebuttable presumption of public access. The weight to accord the presumption applicable to documents or testimony that fall "in the middle of the continuum" necessarily falls to the judgment of the court to be exercised on a case-specific basis. [FN375]

C. Rebutting the Presumption

Even the strongest of presumptions of public access to judicial records can be overridden by sufficiently compelling competing interests. [FN376] In order to justify sealing of judicial records, however, the party requesting it must demonstrate a present and ongoing need to protect the confidentiality of particular testimony or documents that outweighs the presumptive interest in public disclosure. [FN377] This entails demonstrating that the information sought to be sealed "is the kind of information that the courts will protect" and that "disclosure will work a clearly defined and serious injury to the party seeking closure." [FN378]

*381 The secrecy interests sufficient to rebut the presumption of access to judicial records are highly case-specific. For some courts, however, only the most compelling individual privacy interests or the most confidential of commercial information--trade secrets--can overcome the exceptionally strong presumption that most courts indiscriminately accord all judicial records. [FN379] Claims of commercial embarrassment or damaged corporate reputation will not qualify and even confidential commercial information may not suffice. [FN380] Moreover, confidentiality agreements that require the sealing of judicial records arguably supersede a court's nondelegable, supervisory authority over its own records and proceedings. [FN381] Many courts thus refuse to factor into their sealing calculus a party's reliance on such a provision and will accord the corresponding interest in settlement little, if any, countervailing weight. [FN382]

*382 Rather than entirely discounting these "lesser" competing interests, however, a court should again consider the role the particular judicial records play in the adjudication of the litigants' substantive rights. If the disputed judicial
records form the basis for a court's decision on the merits, only exceptional circumstances that implicate the most compelling of personal or property interests should justify closure of the judicial records. Party reliance should not override the presumption, as the litigants cannot reasonably expect a court to perpetually shield from public scrutiny the materials on which it bases its substantive decisions. Even a settlement conditioned upon sealing generally will not rebut the very strong presumption applicable in those cases. In contrast, if access to particular records would only minimally benefit public monitoring of the principal adjudicative function, the resulting presumption of public access becomes merely predictive. [FN383] In such cases, a court might justify the sealing of confidential commercial information that does not amount to a trade secret so long as it is the kind of information that courts routinely protect. [FN384] Moreover, if the presumptive right of access is low, it is appropriate for a court to consider the litigants' mutual desire for confidentiality, their actual and reasonable reliance on the sealing provision, and its role in achieving settlement. [FN385]

*D383 D. Bolstering the Presumption
Of course, a court may also find that considerations, in addition to the presumption, require public access to the court's file. As with issuance or modification of a discovery protective order, for instance, the presence of the government as a party to a lawsuit intensifies the need for access to the court's files. [FN386] In such cases, "the public's right to know what the executive branch is about coalesces with the concomitant right of citizenry to appraise the judicial branch." [FN387] Sealing might similarly contravene the public interest if the lawsuit implicates significant public health or safety concerns. [FN388] As with unfiled discovery, however, a court might experience difficulty identifying these or other cases that fall within a broader public interest. [FN389] Finally, the pendency of related litigation strongly militates against sealing judicial records. In such instances, long-term judicial efficiency may benefit if these other courts and litigants are fully privy to the proceedings. [FN390]

E. Conclusion Regarding Judicial Records
In sum, a broad definition of judicial records, in conjunction with a presumption of public access whose weight varies with a document's role in the core adjudicative function, can guide a court in deciding whether to seal all or part of its file in a case. [FN391] While the public policy favoring settlement probably cannot justify sealing records on which a court bases its substantive decisions, then, that interest can support closure of records only minimally or peripherally relevant to the court's decision-making. As with unfiled discovery, however, the interests of other litigants or the broader public can enhance even a weak presumption and require denial of a joint request to seal.

*384 VI. Confidential Settlements
Thus far, this Article has focused on the presettlement uses and limits of litigation confidentiality--protective orders designed to facilitate the efficient and expeditious progress of discovery and sealing orders intended to preserve the
confidentiality of discovery and other materials filed of record with the court. Confidentiality, however, is also critical to the ultimate settlement of many civil lawsuits. Secrecy undoubtedly facilitates the settlement process, and in some cases, compromise could not be reached without some assurance of its confidentiality. [FN392]

Litigants possess extensive freedom to privately contract for settlement secrecy and may enforce their confidentiality agreement in a separate suit for breach of contract. [FN393] Thus, many confidential settlements can and do occur without any involvement of the court or any judicial review or approval of their terms or their fairness. [FN394] As discussed previously, however, courts today are increasingly involved in the settlement process, with many actively encouraging, if not strong-arming, civil litigants to compromise their disputes. [FN395] Likewise, many litigants are not content to rely upon contractual confidentiality clauses and additionally seek judicial imprimatur of their compromise, either by filing it for approval with the court or requesting that it be otherwise embodied in a court order containing confidentiality or sealing provisions. Given that public access hinges upon the need to monitor the judicial process and that judicial records are presumptively open to public scrutiny, however, this trend toward increased judicial participation in what has heretofore been a private process arguably bodes for expanded public access to civil settlements. [FN396]

This final section discusses some of the public access issues that surround secret settlements. It first explores the litigants' ability to contractually shield their settlement and the factual and documentary evidence underlying it from public scrutiny. It concludes by examining the extent to which courts can or should sanction such confidentiality in pursuit of the strong public policy favoring settlement.

A. Confidentiality Through Private Agreement

Although the extent of judicial participation in settlement may vary, settlements, by definition, require party agreement and ultimately are a matter of private contract. To the extent that confidentiality is a settlement objective, litigants will provide for it in various ways in their agreement. [FN397] For example, settlements often seek to maintain the nondisclosure provisions of stipulated protective orders and might reiterate the postdismissal obligation to return or destroy confidential documents received in discovery. [FN398] Subject to court approval, *386 litigants might further condition their compromise on the sealing or continued sealing of particular documents or of the court's entire file in the matter. [FN399] Litigants commonly agree not to disclose the existence of their settlement or its terms, conditions, or amount, and may further resolve not to voluntarily disclose factual information relevant to their underlying dispute. [FN400] Finally, to enhance and facilitate enforcement of confidentiality provisions, a settlement contract might authorize the recovery of liquidated damages, attorneys' fees, and costs for breach of settlement. [FN401] Parties can maximize (but not ensure) the confidentiality of their settlements and minimize (if not eliminate) judicial involvement *387 therein simply by filing a stipulation of dismissal with the court and relying exclusively on such contractual
Because a stipulated dismissal does not call for the exercise of any judicial discretion and cannot, unless requested, be judicially conditioned, a court cannot order the litigants to file their settlement agreement (and thereby risk making it a judicial record) or to otherwise publicly disclose its terms. Moreover, although a handful of sunshine laws regard certain secret settlements as violative (at least potentially) of public policy, litigants generally possess wide latitude to contract for settlement confidentiality. Contractual nondisclosure provisions, however, merely prohibit the parties to the contract from voluntarily disseminating information relevant to their settlement. A private confidentiality agreement will not bind nonparties, does not create any evidentiary privilege, and might not justify withholding protected information in the face of a freedom of information request or a court order compelling its production in other proceedings. While a court will likely enforce bargained-for secrecy in a suit between the parties to the contract, then, it may not necessarily enforce the litigants' private confidentiality agreement against third parties with a right to access the confidential information. In addition, litigants who rely exclusively on contractual confidentiality provisions potentially limit their enforcement options. A confidentiality order that embodies the parties' settlement converts a private agreement into a court order that will serve as a "powerful means of maintaining and enforcing secrecy." An unconditional, stipulated order of dismissal, in contrast, forfeits contempt of court as an additional deterrent to breach. Moreover, unless an independent basis for federal subject matter jurisdiction exists, litigants will surrender subsequent federal oversight of their agreement if the order of dismissal fails to embody their compromise or otherwise retain jurisdiction to enforce it. In such cases, litigants faced with an actual or threatened breach of their compromise are left to bring an independent enforcement action, suing for private damages, injunctive relief, or both.

B. Judicial Oversight of Settlement Secrecy

Thus, a number of motives may drive some litigants to more deeply involve the court in their confidential settlements. Some may wish to facilitate and enhance enforcement of their compromise, particularly if they foresee a dispute concerning its terms or a need for future judicial recourse. Others may hope that a court order will further shield their agreed confidences from the prying eyes of third parties, either by recognition of the confidentiality order in other courts or as an exception to statutorily required disclosures. In addition to their settlement contract, then, litigants frequently request the court to issue a confidentiality order that either approves and incorporates their agreement or at least references and retains jurisdiction over it. The parties' agreement in this regard, however, will not bind the court, and a confidentiality order, if entered, need not be coextensive with that agreement. Instead, the court possesses discretion whether to reserve or later terminate continuing jurisdiction over a confidential settlement or to sanction a secrecy agreement via court order.
1. Unfiled Discovery
Many of the considerations that inform the exercise of this discretion have already been discussed. For instance, factors relevant to the decision whether to modify or vacate a stipulated protective order should similarly guide the decision whether to continue nondisclosure requirements governing unfiled designated discovery in an agreed judgment or order of dismissal. [FN416] No presumption of public access attaches to such materials. And, although there is no longer any need to expedite discovery, the strong systemic interest in settlement, together with the litigants' actual and justifiable reliance upon the postsettlement maintenance of the stipulated protective order, can continue to supply the necessary "good cause." [FN417]

2. Sealing Orders
In contrast, and also as previously discussed, courts should take a more critical view of settlements conditioned upon the sealing of judicial records, to which a presumption of public access attaches. [FN418] Depending upon the weight of that presumption, the interest in facilitating settlement may well fall short of that necessary to rebut the presumption and justify sealing.

   *391 a. Sealing the Entire Record
For instance, the aim of achieving settlement should not warrant the indiscriminate sealing of the entire record in a case. [FN419] Because both the status of a document as a judicial record and the strength of the resulting presumption vary with what role that document plays in the adjudicative process, the sealing decision necessarily requires particularized judicial review. [FN420] The litigants, in turn, must "itemize for the court's approval which documents have been introduced into the public domain." [FN421] Although the litigants' reliance upon a sealing provision and its importance in achieving settlement may override the low presumption of public access that attaches to documents that bear only marginally upon the determination of their substantive rights, they cannot rebut the stronger presumption that applies to records more central to the merits. Yet, these latter types of judicial records are the ones most likely to motivate litigants to condition their settlement on the sealing of the entire record. [FN422] Since a court should opt for the least restrictive *392 alternative to sealing [FN423] and since litigants must demonstrate a particularized need for continued confidentiality, [FN424] only exceptional circumstances should warrant such wholesale closure.

   b. Sealing Court-Sponsored Bargaining
Qualitatively different access issues arise when the litigants seek to shield from public view their judicially sponsored settlement negotiations or the final product of that bargaining—the settlement agreement itself. In cases of public interest, for example, the media or other interested third parties may request access to settlement conferences with the court or to court-annexed alternative dispute resolution techniques like summary jury trials. [FN425] Assuming that the common law presumption of public access attaches to judicial proceedings as well as judicial records, [FN426] one could argue that the need to monitor our
judiciary at work requires that the public be given access \( ^*393 \) to the "cluster of dispute processes" over which courts today preside. [FN427]

Settlement techniques, like in-chambers settlement conferences and summary jury trials, however, do not constitute a public component of a civil trial. Such settlement proceedings enjoy no historical right of access and, in fact, are traditionally closed to the public. [FN428]

More important, although courts today actively encourage and, to varying degrees, facilitate settlements, settlement proceedings present no issue for adjudication by the courts. [FN429] As stated by one jurist, a "court can exercise all of its Article III powers to determine a case or controversy without ever convening a settlement conference" [FN430] or mandating the litigants to participate in a summary jury trial. Because court-facilitated settlement proceedings play a negligible role in the adjudication of the litigants' substantive rights, then, any presumptive right of access should carry little, if any, weight. [FN431]

A closed bargaining forum fosters the full ventilation of views and the give-and-take necessary to achieve compromise. [FN432] Negotiation itself may depend upon court assurances of confidentiality, and public access to settlement conferences and summary jury trials could thus \( ^*394 \) undermine their core purpose of promoting settlement. [FN433] The significant governmental interest in the judicial promotion of settlement, then, likely outweighs the negligible presumption of public access that may apply to court-sponsored settlement techniques, and can supply the good cause necessary to judicially seal such proceedings. [FN434]

c. Sealing Settlements

A confidentiality order that seals court-sponsored settlement techniques merely permits the litigants to negotiate in private. The necessary balancing of private and public interests, however, arguably shifts when the parties reach a final accord and request court assistance to ensure its confidentiality. For instance, if the settling parties file their settlement with the court, they may lose control over its continued secrecy. Litigants presumably do not file their agreement unless they want the court to take some action concerning it--either by issuing a confidentiality order incorporating its terms or, at the very least, a dismissal order retaining jurisdiction to enforce the accord. Thus, filed settlements are relevant, at least peripherally, to the decision-making role of the courts and, therefore, probably do constitute judicial records that are subject to a presumptive right of public access. [FN435]

\( ^*395 \) Under the functional analysis suggested in this Article, however, the resulting presumption of public access is likely weak given that even filed confidentiality agreements generally present no substantive issue for adjudication by the court. [FN436] While filed settlements will be presumed accessible, then, countervailing factors, such as party reliance upon the sealing order and its importance in achieving settlement, may rebut that presumption. [FN437]

Ultimately, the decision whether to seal the agreement will depend upon a balancing of the private and public interests implicated by the settlement. [FN438]
3. Judicial Discretion and Confidentiality Orders

Settling parties generally can skirt any presumption of public access to their agreement simply by refusing to file it with the court. [FN439] They cannot, however, altogether avoid judicial review of their confidentiality agreements and should not expect courts to blindly endorse or enforce agreed confidentiality orders concerning their settlements. Instead, such orders necessarily call for the exercise of judicial discretion, not only by the court whose docket will be lightened if the case is settled, [FN440] but also by other courts in similar lawsuits who are faced with requests to discover information protected by a confidentiality agreement or order. [FN441]

a. "Good Cause"

No consensus of opinion exists concerning the showing necessary to justify a confidentiality order concerning the terms of a private settlement. Unfiled settlement agreements, however, are similar to unfiled discovery; both are traditionally private components of a civil trial, implicate the privacy interests of litigants, and carry a potential for abuse if disclosed. [FN442] To that extent, one can rightly analogize to protective orders governing discovery and require that the litigants similarly demonstrate "good cause" to justify entry of a confidentiality order governing their settlement.