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## FRUCTIFYING THE FIRST AMENDMENT:<sup>1</sup> AN ASYMMETRIC APPROACH TO CONSTITUTIONAL FACT DOCTRINE

*Amanda Reid, J.D., Ph.D.\**  
*University of North Carolina at Chapel Hill*

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\* Assistant Professor, Hussman School of Journalism and Media at the University of North Carolina at Chapel Hill.

<sup>1</sup> Cf. *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 419 (1918) (“The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests . . .”), *overruled in part by Nye v. United States*, 313 U.S. 33, 52 (1941).

## INTRODUCTION

An Alabama jury decided an advertorial<sup>2</sup> in the *New York Times* defamed an Alabama police commissioner.<sup>3</sup> The Postmaster General decided the book *Lady Chatterley's Lover* was obscene.<sup>4</sup> A Florida court decided editorial articles in the *Miami Herald*, which criticized the court's handling of criminal cases, were contemptuous and a clear and present danger to judicial administration.<sup>5</sup> Cases like these raise the question whether an appellate court must defer to the original fact-finder and accept these findings of fact.<sup>6</sup> Typically, procedural rules demand deference to lower court findings of fact,<sup>7</sup> but a special exception is made for "constitutional facts" that implicate the First Amendment.<sup>8</sup>

The Supreme Court has long recognized the importance of scrupulously safeguarding the line between protected and unprotected speech. The Court has been emphatic that "freedoms of expression must be ringed about with adequate bulwarks."<sup>9</sup> In safeguarding speech, procedural bulwarks can be just as important as the scope of substantive protections.<sup>10</sup> "The history of American

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<sup>2</sup> On March 29, 1960, a full-page advertisement titled "Heed Their Rising Voices" was sponsored by a group of civil rights leaders seeking to raise funds for Dr. Martin Luther King Jr.'s legal defense. *New York Times Co. v. Sullivan*, 376 U.S. 254, 256-57 (1964).

<sup>3</sup> *See id.*

<sup>4</sup> *See* *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488, 490 (S.D.N.Y. 1959); *see also* *Blount v. Rizzi*, 400 U.S. 410 (1971) (considering the extent of a postmaster's power to regulate obscenity); Edward de Grazia, *Obscenity and the Mail: A Study of Administrative Restraint*, 20 LAW & CONTEMP. PROB. 608 (1955) (discussing the postal obscenity regulatory power).

<sup>5</sup> *See* *Pennekamp v. Florida*, 328 U.S. 331 (1946).

<sup>6</sup> *Cf.* FED. R. CIV. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous . . .").

<sup>7</sup> As used in this Essay, the term "lower court findings of fact" includes facts found by a jury as well as by a trial judge.

<sup>8</sup> The term "Constitutional Fact Doctrine" began in the legal scholarship and was then adopted by the courts. Professor John Dickinson is credited with coining the term. *E.g.*, Arthur Larson, *The Doctrine of "Constitutional Fact"*, 15 TEMP. L.Q. 185, 186 n.4 (1941) (suggesting term "originated with John Dickinson in *Crowell v. Benson*; *Judicial Review of Administrative Determinations of Questions of 'Constitutional Fact'*, 80 U. PA. L. REV. 1055 (1932)"); George C. Christie, *Judicial Review of Findings of Fact*, 87 NW. U. L. REV. 14, 26 (1992) (same).

<sup>9</sup> *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963) ("Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards is therefore but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks.") (internal citations omitted).

<sup>10</sup> *E.g.*, Steven Alan Childress, *Constitutional Fact and Process: A First Amendment Model of Censorial Discretion*, 70 TUL. L. REV. 1229, 1235 (1996) (observing that "in

freedom,” Justice Felix Frankfurter once observed, “is, in no small measure, the history of procedure.”<sup>11</sup> And as a contemporary scholar noted, “many of the most important First Amendment issues today involve not so much what is protected as the question of *how* speech is protected and *who* protects it.”<sup>12</sup> At its core, “procedure is power”.<sup>13</sup> To that end, scholars note, “Substantive rights, including constitutional rights, are worth no more than the procedural mechanisms available for their realization and protection.”<sup>14</sup>

Animated by the concern for individual liberties, the Supreme Court has crafted a number of procedural protections unique to First Amendment cases.<sup>15</sup> For example, in a defamation lawsuit, the plaintiff now bears the burden of proving the requisite level of fault.<sup>16</sup> At common law, a plaintiff needed only prove the defendant

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many ways the *judicial process* is as important as the substantive right”) (emphasis in original); Henry P. Monaghan, *First Amendment “Due Process”*, 83 HARV. L. REV. 518, 518 (1970) (observing that procedural protections play a “large role in protecting freedom of speech”).

<sup>11</sup> *Malinski v. New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring); *id.* at 413-14 (“The safeguards of ‘due process of law’ and ‘the equal protection of the laws’ summarize the history of freedom of English-speaking peoples running back to Magna Carta and reflected in the constitutional development of our people. The history of American freedom is, in no small measure, the history of procedure.”).

<sup>12</sup> Childress, *supra* note 10, at 1300 (emphasis in original).

<sup>13</sup> Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291, 1292 (2000).

<sup>14</sup> *Id.* at 1293; accord Erwin Chemerinsky, *Closing the Courthouse Doors*, 90 DENV. U. L. REV. 317, 317 (2012) (“One crucial aspect of the Roberts Court’s decision making has been its systematically closing the courthouse doors to those suing corporations, to those suing the government, to criminal defendants, and to plaintiffs in general. Taken together, these separate decisions have had a great cumulative impact in denying access to the courts to those who claim that their rights have been violated. The Roberts Court often has been able to achieve substantive results favored by conservatives through these procedural devices.”).

<sup>15</sup> *E.g.*, *Chicago Teachers Union, Local 1 v. Hudson*, 475 U.S. 292, 303 n.12 (1986) (“[P]rocedural safeguards often have a special bite in the First Amendment context.” Commentators have discussed the importance of procedural safeguards in our analysis of obscenity, overbreadth, vagueness, and public forum permits. The purpose of these safeguards is to insure that the government treads with sensitivity in areas freighted with First Amendment concerns.”) (quoting GERALD GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 1373 (10th ed. 1980) (citing Monaghan, *supra* note 10, at 520-524; LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 734-736 (1978); Vince Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1481, 1534-1572 (1970)); see also Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 259 n.167 (1985) (noting “the due process clause takes on a special meaning where important substantive constitutional values—such as freedom of speech—are at stake”).

<sup>16</sup> *E.g.*, *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 133-34, 155 (1967); *New York*

intentionally or negligently published a defamatory statement; the defendant did not need to know the statement was false or of its defamatory nature. But to ensure that “debate on public issues” would be “uninhibited, robust, and wide-open,” the Court shifted the burden to public officials and public figures to prove that the defendant knew the statement was false or acted with reckless disregard of the statement’s truth or falsity (i.e., actual malice).<sup>17</sup> For matters of public concern, the plaintiff now bears the burden of proving falsity.<sup>18</sup> And the plaintiff must prove actual malice by clear and convincing evidence, rather than by a mere preponderance of the evidence.<sup>19</sup> Thus the Court has enhanced procedural protections for speech by elevating and shifting burdens of proof.

The Court has not only altered burdens of proof at trial; it has also altered the standard of review on appeal.<sup>20</sup> When “constitutional facts” are involved, the Court has rejected the traditional deference to lower court fact-finders.<sup>21</sup> To safeguard the line between protected and unprotected speech, appellate courts are authorized to engage in an independent review of the record, rather than simply defer to the original fact-finder.<sup>22</sup>

Independent appellate review, also called the Constitutional Fact Doctrine,<sup>23</sup> is the focus of this Essay. Part I examines the

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Times Co. v. Sullivan, 376 U.S. 254, 279-83 (1964).

<sup>17</sup> *Sullivan*, 376 U.S. at 270.

<sup>18</sup> *E.g.*, Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775-76 (1986).

<sup>19</sup> *E.g.*, Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 511 (1984); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *Sullivan*, 376 U.S. at 285-86.

<sup>20</sup> *E.g.*, Wendy Gerwick Couture, *The Collision Between the First Amendment and Securities Fraud*, 65 ALA. L. REV. 903, 916 (2014) (“The safety net of independent review affords a speaker confidence that, even if the trier of fact were to be influenced by prejudice, the ‘clear and convincing’ evidence and ‘actual malice’ standards would be subject to a non-deferential review on appeal.”).

<sup>21</sup> *See infra* Parts I & II.

<sup>22</sup> *E.g.*, *Kois v. Wisconsin*, 408 U.S. 229, 231-32 (1972) (conducting independent assessment whether a poem was obscene); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 54 (1971) (performing independent assessment whether a statement was made with actual malice).

<sup>23</sup> The term Constitutional Fact Doctrine is used interchangeably with independent or plenary appellate review. *Accord* Nathan S. Chapman, *The Jury’s Constitutional Judgment*, 67 ALA. L. REV. 189, 229 (2015) (“Courts have variously referred to the doctrine as the constitutional fact doctrine or the independent review doctrine.”); Adam Hoffman, Note, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 DUKE L.J. 1427, 1430 (2001) (“De novo review of the facts underlying the application of a constitutional standard is often characterized as the

nature and origins of the Constitutional Fact Doctrine. Part II explores the Court's rationale for creating an exception to the typical deference and authorizing independent appellate review. Part III highlights the circuit split and unresolved question of whether the doctrine applies symmetrically or asymmetrically. And Part IV justifies a proposal for an asymmetric application of the Constitutional Fact Doctrine to protect free-speech-claimants. Thus, this Essay explores how the procedural protection of independent appellate review of constitutional facts can be harnessed to fructify the First Amendment.<sup>24</sup>

## I. NATURE OF THE CONSTITUTIONAL FACT DOCTRINE

A perennial jurisprudential question is how and when an appellate court should defer to fact-findings made in a lower court.<sup>25</sup> Standards of appellate review channel decision-making authority between trial and appellate levels.<sup>26</sup> When an appellate court reviews a matter deferentially, the center of gravity of that decision rests with the lower court.<sup>27</sup> On the other hand, if an appellate

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review of 'constitutional fact.' In describing the standard at work in constitutional fact review, courts use several interchangeable terms, including 'de novo,' 'free,' 'independent,' and 'plenary' review.").

<sup>24</sup> *Cf.* *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 419 (1918) ("The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests . . ."), *overruled in part by* *Nye v. United States*, 313 U.S. 33 (1941).

<sup>25</sup> *Cf.* Charles E. Clark & Ferdinand F. Stone, *Review of Findings of Fact*, 4 U. CHI. L. REV. 190, 190 (1937) ("The chief problems involved in a complete union of law and equity concern the preservation of the jury trial right as required by the Seventh Amendment of the Constitution. . . . Traditionally, and for historical reasons, the equity review is a re-examination of the entire record, on both the facts and the law, while that at law is limited to a consideration of the legal errors which may have been committed by the trial court."); 9C CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2571, at 223-24 (3d ed. 2008 & Supp. 2018) ("The provision in Rule 52(a) stating that findings of fact shall not be set aside unless clearly erroneous represents a statement of what was considered to be the federal equity practice in the years just prior to the merger of law and equity.").

<sup>26</sup> Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 997 (1986) ("Scope of review, therefore, is the principal means by which adjudicative decisional power and responsibility are divided between the trial and appellate levels.").

<sup>27</sup> Bryan Adamson, *Critical Error: Courts' Refusal to Recognize Intentional Race Discrimination Findings as Constitutional Facts*, 28 YALE L. & POL'Y REV. 1, 10 (2009) ("As a general proposition, standards of review confine appellate inquiry and judgments within a discrete decisional framework. For example, by directing that facts found by a trial court be reviewed only for clear error, Rule 52(a) binds the appellate judge to

court can decide the matter anew, finality on that question does not rest with the lower court.

It is axiomatic that trial courts are primarily responsible for fact-finding, and appellate courts are primarily responsible for law-developing.<sup>28</sup> The Supreme Court has long recognized the “good old rule” that questions of fact are generally the province of the jury, but questions of law are generally the province of the court.<sup>29</sup> Federal procedure directs that questions of fact are reviewed deferentially, whereas questions of law are reviewed de novo.<sup>30</sup>

A jury verdict will be upheld on appeal if it is supported by substantial evidence.<sup>31</sup> Substantial evidence means more than a mere scintilla; it means relevant evidence that a reasonable mind might accept as adequate to support a conclusion.<sup>32</sup> On a motion for judgment as a matter of law (JMOL), a trial court reviews the evidence—without weighing the credibility of the evidence—to assess whether there is only one reasonable conclusion as to the proper verdict in the case.<sup>33</sup> The trial court may grant a JMOL

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respond to the facts in a particular way and not to engage in a more active inquiry.”).

<sup>28</sup> *E.g.*, Edward H. Cooper, *Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645, 657 (1988) (“[T]rial courts are primarily responsible for sifting the evidence and finding the facts, while appellate courts are primarily responsible for developing the law.”); Louis, *supra* note 26, at 994 (“[F]act-finding is the special province of the trial level, law declaration is the special province of the appellate level, and the distinction between fact and law is the primary means by which the trial and appellate levels divide decisional power between them.”); *see also* Chad M. Oldfather, *Error Correction*, 85 IND. L.J. 49, 49 (2010) (“Most depictions of appellate courts suggest that they serve two core functions: the creation and refinement of law and the correction of error.”).

<sup>29</sup> *See Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794); *see also Bushell’s Case*, 124 E.R. 1006 (1670) (Vaughn, C.J.).

<sup>30</sup> *E.g.*, *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982) (“Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. . . . The Rule does not apply to conclusions of law.”).

<sup>31</sup> *E.g.* *Pavao v. Pagay*, 307 F.3d 915, 918 (9<sup>th</sup> Cir. 2002) (“A jury’s verdict must be upheld if it is supported by substantial evidence . . . even if it is also possible to draw a contrary conclusion.”); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1229, 1233 (10<sup>th</sup> Cir. 1996). On a motion for judgment as a matter of law, a trial court reviews a jury verdict for reasonableness. Fed. R. Civ. P. 50(a)(1) (“If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may: (A) resolve the issue against the party; and (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.”).

<sup>32</sup> *Richardson v. Perales*, 402 U.S. 389, 401 (1971).

<sup>33</sup> *See Fed. R. Civ. P. 50(a), (b)*; *see also Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150 (2000) (emphasizing that the “court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility

when no “reasonable jury” could find for a party on a given issue.<sup>34</sup> Not only are a jury’s findings entitled to deference, but a bench trial’s findings are also entitled to deference upon review. In a bench trial, the trial court’s findings will be accepted on appeal unless clearly erroneous.<sup>35</sup> Review under the clearly erroneous standard is, according to the Supreme Court, “significantly deferential,”<sup>36</sup> requiring an appellate court to have a “definite and firm conviction that a mistake has been committed” before disturbing fact-findings.<sup>37</sup>

While there are technical distinctions between reviewing jury findings for substantial evidence and trial court findings for clear error, both fact-finders are generally reviewed deferentially.<sup>38</sup> This Essay adopts the fiction that appellate court deference for questions of fact is binary: either a finding is given deference or it is not. Gradations of appellate deference (plenary, clear error, abuse of discretion, substantial evidence, arbitrary and capricious, some evidence, reasonable basis, etc.) are irrelevant to the analysis herein. Thus, on appeal, findings of fact—in a bench trial or a jury trial—are given deference, whereas conclusions of law are given non-deferential, plenary review.<sup>39</sup>

A notable exception to the typical deference to trial court fact-finding—either in a bench trial or a jury trial—is the Constitutional

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determinations or weigh the evidence”) (citations omitted).

<sup>34</sup> Under Rule 50, a trial court should grant a judgment as a matter of law only when “a party has been fully heard on an issue” and there is no “legally sufficient evidentiary basis” for a reasonable jury to find for that party on that issue. Fed. R. Civ. P. 50(a).

<sup>35</sup> Fed. R. Civ. P. 52(a)(6) (“Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”).

<sup>36</sup> *Concrete Pipe & Prods. V. Constr. Laborers Pension Tr.*, 508 U.S. 602, 623 (1993).

<sup>37</sup> *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (citation omitted); *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 855 (1982) (citation omitted).

<sup>38</sup> *E.g.*, *United States v. Boyd*, 55 F.3d 239, 242 (7<sup>th</sup> Cir. 1995) (acknowledging different labels of appellate review, but suggesting “heretically” there are “operationally only two degrees of review, plenary (that is, no deference given to the tribunal being reviewed) and deferential”).

<sup>39</sup> It is important to acknowledge that questions of fact and questions of law are not hermetically distinct. The Supreme Court acknowledged “the vexing nature of the distinction between questions of fact and questions of law.” *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982). And a chimerical category of “mixed questions of law and fact” has long bedeviled courts and commentators. *E.g.*, *id.* at 290 n.19; Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235, 236 (1991) (the blended nature of mixed questions “seems to sit precisely at the midpoint between the Scylla of allowing errors to go uncorrected and the Charybdis of judicial inefficiency”).

Fact Doctrine.<sup>40</sup> When a free speech interest is at stake, the gravity of the interest overrides the usual deference accorded to lower court fact-finding.<sup>41</sup> Modern scholars call the Constitutional Fact Doctrine “[o]ne of the most misunderstood and undervalued subjects in federal jurisdiction.”<sup>42</sup> It is a powerful tool, and scholars worry about the potential to misapply the doctrine.<sup>43</sup> Scholars have long urged for a limiting principle to prevent independent appellate review from “wander[ing]”<sup>44</sup> into inappropriate areas.<sup>45</sup>

Independent appellate review of fact-finding started in the administrative law context.<sup>46</sup> In certain cases, the Court independently reviewed facts determined by an administrative agency, including rate-making valuation for takings purposes,<sup>47</sup> citizenship determinations for deportation purposes,<sup>48</sup> and employee status for worker’s compensation purposes.<sup>49</sup> The heightened review was premised on due process concerns, and judicial reluctance to grant administrative agencies the final word on such findings of fact. But over time, *Lochner*-era economic

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<sup>40</sup> *E.g.*, Kevin Casey, Jade Camara & Nancy Wright, *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. B.J. 279, 302-03 (2002) (“There are rare exceptions to deferential appellate review of fact-findings. Among these exceptions are the constitutional facts which were discussed in *Bose Corp. v. Consumers Union of United States, Inc.*[], 466 U.S. 485, 498-511 (1984)]. Resolving a conflict between constitutional provisions, the Supreme Court held that Rule 52(a) does not apply to a finding that a disparaging statement about the sound quality of the plaintiff’s loudspeakers was made with ‘actual malice.’ The actual reach of such exceptions is unclear, and the value of the exceptions outside litigation involving freedom of speech or freedom of the press is uncertain.”).

<sup>41</sup> Christie, *supra* note 8, at 55 (“The [constitutional fact] doctrine asserts that regardless of the nature of the epistemological operations involved in the resolution of certain issues, Rule 52(a) simply does not apply because the issues involved are too important.”).

<sup>42</sup> Martin H. Redish & William D. Gohl, *The Wandering Doctrine of Constitutional Fact*, 59 ARIZ. L. REV. 289, 289 (2017).

<sup>43</sup> *See infra* Part IV.

<sup>44</sup> *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 485 (1984) (alleging product disparagement on the basis that stereo speakers produced sounds that “wander[ed] ‘about the room’”).

<sup>45</sup> *E.g.*, Redish & Gohl, *supra* note 42, at 289.

<sup>46</sup> Louis, *supra* note 26, at 995 (“In the period following the New Deal, courts and commentators carefully examined these variations in institutional deference and their sources, primarily from the administrative law perspective, because of the sudden proliferation of and interest in federal administrative agencies and agency adjudication.”).

<sup>47</sup> *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 298 (1920).

<sup>48</sup> *Ng Fung Ho v. White*, 259 U.S. 276 (1922).

<sup>49</sup> *Crowell v. Benson*, 285 U.S. 22 (1932).



substantive due process<sup>50</sup> fell out of vogue.<sup>51</sup> And as administrative law evolved, the need for independent review of agency determinations waned.<sup>52</sup>

While plenary appellate review of factual determinations withered in the administrative agency context, it found resurgence in the First Amendment context.<sup>53</sup> Independent appellate review found new life in substantive protections for individual liberties. The Constitutional Fact Doctrine evolved from the plenary review of administrative agency's jurisdictional fact determinations.<sup>54</sup> But it's not so much that jurisdictional fact review created constitutional fact review, rather the Court embraced and repurposed a tool it had previously employed.<sup>55</sup> Thus independent appellate review of an agency's jurisdictional facts was a gateway for the Court to adopt de novo review of constitutional facts.<sup>56</sup> So while independent appellate review was initially rooted in administrative law jurisprudence, a successor manifestation of

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<sup>50</sup> See *Lochner v. New York*, 198 U.S. 45 (1905) (striking down legislation setting maximum hours for bakers as unconstitutional under the Fourteenth Amendment Due Process Clause).

<sup>51</sup> *E.g.*, 33 THE LATE CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., FEDERAL PRACTICE AND PROCEDURE: JUDICIAL REVIEW § 8404 (1<sup>st</sup> ed. 2018) (“In deference to agency authority and expertise, de novo review by the courts of agency findings of fact is highly disfavored.”); see also 30A THE LATE CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF EVIDENCE § 6358 (1<sup>st</sup> ed. 2018) (discussing the Progressive Era).

<sup>52</sup> *Louis*, *supra* note 26, at 1030 (“[A]rising out of judicial review of administrative, statutorily defined findings of ultimate fact, the jurisdictional fact doctrine in effect transformed itself into the doctrine of constitutional fact.”); see also *Hoffman*, *supra* note 23, at 1445 (“Constitutional fact initially emerged in the administrative law context at least in part out of concern for procedural safeguards of both economic and individual constitutional rights.”).

<sup>53</sup> *Id.* at 1445 (“As the administrative line died out, a line of cases developed that applied independent fact review out of concern for both individual procedural rights and the need for the appellate courts to guide issues in which law finds meaning only through its application to facts. Over time, the latter rationale came to dominate the ‘procedural line.’ However, another family of cases emerged in which independent review was again primarily justified by potential threats to individual liberties, this time substantive First Amendment rights.”).

<sup>54</sup> Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1785 (2003) (“The doctrine emerged from the jurisdictional-fact doctrine announced in *Crowell v. Benson*[, 285 U.S. 22 (1932)].”).

<sup>55</sup> Michael Coenen, *Constitutional Privileging*, 99 VA. L. REV. 683, 700 n.55 (2013) (“This is not to say that *Crowell* created constitutional fact review. Rather, *Crowell* both confirmed and generalized’ a rule that the Court had already embraced in earlier cases.”) (citation omitted).

<sup>56</sup> Allen & Pardo, *supra* note 54, at 1785-86 (“The doctrine became a tool for courts to use to reexamine the facts in constitutional cases.”).

constitutional fact review has flourished in First Amendment jurisprudence.<sup>57</sup>

The “renascent”<sup>58</sup> Constitutional Fact Doctrine was premised on First Amendment due process concerns.<sup>59</sup> In First Amendment cases, the Court has applied plenary appellate review to findings underlying defamation judgments, obscenity prosecutions, and other judicial proceedings implicating the free speech right.<sup>60</sup> In defamation suits brought by public figures, whether a defendant acted with actual malice is reviewed de novo.<sup>61</sup> In obscenity cases, whether the work lacks serious value is reviewed de novo.<sup>62</sup> In breach of the peace prosecutions, whether the defendant’s conduct actually breached the peace is reviewed de novo.<sup>63</sup> In contempt cases involving media coverage critical of the administration of criminal justice in pending cases, whether the coverage presented a “threat of clear and present danger to the impartiality and good order of the courts” is reviewed de novo.<sup>64</sup> Part II takes a closer look at the Court’s rationale for engaging in constitutional fact review.

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<sup>57</sup> *E.g.*, Louis, *supra* note 26, at 995-96 n.15 (“Most constitutional fact cases today arise out of the Bill of Rights and deal with such questions as whether a film is obscene under the first amendment or whether a confession is coerced under the fifth amendment.”).

<sup>58</sup> Frank R. Strong, *The Persistent Doctrine of “Constitutional Fact”*, 46 N.C. L. REV. 223, 240 (1968); *id.* (“While constitutional limits have receded in the area of economic interests, they have made rapid and revolutionary advances as concerns First Amendment freedoms.”).

<sup>59</sup> Scholars have questioned whether limiting the doctrine to First Amendment cases is justified. Redish & Gohl, *supra* note 42, at 324 (“Nor is there anything inherently ‘special’ about constitutional, as opposed to non-constitutional, claims that give rise to an implied right of supervisory review.”); Allen & Pardo, *supra* note 54, at 1787 (“While *Bose* emphasized the constitutional importance of the issue—and that the ‘vexing nature’ of the law-fact distinction did not diminish the importance—the Court did not explain why the ‘importance’ does not extend to all constitutional issues.”); Christie, *supra* note 8, at 30 (“Do all questions of constitutional law application demand independent appellate review? Or is the doctrine more limited, applying merely to ‘every instance of [F]irst [A]mendment law application’ and perhaps a limited number of other situations?”) (quoting Monaghan, *supra* note 15, at 269)).

<sup>60</sup> *E.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc., 515 U.S. 557, 567 (1995) (applying constitutional fact review to a state court’s conclusion that a First Amendment claimant’s expression lacked essential attributes of protected speech).

<sup>61</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964).

<sup>62</sup> *Pope v. Illinois*, 481 U.S. 497, 500-02 (1987).

<sup>63</sup> *Cox v. Louisiana*, 379 U.S. 536, 544-51 (1965); *Edwards v. South Carolina*, 372 U.S. 229, 235-38 (1963).

<sup>64</sup> *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946).

## II. RATIONALE FOR ENGAGING IN CONSTITUTIONAL FACT REVIEW

To ensure that protected speech is not improperly prohibited, appellate courts engage in an independent review of the underlying facts that have a constitutional dimension. In *New York Times v. Sullivan*, the Supreme Court independently assessed the facts, found the newspaper did not publish the advertorial with the requisite level of fault (actual malice), and rejected the Alabama jury's defamation verdict.<sup>65</sup> The *Sullivan* Court enhanced procedural protections for speech in three distinct ways: (1) by requiring public official plaintiffs to prove a publisher's statement was made with actual malice;<sup>66</sup> (2) by requiring that such plaintiffs prove actual malice by clear and convincing evidence;<sup>67</sup> and (3) by engaging in an independent appellate review of the record to assess whether the evidence satisfied the constitutional standard of actual malice.<sup>68</sup> Together these new procedural protections were intended to shield publishers' mistakes and to minimize the chill on "public debate"<sup>69</sup> by providing publishers with ample "breathing space"<sup>70</sup> to avoid "self-censorship."<sup>71</sup>

The Court justified its independent, non-deferential review of the facts because of the gravity of the constitutional issue at stake.<sup>72</sup> In the words of the Court, independent appellate review of the lower court is necessary to ensure that "the judgment does not constitute

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<sup>65</sup> 376 U.S. 254, 256, 283-84 (1964); see also Strong, *supra* note 58, at 243 ("[T]he historic *New York Times* case is significant for the simultaneous appearance of a newly-drawn constitutional line and full-blown constitutional fact.").

<sup>66</sup> *Sullivan*, 376 U.S. at 279-80.

<sup>67</sup> *Id.* at 285-86.

<sup>68</sup> *Id.* at 285. Accord Couture, *supra* note 20, at 916; Gary Anthony Paranzino, Note, *The Future of Libel Law and Independent Appellate Review: Making Sense of Bose Corp. v. Consumers Union of United States, Inc.*, 71 CORNELL L. REV. 477, 481-82 (1986).

<sup>69</sup> *Sullivan*, 376 U.S. at 279. Cf. *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring) (observing a loyalty oath "has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice").

<sup>70</sup> *Sullivan*, 376 U.S. at 272.

<sup>71</sup> *Id.* at 279 (quoting *Smith v. California*, 361 U.S. 147, 154 (1959)).

<sup>72</sup> See Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 220 (1964) ("The Court makes actual malice a 'constitutional fact' that it will review de novo and indeed did review de novo in the case itself."); see also Allen & Pardo, *supra* note 54, at 1786 ("Under the auspices of constitutional-fact review, appellate courts must review de novo the 'actual malice' element in defamation suits." (citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984))).

a forbidden intrusion on the field of free expression.”<sup>73</sup> The Court’s ruling in *Sullivan*, according to Professor Harry Kalven, Jr., “reflects a strategy that requires that speech be overprotected in order to assure that it is not underprotected.”<sup>74</sup> The core premise of the *Sullivan* Court’s decision is that legal liability will chill robust debate.<sup>75</sup>

As the Court noted, “the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn,” and it calls for “sensitive tools” to separate legitimate from illegitimate speech.<sup>76</sup> One such sensitive tool is the Constitutional Fact Doctrine, by which the Court embraced the “responsibility” to independently examine whether the speech at issue is indeed unprotected.<sup>77</sup> For example, in *Edwards v. South Carolina*, the Court rejected the defendant’s conviction for a breach of the peace, and emphasized its “duty . . . to make an independent examination of the whole record.”<sup>78</sup> Concluding that “the record is barren of any evidence of ‘fighting words,’”<sup>79</sup> and underscoring that a state may not “make criminal the peaceful expression of unpopular views,”<sup>80</sup> the Court overturned the defendant’s criminal conviction.

For cases involving defamation, obscenity, or fighting words, free speech rights often turn on questions of fact. In defamation cases the question often turns on the defendant’s state of mind and whether the publication was made with actual malice.<sup>81</sup> In

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<sup>73</sup> *Sullivan*, 376 U.S. at 285.

<sup>74</sup> Kalven, *supra* note 72, at 213.

<sup>75</sup> *E.g.*, Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1267 n.62 (2005) (“The entire *Sullivan* rule is based on the irreducibly empirical and contingent premise that publishers at risk of legal liability will refrain from engaging in ‘uninhibited,’ ‘wide-open,’ and ‘robust’ reportage—a premise that may be more contestable than the Court believed in *Sullivan*.”) (citation omitted).

<sup>76</sup> *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

<sup>77</sup> *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946) (“The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.”) (citations omitted).

<sup>78</sup> *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963).

<sup>79</sup> *Id.* at 236 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

<sup>80</sup> *Edwards*, 372 U.S. at 237.

<sup>81</sup> *E.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 287 (1964).

obscenity cases the question often turns on whether a work is patently offensive and lacks serious value.<sup>82</sup> Thus for cases involving First Amendment interests, findings of fact are often inextricably intertwined with constitutional rights. A factual error in the trial court – by the judge or jury – can improperly deny a constitutional liberty. To guard against improper denial of speech interests, the Supreme Court embraces an obligation to independently review the facts underlying the constitutional issue, rather than apply the typical deferential review of the facts.<sup>83</sup>

Independent review applies in a full range of cases that implicate speech interests. Writing for the Court in *Roth v. United States*, Justice William Brennan confirmed that “obscenity is not within the area of constitutionally protected speech or press.”<sup>84</sup> The Court explained that obscenity falls outside of First Amendment protection because such low-value speech is “utterly without redeeming social importance.”<sup>85</sup> The Court then instructed appellate courts to independently assess whether the material meets the constitutional definition of obscenity.<sup>86</sup> Again writing for the Court, Justice Brennan reiterated, in *Jacobellis v. Ohio*, that “this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected.”<sup>87</sup> The Court did not shoulder this burden lightly or with pleasure; rather the Court accepted this responsibility as a matter of duty:

We are told that the determination whether a particular motion picture, book, or other work of expression is obscene can be treated as a purely factual judgment on which a jury’s verdict is all but conclusive, or that in any event the decision can be left essentially to state and lower federal courts, with

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<sup>82</sup> *E.g.*, *Jenkins v. Georgia*, 418 U.S. 153, 159-61 (1974) (reviewing de novo, and reversing, a unanimous jury determination that the movie “Carnal Knowledge” was patently offensive while recognizing that the “patently offensive” determination was one of fact).

<sup>83</sup> *E.g.*, *U.S. Bank Nat’l Ass’n ex rel. CWC Capital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 n.4 (2018) (“Usually but not always: In the constitutional realm, for example, the calculus changes. There, we have often held that the role of appellate courts ‘in marking out the limits of [a] standard through the process of case-by-case adjudication’ favors *de novo* review even when answering a mixed question primarily involves plunging into a factual record.”) (citations omitted).

<sup>84</sup> *Roth v. United States*, 354 U.S. 476, 485 (1957).

<sup>85</sup> *Id.* at 484.

<sup>86</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 189-90 (1964).

<sup>87</sup> *Id.* at 190.

this Court exercising only a limited review such as that needed to determine whether the ruling below is supported by “sufficient evidence.” The suggestion is appealing, since it would lift from our shoulders a difficult, recurring, and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only “obscenity” that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no “substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.”<sup>88</sup>

De novo review of obscenity cases risked turning the Supreme Court into a “Super Censor” for the nation.<sup>89</sup> But the Court had no choice, according to Justice Brennan, because the Court had the duty to uphold constitutional law.<sup>90</sup> Material is unprotected only if it is obscene; hence the Court was obligated to ensure that the material is indeed obscene, and thus outside First Amendment protection.<sup>91</sup>

Whether speech falls into an unprotected class is a matter of constitutional judgment; it is not simply a question of fact. As Justice John Marshall Harlan stated:

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<sup>88</sup> *Id.* at 187-88 (citations omitted).

<sup>89</sup> *See id.* at 203 (Warren, C.J., dissenting) (discussing the risk of the “Court’s sitting as the Super Censor of all the obscenity purveyed throughout the Nation”).

<sup>90</sup> Some scholars question whether it is indeed a duty or merely at the discretion of the Court. *Compare* Monaghan, *supra* note 15, at 264 (“To be sure, appellate courts often exercise independent judgment with respect to constitutional law application. But I see no persuasive case for converting this competence into a duty.”), *with* DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS 127 (2008) (“The duty to define the Constitution’s meaning effectively incorporates the duty to ensure its proper application. This can only be accomplished by some heightened level of review of constitutional case-specific fact-finding. In free speech cases, this is unambiguously accomplished by the use of independent review by appellate courts.”).

<sup>91</sup> *Jacobellis*, 378 U.S. at 187-88 (“Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only ‘obscenity’ that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no ‘substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.’”) (citations omitted).

I do not think that reviewing courts can escape this responsibility by saying that the trier of the facts, be it a jury or a judge, has labeled the questioned matter as “obscene,” for, if “obscenity” is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind.<sup>92</sup>

Unless the Court adopted an all-or-nothing approach, it was saddled with the responsibility of deciding on a case-by-case basis. As Justice Harlan stated: “Short of saying that no material relating to sex may be banned, or that all of it may be, I do not see how this Court can escape the task of reviewing obscenity decisions on a case-by-case basis.”<sup>93</sup> The Court was thereby required to independently review the fact-finding of the censors.<sup>94</sup>

The Court extracted itself from “the intractable obscenity problem”<sup>95</sup> by crafting a new test for obscenity. In *Miller v. California*,<sup>96</sup> the Court crafted a three-part test that requires courts to assess whether a work depicts or describes sexual conduct that “taken as a whole, appeal[s] to the prurient interest,” portrays “sexual conduct in a patently offensive way,” and does not “have serious literary, artistic, political, or scientific value” under “contemporary community standards.”<sup>97</sup> With the *Miller* test, the Court was essentially allowed to halt the high volume of independent appellate review of obscenity cases.<sup>98</sup> In a span of

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<sup>92</sup> *Roth v. United States*, 354 U.S. 476, 497-98 (1957) (Harlan, J., concurring in part and dissenting in part) (emphasis in original).

<sup>93</sup> *Memoirs v. Massachusetts*, 383 U.S. 413, 460 (1966) (Harlan, J., dissenting).

<sup>94</sup> *Id.* at 427 (Douglas, J., concurring) (“If there is to be censorship, the wisdom of experts on such matters as literary merit and historical significance must be evaluated. On this record, the Court has no choice but to reverse the judgment of the Massachusetts Supreme Judicial Court, irrespective of whether we would include *Fanny Hill* in our own libraries.”); see also *Freedman v. Maryland*, 380 U.S. 51, 58 (1965) (“[T]he burden of proving that the film is unprotected expression must rest on the censor.”).

<sup>95</sup> *Miller v. California*, 413 U.S. 15, 16 (1973) (quoting *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 704 (1968) (Harlan, J., concurring in part and dissenting in part)).

<sup>96</sup> 413 U.S. 15 (1973).

<sup>97</sup> *Id.* at 24.

<sup>98</sup> William B. Lockhart & Robert C. McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 119 (1960) (after articulating reasonably clear standards, “[o]nly an occasional review by the Supreme Court should be needed to clarify the standards”); Hoffman, *supra* note 23, at 1454 n.153 (2001) (“The *Miller* decision largely enabled the Court to declare victory and leave the field, but obscenity cases still occasionally would be granted certiorari.”). But see C. Peter Magrath, *The Obscenity Cases: Grapes of Roth*, 1966 SUP. CT. REV. 7, 8 (1966) (suggesting the

twenty years leading up to *Miller*, the Court heard nearly 90 obscenity cases,<sup>99</sup> and it has reviewed only a handful after.<sup>100</sup> The Court had been frustrated by the vague and variable I-know-it-when-I-see-it standard,<sup>101</sup> and it was searching for a more instructive test to guide the lower courts.<sup>102</sup> The *Miller* test answered the call. The *Miller* test extracted the Court from the high volume of obscenity cases much the same way the *Miranda v. Arizona*<sup>103</sup> rule alleviated the Court from the surfeit of fact-specific determinations of voluntary confessions by criminal defendants. Much like the glut of obscenity cases, the Court similarly had been enmeshed in a nimety of de novo review of voluntary confessions in criminal cases – until the Court crafted a new rule. In other words, like with the *Miller* obscenity test, the Court had been mired in fact-specific voluntary confession cases until the Court crafted

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Warren Court's "problems are of its own making" because "[t]he Warren Court, after all, is very probably the most activist tribunal in our constitutional history, and this activism is largely responsible for its confrontation with a seemingly endless crop of hard cases").

<sup>99</sup> CLAY CALVERT ET AL., MASS MEDIA LAW 488 (20th ed. 2018) ("Between 1957 and 1977, for example, the high court heard arguments in almost 90 obscenity cases and wrote opinions in nearly 40 of those cases. In stark contrast, as of the start of 2018, the Supreme Court had not heard a single obscenity case in the 21st century involving whether or not a particular movie, book, magazine, Web site or other media product was obscene. It has, instead, considered other issues since the year 2000, such as the constitutionality of statutes regulating child pornography, virtual (computer-generated) child pornography and nonobscene sexual content on the Internet.").

<sup>100</sup> *E.g.*, *Jenkins v. Georgia*, 418 U.S. 153, 160-61 (1974) (concluding, upon de novo review of "Carnal Knowledge," that the movie did not satisfy the *Miller* test).

<sup>101</sup> *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.").

<sup>102</sup> Lee Levine, *Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart*, 35 AM. U. L. REV. 3, 49 (1985) ("In the years following *Jacobellis*, the Brennan approach to independent review dominated in obscenity cases. As Chief Justice Burger explained in *Miller v. California*, the absence of a majority view compelled the Court routinely to reverse convictions for the dissemination of allegedly obscene materials summarily when at least five members of the Court, applying their separate tests, found the materials to be protected by the first amendment."); Hoffman, *supra* note 23, at 1454 ("Finally, in *Miller v. California*, Chief Justice Burger wrote for a clearly frustrated majority of six in trying to put an end to 'the "intractable obscenity problem"' by drawing a bright line limiting obscenity to hard-core pornography that contains the depiction or description of sexual conduct or genitalia. It cannot be said that this rule emerged from the process of applying the previous obscenity standard; it was more an attempt to limit the Court's involvement in an arena in which application had utterly failed to produce a clearer rule.") (citations omitted).

<sup>103</sup> 384 U.S. 436 (1966).



the *Miranda* warning.<sup>104</sup> As one scholar noted, “*Miranda* itself can be understood as an effort by the Court to develop a clear rule that would free it from case-by-case determinations of voluntariness.”<sup>105</sup> While a clear legal rule provides better guidance to the lower courts and helps alleviate some of the burden on the appellate courts, it does not relieve an appellate court of its duty to protect constitutional liberties.<sup>106</sup>

In *Bose Corporation v. Consumers Union*, the Supreme Court reiterated its constitutional duty to conduct an independent, non-deferential examination of an actual malice determination.<sup>107</sup> Bose Corporation, maker of loudspeakers, sued Consumer Reports for publishing an article critical of its product: the Bose 901 stereo speakers. The article stated, in part, that “individual instruments heard through the *Bose* system seemed to grow to gigantic proportions and tended to wander about the room.”<sup>108</sup> Allegations that the speakers produced sounds that wandered around the room was undesirable and Bose sued for product disparagement.<sup>109</sup> After a nineteen-day bench trial, the district court found the statement

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<sup>104</sup> See Strong, *supra* note 58, at 281-82 (discussing the long line of forced confession cases and establishing that *Escobedo* and *Miranda* are in great part a consequence of the Court’s growing concern over the heavy burden of independent review in this class of constitutional litigation); Hoffman, *supra* note 23, at 1452 (“[T]he Court was drawn into a series of highly fact-specific inquiries that did not result in clear rules such that the Court could ever leave the field. The Court finally escaped this burden of review only by vastly simplifying voluntariness down to the technicalities of *Escobedo* and *Miranda*.”) (citations omitted).

<sup>105</sup> Keith R. Dolliver, Comment, *Voluntariness of Confessions in Habeas Corpus Proceedings: The Proper Standard for Appellate Review*, 57 U. CHI. L. REV. 141, 145 (1990) (citations omitted).

<sup>106</sup> Cf. Louis, *supra* note 26, at 1027 n.251 (“Arguably, the Court has formulated bright line constitutional tests in other areas to avoid the burden of reviewing endless findings of constitutional fact.”).

<sup>107</sup> 466 U.S. 485, 514 n.31 (1984).

<sup>108</sup> *Bose Corp. v. Consumers Union of United States, Inc.*, 508 F. Supp. 1249, 1253 (D. Mass. 1981).

<sup>109</sup> *Id.* at 1267 (“The testimony at trial showed that a certain degree of movement of the location of the apparent sound source is to be expected with all stereo loudspeaker systems. Such movement is a natural consequence of the stereo recording process and is due to the various polar radiation patterns produced by an instrument at various frequencies. Because such movement between two loudspeakers is a common effect and is to be expected, a reader would not be surprised to read about ‘instruments’ moving along the wall between two loudspeakers. Movement throughout the other areas of the room, however, is not to be expected. Such a bizarre effect is contrary to what the average listener has become accustomed and would probably be found objectionable by most listeners.”).

that the speakers produced sounds that “wander about the room” was false, disparaging,<sup>110</sup> and published with actual malice.<sup>111</sup>

On independent appellate review, the Supreme Court concluded that the record did not contain clear and convincing evidence that the author of the product review acted with actual malice.<sup>112</sup> Whether a particular statement is stripped of First Amendment protection, the Court noted, “is not merely a question for the trier of fact.”<sup>113</sup> Rather, the Court instructed that appellate courts “must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of ‘actual malice.’”<sup>114</sup>

Justice John Paul Stevens’s opinion for the Court, joined by Justices Brennan, Marshall, Blackmun, and Powell, stated that the independent appellate examination rule “reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution.”<sup>115</sup> The Court clarified that “the rule of independent review” applies irrespective whether the fact-finding is performed “by a jury or by a trial judge.”<sup>116</sup> The *Bose* Court traced the practice of independent review to its earlier defamation cases,<sup>117</sup> obscenity cases,<sup>118</sup> fighting

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<sup>110</sup> *Id.* at 1268 (“[T]he Court finds that the statement in the May 1970 Article that ‘individual instruments heard through the Bose system . . . tended to wander about the room’ is false. The Court also finds that the statement is disparaging.”).

<sup>111</sup> *Id.* at 1277 (“Based on the above finding that Seligson’s testimony to the contrary is not credible, the Court further finds that at the time of the Article’s publication Seligson knew that the words ‘individual instruments . . . tended to wander about the room’ did not accurately describe the effects that he and Lefkow had heard during the ‘special listening test.’ Consequently, the Court concludes, on the basis of proof which it considers clear and convincing, that the plaintiff has sustained its burden of proving that the defendant published a false statement of material fact with the knowledge that it was false or with reckless disregard of its truth or falsity.”).

<sup>112</sup> *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 513 (1984) (“We may accept all of the purely factual findings of the District Court and nevertheless hold as a matter of law that the record does not contain clear and convincing evidence that Seligson or his employer prepared the loudspeaker article with knowledge that it contained a false statement, or with reckless disregard of the truth.”).

<sup>113</sup> *Id.* at 511.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 510-11.

<sup>116</sup> *Id.* at 501.

<sup>117</sup> *Time, Inc. v. Pape*, 401 U.S. 279 (1971); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>118</sup> *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Miller v. California*, 413 U.S. 15 (1973);

words<sup>119</sup> and incitement cases,<sup>120</sup> and civil rights demonstration cases.<sup>121</sup> The next Part of this Essay examines how this Constitutional Fact Doctrine has been applied by the courts and highlights the circuit split that has persisted for over three decades.

### III. SCOPE AND APPLICATION OF THE CONSTITUTIONAL FACT DOCTRINE

Independent appellate review of constitutional facts is now firmly established.<sup>122</sup> But an unresolved question persists: does independent appellate review apply symmetrically or asymmetrically.<sup>123</sup> As Professor Henry Monaghan observed, “Initially, the Court must decide whether both parties, or only the free speech claimant, can demand independent appellate review; that is, can the party opposing the free speech claim demand independent appellate judgment on the first amendment law application point?”<sup>124</sup> Thus, does *de novo* review apply in equal measure when the lower court makes a determination adverse to the speaker as well as when the lower court makes a determination friendly to the speaker? In other words, is independent review a one-way street or a two-way street? This question was probed during the Supreme Court’s oral argument in *Hustler Magazine, Inc. v. Falwell*.<sup>125</sup>

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Jacobellis v. Ohio, 378 U.S. 184 (1964); Roth v. United States, 354 U.S. 476 (1957).

<sup>119</sup> Street v. New York, 394 U.S. 576 (1969).

<sup>120</sup> Hess v. Indiana, 414 U.S. 105 (1973); Fiske v. Kansas, 274 U.S. 380 (1927).

<sup>121</sup> Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963).

<sup>122</sup> *E.g.*, *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 685-86 (1989) (“The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law. This rule is not simply premised on common-law tradition, but on the unique character of the interest protected by the actual malice standard. Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of ‘breathing space’ so that protected speech is not discouraged.”) (citations omitted); *see also* U.S. Bank Nat. Ass’n *ex rel.* CWC Capital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC, 138 S. Ct. 960, 967 n.4 (2018).

<sup>123</sup> *See* Chapman, *supra* note 23, at 229 (2015) (observing “the scope and precise demands of the doctrine are somewhat hazy”).

<sup>124</sup> Monaghan, *supra* note 10, at 245.

<sup>125</sup> 485 U.S. 46 (1988).

Justice Sandra Day O'Connor: I thought you were suggesting that in the First Amendment context, we'd have to consider those issues again.

Mr. Isaacman: Justice O'Connor, I suggest that in the First Amendment context, when a determination is made by a jury that's adverse to speech, and when a jury finds that the speaker made statements that could be construed as statements of fact and were knowingly false, then it is incumbent upon the Court to take that review for the purpose of protecting the speaker. And that's what the First Amendment says, that you have to protect the speaker.

Chief Justice William H. Rehnquist: You think *Bose* is a one-way street, then?

Mr. Alan L. Isaacman: Your Honor, I do think it's a one-way street. *Bose* is intended to protect the speaker . . . .<sup>126</sup>

The question whether *Bose* is a one-way street or a two-way street was not mentioned in the *Falwell* opinion. Writing for a unanimous court, Justice William Rehnquist confirmed that the Court has been "particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions."<sup>127</sup> But the *Falwell* Court did not clarify the application of independent constitutional fact review.

The Circuit Courts of Appeals are split on whether constitutional fact review applies symmetrically or asymmetrically,<sup>128</sup> and for over thirty years the Supreme Court has declined to resolve the split.<sup>129</sup> As the Tenth Circuit noted, "the *Bose* opinion does not make clear whether its more searching review—whose purpose was to avoid 'a forbidden intrusion' on First Amendment rights applies symmetrically to district court findings that favor as well as disfavor the First Amendment claimant."<sup>130</sup>

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<sup>126</sup> Transcript of Oral Argument at 8-9, *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (No. 86-1278).

<sup>127</sup> *Hustler Magazine, Inc.*, 485 U.S. at 51.

<sup>128</sup> *E.g.*, *United States v. Friday*, 525 F.3d 938, 950 (10th Cir. 2008) (noting "circuits have long been split" on whether a "more searching review . . . applies symmetrically to district court findings that favor as well as disfavor the First Amendment claimant") (citations omitted).

<sup>129</sup> *E.g.*, *Don's Porta Signs, Inc. v. City of Clearwater*, 485 U.S. 981, 981-92 (1988) (White, J., noting circuit split and dissenting from denial of certiorari).

<sup>130</sup> *Friday*, 525 F.3d at 950 (citations omitted).

The First,<sup>131</sup> Fifth,<sup>132</sup> Tenth,<sup>133</sup> and Eleventh<sup>134</sup> Circuits apply independent review indiscriminately as a two-way street. But this symmetrical application is undertheorized. While a Tenth Circuit panel was bound to follow precedent—in observing the circuit split—the court stated, “we have never explained why, this Circuit has applied *Bose* even when First Amendment claims prevailed below, and thus taken the side of symmetry.”<sup>135</sup>

The Fourth,<sup>136</sup> Seventh,<sup>137</sup> and Ninth<sup>138</sup> Circuits, on the other hand, apply plenary review only one way and give deference to pro-speech findings by the lower courts. In these circuits, the typical appellate deference applies when the speech-claimant prevailed

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<sup>131</sup> *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 48 (1st Cir. 2008) (de novo review of the district court finding that the challenged law was an unconstitutional abridgement of free speech), *abrogated on other grounds by Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011).

<sup>132</sup> *Lindsay v. San Antonio*, 821 F.2d 1103, 1108 (5th Cir. 1987) (“[I]n deciding whether restrictions on speech are justified, appellate courts do not rely heavily on findings of fact made by trial courts.”) (citing *Dunagin v. City of Oxford*, 718 F.2d 738, 748-49 n.8 (5th Cir. 1983)); *Dunagin*, 718 F.2d at 748 n.8 (“The degree to which an appellate court should defer to the ‘fact’ findings of a trial judge as to the latest truths in the social sciences is an interesting question. The argument can be made that as long as the trial court applied the right legal test or the appropriate level of scrutiny, his findings under each prong of the test, here the *Central Hudson Gas* test, and his decision should be upheld on appeal. . . . There are limits to which important constitutional questions should hinge on the views of social scientists who testify as experts at trial. . . . Perhaps for these reasons, the Supreme Court’s recent commercial speech and other relevant speech cases indicate that appellate courts have considerable leeway in deciding whether restrictions on speech are justified. In none of them did the Court rely heavily on fact findings of the trial court.”).

<sup>133</sup> *Hardin v. Santa Fe Reporter, Inc.*, 745 F.2d 1323, 1326 (10th Cir. 1984) (de novo review of trial court’s finding that no “actual malice existed”).

<sup>134</sup> *Don’s Porta Signs, Inc. v. City of Clearwater*, 829 F.2d 1051, 1053 n.9 (11th Cir. 1987) (agreeing with the Fifth Circuit’s conclusion “that an appellate court is not bound by the ‘clearly erroneous’ standard of review in determining whether a commercial speech regulation directly advances the government’s goals or is more extensive than necessary”) (citing *Lindsay*, 821 F.2d at 1107).

<sup>135</sup> *Friday*, 525 F.3d at 950.

<sup>136</sup> *Multimedia Publ’g Co. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 160 (4th Cir. 1993) (concluding “*de novo* review is required only where a district court decision has left expressive activity unprotected and not, as here, where it has protected the activity”).

<sup>137</sup> *Planned Parenthood Ass’n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225, 1228-29 (7th Cir. 1985).

<sup>138</sup> *Daily Herald Co. v. Munro*, 838 F.2d 380, 383 (9th Cir. 1988) (“When a district court holds a restriction on speech constitutional, we conduct an independent, de novo examination of the facts. When the government challenges the district court’s holding that the government has unconstitutionally restricted speech, on the other hand, we review the district court findings of fact for clear error.”) (citing *Planned Parenthood Ass’n/Chicago Area*, 767 F.2d at 1228-29).

below on the rationale that in such cases there is no risk of a “forbidden intrusion”<sup>139</sup> on free expression. The Seventh Circuit emphasized that this asymmetric review “reflects a special solicitude for claims that the protections afforded by the First Amendment have been unduly abridged.”<sup>140</sup> Independent appellate review, the Seventh Circuit noted, is designed to ensure “that the suppression of protected speech—particularly unpopular or controversial speech—is not insulated from close scrutiny by the straightforward application of the clearly-erroneous rule.”<sup>141</sup> Moreover, an exception to the traditional deference is unnecessary “for the government’s claim that it has been wrongly prevented from restricting speech.”<sup>142</sup> Guarding against the suppression of protected speech is thus unnecessary when the lower court makes a pro-speech finding. The next Part of this Essay outlines a theoretical justification for asymmetric independent appellate review, which both honors the aims the Constitutional Fact Doctrine and provides an important limiting-principle for the Doctrine.

#### IV. PROPOSAL FOR ASYMMETRIC APPLICATION OF THE CONSTITUTIONAL FACT DOCTRINE

Independent appellate review of constitutional facts is a powerful tool for protecting constitutional liberties.<sup>143</sup> But this tool comes with institutional costs—which are discussed in greater detail below. Balancing the costs and benefits of the Constitutional Fact Doctrine, the superior solution to the scope question is a one-way, asymmetrical application of independent appellate review.

To serve its core function, the Constitutional Fact Doctrine requires a clear justification and a limiting-principle. As scholars have charged, “no one appears to fully understand either the underlying political or constitutional rationales for the doctrine, or

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<sup>139</sup> See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 567-68 (1995) (“[O]ur obligation is to ‘make an independent examination of the whole record,’ . . . so as to assure ourselves that th[is] judgment does not constitute a forbidden intrusion on the field of free expression.”) (citations omitted).

<sup>140</sup> *Planned Parenthood Ass’n/Chicago Area*, 767 F.2d at 1229.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> See *Illinois ex rel Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 621 (2003) (“As an additional safeguard responsive to First Amendment concerns, an appellate court could independently review the trial court’s findings.”).

the scope of its doctrinal or conceptual reach.”<sup>144</sup> Independent appellate review creates decision-making inefficiencies, and such inefficiencies need a powerful justification.<sup>145</sup> As the Eighth Circuit once noted, limitless independent appellate review is “detrimental to the orderly administration of justice, impairs the confidence of litigants and the public in the decisions of the district courts, and multiplies the number of appeals in such cases.”<sup>146</sup> Lest independent review overwhelm the appellate courts’ docket and undermine the trial process, a limiting-principle for the application of such review is needed.<sup>147</sup>

There has been a long-standing worry that there is no limit to the facts that might be eligible for independent re-examination.<sup>148</sup> Legal scholars have long recognized, “It would be not merely inconvenient and burdensome to the courts, but altogether disruptive of administrative processes, to hold that every fact-issue on which a claim of constitutional right can be made to depend becomes thereby entitled to a retrial on new evidence in a review proceeding at law.”<sup>149</sup> Fear of unlimited review of jury verdicts was “one of the great obstacles in the path of adoption of the Constitution,” and as Professor Charles Clark reminded, the debate was resolved with “the added protection of the Seventh Amendment.”<sup>150</sup> The Seventh Amendment guarantees the right to a jury trial in “Suits at common law,”<sup>151</sup> and bars appellate review of facts found by a jury.<sup>152</sup>

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<sup>144</sup> Redish & Gohl, *supra* note 42, at 292.

<sup>145</sup> See Louis, *supra* note 26, at 998 (“Crowded appellate dockets and the temporal inability of appellate courts to immerse themselves in the record of every case have necessitated deference to most trial level determinations having a substantial factual component.”).

<sup>146</sup> Pendergrass v. New York Life Ins. Co., 181 F.2d 136, 138 (8th Cir. 1950).

<sup>147</sup> Hoffman, *supra* note 23, at 1434 (claiming “an effective limiting principle for when constitutional fact review should be applied must be established if the doctrine is to remain an effective tool by which appellate courts can fully protect constitutional rights”).

<sup>148</sup> See, e.g., Dickinson, *supra* note 8, at 1072-82.

<sup>149</sup> *Id.* at 1077.

<sup>150</sup> Clark & Stone, *supra* note 25, at 193.

<sup>151</sup> U.S. CONST. amend. VII. In full, the Seventh Amendment provides: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.”

<sup>152</sup> WRIGHT ET AL., *supra* note 25, § 2571, at 224.

Constitutional Fact Doctrine is a powerful bulwark for free speech, but allowing it to “wander aimlessly”<sup>153</sup> threatens core constitutional values and our judicial processes. Appellate courts continually seek to balance decision-making efficiency and accuracy. But appellate courts risk being drawn into endless case-by-case determinations and constant fact-finding. Independent appellate review is essentially a duplication of the trial court’s effort. Expansive use of independent review threatens an appellate court’s ability to meet its other judicial responsibilities.<sup>154</sup> An increased caseload diminishes an appellate court’s judicial administrative efficiency.<sup>155</sup> Judicial resources are not unlimited. If the Constitutional Fact Doctrine is applied too promiscuously, independent review will become unworkable.<sup>156</sup> Symmetrical review is too burdensome to the appellate courts for it to apply indiscriminately.<sup>157</sup> Independent review risks a slippery slope; appellate courts risk facing a full-time job of independently reviewing facts. Limited resources suggest that as the number of appeals increases, the quality of the work may decrease.<sup>158</sup> And if process becomes unworkable, independent appellate review may be abandoned altogether—forcing the baby out with the bathwater.<sup>159</sup>

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<sup>153</sup> Redish & Gohl, *supra* note 42, at 291 (“[T]he [constitutional fact] doctrine is truly foundational to our constitutional system and essential to the judicial protection of constitutional rights. And allowing the doctrine to wander aimlessly, as the Court has and as leading constitutional scholars have urged, threatens core values of our counter-majoritarian Constitution.”).

<sup>154</sup> Louis, *supra* note 26, at 1037 (“Free review of all constitutional fact determinations, because such review requires a more careful examination of the whole record, could have overwhelmed the Court or stolen precious time from its paramount role as the oracle of constitutional and federal law.”).

<sup>155</sup> Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308, 311 (2009) (“Appellate caseloads have skyrocketed, leaving judges with less time for each case and thereby reducing any competence advantage that may have stemmed from appellate judges’ ability to engage in less hurried contemplation.”).

<sup>156</sup> Hoffman, *supra* note 23, at 1462 (“[T]he major concern with constitutional fact doctrine is that if it is defined too expansively, it will overwhelm the docket of the federal appellate courts.”).

<sup>157</sup> DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS 127 (2008) (“Although every case is important, and appellate review of case-specific fact-finding might catch some errors, on the whole, this argument asserts, the costs to the system would be too great and, if done conscientiously, would quickly overwhelm appellate courts.”).

<sup>158</sup> Ann Zobrosky, Note, *Constitutional Fact Review: An Essential Exception to Anderson v. Bessemer*, 62 IND. L.J. 1209, 1226 (1987) (“Appellate judges may find themselves unable to maintain high quality work under the increasing time pressure.”).

<sup>159</sup> Hoffman, *supra* note 23, at 1459 (“[A]n overly expansive constitutional fact doctrine would either overwhelm the federal docket or force appellate courts to withdraw



Without a limiting-principle on the scope of the doctrine, appellate courts face a Hobson's choice: tolerate constitutional error or overwhelm their docket.<sup>160</sup>

Indiscriminate application of independent appellate review also risks undermining the jury's role in the judicial process. Liberal de novo review reduces the jury trial to little more than a "dry run."<sup>161</sup> As one scholar quipped, "why have trials at all if appellate courts can simply start from scratch?"<sup>162</sup> And Justice Antonin Scalia once remarked that the majority's apparent disregard for trial court findings "makes evident that the parties to this litigation could have saved themselves a great deal of time, trouble, and expense by omitting a trial."<sup>163</sup> The jury is thereby rendered a nullity if an appellate court can freely supplant its own assessment of the facts.<sup>164</sup>

Insensitive application of independent review erodes confidence and finality of the trial process.<sup>165</sup> Independent appellate review encourages litigants to seek a do-over in the appellate courts. Widening appellate review has been criticized for giving litigants "two bites out of the apple."<sup>166</sup> But often it is only the wealthy who can afford two bites of the apple. When impecunious defendants have weaker protections than wealthy

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from independent review of facts altogether.”).

<sup>160</sup> Louis, *supra* note 26, at 1038 (noting the Court's "Hobson's choice between ignoring constitutionally offensive results rendered by trial level decision makers or hearing a flood of fact specific, supervisory appeals").

<sup>161</sup> Chapman, *supra* note 23, at 206 ("Indeed, the whole fact-finding exercise at trial is nothing more than a dry run for the court of appeals (or the Supreme Court). The doctrine's potential evisceration of a jury's constitutional judgment therefore casts a pall on the decision whether to send a constitutional question to the jury in the first place.").

<sup>162</sup> Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CALIF. L. REV. 1185, 1211 (2013).

<sup>163</sup> *United States v. Virginia*, 518 U.S. 515, 585 (1996) (Scalia, J., dissenting).

<sup>164</sup> Christie, *supra* note 8, at 56 ("There would be no point in having a trial, however, if the conclusions arrived at can be overturned merely because a *subsequent* reviewer disagrees with them.") (emphasis in original).

<sup>165</sup> Borgmann, *supra* note 162, at 1211 (articulating concern that widespread independent review "render[s] trials an 'essentially pointless exercise' in this manner undermines trial courts' legitimacy [and] threatens to erode the public's and parties' confidence in the conclusions of district courts, which often have the final word in litigation.") (citations omitted).

<sup>166</sup> John F. Nangle, *The Ever Widening Scope of Fact Review in Federal Appellate Courts—Is the "Clearly Erroneous" Rule Being Avoided?*, 59 WASH. U. L.Q. 409, 410 (1981) (quoting letter from Hon. Andrew Bogue, United States District Judge, District of South Dakota, to Hon. John Nangle, United States District Judge, Eastern District of Missouri (April 19, 1979)).

defendants, concerns of unequal access to justice are exacerbated. As Professor Charles Wright asked: “If in two similar cases the person rich enough to afford an appeal gets a reversal, however just, while the person of insufficient means to risk an appeal is forced to live with the judgment of the trial court, has justice really been improved?”<sup>167</sup> Thus routine access to two bites raises distributive concerns, undermines the finality of trial court findings, and increases the caseload in the appellate courts.

An asymmetric application of the Constitutional Fact Doctrine yields an optimal solution to the thorny question of how to cabin constitutional fact review, while at the same time honoring the aims of the Doctrine. Independent appellate review of constitutional facts should be a one-way street to insure protected interests are not infringed. A one-way street is preferable in light of the costs and burdens of overbroad application of independent review. Independent appellate review should be reserved for those instances when a First Amendment interest does not prevail in the lower court.<sup>168</sup> Appellate courts should engage in a second-look review to guard against an inappropriate deprivation of protected speech interests. To that end, a one-way street ensures constitutional liberties are protected to the highest degree.

On the other hand, a symmetrical, two-way street puts constitutional rights at risk.<sup>169</sup> Fact-finders are not the only decision-makers who can err; appellate courts can also make mistakes.<sup>170</sup> And appellate courts should not be allowed to erroneously reverse a speech-protective decision by the lower court.<sup>171</sup> Constitutional fact review is a speech-protective tool, thus

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<sup>167</sup> Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 780 (1957).

<sup>168</sup> Cf. Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1589-93 (2000) (arguing for a one-way ratchet preference for freedoms).

<sup>169</sup> Zobrosky, *supra* note 158, at 1248-49 (“[C]omplete de novo review for constitutional fact cases places a party claiming a constitutional rights violation under a greater risk than a plaintiff or defendant in another type of case. If the trial court finds that the constitutional rights violation occurred, the appellate court could freely review and reverse the decision, unchecked by the clearly erroneous standard. Therefore, a party claiming a constitutional rights violation would run a double risk of having his claim improperly denied.”).

<sup>170</sup> As an appellate judge once noted: “Though trial judges may at times be mistaken as to facts, appellate judges are not always omniscient.” *Orvis v. Higgins*, 180 F.2d 537, 542 (2d Cir. 1950) (Chase, J., dissenting).

<sup>171</sup> See Childress, *supra* note 10, at 1238.

a two-way street “defies the basic point of the doctrine.”<sup>172</sup> Some scholars have argued for symmetric review out of fairness to the plaintiff.<sup>173</sup> While seeking fairness for the plaintiff, such review threatens the speaker-defendant’s constitutional interests.<sup>174</sup> Symmetric application of independent review has been called a “bizarre formalism” and “a foolish consistency.”<sup>175</sup>

All fact-finders are capable of erring. As scholars know, “Any factfinding system will generate two kinds of outcomes: some that are correct and some that are in error.”<sup>176</sup> Allocations of burdens of proof implicitly recognize this possibility of error.<sup>177</sup> Juries can get

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<sup>172</sup> STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, 1-3 FEDERAL STANDARDS OF REVIEW, § 2.19 (4th ed. 2010) (“[I]f de novo review applies because of the First Amendment, scrutiny of pro-speech findings defies the basic point of the doctrine.”).

<sup>173</sup> Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431, 2442 (1998) (“In our view, independent judgment review of the idea-expression decision is valuable even when the defendant won at trial: Whoever won, independent review should produce more refinement of the legal standard, something *Bose* says is constitutionally valuable. Moreover, a symmetric rule is fairer to plaintiffs. Copyright plaintiffs’ claims are not claims of constitutional right, but they are certainly important; as *Harper & Row* pointed out, copyright law itself serves First Amendment goals.”).

<sup>174</sup> Cf. Ned Snow, *Fair Use As A Matter of Law*, 89 DENV. U. L. REV. 1, 27 (2011) (“Replacing the usual clear error standard with de novo would serve only to threaten the jury verdict that favored the defendant speaker.”).

<sup>175</sup> Childress, *supra* note 10, at 1318 (“For if the rule is wholly one of protecting free speech, it would be a bizarre formalism—a foolish consistency—to apply it where the result would allow more ready reversal of one whose rights were protected below.”).

<sup>176</sup> See R.S. Radford, *Statistical Error and Legal Error: Type One and Type Two Errors and the Law*, 21 LOY. L.A. L. REV. 843, 864 (1988); see also Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982).

<sup>177</sup> See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986).

it wrong,<sup>178</sup> trial courts can get it wrong,<sup>179</sup> and appellate courts can get it wrong.<sup>180</sup> In light of this reality, how much “wrongness” are we willing to tolerate?<sup>181</sup> And, more to the point, what *type* of “wrongness” are we willing to tolerate?

Not all errors raise the same degree of concerns; not all errors warrant the same response. We have limited judicial resources and respect for the judicial process discourages unnecessarily duplicative efforts.<sup>182</sup> Thus independent review should be reserved for instances of particular concern that justify an exception, namely underenforcement of constitutional freedoms.<sup>183</sup>

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<sup>178</sup> Compare *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971) (expressing concern that a jury is “unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those ‘vehement, caustic, and sometimes unpleasantly sharp attacks.’”) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)), and DAVID L. FAIGMAN, *CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS* 123 (2008) (“Because the jury represents values associated with the political majority, it cannot fully be entrusted with protection of the values inherent in the Bill of Rights.”), with *Chapman*, *supra* note 23, at 237 (“[T]he jury, whatever its competence in other sorts of cases, has a unique ‘constitutional competence,’ based on its unique ability to bring a popular perspective to the application of constitutional law, an ability that accords with the history and purposes of its role in constitutional structure.”), and Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131, 1183, 1185 (1991) (arguing the role of the jury was to “safeguard liberty” “more than a permanent government official—even an independent Article III judge.”).

<sup>179</sup> *E.g.*, Ronald R. Hofer, *Standards of Review—Looking Beyond the Labels*, 74 *MARQ. L. REV.* 231, 239 (1991) (“[A]re appellate judges better qualified than their counterparts on trial bench? Perhaps, if only by dint of numbers; three (or seven or nine) heads are, so hopes the law, better than one.”); Paul D. Carrington, *The Power of District Judges and the Responsibility of Courts of Appeals*, 3 *GA. L. REV.* 507, 527 (1969) (“This does not assume that circuit judges are wiser than district judges; that I very much doubt. But three heads are better than one, and the tempo of the work of appellate courts allows for reflection and instructions that is not available to trial judges.”).

<sup>180</sup> *E.g.*, *Orvis v. Higgins*, 180 F.2d 537, 542 (2d Cir. 1950) (Chase, J., dissenting) (“Though trial judges may at times be mistaken as to facts, appellate judges are not always omniscient.”); Wright, *supra* note 167, at 782 (“[T]he best way to do justice in the long run is to confine to a minimum appellate tampering with the work of the trial courts.”); Fred S. McChesney, *Talking ‘Bout My Antitrust Generation: Competition for and in the Field of Competition Law*, 52 *EMORY L.J.* 1401, 1412 (2003) (“Because judges (like everyone else) are human, their decisions will sometimes be wrong.”).

<sup>181</sup> *Cf.* Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 *F.R.D.* 173, 176 (1979) (“There are wide variations in the degree of ‘wrongness’ which will be tolerated.”); Victor J. Gold, *Jury Wobble: Judicial Tolerance of Jury Inferential Error*, 59 *S. CAL. L. REV.* 391, 391 (1986) (“Juries decide facts by considering evidence and drawing inferences from it. But jurors are human and humans commit inferential errors.”).

<sup>182</sup> See Paranzino, *supra* note 68, at 492 (“Careful allocation of independent appellate review, however, would allow scarce appellate resources to be targeted for the areas of the law which require extra attention.”).

<sup>183</sup> Cross, *supra* note 168, at 1592 (arguing underenforcement of constitutional

To borrow the statistician's nomenclature, we can classify errors as Type I and Type II.<sup>184</sup> A Type I error rejects the null hypothesis when it is actually true, in favor of the alternative hypothesis (i.e., a false positive).<sup>185</sup> On the other hand, a Type II error fails to reject (i.e., accepts) the null hypothesis when the alternative hypothesis is true (i.e., a false negative). To borrow criminal law's proposition that an individual is "innocent until proven guilty," a Type I error imprisons an innocent person, whereas a Type II error allows a guilty person to go free.<sup>186</sup> In this instance the Type I error is the primary error to avoid, the Type II error is a secondary error. Concern about such Type I errors have long pervaded Anglo-American jurisprudence.<sup>187</sup> English jurist William Blackstone urged it is "better that ten guilty persons escape, than that one innocent suffer."<sup>188</sup> Benjamin Franklin increased the ratio and urged that it is better that "a hundred guilty persons should escape than one innocent person should suffer."<sup>189</sup>

Statistics teaches that an inverse relationship exists between the two types of errors. As we change the procedural mechanisms and make it harder to create Type I errors (e.g., convicting the innocent), we increase the risk of Type II errors (e.g., failing to convict the guilty).<sup>190</sup> Generally we trade off errors, rather than

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freedoms "are both more serious and more likely to occur than" overenforcement of constitutional freedoms).

<sup>184</sup> Note that statistics can inform the decision-making process without devolving into a proposition that legal procedure should be interpreted in probabilistic terms. Radford, *supra* note 176, at 859.

<sup>185</sup> See *id.* at 851; see also Jasper P. Sluijs, *Network Neutrality Between False Positives and False Negatives: Introducing A European Approach to American Broadband Markets*, 62 FED. COMM. L.J. 77, 103 (2010) ("A type-one error designates a false null hypothesis that is mistakenly labeled true; whereas, a type-two error is a true null hypothesis that is mistakenly labeled false.").

<sup>186</sup> Cf. McChesney, *supra* note 180, at 1412 ("Type I error refers to a 'false positive,' analogous in the legal context to mistakenly imposing liability on an innocent defendant. Type II error is a 'false negative,' or failing to punish a guilty party. Each type of error has a cost associated with it.").

<sup>187</sup> Cf. Radford, *supra* note 176, at 852 ("The Anglo-American legal system has traditionally reserved its greatest concern for avoiding Type I errors.").

<sup>188</sup> Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173, 174 (1997) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*352).

<sup>189</sup> Shailly Agnihotri & Cassie Veach, *Reclaiming Restorative Justice: An Alternate Paradigm for Justice*, 20 CUNY L. REV. 323, 330 (2017) (quoting 11 BENJAMIN FRANKLIN, WORKS 13 (John Bigelow ed., 1904) (letter from Benjamin Franklin to Benjamin Vaughan dated Mar. 14, 1785)).

<sup>190</sup> Radford, *supra* note 176, at 851 ("In general, an inverse relationship exists between the relative incidence of the two kinds of errors. Type I errors can be reduced

eliminate them altogether. But depending on the types of errors involved, such a tradeoff may be acceptable. As one scholar noted, “convicting the innocent involves greater negative externalities—social costs beyond those borne by the parties—than acquitting the guilty.”<sup>191</sup> Thus decreasing Type I errors and increasing Type II errors is often acceptable, especially when Type I errors implicate fundamental liberties.<sup>192</sup>

For present purposes, the proposition is that the speech in question is constitutionally protected, and the alternative proposition is that the speech is not protected, and therefore can be prohibited and punished. A Type I error erroneously concludes that the speech is unprotected, when in fact, the speech is protected (e.g., erroneously punishes non-obscene speech). And a Type II error erroneously concludes that the speech is protected, when in fact, the speech can lawfully be prohibited (e.g., erroneously fails to punish obscene speech). The cost of a Type I error is an erroneous deprivation of a constitutionally protected speech right, which is worse than the cost of a Type II error—namely failing to punish speech that lawfully could be prohibited. Others have urged that constitutional fact review should be reserved for “extraordinary circumstances.”<sup>193</sup> I argue, more specifically, that constitutional fact review should be reserved to correct for Type I errors.

Legal safe harbors implicitly reflect concerns about Type I versus Type II errors. First Amendment jurisprudence in particular implicitly recognizes the risk of Type I errors. As one scholar observed, “The risk of erroneous verdicts for plaintiffs is implicit in the Court’s concern with possible ‘chilling’ effects and the need to provide ‘breathing room’ for constitutionally protected speech.”<sup>194</sup> A plurality of the Court once explained that in a normal civil case, applying the preponderance of the evidence standard, “we view it as no more serious in general for there to be an erroneous verdict in the defendant’s favor than for there to be an

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merely by increasing the level of confidence needed to reject the null hypothesis; however, this will simultaneously increase the risk of Type II error.”)

<sup>191</sup> *Id.* at 849.

<sup>192</sup> *Cf.* Willard K. Tom, *Game Theory in the Everyday Life of the Antitrust Practitioner*, 5 GEO. MASON L. REV. 457, 468 (1997) (“If the costs of false positives are high and those for false negatives low, we may tend to adopt rules of per se lawfulness often and rules of per se unlawfulness seldom.”).

<sup>193</sup> *Cf.* Paranzino, *supra* note 68, at 492-93 (urging independent appellate review should be reserved for “extraordinary circumstances”).

<sup>194</sup> Radford, *supra* note 176, at 875 n.149.

erroneous verdict in the plaintiff's favor."<sup>195</sup> In a defamation case, however, the Court noted that "we view an erroneous verdict for the plaintiff as most serious."<sup>196</sup> Speaking for the plurality, Justice Brennan warned that "Not only does it mulct the defendant for an innocent misstatement . . . but the possibility of such error . . . would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate."<sup>197</sup> Thus the risk of an erroneous deprivation has implications far beyond the parties to the suit; it threatens to chill the speech of others.<sup>198</sup> To parry such risks, the Supreme Court has added procedural protections in speech cases, like altering plaintiff's burdens of proof and providing a special exception to typical standards of appellate review.

To consider what type of wrongness we are willing to tolerate it is helpful to conceptualize the court system as having both a horizontal plane and a vertical plane. To suss out the advantages of categorizing legal errors as Type I and II, the trial court level can be viewed on a horizontal plane, whereas an appellate court can be viewed on a vertical plane. On a horizontal plane, procedural changes create tradeoffs between Type I and Type II errors. On this horizontal plane, changing procedural mechanisms to decrease Type I errors will correspondingly increase the risk of Type II errors. Changing burdens of proof at trial, for example, can decrease Type I errors, but will increase the risk of Type II errors. In defamation cases involving public officials, the *Sullivan* Court shifted the burden of proving falsity to the plaintiff, rather than placing the burden of proving truth on the defendant.<sup>199</sup> The Court recognized the difficulty of carrying the burden of proof and erred on the side of protecting "would-be critics of official conduct [who] may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so."<sup>200</sup> Procedural changes in the trial courts create

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<sup>195</sup> *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 50 (1971) (plurality opinion) (quoting *In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring), *abrogated on other grounds* by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

<sup>196</sup> *Rosenbloom*, 403 U.S. at 50.

<sup>197</sup> *Id.*

<sup>198</sup> See Couture, *supra* note 20, at 916; see also Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U. L. REV. 685, 695 (1978) (positing the degree of chill depends on "the probability of an erroneous verdict times the harm produced by such a verdict").

<sup>199</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

<sup>200</sup> *Id.*

tradeoffs; as we make it harder to create Type I errors (e.g., punishing protected speech), we increase the possibility of Type II errors (e.g., failing to punish unprotected speech). By pulling procedural levers in the trial courts (e.g., shifting burdens of proof on falsity or fault), Type I errors are reduced, but the risk of Type II errors is increased. It is just the inherent tradeoff.

But changing appellate standards of review, on the other hand, changes procedural mechanisms on a vertical plane. Appellate review does not operate on the horizontal plane with the trial court level, rather it conceptually adds a vertical dimension. If an asymmetric review is introduced on the vertical plane at the appellate court level, there is no risk of simply trading off errors. In a one-way review, only Type I errors are reviewed on appeal, and only Type I errors can get corrected. On the other hand, symmetric appellate review introduces the possibility that an appellate court will erroneously reverse a pro-speech finding. In other words, in a two-way review an appellate court may *create* a Type I error where one did not previously exist. If independent appellate review is limited to reviewing for Type I errors, appellate courts can only reverse Type I errors, not create them.<sup>201</sup> Thus the one-way, asymmetric review of constitutional facts is the optimal solution to reduce speech-harming Type I errors.<sup>202</sup>

#### CONCLUSION

Independent appellate review is an exception to the traditional deference accorded to fact-finding in the lower court. Findings by a trial court are upheld unless clearly erroneous. Findings by a jury are upheld unless no “reasonable jury” could arrive at that verdict. The typical standards of appellate review apply, unless enhanced scrutiny is warranted. The *Bose* Court has explained that enhanced

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<sup>201</sup> It is, of course, possible that an appellate court may erroneously fail to reverse a Type I error. While regrettable, some amount of wrongness is bound to exist within a system. Constitutional Fact Doctrine does not guarantee an error-free system. Asymmetric review is the optimal, albeit imperfect, solution to minimize Type I errors.

<sup>202</sup> Other scholars have also urged an asymmetric review in certain cases. *See* Snow, *supra* note 174, at 3 (“I propose that the standard of review should always favor fair users, such that *de novo* should govern where copyright holders prevail at trial, whereas clear error should govern where fair users prevail. I further propose that at trial, judges should rule on summary judgment only in favor of fair users; they should rule for copyright holders on summary judgment in the rarest of circumstances, if at all. I thus propose a double standard of review and a one-sided application of summary judgment—all favoring the defendant fair user.”).



scrutiny is warranted when First Amendment rights are at risk: “[W]e have repeatedly held that an appellate court has an obligation to ‘make an independent examination of the whole record’ in order to make sure that ‘the judgment does not constitute a forbidden intrusion on the field of free expression.’”<sup>203</sup>

But if First Amendment interests were protected by the lower court, then the justification for an exception for usual deference is not warranted. Independent review is applied for an instrumental purpose, namely to ensure that protected speech is not impermissibly censored. Only if the lower court makes a finding adverse to a speech claimant does the need for special protection arise. As the *Bose* Court explained, “to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited” the appellate court is empowered to conduct an independent review of the record.<sup>204</sup>

Independent appellate review has costs. And the added costs for the exception are not warranted if a pro-speech finding was made at the lower court. Independent review is the exception, not the rule. As a corollary, deference to the lower court is the rule, not the exception.<sup>205</sup> As the *Bose* Court emphasized, “Our standard of review must be faithful to both Rule 52(a) and the rule of independent review applied in *New York Times Co. v. Sullivan*.”<sup>206</sup>

To apply independent review symmetrically misconstrues First Amendment jurisprudence and erodes the decision-making

<sup>203</sup> *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (quoting *Sullivan*, 376 U.S. at 285).

<sup>204</sup> *Bose Corp.*, 466 U.S. at 505.

<sup>205</sup> As the Court explained:

Duplication of the trial judge’s efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be “the ‘main event’ . . . rather than a ‘tryout on the road.’” For these reasons, review of factual findings under the clearly-erroneous standard—with its deference to the trier of fact—is the rule, not the exception.

*Anderson v. Bessemer City*, 470 U.S. 564, 574-75 (1985) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977)).

<sup>206</sup> *Bose Corp.*, 466 U.S. at 499.

responsibilities in the judicial process. Independent review is a special exception and should not be applied indiscriminately. Without a limiting-principle to control its scope, symmetrical application of independent review undermines the Doctrine's function. Asymmetric application of independent review is consistent with the Court's focus on minimizing erroneous deprivation of speech rights.<sup>207</sup> To safeguard and fructify First Amendment interests, constitutional fact review should be applied asymmetrically to correct for Type I errors.<sup>208</sup>

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<sup>207</sup> *But see* *Connick v. Myers*, 461 U.S. 138 (1983) (applying de novo appellate review where the fact-finder had found in favor of free expression).

<sup>208</sup> *Cf.* Amanda Reid, *Safeguarding Fair Use Through First Amendment's Asymmetric Constitutional Fact Review*, 28 WM. & MARY BILL RTS. J. 23 (2019) (arguing for a one-way, asymmetric review of copyright fair use determinations adverse to free-speech/fair-use-claimants).